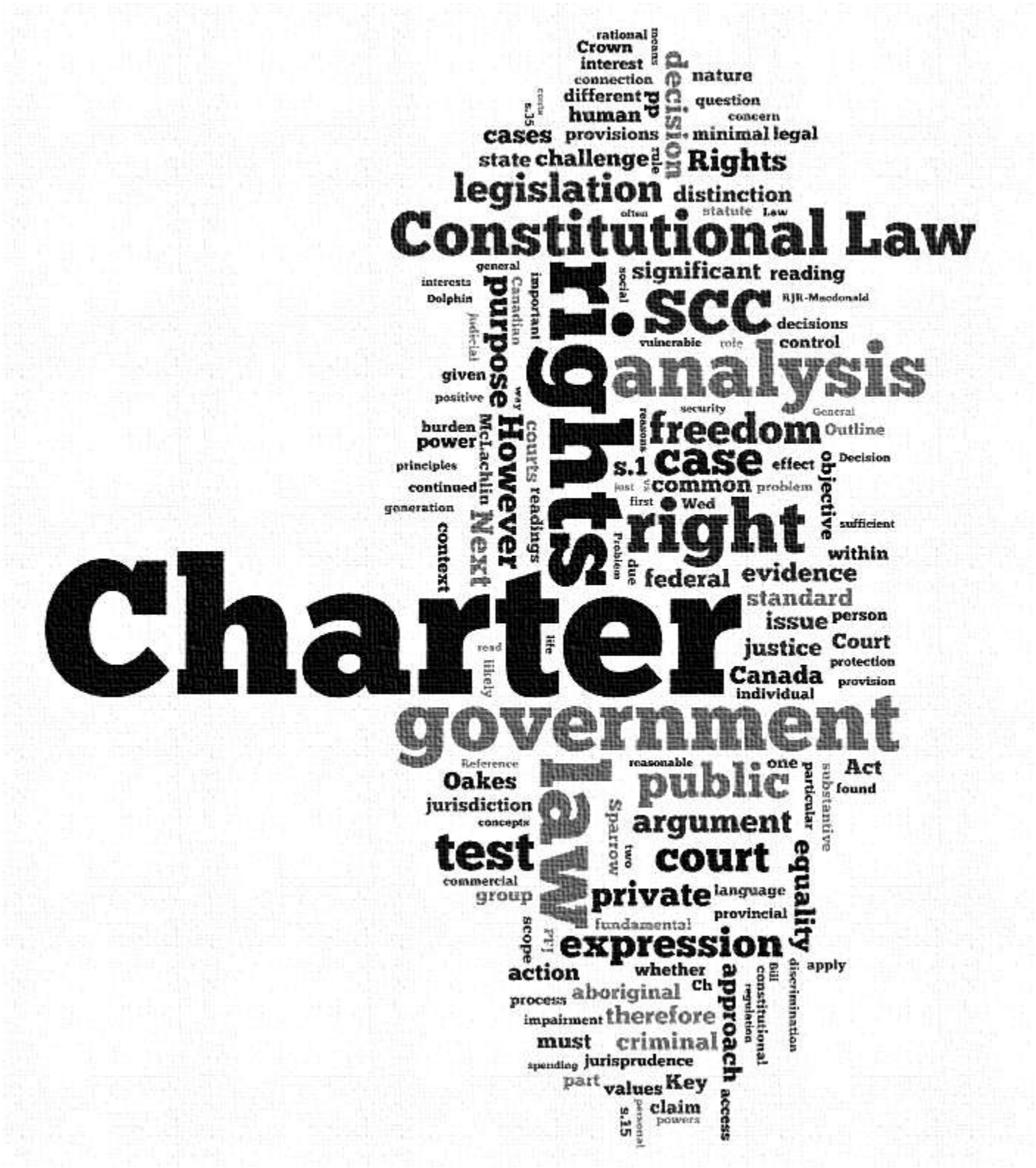
Law 100: Constitutional Law

G. Morgan (Lessard, Spring 2012)



General Constitutional Principles

Parliamentary Sovereignty (A.V. Dicey; inherited from British constitution per Preamble)		
Concept	***Details***	***Key Ideas***
Parliamentary Sovereignty (Britain)	**Supremacy** of legislative bodies; in other jurisdictions, considered an unqualified right to **make and unmake any law** whatsoever; comprehensive law making power; principle of **exhaustiveness** (exhausts all the possibilities of the sorts of laws that one can make)	• Supreme • Unqualified • Exhaustive
Parliamentary Sovereignty (Canada)	(1) **not** compromised by **divided sovereignty** (federal/provincial) (2) supremacy has **never been exhaustive**; qualified by substantive constitutional protections* for **language rights** and **religious education** in *BNA Act* (not intended to constrain but to protect rights → however, may not be functionally true) (3) future parliaments cannot be bound by decisions of past parliaments unless a constitutional or quasi-constitutional document (*CAP*)	• Divided sovereignty • Qualified • Language rights • Religious education
Constitutional supremacy	The constitution delineated the powers of parliaments/legislatures (division of powers and constitutional protections) therefore it is supreme (can bind the legislature.)	• Role of written text • Division of powers • Constitutional protections
Judicial supremacy	Constitutional supremacy is really judicial supremacy as the judiciary interprets the constitutional text Cynical: judiciary only has interpretative role (substantive changes are in the amending formula)	• Role of courts • Role of interpretation

Rule of Law (A.V. Dicey; inherited from British constitution per Preamble)		
Element	***Details***	***Key Ideas***
Rule against the arbitrary exercise of state power	All power must conform to law; there must be laws in society (**no legal vacuum**); if state officials act without the authority of law, then the actions are arbitrary; **narrow** protection (only requirement that the power be **written in law**)	• Written requirement • Arbitrariness restriction • Narrow protection
Formal equality	No privileging according to class, rank or status; **fundamental notion of fairness** known as formal equality (not a robust description that covers discrimination); **thin** protection against formal inequality	• Inequality restriction • Thin protection
Courts articulate the basic principles of the English constitution	As **British** constitution is unwritten, **courts identify principles** (slight change post-incorporation into EU, as now subject to EU's Human Rights codes); in **Canada**, less true as we have **always had written texts** to articulate constitutional rules and principles	• Role of courts
Conception	***Details***	***Key Ideas***
Positive/Minimalist	Laws must **exist** as society is governed by rules.	• Requirement for laws
Proceduralist	Laws must **operate fairly***; assessment of the law and how it operates (not just that it exists but that it operates fairly); minimum **standard** of fairness **articulated by courts** * Fairly = minimal definition that focuses on the **process of law**, not its content (i.e. application not what is captured)	• Fair operation • Role of courts • Process of law
Substantive	Laws must be **fair** and **just** in a **substantive** sense; not simply that the laws exist ((positivist) and operate fairly (proceduralist) but that the law is **fundamentally fair**; more robust and substantive conception of justice; rarely invoked in Canada unless grounded in the Constitution	• Substantively fair and just • Fundamental fairness
Theorist	***Details***	***Key Ideas***
John Borrows, "Questioning Canada's	(1) Aunt Irene's stories as **legal traditions** of his community → shifted understanding of what constitutes law in the territory of North America	• Aboriginal legal traditions

Title to Land"	(2) Settlers declared the application of rule of law on a territory in which a legal order already existed: (a) **arbitrary exercise of sovereignty** to erase existing legal traditions; (b) **non-recognition** (did not recognize existing laws in exercise of sovereignty) (3) **trickery** at core of treaty negotiation process or absent treaties (4) solution: repair sovereignty (5) challenge: potential assumption that law (and the state) must always exist in his narrative of override	• Arbitrary exercise of sovereignty • Non-recognition • Trickery • Narrow rule of law
Catharine MacKinnon, from *Towards a Feminist State* (CP	(1) law on its own terms is exclusive of women as it **conforms to/enforces male power**; (2) notion of **objectivity/neutrality** in law can only be measured with its consistency to these experiences it is built around; (3) **substantive** measure of rule of law otherwise it will only continue to erase other perspectives	• Dominance of male power • Undermined notion of objectivity/neutrality • Substantive rule of law

British Columbia v. Imperial Tobacco (SCC 2005)	*Imperial Tobacco*
Case Details	***Key Concepts***
3 prongs: (1) "the law is **supreme** over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power" (*Manitoba Language Rights*); (2) "the creation and maintenance of an **actual order of positive laws** which preserves and embodies the more general principle of **normative order**" (*Manitoba Language Rights*); (3) "the relationship between the statute and the individual … [must] be **regulated by law**" (*Quebec Secession*)	• Rule of law • Qualification of normative force • Manner and form
Qualification of "normative force" of rule of law: (1) typically the constraints of the rule of law apply to the executive and judicial branches (*Manitoba Language Rights* and *Quebec Secession*); (2) "Actions of the legislative branch are constrained too, but on in the sense that they must comply with legislated requirement as to **manner and form**" (¶60)	
Two justifications for a cautious approach to the scope of rule of law: (1) must operate in conjunction with our constitution so not to make written constitutional rights redundant: "[t]he rule of law is not an invitation to trivialize or supplant the Constitution's written terms" (¶67); (2) other constitutional principles recognized by the Court (e.g. democracy and constitutionalism) uphold the notion that courts do not intervene with legislation that does not violate these constitutional principles/the Constitution → intervention through democratic election/legislature	

Reference re Canada Assistance Plan (SCC 1991)	*CAP*
Case Details	***Key Concepts***
"the Plan" (CAP): (1) lynchpin of the socially robust welfare state in Canada; (2) 50:50 cost-sharing legislation between federal and provincial executives; (3) unilateral federal decision to limit 50% contribution to provinces w/o equalization payments to 5% increase	• Parliamentary sovereignty • Consent as a substantive restraint • Role of Cabinet (executive / legislative) • Courts do no impose on legislatures • Manner and form requirements
Division of powers: (1) S.91 (federal): larger tax jurisdiction and retention of WW2 tax rates for equalization payments and 50% of CAP costs; (2) S.92 (provincial): social welfare under either S.92(13) or S.92(16)	
Argument (1): does the federal government have the power to unilaterally change the terms of the agreement? → agreement does not contain formula for equalization payments (contained in the statute) therefore **parliament can amend unilaterally as sovereign subject to the Constitution**	
Argument (2a): the statute outlines a process that notice (consent) must be given → rejected as S.8 specifies amendment of agreement (not of statute where payment formula contained); secondary rejection that **consent is not a procedural requirement but a substantive restraint** (bind parliament) Argument (2b): S.54 makes Cabinet the body that introduces money bills (this statute) and Cabinet is part of the executive → **Cabinet acts in its legislative function** when introducing bills	
Argument (3): **doctrine of legitimate expectations** (given negotiation by first ministers and expectation in S.8, there is a legitimate expectation of consultation prior to unilateral decision) → rules of natural justice (i.e. procedural rights in the English legal system) do not apply as **courts do no impose on bodies exercising purely legislative functions**	

Argument (4): common law principles that **Parliament can bind its process in future through manner and form requirement**s (and therefore the requirements of notice, consultation and consent are "manner and form" requirements) → consent is substantive, not manner and form	

Operation Dismantle v. The Queen (SCC 1985)	*Operation Dismantle*
Case Details	***Key Concepts***
Constitutional challenge: dispute the right of Parliament to permit US testing of military hardware over northern Alberta Role of Cabinet: in this case, Cabinet was acting as the executive and therefore fully reviewable under the *Charter*/rules of natural justice	• Role of Cabinet (Executive / Legislative)

Constitutional Conventions (from Hogg, "Conventions" in *Constitutional Law of Canada* 3rd ed.)

Concept	***Details***	***Key Ideas***
Definition	(1) "rules of the constitution that are not enforced by the law courts" (Hogg 1) (2) prescribe how to exercise legal power (i.e. governs actions) (3) "a rule which is regarded as obligatory by the officials to whom it applies" (Hogg 3)	• Not enforceable by courts • Exercise of legal power
Application by Courts	(1) may be considered in granting a broader interpretation of a legal issue	
Purpose	"the conventions 'do not exist in a legal vacuum.' They regulate the way in which legal powers should be exercised, and they therefore presuppose the existence of the legal powers. Their purpose is 'to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period.' They bring outdated legal powers into conformity with current notions of government" (Hogg 6)	
Convention	***Details***	
Responsible government	In the constitutional text, power flows from the top down. → in reality, expectation that the government is accountable to the people. Practise that evolved out of political practise (recognition of democratic self-government by Britain, period of decolonization and the rise of the settler governments)	
Governor General	While conferred extensive power in the Constitution, convention that power will only be exercised in accordance with Cabinet or the Prime Minister. Likewise, convention that Royal Assent will never be withheld.	

Unwritten Principles

Concept	***Details***	***Key Ideas***
Function of unwritten principles	(1) "inform and sustain the constitutional text" (*Quebec Secession* ¶49) (2) "vital unstated assumptions upon which the text is based" *Quebec Secession* ¶49) (3) "function in symbiosis" → "[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other" (*Quebec Secession* ¶49) (4) "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood" (*Quebec Secession* ¶51) (5) "essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree'" (*Quebec Secession* ¶52)	• Foundation of the text • Symbiotic relationship • "Lifeblood" • Living tree doctrine
Application of unwritten principles	Areas where unwritten principles are of assistance (*Quebec Secession* ¶52): (a) "interpretation of the text" (b) "delineation of spheres of jurisdiction" (c) "scope of rights and obligations" (d) "role of our political institutions"	• Interpretative aid • Clarification of jurisdiction, rights, obligations and institutions
Limits of unwritten principles	Primacy of the written constitution: "promotes legal certainty and predictability" and "provides a foundation and a touchstone for the exercise of constitutional judicial review" (*Quebec Secession* ¶53)	• Primacy of written constitution
Lessard's comments on	(1) Unwritten principles supplement the text (fill out the gaps in the written	• Supplement the text

unwritten principles	constitution) (2) Court determines that they have a normative force (unenforceable), although in a later decision they will be used with legal force	• Normative or legal force varies
Principle	***Details***	
Federalism	Canada as a federal state, but with significant powers granted to federal government (threaten to destabilize balance. Role of courts "to control the limits of the respective sovereignties" (*Quebec Secession* ¶56). Recognition of "the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction (*Quebec Secession* ¶58). Facilitation of "the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province" (*Quebec Secession* ¶59)	
Democracy	Democracy as the supremacy of the sovereign will of the people. In a Canadian federal state, democracy involves "different and equally legitimate majorities in different provinces and territories and at the federal state" (*Quebec Secession* ¶66). Democracy is both policies of "the particular concerns and interests of people in [the] province" and "a democratic community in which citizens construct and achieve goals on a national scale through a federal government" (*Quebec Secession* ¶66). Democracy must exist in conjunction with rule of law: "democratic institutions must rest, ultimately, on a legal foundation" (*Quebec Secession* ¶67).	
Constitutionalism and Rule of Law	Rule of law "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action (*Quebec Secession* ¶70). Constitutionalism encoded in S.52(1) of the *Constitution Act, 1982*. Constitutionalism secures (1) attention to and protection of fundamental human rights and individual freedoms; (2) institutions and rights to protect minority groups; (3) a division of power that distributes power to different levels of government (*Quebec Secession* ¶74). "Constitutionalism facilitates, indeed, makes possible a democratic political system by creating an orderly framework within which people may make political decisions" (*Quebec Secession* ¶78)	
Minority Rights	Minority rights, not always perfectly achieved, in Constitution: "historical compromises" on religious education and language rights (*Quebec Secession* ¶79); *Charter* (*Quebec Secession* ¶81); and existing aboriginal and treaty rights (*Quebec Secession* ¶82)	

Reference Power

Concept	***Details***	***Key Ideas***
Provision of reference power	Federal → S.53(1) *Supreme Court Act* (CP 4-5) →"The Governor in Council may refer to the Court for **hearing and consideration important questions of law or fact** concerning (a) the **interpretation** of the Constitution Acts; (b) the **constitutionality** or interpretation of any federal or provincial legislation; […] (d) the **powers** of the Parliament of Canada, or of legislatures of the provinces, or of the respective government thereof, whether or not the particular power in question has been or is proposed to be exercised" Provincial →S.1 *Constitutional Question Act* (CP 4-6) → "The Lieutenant Governor in Council may refer **any matter** to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court **shall hear and consider it**"	• Created in *Supreme Court Act* (federal) or *Constitutional Question Act* (provincial)
Details of reference power	(1) can also refer to the trial division to enable evidence and witnesses as when referred directly to the CA or SCC it's purely a question of law (2) typically sustained under *Constitution Act 1867* S.101 (does not exclude reference questions in grant of power to create SCC)	• Question of law vs. evidence • Sustained under S.101
Justiciability Doctrine	**Is the question/issue amenable to a court's adjudication?** → courts in Canada have refused to hear references on the basis of justiciablilty (despite the mandatory language of *SCA* S.53(1) or *CQA(BC)* S.1)	• Amenability to adjudication • Abstract/theoretical • Lack of information

	(1) Question is too **abstract/theoretical** → is the question too imprecise or ambiguous? (2) Question **lacks information** → is there insufficient information to adjudicate? (common in reference cases as there are no trials that produce the richness/diversity of evidence) (3) Question **interferes** with the **legislative process** → is the question political as opposed to legal? (4) Question is **beyond the scope** of the Court (Canadian version of the "political questions doctrine" in US jurisprudence) → does the matter lie outside the expertise (legal) of the courts? * Justiciability doctrine is tailored for the reference question to accommodate the abstractness of asking a question (as opposed to bringing a case). SCC will limit response to meet justiciability.	• Interference with legislative process • Beyond the scope of the court

Reference re Secession of Quebec (SCC 1998)	*Quebec Secession*
Case Details	***Key Concepts***
Four unwritten principles: (1) **federalism**; (2) **democracy**; (3) **constitutionalism** and **the rule of law**; (4) **rights of minorities** (¶32) (1) Each province is free to develop its own jurisdiction (self-government, sovereign within their spheres.) (2) Democracy undergirds the inclusion of the interests of the nation in the secession of a region. (3) Acts of Quebec must be consistent with constitutionalism and the rule of law; enhances democracy. (4) Minority rights also encompasses indigenous groups within Quebec (federal fiduciary obligation.)	• Unwritten principles • Constitutionality of reference power • Justiciability of reference • International law • Democratic process
Amicus curia Argument (1): **reference jurisdiction is unconstitutional** as it violates the separate of judiciary from the legislative/executive branches, and courts adjudicate (do not advise governments) → precedents that uphold reference power; S.101 does not preclude the SCC from issuing an opinion provided primary role is a court of appeal	
Amicus curia Argument (2): questions are of **international law** where the SCC has no jurisdiction	
Amicus curia Argument (3): questions are **not justiciable** as they are too abstract/theoretical, too imprecise/ambiguous, lack information and of a political nature → court decides that (1) abstraction is "par for the course" with the reference; (2) three questions are clear; (3) questions are fundamentally legal in nature (therefore within knowledge/no need for evidence); and (4) clear line between areas of legal and political expertise (and will stop before the line is reached)	
Amicus curia Argument (4): questions violate the **democratic process** of Quebec → Quebec considered it interference with the Quebec Assembly's right to unilaterally secede; Court determines that it is	
Ref. Question (1): can Quebec unilaterally secede under the Canadian constitution? Ref. Question (2): can Quebec unilaterally secede under international law? Ref. Question (3): if there is a conflict between these two responses, how is it reconciled?	
Court decision: Quebec cannot unilaterally secede (provisions of substantial majority in Constitutional decisions), but the unilateral declaration of secession does have force in that it activates a response from its partners in federalism → obligation to negotiate seriously. Imposed constraints: clear majority on a clear question in a referendum → court supervision, however, would be inappropriate as it would trespass on political responsibilities and obligations.	

Reference re a Resolution to amend the Constitution (SCC 1981)	*Patriation Reference* (not read)
Case Details	***Key Concepts***
Conventions are **justiciable** but they cannot **be enforced**.	• Justiciability of constitutional conventions • Three part test for conventions
Three part test to determine out what is a convention: (1) **Precedents**: Precedence of political practice needs to be shown. It has to have been done this way for a significant amount of time or has always been done this way. (2) **Beliefs** of Political Actors: Show evidence that political actors believe they are bound to do this. There is no other option. (3) **Reason**: There has to be some sort of reason why this is a constitutional convention.	

Application: in this case Saskatchewan as an intervener argued that as a federalist state it was unacceptable that Trudeau could unilaterally amend the constitution. The courts said that substantial, not unanimous, consent of the provinces should be required.	

Reference re Provincial Judges (SCC 1997)	*Provincial Judges*
Case Details	***Key Concepts***
Reference Question: how does *Charter* S.11(d) (read-in judicial independence) restrict provincial governments from reducing provincial court judge salaries?	• Judicial independence • Unwritten principles • Gaps in written constitution
Contextual Framework (Majority): "maintenance of public confidence in the impartiality of the judiciary" (*Provincial Judges* ¶10); "maintenance of rule of law" (*Provincial Judges* ¶10)	
Decision: affirms unwritten principle of judicial independence; proposes commission to depoliticize salary changes; extends inferior courts protection of Superior Courts	
Principles Established: (1) salaries may be reduced, increased or frozen as part of an overall economic measure aimed at persons remunerated from public funds, or aimed at provincial court judges only (2) provinces must create independent, effect and objective commissions to review proposed changes (3) commissions must review salaries in light of living and other relevant factors (approx. 3-5 years) (4) while commission decisions are non-binding, governments must justify departures (including in court) (5) judges may not negotiate directly with the government, but may make representations	
Judicial independence: (1) while statutory protections of judicial independence are fine, there is a minimal standard → and not all statutory regimes meet this standard (hence judicial review) (2) *Charter* S.11(d) insufficient → judicial independence to address gaps in existing written law; written constitution is too limited to guarantee judicial independence (*Constitutional Act, 1867* S.96-100 apply to superior courts; *Charter* S.11(d) applies to criminal law proceedings)	
Unwritten principles: unwritten principles are both justiciable and enforceable (not just justiciable); gaps in written constitution legitimately filled by unwritten principles → "the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understanding which are not found on the fact of the document itself" (*Provincial Judges* ¶89) → "In fact, it is in the preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located" (*Provincial Judges* ¶109)	
Dissent (LaForest): *Charter* S.11(d) provides for the same conclusions re: judicial independence given that the majority of the affected courts had significant criminal law jurisdiction (NOT READ)	

British Columbia (AG) v. Imperial Tobacco (SCC 2005)	*Imperial Tobacco*
Case Details	***Key Concepts***
Unwritten principle: judicial independence (1) foundational principle: *Charter* S.11(d); *Constitutional Act, 1867* Preamble, S.96 and S.100 (2) "to safeguard our constitutional order and to maintain public confidence in the administration of justice" (*Imperial Tobacco* ¶44) (3) requires freedom to act without improper "interference from any other entity" (*Imperial Tobacco* ¶45) (4) core characteristics of judicial independence: "[s]ecurity of tenure, financial security and administrative independence" (*Imperial Tobacco* ¶46)	• Judicial independence • Unwritten principles
Role of judiciary: "interpret and apply the law that its role requires it to apply" (*Imperial Tobacco* ¶50)	
Parliamentary sovereignty: "[w]ithin the boundaries of the Constitution, legislatures can set the law as they see fit" (*Imperial Tobacco* ¶52)	

Constitutional Interpretation Approaches

Approach	***Details***
Living tree	Courts have adopted this interpretative doctrine to justify a general and liberal interpretative approach to the

doctrine	Constitution, and the adaptation of the Constitution to social and historical conditions. Frequently endorsed as the "purposive approach" in Charter/aboriginal rights cases. (from Calder): A law should be interpreted by reference to contemporary ideals; Constitution's provisions must be permitted to evolve in response to changing ideals and shifting social conditions. Judicially activists; broader role for courts in interpretation of the constitution; tailor expectations of approach to current/contemporary context; society changes (no static norm); mechanism for adjustment and change outside of amending formula (which can be a lengthy process that creates a gap between society and the law); responsible to minority ideas/interest; power to create/institute remedies; judicially efficient; consistent with narrative of evolution; broad language deliberately used by framers to bank on judicial interpretation, evolution
Framer's intent	(from Calder) a statute should be given the meaning intended by its creators. Object is to ferret out the historical intention Judicially conservative; courts are not democratic (leave decisions to legislative bodies); institutional limits of courts; separation of law and politics; dependence on amending formula (change from amendments not courts); ensures stability and predictability

Persons Case / Reference re British North America Act 1867 (UK) S.24 (SCC 1928)	*Persons Case (SCC)*
Case Details	***Key Concepts***
Legal question: do women constitute "persons" under S.24 of *BNA Act*? SCC decision: women are not persons in this section of *BNA Act*	• Originalist / framer's intent • Intention of the drafters of the Constitution • Narrow interpretation
Interpretative approach: originalist (US: framer's intent) → emphasis on attention to the intention of the drafters of the Constitution. (a) common law as repository of key values and principles; (b) prevent radical change (i.e. tyranny); (c) maintain consistency (stability, predictability); (d) parliamentary sovereignty; (e) courts not perceived as democratic; (f) separation of powers (esp. judicial from legislative branch); (g) intermediate (intermediary) status of SCC; (h) temporal proximity to time of enactment makes it more compelling; (i) maintenance of order and *status quo*	
Sources, techniques and arguments: (1) Close read of statutes; common law; civil and canon law; *Lord Brougham's Act*; *Chorlton v. Lings*; historical record; ordinary meaning (temporally specific to 1867) (2) Orthodox interpretation through the common law's narrow lens/frame (women in England were legally incapable of holding public office) → repository of legal principles (3) Contextual: office of senator created in *BNA Act* therefore right to hold office must be in the statute	

Persons Case / Edwards v. Canada (AG) (JCPC 1930)	*Persons Case (JCPC)*
Case Details	***Key Concepts***
Legal question: do women constitute "persons" under S.24 of *BNA Act*? JCPC decision: women are persons in this section of *BNA Act*	• Dynamic / "living tree" approach / doctrine of progressive interpretation • Distinction between Canada and Britain • External and internal evidence
Interpretative approach: dynamic or "living tree" or doctrine of progressive interpretation → Constitution is organic and therefore grows to accommodate and include social growth/reform/change: "their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasons therefore which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development" (1-67)	
Sources, techniques and arguments: (1) Structural argument: where the words are ambiguous, you can look to other areas of Constitution (2) Two sources of interpretative meaning: (a) external evidence (previous legislation and decided cases; and (b) internal evidence derived within the four corners of the act (3) Precedents must be analogous (4) Distinguish Canada from Britain: "not to interpret legislation meant for one community by a rigid adherence to the customs and traditions of another" (1-67); downplays British precedents that are a stumbling block to the Canadian question (5) Similar focus on words and ordinary meaning as SCC (but ignores the history and custom)	

Colonialism and Aboriginal Peoples

Timeline of Legal Understanding of Aboriginal Title	
	Multiple "contacts"; trade → Commercial relationships, typically of mutual benefit
1763	Royal Proclamation and Treaty of Niagara
1867	BNA Act → S.91(24)
1888	*St Catherine's Milling v. The Queen*: *Royal Proclamation* / Crown "pleasure" as basis of aboriginal title
1973	*Calder v. British Columbia (AG):* common law and facts of prior occupancy is the basis of aboriginal title
1982	*Constitutional Act 1982:* S.35 aboriginal rights entrenched
1984	*Guerin*: affirms *Calder*'s understanding of aboriginal title; fiduciary relationship
1990	*Sioui*
2001	*Chippewas*

Canada's Indigenous Constitution (Borrows)		
Concept	***Details***	***Key Ideas***
Law as tradition	(1) law and culture are implicated in each other → law as a cultural phenomenon (Borrows 8) (2) binary of a colonial character: common/civil law in law school → indigenous law in another department (3) discredits separation of law and notions of legal neutrality → culturally-specific content of law (4) definition of "legal tradition" from *The Civil Law Tradition* (qtd. Borrows 7): "A legal tradition … is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways law is or should be made, applied, studied, perfected, and taught" (5) legal traditions are not necessarily state-centred → legal pluralism framework for understanding this idea; authentic/living tradition is one that moves us beyond itself; law as imbedded in culture (6) law as adaptive/flexible/evolving → space for indigenous law (7) critical point re: the presumption of indigenous legal traditions is that they are static (and therefore not able to evolve) → museum/cultural artefacts (8) jurisprudence rules: core of tradition must be pre-contact; questions point of contact, whether the tradition was pre- or post-contact, whether it developed in relation to "western" laws	• Implication of law in culture, and culture in law • Legal pluralism • Law as flexible • Indigenous legal traditions → implication that they are static?
Law as hierarchy	(1) critique of the story of the constitutional foundations of Canadian laws (2) Canadian constitutional order as self-contradictory and not living up to assertions of core principles such as rule of law (3) the legal hierarchy puts custom in the realm of morality (at the bottom of the legal hierarchy; unenforceable) (4) key element lacking from the creation story is consent → related to the reception of British law (5) model of numbered treaties ('creation stories') (6) treaties that are understood as bringing Canada into existence through consent with indigenous nations are examples of intersocietal law	• Critique of Canadian constitutional order • Absence of consent in creation story • Intersocietal laws
Sources of indigenous law	(1) sacred law (creation stories as repositories of core values) (2) natural law ("reading the relationships of the world", discerning principles about conservation and resource management from the physical world) (3) deliberative law (specific to indigenous traditions, i.e. feasting traditions and councils and circles for dispute resolution) (4) positivistic law (based on the authority of the person asserting the law) (5) customary law (practises with strong historical and socially binding forces) (6) polemical thrust to push back on the understanding that indigenous law is	• Sacred law • Natural law • Deliberate law • Positivistic law • Customary law

	simply customary law	

Legal Framework of Aboriginal Title

Case	***Details***
Royal Proclamation 1763	Two possible interpretations: (1) asserts the independence and sovereignty of the indigenous nation as well as Britain (2) affirms sovereignty of the Crown and the right to the underlying title with aboriginal title "as the pleasure of the Crown"
BNA Act 1867	S.94(2): federal government acquires jurisdiction for "Indians and lands reserved for Indians"
St. Catherine's Milling v. The Queen (1888)	JCPC: under the Royal Proclamation, the Crown could extinguish interest of aboriginal people to occupy land "at the pleasure of the Crown"
Calder v. British Columbia (1973)	(1) Argument that the Royal Proclamation does not have purchase in BC but Court notes that Proclamation moved westward with declaration of sovereignty (2) Court rejects the Proclamation as source of aboriginal title (and that therefore that the title cannot be extinguished by the Crown) (3) Aboriginal title is an inherent right at common law (based on prior occupancy) (4) However, 3:3 split on whether title was extinguished: (a) title was extinguished as BC has been settled and operating under an assumption of title, or (b) title was NOT extinguished as there was not clear and proper intent

Guerin et. al. v. The Queen (SCC 1984)	*Guerin*
Case Details	***Key Concepts***
Facts: Musqueam Indian Reserve (Chief and Councillors on their own behalf and the behalf of all Band members) voted on a lease arranged by the federal Crown to surrender 162-acres to the Shaughnessy Heights Golf Club based on a different set of lease terms than were included in the agreement. Nature of aboriginal title is that land cannot be sold directly except to the Crown (therefore dependant on the federal Crown to conduct transactions related to reserve land per Proclamation). Court finds breach of trust, and failure to exercise requisite care and management as trustee. Damages awarded in federal court (trial) of $10,000,000.	• Fiduciary relationship • Affirms Calder on source and nature of aboriginal title
Fiduciary Obligation: fiduciary relationship from private law and commercial relationships/family relationships → relationships between private person; responsibility imposed on the Crown in the *Proclamation* imposes the federal government now → obligation on Crown (federal government) to meticulously pursue aboriginal interests given this responsibility	
Source and Nature of Aboriginal Title: reaffirms *Calder*: common law doctrine of occupancy; inalienable component carried forward across the centuries; significant as *Guerin* was a majority decision, but it wasn't the holding (ratio)	

R. v. Sioui (SCC 1990)	*Sioui*
Case Details	***Key Concepts***
Facts: Huron band cutting down trees and camping in non-designated spots of provincial park. Was this use consistent with 1760 treaty that granted rights to carry on customs and religion in territory of park (provided use not incompatible with Crown objectives)?	• Relationship of sovereign nations
Decision: upholds Huron treaty rights → provincial legislation does not apply to the extent that it infringes these rights as use was consistent with Crown objectives	
Relationship between Huron nation and the Crown: historically similar to those maintained between sovereign nations; military and pragmatic pressures to treat indigenous nations as independent nations → treaties premised on this relationship	

Chippewas of Sarnia v. Canada (AG) (ONCA 2001)	*Chippewas*
Case Details	***Key Concepts***
Relationship: affirms nation-to-nation relationship in *Sioui*; *Royal Proclamation* cannot be read apart from the Treaty of Niagara (rejects de-contextual approach)	• Nation-to-nation • Contextual
Natural Parents v. Superintendent of Child Welfare (SCC 1976)	*Natural Parents*

Case Details	***Key Concepts***
Facts: Aboriginal child in foster care. Application of foster parents to adopt child. Parents argue that child should be placed with relative as per aboriginal customary law, and argue that *Adoption Act* (provincial) should not apply as it affects status → federal IJI area of Aboriginal peoples	• Aboriginal immunity • S.88 referential incorporation
Decision: *Adoption Act* referentially incorporated under *Indian Act* S.88 therefore valid	
Reasons (Laskin): (1) large, exclusive jurisdiction around Indian family relationship ("Indianness" replaces "vital and essential aspects" in aboriginal immunity IJI); (2) finds for interjurisdictional immunity; (3) however, *Indian Act* S.88 referentially incorporates provincial	
Reasons (Martland): (1) S.88 is declaratory and therefore can raise paramountcy; (2) paramountcy, however, not triggered as conflict is insufficient (produces no inconsistency)	
Reasons (Beetz): (1) both routes lead to the same decision, therefore unnecessary to specify route; (2) in *Dick*, adopts Laskin approach	

R. v. Dick (SCC 1986)	*Dick*
Case Details	***Key Concepts***
Facts: Dick (member of Alkali Lake Band) charged with out-of-season hunting on Crown land / traditional land of Band. Provincial *Wildlife Act*. Argued as IJI area and therefore not applicable.	• Aboriginal immunity • S.88 referential incorporation • Evidence of impact on "Indiannness" • Singling out
Decision: while the law goes to the core of "Indianness", it is referentially incorporated.	
Reasons: (1) provincial law of general application may regulate Aboriginal peoples in their "Indianness" provided it is incorporated under *Indian Act* S.88; (2) distinguished from other cases (*Cardinal, Kruger, Manual*) based on **evidence** that identified hunting as core "Indianness" (expert witness, practical effect evidence) → demonstrated that the impact was not incidental; (3) **singling out** = directly aiming provincial legalisation at federal jurisdiction; (4) S.88 as declaratory (federal government regulates in its jurisdiction by inviting in provincial laws)	

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture (SCC 2002)	*Kitkatla*
Case Details	***Key Concepts***
Facts: BC granted permits to Intercor (a logging company) to permit the harvesting of some culturally modified trees (CMTs). All parties concede that the province has jurisdiction over laws of general application over heritage conservation. The Kitkatla Band argues that the specific provisions related to aboriginal cultural objects (i.e. CMTs) are *ultra vires* as it falls under S.91 (federal heads of power.)	• Aboriginal immunity • S.88 exceptions • Evidence • Singling out
Decision: provincial legislation is *intra vires*	
Reasons: (1) culture falls under both federal and provincial heads of power therefore must consider individual context; (2) distinguishes "**disproportionate impact**" from **singling o**ut (in this case, disproportionate quantity of aboriginal heritage items leads to disproportionate impact); (3) retreat to **federalism principles** (incidental effects can be drastic provided that the matter is within jurisdiction); (4) separates object from people → regulating objects, not people, therefore not in federal jurisdiction; (5) raises question of **evidential support** (considered weak by court) in assessment that objects are not at core of "Indianness"	
Commentary on decision: (1) restrictive view of immunity; (2) narrow reading of "singling out" (prior to *Kitkatla*, legal community would likely consider the references to aboriginal rock paintings as singling out); (3) rhetorical commitment to incorporation of indigenous knowledge systems, but practical hesitate in this decision; (4) fiduciary obligation vitiated by "protection granting" benefit of the legislation; (5) federal government intervened on behalf of the province	

Introduction to Rights Jurisprudence & the *Charter*

Rights Protection in Canada

Mechanisms	***Details***	***Key Ideas***
Charter	Dominant, but not only, mechanism in Canadian rights jurisprudence.	• dominant mechanism
Common law	<u>Tort and contracts law</u> → Individual property rights → Contractual freedoms <u>Administrative law</u> → Principles of natural justice (i.e. procedural rights for due process, endorsement of a procedural content to rule of law)	• individual property rights • contractual freedom • principles of natural justice
Constitutional Act, 1867	<u>Division of powers (S.91 and S.92)</u> can be viewed as third generation rights activated in its recognition of regional communities (esp. in relationship to Quebec) → Federalism as a vehicle for third generation rights, especially religious education and language (minority) rights → Address problems of minorities in regional communities → Exclusive protection, however, as limited to particular settler minority religious/linguistic communities → Critique: erasure of First Nations and other religious/linguistic communities All in 20th century and related to freedoms (typically religious expression and/or expression in general) → typical target: legislative instruments that **curtail expressive freedoms** (municipal legislation) Ex: by-law that prohibits Jehovah's Witnesses from distributing pamphlets; Montreal by-law that prohibits distribution of communist material <u>Implied Bill of Rights</u> As there was no Bill of Rights, the cases were argued as legislation *ultra vires* the province (contrast between Province: Property and Civil Rights and Federal government (well, the defendant): Criminal Law Power → traditionally the courts would find the legislation *ultra vires* under the criminal law power. → a few judges argued for an implied inherited freedoms from unwritten constitutional values through the Preamble → however, never to the extent of the *Quebec Secession Reference* or the *Provincial Judges Reference* <u>Racial discrimination and federalism cases (division of powers as facilitator)</u>: → ex: BC's racial exclusion laws → no argument for unwritten constitutional principles (Britain's record wasn't an improvement) <u>Leading case</u>: *Union Colliery v. Bryden* (JCPC 1899) → federal jurisdiction under S.91(25) Aliens and Naturalization (typically about how to acquire citizenship) → latter decisions (rights to vote; rights to be an employer) back away from *Union Colliery* → raises question whether *Union Colliery* is about racial distaste or about interference with access to (cheap) labour?	• division of powers as embodying third generation rights in respect to regional communities, religious education and language (minority rights) • problem: erasure of aboriginal and other rights • implied bill of rights • division of powers as mechanism facilitate rights protection

Bill of Rights (federal, 1960)	Still active legislation, but largely subsumed by *Charter* and the *Bill of Rights* limitations Remaining areas: a) Property rights → as there are no property rights in the *Charter*, federal legislation that may impact property rights would be addressed as Bill of Rights b) Right to due process (enhanced procedural protection) → broader fair hearing rights under 2(b) Limitations: **(1)** only applicable to **federal legislation** (2) conservative jurisprudence (**cautious approach**) → partly era (judges uncomfortable with this degree of scrutiny of legislation outside of the division of powers) → partly language (emphasis on compromise in *Bill of Rights*) c) *Bill of Right* s.1: **existing rights** → inference that continuation of past practise sufficient (3) **statute** (not constitutionally entrenched) (4) provision stipulates **interpreting laws to not violate the *Bill of Rights***	• active as areas not included in *Charter* (esp. property rights) • limitations: federal legislation, cautious approach, existing rights, statute, presumption of non-violation
Provincial comprehensive human rights codes	Typically passed by provincial legislatures, but reflects movement away from one-off statutes that govern only particular sectors. → exception for human rights codes to permit some discrimination (i.e. athletics clubs that do not permit girls on boys' teams Challenged under *Charter*: while the private actors are not governed by the *Charter*, the provincial legislation that created the comprehensive human rights code (that permitted the discrimination) is subject to the *Charter* protections (*Re Blainey* qtd. in *Dolphin Delivery*, *Vriend*) Accepted model in Canada: → tribunal and commission → BC fruit fly experiment for human rights codes a) Commission model b) Tribunal model c) Tribunal/commission model d) Tribunal model	• comprehensive • exceptions for some discrimination, but subject to *Charter* scrutiny • accepted model = tribunal and commission

Types of Rights		
Type	***Details***	**Charter *Application***
First generation	**Classical conception of rights.** Classic documents: *Declaration of the Rights of Man and of the Citizen* (France, 1789); *Bill of Rights* (US, → documents provide limitations on the exercise of state power in order to protect natural rights (liberty, property) → underlying principle: state as a threat to rights; individuals as central and most important actor (common law similarly imprinted with this conception of freedom and identification of the individual as the most important political actor) → critique: individual as an **abstract rights bearer** Paradigm: freedom of religion, freedom of expression	• *Charter* founded on similar underlying principle of protecting the individual from the state • Arguably protection = mediation in *Charter* context
Second generation	**Individual remains central/most important actor, but embodied.** → individual has a body and needs, and rights are a useful way to address these needs (i.e. not just an abstract conception of freedom)	• While *Charter* rights are first-generation, the jurisprudence

	→ qualification/texturing of the individual to move beyond the abstract → imposes **positive obligation on the state to give meaning (substance) to the rights** → critique: **narrow range of bodies** that are gendered and racialized in exclusionary ways	tends toward second-generation texturing (i.e. poverty issues)
Third generation	**Collective rights that belong to groups**. → individuals are part of large communities with **communal aspirations that must be enjoyed by all** to have meaning.	• *Constitutional Act, 1982* s. 35 (aboriginal rights)
"Straddling rights"	Rights' narratives that **fit either generation**: first generation (negative imposition) or second generation (positive texture that imposes responsibilities/obligations). → equality rights are "straddling rights" → rights to language and culture can be perceived as individual rights (i.e. *Charter* language rights) as well as group rights (i.e. s. 35 structured as a third generation right of peoples	• *Charter* and other constitutional rights can straddle (especially w/ trend towards texturing in jurisprudence)
Four generation	**Post-human conception of rights.** → extends rights (powerful political language) to ecosystems, animals, plants, etc. (emphasis on stewardship relationship w/ planet). → most frequently found in statutory regimes or international covenants	• none in Canadian constitution

Access to the Courts

Methods to Access the Courts

Method	*Details*	*Key Ideas*
Reference power	Constitutionally (or statutorily, in the case of the provinces) entrenched power that courts must advise governments on questions referred to the courts for answer (although discomfort with courts fulfilling this non-judicial function) → only governments exercise this power, which raises questions of **access to justice** and **rule of law**	• advisory role of courts • limited to government questions
Test case litigation	A strategic legal action where the outcome is likely to set a precedent or test the constitutionality of a statute. → very expensive even with Court Challenges Program funding → typically used in aboriginal rights, environmental law and income assistance legislation Ex: NAACP model in civil rights area. The organization pursued a number of test cases as lower court level. After sufficient jurisprudence was established, NAACP picked one case to move to the appellate level.	• strategic legal action • expensive
Intervenor status	The mechanism by which a non-party applies to participate in a limited manner in an on-going litigation. → in Canada, governments can intervene as a right → legal or advocacy groups can apply to intervene at the court's discretion, which generally entails limited participation and/or time constraints on developing factum <u>Receiving intervenor status</u>: → show the court that the non-party will bring a fresh perspective (i.e. provide a missing link in the factual record, or a different perspective on the issue) <u>Williams, "The Amicus Curiae and the Intervener in the High Court of Australia"</u> → three periods: (1) generally not receptive of public interest intervenors (1982-87) (2) liberal approach to intervenors (1987-99) (3) more cautious approach to intervenors (1999-present) → SCC more and more cautious about granting intervenor status (1) strict application of criteria for leave to intervene (2) persuade interveners to jointly submit (3) less intervenors granted oral arguments	• non-party participation in existing litigation • time constraints • req'ment for new perspective or missing link
Public interest standing / citizen's standing	Standing is the mechanism by which an individual or public interest organization challenges legislation without an existing connection or harm from the legislation.	• challenge w/o existing connection or harm

Funding Access to the Courts

Concept	*Details*	*Key Ideas*
Court Challenges Program	A national non-profit organization which was set up in 1994 to provide financial assistance for important court cases that advance language and equality rights guaranteed under Canada's Constitution.	• funding source
Advance costs award	Court order granting advance (or interim) costs to a litigant in order to fund public interest litigation that would otherwise not be continued due to lack of resources. → typically costs awards indemnify the successful litigant → in public interest litigation, advance costs may be awarded to ensure access to the courts and to facilitate the public benefits w/ the litigation	• advance litigation funding • exception to typical costs awards, which indemnify the successful litigant

Protective costs award	Court order providing that the plaintiffs or applicants in public interest litigation do not receive a cost awards against them at the conclusion of the proceedings, regardless of	• litigation protection • alternative to typical costs awards

Cases: (Funding) Access to the Courts

Thorson v. Canada (Attorney General) (SCC 1975)	*Thorson*
Case Details	***Key Concepts***
Facts: Taxpayer class action challenging the validity of the *Official Languages Act* and the money appropriated to administer it (i.e. spending statute)	• no other way to bring issue before courts • justiciable question • statute of general application w/o direct impact on individual
Decision: public interest standing granted → "a person might not be specially affected or exceptionally prejudiced by the legislation which he sought to attack, he might be able to seek a declaratory judgement in the circumstances described" (*Thorson* described in *Borowski*)	
Reasons: (1) tax issue therefore broad impact; (2) "declaratory and directory statute" therefore no offences or penalties through which a citizen/taxpayer could challenge its validity; (3) citizen's standing as only avenue to address court (therefore raises question of rule of law); (4) clear and serious issue (constitutional, division of powers); (5) litigant diligently tried other avenues to raise issue; (6) litigant was respectable (MLA)	
Criteria: (1) justiciable question; (2) statute applies to all members of the public but individuals are not directly affected; (3) **no other way** by which to bring the issue to the court (stringent standard designed to cover only situations in which otherwise the government decision would be immune from scrutiny)	

Nova Scotia (Board of Censors) v. McNeil (SCC 1976)	*McNeil*
Case Details	***Key Concepts***
Facts: Taxpayer class action challenging the validity of *Theatres and Amusements Act* (licensing regime with offence provisions), which required license to screen film. Screened *Last Tango in Paris* w/o license.	• category approach • "rights of the public" • distinguish target group from public group when dissimilar impact
Decision: public interest standing granted → "the plaintiff could legitimately complain (on this Court's construction of the challenged statute) that he was a person within its terms who was being deprived of a right to view a film because of an allegedly unconstitutional exercise of legislative and administrative power" (*McNeil* described in *Borowski*)	
Reasons: (1) regulatory statute but not determined to be distinctive enough to withhold standing; (2) pre-*Charter* censorship decision (huge background issue); (3) while theatre owners were directly implicated in the regime (i.e. subject to the licensing provisions), the general public is also impacted as the regime controls what is available for viewing → therefore impact on the general population which is different from the impact on theatre owners; (4) issue strikes at the "rights of the public" in its central aspects, which differ from the impact on the target group (which would have a legal route to the court)	
Category approach: categories of legislation where standing will be granted = declaratory legislation (*Thorson*) and regulatory legislation + public impact (and no legal route) (*McNeil*)	

Canada (Minister of Justice) v. Borowski (SCC 1981)	*Borowski*
Case Details	***Key Concepts***
Facts: Exculpatory provisions in *Criminal Code* abortion where the code exempts some doctors and patients from criminal liability in certain abortion situations (i.e. pregnant woman who show a hospital committee medical reasons for an abortion). Borowski (as public and private figure) pursues an attempt to find that the provisions violate the *Bill of Rights* (right to life argument.) Borowski did pursue all avenues available to him: did not pay taxes, resigned from cabinet minister role. (His challenge becomes moot as the *Charter* comes into effect and the *Morgentaler* decisions close the issue.)	• three part test • busybody concern (dissent) • timing issue (progress of pregnancy) renders it difficult to litigate in other ways
Decision: public interest standing granted	
Reasons (Martland, majority): (1) exculpatory legislation (shields/exempts from liability) therefore no direct access to challenge; (2) progress of the pregnancy renders it difficult to litigate the issue through the court system (timing); (3) three part test: i) significant issue (broadly understood); ii) genuine interest; iii) no other reasonable or effective way to bring the issue before the courts (revision of *Thorson*)	
Reasons (Laskin, dissenting): (1) busybody concern: "obsessed nutcase"; agenda; need for factual	

record not ideological debate; (2) other ways to bring this action (at least stronger claims from hospitals, doctors and husbands who have a different/more direct experience of the law than the public at larger) therefore does not meet "no other way" standard in *Thorson*	

Canadian Council of Churches v. Canada (Minister of Employment and Immigration) (SCC 1992)	*Canadian Council of Churches*
Case Details	***Key Concepts***
Facts: Canadian Council of Churches (organization that advocates for the interests of immigrants and refugees) applies for public interest standing to challenge sections of the *Immigration Act* based on inherent structural difficulties (72 hr notice for deportation order, systemic vulnerability of immigrants and refugees as non-citizens and individuals in often challenging and desperate circumstances)	• busybody • public interest organizations w/ corporate status can be granted standing • other ways to proceed functionally even if formal restraints
Decision: public interest standing not granted	
Reasons: (1) strong concern about the busybody nature inherent to public interest organizations, and the potential impact on judicial resources if standing is granted to all organizations who believe that they have a genuine interest in an issue; (2) while first two parts of *Borowski* test ultimately satisfied, the SCC found existing means sufficient to litigate the issue (injunction, deportation slow process functionally, claims are being raised in existing system)	

Chaoulli v. Quebec (Attorney General) (SCC 2005)	*Chaoulli*
"From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances. In this sense, there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine. Consequently, we agree that the appellants in this case were rightly granted public interest standing" (¶189)	
Case Details	***Key Concepts***
Facts: *Charter* s. 7 challenge (Quebec Charter s. 1 challenge) to Quebec legislation that prohibits individuals from taking out private insurance for health care covered by provincial health care.	• extreme vulnerability • complex systemic challenge
Decision: public interest standing granted	
Reasons (dissenting): (1) extreme vulnerability given that individuals directly affected by legislation often face significant health challenges (and cannot bear the significant cost of litigation); (2) complex systemic challenge: entire foundation of health care system challenged (public / private)	

Downtown Eastside Sex Workers United Against Violence v. Canada (Attorney General) (BCCA 2010)	*DTES Sex Workers*
Case Details	***Key Concepts***
Facts: organization (SWUAV) represents sex workers (individuals directly affected by the law) who applies for standing to challenge the *Criminal Code* provisions that regulate sex workers.	• multi-provision challenge not suitable for individual cases • systemic nature of the claim (especially s. 15) • cost of litigation better suited to intervenor than individual
Decision: advance costs awarded	
Arguments: (1) while no shortage of cases where this issue arises (i.e. appropriate for test case litigation), SWUAV would challenge multiple provisions that would not necessarily be raised in an individual case; (2) vulnerability argument: complicity challenge given illegality of activity (i.e. must testify as committing illegal activity)	
Reasons: (1) while other high profile cases (i.e. *R. v. Bedford*, leave to appeal granted to SCC), the multi-provision challenge here (esp. in regards to the s. 15 challenge) justifies standing; (2) particular emphasis on the systemic nature of the claim (complexity of s. 15 challenge, cost of litigation given nature of social science data, requirement for extensive time and research to bring forward the case)	

British Columbia (Minister of Forests) v. Okanagan Indian Band (SCC 2003)	*Okanagan*
"special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where [advances costs orders] are appropriate" (*Okanagan* qtd. in *Caron* ¶6)	
Case Details	***Key Concepts***
Facts: Okanagan Indian Band logged to build houses due to a significant homelessness issue. The logging was in violation of forestry regulation and therefore was charged with logging w/o a license. As there were no resources to mount complex aboriginal title defence, the band sued for advanced costs.	• three part test for advance costs

Decision: costs granted up to SCC	
Reasons: (1) three part test for advanced costs: i) impecunious party with a *prima facie* meritorious case; ii) contrary to justice to have the matter dropped; iii) matter of public interest that transcends the individuals before the court (i.e. broader impact on justice)	
Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue) (SCC 2007)	*Little Sisters*
Case Details	***Key Concepts***
Facts: gay and lesbian book store in Vancouver that imports periodical literature from the United States that would often be held up at Customs to the point that it was no longer sellable. The store brought a *Charter* challenge arguing that Customs was stereotyping based on the address. First decision (SCC 2000): there was a *Charter* violation, but the matter was resolved by retraining and a small change to the legislation. After the decision, the hold ups continued and the store was in an even more precarious situation financially, so applied for standing to re-litigate the issue.	• no advance costs as did not transcend individual interest • public interest too broad a standard
Decision: no advance costs	
Reasons (majority): (1) denied based on the third prong (it didn't transcend their own interests as the outcome was only relevant to their case); (2) need to tweak *Okanagan* test as public interest is too broad (captures too much): public importance + high standard of specialness; (3) discussed option to fundraise (but ultimately passed this prong of the test)	
Reasons (Binnie J., dissenting): (1) scathing disagreement of "if flaunting the court's decision isn't a matter of public interest, I don't know what is"	

R. v. Caron (SCC 2011)	*Caron*
"A legal issue of exceptional important that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice" (*Caron* ¶6)	
Case Details	***Key Concepts***
Facts: Caron charged w/ minor driving offence but proceedings are all in English and argues that he has a right to the proceedings in French (source: amalgamation of constitutional texts including the *Royal Proclamation*). His main target is the *Alberta Languages Act*, which purports to wipe out French language rights (similar case to *Reference re Manitoba Language Rights*). Case proceeds in provincial court due to the nature of the offence. Caron runs out of funds and applies for an interim costs award.	• focus on the constitutional challenge (not the vehicle, the quasi-criminal traffic offence) • "sufficiently special" = sufficiently high standard to satisfy the three components of the third prong
Decision: interim costs award granted	
Reasons: (1) superior court (although proceedings were in provincial court) had jurisdiction to award costs; (2) traffic offence is simply the vehicle for the constitutional challenge therefore better fits the civil category of *Okanagan* than to be considered wholly as a (quasi-)criminal individual access to justice issue; (3) impecunious: Caron expended all funds, borrowed money and exhausted all other public sources of funding such as the Court Challenges Program + no requirement to fundraise (unrealistic in the middle of a trial w/ the associate schedule and demands); (4) *prima facie* meritorious: consensus at all levels of court that the case is serious and it would be contrary to the interests of justice for it not to succeed; (5) public importance = three components: i) transcend the private interest; ii) element of public importance; iii) not issue resolved in previous case(s); (6) "sufficiently special" overarching requirement from *Little Sisters* is achieved by requiring the three components be met at a sufficiently high standard; (7) structure of costs order = not a blank cheque to spend government money (stringent requirements for use and review of use; judge imposed limited on hours and types of service included)	

Canadian Charter of Rights and Freedoms

Interpretative Postures

Period	***Details***	***Cases***
(1) strict standard (rights enhancing)	→ **strict** (rigorous) standard of scrutiny of government behaviour → standard of proof = **preponderance of probabilities** (high version of balance of probabilities) as concepts such as "reasonableness," "justifiability" and "free and democratic society" are not amenable to proof beyond a reasonable doubt; [high] civil standard (*Edmonton Journal*)	• *Oakes* • *Motor Vehicles*
(2) deferential standard	→ more **deferential** approach to scrutinizing government action → standard of proof = **balance of probabilities**	• *Irwin Toy* • *RJR-MacDonald* (dissent)
(3) intermediate standard (rigour tempered by deference)	→ some return to stricter posture w/ respect to government deference: "Parliament does not have the right to determine unilaterally the limits of its instruction on the rights and freedoms guaranteed by the *Charter*. The Constitution, as interpreted by the courts, determines those limits" (McLachlin J. in *RJR-MacDonald*) → attempts at a principled approach to deference in *Thomson Newspapers, Hutterian Brethren*	• *RJR-MacDonald* • *Thomson Newspapers* • *Hutterian Brethren*

Cases: *Charter* Analysis

Reference re Section 94(2) of the Motor Vehicle Act (SCC 1985)	*Motor Vehicles*
Case Details	***Key Concepts***
Facts: Absolute liability offence under the BC *Motor Vehicle Act* that includes the possibility of imprisonment. Does this offence violate *Charter* s. 7?	• different from division of powers analysis • scope of s. 7 + PFJs • s. 7 as qualified right • substantive vs. procedural standards of justice
Decision: absolute liability + risk of liberty infringing penalty = infringement of s. 7	
Key concepts: (1) rights-enhancing approach to *Charter*; (2) court's sense of legitimacy in shifting and adopting a new posture in *Charter* analysis	
Reasons (*Charter* analysis): (1) disingenuous distinction between review under the division of powers (not the last word, open space for other jurisdiction to operate) and review under the *Charter* (last word except in some minimal debate); (2) evidence includes extrinsic evidence (drafting process, witnesses of framers of document)	
Reasons (s. 7): (1) *Charter* s. 7 includes two parts and is a qualified right: i) the right to life, liberty and security of the person, and ii) the right not to be deprived thereof except in accordance w/ the principles of fundamental justice (PFJs); (2) PFJ → cannot have any absolute liability offence w/ possibility of liberty infringing penalty; (3) general articulation of the content of PFJs: "found in the basic tenets of our legal system"; "inherent domain of the judiciary as guardian of the judicial system" (¶31); (4) procedural due process = fairness at procedural/adjudicative level (i.e. right to a fair trial, right to know the charge/evidence); (5) substantive due process = broader understanding, which many be broad enough to exclude capital punishment; (6) PFJs can include substantive and procedural dimensions	

R. v. Big M Drug Mart Ltd. (SCC 1985)	*Big M Drug Mart*
Case Details	***Key Concepts***
Facts: *Charter* challenge of the *Lord's Day Act* that obliged companies to close on Sundays.	• ~~shifting purpose~~
Decision: unconstitutional	
Arguments: (1) effect is to give workers a day off (i.e. the purpose has shifted away from the holy purpose); and (2) effect is good (day off)	
Reasons: (1) pith & substance: historically a holy day of rest (Sabbath) day; (2) pith & substance still valid as the purpose is what the drafters intended as the time of writing (i.e. no shifting purpose); (3) as no shifting purpose therefore unconstitutional	

Appendix A: Access to the Courts

Intervener Status

Overview	The mechanism by which a non-party applies to participate in a limited manner in an on-going litigation. → in Canada, governments can intervene as a right → legal or advocacy groups can apply to intervene at the court's discretion	*Ref. re. Workers Compensation Act* (Williams article)

Policy: Balancing Interests		***Key Concepts***
→ access to justice → rule of law	→ judicial resources (costs, floodgates, time) → role of courts (vs. Parliament) → lack of factual record, degree of abstractness → concern about ideological / partisan focus	

Step	***Details***	***Key Concepts***
Threshold requirements (SCC Rule 18(3))	(1) does the public interest group have **an interest**? (2) are their **submissions / opinions useful and different** from other parties? (*Ref. re. Workers' Compensation Act* qtd. in Williams article)	• interest • useful/different perspective
Current Standard	→ "state **precisely the point** in the intervention that is likely to be different from those likely to be made by parties or other interveners" (Williams article)	• precise difference
Limitations	→ interveners are <u>not</u> a party to the case → cannot bring in new evidence → cannot "widen or add to the points in issue" (*Morgentaler*) → often submit a written factum and present minimal or no oral arguments	• limited role

Public Interest Standing (Citizen's Standing)

Overview	3-part test to determine whether a member of the public (or a non-profit organization) will be granted standing to appear in court to challenge a law or government action without a formal charge in which the challenge could occur. (A uniquely Canadian approach to standing.) → application to constitutional cases: Trilogy (*Thorson, McNeil, Borowski*) → application to non-constitutional case: *Finlay* (SCC 1986)	*Trilogy* (***Borowski***, *Thorson, McNeil*), *Canadian Council of Churches*, *DTES Sex Workers*

"It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?" (*Canadian Council of Churches*)

Policy Considerations		***Key Concepts***
→ access to justice → rule of law (standing as only access to court) → government responsible to the individual / group	→ judicial resources (costs, floodgates, time) → role of courts (vs. Parliament) → lack of factual record, degree of abstractness → concern about ideological / partisan focus	• role of courts to balance diverse interests • rule of law

Step	***Details***	***Key Concepts***
General rule = no standing	"as a general rule, it is not open to a person, simply because he is a citizen and a taxpayer or is either the one or the other, in invoke the jurisdiction of a competent court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation" (*Borowski*)	• no standing if not directly affected or threated by the legislation
(1) significant issue (*Borowski*)	To be granted public interest standing, the court must determine that the individual/group has a **significant issue** to bring before the courts. → generally, whether the issue is justiciable → **broadly understood** (→ likely constitutional given seriousness requirement but **not necessarily**) <u>*Finlay*</u>: challenge to administrative authority of a government actor under	• broad • significance not limited to constitutional, but likely

	a regime, which constituted an important decision broadening access (opened a lot of doors in environmental law) *Thorson*: challenge the constitutional validity of the *Official Languages Act* (a spending statute) *McNeil:* challenge the constitutional validity of the *Theatres and Amusements Act* (licensing regime that required licenses to screen film *Borowski*: *Bill of Rights* challenge to the exculpatory provisions of the *Criminal Code* related to abortion → significance tied to **rule of law** (invoke *Constitutional Act, 1982* s. 52)	
(2) genuine interest (*Borowski*)	To be granted public interest standing, the court must determine that the individual/group has a **genuine interest** in bringing the issue before the courts. → "real and continuing interest" (*Canadian Council of Churches*) → **busybody** concern (*Canadian Council of Churches,* dissent in *Borowski*) → difficult threshold for public interest organizations given their role as advocates for a particular issue "It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursing their own particular cases certain in the knowledge that their cause is all important" (*Canadian Council for Churches*) → genuine interest can be attributed to **individuals and public interest organizations with corporate status** (*Canadian Council of Churches*)	• genuine interest • busybody • individual and organizations
(3) no other reasonable or effective way (*Borowski*)	To be granted public interest standing, the court must determine that the individual/group had **no other reasonable or effective way** to bring the issue before the courts. → functional (not just formal) barrier to access (*Canadian Council of Churches*) → revision of "no other way" (*Thorson*)	• no other reasonable or effective way
Previous Approach	→ category approach (post-*McNeil*) useful for analogizing/distinguishing from the Trilogy cases: (1) *Thorson*: declaratory statute (2) *McNeil*: regulatory statute with public dimension (and no legal access) (3) *Borowski*: exculpatory statute	• category approach

Advanced Costs

Overview	3-part test to determine if advance costs are awarded to fund a public interest litigant's court costs	***Okanagan**, Little Sisters, Caron*
"A legal issue of exceptional important that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice" (*Caron* ¶6)		
Policy Considerations		***Key Concepts***
→ significant societal importance → mechanism to ensure significant issues are litigated	→ financial cost to public → deterrence to frivolous litigation → concern about ideological / partisan focus	• balancing interests • financial barriers
Step	***Details***	***Key Concepts***
Threshold	→ no advance costs should be awarded if a lesser award (i.e. costs protection award) would suffice (*Little Sisters*) → issue must be "sufficiently special" (not enough to be in the public interest) (*Little Sisters*, 3rd prong in *Caron*)	• exceptional remedy
(1) impecuniosity	→ the party **genuinely cannot afford to pay** for the litigation and **no other realistic option** exists for bring the issues to trial → litigation would be unable to proceed if the order was not made → no formal requirement for **fundraising** (*Little Sisters*, Caron) but may be considered in a future case (context-specific)	• impecunious party
(2) meritorious claim	→ **contrary to the interest of justice** for the opportunity to pursue the issue to be forfeited **just because the litigant lacks resources**	• *prima facie* meritorious claim

(3) issue transcends individual interests	Three elements (*Caron*): (i) **transcend the private interest** (ii) **element of public importance** (iii) **not have been resolved in previous cases** → meeting these three elements as a **sufficiently high standard** satisfies the "**sufficiently special**" requirement in *Little Sisters* (*Caron*)	• issue is of importance to the public • meeting "sufficiently special" standard
Other considerations	Four guiding principles (*Little Sisters*): (1) "injustice that would arise fi the application is not granted **must relate both to the individual applicant and to the public at large**" (2) "the advance costs award must be an **exceptional measure**" (3) "no injustice can arise **if the matter at issue could be settled**, or the public interest could be satisfied, **without an advance costs award**" (4) "the granting of an advance costs order **does not mean that the litigant has free reign**" → award is imposed/approved w/ a definite structure incl. judge imposed limit on hours and services (*Caron*)	• injustice = individual & public • exceptional measure • matter or public issue cannot be satisfied without costs • no free reign

Appendix B: *Constitutional Act, 1982* s. 35 Analysis

***Constitutional Act, 1982* s.35**	**Recognition of existing aboriginal and treaty rights**	
Overview	The test from *Sparrow* (evolved in *Van der Peet* and *Gladstone*) provides the judicial mechanism by which courts determine whether there is an existing aboriginal right that has been unjustifiably infringed by the Crown.	*Sparrow, Van der Peet, Gladstone*
s.35(1) The **existing aboriginal and treaty rights** of the aboriginal peoples of Canada are hereby **recognized and affirmed**.		
Interpretative Posture	***Details***	***Key Concepts***
Sparrow posture	**Purposive approach** = generous, liberal interpretation → s. 35 is not a preamble → apply treaty principles: doubts should be resolved in favour of the aboriginal rights holder, "honour of the Crown" → apply fiduciary duty (*Guerin*)	• purposive interpretation • "honour of the Crown"
Van der Peet / *Gladstone* posture	**Balancing approach** → recognition of prior occupancy + reconciliation w/ Crown occupancy (embeds the doctrine of discovery)	• reconcile prior occupancy w/ Crown occupancy
Overarching Considerations	***Details***	***Key Concepts***
Two timelines	(1) whether extinguishment took place prior to 1982 (*Sparrow*) (2) whether there is continuity w/ pre-contact practise (*Van der Peet*)	• extinguishment • pre-contact practice
Step	***Details***	***Key Concepts***
(1) scope of the right	<u>What is the scope of the right?</u> → burden = **rights claimant** <u>*Sparrow* &*Van der Peet*</u>: → scope of free-standing and site-specific rights → test: **integral to a distinctive culture at first "contact"** (*Van der Peet*) (1) courts must take into account the **perspective of aboriginal people themselves**. However, courts must do so on terms cognizable to the Canadian legal and constitutional structure. This means placing **equal weight on aboriginal and common law perspectives**. → aboriginal perspective inherently qualified by Crown sovereignty (2) courts must identify **precisely the nature of the claim being made** in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right. → part of the particularizing process in delineating title rights, site-specific rights and activity rights → claimed right should be congruent w/ evidence → some evolution of form permissible but generally high emphasis on historical accuracy (3) in order to be integral a practice, custom or tradition must be of **central significance**. → "defining and central attributes of the aboriginal society in question" (*Van der Peet*) → rejection of "common" practices such as eating, although incongruent w/ acceptance of hunting and fishing practices (retreat from this position in subsequent decisions) (4) the practices, customs and traditions which constitute aboriginal rights are those which have **continuity with the practices, customs and traditions that existed prior to contact**. → realistically a requirement of continuity and a requirement of pre-	• leading case = *Van der Peet* • integral to a distinctive culture

	contact practice → date of contact significant (evidentiary challenge) → "**substantial maintenance of the connection**" (*Mabo* qtd. in *Delgamuukw*) (5) courts must approach the r**ules of evidence in light of the evidentiary difficulties** inherent in adjudicating aboriginal claims. → evidence viewed as a fair and impartial process therefore difficult shift in values → rhetorical commitment to recognition despite difficulty in finding a practical application for the commitment (6) claims to aboriginal rights must be a**djudicated on a specific rather than general basis**. → rights specific to nation therefore limited precedent from other nations' rights (7) for a practice, custom or tradition to constitute an aboriginal right it must be of **independent significance** to the aboriginal culture in which it exists. → the significance standards on its own and is not ancillary to a centrally significant practise (8) the integral to a distinctive culture test requires that a practice, custom or tradition be **distinctive**; it <u>does not</u> require that the practice, custom or tradition be <u>distinct</u>. → distinctiveness = not relative to other cultures' practices (the measure of distinctness) but rather distinguishing within the culture's practises (9) the **influence of European culture** will only be relevant to the inquiry if it is demonstrated that **the practice, custom or tradition is only integral because of that influence**. → derivation from European culture is not permissible (10) courts must take into account both the **relationship of aboriginal peoples to the land** and the **distinctive societies and cultures of aboriginal peoples**. <u>*Delgamuukw*</u>: → scope of aboriginal title rights	
(2) extinguishment	<u>Has the right been extinguished?</u> → burden = **rights claimant** (evidentiary burden = Crown as in their interests to demonstrate proof of extinguishment) <u>*Sparrow* & *Delgamuukw*</u>: → no extinguishment post-1982 as aboriginal rights constitutionally entrenched "the Sovereign's intention must be **clear and plain** if it is to extinguish an aboriginal right" (*Sparrow*) → evidence must show clear and plain intent to extinguish by **federal government between Confederation and 1982** (by British Crown during pre-Confederation era) → such extinguishment **does not require consent of aboriginal party nor does it require express wording** →"necessarily inconsistent" standard rejected: **restrictive regulation of right ≠ extinguished right** (*Sparrow*, *Gladstone*)	• leading case = *Sparrow* • extinguishment = clear and plain • no extinguishment post-1982
(3) infringement	<u>Has the right been infringed?</u> → burden = **rights claimant**	• leading cases = *Sparrow* & *Gladstone*

	Sparrow & *Gladstone*: → *prima facie* interference w/ aboriginal right (*Sparrow*) becomes **meaningful diminishment of the right** (*Gladstone*), which only eliminates the trivial infringements (just a touch above *prima facie*) → does the interference constitute: i) unreasonableness, ii) undue hardship, or iii) denial of preferred means?	• meaningful diminishment of right
(4) justification	Is the government limit on aboriginal right(s) justified? → burden = **Crown** → similar to *Oakes* proportionality analysis but through a particular interpretative lens: "honour of the Crown" / fiduciary duty of the Crown *Sparrow, Gladstone* & *Delgamuukw*: (1) is there a **valid, compelling and substantial objective**? → include non-aboriginal perspectives as aboriginal right analysis involves the reconciliation of aboriginal rights/interests w/ Crown sovereignty (*Gladstone*) → considerations: regional economic balance; recognition of non-aboriginal reliance on fishing industry (*Gladstone*) (2) does the matter of pursuing the objective **reject the Crown's fiduciary obligation**? a) **restrictive posture** (*Sparrow*): doctrine of priority in allocation of resource; minimal infringement; fair compensation for expropriation; consultation in regards to conservation measures b) **balancing posture** (*Gladstone*): when commercial claim (no internal constraints), priority must be procedural and substantive elements → balance aboriginal interests w/ broader Canadian society → framework for recognizing priority without exclusive priority: i) procedural priority = transparent mechanism for allocation; consultation ii) substantive priority = quotas may be imposed but the quotas must reflect the prior claim; facilitate access through lower fees; requirement for compensation if priority cannot be recognized	• leading case = *Gladstone* • valid, compelling and substantial objective • Crown's fiduciary obligation

Appendix C: *Charter* Analysis

Charter	**Two Stage Analysis**	
Overview	2 prongs to *Charter* analysis: (1) rights analysis & (2) limitation analysis → foundational that these stages be **analytically distinct** (*Oakes*) but see difficulties w/ s. 7 and s. 15 jurisprudence	*Oakes*
Stage	***Details***	***Key Concepts***
(1) rights analysis	Burden of proof = **right holder / claimant** Each right had a different map w/ different test/steps Generally two questions: (1) **scope of the right**: is the right holder's activity covered by the scope of the right? → purposive approach: large and remedial approach, rights enhancing approach → sources: historical, philosophical, linguistic, international law, precedent, precedent from other jurisdictions (2) **violation of the right**: did the government interfere w/ the right? what was the government's purpose and what was the effect? → focus on government action (often legislation) → consider both purpose and effect: rights enhancing approach (protects against both intentional and unintentional violation of rights, which is particularly important w/ freedom of expression and equality rights)	• scope of right • violation of right
(2) limitation analysis	Burden of proof = **government** Map specified in *Oakes*: → objective three step analysis (1) **prescribed by law**: is the law or government action prescribed by law? (2) **object and purpose**: substantial and compelling purpose (3) **proportionality** 3-prong assessment: i) rational connection ii) minimal impairment iii) balancing prong	• prescribed by law • object and purpose • proportionality

Charter	**General Approach**	
Consideration	***Details***	***Key Concepts***
Purposive interpretation	Object of *Charter* jurisprudence: → "to secure for persons '**the full benefit of the *Charter*'s protection**'" (Dickinson J.[C.J.] in *Big M Drug Mart* qtd. in *Motor Vehicles*) Interpretation approach: "the right or freedom must then […] be given a **generous interpretation** aimed at **fulfilling that purpose** and **securing for the individual the full benefit of the guarantee**" (Wilson J. in *Edmonton Journal*) → consistent w/ the traditional **living tree approach** → analytically different from LLP purposive approach	• generous interpretation • full benefit of the guarantee
Contextual approach	Rights should be **contextualized with the public dimension of both the legislative objective and the particularized version of the *Charter* value** → "a particular right or freedom may have a different value depending on the context" (Wilson J. in *Edmonton Journal*) → if the *Charter* value is characterized in abstract terms, it will be rhetorically more valuable than the infringement → balance both values either in the abstract or in context (otherwise impossible for a contextualized value to trump the abstract one)	• values may vary based on context • balance values both as abstract or both as contextual • n.b. effective lawyering = inflating the value argued for

Inquiry scope	Generally speaking, a **wide-ranging inquiry** but includes the typical actors (i.e. Canadian precedents in *Bill of Rights* and other human rights decisions, common law protections, etc.) → As precedent may answer the question, there will not be the wide ranging analysis (but the cases we're reading are foundational cases, in which case the full analysis is complete) Varied sources: → linguistic context: other provisions of the *Charter* → historical context → precedent from foreign or international jurisdictions: international norms, conventions and rights instruments → philosophical context: liberal philosophy (according to Sharpe and Roach, John Stuart Mill and Ronald Dworkin seem to be the favourites of the SCC)	• wide-ranging inquiry • varied sources
Evidence	While traditionally extrinsic material was excluded in constitutional adjudication, **extrinsic material is permissibly used** in *Charter* interpretation (*Motor Vehicles*) → weight accorded still limited by "inherent unreliability" (*Motor Vehicles*)	• extrinsic evidence admissible
Rights analysis	Analyze purpose + effect as even if the purpose is *Charter* neutral or even *Charter* enhancing, the effect(s) may ground an action → unlike in division of powers analysis, **effect is substantive** Basic rule: "**either an unconstitutional purpose or an unconstitutional effect** can invalid legislation" (*Big M Drug Mart*)	• either purpose OR effect
~~Presumption~~	No presumption of constitutionality with the *Charter* → unlike in division of powers, where there is a presumption of constitutionality and the challenging government or party needs to rebut that presumption	• no presumption of constitutionality

***Charter* s.1**	**Limitation Analysis**	
Overview	3-part analysis (incl. 3 prong proportionality assessment) to determine whether the infringement of the right is justified under *Charter* s. 1 (1) prescribed by law (*Therens, Irwin Toy, Osborne*) (2) objective and purpose (*Big M Drug Mart*, *Edmonton Journal*) (3) proportionality (*RJR-MacDonald*, *Thomson Newspapers, Hutterian Brethren, N.A.P.E.*) i) rational connection ii) minimal impairment iii) balancing prong (*Dagenais*)	*Big M Drug Mart, **Oakes**, Therens, Irwin Toy, Osborne, Edmonton Journal, Dagenais, RJR-MacDonald, Thomson Newspapers, Hutterian Brethren, N.A.P.E., Butler*
***s.1** The* Canadian Charter of Rights and Freedoms *guarantees the rights and freedoms set out in it subject only to **such reasonable limits prescribed by law** as can be **demonstrably justified in a free and democratic society**.*		
Overarching Considerations	***Details***	***Key Concepts***
Judicial deference	(+) "complex regulatory response to a social problem" (*Hutterian Brethren*); legislative regime distributes scare resources or balances competing claims or interests (*McKinney*) (-) "penal statute directly threatening the liberty of the accused" (*Hutterian Brethren*); situations in which the state is the "singular antagonist" (*McKinney*) * the courts do not use the *Charter* to limit legislatures but rather to require that legislatures act in compliance with the *Charter* (*N.A.P.E.*) → "whenever there are boundaries to the legal exercise of state power such boundaries have to be refereed" (*N.A.P.E.* ¶116)	• balance between judicial deference and type of legislation
Evidentiary challenges	Given the subject matter of some impugned legislation, there may be a **lack of scientific data** regarding the particular object of the legislation. Courts may use	• common sense

	common sense and indirect evidence to draw **inferences**. → e.g. root causes of tobacco addiction in *RJR-MacDonald* and impact of advertising on older ages in *Irwin Toy*) → impact: difficulty establishing what is the appropriate, minimally impairing standard when causation is not understood?	• inference
Fiscal constraints	Generally, courts are **reluctant** to permit government justification of *Charter* right(s) infringement due to **fiscal constraints**. → "To do otherwise would devalue the Charter because there are always budgetary constraints and there are always other pressing government priorities" (*N.A.P.E.*) Budgetary arguments are **not reasonable limits unless there is an exceptional circumstance** (*N.A.P.E.*) → Newfoundland's $127 million deficit = "singular case" of extreme financial situation → "the infringed Charter right cannot be applied in a way that is blind to the consequences for other social, educational and economic programs. […] The budget is simply a forum for juggling spending priorities of all types." (*N.A.P.E.*)	• fiscal constraint are not reasonable limits unless there is an exceptional circumstance
Step	***Details***	***Key Concepts***
(1) prescribed by law	<u>core meaning</u>: **a statement of rule of law (**i.e. was the government action authorized by rule of law?) → not a frequent challenge with *Charter* cases as often challenging legislation (if legislation questioned, often addressed at proportionality: *Osborne*) → rule of law = **accountability of government**, **notice to citizen** → **prescribed in either regulation, statute or common law** (*Therens*) <u>secondary meaning</u>: **question of vagueness** (1) language is so vague that there is **no meaningful content** (typically broad, overly general conferral of discretion) → more common but more variation in the jurisprudence → depends on who is granted the discretion (more discretion is appropriate with a judge than a police officer) → depends on whether there is the possibility for review of the decision → two reasons for scrutiny (both related to rule of law values): (a) accountability and (b) notice to the citizen → <u>test</u>: does it provide a **sufficiently intelligible standard** (*Irwin Toy, Osborne*) (2) language is **contradictory** and **ambiguous** → clearer to identify but rare * preference to address over breath/vagueness in *Oakes* proportionality analysis to consider why legislation was worded as it was (*Osborne*)	• core: rule of law • secondary: question of vagueness
(2) objective and purpose	<u>core meaning</u>: objective of infringing measure articulate w/ precision **<u>substantial and compelling purpose</u>**: "**of sufficient importance to limit a right**" (*Big M Drug Mart* qtd. in *Oakes*) → argued as a high purpose, but generally the court finds the purpose sufficiently substantial and compelling (unless the purpose on its face is offensive of the *Charter* such as in *Big M Drug Mart*) <u>limitation</u>: cannot be a **shifting purpose** (*Big M Drug Mart*) but strategically purpose can be sufficiently abstracted to be a *Charter* compliant and non-shifting purpose (*Butler*) → "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable" (*Big M Drug Mart*)	• compelling and substantial purpose • no shifting purpose • strategic framing

	assessment: does this type of legislation exist in other free and democratic societies? is the objective to provide a benefit or limit access to a benefit? application: → the specified purpose is a strategic place to frame the argument as it **determines what the means are achieving**, which affects iii) the balancing prong (i.e. the different characterizations in *RJR-Macdonald* in the majority and dissenting reasons)	
(3) proportionality	3-prong analysis: **i) rational connection** **ii) minimal impairment** **iii) balancing prong**	• rational connection • minimal impairment • balancing prong
i) rational connection	(i) rational connection Are the limiting measures rationally connected to the objective of the legislation? → may be challenges with evidence (*Butler*, *RJR-MacDonald*, *Irwin Toy*) → **reasonable basis** standard (*Butler*)	• rational connection
ii) minimal impairment	(ii) minimal impairment "The party seeking to uphold the limit must demonstrate on a **balance of probabilities** that the means chosen impair the freedom or right in question as little as possible. What will be "as little as possible" will of course **vary depending on the government objective and on the means available to achieve it**" (*Irwin Toy*) → high standard in *Oakes*: **no other less impairing means** → modified in *Irwin Toy* and *RJR-Macdonald*: **reasonable basis** (*Irwin Toy*, *Butler*) **range of reasonable alternatives** (*RJR-Macdonald*) a) evidentiary difficulties (*RJR-MacDonald*, *Butler*) b) vulnerable group (*Irwin Toy*) → question of legislative tailoring: **do the provisions fit the purpose**? (but no requirement for perfect tailoring: *Butler*) Contextual approach to minimal impairment (*Thomson Newspapers*): (1) **nature of the legislative objective**: a contextual analysis of the a) nature of the social problem which the legislature seeks to address and/or of the b) group the legislature seeks to protect (*Thomson Newspaper*) → when a vulnerable group is protected by the legislative measure, a less rigorous approach is rights-enhancing (2) **nature of the evidence**: when inconclusive social science evidence is all that is available to measure the harm or the effect of the provision, government can rely on **arguments derived from logic and reason** (*Thomson Newspapers* adopting McLachlin J. in *RJR-MacDonald*) (3) **nature of the protected activity**: core/periphery characterization of expression values (*Thomson Newspapers*); particularized right (*Edmonton Journal*); commercial expression (*RJR-MacDonald*)	• no less impairing means (*Oakes*) • reasonable basis (*Irwin Toy, Butler*) • range of reasonable alternatives (*RJR-MacDonald*, majority) • contextual approach (*Thomson Newspapers*) • (Q: would this modification apply to s. 15 w/ high burden on rights claimant?)
iii) balancing prong	(iii) balancing prong → in *Oakes*, the balance between the substantial and compelling purpose (salutary effect) and the impacts on the right (deleterious effect) → in *Dagenais*, the balance is rephrased as "there must be a **proportionality between the deleterious effects** of the measures which are responsible for limiting the rights or freedoms in question **and the objective**, and there must be a **proportionality between the delirious and the salutary effects of the measures**"	• proportionality between deleterious effects and the objective • proportionality between deleterious effects and salutary effects

	* previously thought as judicial dead-end (straight forward judicial balancing therefore discomfort to second-guess legislation); in *Hutterian Brethren*, the SCC used the prong to beneficial impact of the req'ment for photos outweighed the deleterious effects)	

***Charter* s.2(b)**	**Freedom of Expression**	
Overview	Two step analysis to determine (1) whether the expression (activity that conveys meaning) falls within the scope of the right, and (2) whether the right has been infringed. Three threshold limits at scope of right: i) violent forms; ii) public location; iii) positive freedom right.	*Edmonton Journal, RJR-MacDonald, Keegstra,* ***Irwin Toy****, Baier, Butler, Little Sisters*
s.2(b) *Everyone has the following fundamental freedoms: freedom of thought, believe, opinion and expression, including freedom of the press and other media of communication*		
Overarching Considerations	***Details***	***Key Concepts***
Gradations	The value of freedom of expression is gradated (*Edmonton Journal*): (1) core expression (2) periphery expression * recurrent struggle over commercial expression (*RJR-MacDonald*)	• core vs. periphery expression • commercial?
Rationales for Freedom of Expression	For freedom of expression, *Keegstra* is considered the authoritative articulation of the <u>underlying purposes of the right</u> (contextualization in *Edmonton Journal*): (1) **democracy** rationale → classic conception → free and open debate of political matters required for democracy → instrumental protection: freedom of expression enables a health democracy (2) **truth-seeking** rationale → also an instrumental protection → markets an image of social life in which relationships between human beings are transactional and the **exchange of ideas leads to truth** → survival of the fittest: competition of ideas leads to the truth → more debated as history shows that the truth does not always win out Free flow of ideas can be dangerous and destructive (3) **self-fulfillment** rationale → formation of beliefs and opinions (and the expression thereof) is fundamental to our identity and self-flourishment → critique: brooks no limits (does not matter how dangerous or false the commitments might be)	• democracy • truth-seeking • self-fulfillment
Step	***Details***	***Key Concepts***
(0) Does the *Charter* apply?	Federal or provincial legislation = *Charter* applies Other government action or actor = s.32 analysis	• s.32 analysis
(1) scope of the right	**Expression (content) = any activity that conveys meaning** → distinction between form and content <u>Approach</u>: a) consider the linguistic / textual import of the words → broadest conception that the words will bear (without purposive texture, which inextricably ties the values/principles to the expression) b) is the activity **expression**? c) if yes, does the expression fall within the **threshold exclusions**? d) if yes, proceed to (2) rights violation analysis <u>Threshold exclusions</u>: (1) form or method: **violent forms** (i.e. murder, rape, physically assaultive violence) (*Irwin Toy*)	• expression? • threshold exclusions: form or method (violent forms); location (limitation on public property); positive freedom right

	→ form/content distinction clarifies that it's not a critique of the content but rather the form of the content (i.e. the broad definition of content standards) (*Irwin Toy*) (2) location: **expression on public property [public forum] when the expression is incompatible w/ function of the public place** (*Baier*) test: incompatible w/ the purpose of the public space (*Committee for the Commonwealth of Canada*) → judicial willingness to texture classical rights model and find some public spaces incompatible with the expression of the right (i.e. difference between the park and a minister's office, and the courtroom steps and the courtroom) (3) **positive freedom right**: claimant asks government to take action to enhance the right? *Dunmore* criteria (*Baier*): a) claim grounded in freedom **not in access to statutory platform** → is the expression secondary to the access sought? b) government **intended to limit** freedom OR **effects substantially interfere w/ exercise** of freedom → rigorous standard: substantially interfere (more than *Big M Drug Mart* standard) c) government did not simply fail to act but rather **government inaction reinforces or orchestrates private obstacles** → fundamentally, there is no access without government action (functional inability) → requires contextual evidence	
(2) rights violation	Approach: a) general question: **has the government action interfered with the right**? b) two part analysis (*Big M Drug Mart*): i) does the **purpose** of the government action interfere with the right? → legislative intent (*Big M Drug Mart*) → singling out of meaning (*Irwin Toy*): does the law or regulatory scheme attach consequences to certain types of meanings? ii) does the **effect** of the government action interfere with the right? → time, manner & place (i.e. regulation of forms in which the meanings occur) → control of physical consequences of expression → additional burden: "a plaintiff must state her claim with reference to the principles and values underlying the freedom" (CP 5-9)	• government interference • purpose or effects

***Charter* s.7**	**Right to life, liberty and security of the person**	
Overview	Two stage analysis (functionally three stages): (1) is the claimant deprive with a right under s. 7?; and (2) is the deprivation inconsistent with a PFJ?	*Morgentaler, Rodriguez, Chaoulli, Insite, Motor Vehicles*
***s.7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*		
Overarching Considerations	***Details***	***Key Concepts***
Qualified Right	"The term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (*Motor Vehicles* ¶62)	• intrinsically qualified right
Step	***Details***	***Key Concepts***

(0) Does the *Charter* apply?	Federal or provincial legislation = *Charter* applies Other government action or actor = s.32 analysis	• s.32 analysis
(1) right?	**Does the claim come within the scope of s. 7?** Three values: **life**, **liberty** and **security of person** Scope of values: (1) **independent values** therefore need only engage one (*Morgentaler*) (2) the three values **inform each other** and form a coherent whole therefore cannot contradict each other (*Rodriguez*) (3) **within the administration of justice** → little clarity as to what this means: potential ambiguity, especially the further one gets from the **criminal context** a) meaning potentially vast given purposive, rights-enhancing interpretative posture (*Big M Drug Mart*) b) argument that scope narrowed when read within the context of the *Charter* legal rights section (ss. 7 – 14) and read backwards from PFJs (*Motor Vehicles*: relationship between PFJs and natural rights) c) solid consensus that the scope extends beyond the criminal context but **no clarity as to the degree** → s. 7 applied in *Chaoulli* (concurring majority reasons) as within the administration of justice but majority in *Gosselin* did not find social benefits legislation within the administrative of justice when just administering benefits (qualified that a different case within a different social benefits regime might have a different result) Application: (1) Life: *Rodriguez, Chaoulli, Insite* (2) Liberty: right to non-detention (*Motor Vehicles*); personal decisions of a fundamental nature such as parenting (child welfare, custody), where to locate home (*Godbout*), and reproductive choice (Wilson J. in *Morgentaler*) (3) Security of the person: mental, physical and psychological security; **delay, distress** (criminal law context in *Morgentaler*, applied in *Chaoulli* to non-criminal law but health care context by McLachlin C.J.) Positive protection?: possible to apply *Baier* (*Dunmore*) 3-part test to require positive action → however, failed in *Gosselin* → big unknown (frontline issue lacking resolution)	• three values: engage one, but cannot contradict another • within the administration of justice • possibility of positive protection?
(2) deprivation?	**Has the government deprived the claimant of the right?** a) derivation = **government action** → capacity for some personal choice not fatal (*Insite*) → *Gosselin* argued the positive protection here: does a failure to act constitute a deprivation? (not successful but door left open) b) "**morality of the activity the law regulates is irrelevant** at the initial stage of determining whether the law engages a s. 7 right" (*Insite*) c) emphasis on **effect** (not purpose, which can appear to legitimize some balancing of government objectives) (*Insite*)	• government action • morality irrelevant • emphasis on effect
(3) inconsistent w/ PFJ?	**Is the deprivation inconsistent w/ a PFJ?** Principle of fundamental justice: → inherent qualification of the (vast/broad) rights of life, liberty and security of the person: *Charter* protection only functions when the right has been inconsistently deprived → "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our	• existing PFJs = substantive and procedural • new PFJs = (1) legal principles, (2) social consensus,

	legal system" (*Motor Vehicles* ¶64) incl. principles articulated in *Charter* ss. 8 - 4 <u>Approach</u>: → general critique: too much overlap w/ s. 1 *Oakes* analysis, which places a high burden on rights claimant → related critique: rights claimant may bear the burden of the state's concern / role in balancing complex interests (McLachlin J. in *Rodriguez*, dissenting) (1) **existing or new PFJ**? → <u>existing PFJs</u> a) **substantive**: freedom of conscience (Wilson J. in *Morgentaler*); other *Charter* values (*Motor Vehicles*) b) **procedural**: due process (legal rights in *Charter*); gross disproportionality (*Insite*); manifest unfairness (*Morgentaler*); arbitrariness (*Chaoulli*, *Rodriguez* dissent, *Insite*) → <u>new PFJs</u> a) three criteria for new PFJs (*Rodriguez*, *Motor Vehicles*): (1) **legal principle**: source is a basic tenet of the legal system (*Motor Vehicles*, *Rodriguez*) (2) **social consensus**: principle is "vital or fundamental to our societal notion of justice" (*Rodriguez*) (3) **sufficiently precise** to yield an **intelligible standard**: "be capable of being identified with some precision and applied to situations in a manner which yields an understandable result" (*Rodriguez*) b) PFJs not limited to procedural standards of justice (*Motor Vehicles* ¶65) c) "principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as **essential elements of a system for the administration of justice** which is founded upon the belief in **the dignity and worth of the human person and the rule of law**" (*Motor Vehicles* ¶62) d) rejected PFJs: human dignity (*Rodriguez*), protection of children → human dignity too fundamental and underlies the three values (life, liberty, security of the person) in such a fashion that it would make s. 7 circular (2) determine **whether the deprivation is inconsistent w/ the PFJ**? → <u>existing PFJs</u> a) **arbitrariness** (*Rodriguez*, *Chaoulli*, *Insite*) → two step analysis (echoes *Oakes* rational connection): i) identify the purpose of the law ii) determine whether the legislative provision has a sufficient relationship to this purpose (clear connection in theory and in practise to the purpose) → McLachlin J. (*Rodriguez, Chaoulli*): arbitrariness is different from rational connection; standard of necessity (*Chaoulli*) b) **manifest unfairness** (*Morgentaler*) → type of rational connection test: "un**necessary in respect of Parliament's objectives**" + "**result in additional risks** to [the claimants" (*Morgentaler*) → factors considered: uneven application, unclear standard, uneven access (*Morgentaler*) → generally, the purpose (providing a defence) was not achieved	(3) sufficiently precise (intelligible standard) • each PFJ has a road map to determine whether deprivation was consistent w/ PFJ • roadmaps problematic given overlap w/ s. 1 analysis

	given the unevenness in application in access (*Morgentaler*) c) **gross disproportionality** (*Insite*) → echoes *Oakes* balancing prong → "state actions or legislative responses to a problem that are **so extreme as to be disproportionate to any legitimate government interest** (*Malmo-Levine, Insite*): are the effects on the rights claimant balanced with the government objective and results?	
Next Steps	Academic question whether s. 1 analysis still applies given the extensive justification analysis in step (3). → often addressed briefly as the same finding at the PFJ stages (ex: *Insite*)	• minimal application of s. 1 analysis

***Charter* s.15**	**Equality Rights**	
Overview	→ s.15(1) analysis: apply *Kapp/Withler* (with potential caveat that *Withler* applies to complex benefits schemes) → s.15(2) analysis: apply *Kapp*	*Andrews, Law, Gosselin, Health Services, Corbiere, Kapp, Gosselin, Withler*
Overarching Considerations	***Details***	***Key Concepts***
Purposive approach	→ language of equal concern and respect → tied at its core to human dignity	• equal concern • human dignity
Substantive equality	As **laws that are neutral and provide for negative treatment will not be experienced equally** given inequities in private relationships (and therefore produce unequal results), government has responsibility for **positive action** to produce equal/fair results. → emphasis on context, position and impact/effect(s) → rhetorical commitment to substantive equality but Canadian courts struggle to identify a test that captures this commitment (*Andrews*, *Law*) → similar challenges to positive freedom claims (potentially outside functional scope of *Charter*)	• equal laws produce unequal results given inequities in private relationships • positive requirement
Principles	→ purposive approach → purpose of equality guarantee (emphasis on substantive equality) → comparative approach → flexible & contextual analysis	• purposive • comparative • flexible • contextual
Rejected principles (*Andrews*)	→ formal equality → similarly situated test (US rights jurisprudence) → rationality analysis (BCCA in *Andrews*) → equation of equality w/ equal treatment	• no formal equality / identical treatment

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

Step	***Details***	***Key Concepts***
(0) Does the *Charter* apply?	Federal or provincial legislation = *Charter* applies Other government action or actor = s.32 analysis	• s.32 analysis
(1) Does the law make a distinction, in purpose or effect, that is linked to an enumerated or analogous ground and has a harmful impact?	<u>Discrimination in purpose or effect</u> purpose = facial (*prima facie*) distinction effect = adverse effects analysis <u>Discrimination = **legal distinction**</u> "discrimination may be described as a **distinction**, whether intentional or not but **based on grounds relating to personal characteristics of the individual or group**, which has the **effect of imposing burdens, obligations, or disadvantages** on such individual or group not imposed upon others, or which **withholds or limits access to opportunities, benefits, and advantages** available to other members of society.	• "personal characteristic" • enumerated or analogous grounds • immutable or constructively immutable

	Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on individuals' merits and capacities will rarely be so classed" (McIntryre J. in *Andrews* CP 6-7) Enumerated grounds in s.15(1): race, national or ethnic origin, colour, religion, sex, age or mental or physical disability Analogous grounds: citizenship (*Andrews*); sexual orientation (*Vriend*) → **immutable** or "changeable only at unacceptable cost to personal identity" **[constructively immutable]** (*Corbiere*): characters that are suspect markers of discrimination "based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law" and "too often have served as illegitimate and demeaning for proxies merit-based decision making" (*Corbiere*) Examples: immutable: race (*Corbiere*) constructively immutable: religion (*Corbiere*), marital status and citizenship (Lessard) → **occupational category** is not a personal distinction (*Health Services*) [critique: did not consider the individuals, who were disproportionately women, racial groups and individuals w/ varied residency statues, captured by the occupational category]	
(2) Is there discrimination in the substantive sense?	Contextual analysis: (1) comparative in general sense (no mirror image / "but for" comparator) (2) consideration whether regime as a whole is beneficial and whether regime balances competing interests (*Law* factor 3)	• contextual analysis • general comparison • balancing interests
(i) is there perpetuation of disadvantage or prejudice?	Nature of the interest (*Law* factors 1 and 4) → type of harm the interest is tied to : severe and localized nature vs. trivial and generalized nature (courts typically dismissive of financial harm)	• nature of the interest • type of harm • historical prejudice
(ii) is there stereotyping?	Stereotyping (*Law* factor 2) → high burden on claimant as it limits eligibility to lack of correspondence → irrationality in the law is like a stereotype as it maps over the individual in creating distinction based on enumerated or analogous grounds	• correspondence between distinction and harm

Previous criteria / considerations

Step	***Details***	***Key Concepts***
Comparator group	The "but for" group (i.e. share all key characteristics but for the alleged ground of discrimination) (*Hodge*) → critique: de-contextualized approach, difficult hurdle for intersectional claims	• "but for"
Dignity analysis (*Law*)	Subjective/objective approach to whether the plaintiff's dignity was harmed a) plaintiff's dignity harms (subjective) b) reasonable rights holder in the shoes of the claimant (objective) → contextual analysis of the situation in which was the dignity was infringed	• objective and ~~subjective~~ dignity harms
Law factors	(1) pre-existing discrimination (2) correspondence (3) ameliorative purpose (4) nature of interest	• incorporated into *Kapp/Withler* 2-part analysis

s.15(2) *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Step	***Details***	***Key Concepts***
(1) is the purpose of the legislation to	If the **purpose** of the legislation is to have an ameliorative effect for a disadvantaged group identified in the enumerated or analogous grounds, s.15(2)	• purpose vs. effect

ameliorate the condition of disadvantaged individuals?	applies and the legislation does not contravene *Charter* s. 15. If the **effect** of the legislation happens to be ameliorative for a disadvantaged group identified in the enumerated or analogous grounds, s.15(1) analysis applies and the legislation may or may not contravene *Charter* s. 15.	

***Charter* s.32**	***Charter* Application**	
Overview	*Charter* s. 32(1) specifies the scope of the application of the *Charter*: Parliament, legislatures and their respective governments. Four tests/assessments that aid a determination of whether the *Charter* applies: (1) branch of government; (2) routine and regular control; (3) close nexus	*Dolphin Delivery, McKinney, Stoffman, Douglas College, Eldridge, Slaight Communications, Godbout, Vriend, Dagenais, Hill*

s.32(1) *This Charter applies*

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislatures and governments of each province in respect of all matters within the authority of the legislature of each province.

Overarching Considerations	***Details***	***Key Concepts***
Orthodox view	*Charter* mediates the relationship between public and private → narrative = *Charter* governing state actions to protect the individual from state oppression (modelled on iconic first generation rights documents)	• public / private
Element	***Details***	***Key Concepts***
Application to private common law (*Dolphin Delivery, Hill*)	(1) **government actor relies on private common law** (*Dolphin Delivery*) (2) essentially "**public**" (*Dagenais*) (3) **indirect application** (*Dolphin Delivery*, *Hill*) → "the common law must be interpreted in a manner which is **consistent w/ Charter principles**" (*Hill*) Deferential posture to changes: a) courts will only make **incremental** changes (*Hill*) b) **flexible balancing framework**: common law values balances with *Charter* values (*Hill*) c) **no onus shift** (party claiming inconsistency must argue unreasonableness) (*Hill*)	• reliance • essentially public • indirect application
Application to legislation (*Vriend*)	**Legislative under inclusiveness** subject to *Charter* scrutiny → "the language of s. 32 does not limit the application of the Charter merely to positive actions encroaching or rights on the excessive exercise of authority" (*Vriend*) Narrow ratio: i) **existing statute** (not the absence of human rights legislation) ii) statute claims to be a **comprehensive** code of human rights protection (undermined by claim of underinclusiveness)	• legislative underinclusiveness • existing & allegedly comprehensive statute
Branch of government (*Dolphin Delivery*)	→ s. 32(1) specifies Parliament, legislatures and governments a) Parliament and legislatures = legislative branch b) Governments = executive and administrative branches → no inclusion of judicial branch, but judiciary "ought to apply and develop the principles of the common law in a manner consistent w/ the fundamental values enshrined in the Constitution" (*Dolphin Delivery*); "must" (*Hill*)	• legislative branch • executive branch • administrative branch
Routine and regular control (*McKinney*, *Stoffman*)	→ to what extent does the government control the entity's decision making? Factors considered: (1) public funding	• routine and regular vs. ultimate or extraordinary

	(2) ministerial approval (day-to-day operations = routine and regular while infrequent = ultimate or extraordinary) (3) tenure of board members (*McKinney* = tenure, *Douglas College* = removable at pleasure of cabinet) (4) public function (delivery of a key public program or performance of key public function) (5) variation in bodies administered through same act (6) normative functions / contextual factors (academic freedom in *McKinney*) <u>Rejected determinative factors</u>: → public function → public funding → creature of statute	
Public entity vs. specific activity (*Eldridge*)	(1) public entity = all actions public (even if appear private) (2) specific activity = particular action of otherwise private entity was controlled by government and therefore must conform with *Charter* (*Eldridge*)	• public entity • specific activity
Close nexus (*Slaight Communications*)	Although not a government body, a position or body created by statute that **exercises delegated powers** does not have the power to make an order that would result in an infringement of the *Charter* given the **close nexus** between the position or body and the government. → ex: arbitrator (*Slaight Communications*); hospital committee carrying out statutory task (*Eldridge*: identifying coverage under provincial health care program) → policy consideration: do not permit *Charter* circumvention by delegating out *Charter* incompatible decision-making	• exercise delegated power • close nexus
Quintessential government function (*Godbout*)	<u>Four factors</u>: a) power to tax b) democratically elected representatives c) enact by-laws that directly penalize individuals → distinguish *Godbout* (territorial application, governmental jurisdiction) from *McKinney* and *Stoffman* d) exercise delegated authority that provincial government would otherwise exercise	• tax • democratic election • enact by-laws that penalize individuals • delegated authority

Spectrum

~~statutory entities with private objectives~~ autonomous bodies ←→ ~~statutory entities with public objectives~~ bodies controlled by government

private corporations	university (*McKinney*) academic freedom	hospital (*Stoffman*) health = public	arbitrator (*Slaight Communications*)	college (*Douglas College*)

Appendix D: *Constitutional Acts* Provisions

Constitution Act, 1867	
Section	***Provision***
Constitution Act, 1867 Preamble	**Whereas the Provinces** of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with **a Constitution similar in Principle** to that of the United Kingdom
Constitution Act, 1982	
Section	***Provision***
Constitution Act ,1982 s. 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.
Constitution Act ,1982 s. 52	(1) The Constitution of Canada is the **supreme law of Canada**, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of **no force or effect**. (2) The Constitution of Canada **includes** (a) the *Canada Act 1982*, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b)
Canadian Charter of Rights and Freedoms (1982)	
Section	***Provision***
Charter, s. 1	The Canadian Charter of Rights and Freedoms **guarantees** the rights and freedoms set out in it **subject only to such reasonable limits prescribed by law** as can be **demonstrably justified in a free and democratic society**.
Charter, s. 2(b)	Everyone has the following fundamental freedoms: (b) **freedom of thought, belief, opinion and expression**, including freedom of the press and other media of communication
Charter, s. 7	Everyone has **the right to life, liberty and security of the person** and the right not to be deprived thereof **except in accordance with the principles of fundamental justice**.
Charter, s. 15	(1) Every individual is **equal before and under the law** and has the **right to the equal protection and equal benefit of the law without discrimination** and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has **as its object the amelioration of conditions of disadvantaged individuals or groups** including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Charter, s. 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 including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
Charter, s. 32	(1) This Charter applies (a) to **the Parliament and government of Canada** in respect of **all matters within the authority of Parliament** including all matters relating to the Yukon Territory and Northwest Territories; and (b) to **the legislature and government of each province** in respect of **all matters within the authority of the legislature of each province**.

Index of Cases

Douglas College	SCC 1990	College mandatory retirement. Lack of tenure = govt.	4-33
Slaight Communications	SCC 1989	Govt. appointed arbitrator. Close nexus test.	4-34
Godbout	SCC1997	Municipal taxation. Quintessential govt. function test.	4-49
Vriend	SCC 1998	Sexual orientation. Explicit legislative under inclusion subject to *Charter* scrutiny.	4-56
Hill	SCC 1995	Scientology. ~~Government actor~~. CL = consistent w/ *Charter* values. No onus shift.	4-61
Freedom of Expression: Section 2(b)			
Short Name	**Ct./Year**	**Keywords**	**CP**
Keegstra	SCC 1990	Hate speech. 3 rationales: democracy, truth seeking & self-fulfillment	5-4
Irwin Toy	SCC 1989	Kids' ads. Framework of s. 2(b) analysis. Expression = conveys meaning.	5-8
Baier	SCC 2007	Trustee teachers? Threshold exclusion = statutory platform unless *Dunmore*.	5-16
Butler	SCC 1992	Obscenity. No "shifting purpose" does not preclude a shift in emphasis.	5-26
Little Sisters	SCC 2000	Custom seizure. Affirm *Butler*. Only address institutional problems (not effect).	5-40
Equality Rights: Section 15			
Short Name	**Ct./Year**	**Keywords**	**CP**
Andrews	SCC 1989	Citizenship & the bar. Contextual analysis, compactor, definition of discrimination.	6-2
Law	SCC 1999	30-yr-old widow denied CPP benefits. Four overarching considerations (*Law* factors).	6-12
Corbiere	SCC 1999	Aboriginal residency to vote. Enumerated/analogous grounds = immutable.	6-44
Kapp	SCC 2008	Aboriginal fishing. s. 15(2) = enabling positive govt. action. Reaffirms *Andrews*.	6-60
Withler	SCC 2011	Survivor benefits. *Kapp* applied to s. 15(1): two step test. Complex benefits scheme.	6-64
Life, Liberty & the Security of the Person: Section 7			
Short Name	**Ct./Year**	**Keywords**	**CP**
Morgentaler	SCC 1988	Abortion. Crim. context. Scope of security of the person. PFJ = manifest unfairness.	7-4
Rodriguez	SCC 1993	Assisted suicide. Right consistent w/ 3 values. Criteria for new PFJs.	7-16
Chaoulli	SCC 2005	Health care (QC). Security of person. PFJ = arbitrariness. Deference w/ regime.	7-81
Insite	SCC 2011	PFJs = arbitrariness & gross disproportionality. Consider in light of other regulation.	handout
Aboriginal Rights and Indigenous Legal Systems			
Scope and Content of* Constitutional Acts *Section 35			
Short Name	**Ct./Year**	**Keywords**	**CP**
Sparrow	SCC 1990	Leading case: step 2 (extinguishment). Rights must be explicitly extinguished, but extinguished rights are gone for good. Fishing was/is an aboriginal right (evolved).	8-1
VanderPeet	SCC 1996	Leading case: step 1 (rights analysis). "Integral to a Distinctive Culture" Test. Determined that selling salmon not integral.	8-22
Gladstone	SCC 1996	Leading case: steps 3 and 4 (infringement & justification). Selling herring spawn infringed aboriginal right but justified. No internal limit to commercial enterprise.	8-48
Case referenced in class or decision, but not read in course			
Short Name	**Ct/Year**	**Keywords**	**Source**
Finlay	SCC 1993	MB resident claims violation of CAP re: deductions to welfare to recover overpayment. 5-4 decision upheld overpayments.	Sossin article CP 9-16
Thorson	SCC 1975	Taxpayer challenge *Official Languages Act*. Citizen's standing as broad impact (tax issue); no other avenue (no offense/penalty), clear issue, respectable litigant (MLA)	*Borowski* 2-8
McNeil	SCC 1976	Taxpayer challenge film censorship. Citizen's standing as regulation (deprived	*Borowski* 2-9
Okanagan Indian Band	SCC 2003	Logging to build houses contrary to forestry regulations. Sued for costs to mount complex aboriginal title defence. 3-part test.	*Little Sisters* 2-27
Eldridge	SCC 1997	Sign language. Specific activity caught under public entity (otherwise private.)	4-36
BCGEU	SCC 1988	Courthouse case. Charter will apply to CL when it is relied on in litigation involving a government party or in proceedings initiated for a public purpose.	*Hill* 4-67
Haig	SCC 1993	Vote in Quebec referendum. No obligation to provide statutory platform.	*Baier* 5-18

NWAC	SCC 1994	Aboriginal organization funding. No positive duty on govt. to prove funding in the circumstances as no positive	*Baier* 5-18
Siemens	SCC 2003	Plebiscites on video lottery terminals. No right to vote within a statutory platform.	*Baier* 5-19
Delisle	SCC 1999	RCMP s. 2(d) claim (exclusion from statutory regime). Under inclusiveness in s. 15.	*Baier* 5-18
Dunmore	SCC 2001	Positive rights claim. Labour legislation that excludes agricultural workers from union violates s. 2. Distinction drawn between underinclusive legislation and legislative silence. Vulnerable group.	*Baier* 5-20
Fraser	SCC 2011	Follow-up to *Dunmore*. Limited collective component sufficient.	
Health Services	SCC 2007	Occupational category is not a personal characteristic.	6-15
Gosselin	SCC 2002	Differential treatment on age failed at 3rd step (disadvantage/discrimination).	6-17