

# Constitutional Law Tests:

## Colonial Government Powers:

- Common law power was given to Colonies by the Crown ([Royal Proclamation](#))
- Governors of colonies can make laws ([Royal Proclamation](#))
- Colonial government can make laws inconsistent with British Law ([Colonial Laws Validity Act](#))
- Paramount Imperial statutes cannot be overridden ([Colonial Laws Validity Act](#))

## Construction of Government in Canada:

- 2 levels of government
  1. Federal and Provincial
- Separate legislative jurisdictions
- Feds cannot get rid of provinces
- Canada can pass laws extraterritorially ([Statute of Westminster](#))
- Provincial laws can only apply provincially
- Federal law applies to whole country

## What is a Constitution:

- Living Tree ([AG Ontario v. AG Canada, Edwards v. AG Canada](#))
- Sets out legislative jurisdiction of each level of government
- Has an amending formula
- Flexible, courts are not bound by original intent ([AG Ontario v. AG Canada, Edwards v. AG Canada](#))

## Convention/Unwritten Principles:

- Unwritten part of the Constitution
- Underlying assumptions of the written
- Stated in the preamble to the Constitution
  - Preamble has no enacting force or legal status, but can help interpret the statute ([Patriation Reference](#))
  - Preamble illuminates provision of statute it precedes ([Patriation Reference](#))
- Convention is not justiciable ([Patriation Reference](#))
- Can supplement the Constitution if an answer cannot come from the document alone
- Unilateral Secession of a province is unconstitutional ([Quebec Secession Reference](#))
- Unwritten principles are binding on courts ([Quebec Secession Reference](#))
- There are four unwritten principles fundamental to the Constitution ([Quebec Secession Reference](#)):
  - a) Federalism
    - (1) Sharing of power by two levels of government
  - b) Democracy
    - (1) Self-Governance
    - (2) Dignity as human beings
    - (3) Supremacy of sovereign will
    - (4) Obligation to engage in opposition debate

- c) Rule of Law
  - (1) Foundation of legal liberalism
  - (2) Shield against arbitrary power
  - (3) Uniformly applied
  - (4) Constitution is supreme law
- d) Protection of Minorities
  - (1) Charter and linguistic protections
- e) Judicial Impartiality and Independence ([Remuneration Reference](#))
- f) Subsidiarity ([Canadian Western Bank v. Alberta](#))
  - (1) Decisions are made best at level closest to those affected
  - (2) Must also be effective though

### **Amending the Constitution:**

- Substantial consent is needed from provinces, if it would affect all provinces ([Patriation Reference](#))
- This arises from the Federalism Convention ([Patriation Reference](#))
- There needs to be Executive Accountability to legal authority ([Patriation Reference](#))

### **Separation of Powers:**

- Imperative for judicial branch to be impartial and independent ([Questions of Prohibitions](#))
- Federal government cannot make provincial laws to enact treaties ([AG Canada v. AG Ontario \(Labour Conventions\)](#))
- Legislative jurisdiction for treaties depends on the subject matter ([AG Canada v. AG Ontario \(Labour Conventions\)](#))
- Anything that is s.92 matter requires cooperation of provinces and feds ([AG Canada v. AG Ontario \(Labour Conventions\)](#))
- Anything not set out in s.92 is Federal jurisdiction
- “Watertight compartments” ([AG Canada v. AG Ontario \(Labour Conventions\)](#))

### **Rule of Law:**

- Only the Attorney General can sue the Crown
- Discretionary power to executive must be used for goals and objectives of legislation ([Roncarelli v. Duplessis](#))
- Public officials may only act within the powers conferred to them ([Roncarelli v. Duplessis](#))
- An innocent person cannot be punished ([Roncarelli v. Duplessis](#))
- A person must know the prohibitions imposed on them ([Roncarelli v. Duplessis](#))
- There is equality before the law ([Roncarelli v. Duplessis](#)) ([Manitoba Language Reference](#))
- Positive law and order is required ([Manitoba Language Reference](#))
- Cannot operate without any laws ([Manitoba Language Reference](#))
- Judicial impartiality and independence is fundamental to Rule of Law ([Remuneration Reference](#))
- Government policy must be depoliticized ([Remuneration Reference](#)) ([Roncarelli v. Duplessis](#))

**POGG Power:**

- Does not cover enactment of treaties ([AG Canada v. AG Ontario \(Labour Conventions\)](#))
- Provisions in s.91 are just illustrations of POGG, not exhaustive ([Russell v. The Queen](#))
- Something must have national distribution to be POGG ([Russell v. The Queen, Local Prohibition Reference](#))
- Should provincial and federal enactments conflict, Federal powers win ([Local Prohibition Reference](#))
- Incidental/mere effect on provincial legislation is okay ([AG Ontario v. Canada Temperance Federation](#))
- To argue POGG Power
  1. Find the enumeration (head of power)
  2. Find the justification in case law
  3. Apply principles
  4. Argue validity

**Emergency Branch:**

- Judicially Reviewable ([Fort Frances Pulp](#))
- Rational Basis for emergency belief ([Fort Frances Pulp](#))
- Very Heavy Burden of Proof ([Fort Frances Pulp](#))
- Extrinsic Evidence is required ([Anti-Inflation Reference](#))
- Must be temporary and clearly express emergent situation and be mandatory ([Anti-Inflation Reference](#))
- There is no fixed list of subject matter ([Anti-Inflation Reference](#))
- Will effectively suspend the Constitution ([Anti-Inflation Reference](#))
- Can be used to prevent or cure an emergency ([Anti-Inflation Reference](#))

**National Concerns Branch:**

- Can involve any subject matter ([AG Ontario v. Canada Temperance Federation](#))
- Once defined, it is permanently of national concern ([Crown Zellerbach](#))
- Must be completely new or a local matter that has become a national concern ([Crown Zellerbach](#))
- Must be single, distinct, and indivisible ([Anti-Inflation Reference](#))
- Must be uniform legislation that provinces are unable to make laws about ([Crown Zellerbach](#)) ([AG Ontario v. Canada Temperance Federation](#))
  1. What would be the effect on inter-provincial interests if a province does not deal effectively with the situation?

**Criminal Law Power:**

- Act being prevented must be an evil or have an injurious or undesirable effect ([Margarine Reference](#))
- Must take the form of prohibition + penalty + public purpose ([Margarine Reference](#))
- Public purposes:
  - a) Public peace

- b) Public order
- c) Security
- d) Morality
- e) Health
- f) Environment ([R v. Hydro Quebec](#))
- g) Not exhaustive list ([Margarine Reference](#)) ([RJR MacDonald](#))
- Must look at a pith and substance analysis of subject matter
- Criminal Law is a federal power but provinces can enact complementary legislation ([AG Canada v. Dupond](#))
- Provinces have a preventative power, feds have a prohibitive power ([AG Canada v. Dupond](#))
- By-laws and ordinances must be territorially limited ([AG Canada v. Dupond](#))
- Only limitation on 91(27) is colorability ([RJR MacDonald](#))
- An activity related to an evil can be criminalized ([RJR MacDonald](#))
- Criminal law should evolve with society ([R v. Hydro Quebec](#))
- To distinguish Regulatory from Criminal Scheme ([R v. Hydro Quebec](#)):
  - a) Nature of regulation
  - b) Extent of regulation
  - c) Context in which it applies
- Provinces can enact complementary legislation or impose equivalent regulations ([R v. Hydro Quebec](#))
- Double Aspect Doctrine: subject matter might be both provincial and federal (ie: health and environment) ([Rio Hotel v. Liquor Licensing Board](#))
  - Federal legislation is paramount
- Provinces may not invade 91(27) by attempting to stiffen, supplement, or replace criminal law ([R v. Morgentaler](#))
- Ulterior motive = colorability ([R v. Morgentaler](#))

### **Provincial Draft Regulations Should:**

- Use a licensing scheme
- Attach conditions to license holder
- Force license holder to comply with conditions
- Regulate as locally and specifically as possible
- Use different wording than the Criminal Code
- Punish a license holder, not an industry or entertainer, should a breach occur
- All this from [Rio Hotel v. Liquor Licensing Board](#)

### **Statutory Interpretation:**

- Pith and Substance Approach ([R v. Morgentaler](#)):
  - a) Object and purpose of statute
    - (1) Extrinsic Evidence
    - (2) Whole Statute
  - b) Legal Effect
  - c) Actual/Practical Effect
    - (1) This may not always apply
  - d) Motive of Government

(1) If this differs from object, purpose, and effects it can be called “colourability”

- If a word has a set meaning it is hard to argue ([Edwards v. AG Canada](#))
- Ambiguous words can have narrow or broad meanings ([Edwards v. AG Canada](#))
- Consider external and internal evidence ([Edwards v. AG Canada](#))
- Consider the general principles ([Edwards v. AG Canada](#))
- Consider 5 unwritten principles ([Edwards v. AG Canada](#))

### **Regulation of the Economy:**

- Cannot regulate contracts in a province ([Citizens Insurance v. Parsons](#))
- Cannot regulate a particular business or trade in a province ([Citizens Insurance v. Parsons](#)) ([R. v. Eastern Terminal Elevator](#))
- There are two branches to 91(2): Interprovincial and International Trade and the General Regulation of Trade Affecting the Whole Dominion ([Citizens Insurance v. Parsons](#))
- There is no overlap in economic matters between provinces and feds ([Citizens Insurance v. Parsons](#))
- Levels of production cycle of natural products is provincial ([Labatt Breweries v. AG Canada](#))
- Spectrum analysis ([Labatt Breweries v. AG Canada](#)):
  1. Where on the spectrum is process being regulated?
  2. How does it relate to the whole process?
  3. What is the legislation doing?
  4. Does it aim at the border?

### **Interprovincial and International Trade:**

- Cannot legislate on particular matters of an industry ([R. v. Eastern Terminal Elevator](#))
- Even if the legislation is necessary, it doesn't matter ([R. v. Eastern Terminal Elevator](#))
- A noble objective does not legitimize an enactment ([R. v. Eastern Terminal Elevator](#))
- Can get around this through 92(10) ([R. v. Eastern Terminal Elevator](#))
- Early stages of production are provincial, usually ([Carnation v. Quebec Agricultural Board](#))
- Provinces cannot regulate the relationships, price, or conditions of trade between provinces ([Burns Foods v. AG Manitoba](#))
- Criteria for legislating in this area:
  1. Must be under a regulatory scheme
  2. Must be under some kind of agency
  3. Must be concerned with a particular whole, not an industry
  4. Must be incapable of being enacted by provinces
  5. Failure to include more than one province must jeopardize success
  6. This is not exhaustive
- A mere or incidental effect on international/interprovincial trade is okay, for provincial legislation ([Carnation v. Quebec Agricultural Board](#))
  1. Aim must be intra-provincial
  2. Colorability of legislation will overpower this ([Burns Foods v. AG Manitoba](#))
  3. Must have a pith and substance argument

**Ancillary Doctrine** ([GM Motors of Canada v. City National Leasing](#)):

- Challenging a Single Provision in a Large Statute:
  - a) Look to the validity of the provision in isolation
  - b) Look to the validity of the entire Act
  - c) Look at the ancillary doctrine:
    - (1) Is the provision necessarily incidental (truly needed for the Act to function?)
      - (a) Use this if encroachment is great
    - (2) Is there a functional connection between the provision and the Act
      - (a) Use this if encroachment is low
- Need to make sure it's sufficiently integrated
- Allows court to uphold something that would by itself be stricken down
- Extends the jurisdiction of the legislature
  - 1. Look at importance of statute and importance of intrusion together
  - 2. There is no case law that has actually done this
- Encroachment is minimal if:
  - a) It is a remedial, not substantive provision
  - b) It is not widely applicable
  - c) It is not a general breach of action

**Taxation:**

- The power to raise money for the heads of government
- Most problems are raised by ss.92(2),(9)
- Court has ultimate jurisdiction to decide what kind of tax it is ([Canadian Industrial Gas & Oil v. Government of Saskatchewan](#))
- To determine legal effect of taxation use following test: ([Canadian Industrial Gas & Oil v. Government of Saskatchewan](#))
  - 1. What is the legal power in the provision?
  - 2. What is the purpose of the provision?
    - a) Provinces cannot directly aim at taxing things destined for interprovincial trade ([Canadian Industrial Gas & Oil v. Government of Saskatchewan](#))
  - 3. What effect can you infer from that purpose?
- Section 92(9) scope ([Allard Contractors Ltd. v. Coquitlam](#)):
  - 1. Allows the imposition of levies which are indirect in their general tendency
  - 2. Passing on of taxes does not require a direct correlation
    - a) Merely a sufficient amount of the tax needs be passed on
  - 3. It must be tied to a valid regulatory licensing scheme
  - 4. There must be a reasonable connection between cost of running the scheme and the revenue raised by taxation
  - 5. Surplus in revenue is allowed, if an attempt to match cost has been made
  - 6. Essentially, is the cost of running the scheme directly linked to the taxation?
  - 7. Can bring in Ancillary Doctrine in as an argument if necessary
- Restitution is a constitutional right that can be awarded if taxed wrongly ([Kingstreet Investments Ltd. v. New Brunswick](#))
- s.125 of the CA gives two crowns immunity from taxation

1. Federal gov't is not limited to raising revenue for federal purposes
2. The only limitation to federal legislative jurisdiction to tax is with regard to colorability
  - a) You can't tax something with the intention to control something else

### **Direct Tax:**

- Demanded from the very person who is intended to pay it ([Bank of Toronto v. Lambe](#))
- Ascertained by general tendencies of tax ([Bank of Toronto v. Lambe](#))
- Any person found within the province, regardless of whether they live there or not, can be subject to a direct tax ([Bank of Toronto v. Lambe](#))
- Income tax is direct tax ([Canadian Industrial Gas & Oil v. Government of Saskatchewan](#))

### **Indirect Tax:**

- Demanded from a person with the expectation that he will indemnify himself at the expense of another ([Bank of Toronto v. Lambe](#))
- Ascertained by general tendencies of the tax ([Bank of Toronto v. Lambe](#))
- Commodity tax is indirect ([Canadian Industrial Gas & Oil v. Government of Saskatchewan](#))
- Test for indirect taxation: ([Allard Contractors Ltd. v. Coquitlam](#))
  1. Is the tax related directly or indirectly to a commodity and/or its price?
  2. Is the tax imposed when the commodity is being manufactured and/or marketed?
  3. Tax is allowed IF cost of running a regulatory scheme is directly linked to the revenue raised by the taxation ([Allard Contractors Ltd. v. Coquitlam](#))

### **Limitations on Provincial Taxation:**

- There are 5 possible ways to limit provincial legislation:
  1. Is the provincially imposed levy a tax? ([Allard Contractors Ltd. v. Coquitlam](#))
  2. Is the tax a direct tax? ([Bank of Toronto v. Lambe](#)) ([Canadian Industrial Gas & Oil v. Government of Saskatchewan](#))
  3. Is the tax within the province? ([Bank of Toronto v. Lambe](#))
  4. Was the legislation properly enacted? ([Kingstreet Investments Ltd. v. New Brunswick](#))
  5. Does the taxpayer have any immunity? (s. 125)

### **Interjurisdictional Immunity:**

- Reciprocal Doctrine ([Canadian Western Bank v. Alberta](#)):
  - The doctrine can be applied in theory to protect the provinces from the feds
- Establishes unwritten principle of subsidiarity ([Canadian Western Bank v. Alberta](#))
  - Decisions are best made at the level of government that is most effective and closest to those affected
- Used as a defence
- Does not strike down a provincial statute, just limit its applicability to a particular defendant
- Provinces cannot sterilize federal entities (arose first in [John Deere Plow](#) case)

- Main issues are:

- Does Defendant have eligibility?
- Do they get immunity from a provision or from an entire statute?

### **What is IJI:**

- Test for immunity:

1. Is it a federal entity (see below)
  - a) Or is it at the core of a s.91 head of power?
  - b) Or a core POGG power?
2. Does the provincial legislation impair the vital and essential part of the entity? ([Quebec \(Commission du Salaire Minimum\) v. Bell Telephone Co. of Canada](#))
  - a) What is absolutely necessary or indispensable ([Canadian Western Bank v. Alberta](#))
  - b) The part that puts the federal entity at the core of federal head of power ([Canadian Western Bank v. Alberta](#)) ([Orden Estates v. Gale](#))
  - c) Basic and unassailable content ([Canadian Western Bank v. Alberta](#))
  - d) It must be a person, work, or thing as defined by law ([Canadian Western Bank v. Alberta](#))
  - e) There must be a factual finding of impairment ([Canadian Western Bank v. Alberta](#))
3. Does it impair the internal management of the entity? ([Quebec \(Commission du Salaire Minimum\) v. Bell Telephone Co. of Canada](#))
  - a) Establishing impairment to the internal management or operations of the entity will suffice ([Canadian Western Bank v. Alberta](#))
4. A federal vacuum does not impair ([Quebec \(Commission du Salaire Minimum\) v. Bell Telephone Co. of Canada](#))
  - a) So long as the area is within Parliament's legislative jurisdiction

### **Application of IJI:**

- Start with Pith and Substance analysis ([Canadian Western Bank v. Alberta](#))
- Then go to IJI
- Then go to Paramountcy

### **Modified immunity test:**

- Established in ([Bell Canada v. Quebec \(Commission de la Sante et de la Securite du Travail\)](#))
  - *This was overturned, but can still help the argument*
- 1. Impairment itself is not necessary
- 2. An "effect" on the vital and essential part is enough
- 3. "Effect" does not have to be negative

### **Federal Entity Test:**

- Is it a federal work or undertaking? ([Ontario AG v. Winner](#))
  1. Federal Work
    - a) Physical things that cross borders (ie: railroads)
  2. Federal Undertaking

- a) An arrangement that crosses borders
  - b) Must operate as a whole and should not be divided
  - c) If not, they are colorable
  - d) To determine whether it is a camouflaged local undertaking must look at the following:
    - (1) The facts of each case
    - (2) What is the pith and substance of the act/regulation?
- Can be any of the following: ([Canadian Western Bank v. Alberta](#))
1. Federal transportation undertakings
    - a) Airlines (under POGG)
    - b) Buslines
    - c) Railways
    - d) Taxis
  2. Federal communication undertakings
    - a) Scope is not limited to management but also to allow it to fulfill its fundamental mandate
  3. Maritime Law
  4. Indians
    - a) Anything that touches on “indianness”
    - b) What do Indians do as citizens
  5. Management of a Federal Institution
    - a) Where the management is fundamental, indispensable, and necessary to be federal jurisdiction
    - b) RCMP
  6. Federal companies and undertakings
    - a) Federal corporations
    - b) Banks

### **Paramountcy:**

- Feds win. The end.
- Deals with the relationship between valid provincial law and valid federal law
- Paramountcy can only exist when both legislations are found valid
- How to determine whether there is a conflict: ([Multiple Access v. McCutcheon](#))
  1. Determine what each statute is doing
    - a) Use the rules of statutory interpretation
  2. If there is duplication of purpose, there is no conflict
  3. If the legislations say different things a conflict exists
    - a) “You say yes, I say no”
    - b) Compliance with one is defiance of the other
  4. This can vary depending on the court
- There are two forms of conflict: ([BC v. Lafarge Canada Ltd.](#)) ([Multiple Access v. McCutcheon](#))
  1. Operational Conflict:
    - a) Compliance with one is defiance of the other
  2. Frustration of Purpose:
    - a) Compliance with provincial statute frustrates purpose of federal statute

- b) Must persuade court of purpose to win this

### **Extraterritoriality:**

- Extraterritoriality is not really a problem since *Statute of Westminster*
- ET - Go Home!
- Pith and substance of legislation must stay within province ([Ladore v. Bennett](#))
  1. Must find where pith and substance of legislation is located ([Churchill Falls](#))
    - a) If inside province:
      - (1) Not extraterritoriality, legislation stands
      - (2) Incidental extraterritorial effects are okay
    - b) If outside province:
      - (1) Extraterritoriality, legislation will fail
- Every element of matter regulated must be within bounds of province ([RBC](#))
- When there is conflicting overlapping provincial legislation, use Unifund test
- When a plaintiff tries to apply law to someone who appears to be outside their jurisdiction, use Unifund test

### **Applicability of Extraterritoriality:**

- This is from ([Unifund Assurance Co. v. ICBC](#))
  1. Provincial law cannot apply to matters not sufficiently connected to the province
  2. Sufficient connection is characterized by:
    - a) Relationship between enacting jurisdiction
    - b) Subject matter of the law
    - c) Person/entity sought to be regulated
  3. Applicability depends on:
    - a) Order:
      - (1) Would order be undermined if competing regimes are allowed to operate?
      - (2) Must be purposive
      - (3) Must be applied flexibly
    - b) Fairness:
      - (1) Is it fair to the out-of-province defendant?
      - (2) Must be purposive
      - (3) Must be applied flexibly
- This test is not perfect:
  1. It seems to throw out all other tests
  2. It is subjective and risks deviating from legislative intent
  3. It conflates applicability and validity
  4. It makes outcomes difficult to predict

### **Validity of Extraterritoriality:**

- How to tell if extraterritorial legislation is valid: ([BC v. Imperial Tobacco](#))
  1. What is the pith and substance of the legislation?
  2. What is the s.92 head of power?
    - a) Does the pith and substance respect those territorial limitations?

- b) Is pith and substance tangible or intangible?
  - (1) If tangible, find the physical location
  - (2) If intangible, use the sufficient connection ([Unifund Assurance Co. v. ICBC](#)) test
- 3. If it is valid, incidental extraterritorial effects are irrelevant
- 4. Defendant can rebut this using the sufficient connection ([Unifund Assurance Co. v. ICBC](#)) test

### **Aboriginal Rights:**

- Aboriginal title is sui generis ([Guerin v. The Queen](#))
- There is a fiduciary duty of the Crown ([Guerin v. The Queen](#))
  - 1. Quasi-Constitutional Burden on Crown
  - 2. Established by:
    - a) Historical relationship with Crown
    - b) Original occupation of land
    - c) Nature of Indian interest

### **Aboriginal Interjurisdictional Immunity:**

- S. 88 of Indian Act characterizes this
  - *Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal and Statistical Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Act*
- Aboriginal people as persons do not enjoy this privilege ([Dicking The Queen](#))
- S.88 incorporates by reference all valid provincial laws ([Dicking The Queen](#))
  - 1. It does not matter if they impair "indianness"
  - 2. Aboriginal land can still claim IJI
  - 3. Applicability is limited to where provinces have plenary legislative jurisdiction
- The Indian Act is not paramount to any other statute ([Dicking The Queen](#))
  - 1. Parliament cannot unilaterally make these decisions
  - 2. They must be legislated
  - 3. Paramountcy is judicially created and administered

### **Existing Aboriginal Rights:**

- Codified in s.35(1) of Indian Act
- Interpreted generously and liberally ([R v. Sparrow](#))
- General Propositions: ([R v. Sparrow](#))
  - 1. Must have existed at 1982
  - 2. Intention by parliament to extinguish right must be clear and plain
  - 3. Controlled in detail does not amount to extinguished
  - 4. Rights are permitted to evolve over time
    - a) Living tree principle

### **Infringement on Aboriginal Rights:**

- Infringement is possible with justification ([R v. Sparrow](#))

1. Modified Oakes Test
2. Prima Facie Infringement
  - a) Onus is on Aboriginal person
  - b) Is there a relationship between existing right and legislation?
  - c) Is there an adverse restriction?
    - (1) Is the limitation unreasonable?
    - (2) Does the regulation impose undue hardship?
    - (3) Does the regulation deny holders of right their preferred means of exercising that right?
3. Justification
  - a) Onus is on Crown
  - b) Is there a valid legislative objective?
  - c) Is there a balance of priorities?
    - (1) Read in light of fiduciary relationship and the obligations the government has to Aboriginal people
  - d) Are there other pertinent issues?
    - (1) Minimal infringement?
    - (2) Fair compensation?
    - (3) Community consultation?
    - (4) Etc.

### **Protection Under Aboriginal Rights:**

- To claim protection under an Aboriginal right: ([R v. Pamajewan](#))
  1. Characterize the right claimed ([R v. Pamajewan](#))
    - a) The narrower the better
  2. Attach a label to the activity to be protected ([R v. Pamajewan](#))
    - a) Narrower the better
  3. Determine if it is a protected Aboriginal right ([R v. Pamajewan](#))
    - a) Is it in the terms of a treaty?
    - b) Provide evidence that it is an element of practice, custom, or tradition ([R v. Pamajewan](#)) ([Van der Peet](#))
      - (1) Make sure you are band-specific
    - c) Use the Sparrow principles to determine if it is a right existing in 1982 ([R v. Pamajewan](#))
  4. Use the Sparrow test for infringement justification ([R v. Sparrow](#))
    - a) Prima Facie Infringement
    - b) Justification

### **Treaty Rights:**

- How do you interpret a treaty? ([R v. Morris](#))
  1. Look at common intentions
  2. Use historical, political, economic, or social context
  3. Courts can read down common intentions and pick and choose
    - a) Should be liberal and in favor of Aboriginal parties
- How do you claim protection under a treaty? ([R v. Morris](#))

1. Use treaty interpretation, as above
2. Demonstrate that act covers actual right
  - a) Use a respectful approach
  - b) Use a flexible and liberal interpretation
  - c) Activity evolves with time ([R v. Sparrow](#))
3. Treaty rights exclude application of s.88
  - a) Does the provision impair Indianness?
4. Is there meaningful diminution or insignificant interference?
  - a) If you want protection from the statute argue meaningful diminution
    - (1) Needs to be more than a real and substantial connection
  - b) If you want application of the statute, argue insignificant interference

### **Charter Applicability:**

- Intent of Charter is to restrain government ([RWDSU v. Dolphin Delivery Ltd.](#))
- Intent of Charter is to protect individuals from unjust infringement ([RWDSU v. Dolphin Delivery Ltd.](#))
- Charter applies to both the legislative and executive branches of government ([RWDSU v. Dolphin Delivery Ltd.](#))
- Charter does not apply to the Judiciary ([RWDSU v. Dolphin Delivery Ltd.](#))
  1. This is because of the principle of judicial independence
  2. Court orders are not subject to Charter ([RWDSU v. Dolphin Delivery Ltd.](#))
  3. Laws must still be developed with Charter values in mind ([RWDSU v. Dolphin Delivery Ltd.](#))
- Charter can only apply to common law/private litigation if there is governmental intervention ([RWDSU v. Dolphin Delivery Ltd.](#))
- The whole chain of statutory authority is subject to Charter ([Slaight Communications Inc. v. Davidson](#))
- Legislation conferring an imprecise discretion (ie arbitrator) does not allow for Charter infringement ([Slaight Communications Inc. v. Davidson](#))
  1. Unless power is conferred expressly or by necessary implication
  2. This needs undergo a s.1 analysis to be properly determined ([Slaight Communications Inc. v. Davidson](#))
- Charter can be extended to decisions made by administrative bodies subject to Charter control ([Multani](#))
- Charter analysis is not necessary when a common law challenge is made
  1. The onus is on the person alleging a challenge needs be made ([Hills v. Church of Scientology of Toronto](#))
  2. You need only weigh the fundamental value against the underlying principle of the jurisprudence ([Hills v. Church of Scientology of Toronto](#))
  3. Unless the change to common law is so great that this is warranted ([Hyde Case](#))
- Pay attention to the wording in the Charter
  1. Whenever a general term is used, you need to make an argument that it applies to more than natural persons
- All functions of a government entity are subject to the Charter ([Godbout v. Longueuil](#))
- s.2 or s.15 can be violated via the notwithstanding clause

1. This is subject to review after 5 years

### **Government Entity Test:**

-How to tell if something is an entity subject to the Charter

- Control Test: ([McKinney v. University of Guelph](#))

1. Is the body controlled by the government?
  - a) How much control is the government exercising? ([Douglas Kwantlan Faculty Association v. Douglas College](#))
  - b) This requires a factual finding ([Douglas Kwantlan Faculty Association v. Douglas College](#))
2. Look at every factor in isolation
3. Then examine the entity holistically
4. Any one factor subject to government control renders an entity government
5. Look at the degree of control ([Eldridge v. BCAG](#))
6. Look at the relationship to the government ([Eldridge v. BCAG](#))

- Government Policy/Function: ([McKinney v. University of Guelph](#))

1. Does the entity carry out a government policy?
2. Is there a direct and precisely defined connection between the policy and the activity carried out? ([Eldridge v. BCAG](#))
3. A private entity carrying out a government function is subject to the Charter ([Godbout v. Longueuil](#))
  - a) Factors to determine a function are decided on a case by case basis ([Godbout v. Longueuil](#))

### **The Oakes Test:**

- How to tell if a limitation on rights is reasonably and demonstrably justified in a free and democratic society: ([R v. Oakes](#))

1. The onus to prove the infringement is on the party raising the Charter challenge
2. The onus to justify the infringement is on the Crown
  - a) There is a high burden of proof
  - b) The more serious the infringement, the higher the BOP
3. Is there a pressing and substantial objective?
4. Is the infringement proportional?
  - a) Is there a rational connection?
  - b) Is there minimal impairment?
  - c) What is the cost-benefit analysis?

- There are several underlying free and democratic values:

1. Respect for the inherent dignity of the human person
2. Commitment to social justice and equality
3. Accommodation of a wide variety of beliefs
4. Respect for cultural and group identity
5. Faith in social and political institutions that enhance participation of individuals and groups

### **Charter Justification:**

- There is a great amount of deference to government ([Newfoundland \(Treasury Board\) v. N.A.P.E.](#))
  1. When policy decisions are ambiguous ([Newfoundland \(Treasury Board\) v. N.A.P.E.](#))
  2. There is a large margin of appreciation for the choices of government ([Newfoundland \(Treasury Board\) v. N.A.P.E.](#))
- Financial emergencies can be a justification of an infringement ([Newfoundland \(Treasury Board\) v. N.A.P.E.](#))
  1. This needs to survive an Oakes analysis

### **Vagueness:**

- A law will be unconstitutional if it is vague ([R v. Nova Scotia Pharmaceuticals](#))
  1. There needs to be an ability to determine meaning by using reasoned legal analysis ([R v. Nova Scotia Pharmaceuticals](#))
  2. It needs to give sufficient guidance for legal debate ([R v. Nova Scotia Pharmaceuticals](#))
  3. Police need to be controllable by law ([R v. Nova Scotia Pharmaceuticals](#))
  4. Police must not be able to take a vague term and interpret it wildly ([R v. Nova Scotia Pharmaceuticals](#))
- Laws that are vague are unfair to the accused ([R v. Nova Scotia Pharmaceuticals](#))
- There needs to be a standard of notice about new laws ([R v. Nova Scotia Pharmaceuticals](#))
- Laws must offer a grasp to the judiciary ([R v. Nova Scotia Pharmaceuticals](#))
- A charter violation must be prescribed by law ([R v. Nova Scotia Pharmaceuticals](#))
  1. There must be an actual law in existence that authorizes the breach ([R v. Nova Scotia Pharmaceuticals](#))
  2. Then you can answer the question as to whether or not it is a reasonable and justifiable breach ([R v. Nova Scotia Pharmaceuticals](#))
- Vagueness is argued in two ways:
  1. Say there is no law because the law is so vague it can't be a law at all ([R v. Butler](#))
  2. Say the law is so vague it could include anything ([R v. Butler](#))
    - a) Call it overinclusive, overbroad, and void for vagueness ([R v. Butler](#))
    - b) This is argued at the minimal impairment stage of a s.1 analysis ([R v. Butler](#))

### **Remedies:**

- There are merely guidelines, not rules, as to applying remedies ([Schacter v. Canada](#))
- s. 52 remedies include: ([Schacter v. Canada](#))
  1. Striking Down
  2. Severance
  3. Reading In
  4. Delayed Declaration of Invalidity
- s. 24 remedies: ([Schacter v. Canada](#))

1. Used when legislation is valid, but action taken on it is a Charter violation ([Schacter v. Canada](#))
  2. Are not retroactive if legislation is struck down under s.54 ([Schacter v. Canada](#))
  3. Do not allow for delayed declaration of invalidity ([Schacter v. Canada](#))
  4. Are not available if reading in is used ([Schacter v. Canada](#))
  5. Must be “appropriate and just in the circumstances” ([Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#))
    - a) Should meaningfully vindicate the rights of the claimants ([Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#))
    - b) Employ means that are legitimate ([Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#))
    - c) Avoid undue intrusion into legislative role ([Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#))
    - d) Should invoke the function and powers of the court ([Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#))
      - (1) But not go too far over the line
      - (2) Inferred from precedent and normal operation
    - e) Must be fair to the party against whom an order is made ([Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#))
      - (1) It should not place a substantial hardship on that person
    - f) Must be flexible and responsive to the needs of the case ([Doucet-Boudreau v. Nova Scotia \(Minister of Education\)](#))
      - (1) Living tree principle
- There are three steps to find a remedy: ([Schacter v. Canada](#))
1. Identify the extent of the inconsistency ([Schacter v. Canada](#))
  2. Determine whether it should be struck down/severed/read in ([Schacter v. Canada](#))
    - a) In which parts? ([Schacter v. Canada](#))
  3. Determine whether the declaration of invalidity should be temporarily suspended ([Schacter v. Canada](#))
- Three propositions must be measured against a remedy: ([Schacter v. Canada](#))
1. Courts must be conscious of separation of powers ([Schacter v. Canada](#))
  2. There must be a cost-benefit analysis performed if a law is to be struck down ([Schacter v. Canada](#))
  3. Courts must try not to engage in the legislative role too much ([Schacter v. Canada](#))

### **Reading in or Severance:**

- Warranted in only the clearest of cases ([Schacter v. Canada](#))
- Each requirement must be met: ([Schacter v. Canada](#))
  1. Does it further an obvious legislative objective or constitute a lesser interference than striking down would? ([Schacter v. Canada](#))
  2. Is this an acceptable intrusion into the legislative domain? ([Schacter v. Canada](#))
    - a) Justified by an unambiguous choice of means ([Schacter v. Canada](#))

3. Does it make so substantial a change that it would change the nature of the legislative scheme? ([Schacter v. Canada](#))
  4. Does it not touch the budgetary stuff? ([Schacter v. Canada](#))
  5. Reading in is appropriate when it respects the role of the legislature and purpose of the Charter ([Vriend v. Alberta](#))
    - a) If legislation is underinclusive ([Vriend v. Alberta](#))
- Rules for severance:
1. Would the legislature have passed the statute without that provision? ([Vriend v. Alberta](#))
  2. Do the other provisions depend on that provision? ([Vriend v. Alberta](#))
  3. Is the provision essential to the statute? ([Vriend v. Alberta](#))

### **Delayed Declaration of Invalidity:**

- Suspension of invalidity is warranted when:
- Striking down would pose a danger to the public ([Schacter v. Canada](#))
  - Striking down would threaten the rule of law ([Schacter v. Canada](#))
  - A law is declared unconstitutional because of under-inclusiveness ([Schacter v. Canada](#))

### **Freedom of Expression:**

- A s.1 analysis needs to be sensitive to the principles of a free and democratic society ([R v. Keegstra](#))
- Overbroad laws have a chilling effect on legitimate speech ([R v. Keegstra](#))
- The closer you characterize an infringed right to the core of s.2(b), the harder an infringement is to justify ([R v. Keegstra](#))
  1. Artistic expression is at the heart of s.2(b) ([R v. Butler](#))
- Profit motives are not freedom of expression ([RJR-MacDonald Inc. v. Canada AG](#))
- S.2(b) includes both the right to express and the right to receive information ([Harper v. Canada AG](#))

### **Freedom of Expression on Public Property:**

- Location restrictions must be justified under s.1 ([Ramsden v. Peterborough](#))
- Rights of the claimant must be balanced against need for safe and effective operation of state services ([Ramsden v. Peterborough](#))
- Determine if the expression furthers any of the values of freedom of expression ([Ramsden v. Peterborough](#))
- An infringement here is justified when: ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))
  1. The traditional use of the property is not used for free expression ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))
  2. The actual use of the property is not compatible with free expression ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))
  3. The space requires privacy and limited access ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))
  4. There is no legitimate intention under s.2(b) for the expression ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))
  5. Ask yourself:

- a) What is the traditional use of the space? ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))
- b) What is its actual current use? ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))
- c) Is the expression covered in s.2(b)? ([Montreal \(City\) v. 2952-1366 Quebec Inc.](#))

### How to establish an infringement:

- Does the prohibited activity fall within the protection of freedom of expression? ([Irwin Toy Ltd. v. Quebec AG](#))
  - 1. Is it an activity that has content? ([Irwin Toy Ltd. v. Quebec AG](#))
  - 2. Does it convey meaning? ([Irwin Toy Ltd. v. Quebec AG](#))
  - 3. It is not protected if it is violence ([Irwin Toy Ltd. v. Quebec AG](#))
- Is there an infringement on s.2(b)? ([Irwin Toy Ltd. v. Quebec AG](#))
  - 1. This is done two ways: ([Irwin Toy Ltd. v. Quebec AG](#))
    - a) What is the purpose? ([Irwin Toy Ltd. v. Quebec AG](#))
      - (1) Is it aimed at regulating content? ([Irwin Toy Ltd. v. Quebec AG](#))
      - b) What is the effect? ([Irwin Toy Ltd. v. Quebec AG](#))
        - (1) Does it limit freedom of expression? ([Irwin Toy Ltd. v. Quebec AG](#))
- The prohibited activity must promote one or more of the following values: ([Irwin Toy Ltd. v. Quebec AG](#))
  - 1. Seeking and obtaining truth ([Irwin Toy Ltd. v. Quebec AG](#))
  - 2. Participating in social and political decision-making ([Irwin Toy Ltd. v. Quebec AG](#))
  - 3. Individual self-fulfillment ([Irwin Toy Ltd. v. Quebec AG](#))
  - 4. Is the challenged legislation too vague? ([R v. Butler](#)) ([Irwin Toy Ltd. v. Quebec AG](#))

### Is the infringement justified?

- Use the Oakes Test ([R v. Oakes](#))
  - 1. Is there a pressing and substantial objective? ([Irwin Toy Ltd. v. Quebec AG](#))([R v. Oakes](#))
    - a) It can accept social science evidence ([Irwin Toy Ltd. v. Quebec AG](#))
    - b) It can be aimed at protecting a vulnerable group ([Irwin Toy Ltd. v. Quebec AG](#))
    - c) This can have a shifting purpose, allowing new objectives into original legislation ([R v. Butler](#))
    - d) You need to make sure you identify a pressing and substantial objective that could have been intended by the legislation ([R v. Butler](#))
  - 2. Is it proportional?
    - a) Is there a rational connection? ([R v. Oakes](#))
    - b) Is there minimal impairment? ([R v. Oakes](#))
      - (1) Deference is given to parliament to determine the best method ([Irwin Toy Ltd. v. Quebec AG](#))
      - (2) The courts shall not second-guess parliament each time. As long as the impairment is not harsh, it is fine ([R v. Bryan](#))
        - (a) This needs evidentiary support

- (3) You need to look at contextual factors, which include: ([Harper v. Canada AG](#))
    - (a) Nature of the harm and the inability to measure it ([Harper v. Canada AG](#))
      - i) You can use social science evidence for this
      - ii) In the absence of that, use logic and common sense ([R v. Bryan](#))
    - (b) Court may rely on the reasoned apprehension of the harm ([Harper v. Canada AG](#))
    - (c) Vulnerability of the group ([Harper v. Canada AG](#))
    - (d) Subjective fears and apprehension of harm ([Harper v. Canada AG](#))
    - (e) Nature of the infringed activity ([Harper v. Canada AG](#))
    - (f) These will speak to the pressing and substantial objective
  - (4) As long as the measures taken:
    - (a) Are not redundant ([R v. Keegstra](#))
    - (b) Further the pressing and substantial objective ([R v. Keegstra](#))
    - (c) Are a valid s.1 aim ([R v. Keegstra](#))
- c) What is the cost-benefit analysis? ([R v. Oakes](#))

### **Freedom of Expression in Elections:**

- Elections are based on an egalitarian model ([Harper v. Canada AG](#))
  - 1. Wealth is the main obstacle to this ([Harper v. Canada AG](#))
- To promote egalitarian model, there needs be freedom of information ([Harper v. Canada AG](#))
  - 1. This is included in s.2(b) ([Harper v. Canada AG](#))
    - a) Right to express and right to receive information ([Harper v. Canada AG](#))
    - b) This is at the periphery of s.2(b) ([R v. Bryan](#))
- There is a natural deference to parliament with regard to political discourse ([R v. Bryan](#))

### **Freedom of Expression as a Positive Right:**

- Apply the Irwin Toy test ([Irwin Toy Ltd. v. Quebec AG](#))
- Sometimes a claim for protection as a positive right may not be included
  - 1. This is based on Haig case
- To determine: ([Baier v. Alberta](#))
  - 1. Is the restriction on the right included in a regime? ([Baier v. Alberta](#))
    - a) Claiming a unique role is not the same as claiming a fundamental freedom ([Baier v. Alberta](#))
  - 2. Does the legislation substantially interfere with freedom of expression? ([Baier v. Alberta](#))
  - 3. Is the government responsible for the inability to exercise the right? ([Baier v. Alberta](#))
  - 4. Narrow the right to the basic minimum ([Baier v. Alberta](#))
    - a) Use the term fundamental to see if it passes this test ([Baier v. Alberta](#))
- It is better to argue underinclusiveness under s.15

### **Charter Rights Test:**

- Does the Charter even apply?
  1. s. 32 analysis necessary
  2. Check if claimant is protected
  3. Check if Charter applies
- Was there an infringement of rights?
  1. Does it fall within the scope of the right being claimed?
  2. Is there an infringement?
    - a) Purpose of legislation?
    - b) Effect of legislation?
      - (1) Real and legal
- Can the government justify the infringement?
  1. Is there a law?
    - a) Is it too vague?
  2. Use the Oakes Test
    - a) Characterize
    - b) Use contextual evidence and factors
    - c) Use "free and democratic principles"
      - (1) Pressing and substantial objective
      - (2) Rational Connection
      - (3) Minimal Impairment
      - (4) Cost-Benefit analysis
- Does a remedy apply?
  1. s.52 is always applicable
    - a) Can you read in?
    - b) Should you declare invalidity?
  2. s.24 remedies for individual claimants