### ABORIGINAL RIGHTS

#### I. ABORIGINAL PEOPLES AND THE CONSTITUTION – INTRODUCTION

#### II. COMMON LAW FOUNDATIONS OF CONSTITUTIONAL RECOGNITION

- Guerin v The Queen [1984] SCC [Inalienability + Fiduciary Obligations] .............................................................................. 4

#### III. THE CONSTITUTIONAL ENTRENCHMENT OF ABORIGINAL RIGHTS

- R v Sparrow [1990] SCC [Justification of Infringement of an Aboriginal right test] .............................................................. 5
- R v Sappier; R v Gray [2006] 2 SCR 686, 274 DLR (4th) 75

#### IV. THE CONSTITUTIONAL RECOGNITION OF ABORIGINAL TITLE

- Tsihqot’in Nation v British Columbia 2014 SCC 44.

#### V. TREATY RIGHTS

- Grassy Narrows First Nation v Ontario (Natural Resources) SCC 2014 [Numbered Treaties] ........................................ 14

#### VI. THE DUTY TO CONSULT

- Haida Nation v British Columbia (SCC) 2004 ........................................... 15
- Taku River Tlingit First Nation v British Columbia 2004 SCC ............................................................................ 16

#### VII. Metis Rights

- R v Powley [2003] SCC ........................................................................ 17

### CANADIAN CHARTER OF RIGHTS AND FREEDOMS

#### I. CONSTITUTIONAL RIGHTS BEFORE THE CHARTER [Common Law Constitution]


#### II. CHARTER HISTORY

- The Canadian Bill of Rights, RSC 1985, Appendix III (p. 712) ......................................................................................... 23

#### III. JUDICIAL REVIEW

- Fried v Alberta [1998] 1 SCR 493 ......................................................................................................................................... 29

#### IV. CHARTER FRAMEWORK AND APPLICATION

- Amending the Constitution ........................................................................................................................................ 29
- The Canadian Process of Constitutional Amendment ..................................................................................................... 29
- Evaluating the Amending Formula .................................................................................................................................. 30
Section 2(b) – Freedom of Expression

Introduction: Purposes of the Guarantee

- R v Keegstra 1990 SCC
- The Scope and Limits of Freedom of Expression
- Irwin Toy Ltd. v Quebec (AG) 1989 SCC [Gives us a Broad Definition of Freedom of Expression]

Commercial Expression

- RJR MacDonald Inc. v Canada (Attorney General) SCC 1995
- R v Keegstra 1990 SCC
- Saskatchewan (Human Rights Commission) v Whatcott (2013) SCC

Section 7 – Life, Liberty, and Security of the Person

Introduction

- Reference re Section 94(2) of the Motor Vehicle Act (BC) [1985] SCC [defining principles of fundamental justice]

Section 7 and Bodily Integrity

- R v Morgentaler [1988] SCC [Security of the Person]
- Chaoulli v Quebec (Attorney General) 2005 SCC
- Canada (Attorney General) v Bedford 2013 SCC 72 (Security of the Person)
- Carter v Canada (Attorney General) 2015 SCC

Section 15 – Equality Rights

Constitutional History of Equality

- WS Tarnopolsky, “The Equality Rights”

Early Interpretation + Application of Section 15


The Kapp Test

- R v Kapp [2008] SCC
- Withler v Canada (AG) SCC 2011

Equality’s Three Steps

1. Differential Treatment
- Eldridge v British Columbia (Attorney General) [1997] SCC

2. Enumerated and Analogous Grounds
- Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] SCC

3. Disadvantage/Discrimination
- M v H [1999] SCC
- Gosselin v Quebec (AG) 2002 SCC
- Canadian Foundation for Children, Youth and the Law v Canada (AG) 2004 SCC
ABORIGINAL RIGHTS

Pre-Contact, Contact, and the Myth of Terra Nullius

- **Terra nullius**: why does the Crown have sovereignty over the land in the first place – An underlying assumption – Aboriginal societies were lawless societies
- ‘Doctrines of discovery’ – sovereignty could be acquired over unoccupied territory by discovery (conquest or cession) – NA was terra nullius
  - Aboriginal nation did not constitute a ‘legal unit in international law’ Not Christian/civilized enough
- Legal pluralism: This never was empty land – people were here before
- *Sui generis* nature of Aboriginal rights: ‘Unto itself’ – Aboriginal rights are independent + unique feature of Canadian law – common law, constitution law, and Indigenous law – in this mixing of these perspectives we find true Aboriginal rights
- Reconciling prior occupation with Crown sovereignty
- Terra Nullius has had a lasting impact on Western judicial + political thought

I. ABORIGINAL PEOPLES AND THE CONSTITUTION – INTRODUCTION

- The text of s. 35(2) makes only 3 distinctions among Aboriginal people: Indian, Inuit, Metis
- The term ‘Indian’ has legal relevance (‘Indian Act’) – entitles its holders to a specific set of rights and obligations set out in treaties, legislation, and other government policies and programs. If not registered by government under federal procedure – called non-status. There is no federal Inuit registry therefore the status/non-status distinction does not exist
- For most of the country’s history numerous federal administrations treated the groups as if they had no rights
- 35(1) – recognize + affirm (does not say it ‘guarantees’ them) – they are not entrenched therefore they can be infringed if it is justified
- S. 25 of the Charter [No argument to say other people have treaty rights + you do not]
- Understood that these provisions were extremely broad – Courts are the ones that define what the scope and meaning of the terms are (could not be defined previously)
  - Created law from basic + broad framework – lots of discretion by the courts

II. COMMON LAW FOUNDATIONS OF CONSTITUTIONAL RECOGNITION

- Most constitutional issues involving Aboriginal peoples occurred against the backdrop of Aboriginal rights with respect to land – before 1982 a common law entitlement that vested in Aboriginal peoples by view of the Royal Proclamation of 1763
- Declared that lands possessed by Indians were reserved for their exclusive use unless previously ceded to the Crown
- Could not be purchased, settled, or taken by British subjects without Crown’s consent
- Until *Calder v Attorney General of BC* – this was viewed as the sole Anglo-Canadian legal source of Aboriginal rights
- *Indian Act 1985* – regulates treaties for the use and enjoyment of Aboriginal people


- Whether the Cree marriage was valid? Argument that it was not – the English common law was in force in 1803 and the union between Suzanne and William did not meet its requirement → ‘the marriage customs of so-called uncivilized and pagan nations could not be recognized by the court as validating a marriage even between 2 Aboriginal people, much less between a non-Aboriginal and an Aboriginal’
- Quebec Superior Court + CA both held that the marriage was valid and son was entitled to his rightful share of the estate
- Held that the Indian political and territorial rights, laws, and usages remained in full force in the northwest at the relevant time
- The doctrine of Aboriginal rights is not a modern innovation invented by courts to remedy injustices perpetuated in the past – it was reflected in the numerous treaties of peace + friendship concluded in the 17th and 18th century between Aboriginal peoples and the French and British Crowns. Aboriginal rights are also apparent in the Royal Proclamation of 1763
- **Was only in 1973 with the decision of Calder that Canadian law recognized Aboriginal title as common law entitlement separate and distinct from the Royal Proclamation of 1763**
  - Agreed that Aboriginal title existed in Canada – at least where legislation had not extinguished it
  - ‘Aboriginal title does not depend on treaty, executive order, or legislative enactment’

*Guerin v The Queen [1984] SCC* [Inalienability + Fiduciary Obligations]

Facts:

- The Crown allegedly sold 160+ acres of land in the Vancouver area in a manner that was inconsistent with the T/C of sale that was provided and voted on by the band
- Furthermore, some of the T/C were completely omitted and only revealed after the fact

Issues:
• Whether the appellants are entitled to recover damages from the Federal Crown for leasing to a golf club land on the Musqueam Indian Reserve?

Decision:
• Yes, appeal allowed – set aside judgment in the Court of Appeal and reinstate the trial judge’s award

Ratio:
• The nature of Indian title comprises two key aspects: (1) a general inalienability of land except to the Crown, and (2) the Crown’s fiduciary obligation to deal with Indians’ land in their best interests

Analysis: (Dickson J)
• Through the Indian Act – the Crown asserted sovereignty and title on what was once Aboriginal land and say they will control reserve lands and deal with them on Indian’s behalf -- Due to the Crown’s power must exercise it according to the principles of a fiduciary

Fiduciary Relationship
• There is a fiduciary duty between the Crown and the Indians [Honor of the Crown] and if it is breached then liable to the Indians in the same way as if such a trust were in effect.
• Depends on the proposition that the Indian interest in the land is inalienable except on surrender to the Crown

Inalienability
• The surrender provisions in the Indian Act prohibit directly transferring its interest to a third party; no sale/lease can be carried until after a surrender with Crown – the source of a distinct fiduciary obligation
• Nature of Indians’ interest it best characterized by its general inalienability coupled with the fact that the Crown in under an obligation to deal with the land on the Indians’ behalf when the interest is surrendered

Existence of Indian Title
• Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763 none the less predates it – it emerged when the Crown claimed sovereignty of the land (but Aboriginal’s retained title)

The Nature of Indian Title
• In Privy Council – held that Indians had a ‘personal or usufructuary right’
  o Concept of usufructuary right – a mere qualification of or burden on the radical or final title of the Sovereign
• S. 109 of Constitution Act 1867 – The Indian’s interest was an ‘interest other than that of the Province’

III. THE CONSTITUTIONAL ENTRENCHMENT OF ABORIGINAL RIGHTS
• S. 35(1) – The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed

R v Sparrow [1990] SCC [Justification of Infringement of an Aboriginal right test]

Facts:
• [Court is for the first time exploring the scope of s. 35(1) of the Constitution Act 1982]
• Sparrow (appellant) was charged under s. 61(1) of the Fisheries Act of the offence of fishing with a drift net longer than allowed by the terms of the Band’s Indian food fishing license
• The appellant admitted his net was too long, however defended the charge on the basis that he was exercising an existing Aboriginal right to fish and the net length restriction is inconsistent with s. 35(1) and therefore invalid

Issues:
• 1) Whether Parliament’s power to regulate fishing is now limited by s. 35(1) of the Constitution Act
• 2) Whether the net restriction length restriction in the license is inconsistent with s. 35(1)

Decision:
• Affirm CA’s setting aside of the conviction – dismiss the appeal and cross-appeal + a new trial ordered

Ratio:
• Test for justifying an interference of an aboriginal right:
  1) Whether the legislation in question has the effect of interfering with an existing aboriginal right – if so, it represents a \textit{prima facie} infringement of s. 35(1)
    a. Is the limitation unreasonable/unnecessary?
    b. Does the regulation impose undue hardship?
    c. Does the regulation deny to the holders of the right their preferred means of exercising that right?

\textit{[The onus of proving an infringement lies on the individual or group challenging the legislation]}

2) Is the interference justified? [onus is on govt’t to prove it is a valid legislative object]
   a. Is there a valid legislative objective? What was the objective of the department setting out the legislation?
   [Can be valid if necessary for the proper management and conservation of the resource]
   b. The fiduciary duty must be considered when determining whether the legislation can be justified
   c. Priority allocation
d. Others depending on the circumstances [contextual analysis – not a checklist] → whether there has been as little infringement as possible; whether compensation is available [expropriation]; whether the group has been consulted with about the measures being implemented

[A generous and liberal interpretation should be given in favor of aboriginal people]

Analysis: (Dickson CJC and La Forest J)

“Existing”
- ‘Existing’ makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect – therefore, extinguished rights are not revived by the Act
- After 1982, rights become constitutionalized

“Frozen Rights”
- Also, an existing right cannot be read to incorporate the specific manner in which it was regulated before 1982 → existing = unextinguished; not ‘exercisable at some point in history’
- Existing aboriginal rights must be interpreted flexibly to allow their evolution over time

“Extinguishment”
- For the test of extinguishment to be adopted the Sovereign intention must be clear and plain to extinguish an Aboriginal right AND there is nothing in the Fisheries Act or its regulations that demonstrates a clear + plain intention to extinguish Indian aboriginal rights to fish
- Regulation is not extinguishing rights → cannot define a right by incorporating the ways in which it has been regulated in the past
- Government regulations cannot be determinative of the content + scope of an existing Aboriginal right, however can regulate the exercise of that right within s. 35(1)
- AFTER 1982 – can extinguish rights with Modern Treaties

“Recognized and Affirmed”
- Section 35(1) provides a solid constitutional base upon which subsequent negotiations can take place – it also affords constitutional protection against provincial legislative power.
- Recognized and affirmed means something less than absolute or guaranteed therefore, rights are subject to a justificatory process
- The nature of section 35(1) suggests it should be construed in a purposive way – when the purposes of the affirmation of aboriginal rights are considered it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded
- The government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples – the relationship between the government + Aboriginals is trust-like rather than adversarial and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship
- S. 35(1) is not subject to s. 1 of the Charter, however it does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52. Legislation affecting exercising aboriginal rights can still be valid as long as it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

R v Van der Peet [1996] SCC [What is an Aboriginal Right? → Integral to a distinctive culture test]

Facts:
- Appellant charged under s. 61(1) of the Fisheries Act with the offence of selling fish caught under the authority of an Indian food fish license contrary to s. 27(5) of the British Columbia Fishery (General) Regulations [no person shall sell, barter, or offer to sell or barter any fish caught under the authority of an Indian food fish license]
- The charges arose from the sale of 10 salmon by the appellant – she defended this based on an existing aboriginal right to sell fish + that the restrictions imposed by s. 27(5) infringe her right to sell fish + are therefore invalid on the basis that they violate s. 35(1)

Issue:
- Was there an existing aboriginal right to sell fish making s. 27(5) invalid?

Decision:
- No - the appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Stolo culture that existed prior to contact – appeal dismissed

Analysis: (Lamer CJC)
- Dual nature of aboriginal rights – aboriginal rights but are rights held by aboriginal people because they are aboriginal
- Fiduciary duty → When there are doubts/ambiguities between the Crown and aboriginals these must be resolved in favor of aboriginal peoples AND because of the duty the constitutional provisions protecting aboriginal interests must be given a generous and liberal interpretation

The Test for Identifying Aboriginal Rights in Section 35(1)
• The test must be directed at identifying the crucial elements of those pre-existing distinctive societies – it must aim at identifying the practices, traditions, and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans
• The purposes underlying section 35(1) the test must be used to identify whether an applicant has established an aboriginal right protected by s. 35
• **Test \( \rightarrow \) in order to be an aboriginal right an activity must be an element of a practice, custom, or traditional integral to the distinctive culture of the aboriginal group claiming the right**

### Integral to a Distinctive Culture test

1. **Identify/characterize the right being claimed**
   - Right to use the resource – (salmon); sell, exchange, eat, etc. (broad construal)
     - Would lead to ‘yes’
   - Here it was characterized as the ‘right to sell the salmon’ (narrow construction)
     - Court – has to think about it from the legislation \( \rightarrow \) not interfering with her uses of salmon; the legislation is saying she **cannot sell the salmon**
     - Must be particular about what the resource is, where it is (rights do not travel)

2. **Is the practice, custom, or tradition a defining or central feature of the culture in question?** (distinctive but not necessarily distinct)
   - Has to make the culture what it was – emblematic to the culture (eating is not going to fit the bill)
   - Historical uses; ask them

### Analysis of the Test

1. **Courts must take into account the perspective of Aboriginal peoples themselves**
   a. The definition of an aboriginal right must [if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory] take into account the aboriginal perspective in terms that are cognizable [perceptible] to the non-aboriginal legal system
   b. True reconciliation will place equal weight on the aboriginal perspective and that of the common law

2. **Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an Aboriginal right**
   a. A court must first identify the nature of the right being claimed in order to determine whether a claim meets the test of being integral to a distinctive culture of the aboriginal group
   b. The significance of the practice, custom, or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom, or tradition is integral to the distinctive culture – but the significance cannot itself constitute an aboriginal right
   c. Factors to consider **\( \rightarrow \)** the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom, or tradition being relied upon to establish the right

3. **In order to be integral a practice, custom, or tradition must be of central significance to the Aboriginal Society in question**
   a. More than just that a practice, custom, or tradition was an aspect of the aboriginal society of which he or she is a part – must demonstrate that it was a significant and central part of the society’s distinctive culture **\( \rightarrow \)** that it truly made the society what is was
   b. Cannot look at aspects that are true of every human society or those that are only incidental or accessional to that society

4. **The practices, customs, and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs, and traditions that existed prior to contact**
   a. The courts must look to the pre-contact period to identify aboriginal rights – the relevant time period is the period prior to the arrival of Europeans [not the period prior to the assertion of sovereignty by the Crown]
   b. The evidence may relate to customs, practices, traditions post-contact – it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact
   c. Where an aboriginal community can demonstrate that a particular practice, custom, or tradition is integral to its distinctive culture today and that this practice, custom, or tradition has continuity with the practices, customs, or traditions of pre-contact times, that community will have demonstrated the it is an aboriginal right for the purposes of s. 35(1)
   d. Continuity helps ‘frozen rights’ approach to be avoided **\( \rightarrow \)** allows for evolution
   e. An interruption of a P, C, T will not preclude the establishment of an aboriginal right – flexibility

5. **Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims**
   a. Understand the evidentiary difficulties in proving a right which originates in times where there were no written records of the P, T, C engaged in

6. **Claims to Aboriginal rights must be adjudicated on a specific rather than general basis**
a. Depends on the particular aboriginal community claiming the right – nation specific
b. The scope of aboriginal rights must be determined on a case-by-case basis

7) For a practice, custom, or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists
   a. It cannot exist simply as an incident to another P, T, C but it itself must be of integral significance to the aboriginal society
   b. Only integral not incidental will qualify as an aboriginal right

8) The integral to a distinctive culture test requires that a practice, custom, or tradition be distinctive; does not require it be distinct
   a. Distinct = one that is unique – different in kind or quality
   b. Distinctive = a claim that is not relative, the claim is one about the culture’s own P, C, T considered apart from the practices, customs, or traditions of any other culture – this makes the culture what it is, not that it is different from those of another culture

9) The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom, or tradition is only integral because of that influence
   a. European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right
   b. If the P, C, T arose solely as a response to European influences, then it will not meet the standard

10) Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples
    a. Aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land
    b. Rights arise from the prior occupation of land but also from prior social organization and distinctive cultures of aboriginal peoples on that land
    c. Must look at both the relationship of an aboriginal claimant to the land and at the practices, customs, and traditions arising from the claimant’s distinctive culture and society

Application
   • Nature of the claim → Here, she is claiming an aboriginal right to exchange fish for money or for other goods – she is claiming that the P, C, T of the Stolo include as an integral part the exchange of fish for money or other goods – sold 10 salmon = exchange of fish for money and not commercial or market based sale
   • Prior to contact exchanges of fish were only incidental to fishing for good purposes; there was no regularized trading system prior to contact; the trade engaged in between Stolo and Hudson’s Bay was different from that typical of Stolo culture prior to contact; the exploitation of the fishery was not specialized and that suggested the exchange was not central to the culture

Notes: [Dissent]
   • L’Heureux-Dube and McLachlin issued dissenting judgments
   • L – critiqued the majority’s approach to characterizing the nature and extent of Aboriginal rights under s. 35(1) – advocating describing Aboriginal rights at a fairly high level of abstraction rather than focusing on the particular P, C, T → said they misconstrued Sparrow’s use of ‘distinctive culture’. Also adopted a ‘dynamic-right’ approach in preference to a ‘frozen right’ approach. To qualify as an Aboriginal right an aboriginal activity must have formed an integral part of the distinctive aboriginal culture for a substantial, continuous period of time
   • M – emphasized the distinction between an Aboriginal right [to be broadly conceived and constant over time] and the exercise of that right [may vary and take modern forms]. Identified the issue of whether the sale could be defended as the exercise of a basis aboriginal right to continue the historic use of the resource. Rejected ‘integral part’ ‘dynamic rights’ and ‘integral-incidental’ tests favoring an empirical, historical approach to defining Aboriginal rights

R v Sappier; R v Gray [2006] 2 SCR 686, 274 DLR (4th) 75
Facts:
   • Said they had an aboriginal right to harvest the timber
Issue:
   • Whether the Maliseet and Mi’kmaq peoples in New Brunswick possessed an Aboriginal right to harvest timber on Crown lands for personal use
Decision:
   • Yes
Analysis: (Bastarache J)
• An aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right – instead attention must be paid to the significance of the resource to the community in question
• Must understand how a resource was harvested, extracted, and utilized
• The relevant practice [for purposes of the Van der Peet test] is harvesting wood – however, they are not claiming a right to harvest wood for all purposes – here, they claim a right to harvest timber for personal uses [also too general]
• The way of life for Maliseet and Mi'kmaq during the pre-contact period is that of migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation – therefore, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life
• Here, the wood was used to fulfill the community’s domestic needs for things such as shelter, transportation, tools, and fuel – would characterize the claim as a right to harvest wood for domestic uses as a member of the aboriginal community
• ‘Distinctive culture’ → the focus of the court should be on the nature of aboriginal peoples prior occupation –
  o what is meant by ‘culture’ is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and potentially their trading habits
  o ‘distinctive’ is meant to incorporate an element of aboriginal specificity – however it does not mean distinct and the notion of aboriginality must not be reduced to racialized stereotypes of Aboriginal people
• Must first inquire into the way of life of the group pre-contact [seek to understand how the particular pre-contact practice relied upon relates to that way of life]
• Here, harvesting wood for domestic uses [shelter, transportation, fuel, tools] directly relates to the pre-contact way of life of the Maliseet and Mi'kmaq cultures [using rivers/lakes for transportation and living from hunting and fishing]
• Does not need to go to the core of the culture – the fact that harvesting wood for domestic uses was undertaken for survival purposes was enough to meet the integral to a distinctive culture threshold

ABORIGINAL TITLE

IV. THE CONSTITUTIONAL RECOGNITION OF ABORIGINAL TITLE
- In R v Adams [1996] 3 SCR 101 it was held that Aboriginal title was a specific subset of aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act – in doing so, the Court elevated aboriginal title from its common law status to a level of constitutional guarantee
- R v Adams → while claims to an aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out
- Even if do not show that occupation/use of land was sufficient to support claim for title, can demonstrate have a right by showing that a P, C, T taking place on the land was integral to the distinctive culture to that group
- Justification → some aboriginal peoples were nomadic, varying location of their settlements – this does not change that they relied on the land prior to contact w/ Europeans and that these P, C, T were integral to their distinctive cultures
- Even if there is a right where there is no title – this can still be site specific where the right can only be exercised on that tract of land
- BC, Maritimes, and parts of Quebec have no extinguished title. The rest were extinguished with treaty rights.

St Catherine’s Milling and Lumber v The Queen 1888 PC
- Whether Aboriginal people had title. PC gave a right in land, not full sovereignty/title, but a personal and usufructuary right (a right to use land) and this was dependent on the good will of the sovereign.

Calder v AG BC 1973 SCC
- SCC said something did exist called Indian Title but it was not recognized here.

Delgamuukw v British Columbia SCC 1997
- Sets out test for Aboriginal title. It is a right in land, a right to use land, but not an open-ended right. It is a unique right.

Tsilhqot’in Nation v British Columbia 2014 SCC 44
Facts:
• In 1998 T filed an Aboriginal title claim in the court – the trial judgment was according in their favor [broad declaration of title]; this decision was appealed by the BC Court of Appeal [applied a more-narrow test]
• Court of appeal – only specific, intensively occupied areas can support Aboriginal title

Issue:
• Do the T have title to the lands at issue? Did BC breach its duty? How should the courts determine whether a semi-nomadic indigenous group has title to lands?
Decision:
- Appeal allowed and declaration of Aboriginal title granted over the area – further that BC breached its duty to consult owed to T through its land use planning and forestry authorizations.

Analysis: (McLachlin CJ)
- The test for aboriginal title was set out in *Delgamuukw* (1997) and is based on ‘occupation’ prior to assertion of European sovereignty.

**TEST FOR ABORIGINAL TITLE**

1) the land must have been occupied prior to sovereignty [sufficient pre-sovereignty occupation], 2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; 3) at sovereignty, that occupation must have been exclusive.

1) **Sufficiency of Occupation**
   a. Must take into account both the aboriginal perspective and the common law perspective.
   b. Aboriginal → focus on the laws, practices, customs, and traditions of the group – take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed.
   c. Common law → imports the idea of possession and control of the lands – possession extends beyond sites that are physically occupied to surrounding lands that are used and over which effective control is exercised.
   d. This is context-specific – need to look at Aboriginal perspectives and uses of the land.
   e. To sufficiently occupy land for purposes of title must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes – not as high of a standard of adverse possession but not merely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under exclusive stewardship of the claimant group [depends on manner of life/nature of land]. Occupation must reflect the way of life.
   f. In Marshall it was established that nomadic + semi-nomadic groups could establish title to land provided they establish sufficient physical possession [a question of fact].
   g. Regular use for hunting, fishing, or otherwise exploiting its resources could suffice.

2) **Continuity of Occupation**
   a. Where present occupation is relied on as proof of occupation pre-sovereignty, continuity arises.
   b. Does not require an unbroken chain between current P, C, T [Van der Peet] but in order for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times [a question for the trier of fact].

3) **Exclusivity of Occupation**
   a. The group must have had the ‘intention and capacity to retain exclusive control’ [*Delgammuukw*]
   b. Regular use w/o exclusivity may give rise to usufructuary aboriginal rights [right to the use + enjoyment of another’s land] – but for title the use must be exclusive.
   c. That others were on the land does not negate exclusivity of occupation.
   d. Whether there was intention + capacity depends on factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Can be proved by showing others were not allowed on land or only allowed w/ permission, or even lack of challenge of occupancy.
   e. Must also be approached from both an aboriginal and a common law perspective.

- Summary → the claimant group bears the onus of establishing Aboriginal title.

**Was original title established in this case?**
- The trial judge applied a test of regular + exclusive use of the land → this is consistent w/ the correct legal test [and whether evidence in a case supports aboriginal title is a question for the trial judge].
- The Court of Appeal did not establish the trial judge’s conclusion were unsupported by evidence or otherwise in error – his findings should not be disturbed.

**Legal Characterization of Aboriginal Title**
- Aboriginal title gives the right to exclusive use and occupation of the land for a variety of purposes, not confined to traditional or distinctive uses.
- The Crown does not retain a beneficial interest in Aboriginal title in land.
- Crown’s underlying title to lands → 1) a fiduciary duty owed by the Crown to Aboriginal people when dealing w/ Aboriginal lands and 2) the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35.
- The characteristics of aboriginal title flow from the special relationship between the Crown + the Aboriginal group = this relationship makes the title sui generis [unique].
- The notion of *terra nulliensi* was expressly rejected, as the land was clearly held by people who had Aboriginal title. The Aboriginal interest that burdens the Crown’s underlying title is an independent legal interest giving rise to a fiduciary duty.
Incidents of Aboriginal Title

- Similar rights as those associated with fee simple → the right to decide how land will be used, the right of enjoyment + occupancy of the land, the right to possess the land, the right to economic benefit of the land, and the right to pro-actively use and manage the land
- Restriction → it is collective title held for not only the present generation but for all succeeding generations therefore, it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations from using + enjoying it
- Only way for government to use land is to justify the proposed incursion under s. 35 of the Constitution Act

JUSTIFICATION OF INFRINGEMENT

- To justify overriding the Aboriginal title-holding group’s wishes the government must show 1) it discharged its procedural duty to consult and accommodate, 2) its action were backed by a compelling and substantial objective, 3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group [Sparrow]

1) The Duty to Consult
   a. When the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting the Aboriginal title – this duty must be discharged prior to carrying out the action that could adversely affect the right
   b. The level of consultation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right – level of consultation is greatest where title has been established; if title is unproven the Crown owes a procedural duty imposed by the honor of the Crown to consult

2) Substantial + Compelling Objective
   a. The broader public goal asserted by the government must further the goal of reconciliation having regard to both Aboriginal interest and the broader public objective
   b. Examples → development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior British Columbia, protection of the environment or endangered species, the building of infrastructure [Delgamuukw]

3) Consist with Fiduciary Obligation
   a. 1) The Crown’s fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, therefore incursions cannot be justified if they would substantially deprive future generations of the benefit of the land
   b. 2) The Crown’s fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown’s fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection), that the government go no further than necessary to achieve it (minimal impairment), and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact)

Remedies

- Injunction, damages, or an order that consultation or accommodation be carried out

Application

- Prior to the declaration of Aboriginal title, the province had a duty to consult + accommodate the claimed interest in the land – they had a strong claim to the land and the intrusion was significant therefore the duty to consult owed by the Crown fell at the high end of the spectrum + required significant consultation and accommodation
- Crown’s duty to consult was breached when the Crown officials engaged in planning process for the removal of timber

V. TREATY RIGHTS

- Section 35(1) of the Constitution Act protects two broad classes of rights: Aboriginal and Treaty rights
- Treaty making in Canada can be divided into 3 eras: pre-Confederation; post-Confederation; and modern treaties
- From 1764 until 1867 there were approximately 375 treaties between the British Crown and First Nations – from 1867 until 1932 there were approximately another 150 treaties between the Crown and indigenous peoples north of the 49th parallel
- Starting in 1973 with the James Bay and Northern Quebec Agreement there have been another 16 modern treaties between First Nations and Canada
- Each of these eras has its own social, economic, and political distinctiveness that must be considered in order to approach a satisfactory understanding of the treaties signed within these eras
- WHO GETS TREATY RIGHTS? – signatories to individual treaties and the descendants of that group

3 Categories of Treaties:

1) Maritime Treaties of Peace and Friendship (1764-1867)
   - War between British + Aboriginal people and in exchange for not killing each other treaties were made
- Aboriginal rights + title continued to exist in the Maritime’s in addition to the treaty rights that existed

2) Numbered Treaties (1867-1932)
- Swept across Ontario/Prairies/North
- Edmonton = Treaty 6
- These did extinguish Aboriginal rights + title in exchange for treaty rights

3) Modern Day Treaties (1973 –)
- Started with James Bay + Northern Quebec
- Also extinguish Aboriginal title + rights

- Prior to 1982 treaty rights were imagined in law in such a way that rendered them unenforceable or enforceable only against state inaction
- Judicial attitudes towards the legal status of treaties entered into by native peoples and the Crown historically has involved a shift from an approach that imagines native people as different [and inferior] to non-native people toward an approach that imagines native people as the same as non-native people and therefore not worthy of special consideration
- Traditionally, the court saw native people as uncivilized and as belonging to an inferior race and therefore agreements between native people and the Crown were not binding on the Crown in law
- Now – jurisprudence rejects the view they are inferior and now treaties are elevated from the level of non-binding political agreement to that of contractual right – this meant that these agreements were not treated as unique and prior to 1982, Parliament had the power to regulate or extinguish existing treaty rights
- There has been a judicial shift toward the embrace of native difference – recent jurisprudence is more sensitive to native expectations about treaty negotiation and therefore is more accommodating of native difference
- R v Badger [1996] SCC → Cory J identified several canons of treaty interpretation that inform contemporary jurisprudence on the subject:
  o 1) A treaty represents an exchange of solemn promises between the Crown and the various Indian nations – it is an agreement whose nature is sacred
  o 2) The honor of the Crown is always at stake in its dealing w/ Indian people – interpretations of treaties + statutory provisions must be approached in a way that maintains the integrity of the Crown
  o 3) Any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favor of the Indians
  o 4) The onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown – there must be ‘strict proof of the fact of extinguishment’ and evidence of clear and plain intention on the part of the government to extinguish treaty rights

Facts:
- Donald Marshall Jr. [a Mi’kmaq citizen] was charged with selling 463 pounds of eels for $787.10 without a license – contrary to federal regulations made pursuant to the Fisheries Act
- Marshall’s defense was that he was entitled to sell the eels by virtue of a treaty right agreed to by the British Crown in 1760
- The issue at trial was whether Marshall had an existing treaty right that exempted him from compliance with the federal legislation
- In 1760, Aboriginal leaders in the Maritimes asked for truck houses [trading posts] ‘furnishing them with necessaries, in Exchange for their Peltry’ – however, the written document recording the treaty contained only the promise by the Mi’kmaq not to traffic, barter, or exchange any commodities except with such persons [not with non-government individuals]
- The issue was whether this ‘trade clause’ framed in negative terms as a restraint on trade reflected the positive right to Mi’kmaq people to bring the products of their hunting, fishing, and gathering to a truck-house to trade – the trial judge held there was no positive right and rejected Marshall’s defense that he had a treaty right to catch + sell fish
- The court of appeal dismissed his appeal

Issues:
- Does Marshall [and the Mi’kmaq people] have an existing treaty right to catch and sell fish, exempting them from the regulations of the Fisheries Act?

Decision:
- Yes – In the absence of any justification for the regulatory prohibitions, the appellant is entitled to an acquittal – appeal allowed and an order to acquit on all charges

Analysis: (Binnie J)
• The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms – here it is complicated since a series of agreements were signed intending to have them consolidated into a comprehensive treaty that was never brought into existence
• The appellant’s position is that the truck house provision incorporated the alleged right to trade and also the right to pursue traditional hunting, fishing, and gathering activities in support of that trade
  o It is clear that the words of the document alone do not support this

Evidentiary Sources
• The Court of Appeal took a strict approach to the use of extrinsic evidence when interpreting the Treaties of 1760-61 – said it cannot be used in the absence of ambiguity [narrow approach]
• CA approach should be rejected:
  • 1) Even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all terms of an agreement
  • 2) Even in a treaty document that purports to contain all terms, this Court has made clear that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty
  • 3) Where a treaty was concluded verbally and afterwards written by Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms [Dickson J in Guerin]
• The Court’s obligation is to choose from the various possible interpretations of the common intention the one which best reconciles the Mi’kmaq interests and those of the British Crown

The 1760 Negotiations
• It is apparent that the British saw the Mi trade issues in terms of peace – ‘people who trade together, do not fight’ – the British did not want the Mi to become a drain on the public purse so as a result it became necessary to protect the traditional Mi economy including hunting, fishing, and gathering
• The British made it clear that the Mi were not to have any commerce with ‘any of His Majesty’s Enemies’ – A Treaty of Peace and Friendship could not exist otherwise
• The British strategy to support the Mi trade was an investment in peace and could only be effective if the Mi had access to both trade and to the fish/wildlife resources necessary to provide them with something to trade
• **Must look at the common intention in 1760 and not just the terms of the 1760 document to which effect must be given**
  ➔ the trade clause would not have advanced British objectives or Mi objectives unless the Mi were assured of continuing access to wildlife and trade

Ascertainment of the Terms of the Treaty
• Since written text is incomplete – must reference the historical record as interpreted by historians and also in light of the objectives of British and the Mi and the political + economic context in which the objectives were reconciled
• The right to fish is not mentioned in the 1760 document nor expressly noted in the records of the negotiation – not surprising – in colonial times the perception of fishery was one of ‘limitless proportions’
• Courts will imply a contractual term on the basis of presumed intentions of the parties where necessary to assure the efficacy of the contract – officious bystander test
• In ordinary situations the right to trade does not imply the right of access to things to trade, however the honor of the Crown requires this – case law has allowed the concept of implied rights to support the meaningful exercise of express rights granted

Rights of the Other Inhabitants
• The treaty rights-holder not only has the right or liberty ‘enjoyed by other British subjects’ but may enjoy special treaty protection against interference with its exercise
• The fact that the content of Mi rights under the treaty to hunt and fish were no greater than those enjoyed by other inhabitants does not [unless those rights were extinguished prior to April 17, 1982] detract from the higher protection they presently offer to the Mi people

The Honor of the Crown
• **Principle: the honor of the Crown is always at stake in its dealings with aboriginal people**
• Do not think that an interpretation of events that turns a positive Mi’kmaq trade demand into a negative Mi’kmaq covenant is consistent with the honor and integrity of the Crown – nor is it consistent to conclude that the LG accepted the M suggestion of a trading facility while denying any treaty protection to Mi access to the things that were to be trade, even though these things were identified and priced in the treaty negotiations

The Limited Scope of the Treaty Right
• Crown expresses concern that recognition of a constitutionally entrenched right [as here w/ trading] would open floodgates to uncontrollable and excessive exploitation of natural resources – this is based on a misunderstanding of the narrow ambit and extent of the treaty right
Here, what is contemplated is not a right to trade for economic gain, but a right to trade for necessaries – the treaty right is a regulated right and can be contained by regulation within its proper limits

Necessaries = ‘moderate livelihood’ [Van der Peet] includes basics such as food, clothing and housing, supplemented by a few amenities but not the accumulation of wealth – addresses day-to-day needs

Application to the Facts of This Case

There is nothing in the regulations that gives direction to the Minister to explain how she should exercise the discretionary authority in a manner which would respect the appellant’s treaty rights – test for infringement set out in Sparrow

1) Is the limitation unreasonable? 2) Does the regulation impose undue hardship? 3) Does the regulation deny to the holders of the right their preferred means of exercising that right? – the onus lies on the group challenging the legislation

In Adams this test was applied to licensing schemes

Parliament cannot adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance

In the absence of specific guidance, the statute will fail to provide representatives of the Crown w/ sufficient directives to fulfill their fiduciary duties + the statute will be found to represent an infringement of aboriginal rights under Sparrow

In Badger it was found that the test for aboriginal and treaty rights was the same

M treaty rights were not accommodated in the Regulations – the regulatory prohibitions against fishing w/o a license and selling eels w/o a license do prima facie infringe the appellant’s treaty rights under the Treaties of 1760-61 + are inoperative against the appellant unless justified under the Badger/Sparrow test

The Court has held on numerous occasions that there can be no limitation on the method, timing, and extent of Indian hunting under a Treaty – apart from a treaty limitation to that effect

The appellant caught + sold eels to support himself and his wife – the imposition of a discretionary licensing system would interfere with the appellant’s treaty right to fish for trading purposes and the ban on sales would infringe his right to trade for sustenance

Grassy Narrows First Nation v Ontario (Natural Resources) SCC 2014 [Numbered Treaties]

Facts:

This case involved the Keewatin area of Ontario, a portion of land that was included in Treaty 3 in 1873

By virtue of Treaty 3, the Ojibway yielded (surrendered) ownership of their territory [except for certain reserve lands] receiving in return the right to harvest the non-reserve lands surrendered by them until such time as that land was ‘taken up’ for settlement, mining, lumbering, etc. by the Dominion of Canada

The appellants were the descendants of the Ojibway signatories to Treaty 3 and they challenged a forestry license issued by the province of Ontario that authorized forestry operations in the Keewatin area

The trial judge found that Ontario could not take up the lands within the Keewatin area that limited the harvesting rights of First Nations without the approval of the Federal government – she also interpreted the taking-up clause of Treaty 3 as imposing a two-step process (first need provincial authorization then federal approval) before any lands covered by the treaty could be taken up

The Court of Appeal reversed the decision and held that several provisions of the Constitution Act gave Ontario beneficial ownership of and the right to management over the lands in question

Issues:

Whether Ontario can ‘take up’ lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether it needs federal authorization to do so

Decision:

Yes – Ontario has the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3 by virtue of ss. 109, 92A, and 92(5) of the Constitution Act 1867 [however it must exercise its power in conformity with the honor of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests] 

Ontario alone has the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s. 35 of the Constitution Act. A two-step process involving federal approval was not contemplated by Treaty 3

Ratio:

The promises made in Treaty 3 were promises of the Crown, not those of Canada. Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the Constitution Act 1867. ‘Autonomous federalism.’ Therefore, when the lands covered by the treaty were determined to belong to Ontario, Ontario alone became responsible for their governance with respect to matters falling under its jurisdiction by virtue of s. 109, 92(5), and 92A – therefore Ontario is able to take up lands under the treaty for forestry purposes.
VI. THE DUTY TO CONSULT

- **In Delgamuukw**, the Court stated that there is *always* a duty of consultation and whether the group has been consulted is relevant to determining whether the infringement of aboriginal title is justified.
- The consultation must always be in **good faith** and with the intention of substantially addressing the concerns of the aboriginal peoples who lands are at issue.
- Duty to consult also came up in Sparrow, not as a necessary component but a factor to look at.

**Duty to consult**

- Grounded in the honor of the Crown.
- Arises:
  - Anytime gov’t decision making could adversely affect an Aboriginal right or Aboriginal title.
  - “When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”
  - Real – when you know something (ex. a statement of claim, litigation pending, treaty).
  - Constructive – when you should know something (make inquiries if there is a possibility).
- It is an on-going process, context-driven.
- **Scope:**
  - ALSO extends to where Aboriginal rights or title have been asserted BUT NOT yet proven.

**Haida Nation v British Columbia (SCC) 2004**

**Facts:**

- A title claim that has been advanced but not yet proven.

**Analysis:**

- **Duty to consult** arises when the Crown has knowledge [real or constructive] of the potential existence of the Aboriginal right/title and contemplates conduct that might adversely affect it.
- **The Honor of the Crown** requires these rights to be determined, recognized, and respected – this requires the Crown to participate in processes of negotiation.
The government has a duty to consult with Aboriginal groups whenever gov’t decision making could adversely affect an aboriginal right or title

Content = varies with circumstances → in general terms, the scope is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right/title and the seriousness of the potentially adverse effect upon the right/title claimed

**The duty to consult was extended to cases where claims of Aboriginal title or rights had been asserted but not yet proven**

The Crown [acting honorably] cannot run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation – can still manage the resource in question pending claims resolution but depending on the circumstances the honor may require it to consult w/ and reasonably accommodate Ab interests

Duty of good faith on both sides – Aboriginal must no frustrate crown’s good faith attempts or take unreasonable positions to thwart gov’t from making decisions

Reconciliation is a process flowing from rights guaranteed by s. 35(1) + to limit reconciliation to the post-proof sphere risks treating it as a distant legalistic goal devoid of the ‘meaningful content’ mandated by the solemn commitment made by the Crown in recognizing and affirming Ab. Rights + title

**Duty to accommodate** = effect of consultation may reveal a duty to accommodate [if requires amendment of a policy] → the process of accommodation may be best resolved by consultation + negotiation

**Decision:**

- Court found the Crown’s obligation to consult the Haida was engaged – knew the potential Ab. Rights and title in question could be affected by their decision [since strength of claim for right/title was high and the impact of the strategy was serious – the honor of the Crown might also require significant accommodation to preserve the Haida interest pending resolution of their claims]
- The Court grounded the duty to consult in ‘the honor of the Crown’
- Held that the provincial gov’t had a duty to consult with and accommodate the Haida w/ respect to harvesting timber
- Dismissed the provincial gov’t claim that any duty to consult and accommodate arose only after there had been a final determination of the scope/content of the right

**Spectrum – degree where the duty to consult with vary**

- Lowest end = requires notification (likely also explain/discussion)
- Upwards = want to meet with, listen to, respond
- Higher = accommodation [change plans in response to consultation]
- Highest = permission + consent; Aboriginal rights has a veto (alter)

**Taku River Tlingit First Nation v British Columbia 2004 SCC**

- The Court determined that the provincial governments duty to consult w/ the Taku River FN’s was engaged because the proposed action [construction of a 160km long road through the traditional territory] could significantly + negatively affect them
- The Court held that the provincial gov’t consulted + fulfilled its duty to accommodate before approving the reopening of the mine
  - Accomplished through the environmental assessment that was conducted which included consultation w/ interested Ab. Groups including Taku
  - Not all of the broad concerns of Taku were addressed however the Court was satisfied that the assessment committee had given enough attention to the specific issues raised by the Taku
- The Court was not under a duty to reach agreement w/ the Taku and its failure to do so did not breach the obligations of good faith that it owed to Taku
- S. 35(1) → facilitate reconciliation w/ de facto Crown sovereignty – balance societal + Aboriginal interests, which may require Crown to make decisions in the face of disagreement [balance + compromise are necessary]
- There is flexibility in the duty to consult which allows the gov’t to impose its objectives
- It also is not necessary for the gov’t to engage in consultation; can be undertaken by an administrative arm of the gov’t

**Mikisew Cree First Nation v Canada 2005 SCC [Treaty Right]**

- Involved the Crown ‘taking up’ surrendered lands to build a winter road to meet regional transportation needs – this would have the effect of reducing the territory over which the Mikisew would be entitled to exercise its treaty right to hunt, fish, and trap
- Found the Crown had the authority under the treaty to ‘take up’ surrendered lands, BUT it was under the obligation to inform itself on the impact this project would have on the M treaty right to hunt, fish, and trap
- The impacts of the proposed road were clear, established, and substantially adverse to the exercise of the M’s hunting and trapping rights over the lands in question, therefore triggering the duty to consult
- However, since the Crown was proposing to build a fairly minor winter road on surrendered lands where treaty rights are subject to the ‘taking up’ clause the content of the Crown’s duty of consultation was found to lie at the lower end of the spectrum
Crown was required to provide notice and to engage directly with them – provide info about the project, addressing interests, and potentially adverse impacts on those interests. Also required to solicit + listen to M’s concerns and attempt to minimize adverse impacts on their rights

Crown was found NOT to have discharged its obligations when it unilaterally declared the road realignment would be shifted – failed to demonstrate an intention of substantially addressing Ab. Concerns through a meaningful process of consultation. The Court found the Crown had a duty to consult which it had breached

VII. Metis Rights

- The people of the Metis nation regard the Manitoba Act as embodying a treaty that recognizes and affirms their nation-to-nation relationship with Canada – although they argue that its provisions concerning land and resources have not been fulfilled

R v Powley [2003] SCC

Facts:
- Steve Powley and his son Roddy were charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of the Game and Fish Act
- They both entered pleas of not-guilty – they admitted having killed the moose w/o a hunting license but claimed that as Metis they had an Aboriginal right to hunt for food in the Sault Ste. Marie area and that this right could not be infringed by the government of Ontario without justification

Issues:
- Do the Powley’s, as Metis persons, have an Aboriginal right to hunt for food?

Decision:
- Yes - appeal dismissed

Analysis: (The Court)

The Van der Peet Test

- “How should Aboriginal rights recognized and affirmed by s. 35(1) be defined?”
- The majority endorsed a pre-contact test for identifying which customs, traditions, and practices were integral to a particular aboriginal culture, and therefore entitled to constitutional protection – also recognized that this pre-contact test might prove inadequate to capture the range of Metis customs, practices, or traditions [since Metis cultures post-date European contact]
- Modify the pre-contact focus of the Van der Peet test when the claimants are Metis to account for the important differences between Indian and Metis claims

1) Characterization of the Right [Step 1]
- Aboriginal hunting rights [including Metis rights] are contextual and site-specific
- Here, the moose was shot within the traditional hunting grounds of the Metis community and a point was made to document that the moose was intended to provide food for the winter
- The right being claimed can be characterized as the right to hunt for good in the environs of Sault Ste. Marie

2) Identification of the Historic Rights-Bearing Community [Step 2]
- A distinctive Metis community emerged around the mid-17th century in the Great Lakes region

3) Identification of the Contemporary Rights-Bearing Community [Step 3]
- Although the metis lost much of their traditional land base as Sault Ste. Marie they continued to live in the region and gain their livelihood from the resources of the land and waters
- There was also a tendency for lack of information and of underreporting during this period

4) Verification of the Claimant’s Membership in the Relevant Contemporary Community
- While Metis communities continue to organize themselves more formally and assert their constitutional rights it is imperative that membership rights become more standardized
- For now, Courts will have to ascertain Metis identity on a case-by-case basis → taking into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable
- Criteria for Metis identity under s. 35 must also reflect the purpose of this constitutional guarantee: to recognize + affirm the rights of the Metis held by virtue of their direct relationship to this country’s original inhabitants + by virtue of the continuity between their customs and traditions and those of theirmetis predecessors
- Look for 3 broad factors for indicating Metis identity for claiming rights

1) Self-identification
- This self-identification should not be of ‘recent vintage’ – claims that are made belatedly in order to benefit from a s. 35 right will not satisfy this requirement
- There must be a deeper commitment (not a claim for convenience) but a substantial connection to the community that holds the rights
2) **Ancestral connection**
   - An objective requirement + ensures that beneficiaries of a s. 35 right have a real link to the historic community whose practices ground the right being claimed
   - A minimum ‘blood quantum’ is not required but some proof that claimant’s ancestors belonged to the Metis community either by birth, adoption, or other means is required

3) **Community acceptance**
   - Membership in a Metis political organization may be relevant, but is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Metis community
   - The core of community acceptance is past + ongoing participation in a shared culture, in the customs + traditions that constitute a Metis community identify and distinguish it from other groups
   - Other indicia – community activity participation, testimony from other members about the claimant’s connection

5) **Identification of the Relevant Time Frame**
   - The test for Metis practices should focus on identifying those practices, customs, and traditions that are integral to their distinctive existence + relationship to the land → this is accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political + legal control in a particular area
   - Focus on the time after a particular Metis community arose and before it came under the effective control of European laws and customs
   - Identify the P, C, T that predate the imposition of European laws and customs
   - Here, the record supports the finding that the period just prior to 1850 is the appropriate date for finding effective control in this geographic area

6) **Determination of Whether the Practice is Integral to the Claimants’ Distinctive Culture**
   - Evidence indicates that subsistence hunting was an important aspect of Metis life + was a defining feature of their special relationship to the land
   - While Metis fishing was prominent in written accounts, hunting was also important

7) **Establishment of Continuity between historic practice + contemporary right asserted**
   - Hunting for food was important + this practice has been continuous to the present
   - The right claimed by the Powley’s [to hunt for food] falls within the bounds of the historical practice grounding the right

8) **Determination of whether or not the right was extinguished**
   - Doctrine of extinguishment applies equally to Metis and First Nation claims + there is no evidence of extinguishment here

9) **If there is a right, determining whether there is an infringement**
   - Lack of recognition of the Metis right to hunt for food infringes their aboriginal right to hunt for food as a continuation of the protected historical practices

10) **Determination of whether the infringement is justified**
    - Main justification is conservation – it is important, but the record does not support this
    - If the moose population were under threat (no evidence it is), the Metis would be entitled to priority allocation to satisfy their subsistence needs in accordance with the criteria set out in Sparrow

### Aboriginal Rights Review

**Beckman v Little Salmon/Carmacks First Nation SCC 2010 [modern treaties]**

**Facts:**
- The LSCFN completed a land claim agreement w/ Canada + Yukon and as party of the treaty, members of the LSCFN secured assess to Crown lands for subsistence hunting + fishing activities
- In 2004, the Yukon gov’t transferred 65 hectares of this land to a non-native man who applied for an agricultural land grant
- Conflict arose because this land was also used as a trap-line for hunting and fishing, and teaching grandchildren about traditions

**Issues:**
- Issues of the honor of the Crown and the obligations of the Yukon territorial government in ‘taking up’ land under a modern treaty
- What is the Crown’s obligation to the First Nation when Crown land is transferred to individual, non-native use?

**Decision:**
- The Crown had a duty to consult the First Nation about this change of land use
- However, given that the duty to consult was on the lower end of the spectrum the consultation was found to have been adequate – the LSCFN had been given notice + an opportunity to state its concerns
- The impact of the land transfer was not significant and there was no duty to accommodate
The Crown cannot contract out of its honorable dealing (incl. duty to consult) with Aboriginal people – [as held in Haida and affirmed in Mikisew] it is a doctrine that applies independently of the expressed or implied intention of the parties
If there is a ‘taking up’ clause it is likely at the lower end of the duty to consult spectrum

Analysis: (Binnie J)
The main purpose of s. 35 is the reconciliation of Ab. and non-Ab. Canadians – the modern treaties attempt to further the objective of reconciliation by addressing grievances over the land claims and also by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities
HOWEVER, the LSCFN has to recognize the $34 mil along w/ other benefits it received in exchange for the surrender has earned the gov’t a measure of flexibility in taking up surrendered lands
Gov’t position – what the FN negotiated is what they get
FN position – the treaty-making process was the ratification of the LSCFN treaty
Reconciliation is not an accomplished fact – it is a work in progress – the duty to consult is grounded in the honor of the Crown and the honor of the Crown exists as a source of obligation independently of treaties [Mikisew Cree]
Haida ➔ imposed on the parties a duty to consult [and if appropriate] to accommodate in circumstances where development might have a significant impact on Ab. Rights when established
Distinction between older [numbered] treaties and modern treaties are the precision + sophistication of the modern document
The decision maker was required to take into account the impact of allowing the transfer on the concerns and interests of members of the FN
But given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN treaty itself – the content of the duty of consultation was at the lower end of the spectrum

Daniels v Canada 2016 SCC
All indigenous people are considered Indians for the purpose of 91(24)

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

I. CONSTITUTIONAL RIGHTS BEFORE THE CHARTER [Common Law Constitution]
John A MacDonald probably had two different ideas about rights in his mind:
1) The belief that the protection of individual rights was at the heart of the British constitution and that the most fundamental of these rights was liberty
2) That the federal system of government can operate to safeguard rights and freedoms
3) [added a third] the extent to which legislation can protect fundamental rights

COMMON LAW CONSTITUTION
MacDonald understood that British people had struggled to defend their liberty against despotic rulers – individual rights at this were usually divided into 2 kinds:
1) Political rights ➔ the rights to participate in government, especially responsible government [including rights of representation and voting]
2) Civil rights ➔ the rights of individuals to liberty from restraint by government, especially freedoms of the person, speech, religion, and property
British people had also established the basic principle of the rule of law – at its core it was a claim that government and the people were bound equally by the law, and that the government must also obey the law

AV Dicey, Introduction to the Study of the Law of the Constitution [1885]
Two features have at all times since the Normal Conquest characterized the political situations of England:
1) The omnipotence or undisputed supremacy throughout the whole country of the central government
   This was first represented by the power of the Crown, then into the sovereignty of Parliament
2) The rule or supremacy of law [3 meanings with regard to the English constitution]
   1) Gov’t cannot act against citizens w/o authority of the law. No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land [no discretionary powers of constraint]
2) Nobody is above the law. As a characteristic of the country → no man is above the law but also that every man [regardless of rank] is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals
3) Judges play a role in promoting/protecting the rule of law because gov’t action is subject to review by courts. The constitution is pervaded [infused] by the rule of law on the ground that the general principles of the constitution are with us as a result of judicial decisions determining the rights of private persons in particular cases brought before the courts

- Common law bill of rights
  - Rights protected unless clearly + expressly from a statute to take these rights away
  - [Comes from extinguishment of Aboriginal rights through clear + plain intent]
- Division of powers
- Parliament/house of commons – ability to govern ourselves through the rule of law
  - Protect minority rights; S. 133 + s. 93(1) [minority language rights + religious rights]
- Dominant against rule of law
  - Parliamentary supremacy → Parliament is the ultimate authority

THE IMPLIED BILL OF RIGHTS
- Prior to the enactment of the Charter, the Constitution did not expressly limit the legislative authority of the Parliament or a province to interfere with fundamental freedoms such as freedom of expression or freedom of religion
- The critical issue being whether the law in question is in relation to a subject matter assigned to the level of government that enacted it
- The ‘implied bill of rights’ suggests that the Constitution itself [perhaps as a result of the BNA Act preamble] implies that there is a zone of liberty into which the state must not unjustifiably enter, regardless of whether the legislation in question is federal or provincial

Reference re Alberta Statutes [1938] SCC

Facts:
- One of the most dramatic political events in the 1930s was the election of the Social Credit government in AB in 1937 – its monetary policies were vague and muddled but the essential belief was that the total of the payments to individuals from all economic transactions was less than the value of goods produced – and this was the cause of unemployment and depression
- Solution was to impose public control over the banks + provide each individual a ‘social credit’ which they must spend to maintain the balance between payment + production
- Newspaper accounts of the election victory were extensive + almost hostile → gov’t response was the Publication of Accurate News and Information Bill which gave power to the Social Credit Board [which was created by statute] to require newspapers to publish statements that it considered necessary to correct public misapprehension
  - The Bill also gave power to require disclosure of sources + the names of authors
- The Lieutenant Governor refused to assent this Bill and 2 others about economic policy

Issue:
- The power of AB to enact the three bills including the Publication of Accurate News and Information Bill
- Whether this is a colorable attempt to invade the domain of criminal law

Decision:
- All were held to be ultra vires – including the earlier enacted statutes → they interfere w/ the free working of the political organization of the Dominion + cannot be considered as dealing w/ matters purely private + local in the province
- The federal gov’t is the sole authority to curtail [if in the public interest] the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion

Ratio:
- Province may deal w/ property + civil rights of a local + private nature w/in the province but cannot interfere with one’s status as a Canadian citizen + their fundamental right to express freely one’s untrammeled opinion about gov’t policies + discuss matters of public concern
- Freedom of speech is Federal as it is implicit and central to the function of democracy

Analysis: (Cannon J)
- The bill aims to control any statement relating to any policy or activity of the government of the province and declares this object to be a matter of public interest
- The bill does not regulate the relations of the newspapers’ owners w/ private individual members of the public, but deals exclusively w/ expressions of opinion by the newspapers concerning government policies and activities
• **The P+S of the bill** is to regulate the press of AB from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring upon it ridicule and public contempt [dislike]
  o This bill deals w/ the regulation of the press of AB from the viewpoint of public wrongs or crimes
• Used to be English law that criticism of any public policy was regarded as a crime → following the passing of the Fox’s Libel Act it was determined it is not criminal to point out errors in the gov’t of the country and to urge their removal [this was admitted as a valid defence in a trial for libel]
• **Seems that AB is trying to revive the old theory of the crime** which have been declared innocuous [not harmful/offensive] by the fed government and what every Canadian citizen can do lawfully
• **Freedom of discussion is essential to enlighten public opinion – there must be an untrammeled publication of news + political opinions of political parties**
  Democracy cannot be maintained without its foundation → free public opinion + free discussion throughout the nation of all matters affecting the state w/in limits set by criminal code + common law
• Province may deal w/ property + civil rights of a local + private nature w/in the province but **cannot** interfere with one’s status as a Canadian citizen + their fundamental right to express freely one’s untrammeled opinion about gov’t policies + discuss matters of a public concern

Duff CJC
• [Agreed the Bill was ultra vires but that some further observations of the Bill are to be made]
• Under the Constitution, legislative power for Canada is vested in one Parliament consisting of the sovereign [an upper house styled the Senate] and the House of Commons
• **H o C is to be a representative body constituted by members elected by such of the population of the united provinces as may be qualified to vote**
• There is a right of free public discussion – there is no doubt that the Parliament of Canada possess the authority to protect this right – since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in the Parliament

**Saumur v City of Quebec (1953) SCC**

**Facts:**
• Prosecutions under bylaws regulating the distribution of pamphlets in the streets was one of the principal ways in which the government sought to silence the Jehovah’s Witness
• Saumur [a JW] was charged + convicted under one of these bylaws and brought an action that it was **ultra vires**
• Bylaw No. 184 → “It is by the present bylaw forbidden to distribute in the streets of the City of Quebec any book, pamphlet, booklet, circular, or tract whatever without having previously obtained for doing so a written permission of the Chief of Police.” Contravention is punishable by fine or in default by imprisonment.

**Issues:**
• Was this bylaw **ultra vires** by trenching upon the jurisdiction of the Federal gov’t in restraining freedom of communication by writings?

**Decision:**
• Yes – appeal allowed + bylaw declared invalid

**Ratio:**
• **Aspects of religion or free speech may be affected by provincial legislation, but this legislation must be sufficiently definite and precise to indicate its subject matter** – and the subject matter must fall within a head of provincial power
• Provinces can deal with the civil consequences of the exercise of those freedoms but the provinces cannot say you cannot be that religion.
• **Freedom of religion is shared by both levels.**
• The law must clearly define what it means to regulate.

**Analysis:** (Rand J)
• The only powers given to the provinces in relation to religion are s. 92(13) – Property + Civil rights, and 92(16) – matters of a merely local or private nature in the province
• It is self-evident that legislation ‘in relation’ to religion and its profession is not a local or private nature
• S 93 is the only section with references in the statute to religion – about education
• The **Confederation Act** recites its desire of the 3 provinces to be federally united into one Dominion with a constitution similar in principle to that of the UK → where the gov’t is resting ultimately on public opinion reached by discussion and the interplay of ideas – if that discussion is placed under license then its basic condition is destroyed and the gov’t becomes disjoined from the citizenry
• Argued that the bill is aimed towards the administration of the streets → the only practice actually followed is not remotely connected with street regulation
• Aspects of religion or free speech may be affected by provincial legislation, but this legislation must be sufficiently definite and precise to indicate its subject matter
• The language of the legislation must define the matter + mode of administration and cannot relate indifferently to a variety of incompatible matters by means of the device of a discretionary license

Dissent (Rinfret CJC):
• The purpose of the bylaw is not aimed at limiting the activities of the plaintiff + JWs’ but is applicable to all, regardless of nationality, doctrine, or religion
• The bylaw is aiming at the use of streets for the purpose of distribution – this is within the provinces’ jurisdiction
• The bylaw is legal, valid, and constitutional

Notes:
• This was a 5-4 split – one of the judges for the majority [Kerwin J] held that the province had the power to regulate religion however the bylaw conflicted with some early provincial statutes establishing freedom of religion therefore making the bylaw invalid
• Dupond/Chatterjee

Switzman v Elbling [1957] SCC
(Early Morgentaler-type case – Cannot replace criminal code with provincial legislation)

Facts:
• This action was a challenge to the ‘Padlock’ Act [1937] which was enacted to control communism
• S. 3 → “It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever”
• Switzman’s landlord brought an action to evict him because he had used the leased premises for purposes prohibited by this section. S’s defence was that the section was ultra vires

Issues:
• Is section 3 ultra vires the province of Quebec?

Decision:
• 9-1 decision – yes – appeal allowed
• The statute in its entirety is ultra vires

Ratio:
• The prohibition of political expression as an evil would be within the scope of criminal law – here, it is sufficient to say that it is not a matter within the regulation of a Province
• Freedom of religion does not fall exclusively within the federal jurisdiction – it may fall within either level of gov’t

Analysis: (Rand J)
• Apart from sedition, obscene writings and criminal libels, the public law leaves the literary, discursive and polemic use of language in the broadest sense free
• The object of the legislation here [as the title expresses] is to prevent the propagation of communism and bolshevism
• The ban is directed against the freedom or civil liberty of the actor – no civil right of anyone is affected nor is any civil remedy created
• The aim of the statute is [by means of penalties] to prevent a poisoning of men’s minds, to shield the individual from exposure to dangerous ideas, to protect him from his own thinking propensities [there is nothing in civil rights (92(13)) in this]
• Ban as a local matter under s. 92(16)? → the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance excluded from s. 92(16) as a local matter. Preamble says we should be similar to UK.
• The prohibition of political expression as an evil would be within the scope of criminal law – here, it is sufficient to say that it is not a matter within the regulation of a Province
• Freedom of religion does not fall exclusively within the federal jurisdiction. It may fall within either level of gov’t.

Abbott J
• The impugned statute does not deal w/ matters of property and civil rights or with a local or private matter within the Province
• Parliament itself could also not abrogate the right of discussion and debate – the power to limit it is restricted to powers as may be exercisable with respect to criminal law + to make laws under pogg
• Maybe neither level should be able to enact these laws [beyond the power of both]

Dissent: (Taschereau)
• If the provincial legislature has no power to create criminal offences, it has the power to prevent crimes, disorders as treason, sedition, illegal public meetings → it therefore, may validly legislate as to the possession and use of property [as this is exclusively within the domain of civil law + by s. 92(13) is within provincial competence]
• Appeal should be dismissed

Dupond v City of Montreal et al. [1978] SCC
Facts:
• A municipal bylaw imposed a 30-day prohibition on any public gatherings or assemblies
Issues:
• The bylaw was challenged on two grounds: 1) as an invasion of the federal criminal law power, and 2) as an infringement of the fundamental freedoms of speech, assembly and association, the press, and religion
Decision:
• Rejected both grounds of challenge – bylaw intra vires – upheld
Analysis: (Beetz J)
• On the second submission:
  1) None of the freedoms referred to are enshrined in the Constitution as to be above the reach of competent legislation
  2) None of those freedoms are a single matter coming w/in exclusive federal or provincial competence – each are an aggregate of several matters
  3) Freedoms of speech, assembly + association, of the press, and of religion are independent from the holding of assemblies, parades, gatherings, etc. → demonstrations are not a form of free speech but of collective action [are a display/demonstration of force]
  4) Right to hold public meetings on a highway or in a park is unknown to English law [could be a trespass or nuisance]
  5) Assemblies, parades, gatherings is a matter falling under fed or prov. depending on the aspect
  6) The Canadian Bill of Rights does not apply to provincial + municipal legislation
Notes:
• OPSEU also made an argument based on the implied bill of rights cases – some aspects of implied bill of rights hover in Constitutional law [constitutional architecture]

II. CHARTER HISTORY

THE CANADIAN BILL OF RIGHTS
• In 1960, Parliament enacted the Canadian Bill of Rights – initiative coming from PM Diefenbker [who campaigned for constitutional protection for rights since becoming a member of Parliament in 1945]
• Two external influences seem clear + important:
  o 1) International declaration about rights [especially the Universal Declaration of Human Rights adopted by the UN in 1948] – stemming directly from the holocaust
  o 2) The American Bill of Rights + the liberal interpretations by the SCC from the mid 1950s onward [especially Brown v Board of Education – landmark decision on equality between blacks + whites]
• One large factor was probably the fears about regulation by legislatures + administrative agencies [which expanded during the war] – also censorship + free speech rights
  o Troubles about the denials of civil liberties + treatment of Japanese Canadians during the war
• Issues implementing the Bill – no amending formula and the move from parliamentary supremacy to judicial supremacy

Differences Between Bill of Rights + the Charter
• Bill of Rights protects property (but not recognized constitutionality) and there is a right to fair hearing
• Bill is a statute; where Charter is part of the Constitution
• ‘Notwithstanding clause’ in Bill does not have to be clear and explicit to apply
• ‘Notwithstanding clause’ in Charter only applies to some Charter rights
• In Charter, can justify rights and are subject to reasonable limits under section 1
• The Charter expanded rights from the Bill, especially in section 15
• Bill only applies to federal jurisdiction – s. 2 is ‘every law of Canada’ which are those passed by federal parliament. Charter applies to all levels of government/entities because of s. 35.
• Bill does not have any protections against provincial laws
• The Constitution (Charter) is the supreme law of Canada; so if contradict Charter, then are of no force or effect
The Canadian Bill of Rights, RSC 1985, Appendix III (p. 712)

- The Bill of Rights is simply a statute of Parliament, and **not** entrenched like the Constitution Act, 1982
- Two important consequences follow:
  - 1) It governs only matters within the federal gov’t power
  - 2) It can be amended like any other statute [although no significant ones have been made]
- Problems:
  - 1) Effect on other statutes → Bill had no effect on statutes containing a declaration it was to be effective regardless of the Bill; what about earlier statutes? Was it just a guide to interpretation?
  - 2) How should courts approach the Bill? Should its grant of rights be interpreted expansively or restrictively?
- **R v Drybones** [1970]
  - Indian Act – “Indian intoxicated off reserve was guilty of an offence”
  - Liquor Ordinance of NWT – “Offence to be intoxicated in public place”
  - D was charged under the Indian Act + challenged the section saying it violated his right to equality under s. 1(b) of the Bill
  - SCC dismissed an appeal from the Crown from an acquittal → rejected the approach that the Bill was simply a guide to interpretation and said it could have an impact as it is Quasi-Constitutional
- Courts must allow for previous laws to be *inoperative* if conflict with Bill of Rights
- Where conflict between Bill of Rights and earlier statute – the statute would be inoperative
- Ritchie – no individual or group of individuals are to be treated more harshly than another under the law + an individual is denied equality under the law if it is an offence for him to do something which his fellow Canadians are free to do w/o having committed any offence
- During the 70s/80s – several SCC members announced that the Bill [or provincial bills like it] prevailed over later statutes
- ‘Frozen rights approach’ (a denial of expansive interpretation) → s. 2 did not create new rights; its purpose was to prevent the infringement of *existing* rights [R v Burnshire]
- Although – **AG Canada v Lavell** 1974 → challenged Indian Act [Indian woman who married non-Indian man lost her registration] but no provision for man
  - Rejected by SCC – the impugned section could still be enforced w/o denying equality of treatment in the administration of the law. As long as treat all status Indian women the same then it is fine under the bill of rights; and treat all status Indian men the same. Not protecting women
- **Bliss v AG Canada** [1979] – *Unemployment Insurance Act* established a program of benefits for women whose employment was interrupted because of pregnancy but imposed a longer qualifying period for women claiming these benefits than for individuals claiming regular benefits
  - It also excluded interruption of employment because of pregnancy from categories of entitlements for regular benefits
  - SCC – held that this did not discriminate against her on the specified ground of sex – any inequality between sexes in this area is not created by legislation, but by nature → also that discrimination could not be grounded in the more general term ‘equality before the law’
  - SCC said equality = treating all pregnant women the same
- This decision was displaced in **Brooks v Canada**
- **Bill is occasionally used as a ground for decision, however has been almost totally eclipsed by the Charter**

**THE ADOPTION OF THE CHARTER** [Where did it come from?]

- Victoria Charter (1971) – All provinces agreed to it but would have been a more-narrow entrenched bill of constitutional rights, however QB pulled out at last minute
- Trudeau wants to unilaterally amend Constitution; gets defeated by Joe Clark (temporarily), but then re-elected
- AB+QB do not want a constitutional amendment. Trudeau says if QB does not vote for separation then will amend constitution (QB thought to have more provincial powers under s. 92) but Trudeau meant to add Charter
- Provinces go to lawyer → **Reference re Resolution to Amend the Constitution** and the SCC said that legally yes, they can unilaterally amend the constitution w/o provincial consent, however it is a constitutional convention [social/political costs if breached, cannot enforce it though] that they would need substantial provincial consent
- ‘Kitchen Accord’ 1981 – Roy Romano, ON AG, and Jean Chretien – if ON agrees to give up its veto on the amending formula, and if fed gov’t agrees to notwithstanding clause, then the members of the gang of 8 will support the constitution (actually 7 because QB was not invited) – QB challenged, but SCC said no, had ‘substantial consent’
- **April 1982 – Constitution Act** → added the Charter, Section 35, and the amending formula
The Honorable Pierre Elliot Trudeau, Minister of Justice, A Canadian Charter of Human Rights, 1968

- Human rights [matters which affect individual dignity] = natural rights → the rights which all men were entitled because they are endowed with a moral and national nature
- The denial of these rights was regarded as affront to ‘natural’ law [the elementary principles of justice which apply to all human beings by virtue of their common possession of the capacity to reason]
- Natural rights were the origins of the western world’s more modern concepts of individual freedom and equality
- Historically there has been a deep-seated desire for recognition of human dignity [reflected in the words of the American Declaration of Independence]
- WWII events proof of need to safeguard rights of individuals
- Provinces have introduced human rights legislation + Quebec Civil Code committee proposed a declaration of civil rights be included in the revised code
- Right to life, liberty, property, to free speech + free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote – they depend on the outcome of no elections → need to entrench the rights

A Cairns, “Charter Versus Federalism: The Dilemmas of Constitutional Reform”

- The erosion of Britishness
- Post 1945, the status of parliamentary gov’t in Canada was weakened by the decline of the country of its origin [Britain]
- After War, many of post-war immigrants came from areas where the trusting attitude to the state implicit in the British parliamentary tradition would have been marked as naive
- Minorities were fearful of being singled out for negative treatment and so were naturally drawn toward idea of judicially entrenched rights + away from parliamentary majoritarianism
- Support for Charter was facilitated by removal of Privy Council + a national support for the Bill of Rights was part of the movement that had propelled steps in Canadian independence from GB
- Charter emerged to fill the gap of a weakened appreciation of Britain and brought entrenched rights, judicial supremacy, and enhanced role for the written part of the constitution
- Society had gone a transformation since WWII – chief characteristic being a dramatic escalation of nationalism + ethnicity
- Movements behind self-confidence had an international component
- UN was the most influential catalyst behind the transformed climate of Canadian and international opinion – fostering respect for fundamental freedoms + human rights
- Greater influence of US – second half of 20th century is on the rise [incentives to follow them]


- Two purposes of the Charter: 1) to contribute to national unity, and 2) to protect rights
- Context the federal govt made a charter → Quebec demanded major constitutional change giving them more recognition + power [fed govt did not want any reform in response]
- Believed if constitutional reform was to be pursued, it was essential that Quebec’s demands be countered by proposals designed to have a unifying effect on Canada – this is when the fed govt urged that a charter of rights be at the top of the constitutional reform agenda
- Following WWII talk about bill of rights – concern for human rights arising from war against facism and Canada’s obligation under the UN declaration of human rights
- Addition of large numbers of new Canadians w/ no education/experience in liberal democratic values meant that Canada could no longer rely on the British method of protecting civil liberties – a written code was needed
- Trudeau – constitutional strategy [so Quebec would not rely on constitutional reform to solve their problems of political and social modernization]
- Coupling of a constitutional charter w/ Patriation shows how strongly the Trudeau govt believed in the nation-building potential of a constitutional charter – risked dividing the country in order that it might become more united

L. Weinrib, “Of Diligence and Dice: Reconstituting Canada’s Constitution” 1992

- Canadian Constitutional Charter, 1971 [Victoria Charter] → unanimous consensus of all provincial premiers, however Premier of Quebec later withdrew his approval when he failed to achieve his desired resolution on the issue of social policy
- Victoria Charter was more limited than Trudeau’s initial proposal – did not guarantee legal rights, economic rights, mobility rights, or egalitarian rights – it expanded protection to ‘political freedoms’ only [including freedoms of thought, conscience + religion, opinion + expression, and peaceful assembly + association]
• 1978 – Bill C-60 – expanded on Victoria Charter’s fundamental freedoms to include protection for freedom of the press, right to life, liberty, security; right against deprivation of property contrary to law; right to equality before the law
• Recommendations of Royal Commission on Bilingualism + Biculturalism bore fruit in the creation of language rights guarantees for minority language education

L.E. Weinrib, “Canada’s Charter of Rights: Paradigm Lost?” 2002
• W/ the new rights protection, Canada did not create new special constitutional courts or reconstruct political institutions – vested the new judicial review function in existing courts + marked out an innovative constitutional role for the established legislatures
• Complex array of institutional directives – distinguishes from older texts such as US Bill of Rights which does not refer to judicial review
• The most important elements of the Charter’s institutional structure are found in 1) s. 1 – the guarantee + limitation clause; and 2) s. 33 – the notwithstanding or override clause
  o 1) The limitation formula [following post-war model of rights-protecting instruments] requires the state to formulate any exercise of power that limits guaranteed rights
  o 2) The remedial aspirations for the Charter adopt the postwar model of right-protections where the rights only provide one level of constitutional guarantee; the other level is provided by strict terms of the limitation formula
  o 3) The override gives legislatures the last word – unless the constitutional context is transformed/extraordinary consensus for amendment is satisfied
• Limitation/notwithstanding clause mark the culmination of contentious federal-provincial negotiations seeking agreement on a constitutional text for inclusion by amendment into Canada’s written constitution
• The Charter reflected Trudeau’s dual commitment to liberal democracy under the rule of law + a national citizenship based on rights, including minority language rights designed to counter Quebec nationalism
• Every draft of the Charter included express limitation formulation reflecting the fact that the legitimacy of the judicial role remained a strong concern
• Sustained provincial opposition to the Charter finally produced a compromise draft that subordinated a range of rights to a single, expansive, limitation clause
• As the price for acceptance of the Charter as redrafted in the Joint Committee, 7 premiers exacted agreement to a fall-back mechanism in respect to the rights they considered most controversial – this legislative override or ‘notwithstanding’ mechanism made it applicable to rights they believed should not rest for final determination in the courts → fundamental freedoms, legal rights, and equality rights
• This mechanism allowed legislature to suppress guarantees for up to 5 years – re-enactment was permitted
• Left to final judicial determination were the democratic rights, the mobility rights, and the language rights
• Quebec did not agree w/ this compromise
• The notwithstanding clause allowed for parliament/legislature to assert primacy over specified Charter rights for the duration of its electoral mandate by expressly indicating this desire – judicial affirmation if reasonable limits on rights was not part of this

• Only Ontario + New Brunswick supported the federal initiative initially
• Quebec agreed to form w/ 7 other provinces in holding out for a different amending formula and a revised Charter of Rights
  o 1st time Q tied its position on the amendment of the Constitution to the positions of other provinces, and the first time that a gov’t of Quebec had agreed to support an amending formula that did not recognize a veto for Quebec
• By joining forces, they also appeared not as the sole obstacle to constitutional change
• Mistrust of Quebec → the 7 provinces held a meeting to discuss the revised package of amendments that they hoped would be acceptable to the federal gov’t [Quebec not informed/invited] – ‘Night of Long Knives’ – Kitchen Accord

III. JUDICIAL REVIEW
• The Charter transformed Canadian politics from a legislative supremacy to a constitutional supremacy

• Two very different models of democracy are at stake → 1) the power of the ballot is curbed by independent and tenured judges who ensure that rationality and principle are never ejected by impetuous legislatures, rigid bureaucracies, and a dulled citizenry and 2) the second model places its confidence in those who can claim the power of the ballot – judge’s independence and tenure make them unaccountable, elitist, and unrepresentative
• The entrenched bill of rights allows individuals [particularly those w/ minority interests] to seek vindication in an open, public, and responsive process as opposed to legislators who may be unresponsive and are more attentive to majority concerns. Judges can protect minority rights as they are not subject to same pressures as Parliament.

• Ability to unite Canadians – before entrenchment, the structure of Canadian society was significantly influenced by executive federalism [elite form of accommodation dominated by a very small, unrepresentative handful of white males] but not there is protection equally across Canada

• Use of s. 33 – allows judicial decisions under most of the provisions of the Charter to be overridden by the competent legislative body

CONS

• 1) Substantive outcomes and claims that the elected member of government and their agencies have been the more effective vehicle for improving the lives of most Canadians in many circumstances
  o the assistance of the disadvantaged/poor has more often happened because of legislative action
  o this argument reveals that courts have been uncaring or actively hostile
  o Undermines elected officials and gives unelected judiciary more power

• 2) The best chance for a vigorous, responsive, and respected democracy comes from elected representatives
  o We should not rely on a small unelected corps
  o The worry here is that the critical, social, and political questions will be translated into legal issues that will be left to lawyers/judges instead of citizens to work out

• 3) The costs of access to the courts which privilege the powerful and organized and therefore allow them disproportionate use of judicial review either to dismantle legislation and programs or to shield themselves from attack by government or other groups
  o Whatever meaning is possible in interpreting the Charter, it will become slanted towards the rich and the organized
  o Charter is a reflection of the inherent contradiction of liberal ideologies


• The Charter is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians

The Nature of Charter Rights

• Charter rights are predominately negative in nature – aimed at protecting individuals from state interference or control (rights ‘against’) – little reference to positive economic or social entitlements, such as the right to employment, shelter, social services

• The negative nature = a systematic bias in favor of interests of upper-middle class

• The systematic bias is reinforced by a highly selective view of the state

• However, victories that have been won on behalf of workers, unemployed, women, etc. have been achieved in the democratic arena – legislation helped workers have collective bargaining rights, women and labor standards, and minimum wage laws and human rights codes

• Where there has been progress it has come through the democratic rather than judicial arena

• The negative conception of liberty imposed by courts to protect the ‘haves’ of society has been partially supplanted by a positive conception of liberty imposed by legislatures to further interests of ‘have-nots’

• HOWEVER, the Charter threatens to slow or reverse this process – the rights + freedoms are predicated on the hostility to legislative action that animated the common law

• What the Charter is likely to do is to allow the courts to chisel away at certain aspects of the regime and to erect barriers to future innovations

• ‘Progressive’ Charter decisions will be the exception and not the rule, and looking to the courts to improve legislation is perverse as most legislation was enacted to counteract the laissez-faire individualism of court-made common law

• The message the charter is saying is that the State abuses people’s rights and courts are going to protect them (mistrust)

The Nature of the Judicial System

• There are two features of the judicial system that make it an inappropriate forum for advancing the interest of the disadvantaged – 1) the cost of gaining access to the system, and 2) is the composition of the judiciary itself

• The barrier created by money not only denies the disadvantaged access to the courts, it also serves to shape the rights themselves

• Ex. Freedom of expression – who can afford to engage in litigation about this matter? – businesses – therefore, freedom of expression will come to reflect business concerns

• Lawyers/judges attitudes tend to reflect the values of the legal system in which they were schooled – unrepresentative and are not elected, are appointed (economically, well-off, white males)

- The ‘Supremacy of rights’ model
- Underlying this model is respect for the equal dignity and autonomy of each member of the community – in interactions w/ the state each individual is autonomous, equal to all others, an end and not a means to others’ ends
- This model values independent, highly trained and educated judges as a means of tapping a deeper, long-term political voice
- An independent judiciary unlocks the grip of day to day political deal-making and expediency, offers the politicians relief from final responsibility in an unknowable world, and lends legitimacy to a variety of legal operations, such as applying enacted law to particular circumstances evolving judicial doctrines, and constraining lawmakers to legislative direction and policing constitutional proprieties
- Rights/texts are the product of the historical moment in which they are drafted – need to be read as conditional upon the preservation of the whole system of government committed to those underlying values
- In this model, both the legislature and the courts, working to its own strengths, mold society to its deepest commitments
- Chrétien said the role of the courts is to interpret the law where citizens raise claims as a check on what is otherwise the absolute and arbitrary power of the legislatures


- Where the judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the legislative body as dialogue
- This dialogue can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process
- When a court strikes down a law it often offers a suggestion for how the law could be modified to solve the constitutional problems – it is rare that the constitutional defect cannot be remedied
- The Charter can act as a catalyst for a two-way exchange between judiciary and legislature on the topic of human rights and freedoms

The Four Features of the Charter that Facilitate Dialogue

1) Section 33 – the power of legislative override
   - All the legislature needs to do is insert an express notwithstanding clause into a statute and this will liberate the statute from the provisions of s. 2 and ss. 7-15
2) Section 1 – allows for ‘reasonable limits’ on Charter rights
   - If a law is struck down because it does not meet the s. 1 justification, the court will explain the measure that would have satisfied s. 1 – this is available to the enacting body + will generally be upheld
3) Sections 7, 8, 9, and 12 – the ‘qualified’ rights which allow for action that satisfies standards of fairness and reasonableness
4) Section 15(1) – The guarantee of equality rights, which can be satisfied through a variety of remedial measures
- In all 65 cases where the law has been struck down by the SCC for Charter violations – legislative action followed in the vast majority of cases and the typical outcome is new legislation that accomplishes the same legislative objective but more protective of rights
- Judicial decisions can also have an impact on legislation even when the Court does not actually strike down any law
- Judicial review is not a veto over the politics of the nation, but rather the beginning of a dialogue as to how best reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole
- Also, judges write reasons for their decisions and explain themselves whereas Parliament does not have to give reasons and bad decisions are subject to appeal and to critique

Other Cons

- Judicial activism → Listening to a bunch of special interests’ influences policy – Canadian Civil Liberties Association, Unions, Feminist Groups
- Decisions are made based on the evidence put in front of judges → individual facts; moral questions are solved with what’s in front of them + precedent

K Roach – The Supreme Court on Trial

- Because of ss. 1 + 33 which allow governments to limit and even override rights, judges do not have the last word on controversial issues of social policy
- The Charter has created a middle ground between the extremes of legislative and judicial supremacy
Vriend v Alberta [1998] 1 SCR 493

Facts:

- The SCC found that the omission of sexual orientation from the list of prohibited grounds in Alberta’s human rights legislation constituted an unjustifiable violation of s. 15 of the Charter, the equality rights guarantee

Analysis: (Iacobucci J)

- When the charter was enacted Canada went from parliamentary supremacy to Constitutional supremacy. Rights and freedoms were given to each Canadian that no government or legislature could take away. BUT they are not absolute and can be taken away with section 1. Mutual respect for the branches is important.
- Remedy of an unjustifiable violation of Vriend’s rights under s. 52 of the Constitution. And the right has been granted by the provincial legislatures to the judiciary to review.
- The Courts are independent from the executive and legislature, therefore litigants and citizens can rely on the courts to make reasoned and principled decisions
- The Courts are not to second-guess legislatures and executives – and not to make value judgments on what they regard as proper policy choice – rather they are to uphold the Constitution
- There is a mutual respect – this is sometimes expressed in the provisions of the constitution – ex. s. 7 speaks of no denial of the rights therein except in accordance with the principles of fundamental justice
  - S. 33 – establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts
- Most legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives and by doing this the legislature responds to the courts, hence the dialogue among the branches
- This dialogue allows for each end of the branches to be held somewhat accountable to the other – the work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation
- This dialogue + the accountability enhances the democratic processes, does not deny it
- Judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the Charter

Arguments Against:

- Was it enacted entirely democratic, as it was never subject to any election or referendum of any kind. Is it executive federalism?
- Likely not, as it took 7 Premiers and the PM to elect this. There was a substantial majority of elected representatives who decided to enact it.

IV. CHARTER FRAMEWORK AND APPLICATION

Amending the Constitution

The Canadian Process of Constitutional Amendment

1. Design Issues

- 2 main issues have predominated:
  1) The locus of sovereignty –
     - Which institutions should have the power of constitutional amendment [directly w/ citizens or w/ governments?]
  2) The correct balance to be struck between stability and flexibility –
     - On one hand constitution is meant to provide a framework within which the ordinary politics of political communities take place [if were subject to easy change then it would be more difficult for it to provide a set of background rules for political decision making]
     - But since a constitution often addresses controversial issues, making constitutional change difficult arguably protects political decision making because it reduces the ability of constitutional politics to crowd out ordinary politics [politics of non-constitutional issues]
     - However, if it is too difficult to change it may be incapable of adapting to responding to the changing nature of the political community or to fundamental challenges to the constitutional order itself
     - If too rigid = risk becoming illegitimate rather than a foundation for ongoing existence and functioning of a political order

2. The Canadian Amendment Process

- Until 1982, amendments to most parts of the Constitution required legislation by Parliament of the UK – this process was initiated by a join resolution of the Canadian House of Commons and the Senate
- Generally, provinces were sought when amendment affected their rights and interests
• 1980 – Federal gov’t announced attention to secure necessary constitutional amendment w/o provincial consent – lead to the Patrition Reference 1981
  o Provinces agreed that the constitutional practice crystallized into a legal requirement for provincial consent to constitutional changes affecting provincial interests + fed took position no such consent was required
  o Court held (7-2) there was no requirement for provincial consent but also held that there was a constitutional convention that had been established requiring a substantial degree of provincial consent → such a move would be legal however would be illegitimate
• In a later case brought by QB gov’t to determine whether their consent would be required for ‘substantial degree’ of consent, it was held that QB did not need to be among provinces granting consent
• Another important feature of 1982 constitutional package – it transferred power for amending from Parliament in Westminster to Canadian political institutions

There are 5 rules for amending the Canadian Constitution [in Part V of the Constitution Act]:
1) General amending formula or ‘7/50 formula’ [s. 38(1)] requires consent of Parliament of Canada + of 2/3 of provinces having at least 50% of the population of Canada – no province alone has a veto on the amendment
   a. An amendment cannot be proclaimed until at least 1 year after the initiation of the amendment unless every province has indicated assent/dissent + dies in 3 years if does not have appropriate support
   b. If amendment transfers educational or cultural powers the province opting out is entitled to compensation
2) The ‘unanimity procedure’ [s. 41] requires consent be provided by Parliament and the legislatures of all provinces in relation to amendment to the office of the Queen, the Governor General, and the Lieutenant General if a province
3) The ‘bilateral procedure’ [s. 43] deals w/ provisions of the Constitution affecting only some provinces – where an amendment is in relation to a provision affecting one or more, only the legislatures of the provinces affected and Parliament need to consent
4) The ‘federal unilateral procedure’ [s. 44] allows parliament alone to make amendments to the federal executive or House of Commons or Senate – as long as do not affect other powers
5) The ‘provincial unilateral procedure’ [s. 45] replaces the old 92(1) of the Constitution Act and allows provinces to amend its constitution provided that the amendment does not affect matters governed by other amending formula
• S. 35(1) – amendments affecting Aboriginal rights will be preceded by a constitutional conference of first ministers and representatives of Aboriginal people – however, do not need consent of Aboriginal peoples

Evaluating the Amending Formula
1) Constitutional Amendment After 1982
• Amending formula has been successfully used on 10 occasions since 1982 → 7/50 once for Aboriginal rights [including adding s. 35]; s. 44 used twice for new rules governing H of C and provide for appointment of Senator from Nunavut], the rest made through s. 43 – federal gov’t + one other province
• 2 significant failures -- Meech Lake Accord and Charlottetown Accord → both began as efforts to win Quebec’s acceptance of the 1982 constitutional amendments
  o 1. Meech Lake = constitutional recognition of QB as a distinct society, entrenchment of the SCC and provincial nomination of its justices, an increase in terms requiring unanimity under the amending formula, and controls on federal spending power. All provinces went in agreeing but at last minute NF and MB pulled out. Because it did not take full account of Aboriginal rights in amending constitution.
  o 2. Charlottetown = many of the Meech lake appeared here as well – along w/ changes to distribution of powers, an entrenched Aboriginal right to self-government, and an elected Senate w/ equal provincial representation, and guaranteed level of QB representation in H of C
• Requirements of ss. 38 + 41 meant the accord needed unanimous approval w/in 3 years – the Meech lake accord died in 1990 + Charlottetown was voted down in 1992’
• Constitutional reform = ‘mega-constitutional’ politics → the unwillingness of various constitutional actors to undertake piecemeal or incremental constitutional reform, tackling issues one at a time → instead complex packages [Meech + Charlottetown] will be the norm into the foreseeable future
  o A legal implication = s. 38 + 41 → will apply cumulatively to future packages of constitutional amendments, making amendment very difficult
2) Is Part V Undemocratic?
• Cairns argued that the dominance of governments in the amending formula is inconsistent w/ popular sovereignty and the citizens’ constitution enshrined in the Charter
  o The amending formula presupposes that federalism is the most important constitutional organizing principle, that gov’ts are the major actors in federalism, and that amendment is a matter of those gov’ts to handle –
This ‘gov’ts constitution’ contrasts w/ the ‘citizens’ constitution’ [Charter] which presupposes that the citizen-state axis is no less fundamental than the federal-provincial constitutional axis

The community message of the charter contradicts the community message of the amending formula

Monohan argued that the process surrounding the Charlottetown accord illustrates the democratic potential of Part V

Some say that resort to a referendum during the Charlottetown accord established a constitutional convention of popular ratification of amendments

Relevant Legislation

- Referendum Act, 1982
- Constitutional Amendments 1996 – Gave out constitutional veto’s – to ON, QB, BC, AB technically
- Constitutional Amendment Act, RSA, 2000 – AB has to have a referendum before agreeing to any constitutional changes and if AB voting public does not vote for constitutional change, we do not give our consent
  - Still constitutional because not amending the 7/50 formula, but instead setting a higher bar, with more procedural requirements
- Secession Reference Case – If there is a clear democratic expression that gives rise to the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire

The Framework of the Charter

- The charter establishes a two-step process for the adjudication of rights claims
  - 1) Whether a Charter right has been breached by a state act – the court must define the protected interest or activity and determined whether it has been interfered w/ by the state [burden of proof lies w/ the party claiming a breach of rights]
  - 2) If find a Charter right has been breached, then justification of limits on Charter rights – s. 1 states that the protected rights + freedoms may be limited provided the limits are prescribed by law, reasonable, and demonstrably justified’ [burden of proof lies w/ party seeking to uphold the limitation]

Interpreting Rights

A Purposive Approach

- In Hunter the Court held that judgment about the scope or value of a particular right can only be made after the court has specified the purpose underlying the right or delineated the nature of the interests it is meant to protect

Hunter v Southam 1984 SCC

Facts:

- Involved s. 8 guarantee of freedom from unreasonable search and seizure
- A search of newspaper offices was carried out by the Combines Investigation Branch
- The statutory basis for the search did not require prior judicial authorization

Issue:

- What does the term ‘unreasonable’ mean in the s. 8 guarantee of freedom from unreasonable search and seizure?

Decision:

- S. 8 protects an individual’s reasonable expectation of privacy – provisions of the Combines Act that allowed the search were invalid. Appeal dismissed.

Ratio:

- 1) Must first understand the purpose of the section in question and delineate the nature of the interest it is meant to protect and consider the purpose of such a guarantee, including reference to (i) The character and language of the Charter, (ii) historical origins of the concepts enshrined, and (iii) the meaning/purpose of the other specific rights and freedoms which it is associate within the text of the Charter
- 2) Then focus on the reasonable/unreasonable impact in the case, not in furthering some valid gov’t objective

Analysis: (Dickson CJC)

- Not easy to determine meaning of a word in the constitution – not a dictionary definition, nor a statute that can be easily enacted + repealed, a statute also defines present rights + obligations
- Before look at section 8 must look to the broader purpose of the Constitution itself
- Constitution differs from statute since it is drafted w/ an eye to the future and the purpose is to provide a continuing framework, for protection of individual right and liberties; it must be capable of growth + development to meet new historical, political, and social realities often unimagined by its framers [there is a need for a broad perspective in
approaching constitutional documents – Edwards (living tree capable of growth + expansion)]; it is also the supreme law so our interpretation must be guided by this

- **Broad + purposive analysis** = interprets specific provisions of a constitutional document in the light of its larger objectives
- **Larger objectives** = principals of fundamental justice mean procedural fairness, Charter is a part of a large democratic process with many entities agreeing to it, Living Tree

- **Charter is purposive:**
  - Its purpose is to guarantee + to protect, within the limits of reason, the enjoyment of rights and freedoms it enshrines
  - Intent is to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action
- It does not itself confer any powers – this leads to an assessment of the constitutionality of search + seizure must focus on ‘reasonable’ or ‘unreasonable’ impact on the subject of the search or the seizure + not on the rationale to further a valid gov’t objective
- Since the proper approach is purposive – before it is possible to assess reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search:
  - 1) it is first necessary to specify the purpose underlying s. 8 – to delineate the nature of the interest it is meant to protect and consider the purpose of such a guarantee. REFERENCE → (i) The character and language of the Charter, (ii) historical origins of the concepts enshrined, and (iii) the meaning/purpose of the other specific rights and freedoms which it is associate within the text of the Charter
  - 2) Then focus on the reasonable/unreasonable impact in the case, not in furthering some valid gov’t objective
- When there is ambiguity, the court must prefer the rights protecting approach

**Big v Drug Mart 1984**

- Purposive = the meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee – to be understood in light of the interests it was meant to protect
- This can be done by reference to the character and larger objects of the Charter itself; the language chosen to articulate the right or freedom, the historical origins of the concepts enshrined, and to the meaning + purpose of other specific rights and freedoms associated w/ the Charter
  - This interpretation should be generous as opposed to legalistic – allowing for the full benefit of the Charter’s protection
  - BUT must not overshoot the purposes of the Charter right – was not enacted in a vacuum [not out to invent new Charter rights or to reinvent the Charter – still must stick w/ the text of the Charter]
- Difference between statute
  - Charter uses more general language + entrenches more political/moral ideals subject to significant disagreement
  - The two step structure of adjudication rests on the idea that there are two distinct issues to be addressed → the definition of the rights + the justification of limits

**Amendment of Charter**

- Judicial Change – Courts change interpretation of Charter
- Constitutional Conventions
- Amending Formula – Constitutional Amendment Act, AB Requirement [70/50]

**Aids to Interpretation**

1) **Interpretive Provisions in the Charter**
   - These include s. 27 – the Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of the Canadians
   - S. 28 – Notwithstanding anything in this Charter, the rights + freedoms referred to in it are guaranteed equally to male + female persons
2) **Parliamentary and Committee Debates**
   - Minimal weight – become frozen in time to the moment of adoption w/ no growth, ensure that using these do not stunt the growth of the Charter [Reference re Section 94(2) of the Motor Vehicle Act]
3) **Canadian Pre-Charter Jurisprudence**
   - Cautious in applying Canadian Bill of Rights decisions – because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament
4) **Comparative and International Sources**
• Canadian Courts refer to American cases + commentary on their Charter decisions, but need to use them with caution – these constitutions were born to different countries, in different ages, and in very different circumstances. Canadian and US are not alike in every way [must appreciate that fact]
• International – human rights obligations reflect purposes of a free and democratic society + thus those values and principles that underlie the Charter itself

Patrick Macklem, "Social Rights in Canada"
• International law has become a significant feature of judicial interpretation by the SCC of the nature + content of rights and freedoms guaranteed by the Charter
• The Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified [Dickson CJC]
• Even use international treaties that Canada is not party too

V. CHARTER APPLICATION

Introduction: The Debate About Application to Private Action
• Before considering whether a Charter right has been infringed by an impugned course of action/inaction we need to first determine whether the Charter even applies
• The answer to this question lies in the interpretation of s. 32(1) of the Charter:
  o "This Charter applies (a) to the Parliament and gov’t of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon territory and NWT; and b) to the legislature and gov’t of each province in respect of all matters within the authority of the legislature of each province
• In Dolphin Delivery, it was determined by the SCC that the Charter does not apply directly to private actors

Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd [1986] SCC
Facts:
• Union members were engaged in a labor dispute with their employer [Purolator] and wished to picket Dolphin’s premises on the grounds that the company was related to Purolator + was performing work for Purolator during the strike
• Since the applicable labor legislation, the Canada Labor Code, did not regulate secondary picketing the legality of the picketing fell to be determined by the common law
• Based on the common law of tort inducing breach of contract, a BC court issued an injunction to restrain the picketing. On appeal the union sought to have the injunction overturned on the ground that it violated its members’ freedom of expression [under s. 2(b)] – CA dismissed the appeal

Issues:
• The validity of a court order restraining the appellant union from picketing the premises of the respondent company, Dolphin Delivery

Decision:
• Peaceful picketing enjoys protection under s. 2(b) – Dolphin is not related to Purolator, therefore an injunction to restrain the union from picketing Dolphin’s premises was a reasonable limit on expressive freedoms that could be justified pursuant to s. 1
• BUT, there is no reliance upon or exercise of governmental action which would invoke the Charter – therefore, the appeal must fail
• The Charter does not apply to litigation between private parties

Ratio:
• Where the exercise of, or reliance upon governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable
• HOWEVER, where two private parties are in litigation relying on common law and where no act of government is relied upon to support the action, the Charter will not apply

Analysis: (McIntyre J)
Does the Charter apply to common law?
• Yes – s. 52 provides that ‘any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect’ – broad enough to include the common law

Does the Charter apply to litigation between private parties?
• The Charter does not apply to private litigation
• S. 32 of the Charter is conclusive on this issue – it refers to the Parliament + Gov’t of Canada and to the legislature + gov’ts of provinces in respect of all matters within their respective authorities \( \Rightarrow \) from this it can be seen that Parliament + Leg are treated as separate branches, distinct from the executive branch of gov’t, therefore when the word ‘gov’t’ is used in s. 32 it refers to a specific branch of gov’t = the **executive branch**

• To the extent that an action relies on statutory authority which results in an infringement of a guaranteed right or freedom, the Charter will apply and it will be unconstitutional – it will be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a Charter right or freedom – in this way the Charter will apply to common law [whether in private or public litigation]

• HOWEVER, it will apply to the common law only so far as the common law is the basis of some governmental action which [it is alleged] infringes a guaranteed right or freedom

• To regard a court order as an element of governmental intervention necessary to invoke the Charter would widen the scope of the Charter application to virtually all private litigation

• The judiciary must still apply + develop principles of the common law in a matter consistent w/ the fundamental values enshrined in the Constitution – therefore, it is still relevant to private litigants who disputes fall to be decided at common law

**Note:**

• The ruling that the Charter does not apply directly to judges when developing + applying the common law has been significantly attenuated by subsequent rulings

• The ruling that the Charter does not apply directly to private actors is generally accepted

• The Charter **only** applies to gov’t – defining gov’t is difficult however – actions can qualify as governmental in two ways:
  o 1) if the actor itself is governmental, then its actions are subject to the Charter. Includes components + members of the legislative and executive branches of gov’t, and other entities that are controlled by government or that are exercising governmental functions
  o 2) Non-governmental actors may be subject to the Charter if they are engaged in governmental acts, such as implementing a governmental program or exercising a power of compulsion conferred by statute

• Charter can apply to both government action + government inaction \( \Rightarrow \) this is because the rights + freedoms set out in the Charter impose a mix of positive and negative obligations on governments – to the extent that the Charter imposes positive obligations on governments, it must also apply to government inaction to be coherent [ex. s. 23 (minority language education facilities) + s. 14 (right to an interpreter)]

### Governmental Action

**A. Governmental Actors**

• If an entity is part of gov’t, then the Charter will apply to all of its actions – when laws are passed by Parliament + provincial legislatures (due to s. 32) they must comply w/ the Charter

• “Government” under s. 32 includes the executive branch, including cabinet, ministers, officials employed in gov’t departments, police officers, and other public agencies or agents that are subject to ministerial control or charged w/ performance of governmental responsibilities [but does not include **every** entity that is controlled to some degree by gov’t]

### Entities Controlled by Government

**McKinney v University of Guelph 1990 SCC**

**Facts:**

• Eight faculty members and a librarian challenged the mandatory retirement policies of 4 Ontario universities

• They argued that the universities policies violated the equality guarantees found in s. 15 by discriminating on the basis of age

**Issue:**

• 1) Can universities be said to be government actors under s. 32 of the Charter?

• 2) The provincial human rights code, [only protected ages between 18 – 65 from age discrimination] violated s. 15

**Decision:**

• The universities mandatory retirement policies did not come within the concept of government action

• The respondent universities do not form part of the government apparatus and they are autonomous entities, therefore their actions do not fall within the ambit of the Charter - appeal dismissed

• The provision in the provincial Human Rights Code was found to violate s. 15, but upheld under s. 1

**Ratio:**

• The mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is not sufficient to make its actions subject to the Charter
• **CONTROL TEST** (dissent) in determining whether the Charter applies to an entity controlled by the government (i.e. a creature of statute) what matters is control, and if the government controls an entity, if even it is a private entity, then EVERYTHING that entity does is subject to the Charter.

Analysis: (La Forest J)
- Opening up private activities to judicial review could impose an impossible burden on the courts
- **Appellant argument:**
  - Universities constitute part of the legislature/gov’t of the province w/in s. 32 as they are creatures of statute which exercise powers pursuant to statute and carry out a public function pursuant to statutory authority
  - BUT, the mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is not sufficient to make its actions subject to the Charter
    - These entities may be established to facilitate performance of tasks that those seeking incorporation wish to undertake and control, not to facilitate the performance of tasks assigned to gov’t
    - Would undermine purpose of s. 32 to confine the application of the Charter to legislative and government action to apply it to private corporations
  - Universities have the ability to negotiate contracts and collective agreements w/ their employees and to include within them provisions for mandatory retirement, and these actions are not taken under statutory compulsion [not following dictates of the gov’t by entering into these arrangements]
- **Many institutions perform functions that are of important public nature, but are not part of the gov’t:**
  - Railroads, airlines, institutions of learning, symphonies
  - A public purpose test is **inadequate**
- **Appellant argument:**
  - Must look at the entire context – including the facts that universities are established by statute which determines their powers, objects, and governmental structures, they rely on public funding
  - It is evident that the fate of universities depends on government + that they are subject to limitations due to regulation or dependence on gov’t funds – however, does not mean they are organs of gov’t
  - Their duty is to act in the interests of the university not that of the government

Dissent: (Wilson J):
- Broader view of gov’t that is ‘sensitive to the wide variety of roles that gov’t has come to play in our society + the need to ensure that in all of these roles it abides by the constitutional norms set out in the Charter’
- Set out 3 tests:
  - 1) The ‘control’ test – asks whether the legislative, executive, or administrative branch exercises general control over the entity in question
  - 2) The ‘government function test’ – whether the entity performs a traditional gov’t function or a function that in more modern times is recognized as the responsibility of the gov’t
  - 3) The ‘statutory authority and public interest’ test – whether the entity is one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that gov’t seeks to promote in the broader public interest
- Universities satisfy all 3

**Stoffman v Vancouver General Hospital 1990 SCC (p. 808)**
- Doctors at the hospital – mandatory retirement at 65
- 14/16 members were appointed by gov’t plus the governing statute required all regulations be approved by the Minister of Health AND still decided that the hospital was not a part of gov’t nor was the regulation in issue an act of the gov’t
- **Routine control of the hospital was in the hands of the hospital’s board of trustees** rather than in the hands of the provincial gov’t, and these independent/autonomous decisions of the Board were not sufficient to make it subject to the Charter.
- If this routine control of policies was in hands of gov’t or if the mandatory policy had been dictated by gov’t, the Charter would have applied
- Dissent: greater degree of governmental involvement here than in McKinney

**Douglas/Kwantlen Faculty Association v Douglas College 1990 SCC**
- Challenge to a mandatory retirement provision in a collective agreement between a college + union
- The affairs of the college were managed by a board appointed to the prov. gov’t
- Minister allowed to establish and issue directions + approve all bylaws of the board = Charter applied to the actions of the college in negotiation and administration of the collective agreement between itself and the association representing the teachers and librarians at the college
- The gov’t may at all times by law direct the operation of the board → it is part of the apparatus of gov’t both in form + fact
• DIFFERENCE – BC/ON schools = significant amount of internal autonomy; BC college = subject to routine or regular governmental control

Greater Vancouver Transportation v Canada Federation of Students 2009 SCC
• Whether the corporations that operated public transportation in BC violated Charter’s freedom of expression by refusing to accept political advertising to be placed on the sides of their busses
• Found that both TransLink and BC Transit were bound by the Charter and so their advertising policies had to be rewritten to comply with s. 2(b)
• Found it to be a statutory body designated by legislation as an ‘agent of the gov’t’ and the Lieutenant Governor has the power to manage BC Transit’s affairs and operations by means of regulations.
• Cannot be found to be operating autonomously because gov’t has substantial control over day-to-day activities
• TransLink not itself part of the apparatus of gov’t, but governmental because of the substantial control that the municipality exercised over it
• All directors appointed by gov’t must look at actual control over the entity itself
• And if found to be controlled by the gov’t, then all policy/actions/regulations are subject to the Charter (even those private in nature)

Lavigne v Ontario Public Service Employees Union 1991 SCC
• Union payments regardless of belong to union or not. Did not want to pay because did not support the specific political views.
• Agreement between union and Council of Regents (exclusive statutory authority to negotiate collective agreements on behalf of all colleges in the province) provided for the compulsory payment of union dues
• Charter does not apply to the union, but it did apply to the Council of Regents because it was subject to ‘routine or regular control’ by the Minister of Education
• Commercial + contractual activities of the gov’t are not exempt from the Charter
• Colleges are controlled by gov’t, then part of gov’t for purposes of s. 32, therefore everything the college does is subject to the Charter [routine + regular control]
• Once an entity is found to be controlled by gov’t, all of its activities are subject to the Charter

Entities Exercising Governmental Functions
• Even if an entity is not part of the apparatus of the gov’t because it is not subject to regular ministerial control, it may nevertheless qualify as government for the purpose of s. 32 if it is exercising governmental functions

Godbout v Longueuil (City) 1997 SCC [Governmental in Nature]
Facts:
• City of L adopted a resolution requiring all new permanent employees to reside within its boundaries
• As a condition of her employment, the respondent signed a resolution promising she would establish her principal residence in the city and she would continue to live there for as long as she remained in the city’s employ
• If she moved out of the city for any reason, she could be terminated without notice therefore, when she moved she was terminated

Issues:
• Does the city’s requirement violate her rights?

Decision:
• The SCC held that city’s requirement for residence violated the right to respect for private life set out in s. 5 of Quebec’s Charter of Human Rights and Freedoms
• Majority found it was also unnecessary to determine whether it also violated the Canadian Charter

Ratio:
• If an entity is governmental in nature, then it will be considered a gov’t for the purposes of the Charter. And everything the entity does will be subject to the Charter.
• Want to look at 1) the degree of governmental control exercised over them and 2) the governmental quality of the functions they perform

Analysis: (La Forest J in concurrence)
• The policy also violates the Charter [s. 7]
• Where entities other than the Parliament, the provincial legislatures, or the federal or provincial governments are in reality ‘governmental’ in nature [as evidenced by such things as the degree of gov’t control exercised over them, or by the governmental quality of the functions they perform] they cannot escape Charter scrutiny
S. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments

Particular entities will be subject to the Charter scrutiny in respect of certain governmental activities they perform even if the entities themselves cannot be described as governmental

Charter rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender [if gov’t putting their powers into other entities that are not guarded by the Charter]

The view that municipalities are subject to the Charter is not only sound, but also wholly consistent with the case law – though they are institutionally distinct from the provincial governments that create them, they cannot be described governmental entities

• 1) Municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament + the provincial legislatures are accountable to the electorates they represent
• 2) Municipalities possess a general taxing power that, for the purpose of determining whether they can rightfully be described as gov’t, is indistinguishable from the taxing powers of Parliament or the provinces
• 3) Municipalities are empowered to make laws, to enforce them and administer them

Conclusion: Since municipalities derive their existence and law-making authority from the provinces, and since the Charter clearly applies to the prov. legislatures + gov’ts, it must also apply to entities they confer governmental powers within their authority. Otherwise gov’t authorities could simply shirk their Charter obligations.

Apply to labor arbitrators as well – in both cases, the ultimate source of authority is gov’t per se and therefore, the entity under scrutiny will be kept in check through the application of the Charter [just as if the gov’t were performing the actions]

B. Governmental Acts

I. Entities Implementing Government Programs

Eldridge v British Columbia 1997 SCC

Facts:

• 3 individuals [born deaf] sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s. 15 of the Charter
• According to the Medical and Health Care Services Act, the power to decide whether a service is ‘medically required’ and hence a ‘benefit’ under the Act is delegated to the Medical Services Commission
• In the case of the Hospital Insurance Act, hospitals were given discretion to determine which services should be provided free of charge – the hospital/commission did not make sign language interpretation available as an insured service

Issues:

• Does protection under s. 15(1) apply to mandatory sign language interpretation under the Hospital Insurance Act in hospitals? Does the Charter apply to the Commission?

Decision:

• Yes – the failure to provide funding for sign language violated the applicant’s equality rights

Ratio:

• When there is a direct and defined connection between a specific gov’t policy + the hospitals impugned conduct – the services under the Act are an expression of gov’t policy and are therefore subject to the Charter
• If the Commission implements a gov’t policy – gov’t delegated power to them to determine what constitutes a medically required service = acts in gov’t capacity and therefore subject to Charter

Analysis: [La Forest J]

• Since legislatures may not enact laws that infringe the Charter, they cannot authorize/empower another person/entity to do so – however, they may give authority to a body that is not subject to the Charter
  • Example – corporations are entirely created by statute, however are not subject to the Charter because legislatures have not entrusted them to implement specific governmental policies
• 1) If it is alleged that an action (and not the legislation that regulates them) of a quasi-public institution [which may be independent from the gov’t in some respects but in other exercise delegated gov’t powers] violates the Charter, it must be determined that the entity in performing that action, is part of the government within the meaning of s. 32 [either by the very nature or in virtue of the degree of governmental control exercised over it]
  • When an entity is determined to be part of the fabric of gov’t, the Charter will apply to all its activities including those that might be thought of as ‘private’ [Douglas College] – gov’t cannot evade Charter responsibilities by implementing policy through vehicle of private arrangements
2) The Charter can still apply to non-governmental [private] entities in certain circumstances – ex. when engaged in activities that can in some way be attributed to gov’t [if act in furtherance of a specific gov’t program/policy – University of Guelph] – then the entity performing the act will be subject to review under the Charter only in respect of that specific act.

It is not enough to say that hospitals are not ‘government’ for the purposes of s. 32 – in Stoffman = hospitals are non-gov’t entities whose private activities cannot be subject to the Charter [in Stoffman the mandatory retirement policy was a matter of internal hospital management, but was not instigated by the gov’t – hospitals in BC have varying retirement ages all w/ ministerial approval – reflects a large measure of managerial autonomy].

HERE – the Hospital Insurance Act reveals that in providing medically necessary services, hospitals carry out a specific governmental objective [gov’t defines the content of the service delivered/persons entitled to receive it].

2. Entities Exercising Statutory Powers of Compulsion

In addition to gov’t actors and non-gov’t actors implementing specific gov’t programs, the Charter also applies to non-gov’t actors exercising coercive statutory powers.

In Slaight Communications Inc v Davidson SCC it was held that the Charter applied to the order of an adjudicator acting pursuant to the Canada Labor Code because the adjudicator was exercising power conferred by legislation.

**Governmental Inaction**

**Vriend v Alberta** 1998 SCC

**Facts:**
- This case involved the challenge to the omission of sexual orientation from Alberta’s Individual Rights Protect Act (IRPA) – scheme was to prohibit discrimination in public life and to establish a commission for enforcement.

**Issues:**
- Does the omission of sexual orientation violate equality rights under s. 15 – does s. 32 of the Charter prohibit consideration of a s. 15 violation when it arises from a legislative omission?

**Decision:**
- Yes – the Charter applies to legislative omissions.

**Ratio:**
- **The application of the Charter is not restricted to situations where the gov’t actively encroaches on rights**
- Where a challenge concerns an Act of the legislature that is under-inclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the Charter.

**Analysis:** [Cory J]
- Respondent argument = a deliberate choice not to legislate should not be considered gov’t action and therefore should not attract Charter scrutiny; this is a legislative omission; not gov’t action.
- HOWEVER – there is nothing in s. 32 or the jurisprudence concerned w/ application of the Charter that requires such a narrow view of the Charter’s application.
- S. 32(1)(b) = Charter applies … in respect of all matters within the authority of the legislature.
  - Matters within legislative authority could include an omission.
- Since we take a broad and purposive interpretation (Hunter) to the Constitution then a broad and generous reading would catch more government action, and inaction is more protective of individual rights.
- The application of the Charter is not restricted to situations where the gov’t actively encroaches on rights.
- **Do not want the form rather than the substance to determine whether something is open to challenge**

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

- Dolphin Delivery stands for the proposition that the Charter does not apply to the common law when relied upon by private litigants – nor does it apply to a court order issued at the conclusion of litigation between private parties resolved on the basis of the common law interpreted in a manner that is consistent with Charter principles.
- However, courts have started to become more comfortable w/ the notion that the common law needs to be applied and developed in a manner consistent w/ Charter values.
- The common law does not to be

**A. Reliance by Gov’t on Common Law**
- Charter will apply to common law when it is relied on in litigation involving a gov’t party or proceedings initiated for public purpose.

**B. Reliance on Common Law in Private Litigation**
- The Charter does not apply directly – but it is still relevant.
Hill v Church of Scientology 1995 SCC

Facts:
- This case arose as a libel action brought by Crown Attorney Casey Hill against the Church of Scientology and its lawyer

Issues:
- Whether the common law of defamation is inconsistent with the Charter guarantee of freedom of expression

Decision:
- No – the common law of defamation reflects an appropriate balance between the competing interests of freedom of expression and protection of reputation of an individual – appeal dismissed

Ratio:
- In the context of civil litigation involving only private parties, the Charter will ‘apply’ to the common law only to the extent that the common law is found to be inconsistent w/ Charter values

Analysis: [Cory J]
- Private parties owe each other no constitutional duties and cannot found their cause of action upon a Charter right
- The most a private litigant can do is argue that the common law is inconsistent w/ Charter values – cannot allege that the common law violates a Charter right [there is a distinction between Charter rights vs. Charter values ➔ Charter rights do not exist in the absence of state action]
- Far reaching changes to the common law must be left to the legislature
- When the common law is in conflict w/ Charter values, the traditional s. 1 analysis is not appropriate. The balancing must be more flexible than the traditional s. 1 analysis – Charter values framed in general terms should be weighed against the principles which underlie the common law
- Further – the private party challenging the common law is inconsistent w/ the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that the common law should be modified [aka after balancing values, the provisions cannot be justified] – not fair for the other party to have to defend the right
- The Charter has played and will continue to play a central role in defining the legal and social fabric of this country, even in the absence of legislation or government action
- Courts, should scrutinize common law rules closely to ensure that they are not out of step with the values enshrined in the Charter
- If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

Territorial Limits on the Application of the Charter
- Foreign gov’ts are not bound to comply w/ the Charter
- S. 32 does not provide a territorial limitation, just that it applies to all matters within the authority of Canadian gov’ts. But it does not say it has to stop at the borders.
- The general rule in public international law is that a state can enforce its law beyond its territory. Therefore, the Charter cannot be used to impose Canadian constitutional standards on foreign officials and procedures.
- In Cook 1998 SCC – it was held that the Charter applies on foreign territory in circumstances where the impugned act falls within the scope of s. 32 of the Charter on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action, and where the application of Charter standards will not conflict with the concurrent territorial jurisdiction of the foreign state

Hope SCC 2007
- It was determined that s. 32 requires a consideration of two issues:
  - 1) Whether the conduct of a Canadian state actor is at issue, and
  - 2) If so, is there an exemption to the principle of sovereignty (deference to other Nations) that would justify applying the Charter
- WHAT ARE EXCEPTIONS? – [Maybe violation of human rights or consent of foreign state??]
- Whether the challenged state action is in respect of a matter falling within the authority of the Canadian gov’t
- Must look at all of the circumstances before can say that the Charter applies
- The Charter will generally not apply to actions of Canadian authorities in a foreign jurisdiction – w/ 2 exceptions:
  - 1) Actions that violate international human rights – participation of Canadian officers in activities in another country that violate Canada’s international human rights obligations might justify a remedy under s. 24 of the Charter (ex. Khadr)
2) Consent of the foreign state to the application of the Charter – in such a case, the investigation would be a matter within the authority of Parliament and fall within scope of s. 32

Canada v Khadr 2008 SCC

- Khadr relied on the Charter to obtain disclosure of all relevant documents in the possession of the Canadian Crown. He has a Charter right to disclosure of the interrogation.
- If the Guantanamo Bay process under which Khadr was being held was in conformity w/ Canada’s internal obligations then the Charter has no application – however, if Canada was participating in a process that was violative of Canada’s binding obligations under international law the Charter applies to the extent of that participation.
- The conditions Khadr was being held under were illegal under both US and international law – therefore, no question of deference to foreign law arises
  - Interrogation is a violation of international human rights – would be an exception
- “The Charter bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada’s international obligations.” – i.e. “a clear violation of fundamental human rights protected by international law.”
- The SCC held that the Charter applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held ... that “the principles of international law and comity that might otherwise preclude application of the Charter to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay”, given holdings of the Supreme Court of the United States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law... The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court’s order.

Amnesty International Canada v Canada FCA 2008

- Afghan detainees being held by Canadian forces – differs from Khadr (a Canadian citizen), therefore had no attachment to Canada/its laws – the applicable law is the international humanitarian law. All circumstances must be considered including whether there is effective control over the territory and the acquiescence of Canadian Law
- But – “This does not mean that the Charter then applies as a consequence of these violations .... all the circumstances in a given situation must be examined before it can be said that the Charter applies” (para. 20)
- i.e. Is there “effective control” over territory? Has there been acquiescence to the extension of Canadian law?

Canada v Khadr 2010

- “As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the Charter. International customary law and the principle of comity of nations generally prevent the Charter from applying to the actions of Canadian officials operating outside of Canada ...The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations or fundamental human rights norms...
- The question before us, then, is whether the rule against the extraterritorial application of the Charter prevents the Charter from applying to the actions of Canadian officials at Guantanamo Bay.
- Argued that if the charter applies to him in Guantanamo Bay, there should also be a remedy. His s. 7 rights had been infringed by Canadian state action - participated in his torture. Requested that the appropriate remedy was his release
- There is a reason to deviate from the principle that the charter does not apply (found in 2008)
- Satisfied that what was found in 2008 continues to be the case today
- The court says that there cannot be a remedy - many factors in play - constitutional authority of the executive in the conduct of foreign affairs is at play - need to be cautious
- Declare that his rights have been infringed, and ask the government to deal with that appropriately
- Ordered that the government request his release - government appealed this - the federal court of appeal said that Khadr plead guilty to murdering a soldier so he is no longer being detained for a human rights violation and the question need not be answered

DEFINING LIMITATIONS: SECTION 1

Victorian Charter

Victorian Charter, 1971: Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the Legislature of a Province, within the limits of their respective legislative powers, or by the construction or application of any law.

- Broad limitations clause - wide sweep of justifications for limiting rights and freedoms

1980 Draft: The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

- Remove the long list of justifications
• Recognizes vs. guaranteeing
• Parliamentary system of government - are all the limits accepted because they are passed by a parliamentary government generally accepted because the majority chose it - too broad. When you limit the ability to limit, rights become broader and more protected - this is more achieved in s. 1

There are two main structural components of s. 1: 1) the requirement that all limits on rights be “prescribed by law” and 2) the requirement that limits be “reasonable” and “justified in a free and democratic society”

A) Prescribed by Law
• Before the gov’t may argue that competing interests justify the limitation of a Charter right, it must first show that the limit is ‘prescribed by law’ – this serves as a gatekeeper function, limiting the number of instances in which an infringement will be upheld under s. 1

• The two related values advanced by ‘prescribed by law’ requirement according to the European Court, are 1) the law must be adequately accessible; and 2) “law” must be formulated with sufficient precision to allow the citizen to regulate his conduct [intelligibility to the citizen]

• Another justification offered for this requirement is the need to ensure public accountability for any restriction on a constitutional right – this precludes the legislature from granting broad discretion to administrative actors to limit protected rights

• Irwin Toy Ltd. v Quebec (SCC) – courts have been reluctant to set too high a standard for the prescribed by the law requirement – absolute precision in law rarely exists – the question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work – on the other hand, where there is no intelligible standard + where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances there is no ‘limit prescribed by law’
  o Here, a corporation brought a charter challenge against a Quebec law that prohibited commercial advertising directed at children under 13
  o The Court found that the restriction was sufficiently clear to satisfy the prescribed by law standard, and then went on to uphold the law as a justified restriction on freedom of expression

• In some cases, courts have preferred to deal with the claim that a restriction is too vague or too broad in its grant of discretion at the second stage of s. 1 analysis

• Osbourne v Canada – vagueness can have constitutional significance in 2 ways:
  o 1) a law be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power – in these situations there is no limit prescribed by law and no section 1 analysis is necessary as the threshold requirement for its application is not met
  o 2) In the analysis of s. 1 – a law which passes the threshold test may by reason of its imprecision not qualify as a reasonable limit – generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits – here, vagueness is an aspect of overbreadth

Facts:
• The accused were charged under the Combines Investigation Act with conspiring to lessen competition unduly in the sale of prescription drugs – they moved to quash the indictment arguing that the provisions under which they were charged violated s. 7 on grounds of vagueness

Issue:
• Do the provisions of the Combines Investigation Act violate s. 7 on the grounds of vagueness?

Decision:
• No, Argument rejected - appeal dismissed

Ratio:
• Court will be reluctant to find a disposition so vague as not to qualify as ‘law’ under s.1 and will rather consider the scope of this disposition under the ‘minimal impairment’ test

• Outside of cases where the limitation of life, liberty, and security would not otherwise be objectionable but for the vagueness of the impugned law, the proper place of a vagueness is under s. 1

Analysis: (Gonthier J)
• Vagueness can be raised under s. 7 because it is a principle of fundamental justice that laws may not be too vague; it can also be raised under s. 1 on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on Charter rights be ‘prescribed by law’; also satisfies the minimal impairment stage of Oakes
• Doctrine of vagueness is founded on the rule of law, on the principles of fair notice to citizens and limitation of enforcement discretion
• Factors to be considered in determining whether law is too vague: need for flexibility/interpretative role in courts; impossibility of achieving absolute certainty; possibility of varying judicial interpretations of a given disposition

The Proper Place of the Doctrine of Vagueness in Charter Adjudication
• Vagueness under s. 1 or s. 7 involves similar considerations – vagueness as it relates to the minimal impairment branch of s. 1 merges with the related concept of overbreadth
• Rationales of fair notice to the citizen and limitation of enforcement discretion are put forward in every discussion of vagueness
• Court will be reluctant to find a disposition so vague as not to qualify as ‘law’ under s.1 and will rather consider the scope of this disposition under the ‘minimal impairment’ test
• The justifications invoked for the doctrine of vagueness under both s. 7 and s. 1 are similar – the Court sees no ground for distinguishing them
• Outside of cases where the limitation of life, liberty, and security would not otherwise be objectionable but for the vagueness of the impugned law, the proper place of a vagueness is under s. 1

Content of the Doctrine
• The threshold for finding a law vague is relatively high
• Absolute precision in the law is unattainable and the law needs to be generalized in order to be practical
• The 2 rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as theoretical foundations of the doctrine of vagueness – these rationales have been broadly linked w/ the principles known as the ‘rule of law’

a) Fair notice to the citizen
• Fair notice comprises of 2 elements –
  o 1) there is the more formal aspect of notice – acquaintance w/ the actual text of a statute; 2) principles of fundamental justice, such as the doctrine of vagueness must have a substantive as well as procedural content – substantive aspect = a notice or understanding that some conduct comes under the law → a subjective understanding that the law touches upon some conduct based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society
  • The substantive aspect of fair notice is a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society

b) Limitation of law enforcement discretion
• ‘Standardless sweep’ has been used to described the limitation of enforcement discretion rationale for the doctrine – a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute
• When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law the law will be unconstitutionally vague

Scope of the Provision
• An unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague
• A vague provision does not provide adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria – it does not sufficiently delineate any area of risk and therefore, can provide neither fair notice to the citizen nor a limitation of enforcement discretion

Vagueness + Rule of Law
• Laws that are framed in general terms may be better suited to the achievement of their objectives – a very detailed enactment would not provide the required flexibility and might further obscure its purposes behind a veil of detailed provisions
• So a delicate balance must be maintained between societal interest and individual rights
• Once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the ‘minimal impairment’ stage of s. 1 analysis

B) Justification/The Oakes Test

The Oakes Test
• The SCC’s first comprehensive treatment of the meaning of s. 1 came from R v Oakes, which remains the primary referent for this second stage of Charter adjudication
R v Oakes 1986 SCC

Facts:
- S. 8 of the Narcotic Control Act created a ‘rebuttable presumption’ that once the fact of possession of a narcotic has been proven, an intention to traffic would be inferred unless the accused established the absence of such an intention.
- The accused challenged this ‘reverse onus’ provision arguing it violated s. 11(d) of the Charter.

Issue:
- Does s. 8 violate s. 11(d) of the Charter?

Decision:
- Yes – The provision does violate s. 11(d) of the Charter and is not saved under s.1.
- Appeal dismissed

Analysis: (Dickson CJC)
- Section 1 has two functions: 1) it constitutionally guarantees the rights and freedoms set out in the provisions which follows; and 2) it states explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured.
- Any s. 1 inquiry must be premised on the understanding that the impugned limit violates constitutional rights and freedoms.
- The onus of proving that a limit on a right or guarantee is reasonably and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation [demonstrably clearly indicates that the onus of justification is on the party seeking to limit].
- Where evidence is required to prove the elements on a s. 1 inquiry – the evidence should be cogent and persuasive and make the clear the consequences of imposing or not imposing the limit.
- Must satisfy two criteria to establish a limit is reasonable + demonstrably justified in a free + democratic society:
  - 1) The objective must be of sufficient importance [substantial and significant] to warrant overriding a constitutionally protected right or freedom – standard must be high to ensure that objectives which are trivial or discordant w/ the principles integral to a free and democratic society do not gain s. 1 protection.
  - 2) Once a significant, substantial objective is recognized the party invoking the s. 1 must show that the means chosen are reasonable and demonstrably justified – w. a form of proportionality test [R v Big M Drug Mart] → Must balance interests of society with those of individual/groups.
    - 1) Rational connection: The measures adopted must be carefully designed to achieve the objective in question – must not be arbitrary, unfair, or based on irrational considerations [must be rationally connected to the objective].
    - 2) Minimal Impairment: The means, even if rationally connected to the objective, should impair as little as possible the right/freedom in question.
    - 3) Proportionality between means and effect: There must be proportionality between the effects of the measures which are responsible for limiting the right/freedom and the objective which has been identified as of sufficient importance [the more severe the deleterious effect of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society].
- Here, the Court found that s. 8 had an objective of protecting the society from ills associated w/ drug trafficking and this was of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases, and that the seriousness of the problem was self-evident.
- However, the Court found that the means to implement this objective [the reverse onus] failed the 1st step of the proportionality test as the means were not rationally connected to the objective of curbing drug trafficking because there was no rational connection between possession of a small quantity of narcotics and an intent to traffic.

The Subsequent Development of the Oakes Test: Context and Deference


Facts:
- A newspaper challenged s. 30(1) of the Alberta Judicature Act, which limited the publication of information arising out of the court proceedings in matrimonial disputes claiming that the provision was contrary to s. 2(b) of the Charter [guarantee of freedom of expression].
- Attorney general argued it protected individual protection.
- Court found s. 30(1) violated freedom of expression, however were split on the justification issue.

Issues:
- Can s. 30(1) be justified as a reasonable limit under s.1?

Decision:
- No.
Analysis/Dissent: [Wilson J]

- The dissent in this case has been picked up in subsequent decisions.
- There are two possible approaches to the Charter’s application – abstract + contextual
- Under each approach it is necessary to ascertain the underlying value which the right alleged to be violated was designed to protect – do this through a purposive interpretation of Charter rights
- Also necessary under each to ascertain the legislative objective sought to be advanced by the impugned legislation
- Contextualism = must look at the specific facts (the factual matrix) of the case, as a freedom/right might have different meanings in different contexts
  - Balance values at the time level the conflicting right is being balanced at
  - Look at the actual right + the actual value
  - Once look at the rights in context it is easier to see what part of the right is being infringed
  - Limits are more than infringements; about values and objectives the state is trying to achieve
- Abstract = looking at freedom/right as a whole
- Once determine the underlying value and the legislative objective and it becomes clear that the legislative objective cannot be achieved w/o some infringement of the right, then must determine if the legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society
- Abstract (Cory J approach) = the seriousness of restricting the right of freedom of expression and that is difficult to imagine a more important right in a democracy – not a reasonable limit
- Contextual (La Forest) = there is an enormous importance of freedom of expression in a political context, however he finds that it must yield in the context of this case to the litigant’s right to privacy – a reasonable limit under s. 1
- Should not balance one value at large and the conflicting value in its context – nor should one balance a private interest against a public one
- A freedom or right may have different meanings in different contexts = the importance of the right or freedom must be assessed in context rather than in the abstract and its purpose must be ascertained in context – the right or freedom must be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee

Notes:

- Under the final step of the Oakes test courts are now required to compare the actual impact of the law on the affected right (ex. on the freedom of expression interests) with the actual contribution the law makes to its pressing and substantial purpose
- There is also a call for a more contextual approach which requires greater flexibility in the application of each step of the Oakes test and greater deference to legislative judgment when applying the test = a more deferential, reasonableness-based approach to the various strands of the s. 1 analysis in certain contexts

Irwin Toy Ltd. v Quebec (Attorney General) [Deference]

Facts:

- This case involved restrictions on advertising directed at children
- The judges here set out some of the circumstances in which deference to legislative judgment is appropriate

Ratio:

- Deference to legislative choice is appropriate – where the gov’t has sought to balance competing rights; to protect a socially vulnerable group; to balance interests of various social groups competing for scarce resources; or to address conflicting social science evidence as to the cause of a social problem

Analysis: (Dickson CJC, Lamer, and Wilson JJ)

- Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location
- If the legislature has made a reasonable assessment as to where the line is most properly drawn, it is not for the court to second guess
- When striking a balance between claims of competing groups, the choice of means will frequently require an assessment of conflicting scientific evidence and differing justified demands on scarce resources
• Must determine whether the gov’t had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government’s pressing and substantial objective
• Here a distinction was introduced between those cases in which the gov’t is seeking to mediate the interests of competing groups (where a more deferential application of s. 1 is appropriate) and those cases in which the gov’t is the singular antagonist of the individual whose right has been infringed (where a more stringent approach of s.1 is warranted)

Notes:
• There are at least 3 different ways the courts can ‘defer’ to legislative judgment or lower the standard of justification:
  1) **Judicial deference to relevant findings of fact by the legislature** (or a lowering by the court of the standard of proof that the legislature must meet when establishing the factual basis for its justification argument)
     • Ex. Irwin Toy – social science the legislature used to determine whether advertisements manipulated children was not clear cut; however, the Court deferred to the gov’ts reading of the evidence – likely because it recognized it had limited competence in such matters, or no greater competence than the legislature
  2) **Deference to the legislature’s accommodation of competing values or interests** – if the legislature has made an apparently reasonable judgment that concerns about a certain interest justify a limited restriction on expression then the courts may be reluctant to substitute their own judgment for that of the legislature
     • This reluctance may be greater when it recognizes the legislature is making a reasonable attempt to protect the interests of a vulnerable group or to accommodate competing ‘private’ interests
  3) Lowering a standard of justification under s. 1 – **the courts have held that a less substantial or significant competing interest may support the restriction of a less valuable form of expression** – such as commercial advertising or hate promotion (Different forms of expression under s. 2(b) may have greater or lesser value under s. 1)

• Dominant view = Oakes set out a uniform approach for assessing justifiable limitations on Charter rights irrespective of differences in context but in the decade following Oakes, the Court searched for criteria of deference to categorize cases where deference was/was not warranted
• This view misses much of what is at stake in recent s. 1 cases
• Oakes legacy – how should the Court allocate the risk of factual uncertainty when gov’ts legislate under conditions of imperfect information [courts have not adopted a consistent approach to answer this]
• Court in Oakes → “when evidence is required in order to prove the elements of a s. 1 inquiry it should be cogent and persuasive and make clear to the Court the consequences of imposing/or not the limit”
• RJR-MacDonald – McLachlin → Oakes sets up a process of reasoned demonstration as opposed to simply accepting the say-so of gov’ts – the s. 1 inquiry is a fact-specific inquiry
• Oakes has created a major institutional dilemma for the Court given the practical reality that public policy is often made on the basis of incomplete knowledge
• A compromise has been struck in cases where there are conflicting/inconclusive social science evidence – the question is whether the gov’t has a ‘reasonable basis’ for concluding an actual problem exists, that the means chosen would address it, and that the means chosen infringes the right as little as possible → this expects something less of gov’ts than definitive, scientific proof but an absolute lack of evidence is unacceptable
• The Court has split on what kinds of inferences the gov’t is entitled to draw from inconclusive evidence, on whether it is appropriate to apply logic or common sense to surmount an absence of evidence

**Dollars vs. Rights Debate**
• **Singh v Minister of Employment and Immigration 1985 SCC**
  • Argued his s. 7 rights would allow him a hearing to determine his immigrant status
  • Argument – too expensive
  • Court – Charter would mean nothing, if court could stay it would be cheaper to do X [discriminate] – s. 1 argument cannot be based on budgetary interests
• **Schacter v Canada 1992 SCC**
  • Money cannot be the reason for limitation on rights – HOWEVER, such considerations are relevant when deciding what the appropriate remedy is
• **Reference re Remuneration 1997 SCC**
  • Measure whose sole purpose is financial cannot be justified under s.1
  • [Open the door here a little bit – sole purpose → usually gov’ts sole purpose is not financial]
• **Nova Scotia v Martin 2003 SCC**
Budgetary considerations in and of themselves cannot normally be invoked as a free-standing and substantial objective for s. 1

Figueroa v Canada 2003 SCC

Dollars and cents can justify limitation of s. 1

Newfoundland (Treasury Board) v NAPE 2004 SCC

Facts:
- The provincial govt in NF signed a pay equity agreement in 1988 that would have resulted in pay increases for female healthcare workers who had been earning less than their male counterparts
- 3 years later (before any money had flowed to the recipients) the NF govt enacted the Public Sector Restraint Act which postponed the pay increases for 3 years and cancelled any arrears for 1988-1991 saving the govt $24 million
- The SCC found the legislation violated s. 15 of the Charter because the govt was reinforcing gender inequality that it denounced itself in signing the 1988 pay equity agreement – however, it found the violation was saved under s. 1

Issues:
- What kind of government fiscal crises is sufficient (if any) to justify limiting a right or freedom guaranteed by the Charter? Should greater deference be afforded to Parliament under the Oakes test?

Decision:
- No – the acceptance of a greater level of deference would be inconsistent w/ the clear words of s. 1 and undermine the delicate balance the Charter was intended to achieve

Ratio:
- Whenever there are boundaries to the legal exercise of state power they must be refereed – the boundary between an individual’s protected right/freedom and state power must also be refereed – the framers of the Charter identified the courts as the referee
- Separation of powers is a defining feature of our constitutional order, however it cannot be invoked to undermine the operation of a specific written provision like s. 1 – this section itself expresses the importance of the separation of powers by defining limits on legislative sovereignty

Analysis: (Binnie J + 6)
- The evidence in support of a s. 1 justification is very important to the outcome – the only evidence before the Board consisted of an extract from Hansard and some budget documents – this is material of which courts may take judicial notice
- The evidence brought to the Board’s attention is sufficient for the purposes of disposing this appeal

Pressing + Substantial Objective
- The provincial govt faced a severe financial crisis in the spring of 1991 – the prospective deficit would be in the $200 millions unless serious expenditure cuts were made
- The s. 1 evidence includes the expenditure reduction program – including freezing wage scales for public sector employees, closed acute care hospital beds, froze per capita student grants, made reductions in operating budgets, reduced/eliminated programs, laid off 1300 permanent and 350 part-time employees
- The severity of these measures corroborates the govt’s statement that it believed to be in the middle of a fiscal crisis
- Budgetary considerations in and of themselves cannot normally be invoked as a free-standing P+S objective for the purposes of s. 1
- BUT, the fiscal crisis was severe and the cost of putting into effect pay equity was a large expenditure
- At some point, a financial crisis can attain a dimension that elected gov’ts must be accorded significant scope to take remedial measures
- In the prov. Gov’t view – the cuts it would have had to make elsewhere to pay the $24 million would have created even greater grief and social disruption
- But there will continue to be strong skepticism at attempts to justify infringements based on budgetary constraints, so there must be a balance (weighing exercise) between social values and dollars
- Minimal impairment stage cannot be blind to consequences for other social, educational, and economic programs. Must juggle spending priorities of all types. A s. 15 objective is not always going to be put ahead of hospital beds + school rooms

Should conformity with the separation of powers doctrine be added as an element of the s. 1 analysis?
- Deference by the courts to the majority view [in legislatures] would make the independent second look imposed by the courts superfluous, would also leave little protection to minorities
- Separation of powers is a defining feature of our constitutional order, however it cannot be invoked to undermine the operation of a specific written provision like s. 1 – this section itself expresses the importance of the separation of powers by defining limits on legislative sovereignty
- Judicial review of govt action long predates the Charter – it is not the courts which limit the legislatures – it is the Constitution, which must be interpreted by the courts, that limits the legislature [Vriend]
The Override

- Section 33 of the Charter (the ‘override’ or ‘notwithstanding’ clause) began as and remains a controversial part of the Charter
- *Ford v Quebec* is the only case in which the SCC has been asked to review the exercise of the override power (has been used provincially twice – in AB on marriage; and in SK on Back to Work legislation)
- The gov’t of Quebec made use of s. 33 to shield its laws as much as possible from the Charter’s application
- It came from the provinces – the Kitchen Accord. It was a bargain that cemented the agreement. And the idea came from the Bill of Rights, which also had a notwithstanding clause. Bill of Rights = law is going to assume individual rights are protected unless legislature expressly says otherwise, so if going to infringe a right must do so expressly.

How to Use Section 33

- It needs to be expressly declared (cannot be by implication)
- The section(s) (subsection, paragraph) choosing to override must be expressed [Ford]
- In the law itself (not in a debate, news, etc.)
- Does not apply to every provision in the Charter – only a select few
- Subsection 3 – “Sunset Clause” → the effectiveness of the provision will only operate for 5 years
- Sunset clause does not mean it cannot be re-enacted (s. 5) = can re-enact it again – but subject to another clause – going to have to continue to renew every 5 years
- [Because in the time span of 5 years there will be another election so allows it to be a perpetual issue in democratic debate, which avoids the issue that the clause will become attached to the law and then people will forget about it.]

**Ford v Quebec (Attorney General) 1988 SCC**

**Facts:**
- This case involved a challenge to those provisions of the *Quebec Charter of French Language* that required French-only in public signs, posters, and commercial advertising
- Quebec enacted legislation regarding the *Constitution Act, 1982* – made all their former legislation attach to the notwithstanding clause – every law in Quebec was under this. So the Charter does not function in QB with regard to those sections. Political stance as Quebec didn’t sign on to the constitutional amendment.

**Issues:**
- Whether Quebec’s standard clause, omnibus use of the override was valid

**Decision:**
- S. 7 of *An Act respecting the Constitution Act* is inconsistent w/ s. 33 and of no force or effect with the result that the standard override provisions enacted by s.1 came into force on June 23, 1982 in accordance with the first paragraph of s. 7
- Appeal dismissed

**Ratio:**
- The sunset clause is there to let the people decide if s. 33 has been properly invoked; not for the court to intervene
- But, the language of s. 33 ‘shall operate’ does not allow for a retroactive use, so laws can only go forwards [must prefer the rights protecting approach when there is ambiguity]

**Analysis: (The Court)**
- The essential contention against the validity of the standard override provision was that the provision did not sufficiently specify the guaranteed rights or freedoms which the legislation intended to override
- The essential requirement of form laid down by s. 33 is that the override declaration is sufficiently express if it refers to the numbers of the section, subsection, or paragraph of the Charter which contains the provision(s) to be overridden
- A reference to the number of the section, subsection, or paragraph containing the provisions or provisions to be overridden is a sufficient indication to those concerned of the relative seriousness of what is proposed
- S. 33(1) admits two interpretations, one that allows Parliament or a legislature to enact retroactive override provisions, the other that allows prospective derogation only
- Conclude that the latter and narrower interpretation is the proper one and that s. 7 cannot give retrospective effect to the override provisions
- Argument: By using boiler plate clause in all their legislation, Quebec failed based on “Expressly declare”: means that you have to explicitly say what provision of the constitution they are overriding, not just the numbers but the actual right
- Purpose of the charter is to protect and guarantee rights (*Hunter v Southam*) – purposive argument/approach
- Purpose of s.33 – what is it designed to protect? Balance democratic engagement with protection of rights – cannot interpret it in a way to undermine its own purpose
• Court said Quebec followed the form that s.33(1) dictates
• Court also said sunset clause is there to let the people decide if it has been improperly invoked - not for the court to intervene. Deciding whether it is a good reason for invoking are political questions, not for the court.
• S.33 says parliament and legislatures can override courts as long as they follow the formal requirements laid down by s.33 – doesn’t make sense that the court can override back
• However, court said Language of s.33 does not allow for retroactive use b/c of the word “shall operate” in s.33 – Laws can only go forward, not backwards. It could be define as invoking past tense, however when there is ambiguity must prefer the rights protecting approach (Hunter)
• court not doing substantial review when it comes to s.33, just that the requirements are followed

CHARTER REMEDIES

Introduction
• In contrast to the Canadian Bill of Rights, the Charter includes in s. 24 an explicit remedial provision
• Section 24(1)
  “Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”
  o Only for infringement of Charter rights; the law may not have a constitutional deficiency but maybe the power exercised under the law is used in an unconstitutional manner; unconstitutional conduct – not necessarily an unconstitutional law
  o Section 24(2) provides for the remedy of exclusion of evidence obtained in violation of Charter rights
• Section 52(1)
  “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”
  o Remedies for the entirety of the Constitution. Remedial flexibility; declarations of invalidity; severance; reading in/down; temporary suspension
• Initially some believed that s. 24 was the exclusive source of remedial relief for Charter infringements however this was rejected in Big M Drug Mart where it was concluded that s. 52 was available in cases where the constitutionality of the legislation was at issue and a declaration of invalidity was sought
• An individual remedy under s. 24 – for ex. damages – will not be available when a declaration of invalidity has been granted under s. 52(1) although the SCC has not completely precluded the possibilities of combining remedies

K Roach, “Constitutional Remedies in Canada”
• The main purpose of constitutional remedies is the correction of constitutional violations and the regulation of governmental behavior
• The constraints are the need to balance the interests affected by remedies and to respect appropriate institutional roles
• Corrective theory = judges are only justified and competent to order remedies for those who have suffered violations and attempt to restore victims to the position they occupied before the violation
  o When a violation is proven, judges should insist on full correction w/o attempting to balance the affected interests or change govt behavior in the future
• Public model of adjudication = attempt to regulate gov’t behavior – this model stresses that remedial decision-making is a more instrumental and contingent process than determining violations of constitutional rights
  o Judges do not attempt to deduce remedies from the nature of the violation but rather fashion them to achieve compliance w/ the Constitution in the future
• Courts have been sure not to intrude on the role of legislation when devising Constitutional remedies – this has had the effect of courts striking down laws in their entirety rather than attempting to save them by reading in terms or granting limited constitutional exemptions; this has also had the effect of courts granting general forms of declaratory relief as opposed to specific or mandatory remedies

Remedies Under Section 52(1) of the Constitution Act, 1982
• A declaration a law is invalid in its entirety may constitute an overly broad remedy in cases where only some parts of the law or some of its applications infringe the Charter
• Partial invalidation of laws may be accomplished through techniques of severance, reading down, reading in, and constitutional exemptions
• In the case of under-inclusive laws extension of benefits is a possible remedy that may be achieved either through severance of an explicit limitation on the operation of the law or by reading in an extension of benefits
Schachter v Canada 1992 SCC

Facts:
- At this time, the Unemployment Insurance Act provided mothers who had given birth with 15 weeks of maternity benefits and adoptive parents with 15 weeks of parenting leave and the benefits could be shared between the two parents according to their wishes
- A father whose claim for ‘paternity benefits’ following the birth of his child was dismissed as not falling within the provisions of the Act, challenged the decision as a violation of his rights to equality under s. 15 of the Charter
- The trial judge found a violation of s. 15 in that the section discriminated between natural parents and adoptive parents – upheld in appeal
- The remedy was declaratory relief under s. 24(1) extending natural parents the same benefits as were granted to adoptive parents

Issues:
- Was the trial judge correct to read in natural parents to these benefits

Decision:
- No – would be too large of an intrusion and better left for parliament – temporarily suspend and allow legislation to deal w/ appropriate remedy
- Appeal allowed and judgment at trial set aside

Analysis: (Lamer CJC)
- S. 52 mandates striking down any law that is inconsistent with the provisions of the Constitution but only to the extent of the inconsistency – a court can strike down a law, strike down and temporarily suspend the declaration of invalidity, or may resort to techniques or reading down/in
- S. 24 of the Charter extends to any court of competent jurisdiction the power to grant an ‘appropriate and just’ remedy to anyone whose Charter rights and freedoms have been infringed/denied
- In determining how to apply these, a court will determine its course of action w/ reference to the nature of the violation and the context of the specific legislation under consideration

Severance
- Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible – only the offending portion should be of no force or effect
- Sometimes severing the offending portion would be more intrusive to the legislative purpose than striking down provisions which are not themselves offensive but closely connected with those that are – must determine whether the legislature would have passed the constitutionally sound part of the scheme without the unsound part

Reading-In as Akin to Severance
- The same approach should be used with reading in – have parallel purposes
- The difference between the 2 is the manner in which the extent of the inconsistency is defined
- Here, the inconsistency is defined as what the statute wrongly excludes rather than what is wrongly includes
- Reading in vs. striking out → the result should be on the appropriate remedy in the circumstances and not the label used to arrive
- Reading in should be available under s. 52 in cases where it is an appropriate technique to fulfill the purposes of Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the charter

REMEDIES TEST UNDER S. 52
- The first step in choosing a remedial course is defining the extent of the inconsistency which must be struck down
  - Usually the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 will be critical to this determination
  - If not justified under first part of s. 1 test = usually a broad striking down of law
  - Striking down, severing, or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met
- The next step is determining whether the inconsistency may be dealt with by way of severance or in some cases reading in or whether it must be struck down in its entirety
  - The court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution - to read in would amount to making ad hoc choices from a variety of options – this is for the legislature to do
  - The legislature’s choice of means to implement its objective must also be examined – ex. budgetary considerations are relevant once a violation that does not survive s. 1 has been established – court needs to decide whether they can appropriately make decisions which impact budgetary policy
Look at whether the remaining portion has been significantly changed – when the group added is smaller than the original one is usually a safe assumption; not when a larger group is added

Look at the significance of the remaining portion in general

Temporary Suspension of the Declaration of Invalidity
• The last step is determining whether the declaration of invalidity should be temporarily suspended
  o This is appropriate if striking down poses a potential danger or threatens a rule of law or in cases of under-inclusiveness
  o This is a serious matter because a delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist despite the violation – reading in is preferable where appropriate

Application
• Here the violated right was the right to equal benefit of the law (positive right) – positive rights cases are more likely to be read in/down or stricken down and suspend the operation than to immediately strike down
• The benefit is monetary + not one that Parliament is constitutionally obliged to provide – what Parliament is obliged to do (by s. 15) is equalize the provision of that benefit – the benefit is under-inclusive, not prohibited
  o If going to strike down – need to suspend to allow Parliament to bring in a provision in line w/ constitutional requirements
• Without a mandate based on a clear legislative objective, it would be imprudent to reading the excluded group into the legislation – must consider budgetary implications and the group sought to be included likely vastly outnumbers the group to whom benefits were already extended; this would be a substantial intrusion into the legislative domain and would be substantial enough to potentially change the nature of the scheme as a whole
• Parliament is much better equipped to assess the whole picture in formulating solutions in cases such as these

Under-inclusive Laws and Reading In
• While equality rights under s. 15 warrant remedies, other issues such as that of under-inclusiveness may also arise in other contexts where the right in issue is understood as imposing positive obligations on gov’t

Vriend v Alberta [1998] SCC

Facts:
• The Court found that the omission of sexual orientation from the list of prohibited grounds of discrimination found in AB’s Human Rights legislation – the Individual’s Rights Protection Act (IRPA) constituted an unjustifiable violation of s. 15
• The legislative history showed this omission was deliberate
• A gay employee was fired when his homosexuality was discovered and he wished to bring a complaint of discrimination under the Act however he could not because of the legislation’s failure to protect against discrimination on the grounds of sexual orientation
• This is a significant case where the SCC extended constitutionally under-inclusive legislation by reading in rather than striking it down

Issues:
• What is the best way to remedy this unjustifiable violation of s. 15?

Decision:
• Reading in sexual orientation to the provisions of the IRPA is the best way to remedy this under-inclusive legislation

Ratio:
• If able to fix the unconstitutional provision in a precise way and keeping with the overall purpose of legislation itself, then reading in. This is especially relevant for cases where negative rights are being affected. Would you rather no human rights legislation at all, or one with this group added?

Analysis: (Iacobucci J)
• After finding the exclusion of sexual orientation from the Act to be an unjustifiable violation of the appellant’s equality rights – turn to the question of remedy under s. 52
• Step 1) Define the extent of the Charter inconsistency which must be struck down
  o Here, it is the exclusion of sexual orientation from the protected grounds of the IRPA Act
• Step 2) Determine which remedy is appropriate
  o Several remedies are available – striking it down, severance of offending sections, striking down/severing with a temporary suspension, reading down, reading in
  o This violation stems from an omission therefore reading down is not available
  o The roles the sections play in the scheme of the IRPA as a whole are important therefore severing these sections would be akin to striking down the entire Act
• In determining what remedy is important, the court must have regard to the ‘twin guiding principles’ – respect for the role of the legislature and respect for the purpose of the Charter

• 1) Role of legislature = reading in is important to avoid undue intrusion into the legislative sphere
  o The purpose of IRPA is the recognition + protection of the inherent dignity and alienable rights of Albertans through the elimination of discriminatory practices – reading in would minimize interference with this purpose and avoid excessive intrusion into the legislative sphere whereas striking down all of IRPA would deprive Albertans of human rights protection + interfere w/ the scheme enacted

• 2) Respect for the purpose of the Charter = reading in sexual orientation enhances the purposes
  o The Charter is concerned with the promotion and protection of inherent dignity and alienable rights
  o Therefore, expanding the list of prohibited grounds of discrimination allows the Court to act in a manner consistent with the purposes of the Charter
  o Striking down = deny all Albertans protection = anti-ethical purposes of the Charter

• There are also additional criteria to be followed when reading in a provision:
  o A. Remedial precision: the court must be able to define w/ a sufficient degree of precision how the statute ought to be extended in order to comply w/ the Constitution
  o B. Budgetary implications: ensure such considerations are not sufficiently significant to warrant avoiding the reading in approach – can be some budgetary impact as long as not substantial enough to change the nature of the scheme
  o C. Effects on the thrust of the legislation: make sure there is no deleterious impact – here, all persons covered under current IRPA would continue to benefit in same manner as before reading in of sexual orientation- therefore it is reasonable to assume if the Legislation was faced with the choice of having no human rights statute or having one that offered protection on sexual orientation ground, would choose the latter; also look at size of group being added (small or bigger than the original group)
  o D. Interference w/ legislative objectives: the degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to 1) the objective embodied in the legislation in question and 2) the means chosen to pursue the objective – here it is clear that reading in sexual orientation would not interfere with the objective of the legislation but can actually only enhance the objective; the means chosen (the exclusion of sexual orientation) cannot be described as integral to the scheme of the Act

• When a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response and can also turn to s. 33 (the override provision)

Dissent: (Major J)

• Cannot make the assumption that the legislature would have extended the benefit or protection to a previously purposely excluded group. It is the legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements – not for the courts to fill in details
• It is more preferable to declare the offending sections invalid and provide the Legislature with an opportunity to rectify them. There is no intention to deprive Albertans of the protection, but to ensure that the legislation is brought into conformity with the Charter while respecting the role of the legislature therefore this declaration of invalidity should be suspended for 1 year

M v H 1999 2 SCR 3 (Under-Inclusive + Severing)

Facts:
• SCC found that the exclusion of same-sex couples from the definition of spouse in s. 29 of Ontario’s Family Law Act which governed the right to claim spousal support was an unjustifiable infringement of s. 15 – AKA under-inclusive legislation

Issues:
• What should the remedy be for the under-inclusive legislation?

Decision:
• Severing just s. 29 of the legislation w/ a 6-month declaration of invalidity

Ratio:
• Severing can be an appropriate remedy for under-inclusive legislation, if the remedy of reading-in does not also assure the validity of the rest of the legislation

Analysis: (Iacobucci J)
• Step 1: determine the extent of the inconsistency between the legislation and the Charter
  o Here – under-inclusive definition of spouse in s. 29 of FLA
• Step 2: appropriate remedy
• The remedy of reading in is only available where the Court can direct w/ a sufficient degree of prevision what is to be read in to comply w/ the Constitution – must ensure it both remedies the constitutional wrong and ensures the validity of the legislation
• Here – substituting “a man and woman” with “two persons” would remedy the constitutional wrong however not persuaded it would ensure the validity of the legislation – any extension of s. 29 would have no effect on other sections (opt out by cohabitation and separation that only apply to man and woman) – therefore, same-sex could not opt out of the default system
• Where it is inappropriate – must either strike down entirely or sever only offending portions (Schacter – where the offending portion of a statute can be defined in a limited manner it is consistent w/ legal principles to declare inoperative only that limited portion)
• Severing just s. 29 (of no force or effect) is most appropriate remedy w/ suspension for 6-months
Notes:
• ON gov’t response = amended over 60 pieces of legislation

Severance and Reading Down
• Severance is a remedy familiar from federalism cases and involves partial invalidation of the law – ex. Margarine Reference – it preserves the parts of the legislation that do not violate the Charter
• Reading down is used to avoid declaring a law to be of no force or effect – it allows courts to save from invalidity a law that would be unconstitutional if given its broadest interpretation by giving the law a narrower interpretation (ex. McKay v The Queen) – it is not only a remedy but also a technique of interpretation (to keep w/in the constitutional bounds)
• Hunter v Southam – reluctant to save legislation through strong forms of reading in

R v Sharpe – strong reading down to save overbroad legislation prohibiting possessed of child porn and made an exception to 1) self-created expressive material and 2) private recordings of lawful sexual activity
• Schacter – reading in only appropriate where 1) legislative objective is obvious + reading in would further that objective or constitute a lesser interference w/ that objective than striking down the legislation; 2) the choice of means used by the legislature is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and 3) reading in would not require an intrusion into the legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise
• Neither of first 2 are impaired here

Constitutional Exemptions
• When a constitutional exemption is granted, the law remains in force but is declared inapplicable to individuals/groups whose Charter rights are infringed by its effects
• R v Ferguson – this could only be formulated as a remedy under s. 52(1) – laws are of no force or effect to the extent that they are unconstitutional

Temporary Suspension of Declaration of Invalidity
• In some cases, it is appropriate to suspend the effect of the declaration for a period of time in order to allow Parliament/legislature to fill the void
• Should not be used indiscriminately – criteria = potential danger to public, threat to constitutional order, or an under-inclusive law where striking down would deprive deserving persons of benefits w/o providing them to the individual whose rights have been violated
• Manitoba Language Reference introduced this remedy into Canadian constitutional law
• Issue – can a declaration issued under s. 24(1) be delayed? – Eldridge v BC – declaration of entitlement to sign language interpretation was delayed for 6-months

Remedies Under Section 24(1) of the Charter

Doucet-Boudreau v Nova Scotia (Minister of Education) 2003 SCC
Facts:
• No provision or omission in the Education Act prevented the gov’t from providing minority language education but it establishes a French-language school board to provide homogenous French-language education to children of entitled parents
• The problem here was inaction on the part of the prov. Gov’t – its failure to mobilize resources to provide school facilities in a timely fashion ≠ not a failure to recognize the rights but a failure prioritize the rights and delayed fulfillment of its obligations (s. 23 minority rights)
• The parents sought the assistance of the court in enforcing the full and prompt vindication of their rights after a lengthy history of gov’t inaction
• Gov’t argument at trial = should be able to delay its obligations because of lack of consensus in the Acadian and Francophone communities

Issues:
• Was the trial judge justified in retaining jurisdiction and requiring the gov’t report back to the court and the parties on its progress in making minority language schools available after the judge had issued a declaration that s. 23 rights had been violated

Decision:
• The remedy chosen by trial judge meaningfully vindicated the rights of the appellant parents by encouraging the Province’s prompt construction of school facilities w/o drawing the court outside its proper role
• CA erred in striking down the portion of the order in which he retained jurisdiction to hear progress reports on the status of the efforts to provide school facilities by the required dates

Ratio:
• A superior court may craft any remedy it considers appropriate and just in the circumstances and in doing courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts should show considerable deference to trial judge’s choice of remedy and refrain from using hindsight to perfect a remedy – only interfere if committed an error of law or principle

Analysis: (Iacobucci and Arbour JJ)
• S. 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of Charter rights or freedoms
• A remedy under s. 24(1) is available where there is some gov’t action beyond the enactment of an unconstitutional state or provision that infringes a person’s Charter rights

The Meaning of ‘Appropriate and Just in the Circumstances’
• ‘As the court consider appropriate and just...’ – falls to the courts to determine the meaning
• This calls on the judge to exercise a discretion based on his/her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of relevant legal principles
• There are broad considerations judges should bear in mind when evaluating the appropriateness and justice of a potential remedy:
  1) An A + J remedy is one that meaningfully vindicates the rights and freedoms of the claimants – a meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied – an ineffective remedy (or one smothered in procedural delays and difficulties) is not a meaningful vindication of the right and therefore not A+J
  2) Must employ means that are legitimate within the framework of our constitutional democracy – must respect the relationships with + separation of functions among the legislature, executive, and judiciary – the courts must not depart unduly/unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes
  3) It vindicates the right while invoking the function and powers of a court – the capacities/competence of courts can be inferred from the tasks with which they are normally charged and for which they have developed procedures + precedent
  4) After ensuring the right of the claimant is fully vindicated, is also fair to the party against whom the order is made – it should not impose substantial hardships that are unrelated to securing the right
• Because of s. 24’s broad language + myriad of roles it may play in cases it should be allowed to evolve to meet the challenges and circumstances of those cases – tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand – judicial approach must remain flexible and responsive to the needs of a given case

Application
1) Trial judge took proper account of the factual circumstances within which he exercised his discretion to select a remedy → not a failure to recognize the rights but a failure prioritize the rights and delayed fulfillment of its obligations; therefore a declaration would be an ineffective remedy and would force parents to continually seek declarations that are restatements of the declaration in Mahe and therefore, the trial judge was entitled to conclude that he was not limited to declaring the appellant parents’ rights – it was appropriate for him to grant a remedy that would lead to prompt compliance and reduced risk that minority language education rights would be smothered in additional procedural delay
2) The remedy took into account and did not depart unduly from the role of the courts in our constitutional democracy – it was appropriate for him to preserve + reinforce the Department of Education’s role in providing school facilities and this could be done w/o compromising the entitled parent’s rights to the prompt provision of school facilities. The courts may
issue an injunction under s. 24(1) – courts take actions to ensure rights are enforced + not merely declared therefore it was appropriate to choose the injunctive remedy on the terms/conditions he prescribed

3) The reporting order issued by the trial judge was judicial in that it called on the functions and powers known to courts – hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond normal capacities of courts

4) The written order is satisfactory and clearly communicates that the obligation on gov’t was simply to report – however, future orders could be explicit and detailed – the court has discretion to fashion a remedy it considers just and appropriate and not required to identify the single best remedy

Dissent: (Lebel and Deschamps JJ)

- The reporting order was flawed → gave no notice of their obligations, the nature of the reports, or the purpose of the reporting hearings
- The uncertainty was not only inconvenient but amounted to a breach of the parties’ interest in procedural fairness
- A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels – 1) by breaching the separation of powers principle and 2) by acting after exhausting its jurisdiction
- Courts should avoid interfering in the management of public administration – should not require to directly oversee/ supervise administration of their orders – once they have declared what the law is, issued their orders and granted such relief as they think warranted, should not unnecessarily invade the province of public administration
- Should not be politicized – requiring the gov’t to report to the court in order to put pressure on them is a political tactic – breach of powers is breached
- The retention of jurisdiction was not appropriate under s. 24(1) – breached by a principle of procedural fairness and the constitutional principle of the separation of powers

Vancouver (City) v Ward [2010] SCC

- Facts → Police arrested and strip searched a person they thought was a part of a recent crime – did not have any part of the crime
- SCC agrees damages may be awarded when a Charter right has been breached where appropriate and just to do so
- Damages may be awarded for Charter breach under s. 24(1) where appropriate and just.
  - 1) Establish that a Charter right has been breached.
  - 2) Demonstrate why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.
    - Why would damages promote the value section and the remedy in this case
  - 3) The state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust.
  - 4) Assess the quantum of the damages.

Policy argument why damages paid by the state should be inappropriate?

- State – lets solve problem w/ addressing legislation or source of Charter infringement (provide guidance on action that are constitutional/unconstitutional)
- Worry about governing – worry about starting new programs because of potential damages they could face if it is unconstitutional → stopping governing is not in the interest of the public

Section 2(a) - Freedom of Religion

- The text of the Charter reveals that religion is an important element in the understanding of the Canadian Constitution
- Section 2(a) states that ‘everyone has the following fundamental freedoms … freedom of conscience and religion’
- Section 15, provides that the state cannot discriminate, inter alia, on the basis of religion
- Section 15(2) states that it is not contrary to the equality guarantees set out in s. 15(1) for the state to ameliorate conditions because of religion
- Religious freedom consists of 2 basic ideas:
  - 1) ‘Establishment’ of religion – That the state cannot, in the exercise of its powers, impose the state’s preferred religion on individuals or on groups
  - 2) Emphasis is given to individual or group religious practice and stipulates that it is inappropriate for the state to interfere with religious belief or practice – the protection of ‘free exercise’ of religion
The Scope of Section 2(a) – Sunday Closing Laws
- Cases challenging Sunday closing laws – which were in place both at the federal and provincial level when the Charter came into force
- In Big M Drug Mart, the SCC struck down the federal Lord’s Day Act on the ground that it unjustifiably interfered with freedom of conscience and religion as guaranteed by s. 2(a)

R v Big M Drug Mart Ltd. (1985) SCC

Facts:
- Big M was charged with unlawfully carrying on the sale of goods contrary to the Lord’s Day Act
- Big M has challenged the constitutionality of the Act both in terms of division of powers and of s. 2 (freedom of conscience and religion) of the Charter

Issues:
- Does the Act infringe s. 2(a) of the Charter?

Decision:
- Yes – this Act is of no force or effect under s. 52 of the Constitution Act
- Appeal dismissed

Analysis: (Dickson CJC)

**Purpose + Effect**
- An understanding of the purpose and effect of the Act is integral to its constitutional validity
- The Act makes it an offence punishable on summary conviction for any person to violate the Act; any employer to direct violation of the act; any corporation to authorize violation of it
- Purpose + effect of Act:
  - A finding it has a secular purpose is not possible (providing a uniform day of rest from labor)
  - But it’s religious purpose has been long established and consistently maintained by the courts of this country – but the Attorney General argues that is should not be the purpose but instead the effects that are to be assessed when determining constitutionality → NO
- **Both purpose + effect is relevant to determining the constitutionality and either an unconstitutional purpose or effect can invalidate legislation** [they are clearly linked with regard to the object – intended + actual effects are looked at for assessing the object + thus validity]
- If the purpose of the Act offends religious freedom, then it is unnecessary to consider the actual impact of it upon religious freedom
- The effects test can never be relied on to save a legislation with an invalid purpose
- **‘Shifting purpose’ argument** → purpose may shift/be transformed over time
  - Practical difficulties – uncertainty in laws and encourage re-litigation of the same issues [end stare decisis]
  - Stands contrary to ‘Parliamentary intention’ – purpose is a function of intent of those who drafted and enacted the legislation at the time, and not of any shifting variable

**Freedom of Religion**
- The right of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination
- Freedom = absence of coercion or constraint – [if a person is compelled by the state to a course of action/inaction he would not otherwise have chosen, he is not acting of his own volition and cannot be truly free] and also the right to manifest beliefs and practices
- A major purpose of the Charter is to protect within reason from compulsion or restraint
- The Act takes Christian views and using the force of the state translates them into a positive law binding on believers and non-believers alike

**The Purpose of Protecting Freedom of Conscience + Religion**
- **Hunter** → the proper approach to interpretation of the Charter is a purposive one – the meaning of a right or freedom is to be ascertained by an analysis of the purpose of such a guarantee – it is to be understood in the light of the interests it was meant to protect – interpretation is to be generous but must not overshoot the actual purpose of the right in question [must be placed in its proper linguistic, philosophic and historical contexts]
- Hunter → purpose of Charter = “the unremitting protection of individual rights and liberties”
- **Purpose of freedom of conscience and religion** → every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates provided that such manifestations do not injure his or her neighbors or their parallel rights to hold and manifest beliefs and opinions of their own
- This prevents the gov’t from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others
• It is for each Canadian to work out for him/herself what is his/her religious obligations and not for the state to dictate otherwise
• The purpose of the Act = compel observance of Christian Sabbath = infringe s. 2(a)

**Section 1**
• Once a sufficient gov’t interest is recognized must decide if means chosen to achieve the interest are reasonable – proportionality
• 2 arguments to justify the act:
  • 1) Sunday is the most practical day to be chosen for one of rest
  • 2) Everyone accepts + needs a universal day of rest from all work, business, and labor
    o Cannot save this legislation because it achieves a goal that the legislators did not primarily intend

**Edwards Books and Art Ltd v The Queen [1986] SCC**
The difference between this Act, and the one in Big M is the secular purpose of this Act, and giving people a common day of rest. Just because a secular purpose lines up with a religious belief does not make it unconstitutional. Big M’s purpose was to enforce Christian morality, however must also look at the effects.

**Facts:**
• Ontario’s Retail Business Holidays Act was challenged – an Act that established a common day of rest for retail workers
• 4 stores charged w/ failing to ensure no goods were sold or offered for sale on a holiday

**Issues:**
• Is this Act constitutionally valid or does it infringe s. 2(a) of the Charter?

**Decision:**
• Yes – but it can be upheld under s. 1

**Ratio:**
• Legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because its statutory provisions coincide with the tenants of a religion

**Analysis:**  (Dickson CJC)

**Legislation**
• ‘Holiday’ is defined as Sunday and various others day – some w/ Christian denominations and others clearly secular in nature
• It is an offence to carry on a retail business on a holiday punishable by a max. fine of $10 000
• There are exemptions – corner stores, pharmacies, gas stations
• S. 3(4): applies to business that have 7 or fewer employees engaged in the service of the public and less than 500 square feet used for such service, its effect is to exempt these businesses from having to close on Sunday if they closed on the previous Saturday
• Intent = provide uniform holidays to retail workers + not an attempt to encourage religious worship
• **It has a secular purpose and is not offensive to s. 2(a) → but still need to examine effects/impact**
• Indirect burdens? Yes – whether direct or indirect, intentional or unintentional fall within s.2(a)
• 2 coercion arguments:
  • 1) Makes it more expensive for those who observe a weekly day of rest other than Sunday to practice their religious tenets
  o The purpose of 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and in some cases a higher or different order of being – the Constitution only shelters those to the extent that religious beliefs or conduct might reasonably or actually be threatened
  o For a state imposed cost/burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice – if action increases the cost or practicing/manifesting religious beliefs is trivial/insubstantial then it is not prohibited
  • 2) Direct effect of compelling non-believers to conform to majoritarian religious dogma by requiring retailers to close their stores on Sunday
  o One is not being compelled to engage in religious practices merely because a statutory obligation coincides with the dictates of a particular religion
  o A legislative prohibition such as theft or murder is not a state-enforced compulsion to conform to religious practices, merely because some religions enjoin their members not to steal or kill
• There is an “internal limit” to s.2(a). Minor interference with religion is not infringing s.2(a) – has to have an actual state act that threatens religious practice
  o Real impact is on Saturday observers – can’t shop Saturday, and now can’t shop on Sunday either
Forcing to compromise religious beliefs – actual burden, not trivial

**The Impact of the Act**

- This Act has a different impact on persons depending on religious beliefs:
  - 1) Non-Observers
    - The effects are generally secular in nature and do not impair or abridge their freedom of conscience or religion
    - Not interfering w/ their religion
  - 2) Sunday Observers
    - This Act is favorable for Sunday observers – the cost for religious observance has been decreased
  - 3) Saturday Observers
    - It is argued there is no nexus between the law and the freedom of Saturday observers to exercise their religious beliefs
    - This Act leaves the Saturday observer at the same natural disadvantage relative to the non-observer – the competitive pressure to abandon Saturday observance is not insubstantial or trivial
      - Gov’t action chose that they have to be closed on Sunday – but also are closed on Saturday [indirect coercion] – would be easier if gave up that religious tenant of faith and used Sunday as day of rest
    - It also affects Saturday observing consumers – cannot shop on Sundays
    - It is an abridgment of their religious freedoms
  - 4) Other-Day Observers

**Section 1**

- The Act is aimed at a pressing + substantial concern – enabling parents to have regular days off in common with child’s days off from school
- Rational connection → Yes
- Infringement disproportionate? [Minimal impairment] → No – option for retailers with less than 8 employees to stay open so it can be justified for large retailers but not small; this is where deference should be afforded to the legislature (balancing competing groups)
- Changed to “as little as reasonably possible”

**Concurrence (Beetz):**

- No discrimination from act itself – discrimination is from beliefs – act doesn’t make you close on Saturday; religion makes you close on Saturday

**Dissent: (Wilson J)**

- A limit on freedom of religion which recognizes the freedom of some members of the group but not of other members of the same group cannot be reasonable and justified in a free and democratic society = there is no rational connection
- This is not as little as possible – there are less infringing measures

**The Restriction and Accommodation of Religious Practice**

**Syndicat Northcrest v Amselem 2004 SCC [Freedom of Religion Test]**

- A condo association refused to allow Orthodox Jewish unit owners to construct sukkahs on their balconies as part of their celebration of the Jewish festival of Succot
- After a condo owner put one up – its removal was requested claiming it was in violation of the by-laws as stated in the declaration of co-ownership which prohibits decorations, alterations, and constructions on the balconies
- The trial judge found the impugned laws were not in violation of the Quebec Charter + issued the injunction requested by Syndicat to take it down – this was upheld by CA

**Issues:**

- A religious claim for belief and co-owned property under the Quebec Charter of Human Rights and Freedoms – do the bylaws which contain prohibitions against decorations or constructions on one’s balcony infringe the appellant’s freedom of religion protected under the Quebec Charter?

**Decision:**

- The appellants’ religious freedom under the Quebec Charter has been infringed by the declaration of co-ownership – must be allowed to set up the sukkahs provided they remain for the limited time necessary
- Appeal allowed

**Analysis: (Iacobucci J)**

**Definition of Religious Freedom**

- Religion typically involves a particular and comprehensive system of faith and worship – it also tends to involve the belief in a divine, superhuman, or controlling power
- It is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfillment
• Consistent with **personal or subjective** conception of freedom of religion – one that is integrally linked with an individual’s self-definition and fulfillment and is a function of personal autonomy and choice, elements which undergird the right – an emphasis on **personal choice** of religious beliefs – not only the aspects of religion that are recognized by religious experts. Need a personal/subjective approach which means it is sufficient if you believe that it is a religious belief because religions disagree internally what tenants are.
• A person must show ‘**sincerity** of belief’ (Edwards Books) → there is an emphasis on sincerity to fit w/ the broad and purposive interpretations; want to let individuals define their own beliefs and sense of the divine.
• Religious freedom = the freedom to undertake practices and harbor beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials
• Edwards Books → ‘the purpose of 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and in some cases a high or different order of being – these beliefs govern one’s conduct and practices
• Courts are not to determine the content of a subjective understanding of a religious requirement – but it is qualified to inquire into the sincerity of a claimant’s belief – this simply implies an honesty of belief [to ensure the belief is in good faith] – NOT to focus on past practices, as beliefs are fluid and rarely static

**Stage 1 of freedom of religion analysis:**
  o 1) **He/she has a practice or belief, having a nexus with religion**, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and
  o 2) He or she is **sincere** in his or her belief

**Infringement of Religious Freedom**
• **Stage 2** → Once show a religious freedom is triggered, then must ascertain whether there has been enough of an **interference** with the exercise of the right to constitute an infringement of religion under the Charter [**more than trivial or insubstantial**]
• S. 2(a) = prohibits only burdens/impositions that are non-trivial (confirmed in Edwards Books) → AKA show it interferes in a manner that is **more than trivial or insubstantial**
• Must still consider how the exercise of this right will impact the rights of others in the context of competing rights – not if harms another person either

**Application**
• Rabbi’s chosen as trial/appeal – said it was not a commandment for these to be erected
• This is wrong → the Charter does not require any person to prove his/her religious practices are supported by any mandatory doctrine of faith
• Regardless of position in religious texts/officials – if an individual demonstrates he/she sincerely believes a certain practice/belief is religious in nature either it is objectively required or he/she subjectively believes it engenders a connection to the divine – as long as the practice has a nexus with religion it should trigger protection
• Proper test here = whether the appellants sincerely believe that dwelling in or setting up their own individual succah is of religious significance to them irrespective of whether they believe the religion requires them to build their own succah
• Here – Amselem sincerely believed he is obligated by the Jewish religion to set up and dwell in his own succah and that a communal one is not an option – his right is infringed
• The respondent’s rights would be minimally harmed by allowing the appellant’s to set up succah’s – 9 days only so property value would not decrease (even if, the infringement of rights would outweigh the decrease in property value)
• If blocked fire exits/security reasons – this would require recognition – however, here this is not a concern

See **Saskatchewan v Whatcott, 2013 SCC at para 155**
• An infringement of s. 2 (a) of the **Charter** will be established where: (1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant’s ability to act in accordance with his or her religious beliefs....The interference must be more than trivial or insubstantial, so that it threatens actual religious beliefs or conduct.

**Alberta v Hutterian Brethren of Wilson Colony 2009 SCC**

**Facts:**
• AB Traffic Safety Act = all persons who drive motor vehicles on highways to hold a driver’s license – each must have a photograph and used to be w/ the exception of people who object due to religious grounds but this was changed and the photo requirement was made universal – these pictures go to a facial recognition bank
• Hutterian Brethren Colony believe they are prohibited from having their picture taken and objected to this on religious grounds – this forces them to choose between obeying their religion and being able to drive to centers to obtain goods necessary for the Colony
• Members challenged the constitutionality of the bylaw alleging a breach on religious freedom
• Province = require photos in photo bank to reduce fraud/abuse of driver’s licenses
• Both trial + CA held the infringement was not justified under s.1

Issues:
• Is this infringement justified under s.1?

Decision:
• Yes – appeal allowed

Analysis: (McLachlin CJC)
• Here – meets the Syndicat test for infringement of 2(a) right

Justified under section 1?
• Giving effect to each religious claim may undermine the universality of many regulatory programs – including attempt to reduce abuse of driver’s license as here. There is indirect coercion here, not saying cannot practice religion or cannot have driver’s license, but that have to make a choice between them. Internal limit = non-trivial or substantial. It is trivial because can get someone to do driving or can walk. HOWEVER, it is substantial because it is hard to get a driver there.

• When a complex regulatory response to a social problem is challenged courts will give more deference throughout the s. 1 analysis
• 1) Pressing + Substantial
  o Maintaining integrity of the licensing system so to minimize identify theft is clearly pressing and substantial – to ensure no individual has more than one license – other provinces and nations are moving towards this harmonization as well
• 2) Rational connection?
  o Yes – this is more effective than a system that grants some people exceptions
• 3) Minimal impairment?
  o Are there less harmful means of achieving this legislative goal? – The burden is on the gov’t to show the absence of less drastic means of achieving the objective in a real and substantial manner
  o Here – accord legislature deference especially on complex social issues. S. 1 of the Charter does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but that only that it is reasonable and demonstrably justified.
  o RJR MacDonald → measure impair the right as little as reasonably possible to achieve the objective
  o Internal limitation = choose the least drastic means of achieving its objective
  o If a gov’t action or administrative practice is alleged to violate a Charter right, then the court’s remedial jurisdiction is not under s. 52 but under s. 24 instead – a reasonable accommodation analysis may be helpful there
    ▪ Reasonable accommodation = parties adjust the terms of their relationships in conformity with human rights legislations
  o Different when a legislature and people subject to its laws – these laws of general application are not tailored towards the unique needs of individual claimants. The broader societal context must inform the s. 1 analysis
  o The question is whether the infringement is justifiable in a free and democratic society and not whether a more advantageous arrangement for a particular claimant could be envisioned
  o Where the validity of a law of general accommodation is at stake, reasonable accommodation is not the appropriate substitution for a proper s. 1 analysis
• 4) Proportionate in effects?
  o Balance harm done to claimant’s religious freedom + benefits associated w/ universal photo requirement for licenses
  o 1) Salutary effects (benefits)
    ▪ 1) Enhancing security of licensing scheme; 2) assisting in roadside safety + identification; 3) harmonizing AB’s licensing scheme with other jurisdictions
    ▪ 1 – make sure no one holds more than one license and requiring all licenses have a photo will accomplish the objectives more effectively than allowing exceptions – internal integrity would be compromised
    ▪ This effects are sufficient to support some restriction on the right
  o 2) Deleterious effects
Harder cases are where the limit on religious freedoms are due to incidental and unintended effects of the law – this does not preclude the choice of religious belief but makes it more costly

Cost = not being able to drive on the highway – but this does not deprive the Colony of a meaningful choice as to their religious practice

Could hire people to make trips back and forth – driving vehicles is not a right but a privilege

- In balancing the effects, concluded that the impact of the limit on religious practice associated with universal photo requirement is proportionate
- There may be many possible solutions to a particular social problem, and a ‘complex regulatory response’ to a social ill will garner a high degree of deference

Dissent (Abella J):
- Disagrees in the minimal impairment analysis – the law must be carefully tailored so that the rights are impaired no more than necessary (RJR) – not minimally impairing because all alternatives involve taking a photo and this completely extinguishes the right
- Proportionality – cannot say the salutary effects are more than speculation \(\rightarrow\) the effects are slight and largely hypothetical
  - So many people not in the database (700,000) therefore adding 250 individuals from the Colony would be a marginal benefit
- Believe gov’t has not discharged its burden for justification under s.1
- Would dismiss appeal but suspend declaration of invalidity for one year

Dissent (Lebel J):
- Agree with Abella on views on the lack of justification under s. 1 – believe AB failed to prove that the regulation is a proportionate response to the identified societal problem of identity theft
- Detriments to the Colony (having them rely on others for transportation, not being able to drive) outweigh the potential benefits of the scheme

Section 2(b) – Freedom of Expression

Introduction: Purposes of the Guarantee

\[ R \text{ v Keegstra 1990 SCC} \]

Dissent: (Mclaghlin J):

[However, comments on freedom of expression were not a source of disagreement]

- Political process rationale \(\rightarrow\) freedom is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions – this view = only expression relating to the political process is worthy of constitutional protection but this protection is said to be absolute
  - This justifies only a narrow sector of free expression
- Essential precondition of the search for truth rationale \(\rightarrow\) freedom of expression is seen as promoting a marketplace of ideas in which competing ideas vie for supremacy to the end of attaining the truth – the truth may not always prevail but freedom of expression will assist the promotion of truth in ways impossible without the freedom
- As an end in itself \(\rightarrow\) all persons have the right to form their own beliefs + opinions and to express them – freedom of expression is seen as worth preserving for its own intrinsic value
- Words of 2(b) suggest that there is no need to adopt any one definitive justification for freedom of expression


- All arguments for protection of freedom of expression seem to focus on a combination of three values \(\rightarrow\) truth, democracy, and individual autonomy. This freedom protects the individual’s freedom to communicate with others – this freedom is valuable because human agency and identity emerge in discourse
- Some accounts say the freedom is either instrumental or intrinsic
- Intrinsic = an aspect of the individual’s fundamental liberty or autonomy that should be insulted from the demands of collective welfare – this view hard to explain the other regarding or community oriented character
- Instrumental = freedom protects an other-regarding or social activity and so must be concerned with something more than respect for individual autonomy (focus on collective goals of truth and democracy) – here, the fundamental character seems less obvious – its value is contingent upon the goals of truth and democracy
- Listener theories = listener can hear and judge the expression for herself
- Speaker theories = value self-expression
The Scope and Limits of Freedom of Expression

Irwin Toy Ltd. v Quebec (AG) 1989 SCC [Gives us a Broad Definition of Freedom of Expression]

Facts:
- This case involved a challenge to the provisions of Quebec’s Consumer Protection Act and the relevant regulations governing children’s advertising – ‘no person may make use of commercial advertising directed at persons under 13 years of age’
- S. 249 identifies the factors to be considered when determining whether an advertisement is directed at persons under 13 and certain exemptions (allowed in children’s magazines)
- Irwin Toy instituted an action for a declaration that the sections were ultra vires the province or inconsistent with the guarantee of freedom of expression

Issues:
- Do these sections limit freedom of expression? If so, are they justified?

Decision:
- Yes – infringed s. 2(b) but can be upheld under s. 1

Analysis: (Dickson CJ, Wilson, Lamer)

Step 1 – Was the activity within the sphere of conduct protected by freedom of expression?
- ‘Expression’ has both a content and a form – activity is expressive if it conveys meaning and that meaning is its content
- We cannot exclude human activity on the basis of the content or meaning being conveyed – if the activity conveys or attempts to convey a meaning then it has expressive content and falls within the scope of the guarantee
- Content can be expressed in an infinite forms of expression – written or spoken arts, physical gestures
- Here – the advertising aims to convey a meaning and cannot be excluded as having no expressive content

Step 2 – Was the purpose or effect of the government action to restrict the freedom of expression?
- Purpose → must be assessed from the standpoint of the guarantee in question
- If purpose is to restrict content of expression by singling out particular meanings that are not to be conveyed or to restrict a form of expression in order to control access by others to the meaning being conveyed = limits the guarantee
- BUT, if the gov’t aims to control only the physical consequences of certain harm activity regardless of the meaning being conveyed, then its purpose is not to control expression
- If the law merely has an incidental effect on trying to express self, then the effects of the law are infringing the freedom of expression

Step 3 – Restricting Effects?
- Effects → even if gov’t purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the gov’t action was to restrict free expression [burden on plaintiff to demonstrate such an effect occurred by referring to principles and values underlying the protection of free expression]
- Principles underlying the protection of free expression = 1) seeking and attaining the truth is an inherently good activity; 2) participation in social and political decision making is to be fostered and encouraged; 3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant and welcoming environment for those conveying the meaning and those who the meaning is conveyed to
- Plaintiff must show her activity promotes one of these principles – must identify meaning conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing
- Here – gov’t purpose was to prohibit particular content of expression in the name of protecting children and therefore they constitute limitations to s. 2(b) and fall to be justified under s. 1

Section 1 justification →
- Prescribed by law = nothing inherently confusing or contradictory and that despite the element of discretion in interpreting the sections, the legislature has provided an intelligible standard
- Pressing + substantial = concerns are the susceptibility of young children to media manipulation and their inability to differentiate between reality and fiction to grasp the persuasive intention behind the message – used the Trade Commission report on young children saying 2-6 cannot distinguish fact from fiction – reasonable to expand this to older children and advertising in other media
  o Courts are not called upon to substitute judicial opinions for legislative ones (Edwards Books)
  o Here – where legislature mediates between competing claims of different groups it will have to draw a line marking where one set of claims begins and the other fades away
  o If legislature makes an assessment on where to draw the line especially if done by weighing scientific evidence and allocating scarce resources it is not for the court to second guess [substitute one estimate for another]
  o Onus is discharged under this section
- Means proportional to the ends = when striking a balance between claims of competing groups the choice of means will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources
• The evidence sustains that the reasonableness of the legislature’s conclusion that a ban on commercial advertising directed at children was the minimal impairment of free expression consistent with the goal of protecting children against manipulation through such advertising
• Deleterious effects = no suggestion that the effects are so serious to outweigh the pressing and substantial objective – advertisers will have to develop new marketing strategies for children’s products

Dissent: (McIntyre J)
• Do not agree this infringement can be justified under s. 1
• No case has confirmed children have suffered harm from advertising
• No proportionality – total prohibition of advertising under an arbitrary age makes no attempt to achieve proportionality
• Freedom of expression should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent necessary for the protection of the community

Commercial Expression

RJR MacDonald Inc. v Canada (Attorney General) SCC 1995

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

Issues:
• Does this Act infringe the freedom of expression? Can it be saved under s.1?

Decision:
• Yes – and cannot be justified under s. 1
• The prohibitions against advertising and requirement of unattributed warning are of no force and effect – appeal allowed

Analysis: (McLachlin J)
• Believes that both the prohibition on advertising of tobacco products and s. 9 which requires the unattributed health warning on packages, infringes the right of free expression
• Can these infringements be saved under s.1?
• Agrees that the Oakes test must be applied flexibly having regard to the factual and social context of each case – but a contextual approach does not reduce the obligation of the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified; does not give gov’t a free pass to determine free speech
• Deference may vary with the social context in which the limitation on rights is imposed – but should not extend this too far
• Standard of proof on a balance of probabilities at all stages of the proportionality analysis is appropriate
• Objective → the objective is to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products. The objective of the mandatory package warning must be to discourage people who see the package from tobacco use – the objective of reducing tobacco-related health risks by reducing advertisement-related consumption is of sufficient importance to justify overriding of freedom of expression. Cannot state the objective too broadly or else it will immunize the law from being challenged
• Rational connection → trial found that the items of ‘direct or scientific’ evidence were not persuasive; taken together w/ the scientific evidence is sufficient to establish a link between certain forms of advertising and tobacco consumption
• Fails at minimal impairment stage → a full prohibition will only be constitutional under the minimal impairment stage where the gov’t can show that only a full prohibition will enable it to achieve its objective
• Other options that would have been less intrusive – including a partial ban, a ban on lifestyle advertising only, measures to prohibit advertising at children, labelling requirements, attributed health message
• Even with difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter – the Constitution, interpreted by the courts, determines
• Commercial speech should not be lightly dismissed – and motivation to profit is irrelevant to the determination of whether the gov’t has established that the law is reasonable or justified as an infringement of freedom of expression
• For the unattributed label – it was for the gov’t to show why this is required to achieve the objective and it failed to do so

Dissent: (La Forest J)
• In drawing a distinction between legislation aimed at “mediating between different groups” where a lower standard of s. 1 justification may be appropriate, and legislation where the state acts at the “singular antagonist of the individual” where a higher standard of justification is necessary – draw a distinction between courts and legislatures
In according more deference to social legislation (policy decisions) than to criminal justice context, the Court has recognized these important institutional differences between legislatures and the judiciary

- Tobacco = highly addictive, bad for health, dangerous – but unrealistic for parliament to prohibit the manufacturing, sale, or use → so made a compromise = prohibiting advertising and promotion of the products
- Keegstra = fundamental core value served by freedom of expression → search for political, artistic and scientific truth; the protection of individual self-development and autonomy; and the promotion of public participation in the democratic process
- When the form of expression falls father from the ‘center core of the spirit’ the SCC has ruled restrictions on such expressions less difficult to justify – here, the harm engendered by tobacco place this form of expression far from the ‘core’ of freedom of expression values + therefore entitle it to a very low degree of protection under s. 1

The core v. periphery of expression
- This is a controversial idea in free speech – not all speech is created equally
- Some speech lies at the core and some lies at the periphery
- Do not look at rights in abstract – look at them in actuality
- What is it actually an infringement of – in context
  - Right to advertisement of cigarettes
- For the dissent – this falls away from the core of free speech protections
- CORE = political speech; Periphery = commercial purpose – making money
- If periphery should be easier to infringe that speech in s. 1
- Who ranks + who has the power to rank this? [subjective]
- This idea of core/periphery starts to break down
- But context (given the Edmonton Journal contextual) helps to shape this

- Sole purpose for tobacco advertising = inform consumers about and promote the use of a product that is harmful and often fatal to the consumers who use it – the main (if not sole) motivation is profit
- Rational connection = the common sense observation is enough to establish a rational connection here – banning advertising to reduce tobacco consumption
  - However, there was enough evidence to bear out the rational connection between advertising and consumption
- Minimal impairment = in choosing to prohibit only advertisement of tobacco products, it is clear that Parliament adopted a relatively un-intrusive legislative approach to the control of tobacco products
- Proportionality = the deleterious effects of this limitation (the restriction on the rights of tobacco companies to advertise products for profit) do not outweigh the legislative objective of reducing the number of direct inducements for Canadians to consume these products

The Unattributed Warning
- Does not mean they must endorse the message or that consumers will believe they endorse it
- It is common that labelling of products are subject to state regulation – no different than having to label hazard material as ‘hazard’ or ‘dangerous’
- This is proportionate to the objective of informing consumers about the risks of tobacco use

Legislative Sequels to this Case:

- Now – attributed warning labels; ALSO – warning labels are much larger

- This was their first legislative sequel case
- When a law gets struck down; then legislature responds with new law to try again
- Should be more deferential? NO – same standard – apply Oakes Test
- P. 1006 – para 8 → gov’t presented detailed and copious in support of its contention… gov’t listened and demonstrated evidence on why the rights are being infringed
- Para 43 – a certain measure of deference may be appropriate where the problem parliament is tackling is a social policy problem – it may be possible to infer a solution that impairs the right less than the one that has been implemented – but this might not achieve the same goal then what the legislature had in mind – this is a complex task – on complex social issues the minimal impairment test has been met when parliament has chosen one of the reasonable alternatives
- Irwin Toy: Edwards Books
- Here, the rights are upheld
- NOW HAVE WARNING LABELS
Hate Speech

R v Keegstra 1990 SCC

Facts:
- K (high school teacher) was charged under s. 319(2) of the Criminal Code for unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students
- He described Jews as treacherous, subversive, sadistic, child killers – he said they created the Holocaust for sympathy and were deceptive/secretive – wanted his students to reproduce his teachings in class and on exams
- He claimed s. 319(2) unjustifiably infringed his freedom of expression as guaranteed by s. 2(b) of the Charter – trial convicted him; CA accepted his argument
- S. 319(2) – everyone who by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of a) an indictable offence and liable to imprisonment for a term not exceeding 2 years; or b) an offence punishable on summary conviction
- Identifiable group = distinguished by color, race, religion, or ethnic origin

Issues:
- Does s. 319(2) unjustifiably infringe Keegstra’s right to freedom of expression by preventing him from hateful speech against Jews?

Decision:
- S. 319(2) does infringe the right to freedom of expression but can be upheld under s. 1
- Appeal allowed

Analysis: (Dickson CJC)

- After WWII + Holocaust → Universal Declaration of Human Rights – in Canada this prevention of hate speech was reflected in the Code and the Report of the Special Committee on Hate Propaganda in Canada = need to prevent the dissemination of hate propaganda without unduly infringing the freedom of expression
- 1) Does the expression convey a meaning?
  - [Irwin Toy says the type of meaning conveyed does not matter in determining whether s. 2(b) is infringed – it is enough that it attempts to convey a meaning]
  - Only actual violence falls outside of this scope
- 2) Does the legislation aim directly at the freedom – i.e. Keegstra’s teachings?
  - Yes – it seeks to prevent the communication of expression
  - Therefore, there is an infringement

Section 1 Analysis
- Objective → The report of the Special Committee noted that Canada had become a major source of supply of hate propaganda that finds its way to Europe – and the presence of hate propaganda in Canada is sufficiently substantial to warrant concern and there are two types of harm caused by this hate – 1) harm done to members of the target group (impact sense of self-worth and acceptance) and 2) influence upon society at large
  - Also look at international human rights principles and the obligations taken on by Canada which are of significance when assessing the importance of the objective
  - SS. 15 and 27 of the Charter also represent a strong commitment to the values of equality and multiculturalism
  - Overall, there is substantial harm that can flow from hate propaganda and in trying to prevent pain suffered by target groups – this is an objective of utmost importance
- Proportionality → the expression prohibited by s. 319(2) is not closely linked to the rationale underlying s. 2(b)
  - Core of freedom of expression = need to ensure that truth and common good are attained
  - There is very little chance that statements that promote hatred against an identifiable group are true or that their vision of society will lead to a better world
  - Therefore, it is misguided to portray these statements as crucial to truth and the betterment of the political and social milieu
  - S. 2(b) also allows people to gain self-fulfillment by articulating thoughts and ideas as they see fit – but the ideas put forward by those who fall within s. 319(2) represents an extreme opposition to the idea that members of an identifiable group should enjoy this 2(b) benefit
  - We must cut off this freedom at the point when it begins to prevent the individual self-development and flourishing of another group of society
- Rational connection → there are 3 ways where the effect of the legislation might be seen as an irrational means of carrying out the Parliamentary purpose:
  - 1) The provision might actually promote the cause of hatemongers by earning them extensive media attention
    - Argument – sends out a message that hate propaganda is harmful and threatening + to demonstrate the severe reprobation the society holds against these messages
2. The public might view the suppression of expression by the gov’t with suspicion – making it seem as though the expression is true
   - This is so the values beneficial to a free and democratic society can be publicized
3. Germany in 1920s/30s used these same type of laws and they did not stop the racist philosophy under the Nazis
   - Does not say it could have stopped – but this is one way to prevent the spread of racism

- This branch has been met
- Minimal impairment → are the terms too wide to include expression not related to the objective?
  - Not overbroad just need to read it in proper context
  - Will it chill free speech? – People self-censor? Statements made in private conversation are excluded
  - Mens rea must also be ‘willful’ = must subjectively desire the promotion of hatred or have foreseen such a consequence as certain to result from the communication
  - Proof of actual hated is not required in order to justify a limit under s. 1
  - “Hatred” must be defined according to the context in which it is found – emotion of an intense and extreme nature that is clearly associated with vilification and detestation and hatred is predicated on destruction
  - S. 319(2) provides definitional limits which act as safeguards to ensure it will only capture the expressive activity which is openly hostile to Parliament’s objective
- Other modes that could further the objective → using human rights statutes instead of criminal law
  - It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom – the gov’t may legitimately employ a more restrictive measure to further the objective in ways that alternative responses could not
- Ultimate proportionality → few concerns can be as central to the concept of a free and democratic society as the dissipation of racism and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure
  - The effects of s. 319(2) are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s. 2(b). There are real concerns created by hate speech + those are addressed in a reasonable way through the criminal sanction

Dissent: (McLachlin J)
- Rational connection → this section may have a chilling effect on expression by law-abiding citizens and it is far from clear that is provides an effective way of curbing hatemongers
  - This speech also confers publicity for causes + can bring sympathy; gov’t trying to suppress truth; did not work in Nazi Germany
  - The connection is tenuous and it cannot be said there is a strong connection between the criminalization and its suppression. Also a publicity problem and conspiracy theories if gov’t says no people think it’s true
- Minimal impairment → the definition may catch many expressions which should be protected
  - “Hatred” is broad and capable of catching a wide variety of emotion
  - It is also subjective and is proved by inference – usually by judge or jury
  - The danger is that the legislation may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of fear of the criminal process
- Balancing → harm to expression – people afraid to express out of fear; benefit – are worthy but the claims of gains to be achieved are tenuous. The Human Rights Code would have been better to deal with this.
- Any questionable benefit is outweighed by the significant infringement on the constitutional guarantee of free expression
- Lays out three main rationales for freedom of expression:
  - 1. political process/democracy
  - 2. search for truth/marketplace of ideas
  - 3. inherent value/self-actualization

Saskatchewan (Human Rights Commission) v Whatcott (2013) SCC

Facts:
- This case concerned a challenge to a prohibition on hateful publications found in the SK Human Rights Code
- S. 14(1) – No person shall publish or display or cause or permit to be published/displayed on any lands or premises or in a newspaper, through a TV or radio or any other broadcasting devise, or in any printed matter – including any notice, sign, symbol, emblem, article, statement, or other representation
  - (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
  - (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.
Mr. Whatcott distributed flyers on behalf of Christian Truth Activists – two of the flyers were entitled ‘Keep Homosexuality out of Saskatoon’s Public Schools’ (D) and ‘Sodomites in our Public Schools’ (E)

4 individuals filed complaints alleging these materials promoted hatred against individuals because of their sexual orientation

The flyers included many offensive statements – linking homosexuality to HIV/AIDS and pedophilia

SK CA reversed trial findings finding that they failed to take the moral context of the flyers properly into account and that these flyers were a polemic on public policy issues and not hate speech

Issues:

- Is Whatcott’s freedom of expression justifiably infringed by preventing him from handing out his flyers?
- Does s. 14(1)(b) infringe s. 2(a)? Do the flyers contravene s. 14(1)(b)?

Decision:

- Yes, but can be upheld under s. 1, if sever ‘ridicules, belittles, otherwise affronts’ and keep ‘hatred’
- Flyers D and E are seen as hatred and compensation awards reinstated; but flyers F and G are not and do not contravene s. 14(1)(b) of the Code

Analysis: (Rothstein J) [S. 2(b)]

- *Taylor* defined hatred as ‘involving unusually strong and deep-felt emotions of detestation, calumny and vilification’
- Rothstein tweaked this by removing ‘calumny’ [speech amounting to false misrepresentations] – this definition excludes merely offensive or hurtful expression and the question the courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred
- Freedom of expression infringed – s. 1 analysis → it is a pressing and substantial objective
- But the Court found that the words “ridicules, belittles or otherwise affronts the dignity of” in s. 14(1)(b) were not “rationally connected to reducing systemic discrimination against vulnerable groups”. The expression captured by those words was found not to rise to the level of “ardent and extreme feelings” essential to the constitutionality of the limitation on expression in *Taylor*, so the Court ordered those words struck out
- With these words out – the remaining prohibition is not overbroad
- Not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other Charter rights, the exercise or protection of which may infringe freedom of expression.
- [S. 2(a)] → It was not in dispute that W sincerely believes his religion requires him to proselytize homosexuals – this just infringe his freedom of conscience and religion but is justified under s. 1
- If despite the context of the entire publication, even one phrase or sentence is found to bring the publication in contravention of the Code, this precludes publication of the flyer in its current form
- The message that a reasonable person would take from the flyers is that homosexuals by virtue of their sexual orientation are inferior, untrustworthy, and seek to proselytize and convert our children
- Flyers D and E would objectively be seen as exposing homosexuals to detestation and vilification
- But flyers F and G [identical – but have a reprint of a gay magazine and saying ads with men who want to get sodomized (who would be bottoms)] shouldn’t be legal in Saskatchewan; and a bible passage saying if you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea – this would not be found as exposing persons of same-sex orientation to detestation and vilification – reproduction of ads and statements of how ads could be interpreted as ‘men seeking boys’ do not demonstrate hatred required by the prohibition
  - The biblical passage stated on these flyers cannot be taken as inspiring detestation and vilification of homosexuals

**Section 7 – Life, Liberty, and Security of the Person**

**Introduction**

- **S. 7** – guarantees that everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
- *Lochner v New York (1905)* → US Supreme Court struck down a NY statute that set maximum hours of work for bakers on the ground that it violated the due process clause of the Bill of Rights which prohibits state gov’ts from taking away a person’s liberty without due process – the liberty violated was the employees liberty to make contracts about hours of work → interfering with property rights/contracts to do what they want (baker’s want to work more, and agreed to be paid less than min. wage) – substantive due process [dominant view is that judges imposed own ideology, frustrating efforts of progressive legislatures to reform working conditions]
- Administrative law → an individual who will be affected in some distinctive or particular way by a proposed administrative action or decision by the gov’t is entitled to ‘natural justice’ – to have a hearing and to have the decision made by officials who are impartial and independent
Both were a part of the knowledge of lawyers who helped draft s. 7

Section 7 Infringement:

1) Determine the nature + scope of the interference to right to life, liberty, OR security of the person
2) The nature and scope of fundamental justice; state depriving claimant of the right to PFJ
3) The applicability of s. 1 of the Charter

Internal Limits:

- Fundamental freedoms have no internal limits but courts interpret internal limits into these provisions
- Free speech – violent acts are not captured; freedom of religion – harm to others
- S. 7 – there must be an interference with life, liberty, or security of the person AND must be contrary to the PFJ

Reference re Section 94(2) of the Motor Vehicle Act (BC) [1985] SCC [defining principles of fundamental justice]
[First major decision addressing the nature and scope of s. 7]

Facts:
- S. 94(2) imposed a fine and imprisonment on a driver for driving while his license was suspended regardless of knowledge of the suspicion or intent. (Lack of MR)

Issues:
- Does s. 94(2) unreasonably infringe s. 7 of the Charter?

Decision:
- Hurdle 1) interference with life, liberty, security – here, interference with liberty
- Hurdle 2) PFJ
- Absolute liability offended fundamental justice – from the basic principle that the innocent should not be punished – and cannot be justified under s. 1

Analysis: [Lamer J]
The Principles of Fundamental Justice
- In the framework of a purposive analysis designed to ascertain the purpose of s. 7 and the interests it was meant to protect (Big M Drug Mart) it is clear that the interests which are meant to be protected by the words ‘and the right not to be deprived thereof except in accordance with the principles of fundamental justice’ of s. 7 are the life, liberty, and security of the person
- The principles of fundamental justice are not a protected interest but rather a qualifier of the right not to be deprived of life, liberty, and security of the person
- ‘The principles of fundamental justice’ must be determined by reference to the interests which those words of the section are designed to protect and the particular role of the phrase within the section
- Must be looked at with a broad interpretation
- Ss. 8-14 address specific deprivations of the right to life, liberty, and security of the person in breach of the principles of fundamental justice and as such, are violations of s. 7 – it would be incongruous to interpret s. 7 more narrowly (as it is more important) than the rights in ss. 8-14 (less important)
  - In effect these sections are examples of instances in which the ‘right’ to life, liberty, and security of the person would be violated in a manner which is not in accordance w/ the principles of fundamental justice
- The principles of fundamental justice are to be found in the basic tenants of our legal system – they do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system
- Cannot replace the words ‘fundamental justice’ for those of ‘natural justice’ aka procedural fairness
- Although many principles of fundamental justice are procedural in nature, cannot narrow the interpretation of PFJ as there are also substantive elements as well
- Proper approach to determination of principles of fundamental justice = future growth will be based on historical roots
- Held that “principles of fundamental justice” had two prongs:
  1. Is the law substantively fair? (Should we have a law at all?) and 2. Is the procedure fair?

Section 7 and Bodily Integrity
R v Morgentaler [1988] SCC [Security of the Person]

Facts:
- S. 251(1) of the Code provided that anyone who took steps to cause an abortion was guilty of an indictable offence and liable to imprisonment for life; (2) female who sought to cause own abortion liable to 2 years; (4) exception for those in approved hospital if pregnancy likely to endanger life/health
- M established an abortion clinic clearly violating s. 251(1) because it was not approved/did not obtain certificate
- Were charged and argued this provision violated s. 7 of the Charter; Trial = acquittal; Appeal = dismissed acquittal and ordered new trial
Issues:
- Does s. 251 of the Code violate s. 7 of the Charter?

Decision:
- The deprivation of security of the person caused by s. 251 is not in accordance with the second clause of s. 7 – and s. 251 cannot be justified under s. 1 because its procedural delays impairs s. 7 rights far more than is necessary. 251 struck down.

Ratio:
- Security of the person includes both physical manifestations and also emotional/psychological stress and pressure
- Majority only determined the PFJ were violated because of the procedural delays, did not feel it necessary to look at substantial unfairness as well

Analysis: (Dickson CJC)

Security of the Person
- If the state does interfere with the security of the person, the Charter requires such interference to conform with the principles of fundamental justice
- State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person
- Not only does the removal of decision making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotion stress – s. 251 clearly interferes with a women’s bodily integrity in both physical and emotional sense
- There is also a delay in getting the decision made set out in the s. 251 criteria – this delay and the physical interference caused by it [damage to well-being of the woman] is sufficient to inquire whether s. 251 comports with the principles of fundamental justice
- S. 251 forces women to carry a fetus to term contrary to their own priorities and aspirations and imposes serious delays causing increased physical and psychological trauma to those women who meet its criteria

Principles of Fundamental Justice
- Only 20% of hospitals in Canada performed abortions due to the requirements + provinces were also able to impose even more restrictive requirements for approval
- Failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should be granted – only defined as when the continuation of the pregnancy would be likely to endanger the ‘life or health’ of the pregnant women – however, ‘health’ is not defined for the purposes of the section
- Doctors testified at trial that the abortion committees apply differing definitions of health – some allow psychological health to be a justification and others do not
- When the decision of the abortion committee is so directly laden with the consequences, the absence of any clear standard to be applied to the committee is a serious procedural flaw
- The combined effect of these problems + the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice
- Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability – but if that structure is ‘so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of FJ that structure must be struck down’
- Here, the structure of the system regulating access to abortions is manifestly unfair – it contains so many potential barriers to its own operation that the defence it creates will be practically unavailable to women in many circumstances who would otherwise qualify for the defence (AKA – arbitrariness, overbreadth, GD)
- The procedures in s. 251 do not comport with the principles of FJ and it is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that the deprivation of pregnant women’s right to security of the person can never comport with fundamental justice
- The requirements do not comport with the principles of fundamental justice in the procedural sense, and since they cannot be severed from the provisions creating the substantive offence, the whole s. 251 must fail

Section 1
- Not justified because it impairs s. 7 rights far more than is necessary in that they hold out an illusory defence to many women who would otherwise qualify under the exculpatory provisions of s. 251(4) – many women Parliament would not wish to subject to criminal liability will be forced by the unavailability of the defence to risk liability or otherwise suffer harm [such as a late abortion]
- The effects of the limitation upon s. 7 rights are out of proportion to the objective sought to be achieved – objective = protect life, health of women – may be defeated because the structures of s(4) are so cumbersome that women whose health is endangered may not be able to gain an abortion

Concurrence (Beetz):
• If a rule of criminal law prevents a person from obtaining appropriate medical treatment when his/her life is in danger, then the state has intervened and this constitutes a violation of that person’s security of the person
• ‘Security of the person’ must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction + if must choose between the two, then the right to security of the person has been violated
• The delays a pregnant woman may have to suffer as a result of (4) must undermine the security of person for s. 7 to apply → if the delays result in additional danger to the health, then the state has intervened and this intervention constitutes a violation of that woman’s security of the person (the state created additional burdens which violated the PFJ)
• The delays caused by (4) result in 3 additional types of risk, and this violates the PFJ – the risk of post-operative complications increase; risk that the woman requires a more dangerous mens of procuring a miscarriage; and this may result in additional psychological trauma
• Disagrees that having an independent medical opinion offends the principles of FJ

Concurrence: (Wilson J)
• Must view the legislative scheme not only in the procedural sense but in the substantive sense as well
• Must ask what is meant by the right to liberty in the context of the abortion issue – does it give pregnant woman control over decisions affecting her own body? Believes that it is a liberty right to make fundamental personal choices without interference from the state.
• Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens, but it does require the state to respect them – this guarantees every individual a degree of personal autonomy over important decisions affecting their private lives – this no doubt gives a woman a choice to decide whether or not to terminate her pregnancy
• S. 251 clearly violates this right since it takes the decision away from the woman and gives it to a committee
• This is also an interference w/ right to personal autonomy in decision-making – a direct interference with her physical person as well

Dissent: (McIntyre J)
• If no right to have an abortion can be shown, then it cannot be said that security of the person has been infringed
• The interpretive approach to the Charter affords no support for the entrenchment of a constitutional right to abortion – to be accepted as a constitutional right it would have to be based on something more than the mere imposition of stress and anxiety
• A breach of a right would have to be based upon an infringement of some interest which would be of such nature + importance to warrant constitutional protection – the right to have an abortion is not such an interest

Chaoulli v Quebec (Attorney General) 2005 SCC

Facts:
• Zeliotis found the waiting times in Quebec’s public health care system untenable + Dr. Chaoulli was unsuccessful in having his home-delivered medical activities recognized and in obtaining a license to operate an independent private hospital
• These situations came about as a result of a statutory prohibition on private health insurance for health care services available in the public system – Health Insurance Act and the Hospital Insurance Act – they challenged the validity of the prohibition, contending that it deprived them of access to services that do not come with waiting times inherent in the public system
• Deschamps judgement was based strictly on the Quebec Charter – and once she found that this Charter had been violated, she did not find it necessary to consider arguments based on the Canadian Charter
• Quebec Charter = every human being has a right to life, and to personal security, inviolability and freedom [equivalent to s. 7 without the qualification to fundamental justice]

Issues:
• Does this statutory prohibition on private health insurance deprive the applicant of his s. 7 (or s. 1 of Quebec Charter) rights, therefore rendering it void?
• Is this prohibition justified by the need to preserve the integrity of the public system?

Decision:
• Yes – Appeal allowed

Analysis:
[Deschamps J]
• Decided her decision based on the Quebec Charter [not on the Canadian Charter]
• The appellants contend the waiting times violate their rights to life and security [not that they have a right to private insurance]
• The Canada Health Act does not prohibit private health care services – it is only a general framework that leaves considerable latitude to the provinces
• Appellant argues the prohibition infringes right to life – some patients die as a result of long waits for treatment in the public system when they could have gained prompt access to care in the private sector – trial found the right to life and liberty (security) had been infringed – D agrees since they are denied a solution that would allow them to avoid waiting lists

Justification
• Objective: to promote health care of the highest possible quality for all Quebeckers regardless of their ability to pay – quality of care and equality of access are 2 inseparable objectives under the statutes
• According to Attorney General, purpose = to preserve the integrity of the public health care system – likely a pressing and substantial purpose [enact legislation for universal health in response to a need for social justice – gov’t had to be the principal actor in health care]
• Rational connection: the consequences show an undeniable connection between the objective and the measure – the public plan is preserved because it has a quasi-monopoly
• Minimal impairment: the evidence that the existence of the health care system would be jeopardized by human reactions to the emergence of a private system carries little weight; AG failed to discharge burden of proving that a total prohibition on private insurance met the minimal impairment test; other provincial plans (allowing private sector freedom) show that prohibiting insurance is not the only measure a state can adopt to protect the system’s integrity; along w/ plans from other countries – the prohibition is not necessary to guarantee the integrity of the public plan + burden has not been discharged
  o Deference? ➔ The courts have a duty to rise above political debate + leave it to legislatures to develop social policy – but when social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them [judges promote values/perspectives that may not otherwise be taken seriously in the legislative process]
  o Too much policy is not a reason for judges to shy away from making decisions; does not matter if it is complicated or there are complex policy decisions. S. 52 is the Supreme Law of Canada, and sometimes courts are the last line of defence for citizens
  o A court must show deference where the evidence establishes that the gov’t has assigned proper weight to each of the competing interests – certain factors favor greater deference – prospective nature of the decision, impact on public finances, multiplicity of competing interests, difficulty of presenting scientific evidence, and limited time available to the state
  o Here, evidence shows a wide variety of measures available to gov’t – seen from other plans in other countries with mixed systems and they are fine, so this is not minimally impairing.

[McLachlin CJC and Major J]
• The Charter does not provide a freestanding right to healthcare, however where the gov’t puts in place a scheme to provide healthcare, it must comply with the Charter. And if there is a prohibition and the gov’t is saying we cannot do something that is detrimental to health, then it infringes rights
• The Acts limit access to private health care services by removing the ability to contract for private health care insurance – this monopoly results in delays in treatment and adversely affects the security of the person and where a law adversely affects life, liberty, or security it must conform to the PRJ – here, fails to do so
• Given the ban on insurance most Quebeckers have no choice but to accept delays in the medical system + their adverse physical and psychological consequences – this triggers s. 7 (security of the person)
  o Denies people the right to access alternative health care – people in urgent need of healthcare [unless within wealthy few who can afford to pay private] have no choice but to accept the delays imposed by the legislative scheme – Morgentaler
• This adverse impact is significant enough to warrant s. 7 protection since being denied timely health care is significant to current/future health – where lack of timely health care can result in death, s. 7 (protection of life) is engaged

PFJ
• Arbitrary = where it bears no relation to or is inconsistent with the objective that lies behind it – consider state interest and societal concerns that the provision meant to reflect – must be both a theoretical and a real connection based on the facts – onus for showing lack of connection rests with the claimant
  o A monopoly is not necessary to the provision of quality public health care
  o The evidence of the experience of other western democracies refutes the gov’ts theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care
• Where the gov’t fails to deliver adequate care, the denial of private insurance subjects people to long waiting lists and negatively affects their health and security of the person
• This prohibition jeopardizes the right to life, liberty, security in an arbitrary manner
• Given the absence of evidence that the prohibition of the purchase/sale of private health insurance protects the health care system, the rational connection is not made out – **question whether an arbitrary provision will ever meet the rational connection test?**

• This is also not proportionate to the effects of the prohibition – goes further than necessary to protect the public system – it is not minimally impairing

• Benefits also do not outweigh the effects

**Dissent: [Binnie and Lebel JJ]**

• Majority did not lay down a reasonable standard to determine what ‘reasonable’ is – what is within a reasonable time and what are the benchmarks? – Uncertain how much healthcare is reasonable enough to satisfy s. 7

• This case does not rest on constitutional law but on a disagreement with Quebec gov’t on aspects of its social policy

• **A legislative policy is not arbitrary because we may disagree with it** – appellant argument on arbitrariness is based largely on generalizations of the public system drawn from fragmentary experience

• Accept finding of lower courts that a two-tiered health system would have a negative impact on the integrity, functioning, and viability of the public health system

• Agree life or security of some people on some occasions can be put at risk – however, not the liberty at risk [does not protect freedom of contract or the liberty to deliver health care in a private context – this does not protect the right to exercise one’s chosen profession]

**PFJ**

• For a principle to be one of FJ it must be 1) a legal principle, 2) the reasonable person must regard it as vital to our societal notion of justice, which implies a significant societal consensus, and 3) it must be capable of being identified with precision and applied in a manner that yields predictable results

• The aim of health care to a reasonable standard within reasonable time is not a legal principle; there is no societal consensus about what is means or how to achieve it and it cannot be identified with precision

**Arbitrariness**

• Do not agree that this law bears no relation to or is inconsistent with the objective that lies behind the legislation – also do not agree with the expansion of the Morgentaler principle to invalidate a prohibition simply because a court believes it to be unnecessary for the gov’t purpose

• **To substitute unnecessary for inconsistent is to alter the meaning of the term arbitrary** – inconsistent = the law logically contradicts its objectives; unnecessary = the objective could be met by other means  → arbitrariness means there is no rational, and preferring one system to another does not make it arbitrary (that is a policy decision, better left for gov’t)

• 1) What is the state interest sought to be protected?
  o Objective = provide high quality healthcare for many people as possible

• 2) What is the relationship between state interest and the prohibition against private health insurance?
  o In principle – Quebec wants a health system where access is governed by need rather than wealth or status – do not uninsurable people left behind – discourage growth of private-sector
  o Practical – Quebec bases the prohibition on the view that private insurance, and a consequent major expansion of private health services, would have a harmful effect on the public system

• 3) Have the appellants established the prohibition bears no relation or is inconsistent with the interest?
  o In light of the legislative objectives of the Canada Health Act, it is not arbitrary for Quebec to discourage the growth of private sector health care

• If there is a deprivation, it would not violate any legal principle of fundamental justice within s. 7

**Canada (Attorney General) v Bedford 2013 SCC 72 (Security of the Person)**

**Facts:**

• It is not a crime to sell sex for money in Canada – but it is to keep a bawdy-house, to live on the avails of prostitution, or to communicate in public w/ respect to a proposed act of prostitution

• 3 applicants (former prostitutes) brought an application seeking declarations that 3 provisions of the Criminal Code are unconstitutional

• S. 210 = offence to be an inmate of a bawdy-house, to be found in one, or to be owner, landlord, lessor, tenant, occupier [used for prostitution]

• S. 212 = offence to live on the avails of prostitution

• S. 213 = offence to communicate in a public place for purposing of engaging in prostitution

• Prostitution Reference – upheld the bawdy-house and communication prohibitions

**Issues:**

• Does ss. 210, 212(1)(jj), and 213(1)(c) infringe s. 7 of the Charter (security of the person) and if so, are they justified under s.17
Decision:
- They all infringe s. 7 and are therefore inconsistent with the Charter, and hence void – 1-year temporary suspension
- Appeal dismissed, cross-appeal allowed

Analysis: (McLachlin CJ)

Precedents
- Trial judge allowed to reconsider rulings of higher courts if 1) new legal issues arises as result of developments in law, or 2) if change in circumstances/evidence that fundamentally shifts parameters of debate; here application judge allowed to rule on violations of security because the Reference dealt with liberty and vagueness [trial judge findings on social and legislative facts are entitled to same degree of deference as any other factual findings]
- Deference to lower courts – the first instance judge determines facts; appeal courts review decision for correctness/overriding and palpable error and the court expressed preference for social science evidence to be presented through an expert witness

Is Security of the Person Engaged?
- Yes → The prohibitions heighten the risks faced in prostitution – the prohibitions not only imposed conditions on how prostitutes operate but impose dangerous conditions. The safest place to perform their work was in their own houses, there are safer use of health check practices, and it problematizes the notion of choice, as it is a choice for some not for others.

PFJ
- Here – concerned w/ arbitrariness, overbreadth, and gross disproportionality
- A+O = absence of connection between law’s purpose + s. 7 deprivation; GD = impact on life, liberty, security so severe it violates fundamental norms
- A: whether there is a direct connection between purpose of law and impugned effect on individual – must be rational connection between object of law + limits it imposes on life, liberty, security
- O: so broad that it includes some conduct that bears no relation to its purpose – no rational connection between purposes of law and some of its impacts
- GP: only in extreme cases where seriousness of deprivation is totally out of sync with objective – balances negative effect on individual against purpose of law [not against societal benefit that might flow from it]

Keeping a Common Bawdy-House
- Practical effect = confine prostitution to street and out-calls [in-calls are prohibited]
- Evidence that out-calls are not as safe as in-calls – fixed indoor location (receptionists, bodyguards, etc.); interferes with provision of health checks; and prevents resort to safe houses
- This negatively impacts security of the person + engages s. 7
- Purpose = to combat neighborhood disruption/disorder and to safeguard public health + safety
- PFJ → the negative impact on security of person is grossly disproportionate to its objective – harms (high homicide rate) are GD to the deterrence of community disruption

Living on the Avails
- Makes it a crime for any to supply a service to a prostitute because she is a prostitute
- Effect = prevents hiring of bodyguards, drivers, receptionists
- This prevents prostitutes from taking steps to reduce risks they face and negatively impact security of the person
- Purpose = to target pimps and the parasitic, exploitative conduct in which they engage
- PFJ = this is overbroad – captures a number of non-exploitative relationships not connected to the law’s purpose – punishes everyone living on the avails of prostitution without distinguishing who exploit them

Communicating in Public
- Face-to-face communication enhances safety and by depriving them of this tool increases risks – this engages security of the person
- Purpose = to take prostitution off the streets and out of public view
- PFJ = grossly disproportionate – ability to screen clients was an essential tool to avoid violent/drunk clients

S. 1
- Appellant did not argue a s. 1 justification – but did try to justify the living on the avails provision [must be drafted broadly to catch all exploitative relationships → however, is not minimally impairing since it catches clearly non-exploitative ones
- At the final stage 1 inquiry = effect of taking away measures that protect safety + possibly safe lives are not outweighed by effect of protecting them from exploitative relationships

Carter v Canada (Attorney General) 2015 SCC

Facts:
It is a crime in Canada to assist another person to end her own life — a person facing this prospect (who is ill and cannot seek a physician’s assistance in dying, therefore may be condemned to suffering) has two options: can suffer until she dies or can take own life prematurely

**Issues:**

- Whether the criminal prohibition that puts a person to the choice of suffering vs. suicide violates her Charter rights to life, liberty, and security of the person?

**Decision:**

- Yes – this prohibition is void as it deprives a competent adult of assistance where the person clearly consents to termination and the person has a grievous and irremediable medical condition
- Violates s. 7 rights but Parliament must be given the opportunity to craft an appropriate remedy so the declaration of invalidity is suspended for 12 months
- Appeal allowed

**Analysis: (The Court)**

- *Rodriguez v British Columbia* (SCC) – held the prohibition did not violate s. 7; **BUT** recent reports have come down in favor of reform – so the legislative landscape on the issue of physician-assisted death has changed in the last 2 decades since Rodriguez
- The trial judge was **not** bound by Rodriguez – since there were both new legal issues raised (s. 7 and the law relating to overbreadth and gross proportionality have changed since); and because of a change in circumstances/evidence that shifts the parameters of the debate, as the evidence the trial judge had was capable of undermining the evidentiary conclusions from Rodriguez which found that in jurisdictions where this is legal do not see this right being abused to vulnerable people

**Does the Law Infringe S. 7 → Life?**

- Trial found the prohibition had the effect of forcing some individuals to take own lives prematurely for fear they would be incapable of doing so when reached the point where suffering was intolerable – on this basis, the right to life was engaged – SCC agreed
- The right to life is engaged where the law or state action imposes death or an increased risk of death on a person [concerns about autonomy + quality of life have been treated as security or liberty rights]
- ‘Sanctity of life’ – is no longer seen to require that all human life be preserved at all costs- an individual’s choice about the end of her life is entitled to respect

**Liberty + Security**

- Liberty protects the right to make fundamental personal choices free from state interference
- Security of the person encompasses a notion of personal autonomy involving control over one’s bodily integrity free from state interference + it is engaged by state interference w/ an individual’s physical or psychological integrity (Morgentaler)
- Here – an individual’s response to a grievous and irremediable medical condition is a matter critical to his/her dignity and autonomy – this interference w/ ability to make decisions concerning bodily integrity and medical care trenches on liberty; and by leaving people to endure intolerable suffering impinges on their security of the person

**PFJ**

- When looking at O; A; GP – first step is to determine the object of the impugned law
- Objective = to protect vulnerable persons from being induced to commit suicide at a time of weakness
- Canada argues it should be – the preservation of life
  - NO – 1) Rodriguez did not adopt this as the object – remarks to it are best understood as a reference to an animating social value rather than a description of the specific object; 2) if object is stated broadly it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate; 3) object needs to be defined precisely for purposes of s. 7 – the direct target of the measure is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness
- **Arbitrariness:** one that is not capable of fulfilling its objectives – it infringes on rights without furthering the public good said to be the objective of the law
  - Here – a total ban on assisted suicide clearly helps achieve the protection of vulnerable persons from ending their life in times of weakness
- **Overbreadth:** goes too far by denying the rights of some individuals in a way that bears no relation to the objective; the focus is not on broad social impacts but on the impact of the measure on the individuals whose life, liberty, security is trammeled
  - Here – yes – not every person who wishes to commit suicide is vulnerable + there are people who have a considered, rational, and persistent wish to end their lives – therefore, this limitation is at least in some cases not connected to the objective of protecting vulnerable persons
- GD – unnecessary since it is overbroad

Section 1
• Here it is prescribed by law and has a pressing and substantial objective
• Parliament did face a difficult task in balancing the perspectives of those at risk vs. those who seek the assistance of dying – deference needed – but here, since it was an absolute prohibition cannot describe it as a ‘complex regulatory response’ therefore, the degree of deference (while high) is reduced
• Rational connection; yes - where a certain activity poses risks, prohibition of that activity is a rational method of curtailing risks; it is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable from being induced to commit suicide at a time of weakness
• Minimal impairment: [where there is a less harmful means of achieving the legislative goal] no - trial judge concluded (after reviewing the evidence) that a permissive regime with properly designed + administrative safeguards was capable of protecting vulnerable people from abuse + error – can apply the informed consent standard to those wishing to seek assistance in dying; the burden of establishing minimal impairment is on the gov’t + the gov’t did not discharge this burden – the evidence did not support the contention that a blanket ban was necessary to substantially meet the gov’t objectives, as there is international evidence showing no abuse; a theoretical/speculative fear cannot justify an absolute prohibition
• Not necessary to look at final stage + balance benefits/effects

Section 15 – Equality Rights

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

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

WS Tarnopolsky, “The Equality Rights”
• Dicey – ‘equality before the law’ → one of the 3 meanings of the fundamental principle, the ‘rule of law’
  o This excludes the exemption of officials or others from the duty of obedience to the law which governs other citizens
• Marshall – the doctrine implies ‘equality of state and individual before the law’ → requires that rules granting powers to officials be precise and that is the duty of the courts to hold an equal balance between citizens and officials
• Roncarelli v Duplessis → the individual may do anything he pleases unless there is a provision prohibiting him – freedom is presumed; and the authority of the state [public official] can do nothing in his public capacity unless the law permits it

WS Tarnopolsky, “The Equality Rights in the Canadian Charter of Rights and Freedoms”
• S. 1 of Canadian Bill of Rights includes both a non-discriminatory clause + one on ‘equality before the law’
• Regina v Drybones → only case where the SCC held a federal provision contravened the ‘equality before the law’ clause + was therefore inoperative [Indian Act made it an offence for Indians to be intoxicated off a reserve]
  o “S. 1(b) means that no individual or group is to be treated more harshly than another under that law + a person is denied equality before the law it is an offence because of his race for him to do something which his fellow Canadians are free to do w/o committing an offence”
• Lavell → Indian Act – women lose band membership if marries non-Indian, but man does not; found this does not contravene ‘equality before the law.’ Said all women being treated the same to does not matter if being treated worse than men.
• ‘Equal benefit of the law’ (motivation behind this clause) – Bliss case → worked long enough for ordinary benefits but not long enough for maternity; could not claim either – SCC found this did not contravene because it was a benefit and was distinguished from Drybones in that that was equal protection of the law

• Special Joint Committee recommended major changes to the equality provisions
  o Expanding to include equality under the law + equal benefit of the law
  o Adding disability to the expressly prohibited grounds of discrimination
  o Making unmistakable provision for other unspecified forms of unconstitutional discrimination
  o Elaborating the affirmative action provisio to ensure the criteria of ‘disadvantage’ include those that form the basis for prohibited discrimination
  o Altering ‘everyone’ to every individual – to deny rights to corporations
• Lobbying efforts to include s. 28 \(\rightarrow\) rights + freedoms guaranteed equally to male and female persons – the notwithstanding clause is inapplicable to this provision
• S. 32(2) of the Charter postponed s. 15 coming into force for 3 years to allow gov'ts to house clean and deal with any equality violations

Early Interpretation + Application of Section 15


Facts:
• Andrews (British subject but permanent resident of Canada) brought an action for declaration that the Canadian citizenship requirement for admission to the Law Society of BC violated s. 15 of the Charter

Issues:
• Does the citizenship requirement violate s. 15?

Decision:
• Yes - appeal dismissed

Ratio:
• Two part test \(\rightarrow\) 1. Does the law create a distinction? Based on an enumerated and analogous ground – characteristic that gov't can't discriminate against; 2. Does that distinction create a disadvantage by perpetuating a stereotype? (discriminate against)

Analysis: (McIntyre J – Dissent – but here unanimous position on s. 15 interpretation)
• S. 15 is not a general guarantee of equality – it does not provide for equality between individuals or groups nor does it impose an obligation for individuals to accord equal treatment to others
• Every difference in treatment between individuals under the law will not necessarily result in inequality; and inequality may also result from equal treatment (ex. Big M Drug Mart)
• A law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another
• Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application
• The promotion of equality entails promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, and consideration – substantive equality = does not mean identical treatment
• S. 15 are to be granted without discrimination – in a democratic society discrimination is unacceptable because it epitomizes the worst effects of the denial of equality
• Discrimination is when a rule or standard has a discriminatory effect on one group of individuals because of a special characteristic and this is not imposed on other members
• Do not have to prove intent as an element
• Discrimination = a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual/group which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others or which withholds or limits access to opportunities, benefits, advantages available to other members of society; distinctions are more based on personal characteristics on the basis of association with a group as opposed to individual’s merits and capacities

“Enumerated and analogous grounds” approach for interpreting s. 15
• It is not enough to just look at the alleged ground of discrimination and decide whether it is enumerated or analogous but also must look at the effect of it on the complainant
• Not all distinctions/differentiations are discriminatory
• Complainant must show 1) that he/she is not receiving equal treatment before and under the law/it has a differential impact in the protection/benefit accorded by law, but also 2) that the legislative impact of the law is discriminatory
• Any justification/consideration of reasonableness of the enactment will take place under s. 1

Application
• Under the Act, there is a distinction between citizens + non-citizens with respect to the practice of law – the effect is to deny admission to non-citizens who are otherwise qualified
• Rights under s. 15 apply to all persons whether citizens or not and a rule which bars an entire class of persons from certain forms of employment based solely on lack of citizenship without consideration of other qualifications infringes s. 15 equality rights
• Wilson J \(\rightarrow\) Non-citizens are a group lacking in political power + are vulnerable to have their interests overlooked – they fall into an analogous category to those specifically enumerated in s. 15
• La Forest agreed citizenship should be treated as an analogous ground of discrimination but expanded – citizenship is beyond the control of the individual and not alterable by conscious action and it is generally irrelevant to the work of gov’t and assessment of ability to perform/contribute to society
• La Forest would uphold under s. 1 -> favored upholding violations of equality rights if gov’ts are pursuing sound objectives in a reasonable manner + here said it was a reasonable means to ensure members of the legal profession are qualified

The Kapp Test
• In Kapp, the Court reverted to a version of the approach proposed by McIntyre J in Andrews in the context of a challenge that fell within the meaning of s. 15(2)

R v Kapp [2008] SCC
Facts:
• Appellants are commercial fishers (mainly non-Aboriginal) who assert their equality rights under s. 15 were violated by a communal fishing license granting members of 3 aboriginal bands the exclusive right to fish for salmon for a period of 24 hours in Fraser River
• License allowed Abo fishers to fish for food, social + ceremonial purposes, and for sale – some were licensed fishers allowed to fish at other openings for commercial fishers
• Appellants were commercial fishers excluded from the fishery for 24 hours + were charged w/ fishing at a prohibited time

Issues:
• Have the appellants s. 15 equality rights been breached?

Decision:
• No – breach of s. 15 equality guarantee has not been established – appeal dismissed
• The program is protected by s. 15(2) as a program that has as its object the amelioration of conditions of disadvantaged individuals or groups

Ratio:
• S.15(2) test: Gov’t must establish that 1) A program has an ameliorative or remedial purpose; and 2) targets a disadvantaged group identified by enumerated or analogous grounds

Analysis: (McLachlin CJ and Abella J)
• Fed. gov’t has pursued policies to increase Aboriginal involvement in the commercial fishery – as a response to Sparrow to respect rights recognized; provided them with a larger role in fisheries management + increased economic benefits; and minimizing disruption of non-Ab commercial fisheries

Purpose of S. 15
• Ss. 15(1) + (2) work together to promote the vision of substantive equality – (1) is prevented at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds; (2) the Charter preserves the right of the gov’t to implement programs aimed at helping the disadvantaged to improve their situation
• In Andrews – discriminatory impact viewed through 2 concepts – 1) perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds, and 2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant’s or group’s actual circumstances and characteristics
• In Law – the SCC suggested that discrimination should be defined in terms of the impact of the law or program on the ‘human dignity’ of members of the claimant group having regard to 4 contextual factors – 1) pre-existing disadvantage, if any, of the group; 2) degree of correspondence between differential treatment and claimant group’s reality; 3) whether the law/program has an ameliorating purpose or effect; 4) the nature of the interest affected
  o Factors 1+4 go to go to the perpetuation of disadvantage + prejudice; factor 2 deals with stereotyping; and 3 goes to whether the purpose is remedial within the meaning of s. 15(2)
• These factors affirm the approach to substantive equality in Andrews – to combat discrimination defined in terms of perpetuating disadvantage and stereotyping
• Central purpose of combating discrimination – 15(1) = to prevent gov’ts from making distinctions based on the enumerated or analogous grounds that have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping; 15(2) = focus on enabling gov’ts to proactively combat discrimination through affirmative measures

S. 15(2)
• Not every distinction is discriminatory – programs designed to ameliorate the disadvantage of one group will exclude individuals from other groups but this does not make them unconstitutional or discriminatory
• Discrimination requires more than differentiation [need to show the impact of the law is discriminatory]
Here, the appellants were treated differently based on race – need to determine if the program that targeted the aboriginals falls under s. 15(2) in the sense that it is a ‘law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups’

- It was issued pursuant to an enabling statute + regulations – which qualifies as a law, program, or activity
- S. 15(2) approaches – as an interpretive aid to s. 15(1); as an exception or exemption from s. 15(1); or (added here) if gov’t can demonstrate that an impugned program meets the criteria of s. 15(2) it may be unnecessary to conduct a s. 15(1) analysis at all
- It tells us that s. (1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15
- Once complainant establishes a distinction made on an enumerated or analogous ground, it is open for the gov’t to show that the impugned law is ameliorative + thus constitutional, if the gov’t fails to do so, then at this point the program must receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory

“Has as Its Object”

- Language suggests the main consideration is the legislative goal (purpose) rather than actual effect in determining whether a program qualifies for protection (subjective approach) – Courts can examine the legislation to ensure the declared purpose is actually genuine
- To determine the purpose – can look at statements made by drafters and also whether the legislature chose means rationally related to that ameliorative purpose
- The ameliorating purpose does not need to be the sole object of a program

“Amelioration”

- Laws designed to restrict or punish behavior would not qualify for s. 15(2) protection – nor should the focus be on the effect of the law
- But the fact that the law has no plausible or predictable ameliorative effect may render suspect the state’s ameliorative purpose – cannot protect discriminatory programs on colorable pretexts

“Disadvantaged”

- Vulnerability, prejudice, and negative social characterization
- S. 15(2) is to protect gov’t programs targeting the conditions of a specific and identifiable disadvantaged group – not all members need to be disadvantaged as long as the group as a whole has experienced discrimination

Application

- Appellants have demonstrated a distinction imposed on the basis of race (an enumerated ground) as the gov’t conferred the fishing license to particular aboriginal bands only
- 1) Ameliorative or remedial purpose? → provided economic opportunities to bands, to negotiate solutions to fishing rights claims, support progress towards self-sufficiency – means chosen to achieve the purpose are rationally related to serving the purpose
- 2) Program targets disadvantaged group → the disadvantage of Ab people is indisputable – face high rates of unemployment, poverty, face disadvantages in housing, education, health – the license, by addressing long-term goals of self-sufficiency and providing sources of income/employment relates to the social + economic disadvantages suffered by the bands

Equality’s Three Steps

1. Differential Treatment

- The first step in the s. 15(1) analysis is to determine whether the impugned gov’t action/inaction has produced differential treatment
- A difference in treatment most often will be apparent on the face of the challenged law/policy
- Direct discrimination – ex. Andrews – law made citizenship a requirement for being called to bar treating citizens vs. non-citizens differently
- Adverse effects discrimination – ‘facially neutral’ law has a differential impact on the basis of a prohibited ground of discrimination
- Can look at the effects of the law to determine discrimination

Eldridge v British Columbia (Attorney General) [1997] SCC

Facts:

- 3 individuals born deaf and whose preferred means of communication was sign language sought a declaration that the failure to provide public funding for sign language interpreters for the deaf when they received medical services violated s. 15
• According to the Medical and Health Care Services Act, the power to decide whether a service is medically required and hence a ‘benefit’ is delegated to the Medical Services Commission – the Commission and the hospitals did not make sign language interpretation available as an insured service

Issues:
• Does the failure to provide funding for sign language interpretation violate s. 15?
• Have the appellants been afforded equal benefit of the law without discrimination?

Decision:
• No – the failure of the Commission/hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a prima facie violation of the s. 15(1) rights of deaf persons
• Appeal allowed

Ratio:
• Under adverse effects discrimination the gov’t may be required to take special measures to ensure that disadvantaged groups are able to benefit equally from gov’t services
• The principle of discrimination can accrue from the failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public

Analysis: [La Forest J]
• S. 15(1) is to be interpreted generously and purposively
• As deaf persons, the appellants belong to an enumerated group under s. 15 – being physically disabled – persons with disabilities have been excluded from labor force, denied opportunities for social interaction, subjected to stereotyping – have not been afforded the equal concern, respect, and consideration that s. 15 demands
• There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system – the values are promotion of health, prevention/treatment of disease, and the realization of those values through the vehicle of publically funded health care system → there could be no personal characteristic less relevant to these values than an individual’s physical disability
• On its face the medi-care system applies equally to deaf and hearing populations and does not make an explicit distinction based on disability by singling out deaf persons – but appellant’s have an adverse effects claim – the lack of sign language funding renders them unable to benefit from the legislation to the same extent as hearing persons
• It is sufficient that the effect of the legislation is to deny someone the equal protection or benefit of the law
• Elimination of discrimination for disabled persons – seen in the failure to make reasonable accommodation and fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation which results in discrimination against them
• Here, the adverse effects result from a failure to ensure that deaf persons benefit equally from a service offered to everyone
• Trial/CA decision → sign language interpretation services are not medically required; they are ancillary services which are not publicly funded therefore, the appellants were not denied a benefit available to the hearing population
• This approach mischaracterizes the practical reality of health care delivery – communication is an integral part of the provision of medical services – so if there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can they be receiving the same level of medical care as hearing persons?
• Where it is necessary for effective communication, interpretation cannot be considered an ancillary service
• The SCC has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner – this can have the effect of requiring the gov’t to take positive action [ex. by expanding the scope of the benefit to previously excluded persons]
• Here, the failure to provide interpretation denies deaf people equal benefit of the law and discriminates against them in comparison with hearing persons

Notes:
• Vriend v AB is another successful claim of ‘adverse effects’ discrimination
  o Fired when employer discovered he was gay – attempted to file complaint to AB Human Rights Commission alleging discrimination on basis of sexual orientation but did not allow as was not a prohibited ground of discrimination
  o AB gov’t argued the exclusion of sexual orientation was not differential treatment but a ‘neutral silence’
  o SCC – the exclusion amounted to differential treatment directly and in terms of its adverse effects – by reason of under-inclusiveness
  o Distinction between homosexuals and other protected disadvantage groups but also between homosexuals and heterosexuals
• Equal benefit of the law
2. Enumerated and Analogous Grounds

Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] SCC

Facts:
- This case concerned s. 77(1) of the Indian Act requiring band members to be ordinarily resident on their reserve in order to be eligible to vote in band elections
- Non-resident band members brought a challenge under s. 15 alleging that residence was an irrelevant personal characteristic on which to deprive them of a voice in decisions that could deeply affect them

Issues:
- Does the provision requiring band members to be ordinarily resident on their reserve to be eligible to vote violate s. 15?

Decision:
- Yes – s. 77(1) violates s. 15 and cannot be justified under s. 1 [Not minimally impairing under s. 1]
- The words ‘and is ordinarily resident’ struck from statute but delayed for 18 months

Ratio:
- Once a ground is found to be analogous, it is permanently enrolled as analogous for other cases
- The common feature of an analogous ground is immutability – personal characteristics we cannot change or that the gov’t has no legitimate interest in expecting us to change to receive equal treatment under the law + other factors may be seen to flow from the central concept of immutable or constructive immutable personal characteristics

Analysis: [McLachlin and Bastarache JJ]
- **Step 1** Does the impugned law make a distinction that denies equal benefit or imposes an unequal burden? – Yes, the exclusion of off-reserve band members from voting privileges satisfies this requirement
- **Step 2** Is this distinction discriminatory?
- Based on an enumerated ground or a ground analogous? – look at the general purpose of s. 15(1) \(\rightarrow\) to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration – believe Aboriginality-residence constitutes a ground of discrimination analogous to the enumerated grounds
- **Enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making** – they are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists – therefore, they must be distinguished from a finding of discrimination existing in a particular case
  - Distinctions on these grounds are not always discriminatory
  - The same applies to the grounds recognized as ‘analogous’ – this is to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality
  - Enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination – what varies is whether they amount to discrimination in a particular case
  - Do not agree that a marker of discrimination can change from case to case – it is not the ground that changes but the determination of whether a distinction on the basis of a constitutionally cognizable ground is discriminatory
  - If Aboriginality-residence is to be an analogous ground, then it must always stand as a constant marker of potential legislative discrimination, regardless of what the challenge is
  - Once a distinction on an enumerated or analogous established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case
  - **Step 3** Whether the distinction amounts (in purpose or effect) to discrimination on the facts of the case
- **Criteria for determining whether a ground is analogous**
  - Enumerated grounds (sex, race, national/ethnic origin, color, religion, age, mental/physical disability) all have in common the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of personal characteristic that is immutable or changeable only at unacceptable cost to personal identity
  - Must reveal grounds based on characteristics that we cannot change or that gov’t has no interest in expecting us to change to receive equal treatment under the law
  - Other factors – the decision adversely impacts a discrete and insular minority or a group historically discriminated against
  - Actually immutable – race; constructively immutable – religion
  - Sexuality, marital status
- **Once a personal characteristic is recognized or rejected as an analogous ground it will hold across all legal contexts**
  - The analogous grounds inquiry must be undertaken in a purposive and contextual manner – the nature, situation, and the social, political, and legal history of Canadian society’s treatment of that group

[L’Heureux-Dube]
• An analogous ground may be shown by the fundamental nature of the characteristics: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging
• The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground – but should also look at other factors
• Also central if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged. Another indicator is whether the ground is included in fed or prov. human rights codes
• This second stage must be flexible enough to accommodate stereotyping, denials of human dignity/worth that might occur in different ways for different groups of people
• Deciding to live on vs. off-reserve is important to identity and personhood and is therefore fundamental – those living off-reserve have often experienced disadvantage, stereotyping, and prejudice
• Off-reserve band member status is an analogous ground – made no findings about ‘residence’ as an analogous ground contexts other than as it affects band members who do not live on the reserve of band to which they belong
• The answer can vary from context to context in determining whether an analogous ground changes

Notes:
• The following characteristics do not qualify as analogous grounds: employment status or occupation, with respect to the RCMP, with respect to health care workers, province of residence, persons charged with war crimes/crimes against humanity outside of Canada, bringing a claim against the Crown, marijuana users

**Boulter v Nova Scotia NS CA**

• In my view, poverty is not a personal characteristic, under Corbiere, that is (1) "actually immutable" or (2) "constructively immutable" in that either the government "has no legitimate interest in expecting us to change" or it "is changeable only at unacceptable cost to personal identity".
• Poverty is a clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources. Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age.
• As to the second test, the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances attending an immutable characteristic, but to eradicate that mutable characteristic of poverty itself. That objective is shared by those living in poverty....Economic status, poverty or wealth, is not an adopted emblem of identity like religion, citizenship or marital status, that the individual observes peacefully free of government meddling. Poverty per se does not suit the legal pattern for an analogous ground under Corbiere’s formulation.

3. Disadvantage/Discrimination

**M v H [1999] SCC**

Facts:
• Two women cohabited in a same-sex relationship from 1982 to 1992
• H was in a financially stronger position than M and the parties lived in a house owned by H + started own advertising business where H’s contributions were greater than those of M (devoted more time to domestic tasks)
• When the business failed, H was able to find other employment but M was not
• After they broke up, M filed a claim against H for support pursuant to the Family Law Act – here, the definition of ‘spouse’ extended governing support applications beyond married persons to include a man and woman who were not married and had cohabited for a period of not less than 3 years
• M said this definition was unconstitutional by virtue of its exclusion of same-sex couples and that the appropriate remedy was an extension of the definition to include same-sex couples

Issues:
• Does the definition of ‘spouse’ by not including same-sex couples’ violation s. 15?

Decision:
• The definition of spouse violates s. 15(1). It is of no force and effect – 6 months delayed declaration of invalidity [instead of replacing with words ‘two persons’]. Appeal dismissed; remedy modified

Analysis: [Cory and Iacobucci JJ]
• First 2 steps of the s. 15 analysis are satisfied – definition of spouse resulted in differential treatment on basis of sexual orientation which is an enumerated ground
• The determination of whether differential treatment imposed by legislation on an enumerated or analogous ground is discriminatory must be undertaken in a purposive and contextual manner
• Need to inquire whether the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise had the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society equally deserving of concern, respect, and consideration
• The spousal support provisions are there to protect economic interests of individuals in intimate relationships so when a relationship breaks down it ensures that a member of a couple who has contributed to the couple’s welfare in intangible ways will not find himself or herself utterly abandoned
• There are various contextual factors that can be used to determine whether legislation demeans a person’s dignity – the list is not closed and there is no specific formula that must be considered
• In examining contextual factors, a court must adopt the point of view of a reasonable person, in circumstances similar to those of the claimant taking into account the relevant contextual factors:
  1) The preexisting disadvantage, stereotype, vulnerability by the individual/group at issue – here there is significant preexisting disadvantage and vulnerability and these circumstances are exacerbated by the impugned legislation
  2. The correspondence between the ground on which a claim is based and actual need, capacity, or circumstances of the claimant or others – must view from the perspective of the claimant whether the differential treatment imposed by the legislation has the effect of violating human dignity
  3. Whether the impugned legislation has an ameliorative purpose or effect for a group historically disadvantaged in the context of the legislation – argued that here the legislation is meant to target women in opposite-sex relationships and that women in same-sex relationships are not similarly disadvantaged – disagree
  4. The nature of the interest affected by the impugned legislation – here the interest protected is fundamental – the ability to meet basic financial needs following the breakdown of a relationship and same-sex couples of entirely ignored
• An examination of these 4 factors indicate that the human dignity of individuals in same-sex relationships is violated by the impugned legislation

Dissent: (Gonthier J)
• The primary purpose of the Act was to ameliorate the position of women who had become dependent on their partners in both married and conjugal opposite-sex relationships
• Agreed that the legislation imposed differential treatment and that this treatment resulted in the withholding of a benefit
• The unique social role of opposite-sex couples has 2-related features – women bear a disproportionate share of the child care burden in Canada and that one partner tends to be economically dependent on the other (usually the woman) – the legislation has sought to address this dynamic of dependence and there is no evidence that same-sex couples exhibit this type of dependency
• The evidence is to the contrary – show lesbian relationships as having a more equal distribution of labor and a lower degree of financial interdependence than is prevalent in opposite-sex couples; there is economic disparity in opposite-sex – not present in same-sex relationships
• The legislation takes into account the claimant’s actual need, capacity, and circumstances as compared with individuals in opposite-sex couples and by doing so it does not violate human dignity
• The distinction drawn does not discriminate because it does not involve the stereotypical application of presumed group or personal characteristics and does not otherwise have the effect of perpetuating or promoting the view that individuals in same-sex relationships are less deserving of concern, respect, and consideration
• Where a legislative distinction is drawn on the basis off an accurate picture of capacity and circumstance there is no stereotype and discrimination is unlikely

Quebec (Attorney General) v A, 2013 SCC
• It is the discriminatory conduct that s. 15 seeks to prevent and not the underlying attitude or motive
• We must be careful not to treat Kapp + Withler as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory attitude exists, not a discriminatory impact, contrary to Andrews, Kapp, and Withler

Claims involving differential treatment on the basis of age:

Withler v Canada (AG) SCC 2011

Facts:
• Plaintiffs (widows) whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death [Public Service Superannuation Act and the Canadian Forces Superannuation Act] – provide federal civil servants + members of the Canadian Forces, and their families with a suite of work-related benefits both during employment + after retirement – both include a supplementary death benefit – akin to life insurance – provides a lump sum payment to be made to a plan member’s beneficiary at member’s death. For younger plan members, purpose is to insure against unexpected death at a time when the deceased’s member surviving spouse would be unprotected by a
pension/entitled to limited pension funds + for older member’s, purpose is to assist surviving spouses with the costs of the plan members last illness and death – not intended to be a long-term income stream for spouses of older plan members

- The amount (twice the plan member’s salary at time of death) reduces by 10% for every year the plan member exceeds 65 or 60 (depending on the Act). This is only one part of the package of survivor benefits – includes pension, health care, dental care, children’s allowance, student’s allowance
- Argue the legislation discriminates on the basis of age violating s. 15(1)

Issues:
- Does the legislation’s Reduction Provisions discriminate on the basis of age violating s. 15(1)?

Decision:
- No – appeal dismissed
- The Reduction Provisions do not violate s. 15(1) therefore, unnecessary to consider whether infringement is justified under s. 1

Analysis: (McLachlin CJ and Abella J)

- Step 1 ensures courts address only distinctions intended to be prohibited by the Charter – enumerated grounds or grounds analogous [an analogous ground = a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity – included sexual orientation, marital status, and citizenship]
- Step 2 show that the law has a discriminatory impact in terms of prejudicing or stereotyping
  - Establish this by showing that the law perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1) – perpetuation typically occurs when law treats a historically disadvantaged group in a way that exacerbates the situation of the group
  - Can also show that the disadvantage is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant/group
  - If can show that the law imposes a disadvantage by stereotyping members, s. 15 may be found to be violated even in absence of proof of historic disadvantage
- Determine if the law violates substantive equality – [formal equality = mere presence or absence of difference] – goes beyond the façade of similarities and differences, looks at characteristics of the treatment, and the characteristics in the circumstances
- Look at the full context – social, political, economic, and historical factors concerning the group

Comparison under s. 15

- Formal comparison based on the logic of treating likes alike is not the goal of s. 15(1) – need substantive, not formal equality. Comparison is an essential facet of s. 15 but usually not by a formalistic comparison between groups, but by relevant contextual factors
- Mirror comparator group approach – look at group claimed to be protected and whether there is a distinction established by the comparison
- The Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant’s situation, the impugned distinction discriminates by perpetuating the group’s disadvantage or by stereotyping the group
- Concern of mirror comparator groups → can mean the definition of the comparator group determines the analysis and outcome; this may become a search for sameness as opposed to a search for disadvantage; can place an unfair burden on the claimants to find the ‘right’ comparator group (can be no group to use for the purposes of comparison and it may be difficult to decide which characteristics must be mirrored)
- The mirror comparator analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of substantive equality analysis, and may be difficult to apply

Proper Approach

- Step 1) Does the law create a distinction based on an enumerated or analogous ground?
  - The role of comparison here is to establish a ‘distinction’ – claimant asserts she is denied a benefit that others are granted/carries a burden that others do not, by reason of personal characteristics falling within enumerated/analogous provisions
  - Provided that the claimant establishes a distinction based on one or more enumerated/analogous grounds the claim should proceed to step 2
  - If it is an indirect discrimination – more work – focus on effect of the law and the situation of the claimant group
- Step 2) Does the distinction create a disadvantage by perpetuating prejudice and stereotyping?
  - Comparison may bolster the contextual understanding of a claimant’s place within a legislative scheme and society at large and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence will depend on the circumstances
  - All factors relative to the analysis should be considered
Application

- Step 1)
  - Do the pension schemes at issue deny a benefit to the claimants that others receive?
  - Yes – the Reduction Provisions reduce the death benefit payable to surviving spouses of plan members over 60 or 65 years

- Step 2)
  - Do the Reduction Provisions violate s. 15(1)'s protection of substantive equality?
  - Does the impugned law perpetuate disadvantage or prejudice, or stereotypes of the claimant group?
  - Look at purpose of provision in the context of broader scheme → it is in the nature of a pension scheme that it is designed to benefit a number of groups in different circumstances w/ different interests – but are these lines drawn appropriate given the circumstances of the group impacted and the objects of the scheme? [perfect correspondence not required]
  - Where the impugned law is a broad-reaching benefits scheme, comparison with multiple other groups will be necessary
  - The reality is such schemes of necessity must make distinctions on general criteria, including age → look at the death benefit in relation to other benefits that form the comprehensive benefit scheme to determine whether the claimants had been denied an equal benefit of the law – evidence showed the surviving spouses were better equipped than most Canadians to meet their expenses
  - The package will target the same people through different stages of lives/careers – attempts to meet specific needs at particular moments in their lives
  - It treats beneficiaries differently depending where they find themselves – but it is discriminatory neither in purpose nor effect – have Pension benefits to assist them at this time, which (some) younger persons do not, and have other benefit packages as well
  - “The analysis is contextual, not formalistic...” (para. 37) “the multiplicity of interests [the legislation] attempts to balance will also color the discrimination analysis” (38) “The focus of the inquiry is on the actual impact of the impugned law, taking full account of the social, political, economic, and historical forces concerning the group.” (40)
  - “the Court ... must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant’s situation, the impugned distinction discriminates by perpetuating the group’s disadvantage or by stereotyping the group” (54)
  - “the probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.” (65)
  - “Factors such as those developed in Law ... may be helpful. However, they need not be expressly canvassed in every case...” (66) “At the end of the day, all factors that are relevant to the analysis should be considered.” (66)
  - The provisions do not treat the claimants unfairly taking into account all of the circumstances of the legislative framework of the impugned law – the plaintiffs have failed to prove that they suffer from pre-existing disadvantage, stereotyping, prejudice, or vulnerability based on the economic well-being

**Gosselin v Quebec (AG) 2002 SCC**

- Under 30 got less benefits – could get more if they were involved in work programs and training
- Distinction based on age
- Is it discriminatory?
- Stereotype that if you are under 30 more likely to be able to change your situation – less deserving of help – perpetuation of stereotype that they are lazy
- Court disagreed – look at purpose of the law – in this case, not discriminatory – this was not a denial of young people’s dignity, it was affirmation of their potential – it was good for under 30 – if it is good for you, then how can it be discriminatory to you?
- Case has been heavily criticized

**Canadian Foundation for Children, Youth and the Law v Canada (AG) 2004 SCC**

- S.43 discriminatory against kids – what would be an assault on an adult is ok
- Distinction based on age
- Discrimination – because they are young they are not worthy of protection of code – also stereotype that only respond to physical force – stereotype that parents know best instead of themselves – perpetuates vulnerability of children – history of child abuse
• Court saves s.15 – reads in restrictions – reasonable force and no use of implements
• Not discriminatory – if it was otherwise, parents taken away from kids – bad for families (protection of families)
• Overall objective is to keep families together
• Dissent: these seems like a s. 1 argument/thinking
• [Much of s. 1 thinking has been subsumed under s. 15]