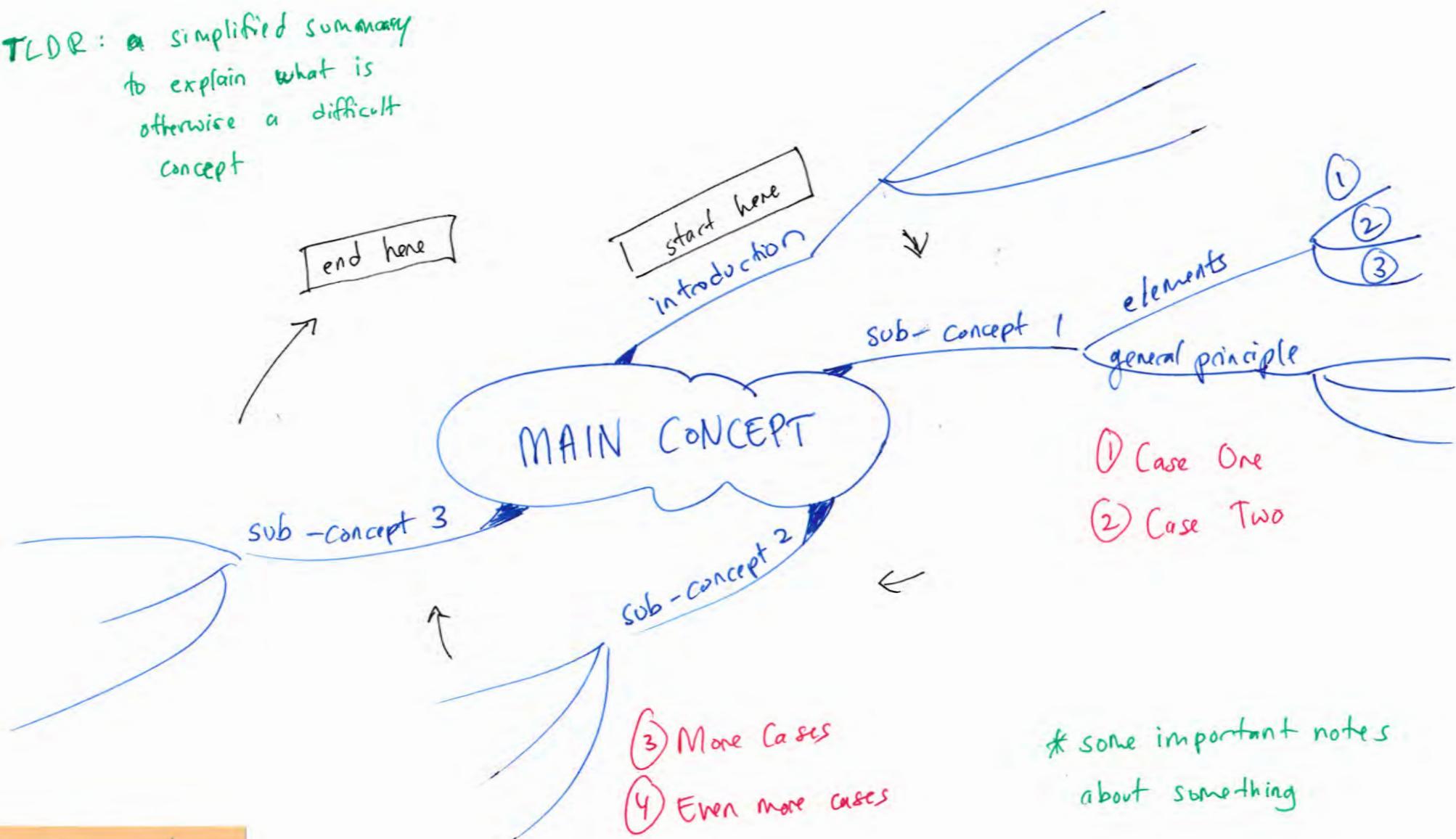


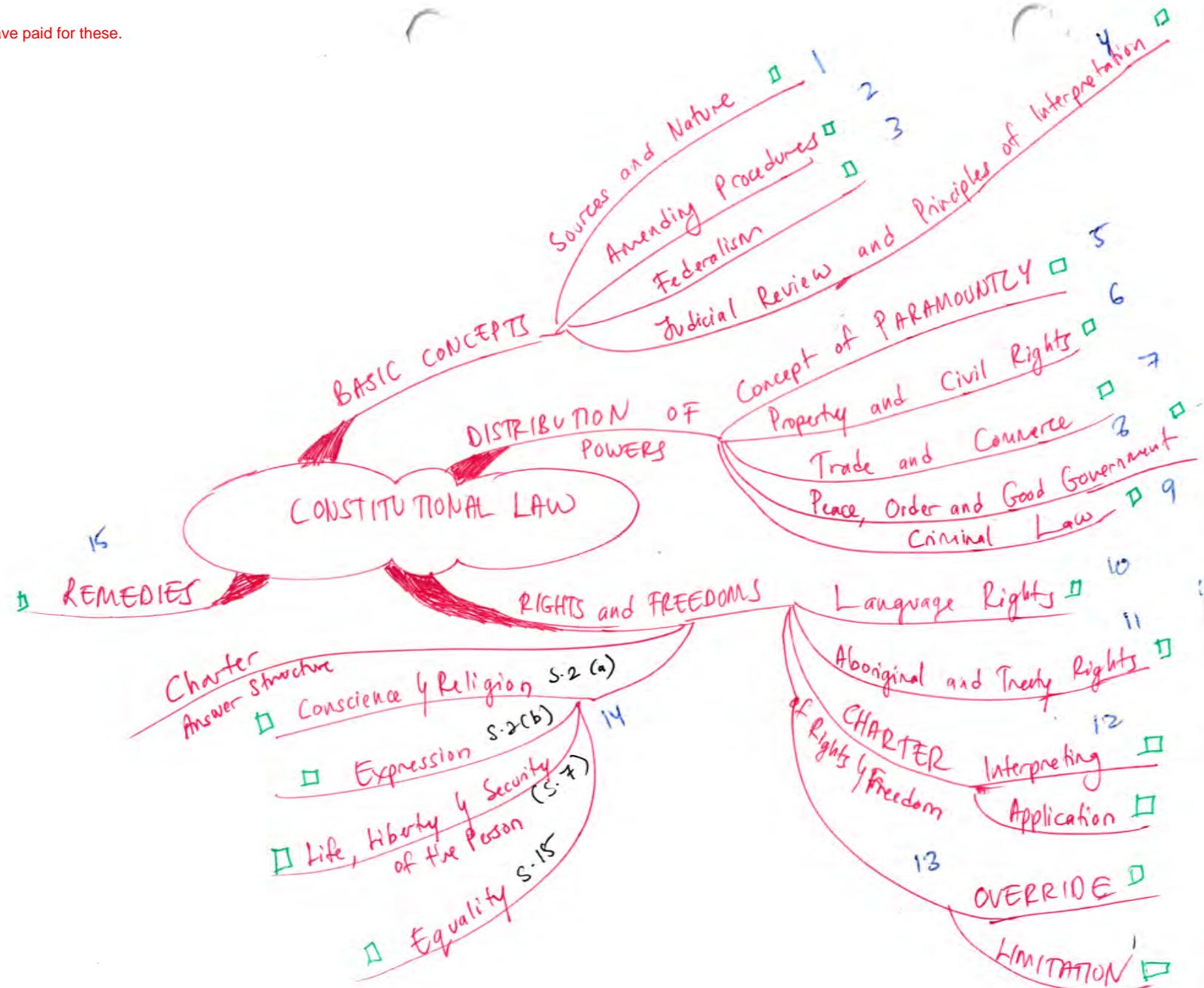
TLDR: a simplified summary  
to explain what is  
otherwise a difficult  
concept



\* some important notes  
about something

how to read this  
mindmap: CLOCK-  
WISE. Start at  
1 o'clock and end  
at 11 o'clock

This is an example sheet.



## Is it Constitutional? Answer structure

### ① Pith & Substance

- purpose / effect
- background context
- conclude what the subject matter is

### ② Classification

- under which head
- is it colourable?
- conclude if intra or ultra vires

### ③ Interaction w/ provincial law? (if both held valid)

- paramountcy? apply both branches
- determine if there is conflict

### ④ Conclude if the law is valid / invalid under Federalism.

Then move on to Charter.

If Charter X applicable, discuss Severance or Struck Down

### ① Is it applicable? S. 32 govt. action

### ② Infringe which right?

~~is it trivial or substantial?~~

R v Jones

### ③ Conclude that X right is infringed

- follow test for each charter right

### ④ Saved by S.I.?

i. Prescribed by law?

ii. Justifiable? apply Balcer test

### ⑤ Decide if saved or not, cite cases.

### ⑥ If not saved, discuss the appropriate remedy

Issue: s. 52(2) exhaustive? per author Hogg:

- "includes" indicates not exhaustive
- cautions courts from adding to the list
- acknowledges the definition omitted a number of instruments key to the government of Canada & the provinces

SC in New Brunswick Broadcasting Co v. Nova Scotia (1993)

- agrees w/ Hogg
- held unwritten doctrine of parliamentary privilege forms part of the definition under s. 52(2)

See also O'Donohue v. The Queen (2003)

(3) Constitution Act, 1982 (CA 1982)

How? UK Parliament Enacted Canada Act 1982

#### 3 major changes

- established a 'domestic' amending formula
- authority over Canada of the UK Parliament was terminated / no Act of UK Parliament will become Canadian law forward
- The Canadian Charter of Rights & Freedom was adopted

The "Constitution Act, 1982" is schedule B

- "Charter" was adopted
- the CA 1982 had 60 sections
- s. 52(2) provides that the "Constitution of Canada" include:

- ① Canada Act, including CA 1982
- ② Acts and orders referred in schedule (30 instruments)
- ③ Any amendments to ① and ②

①

Const. Law prescribes importance

exercises power by organs of state  
explains which organs can exercise legislative executive judicial powers  
sets out limitation of powers  
protects civil liberties  
UPHOLD RULE OF LAW  
provides remedies when govt./officials acts 'outside of the law'  
eg laws enacted contrary to the Constitution may be struck down by Courts / can be challenged

general concepts

① Sources & Nature of Constitutional Law

HISTORICAL TIMELINE

② 1960 Canadian Bill of Rights

- enacted as a Federal Statute
- added to the Constitution in 1982

#### FEATURES

1. No built-in amending procedures. Imperial parliament (Parliament of Westminster) made amendments up until 1982.
2. Governor General as the Queen's Representative appointed the same way colonial governors have been, by the Queen on advice by the PM.
3. Reliance on British Common Law

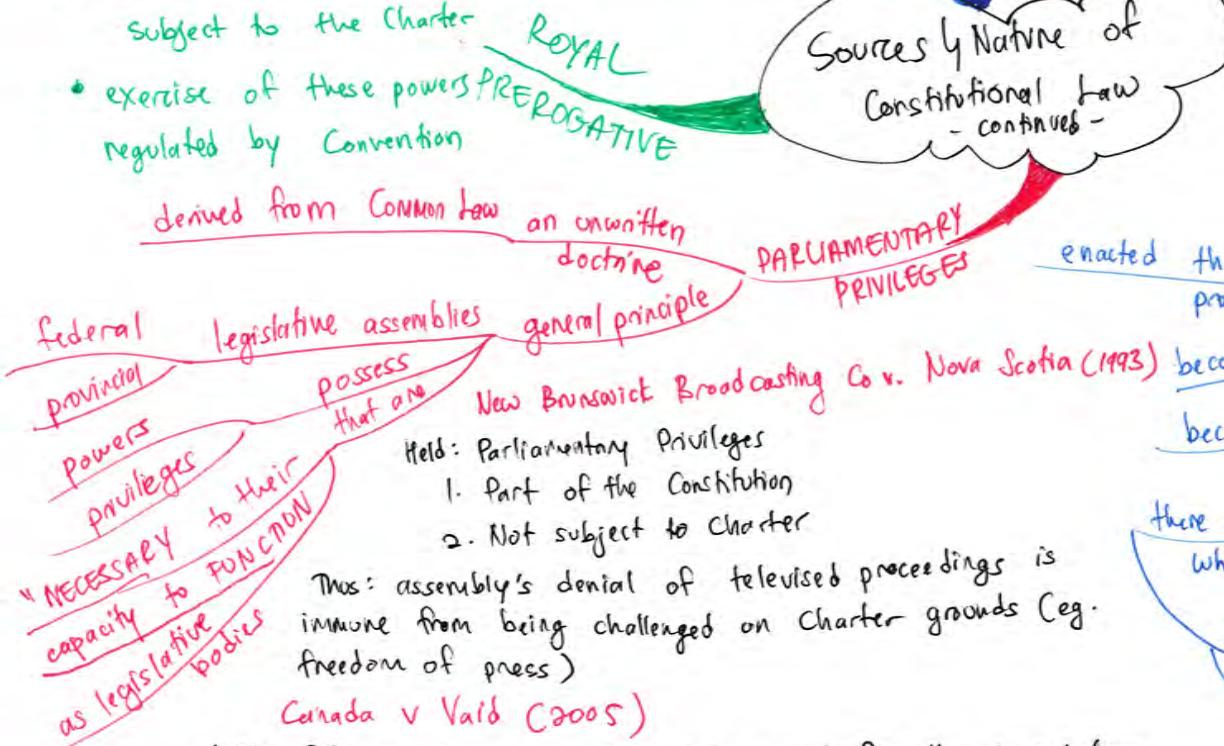
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### O'Donohue v The Queen (2003)

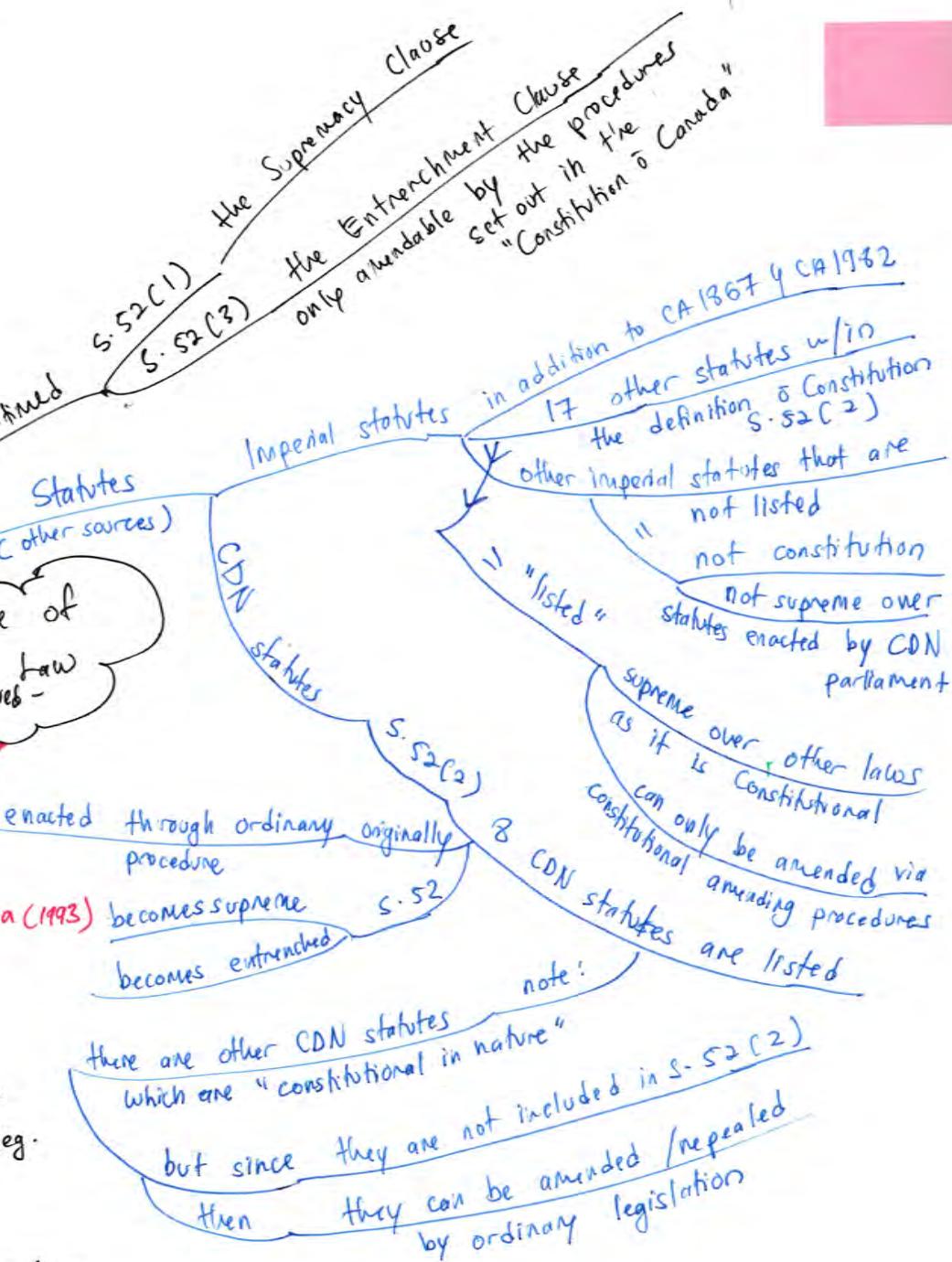
Held: Superior Court of Ontario

- Canada's constitutional monarchy, sharing the British monarch is fundamental to constitutional framework
- thus, the 'rules of succession' for that monarchy must be symmetrical
- 'rules of succession' then becomes part of the unwritten constitution of Canada
- thus, cannot be challenged by the Charter

- a Common Law branch where case law have determined the existence and extent of powers and privileges unique to the Crown
- over the years, have been narrowed down to conduct of foreign affairs, eg. making treaties, declaring wars, appointing PM & ministers, creation of Indian reserves, conferring honours
- powers are subject to Judicial Review and subject to the Charter
- exercise of these powers PREROGATIVE regulated by Convention



Held: P.P. as claimed must be 'necessary' for the legislative body to carry out its function, thus the act of hiring and firing House employees was not a part of P.P. and thus would be subject to Charter scrutiny



## \* Unwritten Constitutional Principles \*

NCA notes prepared by Iman M.

For personal reference only. You should not have paid for these.

### Re Secession Reference (1998)

- while cautioning that the "unwritten norms" as organizing principles of constitutional principles (such as judicial independence in Re Remuneration) is NOT AN INVITATION TO DISPENSE WITH THE WRITTEN TEXT of the Constitution, the SCC is of view that underlying constitutional principles (in certain circumstances) may give rise to SUBSTANTIVE LEGAL OBLIGATIONS = constitute substantive limitations upon gov. actions

- SCC invoked unwritten principles of

- Federalism
- Constitutionalism
- Protection of Minorities
- Democracy

to arrive to a decision

- HELD: If a Canadian province were to successfully hold a referendum to secede, it cannot unilaterally effect secession, but the federal govt. and other provinces would be legally obligated to enter good faith negotiations to accomplish secession

See also CLARITY ACT 2000

### Re: Manitoba Language Rights (1985)

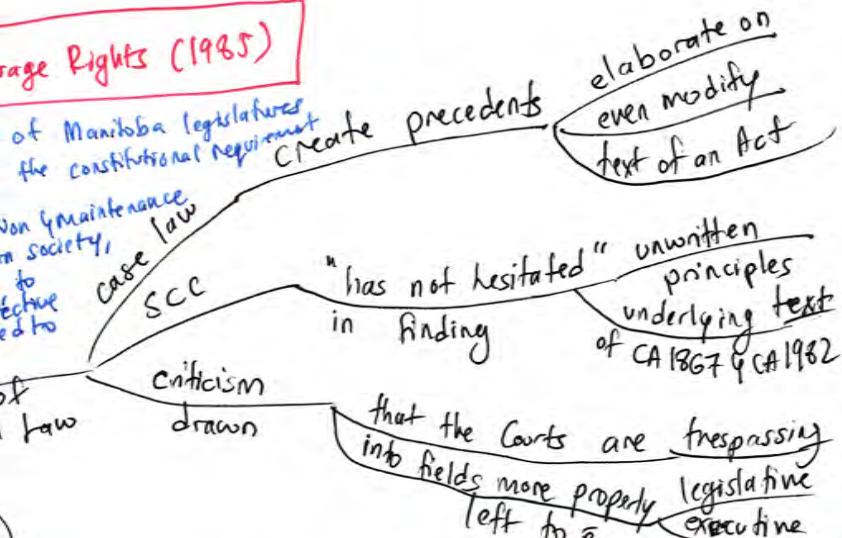
Held (1) Unilingual enactments of Manitoba legislature was not fulfilled  
(2) Role of Law requires creation & maintenance of order and laws to govern society, thus to avoid legal vacuum, to declare these constitutionally defective laws as valid in the time needed to translate & publish CASE LAW as a source of Constitutional law

### Sources & Nature of Constitutional Law - continued -

#### Per SCC:

"Judicial Independence" is an UNWRITTEN NORM, recognized and affirmed by the preamble to the CA 1867, in particular its reference to "Constitution similar in principle to that of the U.K." ... identifies the organizing principles of the CA 1867 and INVITES THE COURTS to turn those principles into the premises of a constitutional argument that culminates in

FILLING IN THE GAPS in the express terms of the constitutional text =



### Re: Remuneration of Judges (1997)

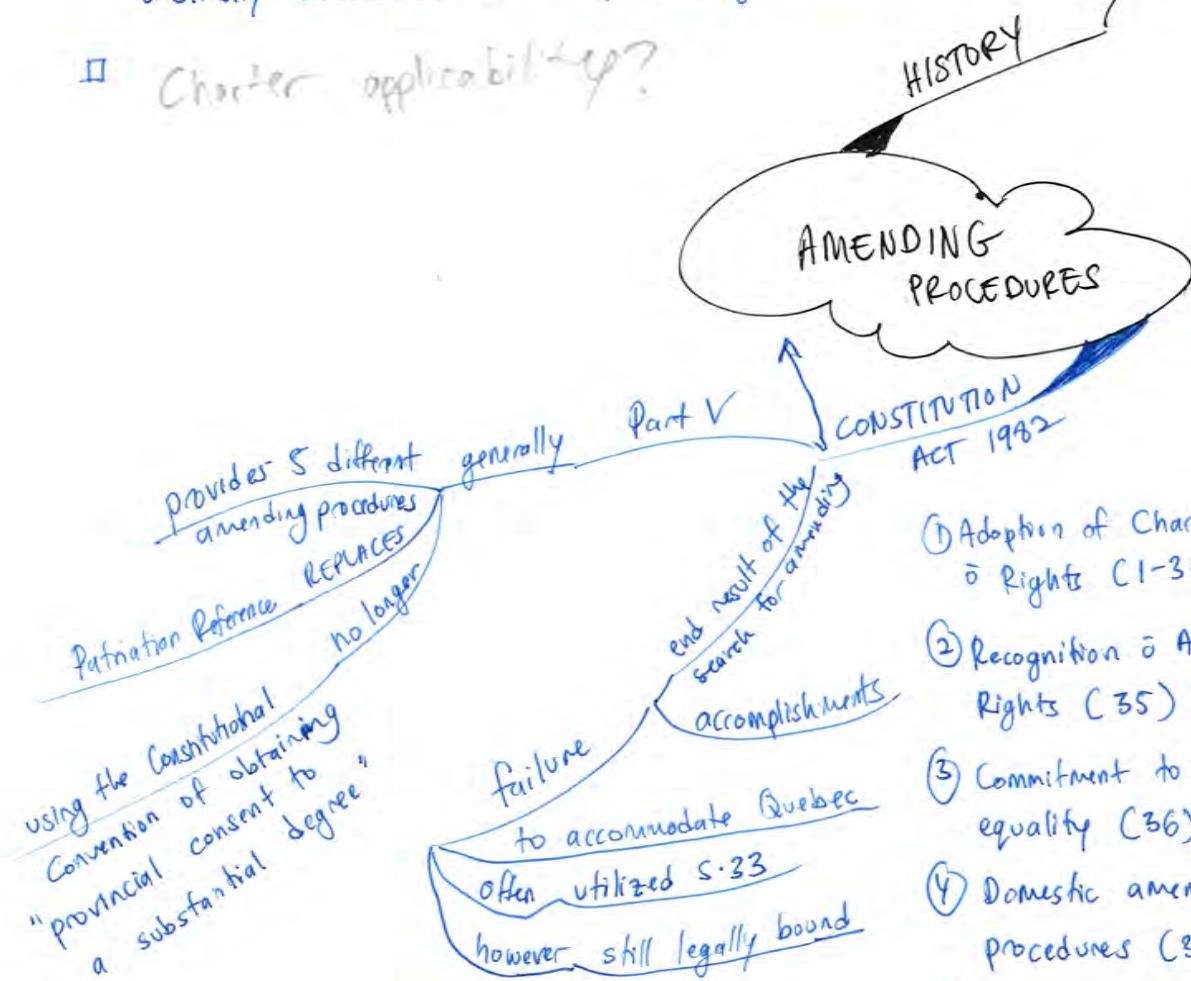
- issue: whether, and how the guarantee JUDICIAL INDEPENDENCE in s.11(d) of the Charter restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial judges

HELD: (1) S. 96 - S. 100 of CA 1867 which only protect the independence of judges in superior, district and county courts, and (2) s. 11.(d) of the Charter which protects the independence of wide range of courts and tribunals including provincial courts, but only when they exercise jurisdiction relating to offences are

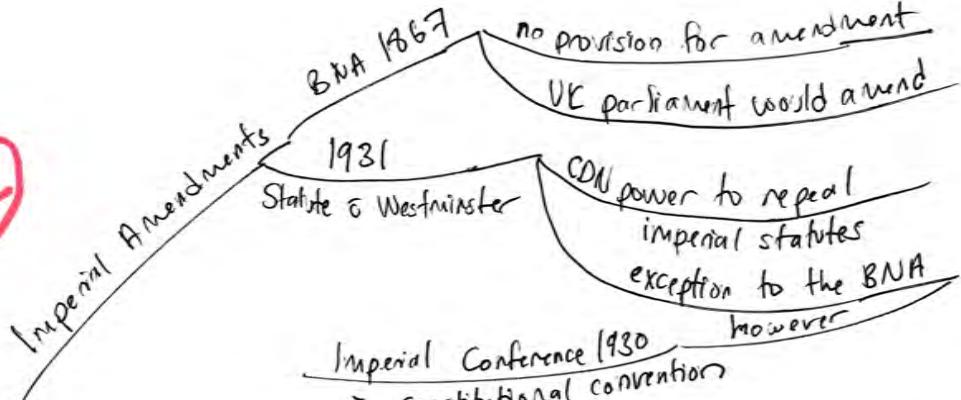
NOT AN EXHAUSTIVE AND DEFINITIVE written code for the protection of judicial independence applying this principle, arrived to the decision that Judicial Independence extends to all level of courts & super<sup>6</sup> only

## Application of the Amendment Procedures

- only apply to the "Constitution of Canada" as defined in S. 52 (2)
- any other legislation can be amended by an ordinary action of a competent legislative body
- Charter applicability?



②



- ① UK Pl. only make amendments to BNA if requested by Canada and consented to by Canada
- ② Practice was to have a request to amend via a joint-address by the Canadian House of Commons & the Canadian Senate
- ③ Also Patination Reference 1981 held that provinces' consent to the amendments proposed was not required as a MATTER OF LAW, but a substantial degree of provincial consent was required as a "MATTER OF CONVENTION".
- ④ Defined the Constitution of Canada and established supremacy

#	Sections	Procedure	Requirement	Exceptions / Remarks
(1)	<p>General Amending Procedure S. 38(1)</p> <p>Applicable to:</p> <p>(1) All residual class of amendments not covered by the specific procedures of 41, 43, 44/45</p> <p>(2) Per S. 42, gives 6 defined classes of amendment to the Constitution. See S.42(1)(a)-(e).</p>	<ul style="list-style-type: none"> <li>• May be initiated by either houses or provincial assembly</li> <li>• once the required assent is procured, a formal proclamation issued by Governor General under the Great Seal of Canada</li> <li>• proclamation can only be made after a whole year from the 'initiating resolution' or if all provinces have adopted their respective assent or dissent resolution</li> </ul>	<p>(1) Resolution of both Houses of the Federal Parliament (Senate + House of Commons)</p> <p>AND</p> <p>(2) Resolution of legislative assemblies of at least <math>\frac{2}{3}</math> of the provinces, provided they represent at least 50% population of all provinces (7/50 Rule)</p> <p>Note: In practice = 1 Western, 1 Atlantic, QB or ON (at least 7 provinces)</p> <p><b>HOWEVER</b> 1996 Bill C-110 aka the "Regional Veto"</p> <p>Statute:</p> <ul style="list-style-type: none"> <li>• imposed new conditions on top of the 7/50</li> <li>• required the 7 minimum agreeing provinces include "5 regions"</li> </ul> <p>ON QB BC Prairie (two) Atlantic (two)</p>	<p>S. 38(3)</p> <ul style="list-style-type: none"> <li>- province have a constitutional right to opt out if the amendment derogates its powers, rights or privileges</li> <li>- does not veto the amendment, but the province will be exempted from being subject to that amendment</li> <li>- max 3 provinces, otherwise will not achieve the 7/50 requirement</li> <li>- resolution to dissent must be passed prior to the proclamation</li> </ul> <p>S. 38(4)</p> <ul style="list-style-type: none"> <li>- revocation of dissent may be done at any time, even after proclamation; conversely revocation of assent is only allowed prior to proclamation (46(2))</li> </ul> <p>S. 40</p> <ul style="list-style-type: none"> <li>- for cultural and education matters, the federal government is obliged to provide "reasonable compensation" to a province that opted out of amendments that transfer provincial legislative powers relating to cultural and education matters to the federal parliament. Objective: to ensure a province is not abandoning cultural or educational matters due to financial issues.</li> </ul>

#	Sections	Procedure	Requirement	Exceptions / Remarks
(2)	UNANIMITY PROCEDURE S. 41	<ul style="list-style-type: none"> <li>similar procedure except requiring a unanimous assent to the amendment</li> <li>there is no time limit</li> </ul> <p>Applicable to matters of "National Significance" and cannot be amended over the objection of a single province. 5 Listed Matters as per S.41(a)-(e)</p>	<ul style="list-style-type: none"> <li>the assent of all the provinces</li> </ul>	have the effect of ENTRENCHING: <ul style="list-style-type: none"> <li>(a) provisions in the Constitution that relate to monarchy and its rep.</li> <li>(b) right of the less populous provinces to a minimum number of members in the Senate (aka "Senate floor")</li> <li>(c) SIA of the BNA is now protected from being repealed under S.44</li> <li>(d) the use of English and French language</li> <li>(e) the composition of the SCC</li> </ul> * not a very effective paragraph as the Supreme Court Act can be amended by ordinary legislative process
(3)	SOME -BUT- NOT- ALL PROVINCE PROCEDURE S. 43	<ul style="list-style-type: none"> <li>similar procedure but only requiring those provinces affected</li> </ul> <p>Applicable as per S.43(a)-(b)</p>	<ul style="list-style-type: none"> <li>assent of the Federal Parliament and the legislative assembly of the affected province(s) only</li> </ul>	See Hogan v. Newfoundland (2000) Note that S.45 gives provinces exclusive rights to amend the "constitution of the province" (ie without Federal parliament). But S.43 will apply to those matters covered under S.52(2) = Constitution of Canada and S.45 applicable to those outside of it.

#	Sections	Procedure	Requirement	Exception / Remarks
(4)	Federal Parliament Alone S.44	<ul style="list-style-type: none"> <li>• may be initiated by the Senate or the House of Commons</li> </ul> <p>Applicability: Subject to S.41 and 42, any amendments in the Constitution relating to the</p> <ol style="list-style-type: none"> <li>(1) Executive Government</li> <li>(2) the Senate or the House of Commons</li> </ol>	<ul style="list-style-type: none"> <li>• ordinary legislative enactment / amendment of the federal parliament</li> </ul>	exception to executive govt. or Senate and House of Commons matters that fall under S.41 (requiring unanimity) or S.42 (requiring 7/50 majority)
(5)	Provincial legislature Alone	<ul style="list-style-type: none"> <li>• ordinary legislative act of the Provincial legislative assembly</li> </ul> <p>Applicability: laws amending the "constitution of the province"</p>		<ul style="list-style-type: none"> <li>• the term "constitution of the province" is not defined anywhere in the Constitution Act</li> </ul>

## DISCUSSIONS ON POSSIBLE METHOD OF

ADDRESSING GRIEVANCES (particular to French-Canadian  
and Western Regions)

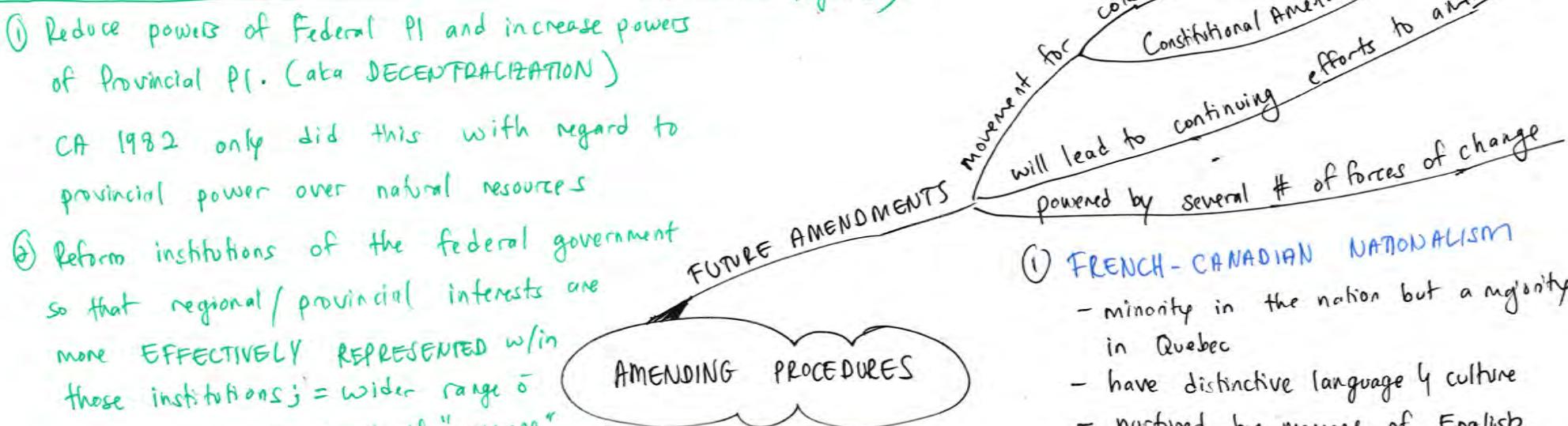
- ① Reduce powers of Federal P. and increase powers of Provincial P. (aka DECENTRALIZATION)

CA 1982 only did this with regard to provincial power over natural resources

- ② Reform institutions of the federal government so that regional/provincial interests are more EFFECTIVELY REPRESENTED w/in those institutions; = wider range of powers may be conferred if "everyone" is confident their interest are properly represented. (aka INTRA-STATE FEDERALISM)

## CRITICISM OF AMENDING PROCEDURES

- degree of difficulty in securing an amendment to the Constitution, ~~UNANIMITY even more~~ tends to favor manufacturing industries and consumers of Central Canada
- w/ the choice of opting-out, there is a strong impulse to proceed with an amendment if ALL PROVINCES agree, lest Canada ends up w/ a "Checkered Constitution" which will strain central institutions
- rule requiring assent of both Houses poses a hazard:
  - long periods of ratification process
  - meanwhile provincial govt. change and opinions change



### ② WESTERN REGIONALISM

- based on the distinct economic base of the four western provinces
- bulk of population is concentrated in QB & ON, federal policies

④ CANADIAN NATIONALISM

- civil libertarian impulse to entrench a Charter of Rights in the Constitution

### ① FRENCH-CANADIAN NATIONALISM

- minority in the nation but a majority in Quebec
- have distinctive language & culture
- nurtured by memory of English conquest and constant danger of assimilation
- want to be master in their own house
- demands of greater power in the provincial legislature in Quebec

### ③ ABORIGINAL PEOPLES

- seek entrenchment of rights to an explicit right to self-government and right to participate in the process of constitutional amendment at least where aboriginal rights could be affected

S. 37 commits to future constitutional discussions

## Secession Reference (1998)

then see CLARITY ACT

- fed. govt. reference to the SCC on the question of validity of unilateral secession

HELD: ① unilateral secession not allowed under the Canadian Constitution (and that a province, even mandated by popular referendum, must still obey the consti. ip. this is the principle of law of CONSTITUTIONALISM)

② no unilateral secession in international law either; and as such SCC declined to discuss what if consti in conflict w/ international law

Further held

Ⓐ IF a referendum yielded a CLEAR majority on a CLEAR question in favour of secession, then give rise to "reciprocal obligation on all parties of the Confederation to negotiate constitutional changes to respond to that desire"

Ⓑ Conduct of parties in such negotiations to be governed by the same Constitutional Principles of Federalism, Democracy, Constitutionalism and the Rule of Law, and the Protection of Minorities (which gave rise to the duty to negotiate in the first place)

Ⓒ Recognized that it is still possible for a province to unilaterally secede unconstitutional, and if the seceding govt. achieve effective control of a territory and recognition by the international community (de facto secession) **TDR:** constitutional amendment required for secession, CLEAR DESIRE TO SECEDE = OBLIGATION TO NEGOTIATE



□ unlike US and AUS constitution, Canadian Constitution does not have provisions that gives effect that the union between the states are "indestructible" or "indissoluble"

- 1976 - Parti Quebecois voted into power
- 1980 - held a referendum asking Quebecers to mandate a negotiation of a "sovereignty - association" agreement (just one step below complete separation) REJECTED 59.5 to 40.5
- 1982 - CF 1982 passed, with no substantial success to accommodate Quebec grievances, QB did not ratify
- 1987 - Meech Lake Accord attempt, failed ratification
- 1992 - Charlottetown Accord attempt, defeated in a national referendum
- 1995 - Parti Quebecois won QB election, held another referendum on sovereignty - with an even 'stronger' question phrased as it made clear that sovereignty was to be declared regardless of Canada accepts it or not (ie. without any need for constitutional amendment) REJECTED 50.6 to 49.4

\* The 1995 move was not challenged by the PM of the time but by a private citizen (Guy Bertrand) w/ the AG refusing to join the proceedings.

## CLARITY ACT (2000)

- aimed to determine what a "CLEAR QUESTION" would mean
- also set out that House of Commons mandated to consider whether there has been "A CLEAR WILL TO SECEDE"
- no right to secede unilaterally, require amendment to constitution

DO NEGOTIATIONS UNLESS

"WILL CLEAR"

① Confederation

② Legislative Union

③ Special Status

④ "Dominions" and "Provinces"

⑤ Subsidiarity, principle of

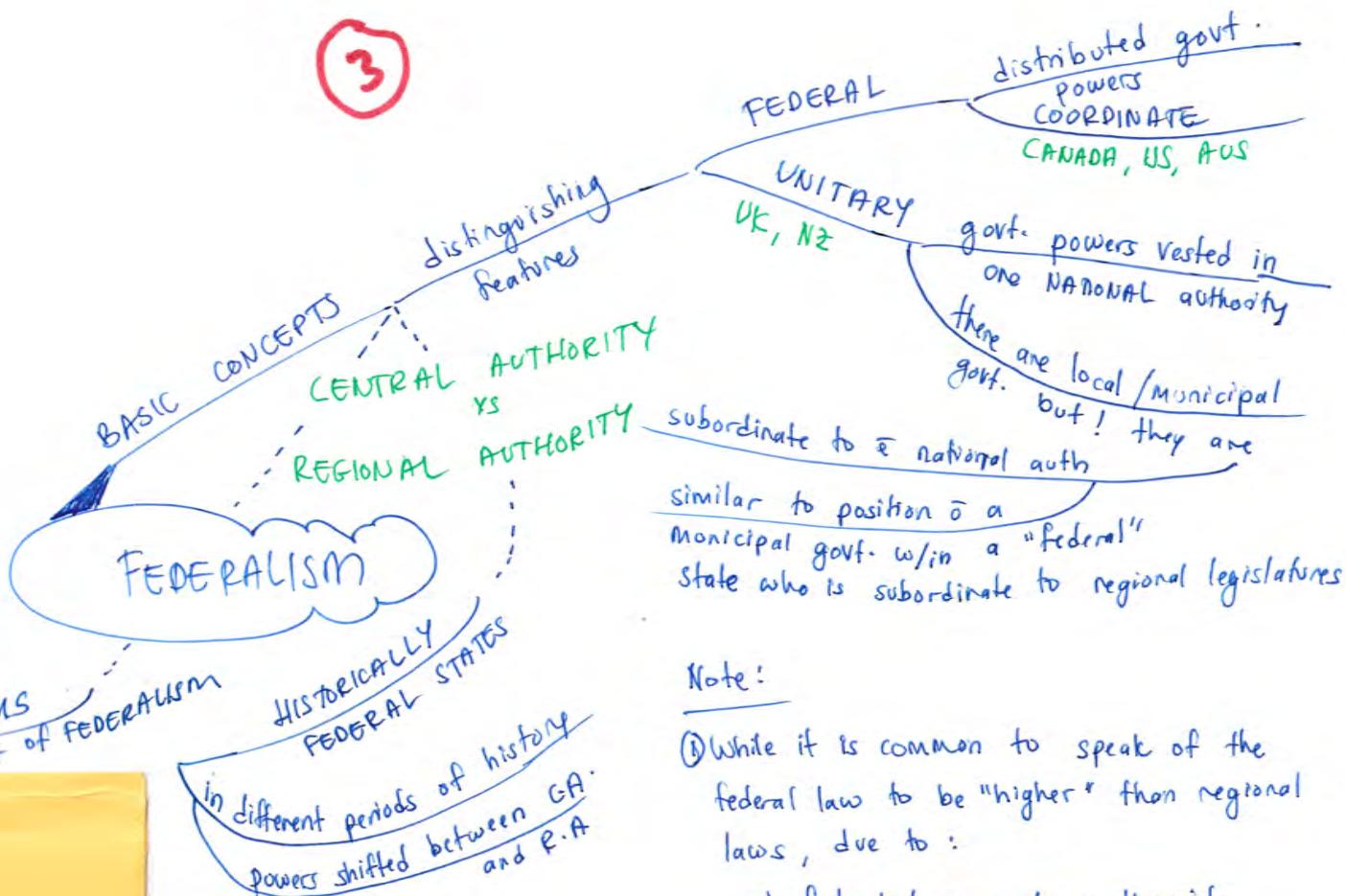
⑥ "Regions"

KEY TERMS  
in the context of FEDERALISM

eg:

- in WWII federal govts increased their power
- since then more powers shifted back to the regional authorities
- More so in Canada compared to US or AUS
- to truly remain a Federal state, there must be autonomy, and some extent of political and legal independence between the 2

③



③ Regional authorities and federal authorities are COORDINATE and carry equal status to each other.

#### ④ Dominions" and "Provinces"

#### ⑤ Subsidiarity, principle of

#### ⑥ "Regions"

### KEY TERMS in the context of FEDERALISM

### FEDERALISM

HISTORICALLY  
FEDERAL STATES

in different periods of history  
powers shifted between G.A.  
and P.A.

### REGIONS

- Members of the Senate are drawn equally from regions
- Originally Canada consisted of 3 regions, Ontario, Quebec, & Maritime Province
- Each Region had 24 senators
- In 1915, the four Western provinces were recognized as a regional and also rec'd 24 seats

The regional "logic" has been compromised:

- In 1949 Newfoundland was admitted and not included in the maritime provinces, instead it was allocated its own 6 seats
- In 1975, Yukon and Northwest Territories were each given one senator
- In 1999, Nunavut was also given a Senator

SCC member is also based on the regional idea

- 3 from Quebec, 3 from Ontario, 2 from the West and 1 from Atlantic provinces

The 7/50 formula of S. 38 rejects the regional formula

- However, there are some regional requirements in that
  - The 7 provinces requirement will always include at least 1 Western province and at least 1 Atlantic province
  - The 50% requirement will mean that either Quebec or Ontario will always be included

In 1996, a "regional veto statute" was passed and is indirectly incorporated into the 7/50 rule

- Remarkably passed via just ordinary legislation
- A Minister will not introduce an amendment into the House without prior consent by ON, QC, BC, at least 2 Atlantic provinces representing at least 50% of Atlantic population and at least 2 Prairie provinces representing at least 50% of their population
- This statute has been criticized as compromising on the equality of the provinces envisioned in the 7/50 formula

Municipal govt. w/in a "federal" state who is subordinate to regional

### Note:

① While it is common to speak of federal law to be "higher" than laws, due to:

- a) federal laws apply nationwide
- b) regional laws only apply to a territory
- c) in case of conflict, federal laws prevail

this DOES NOT MEAN that the authorities are SUBORDINATE to the authorities

② Regional authorities and federal are COORDINATE and carry equal weight to each other.

## "CONFEDERATION"

- originally: a loose association of states, where the C.A. is a subordinate or a delegate of the R.A.
- CANADA: its own unique principle of confederation
  - central govt is not sub. or a delegate, but independent and coordinate
  - in fact when situation makes it unable to coordinate, C.A. is superior

## "DOMINION" and "PROVINCES"

- in Canada R.A. is known as the Provinces (US/AUS call them 'states')
- however, the C.A. term has not been satisfactorily determined
  - "Canada" - the nation as a whole
  - "Dominion" - has a colonial connotation which has since been replaced by the term "Member of the Commonwealth"
- "federal govt. of Canada" if want to avoid using "Dominion" and want to distinguish between the C.A. and the nation as a whole

## "LEGISLATIVE UNION"

- where R.A.'s form a New Unitary state, incorporates the former R.A. units and subject them to the authority of a single C.A.
- UK is the L.U. for England, Wales, Scotland & Northern Ireland
- Before Confederation Upper Canada/ON wanted a L.U. but Lower Canada/QB and the maritime provinces disagree
- A compromise was Federalism

## SPECIAL STATUS

- a term applied to proposed consti. change under which a province would possess larger powers than others
- eg Meech Lake Accord, QB wanted to get a veto power, amongst others - failed
- in a way, all provinces have veto powers in matter requiring unanimity
- theoretically, a province that chooses to opt-out a constitutional amendment although the arrangements will not give that province any special constitutional powers

- recognizing QB as a "distinct society" does not confer Special Status as no special powers were actually conferred

## Principle of SUBSIDIARITY

- a principle that holds decisions affecting individuals should be made by the level of govt. closest to them
- In Canada, the BNA 1867 generally adhere to this
- SCC in *Canada v Hudson (2001)* HELD: ① local decision to impose a more stringent standard on the use of pesticide should be respected  
② The by-law is NOT DISPLACED

by provincial and federal laws  
that also dealt w/ pesticides

- ... "law making and implementation are often best achieved at a level of govt. that is not only effective but also CLOSEST to THE CITIZEN AFFECTED responsive to their needs

and thus most

## IMPORTANCE OF CONSTITUTIONAL SUPREMACY IN A FEDERAL STATE

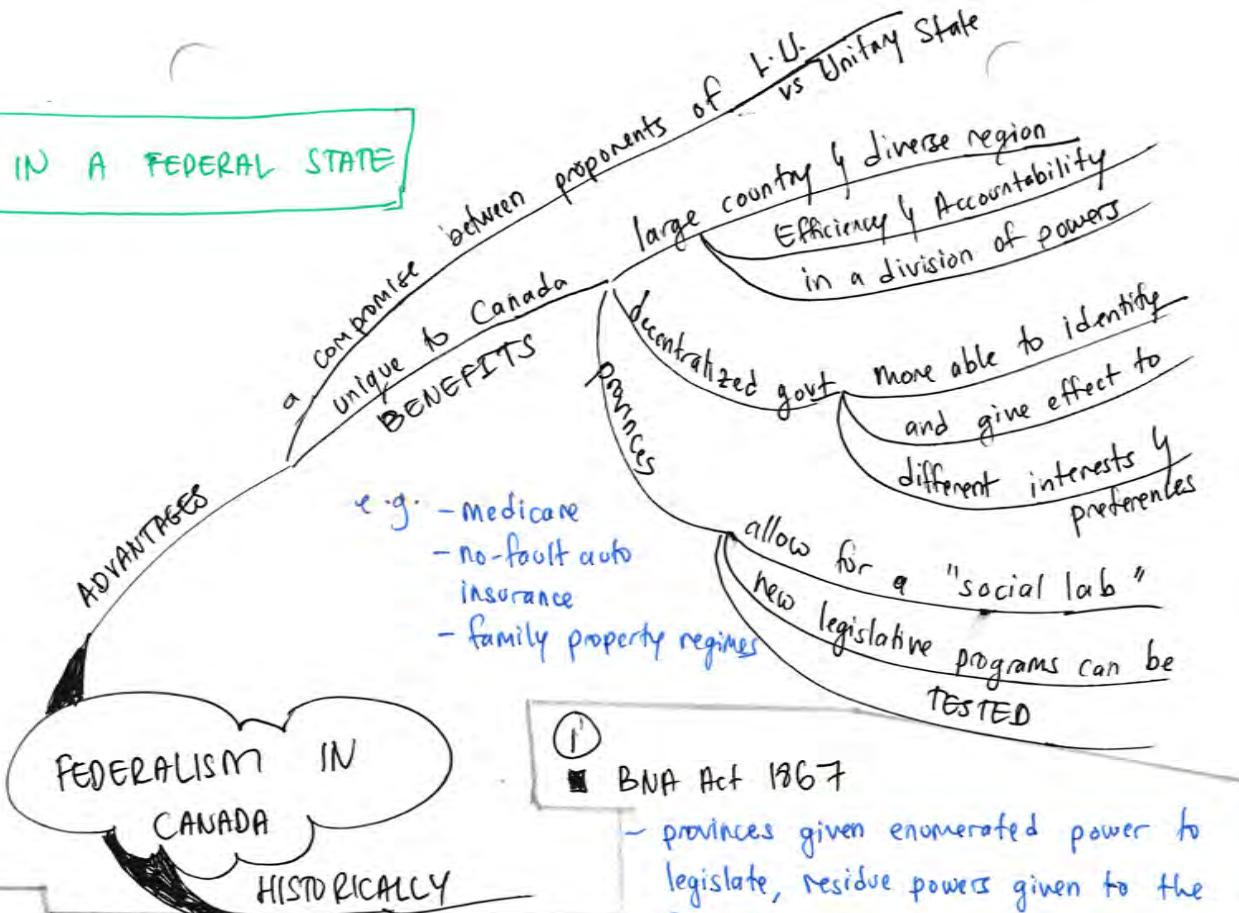
- Federal constitution must be "supreme"; i.e. binding on and unalterable unilaterally by either the central or the regional authority
- Must be rigid and entrenching; i.e. amending procedures is not done via a regular / ordinary legislation, unlike a legislative Union
- Provincial and federal authorities must be COORDINATE in the sense that neither can unilaterally change the constitutional provisions on Distribution of Powers

③

### PUSHBACK via Convention and Practice

- S.92(10) gives the fed. govt. the power to declare a local/provincial matter to be within the federal jurisdiction as to be "for the general advantage of Canada" BUT it is used less often now (previously used in matters such as railways)

- Lieutenant Governor is appointed by the federal govt. but once appointed, he is obliged by convention to act on the advise of provincial cabinet
- S.96 allows fed. govt. to appoint judges of the higher provincial courts, but strong tradition of judicial independence that there has never been a serious claim that fed. appointed judges would favour the government



②

### JUDICIAL PUSHBACK vs Federal Dominance

- the UK Privy Council as the apex appeal court for Canada up until 1949, gave narrow interpretation to principles of federal powers and wide interpretation to provincial powers
- judges believed strongly in provincial rights and established precedents and over time elevated the provinces to a COORDINATE status with the federal government

See Role of the Courts

①

### BNA Act 1867

- provinces given enumerated power to legislate, residue powers given to the federal pl, a strong indicator the framers wanted a strong central govt.
- provinces were made to be SUBORDINATE in many instances
  - fed. govt. can invalidate provincial laws
  - provinces unable to alter their own constitution wrt above
  - fed. govt. able to levy indirect and direct taxes while provincial govt. can only levy direct taxes
- EARLY FEDERAL DOMINANCE with the fed. govt. having the most revenue, and exercised control over provinces the same way the imperial govt. would control the colonies

## Some Discussion on Judicial Review

- ① By J.R., non-elected judges will be making decisions having substantial political significance.

- Hogg believes there should be a presumption of constitutionality (of enacted legislation) and that judges should only override legislative decisions where its invalidity is CLEAR i.e. courts to exercise restraint

- ② Proposed alternatives to J.R.

(a) Federal-provincial conferences, where disputes are directed to be negotiated between interested governments

(b) Specialized Tribunal for Constitutional disputes.

**Role of the Court = via Judicial Review**

- ① Enforce the distribution of powers under the principle of Federalism

- if a statute is judicially determined to be ultra vires, i.e. outside the powers of the enacting body, it will be invalid

- ② Enforce the Charter restrictions (and other non-federal restrictions)

- courts often asked to determine if a statute violates a constitutional prohibition e.g. a statute limiting the freedom of expression

(c) Specialized division of the S.C.C. to ensure maximum expertise.

is not free from doubt / ambiguity

written provisions of the Constitution  
distribution of power provisions  
Machinery for settling disputes

dispute whether or not a legislative body has power to enact a certain law  
not expressly stated but S.52(1)  
Supremacy Clause

- "Constitution of Canada" is supreme and any law "inconsistent" have no force

S.52(1) = CURRENT BASIS FOR JUDICIAL REVIEW

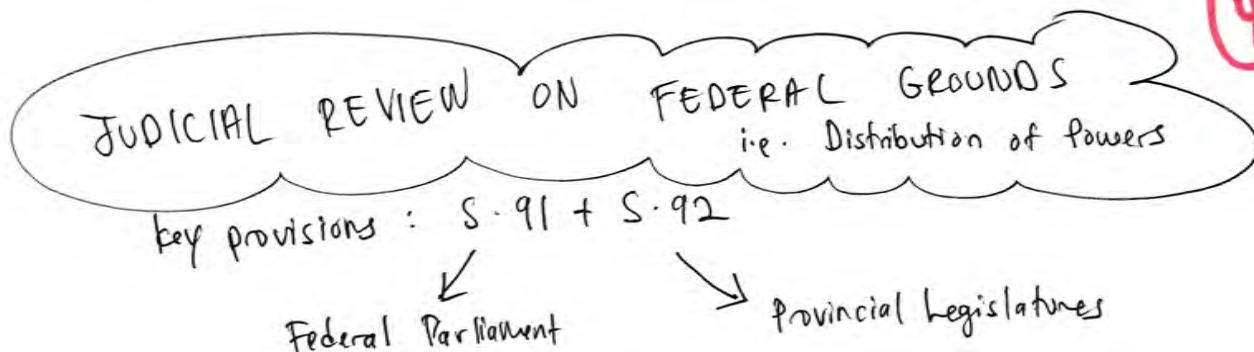
Also:

- If scope broadened by the introduction of the Charter to the Constitution in 1982
  - adds an additional set of limits to the power of legislative bodies



TJPR

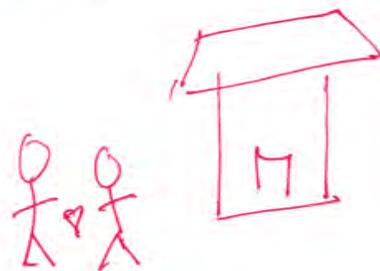
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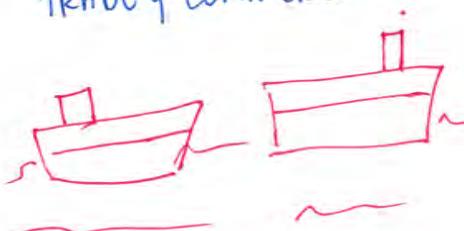
Per S.91 & S.92 : legislative authority in relation to MATTERS coming within the CLASSES OF SUBJECTS

- 2 - step in the J.R. process
- Step 1 : Identify the Matter of the challenged law [CHARACTERIZATION]
- Step 2 : Assign the identified matter to one of the classes of subjects

PROPERTY & CIVIL RIGHTS



TRADE & COMMERCE



[INTERPRETATION OF THE Power Distributing Provisions of the Constitution]

See also:

Priority between Federal & Charter Grounds



PEACE, ORDER, & GOOD GOVERNANCE

Not necessarily invalid = Additional step, if 2 laws are both VALID but in conflict for some reason

### 3 KEY FEDERALISM DOCTRINES

- ① Pithy Substance - is the law valid / constitutional or not
- ② Inter-jurisdictional immunity (IJ) - core of an enumerated power is immune from intrusion by the other government
- ③ Paramountcy - if a provincial law is in conflict w/ a federal law, is it inoperative? <sup>19</sup>

## Priority between Federal & Charter grounds (for J.R.)

- \* no actual significance of priority
  - any law contrary to provision of the "Constitution of Canada" will be "of no force effect"
  - both federal distribution of powers and the Charter are part of the Constitution of Canada
- \* Hogg: federal and provincial legislatures are logically prior to the Charter, as the Charter assumes the existence of legislative powers

IDE: When reviewing the validity of a law — ask

- ① Is the law within the law-making power of the enacting body? Then,
- ② Is the law consistent with the Charter?

**PURPOSE** = intent of the legislature or the defect/mischievous in the law that the legislature is trying to correct

### R v. Big M Drug Mart (1985)

- Court acknowledged that if the purpose of the statute had not been religious, but rather the secular goal of enforcing a uniform rest day from labour, then the Act would have fallen under provincial rather than federal as it did in R v. Edward

### Ward v. Canada (2002)

- SCC to characterize a federal law that prohibited the sale of baby seals even though the law regulating this would be w/in provincial authority
- Court accepted evidence that the purpose of the law was the indirect one of limiting the killing of baby seals = Management of fishery = **FEDERAL**

**EFFECT** = how the law changes the rights & liabilities of those who are affected

Alberta Tax Reference, per Lord Maugham

Sauvure v. Quebec (1953)

### R v. Firearms Act (2000)

Held: Court's analysis on the division of power / classifying law for constitutional purpose should not be concerned on whether or not a measure (enacted law) is likely to achieve its intended purpose; **EFFICACY** or wisdom of the policy is irrelevant to determine pith and substance

see next page for case

**Step 1: Characterization**  
Matter "Pith and Substance"

### Hodges v. the Queen (1883)

Held: Subjects in one aspect and for one purpose fall w/in S.92 may in another aspect fall w/in S.91 → <sup>may be legislated</sup> by either legislature

i.e. **Double aspect doctrine**  
which acknowledges some laws have both federal and provincial "matter" → **NO DEFINITE RULE** as to when to apply this doctrine instead of making a choice but it has been suggested that it is to be applied when the fed. and prov. characteristics of law are roughly equal in importance

Issue when the statute in issue have more than 1 feature

thus

Court will decide on which is the **MOST DOMINANT FEATURE** or **IMPORTANT FEATURE**

### Alberta Bank Taxation Reference (1938)

Held: the Alberta Bank Taxation Act is not an enactment in exercise of the provincial power to raise provincial revenue by direct taxation, but a legislation which in its true character and by ascertaining its effect in the known circumstances to which it is to be applied relates to the "Incorporation of Banks and Banking"

= The rate of taxation provided by the Act is prohibitive in fact and known to the provincial legislature to be prohibitive - forcing banks carrying on business under the authority of the federal Bank Act to discontinue business

i.e. Provincial legislatures are prohibited from **SINGLING OUT** banks or other federal undertakings for special treatment  
HOWEVER, singling out of undertakings w/in a federal jurisdiction is **NOT** conclusive of pith & substance ; see

Bank of Toronto v. Lambe

### Alberta Tax Reference

per Lord Maugham:-

- Court would take judicial notice of any public general knowledge (and may in proper case required to be informed evidence) as to what the

#### EFFECT OF THE LEGISLATION will

be

- Privy Council examined the impact on the banks of the tax proposed by Alberta and found the severity of the tax would characterize the statute as to be in relation to banking than taxation

### Sauvur v. Quebec (1953)

- SCC struck down municipal by-law prohibiting distribution of literature to the public
- Held: ① Subject matter of the law was IN RELATION to freedom of speech & religion which were both exclusive JD of the federal gov.  
② law had the EFFECT that the chief of police would act in the role of a censor (decide which literature allowed)

## Presumption of Constitutionality (Judicial Restraint)

- Choice between competing characteristics of a legislation = choice between validity and invalidity
- In cases where there is no clear answer to the nature of the statute and the absence of prior judicial decisions = the court's choice is inevitably one of policy - How do you guide this choice?
  - ① Federalism - should the law be legislated by a federal or provincial government?
  - ② Shouldn't be guided by judicial approval/disapproval or political situation
- Hogg: a choice to support THE VALIDITY of the legislation is PREFERRED in order to support judicial neutrality.
- Presumption of Constitutionality carries 3 legal consequences:

- ① In choosing between competing, plausible characterization of the law, the court should choose the one that would support validity.  
*Re Firearms Act (2000)*
- ② Where validity question requires a finding of a fact, it need not be proved strictly by the government - it is enough to have a "RATIONAL BASIS" for finding the fact.  
*Reading Down Doctrine* - mitigating impact of J.R. so that instead of held as INVALID, will be held as inapplicable to those extra-jurisdictional matters, and a wide interpretation would extend beyond the powers of the enacting body, the court should "read down" the law so as to confine the application of the law to those that are within the power of the enacting legislative body.
- ③ Where a law is open to both narrow and wide interpretation, and a wide interpretation would extend beyond the powers of the enacting body, the court should "read down" the law so as to confine the application of the law to those that are within the power of the enacting legislative body.

EFFECT OF THIS PRESUMPTION: reduce judicial interference by unelected judges with legislative affairs

NOTE: On Charter grounds, only the third doctrine of "reading down" is applicable.

Step 1: Characterization  
Matter: Pith & Substance (2)

## Re Upper Churchill Water Rights (1984)

- SCC found Newfoundland Reversion Act which aimed to expropriate property of the hydro company (well within its power), had the pith and substance to interfere with the rights of Hydro-Quebec, which rights are situated outside the territorial jurisdiction of NFL = ultra vires
- The Reversion Act is "colourable" legislation aimed at the Power Contract between Churchill Falls Labrador Corp and Hydro-Quebec in 1969 to supply power for 65 years

CRITICISM on application Colourability Doctrine :

- ① Treading a fine line between adjudication on policy and adjudication on validity.
- ② Connotes "judicial disapproval" which casts doubt on the neutrality of judiciary.
- ③ Although the doctrine applies "the maxim that a legislative body cannot do indirectly what it cannot do directly", in reality the legislative body will find a way to do exactly just that.

### The Firearms Act (2000)

SCC applied the presumption of constitutionality which means that Alberta as the party challenging the legislation, is the one required to show that the Act does not fall within the jurisdiction of the Parliament.

### Facts:

- Alberta challenged whether the provisions relating to licensing and registration of firearms in the Firearms Act were validly enacted by the Parliament

### Held:

① Gun control law comes within the Parliament's jurisdiction; pith and substance to enhance public safety by controlling access to firearms through prohibitions and penalties (criminal law) (PURPOSE!)

② While the law has regulatory aspects, it is secondary to the primary criminal law purpose; intrusion into the provincial jurisdiction over "property and civil rights" is not so excessive as to upset the balance of federalism.

(a) Merely fact that guns are "property" does not suffice to show that a gun control law is 'pithy substance' a provincial matter.

(b) The Act does not hinder provinces' ability to regulate the property and civil aspect of guns.

(c) Assuming (without deciding) that provincial legislatures have the jurisdiction to enact a law in relation to the property aspect of firearm, the DOUBLE ASPECTS doctrine permits the Parliament to address safety aspects

③ Efficacy of the law - eg needs of rural or aboriginal Canadians is irrelevant to the question of Parliament's jurisdiction to enact the law.

(d) There is no colourable intrusion into provincial jurisdiction as the Act does not precipitate the Federal government entry into a new field since gun control has been a subject under federal law since Confederation.

FEDERAL UNDERTAKING = a project, activity or program either funded, permitted, licensed or approved by a federal body

S.92(10) of CA 1867 @ "works and undertakings power"

① S.92(10)(a) 4(b) = federal jurisdiction over modes of INTERPROVINCIAL and INTERNATIONAL transportation and communication  
= provincial jurisdiction over modes of INTRAPROVINCIAL transportation and communication

② S.92(10)(c) = all types of works declared by the Parliament to be "for the general advantage of Canada", or "for the advantage of two or more Provinces".  
• tend to be part of the national infrastructure  
• must be declared by the passing of legislation  
- by default eg Atomic Energy Control Act  
- by declaring specific works

comes w/ a class of subjects outside the jurisdiction of that enacting body

to interpret the law narrowly

so as not to apply to matters outside the jurisdiction of that enacting body

Inconsistency between federal and provincial law would prevail

provincial law imperative to the extent of inconsistency

1 first formulated to deal with the effects provincial laws have on federally incorporated companies

2 Up until 1966, applied the Sterilization Test

3 Scope expanded in via Vital Test set in Bell Canada 1966, affirmed in

Bell Canada 1988, modified in Irwin Toy 1989

1914 John Deere, 1921 Great West Saddlery

4 Narrowed in Canadian Western Bank (2007), affirmed in Lafarge

- SCC struck down Lord's Day Act 1906 as unconstitutional, in violation of S.2 of Charter

- found the Act's purpose was, in effect to establish a state religious-based requirement

INTERJURISDICTIONAL IMMUNITY (CJI)

protected by way of historical definition the purported inability of the Federal government to legislate in area assigned by the Constitution to the Provincial government, and vice versa

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historically

doctrine of PARAMOUNTCY

reading down

protected by way of

INTERJURISDICTIONAL IMMUNITY (CJI)

protected by way of historical definition the purported inability of the Federal government to legislate in area assigned by the Constitution to the Provincial government, and vice versa

Presumption against severance that a statute embodies a single statutory scheme of which all parts are inter-dependent

1

2

severance more common in Charter cases

same test, but Charter grounds rarely strike out entire statute

- only 1 Charter case where entire statute is struck

R v Big M Drug Mart (1985)

- SCC struck down Lord's Day Act 1906 as unconstitutional, in violation of S.2 of Charter

- found the Act's purpose was, in effect to establish a state religious-based requirement

## HISTORICAL DEVELOPMENT OF IJJI

### John Deere Plow Co v Theodore Wharton & Others (1914) Privy Council

Held: Provincial laws prohibiting companies not incorporated under the law of the enacting province from carrying on business without a prescribed license were held NOT TO APPLY TO FEDERALLY INCORPORATED COMPANIES

### Great West Saddlery Co. Ltd & Others v The King (1921) Privy Council

Held: Ontario law prohibiting all companies from acquiring / holding land without a provincial license DID NOT IMPAIR the status or essential powers of federally incorporated companies that operated within the province → province can't affect the power to carry on business/exercise power or penalize the companies → can require license to hold land

### Sterilization Test (Impairment)

- federal undertakings only immune from provincial laws which had the effect of sterilizing, paralyzing, or impairing the operation of the federal-regulated undertaking
- until 1968 when it was broadened in Bell Canada (1968)

Held: A provincial law prescribing minimum wage does not apply to The Bell Telephone Company due to the fact that the company was an undertaking described under s. 92 1(a) and (c) of BNA 1867

Test applied: the matters under the Act, such as hours and wages is a VITAL PART of management and operation of the undertaking, even if no sterilization occurs. Thus: Act valid for employers not within federal exclusive jurisdiction only

license to hold land

### 1968 - three cases in SCC

- Bell Canada v Quebec **AFFIRMED**
- Canadian National Railway v Courtois
- Altrans Express Ltd v BC (WCB)

Held: provincial occupational health and safety laws are not applicable to three federal v/taking engaged in interprovincial transportation and communication

- affirmed that 'vital elements' of those federal undertakings are w/in exclusive jurisdiction of the federal Parliament

### Irwin Toy Ltd v Quebec 1989

Held: the Act in question did not purport to apply to television broadcast (federal v/taking) but to acts of an advertiser = not direct application but had an indirect effect, even on a vital part of their operation, will not normally render the provincial law ultra vires

Reciprocity on Provincial Subjects

- should be reciprocated but weight of authority seems to be given to federal heads of power
- some cases federal law READ DOWN to minimize encroachment on provincial heads of power

### Clark v. CNR 1988

Held: limitation period under Railway Act is ultra vires to the extent it purports to apply to a personal injury action arising under provincial law

Largely reserved for

- those heads of power dealing w/ federal things, persons and undertakings
- what is absolutely indispensable / necessary to enable an v/taking to carry out its mandate

## CURRENT JURISPRUDENCE

### Canadian Western Bank v Alberta (2007)

Held: the necessary degree of infringement to apply interjurisdictional immunity was outright impairment of the vital or essential part i.e. impact of the statute must be significant;

broad use of IJJI doctrine would be inconsistent w/ doctrines of pith & substance, double aspect, and paramountcy

Facts: Alberta Insurance Act relates to property and civil rights although the Act applies to banks' promotion of insurance. The fact that Pl. allows a bank to enter a provincially regulated line of business such as insurance does not unilaterally broaden the Pl.'s scope of legislative power: No IJJI - banks subject to the provincial Act

Theoretically, IJJI is consideration after pith & substance analysis, in practice, in absence of prior case law favoring its application to the subject matter at hand, will generally justify court to proceed directly to paramountcy

■ "IJJI should in general be reserved for situations ALREADY COVERED BY PRECEDENT".

These "3 doctrines" held to be "most consistent with contemporary views of Canadian federalism" i.e. "recognize overlapping powers are unavoidable".

## Discussion on the Concept of "Ancillary Powers"

- Unlike the US 4 P's, the Canadian constitution does not include the doctrine of ancillary powers
  - not necessary as Canada has the pith & substance doctrine allows a law w/in the power of one legislature to have incidental effects on matters outside its competence

### Multiple Access Ltd v McCutcheon (1982)

Held: even when F & P laws have been enacted on the same matter, by virtue of Double Aspect doctrine, the doctrine of Paramountcy does not necessarily have to be invoked, unless there is a conflict

### LIVING TREE DOCTRINE

- Constitution is 'organic' and interpretation must be done in a broad and progressive manner so as to adapt it to the changing times & frozen in time (1867)

### - Same Sex Marriage Reference (2004)

### - Edwards v Canada (AB) (1928) / Persons Case

↳ "qualified persons" to be read broadly to include women

↳ rejected definition of marriage institution as "understood in Christendom" - defined as the union of a man and woman, analogizing exclusion of women from common law definition of persons to that of same-sex couples

### introduction

### key concepts

Step 2 : Interpretation of the Constitution - Assigning the Law to One of the Class of Subjects

### EXHAUSTIVENESS

- Distribution of power between F and P is EXHAUSTIVE
- Framers contemplated for 'new laws'
  - S.92(16) - if the matter is merely LOCAL or PRIVATE, it will come w/in provincial powers
  - S.91 opening words - if it has a national dimension will be a federal power

Once the matter has been identified  
the SECOND STEP in a J.R.  
is to assign the matter  
by interpreting of the language of the Constitution

### EXCLUSIVENESS

laws available to both levels provided no conflict and both are valid  
double aspect exception  
or conflict → paramountcy  
overlap  
① impossible to comply w/ both laws  
② applying the provincial law would frustrate the purpose of federal law

■ EXCEPTION to above  
in the THREE CONCURRENCY provisions

### S.92A(2)(b)(3)

### S.94 A

S.95 → both have concurrent powers on agriculture and immigration

Tongue of the Constitution

S.91 & S.92  
exclusive  
no overlap

↓  
① impossible to comply w/ both laws  
② applying the provincial law would frustrate the purpose of federal law

→ prov: powers to export natural resources  
→ fed: concurrent w/ power to regulate trade & commerce

→ fed: old age benefits & pensions w/ prov. concurrent power

2010 IJL case, where IJL applicable over  
Paramountcy and Double Aspect

### Quebec AF v Canadian Owners & Pilots Association (2010)

- Facts:
- Aerodrome built on land zoned as agriculture in QB
  - QB's legislation prohibits use of land for other than agriculture unless authorized by the QB's Agricultural Commission
  - Commission ordered the return of the land to its original state ~~pursuant~~ pursuant to the Act
  - Commission's decision challenged on grounds that aeronautics is a federal jurisdiction

Held:

- Lower courts (QB Admin Tribunal, Court of QB, SC of QB) upheld Commission's decision

- QB CoA held that IJL precluded the Commission from ordering the dismantling of the aerodrome

- SCC held: while the Act is a valid, intra vires prov. legislation, it is inapplicable to the extent that it impacts federal power over aeronautics by virtue of IJL doctrine.

(2) Doctrine of Double Aspect inapplicable if IJL applicable due to Federal core power being impaired

#### ■ Two part test

- ① Determine whether the law trenches on the protected core of a federal competence
- ② Determine if the law's effect on the exercise of the protected federal power is sufficiently serious to invoke IJL.

In this case

- ① Power to determine location of aerodromes is essential to aeronautics and lies in core of federal aeronautic residual power
- ② The Act prohibiting building of aerodromes on designated agricultural land is SIGNIFICANT as it is a large area of land and much of it is strategic for aeronautical purposes

Note: ① Paramountcy not applicable as QB Act and Federal Aeronautics Act not in conflict with each other.

## R v Morgentaler, [1988] 1 SCR 30

Prior to this ruling, section 251(4) of the *Criminal Code*, allowed for abortions to be performed solely at accredited hospitals with the proper certification of approval from the hospital's Therapeutic Abortion Committee.

Three doctors, Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott, set up an abortion clinic in Toronto for the purpose of performing abortions on women who had not received certification from the Therapeutic Abortion Committee, as required under subsection 251(4) of the *Criminal Code*. In so doing, they were attempting to bring public attention to their cause, claiming a woman should have complete control over the decision on whether to have an abortion.

Morgentaler had previously challenged the abortion law at the Supreme Court in the pre-*Charter* case of *Morgentaler v R* [1976] 1 SCR 616 in which the Court denied having the judicial authority to strike down the law.

The Court of Appeal for Ontario found in favour of the government. On appeal, the main issue put before the Court was whether section 251 violated section 7 of the *Charter*. A secondary issue put to the Court was whether the creation of anti-abortion law was *ultra vires* ("outside the power") of the federal government's authority to create law.

### Ruling

*Chapters 5-7*

In a 5-2 decision with four separate judgments, the majority struck down section 251 of the *Criminal Code*.

Dickson C.J. and Lamer J found the impugned law in violation of the right to security of the person and that it cannot be saved by meeting the procedural standards of fundamental justice. The procedural requirements to section 251 of the *Criminal Code* were also found to put women's health at risk because of delays in obtaining the assent of the therapeutic committee, lack of guidelines and availability of accredited hospitals.

Beetz and Estey JJ. found that the means to protecting the foetus did more harm than was proportional to the good and thus failed the "reasonable limit clause" test under the *Charter*. The five judges, including Bertha Wilson – who provided the most comprehensive defense to women's physical autonomy – did not provide a right to abortion, nor was there a suggestion that another regulatory law cannot necessarily meet constitutional standards.

## R. v. Morgentaler, [1993] 3 SCR 463

SIGNIFICANCE: Colourability masks the true purpose, pith and substance show true purpose

March 1989, in order to prevent the establishment of free-standing abortion clinics in Halifax, the Nova Scotia government approved regulations prohibiting the performance of an abortion anywhere other than in a place approved as a hospital as well as a regulation denying medical services insurance coverage for abortions performed outside a hospital. The respondent opened his clinic and performed 14 abortions. He was charged with 14 counts of violating the Medical Services Act. The trial judge held that the legislation was *ultra vires* the province because it was in pith and substance criminal law and acquitted the respondent. This decision was upheld by the Court of Appeal.

SCC: The appeal should be dismissed. Pith and Substance

- Purpose: Excerpts from Hansard evidence demonstrates that members of all parties in the legislature understood the central feature of the proposed law to be prohibition of the respondent's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics per se.
- The legal effect of the introduced regulations partially reproduces that of the now defunct s.251 of the *Criminal Code*
- Effect: the prohibition abortion clinics; restrict access to abortions (essentially prohibited because they did not allow abortions in hospitals)
- The Act in question and the impugned provisions duplicate *Criminal Code* provisions. There is thus a strong inference that the purpose and true nature of the legislation relate to a matter within the **federal head of power in respect of criminal law**.

*Colorability*

## "Covering the Field" aka "Negative Implication Test"

Definition: a "wide" interpretation of paramountcy which would render provincial laws defeated for being in "fields" covered by federal law - precluding any provincial laws in that field

In Canada: rejected this method, employing a 'narrow' definition of paramountcy instead, which allows survival of provincial laws so long as there is no CONTRADICTION to federal laws

TLDR: mere duplication ≠ inconsistency

Pre-A  
See: O'Grady, Stephens, and Smith

⑥ Bank of Montreal and Margat

A

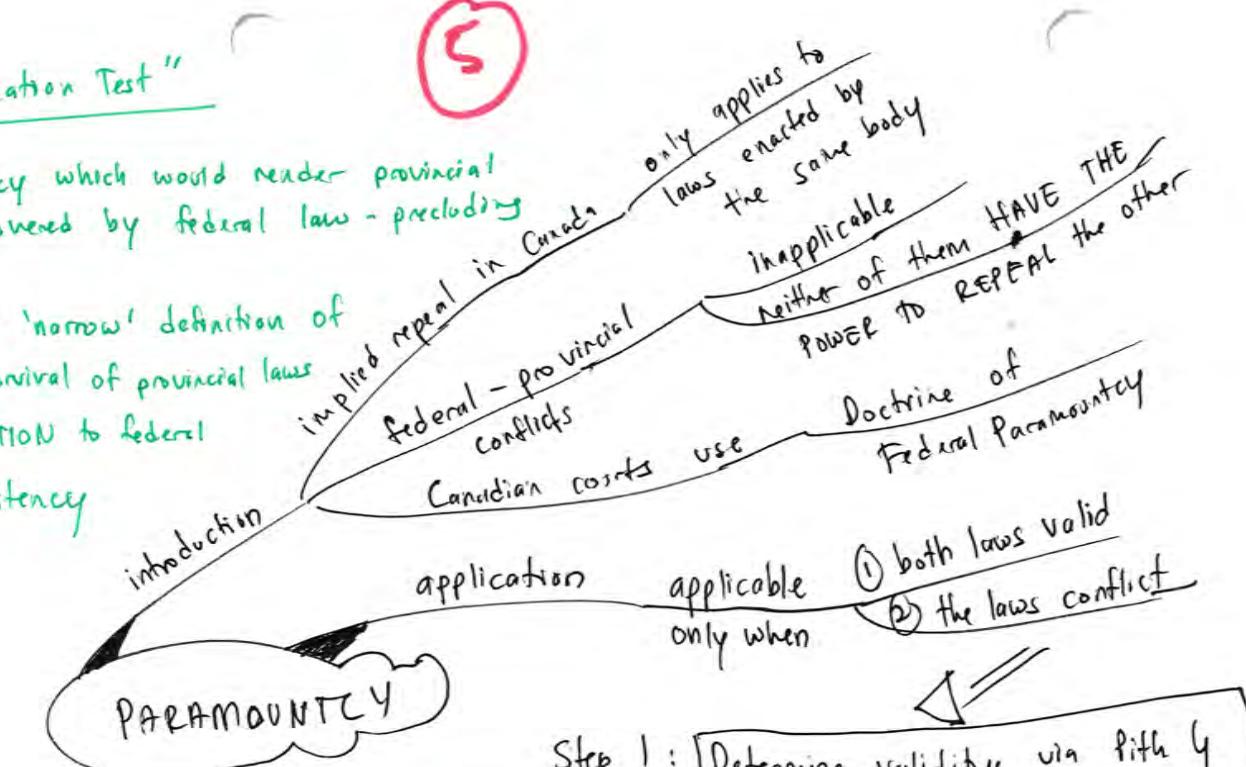
Multiple Access Ltd v McCutcheon (1982)

Issue: Ontario Securities Act and Canada Corporations Act both had provisions for Insider trading

Held: ① Provincial act valid = property & civil rights and federal act valid = trade & commerce + peace, order and good governance.

② No conflict. Laws duplicative and having the same objective with no actual conflict = not sufficient to invoke doctrine of paramountcy, however a claimant seeking action will only successfully utilize one law and not both.

(5)



A

Rothman, Benson & Hedges Inc v Sask (2005)

Issue: Federal Tobacco Act prohibited promotion of tobacco product but permitted displays indicating availability and price.

Tobacco Control Act Saskatchewan banned displays in spaces that admit persons under 18 years.

Held ① Provincial law not frustrate the federal purpose (national health)

② Dual compliance was possible = not inoperative by paramountcy

**PROVINCIAL LAW YIELD TO FEDERAL LAW**

① Rendered inoperative only to the extent of inconsistency.

② Effect temporal. If federal law repealed, then provincial law "revived" w/out re-enactment.

Step 2: Determine if there is a conflict

A: Impossibility of dual compliance; or  
B: Frustration of federal purpose  
at express contradiction

no need to resort to Paramountcy

No conflict  
= Dual Aspect  
Yes, conflict

- what is the federal purpose?  
= Federal Paramountcy.  
- what is the effect of the provincial law on the federal purpose?

"MUST YIELD"

## O'Grady v Sparling (1960)

Majority held provincial highway traffic offence of driving carelessly and federal Criminal Code offence of driving recklessly "could live together and operate concurrently"  
= reflected the covering-the-field test

## Stephens v The Queen (1960)

Similarly = provincial highway traffic offence of failing to remain at the scene of an accident and the Federal Criminal Code offence of failing to remain at the scene of an accident "with intent to escape civil or criminal liability" was held to be of No Conflict

## Smith v The Queen (1960)

Provincial securities law offence of furnishing false information in a prospectus and Federal Criminal Code offence of making, circulating or publishing a false prospectus;  
• majority held no conflict  
• Maryland y "no conflict in the sense of that compliance with one law involves breach of the other" aka express contradiction test

## Then, Multiple Access (1982)

- adopted express contradiction test for finding conflict

Then, B cases i.e. in the absence of express contradiction, doctrine of paramountcy may still be invoked - How?  
= where a provincial law would FRUSTRATE the purpose of a Federal law.

This PURPOSE would ← be DEFEATED if only lawyers were permitted, Thus Provincial law inoperative to proceedings before IRB.

## (B) Cases:

### Bank of Montreal v Hall (1990)

Provincial law: creditor required to give notice to defaulting debtor for a last-minute opportunity to repay before commencing foreclosure

Federal law: Bank Act did not give this last-minute opportunity

Held: Purpose of Bank Act, which had provided a complete code with respect to enforcement of bank loans, would be frustrated if bank had to comply with the Provincial law; "compliance w/ federal statute entails defiance of its provincial counterpart"

### Law Society of B.C. v Margat (2001)

Provincial: Legal Profession Act requires only lawyers to appear as counsel before administrative tribunals and boards

Federal: Immigration Act provided that in proceedings before the Immigration and Refugee Board (IRB) a party could be represented by a non-lawyer.

Held: Purpose of federal law to provide informal, accessible, and speedy process in which parties can be represented by agents who spoke their language and understood their culture and inexpensive ... 31

(b)

## PROPERTY &amp; CIVIL RIGHTS

S.92(13) : In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated :

- (13) : Property and Civil Rights in the Province ≠ "civil liberties" exist where there is an absence = proprietary, contractual, tortious rights excluding fundamental civil liberties; of legal rules; whatever is not forbidden is a liberty \* provincial power covers most of the legal relationship between persons in Canada, except those carved out by S.91 expressly and specifically

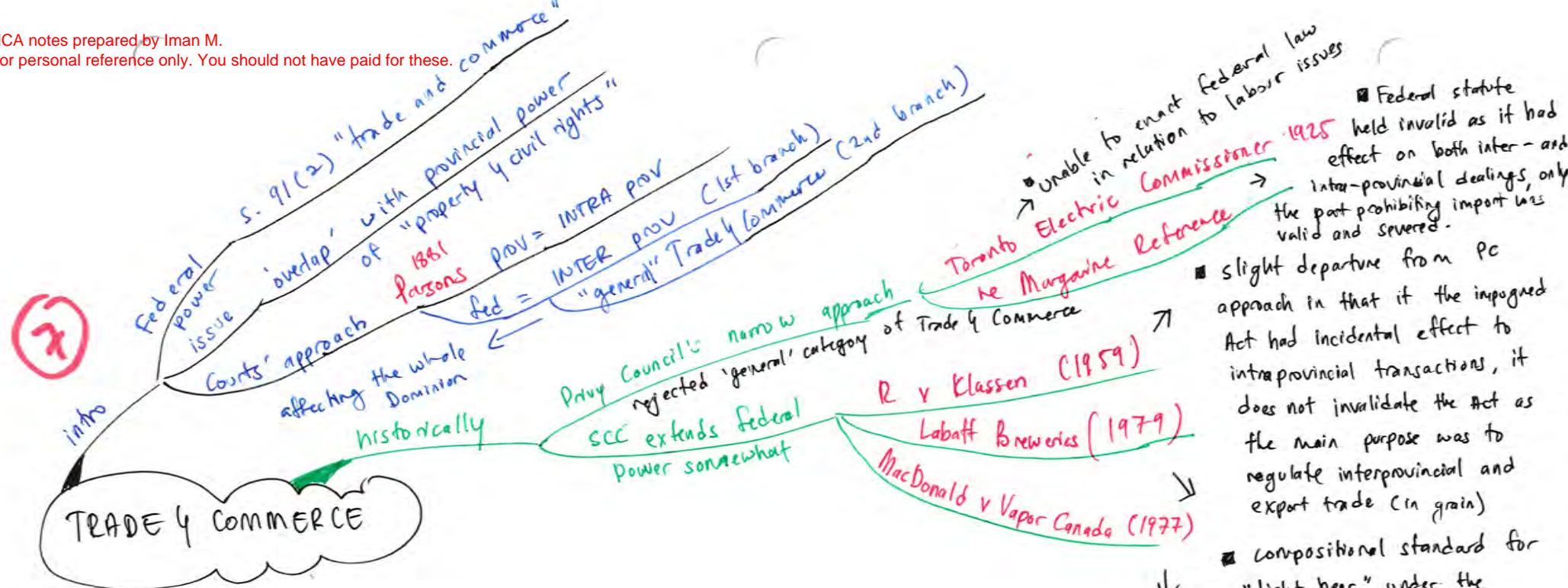
#	Matter & Class of Subject	Provincial Law	Federal Law	Discussion
(1)	"INSURANCE"	<p><u>Citizens' Insurance Co v Parsons (1881)</u></p> <p>Facts: Insurance co. a federally incorporated company, not comply with a provincial act</p> <p>Held: Provincial act is regulating contracts, which falls under the head of property and civil rights</p> <p>Federal power under S.91(2) of Trade and Commerce is limited to</p> <ol style="list-style-type: none"> <li>① International &amp; inter-provincial Trade</li> <li>② Regulating of Trade affecting the whole dominion</li> </ol>	<ul style="list-style-type: none"> <li>• regulate insurance industry under statutes covering foreign co's, federally incorporated co's, and on voluntary basis provincially incorporated basis</li> <li>• regulate Marine insurance</li> </ul> <p>See also Canadian Western Bank v 101</p>	

#	Matter / Classes of Subject	Provincial Law	Federal Law	Discussion
(2)	Business - General Regulation	Ordinarily regulation of business is a matter within property and civil rights	Exceptions ① Industries that are enumerated in s.91, such as <ul style="list-style-type: none"> <li>• navigation &amp; shipping</li> <li>• banking</li> <li>• inter-provincial / international transport or communication</li> <li>• works declared to be for the general good of Canada</li> </ul> ② Industries under the P.O.G.C doctrine eg aeronautics and atomic energy ③ Limited power to regulate business in Trade & Commerce, Taxation, Interest, Criminal Law, and P.O.G.C.	Regulation of industries = immediate impact upon freedom of contract and property rights ≠ ultimate nation-wide objectives
(3)	Regulations of professions and trade	<ul style="list-style-type: none"> <li>■ Comes within property and civil rights of the province</li> <li>■ typical regulation governs entry requirement, rules of conduct, fee setting, and governing body administration</li> </ul> <p>Krieger v Law Society of Alberta (2002)</p> <ul style="list-style-type: none"> <li>■ Crown prosecutor governed by law Society's code of professional conduct (as they are also members)</li> <li>■ Failure to disclose relevant evidence not w/in prosecutorial Discretion, but a legal duty</li> <li>■ The impugned Rule requiring timely disclosure is a matter of ethical conduct, authorized by Legal Profession Act. infringes and not intrude into area of criminal law and procedure.</li> </ul>		

#	Matter / Classes of Subject	Provincial Law	Federal Law	Discussion
(4)	Labour Relations	<p><u>Toronto Electric v Snider (1925)</u> (Privy Council)</p> <p>Issue: Whether federal Industrial Disputes Investigation Act was ultra vires federal parliament legislative powers</p> <p>Held: Act could not be upheld as it did NOT fall under = <del>UDI CONST.</del></p> <ul style="list-style-type: none"> <li>① P.O.G.G. (<sup>Federal</sup> government power)</li> <li>② Trade and commerce</li> <li>③ Criminal law; strike ≠ crime</li> </ul> <p><u>Unemployment Insurance Reference (2005) SCC</u></p> <p>Held: Parliament may enact ss 224-23 of Employment Insurance Act based on s. 91(2A) of the CA 1867 "unemployment insurance"</p> <p>= provision of income replacement benefit during maternal and parental leave does not trench on provincial jurisdiction over property and civil rights</p>	<p><u>Stevedores Reference (1955)</u></p> <p>Held: federal law regulating labour relations was applicable to stevedores as their work of loading/unloading ships was an essential part of navigation and shipping</p> <p>Thus: federal competence to negotiate employment in works / business/undertakings within the legislative authority of the Federal Parliament</p> <p><u>Canadian Pacific Railway Co. v. AG of BC (1950)</u></p> <ul style="list-style-type: none"> <li>■ Although company is a federal undertaking, a specific group of its employees employed at a hotel will not be included, and will be subject to provincial labour regulations</li> <li>= their work is unrelated to the operation that is INTEGRAL to the federal undertaking</li> </ul>	<p>General rule = Provincial competence</p> <p>■ Exception = Federal competence:</p> <p>Test:</p> <p>Work performed by the worker is an INTEGRAL part of an undertaking within Federal Jurisdiction</p> <p>AKA</p> <p>Federal legislative authority over the operation, not over the person or company.</p>
				34

#	Matter / Classes of Subject	Provincial Law	Federal Law	Discussion
(5)	<p><b>Marketing</b></p> <p>Importance: consumer interest, producers create standard for quality</p> <p><b>General principle:</b> Prima facie contracts of sale and purchase a provincial power BUT federal have power to regulate interprovincial trade per s. 92(13)</p>	<p><b>Shannon v. Souris Mainland Dairy Products Board (1938)</b></p> <ul style="list-style-type: none"> <li>provincial scheme regulating milk marketing for milk sold in province</li> <li>Held "in relation to intraprovincial trade", even for milk produced outside of province</li> </ul> <p><b>Manitoba Egg Reference (1971)</b></p> <ul style="list-style-type: none"> <li>provincial scheme regulating marketing of eggs was struck down</li> <li>Held: laws restricting one province from trading with another is INTER PROVINCIAL = exclusive jurisdiction of the federal govt.</li> <li>somewhat contradict Shannon</li> <li>Affirmation: all 10 government of provinces and federal govt. negotiated a federal egg scheme creating quotas etc</li> </ul>	<p><b>Re Agricultural Products Marketing Act (1978)</b></p> <p>SCC upheld ① a national scheme regulating national marketing of eggs; and</p> <p>Held ② provincial statute could impose production quotas on all producers irrespective of the destination of their output</p> <p><b>Central Canada Potash v. Sask (1971)</b> potassium-laden salts (mineral)</p> <ul style="list-style-type: none"> <li>provincial scheme controlling potash production, a product mostly sold outside the province</li> <li>Held: provincial legislative authority does not extend to the control or regulating of marketing of products in inter-provincial or export trade, the scheme's core is price-fixing with the direct effect of regulating export price</li> </ul> <p>↑ law aimed to fix price/economics vs ↑ law aimed for physical conservation</p>	<p>Spooner Oils v Turner Valley Gas Conservation Board (1933)</p> <p>Held: lease of land granted to the oil company under the authority of Dominion Lands Act, the rights are regulated by federal legislature, cannot be taken away by provincial legislative</p> <p>THUS: the legislation is invalid as respect to the lease held by the company</p> <p>BUT legislation is valid as object of law is to prevent waste of natural gas ≠ federal power in trade or commerce or inter-provincial trade</p>

#	Matter	Provincial Law	Federal Law	Discussion
⑥	Securities	■ Corporate securities regulation is well within provincial legislative power of property and civil rights	Exception: provincial agency will have no discretionary power over federally - incorporated company	<u>Reference Re Securities Act (2011)</u> • proposed federal act aiming to regulate the securities industry held not within federal power of "trade & commerce" - property substance of securities industries regulation is a matter of property & civil rights • genuine national concern does not justify wholesale takeover of regulation of securities industry • Federalism demands both federal and provincial legislatures to act effectively within their respective spheres = did not satisfy the 5-step Test in General Motors (1989)
⑦	Property	■ creation, transfer and protection of protection rights well within "property and civil rights"	Exception: when the provincial legislation tries to accomplish a non-proprietary objective if cannot achieve by more direct means (remember colorability)	
⑧	Foreign Ownership	■ <u>Morgan v P.E.I CAB (1976)</u> - provincial law limiting area of property owned by non-residents unless with Minister's permission held intra vires provincial authority over property & civil rights, as it applied to non-resident of non-citizen (aliens) which is a federal head of power "naturalization and aliens"	<u>Switzman v Elbling (1957)</u> ■ provincial law prohibiting use of house to propagate communism was held to have the character of criminal law and not property	
⑨	Heritage Property - protection of heritage or cultural property within provincial power	■ <u>Bedard v Dawson (1923)</u> - provincial law allowed private citizens to apply to close premises used as a "disorderly house" held valid		⑩ Extra-territorial Competence - the term "in the province" makes clear the territorial limitation on the provincial legislature's power over property & civil rights
⑩	<u>Kikatla Band v BC 2002</u> preserving heritage w/in provincial power; BC. Heritage Conservation Act is intra vires as it is w/in provincial power of property and civil rights Also did not 'single out' the appellant indigenous group but is applicable to everyone → criticized (the stable, not the case, as not honoring negative impacts on I.P. rights, lack of consultation)	Prov = annul or reform unconscionable terms of contracts Federal = "interest" and "bankruptcy and insolvency"	■ Held: the law was in relation control and enjoyment of property and safeguarding of community = "property and civil rights" ≠ criminal law	



TLDR: Federal Power

"Trade & Commerce"  
Parsons (1881)

interProv + International — may have incidental effect on intra-provincial matters

general T&C — 5 steps Test / 5 parts Test to determine if "general T&C"  
see General Motors

Important ① never to regulate a specific industry  
eg insurance, beer production,

② must be truly national in scope, and not "Wholesale" or blatantly encroach into provincial jurisdiction i.e. Federalism demands balance/

distribution of power see **Securities Act Reference 2011**

= encroach = unconstitutional/ ultra vires Parliament

- Federal statute held invalid as it had effect on both inter- and intra-provincial dealings, only the part prohibiting import laws valid and severed.
- slight departure from PC approach in that if the impugned Act had incidental effect to intraprovincial transactions, it does not invalidate the Act as the main purpose was to regulate interprovincial and export trade (in grain)
- compositional standard for "light beer" under the federal Food and Drugs Act struck down; federal power on Trade & Commerce ≠ regulation of a single trade or industry

Federal Trade Marks Act. provided civil remedies and cause of action under tort and contract

HELD: unconstitutional as it encroach on provincial authority over property & civil rights  
— proposed a 3 step test which was adopted and modified in **General Motors**

## General Motors of Canada Ltd v City National Leasing (1989) SCC

Issue: Federal Legislation Combines

Investigation Act prohibits price discrimination and provide for a civil cause of action = provincial competence

Held: Act is valid, intrudes the federal parliament authority over "trade and commerce", passing 5 steps test:

- ① General regulatory scheme
- ② That general regulatory scheme is overseen by an agency
- ③ The scheme is concerned with trade in general & a particular industry
- ④ The legislation is of such a nature that provinces jointly or severally would be constitutionally incapable of enacting legislation on their own.
- ⑤ Failure to include one or more provinces would jeopardize the scheme in other parts of the country.

TLDR:

Act is a complex scheme of economic regulation w/ the purpose of encouraging competition, applicable to trade in general and not a particular industry.

+ The impugned provision was functionally related to the main objective  
+ the degree of 'encroachment' is minimal or an  
+ provision is not colourable attempt to cloak actual goal

(8)

"to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces"

S. 91

OPENING WORDS

gives rise  
to  
3 branches

"residual power" of the federal legislative keeping in mind

provincial legislative have **BROAD** powers

property & civil rights  
generally all matters of local or private nature in the province

intro

(1) GAP

(2) national concern

(3) national emergency

# 1

= P.O.G.G

language complete

the incomplete

eg. no enumerated power to enter treaties but have power to enact laws to perform obligations of Canada

eg. no language providing for incorporation of federal companies; Courts have held that federal legislature have residual power to incorporate companies with objects other than provincial

Peace, Order &amp;

Good Governance

# 2

National Concern

= test whether the legislation "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole" : requires 2 elements

(1) Provincial Inability and (2) Distinctiveness (that does not fall with the 2 provincial broad powers)

### # 3 EMERGENCY

- temporarly in nature
- historically the only condition allowed under P.O.G.G.
- historically invoked during actual war times to regulate price control, rent control or 'apprehended insurrection'

1946 - Canada Temperance Federation

turning point from where Courts used to require emergency in order to find for P.O.G.G.

1952 - Johansson v West St Paul Aeronautics satisfy N.C.

1966 - Munro v National Capital Commission zoning, expropriation (renovation of buildings in National Capital Region is N.C. (those matters traditionally w/in provincial authority))

1988 - R v Crown Zellerbach (current jurisprudence)

\* national concern ≠ national emergency

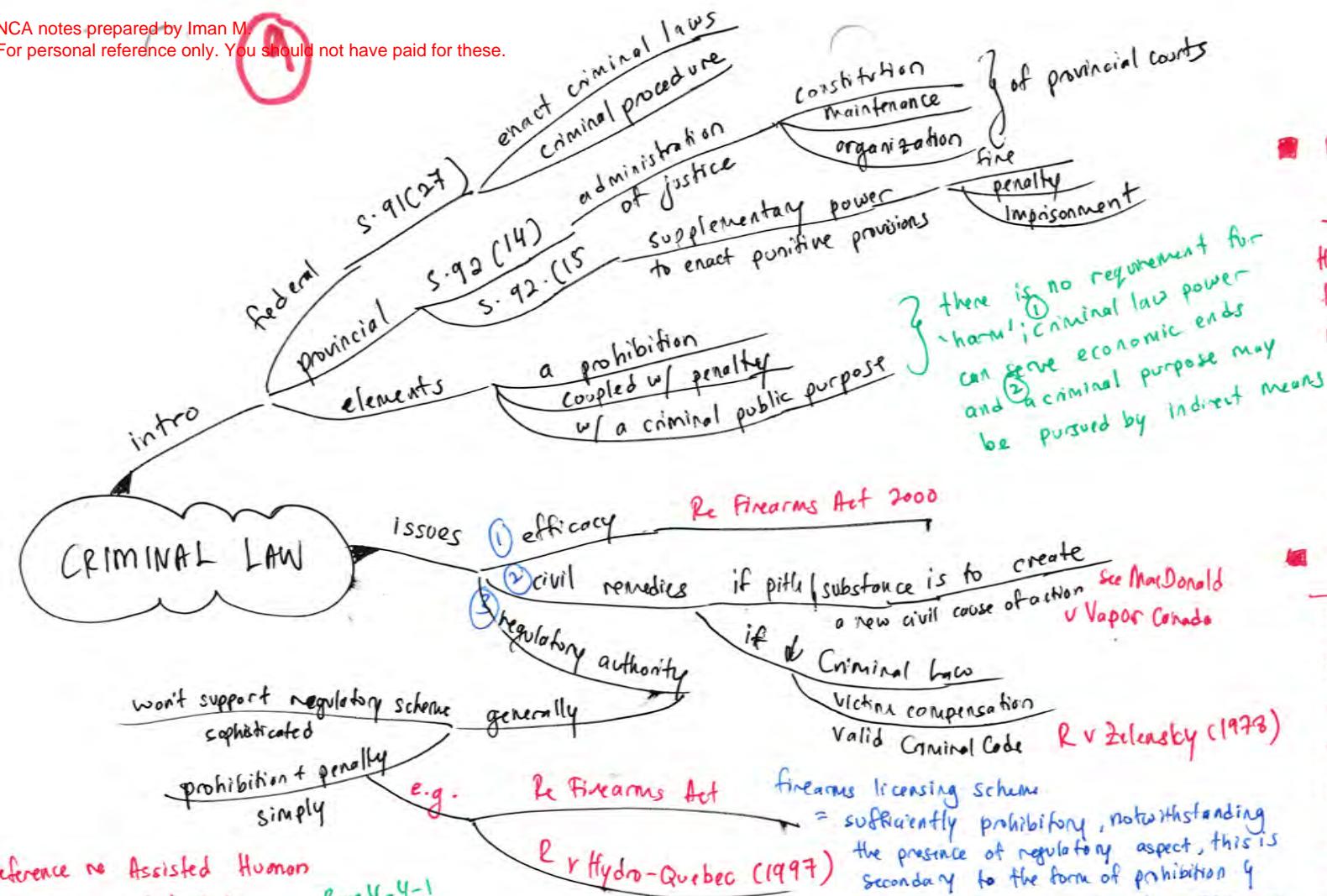
\* applies to (1) new matters and (2) matters of provincial nature but have since become a N.C.

\* N.C. = distinctiveness and provincial inability

### 1976 Anti-Inflation Reference

- federal anti-inflation Act held valid & constitutional
- period of double digit inflation for 20 months
- held: only need to demonstrate a rational basis to find an emergency exist & not requiring definitive conclusions

those matters  
traditionally w/in  
provincial authority)



Reference no Assisted Human  
Reproduction Act 2010 Date 4-4-1

Issue: ARRA, containing prohibitory administrative & regulatory provisions related to assisted human reproduction and similar health matters - ultra vires?

TDR: valid, prohibit commercialization of reproductive functions & other negative practices; INVALID concerns on efficiency and consistency/intended to create national standard exceeded federal legislative authority

## RJR MacDonald v Canada (1995)

Field: "criminal power" include powers  
to regulate public health, even  
indirectly via regulation on  
<sup>ans</sup> advertising; but absolute ban  
on advertising and unattributed  
health warning held to be  
a violation of s.1 of Charter

## Margarine Reference (1949)

Held: Dairy Industry Act 1927 prohibiting production & sale of margarine not w/in federal power; real purpose: protect the dairy industry (economical) purported purpose: Margarine injurious to health; only valid are provisions prohibiting import (under federal power of foreign trade)

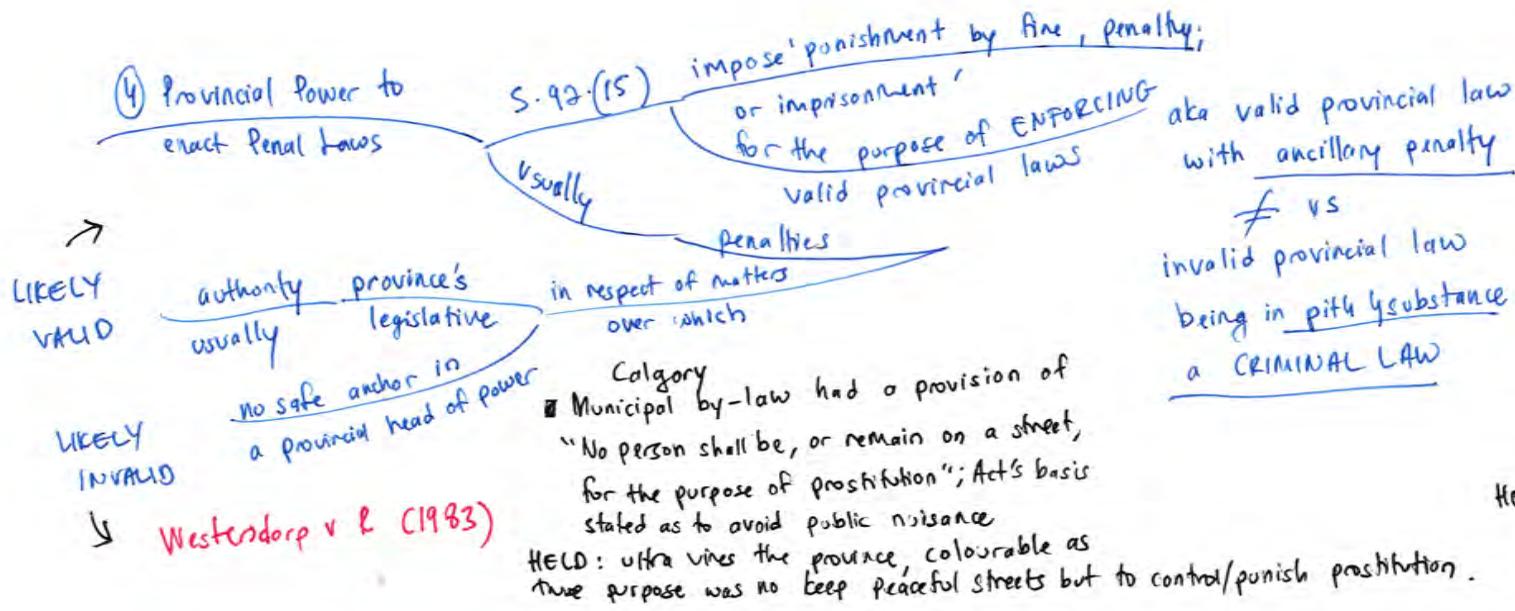
**TDE:** medical fact that product is not harmful makes this provision ultra vires Federal power

## R v Malmo Levine: R v Caine (2003)

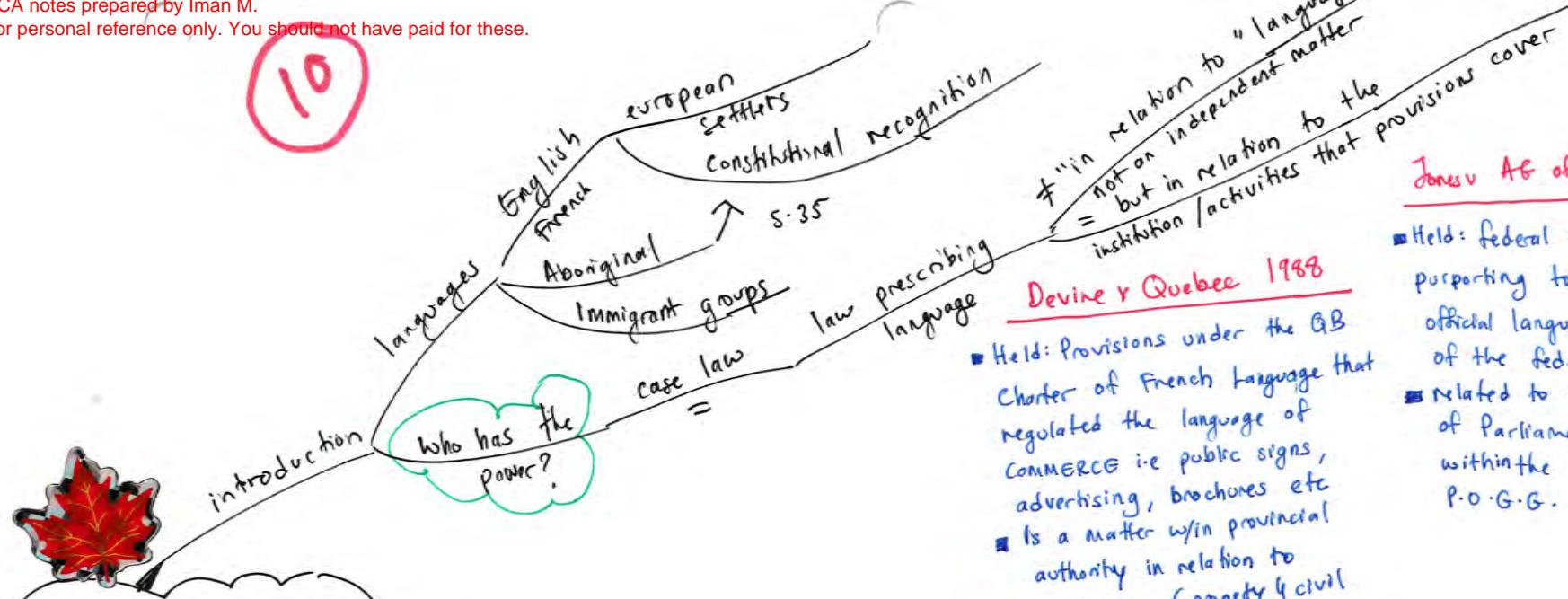
Held: argument that marijuana is not harmful or has minimal harm in view of threat of imprisonment rejected - Pl has power under constitution to criminal or decriminalize it 40

## Reference re Assisted Human Reproduction Act 2010

	Effective ruling of the Court
(1) Sections 5 to 9 prohibit human cloning, the commercialization of human reproductive material and the reproductive functions of women and men, and the use of <i>in vitro</i> embryos without consent	Sections 8, 9, 12, 19 and 60 of the Act are constitutional.
(2) Sections 10 to 13 prohibit various activities unless they are carried out in accordance with regulations made under the Act, under licence and in licensed premises. These "controlled activities" involve manipulation of human reproductive material or <i>in vitro</i> embryos, transgenic engineering and reimbursement of the expenditures of donors and surrogate mothers.	Sections 10, 11, 13, 14 to 18, 40(2), (3), (3.1), (4) and (5), and 44(2) and (3) exceed the legislative authority of the Parliament of Canada under the Constitution Act, 1867.
(3) Sections 14 to 19 set up a system of information management related to assisted reproduction.	
(4) Sections 20 to 39 establish the Assisted Human Reproduction Agency of Canada.	
(5) Sections 40 to 59 charge the Agency with administering and enforcing the Act and regulations, and authorize it to issue licences for certain activities related to assisted reproduction.	Sections 40(1), (6) and (7), 41 to 43, 44(1) and (4), 45 to 53, 61 and 68 are constitutional to the extent that they relate to constitutionally valid provisions.
(6) Sections 60 and 61 provide for penalties,	
(7) ss. 65 to 67 authorize the promulgation of regulations, and	
(8) s. 68 gives the Governor in Council power to exempt the operation of certain provisions if there are equivalent provincial laws in force that cover the field.	



10



## LANGUAGE RIGHTS

the LANGUAGE of

the Constitution

- Historical summary of the Constitution
  - CA 1867 - English, French unofficial
  - CA & CA 1932 - Enacted in both

S. 57 = "equally authoritative"

Charter 16-28 = Various language provisions

## Federal Statutes

- S. 133 CA 1867 - both languages
  - applicable to the federal parliament and Quebec provincial legislative only

- Manitoba Act 1870 s. 23

+ both languages in Manitoba courts & legislature

Quebec's Charter of the French Language

? Discrepancy between E+F version of the statutes' text?

## King v Dubois (1935)

- Where one language version is ambiguous and the other is clear, to resolve by reference to the clear version (in this case, the definition of 'public works' more clear in French)

## Jones v Maheux v Gamache (1968)

- Where there is a divergence, to select the meaning that is compatible w/ both versions
  - in this case, meaning of officer

## The Queen v Compagnie Immobiliere (1979)

- to select the version that gives better effect to the purpose of the statute, even if narrower meaning would be common to both versions

(1)

## S. 133, CA 1867

- applies to legislature and courts at the federal level and Quebec

### AG Quebec v Blaikie 1979

Held: QB's Charter of the French Language does not supersede s. 133, thus

- ① French can't be sole language
- ② Unofficial English translations did not meet 133 requirement

### AG Quebec v Collier 1985

Held: 2 QB statutes enacted in both languages unconstitutional as they incorporated by reference unilingual session papers (French) which were an integral part of the statutes - thus infringed s. 133

### MacDonald v City of Montreal 1976

Held: majority s. 133 does not give the right to choose the language of the process or right to be understood

### AG Quebec v Blaikie 1981 (#2)

s. 133 not applicable to municipal by-laws and school boards, only to the provincial gov't courts, quasi-judicial tribunals

(2)

## Manitoba Act, 1870

s. 23 - similar to 133 but applicable to the province of Manitoba, to protect the rights of minority French-speaking in Manitoba

### Re Manitoba Language Rights 1995

SCC held, failure to comply w/ s. 23 requirement of bilingual enactment resulted in INVALIDITY of those laws  
Thus: almost all of Manitoba's statutes were held invalid as they were enacted in English only, however temporary suspension of invalidity to allow the period of time necessary to translate, print and publish

(4)

## S. (1) and S. 2(b) Charter

### Ford v Quebec 1988

requirement for commercial signs had to be in French only held as breach of freedom to express in one's language of choice ie total prohibition on other language use was DISPROPORTIONATE

### Devine v Quebec 1988

requirement of French without prohibiting other language still offends S 2(b) but is saved by S. 1 = PROPORTIONATE

(3)

## Charter ss 16 and 20

16: E&F official languages and have equality of status

20: Obligation on the government to provide bilingual services to the public

### Desrochers v Canada 2007

Held: English/French services must be of equal quality, users should enjoy equal benefits

- s. 20 should be given liberal purposive interpretation

(5)

## S. 93 CA 1867

Roman Catholic Separate School Trustees v Macmillan 1916

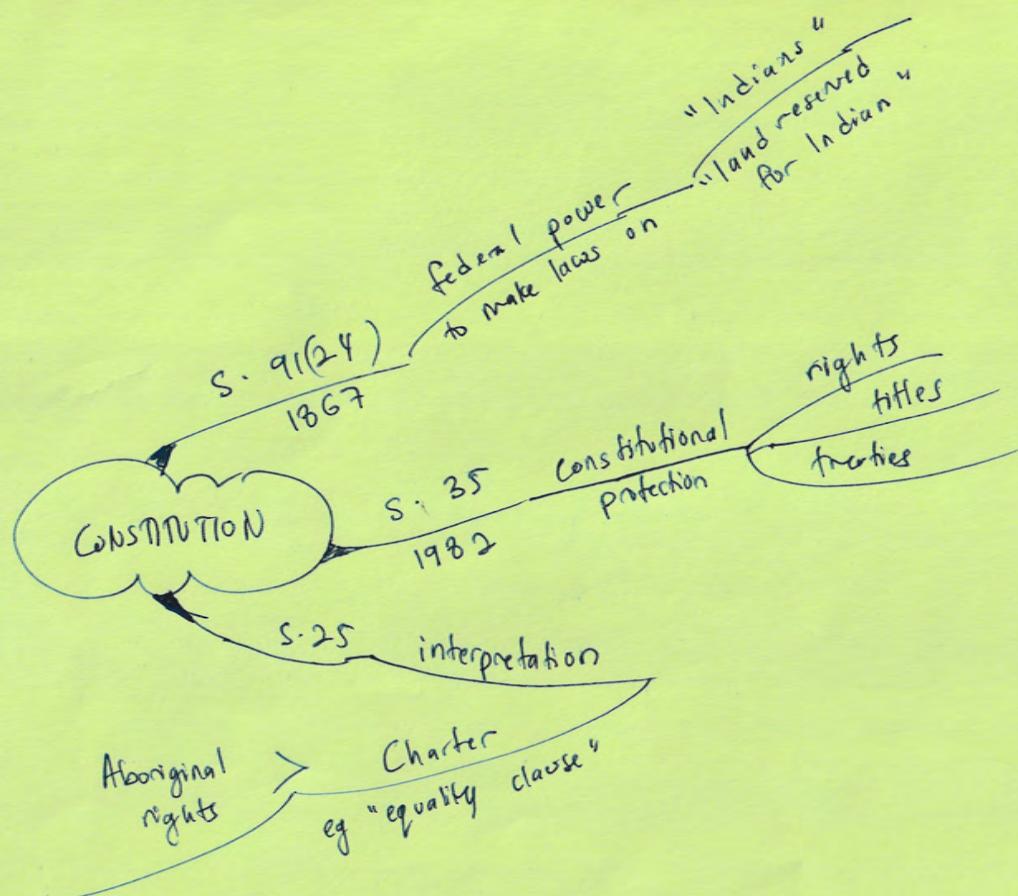
ON can require English to be the medium of instruction in Catholic schools, even French Catholic schools

(6)

## S. 23 of Charter

right of Canadians who are minorities in their province (English in QB and French elsewhere) to have their children receive primary and secondary schooling in that minority language - see 3 categories

(11)



- # Provincial law applicable to Aboriginal people subject to
  - (1) No singling out
  - (2) No derogation of rights
  - (3) No inconsistency w/ a Federal Law (paramountcy)
  - (4) In line w/ S.35 protection

See R v Sparrow

R v Van Der Peet

Delgamuukw v BC 1997

R v Marshall 1999 - treaty right allows fishing by selling w/out provincial license law

R v Marshall 2005 - no commercial logging rights

R v Powley

Haida Nation v BC

(1)

Structure for s.35 Questions

- ① Decide if group possesses s.35 rights - title rights in Tsilqot'in test
- ② Characterization of potential rights under s.35
- ③ Apply Van Der Peet test  
- conclude the result
- ④ Has it been explicitly extinguished by statute or Treaty? Y/N
- ⑤ Does Crown own duty of consultation?  
Discuss, cite, conclude
- ⑥ Justification for infringement of rights - Sparrow

#### s91(24) Constitution Act 1867 (UK):

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming w/in the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming w/in the Classes of Subjects next hereinafter enumerated; that is to say,

- (24) Indians, and Lands reserved for the Indians.

#### s35 Constitution Act 1982

Recognition of existing aboriginal and treaty rights:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

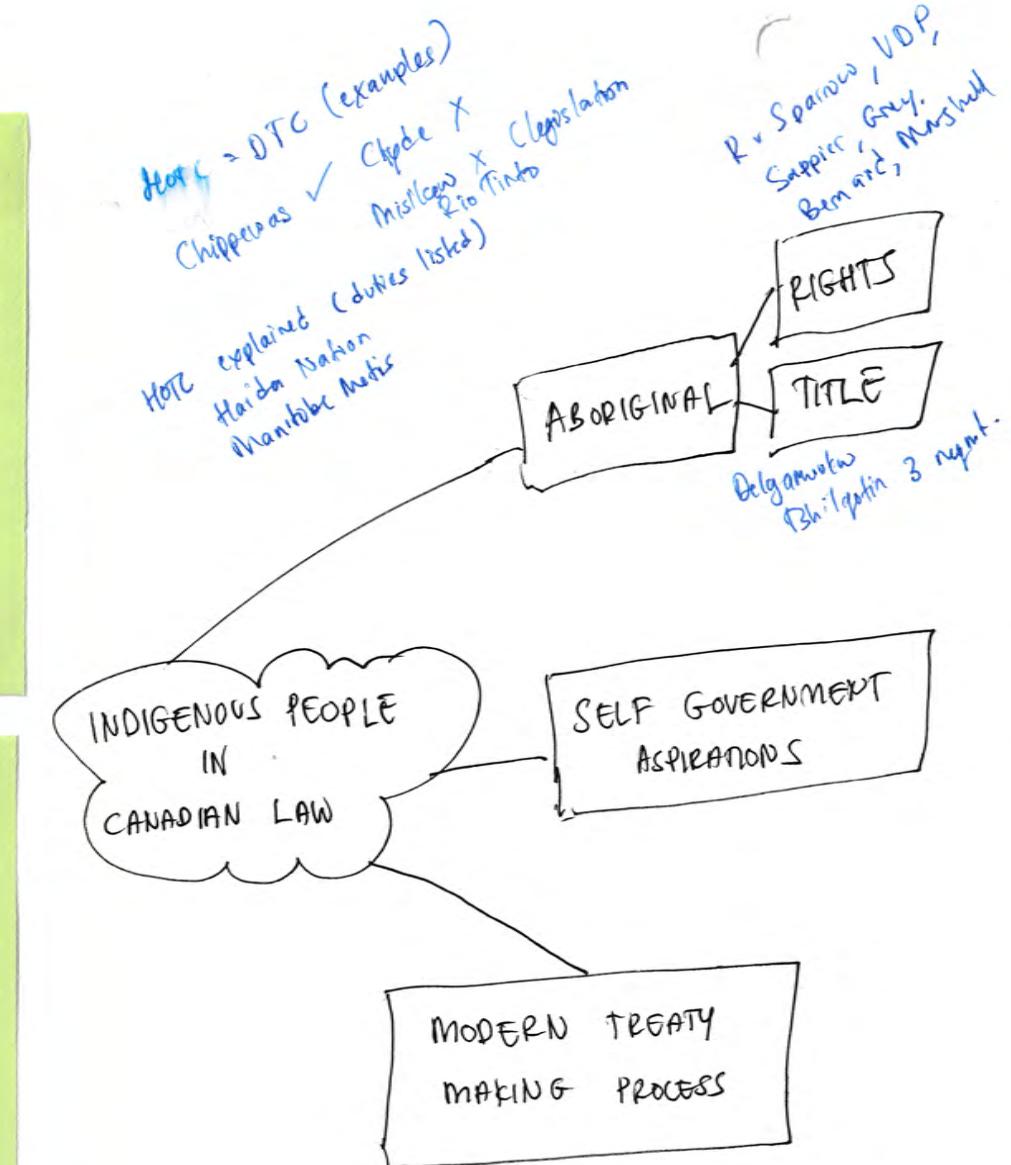
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

- (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.

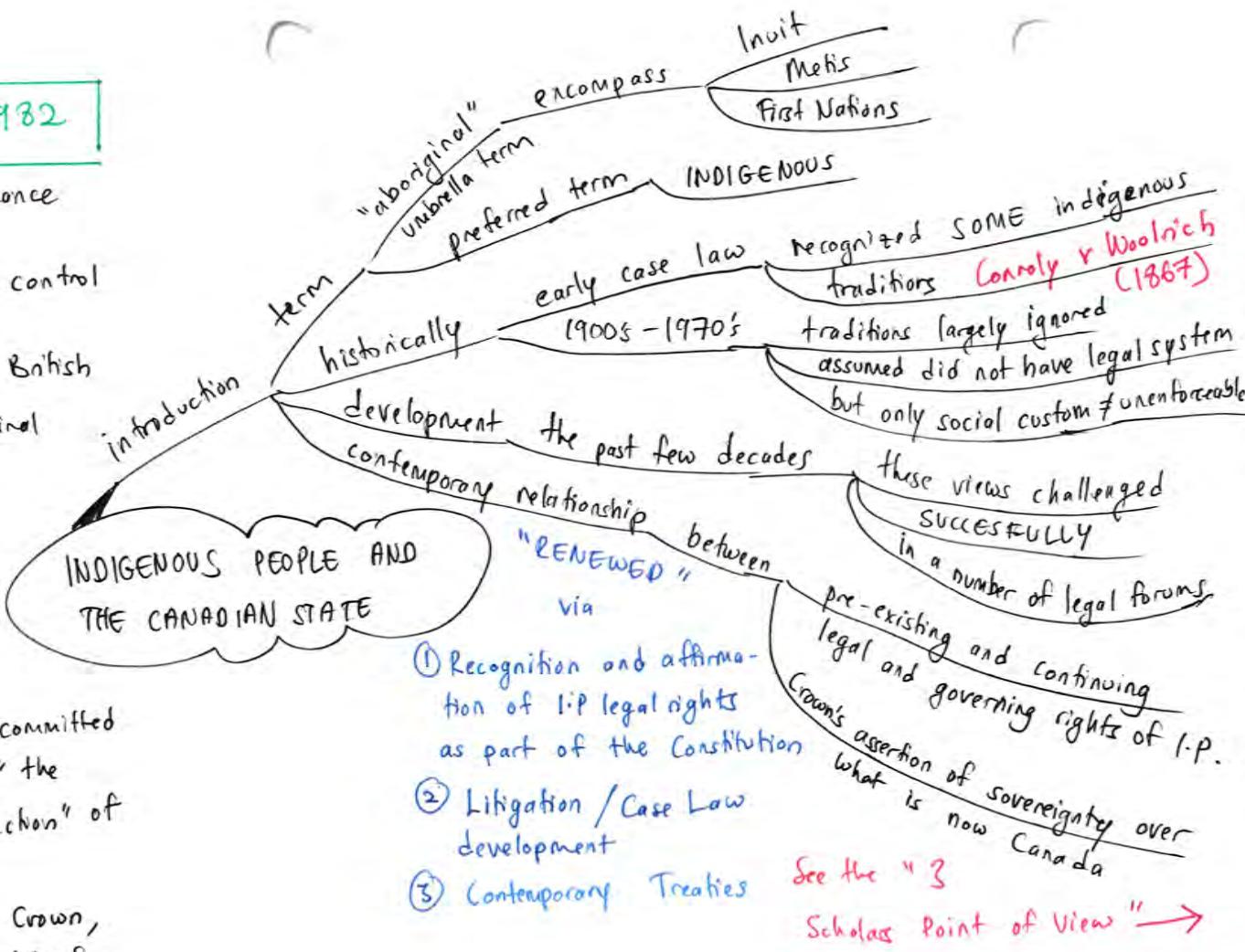
Aboriginal and treaty rights are guaranteed equally to both sexes

- (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.



## INDIGENOUS - STATE RELATION PRE-1982

- ① Early Canadian State and Indigenous Governance  
"Nation-to-Nation Relations"
  - Upon arrival European powers asserted control against each other.
  - After defeating the French in 1763, the British did not want to risk war to gain aboriginal lands = Royal Proclamation 1763
    - to not be disturbed or molested in possession of such parts which have not been ceded or purchased.. reserved as Hunting Grounds
    - forbade encroaching
    - acknowledged fraud & abuses have been committed in "land purchases", which "prejudices" the Crown's interests and "great dissatisfaction" of the "said Indians"
    - land could only be acquired for the Crown, at a public meeting or assembly of the I.P. for that purpose
- Colonial governments tasked with NEGOTIATING TREATIES
  - early treaties of peace and friendship, e.g. no alliances w/ the French, commitment to purchase IP goods, e.g. Mi'kmaq in the east 1700s
  - later treaties in the prairies had a different, more specific character
    - acceptable (specific) purpose of land use
    - no interference with IP hunting practices
    - Europeans providing certain requested goods



- treaties allowed peaceful settlement of Europeans, facilitating core colonial projects such as railway building that would last a century
- many I.P. in the North & West did NOT ENTER TREATIES

- Pre-existing Indigenous LEGAL SYSTEM at times came into direct contact with the European settlers' law
- = explicit recognition of Indigenous and non-indigenous legal systems OPERATING CONCURRENTLY

- Approximately 3% of the Canadian population identify as indigenous
- The past few hundred years saw shifts in how governance and jurisdiction powers have been shared between indigenous and non-indigenous governments
- Three views on the Constitutional Relationship between Indigenous and Non-Indigenous Peoples in Canada
  1. Michael Asch raises **questions about the legitimacy** of Canada's sovereignty given how their powers were obtained. Asch suggested that remedies rest on identifying Canada's origin and future in treaty relationships.
  2. Other scholars have considered how **Canada's constitutional order should reflect the relationship** that exists between the state and indigenous people. e.g. Patrick Macklem identifies 4 "complex social facts" which provide normative justifications for why indigenous legal rights should be uniquely recognized and protected within the constitution, which are:
    - a. IP belong to distinct cultures that were and continued to be threatened by non-Indigenous beliefs, philosophies and way of life;
    - b. Prior to Contact, IP lived and occupied vast portions of NA;
    - c. Prior to Contact, IP exercised sovereign authorities over persons and territories; and
    - d. IP had participated and continue to participate in treaty processes with the Crown.
  3. John Borrows explores other aspects of the public law relationship between Indigenous peoples and the state, **emphasizing how that relationship must evolve.**
    - a. Explores the roles of Indigenous law and legal traditions should play as part of the rule of law in Canada
    - b. IP have not been convinced that the rule of law lies at the heart of their experience with others in this land, thereby making Canada's legal system incomplete
    - c. IP believe that their own laws provide context and detail for judging our relationship with the land and Canadian law has largely ignored, diminished or denied those authorities

## INDIGENOUS-STATE RELATIONS PRE-1982 continued

### (2) The SUPPRESSION of Indigenous Governance

#### Authority and Practices

- Population shift - influx of settlers = sizable British communities AND diminishing indigenous communities due to disruption of natural resources/ food + introduction to European diseases
- Practical shift in power caused the prairie government to adjust the treaty to compel Aboriginal relocation, assimilation and dispossession of ancestral territory, pushing indigenous communities toward small "reserved" tracts of land
- Racist sentiment led to devastating policies
  - assumption that the Indigenous population would be served by assimilation, required 'protection' until assimilated
  - Federal Statute - Indian Act (objective of "protection" and assimilation
    - precluded those "unregistered" from living on reserves
    - imposed a foreign and limited governmental regime on reserve-based communities
    - indigenous land rights became limited to right to reserve lands and nothing else
- Treaty promises forgotten, or their enforceability questioned **R v Syliboy (1923)** - M'Kissag defense - convicted of offenses under law  
Minmag Treaty of 1752 freely hunting fish - treaty right - conviction upheld upon appeal

- I-P suffered many indignities. Most notably the forced attendance of Indigenous children at Indian Residential Schools so as to enable assimilation.

### (3) The TURN TO AFFIRMING and ACKNOWLEDGING the Persistence of Indigenous Legal Rights

- Despite the explicit efforts to suppress and assimilate, I-P persisted in asserting (1) sanctity of treaties and (2) the mere arrival of colonial settlers and establishment of colonial governments did not displace indigenous laws or legal rights
- In 1964, the BC Court of Appeal: **R v White Bob**
- In 1973, the Supreme Court: **Calder v AG of BC**
- Indigenous rights were starting to be recognized as existing, as a matter of law by Canadian courts.
- Further recognized by the Canadian government in the Constitution in 1982.

- Creates an Inuit government for a portion of Labrador called Nunatsiavut Government
- Maintain a public registry of the Labrador Inuit Constitution, Inuit Laws, including Inuit Customary Laws

set out the procedure for conflict between Canadian laws, laws passed by the Nunatsiavut govt. and Inuit customary laws = customary laws will take priority unless ① express extinguishment or ② conflict with Labrador Inuit Charter of Rights and Responsibility (a broader charter than the Charter)

**The Labrador Inuit Land Claims Agreement (2004)**

Modern Treaties and Indigenous Law

"Third Order" of the Government

**Campbell v AG BC / AG Canada v Nisga'a Nation (2000)**

- party sought to have parts of Nisga'a Treaty declared unconstitutional as it granted the Nisga'a Nation legislative jurisdiction; inconsistent with division of powers ss 91 and 92 of the CA 1867

**HELD:** (1) the Nisga'a had legal systems prior to contact and although diminished, had continued until present, although unwritten - a type of custom - can be acknowledged as 'laws'

(2) The 'legislative' powers of the Nisga'a government are significantly limited by the Treaty; in substance are not inconsistent with the Canadian Constitution.

\* Some Indigenous communities see modern treaties as key to self-governance, while others see it as requiring too much compromise on their part, having outcomes that are not sufficiently recognizing the full scope of their governance and land rights.

**Maa-nulth First Nations Final A.**

- duty to consult present as a duty of law, despite a treaty not identifying the matter at hand - as the Group did not attend meeting but opting to send a letter with options to instead, decision and process reasonable

**Beckman v. Little Salmon / Carmacks First Nation (2010)**

introduction

MODERN TREATY MAKING PROCESS

CONTEMPORARY TREATIES

typically includes

- formal transfer of land
- financial compensation
- royalty sharing schemes
- economic development measures
- land access rights
- rights to manage & harvest title, rights & interests in resources (or co-manage)
- right to participate in land use planning

1982 s. 35 recognizes affirms treaty  
the last "historic" confirmed the  
(litigation) as case law perpetuity of Indigenous  
legal regimes and rights over the land

1920's  
1970's

**the Crown & various Indigenous groups BEGAN AGAIN TO NEGOTIATE TREATIES**

Land Claim Agreements

also known as

complex documents  
some major treaties:

James Bay and Northern Quebec A.  
North-Eastern Quebec A.  
Western Arctic Inuvialuit Final A.  
Gwich'in A.  
Nunavut Land Claims A.  
Yukon First Nations Land Claims A.  
Sahtu Dene and Métis A.  
Nisga'a Final A.  
Tlicho Land Claim

Labrador Inuit Land Claims A.  
Nunavik Inuit Land Claims A.  
Tsawwassen First Nation Final A.

10

S.52

S.24

- applies to attacks on legislation
- applicable to the entire Constitution, including Charter
- authorizes only a holding of invalidity
- any court or tribunal with power to decide questions of law
- applies to attacks on governmental action
- applicable to Charter violations only
- wider range of remedies
- "court of competent jurisdiction"

CA 1982  
S.52(1)  
S.24(1)

**CHARTER  
+ unconstitutional  
REMEDIES**

S.52 = Supremacy Clause (explicit basis for JR)

"The Constitution of Canada is the Supreme Law of Canada, and any law inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect".

Wendland v Alberta 1998

**HELD:** Purpose of Alberta Individual Rights Protection Act (IRPA) is the protection of inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. Remedy of reading in sexual orientation into the Act, expanding the list of prohibited grounds of discrimination in the IRPA would not interfere w/ Act's objective, but rather enhance it. Also held extending the law is not an undue exercise of judicial power, if judges intervene was not reached in accordance to democratic principles.

S.52 "SIX" Remedies

(1) Nullification / Striking Down

- = effect as if it did not exist
- = should be the primary remedy, the other five as an EXCEPTION to the general rule that courts should not reconstruct a law to make it constitutional

(2) Temporary Validity

- = power to postpone the operation & declaration of invalidity if necessary eg
  - threaten rule of law *Re Manitoba Language*
  - pose a danger to the public
  - result in a deprivation of benefit from those deserving
- = modern approach, in addition to the three situations above, to have a dialogue with legislature in order to rectify the unconstitutionality

(3) Severance

- = appropriate when the rest of the statute can survive independently; most Charter cases are severable
- = a doctrine of judicial restraint to minimize impact of JR / court intrusion into the legislative process

**Tetreault:** SCC held breach of S.15 Charter to restrict Employment Insurance unemployment benefits to those under 65 only - severance to remove this age bar but law held otherwise valid

undemocratic exercise of judicial power, if judges intervene was not reached in accordance to democratic principles.

#### (4) Reading In *Vriend v AB*

- = power to read in new language if it is necessary to remedy the constitutional defect
- = to be exercised WITH CAUTION and in clear cases of
  - ① the addition of the excluded class is CONSISTENT w/ Legislative Objective
  - ② there seems to be LITTLE CHOICE as to how to cure the constitutional defect
  - ③ the reading in would NOT INVOLVE SUBSTANTIAL CHANGE in the cost or nature of the scheme
- ④ the alternative of striking down the under-inclusive provision would be an INFERIOR Remedy

#### (5) Reading Down

- = appropriate when the law can have 2 interpretation and 1 of them will offend the Charter while the other 1 will not
- = reading down /narrow interpretation will avoid a holding of invalidity

#### (6) Constitutional Exemption

- = never been successfully used
- = basically holding a legislation unconstitutional but only in its application to a particular individual or groups

*Ferguson*: police officer convicted on manslaughter of a prisoner in a scuffle in prison (4 years)  
- judge held entitled to C.E  
- SCC held 4 year is NOT grossly disproportionate to the facts of the case

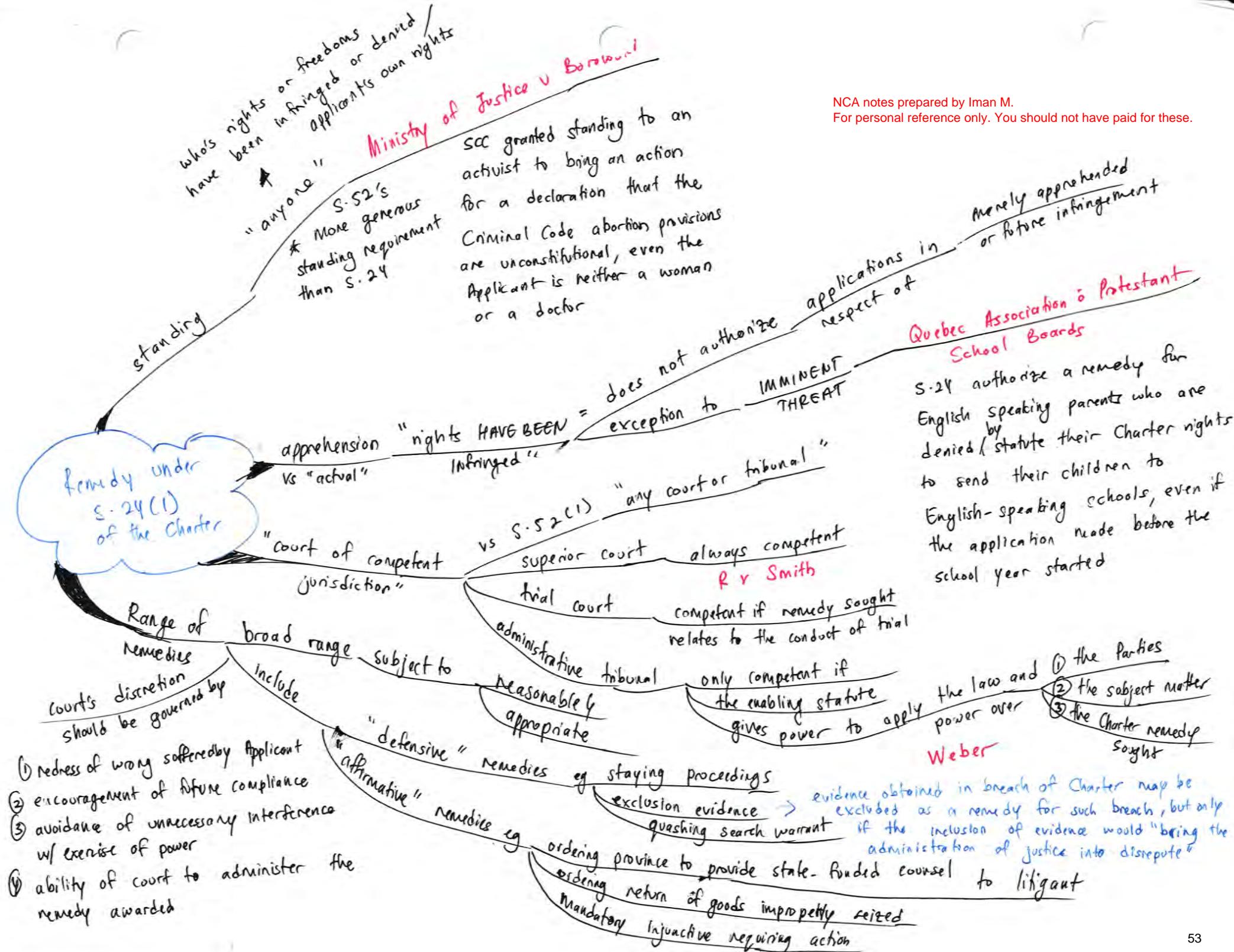
#### Issue of Limitation

- If held UNCONSTITUTIONAL, then it is unconstitutional from inception of the Law
- any newly discovered rights/obligations that flows from the retroactive disappearance of the law will take effect automatically

#### R v Sharpe

- possession of child pornography lead in to inclusion exclusion of 2 types of material
  - ① materials created and held by accused for personal use alone (writtenly visual)
  - ② visual recording created by and depicting accused that do not depict any unlawful activity and for personal use

\* without reading in these exclusions, the entire law will be violation of Charter S.2, so reading in was necessary to uphold the child porno legislation



## Types of Remedies

- ① DECLARATION
  - a remedy that declares a legal position
  - no order for defendant to do anything
  - a declaration that the government is in default of Charter would definitely be obeyed, usually an effective and adequate remedy

- ② DAMAGES
  - sometimes an appropriate and just remedy
  - Step ① establish a Charter right has been breached
  - Step ② Show why damages is just and appropriate (goals)
    - a) compensation (restore the claimant to the position before/without breach)
    - b) deter future violation
    - c) vindicate charter rights

### Vancouver City v Ward

\* Held: strip search & seizure of vehicle violated s.8 (police thought he would be a pie-thrower)  
awarded \$5000 as award

\* Fair to both Claimant and the State / Defendant.

\* Award of COSTS is also at times App. 4 just remedy for breaches that cause inconvenience or delay

- Step ③ State to try and counteract step ②, e.g.
  - a) existence of alternative remedies
  - b) interference w/ good governance
- Step ④ if step ③ fails, then the determination of quantum to be Appropriate & Just
  - a) Must represent a meaningful response to the seriousness of breach
  - b) When addressing vindication - exercise rationality and proportionality ie more serious the breach / infringement for claimant, the higher the award

### ③ Remedies OUTSIDE S. 24(1)

- a Charter breach may be remedied without reliance on S.24(1)
- Court in exercising statutory discretion may be properly influenced by a relevant Charter breach

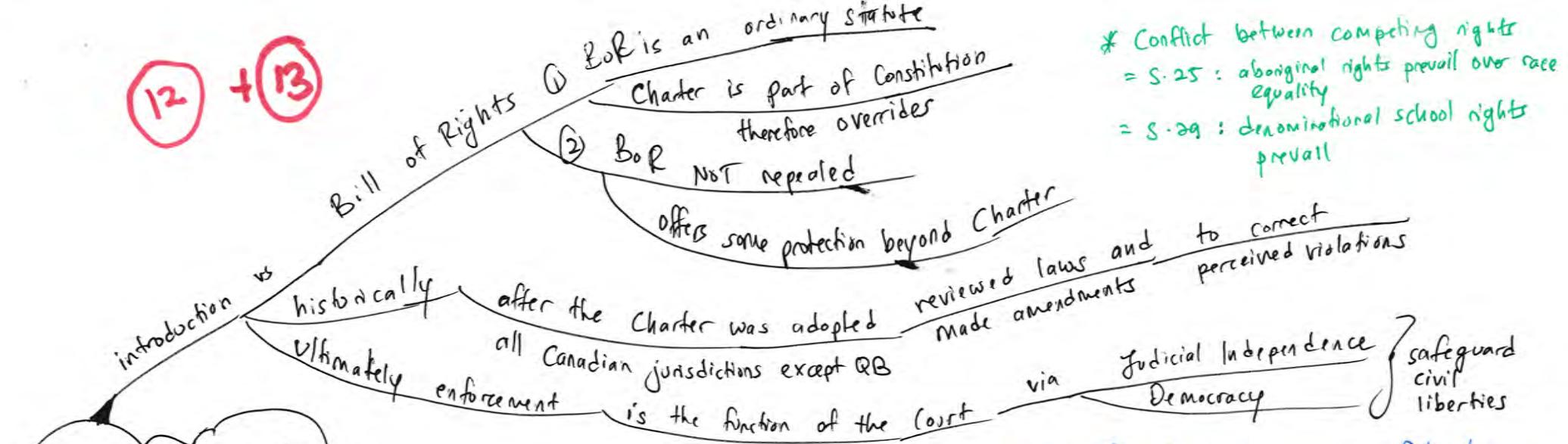
### R v Nasogaluuk 2010

- police used excessive force when making arrest and preventing flight, inflicting injuries
- SCC: upheld trial court's reduced sentence to remedy the breach to S.7

### ④ Appeals - S. 24 NOT authorize an appeal. Right of appeal will depend on the rules of court to which the S.24(1) application was made.

- ⑤ S.31 declares that the Charter does NOT EXTEND the legislative powers of any body or authority. Enforcement of Charter is the function of the Courts under S.24(1) & S.82(1).

12 + 13



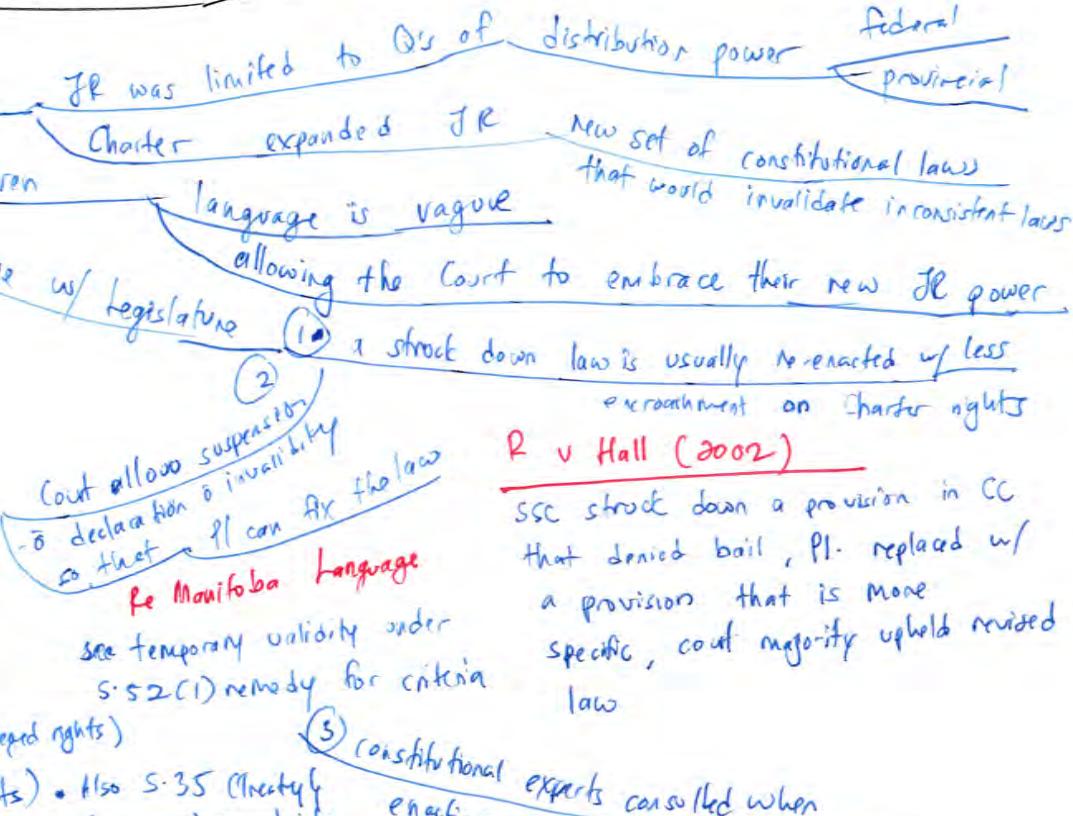
### Role of Section 1

- allocates courts to balance guaranteed rights against a competing societal value
- a law limiting a Charter right is valid if it is a "reasonable" one that "can be demonstrably justified in a free and democratic society"

Note: Unlike the U.S., courts will not refuse to answer a question mired in political controversy, but will answer from a legal point of view derived from constitutional principles and binding precedents → one of the most political questions discussed in Secession Reception

### Role of Section 33

- allows Parliament to enact laws that override guarantees of s. 2 and ss 7 - 15 of the Charter (common rights)
- All that is required is an express declaration of "notwithstanding" Charter
- Does not extend to: (privileged rights)
  - ss 3 - 5 (democratic rights)
  - s. 8 (mobility rights)
  - ss 16 - 23 (language rights)
  - s. 28 (sexual equality)



### R v Hall (2002)

SSC struck down a provision in CC that denied bail, Pl. replaced w/ a provision that is more specific, court majority upheld revised law

(3) + (5)

- ① Does Charter apply?  
Government Action  
S. 32
- ② Any override S. 33?
- ③ Infringement of which Charter?  
Ones on claimant
  - purpose or effect of law
  - does it infringe
  - is the infringement more than trivial? RV Jones
- ④ Is it saved by S.1? Oakes test
- ⑤ Consider a) violate or not, b) saved or not, therefore offend/not (Charter = Constitution)
- ⑥ Discuss remedy options

## Judicial Review of Legislation on Charter grounds

Stage 1 - Determine if the impugned law abridges the Charter

Stage 2 - Determine if saved or justified under section 1

(THEORETICAL)

Some discussions on interpretational approaches

(1) Progressive - flexible, adaptable to changing times, "living tree capable of growth & expansion w/in natural limits"

(2) Generous - may give full effect to civil liberties guaranteed under the Charter, but may reduce legislative powers

(3) Purposive - looks into contextual matters, purpose of statute; limiting scope of Charter while protecting civil liberties Hogg: works well w/ the stringent Oakes test (justification under S.1)

### I(a) Characterization of law

under Federalism → pitch & substance, then which class & subject

- under Charter → consider the purpose & effect
  - purportedly abridging Charter = unconstitutional
  - benign purpose but having effect of abridging Charter = unconstitutional

\* note under Federalism, the rule tolerates effects on matters outside the jurisdiction of the legislating body

### R v Big M Drug Mart

- the Lord's Day Act is unconstitutional as it had a religious purpose - struck in entirety
- \* most Charter violations would be severed from statute instead of struck down entirely as it will remove the effect; or (2) "read down" is interpreted in a way that does not violate

Interpret the meaning of the asserted right

- interpret the language of the Charter to see if it has been abridged by the impugned law

### I(b) Process as purpose

Monahan: Charter as an enhancement to encouraging opportunities for public debate and collective determination

Pros: (1) supplies context for interpreting guarantees  
(2) offers a solution to legitimacy of JR

Hogg: disagrees as most Charter rights are substantial

## Additional Discussions:

### SOURCES OF INTERPRETATION

#### (1) Pre - Charter cases

- doctrine of binding precedent applies
- although few pre-Charter cases will be relevant
- restraint in following cases on BoR as the difference in status ie constitution vs not

#### (2) American Cases

- SCC wary of reading a parallel but some interpretation of similar language may be useful
- s.1 allows for broader interpretation compared to the U.S.

#### (3) International treaties

- not binding, only persuasive

#### (3) Legislative History

- admissible as aid to interpretation

### PRIORITY BETWEEN FEDERAL & CHARTER GROUNDS

#### CHARTER GROUNDS

- Federal ground is more fundamental and validity under federal ground should be established first before asking if it violates Charter

### UNDECLARED RIGHTS

- s.26 makes it clear that the enactment of Charter does not take away existing 'undesigned' rights & freedoms under common law or statute
- although s.24 will not be available as remedy

### WHO BENEFITS?

Corporations?

"everyone" "anyone" "any person"

R v Big M Drug Mart

- corporation could invoke the right to freedom of religion? No but found unconstitutional, therefore corporation not convicted

Those who enter Canada illegally?

Singh v Minister of Employment & Immigration 1985

- assert s.7 rights available to everyone (entitled to hearing)

### APPLICATION of CHARTER (1)

#### EXCEPTIONS

s.15 confers right to an "individual"

- foetus not a legal person
- not to estate of deceased individual
- requirements for certain rights to have citizenship
  - voting
  - mobility
  - minority language education

AG Canada v Hislop 2007

Entity subject to Charter?

Step 1 : Nature of entity - gov. control, no autonomy

Step 2 : Nature of activities

- have autonomy but relevant activity is a government activity

## BURDEN OF RIGHTS

then, subject to Charter.

## APPLICATION OF CHARTER (2)

Vancouver Transportation Auth v

Canadian Federation of Students 2009

Principle : Notice or Act, held Translink & BC transit are controlled by the municipal gov. body, ultimately the provincial gov. through statute. Claimants wanted to raise awareness of upcoming provincial election. However protection of freedom of expression under 2(c) which protects expression on bus advertisements, the policy which prohibits political ads was not a justifiable limit. HEDC invalidly struck down

S. 32 ① both level of government PI and legislature

② Statutory authorities, especially with the 'power of compulsion'

Eldridge v BC

Hospitals not government in character as they exercise autonomy. However, a particular activity can be ascribed to the government, then the organization is subject to Charter wrt that Act. Held: failure to provide public funding for sign language interpreters for the deaf in medical services a violation of S. 15

③ Institutions 'CONTROLLED' by the government

McKinney v University of Guelph

University function as autonomous bodies and gov. had no direct control

(4) Private Action

R v Buhay

Two security guards who opened locker smelling of weed were not actors of the state. But when the police did the same thing at a later time, held violation of S. 8 and excluded the evidence under 24(2)

## ⑤ Courts

### R v Ralkey 1987

- court adjourned 19 times and took 11 months to reach a decision
- s.11(b) right to be tried w/in a reasonable time
- Held: Charter apply to Courts and issued a Stay of Proceedings

### B.C Govt Employees Union v B.C. 1988

Court order issued by a BC CF prohibiting the picketing of the Courts was held to be SUBJECT TO CHARTER review, as courts' motivation to issue the injunction was public in nature. HELD: yes limited freedom of expression under s.1 but was justified under s.1

## ⑥ Extra-territorial Application

### R v Hape (2007)

Search of property by Turks & Caicos local police was claimed to be in violation of s.8. Held: Charter not binding on non-canadian actors and evidence found in search was admissible

### Canada v Khadr (2008)

Canadian citizen captured in Afghanistan & held in Guantanamo

Held: entitled to disclosure of records (s.7) however as Guantanamo processes were contrary to 1949 Geneva Convention, Charter had a extra-Terr. effect, khadr was entitled to s.24(1) remedy of disclosure

## override of rights

### D S.35

- allows Pl. to override s.2, 7-15 of Charter
- without express override, a statute is only valid if it comes w/in S.1 of the Charter
- does not include

S. 3-5 Democratic Rights

S.6 Mobility Rights

ss 16 - 23 Language Rights

S.24 Enforcement Provision

S.28 Sexual Equality Clause

- Comes w/ a FIVE YEAR LIMIT
  - S.33(4) permits re-enactment
  - the purpose to force re-consideration

See Ford v

Quebec ↓

- Rights not taken away retroactively
- Must be expressly declared and specific as to the Charter rights to be overridden

\* Rarely being used due to political pressure from opposition parties, the press, civil rights group and the organized Bar

## LIMITATION OF RIGHTS

### □ S. 1

- rights are not absolute and is subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"
- 2 stage JP analysis
  - ① Court decide if the challenged law has an effect of limiting a Charter Right
  - ② Interpretational application of S.1
- Influence from Europe - ECtHR has a similar limit
  - US does not, only imply limitations to accommodate legitimate restraints
  - CDN courts cannot rely on US jurisprudence
- Standard of justification: the broader the interpretation of the scope of rights, the more relaxed the standard of justification under S.1 to uphold the Legislation
- Burden of Proof: Step 1 is on the Claimant / asserting the breach, Step 2 is on the government to show that it is "reasonable limit and can be demonstrably justified in a free and democratic society"
- No presumption of constitutionality in Charter cases, but there is the principle of Reading Down
- \* "Prescribed by Law" means it must be legally authorized under the law

### Ford v Quebec (1988)

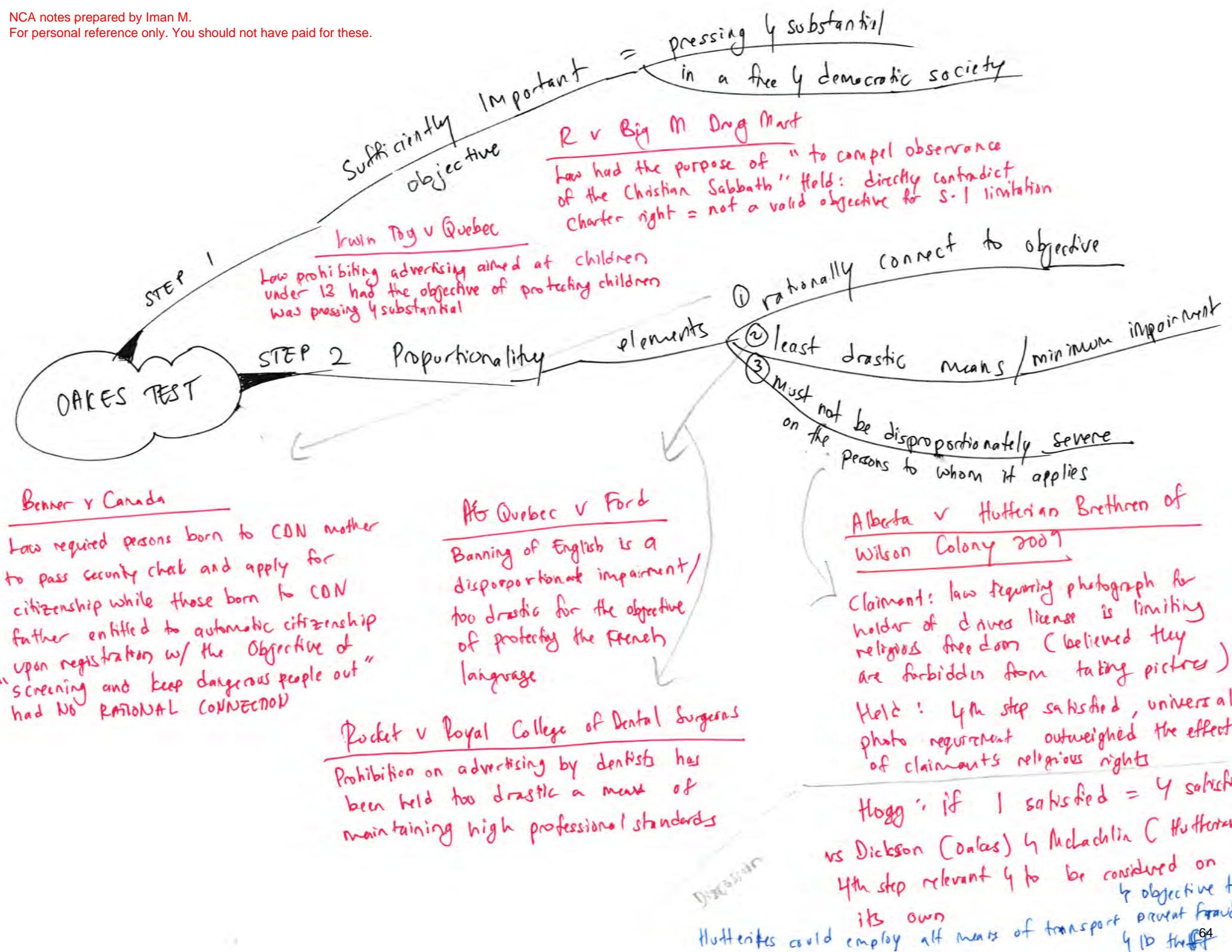
QB Charter of French Language  
which bars the use of language  
other than French on commercial  
signs was HELD: a violation of  
the Charter

Afterwards: the law was amended  
to include a s. 33 override which  
shields it from Charter scrutiny for  
5 years (this in 1989)

Further challenged under the  
International Covenant on Civil &

Political Rights and the Human  
Rights Committee found a violation  
of Article 19 and order the State  
to amend the law.

In 1993, it was amended to  
state that French must be predominant  
but other language may be used.  
(No more using s. 33).

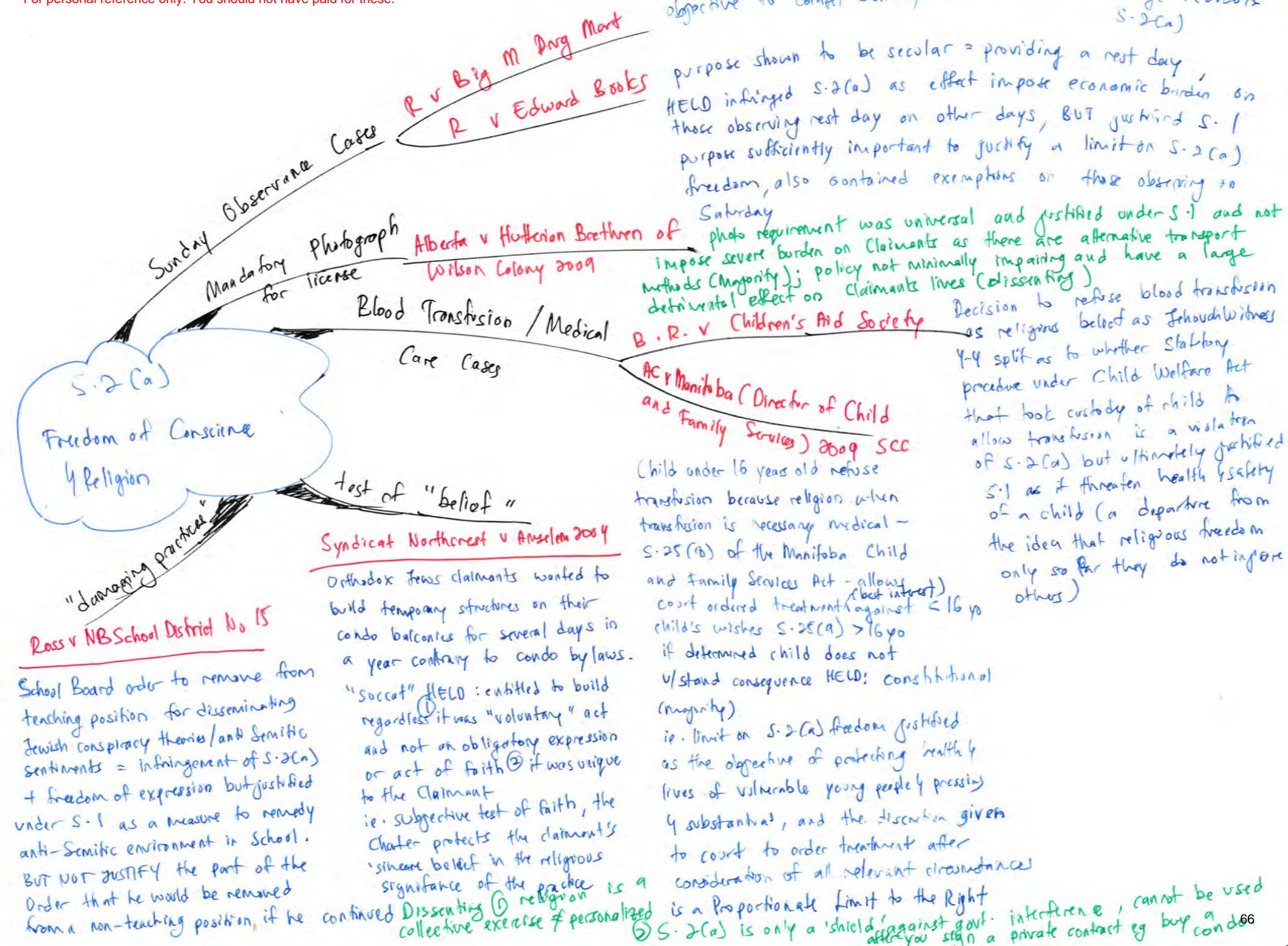


## R v Oates 1986

S. 8 of Narcotic Control Act =  
a rebuttable presumption that possession  
inferred an intention to traffic

HELD: ① S. 8 of NCA violated  
S. 11(d) (presumption of innocence) and  
indirectly S. 7 (life liberty / security)  
② Did not pass rational connection  
test for S. 1 justification as • possession of  
small amount does not support the

inference of intention to traffic =  
irrational to infer so  
= in violation of Charter 4 is of  
no force / effect



## Reference re Same Sex Marriage

### Proposed legislation

s.1 - marriage for civil purposes is the lawful union of two persons to the exclusion of all others

s.2 - nothing in this Act affects freedom of officials of religious groups to refuse to perform marriages that are not in accordance w/ their religious beliefs

① s.1 is intra vires, but s.2 is ultra vires as per the substance relates to who may (or must) perform marriages and falls w/in the subject matter allocated to the provinces

② s.1 of the proposed Act is consistent w/ Charter - extends the right of civil marriage to same-sex couples. Any potential conflict w/ s.2(a) will be resolved w/in Charter ambit.

③ s.2(a) is broad enough to protect religious officials from being compelled by state to perform civil or religious same sex marriages that are contrary to their beliefs

④ Court exercised discretion not to rule on if opposite sex requirement for civil marriages under Ct and under Quebec's legislation consistent w/ Charter.

Question ①

w/in legislative authority for Parliament

② Is the proposed legislation consistent w/ the Charter

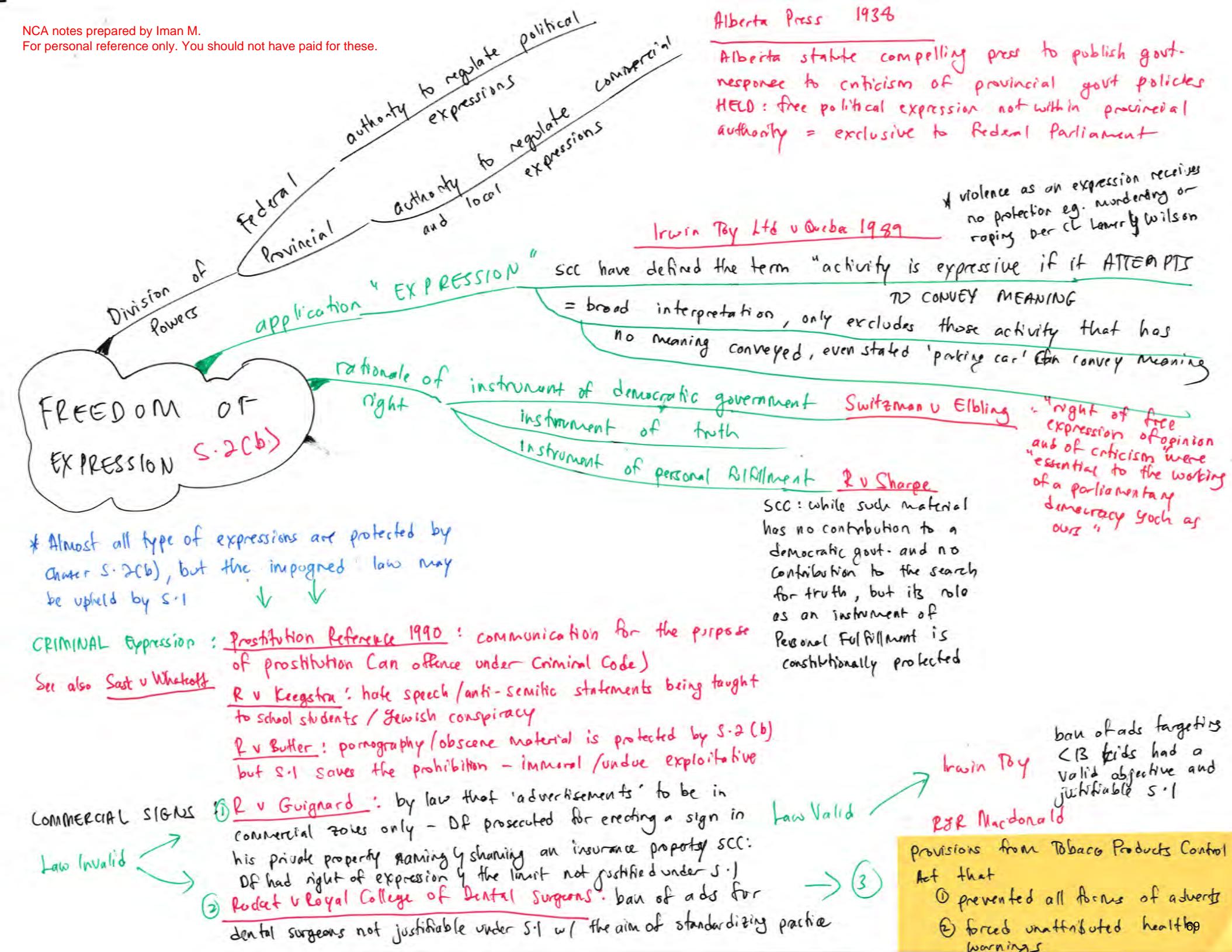
③ Does s.2 (a) freedom protect religious officials

## R. v. N.S. 2012 SCC 72

- The issue is when, if ever, a witness who wears a niqab for religious reasons can be required to remove it while testifying.
- Two sets of Charter rights are potentially engaged — the witness's freedom of religion and the accused's fair trial rights, including the right to make full answer and defence. The answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court.
- Four questions. First, would requiring the witness to remove the niqab while testifying **interfere with her religious freedom?** To rely on s. 2 (a) of the Charter, N.S. must show that her wish to wear the niqab while testifying is based on a sincere religious belief. The preliminary inquiry judge concluded that N.S.'s beliefs were not sufficiently strong. However, at this stage the focus is on sincerity rather than strength of belief.
- The second question is: would permitting the witness to wear the niqab while testifying **create a serious risk to trial fairness?** There is a deeply rooted presumption in our legal system that seeing a witness's face is important to a fair trial, by enabling effective cross-examination and credibility assessment. However, whether being unable to see the witness's face threatens trial fairness in any particular case will depend on the evidence that the witness is to provide. Where evidence is uncontested, credibility assessment and cross-examination are not in issue. Therefore, being unable to see the witness's face will not impinge on trial fairness. If wearing the niqab poses no serious risk to trial fairness, a witness who wishes to wear it for sincere religious reasons may do so.
- If both freedom of religion and trial fairness are engaged on the facts, a third question must be answered: **is there a way to accommodate both rights and avoid the conflict between them?** The judge must consider whether there are reasonably available alternative measures that would conform to the witness's religious convictions while still preventing a serious risk to trial fairness.
- If no accommodation is possible, then a fourth question must be answered: **do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?** Deleterious effects include the harm done by limiting the witness's sincerely held religious

practice. The judge should consider the importance of the religious practice to the witness, the degree of state interference with that practice, and the actual situation in the courtroom — such as the people present and any measures to limit facial exposure. The judge should also consider broader societal harms, such as discouraging niqab-wearing women from reporting offences and participating in the justice system. These deleterious effects must be weighed against the salutary effects of requiring the witness to remove the niqab. When assessing potential harm to the accused's fair trial interest, the judge should consider whether the witness's evidence is peripheral or central to the case, the extent to which effective cross-examination and credibility assessment of the witness are central to the case, and the nature of the proceedings.

- A clear rule that would always, or one that would never, permit a witness to wear the niqab while testifying cannot be sustained. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law.
- Competing rights claims should be reconciled through accommodation if possible, and if a conflict cannot be avoided, through case-by-case balancing. The Charter, which protects both freedom of religion and trial fairness, demands no less.



## Saskatchewan Human Rights Comm. v. Whatcott 2013

- S.14(1)(b) of the SK HR Code, SK HRC found that 4 flyers contained hate speech, OB agreed SK CA disagreed
- SCC: as per Taylor analysis "hatred and contempt" →
- Held S.14(1)(b) infringes on Freedom of Expression but justified under S.1 → However part of the Act "ridicules, belittles or otherwise affronts the dignity of"

Was not rationally connected to reducing discrimination, SCC struck them down (not justifiable)

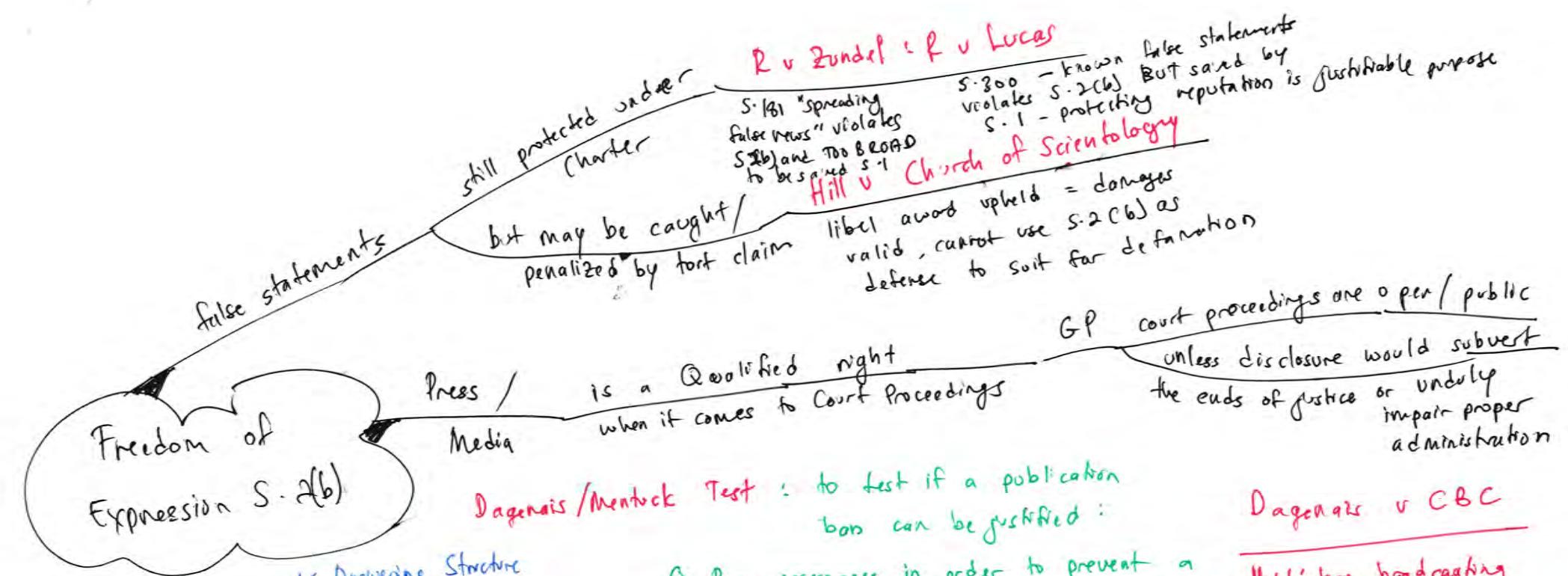
Also held: cannot hide behind own belief or morality to justify hate speech

S.1 = limitation on the Freedom of Expression by prohibition of hate speech, when properly defined & understood, is demonstrably justified in free democratic society

1. S.14(1)(b) for the HR Code  
goes beyond what it means to be a hate

### Taylor's definition of hatred

- ① Objectively, does a reasonable person aware of context and circumstances, would view the expression as exposing a protected group to hatred.
- ② Must be extreme manifestation of emotions, detestation, vilification, inciting a level of abhorrence that leads to discrimination or worse.
- ③ Likely to expose target to hatred, intent to incite hatred or discrimination is irrelevant.



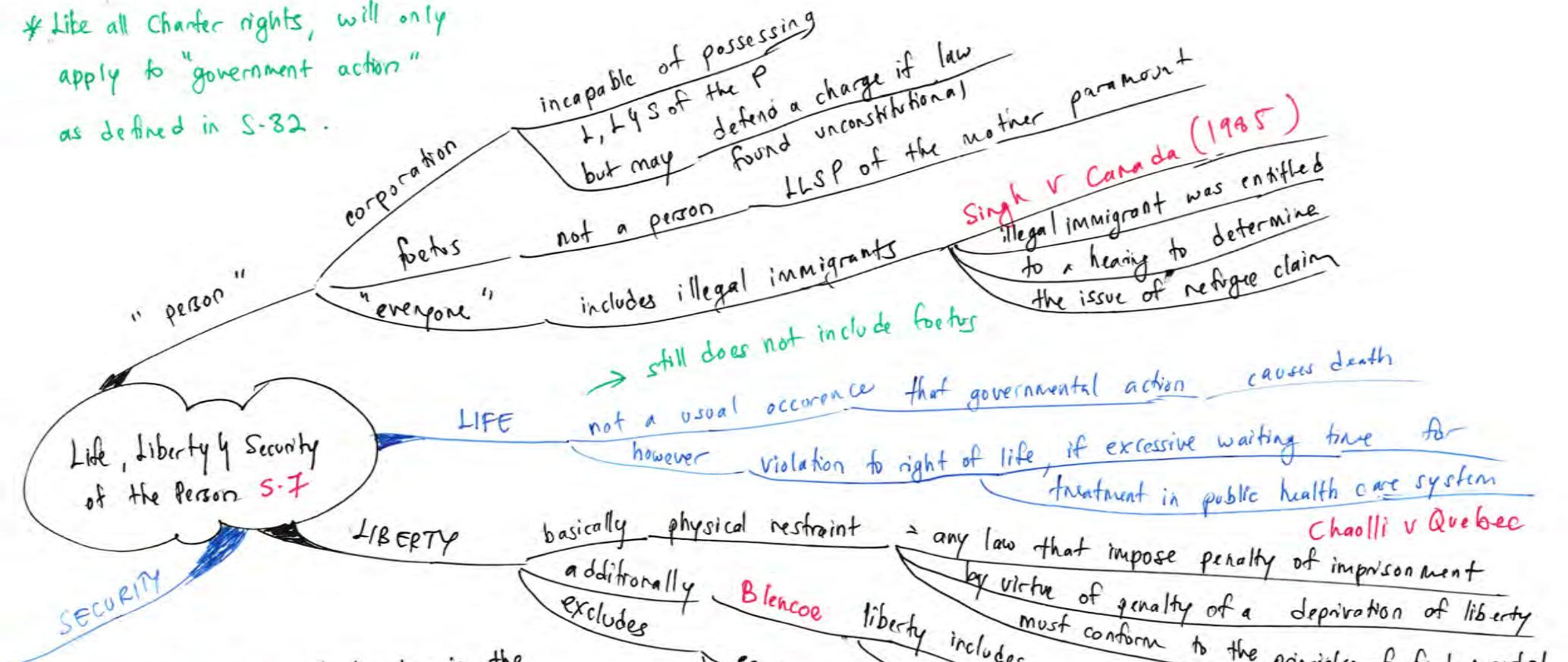
- Montreal City v 2952-1366 QB Inc
- Law prohibited noise produced by equipment that can be heard outside a building
  - Q1 : is the noise expressive content  
A: Yes, an expression w/in S.2(b) protection
  - Q2: Was expression protected for S.2(b) on public property? S.2(b) purpose  
A: Yes, it falls w/in one of the 3 purposes
  - Q3: Does the law infringe the S.2(b) protection  
A: Yes
  - Q4: Is it justified under S.1.  
A: SCC says yes valid to combat noise pollution, have minimal impairment proportionate = VALID

\* Used in

Re Vancouver Suns : Held: Investigative hearing have to be public and name of persons involved = public

Toronto Star Newspaper  
SCC upheld quashing of order to seal materials that could identify confidential informant - allowed to be edited extensively to protect ID<sup>71</sup>

\* Like all Charter rights, will only apply to "government action" as defined in S-32.



R v Morgentaler No. 2 - abortion law in the Criminal Code resulted in delays in treatment and ultimately increase risk to women's health HELD: deprive women of security of person

Chaolli v Quebec - law forbidding purchase of a private health insurance ultimately lead to delays in treatment, putting lives at risk, HELD: breached the principles of fundamental justice under the Quebec Charter

Rodriguez v BC AG 1993 - assisted suicide is illegal under Criminal Code

Pl. applied to strike down law alleging violation of S.7, 12 & 15. HELD: prohibition of suicide reflects a fundamental value of society and thus could not be in violation of fundamental justice

Carter v AG Canada 2015 - overturned Rodriguez and held that provision violated the Charter HELD: adults who are mentally competent and suffering intolerably and enduringly have right to medically assisted death

R v Bedford 2013

\* prostitution under the CC is prohibited under various provisions  
• struck down as unconstitutional, focusing on Security of the person  
Held: Pl. have the power to regulate against nuisance, but not at the cost of the health, safety & lives of prostitutes  
- delayed striking down the law for a year for Pl. to update laws, Bill C-36 passed in Dec 2014

Suspended for 12 months to allow Parliament to amend the law - passed in 2016 w/ more restriction - natural death have to be foreseeable

eg religion expression travel etc

Step 1: Has there been an infringement of one of the three protected interests (L, L, S) of the person?

Step 2: Is the infringement/deprivation in accordance with the principles of fundamental justice?

\* right to F.J. only after L, L, S is deprived, not independently

R v Fontes 1993

## FUNDAMENTAL JUSTICE

Step 2(a) Identify the relevant F.J.

Step 2(b) Determine if deprivation is in accordance w/ F.J.

procedure by substance  
the term covers both PYS

BC Motor Vehicle Reference

BC law had an absolute liability offence which carries imprisonment upon conviction. HELD - any offence that would deprive S-7 on absolute liability violates principles of F.J. Also held that F.J. is broader than "natural justice", consistent with the reading of the rest of the Charter ≠ Bill of Rights

[no concrete decisions to define]

LIFE LIBERTY &  
SECURITY OF THE PERSON  
S-7

there are no finite list of what F.J. principles are, but courts will decide and declare; this is F.J.

### Malm-Levine

3 requirements for a rule to qualify as a principle of F.J. must be

- (1) A legal rule / legal principle
- (2) there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate
- (3) Capable of being identified w/ sufficient precision to yield to a manageable standard

### Some settled principles of F.J.

- (1) Principles against arbitrariness, overbreadth and gross disproportionality - R v Heywood
- (2) Principle against vagueness of law -
- (3) Independence / Impartiality of the Judiciary -
- (4) Accused must be tried and punished under the law in force at the time the offence is committed.
- (5) Young persons are entitled to a presumption of diminished moral culpability (on sentencing)

### vs Some that were decided as NOT F.J.

a convicted sexual offender charged for loitering around a public park where minors would be held: violates S-7 as it would be restricted from many areas, beyond what is necessary for justice eg a different provision for those sexual offenders involving minor

- best interest of a child found as 'not fundamental to the legal system' Canadian Foundation for Children, Youth, and the Law (2004)

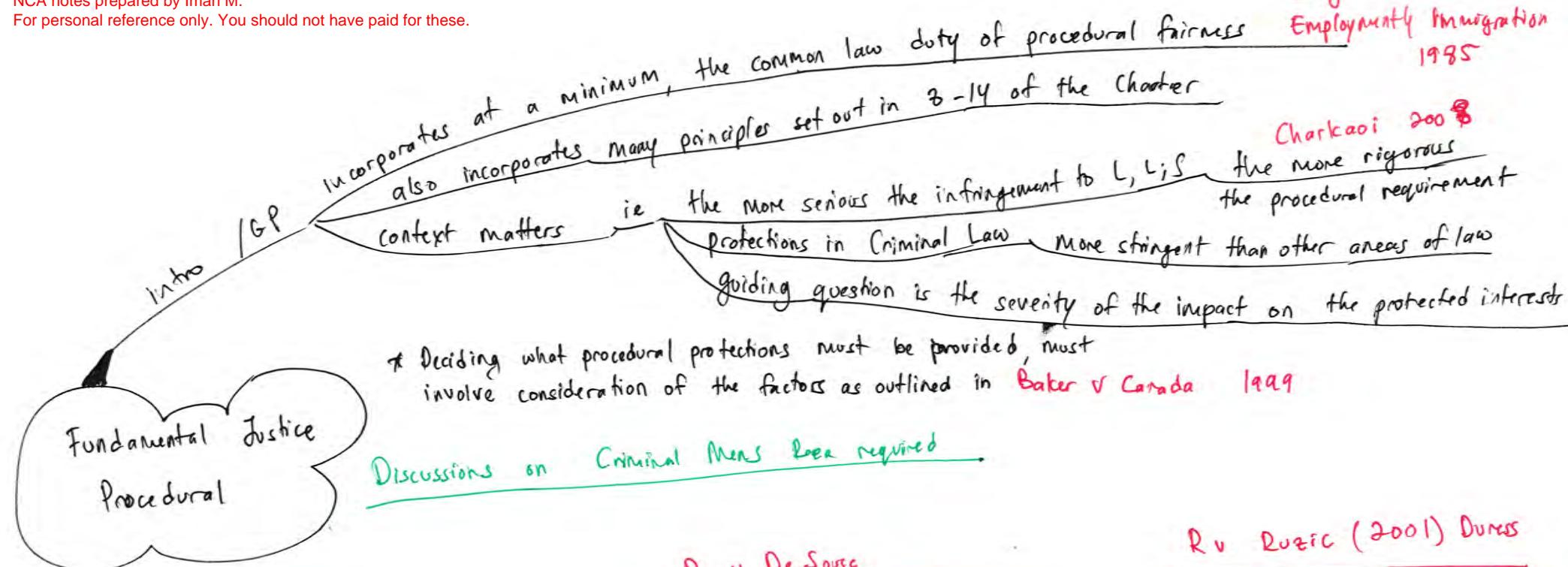
- harm-principle Malm-Levine

- proportionality in the sentencing process is a principle in sentencing but the constitutional standard against which it is measured is that of gross proportionality R v Safarzadeh - Marshall 2016

### Canada v DHS Community Services Society

- Ministry of Health failed to grant an exemption to a supervised drug injection site facility
- Trial Judge (SCCA): s. 4(1) and 5(1) of the Controlled Drugs and Substances Act violated S-7 rights of the site user and granted Constitutional Exemption

- SCC the impugned sections engaged the site users' S-7 rights but operated in accordance w/ F.J., however Minister's failure to exempt the Incite users from these provisions of CDSA
- breached P of FJ
- arbitrary - undermined CDSA's purpose of maintaining by promotion of public safety
- grossly disproportionate - the site's 8 years operating did not have discernible negative impact on health



### R v Vaillancourt 1987

s. 213(d) of CC - guilty of "murder" for committing a robbery w/ a weapon where his accomplice shot and killed a person  
HELD: the impugned provision did not require mens rea to the death, violation of R.o.F.J. and S.7 and not saved by S.1  
= S.213(d) now repealed

### R v Martineau 1990

s. 213(a) - "constructive murder" of the CC where it defined culpable homicide as murder if a person causes death of another while committing specific indictable offences despite having no intent nor subjective knowledge that death might ensue  
HELD: failed proportionality, must have the subjective foresight of intent

### R v DeSousa

s. 269 - unlawfully causing bodily harm - act of throwing a glass bottle to a wall, shattering and injuring a bystander in a party-fight  
HELD: intent to do the action is needed to be demonstrated, not the intent to cause the consequences; the unlawful act is objectively dangerous that a reasonable person would realize the risk of bodily harm

### R v Parks (1992) Automatism

SCC held sleepwalking as a valid defense of "non-insane automatism"  
upheld acquittal of 1st & 2nd degree murder of M.I.C and attempted murder of F.I.L

### R v Ruzic (2001) Duties

- a Yugoslavian woman was arrested upon arrival in Toronto and charged w/prosecution of false passport and narcotics (heroin packages was strapped to her body)
- S.17 of CC - duress as defense required the elements of immediacy and presence of threat

HELD: the requirements of immediacy & presence of threat is too limited and violates S.7

= moral voluntariness is a principle of F.J. protected under S.7 for criminal liability

thus she was able to claim Duties under C.L rules and acquittal was upheld by SCC (she proved that there was a close temporal connection b/t threat & harm)

## **PROCEDURAL F.J. – CRIMINAL CONTEXT**

1. The right to a **fair trial** is a principle of fundamental justice (R. v. Harrer, [1995] 3 S.C.R. 562 at paragraph 13).

This includes the right to cross-examine witnesses (R. v. Lyttle, [2004] 1 S.C.R. 193 at paragraph 43; but see R. v. Khelawon, [2006] 2 S.C.R. 787, at paragraphs 47-48) and, generally, the right to see the witness's face: R. v. N.S., [2012] 3 S.C.R. 726 at paragraph 27. The right to cross-examine witnesses does not apply at a preliminary hearing (R. v. Bjelland, 2009 SCC 38, at paragraph 32). The right to a fair trial also includes the right to control one's own defence (Swain at 971-72).

2. The right to make **full answer and defence** is a principle of fundamental justice in the criminal context.

This principle is not unqualified, however. Relevant evidence can be excluded where such exclusion is justified by a ground of law or policy, such as where the evidence is unduly prejudicial or likely to distort the fact-finding process (R. v. Seaboyer, [1991] 2 SCR 577 at 609; R. v. Mills, [1999] 3 S.C.R. 668 at paragraphs 74-75; R. v. St-Onge Lamoureux, [2012] 3 S.C.R. 187 at paragraphs 71, 74). It can also be excluded to protect informer privilege, subject only to the innocence at stake exception (R. v. Basi, 2009 SCC 52, [2009] 3 S.C.R. 389 at paragraph 43; R. v. Barros, [2011] 3 S.C.R. 368).

The right to receive disclosure is an aspect of the right to make full answer and defence (R. v. Stinchcombe, [1991] 3 S.C.R. 326 at 336; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. Carosella, [1997] 1 S.C.R. 80 at paragraph 37; R. v. Taillefer, [2003] 3 S.C.R. 307 at paragraph 61). This right imposes a duty on the Crown to make reasonable inquiries of other government entities that could reasonably be considered to be in possession of relevant information (R. v. McNeil, 2009 SCC 3, at paragraphs 49-50), including disclosure of evidence gathered by Canadian officials outside of Canada in the context of a foreign criminal proceeding if Canada was participating in the activities of a foreign state or its agents that are contrary to Canada's international obligations (Khadr (2008), *supra* paragraph 18).

3. It is a principle of fundamental justice that **officials exercising prosecutorial discretion must not act for improper purposes, such as purely partisan motives** (R. v. Cawthorne, 2016 SCC 32; R. v. Regan, [2002] 1 S.C.R. 297).

Such individuals are, however, entitled to a strong presumption that they exercise their prosecutorial function independently of such motives. This presumption is not displaced by the fact that the individuals may also exercise partisan duties (e.g., as a member of Cabinet). The bar for a finding that a prosecutor acted for an improper purpose is "very high," and prosecutors are entitled to act for purposes that are "political" in the sense of being motivated by the government's conception of the public interest (Cawthorne at paragraphs 26-28, 34).

4. The common law doctrine of abuse of process in the criminal context has been merged with section 7 of the Charter such that an **abuse of process** will constitute a violation of the principles of fundamental justice (R. v. O'Connor, *supra*; R. v. Nixon, [2011] 2 S.C.R. 566, at paragraphs 36-37).

While some types of abuse of process (e.g., delay) may be better considered in relation to other Charter protections, abuse of process captures at least two residual aspects of trial fairness: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (O'Connor, *supra*, at paragraph 73). The test for abuse of process is whether "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" (Nixon, *supra*, at paragraph 40).

5. The principles of fundamental justice also include a **residual protection against self-incrimination** (R. v. P. (M.B.), [1994] 1 S.C.R. 555 at 577; R. v. S. (R.J.), [1995] 1 S.C.R. 451 at 512; R. v. Jarvis, [2002] 3 S.C.R. 757 at paragraph 67).

This protection requires that a person compelled to give incriminating evidence be protected against the subsequent use of that evidence in a criminal prosecution or any proceeding engaging section 7 of the Charter.

This protection extends to subsequent use of derivative evidence which could not have been obtained or its significance appreciated but for the compelled testimony (S.(R.J.), *supra*, at 454-55; Branch, *supra* at 31-32).

The residual protection also encompasses a constitutional exemption providing complete immunity from compelled testimony where such proceedings are undertaken or used predominantly to obtain evidence for the prosecution of the

witness (Branch, *supra*; Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97; Jarvis, *supra*; Application under section 83.28 of the Criminal Code, *supra* at paragraphs 70-71).

The residual protection also applies in the context of solicitor-client privilege to the “privilege holder” who gave incriminating statements to his or her solicitor when those statements are subsequently ordered disclosed by a court, pursuant to a McClure application (R. v. Brown, [2002] 2 S.C.R. 185). In the context of a judicial investigative hearing (pursuant to section 83.28 of the Criminal Code), the protection against subsequent use extends beyond the criminal context to include any proceeding which engages section 7, including extradition and deportation hearings (Re Application under section 83.28 of the Criminal Code, *supra* at paragraphs 77-79).

The scope of the principle against self-incrimination is determined by a contextual analysis. Relevant factors include the presence or absence of: (1) real coercion by the state in obtaining the statements; (2) an adversarial relationship between the accused and the state at the time the statements were obtained; (3) an increased risk of unreliable confessions; and (4) an increased risk of abuses of power by the state (R. v. Fitzpatrick, [1995] 4 S.C.R. 154 at paragraphs 21-25; R. v. White, [1999] 2 S.C.R. 417 at paragraph 51).

The principle of protection against self-incrimination will not come into play where the required testimony is that of a third party, regardless of the relationship to the accused. As such, state action forcing a person to give incriminating testimony against another person is not contrary to the principles of fundamental justice (Del Zotto v. Canada, [1999] 1 S.C.R. 3).

The principle against self-incrimination also informs the common law rule of evidence governing the use of Mr. Big confessions, pursuant to which such confessions are presumptively inadmissible, with the Crown bearing the burden of establishing that the probative value of the confession outweighs its prejudicial effect (R. v. Hart, 2014 SCC 52 at paragraphs 84-87, 123).

#### **6. A residual protection for the right to silence in the pre-trial context.**

A detained person must be in a position to make a free choice on the matter of whether to speak to the authorities or to remain silent (R. v. Hebert, [1990] 2 S.C.R. 151 at 178; R. v. Liew, [1999] 3 S.C.R. 227 at paragraphs 36-37; R. v. Singh, 2007 SCC 48, at paragraphs 43-46). The right to silence protects against the eliciting of statements by undercover agents but permits observation of the accused by such agents (Hebert, *supra*, at pages 307).

An accused's silence at trial may not be treated as evidence of guilt and no adverse inference may be drawn from the failure to testify: R. v. Noble, [1997] 1 S.C.R. 874 at paragraph 72; R. v. Prokofiew at paragraph 64).

## PROCEDURAL F.J. OUTSIDE CRIMINAL

### **1. The right to a hearing before an independent and impartial tribunal**

(Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267 at paragraph 38; Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869, at 883; Charkaoui (2007), *supra*, at paragraphs 29, 32);

### **2. The right to State-funded counsel where circumstances require it to ensure an effective opportunity to present one's case (G.(J.), *supra* at paragraphs 72-75 and 119; Ruby, *supra*, at paragraph 40);**

### **3. The opportunity to know the case one has to meet (Chiarelli, *supra*, at 745-46; Suresh, *supra* at paragraph 122; May v. Ferndale Institution, *supra*, at paragraph 92; Charkaoui (2007), *supra*, at paragraph 53), including, where the proceeding may have severe consequences, the disclosure of evidence (Charkaoui (2008) at paragraphs 56, 58; Harkat, *supra* at paragraphs 43, 57, 60);**

### **4. The opportunity to present evidence to challenge the validity of the state's evidence (Suresh, *supra* at paragraph 123; Harkat, *supra*, at paragraph 67); the right to a decision on the facts and the law (Charkaoui (2007), *supra*, paragraphs 29, 48); the right to written reasons that articulate and rationally sustain an administrative decision (Suresh, *supra*, at paragraph 126); and the right to protection against abuse of process (Cobb, *supra*, at paragraphs 52-53). The application of these principles is highly contextual, but it may be assumed that if they apply outside the criminal context, they apply with greater force in the criminal context.**

## PROCEDURAL FUNDAMENTAL JUSTICE – EXTRADITION

### **1. The principles of fundamental justice applicable to an extradition hearing require that the person sought for extradition receive a meaningful judicial determination of whether the case for extradition has been established. This requires an independent judicial phase, an independent and impartial judge and a judicial decision based on an assessment of the evidence and the law (Ferras, *supra* at paragraphs 19-26, 85-87).**

## WHAT'S NOT PROCEDURAL F.J.

### **1. Procedural fairness under section 7 does not guarantee the most favourable procedures imaginable (Lyons, *supra*, at 361; Mills, *supra*, at paragraph 72; Ruby, *supra*, at paragraph 46) or a "perfect" process (Harkat at paragraphs 43, 69).**

Oral hearings will not be required in every case in the administrative context (Singh, *supra*, at 213-14; Suresh, *supra* at paragraph 121) as the appropriate level of protection will vary depending on a number of factors, including the seriousness of the individual interest at stake, the complexity of proceedings and other factors outlined above (G.(J.), *supra* at paragraphs 72-81).

### **2. The principles of fundamental justice do not generally include a right of appeal**

Whether in the criminal (R. v. Meltzer, [1989] 1 S.C.R. 1764 at 1774-75) or quasi-criminal/administrative context (Kourtessis v. M.N.R., [1993] 2 S.C.R. 53 at 69-70; Huynh v. Canada, [1996] 2 F.C. 976 (C.A.), at paragraphs 14-20 (leave to appeal to SCC refused); Charkaoui (2007), *supra*, at paragraph 136).

### **3. Denial of an access to personal information request based on the "foreign confidences" or "national security" exemptions in the Privacy Act, limits on the extent of disclosure, and the provision for ex parte and in camera proceedings do not necessarily limit the principles of fundamental justice**

(Ruby, *supra* at paragraph 51; Charkaoui (2007), *supra*, at paragraphs 58-60). Notice and participation are not invariable constitutional norms but are part of a contextual approach to procedural fairness (Charkaoui (2007), *supra*, at paragraph 57; Rodgers, *supra*, at paragraph 47).

## Section 1 considerations on S.7

- SCC has repeatedly stated that S.7 infringements are "not easily saved by S.1" unless in cases of exceptional conditions such as natural disasters, outbreak of war, epidemics and the like  
*Charkaoui 2007*
- Overbreadth, arbitrariness and gross disproportionality, under S.7 is a qualitative analysis while the same under S.1 is a quantitative and qualitative test.  
*dis*

Background: In 2003, Adil Charkaoui, a permanent resident in Canada since 1995, was arrested and imprisoned under a security certificate issued by the Solicitor General of Canada (then Wayne Easter) and the Minister of Immigration (then Denis Coderre). The evidence upon which the certificate was issued is secret, disclosed neither to Charkaoui nor his lawyers. Public summaries of the evidence issued by the Federal Court alleged a connection with "the bin Laden network". Charkaoui appealed his detention three times before being released on the fourth try in February 2005, having spent almost two years in Rivière-des-Prairies prison in Montreal. He was released under severely restrictive bail conditions. Charkaoui has never been charged or tried. The certificate against Charkaoui has never undergone any judicial review; the Federal Court suspended its review process in March 2005, pending a new decision from the Minister of Immigration on Charkaoui's deportability (a decision which evaluates, *inter alia*, risk to Mr. Charkaoui).

*Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 SCR 350 ("Charkaoui I")* 2007 SCC

Chief Justice McLachlin, writing for a unanimous court, holds that sections 33 and 77 to 85 of the IRPA unreasonably violates sections 7, 9 and 10 of the *Canadian Charter of Rights and Freedoms*. The existing levels of secrecy unjustifiably infringed named persons' s. 7 right to a fair hearing, principally named persons face indefinite detentions and may be deported to face substantial risk.

On the section 1 analysis for justification of the violation the Court held that the certificate process was not minimally impairing. The Court cited a clearance system used elsewhere in the world that would designate certain lawyers to view the evidence on behalf of the accused.

The court also found that s. 84(2) of the IRPA was unconstitutional because it denied a prompt hearing to foreign nationals by imposing a 120-day embargo on any application for release. The court corrected this defect by removing this mandatory waiting-period.

The government subsequently amended IRPA, authorizing security-cleared Special Advocates (SAs) to access, as well as to challenge the relevance, reliability, and sufficiency of, evidence tendered during secret hearings.

Amendments to IRPA helped integrate criminal law values of fairness and adversarial challenge into proceedings that were, by this time, generally recognized to be quasi-criminal in character.

*Charkaoui v. Canada (Citizenship and Immigration), [2008] 1 SCR 326 ("Charkaoui II")* 2008 SCC

The SCC further enhanced levels of disclosure and adversarial challenge by requiring intelligence agencies and the Ministers to retain and disclose to reviewing judges and SAs all information in their possession relevant to the named person. The SCC further instructed reviewing judges to draft an accurate summary of this information and then forward to named persons in the event that such information could not be fully disclosed for reasons of national security or the safety of any person.

*Charkaoui (Re), (2009) CF 1030 ("Re: Charkaoui")* 2009 FC

Then, on 14 October, 2009, the Federal Court went further than many would have imagined: it ruled that the certificate issued against Mr. Charkaoui was illegal, null, and *ultra vires* the Ministers of Citizenship and Immigration and the Minister of Public Safety ("the Ministers"). This decision was most directly prompted by the government's withdrawal of key pieces of evidence; a tactic employed in numerous jurisdictions to protect the confidentiality of sensitive information which would otherwise have to be disclosed. The reviewing judge in this case, Tremblay-Lamer J., found that the withdrawal of the evidence rendered the certificate factually unsupportable and ruled that the only appropriate remedy was to quash it, setting Mr. Charkaoui free. To add force to her disapproval of the Ministers' strategy, she proceeded to refuse their request to have certified a set of questions for the Court of Appeal.

## Andrews v Law Society of BC 1989

\* 1st SCC S.15 case

Held: grounds of discrimination under S.15 is not exhaustive - Courts protect individuals from discrimination on grounds ANALOGOUS to those specified in S.15

### R v Kapp (2008)

2-step test

① Does the law create distinction based on an enumarate or analogous ground?

② Is the distinction discriminatory?

Burden of proof:

① claimant to prove / establish distinctive treatment (which presupposes comparison with others) based on a prohibited ground

(legislative intent not required - Enough to show purpose or effect of law is discriminatory).

② If applicable, govt. to demonstrate a measure falls within 15(2) and therefore not discriminatory.

→ Does the gov. act or law creates a distinction based on a 'ground' that withdraws a benefit provided to others or imposes a burden not imposed on others  
→ evidence need not be sophisticated social science evidence, court may rely on official notice or logic

Law v Canada (1999)

EQUALITY

S.15

Some settled 'analogous' grounds

① Non-citizenship Andrews ⑤ pregnancy Brooks

② Marital status Miron v Trudeau

③ Sexual orientation Vriend, Egan

④ Aboriginality - residence (member of a band living off reserve) Carriere v Canada

Not-analogous per SCC

① Place or province of residence

② Professional status / occupational status

③ "substance-orientation" eg. marijuana user

Not analogous per lower courts

① poverty per-se

② prisoner status

### Vriend v Alberta 1998 SCC

- 'Sexual orientation' was not included in the AB HR Act, motions to add it is always defeated
- SCC: sexual orientation as a ground to be read into the Act
  - the exclusion of protection against discrimination on the basis of sexual orientation was an unjust violation of s.15
  - Charter obligations apply to omissions as well as positive acts

### Miron v Trabel (1995)

- Ontario Insurance Act provided benefits only extend to married spouses and excludes common law spouses
- Held: provision was a violation of s.15 and not saved by s.1
- See comparison w/ Walsh i.e. not all times CL = Married for s.15

### Nova Scotia AG v Walsh (2002)

- W cohabited as common law spouse for 10 years
  - applied for spousal & child support and a declaration that definition of 'spouse' under the NS Matrimonial Property Act was unconstitutional
- SCC: while MPA provides different treatment btwn Married and CL spouses, the distinction does not deny them access to a benefit or affect dignity, the difference reflects r'ship differences and individual autonomy of parties

### Quebec AG v A (2013) Enie v Lola

- 7 year cohabitation w/ 3 children
- upon separation, there was a contract allowing Lola to stay in the family home and there was substantial child support
- Lola challenged family law provisions, seeking to extend rights granted to married and civil union spouses to cohabiting spouses

HELD: split decisions; S-4 violation of s.15, then 1 of the 5 judges found it saved, by s. 1, result; no rights extended