**Constitutional Fall Term**

**CONSTITUTIONAL – FEDERALISM**

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| **Q1 Is the Law Valid?** |

Sentence: ….why you do this analysis

1. Identify the “matter”/pith and substance = purpose

- statutory context, purpose of legislation, legislative history and government reports, effects of legislation

2. delineation of the scope of the competing classes

3. then a determination of the class to which the challenged law falls.

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| **A Pith and Substance Analysis** |

* Pith and substance is determined by examining both the purpose and effect of the law.
* Undergoing a pith and substance analysis will help to determine whether the law falls within the federal class of powers or provincial class.
* If the analysis determines that this provincial law falls under the federal class, then it will be invalid and *ultra vires*.
* ***R v Mortgentaler*** is the leading modern case on determining the pith and substance of a law.
* ***R v Mortgentaler*** sets out a five part test

The issue is whether or not this \_\_\_\_\_\_\_\_\_ provincial law is *ultra vires* the province of*­* \_\_\_\_\_ because it is in pith and substance criminal law.

**SEE FLOW CHART FOR P&S ANALYSIS**

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| **The City/Province will bring three counter arguments:** |

## 1. This criminal nature is just an incidental effect

* Because a pith and substance analysis involves the discussion of a piece of legislation’s dominate characteristics, by implication, there are also non-dominant characteristics of that legislation that are deemed secondary or incidental.
* Modern federalism allows for some spill over.

Definition of Doctrine:

* Incidental effects rule allows a law to impact matters outside the enacting legislature’s jurisdiction, so long as these effects remain secondary to the most important features of the legislation which are *intra vires* in their own right.

Ex. former abortion rule was ok as a fed under criminal, even though it had effects on provincial matters of health. The dominant feature was still punishment of abortion on moral grounds.

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| **2) Opposers of the law**  *Individual =*   * These are not secondary, as the pith and substance analysis has demonstrated, the criminal feature of this law that you are labelling “incidental” is in fact the dominant feature. * - in mortgentaler the privatization and the cost and quality of health care services were not proven to be anything other than incidental concerns. Central feature was to prohibit abortion | **1) Defenders of the law** *City/Province Argument =*   * These criminal aspects are secondary or incidental features to the more important feature of \_\_\_\_\_\_\_\_\_\_\_\_, which falls within a provincial class. |

## 2. This subject matter has a double aspect

Definition of doctrine:

* The double-aspect doctrine allows both the federal and provincial government to equally regulate on the same subject because this subject has aspects that fall within both jurisdictions legislative authority.
* The doctrine reflects the overlap in the constitutional division of powers
* A valid double-aspect will be regulated on equal importance by both the provincial and federal side.
* Ex’s of Double Aspects:

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| **Subject Matter** | **PROVINCIAL** | **FEDERAL** |
| *Impaired driving* | Motor Vehicle Act  92(13) + 1 (b) + (15) Property and Civil Rights – Local nature  “Safety on Highways” | Criminal Code  91 (27) – criminal law  “Prohibition of reckless driving is  socially injurious” |
| *Insider Trading/ Securities Regulation* | Ontario *Securities Act*  Prohibited insider trading in shares trading on the TSX | *Canadian Corporations Act*  Federally incorporated companies |
| *Abortion* | Healthcare | Criminal |
| *Prostitution* | Passes zoning reg. that includes provision for regulating prostituiotn says: dominant aspect is control of streets, | Criminal aspect |

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| **2) Opposers of the law**  *Individual =*   * This is not analogist to **Multiple Access** | **1) Defenders of the law** *City/Province Argument =*   * Double-aspect is supported by modern federalism, who find the traditional water-tight compartment approach as unrealistic * Over-lap is expected and is accommodated in a federal state (**GM)** * Courts have shown a preference towards upholding laws; if they can find it valid they will. The double-aspect doctrine allows them exercise this preference in respect to ­­\_\_\_\_\_(this law)\_\_\_\_\_\_ * Overlap is good. There’s nothing wrong with more regulation * This subject matter is similar to another situation where a double aspect was previously found **Multiple Access** |

**-** where law has the same legal effect of federal legislation, but is valid because it is done pursuant to a provincial head of power

## 3. This provision should be saved by the ancillary doctrine.

Province will argue: If the provision is found to be criminal in pith and substance, then it can still be upheld by the ancillary doctrine .

Definition of doctrine:

* The ancillary doctrine applies where a provision in a piece of legislation is, in pith and substance, outside the jurisdiction of its enacting body.
* This provision of \_\_\_\_\_\_ could be saved if it can be shown to be an important part of the broader legislative scheme of \_\_\_\_\_\_, which is within the competence of the enacting body of the province of \_\_\_\_\_\_\_\_
* Whether or not the \_\_\_\_\_\_\_\_\_ (provision) can be upheld, depends on how well it is integrated into the \_\_\_\_\_\_\_\_\_\_\_\_\_\_ (larger Act)

**2 Questions:**

**1) How connected is the provision**

**2) How intrusive is the provision**

The link between the provision and the Act must be equal or greater than the seriousness of encroachment to be valid: **the greater the encroachment, the more it must be integrated**.

Merely tacked on + highly intrusive = bad

Integral/truly necessary + marginal intrusion = best

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| **2) Opposers of the law**  *Individual =*   * The provision is merely tacked –(rationally/functionally related) on and it intrudes in more than a limited way. * Ex. It is merely tacked on and therefore is severable from the Act as a whole. * Just because it the invalid provision is in a valid Act, does not provide an automatic guarantee for the provision’s validity. * **Argue via Lacombe case** | **1) Defenders of the law** *City/Province Argument =*   * The criminal feature of \_\_\_\_\_\_\_\_\_ is necessarily incidental to the larger legislative scheme of \_\_\_\_\_\_\_\_\_which is within the provincial heads of powers. * Ex. It is integral OR rationally/functionally related+ has only a marginal encroachment * Ex. we concede that it intrudes in a limited way, but the link to the Act is more than “rationally/functionally related” …. It is not severable * **Argue via GM case** |

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| **Is this a Criminal Law in Pith and Substance?** |

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| **2) Opposers of the law**  *Individual =*   * Criminal Law Power has been defined much broader than traditional criminal concepts * **Analogize this law with criminal laws of:**   ***RJR MacDonald***  ***Morgentaler***  ***Westendorp***   * A criminal law does not need to have a criminal law form according to ***Hydro-Quebec*** * This is a criminal law because it is attaching a **stigma to a socially injurious behavior** * If the law is criminalizing something that isn’t in the criminal code (abortion, prostitution) then this creates the inference that the federal government made a specific choice not to criminalize this subject 🡪 province shouldn’t either | **1) Defenders of the law** *City/Province Argument =*   * This subject matter does not fall into a traditional area of criminal law as defined in the ***Margarine Reference***: * We are just trying to regulate **property and civil rights under s. 92(13)** * We are just trying to regulate **matters of a local nature under s. 92 (16)** * Just because the law is prohibitorty in its form, doesn’t make it a criminal law (as concluded in ***Margarine Reference*** * **Analogize this law with:**   ***McNeil***  **OR**   * If it is criminal it must have a criminal form |

**Pith and Substance – Flow Chart**

### Step 1: The Legal and Practical Effect of the Legislation

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| *The legal effect of a law is a good indicator of its purpose*   * Do you get a criminal law sense when looking at the provision/Act in its “four corners” * Do the act’s provisions aim at a criminal subject matter? * What is the practical effect of the law? Is it criminal in nature? ( It may not be necessary to consider the practical effect, if the legal effect is criminal) * Does the legislation deal with a subject historically considered part of criminal law? * Traditional Areas of Criminal Law:   Abortion, gun control, any sort of violence …  *Morgentaler (abortion), Westendorp (prostitution) were both provincial laws dealing with a subject historically considered to be federal criminal law*  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_   * + - * + If needed bring in criminal law power analysis here:   Does it seem to attach a stigma to some undesirable social evil?  Are their stiff penalties that look like a criminal law?  *(high fines, imprisonment)*  *s. 92(15) does allow provinces to impose punishment to enforce valid provincial law. This includes prison time. The fact that penal sanctions are being used, is not enough in itself to make a provincial law invalid…BUT unusually harsh punishments for a provincial law may indicate a criminal nature*  *Morgentaler:* $10, 000 – 50,000  *Westendorp: Fines up to $500, imprisonment up to six months*  Is the law in a criminal prohibitory like form? (vs. regulatory)  *Thou shall not ….No person shall*  *Both Morgentaler and Westendorp used criminal prohibitory language and were concluded by the court to be criminal law in pith and substance. The provincial laws were declared invalid* | Yes = Crim.  Yes / No  Yes / No  Yes / No  Yes / No  Yes / No  Yes / No  Yes / No |

### Step 2: Related Legislation

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| * Is there a related (federal) legislation that deals with the same subject matter?   + *We know from Multiple Access that a duplication of a subject matter’s legal effect is ok if it there is a valid double aspect* * Was there a similar federal legislation dealing with the same subject matter which was just struck down?   + *BUT if the federal prohibition is recently struck down due to a Charter violation, then it raises an inference that the province is trying to regulate in order to* ***fill a gap*.** *It is essentially a red flag.*   + *This occurred in Mortgentaler* * Conclusion: - the closer the reproduction, the stronger the inference that the dominant purpose is of criminal law   + *if there is an overlap of legal effects, but the criminal law became inoperative, then it raises an inference that the provincial law was designed to serve a criminal purpose so that it could fill the gap left by the now defunct federal criminal law.* | Yes = Crim.  Yes / No  Yes / No |

### Step 3: Timing

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| *What were the prior course of events leading up to the enactment of this legislation?*   * Did a previous significant event for the city/province (or for the law in general) recently occur?   + *If a significant event just occurred, then it raises the inference that this event was a catalyst for the enactment of the legislation*   + *In Morgentaler a federal abortion law had been struck down, and more importantly, Mr. Morgentaler publicly declared his plans to set up private abortion clinics. Immediately after the province of Nova Scotia was concerned about privatization and quality assurance of health care. These issues were there before, so why were they now all of a sudden part of the province’s concern when Mr. Morgentaler announced his plans?* *The timing therefore raised an inference that Mr. Morgentaler was really the “mischief” that the Act was directed at. Privatization and quality assurance were only incidental factors.* | Yes = Crim.  Yes / No |

### Step 4: History of Legislation

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| *What do the Hansard debates from the legislature or the committee reports indicate about the purpose of the legislation?*   * What does the introducing Minister say about the legislation? Does the purpose given orally align with the purpose stated in the text of the act?   + Generally what is said on the floor of the legislature is a good indication of the activity the law is trying to regulate or perhaps prohibit.   + *In Morgentaler, there was no discussion from the Hansard debates regarding the Acts stated purpose of privatization and costs of healthcare. This raised an inference that this wasn’t crucial to the Act and therefore not its true aim. Instead the members of the legislature discussed the need to deal with Mr. Mortgentaler.* | NO = crim |

### Step 5: Relationship between the means and the stated purpose

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| * Is the law underinclusive in terms of serving its stated purpose?   + *It is suspicious if the actual provisions of the law do not logically lead to supporting the stated purpose.*   + *It suggests that the purpose being advanced may not in fact be the purpose. The true purpose has been essentially masked by the stated purpose.*   + *In Morgentaler, the Act was underinclusive in terms of its stated purpose. It’s stated purpose was quite large in reach: preventing the privatization of medical services and assuring the quality of health care. However, the actual provisions of the act were only directed to the prohibited abortion, liposuction and a few other services. There was a big gap left between the Act’s stated purpose and its legal effect.* | Yes = Crim.  Yes / No |

* 1. Classify the leading feature of the law to the most appropriate provincial and/or federal heads of power – Under what heads of power should the law be classified?
     1. Look at case law to determine what types of things are covered under the applicable division of power section in the constitution
        1. When we look at the federal government power to enact criminal law, you are looking for a law that has a prohibition, penalty
        2. Look at the scope of the law
     2. Does the law fit within the scope as it has been defined in case law
        1. If yes, the law is prima facie valid but still need to look for encroachment
     3. Analyze the encroachment – Does the law encroach on matters within the powers of the other government?
        1. **Incidental effects** – secondary effects and not the dominant feature of the law – generally permissible and law will stand as valid (*General Motors v. Canadian National Leasing; Canadian Western Bank*)

**Conclusion:**

**Oppossers of the law will argue that the is “colourable”** because the effects of the law diverge substantially from its stated aim. The law is a criminal law in pith and substance. It’s true nature relates to matter within the federal head of power by way of s. 91(27). Therefore this provincial law is invalid because it is *ultra vires* provincial jurisdiction as was held in both ***Morgentaler*** and ***Westendorp***

**CONSTITUTIONAL – FEDERALISM**

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| **Inoperability: Assuming the law is valid (not invalid), could it be inoperative/inoperable?** |

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| **The Paramountcy Doctrine** |

**Define Paramountcy doctine:**

* The Paramountcy doctrine is only invoked if a subject matter is found to have a double aspect.
* It will apply if a provincial law is found to have a direct or a conflicting policy approach to the federal law’s regulation over the subject matter.
* The provincial law will become inoperative to the extent that the federal law applies. If for example, the federal law is revoked, then the provincial law can again operate.

**There are two different approaches to invoking the Paramountcy doctrine**

1) Narrower – **direct operational conflict -**  fed Paramountcy is less likely to be triggered,

* + - less scope to PD
    - conflict only happens if its impossible for subject to comply with both jurisdiction “operational conflict”
    - compliance of one law means a defiance of the other law
    - in terms of the operation – if the individual complies with the prov law for ex he or she is violating the fed law
      * ex) Insight case – if shoot up in the centre u will violate fed criminal law

2)Broad- **policy conflict** - if advocate for fed government u want the broad approach

* + - makes it easier to find that two laws conflict – easier to trigger fed Paramountcy
    - there may be an **express contradiction** between the two laws (***BMO***)
    - even if u don’t find operational conflict/ even if laws does run into the direct conflict, Paramountcy may still be triggered if the prov law undermines the policy obj of fed law
    - looks more to the intention of fed law then to if there is a direct operation conflict

**1. Set out overview arguments by both sides:**

**A. Opposers of the Law would want to argue in support of the Paramountcy Doctrine.** In particular, they would want the court to take the **broader approach to the Paramountcy** doctrine because this approach makes it more likely that the doctrine will be triggered.

**They would want to analogize this case with**: ***Bank of Montreal***

* In ***Bank of Montreal***, the federal government had legislated to create a careful balance between the competing interest in farmers and the bankers who were providing credit to the farmers. There is a substantial public policy benefit to making more credit available to farmers as in increases production in the agricultural industry. However, lending credit can be risky for bankers, so the federal laws allowed the bank to immediately seize the farmers equipment if the defaults on their loan. Essentially, both farmers and bankers has an interest in the arrangement.
* When the provincial law required the banks to give notice farmers regarding a deg=faulted loan and the opportunity for the farmers to have a court date before the bank seized their equipment, this upset the carefully designed balance of the federal law.
* The provincial law in ***Bank of Montreal*** was found to be inoperative Paramountcy applied.
* The individual must argue that the harmonious careful designed balance is upset. The situation is very similar to the technical creditor/farmer arrangement in ***Bank of Montreal***

*[possible argument]*

* the federal government has specifically chosen not to prohibit this activity. This is therefore an implicit argument that they are permitting it.
* By not prohibiting this type of activity, the federal government has made a delicate attempt to balance the competing interest of the citizen with that of the greater public. On the one hand the federal government is protecting the freedom of the individual, while on the other trying to support the wishes of ….
* This provincial law is therefore undermining the policy choice of the federal government.

**B. Defenders of this law would want to argue against the Paramountcy doctrine.**

They would want to insist that it is the court should allow the double aspect to prevail. If the court does decide to that Paramountcy applies, the province/city would want the court to apply the **direct operational conflict** approach. This approach is narrower and the threshold for Paramountcy to apply is much higher. The provincial law is less likely to be found inoperative.

The city/province would want to analogize their case with ***Multiple Access,*** because in this case, the court applied the direct operational conflict approach to Paramountcy. The provincial law regarding insider trading did not have a direct conflict with the federal law and therefore the provincial law was able to continue to operate.

If the court chooses to go further and apply the broader approach to Paramountcy, such as in ***Bank of Montreal*** and ***Rothmans,*** the city/province would want to analogize their case to the holding in ***Rothmans***. In *Rothmans* the provincial law was not found to be undermining the policy objectives of the federal law; rather, the provincial law that created a ban all the display of tobacco products displayed in stores with youth under a certain age was seen as furthering the policy of the federal law which limited displays of tobacco products and accessories in certain ways.

The city/province, would therefore want to highlight their law as a harmonious extension of the federal law and emphasize that the federal law has not created a careful balance between competing interest as was the case in ***Bank of Montreal***

**3. Conclude which is the stronger argument**

* If the fed. has specifically chosen not to legislate against something, then this may be a statement that the policy of fed law is being undermined. Not legislating against something is making an implicit statement to permit it. If this is the case, then there is likely to be a policy objective conflict through the operation of the provincial law. The individual has the stronger argument, and the court may find this argument more persuasive.
  + There may be an argument that when you are dealing with a criminal law: [you are dealing with the liberty interests of the individual] so if the fed permits prostitution, abortion, ppl doing things in the streets that don’t amount to obstruction or disturbance etc….then this decision to permit is as important as the decision to prohibit. **When the federal government does not prohibit something then it is an implicit statement that they have chosen to permitting it.** 
    - If the province steps in and forbids what the federal government permits, then there is a contradiction
    - When the fed decides what is criminal and what isn’t – it is making a statement on what is allowed

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| **2) Opposers of the law**  *Individual =*   * Even if a double-aspect is found, the Paramountcy doctrine will render the provision inoperable. | **1) Defenders of the law** *City/Province Argument =*   * There is not a reciprocal federal law that is regulating in this area, so the provision cannot be inoperable. * If the provision is rendered inoperable than there would be a void in this area (“vacuums”) |

* **Paramountcy Continued:**
* **-** two ways where the Paramountcy doctrine overrides the double aspect:
  + **direct conflict**: someone is being told two fundamentally contradictory things (Dickson in **Multiple Access** finds that the Paramountcy approach will only apply in situations of a direct operational conflict of the two levels of legislation)
  + **conflicting policy approach** of federal law is undermined (**Bank of Montreal** case backs off from Dickson’s conclusion in Multiple Access and finds that the Paramountcy doctrine can be invoked were there is a conflicting policy approach – this occurs in a situation where it was possible to comply with both laws, but by complying with the provincial law, the underlying policy of the federal law was being undermined … federal created a balance between the competing interests of the farmers and bankers, by giving the farmer’s extra procedural guarantees, it was upsetting the balance and therefore undermining the policy.)
  + (farmer case)
  + **there is an undermining of the delicate balance created by federal legislation between the bankers and the farmers**
  + **Bank of Montreal =** technical, creditor stuff
* - Rothmans Case: public health policy
  + if you have a direct conflict – this will settle the analysis as the federal law will prevail and the provincial law will become inoperative to the extent that it conflicts with the operation of the federal law
  + This case thinks you also must go one-step further with the analysis and consider the conflicting policy approach discussed in **Bank of Montreal**
    - Even if there is no direct conflict, there could be a policy conflict.
      * If we allow the provincial law to operate, will it undermine the policy of the federal law
    - Federal law: which imposes certain restrictions on marketing tobacco
    - Provincial law: you have a provincial law that poses greater restrictions on marketing tobacco
    - \*\*\* The provincial law does not undermine the policy of the federal law, but it extends the policy. The provincial law goes further in protecting this public health concern so therefore it can seen as complementary rather than contradictory as in **Bank of Montreal**
    - Rothmans = the prov furthering the policy of fed – so its ok
    - **There is a harmonious extension by the provincial law of federal policy which effectively balances the competing interests of the health of consumers and the profitability of tobacco companies**
* - December 2011 exam
  + fed law – that prohibits disturbance or obstruction in public
  + prov law – goes further … even if it the conduct falls short of disturbance or obstruction, you simply need to be involved in squiging or trying to sell something to a driver then this is enough.
  + We have a situation like **Bank of Montreal** and **Rothmans**, with a provincial law doing more than a federal law …
  + Is this harmonious or an undermining?
    - If undermining: then argue for bank of Montreal, Hall …[Jimmy’s Position]
      * Perhaps the federal specifically did not want to go so far with the law. They wanted to keep a delicate balance between the freedoms of the individual … and furthering public \_\_\_\_
    - If harmonious: Province needs to argue ala Rothmans [Province’s position]
      * Also argue that this is similar to the courts finding in **McNeil** that is is ok for the provincial government to try and prevent something, that the federal government prohibits.
  + **Say what each side would want to argue, this is how they would argue…. Then say which is stronger**
  + There may be an argument that when you are dealing with a criminal law: [you are dealing with the liberty interests of the individual] so if the fed permits prostitution, abortion, ppl doing things in the streets that don’t amount to obstruction or disturbance etc….then this decision to permit is as important as the decision to prohibit. **When the federal government does not prohibit something then it is an implicit statement that they have chosen to permitting it.** 
    - If the province steps in and forbids what the federal government permits, then there is a contradiction
    - When the fed decides what is criminal and what isn’t – it is making a statement on what is allowed
  + **How does Rothmans differ from Bank of Montreal, Hall …How does this case fit within these two.**
  + **If you can say there is a difference between a public health policy and a technical/creditor in BMO – if you can really nail these implications and how they work**

**CONSTITUTIONAL – FEDERALISM**

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| **Is the law inapplicable/applicable ?** |

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| **Interjurisdictional Immunity Doctrine** |

* The doctrine of Interjurisdictional immunity qualifies the extent of overlap permitted between the federal and provincial powers.
* It is a doctrine that pulls against the dominant tide of modern federalism.
* Classic federalism is supported by this approach of emphasizing “water tight compartments”
* The court is reluctant to apply the approach of interjurisdicitional immunity. If it there is a necessary conflict between the two laws, it prefers to apply the double aspect route and t hen apply a restrained approach to Paramountcy.

Conceptually the doctrine can be invoked by both the prov and fed govs to give immunity to their laws BUT usually is invoked by the feds.

* **SET OUT TEST HERE**

There are two questions to ask in order to determine if interjurisdictional immunity applies to a given law:

1) does the impugned legislation affect the core (of the federal laws)

2) Does the provincial law impair the federal exercise of its core competence? (A prov. law affecting the federal law is not enough)

Also must consider what the core is:

Something that lies at the centre of the subject matter governed by a law

It is a vital aspect of the federal or provincial legal governing power provided by the division of classes of ss. 91 and 92

Regardless of the test, ***Canadian Western Bank, Insight*** cases tells us that the courts have confined the Interjurisdictional immunity doctrine to only be applicable to those areas it has previously applied to:

Aeronatics as in ***COPA***

Federal undertakings, as determined in ***Canadian Western Bank***

Aboriginal areas***,***

Ports

Federal communications and enterprises

Drug injection is a core of provincial health, as defined in ***Insight***

I-Doctrine: mainly invoked in relation to s. 92 (10) (a), (b), (c)

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| **2) Opposers of the law**  *Individual =*   * The legislation encroaches of a core feature of federal law which is criminal powers. * “street control” is at the core of federal criminal power in s. 92(27)   **Analogize this law with *COPA, Bell #2***   * this subject matter is at the core of the federal jurisdiction over criminal matters. * This is the same as the core for “aeronautics” found in ***COPA,*** “federal undertakings” found in ***Bell #2***, | **1) Defenders of the law** *City/Province Argument =*   * Working in the province’s favour is that the court’s are reluctant to apply this doctrine * This doctrine is not applicable because criminal law is not an area previously designated as a core by past jurisprudence (\_\_\_site cases) * It is only really applicable to those areas where a core has already been defined: aeronautics, federal undertaking * It’s application increases the risks of legal “vacuums” as the province will avoid legislating in an area for concern that it’s laws may be impacted by federal immunity * **Distinguish this law from*, COPA, Bell #2***   **This area at issue is not analogous to the cores found in these three cases. They aren’t applicable**  **Analogize this law with *Canadian Western Bank*** and ***Insight***🡪shows courts reluctance to apply the IID approach to new areas |

**Issues with Interjurisdictional immunity:**

* Difficulties with IDD: Why Court doesn’t favour it
* Focus on “core powers” which are difficult to determine
* Increases risk of “legal vacuums”: “despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called ‘core’ of jurisdiction.”

**CONCLUSION**

**Interjurisdictional Immunity** “the law is valid, but not applicable”

* it would likely not apply here because, it is only usually applied to areas it has only been used in: aeronautics etc.
* Jimmy would want IID to apply … he would argue that the federal criminal jurisdiction is immune to this provincial law because it affects the core of federal jurisdiction
  + There is a core to criminal law, which includes things like bad behaviour on the streets.
  + To the extent that the province is trying to regulate this \_\_\_\_(type of law) it will not apply
* This is not a very successful approach for the opposser of the law.
  + The court has made it clear that they do not want to open up any new areas that the doctrine of Interjurisdictional immunity can apply to. This was made clear in ***Canadian Western Bank, Insight***
  + This doctrine was not applicable to ***Westendorp*** and ***Morgentaler,*** this type of “core-criminal” argument was done to deny the validity of the law, but when you are doing IID, you are saying the law is valid. Thus it doesn’t really work here
  + It was close to being applied in ***Westendorp*** for “prostitution”, but is was not articulated like this, even though it would have been possible for the court to assert that prostitution is at the core of criminal law
  + If the subject matter at issue does not fall within the defined areas, then it will not apply.

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law failed P&S analysis

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| ***R v Morgentaler Morgentaler***  ***Fails P&S analysis* Sets out P&S Test** |

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| ***Multiple Access Ltd v McCutcheon Multiple Access***  “insider trading/securities regulation” ***Example of a double-aspect*** |

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Provision valid – passed ancillary test

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| ***General Motors of Canada Ltd v City National Leasing (CNL)*** ***GM***  ***Saved by the Ancillary Doctrine* Sets out Anc. Doc. Test** |

*Quebec (A.G.) v. Lacombe*………………………………………….Supp

Provision not valid – failed ancillary test

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| ***Quebec (A.G.) v Lacombe*** “aviation at lake cottage country” ***Lacombe***  ***Not saved by the ancillary doctrine*** |

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| ***Bell Canada (Bell #2) Bell Canada***  ***IID successful for the federal law = Bell Canada’s telephone is considered a “federal undertaking”*** |

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| ***Canadian Western Bank v Alberta Canadian Western Bank***  ***IID not successfully applied to the federal law = provincial “peace of mind” insurance did not encroach on the core “banking” area of federal legislative jurisdiction***  **Court chooses to go the route of DA/Paramountcy = paramounty doesn’t apply** |

*Quebec (A.G.) v. Canadian Owners and Pilots Association*……… ……Supp

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| ***Quebec (A.G.) v Canadian Owners and Pilots Association COPA***  ***IID successfully applied to federal core over “aeronautics”*** |

*Canada (A.G.) v. PHS Community Services Society*………………………Supp

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| ***Canada (A.G.) v PHS Community Services Society Insight***  ***IID doctrine is not applied b/c the court refused to apply it to new areas.***  **Insight looses on the Paramountcy but is saved on the Charter Issue** |

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# Analyzing the Validity of a Law

## A. Pith & Substance

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| ***R v Morgentaler Morgentaler***  ***Fails P&S analysis* Sets out P&S Test** |
| **Stated purpose**  Nova Scotia *An Act to Restrict the Privatization of Medical Services -*purpose is to regulate privatization of health-care to uphold a single high-quality health-care system.  - Among other things, it made it an offence to perform an abortion outside a hospital  **Background**  - a Supreme Court decision ruled Criminal Code provisions relating to abortion as unconstitutional.  - Abortion was no longer regulated by criminal law  **Arguments for law**  - province has authority over healthcare, it’s delivery system and the privatization of medical services  it’s within the province’s authority based on the heads (7), (13) and (16) of s. 92.  (7) = jurisdiction over hospitals  (13) = medical profession and medicine due to property and civil rights.  (16) = general jurisdiction over health matters within the province due to authority over all matters local in nature    **Arguments against law**  - encroachment on federal jurisdiction over criminal law, s.91(27), therefore *ultra vires*  - prohibition of abortion has long been considered a criminal law  **Analysis**  *Legal effect*: “four corners of the legislation = yes has legal effect of regulating privatization, but suspect due to penal consequences of practicing abortions  *Course of events*  - there was a gap left by struck down crim law  - background leads to conclusion that stopping Mortgentaler’s broadcasted plans were the prime purpose of the legislation, whereas privatization and quality assurance were only incidental  *hansard debates*  *­*- prov argues if the object of the legislation was to suppress fee-standing abortion clinics on the grounds of public morals than its OK  - but Mr. Morgentaler was the central focus of the debates; privatization discussions were conspicuously absent  - but “interdiction of conduct in the interest of public morals” has always been a classic means to criminal law  **Result**  The legislation was *ultra vires* the province of Nova Scotia because was in pith and substance criminal law  - analysis of the legislations’ history, purpose, and circumstances of enactment lead to the conclusion that the its purpose and dominant characteristic is to restrict abortion as a socially undesirable practice  - on its face the law dealt with a matter within provincial legislative competence: the delivery of medical services 🡪 but this was a “colourable” legislation |

## B. Double Aspect Doctrine

“subjects which in one aspects and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91”

* *Modern approach to federalism supports the double aspect*
* When doing this double-aspect analysis, must analyse the subject matter separately for both heads of powers then come to a conclusion regarding whether or not a double aspect can be satisfied
* A valid double-aspect will be regulated on equal importance by both the provincial and federal side.
* **Examples of double-aspects**: security regulations, temperance, insolvency, highways, trading stamps and aspects of Sunday observance, provincial forfeiture allowed for the proceeds of a criminal activity, misleading advertising (92.13)

*Hodge v The Queen*: liquor trade

*Law Society of BC v Mangat*: legal representation in immigration matters

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| ***Multiple Access Ltd v McCutcheon Multiple Access***  “insider trading/securities regulation” ***Example of a double-aspect*** | |
| ***Background***   * The alleged insider traders wanted the subject (of insider trading/securities regulation) to fall within federal jurisdiction because the limitation period had already passed.   ***Arguments by alleged insider traders***   * Argued against the double-aspect: regulation of trading shares of federally incorporated companies falls within exclusive federal jurisdiction * In the alternative, if there is a double-aspect, Paramountcy overrides it | |
| ***Provincial***   * Ontario *Securities Act*   Prohibited insider trading in shares trading on the TSX | ***Federal***   * *Canadian Corporations Act*   Obligations attached to ownership of shares in a federal company …extends to shareholders, employees etc  Incorporation of companies with other than provincial objects belongs to federal parliament  Also extends to maintenance & shareholder interests |
| ***Result***   * The subject of insider trading has a double-aspect * Dissenting judges didn’t find double-aspect. Only a provincial as “regulation of securities transactions falls under the provincial class of “property and civil rights”.” * **Both IID and Paramountcy were held to not apply** | |

**Impaired Driving = Double-Aspect**

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| 1. Criminal Code  Class: 91 (27) – criminal law  Matter/ - Prohibition of  reckless driving is  socially injurious  Pith + Substance  Aspect | 2. Motor Vehicle Act  92(13) + 1 (b) + (15) Property and Civil Rights – Local nature  Safety on Highways  🡪Double Aspect |

## C. Necessarily Incidental/Ancillary Doctrine

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| ***General Motors of Canada Ltd v City National Leasing (CNL)*** ***GM***  ***Saved by the Ancillary Doctrine* Sets out Anc. Doc. Test** |
| **Background:**   * CNL brought an action against GM for violating s. 33.1 of the federal *Combines Investigation Act* * Whole federal Act was valid, but GM had to resort to questioning the validity of s. 33.1 * GM argued that s.33.1 was *ultra vires* federal parliament because the creation of civil causes of action falls within provincial jurisdiction in relations to “property and civil rights” |
| ***Result***   * **The provision passes the “ancillary test”** * S. 31.1 intrudes in a limited way on the important provincial power over civil rights * S. 31.1 does have a necessary link to the Act * S. 31.1 is an integral, well-conceived component of the economic regulation strategy found in the federal *Combines Investigations Act* * S. 31.1 is integrated into *the purpose and underlying philosophy of the Act* |

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| ***Quebec (A.G.) v Lacombe*** “aviation at cottage lake” ***Lacombe***  ***Not saved by the ancillary doctrine*** |
| ***Background***   * Quebec municipality around a lake obtained an injunction from the Quebec Superior Court requiring Lacombe to cease his aviation operations on the ground that his activity violated the zoning for the lake. * By-law No. 260 is the zoning that Lacombe allegedly is violating. It was enacted following complaints by cottage-owners around Gobeil Lake about aviation activity and takes the form of an amendment to the general zoning by-law for Sacré-Coeur (By-law No. 210).”   ***Argument:***   * Lacombe: argued that the provision, zoning restrictions enacted in by-law No. 260, are ultra vires OR Inoperative due to Interjurisdictional immunity * Quebec: argued that provision is saved by ancillary doctrine |
| ***Result***   * The provincial Act itself is valid * The provision, by-law No. 260 is invalid – *ultra vires* provincial; fails ancillary doctrine test * Lacombe wins: *Court didn’t buy Quebec’s argument, in reality they were trying to prohibit aeronautics, but disguised under the “matter” of zoning, and provincial classes of 92. (13) + (16)*   It does not meet the rational functional connection test set out in **GM**  it does not further the objectives of zoning law generally [rationalize land use for the benefit of the general populace], or by-law No. 210 in particular.”  by-law No. 260 does not confine its ban on aerodromes to vacation areas. Rather, it bans aerodromes throughout *the municipality,* which spans a variety of land uses.”  🡪 The lack of connection between by-law No. 260 and the general zoning purposes of by- law No. 210 is evidenced by the lack of correlation between the nature of the areas affected and the ban on aerodromes. |

# Criminal Law

* + - * + **What defines a criminal law:** It is much broader than our traditional street crime definition

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| **Criminal**   * Prohibition * Penal * Punishment * Public Property | **Non-Criminal = Regulatory Framework**   * Prevention * Regulatory * Licence/ Permit Denial * Private Property |
| * Regulation of unsafe food products * Ex. detailed instructions of how babies cribs can be manufactured * Some public purpose must underlie the prohibition * Ex. pollution (**Hydro)** * Does not need to be prohibitory in form (**Hydro)** * Ex. “public safety” **Firearms** | * The law is regulatory in form: licensing, prior inspection, involvement of an administrative agency exercising discretionary authority in the administration of the law, detailed regulation, civil remedies |
| * Fed can pass laws that are more regulatory in form (**Hydro)** * Fed can pass laws in a prohibitory form: *Thou shall not* | * Can use regulatory form for things that look like criminal “morality” matters …but only narrowly (***McNeil***) |

Prohibition = *if you do it you will get punished*

[Different from prevention = *your not allowed to do it, usually licence denied*]

Criminal [Federal]:

By prohibiting something, you are doing so to stop a **socially undesirable evil**

The thing prohibited **has a moral stigma attached to it**

Regulatory Framework [Provincial]

You are not making a moral judgement on the thing regulated

(not saying it is **evil or wrong**)

BUT instead are **balancing the competing interests of society**

## 1. Federal Laws that Do or Don’t meet the Criminal Law Criteria

* Criminal Law Power says it is ok for the federal government to prohibit something that the government perceives as a **social evil** …but this could be very broad
* **S. 91(27)**  vs  **s.92(13), (16)**
* Key difference between Criminal (Federal) vs. Regulation = “prohibition of a social
* Potential muddy issues:

Prostitution

J-walking

Censorship

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| ***Margarine Reference Margarine Reference***  “Federal government tried to regulate margarine”  ***Fed Gov failed – ultra vires* Defines Criminal Law** |
| ***Issue***   * Is s. 5(a) of the *Dairy Industry Act, ultra vires* the federal parliament? * *Does the matter of regulating domestic trade of the Dairy Industry fall within federal Criminal Law?* * **In order to be a valid federal law, it must fall within the Criminal Power**   ***Analysis***   * ***Criminal Law is Defined*:**   a penal sanction developed to forbid some **evil or injurious or undesirable effect upon the public**  *protecting public peace, order, security, health, morality*  ***Result***   * Nothing evil or injurious to the public could be found in the regulation of margarine, it does not fit the criminal law definition   If there was evidence that margarine was a public safety issue – it may have been ok  It was simply a regulation to protect Dairy farmers from competition   * The prohibition of manufacture, possession, and sale of margarine was *ultra vires* fed. gov. * The law was **prohibitory in its form, but really a** **regulation**, about balancing competing interests between Dairy and Non-Dairy farmers = this is within the province’s authority |

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| ***RJR MacDonald Inc. v. Canada (Attorney General) RJR MacDonald***  “Tobacco advertising”  ***Fed Gov successful = reg. tobacco adv. is permissible as Criminal Legislation***  **Crim form + Reg substance = ok crim Expands the** **subject scope of crim. law** |
| * The Federal Act: *Tobacco Products Control Act*:   put advertising bans, requirement of health warnings on tobacco products  Tobacco companies challenged the constitutionality of the legislation: it intrudes on provincial jurisdiction over advertising grounded in ss. 92(13) or (16).  ***Issue***   * Is the legislation *ultra vires* the federal government because it encroaches on prov. jurisdiction over advertising due to s. 92(13) or (16)?   ***Analysis***   * The “evil” targeted is tobacco’s detrimental “health effects” * Health can be either federal or provincial depending on circumstance (***Margarine***)   ***Result***   * The provision is a legitimate exercise of federal authority over criminal law; the Act is in P & S criminal law * **The federal power has a broad scope over criminal legislation with respect to health; as long as the legislation contains a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil.** |

This was an intermediate policy option by the feds, as could not prohibit the full sale of tobacco

Regulating alcohol is the same

The federal could actually do a prohibition of tobacco or alcohol under criminal law power

Fed gov is able to attempt to prohibit something using a “circuitous path” – ie. Prohibit advertising, without actually prohibiting the thing itself since that would be too difficult at this time

**Criminal law is not frozen in time (*RJR*)**

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| ***R v Hydro-Quebec Hydro-Quebec***  ***Fed Gov successful = env. reg. can fall under Criminal Law Power***  **Expands the form of a crim. Law beyond RJR= it can look regulatory**  Reg. form + Reg substance = court willing to expand their notion of crime |
| * Hydro-Quebec charged under the Federal *Environmental Protection Act* for admitting PCBs * Hydro Quebec was slapped with an interim order by the minister which said they must stop using PCBs (even though the PCBs were not on the banned chemical list at the time)   Hydro-Quebec did not abide by the interim order   * The Act established a process for regulating the use of toxic substances * Hydro-Quebec, in its defence, claimed that ss. 34 and 35 were *ultra vires*   ***Issue***   * Are the sections *ultra vires* the federal gov? to be saved they must be contained under criminal power.   ***Analysis***   * The Act is to regulate substances that pose a risk to env. and/or human health   ***Result***   * Gov wins, The sections were criminal * Pollution is an “evil”; a clean environment is a “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** |

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| ***Reference re Firearms Act (Can.) Firearms Reference***  ***Fed Gov successful = firearms reg. can fall under Criminal Law Power*** |
| * The Federal gov. created the *Firearms Act*, which made it a criminal offence to not comply with the licensing and registration requirements of firearms under the Act.   All firearms must be now registered  Alberta challenged the law, stating that is was regulatory rather than crim. Legislation because of the complexity of the legislation and the discretion given to the chief firearms officer  Also said the act was indistinguishable from existing provincial property regulations schemes (auto and land title registries)  ***Issue***   * Is the *Firearms Act ultra vires* the federal government?   ***Analysis***   * The law in P&S is directed at “public safety”, the regulatory aspects are secondary to its primary purpose; guns have always been seen as traditional criminal law * Provinces regulate “dangerous automobiles” not in relation to public safety, but in relation to s. 92(13) *property and civil rights.* ….guns are criminal b/c just “dangerous”/used as “weapons”   ***Result***   * Fed’s win. The Act is within criminal power * This case continued trend of expanded parliament’s jurisdiction over criminal law power * **A regulatory form can still be ok to be a criminal law as long as it is criminal in P&S and has penal consequences** |

## 2. Provincial Powers Trying to Regulate Morality and Public Order: or *Criminal?*

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| ***Re Nova Scotia Board of Censors v McNeil McNeil***  *“McNeil wanted to screen Last Tango In Paris = censorship issue*  ***Provincial law successful = NO entrenchment******crim power***  **Regulatory form + criminal substance (reg. of morality) = ok for Prov** | |
| ***Background***   * NS government passed the *Theatres and Amusements Act*: est. 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 * NS censorship board banned *Last Tango in Paris* * Mr. McNiel wanted to watch the movie so he wanted the Act declared *ultra vires* province.   ***Issue***   * Does s.92 provide the province with the authority to regulate the viewing of films within its own board which are considered unfit on the grounds of morality or is this a matter of criminal law?   ***Analysis***   * The provisions, if read as a whole are primarily directed at regulation, supervision, and control of film business within the province * Legislation concerned with dealings of **property** = provincial * It is about regulation, not punishment, in order to balance the interests of the province * Enforcing a local standard of morality is not “Criminal”   ***Result***   * The law is successfully upheld * It is in P&S directed to either s.92(13) property and civil rights OR s. 92(16) * **The law uses a preventative form “prior restraint” so it is ok for province**   + “we are not going to grant you a license to do this …” = preventative   + vs. “if you do this kind of thing we are going to punish you” = criminal, penal | |
| ***Provincial***   * Ppl in the community do not want the video shown: trying to **balance the competing** moral, religious interests of people | ***Federal***   * It is a social evil to show the film; therefore we are going to prohibit it; if you show it you will be punished |

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| ***Westendorp v The Queen Westendorp***  “City tries to restrict prostitution”  ***Provincial law fails = entrenched on federal criminal law power***  **Criminal form + criminal substance = NOT ok for Prov** |
| ***Background***   * Westendorp charged with being on street for purpose of prostitution – violates s.6.1(2) of the city Bylaw * Westerndorp challenged the validity of the section   ***Issue***   * Is the section of the bylaw *ultra vires* the province?   ***Analysis***   * The bylaw had a criminal form: “penal punishments + criminal language”   + Fines up to $500, imprisonment up to six months   + No person **shall …**be or remain on the street for the purpose of prostitution * **Province argued** that the bylaw is necessary to for the public to move freely on streets as prostitution creates crowds that are annoying and embarrassing.   ***Result***   * YES, A municipal bylaw regulating public order and morality is an intrusion on fed. criminal law power * **The section is in P & S criminal, and it takes a criminal form** * No public property or private property can be found * The province cannot regulate prostitution (drugs, violence) within “street control” |

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| ***R v Mortgentaler Mortgentaler***  “Province of NS tries to prohibit abortion”  ***Provincial law fails = entrenched on federal criminal law power***  **Criminal form + criminal substance = NOT ok for Prov** |
| * The law takes a prohibitory form ….**No person shall** |

**CONCLUSION:** federal laws have more leeway than the province

# Is the law applicable/inapplicable: *Interjurisdictional Immunity Doctrine*

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| ***Bell Canada (Bell #2) Bell Canada***  ***IID successful for the federal law = Bell Canada’s telephone is considered a “federal undertaking”*** |
| * Woman did not want to work in front of a video monitor while preganant * Occupational Health and Safety Law – Quebec * Allowed the pregnant woman to be reassigned so did not have to work in front of vid monitor * BUT Fed law did not allow this reassignment and would force woman to work infront of this   ***Held***   * The application of a prov. Act involving occupational health and safety could not apply to a federal telephone undertaking (Bell Canada) b/c this would impact labour relations (which are a federal power)   ***Ratio***   * limited the scope of the IID test to the “basic, minimum and unassailable content” (often referred to as the “core” of the leg. power in question) * - if IJI applies, the law enacted by the other level of gov remains valid but has no application with regard to the identified “core |

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| ***Canadian Western Bank v Alberta Canadian Western Bank***  ***IID not successfully applied to the federal law = provincial “peace of mind” insurance did not encroach on the core “banking” area of federal legislative jurisdiction***  **Court chooses to go the route of DA/Paramountcy = paramounty doesn’t apply** |
| ***Issue:***   * Is a provincial insurance regulation invalid based on the IDD as aspects of banking are considered a core area of federal power under s. 91 (15) of the *Constitution,* 1867? * ***Holding:***   + Declined to apply doctrine of IID because the application of the provincial legislation at issue [promoting “peace of mind” insurance] did not encroach on a core area of [banking] federal legislative jurisdiction.   + **Chose to apply the DA/Paramountcy route, but found no Paramountcy, both laws ok**   ***Ratio***   * Tightened up test that has to be met in order for IID to be applicable * Determines: test for IID is whether the provincial law impairs the federal exercise of the core competence |

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| ***Quebec (A.G.) v Canadian Owners and Pilots Association COPA***  ***IID successfully applied to federal core over “aeronautics”*** |
| - L & G challenged the law: s. 26 is ultra vires and inapplicable as it affects the location of aerodomes 🡪 inoperative due to fed. conflict  ***Holding***   * 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: * Ex) aviation, ports, interprovincial rail and federal communications works. & federal things like Aboriginal land, and federally regulated persons such as Aboriginal * Only should be invoked based on precedent |

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| ***Canada (A.G.) v PHS Community Services Society Insight***  ***IID doctrine is not applied b/c the court refused to apply it to new areas.***  **Insight looses on the Paramountcy but is saved on the Charter Issue** |
| * + argument is that insight is at the core – something designed to protect the health of intravenous drug users – obv if this legislation applies b/c it will impact the operation of insight   + a) is there a core identified in healthcare?   + B) is insight included within the core?   ***Result***   * + The court chooses not to apply the IID doctrine, but instead goes the DA/Paramouncy route and Insight is not saved.     - The court says we cannot apply the IID doctrine to those areas that it hasn’t previously been determined to apply for.   + Insight is saved on a Charter issue instead |

# Is the law inoperative: *The Paramountcy Doctrine*

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| ***Multiple Access Ltd. McCutcheon Multiple Access***  ***Court applies “direct operational conflict” approach to Paramountcy = prov. law succeeds, no direct conflict*** |
| * McCutchen tries to knock out prov law but fails as the court finds dbl aspect both fed and prov law valid * So then McCutchen says the laws conflict and federal Paramountcy should be ok * Court says PD does not apply bc duplication of as long as there is no direct operational 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 in terms of prot agr ind     - Scheme makes it eeasier for farmers to get loans     - Quid pro co in fed law : if farmer defaults on loan – the bacnk can immediately seize the farmers equipment and the farmers can’t go to courts     - This law therefore makes a cost-bennefit agreement for farmers to get credit and some security to the banks (makes it easier to forclose 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 em last opp 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** 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 u 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 |

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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 & accessaries 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 * Why does the case not apply here that the fed law was trying to find a balance? * Prof doesn’t know the answer * Thinks that we may not want to apply fed Paramountcy here b/c it would really undermine provs ability to want to legislate in certain areas * It is not super clear why the court distinguished the Bank of Montreal and the Rothman   ***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. |

- BMO helps Jimmy b/c when province puts in this – it effects the federal balance of the two competing interests (farmers and bankers)

City wants Rothmans – there was no balance here to upset … the provincial law did not frustrate the federal … the provincial law furthers the federal.