Table of Contents

Intro to Constitutional Law 3

Elements of the Cdn Constitution 3

My my my my slow ascent from COLONIALISM it went… 4

Judicial Cttee of the Privy Council (JCPC) 4

Reservation and Disallowance (R&D) 4

Legislative Pwr of UK Gov’t 4

Colonial Laws Validity Act (CLVA) 4

Effecting (different) forms of constitutional change 5

Reference Re: Secession of Quebec 6

Judicial Review 7

Triggering Judicial Review 7

1. Private Litigation 7

Standing 7

Mootness 7

Ripeness 7

Political Questions Doctrine – US only 8

2. References 8

Judicial Review: Use of Underlying Principles? 8

*BC v. Imperial Tobacco* 8

*Christie* 8

Constitutional Interpretation 9

Bobbitt’s ‘Sources of Guidance’ 9

Division of Powers: History 10

MacDonald v. Cartier apparent ‘achievements’ 10

Interpretation of Division of Powers 11

R. Simean – Comm, Democ, FE 11

B. Ryder – classical v modern 11

Q of Validity: Pith and Substance 13

Differing Approaches – jcpc, abel, lederman 13

Incidental Effects 14

*R v Morgentaler* (1993) 14

Employment Insurance Reference 15

Validity: Double Aspect Doctrine 16

*Hodge v Queen* 16

*Multiple Access v McCutcheon* 16

Validity: Necessarily Incidental / Ancillary Powers 17

*General Motors –* NI Framework defined. 17

*Quebec v Lacombe* (SCC 2010!) – new judgement!! 17

Q of Applicability: Inter-jurisdictional Immunity (IJI) 18

*McKay v The Queen* (1965) 18

Bell #1 – immunity at heart of management. 18

OPSEU – critiques of IJI (Hogg) 18

Bell #2– Beetz and the ‘core’ Test 19

Irwin Toy – ‘impairment’ standard for indirect application 19

Canadian Western Bank (bitch)– impairment standard for all 20

*Quebec v COPA* (SCC 2010!) – new judgement!!! 20

Q of Operability: Federal Paramountcy 21

Ross v. Registrar of Motor Vehicles 21

Multiple Access – duplication =/= conflict; only imposs comply by cit’s 21

*BMO v Hall* – frustration of federal purpose (FFP) est. 21

*M&D Farms v Manitoba Agri Credit Corp* – imposs. Compliance by decision makers 21

*Law Soc BC v Mangat* – begins merging tests: FFP alongside IoC tests 22

*Rothmans, B&H v Saskatchewan* – tests ‘merge’, FFP more supreme 22

Note on ‘Covering the Field’ 22

91 & 92: 91(2), Insurance and Liquor 23

*Citizens Insurance Co v Parsons* – defining 91(2) trade and commerce 23

*Russell v The Queen* – regulation vs. prohibition (to the Feds) 23

*Hodge v The Queen* – Double Aspect; Provs Regulate; Con interp as regular statute 23

Local Prohibition Reference – provs may prohibit; ‘powers’ of 91 and POGG federal validity; provinces ‘win’ 24

Manitoba School Question 25

91 & 92: Economic Regulation (91(2), 92(13) POGG, labour rel’ns) – Ch. 5 26

Ref re: Board of Commerce– 91(2) ltd, POGG = national crisis 26

*Fort Frances Pulp & Paper* – POGG = national emerg upheld, test for limits 26

*Snider* – presume labour rel’n w provs unless fed industry, limits 91(2) again. 26

*Eastern Terminal Elevators* (ETE) – maintain fed reg of international trade, intern/p trade in 91(2) remains 27

# Intro to Constitutional Law

constitutionalism: set of rules and principles by which a particular society has chosen to govern itself, often via institutions of the state.

* S. 52.1 of Constitution Act 1982 = Constitution as supreme law of Cda.
* Norms and conventions often develop from the Constitution and make up a nation’s constitution. They delineate accepted understandings of how organs of gov’t operate: esp re: workings and limits on the power of the Crown and exec.
* come into existence on the basis of three factors:
	+ practice or agreement developed by political actors
	+ a recognition by poli actors that they are bound to follow it
	+ a normative reason/purpose for the convention.
		- (ie: precedent, belief they are bound by a rule, reason)
* main purpose is to ensure the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values/principles of that period
* they are not enforced by the courts: established by precedents in the institutions of gov’t itself and the sanctions are political.
* tell us HOW the legal rules are applied, almost: legal rules (eg. The capital C Const) = wise powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner.

## Elements of the Cdn Constitution

A list:

1. **parliamentary democracy:** reg and free and open elections, franchise held broadly, reflecting the british trad
2. **Federalism:** div of power between two different recognized orders of gov’t. Federal and regional/provincial.
3. **Individual and group rights:** Hardly any indiv in the BNA acts. Language rights, because of memberships in particular communities. 1982 = individual rights with the Charter
4. **Aboriginal and treaty rights:** 1982 as well, outside the Charter marking them off as a clearly different character as indiv and group rights.
5. **Constitutionalism:** ordinary laws inconsistent with the provisions of the constitution are subject to be declared of no force or effect if part or whole of those laws are challenged appropriately in the courts. Can be of no force and effect if the degree of the constitutional infringement is not reasonably justifiable in a free and democratic society. Supreme law against which you can measure all other law.

B:

1. **rule of law:** aspire to be ruled by law, not by men. If we are to be effected by state action, it should be grounded in the law, not because the arbitrary discretion/whim of individual gov’t officials or elected parties etc. exercising state power.
2. **conventions:** binding to gov’t etc, but no legal force (eg: responsible gov’t)
3. **judicial independence:** judges must be independent of the other two areas of gov’t, but also applies re: other members of society (i.e. parties in a case, or lobby groups etc.) Explained this principle’s existence on the basis on the rule of law.

# My my my my slow ascent from COLONIALISM it went…

1867: still not independent in a few arrangements:

## Judicial Cttee of the Privy Council (JCPC)

* Cdn court of last resort in 1867 and until 1888 (from Crim only) and by 1950s for rest of judicial sphere (after many challenges)
* 1875 = SCC established, but could be followed by either an appeal to the JCPC after its ruling, or could be skipped altogether in ‘appeals per saltum’ that went straight from CA level to JCPC. Abolishing appeals to the British level was considered a bad idea by the Colonial Office in London.

***Nadan*** challenge to 1888 crim jurisdiction legislation

* found unconstitutional in 2 ways
	+ Cda still a colony and therefore could not legislate in any sector that would have an international/extraterritorial effect; would violate colonial contraint
	+ Violated the imperial “Colonial Laws Validity Act” which prevented Cdn Parl from enacting Leg’n that was inconsistent with Imperial Acts (i.e. JCPC acts of 1843 and 44)
* After 1926 King-Byng affair, request by Imperial Dominions to be of equal status to Britain in the empire = Statute of Westminster. Address both the issues raised in *Nadan* and can reenact 1888 legislation.
* After WW2: reference to JCPC re: legality/validity of SCC assuming all final appeal power in cases starting in Canada: recognizes Canada as independent, validity of the law established.
* Despite SCC’s power, the JCPC was the appellate body for all the new cases that came up after the creation of the Constitution in ’67 and their vision therefore wielded unbelievable power in shaping the nature of Canadian federalism as we know it today.
* SCC’s views on the matter were highly diff from JCPC, but were getting overruled at the time.

**Legislative Aspects**

## Reservation and Disallowance (R&D)

* Today, the R&D convention is to automatically give royal assent, once the Parl has passed the law. However this convention has developed OVER a Constitutional provision FOR R&D which still exists and was enacted by the GG at the time of 1867
* four options:
	+ give royal assent
	+ reserve royal assent (save for the Queen’s discretion)
	+ withhold/reject assent (process ends)
	+ even after assent given, Queen as 2 years in which she can still disallow/reverse assent, which would annul the law
* At the beginning, Parliament itself was not very independent because of this power! Not practiced since 1878, however.

## Legislative Pwr of UK Gov’t

* Still able to legislate for Canada in 1867

## Colonial Laws Validity Act (CLVA)

* If the imperial and colonial made law conflict, the imperial overrule.
* Was eliminated by Westminster, but **one exception was the BNA Act**:
	+ Framework must stay intact
	+ Constitutional regime and federal character established
* No statute of Imperial Parl should be construed to apply to the Dominions unless expressly requested by a Dominion.
* 1982 Canada Act (UK): patriation eliminated the power of UK parl: no longer “stuck” with the BNA Act, which is now Canada’s own and able to change it upon request.
* Took so long to add/change the Cdn Constitution because feds and provs couldn’t agree to an amending formula and was locked in by a const convention to okay it with the provs.
	+ Traded Trudeau’s Charter of Rights for provincial-favoured amending formula.
* Constitutional reform stays alive, however, in the wake of anger over 1982, esp in Quebec: Meech Lake and Charlottetown accords were failed attempts at it, may put it to rest for a while.

**Executive Aspect**

-International Arena: at the time of confed and afterwards as well, Canada had no unilateral treaty making abilities

-seen as less realistic over time for the weakening GB, who would probably be better off (economically, organizationally and considering the increased competing interests among the Doms themselves) allowing the Dominions to take care of themselves!

-Balfour Report + Statute of Westminster + eventually get a seat on the LoN!

## Effecting (different) forms of constitutional change

-many things may not need a formal amendment: e.g. “special status” Quebec sought to make explicit in Meech Lake accords was passed in a resolution by Parliament soon after.

How easy SHOULD it be to change a constitution is an important Q:

**Stability**

* Basic values considered fundamental to the well being of society
* Shouldn’t be easily vulnerable to change
* Want it to be a protective safety net against the desires of groups or government that may want otherwise.

VS

**Flexibility**

* Do we have confidence that past drafters thought their rules could apply to our generation?
* A society *is* entitled to reinvent itself.

# Reference Re: Secession of Quebec

* -1996 federal government (Justice Minister Alan Rock) sends reference to SC.
	+ **Supreme Court Act:** allows for GIC to send almost any issue to the court
* Quebec refused to accept the legitimacy of reference processb/c PM appoints judges to SCC, it is totally illegitimate as a political arbiter to Quebec
	+ will not appear before court; amicus curiae appointed

**Q: Does the Constitution allow Quebec to unilaterally secede from Canada?**

1. **Federalism.**

* “recognises the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.”
* Canada is a truly federal state, despite federal disallowance power (Intervenor argument. Court: No, by convention not used)

**2. Democracy**

* “democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government” – 21
* However, Canada as a whole is a democratic community; issues of national concern should be decided nationally.
* Democracy must be tempered with the rule of law.

**3. Constitutionalism and the Rule of law**

* “one law for all” –
* gov’t action must comply with the constitution
* basically, in this case, a majority rule doesn’t override constitution, but implies a responsibility to resolve the situation – this is because of the inherent interaction between democracy and rule oflaw

**4. Respect for minority rights**

* these are underlying principles that inform how we read the constitution – “must be interpreted by reference to the structure of the Constitution as a whole”

**Outcome:** Quebec may not secede unilaterally from Canada, but if Quebec indicates through more than a simple majority vote that it wishes to secede (clear Q, receiving a clear answer from the public), Canada is obligated to negotiate in good faith with Quebec on secession.

-may not guarantee anything: doesn’t mean, though obliged to negotiate, that federal gov’t is obliged to negotiate for terms of a *successful* secession!

* Need of a formal constitutional amendment to make it legal (which would be negotiated about)

Must proceed: constitutionally, by amending procedure, with regard to all minorities and first nations people in Quebec.

Sovereignists got:

* statement that yes vote would give reciprocal obligation by rest of Canada
* recognition of democratic will

**NB:** Duty to negotiate has been noted as most novel part of the judgement. The judgement is also novel because it rests on unwritten principles that create *legally binding obligations*  on both parties.

**NB:** In many ways this reference was unsatisfactory. It didn’t give any guidance on negotiations, amending formula to be used. What would constitute a clear question? What would be the stuff of the negotiation? Who are the parties to the negotiation? What are the rights of linguistic and cultural minorities within Quebec? What would happen if there were an impasse?

Court rejects both the rabid sovereigntists and the rabid nationalists. Result: Both sides claimed victory.

\*\*\*moral: Cdn con law is NOT divorced from what is going on in the real world. Crt is, and should be, aware of what they are being asked for, why and its implications on the issues in the future. Eye to political realities (esp since SCC is a court of policy more than a crt of law)

# Judicial Review

Definition:

Power of courts in Cda to determine, when properly asked to do so, whether action taken by a governmental body or legal actor is or is not in compliance with the Constitution, and, if they find that it is not, to declare it to be unconstitutional (of no force or effect.)

Sources:

**-52.1 Con Act 1982** – The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

**-24 (1) Charter** -- Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

**Legitimacy issue:**

-text will never just answer for the courts. Complex, legislated and creative interpretation must occur. Further they stray from words, less legitimate it seems (esp when they rule against the Parliament’s will.)

-judges are appointed and no accountable, completely immune, do not have to answer for their reasons.

-Are they using their power legitimately? Are they legislating from the bench? Unpopular decisions are often criticized this way.

**The other side:** minority voices get a place in political/legal system (perhaps detachment is a good thing)**;** unaccountable ∴ apolitical; experts in law; provide a voice for minorities and check for majority power, and thus strengthen democracy

# Triggering Judicial Review

2 routes:

Private litigation and References

## 1. Private Litigation

* **ordinary crim/civil proceedings:** no issue of standing. As long as it can make it into court and the judge reasons through judicial review
* **declaratory actions:**
	+ originally the job of the AG to look into laws for their legality in the public interest, but series of cases in the 70s founds it nonsensical for a part of the legislative branch (possibly consulted on the law) to be in charge of triggering a review of that law.
	+ Now private individuals can bring declaratory action for the bench to declare laws unconstitutional.
	+ Standing will be at issue because of this:

A private trigger of judicial review needs to pass 3 preliminary issues (possibly 4):

## Standing

**3 requirements to merit standing (*Borowski)***

1. **Serious issue** has been raised: must have merit, warrant the time of the court, i.e. might *really be* unconstitutional.
2. **Direct effect/genuine interest:** individual challenger must be effected by the challenged law or have a true interest in its constitutionality or not. Must really ‘matter’ to you. Show action, and for a history. (need good arguing and a solid evidentiary record)
3. **No other reasonable/effective means** of getting issue into the court. i.e. can wait for an ordinary proceeding?
	1. Serious criticisms here: *Cdn Council of Churches* on behalf of overhauling the immigration legislation. Said they did not have #3 because it would come up in the immigrant or refugee proceedings. Critiqued because how would a newcomer to the country a) know how to challenge the law and b) would they really have the means/accessibility/ability to do so? How many would have to be rejected or infringed upon by this legislation before one might possibly challenge it?

## Mootness

-usefullness/non-usefullness: if the statute has been repealed or amended, it wouldn’t matter anymore.

## Ripeness

-whether or not the legislation and its application has developed enough yet.

-Less likely to challenge brand new law until we have seen its effects

-cannot challenege a bill through the crts

## Political Questions Doctrine – US only

-reject issues because more appropriately dealt with in the political, not judicial sphere (eg: Operation Dismantle)

-Until now, though Cdn crts have not refused a constitutional challenge on the grounds that the issues raised were ‘too political’

##  2. References

-available to both federal and provincial governments to pose a Q to their highest court (typically on the constitutionality of current or proposed legislation) and the court will be obliged to hear and rule on the legal Qs

-no ripeness requirement: can pose a reference on a bill/proposed amendment

-use an *amicus* who argues the PoV opposite the governement

# Judicial Review: Use of Underlying Principles?

## *BC v. Imperial Tobacco*

-significant part of the Tobacco Co’s arguments centred on the new “underlying constitutional principle’ of RoL. Felt like government had trespassed it when they passed statute that gave government cause of action to seek damages from tobacco companies for healthcare costs

-**3 meanings of RoL that are expressed by SCC in RSQ**

* 1. Supreme over officials of the gov’t as well as private individuals. (One law for all)
	2. Requires creation and maintenance of actual order of positive laws. (Law making needed for society)
	3. Law regulates relationship between state and individual. (Exercise of all public power must find its ultimate source in a legal rule/authority)

-If these are the meanings, can’t really *challenge* law with them!

-Other apparent meanings of RoL are challenged as attempts to just make an amorphous sounding concept apply to their conception of it.

-Tobacco’s conceptions of infringements on RoL: **retroactivity, targeted leg’n, favours the provinicial gov’t** , and thus **lack of judicial independence**.

-None of the above actually enjoy constitutional protection in Cda! Other cases have even refuted such arguments, and upheld legislation that commits them.

-**NB: J only refuted the past conceptions of RoL, but left room open for possible, better conceptions of it. Thus, *Imperial Tobacco* seems to stand for the possibility of the use of RoL to argue against legislation, if the conception of it used has not yet been refuted by courts or has some sort of protection in the Constitution.**

Could have undermined judicial review in 2 ways:

* -ignoring choices of Charter drafters who considered such matters, and stated the accompanying rights in different ways (or in ways that Tobacco co’s were unsatisfied with). Thus, expansion of RoL would make text of Const. redundant.
* Constitutional principles OTHER than RoL favour upholding he legislation! (Federalism and democracy: unhappy? Sanction valid legislation at the ballot box!)

-Rule of law is **not an opportunity to trivialize other aspects of the constitution (other principles, text) and not an opportunity to overturn valid legislative intent.**

Re: judicial independence in *Imp Tobacco*

-rules that Jud Ind MAY be used to challenge legislation (though the passing of valid leg’n here does not nec create a violation of jud ind, and especially not in this case.)

-Diff treatment from RoL: RoL cannot be grounded in the text, but jud ind *is* sourced in it.

## *Christie*

-appellant conceives of RoL as access to justice and to legal professionals when your own rights and liberties are being judged

-PST created a prohibitive fee for many of Mr. Christie’s clients

-unsuccessful in from of SCC

* **Textual** provisions to access to justice/ right to an attorney were obviously already considered by the drafters and were vocalized in certain ways, which were not broad. E.g:
* **Past jurisprudence**: Imperial Tobacco was now decided. This characterization was not within the general principles of RoL
* **History**: RoL is usually associated with protection in criminal areas of law, not in protecting rights.

LIKE IMPERIAL, **doesn’t close the door on the use of RoL.** Elucidates possible uses.

* No prior SCC judgments that upheld legislation attacked w that RoL conception or it’s associated ‘rights’ e.i. they weren’t protected/guaranteed. (*Imperial Tobacco*)
* The RoL conception submitted could not make any other parts of the Const text redundant (i.e. could not have been considered by the drafters (*Christie* and *Imperial Tobacco)*
* Have to be some support in **history** that the RoL *has* bee associated with what you are advancing.

Probably not useful in practical terms to use RoL.

# Constitutional Interpretation

## Bobbitt’s ‘Sources of Guidance’

* **textual** (w/in current v original):
* **historical:** what were the drafters seeking to accomplish?
	+ **Intent:** what would they want the words to mean in *this particular dispute*? (e.g. Did hate propaganda figure into the dabte son this section and is it intended to be included in the term ‘expression’?)
	+ **vs. purpose:** broad goals of the drafters at the time? What public goods did they seek? (e.g. Why is expression important to be protected?)
* **Doctrinal:** previously decided doctrine, often by other judges. Look for governing understanding for approaching a like situation. Most popular
* **Prudential/practical**: Interpretation that will benefit Canada more that the alternative. Consequences-oriented.
	+ Often in federalism cases: better to have the national government control something that the provincial?
* **Stuctural:** deeper into the text, distilling organizaing principles from the WHOLE text and applying them to part. Searches for the *values* of the drafters.
* **Ethical:** Appeal to *ethos* i.e. not necessarily what we are, but what we think we are/strive to be
	+ Peculiarly American
	+ Eg in Cda: court should be hesitant to construe text to bar the gov’t from aiding disadvantaged or vulnerable groups or people

We add:

* **International Law** (law btwn nations + treaty obligations)
* **Comparative Law** (other supreme courts)
* **Scholarly works**
* **CONTEXTUAL:** situating the provision in the entire piece of legislation (think Dickson in NI doctrine here)
* **French/English**: 2 versions have equal legal significance, sometimes the language used in a case has more nuances/hints in its French translation.

# Division of Powers: History

Forces leading to a federal Canada

1. Failure of the Act of Union: new approach to solve tensions between upper and lower Canada governments and populations
2. Security realities: feared US annexation now that civil war politics no longer locked it in stalemate
3. Economic:
	1. Lower Cdn entrepreneurs desired confederation and eventual expansion to the maritimes to increase trade to MTL
	2. Upper Cda ones wanted expansion west to increase their agricultural economy
	3. US reciprocity agreement (free trade in certain goods) o its last legs and Cda can agree it must shift from North-South trade to East-West (also during Winter when no GB trade could occur).
4. Quebec: would not agree to join anything but a federal state. Neede guarantee of some sig degree of autonomy, and ability to govern selves in what they saw important to preserve language and culture.

Legislative history as a lens into intent of the drafters of division of powers

**J. Saywell – The Lawmakers: Judicial Powers and the Shaping of Cdn Federalism**

* Edits and scrutiny in London are telling:
* Worried mostly about ‘property and civil rights’ being able to be construed too broadly
* Added **declaratory clause**: “it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated”
	+ Keeps federal classes more exclusive than without
* Added **deeming clause:** “And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”
	+ Makes sure provincial ‘residual’ power may not enter into these exclusive realms either
* POGG residual power already there (MacDonald was very enthusiastic to avoid same fate as the US): “to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces”
	+ provincial safety present in POGG, however.

## MacDonald v. Cartier apparent ‘achievements’

-MacDonald: federal state where central government was dominant over provincial order of government

* See above re: declaratory, deeming and POGG clauses
* Also had a R&D process via the GG over LGs for provincial statutes (sick burn!)
* Practical monopoly over taxing at the time
* Appting judges and setting up new courts
* Protecting denominational school rights (appeal to the feds to avoid litigation if the approve)
* Declaratory power for industry: 92(10)(c): exemption of provincial jurisdiction over “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.”

-Cartier: true federal state with autonomous provincial governments that had coordinate status to federal within their areas of jurisdiction. Quebec got the autonomy it desired.

How we developed further to Cartier’s vision:

* Declaratory power is now, by convention, only used once provincial consent is sought and acquired by the feds.
* R&D, like the federal one, is by convention never used.
* Power of approval re: denominational schools. Even Laurier (an RC during *Manitoba vs Catholic schools*) had to weigh the use of the valid power versus maintaining classical federalism.
* Taxation power: since income tax (a direct form of taxation) the provincial power has expanded incredibly + increase in kosherness of sales taxes (PSTs)
* JCPC!: their approach often read fed powers narrowly and prov powers broadly (as we will see..)

#

# Interpretation of Division of Powers

## R. Simean – Comm, Democ, FE

 **Criteria for Choice in Federal Systems**

Federalism is not a value – it promotes or sustains (or inhibits) other values, ∴ we should judge federalism and reforms based on other core values which, incidentally, undercut division of powers interpretation

* Community: Where is the ‘identity capital’?
* concern about different conceptions of territorially defined communities and identities since federalism interacts with them,
	+ 3-4 views in Canada: Pan-Canadian, regionally/provincially defined, 2 nations/tongues (fr-eng divide) and First Nations concerns
	+ Interaction occurs because values are drawn from identity and harm might arise from assigning jurisdiction over something to one order of gov’t and not the other, when one community has ‘identity capital’ within it.
* Democracy: What arrangement will best foster democracy?
	+ Democratic values: Participation, responsiveness, liberty, equality
	+ Federalism can be seen as a system of checks and balances: limits gov’t to the authority given to them an expected by citizens (via contract of constitution.)
	+ Provincial = Can be seen as promoting participation (smaller units, etc) making clear interests likely to emerge
		- But maybe small units lack resources to promote interests;
		- rules out majority rule over the whole country
* Functional Efficiency: What level of gov’t administration can deliver most effectively and efficiently?
	+ Seen as a division of labour rather than a division of vested interests
	+ Canadian federalism has been criticized on being too decentralized
		- Tricky to manage economy, facilitate welfare
	+ Also too centralized
		- Sharing is also costly – coordinating policies, procedures, etc, makes gov inaccessible to interest groups

**NB:** tendencies are discernable in different geographies (eg Canada v US), but also ebb with changes in its contexts (eg: Funct Eff more favoured during depression). Choosing one doesn’t favour either centralization or decentralization, but merely defines the terms of debate/interpretation.

## B. Ryder – classical v modern

**“The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations”**

-categorizes 2 approaches to Canadian federalism: classical and modern

-grouped and connected to jurisprudence temporally and by subject matter

*Classical*

* exclusivity of 91 from 92 (and vv) stressed. Jurisdictions are exclusive and intact: silos, ‘watertight compartments’.
* obligation of the courts to act and enforce line drawn between: **judicially activist**
* when spillover is imminent, the courts response must be to **“read down”** the impact of legislation so it won’t have those characteristics that are ultra vires/non applicable or conflicting
* **Temporally**: characterizes JCPC decisions
* **Subjects:** economic regulation legislation
* **Mutual modification** – prov and fed jurisdiction are exclusive and DO NOT OVERLAP –
	+ The lists of powers mutually modify each other – if power is on one list, it is nec not on the other
* *Classical limits:*
* Avoids reality?
* Risks making effective regulation difficult for either legislature (on some topics, no one jurisdiction’s elements could do it alone).
* Gaps in regulation may arise from this. Social problems, don’t fit neatly under only 91 or 92. Might be able to collaborate for regulation, but frustrates the efficiency too.
* Restrains legislation via judicial activism: some like to critique it.

*Modern*

* Exclusivity less rigid.
* Apply P&S, Ancillary Powers, and DAD in ways that allow both levels to legislate as they see fit as long as serious breaches do not occur.
* **Judicial restraint**: let governments negotiate the development of the existence of overlapping legislation, to a certain degree.
* Tolerant of spillover – **dominant effect** of legislation given precedence, rather than its collateral effects on other jurisdictions.
* **Temporally**: SCC era
* **Subjects:** usually regarding regulation of morality or the social order
* *Modern limits*
	+ More overlaps may **undermine provincial autonomy**: Beetz J criticisms.
		- more legitimate overlaps/concurrent legislation allowed to exist
		- conflicts are more likely to arise,
		- **federal paramountcy** more likely invoked
		- provincial legislation to be trumped by federal, carving out exceptions to provincial powers. (See Operability).

# Q of Validity: Pith and Substance

* Validity challenge = whether government has jurisdiction or authority to enact a statute at all.
* Is the legislation or provisions *ultra vires*, or going beyond the outlined jurisdiction, of its legislating government according to s.91 & 92 of the Const 1867?

## Differing Approaches – jcpc, abel, lederman

#### Privy Council

-textual analysis (*Citizen’s Insurance, Hodge*) 🡪 Constitution interpreted like any other stautes (until *Persons*)

-mutual modification process: Where both HoP have an overlapping aspect, from the more general, the more specific carves out an exception to its jurisdiction

* e.g. solemnization of marriage 92(12) v. marriage and divorce 91(6): reads that ‘marriage’ in the latter EXCLUDES juris over its solemnization by the feds.
* while there is the overlap juris potential, the judiciary should strive to minimize it. Doing so from the JCPC establishment= at the expense of federal and favouring the provinces, it would seem.’

-Processes of characterization of law = checking home in 92 first. If no then necessarily belongs to 91. If yes, check for homes in 91. Federal is always supreme if there is both (EXCEPT when validity is under POGG). Doctrine developed into just looking at 91 first because of the exclusiveness of it’s jurisdiction due to the deeming clause.

#### Abel

Know as a structural approach: look to tease out the organizing themes of the

* ID ‘matter’ of the law
	+ Statutory contextual analysis
	+ Dominated by focusing on ‘purpose’ (remedial nature, problem law is addressing) 🡪 see leg’ve history, gov’t reports etc.
	+ Effects – ignoring these allows gov’ts to expand their areas of resp.
* Delineate the scope of the competing classes it might fall under
	+ Precedent and history 🡪 this is why this step is ‘skipped’ in many judgements, because they have already been delineated after so many years.
* Determine the class into which it falls
	+ “**Often the court’s ultimate decision about boundaries and the matters within them [**steps 2 and 3] **is guided by federalism concerns—by beliefs about the optimal balance of power between the federal and provincial governments…” 🡪 here Simean comes out in Lederman’s analysis**
	+ See first 2 bullet points below in Lederman.

#### Lederman

**Lederman – Classification of Laws and the BNA Act**

**SUMMARIZED:**

-find ‘true meaning’🡪 look mostly to effects (will have effects/features that may speak to classes of both fed or prov jurisd)

-effects found in leg will also be shaped by circumstances (see below).

-effect designated as most important (prudential: best for the well being of the nation) will = the main feature

-relative importance of effects can be and are shaped by circumstances, national emergency, analysis on one of Simian’s levels, “widely prevailing beliefs”

-Look for “true meaning” of the law (not subject-matter, which is everything in the law.)

-don’t differentiate between subject matter and purposes/effects/consequences. All speak to and indicate “true meaning”.

-stresses effects in judging true meaning, especially in the case of **colourable law** (one which really means something more than or difference from what its words seem at first glance to say)

-on helpfulness of trying to look for ‘intent’/Hansard –**superfluous.** “The questions is not what may be supposed to have been intended, *but what has been said*.” People intend the ordinary consequences/effects. Shouldn’t change our understanding of true meaning.

Thesis: a rule of law for the purposes of the division of powers is to be **classified by that feature of its meaning which is judged to be the most important one in that respect.**

-The effect found most important is the ‘feature of its meaning’ that will be classed and thus provide for which level of jurisdiction it will hall under.

-Problems arise when a law has features of meaning relavent to both levels of jurisdiction.

-JUDGE “importance” PRUDENTIALLY: **“Is it better for the people that this thing be done on a national or a provincial level? Is the feature of the challenged law which falls within one class more important for the wellbeing of the country than that which falls within the other?**

- relative ‘imporatance’ of an effect can and is shaped by the broader social, political and economic circumstances surrounding its scrutiny.

* “Such considerations as the relative value of uniformity and regional diversity, the relative merits of local versus central administration and the justice of minority claims, would have to be weighed” **SIMEAN** [comm, FE, democ]
* **widely prevailing beliefs** in the country about these issues will be influential 🡪 value judgments of the time on those areas in question will effect the definition of the Simean criteria of choice applied (i.e. social v economic; where do we think these things should go right now?), and eventually the decisions within that frame.

-“**changed eco and social conditions and different moral climate will give to present or proposed laws new features of meaning by which they may be classified and may also alter judgments on the relative importance of their several features.** Though precedent may remove some of this uncertainty, unpredictability still will remain.”

 - The Doctor analogy:

* Who is the best physician? Yet **does not the choice of physician depend to an important degree on the nature of the malady and of the proposed remedy?**

Overlapping of the categories is inevitable, despite ‘exclusivity’, but sought to be minimized via ‘mutual modification doctrine’: e.g. reducing and excepting the generality of “trade and commerce’ for the Parl through understandings of ‘civil and property rights’, and actually vice versa.

## Incidental Effects

* courts may tolerate incidental effects of legislation. In a P&S analysis the dominant characteristic of a law is sought; along the way**, a law will probably be found to have a number of non-dominant effects that are ultra-vires; these effects may be tolerated as incidental and is not fatal to the proper scope of the law.**
* Thus, the actual, dominant matter of the legislation is still legitimately found in that gov’t’s HoPs.
* These collateral effects DO NOT necessarily “disturb the constitutionality of an otherwise valid law.” Must look to the DOMINANT effects. (*Canadian Western Bank*)

## *R v Morgentaler* (1993)

-leading case on the modern P&S doctrine

-Henry charged with 14 counts of violating NS Medical Services Act, which was then challenged as *ultra vires* the prov gov’t.

-act makes its an offence to perform or assist a “designated medical service” (list which included abortion) outside of a provincial recog/run hospital

Steps:

1. Identify the ‘matter’ of the impugned legislation:
	* Searching for its dominant or leading feature, true character, aka pith and substance
	* Flexible, not technical or legalistic interpretive approach/search
	* Purpose and effect of the leg are important, but purpose more so.
2. Determine which class(es) of subjects (i.e ss of 91 and/or 92) the defined matter falls within.

In determining P&S (#1) contributing factors include:

* Legal effect: how it effects rights and liabilities of those subject to its terms (read out from the leg itself)
* Practical effect: how it plays out in real life, and the impact on those effected and how they live. Disparity between practical and claimed legal effect can be a trigger of the P&S and where the matter will fall.
* Legislative history: statements re: the initial and intended purpose of an enactment (Hansard)
* Background circumstances/events leading to passing
	+ In this case: ‘March regulations” clearly against abortion, and a holistic catalyst to the events = Morgentaler’s announcement to open clinic
* Similarity (or lack) to legislation by the other order of gov’t
	+ CCC repealed provisions re: abortion and the MSAct = criminalizing intent and purpose, perhaps rather than regulation of medical and health services.

##

## Employment Insurance Reference

-Had to define the scope of the federal HoP 91(2A) “unemployment insurance” (Abel’s 2nd setps usually unnecessary due to past jurisprudence.)

* looked to history of the HoP (the history and purpose behind the transfer of jurisdiction)
* define/consider ‘essential elements’ of the HoP
	+ interpret generously and progressively (with an eye to the changing needs of the Cdn public)
	+ **NOT ltd to originalist understandings** (i.e. the ‘riders’ to 91(2A) from the 1940 UIAct)
		- Involuntary loss of employment.
		- Seeking work and continued ability TO work
			* Quebec argued that maternal women did not fulfill either of these.
		- DISPLAYS THE ORIGINALIST/TEXTUAL LIMITATIONS. Why we need the ‘living tree’ at times.
	+ HoP defined as: “preserve worker’s economic security and insure their reentry into the labour market by paying income replacement benefits in the event of an interruption of employment.”
		- Saw changes in the labour market (huge increase in women workers, which hadn’t been considered back then, by the riders, but now fall into the same category in the broader purpose of the HoP) 🡪 extent of protection required changes with the changing demographic face of Cdn employees.
		- Additionally, baby-making is part of the national interest as well! If the country needs them to create more citizens, we cannot then deny them the benefits of a national EI plan because it was their ‘individual choice’ to do so. We implement a different eligibility requirement that reflects “a social policy choice linked to the implementation of the plan.” Otherwise we would be denying the plan’s function.
* Is the impugned measure (fed juris over maternity benefits) inconsistent with those essential elements, in their natural evolution?
	+ No.
* *Elliot thinks that if federal maternal benefits are ever challenged again, they will probably apply DAD: importance of a province controlling its birth rate, the upbringing of its youth etc. based on community values will probably be upheld as equally important to a federal unemployment insurance plan to cover maternity as well.*

# Validity: Double Aspect Doctrine

**At glance:**

-2 pieces of valid legislation on same topic

-aspects differ but are equally important to have legislation by respective gov’ts

-moral: overlaps in topics will occur, jurisdiction by one legislature does not nec exclude legislation of the other

Definition:

**-subjects which in one aspect and one purpose fall under 92 may validly, for another aspect and purpose, fall under 91 (and vice versa)**

**-Valid legislation may be enacted by both governments on the same topic, but dealing with different ‘aspects’ of that topic (matters/purposes) and therefore under separate heads of respective powers (either 91 or 92).**

**-“**When a court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either parliament or a Legislature” –Yo thanks, Hogg, p 366.

Origin:

## *Hodge v Queen*

-Cdn Temperance Act is still above: only operating in places it has been triggered in.

-Ontario *Crooks Act* fills the residual voids: created regulatory regime at the local level. New entities (not just the municipal gov’ts) of “licensing commissions” created.

-Challenged by Hodge on validity basis: provincial legislation don’t have jurisdiction over retail trade in liquor anymore, it’s feds’ see: *Russell*.

* JCPC dismisses view via DAD
* Subject/topic: retail of trade and liquor.
	+ one aspect/purpose: national prohibition for moral reasons falls under 91
	+ another aspect: allowing sale to continue, but regulating for consumer protection etc. can fall under 92(5), (8), (16).

Modern Application:

## *Multiple Access v McCutcheon*

**-F:**Concurrent federal and provincial legislation dealing with insider trading. Charges brought against MA under provincial jurisdiction. MA argues that insider trading should fall under federal jurisdiction (limitation period had expired, couldn’t be liable any longer).

**- Dickson J:** Here there is federal and provincial legislation for the same matter (insider trading). The argument is that the legislation is ultra vires the province.

**-Steps of Double Aspect Doctrine Analysis**:

1. Begins with P&S analysis: determine if each piece of legislation ALONE is valid.
* Double aspect area is ONLY found when there are two valid pieces of legislation.
1. **If both laws are valid and of *equal importance* in operating jurisdiction (in prudential Lederman criteria), it is double aspect, and it will allow them to overlap on the leading topic of the leg’n.**

**NB:** While double aspect is consistent with the modern paradigm, judges tend to be conservative with a finding of double aspect. There is a historically closed list: temperance, insolvency, highways, trading stamps, aspects of Sunday observance.

‘Activity’ ------->valid provincial feature/effect/aspect in leg’n------- > s 92 jurisd } Both of “equal importance” = DAD.

 ------->different valid federal feature/effect/aspect in leg---> s 91 jurisd }

# Validity: Necessarily Incidental / Ancillary Powers

**At a glance:**

-applied in challenging validity of a part or provision of a statute

-looking at entirety of the statute/regime may create a ‘need’ for an offending provision. Can be saved by its integration/connection/necessity to the broader statute

-applies equally to provincial encroachments on the federal power!

Leading case:

## *General Motors –* NI Framework defined.

-**F:** Federal amendment to its *Combines Investigation Act* challenged by GM since it creates a civil cause of action for ‘victims’ of competition violators. Challenge on grounds of 92(13) civiland property rights.

**-R: Dickson J** provides framework for application of the NI doctrine:

1. Does the isolated provision appear to encroach on the heads of power of other level of gov’t and ***to what degree*?**

**🡪 *Lacombe* adds to this step!**

* **1. Full P&S validity analysis of part. 🡪 if valid, no further steps. If invalid continue w NI steps…**
* **1.5. to what degree is it ‘invalid’/encroaching?**
1. Is whole act valid?
2. Scrutinize relationship between provision and entire, valid act.
3. From #3, and dependent on the degree of encroachment from #4**: Is there a sufficient degree of integration between the two to validate the law?**
* Reasonable/functional connection: applied when the degree of encroachment is low.
* Necessarily incidental: applied when the degree of encroachment is higher
* Absolutely integral: applied when it is extremely intrusive to the other jurisdiction.

Application in GM:

1. Yes an encroachment, but to a low degree
	1. Not a new substantial law, but just adding a new deterrent/weapon an an already established arsenal of them re: these violations 🡪amount of change
	2. Well est that national government can and has created civil causes of action, when deemed necessary 🡪 past jurisprudence
	3. A cause of action/encroachment that is ltd in scope and only applies to provisions of the Act. Not a new general CoA. 🡪scope
2. Whole act is indeed valid under 91(2) regulation of trade and commerce (under third aspect from *Parsons*)
3. Degree of integration needed= rational/functional connection (because of low encroachment) and is easily met. Being a well-limited part of

**NB:** SCC inconsistent in applied NI doc to all cases re: challenges to a part (notice EI Reference, Mult Access). This is a case of judicial restraint and toleration of overlap – **modern federalism paradigm** (see Ryder). Also a functional approach (see Simean).

## *Quebec v Lacombe* (SCC 2010!) – new judgement!!

-court enacts a **full P&S analysis on the ‘part’** before entering into the NI doctrine on it. 🡨 brand new step! (SEE INSERT NOTES ABOVE)

* If valid from P&S, there is validity, no need to move to NI.
* If invalid, continue with Dickson’s GM framework.

-With an eye to the P&S analysis + degree of violation analysis in 1 and 1.5, determine level of integration needed to validate the provision.

Regarding all of the validity doctrines: (P&S, DAD, NI)

-rest on a weaker view of exclusivity: one that understands exclusivity as the exclusive ability to enact legislation that has as its dominant characteristic the subject matter in question.

-VS IJI: Because federal powers are exclusive, their rule over their enumerations are absolute, valid provincial laws in these areas are preempted.

# Q of Applicability: Inter-jurisdictional Immunity (IJI)

**At a glance:**

-generally worded statute

-enforced on a context/situation/undertaking with distinct opposite jurisdictional character

-Challenge: Can the law *apply* to the specific context or does this application need to be read down by the court?

**General Notes:**

-Departure from overlap allowed by p&s doctrine (incidental effects), NI and DAD (modern paradigm)

-emphasises the exclusivity of jurisdiction. **A CLASSICAL PARADIGM**

-Asserts federal dominance over otherwise valid provincial laws that have incidental effects in federal jurisdiction.

-Applies to: federally regulated undertakings, federally incorporated companies, aboriginal issues (title, possession rights, identity), RCMP, federal political rights (federal election process)

-seems to convey rights on feds not afforded to provinces (although *CWB* established that should and could work in provincial favour as well

**-**after a finding of IJI: law is **permanently read down** for that extra-jurisdictional context (not declared invalid).

-does not require 2 pieces of legislation

**Development of the Doctrine over cases:**

## *McKay v The Queen* (1965)

-first invocation of IJI in a very long time, but brought the doctrine into Cdn jurisprudence, for real.

**-F:** municipal bylaw (valid under 92(13)) regulating and **banning ALL (general)** signs on residential properties (after which they enumerated exceptions). McKay charged criminally in violation of the bylaw by having a federal election campaign sign on their lawn. Challenge applicability of the bylaw to regulating their federally characterized situation.

-**Reasons** of judges are telling re: two different opposing views on IJI

* Martland J: (min, modern view) – P&S doctrine must be supreme. Incidental/ancillary effects on federal jurisdictional powers, doesn’t matter. Focus on the direct effects. Federal gov’t can legislate if they are particularly ruffled = FP.
* Cartwright J: (maj, Classical view) – Feds have *exclusive* jurisdiction over all matters re: federal election campaigns. Because of this a specific/direct prohibition of federal campaign signs would not be excused, so provs cannot effect it through indirect means.

-Implies and accepts IJI as a doctrine, but uses none of the vocab from the modern doctrine today.

## Bell #1 – immunity at heart of management.

**-F:** federally regulated undertaking (92(10)a re: international and provincial communications). Quebec legislation re new min wage. Bell wants immunity from the law since they are federal = no federal min.

-unanimous in favour of IJI and immunity grant.

**- will be applied to legislation that infringes on aspects at the heart of the conduct, management and operation of a federal undertaking**

-**Reasons:** wages = heart of biz’s conduct and therefore leg’n would be regulating/limiting a ‘vital part’ of Bell’s federally regulated operation (might even effect rates), which could not stand.

## OPSEU – critiques of IJI (Hogg)

-the one back tread in the development of IJI; a blip.

-in obiter Dickson buys into **Hogg’s critiques**

* **Inconsistant with the P&S doctrine** wherein a law can “affect” an extrajurisdictional matter, so long as it is not its main feature (**incidental effects doctrine).** Federal HoPs are not only enumerative but defensive in denying power to Provs.
	+ To the latter point I would suggest that that sort of interpretation is not incorrect, considering the deeming clause of s. 91.
* **Immunity unnecessary with FP power.** – just legislate appropriate laws to protect your undertakings/exclusivity if you want to so bad.

-IJI an anomaly that should be curbed or at least limited in scope/power.

## Bell #2– Beetz and the ‘core’ Test

**-F:** + CN Rail + AllTrans: all three challenge the application of provincial health and safety laws to federal undertakings

-Bell: would grant pregnant workers right to ask for reassignment considering their work and their condition.

-succeed in ALL THREE

**-Reasons: Beetz J** – (remember: staunch federalist, wants to maintain provincial autonomy and has no sympathy for modern paradigm, esp DAD)

-Establishes ‘core’ framework in applying IJI:

* “works, things and persons within specific and exclusive jurisdictional of Parliament are still subject to general provincial legislation PROVIDED the application of said legislation does not bear upon those subjects **in what makes them of specifically federal jurisdiction.”**
* Affirms that “what makes them of specific federal jurisd” includes (esp in the case of undertakings) labour relations and working conditions, factors so basic to management of a federal undertaking they cannot be denied. “Essential and vital elements of the undertaking”.
	+ Nothing in constitution or jurisprudence that would indicate that the federal undertaking enumerations should be interpreted so narrow as to lack these basic controls.
	+ Even if it was so narrow: wages, prices to maintain certain conditions etc will effect the strict interpretation re: controlling rates, availability and quality of their services!!!
* IJI as the protection of the “CORE” of federal principles HoPs from provincial application
	+ An example of what would be *not core* to a federal HoP is not offered (i.e. the *actual limits* of the scope of a HoP that Beetz accused Hogg of defining too narrowly).

**Responses to Hogg’s critique (*OPSEU*)**

* **Re: federal HoP as ‘defensive’ against prov. Against P&S**
	+ Defining scope as far too narrow. No authority for this (see above)
	+ Not conferring on parliament any power it doesn’t already have: scope must include the integral parts of regulating its HoP
	+ Preemptive = basically exclusive where it trenches on the vital parts by authority given by lang in the Const itself (in deeming clause)
	+ Exclusivity rule preempts any legislative trenching, not matter if general or particular, or which of these the P&S doctrine puts it in. \*\*\*ugggggh Revisit end of 260-261
* **Re: legislate for FP**
	+ A spirit of contradiction that would = uncertainty and endless disputes (in court) re: conflict possibly having the effect of threatening those that both the legislations are trying to protect
	+ “Federalism requires most persons and institutions to serve two masters; however, in my opinion, an effort must be made to see that this dual control applies as far as possible in separate areas.”

Steps for Applicability

1. Does application of provincial leg’n to the federal context invade the ‘core’ of a federal head of power?
	1. “basic, minimum and unassailable content” of a HoP. Minimum content required to make the HoP fulfill its purpose.
		1. This minimum involves control over basic management and operation over undertakings: labour relations and working conditions.
		2. However, no substantive test here: up to the court’s discretion. Look to the past jurisprudence if you can. (See later how IJI should only be applied before FP when this has already been established before)
	2. If yes, ABLE to invoke IJI doctrine.

## Irwin Toy – ‘impairment’ standard for indirect application

**-F:** provincial restrictions on toy manufacturers’ ability to advertise the products. Irwin toy challenges legislation because they want to use TV and radio ads that fall under federal head of power of telecommunications. Challenge 1) validity (crt applied DAD) and 2) on applicability: even if the leg is valid, can’t apply to toy advertisements on telecommunications.

-admittedly, the provincial legislation seems to apply to broadcasters, part of federal power (“affects” it), but the direct application of the legislation is really on the toy manufacturer firstly.

**-R: If the application of a piece of legislation on an extra-jurisdictional HoP is indirect, questions of applicability must meet a different, stricter test: it must impair a vital part of that HoP.**

-The Bell #2 test still applies in other cases that have direct effect on core of opposite juris cores.

## Canadian Western Bank – impairment standard for all

**CWB F:** Bank against Alberta legislation regulating the activity of promoting types of insurance. Legislation clearly valid, but applies directly to banks which are federal. Rejected the argument. Found that promotion of insurance was not at the ‘core’ of federal regulation of banking.

**LaFARGE F:** Challenged locally supported by law to apply to where a cement batching plant was going to built on port authority land (under shipping and nav federal power). Court rejects arg on similar reasons to CWB: nature of the plant is not at the core of nav and shipping, IJI can’t be invoked.

**Binnie and LeBelle JJ** obiter = serious statements on the doctrine and nature of IJI

*Upholding:*

* IJI is legitimate: text of ‘exclusivity’ in the constitution and the general principles behind federalism.
* Re Hogg’s critique of uneven use of IKI against provs: Should and able to apply to both levels equally, in theory.

*Critiquing:*

* Against the **‘dominant tide**’ of constitutional interpretation, which now favours a high degree of overlap and concurrent legislation between the two levels of jurisdiction. (Takes up the Dickson wariness in OPSEU)
* Application is problematic because of the **uncertainty re: the scope/meaning of the ‘core’** of heads of power
* Application risks the creation of **legal vacuums** in certain areas of application (eg. no back up federal legislation in the area).
* Tendency of **centralization** admitted.
* **Parl can protect** its jurisdictions over areas by legislating for them!

*THEREFORE* ***IJI must be limited and applied with caution, especially in new areas.***

Creates….

MODERN DOCTRINE OF IJI! – impairment standard

* **For IJI to be invoked in ANY case, the impugned legislation must IMPAIR rather than simply AFFECT whatever it is that falls within the ‘core’of the relevant extra-jurisdictional/opposite HoPs.**
* **“core”** here means the “basic, minimum and unassailable content” of a HoP (sticks to Beetz’ definition, though vague.)
* **Order of questions:** Division of powers questions should be dealt with through validity THEN operability, and FINALLY applicability. Only in areas **where past jurisprudence has established valid invocation of IJI**, should questions of applicability be dealt with second by the court.
	+ Basically, court should answer the ‘modern’ questions of Valid and Op first. Avoid the use of IJI to make the decision as much as possible.

## *Quebec v COPA* (SCC 2010!) – new judgement!!!

**-new view to the IJI doctrine**

* would applying the general legislation TRENCH on the core of the federal juris? She says yes (despite that the Feds have never seen it fit to leg actually)
* IF YES: Is the provincial legislation’s effect on the exercise of the protected federal power “sufficiently serious” to invalidate it. (“sufficiently srs to impair Parl’s capacity to legislate in one of their sections?” **NB: forcing to legislate in an area they have chosen not to = sufficient impairment, apparently.**
* Moved towards protecting federal legislative jurisdiction more than protecting of federal undertakings doing what they want to do
* legislative freedom and ability of parliament to exercise that juris.
* Elliot thinks the goal is good, but the application of such language/test doesn’t make sense for that goal
	+ - Applying the ‘sufficiently serious/impairment’ test (maintain the impairment vs. effect trend in the *CWB* framework for IJI w fed undertakings.)
		- If they want to change the focus of the IJI towards legislative freedom, should probably only have to ask: Does the prov legislation encroach upon the core?
		- If yes, then it seems to necessarily impair the federal freedom in the ‘core’. Not tolerating this sort of infringement, would not need to ask the ‘impairment level question’

# Q of Operability: Federal Paramountcy

**At a glace:**

-one provincial and one federal legislation: both valid and both applicable in the context

-claim of ‘conflict’ between the two

1. Determine validity of the 2 statutes
2. Find conflict (may look like an incidental effect or a DAD situation, but with a CONLIFCT)
3. If legit conflict found (see categories below), federal legislation is supreme and provincial is inoperable as long as the conflict exists.

-‘conflict’ categories completely judicially created since Constitution is silent.

-**The more broad and numerous the accepted categories of conflict, the greater the effect on provincial autonomy, which is carved up by federal paramountcy.**

**Accepted Categories of Conflict:**

1. Impossibility of dual compliance
	1. By citizens (*Multiple Access)*
	2. By decision makers (*M&D Farms*)
2. Frustration of Federal Purpose (difficulty to reach the federal goal) (*BMO v Hall)*

-Tests for 1a + 2 merge in *Mangat*  and *Rothmans*, but separate again in *COPA*

*STILL QUESTIONED:*

1. Federal intention to cover the field: intend to be the only game in town, to provide for all cases to be under their leg

## Ross v. Registrar of Motor Vehicles

## Multiple Access – duplication =/= conflict; only IoC by citz

* rather, it’s the ‘ultimate in harmony’ between the levels of power (MODERN PARDIGM; Dickson <3s Hogg)
* other court processes will deal w those who attempt double returns for suits under both statutes.
* he states unequivocally that **impossibility of compliance by citizens is the true source of conflict** needed to trigger FP
	+ Test: Does compliance with one involve breach of other?
	+ In this case of duplicate legislation: complying with one meant full compliance with the other, same for violation.

## *BMO v Hall* – frustration of federal purpose (FFP) est.

**-F:** Federal Bank Act v. Sask Ltn of Civil Rights Act. Former ensures banksc an take immediate action on the terms of a loan (repossession) while the latter needs bank to go before a judge for permission to seize, and if failure to comply, loses security and debtor is released. Is there conflict?

-**R: LaForest J**: jumps on Dickson’s words in Mult. Access:

* “there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; *the legislative purpose of Parliament will be fulfilled regardless* of which statute is invoked by a remedy seeker; application of the provincial law *does not displace the legislative purpose of Parliament.*”
* “refines”/adds to the compliance test via FFP: “dual compliance will be impossible when a provincial statute can be said to frustrate the legislative purpose of parliament.”
	+ In the case: purpose = Create a security interest/lending regime that was a uniform standard across the country + *immediate* ability to enforce loan. Individual differences of legislation that banks would be subject to btwn the provinces would undermine/frustrate this purpose.
* Giving heavy nods to and use of ‘covering the field’ conflict language.
* Opening up the strict conception of **conflict from 1a) to add 2, and possible even 3**.

## *M&D Farms v Manitoba Agri Credit Corp* – IoC by decision makers

**-F:** Fed’l *Farm Debt Review Act* – apply to federal office for stay of proceedings if you are a farmer in difficulty of making loan payments. VS Manitoba *Family Farm Protection Act* – lenders need leave from court before repossessing. M&D gets federal stay, Mtba court doesn’t know, also gives leave to Credit Corp. After stay was over were going to repossess, M&D challenges entire Mtba court proceedings, claimed issue of the stay precluded any reposs. proceedings for access to. Need to start the process all over again!

-**Ratio**: **An operability conflict may arise if decision makers cannot give effect to the provisions of both statutes at issue.**

* In the case: Once the federal stay mechanism had been triggered/granted, the Manitoba judge was confronted with a federal regime that disallowed repossession proceedings, and a provincial statute that gave him authority to allow them. Compliance would only be possible, in this situation, by a limiting of the prov decision maker.

-Case extends categories of conflict to 1b).

**Two examples of the courts meshing the IoC and the FFP tests.**

A LEADING Q at this intersection: *What* ***form*** *of possible compliance is acceptable to avoid conflict and thus FP?*

## *Law Soc BC v Mangat* – begins merging tests: FFP alongside IoC tests

**F:** Prov LS Act vs. Fed *Immigration Act* – Former bans ‘practice of law’ (before tribunals for a fee) by unaccredited individuals. Latter allows appearances by non-lawyers for a fee.

-validity of both = DAD and legit.

**R:** Applied **BOTH** IoC (cits and DMs) *and* FFP tests.

* 2a) not impossible to comply: *could* just appear w/o fee, OR become a lawyer and charge
* FFP? YES: **enforcing forms of adherence to this stricter provincial law would always frustrate federal purpose**
	+ purpose of fed leg: create an informal, accessible (eco, lang, culture etc.) and expeditious imm tribunal.
	+ Does it conflict? YES.
		- Allowing people to be paid (though less than lawyers) for their services would increase numbers of representation that was both culturally, language, and context sensitive.
		- Cheaper than a lawyer = more access to rep for an already socio-economically disadvantaged group.
		- Disallowing fees would negative these effects, and the purpose of the fed leg.
* 2b) DM IoC? Probably, says crt! What does the judge do in this situation? Which statute do they give effect to? Do they kick him out of the court or listen?

## *Rothmans, B&H v Saskatchewan* – tests ‘merge’, FFP more supreme

**F:** Fed *Tobacco Act* (TAct) vs. Sask *Tobacco Contral Act* (STCAct) – Former limits smoke ads while allowing in the context of retail (either by packs or brands on other objects). Latter bans ALL displays/ads in ANY place where sunder 18 year olds are permitted.

**I:** Can Sask act operate given presence of Federal act?

**Ratio**: Provincial enactment *must not* frustrate federal purpose whether there is an impossibility of compliance OR NOT.

* like *Mangat*, applies ‘both’ tests, though some claim two have been fused into one! (see below)
* IoC?: NO-- federal statutes is permissive but establishes no ‘right’ to advertise in retail. Can comply with both by following the stricter prov.
* FFP? NO—the form of compliance available was not frustrating to the federal purpose, but in fact furthered it
	+ TAct’s general purpose: deal with pressing health issue

**-This case establishes FFP as THE operability test.** Some would say that in *Rothmans* the IoC test **takes on the nature of a ‘first step’ in FFP test**, or a **‘way to prove’ FFP**, not necessarily a separate test in itself.

* *If an IoC is present, simply don’t have to continue to next step of asking whether the compliance still FsFP. Inoperative right away.*

**-Only compliance that DOES NOT FFP will be accepted, and maintain the operability of the provincial leg.**

**-If possible compliance is present, yet is restrictive enough to FFP, the prov leg will be deemed inoperative, and Fed Paramountcy will apply**

* *acceptable form of compliance hinges entirely on presence of FFP.*

**-Thus, NOTWITHSTANDING the presence of an IoC or not** FFP can make prov legislation non-operational.

\*\*\*\*\***New judgement note – *COPA***: In the application of the operability conflict test in *Quebec v COPA* this merger of the IoC and FFP tests seems to have faded, and the tests were applied independently from one another again. It’s too soon to say whether the *Rothmans* merged test will continue to apply or if the trend is going to continue in a separated manner like in COPA.

## Note on ‘Covering the Field’

-no modern cases explicitly accept it as a legitimate category of conflict (closest one is *BMO v Hall*)

-Many cases give brief nods towards it.

-IMPLICATIONS of its acceptance are huge to **provincial autonomy.**

* courts would just defer to parliament and what they legislate their intent as, despite possibility of no conflict at all in the traditional tests (IoC a & b; FFP).

# 91 & 92: 91(2), Insurance and Liquor – Ch. 4

## *Citizens Insurance Co v Parsons* – defining 91(2) trade and commerce

**F:** To avoid the provincial statute provisions and enforce their own, an ins co had to display the diffs in coloured ink. CI challenges Ont statute’s validity over insurance co’s. It was federal juris under 91(2) trade and commerce.

**JCPC ruling(s)**

* Sir Montague Smith
* drafters knew overlap would occur (“notwithstanding anything in this act…”), courts should strive to minimize it
* Reducing overlap = less concurrent leg = less op for federal jurisdictional paramountcy. 🡪JCPC did this in a way that favoured the provinces at the expense of federal powers.
* Textual analysis, **mutual modification process. 🡪** will not develop the need to interpret the Const different from other statutes until the *Persons* case ‘living tree’.
* **No legislative history** analysis: eye to American provision that drafters were trying to avoid.

JCPC Analytical Framework for Jurisdiction issues (*The first ‘validity’ doctrine.)*

1. Scrutinize legislation challenged 🡪 find ‘matter’/purpose
2. Does it find **a home** in the enumerated powers of **s. 92?**
	1. If no: Invalid
3. **If yes**: Does it find a home in the enumerated powers of **s.91?**
	1. If no: Legislation is valid under province
4. If a federal home found too, **federal jurisdiction should prevail.**

**Because of this framework, only way to find provincial juris in a challenge was to read down the federal power.**

Application

1. Matter= fire insurance **contracts and the rights arising therefrom**
2. S.92(13) prop and civil 🡪 obvious, contracts are all about prop and civil actions.
3. S.91(2)?? 🡪 NO. If ‘trade and commerce’ was to be interpreted broadly, why would they have included certain other specific sections?
**Has to do with the interpretation given to the matter (re: contracts) at step 1! (in line with Lederman’s analysis?)**
* SCC Gwynn J’s dissenting conception of the matter: regulating the fire insurance industry in general = more tenuous connection to 92(13). Textual reading from here would flag 92(9) saloons etc, and 92(10) local works, as an intention to avoid an over arching power over all business.

**Established contents of 91(2): trade & commerce**

* International trade
* Interprovincial trade
* Perhaps (though now established), general regulation of trade affecting the entire dominion

Consequently for provinces:

* Trade WITHIN their own province necessarily falls in their juris.
* Essential juris for provs of all industry, business (other than those explicitly in 91: banking, shipping etc.)

## *Russell v The Queen* – regulation vs. prohibition (to the Feds)

**F:** Validity of *Canada Temperance Act* (local, opt-in prohibition)

-Montague Smith applies the same test from *Parsons*

-cannot find home in 92 (step 2)! **Key difference: prohibition vs regulation**

* (9) raising rev: prohibition cannot be in a head that = regulating and raising revenue. Opposing.
* (13): “belongs to public wrongs rather than civil rights”. Not quite right
* (16) private and local: not local *enough*. Local triggering does not change the matter: offers a solution to the entire country to a problem of national significance. **Just because effect is local, doesn’t mean reach and purpose is not nationwide.**

-Ruled valid federal leg. No need to find home in 91.

-**effect:** MacDonald felt that *Russell* gave all jurisdiction over the retail trade in liquor to the Feds. Almost as if it was another enumerated section of 91. **The next case and development of the DAD would prove this assumption wrong.**

## *Hodge v The Queen* – Double Aspect; Provs Regulate; Con interp as regular statute

**F:** Validity (+ 2 other arguments) of Ontario regulatory/licensing leg (*Crooks Acts*) to fill in local voids from Cdn Temp Act. Mac still thinks feds have all power over liquor trade from *Russell*.

-Again, prohibition vs. regulation is a big factor.

**Validity**: No juris over trade of liquor, now federal.

* **Double Aspect Doctrine** first applied (SEE PG 16 of this CAN). Moral is, still room for valid prov leg on the topic.
* Continues to step 2: 3 possible **homes for leg in 92**
	+ 5 (sanctions/punishment for reg’n violation): ability to give their regulatory regime teeth.
	+ 16 (local/private nature): are regulating matters of local import. How it can be sold within those communities etc.
	+ 8 (municipal institutions ability): municipal type institutions like they have created have authority under this one.
	+ INCONSISTANT WITH *PARSONS*: no reference to 13! Are not looking at regulatory regimes re: contracts and property yet???

“***Delegatus*** *non potest delegare”* argument.

-claim that provincial legislatures are not just a delegate, subordinate in abilities from the Parl.

-these were inferred from things like federal R&D etc.

-JCPC rules this is a misconception of the standing of legislatures

-**Provincial legislatures are SUPREME within their jurisdictional spheres as much as Parl is in its domain, and Imperial Parliament in its own.**

**Foley’**s argument re: ‘hard labour’ and imprisonment.

-**JCPC maintains Constitution can and should be interpreted as a normal statute.**

**-**do not opt for the restrictive reading of Provincial powers.

-‘imprisonment’ in 92(15) should be understood to include one of its associated sanctions.

## Local Prohibition Reference – provs may prohibit; ‘powers’ of 91 and POGG federal validity; provinces ‘win’

-**F:** opt-in prohibitory regime enacted by Ont, practically parallel to the Cdn Temp Act.

s.91 validity of new federal Cdn Temperance Act?:

-because of the framework implied in *Parsons* and applied in *Russell*, **when prov leg home was not in 92, it was necessarily valid under 91.** THUS if the FEDERAL prohibitory leg was valid under 91, that same power (of prohibition) was not available to the provinces under 92: **extremely classical and exclusive view of division of powers/federalism.**

**🡪** finds authority for this approach in the s. 91 “deeming clause”–**any matter found to fall in enumerated powers of 91 IS DEEMED TO NOT RESIDE in 92.**

POGG validity

-conceived as a separate and distinct enumeration of federal power

-**must be construed narrowly + federal validity under POGG DOES NOT have power on its own to invalidate provincial legislation that finds a home in 92.**

* POGG was not drafted with the exclusionary power benefit of the ‘deeming clause’
* **OTHERWISE = destroy autonomy of the provinces*.*** – now something JCPC has on their agenda. Their view of Cdn federalism is that of Mowat and Cartier. THEY WIN.

**MORAL: 91 enumerated power may carve out for the feds/deny an area of legislation seemingly enumerated under 92, while POGG may not.**

Application:

-s.91 validity of new, federal CTAct: 91(2)? NO. Difference between prohibition and regulation makes it unavailable. Opposing purpose.

* Fed lawyers should have argued for 91(27) re: criminal law! Was implied in *Russel* as a basis for validity!

-POGG validity is upheld (national concern). However, this type of federal validity will not make a difference (i.e. invalidate the leg) if the Local Prohibition Act can be found valid under s. 92!

Provincial leg validity?

-Court rejects args for 92(8) and (9).

-accepts that 16 or 13 would validate it. (one or the other).

* **See 92(16) as playing a residual power role (over local matters) as POGG does in 91.**
* Re: 13 – an inconsistency w *Parsons*. : Why is it that a province prohibits it IS about prop and civil rights, but when the fed prohibit it’s about public wrongs and therefore can’t apply under 13? 🡪 probably the gov’t laywers that didn’t argue 27.

-mirror image temperance acts in both levels, both being upheld: modern federalism! AND we’re in the social sphere. (**Ryder applies!)** Early example of modern federalism in area of social regulation.

## Manitoba School Question

-1890: Manitoban gov’t, with protestant, English, majority support replaced the denomination school regime with a single public one.

-appeal to federal gov’t (Laurier PM) to solve the issue with their s**.93 remedial fed legislation power to enforce denom schools.**

-Despite being RC and French, Laurier suggested a **negotiated approach** was better

-Significance: Had constitutional authority, but declined to exercise it. Had become a **committed federalist**. Believed in the realm of edu (juris being given to the prov) the provs should have complete control, despite federal abilities to intervene/interfere

-Provincial autonomy should be important enough that federal powers over it should be avoided if at all possible.

# 91 & 92: Economic Regulation (91(2), 92(13) POGG, labour rel’ns) – Ch. 5

## Ref re: Board of Commerce– 91(2) ltd, POGG = national crisis

**F:** Objective of fed leg’n = to restrict: (1) combines, monopolies, and mergers; (2) taking unfair profits or hoarding to increase prices. General in scope covering entire Cdn economy. In partic “whether BoC had powes to make an order setting profit margins for clothing prices in Ottawa.”

SCC

Anglin CJC: uphold on third conception of 91(2) general reg of economy/business affecting entirety of Canada.

* Monopolies etc widespread and evil enough to need the fed regulation.
* Provinces couldn’t do it on their own. 🡪 See later in *Grain Elevators* for comment on this notion.
* Also POGG (though hits 91(13) it = an aspect that is not local, because of above beliefs.

Duff J (dissenting) – provincial.

Re: **s.91(2) powers** cannot regulate **the terms of a particular business/contracts.** 🡪 this is the domain of provinces under 92(13)

* Re: Anglin’s above view: If it interferes with the contracts in one type of business and is invalid in that one realm (clothes), how can the aggregation of interferences validate it? (Takes the same view if *Grain Elevators*) 🡪 sort of rejects *Parsons* here.
* Re: the above + POGG: can’t just frame it as something for ‘general scope’ of
* Only operation and/or effect of leg’n, NOT **the goal,** matters for Duff**.** Wants to limit gov’ts ability to extend their scope!

**Haldane – JCPC**

**-**Federal jurisdiction over general economic regulation was highly limited after this case.

-Feds argue: NOT parliament trying to regulate a particular business, but it seeks to regulate the Canadian economy generally.

**-Can the feds sustain these objectives/the leg’n based on one of the 91 powers?**

**91(2):**

* Haldane claims that power to regulate trade & commerce (i.e. the ability to severely interrupt 92(13)) can only be used with POGG (defined under special circs of **national emergency, even in peace time**) 🡪 ***THEN the issue becomes outside 92, but not present in 91, therefore = POGG.***
	+ Essentially deleting the federal jurisd over international/prov trade, and SEVERLY limiting 3rd conception of T&C from *Parsons*. Cannot be used on it’s own, but with POGG or with/in another federal juris only.
	+ It’s not enough of an ‘emergency’, thus is also rejecting the POGG argument.

**91(27) - strict**

* Creating new or novel crimes would fall out of the domain of criminal jurisprudence. New offences would not fall within the domain of 1867.
* Can’t add rules and sanctions and then change the entire features of the leg’n into crim. PLUS the offences don’t stand unless rules come down from the board first. THEN chance of offence.(See also *Snider*).

Both Duff and Haldane are committing to the definition of 92(13) from *Parsons* and protecting the provincial jurisdiction over industries/businesses because “civil rights” = freedom of terms of contracts arising therefrom.

* Protecting from encroachment *despite*
	+ federal regulatory legislation being general, not particular to a certain business/sector
	+ federal regulation in a partic trade = incidental to a regime for regulation of international/prov trade (valid for Feds) (see later in *Eastern Elevators*)

## *Fort Frances Pulp & Paper* – POGG = national emerg upheld, test for limits

**F:** a regulation of WMAct related to the prices of newsprint. Paper controller orders FFPP to repay excess of reg’d prices received from the Manitoba Free Press, but refuse. Challenges Feds ability to control prices under the "emergency doctrine" and if so for how long? (Kept pricing in effect after war ended) .

**Haldane**:

Valid under POGG: had declared emergency, and that state might continue a bit after the formal end to what caused the ‘emergency conditions’ i.e. war.

-clear evidence needed to say that the emergency and it’s resulting conditions are completely over for jud to invalidate use of POGG, otherwise it’s at the government’s discretion. –Deferential Approach (judicial restraint needed)

## *Snider* – presume labour rel’n w provs unless fed industry, limits 91(2) again.

-Now established presumption (from *Parsons, Insurance Act Reference*) that juris over business/industry = with the provinces under 92(13) because of their contractual nature. Exceptions = enumerations (eg: banking and shipping) or when assigned to feds by jurisprudence.

-SAME presumption now applies to the labour relations in an industry thanks to this case. Reasoning is also re: contractual nature.

-The question of validity reflects the jurisdiction over the industry, rather than the jurisd over ‘labour relations’ in general.

-Thus, the feds can also have labour relations legislation when it is one of their authorized industries.

-Again unwilling to permit Parliament to sustain regulatory legislation that encroaches on provincial industry, on the basis of 91(27): that they hold sanctions or “are criminal law” (see also *Board of Commerce*)

-**Once again limits trade and commerce to only w another enumeration:** “It is…now clear that, *excepting so far as thay power can be invoked* ***in aid of capacity conferred independently under other words in s. 91***, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parl to regulate civil right in the Provinces.”

## *Eastern Terminal Elevators* (ETE) – maintain fed reg of international trade, intern/p trade in 91(2) remains

**F:** Federal regulation of the grain trade. Elevator operations challenge validity of federal legislation reducing their allowed profits.

**Anglin (SCC) dissenting**

-thinks regulation of local elevator industry = NI to entire regime which is valid for the international/provincial trade in grain.

-can’t because of *BoCommerce, Snider*

-revives **POGG = national concern** (Watson in *LPRef*)

-conceives of Haldane’s “national emergency” power as also preemptive: if feds didn’t legislate it would be a national emergency! Should be able to forsee it, not just wait for it to happen.

-Thought he tries, feds continue to lose meaningful authority over Canada’s economy via 91(2).

**Duff (SCC) maj:**

-starts with validity of the part of the act challenged re: local industry of grain elevators. = invalid.

* Many other local industries trespassed on
* aggregate small overreaches cannot be overcome by the big objectives of international and interprovincial trade.

-**Different starting point from Anglin: focusing the characterization test on a different area = different outcomes. What does this say of McLachlin’s new P&S for the provision re: NI doctrine in the new judgment of *LaCombe*?**

2 fallacies validate the legislation.

-“large part of the grain trade is export therefore international trade is the main feature”

* worried the feds will be able to use this excuse with lessening and lessening percentages of federal juris. Slippery slope.
	+ But wouldn’t a reducing percentage effect the P&S and make it incidental instead of the main feature?
* Provinces couldn’t to it alone or even together! Someone needs to do it therefore it should be the Feds
	+ Assumes that one order must regulate the whole process alone. (Sort of falling into the issues that DAD addresses. One activity does not = one jurisdiction.)
	+ **work together!** **Duff imposes an obligation on the federal and prov gov’ts to cooperate (each legislating in their own sphere of juris) to enact interlocking regulator regimes.**
		- Certain parts of the economy, especially agriculture.
		- Message taken by Parl: if they can’t get it over such an export-driven and integral sector as grain, won’t get it elsewhere. Therefore *must* cooperate.

-Suggests the use of 92(10)(c) re: declaring jurisd over local works for the advantage of all of Canada. 🡪Feds do this.

-Assumes 91(2)’s limitation applied only to regulation of general Cdn econ. **International/prov trade remains.**

# The State of POGG!

* separate and distinct enumeration of federal power from those in 91 (*Local Prohib Ref – LPR*)
* Does not get benefit of the ‘deeming’ clause. (*LPR*)
* Home in POGG cannot be invalidate provincial legislation falling under 92. May not trench on a 92 power. *(LPR)*
* Home under 91 MAY invalidate a legislation with home under 92 (sans DAD application) due to deeming clause. (Developed in *LPR* from *Russel*)
* Only applicable in special circumstances of state of national crisis/emergency, such as war etc. (*Board of Commerce, Fort Frances P&P*)
* Haldane applies certain types of justifications/reasoning for the national emerg POGG pwr.
	+ **Prudential-** In times of true national emergency, provinces will not be able to deal/or cooperate quick enough with national problems. It makes practical or pragmatic sense to have national emergencies dealt with by national government
	+ **Structural-** Interpreting such a power from the BNA Act 🡪 parts give power to provide for the State as a whole. A textual need for such a power to exist.
	+ **Doctrinal-** Double Aspect: Property and Civil Rights in a new context.  I.e. in times of national emergency jurisdiction can reside with the Feds. (*FFP&P)*

Also note:

**2 Ways of Describing/Theorizing the POGG power**

1. POGG descrbes all of the federal jurisdictions. The enumertions of s. 91 are simply examples of an all encompassing (truly residual) power for the peace order and good gov’t of Canada.
* Montague Smith’s reasons in *Russel* imply this understanding, though they have been interpreted to apply to the other
	+ On federal ability to legislate on public wrongs: “they are of a nature which call within the general authority of Parliament ot make laws for the POGG of Canada, can have direct relations to criminal law, which is one of the enumerated classes…”
		- Like a bonus that criminal law is actually spelled out
	+ On characterizing law: if the Act does not come within one of the classes assigned to the provincial legislature, it is NOT contended that the Parl of Cda does not have the authority under POGG to legislate for it. IE IT DOES.
		- If not in 92 then necessarily POGG! Different from what would develop through *LPR* regarding this.
1. POGG as distinct source of power from the enumerated class of subjects. Like another enumeration itself, whose scope is defined through jurisprudence.
	* Application by the SCC today
	* Definitely originated in *LPR*

# Theories on Haldane/decentralization at the time.

Theories on Haldane’s approach to Cdn federalism, and the reasons behind the decentralizing thrust of the JCPC jurisprudence.

First two (Smith and Mallory) critical, the third (Cairns) much more positively.

**-Smith**: legalistic: JCPC refusal to look at historical and legislative history to help them understand ambiguous terms. That has changed since in the last 30 years.

If they had looked at it they would have realized that the intention was a strong federal gov’t and a weak provincial one.

**-Mallory:** Ideology – Haldane’s = classical liberal i.e. keep the big government out of our lives, laissez faire. Less to do with looking/shaping the

Acknowledges, though that Haldane was a Labour Party supporter?

**-Cairns**: solciology: whether the Smith and Mallory stuff got in the way, but any other approach would have been out of sync with federalism as it was being lived by Cdns (reflected social realities!)

different IDs, economies,

reduced R&D power already! Realization that it would cause serious issues and simply inappropriate.

 🡪decentralizing development occurred entirely on Cdn initiative, rather than from above i.e. the JCPC

Many provincial-federal struggles

Laurier gets voted in! – Mtba Schools, Boar War conscription rejection etc.

We were already in this new world.

**David Schneiderman**

-explanation of Haldane = fondness for Harold Laski (British sociologist), a strong believer in ‘small is beautiful’ i.e. moving decision making down to the local level.