

LAW 2101 – Introduction to Law

Introduction to the Legal System

Sources and Divisions of Law

Sources of Law

- Constitution
- Statutes enacted by the Federal Parliament or a provincial legislature
- Federal or Provincial regulations
- Decisions rendered by judges in the cases they decide
- LRWA Materials (UWO Faculty of Law – edited extract)
 - Law made by courts (common/case law) and the law made by legislatures (statute law)
 - Statute: written law of a legislative body – an act of parliament
 - In CA laws may be passed by federal and provincial legislature but before it can become a statute the act must proceed through legislature in the form of a bill
 - Historical sources of Law were: Custom, morality, and precedent. English common law grew out of customary law, and statute law developed from common law. The root of shift from custom/precedent to statutes was growing complexity of society and its legal problems
 - Common Law: deals with changing social/legal conditions as they emerge in actual disputes – cant anticipate – therefore, at a disadvantage in confronting rapid social change – case by case
 - Traditionally considered best guardian of individual liberties
 - Fears of legislative tyranny disappeared over time with the development of parliamentary democracy
 - Some important laws today such as the criminal code and income tax act are entirely created by statute
 - Legislation: better suited to accommodate change. Statutes deal in generalities and affect broad classes of persons and can be enacted in anticipation of future events, and does not rely on past decision for legitimacy
 - Only federal and provincial bodies can legislate
 - Volume and complexity is such that legislatures are unable to deal with many technical aspects of law – therefore acts provide a general framework – cabinet fills in the details – delegated legislation/regulations dealing with routine matters and issues of major importance
 - Regulations: enacted by cabinet acting as governor-in-council – eventually tables in legislature some such as those dealing with national security are not
 - Many statutes contain sweeping enabling clauses which give cabinet virtually the same law making powers as legislature – but cabinet exercises w/ little or no public debate

Divisions of Law

- Procedural law: deals with court and pre-trial procedure, and rules of evidence and can be applied retrospectively
- Substantive law: deals with rights of individuals
- Public Law: concerned with matters that affect society as a whole. Criminal, constitutional, and administrative. Set rules for relationship between individual and society or roles of different governments.
- Private Law (Civil Law): relationships between individuals. Contracts, property ownership, rights and obligations of family, damage to someone or to their property etc
- Civil case: action between 2 private parties
- Criminal case: Prosecution by crown of an individual under a public-law statute.

Territorial Issues

- Jurisdiction for making laws is divided between parliament of Canada and provincial/territorial legislatures
- Parliament can make laws for all of Canada but only for matters assigned to it by constitution
- Federal parliament: Canada as a whole, trade between provinces, national defence, criminal law, money, patents, and postal service, as well as Yukon, NW Territories, and Nunavut
- Provinces have authority to make laws concerning education, property, civil rights, administration of justice, hospitals, municipalities, and other local/private matters
- Fed law allows territories to elect councils with powers similar to those of the provincial legislatures – and citizens of territories govern themselves

- Local/Municipal govts: created under provincial laws can make bylaws regulating local matters – zoning, smoking, pesticide use, parking, business, and construction permits
- Aboriginal peoples: range of gov powers over reserve lands under federal Indian Act
- Self Governments: exercise gov powers as a result of specific agreements negotiated with federal and prov/terr governments

Two Systems: Common Law and Civil Law

- The Common-Law Tradition: After battle of Quebec in 1759, CA fell under English Law – except for Quebec where civil law is based on the French Code Napoleon. CAs Crim/Civil law have basis in English common and statutory law. Common law based on decisions of judges in the royal courts – system of rules based on precedent. Unique bc its found in past cases, and is slightly adaptable/flexible
- The Civil-Law Tradition: Based on Roman Law – books, statutes, proclamations – until Justinian ordered legal experts to consolidate all into a single book. Quebecs civil code was recently revised – comprehensive statement of rules, many which are broad, general principles, to deal with possible disputes. Courts in civil law first look to code, then previous cases to check for consistency.
- The Two meanings of Civil Law:
 - In contrast to common law to refer to civil code based system
 - Matters of private law in contrast to criminal
- Quebec Act of 1774 made Canada a bijural country, one with 2 types of law. Common law outside of Quebec in private law matters, but in Quebec dealt with under Civil Code of Law. Common law used for public in and out of quebec.

The Court System

Structure of the Courts

- SCC is highest – hears appeals from province appeal courts, federal court, and court martial appeal court, or constitutional questions (only directly by federal attorney general – “reference cases”)
- Decisions of SCC are binding on all lower courts – SCC doesn’t consider itself bound by its decisions, but reluctant to stray from them. Not bound by any decisions, but will refer to cases from HoL, JCoPC, Commonwealth Supreme Courts, and SCoUSA
- Courts of one province not bound to decisions of courts of another, but decisions are considered a persuasive authority.
- ON: Highest court is the Court of Appeal
 - Superior Court of Justice (civil matters and more serious criminal matters)
 - Family court
 - Small Claims court (minor civil matters)
 - Divisional Court (appeal court above Superior Court of Justice but below Court of Appeal)
 - ON Court of Justice (for less serious criminal matters and some family ones)
- Separate federal court which operates across the country. Cases start at Federal Court (Trial Division) and can be appealed to Fed Court of Appeal then the SCC.
- In the USA highest court is the US Supreme Court. Highest in the UK is the House of Lords – Court of Appeal – The High Court

The Adversarial System

Phillips v. Ford Motor Co. of Canada

- Mode of trial procedure is based on the adversary system where people seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happening which form the bases of their allegations
- Procedure assumes litigants assisted by their counsel, will fully and diligently present the material facts which have evidentiary value in support of their respective positions and the disputed facts will get a dispassionate and impartial consideration from a trial judge in order to arrive to the truth of the matters
- Trial is a forum establishes for the purpose of providing justice for the litigants
- Court cannot embark on a quest for scientific/technological truth
- The trial Judge – Haines J – attempted to direct an inquiry instead of a trial – amounting to a mistrial
- Came to a decision, and then seeing the P didn’t provide enough evidence he ordered a series of tests, and went far beyond questioning to clear up obscurities. Took over the examinations and hampered counsel in preparation and in providing of evidence.

Basic Concepts in Learning the Law

Statutory Interpretation (LRWA materials – edited)

- Introduction: Legislation couched in general language, in order to be applied to broad cases. Up to courts to decide if a case fits within the statute.
 - Process of statutory construction has two distinct aspects:
 - Interpretation: meaning of words of statute is determined. Can be interpreted without needing a controversy
 - Application: where meaning is applied to the facts of specific cases. Presupposes interpretation.
 - Exercise of judgement in balancing ordinary meaning of words, context of statute, and purpose
 - Courts also rely on canons of interpretation which give clues as to how problems of statutory meaning have been resolved in the past – rules of statutory interpretation
 - KEEP IN MIND (Maunsell v. Olins): are not rules in having binding force. They are servants, not masters. Aids to construction, presumptions or pointers. Look at circumstances and decide what weight to attach to a particular rule.
 - R. Sullivan: they are indispensable in formulating arguments used by counsel to argue cases and for judges to justify outcomes once a conclusion has been reached
- Historical Rules of Interpretation – which did not generate predictable outcomes. John Willis suggests that it was a matter of guesswork:
 - The Mischief Rule: construed according to their object, with little importance attached to actual words used.
 - Grew out of conditions of judicial law making
 - Heydon's case (1584): construed to suppress mischief and advance remedy according to intent of those who made act
 - Judicial law making allowed/required to further to object of statute
 - Becomes unworkable when legislature and judiciary are separate and the intention of acts is less clear
 - IMPORTANCE: To remind us that legislation has purpose and to keep it in mind
 - Literal or Strict Construction: construed by literal reading of text, without regard to purpose. 18th and 19th C as acknowledgement of parliamentary supremacy
 - No intention assumed, and no outside materials to be used as aids in construction
 - Where language had no discernable meaning – or where a literal reading led to an absurd result judges considered themselves powerless to supply a remedy
 - IMPORTANCE: To provide greater certainty
 - The Golden Rule: allows deviations from literal construction where construction leads to absurdity
- Modern Rule of Interpretation: words of an act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act and the intention of parliament.
 - Adopted by SCC in *Stubart Investments Ltd v. The Queen*
 - Facts:
 - There was a parent corporation and 2 sister subsidiaries: Stubart and Grover. Stubart was profitable (food flavouring business). Grover had significant accumulated losses (different type of business).
 - *Note: losses can be carried forward or backwards. If you had losses in certain year, you could apply those losses against income earned in other years (before or after)*
 - The assets of Stubart were transferred to Grover. Grover then carried on the food flavouring business (assets transferred to Grover). Grover entered into contract with Stubart to manage the food flavouring business. Grover then earned profits from the food flavouring business, and applied its losses against that profit.
 - Crown argues:
 - This is a sham.
 - Even if not a sham, it is an incomplete transaction (when assets were transferred to Grover, the licence to carry on business of food flavor was not transferred).

- Even if not sham or incomplete, there was no purpose to the transaction (no business purpose) except to avoid tax.
 - The Crown won at all previous levels of court.
 - Issue(s): Does a transaction undertaken to decrease the amount of taxes payable need to have a business purpose?
 - Ratio: There is no jurisprudential principle that there must be a business purpose (to a transaction that results in a decrease in taxes payable).
 - Court stated that:
 - No sham: because legal rights and obligations created were those intended.
 - Not incomplete transactions: all assets necessary to carry on business were transferred.
 - No jurisprudential principle that there has to be a business purpose to a transaction before it is recognized.
 - Holding: Decision in favour of Stubar.
 - Comments: Led to statutory General Anti-Avoidance Rules (GAAR).
- Three elements of the modern approach: Ordinary meaning of words, context, and purpose of act.
- Some courts argue that if the plain meaning is clear it is unnecessary to consider the purpose of the legislation... others argue that all three elements are needed.
- Still debated in SCC:
 - Canada v. Antosko [1994] – Mr. Justice Iacobucci stated: must analyze given transaction in context of economic and commercial validity, but that cannot alter result where words are clear and plain, and legal/practical effect is undisputed
 - Quebec v. Corp. Notre-Dame de Bon-Secours [1994]: in unanimous decision said purposive approach always necessary.
 - Friesen v. The Queen [1995]: plain meaning approach. Justice Major – “Clear language takes precedence over courts view of the object and purpose of a provision”
- Lesson: statutory interpretation is dynamic and not even the SCC has figured it out.

Highway Traffic Act. R.S.O. 1990, c. H-8, s. 1(1) – vehicle” includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car.

Stare Decisis and Precedent

- Principle of Stare Decisis: Stare decisis et non quieta movere – to stand by decisions and not disturb settled matters. Court must follow decisions of superior courts in its jurisdiction, and only apply legal rules to the same sets of facts. If another court of similar level has come to a decision, the same is worthy of consideration.
 - Justification:
 - Treating like cases alike creates certainty in law. People can sort legal affairs, and disputes can be resolved based on a reasoned assessment of probable result of litigation.
 - Ensures fairness, and increases respect for the law.
- Ratio Decidendi and Obiter Dicta
 - Ratio decidendi – the reason for deciding. Must explain the result in the case. Principle of law or legal grounds on which the case was decided. Only ratio can create precedent. Not explicitly stated, so assumptions are not made with scientific precision there is an element of subjectivity.
 - Donoghue v. Stevenson (snail in gingerbeer)
 - Narrow: negligent to manufacture beer with snail
 - Broad: negligent to manuf products ppl will eat with impurities
 - Broadest: all consumer products must be safe for use
 - Ratio cant be known until judges in future cases expressly indicate it.
 - Obiter dicta – things said by the way. Not binding on lower courts, but persuasive.
- Binding Authority: court bound to follow decisions of courts higher in hierarchy.
- Persuasive Authority: “can be used to convince:
 - Greater weight given to: court higher in hierarchy, where court was unanimous, series of cases, decision of well-respected judge/court, older decision considered a founding case that

- Rules must be clear: too vague means people can't use them as a guide
 - Rules must be coherent with each other
 - Rules must be sufficiently stable to allow people to plan their lives
 - The making of orders applicable to relatively limited situations must be guided by relatively general, clean, stable rules: where law grants discretion to decision makers, it must be bounded, guided discretion
 - People with authority to make or administer laws in an official capacity:
 - Must be accountable
 - Must actually administer the laws consistently with their tenor
- Roncarelli v. Duplessis [1959] SCC: rule of law was used as a shield to protect a QB restaurant owner from the gov's action in cancelling his liquor license for personal reasons
 - Facts: Roncarelli (R) was a private citizen and Jehovah's Witness who bailed out other Jehovah's Witnesses who had been detained for distributing pamphlets. Duplessis (D) was both the Premier and Attorney General of Quebec who ordered R's liquor licence revoked. Liquor Commissioner revoked R's licence on behalf of D. By statute, the Commissioner was empowered to cancel permits at his discretion.
 - Issue(s): Can a public officer, who is given statutory power to act at his discretion, exercise that discretion without limits and in accordance with personal preference?
 - Ratio: There is no such thing as absolute discretion in public law. Discretion must always be exercised in accordance with statutory purpose.
 - Analysis: Discretionary authority is not unlimited. It must be based on the weighing of considerations pertinent to the object of the administration of the act. No legislative act can give unlimited arbitrary power. Discretion must be used in good faith; unlimited arbitrary discretion would signal the end of rule of law and democracy.
 - Holding: Decision in favour of Roncarelli.
 - TEXT: In circumstances when de facto power of executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting?
 - Examination of statutory provisions governing the issue?
 - Duty of the commission is to serve only those purposes for which it was created – to monitor alcohol licenses the decision to cancel or deny a license is within the discretion of the commission, but the decision should be based on weighing of considerations pertinent to the object of the administration
 - No legislative act can without express language be taken to contemplate an unlimited arbitrary power exercisable for any purpose
 - Discretion implies good faith in discharging public duty
 - What right did he have to punish the licensee for doing what he had a right to do in a matter irrelevant to the Alcoholic Liquor Act.
 - Gross abuse of legal power and a destruction of the economic life of the restaurant
 - To do that would signal the beginning of the disintegration of the rule of law and fundamental postulate of our constitutional structure.
 - Good faith in this context means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose
- Re Manitoba Language Rights [Expert from Courts executive summary]: SCC provides most elaborate meditation to date on meaning of rule of law in Canadian constitutional order
 - Are sections 133 of the Constitution Act, 1867 and 23 (Requirement for both to be in English and French) of the Manitoba Act, 1870, requiring laws be in both French and English, mandatory in Manitoba, Quebec, and Parliament?
 - The guarantee they entrench must be obeyed
 - If so, are those Manitoban laws not printed in both languages invalid under section 23 of the Manitoba Act?
 - Yes, but for reasons given will be deemed temporarily valid
 - If so, do the laws have any force and effect, and if so to what extent?
 - Not enacted, printed, published in English and French and have no force and effect because they are invalid, but will have temporary force and effect

- Sc 52 of constitution: The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
 - Law inconsistent with constitution has no force or effect
- The Court found that the Constitution Act, 1867 and the Manitoba Act, 1870 did require both languages and that those laws that were not in both languages were of no force and effect; however, they were deemed temporarily valid for a time until translations can be re-enacted in order to avoid a legal vacuum in Manitoba and to ensure the continuity of the rule of law.
- Had to delay because then there would a legal vacuum and legal chaos in Manitoba.
- This reference was the first time that the courts in Canada had used the remedy of a delayed declaration of invalidity. Despite its exceptional origins, this remedy has grown to become a preferred one in Canadian public law.
- Rule of law requires creation and maintenance of actual order or positive laws to govern society

What is the Constitution of Canada?

Constitutional Law by Bradley W. Miller

- Constitutional law concerned w/ laws governing the use of government power, unlike other branches of law which take care of obligations between persons this deals with gov – either in dealings with other govts, or in dealings with persons. Setting limits on what govts can do...
- What does a constitution do:
 - Separation of powers: assigns responsibilities to different institutions within the gov. In Canada, gov is composed of 3 distinct branches: legislative, executive, and judicial.
 - Division of powers: in a federal state, assigns jurisdiction over different matters to either federal or provincial governments
 - Establishment of civil rights: constitution can limit government power by providing legal rights to individuals, as was accomplished by CORAF
 - Asserting the principles of a nation: Making a statement from one legal order to another:
 - Preamble to US Constitution: We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence,[note 1] promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
 - Preamble to CA Constitution:
 - Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom:*
 - And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:
 - And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:
 - And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Looking at Law – Canada's Legal System by Fitzgerald and Wright

- State is an organized political community with a government and territory
- Constitution is a set of rules defining its organization and operation
- Fundamental formal rules regulating the state itself
- Constitutional rules made up of customs, conventions, and laws about diff institutions of the state, their composition and powers, and relationships with one another and with citizens
- Not all states have the same kind of constitution:
 - US has a written one
 - UK has an unwritten one
 - Flexible – where every law can be legally changes with same easer and in same manner by sovereign authority

- Rigid – where certain fundamental constitutional laws cannot be change in the same manner as ordinary laws
- Canada: falls between written and unwritten models
 - Basic constitutional rules prevailing in UK have been our foundation
 - Also have specific constitutional enactments. Some serve to regulate composition and operation of a system of multiple legislative authority. Others include explicit enumeration of constitutional rights, and others specify processes for future amendments
 - Several documents:
 - Canada Act 1982
 - Constitution Act 1982
 - 24 other acts and orders
 - Mostly Constitution Acts 1967-1975 (BNA formerly)
- Canada: Falls between flexible and rigid models:
 - Legislatures cannot pass laws outside of the constitutionally defined jurisdiction
 - CORAF gives judges power to consider validity of statutes and exercise of public authority so legislative power is always subject to judicial review
- Today constitution is a badge of nationhood, reflecting our values. Which are: vesting of law-making authority into hands of democratically elected representatives, non-partisan administration of law, and certain executive functions of the state, and a charter of rights
- The ideals of a constitution sometimes stand in great contrast to the actual reality... e.g. Soviet Union

How Canadians Govern Themselves by Eugene Forsey

- Federal state: brings together a number of diff political communities with a common government for common purposes, and separate state or provincial or cantonal governments for particular purposes of each community.
- Federalism combines unity with diversity
- Wanted to found a new nation – a single great power – out of many diverse provinces
- Insistent on maintaining identity, special culture and special institutions of each of the federating provinces or colonies
 - French speaking and roman catholic, Canada east (QB)
 - English speaking and protestant Canada west (ON)
- All felt necessity of union for protection against threat of American invasion or American economic strangulation, therefore needed to bring together small, sparsely populated communities scattered over immense distances, separated by natural barriers, and divided by deep divergences of economic interest, language, religion, law, and education
- Formed federation with strong central gov and parliament – and with ample measure of autonomy and self government for each of the federating communities
- BNA Act 1867: Act of British Parliament – statutory form of resolutions drawn up by Canadian delegates
 - Instead of calling kingdom of Canada – called dominion of Canada
 - Section 26-28 of act done by British – provisions for breaking deadlock btwn senate and HoC – federation resolutions were brought into effect by an act of the British parliament was the father's deliberate choice.
- Constitution Act 1867:
 - Couldn't make amendments, only provinces to own constitute, every other amendment had to be made by an act of British parliament
 - 1926 – Canada is seen as an “autonomous community, in no way subordinate to UK and any aspect of domestic and external affairs” therefore giving rise to a want to be able to amend our own constitution.
 - Asked to patriate... but couldn't agree on an amendment formula so it took till 1982
- Constitution Act of 1982: Written portion of our constitution, but not all of it. Flesh, muscles, sinews, and nerves of constitution are added by legislation, custom, judgements of courts, and by agreements btwn national and provincial governments.
- Core of constitution is 25 primary documents (14 acts of british parliament, 7 of Canadian, and 4 british orders-in-council), with Act of 1867 at core. These did 12 things:
 - Created federation, provinces, territories, national Parliament, provincial legislatures and some provincial cabinets
 - Gave national parliament power to create new provinces out of territories, and power to change provincial boundaries w/ consent of provinces concerned

- Ser out power of parliament and provincial legislatures
- Vested formal executive power in queen, created Queen's privy council for Canada (legal basis for federal cabinet)
- Gave parliament power to set up a supreme court of Canada – 1875
- Guaranteed certain limited rights equally to English and French languages in federal parliament and courts and legislatures and courts of QB and MB
- Separate schools for any province that existed
- Guaranteed QB distinctive civil law
- Gave parliament power to assume jurisdiction over property and civil rights, or any part of such jurisdiction, in other provinces, provided provincial legislatures consented. This power has never been used.
- Prohibited provincial tariffs
- Gave provincial legislatures the power to amend provincial constitutions, except as regards the office of Lieutenant- Governor
- Gave national government (the Governor-in-Council: that is, the federal cabinet) certain controls over the provinces: appointment, instruction and dismissal of lieutenant-governors (two have been dismissed); disallowance of provincial acts within one year after their passing (112 have been disallowed — the last in 1943 — from every province except Prince Edward Island and Newfoundland and Labrador); power of lieutenant-governors to send provincial bills to Ottawa unassented to (in which case they do not go into effect unless the central executive assents within one year; of 70 such bills, the last in 1961, from every province but Newfoundland and Labrador, only 14 have gone into effect).
- Provided legal framework within which we could, and did, adapt, adjust, manoeuvre, innovate, compromise, and arrange
- 1982 – termination of power over Canada
- What are the big changes that the Constitution Act, 1982 made in our constitution:
 - Four legal formulas/processes for amending
 - First 3 amending formulas “entrench” certain parts of the written constitution, placing them beyond the power of Parliament or any provincial legislature to touch
 - Sets out CORAF
 - Gives provinces wide powers over their natural resources - national parliament still allowed to legislate on these matters, and if provincial and federal laws conflict, the federal will prevail.
- PG CON -16
- Other Changes: giving parliament exclusive authority over “Indians and lands reserved for the Indians” – Indians includes Inuit
 - First, it says that the Charter's guarantee of certain rights and freedoms “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada,” including rights or freedoms recognized by the Royal Proclamation of 1763, and any rights or freedoms acquired by way of land claims settlement.
 - Second, “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed,” and the aboriginal peoples are defined as including the Indian, Inuit and Métis peoples.
 - Third, in 1983, the amending formula was used for the first time to add to the aboriginal and treaty rights of Canada's native peoples, rights or freedoms that already existed by way of land claims agreements or that might be so acquired, and to guarantee all the rights equally to men and women. The amendment also provided that there would be no amendments to the constitutional provisions relating to Indians and Indian reserves, or the aboriginal rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms, without discussions at a conference of first ministers with representatives of the native peoples. The amendment came into force on June 21, 1984.
- The Constitution Act, 1982, also contains a section on equalization and regional disparities. This proclaims:
 - (1) that the national government and Parliament and the provincial governments and legislatures “are committed to promoting equal opportunities for the well-being of Canadians, furthering economic development to reduce disparities in opportunities, and providing essential public services of reasonable quality to all Canadians”; and
 - (2) that the government and Parliament of Canada “are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to

provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”

- The 1982 Act also provides that the guarantees for the English and French languages do not abrogate or derogate from any legal or customary right or privilege enjoyed by any other language, and that the Charter shall be interpreted “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada.

Constitution Act, 1867

- Section 3: A new Dominion formed from the Province of Canada, Nova Scotia and **New Brunswick, under the name of Canada.**
- **Section 9: The Queen holds executive power.**
- **Section 16: The seat of government is to be in Ottawa.**
- **Section 17: There will be one Parliament of Canada, consisting of the Queen, the Senate, and the House of Commons.**
- Sections 21-36: Set the rules and composition of the Senate.
- Sections 27-52: Set the rules and composition of the House of Commons.
- **Section 55: Royal Assent to Bills, etc.**
- **Section 56: Disallowance by Order in Council of Act assented to by Governor General.**
- **Section 57: Significance of Queen’s Pleasure on Bill reserved**
- Sections 69-90: Set the rules and composition of the provincial legislatures.
- **Section 91: Sets the powers of Parliament.**
 - **1A. The Public Debt and Property.**
 - **2. The Regulation of Trade and Commerce.**
 - **2A. Unemployment insurance.**
 - **3. The raising of Money by any Mode or System of Taxation.**
 - **4. The borrowing of Money on the Public Credit.**
 - **5. Postal Service.**
 - **6. The Census and Statistics.**
 - **7. Militia, Military and Naval Service, and Defence.**
 - **8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.**
 - **9. Beacons, Buoys, Lighthouses, and Sable Island.**
 - **10. Navigation and Shipping.**
 - **11. Quarantine and the Establishment and Maintenance of Marine Hospitals.**
 - **12. Sea Coast and Inland Fisheries.**
 - **13. Ferries between a Province and any British or Foreign Country or between Two Provinces.**
 - **14. Currency and Coinage.**
 - **15. Banking, Incorporation of Banks, and the Issue of Paper Money.**
 - **16. Savings Banks.**
 - **17. Weights and Measures.**
 - **18. Bills of Exchange and Promissory Notes.**
 - **19. Interest.**
 - **20. Legal Tender.**
 - **21. Bankruptcy and Insolvency.**
 - **22. Patents of Invention and Discovery.**
 - **23. Copyrights.**
 - **24. Indians, and Lands reserved for the Indians.**
 - **25. Naturalization and Aliens.**
 - **26. Marriage and Divorce.**
 - **27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.**
 - **28. The Establishment, Maintenance, and Management of Penitentiaries.**
 - **29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.**
- **Section 92: Sets the powers of the provincial legislatures.**
 - **1. Repealed.**

- 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
- 3. The borrowing of Money on the sole Credit of the Province
- 4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
- 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
- 6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
- 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
- 8. Municipal Institutions in the Province.
- 9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
- 10. Local Works and Undertakings other than such as are of the following Classes:
 - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
 - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
 - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
- 11. The Incorporation of Companies with Provincial Objects.
- 12. The Solemnization of Marriage in the Province.
- 13. Property and Civil Rights in the Province.
- 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
- 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
- 16. Generally all Matters of a merely local or private Nature in the Province.
- **Section 92 A:**
 - Laws respecting non-renewable natural resources, forestry resources and electrical energy
 - Export from provinces of resources
 - Authority of parliament
 - Taxation of resources
 - Primary production
 - Existing powers or rights
- **Section 93:** Puts education under provincial authority and protects separate schools.
- **Section 94:** legislation for Uniformity of Laws in three provinces
 - A. Legislation respecting old age pensions and supplementary benefits
- **Section 95:** Puts agriculture and immigration under joint provincial-federal authority, with federal laws superior.
- **Section 96:** Appointment of judges
- **Sections 97:** Selection of Judges in ON
- **Section 98:** Selection of Judges in QB
- **Section 99:** Tenure office of judges
 - Hold office during good behaviour, removable by gov general on address to state
 - Termination at 75
- **Section 100:** Salaries, etc, of judges
- **Section 101:** General court of appeal
- **Section 102:** Creates the Consolidated Revenue Fund.
- **Section 109:** British Columbia, Ontario, Québec, New Brunswick and Nova Scotia are given constitutional control over their land and natural resources.
- **Section 118:** Sets the sums to be paid to provincial governments to maintain their governments.

- Section 133: Either French or English may be used, and all documents are to be in both languages.
- Sections 146-147: Make provision for other provinces or territories (including Rupert's Land) to join Confederation.

Canada Act, 1982

- And whereas Canada has requested, and consented to, the enactment of an Act of the Parliament of the United Kingdom to confirm and give effect to the said Agreement and the Senate and House of Commons of Canada in Parliament assembled have submitted an address to His Majesty praying that His Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose;
- Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:--
 - Constitution Act of 1982 in Schedule B is enacted for and shall have force of law in Canada
 - Now act of parliament of the UK passed after Const Act 1982 comes into force shall extend to CA as part of law
 - So far as contained in B French version of this act is valid and has same authority as English
 - This act may be cited as Canada Act 1982

Constitution Act, 1982

Part I: Canadian Charter of Rights and Freedoms

- Next chapter.

Part II: Rights of the Aboriginal Peoples of Canada

- Section 35. Recognition of existing Aboriginal rights and treaty rights. 1. They are recognized and affirmed. 2. Definition. 3. Land claims agreement. 4. Guaranteed equally to both sexes
 - 35.1. Commitment to participation in constitutional conference

Part III: Equalization and regional Disparities

- Section 36. Commitment to promote equal opportunities
 - For well being of Canadians
 - Furthering economic development to reduce disparities | opportunities; and
 - Providing essential public services of reasonable quality to all Canadians
- 36.2 commitment respecting public services

Part IV: Constitutional Conferences - Section 37.

Part V: Procedure for Amending the Constitution of Canada (38 – 39)

- Section 38: Changes can only be made with the agreement of Parliament and two-thirds of the provinces (i.e.: seven) composing fifty percent of the population of all provinces.
 - Proclamation issued by governor general under great seal of CA authorized by Resolutions of senate and HOC & Resolutions of legislative assemblies of at least 2/3 of provinces
 - Majority of members
 - Expression of dissent
 - Revocation of dissent
- Section 39: restriction on proclamation:
 - not issued before expiration of 1 year from adoption of resolution initiating amendment procedure
 - Idem -Not be issued after expiration of 3 years from adoption of resolution
- Section 40: Compensation to province not applying to amendment
- Section 41: Amendment by unanimous consent
- Section 42: Amendment by general procedure
- Section 43: Allows amendments to Constitution that affect some provinces with the agreement of Parliament and the provincial legislatures of the provinces affected.
- Section 44: Amendments by parliament
- Section 45: " by provincial legislature
- Section 46: Initiation of amendment procedures
 - Revocation of authorization
- Section 47: Amendments without senate resolution
- Section 48: Advice to issue proclamation
- Section 49: constitutional conference

Part VI: Amendment to the Constitution Act, 1867 (previously British North America Act, 1867)

- Sections 50-51.

Part VII: General: Sections 52-61

- Section 52: primacy of constitution – supreme law and anything inconsistent is of no force or effect
- Section 53: repeals and new names
- Section 54: repeal and consequential amendments
- Section 55: French version of constitution
- Section 56: English and French versions of certain constitutional texts
- Section 57: E & F versions of this act
- Section 58: Commencement
- Section 59: Short Title and citations
- Section 60: References
- Section 61:

Schedule: Modernization of the Constitution: Renames various acts, most notably, the British North America Act, 1867.

Reference re Secession of Quebec

[1998] SCC

Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

- Texts have a primary place in determining constitutional rules, but are not exhaustive
- Constitution also embraces unwritten, as well as written rules
- Constitution of Canada includes: global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state
- Constitution contains a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government
 - Emerge from understanding of constitutional text itself, historical context, and previous judicial interpretations of constitutional meaning

Four organizing principles of the Constitution: Recognition of these principles doesn't mean you have to dispense of the written constitution, rather the written provides a foundation of legal certainty and predictability, and judicial review. Preamble invites courts to turn these principles into premises of a constitutional agreement that culminated in filling of gaps in express terms of constitutional text. These principles are binding on both courts and governments.

- Federalism:
- Democracy:
 - Expressed the sovereign will of people
 - Federal system allows different provinces to pursue policies responsive to particular concern and interests of people in that province
 - Canada as a whole is democratic - enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level
 - Democracy cannot exist without the rule of law – law created framework within which sovereign will is to be ascertained
 - Political system also needs legitimacy which requires interaction btwn rules of law and democratic principles
 - Continuous process of discussion – compromise, negotiation, and deliberation
- Constitutionalism and the rule of law:
- Respect for minorities;

Secession of a province from Canada must require an amendment to the Constitution... radical and extensive. The constitution doesn't allow it or forbid it, but it would alter the governance of Canada in a way that is inconsistent with our constitutional arrangements.

- Right to secede unilaterally is right to secede without negotiating w/ other provinces and fed gov – juridical basis is the expression of democratic will in a referendum
- Referendum provides a method that is democratic and allows you to see the views of the people, has no legal effect, but clear majority must be considered. As long as the result is free of ambiguity both in terms of question asked and support received.
- Focus first on substantive obligations coming from this obligation to negotiate; once nature of it has been described easier to assess appropriate means of enforcement of those obligations, to comment on distinction between legality and legitimacy

- Four principles lead us to reject 2 absolutist propositions
 - Legal obligation on other provinces and fed gov to accede to secession of a province, subject only to negotiation of logistical details.
 - QB cannot invoke a right of self determination and dictate terms that wouldn't be a negotiation and a democracy
 - Clear expression of self determination by people of QB would impose no obligations on other provinces or federal government
 - This would mean that we are promoting a view that says the 3 other principles trump the democratic will of the people of QB
- None of the rights or principles under discussion is absolute to the exclusion of others – QB has to exercise its rights while respecting those of others.
- Need clear majority of QB, and clear majority of CA
- If refusal of a party to negotiate in a manner consistent with constitutional principles, it would put at risk the legitimacy of their assertion of rights and negotiation process as a whole

Federalism

Report of the Royal Commission on Dominion-Provincial Relations

Prevailing view was that the Privy Council has hindered power of Parliament of Canada to deal with economic conditions by giving a narrow interpretation to federal powers, and broad interpretation to provincial ones.

Nature of Confederation: Division of Legislative Powers [Sc 91-95 of BNA]

- 91: dominion “to make laws for 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 legislatures of the provinces:
- 92: provinces given certain powers, and dominion could take legislative power over any local work at any time by declaring it to be for the general advantage of Canada or for the advantage of two or more provinces
 - Property and civil rights in province
 - Generally all matters of a merely local or private nature in the province
- 93: Provinces control over education subject to certain clauses to protect roman catholic and protestant minorities
- 95: Dominion and provinces given concurrent powers over agriculture and immigration, federal to prevail in a conflict

How Canadians Govern Themselves – Eugene Forsey

- Subject to limitations in Con Act 1982, provinces can amend their own constitutions by an ordinary Act of the legislature
- Power to amend provincial constitutions is restricted to changes in internal machinery of provincial gov
- Parliament cant take over any power of provincial legislature but can assign agencies to do the work for them.
- Parliament of provinces have power over old age, disability, and survivors pensions – but provincial power prevails if laws conflict
- Provincial powers: labour legislation. Except for banking, broadcasting... pg CON 37, and if for advantage of Canada or two or more provinces. Social security.
- Parliament – broadcasting and air navigation for wartime mostly, establishing courts, and unemployment insurance
- Parliament can amend constitution in relation to exec gov of Canada and senate and house of commons, but cant touch office of the queen or governor general

Federalism and Judicial Review – Bradley W. Miller

- Judiciary tasked with resolving disputes over whether any law enacted by fed or prov gov has exceeded their respective jurisdictions.
- S. 52 (1) any law inconsistent w constitution is of no force or effect
- Judiciary must give concrete meaning to general phrases like “property and civil rights in the province” Problems of interpretation are persistent in federalism review.
- Judge cant rely on logic and technical lawyering skills such as textual analysis and application of precedent. Should decide what sort of powers provinces should have, and what sorts of powers federal gov should have.

- When reviewing legislation judges always have presumption of constitutionality
- Morgentaler SCC followed a 2 step test in assessing if statute regulating abortion was outside the jurisdiction of Nova Scotia legislature:
 - Characterize subject matter of legislation – “pitch and substance”
 - Interpret the power distributing sections of const to determine if fits in federal or provincial

R. v. Morgentaler [1993] SCC

Facts:

- Nova Scotia enacts legislation to criminalize abortions outside of designated hospitals.
- Nova Scotia enacted this legislation, prohibiting the performance of designated medical services except for in a hospital; denied those violating the Act reimbursement under the Health Services and Insurance Act and made contravention of the Act a summary conviction offence.
- Appellant argues that regulation is valid provincial legislation enacted pursuant to provinces legislative authority over hospitals, health, and practice of medicine

Issue(s): Is this legislation ultra vires the province of Nova Scotia to enact?

Ratio: Federalism/Pith & Substance test:

1. What’s the matter or the mischief that the legislation is intended to respond to (pith and substance)?
2. What is the purpose and effect of the legislation?
3. What is the scope of the applicable heads of power (ss. 91 and 92 of the Constitution Act 1867)?

Analysis:

Federalism/Pith and Substance test:

1. What’s the matter or the mischief that the legislation is intended to respond to (pith and substance)?
 - Look to the statute, social context, Hansard, etc.
 - Hansard: The official report of the proceedings and debates of a legislature in the Commonwealth of Nations, especially of the British or Canadian parliament.
 - Courts apply consideration of policy with legal skill
 - Process of classification is an interlocking one, where BNA and challenged legislation react to one another and fix each others meanings
 - Laws matter is its leading feature of true character – approach must be technical and flexible not formalistic
2. What is the purpose and effect of the legislation?
 - Purpose: why they passed the legislation in the first place; Not about the wisdom of the method of addressing the problem (not up to the Court); Look at:
 - Preamble, legal (intention w/i 4 corners of leg; how the leg as a whole affects the rights and liabilities of those subject to its terms. It is determined from the terms itself) and practical effect (actual economic and social effects / purposes enacted to achieve
 - Use of extrinsic materials: court entitled to refer to extrinsic material of various kinds provided its relevant and not unreliable. Includes legislative history (which has been gradually relaxed bc it cant present intent of legislature) but if court remains mindful of limited reliability it should be admitted as relevant to both the background and purpose of legislation.
3. What is the scope of the applicable heads of power?
 - The Criminal Law: Must look at s.91 and s.92 of the Constitutional Act 1867.
 - Sc 91 gives federal gov exclusive power over criminal law – legislature has in mind to suppress evil or safeguard interest threatened
 - Provincial Health Jurisdiction: no dispute that they have jurisdiction on health
 - Regulation of abortion: subject of criminal law. Used to be prohibited, but the morgentaler decisions focus attention on purpose or concern of abortion legislation to determine if it is truly criminal law.

Colourability: where a statute is in appearance, but not in substance, what it claims to be. (When a level of the government passes legislation saying that they doing so for one reason, when it is really for another)

- Case at bar: Is this an example of a colourable attempt to make an invalid law? NO, this was not a colourable attempt.

1. Legal effect: Four corners of legislation: legislation has effect of preventing privatization by prohibiting the private... if truly for that purpose then okay... but its not...
2. Beyond the four corners:
 - a. Duplication of criminal code provisions: language is virtually indistinguishable from that found in the criminal code. Absence of operative federal legislation doesn't enlarge political jurisdiction though, simply means that if provincial legislation found to be intra vires, no problem of paramountcy arises.
 - b. Background and surrounding circumstances:
 - i. Course of events: catalyst for gov action was rumour that he would start a clinic
 - ii. Hansard: abortion was central concern
 - iii. Searching for provincial objectives: avoid duplication and reduce public costs by preventing privatization:
 1. No evidence that there is concern over quality assurance
 2. Government didn't express concerns about privatisation
 3. No evidence of any prior study or consultation regarding cost effectiveness or quality of medical services delivered in private clinics
 4. Cost effectiveness is divorced from reality
 5. Severe penalties are not fair and inherently wrong

Conclusion and Holding: Yes, the provincial legislation is ultra vires. Subject part of criminal law, and the legislation is suspect on its face. Aimed at suppressing perceived public harm or evil of abortion clinics.

Canadian Charter of Rights and Freedoms

Introduction to the Charter:

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

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

Affirmative action programs

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

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province

where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. (94)

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament

including all matters relating to the Yukon Territory and Northwest Territories; and

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

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

Grant Huscroft, The Charter – Application and Scope:

- What is the Charter? First 34 provisions of Con Act of 1982 set out the Charter
- Including
 - Fundamental freedoms
 - Democratic rights
 - Mobility rights
 - Legal rights
 - Equality rights
 - Official languages of Canada
 - Minority language educational rights
- Sc. 1. Dual purpose. Makes clear that rights are guarantees while making clear that they are subject to reasonable limits as can be justified in a free and democratic society.
- Sc. 33. Notwithstanding clause – can legislate regardless of certain rights for 5 years
 - Main use in Quebec
- Tough to define limits on some rights, than it is on others
- Who must comply with Charter?
 - Designed to control actions of state b/c rights are duties owed by the state
 - Sc. 32. Parliament and gov of Canada, and Parliaments of provinces. Executive and legislative gov branches. Police, agencies, boards, commissions, and tribunals among many.
 - Sometimes difficult to determine if someone bound by it, but courts apply a control test
 - E.g. ON Community colleges bound by Charter but unis are not
 - Hospitals not covered, but some services are
 - Not everything created by legislation is covered – companies are not state actors, but some things done by private cos are considered governmental to keep gov from hiring private actors to do dirty work
 - Common law is not subject to the charter per se
- Who may benefit from Charter rights?
 - Some rights apply to everyone, some only to certain people... ex voting only applies to citizens
 - When apply to everyone, LITERALLY EVERYONE can exercise them – whether in Canada or not, no matter what age they are

- Corporation may be able to exercise rights. E.g. freedom of expression but not freedom of religion, or be subject to cruel and unusual punishment.

Interpreting the Charter

Grant Huscroft, Interpreting Charter Rights:

Written in "majestic generalities: including concepts with which no one would disagree, yet agreement to these concepts masks considerable disagreement as to what they mean in practice and what they require. First courts to interpret began with a blank slate

- Problem of vagueness: not bad. Words can only be understood in context of specific circumstances, in which judgments may be made as to what is reasonable, and what is dangerous
 - Legal standards are necessarily vague and are unlike rules
 - Rule prohibits/requires something specifically
 - Vagueness can be distinguished from ambiguity
 - Vagueness: unsure of scope/breadth and what is included. Rights are underdeterminant.

What does it mean to say that a concept, term, or phrase is vague? Let's start with some examples and then try for an elucidation of the concept. "Tall" is a good example of a vague concept. Some humans are definitely not tall--Danny DeVito, for example. Others definitely are tall--Shaquille O'Neal, for one. But the term "tall" is vague. 5'11 is almost definitely tall for a woman in the United States, but might be a borderline case for men. "Tall" is not the sort of quality for which there are definite criteria that sort the world into "tall" things and "not tall" things. In other words, "tall" is vague. There are lots of terms that are like tall: short, strong, weak, beautiful, ugly, heavy, light, warm, and cool--all of these are terms that seem to have borderline cases. And that is one way that we might define vagueness. A term is vague, we might say, if and only if it has borderline cases. A term is not vague just in case it has no borderline cases. As you might guess, the fact of vagueness creates a variety of issues in the philosophy of language. Is vagueness built into the fabric of the universe? Or is vagueness merely a feature of the imprecision of human language? Is vagueness a property of things? Or is it a property of our knowledge of things? We won't worry about these deep questions. For the purposes of this rough and ready introduction, it is sufficient simply to see that there are such problems and that a philosophical theory of vagueness should propose to answer to them or show that they aren't true problems at all.

- Ambiguity: When something has two different meanings.

What about "ambiguity"? A concept, term, or phrase is ambiguous if it has more than one meaning. Take "cool" for example. One meaning of "cool" has to do with temperature, and in this sense, "cool" contrasts with "warm," "cold," and "hot." Another meaning of "cool" has to do with fashion and social attractiveness. And there are other senses of cool as well, as in, he kept his cool in a very pressured situation. In a particular context, the meaning of an ambiguous term may be clear. With just a bit more context, the sentence "He's one cool dude" is likely to refer to social attractiveness and not temperature. But in some contexts, the ambiguity may be difficult to resolve: "The mojito is a cool drink" could refer either to the fact that mojitos are served chilled or to the fact that mojitos are fashionable and popular among some social groups. And this last example, "cool" can be used to illustrate the fact that the same term can be both vague and ambiguous in the same context. If I say, "Bring me a cool drink!", my utterance may be both ambiguous--do I mean fashionable or coldish?--and vague--how far below room temperature is "cool" or are mojitos still "cool" or are they "out of style"?

- Interpretation of Vague or Ambiguous Texts
 - Many legal texts are vague. In fact, most law students become very familiar with a variety of vague terms early in their law school careers. Take "reasonable"--was the tort defendant's conduct "reasonable" under the circumstances? There will be clear cases of unreasonable conduct: driving 150 mph in a residential area. But there will also be borderline cases. Was it reasonable to drive at 55 mph in a light fog? Some legal language general, abstract, and vague. For example, the phrase "equal protection" in the 14th amendment of the United States Constitution might refer to a very general and abstract idea of equality. Given this generality and abstraction, it might be that the "borderline" cases seem to make up the whole of equal protection doctrine. What would count as a clear example of "equal" or of "unequal"? In a common law system, general and abstract language may be translated into relatively more particular and concrete rules through case-by-case adjudication. Vagueness is ubiquitous in the law. Ambiguity is a bit less common, because many potentially ambiguous terms or phrases are disambiguated by context. "Seizure" can refer to a physical taking or it can refer to a medical symptom, but in the Fourth Amendment of the United States Constitution, it is clear that the correct meaning is the former rather than the latter.
- Relationship to the Interpretation-Construction Distinction
 - The distinction between vagueness and ambiguity is related to the interpretation-construction distinction--discussed in a separate entry in the Legal Theory Lexicon. Roughly, the distinction is that interpretation of a text aims at recovering its linguistic meaning or semantic content. Construction involves the "translation" of the semantic content into legal content: we construe a legal text we formulating legal rules that enable application of the text to particular cases.

- Interpretation and Ambiguity--In many cases, problems of interpretation involve ambiguity: a legal text uses a word with more than one meaning and the interpreter looks to context to resolve the ambiguity.
 - Construction and Vagueness--But when a text is vague, it is usually the case that interpretation cannot resolve the vagueness. Why not? Because interpretation only can take us as far as the meaning of the text: if the linguistic meaning is vague, then something else will be required if we must apply the text to a particular case. Construction allows legal actors (e.g., judges) to devise a supplementary rule or procedure that resolves the vagueness. Thus, a legal text may supply a vague standard ("freedom of speech"), but construction may yield a more particular rule ("no prior restraints"). (There is a Lexicon entry on rules, standards, and principles.)
- Conclusion: "Vagueness" and "ambiguity" are important concepts in the theory of legal interpretation generally, and as a consequence, they are important to constitutional theory and the theory of statutory interpretation. I hope this Lexicon entry has clarified the distinction between these two concepts.
- Original Intentions: Give vague terminology the meaning that those who drafted the charter intended the terminology to have. [Original intentions originalism]. Some issues:
 - Impossible to know their intentions
 - No single intention shared by all those who were involved
 - Even if intentions clear illegitimate to let dead ancestors bind us to meanings
- Original Meaning: Having original meaning – the one they would have had when adopted. Overcomes objections of original intentions, but some terms have no discoverable original meaning.
 - Construction required in addition to interpretation – giving effect to terms – once meaning determined you can develop subrules.
 - Meaning that original meaning can be adapted to suit changing circumstances.
 - Interpretation is concerned with determining meanings of terms
- Living Constitutionalism: opposite of originalism – meaning may change over time
 - Originalism rejected by SCC in early days of charter – C.J. Dickson decided so in *Hunter v. Southam Inc* [1984]
 - *The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.*
 - Facts:
 - Any law inconsistent with the provisions of the Constitution is of no force or effect.
 - Under authority of the Act H entered and examined documents and other things at the business premises of Southam. They wanted to search every file they had in the building, except files in the new room. They declined to give the name of any person whose complaint had initiated the inquiry, or to say which section of the Act the inquiry had begun. Also declined to give more specific information about the inquiry.
 - Issue(s): Is there constitutional validity of a statute-authorizing search of seizure? What does the word “unreasonable” in s. 8 of the Act mean? Do s. 10(3) and (1) violate s. 8 of the Charter because they violate unreasonable search and seizure?
 - Ratio: With no warrant the search is prima facie unreasonable and onus is on police to prove that it was reasonable.
 - A person authorizing a warrant must be capable of acting judicially and must be an impartial authority, presented with sworn evidence, and must have reasonable and probable grounds that there is relevant evidence at site of search.
 - Analysis: Points to take away from this case
 - A search without a warrant is unreasonable - Onus is on state to prove a warrant search is reasonable
 - Must be issued before the search

- Must be granted by someone capable of acting judicially, not just administratively or on investigation
 - Person issuing the warrant must be presented with sworn evidence
 - Person issuing warrant must have reasonable and probable grounds that relevant evidence is present at the site of the search.
 - Holding: Appeal dismissed with costs to the respondent – they are not constitutionally valid
 - Charter is a living tree: Don't cut provisions of act down to narrow and technical construction, but give it a large and liberal interpretation so that Canada to a great extent, but within certain limits, can command own house. – Lord Sankey
 - Meaning may expand and grow over time [But how much is legitimate and okay?]
- Purposive interpretation: defining rights as having regard to purpose they are supposed to serve – Not very broad. Controversial bc charter rights barely have a single purpose.
- What happens when the charter is silent?
 - Statement of some but not ALL rights
 - Other rights protected by legislation, but can be subsumed within protection of broadly worded right inside Charter
 - No right to property – originalism inspired interpretation
- Comparative law influences? Decisions of other countries may be influential
 - E.g. US SC back in the day
- International Influences on Charter interpretation?
 - International Human rights treaties or conventions some of which pre date charter E.G. Convention on elimination of all forms of discrimination.
 - Charter should be presumed to include at least as much protection as these international instruments provide
- Summary? Despite commitment to living constitutional interpretations, court must regard the history of the charter, intentions of drafters, original meanings, and international and comparative law.
- Relationship of rights and limits on rights: Important question... can it be justified under section 1?

Reasonable Limits and the Notwithstanding Clause

R v. Oakes[1986] SCR SUMMARY OF FACTS:

- Facts: Oakes charged with unlawful possession of narcotic for purpose of trafficking. Oakes claims s.8 of Narcotics Act violates presumption of innocence contained in s.11(d) of Charter.
- Issue(s): Is s.8 of the Narcotic Control Act inconsistent with s.11(d) of the Canadian Charter of Rights and Freedoms and thus of no force and effect? If yes, is this violation of the Charter justified under s.1?
- Ratio:
 - OAKES TEST
 1. Prescribed by law?
 2. Justifiable limit? – is it justified in a free and democratic society
 - a. Significant Objective (Pressing and substantial objective):
 - i. Object must be of sufficient importance to warrant overriding of a constitutionally protected right or freedom.
 - b. Proportionality Analysis – means proportionate to objective
 - i. Rational connection test: connected to the end the government seeks to achieve
 - ii. Minimal infringement or least drastic means test: minimally impairs the rights in the Charter
 - iii. No disproportionate effect/deleterious and salutary effect analysis: The law does not have a disproportionately severe effect on those whose rights it infringes (reworded in Degenais – deleterious and salutary effects)
 1. Must be proportionality between effects of measures and objective identified as sufficient importance
- Holding: S.8 of the Narcotic Control Act violates the Canadian Charter of Rights and Freedoms, and is therefore of no force or effect. S.8 imposes a limit of s.11(d) of the Charter which is not reasonable and not demonstrably justifiable.
 - DICKSON:
 - Curbing drug trafficking is substantial and pressing

- Sufficient importance to warrant overriding a constitutionally protected right therefore first criterion of an inquiry is satisfied
- Sc 8 doesn't survive rational connection test because if you can jail people for small amounts that is over inclusive and could lead to unfair and irrational cases therefore fails
- Comments: Dagenais v. C.B.C 1994: Appropriate or "proportionate" balance between deleterious and salutary effects
- IN TEXT:
 - Narcotic Act: those in possession would be presumed to be in possession for purpose of trafficking unless they could prove otherwise and would be convicted
 - DICKSON: Have to consider if the limit is reasonable and demonstrably justified in a free and democratic society. The limit is prescribed by law and not at argument, but rather its constitutionality is.
 - Two functions of Sc 1:
 - Constitutionally guarantees the rights and freedoms set out in provisions which follow
 - Allows rights to be limited by state action
 - Means rights are not absolute
 - Establishes standard of justification for limits on rights
 - Court must be guided by values and principles of charter
 - Rights and freedoms guaranteed in charter are not absolute, especially if they obstruct the realization of collective goals of fundamental importance
 - The onus of proving that a limit is reasonable rests on the party seeking to uphold the limitation – Hunter v. Southam
 - To establish that a limit is justified must satisfy criteria:
 - Must be of sufficient importance to warrant overriding a constitutionally protected right or freedom – R v Big M
 - Party invoking Sc1 must show that means are reasonable and justified – form of proportionality test
 1. Measures must be designed to achieve objective in question – not be arbitrary, unfair, or based on irrational considerations
 2. Even if rationally connected to objective in first sense, should impair as little as possible
 3. Must be proportionality btwn effects of measures which are responsible for limiting the right or freedom – more severe the measure the more important the objective needs to be

Reasonable Limits on Rights:

Sc 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Requirements of Section 1:

Limits must be:

- Prescribed by law
 - Legal authorization is required in order to limit rights
 - Authorization may come from legislation, regulation, common law, necessary implication arising out of law, or binding policy
 - Law must be sufficiently specific
 - must not be too vague
 - must be ascertainable/intelligible
 -
- Reasonable
- Demonstrably justified in a free and democratic society

Oakes Test

1. Define right and determine if its been infringed by law
2. If infringed, determine if its justified

- a. Is limit established in pursuit of an objective that is sufficiently important – “Pressing and substantial” - Limits on rights must be established for a proper purpose
 - i. Problem of general and specific purposes
 - ii. Court usually accepts importance of purpose it identifies
- b. If so, is limit rationally connected to objective? - Must be rationally connected to achieving that purpose
 - i. Steps taken must rationally connected to achieving its purpose; must contribute to realizing it even if they do not guarantee it will be achieved
 - ii. Cannot be arbitrary, unfair, or based on irrational considerations
 - iii. Not difficult to meet
- c. If so, does limit impair the right as little as reasonably possible in circumstances? – Must be minimally impairing
 - i. Historically the lynchpin of the Oakes test
 - ii. Oakes: Court holds that legislation must impair rights as little as possible
 - iii. But it is always possible to conceive of lesser limitation
 - iv. Since Oakes: legislation need only impair rights as little as reasonably possible; allows deference
- d. Finally, is loss to the right proportional having regard to the gain in terms the objective being pursued? - Loss to the right must be proportionate to the gain resulting from the law that limits the right
 - i. Invites comparison of what is being gained in terms of public policy with what is being lost in terms of the right
 - ii. Most difficult part of test to apply
 - iii. Problem of incommensurability
 - iv. Increasingly likely to be important

Failure at any step = bye bye limit. Most important step = #3 and is applied deferentially which is to say that the state may be allowed to pick from a variety of approaches to addressing a problem and need not choose one that limits rights as little as possible

Most difficult step is 4th = which is comparing things that are tough to compare =described as incommensurability – not a science and therefore done.

- Onus on party seeking to limit rights, almost always the state
- Problem: social science evidence is contestable
- Court need only be satisfied on the Civil standard of proof, not criminal
- Balance of probabilities

The Notwithstanding Clause:

Section 33.

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.

...

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Provinces were distrusting of courts and this was the only way theyd agree to charter of rights and freedoms

- How does the clause work: precludes courts from declaring that legislation is of no force or effect on basis that legislation is in breach of the Charter
- What rights are subject to the notwithstanding clause: sc 2 fundamental freedoms, and sc 7 -15 of the charter. Doesn't apply to voting right, mobility rights, official language rights, minority education rights, judicial enforcement or general heading
- Five-Year term: 5 year term... may be renewed
- Prospective operation: Ford v Quebec applies only prospectively, cannot be invoked in order to limit or deny rights retrospectively – after they have been exercised
 - May be invoked before legislation is challenged in court – effect of immunizing legislation against a deceleration of unconstitutionality

- Following a judicial decision that finds legislation to be in violation of the charter
- How significant is the clause: offers only a short term solution that comes at a high political price – does not legitimate disagreement with courts
 - Politically difficult to use given popularity of Charter
 - Never used at the federal level
 - Never used in Ontario
 - Used mainly in Quebec
- Impact of the Notwithstanding clause:
 - Argued that it redresses non-democratic nature of judicial review
 - May influence the way in which courts interpret the Charter

Enforcing the Charter Rights and Remedies:

Charter Litigation:

State actors expected to comply with law, but there is room for disagreement and up to courts to solve.

- How do Charter cases arise?
 - Persons charged with violating the law are free to contest the constitutionality of the law
 - But Charter litigation may also brought by those opposed to legislation even if it does not affect them
 - Groups seeking social reform: Political interest groups, LEAF, Civil liberties groups, and Gay rights groups
- Parties to a charters case:
 - Party” refers to the two sides of a case
 - Party bringing case (the plaintiff or applicant)
 - Party replying to a charter case (the defendant or respondent) – the Government whose legislations or actions are impugned. Attorney Gen from relevant province that passed the law.
 - Not easy to bring a case and cost is great
- Interveners to a charter case: Interveners can participate in litigation without being a party esp bc cases affect many 3rd parties
 - Expected to advance different arguments from parties in order for issues raised by case to be fully aired
 - Less expensive
 - Intervener does not control litigation strategy
 - Intervener may be make written and oral submissions to the Court at Court’s discretion
- Standing: Demonstrate that they were affected by law in some direct way
 - Traditionally “standing” was required to bring suit
 - Supreme Court relaxes standing requirements to allow more Charter challenges:
 - Does case raise a justiciable issue? Serious issue?
 - Does applicant have a real stake in proceedings or is engaged in the issues the case raises
 - Is proposed litigation reasonable and effective means of bringing case to court in the circumstances
- Costs & Time:
 - Parties controls of litigation strategy
 - Time consuming (several years +2/3 for SCC)
 - Expensive
 - Legal costs and potential requirement to pay costs of winning party
 - If claim succeeds the state pays costs. Losing party may be responsible to indemnify winning party on partial basis but gov doesn’t usually seek to recover is defending well.
 - Court may order state to pay costs in advance to allow litigation to be brought if party needs money, case meritorious, and in public interest to allow case to be heard

Charter Remedies:

Invalidating Legislation:

- Distinguish remedies for legislation and actions that violate Charter
- Legislation may be invalidated in whole or part – of no force or effect to the extent of its inconsistency – Strike down
- Legislation may be reinterpreted/revised
- Legislation may be suspended for 6-18 months to allow legislature to address the problem

- Section 24 remedies for state actions that violate the Charter

Interpretative Remedies: May be able to fix a problematic statute by means of interpretation

- Flow from section 52 of Constitution Act 1982
- Court's remedial options include:
 - Declaration of partial invalidity and severance: If whole statute is not inconsistent, sever the offending provision or provisions
 - Court eliminates the words that give rise to the Charter inconsistency, leaving the rest of the statute intact
 - Appropriate where severance is consistent with purpose of legislation, and has minimal fiscal consequences
 - Reading-down – overboard – when applies to a broader range of things than it should. Read down to comply with charter
 - Court may choose an interpretation of legislation that makes it consistent with the Charter
 - May be appropriate if legislation is overinclusive and can be interpreted narrowly
 - Avoids finding of Charter violation
 - Reading-in – under inclusive – when does not apply to all it should. Read in to expand applications rendering it compliant. Euphemism for amending the law and courts should be careful of this
 - May be appropriate where legislation is underinclusive; ie, omits something that ought to be included in order to be consistent with Charter
 - Eg, benefit provisions that should apply to a greater class of persons given the equality right
 - Court “reads-in” words that extend the application of the legislation to make it consistent with the Charter
 - Criteria: Reading in is a radical result because the Court is in effect re-writing the legislation. Justified only in the clearest of cases if:
 - The legislative objective is obvious;
 - Would not be an unacceptable intrusion into legislature's role; and
 - Would not intrude on substantial budgetary decisions
 - Suspension of invalidity: If legislation violates Charter court may delay the effective date of its invalidity for 6-18 months
 - Avoids chaos and preserves rule of law
 - Ironically, allows unconstitutional law to stand in the meantime
 - Allows legislature a chance to fix the law and make the policy choices required
- Raise questions about the appropriate role of the courts

Section 24 (1) concerned with remedies for individuals whose rights are infringed. Court may award whatever remedy is appropriate and just.

Section 24 (1) Remedies: Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

- Declarations: Statement of what law requires. Clarifying requirements of Charter – state actor is expected to bring its actions into compliance with the declaration
 - States what the relevant constitutional obligation is and whether conduct is consistent with it
 - Gives guidance for authorities as to future permissible actions
- Injunctions: judicial order precluding something from happening in the future or requiring that something occurs. Can be problematic bc it requires the court to oversee future conduct of the parties and courts are usually reluctant to do so. Prefer to make orders that resolve disputes for once and for all.
 - Requires that a party do or not do something
 - Not favoured as a Charter remedy because it may require supervision
 - Relatively few examples
- Damages: Monetary compensation for breach of rights. Standard remedy for civil liability, but less common in charter breaches. Difficult to determine financial consequences.
 - Leading case is Vancouver (City) v. Ward, 2010
 - Police informed someone intends to throw pie at Prime Minister at ceremony

- Ward is lawyer at ceremony PM attending; chased and handcuffed as suspect
- Strip searched down to underwear; imprisoned 4.5 hours; car impounded
- Charter violated: Unreasonable search and seizure (s. 8). What damages?
 - \$5,000 damages upheld; conduct serious but not deliberate Charter violation or malicious
 - No damages for car impounding; no actual loss suffered; violation not serious; declaration sufficient
- Compensation, vindication, deterrence purposes
- Damages not appropriate if other considerations render them inappropriate or unjust, eg, alternative remedies, concern for effective governance, etc
- Issues to address:
 - State v individual liability
 - Relevance of intention
 - Whether or not punitive damages are available etc.

24 (2) concerned solely with the exclusion of evidence in criminal law proceedings if its bringing the "administration of justice into disrepute"

Section 24(2) Remedies: Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Schachter v. Canada [1992] SCC: Case where man had a newborn and his wife could take leave but he couldn't, but then an act for adoptive parents allowed both parents to share leave.

LAMER CJ: Three Questions must be answered:

1. What is the extent of the inconsistency? Defined:
 - a. Broadly where legislation fails first branch of Oakes test – purpose not sufficiently pressing/substantial
 - b. Narrowly where fails first element of proportionality test as its used as a means to achieve purpose not rationally connected with it
 - c. Flexibility where legislation fails second or third element of proportionality
2. Can the inconsistency be dealt with alone by severance or reading in? Warranted only in cases where:
 - a. Legislative objective is obvious – where reading in/severance would create a lesser interference w/ objective than striking down
 - b. Means used by legislator to further that objective is not so unequivocal that reading would be an intrusion on leg domain
 - c. Not involve an intrusion into legislative budgetary decisions
3. Should the declaration of invalidity be temporarily suspended? Warranted even if striking down is most appropriate as long as:
 - a. Striking down would pose a danger to the public
 - b. Striking down would threaten the rule of law
 - c. Legislation deemed uncon because of under inclusiveness and striking down would mean a deprivation of benefits

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Freedom of Expression:

Irwin Toy Ltd. v. Quebec (Attorney General):

- Facts: In 1980, Irwin Toy Limited, a toy manufacturer, applied to the Superior Court of Quebec for a declaration that sections 248 and 249 of Quebec's Consumer Protection Act, which prohibited advertising directed at children under thirteen years of age, violated the Quebec Charter of Human Rights and Freedoms. The court dismissed the application. On appeal, Irwin Toy argued that sections 248 and 249 also violated their s. 2(b) rights to freedom of expression under the Canadian Charter of Rights and Freedoms, which had come into force after the case went to trial. The Court of Appeal found that the sections infringed s. 2(b) of the Charter and could not be justified under s. 1. The case was appealed to the Supreme Court of Canada.
 - The Justices considered the rationale of the freedom of expression provision and enumerated three grounds:

- seeking and attaining the truth is an inherently good activity;
 - participation in social and political decision-making is to be fostered and encouraged; and
 - the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.
 - The Justices then considered the scope of expression. They defined it broadly as any activity that "attempts to convey meaning". However, it excluded nonsensical activities that are "purely physical and [do] not convey or attempt to convey meaning" as well as activities that are of a violent form.
 - The majority re-affirmed the decision of *Ford v. Quebec* (1988) by finding that freedom of expression included advertising. Accordingly, they found that the Quebec law violated section 2(b), but then went on to justify it using the Oakes test.
- Dickson CJ, Wilson, and Lamer JJ:
 - Does advertising aimed at children fall within the scope of freedom of expression?
 - We cannot exclude human activity from the scope of guaranteed free expression on basis of the content or meaning being conveyed. E.g. parking somewhere to express meaning.
 - Content of expression can be conveyed through an infinite variety of forms
 - The Second Step: Was the Purpose or Effect of the Gov Action to Restrict Freedom of Expression: If legislation fails purpose test no need to consider further its effects
 - Purpose: Government limits expression if it intended to
 - Restrict content of expression by singling out particular meanings that are not to be conveyed
 - Restrict a form of expression in order to control access by others to the meaning
 - NOT limits if it aims to control physical consequences. E.g. Littering – throwing pamphlets on the ground
 - Effects: Court must decide if effect of gov action was to restrict plaintiff's free expression. Burden is on plaintiff to demonstrate the effect.
 - Sections 248-249: no question that the purpose of the Act was to restrict a particular range of content and certain forms of expression in name of protecting children.

RJR-MacDonald Inc. v. Canada (A.G.) [1995] [SCC]:

- Facts: Federal government banned tobacco advertising and required health warning labels for cigarette packages. Companies thought that it infringed freedom of expression. Attorney Gen said that it did infringe freedom of expression... but if it justified?
- Issue(s):
 - Was the federal legislation ultra vires?
 - Did the federal legislation violate section 2(b) of the Charter of Rights and Freedoms (freedom of expression); and if so, was the legislation saved by section 1 of the Charter?
- Ratio:
 - Regulating public health is a valid criminal law purpose
 - Criminal law power is plenary (broad)
 - Federal legislation banning tobacco advertising and requiring health labels infringes on the freedom of expression -- s.2(b) of the Charter -- and cannot be saved by s.1 of the Charter.
- Analysis:
 - McLachlin (Majority):
 - There are limits to judiciary's deference to the legislature
 - This case is not about the socio-economic or health context; it is about limits to commercial expression.
 - Objective of the Limit of free expression: not to overstate objective. Limited objective of reducing tobacco associated health risks is less significant than broad obj of protecting Canadians generally from risks associated with tobacco use – constitutes obj of sufficient importance to justify overriding the right of freedom of expression.
 - Proportionality:
 - Rational Connection: Show a causal connection btwn the infringement and the benefit. This connection isn't scientifically measurable and therefore has to be

- sought on basis of reason or logic, without insisting on direct proof of a relationship btwn the infringing measure and the legislative objective
- Minimal Impairment: If law falls within a range of reasonable alternative, courts will not find it overboard merely because they can conceive of an alternative... but if gov fails to explain why a significantly less intrusive and equally effective measure was chosen the law may fail.
 - This law extends to ads that arguably benefit the consumer by providing brand info.
 - No evidence to show that partial ban would be less effective than total ban → requirement to save section under s.1
- Proportionality btwn effects of legislation and objective: No need to look at this.
 - Decision: Ss. 4,8, and 9 constitute unjustified infringements on free expression.
 - La Forest (Dissent): Negative effects of tobacco (detrimental health effects). S.1 is not meant to be a formalistic test (instead, it should allow for a socio-economic analysis of tobacco products)
- Holding: Appeals allowed.
- Comments: Revisited in JTI-Macdonald (2007 SCC).
 - Parliament passes new legislation allowing information and brand preference ads but forbidding “lifestyle” ads that might appeal to young people.
 - Brought a challenge and unsuccessful at trial, partly successful at appeal, and completely unsuccessful at SCC

Saskatchewan (HR Commission) v. Whatcott: [2013] [SCC]

- Facts: Whatcott distributed flyers against homosexuality
- 14. – (1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:
 - (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
 - (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.
- (2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.
- SCC opinion:
 - In this case its essential for a commitment to equality and respect for group identity and inherent dignity owed to all humans
 - Objective is pressing and substantial – hate speech rises beyond causing distress to individual group members, it can have a societal impact ranging from discrimination, ostracism, segregation, deportation, violence, and in the extreme, to genocide.
 - 14 b is proportionate to its objective – must seek to marginalize group by affecting social status and acceptance in the eyes of the majority
 - 14 b prohibits public communication of hate speech; does not restrict hateful expression in private communications between individuals... not rationally connected to legislative purpose of addressing systematic discrimination of protected groups and unjustifiably infringe freedom of expression
 - Hate speech is shuts down view points, it is not political expression which contributed to our democracy by encouraging the exchange of opposing views
 - Difficulty of establishing causality and seriousness of the harm to vulnerable groups justifies the imposition of preventative measures that don’t require proof of actual harm
 - 14.1.b. is an infringement of s.2.a. Where 1, claimant seriously holds belief/practice that has a nexus with religion; and 2, the provision at issue interfered with the claimant’s ability to act in accordance with his/her religious beliefs – the words in b “ridicules, belittles, or otherwise affronts the dignity of” are not rationally connected to the legislative purpose of addressing systematic discrimination of protected groups, nor tailors to minimally impair freedom of religion

Equality:

Equality before and under the law and equal protection and benefit of law

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

Affirmative action programs

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

One of the most difficult rights for the SCC, always revisit it.

Andrews v. Law Society of B.C.

- Section 15(1) is not a general guarantee of equality; concerned with **legal** equality
- Mere distinction in treatment doesn't constitute inequality
- Court rejects **formal** equality in favour of **substantive** equality

Discrimination: Defined by McIntyre J. in Andrews

Discrimination is "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

Prohibited Grounds of Discrimination:

- Section 15 prevents discrimination on enumerated grounds and grounds court may recognize as analogous
- Analogous grounds are personal characteristics immutable or changeable only at unacceptable cost to personal identity
 - Citizenship
 - Marital status
 - Sexual orientation
 - Rejected: place of residence; occupation, substance use

R. v. Kapp [2008] [SCC]:

- Law provides preferred fishing rights for Aboriginals in the Fraser river.
- FACTS: Non-Aboriginals fished during this period as a protest and were charged with violating fishing law, and then asserted that they have a *Charter* equality right and that the law discriminated against their right.
- ISSUES: How are affirmative action programs to be understood in the context of a s.15 analysis?
- Solution:
 - The two sections work together to promote equality.
 - 15(1) prevents gov from making distinctions based on enumerated/ analogous grounds that perpetuates disadvantage/prejudice or imposes disadvantage on basis of stereotype
 - 15(2) enabling govts to pro-actively combat discrimination
 - different treatment in service of equity for disadvantages is expression of equality, not exception to it
 - 15(2) allows state to distinguish on enumerated/analogous grounds to ameliorate disadvantage
 - If program is protected under 15(2), it cannot be found to violate equality right under 15(1) and claimant fails
 - If fails under 15 (2) subject to full scrutiny of 15(1)
 - This avoids the symbolic problem of finding a discriminator program before saving it as ameliorative – while giving independent force to a provision that has been written as distinct and separate from 15(1)
 - Gov must demonstrate that:
 - The program has an ameliorative or remedial purpose

- Program targets a disadvantaged group identified by the enumerated or analogous grounds
- Court describes this as starting point, subject to further refinement in future

Whitler v. Canada (Attorney General):

- Facts: legislation gives civil servants a benefit, lump sum death benefit, which changes according to a formula once the prescribed age is passed. Claimants argue that reduction in benefit was discrimination... lost at trial and in BC court of appeal, and appealed to SCC.
- The Court (unanimous):
 - Court's current approach to 15(1)
 - 1. Does law create distinction based on enumerated or analogous ground?
 - 2. Does distinction create disadvantage by prejudice or stereotyping?
- Equality not about sameness or identical treatment. It is about freedom from discrimination.
- Claimants must demonstrate different treatment plus discriminatory impact
- Discriminatory impact through the lens of two concepts:
 - **Perpetuation of disadvantage** when law treats historically disadvantaged group in manner that exacerbates their situation
 - **Stereotype** is a failure of law to correspond to actual circumstances of claimant or group; usually results in perpetuation of disadvantage but need not be based on pre-existing disadvantage
- Analogous ground: personal characteristic that is immutable or changeable only at unacceptable cost to personal identity – sexual orientation, marital status, and citizenship.
- Show that law in purpose or effect perpetuated prejudice or disadvantage to members of a group on the basis of personal characteristics within s 15(1)
- Show that law is based on stereotype that doesn't correspond to actual circumstances/characteristics of the claimant or claimant group – sc 15 violated even without historical disadvantage in this case
- Analysis involves looking at circumstances of members of group and negative impact of law on them – contextual not formalistic, grounded in actual situation of the group and potential for law to worsen situation
- Purpose of Sc. 15. As remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society
- **Substantive equality** is the Court's concern
 - Looks behind similarities and differences to consider whether characteristics are relevant considerations; focuses on impact on group, taking into account all relevant context – social, political, economic and historical factors concerning the group
 - Don't formally compare claimant with another group; judge impact of law and prejudice/stereotype in particular contextual circumstances
- Sc 15 inquiry must focus on substantive equality and must consider all context
- Careful – comparator approach may substitute a formal "treat likes alike" analysis
- Proper approach to comparison:
 - Establish a distinction, by reason of a personal characteristic that falls w/in enumerated or analogous grounds
 - Unnecessary to pinpoint a specific group that corresponds to claimant group except for personal characteristics
 - Whether law works substantial inequality, by perpetuating disadvantage or prejudice or by stereotyping in a way that does not correspond to actual characteristics or circumstances – comparison may bolster contextual understanding of a claimants place
 - Contextual factors that are relevant will vary
 - "look not only at legislation but also to larger social, political, and legal contexts"
- Pension benefits program: purpose of the provision, court will take into account fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors
- DECISION: reduction in benefits did not violate s. 15(1) so unnecessary to consider application of sc.1.

Equality Examples:

- *Andrews*: *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 is the first Supreme Court of Canada case to deal with section 15 (equality rights) of the Canadian Charter of Rights and Freedoms. In the case the court outlined a test, sometimes called the *Andrews* test to determine if there has been a prima facie violation of equality rights.

- Andrews, a British subject and a permanent resident in Canada, met all the requirements for admission to the provincial bar with the exception that he was not a Canadian citizen. Andrews brought a motion to strike down the requirement for citizenship on the grounds it violated s. 15 of the Charter.
- At the Trial level, Supreme Court of British Columbia held in favour of the Law Society. On appeal to the British Columbia Court of Appeal the ruling was overturned.
- The issue put to the court was whether the requirement of Canadian citizenship for admission to the British Columbia bar is an infringement upon or denial of the equality rights guaranteed by s. 15(1) of the Charter. And if so, whether it is justified under s. 1.
- The court held that section 42 of Barristers and Solicitors Act violated s. 15 and it could not be saved under s. 1. The majority was written by Wilson J. with Dickson C.J. and L'Heureux-Dubé J. concurring.
- In dissent McIntyre J. and Lamer J. disagreed on the point of the s. 1 analysis, believing that it would be upheld on the basis of "reasonable limit". The opinion on the "test", however, was unanimous.
- The court first defined a general approach to the equality guarantee. The court stated that the section is not a general guarantee of equality, rather it is only concerned with equal application of the law. It was further stated that it should be recognized that not all differences in treatment will result in inequality and that identical treatment may result in inequality.
- As such, the suggestion to apply the same legal rules to groups or individuals who are "similarly situated" ("similarly situated test" where likes are treated alike and dislikes differently) was firmly rejected. The case of Bliss v. Canada, a pre-Charter SCC case where a pregnant woman was denied employment benefits, was considered as an example of the problems with such an approach.
- Instead the court concentrated on the prohibition on discrimination. . . discrimination may be described as a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified. (p. 280)
- The court states the discrimination must be based on an "enumerated or analogous grounds", and the individual seeking to strike down a law must demonstrate the existence of differential treatment based on either of the two grounds. From there the onus shifts to the Crown who must show the law justified under s. 1.
- *Weatherall*: a male plaintiff objected to the frisking and surveillance of male prisoners by female guards when female inmates were not subject to the same attention by male guards. In both cases, however, no violation was found – in the first because of a "biological fact" (4) and in the second because "differential treatment may be called for in certain cases to promote equality" (3). These rulings recognized differential need and gendered power dynamics.
- *A v Quebec*: The parents of several autistic children brought an action against the British Columbia government for failing to fund a form of treatment for autistic children. They argued that in not providing funding, the government had violated the equality rights of their children as guaranteed by s. 15 of the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada unanimously held that the denial of funding for such a treatment did not infringe the children's equality rights. The court ruled that the the Health Act only guarantees funding for core services, of which the particular autism treatment was not one.

Criminal Law

Introduction:

IN CLASS NOTES – CLASS 1

Crime: an act or omission considered to be a wrong against a society. Prosecuted by state. Involved moral wrong, and reserved for most serious harms in society. Sometimes you can accuse someone of a tort instead of a crime, but this is only person to person.

Terminology:

- Civil cases brought by individuals - Smith v. Jones both humans and corporations can do this
- Criminal cases brought in the name of the state - The Queen against Jones OR R. v. Jones
- Prosecution, not an action
- Prosecuted or charged, not sued
- Civil
 - Plaintiff (victim) and defendant
 - Balance of probabilities (51%)
- Criminal
 - Plaintiff = Crown or the prosecution
 - Defendant = the accused or defendant
 - Victim, complainant, usually the witness of the case
 - Beyond a reasonable doubt (Crown must prove)

Sources of Criminal Law:

- Federal vs. provincial (ss. 91 and 92, Constitution Act, 1867): fed has power to create the law.
- Common law crimes abolished (s. 9)
- All crimes statutory. Has to be enacted by the gov.
 - Controlled Drugs and Substances Act
 - Criminal Code
- Other legislation/acts looks like criminal law but isn't. You can't be accused of something until it is enacted. E.g. In UK when court said "Congratulations its now an offence and youre the first to have committed it" In Canada you can't have common law offences but you can have common law defences.

Scope/ Limitations:

1. Territorial: applying only within Canada. Cant be prosecuted as a citizen of Canada by way of the criminal code in Europe. Certain offences such as piracy, sexual offences involving children and the internet are an exception
2. Age: under 12 years cant be convicted. Youth Criminal Justice Act is 12-17 years with diff procedures and penalties. 19 and over are dealt with as adults.
3. Time: no limitation period for indictable (felonies), and 6 months for summary (misdemeanors). More offences are hybrid where if its summary and 6 months pass they can turn it into an indictable offence.

Analyzing a crime: A(ctus)R(eus)ME(ns Rea)D(efences)

- Actus Reus: Physical Elements of the offence. You don't need all three. Need at least one. Just need to remember that these are the elements.
 - Conduct: application of force in an assault
 - Circumstances: applied without consent
 - Consequences: non for assault, unless bodily harm
- Mens Rea is the mental element and most crimes consist of both
- AR must be willed, voluntary act, not just something like a muscular contraction
- ARMED is used for analyzing criminal cases
- All elements of AR must be proved to get a conviction
- Analyzing a crime is like baking a cake:
 - Go to statute to find crime – recipe for ingredients
 - Look at situation for facts – to see if you have all ingredients
 - Prosecute – make the cake

Extortion: 346. (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain **anything**, by threats, accusations, menaces or violence induces or attempts to induce any person ... to do **anything** or cause anything to be done.

- Bird: extorted a woman for sex. New way that extortion has been used...b/c her consent was valid. Crown has to prove all elements.
- If they don't prove them all then may be allowed or able to convict of a lesser charge
- If you're charged with something you're also technically charged with all lesser offences

Assault Offence: Assault

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly

- Force means any degree of force – a touch, a kiss, a hit
- If I pick someone up and throw them im the one who applied force
- Force/assault requires an action of someone
- E.g. Sleeping and you accidentally kick someone its not assault bc its not controlled by the conscious mind
- Acts that constitute actus reus need an acting conscious mind; directly the movements of the body.

Causation: Two step process.

1. Factual Cause: Some offences require the causing of certain consequences. X is cause of Y in fact – but for test (e.g. winning)
 - a. Prosecution has to show that you've caused the offence in question.
 - b. Winning: wanted credit but lies on form, charged and acquitted bc store doesn't rely on that to give people credit, therefore who cares. Failed the but for test.
2. Legal Cause: X is the cause of Y in law
 - a. Need not be sole cause
 - b. Significant contributing cause (E.g. Smithers, Nette). E.g. Hat, pin, and blade, but even though its not a significant cause it still is a cause
 - c. Thin skull rule (Smithers). E.g. kicked victim in stomach, victim had a condition causing them to choke on their puke... doesn't matter that victim had condition Smithers is still contributor.
 - d. No Novus Actus Interveniens (NAI) – No break in chain of causation. E.g. CN tower... the gunman is the NAI. Has to be apart from the situation, not flowing from the situation.

Causation problems: In each of the following has A caused death?

- Two step process
 - X is cause of Y in fact – *but for* test (e.g. winning)
 - X is the cause of Y in law
- A gives V a fatal dose of arsenic. As V lies dying, B shoots V in the head and instantly kills her.
- A pushed B off of the CN tower. C fires a gun that kills B. Therefore not pushing that lead to his death BUT you can say if A didn't push him he wouldn't have been there...
 - BUT A hates him because B cheated with his wife
 - Therefore, if B hadn't have had affair. A wouldn't hate B.
 - If A hadn't married the wife, he wouldn't be upset at B... etc etc
 - Problem with but for: doesn't have a limit... you can add a BUT to basically anything.
- A hits V on the head and leaves V's unconscious body: on the 401 where a truck runs over and kills V; OR, on the steps in front of the Law School where, after a terrorist bomb explodes, the building collapses on V and kills him.
- After checking the arena, A is about to begin his daily archery practice. Just as A unleashes his first arrow, V bursts from inside the stuffed target, yelling "Surprise!". V dies instantly from an arrow through the heart

IN CLASS NOTES – CLASS 2

Mens Rea: 2 components for most criminal offences. Actus reus and mens rea. Physical and mental. Reason for mental element: provides the moral component that justified punishment.

General Rules:

- Mens rea usually has to go to all elements of the actus reus
- May also have offences where there is an additional MR component beyond AR
- If no MR word (willfully, knowingly) in definition, generally read in
- AR and MR must coexist (overlap) at some point
- Crown has to prove beyond a reasonable doubt, usually does so indirectly by inference.

Three types of mens rea:

- Intention (+ Willful blindness) = subjective (what was actually in the mind of the accused).
 - Deliberate conduct, knowledge of circumstances, desired consequences
 - Does not include:
 - Remoteness – how likely or unlikely something is to happen
 - Knowledge of Illegality – don't need to know its illegal
 - Enthusiasm – don't have to intend eagerly, just intend it
 - Motive – the reason why you do something. White motive need not be proven, it is still a useful factor in a criminal case (Lewis) see *Duggan*: claimed joke/prank, but still intended to take the canoe so had required intention.
 - See *Currie* for illustration of subjective nature and contrast with willful blindness
 - Willful blindness: accused treated in law as having intention even though really didn't.
 - Arises only in special/narrow circumstances.
 - Accused deliberately shut their eyes because they didn't want the knowledge (Sansregret)
- Recklessness = subjective/objective
 - Subjective foresight of risk – accused foresees the risk
 - Objective - unreasonable running of risk
 - Not good enough if the crime requires intention
- Criminal Negligence = objective
 - Similar to tort negligence, which involved conduct falling below that of a reasonable person, but criminal negligence requires a marked departure from that objective standard
 - Reasonable Person -> Tort Negligence -> Criminal Negligence
 - Criminal negligence (definition)
 - 219. (1) Every one is criminally negligent who
 - (a) in doing anything, or
 - (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.
 - Causing death by criminal negligence (This section creates the offence)
 - 220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence ... and liable to imprisonment for life.
 - Causing bodily harm by criminal negligence (creates offence)
 - 221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
 - See *Hundal* generally and *Creighton* for the point that the personal characteristics of an accused are not taken into account, except for a mental incapacity to appreciate the nature of the risk

IN CLASS NOTES – CLASS 3

Attempts:

Analysis is M(ens rea)A(ctus reus)D(efences) instead of ARMED

When dealing with completed offence, focus is on conduct, but “attempt” means person hasn’t completed the offence, so focus is on the intention. Conviction needs more than MR (cant go to jail for what you’re thinking) so need an AR element.

- Justification for attempt convictions:
 - Morally: incompetent would be criminal deserves punishment just as much as a successful criminal. Success or failure may depend on extraneous factors.
 - Practical: allows police intervention before harm is done
 - BUT attempt produces less harm than a full offence so there is a lesser range of punishment
- 24.
 - (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
 - Question of law: (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.
 - Mens rea: intent for attempt = MR of the full offence. Accused intends to do things that constitute that offence.
 - Actus reus: doesn’t have to itself be criminal behaviour – conduct may be innocuous, but must do enough to go beyond mere preparation (question of law)
- Stages of an offence:
 - Idea, thinking (Pure MR)
 - Preparing – problem lies in determining when this ends and when attempt begins
 - England – next to last step theory
 - New Zealand – silent movie test
 - Canadian Courts – R.v. Cline “common sense” test. We cant define it but we know it when we see it, and it’s a judgment call based on all circumstances.
 - Factors:
 - How close was the person to success in space and time?
 - How much was done and what more was there still to do?
 - How serious was the effort? How clear that the accused was directing himself toward the crime?
 - R v. Deutsch: time left until offence is complete not necessarily determinative of whether beyond preparation. E.g. plant bomb timed to go off tomorrow, next week, next year? Is it any less of an attempt?
 - Doing (ATTEMPT!)
 - Success (Completed offence)
- Procedure:
 - Charge full offence, but evidence shows only an attempt (s. 660)
 - Can still convict of the attempt
 - Attempt is always an included offence in the full offence
 - Charge an attempt, but full offence is actually proven (s. 661)
 - Can convict of attempt OR
 - Stop attempt trial and have accused charged with full offence

Accessories:

Parties to offence

Others beside actual perp can be convicted of the actual full offence

- Anyone who knowingly aids, abets, or counsels someone to commit an offence can be convicted in addition to the actual perpetrator
- Requires both physical and mental elements
- The guilty non-perpetrator is called an accessory or a party
- Although the accessory has not personally committed, nevertheless convicted for the actual offence, rather than for some special offence of being an accessory
- For specific purpose of bringing out the perpetrators commission of the offence.

Analysis here (as with Attempts) is also MAD as the accessory's intention is the critical factor.

21. (1) Every one is a **party** to an offence who

1. Actually commits it (*perpetrator*)
2. Does or omits to anything for the purpose of aiding any person to commit it (*aider*); or
 - M/R is key: for the purpose of aiding
 - Know the offence is occurring (don't have to know the criminal label, just have to know the facts and circumstances that constitute an offence)
 - Intend to help the Perp = PURPOSE to help
 - Doesn't have to be a prior relationship or arrangement between the perp and aider
 - Doesn't matter if what aider did is really not helpful
 - Conversely, if did something that happened to help, but didn't mean to – NOT an aider
 - A/R is doing or omitting to do anything to aid, needn't be actual element of the offence
 - E.g. Burglar on shaky ladder and you hold it up for him
 - E.g. Forgetting to lock the back door of the jewelry store you work at.
 - Derivative culpability: in order for you to be an accessory and to be convicted the other guy has to be charged/convicted... but if hes not convicted (died, runs away) you can still be convicted
3. Abets any person in committing it (*abettor*): [abet = encourage]
 - M/R: knowledge of the circumstances (know the offence is occurring), intend to encourage offence
 - A/R: do or omit something to encourage
 - Pretty much have to be present; else, if not present, caught by s. 22 (counselling)

Dunlop and Sylvester v. R: Gang rape of a woman, they didn't actually do it, but were present and identified. More than mere presence is needed for culpability. – Did they encourage by not intervening? No obligation to intervene or call the police except treason or if cop asks for help.

- Issue: Is mere presence enough to find aiding and abetting?
- Ratio:
 - Mere presence is not sufficient for a third party to be culpable.
 - A finding of aiding and abetting requires some knowledge of the crime to be committed and some positive act or omission which aids or abets the offence. Must be proved that the accused intended to give encouragement; that he willfully encouraged.
- Explanation:
 - There needs to be evidence for the jury to decide that he was actually guilty
 - There was an error on the trial judges charge which seemed to indicate that a person could abet another in the commission of an offence is knowingly he stood by while the offence was being committed THIS IS WRONG
 - R v Black – yelling and laughing which was encouragement more than just presence
 - R v Clarkson – no evidence that they had done anything but be there

Common intention

21. (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

Extension of general accessory provisions. If 2 or more people plan to commit a crime together, each can be convicted of any other offence that the partner commits in carrying out the plan if he knew or ought to have known that the other offence would probably result from committing the planned crime

Person counselling offence

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have

known was likely to be committed in consequence of the counselling. [*Guilty of other offences knows or ought to know likely to be committed*]

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

Person who counsels another person to be a party to an offence is a party to that same offence(22.1) has to be a future offence

- *e.g., hire hit man to kill someone: both the killer and counsellor convicted of murder*
- *still guilty even if offence done a little differently than counseled*
- *includes any other offences that the person counseled has committed because of the counseling, if counselor ought to have known they were likely to be committed*

M/R: intend someone to be a party to an offence

A/R: counsel (procure, solicit, incite) another to be a party AND he/she does subsequently become a party (i.e., offence actually happens)

Accessory after the fact: 23.1. An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.

Unsuccessful counseling: depends on another person actually having committed the offence. Died, run away etc. Crown must prove that she has committed the offence. Can be charged of counseling on its own.

Counselling offence that is not committed

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

- (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and
- (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

If offence is not committed you cant be a party to a non-existent offence. Instead charged with s. 464. A separate offence in itself. E.g. Magazine in BC where they wrote an article on how to grow marijuana. Underlying mental element is the intention for the other person to commit the offence.

Mistake of Fact: Not a defence anymore than producing a murder victim alive. Works because it affected MR. You're showing that you actually didn't commit it, not defending against the charge.

- Mistake must be relevant
 - Does offence require MR?
 - If yes, Is MR element required in relation to mistake element?
 - If yes, does mistake negate the MR for that offence?
- Standard for mistake – honest and reasonable?
 - Honest but less reasonable = more incredible
 - Honest mistake does not have to be reasonable
 - R v. Pappajohn:
 - Facts: George Pappajohn put his house up for sale through a real-estate company. He met with a female real-estate agent from the company at a bar. They had lunch together, including drinks, over the course of approximately three hours, after which the two went to Pappajohn's house where they engaged in sexual intercourse. After the event the woman was seen running out the house naked, wearing a bow-tie, with her hands bound. The agent claimed that she was raped, however, Pappajohn claims that short of a few coy objections she had consented. Pappajohn was convicted at trial which he appealed as the judge refused to put to the jury whether Pappajohn should be able to claim that he mistakenly believed that she had consented. His appeal was dismissed by the Court of Appeal and was appealed to the Supreme Court.
 - Issues:
 - What is the required mens rea for rape?
 - Is a mistaken belief in consent available in defence to the charge of rape?
 - Decision: APPEAL DISMISSED

gives her an absolute discharge from her conviction as go-go dancing is not really a problem in Edmonton. He says the same thing about her boss, who was also convicted and discharged.

Kelly Johnson Saga:

- Convicted in provincial
- Acquitted on appeal by Riley J.
- Convicted on crown appeal by C.A.
- Acquitted to SCC

Officially induced error (exception)

- Reasonably relied on erroneous info from official who enforces or administers particular law
- Committed offence as a result
- Unfair to convict so exception to usual rule and legal mistake allowed as excuse
- Onus on accused to prove the elements of officially induced error on a balance of probabilities

Drunkenness: Same rules for drunkenness or druggedness. Not a defence, but may help accused because it negates M/R.

Three ways it can affect:

1. May substantially affect the functioning of mind: dealt with under insanity rules
2. May affect judgment, weaken inhibitions: irrelevant to criminal culpability
3. May make “the accused incapable of forming the specific intent essential to constitute the crime”
 - a. Intoxication can help accused in 3 because it negates the specific intent required for the offence
 - b. Distinction made between crimes of specific intent and general intent (no help in latter)

R. v. George:

- Facts: On February 8th, 1959, George tried to sell a fur to Mr. Avergis but the man declined. Late the same night, when the defendant was very drunk, he came back to the house and assaulted the man, stealing \$22. He was charged with robbery under s.288 of the Criminal Code (now s.343). The accused stated that he was very drunk and did not remember much about the incident, but he did remember hitting someone, and remembered the house being the same one that he had been in earlier that day.
- Issues:
 - Should the courts substitute the offence of common assault?
 - Are charges divisible?
 - Does drunkenness negate mens rea?
- Decision: Appeal allowed, charge of common assault found, sentenced to time served.
- Reasoning:
 - Trial judge first erred by not considering whether or not to divide the charge of robbery into the theft and assault.
 - They cite s.569 of the Code (now s.590(3)), which states that any charge for an indictable offence can be divided if the facts include another offence that is punishable by indictment or summary conviction. Therefore, the trial judge should have considered the charge of common assault.
 - The court then considered how the respondent's drunkenness affects the charges. The court agrees with the trial judge that the intoxication prevented the defendant from forming the specific intent required for the original charge.
 - However, unless intoxicated to the point of insanity the accused could still form the intention to strike the man (and the charge of assault only requiring that the defendant have applied force intentionally).
 - The court then enters a conviction for common assault, saying that they have the power to do so under s.600 of the Code (now s.695). They say that the difference between specific intention and regular mens rea is important in cases involving intoxication.
- Ratio:
 - When a case with a charge for an indictable offence contains facts that lead to a commission of another crime (whether punishable by indictment or summary conviction) the charge may be divided (s.590(3)).

- Intoxication often makes it impossible for a person to form the specific intention in crimes, however only intoxication to the point of insanity will negate mens rea altogether in cases involving only general intent.

R v. Leary: leading Supreme Court of Canada decision on the use of intoxication as an excuse to criminal liability which created what is known as the "leary rule". The Court held that when the accused was found to be sufficiently intoxicated at the time of the offence to be unable to form the "minimal mental element" required for a general intent offence, they may still be held liable as the act of inducing intoxication can be substituted for the requirement of mens rea. The "leary rule" was later challenged in the case of R. v. Daviault, where an exception to the rule was made for when the accused was so intoxicated he was in a state akin to automatism.

- Rape is general intent and drunkenness cannot be applied
- Dissent but what about BC and Ontario?
- CL PG 31

Specific/General Intent:

- Specific: higher level, more complicated offence. two step process, doing X to achieve Y, e.g., murder, robbery, theft
- General: low level, simple offence, one step process, doing X for its own sake e.g., manslaughter, assault

Can go down the scale to find included general offence. e.g., drunkenness negates conviction for murder (specific), but not included offence of manslaughter (general). Accused does not have to prove drunkenness. Onus on Crown to prove M/R, and that accused was not drunk enough to negate M/R. Accused has to raise the issue for it to be considered (air of reality).

Intoxication could also contribute to mistake of fact that could negate M/R, but NOT with sexual offences (e.g., thought she consented) – see s. 273.2

IN CLASS NOTES – CLASS 4

Mental Disorder

Insanity:

- LEGAL term, not medical term. Now called "suffering from a mental disorder"
- Immaterial if accused had A/R and M/R: if mental disorder, then not criminally responsible
- At the time of trial = Fitness to stand trial is at issue
 - Need to be able to instruct counsel
 - Understand the nature and consequences of proceedings
 - If found unfit to stand trial, accused held in mental institution until such time as fit to stand trial. Issue can be postponed to close of Crown's case to see if crown has sufficient case
 - Arise at any stage of trial and decided by jury or judge
 - Sometimes when there is a weak basis for criminal charge they will wait for court decision and only raise issue once guilty or not
- At time of the offence = Defence where criminal responsibility is an issue usually raised in big cases...e.g murder
 - **Defence of mental disorder 16.** (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
 - Suffering from mental disorder (D of M)
 - Incapacity has to stem from a mental disorder
 - Mental disorder means a disease of the mind (not brain)
 - Anything that impairs the functioning of the mind can be a disease of the mind. Origin doesn't matter, can be physical or psychological. Unless its self induced or a transitory mental state like hysteria or concussion.
 - Incapable of appreciating (wider than known) nature and quality OR
 - "nature" – bare physical nature
 - "quality" – e.g., that it will cause death
 - of knowing that it is wrong
 - R. v. Chaulk: "wrong" means morally wrong not legally wrong

16. 2. Presumption

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

- Presumed sane unless proven contrary – shown on a balance of probabilities
- Define legal category of persons who have a disease of the mind... not medical category

16.3. Burden of proof

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

- R. v. Swain: Crown cannot raise mental disorder unless accused puts mental capacity in issue.
 - Facts: Owen Swain was arrested for attacking his wife and children in a bizarre manner, and was charged with assault and aggravated assault. Later at the trial for the charges, Swain's wife testified that Swain was "fighting the air" and talking about spirits. Swain testified that at the time of the incident, he believed that his wife and children were being attacked by devils, and that he had to protect them.
 - Crown cant present evidence of insanity because it breaches their charter rights.. could push accused into being inconsistent, undermine their credibility, and leave jury with impression that they are insane.
 - Only if accused brings up defence can the crown bring up evidence, unless accused puts their mental capacity for criminal intent into question without raising the defence evidence of insanity can be brought forward.
- Generally up to Accused to raise the defence

Disposition:

- If accused found not responsible by reason of mental disorder (i.e., insane), disposition determined at end of trial
- Can be held for indefinite period until found safe to release
- Custody reviewed periodically
- Possible to have outright release
- Insanity generally used only for most serious offences (murder)

Automatism:

- Dissociative state. A mind/body split "dissociative state". Conscious mind not directing the bodily movements. E.g., reflex actions, moving in sleep, epileptic seizure • accused has neither M/R nor A/R (not a "willed act") • need medical evidence to support
- Onus or proof on accused (balance of probability)
- Two types:
 - Insane automatism – dissociative state stemming from a mental disorder "disease of the mind" and treated under insanity rules
 - Sane automatism: complete acquittal – accused walks. Involuntary action not stemming from disease of the mind.

Proving Mental Disorder:

- Insanity: Presumed sane, person raising (usually accused) has to prove on a B of P
- Automatism: Presumed mind is directing the body, accused has to prove B of P. Starting point is "insane" have to prove sane
- To establish if sane or insane automatism:
 - Internal/external approach
 - If state of automatism brought on by internal malfunction/weakness = insane automatism
 - Continuing danger approach (Parks)
 - What should be done with this person: on the street or in custody?
 - If continuing danger to society = insane automatism
- R. v. Parks
 - Asleep, drove 23 km., partly on 401, attacked in-laws
 - Sleepwalking is not a neurological, psychiatric or other illness: no medical treatment for it
 - Held: non-insane automatism
 - Might have been a different result if the onus were on accused as it is today

- Issues: Does sleepwalking constitute non-insane automatism or it is a "disease of the mind" under s.16 of the Criminal Code?
- Decision: appeal dismissed
- Ratio:
 - Automatism works as a defence and results in an absolute acquittal.
 - Once the defendant raises automatism as a defence the burden is on the Crown to prove voluntariness, or alternatively to prove "insane" automatism which results in a non-criminal responsibility verdict but may result in an alternative disposition under s.672.54.
- R. v. Stone
 - Fact: Stone was driving to see his two sons from a previous marriage with his wife. She did not want him to see them and as a result of her reticence he was only able to visit with them for 15 minutes. On the drive back she continued to berate him, telling him he was a loser, that he was terrible in bed, that he had a small penis, and that she was going to go to the police with trumped up assault charges. He pulled the car over and put his head down. He testified that he blacked out and felt a "woosh" go through his body. When he came to he had stabbed her 47 times with a hunting knife that he kept in the car. He hid her body in his truck's tool chest, picked up a six pack, drove home, left a note for his daughter, and took off to Mexico. After a few weeks in Mexico he decided to return to Canada and turn himself in.
 - In his defence, Stone pleaded insane automatism, non-insane automatism, lack of intent, and in the alternative, provocation. The judge allowed for a defence of insane automatism which was presented to the jury. The jury convicted him of manslaughter and sentenced him to seven years. The verdict was upheld by the Court of Appeal.
 - Law presumes that mind is directing the body, that people act voluntarily • so that presumption has to be rebutted
 - Accused must prove automatism on balance of probabilities
 - Issue: Should the defence of non-insane automatism have been left to the jury?
 - Reasoning: First, the accused needs to establish a proper basis for the defence of automatism on a balance of probabilities. This burden shift violates s.11(d) of the Charter, but is saved by s.1. In law, there is a presumption of voluntariness. In order to establish this burden the accused must give expert evidence to go along with their claim of automatism.
 - If this burden is met, the judge must then decide whether mental disorder or non-mental disorder automatism should be left to the jury. The judge must decide whether there is a "disease of the mind" present. If one is present, then a special verdict will be entered as per s.16. If none is present, then only the defence of non-disorder automatism can be left to the jury. The question will then be if the accused acted involuntary on a balance of probabilities – if he did, then he is acquitted.
 - When charging the jury about automatism, the judge must be careful to emphasize the importance of voluntariness in criminal convictions, and concerns about the repute of the administration of justice associated with the defence of automatism.
 - In the case at bar, the trial judge did not err in not charging the jury about automatism because the accused did not establish evidence on a balance of probabilities that would lead to the defence being accepted.
 - Decision: conviction upheld on insane automatism and manslaughter.
 - Ratio: A claim of the defence of automatism has two steps:
 - The accused must establish, on a balance of probabilities, that there is sufficient evidence (if believed) to make the defence operate. In order to do this the accused must have expert evidence to go along with his or her testimony. If this is not met, then the defence fails.
 - The judge must decide if there is a disease of the mind. If there is, then a special verdict is entered and normal s.16 procedures are followed. If there is not, then the question must be left to the jury if the accused acted involuntarily. If he did, then he is acquitted.
- R. v. Luedecke "sexsomnia" - sex with stranger while asleep
 - Facts: assaulted a woman in her sleep at a party. Trial held that they were involuntary and not product of mental disorder. Acquitted. Crown appealed.
 - Issue: Sane or insane automatism?
 - Reasoning:

- Examine risk of recurrence of factors that triggered the accused's automatism
- Triggers in this case included alcohol, fatigue and stress: common place in most people's lives, particularly in the life of a busy, socially active, young man
- Likelihood of recurrence of triggers supports finding that the accused's somnolence should be characterized as a disease of the mind.
- Look at stone and parks.
 - Parasomnia and criminal liability: Parks succeeded because crown failed to prove his condition should be characterized as insane automatism.
 - Automatism reconsidered: In stone they focus on the danger of having him around in society
- Conduct not isolated and based on stone it should be characterized as disease of the mind.
- Appeal allowed and new trial ordered.

Defences:

Defences that are true defences (excuses)

Situations where accused has committed a/r with requisite m/r but is excused because of circumstances

Contrast with:

- Intoxication – may affect m/r
- Insanity – not responsible
- Automatism – negates a/r and m/r

Onus on Crown to disprove defence BARD

Air of reality: Accused has to ensure there is evidence on table to raise the issue

Defences are related – all in a sense species of necessity

- Necessity: Circumstances made me do it
 - Not in code, but rather a Common Law defence preserved by s 8(3)
 - Imminent peril facing the accused (or 3rd party, family member)
 - has to be reasonable, but judged from accused's position
 - probably peril has to be physical, but this is not certain
 - No other way out
 - Modified objective standard
 - NO defence is reasonable and legal alternatives were available
 - Related to point 1 since less imminent peril the more alternatives available
 - Proportionality between harm inflicted and harm avoided – lesser of two evils – purely objective test
 - R. v. Perka:
 - Facts: The appellants were drug smugglers taking marijuana from Colombia to Alaska when their ship encountered troubles off the coast of Vancouver Island. They were forced to unload the cargo and set up camp on the shore as the ship was going to sink. They were arrested by Canadian authorities and charged with importing and trafficking drugs. They stated that they never intended to bring the drugs into Canada and tried to employ the defence of necessity: they had to come ashore to prevent their death. They were acquitted at trial, but the Court of Appeal ordered a new trial which was appealed to the Supreme Court.
 - Issue: Is the defence of necessity a justification or an excuse?
 - Decision: Appeal dismissed, new trial ordered with a proper charge to the jury.
 - Reasoning: The Crown does not challenge the claim that there is a common law defence of necessity; it was established in R v Morgentaler (1976). However, they object to the trial judge charging the jury concerning necessity based on the facts of this case and to him placing the burden of proof of the defence on the Crown, rather than the accused. The Court says that necessity does not justify what someone has done as being lawful, they just excuse them from punishment when the circumstances are taken into consideration.
 - Ratio:
 - To successfully use the common law excuse of necessity there must be three elements:

- an emergency: clear and imminent peril - proven using a modified objective test;
 - no reasonable legal alternative - proven using a modified objective test; and
 - the illegal act must be proportional to the harm avoided - proven using a standard objective test
- The burden is on the Crown to disprove these elements if necessity is raised.
- Duress: They made me do it. Sc. 17 but also still exists in common law.
 - **17.** A person who commits an offence under compulsion by **threats of immediate death or bodily harm from a person who is present when the offence** is committed is excused for committing the offence if the **person believes that the threats will be carried out** and if the person is **not a party to a conspiracy or association** whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is ... treason, murder, attempted murder, sexual assault, robbery, assault causing bodily harm ...
 - Also CL preserved by 8(3): more liberal, and can be used as a defence for murder.
 - Threat of death or serious body harm
 - No other legal way out and reasonable to act in way accused did
 - You have no safe avenue of escape
 - R. v. Ruzic
 - Facts: Threat to mother in Belgrade, so not immediate and not present when offence committed - "moral involuntariness"
 - Issues:
 - Do the immediacy and presence requirements of s.17 of the Criminal Code infringe s.7 of the Charter?
 - Does the common law defence of duress require immediacy and/or presence?
 - At trial she successfully challenged the constitutionality of s.17 of the Code and raised the common law defence of duress and was acquitted. The Crown's appeal was dismissed.
 - Reasining:
 - She argues that she is still acting involuntarily despite the fact that the person making the threat is so far away. The court accepts this, and says that moral voluntariness is a principle of fundamental justice protected under s.7; it is required for criminal liability. The court therefore states that s.17 is unconstitutional in part because of this violation, but they do not specifically address which parts are unconstitutional.
 - LeBel then lays out the common law rules for duress, which state that the threat only has to be made to yourself or someone else (not included in s.17). It does not talk about the threat needing to be immediate. It also requires no easy route of legal escape but does require a close temporal connection between the threat and the harm.
- Provocation: They made me do it by provoking me. Partial defence; only applied to reducing murder. For other defences only taken into account when it comes to sentencing.
 - **232.** (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
 - **What is provocation** (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
 - **(3)** does a particular act amount to provocation? And is the accused deprived of power of self control? Are questions of fact.
 - Applies only to murder – reduces to manslaughter:
 - Wrongful act or insult
 - Sufficient to deprive ordinary person of self control
 - Two key elements: in the heat of passion, cause by a sudden provocation.
 - Objective standard
 - R v. Hill: invest "ordinary" person with characteristics (radical, physical, age, sex) that are relevant to the provocation

- Facts: Hill was convicted of second degree murder for a fatal stabbing. He was sixteen when the incident occurred and testified that he had reacted to the victim's uninvited homosexual advances. He relied on the defences of provocation and self-defence. The Court of Appeal ordered a new trial because the trial judge failed to charge the jury that the objective "ordinary person" standard for the defence of provocation had to take account of the age and sex of the accused.
 - Issue: How is the objective test for the provocation defence to be formulated and to what extent are characteristics peculiar to the individual accused to be taken into account?
 - Decision: Appeal allowed
 - Reasoning: Collective good sense of the jury will add on traits of the reasonable person. Its on a case by case basis.
 - Ratio: There must be a cut-off point where children become treated as "reasonable persons", and that they must approach this point incrementally.
 - Dissent: If the legal system is to reflect accurately the view of children as being in the developmental stages en route to full functioning capacity as adults, the standard against which children's actions are measured must be such as can logically culminate in the objective standard of the ordinary person upon their arrival at full adulthood.
 - Such characteristics do not include temperament or drunkenness
 - Deprived accused of self control – drunkenness can be relevant here
 - Acted suddenly before passion cooled
- Self-Defence: They made me do it by attacking me
 - Many Code provisions where use of force justified e.g., ss. 34-35 (Self Defence), s. 37 (Defence of Others)
 - 27. Justified in using force to prevent commission of an offence or prevent anything being done that you believe is an offence
 - 34.1. Self defence against unprovoked assault can use force by force
 - 34.2. death or bodily harm if reasonable apprehension of it or believed that he cannot otherwise protect himself
 - 37.1 use force to prevent assault only as necessary and don't repeat it.
 - 37.2. nothing will justify wilful of hurt/mischief that is excessively used
 - Common Threads:
 - Reasonable belief (even if wrong)
 - Force used was reasonable, but flexible, cant measure with nicety (e.g. Cadwallader)
 - R v. Cadwallader: Case where 14 year old killed his father. Trial said too much force used and convicted him. Crown agrees that its self defence but only with too much force.
 - Decision: you have to consider being in his state of mind and what decision he made. All accused has to do is establish evidence raising a reasonable doubt to his guilt. Prosecution has to negate that fact. Hes 14 he was reasonable.
 - Appeal allowed and conviction quashed.

CRIMINAL PARTIAL TEXTBOOK NOTES – the rest are combined with the lecture notes that were on previous pages

Law Commission of Canada – What is a Crime (Paper):

- Behaviours subject to some form of societal response.
- An act or omission considered to be a wrong against society
- Prosecuted by the state in criminal proceedings
- Involves moral wrong
- Reserved for the most serious harms in society
- Usually a punitive response to what is a perceived problem to deter the individual wrongdoer and the general public and reinforce certain social values and signaling that certain behaviour has been deemed to be undesirable.
- Criminal Law and Harm:
 - No conduct shall be defined as criminal unless it represents a serious threat to society and unless the act cannot be dealt with through other social or legal means
 - Our criminal law: law ought to be pruned to better differentiate between real crimes and public welfare or administrative wrongs...to be a real crime it must be morally wrong, but this is a necessary condition and not a sufficient one, not all harmful acts should qualify as real crimes.... Real crimes are wrongful acts seriously threatening and infringing fundamental social values

Constitution Act of 1867:

Sc 91 Parliament has power over criminal law, except for constitution of courts of criminal jurisdiction, but including the procedure in criminal matters ... as well as prisons.

Sc 92 Provinces have power over administering within the province, including their own constitutive, as well as maintaining and organizing provincial courts as well as procedures in civil matters. Also control fine, penalty, or imprisonment for enforcing law in province.

Criminal Code [1985]:

Sc 8.2. Criminal law of England is still in force. The old one, except as altered.

Sc. 8.3. Common law principles continue.

Sc 9. No person shall be convicted or discharged for offence of criminal law, offence under any act, or offence of any province/territory of Canada. Nothing in this section affects the power, jurisdiction, or authority that court, judge, justice or prov court judge had.

Sc. 13. Child under 12 not convicted.

Youth Criminal Justice Act [2002 – in force April 2003]:

Sc 2.1. Definition: young person is 12 years and older, but less than 18

Sc 14.1. Youth Justice Court has jurisdiction over any of these cases.

Actus Reus (Physical Aspects of a crime):

- Voluntariness: Has to be an act on part of accused. Has to be the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be willpower to do an act whether the accused knew or not that it was prohibited by law.
- Commission:
 - R. v. Bird [1970 – 3 C.C.C.]
 - Facts: Mrs Salmon had phone convo with Bird resulting in being tricked into intercourse.
 - Branca, J.A:
 - Charged bird with “Without reasonable justification or excuse and with intent to extort or gain something, to wit, sexual intercourse with Salmon, by threats, accusations, or menaces, induce her to have sexual intercourse with him.”
 - Counsel attacks saying that in this case, by facts proven, there could be no offence or infraction against s.291 because of the fact that this wasn’t a material thing.
 - Appeal dismissed. Found that he did extort the use of her body, because it was for personal gain because of the word ANYTHING used in the section.
- Causation:

- Criminal Code:
 - Sc 224. Death that might have been prevented but was caused by act or omission of the individual
 - Sc 225. Death from treatment of injury. Cause bodily injury that is of a dangerous nature and leads to death.
 - Sc. 226. Accelerate the death from the injury or disorder that is already present
- R. v. Winning [1973]: Appeal of appellant who was convicted of obtaining credit by false pretences. Gave her proper name and address, but Eatons did not rely on the information that was falsified. Only looked at name and address. Credit given on reliance of their investigation of her, not her giving them info. Therefore, appeal allowed and conviction quashed.
- R. v. Smithers [1978] [SCC]: Appellant is black, they made fun of him during a hockey game. Punched Cobby once or twice to the head, and then kicked his stomach. Death due to aspiration of foreign materials present from vomiting. Spontaneous aspiration is rare and unusual cause of death.
 - Did A cause B? Can only come from witness evidence, and has nothing to do with intention, foresight, or risk.
 - Kick was contributor outside the de minimis range
 - One who assaults another must take his victim as he finds him “Thin skulled rule”
 - Even if the unlawful act, alone, would not have caused death it is still a legal cause as long as it contributed in some way
 - Appeal was dismissed
 - Criticism: don’t use weird wording when speaking to a jury, and latin. Rather use significant contributing cause.

Mens Rea (Mental Aspects of a Crime): accused must have meant or intended to commit the prohibited act. Act doesn’t make you guilty, the mind does. Fully comprehending MR is by detailed examination of the definitions of particular crimes, and therefore the expression itself is unmeaning.

- Intent: An intention of a mans own mind is a subjective state, but the state of anothers is an objective state. Has to be proven in the same way objective facts are proven. Jury must consider the whole of evidence relevant to it as a fact in issue. Jury must weigh a testimony along w/ whatever inference as to his intentions can be drawn from his conduct or from other relevant facts. Questions are what did he in fact know, foresee, expect, or intend.
- Motive: Exercise of a free will to use a particular means to produce a particular result, rather than with motive that which precedes and induced the exercise of the will. Mental element of a crime involved no reference to motive.
 - What is motive?
 - Emotion prompting an act. Kill because of jealous of cheating wife
 - Means a kind of intention. Kill to prevent a cheating wife.
 - Possible to formulate a number of propositions:
 - Motive is always relevant and hence evidence of motive is admissible
 - Motive is no part of the crime and is legally irrelevant to criminal responsibility. Not an essential element of the prosecutions case as a matter of law. Evidence of motive is merely circumstantial evidence.
 - Proved absence of motive is always an important fact in favour of the accused and ordinarily worth of note in a charge to the jury
 - Proved presence of motive may be an important factual ingredient in crowns case, notably on issues of the identity and intention, when evidence is purely circumstantial.
 - R. v. Duggan [1975]: 3 people got drunk and found a compound gate open, and took a canoe. Didn’t mean it badly. Not much hope that they could get away with what they had done, and would probably have returned the canoe had the police not investigated. Done intentionally under no mistake with knowledge that it was property of another person. Absolute discharge granted.
- Recklessness and Willful Blindness:
 - R. v. Currie [1975] appeal from the appellant against their conviction
 - Facts: used a real cheque with a forged endorsement with intent to use same as if it were genuine. Signed his own name and address on it. Said that someone gave him \$5 to cash the cheque for them. Had another witness with him who saw the other man ask to cash him a cheque.

- Trial: Currie was willfully blind. Should have been suspicious in all of the circumstances of the forged endorsement on the cheque when he received it and should have made further inquiry.
 - Martin, J.A.:
 - Accepts that if a party has a suspicion aroused but deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge – shut his eyes – willfully blind.
 - BUT doctrine of constructive knowledge has no application in criminal law. The fact that you should have known something doesn't make you criminally liable, and does not by itself form a basis for the application of the doctrine of willful blindness
 - Appeal allowed
 - R. v. Sansregret [1985] [SCC]
 - Facts: Kicked him out. He broke in and slept with her with consent because she was afraid. Reported to cops, who then told his probation officer. He did it again less than a month later.
 - Trial: appellant knew that a complainant was made for rape regarding first incident, knew she didn't like him, and knew she told the cops
 - To show willful blindness the law presumes knowledge on the part of the accused, in this case that consent had been induced by threats
 - Issues: Is willful blindness relevant to a mistake of fact in consent in a sexual assault charge?
 - Negligence is often confused with recklessness in the criminal sense.
 - Negligence, failure to take reasonable care, is tested by the objective standard of the reasonable man. Being negligent makes you liable at civil law but forms no basis for imposition of criminal penalties. You've become aware of an inquiry needed, but don't make it because you don't wish to know.
 - Recklessness: to form a part of the criminal mens rea, must have an element of the subjective. Conduct of one who sees the risk of breaking the law but takes the chance.
 - Rule that willful blindness is equivalent to knowledge is essential... but an unstable rule. Find WB where it can be said defendant actually knew, realized probability.
 - BECAUSE he knew she complained about rape, he no longer could say he didn't know she was consenting out of fear. He knows that now. Therefore, no constructive test of knowledge is required. Appellant was aware of her reaction and to proceed in such circumstances constitutes a self deception to the point of willful blindness.
 - McIntyre, writing for the majority, entered a conviction on the basis that even if the accused was not subjectively aware that there was no consent, he was willfully blind to the lack of consent. The culpability of willful blindness is the accused's refusal to inquire whether the complainant was consenting, when he was aware of the need for some inquiry, but decided not to inquire because he did not want to know the truth. Because the appellant was willfully blind to the consent of the complainant, the defense of mistake of fact cannot apply.
 - Ratio: The defense of mistake of fact does not apply in a sexual assault case where the accused was willfully blind to the lack of consent.
- Criminal Negligence:
 - Criminal Code:
 - S 219.1. Criminally negligent if you do nothing or omit to do something that's your duty to do, or show wanton or reckless disregard for lives and safety of others
 - S.219.2. duty is imposed by law
 - S. 220. Cause death by criminal negligence and you're guilty of an indictable offence and liable.
 - S. 221. If cause bodily harm by criminal negligence guilty of an indictable offence
 - R. v. Hundal SCC case :
 - Facts: Hundal was driving his overloaded dump truck towards an intersection. There were several witnesses who said that he ran a red light. He is charged with "dangerous driving causing death" under s. 233 (now s. 249) of the Criminal Code. Section 249 criminalizes simply creating the risk by dangerous driving, deals with bodily harm and

when the driving causes death. The difference between these subsections is the punishment that they allow.

- Issue: What is the mens rea required to prove the offense of dangerous driving?
- Appeal dismissed
- Reasoning: The offence at issue should be assessed objectively within the context of all the surrounding events - "The trier of fact must be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation."
- Ratio: The test for the required mens rea of dangerous driving is a modified objective test - you must take all of the surrounding circumstances into consideration in order to determine if the accused committed a "marked departure" from what a reasonable person in the same circumstances would have done.
- Cory J.: Question here is what the accused should have known... apply a test with some flexibility, in the context of the events.

○ R v. Creighton:

- Facts: Creighton, an experienced drug user, administered cocaine to a willing woman who subsequently died. He refused to contact the authorities when she stopped breathing after taking the drug, but his friend eventually did. He was charged with manslaughter and manslaughter by criminal negligence.
- Appeal dismissed
- Ratio:
 - Objective mens rea is in line with the Charter, and is all that is required for a conviction in manslaughter.
 - The objective standard is whether a reasonable person in the circumstances would have foreseen the risk of harm from their actions. If this is satisfied, then the necessary mens rea has been proven. You should not incorporate personal characteristics into the reasonable standard, as it has to be an unchanging standard that is easy to understand. Only if an accused lacked the capacity to understand the risk flowing from their actions can they be excused.

Attempts:

R. v. Cline [1956] [Ont C.A.]:

- Facts: Cline approached a young boy and asked him to help carry his suitcase, and told the boy that he would give him money for his help. He was wearing large sunglasses at the time. The boy refused. This happened again a few months later. At trial evidence came out that the accused had done this several times before in the exact same style, and that on some occasions he managed to get the boys to help him and then he performed "indecent acts". He was charged with indecent assault and convicted at trial.
- Issues: Can you be charged with attempting to commit an offence if you did not actually get to complete the offence, but were trying to?
- Laidlaw J.A.:
 - Evidence shows a definite pattern of conduct that was meant to lead to assault; therefore the evidence establishes that the accused attempted to commit the offence.
 - Criminal intention alone is enough to establish a criminal attempt. Although there must still be both mens rea and actus reus, in attempt it is the mens rea that is of primary importance. The actus reus must be more than a preparation to commit the crime; it must be an actual attempt to commit the crime that has not succeeded for whatever reason.
 - Six factors dealing with attempt:
 - there must be both mens rea and actus reus, but the misconduct lies primarily in the intention;
 - evidence of similar actions leading to a criminal end, if not too remote in time, will help to prove attempt;
 - the Crown can raise this evidence without waiting for a specific defence;
 - it is not essential that the actus reus is a crime, tort, or even a moral wrong;
 - the actus reus must be more than a mere preparation; and
 - when the requisite intention has been formed, the next action performed to further the attempt to commit the crime satisfies the actus reus.

- The case at bar it is clear that the accused's actions amounted to intent and not mere preparation. Appeal allowed; conviction quashed, new conviction for attempt to commit indecent assault entered.
- Ratio: You can be found guilty of attempting to commit a crime if you did not actually commit the crime; you must have had the necessary mens rea, and have acted to attempt to commit the crime. The actus reus must be more than a mere preparation; however it does not need to be a crime in itself, or even a moral wrongdoing.

NOTE: *Question of law is whether an act/omission is or is not mere preparation to commit the offence*

R. v. Deutsch [1986] SCC:

- Facts: Deutsch ran a company, and put an advertisement in the paper looking for "secretary-sales assistants to the sales executive". When women came in to interview, he told them that they would have to have sexual intercourse with clients if it was required to secure a contract. However, this could result in bonuses of up to \$100,000 a year. An undercover police officer went in for an interview and had the same experience. No one was hired under the ad. Deutsch was charged with attempting to procure females for illicit intercourse with other persons contrary to s.195(1)(a) of the Code (now s.212). He was convicted at trial, but a new trial was ordered on appeal.
- Issues: What constitutes "mere preparation"?
- Decision: Appeal dismissed. Trial did not make a finding as to whether or not there was a necessary attempt to procure, so there must be a new trial.
- Reasoning: The issue in this case is if there was the necessary intent; were the accused's actions enough to lead to a conviction for intent, or were they merely preparatory actions? He agrees with Martin in the Court of Appeal that the holding out of large financial rewards for the applicants was capable of satisfying the actus reus of an attempt to procure the women to have illicit sexual intercourse contrary to s.212. In general, the actus reus for attempt must be some step towards the actual commission of the crime that goes beyond mere acts of preparation. In this case the actual crime could not be committed until one of the women actually had sex with another person; however, his offering financial rewards was a step in attempting to make this action occur.
- Ratio:
 - The actus reus for attempt must be some step towards the actual commission of the crime that goes beyond mere acts of preparation.
 - The distinction between preparation and attempt is qualitative and dependent on the relative proximity of the act (in time, location and between the acts under the control of the accused remaining to be accomplished) to the nature of the completed offence.

Criminal Procedure

Introduction to CP:

- Investigation:
 - Responsibility rests largely with the police
 - Most investigations commence with a complaint from a member of the public, but police are sometimes proactive
 - Generally, it is the police who decide whether to lay charges (based on reasonable grounds to believe the suspect has committed an offence)
 - Wishes of victims considered but not determinative
 - Private prosecutions rare and subject to public control
 - Regulating:
 - Legal rules regulate, to some extent, what the police can and cannot do in the investigation of offences
 - Attempt to achieve a balance between the community interest in law enforcement and the individual interests in liberty, privacy, security of the person, dignity, autonomy, etc.
 - Often extremely controversial
 - We will address some of the major rules
 - Note that there are often important exceptions and nuances
- Prosecution:
 - Responsibility rests largely with Crown Attorney's offices
 - Crowns are quasi-judicial officers whose task is to achieve justice, not obtain a conviction
 - Although they are frequently – but not always – the same thing
 - Crowns screen cases and prosecute only those cases that are in the public interest and for which there is a reasonable prospect of conviction
 - Must disclose case to the accused in advance of trial
- Defence:
 - Normally performed by private lawyers paid personally by the accused or by Legal Aid
 - A narrower role, directed almost exclusively at protecting the interests of the client
 - Subject to duties owed to the court
 - Can assume an almost purely adversarial role towards the prosecution
 - No duty to disclose the defence case to the prosecution
- Trials:
 - Most trials are before judge alone in Ontario Court of Justice
 - Some more serious charges are before judge alone or judge and jury in Superior Court of Justice
 - In a judge alone trial the judge decides the facts
 - In a jury case the jury decides the facts. The judge directs them as to the relevant law
 - Trial options determined by the nature of the alleged offence
 - Three types of offences:
 - Indictable: More serious offences are indictable offences
 - Accused normally has the option of judge alone or judge and jury
 - Accused normally has the right to have a preliminary inquiry
 - Court process meant to screen out frivolous prosecutions and afford the accused an opportunity to probe the Crown's case
 - If a preliminary inquiry is held, the trial occurs in Superior Court
 - Summary conviction
 - Most minor, often nuisance, offences
 - Relatively light punishments
 - One trial option: judge alone in the Ontario Court without a preliminary inquiry
 - Hybrid
 - Biggest category
 - Offences for which the prosecution gets to choose whether to proceed by indictment or by way of summary conviction
 - Once prosecution chooses, accused has the trial options (if any exist) for the applicable category described above

Selected Topics:

- Arbitrary Detention:
 - The police often detain people when investigating offences
 - Meaning they assume control over the movement of a person either physically or psychologically
 - This is usually before they have grounds to arrest the person
 - Little statutory regulation of this
 - Charter s.9 protects against arbitrary detentions
 - Arbitrary detentions occur all the time
 - Traffic and impaired driving enforcement
 - But outside context of driving-related enforcement there is no general power to detain individuals arbitrarily
 - However, the police do have the power to detain for investigative purposes when the detention is not arbitrary but also not authorized by powers of arrest
 - i.e. when the police have less than reasonable grounds to believe a person has committed an offence but more than no or almost no reason to believe the person has committed an offence
 - Investigative Detention - Police have the power to detain for investigative purposes when:
 - They have reasonable grounds to detain
 - Reasonable grounds to detain = A reasonable suspicion in all the circumstances that a person is connected to a particular crime
 - There must be “a clear nexus between the individual to be detained and a recent or on-going criminal offence”
 - Cannot be based on a hunch, even based on intuition gained by experience
 - Not a high standard
 - Higher than mere suspicion but lower than reasonable grounds to believe
 - Quite a bit lower, based on how courts have interpreted reasonable suspicion
 - Risk that racist views will be incorporated into reasonable suspicion
 -
 - And the detention is reasonably necessary in the circumstances: the overall decision to detain is a reasonable one = Consideration of the reason for, and manner and extent of, the detention
 - In theory, the detention must be of brief duration and cannot become a de facto arrest with all its accompanying restraint
 - In reality, these limits are constantly being tested and, often, expanded
 -
 - Arbitrary Detention - Two police officers observe in sequence:
 - A woman who they believe is working as a prostitute while posing as a hitchhiker get into a van and a few minutes later appear back on the street
 - The same woman near a telephone
 - B pick up the woman in his vehicle
 - B and the woman drive around
 - B drop off the woman
 - Based on one of the officers' past work on a prostitution squad, the officers suspect that the woman had 'turned a trick' with the man in the van and had then used the money to buy drugs from B. Did the officers have grounds to detain B for investigative purposes?
 - Investigative Search:
 - A power of search incidental to investigative detention exists, although searches are not permitted in all circumstances
 - The officer must reasonably suspect that his or her own safety, or the safety of others, is at risk
 - The officer does not need to reasonably believe this
 - The search must be confined in scope to an intrusion reasonably designed to locate weapons, not evidence
 - Police are allowed to perform at least a frisk search, and often more
 - The search must also be carried out in a reasonable manner

- R v. Mann:
- Search and Seizure:
 - Police often search premises, places and people during investigations
 - When they find items or information of interest, they seize it for use in a prosecution
 - Searches and seizures can adversely impact on a person's privacy and liberty
 - As a result, the law exhibits a preference for prior judicial authorization: warrants
 - There are, however, many exceptions
 - Warrants:
 - Many provisions in Criminal Code authorize searches and/or seizures, usually but not always under warrant
 - Warrants are issued by judicial officers based on reasonable grounds to believe that an offence has occurred and that evidence of the offence will be found at the location sought to be searched
 - Reasonable grounds exists "where credibly-based probability replaces suspicion"
 - This does not require proof even on a balance of probabilities
 - If the inference of specific criminal activity is a reasonable inference from the facts, the warrant can be issued
 - Reasonable Expectation of Privacy:
 - A warrant is only required, however, where police conduct will invade a person's reasonable expectation of privacy
 - Not every act of 'search' or 'seizure' does that
 - E.g. searches of
 - Hydro records
 - A driveway left open to the public
 - The common hallway of an apartment building
 - Some school areas
 - Determining when someone has a reasonable expectation of privacy can be very controversial
 - E.g. emanations from the home
 - E.g. records of internet usage
 - Warrantless Searches:
 - The law also authorizes the police to conduct warrantless searches in a number of situations
 - The most common and probably most significant situation is when a person is searched incident to her arrest
 - Search Incident to arrest:
 - Cloutier v. Langlois SCC 1990: "... the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him"
 - No requirement for reasonable grounds to believe evidence will be found
 - Must be lawful arrest
 - Must not be conducted in abusive fashion
 - Search must be incidental to arrest: the police must be attempting to achieve some valid purpose connected to the arrest
 - Discovery of item that may be a threat to the safety of the police, the accused or the public
 - Discovery of item that may facilitate escape
 - Discovery of evidence of the offence for which the accused is being arrested, or prevention of its destruction
 - The police can generally search, incident to arrest, almost anything within arrestee's immediate control (e.g. bags, car, pockets)
 - But not his home or, sometimes, electronic devices
 - No firm time limit on when the search can be conducted, but it is usually shortly after the arrest
 - A frisk search of the person is generally permitted, but more invasive searches – strip searches – are only permitted if the police have reasonable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest

- E.g. for concluding the arrestee is secreting an illicit drug in an area only discoverable by a strip search
 - E.g. for concluding the arrestee is secreting a weapon
 - E.g. A police officer stops a car for speeding. He speaks to the driver and obtains her licence. A computer check reveals an outstanding warrant for her arrest for unpaid traffic fines. The officer arrests the driver on the basis of the warrant. In talking to the driver, the officer notices garbage bags in the back seat. They appear to be full of clothing with price tags still attached to them. Suspicious that they contain stolen clothing, the officer searches the bags as well as the trunk of the car, finding even more bags of clothing. The accused is charged with possession of stolen property. Did the search of the car violate s.8?
 - Hunter et al. v. Southam Inc.:
 - R v. Caslake:
- Right to Counsel:
 - Charter s.10(b) guarantees the right, on arrest or detention, to retain and instruct counsel without delay and to be informed of that right
 - A critical right in criminal procedure because counsel acts as a buffer between the individual and the more powerful state
 - Counsel can advise as to the individual's rights and obligations, how the individual should exercise her rights, and how the individual might be able to regain her liberty
 - What must the police do?
 - Informational duties: What the detainee must be told
 - On arrest or detention, the police must advise the detainee:
 - That she has the right to retain and instruct (i.e. consult with) counsel
 - That she has the right to retain and instruct counsel right away, or as soon as reasonably possible
 - Of the opportunity to obtain counsel free of charge where she meets the prescribed Legal Aid financial criteria
 - Of the opportunity and means to access duty counsel
 - In Ontario this means that detainees are advised of the 1-800 number that they can use to contact duty counsel
 - The police must provide this information "without delay": immediately upon arrest or detention, subject to brief delays permitted as a result of operational exigencies
 -
 - Implementation duties:
 - What must be done to enable detainee to exercise her rights?
 - Duty to facilitate:
 - The police must facilitate access to counsel and provide a reasonable opportunity for the detainee to contact counsel
 - This usually includes the duty to offer the detainee the use of a telephone at the earliest reasonable opportunity
 - This can include the duty to afford the detainee an opportunity to make more than one phone call and call more than one person
 - This includes the duty to afford the detainee an opportunity to consult with counsel in private
 - Duty to hold off:
 - The police must cease questioning or otherwise attempting to elicit evidence from the detainee until she has had a reasonable opportunity to retain and instruct counsel
 - Police are entitled to question a detainee (etc.) once she has had a reasonable opportunity to retain and instruct counsel
 - Conditional on reasonable diligence of detainee:
 - Duties to facilitate and hold off are conditional upon detainee exercising reasonable diligence in availing herself of her rights

- Detainee must indicate that she wants to contact counsel
 - Detainee must also make reasonable efforts to contact counsel of choice
- Right to Counsel:
 - L is walking down a public street. Police patrolling the area recognize him as someone wanted for robbery so they stop and arrest him. They give him his rights to counsel and L responds that he wants to speak to his lawyer. The police tell him that he can do so at the police station. L is driven to the police station where he is again informed of his rights to counsel. This time, L says nothing in response. L is placed in an interview room and left there for an hour while the police attend to other aspects of the investigation. The police then return to the interview room and question L for 20 minutes. L denies guilt but admits to being present at the scene of the robbery and involved in a fight. L then asks to speak to duty counsel and is allowed to do so in private. The Crown seeks to introduce L's statement into evidence at trial. L objects that his rights to counsel were breached. Were they?
 - R v. Bartle:
- Right to Silence:
 - Often the police will want to question a detainee
 - The police will sometimes exert considerable pressure on the detainee to speak and to incriminate herself
 - A detainee, however, has a constitutional right to choose whether or not to speak
 - A detainee also has the right to have the choice to remain silent not used against her
 - The fact of silence cannot be used against the accused at her trial on a charge arising out of the investigation
 - Not an absolute right, capable of being discharged only by waiver
 - The police can question a detainee after she has had the opportunity to speak to counsel
 - Asserting the right to silence (even repeatedly) does not necessarily mean the questioning must stop
 - The police can use "legitimate means of persuasion" to encourage the detainee to speak (Hebert)
 - R v. Hebert:
 - What constitutes 'legitimate means of persuasion' is mostly determined by the common law voluntariness rule: see Oickle
 - R v. Oickle:
 - Generally speaking, the police are not entitled to:
 - Threaten a detainee with violence or other adverse consequences if she does not confess
 - Promise a detainee something concrete if she does confess
 - E.g. bail, reduced charges, more lenient sentence
 - Create an atmosphere of oppression
 - E.g. by depriving the detainee of food, clothing, water, sleep, or medical attention; denying access to counsel; or questioning the detainee for a prolonged period of time in an excessively aggressive and intimidating manner
 - Deprive the detainee of an operating mind
 - Play a shocking dirty trick
 - E.g. by pretending to be a chaplain or a legal aid lawyer
 - Police are not required to inform a detainee of her right to silence... Counsel is supposed to do that
 - Detainee does not have the right to have a lawyer present during questioning
 - S was arrested for murder as a result of an altercation at a bar. Shots were fired and an innocent bystander was killed by a stray bullet. S was given his RTC and he spoke to a lawyer at the police station. He was then interviewed for several hours by the police. During the interview, S said on 18 separate occasions that he did not want to say anything. Nonetheless, the police continued to question him and confront him with incriminating evidence. The interviewing officer explained that, "no matter what", he intended to put parts of the police case to S in an effort to get him to confess. Did the police breach S's right to silence?
 - R v. Singh:

- Exclusion of Evidence:
 - A person whose Charter rights are breached can apply to have evidence obtained during or after the breach excluded from the trial
 - The accused bears the burden of showing that her rights were breached and that exclusion from evidence is the appropriate remedy
 - A Charter breach will not necessarily result in the exclusion of any evidence
 - If fact, it often does not
 - In considering whether to exclude evidence the question is whether admission of the evidence could bring the administration of justice into disrepute
 - R v. Grant
 - “Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns” (Grant)
 - Nor is it aimed at deterring Charter breaches, although that may be a happy consequence
 - The goal is to maintain the integrity of, and public confidence in, the justice system in the long-term
 - “Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s.24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence” (Grant)
 - The “focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system” (Grant)
 - The analytical framework is outlined in Grant:
 - “When faced with an application for exclusion under s.24(2), a court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct ..., (2) the impact of the breach on the Charter-protected interests of the accused ... and (3) society’s interest in the adjudication of the case on its merits. The court’s role on a s.24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute”
 - In other words, the courts consider
 - Whether admission of the evidence will send a message to the public that the courts effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct
 - The interests engaged by the infringed right and the degree to which the violation impacted on those interests
 - The negative impact on the repute of the administration of justice of failing to admit the evidence
 - I.e., whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial
 - As a general rule, evidence is more likely to be excluded when
 - The police ignore established limitations on their powers
 - They significantly (and unlawfully) interfere with the privacy, dignity, autonomy or liberty of the accused
 - The resulting evidence is of questionable reliability
 - And vice-versa
 - H is driving along a highway when he is stopped by officer B. B activated his emergency lights because H’s car had no front licence plate, but realized before stopping that H’s car was from Alberta where front licence plates are not required. Nevertheless, B continued to pull H’s car over because he thought that abandoning the stop might have affected the integrity of the police in the eyes of observers. B learns that the vehicle had been rented at the Vancouver airport and he knows that rental cars are often used to courier drugs. B observes that the car interior is

littered with food and drink containers, suggesting that the occupants had travelled straight through from Vancouver. B questions the occupants about their travels and they give somewhat contradictory stories. He asks H for his licence. H cannot produce it and B ultimately determines that H's licence is suspended. B arrests H for driving under suspension. B then decides to search the vehicle as an incident of arrest, purportedly to search for H's licence. B finds two boxes in the trunk. B asks H what is in the boxes. H initially says they contain dishes but, upon being further questioned by B, ultimately admits that they contain drugs. B opens the boxes and discovers that they contain 77 lbs of cocaine. At trial, the judge finds that H's rights under ss.8 and 9 were breached. He holds that B's explanations for stopping and searching the car were contrived. B knew that he did not have reasonable grounds to stop the car. B only searched the car to look for drugs. Should the drugs be excluded from evidence?

Canadian Human Rights

How Human Rights Law Works In Canada

- Enhanced our democracy
- One of the main purposes is to protect certain groups from democracy
 - Assures certain groups don't fall under the wrath of oppression
- Paradox
 - In order to enforce human rights, we need to have government firmly on our side
 - On the other hand, thought the 20th century, the greatest violators of human rights have been governments
- Canada is recognized worldwide in terms of respect for human rights
 - Will focus on Ontario in lectures, but it is similar to other provinces

Where Does Canadian Human Rights Law Come From?

Our Human Rights Failures (Our History)

- Aboriginal peoples
 - Residential schools
 - Can't vote until the 1960s
 - Poor economic indicators today
- Women
 - First 55 years of Confederation they couldn't vote
 - Laws in the 1970s excluding women from certain parts of the workplace
 - Still underrepresented in political institutions
 - 73 cents on the dollar compared to men's salaries
- Japanese Canadians
 - WWII warring against Japan
 - We sent them to interior camps and forced them to stay there
 - Later deported them
 - They couldn't get their Canadian homes back

Failure of Earlier Human Rights Laws

Common law

- Law of contracts, law of torts
- No tort of discrimination until the 1960s
 - No public policy recognized by the courts that recognized that someone had a right to sue if they were discriminated against in private dealings
- **Noble v. Wolf** (SCC)
 - Jewish couple living in Toronto wanted to buy a cottage in Grand Bend
 - It would come with a deed
 - The new owners were to promise they wouldn't sell it to someone that was Chinese, black, Jewish, etc.
 - SCC: Restrictive covenant not valid

British North America Act (1867) – Federalism

- String of cases a century ago that attempted to attack discrimination provision in the provincial laws
 - 'Ultra vires' of the province

- 1914: **Quong-Wing v. the King** (SCC)
 - Saskatchewan had passed laws saying women could not work for people of Chinese ancestry
 - Quong-wing owned a Laundromat and employed a white woman who was happy to work for him
 - SCC found that it dealt with property and civil rights (under provincial jurisdiction), so it upheld the law

Early Anti-Discrimination Statutes

- Several provinces passed these in the 1940s
- Ontario: Racial Discrimination Act
 - 'Different forms of human rights violations are wrong'
 - Weak statements of public policy
 - No human rights commission to enforce them
 - Initiate action yourself
- Courts judged them on a quasi-criminal basis
 - You have to prove the case beyond a reasonable doubt, instead of balance of probabilities
- Very weak remedies
 - Award a token amount of money and a declaration

Criminal Law

- Courts use high evidentiary standard
- Most prosecutors and judges were not interested in treating human rights as a criminal case
- No remedy for the person who was violated
 - Crown v. perpetrator
 - Fine or jail time
 - Violated person only gets the satisfaction of the perpetrator being punished
- Came to be seen as a valueless attempt

1960 Bill of Rights

- Passed by federal Parliament
- Goals
 - Right to be free of discrimination on the basis of gender, race, etc.
- Was a proclamation
- Federal legislation
 - Only applied to the federal government, not provinces
- Courts didn't take it seriously
 - Wouldn't use it to strike down legislation
 - Only 3 cases that actually went through with this stuff

Our International Human Rights Instruments

- **1948 Universal Declaration of Human Rights**
 - *"Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom"*
 - *"Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms"*
- If we begin to respect each other regardless of differences, we would build a world without war, conflict, etc.
- Eleanor Roosevelt was a huge influence in developing this
- Provides a source for the wording of the human rights laws in Canada
- Provides moral pressure for laws in Canada

Ontario Human Rights Code

- 1961: Ontario Human Rights Commission created
- 1962: *Ontario Human Rights Code* enacted
- Today, there are 3 important features of human rights administration in Ontario
 - **Ontario Human Rights Code:** Covers private and public sectors in Ontario (government and private relationships)
 - Covers five main areas of social activity:
 1. Accommodation (housing)
 2. Services (restaurants, stores, etc.)
 3. Contracts
 4. Vocational Associations (trade unions, Ontario Medical Association, etc.)
 5. Employment (most significant one)
 - In employment, s. 5(1) prohibits discrimination on 14 grounds
 - Race
 - Ancestry
 - Place of origin
 - Colour
 - Ethnic Origin
 - Citizenship
 - Creed
 - Sex
 - Sexual Orientation
 - Record of Offences
 - Marital Status
 - Family Status (obligations, responsibilities)
 - Disability
 - Age
 - Reprisal against a person for filing a complaint is forbidden (s. 8)
 - Creates exceptions/defences
 - Accommodation – undue hardship (s. 17(2))
 - Special interest organizations (s. 18)
 - Solemnization of marriage (s. 18.1)
 - Person who is allowed to conduct marriages is allowed to refuse a couple on religious grounds
 - Insurance contracts (s. 22)
 - Special employment (s. 24)
 - **Ontario Human Rights Commission:** Established by s. 27 of the *Code*
 - Given variety of duties to promote human rights:
 - Develop policy statements
 - Develop public education programs
 - Recommend changes to the *Code*
 - Conduct special human rights inquiries
 - Conduct special investigations
 - Research discriminatory practices
 - Initiate human rights complaints to Tribunal
 - Anti-Racism Secretariat
 - Disability Rights Secretariat
 - **Human Rights Tribunal of Ontario:** Established by s. 32 of *Code*
 - Arm's length from Commission
 - Tribunal that receives, investigates, and adjudicates human rights complaints
 - Composed of chair and vice-chairs who conduct formal hearings into complaints
 - Broad remedial powers including:
 - Reinstatement
 - Damages for lost income
 - Damages for mental anguish
 - Apology
 - Creation of employment equity program
 - Human rights awareness sessions

Where Do Human Rights Complaints Come From in Ontario?

- Statistics from 2008/2009 Annual Report of OHRC
- By social sector
 - Employment→74%
 - Services→19%
 - Accommodation (housing)→4%
 - Vocational Associates→2%
 - Contracts→1%
- By prohibited ground
 - Disability→30%
 - Race & Colour→17%
 - Sex (Gender)→14%
 - Ethnic Origin→8%
 - Place of origin→6%
 - Reprisal→6%
 - Age→4%
 - Creed (Religion)→3%
 - Family Status→3%
 - Sexual Orientation→2%
 - Marital Status→2%
- Most complaints are related to the combination of Employment and Disability

Leading Human Rights Legal Concepts

- **Direct Discrimination**
 - Intentional discrimination
 - Example: “No Muslims or Gays served in this restaurant”
- **Indirect Discrimination**
 - Also known as Adverse Impact or Non-intentional Discrimination
 - Neutral rule or practice that has a discriminatory impact/result
 - Example: “All employees must be available to work Friday evenings”
 - Most common form of human rights complaint
- **Systemic Discrimination**
 - Form of indirect discrimination
 - Entrenched pattern of discrimination against disadvantaged group
 - Example: Low wages for women; Aboriginal peoples occupy only low-end jobs; persons with disabilities not getting promotions; etc.
 - Only a handful of these cases
 - Mostly about gender

Leading Human Rights Legal Principles

1. Human rights legislation is not ordinary law. It is quasi-constitutional, therefore it trumps other legislation, except for the Canadian Constitution
2. Human rights legislation is to be given broad and liberal interpretation
3. Exceptions/Defences to human rights are to be given narrow and precise interpretation
4. Human rights obligations cannot be waived by contract or collective agreement
5. Human rights remedies are to be applied broadly, and put the person back into position
6. Motive and intention are not necessary to find a violation of human rights legislation

Human Rights Legislation & The Charter of Rights and Freedoms

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

- Human rights legislation applies to public and private sectors, while the *Charter* only applies to government laws or acts
 - Example: Restaurant refuses you because of your disability, you must go through the human rights process
- *Charter* is part of the Canadian Constitution, therefore human rights legislation must not be under-inclusive

- Example: Alberta and sexual orientation
- *Charter* and human rights rulings influence each other

Three Important Canadian Human Rights Cases

O'Malley v. Simpson-Sears (SCC, 1985)

- O'Malley worked full-time as a retail clerk for Simpson-Sears since 1971
- Became 7th Day Adventist in 1978
 - Sabbath was Friday sundown to Saturday sundown
- Worked afternoon and evening shift
 - Wanted not to work on Friday evenings and Saturdays
- Rule → "All employees must be available to work Friday evenings"
 - Therefore, she was only offered part-time work
- O'Malley argued that this was discrimination on the basis of 'creed'
- Simpson-Sears' defence → No intention to discriminate
 - Also, the rule was for a sound business reason, therefore there was no violation of the *Code*
- O'Malley lost at the Human Rights Board of Inquiry, and lower courts
- Supreme Court of Canada allowed the appeal and established 2 important new human rights principles:
 1. Duty to Accommodate is now part of Canadian human rights law
 2. Indirect or non-Intentional Discrimination is now part of Canadian human rights law
- SCC expanded what the meaning of discrimination is
 - As long as there is discriminatory effect or impact, it discriminates against a person
 - Employer has duty to accommodate employee based on human rights issues

Andrews v. Law Society of British Columbia (SCC, 1989)

- Mark Andrews was a British citizen permanently living in Canada
 - He had English law degrees and had finished his legal articles in BC
- He met all requirements to become a lawyer except he was not a Canadian citizen, as required by the *Barristers and Solicitors Act* of BC
- Law Society of BC refused his application
- Mr. Andrews initiated a s. 15 challenge under the *Charter* arguing:
 - 'Citizenship' should be read into s. 15
 - BC law discriminated against him
 - No justification for doing so
- Supreme Court of Canada establishes 3 important human rights principles:
 - Importance of equality and abhorrence of discrimination in a democratic society
 - *"Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant"*
 - Broad definition of discrimination
 - *"Discrimination...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics..."*
 - *"It is not a questions of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems"*
 - Additional grounds of prohibited discriminating conduct can be added under s. 15
 - Citizenship
 - Sexual orientation
 - Aboriginals living off-reserve
 - Rights of individuals to be interpreted broadly, exceptions to be interpreted narrowly
 - *Varine Case* → When a new ground is added to Section 15 that you cannot discriminate against, it is automatically added to all Human Rights documents across the country

B.C. (Public Service Employee Relations Council) v. BC Government Service Employees Union ("Meiorin") (SCC, 1999)

- Facts
 - Establishes the current test for the duty to accommodate
 - Tammy Meiorin: BC Forest Firefighter

- 1994 – Aerobics fitness test required BC government brings in new regulations
 - Several deaths in the early 1990s
 - Coroner’s report recommended fitness standards for new firefighters
 - New tests are developed to test fitness level of firefighters
 - Every firefighter has to pass the 4 part test
 - When it comes to running 2 kilometers in 11 minutes with weights on her, she doesn’t pass
- Passed 3 parts of the test
- Aerobics test did not distinguish between male and female firefighters
- 2/3s of men passed; only 1/3 of women passed
- Files grievance with work
- Question: Could the aerobics test be revised to include more successful female applicants without compromising safety?
- Union argues that she was not accommodated
- Did the forest firefighting union properly accommodate her?
 - Wins at arbitration, loses on appeal, loses again at appeal, goes to SCC
 - SCC issues groundbreaking decision in September 1999
- SCC in Meiorin created new 3-step accommodation test to assess policies, practices, agreements for compliance with HR law:
 - Rationally connected?
 - Devised in good faith?
 - Is it impossible to accommodate an individual employee, short of undue hardship?
- Definition of Accommodation (3rd step):
 - Employers (& unions) must make every reasonable effort
 - Short of undue hardship
 - Factors of undue hardship:
 - Safety
 - Impact on collective agreement
 - Legitimate operational requirements of workplace
 - Size
 - Interchangeability of workforce
 - Employee morale
 - Cost
 -
 - To accommodate an employee who falls under a protected human rights ground of discrimination
- Decision:
 - Aerobics standard was prima facie discriminatory (significant that women failed the test in much higher numbers)
 - BC government could not prove that present test was reasonably necessary to accomplish safety purpose
 - Therefore, BC government was required to revise the aerobics test to improve women’s access to the jobs while preserving safety standards for forest firefighters.
 - Tammy Meiorin’s dismissal overturned

Duty to Accommodate / Accommodation at Work

- Most significant human rights employment development in past two decades
- Employment obligations: Changed from one-way to two-way street
 - Duty to accommodate vastly increased obligations of employers under human rights legislation
- At end of day, employee with disability still has to perform essential tasks of the job
 - Employer has obligation to ensure that visible and non-visible barriers are eliminated in the workplace (3 ways to fix discrimination)
 - Architectural and structural design
 - Ramps, wider aisles
 - Change policies in the workplace
 - Rules, agreements, etc.
 - All have to conform to duty to accommodate and human rights
 - Attitudes in the workplace must change

- If there is discriminatory behaviour, it must stop
- Covers all protected human rights grounds (but most important ones are...)
 - Gender
 - Age
 - Religious beliefs
 - Family status
- Greatest impact: Disability

Why Disability?

1. Greater range of differences
 2. Much more mutable
 3. Accommodations required are more complex and individually tailored
- Broad Definition in Ont. HR Code, s. 10 “disability” means: “any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes:
 - Diabetes
 - Epilepsy
 - Brain injury
 - Amputation
 - Sight impairment
 - Hearing impairment
 - Mental impairment or disorder
 - Difference between impairment and disability
 - Subsequent human rights decisions have added:
 - Anxio-Depressive state
 - Depression
 - Tobacco Addiction
 - Chronis Fatigue Syndrome
 - Chronic Pain Syndrome
 - Insomnia
 - Dental Condition
 - Migraines
 - Panic attacks
 - Alcohol or drug addiction
 - Dyslexia

New Statement of Accommodation

- Meiorin: New statement of accommodation standard to test policies, practices, agreements, etc:
 - Rationally connected?
 - Devised in good faith?
 - Is it impossible to accommodate an individual employee, short of undue hardship?
 - Most cases are fought over this step
- Example: Sight-impaired person with seeing-eye dog in restaurant
 - Come under both provincial and federal laws
 - Cannot bring animals into a restaurant for purposes of human safety
 - BUT, we make an exception for a seeing-eye dog
 - Our laws allow this to happen
 - Rationally connected?
 - Yes
 - Devised in good faith?
 - Yes
 - Is it impossible to accommodate this person short of undue hardship?
 - Generally no
- Example: Devout Sikh who cannot wear hardhat at construction site
 - **Bhinder v CN Rail**
 - Works as construction technologist with CN Railway
 - Works with properties owned by railway when they’re being renovated or demolished
 - Legal obligation for people on site to wear a hardhat
 - Mr. Bhinder wears a turban, nothing can be put on top of it

- CN fires Bhinder
 - Passes steps 1 & 2, debate over 3rd step
 - As an employer, would you let an employee go to a construction site without a hardhat?
 - Safety is an issue
 - Not a 100% defence
 - Are other employees at risk because Bhinder is not wearing a hardhat?
 - Not really
 - What if he knows the risk?
- Ruling: Mr. Bhinder should have been accommodate based on religious accommodation, given that there is virtually no risk toward other employees
 - Though there is some risk to Bhinder, it's a decision he understood and accepted
- What happens in the case of a workplace injury?
 - If Mr. Bhinder were injured, would he be entitled to compensation?
 - Yes he would
 - No fault insurance

ADGA Group Consultants v. Lane (Ont S.C., 2008)

- Facts:
 - Paul Lane diagnosed with bi-polar disorder
 - Worked 5 years at other firms, performed at high level while being accommodated
 - 22 Oct/01: First day of work as software program tester with ADGA
 - 24 Oct: PL informs work supervisor re: possible inappropriate behaviour
 - 26 Oct: PL tells supervisor he suffers from bi-polar disorder, and explains symptoms & features of illness
 - 30 Oct: ADGA terminates PL because it feared his illness would have adverse impact on his work
 - PL – His bi-polar subsequently escalates to manic stage. Hospitalised. Can't find work. Cycles of depression. End of marriage. Files human rights complaint
 - 2007: Ontario Human Rights Tribunal upholds PL's complaint
 - 2008: Ontario Supreme Court upheld OHRT ruling:
 - At termination, ADGA did not consider accommodating or minimizing impact of PL's illness
 - ADGA did not seek legal advice
 - ADGA did not meaningfully assess nature of bi-polar disorder, nor the ways it is manageable through medication
 - Prima facie discrimination: "Rush to judgement"
 - No attempt to accommodate. Did not establish undue hardship
 - Remedies:
 - \$80,000 in damages + interest
 - ADGA ordered to retain consultant to train management staff on human rights obligations
 - Create accommodation policy

Tahmourpour v. RCMP (CHRT, 2008) (Upheld, FCA 2010)

- Non-Accommodation human rights case
- Race
- Federal jurisdiction – RCMP
- Facts:
 - AT – Muslim Canadian born in Iran.
 - July 1999: Begins RCMP training program
 - Oct. 1999: Terminated from program; files H.R. complaint
 - Differential treatment by instructors
 - Religious pendant
 - Derogatory, abusive remarks about national origin
 - Refusal to re-admit
 - Harassment

- Legal Analysis:
 - Initial onus: on human rights complainant, to establish prima facie case of discrimination (adverse differential treatment) against defendant
 - Onus shifts: to defendant/employer, to provide persuasive evidence that discrimination was not a factor in its actions or decisions
- Human Rights Tribunal:
 - Must judge credibility
 - Must apply taint test where necessary
 - Must apply applicable law

Other examples:

Disability – Mental Illness and Addiction

- *Vancouver Police Board (2002)*
- Employee works as a civilian with the police service board
 - Takes care of upkeep of vehicles, etc.
 - Suffers from bipolar disorder
 - Also has a drinking problem, has suffered from alcoholism
- At one point, goes off work for several months because of the illness
 - Returns to work, sees that an ammunition locker is open
 - Takes the gun, takes some ammunition
 - Tells herself that some day she's going to use it on herself
 - Suffers an episode of bipolar disorder
 - Tries to shoot herself
 - Misses
 - Employer fires her
 - You stole a gun from the police locker
 - Doctor who treats her says she's much better and she's taking medication
 - 'Unlikely to happen again'
 - 'Should be able to go back to work'
- Is there a rationally connected rule (don't steal guns)?
 - Yes
- Is it done in good faith?
 - Yes
- Is it impossible to accommodate this person short of undue hardship?
 - Factor of safety is in consideration
 - Labor arbitration board put her back to work
 - Can accommodate her
 - Police board took great steps to ensure safety of guns and ammunition
 - Productive employee, seemed to have illness under control

Family Status

- *Vancouver Island Shelter (2004)*
- Woman works part-time in a shelter (24 hours/week)
- Has 4 children, husband is a construction worker (he's often not home)
 - One of her children has Asperger's disease, goes to a special school
 - Her work schedule fits her well because she can pick him up from school and he's most comfortable with that
 - Employer wants to change her schedule
 - She says she can't do it because she has responsibilities to this child
 - Employer says 'try it out for 5 weeks', she does and it doesn't work
 - Her child gets worse in his condition
- She argues that her employer did not accommodate her based on family status
- Where an employee has a significant family obligation at home, and the failure to accommodate would create a significant impact on their lives, there will be a duty to accommodate on the part of the employers
 - The failure of which, without a justifiable defence, would be a breach of the human rights code
- Human rights has a broad range to it, you have to make sure you define them in a very defined way

International Law

Lecture 1

What do I mean by international law?

1. Treaties: "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument, or in two or more related instruments and **whatever its particular designation.**"
 - Vienna Convention on the Law of Treaties, article 2:
 - (1) International agreement in writing;
 - (2) Between states [or between a state and an international organization such as the UN];
 - (3) Formed with an intent to be bound; and
 - (4) Governed by international law.
 - Usually between states stating what one state may do, or what another may not do. It can also be on how states treat their individuals.
 - Different kinds of treaties:
 - Bilateral treaties: those between Canada and one other country.
 - E.g. a Free trade agreement.
 - Multilateral treaties: those between three or more countries, generally developed under the auspices of international organizations.
 - More often, Canada is joining these type of treaties. Usually negotiated through an international organization, especially the United Nations.
 - Most famous: UN charter of 1945
 - Plurilateral treaties: generally entered into between one State and a group of States.
 - Setting up free trade areas...
 - E.g. NAFTA
 - Covenant, pact, act, exchange of notes/letters, convention, statute, charter, and arrangement – all mean the same if they satisfy the four requirements under Vienna Convention on Law of Treaties.
 - How does a country become bound by a treaty? (There are often two steps that take place before a country becomes bound by a treaty):
 - (1) Signature – **only** to express political support, nothing more; and
 - (2) Ratification – to express agreement to be **legally bound** by the terms of the treaty.
2. Customary International Law: not covered today

Monism and Dualism: Countries tend to adopt one or the other. Canada adopts both.

- Monism: international law is immediately incorporated as part of a state's domestic law – for example, in the case of a treaty, upon a state ratifying that treaty. E.g. When you ratify a treaty all the law in the treaty becomes a part of the domestic law – very efficient process.
 - Arguments:
 - International and domestic law are part of a continuous legal system.
 - Law is an organic whole: international law sets the boundaries of what states can and cannot do, and then states operationalize that in domestic law.
 - Entry of International Law into Domestic Law:
 - Automatic incorporation: International legal rules are automatically incorporated into domestic law.
 - If there is a clash between the international/domestic laws then the international law would take over.
 - Usually tend to be civil law states, and the exception is that Common Law countries emerging from Britain take on the monist approach.
 - Usually written into their constitution or law
- Dualism: There is a strict separation between the international and the domestic spheres of law. International law does not enter domestic law until it is changed into domestic law.
 - Arguments:
 - Domestic law regulates relations between individuals within a state, and international law governs states.

- International and domestic law regulate discrete subject matter: domestic law covers issues relating to individuals within a state, whereas international law covers issues relating to state-to-state interaction.
- Entry of International Law into Domestic Law:
 - International law must be transformed into domestic law through a law-making process [usually legislation].
 - International law has no direct effect on a domestic legal system. The domestic legal system creates a new rule of its own which mirrors the international rule.
 - International law is a horizontal system where nations operate side by side
 - Domestic law is a vertical system where the law/gov operate above individuals
 - Therefore, how can you integrate these two?
- Not usually written into the constitution... for e.g. In CA

What is Canada's Practice?

Canada: Dualism approach for treaties

- When Canada ratifies a treaty, Canadian law does not automatically change.
- Canada must transform the treaty into domestic law - done through domestic legislation

Policy of Tabling treaties in Parliament:

- In 2008 Canadian Gov implemented this policy.
- Once a treaty has been signed by Canada, the Minister of Foreign Affairs creates a memo explaining the treaty and what it means for Canada.
- Minister provides the memo and a copy of the treaty to the House of Commons.
- Then there is a waiting period of at least 21 sitting days during which Members of Parliament receive time in order to debate the treaty and whether Canada should ratify.
 - Giving the treaty a sober second thought
- After the 21 sitting days, the government can introduce legislation to transform that treaty into Canadian law. If that legislation is adopted, then Canada can consider ratifying the treaty.
- Exceptions to this Policy – The reason these exceptions exist is because in the case of where you need peace, or to establish a boundary, another nation in addition to Canada is affected, and perhaps you can't wait 21 days to ratify a treaty. E.g. In a war you may need to ratify a treaty now in order to adopt a cease fire
 - Peace treaty;
 - Treaty recognizing the independence of a state; and
 - Treaty establishing boundaries.
 - *From: Francis v. Canada (1956) (Supreme Court of Canada)*
- Memo: Minister would have to say 'Well this part of CC or CoHR fulfills this article of the treaty' in order to prove that Canadian law already has that law embedded in its own legal system.
 - Even so, there may still be debate/discussion on whether or not to ratify a treaty, because once you ratify a treaty you take on international obligations
 - Sometimes we have ratified a treaty, and then didn't embed it into domestic law – under international law Canada would be in violation of that treaty, even though in the domestic sphere there would be no wrong.
 - This is reiterated in the following case: *Capital Cities Communications v. CRTC (1978)*

Capital Cities Communications v. Canadian Radio-Television Commission (1978) (SCC):

- Facts: US television broadcasters argued that Canadian commercials could not be substituted into American TV shows being broadcast by US networks across the border into Canada. They relied upon the Inter-American Radio Communications Convention. Canada argued that its Broadcasting Act permitted the substitution of Canadian commercials.
 - Canada was taking out the US commercials and putting in Canadian ones
 - USA says this is in violation of the IARCC
 - SCC: We are a dualist nation... we don't abide by the International Law, therefore all we will consider is the domestic law because of the fact that Canada did not transform the law.
- Law: "There will be no domestic, internal consequences of a treaty unless legislation implements the treaty into domestic law." The Broadcasting Act failed to implement the Inter-American Radio Communications Convention. Therefore, the only relevant legal consideration is what is in the Broadcasting Act.

Labour Conventions Reference of 1937 (Privy Council):

- Canadian Parliament wanted to enact three pieces of legislation to implement three treaties adopted by the ILO (International Labour Organization) in 1919, 1921 and 1928, and ratified by Canada (all at the same time) in 1935.
 - ILO is one of the oldest international organizations in the world.
- Canada wanted to implement all of those treaties to transform them into domestic law.
- Provinces said that: Federal government does not have the power to implement legislation on certain issues in regards to Labour.
- Could the federal government do this, even when their subject matter fell under a provincial head of jurisdiction under s. 92 of the Constitution Act?
- Privy Council found that the federal government is not granted wholesale power to implement.
- Which level can implement treaties into domestic law depends on the subject matter of the treaty – these subjects are set out in ss. 91 and 92 of the Constitution.
- “While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.”
 - This can be problematic?

Transformed Treaties:

Pushpanathan v. Canada (1998) (SCC)

- Facts:
 - Pushpanathan claimed refugee status. The Immigration Act implements the UN Convention on the Status of Refugees.
 - He had previously been convicted of conspiracy to traffic in a narcotic and was excluded under the Immigration Act’s clause rejecting people “who have been guilty of acts contrary to the purposes and principles of the United Nations”
 - How to interpret this phrase?
 - How was it allowed to look at this international treaty given the strict difference in spheres?
 - Canada’s interpretation must be consistent with its own obligations under the refugee convention
 - Looked at actual treaty, the wording, and also applied the rules of treaty interpretation under international law -> actually had to look at the drafting documents to see how states interpreted the treaty and what they were drafting, in order to figure out what the treaty phrase meant
 - Were allowed to do that in order to help the SCC interpret the act
- Law:
 - The purpose of the Immigration Act is to implement the Refugee Convention, so the Court must adopt an interpretation consistent with Canada’s obligations under that Convention.
 - SCC stated that, **as a general rule**, courts will be required to interpret implementing legislation to conform not only with treaty terms, but treaty obligations. Wider than the idea from CCC v CRTC which clearly emphasized the two different spheres of international and domestic law.

Untransformed Treaties: Baker v. Canada (1999) (SCC)

- Treaties don’t get transformed into domestic law because Canada either doesn’t want to transform it, or it falls through the cracks.
- Facts:
 - Baker was a Jamaican national (not a Canadian citizen) with 4 children born in Canada. Baker was ordered deported from Canada. She lived in Canada for 11 years as a domestic worker.
 - She applied for an exemption from deportation under s. 114(2) of the Immigration Act, based on humanitarian and compassionate considerations and the effect of her departure on her 4 Canadian-born children, but was denied and appealed.
 - Argued that Canadian government when deciding on deportation had to look at the Convention on the Rights of the Child, and look at the best interests of the children... but Canada did not transform the treaty.
- Law:
 - SCC found that Canada had a reasonable exercise under their Immigration act to look at the best interests of the child. Must take the child’s best interests into account.

- If Canada is ratifying this treaty, they are indicating to the whole world and Canadians that we intend to follow the treaty so how can we say “Well, we ratified it but we have no intention of transforming it”
- Under Sc 114(2) best interest of child must be look at because.... The principles of the Convention [on the Rights of the Child] ... help show the values that are central to determining whether this decision was a reasonable exercise of the “humanitarian and compassionate” power.
- Therefore, adopted an interpretive approach, where the treaty had persuasive value, but was not mandatory.
- Dissent (Iacobucci): Reference cannot be made to underlying values of an unimplemented treaty in the course of interpreting a statute (unless this is a Charter issue).
 - Should SCC refer to an untransformed treaty to determine the decision of the case? Should they rely on this law as binding?
 - Should they only use them to remedy gaps/ambiguities in the law?
 - Could they ever use an untransformed treaty to overturn a Canadian law that clashes with international law?

Lecture 2 - 26 November 2013

Questions to consider under Dualism:

Should it make a difference whether the SCC refers to an untransformed treaty to:

1. **determine the outcome of a case directly** by using it as the relevant law upon which it relies?
2. to **remedy gaps and ambiguities in domestic laws**?
3. to **overturn a rule** otherwise enforceable under domestic law?

Monism Overview

- There is no division between the international and domestic systems of law.
- The legal system as an organic whole. There is a continuum between the international and domestic levels.
- International law is automatically incorporated into domestic law without any need for domestic legislation. In other words, international law has direct legal effect within a domestic legal system and forms part of the domestic law of the state.
- International law is domestic law, for monists

What if there is a clash between International and domestic law?

- If domestic law is different from international law, then most monist systems have a rule in place: in the event of a conflict between the international and domestic laws, the international law prevails.
- As you will see, Canada adopts a different approach from this traditional monist approach.

Canada:

Monist Approach for Customary International Law:

- For Canada, customary international law automatically forms a part of Canadian law.
- In other words, customary international law enters Canadian domestic law directly, without the need for transformative legislation.
- If there is a change in customary international law globally it automatically becomes a part of Canadian law. No legislation is needed.

Customary International Law:

- General Definition:
 - Unwritten law.

- Binds all states and cannot be altered by any state – no state AT ALL cant decide not to abide by it.
- Int law can exist in two different places in a treaty or binding all.
- E.g. Law prohibiting Genocide, can't torture individuals within their own territory, outside of their own country diplomats should have immunity,
- Legal definition:
 - Customary international law has 2 elements:
 - Sufficiently general and widespread **state practice**; and
 - Evidence of *opinio juris* – a sense on the part of states that this state practice is mandatory. A psychological feeling by states that the practice is obligatory, and that, if usage is departed from, some sort of sanction will – or ought to – fall on the transgressor state.
 - Weird to think about because states don't have feeling, but its actually the people that run the state that have to feel that way.
- State Practice:
 - In order to prove state practice, must show:
 - **General and widespread** nature of the practice; and
 - **Uniformity** of practice.
 - *Courts will also take into account **time duration** of the practice (how long states have been following that practice).
 - E.g. Armenian genocides at the end of WWI. Does law against genocide apply that far back?
 - How to prove general and widespread?
 - Look at the number or distribution of states following the relevant practice. How many states are doing that practice. Would literally count. There are 193 UN states that use it... etc....
 - The International Court of Justice (ICJ) ruled on this in the North Sea Continental Shelf case (Germany v. Denmark):
 - When assessing the extent of state practice, the ICJ counted the number of countries which had delimited their continental shelves.
 - It also suggested that the practice of some states (those with coasts) counted more than non-existent practice of land-locked states. Why should a land locked states action count the same as those who have a coastline? Therefore, you have to look at what state is carrying out the practice because some states weigh more than others in certain situations.
 - State practice does not need to be universal, but needs to be “widespread enough”, encompassing states with different political, economic and legal systems.
 - Explanation of continental shelf: Where the ocean starts to come to our coastline. Gets shallower and shallower.
 - Uniformity:
 - Uniformity means consistency or homogeneity of practice among practicing states.
 - Also look at whether those states adopting the relevant practice remain constant in their adherence, or drift in and out of usage.
 - No need to be perfectly consistent: if a state acts contrary to the rule, but defends its conduct appealing to exceptions or justifications contained within the rule, then this is also evidence that the state feels bound by the rule and that its practice would otherwise be in conformity with the rule.
 - E.g. States that have condemned torture. Both treaties and customary law.
 - But some countries still torture. They can still do it, and then they say “We're sorry, and we know its prohibited” this is what is looked at to see if something is uniform or not.
 - Geneva convention on laws of war is customary international law
 - Time duration:
 - Long duration of state practice is not required, but:
 - If there is only a short time between when a country claims a custom emerged and now, then that country needs to prove **extensive** and **virtually uniform** state practice, **including states most affected**.

- You need to show that the states that practice like you do that agree that it has been customary.
 - Example: The International Court of Justice has considered time duration as part of state practice in the Fisheries Case (UK v. Norway) (1951):
 - Norway used a method of drawing straight lines across bays as a starting point for measuring its sea territory – its very complicated for them because they have a weird coastline, and anything would be weird.
 - For over 60 years, UK did not oppose, and others did not, either.
 - This was taken by the ICJ as evidence that states did not view this method as contrary to international law.
 - UK then protested in 1933.
 - ICJ said that the UK should have objected sooner because the passage of time strengthened Norway’s position that what they had done is customary law.
- Mixed State Practice: What if many states do not follow a rule but still consider the rule to be binding? This is called mixed state practice, because the state says one thing and does another, but the state knows that what it is doing is illegal.
 - The ICJ has considered mixed state practice:
 - North Sea Continental Shelf case (Germany v. Denmark) (1969):
 - ICJ suggests that the practice of some states (those with coasts) counted more than non-existent practice of land-locked states.
 - If the practice is mixed, then the actions of those states most affected count more heavily
 - E.g. Guantanamo bay
 - If you look at the way the US talks about this what they try to say is that “torture is not allowed under international law”
 - They say that torture is allowed
 - They take the definition of torture and say that they haven’t practiced torture – changed the definition
- **Opinio Juris**
 - The ICJ has considered opinio juris in North Sea Continental Shelf case (Germany v. Denmark) (1969):
 - Defines opinio juris - belief by a state that its practice is rendered obligatory by the existence of a rule of law requiring it.
 - States must feel that they are conforming to what amounts to a legal obligation. Must feel legally compelled – not just a habit to do something.

How can a lawyer prove customary international law to the SCC?

- Diplomatic correspondence
- Government press statements
- Conference communiqués
- Summit reports
- Ministerial statements
- Speeches before UN bodies
- Comments made by (or to) the UN’s International Law Commission
- Government statements made in national legislatures
- Gov’t submissions to international and national tribunals, courts

Unless you’re looking at really clear customary law it’s a really difficult case to make.

Canada: Monism (Modified) – meaning that there is a quirky twist on monism. If we were traditionalists we would run into an issue when we had a domestic law and international law clashes... because then international would override... but sometimes this can be an issue.

- Jose Pereira case (1997) and Bouzari (2004):
 - Customary international law is **automatically** incorporated into domestic common law
 - However, domestic Canadian legislation can be enacted to displace/trump customary international law.... But how is this possible because customary law binds every state and no state can get out of it.

- As far as possible, domestic legislation should be interpreted consistently with customary international law obligations, but only when domestic is VERY contrary to what customary is saying does domestic take over.
- Foreign Legations Case (1943, SCC)
 - Facts:
 - Legation: embassy.
 - Under customary international law, diplomats, diplomatic premises and diplomatic property have diplomatic immunities. Immunities are specific “blocking” rules that stop a state from enforcing its own laws against a foreign diplomat or foreign diplomatic property/premises because when the effect of doing so would be inconsistent with the sovereign equality of other states.
 - Diplomats were usually messengers... they have immunity because you “cant kill the messenger”
 - Under Ontario law, section 4 of the Ontario Assessment Act required all property owners in Ontario to pay taxes: “All real property in Ontario ... shall be liable to taxation.”
 - The embassies of Australia, Brazil, France, the United Kingdom and the USA in Ottawa insisted that they should not pay property tax.
 - Consideration of customary international law: “The Courts acknowledge the existence of a body of rules which nations accept amongst themselves [customary international law]. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes...”.
 - Consideration of Immunities as customary international law:
 - “On the whole, therefore, it is impossible to conceive that the prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power ... the latter, in receiving the minister, consents to admit him on the **footing of independency**: and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation.”
 - Takes the analysis of immunity on diplomats and says that... therefore they are inviolable (sp?)
 - Consideration of Taxes:
 - Ontario property taxes are taxes imposed on all to raise revenue, and these cannot be levied on diplomats and diplomatic property (such as embassies).
 - You cant demand from one king to another king that the other king pay taxes to the first king. Under international law this would be illegal.
 - If these taxes were allowed, then the penalty for non-payment would be seizure and sale of the diplomatic property (which is immune, therefore this would be a massive violation of diplomatic immunity) so this is problematic). As well, if the embassy wished to fight the property seizure, it would need to appear before the Ontario courts to do so, and this also violates international law on diplomatic and state immunity from court processes.
- R. v. Hape (2007, SCC):
 - Facts:
 - Hape, an investment banker, was convicted of money laundering. The investigation involved the search, by the RCMP (which had sought permission from the local police authorities), of his property in the Turks and Caicos.
 - The RCMP were permitted to carry out covert, warrantless searches of the premises of Hape’s investment company under the supervision of a member of the Turks and Caicos police department.
 - Okay in Turks and Caicos to search without a warrant
 - Not okay in Canada
 - Hape claimed that his rights under section 8 of the Canadian Charter (under which everyone has the right to be secure against unreasonable search or seizure) were violated.
 - Good question: if you travel somewhere does the charter of rights and freedoms still apply to you

- The Supreme Court therefore had to consider the extraterritorial effect of the Canadian Charter, along with the status of customary international law.
- Monism (modified)
 - Customary international law may be incorporated directly into domestic Canadian law, without the need for legislation.
 - However, Canada can adopt legislation that expressly conflicts with customary international law, in which case the Canadian legislation prevails.
 - If there is no contrary legislation, then Canadian courts may look to customary international law to aid in the interpretation of Canadian law and the development of the common law.
- Customary International law on State Sovereignty:
 - “One of the key customary principles of international law, and one that is central to the legitimacy of claims to extraterritorial jurisdiction, **is respect for the sovereignty of foreign states**. That respect is dictated by the maxim, lying at the heart of the international legal structure, that all states are sovereign and equal.”
- Customary international law on state sovereignty:
 - Canada’s law does respect the sovereignty of foreign states, but we also have to consider that the HR limits how much we should respect this sovereignty - monism modified. If the charter says something different from charter, then charter prevails.
 - The principles of non-intervention and territorial sovereignty may be adopted into the law of Canada in the absence of conflicting legislation. These principles must also be looked at in determining the scope of extraterritorial application of the Charter.

Lecture 3 - 29 November 2013:

Notes for final exam:

- Really helpful doc on OWL under evaluations FAQ
- Won’t be asked details such as who was the judge, but we must be familiar with the key principles of the cases. Especially main facts as they relate to the key principles that we’ve learnt in class.
- Examples: Car bombs, IEDs, shootings, assassinations, kidnappings, hijackings (planes and ships), and bombing airplanes.
- Treaties are reactive and arise after certain situations escalate and are demonstrated that they need to be prevented.

Class 3: Case Study on the Interaction of Canadian and International Law Relating to Terrorism:

“Terrorism”: what does the word mean in international law?

- No single definition
- Usually the word is used to mean certain acts committed with the purpose of provoking a state of terror, intimidating a population or compelling a government or an international organization to do, or abstain from doing, any act.

UN Security Council:

- 15 states: 5 are permanent. France, US, UK, China, and Russia. 10 that get elected.
- Given powers under the United Nations Charter.
- Powers:
 - The United Nations Charter confers “**primary** responsibility for the maintenance of international peace and security” on the Security Council.
 - It also give the Security Council the power to decide what measures not involving the use of armed force are to be employed by countries to give effect to its decisions. (They also have powers involving the use of force, but today we’re talking about not using force)
 - The UN Charter also states “Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the ... Charter.”
 - Regardless of whether or not you’re in a state that is on the Security Council, every state in the UN agrees to abide by any binding decisions the Security Council makes.

Canada: Transforming the UN Charter into Domestic Law:

- The UN Charter is a treaty, which Canada has transformed into Canadian law through the United Nations Act

- The United Nations Act states that the Governor in Council may make such orders and regulations as are “necessary or expedient” to put into effect decisions of the UN Security Council.
 - Also adopt regulations that put in place whatever the Security Council asks Canada to do.

UN Security Council Resolution 1267 (Adopted 1999):

- August 1998: Bombings of 2 US embassies. Kenya and Tanzania. Both resulting in a lot of deaths. Bin-Laden claimed the blame for this and as a result...
- UN Security Council Resolution 1267 created a Committee (called the 1267 Sanctions Committee) that could put people on an Al-Qaeda Sanctions List.
 - Kinds of sanctions: freezing their bank accounts, properties, and any assets
 - Preventing them from traveling anywhere
 - The kinds of people that were on it were those directly affiliated with Al-Qaeda, but after 9/11 it was expanded to include anyone who is a part of Al-Qaeda and their affiliates, and associate organizations.
 - At the time: Any state could make a recommendation to be put on the list.
 - People put on the list were never told they were going to be put on it – argue against it – or have a way to get off of it. Very immediate, and very large effects of it.

Abdelrazik v. Canada (Minister of Foreign Affairs):

- A was born in Sudan, lived there till 1989. Left because he was jailed as the opponent of the president at the time. Came to Canada in 1990, got refugee status in 1992, and became a citizenship in 1995. Got citizenship, lived in MTL and had kids.
- Timeline – 2003:
 - In 2003, Abdelrazik travelled to Sudan to visit his mother, who was ill. He knew he could be in trouble, and he could be detained.
 - He was arrested and detained there for 11 months by Sudanese authorities, but was never officially charged with any crime.
 - During his first period of detention, CSIS officials interrogated him (Never reported back to anybody that they knew he was there. CGov didn’t know he was there, and neither did his family).
 - He was also tortured by Sudanese officials – beat with a hose, took away asthma meds, glasses, etc. Tortured him.
 - Once released Canada denied they knew he was in jail.
- Timeline – 2004:
 - In July 2004, he was moved to a “half- way house” in Khartoum. He was required to report weekly to the Sudanese authorities. Allowed to walk around and what not but he was confined.
 - He visited the Canadian Embassy several times, urgently requesting assistance to return home to Canada. Also approached and visited prominent diplomats.
 - Foreign Affairs arranged for him to fly home via Frankfurt, with a diplomatic escort, on Lufthansa Airlines (which is very very very rare).
 - Days before the scheduled departure, however, Lufthansa informed Canada that it would not board Mr. Abdelrazik because his name was on a “no-fly” list. Other plans he pursued fell through. It is strange because he was not on a UN no fly list... he was not on the 1267.
- Timeline – 2005 – 2006:
 - On July 26, 2005, Abdelrazik was provided with a written decision from the Sudanese Ministry of Justice dated, exonerating him of any affiliation with Al-Qaida. They agreed to give him this decision, as they never officially charged him.
 - In October 2005, he was summoned to a meeting by the Sudanese authorities. Abdelrazik asked Canadian consular officials whether he should respond to the Sudanese summons. He was told that he should, and was assured that Canada would “follow up” if anything should happen. Abdelrazik went and was detained for nine months, until July 2006. He was beaten and tortured.
 - They didn’t really follow up... they weren’t allowed to do anything. Sudanese refused to let the Canadians have access to him.
 - Beaten at random
 - Subjected to torture
 - They never tried to get anything out of him – pointless and random
 - Chained to a doorframe and beaten

- During his detention, his Canadian passport expired.
- Canadian consular officials were denied access to Abdelrazik.
- Timeline – 2006:
 - On July 20, 2006, the day of his release from detention, Abdelrazik was designated by the United States as having “high level ties to and support for the Al-Qaida network.”
 - Reasoning: US Intelligence agents had questioned a leading Al-Qaida leader and that person had said that he was affiliated. Later it came out that he was tortured to get answers – so validity is in question.
 - On July 31, 2006, Abdelrazik was listed by the UN 1267 Committee as an associate of Al-Qaida, likely by the US. The US has never actually owned up to listing him on the list...
 - Canada is now required to implement the 1267 resolution:
 - Once the 1267 Committee listed Abdelrazik, this meant that Canada’s United Nations Act and the United Nations Al-Qaida and Taliban Regulations were applied to Abdelrazik.
 - These Regulations prohibited anyone in Canada and any Canadian outside of Canada from providing funds to be used by a person listed by the 1267 Committee.
 - Not allowed to travel to Canada. Not allowed to go anywhere. His bank accounts were frozen, and no Canadian anywhere in the world could give him any money to survive in Sudan.
- Timeline- 2007:
 - He lived in Sudan on \$100 a month that Canada lends to Canadians in distress. He lived like that for 2 years. Canada said that it could not bring him back to Canada because he was on the 1267 list and could not fly.
 - Canada provides funding to individuals who are in distress elsewhere in the world.
 - Canada sought a special exemption so they could give him the \$100.00 a month.
 - He found a lawyer through supporters in Montréal.
 - In October 2007, Abdelrazik filed a petition requesting that the Minister of Foreign Affairs ask the 1267 Committee to take him off the list. Canada sent the delisting request to the 1267 Committee. The request was denied, without reasons, on December 21, 2007.
 - CSIS and RCMP said that they had no information whatsoever that connected him to any criminal activity. It was a flat out no.
 - Abdelrazik applied again for a Canadian passport, and he was told that he could have an emergency passport, but Canada failed to issue it, never followed through. He was worried that he would be detained again, because he was interrogated by US intelligence officials, and had warnings that he may be imprisoned again.
- Timeline – 2008-2009:
 - On April 29, 2008, Abdelrazik, sought and was granted safe haven at the Canadian Embassy in Khartoum. Literally walked in and asked. Canada got permission from the 1267 Committee to do this.
 - Minister of Foreign Affairs – Lawrence Cannon, he would look at the picture of the man.
 - Good on the CA embassy because normally in these circumstances they don’t let people walk in and live there.
 - He managed to reserve a flight to Canada in August 2008, but Canada did not issue him his emergency passport, so he could not leave.
 - In December 2008, Canada said it would only issue the emergency passport if he could give proof of a fully paid ticket to Canada. On March 15, 2009, Mr. Abdelrazik provided the Canadian Embassy in Khartoum with a confirmed and fully paid ticket from Khartoum to Toronto, with a departure of April 3, 2009. On April 3, the Minister of Foreign Affairs denied his request for an emergency passport, by way of letter delivered approximately two hours before his scheduled departure. It was one sentence long: “Pursuant to Section 10.1 of the Canadian Passport Order the Minister of Foreign Affairs has decided to refuse your client’s request for an emergency passport.”
 - 10.1: security risk
 - Minister didn’t explain how he could be allowed to live in the embassy, yet be deemed a security risk.
 - At this point he took his case to the federal court.
- Legal issues:

- Justice Zinn: “There is a tension between the obligations of Canada as a member of the UN to implement and observe its resolutions, especially those that are designed to ensure security from international terrorism, and the requirement that in so doing Canada conform to the rights and freedoms it guarantees to its citizens.”
 - What happens when CA is being asked to do something to protect their citizens clashes with the rights and freedoms of that citizens have?
- What rights did Canada violate?
 - Right to entry:
 - Abdelrazik focused on the argument that he was denied the international law right of citizens to enter their own country, which was transformed into Canadian law in **subsection 6(1) of the Charter**.
 - Helps to prevent them being stateless
 - Under the Charter, this right is subject, under section 1, to “such **reasonable limits** prescribed by law as can be **demonstrably justified** in a free and democratic society”.
 - Justice Zinn rejects Canadas arguments:
 - First, Canada had argued that he is on a no-fly list and commercial air carriers will not board him, and he cannot fly in the air space of UN states.
 - The 1267 Committee had created an exception for listed individuals who **need to return home**, and Canada knew this. Which relates back to the international right to travel home.
 - Second, Canada put unnecessary roadblocks in his way by not issuing an emergency passport.
 - Officials told him that they would issue an emergency passport, but in fact they would not.
 - The government said that people who helped to buy him a ticket could be charged in Canada. (Threatened them)
 - Even when he had a fully paid ticket, the Minister still decided not to issue the emergency passport. The Minister did not follow the proper process and also waited until the very last minute before the flight was to depart to deny the emergency passport.
 - There were secret internal documents that said he would be denied a passport, but they publically told him and everyone they would... they misled him.
 - Third, when the Minister decided not to issue the emergency passport, he **gave no explanation of the basis on which that determination was reached**.
 - Canada should have demonstrated that there was some great risk for allowing him to enter Canada or transit through other countries – since it did not do this, it *cannot claim that section 1 of the Charter applies*.
 - The whole he can live in the lobby of the embassy, but not go home because hes a security reach.... Contradictory arguments.
 - If he poses no greater risk what justification can there be no allowance for breaching his rights.
 - As well, the judge found that CSIS was complicit in the detention of Mr. Abdelrazik by the Sudanese authorities in 2003.
 - Basic justice rights:
 - Justice Zinn said “**I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness...** It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, *the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge [In reference to the US and how they listed him... unfair of them to be both the accuser and the judge under basic principles of justice].*”
 - “It is difficult to see what information any petitioner could provide to prove a negative, i.e. to prove that he or she is not associated with Al-Qaida. One cannot prove that fairies and goblins do not exist any more than Mr. Abdelrazik or any other person can

prove that they are not an Al-Qaida associate. It is a fundamental principle of Canadian and international justice that the accused does not have the burden of proving his innocence, the accuser has the burden of proving guilt.”

- International and Canadian Law: Innocent till proven guilty
- 1267 Committee: Guilty till proven innocent.
- Zinns ruling:
 - On June 4, 2009, the judge found that the Abdelrazik is entitled to re-enter Canada with the assistance of the government of Canada.
 - He required the Canadian government to issue an emergency passport and make travel arrangements for Abdelrazik within 15 (business) days.
 - The judge stated Abdelrazik, "*is as much a victim of international terrorism as the innocent persons whose lives have been taken by recent barbaric acts of terrorists*".
- Timeline – 2009: On June 18, 2009, the government announced that it would abide by the judge's ruling. Nine days later Abdelrazik flew to Canada.
- Timeline – 2009-now:
 - When he came back he was on the 1267 list. Nobody could hire him, because nobody could pay him.
 - In late 2009, he launched a lawsuit against the Canadian government, and personally against the minister of Foreign affairs Lawrence, for \$27 million. In August 2010, the Federal Court permitted his case to go ahead. Both personally, and the case against the government. They obviously felt that he was personally responsible to some extent.
 - In December 2009, the UN Security Council changed how the 1267 list is created and managed.
 - Did it in response to all the problems that were pointed out by Justice Zinns.
 - Looked into an ombudsperson into how to list and delist people and now there is a more refined process.
 - In November 2011, Abdelrazik was removed from the 1267 Sanctions List.
 - Been in limbo for a very long time and finally removed
 - Case is still going on... just last month, the former Minister of Foreign Affairs was questioned as part of his lawsuit – in the process called discovery
 - Spent all those days looking at his picture in the embassy and now he has the chance to ask him questions directly.
- Take aways from this case:
 - Canada has followed international law on terrorism by taking it and transforming it into Canadian law, but Canada must apply that law, recognizing natural justice, the right to return home, and recognizing the rights it offers its citizens.
 - Canada must look at implementing laws in a wider scope, applying both the international laws, humanitarian rights, and rights within Canada.
 - Abdelrazik's experience resulted in changes which was good, but sucked that he had to go through that in the first place.

Lecture 4 - 3 December 2013

Suresh v Canada (Minister of Citizenship and Immigration) (2002, SCC)

- Question: Is deportation permissible even if there is a threat of torture on return?
- Background and Timeline:
 - Suresh was born in Sri Lanka in 1955.
 - He came to Canada in 1990 at the age of 35.
 - He applied for refugee status and was accepted as a refugee in 1991, and then he applied for landed immigrant status.
 - He could apply as a refugee on the basis of the Tamils and the Similese (sp?) majority... and they are in a disagreement over cultural rights.
 - Right now: Now sure whether to list Sri Lanka as conflict or post-conflict country
 - He ran the World Tamil Movement, a Toronto-based group.
 - Immigrant Act Section 53 (1) General rule: "...no person who is determined under this Act ... to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined ... shall be removed from Canada to a country

- where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion".
- In 1995, the Solicitor General of Canada and the Minister of Citizenship and Immigration began proceedings to deport Suresh. They received a certificate from the Federal Court declaring Suresh a security threat.
 - This certificate was based on the opinion of the Canadian Security Intelligence Service (CSIS) that Suresh was a member of the Liberation Tigers of Tamil Eelam (LTTE), a group engaged in terrorist activity in Sri Lanka. He was accused of raising significant funds for the LTTE through the World Tamil Movement.
 - Had to show reasonable basis for applying, and that he is a security threat
 - The LTTE is engaging in terrorist activities in Sri Lanka, but he was associated with World Tamil Movement, and raising funds for LTTE because the LTTE functioned through funding of the WTM
 - Suresh was detained the next day (Quick process of the national security certificate)
 - Deportation procedure: The Federal Court then held 50 days of hearings and upheld the certificate as reasonable. Sort of like a double check, or a second chance to ensure that the process of issuing the security certificate was legitimate
 - The Court found that Suresh had been a member of the LTTE since his youth and was a member of the LTTE executive, and that Suresh obtained refugee status by misrepresenting the facts.
 - However, the Court also found that Tamils arrested by Sri Lankan authorities are badly mistreated and even tortured.
 - One of the first times that the federal court considered what would happen or what could happen to him on his arrival back to Sri Lanka
 - Suresh underwent a deportation hearing. The adjudicator held that there were no reasonable grounds to believe that Suresh was directly engaged in terrorism, but he should be deported based on membership in a terrorist organization.
 - In September 1997, the Minister of Citizenship and Immigration notified Suresh that she was declaring him a danger to the security of Canada under s. 53(1) of the Immigration Act. This declaration permits the Minister to deport a refugee on security grounds, even when the refugee's life or freedom would be threatened on return.
 - Suresh submitted arguments that he was likely to be tortured, disappeared or killed in Sri Lanka if deported.
 - Immigration Act, Section 53 (1) (Exception to the General Rule): "...no person who is determined under this Act ... to be a Convention refugee... shall be removed from Canada to a country where the person's life or freedom would be threatened ... unless
 - (b) the person is a member of an inadmissible class [which includes members of organizations that there are reasonable grounds to believe engage in terrorism] ... and the Minister is of the opinion that the person constitutes a danger to the security of Canada".
 - The list of inadmissible classes is members of organization that are engaged or believed to be engaged in acts of terrorism... he doesn't himself have to be engaged in acts of terror but just associated/involved with the group
 - 2nd part is that a minister must declare him a threat
 - An Immigration officer for Citizenship and Immigration stated that "to allow Mr. Suresh to remain in this country and continue his activities runs counter to Canada's international commitments in the fight against terrorism" although he also acknowledged that Suresh's activities in Canada were "non-violent" in nature.
 - He also found that Suresh's risk on returning to Sri Lanka was counterbalanced by his activities in Canada.
 - In January 1998, the Minister issued an opinion that **Suresh constituted a danger to Canada and must be deported**, but **did not provide Suresh with the Immigration officer's opinion** and gave Suresh no chance to respond, as that was the procedure permitted at the time under the Immigration Act.
 - Federal Court:
 - Suresh argued that the procedure was unfair and that the Immigration Act violated s. 7 of the Charter. **The Federal Court dismissed his request.**

- Sc 7. Right to life, liberty, and security which can not be deprived except in accordance with the fundamentals of justice
 - The Federal Court judge acknowledged that the analysis of Suresh's s. 7 rights should be informed by international law, especially the Convention Against Torture which Canada has ratified.
 - Convention Against Torture:
 - Article 1: For the purposes of this Convention, the term "torture" means any act by which **severe pain or suffering, whether physical or mental, is intentionally inflicted on a person** for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ...
 - Article 3: No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
 - The Federal Court judge found that the Convention Against Torture only applies where there are "substantial grounds" to believe that the person would be tortured.
 - Suresh did not meet this test because he had not submitted to the Minister a personal statement outlining why he believed he was at risk.
 - The Federal Court judge concluded that Suresh's deportation would not "shock the conscience of Canadians".
- Federal Court of Appeal:
 - Dismissed his application. The right to be free from torture was limited by a country's right to deport those who pose security risks.
 - Canadian legislation has primacy over customary international law.
 - Argument that customary international law includes the prohibition against torture, which is automatically part of Canadian law due to the monist approach
 - While deportation to torture violates s. 7 of the Charter, the violation was justified under s. 1. The objective of preventing Canada from becoming a safe haven for terrorist organizations was pressing and substantial and deportation procedures were a proper response to this objective.
 - Deportation to torture would not "shock the conscience" of Canadians because Canada would only be an involuntary intermediary and not the last link in the chain of causation leading to torture".
 - Big assumption
- Supreme Court of Canada (2001 heard appeal, issued judgment in 2002)
 - "**On the one hand** the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.
 - **On the other hand** stands the need to ensure that these legal tools do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values."
 - The SCC found that s. 53 of the Immigration Act does permit deportation to "a country where the person's life or freedom would be threatened".
 - It then examined whether this law violates s. 7 of the Charter.
 - In order to do so, it looked at the international definition of torture (para. 43). This definition of torture had been transformed into domestic law and included in our Criminal Code.
 - Found that the convention against torture was transformed in domestic legislation into the Canadian law.
 - Criminal Code: Torture:
 - **269.1 (1)** Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

- (2) For the purposes of this section, “torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...
 - Becomes part of the Canadian values... and then look at Sc7.
 - s.7 of the Charter:
 - Section 7 guarantees “everyone ... the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
 - “Everyone” includes refugees. Deportation to torture will deprive a person of their life, liberty and security of person. *But is this deprivation in accordance with the principles of fundamental justice?*
 - In order to figure out the principles of fundamental justice, the SCC looked at international law.
 - It looked at the Convention Against Torture and
 - The International Covenant on Civil and Political Rights.
 - Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
 - Flat out prohibiting torture.
 - Article 4...2. [In times of public emergency] no derogation from articles ... 7 ... may be made under this provision.
 - They found that countries in an emergency may enact special laws... so they added this section
 - Basically torture is just not permitted
 - **Refugee Convention:** Interestingly Canada also had to look at this refugee convention which is an extra...
 - Article 33: No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened ...
 - The benefit of this provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is...
 - It is this that Canada implemented into our immigration act.

Suresh: Supreme Court of Canada Conclusions:

- SCC concludes that international law rejects deportation to torture, even where national security interests are at stake – and so does s. 7 of our Charter.
- Therefore, while the Immigration Act leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where, on the evidence, there is a substantial risk of torture.
- Whenever a minister is making a decision has to take into account the two international treaties that are important
 - If she does that... then the deportation will be justified under sc 53
 - But they also said that there may be exceptional circumstances where deportation to torture might be justified under s. 1 of the Charter.
 - Only deport to torture under extra ordinary measures
 - Without Canada’s action there would be no risk of torture. Therefore, we cannot pretend that we are not a direct participant in the torture.
 - In the end the SCC found that to deport a refugee to torture would generally violate sc7 of the charter. This is clear given the strong HR treaties, and the international covenant against torture... minister has to keep those treaties in mind but have exceptional cases
 - The balance usually lies in not deporting... but sometimes it may tip towards deporting the individual
- Does this strike a fair balance?

R v Hape on International Human Rights Law and the Charter:

- This Court has also looked to international law to assist it in interpreting the Charter.
 - Reiterated the rule: Whenever possible, it has sought to ensure consistency between its interpretation of the Charter, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other ... In interpreting the scope of application of

the Charter, the courts should seek to ensure compliance with Canada's binding obligations under international law...

- Not only do courts have to make sure that HR law and Charter are consistent, also have to look at international law to ensure compliance with our obligations under international law
- Dualism: Two different spheres and unless law is transformed it does not apply
 - Its fuzzy as to whether Canada is dualist or monist