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#

# Federalism

### 3 Major Issues for Federalism

1. Validity of a statute
2. Applicability
3. Conflict with another level of government

### Factors that the court considers in a constitutional case

1. Precedence
2. Ordinary rule of statutory interpretation
3. Theories of federalism and other general principles
4. Scholarly opinion

# Chapter 1 – Colonial Origins to Autonomy

### The Royal Proclamation

* Document that set out guidelines for European settlement of Aboriginal territories in what is now North America. Issued by King George III that North America belongs to me after the Seven Years War was won, but that colonists can’t take aboriginal land unless first bought by the Crown and then sold to them.

### Colonial Laws Validity Act, 1865

* An act to remove the doubts as to the validity of colonial laws. Immune are the paramount imperial statutes (English).
* Section 5 is the important one from which the doctrine of entrenchment flows. Manner and form requirements. We believe in entrenchment. We require a certain procedure in a statute, you have to comply with that procedure in order to change the statute.

### Report of the Royal Commission on Dominion-Provincial relations, 1867-1939

Exercise of royal prerogative by George III for the benefit of North America. Geographical description (1) and giving powers to the governors and representative so they can make laws (2). Fiduciary obligation between the crown and aboriginal peoples.

### Statute of Westminster, 1931

* The main effect was the removal of the ability of the British parliament to legislate for the Dominions, part of which also required the repeal of the Colonial Laws Validity Act 1865.
* British North America Acts was excluded. This was the result of disagreements between the provinces and the feds over how it could be amended because the BNA had no amending procedures in it. IT was resolved only in 1982, thus completing the partition of the Canadian constitution to Canada.
* We are not going to enact any more paramount imperial statutes unless you ask us.
* Power to make extraterritorial legislative jurisdiction to the Federal government.
* Judicial independence

# Chapter 2 – General Approach to Interpretation

### Edwards v. Attorney General Canada, [1930] AC 124

* Whether women are eligible to be appointed to the Senate.
* Within the meaning of section 24, “summon qualified persons to the Senate” – women are persons.
* S. 24 “ The Governor General shall from time to time, in the Queen’s name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator”
* Statutory interpretation – use both internal evidence & external evidence
* The courts do not consider themselves bound at original intent
* The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.

### Reference re Secession of Quebec, [1998] 2 SCR 217

Issues

1. Can the National Assembly, legislature of government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Can international law give the right to effect the secession of Quebec from Canada unilaterally
3. In the event of a conflict, does domestic or international law win?

s. 101 of the CA – The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

s. 3 of the Supreme court Act establishes this court both as a general court of appeal and as an additional court for the better administration of the laws of Canada.

S.53 of the Supreme Court act must be taken as enacted pursuant to Parliament’s power to create a “general court of appeal” for Canada.

* Imposes a duty on the court to render advisory opinions – i.e. this is where they found out it was constitutionally permissible for a government to ask a court for its opinion not in an actual case.

Unwritten principles of the Constitution

* Federalism
* Democracy
* Constitutionalism and the rule of law
* Protection of minority rights

Questions are not justiciable if they are

* Too theoretical or speculative
* Political in nature
* Not yet ripe

# Chapter 3 – Peace Order and Good Government

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

### Russell v. The Queen (1887)

Issue: Is the Canada Temperance Act valid?

Canada Temperance Act was an act which provided for an option for municipalities to opt in by plebiscite to a prohibitory scheme.

When you say the word “democracy” or “constitutionalism – define them.

* Objection made = based on the BNA, it is not competent for Parliament to pass the act.
* Russell was arrested for unlawfully selling intoxicating liquors in Fredericton.
* Early approach of s. 91 was that everything was under POGG.
	+ Any law that cannot be found to be allocated to the provincial head of power under s. 92 must fall into the residual power granted to the federal government.
	+ Law was found to be in relation to public order and safety – therefore a matter of general concern to all of Canada.

**Purpose? POGG case.** Increased the residual power granted to the federal government. Anything that was a general concern to all of Canada fell within s. 91 POGG.

### Attorney General Ontario v. Attorney General Canada, [1896] – Local Prohibition Case

* This case does modify and narrow the modification of POGG.
* The exercise of legislative power by Canada, in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to entrench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92.

Double aspect doctrine = there are some matters that apply to both provincial and federal jurisdiction (Hodge v The Queen)

Answer the 7th question – has the Ontario Legislature jurisdiction to enact s. 18 of Ontario Act “An act respecting local option in the matter of liquor selling”? In so far as the provincial enactment of s. 18 comes into collision with the Canadian Act of 1886, it must yield but they DID have jurisdiction.

The Board ruled that:

1. Provinces did have the power to prohibit trade, but it was based on 92(13)
2. The double aspect doctrine applied, subject to the doctrine of paramountcy.

Result? The province has the power to pass their act, only to the extent that it doesn’t overlap with the Temperance Act. Therefore, the provincial statute is inoperative in any district of the provinces which have already adopted the second part of the Canada Temperance Act.

92(16) – “Generally all Matters of a merely local or private Nature in the Province” will work – it is the residual provincial power. POGG is the federal residual power.

Geographical importance is no longer enough. Has to be a matter which AFFECTS the interest of the Dominion to be national concern.

## Emergency Branch Doctrine

* Parliament will only need a rational basis for believing that there is an emergency. “A reasonable person” – therefore, need extrinsic evidence to show there is no emergency.
* Temporary
* National concerns branch becomes permanently federal. (new subject matter OR new aspects of old 1867 matters)

### Fort Frances Pulp & Paper v. Manitoba Free Press, [1923]

* Emergency legislation challenged based on its continuation.
* The price of paper had been increased with the War Measures Act through the Paper control tribunal – Minister of Customs
* He treated it as a POGG case.
* Established the emergency power of POGG
* If there is an emergency, parliament has legislative jurisdiction under POGG.
* COURT CAN REVIEW THE CONTINUATION OF AN EMERGENCY. Clear evidence is necessary to show that an emergency is over.

Facts = Appellants are manufacturers of newsprint paper in Ontario. The respondents wanted to recover sums they had paid for paper delivered to them at controlled prices.

The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.

I.e. The control of property and civil rights for purposes other than normal purposes may pass to Parliament, because of the emergency.

### Reference Re Anti-Inflation Act (1976) – reread this one, pay attention to the dissent

* Emergency legislation challenged at the commencement.
* Anti-inflation Act was federal legislation that applies to all federal entities (not provincial public sector). Wage and price control in response to rampant inflation in the 70s.
* Provinces had an option to opt-in or not. Laskin says we’re not judging the wisdom of the legislation (how can opt-in be an emergency)
* Majority says emergency POGG. Even though they don’t talk about emergency in the legislation.
* IMPORTANT COMMENT ON EXTRINSIC EVIDENCE = DOESN’T NEED TO ESTABLISH THE FACT OF AN EMERGENCY, JUST ENOUGH TO PERSUADE THE COURT THAT PARLIAMENT HAD A RATIONAL BASIS FOR BLEIEVING AN EMERGENCY EXISTED.
	+ Put this together with Fort Frances where they said the court could determine whether an emergency is over. Here they say they can determine whether the emergency ever existed (not did it exist – but did parliament have a rational basis for believing it)
	+ Therefore any legislation asserted to be emergency legislation pursuant to POGG is judicially reviewable.
* All you need to enough extrinsic evidence that parliament had a rational basis for establishing there was an emergency.
* The power of parliament under national emergency doctrine is not confined to war. Inflation might constitute an emergency
* Factors to make it a national concern (based on Beetz judgment)
	+ Specific and indivisible
	+ A new national concern (inflation is nothing new)
	+ Don’t just put a label on it – that’s not enough
* Factors to make it an emergency? (based on Beetz judgment)
	+ **Temporary – what the majority relies on completely.**
	+ Indivisible subject matter
	+ Specific characterization and subject matter
	+ Exceptional circumstance
	+ Be explicit that the federal legislation is overriding provincial laws – “emergency” is not required. Parliament cannot enter the normally forbidden powers of the province unless it gives an unmistakable signal that it is doing it pursuant to its extraordinary power. (where he thinks Anti-inflation fails)

## National Concerns Branch

### AG Ontario v. Canada Temperance Federation [1946] – Canada Temperance Case

* Challenging the validity of the Canada Temperance Act. Privy Council decides it is still valid.
* AG ON says that it is no longer emergency. How can an emergency be permanent?
* No longer just looking for an emergency circumstance. Need to look at the real subject matter of the legislation
* Revival of POGG
* Matter of national concern.
* Federal legislation which is a matter of national concern, may touch on provincial concerns (double aspect doctrine)

“the true test must be found in the real subject matter of the legislation: if it such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures”

Difference between emergency and national concern? (According to Beetz)

- National concern is power that then becomes permanently allocated to Parliament.

Emergency is temporary, but alters the distribution of power. But you can’t define emergency by temporariness.

### Johannesson v. Municipality of West St Paul, [1952]

Example of how federal legislation upheld on the grounds that it was legislation on POGG – national concern and national dimension.

Municipality passed a bylaw that restricted aerodomes location – a zoning bylaw (land use)

Issue? Is s. 921of the Municipal Act intra vires?

“Any municipal corporation may pass by-laws for licensing, regulating and within certain definite areas, preventing the erection, maintenance and continuance of aerodomes or places where aeroplanes are kept for hire or gain”

- says it is not 92(1) but POGG, sub category which is aeronautics. Found that aerial navigation is national concern.

### R. v. Crown Zellerbach, [1988] 1 SCR 401

* Leading case on the national dimensions branch – how it operates and is applied.
* Provincial inability explanation. Uphold federal legislation where there will be a negative consequence on another province when a province can’t/doesn’t do anything.
* There is shared jurisdiction
* Charged under Ocean Dumping Control Act (federal legislation)
* Argue that section 4(1) of the Ocean Dumping Control Act is ultra vires.
* Crown Zellerbach argues that it is inland water.

POGG

1. National concern is separate from emergency doctrine (Beetz in Anti-inflation reference)
2. Describes scope of national concerns doctrine
	1. New matter which did not exist at confederation OR
	2. Matters which, although originally of a local or private nature, have become matters of national concern (local prohibition case
3. Factors necessary to apply the national concern doctrine
	* Singleness
	* Distinctiveness
	* Indivisibility
	* Scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of power under a federal constitution
4. The effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. All parliament would have

# Chapter 4 – Criminal Law

91(27) is the criminal law power. Provincial law can only do quasi criminal law.

92(6, 13, 14, 15, 16)

* Criminal law 91(27) = prohibition + penalty (for a valid public purpose)
* Prohibition aspect is flexible
* Public purposes are expanding.
* Provincial Drafters – What to Emphasize
	+ Property aspect
	+ Local nature of the problem
	+ Use regulatory techniques – licensing doesn’t look criminal
	+ Don’t copy the criminal code
	+ Don’t use harsh penalties – the harsher it is, the more it looks like criminal
	+ COMPLEMENTARY not supplementary
	+ Can use local morality – but don’t let it be your primary objective.

### Reference re Validity of Section 5(a) of the Dairy Industry Act [1949]

* Leading definition of 92(27)
* If the prohibition is enacted with a view to a public purpose – peace, order, security, health, morality then it can be valid criminal law
* No evidence that margarine was a health concern to Canadians.

## Federal Legislation

* Very broad power.

## RJR-MacDonald Inc. v. Canada

Importance = doesn’t have to be a total prohibition – it could be regulatory

Criminal law is not frozen in time.

* Validity of the Tobacco Products Control Act – challenging the whole statute.
* Purpose? Provide a legislative response to a national public health problem of “substantial and pressing concern”
* Parliament's purpose was to prohibit: advertising, promotion and sale without printed health warnings. These are accompanied by penal sanctions
* Parliament can legislate in regards to health as long as it has a prohibition accompanied by a penal sanction (and a legitimate public health evil) – REMEMBER THE FORMULA
* If the legislation isn’t a colourable intrusion upon provincial jurisdiction, then you’re ok.
* Act was upheld on criminal law. (they tried POGG – but get AWAY from that)
* There are prohibitions and penalties + valid public purpose (evils targeted)
* The detrimental effect was present
* Prohibition + penalty is form. Public purpose is substance (AHRA)
* Aspects learned from rejecting the appellant’s arguments
	+ There is no such thing as a traditional criminal law concern. It is not frozen in time.
	+ It is possible to criminalize an ancillary effect without criminalizing the underlying “evil” (activity. – Prostitution reference ex.
	+ Criminal law can have some exceptions (in this case, for outside of Canada origin) without losing its status.
		- Ss. 17(a) - permits the Governor in Council to make regulations exempting substitute tobacco products from the application of ss. 4 and 7 where they pose less risk to the health of users. - encourage the development of alternative
		- 8(3) - exemption for Dunhil products - this trademark is unique because it has a marketing existence quite independent from tobacco.

Just because one aspect of legislation is criminal doesn’t mean they all should be.

Cromwell's Judgement - which shows the final constitutional fate of the AHRA

* They cannot regulate virtually all aspect of research and clinical practice in relation to assisted human reproduction.
* Viewed as a whole, it is best classified as being exclusive to provincial legislative for 3 reasons.
	+ The establishment, maintenance , and management of hospitals
	+ Property and civil rights in the province
	+ Matters of a merely local or private nature in the province.

He thinks that Section 5-7 are validly enacted under Parliament's criminal law power (AG of Quebec said this) but then he adds that s8, 9, 12 are as well. Section 8, 9 set out prohibited activities - aimed at protecting each person's control over the products of his or her own body.

1. 8 purpose? Prevent use of donor's reproductive material other than if gave consent. Section 9 is age of consent. Therefore this would fall into criminal law.

Section 12 - those provisions which the AG of Q conceded to be valid federal criminal law, prohibit various forms of commercializing the reproductive functions of women and men.

### R v Hydro-Quebec

You can add to the valid criminal law purpose (environmental)

Dissent

* Difference between RJR? The legislation in RJR contained broad prohibitions, tempered by certain exemptions. In this case, there are no general prohibitions but a broad delegation of regulatory authority to the Governor in Council to control the way that toxic substances will be able to interact with the environment.
* RJR (Tobacco Products control Act) addressed a narrow field of activity - advertising and promotion of tobacco products. Here, it is very broad (release of substances into the environment). Environment is shared jurisdiction (Crown Zellerbach). This act is inconsistent with the shared nature of jurisdiction.

Majority

* Lafforey doesn’t want to have it be POGG under national concerns – because then it is always there. National concern gives full power to regulate. Don’t forget about the federal principle – balance 91/92
* Canadian Environmental Protection Act
* Legitimate Public Purpose? Yes – environment.
* Prohibitions backed by penalties? This legislation is essentially regulatory in nature.
* The interim order was being challenged.6a) PCBs of more than 1g/day release prohibition.
* 34 and 35 of the CEPA - which authorized the making of the governor general in council to make regulations in regards to toxic substances (34) and the making of interim orders (35) were found to be valid criminal law. The broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject and has to be kept in mind in interpreting the relevant legislation
* It is new yes. But it is also an extension of existing and very traditional rights and values already protected by criminal law. Ex. Quality of life
* Section 35 – regulatory.
* Section 34/35 are not prohibitory but regulatory.
* The interim order is made by the minister of Health and the Environment.
* Valid Criminal Law - Is the act prohibited with penal consequences. It is parliaments right to choose what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard (Margarine reference)

### Reference re Assisted Human Reproduction Act, 2010 SCC 61

There has to be a prohibition somewhere – but you can add stuff. You need penalties, traditional penalties are fines and imprisonment. There is wiggle room on what valid public purpose is.

**Upholding morality is the principal criminal law object of the Act.**

* Sections 5-9 are absolute prohibitions; s. 10-13 – prohibitions of various activities/controlled activities.
* If you believe there’s a moral issue – then that could be a valid public purpose. This is a pretty low standard. It doesn’t even have to be completely prohibitory
* Low bar to hit for what is criminal
	+ Prohibition, well mostly – can be regulatory
	+ With a penalty
	+ With a public purpose (but not everyone has to agree on what the public purpose is)
* Principle guiding the AHRA was about protection of vulnerable groups and equality, preventing discrimination.
* There are prohibited activities and controlled activities.
* There was no contention over the absolute prohibitions (s.5-9 – human cloning, an in vitro embryo for any purpose other than creating a human being)

How do you define “legitimate public health evil” (RJR)

* 1. Grounded in human conduct
	2. Has an injurious or undesirable effect
	3. On the health of members of the public

They say that the controlled activities belong to the provinces (they are designed to prevent activities and the use of technologies in the health care industry)

## Provincial Legislation

* Preventative rather than punitive (Dupond)
* Complementary NOT supplementary (Dupond)
* Localized (Dupond) – City of Montreal

### AG Canada v. Dupond [1978] 2 SCR 770

* Preventive (not punitive) AND complimentary (to the CC) AND localization AND temporary (not always necessary but a factor in this case)
* The Court upheld a municipal law that regulated the traffic by repressing disorderly conduct during public parades under the provincial constitutional authority to create laws of a "local nature" in section 92(16)
* Can use 92(13)(14)(16) – for administration of justice in the province
* 92(15) – transforms a provincial statute into something that looks and feels like criminal power.
* Suppression of conditions likely to favor the prevention of crime – NOT punitive, an absolute prohibition.

### The Court upheld a municipal law that regulated the traffic by repressing disorderly conduct during public parades under the provincial constitutional authority to create laws of a "local nature" in section 92(16) of the [Constitution Act, 1867](http://en.wikipedia.org/wiki/Constitution_Act%2C_1867).

McNeil v Nova Scotia Board of Censor

* They were banning certain movies. He was angry about it. SCC said it was valid
* Local morality.
* It has to be able to characterize a main objective purpose as regulating a provincial purpose
	+ Film industry IN the province
	+ An element of local morality can be taken into account.

### Rio Hotel v. Liquor Licensing Board, 1987 2 SCR 59

* Do not use phrases from the criminal code “immoral, indecent or obscene live entertainment”
	+ Provincial = objective
* The following conditions were attached to the rio hotel ltd. License in 63.01 : those about stripping, nudity etc.(May 24th, 1984)
* It can be revoked (penalty) – business license? Provinces have jurisdiction over local business 92(10)
* Second attempt to regulate the nude entertainment industry – first time they just copies
* This time just descried the conditions – you have to be able to get on/off the stage without going through anyone – not a subjective label, very clear definitions.
* Regulatory not prohibitory – licensing system.
* Make continued holding of a license on an annual basis contingent on no convictions – it is not evaluating the conduct of conditions.
* The province cannot re-enact the criminal provision and accomplish the same result by effectively “convicting” the licensee of a criminal offence already existing in federal law, under its own process and in its own forum.
* “it is now well established that the suppression of conditions likely to favour the commission of crimes falls with provincial competence”

### Chatterjee v. Ontario, 2009 SCC 19

Act in Question = Ontario Remedies for Organized Crime and Other Unlawful Activities Act, 2001 – Civil Remedies Act – authorizes the forfeiture of proceeds of unlawful activity.

* Found intra vires provincial because of the purpose for property rights 92(13).
* Incidental intrusion into criminal laws.
* You don’t even have to be charged of anything – she didn’t like this.
* Ways they decided it wasn’t 91(27)?
	+ Focused on the breadth of the statute
	+ The objective is to get stuff from crimes
	+ Whether or not the breach has been proved.
* The appellant as stopped by police and was in breach of his recognizance. They took his money.
* How do you figure out if it’s ok?
	+ Determine the pith and substance – purpose/legal effect
		- Focus was on civil remedies (compensate, prevent injury to public)
		- Forfeiture is the transfer of property from the owner to Crown – no conviction

# Chapter 5 – Regulation of the Economy

Wanted a broad power in Parliament to run the economy during the formation.

Economy is not divisible.

Provincial? Production/manufacturing because it is local.

91(2) Summary

* Parliament has real legislation
* It cannot directly regulate the local stations of matters of a trade in a province (Citizens Insurance)
* They can't claim jurisdiction of everything based on percentage of export (Terminal Elevator)
* They can't rely on the sheer volume and distribution of the province.
* We can't decide on constitutional validity just because we think it ought to be different. It has to be justified by the constitution (Securities Reference)
* The validity of the statute is going always to be determined how one characterizes what one statute is about.
* Provinces have legislative jurisdiction over the primary stages of production and manufacturing (Terminal Elevator)
* Provinces have legislative jurisdiction over contracts in the province. (Burns)
* The provinces by regulating those intraprovincial stages or elements or trades or professions can have enormous effects, consequential but mere incidental, on interprovincial trade - it goes up the change and that’s ok - as long as they are not aiming at that you are ok. (Carnation)
* One of the techniques that was utilized - marketing boards and delegation. It is how the provinces and the federal government got around the problem of we got the beginning you got the end. It’s the big middle part that we need to figure out

### Citizens Insurance v Parsons (1881)

* Ontario Act – not ultra vires 92(13)
* Insuring against fire is NOT a trade 91(2).
* Two of Parsons Buildings burnt down. The insurance company was a federal company that said the Ontario act is ultra vires.
* Civil rights is a right that arises from a contract. Insurance is a contract.
* Don’t interpret “civil rights” too narrowly.
* Section 91(2) does not ever cover the power to regulate by legislation in regards to contracts of a particular business or trade in a province.
* S91 (18) - Bills of exchange and promissory notes - this wouldn't have been necessary if all contracts were included. No contracts in s. 91
* 91(2)?
	+ Political arrangements in regard to trade requiring the sanction of parliament
	+ Interprovincial concern
	+ General regulation of trade affecting the whole dominion (do not define)

### R v. Eastern Terminal Elevator Co. (1925) SCC

* The Grain Act (comprehensive regulation of grain – growing, trading etc.) provided the supervision/regulation of the Grain industry and associated trades like grain elevator
* Board commissioners require money – s. 95(7) - the surplus in grain in terminal elevators in excess of - should be sold by the Board of grains commissioner and the proceeds of the sale were to be used to finance the administration of the Canada Grain Act. It is like a tax on the trade. It is a tax on the terminal elevator operators.
* Ultra vires Fed? Yes
* Board of grain commissioners is given delegated legislative authority to make regulations.
* Just because it is a product that is exported doesn’t mean that it is a matter of international trade. They wanted to go back and regulate everything because it is an exported product.
* Terminal elevators are local businesses
	+ The way Parliament could have done it?
		- 92(10) has exceptions. 92(10c) – “such works as although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
		- All they had to do was declare that it was a work for the general advantage of Canada. (Recently nuclear reactor?)
		- A work is a physical thing
* Interprovincial and International Trade:
* - Cannot legislate on particular matters of an industry (R. v. Eastern Terminal Elevator)
* - Even if the legislation is necessary, it doesn’t matter (R. v. Eastern Terminal Elevator)
* - A noble objective does not legitimize an enactment (R. v. Eastern Terminal Elevator)
* - Can get around this through 92(10) (R. v. Eastern Terminal Elevator)

Strictest point of narrow interpretation of 91(2).

### Carnation v. Quebec Agricultural Board P1968) SCC

* All about the intent of the legislature
* It is not because these orders might affect the appellant’s interprovincial trade which should determine their validity, but rather if they were made “in relation” to the regulation of trade and commerce.
* Was the Quebec Agricultural Marketing Board infringing on s. 91(2)?
* The Quebec Carnation Company Milk Producer’s Plan was approved by the market board.
* All the dairy farmers are selling to Carnation. The plan fixes the price. The plan focuses on the price that the dairy farmers are going to get from Carnation. It doesn’t care what happens to the milk after they sell it to Carnation.
* Carnation says they are based out of Toronto – they had an evaporated milk plant in Quebec and they are sending the processed milk across the provincial boundary.
* Carnation was not happy because they were paying more.
* They say it is invalid because they are trying to regulate interprovincial trade.
	+ Those effects are just incidental.

### Burns Foods v. Attorney General Manitoba 1975

* Manitoba tried to make sure you couldn’t buy hogs for slaughter and processing other than the Manitoba Marketing Board. (Man Reg 97/72)
* Natural Products Marketing Act
* Interprovincial contract trying to maintain price equality.
* Easier to see aimed at the borders if coming in and getting stuff by it.
* The Board sells hogs from Saskatchewan
* If Burns food/packers bypass this system, it is screwing with the bargaining power of Manitoba producers.
* It is invalid – regulating interprovincial trade, they were aiming at the border. You can’t force Saskatchewan hog products to comply with your regulations.
* Direct regulation of interprovincial trade is of itself a matter outside the legislative authority and cannot be treated as an accessory of the local trade.
* Carnation – all producers were within the province. The basis of the attack was not that extra-provincial producers were affected but that a larger part of the plant’s production was sold outside the province. This case is different because it prescribes conditions under which the hogs may be brought in from outside which is interprovincial trade.
* (Ritchie Dissenting)There wasn’t any evidence of protectionism. They weren’t “going to the borders”. They were trying to regulate a uniform price for all of the hogs being sold.
* Subjecting the price of imports to the same regulation of local sales in the hope of stabilizing the price of hogs in Manitoba is still regulation of interprovincial trade.
* Direct regulation of interprovincial trade (price and conditions of sale) is itself a matter outside the legislative authority and cannot be treated as an accessory of the local trade.

### Labatt Breweries Ltd. V. Attorney General Canada, 1980

* Appellant seeks a declaration that “Labatt’s Special Lite” is not mistaken for a light beer within the regulations under the Food and Drugs Act – appeal allowed
* Alcohol – 4% Special light but light beer is 1.2-2.5
* Labatt challenges s. 25(1) (c) – establishes the authority in the Governor in Council to pass regulations under the statute - and s 6 (has provisions with reference to drugs, cosmetics and devices.
* Main purpose is a legal recipe
* The regulations of recipes were shot down.
* Since the food and drugs act limits one industry or trade at a time, this is not trade and commerce in the sweeping general sense contemplated in the citizens insurance case.

### General Motors of Canada v. City National Leasing 1989 – Ancillary Doctrine

First time 91(2) was argued successfully

Clarifies the head of power by adding the additional criteria – is the matter of genuinely national importance in scope. Is it qualitatively different than what the provinces could do?

* Ordinary civil claims fall under s. 92(13)
* Outlined the test for the Ancillary doctrine? A law that failed the pith and substance analysis may be saved by this. The intruding provisions of the law will only be upheld if they satisfy the “rational connection” test.
* The doctrine of general application = where a law of general application which the provincial legislature is constitutionally competent to enact affects a matter within federal jurisdiction in a certain manner, the affected matter will be immune to the law’s operation. The provincial law will be read down.
* Combines investigation act creates a civil cause of action for certain infractions of the act (s. 31.1)
	+ Is the act valid under s. 91(2)
	+ Is s. 31.1 valid because it is integrated with the act
* Ancillary doctrine is designed for one or two provisions. (don’t think about it if it’s the whole statute being challenged) – A provision that is prima facie invalid with legislation that is valid.

Branches of 91(2)

1. International/interprovincial
2. General trade affecting the whole country (CNL wants to depend on that)
	1. Was often rejected (Terminal Elevator)
	2. If 2 is allowed – it becomes a question of general interest throughout the dominion (see 5 factors)

There as to be a true balance between 91(2) and 92(13)

GM Test – ways to make 91(2) possible – indication of validity

1. Must be part of a general regulatory scheme
2. Scheme must be monitored by an agency
3. Must be concerned with trade as a whole instead of a specific trade
4. Legislation should be of a nature that the provinces couldn’t do on their own (Crown v Zellerbach provincial inability test)
5. Failure to include one or more province would jeopardize the successful (constitutionally not in terms of policy) operation – double aspect matter

S 31.1 is intra vires Parliament because it is functionally related to the act. S 31.1 says that any person who suffers loss through conduct contrary to any part V provision (businesses undermining competition/ low selling) can sue for damages.

Facts = CNL purchases majority of cars from GM dealers. GM excluded them from preferred interest rate, which they said was a direct help to their competitors. S 31.1 is intruding on 92. But it is ancillary.

GM

1. General Approach
	1. Look at the Act as a whole. And the provision.
2. General Regulation of 91(2)
	1. 5 criteria of the test
3. The Ancillary doctrine
	1. There is a sliding scale of massive intrusion v more justifiable.
	2. How well it is integrated?
		1. More encroachment? Higher integration

Pith and substance of legislation – the doctrine that a law which is federal (or provincial ) in its true nature will be upheld even if it affects matters which appear to be a proper subject for the other power.

Ancillary Doctrine Steps

1. Decide if provision is intruding on 92, if so how much? (if it is valid, then you’re done)
2. Is the act valid? – in 2– general trade affecting the whole dominion – that means finding a regulatory branch
3. Is provision integrated?

To be national concern for 91(2) – it is not enough to be repeated through all the provinces. It has to be something that the provinces couldn’t do effectively individually or in concert.

Ancillary Doctrine

1. Section 31.1 encroach? Yes – it creates a civil right of action, 92(13)
	1. BUT it is only a remedial provision therefore less intrusive
	2. Limited scope of the action
	3. Can do 92(13) if warranted
	4. Doesn’t encroach on the provinces right – doesn’t deprive the provinces of the ability to deal with it.
2. Presence of a regulatory scheme – purpose is to eliminate activities that reduce competition in the market place
3. Validity of regulatory scheme?

### Reference re Securities Act, 2011 – adds additional criteria

Limit on 91(2) – not just because something is IMPORTANT does it matter.

Despite the overlap - Does this federal statute deal with an aspect of securities regulation which is beyond the competence of the provinces even if they were to enact uniform legislation?

Adding – double aspect doctrine – Federal legislation will be constitutional even if the matter, considered from another perspective, falls within a provincial head of power, when it is qualitatively different – fills a gap.

GM test

1-2 = formal structure – regulatory

3-5 = national – Parliament’s unique ability.

Securities Act

1 & 2 = satisfied

3-5 = problematic.

* Duplicate provincial schemes

3) Aimed at securities trade? One Trade – Canada says they are going beyond, fostering fair efficient and competitive national capital market.

If you’re going to argue that the matter has “evolved” – you must have fact.

1. Similar scheme acting in concert possible? Probably yes because they were doing it before.

The government was overreaching – regulating all aspects of contracts for securities within the provinces, including all aspects of public protection etc.

There was an opt-in feature which shows that #5 is automatically debatable.

This fails the ancillary doctrine trust – this is not an incidental intrusion.

# Chapter 6 – Taxation

6 issues that can arise in relation to a provincial taxing statute

1. Characterization issue - is this a tax? (or is it some other kind of levy, for example is it a tax within 92(2) or some kind of permit/license fee within 92(9)
2. If this levy is a tax. Is it direct?
3. Is it in the province, assuming for raising revenue for provincial purposes.
4. Was the legislation properly enacted?
5. Does the tax payer have any immunity? Reference to 125.
6. Assuming that the legislation has been held to be invalid. If the provincial legislation fails any one of 1-5, can the tax payer who has paid the tax before protesting get the money back?

*91(3)* [*The raising of Money by any Mode or System of Taxation*](http://en.wikipedia.org/wiki/Taxation_in_Canada)*.*

*92(2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.*

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

*13.*[*Property and Civil Rights in the Province*](http://en.wikipedia.org/wiki/Section_92%2813%29_of_the_Constitution_Act%2C_1867)*.*

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

*92A (4)* in each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

* (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
* (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

Whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

**125.** No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

### Bank of Toronto v Lambe (1887) PC – all about legislature’s intent with respect to territorial limitation

Flat fee = direct

Facts = Quebec imposed “An Act to impose certain direct taxes on certain commercial corporations”

Bank of Toronto didn’t want to pay – even though they had an office in Montreal because 91(15) - *15.*[*Banking*](http://en.wikipedia.org/wiki/Banking_in_Canada)*,*[*Incorporation of Banks*](http://en.wikipedia.org/wiki/Bank_Act_%28Canada%29)*, and*[*the Issue of Paper Money*](http://en.wikipedia.org/wiki/Bank_of_Canada). – No argument here that Quebec was trying to regulate banks.

Method for Tax Validity

1. Fall within the description of 92(2)
2. If yes, are we compelled by anything in 91 to cut it down (balancing act)

Direct tax = demanded from the very persons who are intended to pay for it

Indirect tax = passing the buck.

Court looked at the intention of the legislation.

Commodity transaction = indirect

If you’re here, you’re taxable. Not about whether it was passed on, but intention of legislature. With respect to territorial limitation, it is about the legislature’s intent on direct/indirect.

### Canadian Industrial Gas and Oil v Government of Saskatchewan (1978) SCC (CIGOL)

Facts = in 1973, the oil price went up a lot. Saskatchewan enacted legislation that would divert the enhanced value of Saskatchewan oil from the producing companies to the provinces. 98% of the oil is exported. Minister was given discretion to change well head price if they thought it was not fair – not the “right price”. Minister’s assessment is not subject to review.

Royal surcharge = (oil produced – Crown royalty oil – Road allowance crown levy) x (well head value as established by the minister – basic well head price)

This is price fixing in international trade.

Bill 42 – mineral income tax + royalty surcharge.

To decide directness - look at the general tendencies of the tax.

|  |  |
| --- | --- |
| Commodity | I |
| Custom levy | I |
| Income | D |
| Property | D |
| Sales tax | I |
| Export Tax | I |

Classic indirect tax = tax levied on a commercial in pursuance of trading transaction.

This is an export tax therefore indirect and ultra vires Saskatchewan?

How?

* All product is for export
* Minister given discretion to change well head price if you sell the oil for too little “not fair” and not subject review.
* Indirect because the purchaser pays the basic well head price & the tax.

Dissenting judgment (better way to approach classification of a tax)

* Hybrid tax – elements of both.
* Relevant criterion = general tendency of a tax.
* Mineral income tax is not being passed on.

Why is this not a commodity tax?

1. Falls upon a holder of only certain rights in respect of part of the amount received
2. Unlike a true commodity tax, it varies with production cost
3. Not an “add to price” but “take from owner”

The price of oil in this situation is not increased. The consumer is unaffected because any attempt to increase would be taxed more. Purchaser would be paying the same price whether the tax was there or not.

No evidence that section 4A is even being used – and even if it is used, it will be after the sale so how can it be passed on?

### Allard Contractors Ltd v Coquitlam (1993) SCC – there is a real question of whether something is a tax or another form of levy (fee you place on something)

Municipal Act s. 930(2) authorizes variable fees, a fee for the removal of oil, sand, gravel, rock.

* Since it is one section – ancillary doctrine should be in your mind
* 92(9) is qualified by a regulatory scheme.
	+ Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes
	+ Can support indirect license fees as part of a regulatory scheme.

Can 92(9) be used to impose variable fees? Yes.

A purposive statement is valuable, but can’t be taken at basic face value.

Certain provincial licensing levies were merely ancillary in nature – objective to create a fund to defray the expenses. A licensing scheme is not ultra vires just because it is indirect. The licenses and the incidental fees must be used to support the scheme

It is illogical to expect a perfect correlation between a tax and the increased cost of a commercial item.

Important question

Is the levy ancillary to the licensing scheme of regulating or prohibiting a trade or is it essentially a fiscal imposition or taxation under a form of disguise or a colourable concept?

This case

1. Doesn’t matter that the section 930 doesn’t mention road – road part can be anywhere in the act
2. Fees are impliedly linked to the costs of regulation
3. A bylaw discriminates illegally when such discrimination is not authorized by enabling legislation – by-law singles out commercial extractors (exceptions for development, improvement, small projects). Authorized because it is implicit in act that there will be differences in volumetric discrimination is surrogate for personal use, incidental etc.

### Kingstreet Investments Ltd. V New Brunswick (2007) SCC

* Liquor control Act had a regulation that created a user charge (11% + PST). That user charge is invalid. Invalidity resulted from the Province’s failure to tailor the charge to the cost of regulating the licenses.
* Didn’t argue indirect tax because then it wouldn’t be reimbursable. They said it was a direct tax that was illegally imposed by regulation.
* The law of restitution is not intended to provide relief to plaintiffs who have suffered no loss.
* If there is an invalid taxing statute, there is a constitutional right to claim repayment of that tax.
* Rejected the immunity rule – against rule of law (deal with the “potential fiscal chaos and inefficiency”
	+ Limitation period of how long you can claim back taxes
	+ No compound interest when there is no moral problem with the invalid tax
	+ Province can mitigate damages
		- Enact new retroactive legislation

If Parliament could show evidence of fiscal chaos, the court would be open to help, but this is not our problem if you can’t show anything.

Rule of law has to be protected. “Guarantee respect for constitutional principles”

The crown may not levy a tax except with authority of the Parliament or the legislature. No taxation without representation is central to our conception of democracy and the rule of law.

### Re Eurig Estate

* Case that deals with #4 – was the legislation properly enacted

Facts = Mrs. Eurig is a widow. There are probate fees she has to pay. Under s. 5 of the Administration of Justice Act, the Lieutenant Governor in Council has the power to set fees, so he set the probate fees.

Issues

1. Were the probate fees or are they taxes?
2. If they are taxes, are they direct or indirect taxes?
3. If they are taxes, was the proper procedure for setting those taxes followed?

They were found to be taxes

* Compulsory
* Levied by a public body, for a public purpose
* There was no link between the cost of probate and the levy.

The province imposed the taxes on the estate so they are direct (not imposed on the executor)

BUT the problem is that it was the Cabinet who was imposing the taxes and not the legislature of the province. Section 53 “bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the house of commons.

All they did was suspend the judgment for 6 months so that the provincial legislatures could fix it up. They got rid of the application to the provinces. S. 53 isn’t entrenched because you can delegate legislation – you just have to be clear that the imposition of taxes can be set in the Cabinet.

### Westbank First Nation v BC – shows that there can be an immunity from taxation

BC hydro was a crown corporation. It acquires permits to use and occupy various lands on Westbank Reserves to build electric lines. Westbank says BC Hydro owes them a lot of money.

Can BC hydro claim immunity under s. 125 – immunity from provincial taxation for Crown property?? Yes.

# Chapter 8 – Extraterritoriality

You can’t derogate from rights outside the province. But there’s no reason why you can’t create rights in the province for the world.

ET can raise two constitutional issues

* 1. Validity – if ET then it is invalid (Churchill falls)
	2. Constitutionally applicable? (Unifund)

8/16 in s. 92 are qualified by the phrase “in the province”

Feds have the ability to legislate extraterritorially (Statute of Westminster) – international law means they don’t do it often.

Two streams of logic

Royal Bank v The King

* Monies raised by the issuing of bonds for the purpose of building a railroad only in Alberta
* Unless all effects were in provinces, then ET

Ladore v Bennett

* If pith and substance is municipal, the ET effects can be disregarded, since they are incidental effects.

### Churchill Falls (Labrador) Inc. v. AG Newfoundland (1984) SCC

Facts =Nfld enacted a lease act “The Churchill Falls corporation limited Act” to allow the company full right to the exclusive use of certain waters of the Churchill River. CFLCo and Hydro-Quebec struck a deal. Quebec was getting the power. After a certain time, Nfld changed their mind. The power contract was necessary for the project to be a success. Hydro-Quebec specifications used and governed by Quebec law. Nfld asked for it back. Hydro-Quebec said no. Then they enacted the reversion act

* The Reversion Act (Nfld) would have repealed the lease. The act is about real property in the province.
* Long term contract (40 years +25 years renewal)
* Why isn't the reversion act valid?
	1. Interfered with federally incorporated company - NOT IMPORTANT - relevant to Ch. 7
	2. The legislation was in relation to property and civil rights outside the province
		1. Everything was in the province silly.
	3. Any effects outside the province would be consequential and irrelevant -WHY WE ARE READING THIS CASE
		1. THAT IS NOT TRUE - BECAUES SIGNIFICANT RIGHTS OUTSIDE THE PROVINCE WOULD BE EFFECTIVE.
		2. Why could they enact the leasehold act but not be able to repeal it?
			1. It is not really legislation in relation to property in the province.
			2. It is really legislation related to the power contract - that is civil rights
			3. 92(13) - property and civil rights - property is easy to locate. Civil rights are intangible.
	4. This is an interprovincial work and undertaking - the federal government could have stepped in.

This case favors Ladore v Bennett.

* Where the pith and substance is in relation to matters that fall within the field of provincial legislation, incidental or consequential effects on extra provincial rights will not render the enactment ultra vires.
* Where however, the pith and substance is the derogation from or elimination of extra provincial rights, even if it is cloaked in the proper constitutional form, it will be ultra vires. A colourable attempt to conceal the appearance will not save the legislation.

Evidence of colourability

* Purpose and intent of the Act
* Nfld attempt to recall more power than was provided for (by a request)
* The government had a pamphlet made that talked about the harsh inequity created by the Power contract.

### Unifund Assurance Co v. Insurance Corp of BC (2003) SCC

Principles in Unifund apply whenever a defendant, to whom a statute is being enforced, says that statute can’t apply to ME?!!!!

 Determine whether there is a sufficient connection between the circumstances and the provincial statute. That is extra-territoriality applicability.

Morguard Investments v deSavoye

* The standard for enforcing a default judgment from a different province is not the same as if it were from another country; rather the Court adopts the test of “real and substantial connection” between the petitioner and the territory exercising jurisdiction.
* Facts = De Savoye had a property in Alberta but resided in BC. The mortgage defaulted in Alberta. The appellant didn’t appear. The respondents foreclosed on the house and wanted BCSC to enforce the Alberta judgements for the shortfall.
* There was a real and substantial connection between Alberta and the action.
* Comity = an association of nations for their mutual benefit – should be stronger between provinces because they share a nation.
* Therefore, the judgement in Alberta was recognized.
* Hierarchy in logic in the Morguard case
	1. Comity
	2. Federalism
	3. Order & fairness
	4. Due process – full faith & credit.

Hunt v T&N plc.

* Case where the Morguard principle were held to apply to constitutional challenges as well as they are fundamental to the constitution.
* Hunt inhaled asbestos fibres from a product made in Quebec. He wanted documents from Quebec. The Quebec Business Concerns Records Act prohibited the removal of documents outside the province which Hunt tried to say was unconstitutional
* The Quebec prohibition was constitutionally inapplicable. The Act would remain in force, but could not be applied against other provinces.
* In short, to use the expressions employed in *Morguard*, at p. 1100, the "integrating character of our constitutional arrangements as they apply to interprovincial mobility" calls for the courts in each province to give "full faith and credit" to the judgments of the courts of sister provinces.
* Federalism is a justiciable constitutional principle. You can challenge the validity of certain rules.

Facts of UniFund

* Car accident in BC involving Ontario residents who were not at fault and a truck driver. Ontario has an act
* UniFund is suing ICBC for having contributed nothing to the payment of the no-fault benefits, is taking a deduction. This is normally s 275 of the Insurance Ontario Act – provides a statutory mechanism for transferring losses between Ontario Insurance companies arising out of the payment of SAB (no fault coverage) under the Ontario Act.
* Under BC Insurance Motor Vehicle Act, the BC court is directed to deduct from a damage award any benefits which induce accident insurance benefits – no double recovery, so then the damages by ICBC is reduced by the amount of the ASB. In Ontario, they are calculated without the SAB because there are more insurance companies than just one and then entitled to indemnification.

The real and substantial connection test in the context of applicability

1. Territorial limits so must be sufficiently connected to it
2. Sufficient depends on the relationship of the jurisdiction, the subject matter of the legislation and the individual sought to be regulated – less on actual physical presence, different degrees depending on subject matter.
3. Applicability to out of province defendants is conditioned by the requirements of order and fairness = both provinces can’t regulate the same thing
4. Order and purpose, being purposive, apply according to the subject matter of the legislation (flexible)

Application? The appellant was not selling insurance in Ontario, their vehicle did not venture into Ontario, and the accident wasn’t there. The deductibility benefit was one conferred by the BC Insurance Act not the Ontario therefore Ontario Act does not apply.

* The Ontario Act appointed an arbitrator – but they couldn’t give authority to decide whether he had authority?

They are not deciding the validity of the act. But the applicability. It is not applicable in these circumstances.

Considerations of constitutional applicability can be organized around the following propositions

* 1. Territorial limits
	2. Sufficient connection
		+ Relationship between the out of province entity and the subject matter of the relation

If intangible, the court must look to the relationship among the enacting territory, the subject matter and the persons made subject to it. – A meaningful connection. (Not talking about a real and substantial connection)

Meaningful connection to the province.

### BC v Imperial Tobacco (2005) SCC

Validity of Provincial Legislation

1. What is the pith and substance?
2. Where is the pith and substance located?

Tangible = pith and substance is not difficult to find

Intangible matter = characterization is complicated.

This legislation creates a cause of action (civil right – intangible) – contract rights are also intangible.

### Tobacco Damages and Health Care Costs Recovery Act

* BC can recover against a manufacturer of tobacco products for the recovery of health care expenditures.
* The territorial limitations on provincial legislative competence reflect the requirements of order and fairness underlying Canadian federal arrangements

Determine pith and substance

* 1. Purpose
	2. Effect of legislation
* Pith and substance of the Act is a creation of a civil cause of action.

Determine whether provincial legislation in pith and substance respects territorial limits?

1. Determine pith and substance and identify a provincial head of power under which it might fall
2. Determine whether the pith and substance respects the territorial limitations on that head of power
3. Tangible? Physical location
4. Intangible? Relationship between the territories, subject matter, persons made subject to it.

This situation?

Exclusively BC, it respects the legislative sovereignty of other jurisdictions and may incidentally capture some activities occurring outside of BC.