**Background**

**Canadian Constitutional Evolution**

* Framers originally set out a set of “watertight compartments”
	+ Could explain why no Constitutional provision on how to resolve conflict b/w feds and provinces
		- However this view is seen as incompatible with modern society
			* Also, since ***Hodge v The Queen***, courts have rejected “quasi-imperial” federalism
				+ I.e. orders of gov’t are **coordinate**

**Agnostic constitutionalism**: appreciates diversity and tries reconcile differences

* **Elliot** & **structural argumentation:** based on “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures” (42)
	+ Began with ***Edwards v Canada (AG)*: living tree doctrine**
	+ Exemplified most prominently in the ***Reference re Secession of Quebec***
		- Federalism, Democracy, Constitutionalism & Rule of Law, Protection of Minorities
		- Both of these cases: Canadian constitution must be given a “large and liberal interpretation” so Canada can be “a mistress in her own house” (*Edwards*)
* **Theories of Federalism:**
	+ **Compact theory**: colonies coming together and creating fed, power, not feds devolving power; provincial autonomy
	+ **Statute theory**: both orders of gov’t created simultaneously
* **Lederman:** logic can’t be used to decide federalism questions, because it “merely displays the many possible characterizations, [and] does not assist in a choice between them” (224)
	+ Point: judges’ choice between competing characterizations of laws will inevitably depend on background understandings of federalism, and which values should be furthered by a federal constitutional design
* **Simeon: Arguments used to justify competing visions of federalism**
	+ Community: country-building; ability to maintain balance b/w regional and national political communities
		- “This law is good because it allows local diversity within a broader national framework”
	+ Functionalism: which gov’t best situated to govern the matter/respond to citizens? Economic concerns ≠ territorial
		- “This law is good because it is the most economically efficient”
	+ Democracy: Smaller units max. participation; fractionalize power
		- “This law is good because it promotes citizen participation and democratic ideals”

 **1. Validity**

* If the *dominant characteristic* of the legislation, or its ***pith and substance*,** falls within one of that government’s heads of power, then it can be upheld as valid *even if* it has incidental effects on matters under other gov’ts jurisdiction
	+ Generally, legislation should be enacted for differing purposes and in different legislative contexts

**1. Pith and Substance**

**What is the “matter”/mischief? Do the stated purpose and legal effect jive? Or is the legislation “colourable”?**

* **1. Legal effect:** 4 corners of legislation; “how the legislation as a whole affects the rights and liabilities of those subject to [it]”
* **2. Similarity to federal law**: e.g. provinces may not invade criminal law by trying to supplement or fill gaps in it
	+ Can have similar legal effect and still be valid, if enacted under proper head of power
* **3. Timing of legislation**: course of events; “catalyst” for government action
* **4. Legislative history**: Hansard
* **5. *Prima Facie* legislative purpose**: if title/stated purpose found to be at odds with actual legislative purpose 🡪 **colourable**

***R v Morgentaler* (1993) F:** NS legislature passes *Medical Services Act* prohibiting abortions in private clinics; also places fines and de-insures violators. Morgentaler charged 14 times for violations in his private clinic.

**I:** Whether the *Act* and regulations made under the *Act* are *ultra vires* on the ground that they are in P&S criminal law?

**A:** Province claims that legislative purpose is the regulation of private medical services to prevent two-tier system.

* Legal effect: preventing privatization by prohibiting private provision of some medical services
	+ *But mostly, expressly prohibits abortions in certain circumstances, with penal consequences*
* Similarity to federal law: had s 251 of the *Code* not been removed, this *Act* would be redundant 🡪 fills gap (very similar)
* Timing: Crown concedes that catalyst was rumour that Morgentaler opening clinic
* Legislative History: privatization isn’t mentioned until 2nd reading; debate reveals opposition to abortion clinics *per se*
	+ Further evidence that provincial purpose masks real legislative purpose:
		- No evidence that abortions in private clinics dangerous; no prior study/consultation RE private medical services; no link b/w list of prohibited private procedures
* Prima facie: medical services; not sufficient to convince court that purpose is regulation of private health industry

**R: the *Act* is colourable attempt to invade criminal law 91(27), based on its matter/P&S (gleaned from disjunct b/w purpose and effect; similarity to Criminal law; timing; legislative history)**

**2. Double Aspect**

**If provisions valid under P&S AND there is similar federal legislation (2 pieces of legislation), how well is the legislated topic rooted in provincial vs federal powers?**

**What is the optimal balance of power in terms of federalism?**

* **Lederman:** double aspect applicable when legislation of equal importance; used to **avoid legislative gaps**
* “The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered”. (**McLachlin**, ***Quebec v Lacombe***, para 99)

***Multiple Access Ltd v McCutcheon***

**F:** Shareholders accused of insider trading, charged under Ontario *Securities Act*; this act challenged as *ultra vires* because applied to federally incorporated company.

**I:** is insider trading federal or provincial authority (P&S)? If both can regulate, are both pieces of legislation nonetheless valid?

**L:** securities = provincial (property); federal companies = federal (POGG)

**A:** both *Acts* valid, pass P&S :

* + Ontario Act: valid under 92(15) property and civil rights (securities)
	+ *Canada Corporations Act*: valid under POGG (regulation of federal companies)

Now, double aspect? The contrast b/w relative importance of both is “not so sharp”. If strike down federal legislation, would leave **legislative vacuum** in provinces that had not enacted securities legislation.

**R: Ontario provincial securities legislation valid/*intra vires* under double aspect, because provinces can validly enact this legislation under 92(13) property and civil rights. Both gov’ts enact similar legislation under different heads of power.**

**3. Necessarily Incidental**

**IF impugned FAIL P&S/provision clearly *ultra vires*, is it closely related to a larger and valid legislative scheme?**

* P&S allows legislation to have **incidental effects** on other gov’ts power (i.e. minor effects)
	+ **Necessarily incidental**: extension of incidental effects logic
		- Where impugned provision *prima facie* invades other gov’t, but closely related to larger and valid legislative scheme, the provision is “necessarily incidental” and saved
* (1) **Is impugned provision *ultra vires*?**
	+ If yes:
		- Consider: **seriousness of encroachment**
			* Broad discretion/unlimited intrusion? Substantive or remedial? Precedent?
* (2) Impugned provision established
	+ Is it **sufficiently related to the overall valid purpose of the *Act*** to uphold its constitutionality based on that relationship?
		- **Minor encroachment** by provision:
			* Is it **functionally related** to the general objective of the legislation?
		- **Major encroachment**:
			* Can the *Act* function without the provision?
			* Will probably lead to operability/paramountcy analysis

***General Motors of Canada Ltd v City National Leasing***

**F:** clause in *Combines Investigation Act* that allows for remedial civil action. GM argues it is *ultra vires* Parliament because it creates a civil cause of action, which is provincial jurisdiction under 92(13).

**I:** whether s 31.1 of the *Act* sufficiently integrated to sustain its constitutionality.

**A:** Impugned provision *prima facie* *ultra vires* b/c federal law creates civil action. Consider seriousness of encroachment:

* (1) Remedial provision, purpose is to enforce substantive parts of the *Act*,
* (2) Limited scope of action, not general
* (3) Established precedent that federal gov’t not barred from creating civil causes of action.
	+ 🡪 Minor encroachment.

Now consider whether the *ultra vires* provision is sufficiently related to the overall (valid) purpose of the *Act*. Minor encroachment here, so must ask whether it is “functionally related”: it is an “integral, well-conceived component of the economic regulation strategy” of the *Act* 🡪 validity established under necessarily incidental.

**R: Remedial civil action in the federal *Combines Investigation Act/Competition Act* valid/*intra vires* because it is closely related and plays functional role within overall valid federal legislative scheme.**

 **2. Applicability**

**Evolution of Interjurisdictional Immunity**

* **Classical approach:**
	+ Originally, promoted “water tight” compartments; sought to contain “spill over”
		- Deregulatory bias; associated with WW2 & judicial activism (why strike down?)
	+ “**Sterilize, paralyze, or impair**” federal head of power (originally: higher bar to strike down)
		- ***John Deere Plow Co v Wharton* (1915); *Great West Saddlery Co v The King* (1921)**
	+ Emerged in relation to federally incorporated companies, then extended to federal undertakings
	+ Weakness: social matters don’t fit neatly into boxes; creates legislative vacuums
* **Modern Approach:**
	+ Maximize ambit of legislative powers (interplay/overlap b/w federal & provincial)
		- Regulatory bias; judicial restraint
		- Defended by Hogg as best way for unaccountable judiciary to approach these problems
	+ ***Bell 1966*** drops standard: provincial legisl. must only “**affect a vital part**” (but see ***Canadian Western Bank***)
	+ ***Irwin Toy*** outlined confusing, vague test based on direct vs indirect impairment:
		- Directly affected federal legislation 🡪 does it affect a vital part?
		- Indirectly affect 🡪 sterilization or impairment
	+ Weakness: compromise provincial autonomy? Federal dominance
* **Two Established cores:**
	+ (Federal companies & undertakings = original)
	+ Aeoronautics
	+ Maritime (tort?) law
* **Distinguishable from paramountcy** in that for IJI to apply, *do not need to have conflicting or inconsistent operation or legislative purposes*, or even any federal legislation at all
* **Risks if used too much (*Canadian Western Bank*):**
	+ Legislative vacuums (read down provincial legislation when no federal legislation to fill gap)
	+ Uncertainty: how to define a core?
		- Incompatible with cooperative/flexible federalism
	+ Centralizing tendency: promote federal legislation over provincial
	+ (Lack of) Subsidiarity: gov’t closest to citizens best able to enact legislation (🡪 functionalism/democracy)
* **Restriction of Legislative freedom test**: what would Parliament have to do to get around the provincial legislation? (e.g. accept that it no longer has power in that jurisdiction, or legislative to specifically override the provincial incursion?)

***Bell Canada (1988)***

**F:** Quebec statute gives right to reassignment to pregnant women if work would be dangerous to pregnancy; no such counterpart in federal legislation. Bell is a federally incorporated and regulated company. Bell Canada refuses to follow Quebec statute.

**I:** Whether Bell Canada, interprovincial/federally regulated company, is subject to provincial health and safety laws?

**L:** 92(13) = property and civil rights [includes labour relations]; but Parliament has exclusive jurisdiction over labour relations when that jurisdiction “is an integral part of its primary and exclusive jurisdiction over another class of subjects” (258)

**A:** (1) Double aspect can’t apply: did not enact for different legislative purposes or in different contexts; doing the exactly same thing. Slippery slope: if use double aspect too much, will “water down” core federal powers.

* (2) Impossible to distinguish from *Bell Canada 1966* (Beetz J).
	+ 🡪 Labour relations of federal undertakings should be captured by Parliament’s exclusive jurisdiction over federal undertakings.
* (3) Concurrent jurisdiction in health and safety here could create coordination problems or contradictions that undermine the health and safety they’re supposed to protect.

**R:** **Provincial legislation not saved under double aspect: risk of “watering down” federal powers if use DA too much; IJI applies be”cause of precedent (*Bell 1966*); regulation of federal undertakings = federal!**

***Canadian Western Bank***

**F:** Bank promotes “piece of mind” insurance. Alberta enacts legislation that regulates promotion and sale of insurance. Bank tries to argue that it should not be subject to the legislation because regulation of banks is federal jurisdiction under 91(15).

**I:** whether or not IJI should apply to insulate banks from provincial insurance regulations?

**A:** Reasons to not use IJI very often:

* Risk of centralization
* Crisis of uncertainty: what is a “core”? Negative consequences of defining them prematurely/too definitively
* Legal vacuums where no legislation exists
* Subsidiarity: gov’t closest to citizens better able to respond to citizen desires
* IJI generally unnecessary: legislation can be worded carefully to pre-empt confusion of application

THEREFORE, the test for IJI should be whether impugned legislation ***impairs*** the ability of federal gov’t to legislate in that core jurisdiction (not whether it “affects”); must rely on precedent or move to paramountcy analysis. Application to this case: peace of mind insurance “can hardly be considered ‘absolutely indispensable or necessary’ to banking activities” (268). Therefore, regulation of this insurance does not impair the core federal power of banking regulation.

**R: test for IJI is whether provincial legislation *impairs* federal core competency; rely on precedent for defined cores, or move to paramountcy analysis. Regulation of promotion and sale of insurance does not impair federal banking jurisdiction.**

***Quebec (AG) v Canadian Owners and Pilots Association***

**F:** Owners and Pilots Association builds airport on agricultural land. Provincial legislation prohibits airports (and other developments) on agricultural land. Province says airport not allowed as per their legislation. Owners association challenges provincial legislation as *ultra vires*, because Parliament regulates aeronautics.

**I:** does the Quebec legislation prohibiting airports on agricultural land impair the federal core jurisdiction of aeronautics enough to invoke IJI?

**A:** P&S of provincial legislation = provide lasting area for agriculture: valid. BUT, operational conflict with federal aeronautics

* Precedent: ***Johanesson*** established that core of aeronautics = determining where airstrips are placed.
* For paramouncty to apply, need either:
	+ (1) Operational conflict (can’t comply with both); or
	+ (2) Legislative purpose conflict
		- 🡪 Neither of these apply here, so use IJI
* **Restriction of legislative freedom test**: legislation would restrict Parliament’s legislative freedom by forcing it to either:
	+ (1) Accept that province can forbid placement of aerodromes, or
	+ (2) Legislate specifically to override the provincial law
* 🡪 Quebec legislation valid to the extent that it doesn’t infringe on Parliament’s ability to choose where aerodromes go.

**R:** **Rely on precedent and pre-defined “core powers” to use IJI; proper test is impairment. Restriction of legislative freedom test.**

***Canada (AG) v PHS Community Services***

**F:** Minister of Health denies extension of InSite exemption from *CDSA*. PHS challenges decision based on core provincial jurisdiction over health

**I:** Is there a core provincial power over health that cannot be impaired by federal legislation?

**A:**  No precedent for what constitutes the “core” of health jurisdiction. Court reluctant to define cores where no precedent: “modern trend is to strike a balance between the federal and provincial governments, through the application of pith and substance analysis and a restrained application of federal paramountcy” (para 65). BUT, the way around the Minster’s shitty decisions = violation of InSite user’s section 7 right to life, liberty, security of the person (denying exemption would actually undermine the purpose of the legislation: to protect health and safety of users).

Narrowing of IJI reflects 3 concerns:

* IJI in tension with dominant interpretive approach that favours concurrency
* IJI in tension with cooperative federalism
* Legislative vacuums (defining a core means that provinces can’t touch it in any way, *even if* there is no federal legislation to fill the gap)

**R:** **where no defined core, Court very reluctant to define one. IJI incompatible with cooperative federalism, concurrency, and risk of legislative vacuums.**

***Marine Services Int’l v Ryan Estate***

**F:** Ryan bros die; widows apply for compensation under provincial and federal Acts. Federal because negligence in the building of the ship…

**I:** Is the federal provision compromised by provincial law?

**A:** Both are valid under P&S; maritime negligence/tort law is core federal power in navigation & shipping. Provincial act alters the range of claimants who can make use of the federal statutory action, but it does not alter the uniformity or maritime law or restrict Parliament’s ability to determine who can bring a cause of action. No operational conflict; no frustration of legislative purpose, just different compensation scheme.

**R: Maritime tort law is a defined federal core power; but the provincial legislation is nonetheless applicable because it does not impair the federal core competency.**

 **3. Operability**

* There is no provision in the Constitution to deal with federal/provincial conflict:
	+ Paramountcy = common law rule!
		- Provincial law rendered inoperative to the extent of the conflict
		- If federal law amended or repealed in a way that removes the conflict, provincial legislation becomes operable again
* Moving from a narrower to broader conception to paramountcy:
	+ ***Multiple Access*** = operational conflict
	+ ***BMO*** = conflict includes incompatibility of legislative purposes
	+ ***Rothmans*** = (1) conflict; (2) conflict of legislative intention?
* What does the move toward a broader application of paramoutncy signal?
	+ Moving back towards asymmetrical federalism?
		- Seems out of touch with the progression of the IJI doctrine (promote concurrency)
	+ Remember to link back to Simeon’s competing values in federalism
		- Community: competing interest of local v national? Provincial v pan-Canadian? English/French
		- Functional: who’s best positioned to make the policy? Private sector efficiency?
		- Democracy: how does the scheme affect majority rule/individual rights/liberty/equality/minorities

***Multiple Access Ltd v McCutcheon* (1982)**

**F:** (see facts under Double Aspect). Court finds provincial and federal securities legislation *intra vires* under double aspect.

**I:** “Are ss 113 and 114 of the Ontario Act suspended and rendered inoperative in respect of corporations incorporated under the laws of Canada?” (278)

**A (Dickson CJC):** narrow approach to paramountcy that favours community and democracy over functionalism/efficiency:

* Duplication w/o actual conflict or contradiction not sufficient to invoke paramountcy
* Legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by remedy-seeker
* Application of provincial statute does not displace legislative purpose of Parliament
* “In principle there would seem no good reason to speak of paramountcy…except where there is actual conflict in operation where on enactment says ‘yes’ and the other says ‘no’.” (281)

**R: No conflict in operation means both pieces of legislation are operable. Narrow approach to paramountcy.**

***Bank of Montreal v Hall (1990)***

**F:** Sask. *Limitation of Civil Rights Act* stipulates that if collateral is going to be seized by banks, must give proper notice, or else debtor is absolved of their liability. *Bank Act* permits federal banks to seize collateral immediately without notice. Both provisions found to be *intra vires* under P&S. Now turn to paramountcy.

**I:** Does the provincial *Limitations of Civil Rights Act* stipulation of due notice conflict with federal *Bank Act* to such an extent to trigger federal paramountcy, and render the provincial provision inoperable?

**A (LaForest J):** modifies test from *Multiple Access* to include frustration of legislative purpose.

* Provincial purpose = prescribe procedure that creditor must folliow in Sask. to take possession of collateral
* Federal purpose = assign immediate right to seize and sell goods that debtors offered as collateral; meant to increase access to credit for farmers during the Depression, and give bank complementary safety net of right to seizure

Dual compliance could be possible, i.e. federal bank seizing collateral but also giving notice. But this would “set at naught the very purpose behind the creation of the s 178 security interest” (285) 🡪 application of provincial legislation would frustrate legislative intent of Parliament, which was to make it easier for banks to seize security interests.

**R:** **“conflict in operation” now includes frustration of legislative purpose. Broader test of paramountcy (conflict in legislative purpose means Parliament wins). Provincial legislation inoperative b/c frustrate federal purpose.**

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

**F:** Provincial legislation prohibits advertising of tobacco products in any place where people under 18 are permitted. Federal legislation allows retailers to advertise tobacco products “subject to the regulations”.

**I:** “Whether…s 6 of the *Tobacco Control Act*…is sufficiently inconsistent with s 30 of the federal *Tobacco Act* so as to be rendered inoperative pursuant to the doctrine of federal paramountcy” (289).

**A:** (1) dual compliance is possible: either don’t allow persons under 18 into the store; or don’t advertise tobacco products. (2) Legislative purposes are the same; provincial act may even further the purpose of federal act. (3) Federal Act says can advertise tobacco “subject to the regulations”, which Major J says does not necessarily refer only to federal regulations.

**R:** **two part test: (1) operational conflict/dual compliance possible? (2) Are legislative purposes/intention in conflict? Provincial legislation operative b/c don’t frustrate federal purpose.**

 **4. POGG**

* 2 branches:
	+ **Emergency:**
		- Temporally limited
		- Not something that can be legislated on already under existing head of power (?)
		- Laskin in ***Reference Re Anti-Inflation*** **3 part test**
			* 1. Does the matter require federal intervention?
			* 2. Do critical conditions exist?
			* 3. Is the legislation temporary?
		- Downplays value of democracy (feds can do anything); probably promotes functional values/efficiency
	+ **National concern:**
		- Not temporally limited/is ongoing
		- No emergency (e.g. environmental regulation)
		- Afirmed by Beetz J in ***Reference Re Anti-Inflation***
			* Focused on gap theory: used to fill legislative gaps that Framers didn’t think about
				+ (So can’t use it in the case of *Anti-Inflation Act*, because inflation not a new matter and can’t use gap theory to justify it under POGG)
		- Value of community: address pan-Canadian problems
* **New Deal Decisions** (JCPC):
	+ Limited POGG to emergency branch
	+ Interpreted narrowly
		- Concerned with provincial autonomy; Quebec nationalism
* **Gap theory**: idea that Framers of the Constitution didn’t think of everything that would be legislated on/regulated
	+ New things come up (e.g. environment)
		- Federal gov’t can use POGG power to address/legislate

***Reference Re Anti-Inflation Act***

**F:** Federal gov’t enacts to curb inflation. Applies to federal public sector, provincial public sectors and large private sector firms. Provincial public sector and private sector usually provincial jurisdiction (intraprovincial matters). Federal gov’t justifies it by arguing (1) rising inflation matter of serious national concern, justifiable under POGG; (2) alternatively, it is an emergency.

**I:** Is the *Act* a legitimate exercise of the POGG power?

**A:** Laskin + 3 (plurality):

* Do not address national concern argument
* **Emergency: 3 prong test (pass all)**
	+ 1. Does an emergency exist, *as rationally believed by the federal gov’t*?
		- Extrinsic evidence on the economy
	+ 2. Does the federal gov’t have a *rational belief* that the emergency requires national legislative response? And that the legislation response is rationally connected to that belief (not colourable attempt at something else…)
		- Link b/w said emergency and the legislative effect
	+ 3. Is the legislation temporally limited?

Beetz J dissent:

* Emergency: federal gov’t must justify its incursion into provincial jurisdiction to use it (more than it has here)
	+ Floodgates: concerned feds will usurp provincial power using POGG
* **National concern 3 part test**:
	+ 1. Must be used to fill a gap, and based on precedent (e.g. aeronautics)
		- Inflation does NOT fit this (currency/tender)
	+ 2. Need set boundaries/degree of unity or indivisibility
		- Inflation “knows no bounds”: affects wages, currency, interest rates, etc.
		- Not discreet like aeronautics
	+ 3. Must address national concern without significantly eroding provincial power
		- Disruption of powers/incursion of feds into provincial heads of power would require Constitutional amendment

**R:** ***Anti-Inflation Act* valid under emergency branch of POGG (Laskin). Extrinsic evidence of emergency; rational link b/w said emergency and legislative response; temporally limited. (3 part test for emergency; Beetz J’s 3 part test for national concern branch.)**

***R v Crown Zellerbach***

**F:** Prohibited from dumping toxic materials at sea under federal legislation. Zellerbach dumping waste in internal provincial waters, close to the coast. The inlet is sea water, but it isn’t out at sea. Grey area as to which jurisdiction it is.

**I:** Does federal jurisdiction prohibiting dumping of toxic materials in sea water extend to water that is provincial marine water?

**A:** Waste flows into federal jurisdiction. National concern applies to matters that didn’t exist before (**gap theory**), and matters that have changed nature to become national concern rather than local provincial matters.

* **Broader test for national concern**:
	+ Singleness:
		- Unique and single topic
	+ Distinctiveness:
		- Distinct from federal (provincial?) head of power
	+ Indivisibility:
		- Can’t be under multiple heads of power…

**R: significant broadening of national concern branch of POGG; country building > province building.**

 **5. Criminal Law**

* ***Reference Re Margarine:***
	+ Prior to this case, focus was entirely on form (prohibition + penalty)
		- But only focusing on form allows federal intrusions into provincial powers
	+ Brings in *purposive* analysis: purpose of legislation
		- Now, look beyond 4 corners of legislation to analyze purpose of legislation (P&S)
* **Regulations v Criminal law**:
	+ Presence of regulatory features *may* make a federal law incapable of being upheld as Criminal
	+ Regulatory features:
		- Licensing and prior inspection
		- Administrative discretion
		- Detailed regulations
		- Civil remedies

**Questions to ask RE criminal law:**

1. Does the Act have an overall justifiable criminal purpose?
2. Does the impugned provisions contribute to that purpose?

***RJR MacDonald Inc v Canada (AG)***

**F:** *Tobacco Products Control Act* broadly prohibits all advertising and promotion of tobacco products, and sale of tobacco products unless the package includes warnings. Exemption for advertisements in foreign publications. Tobacco companies challenge as *ultra vires* 91(27), as intrusion on 92 (13) or (16) (property or general local nature).

**I:** Whether the *Act* is a valid use of Criminal law power under 91(27).

**A:** easily passes form requirement (prohibition + penalty)

* **Purpose**: “evil targeted by Parliament is the detrimental health effects caused by tobacco consumption”
	+ As per *Reference re Margarine*: health regulation is valid exercise of criminal law
* Colourable?
	+ No – hard to see what other purposes are served besides reducing tobacco consumption and protecting public health (which are valid exercises of Criminal law)
	+ If the real purpose/intent of the *Act* was industrial regulation, it would likely contain provisions related to product quality, pricing, labour relations.
		- But it doesn’t, so no evidence of ulterior motive
* Why target advertising instead of consumption itself?
	+ Policy – 1/3 Canadians smoked
	+ Addictive – can’t end all at once
	+ Could encourage black market
* Tobacco consumption and advertisement has always been legal, so this *Act* doesn’t have a valid Criminal purpose:
	+ But Criminal law is ***not frozen in time***
* Exemptions means that the exact same act is legal for international actors, but illegal for domestic actors:
	+ Can have exemptions but not lose criminal status; exemptions serve to delineate logical and practical limits of Parliament’s exercise of criminal law power

**R: Health = valid criminal law purpose; regulation of tobacco advertisement not a colourable intrusion into provincial jurisdiction 🡪 can legislate in an ancillary manner (advertisement rather than consumption, but still valid b/c of health).**

***Hydro Quebec***

**F:** Hydro Quebec dumped PCBs into a river in 1990; charged with 2 infractions under ss 34 and 35 of the *Canadian Environmental Protection Act*. QuProviebec challenges these sections as *ultra vires* 91(27). These sections defined and regulate substances that have potential harmful effects on society, and gives governor in council power to make these regulations.

**I:** whether the power to make regulations by governor, and prohibit and penalize these substances, *ultra vires* 91(27).

**A:** Criminal law purpose (La Forest + 4)

* Underline and protect fundamental values; must keep pace with society
	+ This justifies environmental regulation
* Discrete prohibitions to prevent evils falling within broad purpose
	+ Broad policy objective (e.g. environmental protection) is a means of ensuring prohibition is aimed at that evil
* NO MENTION OF FORM

Application to this *Act*

* Environmental regulation/protection valid under **health** or **security**
* Purpose of impugned provisions:
	+ DOES NOT ESTABLISH BROAD CRIMINAL POWER OVER ENVIRONMENT
	+ s 34 precisely defines situations where use of substances are prohibited and penalized
* Incidental effects on provincial powers irrelevant as long as the purpose is validly criminal

**R: Environmental protection can be valid criminal law purpose, justified under health or security. Relaxation of form requirement: can have regulatory aspects as long as there is a justifiable criminal purpose.**

***McNeil v Nova Scotia Board of Censors***

**F:** Board of Censors can determine which films are permitted to be played in movie theatres. McNeil challenges as *ultra vires* 92(13) (property/civil rights)

**I:** Is the regulation of morality as it pertains to films a valid exercise of provincial property/civil rights power under 92(13)?

**A:** Morality as “matter” has double aspect: both gov’ts can legislate if under proper head of power.

* But if provinces regulate morality, must be *regulatory* rather than *prohibitive*
* Power to regulate = to choose *which* films; was not a blanket prohibition on *all* films
* Films = property rights in theatres

**R: Provinces can regulate morality as long as it is validly anchored in a section 92 head of power; must be regulatory in form rather than prohibitive (e.g. discretion!)**

***Westendorp v The Queen***

**F:** Bylaw in Calgary deals with control of soliciting or carrying on business, trades, or occupations on any street. Amended 1981 so that no person shall be or remain on street for purpose of prostitution; can’ approach another person on the street for prostitution; fines from $100-500, up to 6 months in prison. Stated purpose = public order (prevent public nuisance).

**I:** is the bylaw an *ultra vires* incursion into 91(27)?

**A:** Legal effect = singles out prostitutes (liability triggered by words pertaining to exchange of money for sex…only prostitutes)

* **Purpose** = control or punish prostitution
* Can it be saved as necessarily incidental? (Are the provisions part of larger, valid legislative scheme?)
	+ No, not integrated into a valid scheme
* Is there an alternative head of power to justify it?
	+ Can’t do by prevention what the Criminal law does by prohibition

**R: If the regulations and “prevention” amount to *de facto* prohibition, likely *ultra vires* provinces.**

In order to determine the validity of a piece of legislation, the Court must first establish what the matter, or the “pith and substance”, is. The matter involves first looking to the “four corners” of the legislation and at how it affects those who are subject to it, for example if it regulates or prohibits behaviour. Judges will then look at extrinsic evidence and consider the timing of the legislation and the “catalyst” for government action, to try and discern the problem or “mischief” the government was trying to address. In this process judges may also look to Hansard evidence and legislative debates to see if the stated purpose of the act concurs with minsters’ or members’ remarks about it during debate. Once the matter is determined using thee tools, it must be compared between the respective provincial and federal heads of power, to identify the power under which the matter falls.

In this process, the courts generally try to uphold legislation and favour interpretations that promote cooperative and flexible federalism. Striking or reading down legislation can lead to legislative vacuums where no legislation exists, and could leave subjects unregulated. To avoid this, the double aspect and necessarily incidental doctrines are used to try and uphold the validity of a piece of legislation that intrudes on the other government’s jurisdiction.

The double aspect doctrine recognizes that both provincial and federal governments can enact legislation that has similar legal effects or outcomes, as long as they are grounded in a corresponding head of power under section 92 or 91, respectively. This doctrine was used to uphold Ontario’s *Securities* *Act* when the federal government had legislation that accomplished the same goals and affected the same subjects or individuals as the federal legislation. There, the province’s legislation was valid under 92(13), property and civil rights, while the federal government’s was valid through its jurisdiction over federally-regulated undertakings.

The necessarily incidental doctrine allows a particular provision or section of a piece of legislation to be upheld when that provision has effects that are *ultra vires* or is *ultra vires* on its face. When this occurs, the Court will look to the seriousness of the encroachment on the other government’s jurisdiction. A minor encroachment may be a remedial rather than substantive provision, and one that is specific rather than general. If the encroachment is minor, the court will determine whether it nonetheless contributes to the function of the legislation, and if it could be severed from the legislation without defeating its purpose. If it contributes to the function and cannot be severed without affecting the effectiveness of the legislation, then it will be a necessarily incidental provision within an overall valid scheme, and thus upheld as valid. If it can be severed without affecting the effectiveness of the legislation, then it is likely not functionally related to its overall purpose. Lastly, if the encroachment is a major one into the other government’s jurisdiction, it will generally lead to a paramountcy analysis rather than staying under a validity analysis.

Once the validity of the legislation has been established, a party can nonetheless request the court to read down the legislation so that it is inapplicable to the extent of the conflict with the other government’s head of power. This is where the Interjurisdictional Immunity doctrine is invoked, which attempts to define the core or most important aspects of a federal head of power, in order to determine whether a provincial piece of legislation is intruding on that core power. In theory it could be used to define provincial heads of power as well, but this has not been the history of the doctrine. Judges are reluctant to define the cores of heads of power because interjurisdictional immunity can “invoked in favour of federal immunity at the expense of provincial legislation” (*Canadian Western Bank* at para 35). When the Court delineates areas of federal immunity, it is often at the expense of provincial legislation, because the Court is in effect granting the federal government immunity from provincial intrusion of any degree into the “core” of the power, as defined by the Court.

The test for invoking the interjurisdictional immunity doctrine and defining the “core” of a head of power seems to have gone in a circular motion since the 1960s. Originally, if a provincial law “sterylized, paralyzed, or impaired” federal legislation, it would be read down (*John Deere Plow Co*; *Great West Saddlery Co*). Thus the threshold for reading down provincial legislation was quite high. In the 1960s in the first *Bell Canada* (1966) case, the threshold was lowered to whether or not a provincial law “affected a vital part” of a piece of federal legislation. An implication of this lower threshold was that provincial legislation could more easily be read down, because defining the “cores” of federal powers inevitably means setting firm boundaries within which the federal government is immune from provincial law. Thus if a provincial law even “affected a vital part” of a federal head of power, the Court could set out the parameters of that federal power and bar provinces from ever intruding on it. Even where no federal legislation existed, the Courts could define a federal power. This can lead to legislative vacuums where provincial laws are inapplicable, but where there is no counterpart legislation from the federal government. However, more recently the Court has reversed its position, and in *Canadian Western Bank* it went back the test being whether or not a provincial law “impaired”, rather than simply “affected”, the core of a federal power. The Court in *Canadian Western Bank* and *Quebec v Canadian Owners* stated that IJi should generally be limited to those core powers that have already been defined through precedent cases.

Finally, there is the federal paramoutncy doctrine whereby provincial legislation can be read down and deemed inoperable to the extent of its conflict with federal legislation. This is a common law doctrine, and the Court has fluctuated in its interpretation and test of when to invoke it. If the legislation fails the pith and substance analysis, and the double aspect or necessarily incidental doctrine doesn’t save it, then the court will generally look to federal paramountcy (unless it deals with a “defined” core such as aeronautics, which has already been determined under the interjurisdictional immunity doctrine).

In earlier decisions, the Court would ask whether there was an operational conflict between conflicting federal and provincial legislation. This would occur when citizens could not comply with both pieces of legislation simultaneously, as in where one says “yes” and other says “no” (Dickson CJC, *Multiple Access* at p 281). This was a higher threshold than what was later enumerated in *Bank of Montreal v Hall*, where LaForest J incorporated conflict of legislative purposes into the test. In that judgement, the Court also considered whether Parliament and the Saskatchewan legislature enacted the pieces of legislation for different legislative purposes, and read down the provincial legislation for frustrating the federal legislative purpose. Thus the threshold seems to have been lowered a degree from earlier decisions.