LAW 100 Constitution – Federalism Exam CAN

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# Chapter 1: Introduction

**The elements of the Canadian Constitution**: parliamentary democracy, federalism, individual and group rights, aboriginal rights, principle of constitutionalism, rule of law, constitutional conventions, judicial independence, legislative supremacy

**Sources of the Canadian Constitution**: Imperial parliament leg, Crown Orders in Council, fed and provincial statutes, common law, conventions

**From Colony to Independent Nation State**: *BNA* 1867, SCC created in 1875, 1888 fed gov’t disallowed criminal appeals to JCPC, 1920s JCPC stuck down the disallowance, *Statute of Westminster* 1931 ended status as colony, 1949 appeals to JCPC abolished (QC wanted to keep appeals to JCPC because they favoured provinces), executive independence increased after WWI in int’l realm, 1982 *Canadian Constitution Acts* were patriated – replaced *BNA* – QC did not agree to amendments, Meech Lake Accord 1987 and Charlottetown Accord 1992 were both unsuccessful

# Chapter 2: Judicial Review and Constitutional Interpretation

## Judicial Review and the Legitimacy Issue

- **Judicial review**: power of courts to determine, when properly asked to do so, whether action taken by a gov’t body/legal actor is in compliance w/ Constitution, and if necessary to declare it unconstitutional

- **Principle of constitutionalism**: gov’t action has to comply w/ requirements of Constitution to be valid

- Power of judicial review recognized in s. 51(1) of *Constitution Act*, 1982 and in Charter

- Recently, courts have been asked to declare leg unconstitutional for conflict w/ organizing/underlying principles of Constitution

- Constitutional provisions often unclear and ambiguous in terms of constraints on gov’t

## How Do Constitutional Issues Get to Court?

1. **Ordinary litigation and the rules of standing**

- Common law standing rules required that individual’s own interests be directly affected by law in a way that is different from impact on public at large

- Concrete review

- **Public interest standing**: if P has genuine interest as citizen in validity of leg and there is no other reasonable and effective manner in which issue may be brought before the Court

2. **The Reference Procedure**

- Initiated by executive branch – refer legal Q directly to appellate court for advisory opinion

- Abstract review

- S. 43 of *Supreme Court Act*: Court has duty to answer Qs posed

- SCC has on occasion refused to answer reference question to avoid judicial activism e.g. *Reference re Same-sex Marriage*

- Critics say this politicizes judiciary by requiring consideration of hypothetical issues

- Quick mechanism for obtaining definitive answer on question of constitutional validity

 - Produces advisory opinions, but they are considered as authoritative as other court judgments

- Declaratory proceedings: independent action commenced by someone seeking declaration that a particular law is invalid on constitutional grounds

**Test to determine standing: 1. Is it a serious constitutional challenge? 2. Are you a good person/organization to launch this challenge because you’re directly affected by the leg or do you have a genuine interest in this leg? 3. Is there no other reasonable and effective way to get this challenge before the court?**

- *AG of Canada v. Downtown Eastside Sex Workers United Against Violence in Society and Sheryl Kiselbach* (2012) – Altered (3) above to “Whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts”

* Purposive, generous and flexible approach - factors should be weighed cumulatively
* Courts should exercise discretion and balance underlying rationale for restricting standing w/ important role of courts in assessing legality of gov’t action

- BUT: not every judge will exercise discretion in favour of public interest, lack of predictability

- Alexander Bickel: judges must exercise judicial review on basis of principles; judges should only review most important cases; standing and mootness can be used as barriers; certain challenges should not be reviewed if they are too political

# Chapter 3: From Contact to Confederation

BNA colonies formed a confederation w/ the *BNA* 1867.

## G. Stevenson, Unfulfilled Union

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 gov’t 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 loss of reciprocal trade) and economic motives (capitalist entrepreneurs) also argued strongly towards confederation.

Terms of Canada’s constitution reflected diversity of interests and motives and ideological preferences of colonial politicians who attended the conferences at Quebec in 1865 and London in 1866. 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 fed 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 gov’t**) 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 Fed union was proposed to give effect to this desire. It was hoped that the **fed gov’t would deal with topics affecting the entire country** (jurisdiction over matters in which interests of everyone are identical), **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 gov’t prevailed – final draft came from UK. The Quebec Resolutions were debated, with concerns over jurisdictional conflicts and a weakened Fed state. Numerous drafts dealt with jurisdiction issues, especially “property and civil rights.” The drafters in UK and Macdonald were **attempting to have overlaps resolved in favour of the fed gov’t**. Jurisdictionally, coordinate or classic federalism was written into the constitution. The provision that the fed gov’t could disallow provincial leg qualified that legislative autonomy, but it could be exercised only at the discretion of the executive and was thus a matter of politics or policy, not of law, and its use was not justiciable.

## True Federalism:

1. Division of legislative powers between 2 independent and equal levels of gov’t, one national and one regional.

2. That division of powers cannot be changed by either one of those levels of gov’t unilaterally.

3. Division of powers is protected and enforced by an impartial and independent arbiter.

### Was the Canada created by the bna a true fed state?

- S. 91 of *BNA*: Parliament is given power to legislate for the peace, order and good gov’t of Canada in relation to all matters not coming within the classes assigned to the provinces.

- S. 92(1) – Parliament has ability to declare public works for the public interest – therefore has ability to remove matter from provincial jurisdiction

- Differing taxation powers reflected that feds were clearly superior to provinces – provinces had constrained power to tax, and at the time it was a very significant constraint

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

**Context:** Battle during latter part of 19th century between Mowat (provincial rights) and Macdonald (strong central gov’t), eventually won by Mowat. SCC’s sympathy during this period to Macdonald’s cause (especially Gwynne, J.), not shared by JCPC -> SCC pro-feds, JCPC pro-provinces.

**Summary of JCPC approach:** JCPC took same approach to construing ss 91 and 92 as they would to any ordinary British statute - analytical model to resolve questions of validity, based on close textual reading of ss. 91 & 92 (Parsons and Local Prohibition). By the time they were done, Canada had become a very decentralized country. Mutual modification approach to heads of power in ss. 91 and 92 by JCPC, with examples tending to favour provinces (Parsons). Preference expressed by JCPC for case-by-case resolution of division of powers questions (Parsons), ironically ignored in that same case. Limited scope given to s. 91(2) by JCPC, based on very textual/contextual reading of ss. 91 & 92 (Parsons). Equal/coordinate status given by JCPC to provincial order of gov’t (Hodge). Treatment by JCPC of BNA Act as an ordinary statute, rather than as a special kind of instrument (Spragge, J.A. of Ont. C.A. in Hodge).

**Interpretation of heads of power:** Strict textual reading of s. 92(9) and s. 92(8) (Local Prohibition) by JCPC. Limited scope given to POGG, viewed as a distinct head of fed power, by JCPC, based on language of concluding paragraph of s. 91 and desire to preserve provincial autonomy (Local Prohibition). S. 91(2) limited to regulatory leg (Local Prohibition).

**Canada created by *BNA Act* gave more power to central gov’t, but JCPC interpretation of the Constitution gave more power to provincial gov’ts**

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

F: ON enacted leg about fire insurance policies that specified a set of standard conditions. D purchased insurance in ON then had a fire. P refused to pay – argued that insurance act was ultra vires provincial powers because it fell under 91(2). D won at trial, ONCA and SCC. P appealed to JCPC.

I: Is ON leg valid? Does leg of insurance policies fall under 92(13) or 91(2)?

A: SCC: act deals w/ K of fire insurance. 92(13) should not be limited by 91(2). 92(13) must include right to limit and control manner in which property is dealt w/ and terms and conditions of Ks. JCPC: Overlap can be limited by exercising power to construe heads of power. The matter is Ks. Ks does not fall under any head of power in 91. Would not have been necessary to specify fed power over bills of exchange and promissory notes if feds had authority over all Ks.

C: Leg falls under 92(13), not 91(2). Act is valid.

R: 91(2) should not be read to include power to regulate by leg Ks of a particular business/trade. Provinces can regulate Ks: provincial legs have jurisdiction to regulate Ks of a particular business/trade as long as it is within the province.

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

F: P contravened terms of provincial liquor license and was charged. ON statute is designed to regulate liquor trade in counties in which fed leg does not apply. Ps challenged provincial leg as ultra vires because it falls under 91(2) and claim that Canadian legs are delegates from British Parliament, and therefore cannot delegate law-making powers to Boards of Commissioners because a delegate may not delegate.

I: Is liquor licensing act ultra vires province? Can the provincial leg delegate?

A: JCPC - Spragge: subjects may fall under 91 and 92 for different purposes. *Liquor License Act 1877* is local and has specific purpose – does not interfere w/ general reg of trade and commerce or conflict w/ provisions of *Canada Temperance Act*. Provincial legs are not delegates. **Constitution should be read in a liberal manner, not in same technical manner as a statute.** Object of judicial interpretation is to determine intention of statutes.

C: Leg is valid under 92(16).

R: Origin of **double aspect doctrine**: both orders of gov’t should be able to legislate in the same area provided they do so for different purpose.

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

F: Political pressure to prohibit sale of liquor. *Russell v. The Queen* held that the *Canada Temperance Act* was valid under POGG.

I: Did fed gov’t have jurisdiction to enact *Canada Temperance Act*? If so, did ON have authority to enact provisions of s. 18 regulating liquor?

A: Watson: Can only rely on POGG for matters of national dimensions. Does not cover issues that are arguably local/provincial. Cannot use POGG where provinces have power to legislate (92). POGG is distinct source of leg power – separate head of power. Bigger definition of POGG would infringe on provincial autonomy. 92(13) must be given broad reach. POGG doesn’t get benefit of fed paramountcy set out in 91 because it is not an enumerated head under 91. Matter is laws suppressing liquor traffic in province. POGG is not strong enough to impinge on 92(13) or 92(16). 91(2) is about regulation, not prohibition. Vice of intemperance severe enough to warrant prohibition in certain regions – falls under 92(16).

C: Provincial act is valid under 92(16). Becomes inoperative in any district of province which has adopted fed act.

R: If a subject matter is broadly defined, it can have provincial and fed aspects (double aspect doctrine). POGG can only be used for matters of national concern. **Fed paramountcy** first expressed here.

### The Compact Theory

Confederation was an agreement between the two founding peoples, French and English, therefore Quebec should have special veto powers relating to its position in the fed structure. In constituting themselves as confederation, provinces did not renounce autonomy. Fed compact did not create single new power – part now belonging to feds was taken from provinces. Therefore *BNA Act* cannot be amended w/o consent of each of the parties: the provinces. BUT this is factually inaccurate – no QC at beginning, just LC and UC.

# Chapter 5: The Early Twentieth Century: The Beginnings of Economic Regulation

## Lord R.B. Haldane, “Lord Watson”

Haldane took over as leading JCPC judge from Watson. Sees Watson as being significant contributor to evolution of Canadian federalism through exercise of judicial ability and statesmanship. Watson altered tendency of decisions of SCC and established sovereignty of provincial legs. Watson filled in gaps that UK had deliberately left in constitutions provided to colonies. Worked out relationship of LGs to Crown and established real constitution of Canada. Haldane agreed with Watson's judgments in favour of the provinces as establishing the “real constitution of Canada.”

*Insurance Reference* 1916 – Haldane characterized freedom to do business as civil right – 92(13).

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

F: Post war, fed 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 SCC to determine whether the leg giving them those powers was valid. 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 *Combines and Fair Prices Act* unconstitutional? Is it ultra vires fed gov’t?

A: SCC: Impractical/ineffective for provinces to leg on these issues. Statute could be upheld under 91(2) or POGG. Hoarding provisions upheld under 91(27). But reg of prices under 92(13). POGG does not include power to affect property/civil rights except in extreme necessity or w/o touching provincial rights. Powers about hoarding too broad. From *Parsons*, 91(2) does not allow feds to regulate on particular businesses/trades. Aims of leg should not impact whose jurisdiction it falls under. JCPC - Haldane: 91(2) might not sustain any fed leg on its own – only use is to support fed leg anchored somewhere else in 91. POGG only applies to special circumstances – only in national emergency. Subject matter falls under 92. Existence of offences =/ criminal law. Criminal law is about true crimes.

C: Ultra vires 91.

R: POGG can only apply in national emergencies. 91(2) cannot interfere w/ trades w/o resort to another fed head of power. 91(27) only applies to subject matter that already belong under criminal jurisprudence. 92(13) expanded to include liberty to conduct any business (except those specifically assigned in 91 in any manner). Feds must co-operate with provincial gov’ts in enactment of comprehensive national economic regulatory schemes that reach into areas of provincial jurisdiction.

D: JCPC/SCC’s determination to protect provincial jurisdiction under 92(13) from fed encroachment even when Parliament was attempting to deal w/ economic problems (e.g. combines in restraint of trade and hoarding) on an economy-wide basis, not just in particular sectors of economy.

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

F: Fed and provincial leg enacted to deal w/ labour disputes in certain industries. Board appointed to inquir into dispute between P and employees – Commissioners sought injunction alleging Act was ultra vires. TJ ruled in favour of P. ONCA dismissed claim – act valid under 91(2), POGG and 91(27), Hodgins dissented – no emergency so no POGG, 91(2) and 91(27) do not support Act. SCC ruled it valid under 91(2) and 91(27). Appealed to JCPC.

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

A: Haldane: Cannot make something criminal law by imposing penalties and creating offences. 91(2) can only be used when the power is valid under another head of 91. POGG only allowable in extreme circumstances – *Russell* should be interpreted as using POGG because crisis of intemperance was severe enough to be an emergency. Matter is labour relations, which are Kual. Falls under 92(13).

C: Act is ultra vires.

R: 91(2) cannot stand on its own. POGG can only be used in cases of extraordinary peril. Feds cannot claim jurisdiction under criminal law simply by creating offences. Allocation to provinces of presumptive jurisdiction over labour relations under s. 92(13), on basis of Kual nature of such relations.

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

F: Grain industry governed by *Canada Grain Act* which created the Board of Grain Commissioners and gave it extensive regulatory powers. S. 95(7) was added which limited surplus that grain elevators could retain. D refused to pay surplus, claimed 95(7) was ultra vires because feds cannot regulate profit margins of particular industry. TJ ruled it ultra vires.

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

A: Duff (majority): Act as a whole attempts to regulate many local matters. Feds cannot regulate branch of external trade by regulating particular occupations in provinces. Feds may regulate local works by using 92(10)(c) or by getting rid of minutiae in the act. Doesn’t matter that grains are exported, because many commodities are exported. Crown should regulate through other means e.g. transport. Matter is regulation of local business. Anglin (dissenting): *Canada Grain Act* and 95(7) are allowable. 95(7) designed to promote attainment of purposes of act. *CGA* regulates int’l grain trade – no single province could legislate to cover the field. Matter does not fall under 92. Disagrees w/ Haldane’s judgments in *TEC* re: 91(2) and 91 and likes 91(2) in *Parsons*. *CGA* under 91 because it does not fall under a head of 92. Falls under POGG because a lack of power to legislate for regulation of export grain trade would cause national emergency – relies on Haldanes explanation of *Russell* re: POGG in *TEC.*

C: Falls under 92(13), is ultra vires.

R: Feds cannot regulate specific industries/occupations/businesses/etc. Feds must co-operate with provincial gov’ts in enactment of comprehensive national economic regulatory schemes that reach into areas of provincial jurisdiction.

D: JCPC/SCC’s determination to protect this provincial jurisdiction from fed encroachment even when Parliament’s regulation of particular trades/businesses was incidental to the regulation of international/interprovincial trade.

# Chapter 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 gov’t. 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: Reference made to determine whether *Dominion Combines Investigation Act* (criminal offence to participate in a combine) and s. 498 of the *Criminal Code* (w/ respect to restraining competition) were valid.

I: Is this leg valid?

A: Atkin: Rejection of notion of fixed domain of criminal law – nature of criminal law is going to change as society evolves. Feds should not be denied power under 91 to declare any act to be a crime which is such a violation of generally accepted standards of conduct as to deserve chastisement as a crime. Prohibition and penalty = criminal law. *Board of Commerce* case should not be used as definition for fed power over criminal leg. By creating a criminal offence, the matter becomes crime and can be classified under 91(27). Obiter: 91(2) resurrected as independent source of fed jurisdiction.

C: Both statutes valid.

R: 91(27) must extend power to make new crimes. By creating a criminal offence, matter becomes crime and can be classified under 91(27). 91(2) is resurrected as independent source of fed jurisdiction as in *Parsons*.

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

F: Canada participates and ratifies an int’l aeronautics agreement and then enacts leg in order to implement terms of treaty. S 132 gives gov’t power to perform its int’l obligations. Statute challenged on constitutional grounds. SCC held that aeronautics falls under provinces, but feds can enact convention under 132.

I: Is aeronautics an exclusive fed matter?

A: Sankey: Judges give meaning to text in course of decision making process, but **what really matters is text.** Terms of statutes may be unduly extended in case law. Consider each decision in its own circumstances. Interpreting Constitution should not dim provisions of *BNA* which is the original K. Real object of *Constitution Act* was to give feds high functions and almost sovereign powers by which uniformity of leg might be secured. Holistic, rather than piecemeal, analysis of impugned leg is best. 132 is applicable because this is an Empire treaty – feds can speak for whole under 132. Aeronautics could fall under 91 or 92 – not specifically enumerated. Feds have obligation to carry out terms of convention. Aerial navigation falls under different heads of 91, and what’s left over is covered under POGG. POGG not just for national emergencies – can be used for areas around the enumerated heads. Resurrects understanding of POGG from *Local Prohibition*. Gap understanding of POGG.

C: Regs and act intra vires. POGG performs gap function when matter does not fall under 91 or 92. On the whole, matter falls under 132 and residual bits under POGG.

R: The “matters” of aeronautics could fall under 91(2), 91(5), 91(7) and maybe some parts under

92(13). POGG now has 2, if not 3 distinctive branches: emergencies, importance, filling in gaps not covered by ss. 91/92.

**New Deal**: 8 statutes enacted under Benedett. 5 were struck down in entirety (all dealing w/ organized labour plus *Natural Products Marketing Act*), and 1 half struck down (*Dominion Trade and Industry Commission Act*).

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

F: Reference about validity of *Limitation of Hours Work Act, Weekly Rest in Industrial Undertakings Act and Minimum Wages Act*. Fed gov’t had signed onto int’l treaties re: labour conditions. Relies on 132 to enact leg – but Canada signed treaties as Canada, they are not Empire treaties. Provinces opposed use of 132 to leg on subjects under 92. SCC evenly split – power to enter in int’l treaties, 132, POGG fills gaps vs. doesn’t fall under 132, POGG doesn’t apply, provincial consent necessary.

I: Can 132 allow fed gov’t to enact leg which would otherwise be ultra vires?

A: Atkin: Distinction between formation and performance of obligations in treaty. Making of treaty is executive act, performance of obligations requires leg action. Executive must obtain leg assent. Obligations are of Canada as an int’l person, not as part of British Empire so 132 doesn’t apply. Normally this would fall under 92(13). Feds cannot give themselves leg authority inconsistent w/ Constitution by making promises to foreign gov’ts. POGG requires abnormal circumstances or exceptional conditions. Matter is labour relations and falls under 92(13). Ship of state metaphor: Canada is ship of state, sailing on to larger ventures into foreign waters, but still retains watertight compartments.

C: Act is ultra vires feds.

R: When participating in int’l arena, Canada will have to consult w/ provincial gov’ts prior to entering in treaties and/or include a fed state clause. 132 does not grant new powers to fed gov’t because they participate in int’l agreements – jurisdiction to legislate in implementation of treaty obligations determined by subject matter of treaty and regular 91/92 division of powers. Watertight compartments metaphor.

**Techniques for entering into int’l treaties**:

1. Ensure that treaties contain fed state clause – fed gov’ts will do what they can to extent matters are under their jurisdiction

2. Reservation clause – feds don’t commit themselves to requirements to extent they don’t have jurisdiction

3. Consult extensively w/ provincial gov’ts ahead of time – but provinces do not have to guarantee anything

#### 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. Act was product of a lot of fed-provincial cooperation. Declared invalid by SCC.

I: Is this leg ultra vires the fed gov’t?

A: Duff: resurrects understanding of 91(2) from *Parsons* – general regulation of trade affecting the whole Dominion – but it doesn’t apply here, cannot include regulation of particular commodities. 91(2) does empower feds to regulate external trade and interprovincial trade and ancillary leg that is **necessarily incidental**. Atkin: 91(2) does not allow feds to regulate trade in particular commodities/classes of commodities in so far as commodities are local in provincial sense. Leg speaks of ‘principal market’ therefore commodities still have some intraprovincial trade. Enactments regulate particular commodities. Not sufficient to be national concern, so no POGG. Feds and provinces need to cooperate to get good leg schemes in place. Compartments are watertight even if provinces and feds are ok w/ overlap. Falls under 92(13) – provinces have jurisdiction to regulate not only particular trades/businesses, but also intraprovincial trading activities.

C: Act is ultra vires.

R: Watertight compartments. 91(2) cannot be used to regulate particular commodities. High-water mark for federalism. National concern branch of POGG subsumed under national emergency branch.

D: Even when Parliament and the provincial legislatures develop interlocking/parallel legislative schemes to regulate aspects of the Canadian economy, the JCPC will scrutinize those schemes carefully to ensure that neither order of gov’t encroaches on the jurisdiction of the other.

# Chapter 8: Interpreting the Division of Powers

## I. Values Informing the Interpretation of the Division of Powers p. 200

### R. Simeon, “Criteria for Choice in Fed Systems”

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

1. Community (political, ethnic, geographical, linguistic – country-building, province-building, two-nation building)

2. Functional Efficiency (economies of scale or pathologies of size)

3. Democracy (majority rule, individual rights and freedoms, ability to participate in decision-making)

However, even with these in mind, they could lend themselves towards either notion of federalism – criteria for choice define the terms of the debate.

For instance, does community mean Canada or BC. In general judges do not directly address these values (but Anglin uses functional efficiency in *Terminal Elevator*; JCPC judges use community when they refer to provincial autonomy).

- Laskin: federalism through lens of functional efficiency

- Beetz: federalism through lens of community

## II. Validity: Characterization of Laws

*Parsons*: (1) What is the matter of the law? (2) Does it fit within 92? (3) Does it also fit within 91? If no, then it is valid under 92. (4) If yes, then fed paramountcy wins.

*Allen Abel*: (1) What is the matter of the law? (2) What are the organizing themes in ss. 91-92? 91 relates to economy and 92 relates to social dimensions. (3) Define scope of each class of subjects in 91-92 in way that is consistent w/ overarching theme. (4) Look to see what narrowed class of subject the matter falls into. Text-based. 92(16) is like POGG – residual provincial power.

*Lederman*: (1) Look at law and come up w/ total meaning of law. (2) Look at law through lens of provincial heads of power – is there a provincial aspect? (3) Is there a fed aspect? (4) Which aspect is more important? Which gives a better regime? -> Simeon’s criteria of choice.

* Courts should reach their decisions by weighing values of uniformity and diversity and by following widely prevailing beliefs

## A. Pith and Substance

### K. Swinton “The Supreme Court and Canadian Federalism: The Laskin-Dickson Years

Courts give primary effect to enumerated powers. In deciding validity of law, court engages in process of declassification to determine whether law comes within fed/provincial class of powers. Choosing between competing classifications requires considerations of impugned leg and meaning of constitution’s language.

**Process for identifying classification of leg:**

**1. Identify the ‘matter’ of the statute – text/context, legislative purpose, legislative effect, etc.**

**2. Delineate scope of competing classes – watertight compartments no longer holds – look at precedent and history**

**3. Determine which class the matter falls into.**

### W.R. Lederman, “Classification of Laws and the British North America Act”

91 and 92 are classes of laws, not classes of facts. They are not in the logical sense mutually exclusive. Legal authority must decide how to classify based on non-logical grounds of policy and justice. Everything in a rule of law is subject-matter of it. You must have settled meaning before deciding subject matter. False antithesis between subject matter and object/purpose. Intention should be determined by what has been said, not by what may have been intended. Assume ordinary consequences are intended consequences. Laws should be classified by most important feature of meaning. All judges must do is: straight thinking, industry, good faith and capacity to discount prejudices. Courts must decide whether it is better for the people for the law to be fed or provincial and make a value choice. (Subjective)

**Pith and substance test (*Mortgentaler*): (1) What’s the matter or the mischief that the leg is intended to respond to (pith and substance)? Consider: legal effect, practical effect, course of events leading to enactment, legislative history, similarity to leg enacted by other order of gov’t, judicial precedent, fit between leg and stated purpose, presence or not of studies supporting purpose, purpose of leg. Must be flexible approach, not technical or legalistic. (2) What is the purpose and effect of the leg? Purpose is more important. (3) What is the scope of the applicable heads of power (91/92)?**

#### R. v. Mortgentaler (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 ultra vires the province.

I: Is the *Medical Services Act* ultra vires the province due to being in pith and substance criminal law?

L: Previously prohibitions on abortion had fallen under fed criminal law – had subsequently been ruled unconstitutional.

A: Sopinka: Stated purpose was to prohibit privatization of medical services and maintain high quality healthcare. Province has authority over hospitals, health, medical profession and practice of medicine – 92(7)(13)(16). Dominant characteristic of criminal law is prohibition of an activity, subject to penal sanctions, for public purpose. Approach must be flexible – leg’s dominant purpose/aim is key to constitutional validity, despite importance of effect of law. Central purpose and dominant characteristic is restriction of abortion as socially undesirable practice. Legal effect is different from old Criminal Code provisions, but would be redundant if old CC still existed. Inference that act serves criminal law purpose supported by background and surrounding circumstances. Provincial morality power must be anchored in independent provincial head of power. No supporting evidence re: health and safety of women. Primary objective of the Act is to prohibit abortions as a social evil, while concerns over health care policy, hospital administration, etc. were secondary.

C: Criminal law in pith and substance, ultra vires the province.

- The **doctrine of colourability** is the idea that when the legislature wants to do something that it cannot do within the constraints of the constitution, it colours the law with a substitute purpose which will still allow it to accomplish its original goal. Could have been referenced in *Morgentaler*.

#### Reference re Employment Insurance Act (Can.), ss. 22 and 23 (2005) (p. 226)

F: 91(2A) grants jurisdiction to feds over unemployment insurance – added in 1940. Quebec gov’t made laws directed at supporting families w/ children under 92(13) and 92(16). Feds made laws directed at providing replacement income for working mothers and parents when their employment is interrupted as result of birth/adoption under 91(2A).

I: Are the fed provisions valid under 91(2A)?

A: Deschamps: Courts should refer to framer’s description of power and case law to interpret heads of power. Public unemployment insurance plan is a social measure. Take objective of framers in creating 91(2A) as starting point, then adapt to contemporary realities. Purpose was to equip feds w/ tools needed to mitigate effects of unanticipated unemployment. But nature of unemployment has changed. Public unemployment insurance plans must: (1) Be based on concept of social risk; (2) Have as purpose preserving workers’ economic security and ensuring re-entry into labour market; (3) Pay temporary income replacement benefits; (4) In event of interruption of employment. QC says unemployment due to having kids is voluntary and mothers are not unemployed because they are not available for work. Risk must be understood in social sense. Women form significant part of labour market and have particular needs.

C: Provisions upheld. In pith and substance, maternity benefits are mechanism for providing replacement income during interruption of work – fall under 91(2A). In the end, the fed gov’t allows Quebec to enact their own unemployment insurance, and the fed version is not in force in Quebec.

R: **Court must take progressive approach in identifying heads of power – living tree approach.**

**Incidental effects rule**: what is not the ‘matter’ of the impugned provision is ‘merely incidental’ e.g. Delivery of healthcare in *Morgentaler*

## B. Double Aspect Doctrine

Originated in *Hodge v. The Queen*. Usually court will characterize fed and provincial legs different so they both can be upheld as valid (i.e. not how doctrine is used in *Multiple Access*).

Laws may have a double aspect (2 matters), but classes of subjects do not duplicate or overlap each other -> exclusiveness!

- Areas of **functional concurrency** – concurrency through application of doctrinal tools (p. 240).

- Constitution provides for **de jure concurrency** in agriculture and immigration.

- Beetz saw functional concurrency as threatening provincial autonomy because of fed paramountcy.

### W.R. Lederman “Classification of Laws and the British North America Act”

Overlap is inevitable. Courts have limited generality of classes of laws in 91 and 92 through mutual modification. When overlapping occurs: (1) Nature of challenged fed law that impacts provincial power ignored as incidental affectation, classified by features under fed power; (2) Double-aspect theory – when features of fed and provincial laws are equally important, held that challenged rule could be enacted by either; (3) If they call for inconsistent behavior – fed paramountcy.

**Double aspect doctrine (*Multiple Access*): Laws with substantially different purpose regulating the same matter can both be valid. If there is no express contradiction, then the provincial leg remains operative. Mere duplication w/o actual conflict/contradiction is not sufficient to invoke fed paramountcy and render provincial leg invalid.**

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

F: ON and fed gov’ts both enact leg regulating insider trading. The ON leg – *Securities Act -* governs any trading within the province while the fed leg – *Corporations Act -* governs trading in fedly incorporated entities. Insider trading in securities of fedly incorporated company – Multiple Access – in Ontario. The limitation period under the fed statute was shorter, so D argued that the provincial act did not apply to his case.

I: Does matter of insider trading provisions of fed act fall under fed jurisdiction? Can 2 statutes regulating the same thing both be valid?

A: Dickson: Validity of fed leg must be determined on its own. Viewed in context it is company law, viewed in isolation it deals w/ trading in securities. Securities leg has double character – property and civil rights and company law. Impugned provisions have securities law and companies law aspect. Double aspect doctrine applies when contrast between relative importance of 2 features is not so sharp. Dissent: fed leg is regulation of securities transactions falling within provincial jurisdiction under 92(13), not valid.

C: Both statutes valid and applicable. Fed companies law is fed jurisdiction under POGG. Securities leg is provincial matter under 92(13).

D: Lederman methodology.

## C. Necessarily Incidental

Designed to deal w/ circumstances in which validity challenge is not to entire statute, but to some part of a statute. When impugned provisions examined in isolation, appears to intrude into jurisdiction of other level of gov’t. **If larger scheme of which impugned provision is part is constitutionally valid, provision may also be found valid because of its relationship to the larger scheme**. Offending provisions must be closely related to scheme. Permits gov’ts to intrude substantially on other jurisdictions. Early (unsuccessful) attempt to use doctrine in *The King v. Eastern Terminal Elevator Co.*

- ‘Incidental’ in the context of this doctrine refers to relationship between part of statute that is under challenge and rest of that statute

- This doctrine could have been used in *Employment Insurance Reference* – challenge was to 2 amendments of the act, not the whole act

- Also could have been used in *Multiple Access* – dealt w/ provisions of the act

**Steps (*General Motors)*: (1) To what extent, if at all, does the impugned section encroach on the other order of gov’t? (2) Is the act as a whole valid? (3) Is provision constitutionally justified because of connection w/ valid leg?**

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

F: D brought civil action against P alleging that it suffered losses as result of discriminatory pricing policy that constituted anti-competitive behavior prohibited by *Combines Investigation Act*. P said act was ultra vires because creation of civil causes of action is under 92(13). Amendment to *CIA* allowed victims of anti-competitive behavior to sue perps. Overall act had already been established as valid under 91(27).

I: Is s. 33.1 of the *Combines Investigation Act* ultra vires the feds because it falls under 92(13)?

A: Dickson: Consider degree to which provision intrudes on provincial powers. **If high encroachment, then high degree of integration needed**. Need for judicial restraint in proposing strict tests which will result in striking down lots of leg - overlap of leg is to be expected and accommodated in fed state. 33.1 encroaches on 92(13). But it is only a remedial provision, of limited scope. Act as a whole is valid under 91(2). Due to **minor intrusion**, correct approach is to ask whether provision is **functionally related** to general objective of leg, and to structure and content of scheme. Provision is integral part of act. Dominant tide of constitutional interpretation favours, where possible, operation of statutes enacted by both levels of gov’t.

C: There is necessary link between s. 33.1 and act. Provision is valid.

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

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

1. **Classical** – favours exclusivity of provincial and fed 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 leg. Relates w/ judicial activism.

2. **Modern** – Spillover effects understood to occur and can be allowed in order to allow for effective leg. This is mostly used by the SCC, but the JCPC took this approach to social leg. The downside is that, due to fed paramountcy, the provinces lose autonomy each time overlap occurs. Relates w/ judicial restraint.

*Lacombe and COPA*: Provincial leg regulating land use – applied to citizens wanting to establish private aerodromes. Aeronautics under fed jurisdiction according to *Aeronautics Reference*, but upheld by 132 which no longer has effect, maybe under POGG? In *COPA* the challenge is to applicability.

#### Lacombe v. Quebec (2010) (Supplement)

F: Provincial leg (by-law) that explicitly prohibits establishment of private aerodromes in the area in QC. P runs an air taxi service, with a fed licence, at Gobeil Lake. P argues that provincial leg is ultra vires, or inapplicable by virtue of DII or inoperative because conflicts w/ fed law.

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

A: McLachlin: (1) Identify dominant characteristic. (2) Assign matter to 1+ heads of power. If not under provincial power, is it saved by ancillary powers? Stated purpose is to balance activities of summer home owners and commercial land uses but evidence shows purpose is restricting float planes at the lake. Matter is regulation of aeronautics – outside provincial jurisdiction. Necessarily incidental doctrine concerns leg that in pith and substance falls outside jurisdiction of enacting body. Now a more **rational, functional connection test is applied**. Leg does not constitute serious intrusion, so rational functional test is applicable – provision will be saved when it actively furthers the purpose of the leg scheme. Larger whole is valid – zoning reg under 92(13). The provision is not rationally and functionally connected to the scheme. Arbitrarily bans aeronautics without regard to underlying land use and as such is not even supplemental to the overall leg. Deschamps dissents in favour of province.

C: Provision is ultra vires and not sufficiently integrated. Invalid.

## III. Applicability: The Interjurisdictional Immunity Doctrine

Emphasizes exclusivity of jurisdiction. Typically used where a generally worded provincial law is clearly valid in most of its applications, but in some of its applications it arguably overreaches, affecting a matter falling within a core area of fed jurisdiction. Courts will read down provincial (or fed) statutes to protect the core of exclusive fed (or provincial) powers from encroachment. Originated in cases involving fedly incorporated companies and fedly regulated undertakings. Dickson would have preferred to ignore this doctrine, and allow generally worded laws to apply. If the fed gov’t didn't like that application, they could enact their own leg which would be paramount anyways.

**Protects core of exclusive areas of fed jurisdiction from provincial encroachment, whether or not Parliament has actually passed leg in that area.**

-> DII deals w/ scope of fed power, FP deals w/ way in which that power is exercised.

-> Impugned law is not rendered invalid, it is simply inapplicable to the extra-jurisdictional matter and read down.

**Test (*COPA*): (1) Would application of provincial provision trench on core of fed power? Core = basic, minimum, unassailable content. (2) If so, does it impair exercise of fed power over that area?**

*PHS* has hard time defining core – only *COPA* and *Ryan Estates*.

Risk of creating vacuums is criticism – but this is used as justification to use DII in *COPA*.

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

F: Municipal by-law prohibits displaying signs on residential lawns. P displayed sign in support of fed candidate during fed election and were convicted of violating municipal prohibition.

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

A: Cartwright: Rules of construction: (1) All words, if they be general and not express and precise, are to be restricted to the fitness of the matter. (2) If an enactment is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. Asks whether the bylaw would have been valid had it been targeting specifically at signs during fed elections. Political activity in fed field can only be prohibited by feds – does not fall under 92. Province cannot by using general words effect a result which would be beyond its powers of brought about by precise words. Martland (dissent): Once leg has been held to be valid, it can be applied wherever it is applicable. No fed right for signs in fed elections. No case has ruled that provincial leg under 92(13) can incidentally affect freedom of expression.

C: By-law does not apply to prohibit signs for fed elections.

#### Commission du salaire minimum v. Bell Telephone Co. of Canada (Bell #1) (1966) (p. 255)

All matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the fed parliament. If Parliament has jurisdiction to regulate in industry, then it has jurisdiction to legislate minimum wage in that industry. Provincial leg (e.g. minimum wage) cannot be applied to fedly regulated undertakings.

### Criticism of Interjurisdictional Immunity Doctrine

Dickson (extension of Martland’s position in *McKay*) (in *Ontario Public Service Employees’ Union v AG ON)*:

Doctrine has appeared to extend to fed gov’t exclusivity of jurisdiction not available to provinces. Risk to Canadian federalism. At odds w/ tendency of modern federalism to allow overlap. Inconsistent w/ pith and substance doctrine – law in relation to provincial matter may validly affect fed matter. Fed gov’t can protect undertakings within fed jurisdiction by enacting laws which will be paramount over conflicting provincial laws.

Doctrinal choice: (1) Allow provincial law to apply to fed undertaking or other fed matter until feds enacts conflicting leg or (2) Apply DII to fed matters w/ result that provincial matter is inapplicable, even if there is no fed leg.

#### Bell Canada v. Quebec (Commission de la santé et de la securite du travail) (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 fedly regulated company.

I: Can the valid health and safety reg be applied to a fed company?

A: Beetz: Leg jurisdiction over health, labour and working conditions fall under 92. Feds have jurisdiction over labour relations and working conditions when jurisdiction is integral part of primary and exclusive jurisdiction over another class of subjects. Works, things and persons who are within special and exclusive fed jurisdiction are still subject to general provincial statutes provided that application does not bear upon subjects in what makes them specifically fed jurisdiction. Double aspect doctrine can only be used where there is clear multiplicity of aspects and not merely nominal. Responds to criticism from Dickson re: DII. DII does not confer powers to feds that they don’t already have. Working conditions and labour relations fall within core of fed jurisdiction. Division of jurisdiction will be source of uncertainty and endless disputes – inefficient to require feds to legislate to prevent provincial leg. Double aspect doctrine does not apply here because legs are pursuing same objective by similar techniques.

C: Provincial leg has to be read down so as not to apply to fedly-regulated undertakings such as Bell Canada.

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

In *Irwin Toy v. Quebec (AG)* (1989): ‘vital part’ test properly determines scope of DII when provincial law applies directly to fed undertaking; narrower sterilization/impairment test should be followed when provincial law applies indirectly to undertaking.

In *Ordon Estate v. Grail* (1998): DII applies generally, across board, to protect any fed head of power.

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

F: Provincial leg regarding insurance offered by banks. Bank argued it could not apply to them since they were a fed undertaking. Banks want to sell ‘peace of mind insurance’. Fed gov’ts said ok, provincial leg said no – leg specifically applied to banks.

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

A: Binnie and LeBel: The existence of the DII is supported by both the text of the Constitution and the principles of federalism. In theory, the DII applies to protect provincial jurisdiction from encroaching fed leg as well as fed jurisdiction from encroaching provincial leg. However, the DII is inconsistent with the dominant tide of constitutional interpretation, which favours allowing a high degree of overlap between fed and provincial jurisdiction. For this reason, and also because (a) application of the DII is problematic because of uncertainty regarding the scope and meaning of the “core” of the heads of power in ss. 91 & 92; (b) its application risks creating “legal vacuums” in certain areas; (c) given that it has tended to be applied more often against provincial leg than fed, it has shown itself to have centralizing tendencies and; (d) it is unnecessary, since Parliament can protect its jurisdiction on its own if it wishes to, **the DII should be applied with caution, particularly in new areas. In order for the DII to be applicable in a given case, the impugned leg must “impair” rather than simply “affect” whatever it is that falls within the “core” of the relevant head of power of the other order of gov’t. “Core” for this purpose means “basic, minimum and unassailable content”. Preference should be given in new areas to the doctrine of fed paramountcy instead of the DII** – skip over applicability and go straight to operability. Doctrine should be reserved for heads of power that deal w/ fed things, persons or undertakings, or where it has been applied in the past.

C: No encroachment on core of fed power. No bar to applying provincial leg.

D: Should have been a question of validity, rather than applicability. Necessarily incidental doctrine could have been used. If DII is used, province will be frozen from area forever. If fed paramountcy is used, provincial law can apply when fed law changes. DII is a bigger win for feds – more permanent. Wins on basis of fed paramouncty are more temporary.

R: Court analyzes and modifies DII – more restricted approach.

#### Quebec (AG) v. Canadian Owners and Pilots Association (COPA) (2010) (Supplement)

F: Provincial leg that established agricultural land reserves – reserved land can only be used for agriculture unless Commission grants exception. D constructed private airstrip within area designated as agricultural under Quebec act. Challenged leg on ground that s 26 of Act is ultra vires or inapplicable where it affects the location of aerodromes, or inoperative for conflict w/ fed law.

I: Is s 26 of the Act valid? Does it apply in a situation where it impacts on the fed power over aeronautics?

A: McLachlin: (1) Identify matter. Pith and substance of act, supported by s 26, is land use planning and agriculture. (2) Assign matter to head of power. Falls under 92(13)(16) or 95. (3) DII. **i) Does application of the impugned leg in the context in question trench upon a protected core area of jurisdiction of the other order of gov’t?** Aeronautics involves regulation of all airports and aircraft. Precedent has held that location of aerodromes lies at core of aeronautics – includes local aspects because aerial navigation is non-severable. S 26 trenches on core of fed power. **ii) Does application of the impugned leg in the context in question have a sufficiently serious effect on the exercise of the protected power by the other order of gov’t to make use of the DII, which it will only be held to have if application of the leg would impair the exercise of that power?** Significant shift – looking to protect fed jurisdiction rather than fed activity/undertaking. S 26 significantly restricts fed power to locate aerodromes. Effect on exercise of fed power is sufficiently serious. **Second step will be held to have been satisfied if application of the impugned leg to the context in question would require the other order of gov’t to enact comprehensive new leg if it wants to exercise control over the core area of its jurisdiction that the provincial leg has been held to trench upon.** LeBel and Deschamps dissent.

C: Provincial leg is valid but impairs protected core of fed jurisdiction over aeronautics and is inapplicable to extent that it prohibits aerodromes in agricultural zones.

#### Canada (A.G.) 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 fed *Controlled Drugs and Substances Act*, but in 2008 the exemption was not extended. Claimants brought action for declarations that *CDSA* is inapplicable to Insite. BCCA held that *CDSA* was inapplicable under DII.

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

A: McLachlin: **DII is not restricted to protecting fed cores from provincial leg; can also protect provincial cores from fed leg. Cautious approach to DII from *Canadian Western Bank* confirmed, especially in respect of claims made in new areas. Relevant factors in deciding whether to recognize claimed core: has core been recognized before, would it be small or large, is area in question one in which both orders of gov’t have been permitted to legislate; would recognition of core have potential to create legal vacuums. Possible that courts will refuse to recognize claimed core.** *CDSA* is valid leg. In pith and substance, provisions are valid exercises of fed power under 91(27). Claimants tried to argue core of treatment offered at provincial health facilities. This is a very broad core, has not been recognized before, falls under feds and provinces. Fed role in health makes it impossible to precisely define core of health. Risk of legal vacuums here. DII is not helpful or necessary in this case.

C: Provisions are valid and applicable to Insite. But Insite wins under Charter arguments.

#### Marine Services International v. Ryan Estate (2013) (Supplement)

F: Ryan brothers died on boat. Estate got compensation under provincial leg, then brought action under fed leg against employers. Provincial leg s. 44 barred actions against employers, but fed leg appeared to allow D to sue manufacturers of boat. Court of Appeal held that provincial leg bar was inapplicable due to DII and inoperative due to fed paramountcy.

I: Is s. 44 of the provincial leg inoperative in respect of fed maritime negligence claims under the fed leg by reason of fed paramouncty? Is it constitutionally inapplicable by reason of DII? Can a statutory bar of action in a provincial workers’ compensation scheme preclude a person to whom the bar applies from bringing a negligence action that is provided for by a fed maritime negligence statute?

A: LeBel and Karatkatsanis: Provincial leg mandates automatic compensation for workers w/o need to establish fault of employer – replaces tort action for negligence. Worker’s compensation schemes fall within 92(13). S. 44 applies on the facts of this case. Provincial leg is valid overall. In *Ordon* DII was used to address fed maritime law, so it can be used here – therefore applicability should be addressed first. Maritime negligence law is part of core of fed power under 91(10). Uses two-step test from *COPA*. Prior decision in *Ordon* where two-step test was not used cannot be relied upon. (1) S. 44 of provincial leg trenches on core of fed power under 91(10). (2) But s. 44 does not impair exercise of fed power – does not alter uniformity of maritime law or restrict fed’s ability to determine who has cause of action under fed leg. **Factors to consider when deciding whether application of impugned leg will be found to have sufficiently serious effect on exercise of protected core to make use of DII: breath of other order’s head of power** (navigation and shipping)**, whether courts have in past permitted leg of kind in question** (provincial workers compensation leg), **to be applied on context at issue** (maritime law damage claims) **and whether application of impugned leg would impede ability of other order of gov’t to establish a uniform approach to area over which it has jurisdiction** (Canadian maritime law).

C: S. 44 of provincial leg is applicable.

## IV. Operability: The Paramountcy Doctrine

Problems of operability apply when: both provincial and fed legs are valid (and sometimes when they’re both applicable), fed leg, properly construed, overlaps w/ provincial leg (2nd step added by *Ryan Estate*), and provincial leg conflicts w/ fed leg. **Doctrine of fed paramountcy:** If they are both found to be in conflict, the provincial leg will be held inoperative to the point it conflicts w/ the fed until a point in time when the fed leg is removed.

**Protects existing fed leg policies from being disrupted by conflicting provincial leg.**

Applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of fed jurisdiction, but also to situations in which the provincial leg acts within its primary powers, and Parliament pursuant to its ancillary powers (*CWB*).

-> FP set out in *Local Prohibition*

### Paramountcy in the Constitution

- S. 95 of Constitution: agriculture and immigration are areas of concurrent jurisdiction, provincial laws have effect only to extent that they are not repugnant to fed laws, fed paramountcy

- S. 92A: provincial legislatures have concurrent power to enact laws in relation to export of natural resources to other provinces, subject to fed paramountcy

- S. 94A: concurrency in relation to old-age pensions and supplementary benefits subject to provincial paramountcy

- For most subjects, no paramountcy rule is specified in the Constitution

### Understanding of “Conflict”

The following are the possible definitions or understandings of “conflict” that the SCC has considered in judgments dealing with Questions of Operability and the doctrine of fed paramountcy:

|  |  |  |
| --- | --- | --- |
| **Understanding**  | **Viable?** | **Cases** |
| **Duplication** (provincial leg duplicates the fed) | No | *Multiple Access* – not a conflict – duplication is ultimate in harmony BUT lower courts said that duplication should qualify as conflict – if parties used one of the insider trader provisions, the other would essentially be null and void |
| **IDC** (impossible for those to whom the two enactments are being or could be, applied to comply with both) – focus on individuals  | Yes | *Rothmans**Ross**Multiple Access**M+D Farm**Bank of Montreal*  |
| **IDE** (impossible for judges and other state decision-makers to give effect to both enactments) | Yes | *M+D Farm* *Mangat* *Rothmans* (IDE viable but not applicable)*Lafarge*  |
| **FFP** (permitting the provincial leg to operate would frustrate the purpose underlying the fed leg) – focus on legislature  | Yes | *Bank of Montreal* (most important)*Ross**Rothmans* (provincial found to further fed purpose)*Lafarge* (judgment conflates FFP w/ FICF, if this is true then FICF has been used successfully)*Mangat*  |
| **FICF** (Parliament has expressed the intention to have the fed leg override any provincial leg governing the same area – cover the field) | Maybe – if accepted provincial autonomy will be at whim of Parliament | *Ross* (FICF has been used in Australia)*Bank of Montreal* *Rothmans* |

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

F: P convicted of driving while impaired under s. 234 of Criminal Code. Judge restricted license but did not suspend it under s. 238(1). Registrar suspended license in accordance w/ s. 21 of provincial *Highway Traffic Act*.Provincial AG asked for declaration that s. 238(1) of Criminal Code was ultra vires.

I: Is s. 21 of *Highway Traffic Act* valid? Is s. 238(1) of Criminal Code valid? If both are valid, is there sufficient conflict to invoke fed paramountcy?

A: Pigeon: Criminal Code provides for making/prohibitory orders limited as to time and place, if this is made at same time as provincial license suspension there is no repugnancy – both leg can operate simultaneously – no IDC. No FICF – fed gov’t did not intend to cover all rights to drive after criminal convictions. No FFP. Judson and Spence dissented, would hold provincial leg inoperative.

C: S. 21 of *Highway Traffic Act* and s. 238 of Criminal Code are valid and operative.

R: No conflict when you can abide by law of one jurisdiction w/o violating law of other jurisdiction.

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

F: ON and fed gov’ts both enact leg regulating insider trading. The ON leg – *Securities Act -* governs any trading within the province while the fed leg – *Corporations Act -* governs trading in fedly incorporated entities. Insider trading in securities of fedly incorporated company – Multiple Access – in Ontario. The limitation period under the fed statute was shorter, so D argued that the provincial act did not apply to his case. Divisional Court and Court of Appeal held that provincial law was inoperative due to duplication.

I: Are ON provisions inoperative due to fed paramountcy in case of alleged insider trading in shares of fedly incorporated company, by provisions of *Corporations Act*? Does duplication give rise to fed paramountcy?

A: Dickson: No IDC – can operate concurrently. Diseconomies of having overlapping laws is inherent in fed system. Double liability can be avoided by cooperation between administrators and ordinary supervision of courts over duplication of proceedings. Mere duplication, no contradiction – this is not conflict. Duplication is a part of modern federalism. Court must authorize proceedings under ON act, therefore there is safeguard against double recovery.

C: Provincial provisions under *Securities Act* are operative.

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

F: 2 enactments designed to protect farmers in debt. Fed law required a stay of proceedings, while provincial law authorized commencement of the same proceedings. Creditor got permission from provincial gov’t to foreclose. Debtor got permission from fed gov’t for stay of proceedings.

I: Is there conflict?

A: Not IDC – creditor had permission to foreclose but didn’t have to. Establishes IDE as viable definition of conflict – impossible to give effect to right to sue and stay of proceedings.

C: There is conflict and fed paramountcy applies.

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

F: D got loans from bank and in return granted security interest in farm equipment. D defaulted on loan, and bank pursuant to s. 178 of fed *Bank Act* seized machinery. Bank did not follow procedures under s. 27 of provincial *Limitation of Civil Rights Act*. TJ held that bank did not have to comply w/ provincial leg. SKCA reversed.

I: Do ss 178 and 179 of *Bank Act* conflict w/ ss 19 to 36 of *Limitation of Civil Rights Act* so as to render inoperative ss 19 to 36 in respect of security taken pursuant to s 178 by a chartered bank?

A: Provincial provisions fall under 92(13). Fed provisions intra vires feds. Focus on whether there is FFP – will leg purpose of Parliament be displaced if appellant bank is required to defer to provincial leg in order to realize on its security? Purpose of provincial leg is to prescribe procedure which a secured creditor must follow in SK in order to take possession of security. Purpose of fed leg is to assign to bank right and title to goods in security and confer upon default an immediate right to seize and sell those goods. There is no IDC (bank could comply w/ provincial leg) but there is FFP and FICF – Parliament intended that sole realization scheme applicable to s 178 security interest be that contained in the *Bank Act*. Parliament has enacted a complete code.

C: Ss 19 to 36 of *Limitation of Civil Rights Act* are inoperative in respect of security taken pursuant to s 178 of *Bank Act* by a chartered bank.

R: In questions of operability, focus should be on FFP.

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

F: Fed immigration leg permits non-lawyers to appear as counsel before the IRB. BC does not allow non-lawyers to practice law for a fee. Both laws are valid. P took injunction proceedings against D to prevent him from performing counsel service before immigration tribunals.

I: Is there conflict between these laws?

A: There is no IDC but there is IDE and FFP. The provincial leg gets in the way of the fed purpose of access to justice. No IDC – D could not charge fee or become lawyer.

C: Provincial leg is inoperative in the context of IRB hearings.

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

F: Fed *Tobacco Act* prohibited promotion of tobacco products, except as authorized elsewhere in Act (retail display is ok). SK *Tobacco Control Act* banned display of tobacco products in premises where minors were permitted.

I: Is s. 6 of the provincial *Tobacco Control Act* sufficiently inconsistent w/ s. 30 of the fed *Tobacco Act* to render it inoperative pursuant to fed paramountcy?

A: The allowance by the fed statute is not a positive right, merely an absence of prohibition. The purpose of the fed act is to prevent people from inducements to tobacco usage – no FFP. It is possible to comply with both by following the stricter statute – no IDC. Clear language needed for FICF.

C: No conflict – provincial leg upheld.

#### British Columbia (AG) v. Lafarge Canada Inc. (2007) (p. 293)

F: Fed leg governing property owned by Vancouver Port Authority enacted under 91(10). D wants to build cement batching plant on land. Vancouver City Council did not want to use zoning bylaw to prevent D’s actions, but could have under 92(13).

I: Is there conflict?

A: IDC. Approval req. from VPA for dev’t. Also req. from municipality.

#### Marine Services International Ltd. v. Ryan Estate (2013) (Supplement)

F: Ryan brothers died on boat. Estate got compensation under provincial leg, then brought action under fed leg against employers. Provincial leg s. 44 barred actions against employers, but fed leg appeared to allow D to sue manufacturers of boat. Court of Appeal held that provincial leg bar was inapplicable due to DII and inoperative due to fed paramountcy. WHSCA = prov, MLA = fed.

I: Is s. 44 of the provincial leg inoperative in respect of fed maritime negligence claims under the fed leg by reason of fed paramouncty? Is it constitutionally inapplicable by reason of DII?

A: LeBel and Karatkatsanis: Conflict can be IDC or FFP. There is no IDC here. Fed leg deals w/ tort, provincial leg deals w/ workers compensation schemes. Fed leg provides that a dependent may bring a claim **under circumstances** that would have entitled the person, if not deceased, to recover damages. These circumstances do not exist here because of provincial leg. No FFP. And: (1) consistency w/ GECA/MSCA; (2) distinct in purpose and nature. Fundamental rule of constitutional interpretation: when a fed statute can be properly interpreted so as not to interfere w/ a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the 2 statutes.

C: S. 44 of provincial leg is operative. No conflict.

D: Court uses statutory interpretation to eliminate conflict – construe away the problem. SCC may be going in direction of using statutory interpretation to avoid invoking fed paramountcy.

# Chapter 10: Economic Regulation

## II. Provincial Powers Over Economic Regulation

## A. General Principles

- Numerous heads of power in 91 and 92 assign jurisdiction over particular aspects of Canada’s economy to feds and provinces – focus here on 91(2) and 92(13).

- Understanding of 91(2) inherited by SCC was that it had 2 branches: (1) regulation of int’l and interprovincial trade (maybe w/ necessarily incidental doctrine) and (2) general regulation of trade affecting whole dominion (*Parsons*, *Natural Products Marketing Act Reference*)

- Understanding of 92(13) inherited by SCC: (1) regulation of particular trades/businesses (except those assigned under 91), (2) regulation of labour relations and (3) regulation of intraprovincial trade/trading transactions (*Snider, Natural Products Marketing Act Reference*)

- Feds have been assigned some specific industries outside of 91, e.g. aeronautics in *Lacombe*

#### Carnation Co. Ltd. v. Quebec Agricultural Marketing Board (1968) (p. 356)

F: Milk producers’ plan bound all milk producers shipping milk/dairy to any plants of Carnation in QC. D set purchase price of milk to be paid by P. P argues that D’s orders are invalid because they enable it to set a price to be paid by P for a product the major portion of which, after processing, will be used by it for export out of QC – falls under 91(2).

I: Has D infringed on feds power under 91(2) to regulate trade and commerce?

A: Martland: **Each transaction and each reg must be examined in relation to its own facts. Court must look at intent of scheme. Validity of leg should be determined by aims, rather than effects.** Object of plan was to improve bargaining position of milk producers in QC. Not possibility that orders might *affect* P’s interprovincial trade which should determine validity, but whether they were made *in relation* to reg of trade and commerce. Incidental effects on company engaged in interprovincial trade is ok.

C: Orders not directed at reg of interprovincial trade. Appeal dismissed – leg is valid.

#### AG Manitoba v. Manitoba Egg and Poultry Association (1971) (p. 360)

F: QC produced better chickens and ON produced better eggs. Marketing schemes controlled marketing, at fixed prices, of all chickens sold in ON and all eggs sold in QC. Undue preference to marketing of products coming from within province. MB was good at producing chickens and eggs and wanted access to ON and QC markets. MB asked feds to send ref to SCC asking court to rule on constitutionality of schemes – feds refused because they were trying to negotiate a comprehensive set of marketing regimes for all agricultural products in Canada (*Farm Products Marketing Act).* MB enacted a mirror image to QC reg regime for eggs in their own province, and then referred it to MB Court of Appeal – wanted to lose ref. MB did not provide info that may have justified the scheme.

I: Is MB regulatory regime for eggs, and therefore marketing schemes in QC and ON, invalid?

A: Martland/Laskin: *Parsons*: 91(2) does not include reg of Ks of a particular business in a single province. Distinguished from *Carnation* because here scheme is directed at goods coming from outside province. **Direct object** is reg of importation of eggs, not saved by local market being under same regime. One of objects of Confederation is to form economic unit of whole of Canada.

C: Leg is invalid – invasion of fed power under 91(2).

D: No real functional differences between schemes in *Carnation* and *Manitoba Egg*. Laskin acknowledged that there were problems w/ the case – no factual underpinning.

### Notes and Questions

- **Paul Weiler**: there is reason for courts to scrutinize provincial leg regulating economic matters w/ some care because those people harmed by extraprovincial spillover effects of such leg have no way of holding democratically accountable the provincial leg that enacted that leg

* May not have been appropriate for court to respond to Egg Reference: litigated by collusion; MB constructed scheme for purpose of bringing a ref

- *Burns Foods Ltd v AG Manitoba*: followed *Manitoba Egg* – challenge to MB hog marketing scheme – ultra vires because it prevented processors from purchasing hogs from producers in another province except through agency of Board – **reg which subjects price of imports to same regs as local sales is a reg of interprovincial trade**

- Reasoning in these SCC cases suggests that it is not necessary to find that P&S of entire statutory scheme enacted by provincial leg is to regulate int’l and/or interprovincial trade in order to hold such leg *ultra vires*; it is arguably sufficient to find that part of scheme was aimed at reg of such trade (*Manitoba Egg Ref*.)

#### Re Agricultural Products Marketing Act (1978) (p. 365)

F: Ref by LG of ON to province’s Court of Appeal of a series of questions concerning validity of provisions of the *Agricultural Products Marketing Act*, *Farm Products Marketing Agencies Act*, and *Farm Products Marketing Act*. Eggs marketing scheme in Canada which allocated quotas to each province and producers. ON board set quotas on eggs to be marketed intraprovincially that were identical to interprovincial and export quotas established under national program. ON egg producers challenged quotas (some of eggs might move interprovincially and int’lly, province only has authority to regulate intraprovincial trade), and other constitutional issues raised.

I: Is leg ultra vires provinces?

A: Pigeon: **Control of production, whether agricultural or industrial, is prima facie a local matter, a matter of provincial jurisdiction under 92(10)**. Distinction between production and marketing of an agricultural product. Provinces may not use their control over local undertakings to affect extraprovincial marketing, but they can use control to complement fed reg of extraprovincial trade. Laskin: Nothing in scheme that is in essence and purpose related to provincial boundary. Application of s 121 (which guarantees freedom of trade in Canada) may be different according to whether provincial or fed leg is involved. **S 121 will only invalidate leg that has a “punitive” character and is “directed against or in favour of any Province”.**

 C: Leg is valid.

D: SCC showing restraint when asked to review leg enacted by 2 orders of gov’t following a lengthy process of fed-provincial consultation and cooperation.

## B. Natural Resources

Contentious area of fed-provincial relations through late 1970s and early 1980s. At Confederation, ownership of natural resources specifically granted to provincial gov’ts under s 109.

#### Canadian Industrial Gas and Oil Ltd. v. Gov’t of Saskatchewan (1978) (p. 370)

F: Leg enacted following sharp rise in price of oil in 1973. SK set policy so that if gov’t suspects that a producer is selling oil at less than fair market value, gov’t can replace producers’ price w/ what gov’t thinks appropriate price is, producer has to pay tax on basis of difference between gov’t-established price and oil 1973 price. CIGOL challenged constitutionality of taxing regime: (1) attempt by gov’t of SK to regulate interprovincial and int’l trade in oil; (2) indirect taxation.

I: Is leg indirect taxation? Is leg reg of interprovincial and int’l trade and commerce under 91(2)?

A: Martland: Practical consequence is that SK will acquire benefit of all increases in value of oil produced in that province above set basic well-head price fixed by statute and regs. Most oil in SK is destined for export. Indirect tax – ultra vires. Effect is to set floor price for SK oil purchased for export. **Provincial leg authority does not extend to fixing price to be charged/received in respect of sale of goods in export market** – reg of interprovincial trade and infringement upon 91(2). Distinguish from *Carnation* – here leg is directly aimed at production of oil destined for export and regulates export price. Dickson (dissent): intra vires SK. **American-style balancing test when reviewing provincial leg in the economic sphere: is the interest of the province reflected in the leg sufficiently important to outweigh the burden that the leg imposes on international/interprovincial trade?**

Court should presume that leg act constitutionally. Direct taxation. Not colourable device for assuming control of extra-provincial trade. Transactions are well-head transactions. No impediments to free movement of goods. Emphasis on fair value ensures that tax will not change export oil price. Ultimate position of consumers is unaffected.

C: Leg is directly aimed at production of oil destined for export – regulates export price – ultra vires SK.

D: Arne Paus-Jenssen: court’s lack of understanding of economic issues and logical errors. Leg is an attempt to regulate trade because purchaser is consumer and non-resident of province.

#### Central Canada Potash Co. Ltd. v. Gov’t of Saskatchewan (1979) (p. 375)

F: Regulatory regime for potash industry: (1) Quotas for individual potash producers; (2) Minimum price for potash. Almost all of potash was sold outside province of SK. Central Canada challenged constitutionality.

I: Is potash prorationing scheme valid?

A: Laskin: Only had significance in export markets – aimed at production of potash destined for export and has effect of regulating export price. SK actions directed to proprietary rights of others. **Production controls and conservation measures w/ respect to natural resources in a Province are ordinarily matters within provincial legislative authority**. Provincial leg authority does not extend to the control/reg of the marketing of provincial products in interprovincial/export trade.

C: Leg is invalid – appeal allowed.

D: Premier of SK asserted publicly that there was an SCC bias against SK. Distinguish from *Carnation* in that here they are regulating export price – might have been intra vires just w/ production quota.

**SCC’s rejection of JCPC’s strictly territorial approach to intraprovincial trade/trading transactions, and substitution therefor of an approach based on the court’s assessment of the aim of the impugned provincial leg, in particular whether the leg was aimed at the regulation of international/interprovincial trade (*Carnation, Manitoba Egg Ref., CIGOL and Central Canada Potash*).**

### Note on Section 92A

By-product of SCC’s judgments – introduced in 1982. Significance insofar as provincial jurisdiction over non-renewable natural resources, forestry resources and electrical energy: primarily confirmatory of provincial jurisdiction, but also expands provincial jurisdiction to a limited extent over interprovincial trade (subject to feds paramount leg power in the area) and indirect taxation in relation to such resources (so long as taxes don’t discriminate against other provinces). Express grant of leg power over dev’t of facilities for generation and production of electrical energy (92A(1)(c)) and leg power in relation to export of electrical energy.

- *Ontario Hydro v Ontario (Labour Relations Board*) (1993) re: proper jurisdiction to issue a certificate for collective bargaining for employees at Ontario Hydro’s nuclear electrical generating stations

* 92A was not meant to interfere w/ paramount power vested in Parliament by virtue of declaratory power over all works and undertakings constructed for production, use and application of atomic energy
* Iacobucci (dissent): provincial control over labour relations is integral to provincial jurisdiction over mgmt of nuclear electrical generating facilities – ON Hydro is a provincial undertaking.

### Note on Offshore Minerals

- *Reference re Offshore Mineral Rights of BC* (1967): coastal waters off BC (from low water mark) were within fed jurisdiction

* Fed gov’t had ownership rights over seabed of territorial sea off BC under POGG and right to explore for and exploit resources on continental shelf beyond territorial sea

- *Re AG Canada and AG BC (Re Strait of Georgia*): waters between mainland of BC and Vancouver Island within jurisdiction of province

- Right to explore for and exploit minerals on continental shelf within fed jurisdiction

## III. Fed Powers Over Economic Regulation

2 major doctrinal dev’ts after 1960: (1) courts seemed more willing to apply necessarily incidental doctrine in relation to trade and commerce power, thus allowing fed gov’t to regulate some intraprovincial transactions as part of a scheme directed at reg of interprovincial/int’l trade (*Klassen, Caloil*, not *Dominion Stores)*; (2) SCC applied general reg of trade doctrine to uphold fed competition leg.

## A. Regulation of Interprovincial and International Trade

#### The Queen v. Klassen (1960) (Man. C.A.) (p. 382)

F: S 16 *Canadian Wheat Board Act* prohibited delivery of grain to grain elevator contrary to provisions of Act. Mechanism by which a quota system was enforced to maintain an orderly int’l trade in grain. Any elevator and many other of buildings used in grain trade, including feed mills, declared to be works for general advantage of Canada (s 45). D, owner of a small feed mill, charged w/ failing to record delivery. D had purchased wheat and used it to prepare feeds which were sold locally – had not at any time engaged in interprovincial or export trade. Argued ultra vires in respect to feed mill – attempt by feds to regulate intraprovincial trade.

I: Is s 45 of *Canadian Wheat Board Act* ultra vires w/ respect to feed mill?

A: Adamson: S 16 is necessary and incidental in control of export of grain. Tritschler: purpose means that it is leg in relation to trade and commerce. Provisions affect property and civil rights within province. Not an attempt by feds to interfere w/ or control business within provinces – **incidental and ancillary to achievement of purpose** – P&S is provision of an export market for surplus grains. Impractical to draw distinctions between D and all other handlers of grain in respect of intraprovincial transactions.

C: Leg is valid – appeal dismissed.

### Notes

- *Murphy v CPR* (1958): BC farmer bought grain in MB and tried to ship to BC – prohibited by s 32 of *Canadian Wheat Board Act* – Court found that s 32 and Act as whole were valid leg in relation to reg of trade and commerce – *Canadian Wheat Board Act* does not control/regulate any one trade/business

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

F: Fed gov’t passed regs that prevented oil importers from transporting any gasoline across a line running N-S through ON and QC. Aim was to provide a market for western Canadian oil to west and restrict sale of imported oil to Eastern Canada. P lost license and obtained ruling that regs were unconstitutional for invading provincial jurisdiction. Argued that it invaded provincial jurisdiction because the line divided up parts of ON and QC – therefore affecting intraprovincial trade. Feds passed new leg and again denied D license.

I: Is new leg intra vires fed gov’t?

A: Pigeon: new regs implicitly limited in scope to imported oil – valid reg of int’l trade. Policy is control of imports of a given commodity to foster dev’t and utilization of Canadian oil resources. **Interference w/ local trade is restricted to imported commodity** – not an unwarranted invasion of provincial jurisdiction.

C: Intra vires.

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

F: P charged under *Canada Agricultural Products Standards Act (CAPSA)* w/ selling bruised Spartan apples under the trade name ‘Canada Extra Fancy’ – did not meet quality standards for use of that grade name as required by fed law. Wholly intraprovincial sales could be caught by law only if seller voluntarily chose to use trade name. Part 1 of fed law mirrored requirements of an existing ON law, the *Farm Products and Grades and Sales Act* – but ON statute made it compulsory.

A: Etsey: feds cannot regulate trade entirely within provinces. Better that only provincial law regulate intraprovincial sales – wasteful overlapping, fed statute seeks to add another consequence to same action already proscribed under ON Act. Laskin (dissent): intra vires - feds have compulsory grading requirements for export/interprovincial trade – should complement w/ voluntary grading prescriptions for local transactions – ancillary powers doctrine.

C: 5-4 ultra vires.

D: Unwillingness to use necessarily incidental doctrine in favour of fed leg regulating intraprovincial trade; use of old JCPC jurisprudence on 91(2) rather than *Klassen* and *Caloil*, even while acknowledging that older jurisprudence might be in need of rethink.

## B. General Regulation of Trade

Limited body of jurisprudence relating to second branch of 91(2). SCC’s approach to second branch in *General Motors*, which it used to uphold fed *Combines Investigation Act*: five “indicia”, three contributed by Laskin in *Macdonald v. Vapor Canada* and other two added by Dickson in *CN Transportation.*

**Five considerations**: (*Canadian National Transportation* - Dickson)

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 provincial 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 ch. 8 notes.

I: Is *Combines Investigation Act* valid as general reg of trade and commerce?

A: Dickson: *Parsons* sets out 3 important propositions w/ regard to fed trade and commerce power: (1) does not correspond to literal meaning of words ‘reg of trade and commerce’; (2) includes not only arrangements w/ regard to int’l and interprovincial trade but also general reg of trade affecting the whole dominion; (3) does not extend to regulating Ks of a particular business/trade**. Indicia (above) do not represent exhaustive list of traits that will tend to characterize general trade and commerce leg – nor is presence/absence of any of these 5 criteria necessarily determinative.** 91(2) should sustain competition laws. All indicia satisfied – but 4 and 5 not explicitly addressed. Deleterious effects of anti-competitive practices transcend provincial boundaries. Provincial leg cannot be effective regulator.

C: Valid fed leg under second branch of 91(2).

#### Ref. re Securities Act (2011) (Supp)

F: Fed leg to establish a comprehensive national securities regulatory regime. Provinces could choose to opt in or to continue using their existing regulations.

I: Is *Securities Act* valid as general reg of trade and commerce?

A: McLachlin: Affirmation of 5 indicia from *GM*. There are distinctions between provincial securities regimes. Provinces have jurisdiction to regulate securities within their boundaries under 92(13). Constitution gives feds powers that enable it to pass laws that affect aspects of securities regulation and to promote integrity and stability of Canadian financial system. **Situation must be such that if fed gov’t were not able to legislate, there would be a constitutional gap**. **Second branch cannot be used in a way that denies provincial legs power to regulate local matters and industries within their boundaries.** Main thrust of Act is to regulate, on an exclusive basis, all aspects of securities trading in Canada, including trades and occupations related to securities in each of provinces. **Efficaciousness is not a relevant consideration in a division of powers analysis**. Effect of provisions is in essence to duplicate leg schemes enacted by provincial legislators exercising their jurisdiction over property and civil rights. Test from *GM*: (1) Yes. (2) Yes. (3) Securities trading affects all industries and is general in nature – BUT Act has detailed regs over all aspects of securities trading. (4) Some aspects of leg would be beyond powers of provinces. Would regulate ALL aspects of Ks for securities within provinces, including ALL aspects of public protection and professional competence within provinces. NB: Might be a change in 4th criteria? Not just about constitutional capacity, but about **whether it would be *practical* for provinces to create a scheme**. (5) Provinces can choose to participate, which indicates that reg is effective w/o full participation.

C: Fed leg failed to satisfy enough of indicia – ultra vires.

D: Securities industry was pressuring feds to enact overarching securities leg. Ultimate question when courts are asked to apply second branch of s. 91(2) is **whether impugned fed leg is “qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination**” (from Dickson in *GM*), with five indicia being very much that, not a hard and fast checklist.

# Chapter 11: Criminal Law

## I. Fed Powers Over Criminal Law

Scope of 91(27) is potentially limitless and can subvert division of powers between fed and provincial legs. Haldane started w/ narrow view of 91(27) encompassing only things that traditionally belonged to area of criminal jurisprudence. Test for 91(27) inherited by SCC was from Atkin in *PATA* – prohibition coupled w/ a penalty.

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

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

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

A: Rand: Atkin’s understanding of criminal law is too broad, so addition of third requirement. **Test: (1) Prohibition (2) Penalty (3) Public purpose, such as peace, order, public health, security, or morality, which can support prohibition as being in relation to criminal law.** Purpose of this leg is to regulate trade – third requirement not met. Protecting one industry from competition from another does not qualify as public purpose.

C: Leg is ultra vires feds.

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

F: *Tobacco Products Control Act* prohibits: (1) advertisement of tobacco, w/ exemption for advertising of foreign tobacco products in imported publications, and (2) sale of tobacco w/o health warnings. 2 tobacco companies challenged constitutionality.

I: Is act ultra vires 91(27)?

A: La Forest: Prohibition and penalty are clear. Purpose is protecting ‘health’ which is valid public purpose. **Presence of an exemption to a prohibition does not per se convert prohibition into a reg, and therefore take it outside 91(27). Definition of criminal law is not frozen in time. Feds can choose circuitous path to accomplish its goals as long as goals are constitutionally valid.** Major (dissent): Prohibition of advertising not valid. Not a sufficiently significant, grave and serious danger. Test from *Margarine Ref* should be refined by requiring fed gov’t to establish that proscribed activity pose a ‘significant, grave and serious risk of harm’ to public purpose underlying prohibition. There should be a close fit between prohibition and purpose. Not adopted by majority, but not explicitly rejected either. Feds cannot criminalize this type of speech w/o criminalizing underlying activity of tobacco use. Exemptions are a factor which may lead a court to conclude that proscribed conduct is not truly criminal, but rather regulatory.

C: Act is valid under 91(27).

#### R. v. Hydro-Québec (1997) (p. 433)

F: D ordered to stop emitting PCBs under *Environmental Protection Act*. Act calls for preparation of series of lists by various branches of executive gov’t – domestic substances list, non-domestic substances list, priority substances list (potential to be harmful to env’t) and list of toxic substances. Re: definition of toxicity – concern is on effect on human health and on env’t. S 35 allows for making of interim orders w/o going through normal procedure when Ministers believe that a substance that is not on list of toxic substances needs to be immediately regulated. D charged under interim order w/ releasing toxic substance. D challenges leg. Fed gov’t attempted to support leg under natural concern branch of POGG and 91(27).

I: Is Act valid criminal leg?

A: La Forest: Application of test from *Margarine Reference*. **Protecting env’t in and of itself qualifies as a criminal public purpose for purposes of test for 91(27). Validity of provision must be tested against specific characteristics of head of power under which it is proposed to justify it. Finding this leg valid under POGG means that provinces cannot legislate in this area, but justifying it under 91(27) does not have same effect. Charter apart, only one qualification has been attached to fed power over criminal law – power cannot be employed colourably**. Leg is prohibitory – broad wording is unavoidable in env’t protection leg. Lamer/Iacobucci (dissent): Leg is regulatory - exclusions and provincial powers in area. Consider nature and extent of regs created, and context within which it purports to apply.

C: Act is valid under 91(27): upheld 5-4.

#### Ref. re Assisted Human Reproduction Act (SCC) (2010) (Supp)

F: Act contains straight prohibitions of certain conduct, controlled activities (which are prohibited unless carried out in accordance w/ Act), and administrative and enforcement provisions that support above two. Straight prohibitions are not challenged, but act as a whole, controlled activities provisions, and administrative provisions are. Quebec Court of Appeal held that provisions were not criminal law, but directed at reg of practice of medicine.

I: Is leg scheme as a whole valid? Are ‘controlled activities’ prohibitions valid? Are admin provisions valid under ancillary powers doctrine?

A: McLachlin: **Consider act as a whole first.** Dominant purpose is to prohibit inappropriate practices. Essentially a series of prohibitions, w/ subsidiary provisions for their admin. Does not prevent provinces from enacting leg promoting beneficial practices. Dominant effect is to prohibit a number of practices which feds consider immoral and/or which it considers a risk to health and security. Contains prohibition and penalties. **Morality, public health evils and security are capable of supporting criminal laws** – act has valid criminal purpose. *Morality*: crim law may target conduct apprehended as a threat to our central moral precepts; *Health*: crim law must be grounded in human conduct that has an injurious or undesirable effect on the health of the public; *Security:* protection of people is valid crim law purpose. **Open to Parliament to create reg schemes under criminal law power, provided they further the law’s criminal law purpose. Fed laws may involve large carve-outs for practices that Parliament does not wish to prohibit.** Criminal law cannot be used to eviscerate provincial power to regulate health. **Intrusion on powers of other level of gov’t less serious where impugned provision appears in a legislative scheme that is validated under a broad head of power**. Minor incursion on provincial health powers – rational and functional connection test – valid.

LeBel/Deschamps: **Consider separate provisions first.** P&S is reg of assisted human reproduction as a health service. **Requirement of a concrete basis and a reasoned apprehension of harm for valid crim law.** Not every social/economic/scientific issue is a moral problem. Reg provisions are ultra vires – not necessary for prohibitory provisions, serious infringement on provincial powers, cannot be saved by ancillary powers doctrine.

Cromwell: would uphold certain provisions, matter is not under 91(27), essence is reg of research and clinical practice in relation to assisted human reproduction.

C: 4-4-1 divide. Valid criminal law – not all provisions upheld as valid.

D: Difficult to know whether, and if so to what extent, test for 91(27) has changed as a result of this decision. Signs in Lebel/Deschamps judgment of an interest in reviving Major’s idea from *RJR* of **need for a clear causal connection between proscribed activity and harm(s) fed gov’t says it’s seeking to address, along w/ requirement that harm in question be a serious one.**

- SCC has shown itself to be willing to stretch the meaning of “prohibition” within the 3 part test to cover – and therefore uphold as valid under s. 91(27) - leg that has a distinctly regulatory character to it (*Hydro-Quebec* and *Firearms Act Ref*.).

- Reasons for SCC’s willingness to do that are not clear, but may include considerations such as importance attached to the public purposes in question (health and safety), need for a regulatory approach to deal with problems at issue (environmental protection and use of firearms), a sense of criminal law as a vehicle for articulation of defining national values and a desire to leave room for provincial legislatures to leg in same areas (which would not be possible if national concern doctrine was used to sustain fed leg).

## II. Provincial Power to Regulate Morality and Public Order

Fed power over criminal law exists in tension w/ need to respond to local conditions of public order and morality, which may vary throughout country.

- Mechanisms for giving recognition to local interests in criminal law matters:

* 92(14), which gives provincials legislatures jurisdiction over admin of justice in province, combined w/ fed delegation to provinces of power to prosecute CC offences - much of fed CC is provincially enforced
* In some cases, fed gov’t has, through mechanism of conditional leg, drafted its criminal laws in ways that allow them to be shaped by provinces to respond to local conditions
* Provincial legislatures are given the power to create offences and impose penalties under 92(15)

- Jurisprudence demonstrates that some provincial leg that bears a close resemblance to leg that Parliament has enacted, or could enact, under s. 91(27) is upheld as valid (*Bedard v. Dawson*, *McNeil*, *Dupond*, *Rio Hotel* and *Chatterjee*) and some is struck down (*Switzman*, *Westendorp*, *Morgentaler* and *Starr*).

- **Factors that support a finding of validity**: presence of a strong local interest in matter dealt w/; temporary nature of leg; fact that prohibition forms part of a larger leg scheme regulating a particular kind of business; use of civil remedies instead of prohibitions; if prohibitions are used, limited nature of prescribed penalties; and a preventive rather than punitive character to leg.

- **Factors that support a finding of invalidity:** stand-alone nature of prohibition; seriousness of threat to basic rights posed by leg; degree to which any prohibition parallels an offence in the *Criminal Code*; a conviction that leg was enacted to fill a void recently created in *Criminal Code*; severity of sanctions; and evidence of colourability on part of provincial/municipal leg.

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

F: *Theatres and Amusements Act* and regs enacted under it established a system for licensing and regulating showing of films. Sanction for breach of was monetary penalty and revocation of a theatre owner’s license.

I: Are province’s legs ultra vires NS?

A: Ritchie (majority): provisions primarily direct to reg of film business – 92(13). Do not create criminal offence/punishment. **Morality and criminality are not co-extensive**. Preventive rather than penal. **Province can pass leg aimed at prevention of crime**. Determination of what is acceptable for public exhibition on moral grounds may also fall under 92(16). Laskin (dissent): Determination of what is decent/indecent in conduct/publication falls under 91(27). Fed power under 91(27) extends to anti-social conduct. Direct intrusion into criminal law. Provincial leg authority may extend to objects where moral considerations are involved, BUT objects must in themselves be anchored in provincial catalogue of powers and MUST not be in conflict w/ valid fed leg. No anchorage in provincial power here.

C: Valid under 92(13) and 92(16).

D: Ritchie invalidated on reg of Act which was indistinguishable from CC provision.

### Notes

- *Bedard v Dawson* (1923): challenge to QC leg providing for closure of premises being used as a disorderly house – upheld leg – in relation to property use – provincial power to suppress conditions favouring dev’t of crime – provinces can legislate w/ respect to civil consequences of crime

- *Dupond v City of Montreal et al* (1978): Montreal bassed bylaw prohibiting parades or other gatherings – gave city’s exec committee power to make an ordinance prohibiting public gatherings – Beetz: intra vires as reg of municipal public domain, preventive, explicitly used Simeon’s criteria of community – Laskin: ultra vires attempt to reinforce criminal law

- *Switzman v Elbing et al* (1957): SCC invalidated provincial statute which made it illegal for possessor or occupier of a house to use or permit it to be used to propagate communism or bolshevism and to print, publish or distribute any newspaper or writing propagating or tending to propagate communism or bolshevism – falls under fed jurisdiction

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

F: P charged w/ being on street for purpose of prostitution in contravention of s 6.1(2) of City of Calgary bylaw. Penalties were fines or imprisonment. City had amended bylaw to add s 6.1 which dealt explicitly w/ prostitution.

I: Is it intra vires Alberta?

A: Laskin: Nothing in bylaw which has relation to s 6.1 or to scale of penalties prescribed for breach of 6.1 compared w/ those in general penalty provisions of the bylaw – it must stand on its own merit as a valid municipal law. Triggered only by offer of sexual services or a solicitation to that end – does not relate to control of the streets. Patently an attempt to control/punish prostitution – no property question.

C: Ultra vires AB.

### Notes

- *Goldwax v City of Montreal* (1984): similar bylaw re: prostitution found to be ultra vires

* Fed gov’t responded by repealing existing CC provision and replacing it w/ communication and solicitation provisions

- Subsequent cases at SCC level continue general pattern of upholding provincial laws dealing w/ public order and morality through generous use of doctrine of double aspect

- *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board*) (1987): Dickson upheld provisions of NB *Liquor Control Act* which gave board power to attach conditions to liquor licenses regulating and restricting nature and conduct of live entertainment – prima facie falls under 92(13) or 92(16) – no penal consequences – no direct conflict w/ fed leg – seeks only to reg forms of entertainment that may be used as marketing tools by owners of licensed premises to boost sales of alcohol

- *R v Morgentaler* (1993): struck down provincial law prohibiting performance of certain designated medical services anywhere other than hospital – penal sanctions

- *Chatterjee v Ontario (AG)* (2009): constitutionality of ON *Civil Remedies Act* – authorizes forfeiture of proceeds of unlawful activity – enacted to deter crime (broad enough that feds and provinces can pursue) and compensate its victims (falls under provinces) – leg upheld

- *Starr v Houlden* (1990): SCC found commission of inquiry to be ultra vires intrusion on 91(27) – provincial commission of inquiry set up to investigate allegations of improper financial dealings between provincial gov’t officials and private individuals – province may not enact a public inquiry as a substitute for an investigation and preliminary inquiry into specific individuals in respect of specific criminal offences

# Chapter Nine: Peace, Order and Good Gov’t

As law now stands, POGG has 3 separate branches; (1) national emergency branch; (2) national concern branch; and (3) gap/residual branch; each of these branches (and especially first two) has a distinct set of legal principles/tests governing its application in particular contexts.

### Note on the Historical Development of the P.O.G.G. Power

- Understanding of POGG that emerged from cases decided in 1930s was that it authorized feds to legislate in times of national emergency, and nothing more (*Natural Products Marketing Act Ref*)

- Replaced in *Canada Temperance Federation* (1946) w/ true test of whether real subject matter of leg goes beyond local/provincial concern/interests and must from its inherent nature be concern of Dominion as a whole

* Used to uphold fed gov’t’s re-enactment of *Canada Temperance Act*
* Reaffirmed validity of *Russell* and rejected suggestion that *Russell* was based upon a finding that intemperance constituted a national emergency in 1878
* Expanded scope of POGG by recognized power to legislate for prevention of emergency

- In both *Johannesson* (1952) and *Munro* (1966), SCC relied on national concern understanding of POGG in support of its holding that aeronautics and establishment of a national capital region respectively fell within that head of fed leg jurisdiction.

- *Johannesson v Rural Municipality of West St Paul* (1952): challenge to municipal by-law controlling location of airports – referred to doctrine as supporting exclusive fed leg jurisdiction w/ respect to whole field of aeronautics

* Field of aeronautics is one which concerns country as a whole – falls to feds under POGG using national concern understanding - field of leg is not capable of division

- *Munro v National Capital Commission* (1966): upheld *National Capital Act* on basis of POGG – single matter of national concern

- *Jones v AG New Brunswick* (1975): SCC relied on gap/residual understanding of POGG in support of its holding that fed *Official Languages Act* fell within that head of fed leg jurisdiction - implication that s 91 (in addition to national concern branch) also authorizes fed leg in relation to subject matters not explicitly assigned to either level of gov’t

- Heading into *Anti-Inflation Act* basis, POGG clearly has national concern branch and gap branch – unknown whether it also has a national emergency branch

- Distinguishing feature of modern interpretation of POGG has been re-emergence of national concern doctrine, first introduced in *Local Prohibition* by Watson

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

F: *Anti-Inflation Act* established strict numerical limits of price, profit and income controls. Binding on fed public sector and private sector and provincial private sector – applicable to public sector of each province only if agreement made between feds and province.

I: Is Act ultra vires (in particular to automatic application to provincial private sector)?

A: All nine members of SCC agreed that **(1) national emergency understanding/branch of POGG is a legitimate understanding, and distinct from the national concern understanding/branch; (2) national emergency branch can be used to sustain fed leg in peacetime as well as in times of war/insurrection; (3) an economic crisis can qualify as a national emergency; (4) national emergency branch authorizes Parliament to legislate to prevent as well as to cure national emergencies; (5) to qualify under the national emergency branch, fed leg must be of temporary duration; and (6) test for determining whether fed leg can be upheld under national emergency branch is whether or not Parliament had a rational basis for believing that a national emergency existed or was about to arise.** Sole point of disagreement between majority and dissenting judges in relation to application of national emergency branch concerned question of what kind of signal courts should require Parliament to send if it intended to rely on that branch when it enacted leg in question: Beetz said that Parliament had to send a “clear and unmistakable signal,”(which he held Parliament had failed to do in this instance) while Laskin and other majority judges were willing to accept something less (in that case, a statement in the preamble that “the containment and reduction of inflation has become a matter of serious national concern” supplemented by other evidence of crisis management was held to suffice).

Laskin: Vital national interests engaged OR there is economic crisis amounting to emergency. In enacting Act as a measure for the POGG, Parliament is not opening an area of leg authority which would otherwise have no anchorage at all in fed catalogue of leg powers but rather it is proceeding from leg power bases which entitle it to wage war on inflation through monetary and fiscal policies and entitle it to embrace within Act some of sectors covered thereby but not at all. Beetz (dissent – speaking for 5 w/ regard to national concern): **In order for a new “matter” to qualify as a matter of national concern, it must have a degree of unity that makes it indivisible, an identity which makes it distinct from provincial matters and a sufficient consistence to retain bounds of form; extent to which acceptance of a new matter as such a matter would result in fed encroachment on provincial autonomy also has to be taken into account (and there is every reason to believe that this is in fact the critical consideration in the application of these guidelines).** Ultra vires – directly interferes w/ provincial jurisdiction. In order to characterize an enactment, one must look at its operation, at its effects and at scale of its effects rather than at its ultimate purpose where purpose is practically all-embracing – property and civil rights in P&S. Ritchie (dissent): Agree w/ Beetz that national concern doctrine does not apply here. Leg justified under national emergency doctrine.

C: Valid under emergency branch of POGG.

#### Emergencies Act (1988)

- Imposes a number of statutory constraints on manner in which feds can deal w/ what it perceives to be national emergencies, including requirement that Governor in Council issue a declaration of an emergency that must subsequently be confirmed by Parliament

- Differs from *War Measures Act*: (1) Declaration of an emergency by Cabinet must be reviewed by Parliament; (2) Any temporary laws made under Act are subject to Charter.

#### R. v. Crown Zellerbach Canada Ltd. (1988) (p. 323)

F: *Ocean Dumping Control Act* regulates dumping in provincial marine waters. S 4(1) prohibits dumping of any substance at sea except in accordance w/ act. Sea as defined in Act includes internal waters of Canada. D carries on logging operations in Vancouver Island – charged w/ violating act.

I: Is s 4(1) of *Ocean Dumping Control Act* valid?

A: LeDain: **Summary of national concern branch of POGG: (1) Separate from national emergency doctrine which provides basis for temporary leg; (2) Provides to new matters since Confederation and to matters that have become national concern; (3) Matter must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable w/ fundamental distribution of leg power under the Constitution; and – NEW - (4)** **Consider effect on extra-provincial interests of a provincial failure to deal effectively w/ control/reg of intra-provincial aspects – “provincial inability test”.** If that extra-provincial effect is sufficiently harmful, need for fed leg in relation to that matter will be made out and it’s more likely that matter will be considered one of national concern. **Where a matter falls within national concern doctrine of POGG, Parliament has an exclusive jurisdiction of a plenary nature to leg in relation to that matter, including its intra-provincial aspects.** Control of pollution by dumping of substances in marine waters, including provincial marine waters, satisfies requirements for a matter of national concern. La Forest (dissent): S 4(1) is a blanket prohibition against depositing any substance in waters w/o regard to its nature or amount – no attempt to link proscribed conduct to actual or potential harm to what is sought to be protected. Prevents province from dealing w/ certain of its own public property w/o fed consent.

C: 4-3 – Constitutionally valid under national concern doctrine of POGG.

# Sections 91 and 92 of the Constitution Act

S. 91 – **exclusive powers of fed**

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Gov’t of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

S. 92 – **Exclusive powers of provincial legislatures**

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

* 2 years less a day = prison, 2 years and up = penitentiary

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

* Eleemosynary is an institution funded through charitable donations

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings *other than such as are of the following Classes*:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

- S. 92A – Non-renewable natural resources, forestry resources and electrical energy – Provincial jurisdiction

* S. 93 – Education – Provincial jurisdiction
* If the members of the minority religious group feel that the provincial legislature is adversely affecting their denominational school rights – the fed gov’t is given the authority to respond and enact remedial leg
* S. 94 – has never been used
* S. 95 – agriculture and immigration
* VI. Judicature Provisions – S. 101 – SCC and Establishment of any additional Courts for the better Administration of the Laws of Canada – Tax Court, Court Martial, Fed Court of Appeal, Fed Court

# Interpretation of Heads of Power

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| **Head of Power** | **Case** | **Interpretation**  |
| **POGG** | *Local Prohibition Reference* (1896) | Can only rely on POGG for matters of national dimensions. Does not cover issues that are arguably local/provincial. Cannot use POGG where provinces have power to legislate (92). POGG is distinct source of leg power – separate head of power. Bigger definition of POGG would infringe on provincial autonomy. POGG doesn’t get benefit of fed paramountcy set out in 91 because it is not an enumerated head under 91. (Watson)  |
| *Reference re Board of Commerce Act, 1919 & Combines and Fair Prices Act* (1919) | POGG only applies to special circumstances – only in national emergency. (Haldane) |
| *Toronto Electric Commissioners v. Snider* (1925) | POGG can only be used in cases of extraordinary peril. *Russell* should be interpreted as using POGG because crisis of intemperance was severe enough to be an emergency. (Haldane) |
| *The King v. Eastern Terminal Elevator Co.* (1925) | Anglin dissenting: Reg of grain trade falls under POGG because a lack of power to legislate for regulation of export grain trade would cause national emergency – relies on Haldanes explanation of *Russell* re: POGG in *TEC*. |
| *Reference re Regulation and Control of Aeronautics in Canada*(1932) | Aerial navigation falls under different heads of 91, and what’s left over is covered under POGG. POGG not just for national emergencies – can be used for areas around the enumerated heads. Resurrects understanding of POGG from *Local Prohibition*. Gap understanding of POGG. POGG now has 2, if not 3 distinctive branches: emergencies, importance, filling in gaps not covered by ss. 91/92. (Sankey) |
| *AG Canada v. AG Ontario (Labour Conventions)* (1937) | POGG requires abnormal circumstances or exceptional conditions. (Atkin) |
| *AG British Columbia v. AG Canada (The Natural Products Marketing Act* (1937) | Matter of national concern – *Natural Products Marketing Act* not saved by POGG. National concern branch of POGG subsumed under national emergency branch -> ‘locus classicus’ on scope and meaning of POGG (Atkin). |
| *Multiple Access Ltd. v. McCutcheon* (1982)  | Fed companies law is fed jurisdiction under POGG. |
|  | SEE ALL CASES IN CHAPTER 9 |
| **91(2)** | *Parsons* (1881) | Should not be read to include power to regulate by leg the Ks of a particular business/trade, such as business of fire insurance in a single province. Obiter: should mean (1) int’l trade; (2) interprovincial trade and MAYBE (3) general regulation of trade affecting the dominion (JCPC) |
| *Local Prohibition Reference* (1896) | 91(2) is about regulation, not prohibition. (Watson) |
| *Reference re Board of Commerce Act, 1919 & Combines and Fair Prices Act* (1919) | 91(2) might not sustain any fed leg on its own – only use is to support fed leg anchored somewhere else in 91. 91(2) cannot interfere w/ trades w/o resort to another fed head of power. (Haldane) |
| *Toronto Electric Commissioners v. Snider* (1925) | 91(2) can only be used when the power is valid under another head of 91. Cannot stand on its own. (Haldane) |
| *The King v. Eastern Terminal Elevator Co.* (1925) | Duff (majority): Feds cannot regulate branch of external trade by regulating particular occupations in provinces. Anglin dissenting: *CGA* valid under 91(2) because regulates int’l grain trade – no single province could legislate to cover the field. Disagrees w/ Haldane’s judgments in *TEC* re: 91(2) and 91 and likes 91(2) in *Parsons*. |
| *Proprietary Articles Trade Association v. AG Canada* (1931)  | Obiter: 91(2) is resurrected as independent source of fed jurisdiction. (Atkin) |
| *Reference re Regulation and Control of Aeronautics in Canada* (1932) | 91(2) resurrected in form from *Parsons*. (Sankey) |
| *AG British Columbia v. AG Canada (The Natural Products Marketing Act* (1937) | Duff resurrects understanding of 91(2) from *Parsons* – general regulation of trade affecting the whole Dominion – but it doesn’t apply here, cannot include regulation of particular commodities. Necessarily incidental.  |
|  | SEE ALL CASES IN CHAPTER 10 |
| **91(27)** | *Reference re Board of Commerce Act, 1919 & Combines and Fair Prices Act* (1919) | Existence of offences =/ criminal law. Criminal law is about true crimes. 91(27) only applies to subject matter that already belong under criminal jurisprudence. Fixed domain of criminal law. (Haldane) |
| *Toronto Electric Commissioners v. Snider* (1925) | Feds cannot claim jurisdiction under criminal law simply by creating offences or imposing penalties. (Haldane) |
| *Proprietary Articles Trade Association v. AG Canada* (1931) | Rejection of notion of fixed domain of criminal law – nature of criminal law is going to change as society evolves. 91(27) must extend to power to make new crimes. Feds should not be denied power under 91 to declare any act to be a crime which is such a violation of generally accepted standards of conduct as to deserve chastisement as a crime. Prohibition and penalty = criminal law. *Board of Commerce* case should not be used as definition for fed power over criminal leg. By creating a criminal offence, the matter becomes crime and can be classified under 91(27). (Atkin) |
| *R. v. Mortgentaler* (1993) | Dominant characteristic of criminal law is prohibition of an activity, subject to penal sanctions, for public purpose. (Sopinka) |
|  | SEE ALL CASES IN CHAPTER 11 |
| **92(13)** | *Parsons* (1881) | Must include right to limit and control manner in which property is dealt w/ and terms and conditions of Ks (SCC) |
| *Local Prohibition Reference* (1896) | 92(13) must be given broad reach. (Watson)  |
| *Insurance Reference*  | ‘Civil rights’ includes freedom of K/liberty to do business.  |
| *Reference re Board of Commerce Act, 1919 & Combines and Fair Prices Act* (1919) | 92(13) expanded to include liberty to conduct any business (except those specifically assigned in 91 in any manner). (Haldane) |
| *Natural Products Marketing Act* | 92(13) includes reg of intraprovincial trading activities (Duff) |
| *Toronto Electric Commissioners v. Snider* (1925), *Labour Conventions* | Includes power to regulate labour relations. (Haldane)  |
| *The King v. Eastern Terminal Elevator Co.* (1925) | Regulation of grain trade falls under 92(13) – Duff (majority) |
|  | SEE ALL CASES IN CHAPTER 10 |
| **92(16)** | *Hodge, Local Prohibition Reference* | Includes locally regulating liquor.  |
| **132** | *Reference re Regulation and Control of Aeronautics in Canada* (1932) | Interpreted very broadly. 132 is applicable because this is an Empire treaty – feds can speak for whole under 132. (Sankey) |
| *AG Canada v. AG Ontario (Labour Conventions)* (1937) | 132 does not grant new powers to fed gov’t because they participate in int’l agreements. Leg cannot be characterized as treaty implementing leg. (Atkin) |

# Contributions of Judges from JCPC

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| **Spragge** | - *Hodge*: subjects may fall under 91 and 92 for different purposes; provincial legs are not delegates; constitution should be read in a liberal manner; double aspect doctrine  |
| **Watson**(pro provinces) | - *Local Prohibition Reference*: Limits POGG and 91(2) - See “Lord Watson” |
| **Haldane**(pro provinces)  | - See “Lord Watson” - *Insurance Reference*: freedom to do business is civil right, regulation of particular trade/business falls under 92(13) - *Reference re Board of Commerce Act, 1919 & Combines and Fair Prices Act*: constrains POGG, 91(2) and 91(27) and expands 92(13)*- Snider*: limited POGG, 91(2) and 91(27)  |
| **Sankey** (pro feds) | - *Reference re Regulation and Control of Aeronautics in Canada:* broad interpretation of POGG and 132; method for interpreting Constitution - *Persons* case – living tree  |
| **Atkin** (pro provinces) | *- Proprietary Articles Trade Association v. AG Canada*: expands 91(27) and resurrects 91(2) in obiter - *Labour Conventions*: limits 132 and POGG, watertight compartments metaphor; treaty implementation- *AG British Columbia v. AG Canada (The Natural Products Marketing Act)* – limits 91(2), POGG  |

# Contributions of Judges from SCC

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| **Duff**  | - *Natural Products Marketing Act*: resurrects understanding of 91(2) from *Parsons*, discusses POGG – not sufficient to be national concern- *Eastern Terminal Elevator*: limits 91(2), expands 92(13), suggests use of 92(10)(c) for reg of grain trade  |
| **Anglin** (pro feds) | - *The King v. Eastern Terminal Elevator Co.* (dissent): Disagrees w/ Haldane’s judgments in *TEC* re: 91(2) and likes 91(2) in *Parsons*. Expands 91(2) and POGG (relies on Haldane’s explanation of *Russell* re: POGG in *TEC)*.- *Board of Commerce*: another unsuccessful attempt to retain meaningful authority for the federal order of government to regulate Canada’s economy under s. 91(2)  |
| **Rand** | - *Margarine Reference*: 91(27) |
| **Cartwright** | - *McKay*: DII  |
| **Martland** | - *McKay*: dissent – critical of DII - *Carnation, Manitoba Egg*: econ regulation - *CIGOL*: econ regulation, natural resources  |
| **Ritchie** | - *McNeil*: 92(13), provincial powers in crim realm - *Ref re Anti-Inflation Act*: POGG, agrees w/ Beetz |
| **Pigeon** | - *Ross*: paramountcy - *Agricultural Products Marketing Act*: econ regulation- *Caloil*: econ regulation, natural resources  |
| **Laskin** | - *Manitoba Egg*: econ regulation - *Agricultural Products Marketing Act*: econ regulation - *Central Canada Potash*: econ regulation, natural resources - *Dominion Stores* (dissent): econ regulation, natural resources- *McNeil*: 92(13), 91(27)- *Westendorp*: 91(27), provincial powers in crim realm *- Ref re Anti-Inflation Act*: POGG |
| **Dickson** | - *Multiple Access*: double aspect doctrine, paramountcy - *General Motors*: necessarily incidental - *CIGOL* (dissent): econ regulation, natural resources- *General Motors*: 91(2) |
| **Beetz** | **-** *Bell No 2*: reformulates DII - *Ref re Anti-Inflation Act* (dissent): POGG |
| **Etsey** | - *Dominion Stores*: econ regulation, natural resources  |
| **Lamer** | - *Hydro-Quebec* (dissent): 91(27) |
| **LeDain** | - *Zellerbach*: POGG  |
| **La Forest** | - *Bank of Montreal*: paramountcy - *RJR*: 91(27)- *Hydro-Quebec*: 91(27)- *Zellerbach* (dissent): POGG |
| **Sopinka** | - *Morgentaler*: pith and substance test |
| **McLachlin** | - *Lacombe*: necessarily incidental - *COPA*: test for DII - *PHS*: DII - *Ref re Securities Act*: 91(2)- *Assisted Human Reproduction Act*: 91(27) |
| **Iacobucci** | - *Hydro-Quebec* (dissent): 91(27) |
| **Binnie** | **-** *CWB*: reformulate DII |
| **LeBel** | - *CWB*: reformulate DII- *COPA*: dissent - *Ryan Estate*: DII, paramountcy - *Assisted Human Reproduction Act* (dissent): 91(27) |
| **Deschamps** | **-** *Ref re Employment Insurance*: living tree - *Lacombe*: dissents in favour of provinces - *COPA*: dissent - *Assisted Human Reproduction Act* (dissent): 92(27) |
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| **Cromwell** | - *Assisted Human Reproduction Ac*t (dissent): 91(27) |
| **Karatkatsanis** | - *Ryan Estate*: DII, paramountcy  |