**ISSUE #1: VALIDITY: Is the statute valid?**

* Must prove it doesn’t fit in other jurisdiction’s heads of power and it does fit in yours. BUT: these boxes change in size/scope, vague.
* Ultra vires because legislature which enacted statute acting beyond legislative authority

3 Components:

1. Precedent – case law. BUT: always possible to modify the scope
2. Statutory interpretation
3. Theories of federalism, values and principles, policies

Considerations for interpreting actual statute:

1. External Evidence
2. Internal Evidence
3. Pith and substance
4. Actual motive of government (Colourable?)

(1) DETERMINE PITH AND SUBSTANCE

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| * What is the matter that the legislation is responding to? * Object and **purpose** of legislation   + Intent of Parliament as a whole (objectively)   + **What do you argue the purpose is? -- based on the question**   + Methods:     - A. Legislative History     - B. What problem is being aimed at?     - C. Reading the statute in question * **Effect** of the statute   + Legal effect (always considered) – how will it actually operate?   + Actual/practical effect (sometimes considered) – how has it worked?     - Counsel who wants Courts to consider must introduce   + **Argue what you think the effects are – based on the question** * **Actual motive** of the government   + Ulterior motive (form is A, but intention is B)   + **Doctrine of colourability 🡪** legislation that in form appears to relate to a matter within the legislative competence of the enacting order of government, but in substance addresses a matter falling outside its competence (form does not determine its essential character) 🡪 point to a head of power it is aimed at   🡪 In an easy case purpose, effect & intent all point one direction, otherwise court has to decide which is dominant |

**(2) LOOK TO HEADS OF POWER**

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| * 92(9) – licences to raise revenue for prov purposes (must be fiscal in nature) (*Russel*) * 92(13) – Property and civil rights * 92(16) – matters of a merely local/private nature within the province | POGG 91(10) - Navigation and Shipping  91(27) – Criminal law |

\*incidental effects/encroachment on the other power is acceptable

**(3) ANCILLARY DOCTRINE** (GM)

* **Can the provision be upheld with the ancillary doctrine? (**STATUTE MUST BE VALID)
* **Allows infringement on another jurisdiction’s head of power if the pith and substance of the entire act is “in relation to” an intra vires matter and the infringement is incidental (ancillary) to the pith and substance of the act**
* Justified through connection to valid legislation
* *Assisted Human Reproduction* 🡪 holds up bulk of statute through ancillary (unprecedented)

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| **1. Look at the provision alone, is it valid? To what extent does it intrude on provincial powers?**   * If pith and substance within legislative competence + entire act valid or the provision severable and valid 🡪 inquiry ends (NO INTRUSION) * Provision invalid * 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. 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 * 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  **Ancillary doctrine: allows infringement on another jurisdiction’s head of power if the pith and substance of the entire act is “in relation to” an intra vires matter and the infringement is incidental (ancillary) to the pith and substance of the act**   * If passes 🡪 Intra vires   (*GM)* |

**If trying to UPHOLD legislation: argue there is a double aspect**

**Double aspect doctrine:** laws with substantially similar purpose regulating the same matter can both be valid

* **The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various “aspects” of the “matter” in question** (CWB)
* *Multiple Access* 🡪 the federal aspect deals with company law; the provincial aspect deals with securities regulation
* **If there is no repugnancy (express contradiction), then the provincial legislation remains operable**
* Anchored in different heads of power and governing same activity
* BOTH VALID

ISSUE #2 IS IT APPLICABLE?

**(4) Is it extraterritorial provincial legislation?**

**[(5) Interjurisdictional Immunity?] 🡪** should be reserved for situations of precedent (federal things, persons or undertakings, or where its application was absolutely vital to enable Parliament to achieve its federal purpose, or vital to an undertaking to carry out its mandate) (CWB)

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| **Federal Entities:**   * 1. Can identify entity 🡪 use traditional version   + A. **Identify** a federal entity/undertaking \*see above     - *Churchill Falls* 🡪 Unlikely to succeed with federally incorporated companies (because not claiming IJI for a particular activity, but for the entire company)       * Vs. *Bell*, Bell was not arguing that the COMPANY claimed IJI, but that the activity did.       * As long as legislation leaves the corporate structure in tact (that basically means that it is subject to BC company law) there is no IJI       * But if the company wherever incorporated is involved in an activity that is a federal work and undertaking, if the provincial legislation impairs the management, health and safety regulations etc that activity the federal undertaking can be given immunity     - **Is it divisible?** (Functional analysis 🡪 how does it actual operate? If single/indivisible: can claim IJI, if not: separated) (*Winner*)       * Will not divided unless the business is actually divided – have a bias against dividing     - **Is it colourable?** If it’s actually intra-provincial, **can’t manufacture federal immunity by starting minor inter-provincial operations** (*Winner*)     - *Tessier* 🡪 Expands W&U through **derivative jurisdiction**: don’t have to be a federal work and undertaking on your own in order to fall under the federal umbrella, but you must have a **sufficiently close relationship to a federal work and undertaking (functional analysis) – THIS IS TRUE FOR LABOUR RELATIONS COULD BE TRUE FOR OTHER WORKS OR UNDERTAKINGS (ex. Railway)**        * 1. Look at the operation that is at the core of the federal undertaking       * 2. Look at the particular subsidiary operation engaged in by the employees in question       * Assessing whether the effective performance of the federal undertaking was dependent on the services provided by the related operation, and how important those services were to the related work itself (must be vital)       * *Northern Telecom* 🡪 80% of work done by installers was vital, also completely integration between workers and operating of the network       * *United Transportation Union* 🡪 must be something more than a physical connection and mutually beneficial commercial relationship w/ a federal undertaking       * *West coast Energy* 🡪 facilities located completely w/i province, but in federal jurisdiction because was transported to an interprovincial pipeline (direct jurisdiction)       * Has applied in 2 situations:         + A. when the services provided to the federal undertaking form the **principal part of the related work’s undertaking**         + B. **when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation**       * **Contact** can be important (whether function separately or together, something more than a physical connection, cannot be minor/casual       * **Providing regular/important services is not enough if only minor part of operations** (vs. direct jurisdiction – which can be minor)       * Even if it is vital, if it represents an insignificant part of employee’s time/minor aspect 🡪 not federal       * **Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province**       * Must be functionally part of the interprovincial entity and **lose its distinct character (normal day-to-day activities** must be interprovincial in nature**)**         + If the essential/dominant character (view functionally) is distinct from interprovincial transportation/communication 🡪 remains in provincial jurisdiction   + B. **Identify a core**, its vital and essential element of a going concern (precedents) (*PHS* failed to do this)     - Anything to do with internal management of an entity is essential:       * Labour relations       * Employer/employee relations       * Safety and health       * Provincial health power is TOO broad and extensive (*PHS)*       * If you can’t find a precedent for head of power or entity🡪 you are not prevented, you can argue it; but it will be more difficult. (CWB does not prohibit unprecedented applications of IJI)   + C. **Apply:** persuade the court that the application of the provincial statute (that particular provision) to the federal entity will somehow impair its internal management, or vital or essential part of it (**effect**) (*CWB*)     - Can argue that it will impair prospectively     - Cannot sterilize: *Winner* 🡪 prevent him from operating inter-provincial undertaking     - *Winner*🡪 Fed entity cannot be impaired by the province’s general right to control the roads (Prov authority is limited, does not entitle it to interfere with connecting undertakings)   🡪 If you succeed the court will find them inapplicable to that federal entity   * + - Not invalid for everything * 2. NO entity 🡪 use new version   + A. Identify a federal head of power (NAME IT)   + B. Identify the core of that head of power for the court (NAME IT)     - *Ordon Estate* 🡪 maritime negligence law is the core of 91(10)     - *Canadian Western Bank* 🡪 promoting insurance is NOT the core of banking (91(15))     - *PHS* 🡪 didn’t identify core   + Impairment step 🡪 show the court how the application of that provincial law (or the part of it) will impair the core of that head of power (*CWB)*     - **What is the scope of the immunity that the federal entity can claim? What effect is the provincial statute, if applied, going to have?**   **Provincial Entities:**   * In theory, provincial entities and heads of power are also entitled (*Canadian Western Bank, PHS*)   + *PHS 🡪* **This case expressly continues the POSSIBILITY of a province or provincial entity claiming IJI from the application of federal law – the only case to reach the SCC in which the application of IJI to a provincial entity or head of power has been claimed**   + If you can’t find a provincial entity, it will be hard to find a precedent for IJI at a core of a provincial head of power   + Thus, finding an entity first helps you avoid having to find the core of a head of power – you only find the core when you don’t have an entity! |

ISSUE #3 IS IT OPERABLE?

**(6) Is there an operational conflict? 🡪 Paramountcy**

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| * (1) Are there two pieces of valid legislation? * (2) Is there an **express contradiction** (*Multiple Access*)   + Dual compliance must be impossible   + If provincial bolsters federal, no contradiction * Alternatively, (3) Does the provincial statute **frustrate the purpose** of the federal statute?   + Does the provincial purpose undermine the federal purpose?   + *CWB*: does not try to fully regulate banks, exclude provincial aspects * **Argue that the language of the federal legislation is permissive (“may”) 🡪 therefore provincial does not frustrate or have an operational conflict** *(Ryan)*   + Argue that striking down a provincial statute that is otherwise valid is wasteful, confusing – could create a gap in a provincial scheme of regulation * **Argue that it is double aspect 🡪 (above)** |