EXAM STRATEGY NOTES

**FEDERALISM GUIDLINE/FRAMEWORK**

**PRELIMINARY**:

**A. First,** determine if there is prov AND fed leg? If there is **not both** fed and prov leg, you **cannot use**: Double Aspect (Validity), Operability. However, you **CAN** use: Necessarily incidental (Validity) + Obviously Validity in General, Interjurisdictional Immunity.

**B**. **ORDER OF ANALYSIS** -> **one piece of legislation**, you’ll only ever get up to applicability (but you might have to go to FICF)… 1. Validity, 2. IJI

-> **two pieces**: can go all the way: 1. Validity 2. Applicability 3. Operability \*4. (Maybe) FICF.. **HOWEVER**, if there is a **new core** that has not been defined yet, skip over IJI, and go to OPERABILITY.  **1. Is the legislation valid**? If so, it will either be provincial or federal, and **fits into 91 or 92**.

**A**. **Determining validity**: PITH & SUBSTANCE (**Morgentaller)** trying to find the **“MATTER”** of the legislation, to fit it into a head of power.

1. **Basic analytical framework**
2. Identify the “matter” of the impugned legislation. (A)
3. Determine which “class(es) of subjects” in ss. 91/92 that “matter” “comes within.” (B).
4. **General principles relating to “matter” identification**
5. The search is for the dominant or leading feature of the legislation, its “pith and substance.”
6. The approach must be flexible, and not technical or legalistic.
7. Both the purpose and the effect of the legislation are relevant, but **purpose** is the more important.

**B.** **CASES CAN ASSIST WITH DETERMINING HEAD OF POWER/SCOPE/HOW IT FITS**

\*Note: **Insurance Act Ref** -> for the most part, heads of power scope = fairly decided already, but some debate still exists. **Living Tree** approach may be used in interpreting scope.

\*Note: there is also a difference between spill-over effect with P&S, and NI: P&S, the legislation is mainly about X, but has some effect on other jurisdiction, while NI: it’s the provision of an overall valid piece of legislation that spills over.

-> **Eco Regulation Matters & PROVINCE**: AIM TEST (**Carnation**) determines whether falls under Prov/Fed Head (Property & Civil Rights, Private Local Nature, provisions over RESOURCES , etc. OR 91(2) **– first branch**.

**> Eco Regulation under 91(2) First Branch**: (Inter/international) **Klassen, Caloil**  **-> courts** willing to let fed eco regulation trench on prov with **NI** doctrine, as long as **main aim** is internat/interprov. However, **Dominion Stores** maybe a weird exception, showing that where there **similar/near identical** leg already in the province (mandatory), although you could go Klassen/Caloil route, court may prefer not disturbing the prov scheme.

-> **Natural Resources regulation**: AIM test still used and **CIGoil + Potash** both further **weaken** prov powers because of their interprov/international “aim”. Amendments in 1981: **response to these cases** (assures prov that wrt to their constitutionally mentioned resources, they can find loops around interprov/internat + indirect taxation problems.

-> **General Regulation of Trade**: sustained by **91(2) Second Branch (General Motors, Reference re Securities**) -> **5 step GUIDE** (basically ensuring that the legislation is general enough, and something **qualitatively different** from what the provinces could enact).

-> **Criminal law power** 91(27): can apply to **matters** that are of a **HEALTH/ENVIRONMENT/MORALITY**, when penalty + prohibition (**Margerine**)

\***Prohibition ->** (**R v Hydro –Quebec**) argument that it can be **fairly regulatory in nature** still and criminal law (odd case?)

\***Typically criminal purpose**: (**Assisted Human Reproduction**) possibly strengthened requirement that it has to be **real evil and reasonable apprehension of harm** (+causation element).

|  |  |
| --- | --- |
| **Valid** | **Invalid** |
| * + - * Part of regulatory/licensing scheme       * Preventative (instead of punitive – *Dupont, and the Nova Scotia*).       * Property *(Mcneal, Dawson*)       * Civil Consequences (*Chattergy*) | * Severe penalty * Targeting individuals, relying on CC language (*Morgentaller*) * Free-standing offence |

-> **Province & Moral/Public Order**: no guarantees, but provinces have had success in valid leg with the following:

->**POGG**: currently, three branches: **national concern** (4 criteria in **Crown Zellerbach) --** e.g. **aeronautics** (whole field is given to feds because of indivisibility).  **national emergency** (defined in **Inflation Act Ref**) **-> Emergencies Act 1988** (require announcement of “emergency”) **and residual/gap branch** (**Jones)**.

OTHER ASPECTS OF **VALIDITY**

-(2 pcs of LEG) Double Aspect: **(Multi Access, Hoge)** when two “valid” laws enacted (prov/fed), but overlap in a way: each has a different aspect (e.g. Federal for one purpose, Prov for another), **so long as they don’t OPERATE** at the same time, there will be no paramountcy conflict.

-(Provision in Valid Act)Necessarily incidental (ancillary): **(GM + Lacombe)** a provision oflegislation may still be upheld as valid where there is a **spill-over** effect onto another jurisdiction, and the whole legislation is valid itself (as long as it is **well-enough connected** (**rational connect/function)** to the rest of the valid legislation).

**2. Is the legislation applicable?** ONLY IF YOU HAVE **VALID GENERALLY WORDED (FED/PROV LEG** – open to both (**PHS**)) **that TRENCHES on the CORE** of another jurisdiction.

-If you have already defined core, don’t skip to operability.

-> **PHS**: gives some **factors** going into CORE of head of power.

-Core: **unassailable minimum content** (**Western Bank**)\*\***CWB** **warns/tries to limit IJI** (language of ACTUAL IMPAIRMENT + ORDER).

-**Two steps** (**COPA**): 1. **Trenching on core HEAD/AREA jurisdiction** 2. **Sufficiently serious** to use IJI?

-**Sufficiently Serious**: **Ryan Estate** provides some factors in what counts as “sufficiently serious”

**3. Is legislation operative?** ONLY IF YOU HAVE PASSED EVERYTHING SO FAR AND FED+PROV LEG.

-**5 Types of possible conflict between 2 legs**:

|  |  |  |
| --- | --- | --- |
| 1. **Duplication** | ✗ | *Multiple Access* |
| **2. Impossibly of dual compliance** | ✔ | *Rothman, M&D Farms, BMO, Multiple Access* |
| **3. Impossibility of dual effect** | ✔ | *M&D Farms, Manget, Rothman, Lafarge* |
| **4. Frustration of Federal Purpose** | ✔ | *BMO, Ryan Estates, Manget, Lafarge?* |
| **5. Federal intention to cover the field** | **?** – possibly | *Rothman? BMO, Ryan Estates, Lafarge?* |

**\*If accepted as doctrine**: **4. Is there a Federal Intention to Cover the Field**?

-**Needs to be Express Fed leg?** (BMO)

**DEVELOPMENT OF HEADS OF POWER OVER TIME:**

**POGG Development**

**Early Days** -> **Hodge + Russel**: POGG is extraordinarily broad and has nearly no limits, it’s thought of its own “head of power”, capable of sustaining legislation. But then **Local Prohibition (AG v ON)**, Watson reigns in POGG’s scope to matters that are “**unquestionably of national concern** and should not interfere with matters *truly local and provincial*” + **“textual approach”** to POGG -> *doesn’t get to trump anything since not in* ***enumerated class*** (hence not provinces). **Snider**: clarifies that **Russel** does not mean that Fed Leg, just by being to “general adv of Canada” will be justified without being brought into any 91 section (enumerated class). POGG is **national emergency power** (**Snider + Board of commerce**). Then **Aeronautics Ref** opens POGG back up: *THE THREE BRANCHES* (possibly the gap-bridging). Next, **Labour Conventions,** Atkin rejects national concern branch, back to **emergency** or subsumed under it (**Natural Products**).

**Current**: Left off with Duff’s understanding in Natural Products Marketing Ref -> limited POGG to national emergency (read Watson’s national concern as just first step to building emergency). Next, Inflation Act Ref -> opened up to independence/importance of national concern branch (2nd) .. Johanesen -> all of Aeronautics falls under “national concern” branch. Then Jones case -> upheld Fed Statute of Languages Act on “gap/residual branch”.

->Inflation Act: Differentiates between the two independent branches (concern/emergency). \*GAP branch -> for residual powers that are clearly federal but cannot be taken care of by another head of power.

**91(2) Development:**

**Early Days** -> JCPC ERA: **Parsons** > 91(2) should not include **regulation of particular prov industries** (had to narrow it down because it seemed broad). Two branches: **interprov/internat** + **national importance**. **Local Prohibition:** 91(2) cannot be used to sustain **prohibitory** legislation (because it says “**regulation of T&C”**). **Board of Commerce:** Haldane tried to weaken Fed ability to regulate eco by saying **91(2)** doesn’t sustain any legislation on its own. **Snider**: further restricted 91(2) to not regulate **labour relations** (**presumably** provincial – civil rights: contractual rights between emps and emplyrs). **91(2)** denied in **Eastern Terminal**  🡪 court’s early position on **NOT wanting to give NI effect** when it impacted fairly clearly **provincial** matters – possibly just a product of the ‘Haldane Era’ where provinces dominating feds). Then **PATA** reinstates 91(2) from *PARSONS* (**reject’s Haldane’s** view that it **cannot be used alone**), so it means *interprov/internat, national importance* on its own. Finally, **Natural Prods**: puts everything together so far and uses **Parsons/Pata** full-force 91(2) /w both branches, but *accepts* that it can’t target **particularly prov industries or civil rights (labour relations within the province**) + concurs with **Eastern Terminal** in not letting Parliament to rely too much on *NI* doctrine.

**Current:** Basically the same as natural products: first branch – interprov/internat (**Klassen, Caloil, Dominion Stores**) – courts seem more open to infringement **using NI** on provincial juris (property/civil rights, works etc) and second branch: (**GM + Securities Act Ref**) -> has to involve essentially *distinct* federal leg that the provinces couldn’t create.

**Criminal Law Power** **Development** 91(27): **PATA**: rejected the *Haldane-era* **fixed**/frozen criminal law power (stuck in morality of the late 1800’s), and formalized to prohibition + penalty. **Snider**: Feds can’t regulate prov matters and make it sound federal by putting “teeth” (penalty) to the prohibition. Then **Margarine** adds **public purpose** (health, environment, morality). Eventually it’s stretched to capture some *regulatory* things (**Hydro Quebec**).

Constituional Law – FIRST SEMESTER

Chapter 2

## Triggering Judicial Review:

## 1. Private Litigation

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

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

## Standing

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

1. **Serious issue** has been raised: must have merit, warrant the time of the court, i.e. might *really be* unconstitutional.
2. **Direct effect/genuine interest:** individual challenger must be affected by the challenged law **or** have a true interest in its constitutionality or not. Must really ‘matter’ to you. Show action, and for a history. (need good arguing and a solid evidentiary record)
3. **No other reasonable/effective means** of getting issue into the court. i.e. can wait for an ordinary proceeding?

## Mootness

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

## Ripeness

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

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

-cannot challenge a bill through the courts

## Political Questions Doctrine – US only

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

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

## 2. References

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

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

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

Chapter 4 – 19thc courts under influence - JCPC

\*Note: education is given to provinces under s93. Non-renewable resources under 92(a) since 1982. 95 -> parliament and provinces get immigration & agriculture (Immigration mostly fed?). s101 creates SCC by feds, and fed courts, tax courts, etc.

**We deal with 4 heads of power**: POGG, 91(2): regulation of trade & commerce, 91(27) Fed criminal law power, and 92(13) property and civil rights. The judges: ***Watson, Haldane, Sankey, and Atkin*.** *In this chapter/era, the JCPC interpreted 91/92 in a way that decentralized power, giving preference to autonomy of the provinces*.

**Origins of federalism doctrines**: *paramountcy, validity and operability* came about in these cases.

**This chapter the main judge decentralizing power = WATSON**.

Early seeds of Paramountcy and Validity doctrines in JCPC era.

* **Parsons**: *91(2) should not be read to include regulation of the particular industries or trade within a province*; *Q’s of validity involve a* ***matter-analysis*** *and then fitting into head of power. Preventing conflict can be done by reading-down heads of power*.
  + Facts: Parsons had insurance with Ontario insurer, and fire occurred. The Innsurer could have gotten around the standard provisions, if you give the insured notice (special typeface), but they forgot. When Insured came to collect, the insurer tried to get out by arguing that the statutory provisions did not bind them because they were *ultra vires* the provincial legislature. Argument was that it’s the fed’s power under 91(2) T&C.
  + Decision: Ontario’s legislation is valid/*intra vires*.
  + Analysis: **Two approaches**: you can look at the **matter** as one of contracts (civil relations & property), or as the regulation of fire insurance industry. Here they prevent the feds from winning by **reading down** federal heads of power. **Two step process**: 1. Determine the matter of the legislation 2. Under which heads of power does it fall? (if it can fall under prov, you check to see if it falls under federal. If conflict, you can read down head of power). Answer: matter can fall under provincial head of power 92(13), but not under 91(2) because it’s too broad -> **Textual approach**.
  + Obiter: *narrows down* ***91(2) to: Interprovincial, international trade and possibly matters of national importance***. \*Ironic because they stated in the same case says it should do case-by-case analysis of division of powers.
* **\*Russel**: (NOT in readings, but good background) -> *established an ‘opt-in’ scheme for provincial governments instead of out-right prohibition under fed temperance legislation. Generally falls within POGG power -> validity challenge = unsuccessful*…the leg was *intra vires*. PROHIBTORY LEG.

Origin of the DOUBLE ASPECT doctrine (question of validity + OP):

* **Hodge**: *the province can enact legislation regulating liquor (valid under provincial heads of power for one purpose/under one aspect of a provincial head of power, and the feds can enact also valid legislation for another aspect under a federal head of power* – they just cannot (or operate?) at the same time (while fed one in force – or paramountcy).
  + Facts: Liquor license gave liquor commissioners power to regulate various things, including the offences H and F charged under (allowing billiards to be played, and operating tavern w/o license). The regulatory federal legislation outcome of Russel was used to argue that the provincial legislation binding H&F was *ultra vires* (province cannot regulate liquor) and delegation claim.
  + Analysis: The **matter** analyzed is retail trade in liquor. The matter falls under provincial heads of power (shops, salloons & taverns, property & civil rights, matters of local & private nature), but it also falls under POGG in *Russel*. Just because *Russel* said that feds can prohibit the trade (where activated), doesn’t mean exclusively federal. **Double aspect** allows both to be valid, just not operable at the same time (protects the province’s autonomy), where the feg leg is opted-in.
  + Notes: **BNA act considered just a statute**, not a special instrument, and the provinces are considered equal with Parliament – just legislating for different purposes.

Further narrowing of federal powers in *Local Prohibition* – POGG powers reduced (in obiter): \*further protecting provincial autonomy…

* **Local Prohibition (AG v ON):** *Watson narrowed down the POGG power’s scope to matters that are unquestionably of national concern, and should not interfere with truly local and provincial matters*.
* **Analysis**: Federal side: *Russel said fed temp leg was valid.* The new temperance legislation does not fall under 91(2) (regulation of T&C) because this is *regulatory,* and hence will not sustain **prohibitory approach** to liquor, which leaves POGG as the only option, but POGG doesn’t win out over provinces, **because of strict textual approach** -> reads 91/92 heads of power as exclusive and in event of overlap, feds win. But POGG doesn’t get to trump anything, it’s not in the enumerated classes. Provincial side: 92(9) the regulation of saloons/taverns in order to raise money for prov/local purposes will not get you prohibitory power. 92(8) municipal institutions doesn’t help either (power given before confederation? - no). DOES fall under **92(13,16):** 13 -> property and civil rights (alcohol = bottles), and it is a local/private matter (16). So, provinces = reg + prohib power. **IF** valid prov and fed prohibitory leg, they can co-exist (operate), but once fed enacted in a province, paramountcy takes over.
* **Decision**: prov leg upheld and intra vires..

**Feds** **Provinces**

|  |  |  |
| --- | --- | --- |
| Prohibition | ✔ | ✔ |
| Regulation | ✖ | ✔ |

**Compact Theory**: limited significance in Canadian federalism, but popular in Quebec. Argument that Quebec had a lot of bargaining power, because Canada is the ‘result of a contract’. This is factually inaccurate, because there was no Quebec from the beginning -> not factual bargaining unit.

**Mowat vs MacDonald**: Mowat was premier of Ontario and advocated for control in the hands of the provinces, and eventually won against centralization (strong feds) by the decisions of the JCPC. These cases reduced the power of the feds, and enforced the autonomy of provinces (developed from context of liquor leg).

**SCC** vs **JCPC**: SCC shared sympathies with Maconald’s strong centralized government, but constitutionally could not bring this into fruition because of the reign of the JCPC.

Chapter 5 – The Haldane era, Econ Regulation

**Haldane on Lord Watson**: As Haldane takes over as leading judge in JCPC, offers these comments. Although JCPC took textual approach, Watson was a contributor to the evolution of federalism in favour of strong provinces. H argued W was expounding “REAL” constitution of Canada (it was a skeleton constitution before.. judge’s job is a statesman). He filled in all sorts of gaps in the constitution. He called them “masterly” judgments, and had support of provinces in mind (clear from the cases in ch 4).

The next cases continue the trend in favour of strong provincial autonomy over narrow federal heads of power. Feds set up next Act in order to transition from war-time economy.

* **Reference re The Board of Commerce Act 1919 & The Combines and Fair Prices Act 1919**: *the decision severely weakens fed’s ability to regulate the eco*nomy*. Further strengthens presumption of province’s 92(13) ability to regulate over particular industries/business* (freedom to contract/do business).
  + Facts: Both of these acts passed by feds, and objective was to restrict collusion, monopolies, mergers, unfair profits, and hoarding of necessities. The board is set up to investigate and make orders. This case: an order about profit margins for retail sales & clothing…
  + Q: of the validity of the C&FP Act, which gave the board the power.
  + Analysis [**Haldane**] three possible fed avenues rejected. 1. **91(2)** (T&C): might not sustain any federal legislation on its own; its only use was to support legislation anchored in other sections. \*[Anglin 91(2) would’ve sustained] 2. **91(27)** (Crim law power): Crim law has fixed domain to what was said in 1867, and it deals with “true crimes”. The mere existence of “offences” (punishment under the above Act) does not make something justified under 91(27) – “using the teeth” as justification. 3. **POGG**: only available in times of national emergency (e.g. war, famine), but no evidence of this in the present case.
  + The legislation is **ultra vires** fed jurisdiction, because **the matter** is local retail industry, which falls under **92(13)**, which means prov head of power prevails and strikes out the fed legislation (invalid).
  + Decision: fed leg ultravires/invalid.
* **Toronto Electric Comissioners v Snider** (1925): *presumption in favour of provinces regulating labour relations under 92(13) on the basis of their contractual nature*. *Federal powers weakened*.
  + Facts: Feds passed *Industrial Disputes Investigation Act*, applied to mining (prov) & transport (if interprovincial = federal) & public service utilities (fed if national, prov if not) & communication (same thing). The legislation enabled employees/employers to resolve disputes under a labour board, but no strike allowed then. TEC called in dispute board, and the act was challenged as *ultra vires* prov power.
  + Q: is the act justified by 91(2), 91(27), or POGG, and hence valid?
  + Analysis: **91(27)** argument: it’s obvious that the provision deals with *civil rights* (matter), and does not intend to create a new crime. **No bootstrapping** on offences (creating offence & then regulating based on its existence). **91(2)**: T&C does not allow feds to regulate civil rights (contractual relations of employers/employees of particular industries). **POGG** argument: *Russel* does **not** establish that fed legislation, simply by being to general advantage of Canada, can be justified, even if it cannot be brought within any section 91. POGG is national emergency power. Anything falling under 92 is hence exclusively provincial.
  + Decision: legislation is invalid/ultra vires.

**Haldane’s effects on Federalism**: 1.) 92(13) gives prov leg PRESUMPTIVE jurisdiction over various businesses and industries. The feds can only overcome this if they point to PARTICULAR head of power regulating a business. 2.) 92(17) Crim law power has to involve something deeper than just anything with penalty attached. If only giving teeth to things (e.g. eco regulation), it is not legit federal crim law power. 3) Ability to regulate labour relations = function of jurisdiction over particular industry.

* **The King v Eastern Terminal Elevator Co [Necessarily incidental appears -applicability]** *Parliament still cannot legislate in some trades/businesses when their regulation of that thing is incidental to the regulation of international/interprovincial trade* (cannot be justified on this basis here); *Feds must cooperate with provinces in national schemes reaching into prov juris.* 
  + Facts: Fed leg = *Grain Act*…comprehensive for huge role in economy. Changes introduced, due to complaints, related to permissible profit margins of the owners of the grain terminal elevators in Thunderbay. The Winnipeg grain shipped off to Thunderbay, which is sent elsewhere. One Eastern Elevator owner snubbed feds and argued it was *ultra vires* fed juris.
  + Analysis: [**Anglin Dissent** – starts with **forest**] -> *intra vires* based on 91(2) or POGG. Does not understand how Haldane could see 91(2) as applicable (economy). Defers, tries POGG: cannot use Watson’s POGG, but under Haldane’s rules, it is a national emergency (eco could collapse). Feds regulation this **more efficiently** -> Laskin.
  + [**Duff Majority** – **tress**] -> This is a sheerly local matter (falls under 92(13), identifies two “fallacies”: 1. Evidence that high % of grain moving in international trade justifies feds interaction (same could be said when only low %) 2. If provs can’t move grain internationally and feds can, the feds should regulate *everything*.
  + Decision: Legislation is *ultra vires*, but feds could use 92(1)(c) to declare them works if they want, proceed this way.

Chapter 6 – Depression era, new deal

\*In this chapter, living tree Sankey (JCPC) and others turn around the Haldane era crippling of feds.

**Proprietary Articles Trade Assocation v AG Canada (PATA)**: *reinstatement of the understanding of 91(2) from PARSONS* *and rejection of Haldane’s limitation of 91(27), plus new test*.

* Facts: sort of like board of commerce, won’t be able to establish detailed regulatory regime.
* Q: Issue of prohibition in Criminal Code, and participation in Combines.. (Combines Investigation Act & CC)
* Analysis: **Rejection of Haldane’s treatment of 91(27)**. Criminal law power can’t be based on intuition of what was “true crime”, fixed at conception of BNA act: objective test is just determining whether a) penalty is attached b) prohibited act. Cannot freeze the crim law/scope. **Rejection of Haldane’s treatment of 91(2)**. This is not a dependent head of power, but can be used alone. Has the meaning of *Parsons* again (*interprovincial, international, and matters of national importance*).
* Decision: both acts are *intra vires* fed jurisdiction (valid).

**Sankey’s DIFFERENT approach:** to judicial review under BNA Act, preferring text over doctrine, and considering the Act a “great constitutional charter”, not just ordinary statute as in *Hodge*. Uses **purposive approach**, and he thinks the Act’s purpose = strong central govt, /w holistic instead of piecemeal analysis. Also acknowledges **Aeronautics power** under feds (s132).

* **Aeronautics Reference**: *Aeronautics given valid status as federal power under s132, POGG power clarified as not narrow, and purpose of BNA act = federal leaning*.
  + Facts: Treaties that we “ratify” must be enacted by Parliament. S132 still signifies that cannot independently enter treaties, but UK has to enter for Canada. Feds enact comprehensive reg regime with respect to aeronautics, after UK entered treaty, but went further than obligations required.
  + Analysis: [Sankey]: reads the **main purpose** of the original text (not just ordinary statute) as creating a *strong federal government*, rejecting Haldane/Waston. **Legislation on basis of s132**: *constitutionally valid* -> Parliament obliged because of UK treaty. Also throws in 91(2), 91(5 post), and (7 defence), and **POGG**: NOT just available in national emergencies. **Big picture approach** (like Anglin – ‘the forest’)…. **1.) Emergency** AND **2.) National Concern** and MAYBE **3.) Gap bridging function (if you can’t find anything anywhere)**.
  + Decision: Act is intra vires fed power/valid.

**Depression context:** Bennet’s “new deal” contained batch of 8 statutes (to assist those suffering) 2 of them about agricultural issues (*natural products*) dealing with primary market that is outside of province in which produced, and statutes on working/industrial conditions (limiting work hours, unemployment insurance, wages, etc). **Out of 8, only 3 survive** (all 4 dealing with labuor down). *Whatever Sankey said not realized by JCPC*.

**Canada (AG) v Ontario (AG) – Labour Conventions Case 1937**: *the constitutional power of s132 does not grant the Feds an ability to pass “treaty legislation” than it would otherwise have under Canadian federal division of powers; POGG national concern power denied*.

* Facts: Canada ratified three conventions prepared by ILO. Parliament passed three laws implementing the details of the treaty to give effect to it domestically (Rest & Industrial undertakings Act, The Min Wage Act, Limitation of Hours of Work Act). Provinces led by Ont. Argued unconstitutional -- provincial jurisdiction 92(13).
* Analysis: s132 does not apply when we enter treaties on our own behalf, which was about empire treaties. Argued the matter was “implementation of treaty obligations”.. Rejected: **No such thing as “treaty legislation”, as such**. *Every treaty implementation must be subject to Prov or Fed legislatures, under the heads of power.* Also rejected “SPIRIT” of s132 argument. *National Interest branch of POGG* argument: Atkin rejects and says there **no national concern branch**, **just emergency understanding**.
* Decision: All three acts are ULTRA VIRES.
* Note: Gives us the metaphor of **water-tight compartments** (conception of federalism). **ATKIN**

**Implications of Labour Conventions**: the ability of Feds to enter into treaties is HAMPERED, at least when treaties deal with jurisdiction assigned to provincial governments. Three things the feds can/have to do: 1. *Federal state clauses*: It will do whatever it can to ensure the provincial parts are handled by provinces 2. *Reservation Clauses*: Partially-in (say ‘we have no juris where province concerned). 3. *Consult extensively* before entering.

**-**Duff about 91(2) **NECESSARILY INCIDENTAL HERE AS WELL.**

**SCC.. AG (BC) v AG (Canada) - Natural Products Marketing Act**:  *resurrection of parsons 91(2) which means that it regulates interprov, international trade, general regulation of trade for the dominion (not specific), doctrinal willingness to accept general regulation to some extent*, *but the legislation is caught by what parliament can’t do: regulate interprov trade, specific businesses/commodities; National concern branch of POGG subsumed under national emergency, as in Labour Conventions.*

* Facts: One of Canada’s ‘new deal’ statutes, pkg to try and help farmers. Thrust was to establish marketing regime for natural products grown in various provinces, the main market of which was out of province/country. Provinces wanted this help, and even enacted parallel legislation.
* Analysis**: [Duff] 91(2)** “general regulation of trade” does not comprise the regulation of particular trades or occupations/particular business, nor particular classes of commodities. But, 91(2) **does** regulate *interprov and international trade* (**PARSONS)**. However, *Eastern Terminal* reasons apply: there is SOME external trade (and production), but 91(2) cannot catch the whole intra-provincial activity (**NECESSSARILY INCIDENTAL:** Parliament can only rely on the doctrine to a certain extent).Duff also resurrects the matters of *national concern* meaning of 91(2), but not relevant here. **POGG**-> adopts the *Labour Conventions* version of POGG: There is no national concern branch, just emergency.
* Decision: Act is ULTRA VIRES.

Significance: Affirming the watertight compartments, even when trying to co-operate and respect boundaries, and develop interlocking/parallel leg schemes it is a serious doctrine – no overlap tolerated.

Chapter 8 – Interpreting Division of Powers

**R. Simeon, “Criteria for Choice in a Federal System”**:

1. Community: In dividing up authority/power between national/regional, one could do so on the basis of concerns of different **territorially defined communities** (here the regional are provinces). Three kinds: 1)*Country building* – we’re all Canadian, bigger picture; 2) *Province Building*: how we think of ourselves in terms of Ontarians; 3) *French & Rest of Canada Building*: Prioritizes how Quebecers govern themselves and the rest of Canada. E.g. Provincial autonomy for JCPC judges?
2. Functional Efficiency: What matters is delivering **efficiency and effectiveness**. Focuses on economies to scale. Usually favours *national authority*. Flipside: when you do things only nationally, less sensitive to local needs. Watertight compartments. E.g. Anglin in Terminal elevators?
3. Democracy: does not indicate whether something should be left to provinces or feds, many different conceptions. Could be majority rule, or basic rights and freedoms, electoral participation. E.g. if basic freedoms and rights -> you’d prefer dispersing power down to provinces… or maybe opposite? (It’s harder to escape reign of local government sometimes).

# I. Validity:

**Three doctrines**: Pith & Substance, Double Aspect, and Necessarily Incidental (or *Ancillary*).

**K. Swinton, *The Supreme Court and Canadian Federalism*: The Laskin-Dickson Years** (1990):

-> standard morgentaller approach

**W.R Lederman “Classification of Laws and the BNA Act”** (1981):

* Try to slot it in a head of power, and if there is a conflict, you look to the most important features, if not, go to simean’s 3 factors to see which effect would be best (comm, fe, demos)
* *Thesis*: *that a rule of law for purposes of distribution of legislative powers (91/92) is to be classified by that feature of its meaning which is judged* ***the MOST IMPORTANT one in that respect*. (which is best -> COMMUNITY , FE, DEMOS -> simian)**
  + **Total meaning of the law**.

**Pith and Substance:**

The core “matter” of the impugned legislation, which must find a home in a head of power.

**R v Morgentaller** (1993): *Provincial Medical Services Act was ultra vires the province because it is criminal law power 91(27) in PITH & SUBSTANCE*. *(Not about constitutional challenge)*. *No one part of the “matter identification” trumps the rest: legislative purpose can be trumped by other factors*.

* Facts: Prov power over health is contained in 92(7 – Hosptials), (3 - Over medical profession and practice of medicine) and (16 – Health matters within province). Criminal law s251, which criminalized abortion (was **valid** federal leg, even though incidental effects on health care) was struck down by s7 of charter. M announced he was going to commence with abortions, and legislature first passed some *regulations*, which he challenged on Admin grounds. Then they pass a new statute (which is the one of this case). *Statement of purpose*: “prohibiting privatization & keeping high quality services”… list of medical services that can ONLY be performed in an accredited hospital, and if not, denial of coverage.
* Analysis: **Most of the case is spent on step 1 (the matter),** because this is the crux of the case (whether it’s about health care -> provinces easily, or criminal law -> feds easily) – most heads of power pretty well defined by now. **Core of matter**: not concerned with *incidental effects* (not the dominant characteristic). The judges basically ignore the *purpose clause* of the statute -> other factors indicate that matter is criminal:
  + *Hansard discussions, parliament had the validity for such a law under crim power, duplication of crim code provision, course of events (quickness of passing the leg in response), actual evidence of stated objective absent (ensure quality/reduce costs), no link between services listed, severity of penal sanctions.*
* Decision: Thus, the matter is criminal law power, belonging to feds 91(27), and the NSA is invalid (ultra vires).

**Doctrine of Colourability**: found in M…where the legislature dresses up leg to appear valid, but it really in substance is not. Spoinka in *M* decided not to use it (perhaps slightly pejorative?).

**Framework out of *Morgentaller***.

1. **Basic analytical framework**
2. Identify the “matter” of the impugned legislation.
3. Determine which “class(es) of subjects” in ss. 91/92 that “matter” “comes within.”
4. **General principles relating to “matter” identification**
5. The search is for the dominant or leading feature of the legislation, its “pith and substance.”
6. The approach must be flexible, and not technical or legalistic.
7. Both the purpose and the effect of the legislation are relevant, but **purpose** is the more important.
8. **Factors to be considered in identifying the “matter” (not exhaustive)**
   1. **legal effect**: how the legislation as a whole affects rights and liabilities of those subject to its terms.. what change in law occurs?
   2. **practical effect**: beyond legal – social and economic purposes too. What is it *actually* doing? Is it different from what leg is saying it does?
   3. **course of events** leading to enactment
   4. **legislative history**, including Hansard – (part of purpose):
   5. **similarity (or lack thereof) to legislation enacted** by the other order of government: if there is fed leg in this area, might be suspicious for province to enact similar leg
   6. **judicial precedents** in cases involving similar legislation: you can check to see the characterization of the judicial precedents…
   7. **fit** (or lack thereof) between impugned legislation and purpose proffered by enacting legislature
   8. **presence/absence of studies** and other evidence supporting proffered purpose

\*Exception to the rule that you don’t get debate about the scope of heads of power (one of the statutes surviving the ‘new deal’ (ch6) = unemployment insurance.. new fed authority).

**Refernce Re Employment Insurance Act** s22&23: *Living tree approach used to allow the “matter” to fall within the scope of the federal unemployment insurance head of power (95)*.

* Facts: Two amendments to the act ’71 -> **maternity leave benefits**, and ’84 -> **paternal leave benefits**. Quebec challenges the leave benefits as unconstitutional, because it encroaches on 92(13) and 92(16).
* Analysis: **Matter ->** Feds characterization wins over prov: that these are mechanisms for providing replacement income, when interruption of child comes. But there is still debate about **scope**: whether fed unemp insurance as a head of power catches the “matter”. Que’s argument: features of the provision have to include **involuntary interruption** and **have to be available for work**. They define the leg in a way that allows it to apply using the **living tree** approach **vs originalist** (Que): progressive approach means the meaning of head of power has to adapt to social/labour changes. **Social risk** is involved, which is a great cost to society (policy reason).
* Decision: these employment insurance provisions are ***within* fed leg jurisdiction**.
* **Note: Feds reached agreement with prov after, even though valid fed leg. Also, confession that if federalism issue falls to court, they engage in their own politics/conceptions of federalism -> these disputes should mainly fall to govt (Deschamps ^ , who later becomes defender of prov autonomy).**

**Double Aspect Doctrine:**

The validity of laws that can be passed under a federal aspect and provincial.

**W.R. Lederman, “Classification of Laws and the BNA ACT”**: There are a few ways to try and reduce overlap, e.g. mutual modification, determining which features are most important. D**ouble-aspect** -> When federal and prov laws are valid, and features equally important, they can both be validly enacted, unless you get some sort of conflict (e.g. paramountcy applies).

There is a Q of Applicability + Operability – focus: Validity (DAD)

**Multiple Access** **Ltd v McCutcheon**: *federal and provincial legislation can both be valid when both of their fed/prov aspects are equally important, as long as no conflict occurs*.

* Facts: province is given 92(11) – incorporation of companies /w prov objects (carrying out business that is regulated by prov) and Parliament has federally incorporated companies. Ontario leg has jurisdiction over securities industry, and has *Securities Act*, dealing with insider trading**,** also limited by the *Federal Act* (for fed inc co’s). Defendants chose federal (b/c of Limitations Act).
* Analysis: Standard P&S analysis -> **the matter** of legislation: **company law** (feds), and **regulation of securities industry** (prov), both equally important and fall under prov & federal heads of power. **Thus,** they are both valid pieces of legislation: the prov can legislate under one aspect, and the feds under another: **double-aspect**.

**Necessarily Incidental:**

Another way for fed/prov legs to enact legislation that falls outside of its jurisdiction (Pith & Substance was one.. you have valid legislation which has matter belonging to its jurisdiction, but incidental/spill over effects onto another are tolerated): here, you focus on **validity of a particular part of a statute**. Can it be upheld by a valid statute?

***Note: De Jure* co-concurrency**: in s95 (e.g. Immigration/Agriculture), but ***Functional/De Facto* concurrency** = through the use of various tools.

**Note**: Duff in *Natural Products Reference* used some of this language and early attempts in *Terminal Elevators* to try save new provisions.

**General Motors of Canada Ltd. v City National Leasing**: *spillover effect tolerated from valid Act as a whole that has a provision which encroaches on another jurisdiction, as long as the test is met.*

* Facts: CL is suing GM over apparently discriminatory pricing under federal *Combines Investigation Act*, s33.1 which authorizes civil action. GM argues this provision is *ultra vires* Parliament, because encroaches on 92(13) – property/civil rights. No question about validity of the whole fed Act.
* Q: does the *ancillary/NI doctrine save the provision*?
* Analysis: **Three part test**:
  + 1. To what extent does the provision impinge on the other jurisdiction/head of power (92(13)
  + 2. Is the whole Act valid? If so, proceed to 3, if not, you can stop here.
  + 3. The nature of the relationship: test of whether the provision is **sufficiently integrated** into the rest of the act depends on answer to 1: if high degree of encroachment, you need stronger relationship, e.g. “truly integral”, but if smaller, “rational/functional connection” suffices.
* 2 not a question here, 1: impingement not significant (feds already have civil action powers, scope is very limited, merely remedial) and 3: functional/rational connection suffices, which it passes b/c remedies make the prohibitions in Act much more effective.

This is a **challenge of validity**, while **COPA = applicability**.

**Lacombe** **v Quebec**: *The provincial zoning legislation fails the rational connection test to the whole Act, and hence the provision is ultra vires*.

* Facts: Prov side you get 92(13), which includes zoning (by-laws). Feds get Aeronautics (was 132 – whole field now Parliament’s and location of aerodroms = under POGG). L provides areo taxi out of the lake, for which he has a fed license (stopped before paramountcy). City got injunction against him, and he challenged validity of the particular zoning by-law of the Act.
* Analysis: **Three part test**: 1. Encroachment is minimal (reasons lacking) 2. The whole Act is not challenged (zoning = legit municipal delegated from province) 3. Therefore **rational/functional connection** test: you can’t fit this law prohibiting aerodromes in one area under general zoning regime, because it treats similar kinds of property different, and different property similarly. Not rationally connected (further the aims of zoning leg).

**B. Ryder, “The demise and rise of the classical paradigm in Canadian Federalism: Promoting autonomy for the provinces and first nations”** (1991): Classical approach: watertight compartments, no spill-over, and reading down legislation. Encourages judicial activism. Often the response to legislation interfering with **free market.** Modern approach: overlap exits, and incidental effects are fine. Judicial restraint. *Problem*: danger of paramountcy trumping provincial autonomy. Often responds more to legislation messing with **social or moral order** (asides from the temporal connection: JCPC = classic, SCC = modern).

# II. Applicability (DII):

In these questions, the doctrine of interjurisdictional immunity is the analytical tool used.

**Note**: the three validity doctrines create fair bit of overlap, while DII goes in the opposite direction (avoids concurrency). Tool usually going along with it: *reading down*. For this you need: **valid provincial law that is GENERALLY worded, which applies to the CORE of a federal HEAD OF POWER/jurisdiction (Goes the other way too).**

\***Most updated test found in COPA**. \*CAN APPLY whether there is legislation in the other field or not…whereas operability requires both valid legislations.

**McKay v The Queen**: *provincial power over property, although valid, cannot apply to federal election signs, because this is exclusive fed jurisdiction – only they can prohibit*.

* Facts: M’s city enacted a **GENERALLY WORDED** by-law prohibiting most lawn signs, except for a few like sale signs. No question of the validity of this by-law, under provincial 92(16 – generally, local and private matters of prov), but problem of the enforcement in the context of federal election campaigns.
* Analysis: Thought-experiment: if prov were to enact this by-law directly targeting fed election signs, it would be obviously inapplicable, so they cannot do it **indirectly** either.
* Decision: in favour of M, by-law inapplicable to fed signs.
* Note: early reasoning, not how they actually do the test now. There was no specific fed head of power used as well.

**Bell Canada v Quebec #2**: *travels along path of Bell#1 and McKay*: *GENERALLY worded, valid provincial legislation cannot apply to a federal undertaking, when these laws would* ***affect essential elements*** *of these undertakings; the idea of a* ***basic, minimum, unassailable content of (core)*** *federal head of power -* note, he doesn’t use the word “core” (Western Bank).

* Facts: dealing with provincial minimum wage legislation under 92(10)(a). Quebec tried to force the GENERALLY WORDED min wage leg on Bell, which is a federally incorporated company. Bell acknowledged the *validity* of min wage leg (prov juris), but it is **inapplicable** to the fed company.
* Analysis: [Betts] the valid, general provincial leg cannot apply to a federaly incorporated company, when they attack a **basic unassailable minimum content of federal jurisdiction (basically core)**. Wage rates are essential part of an undertaking, and working conditions are as well (Bell#1) – fall under **the core**. Labour relations are generally under 92(13), but cannot interfere with the **vital/integral** element of a fed regulated industry.
* Address Hogg’s arguments from Bell#1: 1. Contrary to modern federalism (no overlap allowed) and 2. We don’t even need it, if we have paramountcy, since it only protects Feds
  + **Response** to 1: 91 and 92 clearly indicate exclusivity of heads of power. What happened in Bell #1 was appropriate.
  + **Response** to 2: it is terribly messy if bell/other federal undertakings are subject to two different regimes/all sorts of litigation. It’s better for the company to know what the rules are with one player.

**Before Western Bank**: *Irwin/Grant & Toy*: tried to make a test for when generally worded prov leg applies to fed undertaking: **direct v indirect**. Tries to reduce frequency of the DII invoked against province. If prov leg applies directly to fed undertaking: *lower* standard. If applies indirectly, *higher* standard.

***Ordon Estate:*** *clarifies that DII applies* ***generally****, not about federal undertakings, but a* ***core area of jurisdiction***, and can protect any head of power.

**Canadian Western Bank v The Queen in Right of Alberta**: *the provincial legislation does not trench on a core area of fed jurisdiction over banking, by targeting banks with its valid insurance regulating legislation*; *new NARROW approach/cautions to DII*.

* Facts: Bank (regulated federally) got feds to permit the sale of “piece of mind insurance”, but AB had legislation regulation the selling of insurance (ch5 – insurance business = prov). Prov leg unquestioned as valid (although it could have been analyzed under validity and Ancillary doctrine – clearly says “APPLIES TO BANKS” – not generally worded).
* Analysis: The provincial legislation (dealing with property and civil rights) was considered valid but did not trench on a **core** **area** of federal jurisdiction over banks. *The selling of piece of mind insurance does not belong to the core of banking.*
* **\*DII after Western Bank (from the obiter)**: DII = legit doctrine grounded in text (exclusivity), and some fed principles. It should, in theory, work **both ways**. But they go the **Hogg/Dickson (D) route**: DII is inconsistent with **modern federalism** (lots of overlap now), DII carves out **legislative vacuums**, and is also **unnecessary** (paramountcy). 1. **Requires judges to define CORE areas:** much uncertainty/time.
* 2. **Runs the risk of creating vacuums in law**.
* It also has **centralizing tendencies**… because of favour for feds.
* [Binnie & Labelle]: have to be more **cautious in application**, two changes:
  + 1. **Language**: every case needs to involve **impairment** (real impact) of a core jurisdiction (rather than just ‘affecting’).
  + 2. **Order**: switches the framework for addressing the doctrines to some extent. **IF YOU CAN** skip over DII, you do so: you need both orders legislating in the area. Also, if it’s in a NEW AREA, you skip the DII and go to OPP (might have to go back to DII).

**Deals with DII**..b/c **VALID, GENERALLY WORDED prov leg** (unlike Lacombe.. which specifically prohibited aerodromes, which was validity).

**COPA v Quebec:** *adds a two-step analytical framework to Western Bank: 1. Does the prov leg encroach on CORE of federal head of power? 2. If so, is it sufficiently SERIOUS? – note: no fed leg regulating the private aerodrome here*.

* Facts: provincial land designated for agricultural purposes only, and individuals established private aerodrome without permission. Applicability question: can the provincial legislation be applied to COPA, which is doing something under fed jurisdiction (POGG).
* Decision: province cannot apply its valid, generally worded leg (nothing mentions aerodrome) to COPA.
* Analysis [M]: **Two steps**:

1. You look to prov leg, and ask if applied, will it result in **trenching** on a **core area of fed juris**.

* + 2. Determine whether the encroachment is **sufficiently serious** to invoke DII.
* Still about trenching on a *head of power*, not just the *activity* of putting up aerodromes. **Significant shift**: now it really is about protecting *jurisdiction rather than entities falling within juris*.
* Applied: 1. Aerodrome is part of the core, and applying agricultural leg to the aerodrome trenches on fed protected core of aeronautics (prohibits in certain areas). **2. Encroachment is sufficiently serious: forces Parliament to take significant leg action to overcome prov leg.** (Indication of what sufficiently serious encroachment would be).

\*Province using DII…

**Canada v PHS Community Services Society** **(In Cite)**: *Application of the COPA DII test, and there is a failure to identify core of health in province that fed CDSA would be trenching on* – *fed leg intra vires*. *CAUTION exercised from Western Bank*.

* Facts: here DII used to defend provincial head of power from fed leg *CDSA*. *In Cite* injection site was providing safe injection of drugs, without anyone being prosecuted. In Cite argues *CDSA* cannot apply to core of prov health power.
* Analysis: Applying COPA test for DII: 1. Does *CDSA* trench on core of health care (prov leg)? **Fails the core test**: a) *Core of health not recognized/identified by jurisprudence* b) *health is huge area* c) *fair amount of fed involvement in health too* (CDSA is valid even though affects health) d) *Worried about legal vacuum* (feds need to weigh in on controversial issues).
* Decision: Fed CDSA is applicable to In Cite.
* Note: gives us some criteria of when something is in the core.
* **\*Criticism: how can it fail the core test just because the court could not identify it? DII could reject the application of the CDSA to incite activity still.**

\*From application POV:

**Marine Services International Ltd v Ryan Estate**: *Second time COPA test applied and the WHSA workers comp scheme DOES trench on the core of maritime law (fed juris of shipping & navigation), but not sufficiently seriously, because leaves maritime law in-tact: go to operability next.*

* Facts: Ryan estate husbands die in accident at work, and want to use fed law to sue for negligence, but already covered by prov WHSA. Federal Maritime Law under navigation and shipping and Provincial WHSA (workers comp regime) under property & civil rights.. Analytical framework the same (VAL APP OPP, because case has been applied). **Maritime negligence** said to lie at core of shipping & navigation.
* Q: does APPLYING provincial WHSA trench on the core of maritime law?
* Analysis: Step#1 -> yes, maritime negligence in protected core of fed juris over navigation & shipping, and yes, WHSA applied would *trench*. ***Ordon*** *(applied)*. Step#2: **No, not sufficiently serious**, therefore DII does not apply: Basis -> *does not alter the uniformity of Canadian maritime law*. Applying the WHSA leaves it in a similar state as before + navigation & shipping = big area + still a way of recovering + courts have allowed interference before.
* Note: Provides some considerations of what seriousness in violating a core would look like.

# III. Operability – Conflict

Op can be considered after you have two *valid* pieces of legislation, but you won’t know if they’re applicable necessarily, because of *Western Bank* (order can change). If the area has no precedent, you get to Op after validity. If precedent, you’ll know whether it’s applicable first.

**Narrow version of conflict vs wide**: *narrow* allows for more overlap, while *wide* allows for overlap (watertight).

**5 different definitions of conflict**:

|  |  |  |
| --- | --- | --- |
| 1. **Duplication** | ✗ | *Multiple Access* |
| **2. Impossibly of dual compliance** | ✔ | *Rothman, M&D Farms, BMO, Multiple Access* |
| **3. Impossibility of dual effect** | ✔ | *M&D Farms, Manget, Rothman, Lafarge* |
| **4. Frustration of Federal Purpose** | ✔ | *BMO, Ryan Estates, Manget, Lafarge?* |
| **5. Federal intention to cover the field** | **?** – possibly | *Rothman? BMO, Ryan Estates, Lafarge?* |

1. Does the prov duplication of a federal law create conflict?
2. It is impossible for the person subject to the law to comply with both laws at once? – Do they both say, “yes” and “no”?
3. Can a decision maker give effect to both provincial and federal legislation? (e.g if you are given a *right* by feds and province *prohibits* that thing, it’s not impossible to comply with both by just not exercising the right -> you don’t have IDC, but IDE: can’t give effect to both at once, but can comply with both).
4. Does the provincial leg frustrate the federal legislative intent?
5. Does the federal legislation express the intention of wanting to be the only legislation available in the area? Does it make clear no prov leg applies?

**Note**: with modern federalism = more overlap, and with more opportunities for kinds of conflict = greater trumping of provincial autonomy. CONFLICT under ANY of these = paramountcy kicks in.

**Difference between IDC and IDE**:

* IDE for decision makers, and IDC for subjects of the rule. Example to illustrate = *Ross*: IDC is not an issue, **because he can comply with the *stronger* of the two (provincial prohibition), instead of the Federal *righ****t*. But if Mr. Ross drives within the parameters of his federally enforceable *right*, the judge encounters issue of IDE: cannot give effect to the right and the prohibition.

**Duplication**:

**Multiple Access**: *Ontario Securities Act regulating insider trading duplicating the federal company law legislation was not a form of conflict, because no express contradiction*.When you do seek a claim, you have to do it under one or the other: no worries about double recovery. Suggests that you’d need *impossibility of dual compliance* for there to be a confict.

**Impossibility of dual compliance**: most cases look at the impossibility of complying with both pieces of legislation. Recognized as a source of conflict (yes and no being told to subject of a law). Can sometimes be avoided by not using a right granted by the feds, and sticking to the prohibition of the province – technically no conflict then.

**Impossibility of giving dual effect:**

**M&D Farms**: M&D farms defaulted on loan from creditor, and the creditor went to the court to seek **the right** of foreclosure pursuant to the prov leg, but the farmer went to the fed agency which protects giving a **stay of proceedings**. (IDC: not sufficient for conflict here -> just because the creditor had a *right* to foreclose, doesn’t mean they had to exercise it) **IDE**: since there was both a *stay* and a *right* to foreclose, federal paramountcy wins over, since impossible for judge to give effect to both.

**Manget**: about retaining non-lawyer services for a fee. Looked like he was entitled under fed leg, but prov statute at issue = *legal profession act*. Basically trying to practice law, so Law Society goes after him. Argued DII and DFP. (DII: applicability -> *generally worded valid legislation regulating a profession (provincial 92(13)) that applies to a very federal context (federal tribunals)* 🡪 but he skipped over this and tried on Paramountcy). **IDC**: doesn’t pass here: two options are don’t charge a fee, or qualify as a lawyer. But **IDE**: similar to M&D farm -> Feds give RIGHT, and province PROHIBITS, and when you act on the right, it’s impossible to give effect to both, hence **paramountcy**.

**Rothmans**: (cigarette & advertising in stores).. **IDE = valid test**, it just didn’t apply there (no positive right given by the Feds). But all it was an *absence of a prohibition*.

**Lafarge**:federal legislation (enacted under shipping & navigation) governing property owned by Vancouver port authority – makes explicit what uses can be made of the land there. Lafarge wants to build cement plant, not popular with residents – suggested used of zoning by-law to prevent this. On validity issue: municipality has authority to enact zoning by-laws. Applicability: viable, but the cement batching plant did not lie in the **core of shipping**. **Operability**: **IDE**: fed statute says “yes, right to build cement thing”, and zoning prohibits.

**Frustration of federal purpose:**

**BMO:** significant in launching FFP. Federal leg = bank act, authorize banks to realize on security, when some defaults. Sask had prov *limitation of civil rights act*, which says that permission of the court is required before realizing security interest. Bank wanted to streamline, but Hall defends himself /w prov statutory reqs -> penalty for not obeying was HUGE: entire debt is wiped out. Validity: clearly both valid leg. App -> none raised, but could’ve (prov didn’t say it was securities held by *BANKS*). **Opperability**: **FFP** = primary test in this conflict. **Purpose of fed leg**: to create very streamlined, simple process, benefiting borrowers and lenders. Effect of prov leg would **frustrate** this -> paramountcy.

**Manget**: feds think it appropriate to let non-lawyers rep in this case, which is the purpose of the fed leg. Giving effect to prov leg frustrates these intentions.

**Rothmans**: Fed leg prohibits advertising & promotion of tobacco products but makes exceptions where they don’t apply (e.g. RETAIL). Prov leg in sask: provision that bans ALL advertising or display in premises where anyone under 18. **FFP apply?** No conflict because purpose of the FED statute is to combat the evil of tabacco (against young people) and the prov leg furthered this.

**Lafarge**: **conflates FFP with FICF** -> VPA deciding what kinds of things to be build on its property = the only game in town, and no zoning legislation needs to apply. Unusual, but application of FPP, but viable test.

**Implication of the doctrines**: The more overlap in modern fed, the more likely conflict and paramoutncy. If courts want to protect prov autonomy, although IDE and IDC are valid, it has to *read down what the fed legislation is doing*.

**Federal Intention to Cover the Field:**

**BMO**: stated that Bank Act is expressing FICF -> case where parliament has enacted a **complete code** (realization of security interests).

**Rothman?**: *suggested* that perhaps when **language is clear** that parliament could express the FICF.

**Lafarge**: Conflated FFP and FICF -> difference: FP is that all legislation is instrumental and as some object. FICF: just the statement that you want to be the only game in town. Lafarge reads FP broadly enough to include FICF.

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**Ryan Estates**:

* **Possible indication that modern fed requires courts to use stat interp to protect prov autonomy** and **construe the fed leg as not have any relevance**.