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VALIDITY: CHARACTERIZATION OF LAWS

- Does the pith & substance fall under one of the enacting body's heads of power?
- To determine pith & substance, look at the **purpose** and **effect** of the law: the law's **dominant purpose** or **aim** is the key to constitutional validity (*Morgentaler*).

PITH AND SUBSTANCE

- Pith & substance, aspect, matter, character, purpose (same thing)
→ 3 Steps:
 1. Identification of the "matter" of the statute
 2. Delineation of the scope of competing classes
 - What is the scope of the various classes it might fall into?
 3. Determination of the class into which the statute falls

***R v Morgentaler* [1993] 3 SCR 463**

COURT'S ANALYSIS – USE THIS FORMAT – 5 FACTORS

1. Legal Effect

- What does it seem to be doing?
- Express prohibition w/ penal consequences
- Practical effect not as significant, but can bolster your argument

2. Similarity to Criminal Code Provisions

- If too similar, will raise red flag – province stepped into Criminal Law
- More exact reproduction of language → stronger inference
- Similarity may reflect harmony, but probably show province is overstepping
- Provinces can enact laws w/ same legal effect if under a provincial head of power
- No general "rule", but note similarity and make arguments accordingly
- MSA was similar to previous Criminal Code provisions that were struck down – prohibition on abortion

3. Background/Surrounding Circumstances

- Too coincidental, gov't knew of M's intention, responded w/ legislation
- Contributes to impression that it wasn't about privatization/quality assurance

4. Legislative History

- Hansard evidence – what was said during the debates? What wasn't said?
- Concerns about privatization etc. were conspicuously absent

5. Over/Under-Inclusiveness of the Legislation

- Is there a good fit between the means and the ends?
- Does the legislation really address the articulated purpose?
- If means don't logically advance the objectives, it may indicate that the purported purpose masks the true purpose

DOUBLE ASPECT DOCTRINE

Double aspect doctrine – recognizes overlapping jurisdiction – some matters are by nature impossible to categorize under a single head, have both federal and provincial aspects – may fall w/in different heads for different purposes/in different aspects

Double Aspect Theory – if both aspects are equally important, court rules that either level could enact the law – both valid

- Look at each statute individually, determine that both are equally related to the issue (falls within both classes), and both laws are *intra vires* the respective legislature.
- Will lead to paramountcy discussion (conflict/operability).
- What is the true meaning of the challenged law? Full/Total meaning
- Law should be classified by the most important feature of its meaning
- Considerations:
 - Relative value of uniformity/regional diversity
 - Merits of local vs. central administration
 - Justice of minority claims
 - “Who is the better physician to prescribe for this malady?”
- Enumerated “subjects/matters” are classes of laws, not facts
- “Regulation” of trade and commerce; not “trade and commerce”
- Take specific law and ask if the rule is classifiable as that subject
- Seen as subject for legislation, not a definite object
- “Mutual modification” principle – e.g. trade and commerce reduced in scope b/c of provincial class of property & civil rights

Multiple Access Ltd v McCutcheon

NECESSARILY INCIDENTAL

- Ancillary powers doctrine – applies when P&S of the provision is outside the competence of the enacting body – saved if important part of broader scheme that is within the competence of the enacting body
- Incidental effects rule – applies when P&S of provision is within the competence of the enacting body, but touches on a subject outside it's competence – provision will not be invalid merely b/c of incidental effect
 - Mere incidental effects will not warrant invocation of ancillary powers
- If provision is examined in isolation, it appears to intrude into other jurisdiction
- If larger scheme is valid, challenged provision may also be valid
- Depends on how the provision is integrated into the valid legislative scheme
- If not closely related, provision will be severed and declared invalid
- If closely related, provision upheld as “necessarily incidental” to the valid scheme → If there is a sufficient connection between the unconstitutional provision and the constitutional whole, the provision can be saved

Relation to legislation:

Merely tacked on → functionally related → integral/necessary

Degree of intrusion:

Marginal infringement → intrudes in a limited way → highly intrusive

General Motors v City National Leasing; Quebec (AG) v Lacombe

1. Consider whether/to what extent the provision can be characterized as intruding into other level's powers
 - If found *prima facie* to be an intrusion, question is to what extent
 - Ascertain the degree of intrusion, so it can be weighed against justifications (provision's relationship to valid legislation)
2. Ascertain the existence of valid legislation – is the overall scheme valid?
3. Can the provision be justified b/c of its connection w/ valid legislation?
 - Different test in different circumstances
 - If encroachment is minor, only needs to be “functionally related” to justify
 - If encroachment is large, relationship must be stronger, “integral/necessary”

Inclusion of invalid provision in valid statute does not necessarily make the provision valid – Test of **fit** – how well is the provision integrated into the scheme?

- Overlap is to be expected & accommodated in federal system

- Test will always look different b/c circumstances are different, look for patterns

OPERABILITY: THE PARAMOUNTCY DOCTRINE

SCC split between operational conflict vs. policy conflict tests

- Need to know both, usually argue as alternatives

Multiple Access Ltd v McCutcheon

Operational Conflict – ultimate harmony is when both levels legislate on same thing in cooperative way

- Allows the most room for overlapping legislation
- Highest bar for triggering paramountcy

Bank of Montreal v Hall

Policy conflict (still called operational conflict here) – “displacing the legislative intent” – may not be impossible to comply with both, but the intent of the federal law is undermined

Provincial law undermines balance struck by federal gov't

Rothmans v Saskatchewan

Policy conflict – is the legislative intent undermined?

- No – specific purpose of federal law is protecting health, not tobacco companies; balance is struck towards public good
- Policy objective only furthered by SK law
- Look at the underlying purpose, how can it be interpreted?
 - Definitely a matter of argument

FEDERAL POWERS OVER CRIMINAL LAW – s 91(27)

- Criminal → prohibition, penal, punishment of “social evil”, public interest, proof of violation (BARD)
 - Public purpose – peace, order, security, health, morality, etc.
- Non-criminal → prevention, regulatory, balancing interests, private interests, discretion, balance of probabilities

Margarine Reference

Crime = act that law forbids (w/ penal sanctions)

Must be directed at a public interest in the true sense – margarine law is not

RJR MacDonald Inc v Canada (AG)

Detrimental health effects = social evil that warrants use of criminal power

Prima facie criminal law – in the right form

Underlying criminal law purpose – “tobacco kills” – valid use of criminal power

Substantively the court is flexible, categories aren’t closed, criminal law isn’t frozen

R v Hydro-Quebec

Pollution = social evil, can use criminal law power

Criminal form (prohibition) not always necessary – upheld regulatory scheme

Allowing regulation under criminal law might provide for more concurrent jurisdiction on environment than it would under POGG, but still odd result

Reference re Firearms Act

Fed legislation to control guns – looked like regulations – registration & licensing

Upheld under criminal power – underlying purpose pretty clear, guns connected w/ crime and violence

Uses prohibitions and penalties, regulatory aspects are secondary; intrusion into property/civil rights = minimal

More predictable outcome, but still question of form – Fed criminal power = broad

PROVINCIAL POWER TO REGULATE MORALITY & PUBLIC ORDER

Re Nova Scotia Board of Censors v McNeil

Province can regulate obscene films

Objective – moral regulation of film, regulation of business, consumer protection

→ double aspect found

Form of the law (non-prohibitive) is probably what saved it

Westendorp v The Queen

Province can't regulate prostitution under a street control bylaw

Prostitution not a criminal offence, province attempting to “fill the gap”

When province is doing things parallel to criminal code, there is a presumption that we are on problematic terrain (RED FLAG)

R v Morgentaler

NS law prohibiting private abortion clinics

5 criteria articulated and applied → P&S analysis

Criminal in P&S