**Validity**

1. **Pith and substance** 
   1. Identify the matter (**Morgentaler**)
      1. Legal effect
         1. Does the law have a preventative or prohibitory form?
            1. Prohibitory form doesn’t necessarily mean the matter is criminal per the **Margarine Reference**. Regulatory form doesn’t necessarily mean the legislation’s matter is not criminal—no strict formal requirement for something to be a criminal law, per **Hydro-Québec**.
         2. **McNeil** – form is very important for provincial side though - law found to be valid (under property and civil rights 92(13) & morality and public order 92(16)) because its form was regulatory, even if substance could be seen as criminal
         3. In **Westendorp**, a city bylaw had both a prohibitory form, and punished socially undesirable behaviour, making it criminal in form and substance and thus ultra vires provincial jurisdiction.
      2. Practical effect: What is the actual or predicted effect of the legislation in operation?
      3. Purpose: Look at the social or economic purposes which it was enacted to achieve
         1. May look at background of circumstances, legislative history, extrinsic evidence, actual legislation, Hansard, what the Minister says, etc.
         2. Timing of the enactment (**Morgentaler**)
         3. Stated purpose vs. actual purpose
   2. Classify to a head of power (Re Employment insurance act)

Do you get a criminal law sense?

* Morgentaler – fines of 10000-50000; Westendorp – fines of 500, 6 months prison
* Both had historical CC provisions that were similar + both used prohibitory language

Provincial powers to regulate economy: intraprovincial trade + can have incidental effects on interprovincial trade; production is prima facie provincial jurisdiction

Federal power to regulate economy: interprovincial + international trade + can have incidental effects on intraprovincial trade

If found to be ultra vires, say 🡪 in the event the Act is found intra vires and continue analysis

1. **Double aspect (Multiple Access) – If there are two pieces of legislation** 
   1. Are the provincial and federal features of roughly equal importance?
   2. Is there a conflict in operation?
      1. If there is not a sharp contrast between the relative importance of the two features, then double aspect doctrine validates both sets of legislative provisions
         1. Mere duplication in itself does not equal contrast
         2. Both governments may legislate in the same policy areas, provided that they are both valid laws and distinct in pith and substance
      2. If there is a conflict in operation, we would look at paramountcy
2. **Necessarily Incidental / Ancillary Powers (GM Canada) – If there was one piece of legislation + when we look at specific provisions within legislation**
   1. Does the challenged provision intrude on the other jurisdiction?
      1. Pith and substance of the challenged provision
      2. If no, then valid (perhaps incidental effects?)
      3. If yes, go on to step b
   2. Is the rest of the Act valid?
      1. Pith and substance of the Act
      2. If no, then analysis is ended.
      3. If yes, move on to step c (if provision invalid 🡪 if provision was valid, then next step)
   3. Determine whether there is a rational and functional connection between the provision and the scheme
      1. The fit test – how well provision is integrated into the scheme
      2. How important is it for the efficacy of the legislation?
         1. The impugned provision must further the purpose of the valid legislative scheme
      3. If encroachment is minor, the provision only needs to be functionally related to the scheme to justify (“merely tacked on”)
      4. If encroachment is large, the provision must be truly necessary
   4. If there is a sufficient connection between the unconstitutional provision and the constitution as a whole, the provision can be saved as being mere incidental effects

Example:

**GM Canada** – impugned provision found to encroach on provincial powers to a limited degree and to be integral to the act. The provision was upheld.

**Lacombe** – impugned provision was found to encroach on provincial powers, but it was merely tacked on as it had no relation to the rest of the general zoning by-law that it amended

**Applicability – Whether application of mostly valid legislation overreaches and impairs matter falling within exclusive federal jurisdiction**

**Interjurisdictional immunity - CWB**

* In theory, principle is reciprocal, however, in practice, only the federal government has ever made valid provincial law inoperative
* This doctrine operates even if federal power remains not exercised

*If impugned legislation is found valid, consider IJI:*

The next step, applicability looks at whether the application of a legislation that is mostly valid overreaches and impairs a matter that falls within the federal jurisdiction. Although in theory this could apply the other way in terms of whether federal laws overreaches into provincial law, however, there has not been a single case that has shown this yet. Thus, this will not be discussed.

Applicability is dealt with by the interjurisdictional immunity doctrine (IJI), which protects the core of a legislative head of power from being impaired by a government at the other level (**COPA**). The courts in **Canadian Western Bank (CWB)** have explained that IJI must be applied with restraint because a broad application would make it inconsistent with the idea of flexible federalism. Thus, the application of IJI has been reserved for situations that are already covered by precedent (**COPA, PHS**). This list was set out in:

1. Federal elections - **McKay**
2. Telecommunications – **Rogers** – siting of telecommunications pole or radio communication antenna system
3. Interprovincial railways
4. Postal service
5. Banking - **CWB**
6. Aeronautics – **COPA** – location of aerodromes
7. Navigation and shipping
8. Federal parks

*If the impugned legislation seems to infringe one of the federal heads of power above:*

As laid out in **COPA**, the application of IJI is laid out in 2 steps:

1. Does the law trench on the protected core of a power of the other level of government?
   1. In order to be considered a protected core of a power, it must be something that can be said to be a vital or essential element of the power. It is the minimum content necessary to make the power effective for the purpose for which it was conferred.
   2. Would trenching on this protected core make it impossible for Parliament to achieve the purpose for which this power was conferred on it?
      1. Eg**. Rogers** – it is the appropriate and specific siting of radiocommunication antenna systems that ensures the orderly development and efficient operation of radiocommunication in Canada.
   3. Does the law trench on it?
   4. Apply to facts
2. If it does, we must determine whether the effect of the statute or measure on the protected power is sufficiently serious to trigger the application of the doctrine.
   1. In **CWB**, the Court held that it is not enough for the provincial legislation to simply affect that which makes a federal subject of exclusive federal jurisdiction. There must be an adverse consequence in order for IJI to apply.
      1. Eg. **Rogers** – the service of notice of a reserve to Rogers meant that they would have to wait for a very long period of time before they could begin installation. They would be unable to meet its obligations to serve the geographic area in question a required by their license. This was deemed to be seriously and significantly impairing the core of the federal power.
   2. Apply to facts

Thus, I would argue that since the provincial legislation seriously and significantly impaired the core of the federal power over \_\_\_\_\_\_\_\_\_\_, it is inapplicable by reason of IJI.

Since it didn’t seriously and significantly impair the core of the federal power, IJI wouldn’t apply in this case and the provincial legislation is deemed to be applicable to this case.

**Operability – looking at resolving conflict of federal vs provincial law**

**Paramountcy Doctrine**

Operability is based on the doctrine of federal paramountcy, which is modelled on the rule in s 95 of the *Constitution Act, 1867* and means that in the event of a conflict between provincial and federal legislation, the federal legislation wins out, with the provincial legislation rendered inoperative.

Only comes up when

1. there is a double aspect (the field falls under an aspect of federal competence and an aspect of provincial competence with equivalent importance/dominance)
2. the field is occupied by both provincial and federal legislation.

In this case, both laws are valid, but may conflict.

**Multiple Access** – mere duplication doesn’t constitute a conflict sufficient to require paramountcy

The test includes policy conflict: whether the provincial law undermines the purpose of the federal law

* In ***BMO v Hall***, the court found that the provincial law undermined the federal law by undoing the delicate, regulated balance between farmers’ and bankers’ interests that it strove to maintain.

**Dual compliance test (onus on the party trying to demonstrate that paramountcy applies):**

1. Can a person simultaneously comply with both acts? (**Multiple Access**)
   1. If no, there is direct contradiction and paramountcy applies.
2. Does the Provincial act frustrate Parliament’s purpose?
   1. If yes, then paramountcy applies – provincial legislation inoperative to the extent of the conflict
   2. If no, both pieces of legislation will survive

**Validity**

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| **R. v. Morgentaler [1993] 3 SCR 463** |
| **Facts:**  CC provisions relation to abortions struck down based on infringement of Charter rights.. NS government enacted legislation that prohibited abortions from being done anywhere other than a hospital + denying medical services insurance coverage for abortions performed outside hospital. He opened clinic 🡪 charged. |
| **Law:**  Medical Services Act – “purpose is to prohibit privatization of the provision of certain medical services in order to maintain a single high quality health care delivery system for NS” |
| **Analysis:**  Province argues that it falls under their jurisdiction under s.92(7, 13 and 16) – hospitals, property and civil rights, and generally all matters of a merely local or private nature  Morgentaler argues that it infringes s.7 Charter + encroaches federal criminal law power 91(27)  Likely conclusion that central purpose and dominant characteristics is restriction of abortion as a socially undesirable practice which should be suppressed or punished   * Terms of legislation – penal consequences (fines of $10000 - $50000) + restricts abortions in certain circumstances 🡪 practical availability of abortions? * The overlap of legal effects between this provincial legislation and the struck down CC provision * Timing of the case: action seems to respond to Morgentaler rumour of opening clinic * Evidence of legislative debates (Hansard) demonstrates prohibition of Morgentaler’s clinic was central concern + clear opposition of free standing abortion clinics   + The concerns to which NS submits the legislation is absent throughout most of the proceedings (privatization, cost/quality of health care, preventing 2 tier system)   Looking at provincial objectives:   * No evidence that health and safety of women was in danger through these clinics * No concerns about privatization until Act was moved for second reading * No evidence/consultation of cost-effectiveness or quality of services in private clinics * Morgentaler’s clinic will not directly increase the cost to the province * They designated nine unrelated procedures to oppose; if it were the case that they wished to oppose private surgery, they should have just done so |
| **Decision:**  Provincial legislation’s pith and substance deemed to be criminal law, thus ultra vires their jurisdiction. |

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| **Reference re Employment Insurance Act (2005)** |
| **Facts:**  Validity of maternity and parental leave provisions in Employment Insurance Act. |
| **Law:**  Scope of s. 91(2A) – federal power over “unemployment insurance” |
| **Analysis:**  Quebec argues that provincial provision fell under provincial civil and property rights power  Pith and substance of legislation determined to be: providing replacement income when interruption of employment occurs as a result of the birth or arrival of a child   * Does this come within the scope of the federal power over unemployment insurance? * In determining the scope of the power, courts should consider the evolution of the power, its interpretation and modern day realities   AG of Quebec argues that   1. the maternity benefits are gained in respect of a voluntary absence from work and cannot be regarded as relating to insurance 2. individuals who receive maternity benefits are not unemployed because they are not available for work   SCC says:   1. Receiving income replacement benefits when off work due to pregnancy is not incompatible and can be harmoniously incorporated into public unemployment insurance plan    1. Protection against the loss of earnings that results from maternity is a social policy decision and a public insurance plan has a social role    2. The primary objective of social insurance is to reduce individuals’ economic insecurity by promising them compensation in relation to social risks 2. To limit a public unemployment insurance to cases in which contributors are actively seeking employment or are available for employment would lead to denying its social function – Parliament must be able to adapt the plan to new realities in the workplace |
| **Decision:**  EIA’s pith and substance is not family assistance but the governance of entitlement to benefits and replacement income during interruption of work 🡪 consistent with unemployment insurance powers of fed. |

**Double Aspect**

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| **Multiple Access v McCutcheon (1982)** |
| **Facts:**  Ontario Securities Act prohibited insider trading in shares trading on the Toronto Stock Exchange (both provincial and federal corporations). The federal Canada Corporations Act contained almost identical provisions applicable to corporations incorporated under federal law.  Purpose: inside-trading prohibitions protect shareholders by regulating the marketplace in shares and also enabling them to initiate proceedings against alleged insider traders.  Shareholder initiated proceedings under Ontario Act. Respondents claimed exclusive federal jurisdiction 🡪 the statute of limitations for federal legislation passed. |
| **Analysis:**  The Acts deemed to be valid exercises of both enumerated powers (s.91(2) Trade and Commerce vs. s.92(11) incorporation of companies (securities regulation).  Pith and substance of the two Acts were different: Ontario Act aimed at regulation of securities whereas federal Act was aimed at company law |
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**Ancillary powers/Necessarily incidental**

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| **GM Canada v. City National Leasing** |
| **Facts:**  Civil action was brought against GM under Combines Investigation Act (federal jurisdiction for trade and commerce)  GM argued that the civil action created under the federal Act fell within provincial jurisdiction over property and civil rights |
| **Analysis:** |

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| **Quebec v Lacombe (2010)** |
| **Facts:**  There is a municipal bylaw that intrudes on federal power over aeronautics. Purpose of the overall scheme was supposed to be for zoning/land-use planning. Pith and substance of the bylaw was that it regulates aeronautics, which is a federal power. |
| **Analysis/Decision:**  Despite purpose of the overall scheme, there was no evidence of a rational connection to land-use planning, a functional connection to land-use planning and no evidence of a purpose connected to land-use planning. The provision seemed to be a stand-alone prohibition of certain aeronautical activities.  The amendment was passed to protect the use of Lac Gobeil and similar areas by vacationers. However, it did not confine its ban on aerodromes to vacation areas. Rather, it banned aerodromes throughout the municipality, which spans a variety of land uses. It did not function as zoning legislation, but rather, as a stand‑alone prohibition. It treated similar parcels differently, and different parcels the same, belying the first principle of zoning legislation. |

**Interjurisdictional immunity**

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| **McKay et al. v. R [1965]** |
| **Facts:**  McKays put up federal election promotion signs – municipal bylaw prohibited display of all signs in a residential area |
| **Issue:**  Can a municipal bylaw that prohibited displays of signs in a residential area be constitutionally applied to the McKays for posting up their promotional federal election posters? |
| **Decision:**  SCC 5-4 decision – held that bylaw could not constitutionally be applied to the McKays |
| **Analysis:**  Based on proposition that governments should not be permitted to do indirectly something they cannot do directly  Minority decision – they believe that using the pith and substance doctrine, provincial government had rights in relation to property and civil rights   * This should apply even though it my incidentally affect federal propaganda * Many people criticized the decision and agreed with the minority decision |

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| **Bell Canada v Quebec (1988)** |
| **Issue:**  Whether provincial occupational health and safety laws could apply to undertakings engaged in interprovincial transportation and communication |
| **Ratio/decision:**  SCC held that the provincial law was constitutionally incapable of applying to the federal undertaking, and had to be read down so that it did not apply to the federal undertaking  In principle, a basic, minimum, and unassailable content had to be assigned to each head of federal legislative power, and since federal legislative power is exclusive, provincial laws could not affect that unassailable core |

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| **Canadian Western Bank**  IJI not successfully applied; provincial insurance scheme did not encroach on the core of “banking” area of exclusive federal jurisdiction |
| **Facts:**  Alberta enacted legislation and regulations/provincial licensing scheme on insurance. Banks sell insurance for banking. Banks argue that the legislation and regulations should be rendered in operative and/or inapplicable to the bank insurance schemes because they are federally regulated. |
| **Ratio:**  Prov laws will apply to bank so long as they don’t impair the core functions (vital and essential parts) of the bank → If it does impair, then it is inapplicable  Promotion of insurance is not vital and essential to the undertaking of banking – and therefore banks are subject to prov licensing schemes re insurance – this only relates to “authorized types of insurance” and “personal accident insurance” not mandatory mortgage insurance |

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| ***Quebec (A.G.) v Canadian Owners and Pilots Association COPA***  ***IID successfully applied to federal core over “aeronautics”*** |
| **Facts:**  An aerodrome, registered under the federal Aeronautics Act, constructed on land zoned as agricultural in Quebec. S. 26 of ARPALAA (provincial act) prohibited the use of lots in a designated agricultural region for any purpose other than agriculture, subject to prior authorization from a Commission. Permission not obtained prior to constructing the aerodrome, the Commission ordered the return of the land to its original state. The Commission’s decision was challenged on the ground that aeronautics is within federal jurisdiction. |
| **Analysis:**  While ARPALAA is valid provincial legislation, it is inapplicable to the extent that it impacts the federal power over aeronautics. The federal aeronautics jurisdiction encompasses not only the regulation of the operation of aircraft and airports, but also the power to determine the location of airports and aerodromes. This power is an essential and indivisible part of aeronautics and, as such, lies within the protected core of the federal aeronautics power.[1]  In prohibiting the building of aerodromes on designated agricultural land unless prior authorization has been obtained from the Commission, the ARPALAA effectively removed the total area of the designated agricultural regions from the territory that Parliament may designate for aeronautical uses. This is not an insignificant amount of land, and much of it is strategically located.[[2]](https://en.wikipedia.org/wiki/Quebec_%28AG%29_v_Canadian_Owners_and_Pilots_Assn#cite_note-2)  The doctrine of federal paramountcy would not apply in this case.[4]   * Paramountcy may flow either from the impossibility of complying with both federal and provincial laws or from the frustration of a federal purpose. Here, there was no operational conflict, since **the federal legislation did not require the construction of an aerodrome** and it is possible to comply with both the provincial and federal legislation by demolishing the aerodrome. * There was also no evidence establishing that a federal purpose regarding the location of aerodromes was frustrated by the provincial legislation. The federal regulations provide that the Minister responsible may determine that the location of each registered aerodrome is in the public interest, but they do not disclose any federal purpose with respect to the location of aerodromes. |
| ***Holding***  IJI applied 🡪 The prov. law is valid but impairs the core area of aeronautics and is therefore “inapplicable to the extent that it prohibits aerodromes in agricultural zones” |
| ***Ratio:***  IJI should only be applied to cases that have already dealt with that area:  Only should be invoked based on precedent |

**Paramountcy/Operability – provincial law fails - conflict**

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| ***Bank of Montreal v Hall*** “bankers and farmers” ***Bank of Montreal***  ***Court applies the “broader policy objective” approach to Paramountcy = prov law fails, it undermines the policy of the fed law*** |
| ***Facts***   * fed law:   + forces banks to lend credit to farmers – this is troublesome to banks b/c farming is risky     - Substantial public policy benefit to making credit more available to farmers     - Scheme makes it easier for farmers to get loans     - Quid pro quo in fed law : if farmer defaults on loan – the bank can immediately seize the farmers equipment and the farmers can’t go to courts     - This law therefore makes a cost-benefit agreement for farmers to get credit and some security to the banks (makes it easier to foreclose in event don’t get there money back) * Prov law:   + - BUT we have prov leg: all tenures in the prov have the right to a court date before the bank can come in and seize the assets. Law also makes bank give notice to farmer to give them last opportunity to pay * Arguments:   + Bank: the prov law is inoperative here   + Farmer: no conflict – bank can comply with both, if the bank followed the prov law – it would not be defying the fed law   ***Analysis***   * If the prov law is operative then it undermines the purpose and policy of fed law – and this is enough to trigger the PD 🡪 ***don’t need to find the operation conflict*** * Policy conflict is key to this broad approach * There is a **double aspect (Fed: Banking and Prov: Regulation of property and civil rights)** of “making money available to farmers”BUT but even though there is not a direct operational conflict, there is “**an express contradiction**” between the two laws   ***Result***   * Court finds that the fed law finds a carefully regulated balance between the competing interest of farmers & banks 🡪 but with the prov law - giving more adv to farmers 🡪 farmers come out with an adv. 🡪this undermines the policy of balancing interest that was part of the fed law * **“displacing the legislative intent**” of parliament = fed law purpose: balancing of the competing interests of farmers and banks * Suggests that PD can be invoked short of finding a direct operational conflict * Develops the notion that the underlying policy conflict can trigger PD |

***Alberta v. Maloney (2015)***

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| Facts | Province compensated the victim and then they go after the car driver to get the cash back. Maloney until that he claimed bankruptcy and got charged and to the debt own to the Alberta Government. federal Bankruptcy and  Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”), and on the other hand, Alberta’s Traffic Safety Act |
| Issue | Operational conflict between the two laws? |
| Held | Provincial Law conflicted with the Federal Legislation |
| Reasoning | One law consequently provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy.  **This is a true incompatibility.**  Both laws cannot operate concurrently,“apply concurrently” or “operate side by side without conflict”. The facts of this appeal indeed show an **actual conflict in operation** of the two provisions. This is a case where the provincial law says “yes” (“Alberta can enforce this provable claim”), while the federal law says “no” (“Alberta cannot enforce this provable claim”).  The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law. |
| Note | Low Standard Test: So we can use Paramountcy  High Standard: Dual Compliance |

**Paramountcy/Operability – Valid provincial law – no conflict**

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| ***Rothmans v Saskatchewan*** “tobacco adv.” ***Rothmans***  ***Court applies both the “operational conflict” and the “broader policy objective” approach to Paramountcy = prov law successful, it furthers the policy objective of the federal law*** |
| * Fed law limits displays of tobacco products & accessories in certain ways * Prov: bans all tobacco products displayed in stores w/ youth under certain age   ***Issue***   * Clearly a double aspect * Tobacco argues: prov law inoperative as conflicts with fed law * There is no direct operational conflict as they can comply with the prov law w/o violating the fed law - “dual compliance is possible”   ***Analysis***   * Frustration of policy approach like in Bank of Montreal case is not triggered as the prov law is acting in the spirit of fed law * Tobacco would argue: the prov law is against the fed law that was creating a law that balanced the competing interests – economic and public health   ***Result***   * The provincial law furthers the policy of the fed law * court is indicating that they want to trigger a high threshold within this new approach of “policy” for Paramountcy to be triggered. * PROVINCIAL LAW DID NOT FRUSTRATE |

### ***Multiple Access v. McCutcheon***

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| FACTS | Insider trading case brought under provincial securities legislation; insider trading also prohibited under Canada Corporations Act;  Federal and provincial legislatures have the same securities laws (valid and identical) |
| ISSUE | 3. Assuming section 100.4 and 100.5 of the Canada Corporations Act are intra vires the Parliament of Canada and assuming section 113 and 114 of the Securities Act are intra vires the Legislature of Ontario, are sections 113 and 114 of the Securities Act suspended and rendered inoperative in respect of corporations incorporated under the laws of Canada? (No) |
| HOLDING | There is no conflict both legislative schemes can “live together and operate concurrently”  - there is no good reason to speak of parramouncy except where there is actual conflict in the operation of the laws.IE where one says yes and the other syas no. Therefore compliance with one law involves breach of an other |
| RATIO | **Laws can live together so long as there is harmony, duplication without conflict is not a problem; It must be impossible to comply with both statutes to render one inoperative; Justification of allowing two non conflicting laws to co exist is because if one jurisdiction were ever to withdraw their legislation there would still be no gap; Courts avoiding “legislative gaps”**  **Bottom-line:** an inconsistency only exists for the purposes of the doctrine of paramountcy if it is impossible to comply simultaneously with both provincial and federal enactments 🡪 **Dual-Compliance Test** |

### ***Ross v. Registrar of Motor Vehicles (1975)***

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| Facts | Ross convicted of driving while impaired. The judge give a sentence which limited his time to drive, 8-5:45pm (feed family). The Ontario Highway Act prohibited his driving for three months. |
| Issue | 1. Was the provincial Legislation, s.21 of Highway Traffic Act valid 2. Was the federal Legislation that is 238 Valid 3. If both valid, was there conflict between two provisions requiring the application of the rule of federal paramountcy. |
| Held | **Held:** There is no good reason to speak of Paramountcy and preclusion except where there is actual conflict in the operation of the laws – where one says “yes” and the other says “no”; where compliance with one is defiance of the other. |
| Reasoning | Intermittence punishment to ensure securities so that people can serve their suspensions when they could not drive, so that they can provide for their families. This was the purpose for the federal government. The province was being more draconian about it |
| Ratio | Only where there is conflict, one says no and the other yes, can paramountcy be used. |

**Provincial powers over economic regulation under s.92(13) civil and property rights**

**Carnation** – farmers that produce milk – marketing board sets price Carnation has to pay for buying milk from farmers

* Carnation argues that prices are invalid – most of their products leave Quebec so there is interference of interprovincial and international trade (s.91(2))
* Held to be intra vires 🡪 legislation that has incidental effects on a company’s interprovincial business/trade does not make it ultra vires
  + The price determined by the Board has an effect on trade but they are not made in relation to export trade
  + Pith and substance of legislation is Property and Civil Rights – valid

**Manitoba Egg** – provincial schemes gave complete control over marketing (quotas, prohibition of sales of particular products) of eggs and poultry, whether or not produced in the province

* The Plan not only affects interprovincial trade of eggs but it is aimed at the regulation of such trade – it is an essential part of the scheme
* Distinguished from **Carnation** – aim was to regulate pricing of eggs within province and incidentally affected trade between provinces
  + In this case, it actually restricts trade by controlling importation of eggs into the province from other provinces

**Re Agricultural Products Marketing Act** - if you have a confusing enough scheme that has both government that has been negotiated among them, the court will not do anything about it.

Court shows a lot of props to scheme that included the prov and fed working together even though there may have violation in trade and commerce and also property and civil rights

* Production is prima facie provincial – the province where production is located has exclusive jurisdiction over that production facility

**Federal powers over interprovincial and international trade under s.91(2)**

**Klassen** – whether Canadian Wheat Bread Act could apply to purely local work – a feed mill that processed local wheat and sold it as feed to local farmers – quota system enforced detailed recordings in delivery permit books for each delivery to grain elevator

* Klassen failed to record delivery of wheat to his grain elevator
* S. 16 interferes with property and civil rights but it is incidental and ancillary to the purpose of the Act
  + Which is the provision of an export market for surplus grains, a matter which has undoubtedly assumed a national importance

**Caloil** – federal legislation upheld that prohibited transportation or sale of imported oil west of Ottawa – true character = an incident in the administration of an extra-provincial marketing scheme

* Emphasis placed on the fact that the legislation only regulated “imported oil” as opposed to all gasoline

**Dominion Stores** – DS charged with selling locally produced Spartan apples under federal grade trade name “Canada Extra Fancy” (voluntary grading requirements in federal Agricultural Products Standards Act) – argues that apples are grown, produced and sold in Ontario, thus intraprovincial

* Ontario also had legislation that included mandatory grading requirements (evidence that perhaps it is provincial legislation?)
* The Court determined that the provisions of the federal Act were an invalid regulation of intraprovincial trade

**Federal powers over criminal law**

**Margarine Reference** – Federal government tried to regulate margarine by saying it was criminal law

* In order to determine the validity of a criminal law provision:
  1. Prohibition
  2. Penalty
  3. Criminal purpose (public peace, order, security, health, morality)
* Nothing evil or injurious to public about the regulation of margarine; if there was evidence that margarine was a public safety issue then it may have been ok
* It was simply a regulation to protect Dairy farmers from competition 🡪 not aimed at social goal or harm
* The law was prohibitory in form but really a regulation of balancing competing interests between dairy and non-dairy farmers 🡪 within province’s authority

**RJR Macdonald** – Tobacco company argues federal act putting advertising bans + requirements of health warnings on tobacco products is ultra vires, should be under provincial jurisdiction over advertising under s.92(13) or (16)

* Evil targeted is tobacco’s detrimental health effects (health can be federal or provincial depending on circumstances (Margarine))
* The federal power has a broad scope over criminal legislation with respect to health
  + As long as legislation contains prohibition accompanied by penalty + must be directed at legitimate public health evil

**Hydro-Quebec** – Charged under Federal Environmental Protection Act for admitting PCB’s; the Act established a process for regulating the use of toxic substances; they claimed it was ultra vires

* Sanctions considered criminal 🡪 pollution is “evil” + clean environment is “public purpose”
  + A regulatory law can still be found in pith and substance to be criminal law if the focus is a prohibition of a social evil

**Provincial power to regulate morality and public order**

**McNeil –** NS govt passed Act – a system for licensing and regulating showing films; all films must be submitted to the board first for approval + failure was a penalty and a revocation of a theatre owner’s license

* Provisions, if read as a whole, primarily directed at regulation, supervision and control of film business within the province
  + It is about regulation, not punishment – in order to balance interests of the province
* Law is upheld
  + Law uses preventative form as opposed to penal form= “we are not going to grant you a license” vs. “you shall not”

**Westendorp** – City tries to restrict prostitution through bylaw – bylaw had criminal form: penal punishment + criminal language (fines up to $500, imprisonment up to 6 months + “no person shall”)

* Province argued that bylaw is necessary for public to move freely on streets as prostitution creates crowds that are annoying and embarrassing
* The section is in pith and substance criminal law and takes criminal form

S. 91

1A. The Public Debt and Property. (45)

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance. (46)

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed. (48)

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.