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# Canada’s Constitution

**Definition**: An open-ended set of rules, principles, and practices that represent efforts to identify, define, and reconcile competing rights, responsibilities, and functions of governments, communities, and individuals.

**Elements of the Canadian Constitution**

1. Parliamentary democracy: ensures our general laws are made by elected legislative bodies.
2. Federalism: possesses the power to enact laws over matters of national concern (vs. provincial legislatures has the power to enact laws over matters of local concern). Division of legislative powers between the federal and provincial governments.
3. Individual and group rights: claims that citizens have against the state – rights to democratic government and rights to conduct their lives as they choose
4. Aboriginal rights
5. Principle of constitutionalism: government action can be held by the courts to be “of no force or effect” if the courts find that action to be inconsistent with a provision of the Constitution of Canada

**Sources of the Canadian Constitution**

1. Common law: judicial decisions/case law
2. Statutes: created by legislatures and can be modified and indeed overrule common law rules ex. the *Supreme Court Act*, 1985
3. Conventions: rules that have developed from government practice over time and that are enforced not by courts but by political sanction
4. Actions by the British Crown and the British Parliament - Historical acts of the British Crown and Enactments of the Imperial Parliament at Westminster.

**From colony to Independent State:**

Statute of Westminster, 1931: enactment of the Imperial Parliament providing that no further British statute would apply to Canada unless enacted at the request and with the consent of Canada. (Happened after WWI when Canada was coming into its own)

* This aspect of the Statute of Westminster repealed the Colonial Law Validities Act, 1865 which invalidated all colonial laws inconsistent with the laws passed by the Imperial Parliament (except the British North America Act)

1949 - appeals to JC Privey Council abolished

1982 – Patriation

* The Canada Act, 1982 (UK Parliament) no act of the UK Parliament passed thereafter shall extend to Canada
* The Constitution Act, 1982 (Canadian Parliament) affirming but renaming the BNA after including as schedule B the Charter of Rights and Freedoms

**Constitutional Change**:

Constitution has special procedures for change (known as amending forumlae). High degree of consensus required making it difficult. Constitution evolves by judicial interpretation. Case law

🡪 **s. 52** declares the Constitution of Canada “the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution…of no force or effect.”

## Amendment Process:

* **General amendment formula** (s. 38, see also 42): Approval of House of Commons + 2/3 of the Provincial Legislatures representing a minimum of 50% of the population of Canada.

**7/50 Formula**

**s. 38. (1)** An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

 (a) resolutions of the Senate and House of Commons; and

 (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

**s. 42. (1)** An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

 (a) the principle of proportionate representation of the provinces in the House of

 Commons prescribed by the Constitution of Canada;

 (b) the powers of the Senate and the method of selecting Senators;

 (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

 (d) subject to paragraph 41(d), the Supreme Court of Canada;

 (e) the extension of existing provinces into the territories; and

 (f) notwithstanding any other law or practice, the establishment of new

 provinces.

* **Special amendment formulas** (s. 41, see also ss. 43-45 for variations thereon): Approval of the House of Commons and all the Provincial Legislatures).

Requirement of Unanimity

**s. 41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

 (a) the office of the Queen, the Governor General and the Lieutenant Governor

 of a province;

 (b) the right of a province to a number of members in the House of Commons

 not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

 (c) subject to section 43, the use of the English or the French language;

 (d) the composition of the Supreme Court of Canada; and

 (e) an amendment to this Part.

Special Arrangements Procedure

**s. 43** – applicable to some but not all provinces

Unilateral federal and provincial procedures

**s 44 & 45** – mirroring the division of powers in ss. 91(1) & 92(1) of the *Constitution Act* , 1867 (unilateral amendment by either level of government where amendment relates exclusively to its own respective constitution and does not engage the interests of the other level of government)

**Reference Power**: **s. 53. (1)**The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact

**Backdrop to Secession Reference:**

* The backdrop to this exercise of the reference power is the constitutional turmoil, which marked the 80s and 90s after patriation.
* The culmination point came with the near defeat of the federalist side in the 1995 referendum.
* In response, the Federal Government sought a legal framework from the Supreme Court of Canada to guide its own response to any future “yes” vote.

The Patriation Reference

* In 1981, the Federal Government used s. 53 to seek the Supreme Court’s guidance on whether it could amend the Constitution unilaterally or whether it would have to consult the Provinces and/or secure their approval.
* Ultimately, the Court held that a “substantial degree” of provincial consent was required. Unfortunately, the Government of Quebec’s follow up question regarding what amounted to a “substantial degree” did not come to the Supreme Court until after the UK Parliament had enacted the Canada Act without its consent.
* This led to the period of “Mega-Constitutional Politics” during the 80s and 90s in which there were two attempts to re-open the Constitution to bring Quebec “into the fold”: the Meech Lake and Charlottetown Accords.

Meech Lake Accord:

* The Meech Lake Accord is named after the First Ministers’ conference held at Meech Lake, Quebec, on April 30, 1987. Its purpose was to secure the Government of Quebec’s belated assent to patriation.
* Despite the assurances of the various provincial premiers, the accord ultimately failed to garner the requisite legislative unanimity of the ten provincial legislatures.

 The Charlottetown Accord

* The Charlottetown Accord included the major elements of its Meech Lake predecessor in addition to an array of other provisions, inclusive of, but not limited to:
* a guarantee of 25 percent of the seats in the House of Commons to Quebec;
* a double majority requirement for Senate approval of bills materially effecting the French language or culture;
* a grant of exclusive jurisdictions to the provinces on matters of culture;
* Senate reform augmenting the representation of the western provinces;
* Aboriginal self-government provisions;
* various provisions pertaining to the recognition of Canada’s multicultural character; and,
* a “social and economic charter.”
* Unlike the elite-driven Meech Lake round, the Charlottetown round proceeded by public consultation. On October 26, 1992, the accord was put before the Canadian people in a referendum and was defeated nationally 54 to 44.6%.

#### Reference Re Secession of Quebec, 1998 SCC pg. 11, 17-25

Issues:

1. Is there a legal basis for secession in Canada’s Constitution? No.
2. Is there a legal basis for secession in International Law? No.
3. In event of a conflict, which would take precedent? Not applicable.

What is The Constitution of Canada:

1) **S. 52(2**) of the Constitution Act, 1982; and,

2) A series of other “unwritten as well as written rules" or "the global system of rules and principles which govern the exercise of constitutional authority in the whole an in every part of the Canadian state." (citing the Patriation Reference).

Constitutional Principles: vital unstated assumptions upon which the text is based. These principles inform and sustain the constitutional text, and function in symbiosis. These principles dictate major elements of the architecture of the constitution. Allows courts to fill gaps in express terms of constitutional text.

1. **Federalism**-power shared by 2 orders of government (Federal and Provincial). Each is assigned respective spheres of jurisdiction by Constitution Act, 1867. Courts have always been concerned with federalism principle in interpreting constitution to control limits of each side
2. **Democracy**-constitution contemplates existence of certain political institutions, including freely elected legislative bodies, but does not explicitly identify.
3. **Constitutionalism and the Rule of Law**-Law is supreme both over acts of government and individual persons. The exercise of public power must find its ultimate source in a legal rule. We have a system of constitutional supremacy instead of parliamentary supremacy
4. **Respect for minority Rights**-Constitution was founded on protecting minority rights leading to confederation. This continues to influence interpretation of constitution.

🡪 The Courts ultimate holding is that any declaration of unilateral succession unconstitutional. A clear expression of the people of Quebec (or any other province) of the will to secede from Canada would impose reciprocal obligations on all parties to confederation (including the federal government and other provinces) to negotiate.

#### Reference re Supreme Court Act, 2014 SCC 22

**Facts**: The Harper Government’s wish to appointment Federal Court of Appeal Justice Marc Nadon to the Supreme Court.

**Issue**: What type of constraints and how much latitude the Federal Government has in making Supreme Court Appointments.

**Law**: Parliament, cannot enact declaratory legislation that would fundamentally alter the Supreme Court of Canada

**Analysis**:

* The Government drafted legislation to make clear that former membership of 10 years or more would suffice.

**Amending Procedure:**

* **S. 41(d):** Unanimous Consent of Parliament and all Provincial Legislatures required to change “composition of Supreme Court”.
* **S. 42(1)(d**): 7/50 amending procedure to change “essential features of the Supreme Court”.

The court suggests that s. 5 and 6 of the Supreme Court Act are now **‘entrenched’** in the Constitution: *“Changes to the composition of the Supreme Court must comply with s. 41(d) of the Constitution Act, 1982. Ss. 4(1), 5 and 6 of the Supreme Court Act codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as the existed in 1982…Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution…and triggers the application of Part V of the Constitution Act…”*

#### Reference re Senate Reform, 2014 SCC 32

**Facts**: the Harper Government’s wish to unilaterally reform the Senate (to make it elected, set fix terms of office and remove land owning requirements under the BNA Act

Issue: what type of constraints and how much latitude the Federal Government has in reforming the structure of Canada’s Parliament (in this case, the unelected upper chamber/senate).

Believed to be 3 majors problems with the Senate:

* Unelected, therefore undemocratic
* Unequal (not the same number of senators per province)
* Doesn’t really do much anyways

**Analysis**:

* Parliament cannot unilaterally implement a framework for consultative elections for appointments to the Senate: “We conclude that each of the proposed consultative elections would constitute an amendment to the Constitution of Canada and require substantial provincial consent under the general amending procedure…”
* Parliament cannot unilaterally set fixed terms for Senators: “The imposition of fixed senatorial terms is a significant change to senatorial tenure…engages the interests of the provinces as stakeholders in Canada’s constitutional design and falls within the rule of general application for constitutional change – the 7/50 procedure in s. 38.”
* To abolish the Senate, unanimous consent would be required:“abolition of the Senate would fundamentally alter our constitutional architecture – by removing the bicameral form of government that gives shape to the Constitution Act, 1867 – and would amend Part V, which requires the unanimous consent of Parliament at the provinces (s. 41, Constitution Act, 1982.”
* Before it goes on to decide that the Government cannot unilaterally reform the Senate in the way it proposes, the Court emphasizes that beyond its role as equalizing forum for the regions, the Senate has come to “represent various groups that were under-represented in the House of Commons” including Aboriginal groups and various ethnic, gender, religious minorities.
* In this sense, the Court suggests that the some of the popular disdain for the Senate as an institution is unfair.

**The three courts reference each other to answer the question: What is the Constitution of Canada (its nature and content)?**

🡪 First to s 52(2), then court in the Senate Reform looks to the other decisions as authority of certain basic unwritten constitutional principles

* Secession Reference were it defined the Constitution of Canada as “a comprehensive set of rules and principles” providing “an exhaustive legal framework for our system of government.”
* The Supreme Court Reference: The Constitution of Canada “governs the state’s relationship with the individual. Governmental power cannot lawfully be exercised, unless it conforms to the Constitution.”
* Senate Reference: “…The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation…the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes…[emphasis added] ”

Fathers of Confederation (Senate Reference)

* The Father’s of Confederation are a series of men, most of whom were premiers of provinces, either in 1867 at Confederation or at later dates in evolution of the Dominion of Canada (Manitoba, 1870, BC, 1871, etc.). The most recent Father of Confederation is Joey Smallwood, who was Premier of Newfoundland when it entered Confederation in 1949.
* *“The framers sought to endow the Senate with independence fro the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives”* (para 57)
* *“…Correlatively, the choice of executive appointment for Senators was also intended to ensure that the Senate would be a complementary legislative body, rather than a perennial rival of the House of Commons in the legislative process. The proposed consultative elections would fundamentally modify the constitutional architecture* (para 58).

**Conclusion for the References**: *“The notion of amendment to the Constitution of Canada is not limited to textual modifications...”*

# Federalism: Introduction

From Contact to Confederation (pages 63-66, 83-86)

* “Two nations theory of confederation” **Laskin**: imagined Cdn constitutional history as a story of accommodation between the French and English language populations concentrated in “Lower/French Canada” and “Upper/English Canada”. This theory tended to start the clock on Canadian constitutional history at either 1763 (Treaty of Paris) or 1867 (BNA Act)

Pre-Contact:

* Although laws in aboriginal communities did not reflect European laws they are still considered laws. (Often oral and unwritten, customary – not enacted by a “supreme authority”)
* Prior to settlement, North America was considered to be unoccupied according to international law (terra nullius) even though there was an indigenous population.
* The present constitutional laws acknowledge that Canada was not terra nullius. It also sees treaties between Aboriginal nations and the crown as constitutionally significant.

French Canadian Idea of Confederation 1864-1900:

* Prior to confederation there were numerous concerns among French Canadians, who wanted more provincial autonomy to ensure that their rights and culture were protected.
* French wanted federal government to be sovereign over only certain general matters clearly defined in the constitution. "The two levels of government must both be sovereign, each within its jurisdiction as clearly defined by the constitution "
* French were unwilling to accept a legislative union. Wanted a Federal union.
* Ottawa would only have jurisdiction of those matters in which the interests of everyone are identical

Note: The Nature of Federalism (page 119) (A.V. Dicey):

* Federalism can be seen as a structure in which the concerns that effect the nation as a whole would be controlled by the national government while the issues that are not common to the entire country would be dealt with by the individual states (according to Dicey)

Three characteristics of “completely developed federalism” (according to Dicey)

1. “The supremacy of the constitution”
2. “The distribution among bodies with limited and co-ordinate authority of the different powers of government”
3. “The authority of the Courts to act as interpreters of the constitution”
* Dicey was concerned with the rule of law
* Federalism can also be described as two independent powers neither of which are subordinate to the other (**O’Sullivan’s view** which is seen as more aggressive and expresses the eventual triumph of the provinces)
	+ Coordinate gov’ts standing on the same level and deriving their powers from the same sovereign authority
	+ Emphasis on the autonomy of provinces and the fed gov’t: mutually exclusive spheres of power, separated by sharp boundaries
* Federalism means legalism: Interpreters of constitution are judges. Powers of executives are limited by the constitution. It follows that the Bench of judges are the master of the constitution.

Note: The Compact Theory (page 121):

* Looks at federalism from a bottom up perspective. By joining confederation provinces did not renounce their autonomy. They formed a central government only for interprovincial objectives. Federal government arises from provincial powers, to which provinces have ceded a portion of their rights, property and revenues.

Elements of the federal compact (written by **Loranger** a Quebec judge)

1. Although the provinces formed a confederation they were not intending to relinquish their autonomy
2. Legislative/executive power, legal attributes, public property and revenues belong to the provinces

🡪 The compact was not successful as it was incongruent with the leading common law thought -->This theory is very popular among provincial rights advocates, who use it to support their claims.

* Claims such as: BNA Act cannot be amended without consent of each of the provinces, And interpretations of BNA ACT; Provinces entitled to all residue of legislative power not specifically granted to dominion, and there lieutenant governor had the stature and powers they possessed before confederation.
* Compact has continued to be a powerful part of Quebec's constitutional belief.
* Compact is not popular with dominant common law thought who declare BNA Act as sole charter for determining rights of the dominion and provinces

Note: The Power of Disallowance (page 122):

* The power as expressed in ***s.59 and 90*** of the Constitution Act, 1867, entitles governor general, acting on the advice of federal cabinet, to reserve for up to 1 year and then veto any enactment of the provincial legislatures.
* This reflects a subordination of the provincial governments to the federal government, which is incongruent with the notion of federalism.
* The power of disallowance is intended to protect the public from “unjust, confiscatory, or ex post facto legislation”.

# The Division of Powers and Its Interpretation

Under s. 91 and 92 of the BNA Act

* Division of legislative authority under Federal and Provincial
* When statute is outside the jurisdiction, court will call it ultra vires
* When statute is inside the jurisdiction, court will call it intra vires

**Three ways to challenge statutes on the ground of division of powers:**

1. Challenge “the validity of a statute on the ground that it is in its dominant characteristic in relation to a matter beyond the enacting legislature’s jurisdiction and thus within exclusive jurisdiction of the other level of government” – that act is beyond its jurisdiction
	1. Concerning the dominant characteristics or the ***“pith and substance”***
2. “Limit the applicability of valid statutes” – possibility of “reading down”
	1. “Reading down” – give effect to the enacting legislation as much as possible without touching on the federal jurisdiction points
	2. Interjurisdictional immunity
3. “Limit the operability of provincial statutes” – provincial statute conflicts with federal (federal will always hold)
	1. ***Federal paramountcy rule*** – In certain areas, you can have a co-existence of jurisdictions, but where there is a conflict, the federal legislation gets privilege

## Judicial Review and the Legitimacy issue

**Judicial Review**: the power of the courts in Canada to determine, when properly asked to do so, whether action taken by a governmental body or legal actor (ie. Parliament, RCMP) is or is not in compliance with our constitution. If they find it is not, they can declare it to be unconstitutional.

It is written in our constitution:

**s.52(1) of Constitution Act, 1982** - "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect"

**s.24(1) of Canadian Charter of Rights and Freedoms** - "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstances"

**Legitimacy issue**: Constitution is written in general terms leaving it up to interpretation of courts.

* There is a concern that it can result in the actions of democratically elected representatives of the people being declared of no force or effect by appointed judges. Is Judicial Review antidemocratic? Arguments for both sides

🡪 Some have questioned the legitimacy of the courts use of judicial review. For example Paul Weiler argues that disputes regarding legislative jurisdiction would be better resolved through federal-provincial negotiations and the democratic process.

* Peter Hogg – courts should exercise restraint as to how they step into the dispute
* Lawyers are conflicted in their views of judicial review.

Elliot “References, Structural Argumentation, and the Organizing Principles of Canada’s Constitution” (pg 40)

* 6 different forms of legal argumentation
1. **Historical** – intent of the people who wrote it (founding fathers ex. Scalia)
2. **Textual** – present sense of the words (can lead to impractical and overly complicated reading of the law)
3. **Doctrinal** – typical common law form of reasoning
4. **Prudential** – practical cost benefit (what level of government can do this better) (do see a fair amount of this in Supreme Court readings – ex. where its not clear which level of government has jurisdiction, court might make decision based on practical considerations)
5. **Ethical** – whatever is following the Canadian ethos
6. **Structural** – based on inferences from the existence of constitutional structures and their relationships which the Constitution ordains among these structures. 🡪 Inferences from the whole structure of the constitution. (Reference power invites the structural form of argumentation)

🡪 Elliot gives the Reference re Secession of Quebec as examples a case who uses this form of argumentation

* Courts invoked four of the organizing principles of the Constitution (federalism, democracy, the rule of law and the protection of minorities) to resolve the issue of constitutionality of secession by a province

#### Reference re Meaning of the Word “Persons” (1928, SCC) page 45

**Parties**: Governor General exercising reference power pursuant to s. 53 of the *Supreme Court Act.* In a formal sense there are no real parties in a reference.

**Facts**: The Government is being pressured to appoint women to the Senate and requires guidance as to whether women are constitutionally prevented from being appointed to the Senate.

**Issue**: Are women “qualified persons” under s. 24 of the BNA Act?

**Decision**: “Women are not eligible for appointment by the Governor General to the Senate of Canada under s. 24 pf the BNA Act…” (p. 49)

**Reason**: At the time, the people who were writing it wouldn’t have understood the term to include women. In addition, look at the surrounding legislature and common law.

* No. Women aren’t eligible for appointment to the Senate under s. 24 of the BNA Act because they are not “qualified persons” within the meaning of the section.
* Not within the meaning of the section because of it is not supported by a plain reading of the Act, including the surrounding provisions, or the established common law.

**Ratio**: Women are not persons within the meaning of s. 24 of the BNA Act and therefore ineligible for appointment to the Senate.

**Commentary**:

* Although not a dissent, **Justice Duff** concurred for reasons different from those of the majority.
* He rejected the proposition that common law presupposition that women were under a disability and therefore not “persons” didn’t automatically apply to the interpretation of the BNA Act.
* However, he agreed that the provisions of the BNA Act itself had to be read as fixed to exclude women at the time of their drafting.

#### Edwards v. Canada (Attorney General) (1930, PC) page 49

**Parties**: 5 women who have been part of Alberta legislative system & Canada (Attorney General)

Procedural History: Reference – Persons Case SCC

**Facts**: On appeal from the Persons Case

**Issue**: Whether the words “qualified persons” in s. 24 of the BNA Act include women, and whether women are eligible to be summoned to and become members of the Senate of Canada.

**Decision**: “Their Lordships are of the opinion that the word ‘persons’ in s. 24 does include women, and that women are eligible to be summoned and to become members of the Senate of Canada.”

**Reason**:

1. The external evidence derived from extraneous circumstances such as previous legislature and deciding cases
	1. The fact that no woman had served or has claimed to serve in such an office is not of great weight when it was the custom of the time. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. 🡪 The appeal to history is not conclusive in this matter
2. The internal evidence derived from the Act itself
	1. Must take care not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another
	2. The BNA Act planted in Canada a **living tree** capable of growth and expansion within its natural limits

**Ratio**: Women are eligible to be appointed to the Senate (the term “persons” in s. 24 of the BNA Act includes female as well as male persons).

**Commentary**:

* **Lord Sankey’s** judgment in *Edwards* remains enormously influential almost a century later.
* *Edwards* broke with past practice to bring the law into accord with changing values.
* To do this, a judge must have the courage to break with tradition and the skill (rhetorical or otherwise) to make the break appear consistent with established law.

R. Simeon, Criteria for Choice in Federal Systems (pg 200)

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

**Simeon lays out three criteria through which Federalism can be evaluated from**:

1. **Community** (political, ethnic, geographical, linguistic – country-building, province-building, two-nation building, socio-territorial)
	1. What conception of the political community is to be embodied in political arrangements? Federalism is assessed in terms of its ability to defend and maintain a balance between regional and national political communities
	2. In this point of view federalism=dynamic balance between regional and national communities (i.e Federal and provincial)
2. **Functional Efficiency** (economies of scale or pathologies of size)
	1. Federal and Provincial governments are seen as different elements of a single system. Powers are allocated not according to what different communities need to express or protect themselves but rather according to a division of labour criterion: Which level can most efficiently and effectively carry out a given responsibility.
	2. The system as a whole is evaluated in terms of its ability to respond to the needs of citizens (economic and social goals)
3. **Democracy** (majority rule, individual rights and freedoms, ability to participate in decision-making)
	1. Impact of different Federal arrangements on conceptions of democracy (participation, responsiveness, liberty, equality)

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

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

* **Laskin**: federalism through lens of functional efficiency
* **Beetz**: federalism through lens of community

America = democracy, Germany & Australia = functional efficiency, Canada = start with community, 1930s this gave way to functional efficiency

## Interpretation Doctrines

###  (A) Pith and Substance – Validity (CHARACTERIZATION of laws )

**Pith and substance doctrine:** results in a law being upheld if its **dominant characteristic** (it’s “matter”) falls within the classes of subject matter allocated to the jurisdiction of the enacting government (and struck down if it is *ultra vires*)

* **Doctrine of Incidental Effects**: Laws may be upheld if they impact matters outside the enacting legislature’s jurisdiction, so long as these effects remain secondary or **incidential features of the legislation** rather than its most important feature
	+ E.g., *Carnation* case 🡪 board dealing with processors, producers and buyers of milk, located in Quebec, Quebec, and Ontario respectively. Legislation fixed minimum proces that the processors would have to pay to the producers, whils having an effect on buyers in Ontario (i.e. on interprovincial trade; which falls within federal jurisdiction), is merely an incidental effect. The pith and substance of the legislation is to regulate trade within Quebec, a matter within provincial jurisdiction.

\**This is* ***distinct*** *from the* ***necessarily incidental doctrine****. P&S deals with the whole law that has a small effect on the head of power of other jurisdiction; NI deals with a law as a whole that is valid but one provision that intrudes on the other’s jursidiction*

K. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years (pg 207)

All federal systems require a distribution of legislative powers between national and regional governments. This is performed by s.91 and 92 of Constitution Act, 1867 in Canada:

* **s.91** lists 30 classes of subjects that fall within federal legislative jurisdiction including "regulation of trade and commerce" in 91(2) and "criminal law" in 91(27)
* **s.92** lists Provincial jurisdiction over 15 classes of subjects, including "property and civil rights in the Province" in 92(13)
* Some argue that the language in section 91 is to open ended and gives the federal government essentially unlimited legislative power (limited only by the list of provincial powers)
* Others argue that the open wording gives the federal government the ability to deal with issues that are not addressed by either the provincial or federal jurisdictions

**How do courts choose between Competing Classifications? (3 Steps)**

1. **Identify the “matter” of the law** – start with the statutory context but you can include the purpose of the legislation (the problem which triggers the legislation or the legislative history) or effects of legislation. Judge's discretion. Look for the dominant feature of the law – its “pith and substance” 🡪 examine both the purpose and the effect of the law.
2. **Delineating the scope of competing classes** – Which level of gov’t does the statute or power properly fit? There is opportunity for extensive overlap between classes in s.91 and 92. Similar laws can fit in both federal and provincial heads of power. The courts often uphold such legislation using the "double aspect doctrine", whereby they acknowledge that some law may have both federal and provincial purposes. 🡪 Again judge's discretion involved but precedent plays important role
3. **Determining the class in which the challenged statute falls** – ultimate decisions about boundaries and the matters within them is guided by federalism concerns (beliefs about the optimal balance of power between the federal and provincial governments). Can be about optimal balance of power b/w federal and provincial governments and is often shaped by the individual beliefs of the judge.

W.R. Lederman, “Classification of Laws and the BNA Act” (pg 210)

* Important to realize that enumerated ‘subjects’ or ‘matters’ are classes of laws, not classes of facts
* That a rule of law for purposes of the distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that respect

**Doctrine of Colourability/Colourable Law:** a law that **affects a different jurisdictional matter** than is apparent *prima facie*. A provincial law may seem, at the surface, to effect provincial matters but in practice incurs into the federal realm. Ordinary consequences are intended consequences and are those reasonably informed people would expect. Could have been referenced in *Morgentaler*. SCC doesn’t use this because it suggests bad faith on the part of the legislature.

🡪 Pith and substance require looking **both** at the purpose and effect of the law.

#### R v Morgentaler (1993, SCC) pg 215 (private abortions, pith and substance)

**Facts**: Nova Scotia enacted a provincial statute to restrict the privatization of medical services, including abortions. All abortion procedures had to happen in public hospitals. Punishable on summary conviction with a fine. Morgentalar was charged under the act for performing abortions 🡪 he contended that the act essentially criminalized abortions, which falls under federal jurisdiction (thus the act was *ultra vires*, and invalid). NS argued that the purpose of the legislation was to regulate healthcare (within provincial jurisdiction), *not* criminalize.

* Province has authority over hospitals, civil rights (incl. regulating the medical profession), and local matters (ss.92(7), (13), and (16), respectively). Federal has criminal law (s.91(27)).

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

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

**Sopinka (+8!):**

**Pith and substance analysis:**

1. **Legal effect** – how the legislation as a whole affects the rights and liabilities of those subject to its terms. Sometimes courts will also look at “actual (practical) effect” of the law in practice, based on expert testimony, however this is not of importance. The law itself (its legal effect) was to prohibit abortions; a federal, criminal matter
2. **Similarity to Federal Law** – virtually indistinguishable provincial and federal laws; will not necessarily determine validity, however, as double aspect doctrine may apply (per *Multiple Access*) – province can enact legislation with the same legal effect so long as it falls under its head of power. Such similarities “may raise an inference” that the province has stepped in the realm of criminal law 🡪 more similarities = greater inference that the province is trying to do what it cannot (too similar = law will not survive).
3. **Timing of legislation** – questionable that the province became suddenly concerned with privatization when Morgentalar set up his clinic – they knew of his intention to do this. Course of events suggests that privatization and quality assurance considerations were only incidental at best (i.e. this is the inference).
4. **History of the legislation 🡪 consider extrinsic materials** – essential to consider the material the legislature had before it and the legislative debates (Hansard evidence) when enacting statute (court looked at these documents and found that the law appeared to be an attempt by the province to prohibit private abortions by Morgentalar in particular, considered to be a “public evil” [thereby falling under the criminal law]; the “concern” of privatizing medical services was absent from the debates)
5. **What does the legislation address *prima facie*** (what is the law really about – characterization of its purpose) **–** the legislation does not address privatization of healthcare sufficiently to convince the court that this is its purpose 🡪 if the means employed by the legislature to achieve its objective do not logically advance those objectives, this may indicate that the purported purpose masks its actual purpose. If it was aimed at prohibiting privatization of surgical procedures, why was it so specific rather than banning all private surgical procedures.
* Scope of heads of power (jurisdictional divisions):
	+ **Criminal law** – prohibition of activity and penal sanctions (strictly federal).
	+ **Provincial health jurisdiction** - hospitals & medicine due to aforementioned s.92 provisions.
	+ **Regulation of abortion** – was federal; now there’s a vacuum.

**Held**:Pith and substance analysis led the court to determine the law was a **colourable attempt** to regulate criminal law under the mask of a provincial head of power (i.e., *prima facie*, it appeared that the statute was attempting to regulate hospitals). Province acted *ultra vires* because it attempted to prohibit the performance of abortions outside hospitals with a view to suppressing or ***punishing*** what it perceives to be the ***socially undesirable conduct of abortion🡪 criminal law***. If the law was meant to regulate the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, this would have been provincial. **Doctrine of incidental effects** also applies, as the Act falls under crime and punishment in its pith and substance; however this is not undermined because it has some spillover effect in health care, civil rights and local matters (provincial jurisdiction).

### (B) Double Aspect Doctrine – Validity (CHARACTERIZATION of laws )

**Double aspect doctrine**: holds that **laws can fall under two aspects** that related to both federal and provincial matter and are of roughly equivalent importance (i.e. neither can be qualified as “incidental”), ***both bodies can regulate***

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

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

* Areas of **functional concurrency** – concurrency through application of doctrinal tools (p. 240).
* Constitution (explicit text) provides for **de jure concurrency** in agriculture and immigration (s. 95).

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

Dickson was willing to create areas of concurrent jurisdiction

W.R. Lederman, “Classification of Laws and the BNA Act” (pg 235)

* Courts have dealt with the overlapping of federal and provincial categories of laws in a number of ways
* They have used the principle of “mutual modification” to eliminate some of the encroachments of one upon the other

When overlapping still remains, either one of two things has then been done:

* If the provincial feature is deemed quite unimportant relative to the federal feature, then the provincial class of powers has been completely ignored (and vice versa for the federal feature)
* **Double-aspect theory of interpretation**: when the court considers the federal and provincial features are of roughly equivalent importance so that neither should be ignored respecting the division of legislative powers, the decision is made that the challenged rule could be enacted by the federal Parliament or the provincial legislature (only if the courses of conduct and effects are cumulative, not conflicting)

🡪 If they are in conflict the federal rule prevails and the provincial one is rendered inoperative – **Doctrine of Paramountcy (BNA Act Sec. 91)**

#### Multiple Access Ltd v. McCutcheon (1982, SCC) pg 237 (insider trading, double aspect)

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

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

**Dickson J**:

* Does the **“pith and substance”** of the insider trading provisions of the federal act fall within Parliamentary head of power?
	+ Yes, both the federal and provincial legislations have power in this area. The pith and substance of the federal regulation is re: ownership of shares in a federal company (companies regulation under POGG) and the provincial pith and substance is trading and securities which fits within s.92(15)
* If *both* can apply and are of equal importance, double aspect doctrine applies and both orders of government can legislate (Based on Simeon’s principles)
	+ Double aspect doctrine applies when the contrast between the relative importance of the two features is not so sharp

**Conclusion**: neither interjurisdictional immunity *nor* federal paramountcy doctrine apply here

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

### (C) Necessarily Incidental Doctrine / Ancillary Doctrine – Validity (CHARACTERIZATION of laws )

**Necessarily incidental doctrine:** holds that a law with a provision that ***affects matters outside*** the enacting legislature’s ***jurisdiction*** are valid, so long as the effects are ***secondary or incidental features*** rather than its most important feature (i.e. its pith and substance).

This is used in cases where the **provision challenged is a piece of a larger scheme of legislation**. If the larger scheme of which the impugned provision is part is constitutionally valid, the impugned provision may also be found valid because of its relationship to the larger scheme. This will depend on how well the offending provisions are integrated into the valid legislative scheme. The more closely related, the more likely they will be upheld 🡪 needs to examine the provision and its relationship to the law as a whole.

In this way, the necessarily incidental doctrine, like the pith and substance doctrine, **permits governments to intrude substantially on the other level of government’s jurisdiction**, so long as the **most important** features of their laws remain **within their own jurisdiction**

Inverse relationship between seriousness of encroachment on the jurisdiction of the other and the degree of integration/link between the provision and the act 🡪 chart below extrapolated from language used by Dickson J in *GM v CNL* (in that case, the provision intrudes in a limited way, and there is a functional relationship between the provision and the act)



#### General Motors of Canada Ltd v City National Leasing (1989, SCC) pg 242 (anti-competitive behaviour)

**Facts**: Federal *Competitions Act* intended to prevent the creation of monopolies, practices that are aimed at wiping out competition. A section of the *Act* creates a federal tort action offered for companies hurt by anti-competitive behaviour. CNL brought a civil action against GM alleging that it suffered losses as a result of a discriminatory pricing policy (GM offered preferential interest rates to its competitors) that constituted a kind of anti-competitive behaviour prohibited by the *Act.* GM argues the *Act* is *ultra vires* the feds because creation of civil causes of action falls within provincial jurisdiction in relation to “property and civil rights” under 92(13). Overall act had already been established as valid under 91(27).

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

**Dickson CJC (+5):**

* The impugned provision containing the civil action would, in isolation, be a provincial power 🡪 however, it is justified at the federal level because it is **functionally related to the broader objectives of the act**, the pith and substance of which fall under the federal head of power
* Pith and substance doctrine allows for a provision defined “in relation to” a broader law to have incidental or ancillary effects on matters outside the competence of the enacting body.

**Necessarily incidental analysis:**

1. Does impugned provision intrude on provincial powers? If so, to what extent?
2. The degree of the intrusion: here = LIMITED

*🡪 Is the provision a* ***substantive or remedial*** *provision? (the latter being less intrusive)*

* Here: it is a remedial provision meant to help impose the substantive aspects of the Act

*🡪 Is the* ***scope*** *of the provision limited?*

* Here: the intrusion is limited by the other provisions in the Act.

*🡪 Is this the kind of* ***provision that the federal government can enact****?*

* Here: yes; it is well-established that the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted
1. **Establish validity of Act of which the offensive provision is a part of** (under what jurisdiction does its pith and substance fall) 🡪 *Is the act as a whole valid?*
2. Determine if impugned provision is sufficiently integrated with the scheme so it can be upheld by virtue of that relationship.
3. The degree of the integration: here = SUFFICIENT

i.e., *How well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation.* ***Note: the less intrusion, the less connection needed****.*

* Because the provision intrudes only in a limited way on civil rights power, a strict test, such as "truly necessary" or "integral", is not appropriate

*From class: Court is going to look at the broader piece of legislation as a whole before they get to the specific provision. If they see that the legislation is valid, they then go and look at the specific section. They try and see if the specific section is valid, and if it is not, they try and determine how much it really does encroach on the provincial powers.*

#### Quebec v. Lacombe (2010, SCC) (not saved by the ancillary doctrine)

**Facts:** Lacombe provides commercial aerial, and air taxi services out of Gobiel Lake. The municipality of Sacre-Coeur obtained an injunction requiring Lacombe to cease operations on the ground that his activity violated the zoning for Gobeil Lake. The zoning restrictions are contained in By-Law 260, Which was adopted following complaints by cottage-owners around Gobeil Lake. It is an amendment to the general zoning by-law for Sacre Coeur (By-law 210). Both by laws fall under Quebec's Act "Respecting land use planning and development"

**Issue:** Can the province validly restrict the location of private aerodromes? (previous jurisprudence in Aeronautics Reference established that aeronautics are exclusively federal jurisdiction.)

**Laws/Analysis:** McLachlin CJ applies Dickson’s test from *GM* but raises the standard for #3 from supplement (sufficiently integrated) to complement (actively further the legislation).

* **Step 1:** Is By-law 260 outside provincial jurisdiction? To what extent?
	+ Need to look at dominant characteristic, known as "matter". To determine matter need to look at purpose of legislation and effect
		- In this case the purpose was to regulate the location of water aerodromes in the municipality's territory. Judge Concludes that matter is "regulation of aeronautics" ==>This is federal jurisdiction
* **Step 2:** By-law 210 is valid legislation for land use planning
* **Step 3:** Is By-law 260 Connected to By-law 210, such that it should be sustained as a functional part of the whole?
	+ The purpose of by-law 210 is to rationalize land use for the benefit of the general populace. It seeks to treat similar areas similarly. By-law 260 does not further this objective. By-law 260 treats similar parcels of land differently.
	+ By-law regulates the location of aerodromes without reference to the underlying land use regime. It does not function as a zoning regulation, but as a stand-alone prohibition.
	+ By-law does not fill a gap, or enhance, or remove uncertainty. It is not integral to by-law 210

 *“In summary, only the ancillary powers doctrine concerns legislation that, in pith and substance, falls outside the jurisdiction of its enacting body. Laws raising a double aspect come within the jurisdiction of their enacting body, but intrude on the jurisdiction of the other level of government because of the overlap in the constitutional division of powers. Similarly, the incidental effects rule applies where the main thrust of the law comes within the jurisdiction of its enacting body, but the law has subsidiary effects that cannot come within the jurisdiction of that body.”*

**Conclusion:** By-Law 260 is *ultra vires*. It is outside provincial jurisdictions and is not sufficiently integrated within a valid legislative scheme to be saved under the doctrine of ancillary powers.

\*Deschamps J in **dissent** wonders why McLachlin did not apply the double aspect doctrine?

### The Interjurisdictional Immunity Doctrine – applicability

**Interjurisdictional Immunity Doctrine:** Typically used when **generally worded provincial law** is valid in most applications but in some applications it **overreaches** **into a core area of federal jurisdiction**. Courts will **“read down” statutes** to protect the core of exclusive federal (or provincial) powers from encroachment. This does not mean that the laws of the other jurisdiction are invalid, but rather that they do not apply in this instance

More in line with the idea of **watertight compartments** of jurisdiction (***contra*** pith and substance, double aspect, and necessarily incidental, which are more flexible and in line with cooperative federalism 🡪 which is the dominant approach)

To apply IJI, courts will look at the “core” of the issue being addressed, and determine which jurisdiction this falls under. Example ; *Bell #1* – Bell, a federal undertaking, was disputing provincial legislation regarding minimum wages. There was no equivalent federal law, and it was held that they were immune to the provincial law**. A valid provincial law cannot apply to a federal undertaking if it affects a vital part of their operation or management.**

* Note: Other areas of exclusive federal jurisdiction to which provincial laws cannot apply include 🡪 undertakings, postal service, banking, aeronautics, military, RCMP, criminal procedural, national parks, federal elections, navigation, shipping, interprovincial railways and trucking, aboriginal issues

#### Bell Canada v Quebec (Bell #2) (1988, SCC) pg 257 (Quebec read down law because of pregnant worker)

**Facts**: Bell challenged a provincial law that accommodated a change of work tasks for a pregnant worker. There is no equivalent federal law. As will *Bell #1*, it was held that provincial laws cannot apply to the operation and management of a federal undertaking, therefore Bell was immune by operation of IJI.

**Issue:** Can the valid health and safety regulation be applied to a federally regulated company?

**Beetz (+5):**

Various propositions can be made to deal with impugned legislation:

1. Jurisdiction over health belongs to the provinces (s.92(16)).
2. Labour relations and working conditions are exclusively provincial (s.92(13)).
3. Labour relations and working conditions are exclusively federal (if undertaking is federal – s.91(29) and (10).
4. Provincial workmen’s compensation schemes are applicable to federal undertakings.
5. Double aspect theory – similar rules enacted for different purposes and distinct legislative contexts.

🡪 Court found double aspect doctrine didn’t apply since legislation was for the same purpose and in the same aspect (i.e. labour relations and working conditions). They found proposition (3) applied due to it being a federal undertaking and, as such, the provincial law had to be read down so as not to apply to federally-regulated undertakings.

🡪 Judgement stated that the **double aspect should be applied with *great caution*** 🡪 ultimately, eroding the lines between the laws to merge into one unclear power will reduce the authority of provinces in favor one that is more under the control of the federal government (i.e. because paramountcy will ultimately override provincial jurisdiction). DAD should only be invoked when the multiplicity of aspect is “real and not merely nominal”

Beetz sees the jurisprudence here as disconnected (McKay, Bell #1) and creates a general rule:

**Things within the special and exclusive jurisdiction of Parliament are subject to valid, general provincial legislation IF the provincial legislation doesn’t infringe on what makes these subjects federal**

* What is the “core”? Beetz defines this as the “basic, minimal, & unassailable content”

#### Canadian Western Bank v Alberta (2007, SCC) pg 264 (harder test)

\*20 years leading since *Bell #2*

**Facts**: Banks (federal jurisdiction under s. 91(15)) granted permission in the 1990s to promote and sell certain kinds of insurance. Alberta consumer protection legislation enacted regulated the selling of this insurance. Banks sought IJI. SCC tightened up test for IJI doctrine to apply and pr**eferred using federal paramountcy over interjurisdictional immunity to resolve federalism disputes** once validity of impugned legislation has been established 🡪 held that ***IJI should only be applied in rare instances.***

|  |  |
| --- | --- |
| **Route 1: Interjurisdictional Immunity*****Proposed by the bank – Rejected by the court*** | **Route 2: Double Aspect Doctrine*****Accepted by the court –more in line with cooperative and flexible federalism*** |
| 1. What **jurisdiction** does **banking** fall under? 🡪 The basic, minimal, unassailable content of 91(15) - **federal**
2. **Is the matter** of providing banking insurance **at the core of the operation** of the federal undertaking? 🡪Argued that it is a vital and integral element of banks (*court disagreed with this notion, and found instead that it is a peripheral matter*)
 | 1. Aspect 1 - this matter (bank selling insurance) is part of **bank operations**, which falls under **federal** jurisdiction
2. Aspect 2 – this matter is part of **consumer protection** measures, which falls under **provincial** jurisdiction

Both laws, therefore, are valid, and are applicable to the bankEven though the provincial law is more restrictive, this is allowable, as it is **not in conflict** with the federal law |

**Binnie & Lebel (+4):**

**Interjurisdictional immunity is a doctrine of limited application** and it arose from Lord Atkin’s “watertight compartments” metaphor when addressing the levels of government 🡪 has **fallen out of favour**. When invoked, usually in favour of federal issues being immune to provincial laws; where **so many laws for the protection** of workers, consumers and the environment are enacted and enforced at **provincial level**, it is easy to see why this is undesirable. The doctrine has centralizing tendencies, as it tends to be invoked in favour of federal immunity. IJI also **undermines the principles of subsidiarity** – decisions are often best made at government levels that are not only effective, but also closest to the citizens affected. There is also the potential to create legal vacuums.

IJI should only be applied in **areas where it has already been applied** (e.g., federal undertakings). If it hasn’t been applied in this area, the courts should use **P&S and federal paramountcy.** Other criteria to consider in the application of IJI:

1. **Impairment vs. affects** – impairing the “core” competence of the other level of government, rather than merely adversely affecting a law at that level. In the absence of impairment, interjurisdictional immunity doesn’t apply.
2. **Basic, minimum and unassailable power** – essentially the “core” of the matter addressed by the legislation – “peace of mind” insurance wouldn’t apply.
3. **Vital or essential part of an undertaking** – must be absolutely indispensible or necessary to activities (e.g. peace of mind insurance is far from necessary to banking activities).

**Conclusion**: No encroachment on core of fed power. Provincial legislation is applicable to the banks.

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

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

🡪 Happened concurrently with *Lacombe*, also in Québec. Difference is *Lacombe* was a question of **validity** because zoning by-laws specifically prohibited aerodromes. Here, valid generally worded legislation being applied in a federal context (location of aerodromes) = question of **applicability.**

**Issue:** Is this valid provincial legislation applicable in the context of aerodromes (exclusive federal jurisdiction)?

**Analysis:**

**McLachlin CJ**: Sets out what questions the Court needs to answer to apply test as set out by Binnie & LeBel JJ in *Canadian Western Bank*.

* Does the provincial law trench on the core of federal jurisdiction?
* If so, is the entrenchment **“sufficiently serious”** to warrant applying the IJI?
* Changes this step to “ss” in order to account for the higher standard of “impair” demanded by Binnie & LeBel JJ.

Application to these facts:

1. Looks to previous jurisprudence to determine whether the siting of specific aerodromes is a part of federal jurisdiction over aeronautics. It is, therefore s. 26 trenches on this core.
2. This entrenchment is **sufficiently serious** because it forces ppl to remove aerodromes when it is up to Parliament to choose where aerodromes can and cannot be built.
* They have chosen **not** to exert their power to legislate in this area and allowing the provincial legislation to stand would force Parliament to do so.
* Ironic because the SCC is now using the IJI to **protect** Parliament’s right not to legislate (**protection of legal vacuum**)

**Deschamps J.** **Dissenting**: when applying #2 look to **impact** of legislation. Parliament has jurisdiction over location of aerodromes, provincial legislation only removes 4% of Québec’s land, therefore still lots of room to build aerodromes. Deschamps J. would say that this entrenchment is **not sufficiently serious**.

**Conclusion:** Provincial legislation is valid but impairs protected core of federal jurisdiction over aeronautics and is inapplicable to the extent that it prohibits the construction of aerodromes in agricultural zones.

#### Canada (A.G.) v. PHS Community Services Society (2011, SCC) (Insite case)

**Facts**: Insite is a government-sanctioned safe injection facility, created through cooperative federalism (efforts of municipal, provincial, and federal authorities). The substances brought to Insite by users have been obtained from a trafficker in an illegal transaction; the users are in possession of illegal drugs. Insite is a regulated health facility, operating under the authority of the province. *Controlled Drugs and Substances Act* (federal) prohibits possession and trafficking of illegal drugs, however the Minister of Health can issue exemptions for medical and scientific purposes. Insite was subject to this exemption until 2008, at which time it expired.

**Issue:** Is the *CDSA* inapplicable in the context of a provincial health facility?

**Held**: **🡪 Pith and substance** of CDSA falls within federal jurisdiction (i.e. protection of public health and safety – which is a valid purpose for enacting a criminal law).**Incidental effect** of CDSA impacting provincial health institutions, however it is still constitutional (per *Canadian Western Bank*).

 🡪 BC argued that Insite, as a healthcare facility, is under provincial jurisdiction and that by operation of IJI, it should be immune to federal intrusions. It was held that **IJI is narrow**, and that its premise of “watertight cores” is in tension with the flexible ideas of double aspect and cooperative federalism.

**Conclusion**: Application of IJI was rejected by the court, because:

1. It does not agree with the dominant tide of federalism, which permits **concurrent** federal and provincial legislation
2. It is also in tension with **cooperative federalism**, which allows for both levels of government to jointly regulate areas that fall within their jurisdiction (per *Canadian Western Bank*)
3. The risk of creating a “**legal vacuum**” arises, in which the government benefitting from the immunity may not necessarily regulate the field in question (per *Canadian Western Bank*)

|  |  |
| --- | --- |
| **Route 1: Interjurisdictional Immunity (Classical)*****Rejected by the SCC*** | **Route 2: Double Aspect Doctrine (Modern)*****Accepted by SCC*** |
| Basic, minimal, and unassailable content to healthcare includes setting up safe injection site, therefore the Controlled Drugs and Substances Act does not apply 🡪 it is immune to application of criminal law | Aspect 1 – s. 91(27) Substantive Criminal Law – prohibition of drug possession and use via CDSAAspect 2 – s. 92(7)(13)(16) Healthcare, local matters – setting up health institutions, incl safe injection site, falls under jurisdiction of provincial lawThen, look for conflict (which there is), and subsequently apply the doctrine of paramountcyResult: **Criminal laws applicable to Insite** |
| *Note: Insite still exists because the case was won on a Charter argument – closing it would violate s. 7 – life, liberty, and security of person* |

### The Paramountcy Doctrine – Operability

**Paramountcy Doctrine**: In cases of conflict between laws, federal law is paramount and provincial law is inoperative to the extent of the conflict. If federal legislation is repealed, the conflict disappears and provincial law can again be applied.

* + **Narrow reading** of conflict: both can operate unless it is impossible for those subject to, or those responsible for giving effect to, the two legislative schemes to comply with both. This is the **direct operational conflict or impossibility of multiple access** 🡪 preferred approach. *Multiple Access*

**Degree of Conflict required before applying paramountcy doctrine**

* + **Underlying policy** conflict: it may be *technically* possible for persons to comply with both laws (therefore no direct operational conflict), however there is still a conflict between the laws, as the provincial law undermines or conflicts with the ***policy*** that underlies the federal law 🡪 there is therefore conflict, and the doctrine can apply – *Rothman* case illustrated that the court will not easily find that there is a policy conflict
	+ **Broad reading** of conflict: holds a valid provincial law inoperative when it impacts a matter already regulated by federal law. This is the (old) ***occupation of the field*** 🡪 easier to trigger paramountcy (don’t have to find a “conflict”, but rather just that a provincial law is somewhere “on the field” that is covered by federal law for the latter to be paramount); has been overruled.

**Paramountcy in the Constitution: Some provisions codify federal paramountcy**

* S. 95 of Constitution: agriculture and immigration are areas of concurrent jurisdiction, provincial laws have effect only to extent that they are not repugnant to fed laws, fed paramountcy
* S. 92A: provincial legislatures have concurrent power to enact laws in relation to export of natural resources to other provinces, subject to fed paramountcy
* S. 94A: concurrency in relation to old-age pensions and supplementary benefits subject to provincial paramountcy

#### Multiple Access Ltd v McCutcheon (1982, SCC) pg 277 (federal & Ontario statutes – insider trading)

🡪 Case is distinctive since both legislation regulated insider trading in virtually identical ways. MA charged under provincial legislation. Argued for a broad reading of conflict, and that by virtue of “occupation of the field”, province should not be permitted to legislate in federal area. (MA prefers the federal law, as the limitation period under which to bring charges had expired.)

**Dickson (+5):**

* The legislative purpose of Parliament will be fulfilled regardless of which statute is invoked
* Paramountcy only applies where there is actual conflict in operation, as where one enactment says “yes” and the other says “no”: essentially when citizens are being told to do inconsistent things, whereby compliance with one is defiance of the other.
* **Mere duplication without actual conflict** or contradiction is **not sufficient to invoke the doctrine of paramountcy** and render otherwise valid provincial legislation inoperative. We are moving away from watertight compartments and into a cooperative federalism.
	+ Since courts must authorize proceedings under Ontario Act there is a safeguard against double recovery if a company has already recovered under the federal act.

**Conclusion**: Provincial provisions under the *Securities Act* are operative.

#### Bank of Montreal v Hall (1990, SCC) pg 282 (seizing machinery, re-define conflict)

**Facts**: (Federal) *Bank Act* allowed seizure of machinery when farmers default on their loans. (Provincial) *Limitation of Civil Rights Act* required notice to seize otherwise debtor released from further obligations. Bank argues that direct seizure should be permitted, as this is the only reason they agreed to provide loans to farmers so easily to begin with 🡪 allows them to recoup their losses. *Hall* demonstrates that even if it is **possible to comply** with both laws, complying with the provincial law **may undermine the policy** underlying the federal law.

**La Forest (+4):**

* There is an “actual conflict in operation” between the statutes 🡪 the purpose of the federal law would be frustrated if the bank were required to comply with the provincial statute
	+ *Hall* redefined “conflict in operation” as either an impossibility of dual compliance or an incompatibility of legislative purposes
* There is no “express contradiction/direct operational conflict” of the laws, as It is possible to comply with both laws

**Conclusion**: SCC held that the provincial law is inoperative

#### Rothmans v Saskatchewan (2005, SCC) pg 289 (Tobacco acts, no conflict found)

**Facts**: The federal *Tobacco Act* prohibited the promotion of tobacco products, except as authorized elsewhere in the Act (a person may display, at retail, a tobacco product). Saskatchewan *Tobacco Control Act* banned the display of tobacco products in the premises in which persons under 18 were permitted.

**LaForest (Unanimous):**

* Overarching principle from previous cases: **provincial enactment must not frustrate the purpose of a federal enactment**, whether by making it impossible to comply with the latter or by some other means
* Analysis (two-stage test for application of federal paramountcy doctrine):
	+ **Impossibility of dual compliance -** Dual compliance is possible in this case: admit no one under 18 years of age or do not display tobacco products.
	+ **Frustration of legislative purpose -** Legislation enacted for same health-related purposes; no inconsistency between two provisions at issue.

**Conclusion**: No conflict – provincial legislation upheld. It is possible to comply with both by following the stricter statute.

### Summary: Interpretation Doctrines

|  |  |  |
| --- | --- | --- |
| **Validity (modern)** | **Applicability (classic)** | **Operability (modern)** |
| **Pith and Substance doctrine** 🡪 look at the dominant characteristic (the “matter”) of the law, and ask whether it belongs to federal or provincial jurisdiction**Incidental Effects doctrine****Ancillary (Necessarily Incidental) doctrine** – if one of the provisions in isolation might be invalid due to its jurisdiction, it may still be valid taken in the context of the entire law/statute | **Interjurisdictional immunity** 🡪 there is a core to any power/body (e.g., federal undertaking – what is the core of that operation [what is vital to its operation, Bell Canada – labour relations, which is therefore immune to provincial labour laws]; or the core of the power itself such as Cdn Western Bank and Insite)Court wants to limit the application of this approach“**Single aspect**” approach | **Doctrine of paramountcy** 🡪 when two potentially applicable laws are in conflict with one another, the federal law wins. Always.  |

*Morgentaler* provides a useful template for figuring out what the **pith and substance** of a law is (generally the first thing you will do on an exam):

* Can look at the legislative history – what was the minister saying and what was said in debate.
* Can look at the timing of the law – in Morgentaler the law was passed when Dr. Morgentaler was opening a clinic.
* Similarity of the language – what is the provision doing in relation to the federal law (language appeared to be similar to other past provisions prohibiting abortions and to other prohibitory provisions). Not definitive one way or the other but raises a flag (ex: in multiple access there was similar language but that was seen as fine because it shows harmony between the feds and the provinces)
* Fit between the law and its alleged purpose – purpose is to prevent privatization but court says that it barely touches this issue. If really meant to achieve this purpose it would be done in another way.

**Incidental effects:**

* Corollary to the pith and substance doctrine. If there is a dominant character to the law (pith and substance) there may still be effects in the other jurisdictions. Used to describe the inevitable overlap and non-watertight compartments between the categories.
* Just because something may have some effects in jurisdiction ‘x’ doesn’t mean that its pith and substance doesn’t lay in jurisdiction ‘y’.

**Necessarily incidental doctrine/ancillary doctrine:**

* Relates not to this issue of spillage (as in the incidental effects doctrine) solely to the relationship to a particular provisions and the whole of the act. If you take a provision on its own as problematic can you use the act as a whole to make it okay.
* On an exam: make arguments for why its valid and then say if not valid on its own right can we suggest that it is ancillary to the act of which it is a part.
* Highly intrusive on the opposing jurisdiction then the connection to the broader act has to be very tight (truly integral to that act). If the level of intrusiveness is medium then it simply needs to be functionally related and minimally intrusive then it can be merely tacked on.

**Double Aspect Doctrine**:

* If you accept that the compartments aren’t water tight then there is the possibility that a law can have two different aspects (one federal and one provincial) so that each jurisdiction can pass a law. (*Multiple Access* – province and feds passed law on insider trading)

**Interjurisdictional Immunity**:

* There are areas such as federal undertakings and aeronautics that are effectively immune from the opposing jurisdictions legislation. In the *Insite case* there is an attempt to immunize health power in Insite from the federal criminal power. In effect the courts are saying we don’t really like this doctrine very much – so we’ll hold it those areas where it has been traditionally used. Not used in area of banking (*Canadian Western Bank*).
* *Canadian Western Bank* further restricts interjurisdictional immunity – does it impair the operation (whereas *Bell Canada* ask whether it affected) \*\* pay attention to this shift in the law

**Paramountcy**:

* If the double aspect doctrine allows to laws to be valid then you run the risk that they will conflict in their actual operation. Paramountcy says that if they do conflict then federal law will prevail. In *Multiple Access* says there will be an operational conflict only when it is impossible to comply with both. *Bank of Montreal* leads a new approach to this 🡪 there doesn’t have to be this literal conflict its enough if the policy of the fed law is undermined by the provincial law.
* *Rothman’s* – court is not going to choose between either approach but it will apply both. Way to do a paramountcy case is to ask if there is a direct conflict (if so paramountcy is triggered) but in the alternative in the event that a direct conflict isn’t found then ask if there is a policy conflict. Court did not see a conflict of the purpose in this case – found the provincial law to be in line with the federal policy but just doing it more.

# Peace, Order and Good Government

Section 91: *“*It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, 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 …”

***Centralist perspective (Laskin)***

Broad interpretation of POGG power is the power to legislate on matters of **national concern** – meaning a subject matter that goes beyond local or provincial concern or interests is the concern of the Dominion as a whole (modern approach)

Narrow interpretation of POGG power is the power to legislate for the prevention of a **national emergency** 🡪 prescribes a more limited domain of federal power, limited to emergency situations only

***In favour of stronger provinces (Beetz)***

**Judge Laskin** has a centralist vision. He believes POGG constitutes general power while the enumerated powers in section 91 were illustrative only.

**Judge Beetz** = Quebec nationalist and province builder

Note: Broad and narrow variations ***within*** each of these conceptions as well. Broad national concern views advocated for by democratic socialists. Laskin (in *AIA*) advocates for a broad national emergency perspective.

Swinton Article’s interpretation of Laskin and Beetz (Pg. 298)

**Strong Central Government – Laskin**

* Felt that the POGG power was a “general power”, making the enumerated powers in s 91 illustrative only
* Opposed aspect doctrine – took broader view of legislation to see what the legislating body was trying to accomplish (whether it fell under POGG or the enumerated provisions)
* Disliked the “necessarily incidental doctrine” – didn't like that the province could encroach onto federal powers
* Emphasized that the process of constitutional adjudication requires creativity by the judge
* Destructive negative autonomy 🡪 firm belief that a country of Canada’s size and sprawling population requires a strong central government to maintain the cohesion of the state
* Favoured a strong central government and called for flexibility in the interpretation of the constitution

**Provincial Rights – Beetz**

* Beetz was a bit more traditional in interpretation of various doctrines – preferred a more conceptual approach which would preserve exclusive areas of jurisdiction for both levels of government
* Protective over provincial rights and cautious about departing from precedents which provided safeguards for provincial autonomy
* Early focus was on the needs of Quebec and the francophone’s
* Soft nationalist – grown up in the midst of the quiet revolution (Quebec state modernized and secularized)
* Decentralized provincial rights conservatives
* Belief that primary purpose of the BNA act was to protect French speaking authorities in Quebec
* Belief that POGG powers are residuary and subordinate – agreed with the Privy Council
* View that the realist approach of Law and Society scholars violated the common law purpose of *stare decisis*
* Felt that the type of decision making that people like Laskin used was too reliant on the interpretation of the judges

|  |  |
| --- | --- |
|  **Matters of national concern (*Crown Zellerbach*)** | **Matters that constitute national emergency (*AIA*)** |
| *Not a crisis situation* The NCD requires the matter 1) Be **significant, indivisible and distinct**,2) Have extra-provincial effects resulting from a **provincial inability** to deal with it intra-provincially 3) Such that power to the federal gov’t won’t upset the  fundamental **constitutional balance of powers**Application:**- Permanence\***: the NED requires a temporal dimension, but no temporal aspect to NCD**- Subject matter**: Matters that could not have been contemplated when the Constitution was created and which have a national dimension (ex. aeronautics, radio communications), or matters that were initially local, but have become a national concern (this is “**Gap Theory**”) | *“Crisis” situation*The NED requires the matter1) **Necessitates federal intervention**2) Existence of “**critical** **conditions**”3) Creation of **temporary legislation**\***Government** bears onus of proof 🡪 must demonstrate a **rational belief** that there is a matter that requires emergency legislation (reflects courts willingness to be ***deferential*** in “emergency” situations)Heavy burden on other party to prove NO emergency or emergency has endedCategories of emergencies: Public worker emergency, war, public warfare, other emergencies (fires, flooding, disease, accidents, pollution) Note: Parliament has passed the *Emergency Act* to restrict use of NED |

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

* Understanding of POGG that emerged from cases decided in 1930s was that it authorized feds to legislate in times of national emergency, and nothing more (*Natural Products Marketing Act Ref*)
* Replaced in *Canada Temperance Federation* (1946) w/ true test of whether real subject matter of leg goes beyond local/provincial concern/interests and must from its inherent nature be concern of

Dominion as a whole

* Used to uphold fed gov’t’s re-enactment of *Canada Temperance Act*
* Reaffirmed validity of *Russell* and rejected suggestion that *Russell* was based upon a finding that intemperance constituted a national emergency in 1878
* Expanded scope of POGG by recognized power to legislate for prevention of emergency
* In both *Johannesson* (1952) and *Munro* (1966), SCC relied on national concern understanding of POGG in support of its holding that aeronautics and establishment of a national capital region respectively fell within that head of fed leg jurisdiction.
* *Johannesson v Rural Municipality of West St Paul* (1952): challenge to municipal by-law controlling location of airports – referred to doctrine as supporting exclusive fed leg jurisdiction w/ respect to whole field of aeronautics
* Field of aeronautics is one which concerns country as a whole – falls to feds under POGG using national concern understanding - field of leg is not capable of division
* *Munro v National Capital Commission* (1966): upheld *National Capital Act* on basis of POGG – single matter of national concern
* *Jones v AG New Brunswick* (1975): SCC relied on gap/residual understanding of POGG in support of its holding that fed *Official Languages Act* fell within that head of fed leg jurisdiction - implication that s 91 (in addition to national concern branch) also authorizes fed leg in relation to subject matters not explicitly assigned to either level of gov’t
* Heading into *Anti-Inflation Act* basis, POGG clearly has national concern branch and gap branch – unknown whether it also has a national emergency branch
* Distinguishing feature of modern interpretation of POGG has been re-emergence of national concern doctrine, first introduced in *Local Prohibition* by Watson

#### Reference Re Anti-Inflation Act (1976, SCC) pg 303 (rampant inflation, emergency/crisis legislation)

**Facts**: The federal government passed an act to control inflation by disallowing increases in wages, fees, and profits (usually regulated by provinces) – applicable to public servants (federal and provincial), private firms with > 500 people, designated professions, construction firms with > 20 people and other firms of strategic importance. The legislation was set to expire after four years of implementation.

**Issue**: Whether this can be legislated under the federal power of POGG.

* Seven judges held Act was supportable under POGG power as emergency/crisis legislation.
	+ Judges differed on whether to reject or accept a national dimensions argument, which follows.

All 9 members of SCC agreed that:

1. National emergency understanding/branch of POGG is a legitimate understanding, and distinct from the national concern understanding/branch;
2. National emergency branch can be used to sustain fed leg in peacetime as well as in times of war/insurrection;
3. An economic crisis can qualify as a national emergency;
4. National emergency branch authorizes Parliament to legislate to prevent as well as to cure national emergencies;
5. To qualify under the national emergency branch, fed leg must be of temporary duration; and
6. Test for determining whether fed leg can be upheld under national emergency branch is whether or not Parliament had a rational basis for believing that a national emergency existed or was about to arise.

🡪 Sole point of disagreement between majority and dissenting judges in relation to application of national emergency branch concerned question of what kind of signal courts should require Parliament to send if it intended to rely on that branch when it enacted leg in question:

* **Beetz** said that Parliament had to send a “clear and unmistakable signal,”(which he held Parliament had failed to do in this instance) while
* **Laskin** and other majority judges were willing to accept something less (in that case, a statement in the preamble that “the containment and reduction of inflation has become a matter of serious national concern” supplemented by other evidence of crisis management was held to suffice).

**Laskin CJC (+3):** **National emergency found**; no finding on national concern stated

* Found that the legislation was justified under the national emergency doctrine
* **Test**:
	+ Existence of an emergency (not limited to war, plague etc.; economic crisis is sufficient)
	+ Rational belief that the emergency requires legislation (fairly low standard)
		- Court may assess extrinsic evidence to determine whether there is a rational connection (e.g., Hansard, preamble, social science evidence, legislative history) 🡪 gives context, purpose etc.
		- Legislation does not have to deal with the whole emergency (parts are sufficient), does not have to be drafted/enacted immediately, does not have to be universally mandatory, does not have to effectively address the problem 🡪 the courts primary concern is a connection between the purpose of the legislation and the emergency
	+ Temporal limits to legislation
* Preamble stated that “the containment and reduction of **inflation** has become a matter of **serious national concern**” and that “**to accomplish such containment and reduction of inflation** it is necessary to restrain profit margins, prices, dividends and compensation” via implementation of temporary (4 year) legislation
	+ Clearly Parliamentary intention was a far-reaching program aimed at a serious national concern
* **Extrinsic evidence**: the consumer price index is the most relevant figure to the layman when considering inflation and it showed a double-digit inflation rate for successive years. This supports the contention in the preamble, i.e. that there was a national concern about inflation (**rational belief** – met)

Note from Laskin: The rising inflation was a monetary phenomenon and monetary policy is admittedly within exclusive federal jurisdiction. Thus, this is valid legislation for POGG and does not (given the circumstances as well as the temporary character of the legislation) invade provincial legislative jurisdiction. (Although, local trade, commodity pricing, profit margins, employment, wages and labour relations lie within provincial jurisdiction, provided there is no national emergency).

**Richie J** (3) **concurring:** **National emergency found**, national concern doctrine does not exist.

**Beetz (+1 dissenting): No national emergency, no national concern**

* Defined national emergency test very narrowly; i.e. an emergency cannot be assumed unless it is like war, and furthermore held that Parliament must be explicit when exercising such extraordinary power (here, they only said that there is a “national concern”, and did not declare an emergency)
* Finds that there are so many activities that ultimately affect inflation, thus allowing this assertion of legislative authority based on the justification of a “national emergency” make it difficult to fathom what is beyond the reach of Parliament
* National concern test defined (very narrowly, as he is a regionalist), and adopted in *Crown Zellerbach*
	+ - 1. Matter must be **new 🡪** “Gap Theory”
* Inflation is not new
* Note that many issues existed at confederation that have evolved (e.g., some environmental issues)
* NOT adopted in *CZ*: instead require that the matter is of growing concern
	+ - 1. Degree of **unity** in the matter that makes it distinct from provincial matters
* Inflation is basically a composite of different provincial matters (like La Forest J in *CZ* and *Oldman River*)
	+ - 1. Matter must not upset the fundamental balance of powers, by subsuming huge aspects of provincial jurisdiction
* Inflation is such a huge topic that almost any form of economic regulation touches on it

In AIA 🡪 Parliament testing how it could rely on a recently expanding national concern’s doctrine and also under the older emergency doctrine

Note: Emergencies Act, 1985

* *Emergencies Act 1985* defined a national emergency as: an urgent and **critical situation of a temporary nature** that (a) seriously endangers the **lives, health or safety** or Canadians, **or** (b) seriously threatens the ability of the government to preserve the **sovereignty, security and territorial integrity** of Canada.
* While federal cabinet can declare an emergency, it must concisely describe the state of affairs constituting the emergency and be confirmed by Parliament. As well, the declaration can’t be made with consulting the affect provincial governments and an agreement by provincial cabinet that the province can’t deal with the situation.

#### R v Crown Zellerbach Canada Ltd.(1988, SCC) pg 323 (dumping at sea = provincial waters?)

**Facts**: CZ was charged with violating federal legislation which prohibited dumping any substances at sea without a permit. CZ dumped material into provincial waters, and argued that the feds cannot regulate in the absence of evidence that the dumping had any effect beyond provincial waters. AG of BC agrees that the federal legislation should be **read down** to not apply to dumping in provincial waters (limited to marine waters only, enabling province to regulate freshwater, thereby respecting the constitutional balance of powers). Note: difficulty to ascertain the boundary between the territorial sea and internal marine waters; in claiming exclusive power to regulate sources of marine pollution, the feds essentially gave themselves authority to regulate any and every conceivable activity, whether inter- or intra-provincial.

**Issue**: Does the federal legislative jurisdiction to regulate the dumping of substances at sea extend to the regulation of dumping in provincial marine waters?

**Le Dain (+3):**

National Concern Test:

1. **Permanence of matter** – distinguishable from emergency, as that requires temporary legislation
2. **New or growing national concern**
3. **Singleness, distinctiveness and indivisibility** – that distinguishes it from a provincial concern.
4. **Provincial inability\*** – would the provinces’ failure to deal effectively with the control and regulation of an intra-provincial matter have deleterious effects extra-provincially 🡪 this is the most satisfactory rationale for a matter to be of national concern
5. **Reasonably limited scope** – so as to respect the constitutional division of powers
* Marine pollution has extra-provincial and international implications and is clearly a matter of federal concern.
* The difference between salt and fresh water showcases an ascertainable and reasonable limit as far as its impact on provincial jurisdiction is concerned.
* **Court found s 4(1) of the *Ocean Dumping Control Act* to be constitutionally valid and fell within the national concern doctrine of POGG.**

**Beetz (+2 dissenting):** The federal government **can** take steps to prevent activities in a province such as dumping substances in provincial waters that pollute or have potential to pollute the sea outside the province; but this is not the case here.

* The Act essentially encompasses activities that fall within the exclusive legislative jurisdiction of the province (i.e. depositing waste into provincial waters by local undertakings on provincial lands)
* Provision cannot be “read down” to only apply to federal (marine) waters due to the broad definition of “the sea” within it, the inability to demarcate the line between salt and freshwater clearly , and the extension of marine waters into rivers well within provincial land

Provincial inability to regulate effectively 🡪 gives rise to a matter of national concern

**\*Provincial inability** is a major development in modern federalism. Arises when:

1. **Negative extra-provincial externalities** – province may engage in more of a negative externality-causing activity than otherwise (opposite for positive externalities). Example: Ontario chlor-akali plants near rivers flowing into Manitoba negatively impacted the commercial fisheries there; however Manitoba lacked the legal power to regulate mercury discharges in waters beyond its borders.
2. **Collective action problems** – interprovincial non-cooperation meaning they’re able to regulate an area of socio-economic policy but are unwilling to. If one province is non-compliant the rational response of the other provinces is to compete by adopting lax public policies. Some policy concerns straddle the division of powers and render either level of government constitutionally incapable of regulating the problem alone.
3. **True provincial inability** – even if willing to do so. Particularly a problem in the territories and continental shelf.

#### Friends of the Oldman River Society v Canada (Minister of Transport) (1992, SCC) pg 342 (fed enviro)

**Facts**: Alberta government was set to build a dam on the Oldman River – it was approved by the Federal Minister of Transport, who did not subject the project to an environmental assessment. Under *Federal Guidelines Order*, an EA is required for projects that affect federal interests. Friends brought an action to compel an EA by the federal government. Alberta then argued that the statute was not valid, and could not compel an EA as the matter was provincial.

**Ratio**: Generally, provincial jurisdiction will apply in local projects, but federal participation will be required if the project impinges on a federal jurisdiction

**La Forest (+7):**

* The dam is a provincial project, however this does not make it immune to federal legislation 🡪 because federal interests are relevant here, the law is applicable to this environmental issue
* “Environment” was not assigned sui generis to either the provinces or Parliament
* Environment is diffuse subject matter that does not have the “distinctiveness” test under national concern 🡪 it is a composite of various other matters (as LaForest noted in the minority of CZ, and Beetz noted in the dissent)
* Environmental issues may meet the national concern test, but each issue must be assessed on a case-by-case basis (e.g., fisheries vs railways)
* This judgment essentially prevented “Pandora’s Box” that was the judgement in CZ (stopped it from coming down the slippery slope) 🡪 many contended that after CZ, environment fell under POGG as a national concern, as pollution does not respect provincial boundaries – this case purported a more specific analysis

# Criminal Law

## I. Federal Powers Over Criminal Law

#### **Federal Power**

S.91 (27) “The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”

#### **Provincial Power**

S.92(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

S.92(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.”

Thus, mere imprisonment as a consequence is not sufficient to qualify something as a federal law

S.92(13) Property and Civil Rights in the Province.

S.92(16) All Matters of a Merely Local or Private Nature in the Province.

S.92(9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

|  |  |  |
| --- | --- | --- |
| **Pith and substance of the law** | **Criminal (Federal) Law** | **Non-Criminal (Provincial) Law** |
| Prohibit | Regulate |
| Penalize | Prevent |
| Punish | License |
| Public property/interest | Private property  |
| Social evil – something that is morally bad (*Margarine*) | No social evils – nothing is morally bad (*Margarine*) |
|  | ***State is singular antagonist of the individual*** | ***Balancing competing interests***  |

#### Reference Re Validity of Section 5(a) of the Dairy Industry Act (**Margarine Reference**) (1949, SCC) pg 42

**Facts**: A provision in the federal *Dairy Industry Act* prohibits the manufacture, importation, or sale of any dairy product not made from milk or cream. Feds say they are able to legislate in this area as it falls under criminal law.

**Held**: This is not a criminal law power. It’s an economic regulation power. *Ultra vires* the fed criminal power.

Rand J:

**Test to determine if it is a criminal law matter**: Look to the form of the provision (a prohibition backed by a penalty) and look for a criminal purpose

1. Form: Where there is a **prohibition & penal sanctions**.
2. Purpose: Protects public and private interests from a **social evil**.
* Typically criminal: **public peace, order, security, health, morality** (not exhaustive)
* **NOT**: concerned with balancing competing interests of private groups, trade protection + regulation of industries.

**Present case**: the purpose of this regulation lies obviously in the trade effects and balancing competing interests (not health, foreign trade, or protection of the public) 🡪 as such the provision regarding the manufacture etc. of margarine is *ultra vires* Parliament.

Note: Criminal law can have **economic subject matter**, so long as the reason for regulating is to protect the public from a social evil 🡪 it is not about balancing the interests of competing private groups (which is the case in the *Margarine* *Reference*). For example, laws against insider trading, anti-monopoly legislation etc. justifiably falls under criminal law.

#### RJR Macdonald Inc. v Canada (AG) (1995, SCC) pg 425 (criminalizing tobacco ads/required warnings)

**Facts**: Federal Act prohibited advertising and promotion of tobacco products and required warnings on the labels. Purpose was to protect young persons from being enticed to use tobacco products, and enhance public awareness of health hazards. Penalties for violating the Act were fines or imprisonment. Tobacco companies challenged the Act as being *ultra vires* Parliament.

🡪 **Meyers**: Presence of regulatory powers in the impugned act obviously suggests something other than a fully criminal form, however the majority didn't regard these regulatory features as undermining the basic criminal form of prohibition and penalty

**La Forest (+6):**

* Found legislation ***intra vires*** to Parliament’s **criminal law** power *but declared its central provisions of no force and effect as an unjustifiable infringement of freedom of expression (s.2(b)).*
* Recognized that feds can create new crimes, provided that the legislation:
1. Contains a prohibition accompanied with a penal sanction
2. Is directed at a legitimate public evil – here, detrimental health effects
3. Is not a **“colorable” intrusion** into provincial jurisdiction
* In pith and substance, this law is criminal – it meets all of the above criteria
* Rand made it clear that “health” is one of the “ordinary ends” served by the criminal law and it may be used to safeguard the public from any “injurious or undesirable effect.”
* Differs from *Margarine Reference* where the prohibition was not aimed to curtail a public evil but to regulate the dairy industry
* The power to prohibit sales without sales without the warnings is a logical extension of the federal power to protect health by prohibiting the sale of the products themselves. Since Parliament can legislate as to the sale and manufacture of these products, it follows that they can validly legislate to prohibit the advertisement and sales without health warnings.
* Criminal law is not “frozen in time” and can evolve 🡪 furthermore, can criminalize an activity ancillary to the “evil” (i.e. advertising the smoking) without criminalizing the “evil” itself (i.e. smoking)

**Major (+1 dissenting):** is undesirability sufficient to make such expression criminal? The Act is too far removed from the injurious or undesirable effects of tobacco use to constitute a valid exercise of Parliament’s criminal law power. Legislation prohibiting the advertising of a product that is both legal and licensed throughout the country lacks a typically criminal purpose and is *ultra vires* Parliament under s.91(27). ***It is beyond Parliament’s competence to criminalize this type of speech where they declined to criminalize the underlying activity of tobacco use.***

#### R v Hydro-Quebec (1997, SCC) pg 433 (restricting PCB emissions, quasi-criminal law)

**Facts**: *Canadian Environmental Protection Act* regulates the use and disposal of toxic substances. The *Act* allows the Minister of the Environment to order temporary bans pending governmental approval. QC Hydro was charged for violating one of these temporary bans; they argue that it is not criminal as it is within a regulatory framework, and thus is ultra vires federal parliament.

**Test – is it a criminal law power?**

* Prohibition: disposal of PCB toxins
* Penalty: Fines or jail time
* Purpose: Protection of the environment and health
* 🡪 Therefore, YES, it is a valid exercise of criminal law power

**Meyers**: The decision in *Hydo*, like *RJR*, is that parliaments regulation of a toxic substance still met the criminal law test. Once again, the presence of regulatory provisions within the impugned act didn’t stop it from being recognized as a criminal law power.

**La Forest (+4):**

* Pollution is considered a social evil, and environmental protection is in the public interest
* Despite the broad wording (which is inevitable when it comes to the environment) that is the very nature of criminal law 🡪 it is broad
* Limitations on substances emitted are accompanied with penal sanctions
* Per La Forest in *CZ*, federal government must have some control over the environment, as must the province – the two powers can supplement on another
* This judgment essentially expands the forms that criminal laws can take 🡪 can be (a) discretionary and (b) be in areas where there was no prior regulation
	+ *RJR* expanded criminal law to embrace areas beyond what is traditional, to include general public evils (so long as prohibitions are met with penal sanctions)
	+ Purpose over form is favoured: if a law is preventing an evil, the form does not matter
* National concern doctrine differs from criminal law since it seeks by discrete prohibitions to prevent evils falling within a broad purpose (protection of health) instead of assigning full power to regulate an area to Parliament.
	+ Long exercised Parliamentary control over food and drugs by prohibitions grounded in the criminal law power haven’t prevented the provinces from extensively regulating and prohibiting many health matters. They can frequently work together to meet common concerns.

**Lamer & Iaccobucci (+2 dissenting):**

* Found that the impugned provisions of the Act were regulatory and not criminal
* The broad wording used (limitations on “toxic substances”) do not necessitate a finding of endangering human life or health 🡪 may be related to animals instead; thus **not for the purpose of protecting the public interest** from an evil
* Furthermore, there is no offence until the administrative agency intervenes 🡪 i.e. there is no specified norm of conduct, no list of substances (essentially, the **crimes are not codified**) – these are decided on an ongoing basis by the Minister
* They note that provinces can be **exempt** from the provision if they have similar legislation intact – something that cannot be done with proper criminal laws
* Unlike *RJR*, here there is no general prohibition, but instead a broad delegation of regulatory authority to the executive 🡪 discretion given
* Aim is **not to prohibit** toxic substances; just to control (**regulate**) the manner in which they interact with the environment
* Granting Parliament the authority to regulate so completely would preclude the possibility of shared environmental jurisdiction and also infringe severely on other powers assigned to the provinces

#### Reference re Firearms Act (Can.) (1995) pg 445

**Facts**: Offence under the Criminal Code not to comply with the national gun registry (per the Firearms Act). Province argued that the scheme was indistinguishable from existing provincial property regulation schemes (e.g., land title registries), and was regulatory, not criminal, in nature.

**Test – is it a criminal law power?**

* Prohibition: Firearm regulation
* Penalty: Criminal code offence with fines and jail time
* Purpose: To curtail the dangers of firearms
* Therefore, YES, it is a valid exercise of criminal law power

**Issue**: Is the Firearms Act in pith and substance regulation or a criminal law power?

Court found (unanimously) that the law fell under federal criminal law power (thus continuing the trend of expansive interpretation of criminal law power) 🡪 pith and substance was to enhance public safety; law included prohibitions and penalties. Court held that it was distinguishable from provincial schemes, as guns were inherently dangerous, and their primary uses are vastly different from those of provincial property.

Court said the Act did not hinder the provincial ability to regulate the property and civil rights aspect of guns, nor did it precipitate the federal government’s entry into a new field since gun control had been subject to federal legislation since Confederation.

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

The province does have some power to regulate public order:

S.92(14) – provincial administration of justice (incl. policing) and federal delegation of power to provinces to prosecute criminal offences means **much of the Code is provincially enforced**

S.92(15) – provincial penal sanctions (but an ancillary power) to enforce provincial regulatory schemes that are validly anchored elsewhere in the s.92 list of powers – *see example below*.

Province can regulate in areas that fall under s. 92:

Example: driving impaired, can fall under

1. Federal jurisdiction – Criminal – punishing impaired drivers – s. 91(27)
2. Provincial jurisdiction – Highway safety – s. 92(13) and (16)
* The laws are essentially the same, each just has a different pith and substance

#### Re Nova Scotia Board of Censor v McNeil (1978, SCC) pg 452 (movie obscenity, preventative ≠ criminal)

**Facts**: Provincial *Theatres and Amusement Act* served to “licensing and regulating the showing of films” on a case-by-case basis. Shows were banned before they could be shown (prior restraint, not convicting after showing – i.e. theatre is not charged for showing a film after-the-fact [*ex post facto* punishment – which is how criminal law operates]). If a theatre proceeded to show a banned film, they could be fined or have their license revoked. The Board banned *Last Tango in Paris*. McNeil sought a declaration that the movie ban was *ultra vires* the provincial legislation.

**Issue**: Are the act regulations *ultra vires* the provincial legislature?

**Decision**:

* Majority: Pith and substance was property and civil rights therefore, in the provincial jurisdiction.
* Dissent 🡪 This is a criminal matter.

**Ratio**: There can be some concurrence between the federal criminal law power and provincial legislation if the provincial legislation is not contrary to any federal legislation and is anchored in a head of power in s. 92.

**Laskin (+3 dissenting):**

* Found that this law was impeding on federal criminal jurisdiction – creating an offence as there was a penalty involved
* Law is concerned with the films themselves, not the theatre establishments
	+ Dominant feature is affecting public taste based on regulating criminal morality 🡪 there is no double aspect, because this feature of the law is so overarching
	+ Absent/minor feature is the regulation of films and business
	+ Contra majority, which holds that these features are regulated equally by the Act
* Form vs. substance: **colourability** – when you try to pass a law that is outside your jurisdiction but it is worded in such a way that it doesn't actually cross the line
* **Colourability**: when the legislature wants to do something that it cannot do within the constraints of the constitution, it colours the law with a substitute purpose, which will still allow it to accomplish its original goal.

**Ritchie (+4):**

* The legislation is aimed to control the film business, as the purpose deals with the use of property (theatre businesses) to show films, thus falling under s. 92(13) – it is also a matter that is local, falling under s. 92(16)
	+ This is potentially problematic, as most things that involve public morality take place on **private premises** that are operating for profit, i.e. as businesses 🡪 e.g., strip clubs. If regulation of business were sufficient on its own to warrant provincial laws, this would have the potential to impede on criminal law significantly.
* Even if it is accepted that the law regulated morality (which is federal, per s. 91(27)), it is **preventative and not penal** (form is vital!)
	+ If the province had said “you cannot show these kinds of films” and they enforced that in a prosecution format – charges laid after the film showing – then it’d run afoul of the federal government. However, the regulatory board simply says the film cannot be shown beforehand and is entirely different.
* Double aspect to this law:
	+ Prevention of the commission of immorality in private places (local, nature, property and civil rights)
	+ Public morality (criminal)

#### Westendorp v The Queen (1983, SCC) pg 456 (Prostitution, SCC trend reversal)

**Facts**: Calgary bylaw prohibited numerous uses of the streets, including being on the streets for the purposes of prostitution. Penalties included substantial fines or imprisonment (for defaulting on the fines). Westendorp was charged under this bylaw, and argued that it was a **colorable attempt** by the city to regulate criminal law.

**Issue**: Is the municipal bylaw an intrusion into the federal criminal law power?

**Decision**: Yes, the municipal bylaw is an intrusion into the federal criminal law power – because the bylaw was originally broader and specific provisions were added later to address what they (Calgary) felt the criminal code was lacking.

**Laskin (unanimous):**

* Bylaw is invalid. Calgary bylaw preventing prostitution does not pertain to control of the streets. If it was, it would have dealt with congregating on the streets or obstructions and be **unrelated to the activities** of these people
	+ The dominant aim of the impugned provision is obviously to prohibit and punish prostitution, so much so, that it does not allow for a double aspect 🡪 clearly, the goal is not to regulate prostitution for the purposes of public nuisance
		- Clear moral underpinnings, and little, if any, concern with the use and enjoyment of public property
		- The offence here only arises by proposing or soliciting for prostitution 🡪 there is ***no property question***
* Allowing the province to legislate activities like this may let them do the same with drug trafficking – slippery slope argument
* This is *a priori* prohibition on a public activity cf. *McNeil* happened in private and had more of a dual nature.
* SCC more robustly putting the provinces in check and protecting the federal powers

**Notes:** Similar bylaw enacted by Montreal was found *ultra vires*. More recent cases have followed the trend of upholding provincial laws with public order and morality through generous use of the double aspect doctrine rather than finding them as intruding on federal criminal law power.

#### R v Morgentaler (1993, SCC) pg 220-24 (private abortions, pith and substance) – REVISITED

At issue was a provincial law that prohibited private abortion services. The province contended that the purpose of this law was related to the administration of health care, which is within their jurisdiction.

* Court found that the pith and substance (the dominant aspect) of this law was the prohibition of abortion for reasons of public morality, thus falling under the federal power of substantive criminal law (based on jurisprudence – i.e. criminal law previously prohibited abortions, however was struck down under s. 7).
Whatever the province does, it can’t seek to undermine what the federal law does
* If the means of the legislation do not logically advance the stated objectives, that might meant the stated purpose is masking the actual purpose (**colourability** – relate to *Firearms*)
* Sopinka distinguishes his decision from *McNeil*

|  |  |  |
| --- | --- | --- |
|  | ***Morgentalar, Westendorp*** | ***McNeil*** |
| **Form** | Penalty, prosecution, conviction | Regulate, preventative (a priori penalties) |
| **Pith and Substance** | ***Overall*** | Criminal | Local matter, property (private) |
| ***Legal effects (four corners)*** | Explicit prohibition |  |
| ***Similarity*** | Similarity to criminal code provisions (red flag!) |  |
| ***Timing*** | Morgentalar’s intention to open a clinic |  |
| ***History*** | Hansard evidence of “public evil” rationale |  |
| ***Rational connection between means and purpose*** | Underinclusive to meet purported purpose (not all surgeries; specific to activities) |  |
| **Double Aspect** | Dominant aspect (criminalization) was too specific to allow for double aspect | Prevent commission of immorality on private property (prov); public morality (fed) |

#### Ref. re Assisted Human Reproduction Act (2010, SCC) (Supp) – NOT EXAMINABLE

**Ratio**:

* In determining purpose of legislation, Parliament can look at extrinsic evidence.

**2 steps in determining whether a law is valid: characterization and classification**

1. Dominant “matter” or “pith and substance” of the law must be determined
2. Does it fall under a head of power assigned to the enacting body

### Case Review: Form vs. Function

* **Provincial Law Challenge**:
	+ Morgentaler – regulatory form, criminal function (struck down)
	+ McNeill – regulatory form, criminal function (upheld)
	+ Westendorp – criminal form, criminal function (struck down)
* **Federal Law Challenge**:
	+ Margarine Reference – criminal form, regulatory function (struck down)
	+ RJR MacDonald – criminal form, criminal function function (upheld)
	+ Hydro-Quebec – regulatory form, criminal function (upheld)
		- Where the SCC accepted broad definitions of criminal form and function

# Economic Regulations

## I. The Constitution and the Economy

**Federal:**

**S. 91(2): Power to regulate trade and commerce**

s. 91(3): The raising of money by any mode or system of taxation

s. 91(4): The borrowing of money on the public credit

s. 91(14): Currency and coinage

s. 91(15): Banking, incorporation of banks, and the issue of paper money

s. 91(18): Bills of exchange and promissory notes

s. 91(19): Interest

s. 91(20: Legal Tender

s. 91(21): Bankruptcy

**Provincial:**

**S. 92(13): Power over property and civil rights**

**S.121: Free movement of goods across provincial borders**

#### Black and Co v Law Society of Alberta (1989, SCC) pg 350 (Charter: mobility rights)

**Issue**: Did a Law Society of Alta rule prohibiting partnerships between resident and non-resident lawyers (as enacted for the purpose of preventing Ontario’s McCarthy, now, McCarthy Tetrault, from opening a Calgary office) violate s. 6(2)(b) of the Charter? And if so, can it be upheld as a reasonable limit under s. 1?

**Conclusion**: The rule violated s.6(2)(b) (mobility rights) of the Charter and cannot be upheld as a reasonable limit under s. 1

**Key point**: The purpose of s.6(2)(b): La Forest interprets this section as bettering or improving the economic union between provinces by allowing people to work anywhere within Canada (safeguard interprovincial mobility of people and goods in Canada).

**La Forest (+2):**

* Analyses the scope and effect of s. 6(2)(b) on the basis of its intended purpose, namely to safeguard interprovincial mobility of people and goods in Canada.
* s. 6 of the Charter was the culmination of efforts at constitutional reform to strengthen the economic union and guarantee rights of interprovincial mobility.
* Economic integration was a goal of federalism at the time of Confederation
* Canada as “one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond Provinces” (*Murphy* v. *CPR Co.* (1958, SCC)) and echoes of this sentiment are found in Laskin’s judgment in *AG Manitoba* v. *Manitoba Egg & Poultry Ass’n* (1971, SCC)
* Also uses the decision of the Privy Council in *Union Colliery* (1899): province can’t interfere with a resident’s right to live and work in the province of their choice
* Uses Rand J’s judgment in *Winner v. SMT (Eastern)*: because it is the first decision of either the Privy Council or the Supreme Court to arrive at a the idea “that Canadian citizenship carries with it certain inherent rights, including some form of mobility.”
* The freedom of movement is a constituent element of citizenship status beyond the powers of the sovereignty and the state

Note: The Extent of Internal Trade Barriers (pg 352)

* Excerpt from a Federal Government report from the early nineties documenting barriers to interprovincial trade which might be addressed as part of constitutional reform package (we all know what happened in Charlottetown).
* In it, a list of “internal barriers” to trade which are attributed to over-regulation by both federal and provincial governments, these include: procurement practices by provincial governments favouring provincial suppliers, protectionist-type policies protecting provincial industries, agricultural boards that regulate the production of food products in the interests of local producers, etc.
* The excerpted report then refers to its calculations of the economic cost of these barriers to interprovincial trade.

#### Canadian Egg Marketing Agency v Richardson (1998, SCC) pg 353 (purposes of the Charter’s mobility rights revisited)

**Facts**: This case concerns the exclusion of egg producers in the Northwest Territories from Canada’s national egg marketing scheme. The scheme prevents egg producers from the NWT, like Richardson, from marketing or exporting eggs interprovincial or internationally.

* The court considers the purposes of the charter’s mobility rights – emphasizing different factors than La Forest did in the *Black* case

**Iacobucci (+6):**

* Section 6 has a guarantee to gain livelihood subject to laws which do not discriminate on the basis of residence – embodies a concern for the dignity of the individual 🡪 individuals should be able to participate in the economy without being subject to discriminatory legislation
* How does s. 121 fit into this picture? The structural tension between s. 6 of the Charter and the division of powers under the BNA Act (ss. 91&92) is further exasperated rather than aided s. 121 jurisprudence.
	+ Failure of 9/10 provinces to agree that s. 121 should be made more robust
* By interpreting s. 6 so literally, the court may leave aside some of its overriding applications outside just the movement of people
* Majority wants to make sure that s. 6 isn’t overly generalized in a commercial context
* The Court held that s. 6 of the Charter reflected “ human rights objectives” (rather than a free trade ones) and that the primary objective of the impugned federal scheme, its dominant feature or pith and substance, was not to discriminate against out-of-province producers but to regulate the marketing of eggs in the country 🡨 different inflection of s.6 from La Forest in *Black*

**McLachlin (Dissent)** (Meyers agrees with dissent):

* The exclusion of NWT egg producers from the federal marketing scheme is “a senseless and counter-productive impediment to the right of the respondents to pursue their chosen livelihood, egg production, in the province or territory of their choice, the Northwest Territories”
* The offending scheme cannot saved by s. 1 of the Charter as “a reasonable measure demonstrably justified in a free and democratic society” but is instead the product of a historical accident rather than any pressing or substantive objective which would justify the infringement under s. 1.
* These views are closer to La Forest’s in *Black* – they suggest a basic cohesion between s. 6 and earlier ideas of Canada as an economic unit

## II. Provincial Powers over Economic Regulation

Understanding of **91(2)** inherited by SCC was that it had 2 branches:

* (1) Regulation of international and interprovincial trade (maybe w/ necessarily incidental doctrine) and
* (2) General regulation of trade affecting whole dominion (*Parsons*, *Natural Products Marketing Act Reference*)

Understanding of **92(13)** inherited by SCC:

* (1) Regulation of particular trades/businesses (except those assigned under 91),
* (2) Regulation of labour relations, and
* (3) Regulation of intraprovincial trade/trading transactions (*Snider, Natural Products Marketing Act Reference*)

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

🡪 Provinces can utilize their subject matter jurisdiction under s. 92 to impose barriers on the free flow of goods, capital and labour

#### Carnation Co Ltd v Quebec Agricultural Marketing Board (1968, SCC) pg 356

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

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

**Martland (+6)**:

* Each transaction and each regulation must be examined in relation to its own facts. Court must look at intent of scheme. Validity of legislation should be determined by aims, rather than effects
* Object of plan was to improve bargaining position of milk producers in QC.
* **Test**: It is not the possibility that orders might *affect* P’s interprovincial trade which should determine validity, but whether they were made *in relation* to the regulation of trade and commerce.
* The incidental effects on a company engaged in interprovincial trade is okay. Incidental effects are not good enough to find the legislation *ultra vires*
* The orders were not trying to directly control and restrict interprovincial trade – incidental effects are okay

**Conclusion**: Orders not directed at regulation of interprovincial trade. Appeal dismissed – legislation is valid.

#### AG Manitoba v. Manitoba Egg and Poultry Association (1971, SCC) pg 360

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

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

**Analysis**:

**Martland/ Laskin (concurring):**

* *Parsons*: 91(2) Interprovincial trade power 🡪 does not include regulation of contracts of a particular business in a single province.
* Distinguished from *Carnation* because here, the scheme is directed at goods coming from outside province.
* Martland: But in this case, it is my opinion, the legislation now at issue not only affects interprovincial trade in eggs, it **aims** at the regulation of importation of eggs
* Laskin is interested in the notion of the US jurisprudence of commerce laws – says there is no need to deal with s. 121 here. “To permit the scheme (thereby allowing the provinces to seal their borders from the entry of goods) would be to deny one of the objects of Confederation, evidenced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada”
* **The direct object** is regulation of importation of eggs, not saved by local market being under same regime. One of objects of Confederation is to form economic unit of whole of Canada.

**Conclusion**: Leg is invalid – invasion of federal power under 91(2).

Notes and Questions (Re: Paul Weiler)

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

* May not have been appropriate for court to respond to *Egg Reference*: litigated by collusion; MB constructed scheme for purpose of bringing a ref
* *Burns Foods Ltd v AG Manitoba*: followed *Manitoba Egg* – challenge to MB hog marketing scheme – ultra vires because it prevented processors from purchasing hogs from producers in another province except through agency of Board – **regulation which subjects price of imports to same regulations as local sales is a regulation of interprovincial trade**
* Reasoning in these SCC cases suggests that it is not necessary to find that pith and substance of entire statutory scheme enacted by provincial legislature is to regulate international and/or interprovincial trade in order to hold such legislation *ultra vires*; it is arguably sufficient to find that part of scheme was aimed at the regulation of such trade (*Manitoba Egg Ref*.)

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

**Facts**: Legislation enacted following sharp rise in price of oil in 1973. SK set policy so that if gov’t suspects that a producer is selling oil at less than fair market value, gov’t can replace producers’ price with what gov’t thinks the appropriate price is, producer has to pay tax on basis of difference between gov’t-established price and oil 1973 price (1. Tax – Mineral Income Tax; 2. Royalty Surcharge). 98% of the oil/gas is to be exported outside of SK. CIGOL challenged constitutionality of taxing regime: (1) attempt by gov’t of SK to regulate interprovincial and international trade in oil; (2) indirect taxation.

**Issue**: Does the legislation constitute indirect taxation? Does the legislation and supporting regulation trench on Parliaments exclusive jurisdiction of interprovincial and international trade and commerce under 91(2)?

**Martland (+6):**

* Practical consequence is that SK will acquire benefit of all increases in value of oil produced in that province above set basic well-head price fixed by statute and regulations. Most oil in SK is destined for export. Indirect tax – ultra vires. Effect is to set floor price for SK oil purchased for export.
* **Ratio**: Provincial legislative authority does not extend to fixing price to be charged/received in respect of sale of goods in export market – it concerns the regulation of interprovincial trade and constitutes an infringement upon 91(2). Distinguish from *Carnation* – here legislation is directly aimed at production of oil destined for export and has the effect of regulating export price.

**Dickson (dissent):** intra vires SK.

* American-style balancing test when reviewing provincial legislation in the economic sphere: is the interest of the province reflected in the legislation sufficiently important to outweigh the burden that the legislation imposes on international/interprovincial trade?
* Martland’s reasoning is deficient – should adopt the American-style balancing test. This is triggered whenever something starts to flow through interstate channels of commerce.
* Court should presume that the legislature acts constitutionally. Direct taxation. Not colourable device for assuming control of extra-provincial trade. Transactions are well-head transactions. No impediments to free movement of goods. Emphasis on fair value ensures that tax will not change export oil price. Ultimate position of consumers is unaffected.

**Conclusion**: Legislation is directly aimed at production of oil destined for export – regulates export price – *ultra vires* SK.

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

Summary of Carnation, Manitoba Egg and Poultry, and Canadian Industrial Gas and Oil:

* ***Carnation***: in this case the SCC found the Province of Quebec’s monopolistic marketing scheme for the sale of raw milk products to Carnation for *intra vires* the province as being “in relation” primarily to intra rather than interprovincial trade.
* ***Manitoba Egg and Poultry***: In this case, Justice Laskin struck down a provincial egg marketing plan as trenching on the federal power over the regulation of interprovincial trade. This meant a strict curtailment of the provinces’ power to regulate the marketing of goods coming from outside the province
* ***Canadian Industrial Gas and Oil***: If in *Manitoba Egg & Poultry*, Justice Laskin severely limited the provincial power to regulate the economy in a way that extends beyond its borders, *Canadian Industrial Gas & Oil* affirms *Manitoba Egg & Poultry*, to strike down a Saskatchewan law fixing the price of oil on wellheads in the province. Because the evidence demonstrated that the 98% of the oil derived from the province was exported to eastern Canada, the majority of the court reasoned that the province was engaging in price fixing on the inter provincial export market thereby invading the exclusive federal subject matter jurisdiction over the regulation of interprovincial trade and commerce.

## III. Federal Powers Over Economic Regulation

The twin branches of the s. 91(2) power (established in *Parsons*):

1. **The Regulation of Interprovincial and International Trade;**
2. **The General Regulation of Trade.**
* The specific power over interprovincial and international trade easily grounds Parliament’s jurisdiction, and permits the analysis to end there.
* In *General Motors*, we move from the specific to the general, if there is not specific interprovincial or international transaction, which is purported to be regulated, the Federal Government must demonstrate it is acting according to its general power over the regulation of trade.
* In *General Motors* the Court laid down 5 factors to be considered in assessing whether Parliament could be said to be acting according to its general regulatory power under s. 92(1) despite an incidental effect on some head of provincial power (usually s. 92(13)).

### A. Regulation of Interprovincial and International trade

The Supreme Court took a more permissive view of the federal powers. Generally speaking, there is a trend towards an expansion of “necessarily incidental” doctrine to extend Parliament’s s. 91(2) power beyond strictly interprovincial transactions to include the regulation of some *intra*provincial transactions provided they are necessarily incidental to a broader scheme directed at the regulation of interprovincial and/or international grade (*Klassen, Caloil*, **not** *Dominion Stores)*

*Klassen* meant that federal legislation could be permitted to regulate wholly intraprovincial transactions provided that the regulated intraprovincial transaction was an incidental effect of its broader purpose is directed towards interprovincial or international trade (or pith and substance).

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

**Facts**: Fed gov’t passed regulations that prevented oil importers from transporting any gasoline across a line running N-S through ON and QC. Aim was to provide a market for western Canadian oil to west and restrict sale of imported oil to Eastern Canada. Caloil lost their license and obtained ruling that regulations were unconstitutional for invading provincial jurisdiction. Argued that it invaded provincial jurisdiction because the line divided up parts of ON and QC – therefore affecting intraprovincial trade. Feds passed new legislation (changed the legislation to treat “imported oil” rather than “any gasoline”) and again denied Caloil’s license – main idea of this legislation was to create a domestic oil market.

**Issue**: Is new legislation intra vires the federal government?

**Ratio:** Provided “the true character” of a Parliament’s action is to “incident to the administration of an extraprovincial marketing scheme” any “interference with local trade restricted as it is to an imported commodity, is an integral part of the control of imports in the furtherance of an extraprovincial trade policy and cannot be termed ‘an unwarranted invasion of provincial jurisdiction’…”

**Pigeon (unanimous)**:

* The new regulations were implicitly limited in scope to imported oil – valid regulation of international trade.
* Policy is control of imports of a given commodity to foster development and utilization of Canadian oil resources. **Interference w/ local trade is restricted to imported commodity** – not an unwarranted invasion of provincial jurisdiction.
* The objective of Parliament’s regulation was to provide a market for domestic oil west of the line and to restrict competition from foreign oil east of the line. Therefore, any effect on purely intraprovincial transactions was **purely incidental.**

**Conclusion**: Intra vires the Parliament’s s. 91(2) power to regulate interprovincial trade and does not constitute a prohibited invasion of the provinces’ s. 92(27) power over property and civil rights in the province.

#### Dominion Stores Ltd. v. The Queen (1980, SCC) pg 388

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

**Etsey (+5):**

* Federal government cannot regulate trade entirely within provinces. Better that only provincial law regulate intraprovincial sales – wasteful overlapping, federal statute seeks to add another consequence to same action already proscribed under ON Act.

 **Laskin (+4 dissent):**

* *Intra vires* – federal government has compulsory grading requirements for export/interprovincial trade – should complement with voluntary grading prescriptions for local transactions – ancillary powers doctrine.

**Conclusion**: A narrow 5-4 majority of the Court distinguished the case from the earlier *Canada Standard* to strike down the Act as *ultra vires*.

* This decision was widely criticized as inconsistent with the general thrust of the case law (which tended to widen rather than narrow s. 91(2)’s application in the second half of the twentieth century).
* This case may be treated as an outlier and it is relevant that there was overlapping provincial legislation which addressed the standards of intraprovincial agriculture.

### B. General Regulation of Trade

**Is s. 91(2) a valid basis for Parliament’s legislation or regulation? (***GM***)**

1. The “first branch” of the s. 91(2) federal trade and commerce power is to determine straightforwardly “whether the impugned provision can be viewed as intruding on provincial powers, and if so, to what extent”
2. The “second branch” of the test asks **whether the Act itself (or a severable part thereof) is valid.** If its not valid, the inquiry is at and end.
	1. To be valid under the second branch of the test, the Court must consider the **five factors**, the first two as articulated by Chief Justice Laskin in *Vapor* and the final three as adopted by Chief Justice Dickson in *Canadian National Transport* and cited in *General Motors*.

#### Macdonald v. Vapor Canada

* That case revolved around the validity of a provision in the federal *Trade Marks Act, which* purported to permit a civil cause of action to a plaintiff harmed by a “business practice contrary to honest industrial or commercial usage in Canada”.
* Although the Court struck down the impugned legislation as *ultra vires* insofar as it created a private enforcement apparatus, lacked a regulatory scheme under public supervision and largely reproduced statutory remedies and basic rights of action available in the common and civil laws of the provinces, Chief Justice Laskin’s judgment opened the door to a further expansion of Parliament’s power to regulate trade and commerce were these requirements met.
* A decade later, Chief Justice Laskin’s successor, Chief Justice Dickson’s decision in *General Motors* would open the door fully.

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

1. Is a regulatory scheme created?

2. Is the scheme overseen by a regulatory agency?

3. Does the scheme regulate trade in general, as opposed to a particular trade? (Tough)

4. Is the scheme beyond the capacity of the provincial legislatures?

5. Do all provinces need to be included in order for the regulation to be effective?

#### General Motors of Canada Ltd v City National Leasing (1989, SCC) pg 396 (anti-competitive behaviour)

**Facts**: Federal *Competitions Act* intended to prevent the creation of monopolies, practices that are aimed at wiping out competition. A section of the *Act* creates a federal tort action offered for companies hurt by anti-competitive behaviour. CNL brought a civil action against GM alleging that it suffered losses as a result of a discriminatory pricing policy (GM offered preferential interest rates to its competitors) that constituted a kind of anti-competitive behaviour prohibited by the *Act.* GM argues the *Act* is *ultra vires* the feds because creation of civil causes of action falls within provincial jurisdiction in relation to “property and civil rights” under 92(13). Overall act had already been established as valid under 91(27).

**Issue:** Is s. 33.1 of the *Combines Investigation Act* valid as general regulation of trade and commerce? Is the impugned Act’s creation of a civil right of action for anti-competitive acts by the Act valid as necessarily incidental to the Act’s broader purpose of regulating anti-competitive behaviour in the national market place?

**Decision**: “Combines Investigation Act is valid under the federal trade and commerce power, in particular, it is valid under the ‘second branch’ of that power, the power over ‘general’ trade and commerce. Second, I have found that s. 31.1 is constitutionally valid by virtue of being functionally related to the Act.”

**Test to determine the validity for legislation under the second branch of the trade and commerce power – ask if the impugned legislation is:**

1. Integrated/part of a general regulatory scheme (*Vapour*);
2. Monitored by the continuing oversight of a regulatory agency (*Vapour*)*;*
3. Concerned with trade as a whole rather than with a particular industry (*Vapour*);
4. Of a nature that the provinces jointly or severally would be constitutionally incapable of enacting it (*Canadian National Transportation*)*;*
5. Includes one or more provinces because the failure to do so would jeopardize the successful operation of the scheme in other parts of the country (*Canadian National Transportation*)*.*

**Dickson:** *Parsons* sets out 3 important propositions w/ regard to fed trade and commerce power:

1. Does not correspond to literal meaning of words ‘regulation of trade and commerce’;
2. Includes not only arrangements w/ regard to int’l and interprovincial trade but also general regulation of trade affecting the whole dominion;
3. Does not extend to regulating contracts of a particular business/trade**.**
* “The five factors provide a preliminary checklist of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power. These indicia do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria necessarily determinative 91(2) should sustain competition laws.”
* All indicia satisfied – but 4 and 5 not explicitly addressed.
* **(1)** Dickson discerned that the Combines Investigation Act is regulatory in nature based on three components (elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism); the Court is then free to proceed to (2)-(5).
* **(2)** “In my view, the control over the entire process exercised by the Director and the Commission satisfies the requirement that there be vigilant oversight of the administration of a regulatory scheme”
* **(3)** “The Act is quite clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity.”
* **(4)** The deleterious effects of anticompetitive practices transcend provincial boundaries. Competition is not an issue of purely local concern but one of crucial importance for the national economy. Therefore, the provinces jointly or severally would be constitutionally incapable of enacting it
* **(5)** The *Combines Investigations Act* is held to meet the test of a “diverse economic, geographical, and political factors” which make it essential that competition be regulated at the federal level.” Failure to include one or more provinces or localities would jeopardize successful operation” of the legislation “in other parts of the country.”
* Finding that the *Combines Investigation Act* was *intra vires* Parliament, Dickson cites **s. 121** for the basic guarantee of the free flow of trade across provincial boundaries. Here again, we see that the construal of s. 121 by the Court is limited to the basic understanding of Confederation as having created “a single huge marketplace”. Therefore, “if competition is to be regulated at all it must be regulated federally.”

**Conclusion**: Dickson finds that the Act is quite clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity. Valid federal legislation under second branch of 91(2).

#### Kirkby AG v Ritvik Holdings Inc. (2005, SCC) pg 408 (essential – affirms GM)

**Facts**: Kirkby held the patent for lego and when the patent expired Ritvik/Mega Bloks began selling their own version of the blocks which were interchangeable with lego. Kirkby tried to enforce its unregistered trademark pursuant to the civil action created by s. 7(b) of the *Trade Marks Act* (codifying the common law tort of passing-off). Ritvik/Mega Bloks challenged the constitutionality of s. 7(b) of the Act insofar as it purported to create a civil cause of action.

**Analysis**:

* The Court cited the two branches of the s. 91(2) test established in by the Privy Council in *Parsons.*(1) Specifically over transactions which are interprovincial or international, and (2) generally over trade and commerce effecting the country as a whole.
* When it found the encroachment of the provision on provincial power was minimal (branch 1), it considered the presence of some or all of the 5 criteria (branch 2) (para 16 at p. 409, 411) set out in *General Motors* to determine whether Parliament could be said to be legislating in keeping with its general power over trade and commerce.
* At the second branch of the test, the Act is held to be “a valid exercise of Parliament’s general trade and commerce power” (para 28), concerned with the economy as a whole, etc.

**Conclusion**: The Court ultimately dismissed Kirkby’s claim for passing off under the impugned section of the Act but not for the reason that the provision or Act itself was ultra vires.

#### Reference Re Securities Act (2011, SCC) (Supp)

**Facts**: Federal legislation to establish a comprehensive national securities regulatory regime. Provinces could choose to opt in or to continue using their existing regulations.

**Issue**: Is *Securities Act* valid as general regulation of trade and commerce?

**Application**:

**McLachlin:** Affirmation of 5 indicia from *GM*.

* There are distinctions between provincial securities regimes. Provinces have jurisdiction to regulate securities within their boundaries under 92(13).
* Constitution gives the Federal government powers that enable it to pass laws that affect aspects of securities regulation and to promote integrity and stability of Canadian financial system.
* **Situation must be such that if the Federal government were not able to legislate, there would be a constitutional gap**. **Second branch cannot be used in a way that denies provincial legislatures power to regulate local matters and industries within their boundaries.**
* Main thrust of Act is to regulate, on an exclusive basis, all aspects of securities trading in Canada, including trades and occupations related to securities in each of provinces.
* **Efficaciousness (the power to produce a desired result) is not a relevant consideration in a division of powers analysis**. Effect of provisions is in essence to duplicate leg schemes enacted by provincial legislators exercising their jurisdiction over property and civil rights.
* Test from *GM*: (1) Yes. (2) Yes. (3) Securities trading affects all industries and is general in nature – BUT Act has detailed regulations over all aspects of securities trading. (4) Some aspects of leg would be beyond powers of provinces. Would regulate ALL aspects of contracts for securities within provinces, including ALL aspects of public protection and professional competence within provinces. Note: Might be a change in 4th criteria? Not just about constitutional capacity, but about **whether it would be *practical* for provinces to create a scheme**. (5) Provinces can choose to participate, which indicates that regulation is effective without full participation.

**Conclusion**: Federal legislation failed to satisfy enough of indicia – *ultra vires*. The Securities Act as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the Constitution Act, 1867

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