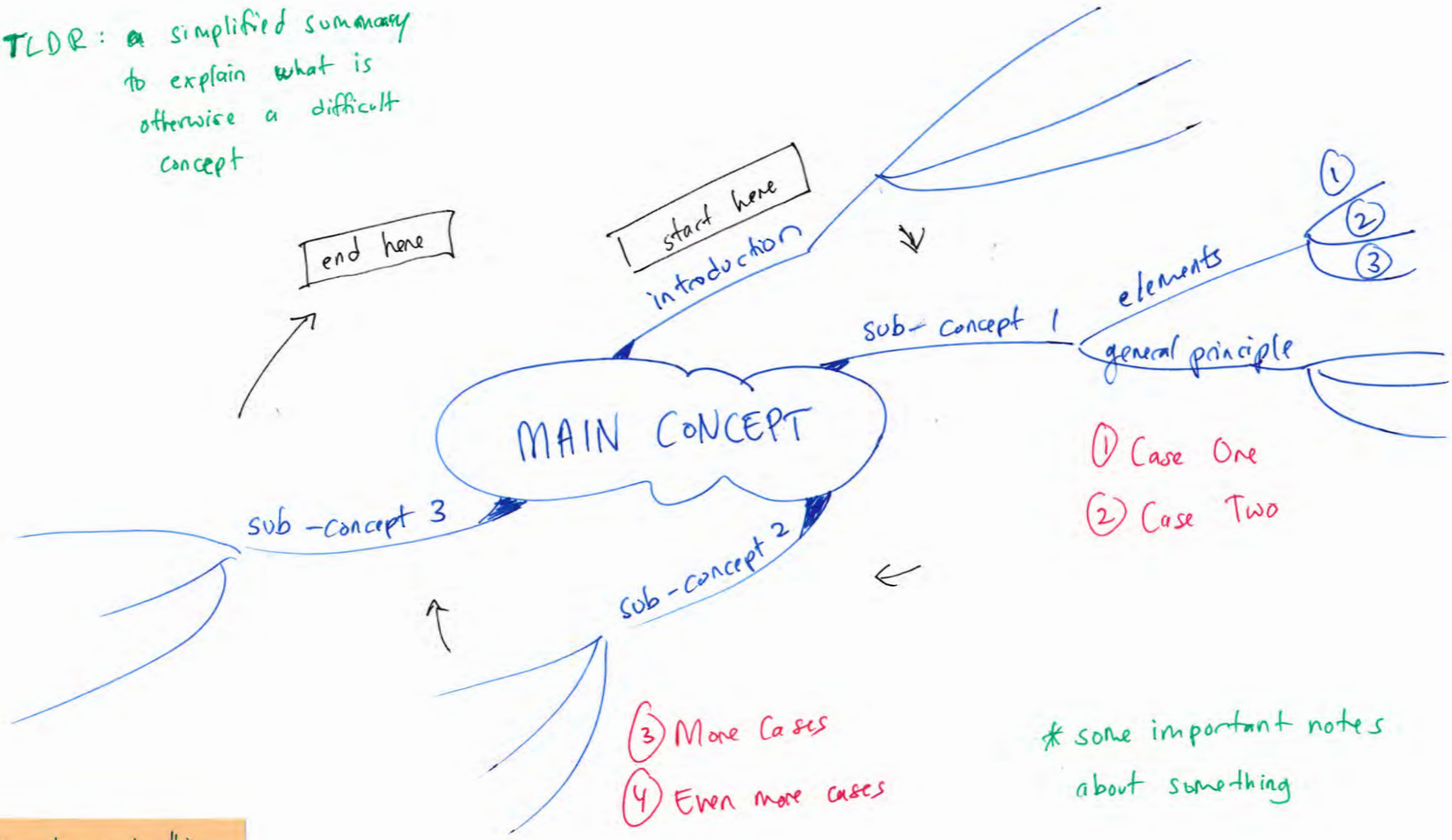
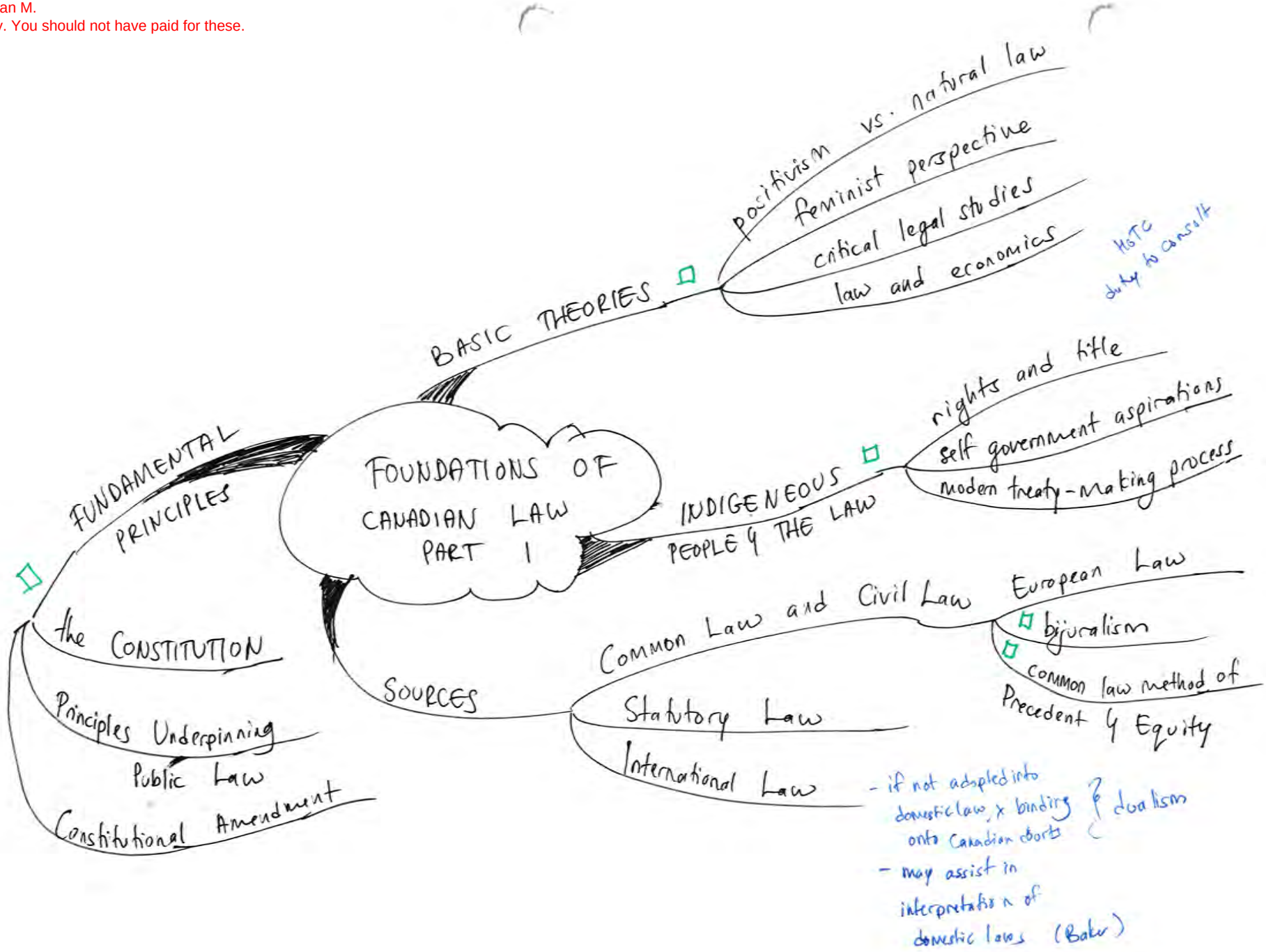
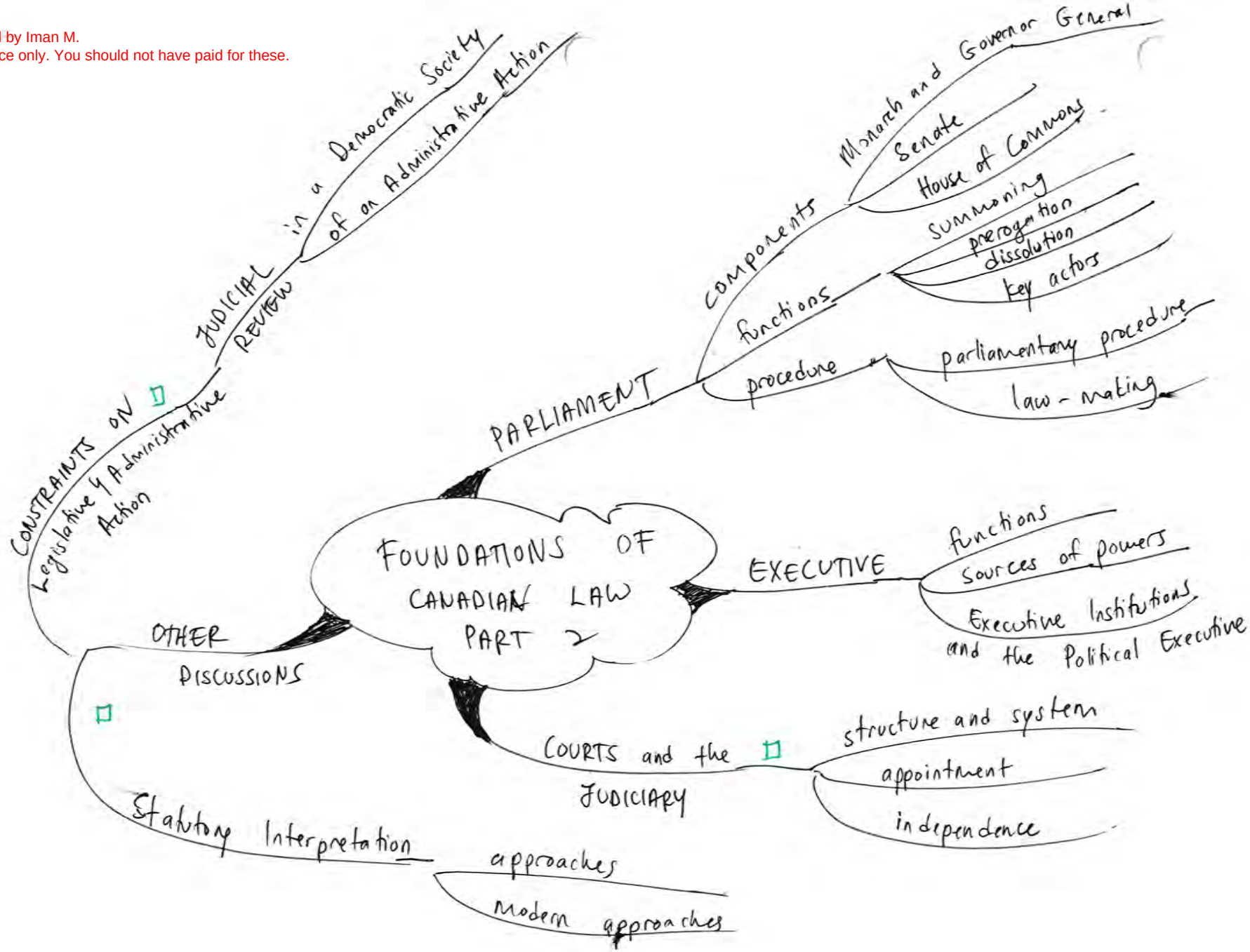
TLDR: a simplified summary to explain what is otherwise a difficult concept



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

This is an example sheet.





LEGAL THEORY

POSITIVISM

what is LAW?

- Sovereign authority commanding
- backed by threat
- habitually obeyed

Re: Drummond Wren

- asks what IS the law

NATURAL LAW

- must be in line with MORAL values ō ē society

Re: Noble & Wolf

- asks if the law is 'true' or OUGHT to be as it is

FEMINIST PERSPECTIVE

- legal rles & institution arises in a PATRIACHAL society and less in the interest of women
- a CRITIQUE / REJECTION of liberalism that does not AID the OPPRESSION OF WOMEN

Edwords v AG Canada

R v Morgantaler

CRITICAL LEGAL SNDIES

descends from LEGAL REALISM

Main views of what is LAW?

Judges' decisions are more of the UNSTATED PUBLIC POLICY PREFERENCES of the Judge

- IMPOSSIBILITY OF OBJECTIVITY
- lack of autonomy from influences of social and political aspects
- most times considered RADICAL

- COMMUNITIES
- SOCIO ECONOMIC CLASS
- GENDER
- RACE

R v RDS

subject to ← their respective

institutionalizes & legitimates the authority & power of a PARTICULAR SOCIAL GROUP or CLASSES

irrational, indeterminate, subjective & incoherent

NOT INDEPENDENT, just a form of politics, enforcing ē oppressive values of specific ideologies

individuals (judges) are NOT objective detached or autonomous

LAW & ECONOMICS

Bank ō America Canada v Mutual Trust

- less focused on morale, more on EFFICIENCY

PARETO OPTIMALITY

↓

welfare ō each relevant party can no longer be maximized except at the expense ō other party

* this does not consider DISTRIBUTIVE JUSTICE

- PUBLIC CHOICE THEORY:

government intervention as a corrective to MARKET FAILURE, but policymakers make decisions to MAXIMIZE POLITICAL SUPPORT

ie SELF INTEREST > SOCIAL WELFARE

= minority group has less influence on legislators compared to majority

Re: Drummond Wren (1945)

- discrimination vs. any certain class of people eg "Jewish" is INJURIOUS TO PUBLIC POLICY, therefore VOID
- J. Mackay: it is his MORAL DUTY to aid cohesion and avoid division between groups (also the Racial Discrimination Act prohibits display, publication of anything representing discrimination or intent to discriminate

Edwards v AG Canada (1929) / the Persons Case

- whether S. 24 of the British North America Acts definition of 'qualified persons' included women (candidate for Senator)
- petition to Supreme Court, unanimous decision that it is EXCLUDED
- upon appeal, Privy Council held that S. 24 INCLUDES women - in some sections the word 'male persons' was used, and in line with the Interpretation Act, 'persons' shall include all sexes
- the object of BNA is to provide CA with a Constitution, and the interpretation of the document should be openly liberal (living tree doctrine) i.e. subject to development, growth & expansion through usage & convention

Re: Noble & Wolf (1948)

- summer cottage with the covenant 'not to be sold to Jewish, Hebrew, Semitic & Negro race or blood' held to be VALID
- J. Schroeder did not want to decide on what is morale, believes it is the DUTY OF JUDICIARY is only to INTERPRET the Law, NOT TO CREATE law based on what it should be
- Note: in the absence of constitutional justifications, judges tend to uphold 'the law' rather than strike it down; ie supremacy of the Judiciary, but if 'the law' is common law and NOT statutory, outdated beliefs should not be continued to be upheld

R v Morgantaler (1988)

- Criminal Code S. 251 makes it an OFFENCE to procure an abortion without a physician's authorization.
- Supreme Ct asked to DETERMINE THE CONSTITUTIONALITY of S. 251
- HELD: Majority found that it OFFENDED the Charter.
- J. Wilson focused more on how a women's liberty should include her absolute discretion to either terminate or carry out a pregnancy.
- NOTE: J Wilson continued to spearhead many more groundbreaking Charter decisions, although she has been criticized as 'blurring the line between the Judiciary & the legislative' in human rights cases

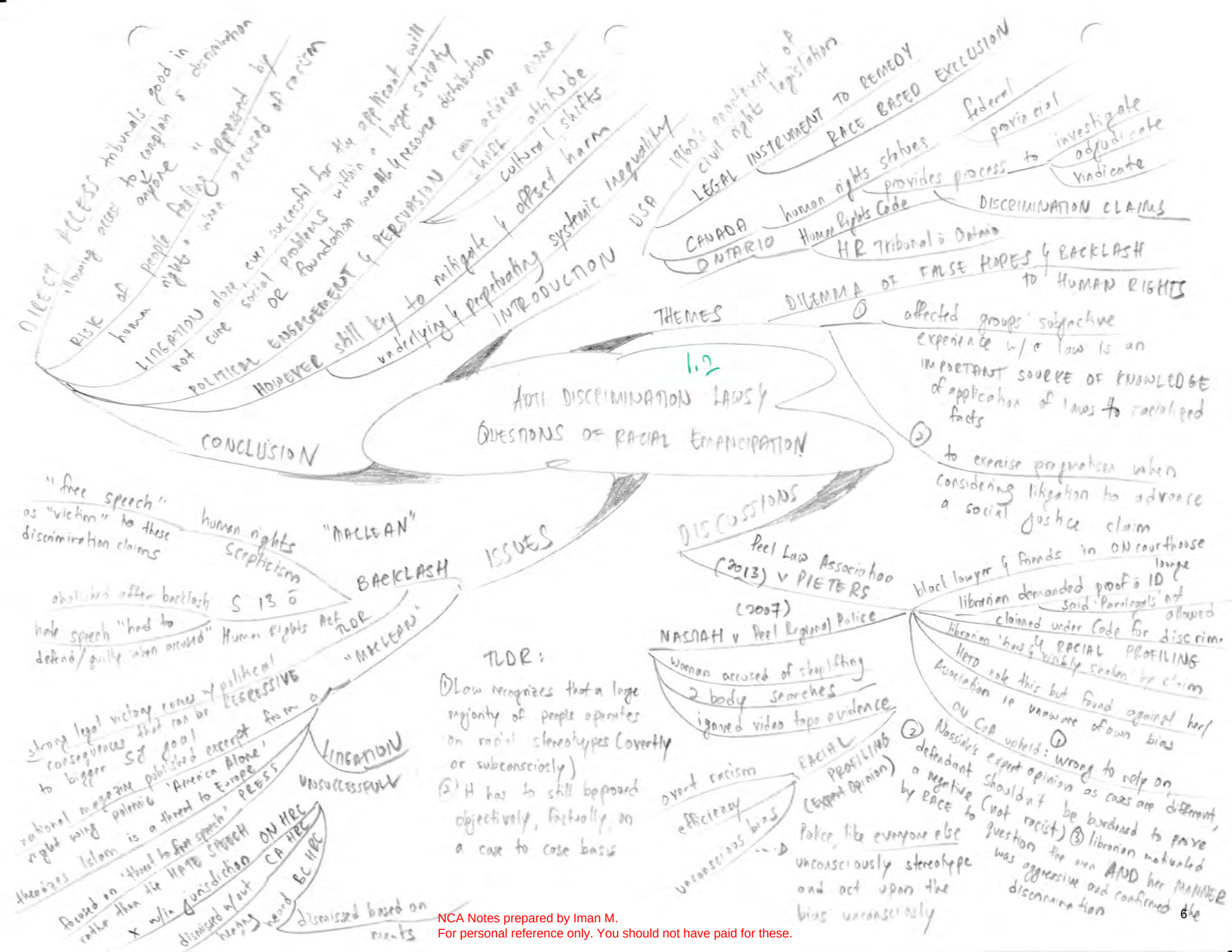
R v RDS (1997)

- a Judge acquitted a black 15 year old accused there is lack of evidence, only his oral evidence vs the police officer's oral evidence
- Judge commented that the police officer
  1. has misled courts in the past
  2. known to over react to non-whites
- Crown appealed for a re-trial, stating that the comments give rise to a REASONABLE APPREHENSION OF BIAS
- Appeal allowed and a re-trial ordered by the NS Supreme Court, and upheld by the NS CoA
- OVERTURNED by the Supreme Court of Canada
  - HELD: (1) All Judges regardless of background are all entitled to a presumption of JUDICIAL INTEGRITY and that UNDERLYING SOCIAL CONTEXT can be used by Judges
    (2) Even with SOCIAL CONTEXT, Judges must STRIVE FOR IMPARTIALITY
  - HELD (Dissenting): "there is an error in law in the evidence or lack of evidence, and that the Judge had RELIED ON SOMETHING ELSE (bias) when arriving

Bank of America Canada v Mutual Trust Co

- Issue: when determining the calculation for damages in a breach of contract, should simple interest be applied, or compound interest?
- HELD: - there is a time value for money
  - that the courts should NOT ENCOURAGE the act of "efficient breach of contract"

- Note: when legislation replaces common law as a primary means of social regulation, law and economics ask
  1. what is the problem?
  2. what is the effect on society?
  3. why do we have laws that we have?
  4. should the laws be different?



The Work of Ideology in Canadian Legal Thought

1.4

LISA M. KELLY (2016)

INTRODUCTION

- in 2005 Judge Rothstein became the first SC Nominee subjected to a parliamentary hearing
- unlike the US counterpart the hearing was not a 'heated' or 'controversial'
- critics
  - applauded non-politicized judicial appointee
  - criticised revealed nothing about the nominee's political views

differing views
1. neutrality thesis ⇐ law & facts only!
2. hermeneutic of suspicion ⇐
   - a view that judges uses fundamentally different modes of reasoning vs legislators use to make law or policy
   - a view that in actuality judges have to decide on questions that have no 'clear' answers = relying on their personal p.o.v. on the matter at hand

CONCLUSION

post retirement in 2016
J. Rothstein

- did not deny political & moral value judgments are inevitable part in adjudication
- still maintain that 'judicial legitimacy' in constitutional democracies rests on a judge's ability to limit or repress his own political views
- propose that (1) the inevitability of political and moral choice in adjudication be acknowledged (2) for scholars, lawyers, judges to develop ideas about when, what principles and what discipline discretion be legitimate

Hermeneutic of Suspicion – Rothstein criticized majority for making a series of legal errors that reflect their specific political understanding on labour relations, collective bargaining and strikes and vice versa

also ideological suspicion arose in the question of deference – competing theories of democracy on workplace democracy and on what roles court and legislatures play:

Rothstein: Judges should exercise caution in deciding based on socio-economic matters, "defer to legislature who have the democratic legitimacy" more freedom

vs Abella: "if Charter compliance is deference, (then) what is the point of judicial scrutiny" ie. it is courts role to monitor legislative

- SK Fed. of Labour v SK (2015)
- Mounted Police Association of ON v. Canada (2015)
- Meredith v. Canada (2015)

aka "the new Labour TRILOGY"

Author's view

- attempting to maintain a depoliticized standard for judicial legitimacy will allow a dilemma to continue
- there will always be conflicts that lack self-evident legal answers and carry a heavy political stake
- imposing a sharp distinction between law and politics on judges = deny judges the tools

RDE: Judge Rothstein's reasoning (both concurring and dissenting) criticized the majority for allowing politics to trump law, and the majority in response insisted that Rothstein's reasoning was likewise influenced by a competing politics.

"The Model of Rules of 1"

- Three Theses
  - Pedigree Thesis
  - Discretion Thesis
  - Obligation Thesis

- Dworkin basically tries to demonstrate that law must be constituted by those standards morally designated to be authoritative

Scott Shapiro (2007) 1-3

THE HART-DWORKIN DEBATE

introduction
- a debate between 2 "school of thoughts"
- mainly on VALIDITY OF (HART's) LEGAL POSITIVISM
- has been going back & forth for around 4-5 decades
- Dworkin critiques Hart through his "The Model of Rules 1"

basic
- POSITIVIST: legality is NOT determined by morality but rather by social practice / facts
- Dworkin: legality is not determined by social facts alone, but by moral facts as well

Author: the "real debate" the clash of the 2 models of law:

(1) Is the law consist in those standards socially designed to be authoritative? OR

(2) " " those standards morally designated as authoritative

TLDR:-
- Some scholars opine that Dworkin's points has been answered by Hart's camp, and that the debate is no longer modern relevant discussion
- author opine the Dworkin side is beyond "The Model of Rules 1", evolved over time
- basic issue is still of importance
  - is law grounded in social facts alone, OR
  - do moral facts also determine the existence and content of the law

(1) POSITIVIST's RESPONSE (HARD / EXCLUSIVISTS)

- judges who seem to use 'morality' is actually relying on "judicial custom", therefore having a 'pedigree' even though it might take the appearance of "morality"
- judges are under a legal duty to apply "extralegal standards"
  - when legal standards run out, judges are under a legal obligation to refer to moral principles for resolution

eg of theoretical legal disagreements, per Dworkin

Tennessee Valley Authority v. Hill (1978)

- conservation group sued TVA to stop completion of a $100 M dam
- threatens the existence of a certain fish, so invoked the Endangered Species Act
- TVA argues project was authorized, funded, and substantially under way before the Act was passed
- Majority sided w/ conservationists, although the judges admitted it would bring about enormous waste of public funding, policy wise not justified but interpreting the text, concluded the SC had no other choice
- Dissenting: Courts should not construe law that lead to absurd results, court should be obliged to apply a modicum of common sense

THE HART-DWORKIN DEBATE (2)

- Positivism cannot explain judges' disagreements with one another about what the Grounds of Law are, as positivists' plain-fact view considers grounds of law is fixed by agreement.

Author: so far positivists have not attempted to explain how theoretical legal disagreements are possible.

The Model of Rules II / Law Empire

- Legal participants frequently have disagreements concerning the proper method of interpreting the law; the only explanation is that these disagreements occur as moral disputes
- Law does not rest on social facts alone but is ultimately grounded in considerations of political morality and institutional legitimacy.

POSITIVIST'S RESPONSE (Soft / Inclusivists)

- believes that legal Positivism does not prohibit moral tests of legality
- Two Theses → Separability Thesis
  - no connection between legality & morality
  - "unjust law" is still law
  → Social Fact Thesis
  - existence and content of law is ultimately defined by certain facts about social groups
- Tests of legality NEED not be moralized, but they COULD.
- Hart's master rule = recognition, which is a social rule / social fact. As such, as long as there is the social fact = existence of a social recognition, there is no bar to treating morality as a condition of legality

S.35 and the Doctrine of Reconciliation

R v Powley (2003)

- defined the term 'Metis'
  = in addition to mixed ancestry, have developed own custom, way of life, recognizable group identity separate from their Indigenous and EU forebearers
- 'Powley Test'
  after identifying the alleged right
  ① establish historic rights-bearing Metis community that formed after contact but before effective European control
  ② Shared customs, traditions and collective identity
  ③ Historic community as claimed have a continuity with a Contemporary community
  ④ In which claimant can show membership to said community

• criticism that many provinces fail to modify laws to recognize rights of Metis, unlike the First Nations. See R v Beer (2011)

Note: Metis do not exist pre-contact as they are descendants of First Nation + EU settlers, primarily French - Specific Indigenous community ≠ anyone with mixed ancestry.

METIS

Mitchell v. MNR (2001)

- discussed status of Indigenous laws with the Canadian legal order
- C.J. McLachlin:
  aboriginal interests arising from historic occupation and use of land
  ① Not terminated by European settlement
  ② Presumed to survive the assertion of sovereignty
  ③ Absorbed into the common law as RIGHTS
- Identified 3 exceptions to the continuity of Indigenous laws:
  ① Incompatible with Crown's assertion of sovereignty ② Surrendered voluntarily through treaty process ③ extinguished by the Goverment prior to S.35 CA 1982

Key CL developments

Note: These are all FIRST NATIONS litigations

R v Sparrow (1990)

• existing right to fish cannot be extinguished by provincial legislation

R v Van der Peet (1996)

selling fish ≠ fishing

• test for identifying aboriginal right = ① integral to the culture ② must exist pre-contact

criticized by R v Sappier } (2006)
R v Gray }

• aboriginal right to cut timber on provincial lands without authorization

Held: aboriginal rights may evolve to take modern forms ≠ not freeze in pre-contact form

Thus: Maliseet and Mi'kmaq in NB allowed to harvest logs for domestic use.

Majority: for "personal use"

Concurring J. would apply it wider for sale and barter within the community

R v Bernard, R v Marshall (2005)

logging for commercial purposes rejected by SCC as being a protected aboriginal right

See Developing Research: →

John Borrows (Indigenous Scholar)

- analyzed Mitchell in detail and finds that many indigenous laws "pass the test"
- states that Indigenous law is more than private or aboriginal community law, but part of national legal structure
- both "sides", Indigenous AND non-indigenous have rights under treaties, with many core treaty rights are granted by IP to settlers
- growing research and literature on how Indigenous laws form part of contemporary legal structure in Canada

R v. Marshall (1999)

78. This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation:

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories:

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed:

at around the time when Indigenous consent was necessary for settler safety.

general principles

- rejected the approach in Syliboy 1927
- affirms treaty rights in addition to aboriginal rights
- considerable body of jurisprudence
- approach to treaties and their place in Canadian consti.

S.35 and Treaty Rights

R v Badger (1996)

Core principles to interpret treaty terms:

① Treaty represents an exchange of solemn promises between the Crown and the various Indian nations.. an agreement whose nature is sacred

② The honour of the Crown is at stake in its dealing with Indian people. It is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned.

③ Any ambiguities or doubtful expressions in the wording of the treaty must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restricts the rights of Indians under treaties must be narrowly construed.

④ Onus of proving a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.

all (1999)

Court has set out the
ning treaty interpretation
sions. They include:

many (9) ...

y was concluded verbally
written up by the
representatives of the Crown, it would
be unconscionable for the Crown to
ignore the oral terms while relying
on the written terms ..."

SCC uphold trial court decision that
(1) No treaty right to harvest trees for commercial purposes
(2) Aboriginal title not established at the location in question
→ Mi'kmaq convicted

R v Marshall; R v. Bernard (2005)

(1) ABORIGINAL TREATIES
Required Case Reading

(1) No treaty right to commercial timber harvest
- although treaty rights are not frozen in time and evolve, a claim to a modern treaty trading right must represent a logical evolution from a traditional activity at the time the treaty was made.
- in fact commercial logging would interfere with fishing, a key traditional activity of the Mi'kmaq

(2) Aboriginal Title Not Established
- test as per Delgamuukw
  - exclusive occcupation
  - continuity of occupation
- exclusive occupation ≠ exclude others but "effective control", and ABILITY to exclude if chosen
- Continuity = group has maintained a substantial connection to the land since Crown's assertion of sovereignty

(C) JUSTIFICATION for Crown to act without ✗ consent

Crown must show

(1) Procedural duty to consult and accommodate is discharged

(2) That its actions were backed by a COMPELLING and SUBSTANTIAL objective

(3) That its actions are consistent with the Crown's FIDUCIARY DUTY to the group

per Delgamuukw: Aboriginals and non-aboriginals are "ALL HERE TO STAY" and must of necessity move forward in a process of reconciliation.

To constitute a Compelling and Substantial objective, the broader public goal asserted by the Crown must further the goal of RECONCILIATION, having regard to both Aboriginal interest and the broader public objective.

a) incursion is NECESSARY (rational connection)
b) go no further than necessary (min. impairment)
c) benefits expected not outweigh the adverse impact on the Aboriginal interest (proportionality of impact)

d) ALSO cannot substantially deprive future generation from benefiting from the land

[c] Aboriginal title holders of modern times can use their land in modern ways

[d] the Crown and others must obtain consent from Abor. title holders - Without consent, Crown only recourse is to establish JUSTIFICATION.

S.35 and Aboriginal Title

(B) Where title is established, what rights?

(1) Ownership rights similar to those associated with fee simple including right to ① decide how the land will be used, ② of enjoyment and occupancy of land, ③ to possess the land ④ to the economic benefits of the land and ⑤ to proactively use the land

(2) Restrictions:

[a] Cannot be alienated except to the Crown

[b] cannot be developed or misused in a way that would deprive future generations

Note: does not exclude permanent change. Whether a particular use is irreconcilable w/ future generations to benefit from the land will be case by case basis

(D) TSILHQOT'IN NATION v B.C. 2014

- Historical landmark case where SC issued a declaration of Aboriginal title

(A) Establishing title, how?

- ones of establish Aboriginal title is on the Claimants
- general requirement to prove Aboriginal title:
  1. "sufficient" occupation of the land claimed to establish title at the time of assertion of European sovereignty
  2. continuity of occupation where present occupation is relied on
  3. exclusive historic occupation
- held that occupation sufficient to establish Aboriginal title is not confined to specific sites of settlement but extends to tracts of lands regularly used for hunting, fishing, or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty
  - * rejects occupation to be only those with intensive occupation which would be "stump sized"

Continued...

(D) Reach of Provincial and Federal Laws onto Aboriginal Title lands

Held: may apply, as long as any infringement passes the Sparrow test as modified (i.e. Justification requirements (1)-(3) above

Manitoba Metis Federation Inc. v Canada (AG) 2013

- Explains the concept of the honour of the Crown (HOTC)
  - HOTC arises from Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of those people
  - HOTC goes back to the Royal Proclamation of 1763, which made reference to "protection"
    - not arise from a paternalistic desire to protect but instead (1) in recognition of their strength and (2) in the necessity of persuading the natives that their rights would be better protected by reliance on the Crown
  - HOTC recognizes the impact of "superimposition of European laws and customs
    - IP were here first
    - IP were never conquered
    - yet made subject to a legal system they did not share
    - historical treaties framed in that foreign legal system, drafted and negotiated in a foreign language

THUS HOTC is required as there is a SPECIAL RELATIONSHIP between I.P. and the Crown arising out of the conflict between Crown's assertion of sovereignty and the pre-existing Aboriginal sovereignty and rights.

"Honour of the Crown" aka HOTC

S.35 and Treaty Rights (2)

- DUTIES THAT ARE TRIGGERED BY HOTC

(1) HOTC gives rise to fiduciary duty when Crown assumes discretionary control over a specific Abor. interest

(2) HOTC gives rise to duty to consult when Crown contemplates an action that will affect a claimed but as of yet unproven Abor. interest

(3) HOTC governs treaty making and implementation, requiring honourable negotiation and the avoidance of the appearance of sharp dealing

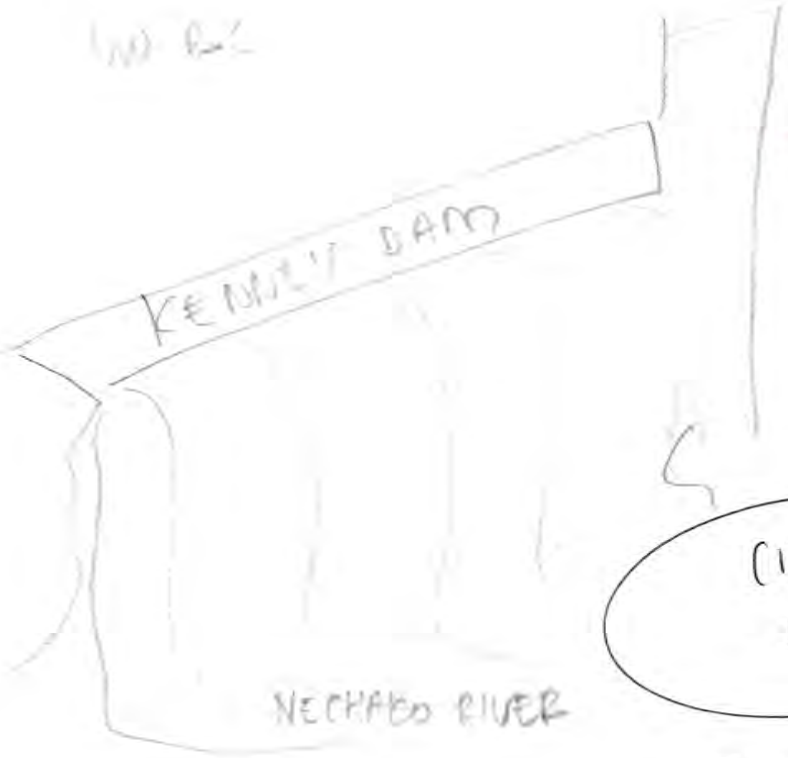
(4) HOTC requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal people

Haida Nation v. BC (Minister of Forests (2004)

- fundamentally altered the analysis of whether Crown behavior complies with the Rule of Law
- Principle that
  (1) honour of the Crown is always present in Crown – Indigenous relations
  (2) in assessing whether infringement of an aboriginal right is justified, the court should consider whether the Crown consulted with affected aboriginal people

i.e: the honour of the Crown required the Crown to consult with potentially affected indigenous communities when authorizing an action that could affect a known, or likely to be proven, aboriginal right = a significant degree of consultation and accommodation is required

"Duty to Consult" case



- if failure to consult in the past, may negotiate compensation
- no duty to consult if there is no adverse effect

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council 2010

(1) ABORIGINAL RIGHTS

(Required Cases in Syllabus)

SCC Decision :-

Held:

(1) Upon inspection of the Commission's enabling statute, the Commission had the constitutional jurisdiction to consider adequacy of Crown consultation, but did not empower it to engage with consultation in order to discharge of that Crown's constitutional duty to consult.

(2) 3 elements (1) Crown's knowledge of potential adverse impact and (2) proposed Crown Act held as satisfied. However as for (3) adverse impact – not satisfied. Reason: 2007 EPA does not have adverse impact on water levels AND failure to consult in 1950's ≠ duty to consult (only remedies are through negotiating compensation)

(3) As what is observed as a type of compromise, SCC held the HOTC requires BC Hydro to give notice and consult as necessary with affected groups in so far any future decisions have potential adverse effect.

FACTS :-

- 1950's B.C. gov granted license to Alcan use of water from Nechako River on a permanent basis (hydropower dam)
- CSTC was not consulted about the dam project
- The dam significantly affected the amount and timing of water flows, impacting fisheries on CSTC claimed lands
- In 2007 Alcan entered an Energy Purchase Agreement with BC Hydro (crown corp.) to purchase excess power and establish a Joint Operating Committee to advise on operation of reservoir
- CSTC applied to BC Utilities Commission to review the sale under the 2007 EPA to consider whether it is in public interest
- Commission decided that (1) while it had power to decide on question of adequacy of consultation, (2) there is no duty to consult as the 2007 EPA would not adversely affect any aboriginal right
- Upon appeal to BCCA, the Commission's orders were reversed and the case remitted to the Commission
- Alcan & BC Hydro appealed to the SCC

4. "Where affected Indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually provide written reasons. What is necessary is an indication that the NEB took the asserted Aboriginal and Treaty rights and interests into consideration and accommodated them where appropriate. In this case, the NEB's written reasons are sufficient to satisfy Crown's obligation."

(2) ABORIGINAL RIGHTS
(Required cases in Syllabus)

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. (2017)

Facts: —

- National Energy Board (NEB) a federal administrative tribunal and regulatory agency was a final decision maker on a pipeline modification project
- NEB issued notice to Indigenous groups, including the Chippewas, informing them of the Project, NEB's role and NEB's hearing process
- Chippewas was granted funding to participate, they filed evidence and delivered oral arguments highlighting their concerns of increased risk of spills that would adversely impact their use of land.
- NEB approved the Project, holding:
  - potentially affected Indigenous groups had received adequate information and given opportunity to share their views
  - potential adverse impacts are minimal and would be adequately mitigated
- Chippewas appealed to the Federal CoA and appeal was dismissed. Further appeal to the SCC.

SCC Decision:-

Appeal dismissed

(1) The process and decision of an independent regulatory body can trigger the Crown's DUTY TO CONSULT and in some cases, even fulfill it.

Thus
- A. NEB have the procedural powers to engage in consultation and the remedial powers to, where necessary, accommodate affected Aboriginal and treaty rights
- B. Crown can rely on NEB to fulfill its duty to consult.

- Compare to the companion case of Clyde River (Hamlet) v. Petroleum Geo-Services Inc. (2017)
  = "significantly flawed" process of the NEB vs. "manifestly adequate"

Key differences are SCOPE OF PROJECTS, NATURE OF RIGHTS involved and NEB process undertaken.

(2) NEB have taken processes that were sufficient to satisfy Crown's duty to consult. Reasons:
1. Provided adequate opportunity to participate in the process.
2. Sufficiently assessed potential impacts on Indigenous rights and found the risk minimal and able to be mitigated.
3. In order to mitigate, NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

UPDATED!

- SCC affirmed and rejected further appeal by Mikisew in Mikisew Cree First Nation v Canada (2018)
- TLDR: Duty to consult imposed on executive ≠ legislative, but when legislative undermines S.35 rights, Aboriginal groups are not left without a remedy. Judges agree to dismiss appeal on grounds that JR under FC Act is not available for actions of federal ministers in the parliamentary process.
- See Reasoning of Mikisew 2018. Judges disagree on whether legislative limb had a duty to consult, therefore giving entitlement to a declaratory relief.

(3) ABORIGINAL RIGHTS
(Required Cases in Syllabus)

Canada v Mikisew Cree First Nation (2016) FCA

BILLS C-38 + C-45

Facts :-

- Federal govt. introduced two OMNIBUS Bills C-38 and C-45, repealing and replacing the Canadian Environmental Assessment Act and a few other statutes on environment and natural resources
- Mikisew claims the bills adversely affects their treaty rights, and the Crown breached their duty to consult
- Applied for the court (FC) a declaration to this effect and an injunction.
- FC held (1) a Judicial Review is permitted in the matter (2) Legislators owe Mikisew a duty to consult while preparing the Bills and (3) Injunction would be 'intervening' in the legislative process and therefore not approved but a declaration of duty to consult owed by Crown, although 'useless' in the face on already enacted bills, would have some value for "parties' future obligations"
- Crown appealed to the FCoA

FCA decision

Held :-

(1) Federal Courts Act did not permit a JR of the matter; legislative decisions are outside the Act's purviews.

(2) Courts inability to intervene in a legislative process includes any sort of declaratory order with respect to that legislative process. Also, imposing a duty to consult would result in a restrain on the Parliament and slow or even halt the legislative process.

(3) Legislative regime with no duty to consult is not immune from a constitutional challenge; "good politics" for legislative to engage Aboriginal groups on legislative initiatives.

(4) Any challenge on a new policy that it didn't sufficiently account Aboriginal concerns, one determining factor of WHETHER INFRINGEMENT ON A RIGHT IS JUSTIFIED will be whether consultation occurred before legislation adopted – but judicial scrutiny will only come into the picture AFTER LEGISLATION ENACTED

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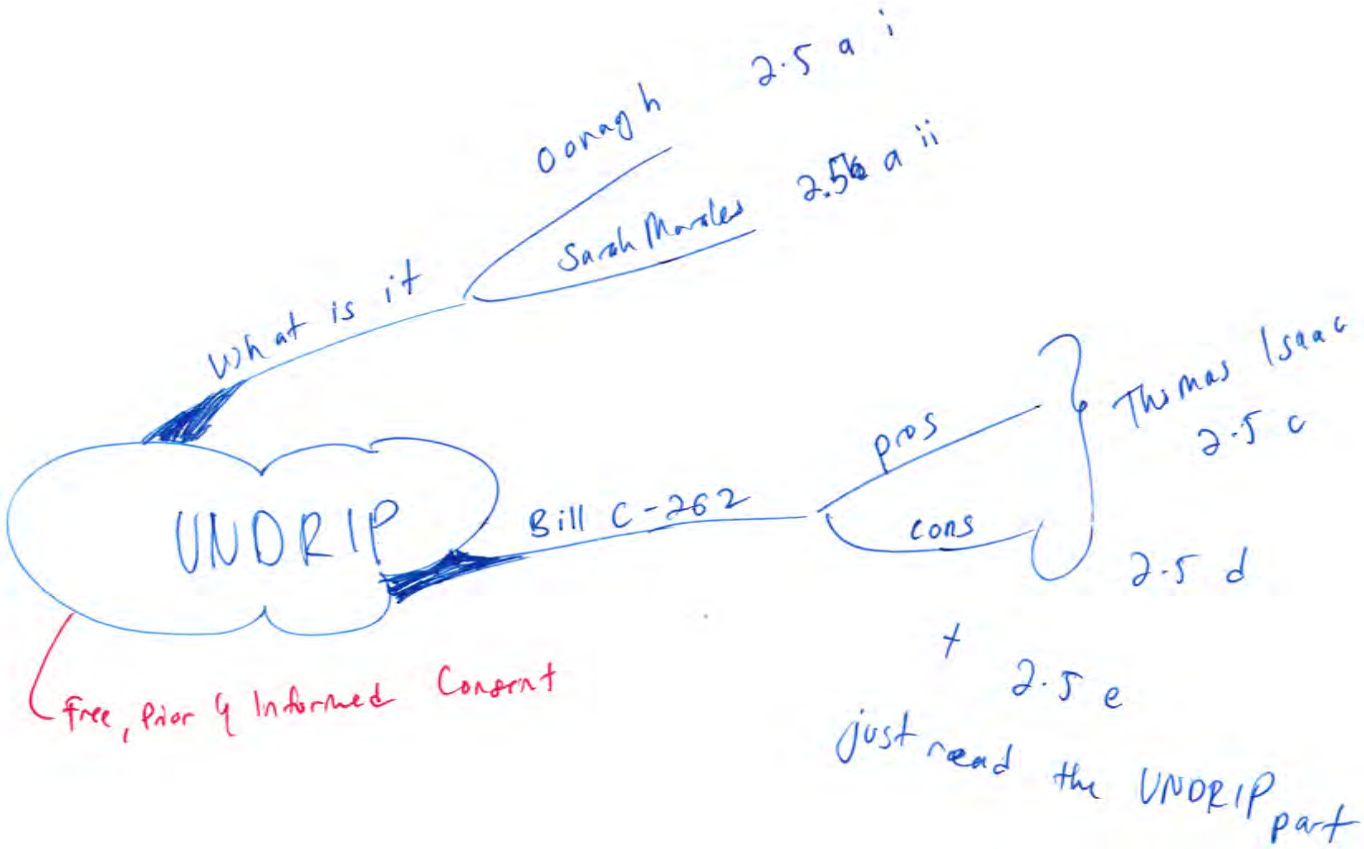

A timeline of residential schools, the Truth and Reconciliation Commission

For over 150 years, residential schools operated in Canada. Over 150,000 children attended these schools. Many never returned. Often underfunded and overcrowded, these schools were used as a tool of assimilation by the Canadian state and churches. Thousands of students suffered physical and sexual abuse. All suffered from loneliness and a longing to be home with their families. The damages inflicted by these schools continue to this day.

Sept. 19, 2007

Phil Fontaine, then national chief of the Assembly of First Nations, said in September 2007 that a federal compensation deal for former students of residential schools marked the end of a 'journey of tears.'

A landmark compensation deal for former residential school students comes into effect, ending what Assembly of First Nations Chief Phil Fontaine called a 150-year "journey of tears, hardship and pain — but also of tremendous struggle and accomplishment." The federal government-approved agreement will provide nearly $2 billion to the former students who had attended 130 schools. Indian Affairs Minister Chuck Strahl said he hoped the money would "close this sad chapter of history in Canada."

The **Indian Residential Schools Settlement Agreement** (IRSSA) is an agreement between the Government of Canada and approximately 86,000 Native Canadians who at some point were enrolled as children in the Canadian Indian residential school system, a system which was in place between 1879 and 1996. The IRSSA recognized the damage inflicted by the residential schools and established a $1.9 billion compensation package called CEP (Common Experience Payment) for all former IRS students. The agreement, announced in 2006, was the largest class action settlement in Canadian history. As of March 2016 a total of $1,622,422,106 has been paid to 79,309 former students. An additional $3.174 Billion has been paid out as of December 31, 2018 through IAPs (Independent Assessment Process) which are for damages suffered beyond the norm for the IRS.

Dec. 21, 2006

The $2-billion compensation package for aboriginal people who were forced to attend residential schools is approved by the Nunavut Court of Justice, the eighth of nine courts that must give it the nod before it goes ahead. (A court in the Northwest Territories is the last to give approval in January 2007.)

However, the class-action deal — one of the most complicated in Canadian history — was effectively settled by Dec. 15, 2006, when documents were released that said the deal had been approved by seven courts: in Alberta, British Columbia, Manitoba, Ontario, Quebec, Saskatchewan and the Yukon. The average payout is expected to be in the vicinity of $25,000. Those who suffered physical or sexual abuse may be entitled to settlements up to $275,000.

Nov. 23, 2005

Ottawa announces a $2-billion compensation package for aboriginal people who were forced to attend residential schools. Details of the Indian Residential Schools Settlement Agreement include an initial payout for each person who attended a residential school of $10,000, plus $3,000 per year. Approximately 86,000 people are eligible for compensation.

Oct. 21, 2005

The Supreme Court of Canada rules that the federal government cannot be held fully liable for damages suffered by students abused at a church-run school on Vancouver Island. The United Church carried out most of the day-to-day operations at Port Alberni Indian Residential School, where six aboriginal students claimed they were abused by a dormitory supervisor from the 1940s to the 1960s. The court ruled the church was responsible for 24 per cent of the liability.

May 30, 2005
The federal government appoints the Honourable Frank Iacobucci as the government's representative to lead discussions toward a fair and lasting resolution of the legacy of Indian residential schools.

March 11, 2003
Ralph Goodale, minister responsible for Indian residential schools resolution, and leaders of the Anglican Church from across Canada ratify an agreement to compensate victims with valid claims of sexual and physical abuse at Anglican-run residential schools. Together they agree the Canadian government will pay 70 per cent of the compensation and the Anglican Church of Canada will pay 30 per cent, to a maximum of $25 million.

Dec. 12, 2002
Presbyterian Church settles Indian residential schools compensation. It is the second of four churches involved in running Indian residential schools that has initialed an agreement-in-principle with the federal government to share compensation for former students claiming sexual and physical abuse.

2001
Canadian government begins negotiations with the Anglican, Catholic, United and Presbyterian churches to design a compensation plan. By October, the government agrees to pay 70 per cent of settlement to former students with validated claims. By December, the Anglican Diocese of Cariboo in British Columbia declares bankruptcy, saying it can no longer pay claims related to residential school lawsuits.

Jan. 7, 1998
The government unveils Gathering Strength: Canada's Aboriginal Action Plan, a long-term, broad-based policy approach in response to the Royal Commission on Aboriginal Peoples. It includes the Statement of Reconciliation: Learning from the Past, in which the Government of Canada recognizes and apologizes to those who experienced physical and sexual abuse at Indian residential schools and acknowledges its role in the development and administration of residential schools. St. Michael's Indian Residential Schools, the last band-run school, closes.

The United Church's General Council Executive offers a second apology to the First Nations peoples of Canada for the abuse incurred at residential schools. The litigation list naming the Government of Canada and major Church denominations grows to 7,500.

1997
Phil Fontaine is elected national chief of the Assembly of First Nations, a political organization representing Canada's aboriginal people.

November 1996
The Royal Commission on Aboriginal Peoples, or RCAP, issues its final report. One entire chapter is dedicated to residential schools. The 4,000-page document makes 440 recommendations calling for changes in the relationship between aboriginals, non-aboriginals and governments in Canada.

The Gordon Residential School, the last federally run facility, closes in Saskatchewan.

1994
The Presbyterian Church offers a confession to Canada's First Nations people.

1993
The Anglican Church offers an apology to Canada's First Nations people.

1991
The Missionary Oblates of Mary Immaculate offers an apology to Canada's First Nations people.

1990
Phil Fontaine, leader of the Association of Manitoba Chiefs, meets with representatives of the Catholic Church. He demands that the church acknowledge the physical and sexual abuse suffered by students at residential schools.

1989
Non-aboriginal orphans at Mount Cashel Orphanage in Newfoundland make allegations of sexual abuse by Christian Brothers at the school. The case paves the way for litigation for residential school victims.

1986
The United Church of Canada formally apologizes to Canada's First Nations people.

1979
Only 15 residential schools are still operating in Canada. The Department of Indian Affairs evaluates the schools and creates a series of initiatives. Among them is a plan to make the school administration more culturally aware of the needs of aboriginal students.

1975
A provincial Task Force on the Educational Needs of Native Peoples hears recommendations from native representatives to increase language and cultural programs and improve funding for native control of education. Also, a Department of Indian Affairs and Northern Development publication reports that 174 federal and 34 provincial schools offer language programs in 23 native languages.

1974
The aboriginal education system sees an increase in the number of native employees in the school system. Over 34 per cent of staff members have Indian status. This is after the government gives control of the Indian education program to band councils and Indian education committees.

1860
Indian Affairs is transferred from the Imperial Government to the Province of Canada. This is after the Imperial Government shifts its policy from fostering the autonomy of native populations through industry to assimilating them through education.

1847
Egerton Ryerson produces a study of native education at the request of the assistant superintendent general of Indian affairs. His findings become the model for future Indian residential schools. Ryerson recommends that domestic education and religious instruction is the best model for the Indian population. The recommended focus is on agricultural training and government funding will be awarded through inspections and reports.

1820s
Early church schools are run by Protestants, Catholics, Anglicans and Methodists.

1620-1680
Boarding schools are established for Indian youth by the Récollets, a French order in New France, and later the Jesuits and the female order the Ursulines. This form of schooling lasts until the 1680s.