There are 3 ways for legislation to be outside the jurisdiction of the legislature that enacted it:
(1) invalid; (2) inapplicable; (3) conflicting, and therefore inoperative

(1) Validity — if a legislature enacts a law that's outside of its jurisdiction (under the division of powers in ss 91 and 92 of the *Constitution Act, 1867*), then that law is invalid. Doctrines: pith & substance, double aspect, ancillary/necessarily incidental.

(2) Applicability — even if a law is valid, it may not apply to something that has interjurisdictional immunity, like airports and reserves and federal undertakings.

(3) Operability — even if a law is valid and applicable, it may not operate because it is a provincial statute that conflicts with a federal statute. Federal paramountcy doctrine.

All of these doctrines are two-way streets in theory, except operability/paramountcy, which is asymmetrical.

(1) VALIDITY
("Is this legislation valid under the *Constitution Act, 1867*?")

What is pith & substance?

Sections 91 and 92 of the *Constitution Act, 1867* distributes jurisdictional power between the provinces and the federal government. That power is distributed according to classes of legislative competence. Each of those classes has 'matters' which fall under them, which are the DJFB.

As Sopinka J explains in *Morgentaler*, classifying a law for federalism purposes, then, involves identifying the 'matter' or 'pith and substance' of the legislation, then assigning that matter to a class identified under either s 91 or s 92 of the *Constitution Act, 1867.* This determines whether the law falls under federal or provincial legislative competence.

The subject of this law could either be W or X, which means that the pith and substance of this law could be Y under s 91 or Z under s 92.

What's the pith & substance of this legislation?

Apply the test for pith and substance found in *Morgentaler*.

Step 1: The legal effect: the 4 corners of the legislation
"Effect" is relevant in both a legal and practical sense.

Legal effect
"Legal effect" is the question of how the legislation affects the rights and liabilities of those subject to it, determined with reference only to the law itself.

Does the law have a *preventative* or a *prohibitory* form?
A prohibitory form is typical of criminal law; preventative form is typical of regulation.

Prohibitory form doesn't necessarily mean the matter is criminal, though, 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*.

Form is very important on the provincial side, though. In *McNeil* (The *Last Tango in Paris* case), the law was found to be valid (regulated film business—property and civil rights under 92(13) AND morality and public order under 92(16)) because its form was regulatory, even if its substance could be seen as criminal.

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.

Does the law punish socially undesirable behaviour, or does it balance competing interests?
Punishment of socially undesirable behaviour is typical of criminal law, and balancing competing interests is typical of regulation. However, there is no strict substantive requirement for something to be criminal in pith and substance,

per *RJR Macdonald*. Parliament has the power to create new crimes around anything determined to be a social evil or public harm— (*RJR*).

Practical effect

"Practical effect" is the question of how the law will actually affect those subject to it in the long term.

Step 2: Extrinsic materials: beyond the 4 corners

In *Morgentaler*, Sopinka J identifies 4 extrinsic materials that are relevant to analysis of pith and substance: (A) similarity to another provision, past or present, that has been understood to fall under a certain head of power; (B) background and surrounding circumstances, including (B1) the course of events/timing, (B2) Hansard evidence / transcripts from legislative debates, (B3) the apparent provincial objective.

(A) Is this legislation similar to another provision or act?

In *Morgentaler*, a provision in the impugned act was found to have the same legal effect as a recently struck down *Criminal Code* provision prohibiting abortions. If the *CC* provision had still been operative, the provincial provision would have been redundant. This suggested that the purpose of the provision was criminal.

(B) What do the background and surrounding circumstances of the enactment suggest its matter is?

(B1) What does the timing of the enactment suggest the law's matter is?

In *Morgentaler*, the timing of the enactment suggested its matter was criminal. The act came into force at the same time that Morgentaler announced he was intending to open an abortion clinic in Nova Scotia.

(B2) What does the content of the debate suggest the law's matter is?

In *Morgentaler*, the court found that the opening of Morgentaler's clinic was the primary concern of the members of the legislature based on their statements in the legislature.

(B3) What does the apparent provincial objective suggest the law's matter is?

In *Morgentaler*, the means employed by the provincial legislature to advance its stated objective did not actually advance that objective at all. The *Act* would not have protected women's safety, nor would it have saved the province money or generally prohibit surgery outside hospitals. It prohibited several unrelated surgical procedures outside hospitals. This suggested that the purported purpose masks the true purpose.

Also in *Morgentaler*, although Sopinka J did not weigh them heavily, the steep penalties also suggested a criminal purpose.

Double aspect doctrine

If the subject that the law pertains to falls validly under two matters, one an aspect of federal competence, and one an aspect of provincial competence, and the relative importance of the subject to each matter is equivalent or nearly equivalent, then the law is valid (*Multiple Access*).

Ancillary doctrine

Used when a provision encroaches on an area of the other legislature's competence, but is important enough to the act as a whole that it should be saved.

3 part test from *General Motors*: (1) Does the provision encroach on the other legislature's jurisdiction? (2) Is the act as a whole valid? (3) Does the ancillary doctrine apply?

(3) is composed of two questions considered together. (a) How integral is the provision to the larger scheme of the act? (b) How serious is the encroachment on the other legislature's jurisdiction?

(3a) can range from 'merely tacked on' to 'truly necessary', with 'functionally connected' in the middle (*GM, Lacombe*). Answer required depends on answer to (3b).

In *GM*, the impugned provision was found to (3b) encroach on provincial powers to a limited degree (partially limited by the fact that the provision was 'remedial'—intended to enforce the substantive portions of the Act without actually being substantive), and (3a) to be integral (less than 'truly necessary', but more than 'functionally connected') to the act. The provision was upheld—'functionally connected' would have been enough, and so its connection was even greater than was necessary.

In *Lacombe*, the impugned provision was found to (3b) encroach on provincial powers ?????, but (3a) to be merely tacked on, as it had no relation to the rest of the general zoning by-law that it amended.

(2) APPLICABILITY

Applicability is based on the doctrine of interjurisdictional immunity, which takes a 'watertight compartments' view of federalism. Even if a law was validly enacted, it can be found to trench on a core competency of the other legislature, and thus not apply in that context.

Although this doctrine is conceptually symmetrical, in practice it is a one-way street, because only federal 'core competencies' have been identified, and the SCC has been reluctant to identify any more (*PHS*), as the current approach to federalism is far more fluid.

2 questions: (a) Does the law trench on an identified protected core of federal competence? (b) Does the law impair the federal exercise of its core competence? (test in *COPA*).

(a) Does the law trench on a protected core?
There are 5 (ish) protected cores of federal legislative competence: 1. Aeronautics (*COPA*); 2. Federal undertakings (*Canadian Western Bank*); 3. Aboriginal peoples and land; 4. Ports; 5. Federal communications and enterprises.

Is the subject of the law (in *COPA* it was the location of aerodromes) essential to the federal power over whatever?

(b) Does the law impair the federal exercise of whatchamacallit?
McLachlin CJ in *COPA* defines 'impairment' as an impact that affects the core federal power in a way that seriously 'trammels' that power.

(3) OPERABILITY

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.

Approach used to be one of direct operational conflict. The two laws had to tear you in two, each *forcing* you to disobey the other (*Multiple Access*). This test was expanded to include *policy* conflict in *BMO v Hall*. The test, then, is 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.

In *Rothmans*, the provincial law was found to *further* rather than hinder the policy of the federal legislation. Indicates a relatively high threshold for 'policy conflict'. The reason the analysis turned out this way is that the court was satisfied that the federal law *pursued a public good* or *broader public policy* rather than balanced public and private interests. You can always make arguments for both. Not clear how to choose between them in any particular case.