**Term 1: Federalism**

[**Peace Order and Good Government** 1](#_Toc416537856)

[Russell v The Queen 1887 2](#_Toc416537857)

[AG Ontario v AG Canada 1896 2](#_Toc416537858)

[Fort Frances Pulp and Paper v Manitoba Free Press [1923] 3](#_Toc416537859)

[AG Ontario v Canada Temperance Federation [1946] 3](#_Toc416537860)

[Johannesson v Municipality of West St Paul [1952] 4](#_Toc416537861)

[Reference re Anti-Inflation Act [1976] 4](#_Toc416537862)

[R v Crown Zellerbach [1988] 5](#_Toc416537863)

[Provincial Inability Test 5](#_Toc416537864)

[**Criminal Law** 6](#_Toc416537865)

[Reference re Validity of s 5(a) of Dairy Industry Act [1949] 6](#_Toc416537866)

[RJR-MacDonald Inc. v Canada 6](#_Toc416537867)

[R v Hydro Quebec [1997] 7](#_Toc416537868)

[Reference re Assisted Human Reproduction Act [2010] 7](#_Toc416537869)

[AG Canada v Dupond [1978] 8](#_Toc416537870)

[Rio Hotel v Liquor Licensing Board [1987] 8](#_Toc416537871)

[Chatterjee v Ontario [2009] 9](#_Toc416537872)

[To argue for provinces: 9](#_Toc416537873)

[**Regulation of the Economy** 10](#_Toc416537874)

[Citizens Insurance v Parsons [1881] 10](#_Toc416537875)

[R v Eastern Terminal Elevator Co [1925] 10](#_Toc416537876)

[Carnation v Quebec Agricultural Board [1968] 11](#_Toc416537877)

[Burns Foods v Attorney General Manitoba [1975] 11](#_Toc416537878)

[Labatt Breweries Ltd v Attorney General Canada [1980] 11](#_Toc416537879)

[General Motors of Canada v City National Leasing [1989] 12](#_Toc416537880)

[Checklists 12](#_Toc416537881)

[Reference re Securities Act [2011] 13](#_Toc416537882)

[**Taxation** 14](#_Toc416537883)

[When Provincial tax statute is challenged, use checklist 15](#_Toc416537884)

[Bank of Toronto v Lambe [1887] 15](#_Toc416537885)

[Test to decide whether tax is lawfully imposed or not 15](#_Toc416537886)

[Canadian Industrial Gas & Oil Ltd v Saskatchewan [1978] 15](#_Toc416537887)

[Two considerations when creating Provincial Tax 16](#_Toc416537888)

[Allard Contractors v Coquitlam [1993] SCC 16](#_Toc416537889)

[Kingstreet Investments Ltd v New Brunswick [2007] SCC 16](#_Toc416537890)

[Re Eurig Estate [1998] SCC 17](#_Toc416537891)

[**INTERJURISDICTIONAL IMMUNITY** 17](#_Toc416537892)

[The IJI Test 18](#_Toc416537893)

[Ontario (AG) v Winner [1954] 19](#_Toc416537894)

[Tessier Lte v Quebec [2012] 20](#_Toc416537895)

[Derivative Jurisdiction Test 21](#_Toc416537896)

[**PARAMOUNTCY 21**](#_Toc416537897)

[Multiple Access v McCutcheon, [1982] 2 SCR 161 21](#_Toc416537898)

[Bell Canada v Quebec (1988), [1988] 1 SCR 749 22](#_Toc416537899)

[Ordon Estate v Grail, [1988] 3 SCR 437 23](#_Toc416537900)

[Canadian Western Bank v Alberta, [2007] SCC 22 23](#_Toc416537901)

[2 kinds of ways to establish conflict 25](#_Toc416537902)

[Canada (AG) v PHS Community Services Society [2011] SCC 44 25](#_Toc416537903)

[Marine Services International Ltd v Ryan Estate [2013] SCC 44 26](#_Toc416537904)

[TEST FOR WHEN THERE’S NO FEDERAL ENTITY 26](#_Toc416537905)

[IJI Summary 27](#_Toc416537906)

[**EXTRATERRITORIALITY** 28](#_Toc416537907)

[Giant Test for Assessing Extraterritoriality 29](#_Toc416537908)

[Churchill Falls (Labrador) Inc v AG Newfoundland, [1984] 1 SCR 297 29](#_Toc416537909)

[Original ET Test 30](#_Toc416537910)

[Morguard Investments v De Savoye [1990] [SCC] 30](#_Toc416537911)

[Unifund Assurance Co v Insurance Corp of BC, [2003] 2 SCR 63 31](#_Toc416537912)

[Real and substantial connection test 31](#_Toc416537913)

[British Columbia v Imperial Tobacco, [2005] SCC 49 32](#_Toc416537914)

[Full ET Test 32](#_Toc416537915)

[**Summary for ET** 33](#_Toc416537916)

**Intro:** Laws that are excessively broad or vague will be incompetent to both levels of govt, thus it is important to engage in a pith and substance analysis of the law to determine what the subject matter is before deciding what jurisdiction it falls under (RJR-MacDonald). Laws that are enacted by the proper legislative body (federal or provincial) will be valid or intra vires of their jurisdictional power.

**1. The** purpose of ­­­­\_\_\_\_\_\_\_ seems to be \_\_\_\_\_\_\_\_\_\_\_\_\_. The legislation itself is set up as a \_\_\_\_\_\_\_\_\_\_\_\_\_. Because \_\_\_\_\_\_\_\_ is a matter falling within provincial/federal jurisdiction, this law will be considered ultra/intra vires of the province/federal govt. This is consistent with the legal effect of the statute as it seems to \_\_\_\_\_\_\_\_. In relation to \_\_\_\_\_\_\_\_\_\_\_\_\_\_.

\*\*Because the law is challenged as being ultra vires of the province/federal govt, an analysis of the motive of the enacting legislature to see if it is inconsistent with the form will be important to determine if colourability is present. A statute that is challenged on ultra vires grounds and is found to be colourable is almost always struck down

# Peace Order and Good Government

* **S 91**: confers on P the power to make laws for the POGG of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provinces (residuary power)
* Distribution of legislative power meant to be exhaustive
* Law that is excessively **broad or vague** will be incompetent to both levels of gov't
  1. Law has to have certain identifiable "matter" (**pith and substance** have to be easily identified) in order to be categories under one authorising body or another
  2. So just because a law that does not fit under any provincial head of power can fall under Parliament's residuary power in s 91 (POGG) does not mean that it always will especially if an **aggregate without any unity or indivisibility**

🡪Otherwise, P could extend authority over virtually anything and call it POGG

* Has three branches
  1. **Gap branch**  > fills gaps in distribution of powers
  2. **National concerns branch** > takes over once matter exceeds power/competence of what provinces can handle on own

🡪 most important element is the need for **uniform national legislation** which cannot realistically be satisfied by cooperative provincial action (because failure of one province to cooperate = adverse consequences for others)

* 1. **Emergency branch** > should be only ***temporary*** and used in times of grave emergency such as war; power knows no limits
* POGG gives Parliament **permanent jurisdiction** over distinct subject matters which do not fall within any of the enumerated heads of s 92 (which are by nature of national concern)
* Also gives **temporary jurisdiction** over ALL subject matters needed to deal with emergency

\*\* btw, most new inventions have been slotted under **92(10)(a)** - things that exceed what provinces can handle (trucks, TV, moves, telephones, buses etc); only **aeronautics** is slotted under national concerns branch of POGG (thus, an anomaly)

## Russell v The Queen 1887

**The most broad POGG ever got: whenever something of general concern for Dominion, should come under federal power because uniformity is desirable**

* No definition of POGG articulated even
* Canada Temperance Act was statute in issue --> federal, but had local-option temperance scheme
* **Statute upheld on basis that it did not fall within any provincial head of power (therefore, must be federal)**
  + However, didn't articulate under WHICH federal enumerated head
* True nature/character of legislation must be determined to ascertain class of subject to which it genuinely belongs
* Laws designed for promotion of public order, safety, morals / subject defendants to criminal procedure/punishment 🡪 public wrongs *not civil rights*
* **Legislation that is national in scope must be enacted by Parliament (not by provinces)**

Russell not completely overruled and can still be useful in arguing that matter with nationwide geographic scope should be subject to POGG.

When considering a **federal statute that is contested as ultra vires**:

1. attempt to locate the statute under a s.92 head of power
2. If the statute can be located under s.92 then consider if it can be located under s.91. If it can also be located under s.91 then it is a matter of federal jurisdiction.
3. If the Act in question did not fall under any s.92 heads of power than it must fall under s.91 for the purpose of POGG. (par 16). **POGG as an umbrella clause.** Limits to POGG have since been reduced.

## AG Ontario v AG Canada 1896

**POGG narrowed to residual clause; National Concerns Branch of POGG; Double Aspect v Paramountcy**

* Aka **"Local Prohibition Case"** --> explained the decision in Russell
* Lord Watson enunciated for the first time a "national dimensions" (national concerns branch) of POGG
  + Some matters of legislation that may have started out as local/provincial may nonetheless acquire **"national dimension"/"national concern"** and thereby come within federal Parliament's POGG power
* In this case however, provincial local-option temperance scheme upheld as being either in relation to 92(13) property and civil rights or 92(16) maters of a merely local or private nature
  + **S.92(16) was established as a residual power for the provinces**
  + (in Russell local-option temperance statute DIDNT come under either)
* PC found that there was scope for provincial and federal legislation (**double aspect**) but, to the extent that there were conflicts between the legislation, federal legislation would be paramount (**paramountcy**).
* **POGG cannot be used to justify legislation with regards to matters that are substantially of a local or provincial interest simply because they are applicable to the whole Dominion**.
* Geographic distribution no longer enough to show provincial matter 🡪 national concern
* provincial legislation conflicts with federal legislation = federal legislation will be paramount.

*After 1911 when Viscount Haldane joined law of lords, POGG power severely constricted/retracted/limited*

*--> decided that only emergency would justice exercise of PGG power; this view persisted until after WWI (then he died in 1928 and POGG was broadened again, but never to same levels as previously)*

*--> War Measures Act came into force and empowered federal gov't to make regulations on almost anything*

## Fort Frances Pulp and Paper v Manitoba Free Press [1923]

**Parliament may infringe on prov jurisdiction during emergencies such as war; emergency continues until Parliament declares no longer an emergency; clear evidence required to overrule Parliamentary decision re: emergency**

* PC held that regime of price control (established during WWI under the *War Measures Act* and continued temporarily after the war), constitutional
* War had ended yet but regime still in place
  + Act stipulated the statutes created under it were only to be in force during war, invasion or insurrection, real or apprehended
  + **Government proclamation** = conclusive evidence that these conditions exist and are continuing, **until** the issue of **a subsequent proclamation** declaring that they no longer exist
* Issue of whether wartime measures could be continued in times of peace deferred to federal gov’t
* **A sufficiently great emergency such as war allows for POGG power to authorise laws which would usually only be competent to provinces** 
  + (In times of emergency, issues of property and civil rights may become issues of POGG)
* Viscount Haldane : "**very clear evidence" would be required to justify the court overruling a decision made by gov't that exceptional measures still applicable**

## AG Ontario v Canada Temperance Federation [1946]

**National Concerns *and* Emergency branches of POGG; POGG not confined to emergencies 🡪 can legislate proactively for preventative purposes**

* "national concern" branch of POGG named (in dicta) and its inconsistency directly confronted
* **Case establishes that there is a national concerns branch as well as an emergency branch of POGG (emergency not necessary to fit legislation under POGG, but emergency also provides a basis for placing legislation under POGG)**
  + If Parliament can legislate when there’s an actual emergency/epidemic**, surely can legislate on the basis of prevention** (thus, emergency not always necessary)
* Decision in *Russell* attacked in this case and even though *Canada Temperance Act* re-enacted in 1927 (new version) *CTA* challenged a second time via two-pronged approach
  + Either *Russell* was wrongly decided because not based on an emergency or
  + If Russell *was* based on an emergency, it had passed now (emergency of drunkenness)
  + Thus, CTA invalid
* Viscount Simon and PC refused to overrule Russell
  + *Russell* not based in emergency, but **POGG power not confined to emergencies** (broke the chains that Haldane had placed on POGG and broadened it again)
  + Stopped short of approving decision, however, stated that has stood for 60 years and as thus embedded in Constitutional law of Canada
* **New test for national concerns branch of POGG** (Similar to Watson's dicta from before):
  + If matter of the legislation goes beyond local or provincial concern or interests, then must be concern of Dominion as a whole
* The validity of the legislation will not be affected because there is still scope for enactments by the provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province (**double aspect doctrine**)

**Double Aspect Doctrine:** Federal legislation that touches on provincial matters is acceptable as long as the aim of Parliament is to deal with the matter of national concern and any impacts on provincial heads of power are incidental.

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

**Aeronautics = National Concern; if non-severable and under feds provinces cannot legislate; Provincial Inability Test**

* National concerns branch of POGG recognised in this case
* s. 921 of *Manitoba Municipal Act* allowed municipalities to pass bylaws licensing and regulating the erection, maintenance or continuation of airports
  + St Paul Municipality passed a bylaw restricting airports in certain areas 🡪 Johannesson had purchased land just prior to this enactment to build an airport for his water sports company
* Issue was whether municipalities had the jurisdiction to pass by-laws relating to airports and argued aeronautics fits under POGG
  + zoning bylaw was blatantly aiming to prohibit airports 🡪 therefore not dealing with land use but with aerial navigation
  + legislation in pith and substance aimed at airports (could be a matter of property and civil rights)
  + but because so closely related to topic of aerial navigation (federal) = province has no jurisdiction
* Aeronautics deemed to satisfy national concern test
* 4 judges cited Temperance case, Locke J though explained *why* should be of national concern
  + Paid growth of passenger and freight traffic by air, use of aircraft for carriage of mail (especially to remote north parts of country), necessity for development of air services to be controlled by a national gov't that could be response to nation as a whole
* **Provincial inability**  brought up 🡪 if some provinces refused to cooperate/accept uniform procedures for use of air space and ground facilities = could endanger residents of other provinces engaged in inter-provincial/international air travel
* **Once something declared as a matter of national interest so as to fall under the POGG clause (and is non-severable in any practical way), provinces cease to have any legislative jurisdiction and federal jurisdiction is exclusive**.

## Reference re Anti-Inflation Act [1976]

**POGG: 2 branches + requirements for each; Matters of National Concerns are permanent**

* Federal wage and price controls as set out in Anti-Inflation Act upheld under emergency branch of POGG by SCC
* Meant to be **temporary** -- set to automatically expire at the end of 1978
* reference was to determine the constitutional validity of the federal Anti-Inflation Act
* 7:2 majority held that Act was valid exercise of federal Parliament's emergency power
* Difficulty with this conclusion was that preamble of Act never discussed or mentioned existence of emergency as one of the reasons for legislation
  + Beetz: can't exercise emergency power unless explicitly told you can
  + Laskin: content with having to make an inference based in common sense ; **all court needs to do is find rational basis for determining an emergency, but don't have to actually make definitive finding**
  + Up to opponents of legislation to establish the absence of a rational basis
  + It is not for the courts to review the wisdom or likely success of a particular policy 🡪 should only decide if a legislature has the authority to enact the legislation.
* Laskin = left open the possibility that could have also been supported under national concern branch
* Beetz (dissent) = "containment and reduction of inflation" too broad a topic to be validly allowed to fit under POGG's national concerns branch
  + **In order to qualify under national concern branch, had to be distinct in identity from provincial matters with** a degree of **unity** that makes it **specific and indivisible**
  + **Once an issue has been recognized as a matter of national concern, it is permanently incorporated into federal jurisdiction.**
  + Inflation lacked specificity
* To fit under **Emergency Branch of POGG**: legislation to be **temporary** and Parliament has to **clearly indicate that believe acting in response to an emergency**.

R v Crown Zellerbach [1988]

**Leading case on National Concerns Branch: singleness (provincial inability test), distinctiveness, indivisibility**

Le Dain J

* Also used national concerns branch as set out in Temperance case
* Crown Zellerbach charged with illegal dumping under s. 4(1) of federal *Ocean Dumping Control Act*
  + Act was concerned with marine pollution and its effect on marine life, human health, as well as navigation and shipping
* Issue was whether a federal law that prohibited dumping in *provincial* waters was valid
* requirement of **distinctiveness** divided the SCC --> majority held that it was a national concern
  + Marine pollution satisfied national concern test because of its predominantly extra-provincial and international character = clearly a concern to Canada as a whole
  + but La Forest dissented = marine pollution lacked distinctiveness required to be slotted under national concern branch because marine and fresh waters mixed and affected by coastal activity and deposits from air
* Federal *Ocean Dumping Control Act* prohibited dumping at sea = upheld in its application to marine waters within province of BC

Provincial Inability Test invoked = failure of one province to protect waters = pollution of other provinces' and federal waters

* Le Dain did not assert federal authority over pollution in general, but held that marine pollution distinct enough with limits
* Decided that requirement of distinctiveness necessary but not sufficient for matter to be slotted under national concern branch of POGG
  + **Must have singleness, distinctiveness and indivisibility ; to determine singleness use provincial inability test**
* the impact on provincial jurisdiction must be reconcilable with the fundamental distribution of legislative power.

# Criminal Law

* **S 91(27)** confers criminal law power to federal gov't (crim law and procedure)
  + However, CC enforced by provinces and decisions to investigate, charge, prosecute matter of provincial policy
* **S 92(13)** gives provinces jurisdiction over property and civil rights
* **S 92(14)** gives provinces power over administration of justice in terms of provincial policing, prosecution, establishment of courts (criminal trials take place in provincial courts but rules of procedure and evidence are federal laws),
  + jurisdiction over correctional institutions divided between two levels of gov't
* **S 92(15)** gives provinces authority to impose penal sanctions for the enforcement of provincial laws -- clearly an ancillary power though
* Viscount Haldane's definition of criminal law too narrow = froze criminal law into mould established in 1867
  + After he died, Lord Atkin offered new definition which extended federal power of criminal law to *make new* criminal laws
  + But this definition too wide = proper balance found in *Margarine Reference*
  + In a federal system, need definition of criminal law which is narrower
    - Prohibition
    - Penalty
    - **Public purpose 🡪 new provision** (key ingredient to making a prohibition part of criminal law)

FORM OF THE LEGISLATION IS CRITICAL to identify legislation as valid criminal law.

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

**Valid crim law under s 91(27) requires prohibition and penalty for a public purpose**

* *“Margarine Reference”*
* Severance ordered (part of statute is bad but the rest is good and can stand alone)
* Rare, because tend to strike down or uphold all of statute (all or none; presumption against severance)
* **Severance clauses** state that if any apart of statute is held unconstitutional judicially, the remainder should remain in effect (much more common in US and Australia)
* **Prohibition + Penalty + Public Purpose**

## RJR-MacDonald Inc. v Canada

**Criminal Law not frozen; indirect legislation against evil; exemptions as clarifiers**

* SCC had to review validity of federal Tobacco Products Control Act
  + Prohibited advertising of tobacco products and required placement of health warnings on packages
* **Prohibition** and **penalty** present (needed for valid criminal law)
* Protection of public health = **public purpose** (also needed for valid criminal law)
* Manufacture, sale, possession, all legal --> La Forest (majority) argued that would be impractical to make this illegal considering how many Canadians were smokers at the time
  + Court decided to go in a roundabout way to protect health of Canadians by making only the *advertising* illegal
  + Major dissented = prohibition on advertising lacked "typically criminal purpose" and therefore ultra vires of criminal law power (majority disagreed; simply taking lesser step than outright ban which would totally be within criminal law making power)
* **Criminal purpose may be pursued by indirect means 🡪** does not need to directly legislate against criminal evil, as long as the prohibition is *aimed* at criminal evil
* **definition of criminal law is not frozen in time** and **power to legislate with respect to the criminal law must include the power to create new crimes**.
* Valid criminal law may contain exemptions for certain conduct without losing its status as criminal law 🡪 define the crime by defining boundaries

## R v Hydro Quebec [1997]

**Criminal Law Power > POGG; challenged provisions must be considered in context of Act; prov regulations/legislation can supplement federal**

* Hydro-Quebec found in violation of interim order that restricted emission of a substance (PCBs) to one gram per day
  + Corporation argued that Act and Interim Order UV criminal law power of federal parliament
* Unanimous decision by SCC that protection of environment = public purpose that would support federal law under criminal-law power
* majority upheld *Canadian Environmental Protection Act* as valid criminal law (administrative procedure for assessing toxicity = prohibition enforced by penal sanction, so sufficiently prohibitory)
* provisions (34 and 35) challenged as being regulatory and not criminal 🡪 court found that single provisions could not be challenged without **considering the other provisions and overall purpose of the Act**
  + regulatory provisions intended to **assist** in identifying substances that would trigger criminal power 🡪 **thus, ancillary to the functioning of the criminal provisions**
  + Minority saw Act as mainly regulatory, not criminal ; prohibition doesn't kick in *until substance classified* or interim order made
  + Also, province being able to "opt out" of a criminal law if had own similar provincial one in place, odd for criminal law
* **Criminal law power authorises complex legislation and extensive degree of regulation including discretionary administrative authority**
* **Preference for using criminal over POGG** 🡪 because doesn’t tilt in favour of feds and because have to be specific (can’t just argue for broad policy area)
  + The use of the federal criminal law power does not preclude the provinces from exercising their powers to further regulate and control pollution either independently or to **compliment** federal action.

## Reference re Assisted Human Reproduction Act [2010]

**Criminal law power can only support a regulatory scheme if the purpose underlying the scheme is a valid criminal purpose; risks grounded in reasonable apprehension of harm may be regulated by crim law**

* Attempted exercise of criminal law power to regulate the use of assisted human reproduction techniques (to protect morality, public health, and personal security of those involved including those not yet born)
  + morality as a valid criminal law purpose focuses only on the importance of the moral issue, not whether there is a societal consensus on how it should be resolved
  + Parliament only needs a **reasonable basis** to expect that its legislation will address a moral concern of fundamental importance
  + when considering morality as a valid criminal purpose the **courts only need to ensure that the pith and substance relates to conduct Parliament views as contrary to our moral precepts** and that there is a consensus that the regulated activity engages a moral concern of fundamental importance
* **Absolute prohibitions** of immoral or risky practices = valid exercise of Parliament's criminal law power (unanimous)
* **Qualified prohibitions** subject to exceptions = court divided on whether valid exercise of Parliament's criminal law power
  + Most of prohibitions subject to exceptions or to regulatory/licensing regimes and so outside criminal law power (and therefore invalid and unconstitutional)
  + McLachlin held whole act was valid under criminal law and prohibitions etc were simply "ancillary" to the rest of it
* **Criminal law need not only regulate the severest risks to public health but may regulate risks that have a reasonable apprehension of harm.**
* **Cases that uphold criminal law on the basis of public health** are generally grounded in

1) human conduct

2) that has an injurious or undesirable effect

3) on the health of members of the public.

* LeBel and Deschamps took new test to be very restrictive: because assisted human reproduction to INHERENTLY harmful or evil needing to be suppressed, could not be validly regulated under criminal law power ; saw the Act as "colourable" in the sense that Parliament was trying to use criminal law power to extend to matters that actually fell within provincial jurisdiction
* **Deschamps’ Concept of Criminal Law** 
  + use of the criminal law power requires a reasoned apprehension of harm that is real and that relates to conduct or facts that can be identified and established **\*it must be possible to describe the risk of harm precisely enough that a connection can be established between the apprehended harm and the evil in question. The risk must be real**
* Cromwell : both disagreed and agreed regarding the two different camps

## AG Canada v Dupond [1978]

**Municipalities can prevent crime via legislation (but cannot punish)**

* Municipal by-law prohibiting all assemblies, parades, gatherings etc in public domain was upheld
* Beetz : (majority) by-law a valid regulation of municipal public domain
  + Purpose not punitive but *preventative* of public disturbances
* **Municipalities have the jurisdiction to pass laws (or bylaws via municipalities) that aim at preventing crime but not that aim at punishing crime.**
* Laskin : dissented, saying that by-law mimicked a criminal law and therefore UV of province (no regulatory purpose but definitely addressing appended breaches and doling out penalties for breaches)

## Rio Hotel v Liquor Licensing Board [1987]

**Prima Facie Criminal law Related to Valid Prov Licensing Scheme is Valid; Length of Penalty and Terminology affect Characterization**

* The NB *Liquor Control Act*included a provision that required licensed establishments with live entertainment to hold a license issued under s.63.01(5)
  + section allowed Board to attach conditions that regulated the nature and conduct of live entertainment, as well as the power to prohibit certain kinds of live entertainment
* This version of the NB Act was a second attempt. The first attempt, which had literally copied a section of the Criminal Code, was declared ultra vires.
  + Found to be IV 🡪 ability to regulate and prohibit specific kinds of entertainment was directly related to a valid licensing scheme
* the longer a penalty and the closer the terminology comes to describing traditionally criminal conduct, the more likely that provincial legislation will be considered ultra vires.
* Where a provision is **enacted in relation to** a valid provincial licensing scheme, **a provision that is prima facie criminal law (ie contains a prohibition and penalty) will be intra vires provincial jurisdiction.**

## Chatterjee v Ontario [2009]

**Province entitled to enact measures to avoid criminality; Statute with a broad focus is less likely to be characterized as criminal.**

* Police pulled over car that was missing a front license plate
  + Computer showed that driver in breach of court order 🡪 arrest 🡪 search of vehicle
  + Found $29 000 in cash (smelled of weed, but no weed anywhere)
* *Civil Remedies Act* (provincial statute) authorised Orders of forfeiture to prevent individuals from profiting from unlawful activity (as defined under both federal and provincial law)
  + Person was not charged but money was forfeited on basis that it was obtained through "unlawful activity"
  + Because not charged or prosecuted, Crown didn't have burden of proving money *was* obtained through unlawful activity (on BOP) --> smell of marijuana and dim view of driver enough for court to be persuaded to order forfeiture
  + Completely different from what would have gone down if law was a criminal one and driver subject to criminal proceedings and standard of proof
* Driver didn't argue using Charter but on basis of federalism and that the Act was unconstitutional intrusion into federal realm of criminal law
  + Binnie wrote for the court and found law to be in pith and substance in relation to property and civil rights (provinces)
  + Purpose of preventing and compensating crime within provincial jurisdiction (not part of sentencing process at all)
* A province is entitled to enact measures to deter criminality and to deal with its financial consequences so long as those measures are taken in relation to a head of provincial competence and do not compromise the functioning of the *Criminal Code.*
* **There is no general bar to a province’s enacting civil consequences to criminal acts provided the province does so for its own purposes it in relation to provincial heads of power.**
* A statement of legislative intent is not necessary but is useful in determining pith and substance.
* **Statute with a broad focus is less likely to be characterized as criminal.**

### To argue for provinces:

1. Emphasise Property Aspects (in drafting and in argument); in rem action, or forfeiture (Chatterjee)
2. Emphasise local nature of the problem (Dupond)
3. Regulatory techniques (Hydro-Quebec dissent: more regulatory = more likely classified as regulatory not criminal) instead of prohibition and penalties (licenses) (Rio) 🡪 provision re valid licensing scheme = ancillary to scheme = not criminal
4. Dealing with problem indirectly (Dupond – aim to *prevent* not to punish)
5. Emphasise deterrence/Preventative (pre-emptive strikes) (Dupond)
6. Framing legislation in a way that doesn't copy *Code* provisions/avoid duplications CC (Rio)
7. Go wide/broad (Chatterjee and Dupond)
8. Avoid draconian penalties (Rio)
9. Never use word supplementary, ONLY USE COMPLIMENTARY (Chatterjee and Rio)
10. Concede if you have to that there is local concern with morality (peripheral to main concern because cant be central purpose)- no case
11. do not let moral concerns be the primary reason the province is legislating (*Rio Hotel*)
12. Concede to some traditional criminal activities that provinces can never deal with: prostitution and abortion (Morgentaler)
13. Temporary (Dupond)
14. what does the extrinsic evidence identify as the pith and substance (*Dupond* – internal documents supported the bylaw as preventing crime)

# Regulation of the Economy

* **91(2)** confers on federal Parliament power to make laws in relation to regulation of trade and commerce
  + Used to overlap with 92(13) property and civil rights
  + But courts narrowed the two to eliminate overlap and make each power exclusive
* **91(2)** has two branches
  + Interprovincial and international trade and commerce
  + General trade and commerce (authorises regulation of *intra*provincial trade); both provinces and parliament can regulate intraprovincial aspects of competition
* **92(10)(c)** works declared for the general advantage of Canada: federal works and undertakings

## Citizens Insurance v Parsons [1881]

**Leading case for s 91(2) 🡪 has two branches; and s 92(13) Property and Civil Rights 🡪 includes contracts and should be interpreted broadly**

* Issue was the validity of a provincial statute 🡪 stipulated that certain conditions were to be included in all fire insurance policies entered into in the province
* PC (Smith) : statute was valid **law in relation to property and civil rights** (did not come within federal trade and commerce power)
  + Civil rights include rights created under contracts
* Property and civil rights as outlined in s.92(13) should be interpreted broadly
* Set the standard for jurisdictional authority : **intraprovincial trade and commerce matter within provincial power**
* **Federal trade and commerce power confined to interprovincial and international trade and commerce and "general" trade and commerce**
* **s.91(2) power has two branches**: 1) international and interprovincial trade 2) general regulation of trade affecting the whole dominion

## R v Eastern Terminal Elevator Co [1925]

**Use of s 92(10)(c) fleshed out; external trade cannot be based on %ages; no reach back; provincial inability test not enough**

* F Grain Act was passed in 1912 🡪 Board created 🡪 had authority to make rules and regulations for the governing, control and licensing of grain terminals and other elevators
* Canada argued that Act was an attempt to regulate a branch of external trade (80% of grain produced was exported)
  + provisions dealing with local matters were ancillary to the main purpose of regulating grain export
* SCC struck down statute which regulated grain trade because very little of Canada's grain stays in province (most is exported)
  + So any attempts to regulate it by province, UV province
* However, federal statute attempted to "reach back" and regulate local operations such as licensing and regulation of grain elevators
  + Court held this to be invalid, making entire scheme invalid
* Also, **external trade cannot be regulated based on percentages**
* Also, **provincial inability test alone cannot be used to grant Parliament jurisdiction to regulate the economy**.
* **BUT s.92(10)(c) can be used to give Parliament jurisdiction to regulate local economic interests.**

## Carnation v Quebec Agricultural Board [1968]

**Interprovincial effects are incidental if legislation directed at local/intraprovincial transactions**

* Carnation argued that the three orders of the Marketing Board invalid because price set relates to products largely sold outside of Quebec 🡪 matter of interprovincial trade and subject to s.91(2) powers
  + Forced Carnation to pay higher prices for milk (than would have in free market) than any other processors
  + Majority of pressed milk shipped out of province = losing money
* SCC upheld provincial marketing plan for sale of raw milk by farmers to Carnation Company (which processed the milk)
  + issue was not about whether legislation **affects** interprovincial trade but more about whether the legislation is **directed at the regulation of interprovincial trade**.
  + SCC found the QC Act was aimed at **improving the bargaining position of local dairy producers and that any interprovincial effects were incidental**.
* If products are **produced locally before being exported, province can likely regulate the industry or production if the focus is on the local transactions.**
* Any effects on interprovincial trade are **incidental** as long as the legislation is directed at a matter of provincial jurisdiction.

## Burns Foods v Attorney General Manitoba [1975]

**Provincial legislation that directly affects interprovincial trade/imports is UV of province**

* Provincial power to control prices
* SCC found that the aim of the regulation was **interprovincial** **trade** not local business
* Contracts happening OUTSIDE of province, UV of province
  + Have to ensure that they *are* indeed being signed outside of province
* More difficult to find intent to regulate local business when the regulations **impact imports from another province** than when the regulations impact exports (companion to Carnation).
* Extrinsic evidence can be used to define intent and purpose of an act.
* **Provincial legislation that directly regulates interprovincial trade cannot be considered have incidental effects on interprovincial trade.**
* **If going out of province, okay; if coming into province, not okay to unilaterally regulate/control**

## Labatt Breweries Ltd v Attorney General Canada [1980]

**General Trade branch specifically for *general*, sweeping, national trade; merely incidental effects okay**

* SCC held that part of the federal *Food and Drugs Act* that authorised regulations prescribing compositional standards for food = unconstitutional
* Federal trade and commerce power rejected as support for federal legislation ; **general trade and commerce power cannot be used for regulation of a single trade or industry that’s mainly local (because not "general")**
* Estey J : criminal law power could be used to enact laws for protection of health but alcohol requirement for what constitutes a light beer not related to health
  + Criminal law power could also be used to prevent deception, but found the issue in this particular case not to fall under this
* Because compositional standards couldn't fall under POGG or trade and commerce = invalid (dissent relied on trade and commerce)
* **Merely Incidental** effect on legislative sphere of other jurisdiction will no longer necessarily doom statute to failure
* confirmed general rules regarding jurisdiction related to the economy as:
  + provincial – legislation related to the support, control or regulation of components in the marketing of natural products; legislation related to contractual rights within the province
  + federal – marketing with respect to interprovincial and international trade; regulation of the flow of trade in extraprovincial channels

## General Motors of Canada v City National Leasing [1989]

**Checklist for Branch 2; Approach to analysing const validity of a provision; Ancillary Doctrine**

* Constitutionality of new *Combines Investigation Act* (*Competition Act*) had to be decided/resolved
* Civil remedy in federal statute (competition act) 🡪 intrusion into property and civil rights but only in limited way
  + **rational connection test** appropriate = all civil remedy did was provide a means and incentive to private enforcement that would improve efficacy of competition law (held to be valid)
  + minor intrusion into provincial jurisdiction but it was a provision that was **essential** to the functioning of the Act.
* Statute held to be valid law under general trade and commerce power 🡪 **civil remedy valid part of the law; complimentary to public enforcement**
* SCC emphasized that a **balance** between federal and provincial jurisdiction must be considered when contemplating the general trade and commerce branch.
  + created **checklists** to use when considering the power
  + also discussed the **process to be used when considering single provisions within a statute**
* (Dickson) attempted to reconcile various approaches court had taken in defining extent of legislative power to affect matters outside competence of enacting body

### Checklists

**5 hallmarks of validity for legislation under the general trade and commerce power**:

1. impugned legislation must be **part of a general regulatory scheme**
2. the **scheme must be monitored** by the continuing oversight of a regulatory agency
3. the legislation must be **concerned with trade as a whole rather than with a particular industry**
4. the legislation should be of a nature that the **provinces jointly or severally would be constitutionally incapable of enacting**
5. the **failure to include one or more provinces or localities in the legislative scheme would jeopardize the successful operation of the scheme** in other parts of the country

These 5 are **not an exhaustive list of traits** that will characterize general trade and commerce legislation and the absence or presence of any of these indicators is not necessarily determinative.

**Approach to analyzing the constitutional validity of a provision:**

1. Look at whether provision itself is ultra vires

* to what extent does the impugned provision **intrude on provincial powers**. If the provision is federal law or is attached to an act (or a severable portion of the act) that is constitutionally valid then the analysis is complete.
* If not UV, stop there; if UV, continue to step 2

1. Look at whether legislation as a whole is ultra vires

* When considering the general trade and commerce power, determine if the act contains a **regulatory scheme (3 components:** explanation of prohibited conduct, creation of an investigatory procedure, establishment of a remedial mechanism)

1. Look at how integral provision is to regulatory scheme as a whole

* can the provision be constitutionally justified by reason of its connection to the valid legislation?
* Must consider how **integrated** the provision is into the scheme of the legislation and also how important it is for the efficacy of the legislation.
* The strength of the test required depends on the level of encroachment on provincial powers.
* **Ancillary doctrine** used to save an invalid provision in otherwise valid statute
  + Allows infringement on another jurisdiction’s head of power if the pith and substance of the entire act is “in relation to” an intra vires matter and the infringement is incidental (ancillary) to the pith and substance of the act.
  + requires that provision in question be either **functionally connected** or **necessarily incidental** (for low and gross encroachment, respectively)
* **Ancillary Doctrine can be used by the provincial and federal governments**

## Reference re Securities Act [2011]

**Scope of National Concerns branch revisited 🡪 used to avoid Constitutional gaps; matter must be distinct**

* Parliament tried to enact comprehensive securities-regulation statute (relying on trade and commerce power)
  + Goal was to provide comprehensive regime of securities regulation under oversight of national regulatory authority with no distinction between inter and intra (goal to wholly displace provincial regulation of the field)
  + Issue was whether proposed act was within legislative authority of parliament
* Act would apply to only those provinces and territories who chose to opt-in (through opt-in formula) to federal regime
  + If chose not to opt-in, would continue to be governed by own provincial statute
  + Provinces still intervened in opposition
* SCC refused to recognise double aspect = statute was unconstitutional intrusion into property and civil rights
* Using 5 part test, 1 and 2 were satisfied however 3 and 5 were not and 4th = problematic
* Main thrust of opposed Act a matter of property and civil rights (so a provincial concern)
* Opt-in feature =possibility that not all provinces will participate
* SCC found that while aspects of the securities market have become national in scope, the Act was chiefly directed at protecting investors by regulating participants in the securities market
* SCC found that **to use the second branch of s.91(2) Parliament had to identify a federal aspect that is distinct from that aspect under provincial jurisdiction.**
* To achieve the requisite national importance scope (**national concern**) it is **not enough that the matter is replicated** in jurisdictions across Canada, **the situation must be such that if the federal government did not legislate, there would be a constitutional gap.**
* When considering the second branch of s 91(2) the question is not which branch of government is the best option to enact the policy, the question is **which government has jurisdiction** for that aspect of the matter.
* **To argue that a matter has evolved to become a matter of national concern requires an evidentiary basis**

# Taxation

Also known as **Fiscal Federalism**.

Question is what does C allow each level of gov't to do in terms of raising revenue?

* ***Winter Haven Stables*** Case 🡪 challenges const validity of income tax act
  + ruled that **feds can raise money any way they want and spend it however they want**
* ***Re Canada Assistance Act*** 
  + Feds' money, they raised it in C legitimate way, so **can spend and cease to spend any way they want**
* **Federal**: can be direct or indirect, must have revenue raising as primary purpose, can’t be colourable towards s92, can raise revenue for federal or provincial use, can spend the revenue any way it likes.

Problem of taxation is **mainly a provincial problem**

* **91(3)**: The raising of Money by **any** Mode or System of Taxation.

- nearly unlimited; can tax you as much as they like, any way they like;can only be challenged for bad intention or colourability

*Provinces much more limited*

* **92(2)**: Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
* **92A(4)**: Put into Act in 1982 **🡪** 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

1. non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
2. sites and facilities in the province for the generation of electrical energy and production there from, 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.

* **92(9)**: Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
* **125:** No Lands or Property belonging to Canada or any Province shall be liable to Taxation. = **immunity provision**

Question: Why are the provinces so limited?

* Simply not anticipated that provinces would ever be important; all the important people would be in Ottawa
* Could hold provincial leaders accountable

When Provincial tax statute is challenged, use checklist**:**

1. Is the payment a tax? (characterization/classification issue) (*Allard v. Coquitlam)*
2. If yes, is it a direct tax? (*Bank of Toronto v. Lambe, CIGOL)*
3. Is the tax imposed within the province? (*Air Canada Case)*
4. If it’s a tax, was the legislation properly enacted? (Provinces try to ensure this); (*Eurig Estate*)
5. Is there any immunity from the tax (s. 125)? Immunity available only for taxation not levies, charges etc (no case on this either; Johnny Walker case)
6. Is an ultra vires tax recoverable? (*Kingstreet Investments) ;* can taxpayers get ultra vires taxes back?

* Should never assume that the only legitimate, constitutional reason to impose a tax is to raise revenue**; taxation can be used to regulate, control, and promote many things as well** 
  + P can impose charges under other heads of power [91(2)]

**Using 92(9) to create indirect taxation as a province** (from *Allard*)**:**

1. The licensing fee must be attached to a valid regulatory/licensing scheme as a fee.
2. The fee must be tailored and used to defray the costs of the regulatory scheme.

**John Stuart Mill’s Definition of Direct/Indirect Tax (Bank of Toronto v Lambe):**

“A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such are the excise or customers.

The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.”

## Bank of Toronto v Lambe [1887]

**Leading Case 🡪 Direct Taxation defined**

* For provincial taxes, anyone found within the province can be taxed, regardless of nationality or place of residence
* Paid up capital just being used as a measure for the tax; still IN the province
* **Direct taxation** = one which is demanded from the very person who it is intended or desired should pay it
* **Indirect taxation** = demanded from a person in the expectation and intention that he shall indemnify himself at the expense of another.

### Test to decide whether tax is lawfully imposed or not

1. **is the tax a direct one (within the province that is used to raise revenue for provincial purposes)?**

* use John Stuart Mill's definition of a direct tax:

🡪 "*One which is demanded from the very persons who it is intended or desired should pay it*"

1. is there anything in s 91 that would cut down the meaning of the words in s.92 so would not cover this tax?

## Canadian Industrial Gas & Oil Ltd v Saskatchewan [1978]

**Classification of Direct/Indirect taxes + creation of new Hybrid Tax**

Martland

* Majority discussed that certain classes of taxes have been accepted by the courts as being direct or indirect as a rule.
  + **Direct: income, sales, property; sales tax collected by vendors but paid by consumers**
  + **Indirect: commodity tax, customs levies, export/import taxes and duties; sales taxed imposed on vendors**
* Considered the tax payable to be **passed on to the consumer** and because all of the oil was exported = export tax
* Found the tax to be indirect and therefore ultra vires.
* **Dissent** (Dickson): A tax does not fit snugly into direct or indirect category = Hybrid Tax
* To be correctly classify hybrid taxes, they need to be **assessed** **on how they actually operate** rather than on how they are constructed.
* If hybrid, inspect the **practical effect** of the tax to determine whether more of a direct or indirect tax tendency
* Shows the weakness in using only *Bank*’s test for directness

### Two considerations when creating Provincial Tax

1. tax should be **labeled in a way that encourages them to be identified as direct taxation**
2. how the tax is actually **charged and collected**

## Allard Contractors v Coquitlam [1993] SCC

**Indirect Taxation under s 92(9) and how to set it up validly**

Iacobucci

* if it’s a **provincial tax**, then has to fall under **92(2)** and has to be **direct** and **within the province**
  + can also fit into **92(a)(4)** but that category is limited to natural resources
* **BUT some** forms of indirect taxation (**LEVIES**) allowed through **variable licensing fees under 92(9)** in combination with s.92(13) or 92(16)
  1. **These fees (the indirect tax) must be attached to/ancillary to a valid regulatory scheme**
  2. must raise revenue to be used towards the cost of the scheme and **defray the costs of regulation**

🡪 There must be some connection between what the revenue is spent on and the regulatory scheme, though it doesn’t have to be a super close match

* You can raise more revenue than required to fund the scheme without problem (but it is easier to argue for the validity of it if the extra revenue isn’t excessive).
* A **properly phrased purpose statement** could assist the courts in determining if an indirect tax is related to a regulatory scheme but this alone will not determine the outcome of analysis
* **Flat rate license fee = direct tax.**

## Kingstreet Investments Ltd v New Brunswick [2007] SCC

**You can recover taxes which the government has collected improperly (rule of law)**

* If a tax is found to be unconstitutional, the burden is not on the taxpayer to prove that they paid the tax under protest
* absence of duress on the taxpayer should likewise not impact their ability to recoup their funds.
* **Limitations:**

(1) provincial limitation act should apply to any cause of action based on the constitutional right, and

(2) tax payer is not entitled to compound interest if there is no gross wrongdoing on the part of the province – just entitled to simple interest.

* Province can request the judgment be suspended if paying would cause financial chaos/deficit for government – they could then **retroactively legislate** a valid tax so they do not have to pay it back
* To claim restitution = need to have experienced loss; can’t use common law principle of unjust enrichment (no deprivation)
* Court outlined **potential ways for provinces to limit payout when a tax is found to be ultra vires:**

1) implement a valid, retroactive tax

2) invoke the Limitations Act to limit amount repayable

## Re Eurig Estate [1998] SCC

**Challenge on Enactment Procedure 🡪 Stay of Decision to allow province to correct**

* Eurig was a widow dealing with her husband’s estate
* challenged a recent change to ON’s probate fees not on the ground that the fee was unconstitutional but on the grounds that the increase was enacted improperly.
* Under *CA, 1867* ss. 53 and 90 require that **any bills related to the public purse must originate in the Legislature**.
  + increase in ON’s probate fees had been enacted under a delegated authority to the LGIC to set fees
  + SCC found the fees to be ultra vires because the increase was enacted by the LGIC not by the Legislature
* SCC stayed the decision to allow ON to correct the error by revising the legislation
* SCC set a **precedent for staying decisions in order to allow provinces to amend legislation in order to avoid repayment of significant amounts of fees/taxes**.

# INTERJURISDICTIONAL IMMUNITY

Law that purports to apply to matter outside of jurisdiction of enacting legislative body can be attacked in three ways

1. **Validity**
   * If subject matter (pith and substance) is not within jurisdiction of enacting body, will be deemed invalid 🡪prov laws may “affect” a federal matter
   * depends on how the law characterised (“in relation to”)
   * dealt with in first semester
2. **Applicability**
   * If a law is found to be valid but part of it applies to something outside of enacting body's jurisdiction in a way that affects the basic, minimum and unassailable core of (fed) subject 🡪 will be deemed inapplicable
   * the other (usually federal) statute has **Interjurisdictional immunity** from the part that is inapplicable
   * remedy will be **reading down** of statute
3. **Operability**
   * Both federal and provincial law are valid *and* applicable but prov law will be deemed inoperative because of **Doctrine of Paramountcy**
   * Applies when there is **express contradiction** either because of
     + **Impossibility of dual compliance** (citizens given contradictory instructions)
     + **Frustration of federal purpose** (overlapping laws, possible to comply with both because no contradiction but provincial law frustrates purpose of federal)
   * Definition of conflict has changed 🡪Used to be a very broad definition, now, *Multiple Access* = relatively narrow because wanting to have as much legislation operable as possible

* When looking at validity of a law, analyse the **pith and substance**
* law which is *in relation* to a matter within a jurisdiction in not objectionable just because affects a matter outside jurisdiction
* the limits of the pith and substance doctrine mark out ill-defined zone of IJI
* When a statute is found to be valid and cannot be struck down on that basis, an argument can be made for IJI – the focus of this section is therefore applicability and operability

### The IJI Test

* **Validity**: Is the provincial law valid?
* **Eligibility:** Is the defendant a federal entity? Is it claiming immunity from application of a provincial law?
  1. Use the tests – *Winner* and/or *CWB*
  2. Look to 92(10)(a) – Federal Works and Undertakings

🡪 Cannot be colorable – pretending to be federal (*Winner*)

* **Application:** Is the entity immune from THIS provincial law? (It is not a blanket immunity)
* Use the tests – *CWB* and *Bell 1966*
* **Effect**: Inoperable for that entity; NOT invalid.

**3 Possible IJI Definitions** 🡪 depending on which case you argue and how you argue it:

1. Broadest definition: IJI available to fed and prov and available to every head of power (the “cores”).
2. Medium: Available to fed and prov entities (i.e. no heads of power).
3. Narrowest: Available to fed entities only.

**Cases:**

* *Winner*: TEST for 92(10)(a) eligibility
* (Bell *1966*: TEST for immunity from prov law: impairment + vital and essential part)
* *Bell 1988*: TEST for immunity from prov law changed: effect, vital & essential part
* *Canadian Western Bank*:
* **TEST for eligibility limited**: federal entities which are persons, works or things that are supported by precedent
* **TEST for immunity from provincial law reverts**: impairment & vital/essential part (but court prefers pith and substance doctrine where mere effect (without adverse effect) = applicable)

**General Facts**

* Prov can’t prevent **a federally incorporated company/federal entity** from carrying on business within a province
* Lots of federal entities : most common is 92(10)(a) "other works and undertakings" = giving federal legislative jurisdiction to all forms of **transportation and communication** which crossed prov boundaries or extended limits of a province (steamships, railways, canals, telegraphs, and other works and undertakings)
* Allowed govt to slot into that category any **newer forms of technology (**telephones for example)
* Govt gets **legislative jurisdiction to regulate** *not ownership*

Other federal entities that could claim IJI:

* Aeronautics (POGG; not 92(10)(a); if it was, would have been divided between federal and prov)
* RCMP
* Canada Post
* Banks and Banking (s 91; Canada Western Bank)
* Indians and land reserved for Indians 🡪 No longer allowed after Tsilhqot’in (must use s 35)
* Cannot claim that entire prov statute does not apply to federal entity because of IJI
* IJI test has changed over the years: narrower now
  1. First has to establish status AS federal entity
  2. And then, application of particular part of prov law will have particular negative effect on the federal entity (degree of immunity based in IJI has changed over the years)

## Ontario (AG) v Winner [1954]

**Definition of works/undertakings under 92(10). Use of roads. Colourability of entities. Sterilization.**

**Facts:** US Bus runs out of US, through NB, back into US. NB says they can pass through but not pick up/drop off ppl.

**Issue:** Is Winner subject to NB’s legislation?

**Analysis:**

* Argued 92(10)(a) allowed prov to control their highways
* 92(10): **Work**=physical thing; **Undertaking**=arrangement under which physical things are used.
* **Works and undertakings read disjunctively** 🡪 **need to satisfy one or the other**
  + Buses are not "work" within meaning of statute but they are an "undertaking"
* **Undertaking** defined as a PLAN which a promote has done everything necessary on his part to put it in motion and has made all essential arrangements.
* **Provinces have authority and control over own roads but not undertakings that use roads if they connect province with others or extend into the US 🡪 exclusively under control of the Dominion** 
  + Legislation denying use of roads or **sterilizing** an inter-prov (federal) undertaking is not allowed
  + **A provincial statute that infringes s.92(10)(a) authority is inapplicable if it sterilizes all functions and activities of an undertaking under s.92(10)(a).**.
* Prov tried to argue that because some trips are within province, not a federal undertaking 🡪 provincial laws should apply to defendant (tried to **divide** the undertaking)
* PC focuses on *How is the business actually operated*?
  + Doesn’t matter if you can strip away parts; question is rather *what is the undertaking which is in fact being carried* on?
* Need evidence to establish this "actual operation"
  + Decided it operated as a **coherent whole** with some part of undertaking under intraprovincial branch, and the rest under intra-provincial branch
  + Thus, federal undertaking which province cannot bear on

**Decision**:  **No. Winner is a federal undertaking (s. 92(10)(a)) and is immune from NB’s licensing laws.**

**Extra:**

* **If not INTEGRAL or REGULAR part of business - not federal**
* **Colourability** 🡪 a carrier who is substantially an internal carrier cannot put themselves outside provincial jurisdiction by starting their activities a few miles over the border
  + Also, cannot simply tack on a federal component to make it federal

Reasons why provincial company would want to be under federal jurisdiction

* Costs
* Differences between labour relations boards in prov and fed
* Wanting to unionise but being prevented by employer (in a prov labour board)

## Tessier Lte v Quebec [2012]

**Don't have to be federal undertaking on own to get under federal umbrella, but have to have sufficiently close relationship to federal work and undertaking to be able to**

**Facts:**

* Quebec's occupational health and safety statute (CSST) does not apply to federal undertakings yet Tessier employees undertake various activities, including inter-prov road transport

🡪trying to argue should be considered federal undertaking

* Prov company preferred federal standards of health -- applied to get under federal umbrella (wanted to avoid being subject to CSST's "general" rates/costs)

**Issue:** whether Tessier's employees are governed by federal or provincial occupational health and safety legislation

**Analysis:**

* Jurisdiction over labour relations and working conditions not delegated to either prov or fed
  + however labour relations tend to be accepted as prov matter since engages prov authority over property and civil rights s 92(13)
* Tessier claiming falls under federal undertaking because of involvement with activities **related to** shipping
  + But s 91(10) does not confer *absolute* authority on fed govt to regulate shipping – must be read in light of s 92(10)
  + Provinces entitled to regulate transportation within their boundaries (feds regulate inter-prov)
  + If “related to” needs to be **integral or necessarily incidental to the effective operation** where federal undertaking **relies on/is dependent to a significant degree** onthe services and employees of a prov company
  + Federal jurisdiction will only be justified if related operation is **functionally connected** to federal undertaking and represents a **significant part** of the operation
* **PRINCIPLE: don't have to be federal undertaking on own to get under federal umbrella, but have to have sufficiently close relationship to federal work and undertaking to be able to**

### Derivative Jurisdiction Test

1. Federal labour regulation justified when services provided to federal undertaking for exclusive or principal part of related work’s activities
2. Services provided are performed by employees who form a functionally discrete unit that can be constitutionally characterised separately from rest of related operation

If employees do not form discrete unit and are fully integrated into related operation then work of the employees must be **vital to functioning of federal undertaking by representing significant part of employees' time or is major aspect of essential ongoing nature of operation**

🡪 Tessier employees do not form functionally discrete unit who only do stevedoring (employees moved around doing various jobs; cranes not exclusively used in stevedoring = so not sufficiently related to shipping)

🡪 stevedoring represented only 14% of Tessier’s overall revenue and no evidence to demonstrate extent to which shipping companies dependent on Tessier’s employees

**Decision:** not federal

**Extra:**

* Federal govt has jurisdiction to regulate employment when
  1. Work, undertaking or business is within legislative authority of Parliament
  2. An integral part of federally regulated undertaking

**Summary of the two cases**

Both of these cases discuss the first question that arises in IJI:

**Is this defendant a federal entity**? (92(10)(a) federal works and undertakings = very large category);

* + If want to argue that business is entitled to derivative jurisdiction, need to know the facts and that the company has such a **functional connection** with a federal entity, that falls within protection of a federal undertaking

# PARAMOUNTCY

* becoming more common as the scope of the **double aspect doctrine** becomes more general
* clarifies that a provincial law is inoperable NOT invalid

**\*\*\* This is THE Paramountcy case – still good law; not the last word**

## Multiple Access v McCutcheon, [1982] 2 SCR 161

**Definition of operational conflict – frustrated purpose and express contradiction tests. Duplication is not a conflict; has to be that one statute says "yes" and the other says "no" = citizens told to do inconsistent things**

**Facts:** Feds and ON have similar anti-insider trading legislation. Df argues immunity to ON law as a federal entity.

**Issue:** Is mere duplication a “conflict” in eyes of the law so that the prov statute will be inoperative?

**Analysis:**

* First step is to assess validity of both statutes.
* Here, fed’s is POGG (gap test) and prov’s is contracts (property and civil rights). > corporate and contract law
* insider trading would fall under double aspect doctrine: corporate aspect and contracts/civil rights aspect
* **Duplication is NOT a conflict 🡪 no true repugnancy since either statute can be applied and Parliament’s legislative purpose will be fulfilled**
  + the fact that plaintiff has **choice of remedies does not prevent concurrent operation**
  + There is only a conflict if prov law **frustrates the purpose** of the fed law, or if there is an **operational conflict** in that complying with one statute will mean defying the other (**express contradiction test**).
  + Both apply but double liability can be avoided through cooperation
  + Provision has **"rational, functional connection"** with company law**.** = **rational connection test**
* **Mere duplication without actual conflict or contradiction is not sufficient to invoke doctrine of Paramountcy and render otherwise valid provincial statute inoperative**

**Decision:** Df must comply with ON legislation because duplication is not a conflict.

Bell Canada v Quebec (1988), [1988] 1 SCR 749 **--> IJI – REJECTED IN LAFARGE and Canada Western Bank !**

**Changes immunity test to affects a vital or essential part of the undertaking: vital part test. IJI can be preventative.**

**\*\*\*** Even though Bell was rejected, Edinger thought it was good. Can use it to support your argument.

**Facts:** Bell claims immunity against provincial health and safety regulations.

**Issue:** Is Bell immune from this provincial legislation?

**Analysis:**

* Impairs requires too much; too hard for companies to wait until they are impaired
* Beetz says old *Bell* test o**f impairment is insufficient -**- test should be if it has an **effect** on the entity.
* It is sufficient if it **affects a vital or essential part** of the federal undertaking – it does NOT have to impair/paralyze (vital/essential = internal workings of company)
  + **Core:** basic, minimum and unassailable content
  + Reasoning: relates to time of court case – shouldn’t have to wait for it to impair/paralyze before claiming immunity.

**Decision**: Bell is immune again because prov law has an effect on it.

* **Vital part test carved out much broader field of immunity from prov law than old sterilisation test - smaller threshold; paralysis/sterilisation no longer needed**
* **Also, cannot have concurrent prov jurisdiction over vital part of federal undertaking**

**Predecessor to CWB**

## Ordon Estate v Grail, [1988] 3 SCR 437

**Heads of power have essential cores to which the other govt can’t regulate towards.**

**Facts:** Negligence action from boats on a lake (navigable waters). Pf wants prov law. Df says it should be fed law because navigable waters are under a federal head of power – didn’t argue that he himself was a fed entity.

**Issue:** Can prov statutes apply to a cause of action otherwise governed by (federal) maritime law?

**Analysis:**

* Maritime law demands uniformity because of its international character; can’t apply prov laws.
  + Each head of power has an **essential core** to which provinces are unable to legislate towards.
  + **But are there cores?**
* Private litigation, little pleasure boats, not federal entity
* Feds come in, in potential IJI, because all of the lakes are navigable waters = Parliament has legislative jurisdiction over the waters by virtue of 91(10) navigation and shipping AND federal legislation (Canada Shipping Act)
* Wanted provincial statutes to apply, and what SCC had done until Ordon case, was apply those statutes depending on the province that accident occurred in
  + But "hard cases make bad law" = suddenly change things up in Ordon and employ "maritime negligence" and want universal maritime negligence law
* Each head of federal power possesses essential core that provinces are not permitted to regulate
* **This is the first case which expressly states and then applies the version of the doctrine of IJI that says that there is a core to each federal head of power** -- so can't apply the provincial statutes
  + **Canada Western Bank goes even further and says that ALL heads of power have core** (91 and 92)

**Decision:** Must use federal law.

**\*\*\*** Edinger thinks this case is inconsistent with pith/substance doctrine. If it is prov in pith/substance, incidental effects on s.91 heads should be irrelevant. This says there’s **immunity against incidental effects**. It **also removes relevancy of whether a federal entity is involved – shifts focus to heads of power instead.** Before, IJI was limited to entities on a case-by-case basis, but extending it to heads of power opens it up.

* Canada Western Bank rejects Bell '88 and accepts 'impairs' 🡪 Court changed its mind about test for IJI.
* Is this the best way to contain IJI though? Is that the right interpretation for the doctrine?
* SCC was trying to close box of IJI but Edinger thinks they just gave fuel to people to litigate in this area.
* Edinger also says that saying IJI is available to prov entities is a bold, unsupported theoretical statement.
* But whatever, use these cases and manipulate them to your client’s benefit
* **Have a choice regarding which of the two you want to use by trying to argue that court should revert back to "affects" or find a different way to define "impairs"**

Canadian Western Bank v Alberta, [2007] SCC 22 (IJI and Paramountcy)

**Leading case on IJI and Paramountcy; Since this case, SCC has been trying to pull back/narrow the scope of IJI; Reverses LaFarge 🡪 prov law must impair a vital and essential part of the federal entity (not just have effect); New unwritten principle of subsidiarity; NOW HAVE POSSIBILITY THAT PROVINCES CAN CLAIM IMMUNITY FROM FEDERAL LAW = complete opening up of IJI Doctrine (every head of power in s 91 and s 92, in theory, could be argument for IJI immunity)**

**Facts:** Bank had permission to sell insurance. Claimed to be immune to AB insurance legislation because banks are federal entities and the insurance was essential to their business. Claimed IJI and, in the alternative, Paramountcy.

**Issue:** (1) Is CWB immune from the AB law or (2) is the AB law inoperable for CWB?

**Analysis:**

* Banks = fed ; trust, insurance, securities companies = prov
* Trying to argue that selling of insurance is banking 🡪 SCC disagrees, it’s simply business
* “In *theory*, **IJI is reciprocal**: it applies both to **protect prov** heads of power and prov undertakings from fed encroachment, and to protect fed heads of power and fed undertakings from prov encroachment.”
  + BUT in reality, it is **asymmetrical** – encroach fed laws just get read down w/o doctrinal discussion 🡪 undermines principles of **subsidiarity** = decisions are best made at level of gov't that is closest to the citizens affected.
  + The ‘dominant tide’: **court should favour, where possible, ordinary interpretation of statutes enacted by *both* levels of govt**
    - in absence of conflict, should avoid blocking application of measures enacted in furtherance of public interest 🡪 **IJI should be used sparingly**
    - IJI (of a federal entity) is **less likely to be found** where the **federal legislation is permissive**, rather than exhaustive 🡪 intention that complementary provincial law will be applicable.
* Binnie: With IJI, courts should **stick to precedent** – limit scope and application of IJI to what’s already been done (preference for pith and substance)
  + Federal things, people, works and undertakings : creatures, distinct from heads of power.
  + **Categories** of IJI: Fed transportation, airplanes, communication, maritime, Aboriginal, fed corporations and institutions.
* Idea of “cores” and broad application of IJI are inconsistent with federalism -- should use incremental approach.
  + Introduce uncertainty, make federalism more rigid and centralised
  + Other level of govt cannot even have incident effect on cores = risk of creating legal vacuums
* Provincial legislation must **impair** federal legislation 🡪 simply “affecting” is not enough because does not imply adverse consequences
* Must be **federal entity and a provincial statute that IMPAIRS a vital and essential part of the undertaking*.***
  + - Try to pin it on “internal management”(*Bell*) – easy argument for feds to make.
* Binnie says *McCutcheon* Paramountcy rules are still fine 🡪 case just adds a new application.
  + Onus is on party relying on doctrine to demonstrate incompatibility because can’t comply with both or frustration
* IJI is difficult so you can **argue Paramountcy first**.
  + Edinger: BUT may need IJI first --can’t have conflict w/o a valid law.

**Paramountcy part of this case**

Canadian Western Bank makes clear is that there is more than one kind of **conflict**: duplication is not one (remember, **conflict =** judicially created concept: court finds conflicts based on definitions that they change over time)

2 kinds of ways to establish conflict**:**

* If one statute says do x and another says don't do x, then you have a **conflict of operation**
* **Frustration of purpose** if operation of provincial statute frustrates operation of federal statute, provincial statute loses
* No direct conflict, so no reason why banks shouldn’t have to comply -- **didn’t affect fed Act’s purpose or operation**.

**Decision:** No IJI immunity (insurance not a core service) and no conflict for Paramountcy to apply. CWB loses.

## Canada (AG) v PHS Community Services Society [2011] SCC 44

**Expressly continues possibility/hope of a provincial entity claiming IJI from application of federal law; only case to reach SCC in which application of IJI to provincial head of power has been claimed**

* Insite which is provincial, claimed immunity from application of federal (crim) law (not the basis on which court allowed Insite to keep open)
* What this case says is: if one level of argument has legislation that is only merely incidentally affecting the other govt level's head of power, usually fine. But if severe encroachment: IJI immunity
  + Edinger disagrees: the other legislation should be struck down
* Insite a provincial entity > it's like a hospital/health facility; whole existence and operation based on being exempt from criminal legislation applying to it
* Tried to claim exemption from federal criminal law on the basis that Insite is a heath facility and thus falls under provincial jurisdiction
  + ss 4(1) and 5(1) impair province’s ability to make decisions about health care services 🡪 IJI immunity
* for IJI to apply, **conflict between laws is not necessary nor is exclusive authority necessary**
* **but** concern regarding precedent: IJI has never been applied to **amorphous subject**
  + what is the **core** of “health”? 🡪 no one head of power: used 92(7) hospitals, (13) prop and civil rights, (16) local and private matters
  + thus, delivery of health services does not constitute a protected **core** of provincial power over health 🡪 no jurisprudence on it, and courts reluctant to identify new areas where IJI applies
  + **doctrine of IJI is narrow** and Insite trying to apply it to *broad* and undefined “core”
* Clear that SCC doesn't like it IJI (para 62, 63, 64) 🡪 using CWB as guide
  + IJI inconsistent with pith and substance doctrine and the more inclusive approach of concurrency and overlap
  + At tension with emergent practice of cooperative federalism
  + Risk of creating legal vacuums because of “no go” zones
* IJI not found for Insite, but s 7 rights of users breached by Minister refusing to grant extension --> court orders minister of health to give an extension (didn't just give a declaration because couldn't trust govt to do as asked, so order; unusual)
* Reciprocity continues: Provinces can claim IJI but before apply IJI courts should see if issue can be resolved on some other basis

 IDENTIFY PROVINCIAL ENTITY RATHER THAN RELYING ON HEAD OF POWER (*When you dont have an entity, have to go to core and claim a head of power* - dealt with in Ryan Estate)

* + Would have been much more difficult to say that no IJI if stated that Insite a provincial entity
  + But because started to slip into heads of power (and couldn't find a specific head of power so argument failed; used s 7 instead)

## Marine Services International Ltd v Ryan Estate [2013] SCC 44

**Sets out how to approach IJI when no federal entity anywhere to be found; Latest and last word on IJI from SCC**

**Issue**: whether bar in provincial argument precludes person barred from collecting under federal

**Analysis:**

* Workers’ compensation schemes are set up so that in the event of an injury, automatic compensation occurs without the need to establish fault on part of the employer
  + Historic trade-off: takes away a worker’s right to sue in tort but gives them automatic compensation
  + These schemes fall within provincial jurisdiction and apply even if workplace accident happens outside of province
* Other statute MSCA applies to seamen engaged in home-trade and foreign voyages but does not apply where a seaman in entitled to claim compensation under any provincial workers’ compensation law
* **In Ordon court stated that maritime negligence law is part of core of federal power under s 91(10) – Navigation and Shipping** 
  + Ryan Estate trying to argue that IJI should apply because provincial workers’ compensation scheme (WHSCA) eliminates access to ability to sue under maritime negligence law (fed) and so trenches on federal core
  + Court agrees but states that new test for IJI applicability is **impairs, not affects**
    - WHSCA neither alters uniformity of Canadian maritime law nor restricts Parliament’s ability to make cause of action determinations
    - Can still receive compensation, just under a different scheme
    - Neither IJI nor Paramountcy apply because the two statutes can operate harmoniously

### TEST FOR WHEN THERE’S NO FEDERAL ENTITY

1. Always better to use a federal entity, but if you don’t have one, have to use a head of power
2. Have a head of power 91(10) – Navigation and Shipping B

* Look for head of power for which there is a **precedent** - SCC likes sticking to precedents (In this case had Ordin Estate so home free)

1. Once you have precedent that allows you to claim head of power has IJI, two stage process
   * + Does provincial statute **trench on core head of power**?
     + Once it trenches, have to decide whether that core of that head of power is **impaired**
     + (Edinger suggests that impaired = flexible and subjective; can lie on spectrum from sterilisation to Effect (but effect too little))
     + Paragraph 60 =discussion of impairment : "**seriously or significantly trammels the federal power; need not paralyse it but may be serious**" = judgement call (have to prove something relatively negative)
     + Will never know when it's "sufficiently serious"; will never know which way the court will swing but should know the process and the arguments
2. Paramountcy 🡪 is there **frustration of purpose? Express contradiction?**

### IJI Summary

Options when acting for a federal entity/federal head of power

1. Try to refer to traditional version of IJI first (pre CWB)- for federal IJI
   * + Find/identify federal entity
     + Ask and answer what's the vital part of this operation? Vital part of this entity
     + Persuade the court that application of provincial statute impairs that essential or vital part of federal entity

* **most federal entities carrying on business in a province, subject to laws in province; not everything can be IJI, only some things may impair the MOST IMPORTANT PART of the undertaking and that's what you argue should be immune**

1. If you can't find federal entity, use new version of IJI
   * + Find federal head of power that you may be able to use and find a precedent that uses that head of power in that way (91(10) is a good choice)
     + Try and identify the core of it (no precedents on this; will have to get creative and argue this)
     + Persuade court that application of provincial law impairs the core of the head of power (trenching, meh; has to have serious negative effect on core)

* 1. If arguing for provincial, same thing as above (try to argue traditional way first and try to keep them focused on the fact that you have a provincial ENTITY because much easier to argue the impairment)
  2. If no provincial entity, Edinger thinks you're pretty screwed cuz no precedents regarding provincial heads of power and their cores; but still worth a try

Question is always how the entity operates and how the impairment affects the vital operation of that entity

**Applying IJI to the Provinces Examples**

Enbridge and KinderMorgen : pipelines crossing provincial borders so federal entity

BC Ferries: provincial because only does provincial waters (Crown Zellerbach case)

* 1. Can BC use IJI against pipelines? Probably not because would impair the federal undertaking
  2. But BC could charge high permit fees, taxes etc once pipeline inside BC because under provincial jurisdiction
  3. In terms of the route of the pipelines: province could try to argue on their behalf because again, inside the province (if affecting health or environment of those in the province)-- can always bargain to try and get a better deal
  4. Provincial legislation would have to IMPAIR the federal undertaking for there to be immunity...we just don't know when "mere effect" crosses into impairment

* 1. For aboriginal land = they don't have any particular, specific "veto" or legit constitutional right that overrides federal plans automatically
     + If route goes over or through Band lands, unless courts/govt have TOLD them the land is theirs, a claim to the land will only give you footing to bargain (just like anyone else)

* 1. Usually, feds only have control over goods once in the flow of trade but what 92(10)(a), (b), (c) give feds the Constitutional right to "reach back" into the production stages (what provinces usually control)

# EXTRATERRITORIALITY

* "in the province" "within the province" etc = ET built into the Constitution
* **Only applies to provs🡪 Parliament has power to legislate extraterritorially (*Statute of Westminster*)**
  + Reason for this: desire to create water tight compartments in the C
  + Development of Interjurisdictional doctrine complicated this
* **Ways of avoiding a complaint that Provincial statute UV (invalid or inapplicable)**
  + 91(2) 🡪 Burns Foods
  + Distinguish between derogation from civil rights and creation of civil rights ; province can't derogate FROM civil rights (destroy civil rights for someone outside the province)
    - i.e. generally not an issue to create benefits for those outside the province.
    - Avoid issues by pointing out how it does apply within prov; don’t directly regulate things outside prov.
* **Churchill Falls** : very important case that solved a lot of ET problems
  + ET was very difficult in Canada up until then because two different "lines" of judgements in two different cases that were incompatible with each other
  + In one case, PC seemed to take approach that provincial legislation will be UV unless all the elements regulated contained within the province (*RBC v the King*, 1930: There can’t be ANY ET effects at all.)
  + In the other case, PC: municipal institutions in the province used pith and substance; the ET parts were "merely incidental" (*Ledore v Bennett*, 1939)
  + This case bring the two together: granted statutory lease to Churchill falls

Involves **validity** and **applicability**:

**Valid but inapplicable** 🡪 Unifund

**Invalid + Tangible 🡪** Churchill

**Invalid + Intangible 🡪** Imperial Tobacco (meaningful connection test)

Giant Test for Assessing Extraterritoriality **(*Imperial Tobacco*)*:***

1. **Validity**

**🡪** When legislation is challenged as ET, first look to **pith and substance** (*Churchill*)

* To determine P&S may look at **purpose and effect** of legislation
* Determine which **head of power** fits under
* If valid through *Churchill*, continue on. If not, stop analysis 🡪 invalid.

1. **Applicability**

**🡪** You must determine if the P&S of the legislation respects territorial limitations head of power

* **Tangible P&S: location** is critical (valid if in prov, invalid if not).
  + But what if the tangible item moves? No answer yet.
* **Intangible P&S:** apply *Unifund* test to determine **applicability** 🡪 **meaningful connection** (real & substantial).
  + Use the four considerations given in *Unifund*.
  + In exam, use “meaningful” as much as possible, rather than real/substantial.

**Note**: If it all comes back as valid, incidental ET effects are irrelevant.

**\*\*\*** Affirms *Ledore v Bennett*.

Churchill Falls (Labrador) Inc v AG Newfoundland, [1984] 1 SCR 297 **(Validity)**

**If pith and substance of a law is within the province, extraterritorial effects are unimportant.**

**Facts:**

* NFLD leased water and rights to CF, with a certain amount of hydroelectric power reserved for NFLD.
* QB bought the rest of the power.
* NFL needed more power, asked Hydro Quebec for more, HQ says nope
* So NFL repeals Reversion Act that grants all the leases to churchill falls = company ends up a shell, has no assets to do the job
* It was valid on face for affecting property within the province.

**Issue:** Was the Reversion Act invalid due to extraterritoriality?

**Analysis:**

Original ET Test**:**

1. **Court looks to pith and substance of the Act = civil rights**
2. **But *where* are these civil rights located**?

* No principle or test given to determine where the civil rights are located.
* SO: when arguing location of civil rights, no guidance but try to claim it’s where you need it.
* If they’re **located within the province, ET effects are unimportant.**
* **If outside prov, the Act is invalid**.
* Performance of contract is **in** Quebec 🡪 colourability, effecting QB’s rights but pretending it’s NFLD.

**If the legislation dealing with civil rights, don't have an actual location; court has to decide where they're located**

* This is an example of SCC looking at prov’s **motive**, instead of **just** the legislation’s object/purpose/effect.
* SCC finds that **incidental effects are unimportant** > *Ledore* line of reasoning.
* An act that aims at ET effects cannot be deemed intra vires because of correct form.
  + **colourability** in order to conceal an unconstitutional objective will not fly (obvs)

**Decision**: Act is invalid because of its colourability 🡪 attempting to derogate Quebec’s rights .

**Extra:**

* property and civil rights is disjunctive
* **Note: This case is a good example of colourability – SCC looked at govt motive and it was aimed outside a border.**
* **The fact that the parties agreed for the contract to be governed by laws of Quebec and decided in Quebec courts isn't actually binding**

## Morguard Investments v De Savoye [1990] [SCC]

**Converted federalism into justiciable CL principle**

* Case in between Churchill and Unifund
* Had nothing to do with Constitutional law but used in Unifund and in Imperial Tobacco

**Issue:** Should BC allow and recognise a court order or judgement from another province

**Analysis:**

* AB judgements are foreign (common law rules)
* Under common rules, in order for BC to recognise a foreign judgement, two criteria had to be met:
  1. Judgement finally conclusive
  2. Jurisdiction in international sense = if the action was started in AB and defendants served in AB, then criterion met
* De Savoyes stopped their mortgage payments, Morguard goes after them
* By the time Morguard sues, De Savoyes moved to BC
* SCC has to decide whether BC should recognise the AB judgement
* SCC decides to open things up a little bit; we should allow other judgements because of
  + 1. **Comity** = enlightened self interest in light of federalism in order to uphold **order and fairness** because we should give full **faith and credit** to a sister province as a form of **due process**
    2. We should do this whenever there is a clear/**real and substantial connection** between cause of action and the province

**Hunt** -- ET or Morguard Recognition Test and court decides to go with latter

**\*\*\*** Edinger doesn’t like Unifund. She thinks judge picked and chose which aspects of the relationship to look at and failed to look at the relationship to Ontario.

Unifund Assurance Co v Insurance Corp of BC, [2003] 2 SCR 63 **(Application)**

**Real and substantial connection test for ET if there is overlapping legislation between two jurisdictions or when PF wants to sue in their jurisdiction someone who is outside the jurisdiction.**

**Facts:**

* ON couple is in BC, gets in accident with BC driver. ON couple gets insurance payments from their ON company and ICBC pays out insurance to them as well.
* Unifund tries to recover from ICBC as per ON legislation but ICBC claims it doesn’t affect them as non-ON company. This is a statutory cause of action.
* Under ON Statute, Unifund can claim SABs from the insurance company of the defendant (ICBC in this case)
* Under BC statute, ICBC doesn't have to pay, under ON statute, ICBC has to pay
  + Both statutes are valid and action commenced in ON under ON law...so now what because provincial law against provincial law

**Issue:** Is ICBC subject to the ON insurance legislation? Or no, because that would be an ET application?

**Analysis:**

* Conflict of laws cases: Where do you bring the action? Whose laws should court apply?
* Overall question: **Which province’s statute has the closest connection to the set of facts for the case?**

Real and substantial connection test**.** Four considerations:

1. The territorial limits on the scope of provincial legislative authority **prevent the application** of the law of a province to matters **not sufficiently connected** to it.
2. What constitutes a “sufficient” connection **depends on the *relationship* among the *enacting jurisdiction*, the *subject matter* of the legislation and the *individual or entity sought to be regulated*** by it.
3. The **applicability** of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the **requirements of order and fairness** that underlie our federal arrangements (from *Morguard*).

* **Order** in the federation would be ***undermined*** *if competing exercises of regulatory regimes are permitted*
* **Fairness** to the *out-of province defendant*
* However, these points weren’t clarified well – ambiguous meanings.

1. Principles of order and fairness, being purposive, are **applied flexibly** according to subject matter of legislation.

* **Invoke Unifund when there are overlapping CONFLICTING provincial laws that appear to apply out of province OR if there aren’t conflicting laws but P tries to apply law from their own jurisdiction to someone who appears outside of that jurisdiction.**

Binnie: There must be a **constitutional principle** for overlapping prov legislation🡪 **provincial paramountcy rule.**

**Decision**: Unifund can’t recover because accident lacks a sufficient connection to ON – can’t use ON legislation. ICBC does not carry on business in ON, nor is it authorized to. The accident took place in BC. ON law does not apply to ICBC.

**\*\*\*** Edinger likes Imperial Tobacco. It uses Unifund (which she hates) but does so in an acceptable way.

## British Columbia v Imperial Tobacco, [2005] SCC 49

**Reconciles *Churchill* and *Unifund* to give current approach to ET analysis.**

**Facts:**

* BC passes Act so they can sue tobacco companies for breach of duty to customers and recover costs for health care for smoking diseases. Tobacco companies claim the Act is invalid for ET (among other reasons).

**Issue:** Is the Act invalid because of extraterritoriality? Did Unifund override Churchill?

**Analysis:**

* Analysis must centre on **pith and substance** 🡪 *Churchill*.

### Full ET Test

**1.**  Validity

* + Find the Pith and Substance and ID the head of power from s. 92 (*Churchill*).
  + Can look to purpose and effect of legislation to determine P&S

**2.** Applicability

* + If P&S is **tangible** (activities, property, etc in the province; can touch see and feel)
    - Where is it located? Within province or ET?
  + If P&S is **intangible** (civil rights, contract rights, etc)
    - look for a **meaningful connection** between enacting territory, subject matter and persons/entities subject to it, to find location (*Unifund*.)
    - try to use wording of “meaningful” and **not** real/substantial when in exam.
* **If law is valid, incidental extraterritorial effects are irrelevant**.
* This case reconciles *Unifund* and *Churchill Falls*.

Application to this case: The P&S is 92(13) Property and Civil rights --> valid prov power. The subject matter is intangible --> go to meaningful connection analysis. Court finds a meaningful connection: it is to recover money spent by BC on BC residents for diseases caused by tobacco companies’ products given to BC residents.

# Summary for ET

* Approach always the same
* When applying test for **intangible** subject matter or for application of prov law to someone out of the province = looking for real and substantial connection TO THE PROVINCE
  + Imperial indicates that there's no scientific approach -- list **all** of the potential connections so that the court can consider all of them
  + Weight of the connections can and will vary from case to case = difficult to predict what the outcome will be
* Even though SCC decided that BC Act valid (in Imperial), tobacco companies didn't give up = argued Act didn't apply to them
  + Their argument was that all of their activity was outside of the province (manufacturing etc) so BC Act/laws cannot apply to them = LOST
  + Damage has to happen IN the province = once that happens, have full tort; not just about negligent manufacturing