1. Outline **federalism/division of powers** – *Quebec Secession reference* – unwritten principle
2. Outline what you are doing
3. Outline what the **pith and substance** test is
4. Overall question: **Can it be argued that it is in pith and substance a S…**..
   1. What is the **purpose** of the law?
      1. What was government trying to accomplish?
      2. Based on the question – what are you arguing the purpose is?
   2. What are the **effects** of the law?
      1. Legal effects? How does the statute look to work?
      2. Actual effect? Only relevant if it’s been in operation, how has it worked?
      3. Based on the question, what are you arguing the effects are?
   3. What was the **motive** of government?
      1. Does the law look valid, but government is really trying to do something different? (Colourability)
5. Based on the pith and substance analysis, **does it fit under the head of power that it needs to? Or can it be construed as such?**
6. If not, **can a provision be upheld using the ancillary doctrine**? (*GM*)
   1. Do a prima facie classification of the provision to see if it’s valid (probably already done)
   2. If it’s not valid, then is the act valid? (also probably done)
   3. If the act is valid, then is the provision sufficiently integrated with the scheme that it can be upheld by virtue of that relationship? Consider the encroachment on federal/provincial powers:
      1. If serious, it can only be saved if it’s necessarily incidental (act can’t function without it)
      2. If not too serious, it can be saved if it has a rational, functional connection – it furthers the operation of the act in some way

**Upholding or Drafting Federal Legislation**

1. **Is it “supposedly” criminal?**
   1. *RJR* – it’s the pith and substance of the legislation, not their wisdom in choosing the method that’s important. If the pith and substance are criminal, it will be intra vires
   2. Definition of a criminal law is a prohibition, backed by a penalty, with a view to a public purpose. (*Margarine Reference*).
   3. A statute containing a prohibition and penalty doesn’t by itself make it criminal. Regulatory provisions do this too “there is no science…” “have to consider the nature and extent of the regulation it creates, and the context” – *Hydro Quebec*
   4. Argue there is a criminal law purpose – “Public peace, order, security, health, morality” from *Margarine Reference*
      1. Parliament can create regulatory schemes under criminal law provided they further the law’s criminal law purpose *RHRA*
   5. If necessary, note that there can be exemptions in criminal law (*Hydro Quebec*)
2. **Is it regulating the economy?**
   1. Acknowledge double aspect matter – feds can legislate under two branches of s.91(2) – *Citizens Insurance*
   2. First try to argue that it is “international or interprovincial trade”
      1. How is this argued right now?
   3. If not, try to argue that it is “general regulation of trade & commerce” (*General Motors*) – Look to *Securities Re* for arguments for points 3-5
      1. Argue it is part of a regulatory scheme
      2. Argue the scheme is monitored by the continuing oversight of a regulatory agency
      3. Argue it is concerned with trade as a whole rather than a particular industry
      4. Argue the provinces jointly or severally would be constitutionally incapable of enacting such legislation
      5. Argue the failure to include one or more provinces in the scheme would jeopardize the successful operation
      6. Finally, from *Securities Reference*, argue as a whole it addresses a matter of genuine national importance and scope in a way that is distinct and different from provincial concerns
3. If it can’t be held up as one of those, can the provision be upheld using the **ancillary doctrine**?
4. If not, **can it be upheld under POGG**?
   1. Emergency doctrine (*Fort Frances*)
      1. Is it temporary?
      2. Is it indicated that it’s an emergency
      3. Is there a rational basis for believing there’s an emergency? (*Anti-Inflation*)
   2. National Concern
      1. Did the matter not exist at confederation, or did it used to be local and now is national?
      2. Singleness, distinctiveness and indivisibility. Can it be broken down into subcategories?
      3. Has it previously been classified as a national concern?

**Upholding or Drafting Provincial Legislation**

1. Arguing it’s not **criminal**. Want to argue that it is in “pith and substance” regulatory
   1. Emphasize the property aspects (*Chatterjee*)
   2. Emphasize the local nature of the problem (*Dupond*)
   3. Employ regulatory techniques (like licenses and permitting) rather than a prohibition and penalty (*Rio*)
   4. Deal with the problem indirectly (*Rio*)
   5. Focus on deterrence/suppression of crime (*Dupond, Rio*)
   6. Don’t copy Criminal Code provisions (*Rio*)
   7. Frame the legislation broadly
   8. Avoid draconian penalties
2. **Regulation of the Economy**. Argue it is 92(13) or 92(16)
   1. Argue that the purpose and effects are all intraprovincial.
   2. If there are extraprovincial effects, argue that they are “merely incidental” to an overall intraprovincial purpose (*Carnation*)
3. **Taxation** – summarize with *Lambe*
   1. Argue it isn’t a tax
      1. If it might not be, argue it fits under 92(9), and that there is consistency between the amount raised and the cost of the regulatory program
   2. If there’s any issue about where the tax is imposed, emphasize that if you are in the province, you’re taxable (*Lambe*)
   3. Argue it’s a direct tax (acknowledge that taxes rarely fall easily into direct or indirect, so it’s the “general tendency that matters”) *CIGOL*
      1. Say the tax won’t be passed on to anyone
      2. Argue it’s an income or property tax, as those are usually valid provincially. NOT a commodity tax. *CIGOL*
4. If these arguments fail for the provision, argue **ancillary doctrine**

**Overall Process**

1. Validity – use the above to see if the statute/provision is valid
   1. Can also use extraterritoriality
2. Applicability – if its valid, does it apply?
   1. Use IJI, extraterritoriality
3. Operability – if it’s valid, and applicable, is it operable?
   1. Use paramountcy

**Interjurisdictional Immunity**

Two possible routes:

1. Federal entity route:
   1. Find a federal entity, either:
      1. An inter-provincial entity (all or nothing) (*Winner*)
         1. Inter-provincial part of the work/undertaking must be regular and continuous
      2. An undertaking that is so connected to the federal undertaking that it has moved into the federal sphere (*Tessier*)
   2. Persuade the court that the application of the statute impairs an essential or vital part of the entity (*CWB*)
2. If no federal entity, use the head of power approach:
   1. Identify a head of power relevant to your IJI claim
   2. Find precedent for that head of power (if you can’t, it’s very hard to argue)
   3. Identify the core of the head of power (invent it)
   4. Persuade the court that the application of the law impairs the core of the federal head of power

**Paramountcy**

A provincial law will be inoperable to the extent of conflict if there is:

1. Operational Conflict (one says yes, other says no – impossible to comply), or
2. Frustration of Purpose (doesn’t directly conflict, but would frustrate it’s purpose

**Extraterritoriality** - **Test for validity:**

1. Determine P&S, and identify a provincial head of power under which it might fall
2. Determine whether P&S respects the territorial limitations on that head of power
   1. If P&S is tangible, simply look at the physical location
   2. If it’s intangible, use *Unifund* “real and substantial connection” approach to locate it:
      1. What constitutes “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

**Test for applicability** (where there are 2 valid statutes – neither is aimed at extraterritorial application) Use the *Unifund* elements.

**Charter**

Steps to a Charter challenge:

1. Find a valid plaintiff
2. Find a valid defendant (Apllicability)
3. No s.33 override (notwithstanding clause)
4. Proper notice has been given
5. Prove a right has been infringed
6. Justification
7. Remedy

**Applicability**

Two ways that the charter can apply:

1. Is it a government entity? If so, all their actions are subject to Charter scrutiny
   1. Look for: government control (*McKinney*), coercive power (*Godbout*), creature of statute (*GVTA*)
2. If it’s a private entity, is it performing a government function? If so, that function will be subject to Charter scrutiny. Unclear what a “government function” is, but some is indicated by:
   1. Implementing a government policy (*Eldridge*)
   2. NOTE: applies to omissions as well as acts (*Vriend*)

**Freedom of Expression (S.2(b))**

1. Does claimant’s activity fall within the sphere of conduct protected by s.2(b) (conveys a meaning). Broad. Exceptions:
   1. Conveys meaning through violence
   2. Method or location removes protection
      1. Private property is “charter free”
      2. Public property undergoes *Montreal* test – is the space a place where one would expect constitutional protection for expression?
2. Characterize the type of expression – core/periphery
3. Was the purpose or effect of gov action to infringe FOE?
   1. Was purpose to control attempts to convey a meaning?
   2. If not, was the effect to restrict FOE? (Must limit core principle)
4. D has opportunity to claim P is making a “positive claim”. If shown, P has to fit their claim within the *Dunmore* criteria:
   1. Grounded in fundamental FOE, rather than access to statutory regime
   2. Exclusion from statutory regime substantially interferes with 2(b), and
   3. Gov responsible for inability to exercise fundamental freedom
5. Burden shifts to D for justification. 4 factors determine extent of evidence needed:
   1. Nature of the harm and inability to measure it
   2. Vulnerability of the group protected
   3. Subjective fears and apprehension of harm
   4. Nature of the infringed activity

**Freedom of Religion**

1. Claimant must show:
   1. That they have a practice/belief which has a nexus with religion, and
   2. That they are sincere in their belief
2. This infringement must be substantial

**Justification**

1. Is the limit prescribed by law?
   1. May be too vague violate s.7. Consider these three factors (*Nova Scotia*):
      1. Need for flexibility and interpretative role of courts
      2. Impossibility of achieving absolute certainty, standard of intelligibility is more important
      3. Many varying judicial interpretations may exist, and coexist
   2. Is it a law? Doesn’t have to be in the narrow sense. Policy may be law when (*GVTA*):
      1. It’s authorized by statute and sets out a general norm or standard that is meant to be binding and sufficiently accessible/precise
2. Is there a pressing and substantial objective?
3. Proportionality:
   1. Is the law rationally connected to the objective?
   2. Does the law minimally impair the right in question?
      1. Just has to be reasonable (*NFLD v. NAPE*)
   3. Are the laws salutary effects proportional to the deleterious effects?
      1. Ex’s – *Bryan*, *Hutterites*

**Remedies**

1. S.52 – applies to any law that is inconsistent with the Charter. Includes:
   1. Striking down the legislation
   2. Severance of the offending sections
   3. Striking down or severance w. temporary suspension of declaration of invalidity (*Schachter*)
   4. Reading down (*Schachter*)
   5. Reading in (*Shachter, Vriend*)
   6. (also may be declared inapplicable or inoperable)
2. S.24(1) – available for a breach of the Charter. Can ask for any remedy, so long as you convince the court it’s “appropriate and just in the circumstances”
   1. Generally used when a law is constitutional but an unconstitutional act was performed under that law’s authority (*Ferguson*)
   2. Ensure you are in a court of competent jurisdiction (*Conway*)

Federalism (and Regulation of the Economy)

In the *Quebec Secession Reference* the Supreme Court of Canada recognized that the Constitution includes a number of unwritten principles, one of which is federalism. This means that political power is shared by the federal and provincial governments, with each being designated respective spheres of jurisdiction via s.91 and 92 of the Constitution. The regulation of the economy is a double aspect matter, without a clear dividing line between provincial and federal power. Parliament derives the majority of their power in this area from s.91(2), the regulation of trade and commerce, and the provinces derive theirs principally from s.92(13), property and civil rights, and s.92(16), matters of a merely local or private nature in the province. There is no doubt that at it’s widest interpretation, s.91(2) could provide for the regulation of nearly the entire economy of Canada. However, in *Citizen’s Insurance* the Supreme Court chose to reject this interpretation, as it does not reflect the intention of the constitutional drafters. In particular, it would render numerous heads of power redundant. This means that the provinces have power to regulate the economy so long as the legislation in “pith and substance” fits within a provincial head of power.

Taxation

Constitutional jurisdiction over taxation is primarily a federal power, as s.91(3) allows for “the raising of money by any mode or system of taxation”. However, the provinces do have their own ability to tax under s.92(2), so long as the tax is direct. As was stated in *Lambe*, a direct tax is one which is demanded from the very persons who it is intended or desired should pay it, whereas an indirect tax is one which is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.