



Federalism

LAW 201A

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Constitutional Interpretation

- **Living tree doctrine:** “The BNA planted in Canada a living tree capable of growth and expansion within its natural limits” [**Edwards** JCPC 1930 ★].

Unwritten Principles

- **Federalism:** Recognizes diversity that existed when the colonies were joining confederation. Decisions should be made at the level closest to the people.
- **Democracy:** The idea of representative and democratic institutions, the promotion of self-government.
- **Constitutionalism and rule of law:** Entails a stable and ordered society, where government action complies with the constitution.
- **Respect for minorities:** Supported partially by the BNA minority rights and historical consequences.

Alcohol Cases

- **Russel:** Decides that as a law doesn't fall under prov heads, it is fed. Extremely expansive interpretation of POGG, pared down later [**Russel** JCPC 1882 ☹].
- **Hodge:** Introduces double-aspect, local matters, licensing, penalties for local matters are provincial [**Hodge** JCPC 1883 ★].
 - **Double-aspect:** Together the two cases introduce the idea that things that promote public order can be managed by both levels.
- **Local sale of alcohol:** prov matter [**McCarthy** JCPC 1883 ★].
- **Concurrent jurisdiction:** Some things can be regulated by both levels [**Local Prohibition** JCPC 1896 ★].

Relevant Cases (p20)

Edwards v Canada

★ JCPC 1930

- 🐦 The persons case; confirmed women are persons and introduced living tree doctrine.

Reference re Supreme Court Act, ss 5 and 6 (Nadon)

○ SCC 2014

- 🐦 Questionable appointment by Harper; questionable reasoning by court re SCA, saying parts but not all of Act are entrenched.

Russel

☹ JCPC 1882

- 🐦 A liquor case; gives strong power to the federal government; somewhat of an outlier.

Hodge

★ JCPC 1883

- 🐦 A reduction of the powers in Russel; introduces double-aspect; Temperance Act wasn't active there at the time.

McCarthy Act Reference

★ JCPC 1883

🐦 Local regulation and sale of alcohol is provincial.

Local Prohibition

★ JCPC 1896

🐦 ON and fed act covered the same sphere; concurrent jurisdiction and upholds both; POGG cannot create a unitary government; discussion of concurrent jurisdiction.

Validity

Resolution: **Striking down.**

Pith and Substance

Begin with s91 and s92. *Characterize* then *allocate*.

1. Identify the statute's **matter**. Look for the **purpose** and **effects** of the legislature, what problem does the legislature wish to address?
 2. Define the **scope** of the competing classes. This will depend on precedent and history.
 3. Determine which class the statute **falls into**. This will turn on beliefs of how to balance federalism.
- **Purpose, Extrinsic evidence:** Look at what mischief the stat is directed, hansard, events leading up to etc. [*Morgentaler* SCC 1993 ★].
 - But you can look at **very old things too** and treat the BNA as static sometimes [*Fastfrate* SCC 2009 ★].
 - **Effects** are something which may be looked at for classification – you can go beyond the four corners of the law [*Morgentaler* SCC 1993 ★].
 - **Colourability:** Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be colourable [*Re Firearms Act* ★ SCC 2000; demo'd but lang not used in *Morgentaler* SCC 1993 ★].
 - **Incidental effects:** Effects that are secondary or incidental to legislation do not matter.
 - **Not use it or lose it:** Scope of fed jurisdiction not limited by how parli initially exercises jurisdiction [*Re Employment Insurance Act* SCC 2005 ★].

Double Aspect Doctrine

- Some laws may have both fed and prov matters.
- Use double aspect when both pieces of legislation are:
 - Equally important.
 - Within their jurisdictional authority.
- Allows both aspects to co-exist. The modern paradigm tolerates overlap.
 - **Distinction:** They must be distinct in some way [*Multiple Access* SCC 1982 ★].

Necessarily Incidental (Ancillary) Doctrine

- **Trenching:** Allows one level of government to enter jurisdiction of the other in order to enact a comprehensive regulator scheme [**Lacombe** SCC 2010 ★].
- **Strongly connected provision:** An impugned provision that would normally be ultra vires can be deemed intra vires due to its rational importance and strongly tied relationship to a larger and valid scheme.
- **GM Test** [**GM** SCC 1989 ⚙].
 - Does the provision intrude into prov powers? To what extent?
 - If marginal encroachment: Functional test.
 - If highly intrusive: Stricter test.
 - Is the act valid?
 - If not: End.
 - If yes: Is the impugned provision sufficiently integrated?
 - Is the provision functionally related to the general objective of the legislation and structure and content of the scheme?
- **Rational and functional test:** Ancillary powers will only save a provision that is rationally and functionally connected to the purpose of the legislative scheme that it purportedly furthers [**Lacombe** SCC 2010 ★].

Relevant Cases (p22)

R v Morgentaler

★ SCC 1993

🐦 MSA purported to be about healthcare; actually about abortion; colourability, harsard; ultra vires.

Re Employment Insurance Act (Fed)

★ SCC 2005

🐦 EIA provided maternity benefits; q of jurisdiction; pith and substance is federal; not use it or lose it; 2A is a 'special' head of power.

Consolidated Fastfrate v Western Canada Council of Teamsters

★ SCC 2009

🐦 Shipping across Canada but through 3rd parties; not envisioned in 1867; provincial.

Multiple Access v McCutcheon

★ SCC 1982

🐦 Insider trading; two pieces of similar stat; applies double-aspect.

General Motors v City National Leasing

⊕ SCC 1989

🐦 Necessarily incidental test, GM and civil action, is civil action ultra vires fed?

Québec v Lacombe

★ SCC 2010

🐦 Necessarily incidental, creates rational and functional test, QC zoning by-law for planes.

Applicability

Resolution: **Reading down.**

Interjurisdictional Immunity

- **Exclusivity:** Theory is that the heads of power grant exclusive power to the feds and deny it to the provinces.
 - Goes contrary to pith and substance.
- **Generally worded legislation:** IJI is not intended for legislation that explicitly treads into the fed's realm.
- **One cannot do indirectly** what one cannot do directly [*McKay* SCC 1965 ★].

Idealized Test

1. **Core** affected: Does the prov law affect a 'core' of a fed matter?
2. **Impair:** Does the prov law impair the fed exercise of its core competency?

Detail

- **Touches basic, minimum, and unassailable core:** If a *generally worded* prov law infringes on the core a strong fed power, it will be **read down**.
 - **Trenching:** Does the prov law trench on the protected core of the federal competence [*COPA* SCC 2010 ★]?
 - **Vital Part:** Is it a 'vital part' of the undertaking [*Bell #1* SCC 1966 ☺ aff'd *Bell #2* SCC 1988 ☺]?
 - **Vital parts limited:** IJI only applies if a core competence of Parli of a vital or essential part part is impaired, only a function that is *essential, indispensable, or necessary* to the federal character of the undertaking [*Canadian Western Bank* SCC 2007 ★].
 - **Wages:** Considered a vital part of the management and operation of a federal undertaking [*Bell #1* SCC 1966 ☺].
 - **Labour relations and working conditions:** Such an essential part of the management and operation of such undertakings that fed jurisdiction over them precludes application of prov legislation [*Bell #2* SCC 1988 ☺].
- **Affecting core is enough:** It is enough for the prov stat to affect a vital or essential part of the fed undertaking, without impairing or paralyzing it [*Bell #2* SCC 1988 ☺].
 - **Affecting is not enough if indirect:** A prov law that only indirectly affects a federal undertaking will survive, IJI is only to be used if the law impairs a vital part [*Irwin Toy* SCC 1989 ☺].
 - **Affecting not enough:** Merely affecting a core competence without any adverse consequences will not lead to IJI, only if it affects it enough to put the undertaking in jeopardy [*Canadian Western Bank* SCC 2007 ★].
 - **Seriousness enough:** The prov law does not need to impair the federal power, but the effect should be sufficiently serious [*COPA* SCC 2010 ★].

Relevant Cases (p24)

McKay v the Queen

★ SCC 1965

🐦 Bylaw around signs; fed election signs; IJI, read down.

Bell #1

☆ SCC 1966

🐦 IJI; QC minimum wage act did not apply to fed Bell; wages a vital part; added 'vital' to IJI test.

Bell #2

☆ SCC 1988

🐦 Bell and QC round 2! Upholds vital part test; labour very vital; enough to touch not impair.

Irwin Toy v Québec

★ SCC 1989

🐦 QC ad law re children; difference between direct and indirect; moving away from vital part test.

Canadian Western Bank v the Queen (Alberta)

★ SCC 2007

🐦 Changes vital part test, limits IJI further; merely affecting not enough.

British Columbia v Lafarge

○ SCC 2007

🐦 A case regarding IJI.

COPA

★ SCC 2010

🐦 A robust application of IJI; creates applicability test.

Operability

Resolution: **Suspending.**

Paramountcy

Idealized Test

1. **Validity:** Are both acts valid?
2. **Impossibility** of dual compliance (express contradiction)?
3. **Frustration** of fed purpose?
 1. Covering the field.*
 2. Duplication.
 3. Impossibility of dual compliance.

*Typically not used in Canada, but found in Australia.

Detail

- **Impossibility of dual compliance.**
 - **Actual conflict in operation:** Must be situation where citizen is being told to do things where complying with one act violates the other [**Multiple Access** SCC 1982 ★].
 - Example: **M&D Farms** SCC 1999 ○.
 - **Impossibility sufficient but not exhaustive:** A prov act may not frustrate a fed act by making it impossible to comply or by other means. Impossibility of compliance is sufficient but not the only test of inconsistency [**Rothmans** SCC 2005 ★].
 - **Possible operational conflict:** Mere requirement of seeking approval of two levels of gov may lead to a conflict leading to paramountcy [**Lafarge** SCC 2007 ★].
 - **Technical ability insufficient:** Being able to comply with both laws by giving up a protection or privilege provided by one act will not stand, it violates the spirit of that act [**Moloney** SCC 2015 ★].
- **Frustration of fed purpose.**
 - **Duplication not frustration:** Where the acts are duplicated so that the will of Parli is fulfilled, so that the purpose, conduct, and remedy are the same, no reason for paramountcy, in fact the ultimate in harmony [**Multiple Access** SCC 1982 ★].
 - **Covering the field:** If the fed does not wish to cover the field then it may coexist with prov laws [**Ross** SCC 1975 ★].
 - **Incompatibility of purpose:** If compliance with both acts is possible but would frustrate the purpose of the fed act, this will be sufficient [**BMO** SCC 1990 ★].
 - **Interference not sufficient:** The purpose of the fed scheme must be frustrated [**Lemare** SCC 2015 ★].

Relevant Cases (p26)

Ross v Registrar of Motor Vehicles

★ SCC 1975

🐦 P banned from driving save certain times; license suspended by prov; strictly speaking no conflict.

Multiple Access v McCutcheon

★ SCC 1982

🐦 Paramountcy; insider trading; duplicate ON and fed stat; duplication will not trigger; purpose of Parli is fulfilled.

M&D Farms

○ SCC 1999

🐦 Paramountcy; impossibility of dual compliance; frustrates federal scheme.

British Columbia v Lafarge

★ SCC 2007

🐦 Cement facility; prov and fed approval; requirement of both leads to operational conflict; prov law inoperable.

BMO v Hall

★ SCC 1990

🔹 Banking acts and farmers; could comply with both but would frustrate purpose of fed.

LSBC v Mangat

○ SCC 2001

🔹 A case regarding paramountcy.

Rothmans

★ SCC 2005

🔹 Tobacco; fed act permitted some signage; SK act more strict; same purpose so not frustrated.

Moloney

★ SCC 2015

🔹 Driving; default and bankruptcy; no license until payment; compliance by losing rights is conflict.

Lemare Logging

★ SCC 2015

🔹 A case clarifying interference with fed schemes.

Peace, Order, and Good Government

National Concern

Prevailing Test

[Le Dain J in ***Crown Zellerbach*** SCC 1988 =★].

- **Singleness, Distinctiveness, and Indivisibility:** The matter must have these qualities, that clearly distinguish it from prov concerns.
- **Scale of impact** must be reconcilable with fundamental division of powers.
- **Provincial inability test** to determine singleness, distinctiveness, and indivisibility:
 - “What would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control of regulation of the intra-provincial aspects of the matter” [Le Dain J in *supra*].
 - **Types of provincial inability:** Negative externalities, collective action problems (jeopardizes whole scheme, free riders), true prov inability [Sujit Choudhry ☝].

Detail

- **National Concern:** Some matters may originate locally but attain qualities that make them matters of national concern [***Local Prohibition*** JCPC 1896 ☹; ***Canada Temperance*** JCPC 1946 ★].

- **Examples** are war, pestilence, possibly alcohol, drugs, and weapons [*Canada Temperance* ☆].
- **Provincial inability**: At times the field of legislation is not capable of division, handing to provinces would be impractical [*Johannesson* SCC 1952 ☼].
 - Also discussed in *ON Hydro* SCC 1993 ☆.
- **Single matter of concern**: An act which ‘deals with a single matter of national concern’ may be found under POGG national concern [*Munro* SCC 1966 ☆].
 - // **Unity, Identity, Distinction, Consistence**: National concern needs “a degree of unity that makes it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form” [Beetz J in *Anti-Inflation* SCC 1976 //☼].
- **Regulation through criminalization** may be possible, if fed wishes to stop a public evil with penal sanctions this could be upheld under the criminal law power [*Hydro-QC* SCC 1997 ⇒☆].
- **Labour relations inseparable** from national concern, at least in terms of nuclear plants [*ON Hydro* SCC 1993 ☆].

Emergency

- **Emergency**: Must be **temporary**. Look to the following [*Anti-Inflation* SCC 1976 ⇒☼].
 - **Scope of application**
 - **Preamble** – though not decisive for Laskin J, who says circ more important than language. **Declaration of emergency not needed** [*supra*].
 - // **Declaration of emergency needed**, saying it is ‘necessary’ is not enough [Beetz J in *supra*].
 - **Extrinsic evidence and rational basis**
 - **Springboard of jurisdiction** – find a head of power and then ‘keep going’.

Relevant Cases (p29)

Local Prohibition

☆ JCPC 1896

🐦 First time POGG national concern articulated.

Canada Temperance Federation

☆ JCPC 1946

🐦 Further elaborates POGG national concern.

Johannesson v West St Paul

☆ SCC 1952

🐦 Aerodromes; regulation not divisible; provincial inability.

Munro v National Capital Commission

☆ SCC 1966

🐦 Ottawa-Gatineau; green belt and expropriation; single matter of national concern.

Reference re Anti-Inflation Act

⇒★ SCC 1976

👉 Inflation ledge; multiple split decisions; POGG emergency defined.

Crown Zellerbach

⇒★ SCC 1988

👉 Definitive test of national concern; marine pollution; fresh v salt water.

Friends of Oldman River

○ SCC 1992

👉 Environment; distinguished from Zellerbach; extension of scope of head of power; prov action affected fed head.

Hydro-Québec

⇒★ SCC 1997

👉 Hydro-QC dumping waste; fed act prohibits; found under crim power; dissent says not SDI enough to be national concern.

Ontario Hydro

☆ SCC 1993

👉 Nuclear energy, national concern; labour relations.

Provincial Regulation of the Economy

- **Provs:** Intra-provincial trade, production and marketing regulation.
- **Fed:** Inter/extra-provincial trade, enhancement of production and industry – trade and commerce power.

Marketing Boards, Production and Supply

- **Basic Test:** Is the law in relation to, or aimed at intra-provincial trade and merely affects inter-provincial trade? If so, it will stand [*Carnation* SCC 1968 ★].
 - **Boards like collective bargaining:** [*supra*].
 - **Purpose not effect:** Look at purpose of the law. If the purpose is intra-prov trade and it merely affects intra-prov trade, it will stand. Directly affecting inter-prov trade is unacceptable [*supra*].
- **Production vs marketing and supply:** Production can be found intra vires provinces, marketing and supply regulation less likely to be so [*MB Egg Reference* SCC 1971 ★].
 - **Production always provincial:** Production is always prima-facie prov, regardless of product destination [*Re Agricultural* SCC 1978 ★].

- **Cooperative federalism allows overreach:** If a prov scheme regulates inter-prov trade but in compliance with a broader scheme in cooperation with fed, it may be upheld [**Re Agricultural** SCC 1978 ★].
- **X Purpose of Confederation: s121** of the *BNA* allows for a national common market. The point of Confederation was a national identity, and with it a national economy and common market. Economic integration was a major pillar of Canada's founding. **s6 Charter** is an economic integration element of sorts [**Black** SCC 1989 X].
 - // **s6 violated by supply management** if excludes your province, as it prevents you from pursuing livelihood in prov of choice [**Can Egg Marketing** SCC 1998 //★].
 - **Purpose of Confederation Not Economic Union: s6 Charter** is a mobility right, not an economic one, and **s121 BNA** is not useful for analysis [**Can Egg Marketing** SCC 1998 =★].

Natural Resources

- **Direct aim at export unacceptable:** Prov cannot directly aim at export and set a floor price for things purchased for export [**CIGOL** SCC 1978 ★].
- **Prov jurisdiction over natural resources limited:** If legislation directly aims at the production of a natural resource for export, this is unacceptable [**Central** SCC 1979 ★].

Relevant Cases (p32)

Black v Law Society

X SCC 1989

- Characterizes *BNA* 121 and *Charter* 6 as economic union elements, point of confederation is union including economic union.

Canadian Egg Marketing Agency v Richardson

=★ SCC 1998

- Pulls back from readings of *s121 BNA* and *s6 Charter*; upholds supply management scheme excluding NWT.

Carnation

★ SCC 1968

- QC milk board and fed corp; focus on purpose not effect; merely incidental; board upheld.

Manitoba Egg Reference

★ SCC 1971

- THE GREAT CHICKEN AND EGG WAR OF 1971; distinguishes *Carnation*, production vs marketing and supply.

Re Agricultural Products Marketing Act

★ SCC 1978

- Strengthens production/marketing distinction; overreach okay if in effort of a cooperative scheme.

CIGOL

★ SCC 1978

- 🐦 SK taxed company, prices raised; effectively setting export price as most oil sold outside SK; distinguished from *Carnation*, this is more direct.

Central Canada Potash

★ SCC 1979

- 🐦 Pro-rationing scheme ultra vires as it was directly aimed at export.

Trade and Commerce

- **Interprovincial or International Trade Branch:** Fed can regulate interprovincial concerns and trade affecting the whole Dominion [*Citizens Insurance* JCPC 1881 ☉].
 - **Some trenching okay:** If trenching on some intra-prov trade is necessarily incidental to regulating interprovincial trade, as its hard to find the line (i.e. like *Zellerbach* with water), should be based on actual effects of the activity on the regulation of trade and commerce [*Klassen* SCC 1960 ★].
 - **Trenching okay, but movement needed:** Incidental trenching on intra-prov trade or prov trade and commerce is okay but the goods in question must be moving between prov or national borders [*Caloil* SCC 1971 ☆; *Labatt* SCC 1980 ★].
 - **Cannot be entirely local:** A fed provision that regulates wholly local trade is ultra vires [*Dominion Stores* SCC 1980 =★].
- **General Trade and Commerce Branch**
 - **Similar to national concern** – fed can regulate trade affecting the whole Dominion [*Citizens Insurance* JCPC 1881 ☉].
 - **Provincial inability, not a power grab:** National legislation aimed at national problems is qualitatively different from anything the provs could do, and clearly measures aimed at the national economy are different than those seeking centralization [Dickson J in *Canadian National Transportation* SCC 1983 ≠○].
 - **Cannot single out one industry:** This is not included in the fed's trade and commerce power [*Citizens Insurance* JCPC 1881 ☉].
 - **Wheat not a single industry, and is of national interest** [*Klassen* SCC 1960 ★].
 - **National ownership or ads not enough:** Regulating a single industry is not national concern, neither national ownership or national ads is enough to make it so [*Labatt* SCC 1980 ★].
 - **Inter-prov competition is general concern:** Competition in inter-prov transactions is a national concern, but the provs may regulate competition within their own spheres of powers [*GM* SCC 1989 ★].
 - **Dividing jurisdiction unreasonable:** Fed trade and commerce power relevant when dividing the scheme to the provs would throw the scheme into disarray, especially when trenching on prov powers/local trade is negligible [*Kirkbi* SCC 2005 ☆].
- **GM Test for General Trade and Commerce** [*GM* SCC 1989 ★].
 - 1. Part of general scheme
 - 2. Monitored by fed agency
 - 3. Concerned with trade as a whole (not particular industry)
 - 4. Provs could not enact ledge jointly or separately

- **Provs already doing:** If provs already doing this work for a while, that may threaten this argument [*Re Securities* SCC 2011 ☆].
- 5. Failure to include a prov would jeopardize scheme (similar to *Zellerbach* prov inability).
- **Opt-in:** An opt-in scheme may threaten this argument [*Re Securities* SCC 2011 ☆].

Relevant Cases (p35)

Citizens Insurance v Parsons

✦ JPC 1881

🐦 Sets out branches of trade and commerce power for first time.

The Queen v Klassen

☆ SCC 1960

🐦 Wheat board; Klassen was being silly; comply with the damn board; trading on intra-prov trade okay if incidental.

Caloil

☆ SCC 1971

🐦 NEB; confirms Klassen; movement of goods needed to ground fed jurisdiction.

Dominion Stores

⇒☆ SCC 1980

🐦 Extra fancy apples; fed scheme for grading; if adopt name must meet standard even if not inter-prov trade; read down, too local.

Labatt Breweries

☆ SCC 1980

🐦 Lite beer that exceeded max alcohol content; contra fed act; not national concern or inter-prov trade; fed act thus ultra vires.

Canadian National Transportation

⇒○ SCC 1983

🐦 Not about trade and commerce; Dickson J's dissent in this case becomes the basis for the GM test.

General Motors v City National Leasing

★ SCC 1989

🐦 Creates GM test for trade and commerce.

Kirkbi

☆ SCC 2005

🐦 Mega Bloks and lego; trademarks; Trade-mark Act inter vires fed; a matter of national concern indivisible to prov level.

Re Securities Act

☆ SCC 2011

- ✉ Proposed unifying Securities Act; opt-in showed provs not joining wouldn't jeopardize; provs had been doing this already; not under trade and commerce.

Criminal Law Power

Consider: Ancillary, double-aspect, purpose. Not IJI.

Federal

- **Elements of fed criminal law form:**
 - Criminal **prohibition**
 - Criminal **penalty**
 - **Prima facie criminal** if the law has prohibitions accompanied by sanctions [*PATA* ☝ in *RJR* SCC 1995 =★].
 - Criminal **purpose** [*Margarine* JCPC 1951 ★].
 - **Directed at evil of some kind, eg, public purpose, peace, order, security, health, morality.**
 - Followings: *Dominion Stores* ☝, marketing not criminal; *Labatt* ☝, beer standards not about health.
 - **Economics:** Can be covered [*Margarine* JCPC 1951 ★].
 - **Criminal law may evolve** to cover things not traditionally in its realm [*RJR* SCC 1995 =★].
 - **Morals enough:** Moral issues are properly criminal law [McLachlin OG in *Assisted Human* SCC 2010 =★].
 - // **Must have underlying public purpose:** Morality isn't enough, must be underlined with suppressing an evil or safeguarding a threatened interest [Lebel J in *Assisted Human* SCC 2010 //★].
 - **Morals not always fed:** Morality can be a provincial concern [*Re NS* SCC 1978 ★].
 - **Not colourable:** The law may not be colourable [*Hydro-QC* SCC 1997 ★].
- **Regulation not criminal**, features include licensing, administrative agency, civil remedy.
 - **Secondary regulation tolerable:** If the primary purpose is a criminal one, some secondary regulation may be tolerable [*Re Firearms Act* SCC 2000 ★].
 - **Full criminalization impractical:** If the full criminalization is impractical then banning a lesser or intermediate thing is permissible [*RJR* SCC 1995 =★].
 - // **Parli can use other means to achieve its policy goals**, rather than half measures that don't criminalize the underlying evil [*RJR* SCC 1995 //★].

Provincial

- **Prov criminal law power:** 92(15) allows provs to pass laws that put impositions of punishment by fine, penalty, imprisonment, but to enforce a prov law that is entrenched in s92 (not a fed law).
- **Preventative measure:** Regulations that have sanctions to prevent things can be okay [*Re NS* SCC 1978 ★].
 - **Limits:** Preventative measures have limits, they cannot be used as a way to usurp the fed crim law power [*Westendorp* SCC 1993 ★].

- **Supplementing crim law:** Deterrence is prov and fed, so long as the law is supplementing rather than supplanting the fed crim law, provs have much room to use civil sanctions that share elements of crim law form [*Chatterjee* SCC 2009 ★].
- **Some infringement okay** if it is part of a larger scheme of regulation and is relatively minor (i.e., no penal consequences) [*Rio Hotel* SCC 1987 ★].
- **Cooperative federalism is only a shield** not a sword, it cannot put on obligations [*QC v Canada* SCC 2015 =★].
 - ≠ **No it ain't**, it must be considered [*QC v Canada* SCC 2015 ≠★].
- **Dismantling act same as enabling** in terms of its character [*QC v Canada* SCC 2015 =★].

Relevant Cases (p38)

Margarine Reference

★ JPC 1951

- Introduction of requirement of criminal purpose; fed tried to ban margarine; criminal law must be aimed at an evil.

RJR MacDonald

=★ SCC 1995

- Crim banned ads, promo tobacco; if can't crim underlying evil can crim intermediate; crim law can evolve.

R v Hydro-Québec

★ SCC 1997

- Hydro-QC was dumping toxins into a river; part of crim law power; crim law cannot be colourable.

Reference re Firearms Act

★ SCC 2000

- AB challenges *Firearms Act* as regulatory; pith and substance is safety, criminal; regulatory aspects secondary.

Reference re Assisted Human Reproduction Act

=★ SCC 2010

- Assisted human reproduction; majority says morality is enough to be crim concern; dissent says public purpose must involve suppressing an evil or safeguarding.

Re Nova Scotia Board of Censors v McNeil

★ SCC 1978

- NS censoring movies; morality not always fed; preventative measures can be prov.

Westendorp

★ SCC 1993

- Calgary by-law addressing prostitution; allowing it to be saved as preventative would lead to slippery slope re crim law infringement.

Rio Hotel

★ SCC 1987

🐦 NB Liquor Control Act regulated entertainment that could help boost alcohol; no penal consequence; some infringement okay if integrated.

Chatterjee v Ontario

★ SCC 2009

🐦 ON act to seize crim money; independent of sentencing; supplementing not supplanting crim law; deterrence is prov and fed.

Québec (AG) v Canada (AG)

⇒★ SCC 2015

🐦 Long gun registry data; head of power on repeal is same as enactment; cooperative federalism is a shield.

Policy Instruments

Trade Barriers

- **Internal barriers:** s121 'common market clause', AIT panel outside of court system.
- **International barriers:** NAFTA, allows fed to be sued by investors.

Spending Power

- **Allows fed to spend money on prov programs outside of jurisdiction.**
 - "The Dominion may impose taxation for the purpose of creating a fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied" [*Unemployment Insurance Reference* JCPC 1937 ☰].
 - **Limits unknown.**
- **Direct fed programs**
 - UI (1940), OAS (1951), CPP (1960s), post-war project that required different relationship between fed and provs.
 - **Unable to regulate:** Regulation impermissible, supplementing to an industry/area is okay.
- **Shared cost programs:** Health insurance, income assistance.
 - Mix of cash transfers and tax points that come with conditions.
- **Equalization payments are unconditional** [(not explicitly unconditional) s36(2) in *Constitution Act* ☰].

Taxation

s. 91(3) The raising of Money by any Mode or System of Taxation.

s. 92(2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

s. 92A(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

- (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
- (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Intergovernmental Agreements

- **Bound by political sanction**, not contract law.

Delegation

- **Delegation impermissible***: The BNA does not allow delegation from one level of government to the other, it would have said so if it did [**NS Interdelegation** SCC 1951 ☝].
- **Administrative delegation**: Functions can be delegated to a minister/tribunal of another level of gov, or a tribunal/board created by both levels – these are generally upheld (ie **Re Agricultural** SCC 1978 ☆; **Can Egg Marketing** SCC 1998 =★).
- **Incorporation by reference**: One level may reference the stat of another level and incorporate it. However, it must be re-assessed each time the other stat is changed, otherwise this would be impermissible delegation.
 - **Fed can do also** as a means of ‘runaround’ the *NS Interdelegation* case [**Coughlin** SCC 1986 ☆].
- **Conditional legislation**: Law of one gov won’t come into affect at another level unless a condition is met.

Relevant Cases (p42)

Reference re Canada Assistance Plan (BC)

★ SCC 1991

- ☛ BC and Fed enter into agreement; fed wanted to reduce payment; stat allowed this but not agreement; political agreements bound by politics.

Coughlin

☆ SCC 1986

- ☛ Fed act delegated power to prov highway boards, but boards derive power from fed; feds are incorporating prov ledge; licensing prov.

Policy Arguments

- **Judicial administration**: Firm v flexible rule; floodgates; slippery slope.
- **Normative**: Moral, social unity, corrective justice.
- **Institutional competence**: Courts or legislatures?
- **Economic**: Efficiency; promote competition; protect local industry.

Constitution Act

91. Legislative Authority of Parliament of Canada

It shall be lawful ... to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

2. The Regulation of Trade and Commerce.

- 2A. Unemployment insurance.
- 3. The raising of Money by any Mode or System of Taxation.
- 10. Navigation and Shipping.
- 12. Sea Coast and Inland Fisheries.

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

- 19. Interest.
- 22. Patents of Invention and Discovery.
- 23. Copyrights.
- 24. Indians, and Lands reserved for the Indians.
- 25. Naturalization and Aliens.

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.

92. Subjects of exclusive Provincial Legislation

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

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

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

8. Municipal Institutions in the Province.

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

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

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

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

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

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.

92A. Laws respecting non-renewable natural resources, forestry resources and electrical energy

- (1) In each province, the legislature may exclusively make laws in relation to
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom
- (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
 (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
 (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,
 whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Referenced Cases

Constitutional Interpretation

Edwards v Canada

★ JPC 1930

🐦 The persons case; confirmed women are persons and introduced living tree doctrine.

Facts

Office of Senator was new. While ‘persons’ in the BNA was read to include women, there was an argument that ‘qualified persons’ excluded them.

Issue

Are women ‘qualified persons’?

Reasons

Previous legislation, precedent, indicated that women were qualified persons.

Precedents

Living tree doctrine, “the BNA planted in Canada a living tree capable of growth and expansion within its natural limits.”

Reference re Supreme Court Act, ss 5 and 6 (Nadon)

○ SCC 2014

🐦 Questionable appointment by Harper; questionable reasoning by court re SCA, saying parts but not all of Act are entrenched.

Facts

The Conservative government added sections 5.1 and 6.1 to the SCA to add ‘greater certainty’ around appointments to ensure Nadon could be appointed to the SCC.

Issue

Can the government amend the SCA? Was Nadon qualified to sit on the court?

Reasons

“We come to this conclusion for four main reasons. First, the **plain meaning** of s. 6 has remained consistent since the original version of that provision was enacted in 1875, and it has always excluded former advocates. Second, this interpretation **gives effect**

to important differences in the wording of ss. 5 and 6. Third, this interpretation of s. 6 **advances its dual purpose** of ensuring that the Court has civil law expertise and that Quebec's legal traditions and social values are represented on the Court and that Quebec's confidence in the Court be maintained. Finally, this interpretation is **consistent with the broader scheme** of the Supreme Court Act for the appointment of ad hoc judges."

Russel

★ JCPC 1882

🐦 A liquor case; gives strong power to the federal government; somewhat of an outlier.

Facts

Concerned the federal *Canada Temperance Act*, which allowed local areas to vote to ban alcohol.

Issue

Was the *Temperance Act* ultra vires the federal government?

Reasons

The power did not fall into any prov head of power, so it was fed.

Precedents

An extremely expansive interpretation of POGG which is reduced later.

Hodge

★ JCPC 1883

🐦 A reduction of the powers in Russel; introduces double-aspect; Temperance Act wasn't active there at the time.

Issue

Does the ON *Liquor License Act (Crooks Act)* conflicted with the federal trade and commerce power?

Province cannot impose hard labour under s92(15).

Delegatus non potest delegare – a delegate cannot delegate.

Reasons

The *Crooks Act* was confined to ON municipalities; therefore local. The license commissioners pass bylaws, define conditions and impose penalties which are all local matters. No interference is found with the trade and commerce power. Uses double-aspect to interpret *Russell*. No conflict with the *Temperance Act* as the act was not locally adopted at the time.

Precedents

Introduces the double-aspect doctrine, upholds provincial scheme for licensing and retail sales.

McCarthy Act Reference

★ JCPC 1883

🐦 Local regulation and sale of alcohol is provincial.

Facts

The *McCarthy Act* was federal, it established liquor licensing requirements.

Issue

Was the fed act ultra vires?

Precedents

Together, Hodge and the McCarthy Act Reference established that provinces had jurisdiction to regulate the local sale of alcohol.

Local Prohibition

★ JCPC 1896

✪ ON and fed act covered the same sphere; concurrent jurisdiction and upholds both; POGG cannot create a unitary government; discussion of concurrent jurisdiction.

Issue

1. Did the feds have power to enact the *Canada Temperance Act*?
2. If yes, did the provinces retain their jurisdiction to enact s18?

Reasons

This is an area of concurrent jurisdiction. POGG cannot be used to create a unitary government. Russel rests on POGG national concern. Prohibition is not part of trade and commerce. There is no conflict between the jurisdictions because the *Crooks Act* and *Temperance Act* were not enacted at the same time in the same place.

Precedents

Concurrent jurisdiction. The distinction between general power and enumerated heads of power diminishes POGG.

Validity

R v Morgentaler

★ SCC 1993

✪ MSA purported to be about healthcare; actually about abortion; colourability, harsard; ultra vires.

Facts

Medical Services Act (MSA) stated purpose was to prevent private healthcare. P claimed MSA was crim law, R claimed was hospitals, property and civil rights, local and private nature.

Issue

Was the MSA ultra vires the province?

Reasons

Extrinsic evidence showed central feature was prohibition of clinics based on opposition of abortion clinics. Pith and substance was to restrict abortion as socially undesirable – overlapping language with the old CC provision, harsard evidence and course of events. As prohibition of abortion with penal consequences was the effect, the law was criminal.

Precedents

Expands what can be looked at for pith and substance.

Re Employment Insurance Act (Fed)

★ SCC 2005

✪ EIA provided maternity benefits; q of jurisdiction; pith and substance is federal; not use it or lose it; 2A is a 'special' head of power.

Facts

Employment Insurance Act (EIA) (Fed) provided maternity benefits.

Issue

Is it fed (unemployment insurance) or prov (property and civil rights, local private nature)?

Reasons

Scope of fed jurisdiction not limited by way Parli initially exercised jurisdiction. S91(2A) specifically assigns EI to Parli, cannot evaluate 2A in scope of general prov jurisdiction, must be evaluated on own terms. The pith and substance of the maternity benefits are that they are a mechanism for providing replacement income during interruption of work – but not all interruptions of work related to maternity relate to EI, so some will stay in prov jurisdiction.

Consolidated Fastfrate v Western Canada Council of Teamsters

★ SCC 2009

🐦 Shipping across Canada but through 3rd parties; not envisioned in 1867; provincial.

Facts

P used 3rd party companies to handle logistics of getting freight across borders. S92(10)(a) says that works going beyond limits of province are federal. Fastfrate is not doing this itself so becomes unclear.

Issue

Federal jurisdiction over interprovincial undertakings.

Reasons

Majority

Fastfrate does not move the freight itself so it does not fall under the provision, prov jurisdiction. A physical connection is required – 1865 speech emphasized preference for local regulation.

Dissent

Test should be functional – reality today, not how transport was viewed in 1867.

Multiple Access v McCutcheon

★ SCC 1982

🐦 Insider trading; two pieces of similar stat; applies double-aspect.

Facts

McCutcheon was a shareholder initiated proceedings under the Ontario Securities Act (OSA) re insider trading. Argument from the insider traders that the Canada Corporations Act (CCA), that was very similar, was the correct legislation and thus the OSA did not apply.

Issue

Are parts of the CCA ultra vires fed?

Reasons

C determines the validity of CCA without regard of prov stat. Striking down CCA would create a gap in provs without insider trading stat. In isolation the provisions of the CCA were securities law – but in context, the scheme was a companies law. Regulating companies with ‘other than provincial objects’ falls under POGG.

Insider trading provisions had both securities and companies law aspect. The double-aspect doctrine validates both sets of legislation. Corporate-security fed and prov characteristics of insider trading provisions are roughly equal in importance, little reason to kill one and let the other live.

General Motors v City National Leasing

★ SCC 1989

🐦 Necessarily incidental test, GM and civil action, is civil action ultra vires fed?

Facts

D brought civil action against P under s33.1 of fed *Combines Investigation Act*. P argued the provision was ultra vires fed as creation of civil causes should be prov under property and civil rights.

Issue

Is s33.1 of the *Act* ultra vires the fed?

Precedents

Creates a test for necessarily incidental.

Québec v Lacombe

★ SCC 2010

🐦 Necessarily incidental, creates rational and functional test, QC zoning by-law for planes.

Facts

Municipal by-law in QC prohibited use of lakes as aerodromes for float planes. Zoning laws fall under pov property and civil rights, but this would also fall under the fed's power over aeronautics.

Issue

Was the bylaw ultra vires the province?

Reasons

The provision was not integrated into the larger scheme.

Precedents

Creates a 'rational and functional test'.

Applicability

McKay v the Queen

★ SCC 1965

🐦 Bylaw around signs; fed election signs; IJI, read down.

Facts

Municipal bylaw prohibited display of all signs in residential areas with few exception.

Issue

Was this bylaw applicable to P, who put up a federal election sign?

Reasons

One cannot do indirectly what one cannot do directly.

Precedents

IJI test contribution.

Bell #1

★ SCC 1966

🐦 IJI; QC minimum wage act did not apply to fed Bell; wages a vital part; added 'vital' to IJI test.

Issue

Does QC's *Minimum Wage Act* apply to Bell?

Reasons

Inapplicable to Bell, it affects a vital part of the management and operation of the undertaking.

Bell #2

★ SCC 1988

🐦 Bell and QC round 2! Upholds vital part test; labour very vital; enough to touch not impair.

Issue

Does a QC law requiring reassignment of pregnant workers apply to bell?

Reasons

Upholds 'vital part' test. Labour relations and working conditions are an essential part of fed undertakings, cannot be divorced from management.

Precedents

It is sufficient that the prov stat which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it.

Irwin Toy v Québec

★ SCC 1989

🐦 QC ad law re children; difference between direct and indirect; moving away from vital part test.

Facts

QC put out a law banning advertising to children in general, but TV is federal.

Issue

Did QC law apply to advertising on TV even though TV was fed?

Reasons

Yes, applies to TV, there is a distinction between direct and indirect.

Precedents

A prov law that only indirectly affects a federal undertaking may survive IJI.

Canadian Western Bank v the Queen (Alberta)

★ SCC 2007

🐦 Changes vital part test, limits IJI further; merely affecting not enough.

Precedents

Vital part test limited to functions that are essential, indispensable or necessary to the federal character of the undertaking, something that if would threaten the undertaking if put in jeopardy. If core competence or vital part only affected without any adverse consequence, no IJI.

British Columbia v Lafarge

○ SCC 2007

🐦 A case regarding IJI.

Facts

Lafarge facility was within fed jurisdiction but construction of facility did not fall within VPA's (fed) core or vital functions.

Reasons

Held IJI did not apply, decided on paramountcy.

COPA

★ SCC 2010

✎ A robust application of IJI; creates applicability test.

Issue

Whether prov law designating areas of the province as agricultural zones, from which all non-agricultural land use was prohibited, applied to prohibit operation of airstrip on private land within agricultural zone.

Reasons

Held that the provincial law as inapplicable. Created an applicability test.

Precedents

Applicability test: Does the prov law trench on the protected core of the fed competence? Is the prov law's effect on exercise of protected fed power sufficiently serious to invoke the doctrine of IJI?

Operability

Ross v Registrar of Motor Vehicles

★ SCC 1975

✎ P banned from driving save certain times; license suspended by prov; strictly speaking no conflict.

Facts

The CC and the prov *Highway Traffic Act* came into conflict. Fed order prohibited driving for 6 mo except Mon-Fri 8:00-17:45, but prov suspended license for 3 months.

Issue

Does the fed law trump the prov one?

Reasons

No conflict. Judge had no jurisdiction to say that the license would not be suspended. If a federal order is made during time in which a provincial license suspension is in effect, there is strictly speaking no repugnancy. True that the person gets no benefit from the indulgence in fed stat, but the CC provision merely wished to give a larger area of discretion to the magistrate.

Parliament did not purport to state exhaustively the law re driving, licenses, or suspension or cancellation for driving offences.

Multiple Access v McCutcheon

★ SCC 1982

✎ Paramountcy; insider trading; duplicate ON and fed stat; duplication will not trigger; purpose of Parli is fulfilled.

Facts

Insider trading.

Issue

Was the duplication of the fed and prov laws a type of conflict that would trigger paramountcy?

Reasons

No conflict, as there was identify of purpose, conduct, and remedy. Though the provisions were duplicated this was fine, admin can work together and C will ensure double liability will not happen.

Precedents

Duplication is not repugnancy, as the legislative purpose of Parli is fulfilled regardless of which statute is invoked, the prov law does not displace the ledge purpose of Parli. Duplication is the “ultimate in harmony.”

Paramountcy will not be triggered “except where there is actual conflict in operation,” where dual compliance is impossible.

M&D Farms

○ SCC 1999

🐦 Paramountcy; impossibility of dual compliance; frustrates federal scheme.

Facts

C cannot simultaneously give effect to stay of enforcement proceedings and right to initiate foreclosure proceedings against the debtor. Fed order prohibited enforcement proceedings for 120 days, prov order made within the 120 day period was itself an enforcement of proceedings.

Issue

Are the laws in conflict?

Reasons

Yes, the provincial leave application cannot be isolated from other stages of the farmland, it requires a response which jeopardizes the purpose of the federal scheme.

British Columbia v Lafarge

★ SCC 2007

🐦 Cement facility; prov and fed approval; requirement of both leads to operational conflict; prov law inoperable.

Facts

Cement facility requires VPA (fed) approval and City of Vancouver approval.

Issue

Was there an impossibility of dual compliance?

Reasons

Mere requirement of municipal approval would give rise to an operational conflict, therefore not necessary for Lafarge to seek the permission of the City because their law was inoperable.

Precedents

Operational conflicts can give rise to paramountcy.

BMO v Hall

★ SCC 1990

🐦 Banking acts and farmers; could comply with both but would frustrate purpose of fed.

Facts

Hall was a farmer, took out bank loans and in exchange gave the bank a security interest on a piece of his farm machinery under the fed *Bank Act*. BMO seized

machinery and brought action to enforce mortgage loan agreement, contra the prov *Limitations of Civil Rights Act*.

Issue

Was there an actual conflict in operation, in the sense that the ledge purpose of Parli stands to be displaced?

Reasons

Though it is possible to comply with both Acts, the two are in conflict as complying with the prov law frustrates the purpose of uniform national banking regulation.

Precedents

Paramourncy test can be satisfied by an incompatibility of purposes.

LSBC v Mangat

○ SCC 2001

🐦 A case regarding paramourncy.

Facts

Fed Immigration act allowed that parties could be represented by non-lawyer, but BC Act said non-lawyers prohibited to practice law. Possible to comply with both by complying with stricter law but purpose of fed act was informal, accessible, speedy process.

Rothmans

★ SCC 2005

🐦 Tobacco; fed act permitted some signage; SK act more strict; same purpose so not frustrated.

Facts

Fed *Tobacco Act* prohibited promo of tobacco product except as auth'd by the *Act*, which auth'd display at retail. SK *Tobacco Control Act* banned display of tobacco products in any premises that permitted persons under 18.

Issue

Are the laws in conflict?

Reasons

There is no frustration of fed purpose as both acts were aimed towards a public health evil. The area of display in the fed Act is not frustrated as it was not a positive entitlement, simply a boundary on the extent of prohibition.

Precedents

The overarching principle of purpose.

Moloney

★ SCC 2015

🐦 Driving; default and bankruptcy; no license until payment; compliance by losing rights is conflict.

Facts

Molony drove uninsured and injured another; AB compensated injured person and sought to recover form Molony who went into bankruptcy and was discharged under the fed *Bankruptcy and Insolvency Act*. AB suspended his license until he paid as per prov *Traffic Safety Act*.

Issue

Were the prov and fed laws in conflict?

Reasons

Majority

The prov was acting as a creditor and was acting contra to the fed Act. There is true incompatibility here – one law says no, the other yes. The act also frustrates the fed purpose.

Dissent

The fed act absolves claims of bankruptcy. Prov is not bringing a claim per se, as if debtor chose not to drive the prov would have no claim. But the prov act does frustrate the purpose of the fed act.

Precedents

Operational conflict is not limited to asking if one can technically comply with both by renouncing protections or privileges.

Lemare Logging

★ SCC 2015

🐦 A case clarifying interference with fed schemes.

Facts

The fed BIA and prov SFSA were potentially in conflict.

Issue

Were the laws in conflict?

Reasons

Both laws were valid. Paramountcy must be narrowly construed, and harmonious interpretation should be favoured. One can comply with both laws by complying with the stricter provincial one.

Precedents

Interference with the fed scheme is okay, it will only reach conflict if it frustrates the fed regime's purpose.

Peace, Order, and Good Government

Local Prohibition

★ JCPC 1896

🐦 First time POGG national concern articulated.

Precedents

Some matters though their origin may be prov, may affect all of Canada and cease to become a merely local matter, rather they become one of national concern.

Canada Temperance Federation

★ JCPC 1946

🐦 Further elaborates POGG national concern.

Precedents

If the subject of the stat goes beyond local or provincial concern, and from its nature becomes the concern of Canada as a whole, then it will fall under POGG. Examples are war, pestilence, possibly alcohol, drugs, weapons.

Johannesson v West St Paul

★ SCC 1952

✈ Aerodromes; regulation not divisible; provincial inability.

Facts

A case involving a municipality passing by-laws for aerodromes.

Reasons

Meets the national concern branch of POGG. “The field of legislation is not ... capable of division in any practical way.” Provincial inability test – they cannot do it on their own.

Precedents

Idea of provincial inability.

Munro v National Capital Commission

★ SCC 1966

✈ Ottawa-Gatineau; green belt and expropriation; single matter of national concern.

Facts

Regarding zoning in the National Capital Region (NCR), Munro’s land expropriated by fed to create a green belt.

Issue

Is zoning in the NRC prov or fed jurisdiction?

Reasons

The fed act affecting the region, as it is the nation’s capital, deals with a single matter of national concern.

Precedents

Single matter of national concern can be found under POGG national concern.

Reference re Anti-Inflation Act

✈ SCC 1976

✈ Inflation ledge; multiple split decisions; POGG emergency defined.

Facts

Fed Anti-Inflation Act applied to private sector firms, fed public sectors, prov public sectors with opt-in. Very broad regulation of the economy, but the ledge was temporary.

Issue

Was the Act valid as emergency legislation? Was the existence of emergency essential to the Act’s validity?

Reasons

Large use of evidence – Stats Canada, expert economists, harsard, and judicial notice.

Was the Act valid as emergency ledge?

Laskin + 6: Act intra vires under POGG as emergency ledge. The use of the word necessary can be enough. Gov only needs a rational basis to say it’s an emergency, looks to purpose.

Beetz & de Grandpre: Act not emergency ledge. Looks to the effects, property and civil rights.

Was the existence of emergency essential to the Act’s validity?

Ritchie + 4: Yes, rejecting national dimensions. Could only be upheld via emergency.

Laskin + 3: Left open whether it was valid under national dimensions

Precedents

POGG allows special legislation in times of emergency, but a declaration of such is not required. POGG emergency is for temporary, not permanent matters.

Crown Zellerbach

→★ SCC 1988

🐦 Definitive test of national concern; marine pollution; fresh v salt water.

Facts

Logging company charged with dumping under s4(1) of fed *Ocean Dumping Control Act*. Act did not require evidence of harm (if it had and evidence was found, could have found this under a head of power).

Issue

Is the section of the Act ultra vires of the fed, is the fed empowered to prohibit dumping of waste in inland marine water?

Reasons

Distinguishing facts: Marine v fresh water; no evidence of actual damage.

Majority (Le Dain + 3)

POGG has emergency and concern dimensions, national concern applies to new matters that did not exist at confederation and ones which were once local but have become matters of national concern.

Says that marine water is distinct from fresh water, that gives it its own characteristic of singleness, distinctiveness, and indivisibility. Because of this distinction there is a reasonable limit to the reach within the separation of powers.

Dissent (La Forest + 2)

Difficult to see impacts beyond province. Marine pollution too big, things affecting it too broad, opportunity for fed to acquire too much power.

Precedents

Sets up the definitive test for POGG national concern.

Friends of Oldman River

○ SCC 1992

🐦 Environment; distinguished from Zellerbach; extension of scope of head of power; prov action affected fed head.

Issue

Turned on the extent of fed's 'plenary power' over environment. Fed wanted to compel environmental assessment of a dam, AB argues trenches on its jurisdiction.

Reasons

Distinguished from *Crown Zellerbach* as that was about marine pollution, this is about the environment, a broader subject.

Environmental control depends on scope of the head of power. The fed action in question is about regulating how fed institutions do their duties, intrusion into prov matters is incidental. It extends the ambit of fed environmental control under areas of fed jurisdiction. This was just an extension of a head of power.

Precedents

The environment is broad and not exclusively a fed power, but where local prov undertakings step into fed jurisdiction (i.e. navigable waters) involvement of both is okay.

Hydro-Québec

-★ SCC 1997

🐦 Hydro-QC dumping waste; fed act prohibits; found under crim power; dissent says not SDI enough to be national concern.

Facts

Hydro-QC allegedly dumped PCBs into river, contra fed CEPA. Hydro-QC argued that CEPA, and an interim order given under it, was ultra vires fed.

Issue

Was CEPA ultra vires fed?

Reasons

Majority

Upheld under the criminal law power. The pith and substance is against a public evil, and the fed wishes to protect the public using penal consequences.

Dissent

Not valid under criminal law power or POGG. Control of toxic substances not sufficiently single, distinct, indivisible to be a matter of national concern.

Precedents

It may be possible to criminalize to regulate.

Ontario Hydro

☆ SCC 1993

🐦 Nuclear energy, national concern; labour relations.

Issue

Who has the authority to regulate labour inside nuclear power plants? This is typically a provincial undertaking.

Reasons

Fed ledge defended on POGG national concern, Declaratory Power 92(10)(c) that allows some prov infrastructure to be managed federally if a matter of national concern.

Upholds labour ledge and says that nuclear energy a matter of national concern, meets the SDI test, has national security aspects. Provincial inability aspects, cannot leave security to provinces. Labour relations inseparable from national concern here.

Precedents

Labour relations are inseparable from the national concern of security.

Provincial Regulation of the Economy

Black v Law Society

x SCC 1989

🐦 Characterizes BNA 121 and Charter 6 as economic union elements, point of confederation is union including economic union.

Facts

McCarthy wanted to open a law office in AB, but AB law society decided to shut it down as the wanted no relationship between resident and non-resident lawyers.

Issue

The legal issue to be answered.

Reasons

Contra 6(2)(b) of the *Charter* (Every [citizen or PR] has the right to pursue the gaining of a livelihood in any province). Economic integration and union were goals of fed'ism, dominant purpose of BNA. With a nationality comes a national economy and a common market – that was the point of Confederation. *BNA* s121 allows free trade in Canada, common market. One of the pillars of confederation.

Precedents

There is free trade between the provinces in Canada.

Canadian Egg Marketing Agency v Richardson

=★ SCC 1998

🐦 Pulls back from readings of s121 *BNA* and s6 *Charter*; upholds supply management scheme excluding NWT.

Facts

There was a national egg marketing scheme with quotas, but no quota for NWT, excluded from supply management and sale of eggs.

Reasons

Majority

s6 *Charter* is a mobility right, not about economic union. Pulls back from s121 *BNA* and says not very useful. The pith and substance of the scheme was not to discriminate against producers by province, the scheme stands, s91/92 contemplate marketing boards.

Dissent

The scheme was an impediment for the right of NWT egg producers to pursue livelihood in prov of choice.

Precedents

Climbdown from earlier characterization of s121 *BNA* and s6 *Charter*.

Carnation

★ SCC 1968

🐦 QC milk board and fed corp; focus on purpose not effect; merely incidental; board upheld.

Facts

Price dispute with Carnation, a fed company, ended in binding arbitration with QC board. Carnation said price was too high, and as most of its milk was destined for outside of QC (though produced there), it was ultra vires the prov.

Issue

Is the QC board impinging on fed trade and commerce power?

Reasons

QC board upheld. C agrees with QC that pith and substance of boards is generally to regulate prices inside QC, the transaction happens within prov. Board is analogous to collective bargaining, unions. Purpose of QC boards was to improve bargaining position of their producers. Focuses on purpose rather than effects.

Uses test from Ontario Reference – Does the ledge aim at regulation of trade in matters of inter-provincial concern? Fact of inter-prov effects are merely incidental, not direct.

Precedents

Test from Ontario Reference used; focus on purpose not effects.

Manitoba Egg Reference

★ SCC 1971

🐦 THE GREAT CHICKEN AND EGG WAR OF 1971; distinguishes *Carnation*, production vs marketing and supply.

Facts

MB copies QC law and challenges itself in court. The MB plan regulated prices of eggs in MB, including out-of-prov eggs.

Issue

Is MB's plan impinging on inter-prov trade?

Reasons

This represents a barrier to inter-prov trade, it is not about production like in *Carnation*, rather it is about marketing or supply.

Precedents

Marketing and supply tend to be ultra vires the provs, but not production.

Re Agricultural Products Marketing Act

★ SCC 1978

🐦 Strengthens production/marketing distinction; overreach okay if in effort of a cooperative scheme.

Facts

Egg marketing scheme between fed and provs, set out quotas for each prov and egg producer, levies, destroyed excess eggs. As part of scheme, ON sets a law that sets quota and levies on intra-provincial marketing of eggs that mirrors fed scheme.

Issue

Is the ON scheme, and the fed one, valid?

Reasons

Whole scheme upheld. Prov law is about production of eggs. The intra-prov aspects were complementary to the fed scheme, cooperative federalism.

Precedents

Control of production prima facie a matter of provincial jurisdiction, regardless of destination. Overreach can be okay if part of a cooperative scheme.

CIGOL

★ SCC 1978

🐦 SK taxed company, prices raised; effectively setting export price as most oil sold outside SK; distinguished from *Carnation*, this is more direct.

Facts

SK legislation created a mineral income tax and a royalty surcharge, intention to allow SK to benefit from all increases in oil value above a certain price. Most oil in SK is for export.

Issue

Was the SK scheme ultra vires?

Reasons

Majority

Ultra vires SK, prov ledge is setting a floor price for oil purchased for export, directly aimed at production of oil for export. Distinguishes from *Carnation* by saying that case

was indirect, whereas this was more direct.

Dissent

The changes related to oil produced within SK.

Precedents

Having the effect of setting an export price is regulating inter-prov trade.

Central Canada Potash

★ SCC 1979

🐦 Pro-rationing scheme ultra vires as it was directly aimed at export.

Facts

SK created a potash pro-rationing scheme, controlling amount and price.

Issue

Was the SK scheme ultra vires?

Reasons

Ultra vires. National resources are ordinarily matters of prov jurisdiction, but maybe not where marketing scheme with price fixing feature. Cannot directly aim at production of something for export, that was its true nature as almost none of the potash was used in SK.

Precedents

Prov jurisdiction does not extend to marketing of prov agricultural or resource products where it is for exports.

Trade and Commerce

Citizens Insurance v Parsons

★ JCPC 1881

🐦 Sets out branches of trade and commerce power for first time.

Precedents

Trade and commerce power *does not include* “power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.”

Trade and commerce power does include “political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.”

The Queen v Klassen

★ SCC 1960

🐦 Wheat board; Klassen was being silly; comply with the damn board; trading on intra-prov trade okay if incidental.

Facts

Wheat Board demanded a quota system enforced by recordings in delivery permit books for each delivery to a grain elevator, Klassen failed to record delivery of wheat to his elevator, used it to make feed sold to local farmers and was charged.

Issue

Can the *Canadian Wheat Board Act* (CWBA) apply to a purely local work?

Reasons

CWBA's application to intra-provincial transactions was incidental to its primary purpose, to regulate interprovincial and exported grain. Allowing some not to meet quotas endangers the whole system.

Precedents

Treading on intra-prov transactions is acceptable if it is necessarily incidental to an inter-prov scheme.

Caloil

☆ SCC 1971

🐦 NEB; confirms Klassen; movement of goods needed to ground fed jurisdiction.

Facts

To provide a market for western oil and restrict sale of imported oil to eastern Canada per the NEP, transportation and sale of imported oil west of Ottawa was prohibited.

Issue

Was this trenching on prov property and civil rights permissible?

Reasons

This is about imported oil, regulation of international trade to protect Canadian industry. Impingement on provincial rights is incidental.

Precedents

Follows Klassen, some trenching on intra-provincial trade okay, but there must be some inter-provincial or international movement of goods.

Dominion Stores

⇒☆ SCC 1980

🐦 Extra fancy apples; fed scheme for grading; if adopt name must meet standard even if not inter-prov trade; read down, too local.

Facts

Dominion stores sold locally produced Spartan apples under fed grade trade name 'Canada Extra Fancy', caught by voluntary grading requirements in fed *Agricultural Products Standards Act* that says if trade name used it must meet standard even if not across prov borders. ON had mandatory grading requirements that more or less mirrored the fed ones.

Issue

Was the fed Act ultra vires?

Reasons

The voluntary name provision is read down to not apply to provs.

Precedents

You cannot regulate local trade happening entirely within a province.

Labatt Breweries

☆ SCC 1980

🐦 Lite beer that exceeded max alcohol content; contra fed act; not national concern or inter-prov trade; fed act thus ultra vires.

Facts

Labatt sold a lite beer that exceeded the max alcohol content to be called lite under the fed *Food and Drugs Act*.

Issue

Was the fed act ultra vires?

Reasons

Regulation of a single trade or industry not crossing borders is not of general concern. Neither national ownership of a trade or undertaking, or national advertising of its products alone will suffice to authorize the imposition of fed trade and commerce ledge.

Precedents

For trade and commerce power, the product must cross borders. Regulation of a single industry even if it is nationally owned or nationally advertised is insufficient for national concern.

Canadian National Transportation

⇒ SCC 1983

🐦 Not about trade and commerce; Dickson J's dissent in this case becomes the basis for the GM test.

Precedents

Dissent (Dickson J)

“When what is at issue is general legislation aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. Such legislation is qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination.”

“The line of demarcation is clear between measures validly directed at a general regulation of the national economy and those merely aimed at centralized control over a large number of economic entities.”

General Motors v City National Leasing

★ SCC 1989

🐦 Creates GM test for trade and commerce.

Facts

About a fed competition act, a challenge to preferential interest rates to support its competitors.

Issue

Is the fed legislation ultra vires?

Reasons

First determined if ledge was valid, did ancillary analysis.

Precedents

5-Part Test: (1) Part of a general scheme; (2) monitored by fed agency; (3) concerned with trade as a whole; (4) provs could not enact ledge jointly or severally; (5) failure to include prov would jeopardize scheme.

Gives fed power to regulate inter-prov transactions to do with competition – competition is not a single matter and can be divided between fed and prov.

Kirkbi

☆ SCC 2005

🐦 Mega Bloks and lego; trademarks; Trade-mark Act inter vires fed; a matter of national concern indivisible to prov level.

Facts

Kirkbi held patents for lego sets; patents expire in Canada and Mega Bloks began manufacturing the same interlocking system as Lego. Mega Bloks challenged the fed *Trade-marks Act*.

Issue

Was the Act ultra vires the fed?

Reasons

The Act is intra vires the fed as per general trade and commerce power. Trade-marks are national.

Precedents

Things of a national concern that minimally tread into prov powers are fed trade and commerce.

Re Securities Act

☆ SCC 2011

🐦 Proposed unifying Securities Act; opt-in showed provs not joining wouldn't jeopardize; provs had been doing this already; not under trade and commerce.

Facts

Purpose of proposed fed *Securities Act* was to create a single securities regulator, protect investors, ensure fair efficient markets, stabilize and integrate Canada's financial system. It was a comprehensive scheme meant to displace the old prov ones, and was opt-in for provs.

Issue

Was the act ultra vires the fed?

Reasons

The five part test is applied, and it fails on 'trade as a whole' and 'would one prov opting out jeopardize it'. C decides provs could regulate this without feds, no prov inability – partly because provs had been doing this already. Also says that opt-in provision shows one prov not participating would not jeopardize the scheme.

Criminal Law Power

Margarine Reference

★ JCPC 1951

🐦 Introduction of requirement of criminal purpose; fed tried to ban margarine; criminal law must be aimed at an evil.

Facts

Fed passed legislation protecting dairy industry by banning production, import of margarine with penal consequences.

Issue

Was the prohibition of margarine ultra vires the fed?

Reasons

This law does not seem to be aimed at a criminal purpose, it is ultra vires. Fed criminal law *does* however have a place in economics.

Precedents

Establishes the requirement of purpose, the law must be directed at some evil. Law should be about, eg, public peace, order, security, health, morality.

RJR MacDonald

-★ SCC 1995

🐦 Crim banned ads, promo tobacco; if can't crim underlying evil can crim intermediate; crim law can evolve.

Facts

Tobacco Control Act prohibited ads, promos, and sales without health warnings.

Issue

Was this act within the fed's criminal law power?

Reasons

Majority

Prohibitions accompanied by penal sanctions are prima facie criminal law (per *PATA* case). The common thread of purpose here is public health, but Parli had only banned ads, not production or sale. The law was not colourable. It would be impractical to ban the product, but the lesser or intermediate option can be upheld.

Dissent

The underlying evil here remains legal, so a prohibition on ads is ultra vires. Parliament could have met its policy goals in other ways.

Precedents

If criminalizing something is impractical, criminalizing a lesser or intermediate option is permissible. Further, criminal law can branch out beyond its 'traditional' bounds.

R v Hydro-Québec

★ SCC 1997

🐦 Hydro-QC was dumping toxins into a river; part of crim law power; crim law cannot be colourable.

Facts

Fed criminal law Act regulates use of toxic substances, admin agency decides if a substance is toxic. As there is administration involved, question as to whether it was a criminal law power.

Issue

The legal issue to be answered.

Reasons

Protection of a clean environment is a public purpose, sufficient to support a criminal prohibition, and pollution is an evil that Parli can legitimately seek to suppress.

Precedents

Criminal law cannot be colourable, a legitimate purpose must be found.

Reference re Firearms Act

★ SCC 2000

🐦 AB challenges *Firearms Act* as regulatory; pith and substance is safety, criminal; regulatory aspects secondary.

Facts

The *Firearms Act* banned/restricted certain types of firearms and established a comprehensive licensing system and a national registration system. AB claims the law is regulatory, similar to registration of cars.

Issue

Is the Act criminal or regulatory?

Reasons

The act is within the criminal power. The pith and substance of the law is enhancing public safety by controlling access to firearms through prohibitions and penalties – there were regulatory aspects but they were secondary to the primary criminal law purpose.

Precedents

Some degree of regulation if it is secondary to its criminal purpose may be tolerable.

Reference re Assisted Human Reproduction Act

→★ SCC 2010

🐦 Assisted human reproduction; majority says morality is enough to be crim concern; dissent says public purpose must involve suppressing an evil or safeguarding.

Facts

The Act prohibited certain activities like cloning, removing eggs or sperm without consent. Other activities were controlled, prohibited if not done in accord with the law.

Issue

Was the act within the crim law power?

Reasons

Majority (McLachlin OG)

These issues raise moral concerns which are rightly criminal concerns. Even if the other provisions are not criminal, they should be upheld per ancillary doctrine. However McLachlin switches the order of inquiry and begins with the whole act first – its dominant thrust is prohibitory to protect health and safety. The fact that regulation is there is irrelevant, as the whole act targets a legitimate crim law purpose, per its aim at a public health evil (risk is enough), the enforcement provisions are upheld through ancillary doctrine.

Dissent (Lebel J)

Morality is too wide here, we should look beyond it. The only valid public purpose must involve suppressing an evil or safeguarding a threatened interest. These are not preventing evils, but social interventions. Each provision has its own purpose, should not look at the act as a whole first, that's working backwards.

Precedents

Morality may or may not be sufficient to find a criminal purpose.

Re Nova Scotia Board of Censors v McNeil

★ SCC 1978

🐦 NS censoring movies; morality not always fed; preventative measures can be prov.

Facts

NS *Theatres and Amusements Act* allowed a board to censor films, penalties if shown against board's wishes.

Issue

Was NS exercising fed crim law power?

Reasons

Fundamentally this is regulation of property, and it takes place wholly within the province. Provincial legislation about morality is not necessarily fed crim power. The

rejection of films was based on failure to conform with standards of propriety, not something prohibited with penal consequences, instead the act is preventative.

Precedents

Provs have power to regulate to prevent things, morality is not always fed.

Westendorp

★ SCC 1993

🐦 Calgary by-law addressing prostitution; allowing it to be saved as preventative would lead to slippery slope re crim law infringement.

Facts

Calgary by-law prohibited prostitution.

Issue

Was this an infringement on the fed crim law power?

Reasons

The law was clearly an attempt to control and punish prostitution, if we extended preventative measures against public nuisance to cover this, then we could allow provs to infringe on much of the CC. It was also colourable.

Precedents

Preventative measures have limits.

Rio Hotel

★ SCC 1987

🐦 NB Liquor Control Act regulated entertainment that could help boost alcohol; no penal consequence; some infringement okay if integrated.

Facts

NB *Liquor Control Act* regulated forms of entertainment that may be used as marketing tools to boost sales of alcohol, had no penal consequences just licensing restrictions. Rio Hotel claimed it was about morals, which should be fed crim law power.

Issue

Was this an infringement on the fed crim law power?

Reasons

The prohibition was integrated in a comprehensive scheme of regulation and licensing.

Precedents

Some infringement is okay if it is integrated into a comprehensive scheme.

Chatterjee v Ontario

★ SCC 2009

🐦 ON act to seize crim money; independent of sentencing; supplementing not supplanting crim law; deterrence is prov and fed.

Facts

ON *Civil Remedies Act* authorizes forfeiture of proceeds of unlawful activity.

Issue

Was this an infringement on the fed crim law power?

Reasons

Purpose is to deter crime and help victim's compensation, and deterrence can happen at both levels of gov, and compensation is prov. This law is about jurisdiction over

property. Forfeiture is not supplanting crim power, but supplementing it, it is independent.

Precedents

Provs have substantial capacity to use civil remedies as a sidebar to crim law, to prevent or suppress them.

Québec (AG) v Canada (AG)

⇒★ SCC 2015

🐦 Long gun registry data; head of power on repeal is same as enactment; cooperative federalism is a shield.

Facts

Long gun registry was repealed and fed wished to destroy data, QC wished to keep data claiming cooperative federalism, and that the act was regulatory.

Issue

To what extent should cooperative federalism be considered in dismantling of a scheme?

Reasons

Majority

Cooperative federalism is a shield, not a sword. When looking at the pith and substance of the dismantling of an act, it is the same as what set it up. In this case, crim law power. The law was not colourable.

Dissent

Cooperative federalism should be considered when dismantling, true purpose of destroying data was to prevent provs from using it, not properly fed.

Precedents

Cooperative federalism is a shield, the character/head of power of a repeal is the same as its enactment.

Policy Instruments

Reference re Canada Assistance Plan (BC)

★ SCC 1991

🐦 BC and Fed enter into agreement; fed wanted to reduce payment; stat allowed this but not agreement; political agreements bound by politics.

Facts

Canada Assistance Plan allowed fed to enter into agreements with provs to pay forward their social assistance welfare expenditures. Feds decided to limit expenditures to reduce deficit using a formula that was in the Act but not in the intergovernmental agreement.

Issue

What is the effect of having the contribution formula only in the statute and not in the intergovernmental agreement?

Reasons

The statute is valid, it does not change due to an intergovernmental agreement. This is not an ordinary agreement, it is one between governments, here we will not rely on contract law but political sanctions for non-performance.

Precedents

Political agreements are bound by political sanctions, not contract law.

Coughlin

☆ SCC 1986

🐦 Fed act delegated power to prov highway boards, but boards derive power from fed; feds are incorporating prov ledge; licensing prov.

Facts

Fed *Motor Vehicle Transport Act* delegated power to prov highway transport boards to regulate interprovincial trucking (a matter otherwise in fed jurisdiction).

Issue

Did the feds delegate their power?

Reasons

The prov boards derive their power from the fed, not prov. Feds can terminate them at any time. It is not delegation but adoption of prov stat by fed. Licensing left up to provs.

Precedents

There are ways to circumvent delegation.