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# Ch 3. From Contact to Confederation

## Confederation

*G. Stevenson, Unfulfilled Union, 5th ed*

Province of Canada established in 1841 by uniting Upper Canada and Lower Canada, on the recommendation of Lord Durham's report. French language was recognized. The principle requiring government to maintain the confidence of the elected lower house was also established around this time. There were tensions between Upper and Lower Canada resulting in difficulty maintaining confidence. Expansion proposed as a means to bring about confederation and resolve some of these difficulties. At the same time, threat of US invasion and economic motives also argued strongly towards confederation.

There was enthusiasm for "a Constitution similar in principle to that of the UK" and a desire to avoid "undesirable" aspects of the US Constitution. There was a desire to maintain residual power at the federal level. French-Canadians desired stronger provincial powers, in areas like education and legal system, leading to "property and civil rights." John A. Macdonald was the principle author of the *BNA Act* and his views of Federalism (strong central government) reigned at the beginning.

*A. Silver, The French-Canadian Idea of Confederation, 1864-1900*

French-Canadian population concerned with preserving their nationality and thus sought for provincial autonomy or at least co-ordinate sovereignty. A true Federal union was proposed to give effect to this desire. It was hoped that the federal government would deal with topics effecting the entire country, but be powerless to invade topics of provincial importance.

*J. Saywell, The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*

The maritime delegates initially desired residual power to go to the provinces. The view that providing residual powers to Parliament would strengthen the general government prevailed. The Quebec Resolutions were debated, with concerns over jurisdictional conflicts and a weakened Federal state. Numerous drafts dealt with jurisdiction issues, especially “property and civil rights.” The drafters were attempting to have overlaps resolved in favour of the federal government. Additionally, federal government could disallow provincial legislation.

*True Federalism:*

1. Division of legislative powers between two independent orders of government with equal status.

2. The division of powers needs to be unalterable by unilateral decisions of either order.
3. Division protected and enforced by an independent, impartial body.

## Ch 4. The Late Nineteenth Century: The Canadian Courts Under the Influence

Context: MacDonald and Ontario premier Mowat struggling for power. SCC was sympathetic to MacDonald, but JCPC tended towards provincial rights. By 1900 Mowat had triumphed and provinces were winning most division of powers challenges.

### *Citizens Insurance Company v. Parsons (1881) p. 97*

**F:** Ontario had enacted legislation required standard conditions in every fire insurance policy. Parsons' insurance required disclosures that did not comply with these conditions. Parsons did not make these disclosures, and as a result his claim was denied. Parsons asserted the conditions were void because they didn't comply with the provincial statute. The insurers responded by saying the legislation was *ultra vires*.

**I:** Is the fire insurance legislation **valid** provincial legislation, under s 92(13), or does it fall under 91(2)?

**R:** JCPC performs a close text in context analysis of the language in ss 91 and 92. They say the heads of powers need to be mutually modified in order to make sense. Section 91(2), Regulation of trade and commerce, read down to mean only international or inter-provincial trade and “trade affecting the whole dominion.

**A:** The “matter” is contracts. This is classified as civil rights, which is part of s 92(13). Could it also be classified under a federal head of power? Not after reading down s 91(2).

**C:** The impugned legislation is held valid under s 92(13).

### *Hodge v. The Queen (1883) p. 107*

**F:** Hodge, a tavern owner, contravened the terms of his provincial liquor licence and was charged.

**I:** 1. Is the liquor licencing act *ultra vires* the province?
2. Can the provincial legislature delegate to a Board of Commissioners? (*delegatus non potest delegare*)

**R:** With respect to (2), JCPC ruled that the provincial parliaments were supreme within their jurisdiction and not delegates of the federal parliament or the crown.

*Russel* had ruled that the *Temperance Act* was a valid federal subject under since it had no home in s. 92. Thus, Hodge argued, it cannot fall under provincial control as well. The JCPC decides this

is not the case, giving rise to the double aspect doctrine: “subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91.”

**A:** The “matter” is locally regulating liquor: “matters of a merely local nature.” This falls under s. 92(16).

**C:** The impugned legislation is held valid under s. 92(16).

*AG Ontario v. AG Canada (The Local Prohibition Reference) (1896) p. 114*

**F:** Ontario enacts legislation similar to federal *Temperance Act*.

**I:** Is the provincial legislation valid?

**R:** The key to this is the understanding of POGG. Lord Watson recognizes it as a distinct head of power, but limits the scope to matters of “national concern.” Thus, it cannot be used to remove matters from an enumerated provincial head of power. This is based on a close textual reading of the closing paragraph of s. 91: “enumerated in this section” cannot refer to POGG, which is part of the introductory paragraph and not “enumerated,”

**A:** The “matter” is laws suppressing liquor traffic in the province, which is classified as either s. 92(13) or s. 92(16). Although the matter could be classified as POGG, that is not strong enough to impinge on enumerated heads of power in s. 92.

**C:** Provincial legislation upheld, but would be inoperative in districts adopting the federal legislation.

## Ch 5. The Early Twentieth Century: The Beginnings of Economic Regulation

*Lord R.B. Haldane, “Lord Watson” (1899) p.129*

Haldane sees a judge as being a “statesman as well as a jurist,” and responsible for filling in the gaps left by the legislature. He agreed with Watson's judgements in favour of the provinces as establishing the “real constitution of Canada.”

*Reference re Board of Commerce Act, 1919 & Combines and Fair Prices Act, 1919 p.133*

**F:** Post war, federal acts attempting to control unfair monopolies, hoarding, and price fixing. Board of Commerce had set profit margins on clothing leading to complaints by merchants. They arranged a reference to the Supreme Court to determine whether the legislation giving them those powers was valid. Justice Anglin argues it is valid under 91(2) or POGG and the parts about hoarding are also valid under 91(27). SCC had split 3-3 and it was appealed to the JCPC.

**I:** Is this valid federal legislation?

**R:** Lord Haldane further constrains POGG, 91(2) and 91(27). He says: POGG can only apply in national emergencies; 91(2) cannot interfere with trades without resort to another federal head of power; and 91(27) only applies to subject matters that already belong under criminal jurisprudence.

He also expands 92(13) to include the liberty to conduct any business (except those specifically assigned in 91 in any manner.

**A:** Given the above understandings, regulation of business does not fall under any federal head of power and is captured within a provincial head of power.

**C:** Therefore, the federal statutes cannot be valid.

*Toronto Electric Commissioners v. Snider (1925) p. 142*

**F:** Federal and provincial acts enacted to deal with labour disputes in certain industries. Toronto Electric Commissioners challenge the validity of the federal statute. A 4-1 majority of the SCC ruled it was valid under s. 91(2) or s. 91(27).

**I:** Is the federal *Industrial Disputes Investigation Act* valid?

**R:** Haldane affirms earlier decisions: 91(2) cannot stand on its own; POGG can only be used in cases of "extraordinary peril." Furthermore, the act regulates striking but does not make it a crime, so it cannot fall into 91(27).

**A:** The "matter" is labour relations, which are contractual. This falls under s. 92(13) and cannot fall under any federal head of power.

**C:** The federal statute is invalid.

*The King v. Eastern Terminal Elevator Co. (1925) p. 146*

**F:** *Canada Grain Act*, valid federal legislature, is amended to include s. 95(7) in order to regulate profits made by the grain elevator companies. Eastern Terminal refused to comply and argued that the section was *ultra vires.*

**I:** Is s. 95(7) valid or necessarily incidental to the *Canada Grain Act*

**R:** A majority of the SCC sees this as regulating a local work, despite the majority of the grain being destined for international trade. Anglin, in dissent, argues the section should be valid. He would like to use the international branch of 91(2) but admits Haldane has blocked that route. Secondly, he says the subject matter does not fall under any provincial head of power, so it must be federal. Finally, he says that without this statute, a national emergency WOULD occur, so POGG can come into play before the emergency actually occurs.

**A:** According to the majority, the “matter” is regulation of a local business, clearly 92(13).

**C:** The SCC adopts Haldane's views and rules the section invalid. The federal government uses s. 91(10)(c) to declare grain elevators as works for the greater advantage of Canada, allowing them to regulate in that area.

## Ch 6. The 1930's: The Depression and the New Deal

Generally, Lords Atkin & Sankey doing away with everything Haldane was doing and giving life back to 91(2) and 91(27). Sankey notes that the *BNA Act* is special and has to be interpreted in a purposive way; the main purpose is establishing a strong central government. He minimizes Haldane's jurisprudence by emphasizing the importance of the original provisions and purposes.

### *Proprietary Articles Trade Association v. AG Canada (1931) p. 159*

**F:** Federal legislation creating criminal offences relating to participation in combines was challenged.

**I:** Is this legislation valid?

**R:** Lord Atkin, for the JCPC notes that the nature of criminal law is obviously going to change as society evolves and 91(27) must reflect that.. He defines a criminal act as anything prohibited with penal consequences. In *obiter* he suggests that 91(2) does contain matters on its own, contrary to Haldane's views.

**A:** By creating a criminal offence, the matter becomes crime and can be classified under 91(27).

**C:** The legislation is valid, and the scope of 91(2) and 91(27) is expanded.

### *Reference re Regulation and Control of Aeronautics in Canada (1932) p. 161*

**F:** Canada participates and ratifies an international aeronautics agreement and then enacts legislation in order to implement the terms of the treaty. Section 132 gives the government power to perform its international obligations.

**I:** Is aeronautics an exclusive federal matter?

**R:** Lord Sankey agrees that parts of aeronautics could fall under both provincial and federal heads of power. However, rather than perform a piecemeal analysis, he says it is better to take a broader view of the subject. He also re-expands POGG to include matters of national importance and asserts that aerial navigation and fulfilment of international obligations both fall into that category.

**A:** The “matters” of aeronautics could fall under 91(2), 91(5), 91(7) and maybe some parts under 92(13). On the whole, however, the general matter falls under 132 and the residual bits under POGG.

**C:** The legislation is valid, POGG gains ground and 132 interpreted very broadly.

*AG Canada v. AG Ontario (Labour Conventions) (1937) p. 171*

**F:** Canada had ratified international conventions relating to minimum wages and work standards. They then enacted legislation to comply with the conventions.

**I:** Can s. 132 allow the federal government to enact legislation otherwise *ultra vires*?

**R:** Atkin rejects the possibility of s. 132 granting new powers to the federal government merely because they have participated in international agreements. Doing so would effectively eliminate all provincial powers. Instead, he performs a regular s 91/92 analysis.

**A:** The "matter" is labour relations, and falls under 92(13).

**C:** The statutes are invalid. When participating in the international arena, Canada will have to consult with provincial governments prior to entering in treaties and/or include a federal state clause.

*AG British Columbia v. AG Canada (The Natural Products Marketing Act) (1937) p. 177*

**F:** *Natural Products Marketing Act* established by Canada, mostly in relation to products intended for export or inter-provincial use.

**I:** Is this legislation *ultra vires* the federal government?

**R:** It possibly falls under 91(2) or POGG. This is not a sufficient cause to be considered "national concern," so POGG cannot be used. 91(2) does allow for "general regulation of trade affecting the whole dominion," but that cannot mean particular commodities. Some of the enactments do effect provincial trade, in a manner too great to be saved by the necessarily incidental doctrine.

**A:** Parts of the statute fall under 91(2) and the rest under 92(13).

**C:** As a whole, the statute is invalid.

# Ch 8. Interpreting the Division of Powers

## Values Informing the Interpretation of the Division of Powers

*R. Simeon, "Criteria for Choice in Federal Systems" p.200*

In order to understand and interpret our division of powers, we need to question the values used in making those interpretations. Different federal states have different key values. Simeon lays out three criteria:

1. Community
2. Functional Efficiency
3. Democracy

However, even with these in mind, they could lend themselves towards either notion of federalism. For instance, does community mean Canada or BC. In general judges do not directly address these values.

## Validity: Characterization of Laws

### Pith and Substance

*K. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*

Swinton sets out a three step process for identifying the classification of legislation:

1. Identify the "matter" of the statute. This can involve text/context, legislative purpose, legislative effect, etc.
2. Delineate the scope of the competing classes. Concept of watertight compartments clearly not applicable any more, if ever. Precedent and history used to determine the scope of competing heads of power, but often comes down to a value decision by the court.
3. Determine which class the matter falls into. The easy part.

*W.R. Lederman, "Classification of Laws and the British North America Act" p. 210*

Enumerated classes in s. 91 and s. 92 must be understood as "laws regulating ..." not as the facts themselves. For instance, "seacoast & fisheries" actually means "laws regulating seacoast & fisheries." The categories in 91 and 92 are not mutually exclusive. Any law will have several features, and the role of the courts is to determine which is the central feature. To do so, they decide whether it is better for the people for the law to be federal or provincial and make a value choice.

*R. v. Morgentaler (1993) p. 215*

**F:** After abortions were no longer regulated by criminal law, Nova Scotia enacted a *Medical Services Act.* Among other medical services, it prohibited abortions from occurring in clinics, with fines of $10,000-$50,000. It also disentitled anyone receiving such a service from medical benefits. Morgentaler had opened an abortion clinic and was charged under this act. He challenged it as being criminal law and *untra vires* the province.

**I:** Is the *Medical Services Act* valid provincial law?

**R:** The province asserts it is medical law, falling under ss. 92(7)(13)(16). In determining the "matter" the court looks at the legal/practicle effect, course of events leading to enactment, legislative history, *Hansard,* etc. The legal effect is to create an offence, with a fine much higher than one would expect for a regulatory fine, copying the effect of the abolished criminal code provisions. In examining the history and *Hansard*, they saw that the government expressed a desire to shut down abortion clinics. Then they briefly look at the scope of 91(27) and 92(7).

**A:** Taking all these factors into account, the court determines the primary objective of the *Act* is no prohibit abortions as a social evil, while concerns over health care policy, hospital administration, etc were secondary.

**C:** Thus, it falls under 91(27) and is *ultra vires* the province.

*Ref. re Employment Insurance Act (Can.), ss. 22 & 23 (2005) p. 226*

**F:** Quebec challenges maternal/paternal benefit provisions of the *Employment Insurance Act*.

**I:** Are parental leave benefits part of 91(2A) – insurance – or 92(13) – supporting families?

**R:** Quebec argued that the meaning of employment insurance in 1940 was to support those who had lost employment involuntarily and were seeking new work. Parents do not fit into this category, so paternal benefits cannot be related to insurance. SCC rejects this interpretation and calls for a living tree approach. Given the changing workforce and importance of children, this is a valid area to insure.

**A:** "In pith and substance, maternity benefits ... [provide] replacement income during an interruption of work."

**C:** This is valid under s. 91(2). In the end, the federal government allows Quebec to enact their own unemployment insurance, and the federal version is not in force in Quebec.

### Double Aspect Doctrine

Used by courts to varying degrees depending on the subject matter and time. There is a worry that expanding areas on concurrent legislation with result in more instances of the provinces being subordinate to the federal government.

*W.R. Lederman, "Classification of Laws and the British North America Act" p. 235*

In spite of mutual modification and necessarily incidental doctrines, sometimes a law has both federal and provincial features of approximately equal importance. Both the federal and provincial governments could thus enact valid laws on that subject. If the laws do not conflict, they can coexist. Otherwise, the federal paramountcy doctrine comes into play.

*Multiple Access Ltd. v. McCutcheon (1982) p. 237*

**F:** Ontario and federal governments both enact legislation regulating insider trading. The Ontario legislation governs any trading within the province while the federal legislation governs trading in federally incorporated entities. The limitation period under the federal statute was shorter, so McCutcheon argued that the provincial act did not apply to his case.

**I:** Can two statutes regulating the same thing both be valid?

**R:** Federal companies law is federal jurisdiction, under POGG. Securities legislation is a provincial matter, under 92(13). This legislation can have a double character: company law and securities law. Neither is obviously more important.

**A:** Applying the double aspect doctrine allows the court to declare both are valid.

**C:** Applicability and operability discussed later.

### Necessarily Incidental

Valid laws may impact spheres belonging to the other level of government. If the impacting provisions are necessary for the overall legislation to be effective, they can be upheld. If the provision is not closely related to the overall legislation is will be severed and declared invalid. Unfortunately, the courts do not consistently use this doctrine.

*General Motors of Canada Ltd. v. City National Leasing (1989) p. 242*

**F:** Federal *Combines Investigation Act* creates a civil cause of action (s. 33.1) for parties who suffer losses as a result of behaviour prohibited under the act. CNL sues GM using this provision. GM argues that civil causes of action are 92(13) and the provision is invalid.

**I:** Is s. 33.1 of the *Combines Investigation Act* valid?

**R:** Dickson sets out a three step analytical framework for applying the necessarily incidental test:

1. To what extent, if at all, does the impugned section encroach on the other order of government?
2. Is the act, as a whole, valid?
3. How connected is the provision in question to the act as a whole?

The more encroachment found in question 1, the greater degree of connection required for question 3.

**A:** Dickson goes on to apply this test:

1. The provision is remedial and only creates a single cause of action. Thus, the encroachment is minimal.

2. The *Act* is valid.
3. A minimal encroachment requires the provision be functionally related. The provision is an integral component of the *Act*, and would pass even a necessarily incidental test.

**C:** The section is valid.

*B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" p. 247*

Sets out two judicial approaches that have been used with respect to 91&92:

1. Classical – favours exclusivity of provincial and federal powers. The courts try to draw a bright line, by mutual modification, between the heads of power and avoid overlap. This was mostly used in the JCPC era, but continues to be taken by the SCC in economic regulation. The downside is that many areas may become too compartmentalized to allow for effective legislation.
2. Modern – Spillover effects understood to occur and can be allowed in order to allow for effective legislation. This is mostly used by the SCC, but the JCPC took this approach to social legislation. The downside is that, due to federal paramountcy, the provinces lose autonomy each time overlap occurs.

*Quebec (AG) v. Lacombe (2010) (Supplement)*

**F:** Lacombe runs an air taxi service, with a federal licence, at Gobeil Lake. Provincial zoning restrictions prohibit aerodromes at the lake.

**I:** Can the province validly restrict aerodromes, a federal head of power?

**R:** Going to use Dickson's framework:

1. The by-law is, in pith and substance, attempting to regulate aeronautics, a federal head of power.
2. Zoning legislation, in general, is valid provincial grounds.
3. This zoning bylaw is not closely connected to the general zoning scheme. In fact, it arbitrarily bans aeronautics without regard to underlying land use and as such is not even supplemental to the overall legislation.

**A:** Given the lack of function connection, the challenged bylaw cannot be upheld with the necessarily incidental doctrine.

**C:** The bylaw is invalid.

## Applicability: The Interjurisdictional Immunity Doctrine

This doctrine reverses the trend of overlapping jurisdictions. Applies when valid, generally worded statutes are applied to areas in the core of the other jurisdiction. Dickson would have preferred to ignore this doctrine, and allow generally worded laws to apply. If the federal government didn't like that application, they could enact their own legislation which would be paramount anyways.

*McKay v. The Queen (1965) p. 251*

**F:** A municipal bylaw prevents the display of lawn signs. McKay goes ahead and puts up a sign supporting a candidate in a federal election. He argues that the bylaw is not applicable to federal election signs.

**I:** Can the valid bylaw be applied in this context?

**R:** If the bylaw had be worded to apply in this specific context, it would certainly have been *ultra vires*. Four judges dissented, saying that there is no federal head of power regarding election signs, so there is nothing for the bylaw to intrude on.

**A:** The bylaw cannot be applied to federal election signs.

**C:** The bylaw remains as it is, but is read down by the courts in order to remain constitutional.

*Bell Canada v. Quebec (Bell #2) (1988) p. 257*

**F:** Quebec law gave a right to reassignment for pregnant women in all businesses. Bell Canada argued that this law could not apply to it, since it is a federally regulated company.

**I:** Can the valid health and safety regulation be applied to a federal company?

**R:** Regulation of federal undertakings is exclusive federal jurisdiction. “Exclusive” means it preempts any provincial powers relating to the CORE of the head of power. The test used is “affects.”

**A:** Management and operation of federal undertakings are at the core of regulating said undertakings.

**C:** Provincial law read down in contexts of federal undertakings**.**

*Canadian Western Bank v. The Queen in Right of Alberta (2007) p. 264*

**F:** Provincial legislation regarding insurance offered by banks. Bank argued it could not apply to them since they were a federal undertaking.

**I:** Can valid provincial regulation regarding insurance providers apply to banks?

**R:** Court analyzes and modifies the Interjurisdictional Immunity doctrine (see handout). Decides to

take a more restricted approach to interjurisdictional immunity. The current test is for “impairing,” strict test than affects.

**A:** Insurance isn't at the core of banking. Affecting insurance doesn't constitute impairing banking.

**C:** The provincial legislation regarding insurance can apply to banks.

*COPA v. Quebec (2010) (Supplement)*

**F:** Quebec's agricultural preservation act (*ARPALAA*), s. 26, prohibits the use of designated agricultural areas for anything other than agriculture. Laferrière and Gervais go ahead and build an airstrip anyways.

**I:** Is s. 26 *ultra vires* the province? If not, is it applicable to aerodromes?

**R:** The pith and substance of the Act, which is supported by s. 26, is land use planning and agriculture. This falls under s. 92(13), 92(16) or 95. Next, does applying it to aerodromes infringe on the core of power over aeronautics. Aeronautics involves regulation of all airports and aircraft. Precedent has held that the location of aerodromes lies at the core of aeronautics. Section 26 significantly restricts the federal power to locate aerodromes.

**A:** Section 26 is valid provincial law, but it cannot be applied in the context of aviation.

**C:** Section 26 has to be read down as inapplicable to aerodromes.

*Canada v. PHS Community Services Society (2011) (Supplement)*

**F:** Insite safe injection facility used to give clients drugs without fear of arrest. Insite had been given an exemption from the federal *Controlled Drugs and Substances Act*, but in 2008 the exemption was not extended.

**I:** Is the CDSA inapplicable to a provincial health facility?

**R:** The core of health care is not established by jurisprudence and not identified by the claimants. If the entirety of health care was considered the core, it would be too broad.

**A:** Interjurisdictional immunity does not apply here.

**C:** Although the division of powers argument fails, the decision of the Minister not to allow the exemption violates s. 7 of the *Charter* and [s]he was ordered to grant the exemption.

## Operability: The Paramountcy Doctrine

Operability centres on questions of conflict. There are five possible understandings of conflict:

1. ~~Overlap~~. Too broad.
2. ~~Duplication~~. “Perfection of harmony” - *Multiple Access*

3. Impossibility of dual compliance.
    - By the public, as seen in *Ross, Bank of Montreal, Multiple Access*.
    - By decision-makers, as seen in *M&D Farm* (note on p 281)
4. Frustration of federal purpose. Seen in *Bank of Montreal* and *Rothmans*. *Rothmans* goes further and says (3) is just a part of (4).
5. Federal intention to cover the field. *Bank of Montreal* refers to this as well, but it is not clear if (5) alone can be considered conflict.

*Ross v. Registrar of Motor Vehicles (1975) p. 273*

**F:** Certain criminal driving offences allow the judge to issue partial suspensions. Ross was issued a 6 month suspension, but allowed to drive to and from work. Ontario's Registrar of Motor Vehicles suspended his licence for 3 months anyway. Ross challenges the provincial legislation.

**I:** Are the provincial and federal statutes valid? If so, do they conflict, requiring paramountcy.

**R:** The court decides both pieces of legislation are valid and goes on to consider the operability of the provincial driving suspension. Pigeon notes that the criminal code does not attempt to deal with all issues of motor vehicles, so there is no (5). Furthermore, Ross can comply with both orders by not driving at all, so there is no (3).

**A:** The court finds no conflict here.

**C:** Both orders are valid and operable.

*Multiple Access Ltd. v. McCutcheon (1982) p. 277*

**F:** See page 11 of this CAN(Multiple Access Ltd. v. McCutcheon (1982) p. 237). Both federal and provincial securities legislation was deemed valid.

**I:** Is provincial securities legislation operable when a federal statute already applies?

**R:** Both statutes serve the same purpose and have similar provisions. (2) is not a good understanding of conflict. It is possible for people to comply with both statutes, so there is no (3).

**A:** There is no conflict, so paramountcy does not apply.

**C:** The provincial statute is operable.

*M&D Farm Ltd. v. Manitoba Agricultural Credit Corp. (1999) p. 281 (Notes)*

**F:** Federal law required a stay of proceedings, while provincial law authorized commencement of the same proceedings.

**I:** Is there conflict here?

**R:** A citizen could comply with both by waiting until the stay period was over. However, after beginning proceedings a judge could not simultaneously give effect to the stay and the right. This gives rise to the second branch of (3).

**C:** There is conflict, and federal paramountcy applies.

*Bank of Montreal v. Hall (1990) p. 282*

**F:** The *Bank Act* permits seizure of collateral upon default of a loan. The provincial *Limitation of Civil Rights Act* requires notice to be given before seizure. Hall's farm machinery was seized by the bank without notice. The SCC decided that both acts with *intra vires* their respective order of government.

**I:** Is the provincial act operable in the face of the *Bank Act*.

**R:** La Forest notes that since (2) means there is no conflict, the opposite of (2) must give rise to conflict. There is no (3), since the bank could comply with both by following the provincial scheme, but that does not mean there is no conflict. Thus, he asks whether there is conflict in operation, meaning that the purpose of parliament would be displaced if the provincial law was followed (4). The purpose of this portion of the *Bank Act* is to create a uniform regime to guarantee their rights without dependence on provincial legislatures. He also mentions (5), saying that parliament created a complete code, so there is no room left for the provincial legislation.

**A:** The provincial legislation conflicts with the federal, since it frustrates federal intention (4).

**C:** Provincial legislation is inoperable to actions taken under the *Bank Act*.

*Law Society of British Columbia v. Mangat (2001) p. 287 (Note #4)*

**F:** Federal immigration legislation permits non-lawyers to appear as counsel before the IRB. BC does not allow non-lawyers to practice law for a fee.

**I:** Is there conflict between these laws?

**R:** Although a citizen could comply, a judge could not (3). More weight is given to (4).

**A:** The provincial legislation gets in the way of the federal purpose of access to justice.

**C:** Provincial legislation is inoperable in the context of IRB hearings.

*Rothmans, Benson & Hedges Inc. v. Saskatchewan (2005) p. 289*

**F:** Federal *Tobacco Act* prohibits promotion of tobacco except for certain types of promotion. Displaying tobacco at retail is permitted. Saskatchewan has enacted a *Tobacco Control Act* which

bans all advertising and display anywhere children under 18 are permitted.

**I:** The the provincial act inoperable due to the provisions of the federal act?

**R:** The allowance by the federal statute is not a positive right, merely an absence of prohibition. The purpose of the federal act is to prevent people from inducements to tobacco usage. It is possible to comply with both by following the stricter statute. Additionally, he notes that (3) is just one example of (4).

**A:** There is no (3) or (4), so there is no conflict.

**C:** The provincial act is upheld.

# Ch 10. Economic Regulation

## Provincial Powers Over Economic Regulation

### General Principles

Numerous heads of power assign particular aspects of the economy to specific orders of government. The focus here is the potential conflict between 91(2) and 92(13).

What is the scope of economic regulation under 92(13)? Courts seem to have an underlying desire to preserve economic unity within Canada and eliminate unacceptable barriers to trade.

*Carnation Co. Ltd. v. Quebec Agricultural Marketing Board p. 356*

**F:** A band of milk producers form under the regulations established by the Marketing Board and have a hearing to set a price on their milk sales to Carnation. Carnation alleges this interferes with 91(2) since they sell the milk products outside of Quebec.

**I:** Is the legislation an interference with extraprovincal trade?

**R:** The previous test was territorial. Under that test, the purchase of milk occured within the province and would therefore be intraprovincal. However, Martland feels this is not significant enough to grant the provinces power. The new test is whether the orders "affect" interprovincial trade or are made "in relation to" such trade.

**A:** The legislation in question was not made in relation to anything falling under 91(2). At most, it had an incident affect on interprovincial trade.

**C:** The provincial legislation is valid.

*Note on AG Manitoba v Manitoba Egg and Poultry Association (1968) p. 360*

**F:** Manitoba enacts legislation to control the marketing of all eggs within the province.

**I:** Is such legislation *ultra vires* the province?

**R:** Use the test set out by Martland. At least part of the legislation aims to control the sale of eggs imported to the province.

**A:** This legislation is specifically designed to regulate interprovincial trade in eggs, and should therefore fall under 91(2).

**C:** The legislation is invalid.

*Notes*

There was a question of whether the reference should have been heard at all since there was no factual underpinnings and it seemed identical to *Carnation*. Perhaps the courts should take an agressive approach to judicial review of provincial protectionist schemes since it most affects those outside the province who cannot vote on the issues. (Weiler)

*Note on Re Agricultural Products Marketing Act (1978) p. 365*

The Agricultural Products Marketing Act was part of a cooperative scheme between the federal and provincial governments to address the issues arising in the *Manitoba Egg Reference*. Several egg producers were unhappy with the quotas set out under this scheme. The court shows restraint since a great deal of effort went into establishing the scheme. To do so, Pigeon distinguishes production from marketing and says that production falls to the provinces under 92(10) (local undertakings). Laskin limits the scope of s. 121 to legislation "in essence and purpose" related to provincial boundaries.

## Natural Resources

*Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan (1978) p. 370*

**F:** Rapid increase in world oil prices led Saskatchewan to enact legislation that, in essence, ensures their provincial government will reap the benefit of the increase in value. Most of the oil in Saskatchewan is destined for out of province trade.

**I:** Does this legislation regulate inter-provincial and international trade, falling under 91(2)?

**R:** The purpose of the legislation is to drain off the benefits that would otherwise go to the producer. However, the effect is to regulate the export price.

**A:** Provincial authority does not extend to fixing price in an export market.

**C:** The legislation is invalid. Dickson, in dissent, would have done a balancing test and concluded the benefit to Saskatchewan outweighed the detriment to free trade.

*Central Canada Potash Co. Ltd. v. Government of Saskatchewan (1979) p. 375*

**F:** Saskatchewan enacts legislation setting quotas and minimum prices on potash production.

**I:** Does this fall within provincial legislative authority?

**R:** The appeal court upheld the legislation arguing that is was really important for Saskatchewan and that if it were *ultra vires* Saskatchewan, it would necessarily be federal. Federal legislation certainly cannot control production within a province.

**A:** Just like *CIGOL*, above, a direct object of the legislation is price regulation in an export market.

**C:** This legislation is invalid.

*Note on Section 92A p. 379*

Added in 1982, expressly establishes provincial rights over non-renewable natural resources, forestry, and electricity generation. This allows provinces to legislate on export of these resources, subject to federal paramountcy.

*Note on Offshore Minerals p. 381*

In 1967, SCC decided waters off the coast of BC were under federal jurisdiction. This was clarified in 1984 which determined that the waters between the mainland and Vancouver Island were still under provincial jurisdiction.

## Federal Powers Over Economic Regulation

Originally formulated in *Parsons*, in the *Natural Products Marketing Act Reference* the two branches were established:

1. Regulation of interprovincial and international trade.
2. General regulation of trade affecting the whole dominion.

### Regulation of Interprovincial and International Trade

*The Queen v. Klassen (1960 Man CA, leave to appeal denied) p. 382*

**F:** *Canadian Wheat Board Act* set out a quota system and required all grain to be logged under that sytem. K purchased grain from a local farmer without recording the purchase. However, the processed feed was never sold outside of Manitoba.

**I:** Is the *CWBA* constitutional when applied to small, local transactions?

**L:** Necessarily incidental test: First determine the nature of the legislation, then see if the interference with proprety and civil rights is necessarily incidental to its effectiveness.

**A:** The nature of the legislation is to market surplus grains effectively and fairly. It is necessary to monitor local purchases as well in order to control prices and ensure all producers are on equal footing.

**C:** The interferences are necessarily incidental, and therefore the application to local feed mills is constitutionally valid.

*Caloil Inc. v. AG Canada (1971) p. 387*

**F:** Companies importing oil had to sell it to the east of a line running through Ontario and Quebec. This meant that some parts of Quebec were OK and others weren't.

**I:** Is the regulation of where in Quebec this oil can be sold *ultra vires* since it deals with intraprovincial trade?

**L:** Necessarily incidental test again.

**A:** The restriction is an integral part of the control of imports.

**C:** Regulation upheld.

*Dominion Stores Ltd. v. The Queen (1980) p. 388*

**F:** DS, an Ontario store, sold apples produced in Ontario labelled "Canada Extra Fancy." The *Canada Agricultural Products Standards Act* sets out requirements to label produce as "extra fancy".

**I:** Do the federal requirements apply to local produce sold locally?

**L:** Ignores the necessarily incidental test, instead arguing watertight compartments.

**A:** Federal legislation may not regulate transactions occuring entirely within a province.

**C**: Legislation found to be *ultra vires* by a 5-4 majority.

### General Regulation of Trade

Acknowledged as a branch of 91(2) but hardly ever used until 1984. Five considerations are laid out for the court to consider: (*Canadian National Transportation*)

1. Is a regulatory scheme created?
2. Is the scheme overseen by a regulatory agency?
3. Does the scheme regulate trade in general, as opposed to a particular trade?
4. Is the scheme beyond the capacity of the provinicial legislatures?
5. Do all provinces need to be included in order for the regulation to be effective?

*General Motors of Canada Ltd. v. City National Leasing (1989) p. 396*

**F:** See p. 11 (General Motors of Canada Ltd. v. City National Leasing (1989) p. 242).

**I:** Is the *Combines Investigation Act* valid as a general regulation of trade and commerce?

**L:** Five questions laid out above. Court notes they are indicia, not requirements.

**A:** There is clearly a regulatory scheme (1) with various administrative bodies in place to oversee it (2). All three of the remaining indicia are found, pointing to a finding that the scheme is truly national in scope.

**C:** The *Combines Investigation Act* is valid federal legislature.

*Ref. re Securities Act (2011) Supplement*

**F:** *Securities Act* would create a single national securities regulator. Provinces could choose to opt in or to continue using their existing regulations.

**I:** Is the *Securities Act* valid as a general regulation of trade and commerce?

**L:** The five points above.

**A:**

1. A regulatory scheme would be created that would replace the provincial scheme and better handle systemic risk.
2. Yes.
3. Although securities trading is an industry unto itself, it effects all industries and is general in nature.
4. Some aspects of the legislation would be beyond the powers of the provinces.
5. Provinces can choose to participate, indicating the regulation is effective without full participation.

**C:** The *Securities Act* as a whole is invalid. The parts of the act dealing with inter-provincial aspects could be validly enacted on their own.

**TODO Hogg, Chapters 20 & 21.1, 2, 5 - 10**

# Ch 11 – Criminal Law

## Federal Powers over Criminal Law

Haldane started with a narrow view of 91(27) encompassing only things that traditionally belonged to the area of criminal jurisprudence. Atkin, in PATA, replaced that with a very broad view: any

prohibition combined with a penalty.

*Reference re Validity of s. 5(a) of the Dairy Industry Act (Margarine Reference) (1949) p. 422*

**F:** *Dairy Industry Act* prohibited the manufacture or sale of any butter substitutes.

**I:** Is this prohibition a valid exercise of 91(27).

**L:** Atkin's understanding of criminal law is too broad, so a third requirement is added: the prohibition must support a public purpose such as peace, order, public health, security or morality.

**A:** The purpose of this legislation is to regulate trade, so it cannot be upheld as criminal law.

**C:** The legislation would be *ultra vires* of the federal legislature.

*RJR MacDonald Inc. v. Canada (Attorney General) (1995) p. 425*

**F:** *Tobacco Products Control Act* prohibits advertisement of tobacco and sale of tobacco without health warnings.

**I:** Is the Act a valid exercise of the criminal law power?

**L:** The requirements are: prohibition, penalty, and public purpose. Dissent argues an additional requirement: close fit between the prohibition and the purpose.

**A:** Prohibition and penalty are clear from a plain reading of the act. The purpose is protecting "health" which is a valid public purpose. It is not necessary for parliament to criminalize all use or sale of tobacco in order to criminalize the advertising of tobacco.

**C:** The Act is valid.

*R. v. Hydro-Québec (1997) p. 433*

**F:** Hydro Quebec ordered to stop emitting PCBs under the *Environmental Protection Act*. HQ challenges the legislation.

**I:** Is the Act valid criminal legislation?

**L:** Test for the three requirements in Margarine Reference/RJR.

**A:** Court agrees that protection of the environment is a legitimate public purpose. Dissent finds that the legislation was regulative in nature due to the number of exclusions and provincial powers in the area. Majority classifies it as prohibitory, saying the environmental purpose is important enough to overshadow those concerns.

**C:** The Act is valid.

*Ref. re Assisted Human Reproduction Act (SCC) (2010) Supplement*

**F:** The Act has prohibitions, exceptions and sections regulating the prohibitions.

**I:** Are the impugned sections necessarily incidental to the Act as a whole (and is the Act as a whole valid)?

**L:** Three requirements, above. Necessarily Incidental test.

**A:** 4-4-1 decision. McLachlin reverses the test set out in General Motors of Canada Ltd. v. City National Leasing (1989) p. 242 (p 11). In looking at the legislation as a whole, she sees the pith and substance as prohibition to protect health and morality which is valid criminal law.

LeBel uses the test set out in GM and find substantial interference into provinicial jurisdiction of health care from certain sections of the Act and strikes them down.

Cromwell also finds certain sections as regulating health care and strikes them down.

**C:** Some sections were upheld along with the regulations required to oversee those sections.

## Provincial Power to Regulate Morality and Public Order

Under 92(15) provinces are allowed to have fines and penal sanctions as long as they relate to another provincial head of power. The cases turn on what constitutes a valid provincial source. A fair amount of concurrency has been accepted.

Factors Supporting Validity
- Regulation rather than prohibition – McNeil, Rio Hotel
- Loss of licence and/or minimal fines – McNeil
- Temporary
- Local interest focus – McNeil
- Property – Chaterjee, Bedard v Dobson.
- Preventative – McNeil, Dupond

Factors Supporting Invalidity – Morgentaler, Westendorp
- Similar to criminal code offence
- Jail time, significant penalties
- Fill recent void in criminal code
- Free standing prohibition.
- Threat to rights/freedoms – emphasized by Laskin.

*Re Nova Scotia Board of Censors v. McNeil (1978) p. 452*

**F:** Nova Scotia *Theatres and Amusements Act* requires all films go through a censor board. Showing a prohibited film would result in a fine and revocation of the theatre owner's licence.

**I:** Are these sections of the act valid?

**A:** Narrow majority sees this as regulation of the film industry and therefore acceptable. Alternatively, they argue local morality is a matter of private nature within the province and

therefore could be upheld under 92(16). Dissent sees this as a provincial authority defining legality and therefore intruding into 91(27).

**C:** Regulations upheld, except for one that mimicked a *Criminal Code* provision relating to exhibition of an indecent show.

*Westendorp v. The Queen (1983) p. 456*

**F:** Calgary bylaw regulating use of city streets had penalties up to $300/60 days imprisonment. Bylaw was amended to include prostitution with penalties of up to $500/6 months imprisonment. Criminal provisions regarding prostitution had recently been changed.

**I:** Is the amendment to the bylaw constitutionally valid?

**A:** The amendment has nothing to do with control of city streets and it clearly does not fit with the existing bylaw. It is a clear attempt to supplement the C*riminal Code* in dealing with prostitution.

**C:** Unanimously held to be invalid.

Hogg, Chapter 18.1 - 6 and 18.10 – 11

## Peace, Order, and Good Government

*Historical Development of the P.O.G.G. Power p. 295*

Haldane limited use of this power to matters of national emergency. Watson later brought in the idea of national concern. This was given its current formulation by Viscount Simon in *AG Ontario v Canada Temprance Federation (1946)*: the subject matter of the legislation must be the concern of the Dominion as a whole. He also states that legislation aimed at preventing an emergency is just as valid as legislation enacted to cure an existing emergency.

SCC used this formulation of national concern to uphold aeronautics legislation and the *National Capital Act* in *Johannesson* and *Munro*, respectively. They also add a third "gap" branch, involving matters that don't fall under any available head of power (*Jones v AG New Brunswich*).

*Reference re Anti-Inflation Act (1976) p. 303*

**F:** The statute placed controls on incomes and prices across large portions of Canada's economy. The provincial public sector was left as an opt in system. Eight provinces had agreed to opt in.

**I:** Is the *Anti-Inflaction Act* valid under either the national emergency or national concern branch of POGG?

**L:** Court agreed on a number of points:

- National emergency and national concern are seperate branches.

- National emergencies could occur during peace time.
- An economic crisis could be an emergency (as opposed to just war or health)
- Government may legislate to prevent an emergency as well as to cure
- There must be a rational basis to conclude there is or will be an emergency
- The legislation must be temporary, although it can allow for periodic renewal.

National concern requires a unity that distinguishes it from provincial matters and an acceptable scale of impact on provincial jurisdiction.

**A:** According to the majority, the legislation was valid. They considered extrinsic evidence as proof the government was acting in face of an emergency. The dissent would have required an explicit statement in the Act that there was or would be a national emergency. Another majority agreed that national concern alone would not have been sufficient to uphold the legislation since "inflation" could seriously affect many areas of provincial authority.

**C:** The act is upheld under the national emergency branch of POGG. Later, the *Emergency Act* was passed, specifying the procedure the government must use in order to enact emergency legislation.

*R. v. Crown Zellerbach Canada Ltd. p. 323*

**F:** CZ charged with dumping logs in the Gulf of Georgia without obtaining a permit, as required by the *Ocean Dumping Control Act*, which includes both territorial sea and internal waters.

**I:** Can the act validly apply to provincial waters as a matter of national concern?

**L:** Test for national concern includes: (p. 326)

1. The matter must have singleness, distinctiveness and unity that clearly distinguishes it from provincial matters AND an acceptable scale of impact on provincial jurisdiction.
2. "Provincial ability test" – If a province fails to legislate, will the negative effects be felt outside the province.

**A:** Majority: Controlling marine pollution of salt water meets the above test. Dissent: Almost anything could be characterized as protecting the environment so there is no national concern here.

**C:** Upheld 4-3 as a matter of national concern.

Hogg, Chapter 17