Section 91: 27(criminal law**), 2(**trade and commerce**), 14(**currency/coinage**), 15(**banking**)**
Section 92: 14(admin. justice), **15(**penal sanctions connected to prov. regulatory scheme), **7(**health care**),**
13(property and civil rights**), 16(**laws of a local or private nature**)**
Colourable law- law that seems to mean something different than its stated purpose
P&S= intermediate level of generality ot characterize a law as relating to classes of laws falling in fed. or prov. jurisd~

P&S Analysis- flexible test incorporating legal and practical effects of the law but leg. intent also important

R v Morgentaler, 1993*:* '88 SCC rules CC provisions on abortion unconst. Morg~ plans to set up clinic in NS. NS passes *Medical Services Act* supposedly intended to prevent privat~ of medical services and protect healthcare
→ Morg~ claims they intrude on Parliament's exclusive criminal power
Classifying a law involves identifying the matter or P&S of the law and its effects, then assigning it into one of the classes of subjects under ss.91 and 92 of the Constitution Act.
Process involving a consideration of the matter and the purpose and effects of the law:
→ Is the law intended to regulate and control healthcare (valid use of prov. leg. power under 92(7)) or is itintended to prohibit out of hospital abortions and punish its users and providers.
→ The language of law placed it firmly in provincial jurisdiction
→ However courts can use other info when classifying a law.
Criminal law tends to include laws whose main character is (a) prohibition of some activity (b) backed by penal sanction and (c) for some public purpose

- **Generally**- try to characterize law so that previous caselaw will place case where you want it

Morgentaler P&S analysis:

(1) Legal Effect- what is the law's effect w/i the 4 corners of the legislation
- more important than practical- even if practical effect doesn't accord with legal effect, if the legal effect isn't permissible, the practical effects are a secondary matter
  - *If legal effect is prohibitory, no need to prove its practical effect-enough to strike it down*
- How will the law affect those subject to its terms, according to the terms of the law?
- May be useful to finding a law's matter, even if enacting body didn't intend the particular legal effect
- *Effect is to prohibit out-of-hospital abortions.*

(2) Provincial law's similarity to existing or previously existing federal laws?
- Even if legal effect of prov. and fed. laws are identical, doesn't mean they're automatically in conflict- prov. law can have same effect, provided that it's anchored in a prov. head of power
- If prov. law basically duplicates Criminal Code provisions it suggests that it's infringing criminal law power- the closer the language, the stronger the inference
- Province can't legislate and enter criminal law by passing laws that add to, replace, or fill gaps in crim law.
- Mere absence of fed. law restricting abortion doesn't widen prov. jurisdiction- just that paramountcy won't arise.
- *MSA basically duplicates Criminal Code provisions*

(3) Background/circumstances to law's creation?
- Timing: *Why did NS address privatization of medical services so soon after Morgentaler's decision to pen a clinic?*

(4) Law's legislative history:
- Hansard debates can be used- with caution
  - *Hansard suggested most of legislative debate focussed on Morg~s abortion clinic rather than state purposes of bill (2-tier healthcare, costs)*
- Prov. laws can create/enforce local morality standards, prohibitting certain conduct for moral reasons is a classic criminal law purpose
  - *Strong inference that MSA's P&S relates to criminal law.*

(5) Legislation's scope- how do its means relate to its stated objectives?

- What is the scope of state objectives?
- How do the means relate- do they logically serve to advance the objectives- suggests that stated purpose is law's matter.
    - Does the law do too much? Or too little?
- In concert what do the pieces of evidence seem to suggest about the law's mains feature?
    - *MSA's stated objectives are incidental to its P&S- prohibiting abortions outside hospitals- criminal law.*

Double Aspect Doctrine- replaced earlier classical theory of const. interpretation requiring 'watertight' compartments; a strict, clear separation b/w fed. and prov. leg competence under double aspect both levels of gov. can pass the same law provided that they can establish an aspect of their juris. engages it.
→ Legislative subject has aspects falling in both provincial and federal jurisdiction.

Multiple Access v McCutcheon: Canada Corp. Act (CCA) has prohibitions against insider trading- senior exec charged under Ont. Securities Act (OSA), prov. law w/ very similar provisions.
→ Exec. claims OSA is unconst. because it deals with issues under federal jurisdiction.
Court was unsure if leg. subject of insider trading related more to prov. aspect or to federal aspect.
→ Both aspects of leg. suject were roughly equal in importance- apply double aspect when the relative important of features in relation to legisaltive subject is too close to distinguish, double Aspect doctrine allows that laws in relation to subject can be enacted by either jurisdiction
- Laws at both levels involve same people/things but with different effects and purposes associated with them.
→ If they conflict paramountcy invoked, prov. power rendered inoperative to extent of the inconsistency.
→ "importance"= relative strength of connection b/w leg. subject and its aspects
Morgentaler- law has one dominant aspect/P&S
Multiple Access- other end, court rules leg. subject can have 2 aspects of roughly equal importance.
→ Cases of overlap are also permitted in the case of incidental effects (law's P&S is prov., effects permitted on fed. area and vice-versa)
Dickson J: notes that when assessing whether CCA provisions are outisde prov. power, important to note that other provinces don't have same insider trading provisions as Ontario has, so if you strike CCA down= leg. gap.
→ P&S of CCA fall w/i federal classes of subjects (regulating fed . incorp co's)
→ If leg. subject falls under both fed. and prov. heads of power and law has roughly equal importance to both, no reason to strike down one and let the other live
→ Noted that const. interp. should be flexible to accomodate the complexity/ambiguities in Canadian soiciety
- even if law has fed. and prov. aspects court can allow it to stand thru double aspect, creating concurrent fields of legislation.

→ Will not applying double aspect create legislative gap if one law is struck down?

→ **Presumption of constitutionality- courts will look for to preserve a law's constitutionality, within bounds, as they presume that the legislature did not intend to pass an unconstitutional law**

Paramountcy- judicial solution to resolve conflicts between fed. and prov. laws- prov law is inoperative to the extent of the conflict (if law only has 1 aspect no need for paramountcy)
→ **Conflict** can be defined differently and its meaning has changed over time. Broadest definition being that if prov. law impacts in any matter regulated by federal law- its inoperative- or narrowly- prov. law is inoperative only if it's impossible to comply with both both laws.

Multiple Access- dual compliance test that superceded stricter use of paramountcy- Narrow/smaller conflict def'n. SC says both laws valid- then turns to paramountcy analysis
→ OSA and CCA are fairly similar-can you have duplication or does this require apply paramountcy to render OSA inoperative?
Dickson- mere duplication doesn't constitute a conflict sufficient to require paramountcy
→ Provided that compliance with 1 law doesn't require breaching the other law, creating concurrent laws is permitted
→ No repugnancy- as either set of laws, if applied, will fulfill Parliament's legislative purpose
→ Dickson adopted Hogg's proposition that the complications and ineff. arising from the creation and operation of concurrent legal regimes were just the price of federalism and balancing fed. and prov. interests
- Noted that Canadian const. interpretation was trending towards permitting overlap and cooperative federalism.

BMO v Hall *(La Forest J)*: Hall borrows BMO, grants security interest on equip~ thru s. 178 of fed. *Bank Act*
→ He defaults, bank seizes machinery without giving noticed as required by s.27 of the *Limitations of Civil Rights* Act, releasing Hall from obligations for security interest.
→ No operational conflict- bank can just choose not to seize securitized interest, wait for prov. procedures to finish
→ Both LCR and Bank Act intra vires- impugned provisions of Bank Act vital to its overall legislative scheme.
→ Relevant provisions of Bank Act and LCR may not have a strict operational conflict- there is conflict in that BA permits creditor to seize securitized loan immediately upon default, while LCR says you must wait.
- While bank can choose to wait, La Forest states that requiring banks to defer to the LCR displaces the legislative intent of Parl.--> *Bank Act* was intended by Parliament to create relatively uniform lending mechanisms so banks wouldn't have to verify compliance w/ many different prov. laws when creating and enforcing security interests, aiding in creating an efficient way of accessing capital nationwide.
→ Forcing banks to wait out of deference to LCR is an unacceptable route to avoid repugnancy.
→ No room for provincial legislation to operate insofar as it obstructs the legislation's and Parliament's purpose.
- relevant provisions of the LCR that conflict w/ ss.178/189 of *Bank Act* inoperative to extent of inconsist.
Test= would become known as the frustraton of purpose test-
→ Conflict in operation required to arise for applying paramountcy can result if (1) No possibility of dual complaince OR (2) 2 legislative regimes are incompatible.

- Applicability (Int.Jur.Imm) protects core of fed. area whether or fed. leg. has covered it, paramountcy/operability only protects enacted fed. leg. from prov. encroachment
    - Paramountcy considered the best way to resolve conflcits b/w fed. and prov. laws owing to its flexibility compared to int.jur.imm.

Rothmans v Saskatchewan: prov. *Tobacco Control Act (TCA)*severely restricts marketing/promotion of tobacco products- banning them anywhere -18 might be, federal *Tobacco Act* (TA) is less strict- meant to protect health, raise awareness, stop young from smoking.
→ Tobacco co's claim conflict b/c TA has provision permitting ads/promotion in some cases and TCA restricts them entirely where -18 might be, says paramountcy should apply- however no indication Parl. was intending to grant a +ive right to display tobacco products given stated purposes of Act.
→ No operation conflict- dual compliance possible if retailers (1) admit no -18 or (2) restrict display as per prov. act
→ No Frustration of purpose as in BMO- court saw main purpose of TA as promoting public health which the prov. law actually also aims to do.
→ Both claims created w/ same purposes in mind and serve the same ends, therefore no inconsistency

Federal Power over criminal law.

Crim.law pwer falls under s.91(27) however prov. have some scope to use fines/penalties under s.92(15)(16)(13)
→ How do you assess P&S of law as falling under 91(27) or 92(15)(16)(13)?
Criminal= aims to prohibit conduct or prohibit some social evil, in the public interest, proof= beyond reason. doubt
Non-criminal matter: prevention of some conduct, regulatory, balance interests, discretion of officials, proof= BoP

Margarine Reference: S.5(a) of the *Dairy Industry Act* prohibited manufacturing, importing, possessing to sell, margarine and butter substitutes, within a statute dealing generally w/i the dairy industry- is it w/i Parl's leg comp~?
→ s.5(a) defended as a valid use of crim. law power- Prohibition on certain activities or conduct, combined with sanctions, to combat some social or undesirable effect.
What's public purpose of s.5(a) that suggests it's relation to crim. law power? Ordinary ends of crim. law power don't seem to fit- rather the law has an economic legislative purpose- protecting the dairy industry from comp.~
→ Econ. issues not excluded from use of crim. law power, but impguned law doesn't really fall w/i scope.
- less about protecting economicy from margarine- more about protecting a specific economic interest
- No public interest or general social evil engaged by provisions in questions and its consequences aren't of a criminal nature. → Regulating trade falls w/i prov. jurisidiction.

Defining some activity as harmful to public good and prohibiting is a powerful way to anchor leg. in fed. HoP.
→ Question si how far you can extend trad. use of crim. law power to cover newactivities
→ Generally crim. law power broad- if it meets formal req. of prohibiiton + sanction it will survive even in absence of crim. law purpose.
→ Valid law under s.91(27) requires prohibition + sanction aimed at ordinary crim. law purpose-- and sanction + prohibition alone may not be enough if it seems to relate to established prov. area.

RJR MacDonald v Canada: *Tobacco Products Control Act*- health protecting young, raising awareness
→ prohibits ads/promos and has punishments including jail time.
→ Tobacco co's challenge as falling under prov. juris. over advertising- fed. gov wants to characterize it as valid use of crim. law power, within Margarine Reference criteria
La Forest: crim law has a broad definition, the TPC Act includes a clear prohibition and penal sanctions with the criminal purpose of curbing the social/public evil of tobacco's harmful side effects
→ protecting health is valid crim. law purpose- no evidence that Parl. had other intent- regulating tobacco ads has dual aspect
→ In Margarine Reference, prohibition wasn't aimed at a social evil but aimed at regulating dairy industry
→ Rejects tobacco co.'s claim that even if it meets Margarine criteria, it doesn't resemble an existing CC offence - use of crim. law power doesn't have to create offences closely analogous to extant offences.
→ SC open to expanding use of crim. law power- its a "vehicle" for prohibiting injurious things
→ Categories of crim. offences aren't closed- and new offences don't have to resemble existing ones.

R v Hydro-Quebec: Hydro-Quebec violates order created by federal minister restricting emissions (under *Env.Pro. Act)*- order created process to regulate use of toxic substances.
→ *Friends of the Oldman River* established that const~ should be interpreted broadly to allow both levels of gov. wide scope to protect the environment
→ Crim. law power uses discrete prohibitions to curb social evils within a broader purpose- more precise a tool than employing POGG via the national concern, giving Parl. full power to regulate
→ Social evil present (emission of toxic substances) which law attempts to curb. Means are different from typical uses of criminal power but ends are the same. Its regulatory form actually helped to narrow its scope and intrusion into provincial powers.
→ sufficient that law is in public interest aimed at some social evil
→ Different unprecedented form of federal regulation over environment- lowering formal requirements for a law to be a valid use of criminal law power. In line with *RJR MacDonald*, expands scope of area that can be regulated through crim.law power, but while *RJR MacDonald* was a departure from the **required substance** of law to be valid use of 91(27) *R v Hydro-Quebec* is a **departure from the required form** of a law to be a valid use of 91(27)

Reference re Firearms Control Act: Act more closely resembles regulatory/licensing scheme than crim. law
Alberta claims its a regulatory scheme rather than crim. law- owing to complexity + discretion of chief gun officer
→ Also resembles existing prov. car and land title registries
SC rules that FCA's regulatory aspects brought within its broader and primary crim. law purpose
→ though form is regulatory, overall substance and purpose= criminal
→ P&S= public safety through controlling access to firearms using penalties and prohibitions
Laws/regulatory regimes can be complex- no need to closely resemble simpler crim. laws
If broad aim is to prohibit social evil through sanctions it's a valid use of crim. law power.
→ SC rejects argument comparing it to car/land registries noting their very different role/purpose from guns
→ Valid crim. law must have a valid crim. law purpose linked to a prohibition and penalties
→ continuing from *R v Hydro-Quebec*- substance of law is still criminal
→ Court has relaxed the form requirements for a valid use of 91(27)

Provincial Power to regulate Morality/Public Disorder- crim.law power must be balanced w/ need to regulate local conditions using criminal offences. s.92(14) admin. of justice allow provinces to enforce many CC offences.
s.92(15) allows provinces to create penal sanctions, provided they are linked to enforcing valid prov. scheme anchored in 92.

Nova Scotia Board of Censors v McNeil*: Theatre and Amusements Act* creates board and allows it to regulate and control film industry in NS, including power to impose fees, revoke licenses.
→ Board can decide whether a film is immoral and bar it from being shown.
→ P&S of Act? Public morality generally= criminal law, but regulating local trade= provincial jurisdiction.
Criminal approach to moral regulation of films treats it as a matter of morality/obscenity, dealt w/ thru prohibitions and penal sanctions= federal aspect- prohibit and punish certain conduct to curb social evil.
Regulation of local trade approach- censors rather than punishes, prevents films from being shown through screen and regulation
→ this provincal aspect is preventative, doesn't punish showing films but regulates them and aims to prevent them from being shown.
Ritchie: Act as a whole aimed at regulating film business in NS, regulating trade and use of property- exercises prov. power of matters entirely w/i province- doesn't create a criminal offence, just authorizes board to censor films judged inappropriate and regulate business
→ legislationb ased on local morality standards doesn't aumatically intrude into crim. law power.
→ Province can regulte local trade by its own standards- law is preventative rather than penal
(court later pulled back on this judgement- allowing prov to regulate so widely using business power could potentially allow it to regulate almost anything by bringing it with 'business')

R v Westendorp: Act of prostitution not criminalized by Parl.~- just its associated activities.
→ Calgary passes a "use of street by-law" with privisons that punish prostitution with fines and potentially imprisonment- by-law as a whole deals with regulating city streets
Effect of by-law is to criminalize behaviour Parl. chose not to criminalize
→ Provision relating to prostitution don't relate to the rest of the by-law and have higher penalties than other offences in the by-law- they focus directly on soliciting sex rather than controlling streets.
Court severs provisions on prostitution- in P&S an attempt to attack what city sees as a social evil, doesn't deal with public/private property use.
By-law=attempt to establish concurrency beyond boule-aspect, usurping exclusive criminal power.
→ the offences definitions and penalties don't resemble an attempt to address a public nuisance (stated pobjective).

- How is prov. legislative power limited by 91(27
    - ***McNeil-*** court was willing to accept a double aspect- restricting obscene film had a criminal/federal element but it also had a provincial element through the regulation of theatres/premises
    - ***Morgenthaler-*** court decides law only has one true character- *a criminal aspect in prohibiting abortions*, therefore it's a federal law and ultra vires provincial enacting authority
    - ***Westerndorp***- similarly to Morgenthaler- dominant and primary aspect of law is a criminal purpose, its provincial aspect is merely incidental
        - How to distinguish the difference? Westendorp/Morgenthaler is clearly of a more prohibitotry nature, while McNeil is more of a regulatory nature
        - **Westendorp/Morgenthaler** line of arguing is also one where prov. law seems to be filling a perceived gap in federal criminal power- province wants to do what federal gov. has decided shouldn't be included, whereas in Mcneil both federal and prov. governments have regulated obscene films

Ancillary Doctrine: If a single provision, assessed in isolation, involves a matter related to class of subjects ultrav ires enacting body's purview, the provisions is considered necessariyl incidental to teh overal leg. scheme
→ **Applies when a provision is in P&S outside leg competence of enacting body, but may be saved by link to overall valid law. *Does not apply in case of double aspect.***

GM v CNL: GM tries to have s.33 of Combines Investigation Act struck down- an otherwise valid use of federal power- as invalid because it creates a civil CoA- provincal power. (They were being sued under it
Dickson- Two step test
(1) Does the impugned provision intrude into the jurisdiction of the body that didn't enact it?
→ If not, no need to proceed further. If provision is valid, but Act isnt, different analysis.
→ If yes, go to next step.
(2) If act is valid, is the provision sufficiently important to the ACt htat it can be upheld through that relationship?
→ (A) How closely is the challenged provision linked to the valid legislation?
→ How integrated is the provision with the valid legislation- and is it vital to law's effectiveness?
→ (B) the degree of infringement- is there precedent for the intrusion, is it wide ranging, is it remedial or adversarial?

Dickson notes that leg. will often have incidental effects but there are permitted in mordern trend of const. inerpretation so judges shouldnt be overly strict when assessing a law's validity on this basis.
→ but merely being part of Const. valid Act doesn't confer validity- must be related to the legislative scheme.
For a provision to stand there must be a balance between the provisions importance to a bill and its degree of intrusion
→ If an intrusion is integral to functional the bill and itsobjectives, a high degree of intrusion may be permissible.
→ If a provision is merely tacked on to a bill and doesn't seem to advance its objectives, intrusion in more than a marginal way into the nonenacting legislature's jurisdiction may require it to be knocked down
→ If a minor encroachment, only need to prove provision is functionally related- a rational connection b/w provision and Acts purposes and objectives.

Quebec v Lacombe*:* Quebec passes by-law including provision restricting the building of aerodromes in a particular area. P&S of provision was to regulate aeronautics.
→ If provisions P&S is outside leg. competence of enacting body, only salvageable if important part of overall law.
→ Even a slight degree of intrusion requries the provision to be rationally, functionally connted to over law.
As the degree of intrusion increases, the connection between the provision and the law shifts towards necessity.
→ Ban on aerodromes infringes clear federal power, and doesn't seem connected to interests of land zoning-it's just a ban on aerodromes without reference to land-use. Struck down.

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Margarine Reference: → Generally crim. law power broad- if it meets formal req. of prohibiiton + sanction it will survive even in absence of crim. law purpose.
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Provincial Use of Criminal-like sanctions through 92(14)+(15)

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