Constitutional Law FALL 2016 Edinger

Edinger’s Tips 3

Roadmap 3

Constitutions 3

Colonial Origins to Autonomy and Independence 4

The Royal Proclamation, 1763 4

Colonial Laws Validity Act, 1865 4

Statute of Westminster, 1931 4

Relationship between Colonial Laws Validity Act and Constitution Act 1867 4

Statutory Interpretation Cases 5

Constitutional Procedure 5

Ordinary Litigation 5

Lis Inter Partes 5

Declaratory Action 6

References 6

How to bring a Reference to court 6

Constitutional Question Act, RSBC 1996, c 68 6

Pith and Substance Analysis 7

Peace Order and Good Government 8

Russell v The Queen (1882) 8

AG Ontario v AG Canada 1896 “Local Prohibition Case” 13

#1 Emergency Power 9

Challenging Federal Legislation based on Emergency Power 9

Fort Frances Pulp & Paper v Manitoba Free Press (1923) FEDERAL valid 9

Reference Re: Anti-Inflation (1976) FEDERAL valid 10

#2 National Concerns 11

Challenging Federal Legislation based on National Concern Doctrine: 11

Ontario (AG) v Canada Temperance Federation (1946) FEDERAL valid 12

Johannesson v Mun of West St Paul (1952) PROVINCIAL invalid 12

R v Crown Zellerbach Canada (1988) FEDERAL valid 13

Criminal Legislation 14

Federal Criminal Power 14

CHALLENGING FEDERAL CRIMINAL STATUTE 15

Ref re Validity of Section 5(a) Dairy Act (Margarine Reference) (1949) FEDERAL invalid 15

RJR MacDonald Inc v Canada (AG) (1995) FEDERAL valid 15

R v Hydro Quebec (1997) FEDERAL STATUTE 16

Reference re Assisted Human Reproduction Act (2010) FEDERAL 17

Provincial Criminal Power 18

DEFENDING PROVINCIAL LEGISLATION AS NOT UNDER FED CRIMINAL POWER 91(27): 18

CHALLENGING PROVINCIAL LEGISLATION AS INVADING FED CRIMINAL POWER 91(27): 19

Dupond Case - AG Canada v Montreal (City) (1978)<CHARTER PROVINCIAL valid 20

Rio Hotel Ltd v New Brunswick (Liquor Licensing Board) (1987) PROVINCIAL valid 20

Chatterjee v Ontario (2009) SCC 19 PROVINCIAL valid 21

Goodwin v BC (Supt of Motor Vehicles) 2015 SCC 46 PROVINCIAL valid 22

Quebec v Canada (2015) FEDERAL valid 22

Regulation of the Economy s 91(2) 22

Federal Regulation of Economy Power 23

Provincial Regulation of Economy Power 24

Citizens Insurance Co of Canada v Parsons (1881) PROVINCIAL valid 24

Canada v Eastern Terminal Elevator Co (1925) FEDERAL invalid 25

Carnation Co v Quebec (Agricultural Marketing Board) (1968) PROVINCIAL valid 25

Manitoba (AG) v Burns Foods (1975) PROVINCIAL invalid 26

Labatt Brewing Co v Canada (1980) FEDERAL invalid 27

GM v City National Leasing Ltd (1989) FEDERAL valid 27

Reference re Securities Act (2011) FEDERAL invalid 29

Extraterritoriality 30

Arguing Invalid PROV Legislation Due to Extraterritoriality 30

BC v Imperial Tobacco (2005) PROVINCIAL valid 31

Unifund Assurance Co v ICBC (2003) SCC PROVINCIAL invalid 32

# Edinger’s Tips

* Say the argument you would make, and then evaluate the argument
* Acknowledge that some parts of arguments may be flawed. Don’t set out all your arguments AND ALL THE OTHER ARGUMENTS. Instead, just address the other parties’ arguments inasmuch as it addresses your own weaknesses and enhances your argument. Don’t go through every counterargument possible. Don’t make arguments FOR the other party.
* Know how you’d have to argue a statute or provision to be PROVINCIAL, or to be FEDERAL – make checklists – both sides for each head of power.
* Give names for cases – just a recognizable name (e.g. General Motors, or Securities Act Reference, etc…)
* Don’t waste time copying into the answer the facts given in the problem… it is better to put your analysis. The professor sets the facts so knows them. What you ought to be doing is working with the relevant facts.
	+ Only incorporate the facts into your application of the principles.
* Don’t just lay out all of the law, actually apply it/say how you would apply it.
* Every case will have multiple issues. State the relevant principles and apply the law to the facts.
* Deal with it issue by issue. Don’t list the issues, then address the issues. List the first issue, address it. Then the second issue, and address it. Etc…
* Depends in large part on how the legislation is drafted – In all cases in the course you must look at how the legislation is framed, not just what the provinces are doing. This makes it key that you understand the meaning of the legislation in the case…

# Roadmap

* Find a plaintiff and defendant
* What remedy are you seeking (applicability/validity/operability)
* Characterize the legislation – sum it up – make it specific indivisible
	+ What is the subject matter of the legislation?
	+ Is it a new subject matter?
	+ Has it already been allocated in a case as federal or provincial?
* Make an argument and justify it
* Consider counterarguments
* Go through all of the processes (for Federalism must begin by looking at validity then the rest)

# Constitutions

A constitution creates the institutes of government AND regulates relationships between institutions of the government, the government itself, and citizens.

**Federal constitutions** involve a division of legislative jurisdiction between the federal government and the provinces, in which some matters belong to the federal government, and some to the provincial government.

**(1)** A central government with some authority over the entire geographic region

**(2)** The entire geographic area of the country is divided into geographically identifiable units or regions such as provinces,

**(3)** Legislative jurisdiction [or prescriptive jurisdiction] is divided between the central government and the provincial/unit governments,

**(4)** The distribution or division of legislative jurisdiction is governed by a written or rigid constitution**,**

**(5)** The constitution has rules to deal with conflicts between the central and regional laws,

**(6)** There has got to be some form of judicial review that decides whether people are complying with or breaching the constitutional law.

**What are the sources of our constitution?**

1. Constitution Acts 1867 and 1982, Imperial Statutes
2. Common law
3. Custom, convention, and usage
4. Values

#1-2 are justiciable; #3-4 are only justiciable if the government legislates on them

# Colonial Origins to Autonomy and Independence

## The Royal Proclamation, 1763

**Established colonial govts, sets up govt and geography of the colonies**

(1) Royal protection for anyone inhabiting or resorting in the said colonies.

(2) Enjoyment of the benefit of the laws of England.

(3) Governors of colonies have power to erect and constitute courts of judicature and public justice for the hearing and determining all causes as near as may be agreeable to the laws of England.

(4) Appeals can be made to Privy Council.

## Colonial Laws Validity Act, 1865

**This Act removed any inconsistency between local/colonial and British/imperial legislation.**

**I**t confirmed that colonial legislation passed in the proper manner had full effect within the colony, limited only to the extent that it was not in contradiction with any Act of Parliament that contained powers which extended beyond the boundaries of the UK to include that colony.

## Statute of Westminster, 1931

**Established legislative independence for dominions. Recognized status of some colonies as nation states (Canada), gave treaty-making powers.**

*s. 2:* Canada is free from all British statutes except the BNA Act b/c it is protected by the colonial validity act. The
 British will not pass any statutes over Canada unless asked to.

S. 3*:* Canada can pass laws extraterritorially (i.e. can make j-walking in Paris illegal).

* Enabled by Imperial Parliament
* England could only legislate for dominions if they were requested to (exception: Imperial statutes)
* Did not give legislative power for BNA 1867 (this did not come until 1982)
* Repeals Colonial Laws Validity Act
* Colonial Statutes can modify Imperial Statues with exception of *BNA Act*

#### Relationship between Colonial Laws Validity Act and Constitution Act 1867

* ***Colonial Laws Validity Act:*** When the Parliament in London is operating in its Imperial capacity and enacting statutes, if there is a conflict between the Imperial statute and the colonial statute, the Imperial statute wins
* ***Constitution Act 1867:*** The BNA Act is a paramount Imperial statute
* If the Imperial statute is the constitution of a dominion and the proper procedures are followed in the proper circumstances, then one can reform or amend the constitution
* But there are no amending procedures included in the Constitution Act 1867
* Thus, this Act cannot be amended in Canada, and in order to do so one must petition the Queen

We didn’t become completely independent until 1982, when we finally got amending procedures in the Constitution

# Statutory Interpretation Cases

|  |
| --- |
| Edwards v Attorney General (Canada) 1930 |
| **Question**: Does “qualified persons” of s.24 of BNA Act 1967 include women? Can women be summoned/become members of the Senate? 🡪 YES**Reasons**:* Reference from member of the public
* External Evidence – legal systems (women in public office) 🡪 No
* Internal Evidence
* Original meaning: both sexes
* Some sections used “persons” and “males” indicating they are distinct, s.11 requires persons to include women

**Ratio**: * **Living tree approach to interpretation: Interpretation must be flexible. The original intent of the statute is capable of growth and expansion within its natural limits.**
* This is how you approach all interpretation of the Constitution Acts. Interpret words to fit current times.
 |

|  |
| --- |
| Reference re: Secession of Quebec |
| * **Unwritten principles (federalism, democracy, rule of law, respect for minorities) can be used to fill gaps in the text.**
* Must consider unwritten principles of constitution, which are found between lines of Constitution and constitute substantive limitations upon government action.
* None are absolute or can trump the others. Democracy means more than simple majority rule – exists in the larger context of other constitutional values. Now you can make arguments to courts based on these principles.
* They are not exhaustive. Can be used in any division of powers or Charter case (supplement the constitution)
* Use in ANY Constitutional case as support
 |

# Constitutional Procedure

**Mechanics of Constitutional litigation:** Starting litigation - ***ordinary litigation*** (lis inter parties or declatory actions) and ***references.***

## Ordinary Litigation

### Lis Inter Partes

* Dispute between two parties in which a statute is relevant to outcome of the action.
* Defendants can always challenge the constitutionality of a provision *Big M Drug Mart*
* Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid

|  |
| --- |
| Canada v Downtown Eastside Workers (2012) Lis Inter Partes |
| F: Constitutional challenge to the prostitution references of the *Criminal Code***Constitutional Challenge Requirements:** **(1) Serious Justiciable Issue;** **(2) Plaintiff’s genuine interest OR directly effected;** **(3) No other reasonable/effective means** **Not a strict test, not rigid rules. Weighed cumulatively and in light of their purpose.**  |

### Declaratory Action

Apply for standing to seek a declaration in order to call into question (as *ultra vires*) a statute or provision of a statute. Whether or not you are granted standing is subject to the discretion of the Court*.*

Minister of Justice v Borowski, [1981] 2 SCR 575:

**Public Interest Standing Test (declaration of invalidity):** To establish status as a plaintiff in a suit seeking a declaration that legislation is invalid (1) must be a serious issue as to its invalidity, (2) must be affected by legislation directly OR have genuine interest as a citizen, AND (3) no other reasonable or effective manner of bringing the suit before the court.

## References

* Allows the federal executive (Governor General in Council) to ask the SCC any question that it felt like. The Court HAD to answer the question.
* There were serious defects in the Reference Power as initially constituted: (1) No one would challenge/argue the questions put forth, (2) No reasons were required for decisions, (3) The provinces hated it
* The provision was not struck down – instead it became the case that the Lieutenant Governor could do the same and pose questions to the provincial or provincial supreme court
* There have been times where the SCC has altered the questions being asked so that they are more favourable to answer
* However, the Courts attempt to do their best in terms of making a reference more like ordinary litigation
* **It does not become a precedent when decided – does not bind subsequent courts.**
* Another difficulty is that the Governor General in council can put a tough situation in the hands of the SCC since the GG doesn’t want to make the decision
* Also, does not have the benefit of seeing the arguments at lower courts, or the decisions of lower judges

### How to bring a Reference to court

#### Constitutional Question Act, RSBC 1996, c 68

**1**. If Lieutenant Governor in Council refers something to CA or SCC, that court must hear it.

**2.** An opinion, with reasons, must be given. Dissenting justices can also give reasons.

**3.** **If matter involves constitutional validity of an Act, the Attorney-General of Canada must be given notice.**

**4.** **BC (and other provinces, if they have an agreement w/the fed govt) must also be notified.**

**5**. CA or SCC can order that people or groups who would be interested in the reference be notified and heard.

**6**. You can appeal the outcomes of references like a normal case.

**7.** The reasons of the court must be published in the Gazette.

**8**. “The Notice Provision”

Definition of “constitutional remedy” (🡪 s. 24(1)) and “law” (enactment w/in meaning of Interpretation Act)

Law can’t be declared invalid and no remedy can be given until AG of BC and Canada are notified.

Notice must be in accordance with this section and there must be at least 14 days notice.

If AG of BC or Canada is involved in proceedings, AG is a party and has the same rights as any other party.

**9.** (1) SCC can hear an action from AG of BC or Canada to determine validity of an Act, even if no further relief is sought. (2) It is sufficiently constituted if both AGs are parties and (3) it can be appealed like a normal case.

# Pith and Substance Analysis

**Pith and substance analysis (***RJR***):** Dominant purpose of a statute, legislative intent in enacting the statute.

**1:** **Object and purpose** – objective

* + Based on legislative history
	+ Evil aimed at
	+ Form and content of legislation
* **2: Effect of the statute** – what does it accomplish? The way in which it will operate
	+ Legal effect – always considered - determined by looking at the statute, always looked at
	+ Practical effect – optional… sometimes the actual effect varies from the legal effect
* **3:** **Ulterior Motive** (actual intent of the government)
	+ If motive differs from proposed effect, the action is called **colourable** – this is a pejorative term which means that the legislature is trying to fool the judiciary about the intention of a bill they are passing
	+ The **doctrine of colourability** is the idea that when the legislature wants to do something that it cannot do within the constraints of the Constitution, it colours the law with a substitute purpose, which will still allow it to accomplish its original goal.

# Validity of a Statute

**When challenging validity, you must prove it does not fit into the other group’s box and then that it does fit into your box. Problem: boxes change in size and scope throughout time, boxes are vague.**

**3 components to general interpretation of validity:**

1. Precedents - common law – how have they been interpreted before? However, this is rarely binding and it is always possible to modify the scope.
2. Ordinary rules of statutory interpretation
3. Theories of federalism - values and principles, policies

**Considerations in interpreting the actual statute**:

1. External evidence
2. Internal evidence
3. Pith and substance (object and purpose; legal and maybe practical effect)
4. Actual motive of government (colourability issue)

## Peace Order and Good Government

**POGG:** Introductory clause to s.91 treated as a head of power in itself.

**Present scope of POGG (present day):** there are two branches to POGG –

(1) Emergency power,

(2) National concerns doctrine

**Gap branch:** Gap between feds and provincial heads of power counts as POGG *Russell*.

**POGG is a residual clause – it can’t be both a s 91 or a s 92 issue, it needs to be ONE OR THE OTHER.**

***The Local Prohibition case* placed limits on the POGG power: one can only rely on POGG for matters of national dimensions, and cannot use POGG where the province has power to legislate.**

|  |
| --- |
| Russell v The Queen (1882)  FEDERAL valid |
| **Facts**: *Canada Temperance Act* allowed local municipalities to vote on whether they wanted to ban liquor by referendum. P charged with selling liquor. **Russell Argues**: Ultra vires the federal government* + ~~92(9) licenses to raise revenue for provincial/local/municipal purposes~~ NO not a fiscal law
	+ ~~92(13) property and civil rights~~ NO 🡪 dealing with public order/safety
	+ ~~92(16) all matters of a merely local/private nature in province~~ NO 🡪 objective for uniform national legislation to promote temperance

**Valid 🡪 intra vires the federal government under** **POGG as an umbrella 🡪the broadest POGG ever got. If it doesn’t fall in provincial jurisdiction, then automatically falls in federal jurisdiction.** * **This would mean that if a clause didn’t fall under 92, do not need to enumerate the 91 head a statute would fall under (could be anything)**
* **Requires: ONLY geographic distribution (minimal)**
 |

### #1 Emergency Power

* Originated in *Fort Frances*
* Federalism can be set aside in times of emergency – Feds can usurp prov powers *Fort Frances*

**Pre-conditions to the use of the emergency branch** (*Beetz dissent: Anti-Inflation and Crown Zellerbach)*

1. Legislation should be **temporary**
2. Parliament should **indicate clearly** that it is acting with a sense of urgency/emergency

**Existence of emergency can be judicially reviewed**: *Anti Inflation, Fort Frances*

* Parliament need only have a **rational basis / reasonable quantum of proof** for believing an emergency exists and establishing the initial emergency declaration

|  |
| --- |
| Challenging Federal Legislation based on Emergency Power |
| * **Commencement**:
	+ **Argue no rational basis** for determining emergency (*Anti-Inflation*)
		- Parliament was **not clear and explicit** (*dissent Anti-Inflation*)
	+ MUST be **temporary legislation** (*dissent Anti-Inflation*)
		- Even if it IS temporary, may not be **emergency** legislation *(dissent Anti-Inflation*)
	+ **Argue legislation doesn’t indicate Parliament** **acting out of crisis** (*Anti-Inflation🡪 public sector not bound, private sector bound)*
* **Continuation**:
	+ Remember: Can be extended after emergency if **no proclamation emergency over** *Fort Frances*
	+ Burden on challenger🡪 **present** **very clear evidence emergency ended** (*Fort Frances)*
	+ Not expertise of judiciary, therefore deference to the government
* **Use extrinsic evidence (admissible and necessary)**
 |

|  |
| --- |
| Fort Frances Pulp & Paper v Manitoba Free Press (1923) FEDERAL valid |
| **Facts**: P wanted to recover sums they paid for paper which were over controlled prices regulated by law in the *Paper Control Tribunal.* Held intra vires in lower courts. D – manufacturers P – publishers* 1917 GG made Order in Council authorizing fix quantity/price newspaper, tended to 1918. Then set up *Paper Control Tribunal*
* *War* *Measures Act* –exists from proclamation of war – proclamation of peace
	+ GG has power to do/authorize acts necessary for security/defense/peace/order/well-being of Canada
* Proclamation of peace hadn’t been issued (unsure) – War had ended

**Issue**: Could the Court review the continuation of the emergency in order to apply the emergency doctrine of POGG? YES **Ratio:** * **Court can decide whether emergency still continuing 🡪 very clear evidence required**
* **Creates emergency branch 🡪 gives great power to the federal government during times of war or extreme emergency, can infringe on provincial jurisdiction (and can be extended afterwards if no proclamation of peace)**
* In this case, issues of 92(13) **property and civil rights 🡪 POGG**
* **Federalism** can be placed aside in times of war
* **When is emergency legislation reviewable?**

🡪 When emergency is over, but regulation is continuing. * Heavy burden on challenger🡪deference to Federal government. **Clear evidence required for court to overrule Parliamentary decision re: emergency**
* Deciding whether an emergency continues is not expertise of judiciary
 |

|  |
| --- |
| Reference Re: Anti-Inflation (1976) FEDERAL valid |
| **Facts**: Federal government passed the *Anti-Inflation Act,* which set wage and price controls. Reference was to determine its validity, and whether it was binding on the Ontario public sector. *Anti-Inflation Act* set wage and price restrictions – applied to suppliers of commodities or services (public and private sectors) – gave exemptions to whole provincial public service sector, and large private sector organization**Issues**: * Is the AIA ultra vires feds s 91? YES 🡪 AIA upheld as emergency under POGG
* If the AIA is intra vires is the agreement between fed govt and ON govt effective under the AIA as binding on public sector in Ontario? NO

**Reasons:** (7:2 valid) * If this is an emergency, how can we leave out the prov public sector?
	+ **Provinces can contract in re public sector under their own administration**
* Is there evidence of a rational basis for the act as a crisis measure?
	+ **Only needs to persuade the Court that there is SOME rational basis for believing there is an emergency the legislation 🡪 use when an emergency has arisen to create legislation**
	+ **Court can decide whether there is truly an emergency**
* Serious national concern (inflation contrary to interests of all Canadians)
* **Emergency**:
	+ **Scope 🡪 indicates crisis**
	+ **Preamble 🡪 suggests crisis**
	+ **Temporary**

**Dissent (BEETZ)**: \***LEADING JUDGEMENT ON EMERGENCY DOCTRINE\**** AIA not intra vires feds – in provincial heads
* **NATIONAL CONCERN: effect is permanent**
	+ Any subject matter that gets permanently allocated to POGG national concerns must have a **singleness, distinctiveness and indivisibility** (cannot be broken into subsets)
		- Has to be distinct in identity from provincial matters with a degree of unity that makes it specific and indivisible 🡪 or would step on prov powers and make them meaningless
		- Inflation lacks specificity 🡪 carried into *Zellerbach*
* **EMERGENCY BRANCH: temporary alteration of distribution of powers**
	+ Must be **explicit** when using this power, wording must show its an emerg
		- *Anti-Inflation* does not pass this test, Hansard doesn’t show emerg, preamble doesn’t show emerg
	+ Must be **temporary**
		- Emergency legislation has to be temporary, but **temporary legislation does not mean that its emergency legislation**
* **To determine if it is a national emergency:**
	+ **1. How does the emerg doctrine operate in the Constitution?**
	+ **2. Was the legislation enacted to deal with emergency in Cost sense?**
 |

### #2 National Concerns

* *Local Prohibition 1896* – geographic distribution + subject matter
* *Canada Temperance 1946* – matter affects nation as a whole, creates ntl concern branch, double aspect ok
* *Johanesson 1952* – double aspect doctrine, subject matter=ntl, federal paramountcy, permanent new head
* *Anti Inflaction -* Dissent describes single, distinct, indivisible, national concern diff than emerency
* *Crown Zellerbach -* most thorough analysis, provincial inability test, confirms Beetz single distinct indivisible

**(1)** **Any subject can be a matter of national concern**, and it is very open ended.

**(2)** **If that subject is found by the court to be a matter of national concern, it is** **permanently federal** … it is as if you are adding enumerated heads to s.91 (*Anti-Inflation dissent, Zellerbach)*

**(3)** Can apply to **new matters** that did not exist at Confederation and to **prov matters** (local or private nature) that have become matters of national concern (*Zellerbach*)

**(1)** A matter **must** have a **SINGLENESS, DISTINCTIVENESS, and INDIVISIBILITY**

* Cannot be broken down into subsets
* Must be clearly distinguished from matters of a provincial concern (*Crown Zellerbach*)
* The impact on provincial jurisdiction must be reconcilable with the distribution of power under federalism in the Constitution (*Crown Zellerbach*)
* Must have a degree of unity that makes it specific and indivisible (*Anti-Inflation dissent*)
* When selecting label: not too broad, not too narrow (ex. environment v marine pollution in *Zellerbach*)
	+ **NOT SINGLE/DISTINCT/INDIVISIBLE**: **Inflation** (*Anti-Inflation*), **Environment** (*Crown Zellerbach*)
	+ **SINGLE/DISTINCT/INDIVISIBLE: Marine pollution (***Crown Zellerbach***)** special kind of pollution (distinct), difficult in determining the boundaries of internal/external water (indivisibility), distinguishable from fresh water (singleness, indivisibility)

(2) Consider **the effect on extra-provincial interests to determine if single/distinct/indivisible of a provincial failure to deal effectively with the control or regulation of intra-provincial aspects of the matter**

* Can use **provincial inability test** to determine this **BUT NOT ESSENTIAL** – used in *Aeronautics*, *Zellerbach*

**UPHELD**: **Temperance** 🡪 **public order and safety** (In *Russell*, *Canada Temperance Case*)

 **Aeronautics**, **marine pollution** ~~environment~~(*Crown Zellerbach*),

**NOT UPHELD**: Internet, Cloning (provincial jurisdiction: health; divisible: human cloning? Vegetable cloning? Cells **if it’s bad for society 🡪 criminal law is better**

|  |
| --- |
| Challenging Federal Legislation based on National Concern Doctrine: |
| 1. **Argue that it doesn’t have the** **geographic distribution**
	* Not a matter of national concern (*Local Prohibition Case*) – **must respect federalism & autonomy of the provinces**
	* Argue concern/matter/problem does not go beyond a local concern (*Canada Temperance case*)
		+ NOT inherently concerned with the dominion as a whole
2. **Argue that it doesn’t have the subject matter that requires Federal involvement**:
	* Argue it **fails the Provincial inability test** **provinces could deal with it** within their legislative authority effectively *Zellerbach*
		+ The federal govt cannot regulate local transactions just because they have an interest in them *(Eastern Terminal Elevators)*
	* Argue that it **would not be favourable to have the matter permanently under federal jurisdiction** (once POGG NCB exclusively federal – Aeronautics case)
		+ Ex. Would be better dealt with locally (more effective, efficient),
		+ **Incidental effect on Fed power doesn’t matter -** Argue that the province could legislate within its jurisdiction even if there was an effect on a s.91 head
3. **Argue it doesn’t** **demonstrate singleness, distinctiveness and indivisibility**
	* Can it be divided? Must have a degree of unity that makes it specific and indivisibile to be National Concern *Anti-Inflation dissent*
	* Must be clearly distinguished from matters of provincial concern (*Zellerbach)*
	* Argue it is TOO BROAD or TOO NARROW to be considered indivisible (ex. Environment (not indivisible) v Marine pollution (indivisible) *Zellerbach*
	* Doesn’t exhibit a degree of unity that makes it specific and indivisible? (*Anti-Inflation dissent*)
 |

|  |
| --- |
| Ontario (AG) v Canada Temperance Federation (1946) FEDERAL valid CREATES NATIONAL CONCERN BRANCH |
| **Facts**: Action against Federal Government 🡪 questioning validity of *Canada Temperance Act* (decision in *Russell)* **Argued**: (1) Either *Russell* was decided wrong (not emergency); or (2) if *Russell* was based on emergency, it was no longer an emergency 🡪**CTA UPHELD****Reasons**: *CTA* was upheld not because of an emergency (permanent not temporary legislation)* **True test** **is subject matter of legislation 🡪 if it goes beyond local interest, is concern of dominion as a whole it goes to POGG**
* If gov can legislate in 1878, also have power to re-enact provisions with objective of preventing a repeat of the same state of affairs
* Can legislate for prevention (emergency not necessary)
* Can take away power from the provinces
1. **Opened up POGG again. Not confined to emergency branch.**
2. **Upholds *Local Prohibition Case* –** meets subject matter standard.
3. **Creates national concerns branch 🡪 subject matter that goes beyond a local concern, inherently concerned with dominion as a whole (may touch on other matters within provincial jurisdiction – matters may overlap, there may be room for provincial aspects) (double aspect doctrine)**
 |

|  |
| --- |
| Johannesson v Municipality of West St. Paul [1952] 1 SCR 292 PROVINCIAL STATUTE ultra vires prov 🡪 aeronautics = Fed head of power |
| **Facts**: Appellant purchased land for floatplanes, then municipality enacted by-law per Manitoba provincial statute *Municipal Act* s.192 allowing municipalities to prohibit aerodromes in defined areas. **Legal History**: Trial: *intra vires provincial*, CA: affirmed *intra vires*. **Ratio**: * Affirms **subject matter** is sufficient to be put in **National Concerns Branch** (*Local Prohibition)*
* Airports - subject matter demonstrates **double aspect doctrine** – provincial legislation is invalid insomuch as it relates to aeronautics but other aspects (ex. building standards) may not be exclusively federal.

**Once subject matter under POGG, belongs exclusively to Federal government, provinces cannot legislate permanently.****Reasons**: * Previous case JCPC decided that aeronautics was in federal jurisdiction, matter of national interest (subject matter) 🡪 affects body politic
* **Pith and substance = property and civil rights 🡪 provincial BUT closely connected w/ aerial navigation 🡪 federal**
* **Provincial inequality 🡪 if some provinces refused to cooperate/accept uniform procedures for use of air space and ground facilities**
 |

|  |
| --- |
| AG Ontario v AG Canada 1896 “Local Prohibition Case” PROVINCIAL invalid |
| **Facts**: Ontario legislature enacted s.18 Ontario Act (An Act to improve the Liquor License Act), essentially the same as the Canada Temperance Act* **POGG cannot be used to justify legislation of local/provincial interest just because of geographic distribution (would destroy autonomy of provinces – must respect** **federalism**)
* Provinces should retain jurisdiction over matters provincial/local interest

**geographic distribution + subject matter (national concern)*** Was valid (**double aspect doctrine)**, but subject to **federal** **paramountcy** 🡪 that federal government wins.
* **Narrows POGG, must persuade court that subject matter is of national concern (national concerns branch)**
* **POGG is a residual clause, not an umbrella.**
* **Local matters can become matters of national concern. 🡪 evolution argument, used later in the *Securities* case**
 |

|  |
| --- |
| R v Crown Zellerbach Canada (1988) FEDERAL STATUTENational Concern Doctrine \* Singleness Distinctiveness and IndivisibilityProvincial Inability Test \* LAST POGG CASE |
| **Facts**: * Federal government enacted *Ocean Dumping Control Act* prohibits dumping of substance at sea.
* Crown Zellerbach was dumping wood waste in internal provincial waters, had permit but wasn’t in vicinity of dumping site.
* Argues s. 4(1) of *ODCA* is *ultra vires*. AG argued that it was within POGG for the prevention of marine pollution.

**Reasons**:Marine pollution cannot fit into s. 91 heads of power**4 elements of National Concerns:****1. National concern doctrine is distinct from emergency, which must be temporary**Affirms ***Beetz* in *Anti-Inflation Case* 🡪** Rejects ***Canada Temperance Case*****2. Can apply to new matters that did not exist at Confederation, and matters which were once local which have become national concern** **3. Affirms: singleness, distinctiveness & indivisibility (dissent *Anti-Inflation*)****4. Which clearly distinguishes it from matters of a provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power** (**Provincial inability test -** **Other provinces unable to deal with it individually, would any province failing to deal with it cause a national problem?)****Application**: Marine pollution was shown to be a special kind of pollution, pragmatism: difficulty in determining boundaries of internal/external water (indivisibility), distinguishable from fresh water (singleness, indivisibility)**Edinger’s notes**: * Strange they accepted marine pollution as a distinct, indivisible matter of national concern
* Could have justified it under federal heads of shipping or sea-coast fisheries
 |

## Criminal Legislation

|  |
| --- |
| Federal Criminal Power**91(27) enables the Federal government to legislate for the *Criminal Code* and beyond the CC*** + - Early cases interpreted 91(27) more narrowly, nowadays more broadly
		- Federal statutes other than CC can impose criminal penalties under 91(27)

**In order to qualify under s 91(27), the criminal provision must:** *RJR, ARHA, Dairy*(1) Be a **prohibition**, (2) Carry a **penalty** (penal sanction), and (3) Be for a **public purpose** (generally in relation to public peace, order, security, health, and morality, and also environment - *Dairy)*The **public purposes** can be expanded, the **prohibition** is flexible, but it is ALMOST ALWAYS necessary to have a **penalty**.**The statute must also pass a test for colourability:** since the law must have a legitimate public purpose underlying the prohibition. *Hydro Quebec***Does not have to deal with a traditional criminal law concern 🡪 Can create new laws (***RJR***)*** The definition of criminal law is wide and new crimes can be created – does not have to be typical criminal-related matters.
* You can criminalize ancillary activities without criminalizing the evil itself – if the **pith and substance** is right, you can do it, even if you’re doing it in a roundabout way. Criminal law can contain valid exemptions for certain conduct.
* However, there is a limit in that criminal law must be checked for **colorability**. Scrutiny on form of criminal law should be loosened. *RJR*

**The criminal federal head of power is preferred over POGG** *Hydro Quebec***Is it a matter traditionally within criminal law competence?*** When enacting the long-gun registry, found it to be valid criminal law 🡪 guns (merely incidental effects on legislative jurisdiction there are still provincial aspects leftover related to guns (sales etc.)) (*Quebec v Canada*)

**Must include a public purpose****Morality** (*Russell v The Queen, Margarine Reference, Assisted Human Reproduction*)**Health** but legitimate public health evil – can indirectly control evil as long as aimed at the **evil** (*RJR MacDonald, Assisted Human Reproduction*)**Security** (*Assisted Human Reproduction*)**Public peace and order** *Margarine Reference*Can be repealed – gives deference – if Parl can enact, Parl can repeal (Quebec v Canada)  |

#### CHALLENGING FEDERAL CRIMINAL STATUTE

1. **Argue its NOT a valid public purpose**
2. **Argue it is colourable** 🡪 use extrinsic evidence (*RJR MacDonald,* also *Hydro-Quebec*)
	* What is the government ACTUALLY aiming at? (ex. regulate advertising, regulate a specific industry etc.) (*RJR*)
	* Effects of the legislation directly impinge on some other subject matter as to reflect some alternative or ulterior purpose
3. **Argue federal power cannot be limitless** 🡪 would make federalism hollow and make criminal law power have no limits (dissent *Assisted Human Reproduction*)
	* **Must address a real, objective evil & demonstrate** **a reasonable apprehension of harm** (*dissent, Human Reproduction*)
	* ARGUE: there IS a threshold (*dissent Human Reproduction*)
	* Just because its new doesn’t justify it (*dissent Human Reproduction*)
	* **Evil or threat must be real and must describe the risk of harm precisely enough that a connection can be established between the apprehended harm and the evil in question**
	* Argue Malmo Levine and Majority in Assisted Human Reproduction were badly decided
	* Argue this would jeopardize the division of powers
4. **Argue its real purpose is regulatory**
	* *Assisted Human Reproduction* 🡪 set up a national scheme to regulate human reproduction (mandatory national standards) 🡪 regulation of a health service
	* *Dissent of Hydro Quebec* (which Edinger Agrees):
		+ Subject matter determines if its regulatory or prohibitory, prohibition & penalty does not mean its criminal in nature
		+ Nature and extent of regulation, the context and subject matter all determine whether its regulatory or *prohibitory*
		+ Is there broad sweeping discretion for Ministers? Are there equivalency exceptions given to provinces?

|  |
| --- |
| Ref re Validity of Section 5(a) Dairy Act (Margarine Reference) (1949) FEDERAL invalid 91(27) prohibition must include public purpose |
| **Facts**: Prohibited manufacturing/selling etc. margarine or butter substitutes (theory: margarine bad for heath)**Decision**: Severance of*Dairy Industry Act* ordered (part of Act is bad but rest is good and can stand alone) **Reasons**: Scientific evidence 🡪 no risk to health. Lobby from dairy industry is not valid criminal law.**RATIO: Sets out scope for 91(27): Must be a prohibition coupled with a penalty enacted with a valid public purpose** (public peace, order, security, health, morality) |

|  |
| --- |
| RJR MacDonald Inc v Canada (AG) (1995) FEDERAL STATUTEDISSENT JUDGMENT ONLY all agreed fits under 91(27) differed on Charter |
| **Facts**:* *Tobacco Products Control Act* prohibits, with exceptions, all advertising and promotion of tobacco products, adds health warnings, lists toxic components and produced in combustion
* **Purpose**: legislative response to national public health issue of substantial pressing concern

**Ratio:*** TPCA is valid under 91(27) as federal criminal laws. Meets Margarine Ref requirements of PROHIBITION + PENALTY + PUBLIC PURPOSE.

**Reasons**:* **Valid under 91(27) so doesn’t need to be under POGG**
	+ **Can include public health concerns**
	+ **Criminal law can adapt with new prohibitions as needed with changing times**
	+ **Does not have to deal with traditional criminal law concerns (Feds have power to create new laws), can legislate in the widest sense**
* **Health** is both fed and prov head, but feds can validly employ criminal law power
* **Actual Intent:** If their underlying intent was to encroach on provincial power to regulate advertising, would have regulated in more than 1 industry, if wanted to regulate tobacco industry would have relating to quality, pricing labour.
	+ Regulated instead of prohibited because prohibition leads to black market
* **Can indirectly control elements (can criminalize an ancillary to an “evil”) as long as aimed at evil**
* **Form is flexible: can be largely regulatory and can contain exemptions** (which normally indicate regulations)
	+ Exemptions as “clarifiers”
	+ Ex. contains exemptions for publications and broadcasts originating outside Canada)

**Colourability is the only limit on 91(27) other than definition (plenary power)*** + To prove colourability 🡪 use extrinsic evidence
 |

|  |
| --- |
| R v Hydro Quebec (1997) FEDERAL STATUTECRIMINAL OR REGULATORY LEG ? |
| **Facts**: * Minister of Environment made an interim order restricting PCBs to 1 gram per day.
* Hydro Quebec broke the order. Challenged criminal validity of two sections in statute and the interim order.

**Majority**: **CRIMINAL – Protection of environment is valid criminal law, upheld interim order*** **Must be looked at in the whole scheme (provision aimed at promoting dominant purpose of statute & scheme is valid 🡪 provision is as well)**
* **Legislating under criminal head 91(27) is preferable over POGG**
* **Not POGG – not distinct and indivisible**
* POGG allows legislation in broad policy areas
	+ Criminal must be more specific and still allows room for provinces to legislate on same subject matter (**double aspect**)
* **Does not preclude provinces from legislating to complement**

**Dissent**: **REGULATORY** \* Edinger agrees with this decision \* * **Prohibition & penalty does not mean its criminal in nature**
* **Subject matter determines if its regulatory or prohibitory**
* **Looks at authorizing provision (S 34) gives regulatory powers – no prohibitions in it!**
	+ To determine if legislation “has crossed the line from criminal to regulatory involves considering the nature and extent of the regulation it creates, as well as the context within which it purports to apply” para 48
* Gives broad, sweeping discretion for Ministers of Health & Environment (criminal would likely not do this)
* Can except provinces that have equivalent legislation (unusual for criminal)
* Distinguish from *RJR MacDonald* 🡪 this contains no general prohibition, broad area of concern
	+ Environment is more broad than human health

**Dissent** conclusion🡪 Regulatory (failed first requirement)**Majority focused more on interim order, looks like criminal purpose … Dissent looked more at s 34 authorizing provision, looked like regulatory provision not criminal.** |

|  |
| --- |
| Reference re Assisted Human Reproduction Act (2010) FEDERAL STATUTE  |
| **Facts**: *AHRA* regulated aspects of in vitro, prohibited cloning, determining sex for non-medical reasons, altering genome, removal of sperm/ova from someone <18y/o etc.**Reasons**: (**McLachlin**)* **Parliament can create regulatory schemes under 91(27)** (Affirms *RJR* & *Hydro Quebec*)
* Pith and substance: upholding morality, some provisions: prohibiting public health evils & promoting security
	+ Morality is a proper basis for 91(27) (*Russell v The Queen, Margarine Reference*)
	+ Health – shared by feds and provinces
		- Must address legitimate public health evil (*RJR Macdonald*)
	+ Security
* **Three constant features:**

1. Human conduct2. Injurious or undesirable effect3. Health of members of the public * **No minimum threshold for level of harm – There just has to be some belief of harm by Parliament** (per *Malmo-Levine*)
* **Uses ancillary doctrine in an unprecedented way** (upholds the bulk of the statute instead of a single provision – relationship of a provision which links to a separate head of power is linked to a full statute that is linked to a different head of power

**Dissent**: (**Deschamps**)* Finding regulatory provisions intra-vires would effectively oust provincial power over health due to **federal paramountcy**
* Should not be able to promote beneficial medical practices
* Pith and substance of a criminal law issues should be narrowly applied to specific
* Just because its “new” doesn’t justify it
* Must be an objective evil with substantive component of harm
	+ **Threshold: emphasizes a minimum threshold of harm -** **reasoned apprehension of harm – before Parliament can make something criminal**
	+ **P 240 - 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**
	+ **Important to balance the powers between federal and provincial powers otherwise Parliament’s power would be limitless and there would be no scope for judicial review**
	+ Otherwise🡪 criminal law power would have no limits (colourable)

**Cromwell**:* Disagreed with CJ in upholding the whole statute, but found more provisions valid than other 4.

4 valid : 4 mostly invalid : 1 didn’t agree with others |

### Provincial Criminal Power

**92(15): Allows provinces to impose punishment by fine, penalty or imprisonment under:**

**92(13)** property and civil rights

**92(14)** administration of justice (courts) in the province

In combination with 91(27), give to the central government the power to make criminal law and create criminal law and gives to the province the ability to enforce that law

**92(15)** can **impose punishment by fine, penalty, or imprisonment of offence under prov head**

**92(16)** matters of a merely local and private nature

**Provincial heads of power can get challenged on the basis that they are invalid legislation since they should actually fall under s. 91(27).**

#### DEFENDING PROVINCIAL LEGISLATION AS NOT UNDER FED CRIMINAL POWER 91(27):

**When you use these, make sure you explain how they would be applied:**

1. **Emphasize 92(13) property and civil aspect** (in drafting and in argument)
	1. There is no general bar to provinces enacting civil consequences to criminal acts in relation to provincial heads of power (property and civil rights)
	2. *Chaterjee* 🡪 CRA purpose compensating victims through proceeds of crimes taken from criminals, **pith and substance: property rights**
2. **Emphasize local / provincial nature / aspects of the problem 92(16)**, limited scope of problem *Dupond*
	1. Emphasize the **temporary nature** of the legislation *Dupond*
	2. If its **transaction oriented** or a business and local 🡪 province has plenary jurisdiction (*Rio Hotel*)
	3. **Licensing schemes are great tools for provinces to use –** use conditions attached to license to be provincial (local) in nature (*Rio Hotel*)
3. **Focus on form: employ regulatory techniques** (licensing, permitting, zoning)
	1. **Avoid prohibition + penalty form** *Rio Hotel*
	2. Connect issue to a valid regulatory scheme, perhaps under 92(9)
	3. Must be associated with a valid scheme of regulation (prohibitions cannot be sustained by themselves) (*Dupond,* dissent Laskin)
		1. Otherwise, destructive to the principle of exclusiveness
	4. Does not become a matter of criminal law because it has a prohibition and makes it an offence to observe the prohibition (*Dupond*) 🡪 but what is a criminal law then?
	5. Prohibitions not sustainable by themselves (Dupond, dissent)
4. **In drafting a leg - deal with the problem indirectly** (i.e., *Goodwin*, *Rio Hotel, Chatterjee, Dupond*)
	1. Licencing (*Rio Hotel*) 🡪 **use licensing system to take away license** 🡪 license required to operate businesses that supply the prohibited good, license may be removed if licensee selling prohibited good contrary to the prohibition
	2. **Instead of punishing the individual, punish the supplier or regulator** 🡪 *Rio* they punish the hotel instead of the individual 🡪 more preventative
	3. **Make sure penalties are not too harsh** (avoid imprisonment)
		1. BUT imprisonment is not fatal 🡪 *Dupond* by-Law: Penalties set up are fines and imprisonment - if fines are not paid, imprisonment
5. **Emphasize prevention of crime and pre-emptive strikes (deterrence)** *Dupond*
	1. **Must identify** pith and substance – can have incidental effects on s.91 heads and still be valid
	2. Suppress conditions likely to favour commission of crimes (*Dupond*, *Chatterjee*)
	\*Feds also have this power
	3. Provinces have legislative jurisdiction over preventative power (local, temporary)
		1. *Dupond* 🡪 preventing conditions conducive to breaches of the peace and detrimental to the administration of justice
	4. Provinces can control vice & crime
		1. *Dupond* 🡪 dealing with assemblies before the begin (preventative) versus the Criminal Code which prohibits them after they have formed (punitive)
	5. *Chatterjee* – can suppress crime through *in rem* action
		1. Civil consequences for criminal offences provided the province does so for its own purposes in relation to provincial heads of legislative power (*Chatterjee*)
		2. Can have punitive effects 🡪 as long as its dominant purpose is preventative not colourability (*Chatterjee*) \*\*Edinger thinks that *Chaterjee* was colourable
6. **Avoid duplicating Criminal Code provisions when framing legislation** *Rio Hotel #1, Goodwin?*
	1. **Don’t use language directly from Criminal Code** (replaced with conditions) (*Rio Hotel*)
	2. **Do not use form prohibition+ penalty 🡪 use regulations and conditions**
7. **Go wide** (make it broader than a Code provision does, and get everything) *Chatterjee, Dupond*
	1. In *Chaterjee*🡪 both federal and provincial offences, doesn’t single out offences (only concerned with the effects of crime)
	2. In *Dupond* 🡪 broad prohibitions (all gatherings)
8. **Argue complementary, not supplementary** (use of wording is important) 🡪 don’t add to *CC* provisions and fill in gaps but complement something that *CC* covers without infringing *Rio, Chatterjee*
	1. **When double aspect doctrine occurs** and the law could be both federal and provincial purpose, the provincial law is intra vires if it is complementary to the criminal law. Uphold statutes as long as they aren’t conflicting.
9. **Concede provincial legislature's concern is with morality** but argue **it is only a minor concern.**
10. **Hide colorability -** Avoid discussing the real problem the legislature is trying to solve
11. **May have to concede that there may be some traditional criminal activities prov can't regulate, no matter what aspect of it they're dealing with (e.g., prostitution and abortion)**

#### CHALLENGING PROVINCIAL LEGISLATION AS INVADING FED CRIMINAL POWER 91(27):

**\*Look at defending provincial legislation section, argue the opposite**

1. **Does it use language directly from Criminal Code**? (*Rio Hotel* – original statute)
2. **Despite regulatory form, trying to enforce code provisions** (*Rio Hotel*)
	1. Offences in “regulatory” program are not necessary for its purpose (*Rio Hotel*)
3. **Argue that the only thing local is its territorial** **ambit** and the subject is relating to criminal law
4. The heavier the penalty and the closer the terminology comes to describing conduct traditionally criminal🡪 criminal law (*Rio Hotel*)
5. **Argue supplementary not complementary**
	1. Trying to enforce Code provisions through regulation (*Rio Hotel*)
6. Is the legislation **colourable**?
	1. \*\*Edinger thinks that *Chaterjee* was 🡪 avoiding criminal procedure and protections that it offers (everything in the *Charter*)
7. **MUST be within a valid scheme of regulatory legislation** (*dissent Dupond*)
	1. Provincial prohibitions cannot be sustained by themselves to forbid conduct or behavior (dissent *Dupond* 🡪 there are no regulations that the sanction supports)

|  |
| --- |
| Dupond Case - AG Canada v Montreal (City) (1978)<CHARTER PROVINCIAL valid |
| **Facts**: * Appellant attacked validity of a by-law which set up fines and imprisonment in relation to public gatherings, assemblies or anything that endangers “tranquility, safety, peace, or public order in public places, parks” etc., prohibited assemblies for 30 days
* Frames as a way to safe guard civil liberties, prevent riots, safeguard public domain
* **Dupond argues they are criminal law**

**Majority (Beetz) VALID PROV LAW:*** **Bylaw and ordinance are valid provincial law**:
* **Preventative, not punitive** 🡪 prohibit all gatherings (even innocent ones)
	+ Temporary, indicative of preventative nature
	+ Only deals with local issue
* Doesn’t pass P&S of criminal code test
* **Provinces have legislative jurisdiction over preventative power (local, temporary**)

\*NOTE: federal government also has preventative power (preventative power is not exclusive – shared)* + Code: forbids assemblies once they have been committed
	+ Ordinance: aims at preventing them in the first place by suppressing conditions
	+ **Uphold prov leg “complementary” call it Fed law not prov “supplementary”**
* Provincial enactment does not become criminal law because it has a prohibition

**Dissent: (Laskin) INVALID – FED POWER*** Justified as peace order and security – must be criminal leg!
* Mini-Criminal Code
	+ **Local nature is not a test of constitutional validity**
	+ Focus (on breach of peace and maintenance of public order) is clearly within criminal law
	+ **MUST be within a valid scheme of regulation (prohibitions are not sustainable by themselves)**
	+ **Supplementary not complementary**
 |

|  |
| --- |
| Rio Hotel Ltd v New Brunswick (Liquor Licensing Board) (1987) PROVINCIAL valid |
| **Facts**: NB enacted Liquor Control Act - comprehensive statute creating a licensing system, 2 kinds: (1) liquor outlet (2) entertainment, with conditions. Rio Hotel held it was ultra vires and should be fed criminal**Held**: Valid prov legislation as it was regulatory, local in nature. Provinces cannot reenact a provision of the criminal code – must be distinguishable from criminal law – valid prov legislation must fit licensing scheme**Reasons**:* Offences in regulatory program must be reasonably necessary for its purpose
* Harsher and longer the penalty imposed & closer terminology to criminal law🡪 more doubtful valid prov legislation
* Constitutionally valid 🡪 licensing scheme with **regulations and conditions** related to the provision of the license (a long as not clearly criminal)
	+ Related to **local operations**
	+ **Transaction oriented**, business 🡪 provinces have plenary jurisdiction
	+ **Entertainment is a marketing tool for the alcohol sales which are licensed under prov valid licensing scheme**

**More likely upheld when provincial statutes are in the form of a regulatory scheme (dealing with a head of provincial power) with licensing scheme, fees, conditions for the license, use regulations and conditions instead of prohibitions because this looks civilnot criminal.**  |

|  |
| --- |
| Chatterjee v Ontario (2009) SCC 19 PROVINCIAL valid |
| **Facts**: * Appellant was driving outside of where was allowed by his bail. Stopped by police. Police found money and items used in grow op, smelled like marijuana. Never charged with offence, but money and items seized.
* CRA authorizes forfeiture of proceeds of unlawful activity – can seize proceeds of crime and instruments of crime regardless whether a charge is laid.
* CRA defines ‘crime’ as breaking any law in the world provided there would be an offence if committed in Ontario para 20
* **Challenged validity of *Civil Remedies Act* (in Ontario) as ultra vires provincial law as it is criminal in nature.**

**Reasons:*** **Pith and substance of CRA: deter crime and compensate victims**
	+ **No general bar to province enacting civil consequences to criminal acts in relation to provincial head of power** (🡪 property and civil rights)
	+ **CRA fits neatly into the provincial competence in relation to property and civil rights in the province para 25**
	+ Creates property-based authority to seize money etc.
	+ Provinces and federal gov can legislate to prevent crime (broad enough)
	+ Compensating victims 🡪 only provincial jurisdiction
* **Forfeiture has de facto punitive effects, dominant purpose: to make crime unprofitable by taking away proceeds of crime** **(not colourable)**
	+ Focusses on “in rem” against the PROPERTY not “in personam” against the PERSON
	+ **Complements not supplements** federal forfeiture provisions (appellant argues CRA is supplementing and stiffening CC provisions)
		- Difference: does not require conviction of offence (just BOP that related criminal activity)
* **Defines purpose clause as “useful tool” to interpret legislative intent – in CRA entirely linked to property and civil rights.**
* **Doesn’t single out offences 🡪 only concerned with effects of crime** (**broad purpose less likely characterized as criminal)**

**EDINGER** doesn’t like this case 🡪 **NO CHARGE OR OFFENCE** 🡪 circumventing protections of the *Charter,* supplementing *Criminal Code,* * **Colourable** 🡪 subverts/avoids protections of criminal procedure and *Charter*
* **Succeeds because of the framing of the legislation as fully property purpose**
 |

|  |
| --- |
| Goodwin v BC (Supt of Motor Vehicles) 2015 SCC 46 PROV valid |
| **Facts**: * Goodwin received a driving prohibition pursuant to a new Automatic Roadside Prohibition scheme.
* ARP – suspension x 90 days, impounded car x 30 days, attend remedial programs, pay fine if Fails.
* Goodwin argues the ARP is a colourable attempt at invading the federal criminal law

**Issue**1. **Is the ARP scheme** **intra vires provincial powers** (as it may invade the federal government’s exclusive jurisdiction over criminal law)? **YES** (if this succeeds, don’t need to go to #2)
2. Charter challenge – presumption of innocence guaranteed by s. 11 of the Charter

**Reasons**:* **Pith and substance (object and purpose) goes to regulation of driving (provincial under 92(13) not criminal law.**
* **Should it be considered as federal criminal leg because it has a prohibition + penalty + public purpose? Or is it a provincial issue under Motor Vehicles Act?**
* **The purpose it deterrence not just punitive – therefore it is intra vires provincial not criminal**
* **Financial penalties and privileges do not make legislation punitive**
* **Police discretion is important to uphold and not restrict**
* **Double aspect matter – province can legislate to complement CC – overlapping powers are unavoidable**
* **Deterrence is a valid purpose of provincial law under property and civil rights!**
 |

|  |
| --- |
| Quebec v Canada (2015) FEDERAL  |
| **Facts**: * Canada had an established long-gun registry (Liberals) that current Conservative govt was going to repeal law, including destroying the data.
* Original legislation had been challenged in Alberta and had gone to SCC and barely made it through. **Relied on 91(27) but played havoc with form of** **PROHIBITION + PENALTY + PUBLIC PURPOSE**. SCC had upheld it as valid criminal law though.
* Quebec wanted to create its own provincial gun control scheme, wanted Canada to give them the data on long guns in Quebec. Feds refused.
* Quebec challenged federal *ELRA* s. 29 ability to destroy data 🡪 form is property and civil rights not criminal law. BUT Quebec had not yet created a long-gun registry.
* Trial allowed QC to get data 🡪 unconstitutional, ultra vires Feds because of cooperative federalism
* CA – reversed decision of trial judge 🡪 Quebec has no right to data 🡪 Parliament has power to destroy data 🡪 **cooperative federalism cant be used to supersede formal division of powers**
* SCC DISMISSED APPEAL

**Reasons**:* **Cooperative federalism (as a new unwritten principle) does not limit the scope of legislative powers defined by Constitution** 🡪 if there is a breach of the federalism principle it is justiciable
* Quebec’s argument that they have a right because of expectation of continuing access regardless of changes in federal legislation 🡪 would mean that the Firearms Act was binding, which Parliament couldn’t undo (would inhibit future legislative action)
* **91(27) cannot be limited - Bad motive cannot limit legislative jurisdiction**
* **Pith and substance of a provision must be considered within the context of the statute as a whole 🡪** s. 29 must be considered within the scheme of the whole act.
* **If its pith and substance relates to a federal head and has incidental effects on provincial heads of power it is still intra vires Feds**
* **Not a prohibition + penalty + public purpose**
	+ **Court classifies it as a derivative of the scheme it is undoing (public safety under criminal law) (Guns are traditionally under criminal law)**
	+ **If they can pass it they can repeal it**
* **If Quebec had argued they owned the records instead of cooperative federalism it would have given the courts a legal basis to give them the records**
 |

## Regulation of the Economy s 91(2)

**CLEARLY A DOUBLE ASPECT MATTER. Legislative jurisdiction divided federally vs. provincially**

FED 91(2)🡪 1. International and Inter-Provincial Trade (2 branches set out in *Parsons*)

 2. General Regulation of Trade and Commerce

PROV 92(13) 🡪 Property and Civil Rights

 92(16) 🡪Matters of a merely local or private nature

### Federal Regulation of Economy Power

* **The central/federal government** gets to control things once they enter the flow of trade – once things get into a stream of trade, then the federal government gets legislative jurisdiction.
* 91(2) 🡪 main head of power for federal govt, most frequently used with regard to the economy
* **The leading case on s. 91(2)** is *Parsons* (has not been broadened or narrowed).

***Parsons* sets up two branches** **of Federal Regulation Power:**

1. **International and interprovincial trade –** Occurs when agricultural products or natural resources have moved from PRODUCTION into the FLOW OF TRADE across borders.
2. **General regulation of trade and commerce affecting the WHOLE dominion**. Defined in *GM*
* **5 criteria (indicators) to determine whether ENTIRE statute is part of the general regulation branch of s. 91(2) aka** *GM***:**

**(1)** Is the legislation part of a general regulatory scheme?

(2) Does this scheme need to be overseen by a regulatory agency?

(3) Is it general (trade as a whole), instead of dealing with single industries?

(4) Legislation must be of nature that provinces jointly or independently would be incapable of doing on their own.

(5) Failure for one or more of the provinces or localities to implement this scheme would jeopardize the scheme in other parts of the country.

* + These 5 criteria are not exhaustive or determinative, not all 5 are required.
		- The overriding consideration is whether what is being addressed in a federal enactment is genuinely a national economic concern and not just a collection of local ones
* **NOTE THAT GM ONLY APPLIES TO THE GENERAL BRANCH OF 91(2) and NOT 91(2) IN GENERAL**

**FEDERAL GOVT CANNOT do the following:**

(1) Directly regulate the local stations of matters of a trade in a province *Parsons*

(2) Reach back into the production of the goods *Terminal Elevator*

(3) Claim jurisdiction based on percentages of export *Terminal Elevator*

(4) Rely on sheer volume of trade or geographic distribution across Canada of trade

(5) Regulate PARTICULAR industries if they are substantially local in nature (single industries or businesses) *Labatt, Securities 🡪 Labatt seems stronger*

* 1. Regulation of a single trade/industry is not national concern, and national ownership of a trade/undertaking or national advertising of products is not sufficient to authorize the imposition of federal trade and commerce legislation.

*Reference Re Securities Act, 2011 SCC 66:* The Court never says that you can’t use the evolution argument for 91(2) – that the issue evolved from provincial to national concern – But if you want to make this argument, you must bring in hard evidence to persuade them

### Provincial Regulation of Economy Power

* **Provinces** can control practically all activities and people within the province
* **Provinces:** Two main heads for the purposes of the economy: **92(13)** property and civil rights, **92(16)** matters of a merely local and private nature
* **S 109 gives rights for natural resources to provinces**
* **S 125 goes with 109 because it creates an immunity from taxation – prohibition from prov being taxed on natural resources**

**PROVINCIAL GOVT CAN:**

**(1) Control the EARLY STAGES** of the manufacturing/marketing process *Terminal Elevator*

**(2) LEGISLATE CONTRACTS** (*Burns*) and **THE PROFESSIONS** (businesses, trades)

If contractual rights within the province are the object of the proposed regulation, then the province has authority.

**(3) HAVE INCIDENTAL EFFECT ON TRADE:** The effect on interprovincial/international trade is constitutionally irrelevant and are said to be MERELY INCIDENTAL unless the court decides that it is the effects on interprovincial trade that the province is AIMING at (**PITH AND SUBSTANCE)**. (*Carnation)*

**(4)** Can’t take as precedent setting, but simple theme is that it is much easier for provinces to regulate/control goods *going out* (*Carnation*) than those *coming in (Burns)*. This is because harder to control them in the same INDIRECT WAY as when going out.

**(5) LEGISLATE LOCAL ISSUES** – the activity/transaction/thing regulated is LOCAL, and that is what the province is AIMING TO REGULATE

|  |
| --- |
| Citizens Insurance Co of Canada v Parsons (1881) PROVINCIAL valid \* Leading case on Regulation of Economy \* |
| **Facts:** Citizens Insurance Co didn’t want to honor the Ontario’s *Fire Insurance Policy Act* 🡪 argued it was 92(13) and therefore ultra vires Ontario. **Held**: 1. The Fire Insurance Policy Act was not ultra vires provincial jurisdiction and applied to all insurance companies that insured property within the province.
2. The Act was not a regulation of trade and commerce under s. 91(2) of the BNA Act, 1867.
3. Insurers in Ontario had to comply with the statutory conditions imposed under the Fire Insurance Policy Act.

**Ratio**: **91(2) Trade and Commerce: given a narrower meaning.** **Sets out branches:*** + **1. International, interprovincial trade (movement of goods)**
	+ **2. General regulation of trade and commerce**

**Reasons:**Insuring against fire is not a trade* + **91(2) DOES NOT INCLUDE CONTRACTS of a particular business or trade (such as fire insurance) in a particular province – any and all statutes regulating contracts are provincial**
	+ **Unless they specifically relate to another head of power (especially not those that are related to a specific trade or business, in the bounds of a province)**
	+ **Property and civil rights should be interpreted broadly**
* **Labatts says “trade and commerce power has been rescued from near oblivion following Citizens case…**
 |

|  |
| --- |
| Canada v Eastern Terminal Elevator Co (1925) FEDERAL invalid |
| **Facts:** Federal statute *Canada Grain Act* passed under 91(2). Act states that the Canadian Wheat Board receives any of the surplus wheat in the elevators at the end of a crop year (is sold to them). In the year in question, the Eastern Terminal Elevator had surplus in its Port Arthur Elevator.Eastern Terminal Elevator didn’t want to pay a levy required by the Act, said it was ultra-vires. **ISSUE**: Can the federal government regulate private elevator sales? NO**DECISION**: The Canada Grain Act is ultra vires the Parliament of Canada. **The whole Act falls because it is not within s 91(2). It is under 92(13) because 1) deals with the right of ownership of surplus grain, and 2) it is an attempt to regulate profits - both of these fall under s.92(13) prop and civil rights****Reasons:*** **91(2) does not give the Federal government legislative jurisdiction to reach into the provinces to regulate local businesses even if majority of product is external**
* **Provincial inability test alone cannot be used to grant Parliament jurisdiction to regulate the economy.** **The federal govt cannot regulate local transactions just bc they have an interest in them.**
* **Even when a high percentage of goods are crossing borders, it does not give the federal government legislative jurisdiction to reach into the provinces to regulate local businesses**
	+ Difficult to use 91(2)

After this ruling, Feds used DECLARATORY POWER to declare grain elevators to be WORKS FOR THE GENERAL ADVANTAGE OF CANADA and therefore was under Federal power. 92(10)cSection 92(10)(c) matters under section 91(29), which states:

|  |  |
| --- | --- |
| **“** | *29. Such Classes of Subjects as are implicitly exempted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.* |

 |

Carnation and Burns Foods deal with Provincial legislation

* Are they ultra vires prov as they are really about 91(2) federal trade and commerce?
* Carnation was not ultra vires prov
* Burns Foods WAS ultra vires

|  |
| --- |
| Carnation Co v Quebec (Agricultural Marketing Board) (1968) PROVINCIAL valid |
| **Facts**: * Marketing Board created a plan which bound all producers of milk shipping their products to Carnation’s plant in Quebec, determined price, Carnation up paying more than others
* Carnation argues that the majority of product will be exported, and a local statute was having a negative effect on their interprovincial trade (by prices) 🡪therefore ultra vires provincial, fits in 91(2) regulation of trade and commerce.

**Held**:  * Valid as Quebec was aiming to improve the business of dairy farmers overall
* **Incidental effects on trade and commerce does not mean that they constitute a regulation of trade and commerce.**
* **The Court found that the pith and substance of the Board was related to dairy farmers’ contractual rights which is valid provincial subject matter.**

**Reasons**:* Pith and substance: improving bargaining position of farmers (local businesses)
	+ Effect of doing business in Quebec
 |

|  |
| --- |
| Manitoba (AG) v Burns Foods (1975) PROVINCIAL invalid |
| **Facts**: Hog Producers’ Marketing Board changed regulations once found out Burns was importing Saskatchewan hogs into Manitoba (by-passes teletype auctions). **Reasons**:* Circumstances that led to enactment of the regulation deeming Sask hogs to be Manitoba hogs allowed SCC with not much difficulty to say the regulation was aimed at interprovincial trade. Clearly designed for the purpose of non-Manitoba hogs.
* Question: what is Manitoba had known the facts that there were hogs coming from other provinces and they had drafted the original legislation so that all hogs had to be sold by way of the teletype auction – would that have made a difference? Maybe, SCC might have held that there wasn’t clear evidence that the Board in Manitoba was aiming at those Sask hogs. Regulation would have been framed neutrally.
* If Parliament cannot regulate local trade b/c more efficient to regulate it inter-provincial trade, provincial legislature cannot regulate inter-provincial just because its desirable for the control of intra-provincial trade
* **Direct interference with interprovincial trade (not insignificant) 🡪 effectively dictates conditions under which hogs can be brought in from outside Manitoba**
	+ Subjects imports to same regulations as local sales

**Province cannot, as an incident of its authority over local matters, regulate buying of products from other provinces** **IGNORE CONTRACTS DISCUSSION ON 268 - Edinger deplores the part of Burns Foods pg 268 talking about conflicts rules for contracts – can the province regulate the buying of hogs in another province – he says that the contract would have been made in Saskatchewan and therefore not within the leg authority of the Prov of Manitoba.** Add note: There is a very recent history in Canada of one province discriminating against another province. So the SCC in Burns Food was looking for discrimination 🡪 didn’t find any, Mb wasn’t discriminating against Sask hogs, but it could have so SCC struck leg down. |

|  |
| --- |
| Labatt Brewing Co v Canada (1980) FEDERAL invalid |
| **Facts**: Labatt seeks declaration that its “lite” beer is ok per FDA. Challenges validity of **Regulation** B.02.134 and **sections 6** (prohibits false advertising of food as meeting another food standard) and **25(1)** (prescribing standards of strength, potency, content of food) of the *Food and Drug Act* as being ultra vires federal govt. Beer was entirely local at this point.**Held**: Malt liquor local in production and in marketing, not intra-provincial or international trade or commerce. **Ratio**: **Even if it covered a substantial portion of Canadian economic activity, Federal government cannot regulate a single industry that’s mainly local in nature under s 91(2).****Reasons**:* The impugned regulations construct a detailed code governing malt liquors, ingredients, labeling, names that they can be sold under.
* **Fails under branch 1 (interprov and intl trade) of 91(2)** Brewing is local in nature - transportation to distant markets is expensive, Labatts produces in all prov except Quebec and PEI
* Local production and marketing both fit under provincial heads of power 92(1)
* **Fails under branch 2 (general trade and commerce – not yet defined clearly by SCC)** – Can’t have a legislative recipe for a product – even if you had a legal recipe for every product manufactured in Canada, it wouldn’t be general trade and commerce because you’d be regulating single industries – not general industry overall.
* Must determine correct pith and substance of legislation – may fit between heads of power but be more one than the other
	+ **Merely Incidental effect on legislative sphere of other jurisdiction will no longer necessarily doom statute to failure**
* Impugned regulations relate to a single industry 🡪 not to control the distribution of the products international or intraprovincial (which would then fit under fed trade)
	+ Main purpose: regulate brewing industry

Negative statement: What general branch of trade and commerce is NOT: regulation of a certain industry |

|  |
| --- |
| GM v City National Leasing Ltd (1989) FEDERAL valid 1st case SCC confirms 2nd branch of trade and commerce power (general trade and commerce affecting Canada as a whole) \*\* 1st case to coherently discuss ancillary doctrine |
| **Facts**: CNL alleges that GM, directly or indirectly, from 1970-1980 had been paying preferential interest rate support to competitors of CNL in addition to the ones available to CNL (price discrimination per CIA s 34), argues it gives them a civil action under federal *Combines Investigation Act* per s 31.1 if any entity has been injured by breach of the competition act s 34. GM argues it is ultra vires feds.**Held**: * Found the impugned provision of CIA minor intrusion into provincial jurisdiction but it was remedial, not unprecedented, and limited by the restrictions of the act. **The provision was held essential to the functioning of the Act.**
* **Act as a whole embodies a complex scheme of economic regulation. Purpose to eliminate activities that reduce competition. Entire act geared to this objective**.
* CIA part of valid regulatory action, meets scheme of regulation that is national in scope.
* 31.1 is intra vires the fed parliament. CIA is valid under 2nd branch of fed trade and commerce power (power over general trade and commerce). (Prima facie would have been 92(13) but you need to do any analysis).
* 31.1 is constitutionally valid by virtue of being functionally related to the CIA.

**Reasons**:* 91(2) defined in Citizens – original meaning of “regulation of trade and commerce” sufficiently wide
* **Meaning of trade and commerce can, when exercised competently by parliament, legally modify or affect property and civil rights in a province (per Citizens/Parsons)**
* **91(2) has two branches of power since Citizens/Parsons:**
	+ **international and interprovincial trade and commerce (largely challenged)**
	+ **general trade and commerce affecting Canada as a whole (not yet challenged**)
* 91(2) has been considered since Citizens/Parsons both broadly and restrictively. Proposes none have properly balanced 91(2) and 92(13).
* Province has rights of action under 92(13) to legislate about civil property rights actions.
* **Validity for 2nd branch general trade and commerce (1-3 from Vapor, 2 new added in Cdn Ntl Transportation):**

**1. Part of a general regulatory scheme (3 components: explanation of prohibited conduct, creation of an investigatory procedure, establishment of a remedial mechanism****2. 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 a particular industry****4. Legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting****5. Failure to include 1 or more provinces or localities in the scheme would jeopardize the operation of the scheme in other parts of the country*** + **Federal legislation should not upset the balance between fed/prov, should not encroach on prov jurisdiction**

**\*Not an exhaustive list, absence of criteria is not determinative, case by case analysis** **To determine constitutionality of a single provision** **1. Look at the provision alone, is it valid? To what extent does it intrude on provincial powers?** * + Does it contain a regulatory scheme? If so probably valid trade and commerce
		- If pith and substance federal + entire act valid/provision severable and valid 🡪 inquiry ends
	+ When assessing **seriousness of encroachment**, consider 3 factors:
		1. Only remedial provision (help enforce substantive aspects of the Act, not in itself substantive (remedial typically less intrusive)
		2. Limited scope of the act
		3. Federal government is not precluded from creating rights of civil action where measures are warranted

**2. Is entire statute valid?** * + Use 5 points above for general trade and commerce
	+ Not valid 🡪 end of inquiry (ex. *Terminal Elevators* struck down here)

**3. Can provision be justified through connection with valid legislation?** (**ANCILLARY DOCTRINE)*** + Invalid provision inside a valid statute does not make it valid
	+ **Consider relationship of provision to the Act as a whole – the greater the intrusion into provincial jurisdiction, the more tightly it has to be related – the minimal intrusion only requires a looser connection to the Act**
	+ Must consider how much it intrudes on provincial powers
		- Marginally 🡪 “functional” relationship sufficient to justify
		- Highly intrusive 🡪 stricter test
		- \*Can have incidental/ancillary effects on other powers
	+ If passes 🡪 Intra vires
	+ If it doesn’t 🡪cannot be sustained under general trade and commerce

**Ancillary doctrine: allows a court to uphold a single provision as valid even though it infringes 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.** |

|  |
| --- |
| Reference re Securities Act (2011) FEDERAL invalidAdds a weapon to the armour of 91(2) – it is possible for a matter of 92(13) to evolve and become an issue of national trade and commerce |
| **Facts:** If validly adopted, would create a single scheme governing trade of securities throughout Canada. Gov says its under general trade and commerce even though some aspects fall in provincial authority (property and civil rights); **say it evolved from a provincial to a national matter (evolution argument – also used in Local Prohibition Act – local matters might grow to be issue of national concern)****Ratio: from Cdn Ntl Transportation, GM and Kirkbi AG together:**Para 83 - Provided the law is part of a regulatory scheme aimed at trade and commerce under the oversight of a regulatory agency, it will fall under the gernal fed trade and commerce power if the matter is genuinely national in important and scope (not enough that the matter be replicated in all jurisdictions across Canada, it must be something that the provinces either alone or together could not effectively achieve). To put it another way the situation must be such that if the federal govt were not able to legislate, there would be a constitutional gap.**Reasons**:* Federal government has not shown that securities has changed so regulation of all aspects falls under the 2nd branch (general trade and commerce)
	+ Must show that there is a constitutional gap if the federal government doesn’t legislate (provinces individually or in concert couldn’t effectively achieve)
* **Demonstrates double aspect doctrine**
	+ **Federal legislation will be constitutional even if the matter also falls in the provincial head of power**
	+ **6. Whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns.** (add’s 6th factor to GM)
		- **Need to find a DISTINCTIVE aspect for the federal government to regulate**
* **General trade and commerce cannot be used so that it denies the provinces the power to regulate local matters/industries within their boundaries**
* **Used test from GM general trade and commerce, met first two.**
	+ **1 and 2 go to required formal structure**
	+ **3-5 go to whether federal regulation is constitutionally appropriate, tell us if it is re national concern or provincial?**
1. Is impugned law part of regulatory scheme? YES
2. Is the scheme under oversight of a regulatory agency? YES
3. Is leg concerned with trade as a whole (vs particular industry)? Look at p&s NO
	* + Preserving capital markets to fuel Canada economy is a national trade issue, BUT descends into detailed regulation of all aspects of trading in securities (this is provincial) para 116
		+ Securities market hasn’t changed enough to be a national concern para 117
4. Is leg of a nature that provinces can handle alone or together? NO
* ALMOST YES - Provinces lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals so a federal scheme might be better suited para 121
* BUT- the detailed regulation of all aspects goes too far into prov jurisdiction
	+ - Provinces could withdraw from a scheme, no assurance they could effectively address issue of national systemic risk, competitive national markets
1. Would failure of 1 or more provinces included frustrate scheme? NO
	* + B/c main thrust is dealing with day-to-day regulation, proposed Act would not flounder if a province didn’t participate
	* From GM – not all 5 are required, not an exhaustive list, must be considered case by case

**Overall Act is of provincial nature. Pith and substance = local concerns – chiefly regulates contracts and property matters within provinces para 125. Like Eastern Terminal they reached too far into provincial jurisdiction. Not incidental effect.** * Could not invoke ancillary doctrine 🡪 to invoke that the act as a whole must be valid

**Proposes a solution of cooperative federalism – provincial securities regulation with Parliament dealing with the national parts.**  |

## Extraterritoriality

* There was no federal jurisdiction to legislate extraterritorially until the *Statute of Westminster* 1931
* All provincial legislation is limited territorially (express terms of Constitution Act 1867) ***Unifund***
* **Federal legislation is not limited, but presumption that they did not intend to legislate extraterritorially**

**Challenges may be made to validity and applicability:**

🡪 **Validity**: invalid because of extraterritorial pith and sub (most common use) ***Churchill Falls***

🡪 **Applicability**: Statute is valid but inapplicable in *that* application (fallback option) ***Unifund***

* Provinces are not so much restricted from ***creating*** rights outside prov but with ***detracting/ derogating*** from activities/rights outside prov 🡪 generally not an issue to create benefits for those outside the prov.
* **Avoid issues by pointing out how it does apply within prov; don’t directly regulate things outside prov**.

### Arguing Invalid PROV Legislation Due to Extraterritoriality

1. **Argue the pith and substance is Federal not Provincial (link to a Fed head of power)***Churchill:* When validity of legislation is challenged on basis of extraterritoriality, the analysis centres on the pith and substance of the legislation
	* If it is in relation to matters falling within the field of provincial competence, the legislation may be valid – incidental or consequential effects on EP rights will not make it ultra vires.
	* However, where the pith and substance is the derogation from or elimination of extra-provincial rights, then even if it is cloaked in the proper constitutional form (e.g. colourability – by making it look like its aimed at local matters) it will be ultra vires.
	* In determining pith and substance, court identifies its essential character or dominant feature; this may be done through reference to both the purpose and effect of the legislation
2. **Identify the provincial head of power from s 92 (***Imperial***)**
* **For Tangible Matters (aimed at people, property):** Easy- look for the location of the matter to see if its valid;
	+ E.g. “no person shall”; this means a person in BC
	+ If aimed outside province 🡪 ET applies, ultra vires
	+ If aimed inside province 🡪 ET does not apply, intra vires
	+ **For Intangible Matters** (ie. civil rights, contracts) locate matter by:

	**REAL AND SUBSTANTIAL CONNECTION TEST** *Unifund* **Use where there are two valid provincial statutes where one says yes the other says no**

If two valid provincial statutes w/ an operational conflict 🡪 apply 4 principles to see which statute applies

Even if there is no 2 overlapping valid provincial laws that are inconsistent 🡪 if its one statute whose applicability is at issue, use principles to argue the provincial legislation inapplicable.

* + 1. **If real and substantial connection 🡪 ET does not apply, intra vires**
		2. **If NO real and substantial connection 🡪 ET applies, ultra vires**
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. You want a meaningful relationship between the
	1. Enacting province,
	2. The subject matter of the legislation and
	3. The persons or entity made subject to it or 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** (order in the federation would be undermined if competing exercises of regulatory regimes are permitted, and there must be fairness to the out of province defendant)
4. Principles of order and fairness, being purposive, are applied FLEXIBLY according to the subject matter of the legislation.

This is identifying relationships and asking whether there is a ***meaningful relationship***

* + 1. Preferable to use term ‘meaningful’ on exam instead of ‘real/substantial’

**If this all comes back as valid, then incidental extraterritorial affects are irrelevant!!!**

|  |
| --- |
| BC v Imperial Tobacco (2005) PROVINCIAL valid |
| **Facts**: The *Tobacco Damages and Health Care Costs Recovery* Act authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products* Gave BC the right to collect from tobacco companies, reverse the burden of proof, had to prove on a BOP, and they would be jointly and severally liable, operates retroactively

**Reasons**:* Pith and Substance
	+ 1. Identify essential character or dominant feature (*Firearms Act*), identify a provincial **head of power under which it might fall**
		- **Tangible (intrinsic and observable physical presence) 🡪 is it within territorial limits?**
			* **Look at location of the matter**
				+ **Inside province 🡪 intra vires**
				+ **Outside province 🡪 ultra vires**
		- **Intangible 🡪 use *Unifund* principles to determine the location of the intangibles**
			* **Ex. Contracts, civil rights, etc**
			* **Uses meaningful connection (not substantial) to the enacting province and pays respect to the legislative sovereignty of other territories**

**🡪 If so, pith and substance is regarded as situated in the province, and its valid****Validity is looked at between the *kinds* of parties, then when you are looking at applicability its between the particular plaintiff (Unifund criteria)****In imperial tobacco, they lost on validity (it was valid). They went back and then they argued that it didn’t apply (they also lost).** **The law might be valid (because you satisfied imperial tobacco factors) and then that it doesn’t apply to a party specifically (applicability) 🡪 those connections might be different****Application**:* Pith and substance 🡪 civil cause of action (92(13) Property and Civil Rights)
* Can capture incidental effects (that’s all it does)
* But no territory could possibly assert a stronger relationship to that cause of action than BC
 |

|  |
| --- |
| Unifund Assurance Co v ICBC (2003) SCC PROVINCIAL invalid |
| **Facts**:* Unifund (Newfoundland company) seeks to recover from ICBC for $750 000 under an Ontario Statute
* Dispute stems from a car accident in BC (P from Ontario, D from BC)
* Injured P returned to Ontario to collect benefits from Unifund
	+ Unifund wants to subject ICBC to the Ontario Scheme of loss transfer provisions (statutory mechanism that transfers losses between Ontario insurance companies)
* ICBC owes 2.5$ million to victims but under BC law (*Insurance (MV) Act*) is allowed to deduct no-fault payments (even though they didn’t pay any part of the amount)
	+ Can deduce wherever issued
	+ Deducts $750 000 from 2.5 million award
* Essentially, ICBC is taking a $750 000 deduction created at Unifund’s expense (because ICBC contributed nothing to the payment of no fault benefits)

**Reasons**:* 4 Principles to find a **Real and Substantial Connection**: \*If there are two valid provincial statutes where one says yes, the other says no 🡪 apply these criteria
	+ 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**
		- \*\* Find examples here (divorce etc.)
		- Subjective
		- **Different degrees may be needed depending on subject matter**
		- **the subject matter of the legislation to determine if the relation was "sufficient" to support the validity or applicability of the legislation in question**
			* Imperial tobacco 🡪 NO, its just applicability
	+ 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
		- **Flexible approach**
		- Fairness to out of province defendant is important 🡪 if Unifund is right, ICBC would be obligated to respond to insurance regimes in each province or state claiming a financial fall out from the BC accident arising out of whatever obligations those other province’s legislatures have imposed on their own insurance companies
		- *Thomas Equipment* 🡪 sell and promote machinery was bound by Alberta statute (more than just a vender)
	+ 4. The principles of order and fairness, being purposive, are **applied flexibly** according to the subject matter of the legislation
		- Strength of relationship caries with type of jurisdiction being asserted (court jurisdiction, but law of other province v. law of a province)

Because the accident occurred in BC, the Court saw this as a huge factor. * But it has nothing to do with where the accident occurred.
* This is a bad decision because if it had occurred in Saskatchewan would they have applied Sask law?
* Didn’t even ask if Ontario had a connection
 |