**Class 2**

Nature of a Constitution

* Constitution sets out series of rules, principles, practices that relates to governance of a society.
* Legislative power resides with the legislative assembly, parliament. Cabinet holds executive power, administers law. Judicial power is held by judges, the judiciary. Constitutions talk about how these three branches are structured constitutionally as far as what they can do.
* Constitutions also capture the aspirations and values of a country
* Constitution also protects individual rights and freedoms. Rights framework that a nation understands itself to have.
* Constitutional talks about relationship between federal and provincial, but indigenous governments are entering into the picture as well. Politics of reconciliation.
* Relationship between state and individual also superimposes itself on the division between fed/prov. Area of jurisdiction that the individual has that cannot be interfered with by fed or prov government.
* There’s also a boundary for indigenous governments
* Three distinct relationships that structure our constitution, all happening at the same time. Fed/Prov, Gov/Individual, Indigenous/individual/state

Sources of Constitutional Law

* written documents. Canadian constitution consists of a number of documents, over 20 statutes and orders in council that are part of the constitution. The two kinds of written documents: imperial statutes or orders of council, Canadian statutes
* Imperial statutes and orders in council consist of those statutes that are passed by the UK’s parliament, acting as the imperial parliament to apply in Canada as a colony. There are 20 or so imperial statutes or orders in council in our constitution
* Other document is Canadian Statute, a law passed by Canadian national parliament.
* Constitution is entrenched, rights and freedoms are entrenched in our constitution. Entrenched means it’s subject to change only by a very specific route. Can’t be changed by ordinary legislative action. You need 7 provinces constituting 50% of Canadian population to approve amendent
* Case law, judges interpreting written provisions. Common law fleshes out constitution in ways not expressly written out. Clarifies important elements of constitution
* Exercises or prerogative or privilege by PM or Cabinet. Largely removed by statute. Privilege is power of parliament to conduct its own affairs.
* Conventions: not legally enforceable, only political ramifications. Not constitutional rules, not written down, and though they can be articulated by courts, they can’t be enforced. They are habits, they evolve
* Unwritten Principles (legally enforceable)
* Indigenous law

Doctrine of repugnancy

* up to 1982, no law in Canada could be in contradiction of the British North American Act. Any amending had to come from Westminster amending its own law. 1982 was approved by Westminster, cut off the need to go to Westminster.

**Class 3**

John Borrows

* There’s no theory that accounts for our wilful blindness to indigenous law.
* Law of reception, you pick a day at when a colony came into being and whatever the law is in England at that time is the starting point of the law in that colony
* There is no one indigenous legal system, they have different systems, some have customary laws or more natural systems of laws.
* There was never conquest, just often cooperation and welcome and even cases where indigenous marriages were recognized. Also, is that the framework we want to apply? That we’re in the vanquishers and they’re in a position to overcome conquest?
* Morality has a place in the politics of how we understand indigenous legal systems. Saying indigenous legal systems are as complex as we are. It’s as diverse, complex, and compelling, has evolution and change, need for flexibility, etc. Makes a case for its uniqueness. Indigenous is part of Canadian constitutional law that isn’t as developed and needs more attention.

Prerogative

* the powers that crown retains that haven’t been taken away by struggles or parliament. Still a source of Canadian con law because some elements of Canadian state have been shaped by royal prerogative, but much diminished (issuing passports, not sweeping proclamations).

Imperial Statutes

* laws passed by the Westminster parliament acting in its imperial capacity to pass rules and laws to its colonies. It’s by imperial parliament, so laws it passes to colonies are called imperial statutes. .
* They preserve imperial nature of Britain’s relationships with its colonies. Imposes will of parliament on that colony and it can be changed or amended only by the imperial power, not by the colony to which the statute applies.

British North America Act, 1867

* Created Dominion of Canada by bringing together three colonial territories
* BNA Act allowed the GG or LG to invalidate laws that were otherwise passed by legislative assembly in Canada. 1867 did not mark growth of this fully independent nation.

Colonial Laws Validity Act, 1865

* Says any colonial law that is repugnant to any Act of Parliament (Westminster) are repugnant and as such has no force. This is the Doctrine of Repugnancy, colonies could not, in their own assemblies, pass any laws that contravenes, contradicted ,or conflicted with imperial statutes that applied to that colony. They become void

Statute of Westerminster, 1931.

* Undoes CLV act. Says new laws passed in Westminster are no longer binding on colonies
* removes the doctrine of repugnancy from 1931
* leaves open the possibility that a dominion may ask for and consent to an imperial statute.
* CLV Act is gone, so imperial statutes can now also be tinkered with and changed or laws can be made that stand against them
* Nothing in SoW Act applies to the repeal and revision of the BNA Act. Doctrine of repugnancy continues to apply to the BNA Act of 1867. Has to be followed by any domestic laws coming out of Canada at national or provincial level. Only way to change or amend BNA Act is to go back to Westminster, can’t do it in domestic parliament.

Canada Act, 1982

* premiers and PM came up with an amending formula that everyone but Quebec agreed to. SCC said as long as substantial agreement, you can go ahead. However, if you were to put in this amending formula/amendment...you’d have to go back to Westminster to do it.
* No act of the Parliament of UK passed after Constitution Act 1982 shall extend to Canada as part of its law (cut colonial law, Westminster no longer has authority to do anything of legal affect in Canada, even if we ask and consent
* Section 52 of Constitution Act 1982 says constitution of Canada is supreme law of Canada and any law inconsistent with constitution is, to the extent of this inconsistency, of no force or effect. It reads like the doctrine of repugnancy

**Class 4**

Reference Procedure

* way to get a question or dispute before a court to get a judicial opinion on it. A reference allows the government, either prov or fed, to refer a question to SCC (if fed) or Court of Appeal or Supreme Court (if prov).
* SCC can answer the question subject to the extent that the court deems it appropriate to answer the question.
* BC: Constitutional Question Act. Lt Gov or cabinet can refer any matter to the Court of Appeal or Supreme Court for hearing and consideration and CoA and SC must then hear or consider it.
* In practice, reference sets precedence, though technically it’s only opinion.
* Question comes from AG, interveners are parties that come in and argue one side or the other of the question even though they aren’t part of the dispute.

Secession Reference

* adversarial system and so want someone to argue both sides, need someone to argue sovereignty side, but Quebec wants none of it. Court can’t say reference is really legitimate without anyone representing other side, so they appoint an amicus curiae
* Canada is known for having a lot of interveners as a way of diversifying the perspective of the court on these central issues.
* Question: Whether under Constitution of Canada, you can unilaterally secede? International law? What if conflict between the two?
* Court notes that the text of the constitution is not exhaustive.
* Court says constitution is more than just the written words in the documents, got series of unwritten rules, support rules and principles attached to it, conventions, etc. As we look at constitution, need to know it’s not everything there is to constitutional law.
* Court understands there to be a series of fundamental, organizing principles to the constitution that are not referenced explicitly in the text. These principles flesh out the text, ensure it’s lucid and has functioning framework.
* Court lays out four of these principles: federalism, democracy, constitutionalism and rule of law, respect for minorities.
* Court says our constitution is primarily a written one and there’s a primacy that they’ll give to the written stuff, the text will have primary place in determining constitutional rules
* These four principles give SCC freedom to interpret, lets them fill gaps in constitution. It gives them flexibility going into the future for situations not expressed in the text, problems can arise that weren’t expected, so not explicitly referenced in the text. Need this large potential to constitution that provide exhaustive framework that allows it to

The Unwritten Principles

* Federalism: recognized in that we are federal state, powers divided between national and regional, it’s an organizing theme of our constitution.
* Democracy: such a fundamental value that it might seem ridiculous to even write it in constitution (according to Court), important to individual and how to structure institutions.
* Constitutionalism and rule of law: constitutionalism is entrenchment, give constitution supremacy, political life must happen according to constitution. Rule of law is that all laws and everything done is subject to provision of constitutional law/rules.
* Protection of minorities: reflects broader principle that is in several specific provisions.
* Principles exist in “symbiotic” relationship. No principle trumps or excludes another principle, all must be worked out so equally enforced and compatible.

Secession Reference Decision

* secession requires constitutional amendment. Each participant in confederation has a right to initiate constitutional. However, that each participant can initiate change doesn’t mean they have right to unilateral secession without prior discussions/negotiations with other provinces/government.
* Similar obligation on rest of Canada, and fed, to engage in negotiations with the guy wanting to secede as well. Can’t just ignore that province. In light of these four principles, they have an obligation to negotiate constitutional changes in good faith in response to a stated desire by one province to secede.
* Everything in negotiations must take principles into account, particularly protection of minorities.

**Class 5**

Results of Secession Reference

* Chretien says secession, however, is a legal act as much as a political one. He’s emphasizing other aspects of SCC’s decision, question must be clear and a clear majority. Talks of need for enhanced majority and good faith negotiation, rejects idea of sovereignty association. Suggests that everything would be on the table in negotiation (national debt, boundaries, protections of minorities)
* Ted Morton: secession question is illegitimate, as it’s a purely political question, and so legitimacy of judiciary is questioned here. Court should/ not make judgments or pronouncements on political questions without a significant enough legal basis. Clarity Act

Clarity Act

* Is it a clear question?
* If it’s a clear question with a clear majority, the size of majority must be taken into account. Anything is up for grabs in the negotiations. Unilateral conditions are not possible.
* Clarity Act established conditions under which the Government of Canada would enter into negotiations that might lead to secession following a vote by a province.

Judicial Review

* whether the powers given to government under federalism are being abided to by governments.
* to determine whether an action taken by the federal or provincial government complies with the constitution. Gives courts the power to evaluate the otherwise legitimate action of one or other level of government.
* s.52 part of Constitution Act 1982, Constitution is supreme law. This is basis of giving courts the authority for judicial review, to review what would otherwise be legitimate government action. If court rules a government action is inconsistent with the constitution, it’s of no force or effect.
* Key objections to having judges do this: saying that an action that an otherwise completely legitimate government has done, democratically elected and passed a law through house properly, court has a power to say that that otherwise completely legitimate action is of no force and effect. Huge amount of power, overruling majority government doing everything properly as a representative of the will of Canadian people
* Judges determine which jurisdiction these actions fall under, if not both. That said, government will never say it’s neither. Principle of “exhaustiveness,” we have a legal where some government in some place gets to do everything. Cannot talk about a potential legislative action that is in or other or both jurisdiction.
* That said, under the charter, a decision that an action is unjustifiable under the Charter, unconstitutional under the Charter, that’s something that NEITHER federal or provincial can do Charter tells against all levels of government, sets up a jurisdictional boundary that no government can pass.

**Class 6**

Justiciability

* is the court an appropriate institution?
* Is this issue/case/question something that can be legitimately or appropriately decided by the judiciary? If the question, for instance, is deemed to be too political a question or demands an expertise that judges don’t have or asks them to do something that steps out of what we think is appropriate for judges than we can say there are issues of justiciability.
* provisions in our constitution that we have a consensus that they are not justiciable
* Apart from s.36, we have a justiciable constitution.
* Courts, can’t determine govn’t spending
* How constitution sets up boundaries (which courts enforce): division of power between fed and prov, the charter (a boundary between the state and the individual). Under judicial review, court articulates this boundary between state and individual, whether a gov can do something or if it infringes on a right.

Problems with Judicial Review - Democracy

* From democracy standpoint, problematic that judges are appointed and not elected. You have appointed judges ruling on democratically enacted laws made by democratically elected officials. Judges may not be representative.
* elected representatives do is appoint those judges, so there is a bit of a link there to democracy.
* However, it’s not clear that support for democracy means you’re inevitably opposed to judicial review, as judges have the power to enforce rights of minority against tyranny of majority. Judicial review is essential to democracy as it enables a full range of interests to be part of public agenda. Being appointed, means you don’t have the accountability, so can enforce minority.
* Another good thing about appointment is that judges are disinterested, not implicated in political quarries or squabbles.
* Federalism issues with SCC appointment: it’s appointed by the federal government and provincial govs may not like this. It’s a creation of the federal government, how can it be a neutral arbitrator when issues come up between fed and prov gov?

SCC

* unitary system, it makes laws for all of Canada, and it’s nation-building in this way
* What SCC says is binding precedent for all other courts in Canada.
* Centralists, those who favour a strong central government, vs. Provincialists/regionalists (want stronger power in regions) find reasons in federalism to support or object to SCC.
* Those who object worry that having SCC as third party enforcer of division of powers would take away some of the authority from fed gov itself to decide jurisdictional disputes.

Conventions

* establish habits and patterns of behaviour that make our system what it is
* dictate how written provisions are regarded, like formal part of text that gives power of disallowance is completely disregarded.

Imperial Tobacco

* BC trying to bring claims for tobacco induced costs and damages. IT claimed that certain aspects of the legislation so changed certain aspects of evidence, etc, that it went against judicial independence.
* Judicial independence safeguards constitutional order, maintains trust in administration of justice, requires that decisions be made on basis of law and justice, that there’s no interference from other entities.
* Case defines judicial independence, judge says you need both the reality and appearance of the independence in the judiciary. Legitimacy and stature of adjudication depends upon the appearance of independence as much as the actual independence.
* Judge defines rule of law, saying that it doesn’t dictate the content of laws. Judiciary’s job to interpret law and legislation’s job to determine the content. Whatever the content is must then be independently adjudicated on. It’s not up to the court to engage in consideration of the wisdom or the value of the particular rules that get democratically passed by legislature as long as they’re keeping in rules of constitution, they just must adjudicate on them independently.

Christie

* Unwritten principles can be used as a basis for finding by the court that a government act is unconstitutional.
* Unwritten principles allow powers to come up with unique solutions to problems, gives them more power to adapt to particular situations. However, also gives them a power that can become arbitrary, can apply unwritten principles however they see fit. Their reading finds invisible words that the lawmakers didn’t put in there. On the other hand, it would be ridiculous to be unable to use, say, democracy in a decision just because it’s not explicitly written.
* “nor has rule of law been understood as a right to have a lawyer represent,” his claim was a general right to counsel in every court or tribunal procedure, rule of law historically doesn’t have this understanding, right to counsel was a limited right that extended, if at all, to the criminal context. There may be a right in certain situations, but not GENERALLY.
* That’s not what the rule of law will give you. Rule of law is “at least this,” but “certainly not that” (general right to counsel). Left open possibility that there may be more content specific application of rule of law.

**Class 7**

Persons Case

* Governor general shall summon “qualified persons” to the senate. GG again on binding advice of the PM. Can “qualified persons” include not just men, but also women?
* Even if successful, the case would only apply to privileged women. Still had to have $4000 in property.
* SCC found that women were not qualified persons, were not legal persons insofar as being qualified for Senate. JCPC overturned this
* Difference between SCC and JCPC decisions is that both rely on different forms of argumentation
* Judge says it’s not about desirability of women in senate. They say this so they can keep it a legal question and not a political one, so legitimate, as they don’t have electoral process behind them as politicians do.
* Idea is that the constitution means the same thing through time at any one point, whatever the framers wrote and enacted it meant it to mean. This is the doctrine of original intent: the intent of the drafters of the Constitution determines the meaning regardless how many years later you’re applying it.
* Linked to historical argument is a textual argument. Textual argument is consideration of the present sense of the words of the provision in question.
* Common law with respect to women in 1867 was that they were not allowed to have any part in politics. Married men were subsumed into legal personality of their husband. Women have legal incapacity to hold public office in 1867.

 Lord Brohm’s Act

* British statute that says words that import that masculine gender, that refer only to masculine gender, should be interpreted to include women as well unless the specificity to men is expressly indicated. This act was in effect when the BNA Act was passed
* Angland doesn’t buy this and goes to precedent. A case that says use of the word “man” is enough of an express indication in itself. Very weird ruling, goes against Act. Judge also just says it would be too radical a departure from tradition for judicial interpretation.
* He also says that “persons” doesn’t explicitly include women, it doesn’t trigger the Act because it doesn’t have that potential exclusion in it, but in the context, it should be read as men only as it would be too radical a departure from tradition if otherwise.

JCPC Ruling

* he looks at the history of patriarchy, the ignoring of Lord Brahm’s act, looks at all these things that ignored women. The original meaning of that term, as it’s used, probably means that s.24 was not intended to include women.
* However the word is ambiguous and is used in other contexts to include both men and women. Discussion of custom used to exclude women is not really relevant. Custom becomes tradition and this tradition eventually stops making sense. .
* Judge says one should not apply to the Canada of today things that come out of different circumstances and time. There’s no presumptive exclusion of women. He is rejecting historical argument and he turns to internal evidence, going to do textual argument.
* He goes on to articulate today’s dominant interpretive attitude towards Canadian Constitution. The “living tree.” Constitution is a tree planted, capable of growth. As Canada changes, that change will be reflected by/in its constitution.
* He says he’s not making a decision about the rights of women, only whether the GG can appoint them. He’s downplaying the political import, just saying it’s a legal thing
* Rejects doctrinal argument regarding dismissal of Brahm’s act. Says if qualified persons not meant to include women, there would have been express limitation. There are express limitations used in other portions of the BNA Act.

Other Arguments of Judicial Interpretation (Elliot)

* Doctrinal argument: argument based on past precedent
* Prudential argument: argument about costs and benefits or practical argument – questions of effect, functionality
* Ethical argument – appeal to what we think we are, what we think are the characteristics of our institutions and our society
* Structural argument: inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures....simple logical moves from the entire Constitutional text rather than from one of its parts

**Class 9**

Residual powers:

* anything that’s not explicitly mentioned or otherwise explicitly granted, if can’t be understood as part of enumerated lists that gave jurisdiction to federal or provincial, formally, they reside at the federal level.

Federalism

* idea that government power is distributed between central authority and regional authority so that an individual in the state is subject to both levels of authority.
* Either level of government can’t shift this allocation of power and questions about the allocation of power are decided by a third party – usually judiciary.
* One level can’t alter at its will what the other can do, fixed jurisdictional division enforced against both levels of government
* Idea of coordinate power is critical, not subordinate power (one level is not considered below the other). Itt combines unity and diversity, but this is also a tension, always a pull of regions against having coherent character through the state.

**Class 10**

Theories of Federalism

* Centralist mode: argument that the strongest level of government should be the central one, that this is what the framers/drafters of BNA Act intended.
* People who make this argument point to textual tuff in BNA Act, like the fact that BNA Act sets up a federal disallowance power. This is the formal constitutional ability for the provincial LG, who is appointed by fed, to refuse to give royal assent to provincial legislation. Fed cabinet, executive, is the one telling LG what to do. However, this has not been used in decades .
* S. 92 is list of provincial powers, but part of it, s. 92 (10) gives power to federal government over transportation, and lets federal government to grab something that would otherwise be provincial and make it federal.
* Compact theory: This is that constitution is the result of an agreement, contract, or compact, between the provinces and what the provinces did was delegate a bit of their powers to a federal government. The residual powers therefore stay with prov and fed is understood to be a creation, and secondary to, of the provincial government.
* Two-nation theory is another understanding of federal estate with a lot of historical importance or relevance, that there are two nations that came together and still make up the Canadian state. The English Canadians and French Canadians and any issues of balance should be tackled with the understanding that the federal state comes from the conjoining of these two nations.
* Coordinate federalism or cooperative federalism: each government is equal, there’s no hierarchy. Both prov and fed governments are each supreme within their own jurisdiction. Relationship of equality between these two levels, neither superior to the other, no gov that trumps consistently whenever there’s a dispute.
* Symmetrical vs. Asymmetrical federalism.: Symmetrical = every province gets to do what every other province gets to do, provincial power is the same for every province. Asymmetrical is the opposite, that in some circumstances, some provinces may have more jurisdictions than the other or may be treated differently.
* No one of these understandings always wins, the negotiation of these understandings and the debate between them shapes Canadian federalism.
* John A. Macdonald wanted very distinctive centralist mode but participants in Confederation debate from Quebec were much more comfortable with compact theory.
* These arguments can overlap and co-occur. For instance, many Quebec politicians may argue dualist and compact at the same time, or dualist and centralist. Arguments can overlap.

Dicy article on Federalism

* federal states are essentially about reconciling national unity with the idea of states’ rights. Tension of unity in the face of diversity.
* Federal state’s key features: 1) supremacy of constitution, 2) legislative authority distributed between two levels of government, and 3) the court is the interpreter of the constitution
* Constitution is supreme so that it provides a solid structure. Provides stability, stops government from changing rules that are meant to control and structure it
* Court needs to be interpreter because you need an independent arbitrator when two sides conflict, this asserts the supremacy of the constitution above all. Not just one side overcoming the other. Determined by third party representing the constitution.

Smith article on Federalism

* Clear trend in Canadian cases to expand provincial jurisdiction at the expense of federal jurisdiction and Smith takes issue with this and takes argument that while this is what happened, the result is that coming into mid 20th century, Canada’s constitution had come to mean something significantly different from what the founders intended.
* Privy Council gave narrow interpretation of Canadian constitution, giving much more power to prov that founders thought would be the result. This is, to Smith, because Court has not taken into account important historical factors. Much more compact theory than centralist
* Smith gives example of how privy council read pre-amble of BNA Act. Should be read that residual, left over strong power should be given to fed, but privy say “peace order and good government” powers are only for extreme, emergency circumstances.

Cairns article on Federalism

* makes argument that while privy council gave more provincial power, this was not out of line with actual growth of nation of Canada itself. Led to growth of natural resources, which increased burdens on prov and how Canada had gone from 4 to 10 provinces and so necessarily became important and diverse, need to recognize that diversity as an important feature of Canadian federalism.
* Initial focus in 1867 was that the need to move away and establish an independence from UK and as Canada went on and grew as a nation, the provinces became much more important focus. We were a more federal and diverse society, more regions than 1867, and consequently more reason for attention to jurisdiction at provincial level and the centralizing aspects like federal disallowance fell into disuse and became conventionally unacceptable.

POGG and JCPC’s interpretation

* Pre-amble gives power to legislate for “peace, order, and good government” to the federal government. On interpretation says this gives a very broad, residual power to the federal government. Thought was that this phrase granted residual power to fed. Privy Council, however, thought it meant power to legislate in times of emergency, much more narrow.
* PC inclined to read the scope of “POGG” power down, and read “private and local nature” assigned to prov as being much more expansive.

Decline in Federalism cases

* Fewer federalism cases since the 1970s, where courts have to decide distribution of powers. One argument is that this is due to the rise of executive federalism in Canada, issues being worked out by bureaucratic discussions, through the executive levels of the fed and prov. Govn’t officials meet and hammer out how they’re going to cooperate and handle.
* Criticism is that there’s no accountability or transparency here.

**Class 11**

Simeon article

* Criteria for choice in federal systems. Sets out the normative dimensions and political arguments when people make argument about what kind of federal state Canada should have.
* 3 kinds of themes, simeon said, will probably appear: community, functional effectiveness, democracy
* Simeon says each of these have their own constellations of values and perspective, not all coherent, some competing. Often get engaged in same conversation, but don’t speak to each other. Can have parallel conversations about a specific issue.
* Even within the same track, there are different perspectives. So within perspective that says community is important, you might think local community while someone else thinks national.
* Communities tend to be territorial, but can also be other kinds: socio-economic, women, individuals with disabilities. Simeon’s point is that in this area, it’s predominantly territorial. Perspectives of emphasizing communities and those values has visions that evoke national pan-Canadianc ommunity, or community of the province, or two distinct national communities (two-nation).
* Functionalism: what’s the most efficient and effective division of labor in determining what level of government something should be doing what. What level can most effectively carry out this particular responsibility. Emphasis on economic goals, it’s the perspective of public administrators, and it looks at things like economies of size, scale.
* Democracy is idea that how we set out the division of powers and interpret that division of powers in the federal state should be responsive primarily to importance of participation, responsiveness, representation. Whether we want to protect minority rights against majority, or if we want to ensure majority will is respected. Conflicting perspectives all around value of democracy.
* Simeone’s point: give us tools to make generalizations and the sorts of arguments at stake in decisions around Canadian federalism and understand how those arguments have a kind of coherence, that they have different poles of values that organize them.
* there are many gaps in constitutional argument where the values and perspective of the judge become important and Simeon provides us with things that judges are thinking about that fill those gaps as they move through arguments that are not determinative and conclusions that can go one way or another.
* Constitutional doctrines have important educative values. They privilege some concepts of sovereignty, legitimacy, representation and the like over others and thus make them easier to defend or harder to attack. At a more empirical level, they entrench some kinds of interests over others, and structure the incentives within which political actors work.

Bobbits forms of argumentation:

* Historical argument that marshals the intent of the drafters of the Constitution and those who adopted Constitution
* Textual argument...consideration of the present sense of words of the provision in question
* Doctrinal argument...argument of previous cases
* Prudential argument....argument about costs and benefits or practical argument....questions of effect, functionality
* Ethical argument....appeal to what we think we are, what we think are the characteristics of our institutions and our society
* Structural argument....inferences from the existence of constitutional structures and the relationships the Constitution ordains among these structures....simple logical moves from the entire Constitutional text rather than from one of its parts
* Others?...collective narratives

Subsidiarity

* ties into Simeon’s community and democracy.
* idea that sometimes things are best done at the most local level possible because then you are closest to the needs, to the people who are most affected by that program.
* The federal government only acts when the provinces cannot further their own interests through individual action.
* Idea is if you can do locally then you do it locally, only do at national level what can’t be effectively done at the provincial level. Applying to Incite
-community, focus on positive effects in community, how the local residents favour it.

Ryder article

* Difference between modern and classical paradigm.
* Transformational constitutionalism: constitution is meant to move us to a better place.
* Classical is tightly set out division of powers, metaphor of watertight compartments so that if it is in prov jurisdiction, not a piece of it can stray to fed, nor can it be touched or influenced by fed in any way and when we get a dispute, must give a clear-cut declaration that it lies in prov or fed, not in both, and if it in any way intrudes into the other jurisdiction, even minor way, it will be declared invalid. Strict policing of boundary with strict understanding.
* Modern has more overlap between levels of govn’t. Modern regards division of powers as hermetically sealed compartments to be impossible, that in a functioning state you cannot not allow some overlap, some shared responsibility, some tolerance for impact of the other jurisdiction.
* In classical, fuzzy boundary doesn’t make sense, clear delineation. To a modern paradigm, inevitably in a modern state, and desirably, you will have overlap.
* To have both paradigms true at the same time....it’s just that you have many different judges with many different perspectives, activist court for classical paradigm and opposite for modern.

**Class 12**

Interpretation doctrines

* a series of formulae that courts use in deciding whether an issue is in a particular jurisdiction.
* First category of interpretation doctrines: validity. These look at question at whether piece of legislation is valid. If a piece of legislation is valid, it is intra vires. If not, it is ultra vires.
* Validity is question of whether at the first level, legislation is something that level of government can be doing. If not, it is ultra vires, it is as if it had never been done, can be of no effect. If it’s contrary to s. 91 or s.92, it’s ultra vires. Prov doing something not listed in s.92. When you say something is ultra vires, you’re saying it’s in contravention of constitution’s division of powers and by s.52, it’s of no force or effect.
* 2nd category of doctrines: applicability. Things like interjurisdictional immunity. Questions of applicability speak to whether the legislation has application.
* 3rd category: operability. Goes to whether a law is operative in a certain context. Finding something is inoperable is a suspension of the effect of a provincial law.
* Operability is something that only works to effect provincial laws, validity and applicability can work for either. Paramountcy is THE doctrine under the operability question.
* Once a law is deemed ultra vires, no point even talking about applicability or operability. Those only are to be discussed if a law is valid.

Swinton

* introduction to basic main validity doctrine. This is the “pith and substance” doctrine.
* Pith and substance = characterization of the law in question. Pith is the core, or substance. You’re looking at what a law is essentially about at its core, this is essentially the characterization of a law. What a law’s dominant aspect is about
* Swinton: importance of grounding argument in constitutional text, text is primary.

Lederman

* These are classes of laws and not classes of fact. Each of these headings is not a specific fact or object, but rather a grant of legislative authority, means you get to regulate whichever government has this power as a matter of law. These are classes of legislative topics
* the categories (heads of power) overlap
* test of pith and substance is not a logical, closed test, lots of room for judicial attitudes like Black or Simeon, different attitudes about how state should be organized. Lots of space for these frameworks in the judges head to come through in these tests

The Pith and Substance Test (Swinton)

* process of working through these doctrinal tests is not a formally logical one. Policies of justice will shape how that test is worked through by any particular judge

3 steps of pith and substance test (Swinton)

* Identify the MATTER of a piece of legislation. The matter is the pith and substance, identify the essential core of the legislation, its core matter.
* Expand your scope, look beyond legislation, and look at what the scope of the possible places in the lists of 91 and 92 are, where legislation of this matter could fit
* Brings first two stages together, determine which class this legislation fits in.
* If it lies in list of enacting govn’t, it’s intra vires. If it falls in list of the other govn’t list, it’s ultra vires.

**Class 13**

Pith and Substance

* Swinton emphasizes this process isn’t a science, not a determined, logical process, actually an art with lots of room for values to play role in the choices the courts make at stage 1 in particular and the fit in stage 3. Visions of federalism play role. (Simeon and Ryder)

Parsons

* 19th century consumer protection, privy council reads down broad federal powers to give more narrow meaning. Classical paradigm is more favourable in expanding provincial power rather than federal
* Rules of standing: You must have an interest that is affected, at which point you get “private standing,” relation to what issue you’re raising, that it implicates your interests.
* they’re getting the chance to say they shouldn’t be punished by a law that is unconstitutional as rule of law says nothing will have force of effect if it’s against constitution. Arguing this is something that constitution doesn’t give provincial jurisdiction to pass. Rule of law argument. It can’t be law if the government that passes it doesn’t have the jurisdictional permission to do so
* Company is saying don’t have to comply with this provincial legislation because it can’t be passed by provincial governance and hence ultra vires and of no force and effect
* If you’re insurance company, you’re arguing that it fits under trade and commerce in s. 91. Maybe this is also POGG, a broader provision in s.91
* Parsons and Ontario argue that it would fit under various headings of s.92, “property and civil rights,” “local works and undertakings,” and local and private matters (which is a default category). Court finds that it goes under property and civil rights.
* Key part of method of Parsons case is idea of “mutual modification.” This is the argument that if a matter, a substance, a type of legislation falls within a particular head of power in one list of jurisdiction, s. 91 or 92, then by definition it will not fall in the other list
* Pair mutual modification with notion of full coverage (nothing you could legislate on that wouldn’t be in s.91 or 92) then you end up with technique that Parsons employs.
* Employing mutual modification, if it’s in s.92 under s.92(13), then it’s not in 91. Mutual modification is premised on idea that there’s no sharing between 91 or 92, it’s either in one or the other. Methodology of mutual modification is a feature of classical paradigm

Whether it fits in scope of head of power

* it either fits or it doesn’t, it’s not a question of degree. Hence, in classical paradigm, if it fits into a head of power in the jurisdiction (say, s.92) that the court first looks, they no longer have to look at s.91.
* Classical = it’s either in one or the other, no overlap. In modern paradigm, where overlap is accepted, they will look at both s.91 and s.92. don’t stop looking if they find a fit in one section. Can be multiple places where it fits.

Problem with Parsons

* Illusion of territoriality, federal jurisdiction happens on provincial territory, not caught by territorial limits. A bank is going to be governed by federal jurisdiction over legislation regarding banking, but as a property owner will be governed by provincial legislation. There’s an interweaving that is much more complex that a simple territorial analysis. Can be in both.

Morgentaler case (Determing P&S via legal effect and practical effect)

* Morgentaler = no regulation of abortion under criminal code, default to other methods of regulation of abortion. Provinces who didn’t support abortion tried to find other ways within their jurisdiction of stopping Morgentaler from opening clinics. Try to use their head of power concerning hospitals.
* Court finds that the fine that they’d give to Morgentaler looks more like a criminal law fine, due to its size. Doesn’t look like a health regulation fine.
* Court says it’s matter, pith and substance lies in federal jurisdiction (criminal law). Provinces tried to put the purpose of its legislation in healthcare and provincial law, but court finds that its real purpose is NOT the stated purpose. That the real purpose is not over concerns of quality of its healthcare system. It’s to regulate and penalize abortion.
* To find out the dominant aspect/matter of legislation, court looks to purpose of the legislation and its effects, two parts: legal and practical effect
* Legal effect: you’re looking at how legislation affects the rights of those affected formally, turn to legislation and see what it says it’s going to do to people legally, what rights and liabilities it imposes. These can be good indicators of what legislation is about.
* Practical effect: not at what the text says it’s going to do, but what in practice, practically, it actually does do. Sometimes legislation can have lofty purpose, but when it plays out in social context, it does nothing or does something totally different from what it says it’s going to do.
* Judge looks at both legislation (the four corners of teh statute, it’s text) but also look at the extrinsic evidence around it.
* Court reiterates what counts as criminal law so by the time court finishes step 2, they’ve got the answer to what the pigeon hole is

**Class 14**

Determining the Matter (Morgentaler)

* Look at extrinsic factors (speeches, timing, context).
* Intrinsic factors: statute itself, what its terms are, what it says
* Legal effects: look at the text of the statutes, the four corners of the legislation, see legal effects
* Practical effects: look at what impact the legislation is actually having
* Purpose of the legislation may end up being very different from what the text says it is.
* After matter is determined, look at scope of the relevant heads of power, and then do the act of fit: where does the determined matter fit in the pigeon holes s.91 and 92 set out.

Morgentaler

* Legal effect: it prohibits an act that usually falls under federal criminal code and wording of the statute is almost identical to s.251 of the Code.
* Extrinsic evidence: the parliamentary debates don’t mention privatization of health concerns, but rather the central concern was about stopping Morgentaler and abortion as a public evil. The timing of the legislation was also very soon after his plan became known. The province conducted no studies to show increase in costs and complications to back up their healthcare concerns.
* Text of legislation (intrinsic) has a list of medical services that seem arbitrary. Structure doesn’t support province’s argument and with extrinsic evidence, casts doubt on stated purpose
* The severity of the penalties are also much more than usual for provincial laws, which are regulatory rather than punitive. Again, this doesn’t fit the stated matter.
* Court concludes that on all these factors, we have a piece of legislation that says it’s about healthcare but is really about restricting abortion. Ultra vires.

Doctrine of colourability

* when a government actually tries to do something it doesn’t have jurisdiction to do but colors it in a way to make it look like it’s something that falls within their jurisdiction.
* Law that looks like something on the face of it, but is actually something else when you dig a little deeper.
* Provincial government in Morgentaler seems to have bent over backwards to pass a law that regulates abortion while making it look like it’s really about healthcare.
* Although there’s no consequence to being declared colorable, there’s a lot of shame in being declared so. Court refuses to say Morgentaler is colorable because it says it’s too obvious , it’s not devious enough, too obvious to be a real effort to cover up the real purpose. In practice though, they’re still saying this legislation isn’t what it says it is. Court probably did this so not to attach the stigma of colorability to the government.

Unemployment Insurance Case

* Here we have dispute, not only over what the dominant characteristic of the unemployment insurance act is, but also what the scope of the head of power that fed has for unemployment insurance. This is a case that thus combines debate of level 1 with a debate at second stage.
* Political struggle between Quebec and federal government. Quebec runs own maternity scheme, but gets moneys out of federal taxes for employment insurance. Quebec wanted more money from fed, so Quebec decided to say you don’t have jurisdiction to give maternity leave, it’s at provincial jurisdiction
* Quebec’s materinity schemes were more generous than what fed had under unemployment insurance legislation.
* First bit of the case is about the approach court is going to give to reading s.91-92, specifically 91(2a) which is the portion at issue here. If fed has jurisdiction to do what it’s doing, it’s going to be here. What’s the scope of 91(2a). There’s also a relevant provincial head of power as well. This is the prov jurisdiction for property and civil rights, s.92(13), which is what quebec will argue should include whatever the dominant purpose of the legislation is.
* Must be interpreted as generally as possible. Frames what this legislation jurisdiction is about very generally, deal with destitution caused by unemployment and facilitate re-entry into the labour market. She says there are four characteristics critical to an unemployment insurance
* Does maternity benefit program fall within corners of federal unemployment insurance program? Find out what it’s dominant characteristics are as part of stage 1. Then in stage 2, see if this falls within s.91(2a), and if it does, it’s ultra vires, falls within federal jurisdiction.
* Federal have jurisdiction over unemployment insurance plans, defined by having four characteristics court lays out. These are very broad, allow judges to respond to significant changes in labour and evolve with times. Judge will argue that the social risks of unemployment have changed as the labour market has evolved, particularly with the strong presence women nowaydays and so policy around unemployment insurance programs must evolve with these changes and that indeed the maternity concerns will fall under 91(2a) which evolves with these new factors in the labor market and the greater role of women in it. (Living Tree)
* Quebec says it doesn’t fall under 91(2a) because unemployment insurance is for whether you’re unemployed, if unemployment is voluntary it doesn’t fall under unemployment insurance. Says it falls under family issues and hence civil and property rights. Unemployment means you’re looking for work, maternity leave is voluntary.
* Court doesn’t agree, they want unemployment insurance to cover what happens to women when they have kids, think this issue should be socially shared. Policy issue.
* Court also says legislation does have social aspect like quebec says, but not its dominant characteristics, which are the four characteristics of unemployment insurance programs.

**Class 15**

Incidental effects

* idea that individual pieces of legislation will have many purposes and aspects, they’re going to affect a number of things. Pith and Substance analysis determines the dominant aspect, the main core thing the legislation is about.
* Those other things it does, those other aspects it has, will, if they are not as important, be tolerated as incidental affects and won’t change the characterization of the law.
* You can allow something that has a dominant aspect that is provincial, to have incidental effects that are federal, so long as they are purely incidental, minor, secondary, and not at all dominant.
* Thus, allow some overlap, in practice, between the two jurisdictions, inevitable in complex regulatory world, not possible to define these so that they’re exclusive and line is clear.
* May create shared jurisdiction in some matters.
* Doctrine of incidental effects is that you’ll tolerate minor, secondary, incidental effects a piece of legislation will have in the other jurisdiction, as long as its dominant aspect lies in the jurisdiction of the enacting governmentWhen frame constitutional challenge, you can challenge the whole statute, or you can say just a piece of it is improper. You can sever, pull out a part of a statute and challenge it alone as unconstitutional.

General Motors Case

* Dickson, J: in determining the proper test, should be seen in a federal system it is inevitable that in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other government.
* Certain degree of judicial restraint in striking down legislation that spills over in minor ways.

Double aspect doctrine

* principle of interpretation. It’s different from other doctrines in that it’s not a process that leads to a particular conclusion. Rather, it’s a characterization of a particular situation
* Lederman: Double aspect doctrine is an instance when “subjects which in one aspect and for one purpose fall within s.92, may in another aspect and for another purpose fall within s.91.”
* Idea that you have a field of human activity that can be understood as being subject credibly to provincial regulation and credible equally also to federal regulation.

Multiple Access

* insider trading. From federal perspective and from the provincial perspective, each level of govn’t has jurisdiction to legislate on insider trading.
* From federal, that jurisdiction resides in fed’s “peace, order, and good government” power which has been read to include the power to incorporate, regulate, and set rules for corporations with federally covered purposes (like if you trade nationally).
* Provincially, the govn’t has jurisdiction over security trading and from that, also gets to pass legislation to regulate insider trading.
* area of human activity, can from one aspect be security regulations and be registered by prov, from another aspect, jurisdiction over federally incorporated companies, be legislated by fed.
* Same activity, but different ways of slicing it. From those different perspectives/aspects, it’s subject to regulation by both levels of government. This is known as a double aspect area, has an aspect that is fed regulated and prov regulated.
* two pieces of legislation, which work concurrently and in harmony with each other.
* Double aspect doctrine found after two stage analysis (see below): near identical legislation from both places and Dickson says they’re both ok about doing that.

Double Aspect Doctrine cont’d

* In double aspect, we’re still discussing validity, still have to look at IJI and paramountcy
* Double aspect can refer either to a field of human activity or to a piece of legislation. In multiple access, it’s almost the same law, almost word for word, except that fed has longer limitation period and prov limitation period is already expired, so the inside traders want to go under prov, want fed to be invalid so only prov is applicable and so they can no longer be charged.
* Double aspect refers to both the field being regulated AND to a particular law regulating that field so that that law could’ve been passed by other gov, as it touches on a field that either gov could regulate because that AREA is double aspect.
* Danger in proliferation of double aspect areas
* Double aspect goes against classical because it says that there’s something that lies in both jurisdictions, we’re just saying it has different aspects
* First stage of this inquiry is a look into the validity of each piece of legislation.
* Second stage is “what can i say about finding both of these valid,” say it’s a double aspect area, each piece of valid and equally important.

**Class 16**

General Motors case.

* General Motors is challenge to federal competition act.
* Question is whether the federal government had to justify its competition legislation under its criminal jurisdiction, had to make that legislation look like criminal law. Scope of the federal criminal law power is different than the scope of federal jurisdiction over trade and commerce.
* Real constraints put on federal government about the design of an anti-monopoly scheme, given that it had to fit within criminal scheme. Constraints on regulatory design and efficiency.
* Dickson: actually finds that this anti-combines legislation could be located within fed jurisdiction for trade and commerce, doesn’t have to look like criminal legislation to be enacted, it’s part of broadening of fed’s trade and commerce
* Constitutional challenge was not to whole legislative scheme, but only a part of it
* If a court finds that a part of a statute is unconstitutional, can that part be severed? Turns on whether it makes sense to take that part out and will statute still make sense, or is that part so integral to the statute that without it, the entire statute is meaningless.
* Up to this case, any federal anti-monopoly, anti-combines legislation has to be passed according to its criminal law jurisdiction.
* AG Canada is using this as a test case to undo narrowing of federal jurisdiction over trade and commerce power. They are not simply going to argue that s.31.1 is an incidental effect attached to otherwise valid criminal law, but rather argue that the legislation as a whole, including s.31.1, can be justified under trade and commerce power in s.91
* Dickson finds that but for s.31.1, rest of statute can be justified under trade and commerce power. But what to do with s.31.1. What Dickson is going to say is that because the rest of teh statute is valid and because s31.1 is sufficiently connected, functionally, to rest of the statute, it also will be valid, even if considered on its own, it clearly lies in provincial jurisdiction.

Necessarily Incidental – GM Verdict

* starts off by saying that overlap is going to be inevitable in a federal system pursuing valid objectives. Don’t strike down legislation every time it overlaps.
* Necessary incidental is about making the piece of a larger whole valid, that otherwise wouldn’t be valid on its own, provided that larger whole is valid.
* Court is more likely to treat overlap as an incidental effect. Pith and substance doctrine says dominant aspect can co-exist with incidental effects in other jurisdiction and still be valid legislation. That’s the dominant tide, the dominant reading these days, that allows for incidental effects in the other jurisdiction to be tolerated.

CNL case

* CNL leases trucks and majority of trucks are purchased through franchised dealers financed through GM. CNL claims that GM has been giving better terms on leasing to other dealers who are national leasing competitors. The statute here is the combines investigations act, which prohibits such kinds of favourable or discriminatory arrangements.
* GM wants to escape this liability for this price discrimination in the individual action brought against it by CNL, so will make argument that this provision in statute that lets CNL sue them is unconstitutional.
* Dickson sets up a three stage process for this kind of provision of a larger legislative scheme. It is a true interpretation doctrine, can take it to a conversation about any head of power in either s.91 or s.92. Focus is on a piece of legislation, a section of legislation that looks at first glance like it’s invalid and outside enacting govn’t’s jurisdiction, but is valid based on larger whole.

Dickson’s Process for Necessarily Incidental Doctrine (CNL)

1. Look at the validity of the challenged provision, does it intrude on other jurisdiction? While Dickson just declares that it appears invalid in CNL, subsequent cases have suggested that proper test here is a pith and substance analysis into the impugned provision. Looking at the section alone, take microscope to section alone and forget the rest of the legislation, only that section and see what it’s matter or dominant aspect is and which head of power it might fit in, and then given it’s matter and scope, where it does in fact fit. If it does intrude on the other jurisdiction, how much does it intrude? Doesn’t go into much detail. Not a scientific measurement, just a normative judgment. 3 levels of intrusion: minimal, moderately, or highly
2. (really still step 2) Look at the whole statute MINUS the offending provision. Look at the validity of the legislation as a whole and whether it is valid, a pith and substance analysis for rest of the statute. If it’s ultra vires, PBGH. In CNL, Dickson concluded rest of statute was intra vires the trade and commerce power.
3. Look at whether the relationship between the impugned provision and the rest of the statute, which is valid, is adequate to allow you to say you’re going to make, on basis of that relationship, the impugned provision valid in this context given its attachment to this legislation. Level of intrusion determined earlier will determine the kind of fit the provision will have to have with the statute. If highly intrusive, the provision must be “truly necessary” for rest of statute to work. If it’s moderately intrusive, then “necessarily incidental” to the statute, if it’s minimally intrusive, then it merely requires a “rational, functional connection” to it. In this case, this is a remedial provision, it’s procedural, not substantial mechanism, it’s limited and constrained, and so it’s a minimal intrusion and so simply needs to enforce and be consistent and rational with rest of statute, simply needs a rational function connection to the rest

Necessarily Incidental vs. Incidental Effects

* Necessary incidental effect is dealing with a piece of a statute that isn’t valid, considered on its own, dealing with whether something with a dominant purpose that’s clearly invalid can be rendered valid by connection to something larger that’s clearly valid.
* In incidental effects doctrine, you’re actually saying that the dominant purpose of what you’re looking at is valid, but in addition to this purpose, it’s going to have other tangential purposes in the other jurisdiction. Won’t make it valid, just tolerate these incidental effects.
* Any time you notice that there’s a piece of a statute of a larger whole that’s problematic, want to think about whether justify in terms of necessary incidental test instead of just incidental effect, intrusion is bold and obvious and a whole distinct part of a statute.
* If necessarily incidental fails, the portion of the law is invalid and not sufficiently integrated in a valid sceheme, it will be ultra vires and the law will be read down with the offending provision read out of it.

**Class 17**

Summary of Tests and doctrines thus far

Pith and Substance

* first determine the “matter,” the dominant characteristic
* assign this to one or more relevant heads of power.
* if it falls under a head of power of the enacting government, then it’s valid. If not, then have to see if it’s saved by the ancillary doctrine.
* Provision not held invalid if it has incidental effects on the other government’s jurisdiction if pith and substance are in its jurisdiction.

Ancillary Power Doctrines:

Necessarily incident

* Provision is itself ultra vires, but tolerated because it is substantially integrated with the rest of the law, which is intra vires

Incidental effects

* provision/law is intra vires but it touches on a subject that is outside of its jurisdiction. It is intra vires because the dominant characteristic of the law
* Double aspect is about overlapping jurisdiction, ancillary is where a legislative provision does NOT come within its enacting government’s jurisdiction but can still be valid. Double aspect is not an ancillary doctrine

Interjurisdictional Immunity

* the first stage analysis into validity is going to end up letting exist lots of overlapping effects
* Interjurisdictiona Immunity responds to this. It’s of the classical paradigm mode, it allows you, through application of inapplicability, to pull back any application any particular valid law may have in a core area of the other level of government’s jurisdiction. Pulls us back to exclusivity of jurisdiction.
* First look at whether the legislation at issue is valid, then determine if it falls into IJI.
* Court says it applies to protect some areas of provincial jurisdiction and some areas of federal. Historically, cases that use it specifically have only protected areas of federal jurisdiction. Once exception is Insite

McKay

* Read down, keep legislation valid, but limit the scope of its application McKay case, court takes option of reading down legislation so it no longer applies in federal jurisdiction over election signs. It doesn’t use language of interjurisdictional immunity, but the outcome is as if that immunity had been used because the application of the prov by-law was read down so no longer applied to federal election signs, but was otherwise valid and applied to all other signs.
* Reading down legislation so not applicable to core area of other government’s jurisdiction is what interjurisdictional immunity does. Give that collection of words that is the statute a narrower meaning than it might otherwise have.
* McKay- by-law that prohibits display of federal election signs. By-law is valid, as in pith and substance in prov jurisdiction, simply can have this incidental effect in federal jurisdiction
* Cartwright writes majority with two general rules of statutory construction: general rules should be given a meaning that best suits the object of that legislation.
* Presumption of Constitutionality: If two interpretations/constructions of a statute are possible, one of which would make it unconstitutional, and both are equally plausible, then you take the interpretation that would keep it constitutional
* Cartwright says prov cannot do something through general words that it wouldn’t be able to do through precise words. Distinguishing between singling out and general application. General application is that the law just applies generally, singling out is that law is much specific in what it applies to. Prov can’t use general language to capture federal election signs because it couldn’t single out fed signs. By-law remains valid, but read down to give meaning that does not apply to fed election signs, it gets reduced applicability even though it’s already found to be valid.

McKay Dissent

* willing to hold that this impact on federal election sign is a tolerable incidental effect from a valid provincial legislation. Its impact on election signs is merely incidental or secondary and so does not impact constitutional status of the legislation.
* Federal govn’t has no law about political signs, hasn’t done anything there, and prov has incidental effect on this area, but no, court says you don’t need to have legislation in that core area to immunize it via interjurisdictional immunity. Federal govn’t has no inclination to legislate in that area and prov is barred from legislating in that area. Leaves a gap.

**Class 18**

Federally Regulated Undertakings and Federally Incorporated Companies

* among the areas of federal jurisdiction that have been historically immunized are the areas of federal jurisdiction over federally incorporated companies and federally regulated undertakings. These are not the only areas of federal jurisdiction that have been protected by immunity.
* Federally incorporated companies: nowhere does the list in s.91 show jurisdiction over companies with federal purposes, but it’s been read into federal jurisdiction through the POGG statement in s.91. a federally incorporated company is one incorporated under federal law by the virtue of s. 91, POGG statement. It’s simply a company incorporated under federal law.
* A federally regulated undertaking is an undertaking that’s exempt from provincial jurisdiction by virtue of s.92 (10abc) and stated to be part of federal exclusive jurisdiction by s.91(29).
* Subjects expressly exempted from provincial jurisdiction in s.92 are the head of power that 91(29) gives to the federal govn’t. These are a, b, c. A federal undertaking is a local undertaking that by reason of a, b, or c is exempted from provincial jurisdiction and are thereby, under 91(29), given to federal jurisdiction.
* Law up to the Bell cases was that for either a federally regulated undertaking or a federally incorporated company, if the prov govn’t’s laws impaired or sterilized that undertaking, it would be read down so that it wouldn’t be applicable in that way to the federally regulated undertaking or company. Test for finding immunity would be invoked was one of paralyzing, impairment, and sterilization, a significant shutting down or hindering
* what gets immunized is not the company or undertaking, it’s the jurisdictional core that powers the constitutional authority that the level of govn’t has

Bell Canada #1

* case that deals with application of quebec’s miminum wage act. This establishes a commission that regulates things like working hours, conditions, and minimum wage. Bell Canada refused to pay levy commission imposed, claiming it wasn’t subject to commission’s authority, because it was set up by provincial law and Bell Canada was a federally regulated undertaking
* Core: “all matters which are a vital part of an interprovincial (federal) undertaking are matters which are subject to the exclusive legislative control of the federal parliament.”
* Previous test for immunity had been the one for sterilization, paralysis, or impairment, severe impact on the entity. What Bell #1 says is that you don’t have to have this sterilization or severe impact on the operations of a federally regulated undertaking. Instead, as long as the provincial law simply affects a vital part of operation or management, it will be read down so as to not apply to that federally regulated undertaking.
* The result then in this case was that the provincial law at issue was rendered inapplicable to bell Canada by virtue of the idea that the core jurisdiction the govn’t had over undertakings protected those undertakings from being affected in this manner by provincial laws.
* it’s enough if you just affect a vital and essential part of that undertaking (note this is only for undertakings NOT federally incorporated companies). You can affect a vital or essential part WITHOUT paralyzing or sterilizing the undertaking.

Bell #2

* provincial law at issue gives right of re-assignment to pregnant workers. They say this law can’t touch them because it’s impinging, according to Bell #1, affecting a vital and essential part of their operations and so lies in core of jurisdiction over federally regulated undertakings that is immunized. Bell #2 confirms the new Bell #1 test in relation to federally regulated undertakings, while making immunity into a more coherent doctrine.

**Class 19**

Bell #2 cont’d

* sets up three propositions: relative, federal, and provincial jurisdiction
* immunity applies to a range of subject areas in federal jurisdiction and provides a list. Immunity applies when the provincial law in question bears on one of these subject matters in a manner that touches these subject areas in their core
* core will be a vital and essential part of that jurisdiction. He introduces that idea of touching a vital and essential part.
* This area of legislation is ruled to not be double aspect. This is not a law that from one aspect is federal and in another is provincial. It is a single aspect provincial law that nonetheless touches upon a vital and essential area, a core, of federal jurisdiction.
* If you end up with valid legislation that touches upon the other level of jurisdiction in any way, or that has any kind of relationship with a piece of legislation passed by the other level of govn’t, you want to go to interjurisdictional immunity and federal paramountcy
* All this only still only applies to federally regulated undertakings, federally incorporated companies are still stuck on the paralyzed/sterilized test.

Irwin Toy (direct and indirect effect)

* a quebec law that limits advertising by toy companies to children and says there are certain restrictions on when companies get to and what kinds of ads they can do for audiences under a certain age. The broadcasters are federally regulated undertakings, while Irwin Toy is a federally incorporated company, so for it, the test would be sterilized/paralyzed, which Irwin can’t argue, can’t say being unable to advertise in certain ways paralyzes it.
* So it argues the Bell #1 test for the broadcasters who would carry their ads were they not restricted. Argues that this legislation affects the revenue of those broadcasters, who are federally regulated undertakings, revenue and income is a vital and essential part, and because this touches on that, the Bell #1 test is met and the legislation should be read down
* Introduces notion of whether there is a direct or indirect effect.
* Irwin Toy tells us that if it is an indirect effect on a vital or essential part of a federal undertaking, there’s NO jurisdiction. (Their argument about broadcasters failed)
* If it’s direct or indirect affect that sterilizes or paralyzes you can have interjurisdictional immunity for companies OR undertakings.
* For it to meet the easier test of Bell #1, it must be a direct effect, not indirect as Irwin tried to argue.
* All Irwin toy does is accept the rule of Bell #1 but adds in the word “directly,” can only use the test if the effect is direct.

Canadian Western Bank

* not happy with Bell #1’s reduction of the test for immunity to federally regulated undertakings to merely “effecting,” it won’t go back to “sterilizing,” but will go to “impair,” something in between. Will sit with this idea with minimal, unassailable core, but will change the test for the impact you have to have on that core to “impair.”
* the Federal Bank Act, authorizes Charter Banks to promote certain kinds of insurance (banks are within federal jurisdiction, explicitly named in s.91, and under this jurisdiction, fed has allowed banks to provide certain kinds of insurance.). In Alberta, under prov jurisdiction of insurance, passed certain kinds of consumer protections, provincial insurance act, requires businesses who sell insurance as a sideline of business to obtain a permit as a restricted insurance agent, must comply with certain restrictions
* This is a valid provincial act that has an effect on federal jurisdiction of banking. Court looks at immunity and whether because of that overlap,

**Class 20**

Canadian Western Bank – 6 points if IJI

1. There is good reason to have a doctrine of interjurisdictional immunity
2. The doctrine protects both federal and provincial legislative jurisdiction
3. The doctrine is undertow to dominant tide of constitutional interpretation
4. Therefore, apply with caution, (see below for reasons)
5. Test revised to make it more difficult to invoke successfully (“impairs” not “affects,” generally reserve for precedent, “federal things, persons, works or undertakings” or “indispensable or necessary,” “basic, minimum, and unassailable content,” no direct/indirect, all impairment)
6. Order of doctrines: paramountcy, then interjurisdictional immunity

Concerns Regarding IJI

* Impairs cooperation between governments and goes against idea of flexible federalism
* It creates uncertainty, what is the core? Doubt about applicability of law if there is extensive use of IJI. Court will take case by case approach, no broad general statements.
* Concerned about the creation of legal vacuums, get areas that prov is prevented from having its laws apply, yet fed has passed no laws in relation to it
* Centralizing tendency of development of IJI, as it’s typically only immunized federal jurisdiction, too centralizing a doctrine if there is overuse of IJI.
* Fed already has paramountcy available to it, it just requires the fed to actually pass legislation and THEN show that there’s a conflict.

Impairment

* tougher standard to meet from Irwin Toy, harder to invoke IJI.
* Court also says that IJI generally (not always) will be reserved for situations where it has already been invoked. Precedent will be the guiding basis for whether IJI applies.
* Impairment suggests a negative effect, just “effect” doesn’t necessarily mean this.
* It’s about protecting the core of a jurisdictional grant so that the grant remains meaningful. This is what is meant as “indispensable,” it’s what gives this grant meaning, which is lost if the other level can muck around in it.
* Appears court is removing the direct/indirect distinction that Irwin Toy established. The standard now for ANYTHING for application of IJI is impaired, not merely effect. There has to be at minimum impairment, can’t merely affect. Indirect and direct no longer seems relevant.
* CWB says that most appropriate doctrine to initially employ is not necessarily always the doctrine of IJI. IJI pulls court into abstract discussions of cores and parts, it’s of limited application by precedent, in practice it’s largely reserved for federal undertakings and federal things. If a case can be resolved first by P&S analysis with incidental effects and then by paramountcy, then no need to turn to IJI. Preferable to resolve the case via paramountcy COPA Case (Quebec (Attorney General) v. Canadian Owners and Pilots Association)
* the prevailing view is that the application of IJI is limited to the cores of every legislative head of power already identified in the jurisprudence (limited generally to precedent, in other words).

Two-stage test of Interjurisdictional Immunity from CWB

* First step: determine if the provincial law (though that could be prov or fed in theory) trenches on the protected core of a federal competency.
* 2nd step: determine if the provincial law’s effect on that core is sufficiently serious to invoke IJI.
* Think about whether that core is protected in precedent. Court will be reluctant to move to protect new cores that haven’t already been given protection under IJI.
* CWB says IJI doesn’t apply in situations of double aspect
* core cannot be broad and amorphous
* If the provincial law doesn’t impair the core of the fed head of power, it’s applicable.

**Class 21**

Paramountcy

* is exception to toleration of incidental effects.
* Like IJI, federal paramountcy favours the federal govn’t, though IJI can in theory apply to prov. Unlike IJI, only a few heads of power are traditionally considered to be immunized at their core. Paramountcy, however, can potentially touch on any kind of legislation that comes from fed or prov govn’t.
* Key difference is that paramountcy involves the question of the relationship or interaction between two pieces of legislation, a piece of fed and a piece of prov. Question is whether there is a conflict between those two pieces of legislation
* Provincial law only have effect to the extent that they are not repugnant to federal legislation.
* when there’s a federal law and prov law, each of which are valid, and they are in conflict, then the federal law is paramount and will trump the provincial law, and render it inoperable to the extent that it is in conflict and as long as that conflict persists.
* It’s a potentially temporary inoperability, as were the legislation to be changed or amended or repealed so it’s removed, conflict disappears, if fed law or portion of it is gone, the prov law will resume full operability.

Two steps to working your way through paramountcy argument:

1. Each law must be held to be valid and an independent enactment (do a separate pith and substance analysis of each law on its own, see whether its particular matter falls within jurisdiction of its enacting govn’t. If both are laws are invalid, or if only one is valid, there’s no conflict to worry about). If only prov law is valid, still have to check for IJI
2. If both are valid, now see whether there’s a conflict between the two laws.

Conflict Tests/types of conflict

* Impossibility of Dual Compliance: Simply cannot comply with both laws, like if federal law says “do x” and prov law says “don’t do x.”
* Frustration of Legislative Purpose
* Covering the Field: if federal govn’t has one foot in the field, it gets the whole field. Doesn’t matter if it’s saying something opposite or slightly different than prov, if it’s in the field at all, it means prov can’t be there.

Ross

* occupying the field. If the fed is doing something in that field of human activity, the implication of that is that the provincial govn’t can’t be. Fed is interpreted is assumed of having intention of occupying the field.
* case shows early rejection of this older covering the field test. Case involves a provincial law dealing with a driving offence, and a federal law, both are found valid. Possible for driver to adhere to the consequences of breaking the fed law and extra consequences of prov law.
* Court says potential of inconsistency or conflict does not lie simply in the fact that there’s this co-existence of two laws. If parliament does not state its intention to be the exclusive, exhaustive piece of legislation in the area, there is NO conflict, and so the provincial order in this case stands.

Multiple Access

* Court says here that because there’s no impossibility of dual compliance, there’s no conflict. You can comply with both the terms of the fed and prov legislation, not being told to do x and not x. Legislation is so similar that you’re basically told to do x by fed and to also do x by prov. You can comply with both easily, as their identical, if you comply with one, you’ll be complying with the other. Almost identical laws = “the ultimate harmony”
* Dickson finds another group of cases here about drunk driving. The two jurisdictions may require different blood alcohol and federal code is higher than prov code, so if you got a lower reading such that you didn’t trigger the fed provisions, you might argue that provincial provisions are in conflict with fed and inoperative. Courts refused to accept this, not found conflict, as you could adhere both the fed AND prov requirements simply by adhering to the lower level, as in so doing, you’d be adhering to the fed’s higher standard.

M&D Farms

* express conflict for the court. Court is being asked under federal legislation to stay proceedings and is being told under prov legislation to go ahead with proceedings. The impossibility of dual compliance is in terms of the legal decision-maker who is charged with enforcement of both statutes, NOT the regulated party. It can’t both give effect to an enforcement order and stay an enforcement order

Bank of Montreal case

* introduces “incapability with federal intent” or frustration. Here, a farmer has a loan with bank to buy farm equipment, special kind of loan that he got under the Bank Act, a federal statute. Bank Act has a provision that makes it easy for farmers to get loans. The compensation for banks having to more easily lend money to farmers is that if that farmer defaults, the bank can come right in and seize the equipment, no process or intervention by the courts.
* But provincial legislation protects all debtors from having creditors seizing stuff without going through process and without notice. You have to serve notice to debtor, give them last chance to pay, go to court.
* SCC says the Bank wins through doctrine of federal paramountcy. The bank is not obliged to comply with the prov law because that law is inconsistent/in conflict with the fed law. It is an express contradiction.
* Though dual compliance is possible, if bank followed the prov law, it would not be in violation of the federal law.
* Here the conflict is understood as an incompatibility with the federal intent. Court says the federal govn’t would be frustrated if the prov law were to dictate the terms of the bank’s behaviour in these circumstances. Intended Bank to have extraordinary powers to take back security, that was the trade-off for easier lending that was forced on the banks. To not allow easy foreclosing would be to pass a prov law that was incompatible with legislative intent in those provisions of the Bank act.
* Because court finds conflict, those prov rules are made inoperative to the bank in these circumstances. To the extent that they are in conflict, they are inoperable.

**Class 22**

Mangat

* Provincial law: to be advocate had to be a lawyer, while federal immigration act allowed non-lawyers to appear before refugee board.
* It’s determined to be double aspect, both pieces of legislation are valid, the matter of representation before immigration and refugee board is double aspect
* Because if there’s no conflict, both statutes will remain in effect, if there is a conflict, the federal statute will be paramount. You CAN comply with both statutes simply by having a lawyer represent you before the board, so dual compliance is possible.
* Despite this, there is a conflict, because there is a frustration of legislative intent. Purpose of intent of fed legislation was to open up access by having more affordable representation by allowing anyone to represent you. By saying it must be a lawyer, the prov is frustrating that

Spraytech (permissive v. Mandatory rules)

* lawncare companies in Montreal use pesticides that are approved for use by a federal statute, but then the City of Hudson enacts a by-law that limits the use of particular pesticides.
* They argue that this by-law is inoperative because there’s federal legislation that sets out permissible pesticides and lawncare’s argument is that this federal act in regulations which specify pesticides that can be used are in conflict with provincial by-law that prohibits some of those pesticides from being used freely. They are arguing positive allowance to use these pesticides that cannot be taken away by municipality due to doctrime of paramountcy.
* Court says there is no conflict here. Brings important distinction between permissive and mandatory rules.
* Court says there is no conflict between the fed and by-law, because no difficulty in complying with both of them, you’re not told you HAVE to use the pesticide by the fed law, if don’t use that pesticide, it would comply with both fed and by-law. No frustration of federal intent either, as the intent is not to grant a positive right to use of the pesticide, it is simply to say you CAN use it, it’s not mandatory, only permissive, the govn’t is neutral about whether you use it.
* Permissive is unlikely to set up a positive right so unlikely to leads to a conflict.

Rothmans

* a tobacco control act passed by Sask govn’t, prohibits advertisement and display of tobacco in any premises that ppl under 18 get to go in. There’s also a Federal Tobacco Act, and has a provision that creates an exemption from another provision, s.19. s.19 says you can’t promote Tobacco anywhere in Canada. Exemption to this, in s.30, says any person subject to regulations who can sell tobacco may paste notices saying these products are available and what their prices are. Exemption from s.19 ban allows for retail displays and notice of the sale and price.
* Two pieces of legislation: look at validity first. Court found them both valid, so then look at whether or not there was a conflict between them
* It doesn’t conflict here. Judge points us back to Multiple Access and dual compliance. Language in multiple access is that inconsistency can ONLY be found if there’s an impossibility of dual compliance. That “only” has disappeared from the judge’s summary in this case. It’s disappeared because right after pointing us back to Multiple Access, Justice Major says subsequent cases indicate that impossibility of dual compliance is not the sole mark of inconsistency. Not just dual compliance sets up inconsistency. Prov legislation that frustrates part of its legislative purpose is also inconsistent for purposes of paramountcy doctrine.
* Rothman says that the Mangat test of frustration is the overarching principle. Any inquiry into conflict is at base about frustration of federal intent and that showing the impossibility of dual compliance is just one way of showing frustration of federal intent. Still applies both to decision-makers and the regulated persons/entities. This also means that if there is no dual compliance problem, you still have to ask whether there’s frustration.
* Have to ask whether it’s possible for retailers to comply with both fed and prov first. If it is possible for them to comply with both, then ask second question: whether such compliance with both will lead to compliance with prov that will frustrate intent of federal enactment
* Can have situations where dual compliance is possible, but it still frustrates federal intent
* He says it’s not establishing positive right to display, purpose of fed statute is to go with prov statute to fight against evils of tobacco, particularly young persons. Giving effect to prov legislation thus does not frustrate fed legislation, both are about health and are about limiting and discouraging tobacco use and exposure to tobacco products.
* Absent clear statutory language to that effect, court will NOT read federal legislation as intending to occupy the field.