

LAW 435
CONSTITUTIONAL
CARVER

INTRODUCTION

What is a Constitution:

- A mirror reflecting the national soul
 - A blueprint of a nation, the basic framework, the operation of the state as a legal value

Rule of Law

- Society is based on laws and rules, not by the arbitrary decisions of people in power.
- All individuals in society fall under rules, no one is above the law.

Roncarelli v. Duplessis

KEY:

- Society must function under the Rule of Law. Duplessis' actions went against that – he acted on his own volitions and abused his power. .
- The Rule of Law acts to protect us from corruption among other evils of individuals.
- Moreover, since D. was not following the Rule of Law, his actions had no legal grounds.

Facts:

- Roncarelli owns a restaurant. Duplessis is pissed at Roncarelli for religious reasons. Uses his position to hurt Roncarelli. Corruption.

Manitoba Language Act

- Perfect example for **The Rule of Law**
- All Laws not written in French in Manitoba are of no effect – but that includes all laws. We cannot have a Province without laws. Use the Doctrine of Necessity and Rule of Law to keep the laws on the books until they are rewritten.

Parliamentary Supremacy

- Written into Constitution in 1867, to give us a system similar to the Britain
- Parliament can make or break any law it chooses, does not have to follow the laws of the past. Cannot create laws and force future governments to enforce them
- We wrote our Parliamentary Supremacist Constitution down for Federalism. 1867 Politics necessitated a written Constitution to split up the powers.

Constitutional Supremacy

- **Charter 1982** transformed Canada from Parliamentary to Constitutional Supremacist country.
- This didn't change the makeup of the Parliament as much as **what laws could be changed/enacted**
- Some Provinces were against this aspect of the Charter, so the 1982 Constitution contains a clause in s.33 ("Notwithstanding Clause"), which allows Legislature to make laws which override the Charter. This means that while there is Constitutional Supremacy in Canada, it's not 100% applicable all the time.
 - The executive branch especially is seen as being more of the system of Parliamentary Supremacy

Separation of Powers – Makeup of Canadian Government Legislature (Making the Law)

- Laws written by the Legislature are:
 - Oriented to the future

- Oriented to the public interest
- Open-ended with broad-reaching outcomes
- Legislature
 - House of Commons (F) (elected)
 - Senate (F) (appointed)
 - Provincial Legislatures (elected)
- Municipal bodies, councils, school boards (authority is delegated to them)

Executive (Implements the Law)

- Not completely separate from the Legislative branch (like in the U.S.)
 - Subordinate to the Legislature

Judiciary (Enforces the Law)

Babcock v. Canada 2002

KEY: Written principles taken precedent over unwritten Constitutional Conventions.

Facts::

- Government, after disclosing a number of documents, objected to the disclosure of some of their docs.
- Government brought a motion wherein they asked that many documents be protected and did not want to produce many documents at court. They also asked that 5 documents which had already been given to the prosecution be protected as well.
- Plaintiffs brought a motion to compel the production of the docs.

Case History:

- The Chambers Judge ruled for the Government and said that by delivering the certificate production of the docs
- The court of Appeal overruled this decision

ACHIEVEMENTS OF THE CONSTITUTION (1867 Act)

1.Federalism

- 2 levels of sovereign legislature, national and provincial
- S. 91 and s. 92
 - Very famous and important sections of the Constitution – read
- S. 91
 - Section that points out areas where the Federal Parliament has authority
 - Fisheries, statistics, banking, paper money, postal service etc.
 - S.91 (2): Federal regulation over commerce
 - S. 91(7): Criminal law including criminal procedures
- S.92
 - Section that points out provincial powers
 - 16 heads of power listed
 - S. 92(13): Property and civil rights (provincial authority)
 - Private/Economic Legal Relationships:
 - Contracts, Torts, property laws

(Secession Reference: pg. 33-48)

- Gives a historical study of this problem

- Explains how Quebec and other provinces would not agree to come into the Constitution and into fold without the strong upholding of Provincial independence
- Explains how important this separation was to bring all provinces together

2. Protection of Minority Rights

- S. 93
 - Protecting religious minority schooling (Catholic schools in Ontario, Protestant schools in Quebec). Allowing people to keep these schools open
 - Minority school rights are protected by the Constitution
 - Funding the Catholic schools can be seen as discrimination as religious schools (non-Catholic) do not receive the same funding.
 - **One part of the Constitution cannot be used to attack another part of the Constitution.**
- S. 133
 - Protection of bilingualism in Parliament, the Quebec legislature, and the Federal and Quebec courts

3. Aboriginal Issues

- S. 91(24)
 - “Indians and lands reserved for Indians” are reserved to fall under Federal legislation.
- Status of Aboriginal Legal Issues
 - We must recognize that when the English conquered this land and became the new colonial power over what is now Canada, there were many laws that were established to cement England’s power over resources/people etc.
 - 1763: ‘*Royal Proclamation of 1763*’.
 - Dealt with many issues. But regarding Aboriginal issues, the Crown recognized that the Crown was making a claim on land that had other people (Aboriginals) living there. In respect of those lands, this *Proclamation* said that the Crown would deal with the legal issues relating to these people (via treaties).
 - Individual settlers would not have the legal right to deal with these issues. The Crown would deal with these issues.
 - Meant that settlers could not get title to land occupied by Aboriginals without the Crown first obtaining treaties with the Natives.
 - In 1867, that role that the *Proclamation* gave to the British officially became the authority of the Canadian Parliament.
 - The Constitution passed the power listed in the *Proclamation* from the British to Canadian federal parliament.
 - Provinces do not have any authority to settle treaties or deal with land issues etc.

4. National Judiciary

- Unified the courts in Canada by saying that each Province had its own Superior Courts and its own court system
- Unify the legal system
- S.96
 - Gives the authority for the Federal Government to appoint judges to the Provincial Superior Courts
- S. 101
 - The writers of the Constitution believed that there might be a need for a higher court than the Provincial Supreme Courts.

- This section gave the Federal Gov't the *power* to create a Federal Supreme Court.
- The Gov't used that power in 1875 to create the Supreme Court of Canada
 - The S.C.C. is **not** entrenched in the Constitution. It's not specifically mentioned in the Constitution.

Not done in 1867

- No bill of rights was created. No guarantee of individual rights
 - The framers of the Constitution did not include this **on purpose**.
 - The Anglophones were keen to remain under a British system of laws, and didn't believe much in the U.S. system of laws. Nobody really argued for that kind of document.
- No Independence from Britain
 - Nobody was serious about divorcing the new entity of Canada further from British rule
- No Consensus as to an amending formula

2 Major Issues that have come up and again:

- What entity defined the Constitution?_The British Parliament
 - So technically, the British Parliament enacted the Constitution. Essentially, the framers of our *Constitution* went to the British Parliament and asked them to enact these Statutes which spoke to the independence of Canada.
 - Technically, the *Constitution* was not enacted **in Canada**. It was enacted **in Britain**.
 - Since our *Constitution* was enacted in British Parliament, we would need the permission of the British Parliament to make any changes to our own *Constitution*.
 - This was technically a regular British Statute, meaning that the Brits could technically make any changes to our *Constitution* that they wanted
 - We solved this problem
- How do we ammend the Constitution?

- The 2 issues which the 1867 BNA Act did not deal with became major problems and major sources of discord in our politics
 - Not domesticating (patriating) the document when other British dominions had achieved that was tied strongly to **the lack of ammending Formula**.
 - We did not have an agreement as to how we could ammend the Constitution.
 - Since we couldn't agree on how to resolve the ammending formula, we weren't in a position to ask the British to turn that power over to us

Formula for the Ammendment of the Constitution

- Why was this such a big deal? – It's a core issue of Political Power
 - If your consent is required to ammend the Constitution, then you can prevent **any** changes that may be made.
 - You can also protect any parts of the Constitution that you wish to keep.
 - You have strong bargaining power to get a better situation for yourself.
 - If your consent is **not** needed, changes can be made without your agreement, you may lose certain powers and you have a poorer negotiating position

**Re: Resolution to Amend the Constitution (PATRIATION REFERENCE) [1981]
(Constitutional Conventions)**

Key: The role and strength of Conventions

Facts:

- Prime Minister Trudeau wanted to Patriate the Constitution
- May 1980, a referendum took place in Quebec regarding succession. 60% of the Quebec population voted **against** succeeding from Canada.
- After 1980, Trudeau could still not get the agreement of all the Premiers, so Trudeau said 'screw it, I'm going ahead alone'
 - Trudeau wanted:
 - Protection for individuals
 - Patriation
 - An Amending formula
 - Only 2 other provinces agreed with Trudeau's idea to go ahead alone.
 - The other provinces formed 'The Gang of 8'.
 - The Patriation Reference was brought by 'The Gang of 8' to try and stop Trudeau from making the changes to the Constitution unilaterally.

Case History:

- 3 separate provinces brought to question to their respective courts, which were not fully listened to
- The Supreme Court of Canada brought the questions of separate provinces together and brought forward the Patriation Reference.

Because this case is a *Reference Case*, it passes over the lower courts and goes direct to the Supreme Court of the provinces or of Canada.

QUESTION: (1) Does constitutional law require the consent of the provinces for an amendment of the Constitution that affects their powers?

- **Majority:** 7 to 2 judges said no. The Federal Government did not require the consent of the provinces.
- Precedent found in British cases also showed that the Fed's do not require the consent of the provinces.
- **Ratio:**
 - **Province:** Provinces felt that the internal division of power gave them consent.
 - **Province:** The whole structure of the Constitution and the country was premised on Federalism. That framework should also inform the understanding behind any Amending Formula
 - **Court:** There is nothing in the law that stops the Canadian Parliament for going forward with their amendments.
 - **Court:** The written constitution does not say (explicitly) that the Fed.'s cannot do what they want to do.
 - The provinces asked that the court to bar the Parliament from going to England to ask them to amend the BNA Act as Trudeau wanted.
 - There is no legal warrant for that request
 - (pg. 1374) The court felt that fulfilling the request of the Provinces would mean asking them to act as legislators
 - Following the request would handcuff the British Parliament
 - It's not in the text of the Constitution. The court felt that since there was no amending formula, they weren't prepared to make a judgment which effectively created one.

- **Minority:**
 - Unilateral action goes **against** the idea of **Federalism**. Since there is no check or balance to prevent the Federal government from going to England to make any changes they wanted on their own.
 - The majority opinion consented to this above point, but said that this was not the case. The case at hand was different from the above case, so we shouldn't deal with it.
- Both sides agree that there is an absence of text. However, each side draws a different conclusion from the lack of text.
 - Majority: Nothing is written, so the government CAN do it
 - Dissent: Nothing is written so the government CANNOT do it.

QUESTION: (2) Do any conventions of the Constitution require the consent of the provinces for an amendment of the Constitution that affects their powers?

- **Majority** 6 to 3 said Yes: A convention does exist that says that the government cannot proceed without a substantial majority of the provinces.
- While a convention does exist barring the Federal Government from doing this, having a convention is not enough. This is a matter of law **not** a matter of convention. Just because it's never been done before doesn't mean that it's not allowed to be done.

Constitutional Conventions (THE KEY QUESTION DEALT WITH BY THE PATRIATION REFERENCE)

- The court in the Patriation Reference said that a convention is:
 - A custom or practice that's been hardened into something else.
 - But: **They are not laws.**
 - The source of convention is political conversation, negotiation. The source is **not** from the courts.

Chief Justice Laskin

- The chief justice of the S.C.C. when the Supreme Court heard the Patriation Reference

KEY: What is said about Conventions of the Constitution.

Q: Who first supposed that the Constitutional Convention called for substantive agreement of the provinces rather than unanimous agreement?

- Saskatchewan.
- Saskatchewan was the only province of the Gang of 8 which came in and argued that there is a convention in place with requires a **substantial** agreement.
 - The other 7 of the Gang of 8 said that the Convention required a unanimous agreement.
 - While the court decided strongly against the need for a unanimous agreement, the Court liked the argument that a substantial agreement was necessary via Convention.
- **What** are Conventions of the Constitution?
 - Conventions tend to be in conflict with the laws of the Constitution.
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- **Are** the Conventions part of the Constitution of Canada?
 - **Yes they are.**
- **Are** the Conventions part of the law(legally enforceable)?

- **No they are not enforceable. They are not a part of the law of the Constitution.**
- The Courts do not enforce what is not law.
- **How** do Conventions come into existence (What is the test to decide how to recognize something as a convention)?
 - A precedent of political action over time
 - A past practice does exist in Canada. In every case in Canada's history, they have attempted to get the substantial agreement of the provinces before making Amendments
 - Recognized by parties over time
 - The Provinces obviously recognize this, they are bringing this issue forward
 - The existence of normative reasons for the practice
 - The Federalism principle is the normative reason. The necessity for agreement serves the Federalism principle
 - The majority of the Supreme Court stated that all three of the above tests were met by **the Convention of Substantial Agreement**.
- The Constitution has 2 separate parts. The Law of the Constitution and the Conventions of the Constitution. Both are necessary parts, though only the Law of the Constitution is legally enforceable by the Courts.
 - The Conventions are not part of the law of the Constitution.

Who won this case?

- The case gave a good result for English provinces. By stating that that a substantial agreement was required, it gave them the answer that they had wanted, or had been playing under. Quebec wasn't happy with that answer because it stated that only a substantial majority was required, and not a unanimous agreement was required. Quebec was hoping for a unanimous agreement because it would give them the **power of veto** of any proposed Constitutional amendments.
- **Prof: It brought both sides together to the negotiating table.**

What happened in the Negotiations?

- The talking went all through the night and an agreement was reached
 - The Federal Government and 9 other provinces agreed to the Constitution Act 1982
 - Quebec did not agree to the new Constitution, however, it is still bound to the Constitution. Quebec voted unanimously to not agree with the 1982 Act.

Peter Hogg argues that the Supreme Court should have refused to answer the second question because it did not go to a question of law—i.e., the Court stepped outside its proper role. What would have been the situation had the Court refused to deal with the second question? Do you agree with Hogg or not, and why?

Why aren't Conventions Enforceable?

- The Conventions and the laws are often inconsistent or in conflict with one another. The Courts are in place to uphold the Law.
 - They must choose to uphold the law over choosing to uphold the Convention. Doing otherwise would cause confusion in the law.
- Laws of the Constitution speak in very broad terms about who can do what, and the laws must be followed universally (in all cases where they apply)

What did the Constitution Act 1982 Achieve?

- **Patriation**
 - To bring the Constitution to Canada and make it an all-Canadian document
 - It was accomplished in a somewhat ironic fashion. It was made a solely Canadian concern **by the British**.
 - The British also created a Statute stating that the British have no more formal pull with Canada.
 - However, the British made a Statute which effectively Patriated Canada. There's no reason why Britain couldn't enact a new Legislation which brought Canada back into the fold. However, Canada would simply ignore any statutes written by British of that effect.
- **Canadian Charter of Rights and Freedoms (Part I of the Constitution Act)**
- The first time where individual rights were entrenched into the Canadian Constitution
 - s.1 - important section protecting freedoms
 - s.7 – important legal rights
 - s.23 – protecting French/English public schooling (**Quebec did not like this clause**)
 - s.33 – Notwithstanding clause
 - Allows the Provincial Legislature to opt out of certain Charter Rights by simply saying so.
- **Aboriginal Rights (Part II)**
 - s.35 – Protects existing aboriginal and treaty rights in Canada
 - s. 35(2) – Defines who is an aboriginal
 - s.35.1 – Guarantees aboriginal participation in the discussion respecting any amendments that affect aboriginals
 - Not a veto though
- **Constitutional Supremacy (Part VII)**
 - s.52(2) Defines what Legislation is included in our Constitution. The Constitution of Canada **includes**.
 - There term **includes** means that the list given is not exhaustive. It allows for the existence of Conventions
 - The BNA Act, the 1982 Act, many amendments made over time (to include Alberta etc.)
 - s.52(3) The Constitution can only be amended through the means given in the Constitution itself.
 - It is not subject to any other formulas or bodies amending the Constitution
 - **Entrenchment**
 - Canada moved from a system of Parliamentary Supremacy to Constitutional Supremacy
- **The Amending Formula (Part V ss.38-49)**
 - ***7 plus 50**
 - The agreement of 7 provinces which must include over 50% of the Canadian population; except for the unanimity situations.
 - ***Unanimity** is required for **some** matters. Everyone must agree on changing some matters such as:
 - The presence of the monarchy
 - The methods of selecting senators
 - The composition of the Supreme Court of Canada

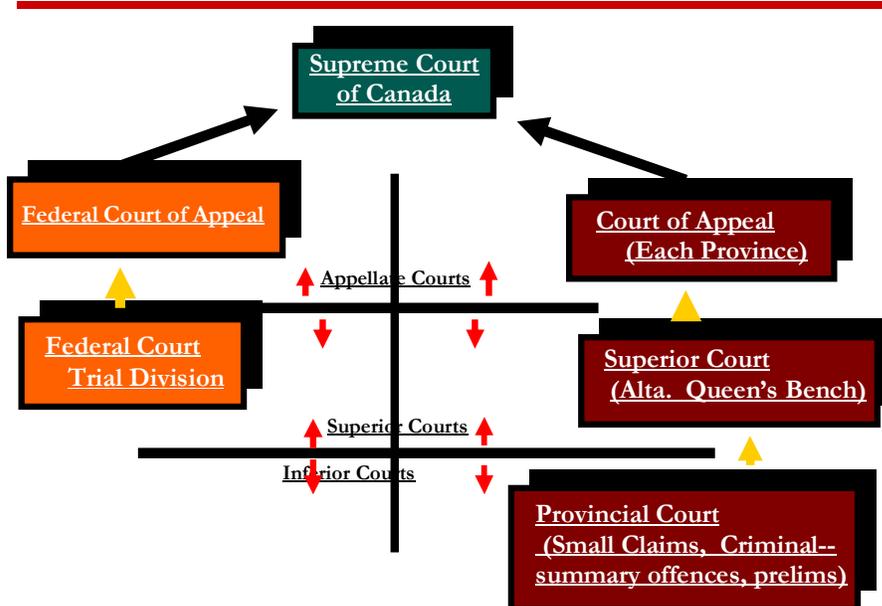
- Matters that affect only one or only a few provinces can be dealt with directly between the Federal government and those specific provinces.
 - There are times when we may not need to get every province involved
- Notice that referendums are not mentioned in the Charter. This amending formula deals with the government. The power of amending the Constitution rests in the hands of the government, not the general population.
- It's really tough to amend the Constitution. (Meech Lake case)

Things left undone by the Constitution Act 1982?

- Reconciliation of Quebec to the Constitution
- Aboriginal right of self-government
- Senate reform
- Entrenchment of the Supreme Court, and changes to the appointment process
- Explicit recognition of an individual right to property

SUPREME COURT OF CANADA

- **Judicature Provisions (ss.96-101)**
 - Source of certain regulations regarding Canadian Courts



Differences from US Courts:

- Canadian Supreme Court can deal with both Federal **and** Provincial matters. (The US Courts only deal with Federal Matters)

Role of Supreme Court:

- To interpret and apply (enforce) the Constitution.

- We need an outside group (other than lawmakers) to determine if the laws passed are Justified – to measure the new law against the Constitution and have the authority to claim that ‘lower laws’ do not have any cause or effect if necessary
- The Constitution **requires** interpretation. All provisions of the Constitution are necessarily vague.
 - The Constitution is **almost never** sufficient at face value. Disputes can never be solved by a simple reading of the Constitution.
 - It is rarely obvious how to apply the Constitution to a particular problem.
- The Supreme Court’s decisions have *stare decisis*. The rulings are binding on lower courts and the **reasons behind the rulings are also law**

Federal Jurisdiction over ‘Trade and Commerce’

s.91(2) “The Legislative authority of Parliament (Fed.) extends to: The Regulation of Trade and Commerce”

- While the Constitution mentions only s.91(2), there is a lot of common law which gives us more specifics
- Common Law tells us that:
 - The Fed.’s have authority over international and interprovincial trade
 - ‘Trade’ speaks to the exchange of goods, not manufacturing. So...Provincial authority is over manufacture while the exchange can be overseen by the Feds
 - The Fed’s have authority to regulate trade on a national basis
- The Constitution gives us a single line. That isn’t really **the law re: Federal Jurisdiction over the economy**.
 - **The Law** is really the 3 points above which speak to actual distinctions between Federal and Provincial authority.
- **Constitutional Doctrine is necessary. It needs to be interpreted and applied. It is not sufficient on its own.**
- The decisions of the Supreme Court on Constitutional Rulings **are NOT** a part of the Constitution itself.
 - While they are a necessary part of the Law, they are very different than the Constitution itself.
 -
- **The Constitution:**
 - The Text
 - Conventions
 - Unwritten Principles
- Changes in Supreme Court rulings **look like** Constitutional amendments which do not require formal amendments. But are they?
 - **NO.**
 - Our understanding of the Constitution changes over time but it is not correct to describe our judicial changes as part of the amending formula.

HOW CONSTITUTIONAL CASES GET TO THE SUPREME COURT OF CANADA

Personal Standing:

- Ordinary civil/criminal litigation is at a lower court, but whose decision is affected by a Constitutional issue.

- The case can be appealed to the Provincial Court of Appeal. If a further appeal is desired, the appeal is brought to the Supreme Court IF:
 - In a civil case, the matters are believed to be 'of public importance'
 - In a criminal case, when the S.C.C. wants to look at the case
 - In a criminal case, if there is a dissenting judge in the Court of Appeal, the appeal is automatic

Public Standing:

- Allows for a person to bring a Constitutional Challenge to the court even if they are not directly affected if the Court finds:
 - A serious legal issue
 - The person has a genuine interest in the matter
 - No other reasonable way which the issue would come before the Court.

Reference Questions:

- The Supreme Court **does not always** have to answer any question brought before them in a Reference case.
 - The Court may also choose to change the question being asked to them so that the question becomes more of a legal issue than a political one.
 - If An answer from the Court may disturb rights which had already been given, they may not answer the question
 - Very political questions
 - If the Court feels like they are being used by politicians. They didn't like being told **not** to answer certain questions.

REFERENCE RE: SECESSION OF QUEBEC

KEY:

- The Secession of any province would be a very difficult and troublesome time. Should we have a post-referendum Canada (with a Yes vote), the whole time would be really difficult.

Federal Gov't:

- Secession is not referenced in the Constitution. Any secession would require an amendment to the Constitution to allow for one.
- The amending formula would have to be used – and one cannot amend the Constitution unilaterally

Quebec:

- A referendum would show the democratic will of the Quebec people. That democratic will is enough to secede from Canada unilaterally.

Decision:

- No, but.
- Unilateral secession is unconstitutional, but a clear majority on a clear question would require negotiation among the parties towards a mutually agreed upon secession. It would require a major amendment, which must be made according to the amending formula.
- Four important unwritten principles; Federalism, Rule of Law, Respect for Minorities and Democracy.
 - Any decision/interpretation of the Constitution must follow all of these principles.

- No one Convention is more important than the other, or trumps the other. They all must work together.
- These conventions fill in the gaps left in the Constitution. They assist in interpretation
- The Unwritten Principles cannot overrule written text
- They have full legal force

Quebec was not involved in this case. They objected to the proceedings

CLASS NOTES

(3) Purposes of Unwritten Principles:

- To Interpret the written text of the Constitution (para. 52)
 - Re: division of powers, etc.
- They should never really be in conflict with the text
 - Since they are such a base for the Constitution itself – it seems odd that they be in conflict.

Hypothetically – if they are in conflict: What happens? (If Federalism was in conflict with a new Statement in the text) (para. 53)

- Text takes priority over the unwritten principles.
 - The Unwritten principles come about from Judges, while the text comes from the Legislative body.

Can Unwritten Principles stand on their own? Apart from Interpretation? (para. 53/54)

- Unwritten Principles fill the gaps left in the Constitutional text.
 - There are gaps which can be filled by looking at unwritten principles.
- **Is the Patriation Ref: a Gap? YES**
 - **How an amendment to Constitution can be made without any text regarding an amendment formula)**
 - There was no text about how an amending process should work.
 - We used unwritten principles to decide how the amending process should work, since there was no text to speak on this issue.
 - **Is the Quebec Ref: a gap? MAYBE**
 - The Court doesn't go so far to say so.
- Unwritten principles can constitute rules of law and have full legal force.
 - They can be the source of real limitations on Governments.

The Constitution is made up of:

- Written Text
- Unwritten principles
- Conventions (**Not Enforced by Courts**)
- Common Law (prerogative powers)
 - Keep in mind that other unwritten principles may be identified later on. Our current list is not exhaustive.
 - Case law interprets the above 4 parts – they are not part of the Constitution

Role of Judiciary in a Post-Referendum Period with 'YES' Majority? (para. 153)

- **Fairly small role – leave negotiations up the politicians who are best suited for that kind of negotiation**

WHY?

- **Court involvement would make Politicians less willing to negotiate**
 - Politicians have Constitutional obligations to negotiate – but they may not be very willing to do so.
 - The Courts are capable of deciding what makes a fair question or not – the problem is, if they make themselves willing, politicians would also be willing to give the Courts the chance to decide on the question. This removes the push for negotiations.
- The Court states: **Don't rely on us! We won't get you off the hook**
 - If the Court said nothing - it would allow for the negotiations to fail because both sides would assume that upon a failure in negotiations the Courts would take over.
 - Instead, the Court ruled themselves out of this issue to force politicians to solve the problems themselves
- **The risk:** We may have a stalemate where the negotiations cannot move forward.
 - If negotiations fail, one side may act unilaterally. In that scenario, the international opinion would be an important deciding factor as to whether secession was completed properly or not

Who Won This Case?

- Nobody:
 - If a referendum goes forward, it would be chaos and the Court wasn't able to give a good enough answer to help the process move along.
 - They identified all these problems

Legality/Legitimacy:

- **Who's legitimacy was at stake?**
 - The Supreme Court as an institution
 - Quebec didn't even participate in the process. Since the Judges are appointed by the Federal Government and Quebec felt that the S.C.C. would just tow the governments line
 - Were they a mouthpiece for the Federal Government or an outside force?
 - The Constitution
 - Did the Constitution tie the hands of an unhappy part of the population – or did they give options to Quebec.

KEY: THIS JUDGEMENT WAS CONCERNED WITH LEGITIMACY AND THE COURT FOUND A LEGITIMATE ANSWER WHICH BOTH PARTIES WERE HAPPY WITH. PROVED THE CONSTITUTION GAVE SOMETHING REALLY POSITIVE BACK TO SOCIETY.

- Quebec accepted the S.C.C.'s decision
 - An Act was enacted called: "Exercise of the Fundamental Rights and prerogatives..."
 - Quotes the S.C.C.'s decision and admits Quebec's acceptance of the decision
- Government enacted the Clarity Act
 - Nobody will attempt to bring forward an amendment to the Constitution which would result in secession unless negotiations had taken place

CHAPTER 3 CONSTITUTIONAL INTERPRETATION

FEDERALISM – DIVISION OF POWERS

Federal Authority:

- Peace Order and Good Government (POGG)
- **Residual authority**
- **Exclusive:** The heads of power listed in s.91 and s.92 are exclusive. They and only they have the authority and can make laws without interference from other jurisdictions.
- s.91 – Federal Authority
 - POGG
 - (2) Trade and Commerce (Branch 1, 2)
 - 21,23,24,27 – Bankruptcy, Copyrights, Aboriginals, Marriage, Criminal
- s.92 – Provincial Authority
 - (13) Property & Civil Rights
 - (16) Local Matters
 - 8,12 – Municipal institutions, solemnization of marriage

Legal Analysis Technique for Statute Analysis

LEVEL 1: PITH & SUBSTANCE

The Wrong Government passed this law – thus it is not Constitutional

Step 1:

- Identify the Pith & Substance of the law

Step 2:

- Test the applicability of the law in relation to the other Head's of Power to see if there is the issue of **interjurisdictional immunity**

Step 3:

- Determine if there is a true overlap and then follow Paramountcy

Union Colliery Company of BC v. Bryden [1899]

KEY:

Pith & Substance analysis was conducted. P&S was found to be regarding naturalization of aliens and immigration – a Federal matter. Law is *ultra vires*

A law can have two different aspects

Jurisdiction issues are not about the wisdom of the law – only concerned with properly attributing the law to the proper division of powers

Anti-Asian Legislation was enacted by Province of BC during a wave of Chinese immigration because BC wasn't happy with the immigration. But since the Fed. Has authority over aliens, BC made a number of *ultra vires* legislation at that time to try and prevent immigration.

Facts:

- Province makes regulation (*Coal Mines Regulation Act*) to protect boys under 12 and women from having to work underground in mines. In 1890, the Act is amended to prevent Chinamen from working underground. “No boys, girls or Chinamen underground”.
- Statute was made to keep Chinese immigrants outside of the BC workforce
- Π wanted to hire Chinamen, but could not. Only recourse was to have the law struck down.
- Π argued that *Coal Mines Regulation Act* is *ultra vires* as the Province doesn't have the authority to legislate employment terms for China men.

History:

- **Privy council:** This law was about regulating the mining industry (s.92(13))

Decision:

The Coal Mines Act is *ultra vires* and illegal. It clearly affects aliens/naturalized people and that falls under Federal jurisdiction. The relationship of the case to mining is cursory.

Issue:

- Does the *Coal Mines Regulation Act* create a statutory prohibition which affects aliens or naturalized citizens?

Reasons:

- s.92(15) gives Provinces power to regulate the mining industry
- s.91(25) gives Federal authority over Naturalization and aliens

- Court was a little bit activist. The Statute spoke not only of Chinese immigrants, but also people of Chinese background.
- **Dominant Feature:** Naturalization and aliens, not mining regulations
- The Pith & Substance of the **original** Act was to prevent children and girls from being forced into working in mines. (Child Labour)
- The **added clause** about ‘No Chinamen’ was about Chinese immigrants and naturalization.
 - Federal Government has jurisdiction over naturalization and aliens – not the Province.
 - Since they can't argue that the ‘No Chinamen’ clause was about protecting children (possibly Provincial jurisdiction) – **it must have been about naturalization of aliens.**
 - **This is a Federal matter and not in the Provinces jurisdiction**

PITH AND SUBSTANCE:

Pith & Substance Analysis has 2 Parts:

- (1) Analyzing the Law
 - Interpreting the Law
- (2) Analyzing the scope of the Heads of Power
 - Interpreting the Scope

Interpreting the Law:

What is the Pith & Substance of the Impugned Law? What is the Dominant Feature?

- Laws re: aliens/immigration
- Lawyers are attempting to find a characteristic that will fall within the scope of an Authority
- We may have to start from scratch. This law is either new, or has not been challenged before.

Interpreting the Heads of State: (Interpreting the Scope of the Legislature's Authority)

Exactly what powers fall under the scope of the Provincial Jurisdiction?

- We have a great deal of case law explaining the scope of the Heads of Power. We don't need to start from scratch here.
- We have a lot of case law which tells us the scope.
- We spend less time on this situation – as it has been done before

Pith & Substance Analysis can include:

- **Purpose of Legislation:**
 - Intrinsic Evidence: Preambles, Whereas clauses, explanations of the law written before the actual Law in the Statute
 - Extrinsic Evidence: Speeches by Ministers, political statements
 - The Courts only started considering these kinds of statements when attempting to determine the purpose of legislation.
- **Effect of Legislation:**
 - How the law actually operates.
 - **NOT** the effectiveness of the law – how good of a job the law does
- If the Purpose and Effect are drastically **different** from one another – we may have a problem of **colourability**.
 - **Colourable:** The Legislatures may have dressed up the law to try and fool the Court.
 - The law is named to be a law about insurance, but it may just be about regulating banks. If so, the law is colorable.
- If the Purpose of the law is invalid – the law is invalid
- If the Purpose of the law is valid- **then** we look at the effect. If the effect is invalid the law is invalid
- **But if the purpose of the law is invalid, but the effects are valid – the law is still invalid.**

Dominant / Incidental Aspect:

- All laws will effect many jurisdictions. But which aspects of the law have the greatest effect?
- If the Law passes the Pith & Substance (it falls under the correct head of power) any incidental aspects are irrelevant in determining its validity.
- We cannot say that a law is invalid if the incidental aspects fall underneath a head of power which is different than the Dominant aspect.
 - No law will be perfectly secluded within one category (s.91 or s.92)
 - Every law will have an impact on things outside of its jurisdiction. **As long as those effects are incidental, those effects do not change the ruling on its validity.**

Canadian Western Bank v. Alberta

Facts:

- In 2000, Alberta enacted changes to the *Insurance Act* which made Federally chartered banks subject to Provincial laws regarding selling insurance
- Banks tried to say that selling insurance was part of the banking within the meaning of s. 91(15) of the *Constitution Act, 1867*.
- Banks said that: The *Insurance Act* were inapplicable to the banks' because of interjurisdictional immunity or paramountcy.
- The trial judge dismissed the application.

Decision:

- **Pith & Substance:** the *Insurance Act* was valid provincial legislation - *Intra vires*.
- **Interjurisdictional Immunity:** Inapplicable because the promotion of authorized insurance was not at the core of banking
- **Paramountcy:** Inapplicable because there was no operational conflict between the federal and provincial legislation.
- The Court of Appeal upheld the decision.

Case:

- The bank is challenging the law.
- **The law at issue is:**
 - Provincial Legislation Act regarding the sale of insurance. The bank doesn't want to be subject to laws which regulate how they sell insurance.

Pith & Substance:

- P&S of the *Insurance Act* shows the law to be valid.
 - Alberta enacted legislation which is directly related to the sale of insurance.
 - Alberta has jurisdiction over the sale of insurance – has been that way for 125 years.
- Is there an argument over **Pith & Substance**? **NO**

DOUBLE ASPECT

Multiple Access v. McCutcheon

- Insider trading laws had an aspect that fell within both Fed. (Regulation of Federally incorporated Companies) and Provincial (Property & Civil Rights) Jurisdiction – but for different purposes

DOUBLE ASPECT DOCTRINE

- Pg. 165
 - A Pith & Substance analysis showed that the law properly fell under both jurisdictions.
 - The relevant importance for each Head of Power isn't so different.
- Both laws are able to be in effect.

- When viewed in one light, the law falls within Federal jurisdiction. When viewed in another light, it falls under Provincial jurisdiction.
- Federal legislation only takes precedence (Paramountcy) when there is a direct conflict between the two laws.
 - Duplication is not a direct conflict. They must be **contradictory**.
- **In situations where there are two laws in society (both valid) we may find ourselves in the situation of having to ask which law to follow?**
- **We answer those questions through Paramountcy and Interjurisdictional Immunity**

PARAMOUNTCY

What:

- When a conflict between a valid Federal and a valid Provincial law actually does come up – the Provincial law becomes inactive for the duration of the conflict.
- Only occurs when both Heads of Power have valid laws (which have been tested by a Pith & Substance analysis)

When we can apply Paramountcy (Meanings of Conflict):

- **(1) Impossibility of Dual Compliance:** When following one law means automatically breaking the other. (*Multiple Access v. McCutcheon*)
 - **Mutual exclusivity of laws**
 - “Narrow approach” –
- **(2) Conflicting Purposes (Frustrate or Displace):** When Provincial laws displace or frustrate the Federal Legislature’s **purpose** behind enacting the law in question.
- If Paramountcy does not occur – we can then turn to Interjurisdictional Immunity to see if we can’t read down the Provincial law in question.

When Paramountcy doesn’t occur:

- When the Provincial laws go beyond the Federal law by adding requirements that supplement the Fed.’s law. (NOT Impossibility of Dual Compliance)
 - When one law is more severe than the other
 - Fed: You must not do A
 - Prov. You must not do A **and** B.
- When mere duplication of laws occur
- Court **used** to take a *laissez-faire* attitude with overlapping laws and applied Paramountcy **only for impossibility of dual compliance**.
 - Today – the Courts allow for other circumstances when they apply Paramountcy.

Rothmans, Benson & Hedges Inc. v. Saskatchewan [2005]

KEY:

- **Expands the Court’s use of Paramountcy. It applies where a provincial law is inconsistent with the purposes of the Fed. Law.**
- The Sask. Law **wasn’t inconsistent enough** to lead to Paramountcy.

Facts:

- Fed. law allowed for a measure of retail store advertising of tobacco. The Provincial Law banned **all** tobacco advertising.
- Both laws are valid – are they in conflict??

Impossibility of Dual Compliance? :NO

- The Federal Law was prohibitory and fell under the Criminal Law power of the Feds
 - It prohibited certain aspects of the sale of tobacco – not all aspects, just some aspects.
 - Simply because the Fed. Law didn't prohibit retailers from advertising tobacco openly doesn't mean that the Fed. Law gave them the authority to do so
 - There's no reason why the Province isn't able to further limit the ability to advertise tobacco.
- There is no problem in following both the Provincial and the Fed. Law.
 - You either stop anyone under 18 from shopping in your store; or you don't advertise tobacco openly.
- If the Province gave extra rights and allowed certain kinds of advertising that was prohibited by the Feds – then we would have an issue. In this case, both Heads are on the same page.

Frustrate/Displace? NO

- The Provincial law actually furthers the Fed.'s purpose behind their law. It protects children even more than the Fed.'s law alone.
- Both Heads enacted their laws for the same purpose.
- **Tobacco:**
 - The Provincial law actually frustrates the Fed. law. The Fed. law grants tobacco companies the **right to advertise** in retail stores (under certain conditions)
 - This is a good example of the tobacco company not caring about how much money they throw at this case. It's a poor argument – but tobacco companies have enough money to try and 'run it up the flagpole'.

INTERPRETING TERMS IN STATUTES

R. v. Blais

KEY: Does the Term 'Indian' in para. 13 of the NRTA include the Metis??

Interpretation of terms in Statutes must be made in context. "We cannot divorce the expression from the context of its enactment"

Historical, Language, Objective contexts. Living Tree Principle

Decision:

- The term Indian, in the NRTA, does **not include** the Métis

Reasons:

- We must look at the terms in a Statute in context and think about the purpose of the Statute when interpreting terms. We cannot divorce the expression from the context of its enactment (purpose)
- **Historical:** There has been a difference between Indian and Métis since 19th Century.
 - The Métis themselves didn't consider to be Indian –but a separate and distinct group
 - *****: This distinction was most clearly made by the PM around the time of Métis uprisings. It could be that using the PM's words to prove the distinction the Métis felt about themselves is not very accurate and a bit too political**
 - Other legislation can be cited which speaks to Indians and includes the Métis (such as Statutes that deal with all Aboriginal people).
 - In the context of the NRTA, Indians referred to a group of Aborigines, of whom the Métis are **not** a part

- **Language:** Half-Breed (Métis)
 - At the time of the Statute's passing, we had different terms – Indians, White, Half-Breed (Métis). Indian referred to a **separate group from White or Half-Breed**.
 - Para. 13 of the NRTA is under the heading "Indian Reserves". "Indian Reserves" were different than Métis reserves. It's obvious that the heading gives us a clue as to who the sections underneath it refer to. Indians.
- **Objectives:** Meant to assist Indians
 - The Métis were better off than Indians. s.13 of the NRTA was meant to help Indians, the Métis didn't need such help at that time.

Reference re: Same-Sex Marriage

KEY:

Living Tree Principle: Keeps the Constitution relevant, but has a limitation on it called 'natural limits'. Court refused to discuss the slippery slope concept of expanding the definition of marriage.

Issue:

Is the definition of marriage as written in the 1867 Constitution set in stone, or can it evolve?

Decision:

Parliament can make a law regarding civil union marriages (s.1 of Proposed Act), but not s.2 which spoke about religion, being of Provincial authority

Reasons:

Living Tree Principle: Keeps the Constitution relevant

- Canada is not the Christian nation it once was, its pluralistic now, and expanding terms is done all the time and is a major cornerstone of the Constitution.
- We need to expand the definition to keep the Constitution relevant for the realities of Canadians. Just like we expanded Constitutional meaning of telegraph to include telephone and internet, etc.
- Expanding the definition of marriage does not break Lord Sankey's 'natural limits'. Allowing it to expand to the union of two people (not just a man and a woman)
 - But do arranged marriages, polygamous/polyandrous marriages break the 'natural limit' boundary?
- **The Court stated that they would not determine what abstract kinds of unions would or would not break Sankey's natural limit.**
 - They chose not to discuss the slippery slope argument.

PITH & SUBSTANCE (Leading Feature)

- Used to determine under which head of power a given piece of legislation falls.
- We use P&S when a law is challenged for being *ultra vires* or not within one's jurisdiction
- **Dominant Feature:**
 - We look at the characteristics of a law, what the law does and the most important characteristics to decide on the Pith & Substance

Colorability:

- If it looks like a duck, talks like a duck and eats like a duck, it's a duck – even if you call it a cow or sit it at the kitchen table.

- It's a duck because of what the animal actually does. Calling it something different isn't going to change that
 - This is true if we are trying to fool people or not.
- Once we find the Dominant Feature, we look to s.91 or s.92 of the Constitution to decide with legislative body has jurisdiction

Incidental Characteristics:

- **The essential nature (Leading Feature) of a statute is MORE important than its form (name) or its incidental characteristics**
- The Constitutionality of a law is based on its main focus or thrust, not its secondary features.
 - A statute that is essentially about Criminal Law is a Federal matter, even if there are civil ramifications.
- **R. v. Morgentaler**
 - A P&S analysis showed that while the law said it was 'protecting health services[Provincial]' the Dominant Feature of the law was to prevent abortions [Federal]. The law was struck down because we showed which legislative body had authority over the Dominant issue.

R. v. Big M Drug Mart Ltd.

KEY: Restriction of work on Sunday. Is this primarily a religious or secular purpose? (use Pith & Substance to determine). The answer to religion/secular will determine if jurisdiction falls to the Province or the Fed.

Once we characterize the pith and substance as X, we cannot/should not change its characteristic. The effect of the law is of only secondary relevance.

Facts:

- If the law is religious in nature – it falls under Parliament's jurisdiction as maintenance of public order and public morals
- If the law is secular in nature – it falls under Provinces jurisdiction as property and civil rights in the Province
- Breaking Sunday legislation is/should be a breach Criminal Code – the Parliamentary jurisdiction.

Decision:

- **The Purpose of Sunday Legislation is the compulsion of a religious observance (Shabbat).** It falls under Parliamentary jurisdiction

REASONS:

- **Historical:** The purpose of the Legislation is **definitely** religious.
- **BUT:** The **effect** of Sunday legislation is **secular**.
- **Precedent:** Many cases consider Sunday legislation to fall under Parliament jurisdiction.
- **Effects:** The effects of Sunday Legislation do not infringe on anybody's rights or freedoms – at worst they cause an imposition to Jews who have to do their banking during the week instead of Saturday since it's Shabbat.
- **Americans:** They see the law as **purely secular in nature**. Any references to religion are just historical. This allows for Sunday Legislation to continue without infringing on Freedoms of Religion.

TEST (PURPOSE/EFFECT):

- If the Purpose of the law is invalid – the law is invalid
- If the Purpose of the law is valid- **then** we look at the effect. If the effect is invalid the law is invalid
- **But if the purpose of the law is invalid, but the effects are valid – the law is still invalid.**

Shifting Purposes Argument:

- We should focus on the effects of the law and allow that the purpose of a law may shift according to shifting social norms.
 - **CONS:**
 - Any law on the books can get its purpose shifted- thus making it invalid
 - Bring uncertainty to the law
 - Get rid of *stare decisis* and encourage relitigation of cemented legal issue
 - Retaining the mindset of the drafters of the Statute is a key component in the interpretation of laws. Purpose-shifting goes against this Doctrine
 - Re-interpretations of this kind may work with the scope of legislative powers.

Canadian Western Bank v. Alberta

KEY:**Facts:**

- Federal banks have started to sell insurance. Federal banks are 'immune' from Provincial regulations
- Insurance falls under the scope of the Provinces, and has been that way for 125 years.
- Is the sale of insurance a core tenant of banking or is it a separate thing from banking. If it's separate, then insurance has Provincial jurisdiction. If it's core to banking, then the Federal Banks can sell insurance and not pay attention to Provincial regulations regarding the sale of insurance.

Pith Substance:

- Promotion of optional insurance is not essential to banking. The banks only dealings with insurance are of a secondary or incidental nature
 - Since insurance isn't essential to banking (Federal), there's no reason why the insurance aspects of the banks practices shouldn't be legislated by Provincial rules
 - Mortgage insurance is a kind of insurance which can be seen to essential to the business of banking.
 - Since the insurance in this case is optional, it doesn't qualify as under Federal Jurisdiction

Hodge v. The Queen

Double Aspect Doctrine

- Both Federal Parliament and Provincial Legislatures can enact valid legislation on a single subject as long as they come at the legislation from a different perspective (the different aspects of the matter)

KEY: The possibility of jurisdictional overlap was expressly recognized as implicit in the structure of the Constitution 1867.

We don't have watertight containers between Federal/Provincial powers

Decision: No Conflict. The provincially delegated authority to make laws re: billiards in taverns is *intra vires*. Meant to preserve peace and public decency. Does not get involved with the general regulation of trade/commerce, so does not conflict with Federal authority.

Multiple Access Ltd. v. McCutcheon [1982]

Double Aspect Doctrine

When the Pith & Substance Test shows that the Federal and Provincial features of a rule are pretty equal in importance, and neither should be ignored (or made higher than the other), we decide that it doesn't make sense to kill one just to let the other live.

- **We can let both rules live.**
 - We can allow for Federally incorporated corporations which operate in a Province to fall under rules created by the Province (when raising capital and following ethical business rules)
- Duplication is the 'ultimate in harmony'.

Paramountcy:

- **Paramountcy is based on the assumption of the Double Aspect doctrine**
- KEY: How great does the inconsistency need to be in order for Paramountcy to occur?**
- We do not need to rely on Paramountcy if both Heads of Power create essentially the same law.
 - Duplication is acceptable
 - Inconsistency is not
 - Paramountcy would apply if following the law is mutually exclusive, if they are inconsistent. If you can't follow one without following the other; or
 - if the Province's law displaces or frustrates the Fed.'s purpose behind making the law.

Interjurisdictional Immunity

- Prevents a law from being applied to matters outside of the constitutional jurisdiction of the enacting head of power.
 - For example, where a provincial law is found to intrude into a matter in the jurisdiction of the federal government the law will be interpreted through the "reading down" doctrine to exclude that matter.
 - Favours Federal Jurisdiction
 - Limits the effect of Provincial laws when they violate the 'core' of a matter that falls under Federal Jurisdiction.
- **KEY:**
 - **For Fed. Incorporated companies:** Interjurisdictional Immunity applies only when the Province's law **impairs something core or essential to the Federal undertaking** (or vice versa)
 - It's not always necessary to look at this area. Usually a P&S analysis followed by a Paramountcy analysis is sufficient.
 - **Quebec Minimum Wage Case:** Changed the Interjurisdictional Immunity Test:
 - The law must affect a vital part of the management or operation of the undertaking. It does not need to go so far as to impair. Affecting a core part is enough.
- Attack the law in 3 ways

- Validity: If the Pith and Substance of the law is *ultra vires*. If so, the law is invalid for lack of jurisdiction
- Applicability: While the law is valid in most situations- it's not valid in **this** situation.
- Operability: A problem of paramountcy exists. When following a Federal Law is mutually exclusive from following a Provincial Law. Following the Province means breaking the law of the Feds.

Paul v. British Columbia

- The Province's law had a major effect on an area which is under the exclusive authority of the Federal Government.
- We may keep the law, but we 'read down' the law when it affects the Feds – we only utilize that law when it does not affect Federal authority as its fully understood.

Canadian Western Bank v. Alberta

- Banks want the Courts to consider the sale of Insurance to be part of 'banking' thus under Federal Jurisdiction.
 - If the Court agrees – then the Province's insurance laws would not apply to the Federal Jurisdiction. They could get the law 'read down' or even struck under Paramountcy – but only if the sale of insurance is part of 'banking'.
 - Areas which are under the exclusive jurisdiction of one Head of Power must have laws created by that same Head of Power.
 - Laws enacted by Province can and will have effects on the other side – the question is: Are the effects incidental or do they effect the core of the problem?
 - **Affects vs. Impairs**
 - For a law to be 'read down' or struck down for Interjurisdictional immunity the law must **not only affect a 'core' part** of Federal Banks – it must **impair** Federal Banks.
 - **Unless the law impairs – interjurisdictional immunity doesn't apply**

(1) Overall Judgment re: Immunity to Fed. Chartered Banks

- We should keep the law within the boundaries already set.
-

(2) What's the purpose of the Immunity Doctrine?

- **It preserves the division of the Heads of Power; as well as**
- **Exclusivity – there are somethings which are out of bounds**

Order of Applying the Doctrines

ORDER:

- 1. Pith & Substance comes first
 - Ensure the law itself is valid
- 2. Interjurisdictional Immunity/Paramountcy (see if it's applicable/operative in this case)
- Moving directly to Interjurisdictional Immunity is not the best scenario

British Columbia v. Lafarge

ORDER

- 1. Pith & Substance then Paramountcy
- 2. Interjurisdictional Immunity

- Serious criticisms of the Doctrine, states that (1) above is enough.

Criticisms of Interjurisdictional Immunity

- Overly complicated/ too vague & it's scope is too wide
- Unnecessary, is already covered by Pith & Substance + Paramountcy.
 - BUT: It's still good, as long as we go back to the 'impairs' test to decide if the law goes beyond it's authority. Quebec case test is too wide
 - The doctrine is necessary for situations where a Provincial law is valid, but purports to apply to Federal matters (Canadian Western Bank)

Pro's of Interjurisdictional Immunity:

- When there's a good law which affects Federal and Provincial matters, I.I. allows us to allows us to keep the law by reading it down. We don't need to scrap an entirely good law for a side impact on a Federal matter. We keep the law and just not apply it to the Federal matter that is causing the issue.
- Prevents a Provincial law from effecting a Federal area if there is no equivalent Federal law in place
 - We need an equivalent Fed. Law to use Paramountcy. If the Fed's don't have a law in place – Paramountcy can't apply and we would have to allow a Provincial law to stand until an equivalent Fed. Law comes into place to replace the Provincial law.
 - When there's a good law which affects Federal and Provincial matters, I.I. allows us to allows us to keep the law by reading it down. We don't need to scrap an entirely good law for a side impact on a Federal

Instances to Use Interjurisdictional Immunity

- Federally incorporated companies where a Provincial law is affecting them
- Federally regulated undertakings/Federal matters where a Provincial law is affecting the core or vital part of that undertaking/matter
- Federal institutions that enjoy immunity from provincial laws that specifically target those institutions.

Chapter 7 – TRADE AND COMMERCE

OVERVIEW:

- No protection for Private Property in our Constitution
- Mobility Rights (s.6 Charter)
 - Allows people to move beyond borders. Prevents barriers to the free movement of people
 - Also provides some protection against barriers to labor movement
- s.91(2) of the Constitution gives Feds the power over the 'regulation of trade and commerce'
 - This is extremely broad, and isn't really the case as the provinces have a lot of authority over commerce.
- We limit the reach of s.91(2) through s.92(13). Property and civil rights.

Our viewpoint of Federalism doesn't include total Federal control over trade and commerce. A literal reading would make us think this. But we need to interpret s.91(2) and s.92(13) closely to get to our version of Federalism.

Parsons case brought about the idea of the 2 Branches of s.91(2) – Trade and Commerce:

- Federal Government has **exclusive** authority over:
 - **Branch 1. Regulation of Interprovincial/International Trade and Commerce**
 - **Branch 2. Regulation of Trade Affecting the Whole Dominion**

Citizens Insurance Company v. Parsons (1881)

- Challenges provincial consumer protection legislation which regulates fire insurance
- Provinces have the right to regulate fire insurance – it does not fall solely under Federal jurisdiction.
 - Provincial law does not impair Federal authority to incorporate companies.
- **Property and civil rights (s.92(13)) should be read broadly to encompass rights regarding contracts between persons(incl. fire insurance).**
- **Trade and Commerce (s.91(2)) should be read narrowly.**
- Privy Council establishes three characteristics of the trade and commerce (s.91(2)) power:
 - 1) the "regulation of trade and commerce" should not be read literally
 - 2) it includes international and interprovincial trade as well as "general regulation of trade affecting the whole dominion" (2 Branches)
 - 3) it does not extend to regulate contracts of a particular business or trade.
- The *Ontario Act* is **valid**.

THIS DECISION CREATES THE 2 ASPECTS OF FEDERAL POWER OVER TRADE AND COMMERCE:

Examples of Regulations that fall under Federal Jurisdiction:

- Exports, imports into Canada
- Marketing, production

Canada v. Canadian National Transportation Ltd.

Regulation over the whole dominion CANNOT include regulation over a single trade or business

Allowing this goes against the whole idea of local autonomy and the division of powers

-
- The limits imposed on Fed.s in s.91(2) aren't fixed – they change to preserve the proper constitutional balance
- Using the General Dominion part of the lesson from Parsons is rarely successful (Wharton and Canada Standard Trade Mark Case are the only 2 that were successful)

Reference re Agricultural Products Marketing Act

The courts tried to apply this framework in the area of agricultural product marketing (in 1940's and 50's)

Provincial taxes on resources largely destined for export.

- Canada has a unique marketing system (Marketing Board System) that provides price maintenance, market share protection in many areas of agricultural product (eggs, chickens)
- We have quotas and licenses for producers to avoid them overproducing
- When the idea of price stabilization came into focus, the question became: How will these price stabilization policies affect Federal or Provincial authority?

- So which Head of Power has the authority to establish those kinds of regulatory systems?

Decision:

- **The Court approved a marketing scheme (an egg war) that involved Fed. And Prov. Cooperation.**
 - Each side passed laws that were within their respective jurisdiction.
 - Some interdelegation took place and the court recognized that the cooperation *was acceptable*.

CIGOL Case (similar to above case)

- Sask. wanted more revenue from the production of the resource. Imposed a tax on producers.
- BUT: Most of the production was destined for export (mostly to the US)
- Company challenged the tax on that basis – although it appeared to be a tax on production within the province, it actually had a greater impact on exports in Canada and the US.
- SCC agreed with the Company and struck down the Tax.

Potash Case (I think: Central Canada Potash Co. case)

- Sask. Also had issues with their Potash. Similar tax. Tax imposed on Potash that was mostly for export. SCC struck down the Potash tax also.

Study Questions for *General Motors v. City National Leasing* (SCC, 1989)

Oct. 29/08

- Privy Council expressed their opinions with the 2nd Branch of Trade and Commerce. It was raised in the *Parsons* case, (in vague language, only as a possibility).
- When it was raised again in later cases (ie: price control legislation brought from Fed. Government, legislation around WWI)
- *Canadian National Case* – wanted to find a broader authority for Federal regulation of Trade and Commerce

Why we look at GM Case:

1. Branch 2 Analysis
2. Tools of Division of Power Analysis

Branch 2 is an ALTERNATIVE to Branch 1. Under a Branch 2 analysis - we're not interested in whether the conduct taking place occurs in only one Province or throughout Canada. It only matters that the issue is of importance to the entire country.

Trade and Commerce Power (pages 313-316)

1. *What are the facts underlying the dispute in this case? What is the impugned legislation, and who is challenging its validity and why?*
- s.31.1 of the *Combines Investigation Act* sets out civil causes of actions for breaches. BUT civil causes of action are within Provincial Jurisdiction. But *Combines* is a Federally enacted Statute that deals with anti-competitiveness in business. .

- GM is challenging the validity of *Combines*. GM sold cars to CNL as well as their competitors, but gave a better interest rate to the competition. This is against *Combines* and GM was hit with some civil actions.
- GM argues that the civil causes of action part of *Combines* is outside the scope of the Federal Government and *Combines* is thus unconstitutional.
- CNL is suing for an alleged violation of the *combines act* over a form of price preference treatment that GM is doing.
- GM attacks the legislation that is the basis of the lawsuit as being not within Federal Jurisdiction.

2. *What five-part test for the general trade and commerce power does the Court set out?*

Dickson sets out the following Test. Branch 2 Test

1. Legislation must be part of a general regulatory scheme
2. The scheme has to have oversight from a regulatory agency
3. Legislation is related to trade as a whole
4. Provinces, jointly or separately are constitutionally unable to enact this legislation
5. Failure to include a single (or more) province in the legislative scheme would jeopardize the whole thing. (We need all provinces in – or the system won't work)

S.31(1) and *Combines* passes these Tests with flying colors.

- A lot of the competition issues that the Act applies to (monopoly) businesses that operated ONLY within one Province.
- Is this a problem? NO
 - 1st Branch of Trade and Commerce is worried about International or Interprovincial Trade and if it's in Federal Jurisdiction.
 - **The 2nd Branch worries about General Dominion – and it has been developed as an alternative to the 1st branch. So it's not of any importance if the problem occurs in only one Province.**
 - For a law to be valid under Branch 2, it doesn't have to also be valid under Branch 1.
 - Branch 1 and 2 are totally separate

3. *Why is it important for the general trade and commerce power that there be "regulatory supervision" by an official or agency ?*

Shows the Fed's commitment to regulate the issue as a whole.

- Bringing the issue from a local (provincial) issue to a Federal issue means that we need oversight. We lose a level of local oversight.
- We need to show that the Fed's are committed to taking care of the issue in question. It's being supervised and monitored. There's a regulatory mechanism that's at work.

Having a regulatory agency in place is not 100% necessary – BUT – it is a useful indicator.

4. *From time to time there has been discussion of whether Canada should have a national Securities Commission (like the SEC in the United States, and other like agencies), rather than having the securities industry regulated by several provincial regulatory bodies such as the Alberta and Ontario Securities Commissions. What arguments would you make for and against the constitutionality of a Canadian Securities Commission?*

Canada has separate Securities Commission (Ontario Securities Commission is the most important – TSX)

- Can the Feds create a single Securities Commission for the whole Country? **YES**
 - If so, the Feds would create this with s.91(2). To make this kind of legislation, **they would need to:**
 - Ensure that there are rules which cover international Trade;
 - Create offences that look like criminal offences (since Feds control Criminal Law offences)
 - Work the law to make sure that it complies with the Test from Question 2.
- **Arguments For a National Securities Commission:**
 - International Trade
 - Business community wants the Country to create one.
 - There are some things the Province cannot legislate (ie: Interprovincial issues) – so keeping the commissions separate leaves gaps in the law.

Dickson:

- **Arguments against creating a Federal Securities Commission:**
 - **Historically** – the Provinces have had that control (Fails Test 4).
 - **Why fix it if its not broken:** Is this individual Province scheme failing? Or is it working? Do we need the Feds to take over?
 - Is the current system missing issues, or are there big loopholes from being split up?
 - **Artem Insights:** A provincial system splits up all the Trials which come out of Securities issues. A federal system would bring all those cases together and they would get swamped.
 - **Branch 1:** Securities can be seen as a single industry. Branch 1 states that individual industries are Provincial authority.

Necessarily Incidental Doctrine (pages 141-148) WHEN ONLY 1 PART OF A SCHEME IS BEING CHALLENGED

1. *What is the three part test devised by the SCC for assessing whether an impugned section or provision of a statute is valid by virtue of its relationship to the statute as a whole?*

This test is not identical in all cases. The test varies depending on the encroachment on provincial power

TEST:

1. Does the impugned provision infringe on provincial powers (if not, then the 1st part is: is the Act itself valid?)
 - a. What level of infringement takes place?
2. Is the provision(or act itself) valid under the 2nd branch of s.91(2)?
 - a. We decide this based on the presence of a regulatory scheme;
 - b. Also use a P&S analysis
3. If the regulatory scheme is valid, we then decide if the provision is sufficiently **integrated** with the scheme.
 - a. Is it necessarily incidental? It's so integrated into the scheme as a whole that although it may infringe, it's necessary to the Act as a whole.
 - b. Is this section necessarily incidental to the Act as a whole.

If we pass the 3rd Test – we have an *intra vires* provision.

Passing this test does not automatically make the whole Statute valid, - it only makes the impugned provision OF the statute valid.

2. *How is the test applied to the facts of this case?*

The provision is remedial in nature (less intrusive re: provincial power), this kind of encroachment is not unprecedented AND the encroachment is limited.

1. YES

The Act is meant to eliminate activities that reduce competition in the market-place. There are investigatory methods, and many ways to solve and address the problems the Act allows us to discover

2. YES

The Act is meant to improve the economic welfare of Canada as a whole. We cannot apply a regulatory scheme to competition unless we do it Federally. We can't have differing competition laws.

3. YES

3. *What problem is this doctrine intended to resolve? How would you distinguish the doctrine from the "pith and substance" and "incidental effect" doctrine?*

The nature of regulating competition is necessary to be regulated Federally.

Incidental Effect goes one step beyond P&S. P&S allows for a statute to have incidental effects on the other Head of Power – but does not go into details about where to draw the line.

This Necessarily Incidental (NI) Doctrine vs. incidental effect (IE) Doctrine
(Pith & Substance (P&S))

INCIDENTAL EFFECT: NOT NECESSARILY A SMALL EFFECT. JUST A SIDE EFFECT.

- IE Doctrine is an effect of a P&S Doctrine.
 - In the IE Doctrine – there's no analysis of the connection between the Act and the Section individually
- For NI Doctrine – they look at the connection between the Act and the Section
 - In GM: The attack is only on the part which allows for civil causes of action.
 - **Hogg: Loves P&S and IE.** He thinks that P&S and IE are all you really need. If the overall Act is valid (meaning we've already shown that the individual section has only an incidental effect) then we're good to go – the analysis is complete.
USING NI
 - **NI:** a Section is being challenged and on its face, that section appears to infringe on the other power

Definition:

- There will always be some level of overlap, the incidental effects are always going to happen.
- The encroachment is necessary for the entire piece of legislation to work. We shouldn't look
- We have to look at the whole Act as a whole and not look at the encroaching Section individually.

- It acts as a justification.
 - The impugned section DOES have an effect but if it is necessary for the entire Act we can allow the Section.

CRIMINAL LAW POWER

s.91(27) Gives Federal Jurisdiction over:

- Procedural Law
- Substantive Law
 - **NOT creating Courts of Criminal Jurisdiction**

Creates a uniform Criminal Law across the Country

- Does not follow the U.S. State by State system

s.92(14) Gives Provincial Jurisdiction to:

- Policing
- Prosecution matters
 - We have Provincial Crowns which prosecute Federally created criminal matters.
- Courts

s.92 (15) Gives Provinces Jurisdiction to:

- Impose fines and penalties, imprisonment, etc. to enforce any law of the Province

SCOPE OF CRIMINAL LAW – Cases

Criminal Law must be 3 Things:

1.

Board of Commerce case (1922): Very narrow test for what falls within Federal Jurisdiction

- **Haldane**: Criminal Power only applicable ‘**where the subject matter is one by its very nature belongs to the domain of criminal jurisprudence**’.
 - Feds enacted legislation that was challenged in the *Board of Commerce* case which creates Fed. Penalties for unlawful civil conduct
 - Confines law to morality, leaves out economic or social ills. No ability to create criminal laws about new behaviors.

P.A.T.A. - Proprietary Articles Trade Association – (1931) Very broad test

- **Atkin**:
 - **Criminal Law is ‘any act prohibited with penal consequences’.**
 - Goes against Haldane’s approach, doesn’t take morality into account.
 -

Margarine Reference (SCC, 1949) – CURRENT DEFINITION

- Criminal Law:
 - 1. Has a public purpose (peace, order, security, health, morality, etc.);
 - 2. Is Prohibited; and
 - 3. Has a penalty.
- Tested the 1949 era definition of what the Criminal Law was. Used to be ‘any act prohibited with penal consequences’. The Margarine laws had penal consequences, but were in P&S

about protecting Dairy farmers. The P&S was a Provincial jurisdiction (property & civil rights)

- J. Rand: **There is something substantive that is involved with the Criminal Law. The law must be directed at a public purpose like public peace, order, security, health, morality....** (Pith & Substance)
- Federal legislation that criminalized the importation of a butter substitute called margarine.
 - **This was really about protecting an industry from competition.** Not under Criminal Law Power.

Labatt Brewing (SCC, 1980)(pg. 379)

- *Food and Drugs Act* prohibited labeling beer that was over 2.5% as 'light beer'. Labatt challenged the laws in the *FDA* as outside the Federal Authority to regulate on that issue.
- **FDA law was outside Federal Authority.** Too regulatory, (so not Crim. Law) and not part of POGG.
 - Labatt was selling Light Beer that didn't qualify under Canadian laws to be called Light Beer.
 - If impugned law dealt with preventing deceptive marketing, we would allow it under the Criminal Law power.
 - This law was about **naming/labeling issues.**

LA FOREST:

- La Forest was worried about expanding POGG. Felt it would go against the vitality of the Provincial authority.

3 Cases from 1995-2000 which explain the Criminal Law Power

***RJR MacDonald Inc. v. Canada* [1995] 3 S.C.R. 199 – Tobacco advertising Case**

- 1st serious attempt by Feds to prohibit and limit tobacco advertising in Canada
- Charter argument: Law is *ultra vires* the Fed. Power.
 - **LOST:** Tobacco companies attacked the Fed. Legislation and raised many Constitutional Issues
 - P&S Analysis: Act is Criminal Law
 - Prohibition? YES. Penalties? YES. Public Good? YES (Health effects)
 - **Law was valid under Division of Powers**
- Charter argument: Freedom of Expression (s.2 of Charter) which is **not** justified under s.1 of Charter
 - **WON:** Limiting advertising was an unjustified limit on the company's freedom of expression AND the public's freedom to receive information
 - The law was struck down
- Led to a redrafting to Tobacco advertising legislation and that legislation was challenged in *Benson v. Hedges*.

Colourability: Banning Advertising and not the tobacco itself: **NOT COLORABLE.**

- If the law was coloured (P&S: Regulating tobacco industry) we'd see labour rules, pricing, etc.
- Restricting advertising is creative legislation. We cannot ban sale of cigarettes outright (problems with prohibition).
 - If it would be valid criminal law to ban the sale of tobacco (similar to the sale of cocaine), then it follows as a legal power to ban the **advertising** of that product.

- Intent is to combat a public health ‘evil’. The method of combating this evil isn’t pertinent.

La Forest J.: (Majority)

- **Tobacco Arguments** – That the law is NOT valid criminal law.
 - Not a traditionally criminal issue: **NO**
 - Crim law is plenary.
 - Too regulatory in nature to be considered Criminal Law – it’s not what Criminal Law should look like: **NO**
 - Criminal Law doesn’t have to go to the root of the problem. It can tackle the harm in an indirect way.
 - Criminal Law isn’t frozen in time. Tobacco wasn’t a health concern in 1867 because we didn’t know it was a health issue then.
 - Prostitution laws
 - The exceptions written into the Law make it more regulatory in nature: **NO**
 - Exceptions can easily be put into the Criminal Law.

Dissenters:

- Was worried about when Parliament doesn’t prohibit the consumption of a product, but does prohibit many aspects of consumption.

Hydro Quebec – PCB’s polluting the environment

- Prosecution against Hydro Quebec for releasing PCBs into the environment without a permit.
- **Laws protecting the environment is a public purpose that falls under Criminal Law Power.**
 - We don’t need to have an exhaustive list of things that fall under the Criminal Power. As times change, we can add certain things to what falls under Criminal Law
 - Criminal Law protects our fundamental values. Protection of the environment **has become** a fundamental issue in Canada.
 - It’s not necessary to use the ‘protecting health’ argument. Clean environment alone is sufficient.
- CIPA Act was **not** colourable. Dealt with protection of the environment and health concerns with polluting these specific PCB’s.
- Doesn’t upset the balance of power.
 - Criminal prohibitions on the release of toxic substances doesn’t get in the way of the Provinces regulation of the release of substances. Both are protecting the environment, but do not conflict
- The bad guys in both this case and the RJR case used the same arguments. Both failed.
- Argument re: being more regulatory than prohibitory.

POGG:

Fed power to legislate over things in Canada as a whole.
 National attention issues: Epidemic, Pestilence, disease.
 May go so far as economic crisis or war-time crisis.

Reference re: Firearms Act [2000] 1 S.C.R. 783 (S.C.C.).

- Required the registration of all firearms, handguns, rifles, etc. which before this Act, didn’t need to be registered

- The government of Alberta, on behalf of the people, made a Reference to the Alberta C.A, then appealed to the SCC.
- SCC used this case to give a good P&S analysis. They set out the steps for P&S really nicely.

Decision: Valid use of Criminal Law Power. P&S: To restrict access to inherently dangerous things for public good. Act focused on public safety and was different than the Provincial property regulatory scheme. Effects on property of guns was incidental (P&S was NOT regulatory, but about public safety). Passed Margarine Reference test.

**** Extrinsic Evidence:**

- Used both intrinsic and extrinsic evidence
 - Extrinsic: The statements in Parliament by Justice Minister Allan Rock.

**** Operational Effects of the Law:**

- How it operates on the Ground
 - P&S Shows that the registration protects the people. How the law, when put into operation, actually does, or requires people to do. Court wants to look at the purpose of the legislation, but also about how it works. If there's a big difference between the two, that may cause some problems.
 - (Para 24): Looks at the effects of the Scheme. How it actually operates.
 - **(P&S): More like a public safety measure, not like a property regulation measure.**
 - Invalid law would look **only** at property regulations.

**** Historical Issues in Alberta re: Firearms**

- In the past, guns used for illegal purposes used to be regulated
- **This law extended the older laws regarding illegal guns to include ALL guns.**
- The older laws had been upheld – they were passed by the Feds and the law was upheld.
 - Court: The older laws have been good for 80 years. That law was valid under the Criminal Law Power. **How can you only now argue this law** when we extend what guns are to regulated.
 - **The old law is good, challenged and passed the test. How can the changes being made today make the previously good law invalid now???**
 - Alberta has an uphill battle.

**** P&S Analysis: Fed. Authority**

- The law falls under Federal Authority.
 - **To promote public safety**
 - Allan Rock: 'preservation of the safe, civilized and peaceful nature of Canada'
 - Case law shows that earlier gun control law was to promote public safety.
 - No issue with Fed.s making the old gun control law. That law lasted 80 + years. New law is a **limited expansion** of the pre-existing legislation.
 - How can we now have a P&S issue with the limited expansion if there was no P&S issue with the original law.
 -

Is this a Criminal Law?: YES

- TEST:
 - (1) Valid Criminal Law Purpose? **YES**
 - Public Safety
 - (2) Have laws of this type generally been held to be criminal law? **YES**
 - We're talking guns here. Guns are dangerous, we want to protect people.
 - (3) Purpose of law must be connected to a prohibition backed by a penalty? **YES**

- It's this very penalty that is being challenged. The penalties are meant to prevent dangerous people from getting guns.

Is this lawful under POGG? Not necessary

- If law is mainly in relation to criminal power, then incidental effects that touch on property don't upset balance of Federalism.
 - Alberta hasn't shown that the effects on Provincial Law are more than just incidental.
- Efficacy of law has nothing to do with Division of Powers analysis.

Mischief Approach:

- Court looks at the problems the Act is intended to address or fix.
 - Gun violence, illegal trade in guns, suicide, accidental deaths.
 - These are related to public safety.
- If the law is about preventing misuse, the impugned law should deal **only** with preventing misuse.
 - **BUT:** Guns are dangerous even if they're not misused. Suicide rates increase as the availability of guns increase.
 - Fed. Can use indirect means to further public safety.
 - Preventing misuse is one indirect way.

Too complex/Regulatory? NO

- Other exercises of the criminal power (*Food and Drug Act*, Environmental Protection) are very complex, but are still criminal Law.
 - One isn't really connected to the other.
- The law doesn't affect Provincial regulations (ie: hunting, other aspects of firearm use) regarding the civil and property rights of guns.

Operational Effects:

- **DON'T AFFECT the Constitutionality of the Legislation.** The efficacy argument is for Parliament to discuss – not the Supreme Court.
- **Retains Double Aspect Doctrine:** Provinces retains laws re: regulations on certain firearms. Impugned law doesn't effect those laws.
- **Not Colorable:** Fed.'s don't have any improper motive here.
- Law is valid since it's intention is to ensure that only those qualified to have guns can have guns.

**** Moral Content:**

- Alberta's argument itself is flawed. Criminal Law doesn't have to be related to immoral acts.
 - Criminal Law of market competitiveness may not be seen as Moral. Criminal Law chooses **not** to criminalize actions that many see as immoral (adultery, incest)
- Gun regulation is moral since it acts to prevent immoral acts like murder, theft, terrorism, etc.

ON/SK: Not necessarily incidental?:

- Registration is a key part of the Act, cannot be severed. It's necessarily incidental. It cannot be severed from the rest of the Act. The registration also promotes the P&S of the Act (public safety).
 - Licensing deals with people. Registration with guns.
 - If we only have licensing, we won't be able to keep track of firearms if a gun is sold to a non-licensed person. We wouldn't know where a gun came from if sold from an unlicensed person (or to an unlicensed person).

- If we try to prohibit an offender from using guns, the registration system lets us know how many guns he has, so we can take them away.

Federal Law prevents Province from Regulating (402-403)

- Alberta argues that impugned law threatens Federalism.
 - Are the effects of the law (in P&S) re: public safety or re: property & civil rights.
- If Law is in P&S public safety, then incidental effects that touch on property & civil rights **DON'T** threaten Federalism.
 - The law and its effects and P&S public safety.
 - Any effects on P&CR are incidental and constitutionally irrelevant.
 - Guns are property. The law limits ability to own that property. Thus, law is about P&CR. **NOPE**. Drugs, food, porn is also property, but under Criminal Law.
- Impugned law doesn't affect Province's regulations re: hunting, discharge in municipal areas.
- ****Alberta says that impugned law takes away their ability to make their own laws regarding gun regulation. They take over the field. Not good enough**
 - Double Aspect Doctrine would allow the Province to make additional laws re: gun regulation (hunting rifles, ordinary firearms)
 - Both heads of Power can make laws in this field

**** Implied Limits:**

- P&S: Must have prohibition backed by penal consequences. Must have criminal – public purposes.
 - R. v. Hydro: Increased scope of criminal law to include protecting environment.
 - **Not affecting Public Safety:** If the base for enacting guns was to prevent what could result from the **use of guns (public harm)**, then we have a real limit against government regulating drugs or other possessions which can be used to purposes we don't like, which aren't harmful.
 - Federal imposes authority on area's that don't deal with Public Safety. Majority of argument is based on protecting public.
 - Suppose the mischief approach showed that the only real bad effect of a law was illegal trade **within** a province. It could be that this law wouldn't hold up as a Fed. Law. Illegal trade of cowboy hats.
 - Discretion (pg. 399)
 - Para. 47,48
-

Plausibility Argument:

- Counsel looked at efficacy of legislation – past and plausibility of future. History of registration for 70 years for unlawful firearms. It hasn't been very useful. Unless the registry is 100% reliable, the Police cannot rely on it for their safety.
 - Is it even plausible for the registration legislation to fulfill its purpose?
 - **The plausibility/efficacy of the legislation to fulfill its purpose has NOTHING to do with it's constitutionality.**
 - If old regulation isn't working – this doesn't take away power of government to make laws to try and make the registration work better.
 - Is the plausibility argument colourable? **NO**
 - **Efficacy is an argument for Parliament, for the makers of the law – has nothing to do with Constitutionality.**
 -
- Court told counsel to return to P&S of Legislation argument.

- **Efficacy is an important Constitutional Issue in CHARTER CASES.**
 - The effect of the law's intrusion of people's rights.

Legislation just creates a Regulatory System:

Purpose:

- Counsel said some Minister states that purpose of legislation was: 1. Stop criminals from using illegal firearms, 2. Punish smugglers 3. Create a context where the legitimate use of firearms is carried out in a matter of public safety.
 - **1 and 2 are totally criminal matters**
 - 3. Falls under Property and Civil Rights. Licensing, registration, penalties for failing to do so in the interest of public safety. Not criminal Law - but Private Property.
 - Therefore, purpose of legislation (this part) is for private property, same as a regulation for cars, dogs and bicycles.
 - **Court: Minister was talking about Considerations of the Legislation, different elements – NOT PURPOSES OF LEGISLATION.**
 - **Distinguish between purpose and the means achieved to reach that purpose. Is the registration a purpose in itself or a means to achieve overall public safety?**
 - Criminal Law isn't normally about creating orderliness. It's designed to prohibit something, or suppress something. Those are normal uses of Criminal Law power. This legislation is isn't about prohibiting or suppressing, so it's not criminal law.
 - Only crimes are about breaking the regulations of the registry.
 - **This legislation prohibits guns. It suppresses access to guns.**
 - **Regulations are designed to ensure legitimate uses of firearms. It prevents the use of illegitimate use of firearms.**

Provincial Power to Punish:

- Provinces have the right to impose penal sanctions (s.92[15]) and have authority to do so over Property and Civil Rights (s.92[13]).
- *Margarine Reference* gives area's that the Province **may possibly** be able to impose punishments (peace, order, security, morality, health, etc.)
 - Following cases sheds light on where/when Provinces can impose penalties.
- Provincial power to create offences (s.92.15) **is less broad** than the Fed.'s power to create offences (s.91.27).
 - Provinces can make offences in area's where they have ordinarily had jurisdiction:
 - Parks, streets, property, business activity, corporate security.
 - If Province tries to create an offence that's not safely anchored in property and civil rights (or other s.92 area), they are in trouble.

***Bedard v. Dawson* [1923] S.C.R. 681**

KEY: Upheld Provincial laws that supplemented Criminal Law. Law was about the use of control and enjoyment of property and at most, aimed at suppressing the conditions likely to cause crime, not the punishment of crime.

Decision:

- SCC upheld Provincial law that authorized the closing of 'disorderly houses' (DH). DH were places where people had been found and charged with gambling/prostitution charges.

- Provincial law that allowed for the closing of a ‘disorderly house’. Law seems to increase the penalties imposed by Criminal Law.
- **Valid Provincial Power:**
 - Law is about the control and enjoyment of property and safeguarding community from the illegal use of the disorderly houses by others
 - Law is aimed at suppressing conditions that might lead to crime, and NOT punishing that crime.

***Westendorp v. The Queen* [1983] 1 S.C.R. 43**

KEY: Law was, beyond question, aimed solely at controlling/punishing prostitution. Went against *Bedard* precedent.

Colourability:

- S.6.1 is the only section that deals with prostitution. All the other sections of the by-law, before and after 6.1 are of no relevance to prostitution. S. 6.1 didn’t talk about other ways in which you could control streets, avoid nuisance/embarrassment, avoid the nuisanceful congregation of people, etc.
- P&S Analysis: By-law is about punishing prostitution.
- Colourable: **YES**. Law said it was about preventing nuisance. Actually dealt with the ‘evils’ of prostitution.
 - The rest of the by-law had nothing to do with prostitution. This was one small statute tossed in among many others in an attempt to hide it.
- Double Aspect: **NO**. This law goes BEYOND Double Aspect and is trying to usurp Fed. Power in legislating against prostitution.

***Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)* [1987] 2 S.C.R. 59**

KEY: Provincial law restricting the amount of nudity of bars was Valid – Not Criminal Law Power.

No penalties associated with breaking Provincial law, it regulated entertainment meant to boost liquor sales. Criminal code provisions (re: nudity) didn’t conflict with Provincial law.

Dickson:

- Law was a regulatory scheme regarding the sale of alcohol and giving away liquor licenses. Prevents all nude entertainment as part of the liquor license.
 - Is this prohibition about morality (public good → Criminal Law under *Margarine*)
- P&S Analysis: Purpose is totally different than that of the Criminal Law. Entertainment, not nudity/indecency.
- Double Aspect Doctrine: Both laws regulate nudity, but in very different lights. No direct conflict. Capable of complying with both legislations.
- No Penal consequences: Breach results in losing liquor license only.
- Not colourable: Not about preventing nudity, but about regulating what kinds of places sell liquor

Estey:

Firearms Reference re: Implied Limits

Discretion:

- Scope of decision making authority (choice) that is left in the hands of officials/boards.

- Legislation gives officials a level of discretion in using their own mind to determine punishments, etc.
- **LIMIT:** It may be too discretionary to allow officials to make decisions on criminal law.
 - A law enacted in this way is problematic.

Distinction between Prohibition/Penalties that only deal with Regulatory Scheme:

- Penalties designed more at raising revenue than opposing prohibitions.
- Prof doesn't know what they're saying here.
- Some prohibitions cannot be linked to criminal conduct but are just enforcement mechanisms that don't deal with the criminal law.

PROVINCIAL JURISDICTION FROM s.92(15) – PUBLIC MORALITY

SECTION 92(15): Ancillary Power

- Provinces can impose fines/penalties (incl. imprisonment) under OTHER valid Heads of Power.
- Punishments must be directed at enforcing laws otherwise within Provincial authority

Morgentaler v. Nova Scotia (SCC, 1993)

- No common theme to law
- Law was directed at prohibiting performing abortions (in private clinics)
 - So much of this legislation is window dressing, created just to make it look like it's not about abortion.
 - Talking about other medical conditions is window dressing.
 - Having issue with private clinics doesn't make sense since Province previously liked
- **MOST extensive use of extrinsic evidence in judgment.**
 - Royal commission report, timing of events, Hansard (what politicians are talking about),
 - Province says it makes health care more efficient, avoids 2 tier system. Actual effect is only to prevent abortions.
- Colourability (Sopinka):
 - Sopinka says it isn't colourability, but it probably is.
 - This is one of the best rulings on colourability
 - Stated purpose vs. real P&S (using extrinsic evidence)

Practical Effect of the Legislation

- Restricting/preventing abortion
 - Actual operative effect isn't going to save legislation which by purpose is invalid, but could raise questions about legislation that has those effects
 - Only works one way.
- Morgentaler is arguing that purpose of legislation is to regulate/restrict access to abortion,
 - He created his own private clinic because he didn't believe that there was enough access through the public system.
- Province defends their legislation – similar to Firearms Reference. Doesn't restrict access to abortion
 - Province disagree's on Morgentaler's premise.

- Province accepts that abortion is lawful. Provincial law doesn't go to that criminal question.
- The legislation only speaks to **where** abortions could take place.
-
- **Court:**
 - Province is talking about the impact. But the impact isn't relevant. We also don't know 100% what the impact of Provincial legislation would be.
 - But we do know the purpose. Preventing abortions from taking place. A criminal law power.

Extrinsic:

- Used to assess the purpose of the legislation

Sopkina (Not Colorable Legislation) Issue of Severance. Using Necessarily Incidental Analysis:

- Province says: If you don't like the abortion aspect of the legislation, strike that abortion legislation but keep the rest of the legislation.
- **Court: No**
 - Proof that the Court believed the other parts of the Legislation were just filler.
 - Even though it seemed that the other parts of the Legislation were within Provincial authority
 - But since the abortion is the dominant thing, and the other parts were just thrown in.
 - Shows that the Court is unhappy with this attempt.
- Calling the Legislation colourable (for such a divisive issue) might make the Court seem less neutral.
 - Court didn't go all the way and call it colourable, but went pretty close.
- Striking the whole thing down is more provocative. It shows that they weren't fooled by this attempt.

Severability (connected to NI)

- If the Act isn't consistent with Federal Act, it can be read down with Paramountcy. But it's only the inconsistent parts that are read down.
- This Legislation is a good instance of a situation where a single provision which sticks out causes a problem for the whole legislation.
 - It's not necessarily incidental to the provision as a whole.
- The Province is free to try again and reenact the legislation without the abortion provision.
- **Court asked:** What would Province rather have us do?
 - Sever the abortion clause and leave the rest; OR
 - Strike down the whole thing and let Province try again

Hogg: Severance is rarely used in Division of Powers analysis.

- If Province brought new legislation, that was almost identical, but which attempted to change its purpose, could be heard and may stand up to scrutiny.
- If the Province actually did that, and had new legislation, but which the same effects as the 1st time around, is this going to pass? Would they be able to look at the effects? **Prof doesn't know.**

Health Protection Act – Bill 11 [passed 2001]).

- Health Protection Act was controversial because despite preamble, people thought this was an attempt by Alberta to **expand private health care**

- Move to two-tier health care system
- Would give Minister the power to approve private clinics.
- If Abortion clause was put into **this** Provincial bill, it would likely be struck down
- This Act doesn't stop abortion, it only stops abortion in unlawful clinics.

What if Morgentaler legislation was passed in Alberta in 2002?

- Health Protection Act is P&S not criminal. No criminal penalties. Not criminal law.
- If abortion was put into **this** Provincial Bill (Not Health Protection Act), it may go over easier.
-

KEY: Under different circumstances, the N.S. Legislation being challenged would have been seen quite differently.

Court essentially called this legislation colourable. Didn't believe that the Province was interested in anything OTHER than Abortion.

But a few years later in Alberta – they passed essentially the same case.

POGG: Peace, Order and Good Government

- *The Constitution Act 1867* had centralizing tendencies.
- Centralizing Features:
 - Power of Disallowance
 - Residual Power of POGG

Power of Disallowance:

- The power of Fed.'s to **disallow** Provincial Legislation.
- Power to reserve laws and prevent them from coming into effect for some time
 - Keeps Provinces 'in-line' from passing wacky legislation.
 - Remains in the *Constitution*, but hasn't been used since 1940's. Parliament probably couldn't use this again.
 - We likely have a **convention** of not using this Power.

Residual Power of POGG:

- Relates to all matters not enumerated in s.92 or in s.91.
 - **Macdonald's View:**
 - We do the opposite of the U.S.
 - We give residual power to Parliament, not the provinces
 - JCPC has never carefully looked at the specific terms within POGG. A literal interpretation was not used in any of their analyses.
-

POGG- NATIONAL CONCERN:

- Permanent
- No intrusion. Adds a new power to Federal authority.
- Distinctiveness
- Newness
- Provincial Inability
- Must have some sort of Canada-wide issue

POGG – EMERGENCY:

- Temporary in Nature
- Allows for minimal intrusion into Provincial power
- Courts decide if we have an emergency
 - Cannot rely on experts
- Must be some kind of special emergency/epidemic/disaster
 - Law doesn't need to specifically mention the term 'emergency'

Early View of POGG

- POGG is a General Power, above all others
- S.91 enumerates certain areas that are undoubtedly under POGG
- S.92 enumerates certain areas that are NOT under POGG
- Whatever remains falls under POGG

JCPC: 2 Branches of POGG:

- 1. Emergency (pg. 497)**
- 2. National Concern**

Judicial Committee of the Privy Council

- Made early decisions regarding what POGG is/was
- 3 contradictory Phases before 1947.
- After '47, the Supreme Court used the JCPC's decisions to create an overview and a single understanding of POGG. JCPC's decisions were fractured and contradictory.
- Didn't produce dissenting opinions, but 1 single opinion
- Watson (1880-1899) & Haldane (1911-1928)

POGG: National Concern Doctrine

KEY:

- Parliament has authority over 'general concern to the dominion'
- Must be unquestionably of matters of Canadian interest and importance
 - Should not intrude into s. 92 powers.

Russell v. The Queen (1882)

KEY:

- **Promotes National Concern Doctrine**
- 1st case to look at POGG

Facts:

- Federal Law allowed individual counties to bring about **Prohibition** to be about in their area.
- **Is this *Intra Vires* Parliament?**

Decision: Federal Law upheld. Valid under POGG

Reasons:

Court:

- Parliament has authority over 'General Concern to the Dominion'.(Root of National Concern)

Local Prohibitions Case

KEY:

- **Promotes National Concern doctrine**, but limits Russell.

Facts:

- A few years later, the Province enacted very similar legislation to the *Russel case* legislation.
- Province enacted this law as a challenge to the Russell ruling as a way to have the issue re-examined.

Decision: Provincial law upheld: Double Aspect Doctrine; BUT

Reasons

- JCPC expresses doubt about worthiness of POGG.
- Restricts POGG to ‘matters that are **unquestionably** of Canadian interest and importance
 - POGG shouldn’t be allowed to intrude on s.92 powers.

Promotion of POGG as Emergency Doctrine ONLY

KEY:

- To be used **ONLY** in exceptional circumstances
 - War, famine etc.
- **MUST** be temporary in nature
 - Parliament, not the Courts, will decide when emergency ends
- **CAN** intrude on s. 92 powers
- Court will decide when there is an emergency.

Reference re: Board of Commerce Act (1921)

- Parliament enacts legislation to regulate price-fixing, hoarding and other activities taking place after the War. Infringes on Parliamentary authority
- **POGG is only in exceptional circumstances**
 - If there is an exceptional circumstance, the intrusion is justified.
- In 1921: No war, no emergency so Fed. Legislation struck down.

Fort Francis Pulp and Paper

KEY:

- **Emergency Nature is temporary. Laws under POGG must be temporary in nature.**

Facts:

- Parliament wanted to control the use of newsprint to ensure that there would be enough and no shortages. Passed during the war but lingered on after the War.

Decision:

JCPC upheld law as under an Emergency Power.

- **BUT:** Legislation should decide when an emergency ends, and Court shouldn’t be the one answering the question.

Snider (1925)

KEY:

- Law couldn’t be upheld under National Concern – so we upheld it under Emergency
 - ‘Grand national drunk problem’

Facts:

- Very old Federal labour legislation. Tried to use this law to deal with a utilities strike.
-

Decision: Federal law struck down.

- **NOT** upheld under POGG. Tried unsuccessfully to use *Russell* precedent to uphold law.
- **Reinterpreted Russell** ruling to consider the law was **actually** upheld because Prohibition was seen as an emergency – “Grand national drunk’ problem. (**not** national concern)

New Deal Legislation (During the Great Depression) [1937]

KEY:

- Courts determine when there is an emergency, but not when it ends

Facts:

- In Canada, Parliament tried to pass 'new deal' legislation to create unemployment insurance, pensions, protective labour laws etc. as a response to the Depression.
 - These laws were challenged and brought to JCPC.
 - **JCPC struck all the laws down.**
 - This made people Angry.
-

Haldane View of POGG

- Enumerated provincial powers
- Enumerated Federal powers are subtracted from Provincial powers
- Anything not falling under s.92 OR s.91 go to POGG, but **ONLY AS AN EMERGENCY**

Lord Haldane:

- Reinterpreted POGG to **only** be used in Emergencies.

Canada Temperance Federation (1946)

POGG – NC: Goes beyond local/provincial concern

Facts:

- We have a problem with Prohibition again
- Some matters go beyond a local/provincial concern AND
- Have become matters of National Concern.

Decision: Federal Law upheld under POGG: National Concern

Doesn't overturn Russel and brings Russell back

Johanneson v. West St. Paul (1952) – (NEWNESS)

federal jurisdiction over **aeronautics** found under POGG as a matter of national concern.

Munro v. National Capital Commission (1966) – PROVINCIAL INABILITY

Ontario/Quebec unable to create "National Capital Region" by themselves.

Used POGG – NC to accomplish this.

ANTI-INFLATION ACT REFERENCE

2 branches, separate and distinct.

- Conservatives introduce Fed. Legislation to freeze wages and other monetary legislation to combat inflation.

Majority Rulings: *INTRA-ULTRA VIRES?*

- Laskin: (7-2)
 - Act is *intra vires*. Upheld under POGG. Why? Emergency Doctrine
- Beetz: Dissent
 - Act is *ultra vires*.

Majority Ruling: Use of Term: Emergency?

- Laskin: (7-2)
 - National emergency does not need to be explicitly stated
 - Lack of the term 'emergency' doesn't matter
- Beetz:
 - Just a national concern is not sufficient.
 - Parliament must make **explicit** reference to 'emergency'

Majority Ruling: Is it upheld on National Emergency or National Concern Basis

- Beetz: (5-4)
 - CANNOT be held under a National Concern.
- Laskin:
 - Can be held under Emergency, so we don't need to look at National Concern

Emergency Doctrine:

- Necessary Features:
 - Majority: Doesn't need to be explicitly stated as 'emergency'
 -

Before 1976: 2 streams of POGG cases. Contradictory.

1. JCPC stated in one stream that POGG is **ONLY** for **national emergencies**.
 2. When matters are or assume a **National Concern** for Canada
 - We don't know if they're exclusive one another or if they both count.
- Laskin: (Majority in Emergency)
 - Main POGG issue is National Concern.
 - Emergencies are examples of issues that are of National Concern.
 - Emergencies:
 - Doesn't have to be explicit
 - Beetz/Ritchie: (Majority in National Concern and the actual Law) **2 different Powers (Just like 2 branches of Trade and Commerce)**
 - POGG only comes into play where we have a National Emergency.
 - National Concern does count, but not in this situation.

Beetz's: Differences between Emergency & National Concern:

- **Emergency:**
 - Risk to Country as a whole
 - Great urgency, actual emergency (more than **just** war/famine, etc.)
 - Must Declare an emergency
 - **Temporary.**
 - ****Parliament can take over any power** that is needed to deal with the crisis. **
- **National Concern:**
 - One particular power is added to s.91/s.92 that we're present in 1867 that's not local/private nature
 - Essentially, the power is added to s.91/s.92
 - The effect is **permanent**
 - Closer to an amendment to the Constitution
 - ****Does not authorize a 'take-over' of established Provincial Jurisdiction. Only applies to issues not covered in s.92. ****

Why Does Beetz reject Emergency Basis of this Act:

- Too broad, applies to too many Heads. Takes away too much Provincial independence

- Emergency must be explicitly stated

Beetz: Inflation is a Not National Concern:

- Inflation is **not a distinct subject matter** over which Parliament has exclusive jurisdiction.
 - It's too broad
 - Deals with too many things
- The issue must be identifiable.
- Giving Parliament authority over inflation would **reduce Federalism**
- **Beetz:** Maybe the Emergency/National Concern Doctrine is an **unwritten** principle.
 - Not explicitly stated in the Constitution but an unwritten principle that allows Government to act in emergencies.

Russel v. The Queen (1882)

Broad view of General Branch of Parliament's authority and POGG. Doesn't seem to follow other cases view of POGG.

- Federal *Canada Temperance Act* (re: booze) ("The Act") is challenged as *ultra vires* by Russel. Russel needs to show which s.92 power The Act infringes on.
 - **NO: S.9:** Re: raising revenue for **provincial/local/municipal** reasons.
 - NOT Regulating Trade.
 - **Act doesn't interfere with s.9 –**
 - Even if it did interfere with s.9, Federal Power could still make a law that infringes on s.9 under POGG. Or look at Paramountcy
 - **NO: s.13:** Regulating alcohol is like regulating guns/poisons. While these things are 'property', the P&S of regulation is Public Order and Safety (Federal)
 - The Act is **not about** Property
 - Civil Rights portion of s.13 doesn't remove authority from Parliament to make laws re: criminal/wrongful uses of property
 - s.16: Parliament wanted uniform legislation throughout Canada for booze. Act is about booze in all of Canada. The fact that the effect of the legislation is on a local level doesn't change P&S.
- Don't let the incidental effects get in the way.
- **Since The Act doesn't fall anywhere under s.92, analysis is FINISHED. Power to make this law falls under POGG.**

A.G. Ontario v. A.G. Canada (Local Prohibitions Case)

Narrower view of POGG power. POGG is only 'National Concern'. Used 'covering the field' doctrine, that's no longer used.

- Question Did Canada have authority to enact *Canada Temperance Act*?
- Question 2: If Canada Temperance Act is in force, does Ontario have the authority to enact their Liquor License Act?
-
- **Anything NOT enumerated in s.91 should ONLY go to Parliament in situations unquestionably of Canadian interest and importance. We cannot allow everything not mentioned in s.91 to automatically go to Parliament.**

- Doing otherwise **removes Provincial autonomy**. It would allow POGG to be used to give Parliament anything not specifically listed in s.92(1-15) and it would remove the use of s.92(16)

Example:

- Making a law re: sale/right to carry weapons would be within right of Province to make laws. (s.92(13) or 16). It could not simply be overridden automatically by POGG
 - **BUT:** Weapons trafficking can be legislated by Parliament.
 - Weapons trafficking is of Canadian interest/importance and has the basis to be legislated by Feds. Under POGG.
- *Liquor License Act* falls under s.92(13) or s.92(16). It cannot be overridden automatically by POGG (unless national importance)
 - **ALSO:** It doesn't affect the liquor trade between Provinces or internationally.
 - **SO:** Restricting access to alcohol in specific townships falls under s.92(16).
 - Parliament can't enact a law that's specifically about prohibiting booze in a certain township.

Decision:

- Federal *Temperance Act* occupies the field of legislation. **BUT:** There's no inconsistency in parts of Ontario where the Fed. Legislation doesn't apply.
- Ontario *Liquor License Act* is *intra vires* Province and can be enacted. **BUT:** It will become inoperative under Paramountcy in any parts on Ontario which have or will adopt the Federal Act.

Re: Board of Commerce Act, 1919 and the Combines and Fair Practices Act, 1919

- POGG is limited by Privy Council (Haldane) to apply **only in an emergency**.
- Struck Down: Legislation that prohibited the hoarding of life necessities (food, clothing) and forced those necessities to be sold at fair prices.
- Only exceptional/abnormal circumstances allowed Parliament to entrench on s.92.
 - War/Famine
- This peacetime economic measure was too permanent to be followed under POGG

Fort Frances Pulp and Paper co. v. Manitoba Free Press Co.

- Use of POGG **power during war-time (thus an emergency)**.
- Federal Government create price control legislation. Found to be *intra vires* (Constitutional) because it was War-Time and *War Measures Act* allowed these price controls.
- Although this case took place **after** fighting had ceased, there was sufficient reason to believe that the emergency was still present.
 - At what date did the disturbed state of Canada totally go away?
 - 1 day after Armistice might be too soon.

-
- Johannesson and Munro deal with issues that :
 - didn't exist at Confederation
 - Conflict between goals of the Federal and Provincial government
 - Deal with Coherence & Identifiability.

Johannesson Et Al. v. Rural Municipality West St. Paul (aeronautics) (1951)

- II wants to build a landing strip on his land. But, there's a municipal by-law banning the building of aerodromes.
- Court: Aeronautics falls under POGG as of 'National Concern'. By its' very nature, aeronautics goes beyond local/provincial concern.
 - Passenger traffic all over Canada and the World, mail, shipping, reaching resources in the NWT
- **Kellock:** Building aerodomes can't be divorced from aeronautics as a whole.

Munro v. National Capital Commission [1966] (SCC)

KEY: Broad interpretation of 'national concern' Branch of POGG to include cleaning up Ottawa to make it look presentable as a capital

Decision:

- Zoning/Expropriation/Renovation of land within Ottawa Region is under Federal Authority (using POGG) and not Province.
- P&S analysis shows that Legislation was meant to make Canada's Capital in look in accordance with it's national significance
- While zoning falls under s.92(13), the Subject matter of legislation here isn't enumerated in s.91 or s.92.
- Since the P&S is justifiably Federal, any incidental effects on civil matters don't make it unconstitutional.
- Apparently, we may be moving, In Canada into a Constitutional crisis. Only came about last Thursday
- **Crisis:** Who is going to form the Government of Canada? It's up in the air right now.
- **Role of Governor General:** (Monahan article in 1st class – Governor General's leeway to use authority to refuse to call an election, or calling one not pursuant to statutory regulations)
 -

Why would'nt she grant a dissolution:

Anti Inflation on Emergency Basis

Laskin' and Ritchie

- Look at the circumstances that give rise to the existence of the emergency that would usupport intrusive legislation.
 - Laskin: Pg. 494 **Rational Basis Test** – Parliament must pass this test to have Emergency Basis rationale.
 - Need to prove that you're worries are backed up on a **rational basis**.
 - We can listen to experts to see if we need Government intrusion
 - **Court:** Parliament **DID NOT** have a rational basis.
 - Extrinsic Evidence can be used
 - Experts, understanding what inflation is/does/could do
 - Since all the experts didn't agree on if we had a crisis, the Court must decide if the evidence disclosed show that there is a **rational basis**
 - Onus of proof is on the other end. You must prove **on clear evidence that there is NO emergency**.
-

POGG NATIONAL CONCERN DOCTRINE & ENVIRONMENTAL PROTECTION

Crown Zellerbach v. B.C. (SCC, 1988) (POGG – NC & Environment)

- The relationship between the emergency and national concern branches of POGG
 - We don't elaborate on the Emergency Power – **but give a strong Statement on the National Concern Doctrine**
- The factors needed for legislation to be upheld under the national concern branch of POGG.
 - Distinctiveness
 - “Provincial inability”.
 - Newness
- The basis of Justice La Forest's disagreement with the majority.

Facts:

- Crown Zellerbach is charged with the dumping of wood waste in marine waters without a permit, contrary to section 4 of the *Ocean Dumping Control Act*, a federal statute.
- The facts are undisputed: the dumping occurred in marine waters within provincial territory. The wood waste in question was 'inert' (was not going to move), and posed no risk of pollution.
 - **Challenge:** Company challenges Fed. Law.: **Can the Feds prohibit dumping in provincial waters?** The wood dumped was 'inert'. Once dumped, it would stay there. Not toxic, wouldn't leave Provincial waters,
- Criminal Law power wasn't used as an excuse. The Crim. Law wasn't as broad at the time of the Zellerbach case.
- Lawyers wanted to see how far they could press the National Concern Doctrine.

Relationship between POGG-National Concern and POGG-Emergency

Pg. 478: LeDane

- 4 settled matters under POGG
 - 1. POGG – NC is different than POGG – E. What Baetz said in AIA (although he was dissent in AIA) is correct. 2 branches, separate and distinct.
 - 2. A national concern can arise either as a '**new**' matter, or a matter that has outgrown being a local concern.
 - 3. A national concern must have a **singleness**, an indivisibility, that is reconcilable with the existing division of powers.
 - 4. Provincial **inability to regulate** is a criterion of indivisibility
- The majority acknowledges that Justice Beetz in AIA set out the appropriate understanding of the national concern doctrine of POGG.
- Note that Justice Beetz is one of two dissenting Justices in the *Crown Zellerbach* case.

Zellerbach:

- The majority believes the impugned legislation is directed at a “national concern” in that sense:
- Marine pollution, or the control of marine pollution. The majority believes that “salt water” provides an ‘indivisibility’ and unity in subject matter that meets the NC test.

Newness:

- National concerns may arise as “new” matters (not addressed in sections 91 and 92), or may be matters which originally local in nature have become ‘national.’
- Peter Hogg argues that if it matters at all, “newness” should go to ‘conceptual’ newness, not to new technologies or subject matters. He notes that historical newness of a matter (especially a technology) has not generally been a barrier to assigning it to the abstract categories set out in sections 91 and 92– and nor should it.

Distinctiveness:

- ‘Singleness’ and ‘identity’ of subject matter
- Not a major impact on areas of provincial jurisdiction
- Provincial inability may be an indicator of indivisibility.
- ‘Marine pollution’ has this distinctiveness quality: it’s distinguished from fresh water; subject to an international treaty

Provincial Inability:

- What does Justice Le Dain appear to mean by the phrase “provincial inability” ? Does he mean “inability to regulate” or “being unwilling to regulate”?
- He says it exists where “provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests”.
- Not merely where province(s) unable to effectively regulate a matter.

ALL JUDGES SAY YOU CAN'T GO TO FAR

Dissent: (LaForest:)

KEY: (Zellerbach & Hydro)

- LaForest is an environmentalist. He wants the Courts to be actively connected to environmental protection. He doesn’t want protection to be a Federal Jurisdiction.
- He wants the provinces to have a strong responsibility to deal with the environment.
- He thinks Federal jurisdiction is **bad for the environment**. He wants the Provinces to be involved and doesn’t want to shut them out.
- The “environment” is an amorphous matter, more like “inflation” than radio or aeronautics, or other ‘single and indivisible matters’.
- “Marine pollution” is too close to the “environment” as a subject matter. It would similarly create an exclusive federal jurisdiction over any activities that result in substances ending up in the oceans.
- La Forest’s caution is that the challenge for courts in dealing with POGG-NC is to confine it.

Does environment protection fall under POGG-NC? NO

- Prof’s sees this as the opposite

KEY TO ZELLERBACH:

- 5-4 Majority in Zellerbach said that Marine Pollution (protection of the marine environment) **IS A NATIONAL CONCERN** (does come within POGG)
 - The legislation is upheld as valid on that basis
 - The Court (Beetz) thinks that environment is under National Concern
 - 1. Court: It needs to refer to **either a new matter OR a matter which has developed over time** from a local into a national concern (Newness)
 - **Court:** POGG- NC needs a level of 'newness'
 - **2. (MOST IMPORTANT) COURT: It must have" a single-ness and indivisibility. A distinctiveness to it as a subject matter. Not an aggregate on different concerns or an amorphous concern" (Inflation was amorphous and NOT indivisible, so thus it's not part of POGG-NC)**
 - 3. Having a provincial **inability** to deal with the subject matter helps to prove Number 2. (Singleness).
 - Prof **really really** agrees with the newness factor
 -
 - Marine Pollution has a singleness to it.
 - **Dissent:** They have a serious issue with indivisibility. Protection of the environment is very similar to inflation as it's a huge issue and very amorphous. Marine pollution is just like inflation and is just one part of protection of the environment.
 - Indivisibility was the big disagreement in this case.
 - Majority says yes
 - Dissent says no
-

- Exercising Statutory Power/Authority OR Creature of Statute?

CONSTITUTIONALISM

WHAT laws can be made?

- The Constitution serves as a source of recognizing what is and what isn't binding law. The law for making new laws.
- *Rule of Recognition*
- Constitution tells us:
 - 1: **Who** can make laws (how can they make it)
 - 2: **What** laws can be made (what laws cannot be made)

Who can make laws:

- Division of Powers (Parliament vs. Province)
 - Expressed in *The Constitution Act, 1867*
 - Includes residual clause (anything we forgot goes to Feds)

What laws can be made:

- Constitution 1867 was pretty much silent re: what laws could be made.
 - Except for a few laws re: language and religious education
 - Relied on doctrine of Parliamentary Sovereignty
 - Many events took place which showed a lack of protection for minorities
 - October crisis 1970;
 - Internment of Japanese Canadians in WWII;
 - Racist immigration laws against Asians in 1800s;
 - Anti-communist measures in 1950s

- There were many attempts to try to protect minorities, but they were indirect challenges to these racist laws
- **Law for making laws**
- Constitution 1982 introduces *The Charter of Rights and Freedoms*.
 - Protects specific individual rights, places limits on **what** laws can be made/cannot be made
 - Gives **constitutional answer to the ‘what’ question**
 -

CONSTITUTIONAL INTERPRETATION

Constitution and Judiciary:

- Written constitution gives more strength to Judiciary
- Which question gives more strength to the Judicature. Who? Or What?
 - Answering What questions appears to give more controversy
- **Judiciary needs to be careful to ensure the keep their legitimacy while reviewing legislation**
 - Legitimacy is tied to **how well we think Judges are interpreting meaning of Constitution**
 - If Judges interpret Constitution against how we interpret things, they lose legitimacy (ie: *Sharpe*)
- BUT: Meanings are controversial, we so need many methods to interpret
- Legislative Review by judges is actually a devate over the meaning and status of interpretations

Phillip Bobbitt (1989)

Modes of Interpretation by US Supreme Court

- Textual (**not used very much anymore**)
 - Literal interpretation
 - We move away from this due to Living Tree Doctrine
- Doctrinal (**still used fairly often**)
 - Precedent
- Structural
 - Derive meaning from structure of Constitution & institution that it creates
- Historical
 - Original intent of the framers
- Prudential
 - Use a Cost/Benefit analysis to find out what the most prudent thing to do is

LIVING TREE DOCTRINE

- **Fundamental Tenet of Constitutional Interpretation**
 - **Organic** and must be read in a **broad and progressive manner** so as to **adapt** it to the **changing times**.
- Interpret Constitution to follow present-day standards, requirements and needs

- Be careful **not to overshoot the actual purpose of the right or freedom**
 - Read within context of society today
- Constitution wasn't written in a vacuum in 1867. We appreciate that the Constitution THEN must be placed in the correct linguistic, philosophic and historical context
 - SO: We need to place the Constitution in today's linguistic contexts too ensure we keep the meaning close to the framer's meaning
- Analysis **must be anchored in historical context of Constitution**
 - We cannot invent new obligations.
- Allows Constitution **to deal with issues not present in 1867**
 - We can use the Constitution to deal with issues that didn't exist/even contemplated in 1867 (telecommunications)
- Allows changes to contentious issues (gay marriage)
- **Subject to natural limits**

Original Intent Approach is consistently being Shut down:

- Reference re: s.94(2) of BC MVA
 - Shut down Original Intent approach to allow for Substantive Justice to be protected by PFJ
- *Edwards*: used Living Tree
- Reference re: Same Sex Marriage

FOCUS CASE

Edwards v. Attorney-General For Canada (1929), [1930] A.C. 124
(Persons Case)

KEY:

- Introduces Living Tree Principle to Constitutional Interpretation
 - Move away from **Original Intent Approach**
- Pre-Charter case which gave equality to women

Facts

- Group of 5 women (Famous Five), including Emily Murphy challenged the Constitution and wanted women to be appointed to the Senate
- Section 24 of BNA Act 1867 states that 'qualified persons' can be appointed to the Senate.
- **Are women included in the term 'qualified persons'?**
- Older decisions: Women aren't considered 'persons'

Decision: Women are considered Persons under the law. Section 24's use of qualified persons included women

Reasons:

LORD SANKEY

- SCC reasons were poor. The fact that women are excluded from all public offices is an ancient, barbaric relic
- **Canadian Constitution is like a Living Tree**
 - We should not base our interpretations literally and rigidly on interpretations from centuries ago. Even though the interpretations worked back then, they don't necessarily work today
 - Think interpretations of Roman Law which we don't use.
- Section 24: Language
 - Members – doesn't denote gender
 - Persons – not restricted to only men
 - Qualified persons – none of the qualifications speak of having to be male

- Use of male pronouns (he,him,his) – not relevant
- Other sections of Constitution use the term ‘male persons’ to refer to only men. This isn’t used here
- Intention
 - No proof that there was an intention by framers of Constitution to exclude women
 - Didn’t exclude women from the sections which spoke of qualifications for all Senators (over 30 etc.)
 - If they had intended otherwise, they would have stated otherwise

CHARTER

IMPORTANT SECTIONS

- Limitations on Charter Rights and Freedoms (Sections 33 and 1)
- Freedom of Religion– Section 2(a)
- Freedom of Expression– Section 2(b)
- Application of the Charter– Section 32
- Equality Rights– Section 15
- Life, Liberty and Security of the Person – Section 7
- Charter Remedies– Sections 24(1) and 52

Substantive Rights

- 2: Fundamental freedoms (religion, expression, assembly, association)
- 3-5 – Democratic rights (vote, elections)
- 6 -- Mobility rights
- 7-14 – Legal rights (including rights of accused)
- 15 -- Equality rights
- 16-23 – Minority language rights (including in education)

Organizing Provisions

- 1: Justification of Limits on Rights
- 33: Notwithstanding Claus
- 24: Remedies
- 25-31: Interpretive Provisions
- 32: Who the Charter applies to

LIMITATIONS ON CHARTER RIGHTS:

Section 1: Justification Clause

- Constitutional Guarantee of the substantive rights in later sections in the Charter
- Also explains that the rights are **NOT absolute**
 - Subject to **reasonable limits as are demonstrably justified in a free and democratic society**

- Gives a good picture of what we hold most important, what rights we want to uphold in the Constitution

•

Section 33: Notwithstanding Clause

- Allows Government to make laws which will stand – despite infringing on certain Charter rights

SECTION 33 – NOTWITHSTANDING CLAUSE

- Invoking the notwithstanding clause in a statute ‘insulates’ it from certain *Charter* sections.
- Section 33 can be used against:
 - 2 (fundamental freedoms),
 - 7 through 14 (legal rights); and
 - 15 (equality rights) of the *Charter*.
- Section 33 **cannot be used against**:
 - 3-5 (democratic rights),
 - s. 6 (mobility rights), and
 - ss. 16-23 (minority language rights).
- Expires after 5 years, but may be renewed – 33(3) and (4).
- Can be used preemptively. We don’t need to wait until the Courts find a violation to use s.33
 - **Cannot be used retroactively**
 - **BUT: Can be used in 1st draft of legislation so it never is struck down the first time**
- Appears to be a ‘sleeping giant’. It can be used to seriously override significant individual rights

History:

- Feds didn’t want a notwithstanding clause (in 1982) but several Provinces wanted one.

Ford v. Quebec [1988] SCC Analysis of Notwithstanding Clause

KEY:

- Courts will not review the substantive merits of reasons for s. 33 being invoked.
 - No need for substantive review of the legislation
- **Cannot be applied retroactively**
 - Must use s. 33 Narrowly
 - Can be used for prospective derogation of rights **only**
 - **BUT: Section 33 can be use preemptively**
- Legislature can make laws that infringe all Charter rights possibly using Notwithstanding clause
- Law must refer to the Charter right to be overridden
 - This way – if Government is trying to pull a fast one – it’s apparent for all to see
 - Ie: it’s embarrassing
- Citing the sections of *The Charter* that the law seeks to be exempt from is sufficient to make a valid law under s.33.
- Courts don’t want to get overly involved in s.33.
 - Very political issue

Facts:

- French-only sign legislation in Quebec challenged as infringing on language rights in Charter.
- Original law was struck down. Redrafted **using notwithstanding clause**
 - **Infringed s.2b (Expression) – but Notwithstanding clause was applied**
- Quebec used notwithstanding clause on all of its legislation regarding French only.
- They used the notwithstanding clause quite broadly

Decision: Valid uses of s.33, BUT, cannot be applied retroactively

Controversy over Notwithstanding Clause

Does s. 33 mean that Canada effectively does not have an entrenched charter of individual rights? Does it effectively mean that parliamentary supremacy, not constitutional supremacy, remains the dominant principle of our Constitution?

- NO. We retain Constitutional Supremacy, however, s. 33 is the method Parliament can use to Dialogue with the Judiciary
 - We still have laws/rights which no Parliament can **ever** take away from us (*Vriend*)
 - BUT: Those rights are NOT absolute, and s.33 (Oakes too) is a method of limiting those rights
 - Limitations imposed by s.33 only apply to certain laws and do not apply to many of the most important laws (Democratic rights, mobility, minority language rights)
 - Parliament has the ‘last word’ on many issues, but not all
 - They can impose racist laws, but those laws must not affect mobility etc.
 - Given they cannot use s.33 on democratic rights, freedom for the public to go against political agenda
 - Temporariness of s.33 means current Parliament **cannot impose their will on successive governments** (keystone of Parliamentary Supremacy)
 - Section 33 needs to be reviewed every 5 years. So AT LEAST 1 election will take place, new governments and a chance for public to express their will re: this law
 - This would likely be an important issue in elections, given hesitation to use s. 33 in the 1st place.
 - One Parliament could only continue the law (with s.33) if they retain majority in government. This (theoretically) only takes place if the public supports their law.
 - They are not imposing will on future parliaments, but only continuing their ideology as long as they are in office
 - Once they leave office, lose power, their ability to retain that law vanishes – **thus no Parliamentary Supremacy from s.33**
- YES. Parliament in a technical sense is free to use notwithstanding clause to impose racist policies
 - BUT: Courts have only so far stated that they don’t want to get involved very much.
 - They give a lot of deference to s.33, but likely only because Government is also scared to use it, and offers lots of deference to s.33 themselves
 - IF Parliament gets more involved and uses s.33 a lot more often, it is likely that Courts will interfere more as well

- Unique solution to balance the power of Judiciary with the power of Parliament
 - Using s.33 too much threatens legitimacy of Parliament and Judiciary

Is it illegitimate to use the notwithstanding clause at all ?

- NO. Method for Parliament to Dialogue with Judiciary (*Hogg*)
- Important limit on the powers of Judiciary – allows Parliament to enact laws despite the feelings of the Courts
- Using s.33 has friction from the Courts AND from the Public
 - It doesn't give Parliament free-hand discretion to do whatever they like
 - Risks their legitimacy and public backing
 - Courts responded (previously) by striking down laws without s.33,
 - Public responds through their votes (supporting or not supporting the law)
- Does not apply to all rights/freedoms, does not give freehand discretion
 - Cannot be used Pre-emptively (*Ford*)
- BUT: Parliament has been hesitant to use it, and for good reason
 - Basically an admission that the law breaches *Charter*, and yet Parliament is happy breaching the very basic rules/rights in society
 - CAN Removes legitimacy of Parliament
 - Should not be used as a purely political tool to achieve purely political aims
 - Should only be used for extremely Important situations or to express strong disagreement/unhappiness with Courts
- YET: Courts *Ford* shows that Courts are hesitant to get involved, and have accepted the use of s.33 in very far reaching ways (Quebec used s.33 in all legislation) – not just for 1 specific law
- REMEMBER: Temporariness of the law. Nothing here is forever. At worst, we will have a maximum 5 year period. In between that time, we have the need for the next Parliament to analyze the law (with s.33) and use Political will to actually pass that same law again
 - This would only occur in extreme situations, where successive Parliaments should show will of people in their support of the law

Dialogue Theory:

Section 33 means that with respect to the rights in sections 2 and 7-15 of the Charter, the legislatures have the 'last word'.

Political Will and public backing for public officials is an important part of the Dialogue Theory

- Parliament is **strongly** influenced by public sentiment.
 - After a ruling, Parliament will decide on their 'response' based on public sentiment
 - For Child porn, where public agrees with Judiciary, Parliament WILL NOT interfere as there's no political will
 - This gives Judicial decision the Democratic backing which many argue is not present in Judiciary
 - For other decisions, where public sentiment is against Judicial ruling, Parliament WILL interfere due to sentiment and political will
 - This removes the Judicial backing for a decision because the people are NOT against it, and thus influence Parliament to draft laws to change the ruling
-

SECTION 1 OF THE CHARTER

Justification Provision of the *Charter*

The *Charter* 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**.

PRESCRIBED BY LAW

- Any limitations of Charter rights **MUST BE Prescribed by law.**
 - NOT Justifiability
 - Purpose of law can be justified – **but is the law itself justified?**
- Only arises when Charter violation is proven
- Explains that *Charter* rights aren't absolutes. Limits are necessary
- Must balance society's interests against individual interests

- Purpose:
 - **Certainty of Law:**
 - Ensure limits are known to citizens
 - Ensure limits are known to law enforcement
 - Any limitations on *Charter* rights **MUST BE**
 - Known by citizens & law enforcement **in advance**
 - Not be at the discretion of a state official
 - Not be too vague so as to prevent legal debate

“free and democratic society” means a commitment to:

- democratic values
- Inherent dignity of human person
- Commitment to social justice/equality
- Respect for beliefs, culture, group identity,
- Faith in social/political institutions that enhance citizen's participation in society

Two applications of “prescribed by law”:

(Prevents) Unbounded discretion

- Limits must be authorized by a law, not a matter of pure discretion of a state official
 - Limit can be statutory or common law
- When exercising their power, a State Official shouldn't be able to absolute discretion
- *Therens* (1985) (838)
 - **A police officer's failure to advise an arrested person of his right to retain and instruct counsel – s. 10(b)-- was not “prescribed by law”.**
 - *Therens* taken to Police station, given Breathalyzer. During this whole time, not advised of right to counsel.

(Avoid) Vagueness

- Law which limits a *Charter* right is so unclear that it doesn't give sufficient guidance to law officials/citizens re: what is/isn't legal

- *R. v. Nova Scotia Pharmaceutical Society* (1992)
 - Law is too vague – Does not provide basis for legal debate
 - Rare: Courts will rarely find a law to be Not prescribed by Law for Vagueness
 - Use of the word **Unduly**

2 Stage Analysis of Charter Cases

1: Has there been a Violation of a *Charter* right or Freedom?

- Onus of Proof on Claimant

2: If there was a violation, can this be justified under s.1?

- Onus on Government

OAKES TEST

HOW TO DETERMINE IF VIOLATION IS JUSTIFIED

IMPORTANCE:

Pressing and Substantial Objective (Sufficiently Important):

- Cannot override *Charter* for silly small things
- Must relate to pressing and substantial societal concerns
- Where do we find a law's objectives?
 - States of purpose in legislation, government officials, 'White Papers', Mischief rule of Statutory interpretation
- **Government must justify infringing aspect of law** (*RJR Macdonald*)
 - Not enough to show purpose of entire law is good. Good purpose behind entire law won't carry infringing section forward automatically
 - Law: Reducing tobacco consumption: GOOD
 - Section: Reducing Tobacco Advertising: ?????
 - Justification for Law isn't enough – need justification for Section
- The **More vulnerable** the group being protected – the **more deference** should be given (*Harper*)

PROPORTIONALITY:

A: Rational Connection Test:

- Where is the **connection** between the law being challenged and the objective attempting to be reached?
 - Avoids **arbitrary** laws
 - The connection can often be shown using common sense/logic. Formal evidence is not always required
 - Does proving Possession really lead to conclusion that you are trafficking drugs?
 - Possibly makes it more likely – but is it proof BRD?
- Actual Evidence of connection (ie: scientific evidence) isn't required if unavailable (*Harper*)
 - Government can use **reasoned apprehension of harm** instead

B: Minimal Impairment: (Least Drastic Means)

- How targeted, how measured is the law?
 - Does it limit the Charter Right as little as reasonably possible? (*Edwards Books*)
- Is there a better method that is less impairing?

- **BUT:** Doesn't mean the absolute least impairing solution (*Edwards Books*)
- *Irwin Toy*: Distinction between when state is acting as mediator between competing private groups/protecting vulnerable groups (more flexible) or in Criminal Law (stricter application)
- The law falls most often from this portion of the Test

C: Proportionality between Effects and Objective: (Tightness of Fit)

- The actions the State takes must make sense when compared to the seriousness of the problem
- If the state takes severe effects, the objective must be much greater to justify it.
- Hogg questions if this step serves any valid purpose
- *Dagenais v. CBC*: Added this Step
 - Publication ban made on trial. TV show made about trial.
 - Freedom of expression of TV show vs. accused's right to fair trial

CONTEXTUAL FACTORS TO ASSIST IN JUSTIFICATION TEST

Harper:

- 'Skew' Oakes Test
- Gives Government More or Less Deference in their violation
- (1) Nature of alleged harm to society, ability to measure that harm
 - When not easily quantifiable – government relies on **reasoned apprehension of harm**
 - Don't hold Government at an impossible evidentiary requirement
 - Scientific evidence cannot always be required
- (2) Vulnerability of group intended to be protected
 - The More vulnerable the Group – the greater deference given to Government to protect them
 - Vulnerability to manipulation counts (*Harper*)
- (3) Subjective apprehension & perception of harm
 - If public/society **perceives** risk of harm – we should give more Deference
 - **Prof:** NO. Perpetuates Myths/Stereotypes.
 - We shouldn't allow perceptions to dictate Oakes Test. Charter is meant to challenge perceptions and change perceptions towards better democracy.
- (4) Value of Protected *Charter* interest
 - Greater the *Charter* interest – the more deference given
 - Political expression deserves higher protection
- **Evidentiary Requirement for Sufficient Objective/causality/connection**
 - Do not hold Government to impossible evidentiary standard
 - Despite not having clear-cut evidence, we can reduce burden and give more deference to Government
 - No Evidence of Harm? Use Reasoned apprehension of harm
 - Etc.

***R. v. Oakes* (SCC, 1986)**

KEY:

- Introduces Oakes test to determine if Law is Justified violation of *Charter*
- Law fails because NO Rational Connection

Facts:

- Section 8 of *Narcotics Control Act*. Assumed that any possession of narcotics was for the purpose of trafficking.
- Trafficking is more serious than possession. Potential for life sentence
- Section 11(d): Innocent until proven guilty
- Impugned law was a reverse onus law. Accused had to prove that they **were**'t a drug trafficker.

Decision: Section 11(d) violation was not Justified under Section 1. Failed Oakes Test

In Oakes specifically:

Importance: YES

- Proving trafficking is very difficult, possession is easier
- Assists police in preventing serious harm to society
- Finding evidence of trafficking is really hard – but possession is a good indicator of trafficking
- Law assists Police to better do their job

Rational Connection: NO

- It's not rational to assume that all drug possessors are drug traffickers.
- Even a small quantity of drugs would support the reverse onus charge.
 - **There was a lack of any specification in the law**
 - (re: how much drugs you need to assume that you're a drug dealer).
 - Any amount of drugs found on you would lead to the reverse onus being used
- Finding 10 Kg of Coke leads to Trafficking presumption (thus reverse onus) – but finding 3 grams doesn't
 - Law treats both situations as the same

Minimal Intrusion: NO

- Easy to make minimally intrusive by adding laws re: quantity etc.

Proportionality between Effects and Objective: NO

- Law isn't targeted
- Doesn't limit *Charter* as much as possible

***Dagenais v. CBC* 1994, SCC) (847)**

KEY:

- **Added to the last step of the Oakes test: (Tightness of Fit)**
 - Balance benefit of social interest against actual harm.
 - Recognize that the actual benefit might not be what the stated benefit is.
- What is the harm to freedom of speech VS the harm done to this trial if we allow the TV show.

Facts:

- Publication ban on showing a TV mini-series (“Boys of St. Vincent’s”) before completion of criminal proceedings dealing with the case on which the series was based. Freedom of expression vs. accused’s right to a fair trial.

Decision: CBC wins. Injunction was lifted – TV show was shown

CONTEXTUAL FACTORS

Harper v. Canada (SCC, 2004)

KEY:

- 4 Contextual Factors to look at to give greater Deference to Government (See under Oakes)
 - Nature of Harm
 - Vulnerability of Group
 - Perceived Harm/Risk
 - Value of Interest
- No need to place impossible (scientific) evidentiary burden on Government to prove:
 - Causality/Connection, Substantial Importance
-

Facts:

- Stephen Harper & NCC challenged newly enacted election expenses limitations in the *Canada Elections Act*.
- Act limited third-party spending in federal election campaigns to: (a) \$3,000 in any one constituency; (b) \$150,000 nationally.
 - Limits the spending of citizens themselves
- The NCC argued that these limits violated both section 3 and section 2(b) of the *Charter*.
- Very little evidence was available to show the impact of elections of private spending
- Really meant to keep money from being spent on negative campaign ads

Infringement of Charter Rights?

Infringement of Right to Vote (3)? NO

- Spending limits do not violate meaningful participation in elections

Infringement of Free Expression (2.b)? YES

- VERY BROAD: Putting up flags, speaking, TV commercials. Many things are protected

Decision: Law violates Freedom of Expression but **Justified Under S.1.**

Bastarache: (MAJORITY)

OAKES TEST: PASSES

Substantial Objectives: YES

- Purpose of spending limits: **electoral fairness:**
 - Promote Right to Vote – voting process

Rational Connection: YES

- The objectives are connected to the means.
- Lack of evidence?
 - Use **reasoned apprehension of harm** – see Contextual Factors
 - Cannot hold Government at impossible evidentiary standard

Minimal Impairment: YES

- While the limits may be restrictive during the election season, this limit does not exist when we aren’t in an election.

- Allows for a great deal of inexpensive speech (TV may be out, but radio, newspaper etc. is still IN)
- **Remember:** these are limits on 3rd parties, NOT political parties.
 - Thus, the impairment is minimal

Proportionality: YES

- Ensures candidates aren't overwhelmed by 3rd parties

Areas of disagreement: Dissent: Major

- The importance of election advertising as political expression
 - Dissent saw advertising as super important
 - Majority saw it less so
- Need for **evidence**: see minority at para 38—"no demonstration"
 - **No rational connection** - Dissent: 'I want the evidence!'
- **No proportionality**
 - No quantifiable danger – so benefits of the limits are illusory
 - Serious infringement does certainly exist – easily quantifiable
 - Law may cause more problems that it seeks to solve

DIALOGUE THEORY (*Vriend*)

Explanation of the Relationship between Courts and Law-makers

After Charter – Critics claimed that Courts had too much power!

- Courts were striking down all these laws
- People felt that Courts were making decision on important social/economic reasons

But – Hogg expresses the Dialogue Theory to explain the Power Balance

- Legislators actually have the last word on Canadian law, irrespective of the Charter
- **How Law-makers 'Dialogue':**
 - **Constitutional amendment** (including amending the *Charter* itself)
 - **Section 33**– Notwithstanding clause.
 - **Section 1** – Even if Court rules a law unconstitutional under Oakes, Government can redraft the law to fulfill and pass Oakes.
- **How Courts 'Dialogue':**
 - *Charter* review
 - Independent actors – separate from Legislative branch
- **Courts aren't all powerful** – Government still has the last word

Dialogue is Healthy:

- Neither side can act unilaterally and needs the other side
- The Dialogue
 - Government making Laws
 - Courts striking them down
 - Government amending Laws
 - Etc.etc.
- Healthy development towards better laws
- Explains the need for *Charter* Review

- After laws are struck down by Judiciary, Parliament (in most cases) was quick to draft new laws which followed *Charter* which still met the original objective

Both sides are accountable to the other

- Democracy is NOT just the will of the majority
 - Parliament needs to act to protect democratic values (not just will of majority) but also democratic values mandated by *Charter*
 - If they fail to do so – Courts hold them accountable by striking law down
- Courts act in democratic fashion to protect entire population, not just the majority population
 - Parliament (by its nature) usually promotes Majority first
 - Courts can back up the Minorities when Majority does not actively protect them

Public Will enters Dialogue:

- Courts don't directly speak to Public sentiment, but may do so **indirectly**
 - *Sharpe*: Sentiment was so against allowing kiddie porn that they may have been pressured to justify Parliament's s.2(b) violation
 - Otherwise, they would lose credibility
- When courts strike down a law, Parliament must choose if they wish to bring it back
 - If public agrees with Court – Parliament will never redraft law as they would make public very unhappy – risk political future
 - If public disagrees with Court – Parliament is pushed to redraft laws.
 - This may disagree with Court – but they do so with Public sentiment behind them
 - Legitimacy of Parliament's 'dialogue' is present

Criticisms of Dialogue Theory

- How can s.33 be a method of Dialogue if Government never (and is scared) to use it?
 - Lack of use doesn't show it cannot be used – possibility is still useful
 - Use of s.1 and redrafting seems to fulfill all Government's needs
 - No evidence to show that Government can't use it - simply haven't had need to yet
- Method of Dialogue is dangerous – leaves gaps in the law as Courts strike laws down
- There is a strong check on political maneuvers to fulfill society's wants – but no check on the Courts
 - Public may be pushing for laws which Courts will continue to strike down, despite public sentiment (regardless of how strong)

Vriend v. Alberta (1998)

KEY:

- SCC reads sexual orientation into law to protect gays – same as it would protect Jews etc.

Facts:

- *Π* fired for being gay. Tries to sue under *Alberta Human Rights Commission (AHRC)* but couldn't because IRPA did not include sexual orientation as being protected
- Charter argument that sexual orientation should be protected

Decision: AHRC was itself unconstitutional because it didn't protect gays but did protect women, Jews, etc.

Reasons:

- Courts must interpret legislation under the guise of protecting the social contract created by *Charter*.
- Works as part of democracy, preventing automatic majority rule, since most laws being struck down, which hurt minorities, are brought about by the majority
- SCC: Used Dialogue Theory to find in favor of Vriend.

***Sauve v. Canada (Chief Electoral Officer)* [2002]**

KEY:

- Parliament enacts law that restricts inmate voting rights
- Using Oakes Test, law was NOT JUSTIFIED
- *Charter* rights are subject to a hierarchy. Voting rights is high

Decision: (5-4)

- Restricting prisoners from voting VIOLATES *Charter* and IS NOT JUSTIFIED by s.1

MAJORITY (McClachlin)

- Substantial Objective? **NO**
- Rational Connection? **NO**
 - No proportionality
- Minimal Impairment? **NO**
 - Used s.52 to find the law of no force or effect since it violates the *Charter*
 - Section 33 doesn't apply to voting rights
 -

DISSENT: (Gonthier)

- Violates s.3 – Justified under s. 1.

CHAPTER 20 – PURPOSIVE APPROACH TO CHARTER RIGHTS AND FREEDOMS

2 Stage Analysis of Charter Cases

1: Has there been a Violation of a *Charter* right or Freedom?

- Onus of Proof on Claimant

2: If there was a violation, can this be justified under s.1?

- Onus on Government
- Remedies: Section 52 and/or s. 24

***Hunter v. Southam* [1984] (pg. 772)**

KEY:

- **HOW** to interpret *Charter*
- **Charter is Purposive Document**
 - SCC tries to find Purpose behind right
 - Interpret *Charter* differently than regular statutes

- **Purpose behind Section 8 (S&S):** Protecting Reasonable Expectation of Privacy
 - Searches are *prima facie* unreasonable unless given with prior authorization by impartial 3rd party AND based on R&PG that search will produce evidence of an offence
- Searches violated s. 8 (S&S) AND NOT JUSTIFIED UNDER SECTION 1

Facts:

- Hunter: Newspaper
- Southam: Director of *Combines* bureau.
- Law allowed him to sign a warrant to get officers to seize records to investigate monopolistic activity
- Hunter challenged *Combines Act* which allowed this search as being Unconstitutional against S.8 (Right to be secure against unreasonable search and seizure)
- The search took place 2 days after *Charter* was passed.

Issue: What does the right “to be secure against unreasonable search or seizure” mean ?

Decision: *Combines Act* which allows for those searches violate s.8 and are NOT justified by s.1

Reasons: (Dickson)

- Constitution is different than ordinary statute. Requires a more far reaching interpretation.
 - Not too narrow or technical
- Searches are *prima facie* unreasonable unless permission by impartial arbiter AND R&PG search will find evidence
- These searches are unreasonable and NOT justified under s.1

HOW TO INTERPRET CONSTITUTION (*Hunter*)

- **Charter is Purposive Document**
 - Purpose is to protect rights, and restrict government action
 - By itself, is not an authorization for governmental action
 - Strict interpretation of Text **isn't enough.**
 - Other factors, contextual factors, normative/ethical understanding, other countries, law prior to Charter
- **Identify the PURPOSE of the right (nature of the interest it's meant to protect)**
 - In *Hunter* – s.8 is protecting people's REP.
 - For all *Charter* rights – the SCC tries to identify their purpose
- **Claimant must show their claim comes within that purpose**

CHAPTER 19 – FREEDOM OF CONSCIENCE & RELIGION

Section 2(a):

Everyone has the following fundamental freedoms;
 (a) freedom of conscience and religion

WHY? Why not just have Freedom of Expression?

- Freedom of Expression protects thoughts
- Freedom of religion is Belief + Practice
 - Freedom to actually follow your beliefs (action)

Violation: Imposing extra costs on followers of a certain religion

BUT: The s.1 Justification question isn't answered.

By guaranteeing Freedom of Religion, does this Oblige the state to?

- Privilege religious beliefs/practices **over other** beliefs/practices?
- Ensure a neutral or secular public domain?
 - A little of both.

Does it protect religion or simply avoid having the majority religion foisted on minorities?

- Is it a clear separation of Church and State and protects minority religion

Sunday Closing Laws

History

- *Robertson and Rosetanni* case lost the argument that Sunday Closings infringes Freedom of Religion
 - Court: Secular reasons for the Sunday Closings, looked at effects of law (simply lost business). Believed purpose was secular

Big M Drug Mart [1985] Religious Sunday Closing Law

KEY:

- **Freedom of Religion is finally recognized and protected using the *Charter*.**
 - *Robertson and Rosetanni* decision is ‘reversed’ and more protection is afforded.
- **Purpose behind law was INVALID** – Totally went against Purpose of Charter right
 - Invalid Purposes like this CAN NEVER BE JUSTIFIED under s. 1.
- **Court didn’t allow a shifting purpose argument**
 - Purpose behind old law was the same as current law (RELIGIOUS)
 - Purpose of Law violates s.2(a) of Charter
- Includes a limit on Government:
 - Government cannot coerce people to affirm specific religions or perform specific religious practices
- Corporations have standing to raise Charter issues
- Section 2(a) Protects
 - Freedom to hold & manifest your own beliefs
 - Hold views openly, without fear of reprisal
 - Right to worship, practice, teach, disseminate religion
 - Plus more
 - Freedom NOT to be constrained to observe your beliefs or FORCED to follow another belief
 - Subject to limits to protect safety, other rights of others, morals
 - No one can be forced to act against their beliefs/religion

Facts:

- Π kept his store open on Sunday, was charged with violating *Lord’s Day Act*.
- Challenged Act using s.2 of *Charter* (and Division of Powers)
- Sunday closing laws were upheld in 1903 (*Hamilton Streetcar Railway*) as criminal law.
 - P&S of OLD law was to enforce religious observance of Christian Sabbath (public morality)

Reasons: (Dickson)

- Law goes against Purpose of Charter Right
- Law infringes Freedom of Religion

- **Takes a Christian religious value and uses the force of the State to create a positive law on Christians and non-Christians alike**
- Protects one religion over the other
 - Jews/Muslims lose ability to work on Sunday, as their Sabbath is another day
- Parliament can't give preference to one religion over the other, even if it's the majority

Why Protect Religious Freedom?

- Freedom to make independent decisions is central in democracy.
 - Religious freedom is at the base of this idea
- Canada's values require that every person is free to hold their own beliefs, opinions.
 - Refusing to do certain things is just as much a right as choosing to do certain things for religious reasons.

Edwards Books Secular Sunday Closing Law

KEY:

- **Purpose of Law**
 - Effects of *Big M* and *Edwards Books* are largely same – but purpose is different
 - This law is Justified
 - *Big M's* law unjustified (due to Purpose)
 - Sunday closing laws **are valid for secular, but not sectarian** purposes
- **Charter also protects against laws that infringe Charter rights by Effect** (indirectly)
 - Ie: Laws that coerce people to practice Christianity (indirectly) ARE VIOLATIONS
 - This law prevented someone from making money on Sunday. No indirect prohibition of religious observance
- **Burden must be non-trivial**
 - Laws that make following minority religions **more expensive are NOT violations**
 - Burden must be more than non-trivial
 - Equality: Will be dealt with more later in Equality

Facts:

- *Retail Business Holidays Act*. Required business to be closed on certain days
 - Sundays, some Christian religious days, other non-religious days
- Purpose: Provide for Common Day of Rest (Secular)
 - No direct religious purpose
 - Law had benefits and negatives to many people

Decision:

Law is valid (6) Law is invalid (1).

Law infringes s.2(a) but IS JUSTIFIED under s.1

(Dickson +2): Infringement of s.2(a) but justified under s.1

(Beetz +1): No violation of s. 2(a)

(La Forest): No violation of s. 2(a)

Wilson: Violation of s. 2(a) AND not justified under s.1

Reasons: (Dickson)

- **Purpose of legislation was SECULAR**
- Charter violation was Indirect
 - Purpose was secular

- Indirect effect had positive/negative effects
- Burden was Small
 - The prohibition was against making money on Sunday, **this is very different from a prohibition on a religious observance on this day**
- **Justified** under Oakes
 - Objective: YES
 - Connection: YES
 - Min. Impairment: YES
 - Law had exemptions for small, Jewish/Muslim retailers

Law had Impact on many people – some religious, others not

- **Non-believers:** People who simply don't follow a weekly Day of Rest
 - Positive & Negative Benefits:
 - Cannot do business for 7 days/week
 - Day of rest is maybe a good thing (employee POV)
- **Sunday Observers:** People who wouldn't shop on Sunday anyway
 - positive Benefits:
 - Now nobody shops on Sunday.
 - They don't lose out by following their religion
 - **This is not problematic at all**
- **Saturday Observers:** Jews
 - Negative Effects:
 - Being Jewish is **more expensive**
 - Cannot do business on Saturday and NOW on Sunday too!
 - Burden isn't so great
 - Purpose was not to infringe these rights
- **The Act benefits some and burdens others.**

3 kinds of limits of Charter Rights

1: Purposeful Limit (*Big M*)

- Purpose of the limit contradicts the values underlying the right
- **Invalid**
 - CAN NEVER HAVE SUFFICIENT OBJECTIVE to pass Oakes

2: Intention (Direct) Limit (*Sharpe*)

- Right is intentionally limited, but purpose is to achieve a valid, DIFFERENT objective (ie: harm reduction)
- Purpose is not to simply/fully deny the Charter right
- **Valid/Invalid**
 - Depends on extent of limit (use Oakes)

3: Effects-based (Indirect) Limit (*Edwards Books*)

- Purpose behind law (objective) is unrelated to Charter right
- **Valid/Invalid**
 - Depends on extent of violation placed on others
 - Effects-based legislation has more le-way to violate, especially when they do not directly violate Charter, but violate in secondary way

Meaning of Religion
ANSELEM [2004] 2 SCR 551 (915)

KEY:

- Religion is **PERSONAL**
 - Personal beliefs, convictions, practices rooted in religion,
 - Not secular or socially based
 - Freely/deeply held personal convictions/beliefs connected to spirituality
 - **Based on sincerity of belief, not correctness according to authority**
 - Spiritual leaders do not define Religion (in s. 2.a)

What is religion? (Iacobucci)

- We can't define it directly, but we can figure out an outer definition of religion
 - **Personal** Beliefs, convictions, practices rooted in religion, as opposed to secular or socially based
 - Freely/deeply held personal convictions/beliefs connected to spirituality.
- Claims based on religious belief are based on **SINCERITY** of the Belief, not the **CORRECTNESS** of the belief compared to religious experts
- Religion is **intensely personal** – it varies greatly between people
- Is religious belief more privileged/protected than non-religious conscientious belief/practice?

: a difference of view over whether the religious practice could be accommodated short of undue hardship? WHAT DOES THIS MEAN?

Facts:

- Orthodox Jew (Amselem) want to build a succah on their balcony.
- Balcony is common property – building owners didn't allow structures to be built on balconies
 - Wanted to keep building looking uniform throughout
- Rabbinical authority stated that building a succah was not requirement according to Halachah.
- **Indirect Limit** on Charter Rights (Religious Practices)
 - Purpose was aesthetic, not preventing religious practice or preventing succah's from being built

Decision: (Iacobucci)

- **Amselem has right to build Succah**
- Building should have done more to accommodate Amselem

Iacobucci's Objection to rely on this kind of evidence?

- Religious belief is **personal** belief
 - Correctness of practice/belief compared to traditional authorities shouldn't be relevant.
 - Incorrect to allow freedom to practice religion only according to rabbinical authority
 - You have freedom to interpret religion how you want

***Hutterian Brethren v. Alberta* [2007] AJ No. 518**

- This case has just gone to SCC – awaiting a decision

CA: Decision

- Forcing Hutterites to have drivers license photo's taken INFRINGES Freedom of Religion
- NOT JUSTIFIED by Oakes
 - Objective: OK
 - Connection: **NO**
 - Law wouldn't prevent ID theft/fraud
 - Minimally Impairing? **NO**
 - NOT enough accommodation
 - Risk of harm is minimal and you could create exclusions for these groups

Facts:

- Taking your photo for photo ID is against Religious beliefs of Hutterites.

Reasons:

- II relying **heavily** on Amselem.
 - No Rational Connection – NOT Minimally Impairing

Amselem vs. Hutterites:

- Amselem's religious beliefs are of a particular succah in a particular location
 - This is Religion and must be protected
- Hutterites religious beliefs are MUCH FARTHER REACHING
 - Photo ID? What about having pictures taken with Police, surveillance etc.
 - Slippery slope. Is there a level of violation that we can tolerate?

FOCUS CASE:

Trinity Western University v. BC College of Teachers [2001]
Freedom of Religion

KEY:

- **Majority: Freedom to hold beliefs is above equality**
 - Equality of rights on the basis of sexual orientation **DO NOT** trump freedom of religion and association
- **Dissent: Freedom of Equality is higher than freedom of religious conduct**
 - Beliefs are a private matter and may not always be applied in public actions or expressions
- **NO HIERARCHY OF CHARTER RIGHTS**
 - Must be read in accordance with one another
 - No right is absolute
 - No right is privileged over any other
- **MAJORITY Reconciled Values**
 - Religious **Belief** → Equality
- **DISSENT Reconciled Values**
 - Equality → Religious **Conduct**

Decision: (8-1: Bastarache)

- TWU Got to have their own 5 year program, didn't need to be combined with SFU.

Reasons:

- No Charter rights are absolute or higher than any others

- College denied approval based on irrelevant considerations.
 - College should focus on discipline, curriculum, etc.
 - NOT Interpret scope of human rights, enforce Gay rights
- Stopping TWU is inconsistent with Section 2 of *Charter*
 - BUT: TWU's admission policies didn't violate section 15 of *Charter*
 - NO specific infringements

CHAPTER 20 – FREEDOM OF EXPRESSION

Section 2(b)

Everyone has the following fundamental freedoms;
 (b) freedom of thought, belief, opinion, and expression,
 including freedom of the press and other media of communication

Not called Freedom of Speech

- Not absolute, but must fit within certain limits
- Restrictions come primarily based on harm that can be caused by Expression

HOW TO:

- 1) Define scope as defined in s. 2(b)
 - Very Broad definition
- 2) Determine if infringement is justified under s.1

Protected Values/Interests:

- Free expression, assures self-fulfillment,
- Truth
- Securing participation in politics/ community
- Maintain stability in society throughout change

PRINCIPLES / PURPOSE:

- 1) Essential to **democracy**. Protects political expression/debate
- 2) **Truth**: Allows for marketplace of ideas, best guarantee of truth, social progress
- 3) **Intrinsically good**. Self-realization,

What is expression? (*Irwin*)

- More than making noises, less than any human conduct
- Activities that conveys meaning are *prima facie* within scope of 2.b
- **Very broad scope**: This was done on purpose
- Political Expression
- Artistic expression
- **Content** (meaning) **AND Form** (activity)
 - Daily activities can be protected if done to convey a message
 - Parking in handicap spot? NO
 - Parking in pregnant ladies spot to protest unfair treatment to fat men? YES
- **Violence is NOT protected**
- 2.b protects expressive content, **however unpopular, distasteful or contrary to mainstream**
- Court's aren't quick to exclude expression.

- Hate speech is **protected** (s.2(b))

How to Limit Expression: (*Irwin Toy*)

- 1) **Is the Expression disqualified from s. 2(b) protection because of its form?**
 - Violence, Threats of violence (more possible)
 - Undermine Charter Rights
 - DOES NOT serve Purpose/Value of s.2(b)
- 2) **How does Parliament infringe s. 2(b)?**
 - Government wants to limit content (selling to kids)
 - This was a purposeful limit
 - Could not show evidence of HARM to children

Irwin Toy

KEY:

- Popularity of statements doesn't affect acceptance by s.2(b)
- Irwin Test

Facts:

- Prohibiting advertisements against 13 year olds

Issue: Is a ban on advertising to kids under 13 an infringement of Freedom of Expression. If so, is it justified under s.1?

Decision: (3-2 Dickson)

- Law violates Freedom of Expression
 - Advertising to 13 year olds in this case IS EXPRESSION
- Violation is **purposeful (direct)**
- Violation if **justified under Oakes**

Reasons:

Irwin TEST:

- 1) Is the Expression disqualified from s. 2(b) protection because of its form? **NO**
 - No violence – nothing to disqualify expression.
 - Content is reflective of principles of s.2(b)
 - Unpopularity of advertising to kids is irrelevant
 - Purpose is to convey a meaning to earn profit
 - Content: YES
 - Form: YES
 - Communicates Meaning: YES
- 2) How does Parliament infringe s. 2(b)? **PURPOSEFULLY**
 - Government wants to limit content (selling to kids)
 - This was a purposeful limit
 - Could not show evidence of HARM to children

Commercial Expression
JTI Macdonald (SCC, 2007)

KEY:

- Legal Techniques when Overbreadth is argued

- If Π argues Overbreadth – Courts can respond by construing legislation narrowly
 - Interpret law very narrowly
 - Don't spread net out too far
- Commercial Expression is protected, but can be limited

Facts:

- Law struck down in RJR MacDonald (limiting tobacco advertising)
 - NOT Minimally Impairing
- New legislation passed, and challenged in *this* case
 - New laws allowed Government to put warning signs on smokes, as long as it was clear warnings came from Government
- **Law prohibits 'lifestyle advertising'** – prohibits ads that evoke a positive/negative emotion about tobacco. Does not go so far as to ban 'merely perceptual images'

Decision: Law INFRINGES s.2(b) BUT JUSTIFIED Under s. 1.

Reasons:

OAKES

(1) **Objectives: YES**

- Prevent harm, reduce smoking in people and kids

(2) **Rational connection: YES**

- Advertising increases smoking

(3) **Minimal impairment: YES**

- Law isn't overbroad in banning life-style advertising.
 - It stops short of banning 'merely perceptual' images or brand recognition messages
- Doesn't prevent company from sponsoring scientific research generally
 - Prevents certain reports (ie; directed at tobacco consumers ONLY)
 - Could not use in direct marketing campaigns

(4) **Proportionality: YES**

- Benefits by preventing smoking in kids is REALLY HIGH

FOCUS CASE

R. v. Sharpe

Child Pornography & Freedom of Expression

KEY:

- Evidence of rational connection. Reasoned apprehension is needed ONLY, no need for scientific certainty

Facts:

- Police seize text, photos, books, manuscripts, stories of Man-Boy Love
- Sharpe charged with Possession of Child Porn and Possession for purposes of distribution
- Challenges constitutionality of law against mere possession of child porn
 - Violates s. 2(b) [and s.7]
- Freedom of Expression vs. Harm from Child Porn

Decision: (McClachlin) (6-3)

- Law VIOLATES s.2(b) but IS JUSTIFIED UNDER s.1

- BUT: Court **reads-in** 2 Major Exceptions to Law;
 - 1) Self-created, privately held (By Adults)
 - 2) Self-made depictions, privately held (By Teens)

Old Exceptions:

- Artistic Merit/Character
 - Dominant Purpose of work must be art and not sexual
 - Must be reasonably viewed as art
- Material for Scientific purposes
- Public Good
 - Ie: pictures used in a trial
- NOT innocent nudity (bathing)
- NOT casual intimacy (hugging)

New Exceptions (Read-in by courts):

- A) Self –Created; AND
- B) Poses little/no harm to kids; AND
- C) Private Use
 - I) Self-created, privately held (By Adults/Kids)
 - Journals, drawings, etc.
 - II) Self-made depictions, privately held (Teens)
 - Picture taken by 16 year old couple

Reasons:

Violates s. 2(b)

- Child Porn has:
 - Content
 - Form; and
 - Communicates Meaning
- Popularity of expression isn't relevant
- NOT Violent (at least this stuff wasn't)
- **Limit was purposeful** – BUT purpose was to reduce harm to EXTREMELY VULNERABLE group in Society
 - Clear-cut evidence that child porn is harmful
- Possession is integral part of expression

Oakes: YES

- Substantial Objective
 - Reduce Harm to kids
 - Avoid bad attitudinal changes in society
- Rational Connection
 - Clear evidence that reducing child porn **possession** reduces child sexual abuse
 - Fuels fantasies
 - Aids law enforcement to catch offenders
 - Used to groom victims
 - Prevent abuse to the kids in the photos
 - **Reasoned apprehension is needed** – NOT scientific Certainty
- Minimally Impairing
 - Traditional exceptions apply
 - Court reads-in New exceptions to make it even more Minimally Impairing
 - Will provide certainty and avoid people worrying over harmless material
- Proportionality
 - Harm to children IS SO GREAT that Parliament can get away with a lot!

WHEN PURPOSEFUL LIMITS OF CONTENT OF EXPRESSION ARE JUSTIFIED HATE SPEECH / PORNOGRAPHY

Nature of Justified Limit must be:

- Reduce negative consequence to society/groups or individuals caused by the content
- Assumption that expression CAUSES HARM to society/groups/persons

- REMEMBER: We are accepting that the law limits expression, limits content, but we allow for it anyway.

2 Perspectives of Freedom of Expression:

Critical Legal/Feminist

- Expression not privileged over equality
- Expression is a form of action
- Expression is political/affects, shows power relationships
- Expression is harmful (especially to vulnerable groups)

Liberal/Civil Liberties

- Expression is privileged, basic to all freedoms
- Not Action
- Not political, neutral. Can be political, can be apolitical
- NOT harmful.
 - Any harm caused by expression must show causation.

Freedom of Expression and Hate Speech

Critical Legal Argument:

- Expression against large groups of people is against equality
- Promoting views is FORM – action
- VERY Dangerous – causes of society to permit Human Rights abuses
 - Harm from expression is so great that it necessitates prevention
- Hate speech isn't dialogue, but racism being expressed.
 - Goes against idea of free speech and dialogue
 - Segregationist tendencies of people and ideas
- Lies and deceptions are NOT expression

Civil Liberties argument:

- Oppose hate speech with MORE free speech.
 - Don't assume people will become racist by hearing hate speech
 - They will take this approach along with other side of story
 -
 - Cherry-picking:
 - Other information/expression should be prohibited
 - Violent films, sex, drugs etc.
 - Wouldn't these also cause people to become more violent, have more sex etc.
 - **Expression doesn't really turn into action without rational mediation?**
-

Keegstra (1990)
Hate Propaganda

KEY:

- Hate speech is protected Expression by s.2(b)
 - Violent nature does NOT exclude
- Threats of violence from hate Speech ARE Protected
 - Trends are moving AWAY from this
- Limiting Hate Speech is JUSTIFIED UNDER OAKES
- Content that Undermines Equality and other Charter rights are harmful – good excuse to limit them
- Defence for statements of truth or statements with religious foundation
 - Limited to intense hatred, promotion etc.

What is Hate Propaganda?

- Most of it is Political
 - Anti-Jewish, Anti-Black, Anti-whomever
 - How things should be run, who should be allowed in the Country
-

Facts:

- High school teacher charged with willful promotion of hate propaganda
- Had very anti-semitic views, promoted those views to his students

Decision: (Dickson)

- Hate Speech is protected by s. 2(b) BUT IS JUSTIFIED UNDER Oakes

Hate propaganda is protected under s. 2(b)

- Form: YES
 - Simple teaching, asking questions, indoctrination – NO VIOLENCE
- Convey meaning: YES
- Content: YES
 - Anti-semitic BS
 - NOT excluded because of threat of violence argument
 - **Threatening violence is CONTENT – allowed**
 - Trends are moving away from this
- **Since Keegstra - Courts have backed away from defending threats:**
 - Terrorist expression (with threats of violence) may not be protected by Freedom of Expression

Limiting Hate Speech is JUSTIFIED UNDER Oakes

Objectives: YES

- Harm:
 - Humiliation/Degradation of targets of hate
 - Negative influence on society – social discord
- Hate speech goes against Equality
 - Content that undermines equality is harmful
- Hate speech goes against democratic values
- Hate speech doesn't really serve purpose of Freedom of Expression

Rational Connection: YES

- Strong connection between hate speech and racism/hatred

- Aren't these laws counter-productive? AREN't we publicizing their views?
 - YES – but it's worth it to stop expression;
 - AND We are not publicizing views but acknowledging illegality

Minimal Impairment: YES

- High *Mens rea* is required
- Active support or instigation
 - Not just keeping views to yourself
 - Active Promotion is needed
- Hatred:
 - Intense and extreme emotion
 - **Not just Dislike**

***R. v. Butler* (1992)**
Pornography

KEY:

- Laws cannot limit Expression based on Enforcing conventional morality
 - Charter violation (s.2(b))
- Laws aimed at reducing harm may be grounded in moral values
 - IF you can show immorality is an accepted source of harm
- Proof of Harm: Reasonable Apprehension of harm is sufficient

Facts:

- Challenge to CC s. 163 – Prohibition against selling/producing **obscene materials**
- Obscene Materials:
 - Dominant characteristic is:
 - A) Undue Exploitation of sex; or
 - B) Sex + Crime/Horror/Violence
- No prohibition of sex itself
- Limitation of s.2(b) – but is it justified?

Decision:

- Prohibition against selling certain kinds of obscene pornography is violation of s.2(b) but JUSTIFIED UNDER Oakes

What is Obscene Pornography?

- 1) Dominant purpose MUST be exploitation of Sex; AND
- 2) Exploitation must be **undue**; BUT
- 3) Defence of Artistic Merit

What is Undue?

- Fails Community Standard of Tolerance Test
 - A) What would Canadians tolerate OTHER Canadians be exposed to?
 - Not themselves

Pornography IS PROTECTED as Expression under s.2(b):

- Content: Sexually exciting material
- Form: Pictures/Video etc.
- All forms of Pornography are protected
 - Vanilla Sex

- Degrading/Dehumanizing Sex
- Sex + Violence

Limiting Pornography IS JUSTIFIED UNDER Oakes

Objective:

- **HARM:** Minimizing danger to society
 - NOT Morality
 - Degrading women leads to anti-social behaviour
 - Destroys fabric of society, leads to exploitation of women
 - Undermines equality
- Original purpose (immorality) and new purpose (reducing dangers) are linked
 - Original purpose was backwards way of promoting current purpose

Rational Connection: YES

- **Reasoned apprehension of harm** is sufficient

Minimally Impairing: YES

- Only applies to certain, very violent/degrading porn
- No limitation on private use/viewing
- Defence for artistic merit
 - Courts are generous in what constitutes artistic merit – most things do

Limiting Freedom of Expression on Public Property Montreal (City)

- Regulation of **physical effects** of expression **more than content** itself
 - Content is Neutral – simple noise/music etc.
- Limits are usually **time/place/manner restrictions**
 - Legal issue is usually whether appropriate alternatives or exemptions are available

Montréal (City) v. 2952-1366 Québec Inc. (SCC, 2005) (p. 989)

KEY:

- Expression on **PUBLIC** property are **protected** MORE THAN expression on **PRIVATE** property
- **Application of s.2(b) on Public Property TEST:**
 - 1) Is the Public place somewhere that you would expect Constitutional protection for Expression?
 - Does expression in that place conflict with purpose/values of s.2(b)?
 - NO? You do expect protection
 - Historical/Actual function of place. Does it undermine/promote values of s.2(b)?
 - Promotes values? You do expect protection
- Noise is protected Expression – but limitations are Justified

Facts:

- A nightclub is prosecuted under a city bylaw that prohibits “noise... whether it is inside a building or installed or used outside... [where it] can be heard from the outside”.
- Club put up speakers outside building to promote dancers inside
- Challenged law as violating Freedom of Expression

Decision: (McLachlin) (8-1)

- Noise from speakers **is protected** by s.2(b)
- Law does violate s. 2(b)
- Violation of s.2(b) IS JUSTIFIED UNDER Oakes
- Fact that this location was a public place **did not exclude** s.2(b) protection
 - Fact specific

Noise is Protected by s.2(b)

- Has expressive content
 - Purpose of noise – advertising a leisure activity

Public Place Test:

- Time/Place/Manner did NOT exclude s.2(b) protection
- You expect Constitutional protection for expression on the street, during day OR at night
 - Expression promotes s.2(b) purpose (profits)
 - Historical/Actual function of streets – public gathering etc.

Limitation on Noise IS JUSTIFIED UNDER Oakes

- Minimally Impairing? YES
 - Allows for special permits
 - Other alternatives are impractical or don't achieve objectives
- Objective? YES
- Proportional? YES

Dissent: (Binnie): Disagrees with interpretation re: what the noise is.

- Very critical of majority. They went too far in statutory interpretation

APPLICATION OF THE CHARTERSection 32

Who does the Charter apply to? Who doesn't it apply to? Where's the Line?

Section 32(1)

- Charter applies to Government/Parliament
- Applies to matters within the authority of Parliament and Legislature of Province.
- **State actors NOT private actors**

ALL THINGS ARE NOT subject to the Charter

- *Dolphin Delivery* – **Rejects** broad reading of Charter
 - Charter applies to State or public actions/actors NOT private
- *McKinney*:
 - **Majority:** (LaForest) Government means executive branch, Crown, Cabinet, Ministries, Civil Service, army etc.

- **Dissent:** (Wilson) Wants a broader reading. Government means more than just that.

What is government? (*Dolphin Delivery*)

- Executive Branch, Crown, Cabinet, Governor-in-Council, Lt. Governor-in-Council, Ministries, Armed Services etc.

Test to see if actor is Government:

A) Is the entity controlled by government? (*McKinney*)

- Does it Exercise Statutory Power? If so – Government
- Are they autonomous?
- IRRELEVANT considerations
 - How much government funding they receive
 - Being subject to government regulations
 - Serving important public purpose

B) Exercise of Statutory Power – NOT Creatures of Statute(*McKinney*)

- Exercising Statutory Power
 - Express power from Parliament to affect people's status, rights, duties
 - Powers to make legally binding decisions
 - Private people with statutory powers **are subject to Charter**
 - Ie: Regulatory bodies for professions (*law Society of Alberta*)
- Creature of Statute
 - Entity created by statute
 - Most legal (artificial) persons – most are created by statute anyway

C) Government Activity (*Eldridge*)

- Providing Health care, Policing, jails etc.

If you are Government

- All activities (even commercial/employment activities) are subject to Charter

Dolphin Delivery: (SCC, 1986)

KEY:

- Does NOT broaden scope of Government
 - If we broadened scope here (to Judiciary) we would widen scope of Charter to touch on ALL private litigation
- Charter **DOES NOT apply** to litigation between purely private parties with no connection to Government
 - We need to find sufficient governmental actors (See *McKinney* Test)
- Charter **ONLY** applies to Common Law **when government is involved**
 - BUT: Common Law must be developed in accordance with **Charter values**
- Court orders **do not invoke Charter protection**
 - Applies for Judgments between private parties)
 - Not closely related enough to government
- Many things will bring us out of purely private matters and into realm of Charter
 - Delegated Legislation, municipal by-laws, regulations from other Legislative bodies
 - Ie: *Ontario Human Rights Code (Blainey)*

Facts:

- One private party prevents the other from Picketing
- Prevention from picketing is an obvious infringement of s.2(b) and also probably unjustified
- BUT: These are private parties!
- Charter DOES NOT APPLY!

Decision: (McIntyre) Unanimous

- Charter is not involved here. Private Parties

Hill v. Church of Scientology of Toronto (SCC, 1995)

KEY:

- Supports findings of *Dolphin Delivery*
 - Charter is not involved in common law where there is NO governmental involvement
 - BUT REMEMBER:
 - **Common Law needs to be interpreted in accordance with Charter**
 - BUT: Judges will NOT make far-reaching changes to Common Law – that is left to Parliament
- Private parties cannot argue violation of **Charter RIGHT**
- Private parties CAN argue common law is inconsistent with **Charter VALUE**
- Being a government employee isn't enough
 - Must be acting as a governmental actor
- **Violations of Charter Values must be seen more flexibly than violations of Charter Rights**
 - Ie: No Oakes Test analysis

Claiming Charter Value Violation: (*Scientology*)

- X claims that common law is inconsistent with Charter Value
- X Bears on us to:
 - Prove common law fails to comply with Charter values; AND
 - When we balance values, common law should be modified
 - Balancing act is MUCH more flexible [against enforcing Charter] in these situations

Facts:

- Defamation
- Church defames Hill (government employee)
- Hill sues Church and seeks damages
- Church challenges laws behind Defamation
 - Defamation laws too restrictive on Freedom of Expression – NOT Justified in Free/Democratic society

Decision:

- Hill wins his Defamation suit. No Charter involvement in this private litigation

EQUALITY RIGHTS & SECTION 15 OF CHARTER

Section 15 1

Every individual is equal before and under the law and has the right to the **equal protection and 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.

15(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.

Formal Equality:

- A right that Protects groups from laws that single them out for worse treatment based on race, gender etc.
- Minimal (Weak) Equality Rights

Substantive Equality:

- A right that puts a duty on government to be proactive to create equal outcomes in society
 - Act to overcome disadvantages
- Strongest Equality Rights

Andrews v. Law Society of BC (1989)

KEY:

- **Substantive Equality Approach**
 - SCC Changed the way we look at Equality Rights in Canada

Facts:

- Non-citizen from UK challenges s.42 of BC *Barristers Act*.
- Wants to practice in BC but cannot under BC Law as he's not a Canadian Citizen

What is Equality?

McIntyre J.

- Not a general guarantee of equality. Not an abstract sense of equality.
- Ensure equality in formulation/application of law.
- Large remedial component
- Does not provide for equality between individuals or groups within society in a general or abstract sense
- Use Substantive Approach

Decision: The law was discriminatory – went against s.15 protection

SUBSTANTIVE EQUALITY APPROACH. (1989)

Large remedial component

KEY:

- Large **Remedial** component
- (1) **No intention** to discriminate is **required**

- Focus on advantage/disadvantaged groups
- The impact of discrimination is important
- You don't have to be member of disadvantaged group to claim Equality rights – but it helps
- (2) Adverse effect / Systemic Discrimination –
 - Laws that are discriminatory because of an adverse/disproportionate effect to the group are still protected.
 - Need to show harm/prejudice/disadvantage
- (3) The Duty to Accommodate –
 - Equality involves a duty to accommodate differences where not to do so would deny equal benefit or protection of the law
 - “accommodation of differences...is the essence of true equality” (*Andrews*)

3 STEP SUBSTANTIVE EQUALITY TEST (ANDREWS)

1) Differential Treatment

Is there a distinction in the law between groups?

- Look for differential treatment (in law) between claimant groups and other groups
- A) Personal Characteristics; OR
- B) Failure to accommodate already disadvantaged groups
- Claimant may select the comparison group. BUT: If the Court feels that comparison group is inappropriate – choose a new one (*Law*)
- *Hodge/Auton*:
 - Group chosen led to failure of Equality claim.
 - WE should find a group that is similar in all relevant ways to the benefit.

2) Enumerated/Analogous Grounds

Is the distinction based on enumerated/analogous grounds?

- List of enumerated grounds isn't closed, and is open to analogous groups
- BUT: **We need to focus on the specifically enumerated grounds.**

Is it Immutable? Can the distinction about you be changed? At large personal cost? Does Government want you to change?

How to determine what is an analogous group?

- **Immutability:** Not alterable by conscious action, or only alterable with unacceptable costs
 - LaForest – *Andrews*
- Discrete & insular minority
 - Used by McIntyre in *Andrews*
- Lacking political power
 - Wilson – *Andrews*
- Analogous Grounds
 - Marital status (*Miron v. Trudel*, 1995)
 - Sexual orientation (*Egan*, 1995)
 - Citizenship (*Andrews*, 1989)
 - Aboriginal - residence (*Corbiere*, 1999)

3) Discrimination in a substantive sense

- The distinction must also be “discriminatory”
 - Law imposes a **burden**, or **denies a benefit**, on the basis of enumerated or analogous grounds
- **Human Dignity Approach:**
 - **Adds 4** contextualized Factors (*Law*)

Corbiere v. Canada (1999)

KEY:

- Test for Analogous

Facts:

- Aboriginal Residents or On/Off Reserve status was analogous ground to be protected under s.15.
- Aboriginals wanted to vote in Band elections despite living off the reserve

Test to determine if we have an Analogous Group:

- Enumerated and analogous grounds are “**markers of suspect grounds associated with stereotypical, discriminatory decision- making.**”
- Analogous grounds are those involving personal characteristics that are “**immutable or changeable only at unacceptable cost to personal identity**” – i.e., the government has no legitimate interest in expecting individuals to change.

Law v. Canada [1999]

KEY:

- New Approach: **Human Dignity Approach**

Facts:

- Direct discrimination based on age?
- Canada Pension Plan only pays out if beneficiary is over 35, or has dependant kids or has a disability
- Ms. Law had no children, no disability, and was 30 years old when her husband died.
- Claims Age discrimination
- Court uses Human Dignity Approach:

Decision:

No violation of Human Dignity → No Violation of Equality Rights

Reasons:

- Differential Treatment? YES
- Enumerated Ground? YES
- Discriminatory Distinction? **NO**
 - No violation of Human Dignity
 - 1) Adults under 35 aren't historically disadvantaged group

- 2) Corresponds to younger persons better ability to earn money
- 3) Purpose is to ameliorate the situation of older surviving spouse
- 4) It's only money

HUMAN DIGNITY APPROACH [1999]

KEY:

- Preventing the **violation of essential human dignity**
- Distinctions in the Law, even based on enumerated/analogous grounds **are NOT discriminatory** if they don't violate essential human dignity
- Underinclusive laws that help most people, but leave out historically disadvantaged groups are problematic.
- Laws which help most everyone, except for the already super advantaged, may not be discrimination
- This approach increases the amount of evidence we need to bring to get an Equality claim **and diminish the importance of s.1 cases**
 - BUT: Section 1 analysis is still important, especially where equality rights claims failed.

HUMAN DIGNITY TEST :

PART 3 OF ANDREWS TEST:

What Human Dignity Means - How to prove law violates human dignity?

- 1) Is the Claimant a member of a historically disadvantaged group, or otherwise vulnerable/disadvantaged?
 - **Probably the most compelling factor**
 - Less Disadvantaged → Less harm to dignity
- 2) The degree of correspondence (relevance) between distinction in the law and the actual need, capacity or circumstance.
 - Closer connection → Less harm to dignity
- 3) Does, by excluding the claimant, the law have an ameliorative effect on other more disadvantaged groups?
 - Does the law act to help other disadvantaged people?
 - More ameliorative → Less Harm to dignity
- 4) The nature and scope of claimants interests which the law effects
 - Less important → Less harm to dignity

APPLYING HUMAN DIGNITY APPROACH

Trociuk: (2003)

- Challenged Legislation to let a mother name child without approval/notification of father
- Men, while historically **advantaged**, can still claim for equality rights
 - Being advantaged goes against you – BUT – does not prevent claims.
 - While we help out disadvantaged groups MORE – we will help all groups

Decision: Men WIN

Nova Scotia Workers Compensation Board v. Martin

- Discrimination can occur **within** disadvantaged groups
- NS Law is challenged that provides lower benefits to people on the basis of chronic pain syndrome than other disabling conditions

Decision: Discrimination!

- All 4 contextual factors were found in this claim
 - Also – there was stereotyping and prejudice against people with chronic pain syndrome
-

APPLYING HUMAND DIGNITY IN LIGHT OF SECTION 1

Lavoie v. Canada (2003)

KEY:

- Despite being Discriminatory (Breach of S.15(1)) rights (Using *Andrews*), Court found law **justified under s.1**

Facts:

- Government hiring practices gives preference to Canadian citizens (*Public Service Act*)
- Non-citizens make claim that this is discriminatory

Decision – Majority:

- Law is violation of s.15 – Discrimination re: Equality
- **BUT: It is justified under Section 1**
 - Purpose is to encourage non-citizens to gain citizenship

Decision – Dissent:

- Law is violation of s.15 **AND is NOT JUSTIFIED Under Section 1**
 - Helping citizens doesn't promote Canadian values of helping and using immigrants

Newfoundland (Treasury Board) v. N.A.P.E. [2004]

KEY:

- During Budget Crisis, saving money can be a justification for infringing Equality Rights
 - Ie: Law infringed s.15 – but justified under s.1
 - Normal situations, money is not an issue (re: s.1 justification) – this was very special case

Facts:

- Women sued under s.15 and settled with government for \$24 M in back pay.
 - NF's budget crisis hit and Government made laws that rescinded the settlement
-

EQUALITY

Difference between Eldridge and Auton: Legal Entitlements

Eldridge: YES

- Right to Proper Medical Treatment
- No intention to discriminate

Auton: NO

- No right to treatment for this specific medical condition
- Argued that to have equality – their condition SHOULD BE Covered
- Argued for intention to discriminate

Direct Discrimination vs. Adverse Effect Discrimination

- Direct: A law that on its face discriminates on grounds that you cannot discriminate about
 - No Blacks!
 - Adverse Effect: Rule adopted that is on its face, neutral. Applies equally to all employees
 - BUT: Has discriminatory effect on certain employees because it imposes restrictions/penalties/extra impositions that aren't imposed on others
 - **Really relevant for disabled people**
 - Buildings without elevators or ramps
 - Design of building is very neutral – but doesn't take cripples into account
 - Firefighters need to be a certain size/height or lift certain weight
-

Eldridge v. BC

KEY:

- Sign language interpretation is a Legal Entitlements (medical necessity due to communication)
- **Problem occurred with HOW hospital applied law**
 - Law remained legal – but must be **applies to ensure s.15 is satisfied**
- Equal (proper) medical treatment is a s.15 right
-

Facts:

- Deaf people sued Province for not providing sign language interpreters for medical treatments
 - Claimed poor communication between Doctor and deaf patients led to poor medical treatments
 - Possible danger of misdiagnosis
- Government forced deafs to pay for interpretation

Decision (LaForest) –Unanimous

- NOT providing Interpreters **is a violation of s.15 rights**
- Government must take special steps to accommodate disadvantaged group (deaf)
- If interpreters are needed to provide effective service, than **you must provide them and pay for them**
- Law remains

Precedent for Non-English Speakers? NO

- Lack of English **is not a viable ground for equality rights**
 - Not immutable;
 - Government expects you to learn English

SECTION 15 (2) & AFFIRMATIVE ACTION

(2) – Subsection (1) **does not preclude any law, which... amelioration of conditions of disadvantaged individuals**

- **Enables government** to pro-actively combat existing discrimination through affirmative action (*Kapp*)
 - **By definition – is NOT discriminatory**
- **Section 15(2)** is a Defence by Government
 - If X claims Equality violation – Government can counter with s.15(2)
 - If it is successful – there is no need to address Human Dignity question
- **Analyze s.15(2) on it's PURPOSE – NOT EFFECTS**
 - Government has to show purpose is to ameliorate other group
 - Does NOT need to show law has actual ameliorative effects
 - Law can have more than just an ameliorative purpose
 - Rational Connection must be proven
 - Invalid Purpose: Laws 'for their own good'

R. v. Kapp (2008)

KEY:

- Section 15(2): Affirmative Action is strong here in Canada
- Section 15: Combats against discrimination
 - Prevents Discrimination (15(1)); AND
 - Helps disadvantaged groups improve their situation (15(2))
- **Did the Court say:**
 - To Appellants that you're equality rights were NOT infringed?

Facts:

- Rights were given to Aboriginal tribe to fish in a certain area exclusively
 - Aboriginal Fishing Strategy used to help Aboriginals get involved in commercial fishing
- Non-Indian fishers fished there in protest. Were charged with illegal fishing
- Trial: Not convicted
- CA: Overturned and convicted non-Indian fishermen

Decision: Affirmative Action upheld! No violation of Non-Indian's Equality Rights

Reasons:

- Aboriginal Fishing Strategy falls under s. 15(2).
- Purpose: To Ameliorate the conditions for Aboriginals
 - Supports self-sufficiency, helps negotiate re: aboriginal fishing claims
 - Ameliorates situation of Aboriginals – traditionally disadvantaged socially/economically
- Giving special fishing privileges to Aboriginals is **rationally connected** to purpose
 - Objectives correlate to actual economic/social disadvantage

Improvement doesn't have to be the sole purpose of program but must serve that purpose

Lovell

Now that we understand 15(1)
15.2 helps us to better understand 15.2
doesn't have independent status for cases in the future

THIS IDEA IS REVISITED IN Kapp

- Since 15.2 was used in this case – it shows that 15.2 has value

SECTION 7

LIFE, LIBERTY AND THE SECURITY OF THE PERSON Principles of Fundamental Justice

How to Analyze for Section 7

- 1) Is the state engaged in limiting(depriving) someone of life, liberty and/or security of person
 - Life,Liberty,Security are not strict terms: Broader definitions
- 2) If so, is the Deprivation done according to principles of Fundamental Justice?
 - Test the effects, in addition to the intended purpose(*Morgentaler*)
- 3) if the deprivation is NOT according to Fundamental Justice, can it nonetheless be justified under s.1?

What is Life, What is Liberty? What is Security of the person?

Principles of Fundamental Justice (PFJ)

- Procedural
- Substantive
 - Basic Tenets Approach
 - Arbitrariness

Where does s.1 fall after PFJ?

- Section 1 isn't so important in s. 7 cases.
 - Most analysis fall within the first 2 analysis of these cases
-

Most important area of Charter Rights in:

- Administrative Law
 - Immigration Law
-

What is Life/Liberty/Security of the Person

Singh v. Minister of Immigration (1985)

- Life, Liberty and Security of Person are 3 distinct interests

Liberty: (*Blencoe*)

- Includes freedom from physical restraint; AND

- State cannot touch you without your consent
- Cannot perform medical treatment etc.
- Freedom to make personal choices of a fundamental nature (*Morgentaler*)
 - Personal autonomy over important decisions affecting their private lives
 - **Similar to a constitutional right to 'choice'**

Security of the Person: (*Blencoe*)

- Includes bodily integrity; AND
- Some degree of psychological integrity
 - Protects bodily integrity and state-imposed psychological stress (in criminal context) [*Morgentaler*]
- Right to access medical treatment (*Chaoulli*)

Irwin Toy (1989)

- **Does NOT include property right**
- A) Economic rights are not protected by s.7
 - This isn't 100% all economic rights though
- B) Corporations economic property rights aren't protected by s.7

On Exam: What kinds of Laws can Parliament make after Morgentaler

Morgentaler: Abortion case

- Does this involve the state affecting the Life, Liberty, Security of Person of the Mother?
 - What about the rights of the fetus?
 - Common Law: Not yet a person for legal purposes
- Test: 2)
- Is this Law a Breach of Fundamental Justice?
 - **Test the effects, in addition to the intended purpose**
 - The effects of the law are manifestly unfair – despite the stated purpose

Laws cannot create criminal laws that prevent abortions

- Restrictions are allowed – but which kinds?
 - BUT: Parliament can create laws re: safety of women
 - Laws that don't impose distress on women
 - Get rid of issues of **access** or delays (committees)
- **Today:** No criminal code provisions for Abortion

What is unconstitutional about this law?

- **NOT Property: This was done on purpose**

What is Fundamental Justice?

What is against PFJ

- A law that has the potential to convict someone who has not really done anything wrong
- : Is this JUST?
- Procedural Justice? Is the procedure fair? Part of PFJ

- Substantive Justice: Is the Law itself fair? Part of PFJ

Reference re: s.94(2) of BC Motor Vehicle Act (1985)

- Section 94(2) of MVA created absolute liability offence for driving with license suspension AND mandatory imprisonment
 - Jailing someone who didn't have a guilty mind is a substantive Justice issue
 - **Court found law unconstitutional:** Thus – PFJ included Substantive Law
- **Fundamental Justice is NOT LIMITED to Procedural rights**
 - **ie: Natural Justice :** Fairness
 - Also includes **substantive Fairness**
- **Original Intent approach to Charter interpretation is denied**
 - Charter interpretation can change – we can take political comments made by Charter drafters
- **NOT Due Process (like in the US)**
 - In Canada – we deal closely with the test. We use the text to show that they used *Living Tree Approach*. Used the lack of natural justice term or due diligence term
- PFJ found in **basic tenets of legal system**
- Inherent in the Judiciary

Deportation to someplace that uses capital punishment:

Can only be moved if Canada obtains a guarantee that the other state will not use capital punishment on accused

- Canada is against this
 - Canada can track this: Did the state kill them? They can rely, more-or-less on their word not to use capital punishment

Deportation to a place with risk of torture

How can Canada obtain these kinds of guarantees??

This is an ongoing issue: Can the government rely on guarantees from unreliable states?

- No! Canada doesn't allow this
 - BUT: It hasn't been decided 100% if Canada can rely on the word of other countries.
 - Who defines 'torture'?
 - We could use International Court's definitions or allow SCC to define it

What is Substantive Unjustness?

- **Arbitrary Laws**
 - Means of the law does not serve the objective
 - (*Rodriguez, 1993*)
 - It seems to be just getting in the way
 - Similar to Oakes analysis.
 - If Means don't contribute to achieving objective, they may be arbitrary.
- **Basic Tenets Approach:**
 - Does impugned law breach a 'basic tenet' of the law
 - *Children, Youth and the Law Foundation* (2004):
 - Parties try to argue that 'best interests of the child' is a basic tenet of Canadian law
 - **Court: No** it isn't. Doesn't meet standard for what a basic tenet is

Basic Tenets Approach Test (*Canadian Foundation for Children, Youth and the Law*)

- (1) is it a “legal principle”? Yes.
 - (2) is there a consensus that the principle is “vital to our societal notion of justice”? No.
 - (3) is it sufficiently precise to yield a ‘justiciable standard’? No.
 -
-

Rodriguez, 1993)

KEY:

- Prohibition against assisted suicide is NOT unconstitutional / against PFJ
- PFJ reflect social consensus
 - **But must be legal principles**
 - Must also be able to be stated with **some precision** – cannot be broad generalizations
 - PFJ is **not based solely on social consensus**
- PFJ is **not based purely on historical basis**
 - A law that has existed for a long time is not automatically Just

Facts:

- Wanted to get a doctor to give her a painless death before she continues to deteriorate
- **Claim:** Prohibitions against assisted suicide violate **Security of person** (right of autonomy) in **arbitrary way**.
 - Law doesn’t criminalize suicide so it shouldn’t criminalize assisted suicide
- **Rodriguez:** Security of the person is infringed because prevention against assisted suicide is state interference over control of one’s own bodily integrity
- Rodriguez eventually did commit suicide with assistance

Decision: (5-4) (Sopinka)

NO – Law is upheld

- **Security of the Person is triggered**
- BUT: Security of the person **does not include** control over the time and circumstances of your death
 - Conflicts with the life interest connected to security of the person
- Objective is protection of the vulnerable.
 - Alternative law that protects vulnerable is not at hand so law is not arbitrary
- This issue should be address by Parliament and not the Courts
 - Courts don’t want to change the law – but may want Parliament to

Dissent: (McLaughlin)

- No real difference between suicide and assisted suicide
 - Only difference is that in assisted suicide cases, the victim cannot do it without assistance
 - Prohibiting one form and not the other is arbitrary
 - If we allow healthy people to kill themselves, we are allowing people to kill themselves. Not helping Sue deprives her of a right we give to others.
 - This is an arbitrary law
-

Canadian Foundation for Children, Youth and the Law v. Canada (2004)

KEY:

- Test to decide if a concept is a PFJ
- Is best interests of the child a PFJ? **NO**

Facts:

- “Spanking Defence” in *Criminal Code*
- Does it breach a PFJ – Best Interests of the Child (thus violate s.7)?

Decision: Spanking **IS NOT A VIOLATION** of s. 7

Basic Tenets Test:

- (1) Is it a “legal principle”?
 - Yes
 - Best interest of the child is a **legal principle**. BUT NOT A PFJ because it **may be secondary to other PFJ**
 - Putting someone in jail (follows PFJ) even though it’s not in the best interest of their kid
- (2) Is there a consensus that the principle is “vital to our societal notion of justice”?
 - No
- (3) Is it sufficiently precise to yield a ‘justiciable standard’?
 -
 - No

AND: Best interest of kid is not clearly defined

Gosselin v. Quebec

KEY:

- **Now: No positive rights from s.7**
 - No positive right for substantive Support
- **Dissent:** Negative **AND POSITIVE** rights from s.7 (Not law)
- Also leaves the door open that s.7 does entail **positive rights to Life Liberty Security**
 - Only in special circumstances
- Dissent has neat view of s.7 (see’s 2 rights).
 - This is **NOT** the majority view and not technically law, but makes it a possibility.

Facts:

- Welfare Legislation gave reduced benefits to people who weren’t working and who were single and under 30
- Full benefits were given to people who were working or in school
- Gosselin was under 30 and not working. She wasn’t able to live on the Government handouts alone and resorted to prostitution
- Claimed that these social welfare legislation violated s.7 rights

Issue:

- Do people have a **positive right** to the state's subsistence level support? NO!

Decision: (5-4) McLachlin:

No violation of s.7

- **No positive right to provide subsistence level support** (*Gosselin*)
 - **BUT:** It is available in special circumstances
- Court didn't even see this as a s.7 issue really
- Didn't see sufficient hardship
- Didn't see how absence of state support created Gosselin's situation.

Dissent (Arbour): Unique view of S.7

Wanted Gosselin to win.

- Section 7 contains 2 rights (not just the one negative kind of right)
 - 1) There is a **Positive Legal Rights**
 - Just like right to fair trial (positive right)
 - You can claim for a fair trial. You're not limited to a charter claim if you are NOT given a fair trial
 - Just because s. 7 doesn't cover economic rights (property rights) doesn't mean that economic impact can't be the basis for a s. 7 claim
 - 'Free-standing' right, separate from PFJ
 - Positive obligation on the State, but subject to limitations under s.1
 - 2) **Negative Rights**
 - The kinds of s.7 rights that the Majority thinks of above
 - Arbour reads s.7 differently to include BOTH positive and negative rights
 - (1) Right to Life, Liberty and security of the person **AND (2)** the right not to be deprived thereof
 - Creates 2 rights
 - 1st phrase. Positive right to life, liberty...
 - Places obligation on State
 - 2nd phrase. Right not to be deprived
 - Very small place for s.1 analysis after we establish a s.7 right.
 - Difference between majority and Dissent: Both agree with Negative Rights – but Majority doesn't agree with existence of Positive Rights
-

Chaoulli v. Quebec

KEY:

- 4-3: Law violated Quebec Charter
- 3: Law violated **Canadian Charter**
- **Adverse impacts from s. 7 must be serious!**
-

Facts:

- Doctor wants to be able to practice medicine privately
- Tried to get a license to allow him to act as a private hospital and provide private services
- Provincial legislation prohibited private health insurance

- Scheme didn't prevent people from buying medical treatment
 - It **prevented getting insurance** for private services
- Tried to challenge ban against private practice as ban **was against life, liberty and security of the person**

Issue:

Does law violate s.7 of Charter?

Does it violate equivalent law in Quebec Charter

Decision: 4-3: Violation of Quebec Charter

Deschamps:

- **Law VIOLATES Quebec Charter**
 - Section 7 is triggered
 - Government policies risk life/security of the person
 - Justified under Oakes?
 - Objective: OK
 - Rational Connection: OK
 - Minimal Impairment: **NO**
 - Other countries, other provinces
 - No need to use this method to preserve system
- **No comment on Canadian Charter**

McLachlin/Major/Bastarache:

- Law VIOLATES Quebec Charter
 - Concurs with Deschamps
- Law VIOLATES Canadian Charter
 - **When government does something, they must do it according to Charter**
 - Q: Does our current system violate s.7
 - Infringes s.7
 - People die while on wait lists
 - People suffer extra while on wait lists
 - Law increases wait lists
 - Arbitrarily
 - **No real connection** to purpose AND
 - **No theoretical connection** to purpose
 - Looked at other countries with no problems
 - Fails to conform with PFJ
 - YES: Because Arbitrary
 - NOT Justified by Oakes

Binnie/LeBel (Dissent):

- Argued against principle that health care that's not at a reasonable time is against PFJ
- Arbitrariness: agree with purpose to provide public health for despite money situation
 - Don't agree that ban is arbitrary
- Section 7 triggered
- NO Violation Quebec or Canadian Charter

After Decision – door opened to private health care services

- Supreme Court gave Quebec one year to amend its healthcare legislation and rectify the violation of the *Quebec Charter*.

- 2 tier system could become a reality

Other Factors (Chaoulli)

- The prospective nature of the decision.
- The impact on public finances.
- The multiplicity of competing interests.
- The difficulty of presenting scientific evidence
- If law follows public values/maintain public order

Canadian Medical System:

- “single-tier” in Canada
- all medical and health care services that come within the system of public insurance are 100% paid for by the insurance scheme
- Doctors are not permitted to “extra-bill” or “double-bill” for their services (another condition set out in the Canada Health Act).
- Doctors can opt-out but must charge patients 100% of the service (cannot have 1 foot in each door)
- You can charge for services NOT covered by Government
- Provinces are discouraging development of private health care
 - Want to keep **equity** in system – do not draw resources out of public sphere

CHARTER REMEDIES

Section 52:

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.”

Underinclusion Remedy(*Shacter*):

- Extend benefits to claimant group
- Or
- Strike legislation down

Schacter

KEY:

- **Case was** only argued based on remedy – Governemnet conceded that there was a violation
 - BUT: The Court likely would have found that we didn’t have a s.15 violation.
 - Government conceded too quickly.
- Why a **BAD** s.15 case?
 - Analogous/Enumerated Grounds: **NO**
 - Analogous: Can we find analogous grounds? **NO**
 - It might be – but there may be a big issue in finding natural parents can be an analogous ground
 - Human Dignity? **NO**
 - Discrimination has been to adoptive parents – NOT biological parents.
 - **NO** offence to Human Dignity
 - Speak to Need? **NO**
- **Appropriate Remedy:**
 -

Underinclusiveness:

2 main options

- Extend benefit to group B; OR
- Deny benefit to group A

Facts:

- S. 15(1) challenge to provisions of *Unemployment Insurance Act*.
- Act gave 15 weeks of parental benefits to **adoptive** parents on the arrival of their child. Adoptive parents could share the benefits between them as they saw fit.
- Adoptive parents treated better than natural birth parents
 - Only provided for maternity benefits (not shared)
- CA: Government conceded that the law unjustifiably violated natural parents' equality rights.
- Lamer CJ's criticized this concession. What arguments may have been available to the government under section 15(1)?

Issue: What is the appropriate remedy under s. 52(1) ?

Lamer's 5 possible remedies:

- 1. Declaration of invalidity concerning the impugned law
 - Strike down Law
 - Of no force/effect
- 2. Declaration of invalidity, suspended for a specified period
 - Law is unconstitutional BUT: Suspends declaration for a period of time
 - In the meantime, Parliament enacts new, valid legislation.
 - **Avoids legal vacuum.**
 - **Good when:**
 - **Vacuum poses risk to public safety**
 - Denies benefits of an otherwise good program to deserving people not connected to court case
 - **Cons:**
 - **Maybe not the least intrusive method.**
 - Forces issue onto Parliament's agenda, may take time to get dealt with
 - What is the **status of persons** under the law during suspensory period?
- 3. Severance or "reading down" of a portion of the law
 - Problems only with one small section
- 4. 'Reading in' words into the law
- 5. Section 24(1) remedy that is "appropriate and just"

Vriend

KEY:

- **Remedy:** (4) Read in 'sexual orientation' into legislation
- **Dialogue Theory:**
 - Reading in by Courts is a method of Dialogue – but Legislature has last word as they can enact law without Judicial change

Facts:

- Employee discrimination laws didn't include gays/lesbians

Decision (Iacobucci)

- Read in 'Sexual Orientation' into legislation

Reasons:

- Read-in was precise
- Insignificant budgetary impact
- Added group is small. Much smaller than existing beneficiary group
- Reading-in follows PFJ – follows ideas of democracy

Dissent:

- Do not Read-in when courts specifically chose NOT to include that addition

What would have followed a suspended declaration of invalidity? Should that be a concern for a court?

- If Courts declared the law invalid, but Legislature wanted to keep the law as-is, then the suspensory period would end, and Legislature would not have made the change
- Question would go back to the Courts, who would need to strike down the entire law: Legal Vacuum.
 - In both cases, the Courts wouldn't budge, and would likely win the dialogue
- Legislature is always free to amend (or not amend) the legislation
 - BUT: Their amendments must conform to Charter/Constitution
- Yes:
 - If Legislature's stance violates Charter, then Court is in the right and should not back down
 - End result is the same – however, reading in takes MUCH less time, and nobody is ever denied any benefits

Sharpe

KEY:

- **Remedy: Reading-in exceptions to 'child pornography'**
 - **Court** chose those exceptions, but the language the Court used may have been different as the language used by Parliament
 - **BUT:** Parliament is free to amend the legislation.

REMEDIES
SECTION 24 (1) & (2):

24(2): Evidence can be excluded if its admission would 'bring administration of justice into disrepute'

24(1): Anyone whose rights were infringed can obtain remedies that the Court considers just/appropriate.

Doucet:

- Gives Courts ability to order remedial action that is just in circumstances.
- Available when there's government action that goes beyond simply enacting an unconstitutional statute
 - Applies NOT ONLY when there's an unconstitutional law
 - Applies when source of Charter breach is not in legislation

- Ie: legislation isn't attacked.
- Government action is taken which infringed a Charter right.

Doucet-Boudreau v. Nova Scotia (Minister of Education)

KEY:

- Remedies should be flexible
 - Can go beyond traditional remedies
 - Can change according to needs/circumstance of violation
- Courts created deadlines that Government had to follow to avoid as remedy to Charter Violation
 - Government had to act in Good Faith
 - Impose Good Faith Standard on Government in non-Aboriginal situation

Facts:

- Nova Scotia has a large number of Francophones and Acadians
- French-language education in Nova Scotia has been severely lacking in the past
- The *Charter* created s. 23 which gave people the right to have access to French-language secondary schooling where numbers warranted it
 - Numbers must be warranted
 - Numbers must speak French – but only available schools were in English
- If violated then remedies are sought according to s. 24(1) of the *Charter*
- Francophones sued
 - School's weren't being built fast enough (or at all):
 - Serious delays
- Trial Court: Section 23 violation
 - Remedy: Build French schools. Give status reports to Courts
 - **Use 'best efforts' to do so**
 - Gave deadlines for when schools had to be built, and deadlines for when they had to report to Court
- Appeal: Overturned
 - Against *functus officio*:
 - Court made ruling but had no authority to carry it out
 - **Individual Judge tried to retain his jurisdiction**

Decision (Iacobucci/Arbour):

- **Good Remedy!**
 - Section 24.1 creates **full, effective and meaningful remedies**

Majority - Reasons:

- Statute reports limited Delays
 - Delays were the core of the violation
- Courts stayed within their powers
 - Asking for status reports didn't go against traditional ruling
 - After applying for AMP, accused goes back to Court as a status report, to see if they finished their service
- Remedy was fair to Province
 - NOT unfair to ask for status reports
- **Government had to use 'best efforts' to do so**

- Gave deadlines for when schools had to be built, and deadlines for when they had to report to Court
- Individual Trial Judge tried to retain his jurisdiction
- **Section 24 clearly gives very wide discretion**

Dissent: (Major) Breaches Separation of Powers and Procedural Fairness

- **Lack of Clarity:**
 - Trial Court's remedy didn't tell Government what they needed to do
 - Court orders need to tell parties exactly what's expected of them
- **Don't get involved in public policy management**
 - Keep the separation of Legislature/Government and Judiciary clear and strong
- **Don't directly oversee administration of Orders**
 - Assume that they are followed in Good Faith
 - Judges should'nt give into temptation and enter sphere of public policy management just to know that their Orders were followed
- **Ability to make subsequent orders is Dangerous**
 - Court's should'nt dictate how to implement public policy.
 - Leave that to Government (separation + Government is better able)
- **Too Political**
 - Courts were using their power to pressure Government the same way Political actors pressure Majority
 - Outside scope of Courts

ABORIGINAL RIGHTS

Constitutional Provisions

1763: Royal Proclamation

- Creates special relationship between Crown and First Nations
 - Crown puts itself in the middle between Settlers and Indians
- Requires Treaties to obtain land from First Nations

Charter – Section 25

- The Charter cannot be interpreted to take away any rights or freedoms given to Indians because of Aboriginal/Treaty Rights
 - Charter doesn't apply to rights recognized in 1763
 - Charter doesn't apply to **new** rights acquired by Indians
- Only applies to laws that actually impair Native rights (*Kapp*)
 - Does **not include** laws with incidental effects on Natives
- 3 Steps: (*Kapp*)
 - 1) Ensure we have a valid, substantive Charter right
 - 2) Determine that Native right falls under s.5
 - 3) Decide if we have a true conflict between Charter right and Native right
- Section 25 and 35 go together
 - Partners to **promote reconciliation and negotiation in Treaty process**
 - Prevents the Charter from

Section 91(24) of Constitution 1867:

- Parliament has power to make laws regarding Indians and Native Lands
- Crown holds Reserve land in trust for benefit in Natives
- Provincial laws (general application) **do apply** to Natives (and on reserve lands)

- Ie: Traffic laws on reserves
- BUT: Provincial laws ARE NOT APPLICABLE IF they go to matters important to Indian status, cultural identity, or Aboriginal/Treaty rights

Section 35 of Constitution 1982:

- **Existing** Aboriginal & Treaty rights are **recognized** and **affirmed** (before 1982)
- Indians include:
 - Indian, Inuit, and Metis
- Protects historically important practices that persist to the present day
- 35.1: Guarantee for Constitutional Conference before amendments to s.91(24) or s.25 can be made

Who are Metis for s.35: (Powley)

- Not just people with mixed Native-European heritage,
- Requires:
 - Self-Identification, Ancestral connection, community acceptance
 - Without formal ID, case-by-case basis
- Difficulty in determining which Metis communities get protection doesn't remove protection
- **DO NOT ONLY LOOK AT PRE-CONTACT PRACTICES:**
 - Must take into account the changes in community due to assimilation with European culture

R. v. Sparrow

KEY:

- Crown has Fiduciary Duty to Aboriginal groups
- Honour of the Crown is at stake during negotiations
- **Existing** Aboriginal Rights
 - Flexible – not just what their rights were in 1700s
- **How to extinguish**
 - Consent of Natives; OR
 - Constitutional Amendment
- S.35 creates solemn commitment by Crown to negotiate, act in Good Faith, with Honour and protects from Provincial legislation

Facts:

- Members of Musqueam band charged with violating fishing laws
- Net was too large
- **Does a prohibition against net size violate Aboriginal right to fish?**

What are Existing Aboriginal Rights:

- Any rights not extinguished before 1982.
 - Extinguished rights are NOT revived by s. 35(1)
- **Flexible:** NOT Frozen in Time
 - Are allowed to have changed to include their contemporary form

How Aboriginal Rights are Extinguished:

- Before 1982: Legislation with Clear and plain intent to extinguish rights
 - **No consent by Aboriginal groups needed**
 - Cannot be inferred from mere regulations re: those rights

- After 1982: Consent of holders of Aboriginal Right OR Constitutional Amendment
 - **NEED CONSENT**
 - Cannot simply make laws that extinguish rights like before 1982.

What is 'recognizing and affirming' Aboriginal Rights?

- Solemn commitment by Crown
- Constitutional basis for:
 - Negotiations
 - Protection against provincial Legislation
 - Fiduciary relationship between Crown and Natives to act with Honour

Aboriginal rights are NOT absolute

- Allows for limitations IF consistent with Crown's fiduciary duty
- Crown must justify any limitations on Aboriginal rights

How to Limit Aboriginal Rights:

- 1) Has existing right been infringed?
 - Onus on Native group to establish the right, show it has been limited
 - How much interference, how did they pursue that right
- 2) Is the Limit Justified?
 - Onus on Crown
 - Honour of Crown at stake, Fiduciary Duty
 - A) Valid Objective?
 - Public interest is too broad
 - Conservation (Environmental) is ok
 - B) Consistent with **Fiduciary Relationship & Honour of the Crown**
 - Gives Priority to Aboriginal Rights
 - Has there been consultation/negotiation?
 - Not determinative, but important
 - Proper Compensation given?

Crown is held to higher standard of honourable dealing (*Guerin*)

Honor of Crown is at stake during any negotiations with aboriginal peoples (*Sparrow*)

Sui generis fiduciary duty (*Guerin*)

Fiduciary Duty on Crown when dealing with Aboriginal groups

- Basis for Constitutional Protection of Aboriginal/Treaty Rights
- BUT: Not everything is a Fiduciary Duty
 - Ie: Moving expenses

Haida: Duty to Consult

- Similar foundation to Fiduciary Duty and Honour of Crown

TREATY RIGHTS

Section 35(1):

Badger –Extinguishing and Infringement of Treaty Rights

- Justification rule from *Sparrow* applies to limits on Treaty Rights
- **Should treaty rights be MORE immune to limitations than Aboriginal rights?**
 - YES: If they assert a treaty right, it is specific, concrete and nothing may be in the treaty granting Crown authority to then regulate the rights being agreed to when treaty was created
- Don't need to be proven like Aboriginal Rights do
 - No need for historical evidence (ie: activities, practices of certain people, continuity)
- Rights are Contractual
- New Treaty rights can be created post-1982 using modern treaties/land claim agreements

Badger (Cory)

- **Treaty** is an exchange of promises between Crown and Indian group, entered into with **solemnity**
- Honor of Crown is implicated in the Treaty
 - No 'Sharp Dealing' by Crown is allowed
- Ambiguities should be **resolved in favor of Aboriginal group**.
- Limitations of rights should be narrowly construed

Delgamuukw (SCC, 1998)

KEY:

- Aboriginal title is sub-category of Aboriginal rights
- *Sui generis* form of property ownership
 - Not common law concept of land – a new concept
 - Proprietary interest
- **Group must show exclusive occupation of the territory prior to British Sovereignty**
- Oral History is acceptable evidence for Title

Facts:

- Claim to Aboriginal title went to trial for land in Northern BC by Gitks'an people
- Awaiting a re-trial
- Group is looking for TITLE to land, not just Rights to engage in certain activities

What is Aboriginal Title?

- Proprietary ownership right, not just right to engage in certain activities
- Inalienable, except to Federal Crown
- Communal, not held by individuals
- Limited by **irreconcilable use**
 - Aboriginal holders cannot use land for inconsistent purposes from their cultural connection to the land

Lamer:

- Crown has moral/legal duty to negotiate and resolve claims
- Need for negotiations with give and take on both sides to obtain the basic purpose of s.35(1)

What is purpose of s.35(1):

- **Reconciliation**
 - Reconcile pre-sovereignty Aboriginal society with current Canadian Society
 - **Reconcile history and sovereignty**

- Don't give power to one over the other
 - We're all here to stay
- Don't rely on Courts – but rely on negotiations instead to get a better result

HAIDA NATION v. BC

FACTS:

- Haida nation has a claim to aboriginal title to certain lands named as the Haida Gawaii, by the Haida people, which have not yet been resolved.
- In the mean time the Province of British Columbia has issued a Tree Farm Licence that permits a private company to harvest trees in the designated area for which their claim is pending to be formally recognized by the Courts.
- Allowing the trees to be cut down removed cedar, which was used by Aboriginals
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Issue:

- Does Crown have DUTY TO consult and accommodate Aboriginals before Aboriginals can prove title or rights have been fully determined
- Does this Duty extend to 3rd parties

Decision: (McLachlin)

- **BC has legal duty to consult with Aboriginal groups**
 - Province AND Federal Crown
- Good faith consultations may lead to obligation to accommodate Aboriginal group
- 3rd Parties DO NOT owe a duty to consult or accommodate

Reasons

- Honor of Crown
 - Basis behind duty to Consult with Aboriginal group
 - Requires good faith negotiations
- Fiduciary duty does exist, but not in this case
- Crown must respect potential, but unproven interests
- Duty comes up when Crown has real/constructive knowledge of potential existence of Aboriginal Rights/Title
- Credible but unproven claim is enough to trigger duty
- No Duty to Agree
 - Strength of duty depends on strength of claim (proven/unproven)
- Accommodation
 - Amending Crown Policy
- Reconciliation means:
 - Compromise by both sides

Secession Reference vs. Aboriginal Rights

Prof's favorite case

- 1) Both cases (in terms of s.35) raise the issue of Sovereignty in a fundamental way

- Where does power lie in the system? Who has power?
 - Where does legitimate sovereignty lie?
 - British Sovereignty? 1867?
 - Sovereignty claim that pre-exists or exists OUTSIDE 1867 sovereignty
 - Is this a legitimate authority?
- 2) Text of Constitution is silent regarding the answer of sovereignty (Quebec or Indians)?
- However, presence of s.35 OUTSIDE of Charter may be interpreted as giving Natives a right to self-governance
 - Right to self-governance is not written in Constitution, and likely goes against very core of Canadian values (of having one united country)
- 3) Challenge to legitimacy of Constitution itself

So what did Courts do about it

- 1) Court interpreted Constitution anyway. They gave a framework to resolve these issues
- Court gave an answer

Sparrow:

- Court gives an answer based on the text but provided several steps and answers to the Question
- 2) Neither side gets everything that they want
- BUT: Aboriginals have the leg up in negotiations with Crown due to Honour of Crown being at stake, possible Fiduciary Duty and duty to accommodate in reconciliatory fashion
 - This does not really exist for Francophones looking to Secede from Canada
 - A Similar duty does exist to Francophones from *Chaoulli*