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Foundations of Canadian Law

A complete guide to the NCA Foundations of Canadian Law syllabus, topic by topic, with case snapshots, exam tips and practice problems with model answers.

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- Part I** Basic Theories of Law; Racism & the Law
 - Part II** Indigenous Peoples and the Law
 - Part III** Sources of Canadian Law
 - Part IV** Fundamental Principles of the Canadian Legal System
 - Part V** Parliament, the Executive and the Courts
 - Part VI** Statutory Interpretation and Constraints on Legislative and Administrative Action

Follows: NCA Foundations of Canadian Law syllabus, revised July 2025 (Topics 1–10)

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This guide is a study aid, not legal advice. Always check the current NCA syllabus and the primary sources.

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Basic Theories of Law; Racism & the Law

Syllabus Topic 1

ON THE SYLLABUS

What the syllabus assigns for Part I

Topic 1, Basic Theories of Law; Racism & the Law. The syllabus lists four headings: Positivism and Natural Law; Feminist Perspectives on Law; Critical Legal Studies; Law and Economics. It then assigns these required readings:

- Bryden, Kennedy et al, *Public Law: Cases, Commentary, and Analysis*, 5th ed (Emond, 2025) ("Bryden"), Chapter 2, "Legal Theory in Relation to Public Law";
- *R v Morris*, 2021 ONCA 680;
- 8573123 *Canada Inc v Keele Sheppard Plaza Inc*, 2021 ONCA 371;
- *R v Gladue*, [1999] 1 SCR 688;
- Michael Trebilcock, "Law and Economics" (1993) 16:2 Dal LJ 360;
- Asha Kaushal, "Multiculturalism and the Irreducibility of Race" (1 October 2024), UBC Allard School of Law Research Paper.

The syllabus (revised July 2025) assigns no paragraph ranges for Topic 1, so the whole of each reading is examinable.

Learning objectives

By the end of Part I you should be able to:

- explain the difference between saying what the law **is** and saying what it **ought to be**, and why every theory in this Topic takes a position on that difference;
- state the core claims of natural law theory (classical and procedural) and of legal positivism (Austin and Hart), and identify which one a given statement about law reflects;
- explain Dworkin's challenge to positivism and why it is anti-positivist without being a classical natural law theory;
- describe the main strands of feminist legal theory, critical legal studies, law and economics and critical race theory, and apply each one to a Canadian case;
- summarize Trebilcock's account of law and economics, including its two methods, its efficiency concepts, its critics and its own stated limits;

- summarize Kaushal's argument that Canadian law has treated race as a kind of culture, and evaluate it;
- explain what *Gladue*, *Morris* and *Keele Sheppard* decided, and what each shows about how Canadian courts take account of racism;
- write a short critical answer that defines terms, attributes ideas to the right author or case, applies them, and reaches a view.

How Part I is examined

Foundations is unlike the other NCA subjects you may have written. Part of it tests rules you must apply to facts, as Constitutional or Administrative Law do. Part of it tests whether you have read and **thought about** the assigned materials. Legal theory sits mostly in the second category, but examiners often turn it into a problem: a speaker makes a claim about law, and you must identify the theory behind it and say whether the claim holds up.

The syllabus describes four question types, and Part I material can appear in any of them:

Question type	What the syllabus says it tests	How Topic I typically appears
Short answer or multiple choice	Whether you can evaluate statements about the syllabus material briefly and accurately	"True or false: a legal positivist must believe that an unjust law must be obeyed."
Essay	Whether you have engaged critically with the readings and formed your own view of their strengths and weaknesses	"Critically assess the claim that Canadian courts can address systemic racism through ordinary sentencing principles."
Problem	Whether you can identify issues, state the rules, apply them to new facts and reach a reasoned conclusion	A scenario in which a judge, official or citizen reasons about law, and you must classify and assess that reasoning
Combined	Any of the above, sometimes inside a larger question on another Topic	A question on statutory interpretation (Topic 9) that also asks which theory of law the court's approach reflects

The NCA's published sample exam instructions for this subject list four elements that a passing answer must contain: accurate identification of the relevant issues; a short explanation of key terms and concepts; evidence of critical analysis; and citation and application of the relevant syllabus cases and readings. Clear, well-organized writing in full sentences earns further marks, but you cannot pass without the first four. The same instructions say that unattributed quotations, including from online summaries, are plagiarism and earn zero.

EXAM TIP

Precision is the whole game in theory questions

Markers can tell within two sentences whether you understand a theory. "Positivists think law and morality are separate" is too loose to earn much. "Positivists hold that whether a rule is legally valid depends on its source in social facts, such as enactment by a body the legal system recognizes, and not on its moral merit" is precise, attributable and usable. Define first, then apply.

Topic 1: Basic Theories of Law; Racism & the Law

1.1 Why legal theory matters in a Canadian law exam

Every lawyer already uses a theory of law, usually without naming it. When you tell a client "the statute says X, so you must do X," you are relying on the idea that law is what the authorized institutions have laid down. When you argue that a court should not read a statute to produce an absurd or unjust result, you are relying on the idea that law has a moral purpose. When you argue that a rule will simply make landlords raise rents, you are doing economics. Topic 1 asks you to make these assumptions explicit and to test them.

Two distinctions organize the whole Topic.

Descriptive and normative claims. A descriptive (or "analytical") theory tries to explain what law is: what makes something law, and how legal systems work. A normative theory says what law *ought* to be or do. Positivism is primarily a descriptive theory. Law and economics has both a descriptive branch and a normative branch, as Trebilcock explains (1.7). Feminist, critical and critical race theories mix the two: they describe how law actually operates (often, how it entrenches hierarchy) in order to argue for change.

Internal and external perspectives. Some theories look at law from the inside, the way judges and lawyers reason with it. Others look from the outside, at what law does in society: who wins, who loses, whose experience it reflects. A good critical answer often moves between the two: what the court said it was doing, and what its decision does.

Bryden's Chapter 2 places these theories at the start of a public law book for a reason. Public law is about the authority of the state: when the state's commands bind us, and on what conditions. That is exactly the question legal theory asks in general form.

1.2 Natural law

The core claim. Natural law theorists hold that there is a **necessary connection between law and morality**. On the strongest version, a rule that conflicts with basic moral principles is not truly law at all, however properly it was enacted. The principles are "natural" in the sense that human beings can discover them by reason, rather than because a ruler announced them.

Classical natural law. The tradition runs from Greek and Roman thought through Thomas Aquinas in the thirteenth century. For Aquinas, human law is a rational direction aimed at the common good, made and published by whoever has responsibility for the community. A human law that departs from the requirements of reason and the common good is, in his words often quoted in Latin, *lex iniusta non est lex*: an unjust law is not law.

That slogan can be read in two ways, and the difference matters on the exam.

Reading	What it claims	Is it compatible with positivism?
Strong	A grossly unjust rule is not legally valid. It is not law at all.	No. It makes moral merit a condition of legal validity.
Weak (associated with modern natural lawyers such as John Finnis)	An unjust rule may be law in the technical sense, but it is a defective or "corrupt" instance of law and does not create a moral obligation to obey.	Largely yes. A positivist can agree that a valid law may be morally bad and may not deserve obedience.

Procedural natural law: Fuller. Lon Fuller, writing in *The Morality of Law* (1964), argued that law has an "inner morality" built into the very idea of governing people through rules. He told the story of an imaginary king, Rex, who fails at law-making in eight distinct ways. From those failures Fuller drew eight requirements of legality:

Fuller's requirement	What it means	A Canadian echo
Generality	Govern by general rules, not ad hoc orders	Legislation sets standards for classes of people and situations, which officials then apply
Promulgation	Make the rules known	Statutes and regulations must be published before they bind
Prospectivity	Don't make rules retroactive	Charter s 11(g): no conviction for conduct that was not an offence when committed
Clarity	Make rules understandable	Laws that are too vague to guide conduct can violate Charter s 7
Non-contradiction	Don't require and forbid the same thing	Federal paramountcy resolves conflicts between valid laws
Possibility	Don't demand the impossible	Defences of impossibility and due diligence
Constancy	Don't change rules so often that people cannot follow them	Stability is a rule-of-law value (Topic 4)
Congruence	Officials must act according to the declared rules	Judicial review of administrative action (Topic 10)

Fuller's point was that a system that totally fails these requirements is not a bad legal system but **no legal system at all**. That makes him an anti-positivist: he too holds that law and morality are necessarily connected, though the morality he identifies is about the *form* of law rather than its content. A system could, in principle, satisfy all eight requirements and still pursue wicked aims, which is the standard positivist objection to Fuller.

Natural law in Canadian law. Canadian courts do not invalidate statutes for being unjust in the abstract. But natural law ideas have shaped the legal order. The preamble to the Charter declares that Canada is founded on principles that recognize "the supremacy of God and the rule of law." Section 7 protects life, liberty and security of the person except in accordance with "the principles of fundamental justice," a phrase that invites moral reasoning. And many of Fuller's requirements now appear as constitutional rules. Notice, though, that Canadian courts enforce these standards **because the Constitution makes them law**. That is a point positivists use in reply (1.3).

BEYOND THE SYLLABUS

The Hart–Fuller debate and the Radbruch formula

After the Second World War, German courts had to decide whether Nazi-era statutes had been "law." The jurist Gustav Radbruch, previously a positivist, argued that a statute whose injustice reaches an intolerable degree loses its claim to be law. In a famous 1958 exchange in the *Harvard Law Review*, H.L.A. Hart and Lon Fuller debated a German case in which a woman who had denounced her husband to the Nazi authorities was later prosecuted. Hart argued that it was more honest to admit that the Nazi statute was law, but so evil that it should not be obeyed or should be retroactively overridden; Fuller argued that the Nazi regime had so corrupted legality that its enactments did not deserve the name of law. The debate is the clearest illustration of what is at stake between the two traditions.

1.3 Legal positivism

The core claim. Positivists hold that the existence and content of law depend on **social facts**: on what has been enacted, decided or accepted by particular people and institutions. Whether a rule is legally valid is one question; whether it is morally good is another. This is often called the **separation** (or separability) **thesis**. The nineteenth-century positivist John Austin put it memorably: the existence of a law is one thing, and its merit or demerit is another.

The separation thesis is frequently misunderstood. It does **not** mean that positivists think law is morally good, that law should be obeyed whatever it says, or that morality is irrelevant to law-making. Many positivists, including Bentham and Hart, were reformers who believed that seeing law clearly is the first step to criticizing it. The claim is narrower: you can identify what the law is without first deciding whether it is just.

Austin's command theory. For Austin, law is the **command** of a **sovereign** backed by a **sanction**. The sovereign is a person or body that the bulk of society habitually obeys, and that does not habitually obey anyone else. This theory is simple and captures the coercive face of criminal law. It has well-known weaknesses, which Hart set out:

- **Not all law commands.** Rules that confer powers, such as the rules for making a will, forming a contract or enacting a statute, do not order anyone to do anything. They enable people to change their legal position.
- **Law binds law-makers.** Statutes apply to the legislators who enact them, which a theory of commands from above cannot easily explain.
- **Continuity of authority.** When a monarch dies, the successor's first command is law immediately, before any habit of obedience has formed. Something other than habit must explain this: a rule identifying who may make law.
- **Sovereignty is often divided or limited.** Austin's model of an unlimited sovereign fits poorly with a federal state like Canada, where legislative power is divided between Parliament and the provinces and limited by an entrenched Constitution.

Hart's concept of law. In *The Concept of Law* (1961), H.L.A. Hart rebuilt positivism around **rules** rather than commands. His main ideas:

- **The internal point of view.** A social rule differs from a mere habit because people who accept it use it as a standard: they criticize departures from it and treat it as a reason for acting. A legal system exists when officials, at least, take this internal point of view toward its rules.
- **Primary and secondary rules.** Primary rules impose duties (do not steal; pay your taxes). A society with only primary rules would suffer from three defects: uncertainty about what the rules are, no way to change them deliberately, and no authoritative way to settle disputes about them. Secondary rules cure these defects: rules of **change** (how to make and repeal law), rules of **adjudication** (who decides disputes and how) and, most importantly, a rule of **recognition**.
- **The rule of recognition.** This is the ultimate test, accepted in the practice of officials, that identifies which rules belong to the legal system. Its existence is a matter of social fact: it exists because officials actually use it. In Canada, the rule of recognition is closely tied to the Constitution, which s 52(1) of the *Constitution Act*, 1982 declares to be the supreme law, rendering inconsistent laws of no force or effect.
- **Open texture and discretion.** Legal rules are expressed in general language, and general words have a settled core and an uncertain fringe. Hart's example was a rule banning vehicles from a park: a car is clearly covered, but a bicycle, a toy car or a war memorial tank is not clear. In such penumbral cases, Hart said, the law runs out and the judge must exercise a discretion, in effect making new law.

Inclusive and exclusive positivism. Canadian law is full of morally loaded standards: "reasonable," "fundamental justice," "free and democratic society," "just." Does that defeat positivism? Two positivist answers exist.

- **Inclusive (or "soft") positivists**, including Hart in his later writing, say that a legal system's rule of recognition *may* make moral standards part of the test for valid law. The Charter is the obvious example: Canadians are legally bound by moral standards such as "fundamental justice" **because** the Constitution, a social fact, incorporates them.

- **Exclusive (or "hard") positivists**, notably Joseph Raz, say that law is always identifiable from its sources alone. On this view, when the Charter tells judges to apply "fundamental justice," it directs them to reason morally and then make law, rather than making morality itself part of existing law.

Law, convention and habit. Positivism also gives you a vocabulary for distinguishing law from other social rules. Not every rule that people follow, and criticize others for breaking, is a legal rule. A rule becomes legal when it is identified by the system's rule of recognition and so is enforceable through its institutions. Canadian constitutional practice provides a classic example.

BEYOND THE SYLLABUS

Constitutional conventions: binding, but not law

In *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 (the *Patriation Reference*), a majority of the Supreme Court held that the federal government could, as a matter of **law**, ask the UK Parliament to amend Canada's Constitution without substantial provincial consent; a differently constituted majority held that doing so would breach a constitutional **convention**. Conventions, the Court explained, are rules of political morality that the political actors treat as binding, but courts do not enforce them. The case is a clean Canadian illustration of Hart's distinction between legal rules and other social rules that people accept as binding. It is not on the Foundations syllabus.

1.4 Dworkin's challenge: principles, integrity and the "right answer"

Ronald Dworkin, Hart's successor at Oxford, mounted the most influential attack on positivism. It is worth separating his view from natural law, because exam statements often blur the two.

Rules and principles. In *Taking Rights Seriously* (1977), Dworkin argued that law contains not only **rules**, which apply in an all-or-nothing way, but also **principles**, which have weight and must be balanced. His example was *Riggs v Palmer* (1889), in which a New York court refused to let a grandson inherit under his grandfather's will after murdering him, although the wills legislation, read literally, entitled him to inherit. The court relied on a principle that no one should profit from their own wrong. That principle had never been enacted, so a test of pedigree (who made it, and how) could not identify it. Yet judges treated it as binding law. Dworkin concluded that positivism's source-based test cannot account for the whole of the law.

Hard cases have right answers. Against Hart's claim that judges exercise discretion when rules run out, Dworkin argued that judges are still bound: they must find the principles that best explain and justify the existing legal materials. His imaginary judge, Hercules, does this perfectly. Real judges do it imperfectly, but there is, Dworkin said, usually a right answer to be found.

Law as integrity. In *Law's Empire* (1986), Dworkin developed this into a full theory. Legal reasoning is **interpretive**: an interpretation of the law must **fit** the existing decisions and statutes reasonably well and must show them in their best moral light (**justification**). Law, on this view, is partly a matter of political morality. That is why Dworkin is an anti-positivist. But he is not a classical natural lawyer: he does not say there is a universal higher law against which all human law is measured. The morality that matters is the one that best justifies *this* community's legal practice.

Hart's reply was that inclusive positivism can explain principles too: in many systems, the rule of recognition directs judges to apply principles that courts have long relied on. The debate continues, and you need not choose a winner. You do need to state each side accurately.

BEYOND THE SYLLABUS

Unwritten constitutional principles

Dworkin's account of principles resonates with the Supreme Court's reasoning in *Reference re Secession of Quebec*, [1998] 2 SCR 217, which identified federalism, democracy, constitutionalism and the rule of law, and the protection of minorities as unwritten principles that animate the Constitution. Topic 4 (Fundamental Principles of the Canadian Legal System) examines how far such principles bind. For Topic 1, the point is only that Canadian constitutional law treats some unenacted principles as legally significant, which is the kind of evidence Dworkin relied on against positivism.

Identifying the theory behind a statement. Exam questions often give you a claim about law and ask what theory it reflects. The table below is a thinking tool, not a script. Work through it, then explain your conclusion in sentences, quoting the words of the statement that drive it.

Step	Ask	If yes
1	Does the speaker deny that a rule is law because it is immoral or unjust?	That is strong natural law, and so anti-positivist. Check that injustice is doing the work: denying a rule's legal status for another reason (no official recognizes it, it was never enacted) is not natural law.
2	Does the speaker accept that the rule is law, but say it is defective, wrong or not owed obedience?	That is compatible with positivism (and with weak natural law). Criticizing a law morally does not make anyone an anti-positivist.
3	Does the speaker test legal status by source : enactment, a court decision, official acceptance, the Constitution?	That is positivist reasoning (Austin if it turns on commands and sanctions; Hart if it turns on rules accepted by officials).
4	Does the speaker say that the law includes the moral principles that best justify the community's legal practice?	That is Dworkinian interpretivism: anti-positivist, but not classical natural law.
5	Does the speaker say that the legal system as a whole fails to be law because it lacks generality, publicity, clarity or congruence?	That is Fuller's procedural natural law.

COMMON MISTAKE

Common mistakes on positivism and natural law

- Saying positivists believe every law must be obeyed. The separation thesis is about how to identify law, not about the duty to obey it.
- Treating any moral criticism of a law as natural law reasoning. The question is whether the speaker makes morality a **condition of legal validity**.
- Labelling Dworkin a natural lawyer without qualification. He is anti-positivist, but his theory is interpretive, not a theory of universal higher law.
- Forgetting that a rule people feel bound by may still not be law. Positivism distinguishes legal rules from conventions, customs and habits by asking whether the legal system's own test of validity recognizes them.
- Describing Hart's theory as Austin's. Hart rejected the command model. Get the authors right.

1.5 Feminist perspectives on law

The core claim. Feminist legal theory begins from the observation that law, although presented as neutral, was largely made by men, for a world organized around men's experiences, and often treats those experiences as the universal standard. Feminist scholars ask what Katharine Bartlett called "the woman question": how does this rule affect women, and does it reflect experiences that are typically women's? Answers differ, which is why it is better to speak of feminist *theories*.

Strand	Central idea	What it asks of law	A typical criticism
Liberal feminism	Women and men are equally capable and should be treated as equals	Remove formal barriers; apply rules equally	Equal treatment of people in unequal positions can entrench inequality
Cultural (relational) feminism	Drawing on Carol Gilligan's work, women's moral reasoning often stresses care and relationships rather than abstract rights	Value care, relationships and context; reconsider adversarial and rights-centred processes	Risks reinforcing stereotypes about women's "nature"
Dominance (radical) feminism	Catharine MacKinnon: gender is a hierarchy of power, not a neutral difference; much of law reflects male dominance, especially over sexuality	Focus on power, sexual violence and exploitation; ask who benefits	Can seem to deny women's agency; contested on pornography and sex work
Intersectional feminism	Kimberlé Crenshaw: race, gender, class and other axes of disadvantage combine in ways that single-axis analysis misses	Analyse claims at the intersections; do not treat "women" as one group	Critics say it is hard to operationalize in legal tests
Postmodern and anti-essentialist feminism	There is no single "women's experience"; identity is constructed and plural	Suspicion of grand theories, including feminist ones	May undercut the ability to make collective claims

Feminist methods. Beyond its substantive claims, feminist scholarship popularized methods that now appear across critical legal thought: attention to lived experience and narrative; consciousness raising (individual stories revealing shared patterns); and practical, contextual reasoning rather than deduction from abstract rules.

The equality–difference problem. One tension runs through the field. If law treats women exactly as it treats men, it may ignore real differences (pregnancy, caregiving, vulnerability to sexual violence). If law treats women differently, it may reinforce the stereotypes that justified exclusion in the first place. Canadian constitutional law has largely resolved this in favour of **substantive equality**: equality measured by the effects of a law on real people in their actual circumstances, not by whether the law uses identical words for everyone. Charter s 15 protects equality "without discrimination," s 15(2) protects ameliorative programs, and s 28 guarantees the Charter's rights equally to men and women.

Feminism and the other readings. Feminist scholarship is not confined to a separate box. Kaushal's article draws on a special forum on the RDS case in the *Canadian Journal of Women and the Law*, a reminder that much Canadian scholarship on race and law came from feminist journals and scholars (1.9). The offender in *Gladue* was a young Indigenous woman who killed her partner, and an intersectional reading would ask how gender and Indigeneity combined in her case (1.10).

BEYOND THE SYLLABUS

Feminist ideas in Canadian judgments

In *R v Lavallee*, [1990] 1 SCR 852, Wilson J, the first woman appointed to the Supreme Court, held that expert evidence about the effects of an abusive relationship could help a jury understand whether a woman who killed her abusive partner reasonably feared death and believed she had no alternative. She observed that the "reasonable man" of the law of self-defence had been imagined as a man in a bar-room brawl. In a 1990 lecture, "Will Women Judges Really Make a Difference?", she argued that women judges could bring perspectives that the law had overlooked. Neither source is on the Foundations syllabus.

1.6 Critical legal studies

Origins. Critical legal studies ("CLS") emerged in the United States in the late 1970s, building on American legal realism (which had argued that judges decide cases on policy and intuition and then justify the result with rules) and on Marxist and critical social theory. Leading figures included Duncan Kennedy, Roberto Unger and Mark Tushnet.

Core claims.

- **Indeterminacy.** Legal materials rarely dictate a single result. For almost every rule there is a counter-rule or exception, and for every principle a competing principle (individual freedom against altruism, certainty against fairness). The outcome depends on choices that the doctrine itself does not make.
- **Law is politics.** Because the materials do not decide cases, judicial decisions are choices between values and interests. The language of neutral legal reasoning disguises those choices.

- **Legitimation.** Law helps make existing social arrangements, including inequalities of wealth and power, look natural, necessary and fair. People come to accept those arrangements as simply "the way things are."
- **The public-private distinction.** Liberal law treats the market and the family as private spheres outside politics. CLS scholars argue that these spheres are created and shaped by law (property, contract, family law), so the distinction hides state choices.
- **The critique of rights.** Some CLS scholars argued that rights are too indeterminate to protect anyone reliably, that they cast people as isolated individuals with competing claims, and that winning rights in court can demobilize political movements.

Responses. Two very different responses matter for this course.

- **From mainstream legal theory:** most cases are easy, and lawyers predict outcomes reliably. Indeterminacy at the margins does not show that law is "just politics." Hart's open-texture account already accepts that some cases require judgment.
- **From critical race and feminist scholars:** the critique of rights looks different to people who were long denied them. Patricia Williams and others argued that for Black Americans, the language of rights was a hard-won tool of dignity and resistance, not an illusion. This disagreement is one reason critical race theory developed as a distinct movement (1.8).

CLS and the readings. CLS gives you a way to read *Keele Sheppard* (1.12). The lease set a strict rule: written notice by registered mail six months before expiry. Equity offered a standard: the court may relieve against forfeiture where it is just. Duncan Kennedy argued that the choice between rules and standards reflects a deeper conflict between individualism and altruism, and is never politically neutral: rules promise certainty but can produce harsh results; standards allow attention to context but give room to judges' own values. In *Keele Sheppard*, the standard allowed the court to see what the rule would have hidden.

BEYOND THE SYLLABUS

Critical scholarship and the Charter

Some Canadian scholars influenced by CLS predicted that the Charter would move political disputes into courts, protect private economic power from regulation, and offer little to disadvantaged groups. Michael Mandel's *The Charter of Rights and the Legalization of Politics in Canada* (1989) is a well-known example. Whether the predictions came true is a live debate, and a good essay question.

1.7 Law and economics: Trebilcock

The assigned reading is Michael Trebilcock's survey of the field. Read it for its structure, which gives you a ready framework for any question on the topic.

Old and new law and economics. Trebilcock distinguishes an older tradition, in which economics was applied to areas of law that obviously concern markets (competition law and economic regulation), from a newer movement that from the 1960s applied economic analysis to every area of law. He

credits two foundational works: Guido Calabresi's analysis of accident law and Ronald Coase's analysis of property rights and social cost.

Two styles of analysis. This is the heart of the reading.

	Positive (descriptive, predictive) analysis	Normative (prescriptive) analysis
The question	If this legal rule is adopted, how will people respond, and what will the consequences be?	Which legal rule is better, judged by its effect on welfare?
The assumption	People are rational and respond to incentives; legal rules work like prices attached to conduct	Social welfare can be assessed by efficiency criteria
Example	If landlords cannot evict tenants for late renewal notices, how will lease terms and rents change?	Is a rule allowing relief from forfeiture efficient?
Its limits	Depends on the accuracy of behavioural assumptions	Depends on contestable value choices (below)

Two efficiency concepts. Normative analysis uses two tests, and you should be able to define both.

- **Pareto efficiency.** A change is a Pareto improvement if it makes at least one person better off and no one worse off. Voluntary exchanges are presumptively Pareto improving, because each party agreed to the deal only because it expected to gain. This is why economists tend to prefer private, voluntary transactions to collective decisions.
- **Kaldor-Hicks efficiency.** A change is efficient in this sense if those who gain could, in principle, compensate those who lose and still be better off, even if no compensation is actually paid. Because almost every legal change creates winners and losers, real policy analysis usually relies on this test.

The Coase theorem. Coase's insight, which Trebilcock's discussion of property presupposes, is that if bargaining were costless, parties would negotiate their way to the efficient use of a resource whichever of them the law initially gave the right to. In the real world, bargaining has costs (finding the other party, negotiating, enforcing the deal). So legal rules matter: they should reduce transaction costs, or allocate entitlements to the party who would end up with them anyway.

The critics, as Trebilcock presents them. Trebilcock is candid about the objections:

- Concepts central to Pareto analysis, such as what counts as "voluntary" and what counts as an "externality," are vague.
- Efficiency analysis takes existing preferences as given, including preferences that may be morally objectionable, and takes the existing distribution of wealth as given, even if it is unjust.
- Kaldor-Hicks analysis measures value by willingness to pay, which gives more weight to the preferences of the wealthy.
- Communitarian critics say that economics assumes an isolated individual whose preferences exist before society, ignoring how communities shape identity and preferences.

- Richard Posner's claim that law should maximize wealth runs into the objection that people's starting endowments often reflect luck rather than desert.

Applications. Trebilcock then surveys how economic analysis has reshaped thinking about property, contract (preventing opportunism, reducing transaction costs), tort (strict liability compared with negligence), corporate law, competition law, international trade, criminal law (deterrence and optimal penalties), family law, access to justice and immigration.

Trebilcock's conclusion. He rejects "one-value" approaches. Efficiency without attention to distribution, and to whose lives are improved, is impoverished; theories of distributive justice that ignore how wealth is created are idle; and extreme communitarianism can become exclusionary or authoritarian. Economics deserves a prominent but **not exclusive** place in legal analysis. This is the most quotable claim in the reading, and the one you should be ready to evaluate.

Applying the lens. Take relief from forfeiture in *Keele Sheppard* (1.12). A strict notice deadline lowers transaction costs: both parties know where they stand, and landlords can plan. But enforcing it there would have caused the tenant to lose about \$150,000 of improvements and a successful business, while the landlord showed no financial loss from renewal. On a Kaldor–Hicks view, forfeiture would destroy value for little gain, so relief was efficient. A critic would add that efficiency analysis alone could not register what the court found most troubling: that race appeared to shape the landlord's decision. That is exactly Trebilcock's point about the limits of a single value.

1.8 Racism and the law: critical race theory

The syllabus heading puts "Racism & the Law" beside the basic theories, and the readings that follow are all about race. Critical race theory ("CRT") is the theoretical frame that best explains why.

Origins. CRT developed in the United States in the late 1970s and 1980s among scholars, many of them scholars of colour, who shared CLS's scepticism about legal neutrality but found that CLS paid too little attention to race and was too quick to dismiss rights. Derrick Bell, Alan Freeman, Richard Delgado, Kimberlé Crenshaw, Mari Matsuda and Patricia Williams are central figures.

Core ideas.

- **Racism is ordinary, not aberrational.** Racism is not mainly the work of a few prejudiced individuals. It is built into institutions and everyday practices (**systemic** or **institutional** racism) and can operate without anyone intending it.
- **Race is socially constructed.** Racial categories are not biological facts. They are created and maintained by social practices, including law, and they place people in a hierarchy.
- **The critique of colour-blindness.** Rules that ignore race can preserve racial inequality, because they leave the effects of past and present discrimination in place.
- **Interest convergence.** Derrick Bell argued that gains for racialized groups tend to come when they also serve the interests of the dominant group.

- **Intersectionality.** Crenshaw's work showed how Black women's claims fell between doctrines built for "women" (implicitly white) and "Black people" (implicitly male).
- **Voice and narrative.** Stories of lived experience can expose assumptions that pass as common sense in legal reasoning.

CRT and Canadian law. Canadian courts now accept, as a matter of judicial notice, that anti-Black racism and systemic discrimination against Indigenous peoples are realities in Canadian society and its justice system. The three syllabus cases show this from different directions: *Gladue* in Parliament's sentencing direction for Indigenous offenders; *Morris* in sentencing Black offenders under general principles; *Keele Sheppard* in private law, where racism shaped a commercial decision. Kaushal's article asks whether Canadian law has the concepts it needs to see race clearly at all.

BEYOND THE SYLLABUS

***R v Le*, 2019 SCC 34**

In *Le*, the Supreme Court held that a young Asian-Canadian man was arbitrarily detained when police entered a backyard in a Toronto housing co-operative without justification, and that the analysis of whether a person is "detained" must take account of how a reasonable person of the claimant's racial background would perceive a police encounter. The majority relied on reports documenting the over-policing of racialized and low-income communities. *Morris* cites *Le* at para 1, but *Le* is not on the Foundations syllabus.

1.9 Kaushal, "Multiculturalism and the Irreducibility of Race"

The thesis. Kaushal argues that Canadian law has tended to treat race as if it were a kind of **culture**, and that this has held back the law's understanding of race, racialization and racism. She ties the problem to multiculturalism, which in Canada has a distinctly **legal** character: it was announced as federal policy by Prime Minister Pierre Trudeau in 1971, became an interpretive principle of the Charter in 1982 (s 27 directs that the Charter be interpreted consistently with the preservation and enhancement of Canadians' multicultural heritage), and was legislated in the *Canadian Multiculturalism Act* in 1988. During the decades around the turn of the century, multiculturalism was the dominant language of difference across much of the Global North, and race and religion were pushed to the side.

Race and culture are different kinds of thing. This distinction is the core of the article, and the meaning of "irreducibility."

	Culture	Race
What it is	Shared beliefs, practices and meanings: an identity and a world view	A socially constructed status that places people in a social hierarchy
Where it comes from	Usually inherited or chosen; people inhabit it	Ascribed by others; a racialized person cannot step outside it

	Culture	Race
Its shape	Horizontal: different cultures side by side	Vertical: a ranking
Its relation to discrimination	Discrimination based on culture is independent of culture itself	Racism creates race: the category exists because of the practice of ranking
What law's response needs to provide	Space and recognition	Redistribution and the dismantling of subordinating practices

Because race is about hierarchy and subordination, it cannot be reduced to, or folded into, a discussion of cultural diversity without losing exactly what makes it a legal problem. Multiculturalism speaks the language of diversity and inclusion, identity and recognition, and so tends to leave the distribution of power and resources untouched.

The reading of RDS. Kaushal uses the Supreme Court's 1997 decision in RDS, one of the few Supreme Court cases to confront race directly, as her main example.

BEYOND THE SYLLABUS

R v S (RD), [1997] 3 SCR 484

A Black youth in Halifax was charged with assaulting a white police officer. Judge Corrine Sparks, Nova Scotia's first Black judge, acquitted him, and in her reasons remarked that police officers had been known to mislead the court and to overreact, particularly with non-white groups. The Crown argued that these remarks showed a reasonable apprehension of bias. A majority of the Supreme Court restored the acquittal. L'Heureux-Dubé and McLachlin JJ held that a judge may draw on an understanding of social context, including the history of racism in the community, and that the reasonable person who assesses bias knows that history. Cory J (with Iacobucci J) agreed that there was no reasonable apprehension of bias but found the remarks troubling and close to the line. Major J, for three dissenting judges, held that the trial judge had relied on a stereotype rather than evidence. The case is not on the syllabus; you need it only to understand Kaushal's argument.

Kaushal's points about RDS are these:

- **Multiculturalism framed the judgment.** Cory J's discussion of judging fairly in a multicultural society, relying on s 27, was a generous statement, and L'Heureux-Dubé J endorsed it. But language and culture are different from race, so a principle of multiculturalism is a poor tool for resolving race-based inequality.
- **Evidence was the fault line.** The judges divided over whether racism must be proved by evidence linking it to the particular officer, or can be recognized as part of the social context. Kaushal observes that whether racism "requires evidence" depends on where one stands, and that demands for evidence can carry the perspective of judges who have not experienced racism.
- **Race was relegated to "context."** Even the plurality treated race as background, out in society, rather than as something law itself helps produce and maintain. Kaushal calls race a technology of law: a legal practice that sorts and subordinates.

- **The decision gave no account of race.** It offered no working definition of race or racism, made little use of social science, and suggested no framework for deciding race claims.

Five ways culture and race interact. Kaushal then surveys the academic "cultural turn" after the discrediting of biological race in the mid-twentieth century. She identifies several patterns: culture can carry racial assumptions within it; culture can efface race by renaming hierarchy as diversity; "cultural racism" can exclude people on grounds of supposedly fixed cultural difference; culture can **rationalize** race, by blaming disadvantage on the culture of the disadvantaged group; and the two can blend, as in Neil Gotanda's idea of "culture-race."

The fourth pattern bears directly on *Morris*. Kaushal notes Canadian critiques of Impact of Race and Culture Assessments, the sentencing reports used for Black offenders in Nova Scotia, of the kind the Court of Appeal accepted in *Morris*: the reports are designed to make anti-Black racism visible, but by tying race to "culture" they can portray Black offenders as products of a pathological culture and serve a narrative that does not fit the whole Black community.

From culture back to race. Finally, Kaushal argues that after 9/11, anti-Muslim racism reversed the direction of travel: instead of racism being wrapped in the language of culture, religion and culture were racialized and treated as fixed and threatening. She reads the Supreme Court's niqab decision, *R v NS*, 2012 SCC 72, as a case in which religion and culture served as proxies for a racial logic the Court did not name.

Her conclusion. Law still struggles to grasp what the social construction of race means. A deep understanding would let courts separate the **structural** dimensions of race from the **identity** dimensions of culture and religion, and would keep the focus on the hierarchies and distributive patterns at the root of racism.

Evaluating Kaushal. An essay will reward a view of your own. Some lines of argument:

- *In support*: the article explains why a court can sincerely praise diversity and still fail to see a racist practice. *Keele Sheppard* illustrates the point: the landlord's talk of "family-oriented customers" sounded like a preference about clientele (culture) but, the court found, reflected anti-Black stereotyping (race).
- *Against, or qualifying*: Canadian equality law already has a structural vocabulary in the substantive equality analysis under s 15, which focuses on disadvantage and effects, not identity. *Morris* (2021) shows courts receiving extensive evidence about the structural causes of anti-Black racism, which suggests the "arrested development" may be easing. And Kaushal does not offer a detailed doctrinal alternative, so a critic could ask what, concretely, courts should do differently.
- *A middle position*: the problem may lie less in multiculturalism than in the law of evidence and proof. Courts are comfortable with facts proved about individuals and uncomfortable with structural facts, which is exactly where RDS divided and where *Morris* and *Keele Sheppard* rely on judicial notice.

1.10 *R v Gladue*: Parliament's recognition of systemic discrimination

CASE SNAPSHOT

***R v Gladue*, [1999] 1 SCR 688**

Context. Jamie Gladue, a 19-year-old Indigenous woman (her mother was Cree and her father Métis), stabbed and killed her common-law partner in British Columbia during an argument fuelled by suspicion and alcohol. She pleaded guilty to manslaughter and was sentenced to three years' imprisonment. The sentencing judge declined to give special weight to her Indigenous background, partly because she lived off-reserve in a city. The Court of Appeal dismissed her appeal.

Issue. How should a sentencing judge apply s 718.2(e) of the *Criminal Code*, which directs that all available sanctions other than imprisonment that are reasonable in the circumstances be considered for all offenders, "with particular attention to the circumstances of aboriginal offenders"?

Holding. Cory and Iacobucci JJ, for a unanimous Court, held that s 718.2(e) is **remedial**. It is not merely a restatement of existing law: Parliament enacted it to respond to the serious over-representation of Indigenous people in prisons and to encourage a restorative approach to sentencing, and judges have a duty to give that purpose real force. Sentencing remains individualized, but the provision changes the **method** of analysis for Indigenous offenders. The judge must consider (a) the unique systemic or background factors that may have played a part in bringing the particular offender before the court, and (b) the types of sentencing procedures and sanctions that may be appropriate because of the offender's Indigenous heritage or connection (para 93). Judges may take **judicial notice** of the broad systemic and background factors affecting Indigenous people. The provision applies to all Indigenous offenders, on or off reserve, in cities or in rural areas. It is not an automatic discount: generally, the more serious and violent the crime, the more likely it is that the sentence will in practice be the same as for a non-Indigenous offender.

Result. The sentencing judge had erred, but the Court did not order a new sentencing hearing: three years was not unreasonable for a serious offence, and Ms Gladue had already been released on day parole and then full parole. The appeal was dismissed.

Why it matters. It is the leading statement that Canadian sentencing law must take account of systemic discrimination against Indigenous peoples, and the source of the "*Gladue* factors" and *Gladue* reports. For Topic 1, it shows **Parliament** directing courts to see structural disadvantage, and courts treating that direction as a remedial command. *Morris* later held that the special *Gladue* methodology is confined to Indigenous offenders because of the text and purpose of s 718.2(e) (1.11).

Reading *Gladue* through the theories. A positivist would stress that the change came from enacted text, which the Court interpreted by reading its words in their full context and in light of its purpose (Topic 9 covers this "modern approach," which the Court applied in *Gladue*). A critical race theorist would see the case as recognizing that facially neutral sentencing principles had produced massively unequal outcomes. A feminist, intersectional reading would ask how Ms Gladue's age, gender and Indigeneity together shaped her circumstances and the response of the justice system. And Part II of this guide returns to the case from the perspective of Indigenous peoples and the law.

BEYOND THE SYLLABUS

***R v Ipeelee*, 2012 SCC 13**

The Supreme Court later reaffirmed *Gladue*, held that an Indigenous offender need not show a causal link between systemic factors and the offence, and held that the *Gladue* principles apply to serious offences and to breaches of long-term supervision orders. *Morris* relies on *Ipeelee*. It is not on the Foundations syllabus.

NOTE

Section 718.2(e) today

Section 718.2(e) now reads: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." The words about harm to victims or the community were added in 2015, after *Gladue* was decided.

1.11 *R v Morris*: anti-Black racism and sentencing

CASE SNAPSHOT

***R v Morris*, 2021 ONCA 680**

Context. Police responding to a reported home invasion in Toronto, whose suspects were described as four Black men, approached Kevin Morris and three other Black men in a parking lot. Mr Morris ran. He was tackled and arrested, and police found a loaded handgun in a jacket he had discarded during the chase. No one was charged with the robbery. A jury convicted him of possessing a loaded prohibited or restricted firearm (s 95 of the *Criminal Code*) and related offences. At sentencing, the defence filed two reports: one on the history and effects of anti-Black racism in Toronto and the justice system, and one tracing how that racism had affected Mr Morris's own life. He had been stabbed and seriously injured almost two years earlier and had symptoms of post-traumatic stress. The trial judge held that systemic racism reduced the seriousness of the offence and the weight of denunciation and deterrence, and imposed a sentence that left Mr Morris with one day in jail plus probation.

Issue. How should a sentencing judge take evidence of anti-Black racism into account?

Holding. A five-judge panel of the Court of Appeal, writing as "the Court," allowed the Crown's appeal in part. It began by declaring that overt and systemic anti-Black racism is a reality in Canadian society and its justice system, which must be acknowledged, confronted and ultimately erased (para 1). Its principal conclusions (para 13) were:

- Social context evidence about an offender's life experiences may be used, where relevant, to **mitigate the offender's degree of responsibility** and to help blend the purposes of sentencing.
- The **seriousness of the offence** is measured by its wrongfulness and the harm it posed or caused. An offender's experience of racism does not reduce the seriousness of the offence. The trial judge's main error was to blur these two parts of proportionality (paras 77, 149).
- Courts may take judicial notice of anti-Black racism and should give a **generous gateway** to objective and balanced social context evidence about its existence, causes and effect on the

offender.

- The **Gladue methodology does not apply** to Black offenders, because Parliament singled out Indigenous offenders in s 718.2(e), and because the rationale in *Gladue* (including Indigenous communities' distinct conceptions of a just sentence) does not apply in the same way (paras 118–122). But the *Gladue* jurisprudence can inform the approach in several respects (para 123).

Reasoning in brief. The offender need not prove a causal link, in the criminal law sense, between racism and the offence (para 96). But there must be **some connection** between the racism and the circumstances said to explain or mitigate the offending; otherwise mitigation would become a discount based on skin colour, which everyone agreed would be wrong (para 97). Here, there was such a connection: evidence supported a finding that racism helped produce Mr Morris's genuine fear for his safety, including fear of police, which partly explained why he carried a gun. That reduced his moral blameworthiness, but only to a limited extent (paras 99–101). The Court rejected the argument that society's complicity in racism weakens its authority to denounce gun crime, noting that Black communities in Toronto bear a disproportionate share of gun violence and are entitled to the law's protection (paras 82–85).

Result. The Court substituted a sentence of two years less a day, followed by the probation the trial judge had ordered, and, as the Crown had conceded was appropriate given the passage of time, permanently stayed the custodial sentence (paras 183–184).

Why it matters. It is the leading appellate statement of how anti-Black racism enters sentencing: it can reduce the offender's moral blameworthiness and shape the choice of sanction, but it does not make the offence less serious, and Black offenders are sentenced under general principles rather than the *Gladue* framework.

Why Morris is in a theory Topic. *Morris* is a case about how a legal system takes account of injustice it did not create through any single act. It shows the strengths and limits of working within existing law. The Court insisted that nothing in its approach was new: the individualized sentencing process can already take account of an offender's background, and what was new was the kind of evidence offered and the courts' willingness to engage with it (para 107). It added that acknowledging anti-Black racism enhances the legitimacy of the justice system in the eyes of communities that have good reason to see it as racist (para 106).

That gives you material for both sides of an essay:

- A **positivist** reading emphasizes the Court's fidelity to Parliament's text: s 718.2(e) mentions Aboriginal offenders only, and it is for Parliament, not the courts, to extend it (para 121).
- A **critical race** reading welcomes the recognition of systemic racism but asks whether separating "seriousness of the offence" from "the offender's responsibility" keeps structural injustice at arm's length, treating it as a fact about one offender's history rather than about the system that sentences him. Kaushal's critique of race and culture assessments (1.9) adds a further worry: the very reports that made racism visible in *Morris* can pathologize the communities they describe.
- A **CLS** reading notes how much turned on contestable categorization: whether racism goes to the gravity of the offence or the culpability of the offender decided the case.

- A **law and economics** reading would focus on deterrence: the Court's insistence on denunciation for gun crime rests on assumptions about how sentences affect behaviour.

1.12 *Keele Sheppard*: racism in private law and equitable discretion

CASE SNAPSHOT

8573123 Canada Inc (Elias Restaurant) v Keele Sheppard Plaza Inc, 2021 ONCA 371

Context. A family business, run by a husband and wife, operated a restaurant serving African and Caribbean food in a Toronto plaza. Its lease gave it an option to renew, exercisable by registered-mail notice six months before expiry. It did not give that notice. It tried to reach the landlord and its property manager before and after the deadline, but its calls were not returned. The landlord kept it on as an overholding tenant for almost three years and then terminated the tenancy, saying it wanted a more "suitable" tenant that would attract "family-oriented customers." The tenant had never missed rent, had kept paying through the pandemic, and had installed about \$150,000 of improvements. The application judge granted relief from forfeiture under s 98 of Ontario's *Courts of Justice Act*, which allows a court to relieve against penalties and forfeitures on just terms. He found that the landlord had deliberately avoided the tenant's calls, that the landlord's affidavits relied on racially derogatory themes, and that, whether or not the landlord was consciously motivated by race, the realities faced by Black businesspeople were relevant to his discretion.

Issue. Could the court take anti-Black racism into account in exercising its equitable discretion to grant relief from forfeiture, and was the application judge's decision open to him?

Holding. Yes. The Court of Appeal (Strathy CJO, Feldman and Sossin JJA) dismissed the landlord's appeal. The findings that the tenant had tried to renew and that the landlord had avoided it were factual and showed no palpable and overriding error (paras 9–11). The landlord's language supported the conclusion that the real issue was that the tenant was a Black-owned business serving an Afro-Caribbean community (para 13). The application judge was entitled to take judicial notice of anti-Black racism in Canada, and to treat it as relevant to the landlord's refusal to negotiate a renewal **regardless of whether the landlord acted with conscious racist intent** (paras 14–15). Given the absence of prejudice to the landlord, the serious harm to the tenant and the tenant's good faith, there was no basis to interfere with the discretion (para 16).

Why it matters. It shows that racism is not only a concern of criminal and constitutional law: it can be relevant in private law disputes between businesses, particularly where a court exercises an equitable discretion. It also confirms that unconscious stereotyping can matter, and that courts may take judicial notice of anti-Black racism in civil cases.

BEYOND THE SYLLABUS

The test for relief from forfeiture

The Supreme Court's general framework for relief from forfeiture looks at the conduct of the party seeking relief, the gravity of the breach, and the disparity between the value of what would be forfeited and the damage caused by the breach (*Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490). The Court of Appeal in *Keele Sheppard* did not restate the test, because the landlord did not challenge the legal analysis (para 9). It is not on the syllabus.

Why *Keele Sheppard* is in a theory Topic. The case is short, but it illustrates several ideas from this Topic at once:

- **Facially neutral reasons can carry racial meaning.** The landlord framed its decision in commercial terms (a more suitable tenant, family-oriented customers). The court looked through the language to the stereotype behind it, which is the move critical race theory asks lawyers to make.
- **Racism without intent.** The court treated racism as relevant even if it was not conscious, which reflects the systemic understanding of racism described in 1.8.
- **Rules and standards.** A strict contractual rule would have ended the tenancy. An equitable standard allowed the court to take account of the whole context, including race (1.6).
- **Efficiency and justice.** Relief avoided a large and pointless loss, which an economist would endorse, but the court's concern was justice between the parties, not efficiency alone (1.7).
- **Race and culture.** The landlord's complaint was ostensibly about clientele and atmosphere: a kind of cultural objection. The court identified it as racial. Kaushal's distinction (1.9) explains why that identification mattered.

1.13 Putting the theories to work

Most theory questions reward you for using two or three lenses on the same material and showing what each reveals and what each misses. The table pulls the Topic together.

Theory	Its central question	What it highlights in the syllabus cases	What it tends to miss
Natural law	Does this law conform to moral principles? Does the system respect the requirements of legality?	Whether sentencing and equitable remedies achieve justice for the individual	Gives little guidance on <i>which</i> moral principles govern when people disagree
Positivism	What makes this rule law? What did the authorized institutions actually lay down?	In <i>Gladue</i> and <i>Morris</i> , the text of s 718.2(e) and the respective roles of Parliament and courts	Says little about whether the law is just or whom it serves (by design)

Theory	Its central question	What it highlights in the syllabus cases	What it tends to miss
Dworkin	Which principles best fit and justify the existing legal materials?	How courts in <i>Morris</i> and <i>Keele Sheppard</i> reasoned from principles (proportionality, equity, equality) to new applications	Critics say "best justification" hides the judge's own values
Feminism	How does law reflect and affect gendered experience?	Intersections of gender and race (<i>Gladue</i>); the perspective built into "reasonable" standards	Single-axis versions can overlook race and class
CLS	Whose interests does the law serve, and how does legal reasoning hide political choices?	The contestable categories that decided <i>Morris</i> ; rules and standards in <i>Keele Sheppard</i>	Can understate how predictable most law is, and how much rights matter to the marginalized
Law and economics	How do rules change behaviour, and which rules maximize welfare?	Deterrence in <i>Morris</i> ; the value destroyed by forfeiture in <i>Keele Sheppard</i>	Distribution, desert and identity, as Trebilcock himself concedes
Critical race theory	How does law construct and maintain racial hierarchy, and how can it be dismantled?	Systemic racism and judicial notice in all three cases; Kaushal's critique of race-as-culture	Critics question reliance on narrative and the difficulty of turning structural critique into legal tests

EXAM TIP

Writing a strong theory answer

- **Define before you apply.** Two precise sentences on what a theory claims, attributed to the right author, earn more than a page of loose description.
- **Use the assigned readings by name.** The instructions require you to cite and apply syllabus cases and readings. "As Trebilcock argues, efficiency analysis takes existing distributions of wealth as given" is the kind of sentence markers look for.
- **Apply to the facts or the statement in front of you.** Quote the words of a statement that show which theory it reflects, or the facts of a case that a theory illuminates.
- **Show critical analysis.** State a strength, a weakness and your own view. "Both sides have merit" is not a view; "Kaushal's diagnosis is persuasive, but the remedy lies in the law of evidence rather than in abandoning multiculturalism" is.
- **Attribute every quotation.** Unattributed quotations, including from summaries, earn zero under the NCA's instructions. If in doubt, paraphrase.

COMMON MISTAKE

Common mistakes in Topic 1

- Writing a general essay on "law and morality" without defining positivism or natural law precisely, or without naming any author.
- Attributing *Gladue's* methodology to Black offenders. *Morris* holds that it does not apply, though it can inform the approach.
- Saying *Morris* held that systemic racism reduces the seriousness of a gun offence. It held the opposite: racism can reduce the offender's moral blameworthiness, not the gravity of the offence.
- Describing *Keele Sheppard* as a human rights or Charter case. It is a private law case about equitable relief from forfeiture, in which racism was relevant to the court's discretion.
- Treating *Trebilcock* as an uncritical champion of efficiency. His conclusion is that economics has a prominent but non-exclusive role.
- Reducing *Kaushal* to "multiculturalism is bad." Her claim is that treating race as culture hides hierarchy, and that law must distinguish the structural dimensions of race from the identity dimensions of culture and religion.
- Relying on cases from the jurisdiction where you trained. Foundations rewards the Canadian syllabus materials.

Part I review

Part I tests two skills: stating each theory and reading precisely, and using them to analyse a statement, a case or a set of facts. The Foundations exam can ask for either, often in the same question, so this review mixes quick checks, essay angles, and practice problems that include both fact-based questions and a short essay.

Quick checks: true, false or partly true?

Answer each in two or three sentences, then compare with the suggested answer.

- 1. A legal positivist must believe that every valid law ought to be obeyed.** *False.* Positivism's separation thesis concerns how law is identified: by its social sources, not its moral merit. Whether a valid law deserves obedience is a separate moral question, and positivists such as Hart insisted that seeing a wicked law clearly as law is what allows us to criticize and resist it.
- 2. Hart defined law as the command of a sovereign backed by a sanction.** *False.* That is Austin's command theory. Hart rejected it because it cannot explain power-conferring rules, laws that bind their own makers, or the continuity of legal authority, and he rebuilt positivism around primary and secondary rules and a rule of recognition accepted by officials.
- 3. For Fuller, a system that wholly fails to make its rules public, prospective, clear and consistent is not a legal system at all.** *True.* Fuller's procedural natural law holds that law has an inner morality of eight requirements, and that total failure to meet them produces something that is not law. Note the

limit: meeting all eight does not guarantee that the law's content is just, which is the main positivist objection.

4. Dworkin is a natural law theorist. *Partly true.* Dworkin is an anti-positivist: he holds that law includes the moral principles that best fit and justify a community's legal practice, so moral reasoning is part of identifying the law. But he does not claim that a universal higher law invalidates unjust human law, which is the classical natural law position.

5. Under *Gladue*, s 718.2(e) of the Criminal Code requires judges to impose a shorter sentence on an Indigenous offender than on a non-Indigenous offender for the same offence. *False.* *Gladue* holds that s 718.2(e) changes the **method** of sentencing Indigenous offenders, requiring attention to systemic and background factors and to appropriate (often restorative) sanctions, but it is not an automatic reduction (para 93). The Court added that for serious and violent offences, sentences will often in practice be similar.

6. Under *Morris*, a Black offender who relies on evidence of anti-Black racism must prove that racism caused the offence. *False.* The Court of Appeal held that causation, in the criminal law sense, plays no role (para 96). But there must be **some connection** between the racism and the circumstances said to explain or mitigate the offending; otherwise the mitigation would be a discount based on skin colour (para 97).

7. *Morris* held that the effects of systemic racism on an offender can reduce the seriousness of a gun offence. *False.* The Court held that the seriousness of the offence depends on its wrongfulness and the harm it caused or risked, and that racism does not reduce it (para 13). Racism can reduce the **offender's moral blameworthiness** and help shape the sanction. The trial judge's main error was to blur the two.

8. In *Keele Sheppard*, anti-Black racism was relevant only because the landlord was found to have been consciously motivated by race. *False.* The Court of Appeal held that the application judge was entitled to treat anti-Black racism as relevant to the landlord's refusal to renew whether or not the landlord's actions were consciously motivated by racism (para 15). That reflects a systemic understanding of racism, which can operate through stereotypes without deliberate intent.

9. Trebilcock explains that a change is efficient in the Kaldor-Hicks sense only if those who lose are actually compensated. *False.* Kaldor-Hicks efficiency requires only that the winners' gains are large enough that they **could** compensate the losers and still be better off. Actual compensation would make the change a Pareto improvement. Because real legal changes almost always create losers, policy analysis usually relies on the Kaldor-Hicks test, which is one reason critics say it can ignore distribution.

10. Kaushal argues that race and culture are unrelated concepts. *False.* Kaushal accepts that race and culture overlap and are bound up with each other. Her claim is that they differ in kind: culture is a shared world view people inhabit, while race is a socially ascribed position in a hierarchy, so race cannot be reduced to culture without hiding the subordination that makes it a legal problem.

11. Critical race theory simply applies the CLS critique of rights to race. *False.* CRT shares CLS's scepticism about legal neutrality, but its founders broke with CLS partly over rights. Scholars such as Patricia Williams argued that rights have real value for people who were long denied them, and CRT also centres race, which CLS largely neglected.

Essay angles

Each angle sets out a live debate, the strongest arguments on each side, and what a strong answer does. None has a single correct conclusion; markers reward a defended view built from the readings.

Angle 1: Is law separate from morality in Canada?

For separation (positivism). Canadian courts identify law by its sources: statutes, regulations, precedent and the Constitution, which s 52(1) of the *Constitution Act*, 1982 makes supreme. Even morally loaded standards such as "fundamental justice" bind because the Constitution enacts them, which inclusive positivism explains. *Gladue* and *Morris* are both exercises in reading Parliament's text: the Court in *Morris* refused to extend *Gladue* because s 718.2(e) singles out Aboriginal offenders and it is for Parliament to change that (para 121).

Against separation (Dworkin and natural law). Canadian judges constantly reason from principles that no one enacted in so many words: the equitable idea that forfeiture should not be enforced where it would be unjust (*Keele Sheppard*), the principle that sentencing must be proportionate and individualized (*Morris*), and the unwritten constitutional principles. Fuller's requirements of legality are woven into the Charter. On this view, morality is not just a source of criticism but part of how Canadian lawyers determine what the law requires.

What a strong answer does. It defines both positions precisely and attributes them correctly (Austin, Hart, Raz; Fuller, Dworkin). It distinguishes the descriptive question (how do we identify law?) from the normative one (should we obey it?). It uses at least two Canadian examples, and it reaches a view: for example, that inclusive positivism describes Canadian law well, but at the cost of conceding much of what Dworkin claimed.

Angle 2: Can ordinary sentencing principles respond to systemic racism?

Yes. *Morris* insists that nothing in its approach is new: individualized sentencing has always considered an offender's background, and the general principles are broad enough to take account of anti-Black racism (paras 106–107). Judicial notice, a generous gateway for social context evidence, and attention to over-incarceration (para 123) give judges the tools they need, while keeping proportionality and Parliament's choices intact.

No. Critical race theory and Kaushal suggest that the framework keeps racism at arm's length. Treating racism as part of one offender's "background" frames a structural problem as an individual misfortune; denying any effect on the seriousness of the offence means the system never weighs its own role. And the reports that make racism visible can, as Kaushal notes, portray Black offenders as products of a deficient culture. *Gladue* itself shows that Parliament thought ordinary principles had failed for Indigenous offenders.

What a strong answer does. It states the holdings of *Gladue* and *Morris* accurately (especially the line between seriousness and blameworthiness), brings in at least one theoretical reading (Kaushal or CRT), considers the institutional question (is this for courts or Parliament?), and takes a position.

Angle 3: Is efficiency a sufficient value for law?

Yes, or nearly so. Efficiency gives a common measure for comparing rules, focuses attention on real consequences rather than good intentions, and explains a great deal of doctrine, from contract to tort to sentencing deterrence. Relief from forfeiture in *Keele Sheppard* can itself be defended as efficient: it avoided destroying a successful business for no gain to the landlord.

No. Trebilcock himself concludes that economics has a prominent but non-exclusive role. Efficiency takes existing preferences and wealth as given, weighs the preferences of the wealthy more heavily, and cannot register harms such as racial stereotyping, which was the decisive concern in *Keele Sheppard*. Communitarian critics add that it assumes a pre-social individual.

What a strong answer does. It defines Pareto and Kaldor–Hicks efficiency, separates positive from normative analysis, uses Trebilcock's critiques and conclusion by name, applies the lens to at least one syllabus case, and explains which values efficiency misses and why they matter.

Practice problems

NOTE

How to use these problems

The fact patterns are original and fictional. Write in full sentences and paragraphs, then compare your answer with the model. The models show the depth and method an examiner rewards; do not memorize them as scripts. Each model names the readings it relies on, because the exam requires you to cite and apply syllabus materials.

Problem 1: The forgotten Sunday statute (about 25 minutes)

The (fictional) *Day of Rest Act, 1921* of the Province of Lakeland provides that "no retail shop shall open for business on Sunday," on pain of a fine. It has never been repealed, but no one has been prosecuted under it for over forty years, and most shops in Lakeland now open on Sundays. Last month a newly elected municipal prosecutor charged Noor, who runs a bakery, under the Act. Four people commented publicly:

- **Noor:** "That Act isn't law any more. Nobody obeys it, the police have ignored it for decades, and a law that nobody follows or enforces is just words on paper."
- **A provincial court judge, speaking at a conference:** "Until the Legislature repeals it, the Act is valid law, whatever any of us thinks of it. Whether it is wise, or whether this prosecution is fair after forty years of silence, are different questions."
- **A religious-freedom advocate:** "A statute that compels everyone to observe one faith's day of rest offends the equal dignity of citizens so deeply that it has never truly been law."

- **A law professor:** "No statute is read in isolation. Read in light of the principles that make sense of our legal order as a whole, including equal religious citizenship, the Act cannot be applied to require non-Christians to close on Sunday."

Identify the theory of law that best describes each comment, and evaluate each one.

Model answer

Issue. The question is which theory of law each speaker relies on, and whether each claim about the Act's legal status holds up. The four comments turn on different tests for what makes something law: effectiveness, source, moral merit and interpretive principle.

Rule. Legal positivists hold that a rule's validity depends on its social source (for Hart, whether it is identified by the rule of recognition that officials accept), not on its merit; Austin's earlier version treated law as a sovereign's command backed by a sanction. Natural law theorists hold that law and morality are necessarily connected; on the strong classical reading, a grossly unjust rule is not law at all. Dworkin, an anti-positivist, holds that the law includes the principles that best fit and justify the community's legal practice.

Application. Noor ties the Act's legal status to whether it is obeyed and enforced. That is closest to a command theory in Austin's style, which links law to sanctions, or to the realist idea that law is a prediction of what officials will do. It is not a natural law claim: she does not say the Act is invalid because it is unjust, but because it is ignored. Hart would answer that the **effectiveness** of a legal system as a whole is a condition of its existence, but that an individual rule identified by the rule of recognition remains valid even if it is widely disobeyed. Canadian law agrees: statutes do not lapse through disuse; they remain in force until repealed, struck down or displaced. Noor's claim about the Act's validity is therefore weak, although her point about forty years of non-enforcement may matter to the fairness of prosecuting her, which is a separate question.

The judge takes a classic positivist position. Validity depends on the source (enactment, no repeal), and the judge expressly separates it from wisdom and fairness. That is the separation thesis in Austin's and Hart's sense. It does not commit the judge to thinking the Act is good, or that Noor must be convicted regardless of other legal rules; it says only that the Act's status as law does not depend on its merits.

The advocate makes the strong natural law claim: the Act "has never truly been law" because of its injustice. Morality is treated as a **condition of validity**. A critic would point out that this makes the content of law depend on contested moral judgments (is a common day of rest really an attack on equal dignity, or a labour protection?), and that Canadian courts do not invalidate statutes on that basis alone. Notably, the advocate's practical goal is available through positive law: a statute that compels religious observance may be challenged under the Charter, and s 52(1) of the *Constitution Act, 1982* makes inconsistent laws of no force or effect. A positivist would say the Act would then cease to be law because a higher legal source says so, not because it was never law.

The professor reflects Dworkin's interpretivism. The claim is not that the Act is void, but that its legal meaning must be worked out in light of the principles that best justify the legal order, and that so read, it does not reach Noor's situation. This differs from the advocate: the professor treats morality as part of interpretation, not as a test that strikes the rule down. A positivist would object that the Act's words ("no retail shop") are clear, and that reading in an exception is judicial law-making unless a legal source, such as the Charter or a statutory interpretation principle, authorizes it.

Conclusion. Noor relies on an effectiveness or command-based view, which wrongly treats non-enforcement as repeal; the judge states a sound positivist position; the advocate states strong natural law, which Canadian law does not accept as a ground of invalidity, though the advocate's aim can be pursued through the Charter; and the professor states Dworkinian interpretivism, which is the most persuasive route to protecting Noor but depends on finding a legal principle that the Act's clear text can bear.

Problem 2: A sentencing hearing in Toronto (about 30 minutes)

Darius, 22, pleaded guilty in Toronto to robbing a convenience store clerk using an imitation handgun. The clerk was terrified but unhurt. Darius's father is Mi'kmaw, from a community in Nova Scotia, and his mother is African Nova Scotian. Darius grew up in Toronto, spent much of his childhood in foster care after his father's death, left school at 16, and has two youth convictions for theft. He says he committed the robbery because he owed money to an older man in his building who had threatened him. Defence counsel has obtained a report tracing the effects of anti-Black racism on Darius's schooling and encounters with police, and has asked for a report on his Indigenous background. The Crown argues: (a) Darius grew up in a city, not in a Mi'kmaw community, so his Indigenous heritage is irrelevant; (b) the anti-Black racism report should be given no weight because nothing shows that racism caused the robbery; and (c) robbery with a weapon is so serious that only a lengthy penitentiary term is appropriate. Assume that a range of sentences, including a reformatory term, is legally available.

Advise the sentencing judge on how to approach the evidence about Darius's background.

Model answer

Issue. The issues are whether s 718.2(e) and *Gladue* apply to Darius despite his urban upbringing; how evidence of anti-Black racism may be used under *Morris*; and how both bear on a serious offence.

Rule. Section 718.2(e) of the *Criminal Code* directs that all available sanctions other than imprisonment that are reasonable and consistent with the harm done be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. *Gladue* holds that the provision is remedial and changes the method of sentencing Indigenous offenders: the judge must consider the systemic and background factors that may have brought the offender before the court, and the sanctions that may be appropriate because of his Indigenous heritage or connection (para 93). It applies to Indigenous offenders wherever they live, including in cities, and judges may take judicial notice of the broad systemic factors. *Morris* holds that the *Gladue* methodology does not apply to Black offenders as such, but that judges should take judicial notice of anti-Black racism,

admit social context evidence about it, consider the over-incarceration of Black offenders, and use the evidence where it bears on the offender's moral responsibility or on the choice of sanction (paras 13, 123). No causal link is required, but there must be some connection between the racism and the circumstances that explain or mitigate the offending (paras 96–97). Racism does not reduce the seriousness of the offence (para 13).

Application. *The Crown's first argument* misstates *Gladue*. The Court held expressly that s 718.2(e) applies to all Indigenous people, on or off reserve, in a large city or a rural area, and that "community" must be understood broadly. Darius's father was Mi'kmaw, and the loss of that connection through his father's death and his years in foster care is itself the kind of background factor the *Gladue* analysis looks for. The judge must therefore apply the *Gladue* method, and should have the information a *Gladue* report provides about his heritage, his connection (or disconnection) from his father's community, and any culturally appropriate options.

The Crown's second argument applies the wrong test. Under *Morris*, Darius need not prove that racism caused the robbery. He must show a connection between anti-Black racism and the circumstances said to mitigate his responsibility. The report links racism to his school experience and police encounters; the judge should ask whether those disadvantages helped produce the situation he was in (leaving school at 16, financial precarity, owing money to a man who threatened him). If the evidence supports that connection, it can reduce his moral blameworthiness to some degree, as fear arising partly from systemic racism did in *Morris* (paras 99–100). The duress-like explanation he offers is relevant in its own right, but its weight is limited: he still chose to rob a clerk using what looked like a gun.

The two analyses do not exclude each other. Darius is both Indigenous and Black. Section 718.2(e) and *Gladue* govern because he is an Indigenous offender, and nothing in *Morris* suggests that the judge must ignore evidence of anti-Black racism in his life when doing so; *Morris* itself says that such evidence is part of an accurate picture of the offender (para 91). An intersectional reading, drawn from feminist and critical race scholarship, explains why the judge should look at how the two sources of disadvantage combined, rather than treating them as alternatives.

The Crown's third argument is partly right. Both *Gladue* and *Morris* insist on proportionality. The robbery was serious: an armed threat (even with an imitation weapon) against a vulnerable worker, causing real fear. Darius's background cannot reduce the seriousness of the offence (*Morris*, para 13), and *Gladue* recognizes that the more serious and violent the crime, the more likely sentences will in practice resemble those of non-Indigenous offenders. But that does not end the analysis. Background factors can reduce his blameworthiness, and the restraint principle, applied with particular attention to his circumstances as an Indigenous offender and in light of the over-incarceration of Black offenders, requires the judge to consider whether a shorter custodial term, or the least restrictive sanction consistent with proportionality, can meet the purposes of sentencing. Rehabilitation matters for a 22-year-old with no adult record.

Conclusion. The judge should reject the Crown's first two arguments: *Gladue* applies to Darius despite his urban upbringing, and *Morris* requires a connection, not causation, before anti-Black racism can mitigate his responsibility. The judge should obtain and consider both the *Gladue* information and the social context report, assess how far they explain Darius's choices, and then impose a proportionate sentence that reflects the seriousness of the robbery without treating it as more blameworthy than his circumstances warrant. The likely result is a sentence at the lower end of the range the offence would otherwise attract, with conditions directed to rehabilitation and, where available, to reconnecting him with culturally appropriate support.

Problem 3: The butcher's lease (about 30 minutes)

Yusuf and his sister run a halal butcher shop in a suburban Ontario plaza. Their lease gave them an option to renew for five years by written notice at least three months before expiry. They sent the notice two weeks late, because Yusuf was abroad on pilgrimage and the store's mail was not opened. They had paid rent on time for eight years and spent about \$90,000 refitting the shop. The landlord refused to renew. Its property manager's emails, produced in the litigation, say that the plaza needs "a more family-friendly, mainstream tenant mix," complain that "customers in religious dress gather outside after prayers," and mention "smells that put off our core demographic." The landlord's evidence shows no prospective tenant and no rent increase available. The tenants have applied for relief from forfeiture under s 98 of the *Courts of Justice Act*.

Advise the tenants. Your answer should consider *Keele Sheppard* and at least two other Part I readings.

Model answer

Issue. The issues are whether the court should relieve the tenants from the consequences of their late notice, and whether, and how, the landlord's apparent hostility to the tenants' religion and community can be taken into account.

Rule. Section 98 of the *Courts of Justice Act* allows a court to grant relief against penalties and forfeitures on such terms as it considers just. In *Keele Sheppard*, the Court of Appeal upheld relief from forfeiture for a tenant that had missed a renewal deadline, where the tenant had acted in good faith and tried to renew, the landlord showed no prejudice, and the tenant would suffer serious harm (para 16). It also held that the court could take judicial notice of anti-Black racism and treat it as relevant to the landlord's refusal to renew, whether or not the landlord was consciously motivated by racism (paras 14–15).

Application. *The ordinary equities.* The tenants' breach was a two-week delay in giving notice, caused by an absence for religious pilgrimage, not by indifference. They had paid rent faithfully for eight years and invested about \$90,000 in the premises. The landlord has no replacement tenant and no higher rent available, so it shows no financial prejudice from renewal. Those facts closely resemble the factors that supported relief in *Keele Sheppard*. Unlike the tenant there, Yusuf and his sister did

not try to contact the landlord before the deadline, which weakens their position somewhat; the court would want evidence of their intention to renew and of how quickly they acted once the problem was discovered.

The landlord's reasons. The emails describe a preference for a "family-friendly, mainstream" mix, object to customers "in religious dress," and refer to "smells." On their face, these sound like preferences about atmosphere and clientele: matters of culture. *Keele Sheppard* shows that a court may look behind such language. There, the landlord's wish for "family-oriented customers" was found to reflect stereotyping of a Black-owned business serving an Afro-Caribbean community, and that finding was relevant to the equitable discretion even without proof of conscious intent. Kaushal's analysis explains why the same approach fits here. She argues that anti-Muslim racism works by treating religion and culture as fixed, threatening markers of difference, so that people "recognized" as Muslim by their appearance or dress are excluded through a racial logic expressed in cultural terms. The property manager's emails are a clear example: objections to religious dress and to the "smells" of a halal butcher are objections to who the tenants and their customers are. The tenants should therefore argue that the court may, as in *Keele Sheppard*, treat this anti-Muslim stereotyping as relevant to whether the landlord's refusal is a legitimate commercial choice that equity should respect.

A further argument from efficiency. Trebilcock's account of law and economics supports the same conclusion from a different direction. Strict deadlines reduce transaction costs, which is a legitimate reason to enforce them. But enforcing this one would destroy a \$90,000 investment and an established business, while the landlord gains nothing measurable. On a Kaldor–Hicks view, relief creates more value than it destroys. Trebilcock's own warning about one-value analysis also matters: efficiency alone cannot capture the harm of exclusion based on religion, which is why the court's concern with justice between the parties should be decisive.

The landlord's best reply. The landlord will say that a contractual deadline is a bargained-for term, that commercial certainty matters, and that its views about tenant mix are its own business. It may also deny that the emails reflect its reasons. The tenants should respond that relief from forfeiture exists precisely to prevent a minor, good-faith default from causing a disproportionate loss, and that *Keele Sheppard* allows the court to consider stereotyping in deciding whether the landlord's position deserves equity's support.

Conclusion. The tenants have a strong application. The equities (a short, explained delay; a long record of good performance; a large investment; no prejudice to the landlord) favour relief on their own. The emails strengthen the case: following *Keele Sheppard*, and understood through Kaushal's account of how religion and culture can be racialized, they allow the court to find that the refusal reflected stereotyping that equity should not reward, whether or not the landlord recognized it as such. The tenants should file promptly, explain the pilgrimage and their intention to renew in their evidence, and offer to comply with any reasonable terms the court sets.

Problem 4: A missed-deadline protection law (about 15 minutes)

After several publicized cases like *Keele Sheppard*, a provincial government proposes a law requiring commercial landlords to give tenants written notice 60 days before a renewal option expires. An option would not lapse until 30 days after that notice is given. Using Trebilcock's framework, explain how a law and economics analyst would assess the proposal, and identify the limits of that analysis.

Model answer

Issue. The question asks for a law and economics assessment of the proposed rule and an account of its limits, using Trebilcock's distinction between positive and normative analysis and his summary of the critiques.

Rule. Trebilcock distinguishes positive analysis, which predicts how people respond to legal rules treated as implicit prices, from normative analysis, which judges rules by efficiency. A change is Pareto efficient if it makes someone better off and no one worse off; it is Kaldor–Hicks efficient if the winners could compensate the losers. He records the main critiques (existing preferences and wealth are taken as given, willingness to pay favours the wealthy, and the analysis ignores community and desert) and concludes that economics deserves a prominent but non-exclusive role.

Application. *Positive analysis* asks how landlords and tenants would respond. Landlords bear a small new administrative cost (sending one notice) and lose the occasional windfall from a lapsed option. They may respond by raising rents slightly, by shortening renewal options, or by negotiating leases without options. Tenants, especially small businesses without lawyers, would rarely lose options by accident, which reduces the risk of losing improvements and encourages them to invest in their premises.

Normative analysis asks whether the rule is efficient. It is not a Pareto improvement, because some landlords lose the chance to re-let at a higher rent. But it is likely Kaldor–Hicks efficient: the cost of a notice is trivial, while the losses it prevents (stranded investments and destroyed businesses, as in *Keele Sheppard*) are large. It also reduces litigation over relief from forfeiture, which is costly for both sides. A sceptic would reply that sophisticated parties can protect themselves by contract, and that a mandatory rule removes freedom to bargain for different terms.

The limits. As Trebilcock notes, efficiency analysis takes the existing distribution of bargaining power and wealth as given, so it may understate why small tenants struggle to protect themselves. It also cannot capture the concern that motivated the publicized cases: that landlords might use technical defaults to remove tenants for discriminatory reasons. That is a matter of justice and equality, which a one-value analysis cannot weigh.

Conclusion. A law and economics analyst would probably support the proposal as a low-cost rule that prevents large, wasteful losses, while noting possible adjustments in rents and lease terms. Following Trebilcock, the analysis is useful but incomplete: the strongest reasons for the law, protecting vulnerable tenants against disproportionate and sometimes discriminatory loss, lie partly outside efficiency.

Problem 5: Short essay (about 30 minutes)

"The Court of Appeal in *Morris* was right to refuse to extend the *Gladue* methodology to Black offenders." Discuss.

Model answer

Issue. The question is whether *Morris* was right to hold that the special *Gladue* methodology under s 718.2(e) applies only to Indigenous offenders, while allowing evidence of anti-Black racism to be considered under general sentencing principles. Answering it requires an account of what each case decided and an assessment of the institutional and theoretical arguments on both sides.

The decisions. In *Gladue*, the Supreme Court held that s 718.2(e) is remedial: it responds to the over-incarceration of Indigenous people and requires judges to consider the systemic and background factors that brought the offender before the court and the sanctions, often restorative, that suit the offender's heritage (para 93). In *Morris*, the Ontario Court of Appeal accepted that anti-Black racism is a reality in Canadian society and the justice system (para 1), but held that the *Gladue* methodology does not apply to Black offenders (paras 118–122). It gave two reasons: Parliament singled out Aboriginal offenders in the text of s 718.2(e), and it is not for courts to amend that choice (paras 119–121); and *Gladue*'s rationale rests partly on Indigenous communities' distinct conceptions of a just sentence, which the Court found no basis to attribute to Black communities (para 122). It then held that general principles allow judges to take judicial notice of anti-Black racism, admit social context evidence, and give it weight in assessing blameworthiness and choosing a sanction (para 123).

The case that *Morris* was right. The textual argument is strong. Section 718.2(e) speaks only of Aboriginal offenders, and *Gladue* itself read the special reference as signalling that their circumstances are unique. A positivist would add that extending a statutory direction to a group Parliament did not name is law-making, and that sentencing policy belongs first to Parliament. The rationale argument also has force: *Gladue* concerns not only disadvantage but the distinct relationship between Indigenous peoples and the Canadian state, and the restorative traditions of their communities. Finally, *Morris* did not leave Black offenders without recourse. Its approach gives anti-Black racism a real place in sentencing, as the substitution of a reformatory sentence in *Morris* itself shows (paras 183–184).

The case that *Morris* was wrong, or incomplete. Critical race theory warns that frameworks which treat structural racism as a feature of one offender's background tend to individualize a systemic problem. *Morris*'s insistence that racism never affects the seriousness of the offence (para 13) means the court never weighs the system's own role, and its rejection of the argument that societal complicity weakens denunciation (paras 82–85) keeps that role out of view. Kaushal's analysis adds a further concern: by relying on reports that link race to "culture," the *Morris* approach can portray Black offenders as products of a deficient culture rather than of racism. A Dworkinian might also argue that the principle underlying s 718.2(e), that sentencing must respond to systemic over-incarceration, fits and justifies extending the method by analogy, without needing new words from Parliament.

Assessment. On balance, *Morris* was right on the narrow question, but its reasoning leaves important work undone. The textual argument is decisive for a court: s 718.2(e) names one group, and the Indigenous context is legally distinct, grounded in the special relationship between Indigenous peoples and the Crown that Part II of this guide examines. But the critics are right that general principles, as *Morris* applies them, treat racism as background rather than as something the justice system helps produce. If the problem is structural, the response should be too, which points to Parliament: either a specific statutory direction, as for Indigenous offenders, or sustained funding for the kind of social context reports *Morris* endorsed, with attention to Kaushal's warning about how those reports describe Black communities.

Conclusion. *Morris* correctly refused to rewrite s 718.2(e), and its approach gives anti-Black racism a real, if limited, role in sentencing. Whether that role is enough is a question for Parliament as much as for the courts.

Part I summary

- **Theories answer two different questions:** what law is (descriptive) and what it should be (normative). Keep them apart in every answer.
- **Natural law** links law and morality necessarily. Classical natural law, on its strong reading, denies the legal status of grossly unjust rules; Fuller's procedural version holds that a system failing his eight requirements of legality is not law.
- **Positivism** identifies law by its social sources. Austin's command theory gave way to Hart's rules, the internal point of view and the rule of recognition. Positivism does not require obedience to wicked law, and inclusive positivism explains how the Charter makes moral standards law.
- **Dworkin** is anti-positivist but not a classical natural lawyer: law includes the principles that best fit and justify legal practice.
- **Feminist, CLS and critical race theories** examine whose experience law reflects and whose interests it serves. CRT emerged partly from disagreement with CLS about rights and about race.
- **Trebilcock** sets out positive and normative law and economics, Pareto and Kaldor-Hicks efficiency, the critiques, and his conclusion that economics has a prominent but non-exclusive role.
- **Kaushal** argues that Canadian law, shaped by legal multiculturalism, has treated race as culture, and so has missed the hierarchy that makes race irreducible.
- **Gladue:** s 718.2(e) is remedial and changes the method of sentencing Indigenous offenders, wherever they live; it is not an automatic discount.
- **Morris:** anti-Black racism can reduce an offender's moral blameworthiness and shape the sanction if there is some connection to the offending, but it does not reduce the seriousness of the offence, and the *Gladue* methodology does not apply to Black offenders.
- **Keele Sheppard:** anti-Black racism, conscious or not, was relevant to the court's equitable discretion to relieve a tenant from forfeiture.

Coming up: Part II, Indigenous Peoples and the Law

Part II turns to Topic 2, which the syllabus divides into five sets of readings. It begins with the constitutional foundations (s 91(24) of the *Constitution Act, 1867* and s 35 of the *Constitution Act, 1982*), the Truth and Reconciliation Commission's final report, and the *United Nations Declaration on the Rights of Indigenous Peoples* and the federal Act that implements it. It then examines Indigenous institutions and self-government (*Pamajewon*, the 2024 Reference on the federal Indigenous child welfare law, and readings on corrective justice, Secwepémc law and the inherent right of self-government); Aboriginal rights and the duty to consult (*Chippewas of the Thames*, *Clyde River*, *Mikisew Cree*, *Pastion* and the effect of *Vavilov*); Aboriginal title (*Tsilhqot'in*, *Uashaunnuat* and title claims to private land in Quebec); and treaties (*Restoule* and treaty interpretation).

END OF THE FREE SAMPLE

That was Part I. Five Parts to go.

Parts II to VI cover the other nine syllabus topics, from Indigenous peoples and the law to statutory interpretation and judicial review, in the same depth, including the 2025 articles on the current syllabus.

PART II • TOPIC 2 (A–E)

Indigenous Peoples and the Law

Sections 91(24) and 35, the TRC and UNDRIP, self-government and Indigenous legal orders, the duty to consult, Aboriginal title after *Tsilhqot'in*, and treaty interpretation after *Restoule*.

PART III • TOPIC 3

Sources of Canadian Law

Reception, bijuralism and the civil law, precedent and stare decisis, equity, appellate standards under *Housen*, and international law in Canadian courts (*Baker*, *Hape*, *Nevsun*).

PART IV • TOPIC 4

Fundamental Principles of the Canadian Legal System

The rule of law, constitutional supremacy, parliamentary sovereignty, federalism, the separation of powers, judicial independence and constitutional amendment.

PART V • TOPICS 5–8

Parliament, the Executive and the Courts

The Senate and the Commons, law-making and parliamentary privilege, the Crown, prerogative and conventions, and the courts: appointments, independence and judicial discipline.

PART VI • TOPICS 9–10

Statutory Interpretation and Constraints on Legislative and Administrative Action

The modern approach to interpretation and its tools, *Vavilov* review, regulations after *Auer*, habeas corpus, and artificial intelligence in government decision-making.

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