CONSTITUTIONAL 2016 -2017 MINI CAN

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# INITIAL STEPS FOR ALL CASES WHAT REMEDY IS THE CLIENT SEEKING?

1. **Outline what the pith and substance is**
   1. What is the **purpose** of the law?
      * What was government trying to accomplish?
      * What **evil** is aimed at? *RJR (tobacco) AHRA (human cloning)*
      * Based on the question – what are you arguing the purpose is?
      * Legal history, preamble, intent of legislation
      * Look for **dominant features vs merely incidental features – be specific**
   2. What are the **effects** of the law?
      * Legal effects? How does the statute look to work?
      * Actual effect? Only relevant if it’s been in operation, how has it worked? *Morgentaler*
      * Based on the question, what are you arguing the effects are?
   3. What was the **motive** of government?
      * Consider - speed, press releases, timing of events, extrinsic evidence
      * Does the law look valid, but government is really trying to do something different? (Colourability)
2. **Put the pith and substance into a head of provincial or federal power**
   * 1. **POGG** – residual power *Russell (umbrella), Local Prohibition Case (residual)*
        1. National Concern *Zellerbach*
        2. Emergency *Fort Frances*
     2. **Criminal Law** 91(27)
        1. Prohibition + Penalty + Purpose *RJR, ARHA, Dairy*
     3. **Trade & Commerce** 91(2)
        1. International and Interprovincial Trade
        2. General Regulation of Trade Affecting the Whole Dominion

* Consider ordinary rules of statutory interpretation
* Theories of federalism
* Common law precedents – how has this head been interpreted before?

# CHALLENGING FEDERAL STATUTE – POGG EMERGENCY Doctrine

**Commencement**:

1. **Argue no rational basis for determining emergency to start with** (*Anti-Inflation*)
   * Parliament wording was **not clear and explicit** (*dissent Anti-Inflation*)
   * Could have been dealt with through an existing federal or provincial head of power– although remember that federalism can be set aside in times of war and emergency *Fort Frances*
2. **Argue is it NOT temporary legislation (temporary alteration of distribution of powers** (*dissent Anti-Inflation*)
   * Even if it IS temporary, may not be **emergency** legislation *(dissent Anti-Inflation*)
3. **Argue legislation doesn’t indicate Parliament** **acting out of crisis / war / extreme emergency** (*Anti-Inflation🡪 public sector not bound, private sector bound***Parliament must show it is operating out of a sense of emergency / urgency 🡪 if not demonstrated in all wording, it isn’t a crisis!** *Beetz dissent Anti Inflation*

**Continuation**:

1. Burden on challenger🡪 **present** **very clear evidence emergency ended** *Fort Frances*

* Remember: Can be extended after emergency if **no proclamation emergency over** *Fort Frances*
* Court will NOT overrule Fed decision re declaration/ending of emergency-not expertise of judiciary *Fort Frances*
* **Use extrinsic evidence (admissible and necessary)**

# CHALLENGING FEDERAL STATUTE – POGG 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 NOT inherently concerned with the dominion as a whole
     + True test is subject matter of legislation 🡪 if it goes beyond local interest, is concern of dominion as a whole it goes to POGG *Canada Temperance*
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 the pith and substance = Provincial head of power under s 92 *Johannsen*
     + Argue that all provinces would be able to deal with it equally to ensure consistency in Canada (*Johannsen*)
   * Argue that it **would create a new federal head of power that would not be favourable to have the matter permanently under federal jurisdiction** (once POGG NCB exclusively federal – *Johannsen* aeronautics)
     + 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 *Canada Temperance* (double aspect doctrine)
   * **Argue if it is criminal in pith and substance, better to be under criminal Fed power than POGG** *Hydro Quebec*
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*)

* **UPHELD Ntl Concern**: **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? **if it’s EVIL for society 🡪 criminal law is better**

#### 

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.

# CHALLENGING FEDERAL STATUTE – Criminal Law

1. **Argue it doesn’t meet the required form of prohibition + penalty + public purpose (health security peace order)** *Margarine Refernece*
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, reflects alternative or ulterior purpose

1. **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 **If you allowed feds to regulate areas in prov competence it will oust all prov heads of power – need limits to federal powers!** *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 Assisted Human Reproduction were badly decided – P&S of criminal should be narrow, new doesn’t justify adding to criminal power, can’t use ancillary doctrine for multiple provisions in a single statute!
* Argue this would jeopardize the division of powers

1. **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: pith and substance is criminal, not regulatory*
* *Dissent of Hydro Quebec* (which Edinger Agrees):
  + Subject matter determines if regulatory-prohibitory, prohibition & penalty does not mean its criminal
  + Nature 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?

# 

# DEFENDING FEDERAL STATUTE – Criminal Law

1. **Argue its a valid criminal law public purpose** 
   * “Public peace, order, security, health, morality” from *Margarine Reference*
   * Parliament can create regulatory schemes under criminal law provided they further the law’s criminal law purpose *RHRA*
   * SHOW THAT IT FITS THE DEFINITION of a criminal law - prohibition, backed by a penalty, with a view to a public purpose. (*Margarine Reference*).
2. **Argue the pith and substance is entirely criminal** 🡪 use extrinsic evidence (*RJR MacDonald,* also *Hydro-Quebec*)
   * *RJR* – it’s the pith and substance of the legislation, not their wisdom in choosing the method that’s important.
   * *RJR* – does not have to deal w/ traditional crim law concerns, feds can create new criminal laws, form is flexible, as long as it is aimed at an evil
3. **Argue it addresses a real, objective evil & demonstrates** **a reasonable apprehension of harm** (*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 Majority in AHRA correctly decided – Parliament CAN CREATE REGULATORY SCHEMES – **no minimal threshold for harm, doesn’t oust provincial powers, it supplements them!**
   * Argue this would **NOT jeopardize the division of powers**
4. **Argue its real purpose is CRIMINAL NOT Regulatory**
   * Does not preclude provinces from complementing criminal law with their own legislation (*Hydro Quebec*)
5. **Argue federal criminal power 91(27) cannot be limited** *Quebec v Canada*
   * Cooperative federalism does not limit powers defined by the constitution, any breach in jurisdiction is justiciable
   * If its P&S relates to a federal head and has incidental effects on prov heads of power it is still intra vires Feds
   * Even it is a bad motive it does not limit federal power

# DEFENDING PROVINCIAL STATUTE – Criminal Law Complementary not supplementary

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

1. **Argue in pith and substance it is not Criminal.**
   1. Frame legislation BROADLY not narrowly
2. **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 not crime**
3. **Emphasize local / provincial nature / aspects of the problem**, limited scope of problem
   1. **92(15) Provinces can create punishments with fine, penalty, or imprisonment under prov heads**
   2. **Bylaws and ordinances are valid provincial law** *Dupond*
   3. Emphasize the **temporary nature and local ambit** of the legislation *Dupond*
   4. If its **transaction oriented** or a business and local 🡪 province has plenary jurisdiction (*Rio Hotel*)
   5. **Licensing schemes are great tools for provinces to use –** use conditions attached to license to be provincial (local) in nature (*Rio Hotel*)
4. **Use regulatory techniques** (**licensing, permitting, zoning**)
   1. **Avoid prohibition + penalty form** *Rio Hotel* instead use fees, conditions, licensing, regulation as this looks civil not criminal
   2. **If you use prohibition + penalty, it does not always mean it is criminal** *dissent Hydro PQ, Goodwin*
   3. Does not become a matter of criminal law because it has a prohibition and makes it an offence to observe the prohibition (*Dupond*)
   4. Connect issue to a valid regulatory scheme, perhaps under 92(9)
   5. Argue it is associated with a valid scheme of regulation (prohibitions cannot be sustained by themselves) (*Dupond,* dissent Laskin)
   6. Prohibitions not sustainable by themselves (Dupond, dissent)
5. **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 and draconian penalties)
      1. BUT imprisonment is not fatal 🡪 *Dupond* by-Law: Penalties set up are fines and imprisonment - if fines are not paid, imprisonment
6. **Emphasize Deterrence not Punishments - Prevention of crime main goal (forward looking)** *Dupond, Goodwin*

**\*\* Must identify pith and substance – can have incidental effects on s.91 heads and still be valid**

* 1. **Set up a national scheme to regulate human reproduction** (mandatory national standards) 🡪 regulation of a health service *Assisted Human Reproduction*
  2. **Subject matter determines if its regulatory** *Dissent of Hydro Quebec* (which Edinger Agrees):
* “prohibition+penalty+public purpose” does not mean its criminal
* Nature / extent of regulation, context and subject matter determine whether its regulatory or *prohibitory*
* Is there broad sweeping discretion for Ministers? Are there equivalency exceptions given to provinces?

**\*\* Suppress conditions likely to favour commission of crimes** \*\*  
**\*Feds also have this power, provinces can complement it – Double aspect is OK overlapping powers unavoidable! (***Goodwin***)**

* 1. **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
     2. *Goodwin 🡪 Deterrence is a valid purpose of provincial law, police need discretion to uphold law*
  2. **Provinces can control vice & crime – complements federal criminal powers**
     1. *Dupond* 🡪 dealing with assemblies before the begin (preventative) versus the Criminal Code which prohibits them after they have formed (punitive)
     2. *Goodwin 🡪* when focus is deterrence not punishment, it is valid provincial law
     3. *Chatterjee* 🡪 **no general bar to province enacting civil consequences to criminal acts in relation to prov head of power –** both provinces and federal govt can legislate to prevent crime
        1. Civil consequences for criminal offences provided the province does so for its own purposes in relation to provincial heads of power (*Chatterjee*)
        2. Can have punitive effects 🡪 as long as its dominant purpose is preventative not colourability (*Chatterjee*) \*\*Edinger thinks that *Chat* was colourable – took property under guise of victims

1. **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**
2. **Go wide** (**make it broader than a Code provision does, and get everything**) *Chatterjee, Dupond*
   1. *Chaterjee*🡪 both fed and prov offences, doesn’t single out one offence (only concerned with effects of crime)
   2. *Dupond* 🡪 broad prohibitions (all gatherings)
3. **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 criminal law as long as they aren’t conflicting.
4. **Concede provincial legislature's concern is with morality** but argue **it is only a minor concern.**
5. **Hide colourability -** Avoid discussing the real problem the legislature is trying to solve
6. **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 STATUTE – Criminal Law

**\*Look at defending provincial legislation section, argue the opposite \*\* Supplemenatry not complementary**

1. **Point out language directly from Criminal Code – makes it criminal** (*supplementary*) (*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 *Rio Hotel*
5. **Argue supplementary not complementary** 
   1. Trying to enforce Code provisions through regulation (*Rio Hotel*)
   2. Prohibition not sustainable by themselves, must invoke criminal power so ultra vires Prov (*dissent Dupond*)
6. Is the legislation **colourable**? \*\*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)

**Is it a matter traditionally within criminal law competence?**

**Morality** Russell v The Queen, Margarine Reference, Assisted Human Reproduction

**Health** legitimate public health evil – can indirectly control evil as long as aimed at the evil RJR MacDonald, AHR

**Security** Assisted Human Reproductio*n*

**Public peace and order** Margarine Reference

# DEFENDING FEDERAL STATUTE – Regulation of Economy

1. **Argue it is a matter related to regulation of the economy (trade, commerce, sales, production)**
   1. Acknowledge double aspect matter – feds can legislate under two branches of s.91(2) – *Citizens Insurance*
   2. Argue a local matter has **evolved** into a national matter (*Securities* similar to *Local Prohibition Case*)
   3. Would have to support this with factual matrix that it is no longer an industry-specific matter (*Securities* – but evolution argument is from *Local Prohibition Case*)

**91(2) Trade and Commerce given two branches:** *Citizens Insurance*

1. **International interprovincial trade**
2. **General regulation of trade and commerce**
3. **Argue that it is “international or interprovincial trade**”

* End of production process is federal (everything in between is up for grabs)
* Merely incidental effects (or significant effects) on local business are okay () as long as its aimed at international/interprovincial trade *Labatt*

1. **If not intl or interprov trade, argue that it is “general regulation of trade & commerce”** (*General Motors*)

* **Federal legislation should not upset the balance between fed/prov powers**

**GM TEST for General Regulation of Trade and Commerce Applicability:**

* + - 1. Argue it is part of a **regulatory scheme** 
         1. Explanation of prohibited conduct
         2. Creation of an investigation procedure
         3. Establishment of a remedial mechanism (GM was part of a well-integrated regulatory scheme)
      2. Argue the scheme is **monitored by the continuing oversight of a regulatory agency (**GM was**)**
      3. Argue it is **concerned with trade as a whole** rather than a particular industry (GM was, Labatt wasn’t)
         1. GM 🡪 Regulating trade, competition is a concern for the whole economy
         2. Securities 🡪 Look at purpose and effects

Aimed at day-to-day conduct, detailed regulation of all aspects of trading (GOES TOO FAR)

Argued that it has transcended its local nature and is now a national concern (but would have to present a factual matrix that shows it is no longer a local matter)

* + - 1. Argue the provinces **jointly or severally would be constitutionally incapable** of enacting such legislation (Securities 🡪 federal scheme might be aimed at what provinces could achieve but fails because it goes too far in trying to regulate all aspects)
      2. Argue the **failure to include one or more provinces in the scheme** would jeopardize the successful operation GM 🡪 must cover intraprovincial trade if it is to be effective
      3. Finally, added in *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 (double aspect)

1. **Argue that it is a specific work for the general advantage of Canada**

* Feds can regulate it under 91(10)(c) (*Eastern Terminal Elevator*) [hasn’t been used since the 60s]
  + - Must be a physical work (*Eastern Terminal Elevator*)
    - Federal government has declaratory power

# CHALLENGING FEDERAL STATUTE – Regulation of Economy

1. **Argue Parliament is trying to make a provincial matter into a federal matter:**

* Provincial inability test alone cannot be used to grant jurisdiction to the Feds (*Eastern Terminal Elevators*)
* Cannot claim jurisdiction based on percentages of export (*Eastern Terminal Elevators* 🡪 80% international trade
* Cannot rely on sheer volume of the problem (*Securities*) or sheer national distribution of the problem (not enough for jurisdiction)
* Argue that there are MORE than merely incidental effects (*Labatt*)
* Parliament cannot reach back into provincial jurisdiction to regulate local businesses *Eastern Terminal Elevators, Labatt, Securities*

1. **Argue 92(13)** **property and civil rights** 🡪 this head of power should be interpreted **broadly** (*Citizens Insurance*)

* Argue Feds directly regulating trades, contracts in a province (*Citizens Insurance*)
* Argue that there are more than incidental effects on the other sphere (*Securities*)
* Pith and substance is not 91(2)

1. **Argue 92(16)** 🡪 Matters of a merely local or private nature

* General trade and commerce cannot be used so that it **denies the provinces the power to regulate local matters/industries within their boundaries** (*Securities*)
* Must be directly aimed at international/interprovincial trade or general recognition of trade generally (genuine national concern) (*Securities, GM*)
* Feds cannot regulate local trade just b/c its more efficient to regulate it with interprovincial (*Burns*)

1. **Feds cannot regulate particular industries** *Eastern Terminal Elevators, Labatt*

* Cannot regulate localized products even if they cover substantial portions Canadian economic activity *Labatt*🡪not controlling the regulation of the distribution of products or their movement through channels of trade; main purpose 🡪 regulate brewing process

# DEFENDING PROVINCIAL STATUTE – Regulation of Economy

1. **Argue it relates in P&S to a provincial head**

* Provinces regulate production, Feds can’t regulate a single industry by itself *Labatt*
* **Purpose and effects are all intraprovincia**l
  + If there are extraprovincial effects, argue that they are “merely incidental” to an overall intraprovincial purpose (*Carnation*)
    - Argue it is a local business with incidental effect on trade and commerce *Carnation*
    - If products are produced locally before being exported, province can likely regulate the industry or production if the focus is on the local transactions *Carnation, Labatt*
* **Find a provincial head of power**
  + **92(13) Property and Civil Rights** interpreted broadly, contracts and rights arising out of them are provincial matters (*Citizens Insurance*)

1. **Argue that its P&S is Local matters / local businesses - despite effects on interprovincial trade**

* Provinces have jurisdiction over local businesses & professions
* 92(13) Property and civil rights, contracts *Citizens Insurance, Eastern Terminal Elevators*, *Carnation*
* 92(16) matters of a merely local or private nature
* *Carnation* 🡪 Quebec aimed at improving the bargaining position of producers (local businesses)
* There can be **SIGNIFICANT effects** on interprovincial and international trade (*Carnation*)– it is permissible UNLESS🡪 the province was aiming at those effects (to produce them) as its main objective (**colourability)**
* Provinces can regulate early stages of manufacturing/production (*Eastern Terminal Elevators*, *Carnation*)
  + Regardless of the destination of the goods
* Regulating what is produced in province (*Carnation*), not what is coming into the province (*Burns*)
* Provinces prima facie able to legislate with reference to production (*Labatt*)

1. **Argue that Parliament is overstepping its bounds by:**

* Reaching back into the production/ of goods and regulate it directly (*Labatt / Eastern Terminal*)
* Claiming Jurisdiction based on percentage of goods exported (Eastern Terminal)
* Relying on sheer volume of trade (Securities)
* Relying on geography of trade (Securities)
* Regulating particular industries (Labatt, Securities)
* Creating a federal scheme because it’s more efficient that an intraprovincial one (Eastern Terminal, Securities)

# CHALLENGING PROVINCIAL STATUTE – Regulation of Economy

1. **Argue that the aim is to regulate 91(2) Inter-provincial and International Trade:**
2. Not a local or private matter
3. Not property or civil rights
4. Provinces can’t AIM to produce effects on interprovincial and international trade (*Carnation*)
5. Province cannot regulate inter-provincial trade because it is beneficial for the effective control of intra-provincial trade (*Burns*)
6. *Securities*🡪 take argument from this case (although they were trying to uphold Federal) – but that it changed so much that regulation of all aspects fall within the general branch??
7. **Argue it is within 91(2) General Trade and Commerce**

* The provinces cannot use their power to deny the federal government powers under 91(2) to regulate on matters of national importance & scope (*Securities*)

1. **Argue that the interference/effects with interprovincial trade are MORE THAN INCIDENTAL**

* *Burns* the interference with interprovincial trade was not insignificant 🡪 it effectively dictated conditions under which hogs can be brought in from outside Manitoba; effectively subjects price of imports to same regulations as local sales

1. **Argue the statute essentially regulates buying of products from other provinces** (*Burns*)

* Even if the law in form doesn’t appear to be regulating inter-provincial trade, is it colourable?

# EXTRATERRITORIATILY TEST FOR PROVINCIAL LEGISLATION

**Test for validity:**

1. **Determine P&S, and identify a provincial head of power under which it might fall**  *Churchill Falls* 🡪 P&S outside province
2. **Determine whether P&S respects the territorial limitations on that head of power** *Imperial Tobacco*
   1. If P&S is **tangible**, simply look at the physical location
   2. If it’s **intangible**, use *Unifund* “**real and substantial connection**” test approach to locate it:
      1. Must be sufficiently connected to the province:

* 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
* 🡪 legislation must respect the dual purposes (order and fairness) of the territorial limitations in s.92

**Test for applicability:**

1. **Where there are 2 valid statutes – neither is aimed at extraterritorial application** - Use *Unifund* elements

* Applicability of an otherwise competent provincial legislation to out-of-province Ds is conditioned by requirements of ***order and fairness*** that underlie our federal arrangements *Unifund*
* Principles are purposive and applied flexible *Unifund*
* Court does not want to allow for conflicting rules between provinces
* **For exam:** look for real and substantial connection, but overriding concerns are “order and fairness”.
* **For exam**: any prov legislation purporting to regulate contracts or transactions will be hardest statute subject to deal with b/c contract might not have sufficient connection to B.C.

# UPHOLDING FEDERAL LEGISLATION UNDER ANCILLARY DOCTRINE

**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**

1. **Look at the provision alone, is it valid?** 
   1. If pith and substance federal + entire act valid/provision severable and valid 🡪 no intrusion, inquiry ends
2. **To what extent does it intrude on provincial powers?**
3. **If serious**, it can only be saved if it’s necessarily incidental (act can’t function without it)
4. **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 – see #4
5. **Entire statute valid?**
6. Not valid 🡪 end of inquiry (ex. *Terminal Elevators* struck down here)
   * + The rest of the statute has to be valid (can’t just rely on the ancillary doctrine to make the whole statute valid (*Securities*)
7. If yes 🡪 Move onto #4
8. GM 🡪 valid as a whole
9. **Can provision be justified through sufficient connection and integration with the scheme so that it can be upheld as valid legislation?** (**ANCILLARY DOCTRINE)**
10. Invalid provision inside a valid statute does not make it valid
11. 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 power
    * GM 🡪 the provision is an integral part of the Combines Investigation Act scheme regulating anti-competitive conduct

If passes 🡪 Intra vires

If it doesn’t 🡪cannot be sustained under general trade and commerce

# ARGUING INTERJURISDICTIONAL IMMUNITY

1. **IS THE DEFENDANT A FEDERAL ENTITY?: (originally IJI was limited to fed entities “persons works or things”)**
   1. **Identify the federal entity** Winner, Tessier
      * Look to Federal Heads of Powers that are federal works and undertakings
      * Look at Provincial heads 92(10) a-c provincial exemptions
      * Industries that cross provincial boundaries (forms of transportation, communication, shipping lines, federal persons, banks, post office, RCMP, army, anything CONTROLLED by parliament)
   2. **Ask what the essential status and capacity/vital part of the operation is a going concern**.
      * Interworking of the federal entity are always vital and essential (wages, hours of work, health and safety precautions, workplace conditions, organization, mgmt.)
      * Lots of precedent there… NAME THEM
   3. **Then ask what immunity does this entity have from the application of provincial statute**  
      Winner / Bell… Pre-Canadian Western Bank
   4. **Persuade the court that the EFFECT of the application of the provincial statute impairs an essential or vital part of the federal entity** CWB, Tessier (not upheld only 14%, no impairment)
      * Example: Legislation can’t STERILIZE an undertaking Winner
        + The province can regulate roads so long as they don’t do so in a way that impairs or sterilizes federal power (relates to IJI)
        + Can control roads but not undertakings that use roads.
      * Bell, CWB*:* the test of impairment is insufficient and inconclusive in cases where, without going so far as to impair or paralyze federal undertakings, an application AFFECTS a vital part of those undertakings.
   5. **All federal entities carrying on business are going to be subject to the vast majority of provincial laws – it is only certain parts of certain provincial statutes that infringe – this is only area of immunity**
2. **IF YOU CANNOT FIND A FEDERAL ENTITY, USE A HEAD OF POWER: transferred immunity for federal entities to heads of power**

* CWB IJI is a reciprocal doctrine, every head of power has an immune core.
* CWB, Marine Services v Ryan *-* **Sets out very clearly how to approach IJI when there is no federal entity anywhere to be found:**

A. **Identify a federal head of power** **(NAME IT)**

* + 91(10) navigation and shipping is a great one *Canadian Western Bank*

B. **Identify the core of that head of power for the court (NAME IT)**

Try to find a Precedent

If you don’t know the core of the head of power, make it up and write something!

Ordon Estate 🡪 maritime negligence law IS the core of 91(10)

Ryan 🡪91(10)

Canadian Western Bank 🡪 promoting insurance is NOT the core of banking (91(15))

PHS 🡪 didn’t identify core of provincial head of power

C. **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

* Ryan estate
* Ordon
* What is the scope of the immunity that the federal entity can claim? What effect is the provincial statute, if applied, going to have?
* *Marine Services Two-Step test to trigger IJI*
  1. So you identify a federal head of power relevant to your claim for IJI -
  2. Then work on finding the core of the head of power – there will be no precedent’s, you will have to invent it *Canadian Western Bank*
     + **Try and find a precedent (Binnie in CWB)**
     + **If a claim has been allowed, whether or not it was successful \* MAKE LIST OF PRECEDENTS**
     + When can you rely on IJI
       - **Can rely when there is precedent:** IJI should be limited to what has been done in the past (precedent). An attempt to limit the scope and application of IJI to what’s already been done
       - You have to determine what is at the core, and use IJI when the provision touches on the vital/core component of power
       - Can protect provincial jurisdiction, but should be restrained to only protect areas where there is precedent.
  3. **Persuade the court that the application of the provincial law impairs the core of the head of power – a SERIOUS/SIGNFICANT negative effect on the core (PHS 🡪 didn’t even find let alone impair a core)**
     + There must be an **impairment (as opposed to affect)** – factual – look at the ACTUAL ENTITY, not the head of power.
     + **Whenever IJI available:** Must consider the level of intrusion on the “core” of the power on the other level of govt which would trigger the application of IJI.
     + It must be more than a mere effect – it is when the adverse impact of a law adopted by one level of govt increases in severity from affecting to impairing (without NECESSARILY sterilizing or paralyzing) such that the “core” competence of the other level of gov is placed in jeopardy.

1. **You can do the same for provincial heads of power (go with traditional first, and then the second option) – with the traditional version, must find a provincial entity** – **no provincial IJI until CWB introduced the idea!**
   1. **Canada v PHS Community Services Society, 2011 SCC 44**

* 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 CC in which the application of IJI to a provincial entity or head of power has been claimed
  1. 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
  2. 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!
  3. Argue that the federal statute IMPAIRS the provincial head of power. Hard to succeed.
  4. If you don’t hae a provincial entity to defend, use a provincial head of power:
     + Name a head of power
     + Identify the core
     + Show how the federal statute impairs the core of the prov head of power

**If you’re defending, remember in CWB they said PRECEDENTS are very useful – lets confine IJI to precedents. There are no precedents involving provincial entities.**

**Courts would rather use Paramountcy then IJI. Edinger would only use provincial IJI as a last resort. Considerable success can be had in federal IJI.**

**PARAMOUNTCY**

**CONFLICTS BETWEEN FED AND PROV LEGISLATION**

(1) Are there two pieces of valid legislation?

(2) Is there an **express contradiction** (*Multiple Access*) one says yes the other says no

Dual compliance must be impossible

If provincial bolsters federal, no contradiction

(3) If not express contradiction, does the provincial statute **frustrate the purpose** of the federal statute?

Find the OBJECT AND PURPOSE of both the Federal and Provincial 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*

*A conflict renders the prov statute inoperative to the extent of the inconsistency*

# PREWRITTEN TEXT

**FEDERALISM AND HEADS OF POWER**

In *Reference re Secession of Quebec,* the Supreme Court of Canada recognized that the Constitution includes a number of unwritten principles, including federalism, the rule of law, and respect for minorities. These unwritten principles place substantive limitations on government action. Within Federalism, political power is shared by and distributed to the federal and provincial governments.

Each of the federal and provincial government’s jurisdictions are specifically designated in s 91 and 92 of the Constitution Act 1867. S 91 also includes an introduction, which assigns any residual matter to the Federal Government under the Peace order and Good government doctrine.

**CONSTITUTIONAL CHALLENGES**

In *Edwards*, the Court emphasized the living tree approach to constitutional interpretation. We must utilize flexible methods of understanding, recognizing that the original intent is capable of growth and expansion within natural limits.

*In order to bring a constitutional* challenge, the requirements are that the issue is serious and justiciable, the plaintiff has a genuine interest or is directly affected, and there is no other reasonable means of dealing with the issue. This is not a strict test, it must be weighed. *Downtown Eastside Workers*

**REGULATION OF THE ECONOMY – DOUBLE ASPECT MATTER**

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.

**REGULATION OF THE ECONOMY – PROVINCES HAVE JURISDICTION**

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.

**FEDERAL CRIMINAL LAW POWER**

Criminal law is generally considered federal jurisdiction under s 91(27) which enables the federal government to legislate through the Criminal Code of Canada and other criminal statutes such as the *Controlled Drugs and Substances Act*. In order to qualify under s 91(27) a criminal provision must include a prohibited act, carry a penalty, and be for a public purpose. *RJR, ARHA, Dairy Ref.*

**PROVINCIAL LEGISLATION COMPLEMENTS FEDERAL CRIMINAL LAW**

Under s 92(15) of the Constitution Act 1867, Provinces can create statutes that include prohibitions and penalties, including fines and imprisonment, for actions that in pith and substance are directly related to their specific heads of power listed in s 92, so long as the emphasis is on prevention and deterrence of crime. *Chatterjee*, *Dupond*

**COURTS** - Under s 92(14) of the Constitution At 1867, Provinces can create courts to administer justice, and enforce criminal law set out in 91(27), enforce property and civil rights 92(13), and all matters which are of a merely local and private nature 92(16) or any other provincial head of power.

**LICENSING** - In 92(9) provinces are able to set out regulatory and licensing schemes, which, if infringed, could include prohibitions, and penalties yet remain under Provincial jurisdiction to regulate

**ANCILLARY DOCTRINE**

The ancillary doctrine allows the federal or provincial government to infringe on the other 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

# Federal s 91 powers

|  |  |
| --- | --- |
| 1. | Repealed. |
| 1A. | The Public Debt and Property. |
| 2. | **The Regulation of Trade and Commerce**. |
| 2A. | Unemployment insurance. |
| 3. | The raising of Money by any Mode or System of Taxation. |
| 4. | The borrowing of Money on the Public Credit. |
| 5. | Postal Service. |
| 6. | The Census and Statistics. |
| 7. | Militia, Military and Naval Service, and Defence. |
| 8. | The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada. |
| 9. | Beacons, Buoys, Lighthouses, and Sable Island. |
| 10. | **Navigation and Shipping**. |
| 11. | Quarantine and the Establishment and Maintenance of Marine Hospitals. |
| 12. | **Sea Coast and Inland Fisheries**. |
| 13. | Ferries between a Province and any British or Foreign Country or between Two Provinces. |
| 14. | Currency and Coinage. |
| 15. | Banking, Incorporation of Banks, and the Issue of Paper Money. |
| 16. | Savings Banks. |
| 17. | Weights and Measures. |
| 18. | Bills of Exchange and Promissory Notes. |
| 19. | Interest. |
| 20. | Legal Tender. |
| 21. | Bankruptcy and Insolvency. |
| 22. | Patents of Invention and Discovery. |
| 23. | Copyrights. |
| 24. | **Indians, and Lands reserved for the Indians**. |
| 25. | **Naturalization and Aliens**. |
| 26. | **Marriage and Divorce**. |
| 27. | **The Criminal Law**, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. |
| 28. | The Establishment, Maintenance, and Management of Penitentiaries. |
| 29. | **Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces**. |

# Provincial powers s 92

|  |  |  |  |
| --- | --- | --- | --- |
| 1. | | Repealed. | |
| 2. | | Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes. | |
| 3. | | The borrowing of Money on the sole Credit of the Province | |
| 4. | | The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers. | |
| 5. | | The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon. | |
| 6. | | The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province. | |
| 7. | | The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals. | |
| 8. | | **Municipal Institutions in the Province**. | |
| 9. | | **Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes**. | |
| 10. | | Local Works and Undertakings other than such as are of the following Classes: | |
| *(a)* | Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province: | |
| *(b)* | Lines of Steam Ships between the Province and any British or Foreign Country: | |
| *(c)* | Such Works as, although wholly situate within the Province,  are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces. | |

|  |  |
| --- | --- |
| 11. | The Incorporation of Companies with Provincial Objects. |
| 12. | The Solemnization of Marriage in the Province. |
| 13. | **Property and Civil Rights in the Province**. |
| 14. | The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts. |
| 15. | **The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.** |
| 16. | **Generally all Matters of a merely local or private Nature in the Province**. |