2020

Constitutional Law

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NOVA SCOTIA BARRISTERS' SOCIETY

CONSTITUTIONAL LAW

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CONTENTS:

GENERAL CONSTITUTIONAL PRINCIPLES

- The Constitution of Canada includes the *Constitution Act, 1867* (previously named the *British North America Act*), the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms* (ss. 1-34), and subsequent amendments: s. 52(2) *Constitution Act, 1982*.
- "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" – s. 52(1) *Constitution Act, 1982*). This section embodies the essence of the "constitutionalism" principle, which requires that all government action comply with the Constitution: ***Reference re Secession of Quebec,*** 1998 CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217 at ¶72.
- The preamble of the *Constitution Act, 1867* states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". This is the textual source for several constitutional principles including the rule of law, democracy and judicial independence: ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 at ¶44; ***Beauregard v. Canada*** [1986] 2 S.C.R. 56, 72.
- Rule of law means that law is supreme over the acts of both government and private persons; it "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"; and it means that "the exercise of all public power must find its ultimate source in a legal rule." ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 at ¶71.
- No constitutional principle supports a right to be represented by a lawyer in court or tribunal proceedings where a person's legal rights and obligations are at stake, in order to have effective access to the courts or tribunal proceedings. While in certain specific and varied cases a right to counsel has been given constitutional status to maintain the rule of law, there is no broad general right to legal counsel as a precondition to, or aspect of, the rule of law. The fiscal implications of the right sought cannot be denied when the claim represents a "huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers." ***British Columbia (Attorney General) v. Christie*** 2007 SCC 21 at paras 14, 22-28.
- According to the ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 the protection of minorities is also a constitutional principle.
- The doctrine of progressive interpretation ("living tree" doctrine) applies to the Constitution, including the *Charter*: see ***Edwards v. A.G. Canada*** [1930] A.C. 124 where Lord Sankey held that the Constitution is "a living tree capable of growth and expansion within its natural limits" and therefore the term 'persons' (who can hold a seat in the senate) includes women.
- The Constitution must be interpreted flexibly over time to meet new social, political and historic realities: ***Hunter v. Southam***, [1984] 2 S.C.R. 145, 155. The Court has rejected the American "original intent" doctrine in determining the meaning of *Charter* rights and adopted a purposive approach instead: ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486, 499.

- One part of the Constitution can't be used to interfere with rights protected by a different part of that same document: "It was never intended that the *Charter* could be used to invalidate other provisions of the Constitution." ***Reference Re Bill 30, An Act to Amend the Education Act (Ont.)***, [1987] 1 S.C.R. 1148.

SEPARATION OF POWERS

- There is no explicit "separation of powers" in the Constitution between the three branches of government – the legislature, the executive and the judiciary. But in ***Fraser v. P.S.S.R.B.***, [1985] 2 S.C.R. 455, 469-70, Dickson, C.J. held that in broad terms, the role of the judiciary is to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.
- Canadian jurisprudence does not require strict separation of powers – judicial functions may be vested in non-judicial bodies such as administrative tribunals (subject to s. 96 of the *Constitution Act, 1867*) and the judiciary may be vested with non-judicial functions such as references.
- Removal of our bicameral form of government – by abolition of the Senate – would fundamentally alter our constitutional architecture by eliminating Senate's role in the review of constitutional amendments. Under the Part V amending formula, it requires the unanimous consent of Parliament and the provinces. *Reference re Senate Reform*, [2014] 1 S.C.R. 704.
- Inherent in the constitutional separation of powers is the principle of parliamentary privilege, which shields certain areas of legislative activity, such as debates in the House of Commons, from external, including judicial, review. The privilege ensures that the legislative branch has the autonomy required to perform its constitutional functions, and that elected representatives "have the freedom to vigorously debate laws and to hold the executive to account." See ***Chagnon v. Syndicat de la fonction publique et parapublique du Québec***, 2018 SCC 39. For example, parliamentary privilege includes the power of a legislative assembly to exclude a "stranger" from the legislative chamber and that power is not subject to the *Charter*. ***New Brunswick Broadcasting Co. v. Nova Scotia***, [1993] 1 S.C.R. 319. In ***Chagnon***, the Supreme Court ruled that the privilege, anchored as it is in the protection of the Legislature's ability to carry out its constitutional role, does not immunize decisions to dismiss security guards employed by the Quebec National Assembly, from administrative or judicial review, because the management of security guards is not so "so closely and directly connected to the Assembly's constitutional functions that the Assembly requires immunity from the applicable labour relations regime in order to fulfil these functions."

ss. 96-101 of the *Constitution Act*, 1867

- ss. 96-101 were designed by the framers to ensure judicial independence through security of appointment, some uniformity of law throughout the Canadian judicial system, and a form of separation of powers.

- The unilateral power of Parliament to provide for the constitution and maintenance of a general court of appeal under section 101 of the *Constitution Act, 1867* has been modified by the amending formula under Part V of the *Constitution Act, 1982*. The Supreme Court of Canada gained constitutional status because of its evolution into the final general court of appeal in Canada. Changes to the composition of the Court can only be made by unanimous agreement of Parliament and the provincial legislatures. *Reference re Supreme Court Act, ss. 5 and 6*, [2014] 1 S.C.R. 433.
- Provinces may confer judicial functions on inferior courts and administrative bodies created by statute subject to s. 96, which has been interpreted by the courts as a means to protect a "core" jurisdiction of the superior courts.
- The test for determining whether a conferral of power on an inferior tribunal or court violates s. 96 involves three steps:
    1. Does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation?
        - The characterization of the power at issue must not be too broad to avoid large accretions of jurisdiction by inferior courts or too narrow so as to freeze their jurisdiction at what it was in 1867; it should be characterized by the "type" of dispute. ***Sobeys Stores v. Yeomans and Labour Standards Tribunal***, [1989] 1 S.C.R. 238 finding that characterizing the scope of the power as that over "master-servant" or "employee-employer relations" was too broad; focusing on the remedy, specific performance, was too narrow. The correct characterization was unjust dismissal.
        - When doing this analysis, you must consider all four original confederating provinces (NS, NB, ON, QB), not just the jurisdiction of the particular province whose law is being challenged as violative of s. 96. If this results in a tie, the jurisdiction in the United Kingdom in 1867 must be considered. All of the provinces that joined after Confederation are taken to have accepted the distribution of jurisdiction at Confederation.
        - Look at the "general historical conditions" prevailing in the confederating provinces. The analysis is not restricted to exact date of Confederation, but the situation "reasonably contemporaneous" with it. ***Reference re Amendments to the Residential Tenancies Act (N.S.)***, [1996] 1 S.C.R. 186.
        - If the superior courts exercised exclusive jurisdiction over this power at Confederation → go to step 2.
        - If the inferior courts exercised exclusive jurisdiction over this power or the jurisdiction was broadly co-extensive at Confederation, the conferral of power to an inferior court or tribunal is valid today and the statutory provisions are *intra vires*.

- A general shared involvement in a jurisdiction is enough to be broadly co-extensive; it does not need to have been concurrent in all respects. Factors relevant to this analysis include from McLachlin J. (as she then was) ***Reference re Amendments to the Residential Tenancies Act (N.S.)***, [1996] 1 S.C.R. 186 and Wilson J. ***Sobeys Stores v. Yeomans and Labour Standards Tribunal*** , [1989] 1 S.C.R. 238:

  Was the inferior court jurisdiction geographically restricted? Was it confined to certain municipal or district courts or was it exercised provincewide?
  Was the inferior court jurisdiction limited to a few specific situations? For example, in the area of unjust dismissal, did only certain types of employees have recourse to the inferior courts?
  Was the inferior court jurisdiction restricted by pecuniary limits so as to reduce its scope even after allowing for inflation?
  The percentage of the population that would have used the inferior courts.
  The frequency with which disputes amenable to their process arose.

- If the jurisdiction is a novel one, the conferral of power to an inferior court or tribunal is valid today. ***Reference re Young Offenders Act (P.E.I.)***, [1991] 1 S.C.R. 252 where the majority found that the jurisdiction over young persons charged with a criminal offence was novel.

- Questions to assist in determining whether the jurisdiction is novel from Lamer, C.J. ***Reference re Amendments to the Residential Tenancies Act (N.S.)***, [1996] 1 S.C.R. 186:

  1. Is the legislation an attempt to respond to a new societal interest and approach regarding the subject matter?
  2. Is the legislation based on principles of law that make it distinct from similar legislation?
  3. Is there an identifiable social policy that is different from the policy goals of analogous legislation?

  (The majority in ***Reference re Amendments to the Residential Tenancies Act*** reserves this last inquiry for step 3.)

If the superior courts exercised exclusive or predominant jurisdiction in 1867, the analyses continues and asks:

2. Does the provincial tribunal exercise a judicial function?

   - A tribunal is acting in a judicial capacity if it is called upon to adjudicate a dispute between two parties through the application of a recognized body of rules in a manner consistent with fairness and impartiality. ***Re Residential Tenancies Act, 1979***, [1981] 1 S.C.R. 714, 734-36.

- In ***Sobeys Stores v. Yeomans and Labour Standards Tribunal***, [1989] 1 S.C.R. 238 Wilson J. found that the Labour Standards Tribunal was acting sufficiently like a court, but the Director was not performing a judicial function even though the Director dealt with private disputes between parties.
- If the tribunal is not exercising a judicial function the conferral of power to an inferior court or tribunal is valid today. If it is exercising a judicial function, continue to step 3.

3. Are the impugned judicial powers necessarily incidental to the Tribunal's administrative function or the broader policy goal of the Provincial Legislature?
    - If the impugned judicial powers are subsidiary or ancillary to general administrative functions assigned to the tribunal (e.g., ***Labour Relations Board of Saskatchewan v. John East Iron Works,*** [1949] A.C. 134) or if the powers are necessarily incidental to the achievement of a broader policy goal of the Legislature (e.g., ***The Corporation of the City of Mississauga v. The Regional Municipality of Peel***, [1979] 2 S.C.R. 244), then the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (e.g., ***Attorney General of Quebec. v. Farrah,*** [1978] 2 S.C.R. 638) so that the tribunal can be said to be operating "like a s. 96 Court." ***Re Residential Tenancies Act, 1979***, [1981] 1 S.C.R. 714.
    - Policy arguments are relevant at this stage. In ***Sobeys Stores v. Yeomans and Labour Standards Tribunal***, [1989] 1 S.C.R. 238, Wilson J. found that the tribunal's judicial function is necessarily incidental to the implementation of broader policy goals the Code is designed to achieve, namely the protection of non-unionized workers.

- The core jurisdiction of superior courts protected by section 96 of the *Constitution Act, 1867* precludes legislative measures that prevent people from coming to the courts to resolve disputes. Court hearing fees that deny people of moderate means access to the courts are unconstitutional. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59.

PROVINCES

THRESHOLD ISSUES

Justiciability

- The question of "justiciability" is preliminary to the merits of a constitutional matter. It is a threshold issue that must be answered first.

- In Canada, Wilson J. on behalf of the Supreme Court of Canada stated that there is no "political questions doctrine" *per se* (by contrast with the U.S., where the basis of the doctrine is that some questions are inherently nonjusticiable because they are too political for judicial resolution). However, she did discuss the issue of institutional competence. She took the view that an issue is non-justiciable if it involves "moral and political considerations which it is not within the province of the courts to assess". Wilson J. stated that an inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or, instead, deferring to other decision-making institutions of the polity. ***Operation Dismantle v. The Queen***, [1985] 1 S.C.R. 441, 465, 472.
- The Supreme Court of Canada held that, while it is not appropriate for the courts to second guess the executive by reviewing the wisdom or merits of its decisions in matters such as military defense policy, it is appropriate for the courts to decide whether any particular act of the government violates the rights of the citizens; courts have an obligation under the *Charter* to do so. ***Operation Dismantle v. The Queen***, [1985] 1 S.C.R. 441.
- In ***Borowski v. Canada***, [1989] 1 S.C.R. 342, 362, the Court again reviewed the concept of justiciability and stated that "the Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch".
- In ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217, the Court held that when dealing with a reference, the Court may deal with hypothetical questions and issues that might not otherwise be considered "ripe" for decision. Further, the Court held that while it was not the appropriate function of a court to answer a purely political question, the questions in this instance (the legality of a unilateral declaration of succession by a province) had a "sufficient legal component to warrant the intervention of the judicial branch."
- The Court also articulated circumstances in which it may decline to answer a question on the basis of non-justiciability:
    1. To do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or;
    2. The Court could not give an answer within its area of expertise; namely, the interpretation of the law.
- In ***Reference re Same-Sex Marriage***, 2004 SCC 79, the Court held that there were three circumstances when it would exercise its discretion to decline to answer a reference question:
    1. when the question is too ambiguous or imprecise to allow an accurate answer;
    2. where the parties have not provided the Court with sufficient information to provide a complete answer; and
    3. if answering mirrors issues already disposed of in lower courts where an appeal was available but not pursued.

Standing

- Standing should be distinguished from *capacity* of the parties to sue or be sued and the *merits* of the case. It is also a threshold issue.
- There are three ways in which a constitutional issue is raised:
    1. in the course of other proceedings (e.g., criminal or civil matters),
    2. when a bare constitutional issue needs to be decided, and
    3. through the reference procedure (available only to governments).
- From another perspective, a party seeking to invoke the *Charter* may be granted standing under three broad heads: standing as of right, public interest standing, and under a court's residuary discretion.

In the course of other proceedings – Standing as of Right

- The corollary of s. 52 of the *Constitution Act, 1982* (Supremacy of the Constitution) is the principle that no one can be convicted of an offence under an unconstitutional law. ***R. v. Wholesale Travel Group Inc.***, [1991] 3 S.C.R. 154, 179.
- As a general rule, the *Charter* may only be invoked by those who enjoy its protection ("standing as of right"). In other words, the claim is pursued by the rights holder.
- However in ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, the Supreme Court of Canada explained that in criminal cases involving rights violations, it is the nature of the law, not the status of the accused that is in issue. The Court created an exception and allowed Big M to challenge the constitutionality of the law under which the charge was brought, even though Big M, a corporation, could not enjoy or exercise the specific *Charter* right claimed (s. 2(a) freedom of religion).
- In ***R. v. Wholesale Travel Group***, [1991] 3 S.C.R. 154, the Court clarified that a corporation has standing to challenge a statute under the *Charter* even if the *Charter* provisions in question (ss. 7 and 11(d) in that case) don't apply to corporations as long as the statute applies to both individual and corporate accused.
- In ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157, the Court extended the so-called Big M exception and granted corporations standing as of right in civil cases to challenge the constitutionality of the law where that civil law is the foundation for the state's pursuit of a remedy against the corporation. The Court stressed that in this case the corporation did not come before the Court voluntarily. The corporation was allowed to challenge the egg marketing scheme and argue that the legal provisions relied on by the state violated ss. 2(d) and 6 of the *Charter*.

A bare constitutional issue – public interest standing

- A trilogy of pre-*Charter* cases ***Thorson v. Attorney General of Canada***, [1975] 1 S.C.R. 138, ***Nova Scotia Board of Censors v. McNeil***, [1976] 2 S.C.R. 265, ***Minister of Justice of Canada v. Borowski***, [1981] 2 S.C.R. 575 first established a test for public interest standing on a constitutional issue.

- The current test for granting public interest standing in constitutional cases was determined in ***Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45:
    1. there must be a serious, justiciable issue as to the validity of the challenged law;
    2. the party bringing the case has either a real stake in the proceedings or is engaged with the issues it raises; and,
    3. the proposed suit, in all of the circumstances and in light of a number of considerations, is a reasonable and effective means to bring the case to court.
- These three factors are interrelated and are to be assessed and weighed cumulatively.
- The key in public interest standing cases is whether or not the law would be immunized from scrutiny if public interest standing were denied.
- The trilogy test for public interest standing was extended to a non-constitutional challenge of the statutory authority of administrative action. ***Finlay v. Minister of Finance v. Canada***, [1986] 2 S.C.R. 607.
- In an earlier case, ***Canadian Council of Churches v. Canada***, [1992] 1 S.C.R. 236, the Court decided that the trilogy test need not and should not be expanded. In that case standing was denied a public interest organization because there were already 33,000 refugee claimants directly affected by the law in issue who could have brought constitutional challenges.
- In ***Chaoulli v. Quebec***, 2005 SCC 35, the Court held that a physician and a patient had public interest standing to challenge the validity of provisions that prohibited private insurance for services available in the public health system.

Residual discretion

- Superior courts have a residual discretion to hear *Charter* arguments by parties who would not normally have standing to invoke the *Charter* where the question involved is one of national importance. ***Canadian Egg Marketing Agency v. Richardson*** , [1998] 3 S.C.R. 157.

Mootness

- A case becomes moot when there is no longer any dispute between the parties. The parties may wish to proceed, however, because they believe that some principle is at stake. Generally the courts will not decide a case that has become moot. ***Borowski v. Attorney General for Canada***, [1989] 1 S.C.R. 342, 357, where the case did not proceed because the abortion provisions in the *Criminal Code* had been struck down in a prior case ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, rendering Mr. Borowski's argument moot.

- The court, however, can exercise its discretion to hear and decide the case when the interests of justice so require. For example, in ***Tremblay v. Daigle***, [1989] 2 S.C.R. 530, Ms. Daigle obtained an abortion before the Supreme Court of Canada had ruled on whether her choice could be vetoed by the father of the fetus. It was decided that, because of the importance of a decision on other pregnant women who might potentially have injunctions filed against them, the appeal should continue.

Jurisdiction – authority to interpret and apply the Constitution

- Always check the statute to determine which court or administrative body has jurisdiction over a constitutional matter.

Superior courts

- The superior courts of each province have original and inherent jurisdiction, which includes jurisdiction to hear constitutional matters and a supervising and reforming power (judicial review) over all provincial and federal boards. Inherent jurisdiction can be removed from the superior courts subject to s. 96 and s. 101 (see below) of the *Constitution Act, 1867* and subject to the general rule that superior courts retain inherent jurisdiction to determine the constitutionality of legislation.
- There does not appear to be any constitutional barrier to a superior court judge sitting and holding a hearing outside her home province, e.g., for the purpose of implementing a national class action settlement: ***Endean v British Columbia***, 2016 SCC 42.
- In ***Mousseau v. Canada*** (1993), 107 D.L.R. (4th) 727 (N.S.C.A.) the claimants sought a *Charter* remedy against the Attorney General of Canada and the Millbrook Band Council for unlawfully discriminating against them, a matter which fell within the Federal Court's exclusive jurisdiction pursuant to s. 18(1) of the *Federal Court Act*. The Nova Scotia Court of Appeal held that s. 18 can't be read so as to deprive provincial superior courts of their jurisdiction to determine the constitutional validity and applicability of federal legislation, but this power can be distinguished from the jurisdiction to pass upon the manner in which a board or a tribunal functions under such legislation. The Court decided that the Federal Court had exclusive jurisdiction over the latter power of review as the only court of competent jurisdiction. See also: ***Canada Labour Relations Board v. Paul L'Anglais Inc.*** [1983] 1 S.C.R. 147.
- Similarly in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929 the claimant commenced an action against his employer based in tort and on a breach of his ss. 7 and 8 *Charter* rights separate from his collective agreement proceedings. The majority of the Court rejected the concurrent or overlapping model and adopted the exclusive jurisdiction model. As a result, if a claim (even a *Charter* claim) arises from the collective agreement and those disputes are governed by an exclusive jurisdiction legal framework, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. In this case, however, the *Charter* claim did not involve a challenge to a statute.

Federal Court

- The Federal Court is a statutory court created in 1971 for "the better Administration of the Laws of Canada" (s. 101 of the *Constitution Act, 1867*). It inherited the jurisdiction of its predecessor, the Exchequer Court of Canada, over matters involving copyright, admiralty, tax, etc. and it gained additional powers including the judicial review of federal agencies and officials. (Hogg, ***Constitutional Law of Canada: Student Edition*** 2004, 195-96). The Federal Court does not have inherent jurisdiction like the section 96 superior courts do: ***Windsor (City) v Canadian Transit Co***, 2016 SCC 54 at para 33.
- "In order to decide whether the Federal Court has jurisdiction over a claim, it is necessary to determine the essential nature or character of that claim": ***Windsor (City) v Canadian Transit Co***, 2016 SCC 54 at para 25. There is a three-part test (reiterated in ***Windsor*** at para 34): (1) there is a statutory grant of jurisdiction from Parliament (e.g., section 23 of the *Federal Courts Act*; subsection (c) was at issue in ***Windsor***); (2) there is "an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction"; and (3) the case is based on "a law of Canada" (which does *not* include the *Constitution Acts*).
- As a statutory court, the Federal Court has jurisdiction to hear constitutional questions but only when the matter is otherwise properly before the court according to the relevant statutes. ***Northern Telecom v. Communication Workers of Canada***, [1983] 1 S.C.R. 733 holding that the Federal Court had jurisdiction to determine a constitutional issue arising as a preliminary question in the review of a federal administrative board action based on a federal law.
- The Federal Court has the discretion to refuse to exercise its jurisdiction on judicial review, e.g., where there is an adequate alternative – like a provincial superior court. ***Strickland v Canada (Attorney General)***, 2015 SCC 37 (where the Federal Court had properly refused to exercise its discretion to judicially review the legality of the *Federal Child Support Guidelines*).
- Parliament can confer exclusive judicial review powers over federal agencies administering the laws of Canada to the Federal Court, a court created for the better administration of those laws (s. 101 of the *Constitution Act, 1867*). ***Strickland v Canada (Attorney General)***, 2015 SCC 37. But Parliament can't confer exclusive jurisdiction over the interpretation and application of the Constitution to the Federal Court. The jurisdiction of the superior courts on constitutional issues cannot be ousted because that would no longer be merely the administration of a law of Canada. ***Canada v. Paul L'Anglais,*** [1983] 1 S.C.R. 147 where the Court held that the Superior Court of Quebec had concurrent jurisdiction to determine whether the Canada Labour Relations Board had jurisdiction to determine the constitutional applicability of the Canada Labour Code.

Administrative tribunals

- Administrative tribunals are also creatures of statute. Their jurisdiction must be found in a statute and must extend to the subject matter of the application, the parties and the remedy sought. ***Douglas/Kwantlen Faculty Ass. v. Douglas College***, [1990] 3 S.C.R. 570.
- Whether or not an administrative tribunal has the jurisdiction to determine constitutional questions depends on whether, as a matter of statutory interpretation, Parliament or the Legislature granted the administrative tribunal, either explicitly or implicitly, the power to determine questions of law through its enabling statute.
- In ***Cuddy Chicks v. Ontario Labour Relations Brd***, [1991] 2 S.C.R. 5 the enabling statute expressly granted the Board the authority to "determine all questions of fact or law that arise in any manner before it".
- Absent an explicit grant of jurisdiction to determine questions of law, it is necessary to consider whether the legislator intended to confer an implied jurisdiction upon the tribunal. Relevant factors will include: the statutory mandate of the tribunal and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations including the tribunal's capacity to consider questions of law. ***Nova Scotia (Workers' Compensation Board) v. Martin,*** [2003] 2 S.C.R. 504.
- If either explicit or implicit jurisdiction is found, then by the operation of s.52(1) of the *Constitution Act, 1982*, the administrative tribunal is presumed to be able to address constitutional issues, including the constitutional validity of its enabling statute. The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by pointing to an explicit withdrawal of authority to consider the *Charter*, or by convincing the court than an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* from the scope of the questions of law to be addressed by the tribunal. ***Nova Scotia v. Martin*** 2003 SCC 54, [2003] 2 S.C.R. 504 finding that the Workers' Compensation Board had express or at least implied authority to entertain questions of law and that the claimants had not rebutted the presumption that this includes the jurisdiction to consider the constitutionality of the enabling statute.
- In ***Okwuobi v. Lester B. Pearson School Board***, 2005 SCC 13, [2005] 1 S.C.R. 257, the Court held that where a law vests exclusive jurisdiction in an administrative tribunal, and that tribunal has the power to decide *Charter* issues under the test in ***Martin, supra*** an application cannot be brought to the Superior Court with respect to those *Charter* issues, except in cases where only the Superior Court can provide an appropriate and just remedy. This "exclusive jurisdiction model" was affirmed in ***R. v. Conway***, (2010) SCC 22.
- In *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 the Court determined that the standard of review as to whether administrative decision makers exercised their statutory discretion in accordance with the *Charter* is reasonableness.

- The *Doré* standard was confirmed in ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12. The first question for the reviewing court is whether the administrative actor's decision engaged the *Charter* "by limiting its protections." If so, the court must review the decision on the reasonableness standard to determine whether it reflects a proportionate balancing of the *Charter* interests at stake.
- Administrative tribunals can't issue general declarations of invalidity; they may only decide to not apply the unconstitutional part of the *Act* to the parties before it. A formal declaration of invalidity can only be issued by a superior court (or the federal court, by statutory authority). ***Mouvement laïque québécois v. Saguenay (City)***, 2015 SCC 16. A determination by an administrative tribunal that a provision of its enabling statute is inoperative because it conflicts with the *Charter* is not binding on future decision-makers, within or outside the tribunal's administrative scheme.

PROCEDURAL MATTERS

Timing

- A provincial court judge sitting in a preliminary hearing is not a court of competent jurisdiction and so does not have the jurisdiction to afford a *Charter* remedy under s. 24(1) or (2) prior to election by the accused. ***R. v. Mills***, [1986] 1 S.C.R. 863.
- Interlocutory appeals in a preliminary hearing in respect of refusals or grants of *Charter* remedies under s. 24(1) are not available because the preliminary hearing magistrate is not a court of competent jurisdiction as required by the section. ***Mills v. The Queen***, [1986] 1 S.C.R. 863.
- For further comments, see the Remedies section.
- The decision whether to rule on a *Charter* application or to reserve to the end of the evidence is based on two policy considerations:
    1. criminal proceedings should not be interrupted by interlocutory proceedings;
    2. the adjudication of constitutional challenges that have no factual foundation should be discouraged. ***R. v. DeSousa***, [1992] 2 S.C.R. 944.
- In the absence of a factual foundation, the court cannot adequately resolve a *Charter* argument based on the effects of legislation rather than its purpose. The presentation of facts is ordinarily essential to a proper consideration of *Charter* issues. ***MacKay v. Manitoba***, [1989] 2 S.C.R. 357; see also: ***Reference re Same-Sex Marriage***, 2004 SCC 79, [2004] 3 S.C.R. 698.

- Section 24(1) does not authorize an application in respect of a merely apprehended future infringement (the section states that the applicant's rights "have been" infringed or denied). However, it appears that the imminent threat of a *Charter* violation will satisfy the section. ***Quebec Association of Protestant School Boards v. A.G. Quebec*** (1982), 140 D.L.R. (3d) 33 (Que. S.C.), aff'd by the Que. C.A. (1983) 1 D.L.R. (4th) 573, aff'd by the Supreme Court of Canada [1984] 2 S.C.R. 66, where a remedy for English-speaking parents who were denied by statute their *Charter* right under s. 23 to send their children to an English-speaking school was granted, even though the application was made before the school year started and so before any child had actually been refused admission.
- If a separate application is made to a superior court and the lower court is a court of competent jurisdiction, the superior court can and should decline to grant any remedy, because it is the trial judge who is in the best position to assess what is the remedy that is just and appropriate. ***R. v. Smith***, [1989] 2 S.C.R. 1120, 1129. However, an application to a superior court may be appropriate if it is the action of the trial judge that is the subject of the complaint. ***R. v. Rahey***, [1987] 1 S.C.R. 588.

Notice

Federal Court Act, R.S.C. 1985, c. F-7, s. 57 as amended 1990, c. 8, s. 19

- The Act states that, in cases involving the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of any province, or of regulations thereunder, except where otherwise ordered by the court or the federal board, commission or other tribunal, ten days' notice must be given to the Attorney General of Canada and the Attorney General of each province before the constitutional question can be argued.

Constitutional Questions Act, R.S.N.S. 1989, c. 89, s.10

- The Act requires that, when the constitutional validity or constitutional applicability of any law (which includes an Act of the Parliament of Canada or the Legislature, or a proclamation, regulation or order in council made pursuant to any such Act) is brought into question or an application is made to obtain a remedy (pursuant to section 24 of the *Charter* but not for exclusion of evidence or for a remedy consequential on exclusion of evidence) at least 14 days' notice must be given to the Attorney General before the day of argument. However, the court may, on an *ex parte* application made for the purpose, order an abridgement of the time for service of the notice.

Evidence

- The standard of proof of legislative facts in *Charter* cases is the civil standard (balance of probabilities). ***R. v. Oakes***, [1986] 1 S.C.R. 103.
- The burden of proof is on the person asserting the breach to establish that a violation of his or her *Charter* rights has occurred, and on the government to justify the violation under s. 1. ***R. v. Oakes***, [1986] 1 S.C.R. 103, 137.

- The general rule is that a court may make findings of fact on the basis of either sworn evidence or judicial notice. Judicial notice may be taken only of "facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy." Sopinka, Lederman and Bryant, ***The Law of Evidence in Canada, 2nd ed.*** 1999, 1055. See: ***R. v. Find*** 2001 SCC 32, [2001] 1 S.C.R. 863.
- On appeal in a *Charter* case, the trial judge's findings on social and legislative facts will be entitled to "the same degree of deference" as the trial judge's findings on the adjudicative facts; an appeal court can only interfere if the trial judge made a palpable and overriding error of fact: ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 109.
- In reference cases, social-science briefs can be admitted as evidence by the courts ***Anti-Inflation Reference***, [1976] 2 S.C.R. 373. "Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible." ***Residential Tenancies Act Reference***, [1981] 1 S.C.R. 714.
- In constitutional cases, the court will consider a wide variety of materials in determining both whether a right has been violated and whether any such violation is justified under s. 1.
- If a constitutional issue is recognized for the first time on appeal, factual material filed without formal proof may be accepted. See:
    1. ***R. v. Hufsky***, [1988] 1 S.C.R. 621, 634-635;
    2. ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927, 983-984.
- The trial court has a discretion to admit unsworn evidence that is not inherently unreliable. ***R. v. Morgentaler*** (No. 2), [1988] 1 S.C.R. 30, where the judges in the majority referred to a variety of evidence respecting abortion without questioning its admissibility or drawing any distinction between material adduced through sworn testimony and unsworn material received by the trial court.
- Reports of royal commissions and law reform commissions, government policy papers and parliamentary debates ("*Hansard*") are admissible. ***R. v. Morgentaler***, [1993] 3 S.C.R. 463.
- Extrinsic material with respect to the interpretation of the Constitution may be considered but should be given little weight. ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486, 507-508, where the Court considered the Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution but declined to interpret s.7 of the *Charter* as excluding substantive review.

- The "common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold" an unconstitutional law. This means a lower court may depart from otherwise binding precedent in a *Charter* case "when a new legal issue is raised, or if there is a significant change in the circumstances or evidence" that "fundamentally shifts the parameters of the debate": ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, where the application judge had permissibly departed from *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*") based on the evidence before her, and the Supreme Court deferred to her findings on social and legislative facts. See also ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 44 (where the trial judge had properly determined that she was not bound by the assisted-suicide case of *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 because the law of section 7 had changed since then, particularly the principles of overbreadth and gross disproportionality, and the "matrix of legislative and social facts" was also different).
- Only in narrow situations should trial judges depart from precedent, and courts should not do so based on one expert's interpretation of a statutory provision, in the absence of an evolution of legislative or social fact, or a comparable "fundamental shift." Doing so would be akin to "[ceding] the judge's primary task to an expert," and would create the type of "instability in the law that the principle of stare decisis aims to avoid." See ***R v. Comeau***, 2018 SCC 15.

DIVISION OF POWERS

- The federal nature of the Constitution means political power is shared by two orders of government, each autonomous in developing laws within their respective spheres of jurisdiction. These powers are assigned by ss. 91-95 of the *Constitution Act, 1867*. ***Ward v. Canada*** 2002 SCC 17, [2002] 1 S.C.R. 569 at ¶30.
- The issue of validity under division of powers logically precedes a consideration of whether the challenged provisions infringe the *Charter*. (Hogg, ***Constitutional Law of Canada: Student Edition*** 2004, 363).

Pith and substance analysis

- The two-part "pith and substance" analysis determines whether a law falls within the legislative competence of the legislature that enacted it.
    1. What is the essential character of the law?
    2. Does that character relate to an enumerated head of power granted to the legislature in question by the *Constitution Act, 1867*?
- The pith and substance analysis must be conducted before considering "the doctrines of interjurisdictional immunity and federal paramountcy, both of which are predicated on the constitutional validity of the impugned statute or measure": ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at para 35.
- A law can be valid under more than one provincial power (***Attorney General of Quebec v. Kellogg's Co. of Canada***, [1978] 2 S.C.R. 211 upholding provincial advertising legislation under s. 92(13),(16) and s. 93) or more than one federal power (***Thomson Newspapers v. Canada***, [1990] 1 S.C.R. 425 upholding the federal *Combines Investigation Act* under s. 91(2) and (27)).
- When a law is challenged for lack of legislative competence, there is a legal presumption of constitutionality. "When faced with two plausible characterizations of a law, we should normally choose that which supports the law's constitutional validity." ***Siemens v. Manitoba*** 2003 SCC 3, [2003] 1 S.C.R. 6 at ¶33, finding that a provincial law regulating gaming was *intra vires*.
- Some subjects can't be assigned to a specific constitutional head but are instead amorphous topics which can be addressed by either valid federal or provincial legislation depending on the nature of the problem addressed. Amorphous topics include: health – ***Schneider v. British Columbia***, [1982] 2 S.C.R. 112 (provincial statute providing for compulsory treatment of heroin addicts) and ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199 (federal tobacco advertising laws); the environment – ***Friends of Oldman River Society v. Canada***, [1992] 1 S.C.R. 3 at ¶96; and language – ***Devine v. Quebec***, [1988] 2 S.C.R. 790, 792.

- The concept of cooperative federalism "is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action" but it does not modify the separation of powers or otherwise impose "limits on the otherwise valid exercise of federal or provincial legislative competence" as set out in sections 91 and 92: ***Quebec (Attorney General) v. Canada (Attorney General)***, 2015 SCC 14 at paras 17-20. See also ***Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.***, 2015 SCC 53 at paras 22-23. In other words, cooperative federalism cannot "override nor modify the division of powers itself"; it cannot be used to suggest "that an otherwise unconstitutional law is valid": ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at para 39.
- Employer-employee and labour-management relations are within provincial legislative competence in so far as such relations have an independent constitutional value; but in so far as they are merely a facet of a particular industry or enterprise, their regulation is within the legislative authority of that body which has power to regulate the industry or enterprise. ***Northern Telecom v. Communications Workers of Canada***, [1980] 1 S.C.R. 115.
- When conducting a pith and substance analysis of a municipal measure, the relevant provincial head(s) of power must be considered to determine whether the municipality, as the "entity exercising delegated powers", had the requisite constitutional authority to enact the measure : ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at para 34.

Determining essential character

- Examine the purpose and the legal effect of the impugned law to determine its true character. This includes looking at the mischief the legislation is directed at, the words used in the impugned legislation and the circumstances surrounding its enactment. If the challenged provision is part of a larger scheme, consider how the provision fits into the scheme as part of determining its pith and substance: ***Quebec (Attorney General) v Canada (Attorney General)***, 2015 SCC 14 at para 30. Extrinsic evidence can be considered when determining the purpose of the law or measure, as can "the practical consequences of the application of the measure": ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at para 36.
- In interpreting a statute, "the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the enacting legislature]." Only if there is "real" ambiguity such the provision is capable of more than one meaning" is it appropriate to consider other interpretive principles, including the principle that law ought to be interpreted in a manner consistent with *Charter* values. ***Bell ExpressVu Limited Partnership v. Rex***. 2002 SCC 42, [2002] 2 S.C.R. 559 at paras. 26-29
- A circuitous route to achieve a valid legislative objective is permissible. ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199 upholding a law directed at reducing smoking by banning advertising and not smoking itself.

- The purpose of a law can't shift over time. ***R v. Big M Drug Mart***, [1985] 1 S.C.R. 295, the federal government could not assert a secular purpose on the basis of social change when the original drafters intended the Sunday shopping law to have a religious purpose.
- The effects of the law may be helpful in illuminating the core meaning of the law, but the Act's effects can never save legislation with an invalid purpose. ***Big M Drug Mart***, [1985] 1 S.C.R. 295.
- The wisdom and efficaciousness of legislation are not relevant in a division of powers analysis. ***Reference re*** *Firearms Act*, 2000 SCC 31, [2000] 1 S.C.R. 783, and ***Ward* v. *Canada*** 2002 SCC 17, [2002] 1 S.C.R. 569.

Determining the scope of the heads of power

- The heads of power should be construed in relation to one another. In cases where federal and provincial classes of subjects contemplate overlapping concepts, meaning must be given to both through the process of "mutual modification." ***Citizens' Insurance Co. of Canada v. Parson*** (1881), 7 App. Cas. 96 (P.C.), reconciling the federal power over trade and commerce in s. 91(2) with the provincial powers over property and civil rights and local matters in s. 92(13), (16).
- Classes of subjects should not be construed so broadly as to expand jurisdiction indefinitely. Courts are sensitive to maintaining the balance of Canadian federalism. ***Reference re Firearms Act,*** 2000 SCC 31, [2000] 1 S.C.R. 783; ***Ward v. Canada*** 2002 SCC 17, [2002] 1 S.C.R. 569 at ¶30.

Colourability

- The "colourability doctrine" in the distribution of powers is invoked when a law looks as though it deals with a matter within the enacting body's jurisdiction, but in essence is addressed to a matter outside the enacting body's jurisdiction. ***R. v. Morgentaler***, [1993] 3 S.C.R. 463 at ¶47; ***Quebec (Attorney General) v. Canada (Attorney General)***, 2015 SCC 14 at para 31.
- In ***Reference re Upper Churchill Water Rights Reversion Act 1980***, [1984] 1 S.C.R. 297, the Court found the extrinsic evidence regarding the operation and effect of the impugned legislation showed that the *Act* was colourable legislation beyond the competence of the province because of its extraterritorial effects on civil rights in Quebec.
- In ***R. v. Morgentaler*** , [1993] 3 S.C.R. 463 at ¶47, the Court found that it was unnecessary to invoke the colourability doctrine because the Nova Scotia *Medical Services Act* dealt with criminal law on its face. "In any event, the colourability doctrine really just restates the basic rule, applicable in this case as much as any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing."

Incidental effect

- The pith and substance doctrine enables a law that is classified as "in relation to" a matter within the competence of the enacting body to have an incidental or ancillary effect on matters outside the competence of the enacting body. Provincial and federal governments have equal ability to legislate in ways that incidentally affect the other government's sphere of power. ***General Motors of Canada v. City National Leasing***, [1989] 1 S.C.R. 641 at ¶45.
- Where a law encroaches on the other government's sphere of power, the Court must decide whether the effects are just incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or in pith and substance, in relation to a matter outside the enacting body's jurisdiction. ***Reference re*** Firearms Act, 2000 SCC 31, [2000] 1 S.C.R. 783 at ¶49-50 finding that the effect of the federal gun registry law on property and civil rights is incidental. ***Quebec (Attorney General) v. Canada (Attorney General)***, 2015 SCC 14 at para 32; ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at para 37.
- Where a particular provision of an Act encroaches on the other government's sphere of power, the two-part ancillary doctrine test from ***General Motors of Canada v. City National Leasing***, [1989] 1 S.C.R. 641 at ¶46-47 may be applied:
    - Determine the extent or degree of the intrusion: very marginal, marginal or highly intrusive.
    - Given this degree of intrusion, ask whether the impugned provision is sufficiently integrated within the scheme and sufficiently important for the efficacy of legislation.
    - If the intrusion is very marginal, "tacked on" is sufficient. If it is a marginal intrusion, a "functional relationship" is required (see: ***Papp v. Papp*** [1970] 1 O.R. 331 finding that custody provisions in the *Divorce Act* were rationally and functionally connected). If it is highly intrusive, a stricter test like "truly necessary" (see: ***R. v. Thomas Fuller Construction*** [1980] 1 S.C.R. 695) or "integral" (see: ***Northern Telecom v. Communications Workers of Canada***, [1980] 1 S.C.R. 115) or "necessarily incidental" (see: ***Regional Municipality of Peel v. MacKenzie***, [1982] 2 S.C.R. 9) is required.
- In ***Kitkatla Band v. B.C.*** 2002 SCC 31, [2002] 2 S.C.R. 146 the Court reinterpreted ***City National Leasing*** as requiring merely the following analysis: 1. Is there an intrusion? 2. If so, if the intruding provision part of a valid scheme? 3. If so, is the intruding provision sufficiently integrated into the valid scheme? If it is, it will be found to be valid.

Territorial effect

- The federal government can enact laws that affect all or part of Canada and that have legal consequences that affect outside Canada, such as our piracy, espionage and terrorism laws.

- But a provincial law must be in relation to a matter territorially within the province and may only validly impair extra-provincial rights if the extra-provincial effect is incidental. ***Reference re Upper Churchill Water Rights Reversion Act 1980***, [1984] 1 S.C.R. 297 at 333, finding the provincial statute invalid because it represented "a colourizable attempt to interfere with the power contract" that created rights outside Newfoundland.
- In ***British Columbia v. Imperial Tobacco***, 2005 SCC 49, [2005] 2 S.C.R. 473, the S.C.C. held the *Tobacco Damages and Health Care Costs Recovery Act* of British Columbia was not unconstitutional by reason of extraterritoriality. The Act permitted the province to sue a tobacco manufacturer for the costs of British Columbia treating individuals exposed to tobacco though the cause of action might encompass activities occurring outside of British Columbia. The Court examined the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it in order to determine whether the legislation respected the two purposes of territorial limits: ensuring a province's law has a meaningful connection to the enacting province and pays respect for the legislative sovereignty of other territories.

Double aspect

- Aspects Theory: subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91. ***Hodge v. The Queen*** (1883) 9 App. Cas. 117 (P.C.).

- When an impugned law has both provincial and federal features, the court must decide whether one or the other features are of sufficiently greater importance to give exclusive legislative power over the subject to either the federal or the provincial government. But, if the federal and provincial features are of equal importance, the court will find concurrent jurisdiction and the challenged provisions could be enacted by either the federal or provincial governments. ***Multiple Access v. McCutcheon***, [1982] 2 S.C.R. 161 finding that the federal and provincial characteristics of insider trading legislation were roughly equal in importance so there was little reason "to kill one and let the other live".

- Concurrent fields have been recognized in, among others, the realms of highway traffic, insolvency, temperance and gaming.

- There was no double aspect in ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23, where a municipal measure was passed for the purpose of preventing Rogers from installing a radiocommunication antenna system on particular property in the city. Radiocommunication is under federal jurisdiction, so the municipal measure was *ultra vires*. There was no equivalent provincial aspect (e.g., protecting health and well-being, or promoting harmonious municipal development) that could give the measure a double aspect and render it constitutional. (See paras 50-53.)

Paramountcy

- Where federal and provincial statutes both regulate a concurrent subject matter, both statutes can coexist insofar as there is no conflict. But where the federal regime is meant

to be exclusive and there is actual conflict, the federal legislation will prevail according to the paramountcy doctrine. ***Law Society of British Columbia v. Mangat*** 2001 SCC 67, [2001] 3 S.C.R. 113 at ¶23; ***Alberta (Attorney General) v. Moloney***, 2015 SCC 51 at para 16; ***Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.***, 2015 SCC 53 at paras 15-23

- The first step, when considering a potential conflict, is to confirm that the "overlapping federal and provincial laws are independently valid." If so, does their concurrent operation create a conflict? ***Alberta (Attorney General) v. Moloney***, 2015 SCC 51 at para 17.
- There are two branches of the paramountcy test, meaning, two possible ways a conflict may be found: "(1) there is an operational conflict because it is impossible to comply with both laws" (i.e., one says "yes" and the other says "no"), or "(2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment": ***Alberta (Attorney General) v. Moloney***, 2015 SCC 51 at para 18.
- The paramountcy doctrine only applies to conflicts between federal and provincial legislative enacments, and not to non-statutory, or judge-made, federal rules, such as the rules of Canadian Maritime Law: ***Desgagnés Transport Inc. v. Wärtsilä Canada Inc.***, 2019 SCC 58.

Provincial laws imposing stricter limits on advertising of tobacco products than those contained in federal law are consistent with federal purposes and thus do not attract the paramountcy doctrine: ***Rothmans Benson & Hedges Inc. V. Saskatchewan***, 2005 SCC 13, [2005] 1 S.C.R. 188.

Interjurisdictional immunity

- "The doctrine of interjurisdictional immunity protects the 'core' of a legislative head of power from being impaired by a government at the other level": ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at para 59. The first question is whether the impugned statute or measure "trenches on the 'core' of a power of the other level of government"; if so, the second question is "whether the effect of the statute or measure on the protected power is sufficiently serious to trigger the application of the doctrine."

- Absent conflict, the validly enacted law of each level of government will have its normal operation. However, the cases on interjurisdictional immunity have applied the doctrine to render inapplicable a provincial law if it would have an effect on a federal matter – federally incorporated companies, federally regulated undertakings, federal entities – that is inconsistent with the scope of power assigned to the federal government. In theory, it also applies to protect provincial matters from federal laws. The possibility for the province to rely on the doctrine was left open in ***Canada (Attorney General) v. PHS Community Services Society***, [2011] 3 S.C.R. 134). The doctrine is premised on the idea that there is a "basic minimum and unassailable content to the heads of power under sections 91 and 92 of the *Constitution Act, 1867*.

- While the doctrine continues to exist, ready recourse to it would be inconsistent with cooperative federalism and the Supreme Court of Canada is increasingly emphasizing its limited nature ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44.

- In ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23, the Supreme Court held (at para 61) that the doctrine will "generally" only be applied in "situations that are already covered by precedent."

- Even assuming the area is covered by precedent, the doctrine will only apply if the federal undertaking/entity would be "impaired" as opposed to merely "affected" by the application of a provincial law. ***Canadian Western Bank v. Alberta***, 2007 SCC 22. In this case, provincial laws regarding insurance (a provincial matter) applied to banks (a federally regulated business) because insurance promotion was not at the core of banking and did not constitute a vital part of the banking business that was "impaired" by the provincial law.

- Before applying the doctrine of interjurisdictional immunity to a new area, courts should ask whether the constitutional issue can be resolved through the application of pith and substance analysis and a restrained application of federal paramountcy. ***Canada (Attorney General) v. PHS Community Services Society***, [2011] 3 S.C.R. 134.

- "Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic." The provincial power over health does not prevent the federal criminal law from applying in health-related areas (***PHS Community Services***, *supra*) nor does it prevent the federal government from legislating on the topic of physician-assisted dying: ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 53. Interjurisdictional immunity claims failed in both *PHS* and *Carter*.

- A provincial agricultural land use law which in its application to aerodromes would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand is inapplicable to aerodromes under the doctrine of interjurisdictional immunity. ***Quebec (Attorney General) v. Canadian Owners and Pilots Association***, [2010] 2 SCR 536.

- Decisions about what treatment may be offered in provincial health facilities do not constitute a protected core of the provincial power over health care and are therefore not immune from federal interference. ***Canada (Attorney General) v. PHS Community Services Society***, [2011] 3 S.C.R. 134.

- The location of radiocommunication antenna systems (for cellular telephone networks) is part of "the core of the federal power over radiocommunication." A municipal measure purporting to determine where such a system could be located had a sufficiently serious effect on the federal power to trigger the doctrine and render the

municipal measure inapplicable: ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at paras 66, 69, 72.

- By altering the range of claimants who may make use of the maritime negligence action created under federal law, a provincial statute creating a workers' compensation scheme trenches on the core of the federal power over navigation and shipping. However, this level of intrusion is insufficient to trigger interjurisdictional immunity. It is not significant or serious when one considers the breadth of the federal power over navigation and shipping, the absence of impact on the uniformity of Canadian maritime law, and the historical application of workers' compensation schemes in the maritime context. ***Maritime Services International v Ryan Estate***, 2013 SCC 44.

- Note that, in the context of Aboriginal title (and possibly other Aboriginal and treaty rights), the doctrine of interjurisdictional immunity has been displaced by the section 35 infringement / justification framework, whether the allegedly infringing law is federal or provincial. "Aboriginal rights are a limit on both federal and provincial jurisdiction": ***Tsilhqot'in Nation v British Columbia***, 2014 SCC 44.

Interdelegation

- The federal and provincial governments can't disturb the distribution of legislative powers even by consent. A constitutional amendment is required to alter the arrangement Parliament cannot delegate legislative powers to the provincial legislatures and *vice versa*. ***Attorney General of Nova Scotia v. Attorney General of Canada*** (Nova Scotia Interdelegation Case) [1951] S.C.R. 31.
- Other kinds of interdelegation and cooperative schemes are constitutionally permitted as long as they don't actually purport to enlarge the powers of one of the legislative bodies:
    - **anticipatory /incorporation by reference:** federal and provincial governments can adopt by way of reference the law of another jurisdiction in a way that anticipates and includes any future changes made by the other jurisdiction. ***Attorney General of Ontario v. Scott,*** [1956] S.C.R. 137 upholding the *Reciprocal Enforcement of Maintenance Orders Act*, which permitted defences available according to the laws of the reciprocating state as they are amended from time to time.
    - **administrative delegation and agency adoption**: federal and provincial governments can delegate powers to a board enacted under the other head of power. ***Coughlin v. Ontario***, [1968] S.C.R. 569, upholding the federal government's anticipatory administrative delegation of power over inter-provincial transport to the Ontario Highway Transport Board.
- In ***Pelland v. A.G. Quebec***, 2005 SCC 20, [2005] 1 S.C.R. 292, the S.C.C. upheld the federal-provincial scheme with respect to the production and marketing of chicken. The federal agency assesses the national market and established a global production quota for

each province. The provincial agency adopts as its intraprovincial production quota the exact share assigned to it by the federal body, and the federal agency delegates its authority to regulate the marketing of chickens in interprovincial and international trade to the provincial body. Each producer within a province then obtains a single quota that applies to all his or her chickens, regardless of whether destined intraprovincially, interprovincially or internationally. The federal agency awards licenses for interprovincial or international marketing. See also ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48, where the Supreme Court confirmed that cooperative federal-provinical regulatory schemes do not constitute impermissible delegation, where neither level of government transfers its "primary legislative authority … with respect to matters over which it has exclusive legislative jurisdiction to a legislature of the other level of government."

Selected federal powers

Trade and Commerce – 91(2)

- In ***Citizens' Insurance Co. of Canada v. Parsons***, (1881) 7 App. Cas. 96 (P.C.) Sir Montague Smith established that there are two branches within this head of power:
  - interprovincial or international trade: There is no test other than the pith and substance of the act must be to regulate interprovincial or international trade.
    - The control of agricultural or industrial production is *prima facie* a local matter within provincial competence. See ***Labatt Brewing Co. v. Canada***, [1980] 1 S.C.R. 914 where Estey J. declared the federal labeling regulations for "light beer" were invalid because they purported to regulate the production and local sale of a specific product.
    - Federal attempts to control the flow of a commodity though distribution channels are usually *intra vires*. See ***Caloil v. Canada,*** [1971] S.C.R. 543 where the Court upheld a federal law regulating the distribution of imported oil.
    - A federal law that regulates transactions wholly within a province cannot be upheld under this branch unless the intraprovincial effects of the law are incidental to the interprovincial or international aspects. See ***Caloil v. Canada,*** [1971] S.C.R. 543 and Laskin, C.J.'s dissent in ***R. v. Dominion Stores*** , [1980] 1 S.C.R. 844.
    - Federal agricultural products production and marketing have been found valid under schemes that work in conjunction with valid provincial schemes: see ***Pellard***, ***supra***, ***Interdelegation***
  - general regulation: This power can only be used to legislate on matters of genuine national importance and scope – matters that transcend the local and concern Canada as a whole. ***Reference re*** *Securities Act*, 2011 SCC 66**.** In upholding the *Combines Investigation Act* under this branch, Dickson, C.J. in ***General Motors of Canada v. City National Leasing***, [1989] 1 S.C.R. 641 set out a non-exhaustive list of five features of the law that are typically required in order to be

characterized as general trade and commerce legislation. The absence of any of these criteria is not necessarily determinative.

1. The legislation must be part of a general regulatory scheme.
2. The regulatory scheme must be monitored by the continuing oversight of a regulatory agent.
3. The legislation must be concerned with trade as a whole rather than a particular industry.
4. The legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting.
5. Failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

Based on these criteria the Supreme Court of Canada concluded that the general trade and commerce power could not be used to implement a comprehensive regime to regulate securities nationally. ***Reference re Securities Act***, 2011 SCC 66. The day to day regulation of contracts for securities is a provincial power. Aspects of securities, such as national data collection and management of systemic risk, are related to trade as a whole. The general trade and commerce power could be used to implement laws related to national data collection and management of systemic risk.

The Court confirmed this reasoning in ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48, upholding a comprehensive federal-provincial scheme to regulate securities nationally. Here, the federal law was limited to controlling systemic risk with the potential to create material adverse effects on the Canadian economy as a whole, and to the protection against financial crimes. Designed to work alongside provincial laws, the key to the federal law's constitutional validity was that, unlike its predecessor, it did not attempt to regulate the day-to-day aspects of the trade in securities. Rather, it was limited to the preservation of the integrity and stability of the Canadian economy, which has a national dimenstion that lies beyond the competence of the individual provinces.

Criminal Law – 91(27)

- The scope of the criminal law power has always been defined broadly. The modern test was set out in ***Reference re Validity of Section 5(a) of the Dairy Industry Act*** , [1949] S.C.R. 1: a criminal law must have a valid criminal law purpose backed by a prohibition and a penalty.
- Valid purposes include the promotion of public peace, order, security, health, morality and other legitimate public purposes like protecting the environment. ***R. v. Hydro-Québec*** 1. The law should be directed against some evil, injurious or undesirable effect upon the public's social, economic or political interests, but criminal law is not confined to prohibiting immoral acts. ***Reference re*** Firearms Act, 2000 SCC 31, [2000] 1 S.C.R. 783.

- Parliament may criminalize an ancillary activity (advertising of cigarettes and solicitation for prostitution for example) without also criminalizing the underlying activity or 'evil' (consumption of tobacco or prostitution. ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199 and ***Reference re ss.193 and 195(1)(c) of the Criminal Code*** (***Prostitution Reference***), [1990] 1 S.C.R. 1123.
- Criminal law may validly contain exemptions for certain conduct without losing its status as criminal law. ***R. v. Morgentaler***, [1993] 3 S.C.R. 463 exemption from prosecution where woman's life in danger; ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199 exemptions for certain kinds of advertising.
- The fact that an Act is complex and regulated by an administrative agency does not necessarily detract from its criminal nature: the *Food and Drugs Act*, *Canadian Environmental Protection Act* and *Firearms Act* have all been upheld under the federal criminal law power. But if the Act is too regulatory as in ***R. v. Boggs***, [1981] 1 S.C.R. 49, where the Court struck down the federal *Criminal Code* offence of driving a motor vehicle while one's provincial driver's licence was suspended for any reason, it will not be valid criminal law. See also **Reference re *Assisted Human Reproduction Act***, 2010 SCC 61 where a 5-4 majority (in the result) found a number of provisions of the federal *Assisted Human Reproduction Act* to be *ultra vires.*
- A provincial law "will not invade the federal power over criminal law merely because its purpose is to target conduct that is also captured by the *Criminal Code*": ***Goodwin v. British Columbia (Superintendent of Motor Vehicles)***, 2015 SCC 46 at para 32, upholding a provincial "automatic roadside prohibition" scheme enacted to combat impaired driving even though one purpose of the scheme was deterrence.
- Provinces may validly proscribe gaming such as video lottery terminals without invading federal criminal law power: ***Siemans v. Manitoba (A.G.)***, 2003 SCC 3, [2003] 1 S.C.R. 6. The federal government does not have a monopoly on morality through its criminal law power.

POGG – preamble

- The Peace, Order and Good Government Clause in the preamble to s. 91 is a residual federal power. Case law has given content to the POGG power in four ways: gaps in the enumerated heads of power (*i.e.*, federal incorporation power assigned to POGG because s. 92(11) gives the provinces the power incorporate companies with provincial objects); new subjects developed since 1867 that are matters of national concern (*i.e.*, aeronautics); matters that although originally matters of a local concern, have since, in the absence of national emergency, become matters of national concern (*i.e.*, environment) and national emergencies. Most cases are decided on the basis of one of two branches:

    1. **national concern**: In upholding federal jurisdiction over marine pollution under this branch, Le Dain J. in ***R. v. Crown Zellerbach Canada***, [1988] 1 S.C.R. 401 set out five requirements for a matter to qualify as a matter of national concern. It must have a (1) singleness, (2) distinctiveness and (3) indivisibility that clearly distinguishes it from matters of provincial concern,

(4) the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province, and (5) the scale of impact on the provincial jurisdictions is reconcilable with the fundamental distribution of legislative power under the Constitution.

Stay tuned: In March 2020, the Supreme Court of Canada will hear a set of appeals challenging the federal *Greenhouse Gas Pollution Pricing Act* (the federal carbon pricing system). The *Act* was upheld as *intra vires* the federal government, pursuant to the national concern branch of POGG, by the Court of Appeal for Saskatchewan and the Court of Appeal for Ontario. The Court of Appeal of Alberta deemed the *Act ultra vires* the federal government.

2. **emergency branch**: Early case law held the federal government had to prove that the emergency, like war or famine, was of such necessity and the circumstances were so highly exceptional that the federal government had to regulate the matter in question in order to maintain the law, order and safety of the Dominion as a whole. With the Court's decision in ***Reference re Anti-Inflation Act***, [1976] 2 S.C.R. 373, even peacetime legislation can now be upheld under this branch as long as the law is temporary and there is some rational basis for the emergency legislation. It is not necessary for the federal government to issue a declaration that the legislation was in response to a national emergency.

Federal Works and Undertakings – 92(10) and 91(29)

- "Works" refers to a physical thing (***Montreal v. Montreal St. Ry.*** [1912] A.C. 333) and "undertakings" refer to "not a physical thing, but an arrangement under which … physical things are used" (***Re Regulation and Control of Radio Communication in Canada*** (Radio Reference) [1932] A.C. 304, 315).
- "Other works and undertakings" in s. 92(10)(a) covers works and undertakings involved in communication or transportation (Hogg, ***Constitutional Law in Canada: Student Edition*** 2004, 549).
- A requirement for federal jurisdiction over transportation undertakings is that the undertaking itself physically operates or facilitates carriage across interprovincial boundaries. This means the undertaking must itself perform the interprovincial carriage of goods. Unlike with communication, with transportation the means of providing the service is determinative. (***Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters***, [2009] 3 S.C.R. 407)
- There are two ways for a business to be governed by the federal works and undertaking jurisdiction:
    1. A **single federal work or undertaking** where the relevant business units are functionally integrated (physically and operationally) and subject to common control or management. See ***Northern Telecom v. Communications Workers of Canada***, [1980] 1 S.C.R. 115 and [1983] 1 S.C.R. 733 where the installation unit employed by Northern Telecom was considered part of a

single federal undertaking. See also ***Westcoast Energy v. Canada***, [1998] 1 S.C.R. 322 where a proposed gathering pipeline was considered part of a single federal work.

2. The enterprise is an **integral part** of a **core federal work or undertaking** even if functionally separate. ***Reference re: Industrial Relations and Disputes Investigation*** (***Stevedores Reference***), [1955] S.C.R. 529 where stevedores were held to be sufficiently integral to shipping. To ascertain whether it is integral examine the relationship between the activity, the particular employees under scrutiny and the federal operation. ***Tessier Ltée v. Québec***, 2012 SCC 23.

   Federal regulation may be justified when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities or when the services are are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation. ***Tessier Ltée v. Québec,*** 2012 SCC 23.

3. ***Desgagnés Transport Inc. v. Wärtsilä Canada Inc.***, 2019 SCC 58, sets out a number of non-exhautive factors that assist in determining whether an activity has an integral connection to the exercise of a federal head of power, in this case, the navigation and shipping power (the "**integral connection test**" at para. 56). The test must be applied rigorously, to ensure that federal powers are not unduly expanded, and "the ultimate question is whether the maritime elements of the matter are sufficient to render it integrally connected to the navigation and shipping head of power" (para. 52).

- The declaratory power in s. 92(10)(c) allows the federal government to declare that certain local "works" are "for the general advantage of Canada." It has been used hundreds of times in relation to local railways, bridges, dams etc. Although s. 92(10)(c) only applies to "works", no declaration has ever been invalidated because it purported to apply to an "undertaking" (Hogg, ***Constitutional Law in Canada: Student Edition*** 2004, 560).

Interprovincial Trade – S. 121

- The terms of s. 121, that all goods, "of any one of the Provinces shall … be admitted free into each of the other Provinces" does not mean that provinces can never impose tariffs on the import of good from other provinces.

- In ***R v. Comeau***, 2018 SCC 15, the Supreme Court held that the term "admitted free," in the text of s. 121, is not to be interpreted as "prohibiting any and all burdens on the passage of goods over provincial boundaries, essentially imposing an absolute free trade regime within Canada." Instead, s. 121 prevents provinces from passing laws aimed, "in essence or purpose," at impeding interprovincial trade by creating barriers at provincial lines. But provinces may "legislate to achieve goals within their jurisdiction even where such laws may incidentally limit the passage of goods over provincial borders." In ***Comeau***, the Court upheld legislation that imposed "incidental burdens on the passage of

goods between provinces." While the impugned law, which limited, by fine or seizure, New Brunswick residents' ability to stock liquor acquired from outside of the province's liquor Corporation, was found to constitute an indirect tariff, its purpose was not to restrict trade, but rather, to mange and monitor the liquor trade within the province, and to "enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick."

CHARTER PRINCIPLES

Interpretation of the *Charter*

- A law will offend the *Charter* if either its purpose or its effect is to abridge a *Charter* right. See ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, 331, where the Court held that the federal *Lord's Day Act* failed the purpose test.
- Where the effect of a law on a *Charter* right is trivial or insubstantial, there is no breach of the *Charter*. ***R. v. Jones***, [1986] 2 S.C.R. 713.
- The Court has called for a generous or "purposive" interpretation of the *Charter* "suitable to give to individuals the full measure of the fundamental rights and freedoms referred to": ***Hunter v. Southam***, [1984] 2 S.C.R. 145, 156.
- The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the s. 15(1) rights of another. ***Reference re Same-Sex Marriage***, [2004] 3 S.C.R. 698
- There are four main steps to consider in *Charter* cases:
    1. Is there government action?
    2. If so, does that action infringe a *Charter* right in ss. 2-23?
    3. If so, can the party defending the government action establish the infringement is justified under s. 1?
    4. If not, what is the appropriate remedy under s. 24 of the *Charter* or s. 52 of the ***Constitution Act, 1982***?

Application of the *Charter*

- In any *Charter* analysis, the first question to ask is: "Does the *Charter* apply?"
- s. 32 is the application section of the *Charter*. The concept behind the application question is that the *Charter* only applies to the government; it does not apply to purely private issues. See ***RWDSU v. Dolphin Delivery***, [1986] 2 S.C.R. 573, 593-99 where the Court first decided that the *Charter* was intended to regulate the relationship between the individual and the State; to restrain government action and to protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation.
- The extent of governmental intervention necessary to make an entity a "governmental actor" for the purpose of s. 32 depends on the nature of the entity and the activity involved. ***Eldridge v. British Columbia***, [1997] 3 S.C.R. 624.
- s. 32 applies to:
    1. The actions of Parliament and the legislatures of each province: legislation (explicit in s. 32).
    2. The government of Canada and each province. This includes:

- Entities or persons that exercise statutory authority such as Cabinet decisions (***Operation Dismantle v. The Queen***, [1985] 1 S.C.R. 441); the Attorney General (***R. v. S.(S.)***, [1990] 2 S.C.R. 254); and municipalities (***Ramsden v. Peterborough***, [1993] 2 S.C.R. 1084).
- Entities that are sufficiently controlled by either the legislative or executive branch such that their activities may be seen as an activity of the government itself. The "control test" looks for an institutional or structural link with government to determine whether a public body is covered by the *Charter.* See ***Douglas/Kwantlen Faculty Association v. Douglas College***, [1990] 3 S.C.R. 570 where the college was sufficiently controlled by the British Columbian government. Compare to institutions that were sufficiently independent of government and therefore not subject to the *Charter:* See ***McKinney v. University of Guelph***, [1990] 3 S.C.R. 229, (a university) and ***Stoffman v. Vancouver General Hospital***, [1990] 3 S.C.R. 483 (a hospital).
- Non-governmental entities acting pursuant to statutory authority in order to effectuate specific government policies or programs. See: ***Eldridge v. British Columbia***, [1997] 3 S.C.R. 624 where the Court held that although hospitals are not governmental actors in general, they are subject to the *Charter* when deciding what publicly funded services to provide.
- State agents. In the case of other private entities, you must consider the relationship between the state (the police) and a private entity such as an informer or private security guard. ***R. v. Broyles***, [1991] 3 S.C.R. 595, 608 held that an informer's actions would only be subject to the *Charter* if the exchange between the accused and the informer would not have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents. See also: ***R. v. M. (M.R.)***, [1998] 3 S.C.R. 393 where the cooperation between the vice-principal and the police was not sufficient to indicate the vice-principal was acting as an agent of the police during the search of a student's locker. ***R. v. Buhay*** 2003 SCC 30, [2003] 1 S.C.R. 631 where the Court held that the security guards were not governmental actors, were not effecting a specific governmental program or policy and were not acting as state agents at the time they searched the locker because it could not be said that the security guards would not have searched the locker but for the intervention of the police.

Courts

- The Supreme Court originally held that the word "government" in s.32 means only the executive and administrative branch and does not include the judicial branch. Therefore, the court found that a court order was not a governmental action. ***RWDSU v. Dolphin Delivery***, [1986] 2 S.C.R. 573. However, this decision was restricted by ***R. v. Rahey***, [1987] 1 S.C.R. 588, where the Court held that court action could constitute a breach of the *Charter* (a trial judge had adjourned an application for a directed verdict of acquittal 19 times and taken 11 months to reach a decision).

- In ***BCGEU v. British Columbia***, [1988] 2 S.C.R. 214, the Court held that a court order was subject to *Charter* review. ***Dolphin Delivery*** was distinguished on the basis that the injunction in that case was issued to resolve a purely private dispute. In the ***BCGEU*** case, it was held that the Court was acting on its own motion and not at the instance of any private party.
- The Supreme Court appears to have reconciled the seeming contradictions in the case of ***Dagenais v. CBC***, [1994] 3 S.C.R. 835, 943, where McLachlin J., (dissenting on other grounds) held that court orders are subject to *Charter* scrutiny when they are part of a public process. She agrees with Professor Peter Hogg's reconciliation of ***Dolphin Delivery*** with ***BCGEU*** and ***Rahey***, where he states that a court order, when issued as a resolution of a dispute between private parties and when based on the common law is not governmental action to which the *Charter* applies. (See Hogg, ***Canadian Constitutional Law: Student Edition*** *2004*, 771-72.)
- The rules of the civil law in Quebec governing relations between private parties are exempt from the *Charter*. ***Tremblay v. Daigle***, [1989] 2 S.C.R. 530, 571.
- The *Charter* may apply to the actions of administrative bodies that exercise statutory authority even if they perform an adjudicative function. ***Slaight Communications v. Davidson***, [1989] 1 S.C.R. 1038 where the Court held that the *Charter* applies to the orders of a statutorily-appointed labour arbitrator. ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307 where the Court held that although the Human Rights Commission is an arm's length and independent adjudicative body, its administration of a governmental program to redress discrimination is subject to the *Charter*.

Common law

- The *Charter* applies to government action based in common law. Even if there is no governmental actor, the common law should be developed in a manner consistent with the values of the Constitution. ***Dagenais v. CBC***, [1994] 3 S.C.R. 835, where the court held that it was necessary to reformulate the common law rule in a manner that reflects the principles of the *Charter*.
- In ***Hill v. Church of Scientology of Toronto*** , [1995] 2 S.C.R. 1130, the Court held that, in the absence of government action, *Charter* rights don't apply to common law rules but *Charter* values are a proper source of material against which to test and develop the common law. So, a person can raise a challenge to a common law rule to show that it should be changed to better reflect the values in the *Charter*. The burden is on the challenger throughout the process. In effect, when the *Charter* does not apply directly, it will apply indirectly. See ***M.(A.) v. Ryan***, [1997] 1 S.C.R. 157, where *Charter* values were applied in determining the extent of the privilege claimed by the plaintiff in a civil action for psychiatric records sought by the defendant and ***R.W.D.S.U. v. Pepsi-Cola Canada*** 2002 SCC 8, [2002] 1 S.C.R. 156 where they were used to accommodate secondary picketing under the common law in a manner that observed freedom of speech and assembly.

- More recently, however, the Court has held the *Charter* values interpretive principle is triggered only where there is genuine ambiguity: ***Bell ExpressVu v. Rex*** 2002 SCC 42, [2002] 2 S.C.R. 559.
- The Court uses *Charter* values to interpret the criminal law so as to avoid conflict with the *Charter*: ***Can. Foundation for Children, Youth and the Law v. Can.***, 2004 SCC 4, [2004] 1 S.C.R. 76; ***R. v. Labaye***, 2005 SCC 80, [2005] 3 S.C.R. 728; ***Canada (Attorney General) v. JTI-MacDonald Corp.***, 2007 SCC 30.

Underinclusion

- The *Charter* applies to alleged underinclusive legislation where it is claimed that the statute's underinclusiveness violates a fundamental *Charter* right or freedom. See: ***Dunmore v. Ontario (A.G.)***, 2001 SCC 94, [2001] 3 S.C.R. 1016 where the appellants' claim that their exclusion from the *Labour Relations Act* violated their freedom to associate. ***Vriend v. Alberta***, [1998] 1 S.C.R. 493, where the Court required the provincial human rights statute governing relationships in the private sector to conform with s. 15(1) of the *Charter* by including sexual orientation as a prohibited ground of discrimination.

Geographic application

- The *Charter* does not govern the actions of a foreign government. See, for example, ***Schreiber v. Canada (A.G.)***, [1998] 1 S.C.R. 841 where the Court held that the *Charter* did not apply to the allegedly unreasonable search because all of the actions that relied on state compulsion in order to interfere with Schreiber's privacy interests were done by the Swiss authorities. The letter sent by the federal Department of Justice to Swiss authorities requesting assistance in a criminal investigation did not violate the *Charter*.
- The *Charter* applies to the actions of Canadian actors within Canada but not extraterritorially. In ***R. v. Hape***, 2007 SCC 26 the Court retreated significantly from ***R. v. Cook***, [1998] 2 S.C.R. 597, where the *Charter* was applied to the actions of Canadian detectives in interviewing an accused in the United States. In ***Hape***, Canadian police executed a search that complied with the law of the extra-territorial jurisdiction in which the search occurred, but which was not compliant with the *Charter*. The Court held the evidence obtained was nonetheless admissible in a Canadian prosecution because Canada cannot seek or obtain extra-territorial enforcement of the *Charter* under accepted international law principles of state sovereignty. Only if the evidence from the search in the foreign state would make the Canadian trial unfair, would exclusion be obtained under ss. 7 or 11(d).
- However, where the actions of Canadian officials involve participation in processes or activities that violate Canadians international human rights obligations there is no deference to foreign domestic laws. In such instances, the *Charter* applies to the conduct of the Canadian agents. In ***Canada (Justice) v. Khadr***, [2008] 2 S.C.R. 125 the Court found that because Canadian agents participated in an interview process that the Supreme Court of the United States had already determined violated international

human rights obligations to which Canada was a party the section 7 duty of disclosure applied. The content of this duty will be defined by the nature of Canada's participation in the process that violated Canada's international human rights obligations.

- The actions undertaken by the Canadian government in extradition are subject to scrutiny under the *Charter*. Section 7 would apply to decisions to extradite to face the death penalty even though the Canadian government would not itself administer the lethal injection because no execution can or will occur without the act of extradition by the Canadian government. The Minister's decision is a prior and essential step in a process that may lead to death by execution. ***United States v. Burns***, 2001 SCC 7, [2001] 1 S.C.R. 283. Compare to ***Spencer v. The Queen***, [1985] 2 S.C.R. 278 where s. 7 did not apply to prevent the Crown from compelling Spencer as a witness even though a Bahamian Act made it an offence to reveal knowledge about the banking transactions he would be asked about. The operation of the Canadian law did not necessarily put him in jeopardy of prosecution under the law of the Bahamas. He would only be in jeopardy if he chose to go there.

s. 33 Override

- This section enables Parliament or a Legislature to enact a law that will override the guarantees in s. 2 and ss. 7 to 15 of the *Charter*. All that is necessary is the enactment of a law containing an express declaration that the law is to operate notwithstanding the relevant provision(s) of the *Charter*.
- Outside Quebec, the override power has been used infrequently. For example, in Saskatchewan it was invoked to protect back to work legislation (The ***SGEU Dispute Settlement Act***, S.S. 1984-85-86, c. 11, s. 9) which had previously been held by the Court of Appeal to be contrary to the guarantee of freedom of association. ***RWDSU v. Government of Saskatchewan***, [1985] 5 W.W.R. 97 (Sask. C.A.). The case was later overturned by the Supreme Court of Canada, thus rendering the use of the override power unnecessary.
- The override power is subject to the restriction in s. 33(3), which states that an express declaration will automatically expire at the end of five years. s. 33(4) permits the express declaration to be re-enacted, but this re-enacted declaration will also expire at the end of the five-year period (s. 33(5)). The purpose of the "sunset clause" is to force reconsideration by the Parliament or Legislature at five-year intervals (during which period elections must be held).
- The Supreme Court of Canada held that "omnibus" descriptions were legally sufficient (Quebec's *Bill 62* added a standard-form notwithstanding clause to each of the Acts adopted by the National Assembly of Quebec before April 17, 1982). The Court further held, in ***Ford v. Quebec*** , [1988] 2 S.C.R. 712, that an omnibus reference to the rights outlined in s. 2 and ss. 7-15 was specific enough. The Court did find, however, that there was no retroactive declaration allowed. It held that the normal presumption against retroactivity should be applied to the language of s. 33 (*ibid*, at 744).

LIMITATION OF *CHARTER* RIGHTS

- s. 1 is the general limitation clause of the *Charter*. This section performs two functions:

  It expressly guarantees the rights and freedoms set out in the *Charter* and

  It provides for limits on those guaranteed rights.

- In ***R. v. Oakes***, [1986] 1 S.C.R. 103, the Supreme Court of Canada prescribed a single standard of justification for all rights, made the standard a high one and cast the burden of satisfying it on the government or the other party seeking to support the challenged law. The standard of proof is the civil standard – "proof by a preponderance of probability".

Reasonable limit — general

- According to McLachlin J. in ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199 at ¶127, "the party defending the law must show that the law which violates the right or freedom guaranteed by the *Charter* is 'reasonable'. In other words, the infringing measure must be justifiable by the processes of reason and rationality."
- The Court will not require magic numbers and is hesitant to substitute their opinion with respect to details of line-drawing for that of the Legislature or Parliament. In ***R. v. Edwards Books and Art***, [1986] 2 S.C.R. 713 Dickson C.J. said "I do not believe there is any magic in the number 7 as distinct from, say, 5, 10, or 15 employees as a cut-off point for eligibility for the exemption. In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(a) interests of those affected the Legislature engaged in the process envisaged by s. 1 of the *Charter*. A 'reasonable limit' is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the Legislature to impose. The Courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." See also ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927.

Prescribed by law

- The words "prescribed by law" make it clear that an act not legally authorized cannot be justified under s. 1. Statutes, regulations and a rule of the common law are all prescribed by law. ***R. v. Therens***, [1985] 1 S.C.R. 613, 645.
- The law must not be too vague to constitute a limit prescribed by law. The legislature must provide an intelligible standard according to which the judiciary must do its work. ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927, 980-83.
- Violative conduct by government officials that is not authorized by statute is not "prescribed by law". ***Little Sisters Book and Art Emporium*** *v.* ***Canada***, [2000] 2 S.C.R. 1120 at ¶141 where the Court found that the source of the s. 15(1) infringement was not the customs legislation itself but rather the unconstitutional actions of customs agents.
- A government policy may be considered "prescribed by law" for s. 1 purposes if it has been authorized by statute or regulation; sets out a general norm or standard meant to be binding;

and is "sufficiently precise and accessible": ***Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component***, 2009 SCC 31.

Demonstrably justified

- According to McLachlin C.J. in ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199 at ¶128-29, "the choice of the word 'demonstrably' is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration … While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement."

Oakes test

- ***R. v. Oakes*** [1986] 1 S.C.R. 103, as interpreted later by ***Dagenais v. CBC***, [1994] 3 S.C.R. 835, lays down the criteria that must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society:
    1. Pressing and substantial objective – The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right.
    2. Proportionality –
        a. The law must be rationally connected to the objective;
        b. There must be minimal impairment of the rights (*i.e.*, no more than reasonably necessary to achieve the objective); and
        c. The deleterious effects of the impairment must not outweigh the salutary benefits achieved in pursuit of pressing and substantive objective.
- The s. 1 inquiry is by its very nature a fact-specific inquiry. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. McLachlin J. in ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199.

Recall that in cases where an administrative actor's discretionary decision is being reviewed for *Charter* compliance, the proportionality analysis from *Doré* applies: ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12.

Pressing and substantial objective

- An objective cannot provide the basis for a s. 1 justification if the objective is itself incompatible with *Charter* values. It also cannot be justified if that asserted objective did not actually motivate cause the enactment of the law (the rule against shifting objectives). ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295.
- Typically, courts have been reluctant to disallow a s. 1 defence on the basis that the government objective is not pressing or substantial. See for example ***R. v. Guignard*** 2002 SCC 14, [2002] 1 S.C.R. 472, where the Court accepted that preventing visual pollution and driver distraction were pressing and substantial objectives for the bylaw, which prohibited the erection of advertising signs outside an industrial zone.
- The judgment of McLachlin J. in ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139, 250 is one of the rare examples where the Crown failed to establish an objective of sufficient importance to override a *Charter* right. She found the government's objective in prohibiting any advertising or soliciting at an airport except as authorized by the Minister, namely that an airport is not an appropriate place for this type of communication, "amounts to little more than the assertion – more as an article of faith than a rationally supported proposition." See also ***Sauvé v. Canada (Chief Electoral Officer)*** 2002 SCC 68, [2002] 3 S.C.R. 519 (restrictions on prisoner voting rights struck down) where the majority was not impressed by the government's two "vague and symbolic objectives": enhancing civic responsibility and respect for the rule of law and providing additional punishment.
- The objective that is relevant to the s. 1 analysis is the objective of the *infringing* measure, as opposed to the objective of the statute as a whole unless the entire statute is challenged. ***R.J.R-MacDonald v. Canada***, [1995] 3 S.C.R. 199. In ***Vriend v. Alberta***, [1998] 1 S.C.R. 493, the benign objective of the human rights legislation – to eliminate discriminatory practices by employers – could not be invoked to justify the breach, because the breach lay in what was omitted from the Act.
- Saving money is not a compelling objective in most cases for violations of *Charter* rights: ***Singh v. Minister of Employment and Immigration***, [1995] 1 S.C.R. 177 *per* Wilson J. at 218-219. However, in ***Newfoundland v. N.A.P.E.*** 2004 SCC 66, [2004] 3 S.C.R. 381, the Court allowed the province to claim fiscal crisis to justify legislation that violated s. 15 equality by erasing a government obligation to provide $24 million to female workers in the hospital sector for pay equity. By contrast, the provincial assertion of costs as justification for violation of association rights of workers was rejected in ***Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia***, 2007 SCC 27.
- Nor is administrative expediency a legitimate claim unless the situation is extreme and exceptional: ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486 *per* Lamer J. at 518.
- Mainaining the fairness of the electoral system to Canadians residing in Canada is a pressing and substantial objective under the s. 1 analysis: ***Frank v. Canada (A.G.)***, 2019 SCC 1.

Proportionality

In considering the three proportionality requirements, a Court must balance the interests of society with those of individuals and groups. ***R. v. Oakes***, [1986] 1 S.C.R. 103, 139.

Rational connection

- "The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose." ***R. v. Edwards Books and Art***, [1986] 2 S.C.R. 713, 770; ***Benner v. Canada***, [1997] 1 S.C.R. 358.
- It is easier for total bans to satisfy the rational connection step. Compare ***Ramsden v. Peterborough***, [1993] 2 S.C.R. 1084, 1086 where the total ban on postering was rationally connected to the objective of avoiding litter, aesthetic blight and associated hazards; and ***R. v. Guignard*** 2002 SCC 14, [2002] 1 S.C.R. 472 at ¶29 where the bylaw failed this step for being arbitrary because the respondent's bylaw prohibited only those signs that expressly indicated the trade name of a commercial enterprise in residential areas. All other types of signs of a more generic nature were exempt from the bylaw.
- Few cases fail this step. "Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple of evident. They may be room for debate about what will work and what will not, and the outcome may not be scientifically measureable. Parliament's decision as to what means to adopt must be accorded considerable deference in such cases." ***Canada (Attorney General) v. JTI-MacDonald Corp.***, 2007 SCC 30 at para. 41

Minimal impairment

- Deference may be appropriate on this step as well. "There may be many ways to approach a particular problem, and no certainty as to which will be the most effective way. ... For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives ...." ***Canada (Attorney General) v. JTI-MacDonald Corp.***, 2007 SCC 30 at para. 43.

  If possible, in cases of ambiguity, the Court will construe laws in a manner that eliminates overbreadth problems to ensure minimal impairment of rights: ***Canada (Attorney General) v. JTI-MacDonald Corp.***, 2007 SCC 30 at para. 44.
- A total ban is harder to justify under the minimal impairment step. A full prohibition will only be constitutionally acceptable under this stage where the government can show that only a full prohibition will enable it to achieve its objective. If a partial ban would also achieve the state's objective, a total ban will fail this step. ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199.
- A total ban on the use of corporate names in sponsorship promotion, or on sports or cultural facilities was upheld in ***Canada (Attorney General) v. JTI-MacDonald Corp.***, 2007 SCC 30.

- The concept that the law should impair "as little as possible" the right or freedom in question is the most common reason that laws "fail" the s. 1 analysis. The courts have often held that other legislative options were available which would still accomplish the desired objective but would impair the *Charter* right less than the law that was enacted.

  See:

  - ***R. v. Vaillancourt***, [1987] 2 S.C.R. 636, striking down the felony murder rule;
  - ***Ford v. Quebec***, [1988] 2 S.C.R. 712, s. 58 of the *Charter of the French Language*, which required the exclusive (as opposed to predominant) use of French is not minimally impairing; Compare to ***Devine v. Quebec***, [1988] 2 S.C.R. 790, 794 upholding ss. 52 and 57 of the *Charter of the French Language*, which permitted the predominant display of French together with another language.
  - ***Edmonton Journal v. Alberta***, [1989] 2 S.C.R. 1326, striking down the provisions of the *Alberta Judicature Act* that prohibited the publication of accounts of matrimonial litigation.
  - ***Libman v. Quebec***, [1997] 3 S.C.R. 569, finding that the affiliation system, which restricted spending in referendum campaigns to those affiliated with an official "Yes" or "No" committee, was not minimally impairing for political independents. Alternatives, like those proposed by the Lortie Commission (on electoral reform), would have been less impairing.
  - ***Thomson Newspapers Co. v. Canada***, [1998] 1 S.C.R. 877 striking down s.322.1 of the *Canadian Elections Act*, "a very crude instructment" that restricted the publication of opinion polls in the final three days of an election campaign.
  - ***Dunmore v. Ontario (A.G.)*** 2001 SCC 94, [2001] 3 S.C.R. 1016, the total ban of agricultural workers from the statutory labour relations scheme was not minimally impairing in two respects: it denied the right of association to every sector of agriculture and it denied every aspect of the right of association.

- Minimal impairment means that laws must not be overinclusive or broader than necessary, and improperly apply to people to whom they are not intended to apply. Where there is no correlation between between the effects of an impugned measure, and its stated objective, a law will not be found minimally impairing: ***Frank v. Canada (A.G.)***, 2019 SCC 1.
- The courts have held that "a legislature must be given reasonable room to maneuver" and stated that the courts are "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." ***R. v. Edwards Books and Art***, [1986] 2 S.C.R. 713, 782, 795. In other words, the courts look for a reasonable legislative effort to minimize an infringement on a *Charter* right. ***R. v. Whyte,*** [1988] 2 S.C.R. 3, where the *Criminal Code* reverse onus provision presuming that a person occupying the driver's seat of a vehicle has care and control

of the vehicle for the purpose of a drunk driving offence was upheld – the court stated that the clause was a "restrained parliamentary response to a pressing social problem" and "a minimal interference with the presumption of innocence".

- The Court will grant some deference to the legislators because of the difficulties inherent in the process of drafting rules of general application. A law should not fail minimal impairment just because a court can conceive of an alternative that seems to it to be less restrictive. But deference must not be carried to the point of relieving the government of the burden. McLachlin J. in ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199.
- To attract this deference, the government may have to lead social science evidence. However, "social science evidence may not be necessary" if "the scope of the infringement is minimal" (as it was in ***BC Freedom of Information and Privacy Association v British Columbia (Attorney General)***, 2017 SCC 6, where the statutory registration requirement was only a minimal limit on the political expression of sponsors of election advertising).
- Delay in crafting a complex legislative response to demonstrated pay inequity that breaches s. 15(1) may be minimally imparing where the government acts with reasonable diligence in creating the new regime, and the delay is kept within "reasonable bounds." ***Centrale des syndicats du Québec v. Quebec (A.G.)***, 2018 SCC 18.

Proportionality

- The deleterious effects of the policy must be measured against the salutary effects. The issue is the practical effects of the law (in terms of the collective good it represents) measured against the limitation to the right. This is "the only place where the attainment of the objective may be weighed against the impact of the right." ***Canada (Attorney General) v. JTI-MacDonald Corp.***, 2007 SCC 30 at paras. 45-46.
- In ***Hutterite Brethren***, 2009 SCC 37 at para 75 the S.C.C. confirmed that the fourth step of the *Oakes* test is not redundant. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups."
- Potential budgetary savings may be relevant in assessing the salutary effects of a law, however in **G.*(J.) v. New Brunswick***, [1999] 3 S.C.R. 46 at ¶98-100 the Court found that the proposed budgetary savings of denying legal aid to parents in custody matters were minimal and disproportionate to the deleterious effects given that the *Charter* only requires the government to provide legal aid where it is essential to ensure a fair hearing and the parent's life, liberty or security is at stake.
- On the other hand, in ***N.A.P.E. v. The Queen (Nfld.)***, 2004 SCC 66, [2004] 3 S.C.R. 381, the S.C.C. held that Newfoundland and Labrador's severe financial crisis constituted a pressing and substantial objective which justified the province not paying costs of implementing agreed upon damages for pay equity violations.
- If commercial speech is used to induce harmful and addictive behavior, its "low value" becomes tenuous. ***Canada (Attorney General) v. JTI-MacDonald Corp.***, 2007 SCC 30 at paras. 47, 68.

CHARTER RIGHTS

Fundamental Freedoms (Section 2)

- This section operates to insulate an individual from government interference. The guaranteed freedoms ensure "that within a given broad range of private conduct an individual will be free to choose his or her own course of activity." ***Ford v. Quebec***, [1988] 2 S.C.R. 712, 751. The section states that everyone has the following fundamental freedoms:

2(a) freedom of conscience and religion

- In ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, 178, Wilson J. defined freedom of conscience as "personal morality which is not founded in religion" and as "conscientious beliefs which are not religiously motivated".
- The governing definition of freedom of religion was first articulated by Dickson J. (as he then was) in ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, 336 as "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". Therefore s. 2(a) protects "the freedom to hold religious beliefs and the freedom to manifest those beliefs" (meaning it protects practices as well as beliefs): ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)***, 2017 SCC 54 at paras 63-64.
- The Supreme Court of Canada has defined freedom of religion to include any voluntary and sincere expression of faith, measured subjectively with as little scrutiny by a court as is possible, whether or not it is part of an established or shared belief system: ***Syndicat Northcrest v. Amselem***, 2004 SCC 47, [2004] 2 S.C.R. 551 at paras. 47-52, and see also: ***Multani v. Commission scolaire Marguerite-Bourgeoys***, 2006 SCC 6, [2006] 1 S.C.R. 256 at para. 37. Recently developed beliefs and practices can be included: "The *Charter* protects all sincere religious beliefs and practices, old or new" (***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)***, 2017 SCC 54 at para 69).
- While the sincerity of the belief in a practice is assessed on a subjective basis, to establish an infringement of freedom of religion a claimant must also offer objective proof of an interference with the observance of the religious practice. ***S.L. v. Commission scolaire des Chênes***, [2012] 1 S.C.R. 235.
- Like freedom of expression under section 2(b), there is broad protection for freedom of religion under section 2(a). "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" and the analysis will then move on to justification under s. 1: ***Saskatchewan (Human Rights Commission) v. Whatcott***, 2013 SCC 11 at paras 154-155.

- However, the state has no duty under section 2(a) to "protect the object of beliefs". "In short, the Charter protects the freedom to worship, but does not protect the spiritual focal point of worship": ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)***, 2017 SCC 54 at para 71.
- Exposing children to a comprehensive presentation of various religions without forcing them to join them does not constitute an indoctrination of students which would infringe freedom of religion. ***S.L. v. Commission scolaire des Chênes***, [2012] 1 S.C.R. 235.
- There are collective aspects to freedom of religion: ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12 (Minister's decision to require Catholic school to teach Catholic faith from neutral, non-religious perspective was disproportionate interference with "the collective manifestation and transmission of Catholic beliefs"); ***Law Society of British Columbia v. Trinity Western University***, 2018 SCC 32 ("Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices.")
- The state has a duty of religious neutrality, which means it cannot favour any belief or non-belief over another. A provision (e.g., requiring prayer before a municipal council meeting) may be found to breach this duty. "A provision of a statute, of regulations or of a by-law will be inoperative if its purpose is religious and therefore cannot be reconciled with the state's duty of neutrality": ***Mouvement laïque québécois v. Saguenay (City)***, 2015 SCC 16 at para 81.
- State neutrality still requires recognizing and affirming religious freedoms, and pluralism. "A secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests": ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12 at para 43.
- In ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, 351 the Court struck down the federal *Lord's Day Act*, which prohibited commercial activity on Sunday because the purpose of the Act was to compel the observance of the Christian sabbath. The Court held that government may not coerce individuals to affirm a specific religious practice for a sectarian purpose. ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, 347.
- Ontario's *Retail Business Holidays Act* was subsequently upheld because its purpose was a secular one which provided a common pause day for retail workers, with a restricted "sabbatarian exemption" for retailers with small stores who closed their stores on Saturdays. While its effect was to impose an economic burden on those who observed a sabbath on a day other than a Sunday, the court upheld the law under s. 1, stating that the secular purpose of providing a common pause day was sufficiently important to justify a limit on freedom of religion. ***R. v. Edwards Books and Art***, [1986] 2 S.C.R. 713.
- In ***Young v. Young***, [1993] 4 S.C.R. 3, the majority of the Court held that no order respecting custody or access that was made in the best interests of the child could violate freedom of religion. The right to freedom of religion did not guarantee any religious activity that would not be in the best interests of the child and therefore was a limit on s. 2(a). In ***B.(R.) v. Children's Aid Society***, [1995] 1 S.C.R. 315, the Court held that the

statutory provision invoked to give a child a blood transfusion contrary to the wishes of the parent's constituted a serious violation of the parent's freedom of religion which was nonetheless justified under s. 1.

- The Court of Appeal in Ontario held that a provincial regulation requiring a public school to devote time to religious education, even though a parent had the right to apply to exempt a pupil from the studies, was coercive and therefore a breach of s. 2(a). The Court concluded that the purpose of the regulation was the indoctrination of Christian belief. ***Corporation of the Canadian Civil Liberties Association v. Ontario***, (1988) 65 O.R. (2d) 641 (C.A.).
- The refusal of a province to publicly fund alternative minority religious schools does not violate s. 2(a) or s. 15(1). ***Adler v. Ontario***, [1996] 3 S.C.R. 609. (see Language Rights and Education Rights, Denominational Schools section). Sopinka and Major JJ. took a very restricted view of s. 2(a) in holding that "nothing in the *Education Act* relating to mandatory education *per se* involves a breach of appellants' rights under s. 2(*a*) of the *Charter*. The Act allows for the provision of education within a religious school or at home and does not compel the appellants to act in any way that infringes their freedom of religion."
- A universal photo requirement on all provincial driver's licenses infringes the section 2(a) rights of a colony of Hutterite Brethern members in Alberta but is justifiable under section 1. A universal photo requirement is rationally connected, minimally impairing and proportional to the pressing and substantial objective of minimizing identity theft. ***Alberta v. Hutterian Brethren of Wilson Colony***, 2009 SCC 37.
- The ***Reference re Same-Sex Marriage***, 2004 SCC 79, [2004] 3. S.C.R. 698 held s. 2(a) protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs. The proposed federal legislation contemplates exemption on this ground in order to comply with the *Charter*. The SCC further suggested that s. 2(a) also protects against the compulsory use of sacred spaces for ceremonies contrary to religious beliefs. The mere recognition of equality rights of same sex couples however, cannot constitute a violation of any other rights in the *Charter*. Conflicts of rights do not imply conflict with the *Charter*, resolution is achieved generally by internal balancing and delineation, failing which a law will not survive s. 1 analysis and be of no force or effect. ***Trinity Western University v. College of Teachers***, [2001] 1 S.C.R. 772.
- A similar approach to conflicting values was adopted by a majority of the Supreme Court of Canada in ***Bruker v. Marcovitz***, 2007 SCC 54. The Court allowed civil enforcement of an agreement between a husband and wife to appear before rabbinical authorities to obtain a *get* – a Jewish divorce. The husband then refused, for 15 years, to provide the necessary consent, rendering the wife unable to remarry under Jewish law. Her action for damages for breach of the civil agreement was enforceable notwithstanding his claim that enforcement violated his right to religious freedom under the *Québec Charter*. The majority ruled that even if there was a non-trivial interference with his religious belief, his interests had to be balanced against countervailing rights, values and harms, including: "[t]he public interest in protecting

equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations..." (at para. 92)

- Conflicting *Charter* values were also at stake in ***Law Society of British Columbia v. Trinity Western University***, 2018 SCC 32 (and companion case ***Trinity Western University v. Law Society of Upper Canada***, 2018 SCC 33).Trinity Western University (TWU) is an evangelical Christian university in British Columbia that wished to open a law school. In both cases, provincial law societies denied accreditation to the proposed program because of the discriminatory nature of the mandatory "Community Covenant" that all members of the university (students and faculty alike) must sign, which effectively prohibits same-sex relationships. A majority of the Supreme Court found that "studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct enhances the spiritual growth of members of that community." Accordingly, limiting community members' ability to do so, by taking aim at the Covenant supporting that practice, triggers the protection of s. 2(a). However, the law societies' decisions to deny accreditation did not, in the majority's view, significantly limit religious freedom, because the Covenant was not absolutely required to study law in a Christian environment, and studying law in such an environment, while preferred, is not necessary for community members' spriritual growth. Moreover, the decisions not to accredit the proposed law school were reasonable, as they represented an appropriate balance between the religious rights of TWU community members, and the law societies' statutory objectives of ensuring equal access to and diversity in the legal profession and "promoting the public interest in the administration of justice by preserving rights and freedoms." Specifically, the denial of accreditation "[prevented] the risk of significant harm to LGBTQ people who attend TWU's proposed law school," as LGBTQ people would either have to live a lie, and sacrifice deeply personal aspects of their lives, or face the prospect of disciplinary action or expulsion for breaching the Covenant.
- Where it is not possible to accommodate freedom of religion without risking trial fairness in a case involving a witness who wears a niqab for religious reasons while testifying, the witness will be required to remove the niqab before testifying if the salutary effects of doing so outweigh the deleterious effects. ***R v NS***, 2012 SCC 72.

2(b) freedom of expression

- This paragraph guarantees everyone "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".
- Freedom of expression protects any non-violent attempt to convey meaning. The Supreme Court accepted the "content neutrality principle", meaning that human activity cannot be excluded from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. In addition the Court has struck down laws that have time, place and manner restrictions that unnecessarily burden free speech despite being neutral as to the content of speech.

See:

1. ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927 holding s. 2(b) includes commercial speech, such as advertising by corporations.
2. ***R. v. Keegstra***, [1990] 3 S.C.R. 697). the Court acknowledged that not all expression is equally worthy of constitutional protection.
3. ***R. v. Zundel***, [1992] 2 S.C.R. 731, 760 however, evaluation of the worthiness of the expression is relevant only to the s. 1 analysis.

- Expression has both a content and a form and the two can be inextricably connected. ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927.
- Freedom of expression includes the freedom to express oneself in the language of one's choice. ***Ford v. Quebec***, [1988] 2 S.C.R. 712.
- s. 2(b) protection extends to deliberate falsehoods. ***R. v. Zundel***, [1992] 2 S.C.R. 731.
- Hate speech is at some distance from the spirit of s. 2(*b*) because it does little to promote, and can in fact impede, the values underlying freedom of expression.
- If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group. ***Saskatchewan (Human Rights Commission) v. Whatcott***, [2013] 1 S.C.R. 467
- Systemic discrimination is more widespread than intentional discrimination and the preventive measures found in human rights legislation reasonably centre on effects, rather than intent. The difficulty of establishing causality and the seriousness of the harm to vulnerable groups justifies the imposition of preventive measures that do not require proof of actual harm. ***Saskatchewan (Human Rights Commission) v. Whatcott***, [2013] 1 S.C.R. 467

Freedom of expression necessarily entails the right to say nothing or the right not to say certain things. See ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038, 1080 where a labour arbitrator had, *inter alia*, required an employer, by way of remedy for unjustly dismissing an employee, to provide a letter of recommendation consisting only of uncontested facts found by the arbitrator. See also ***RJR-MacDonald v. Canada (A.G.)***, [1995] 3 S.C.R. 199 where the impugned law violated s. 2(b) by requiring tobacco manufacturers to print unattributed health warnings on tobacco packaging.

* Freedom of expression protects the right to receive expressive material as much as it does the right to create it. ***Little Sisters Book and Art Emporium*** *v.* ***Canada*** 2000 SCC 69, [2000] 2 S.C.R. 1120. It protects listeners and speakers. ***Ford v. Quebec***, [1988] 2 S.C.R. 712.

* The test to be used to determine whether freedom of expression has been infringed is set out in the case of ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927 as follows:

1. Determine whether the plaintiff's activity is within the sphere of conduct protected by freedom of expression. Activity is expressive if it attempts to convey meaning (***Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference)***, [1990] 1 S.C.R. 1123). It does not include acts of violence as a form of expression. ***RWDSU v. Dolphin Delivery***, [1986] 2 S.C.R. 573, but threats of violence are protected by s. 2(b) because of the content neutrality principle. ***R. v. Keegstra***, [1990] 3 S.C.R. 697, 732-733.

2. Determine whether the purpose or effect of the government action is to restrict freedom of expression. The burden is on the plaintiff to show it does.

   If the purpose of the legislation is to restrict freedom of expression, there is a violation of s. 2(b). Pornography laws are an example of a purposeful violation, but even a law that appears to be a content-neutral time, place, or manner restriction may in fact be a purposeful violation.

   If the law is really a content-neutral time, place or manner restriction, the claimant must show that the effect of the government's action was to restrict the claimant's free expression. In order to establish a s. 2(b) effects violation, the claimant may still succeed if they show that the activity which was restricted by the government's action should not have been because the regulated activity promotes at least one of the principles underlying the protection of free expression: (a) the pursuit of truth, (b) democratic participation, or (c) individual self fulfillment and human flourishing. ***Ford v. Quebec***, [1988] 2 S.C.R. 712.

3. Then conduct a section 1 analysis.

   The degree of constitutional protection may vary depending on the nature of the expression at issue. "This is not because a lower standard is applied, but because the low value of the expression may be more easily outweighed by the government objective." Political expression is at the core of the freedom of expression guarantee. See ***Thomson Newspapers v. Canada (A.G.)***, [1998] 1 S.C.R. 877 where a prohibition of new opinion polls during the last three days of an election was considered to be too severe a restriction to be upheld under s.1.

   Compare ***R. v. Keegstra***, [1990] 3 S.C.R. 697, where the *Criminal Code* offence of hate speech was upheld under s. 1, and ***R. v. Zundel***, [1992] 2 S.C.R. 731, where the old false-news provision of the *Criminal Code* was not saved under s.1.

   In ***R. v. Guignard*** 2002 SCC 14, [2002] 1 S.C.R. 472 at ¶31 the impact of the bylaw on Guignard's freedom of expression was found to be disproportionate to any benefit from the bylaw because evidence accepted in ***Ramsdem v. Peterborough***, [1993] 2 S.C.R. 1084 showed that "posting signs is an optimum means of expression for individuals. By limiting that means of expression, the bylaw amounts to a serious and unjustified infringement of a form of expression that has been commonly used for a long time and is closely connected to the values underlying the protection of freedom of expression."

* A law limiting expenses that may be incurred during a referendum campaign in Quebec by regulating both the amount of spending and specifying that all expenses

had to be incurred only through a group affiliated with the National Committee organized to support a particular outcome of the referendum infringes s. 2(b). The law was not justified under s. 1 because of its effect on individuals and groups who could neither join the National Committees nor participate in an affiliated group. ***Libman v. Quebec***, [1997] 3 S.C.R. 569. Parliament's response to the ***Libman*** decision was to limit third party election advertising expenditures and require a third party to identify itself in all advertising and register with the Chief Electoral Officer. The majority of the Supreme Court found that this regime restricted political expression but it was justified under s. 1 in ***Harper v. Canada (A.G.)***, 2004 SCC 33.

* The common law of defamation is not inconsistent with *Charter* values because it strikes an appropriate balance between the twin values of reputation and freedom of expression. ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130.

* Commercial expression and language of speech is protected by the guarantee of freedom of expression. ***Ford v. Quebec***, [1988] 2 S.C.R. 712, where the Court held that the language-of-signs law violated s. 2(b).

* The "community standard of tolerance test" was outlined in ***R. v. Butler***, [1992] 1 S.C.R. 452, where the Court held that the prohibition of pornography offended s. 2(b), but could be justified under s. 1. The test, which was approved in ***Little Sisters Book and Art Emporium*** *v.* ***Canada***, 2000 SCC 69, [2000] 2 S.C.R. 1120, is as follows:

    1. The court must determine what the community would tolerate others being exposed to, on the basis of the degree of harm that may flow from such exposure.

       Categories of pornography

       a) Explicit sex with violence
       b) Explicit sex without violence, but which is degrading or dehumanizing
       c) Explicit sex alone

       The third is acceptable, the others are not. Anything involving children is prohibited. These categories are subject to the "artistic defence".

    2. The artistic defence arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. The portrayal of sex must then be viewed in context to determine whether undue exploitation of sex is the main object of the work or whether it is essential to a wider artistic, literary or other similar purpose. If it is essential, ask whether the expression conveys or attempts to convey meaning in a non-violent form, then determine whether the purpose or effect of the government action is to restrict freedom of expression (the "freedom of expression test" from ***Irwin Toy***).

    3. Conduct a Section 1 analysis.

- In ***R. v. Labaye***, 2005 SCC 80, [2005] 3 S.C.R. 728 the "community standards" test was revisited and effectively rejected by a majority of the Supreme Court of Canada in the context of a charge of keeping a common bawdy house for the practice of indent acts, contrary to s. 210(1) of the *Criminal Code.* The majority held the

decisions of ***Butler*** and ***Little Sisters*** mark a significant shift from a community standards test to a harm-based test. There are two steps in the new approach: (1) the harm at issue must be grounded in norms formally recognized in the Constitution or other similar fundamental laws, and (2) it must serious in degree by being incompatible with proper social functioning (at para. 30).

Under step (1), the Court identified three harms (though the list is not closed): harm to involuntary observers of inappropriate conduct; harm to society by predisposing others to anti-social conduct; and, harm to individual participants (at para. 36). It is not enough that most members of the community might disapprove of the conduct (at para. 37). In this case, the Crown failed to prove any harm to participants, observers or society. The second step was not reached but the majority noted: "[c]onsensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society" (at para. 71).

- Freedom of expression does not historically imply freedom to express oneself wherever one pleases. Freedom of expression does not automatically comport freedom of forum. ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139, where the Court unanimously agreed that private property owners can restrict expression. But the government does not possess the absolute power of a private owner to control access to and use of public property.

See:

1. ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139, where the Court unanimously agreed on the right to use public property, but split into three directions on the scope of the right. The most expansive view held that s. 2(b) conferred a right to use all governmental property for purposes of expression and any limitation of access or use would have to be justified under s.1. The middle view proposed that a prohibition on expression on governmental property would violate s. 2(b) only if the person seeking access was pursuing one of the three purposes of the guarantee of freedom of expression (seeking truth, participation in decision-making and individual self-fulfillment). The narrowest view held that proprietary controls would be allowed over access or use to the extent necessary to carry out the principal function of the governmental place. It stated that only if expression is compatible with the function of the place, would a limitation on expression offend s. 2(b) and require justification under s. 1.
2. In ***City of Montreal v. 2952-1366 Quebec Ave.***, 2005 SCC 62, [2005] 3 S.C.R. 141, the Court clarified ***Committee for the Commonwealth*** and explained that s. 2(b) is not triggered merely by government ownership of a location. The issue is whether free expression in a particular place undermines the values of s. 2(b), i.e. democratic discourse, truth finding and self-fulfillment. In answering this question, consider two factors: the historical or actual function of the place, and whether other aspects of the place suggest that expression within it would undermine the values underlying free expression. In this particular case, a municipal bylaw prohibited a strip club from using a loudspeaker that amplified

music and commentary accompanying dancers where those sounds would be heard on public streets. While s. 2(b) was triggered (public street) and violated (expressive content), the by-law was justified under s. 1.

3. ***Ramsdem v. Peterborough***, [1993] 2 S.C.R. 1084, where the Court held that a ban on postering was too broad to be saved under s. 1. It was implied that a more narrowly constructed ban may have been upheld.

* Freedom of the press includes the freedom to publish reports or proceedings in court and the right of the press and the public to be present in court. ***Edmonton Journal v. Alberta***, [1989] 2 S.C.R. 1326, 1337. Limits imposed under the *Criminal Code* and rules of practice have been justified under s.1.

See:

1. ***Canadian Newspapers Co. v. Canada***, [1988] 1 S.C.R. 122, where the Court upheld a provision for a court order prohibiting the media from disclosing the identity of the complainant in a case of sexual assault.

2. ***Re Southam and the Queen (No. 2)*** [1986] 53 O.R. (2d) 663 (C.A.), where the Court upheld the requirement that hearings under the *Young Offenders Act* be open to the press and public subject to a discretion in the judge to order that a hearing be closed.

3. ***CBC v. New Brunswick***, [1996] 3 S.C.R. 480, where the Court upheld a media exclusion from part of a sentencing hearing detailing the sexual offences committed by the accused.

4. ***Canadian Broadcasting Corp. v. Canada***, 2011 SCC 2 where the Court upheld under section 1 Quebec "rules of practice" which allowed chief justices to designate public areas of the courthouse where media could not conduct interviews or take photographs and which prohibited any broadcasting of a recording of a hearing.

* Parliamentary privilege includes the power of a legislative assembly to exclude a "stranger" from the legislative chamber and that power is not subject to the *Charter*. ***New Brunswick Broadcasting Co. v. Nova Scotia***, [1993] 1 S.C.R. 319.

* Both primary and secondary picketing engage freedom of expression. To balance traditional common law rights, *Charter* values and the core principles of the collective bargaining system in Canada, secondary picketing is now generally lawful unless it involves tortious or criminal conduct. ***R.W.D.S.U. v. Pepsi-Cola Canada***, 2002 SCC 8, [2002] 1 S.C.R. 156.

* Generally, the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. ***Haig v. Canada***, [1993] 2 S.C.R. 995. The Supreme Court of Canada, in ***Baier v. Alberta*** 2007 SCC 31 at para. 27, adopting the s. 2 (d) authority of ***Dunmore v. Ontario (Attorney General)***, [2001] 3 S.C.R. 1016, discussed *infra*, has held that a court must first determine whether the claim is a negative one (to be free from government interference) or a positive one (entitlement to

government action). If it is a positive claim, the following analysis is required by claimants to establish a violation of s. 2 (b):

> (1) Claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime.
>
> (2) The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a substantial interference with activity protected under s. 2, or that the purpose of the exclusion was to infringe such activity. The exercise of a fundamental freedom need not be impossible, but the claimant must seek more than a particular channel for exercising his or her fundamental freedoms.
>
> (3) The state must be accountable for the inability to exercise the fundamental freedom (*i.e.*, by substantially orchestrating, encouraging or sustaining the violation).

If the claimant cannot satisfy these criteria then the s. 2(*b*) claim will fail. If the three factors are satisfied then s. 2(b) has been infringed and the analysis will shift to s. 1.

In ***Baier*** the Court held s. 2(b) was not violated by a provincial law restricting school board employees from election to school boards (by deeming a successful candidate to have resigned from employment by the board in order to serve as school board trustee). The Court ruled that school boards are not constitutionally protected and provinces are free to regulate them; there is no constitutional right to run for election to a school board. The demand for a statutory platform or a "particular channel of expression" rather than a fundamental freedom was fatal to the claim (at para. 54). The claimants also failed at the second step. The exclusion of school board employees did not substantially interfere with employee's ability to express themselves on education issues. Finally, there was no evidence to support the claimant's assertion that the province was motivated by the invalid purpose of curtailing the expression of employees critical of government policy.

In ***Greater Vancouver Transportation Authority v. Canadian Federation of Students***, 2009 SCC 31 the court concluded that the respondents' claim, after being denied the ability to purchase commercial space on public buses, did not trigger a positive rights analysis because the transit authorities' policies targeted content not groups.

2(c) freedom of assembly

* Section 2(c) guarantees to everyone freedom of peaceful assembly.
* Municipal bylaws restricting public meeting or parades will have to be justified under s. 1. ***A.G. Canada and Dupond v. Montreal***, [1978] 2 S.C.R. 770, but note, this was a pre-*Charter* case.

2(d) freedom of association

* Section 2(d) guarantees everyone freedom of association. Litigation has primarily arisen in the context of labour relations (unions).

* As recently stated by a majority of the Supreme Court, "s. 2(d), viewed purposely, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities": ***Mounted Police Association of Ontario v. Canada (Attorney General)***, 2015 SCC 1 at para 66.

* The traditional formulation of the content of this right was set out in ***Professional Institute v. N.W.T.***, [1990] 2 S.C.R. 367: freedom of association protects the freedom to establish, belong to and maintain an association, the exercise in association of the constitutional rights and freedoms of individuals, and it protects the exercise in association of the lawful rights of individuals. It wasn't thought to protect an activity solely on the ground that that activity is a foundational or essential purpose of an association. It was considered an individual right, not a collective right.

* In a series of decisions, called the ***Labour Trilogy: Re Public Service Employees Relations Act***, [1987] 1 S.C.R. 313; ***PSAC v. Canada***, [1987] 1 S.C.R. 424; ***RWDSU v. Saskatchewan***, [1987] 1 S.C.R. 460, the Courts found that freedom of association was not infringed by legislation denying the right to strike to public sector employees, nor by legislation imposing caps on future wage increases of public sector employees, nor by legislation ordering striking dairy workers to go back to work.

* But in ***Dunmore v. Ontario (A.G.)***, 2001 SCC 94, [2001] 3 S.C.R. 1016 the Court found that this traditional conception of the right of association as purely individualistic did not capture the full range of activities protected by s. 2(d). Bastarache J. held that in some cases s. 2(d) should be extended to protect activities that are inherently collective in nature, in that they cannot be performed by individuals acting alone. At para. 17: "This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d)…it is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning."

* In ***Dunmore v. Ontario (A.G.)***, 2001 SCC 94, [2001] 3 S.C.R. 1016, the Court found that excluding agricultural workers from access to the statutory labour regime governing unions in Ontario constituted a serious interference with the worker's right to associate. Although the *Charter* does not ordinarily oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms, and there is no constitutional right to protective legislation *per se*, the agricultural workers met the evidentiary burden of showing that they are substantially incapable of exercising their fundamental freedom to organize without a regime that protects their associational interests.

* The ***Labour Trilogy*** was overturned in ***Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia***, 2007 SCC 27 in which the Court held that s. 2(d) of the *Charter* protects "the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues" (para. 19). They did not find that section 2(d) protects the right to strike. Section 2(d) protects against laws that by intent or effect *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals.
* Section 2(d) violations may be justified under s. 1 where interference with the collective bargaining process is "on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis." In ***Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia***, the Court ruled that the numerous violations of s. 2(d) – invalidation of existing collective agreements and limits on content of future agreements - were not justified: there was no evidence showing that the government considered alternative and less intrusive means, and it did not engage in meaningful consultation with affected unions.
* In ***Ontario (Attorney-General) v. Fraser***, [2011] 2 SCR 3 the majority of the Court applied ***Health Services*** and found that that case held that section 2(d) protects only the right to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. Implicit in the statutory interpretation adopted in ***Fraser*** they also concluded that as part of the protected general process of collective bargaining, section 2(d) requires employers to consider employee representations in good faith.
* The exclusion of RCMP members from collective bargaining, effected through federal legislation, infringed section 2(d) because the alternative process of employee association available to RCMP members did not provide them with sufficient choice and independence to effectively advance their collective interests: ***Mounted Police Association of Ontario v. Canada (Attorney General)***, 2015 SCC 1 (note that this was a different result from ***Delisle v. Canada (Deputy Attorney General)***, [1999] 2 S.C.R. 989).
* A federal statute that imposed a temporary wage rollback on the RCMP during the 2008-2009 recession was not an infringement of their freedom of association: ***Meredith v. Canada (Attorney General)***, 2015 SCC 2.
* In ***Saskatchewan Federation of Labour v. Saskatchewan***, 2015 SCC 4, a majority of the Court (arguably) found for the first time that section 2(d) protects a right to strike. There, the five-judge majority struck down Saskatchewan's essential services legislation, which prohibited essential services workers from striking. The legislation constituted "substantial interference" with freedom of association under section 2(d) and was not justified under section 1 (primarily on minimal impairment grounds). The two main constitutional problems were that (1) the legislation gave the public employer the power to unilaterally decide who and what was "essential," and (2) it did not provide a meaningful alternative to strikes, like arbitration.
* In ***British Columbia Teachers' Federation v British Columbia***, 2016 SCC 49, a majority of the Supreme Court adopted the reasons of the dissenting judge in the BC

Court of Appeal in a case involving a long-standing labour dispute between the teachers' union and the Province. In doing so, the SCC confirmed that bad faith consultation by the government (which may also be the employer) with a union about proposed legislation affecting collective bargaining (e.g., legislation that nullifies particular terms in a collective agreement) can constitute a breach of section 2(d). Here, the government negotiated in bad faith because it did not really intend to take the union's representations into account before enacting a new version of legislation that had previously been found unconstitutional. The infringement of section 2(d) was not justified under section 1.

The Freedom not to associate:

* In ***Lavigne v. OPSEU***, [1991] 2 S.C.R. 211 there was significant disagreement about whether the right to freedom of association included the right not to associate and what the right not to associate means. Lavigne was a teacher who had to pay union dues even though he chose not to join the union. The Court was unanimous in rejecting his claim, but four different sets of reasons were written. Three justices believed that freedom of association should only be viewed as a positive right. Four of the justices believed that freedom of association included a right to not associate, but the negative right was not a simple mirror image of the positive right.
* In ***R. v. Advance Cutting & Coring***, 2001 SCC 70, [2001] 3 S.C.R. 209, construction workers challenged the Quebec *Construction Act*, which in effect required them to join one of several unions. The legislation was found to be constitutional (five to four), but eight justices agreed that the freedom of association included a right to not associate.

Freedom to vote (Section 3)

- This section confers on every citizen the right to vote in federal and provincial elections. The right does not extend to municipal elections or referenda or plebiscites. ***Haig. v. Canada***, [1993] 2 S.C.R. 995.
- This right is not subject to the override provision in s. 33 of the *Charter*.
- The purpose of the right to vote in s. 3 is to confer on each citizen effective representation in the Legislature. Effective representation in the Legislature does not require absolute parity of voting power, and deviation from parity that could be justified on the grounds of effective representation are not breaches of the section. ***Re Saskatchewan Electoral Boundaries***, [1991] 2 S.C.R. 158.
- It has been argued that regulation of the electoral process in tantamount to a limitation on the right to vote by the reduction in information such measures produce. These cases have so far been decided under freedom of expression rather that the right to vote. ***Thomson Newspapers Co. v. Canada***, [1998] 1 S.C.R. 877.
- The section also confers upon every citizen the right to be qualified for membership in the federal House of Commons or a provincial legislative assembly. All disqualifications

of citizens are now contrary to the *Charter* unless they can be justified under s. 1. ***MacLean v. A.G. Nova Scotia***, (1987) 35 D.L.R. (4th) 306 (N.S.S.C.(T.D.)).

- In ***Sauvé v. Canada (Chief Electoral Officer)***, 2002 SCC 68, [2002] 3 S.C.R. 519, s. 51(e) of the *Canada Elections Act*, which denied the right to vote to prisoners serving a sentence of two years or more, was successfully challenged. The government conceded the s. 3 violation and the majority of the Court found the restriction could not be saved under s. 1. In doing so the majority held that "the right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside… The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause."
- Under the *Canada Elections Act*, a political party was required to nominate candidates in at least 50 electoral districts in order to obtain, and then to retain**,** registered party status. In ***Figuero v. Canada (A.G.)***, 2003 SCC 37, [2003] 1 S.C.R. 912 the appellant's challenge of the constitutionality of the 50-candidate threshold was successful. Iacobucci J. writing for the majority held that while on its face, s. 3 grants only a right to vote and to run for office in elections, the purpose of s. 3 is to ensure effective representation and that each citizen as a right to play a meaningful role in the electoral process. He found that the impugned provisions interfered with the ability of members and supporters of political parties that nominate fewer than 50 candidates to participate meaningfully in the electoral process and they could not be saved by s. 1.
- The right to meaningful participation includes a citizen's right to be reasonably informed of all the political choices. ***Libman v. Quebec***, [1997] 3 S.C.R. 569 at ¶47.
- In ***Harper v. Canada (A.G.)***, 2004 SCC 33 the Court found that limiting third party advertising expenses violated s. 2(b) but did not violate s. 3. Bastarache J. held that s. 3 does not guarantee a right to unlimited information or to unlimited participation because in the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources to dominate the political discourse. "To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented."
- In ***Frank v. Canada (A.G.)***, 2019 SCC 1, the Court held that denying Canadian citizens who have resided abroad for five years or more the right to vote in a federal election, unless and until they resume residence in Canada, breaches s. 3.

Duration of legislative bodies (Section 4)

- This section prescribes a maximum duration of five years for the House of Commons and each provincial legislative assembly. The period is a maximum term, not a fixed term. The period can be extended in time of real or apprehended war, invasion or insurrection, and only if the extension is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly.

Annual sittings of legislative bodies (Section 5)

- Section 5 stipulates that there shall be a sitting of Parliament and of each Legislature at least once every twelve months. It does not say how long the sitting must continue.

Mobility rights (Section 6)

- This section is not subject to the override provisions of s. 33 of the *Charter*.
- This section does not extend to corporations.
- History: s. 121 of the *Constitution Act, 1867* ensures the free flow of goods between provinces (no inter-provincial tariffs on goods). The framers of the *Charter* considered expanding s. 121 to include the free flow of capital and services but nine out of ten of the provinces rejected the idea. See ***R v. Comeau***, 2018 SCC 15. This history and the jurisprudence suggest what s. 6 was not intended to accomplish – the entrenchment of the right to engage in any specific type of economic activity anywhere in Canada. Instead, the inclusion of s. 6 in the *Charter* reflects a human rights objective: to ensure mobility of persons, and to that end, the pursuit of a livelihood on an equal footing with others regardless of residence. ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157.
- Section 6(1) grants to every citizen of Canada the right to enter, remain in and leave Canada. This right does not extend to non-citizens. ***Chiarelli v. Canada***, [1992] 1 S.C.R. 711, where the Court upheld the deportation of a non-citizen permanent resident who had been convicted of a serious criminal offence.
- Paragraph 6(2)(a) confers the right of every citizen of Canada and every person who has the status of a permanent resident of Canada, to move to and take up residence in any province (by s. 30 of the *Charter*, the word "province" includes a federal territory).
- Paragraph 6(2)(b) confers the right to pursue the gaining of a livelihood in any province. This, however, is not an unqualified right on every citizen and permanent resident of Canada and it does not support a "free-standing" right to work. ***Law Society of Upper Canada v. Skapinker***, [1984] 1 S.C.R. 357. Each province has a distinctive regime of law for each industry, trade, profession or occupation and these variations can constitute legitimate barriers to personal mobility under s. 6(3)(a).
- Paragraph 6(3) is not an independent savings provision as suggested by ***Black v. Law Society of Alberta***, [1989] 1 S.C.R. 591, a case where the Supreme Court of Canada held that two regulations, the purpose of which was to discourage law firms from outside Alberta from establishing branch offices in Alberta, were invalid because the effect of the regulations was to impair the ability to gain a livelihood in Alberta of those members of the Alberta Bar who did not reside in Alberta. Instead, s. 6(2)(b) and s. 6(3)(a) should be read together as defining a single right. ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157.
- Section 6(3)(b) authorizes law providing for reasonable residency requirements to qualify for publicly funded social services.

- Section 6(4) contemplates provincial laws that explicitly discriminate against non-residents, provided the law is for the amelioration of conditions of socially or economically disadvantaged individuals in a province whose unemployment is higher than the Canadian average (e.g., Newfoundland's requirement that its residents be given preference in employment in the offshore oil industry).
- The focus of a s. 6 analysis is whether the purpose and effect of the impugned regulation infringes the right to be free from discrimination on the basis of residence in the pursuit of a livelihood. In ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157, the Court set out the steps for a s. 6 analysis as follows:
    1. Are s. 6 mobility rights engaged? Has there been an attempt, whether by physical presence or some other means, to pursue a livelihood in a province other than the province of residence?
    2. Compare residents of the origin province who attempt to make their livelihood in a destination province with residents of the destination province who also make their livelihood in the destination province.
    3. Is the primary basis of the discrimination "residence" (a violation of s. 6) or does the discrimination result from the appropriate exercise of the legitimate heads of power contained in ss. 91 and 92 which authorize the regulation of the economy?
    4. If there is a violation of s. 6, is it saved by s. 1?
- In ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157 the Court found that there was no violation of s. 6 because the true basis for the distinction is the historical pattern of production in the industry, not the claimant's province of residence. Similarly, in ***Archibald v. Canada***, [1997] 3 F.C.R. 335 the Federal Court found that *Wheat Board Act* does not discriminate *primarily* on the basis of province of residence because provincial boundaries are merely being used as a reasonably accurate marker for an economic reality which generally exists in those provinces.

Fundamental justice (Section 7)

- "Everyone" does not include a corporation. ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927, 1004. However, a corporation is entitled to defend a charge on the basis that the law is a nullity. ***R. v. Wholesale Travel Group***, [1991] 3 S.C.R. 154, where the Court allowed the corporation to defend a criminal charge on the ground that the law under which the charge was laid would be a violation of s. 7 in its application to an individual (see Standing).
- An individual may invoke s.7 even when appearing as a witness as a representative of a corporation. ***Thomson Newspapers Ltd. v. Canada***, [1990] 1 S.C.R. 425.
- "Everyone" includes immigrants to Canada. ***Singh v. Minister of Employment and Immigration***, [1985] 1 S.C.R. 177.
- Generally, the Supreme Court has advocated the single right approach to s. 7: there is a right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. Building on the judgments of Lamer C.J. and

Wilson J. in ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486 and Wilson J. in ***Operation Dismantle v. The Queen***, [1985] 1 S.C.R. 441, however, Arbour J. in ***Gosselin v. Québec (A.G.)*** 2002 SCC 84, [2002] 4 S.C.R. 429 argued that there are two rights within s. 7: a free standing 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. The two rights approach has not been asserted since ***Gosselin***.

- There is a two-step approach to a s. 7 analysis. ***Re SS. 193 and 195.1 of the Criminal Code (Prostitution Reference***), [1990] 1 S.C.R. 1123; ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 55:
    - Threshold: Does the law interfere with or deprive the claimant of their life, liberty, and / or security of the person? If yes:
    - Is the deprivation in accordance with the principles of fundamental justice?
- "The extent to which s. 7 of the *Charter* applies outside the context of the administration of justice" remains unsettled: ***Association of Justice Counsel v. Canada (Attorney General)***, 2017 SCC 55 at para 49.

Life, liberty and security of the person

- The Supreme Court has rejected a "qualitative" approach to the right to life: "the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights": ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 62.
- Any law that imposes the penalty of imprisonment, whether the sentence is mandatory (See ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486, 515, 529) or discretionary (See ***R. v. Swain***, [1991] 1 S.C.R. 933) is by virtue of that penalty, a deprivation of liberty, and so must conform to the principles of fundamental justice.
- The liberty interest protected by s. 7 is no longer restricted to mere freedom from physical restraint. "Liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. The s. 7 liberty interest is said to protect "a sphere of personal autonomy involving 'inherently private choices'" that go to "the core of what it means to enjoy individual dignity and independence": as cited in ***Association of Justice Counsel v. Canada (Attorney General)***, 2017 SCC 55 at para 49 See also ***Blencoe v. British Columbia (Human Rights Commission)*** 2000 SCC 44, [2000] 2 S.C.R. 307 at ¶49; ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 64.
- Security of the person includes control over one's body. ***Rodriguez v. British Columbia***, [1993] 3 S.C.R. 519; ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 64.
- Security of the person also encompasses psychological integrity of the individual. To violate security of the person, the impugned state action must have a serious and

profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. The effects need not rise to the level of nervous shock or psychiatric illness, but they must be greater than ordinary stress or anxiety. ***New Brunswick v. G. (J.)***, [1999] 3 S.C.R. 46.

- In ***Chaoulli v. Quebec***, 2005 SCC 35, [2005] 1 S.C.R. 791, the Court split into three judgments, but agreed a violation of life and security of the person occurred as a result of delays in medical treatment in the public health care system and the prohibition on purchase of private health service for such treatment. The dissent opinion qualified the finding to cases of some individuals on some occasions (paras. 191-200) and to lifesaving treatment (para. 203)
- Security of the person protects basic human dignity. ***Rodriguez v. British Columbia***, [1993] 3 S.C.R. 519, 521. But it does not include a generalized right to dignity, or more specifically a right to be free from the stigma associated with a human rights complaint. ***Blencoe v. British Columbia (Human Rights Commission)*** 2000 SCC 44, [2000] 2 S.C.R. 307 at ¶74.
- The *Criminal Code* prohibition on assisted suicide infringes the rights to liberty and security of the person, contrary to the principle of fundamental justice that laws cannot be overbroad (see below), in certain limited circumstances. The result is that a competent adult will have a right to physician-assisted dying where they (1) clearly consent to the termination of life, and (2) have "a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition": ***Carter v. Canada (Attorney General)***, 2015 SCC 5, reversing *Rodriguez*, *supra*.
- In ***Irwin Toy v. Quebec***, [1989] 1 S.C.R. 927, 1003 the Court decided that the intentional exclusion of "property" from s. 7, and the substitution of "security of the person" leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person." To this end see ***Gosselin v. Québec (A.G.)***, 2002 SCC 84, [2002] 4 S.C.R. 429, where the majority denied the claimant's s. 7 claim to adequate welfare on the facts but left open the future development of this aspect of s. 7.
- Section 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person. For example, civil committal to a mental institution (***R. v. Swain***, [1991] 1 S.C.R. 933), child custody proceedings (***New Brunswick v. G. (J.)***, [1999] 3 S.C.R. 46) and human rights commission proceedings (***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307).
- In order to meet the threshold test, there must be a sufficient nexus between the state action and the prejudice to the claimant. ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 S.C.R. 307. See also Bastarache J.'s discussion in ***Gosselin v. Québec (A.G.)***, 2002 SCC 84, [2002] 4 S.C.R. 429 at ¶222.

The causation requirement was satisfied in ***Suresh v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 1, [2002] 1 S.C.R. 3, where the Court held that the government cannot avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand where Canada's participation (deportation to face potential torture) is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation.

- The flexible "sufficient causal connection" was established in ***Canada (Attorney General) v Bedford***, 2013 SCC 72 where the statutory prohibitions heightened the risks associated with a legal activity. That causal connection is not negated by the actions of third-party johns and pimps, or prostitutes' so-called choice to engage in prostitution. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.
- The question of whether s. 7 can apply to protect rights or interests wholly unconnected to the administration of justice remains unanswered. McLachlin C.J. in ***Gosselin v. Québec (A.G.)***, 2002 SCC 84, [2002] 4 S.C.R. 429 at ¶80.
- None was apparent in ***Chaoulli v. Québec***, 2005 SCC 35, [2005] 1 S.C.R . 791 but all of the justices agreed s. 7 was engaged by a provincial law banning private medical insurance for public heath case services where there was significant delay and health-related harms to life and security of the person.

Principles of fundamental justice

- Fundamental justice includes both procedural and substantive justice. ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486.
- The principles of fundamental justice are to be found in the "basic tenets of the legal system." ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486. They do not equate with public policy, nor vague moral or ethical views.
- To determine principles of fundamental justice look at Canadian law, international norms and treaties, and the common law natural justice norms (for procedural principles). ***Suresh v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 1, [2002] 1 S.C.R. 3.
- A "principle of fundamental justice" must fulfill three criteria. ***Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)***, 2004 SCC 4, [2004] 1 S.C.R. 76 and ***R. v. Malmo-Levine***, 2003 SCC 74:

    1. It must be a legal principle.
    2. There must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": ***Rodriguez v. British Columbia***, [1993] 3 S.C.R. 519.
    3. The alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.

- The balancing of individual and societal interests within s. 7 is relevant when elucidating a particular principle of fundamental justice. ***R. v. Malmo-Levine***, 2003 SCC 74 at ¶98.
- Judicially recognized principles of fundamental justice include:
  - The right to silence. ***R. v. Hebert***, [1990] 2 S.C.R. 151. This means that upon detention an accused cannot be questioned to elicit an involuntary statement by an undercover police officer **(*Hebert*)** or another agent of the state (***R. v. Broyles***, [1991] 3 S.C.R. 595,), where he has refused to do so voluntarily.
  - The right to a fair trial or hearing, aspects of which include the right to present full answer and defence (***R. v. Seaboyer***, [1991] 2 S.C.R. 577) and the Crown's obligation to make full and complete disclosure of all relevant information. (***R. v. Stinchcombe***, [1991] 3 S.C.R. 326). See also ***Singh v. Minister of Employment and Immigration***, [1985] 1 S.C.R. 177 and ***Suresh v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 1, [2002] 1 S.C.R. 3.
  - Federal law violates fair hearing rights in s. 7 where it allows for the detention of a permanent resident or foreign national on the grounds of national security, based in part on material kept secret from the detainee: ***Charkaoui v. Canada (Citizenship and Immigration)***, 2007 SCC 9. The state may not detain people for significant periods of time without according them a fair judicial process. A fair process is: the right to a hearing before an independent and impartial magistrate who makes a decision based on the facts and law. The party affected has the right to know and meet the case against them. In ***Charkaoui*** the Court found the right to know and meet the case, and the right to a decision based on the facts and law, was violated: "either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here." (at para. 61) The Court did make clear that an alternative processes, such as using an independent agent (a government-authorized and security-cleared special advocate or counsel) to represent the interests of the detainee during judicial review of the detention, may be complaint with the *Charter* (at para. 87).
  - Offences that carry the penalty of imprisonment must include a minimum element of mental fault (such as intentional or reckless conduct). Therefore, offences of absolute liability with a penalty of imprisonment violate s. 7. ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486. The element of fault must be subjective *mens rea* if it is a true crime offence, but need only be negligence (*i.e.*, a departure from an objective standard) if the offence is regulatory. The principles of fundamental justice will be satisfied if there is a defence of reasonable care. The burden of proof is on the defendant. ***R. v. Wholesale Travel Group Inc.***, [1991] 3 S.C.R. 154.
  - The principles of fundamental justice include the right to be tried and punished under the law in force at the time the offence if committed. ***R. v. Gamble***, [1988] 2 S.C.R. 595.

- The silence of an accused cannot be used by the trier of fact to remove a reasonable doubt, subject to an exception where the defense of alibi has been raised. ***R. v. Noble***, [1997] 1 S.C.R. 874.
- A law cannot be vague. ***Re ss. 193 and 195.1 of the Criminal Code (Prostitution Reference)***, [1990] 1 S.C.R. 1123. The constitutional standard of precision the law must meet to avoid vagueness includes three tests:
    1. whether the law is intelligible,
    2. whether the law sufficiently delineates an area of risk, and
    3. whether the law provides an adequate basis for legal debate. ***R. v. Nova Scotia Pharmaceutical Society***, [1992] 2 S.C.R. 606.
- The state may only relieve a parent of custody of their child when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination. ***New Brunswick v. G. (J.)***, [1999] 3 S.C.R. 46.
- The principle against self-incrimination. In a regulatory context, the principle against self-incrimination under s. 7 of the *Charter* does not prevent the Crown from relying on fishing logs and hail reports as evidence at trial, even if these documents are statutorily compelled. There is little expectation of privacy with respect to these documents, since they are produced precisely to be read and relied upon by state officials. ***R. v. Fitzpatrick***, [1995] 4 S.C.R. 154, where the court stated "it is not contrary to fundamental justice for an individual to be convicted of a regulatory offence on the basis of a record or return that he or she is required to submit as one of the terms and condition of his or her participation in the regulatory sphere. In this context, the balance between societal and individual interests under s. 7 of the *Charter* suggests that the principle against self-incrimination should not be applied as rigidly as it might be in the context of a purely criminal offence".
- In ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844, the court held that a municipal resolution requiring all new employees to reside within its territorial limits constituted an unjustifiable violation to s.7. The right to choose where to establish one's home is a "quintessentially private decision going to the very heart of personal or individual autonomy."
- **Overbreadth**: A law cannot be overbroad (go further than necessary to accomplish its purpose). ***R. v. Heywood***, [1994] 3 S.C.R. 761. The purpose of the law must be determined first, because the overbreadth analysis is about "the relationship between the law's purpose and its effect": ***R v Safarzadeh-Markhali***, 2016 SCC 14 "The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object": ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 85; ***Canada (Attorney General) v Bedford***, 2013 SCC 72. This is not the same as asking whether Parliament has "chosen the least restrictive means, but

whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature": ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 85.

- **Arbitrariness**: The S.C.C. in ***Chaoulli*** was unanimous that it is a fundamental principle of justice that a law must not be arbitrary. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person. A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. ***Canada (Attorney General) v Bedford***, 2013 SCC 72.
- In ***Chaoulli*** four justices held Quebec's prohibition on private insurance for publicly funded and delivered treatment was arbitrary because the government failed to prove the claim that the prohibition was necessary to maintain quality public health care.
- **Gross disproportionality**: Arises where the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The focus is on the "impact on the rights of the claimant," not the impact on society as a whole: ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 89. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. ***Canada (Attorney General) v Bedford***, 2013 SCC 72.

- All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. Therefore, the first step is to identify the object of the law. The law should not be defined too broadly. ***Carter v. Canada (Attorney General)***, 2015 SCC 5; ***Canada (Attorney General) v Bedford***, 2013 SCC 72.
- This analysis does not look to how well the law achieves its object, or to how much of the population the law benefits: "In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1": ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 79; ***Canada (Attorney General) v Bedford***, 2013 SCC 72.
- The "best interests of a child" is not a principle of fundamental justice because it fails to meet the consensus requirement and does not trump other claims or interests in all cases. ***Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)***, 2004 SCC 4, [2004] 1 S.C.R. 76.
- The "harm principle" is not a principle of fundamental justice. Even if it is a legal principle, it does not meet the other two requirements. ***R. v. Malmo-Levine***, 2003 SCC 74.

- Thus far the principle of "parity, which would require that offenders committing acts of comparable blameworthiness receive sanctions of like severity" has not been accepted as a principle of fundamental justice: ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at paras 91-92.

Section 7 & Section 1

* Originally it was said that a law that violates the principles of fundamental justice can still be upheld under s. 1 but "only in cases arising out of exceptional condition, such as natural disasters, the outbreak of war, epidemics, and the like." ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486, 518. Practically, however, the s. 1 justification has never been upheld by a majority of the Supreme Court of Canada in a s. 7 case, although courts routinely apply the ***Oakes*** test (see for example ***Suresh v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 1, [2002] 1 S.C.R. 3, where the procedural violation failed the rational connection step, and ***New Brunswick v. G. (J.)*** , [1999] 3 S.C.R. 46, where the procedural violation failed the final proportionality step).
* In ***Charkaoui v. Canada (Citizenship and Immigration)***, 2007 SCC 9 the Court stated: "[v]iolations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1... Nevertheless, the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex" (at para. 66).
* In ***Carter v. Canada (Attorney General)***, 2015 SCC 5 at para 95, the Court acknowledged that the state may in limited situations be able to justify a s. 7 violation on the *Oakes* test based on "the public good – a matter not considered under s. 7, which looks only at the impact on the rights claimants."

Equality (Section 15)

- Section 15 confers its right on an individual and so excludes corporations. Equality is expressed in four different ways: equality before the law, equality under the law, equal protection of the law and equal benefit of the law.
- This section expressly guarantees against discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (referred to as enumerated grounds). The section makes clear, by the phrase "in particular", that the named grounds are not exhaustive. This has been interpreted by the Supreme Court of Canada to include "analogous" grounds of discrimination. Discrimination is the imposition of some disadvantage on an individual by reason of the individual's possession of a listed or analogous s. 15 characteristic. ***Andrews v. Law Society of B.C.***, [1989] 1 S.C.R. 143.
- The section 15 analysis has become more contextual and flexible thanks to the decision of a majority of the Supreme Court of Canada in ***Quebec (Attorney General) v. A***, 2013 SCC 5. This must be kept in mind when reviewing the analysis set out in older cases. The majority in *A.* recognized that while the perpetuation of prejudice and false stereotyping

are useful guides, what constitutes discrimination requires a contextual analysis including taking into account pre-existing disadvantage, and the purpose of the law.

- As summarized in ***Kahkewistahaw First Nation v. Taypotat***, 2015 SCC 30 at para 16, citing *A.* at para 331: "s. 15(1) of the *Charter* requires a 'flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*.'" The focus is on substantive equality and "laws that draw *discriminatory* distinctions."
    - The first part of the now-governing section 15(1) analysis asks: Does the law create a distinction based on an enumerated or analogous ground? The claimant must show that "the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group."
    - The second part of the inquiry contextually considers whether there is an arbitrary or discriminatory disadvantage, meaning the law "fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage"?
- To be covered under section 15 the alleged inequality must be one made by 'law'. Law includes statutes, regulations, mandatory retirement policies, collective agreements, and policy decisions (***Eldridge v. British Columbia (A.G.)***, [1997] 3 S.C.R. 624). Law includes conduct taken under the authority of law. ***Douglas/ Kwantlen Faculty Assn v. Douglas College***, [1990] 3 S.C.R. 570.
- The basis for the differential treatment must be one or more enumerated or analogous grounds of discrimination:
    - There can be multiple grounds. See ***Law v. Canada (Min. of Employment and Immigration)***, [1999] 1 S.C.R. 497 where the differential treatment was based on age, disability and parental status.
    - Although the claimant in ***Symes v. Canada*** 1, [1993] 4 S.C.R. 695 lost on the s. 15 claim, the Court confirmed that discrimination does not require that all members of a group be negatively affected by a legislative distinction. If the other requirements were met, it would have been enough that a subgroup of women were subject to differential treatment based on sex.
- In order to determine whether discrimination can be found under analogous grounds, the following factors (from ***Andrews v. Law Society of B.C.***, [1989] 1 S.C.R. 143) should be addressed:
    1. Are the grounds immutable (that is: the personal characteristics cannot be changed without great difficulty or cost)?
    2. Is it a personal characteristic?
    3. Is the person part of a discrete and insular minority?
    4. Is there an historical pattern of disadvantage?

- But analogous grounds must not be restricted to just historically disadvantaged groups if the *Charter* is to retain future relevance. ***Miron v. Trudel***, [1995] 2 S.C.R. 418.
- Judicially recognized analogous grounds:
    - Sexual orientation. ***Egan v. Canada***, [1995] 2 S.C.R. 513), ***Vriend v. Alberta***, [1998] 1 S.C.R. 493.
    - Marital status. ***Miron v. Trudel***, [1995] 2 S.C.R. 418, ***Nova Scotia (A.G.) v. Walsh***, 2002 SCC 83, [2002] 4 S.C.R. 325.
    - Aboriginal members living off-reserve. ***Corbière v. Canada (Min. of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203.
    - Citizenship. ***Andrews v. Law Society of B.C.*** [1989] 1 S.C.R. 143, ***Lavoie v. Canada***, 2002 SCC 23, [2002] 1 S.C.R. 769.
- Employment status is not an analogous ground. ***Re Workers' Compensation Act,* 1983 (Nfld.)**, [1989] 1 S.C.R. 922.
- In ***Lovelace v. Ontario***, 2000 SCC 37, [2000] 1 S.C.R. 950, the Court denied that the exclusion of non-band Aboriginal communities from the First Nations Fund violated s. 15, but the Court left the issue of whether belonging to a non-band Aboriginal community is an analogous ground undecided.
- Once a characteristic is recognized as an analogous ground, it will always be recognized as an analogous ground. ***Corbière v. Canada (Min. of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203.
- The 'law' must impose differential treatment between the claimant and others, either in purpose or effect. This requires a comparative analysis. For example, in ***Andrews v. Law Society of B.C.***, [1989] 1 S.C.R. 143 the treatment of citizens and non-citizens had to be considered. Adverse effects differential treatment can be based on a disproportionate impact. ***Symes v. Canada***, [1993] 4 S.C.R. 695. While equality is a comparative concept the comparison should be contextual not formal, and does not need to be done using a mirror comparator group analysis. Provided that the claimant establishes a distinction based on one or more of the enumerated or analogous grounds, the claim should proceed to the second step of the two-part analysis. ***Withler v. Canada (Attorney General)***, 2011 SCC 12.
- Discrimination need not be intentional. ***Andrews v. Law Society of B.C.***, [1989] 1 S.C.R. 143. It is not necessary to show that the purpose of the challenged law is to impose a disadvantage on a person by reason of his or her race, national or ethnic origin, etc. It is enough to show that the effect of the law is to impose a disadvantage on a person by reference to one of the enumerated or analogous characteristics or by systemic discrimination (caused by a law that has a disproportionately adverse effect on persons defined by any of the prohibited categories). Purpose and intention are part of the s. 1 jusitification analysis, whereas the s. 15(1) analysis focuses on the law's impact, and not its motive: ***Centrale des syndicats du Québec v. Quebec (A.G.)***, 2018 SCC 18.
- The differential treatment must have a discriminatory impact. In ***Law v. Canada (Min. of Employment and Immigration)***, [1999] 1 S.C.R. 497 the Court determined that the

discrimination inquiry requires an evaluation of the following contextual factors from the perspective of a reasonable person, dispassionate and fully apprised of the circumstances who is possessed of similar attributes as the claimant in order to determine whether the claimant's human dignity has been demeaned: i) pre-existing disadvantage, prejudice, stereotype, vulnerability; ii) correspondence between the distinction and the claimant's characteristics and circumstances; iii) whether the 'law' is designed with an ameliorative purpose; iv) the nature of the interests affected.

- In ***R. v. Kapp***, [2008] 2 S.C.R. 483 the Court abandoned the focus on human dignity and the four contextual factors identified in *Law* and suggested that the *Andrews* inquiry into whether the distinction creates a disadvantage by perpetuating prejudice or stereotype remains the template for determining substantive equality under section 15. They noted that the dignity test under *Law* has sometimes imposed an additional burden on claimants and resulted in formalistic reasoning. *Kapp's* rejection of the *Law* dignity test was repeated in ***Ermineskin Indian Band and Nation v. Canada***, [2009] 1 S.C.R. 222. The Court relied on *Kapp* (without reference to *Law* or its four part contextual dignity analysis) in order to deny a section 15 claim on the basis that the disadvantage caused by the differential treatment did not perpetuate prejudice or stereotype.
- Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Substantive inequality may also be established by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. ***Withler v. Canada (Attorney General)***, 2011 SCC 12.
- Where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis. ***Withler v. Canada (Attorney General)***, 2011 SCC 12.
- Section 15(2) is an exception to the general prohibition of discrimination in s. 15(1) and authorizes the creation of affirmative action programs that have the purpose of ameliorating the conditions of disadvantaged groups. If the government can establish that a program or activity has an ameliorative purpose (it does not need to be its sole purpose) then it is exempted from s. 15(1) scrutiny. ***R. v. Kapp*** [2008] 2 S.C.R. 483. However, the existence of an ameliorative program cannot bar a claim under s. 15(1) by members of the group that the impugned legislative scheme was meant to protect: ***Quebec (A.G.) v. Alliance du personnel professionnel et technique de la santé et des services sociaux***, 2018 SCC 17.
- Distinctions arising from ameliorative programs are protected under section 15(2) even where the included and excluded groups share a similar history of disadvantage and

marginalization. Section 15(2) recognizes that governments may have particular goals related to advancing or improving the situation of particular subsets of groups. Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. ***Alberta (Aboriginal Affairs and Northern Development) v. Cunningham***, [2011] 2 S.C.R. 670.

- Ameliorative programs under s. 15(2) may be found to breach s. 15(1) where a legislative scheme seeks to correct future discrimination, but leaves past inequities immune from redress: ***Quebec (A.G.) v. Alliance du personnel professionnel et technique de la santé et des services sociaux***, 2018 SCC 17.
- Discrimination is expressly permitted by the Constitution in certain cases. Under the *Constitution Act*, 1867, for example, a person under the age of thirty cannot be appointed to the senate (s. 23), a senator must retire at the age of 75 (s. 29), and a judge must retire at the age of 75 (s. 99). Section 93 guarantees the rights of Roman Catholic and Protestant school supporters that existed at the time of confederation and any system of separate schools thereafter established. Nothing in the *Charter* abrogates any denominational school rights (s. 29 *Charter*). In these cases, section 15 is to be read as qualified by the language of the earlier Constitution. This is also true regarding the language rights of ss. 16 to 23 of the *Charter*. There is a special status conferred on English and French that is not extended to other languages.

LANGUAGE AND EDUCATION RIGHTS

Right to an interpreter (Section 14 *Charter*)

- Section 14 confers upon a witness who does not understand or speak the language, or who is deaf, the right to an interpreter.
- The quality of interpretation has to meet the standard on "continuity, precision, impartiality, competence and contemporaneousness". The constitutional standard of interpretation must be maintained throughout the trial, except where the vital interests of the accused are not involved. ***R. v. Tran***, [1994] 2 S.C.R. 951, 979.
- The right to an interpreter applies in "any proceeding" which includes civil and criminal proceedings and probably proceedings before administrative tribunals as well as courts (Hogg, ***Constitutional Law in Canada: Student Edition*** 2004, 1170).

Official languages (Section 16 *Charter*)

- Section 16 makes English and French the official languages of Canada and New Brunswick. It also confers on English or French equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada, and in all institutions of the legislature and government of New Brunswick. The section also provides that nothing in the *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French. This is a codification of the existing constitutional rule that authorizes the Parliament and Legislatures to create

language rights above and beyond those conferred by the Constitution. ***MacDonald v. City of Montreal***, [1986] 1 S.C.R. 460, 496.

- In ***Lalonde v. Ontario*** (2002), 56 O.R. (3d) 577, 2001 CanLII 21164 the Ontario Court of Appeal relied on the provisions of Ontario's ***French Language Services Act*** R.S.O. 1990 c.f.32 and the unwritten constitutional principle of protection of (French-speaking) minorities to set aside a government decision to restrict access to the only French-language hospital in the Ottawa city area.

Bilingual court proceedings (Section 19 *Charter*)

- Section 19 provides for the right to use either English or French in any proceeding in any court established by Parliament, and in the province of New Brunswick. This right extends to all parties, including witnesses and counsel, who appear in a federal court, such as the Tax Court of Canada. These courts must provide the "resources and procedures," such as interpreters, in order to respond to requests to participate in the official language in which the proceeding is not being conducted. Judges are primarily responsible for upholding these language rights, and must actively participate in protecting individuals' language rights, by informing them of their right to an interpreter. ***Mazraani v. Industrial Alliance Insurance and Financial Services Inc.***, 2018 SCC 50.

- Asking a participant in a court proceeding to speak in a language other than the official languge of their choice constitutes a violation of s. 19, as well as s. 14 of the *Official Languages Act* and s.133 of the *Constitution Act, 1867*. ***Mazraani v. Industrial Alliance Insurance and Financial Services Inc.***, 2018 SCC 50.

- The appropriate remedy for a court's failure to uphold s. 19 language rights will typically to be to order a new trial. See ***Mazraani v. Industrial Alliance Insurance and Financial Services Inc.***, 2018 SCC 50.

Bilingual services (Section 20 *Charter*)

- Section 20 imposes an obligation on government to provide bilingual services to the public. In the federal jurisdiction, the obligation attaches to any head or central office of an institution of the Parliament or government of Canada without qualification. It attaches to other federal government offices only where either there is a significant demand for bilingual services from that office or, due to the nature of the office, it is reasonable that bilingual services be provided by that office. No meaning has yet been given by the courts on the terms "significant demand" and "reasonable".
- In New Brunswick, the obligation to provide bilingual services attaches to any office of an institution of the legislature or government of New Brunswick. The obligation is unqualified. This obligation extends to all policing services offered by the RCMP in New Brunswick under an agreement with the provincial government: ***Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada***, 2008 SCC 15.
- In the other provinces, there is no constitutional obligation to provide provincial government services in both official languages.

Minority language education rights (Section 23 *Charter*)

- This section confers upon citizens of Canada who are members of the English-speaking minority in Quebec or the French-speaking minority in the other provinces, the right to have their children receive primary and secondary school instruction in the minority language in that province. This right applies to denominational and non-denominational schools, and is possessed by parents who fit into one of the three categories established by the section:
    1. the mother tongue of the parent (s. 23(1)(a));
    2. the language of primary school instruction in Canada of the parent (s. 23(1)(b)); and
    3. the language of instruction in Canada of one child of the parent (s. 23(2)).
- The mother tongue of the parent applies to citizens whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside. This paragraph applies to French speakers in the rest of Canada, but will not apply to English speakers in Quebec until the legislative assembly or government of Quebec decides to adopt it (this exemption (*Constitution Act, 1982*, s. 59) was provided for Quebec in light of the fact that Quebec did not join in the constitutional agreement in 1982).
- The second category of parent entitled to minority language educational rights has become known as the "Canada clause" because under the paragraph, Canadian citizens who move from one province to another, retain the right to have their children educated in the same language as that in which the parent was educated anywhere in Canada. Quebec is not exempted from this clause. ***Attorney General of Quebec v. Quebec Protestant School Boards***, [1984] 2 S.C.R. 66, where the court held that the Quebec provisions which excluded the children of persons who had been educated in English in provinces other than Quebec, was in direct conflict with the "Canada clause" and had to yield to s. 23(1)(b).
- Section 23(2) applies to citizens who have *a* child who has received, or is receiving, primary or secondary school instruction in English or French in Canada. They have the right to have *all* their children receive their schooling in the same language. Quebec is also not exempted from this clause.
- However, in ***Solski (Tutor of) v. Quebec***, 2005 SCC 14, [2005] 1 S.C.R. 201, the Court held that the differences between the minority language community in Quebec, and the communities outside Quebec, must be taken into account in assessing Quebec language laws. Here, the Court upheld previous cases conditioning s. 23 rights to students who had completed the "major part" of their instruction in English but it interpreted that requirement qualitatively and not quantitatively as Quebec had done, and much less restrictively so as to allow the students access to English language instruction.
- In making a qualitative assessment as to whether the 'major part' of a student's instruction was in English, Quebec must evaluate each individual child's educational pathway –have to consider duration of pathway, type of instruction and the nature and

history of the institution where they were. ***Nguyen v Quebec (Education, Recreation and Sports)***, [2009] 3 S.C.R. 208.

- It would be contrary to the purpose of s. 23 (2) to equate immersion programs with minority language instruction: ***Solski, supra***.
- This right to minority language education is not an absolute right. Section 23(3) states that the right to instruction "applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction." The Court has held that the effect of s. 23(3) is to establish a sliding scale of entitlement based on the number of children whose parents qualify under this section. The upper limit is a minority French language school board. But if the numbers do not warrant that, then as in ***Mahé v. Alberta***, [1990] 1 S.C.R. 342, s. 23 parents may nonetheless be entitled to special powers of management and control over their children's French language education.
- In ***Association des parents de l'école Rose-des-vents v. British Columbia (Education)***, 2015 SCC 21 the Court confirmed the "sliding scale" approach to section 23. The upper level of the scale requires "substantive equivalence" to facilities available for majority language students, applying a purposive, contextual, and holistic approach. The first step is to determine the parents' entitlement by applying the sliding scale. Then, the analysis turns to examining what "substantive equivalence" requires on the facts. Here, the "comparator group that will generally be appropriate for that assessment will be the neighbouring majority language schools that represent a realistic alternative for rights holders": para 37. Issues of cost and practical concerns can factor into the first step, the sliding scale analysis, but the province / territory cannot rely on them again to justify a lower level of substantive equivalence: para 46. (Although practical and costs considerations may come into play on a section 1 justification: paras 49-50.)
- In ***Arsenault-Cameron v. Prince Edward Island***, 2000 SCC 1, [2000] 1 S.C.R. 3, the Court accepted evidence that a school is the single most important institution for the survival of a minority language in a region. As a result, the Court found that the Minister's decision to bus children to an existing French language school in another region instead of building them one in Summerside was not constitutionally sufficient.
- In ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62, [2003] 3 S.C.R. 3 Francophone parents living in five school districts in Nova Scotia applied for an order directing the Province to provide French-language facilities and programs at secondary school levels. The government did not deny the existence or content of the parents' rights under s. 23 of the *Charter* but rather failed to prioritize those rights and delayed fulfilling its obligations. The trial judge found a s. 23 violation and ordered the Province to use its "best efforts" to provide school facilities and programs by particular dates. The Supreme Court upheld the trial judge's decision to retain jurisdiction to hear reports on the status of the efforts. None of the language rights protects the use of the English or French language in commercial (or private) settings. But, statutory language requirements may offend the guarantee of freedom of expression in the *Charter*. ***Ford v. Quebec***, [1988] 2 S.C.R. 712, where he court held that provisions requiring commercial

signs and advertisements to be exclusively, as opposed to predominantly, in French offended s. 2(b) of the *Charter*.

Denominational school rights (Section 93 Constitution Act, 1867)

- The opening of s. 93 grants provinces the jurisdiction over education.
- s. 93(1) states that provinces may not enact laws that prejudicially affect denominational school rights that existed at the time of the union. Therefore, the scope of the rights and privileges protected under this section must be determined by considering the history of pre-Confederation legislation pertaining to education in the province in question. Wilson J. in ***Reference re Bill 30***, [1987] 1 S.C.R. 1148.
- The test for whether a law is violating a s. 93 right is: Does the provincial law prejudicially affect a right or privilege related to either a denominational aspect of schooling or a non-denominational aspect of schooling necessary to give effect to a denominational aspect which existed by law at the time of the union, and that was enjoyed by a class of persons at the time of the union. ***Greater Montreal Protestant School Board v. Quebec (A.G.)***, [1989] 1 S.C.R. 377.
- In ***Adler v. Ontario***, [1996] 3 S.C.R. 609, parents of Jewish and non-Roman Catholic Christian children sought public funding of other kinds of denominational schools based on s. 2(a) and their s. 15(1) rights. Iacobucci J. for the majority held that s. 2(a) and s. 15(1) cannot be used to enlarge or detract from s.93. With regards to the parent's claim that funding secular schools and not the desired denominational schools violates s. 15(1), Iacobucci J. held that the existence of public schools is part of s. 93's comprehensive code and consequently also receive protection and immunity from attack on those grounds.
- In ***Ontario English Catholic Teachers' Assn. v. Ontario (A.G.)***, 2001 SCC 15, [2001] 1 S.C.R. 470, the Court upheld Ontario's new funding model for all school boards. The Ontario English Catholic Teachers' Association's challenge failed because the ability to tax supporters is not a right or privilege with respect to denominational schools. s. 93(1) only protects the right to funding, not the specific mechanism through which funding is delivered. The Province is therefore generally free to alter funding allocation as it sees fit, provided that sufficient funds are delivered to denominational schools so that they receive a proportional amount to the public education system.
- Note: s. 93 does not apply uniformly across Canada. You must check specific terms of union of each province for variations or repeal and replacement.

Parliamentary language rights (Section 133 Constitution Act, 1867)

- Either language may be used in the federal or Quebec debates (permissive); the records and journals of the Parliament of Canada & Legislature of Quebec shall be published in both languages (mandatory); a person bringing a proceeding in a federal or Quebec Court can use either language (permissive); and federal and Quebec statutes must be published in both languages (mandatory).

- **s. 23** ***Manitoba Act, 1870*** and **s. 110** ***North-West Territories Act, 1886*** (out of which Alberta and Manitoba became provinces) parallel s.133.
- In ***Quebec (A.G.) v. Blaikie***, [1979] 2 S.C.R. 1016, the Court found that certain provisions of the *Quebec Charter of French Language* (Bill 101) were in conflict with s. 133. The Court held that: provincial legislation passed in accordance with a statute published only in French was invalid; s. 133 demands bilingual printing, publishing and enactment; English and French versions must be equally authoritative and both must have official status; and simultaneity in the use of both languages for enactment is required. In ***Quebec (A.G.) v. Blaikie (No. 2)***, [1981] 1 S.C.R 312, the Court elaborated on its first decision and held that regulations adopted by or subject to the approval of the Government of Quebec and Rules of Court were subject to the requirements of s. 133, but regulations of subordinate bodies not subject to approval of government of Quebec were not subject to requirements of s. 133.
- The same rules apply in Manitoba. ***Manitoba (A.G.) v. Forest***, [1979] 2 S.C.R. 1032, ***Reference Manitoba Language Rights***, [1985] 1 S.C.R. 721.
- In ***R. v. Mercure***, [1988] 1 S.C.R. 234, the Court found that s. 110 of the *North-West Territories Act* continued to apply in Saskatchewan (and Alberta), but unlike s. 133 and s. 23 of the *Manitoba Act* the language provisions could be repealed with a regular statute as opposed to a constitutional amendment. The bilingual requirements have been repealed in both Saskatchewan and Alberta.

REMEDIES

- Section 24 of the *Charter* and subsection 52(1) of the *Constitution Act, 1982* are the sources of a court's power to remedy constitutional violations. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: see ***R. v. Ferguson***, 2008 SCC 6 at para. 61.
- Typically only one of these will be provided, but see ***R. v. Demers***, 2004 SCC 46, [2004] 2 S.C.R. 489 where this point was addressed and both remedies permitted to ensure justice to the individual affected in case the legislature failed to fix the legislation within the year of the suspended declaration of invalidity.

Supremacy clause

- Section 52 is engaged when a law itself is held to be unconstitutional. It preserves all pre-existing remedies (such as declarations of invalidity) for unconstitutional action and extends them to the *Charter*.
- Section 52 is the appropriate section to rely upon (rather than section 24 of the *Charter*) when a law itself or the (external) written policies of a government actor are themselves

held to be unconstitutional. ***Greater Vancouver Transportation Authority v. Canadian Federation of Students***, 2009 SCC 31.

- From ***Schachter v. Canada Employment and Immigration Commission et al.***, [1992] 2 S.C.R. 679, 695-719, the following approach is to be followed (as outlined by C.J. Lamer) once section 52 has been engaged:
  1. Determine the extent of the constitutional inconsistency, having regard to any pressing and substantial government objective used to justify the law under s. 1.
  2. Determine whether that inconsistency should be dealt with alone by way of severance (striking down part of the legislation) or reading in (judicially inserting words into the legislation), or if other parts of the legislation are inextricably linked to it, the law should be struck down entirely.
  3. Determine whether the declaration of invalidity (whether through nullification or severance) should be temporarily suspended.

Striking down the law (nullification)

- The effect is that the litigation will be determined as if the unconstitutional law did not exist. So, if the litigation is a criminal prosecution, the person charged is entitled to an acquittal. If a civil action, the party relying on the invalid law will lose the legal basis for the case. (Hogg, ***Canadian Constitution Law: Student Edition*** 2004, 852.)
- In ***Re Manitoba Language Rights***, [1985] 1 S.C.R. 721 (not a *Charter* case), the Court found that the laws of the province that were enacted only in English were unconstitutional and therefore of no force or effect, but gave the laws temporary validity to allow the legislature time to enact the required corrective legislation.
- The entire *Lord's Day Act* was held to be unconstitutional because of its religious purpose and was struck down. ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295.

Severance

- Severance is the appropriate remedy when only part of the statute is held to be invalid and the rest can independently survive. Severance occurs in most *Charter* cases because it is unusual for a *Charter* breach to taint a statute in its entirety. This remedy is a doctrine of judicial restraint because its effect is to minimize the impact of a successful *Charter* attack on the law. (Hogg, ***Canadian Constitution Law: Student Edition*** 2004, 852.)
- Severance must be only used in the clearest of cases where:
  1. the legislative objective is obvious and severance would further the objective or constitute a lesser interference than striking down;
  2. it would not constitute an unacceptable interference in the legislative domain;
  3. it would not intrude in legislative budgetary decisions to change the nature of the scheme involved (***Schachter v. Canada***, [1992] 2 S.C.R. 679).

- In general, use it when it is clear the legislature would have enacted the law without the offending provision.

Reading in

- In the case of reading in, the inconsistency is defined as what the statute wrongly excludes, rather than what it wrongly includes. ***Schachter v. Canada***, [1992] 2 S.C.R. 679.
- A group wrongfully left out of the legislation can be read in. ***Schachter v. Canada Employment and Immigration Commission et al.***, [1992] 2 S.C.R. 679.
- Reading in is available if the extension of the reach of the benefit can be determined with adequate precision. ***Miron v. Trudel***, [1995] 2 S.C.R. 418, where common-law spouses were the excluded group. ***Vriend v. Alberta***, [1998] 1 S.C.R. 493, where sexual orientation was the excluded ground.
- Reading in (as with severance) must be only used in the clearest of cases where:
  1. the legislative objective is obvious and reading in would further the objective or constitute a lesser interference than striking down;
  2. it would not constitute an unacceptable interference in the legislative domain;
  3. it would not intrude in legislative budgetary decisions to change the nature of the scheme involved (***Schachter v. Canada***, [1992] 2 S.C.R. 679).

Reading down/constitutional exemption

- Reading down is the appropriate remedy when a statute will bear two interpretations, one of which offends the *Charter* and one which does not. The latter interpretation (normally the narrower one) will be held by the court to be the correct one. In many ways it is a principle of constitutional legislative interpretation, rather than a remedy under s. 52.
- This is differentiated from reading in (which involves the insertion of words into a statute), in that reading down is strictly interpretation of the existing words.
- The remedy of reading down was considered in ***Rocket v. Royal College of Dental Surgeons***, [1990] 2 S.C.R. 232, but the offending provisions were severed instead because the legislation was drafted in the form of specific exclusions to a general prohibition and there was concern regarding the potential chilling effect that leaving the legislation intact might have.
- The constitutional exemption remedy is used to declare that legislation will be inapplicable in certain situations (where its application is unconstitutional) but will be applicable in other situations (where its application is constitutional). It is similar to reading in, in that the court is constitutionally "amending the legislation".
- Constitutional exemption has been discussed *in obiter* by the Supreme Court of Canada on several occasions.

See:

1. ***R. v. Schachter***, [1992] 2 S.C.R. 679, 719;
2. ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, 315;
3. ***R. v. Edward Books and Art***, [1986] 2 S.C.R. 713, 783.
4. In ***Rodriguez v. British Columbia***, [1993] 3 S.C.R. 519, the dissent would have struck down the legislation, but suspended it for a year and then would have given a constitutional exemption to Rodriguez under s. 24.
5. ***In Reference re Remuneration of Judges of the Provincial Court of P.E.I., Reference Re Independence and Impartiality of the Provincial Court of P.E.I.***, [1997] 3 S.C.R. 3, the Court held that the closure of the provincial court infringed judicial independence and was not justifiable under s. 1. The appropriate remedy was considered to be the exemption of provincial court staff from the legislation.
6. In ***R. v. Ferguson***, 2008 SCC 6, the Court held a constitutional exemption is not an appropriate remedy for a mandatory minimum sentence law that results in a sentence that violates s. 12. If a mandatory minimum sentence would create an unconstitutional result in a particular case, the minimum sentence must be struck down. The Court found that granting an exemption from mandatory minimum laws (whether under s. 52 or s. 24(1)) is to read in a discretion to a provision where Parliament clearly intended to exclude, and would undermine the rule of law by generating uncertainty and unpredictability.

   The decision, while specifically about mandatory minimum sentences, is sharply critical of constitutional exemptions generally: "The divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice" (para. 72). Further, "[b]ad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada" (para. 73).

Retroactivity

In ***Canada (Attorney General) v. Hislop***, 2007 SCC 10, [2007] 1 S.C.R. 429, the Court held that while courts usually grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling, if the law changes substantially through judicial intervention, a court may limit the retroactive effect of its judgment by consideration of factors such as good faith reliance by governments, fairness to the litigants and the need to respect the constitutional role of legislatures. In this case, which involved claims to retroactive pension benefits, the Court found departure from pre-existing jurisprudence on same-sex equality rights, and all the other relevant factors, favoured limiting retroactive relief.

Temporary suspension of the declaration of invalidity

- The Court considers the effect on the public of a declaration of invalidity: if nullifying or severing would result in a danger to the public, a threat to the rule of law, or a deprivation of benefits from deserving persons, then it may temporarily suspend the declaration of the invalidity. ***Schachter v. Canada***, [1992] 2 S.C.R. 679.
- In ***Re Manitoba Language Rights***, [1985] 1 S.C.R. 721 (note: this is not a *Charter* case), the Court held that the unconstitutional laws were to be given temporary force and effect to allow the legislature time to enact the required corrective legislation. So the "rule of law" was invoked (creation and maintenance of law to provide social order is paramount) to provide temporary validity to the unconstitutional laws.
- The under-inclusive law (in the *Unemployment Insurance Act*) would have been given temporary validity in ***Schachter v. Canada***, [1992] 2 S.C.R. 679, but the law had been changed during the period of litigation.
- The Court invoked a six-month period of temporary validity after *Criminal Code* provisions regarding detention of persons acquitted on the ground of insanity were found to violate ss. 7 and 9 of the *Charter*. ***R. v. Swain***, [1991] 1 S.C.R. 933.
- In ***Carter v Canada (Attorney General)***, 2016 SCC 4, the Court granted a four-month extension of the suspension of the declaration of invalidity it had imposed in 2015 SCC 5, which struck down the *Criminal Code* ban on assisted suicide in certain circumstances (discussed above under s. 7). This was justified by "extraordinary circumstances": the disruption in legislative work on a new regime for physician-assisted suicide that resulted from the four-month-long federal election campaign. In the interim, the Court expressly granted an exemption to allow individuals who fit the *Carter* criteria to apply for relief from their provincial superior court. Federal legislation on medical assistance in dying in response to *Carter* received Royal Assent in June 2016: SC 2016, c 3.

Remedy clause

- Section 24 is an individual remedy (but not an exclusive remedy) for the person whose rights have been infringed and is specific to the *Charter*. It is typically invoked in cases where the statute or provision in question is not itself inconsistent with the *Charter*, but action taken by government under it nonetheless violates *Charter* rights.
- In ***Eldridge v. British Columbia (Attorney-General)***, [1997] 3 S.C.R. 624, the Court found the failure to provide sign language interpretation for deaf patients was unconstitutional but the governing statutes were fine. The Court issued a declaration requiring the law to be administered in a manner that did not violate s. 15 (equality).
- A proceeding claiming s. 24(1) relief must be brought before a court or tribunal that, independently of the *Charter*, has the jurisdiction over the parties, the subject matter and the power to make the remedial order sought.
- It may be applied only by a court of competent jurisdiction. This always includes superior courts. ***R. v. Rahey***, [1987] 1 S.C.R. 588 and trial courts when hearing an

application for a remedy that relates to the conduct of the trial. ***R. v. Smith***, [1989] 2 S.C.R. 1120. A judge conducting a preliminary inquiry into a criminal charge is not a court of competent jurisdiction. ***Mills v. The Queen***, [1986] 1 S.C.R. 863.

- In ***R. v. Conway***, 2010 SCC 22 the court concluded that administrative tribunals with the jurisdiction to decide questions of law (*i.e.*, tribunals that meet the test in ***Martin***, ***supra***) are "courts of competent jurisdiction" for section 24(1) purposes. If they meet this test then the second question is: does the statute allow the particular remedy sought? (To answer this examine: legislative intent; the statutory mandate and function; the text of their enabling statute)
- Standing to apply for a remedy under s. 24(1) is granted to "anyone" whose *Charter* rights "have been infringed or denied". This includes a corporation where applicable. ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, 313.
- "Anyone" is limited to the applicant's own rights. See:
    1. ***R.v. Edwards***, [1996] 1 S.C.R. 128. (his girlfriend's apartment);
    2. ***R. v. Belvanis***, [1997] 3 S.C.R. 341. (passenger in someone else's car);
    3. ***R. v. Lauda***, [1998] 2 S.C.R. 685. (fields in which one is trespassing).

* The range of remedies is limited only by the phrase "such remedy as the court considers appropriate and just in the circumstances". In ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62, [2003] 3 S.C.R. 3, the Supreme Court upheld an order by a Nova Scotia trial judge who retained jurisdiction to ensure that the Province complied with his order. The majority emphasized that under s. 24(1), a superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, it must exercise a discretion based on its careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. The court must also be sensitive to its role as judicial arbiter and not fashion remedies that usurp the role of the other branches of governance.

* In ***Vancouver (City) v. Ward***, 2010 SCC 27, the Court awarded damages as a personal remedy under section 24(1). To determine whether damages are an appropriate and just remedy in the circumstances the court articulated a four step inquiry: The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors (e.g., there is an effective alternative remedy, or ordering damages would hinder good governance) defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

* Underlying an analysis of whether *Charter* damages are appropriate is a concern about striking the appropriate balance between "constitutional rights and effective government": ***Ernst v Alberta Energy Regulator***, 2017 SCC 1 at para 25 (*Charter* damages not appropriate; judicial review was a more appropriate alternative remedy to address the alleged *Charter* breaches committed by the Alberta Energy Regulator).

* As stated in ***Henry v British Columbia (Attorney General)***, 2015 SCC 23 at para 91: "Courts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far."
* According to ***Henry v. British Columbia (Attorney General)***, 2015 SCC 24, a court of competent jurisdiction may award damages against the Crown under s. 24(1) for prosecutorial misconduct (e.g., the failure to disclose evidence that contributed to a wrongful conviction) even without proof of malice. The elements of the cause of action that could give rise to such damages are: " (1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result" (para 85). In ***Canada (Prime Minister) v. Khadr***, 2010 SCC 3, the Court recognized a *Charter* violation but granted only a declaratory remedy (*i.e.*, they did not grant the remedy requested by the claimant – an order that Canada request his repatriation) in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs.
* Remedies ordered include "defensive remedies", where the court nullifies or stops some law or act. ***Tyler v. MNR***, [1991] 1 C.T.C. 13 (F.C.A.), where the Court prohibited the Minister from communicating to the police the contents of the information requested under s. 231.2(1)(a) so long as the *Criminal Code* and *Narcotics Control Act* charges remained outstanding, and affirmative remedies such as ordering the return of goods improperly seized. ***Lagiorgia v. Canada***, [1987] 3 F.C. 28 (C.A.), or the awarding of costs (***R. v. Dostaler*** (1994), 91 C.C.C. (3d) 444 (N.W.T.S.C.). Remedies must be within the ordinary statutory or inherent jurisdiction of that court (e.g., the provincial court in a limited trial does not have jurisdiction to award damages for a breach of the *Charter*).
* This section does not independently authorize an appeal from the decision of a court of competent jurisdiction where the existing process does not provide for an appeal from that court. ***Mills v. The Queen***, [1986] 1 S.C.R 863.

Exclusion of evidence

- Section 24(2) provides for the exclusion of evidence when it is established that, having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into disrepute.

i) The threshold requirements

- It applies when evidence has been "obtained in a manner" that infringed or denied a *Charter* right. There must be either a causal connection or a temporal and contextual connection between the *Charter* violation and the discovery of the evidence. If the connection is temporal rather than causal it cannot be too remote. ***R. v. Strachan***, [1988] 2 S.C.R. 980.

See also:

- ***R. v. Burlingham***, [1995] 2 S.C.R. 206;
- ***R. v. Goldhart***, [1996] 2 S.C.R. 463.

* The burden of proving that the admission of the evidence would bring the administration of justice into disrepute is on the person seeking to exclude the evidence. The standard of proof is the civil standard – the balance of probability. ***R. v. Collins***, [1987] 1 S.C.R. 265, 280.

* The person seeking to exclude the evidence must prove both that a *Charter* right has been infringed and that admitting the evidence obtained would bring the administration of justice into disrepute. ***R. v. Grant***, [2009] 2 S.C.R. 353

ii) Three lines of inquiry

Grant establishes that the rationale for section 24(2) is to maintain the integrity of, and public confidence in, the justice system. Its focus is long-term, prospective and societal. The Court identifies three lines of inquiry to balance the societal interests involved. The test is intended to be more flexible than the prior ***Collins/Stillman*** "two-box approach".

0. The seriousness of the *Charter* breach (gauges the blameworthiness of the state conduct).
1. The impact on the *Charter*-protected interests of the accused (examines the nature and degree of intrusion of the *Charter* breach into the *Charter*-protected interests of the accused; inquiry depends on the kind of evidence involved – statements presumptively excluded, with bodily evidence depends on degree of intrusion on bodily integrity/dignity, non-bodily physical evidence generally admitted unless serious breach; derivative evidence will depend on reliability, seriousness of breach and discoverability).
2. Society's interest in adjudication on the merits (examines the reliability of the evidence and its importance to the Crown).

Other remedies

Stay of proceedings/interlocutory relief

In exceptional cases where a flagrant *Charter* violation is established a stay of criminal or quasi-criminal proceedings has been granted as no other remedy can signal the court's disapproval of the conduct in issue.

- Interlocutory relief is available before hearing the merits of the case. ***RJR - MacDonald Inc. v. Canada***, [1994] 1 S.C.R. 311.
- There is a three-part test that the moving party must meet set out in the case of ***Manitoba v. Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110:
    1. the moving party must demonstrate a serious question to be tried;
    2. irreparable harm will be done to the moving party (must look to the nature, not the extent of the harm) if the injunction does not issue;

3. the balance of inconvenience, taking into account the public interest, favours the injunction.

CONSTITUTIONAL LAW IN AN ABORIGINAL CONTEXT

This chapter will provide a brief overview of s. 35 of the *Constitution Act, 1982*.

Section 35 *Constitution Act, 1982*

Section 35(1) is found in Part II of the *Constitution Act, 1982*, entitled "Rights of the Aboriginal Peoples of Canada," and provides as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Prior to s. 35, Aboriginal rights or treaty rights could be unilaterally extinguished by the federal Crown. On April 17, 1982, the *Constitution Act, 1982* was proclaimed into force, initiating a new era for the rights of Aboriginal people in Canadian law.

The *Constitution Act, 1982* also contains the *Canadian Charter of Rights and Freedoms* ("*Charter*") and a Canadian brand formula for amending the Constitution of Canada. Section 35 is outside the *Charter*, which occupies ss. 1 to 34 of the *Constitution Act, 1982*. Because it is outside the *Charter*, this allows for certain advantages:

1. **Section 1** – Section 35 is not subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, the Supreme Court has held that s. 35 rights are not absolute and developed a justification test.
2. **Section 25** – "The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…." Aboriginal and treaty rights, and other rights or freedoms pertaining to Aboriginal people in Canada, cannot be limited by any provision of the *Charter*.
3. **Section 33** – Section 35 rights are not capable of being overridden by the *Charter* (the "notwithstanding clause").

The enactment of s. 35 signalled a fundamental change in how Aboriginal peoples and their rights are viewed, both by the judiciary and government. The rights are not defined in the *Constitution Act, 1982*. However, the Supreme Court of Canada has provided guidance on the constitutional significance and meaning of s. 35.

Aboriginal rights

The Supreme Court of Canada in ***R.* v. *Van der Peet***, [1996] 2 S.C.R. 507, established a set of criteria to identify Aboriginal rights. In essence, criteria for the identification of Aboriginal rights included identifying the precise nature of the activity, which activity must have been "an integral part of the specific distinctive culture" of the Aboriginal group prior to contact with Europeans.

R. v. Isaac (1975), 13 N.S.R. (2d) 460 (CA), and ***R. v. Denny*** (1990), 94 N.S.R. (2d) 253 (CA) both considered Aboriginal rights in Nova Scotia, and held that Mi'kmaq of Nova Scotia have an Aboriginal right to hunt, fish, gather for food, social and ceremonial purposes in traditional territories.

R. v. Sappier; R v. Grey, 2006 SCC 54, although a New Brunswick case, is followed in Nova Scotia, did find that the Mi'kmaq of New Brunswick had an Aboriginal right to harvest logs for domestic purposes in the traditional territories of their respective communities.

Self-government

Volume 2 of 1996 Report of the Royal Commission on Aboriginal Peoples (RCAP) stated that both as a matter of constitutional and international law, Aboriginal peoples' have the right to self-determination, which includes the right to self-government. It explained that self-determination is the right of Aboriginal peoples to choose their destinies and means that First Nations, Inuit and Metis have the right to negotiate the terms of their relationship with Canada and choose governmental structure that meet their needs. It further explained that self-government includes the ability of Aboriginal peoples to enforce their own rules, resolve disputes, problem-solve, and establish their own governing institutions to carry out these tasks.

While Aboriginal peoples currently have some rights to exercise greater decision-making control over certain areas under legislation or through agreements with other governments (for more information, see "Aboriginal Law," Section 2, "Applicable Laws), including modern treaties, this approach has generally been critiqued as piecemeal and insufficient to achieve the vision of the inherent right to self-determination and self-government discussed in RCAP.

In ***R v. Pamajewon,*** [1996] 2 SCR 821, the Supreme Court of Canada stated that in order to prove a right to self-government under section 35(1), an Aboriginal group would have to meet the same test for proving an Aboriginal right as set out in *R v. Van der Peet*. This requires proving that a specific area of self-government was integral part of the specific distinctive culture of the Aboriginal group prior to contact with Europeans. This approach has criticized by several scholars, including the late Peter Hogg who states in his seminal *Constitutional Law of Canada* text, at Chap. 28: "These restrictions [in *Van der Peet*] are severe for rights to hunt and fish and harvest, but they are singularly inappropriate to the right to self-government."

Aboriginal title

Aboriginal title is a subset of Aboriginal rights – is a right in the land itself – not just the right to hunt, fish and gather from it. It therefore requires a different test for identification. ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, requires the claimant to establish exclusive use and occupation of the territory "at the time of assertion of British sovereignty."

The Supreme Court of Canada in ***R.* v. *Marshall; R.* v. *Bernard***, [2005] 2 S.C.R. 220, remarked that despite the nomadic or semi-nomadic lifestyle of the Mi'kmaq of Nova Scotia and New Brunswick, they could establish "effective control" rather than exclusive occupation. This would be a question of fact and require regular use of definite tracts of land for hunting, fishing or otherwise.

In ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44, the Supreme Court of Canada confirmed that occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

Métis

The test for Métis Aboriginal rights is applied to a different time period, notably during the time following the contact between First Nation peoples and Europeans. In ***R. v. Powley***, [2003], 2 S.C.R. 207, the Supreme Court of Canada recognized the Métis in Western Canada and Northwestern Ontario. Also see ***Daniels v. Canada (Indian Affairs and Northern Development)***, 2016 SCC 12.

Treaty rights

In ***R. v. Badger***, [1996] 1 S.C.R. 771, the Supreme Court of Canada set out principles for the interpretation of treaties and the rights that arise from them:

1. Treaties represent an exchange of solemn promises between the Crown and the various Indian Nations.
2. The honour of the Crown is always at stake. The Crown must be assumed to intend to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.
3. Any ambiguities or doubtful expressions in the wording of the treaty must be resolved in favour of the Indians. Any limitation of rights must be narrowly construed.
4. The onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown.

The Court also stressed and confirmed earlier court decisions that the context in which treaties were negotiated was important and that oral agreements would be recognized. Thus, "the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing." Moreover, "the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation."

In ***R.* v. *Marshall***, [1999] 3 S.C.R. 456 (*Marshall 1*), the Supreme Court of Canada added the following principles for interpreting treaties. First, extrinsic evidence is available to show that a written document does not include all of the terms of the agreement. Second, extrinsic evidence of historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms, even absent any ambiguity on the face of the treaty. Third, where a

treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.

In Nova Scotia, the Supreme Court of Canada has recognized two treaties. ***Simon* v. *The Queen***, [1985] 2 S.C.R. 387, involved a member of the Shubenacadie Band hunting outside the Indian Brook Reserve, and the Peace and Friendship Treaty of 1752, which states, "It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and fishing as usual …". In that case, the Court held that Mr. Simon had a right to hunt and the included right having a firearm under the treaty. In *Marshall 1*, the Supreme Court of Canada held that the Mi'kmaq had a treaty right to hunt and fish and to sell the products of their hunting or fishing in order to obtain moderate livelihood based on the Peace and Friendship Treaties of 1760-61. In ***R.* v. *Marshall***, [1999] 3 S.C.R. 533 (*Marshall 2*), the Court emphasized that such rights are subject to the regulatory authority of the Crown, provided the Crown has provided the necessary justification for any regulatory measures that would constitute an interference with an infringement upon the Mi'kmaq's exercise and enjoyment of their right.

Limitations upon rights

Although the *Constitution Act, 1982*, through s. 35, protects existing Aboriginal rights and Treaty rights, these rights are not absolute. The Crown, including both federal and provincial legislators, may make laws, and their representatives may make decisions acting within their respective authorities. In some instances, these activities may infringe on Aboriginal rights and Treaty rights and, in such instances, once the Aboriginal group has proven a right and an infringement, the Crown must then justify that infringement or limitation.

Infringement of a s. 35 right occurs where "the legislation in question has the effect of interfering with an existing aboriginal right" (***R. v. Sparrow***, [1990] 1 S.C.R. 1075 at 1078) or where there has been a "meaningful diminution" of the right, which "includes anything but an insignificant interference with that right" (***R. v. Morris***, 2006 SCC 59 at para. 53).

Once a *prima facie* infringement has been established, the onus shifts to the Crown to demonstrate either that it has the consent of the Aboriginal rights holders, or that the interference is justifiable. Justification requires the Crown to meet a three-stage test articulated by the Supreme Court in *Sparrow* and re-stated in *Tsilhqot'in*. To justify the infringement, the Crown must show: 1) that it discharged its procedural duty to consult and accommodate, 2) that its actions are backed by a compelling and substantial government objective and 3) that the government's actions are consistent with the Crown's role as a fiduciary toward Aboriginal people.

In *Sparrow*, the Supreme Court held that conservation amounts to a compelling and substantial objective and rejected the argument that public interest was a valid legislative objective. However, in the context of a commercial rights case, ***R. v. Gladstone***, [1996] 2 SCR 723, the Supreme Court held that the test for a compelling and substantial objective could be met by goals such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, of non-Aboriginal users in an industry. Similar objectives apply in the context of Aboriginal title, since Aboriginal title entails an "inescapable economic component": ***Delgamuukw* v. *British Columbia***, [1997] 3 S.C.R. 1010.

In assessing whether or not the Crown's actions were consistent with its fiduciary duty owing to Aboriginal people, according to *Sparrow,* the court must look at all of the circumstances of the case, including the nature of the right and consider a number of factors, including whether the right has been given adequate priority in relation to other rights. According to *Tsilhqot'in,* incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land. Further, the infringement must meet a three-part proportionality test:

1. the incursion must be necessary to achieve the government's goal (rational connection);
2. the government must go no further than necessary to achieve it (minimal impairment); and
3. the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact).

The duty to consult and accommodate

The Crown also has a duty to consult and accommodate with respect to infringements of credibly asserted but unproven Aboriginal and Treaty Rights or Aboriginal Title. The test to determine whether there has been appropriate consultation and fair compensation has been expanded by the Supreme Court of Canada in ***Haida Nation* v. *British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, ***Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550, and ***Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)***, [2005] 3 S.C.R. 388.

In these cases, the Court held when the Crown is contemplating a course of action or a decision that could have a negative effect on Aboriginal rights, it has a duty to consult and accommodate. The duty to consult arises early on, including at the strategic planning stages. The scope and content of the duty to consult depends both upon the strength of the asserted rights claim and the seriousness of the impact on the underlying Aboriginal or treaty right: ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43. Recent cases discuss when the Crown may delegate its duty to an administrative tribunal, such as the National Energy Board, and when there may be a duty to fund the participation of the affected Indigenous group in consultations: see ***Clyde River (Hamlet) v. Petroleum Geo Services Inc.,*** 2017 SCC 40 and ***Chippewas of Thames First Nation v Enbridge Pipelines Inc.,*** 2017 SCC 41.

The Crown's duty to consult only applies to the Executive branch of government and not to the Legislature. Flowing, as it does, from the honour of the Crown, the duty is only triggered by Executive action or statutorily delegated Executive action. To hold otherwise would undermine the principles of the separation of powers, parliamentary sovereignty, and parliamentary privilege, and would result in inappropriate judicial oversight into the Legislature's law-making power: ***Mikisew Cree First Nation v. Canada (Governor General in Council)***, 2018 SCC 40. However, after legislation has been adopted, Aboriginal groups who assert that the effect of the legislation is to infringe s. 35 rights have their remedies under the infringement and justification framework set out in *R. v. Sparrow.*

Section 35, the TRC and the *United Nations Declaration on the Rights of Indigenous Peoples*

As noted in the Aboriginal Law chapter, the 2015 Final Report of the Truth and Reconciliation Commission of Canada ("TRC") was critical of the Supreme Court of Canada's jurisprudence interpreting s. 35 of the *Constitution Act, 1982* because it continues to be rooted in colonial and racist doctrines, including, for example, *terra nullius* and the doctrine of discovery. Ties to these doctrine, the TRC argues, results in subjugating Aboriginal peoples to an absolutely sovereign Crown (p. 202-207).

In practical terms, the TRC has claimed that the unquestioned assumption of Crown sovereignty over the lands and peoples in what is now Canada is problematic in so far as it has led to interpretations of s. 35 that permit the extinguishment of inherent rights (p. 191), denies Aboriginal peoples' inherent right to self-determination (p. 184), and results in heavy evidentiary burdens being placed on Aboriginal claimants in s. 35 cases (p. 214-215). In order address this problems, the TRC calls for the *United Nations Declaration on the Rights of Indigenous Peoples* to be endorsed and implemented by governments in Canada and for it to be the framework through which Aboriginal rights are interpreted and reconciliation achieved (p. 187-191).

The *Declaration* was adopted by UN Human Rights Council on June 29, 2006 and subsequently supported by the General Assembly on September 2007. It contains 46 articles that comprehensively addresses Indigenous peoples' fundamental individual and collective rights to land, resources, self-government, consultation, economic rights, culture, language, non-discrimination, and other topics. The rights set out in the *Declaration* are intended by the United Nations to "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (Article 43).

The Canadian government has endorsed the *Declaration* without qualification since May 2016 and has committed to fully implementing the instrument in Canadian law, including supporting an interpretation of s. 35 as containing a "full box of rights" supplied by *Declaration.* A federal bill to assist in the implementation of the *Declaration* died on the order paper before the conclusion of the last sitting of Parliament. However, the federal government has committed to introducing a similar bill in the current sitting of Parliament. Despite this, several recent federal statutes include commitments to adhere to the principles in the Declaration, which would inform the interpretation of those instruments (see, for examples, the *Indigenous Languages Act*, SC 2019, c 23, the *Impact Assessment Act*, SC 2019, c 28, s 1, the *Department of Indigenous Services Act*, SC 2019, c 29, s 336, the *Department of Crown-Indigenous Relations and Northern Affairs Act*, SC 2019, c 29, s 337, and *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24). In addition, the British Columbia Legislature passed its own law to implement the *Declaration* in December 2019 (see *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019) and other provinces are considering similar legislation.

Independent of recognition of the *Declaration* in Canadian legislation, through the presumption of conformity with international law (see *R. v. Hape*, 2007 SCC 26 at paras. 53-55), the *Declaration* can be used to interpret domestic laws. The presumption has already informed the interpretation of Canadian law in a number of cases, including in the areas of administrative law (see *Simon v. Canada (Attorney General)*, 2013 FC 1117), human rights (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 aff'd 2013 FCA 75) and constitutional law (*Catholic Children's Aid Society of Hamilton v. H. (G.)*, 2016 ONSC 6287).