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# Aboriginal Rights

## Introduction

* Mainly based on oral traditions and customs
* European nations asserting sovereignty over lands newly “discovered” in the Americas justified their claims by relying upon the doctrine of *terra nullius*
* Sovereignty over occupied territory could only be acquired by conquest/cession
* North American = terra nullius (aka vacant) under doctrine of discovery because European powers viewed Aboriginal nations as insufficiently Christian or insufficiently civilized to justify recognizing them as sovereign over their lands/people
* Underlying assumption of terra nullius: Aboriginal societies = lawless
* Aboriginal self government evident in numerous treaties

## Constitutional Rights

* S 91(24) of Constitution: Federal Government has jurisdiction over Indian claims
* S 25: The guarantee in this Charter shall not abrogate freedoms that pertain to Ab peoples
* S 35 (2): three distinctions btw Aboriginal peoples = Indian, Inuit and Metis
	+ Indian = certain indigenous peoples holding status under *Indian Act*
	+ Inuit = from circumpolar north
	+ Metis = Population of mixed ancestry btw fur traders and cree women; fought for Manitoba and northwest
	+ : “existing aboriginal and treaty rights of ab. Ppl of Canada are hereby recognized and affirmed” (= vague, unable to define existing rights)
		- Feds and province can no longer regulate at will on matters concerning aboriginal people
		- Sparrow addresses what it means to say that an aboriginal right exists, is recognized or affirmed
* S 52: The Constitution is Supreme, so laws that take away Ab rights is unconstitutional
* Royal Proclamation: Lands possessed by Indians in America were reserved for their exclusive use, unless previously ceded to the Crown
	+ The crown alone possessed the initial right to acquire the indigenous territory
	+ Gives teeth to s 35
* *Conolly v Woolrich* 1867: Aboriginal peoples hold rights to territory bc of their legal system that predate the est. of colonies on the continent
	+ Facts: Cree wedding upheld at legitimate
	+ Sources of Canadian law include common laws and political systems of Aboriginal Nations
	+ Historically: harmonious relations btw aboriginals and fur traders
	+ Courts periodically enforced right of Aboriginal peoples to conduct affairs under their own laws
	+ Decision contrasts belief that ab. Do not have general right to govern themselves
	+ BUT constitution does not explicitly acknowledge ab. Right to self government – so it is only a moral or political right
* *Calder v BC (AG) 1973*: Canadian law recognize Aboriginal title as common law entitlement separate and distinct from Royal Proclamation of 1763
	+ Judson and Hall JJ split on
		- 1. Whether Nisga’a title to ancestral territory extinguished by land enactments in BC
		- 2. Whether RP applicable to indigenous territory in that province
	+ Agreed on: Ab title exist in Canada (where it had not been extinguished) + RP not exclusive source of Ab title

## Overarching Themes

1. The role of history – Canada’s colonial origins in light of pre-existing, established aboriginal societies
	* Established aboriginal societies w/ their own legal systems = tension btw settler and aboriginal societies.
	* Section 35 is illustration of how this tension is negotiated
	* Royal proclamation: crown asserting general title to all lands, but also allows for relations and treaties through the crown
2. Legal pluralism v Legal monism
	* Pluralism: Law in Canada doesn’t emanate from one exclusive source
3. Reconciling prior occupation with Crown sovereignty
	* Guerin: New way to conceptualize tension
		+ Can only deal with lands in a way that is respectful to aboriginal peoples
		+ Fiduciary relationship
	* After 1982, new standing in section 35
	* Section 35 is not part of the charter, not balanced or subject to regulation in the same way as charter rights are
4. The *Sui generis* nature of aboriginal rights
	* The Crown acting in a way that is respectful of aboriginal societies and rights
5. Fiduciary duties of the Crown – Honour of the Crown
	* Concept of FD borrowed from common law/ equitable

## Different Types of Rights Claims and Applicable Cases

* Aboriginal Rights (Sparrow, Van der Peet, Sappier)
1. How should the right in question be characterized (site and nation specific, history *Sappier*)
2. Is the custom or practice integral to the distinctive culture of the aboriginal peoples at the time of contact (*Van der Peet*)
3. Has the right been “extinguished” (*Sparrow*)
4. Has the right been justifiably infringed (*Sparrow*)?
	1. Has the right been infringed (unreasonable or undue hardship)?
	2. Is the interference justified (valid objective, consultation, priority allocation)?
* Aboriginal Title (Delgamuukw)
1. (1) Right to exclusive use and occupation of land protected by s 35.
2. (2) The right is *sui generis*, communal in nature, and inalienable except to Crown.
3. (2) Exclusive use and occupation is not restricted cultural practices protected by s 35, it is broader but not absolute (cannot use it in a manner irreconcilable with the nature of aboriginal title).
4. (3) Have to show exclusive occupation and use was manifest prior to contact (see also *Marshall* and *Bernard* on regular use and control).
5. (4) Manner of proof needs to be consistent with the s 35 goal of “reconciliation”--sensitive to both aboriginal and non-aboriginal perspectives.
* Aboriginal Treaty Rights (Marshall)
1. Different kinds of treaties (peace and friendship 1760s, northwest treaties of 19th century, and the modern treaties after 1975).
2. Text is important.
3. BUT aboriginal perspectives must be taken into account in interpreting the treaty. Large, liberal interpretation may include implied rights.
4. Treaty rights still subject to justified infringement.
* Honour of the Crown and Duty to Consult (Haida Nation, Taku River, Mikisew Cree, Rio Tinto)
* Metis Rights (Powley)
	+ Must prove e

### Guerin v The Queen 1984 SCC p 551 [Fiduciary Duty of the Crown, must respect interest of Ab]

Facts: Band claims that crown breached trust obligations by leasing reserve land to golf club bc a T&C different than initially disclosed, crown failed to act w/ care and management req’d of trustee

Issue: Whether the Musqueam Indian Band are entitled to recover damages from fed Crown in respect of leasing to a golf club of land on Musqueam Indian Reserve

Decision: (Dickson J) for the Band

Reason:

S 18.1 of Indian Act: Lands should not be sold, alienated or leased by crown until they have been surrendered to crown by the band

Fiduciary relationship of the crown:

* Under equitable obligation, enforceable by courts, to deal with land for benefit of Indians
* Mere Indian interest in land ≠ fiduciary relationship. Depends upon proposition that Indian interest in the land is inalienable except upon surrender
* Existence of Aboriginal Title in Canadian Law
	+ *Calder et al v AG BC* 1973: ab title as legal right derived from Indian’s historic occupation and possession of tribal lands and predates the royal proclamation
	+ Johnson v M’Intosh (US): Title found in royal proclamation , but also traditional occupation
* Nature of Indian Title
	+ St. Catherine’s Milling: PC held that Indians have personal and usufructuary right in lands which they traditionally occupied
	+ Indians have legal right to occupy/possess land – ultimate title w/ crown. Indian’s interest does not amount to beneficial ownership – it is not completely exhausted by concept of personal right. It is sui generis. Interest gives rise, upon surrender, to a fiduciary obligation on part of crown to deal w/ land for benefit of Indians
* Crowns Fiduciary Duty: Prevent Indians from being exploited
	+ Where by statute, agreement or unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity supervises this by holding them to strict standard of conduct
* The crown was not empowered by the surrender document that the band signed to ignore the oral terms which the band understood; crowns behaviors = unconscionable🡪 not supported by equity
	+ Crown cannot promise certain lease and deliver another to bands detriment

Ratio: Crown must follow fiduciary duty requirements

## Constitutional Entrenchment of Aboriginal Rights

### R v Sparrow 1990 SCC p 558 [Definition of Existing: must not be extinguished, Defining Recognized and Affirmed, Test for Ab Right; Is the Aboriginal right justifiable infringed?]

* Analyzes nature and scope of Aboriginal rights as recognized by s 35(1)

Facts:

* Musquaem food fishing licence dictated by Fisheries Act. Band member charged with offence of fishing with net longer than permitted by food fishing licence.
* Defence: exercising existing aboriginal right to fish and net length restriction is inconsistent with s 35 of const. act and is therefore invalid

Issue: Whether parliament’s power to regulate fishing is now limited by s 35(1) of the Cont. and whether the net length restriction in the licence is inconsistent with that provision?

Decision: New trial

Reason:

* **Existing**: rights in existence when const. came into effect, const. cannot revive rights
	+ Is it unextinguished? not about whether it was once exercisable at a certain time in history
	+ Must be interpreted flexibly, to permit evolution of ab rights.
	+ Crown insisted that band’s right to fish extinguished by fisheries act
	+ Test of extinguishment: **sovereigns intention must be clear and plain.**
		- *Through treaty process or Clear and Plain intent to extinguish through legislation*
		- *(After 1982, all ab. Rights became constitutional, and require const. amendment)*
	+ Fisheries Act did not meet extinguishment req. bc still allowed fishing, just w/ limits
	+ Anthropological evidence suggests ab existence of fishing right
	+ Frozen vs. Contemporary form
		- They aren’t frozen in time – the manner in which those rights are exercised can change
* **Recognized and affirmed**:
	+ Aboriginal rights are not subject to s 1 of the *Charter*
	+ Band says that ab title entails right to fish by any non-dangerous method. Continuing gov. power to regulate would have to be exceptional and strictly limited to regulation clearly not inconsistent with s 35. In certain circumstances, necessary conservation measures MIGHT qualify
	+ **Purposive + Liberal interpretation of words demanded**: Treaties and statutes related to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians
	+ Principle: Government has responsibility to act in fiduciary capacity with aboriginal peoples. Relationship is trust-like
	+ Legislation that affects their rights must justify the interference
		- The extent of legislative or regulatory impact on an existing ab. Right may be scrutinized so as to ensure recognition and affirmation = strong check of legislative power = holds crown to substantive promise (does not grant ab. Immunity from crown) *Ab Rights are not Absolute!*

**Test:** To determine whether fishing rights have been interfered to be a prima facie infringement of s 35 [onus on claimant]

1. Is the limitation unreasonable?
2. Does the regulation impose undue hardship?
3. Does the regulation deny to the holders of the right their preferred means of exercising that right?

If *primie facie* interference found: Move to justification analysis [onus on gov]

 What constitutes legitimate regulation of const. ab. Right?

1. Is there valid legislative objective? (ie. Is it conserving a natural resource? Or preventing harm to populace?) The constitutional entitlement is second ONLY to conservation measures
2. If yes, then:
	1. Does it uphold the fiduciary relationship? Is priority allocation met?
		1. Are the needs of the Indians met first? Indian food requirements met first before allocation to others ie. Commercial/sport fishing)
	2. Other potential factors: minimal infringement (has the government chosen a means of regulating that is the least intrusive available), fair compensation, consultation

Result: New Trial. Band needs to show that shorter fishing nets infringe collective aboriginal right to fish for food, and if that is found, then crown must demonstrate that regulation is justifiable.

Class Analysis:

* This “non-absolute” quality of Ab rights has been *invented* by the courts to preserve crown sovereignty
* Courts encouraging political settlement by providing mode for judicial arbitration. Indicate that there aren’t enough facts.

### R v Van der Peet 1996 p 571 [To exist: Rights must be unextinguished and integral to Ab society, Characterize the right in question, exactly what activity, for what purpose and where?, Was the practice integral to the distinctive culture [way of life] at the time of contact/control of the ab peoples in question]

Facts:

* Dorothy caught selling fish (which she caught under the Indian food fish licence) and this is an offence under s 27(5) of the BC Fishery Regulations.
* Defence: selling fish is an existing aboriginal right. S 27(5) infringes her right to sell fish and it is therefore in violation of s 35(1) of the const.

Issue: Scope of s 35(1)?

Decision: Not only must rights be unextinguished, but also integral to Ab society. Appellant failed to demonstrate that trading fish for money was integral to her culture, since there was no regularized trading system prior to contact.

Reason:

* Dorothy argues that CA defined rights under s 35(1) by pre-contact activities instead of pre-existing legal rights.
	+ Court must define rights as “rights” w/o losing sight that they are specifically aboriginal
	+ Must be treated differently than *Charter* Rights bc they are rights held only by aboriginals
	+ The court must define scope of s 35(1) in a way which captures *both* aboriginal and the rights in aboriginal rights
	+ Purposive approach to interpretation: ab rights in relation to Canadian society as a whole
* General Principles:
	+ S 35(1) should be given generous and liberal interpretation in favour of aboriginal peoples (Sparrow)
	+ Crown has fiduciary obligation to aboriginal peoples
	+ S 35 rights are not charter rights, they are communally held and racially defined
	+ Ambiguity must be resolved in favour of the aboriginals (Sutherland)
	+ Purposive Approach: Must identify the basis for special status of ab. Ppls
		- Reason: Ab ppls already lived here in distinct cultures before Europeans arrived
		- *Is it possible to reconcile aboriginal and non-aboriginal perspectives when determining the existence of s 35 rights?*
			* Court must reconcile pre-existence of aboriginal societies with the sovereignty of the Crown
	+ *Sui generis*: take into account perspectives of both ab ppls and common law: “intersocietal law”
* Test for identifying Aboriginal Rights under S 35(1) “The integral to a distinctive culture test”
	+ Directed at identifying the Integral and Distinctive elements of those pre-existing distinctive societies ie. The practices, traditions and customs central to the aboriginals
	+ Attempting to provide concrete method to determine if right exist
1. Is the practice, custom or tradition a defining or central feature of the culture in question? (*distinctive*, but not necessarily distinct)
	1. Courts must account for the perspective of the Aboriginal peoples themselves
		1. Must do so in terms cognizable to the non-aboriginal legal system
		2. Must take into the perspective of the common law = true reconciliation
	2. Courts must identify precisely the nature of the claim being made in determining whether the Ab claimant has demonstrated the existence of an Ab right
		1. What was the nature of the action done?
		2. What is the nature of gov regulation/statute or action being impugned?
		3. What is the nature of the practice, custom or tradition being relied upon to est. that right?
	3. Is the practice, custom or tradition integral? Ie. Is it of central significance to the Ab society?
		1. Must be more than an aspect, or took place in ab society
		2. Must be central + significant part of society’s distinctive culture
		3. It must be a thing that makes the culture of the society distinctive – that it was one of the things that truly made the society what it was
		4. (Reasoning: Court cannot simply look at aspects that are true to every human society ie. Eating to survive) Nor can it look at incidental or occasional practices
		5. Ask: without that practice, would the culture be fundamentally altered?
	4. Does the practice associated with the right have continuity prior to contact?
		1. Relevant time period it prior to the arrival of Europeans, not the period prior to assertion of sovereignty of the crown
		2. Existing rights must be interpreted flexibly – not “frozen” in time –to account for evolution
		3. Note: this is not necessarily determinative for Metis rights (approach unsettled)
	5. **Trial judges should adopt flexibility with evidentiary proof**
	6. Existence of right cannot be decided generally – will apply only to specific aboriginal community claiming the right
	7. Practice must be of independent significance
	8. Distinctive is required, not distinct. Two cultures may share a similar tradition which defines each of them individually
	9. Influence of European culture only relevant if it is demonstrated that the practice is ONLY integral because of that influence
	10. Must look at ab. Relationship to the land

*Consider aboriginal perspective regarding the nature of the practice*

*The relevant time period: pre-contact*

*Flexible rules of evidence*

*Site and Aboriginal Nation is specific*

*Doctrine of evolution and its limits: the courts seems to be holding out hope that there is a large liberal interpretation, but perhaps by adding these required steps, the court is becoming less liberal*

Class Analysis: Presents more demanding, restrictive gloss on *Sparrow*. Not necessary to show that the cultural practice was unique, must show that this is a central feature of your cultural practices.

Dissent:

* LHD:
	+ Defining the right: should define with high level of abstraction
	+ Period of time necessary for activity to be recognized: took dynamic rights approach in preference to frozen right approach;
		- Frozen rights overstates impact of European influence, crystallizes aboriginal practices as an arbitrary date, imposes heavy burden on those claiming an aboriginal right, embodies unprovable assumptions
		- Argued that it should have formed an integral part of the distinctive Ab culture for substantial continuous period of time
* McLachlin:
	+ Defining the right: Broadly conceived and constant over time, exercise of that right may take modern forms
	+ Period of time necessary for activity to be recognized: Empirical historical approach
		- Crucial issue: whether the sale could be defended as the exercise of that right, which may vary over time and take modern forms

### R v Sappier; R v Gray 2006 SCC p 590 [Does not have to go to “core” of peoples culture, but still needs to be an essential feature.]

Issue: Whether the Maliseet and Mi’kmaq peoples in New Brunswick possessed an Aboriginal right to harvest timber on Crown lands for personal use?

Decision: Bastarache J held that an aboriginal right cannot be characterized as a right to a particular resource bc to do so would treat it as akin to common law property right.

Reason: (used test outline in Van Der Peet)

* Attention must be paid to the significance of the resource to the community in question
* To grasp the importance – court must understand how it was harvest, extracted and utilized
* Courts must determine how the claimed right relates to pre-contact culture, integral to the distinctive culture
	+ Practice must help define the distinctive way of life of the community
* Present case: right to harvest timber for personal use is too general. Practice must help define the way of life or distinctiveness of the particular aboriginal community
	+ Practice must be characterized as pre-contact context
	+ In pre-contact, aboriginals would harvest wood for domestic uses as shelter, transportation, tools and fuel
	+ Therefore, claim as right to harvest wood for domestic use as member of aboriginal community
* Distinctive culture
	+ Scholars argue that culture has been taken to mean fixed inventory of traits or characteristics, cant look at European view imposing that on them
	+ Doesn’t have to go to the core of the people’s culture
	+ Dissent in van der peet: Maclachlin: different people may entertain different ideas of what is distinctive = problems of indeterminacy in the test
* Note: cannot reduce gathering of birch bark solely to building of canoes as it was in specified anthropological findings, the court must first inquire into the way of life.

Conclusion: Must discard the idea that the practice must go to the core of people’s cultures. The facts that harvesting wood was for survival purposes is sufficient to meet the integral aspect of a distinctive culture threshold

Class Discussion:

How *R v Sappier* implements the framework of *Sparrow* and *Van der Peet*?

Van Der Peet requires the “Integral to a Distinctive Culture Test”

1. Characterize specifically the right in question: Exactly what activity, for what purpose, and where? (Van der Peet, Sappier)
2. Was the practice integral to the distinctive culture [way of life] at the time of contact/control of aboriginal peoples?
	1. Is harvesting wood a defining central feature of the culture in question?
	2. What are the perspectives of the Aboriginal perspective? Ie. Expert testimony/ Elders
3. Has the right already been extinguished in legislation pre-1982 or a treaty? (*Sparrow*)
	1. Note: Mere regulation legislation does not cut it.
4. Is the right being interfered with? Is the interference justified? (*Sparrow*)
	1. Does the legislation have a valid objective? Ie. Conservation, health and safety
	2. Is the limitation in the best interest of the aboriginal peoples?
	3. Does it prioritize allocation to first nations?

Applied to Sappier:

1. Harvesting wood for domestic use is too vague.
2. Must narrow to use for “shelter, transportation, tools, fuel”. Narrowing to merely “bark collection for canoe-making” is too specific.

## Constitutional Recognition of Aboriginal Title

Aboriginal Title

* Treaties: An interest in Land
* Royal Proclamation of 1763: Assertion of crown sovereignty juxtaposed which recognizes that much land is currently occupied by Aboriginal society
	+ Seems to be that Aboriginal peoples have an interest in the land
* *St. Catherine’s Milling and Lumber v The Queen 1888* [Abs interest = use to land]
	+ What was the nature in Aboriginal Land was given up
	+ PC: Aboriginal peoples had some interest in the land. Called it a personal and usufructury right: the nature of the interest in the land was somewhat superficial = right of usage, but did not enable abs to fundamentally alter the land through exploitation of non-renewable resources
* *Calder v AG BC* 1973 SCC [Ab title exists!]
	+ Nishga Tribe of BC claim title over BC land that was present before confederation. Denied at trial, upheld at appeal.
	+ Issue: Do the ab land claims exist? If so, were they extinguished?
	+ SCC held that aboriginal title exists – but were split on whether or not it had been extinguished.
		- Majority: extinguished by gov control over land
		- Dissent: more must be present to prove that lands were extinguished
* *R v Marshall/R v Bernard 2005 SCC*  p 610[Further defining Ab title🡪 must prove exclusive pre-sovereign occupation]
	+ Facts: Harvesting Timber
	+ Test for title: claimants must prove ‘exclusive’ pre-sovereignty occupation of land by their forebears
	+ What does exclusive mean? Effective control: the intention and capacity to control
	+ What does occupancy mean? Regular use of land – a degree of physical occupation or use of equivalent to common law title has been made out.” (para 66)

### R v Adams 1996 SCC p 592 [Ab title is a specific subset of ab rights, affirmed by const]

Decision: Majority held that Aboriginal title was a specific subset of Aboriginal rights recognized and affirmed by s 35(1) of the Const.

* + Effect: Court elevated ab title from common law status to the level of constitutional guarantee

Reasons: Lamer CJC

* Aboriginal rights cannot be inexorably linked to ab title bc some aboriginal peoples were nomadic
* Location of settlement before and after contact may have changed
* A right to hunt on a certain tract of land precludes the right to hunt elsewhere, but this does not necessarily include title to that land

### Delgamuukw v British Columbia 1997 p 594 [Test for Ab title]

Facts: Gitksan or Wet’suwet’en chiefs who claim 58,000 km of BC. Original claim for ownership of the territory and jurisdiction over it. Transformed into claim for aboriginal title. BC counterclaimed that appellants have no right or interest in the territory, or that the cause of action ought to be for compensation from Government of Canada.

Issue: Nature and scope of constitutional protection afforded by s 35(1) to common law aboriginal title

Decision: Orders new trial, but suggests negotiation as better method

Reason: Lamer CJC

1. What is the nature of this court’s ability to interfere with factual findings made by the trial judge?
* Reluctant, unless there is a palpable and overriding error – appellate courts should not substitute their own findings of fact for those of trial judge
* Appeal court can interfere in cases involving determination of aboriginal rights, Failure of trial judge to appreciate evidentiary difficulties inherent in adjudicating aboriginal claims
* Although the doctrine of ab rights is a common law doctrine, ab rights are truly sui generis and demand unique approach to treatment of evidence which gives weight to ab perspective w/o straining Canadian legal system
* Usually oral histories would not be admissible, cannot rule against them as hearsay
1. What is the content of aboriginal title, and how is it protected by s 35, what proof is required?
* Content of ab title: is a right in land, and as such, is more than the right to engage in specific activities which may be themselves aboriginal rights
	+ Right to sue land for variety of activities, not all need to be aboriginal practices
	+ Those activities in themselves do not constitute the right, they are parasitic on the underlying title
	+ Range of uses is subject to limitation that they must not be irreconcilable with nature of attachment to land which form basis of abs title
	+ Inherent limit flows from title as sui generis interest in land, which differentiates it from a fee simple
* General Features
	+ Sui generis: must be understood through common law and ab perspectives, no freedom of transfer, derived from pre-contact occupancy
	+ **Inalienability**: Cannot be transferred, sold or surrendered to anyone but crown
	+ **Source**: Ab title was recognized by the proclamation, but arises from prior occupation of Canada by ab peoples.
		- Relevant by physical fact of occupation (derives from fact that occupation is proof of possession as per common law)
		- Arises from possession before assertion of British sovereignty vs. normal estates like fee simple, which arise afterward
	+ **Communally held** = collective right to land held by all members of ab. Nation. Decisions made communally
* Content of Ab title
	+ Aboriginal title encompasses right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of ab. Practices integral to distinctive ab. Cultures
	+ Those protected uses must not be irreconcilable with the nature of the group’s attachment to that land
		- Ie. Strip-mining, Depending on title to land: can’t destroy value as a hunting and fishing territory, can’t destroy value as burial ground (by building parking lot)
		- Cannot threaten future relationship by their very nature excluded from the content of ab title
		- Important non-economic component in relationship to land, to be enjoyed by community and cannot put land to use in a way which would destroy that
* Ab Title under s 35
	+ Ab title is a species of ab rights recognized by s 35, but it is distinct from other ab rights bc it arises where a connection of a group with a piece of land was “of a central significance to their distinctive culture”
	+ Some ab groups will be unable to make out a claim in title, but nevertheless possess ab rights
* Proof of Ab title
	+ Ab rights = right to activity; ab title = right to land itself
	+ Test:
		- 1. The land must have been occupied prior to sovereignty
		- 2. If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity btw present and pre-occupation
			* Not imposed too strictly to account for colonizers
			* If nature of occupation has changed, this does not preclude continuity
		- 3. At sovereignty that occupation must have been exclusive
			* can be demonstrated even if other ab groups were present.
			* Demonstrated by intention and capacity to retain exclusive control
* Infringement of Ab title: Test of Justification
	+ Rights are not absolute and can be infringed by both fed and prov governments
	+ Development of agriculture, forestry, mining and hydroelectric power, general economic development of interior of BC, protection of environment/ endangered species, building of infrastructure and settlement of foreign populations to support above aims = justify infringement
	+ Must uphold fiduciary relationship; uphold basic s 35 goal “the reconciliation of the pre-existence of ab societies with the sovereignty of the crown”. “Lets face it, we are all here to stay” Lamer CJC
	+ **Ab Title**
		- **1. Right to exclusive use and occupation of land**
			* **ab title given priority**
			* **Participation in development of resources**
			* **Conferrals of fee simples**
		- **2. Right to choose uses of land**
			* **Involvement of abs in decisions taken with respect to land**
			* **Consult abs, or gain consent from them**
		- **3. Lands held have economic component**
			* **Suggests that compensation is relevant**
			* **In keeping with duty of honour and good faith, crown must ensure fair compensation**

Key Points in *Delgumuukw*:

1. Use of oral history as evidence
2. Define the nature of aboriginal title: sui generis, inalienable to all but crown, communally held
3. Define the content of aboriginal title: exclusive use and occupation of land so long as those uses are not irreconcilable with nature of ab title
4. How can aboriginal title be proven? Claimed land must have been exclusively occupied prior to crown sovereignty, and group must have continuity
5. How can aboriginal title be justifiably infringed? See test above
6. Duty to consult: is circumstantial: becomes more or less demanding based on circumstances and nature of infringement. Minor infringement = may only require duty to discuss important decisions.

R v Bernard, R v Marshall: p 611

**Test for title**: Claimants must prove exclusive pre sovereignty occupation

**What does exclusive mean?**

**What does occupancy mean?**

## Aboriginal Treaty Rights

* S 35(1) protects Aboriginal and Treaty rights; they are recognized and affirmed
* Effect: if you have a legally binding treaty right it’s constitutional status allows its to trump legislation attempting to regulate such right (Constitutional supremacy)
* Three treaty eras: Pre-confed, post-confed, modern treaties
* After confederation, crown took more dominant role
* Modern treaties much better reflection of common intention of parties compared to 1760 where one party could not speak English, was written down by English party, vague

**ON AN EXAM**

* 1. Understand the nature of the right being claimed (ie hunting? Fishing?)
	2. What does the clause in plain reading mean?
	3. Look to extrinsic evidence to aid the clause (ie. Expert testimony, from prof or oral history from elder)
	4. Apply generous interpretation of treaty rights, that upholds honour of the crown. Large, liberal interpretation may include implied rights.
	5. Apply Sparrow analysis:
		+ Is it being infringed? Is this justifiable? Has it been extinguished?
	6. Note: still subject to justified infringement

### Patrick Macklem “First Nations Self-Government and the Borders of the Canadian Legal Imagination”

* Treaty rights prior to 1982 where either unenforceable or enforceable only against state inaction
* Courts viewed ab. As inferior. Effect: permitted parliament to regulate or extinguish existing treaty rights
* Plain meaning of treaty guarantee determined by process that accepted the legitimacy of anglo-canadian legal consciousness. Effect: expansive definitions of meaning of land surrenders and narrow interpretation of treaty benefits flowing to native peoples
* Shift after 1982, more sensitive to native expectations, more accommodating

### R v. Sioui 1990 p 614 [Must choose interpretation that reconciles ab interests with conqueror]

* Huron convicted of cutting down trees, camping and making fires in provincial park
* Defence: ancestral customs and religious rites protected by treaty entered into by Huron and Crown in 1760
* Lamer J makes broad interpretation of treaty provision: The free exercise of The Huron religion and their customs
* Must choose interpretation of treaty that best reconciles the Hurons interests with the conqueror
* Lamer J: rights guaranteed by the treaty could be exercised over the entire territory frequented by the hurons, so long as it is not incompatible with the particular use made by the crown

### R v Badger 1996 p 615 [No sharp dealings w/ abs, must uphold honour of crown]

* Several canons that inform contemporary jurisprudence on the subject
	+ Treaty = Exchange of solemn promise btw nation and crown, sacred
	+ Honour of crown is at stake in its dealing w/ Indian ppl, must maintain integrity of crown. No “sharp” dealings are sanctioned
	+ Ambiguities must be resolved in favour of the Indians, any limitations which restrict the rights of Indians under treaties must be narrowly construed
	+ Onus of proving that treaty/right has been extinguished lies on crown. Must be strict proof and evidence of clear/plain intention on part of gov to extinguish rights

### R v Marshall 1999 SCC p 615 [Treaty rights upheld; must look at extrinsic evidence]

Facts: Marshall charged with selling Ell contrary to *Fisheries Act*. Defence: entitled to sell eels by virtue of Peace and Friendship treaty right agreed to by BC crown in 1760

Issue: Whether Marshall had existing treaty right exempting him from conviction? Whether trade clause granted right to Mikmaq to trade?

Decision: Fishing regulations are inconsistent with treaty rights of Micmac and therefore of no force or effect or application to him by virtue of ss 35(1) and 52

Reason:

* Plain reading is not in Marshall’s favour: “I will not trade with anyone except British crown and truck house management”. (p 616) Limits his ability to trade with other ppl.
* External evidence must be used to aid treaty interpretation
* Court must choose from amoung interpretations to choose one that best reconciles hurons interest with crown’s
* Limitation: Must make sense of provision in historical context (English just took over Nova Scotia from France)
	+ The 1760 negotiations: To maintain order, keep Micmac people happy so they would be allied. Crown barred trade with their enemies. The treaty would not have advanced British objectives unless the mikmac were *assured continuing access to wildlife to trade*. (aka in order to trade with british, they need access to fish/hunt)
* Courts will imply contractual terms when necessary to give business efficacy meeting officious bystander test. In sui generis relationship, court must imply that right to trade implies right to access things to trade
* Inherent in treaty is special rights: protection against interference with its exercise. The fact that others enjoyed hunting and fishing just like micmak does not detract from content of mikmac rights (Since ab rights were not rightly respected)..unless they were extinguished prior to 1982
* To maintain honour of crown, cannot interpret positive Micmac right into negative micmak covenant.
* Worried about opening general trade floodgate: It is not a right to trade generally for economic gain, but a right to trade for necessaries. It is regulated and can be contained by proper regulations. Necessaries = moderate livelihood ie. Through catch limits etc. Root that limit in the scope of the right as articulated by the treaty.
* Current licencing scheme does not protect or accommodate treaty rights so interference is not currently justified, and as such are inoperative against eh appellant.

Ratio: Treaty rights upheld - did not pass justification of infringement test

Key Point: The language of aboriginal treaties is difficult to unpack, recognizes concepts that don’t do full justice to the types of interests being protected

## Duty to Consult

* There is always a duty of consultation, duty to discuss important decisions. Minimum acceptable standard is consultation in good faith, maximum requiring full consent of ab nation (when provinces enact hunting and fishing regulations in relation to their ab land)
* Duty to consult on established rights: is circumstantial: becomes more or less demanding based on circumstances and nature of infringement. Minor infringement = may only require duty to discuss important decisions. Major infringement = duty to consult may require no less than consent (*Delgummukw*)
* Why? Honour of the Crown (*Haida Nation*)
* When? Duty to consult extends to rights that have been asserted, not yet proven at trial (*Haida*)
* What and How? Scope of duty is proportionate the prelim assessment of strength of case supporting existence of right/title and to the seriousness of the potentially adverse effect upon the right or title claimed (*Haida*)
	+ Must show government real and constructive evidence of claim by writing to them “I’m writing to inform you of pending claim for ab title/rights”. Constructive: Signs of protest
* Duty to consult (in this case) is not breached in failure to reach agreement (*Taku*)
* Duty to consult that impacts treaty rights atleast requires inform abs + accommodate concerns in good faith (*Mikisew Cree*)

Current Event:

* Shells Jackpine Line in Northern Alberta: Has duty to consult been met?
	+ It affects their treaty rights as of “Treaty 8” and will hurt the environment.
* *Rio Tinto Alcan inc v Carrier Sekani Tribal Council 2010*
	+ Duty to consult arises when gov decision adversely impact Ab rights claim
	+ Grounded in honour of the crown
	+ Reconciliation is the goal (obligation to negotiate in good faith)
	+ Nature of duty varies with situation considering strength of claim, seriousness of impact
	+ Potential remedies include injunctive relief (court order to stop doing something ie. Construction of line), damages, order to carry out consultation
	+ Duty is triggered by: real or constructive knowledge of ab claim to resources; conduct that adversely impact claim or right
	+ Government can delegate duty to consult to admin bodies (ie. Sufficient for national energy board)

### Haida Nation v BC 2004 [Duty to consult whenever gov decision making, duty extends to rights and titles that have been asserted but not proven at trial; duty proportionate to strength of case vs. potential adverse impact]

* Facts: Province unilaterally decides to change and redistribute tree farming licences over land where Haida nations claims title.
* Strong interpretation of “duty to consult” and renewed emphasis on principle of honour of the crown in all dealings with Ab peoples.
* Held: government has a duty to consult with Abs whenever gov decision making could adversely affect Ab right or Ab title, and that duty extends to rights and titles that have been asserted but not fully litigated
* Case: Government had duty to consult w/ and accommodate Haida w/ respect to harvesting timber on lands where Haida had claimed ab. Title.
* The duty to consult is grounded in the principle of “Honour of the Crown”
* Scope of duty is proportionate the prelim assessment of *strength* of case supporting existence of right/title and to the seriousness of the *potentially adverse effect* upon the right or title claimed
	+ Assess strength by applying tests laid out in *Sparrow* etc.; or for title apply *Delgummukw*
* Court says given strength of case, coupled with serious impact of tree farming licences, meant that honour of the crown duty to consult = significant consultation. (would include phoning lawyers, asking about concerns, trying to accommodate those concerns)

Class Explanation: Looks like secession reference. A fundamental constitutional value s 35 ie. The honour of the crown as a “unwritten” constitutional principle which requires ongoing process of negotiation, consultation of ab interests.

### Taku River Tlingit First Nation v BC 2004 [Duty to consult exists; fulfilled by environmental assessment, inability to reach agreement ≠ breach of obligation of good faith]

* Proposed action (160 km road) ran though groups traditional territory and could negatively affect abs. Court held that prov gov has consulted and fulfilled its duty to accommodate b4 approving reopening of mine
	+ Accomplished through environmental assessment, consultation with abs
	+ Prov. not under duty to reach agreement with abs, and failure to do so did not breach obligation of good faith it owed

### Mikisew Cree First Nation v Canada 2005 [Duty to consult = obligation to notify abs on construction which would impact treaty rights]

* Crown build “winter” road takes up land where abs can exercise treaty rights to hunt, fish and trap. Duty to consult had been breached
* Even if lands had been surrendered, they had obligation to inform abs of impact of building road
* Given that “winter road” was small interference, duty = provide notice to abs and provide info about project and anticipating potential adverse impacts. Crown required to listen carefully to abs concerns and attempt to mitigate impact on treaty rights
* Held: Crown found not to have performed obligations when unilaterally declared road project, should had demonstrated interest in substantially addressing Ab concerns through consultation

## Metis Rights

* Protected under s 35, but framework developed mainly for “pre contact” and doesn’t necessarily apply to Metis
* “a person who self-identifies as metis, is distinct from other aboriginal peoples, is of historic Metis nation ancestry, and is accepted by the Metis Nation”

### R v Powley 2003 SCC p 634 [10 step Framework for Metis proof of right]

Facts: Powley and son charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of *Game and Fish Act*. Admitted to killing moose w/o license. Claimed that as Metis, they had ab right to hunt for food in Sault Ste. Marie area, and this right could not be infringed by gov of Ontario w/o justification. Trial court + ont CA agreed with Powleys.

Issue: Do the Powleys have this right to hunt in Sault ste. Marie Area?

Decision: Yes they have right, infringement not justified.

Reason:

* Van Der Peet Test
	+ How should the aboriginal rights recognized and affirmed by s 35(1) of Const. Act be defined?
		- Inclusion of Metis in s 35 is not traceable to their pre-contact occupation
		- So: s 35 requires that we recognize and protect those customs and traditions that were historically important features of Metis communities **prior to the time of effective European control**
			* Modification designed to account for post-contact emergence of Metis, and post-contact foundation of their ab. Rights
	+ 1. Characterization of the Right: (*Van Der Peet* para 76)
		- Right to hunt for food in environs of Sault ste. Marie
		- (Periodic scarcity of moose does not undermine claim)
	+ 2. Identification of Historic Rights-bearing community
		- Metis developed in upper great lakes mid 17th century
	+ 3. Identification of Contemporary Rights-Bearing community
		- Metis community persisted in and around that area. Advent of European control did not eliminate the community and its traditional practices in that area
	+ 4. **Verification of the Claimant’s Membership in the community**
		- Look to self-identification, ancestral connection and community acceptance.
			* Claimant must self-identify as Metis
			* Require proof that ancestors belonged to metis community by birth/adoption
			* Membership in modern community ie. Metis political organization, evidence of participation of community activities, testimony from others
	+ 5. Identification of the Relevant Time Frame
		- Test: focus on identifying those practices, customs, traditions that are integral to Metis community’s distinctive existence and relationship to the land
		- Historical record supports finding that prior to 1850 is appropriate date for finding effective control of Metis in this geographic area. Lived largely unaffected by European practices.
	+ 6. Is practice integral to claimants distinctive culture?
		- Subsistence of hunting an important aspect of Metis life and defining feature of their special relationship to land
		- Obtained livelihood from hunting/fishing (p 639)
	+ 7. Est. of continuity btw historic practice and contemporary right asserted
		- Powley claims Metis right to hunt for food. Right claimed falls w/in bounds of historical practice grounding the right
	+ 8. Was it extinguished? No evidence of extinguishment
	+ 9. Is there infringement on the right? Ontario currently does not recognize metis right to hunt for food. Lack of recognition infringes ab right to hunt for food as continuation of their protected historical practices in that community
	+ 10. Is infringement justified? Conservation argument fails. Moose population not under threat. Ontario’s denial of metis right to hunt for food cannot be justified
* Cross Appeal of Requesting a Stay dismissed.

### Beckman v Little Salmon/Carmacks First Nation (Supp) 2010 SCC [Duty to consult goes beyond required situations stipulated in modern treaty; treaty can still be justifiably infringed]

Facts:

* Treaty “Little Salmon Carmacks First Nation Final Agreement” 1996. Grant application still waiting approval, but decision in 2004 was made without proper consultation and regard to relevant First Nation’s concerns. Yukon gov argues that no consultation was required, since treaty is “complete code”. Treaty refers to all required consultation interactions and land grant application is not one of them

Issue: Interpretation and implementation of modern comprehensive land claims treaties btw Crown and First Nations + Other levels of gov. Application for Yukon government to approve grant of surrendered land to a Yukon resident named Larry Paulsen.

Decision: A treaty is not a complete code, still requires duty to consult. And they fulfilled duty to consult

Reasons:

* Modern treaties are much more sophisticated then historic treaties, involving significant negotiations etc.
* Designed to place abs in mainstream legal systems with advantages of continuity, transparency and predictability
* Simply because the duty to consult “constitutional” does not mean that there must be a reciprocal constitutional right of the abs to be consulted. Not every case dealing with treaty rights can be a constitutional case
	+ In this case – the constitutional limits include the honour of the crown and its supporting doctrine of the duty to consult
* If there was adequate consultation, did the Director’s decision to approve the palsen grant, fall within the range of reasonable outcomes?
* The content of the duty of consultation was at the lower end of the spectrum. It was no burdensome. But nor was it a mere courtesy.
* Argument that treaty is a complete code is untenable
* Treaty does not exclude the duty to consult

Class Explanation

* Environmental assessment, aboriginal community raised concern.
* Paragraphs 76 onwards – advance notice was given to nation that it was considering making this land grant.
* Invited comments. Abs had permission to survey if there was a known cultural site this would interfere with. The trap line owner was entitled to compensation under the treaty to people affected by land grants. Any other broader affect would be minimal.
* No consensus. Consensus not necessary to fulfill duty to consult

### Lax Kw’alaams Indian Band v Canada 2011 SCC (Supp) [Issues on how to frame the rights claim and extend historical activity into modern practice]

Facts: Claim for commercial harvesting and sale of “all species of fish” within traditional waters. Trial judge rejected claim bc she was not persuaded that peoples pre-contact customs, practices and traditions supported such a right. Their trade of fish products was limited to single species: Eulachon. Upheld by BCCA. Abs appeal and argue same, or in alternative argue lesser right to general fish for community sustenance or in alternative, right to food, social and ceremonial fishery.

Issue: Do Abs have these rights?

Decision: Uphold BCCA, dismiss appeal. Abs do not have right to commercial fishery.

Background:

* Eulachon is only significant species of fish which makes grease used for trade
* Is practice of trading eulachon grease equivalent to a modern right to fish commercially all species in their Claimed Territories?
* Attempt for commercial fishery of all species too removed from eulachon grease trade
* Facts:
	+ Harvesting and consumption of all fish species was sporadic
	+ Abs hold licence to harvest fish for food, social and ceremonial purposes
	+ Pre contact activity of eulachon grease does not right broader than harvesting of fish for subsistence
		- Trading fish was relatively minor and restricted to one species
		- Harvesting extra fish for over winter
		- Other types aka Salmon, were only for subsistence purposes not trade

Reasons:

* Did TJ err in refusing to consider modern commercial fishery to be evolution of pre-contact trade in Eulachon grease?
	+ Trade in any other fish resource besides Eulachon grease could not be described as integral to their distinctive culture. Other trade was sporadic. Proof of sporadic trade is not enough to show that trade was pre-contact way of life.
	+ Extension to general commercial fishery would represent an outcome different from the activity on which it would be based
* Did TJ err in refusing to make a declaration on Lesser and Included Rights?
	+ Abs want right to harvest fish of all species and sale for sustenance of community
	+ Neither party led evidence to support lesser rights, and unfair to introduce new issues at end of proceedings
	+ Meaning of “lesser” was too vague, a lesser right can still have big impact on economy
* Did TJ err in failing to award commercial fishery licence on basis of the Honour of the Crown?
	+ TJ found no express promise had been made by crown of any preferential access to commercial fishery
	+ No implied promise - because nothing to base it on ie. No treaty to interpret, no undertaking by crown etc.

Conclusion: They have right to take fish for food and ceremonial purposes.

Class Example: Problem 1:

Last year, James Morriseau, an Ojibwa and member of the Lac Seul First Nation (located near Sioux Lookout, Ontario) married Donna Matthews, a Cree from the Bearskin Lake First Nation (approximately four hundred kilometers north of Sioux Lookout). James and Donna are Status Indians. After their wedding, James and Donna moved to a house on the Bearskin Lake reserve.

Last week, using a high-powered rifle, James shot and killed a moose on lands just east of the reserve, the traditional hunting territory of the Bearskin Lake First Nation. James shot the moose primarily to feed his family, although he admits that his plan is to freeze the meat and distribute some of it to friends. While transporting the moose carcass home, James was stopped by a conservation officer and charged with hunting without a provincial licence contrary to Ontario’s *Fish and Wildlife Conservation Act, 1997*. James admits that he shot and killed the moose and that he does not possess a provincial hunting licence.

Assume that a treaty extinguished aboriginal title (but no other rights) to the area in question and that the treaty provides no rights to hunt. **Discuss the constitutional grounds on which Mr. Morriseau might defend himself.**

Aboriginal Rights (Sparrow, Van der Peet, Sappier)

Issue: Upon marriage, do your rights become communal between you?

Firstly, consider constitutional grounds!

Secondly, say why its not a title case or treaty case.

Thirdly, jump into Sparrow analysis:

1. How should the right in question be characterized (site and nation specific, history *Sappier*)

* Right to hunt moose for subsistence for family/community

Is the custom or practice integral to the distinctive culture of the aboriginal peoples (*Van der Peet*)

* Distinctive culture: Ambiguities should be interpreted in favour of abs, so concern over marriage “in” rights = in favour of abs.
* The means of exercising one’s aboriginal rights can evolve over time, use of rifle over bow/arrow not a problem
* Historical evidence:
	+ Oral history, expert evidence on whether bear skin lake cree nation have hunted pre-contact for subsistence purposes

Has the right been “extinguished” (*Sparrow*)

* The right to title has been extinguished, but this does not exclude lesser rights claims.
* Legislation: Does not have clear and plan effect of extinguishing right (Sparrow)
	+ But this is irrelevant if the legislation is after the constitution.

Has the right been justifiably infringed (*Sparrow*)?

* + Has the right been infringed (unreasonable or undue hardship)?
	+ Is the interference justified (valid objective, consultation, priority allocation)?

## Practice Exam Questions

* In a recent article in the *Dalhousie Law Journal*, a scholar argues that “the interpretation of treaties and legal instruments in aboriginal rights litigation involves a complicated and inextricable weave of history *and* law. In this *sui generis* area of law, legal interpretation and historical interpretation are intertwined.”

**With detailed reference to course materials, discuss whether or not that assessment is accurate and why or why not.**

* In *R. v. Van der Peet*, [1996] 2 S.C.R. 507, Chief Justice Lamer writes:

“[W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.  The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”

**With detailed reference to course materials, discuss whether or not the Court’s s. 35 jurisprudence has been successfully “directed towards reconciliation.**

# Constitutional Rights Before the Charter

## Introduction

* John A Macdonald Speech 1864: Idea of constitutional rights pre-dates Charter
	+ Advantages from connection to UK, ie. Constitutional freedoms
	+ Protection of the individual at heart of British Constitution
	+ Fundamental right of liberty
	+ Federal system of government can operate to safeguard these rights
	+ Legislation can protect fundamental rights

## Common Law Constitution and Constitution Act, 1867

* Two types of individual rights
	+ Political rights: rights to participate in government, representation, voting
	+ Civil rights: liberty from restraint by government, freedoms of the person, speech (right to express eccentric opinions deviating from majority), religion, property,
		- Constitutional liberty: “The good sense and right feeling of the people”- Edward Blake
* Provincial rights: Separation from Dominion
* Minority rights: Minority education rights and s 133 language rights
* Rule of Law: Claim that both government and people were bound equally by the law and that government must always obey the law.
	+ *Duplessi*: Rule of law requires executive officials to exercise power in a manner justified by existing legislation and common law principles.
* Implied Bill of Rights: suggests that const implies that there is a zone of liberty which the state must not unjustifiably enter
* Courts interpret legislation as not intending to infringe on above rights.
	+ Looked at preamble
	+ Argued that certain freedoms are beyond legislative regulation
	+ Weakness: lack of explicit constitutional foothold for such claims
	+ Lawyers and politicians argue for constitutional amendment to include explicit protection for fundamental rights
* In future, SCC reignites discourse of unwritten principles in *Re Quebec Secession Reference*

#### AV Dicey 1885 “Introduction to the Study of the Law of the Constitution”

* Officials can’t act as judge, jury and execution.
* Degree of due process required.
* No one is above the law.

#### Reference re Alberta Statutes 1938 p 694 [Bill infringing free speech through penal sanction is ultra vires; illustrates dependence on preamble; illustrates residual powers/pogg]

* Election of social credit government in Alberta in 1937. Monetary policies vague, total of the payments to individuals from all economic transactions was less than the total value of goods produced, shortfall caused by unemployment and depression. Solution: impose public control over banks etc and provide individuals with social credit
* Establish board to require newspapers to publish statements necessary to correct public misapprehension and print government approved stories and require journalists to disclose their sources
* Primarily struck down for infringing dominion legislation of banking, on federalism ground
* Willing to protect rights before they were “codified”

Cannon J: (Obiter)

* This kind of credit cannot succeed unless everyone should be induced to believe in it and help it along
* Bill aims to control any statement relating to any policy or activity of the government of the province and declares this object to be a matter of public interest
* P&S: to regulate press of Alberta by preventing public from being misled, reducing opposition to silence or ridicule social credit government
* Issue: do the provisions of the bill invade domain of criminal law and trench upon exclusive legislative jurisdiction of Dominion?
	+ To deprive the citizen of a right do that he could lawfully do.
	+ Criminal Code: no one shall be deemed to have seditious intention because he acts in good faith of pointing out errors in government of Canada or to urge their removal
	+ Bill attempts to revive old theory of crime of seditious libel by enacting penalties and denying Alberta newspaper publishers advantage of changed code.
	+ Freedom of discussion is essential to enlighten public opinion in democratic state
	+ Bill is ultra vires of Provincial leg. No province can reduce rights of citizens compared with those of rest of Canada
* DUFF CJC: (Obiter)
	+ Bill is ultra vires
	+ Preamble of BNA, shows that constitution of Dominion is to be like UK. Statute contemplates parliament working under influence of public opinion and public discussion
	+ Public discussion is breath of life for parliamentary institutions
	+ Residual Power Argument: POGG to deal with freedom of speech; protecting the constitution itself, is federal jurisdiction
	+ Access to information is a method “the people” use to hold the government accountable. It is necessary in a democratic society to learn the criticisms of their government to influence their choices in elections
	+ This bill exceeds limit of provincial regulation of newspapers

#### Saumar v City of Quebec 1953 p 699 [Upholds Freedom of Religion, Religion is nationwide]

Facts: Saumar (Jehovahs witness) charged under bylaw prohibiting distribution of pamphlets in streets of Quebec unless having obtained written permission of Chief of Police. Brought action declaring it *ultra vires*. Argued that constitution of Canada should protect freedom of religious expression. SCC split 5-4

Issue: Is by law *ultra vires*?

Decision: Yes. Religious freedom is fundamental.

Reasons: Rand J

* Infringes freedom of religious worship,
* Trenches upon jurisdiction of dominion in restraining freedom of communication by writings
* Chief of police grants license under his discretion if he considers it not objectionable
* P&S: censorship, remotely connected to street regulation as proposed
* Religious freedom is a fundamental, it is NATIONWIDE
* Perhaps under 92(13) and 92(16), does not fall under those, as it is a nationwide interest
* Civil rights arise form positive law (legislation, statutes etc)
* Freedom of speech, religion and inviolability of the person = original freedoms and necessary attributes and modes of self-expression, primary conditions of community life w/in legal order
	+ = freedom of speech is not absolute.
	+ The province of quebec can deal with the negative consequences of speech that creates public disorder, BUT cannot prevent that speech at all.
* By-law invalid

Reasons: Rinfret CJC Dissenting

* By-law is nothing other than police regulation, streets should not be used for purpose of distributing documents
* P&S: the use of the streets for purposes of distribution
* One cannot use the preamble to restrict provincial jurisdiction of local matters
* Provincial rights argument: It is a local nature
* A population which is 90% catholic not only has the right but the duty to prevent the dissemination of such infamies
* By-law is legal, valid and constitutional

#### Switzman v Elbing 1957 p 705 [Upholds Freedom of political beliefs]

Facts: Challenge to padlock act 1937 – quebec leg. Attempt to control communism. Gave government the power to padlock premises that it believed were used for the propagation of communism.

Issue:

Decision:

Reasons: Rand J

* Ban is directed against freedom or civil liberty of the actor; no civil right or anyone is affected nor is any civil remedy created. Certain fundamental rights were being infringed.
* Preamble: Canadian government is in substance, the will of the majority expressed directly or indirectly through popular assemblies. Government requires free public opinion of an open society
* Public opinion requires demands of unobstructed access to and diffusion of ideas
* Outlawry, divesting civil standing and destroying citizenship is a matter of Dominion concern
* Prohibition of this activity as evil is a criminal law – must be dominion
* Not a matter within the regulation of the province
* Ultra vires of the province

Abbott J:

* Right of free expression of opinion and criticism are essential to working of democracy
* Right cannot be abrogated by province = ultra vires
* Parliament could not abrogate this right of discussion and debate. It is restricted to criminal law and to POGG…
* (Upholds this idea of supremacy)

Taschereau J

* Not criminal law
* The legislature did not say that any act constituted a crime, did not confer character of criminality upon communistic doctrine
* Province can validly legislate as to the possession and use of property
* Suppression of spreading subversive doctrines is as important as suppression of disorderly houses
* This does not constitute obstacle for liberty of free press and liberty of speech
	+ These liberties would cease to be a right if individuals propagate communism successfully

Ratio: **Democratic form of government cannot function w/o free expression of political views**

Class Analysis: Looks like they are using unwritten constitutional principles to trump the written text. Perhaps would prefer to leave discussion of “unwritten” aspects of preamble outside of the argument. Focus on separation of powers/ultra vires aspects rather than freedom of speech + freedom of religion

Note: Much of this is obiter and is continued to be used in inspiration, but not binding

### Beetz J Grapples with Unwritten Rights

#### Dupond v City of Montreal et al 1978 [Beetz J frustrated with line of argument using preamble]

* Facts: Challenge to a municipal bylaw imposing a 30-day prohibition on any public gatherings or assemblies
* See Beetz J expressing frustration of line of argument using preamble
* “Exceedingly difficult to deal with an argument couched in such general terms.”
	+ Difference btw fundamental right vs right that’s not fundamental is arbitrary
	+ None of the freedoms referred to are so enshrined that they should outweigh written text of constitution.
	+ None of these freedoms is a single matter coming w/in exclusive fed/provincial competence
	+ Does not say that powers of const. should be restricted in relation to “fundamental rights”

#### Ontario Public Service Employees Union v Ontario 1987 [Beetz J more open to using general democratic arguments]

* Beetz J backtracks
	+ Neither parliament nor legislature can enact legislation that is against the basic democratic structure of the constitution

## Charter History

### Universal Declaration of Human Rights 1948

* Movement from UK style constitution post WWII to more American style based on Bill of Rights
* Unfolded as broader objective of gaining independence from Britain, patriating constitution and coming up with amending formula
* Civil liberties groups gaining traction in CDN legal circles, speaking out against government action which is contrary to individual rights
* The Declaration itself
	+ Inalienable rights that belong to individuals by virtue of human nature
	+ Post-war mankind realizing outrage of war acts
	+ Reaffirm general faith in fundamental human rights
	+ **Clash of views: Provisions that resonate strongly with negative rights (freedom from government action/expropriation, arbitrary arrest etc.) draw inspiration from American style of constitutional rights discourse**
		- Competing with positive (freedoms to choice of employment, right to rest/leisure, right to standard of living)
* Raises question: If after WWII, there was pull for introduction of human rights legislation, why wasn’t the charter a slam dunk?
	+ Issues: What prevented well-meaning politicians from incorporating this political project?
		- Need cooperation from provinces + dominion
		- UK has no written human rights, we have common law heritage that already covers this
		- UK has parliamentary supremacy, worried about constitutional supremacy (bc they aren’t as representative as political branches are)
		- Positive rights can be expensive (ie. Hospital drain public purse)

### The Canadian Bill of Rights

* 1960 Parliament enact Bill of Rights (Introduced by John Defanbaker)
	+ Shaping Influences
		- External influences from Universal Declaration of Human Rights and American Bill of Rights
		- Fear about regulation by legislatures and administrative agencies
	+ Quasi constitutional

#### The Canadian Bill of Rights RSC 1985 Appendix III p 712

* Preamble: Canadian Nation is founded upon principles that acknowledge the supremacy of God, dignity and worth of the human person and position of family in society of free men and free institutions
* Section 1: In Canada there has existed the following human rights without discrimination of race, national origin, colour, religion or sex,
	+ Right to individual life, liberty, security of life, enjoyment of property
	+ Right to equality before the law and protection of the law
	+ Freedom of religion
	+ Freedom of speech
	+ Freedom of assembly and association; and
	+ Freedom of the press
* S 2 declared that every law of Canada, unless expressly declared by an Act of Parliament that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to infringe any of the rights within it
* **Applies to property**

Note: **Simply a statue of Parliament, not entrenched, like** the Constitution Act 1892

* Governs only matters w/in fed gov’s power
* Province’s inclusion discussed, but they wanted to protect their autonomy
* It can be amended like any other statute, but is quasi-constitutional because further statues must explicitely state they override it.
* Problem for the courts
	+ What is the bills effect on other statutes? S 2 says bill has no effect on statute if expressly excluded. What about not expressly excluded but still violates rights?
	+ How could courts approach the bill? Should grant of rights be expansively or restrictively
* ***R v Drybones [1970] [only success of BoR!]*:** Charged with being intoxicated off a reserve, challenged section bc it violated his right to equality before the law under s 1(b) of the Bill = discriminatory
	+ Ritchie J: Considered argument that the Bill was simply a guide for interpretation: This converts it from its apparent character as a statutory declaration of fundamental rights and freedoms which it recognizes, into little more than a rule for the construction of federal statutes. Rejected this approach relying on opening words of s2.
	+ Dissent = should exercise more modest functions
* *Winnipeg School Division 1 v Craton [1985*]: To adopt a theory of implied repeal by later statutory enactment would rob statute of its special nature and give scant protection to the rights it claims
* *R v Burnshine [1975]:* Vouched for “Frozen rights” approach, manifestation of general denial of expansive interpretation
* Generosity of interpretation diminished
* ***AG Canada v Lavell [1974]****:* Indian woman who married a non-indian man lost her status, but no equal provision for Indian man.
	+ She can rely upon 1(b). Treats women differently than men. Imposes disadvantage on them.
	+ SCC reject challenge. Majority declared that “the meaning to be given to the language employed in the Bill is the meaning which it bored in Canada at the time it was enacted”.
	+ The phrase “equality before the law” did not express “egalitarian”.
	+ Because the legislation treated all women the same, and treated all men the same, there is no discrimination.
* ***Bliss v AG Canada [1979]*:** Women challenging legality of Unemployment Insurance Act with regards to employment insurance for pregnancy leave.
	+ Imposed longer pre-departure qualifying period for women. Excluded benefits for people taking leave to give birth.
	+ Equality argument. Treating women who are pregnant different from other women, and treating women different than men.
	+ Ritchie J held that Act did not discriminate on specified ground of sex, inequality is not created by legislation but by nature.
* *Bill of Rights* today has been almost totally eclipsed by Charter
* Narrow interpretation of equality rights led many people who believed in fundamental rights to demand a more explicit document

### Differences btw Bill of Rights and Charter

* Scope is more restricted than under the *Charter*. Only applied to matters within federal jurisdiction and federal legislation.
* Wording of the Bill suggests it does not create new rights, just enforces existing ones
* Reasonable limitation clause in the *charter*, not one in the Bill of Rights.
* Bill of Rights is legislation and can be repealed.
* Bill of Rights expressly mentions property, which is not expressly protected under *Charter*
* Charter rights more expansive/descriptive than Bill of Rights
* Bill of Rights sets out rules of statutory interpretation
	+ Difficult to turn a piece of legislation that is aimed at censoring the press, into a construal that solicits freedom of speech

## The Advent of the Charter

### The Adoption of the Charter

* Charter first tabled in 1968 by:

#### Trudeau [Charter developed as fulfillment of natural evolution of liberal enlightenment theory]

* + Historical origins of human rights
		- Natural rights: security, shelter, nourishment
		- Led to concepts of individual freedom and equality
		- Deep-seated desire for recognition of human dignity
	+ 1789: France and US embody ideas: Man shall not be deprived of liberty or property except in accordance with law
	+ Method to combat Quebec nationalism **– encourage Canadian unity**
* In Canada, no form of guarantee (beyond those in BNA) of individual liberty
* An entrenched bill of rights would offer constitutional protection, at price of restriction on theory of legislative supremacy – not a high price to pay
* Purpose: **to establish certain rights as legal principles to be applied by the courts**: Ones right to life, liberty, property, free speech, free press, freedom of worship, of assembly
* NOTE: Essay question material below

#### A Cairns, Charter Versus Federalism: The Dilemmas of Constitutional Reform 1992 [Charter is a historical development based on changing social thinking; Complex international and domestic motivations for adopting the charter]

* Must account for pervasive international dimension of struggles
* **Erosion of Britishness**
	+ As Canada become less British, support for parliamentary supremacy was weakened
	+ Created a gap in constitutional symbolism of completely autonomous nation
	+ Charter emerged to fill the gap, brought judicial supremacy and enhanced role for written const.
* **International Sources of Politicized Ethnicity**
	+ Diffusion of new normative order and push for equality was facilitated by easy mobility of persons/immigrants and ideas across national boundaries
* **International Rights Dimension**
	+ Human rights became a piece of political dialogue
	+ Fostered respect for fundamental freedoms and human rights
	+ Canada distinctly lukewarm to incorporation of UN charter
	+ Canada increased her accountability to the world community
	+ Charter must be binding on both orders of government to be effective
	+ Direct and indirect proselytizing on behalf of rights by UN challenged regimes practicing federalism and employing parliamentary supremacy to modify their constitutional arrangements

#### P. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” (1983) p 725 [Product of const. negotiations btw dominion, provinces to achieve unity; response to Quebec nationalism]

**Two purposes of the charter: 1. To contribute to national unity 2. To protect rights**

#1: To Contribute to National Unity

* The constitutional issue was a priority. But if constitutional reform was to be seriously pursued, essential that Quebec’s demands be countered by proposals designed to have unifying effect on Canada
	+ Incorporation of language rights

Question: How does Charter reach unity? As an attempt to transcend traditional fault lines of CDN federalism, fundamental rights that are national, which *every* person would have

* To reach agreement on common values = essential first step
* Additional larger numbers of new Canadians with no experience in liberal democratic values required Canada to rely on something other than British method of protecting civil liberties
	+ For such a heterogenous population – written code was needed
* Trudeau-Government believed in nation building
* They would risk dividing the country in order that it might become more united
* “We must define the common threat that binds us together”

#2: Following experience of Japanese internment.

#### L. Weinrib, “Of Diligence and Dice: Reconstituting Canada’s Constitution” 1992 p 728 [Proposed charter negate exercise of gov power rather than require it]

* Proposed charter did not guarantee legal rights, economic rights, mobility rights or egalitarian rights
	+ **Extended protection to political freedoms only**
	+ Effect: negate exercise of government power rather than require it

#### LE Weinrib, “Canada’s Charter of Rights: Paradigm Lost?” 2002 [Charter tackles institutional legitimacy and judicial review]

* Adoption of charter = Canada join regime of right-protection
* Vested in new judicial review functions in existing courts
* Most important elements: s1 : the guarantee and limitation clause and s 33: the notwithstanding or override clause
	+ Limitation formula: requires state to formulate as law, any exercise of power that limits guaranteed rights
	+ The notwithstanding clause applies only to certain rights
* Shows dual commitment to liberal democracy under the rule of law and national citizenship based on rights
* **Every draft contained limitation clauses – shows strong concern for judicial role**
* Three possible outcomes to successful charter challenge
	+ 1. Enjoyment of rights as guaranteed
	+ 2. Legally prescribed limits upon those rights justified by gov in courts of law
	+ 3. Constitutional amendment
	+ 4. Notwithstanding clause: parliament could assert primacy over charter for duration of electoral mandate

#### ME Gold, “The Mask of Objectivity: Politics and Rhetoric in the SCC” 1985

* Initially only 3 provinces support. SCC say need more “substantial measure of consent”
* Gang of 8: Quebec’s first time tying itself to amendment that did not give it veto power
* Then quebec opposed charter - their opposition was not related to its content, but became another battle ground for Quebec’s place in confederation

#### The Kitchen Accord

* Patriation
* Amending formula (7 provinces or 50% population)
* All the Charter with a notwithstanding clause (s 33) = deal breaker for the provinces
* Legitimacy problem: Issue with judges having the power to review the Charter, which may raise issue of judicial activism

## Judicial Review under the Charter

* Debates about the wisdom of entrenchment have turned into debates about the appropriate methodology for judicial interpretation of the Charter. Both right and left wing have mounted strong critiques of the charter.
* What arguments support/negative the view that judicial review is illegitimate or unfortunate

|  |  |
| --- | --- |
| Against Charter + judicial review:  | For Charter + Judicial review: |
| * Cost of access to the courts, expensive only a few can afford to fight (Bogart)
* Setting of the status quo difficult to overturn
* Purpose for creation (Bogart)
* Dialogue is uneven
* Demographically, we’re passing power from legislative chamber to an institution that historically and still is dominated by middle class males (Petter)
* Favour negative rights, the type that protect the “powerful” from state intervention ie. Attempts to regulate the market, redistribute wealth (Petter)
* Elected members more “fair” to improve lives of CDNs (Bogart)
* Charter gives legislature excuse to not take hold of the problem
 | * Dialogue of the courts/legislature allows checks and balances; allows judges to improve democracy.
* Having judges review legislation for charter compatibility if not a zero sum game, its these two institutions engaging in a dialogue, very often parliament reintroduces the same legislation tailored to courts requests (Justice Iaccobucci).
* Rule of Law created constitutional supremacy, and charter provides set of principles above the legislature.
* Protection of minority rights, which otherwise don’t find expression in the political process.
* Constitution gives judges that power – any law that is inconsistent with const. is of no force or effect to extent of inconsistency. (S 52)
	+ This is a living tree approach. Or should we approach it more narrowly to give governments more space
 |

#### W. Bogart, Courts and Country 1994 p 737 [JR saps democracy of progressive decisions]

Judicial review will sap democracy of progressive decisions due to costs of litigation

Pros for entrenched Bill of Rights

* Allows minority interests in open, public, responsive process vs. unresponsive legislature
* Ability to unite Canadians
* Charter focuses on ensuring integrity of politics by buttressing opportunity for public debate and collective deliberation
* Existence of s. 33 which allows judicial decisions under most provisions of charter to be overridden by competent legislative body

Cons

* Born as device for centralization and check forces of separatism led by Trudeau’s rival
* Charter is reflection of the inherent contradiction of liberal ideology
* 1. Substantive outcomes: elected members of gov are more effective for improving lives of cdns
* 2. Process: best chance for vigorous, responsive and elected democracy comes from elected reps
* 3. Costs of access to the courts, allows disproportionate use of judicial review for rich
* Contended that chance for greatest justice comes from legislature

#### A. Petter, “Immaculate Deception: The Charter’s Hidden Agenda” 1987 p 739 [Charter is regressive instrument more likely to undermine than to advance interests of socially and economically disadvantaged CDNs: Too expensive for poor to litigate, and judges all white/old]

Argues that charter is regressive instrument more likely to undermine than to advance interests of socially and economically disadvantages Cdns

* Nature of Charter Rights
	+ Set on founded belief that main enemy of freedom is the state
	+ Rights are predominantly negative in nature
	+ Negative nature reflects systematic bias in favour of interests of upper middle class
	+ No protection for jobs, food, housing = not fundamental apparently
	+ Charter likely to erect barriers to future innovation. Legislature has already led women’s right + minimum wage laws
	+ Charter will serve to weaken impetus for further legislative reform
* Nature of the Judicial System
	+ Judicial system is an inappropriate forum for advancing interests of disadvantaged
		- **1. Cost of gaining access to the system**
			* Expensive
			* Litigation more likely to be afforded by rich parties
			* Freedom of expression will come to reflect business concerns
		- **2. Composition of judiciary**
			* Judiciary does not possess experience to comprehend social impact of claims made under charter
			* Mostly have wealthy origin, or made their names in business
			* Attitude reflects legal system of where they were schooled
			* Judges see role as policing boundaries btw natural zone of individual autonomy and unnatural activities of state. BUT liberty may be better protected by legislation than by idea of autonomy dictated by “market”

#### L. Weinrib “Limitations on Rights in a Constitutional Democracy” 1996 p 743 [Welcomes judicial protection of individual rights as a correction for perceived inadequacies of majoritarian politics]

Two models for understanding the Charter and role of courts: Majoritarian vs. Supremacy of Rights model

Supremacy of Rights Model:

* Welcomes judicial protection of individual rights as a correction for perceived inadequacies of majoritarian politics
* Respect for equal dignity and autonomy of each member of the community
* In interactions with the state, each individual is autonomous, equal to all others
* Charter recognizes that majority politics may not account for minority views
	+ Dynamics of political forum not receptive to values embodied in rights
	+ Judiciary offers politicians relief from final responsibility in an unknownable world, lends legitimacy to variety of legal operations, allows for evolving judicial doctrines,
	+ Courts become important law creators
	+ While enumerated rights are not absolute = marks extension of commitment to right-based values
* Both courts and leg. Work together to mould society to its deepest commitments
* Courts oversee functioning of free and democratic society

#### PW Hogg and AA Bushell, “The Charter dialoge btw Courts and Legislatures” 1997 [Judicial decision causes public debate which Charter values and plays more prominent role = it is a DIALOGUE]

Concept of Dialogue

* Judicial decision causes public debate in which Charter values play more prominent role. Leg body in position to respond, being respectful of Charter values.

How Dialogue Works

* When court strikes down a law, often offer suggestion for change to resolve problem
* In 2/3 of cases, leg has changed law to meet reqs
* Charter acts as a catalyst for 2-way exchange btw judiciary and leg on topic of human rights and freedoms

Four feature of the Charter that facilitate Dialogue

* 1. Section 33: power of legislatures to override
* 2. Section 1: allows for reasonable limits on guaranteed charter rights
* 3. Section 7,8,9,12: qualified rights allow for action that satisfies standards of fairness and reasonableness
* 4. Guarantee of equality rights under section 15(1), which can be satisfied through variety of remedial measures
* Barriers to Dialogue:
	+ When objective of impugned legislation is unconstitutional
	+ When an issue is so controversial, political forces make it impossible for legislature to respond to courts Charter decision

Dialogue may occur even when laws are upheld

* Dialogue can occur outside court room, even when not at issue

#### K Roach 2001 [Impact of allegations of judicial activism on dialogue will result in more judicial deference]

* American debate about judicial activism has been inappropriately imported into Canada, without recognition of the fundamental structural differences btw the Charter
* Charter = middle ground btw extremes of leg and judicial supremacy
* Worries about impact that allegations of judicial activism will have on dialogue
	+ May produce excessive judicial deference

#### Vriend v Alberta 1998 SCC p 751 [Dialogue enhances democratic process]

Facts: SCC finds that omission of sexual orientation from list of prohibited grounds in Abs human rights legislation constituted unjustifiable violation of s 15 Charter

Reasons: Iacobucci J

* Justifying courts role: Charter = constitutional supremacy, but since rights and freedoms not absolute, meaning of rights and justification settled in court
* To have constitutional supremacy was a democratically voted decision.
* Courts must respect other roles
* **Dialogue enhances democratic process**
* **Court must inevitably delineate attributes of a free and democratic society to protect democratic values in cases where leg. Fails too**
* Appropriate remedy = read in discrimination on grounds of sexual orientation

#### R v Mills 1999 p 753 [SCC endorses dialogue theory. Roach says dialogue discourages leg. debate and Morton says judges fail to recognize “Staying power” of judicial decisions]

SCC endorses dialogue theory of judicial review. Sometimes defers to parliament

Criticism by Roach: discourages continued legislative debate and reform

Criticism by Morton: Active role that judges play is a revolution, they should not be making policy. Hoggs dialogue theory fails to recognize “Staying power” of new judicially crated policy *status quo*, especially when issue divides political caucus

Hoggs Response: Dialogue is in place in Vriend. The fact that it is politically costly to reverse a dialogue decision is not a bad thing.

# Charter Framework and Interpretation

##  The Canadian Process of Constitutional Amendment

### Reading of the Charter

* Clauses that raise eyebrows
	+ Broad language: what is *unreasonable*? (in unreasonable search and seizure)
	+ Notwithstanding clause s.33: Does not apply to certain items high on Trudeaus authority ie. Mobility and language rights; aboriginal rights; democratic rights but does include fundamental freedoms.
		- Because: those were deal breakers to participants at the time
	+ Some redundancies with “official language” explained by big push for them by Trudeau
	+ Preamble: history of linking “natural” law though divinity (notion to god). Tension between recognizing supremacy of god, and freedom of though + religion. Does not impose separation of church and state – as it maybe contends
	+ Right to be tried within a reasonable time protects criminals, not private litigants
* Questions:
1. What leg power does Charter confer on Parliament? Section 31: Nothing in this charter adds to legislative power of parliament/provinces.
2. What remedy may court give in enforcement of Charter right? (s 24.1) “appropriate and just in the circumstances”
3. What is the status of the French version of Const. Act 1982? (s18) Says they are both equally authoritative in English and French.
4. What provision regulates linguistic handling of trial of someone who speaks only Ukrainian? Right of assistance of interpreter (s 14)
5. What is the consequence of a law’s inconsistency with const. of Canada: It will be of no force and effect (s 52)
6. Might s 2(a) of Charter challenge denominational schooling rights of s 93 of Const.?

No. Section 29: Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

1. How many years is the limitation on a declaration made under s 33.1 that an Act of Parliament operates notwithstanding s 23 of Charter. Section 33 does not apply to section 23.
2. Does someone sued for breach of contract have right to be tried w/in reasonable time? No. (S 11b) Persons tried to an offence have right to be tried w/in reasonable time
3. On what principles is the constitution founded? Preamble: Principles that recognize supremacy of god and rule of law
4. What is the textual basis for arguing that SCC has entrenched constitutional statuts?
	1. S 41D: The following constitutional amendments must be unanimous: The composition of the SCC
5. What textual authority most clearly confirms that Canadian Bill of Rights remains unaltered by the Charter?
	1. S 26: The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
6. According to the Charter, how should it be interpreted?
	1. S 27: This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians
	2. S 28: the rights and freedoms referred to in it are guaranteed equally to male and female persons.

### Design Issues

* 1. Locus of Sovereignty: which institutions should be vested with the power of constitutional amendment
* 2. Correct balance to be struck btw stability and flexibility
	+ const. should provide framework, but also able to adapt to changing nature of political community

### The Constitutional Amendment Process

* Pre-1982: amendments require legislation by parliament of UK
* Such a move of amending the constitution without provincial consent would be legal but not legitimate
* In 1982: 7/50 formula:
	+ Consent of parliament + 2/3 of provinces having atleast 50% population of Canada
	+ No province alone has a veto
	+ Amendment cannot be proclaimed until 1 year after initiation of amendment process
* Amendments of office require unanimity procedure
* S 42: Provisions affecting only some provinces: bilateral procedure
* S 44: Parliament alone can make changes to fed exec/house of commons/senate through fed unilateral procedure
* S 45: Provincial unilateral procedure: province can amend its constitution provided that amendment does not affect matters governed by other amending formulae (such as office of lieutenant Gov.)
* Note: Constitutions can change in other ways
	+ 1. Judicial Interpretation
	+ 2. Constitutional Convention

## Constitutional Framework OUTLINE

**Section 96-100 (Provincial superior courts)**

* Alberta Court of Appeal
* Alberta Court of Queen’s Bench

**Section 101 (Federal Courts)**

* Supreme Court of Canada
* Federal Court of Appeal
* Federal Court of Canada
* Tax Court of Canada
* Military Courts

**Section 92(14) Provincial courts**

* Provincial Court, Alberta Court of Appeal, ABQB

## Amending Formulae (Constitution Act, 1982 pg 132-134)

1. General Amendments (s. 38) most complicated
	1. Resolutions of the House of Commons and Senate – s. 38(1)(a)
		* Majority of the members of the House, not just a majority of the members of the legislature voting on that day
	2. 2/3 of provinces (7) + 50% of population – 38(1)(b)
		* Due to the size of some provinces (Quebec and Ontario) it makes it hard to pass an amendment without at least the support of one of them
	3. No vetoes
		* For derogation from provincial rights/powers, majority support for resolutions s. 38(2)
		* Provincial opting out by resolution of legislature – s. 38(3) with compensation for power transfers affecting education or culture s. 40
			+ It can pass a resolution saying they do not particularly agree with the amendment
		* Proclamation issued by governor general – s. 38(1) no sooner than 1 year from initial resolution – s. 39(1) and no later than 3 years from initial resolution – s. 39 (2)
2. Exceptional Amendments (s.42) – must use the s. 38(1) process even though they would otherwise be subject to formula in s. 43 or s. 44
	1. Proportionate representation of provinces in the House of Commons – 42(1)(a)
	2. Powers of Senate or method of selecting Senators – s. 42(1)(b)
	3. Number of Senators per province and residence qualification of Senators – s. 42(1)(c)
	4. Supreme Court of Canada (other than the composition) – s. 42(1)(d)
	5. Establishment of new Provinces – s. 42(1)(f)
3. Unanimous Amendments (s. 41)
	1. Changes to the office of the Queen, Governor General or Lieutenant Governor of a province s. 41(a)
	2. House of Commons representation lower than Senate representation in 1982 (the PEI Rule) – s 41(b)
		* PEI Rule – they have 4 seats in the HofC even though the population is very small > they put it in the constitution that the only way the number of representatives can be changed is if everyone agrees (so they would have to agree to the amendment affecting them)
	3. Changes to the use of English or French Language, except for English or French language use in a province – 41(c) and 43(b)
		* It has to be unanimous to abandon bilingualism
	4. Changes to the composition of the Supreme Court of Canada - s. 41(d)
		* Has 9 judges, 3 have to be from quebec
	5. Changes to the amending formulae – s. 41(e)
		* Cant change the way it is to be amended unless everyone agrees or this section would be manipulated
4. Bi-lateral/Multi-lateral Amendments (s. 43)
	1. Requires proclamation following resolutions of both legislatures of affected province(s) and House of Commons and Senate
	2. Amendments to Constitution that affect one or more provinces but not all provinces
	3. Includes interprovincial boundaries and use of English or French language within a province
5. Other Amendment Mechanisms
	1. Federal Only Amendments (s. 44)
		* Amendments relating to the federal executive, House of Commons and the Senate, except for matters covered by s. 41 and s. 42 can be made by parliament
	2. Provincial Only Amendments (s. 45)
		* Amendments relating to the constitution of a province can be made by the provincial legislature, except for matters covered by s. 41

### Hogan v. Newfoundland (Attorney General)(pg. 141) [example of bilateral Amendment formula]

* NFL wanted to eliminate the denominational schools as protected by the Constitution
* This was a s. 43 amendment, so it requires the agreement of parliament
* Province tried to argue that the provision protecting the denominational schools went against the unwritten constitutional principle of respect for minority rights (in the vein of *Secession Reference)*

Court disallowed this reasoning because (1) its one thing to use the principles to interpret, it is another to amend the constitutional itself with them, (2) unlike the *Secession Reference*, there is an existing procedure for interprovincial linguistic right that can be followed here, and (3) secession is special.

* This affects more than just NFL, it affects term 17, part of the terms of union between Canada and NFL, so it is an amendment to Canadian constitution with respect to NFL
* It is s. 43 because it only relates to NFL, so it needs to be a bilateral agreement between Canada and NFL, these parties need to agree, other provinces do not weigh in

## Evaluating the Amending Formula

### Constitutional Amendment after 1982

Seven successful amendments

Two significant failures:

* Meech Lake Accord
	+ Had some elements that required unanimous support, some elements could have been adopted and others not = unacceptable political outcome
	+ Did not make 3 year time limit
* Charlottetown Accord
	+ Req unanimous approval and voted down
* Criticism: Packages that include mega constitutional politics make amendment extremely difficult

Relevant Legislation:

* Referendum Act 1992
* *Constitutional Amendments1996*
	+ Builds on 7/50 rules
	+ No Minister of crown shall propose motion for change unless consent of Ontario, Quebec, BC, 2+ Atlantic provinces, 2+ Prairie provinces
	+ Makes amendment more difficult than 7/50
	+ Gives a lot of different players an essential veto over constitutional amendment. Ie. Alberta has a veto due it its population.
* *Constitutional Referendum Act 2000* (Alberta Legislation)
	+ Any constitutional issues which require our consent must be put to referendum in Alberta.
	+ (The decision of the referendum not binding on them, but they best use it…)

*Note*: Issue with constitution that is too rigid: unable to adapt to new social issues

Reference re Secession Quebec and the duty to negotiate

* Vote in favour of separation in Quebec would give rise in a duty to negotiate
* Grounded in Unwritten principles in constitution

### Is Part V Undemocratic?

Cairns argues:

* Dominance of gov in amending formula is inconsistent with popular sovereignty and citizens constitution
* Amending formula presupposes that federalism is the most important constitutional organizing principle
* Only the cleavages defined by federalism have to catered to in the amending formula whereas charter = Canada as a single community
	+ Canadians are more than a federal people

Is there a convention that there should be a referendum before any constitutional amendment? May be good reason there should be, to be able to represent the popular input (Monahan)

# Framework of the Charter

Two step approach to adjudication of rights claims

1. Whether a charter right has been breached by a state act?
	1. BoP lies on party claiming breach of right to show that their right has been infringed
2. Justification of limits on Charter rights
	1. BoP lies on state, seeking to uphold right
	2. Must prove that the limits are prescribed by law, reasonable and demonstrably justified
	3. Argue why this justification is justifiable

Test on How to interpret the Charter:

1. Historical origins that led to this right being entrenched? *(Big M Drug Mart)*
2. Interrelationship btw different charter rights? *(Big M Drug Mart)*
3. Consider other broader interpretive resources to illuminate a right (*Reference re Motor Vehicle Act*)
4. Living Tree approach: Need for broad perspective, purposive analysis, which interprets specific provisions of const. doc. In light of its larger objects(*Hunter*)

## Interpreting Rights

### Purposive Approach

In *Hunter v Southam:* SCC stated that a judgement about the scope or value of a particular right can only be made after the court has specified the purpose underlying the right or delineated the nature of the interests it is meant to protect

#### Hunter v Southam 1984 SCC p 758 [Charter to be interpreted purposively; 2 step process for interpretation]

Facts: Combines Investigation Branch show up at Edmonton Journal saying they want to search the offices of a newspaper.

Issue: what is the meaning of “unreasonable” in s 8 guarantee from unreasonable search and seizure?

Decision: Unreasonable to allow search w/o reasonable or probable grounds to believe offence had been committed

Reasons:

* Interpretation of construing const. is different than construing statute
* **Need for broad perspective, purposive analysis, which interprets specific provisions of const. doc. In light of its larger objects**
* Eye for the future
* The constitution itself is *sui generis*
* **The Charter is purposive document: to guarantee and protect, within limits of reason, the enjoyment of the rights and freedoms it enshrines**
* Intended to constrain gov action - Does not confer any powers of search and seizure
* STEP 1: Interpret Scope of right. Is government action infringing charter right?
	+ Onus on rights claimants. Up to Edmonton Journal to est. that it has right to be free from unreasonable search and seizure.
* STEP 2:
	+ Onus shifts on government that their action is within the limits proscribed by law, which is justifiable in a free and democratic society.

Interpret provision purposively:

* 1. Specify purpose underlying s 8: delineate the nature of the interests it is meant to protect
* 2. Assess reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search (Cannot be determined by dictionary)
* Applied: s 8 protects individuals reasonable expectation of privacy
	+ So: government can’t come and look at your stuff because it might find something interesting. Must have objective basis for thinking it would find evidence of crime on premises.

#### Reference Re Motor Vehicle Act p 761 (READ – in notes after above case)

#### R v Big M Drug Mart Ltd 1985 p 760 [Charter to be interpreted with purposive approach, but adds court should look to language, historical origins and association/scheme within charter]

* In light of the interests it was meant to protect
* Purpose of right sought by reference to character or larger object itself, to the
	+ 1) **Language** chosen to articulate the specific right in question,
	+ 2) The **historical** origins of the concepts enshrined, (can look to moral philosophy)
	+ 3) Look to its **placement**, what is it associated with in the charter, **interrelationship** btw different rights and freedoms w/in the charter
* Answers: Why a charter right should include [this set of facts/scope/circumstance].

#### R v Therens 1985 SCC [Not necessary for court to read internal limits into definition of particular right, should be broad and expansive of s 1]

## Aids to Interpretation

1. Interpretive Provisions in the Charter
	1. S 27: charter shall be interpreted in manner consistent with preservation and enhancement of multicultural heritage of Canadians
	2. S 28: notwithstanding rights and freedoms granted equally to males and females
2. Parliamentary and Committee Debates
	1. Grant some weight to charter *hansard*
3. Canadian Pre-Charter Jurisprudence
	1. SCC signaled that Bill of Rights has limited relevance in Charter cases
4. Comparative and International Sources
	1. Much ideas drawn from other jurisdictions
	2. Reasonable for Canadian courts to look to other jurisdictions for interpretation of rights

#### Patrick Macklem “Social Rights in Canada” 2007 p 764

* International law = prominent feature of judicial interpretation of Charter at SCC
* Should provide protection as great as international human rights documents which Canada has ratified (Dickson CJ)
* Also treaties that Canada is not a party too
* Canada’s international legal obligations are relevant to interpretation of domestic const. guarantees

# Charter Application

* Does the Charter apply?
* S 32(1)
	+ A) To the Parliament and Government of Canada in respect of all matters w/in authority of Parliament including Yukon and NW territories
	+ B) To legislature and government of each province in respect to all matters w/in authority of leg of each province
* S 32(2): Notwithstanding subsection (1), section 15 shall not have effect until 3 years after this section comes into force.
* Does it limit it to solely gov and not private actors? Or simply reinforce that it applies to gov??

Charter applies to entity on one of two basis:

1. Entity itself is government for purposes of s 32: inquire whether the entity whose actions have given rise to the alleged Charter breach can, either by nature or in virtue of degree of gov control, can be properly characterized as gov. In such cases, ALL activities of entity will be subject to charter, regardless of whether activity could be described as “private” (*Eldridge)*
2. Entity may be found to attract charter scrutiny for particular activity ascribed to gov. (*Eldridge)*
	* + - Look at nature of activity itself
			- Scrutinize quality of the act, rather than quality of the actor
			- Ie. Entity implementing specific statutory scheme or government program

3. Entity implementing coercive orders backed by the state (*Blencoe)*

#### Retail Wholesale and Department Store Union v Dolphin Delivery Ltd 1986 p797 [The charter does not apply to litigation btw private parties, based solely on common law, cannot be used as cause of action in these circumstances]

Facts:

Issue: Validity of court order restraining a union from picketing premises of the R company. Union wanted to picket on company bc Purolator had hired Dolphin Delivery to do their job while they striked. Since Canada Labour Code did not regulate secondary picketing, legality of proposed picketing fell to be determined by CL. BC court issued injunction to restrain picketing. Union sought to have injunction overturned bc it violated members’ freedom of expression. Dolphin delivery sued for inducing breach of contract bc people picketing on their land would encourage ppl to stop doing business with them.

**Decision: SCC majority allow injunction saying that peaceful picketing is protected by charter, but since dolphin delivery not related to Purolator, restraint was a reasonable limit on expressive freedoms justified pursuant to s 1. ??**

Reason:

* The charter does apply to the common law, only in so far as the common law is the basis of some governmental action which allegedly infringed a guaranteed right or freedom
* The charter does not apply to litigation btw private parties
* S 32 specifies the actors to whom the Charter will apply = leg, executive and admin branches of government
* **Union’s argument**: Appellants argue that injunction (order of court) infringes freedom of expression (2b), and as the judicial is part of branches of gov, charter should apply to this. WRONG.
* **Dolphin Delivery’s Argument**: In applying the charter, the courts act as neutral arbiters, not as contending parties involved in a dispute. Judiciary is not included in s 32.
* **Where 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.** (bc technically every time the court makes an order its constraining a liberty, there would be no finality in this type of litigation)
* Case at hand: rule in common law that renders secondary picketing as tortious, no offending statue.

Ratio: The charter does not apply to litigation btw private parties, based solely on common law.

Criticisms: Leaves powerful private actors unchecked, cannot secure promise of basic rights (*Petter*) – but a patchwork or rights exists ie. Common law injunctions, statutes

Note: Charter can also apply to government INACTION – ie. Imposes positive obligations

Note: In Quebec – much of their tort law is codified in civil code. Civil code is subject to charter scrutiny.

What does government mean in section 32?

* Legislative, administrative branches of government

## Governmental Action: Governmental Actors

* Debated whether government includes judiciary
* Government includes: executive, cabinet, officials employed in government departments, police officers, public agencies charged with performing governmental responsibilities: but not all actions considered governmental action.
* What factors should courts emphasize in determining governmental action?
* ON EXAM: Draw out particular facts that show the government has the power to control the decision at hand

### Entities Controlled by Government

#### McKinney v. University of Guelph 1990 SCC p 803 [Public Universities have legal autonomy, SOME decisions do not come within government action; public purpose test is invalid]

* An entity won’t qualify as a governmental entity for the purposes of section 32, unless its under government control. Statutory pedigree isn’t sufficient condition for establishing if charter applies. Heavy funding isn’t enough.

Facts: Faculty challenged mandatory retirement policy at Ontario University. Violated equality of s 15 by discrimination of age.

Issue: Whether charter was applicable to actions of universities? Ie. Are universities government actors under s 32?

Decision: Majority concluded that universities mandatory retirement policies did not come within concept of government action.

Reasons: La Forest J

* A argue that universities are *creatures of statute* which *exercise powers pursuant to statute* and carry out *public function* pursuant to statutory authority. Government plays a role in appointing people who are on the board of governors of these institutions.
* Mere fact that entity is creature of statute is no way sufficient to make its actions subject to charter – then every incorporated company would be subject to charter – test is too broad.
* Charter not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging in governmental responsibility.
* Cannot use “public purpose test” simply bc something has public purpose does not mean it is subject to charter.
* **Adopts a type of “government control test”**
	+ Universities have legal autonomy apart from gov – many decisions are not gov decisions
	+ The Gov can’t control management control at the university – it was be opposed to academic freedom if they intermingled in this.
	+ **There may be situations in respect of specific activities, where the decision is that of the government, and therefore it becomes an act of government.**

Dissent: Wilson:

* Would have adopted broader interpretation of section 32. Control is one way to est. that institution is part of gov. but ask “whether they are performing has a government function” “whether the institution has a public purpose” “whether the institution is exercising statutory authority”
	+ Concluded that university satisfied all three tests

#### Stoffman BC [Mandatory retirement in hospital context. Government involved by appointing 14/16 board members which approves policy, and minister of health services approves it. Charter does not apply bc regulation at issue is not an act of government bc day to day routine control was exercised independent of government]

Are hospital subject to the Charter?

Only if the Province exercises “routine control” over the impugned decision

Mandatory retirement does not count

#### Douglas Kwantlen College [Community college agreement that includes mandatory retirement provision is subject to charter bc gov has routine/regular control, board is appointed prov. Gov. and empowered by statute.]

* Note: Not yet ruled whether public schools are subject to the charter

#### Greater Vancouver Transportation Authoirty v Canadian Federation of Students [Government responsibility is privatized, charter applies to advertising on translink bc municipal is its own governmental body]

* Is a company which administers public transportation systems subject to charter?
* Yes, the company is designated to be an “agent of the government” under provincial legislation, and the government exercises “substantial control over its day-to-day activities”

#### Lavigne v Ontario Public Sector Service Employees Union [Council is subject to the routine or regular control of the provincial Minister of Education, is subject to charter]

* Provincial council of regents, negotiates collective agreements on behalf of all community colleges w/in province
* Subject to charter because the Council is subject to the “routine or regular control” of the provincial Minister of Education

Note: Unsettled whether crown corporations (like CBC) are subject to *charter*. CBC not subject to charter on issues of advertising and broadcasting.

Example: Government Control at the U of A?

* Board of governors is a corporation. The government appoints board members, but the management of policies is conducted at arms length. Board of directors is autonomous.
* Must look for close connection/stipulation to demonstrate government control
* Apply Mckinney to say that U of A is not subject to charter. Must not that McKinney left it open that some decisions would be applicable.
* Must be specific. Ground argument in fact finding.

### Entities exercising Governmental Functions

* Even if entity is not party of government apparatus, may qualify as government for purposes of s 32 if it is exercising governmental functions.

#### Godbout v Longueuil (City) 1997 p 811 [Municipality residence requirement is subject to Charter application and violated right to s 7 bc Muncipalities act in governmental capacity]

Facts: City adopted policy requiring new permanent employees to reside within city boundaries. If R moved out at any time, she could be terminated without notice. SCC held that city’s residence requirement violated right to respect for private life set out in Quebec’s Charter of Human rights. Unnecessary to consider arguments based on CDN charter.

Issue: Does it affect CDN Charter?

Decision: Yes, s 7

Reasons: La Forest J (Only SCC judge that talked about this – the rest didn’t find it necessary to address, so it is not a majority opinion)

* Residence policy violated s 7, life liberty and security of the person.
* Held that municipalities are subject to the Charter
* The ambit of s 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the fed/prov govs.
* Particular entities will be subject to Charter scrutiny in respect to certain governmental activities they perform, even if entities themselves cannot be accurately described as governmental
* If it was otherwise, gov and prov could easily shirk charter obligations by conferring powers on entities and having them carry out government activities/policies
* Governmental is different than merely public.
* Canadian Charter applies to municipalities, municipal by laws
* Municipalities are governmental because
	+ 1. Municipal councils are democratically elected members of general public, accountable to constituents (analogous to parliament)
	+ 2. Have general taxing power
	+ 3. Empowered to make laws, administer and enforce them within jurisdiction
	+ 4. Derive existence and law-making authority from provinces ie. Exercise powers conferred on them by provincial leg.
* Municipality similar to Labour arbitrator (which is subject to Charter application as found in *Slaight Communications Inc v Davidson*)
	+ Adjudicator exercising delegated powers cannot infringe charter through decision making
	+ Municipalities have broader discretion, however in both cases, ultimate source of authority is government, and consequently entity will be kept in check through application of charter

## Governmental Action: Governmental Acts

### Entities Implementing Government Programs

#### Eldridge v BC (AG) 1997 SCC p 816 [Hospitals must provide medical services without discrimination as per charter s 15]

Facts: 3 Deaf individuals sought declaration that failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s 15.

Issue: Does the charter apply for hospitals?

Decision:
Reason:

* Do hospitals fall under s 32
* Charter should not apply to private or commercial arrangements of governmental entities (Douglas, Lavigne) Because: the government should not be permitted to evade their Charter responsibilities by implementing policy through the vehicle of private arrangements
* *McKinney*: The charter applies to private entities in so far as they act in furtherance of a specific government program or policy.. Ie. The private actor implements the program, government retains responsibility for it. BECAUSE: governments should not be able to escape Charter scrutiny by entering commercial contracts or other private arrangements
* Para 44:
	+ Charter applies to entity on one of two basis:
		- 1. Entity itself is government for purposes of s 32: inquire whether the entity whose actions have given rise to the alleged Charter breach can, either by nature or in virtue of degree of gov control, can be properly characterized as gov. In such cases, ALL activities of entity will be subject to charter, regardless of whether activity could be described as “private”
		- 2. Entity may eb found to attract charter scruity for particular activity ascribed to gov.
			* Look at nature of activity itself
			* Scrutinize quality of the act, rather than quality of the actor
			* Ie. Entity implementing specific statutory scheme or government program
* *Stoffman*: hospitals are non-governmental entities whose private activities are not subject to charter. However, do Hospitals effectively implement governmental policy in providing medical services under the Hospital Insurance Act?
	+ Purpose of act: provide particular services to public
	+ Structure of act reveals that in providing medically necessary services, hospitals carry out specific governmental objective. Hospitals are vehicles the legislature has chosen to deliver this program. Resembles a government service more than an insurance scheme
	+ There is direct and precisely defined connection
	+ Alleged discrimination is intimately connected with medical service delivery system
	+ The legislature, upon defining objective as guaranteeing access to range of medical services, cannot evade its obligation

Ratio: Hospitals must provide medical services without discrimination as per charter s 15

### Entities Exercising Statutory Powers of Compulsion

* Charter applies to non-governmental actors exercising coercive statutory powers

#### Slight Communications Inc v Davidson 1989 p 819 [Charter held to apply to order of an adjudicator acting pursuant to Canada Labour Code bc adjudicator exercising power conferred by legislation]

Result: some administrative tribunals and labour adjudicators are bound by the Charter, while courts, following *Dolphin Delivery* are not, in sofar as their order are at the request of private litigants relying upon the common law

*Eldridge* and *Slaight* were followed in *Blencoe*:

#### Blencoe v BC (Human Rights Commission) 2000 [Human Rights Commission processing actions subject to Charter Application]

Issue: Whether the lengthy delays resulting from Human Rights Commissions processing of sexual harassment complaints against Blencoe violated his s 7 rights.

Reasons: Bastarache reject argument that Commissions independence from gov render the charter inapplicable.

* 1. HRC charged with implementing specific government policy/program (like hospital in *Eldridge*)
* 2. HRC exercised statutory power of compulsion. Authority not derived from consent of parties, but from Human Rights Code, which gave them power to investigate complaints and decide who to deal with such complaints.
* Therefore, charter applied to Commission’s acts in processing the complaint

Note: Not yet resolved whether charter would apply to “citizen’s arrest” when a private security guard or other non-governmental actor exercises this power.

## Governmental Inaction

* S 32: Charter applies to all matters w/in fed + prov govs.
* Charter requires fulfillment of a positive obligation, the charter also applies to inaction on part of government with jurisdication to meet that obligation
* Ie. If gov fails to fund minority language educational facilities = subject to charter

#### Vriend v Alberta 1998 SCC p 821 [Charter can apply in situations of omissions]

Facts: Teacher asked by employers whether he was gay, responded affirmatively and fired. Files complaint with HRC. Challenged omission of sexual orientation from Alberta’s *Individual’s Rights Protection Act* 🡪 but this failed due to omission. Brings charter challenge to government for failing to include sexual orientation as discrimination.

Issue: Does the Charter apply in situations where the government is refusing to do something?

Decision: The charter does apply to the legislative omission at issue

Reasons: Cory J

* Should charter apply to government inaction? This could open flood gates
* SCC:
	+ It would be absurd to not include omissions, because it would allow the government to have underinclusive legislation that has discriminatory effects and is immune
		- The form rather than the substance would determine application
		- S 32 refers to “all matters”
	+ Could argue that deliberate decision to omit is an act. However not necessary to rely on this position to find Charter applicable
	+ There are positive rights in the Charter that require government take positive actions to ensure that those rights are respected (s 23)

Ratio: Charter can apply in situations of omissions.

Note: Can’t sue employer for violating charter rights because employer is a private entity.

Note: Provincial court objection that judicial review would be “illegitimate” countered with: The deference properly due to choices made by legislature will be taken into account in deciding whether the limit is justified under s 1.

Note: Courts have held that once government has decided to implement a policy or program, it must do so in a nondiscriminatory manner

#### Haig v Canada 1993 p 823: [Fundamental freedoms in s2 impose no positive obligations on state ie. Freedom of expression “prohibits gags, but does not compel the distribution of megaphones”]

#### Dunmore v Ontario (G) 2001 SCC [Gov may have some positive obligations to protect freedom of association of vulnerable groups]

* Slight Departure from *Haig*
* Provincial labour legislation that has general right to unionize excludes agricultural employees. Brought charter challenge that infringed freedom to unionize/association.
* Court found that exclusion violated freedom of association.
* S 2(d) of Charter imposes a positive obligation on the sate to extend protective legislation to unprotected groups.
* State has an obligation to facilitate the exercise of associational freedoms
* Bastarache J attempts to draw distinction btw legislative silence and under inclusive legislation. = not persuasive

## Application of the Charter to Courts and the Common Law

* Charter does not apply to common law when relied on by private litigants (*Dolphin Delivery*)
* Charter does not apply to court order issued at conclusion of litigation btw private parties resolved on basis of common law (*Dolphin Delivery*)

### Reliance by Government on Common Law

* Charter will apply to common law when it is relied on in litigation involving government party or in proceedings initiated for public purpose
* Note: Where common law rule is relied upon by Crown in criminal proceedings, the Charter applies as state prosecution provides requisite element of gov action. Judges are able to reformulate the common law rule so that it will not conflict with principles of fundamental justice (*Swain*) and (*Dagenais*)

#### BCGEU v BC(AG) 1988 [Court ordered injunction is subject to Charter but did not violate Charter]

Issue: What is authority of court to punish for breaches of law?

Decision: Injunction does not violate the Charter

Reasons: Motivation of court action is “public” not “private” 🡪 subject to charter. The criminal law is being applied to vindicate the fundamental freedom of expression. But its justified.

### Reliance on Common Law in Private Litigation

* Charter does not apply directly to private litigation resolved on the basis of common law, but is still relevant
* “The judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”

#### Hill v Church of Scientology of Toronto 1995 SCC p 827 [Common law of defamation strikes balance btw freedom of speech and protection of individual]

**Charter values should be weighed against the principles that underlie the common law**

Facts: Crown attorney suing church of scientology for libel and defamation, where they were planning to publicize criminal contempt proceedings against Hill.

Issue: Whether the common law of defamation was inconsistent with the Charter guarantee of Freedoms of Expression?

Decision: Common law of defamation = balance btw competing interest of freedom of speech and protection of individual. No need to amend it.

Reasons:

* D argued that this type of law suit offends freedom of speech.
* Court reaffirms *Dolphin Delivery*: Private parties owe each other no constitutional duties and cannot file cause of action on charter right
	+ Court holds that charter informs the common law, the way is develops, and judges applying common law framework. Judges must be sensitive to fundamental values expressed in Charter.
* Even considering the importance of freedom of expression as fundamental constitutional value in Canada, the common law of defamation, which gives people a cause of action to sue someone who is spreading lies about them, this cause of action appropriately balances freedom of expression under the traditional s 1 framework.

#### R v Salituro 1991 [Iaccobucci “if possible to change common law to make consistent w/ Charter, without upsetting proper balance btw judiciary + leg, then rule ought to be changed]

* Common law rule that spouse could not testify as witness on behalf of ex-spouse, when they are irreconcilably separated, was against charter freedom of expression.

### Who can Claim Charter Rights?

* “Everyone has the right”: ss. 2, 7, 8, 9, 10, 12, 17
* “Any person”: ss. 11 and 19
* “any member of the public”: s. 20
* “Anyone”: s. 24 [*Signh* applies to everyone, including people claiming refugee. Grounded in broad liberal interpretation, to protect individuals from government action.]
* “Citizen”: ss. 3, 6, 23 [citizen is a term of art that is somewhat restrictive ie. Only citizens can vote in Canada. When the term citizen is used, non-citizens like permanent residents/tourists do not have those rights]

## Extra-Territorial Application

* When Canadian officials do business in other countries.
* Foreign governments are not bound to comply with the Charter
* Does Charter apply to Canadian government actions abroad?
	+ Must look outside s 32 (R v Cook 1998)
* General rule: state cannot enforce its law beyond its territory. Charter cannot be used to impose Canadian const. standards on foreign officials and procedures
	+ But See, *Cook*
	+ Narrowed by *Hape*
	+ Human Rights Exception *Khadr*

#### R v Cook 1998 [Charter applies abroad where impugned act falls w/in s 32, and where charter does not conflict with territory’s jurisdiction\*\*\*Narrowed by Hape]

Facts: Cook arrested on warrant issued pursuant to extradition request regarding a murder he was alleged to have committed in Vancouver. New Orleans detectives failed ot provide him with timely notification of counsel.

Decision: Court applied Charter to the actions of Canadian detectives in the US

Reasons: Iaccobucci:

* “Charter applies on foreign territory in circumstances where the impugned act falls w/in scope of s 32 of the Charter on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action, and where the application of Charter standards will not conflict w/ concurrent territorial jurisdiction of the foreign state

#### R v Hape 2007 SCC p 832 [If foreign gov has not consented to application of Canadian law, charter does not apply to Canadian citizens there]

Issue: Whether RCMP officers were subject to Charter when conducting search and seizure in Turks and Caicos? No.

* Whether government in Turks and Caicos Islands consented to application of Canadian Law? No evidence on this fact 🡪 so charter does not apply.
* LeBel J: Since search was carried out in Turks and Caicos, not a matter w/in authority of parliament + absence of evidence of consent.

#### Canada (Justice) v Khadr 2008 SCC p 833 [Charter applies extraterritorially when act is clear violation of fundamental human right protected by international law]

Facts: Khadr seek to rely on Charter to obtain disclosure of documents for his defence. Canadian gov, relying on *Hape*, argued that Charter disclosure does not apply extraterritorially.

Decision: Reject CDN gov position. Court gave effect to international human rights exception to general principle that Charter does not apply extraterritorially

* “The charter bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada’s international obligations”
	+ Clear violation of fundamental human rights protected by international law
	+ Courts should seek to ensure compliance with Canada’s binding obligations under international law.

Amnesty International Canada in NOTES: Charter did not apply

# Section 1

S 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

a) the Charter guarantees rights and freedoms;

b) subject *only* to such *reasonable* limits;

c) prescribed by law;

d) *demonstrably* justified in a free and democratic society.

## Defining Limitations

Structural components of S 1: All limits on rights be “prescribed by law” and 2) requirement that limits be “reasonable” and “desmonstrably justified in a free and democratic society”

### A. Prescribed by Law

* Limits the number of instances in which an infringement will be upheld under s 1
* Court required generally: notice to the citizen; specifically: (*Sunday Times*)
	+ 1) law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case
	+ 2) norm cannot be regarded as “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct

#### R v Therens 1985 [Limit imposed by law cannot be arbitrary. Must be expressly provided for by statute or regulation]

#### Irwin Toy 1989: [Courts concerned that excessive emphasis on precision in language may unduly restrict legislatures in accomplishing their objectives]

* Corporation brought charter challenge against Quebec law, which prohibited commercial advertising directed at children under the age of 13. To decide if it was directed at this group, law looked at nature of goods advertised, manner of presentation, and time/place shown.
* Court found restriction sufficiently clear to satisfy prescribed by law standard, upheld law as a justified restriction on freedom of expression

#### Taylor v Human Rights Commission 1990 [Courts preferred to deal with claim that restriction is too vague/broad in its grant of discretion at second stage of s1 analysis as part of its general (and contextual) balancing of competing interests]

* McLachlin: Difficulty in ascribing constant meaning to terms used in challenged section = factor to be taken into account in assessing whether law is demonstrably justified in free and democratic society.
	+ But reluctant to circumvent balancing analysis of s 1 by finding that words were so vague as not to constitute a “limit prescribed by law”, unless provision could truly be described as failing to offer intelligible standard.

#### Osbourne v Canada 1991 [ Sopinka J Agrees with McLachlin in Taylor]

* Vagueness can render law incapable of interpretation = no s 1 analysis necessary
* OR: vagueness can play constitutional role. A law which passes threshold test, may, by reason its imprecision, not qualify as a reasonable limit. May be too overbreadth
* In this case, law restricted right more than necessary to meet objective of ensuring public service neutrality.

#### Sunday Times v UK 1979 [Described two requirements that flow from “prescribed by law”]

Newspaper prohibited by injunction from publishing article about thalomide-related birth defects on grounds that such a publication might interfere with course of lengthy, ongoing legal proceedings. Breach of injunction would constitute contempt of court. Sunday times argued injunction infringed freedom of speech.

Issue: whether common law rule allowing contempt action for breach of injunction constituted a limit that was prescribed by law on the right to freedom of expression under the European convention.

Reasons:

* Court required generally: notice to the citizen; specifically:
	+ 1) Accessible: law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case
	+ 2) Intelligible: norm cannot be regarded as “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct

#### R v Nova Scotia Pharmaceutical Society 1992 p 769 [vagueness is high threshold, concerned with intelligibility and accessibility, government must act above board when limiting charter rights]

Facts: Accused charged under *combines investigation act* with conspiring to lessen competition unduly in the sale of prescription drugs. Moved to quash indictment, arguing that provisions under which they were charged violated s 7 on grounds of vagueness.

Issue:

Decision: SCC rejects argument and dismisses appeal

Reasons: (Gonthier J)

1. Vagueness can be raised under s 7, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s 1 of the Charter, on the basis that an enactment is so vague so as not to satisfy the requirement that limitation on Charter rights be “prescribed by law”. Vagueness is also relevant to “minimal impairment” state of the Oakes test
2. Doctrine of vagueness founded on rule of law, particularly on the principles of fair notice to citizens and limitations of enforcement discretion
3. Factors considered in determining if law is too vague include
	1. Need for flexibility and interpretive role of courts
	2. Impossibility of achieving absolute certainty, intelligibility = more important
	3. Possibility that many varying judicial interpretations of given disposition may exist/coexist
	4. Vagueness under s 1/s7 = similar as above. Under minimal impairment of oakes, vagueness merges with concept of overbreadth
	5. Court reluctant to find disposition so vague as not to qualify as “law” under s 1, and will rather consider the cope of this disposition under minimal impairment test (Taylor and Osborne)
* Proper place of Vagueness in Charter Adjucation
	+ Rationales of fair notice to citizens and limitation of enforcement discretion put forward for both s 1 and s 7
* The Content of the Doctrine of Vagueness
	+ Threshold for finding law vague is high (Osburn, Butler)
	+ Fair Notice to Citizen:
		- 1) formal aspect of notice: substantive notice before the enactment. If weak, can be compensated by bringing to attention of public the actual terms of law, through publicity and advertising schemes.
	+ Limitation of Law Enforcement Discretion
		- Considerable expansion in discretionary powers of enforcement agencies
		- A conviction cannot automatically flow from decision to prosecute
	+ European Court of Human Rights Case Law
		- They agree with our definition of “prescribed by law”
	+ The Scope of Precision
		- An unintelligible provision gives insufficient guidance for legal debate and is unconstitutionally vague.
		- Language is not an exact tool. Laws = guidance, not direction, of conduct
		- A vague provision fails to delineate an “area of risk”
	+ Vagueness and the Rule of Law
		- Modern State, while acting as an enforcer, assumes more and more of an arbitration role
		- Arbitration must be done according to law, but often reaches such a level of complexity that corresponding enactment will be framed generally
		- Only bad when generality leads to insufficient indication as to how decisions must be reached

### B. Justification

### 1. The Oakes Test

#### R v Oakes 1986 p 774 [Dickson outlines Oakes Test]

Facts: S 8 of *Narcotic Control Act* created rebuttable presumption that once the fact of possession of a narcotic had been proven, an intention to traffic would be inferred unless the accused established the absence of such an intention. Accused challenged “reverse onus” provision, arguing that it violated s 11(d) of the Charter. After finding that s 11(d) violates the Charter.

Issue: The Court then went on to discuss whether the limit could nonetheless be upheld under s 1 ?

Decision:

Reasons: Dickson CJC (+4)

* **S 1 has 2 functions**
	+ **1. Constitutionally guarantees the rights and freedoms of charter and**
	+ **2. States explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured**
* S 1 contextual element of interpretation: “free and democratic society”. Court must be guided by the values and principles essential to a free and democratic society ie. Respect/dignity for human person, commitment to social justice/equality, respect for cultural/group identity
* Rights and freedoms guaranteed by charter are NOT absolute.
* **Onus rests upon party seeking to uphold limitation**
	+ Standard of proof = **based on a balance of probability** (not crim byd standard)
	+ To establish that limit is reasonable and demonstrably justified in a free and democratic society = must satisfy 2 criteria
		- 1) The measures responsible for the limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom” (R v Big M Drug Mart 1985).
			* Objectives cannot be trivial or discordant with integral society
			* At minimum, objectives must relate to concerns which are pressing and substantial in society before they can be characterized as sufficiently important
		- 2) Once #1, party invoking s1 msut show that the means chosen are reasonable and demonstrably justified.
			* Involves form of proportionality test (Big M Drug Mart)
			* Court will be required to balance the interests of society with those of individuals and groups
			* Proportionality test:
				+ 1) measures adopted must be carefully designed to achieve the objective in question – must not be arbitrary, unfair or based on irrational considerations. Must be rationally connected to objective
				+ 2) The means, if rationally connected, should impair “as little as possible” the right or freedom in question
				+ 3) Must be proportionality btw effects of the measures which are responsible for limiting charter right, and the objective which has been identified as of “sufficient importance”
				+ NOTE: if the limitation is severe, the measure will not be justified byt eh purposes it intended to serve. The more severe, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and dem. Society.
* Applied to facts at hand:
	+ Objective of protecting society from ills of drug trafficking of sufficient important to warrant overriding a constitutionally protect right. Evidence included seriousness of drug trafficking and abuse. BUT the means chosen to implement objective – reverse onus – failed first step of proportionality test. Not rationally connected to objective of curbing drug trafficking bc there was no rational connection btw possession of a small quantity of narcotics and intent to traffic.

### Demonstrably Justified: The Oakes Test Review

“Demonstrably justifiable in a free and democratic society”

SCC attempts to give you framework to use, whether government reason for limiting a right is acceptable.

1) Pressing and Substantial Objective: What is government’s purpose in passing this?

* See *Big M Drug Mart*, [1985] 1 S.C.R. 295
* Government must have important reason for reversing the onus of proof in the criminal trial.

2) Rational Connection: Is the means chosen to achieve purpose has a rational connection?

* See *Benner v. Canada*, [1997] 1 S.C.R. 358
* Between the means chosen and the objective stated in the legislation.

3) Minimal Impairment: Does the government means chosen infringe the right as minimally as possible?

* From “as little as possible” to “as little as reasonably possible” to “margin of appreciation”
* “What is the government trying to show?” (8/10 case rise/fall on this point)
* If you are trying to reduce drug trafficking, the means chosen cannot be so broad or draconian, that you are creating reverse onuses against ppl who are living with people in possession of drugs etc. If the gov. has an alterntive means of regulating behavior that is more respectful of charter rights, good chance that gov’s case will fail.
* Court has moved to give legislation more deference.. as long as legislature has chosen one of the least infringing objectives out there.
	+ Acting on behalf of gov: no other reasonable method
	+ Acting on behalf of citizen: another reasonable alternative available. This is too broad.
	+ On Exam: “Has the government chosen the least minimal impairment available”

4) Proportionate Effects: Do the negative effects outweigh benefits of objective.

* *Dagenais*: p 776 “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…”
* **“Practical benefits”** of the legislative scheme. Gov must show it is achieving these.
* Q: Whether or not the negative effects on an exercise of a right outweigh the importance of a government objective.

### 2. Subsequent Development of the Oakes Test: Context and Deference

* Emergence of Contextual approach
	+ Court must asses the value or significance of the right and its restriction in their context rather than in the abstract
		- Must compare/balance value of what the restriction achieves in practice, against actual cost to freedom
		- Ie. SCC has held that certain forms of expression, such as hate promotion, are less directly connected to freedom of expression, than other forms
* Courts willingness to defer in certain circumstances to legislature’s judgement about need for/effectiveness of particular limit. Deference is linked to context, and is more important in some contexts than others.
* Disagreement over what contextual factors should be taken into account and whether they should affect “rational connection” or “minimal impairment” stages, or only final balancing

#### Edmonton Journal v Alberta (AG) 1989 p 781 [Origins of Contextual approach; The importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context]

Facts: Newspaper challenged s 20(1) of Judicature Act, which limited publication of information arising out of court proceedings in matrimonial disputes, arguing its against freedom of expression. Court agreed that it violated freedom of expression, but split on justification. 4 ruled the provision was not a reasonable limit. Wilson J concurred. La Forest J + 3 dissented finding that limit on freedom of expression could be justified as reasonable limit. Wilson J described a context-sensitive approach to s 1, later adopted by all.

Issue: What is the proper method of application of Charter to individual cases?

Decision:

Reason:

* Two Approaches, Abstract Approach, and Contextual approach. Steps are the same, but affect result of balancing process under s 1.
* Once decided that legislative objective cannot be achieved without infringement, decide if its reasonably justified
	+ Abstract approach: Freedom of expression has place in political, social and educational institutions; seriousness of restricting free exchange of ideas, basic right of democracy
		- Values conflict – right of litigants to protection of their privacy in matrimonial disputes and right of public to an open court process. Both cannot be fully respected.
	+ Contextual approach: balancing the right to privacy against freedom of the press under s 1 is not more appropriate than an approach which assess importance of rights at large
		- Cannot balance one value at large, and one in context
		- Pro: Recognizes that particular right may have diferent value depending on context
			* Ie. Freedom of expression has greater value in political context, than in disclosure of matrimonial dispute
			* Brings into Sharp relief, the aspect of the right which is truly at stake, and competition against it
		- The importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context
		- THEN: the right must then be given generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee

Ratio: The importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context

Note: Drawbacks to contextualism?

* Makes constitutional law less certain
* Difficult to make the analysis.

Limits aren’t just infringements on rights, they also express policy goals and values. Government trying to balance the competing interest of different interest groups.

#### Irwin Toy Ltd v Quebec (AG) 1989 p 783 [greater deference to legislative choice is appropriate when 1) gov sought balance btw competing rights;2) to protect socially vulnerable; 3) to balance interests of various groups needing scarce resources; or to address conflicting social science evidence as to cause of social problem]

\*\*high water mark of judicial deference\*\*

Facts: Restrictions on advertising at children at certain times.

Issue:

Decision:

Reason: Dickson, Lamer and Wilson

* Legislature mediates btw competing claims of different groups = must draw line marking where one set of claims begins, and other fades
	+ If legislature has made reasonable assessment as to where the line is most properly drawn, especially involving weighing scientific evidence/allocating scarce resources, not for courts to second guess
* A legislature mediating btw claims of competing groups forced to strike balance. Vulnerable groups will require gov. protection, others will require gov not intrude.
* When legislature is the singular antagonist of the individual whose right has been infringed (ie. State asserting responsibility for prosecuting crime) the courts can assess with certainty whether the “least drastic means” for achieving the purpose has been chosen

Note: introduced distinction btw mediation and social antagonist

Result:

1. Court deferred to gov’s reading of social science evidence as it had limited competence here
2. Courts reluctant to substitute judgement if find gov made reasonable attempt to protect vulnerable group of children against need for freedom of expression
3. Lowering of standard of justification under s 1: A less substantial or competing interest may support restriction of a **less valuable** form of expression such as commercial advertising or hate promotion

#### R v Lucas (1998) [While language is not perfectly drafted, it creates an area of risk that publicly calling someone a pedophile falls into]

Facts: Picketing trial of police officer who Ms. Lucas thought was involved sexual abuse of children.

Argued that S 298 was unconstitutionally vague. It was a limit on her freedom of her expression.

298 (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

Can’t be justified under s 1 because its unconstitutionally vague.

* What constitutes lawful justification or excuse?
* Designed to insult 🡪 is this on a subjective or objective standard
* The concern about vagueness that we outlined is a fairly low threshold
* While the sections in question are not perfectly drafted, language is not an exact tool, must simply enunciate boundaries that create an area of risk.
* Never get a law that can determine in advance what conduct will or will not be subject to criminal prosecution. If you are calling someone a pedophile, must know that you are taking a risk in defamatory libel.
* Her actions were adequately articulated by the prescribed by law standard.
* Limit on freedom of religion may be different from limit on right to equality

### Realities of Oakes (ideas from Sujit Choudhry)

* Set up conflict btw demand for definitive proof to support each stage of the s 1 analysis, and the reality of policy making under conditions of factual uncertainty
* When governments legislature under conditions of imperfect information, courts backstep by offering deference
* Original Oakes Test Passage requiring cogent and persuasive evidence is overlooked
* Result: courts struck compromise: IN cases where there is conflicting/inconclusive social sicence evidence, the question is “whether the government has a reasonable basis for concluding that an actual problem exists, the the means chosen would address it, and that the means chosen infringes the right as little as possible”. Lack of evidence is unacceptable, must be some factual basis for public policy, but not scientific certainty
	+ Disagreements exist over what types of inferences gov’s can infer from inconclusive evidence

Legislation -> during a certain period you cannot advertise to children. Justified the government in limiting/regulating when these advertisements could air.

Deference: *Irwin Toy*

1. Does *Irwin Toy* retreat from the “stringent” requirement set out in *Oakes*?
	1. Have they retreated from the stringent justification standard of the Oakes test.
	2. Should have grafted the legislation to be more discriminating btw the types of advertisement they could look at. Fails minimum impairment standard and therefore this case signifies a retreat from oakes.
	3. Three criteria are quite broad and construed as applying to any circumstance – potentially very broad. Any time the government is passing legislation – it acts in a circumstance where there are competing claims being made.
	4. Civil libertarian says your giving government way too much space to justify rights.
2. “If the legislature has made a reasonable assessment as to where the line is most properly drawn…it is not for the court to second guess”. Problem = isn’t the purpose of s. 1 for courts to “second guess” legislatures?
	1. Categories might not be as broad. Still asking the government to justify, based on evidence – and this still has to be reasonable + acceptable.
	2. Maybe could say – it’s a reduced power – its still present
	3. S 1 may not allow the courts to second guess, simply scrutinize legislation in a rights-honouring society.
3. What is the difference between government acting as “mediator between conflicting groups” and as a “singular antagonist”?
	1. When mediating between groups maybe you should be given more leeway, vs. in a situation where government is enacting as a singular antagonist.
	2. Example of mediator: Freedom of expression of Irwin Toy vs. vulnerable consumer groups
	3. Singular antagonist: infringement of rights on prosecution
		1. Maybe there isn’t a difference, since government is elected majority, they are always mediating interests.
		2. *This seems completely artificial!!*
4. Is contextualism another word for deference?
	1. Context is essential in substantial objective proportionality, can’t be extended to the extreme of treating to the law as a unique socio economic phenomenon which parliament is the best judge for.
	2. Deference may vary with the social context in which limitation on rights is imposed
	3. Both the situation and the difficulty devising legislative solutions ot social problems may affect deference
	4. Deference may not be used to the point of relieving the burden of demonstrably justifying the infringement (RJR Macdonald)

### Budgetary Considerations do Not Justify Infringement of Rights

*See Generally:*

***Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177**:

* Consequence of gov’s decision to deport would expose Singh to threats to life, security, liberty.
* Inability to have a oral hearing was contrary to fundamental justice.
* Government leads with fiscal argument: cannot bear the burden of section 1**.**
* SCC: “Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice…” (Wilson, J.)

***Schacter v. Canada*, [1992] 2 S.C.R. 679:**

* “This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive section 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.” (Lamer, C.J.)

***Ref re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 S.C.R. 3**:

* “A measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1.” (Lamer, C.J.)
* Gov argued it was a time of austerity, SCC rejected argument.

***Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504**:

* “Budgetary considerations in and of themselves cannot normally be invoked as a free-standing and substantial objective for the purposes of s. 1 of the *Charter*.” (Gonthier, J.)

***Figueroa v. Canada (Attorney General)***, [2003] 1 S.C.R. 912

* “I do not wish to rule out the possibility that there might be instances in which the potential impact upon the public purse is of sufficient magnitude to justify limiting the rights of individual citizens.” (Iacobucci, J.)

*But See:*

#### Newfoundland (Treasury Board) v NAPE 2004 (supp) [First time fiscal restraint argument held adequate as s 1 justification, under extraordinary circumstances]

* Facts: Wage parity agreement, negotiated with public servants, which was supposed to be implemented in severe financial hardship, where NFL had +10 mill float, to -200 mill deficit due to drastic loss of federal transfers from ottawa
* Government shelves agreement, and extend the plan to bring waive parity into place. Justification for doing so, against infringement of right to nurses equality, 1) we’re in a financial crisis, 2) effect = close public schools or hospitals
* Remarkable: First time, SCC allowed this type of budget constraint to satisfy the Oakes analysis. While its true that they cannot be normally invoked, the type of financial crisis that NFL was facing, was an exceptional case, not a normal circumstance.
* BUT: Court takes great pains that to address that this type of argument is exceptional.
	+ Budgetary considerations in and of themselves cannot NORMALLY be invoked
	+ To value budgetary constraints would devalue the charter because there are always budgetary constraints and there are always other pressing government priorities.
	+ Court cannot close their eyes to periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see gov through crisis.

# The Override: Section 33

* Rarely invoked. Employed by Saskatchewan in labour situation, and by Alberta to protect the definition of marriage btw man/women to incorporate opposite sex .
* S 33:
	+ (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof **shall** operate notwithstanding a provision included in section 2 or sections 7 to 15.
	+ (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
	+ (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
	+ (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
	+ (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).
* **Expressly**🡪 must be clear in expressing intent to override charter rights because for political reasons, should be required to bring attention to it to legislature and to citizens. Must be done above board, and publicly. Meant to facilitate some sort of democratic response.
* **Every 5 years**🡪 every gov cycle lasts max of 5 years, and so it must be debated and renewed in the legislature
* **Note🡪 Do not need to explain reason for doing so.**
* **Key point🡪** allows leg to override rights, but seems to suggest that this is subject to democratic debate
* **Must be prospective!!**

#### Ford v Quebec (AG) 1988 [Quebec successfully use s 33, express = #’s sufficient, not right specificity and court declares that it must apply prospectively]

Facts: In protest of constitutional amendment to which it had not agreed, Quebec made use of s 33 to shield laws from Charter application with an omnibus bill.

Issue: Whether Quebec’s standard clause, omnibus use of the override was valid?

Reasons:

* Standard override invalid because it simply lists charter rights by number and does not sufficiently draw to the attention of the legislature and the public so that the relative seriousness may be perceived
* However, s 33 does not make reference to substantive review process, and importing need for clear identification seems to be a substantive review ground.
* NO warrant in terms of s 33 for such a requirement. Leg may be permitted to override a number of charter provisions.
* It is a valid exercise of authority in so far as it purports to override all provisions.
* Only requirement is an **express declaration** – which has been done
* Court is of the opinion that s 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the Charter which contains the provision to be overridden
* The validity of the enactment is not affected by the fact that it was introduced into All Quebec statutes enacted prior to certain date by single enactment (omnibus effect)
* Concerning the retrospective effect: Although s 33 is ambiguous as to whether it allows prospective AND retrospective effect (in both French and English version), Court has, based on rules of construction, option to choose narrow interpretation. Only prospective!
* **Must be Prospective**
* **Express Declaration**🡪 charter numbers sufficient, does not need to identify rights specifically.

Note: Why did court go this way on the “express” argument/ omnibus aspect:

* The point of s 33 is to give governments the ability to limit rights, notwithstanding charter rights, and this use should not be restricted by the courts.
* Court reluctant to impose strict test on s33. That legislation faces the public, faces debate. Democratic process will take care of this issue.
	+ Follow up: Notwithstanding clause was not renewed in some clauses after further elections. Tended to apply to language laws.

## Judicial Review and S 33

* Those who are proponents of judicial review view s 33 as undermining it
	+ Or maybe it helps it – because judges task is to protect normative values for which rights stand, a task suited to judiciary.
	+ A government bent on disregarding charter should have no place in courtrooms.
* On other hand, s 33 gives leg final say on appropriate scope/limits

## Perspectives on S 33

#### Weinrib [argues that the notwithstanding clause may blunt the argument that JR is anti-democratic and give the courts greater confidence]

* Even when dormant it insulates the judiciary from complaints.
* The clause designates the forum for disagreements about charter violations to the legislature, not the court room

#### Hon Allen E Blakeney [s 33 allows gov to take action without facing stone wall of individuals asserting liberties]

* Included in the charter to ensure that the state could, for economic or social reasons, or because other rights were found in the circumstances to be more important, choose to override a Charter-protected right
* **Rights enumerated in the charter are NOT more important than other human rights**
* Where violation of human right stems from the operation of economic/social systems, 🡪 best instruments for enforcing these rights = leg, exec and admin arms of gov
* Ie. Health care, public education, the right to government redistribution of resources won’t run up against a stone wall of individuals asserting their liberties.

#### Prime Minister Brian Mulroney [s 33 is a net loss of rights]

* S 33 is a net reduction of rights in Canada. So long as governments have section 33, majority can override gov. at will.
	+ Comment: the mechanics of s 33, bc they require express declaration, in being time-limited and not used very often, points to the impracticality, in applicability for governments that look to long terms in office, its not a strategic move. There are other ways the gov can modify legislation and be Charter compliant without facing this political cost.

#### Kent Roach [s 33 is genius bc encourages democratic dialogue]

* S33 is a sophisticated way of balancing and promoting democratic dialogue about the treatment of rights and freedoms between courts and legislatures.
* Comment: Giving judiciary and legislative branch tools to give/take their say. Provision stimulates discourse, holds politicians accountable, encourages mobilization of issues.

#### Paul Martin 2006 federal election campaign [I don’t like s 33, we’re going to strengthen charter by removing by constitutional means the ability of fed gov to use s 33]

* Comment: How would he go about this? Unanimous amending formula procedure. – Might be unilateral amending formula if he focuses on just fed gov and charter. May just be speculative political talk that he knew would never come to form

## Question on an Exam for s 33:

1) In what sense might section 33 be characterized as a “flaw”? Does section 33 “reduce individual rights”?

2) What is the “genius” of s. 33 that Roach suggests? How can an override of rights be conducive of dialogue?

3) What various “constitutional means” are available to carry out Paul Martin’s plan to remove the possibility for the federal government to use the notwithstanding clause? Does removing s. 33 “strengthen” the *Charter*? Do you agree that politicians should never be able to overturn the decisions of courts?

4) What might explain why section 33 has been used so infrequently? Should governments be willing to use it more often?

# Constitutional Remedies

* S 24 of charter and s 52 of const. act
* **S 24: Act of government (not legislation or regulation)**
	+ (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
		- **Court of competent jurisdiction**🡪 raises issues of competency, only QBs/superior courts? Also includes provincial courts. Also Admin Tribunals. SCC says yes: provided that they have jurisdiction over parties, subject matter and requested remedy.
		- **Appropriate and Just in the circumstances🡪** Court has broad jurisdiction (See *Doucet Boudreau*) to make any remedy they want.
	+ (2) Where, in proceedings under subsection (1), a court concludes that **evidence was obtained in a manner that infringed** or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
	+ **Sub 2:** applies primarily in **criminal proceedings.**
* **S 52: Legislation**
	+ (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
	+ Note: resorted to when people are applying to strike down legislation.
	+ ie. The *immigration Act* on its face does not raise constitutional concerns, but the manner in which the official is exercising his power raises problems under racism etc.
* Purpose of having two remedial provisions:
	+ Depends on manner in which minister is exercising their legal powers 🡪 grants flexibility
* Class Examples:
	+ Persons case: PC takes broader reading that “persons” should be read in light of contemporary context, which includes women.

## Types of remedies available (courts take broad view)

* Declaration of invalidity – striking down (ie. Result when in P&S = invalid)
* Severance – strike down the offending provision only
* Reading in (Legislation is under inclusive ie. *Vriend*, *Schachter*)
* Reading down (Interpretation statutory provision narrowly to be charter compliant)
* Suspensions of Declarations of Invalidity (Consequence of striking down leg. is against public policy, so court will suspend its invalidity for 1 year so as to give government time to amend legislation)
* Tailored remedies under section 24(1) ie. Constitutional exemptions, injunctions or limited application of award of damages suggested from scholars (limited + rare cases)

*Marbury v Madison (US case)*: there should be meaningful remedy

## Remedies Test (*Schachter*) [Use on an exam]

1. Define the extent of the inconsistency, as precisely as you can (What exactly is the constitutional problem with this law)
2. Determine the appropriate remedy: Severance, Reading in, Reading down, strike down in its entirety (Answer the question: which of these is the best for each of the below, then choose which one fits all best).
	1. Consider:
		1. Remedial precision (tailor remedy to address to problem)
		2. Budgetary implications
		3. Relative Size of the added groups
		4. Effect of remedy on the remaining portion
		5. Extent of Interference with Legislative Objective
3. If striking down, should the remedy be temporarily suspended? (Must show good reason 🡪 give time limit)
	1. Danger to the public? (*Swain*)
	2. Rule of law threatened? (*Reference Re Manitoba Language Acts*)
	3. Nature of the benefit – required or discretionary?
	4. Perpetuation of an unconstitutional state of affairs

#### K. Roach, “Constitutional Remedies in Canada”

* Main purpose of constitutional remedies: the correction of constitutional violations; the regulation of governmental behavior
* Corrective Model: Judges are only justified and competent to order remedies to the extent that they repair harms caused by a government’s violation 🡪leaving more robust remedial ambitions to legislature
	+ Will not infringe separation of powers
* Adjudicative Model: remedies attempt to regulate governmental behavior associated with public model of adjudication which stresses that remedial decision-making is more instrumental and contingent process than determining violations
* Paradoxical effect of concern not to intrude on legislature = courts strike down laws in entirety rather than save them by reading terms
* Some courts have invited a legislative reply by suspending a declaration of invalidity

## Remedies under section 52(1) of the Const.

Remedial Options:

1. Partial invalidity ie. Severance, reading down, reading in, reading down
2. Striking down
3. Temporary suspension of a declaration of invalidity for a period of time to allow provincial leg/parliament to fill the void.

#### Schachter v Canada 1992 p 1381 [Suspending invalidity of an unconstitutional law is a valid remedial provision]

Facts: s 15 of Unemployment Insurance Act discriminated btw natural parents and adoptive parents with respect to parental leave. Gave 15 weeks off to adoptive parents. But if it is a biological child, only mom can get it. TJ granted declaratory relief under s 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s 32, without affecting a women’s right to maternity benefits. ON appeal, on question was the remedy, parties conceded that there was a violation.

Issue: Was the remedy valid?

Decision: Court would not have read in, would have severed offending provision and given suspending unconstitutional invalidity of Legislation to allow Parliament to amend it.

Note: If parliament does not fix this w/in 1 year, legislation is invalid.

Reason: Lamer CJC (+4)

* Court has flexibility in determining course of action
* Simply must be “appropriate” and “just”
* Doctrine of Severance
	+ Adopted to interfere with leg as little as possible
	+ In some cases, severing is more intrusive, if provisions are closely connected to offensive provisions
	+ “Whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all
* Reading in is Akin to severance
	+ The inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes
		- Where the inconsistency is defined as what the statue excludes, logical result of declaring inoperative that inconsistency may be to include the excluded group w/in statutory scheme = reading in
		- Statute that benefits one group = court read in words
		- Statute that benefts all but one group = court strike out words
			* SO – read in or strike out = same effect
		- Focus should be appropriate remedy – not the label
* Purposes of reading in and severance
	+ Respect for role of legislature
		- Reading in and severance both must respect legislature
	+ Respect for purposes of the charter
		- Unavailability of reading in would mean that standards developed under charter would have to be applied in certain cases in a disadvantageous way
		- Ie. Welfare benefits apply to single mothers not fathers. Brought to violate s 15 of charter. If court’s only option was to strike down, it would remove welfare benefits for both parties! (ag NS v Phillips 1986)
* Choices of remedial options under s 52
	+ Defining the inconsistency
		- Where the purpose of the legislation is pressing, but means used to achieve objective are not rationally connected to it, the inconsistency struck down will be whole portion that fails rationale connection test
		- Where second or third element of prop. Test not met, there is more flexibility in defining the extent of the inconsistency. Can be carefully tailored
	+ Decide whether severance or reading in is appropriate
		- Whether the inconsistency may be dealt with by way of severance or reading in or struck down?
			* Remedial precision:
				+ Reading in has less precision (hunter v southam), and sometimes it should be left to legislature
				+ Should not read in cases where there is no manner of extension which flows with sufficient precision from requirements of const.
				+ Should not read in if making ad hoc choices
			* Interference with the legislative objective
				+ Degree to which a particular remedy intrudes into the legislative sphere can be determined by giving careful attention to the objective embodied in leg.
				+ Budgetary consideration cannot be used to justify violation
				+ A remedy that entails an intrusion so substantial as to change the nature of the legislative scheme in question is clearly inappropriate
			* The Change in significance of the remaining portion
				+ Whether the significance of the part which would remain is substantially changed when the offending part is excised

If question is whether to extend benefits to a group not included, question of change in significance looks at size of two groups

* + - * Significance of the remaining portion
				+ If the remaining portion is significant, or of a long standing nature, its strengthens the assumption that it would have been enacted without the impermissible portion. If portion is encouraged by portions of constitution, strengths the assumption that the legislature would have enacted it without the impermissible portion
	+ Validity of suspending effect of declaration until Parliament/prov has had opportunity to fill the void
		- Appropriate where striking down of provision poses danger to the public (Swain), or otherwise threatens the rule of law (reference re Manitoba language rights).
		- May also be appropriate in cases of underinclusiveness (not overbreadth)
		- If there was no obligation of gov to provide benefits anyways, may be inappropriate to extend
		- Delayed declaration serious, bc allows violation to persist
* Remedial options Appropriate to this Case
	+ The Nature of the Right involved
		- Positive right, the right to equal benefit of the law
		- Benefits more likely to fall into class of reading down/reading in or striking down and suspending operation rather than mandate immediate striking down
		- Thus striking it down would be inappropriate
	+ The Context of the Unemployment Insurance Act
		- Objective: to extend benefits to parents of newborns
		- Reading in would further this purpose
			* But! Without mandate based on clear legislative objective, it would be imprudent for J to take course of reading the excluded group into the legislation
				+ Ie. Implications of budgetary considerations underlines this, and since excluded group is HUGE compared to included group
	+ Before this action, parliament launched new rules for leg, with different consideration, but is constitutional (ie. Both natural and adoptive parents get benefits for 10 weeks)

## Under inclusive Laws and Reading In

#### Vriend v Alberta 1998 p 1391 [Underinclusiveness, Reading in is Valid remedy in this case]

* One of few cases in which Supreme Court extended constitutionally underinclusive legislation by reading in rather than striking it down
* Use of this remedy was controversial and dissent

Majority (Iaccobucci J): Courts say it is more likely that given choice of having invalid legislation, or expansion, legislation would choose the latter.

* Deflect concerns about budgetary considerations because it will just slightly increase complaints heard from homosexuals.

Dissent: Major J

* Sexual orientation was EXPLICITELY excluded.
* Use of *Schachter* to support reading in is not compelling
* Assumption cannot be made that legislature would have chosen to include this and extend the benefit
* Would order declaration of invalidity be temporary suspended, to ensure leg can bring it into conformity with the Charter while respecting the role of the leg.
* Its disrespectful to leg it “read it in”, we are precluding the dialogue!

Class Analysis:

* It is precise enough
* Will not alter budget massively (little bit more human rights application)
* Relative size of added group = small
* Effect of remedy on remaining portion = unaffected
* Furthers the legislative objective

#### M v H 1999 SCC p 1998 [Did not read in because does not satisfy precision, severing is most appropriate]

Facts: Involved legislation that was constitutionally under inclusive bc of the omission of gays and lesbians. Court distinguish Vriend on Remedy, and chose to strike down underinclusive legislation, subject to a six month delayed declaration of invalidity, instead of utilizing the technique of reading in

Issue: Ontario legislation sets out rights to spousal support 🡪 only gives that right to collect to those in marriage btw man and women.

Decision:

Reason:

* Read out spouse to replace with two persons, with application suspended for one year. Not good
* Must consider preciseness, budgetary implications, effect on remaining portion of legislation, significance or long-standing nature,
* Precision requires: Ensure validity of legislation and remedy the constitutional wrong
* Reading In will not achieve above
	+ 🡪Leaves issues for other parts of act
* Striking down whole FLA is excessive
* Severing s 29 of Act, is most appropriate remedy. Should be temporarily suspended for a period of 6 months

## Severance and Reading Down

* Severance: Partial invalidation of the law
	+ Fulfill the purposes of the Charter while preserving those parts of the legislation that do not violate the charter
* Ex. *Tetreault-Gadoury 1991*: court deleted age 65 bar to unemployment benefits
* Reading down permits courts to save from invalidity a law that would be unconstitutional if given broadest interpretation, by giving law narrow interpretation
	+ Ex. *McKay 1965*: municipal bylaw prohibiting the placement of signs does not apply to federal election signs
* Doctrine of reading down is rooted in notions of legislative intent 🡪 presumption that leg. intended to act w/in bounds
* *R v Sharpe*: Scc used explicit and strong remedy of reading in to save potentially overbroad legislation to prohibit child pornography

## Constitutional Exemptions

* Law remains in force, but it is declared inapplicable to individuals or groups whose Charter rights are infringed by its effects
* The court held that it would be inappropriate to fashion a constitutional exemption for a mandatory sentence under Code bc : to read in where parliament clearly intended to exclude discretion is an inappropriate intrusion into legislative sphere
* RECONCILIATION WITH ABOVE?: Explicit: exemption requires going against explicit statement of leg vs Oversight: reading down deals with an oversight

## Temporary Suspension of the Declaration of Invalidity

* Immediate nullification creates legislative void
* Suspend temporarily the effect of the declaration for a period of time in order to allow Parliament to fill void
* Justification for Delayed declaration (*Schachter*): Potential danger to public, threat to constitutional order, underinclusive law where striking down would deprive deserving persons of benefits
* Reference re Manitoba Language Rights 1985: Court declared invalid legislation temporary valid for time required to do translation/re-enactment bilingually
* Dixon v BC 1989: electoral boundaries violate right to vote bc of population variations that deviated too extremely = specify temporary period during which legislation would remain valid to allow leg opportunity to enact scheme
* Courts have used this remedy often after Schachter because it facilitates dialogue 🡪 serves as a springboard into dialogue. Courts do not determine how it should read, and leg. will revise within time limit

#### Doucet-Boudreau v Nova Scotia 2003 SCC p 1421 [Sets up what Appropriate and Just means]

* Problem with prov. Gov. They know they have an obligation to construct French language schools. The government has delayed building these schools for an extended period of time.
* TJ agrees there is a charter breach due to gov. inaction. Remedy?
	+ A argues that after favourable court ruling, no confidence that gov will act quickly in building schools.
	+ TJ’s remedy: Order government to remedy this breach using their “best efforts” and require them to report into court every few months and we’ll have a court hearing, gov lawyer will report on steps prov government has taken to remedy breach.
* Remedy under s 24 is available where this is some gov action beyond enactment of an unconstitutional statute or provision, that infringes a person’s charter rights
* The problem was Inaction on part of prov government
* Statutes and CL help court choose remedy under s 24
* Reasons**: Iaccobucci J**
	+ Majority Summed up: concerned about “timely manner”; use of power is well-founded in past practices; does not unduly encroach upon legislative/exec functions; exec branch is ultimately in charge
* **Appropriate and Just**
	+ Discretion based on ToF nature of the right and of the infringement, the facts, the application of the relevant legal principles
	+ These general principles may be informed by jurisprudence
	+ Does not apply strictly
	+ **First**: An appropriate and just remedy in the circumstances of a Charter claim is one that meaningfully vindicates the rights and freedoms of the claimants
		- Must be relevant to the experience of the claimant and must address circumstances in which right was infringed/denied
	+ **Second**: Must employ means that are legit w/in framework of our const. democracy. Must strive to respect separation of functions
		- Courts already adjudicate executive functions in circumstances such as bankruptcy
	+ **Third**: Judicial one which vindicates the right while invoking the function and powers of a court
		- Court will not leap into decisions for which its design and expertise are manifestly unsuited
		- Capacity and competence of courts inferred from tasks which normally charged and have developed procedures and precedent
	+ **Fourth**: After ensuring the right of the claimant is fully vindicated, is also fair to the party against whom the order is made
		- Remedy should not impose substantial hardships that are unrelated to securing the right
	+ **FIVE**: judicial approach to remedies must remain flexible and responsive to needs of case
* **STEP ONE:**
	+ LeBlanc J selected effective remedy 🡪 facts disclosed that continued delay imperil already vulnerable s 23 rights
		- Order is creating blending of remedies and processes already known
	+ Clear that gov was required to provide the homogenous French language facilities at issue: the entitled parents sought the assistance of the court in enforcing the full and prompt vindication of their rights after a lengthy history of government inaction
		- According to tj, gov did not deny existence of s 23 rights
		- LeBlanc properly took account of factual circumstances
	+ Where governments have failed to comply with well understood constitutional obligations to take positive action in support of the right, the assumption underlying a preference for declarations may be undermined
	+ *Mahe* speaks to all provincial and territorial govs
	+ Remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay
* **STEP TWO**
	+ Clear that court can issue injunction under s 24
	+ Power of courts to issue injunctions against executive is central
	+ Courts do take actions to ensure that the rights are enforced, not merely declared
* **STEP THREE**
	+ Courts of equity have long accepted and overcome difficulty of supervision where situations demanded such remedies
* **STEP FOUR**
	+ Remedy was not unclear in a way that would render it invalid
	+ Fairly original remedy in order to provide flexibility to executive while vindicating the s 23 right.
	+ TJ was not required to identify the single best remedy, even if that were possible. In our view, the TJ’s remedy was appropriate and just

**Dissent: (Le Bel)**

* Minority Summed Up: TJ overreached institutional role; the right remedy is simply to state there is a charter breach and let gov deal with it; it is vague/lacks notice/clarity
* Courts should not unduly encroach on areas which should remain resp. of public admin
* Order was seriously flawed, no clear notice of obligations
* Proper notice should be given to parties + clarity in defined standard of compliance
* His terms did not shed much light
* Separation of Powers: Courts should be wary of going beyond the proper scope of the role assigned to them in the public law of Canada
* Goes against Finality, should abstain from managerial role using continuing supervision

# Freedom of Religion

S 2: Everyone has the following fundamental freedoms:

1. **Freedom of conscience and religion;**
* Freedom of **conscience**: fundamental matters of conscience that aren’t religious, but personal beliefs ie. Those of atheists, pacifists etc.
1. Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication
2. Freedom of peaceful assembly; and
3. Freedom of association

### Freedom of Religious Analysis TEST (Amselem)

1. Does the claimant sincerely believe in the custom, practice or belief having a nexus with religion? (nexus = connect with wonder of being/divine)
2. Has the custom, practice or belief been interfered with in a manner that is more than trivial or insubstantial? (non-trivial = from *Edwards Books*)
	1. Ie. Substantially interfered with or actually threatened
	2. Consider context of harm and rights of others
3. ONCE this has been done – s 2a breach is made out and then go into section 1 analysis.

**How is s. 2(a) infringed:**

* To what extent can people bring religious paraphernalia in public spaces
* To what extent can people use illegal drugs in their religion
* Also mentioned in **section 15**: Charter’s equality guarantees: provides that state cannot discriminate, on the basis of religion
* When assessing freedom of religion argument, must look to what the other competing interest might be

## Religious freedom consists of two basic ideas

1. Establishment of Religion: State cannot impose the state’s preferred religion on individuals or on groups
2. Protection of Free Exercise of religion: Gives emphasis to individual or group religious practice and stipulates that it is inappropriate for state to interfere with religious belief or practice
* Both raise question about place of non-religion under const: can the state privilege religion over non-religion? Do claims to free exercise of religion have higher const. status than claims to be free of religion altogether?
* Cases stress the importance of children to religious life and community and the perceived difficulties of raising children within a religious culture that is embedded in a larger context of varied religious and secular ways of life
* Relationship of religion and the law
	+ Some argue to realize as much separation as possible
	+ Others argue secularization of the state is bad
	+ Effort of legal order to define itself as distinct from religious order 🡪 mark of modernity
	+ What may perceived as secular to some (ie. Eating certain foods) holds religious significance for others (*R v Videoflicks 1984)*

## Court Shifts Transitions

Early Cases: SCC more confident in role of guardian, including large and liberal rights protect, and more strict analysis of justifiable limits under s 1

Later Cases: Judges reveal disagreements on substantive and methodological grounds. Early cases may have appeared easier in 19th century homogenous Canada

## Sunday Observance and the Scope of Section 2(a)

* Sunday closing laws prohibited work on one day of the week
* In *R v Big M Drug Mart Ltd 1985*: SCC struck down federal Lord’s Day Act 1970, on the ground that it unjustifiably interfered with freedom of conscience and religion as guaranteed by s 2(a)

#### R v Big M Drug Mart 1985 SCC p 843 [Invalidity of Shifting purpose argument; Essence of freedom of religion]

* S 15 had not yet come into force in this case. That’s why they only argue s 2a
* Purposive method
* Understanding purpose of legislation that’s being impugned

Facts: Mart charged with unlawfully selling goods on Sunday contrary to Lords Day Act. Lords day = midnight Saturday night to midnight Sunday night and prohibits any work or commercial activity on this day.

Issue: Is the state introducing laws which compel people to obey religious belief of the majority?

Decision:

Reason: (Dickson CJC+ 4)

The Characterization of the Lord’s Day Act

1. The problem
* Purpose of leg: Religious: securing public observance or
Secular: providing uniform day of rest.
🡪Religious bc day is rest is Christian Sabbath = Sunday
* Purpose and Effect: AG Alberta contends that it is not the purpose, but the effects that are relevant to determining constitutionality
* J disagrees – both purpose and effect are relevant. All legislation is animated by the object the leg intends to achieve. Object is identified through intended and actual effect
* **If the purpose offends FoR🡪** unnecessary to consider the actual impact effects of Sunday closing upon religious freedom
	+ Even if such effects were found inoffensive, they could not save legislation whose purpose violates Charter guarantees
* **If a law has valid purpose** 🡪but unconstitutional effects, may be struck down
* TJ and American Supreme Court (which sustained legislation finding no violation of American const) **suggest that purpose may shift,** or be transformed over time by changing social conditions and now its more a secular purpose of protecting workers.
	+ Objections to shifting purpose argument (p 845)
		- 1. Practical difficulties: no legislation would be safe from revised judicial assessment of purpose. Laws assumed valid could be struck down. Create uncertainty, encourage re-litigation of same issues. Effective end *Stare decisis* in division of power cases
		- 2. Theory of shifting purpose stands in contrast to “parliamentary intention”. Purpose is a function of the intent of those who drafted, not of any shifting variable
	+ SO: while act may be more secular today than in past, cannot justify conclusion that its purpose has changed.
1. Freedom of Religion
* **Essence: right to entertain such religious beliefs as person chooses, the right to declare religious beliefs openly without fear of hindrance or reprisal, and the right to manifest religious belief by worship, practice or teaching/dissemination.**
* Freedom: the absence of coercion or constraint
	+ Subject to limitations necessary to protect public safety, order, health, or morals or fundamental rights and freedoms of others
* Charter safeguards religious minorities from threat of tyranny of majority
* Lords Day Act is a form of coercion
* The protection of one religion and non-protection of others imports impact destructive of religious freedom of collectivity
* “If I am a jew, the practice of my religion implies my right to work on Sunday. It seems to me that any law purely religious in purpose, which denies me that right, must infringe my religious freedom”
1. Purpose of protecting Freedom of Conscience and Religion
* ***Hunter v Southam*: proper approach to definition of rights was purposive. Meaning of right or freedom was to be understood in light of interest it was meant to protect**
* Must place that right in its proper linguistic, historic and philosophical context.
* **Historical origins** in freedom of religion struggles in post-Reformation Europe 🡪perception that belief was not amenable to compulsion. Attempts to compel belief denied reality of individual conscience and dishonoured God
* At the heart of democratic political tradition = **individual conscience and individual judgement. State should not exercise power/coercion to reward certain religions over others**
* Nothing in these reasons suggests opposition to Sunday being spent as religious day, diversity of belief makes it constitutionally necessary that parliament cannot provide legislative preference for any one religion at expense of another
* Collective responsibility of community to enforce religious conformity no longer legit by charter
1. S 1 of the Charter: Is the *lords day act* justified by s 1?
* Not all government objective is entitled to s 1 consideration, must be sufficiently important, pressing and substantial matter: DOES NOT PASS STEP 1
* The Two arguments that were suggested do not justify s 1
	+ **1. Choice day of rest adhered to by majority is most practical** 🡪 submission is no more of convenience and expediency, is fundamentally repugnant
	+ **2. Everyone accepts the need and value of a universal day of rest from work** and it might as well be the one traditionally observed 🡪 asserts objective which has never been found by court to be motivation for legislation. Cannot be legit because it achieves a secular objective that legislators did not primarily intend
* Failed on first part.

Note: AB AG argued that Big M as a corporation did not have conscience and could not hold religious beliefs.

* Dickson CJC: any accused, whether corporate or individual, may defend criminal charge by arguing that law is constitutionally invalid
	+ Whether corporation can enjoy freedom of religion is irrelevant. Big M is arguing that legislation impairs freedom of religion.
	+ **A law which infringes religious freedom is, by that reason alone, inconsistent with s 2(a). It is the nature of the law, not the status of the accused, that is at issue**

Class Notes: (CAN HAVE BOTH FEDERALISM AND CHARTER ARGUMENT)

* Could you argue this under federalism grounds? 92.13, 92.16
	+ When you read legislation that prohibits selling goods on Sunday, is there a federalism issue here.
	+ This piece of legislation is ultra vires because it infringes upon provincial jurisdiction concerning property and civil rights (bring in cases from first term, *Parsons* etc)
	+ Federalism argument failed, may fall under public morality, public order under crim law power.
* Charter: problem 🡪 if the main purpose is to regulate morality, doesn’t that infringe freedom of religion?
	+ What is the “purpose test” and whats the problem with recognizing a “shifting purpose” argument?

#### Edwards Books and Art Ltd v The Queen 1986 p 851 [Indirect coercion by the state is comprehended within the evils from which s 2(a) may afford protection]

Facts: Challenge to Ontario *Retail Business Holidays Act* 1980, provincial law that established common day of rest for retail workers. Four retailers charged with failing to ensure no goods sold by retail on holidays and Sundays. Act provides exemptions for corner stores, pharmacies, gas stations, educational/rec activities. Exemption in s 3(4) to businesses which have 7 or less employees, less than 5000 sq ft 🡪 exempt these businesses from closing on Sunday if they close the previous Saturday.

Issue:

Decision: Enacted to provide uniform holidays to retail workers = secular purpose, not offensive to charter.

Reason: (Dickson CJC)

* **Even if law has valid purpose, must consider effects (*Big M*)**
1. Constitutional Protection from state-imposed burdens on religious practices and religious non-conformity
* Two forms of coercion alleged:
	+ 1) Makes it more expensive for retailers and consumers who observe a weekly day of rest other than Sunday to practice their religious tenets. Act indirectly coerces persons to forego practice of religious belief.
	+ 2) Act has direct effect of compelling non-believers to conform to majoritarian religious dogma, by requiring retailers to close their stores on Sunday
* Indirect coercion by the state is comprehended within the evils from which s 2(a) may afford protection
	+ Matters not whether it is direct/indirect, intentional/unintentional, foreseeable or unforeseeable. All coercive burdens are potentially within the ambit
	+ Note: not every burden is offensive to constitutional guarantee🡪 Furthermore, trivial or insubstantial government regulations aren’t going to attract s 2a scrutiny.
	+ Purpose of s 2(A): Ensure society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature etc.
	+ #1: Legislative/ admin action which increases cost of practicing or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial
	+ #2: not the freedom affirmatively to practice one’s religious beliefs, but rather the freedom to abstain from the religious practices of others
		- Reasonable citizens do not perceive the legislation as requiring them to pay homage to religious doctrine
		- Merely because statutory provisions coincide with tenets of religion
* Consider the impact of the Act with view to determining whether it significantly impinges on freedom to manifest or practice religious beliefs.
1. Section 2a Analysis: Impact of retail business holidays act: Different impact on persons with different religious beliefs.
	1. Non observers
		1. Those who do not subscribe as matter of faith, a duty to refrain from working/shopping on specified day of the week
			1. Act prevents non-observing retailers from doing business on Sundays. IN absence, they would conduct business 7 days a week, and have competitive advantage over religious observers.
			2. Purely motivated by business considerations rather than religious freedom
	2. Sunday Observers
		1. Favourable impact. Requires some retailers to refrain from trade, and are relieved of loss of market share from those who would have been open
	3. Saturday Observers
		1. AG Ont submits: any disability suffered by Saturday-observers is consequences of religious belief not of act. Effect of act is to require them to close on Sunday.
		2. BUT, in absence of legislation, Saturday/Sunday observers would be on equal footing – both one day closed. Act has effect of leaving Saturday observer at natural disadvantage to non-observer and added disadvantage to Sunday observer
		3. Competitive pressure to open on Saturday is not insubstantial or trivial
		4. Their freedom of religion is abridged by the Act
		5. Also – imposes burden on single-parent/ M-F working families who cannot do anything on Saturday, and nothing Sunday bc things are closed
2. S 1 of Charter
	* *OAKES*
	* 1) The act is aimed at a pressing and substantial concern (encourages same days off as children, family time etc.)
	* 2) Rational connection: requiring business owners to close businesses ensures that workers have good business schedule.
	* 3) Problem centers on Minimal Impairment (This is where the court splits)
	* 1) Is it acceptable for legislation to have focused exclusively on retail industry?
		+ Ont Law Reform: Retail industry presented most pressing problem 🡪 high proportion of women, low level of union
		+ Does it abridge freedom of religion of Sat. observers as little as reasonably possible?
			1. There are two other options, but court does not decide which one is better.
			2. Court must alleviate effect of Sunday closing laws on Saturday observers. Infringement is not disproportionate to leg. objectives. A serious effort has been made to accommodate sat. obvs. In so far as possible
	* 2) Is scheme of exemptions w/in act, btw dif types of retail, justifiable?
		+ Balancing interests of more than 7 employees to a common pause day against the freedom of religion of those affected constitutes justification for the exemption scheme selected by the Province of Ont.
		+ Justified in case of large retailers but not in case of small. By reference to the number of persons the larger retailer employs, a decision to stay open on Sunday would deprive a larger number of employees from common pause day than would decision by small retailer. Justified on basis of ground of size.

Beetz J (McIntyre Concurring in result)

* Impugned legislation does not violate freedom of religion, and is of full force and effect without needed to rely on s 1
* **Economic harm on sat. observers is not caused by Act, results from deliberate choice of tradesmen who gives priority to religion over financial benefit**

Wilson J (Dissenting in Part)

* Agree with Dickson that Act is intra vires the Province bc its purpose is to establish a common pause day for those employed.
* Agree it infringes s 2. Requires sat. obs. To be closed 2 days instead of one.
* Can the infringement be justified under s 1? NO
	+ Freedom of religion that recognizes freedom of some members of a group, but not other members cannot be reasonably and justified in free and democratic society
	+ Effect of disparate treatment, as being based on size, is that religious freedom of some is respected and others it is not. This effect make legislation vulnerable to attack on const. grounds.
	+ Leg must decide whether to subordinate FoR to objective of common pause day OR to subordinate common pause day to FoR 🡪 NOT BOTH to different group members 🡪 result is checkerboard legislation. They have not given adequate reason to justify exemption
* Severed those paragraphs that limited scope of the exemption to smaller retailers.

La Forest J would have upheld the Act under S 1

Note: Dickson CJC introduced more deferential or reasonableness standard into Oakes Analysis 🡪 framed question as whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom.

* Contextual factor triggering more deferential approach = protection of vulnerable group of retail workers

Class Notes:

Difference btw *Retail Business Holidays Act* different from the *Lords Day Act*?

* *Holidays Act* includes secular holidays in addition to Sunday off. Also it includes exemptions in the legislation for small business owners and certain retailers: fresh fruit stores, recreation, amusement, etc.

What are the internal limits of fundamental freedoms? Don’t need to define those

## The Restriction and Accommodation of Religious Practice

* *Syndicat Northcrest*: SCC held that a condo’s refusal to permit Orthodox Jew to construct succahs on their balconies as part of holiday celebration breached freedom of religion under Quebec Charter of Human Rights. Condo board can regulate the use of your property to a great extent. The most they allowed was that you can put one up together in the garden but not on the balcony.
* Because restriction on religious practice was imposed by non-state actor, charter not applicable.
* Majority Binnie J: the principles applicable in cases where an individual alleges infringement of religious freedom under the Quebec Charter are also applicable to claim under s 2(a) of Canadian charter

#### Syndicat Northcrest v Amselem 2004 SCC p 865 [Method for assessing s2a claims; court emphasizes that judges should not question validity of religion, exercise restraint; only assess subjective belief of C and sincerity of their dedication]

* Showing 2 a infringement, what is the evidentiary focus etc.
* Lesson: instead of hiring experts, religious authorities, asking client to testify directly, talk about impact of government action on their own views.

Facts: Condo board argues that balconies are common property, but for exclusive use of owner. Effect: Cannot use it anyway you like. Permission from condo board to put Succah up was refused.

Issue:

1. Whether the clauses in the by-laws of the declaration of co-ownership, which contained general prohibitions against balcony decorations, infringe the A’s freedom of religion under Quebec Charter.
2. If so, whether refusal is justified by its reliance on co-owners rights to enjoy property and personal security under s 1?
3. Whether A waived rights to freedom of religion by signing declaration of co-ownership?

Decision: Allow the appeal.

Reason: (McLachlin CJC, Iacobucci, Major, Arbour and Fish JJ concurring)

* **Feature of constitutional democracy = respect for religious minorities** *(Reference re Secession of Quebec 1998)*
* These rights are not absolute. Must exist in matrix of competing rights. Respect for minority rights must co-exist alongside societal values that are central to the make-up and functioning of a free and democratic society
* Court deals with interrelationship btw fundamental rights both at conceptual level and for a practical outcome.
* Quebec court denied claim. Disagree and would allow the appeal.
* R has raised rights to enjoy property and personal security as justification of infringement 🡪 The impairment of the appellant’s religious freedom is serious whereas I conclude that the intrusion on R is minimal
	+ A’s are allowed to set up succahs for minimal time. Must allow for emergency access route and impair aesthetics of building as little as possible.
* R also raises that economic value of property is diminished
* Analysis
	+ Religion = particular and comprehensive system of faith and worship, deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment
	+ Person must show “sincerity in belief”, not validity of the belief (*Edwards Books*)
	+ State will not assess sincerity of religion (**shift from objective test)**, on sincerity of practice that belief is exercised in good faith, not fictitiously
	+ **At first stage**: To trigger freedom of religion
		- Claimant must show that she has a belief, with a nexus in religion, which calls for particular conduct
		- Must then show that she is sincere in her belief
		- Note: Reason: To assess whether these affirmations are made in good faith
		- EVIDENCE: is this a long standing practice? A habit? Attempt to ascertain religious beliefs at THIS point in time. Credibility of C’s testimony, whether belief is consistent with current religious practices
	+ **Infringement:**
		- S 2(a) prohibits burdens/impositions on practices that are non-trivial
		- No right is absolute and we must take rights of others into account – conduct that would cause harm/interfere with rights of others would not be automatically protected
* Applied to the case at hand
	+ Is FoR triggered?
		- Complainant(C) does not have to prove obligation of religion.
		- C must demonstrate that she sincerely believes that a certain practice or belief is experientially religious in nature in that it is
			* Either objectively required by religion OR that she subjectively believes that it is required by religion
			* OR that he believes that the practice engenders a personal, subjective connection to the divine
		- Sincerity:
			* **One’s past practice methods cannot dictate the sincerity** one has of practicing a new way in the future. People’s religious beliefs can change overtime.
	+ Justification?
		- Would not drop economic value of property due to 9 day festival. + FoR outweighs this (*sl: maybe this is not the strongest, if the festival was longer etc.)*
		- Preserving appearance of balconies cannot be reconciled with total ban on FoR, furthermore 9 day festival is minimal annoyance
		- Security concerns of blocking fire escape routes require serious recognition
			* Ideally, A answered such concerns by not blocking any doors, obstruct fire lanes and pose no threat to safety or security.
		- J says A can set up succah and at the same time attempt to closely respect co-owner’s property interests.

#### Alberta v Hutterian Brethren of Wilson Colony 2009 P 885 [Goal of united security for universal driving license regime against identify theft justifies requirement of photos. Majority suggests Hutterites can make other driving arrangements]

Facts: *Traffic Safety Act* requires all persons who drive to hold driver’s license. Those who objected to photo on religious grounds were granted non-photo license since 1974. In 2003, Alberta made photo requirement universal to put in id data bank. Hutterian believe Second Commandment prohibits them from having their photos taken. Unable to reach agreement with province = challenged constitutionality.

Reasons (McLachlin CJC (Binnie, Deschamps, Rothstein JJ concurring):

* H argues that regulation forces members to choose btw obeying second commandment and adhering to rural communal lifestyle
* Freedom of religion has individual and collective aspects
* Broader impact of photo requirement is relevant at Proportionality stage of s 1 analysis
* Infringement made out where:
	+ 1) Claimant sincerely believes in belief or practice that has nexus with religion
	+ 2) The impugned measure interferes with the claimant’s ability to act in accordance with his religious beliefs in a manner that is more than trivial or insubstantial
	+ Province concedes first element
	+ Second test seems to have been met (although analysis not shown)
	+ Note: Section 2(a) was not argued, it was conceded by the province
* **Is limit on S 2(a) justified under s 1?**
	+ Giving effect to each religious claim could undermine universality of many regulatory programs
	+ A degree of deference is appropriate
	+ *OAKES ANALYSIS*
* 1) Is the purpose for which the limit is imposed pressing and substantial?
	+ To prevent identify theft or fraud, and forms of mischief which these facilitate, and harmonization of international and interprovincial standards for photo identification
	+ Ensure integrity of driver licensing system
	+ Harmonization of international and interprovincial standards
* 4) Is the Means by which the Goal is further proportionate?
	+ 2) Is the limit rationally connected to the purpose?
		- Universal will be more effective than one that grants exemptions.
		- Yes. Rationally related
	+ 3) Does the limit minimally impair the right?
		- Whether the limit on the right is reasonably tailored to the pressing and substantially goal put forward. Are there less harmful means?
			* **The courts accord deference to legislature**
			* Government must chose the least drastic means of achieving objective
			* Deference is not blind or absolute
		- Province proposes alternatives which would minimize impact on Colony members by eliminating or alleviating the need for them to carry photos. H reject these, for them the only acceptable measure is to remove photos.
		- H’s proposal that they have cards which say “not for ID purposes”, compromises Provinces goal of minimizing risk of misuse of driver’s licenses for identify theft
		- This disparity could be exploited by wrongdoers
		- **The universal photo requirement minimally impairs s 2(a). Falls w/in range of reasonable options available. All other options undermine goal**.
* Against Dissent:
	+ Argument that 700k Albertan drive unlicensed is miniscule by risk of few hundred potential religious objectors.
		- Problem: rests on overly broad view of objective of photo requirement as being to eliminate all identity theft. It is the modest goal as integrity of the system, so as to minimize identity theft.
* The Courts Below
	+ Where validity of law is at stake: courts must use Oakes
	+ Where gov action or admin practice is alleged to violate charter rights 🡪 look to jurisprudence on the duty to accommodate.
	+ Minimal impairment and reasonable accommodation are conceptually distinct
	+ Reasonable accommodation when applied to the single individuals:
		- Is drawn from human rights statutes, envisions dynamic process where parties adjust relationship to meet human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party
	+ Laws of general application are not tailored to unique needs. Constitutionality under s 1 is determined, not by whether it is responsive to UNIQUE needs, but rather whether its infringement is directed at an important objective and proportionate in overall impact
	+ Must look at free and democratic society as a whole, not arrangement for particular claimant
	+ Similarly, “Undue Hardship”, pivotal to reasonable accommodation, is not easily applicable to legislature enacting laws. Applying “undue hardship” broadly attenuates the concept. Better to speak of minimal impairment and proportionality effects
	+ Conclusion: where validity of law of general application is at stake, reasonable accommodation is not appropriate substitute for proper s 1 analysis based on methodology of Oakes
* Is the law Proportionate in its Effect: (**WHERE THE COURT SPLIT)**
	+ Questioned how a law which passes first three rigors, could fail at final inquiry. The fourth branch takes full account of severity of the deleterious effects of the measure on individual or groups, whereas first 3 take into account purpose
	+ Salutary Effects:
		- 1) Enhancing security of the driver’s licensing scheme
			* Through computer software ensures that no person holds more than one license
			* Enhances security of licensing system and of Albertans
			* Requiring ALL, will accomplish security-related objectives more effectively than would an exemption
		- 2) Assisting in roadside safety and identification
		- 3) Eventually harmonizing Alberta’s licensing scheme with those in other jurisdictions
		- Salutary effects are sufficient, subject to final weighing against negative impact on the right
	+ Deleterious Effects:
		- Effects of limit on Colony members’ exercise of the s 2a right.
		- Seriousness of the effects of the limit on Colony members FoR is addressed:
		- Inevitable that some religious practices will come into conflict with laws and regulatory systems of general application
		- In judging seriousness, the perspective of the religious or conscientious claimant is important.
			* Must be considered in context of a multicultural, mult-religious society where duty of the state authorities to legislate for general good produces conflicts with individual beliefs.
			* Must be judged on case-by-case basis
		- Canadian law reflects the fundamental proposition that the state cannot by law directly compel religious belief or practice. To compel religious practice deprives individual of fundamental right to choose religious experience, or lack thereof. It will fail at first stage of Oakes.
		- Infringement on cases of incidental are more difficult
			* The absence of meaningful choice renders the impact of the limit VERY serious (Multani)
		- Huttarians claim they are being faced with this choice.
			* But evidence does not support the conclusion that arranging alternative m means of highway transport would end Colony’s way of life.
			* **The law does not COMPEL the taking of a photo.** Merely provides that a person who wishes to obtain a driver’s license must permit the photo to be taken. Driving cars on the highway is not a right, but a privilege. Many adult citizens do not hold licenses.
	+ Weighing the Salutary and Deleterious Effects
		- Law’s goal should not be lightly sacrificed
		- Public benefit weighed against C’s religious rights
		- Its deleterious effects fall at the less serious end of the scale

Abella J (Dissent)

* Freedom of religion has individual and collective aspects (*Edwards*)
* Parts majority with Minimal impairment analysis
* Government must show that measure impairs the right as little as reasonably possible in order to achieve the legislative objective. It must be carefully tailored. (*RJR Macdonald*)
* **Misconstrued Oakes Analysis**: At minimal impairment stage: **Should not assess whether the infringing measure fulfills government’s objective more perfectly than any other. Assess whether the means chosen to impair the right no more necessary to achieve the objective.**
	+ All alternatives presented by Gov involve taking the photo, and this is the very right which offends religious beliefs.
* **Proportionality (WHERE THE COURT SPLIT)**
	+ Majority balances negative effect of infringement against actual benefits derived from leg. measure
	+ Gov has not discharged evidentiary burden or demonstrated that salutary effects are anything more than speculation
	+ Facial recognition technology is not fool-proof
	+ No evidence from gov that Code G licences have caused harm to integrity of licensing system
	+ 700k Albertans don’t have drivers licences, hard to see how colony of 250 non-photo will reduce opportunity for identity theft
		- Benefit of adding Hutterites photos would be marginal
	+ Furthermore, what about other photo ids? Alberta has not taken measure on that, so suggests risk is not sufficiently compelling.
* Photo requirement is a form of indirect coercion that makes them choose btw religious beliefs and self sufficiency. (sl: REALYY? Part of being self-sufficient is taking care of things. Ordering a driver does not hinder this substantially).
* Troubled by Majority’s ruling that driving is privilege. Contradicts that “once a state provides a benefit, must do so in a non-discriminatory manner” (*Eldridge*)
* Inconsistent with s 2a; Not justified under s 1!

LeBell J (Dissenting) Fish J (Concurring):

* Agrees with Abella on nature of FoR and that impugned regulation has not been properly justify. I would dismiss appeal and uphold declaration of invalidity of regulation that requires Hutterites to have photos taken as condition for renewal or issuance of driver’s licence
* RoF: We are discussing fate not only of group of farmers, but of community that shares common faith and way of life and passing it on to future generations.
* Drivers licence is not a privilege granted at the discretion of governments. Ever would-be driver is entitled to a licence if they meet the required conditions and qualifications. Such a licence is critical to everyday life in rural Alberta.
* A small number of people carrying a license without a photo does significantly compromise the scheme, but these small group of people are being made to carry a heavy burden.
* It is not proportionate

**CLASS EXAMPLE:**

*R v Kharaghani 2011* ONSC

Facts: Brothers charged with trafficking and possession. Claim that freedom of religion is infringed. Testify in court that consuming cannabis has a spiritual aspect and is a sacrament from the land of god.

Issue: Is the controlled drugs substances act unconstitutional because it infringes the freedom of religion.

Decision: Law was upheld in that it constituted a justifiable limit on freedom of expression

Argument

|  |  |
| --- | --- |
| Brother’s Lawyers | Crown |
| 1. Show sincere believe in custom practice or tradition having a nexus with religion: Ask client to talk about why weed usage is important to him religiously, how it forms integral aspect of his religion
	* Testify to it being a sacrament
2. Show Non-trivial interference with religious practice. It was substantial.
 | *Oakes*Step 1: Public Health, Criminal 🡪 social cost associated with possessing and trafficking drugs like marijuana. Attempt to draw in social science evidence to help buttress the argument. Pressing and substantial objective. Step 2: Step 3: Minimal impairment* Centered on whether or not the fed government could conceive of a less evasive way of regulating weed. One that created an exemption for the brothers (ie. A card allowing them to carry pot)
* Did not succeed. Court held that the law was minimally evasive. No other alternative to a blanket prohibition.
* Court seems to be letting parliament take the lead. (ie. Parliament allowed medicinal weed, let them rule on this)
 |

**2 key points**

1. Working on the Charter Analysis. The basic 2 step. Person challenging the law bears the onus of showing the infringement. (For religious freedom go to Amselem).
2. Onus shifts to government to justify any law or decision that infringes on that freedom. Be clear about what possible objectives there are for having this law in place. Do *Oakes* analysis (salutary effects vs. deleterious effects etc.)

Note: can companies raise religious freedom arguments? Get them to provide witnesses that show that the law hurt their freedom of religion

# Freedom of Expression

## Introduction: Purposes of the Guarantee

* Main rationales for importance accorded to FoR
* Consider historical, philosophical, cultural reasons for protecting FoR protection.
	+ In history: Galileo thrown in jail for supporting metaphysics against pope’s beliefs
		- Anti-Communism
		- Teachers aren’t allowed to give F’s anymore in elementary school

|  |  |
| --- | --- |
| Pros of free speech | Cons of free speech |
| * Instrumental in promoting free flow ideas essential to political democracy and functioning of democratic institutions (A Meiklejohn)
* Essential precondition of the search for truth (Milton)
* Important to allow people to express themselves in the way they see fit: Access to others to unconventional ways of looking at things
* Autonomy and Self Fulfillment
* Social interaction + communication (Moon)
 |  |

#### R v Keegstra 1990 SCC p 963 [FoE necessary for democracy and search for truth]

McLachlin J

* Freedom of expression as A) means to other ends ie. Instrumental vs. B) end in itself
* **Instrumental Theories:**
	+ The Political Process Rationale: **freedom is instrumental in promoting free flow of ideas essential to political democracy and functioning of democratic institutions** (A. Meiklejohn)
		- So is only expression relating to politics worthy of const. protection?
		- No. protection for expression is absolute
		- Limited theory. Justifies relatively narrow sector of freedom of expression
	+ **Essential precondition of the search for truth** (Milton)
		- Promotes marketplace of ideas in which competing ideas vie for truth
		- Critique: dangerous, destructive, untrue ideas prevail in the shortrun
		- Does not guarantee truth will prevail, but promotes truth
* **End in itself**: Value essential to the sort of society we wish to preserve
	+ “The proper end of man is the realization of his character and potentialities as a human being”
	+ All persons have the right to form their own beliefs and opinions and to express them
	+ Freedom of expression is seen as worth preserving for its own intrinsic value
	+ Criticism: too broad, does not answer why expression should be deserving of special const. status while other self-fulfilling activities are not
	+ Intrinsic Value + practical consequences (Shauer)
		- Evaluates reasons why gov might attempt to limit expression. History shows that attempts to restrict expression account for disproportionate share of governmental blunders
		- When govs censor, they act as a judge in their own cause, end up enhancing own popularity by silencing unpopular expression
* Broad wording of s 2(b) is arguably inconsistent with a justification based on a single facet of free expression 🡪 no need to adopt any one definitive justification for freedom of expression

#### R Moon “The Constitutional Protection of Freedom of Expression” p 966 [FoE is an essential way of identify social interaction, communication, relations]

* Most arguments seem to combine truth, democracy and individual autonomy.
* Contributes to the public’s recognition of truth; to growth of public knowledge; necessary to operation of democratic form of government
* FoR is supported by overlapping justifications
* Rest on common recognition that human agency emerges in communicative interaction
* Protects individuals freedom to communicate with others
* Structure of constitutional adjudication suppresses social or relational character of freedom of expression and its distributive demands
* Must recognize social character of FoE is critical to understanding value + harm of expression, and limits/scope of freedom
* Recognize that individual agency and identity emerge in communicative interactions = value of E
* Dependence on expression means that words can be hurtful
* Intrinsic value:
	+ Permits free and rational beings to express their ideas and feelings
	+ Criticism
		- Misdescribes the value at stake
		- Individual does not simply gain satisfaction from expressing views, his views take shape in communicative process
* Instrumental:
	+ Contributes to valued state of affairs, to realization of social goods such as public knowledge or democratic gov.
	+ Criticism
		- If its an instrumental right, its fundamental character is less obvious
		- No shortage of arguments it does not advance these goals
* Listener vs. Speaker Centred
	+ Listner: right of listener to hear and judge expression for herself 🡪 protected as a matter for her autonomy as a rational agent or for its contribution to social goals such as development of truth
	+ Speaker: value of self-expression
	+ BUT: Freedom of expression is valuable because it advances an important individual interest of the listener and important individual interest of the speaker

Notes:

* Central issue in contentious FoE cases ie. Restriction of hate promotion/ads/porn: whether the restricted expression causes harm
* Typically dealt with under s 1 where courts look to social science evidence of link btw expression and harm
	+ Evidence often inconclusive -🡪 courts rely on common sense
* Owen Fiss in “Liberalism Divided 1996”
	+ Division prompted by free speech controversies is attributable to liberalism as political philosophy
		- Today its mandate is more pluralistic 🡪 devoted to furthering equality over protecting liberty
	+ Confronts liberals with choice btw liberty or equality
	+ But also conflict btw liberty and liberty 🡪 dispute over very meaning of freedom
		- Two ways of understanding liberty at issue
		- Some libertarians support regulation of porn/hate speech bc these expression silence disadvantaged groups/distort public debate
* How does silencing occur? When should we regard the audience as something that expression “affects” or something that expression “causes” to act in a particular way?

## Scope and Limits of Freedom of Expression

* In *Irwin Toy* the Court consolidated its earlier ruling in *Dolphin Delivery* and *Ford*, and laid out the basic approach to be followed when FoE claims are to be made
* Whether it infringes FoE, and whether it does so in a way that is Justifiable?
* Andrew Petter 🡪 charter plays into those who have big pockets to fight infringement (Evidenced by big SCC cases brought by corporation ie. Big M Drugmart and Irwin Toy)

#### Irwin Toy Ltd v Quebec (AG) 1989 SCC [Restriction of Corporate advertising is a 2b violation, proceed to Oakes, overarching theme of deference to gov on specifics when dealing with conditions of uncertain evidence]

* Broad characterization on section 2b
* Category that is excluded: violence

Facts: Challenge to provisions of Quebec’s Consumer Protection Act 1978. No advertising directed at persons under 13 years of age.

Issue: Whether s 248 and 249 limit freedom of expression as guaranteed by the Canadian and Quebec Charters?

Reasoning: (Dickson CJC, Lamer and Wilson JJ)

**Step 1**: Was the P’s activity within the sphere of conduct protected by Freedom of Expression?

* Expression includes **Form And Content**
	+ Human activity cannot be excluded from scope of FoE on basis of content or meaning being conveyed
	+ If an activity conveys a meaning – it has expressive content 🡪 falls within scope of protection
	+ Generally does not include:
		- Day to day tasks = basically any activities without expressive content.
			* But this can be rebutted ie. Parking car in reserved lot as sign of protest has expressive content
		- Violent acts = Violence as a form of expression receives no such protection.
			* Ie. A murderer or rapist cannot invoke FoE in justification of form of expression
	+ Written or spoken work, the arts, physical gestures or acts

**Step 2**: Was the purpose or effect of the government action to Restrict Freedom of Expression?

* Purpose Test:
	+ **On must be aware of drifting to either of 2 extremes**
		- **Most human activity has expressive element, so gov’s purpose is virtually always to restrict expression**
		- **Or: gov can claim subjective purpose was to address some real or purported social need, not to restrict expression**
	+ To avoid both extremes: government purpose must be assessed from the standpoint of the guarantee in question
	+ If the gov purpose is to restrict the content of expression
		- by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of FoE, = Limits the guarantee
		- In order to control access by others to a meaning being conveyed or to control the ability of one conveying the meaning to do so = Limits the guarantee
			* Ie. rule against handing out pamphlets (which may purport to have purpose of controlling litter)
	+ Where gov aims to control only physical consequences of certain human activity, regardless of meaning is being conveyed, purpose is not to control expression
		- Ie. rule against littering = aims to control physical consequence, whether conduct conveys meaning
	+ **Does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behavior of others, or does it consist, rather, *only* in the direct physical result of the activity?**
	+ In the case at hand: gov purpose was to prohibit particular content
* Restricting Effects:
	+ Is the effect of the government action to restrict P’s FoE?
	+ Burden on P to demonstrate effect occurred. Must state claim with reference to the principles and values underlying the freedom
		- 1) Seeking and **attaining the truth** is an inherently good activity
		- 2) Participation in **socia**l and political decision-making is to be fostered and encouraged
		- 3) The diversity in forms of individual **self-fulfillment** and human flourishing ought to be cultivated in an essentially tolerant, environment not only for the sake of those who convey meaning

**Step 3**: Is the limit of FoE justified under s 1?

* Whether evidence submitted by gov establishes that children under 13 are unable to make choices and distinctions respecting products advertised and whether this justifies the restriction on advertising put into place.
* Pressing and substantial objective
	+ Concern: for protection of a group which is particularly vulnerable to techniques of seduction and manipulation abundant in ads = generalized concern of impact of media on young children
	+ Report showing children cannot distinguish fiction from nonfiction = sound basis for evidence of manipulation
	+ Give deference to legislature on reasonable assessment as to age
* Means proportional to the Ends
	+ Rational connection test found to be easily satisfied.
	+ Issue of Minimal Impairment
	1. Is the means proportional to the ends?
		1. When striking balance btw claims of competing groups, choices of means frequently will require assessment of conflicting scientific evidence and differing justified demands on scarce resources
		2. Evidence is unclear, so court gives flexibility to gov to decide where the line (ie. Timing, age, other specifics etc) should be drawn.
		3. Courts simply require a reasonable evidentiary basis for gov’s conclusions, and this was met. (Even if there is conflicting evidence)

Bottom Line: Advertising is a clear 2b violation

Dissent: (Mcintrye):

* Not justified under s 1:
	+ Difficulty distinguishing fact/fiction happens to adults too
	+ Children are not at risk here, simply an irritant to parents
	+ Arbitrarily fixed age = no attempt to achieve proportionality
	+ Restriction should not be sustained, even if children adversely affected
	+ Cannot take lightly a step in this direction
* “Ironic that most attempts to limit FoE and hence freedom of knowledge and information are justified on basis that limitation is for benefit of those whose rights will be limited.”
* Because: FoE was seen as dangerous, and was used to oppose and restrict public education in earlier times. Education of woman was retarded on basis that wider knowledge would make them dissatisfied with their role in society

#### RJR MacDonald Inc v Canada (AG) 1995 SCC [Violated FoE and could not be upheld under s 1]

* Advertising at smokers or potential smokers.
* Focus on Minimal impairment on government
* Violated and could not upheld under s 1

McLachlin: MAJORITY: Agree that ads constitute violation of 2b, also thinks health messages on boxes do too

* Combination of health message requirement and limit on other ads on box = violates 2b
* Justified?
	+ Just because you need context, doesn’t require burden of proof on court. Undercuts obligation of parliament to provide justification
	+ Distinction btw balance rights/state imposed infringement = hard to apply
	+ Deference must not be carried to point of relieving gov of burden which charter places on them of demonstrating that the limits it has imposed are reasonable and justifiable
	+ Balance of probabilities required – common sense is too low
* Objective: prevent ppl in Canada from being persuaded by ads to use tobacco products. Mandatory package warning must be to discourage people who see package = sufficient to justify overriding
* Rational connection:
	+ Causal relationship not scientifically measurable (ie. changing human behavior)
	+ Court finds causal connection btw infringement and benefit sought on basis of reason or logical, without insisting on direct proof
	+ Direct evidence not found.
	+ Less direct = sufficient to establish on balance of probabilities a link based on reason btw certain form of ads, warnings and tobacco consumption
* Minimal Impairment
	+ Courts will not find it overbroad merely because they can conceive of less intrusive alternative
	+ Shown that partial ban is less effective than full ban but may still achieve objective (ie ban on lifestyle ads)
	+ Gov has deprived court on result of study of 100% ban = courts make adverse inference
	+ Core vs. Periphery: Cannot undervalue expression at issue, even if less important should not be lightly dismissed
	+ Government failed to show why health warning couldn’t be attributed to them, and why restricting other info on package would achieve objective
	+ NOT MET: Prohibitions against ads + health materials on box of no force or effect
* Iacobucci J: charter allows health warnings, but they must be attributed to their author

La Forest J: (DISSENT)

* Oakes test should be applied flexibly
* Evidentiary requirement will vary depending on nature of legislation and nature of right infringed
* Distressing evidence that majority of tobacco consumption is by young and less educated
	+ = fundamental institutional problem that must be taken into account in s 1 balance
* Strict application of proportionality would place impossible onus on parliament by requiring produce definitive social scientific evidence
* Court in *Irwin Toy*: draws disction btw legislation aimed at mediating btw different groups (subject to lower standard of s 1 justification) and legislation where state acts as singular antagonist of individual.
	+ Class note: this distinction is arbitrary
	+ J: Courts should give deference, as they are not specialists in policy-making
* When **form of expression falls further from “centre core of the spirit”** of values (ie. search for truth, protection of individual autonomy, self-development: *Keegstra*) then court has restriction on such expressions are **less difficult to justify**
* This form of expression is just as far from core as prostitution, hate mongering or pornography lie = gets low degree of protection under s 1
	+ Ads serves not political/scientific/artistic ends, does not promote participation in political process. Sole purpose is to inform consumers of a product that is harmful/fatal to them
* Oakes test
	+ Proportionality:
		- CA may interfere with finding of TJ if TJ erred in consideration or appreciation of the legislative or social fact
	+ Rational Connection:
		- Unnecessary for gov to demonstrate rational connection according to balance of probabilities
		- Gov must demonstrate it had reasonable basis for believing such a rational connection exists
		- Common sense observation: tobacco companies spend 75 million a year on ads, they would not do that if they didn’t know ads increased consumption of product
		- Advertisers Claim that tobacco ads are aimed at brand loyalty is not sufficient to defend them, since commercials targeted at branch loyalty may induce non-smokers
		- Furthermore: internal tobacco marketing docs, expert reports and international materials show target of increasing consumption
	+ Minimal Impairment
		- Advertisers suggest Parliament could have forbid “lifestyle” advertising, or advertising directed at children. But no need to prohibit brand loyalty/informational which is targeted at smokers.
			* FAIL: relevance of context cannot be understated. Fit btw means and ends will vary depending on nature of right and nature of legislation
		- Passes Oakes. Infringement focused on advertiser who sell only legal product in Canada that harms and kills consumers
		- = unintrusive method compared to making them illegal
		- Measures were result of 20 year public policy process
	+ Gov’s failure to disclose docs which may have contained alternatives = those options do not displace overwhelming evidence indicating prohibition was reasonable
	+ Proportionality btw effects of legislation and objective:
		- Deleterious effects of limitation, do not outweigh leg. objective of reducing number of direct inducements for Cdns to consume smokes
* Requirement to put unattributed health messages on box = no infringement of 2(b) because does not indicate that tobacco manufacturers endorse this. Labeling of products for human consumption is subject to state regulation.

Themes

* The core vs. the periphery of expression (bottom of p 991)
	+ This form of expression is on the periphery, as far from the core of freedom of expression as possible. Entitle it to a low degree of protection under s 1.
	+ Must take into consideration the context in the section 1 claim.
		- Justice Wilson in the Edmonton Journal case 🡪 can’t treat all speech the same. You must bear in mind the context. Newspapers seeking to divulge the private details of matrimonial disputes in court rooms. Does that speech deserve same protection as unpopular political ideology? Or to artists? NO. does not deserve the same protection. The legislative objective in restricting certain types of speech is more acceptable than in other contexts.
		- Easier to justify infringements of speech lied in periphery, than in courts opinion that lies in core of section 2 b. WHAT do you think about this??
		- What if there is a spectrum? Should courts be playing this game, or determining what is important or less important constitutionally.
* Deference vs. the Rigor under section 1
	+ Both see pressing and substantial involved, rational connection, BUT split on minimal impairment.
	+ Could parliament have come up with something less intrusive than a complete ban on advertising tobacco products?
	+ La Forest:
		- Ensuring the government acts in objectively reasonable manner, in deciding hwo to limit FoE.
		- Parliament could have adopted much more intrusive alternative. Parliament could have invoked its criminal law power.
		- Total prohibition is struck down.
	+ McLaughlin stringent
		- Drew adverse inference from lack of disclosing alternatives
		- 997-998: As with context, care must be taken not to extend notion of deference too far. Cannot be carried to relieve gov of burden of demonstrating that limits are reasonable and justifiably.
		- She concludes its unreasonable and unjustified
			* 1. Gov didn’t share
			* 2. Something less than a total ban should have been considered.
				+ Suggests brand loyalty advertising

Result: Legislation was struck down. But a gov came back with a better legislation, accommodating charter values and rights. No lifestyle advertising allowed, increased health warning size on packages.

Facts: Government has conceded 2b infringement

Step 1: Pressing and substantial objective 🡪 leads to addiction and serious health problems

Step 2: Rational connection 🡪 Connection btw restricting advertising and achieving objective of reducing tobacco consumption and related health risks

Step 3: Dispute btw minority and majority opinion

* Majority: These provisions are not minimally impairing, and they should be severed and struck down. The government considered alternatives to a blanket prohibition, and withheld evidence of the other options. We need to see evidence that you’ve considered other less invasive measures and that you rejected them for a constitutionally acceptable reason.
	+ “the government presented no evidence in defence of total ban, no evidence comparing its effects to less invasive ban”. Government deprived the courts of results of study.
	+ If they would not show it, one must infer that study showed same salutary effects with less restrictive approach.
* Minority: When we’re thinking about the justifications for regulating speech, we should have in mind the type of speech we are dealing with

Question: What about government to regulate funding due to no belief in climate change.

Note hutterin minority cites RJR macdonald.

### Exam Prep

Example: Curfew laws

1. Does this activity fall within freedom of expression?
2. Purpose test
3. Restricting effects (Commentators may simplify the framework by eliminating 2 & 3)

## Freedom of Speech: Hate Speech

* Canada has criminal laws that regulate hate speech s 319(2)
	+ Everyone who willfully promotes hatred against any identifiable group is guilty of an offence
* Defences:
	+ Establishes statements were true
	+ If in good faith, person attempted to establish argument an opinion on religious subject or subject based in belief on religious text
	+ If statement was relevant to public interest, for public benefit
	+ If, in good faith, he intended to point out for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada

Is it necessary to criminalize this type of speech? Does this go to far?

#### R v Keegstra 1990 SCC p 1018 [Wilful promotion of hatred crime infringes 2b, but is justified. Strong dissent]

* Same themes as Irwin toy ie. Core/peripheral speech

Facts: Highschool teacher charged with unlawfully promoting hatred against identifiable group by communicating anti-Semetic statements to his students. He argued that Code unjustifiably infringed his FoE.

Issue: Does it infringe FoE? Is it Justifiable?

Decision: Infringes and is justifiable.

Reason:

* Purpose of code: need to prevent dissemination of hate propaganda.
* Test from *Irwin toy*
	+ Step 1: Communications which willfully promote hatred against an identifiable group without doubt convey a meaning and are intended to do so
	+ Step 2: Prohibition aims directly at words, that have as their content and objective, the promotion of racial/religious hatred. Code s 319(2) seeks to prevent the communication of expression
	+ Therefore: S 219(2) constitutes infringement
		- Note: excluded from charter protection is threats of violence and acts of violence
* Section 1 Analysis
	+ Objective: MET
		- Whether the amount of hate propaganda in Canada causes sufficient harm to justify leg. intervention?
			* Increased immigration/economic difficulty = ratially motivated incidents
		- Presence is sufficiently pressing and substantial to warrant concern
			* Harm #1: done to members of target group causing grave psychological consequence
			* Harm #2: Influence upon society at large
			* Consistent with Canada’s international human rights values
			* SS 15 + 27 of charter = strong commitment to value of equality/multiculturalism
	+ Proportionality
		- Intro
			* Not all expression is equally crucial.
			* Truth: Statements intended to promote hatred unlikely to lead to better world in quest for truth = misguided
				+ “Its equally destructive of free expression of values, to treat all expression as equally crucial to the core. At the core is the need to ensure that truth and common good are attained. In some situations, speech can obstruct or be a detriment to the search for truth. Little chance that hate statements are true, or that a vision to a better society would. Bottom line: The limitations are easier to justify under s 1. “
			* Self fulfillment: self-autonomy stems from one’s ability to articulate and nurture identity derived from membership with cultural/religious group
			* Political: suppression of hate propaganda muzzles participation of few individuals in democratic process, but degree of limitation is not substantial. Hate propaganda argues for a subverted undemocratic process
		- Rational connection: MET
			* Suppression of hate propaganda clearly reduces harm to identifiable groups
			* BUT: Criticism
				+ McLachlin J: brings hater mongers media attention, see themselves as martyrs and may generate sympathy from community, public may view suppression of gov as suspicious
			* Hate trials are methods by which good values are emphasized.
		- Minimal impairment: MET
			* Critics claim legislation is overbroad and has effect of criminalizing more than hate speech, and leads to censorship
			* Pros: does not criminalize private conversations, also requirement for MR of WILFUL promotion
			* Hatred must be defined in context in which it is found.
				+ Hatred connotes intense and extreme nature. Predicated on destruction. Thrives on insensitivity. Due to this extreme definition of hate, less overbroad
			* Terms of offence do not unduly restrict 2 b, indicate it has limits which act as safeguards to ensure capture only expressive activity, attack only harm at which prohibition is targeted
			* Alternative methods:
				+ Criminal sanction not necessary – could use human rights tribunals
				+ But s 1 does not force gov to rely upon least intrusive mode. If that measure is not redundant, and further objective better than alternative = it is proportional
		- Deleterious nature does not outweigh advantages gained from the limitation of 2b since hate promotion is very far away from core

McLachlin: Dissenting

* Agrees it infringes 2b. Agrees with first step of toy that goals of protecting social harmony and individual dignity are of substantial nature
* Proportionality
	+ Rational Connection: Tenuous, not strong + evident
		- Given the actual effect of legislation, does a rational connection exist?
		- S 319(2) may have chilling effect, but not clear it provides effective method to curb hatemongers
			* May promote cause 🡪
			* Brings hater mongers media attention, see themselves as martyrs and may generate sympathy from community, public may view suppression of gov as suspicious
	+ Minimal impairment
		- Overbroad: difficulty in interpreting “hatred”
		- Majority says MR of Wilful limits it. But Mclachlin J argues that it will still allow those who promote hatred for non-nefarious reasons to be convicted
		- Case law shows “hate speech” under s 319 covers a lot of speech
		- Danger that legislation may have chilling effect on legit activities important to society by subjecting innocent persons to constraints born of out fear of being criminalized
	+ Importance of Rights vs. Benefits conferred
		- Cons
			* Limitation of FoE by s 319(2) applies to all public expression. Invokes limitation on all 2b which charter intends to protect
			* Infringement is criminally liable
		- Benefit
			* Underlying objectives are worthy nature
			* Not clear that legislation has opposite effect (publicity)
			* Difficult to see how 319(2) fosters goals fo social harmony + individual dignity
* Benefits are outweighed by deleterious effects
* Limit on expression cannot be justified

Notes: p 1035

* *Mugesara*: court must take into account character of audience and social/historical context of speech to decide if it is willfully promoting hatred
* *Taylor v Human Rights*: Human rights leg prohibit repeated telephone messages spreading hate. Court held this was reasonable and demonstrably justifiable. (Mclachlin dissented)

#### Saskatchewan v Whatcott 2013 SCC [GOOD REVISION CASE FOR FINAL – CAN case in light of doctrine of s 2b]

Facts: distributing pamphlets warning people about sodomites in the public schools.

Prosecuted under Saskatchewan human rights code (no prospect of jail).

Whether or not section 14(1)(b) is constitutional:

SCC strikes down “ridicules, belittles, or otherwise affronts the dignity” bc too broad

GOOD CASE FOR REVIEW! Very recent decision. Gives the framework for dealing with FoE issues.

# Section 7: Life, Liberty and Security of the Person

Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

When section 7 first interpreted, public read into 2 rights = Theory rejected

* 1) Everyone has the right to life, liberty and security of the person and the 2) right not to be deprived thereof except in accordance with the principles of fundamental justice.
* No! you read it as a whole
* SO: the right to life, liberty and security of the person CAN Be limited/ interfered with 🡪 provided that limit is in accordance with principles of fundamental justice.
	+ Second half seems to import justifiably limitations, which are already included in section 1
	+ Issue of redundancy has come to the floor recently
* Infringement occurs when: Limitation of life, liberty and security of the person that is NOT in accordance with PFJs (GO to S 1 Justification on Exam)
* OR: Limitation of life, liberty and security of the person that IS in accordance with PFJs (then see if this is justified under s 1)

|  |  |  |  |
| --- | --- | --- | --- |
| **Principles of Fundamental Justice**  | Right to Life | Right to Liberty | Right to Security of the person |
| * Definition purposely left open ended, cold definition does not exist
* Cases present illustration of things that offend principles of fundamental justice
* **“Basic Tenets of the Legal System**” (*Reference re Motor*)
* Includes: presumption of innocence (*Reference re Motor*)
* Cannot be so broad they amount to vague generalizations. Must be identifiable with precision, applied to situations to yield understandable result, must be legal principles (*Rodriguez*)
* PFJ Must be qualified in LLS, can’t be same as LLS(*Rodriguez*)
* Reasonable people must regard it as vital to our societal notion of justice (*Rodriguez*)
* Overbreadth: deprives rights more than necessary (*PHS*)
* Gross Disproportionality: deprivation of a right is so extreme that is outweighs gov interest (*PHS*)
 | More narrow than Liberty🡪 State action that puts your life interest in peril🡪 Failure or refusal to give you access to timely med treatment🡪 Deporting to country that is likely to torture you or subject you to death penalty🡪Must endanger life of someone | Past: Liberty of contract, economic relationshipsPhysical liberty ie. Imprisonment, house arrest- Constraint on location of home 🡪 state can’t tell you where to live (*Godbout*)- Woman’s life choices to abort (*Morgentaler*)(Right to property expressly excluded)- Right to make fundamental choices, w/o interference from state (*Morgentaler*) | * State interference with bodily integrity and serious state-imposed psychological stress, at least in crim law context, constitutes breach of security of the person (*Morgentaler*)
* Serious mental stress
 |
| When Is PFJ Offended? |
| * A defence that is illusory: offends basic tenet of legal traditions (*Morgentaler*)
* Where deprivation of right has nothing to enhance state interest = breach of PFJ made out, since individual’s rights deprived absent valid purpose (*Rodriguez*)
* A legislative scheme that limits a right, to deal with her body as she chooses, arbitrarily is contrary to PFJ (Dissent: *Rodriguez*)
 |

#### Reference re Section 94(2) of the Motor Vehicle Act (BC) 1985 SCC p 1161 [Use Purposive approach, Reject narrow interpretation of PFJ; fundamental justice ≠ natural justice; imprisonment = deprivation of liberty s 7; PFJ = basic tenets of legal system]

* Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy
* Open-minded approach to determining meaning of “principles of fundamental justice”
* Principles of Fundamental Justice
	+ Purposive analysis, ascertain the purpose of s 7 and the “interest it was meant to protect” (R v Big M Drug Mart Ltd)
		- = The right not to be deprived thereof except in accordance with principles of fundamental justice
		- In states: PFJ = right to substantive due process of law (the court identifying a substantive value ie. freedom of contract, and reading it into the due process law)
		- In Canada, SCC rejects evidence of original intent, which wanted PFJ to mean solely procedural due process
			* Framers wanted to avoid substantive due process
		- It IS NOT simply a procedural right.
			* Should be interpreted broadly so it’s wider than process/fair hearing (right to notice, right to disclosure, right to court hearing).
	+ Why did they reject narrow definition? (Lamer J)
		- Purposive analysis (*Hunter Southam* Principle: purpose of charter is to guarantee rights) More narrow 🡪 more likely to limit rights
		- Natural Justice = Procedural due process
			* But they used term Fundamental justice 🡪 not synonymous with natural justice
			* To do so would strip these rights of their content, inconsistent w/ affirmative language
		- **Found in Basic Tenets of the Legal system. Does not lie in realm of general public policy, but in domain of judiciary as guardian of justice system**
		- Must understand s 7 in context of other rights included in this section of charter. Living tree approach, going beyond original intent, is acceptable
	+ What is PFJ:
		- **Due Process + Basic Tenets of the legal system**
			* PFJ are found in basic tents of our legal system. Basic tenets: **Long standing tradition recognized by our courts**
			* Could be referencing unwritten principles
		- Ie. Includes presumption of innocence
* Decision: Absolute liability offended fundamental justice, innocent should not be punished. Not justified under s 1. The alternative of a statute that imposed strict liability coupled with defence of due diligence = reasonable

### Section 7 Test

1) Is there a *prima facie* violation of life, liberty, or security of the person?

2) Is the deprivation in accordance with the principles of fundamental justice?

* + What are the pfj?
		- must be a legal principle
		- reasonable people must regard it as vital to our societal notion of justice (social consensus);
		- capable of being identified with precision and applied in a manner that yields predictable results (i.e. not unduly vague)

### Test for PFJ from Canadian Foundation for Children, Youth and the Law v Canada (AG) 2004 SCC

Note: This is from Hallsbury

(1) The principle must be a legal principle as compared to one pertaining to a more general public policy context;

(2) There must be a broad consensus that the principle is fundamental to our societally recognized conception of justice;

(3) The principle must be subject to precise identification and predictable application

## Section 7 and Bodily Integrity

* Imprisonment constitutes a deprivation of liberty s 7
* Some laws also threaten interest associated with integrity of human body in addition to or in absence of threat of liberty by imprisonment

#### R v Morgentaler 1988 p 1165 [State interference with bodily integrity + serious state imposed psychological stress breaches security of person; Defence that is illusory offends PFJ]

Facts: Criminal offence for anyone who took steps to cause abortion = indictable offence, liable for imprisonment. Except if you have an abortion in a credited hospital, after being accepted by doctors on 3-board committee as abortion being necessary to the life of the woman.

Issue: Does this infringe s 7?

Decision: Falls under s 7, Infringes PFJ, not justified by s 1

Reasons: (Dickson CJC)

* Security of the Person
	+ CL: any med procedure w/o consent = assault
	+ Charter: elevated to status of constitutional norm
	+ If the state does interfere with security of the person, charter requires such interference to conform with principles of fundamental justice
	+ Definition
		- A: explicit right to control ones’ body and make fundamental decisions about one’s life
		- Crown: circumscribed interest, relates to concept of physical control, simply protecting individuals’ interest in his bodily integrity
	+ Conclusion: **state interference with bodily integrity** and **serious state-imposed psychological stress**, at least in crim law context, constitutes breach of security of the person
	+ BUT: parliament can do so, as long as it conforms with principles of FJ
	+ Evidence shows that Code byd is a violation of security of the person of thousands of CDN women who have made difficult decision to abort
* Step 1: Does Prohibition affect s7: bodily integrity? Yes. As a result, must comport with principles of FJ
	+ 1) Physically + emotionally taxing, woman told she cannot submit to safe medical procedure unless he meets criteria
	+ 2) Indecision of knowing whether abortion will be granted = emotional stress
	+ 3) Forcing woman to carry fetus to term = profound interference
	+ 5) Delay in finding if they are accepted for abortion, may make abortion impossible/dangerous
	+ 6) Harms psychological integrity of woman seeking abortions
* Step 2: Is infringement accomplished in accordance with principles of FJ, thereby saving the provision of the code?
	+ Does not conform with PFJ because DEFENCE IS ILLUSORY. Exists in name only
		- Method to get defence has significant delays
		- No practical implementation
		- Not every hospital offers this
		- Flaw in administrative system causes delay
		- Woman should not have to travel to hospitals that do perform abortions
		- Health had varying interpretations 🡪 fact that this certificate was not granted according to strict standard = access to defence is arbitrary, random
		- Furthermore, provincial legislatures can implement MORE restrictions.
	+ Deprivation of security of the person is not in accordance with second clause of s 7
* Step 3: Is it justified under s 1? (ON EXAM do s 1 analysis, unless told not too)
	+ Fails on proportionality: procedures impair s 7 far more than necessary through pain of late abortion due to delays
	+ Effects on limitation upon s 7 are not proportionate to objective sought to be achieved 🡪 procedures establish actually defeat the objective designed to protect life/health of women; admin structures too cumbersome

Beetz J: concurring

* Pregnant woman’s person cannot be said to be secure if life /health is in danger, and she is faced with rule of crim law which precludes her from attaining effective/timely medical treatment
* If rule of criminal law prevents person from getting med treatment when life in danger = state has intervened and affects s 7
* Note: s 7 cannot simply be invoked because pregnancy amounts to medically dangerous condition.
* Agrees that there are procedural delays associated with committee create burden of risks
	+ These **delays undermine her security of the person and violate PFJ**
	+ It is this **state creation of an additional risk** that would be likely to endanger her health, **including psychological trauma**
* Requirement of abortions to be performed in hospitals, the committee organization, an exclusion of doctors who performed therapeutic abortions = violated principles of FJ and could not be saved under s 1

Wilson J: Concurring (but sees problem much fundamentally, above are leaving door open for Parliament to tinker with process. She says, even if you do that, still offends s 7)

* Can a pregnant woman be compelled by law to carry a foetus to term?
* If she cannot by law be compelled to do so, a review of the procedure is pointless
* Right of Access
	+ What is meant by the right to liberty in context of abortion? Does it give pregnant woman control over decision affecting her own body? If not, does her right to security of person give her that control?
	+ Right to liberty?
		- Liberty tied to concept of human dignity
		- **Liberty grants individual a degree of autonomy in making decisions of fundamental personal importance, without interference from the state**
		- The right to reproduce or not to reproduce should be the womans, it is integral to her struggle to assert her dignity and worth as human being
		- Does Code violate this? YES
	+ Right to security of the person
		- Protect both physical and psychological integrity of individual
		- Asserts that the woman’s capacity to reproduce is not subject to her own control, it is a direct interference with her physical person
* These are not in accordance with FJ.
* Not a reasonable limit under s 1 because it took the decision away from the woman at ALL stages of pregnancy and was not sufficiently tailored to its objective

McIntyre J (La Forest Concurring) Dissent:

* A woman does not have a right to abortion
* Purpose of legislation is to interfere with individual priorities and aspirations
* A right to abortion cannot be implied in the Charter
* Interferes with integrity of person? No, mere anxiety + stress not enough. Need more than state-imposed stress or strain.

Note: in *Diagle v Tremblay 1989* SCC held that Foetus is not a human being under Quebec Charter, but did not say whether it counted under “everyone” in s 7.

#### Rodriguez v BC AG 1993 SCC p 1178 [PFJs are not broad generalizations, denial of ability to make a choice violates PFJ]

Facts: Rodriguez terminally ill with Lou Gherig’s disease. Sought declaration that she was entitled to have assistance in committing suicide. Assisting suicide is crime s 241(b).

Issue: Whether s 241(b) infringes s 7, by inhibiting A in controlling timing and manner of her death.

Decision: Section does interfere on security + Liberty interest, but resulting deprivation is not contrary to PFJ.

Reason: (Sopinka J + 4) (More Security)

* A’s application is based on
	+ 1) Right to live her remaining life with inherent dignity of human person (S + L)
	+ 2) Right to control what happens to her body while she is living (S + L)
	+ 3) Right to be free from governmental interference in making fundamental personal decisions (liberty)
* J: Merits the argument: security of the person, by its nature, cannot encompass a right to take action that will end one’s life as security of the person is intrinsically concerned with well-being of living person
	+ In respecting the intrinsic value of human life and inherent dignity – does the constitution incorporate a right to terminate one’s own life in any circumstances?
* Sanctity of life: excludes freedom of choice in self-infliction of death
* *Morgentaler*: notion of personal autonomy involving control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress
* *Reference re ss 193 195 of Code*: Section 7 is implicated when state restricts individual’s control over physical or mental integrity
* **Step 1: Does the prohibition affect s 7?**
	+ **Personal autonomy, the respect to right to make choices concerning one’s own body, control over physical/psychological integrity, human dignity = encompassed by SoP.**
		- Choice argument: Echoes Wilson in *Morgentaler*
	+ S 241 (b) deprives A of autonomy over her person, causes her physical pain and psychological stress.
* Step 2: Is this deprivation contrary to PFJ?
	+ s 241(b) is valid and desirable which fulfills govs objectives of preserving life and protecting vulnerable
	+ Is it overbroad – should there be an exclusion to those in shoes of A?
	+ PFJ: cannot be so broad they amount to vague generalizations. Must be identifiable with precision, applied to situations to yield understandable result, must be legal principles
	+ Must look to the rationale behind the practice and the principles which underlie it
	+ In arriving at these principles, must balance interest of state + individual
		- Where deprivation of right has nothing to enhance state interest = breach of PFJ made out, since individual’s rights deprived absent valid purpose
	+ Purpose: to protect vulnerable who might be induced in moments of weakness to commit suicide. Grounded in the state interest in protecting lift and reflects policy of state that human life should not be depreciated by allowing life to be taken
		- Part of fundamental conception of sanctity of human life
		- What are the rationales behind the few exceptions where assisted suicide is legal?
			* A says distinction btw active/passive forms of treatment = arbitrary
				+ Withdrawing life support is done w/ same knowledge death will ensue
				+ Some say: natural vs. artificial forces = distinction
				+ At CL: doctor must discontinue treatment when patient withdraws consent, even if that may lead to death
				+ Intention of palliative case is to ease pain, intention of assisted suicide is to cause death
	+ Human life must be protected and we cannot undermine the institutions that protect it
	+ TO permit physical to lawfully take life sends sign that state approves of suicide
	+ No PFJ violated

Dissent (McLachlin J + 1): (More Liberty)

* Denial to A’s choice cannot be justified
* Parliament has put in **scheme which does not bar suicide BUT criminalizes the act of assisting suicide: The effect is to deny people of choice of ending their lives solely because they are physically unable to do so**
* Step 1: Does this deprive s 7?
	+ Deprives A of Security of the person, the right ot make decisions concerning her own body, affecting only her own body
	+ Section 7 mandates that if the state limits what people do with their bodies, state must do so in a way which does not violate PFJ
* Step 2: Offends PFJ?
	+ Offends PFJ
	+ **If a legislative scheme limits the right of a person to deal with her body as she chooses violate the PFJ if the limit** is **arbitrary**
		- Ie. Bears no relation to, or is inconsistent with, the objective that lies behind the legislation, or is inconsistent with the objective that lies behind the legislation
	+ Does the fact that a legal regime which regulates suicide denies A the right to commit suicide because of her physical incapacity, render the scheme arbitrary?
		- Is it fair that she is denied the choice to end her life, because it may open floodgates where vulnerable people will end theirs?
		- Does not accord with PFJ that A is disallowed what is available to others merely because they are physically able, or because she bears the burden where people in the future might not get consent for assisted suicide
* Step 3: Cannot be saved under s 1
	+ Objective does not outweigh serious infringement of individual liberties
	+ Distinction btw suicide and assisted suicide is arbitrary
	+ Justification embraces 2 concerns:
		- Fear that unless assisted suicide is prohibited, it will be used as cloak for murder
			* BUT Sufficient remedy in offences of culpable homicide
		- Even where consent is given, it may not be voluntary ie. While in depression
			* BUT sufficient remedy in offence against counseling suicide
* You could tailor prohibition to enable A to have her choice, but still protect vulnerable people

**Class Notes:**

Liberty:

* State interference with fundamental person choices (*Morgentaler*)
* Mere prospect of criminal liability

Security:

* State interference with bodily integrity (*Morgentaler*)
* Serious state imposed psychological stress (*Morgentaler*)
	+ She’s put in place of making psychological stressful decision, she either relinquishing her decision regarding the manner and timing of her death, or asks her doctor who may face criminal sanction.
	+ Palliative cannot address all forms of suffering, ie. psychological suffering due to lack of fulfillment of life, burden on family etc.= Loss of dignity

Life:

* It might persuade her to commit suicide prematurely, while she is still physically able. Instead of allowing her to live a little longer, and allowing assisted suicide.

Step 1) Does it engage s 7 interest? How?

Step 2) Is it contrary to PFJ

* Compare the objective of the act with the effect of the act, to see if the scheme is arbitrary

#### Chaoulli v Quebec (AG) 2005 SCC p 1205 [PFJ: laws should not be arbitrary, must show real connection and that limitation is necessary to achieving objective of universal health care]

Statutory prohibition on private health insurance for health care services available in the public system. Facts: A’s: Deprived them of access to services that do not come with waiting times inherent in the public system. Violation of s 7.

* Note: Judgement based on Quebec Charter “every human being has a right to life, and to personal security, inviolability and freedom.” Does not have qualifications that s 7 of charter has, so quebec is more broad. Use his judgement for general characterization of the issue. J used Oakes test, although justification clause in Quebec charter is different.

Issue: Generally: is the prohibition justified by the need to preserve the integrity of the plan? Specifically: Whether Quebeckers who are prepared to spend money to get access to health care, that is not accessible in the public sector due to waiting lists, may be validly prevented from doing so by the state

Decision: Prohibition infringes right to personal inviolability and is not justified.

Reasons: (Majority: Deschmaps J)

* Legislative Context:
	+ Canada Health Act does not prohibit private health care services, nor does it provide benchmarks for length of waiting times that might be regarded as consistent w/ principles it lays down, and the principle of real accessibility
* Infringement of Rights protected by S 1 of Quebec Charter
	+ Waiting lists are real and intentional – they are a way of rationing
	+ The right to life is affected by the delays that are necessary result of waiting lists
	+ Patients should not have to go outside Quebec to get health care
	+ TJ did not err in finding that the prohibition on insurance for health care already insured by state constitutes an infringement of the right to life and security
* Justification for prohibition
	+ Purpose of Statute
		- Promote health care fo highest quality for all Quebeckers, regardless of their ability to pay
		- Quality of care and equality of access are two inseperable objectives
		- Intention of Legislature to limit provision of private services outside the public plan
		- Preserving public plan is pressing and substantial purpose
	+ Proportionality
		- Rational Connection
			* Undeniable connection btw objective + measure. Public plan preserved because it has a quasi-monopoly
		- Minimal Impairment
			* Evidence that health care system would be jeopardized by human reactions to emergence of private system carries little weight
			* AG of Quebec failed to prove burden that total prohibition on private insurance met minimal impairment test
			* Because other Canadian provinces have allowed insurance for private practices, and this has not threatened public plan’s integrity = prohibition not necessary to guarantee integrity of public plan
		- Should the court show deference?
			* Court must show deference where evidence establishes that the gov has assigned proper weight to each of the competing interests
				+ Certain facts get greater deference:

Ie. Prospective nature of decision, Impact on public finances, competing interests, difficulty of presenting scientific evidence

* + - * Quebec has failed to act for many years while situation deteriorates. They cannot choose to do nothing in face of violation. Gov has not given reasons for its failure to act Inertia cannot be used as an argument to justify deference.

McLachlin CJC and Major J (Bastarache Concurring): Agree with Deschamps conclusion as to invalidity of impugned provisions in respect of Charter.

* As ask: because delays in public system place health and security at risk, they should be allowed to take out insurance to permit them to access private services
* Health care scheme must comply with the charter
* Act does not prohibit private health services 🡪 but effect: limit access to private health services by removing ability to contract for private health care insurance to cover the same services covered by public insurance
* Where a law adversely affects life, liberty or security of the person, it must conform to PFJ. This law fails to conform.
* Step 1: Whether the prohibition on insurance for private medical care deprives individuals of their life, liberty, security of the person protected by s 7 of the Charter?
	+ Delays cause physical and psychological consequences of waiting times on patients = breach of security of the person
	+ Suffering is serious, failure of timing may risk life
* Step 2: Contrary to PFJ? YES
	+ 1) **PFJ = laws should not be arbitrary (Malmo-Levine, Rodriguez)**
		- Limit must have theoretical and real connection on the facts
		- “bears no relation to, or is inconsistent with, the objective that lies behind it”
		- More serious the impingement, more clear the connection must be
	+ 2) Is the prohibition on private medical insurance arbitrary?
		- Onus in showing lack of theoretical/**real connection** rests on claimant
		- A argues: Many western societies do not impose monopoly on delivery of health care and successfully deliver citizens superior and affordable services across Canada
			* Suggests: **Monopoly is not necessary** or even related to provision of quality public health care
		- Must look to evidence, rather than assumptions
		- R unsuccessfully argues: monopoly necessary to uphold integrity of public health system, thought it would divert doctors into private system 🡪 no evidence shown only “common sense” assumptions
	+ Infringes in an arbitrary manner, not in accordance with PFJ
* Step 3: Section 1 of Charter?
	+ Rational Connection: not made out. Can an arbitrary provision ever meet rational connection test? Unlikely
	+ Proportionality: denial of access to timely medical care is not proportionate to beneficial effects of prohibition on private insurance to health system as a whole.
		- Not minimally impairing
	+ Benefits do not outweigh deleterious effects

Dissent: Binnie and LeBell JJ (Fish J concurring)

* Should not be resolved as matter of law by judges
* TJ found no LEGAL basis to intervene
* Disagreement is based on aspects of social policy
* PFJ:
	+ Revisit Reference Re motor Vehicle Act: basic tenets of legal system
	+ **Reiterate Justice Sopinka’s qualifications in *Rodriguez***
		- **Must be legal principle**
		- **Reasonable person must regard it as vital**
		- **Must be applied in a manner that yields predictable result**
* McLachlin has gone too far 🡪 She’s created charter right to health care w/in a reasonable amount of time!
* Importing freedom of contract that framers expliticely were attempting to avoid
* Do not agree with expansion of arbitrary to include “unnecessary” to government’s purpose

#### Canada v PHS Community Services Society, 2011 SCC (Supp) [PFJ: Law cannot be Arbitrariness and Grossly Disproportionate]

Facts: Insite = safe injection facility in DTEastside Vancouver. 2008 Fed gov failed to extend Insite’s exemption from operation of Controlled Drgus and Substances Act. Insite bring action that CDSA was inapplicable and application result in violation of s7, or in refusing to grant CDSA exemption = violate C’s right. BCCA held application of CDSA to Insite would violate Charter and CDSA was inapplicable to Insite under doctrine of interjurisdictional immunity.

Issue: Whether Insite is exempt from fed law, because Insite is a health facility w/in exclusive jurisdiction of the Province, or because application of criminal law would violate Charter.

Decision:

Reasons:

**Division of Powers:** Court held that CDSA was intra vires and did apply to Insite under doctrine of Interjurisdictional Immunity

**Charter Claims:**

* S 4(1) and S 5(1) prohibiting possession and trafficking, are invalid bc they limit s 7 and are not in accordance with PFJ
	+ **Step 1: whether SS limits right of claimants to s 7, by engaging or depriving s 7**
		- **S 4(1) Possession: YES, Engages**
			* Prohibition of possession engages liberty interest of staff bc it exposes them to threat of being imprisoned for carrying out their duties
			* Their minimal client involvement (ie. welcoming drugs onto premises) makes them liable to imprisonment = liberty interest (*Malmo Levine*)
			* Threat to liberty of staff impacts s 7 rights of clients who seek health services
			* Without exemption: deprives clients of lifesaving medical care, engaging right to life + security of the person, amounts to serious state imposed psychological stress (*Morgentaler*)
			* To prohibit the possession of drugs ANYWHERE engages liberty (but is justified), to prohibit possession at Insite, engages rights to life and security too
			* Limits s 7 of staff and clients
		- **S 5(1) Trafficking: NO, does not engage**
			* Canada concedes that trafficking charges would not lie against staff of Insite for their legitimate activities on the premises
		- Canada argues that negative health risks is not because Insite is unable to provide them, but drug user’s decision to use illegal drugs
			* 1) Personal choice, not the law, is cause of death and disease Insite prevents
				+ BUT: addiction is an illness
			* 2) Moral: those who commit crimes should be made to suffer consequences
				+ BUT: whether a law limits a charter right is a matter of purpose and effect, not whether the law is RIGHT or Wrong. Morality of the activity the law regulates is irrelevant at first stage.
			* 3) Government Policy: Decision to allow supervised injection is policy question, immune from charter review
				+ BUT: policy not relevant at first stage. Relevant at s 1 justification.
	+ **Step 2: whether limitation is in accordance with PFJ (Chaoulli) Yes. Accords.**
		- Insite Argues: Arbitrary, Disproportionate in effects and Overbroad
			* Scheme of CDSA has 2 purposes:
				+ Protection of public health and maintenance of public safety

Public safety achieved by prohibition on possession and trafficking in illegal substances

* + - * Provides Minister of health with broad discretion to grant exemptions from application of the Act for medical/scientific purposes/public interest
				+ BECAUSE of power to grant exemption = not violate s 7
* **S 7 rights infringed by Minister’s refusal to extend exemption for Insite from application of fed drug laws?**
	+ Should court consider this issue? Yes, required by justice to do so bc s 7 rights at stake
	+ Discretion vested in Minister of Health is not absolute -🡪 must conform with Charter (*Suresh*)
	+ Has minister made a decision?
		- Made decision to refuse exemption
	+ **Step 1: Is s 7 engaged by minister’s decision?**
		- Application of s 4(1) engages staff liberty interests, and clients security + life interests
		- Rejection of exemption therefore engages s 7
	+ **Step 2: Does the Minister’s refusal to grant an exemption to Insite accord with PFJ?**
		- Minister’s refusal to grant Insite an exemption was arbitrary and grossly disproportionate in its effects, Not in accordance with PFJ
			* **Arbitrariness**
				+ Step 1: Identify law’s objectives

Decision of minister must target purpose of act

* + - * + Step 2: Identify relationship btw state interest and impugned law, or impugned decision of minister

Claimants must establish that limit imposed by law is not in accordance with PFJ

TJ found: traditional crim law not help to reduce drug use in DTES, risk of injection drug users of death/disease is reduced under supervision; presence of Insite did not contribute to increased crime rates or relapse rates

* + - * + Step 3: Is it arbitrary?

Maclachlin: whether the limit was necessary to further state objective

Binnie: a deprivation of a right bears no relation to/inconsistent with, the state interest that lies behind the legislation

Don’t need to choose one bc meets both: ON EXAM, must demonstrate that government limit bears no relation to more general state objective

* + - * **Gross Disproportionality**
				+ Is the deprivation so extreme as to be *per se* disproportionate to any government interest
				+ State actions/legislative responses that are so extreme as to be disproportionate to nay legit government interests (Malmo)
				+ Insite saves lives. No discernable negative impact on public safety/health objectives
				+ Effect of denying services is GD to any benefit that Canada might derive from a uniform stance on possession of narcotics
			* **Overbreadth**
				+ Does the law deprive s 7 more than necessary? Need not consider this aspect because above 2 are met
* Section 1?
	+ No s 1 could succeed.
	+ Goals of CDSA are maintenance and promotion of public health and safety.
	+ Minister’s decision to refuse exemption bears no relation to these objectives, therefore cannot justify infringement.
	+ In administering criminal law, state cannot deprive s 7, in manner that violates PFJ
* Remedy:
	+ Tell Minister to reconsider exemption? = inadequate bc infringement is serious, theatens health and lives of claimants.
		- Could result in new litigation
	+ In these special circumstances, an order in nature of Mandamus is warranted
		- Order minister to grant exemption to insite under s 56 of the CDSA

# Section 15: Equality Rights

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

🡪 Sign to CDN courts that we want to give provinces/parliament to introduce affirmative action programs (ie. programs for disadvatanged)

* Equality: a normative commitment to equal treatment in the administration and enforcement of the law (Constitutional Theorist AV Dicey)

## Section 15 Test

1) Does the law create a distinction based on an enumerated or analogous ground? (*Andrews*)

2) Does s. 15(2) preclude the claim? (*Kapp*)

* Does the program have an ameliorative or remedial purpose?
* Does the program target a disadvantaged individual or group?

3) Does the distinction perpetuate a disadvantage by prejudice or stereotyping? (*Andrews*)

#### WS Tarnopolsky “The Equality Rights” 1982 p 1232 [UK: equality = rule of law]

* Equality Before the Law in UK Const. Law
	+ “Equality before the law” = similar to the Rule of Law
		- The equal subjection of all classes to the ordinary law of land
		- Rule of law excludes exemptions of officials or others
	+ Modern: “Equality of state and individual before law”
		- Ie. *Roncarelli v Duplessis* 1959

#### WS Tarnopolsky “The Equality Rights” 1983 p 1233 [CDN: Bill of Rights rejects Egalitarian concept]

* American Bill of Rights: did not include equal protection clause. Adopted after civil war. Purpose: extend same rights of white people to slaves.
* From Section 1 of the Bill of Rights to Section 15 of Charter
	+ Bill of Rights
		- Only successful case was *Regina v Drybones* 1970
		- *Lavell*: Rejection of egalitarian concept
		- *Bliss*: Adopted “equal subjection of all classes to ordinary law administered by ordinary courts”

#### D. Gibson 1990 [women groups lobby to make equality guarantee more effective]

## Early Interpretation of S 15: The Andrews Test

Original Andrews Test: (1989)

1. **A distinction in treatment**
2. **That results in the imposition of a burden or denial of a benefit**
3. **On the basis of an expressly prohibited ground or one analogous thereto**

#### Andrews v Law Society of BC 1989 p 1237 [3 step test for breach of equality, first major case on s 15]

Facts: A (British) brought action that Canadian citizenship requirement for admission to law society of BC violated s 15 of the charter.

Issue: Does the citizenship requirement for entry into legal profession contravene s 15(1)?

Decision: Citizenship requirement violated s 15

Reasons (McIntyre) (dissenting, but court unanimous on this point)

* A claiming equal benefit of the law: a license to practice law is a benefit conferred by the state.
* S 15(1) = every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination
* Concerned with application of the law
* The unattainable ideal should be that a law express to bind all should not, bc of irrelevant personal differences, have a more burdensome/less beneficial impact on one than another
* **“Similarly situated test” cannot be the test. Not enough to say are all women being treat the same, are all Jews being treated the same. Consideration must be given to content of law, its purpose, impact on those it applies, and those it excludes. Must understand this distribution against the backdrop of political history.**
* No intent required as element of discrimination, it is the impact which is decisive
* **Enumerated/analogous ground** = race, national or ethnic origin, colour, religion, sex, age or mental or physical disability
	+ In case at hand: excludes A from practicing based on being not from Canada. Unable to get the benefit.
* Is distinction discriminatory, being imposed based on stereotype or prejudice?
	+ Gov argues that they want to make sure lawyers have taken Canadian oath, to uphold CDN institutions + laws, maybe we’re not satisfied with your commitment to upholding CDN rule of law
	+ Stereotype/prejudice: making assumption based on someone’s worth based on formal characteristics, rather than content of person
	+ Judges agree that citizenship should be treated as analogous grounds of discrimination
		- Citizenship, is beyond the control of the individual
		- Citizenship is generally irrelevant to the legitimate work of government and to assessment of an individual’s ability to perform or contribute to society

### Important Principles from Andrews

* Equality cannot be reduced to sameness of treatment, differences must sometimes be taken into account
	+ Laws that are facially neutral, may be discriminatory in impact
* Actual Effects of challenged law is the focus, not intention to discriminate
* Discriminatory law:
	+ McIntyre: one that in purpose or effect, attributes personal characteristics to an individual solely on basis of association with a group
	+ Wilson: law that produces or reinforces disadvantage of certain groups/ individuals
* Personal characteristic will be accepted as analogous ground if it shares the essential features of personal characteristics listed in s 15
	+ La Forest: those that are beyond the control of the individual
	+ Wilson/McIntyre: personal characteristics o groups lacking political power

## The Kapp Test

* Enables gov to pro-actively combat existing discrimination through affirmative action (Kapp)
	+ By definition is NOT discriminatory
* Section 15(2) is a defence by GOv
	+ If X claims Equality violation – gov can counter with s 15(2)

#### R v Kapp 2008 SCC p 1268 [Affirmative Action is not discriminatory: 2 stage test]

Facts: Rights given to Aboriginal tribe to fish certain area exclusively, used to help Abs get involved in commercial fishing. Non-Indian fishers protest.

CA: Overturned and convicted non-indian fisherman

Issue: Does special license that gives Abs first crack at limited resources, is that unconstitutional? A form of reverse discrimination?

Decision: Affirmative Action upheld, no violation on Non-Indian equality rights

Reasons:

* Aboriginal Fishing Strategy falls under s 15(2), but a breach as not been established because:
* Every difference in treatment btw individuals under law will not necessarily result in inequality and that identical treatment may frequently produce serious inequality (Andrews)
	+ Enumerated Grounds:
		- Whenever a law distributes burdens or benefits on grounds that draw lines based on the section 15(1) grounds.
			* Certain types of distinctions are going to attract judicial scrutiny
* **Andrews is the template**
* **Substantive equality recognizes: all human beings equally deserving of concern, respect and consideration”**
* **Purpose of 15(2): enabling govs to pro-actively combat discrimination**
* Certain gov programs have special protection
* Purpose: To ameliorate the conditions for Abs
	+ Support self-sufficiency, help negotiate re: aboriginal fishing claims
	+ Ameliorates situation of aboriginals – traditionally disadvantages socially/economically
* Giving special fishing privileges to Abs is **Rationally connected** to purpose
* Objective correlate to actual economic/social disadvantage
* **Test:**
	+ 1) Does law create a distinction based on an enumerated or analogous ground?
	+ 2) Does s 15(2) preclude the claim? Analyze s 15(2) on its PURPOSE
		- Gov must show that program is ameliorative or remedial (does not need to prove effects)
			* Show their **intent** was to improve lives of disadvantaged people
			* Do not need to prove that legislation achieves this objective, must simply be the main purpose
		- Gov must show that program targets disadvantaged individual
			* Disadvantaged individual? Look to enumerated grounds.
			* Groups identified by vulnerability, prejudice, and social negative characterization
	+ 3) Does the distinction perpetuate a disadvantage by prejudice or stereotyping?
		- Only when distinction leads to unacceptable treatment
		- Discrimination may be described as a distinction, whether intentional or not, based on grounds relating to personal characteristics, which has the effect of imposing burdens, not imposed upon others, or withholds access to opportunities available to other members of society

## Equality’s Three Steps: STEP 1

### Differential Treatment

* First Step of 15(1) analysis: determine whether the impugned gov action or inaction has produced differential treatment based on enumerated and analogous ground?
* Difference in treatment will be apparent **On the Face, but could also be facially neutral and result from EFFECTS**
* *Andrews, Law, Kapp*: discrimination can lie in the effects of a law

#### Eldridge v BC AG 1997 p 1280 [possible to establish claim of discrimination based on adverse effects of facially neutral benefit scheme]

Facts: Deaf seek declaration that failure to provide public funding for sign language interpreters when receiving medical services violates s 15 of charter. Hospitals decided what is a medically req’d benefit.

Issue: Whether failure to provide funding for sign language interpretation violated s 15?

Decision: Violation of s 15

Reasons:

* S 15: Serves 1) to express a commitment: to equal worth and human dignity and 2) instantiates a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society”
* Deaf persons = belong to enumerated group under s 15(1), **physically disabled**
* (Answers Step 3): History of disabled persons in Canada is one of exclusion and marginalization
* Commonly, laws of general impact that have a disparate impact on disabled
* Sopinka J observed that in case of disabled persons**, failure to take into account adverse effects of** generally applicable laws results in discrimination: the effect of the legislation denies someone the equal protection or equal benefit of the law
* Below Courts Held:
	+ Failure to ensure that they benefit equally from a service offered to everyone
	+ TJ and CA found on this basis, failure to provide sign language interpretation was not discriminatory
	+ Held that there was a categorical distinction btw state-imposed burdens and benefits, and that government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate
	+ Courts below found sign language interpretation is a discrete, non-medical ancillary service, and concluded that A were not denied a benefit available to hearing population
* Below Courts were wrong because:
	+ Deaf person must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system intended to make ability to pay irrelevant
	+ NOT ANCILLARY: It is the means by which deaf persons may receive the same quality of (BENEFIT) medical care as hearing population
	+ Once accepted that effect communication is an indispensible component of delivery of medical services, gov must ensure deaf persons can communicate effectively with health cre providers
* Conclusions
	+ It should be possible to establish claim of discrimination based on adverse effects of facially neutral benefit scheme
	+ S 15 makes no distinction btw laws that impose unequal burdens and those that deny equal benefits
	+ Failure to provide sign language interpretation = denies them of equal benefit of the law, discriminates them in comparison with hearing persons
* Justified?
	+ NO. Gov has not made a “reasonable accommodation” of the A’s disability
	+ The negative impact on deaf persons access to health care outweighs objective of limiting health care expenditures

### Enumerated Or Analogous Grounds

* Once a personal characteristic is recognized or rejected as an analogous ground, it will hold across all legal contexts 🡪 Followed (McLachlin)
* A NUMBER OF FACTORS can be used to determine Analogous Ground 🡪 Followed (LHD)

#### Corbiere v Canada 1999 SCC p 1300 [Once a ground is ground to be analogous, it is permanently enrolled as analgous for other cases; can expand enumerated grounds based on context]

Facts: S 77(1) of Indian Act required band members to be “ordinarily resident” on reserve to be eligible to vote in band elections. Non-resident band members challenge under s 15, bc residence is irrelevant personal characteristic on which to deprive them of voice. Court agreed that impugned provisions violated s 15, but defined “analogous grounds” doctrine differently.

Reasons:

McLachlin and Bastarache JJ

* Band members off-reserve has been generally disadvantaged. By depriving them of votes in band elections, you disenfranchise a group of people so that they no longer have a voice in decision important to them
* Agree that Aboriginality-residence constitutes ground of discrimination analogous to enumerated grounds, but comment on
	+ 1) the suggestion that the same ground may or may not be analogous depending on circumstances
	+ 2) criteria that identify an analogous ground
* Since enumerated grounds are only discriminators of suspect grounds of distinction 🡪 these grounds are not always discriminatory
	+ Same applies to grounds recognized as “analogous”
	+ Merely identifies a type of decision that is suspect bc it leads to discrimination and denial of substantive equality
* Therefore, a marker of discrimination does not change from case to case BC it Is not the ground that varies, but the determination of whether a distinction on the basis of constitutionally cognizable ground is *discriminatory*
	+ Ie. sex will always be a ground, but sex-based legislative distinctions may not always be disctiminatory
* If this were to occur, messes up 2nd and 3rd stage of test
	+ 2nd : Whether the distinction is on the basis of an enumerated or analogous ground
	+ 3rd: Whether that distinction, on the facts, affronts s 15.
	+ Must answer yes to both inquiries
* Notes on this new analogous ground of “Aboriginality residence”
	+ Canadians should not confuse reserve status with residence, their situation is unique and complex
	+ There’s not problem that this enumerated ground is limited to subset of Canadians, so is pregnancy. “Embedded” analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination
* **To determine Analogous Ground, defining feature is immutability🡪 Not followed**
* **Once a personal characteristic is recognized or rejected as an analogous ground, it will hold across all legal contexts 🡪 Followed**

LHD:

* **A NUMBER OF FACTORS can be used to determine Analogous Ground 🡪 Followed**
* Analogous ground shown by fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identify, personhood, or belonging
	+ Is characteristic immutable, difficult to change (Vriend)
	+ Is it defined by those lacking political power, disadvantaged, or vulnerable (Andrews)
	+ Must adapt to stereotyping, prejudice, or denials of human dignity specific to a certain group
* **Determining something is an analogous ground, varies from context to context, might be ground sometimes, sometimes not 🡪 not Followed**

### Not Analogous Grounds

* Employment status or occupation with respect to RCMP (Re Workers compensation Act) and health care workers (Delisle)
* Province of residence (Turpin)
* Persons charged with war crimes or crimes against humanity outside of Canada (*Finta*)
* Person bringing claims against the crown
* Marijuana users (*Malmo*)

## Equality’s Three Steps: STEP 3

### Appropriate Comparator Group

* S 15(1) Claimant must prove that the law either:
	+ Perpetuates Prejudice and Disadvantage
		- “When the law treats a historically disadvantaged group in a way that exacerbates the situation of the group” or
	+ Stereotypes
		- “When the law employs assumptions that do “not correspond to the actual circumstances and characteristics of the claimant” including where no previous history of disadvantage
* The analysis is Contextual, not formalistic
* The multiplicity of interests the legislation attempts to balance will also colour the discrimination analysis
* Focus on the inquiry is on the actual impact of the impugned law, taking full account of the social, political economic, historical forces concerning the group
* The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances
* All factors that are relevant to the analysis should be considered

#### Withler v Canada (supp) 2011 SCC [At Step 2: Must look at entire context, not simply at narrow comparator group]

Facts: Ps widows had federally supplementary Death benefits reduced bc age of husband at time of death. Legislation reducing benefits discriminates on basis of age, violating 15(1)

Issue: How an analysis under s 15(1) is to proceed where the impugned law is part of a wide-reaching leg. scheme of gov benefits?

Decision: Does not violate, appeal dismissed

Reasons:

* Purpose:
	+ For younger members: protect young spouse who does not have pension, or has limited pension funds
	+ For older members: assist spouse with cost of dead spouses’ last illness and death
		- Not intended to be a long-term income stream for spouses of older plan members
	+ Amount = 2x plan members salary at time of death/termination of employment
		- With reduction provisions based on plan member’s age, after 65, and -10% thereafter every year
* Step 1: Adverse distinction based on Enumerated or Analogous Ground
	+ Whether the pension schemes at issue deny a benefit to the C that others receive?
		- Yes. Age-related reduction = analogous ground (*Law*)
* Step 3: Substantive Inequality
	+ Whether reduction provisions reduce death benefit for beneficiaries of older members violates s 15(1) protection of substantive equality?
		- Having regard to relevant context, does impugned law perpetuate disadvantage or prejudice, or stereotypes of the claimant group?
	+ Context: TJ
		- Broader pension scheme
		- Designed to benefit number of groups
		- In cases involving a pension benefits program, contextual inquiry at the second step of s 15(1) will focus on purpose of the provision that is alleged to discriminate
			* Whom did leg intend to benefit and why?
			* Such programs are designed to benefit different groups, draw on factors such as age
			* Are lines drawn appropriately, considering circumstances of person impacted, objects of the scheme
			* Scheme must make distinctions
			* Claimants were better equipped than most CDNS
			* Claimants able to pay funeral/medical costs
		- Allocation of resource/leg policy goals considered
			* Age based rules effective in meeting needs of claimants and achieving goals for coverage/income
		- **Reduction Provisions, considered in relation to entire benefit plan, correspond to c’s needs and circumstances**
	+ CA was wrong because she narrowly conceived the comparator group, led her to the conclusion that there was discrimination. Comparator group is not just spouses who receive full benefits (ie. younger), must look at entire context, the entire plan and lifetime needs of beneficiaries.

#### M v H 1999 SCC p 1315 [Sexual orientation is analogous ground, “spouse” failure to include same-sex relationship = discrimination]

Facts: Sue for spousal support; but definition of spouse doesn’t recognize same sex relationship

Reasons: Cory J:

Appeal concerned with equal treatment of unmarried conjugal couples 🡪 nothing to do with marriage per se

Step 1: Differential Treatment: Yes, btw same sex and opposite sex relationships

* Same-sex couples are not able to launch a claim for spousal maintenance, while traditional couples are.

Step 2: Analogous Grounds: Yes, sexual orientation as an analogous ground (*Egan, Corbiere*)

Step 3: Discrimination?

* Comparator Group – Couples of opposite sex relationships who are not married
	+ A) Pre-existing disadvantage
		- Discriminated against historically
		- Stereotypes have been longstanding against same-sex relationships
	+ B) Correspondence
		- What is the benefit that the legislation is inferring upon people?
		- Distinction being made match purpose of the legislation
		- No reason why same sex ought to be excluded
	+ C) Ameliorative Purpose
		- Dissent: Gonthier J: Allegedly 🡪remedial purpose: aids women in opposite-sex relationships, and women in same-sex relationship do not face that same type of discrimination w/in the relationship
		- But: there are economic dependencies in all relationships that render one party particularly vulnerable
	+ D) Nature of Interest Affected
		- Nature of interest protected by s 29 of the Family Law Act is fundamental
		- Exclusion of same-sex partners promotes view that individuals in same-sex relationships are less worthy of recognition/protection
		- Implies they are incapable forming intimate relationships of economic interdependence as compared to opposite-sex couples, w.o regard to actual circumstances
		- Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships
* Dissent is anxious to prevent const. law from undermining opposite-sex definition of marriage
	+ Note: Court holds it is not their place. Left to legislature to rule on legality of marriage in *same sex reference*

Notes:

* Issue of Remedies: Court could have read in same-sex couples. Didn’t do that: declared invalidity to give legislature time to revise legislation in light of ruling
* Dissent divide on question of purpose behind spousal support scheme 🡪 disagree on second contextual factor in *law*: whether there is correspondence btw the actual needs of the circumstances of same-sex couples and their exclusion from the legislation

#### Gosselin v Quebec (AG) 2002 SCC p 1325 [Less social assistance for under 30 = valid incentive for them to enter labour force]

Facts: Regulations stipulate base amount of social assistance payable to ppl under 30 was 1/3 of that payable to those 30 and over. Those 30 and under could increase welfare payments by participating in educational/work expreince programs. 1989 age based discrimination removed. Gosselin brought class action on behalf of all those affected by old scheme (which was protected under Quebecs notwithstanding clause).

Issue: S 15 Claim?

Decision: Did not discriminate

Reasons:

* Law’s contextual factors to assess whether provisions discriminated on basis of age
* Government attempting to create incentives for younger ppl to enter labour force
* Dissent (LHD): Ms. Gosselin would have reasonable felt less valued, and less deserving of respect
* Dissent (Bastarachce): Distinction was made simply on basis of age, not need, opportunity or personal circumstances = offends human dignity
* Would these provision now be exempt as ameliorative (*kapp*)?
	+ Sl: no – because no pre-existing discrimination of young ppl. Its different. you are putting a burden on them, to push them in a certain direction, whereas kapp you were granting them a benefit

#### Canadian Foundation for Children v Canada AG 2004 SCC p 1326 [Allowing spanking is not discriminatory bc corresponds with age-based distinction and actual needs of children]

Facts: Spanking allowed by code s 43 on children by parents and teachers

Issue: discrimination on age?

Decision: Not discriminatory

Reasons: Mclauchlin:

* No violation of s15 bc correspondence btw age-based distinction and actual needs and circumstances of children
* Children need a safe environment, but must depend on parent for guidance and discipline
* S 43 represent Parliament’s attempt to accommodate these needs
* Criminalization of such conduct risks ruining lives and breaking up families, a burden borne by the children
* Dissent in part: Binnie J: Violation of s 15(1): denying children protection of crim law of force that would be assault if used against an adult was disrespectful to child’s dignity and turned child into second-class citizen
	+ Protection of physical integrity = fundamental principle
	+ S 43 is reasonable limit, proportionate measure directed at limiting intrusion of Code into family life
* Dissent: Deschamps: violation of s 15(1) and s43 not reasonable bc compounded childrens pre-existence as vulnerable and powerless, restricted access to the law

#### SR Moreau “The Wrongs of Unequal Treatment” [4 ways unequal treatment wrongs citizens]

* Unequal treatment wrongs citizens in 4 ways
	+ **1. Unequal treatment is based on prejudice and stereotype**
		- Wrong to look to comparator group because the stereotype/prejudice does not arise from a comparative fact
		- Presence of ameliorative purpose in Kapp still contributes to wrong because it is understood based on stereotype or prejudice
	+ **2. Perpetuates oppressive power relations**
		- Leave certain individuals w/o social or political influence
		- Some denials of benefits perpetuate oppressive power without stereotype/prejudice (*vriend*)
		- Individual has been wronged merely by virtue of being deprived of benefit
	+ **3. Leaves some individual without access to basic goods**
		- What is important: absolute condition of those who are worse off, not relative difference btw those who have more/those who have less
		- If the government chooses the make a certain benefit available to public, then it wrongs individuals if it denies them these benefits, and this denial leaves them without access to relevant basic good
			* Gov must legislate in a way that does not leave most disadvantaged groups in our society without access to relevant basic goods
	+ **4. Diminishes individuals feelings of self worth**
		- Individual’s subjective perception of self-worth. Without more cannot ground claim
		- Feelings of inferiority (ie. not getting bonuses) are not grounds for less self-worth
		- The differential treatment must be unfair

**Approaching a Charter Fact-Pattern**

**Step 1: Does the Charter Apply**

* May not require a lot of effort

**Step 2**: Which Charter Rights are Engaged?

* **Be Precise in what interests are engaged. What particular provisions engage which interests.**

**Step 3**: Is that Charter Right infringed?

* Does the internal limit negate the infringement?
	+ Ie. FoE does not protect Violence

**Step 4**: Is the prima facie infringement justified by s 1?

* Oakes Analysis

**Step 5**: What Remedies are appropriate?

* Should the legislation be struck down? Provision severed? Should additional language be read in?

**In an Opinion letter:**

“Thank you for retaining my firm. In this letter I will discuss the merits of your charter claim. In short, your charter claim will likely be successful/unsuccessful and provide this remedy.”