LAW 100: Constitutional Law: Federalism

# Part I – Introduction to Canadian Constitutional Law

What is a constitution?

* A system of rules, principles, and practices that govern a legal or political system
* “A mirror reflecting the national soul” – Peter Hogg
* “The law prescribing the exercise of power by the organs of a State” – Peter Hogg
* The Canadian Constitution sets out three key relationships

1. **Federalism**

* The relationship between the federal level of government and the provincial level of government

1. **Individual rights**

* The relationship between individuals and the State
* Structured primarily by the *Canadian Charter of Rights and Freedoms*

1. **Aboriginal rights**

* The relationship between aboriginal peoples and other groups and the government

Sources of Canadian Constitutional Law

1. Written documents

* Imperial Statutes – statutes from Westminster Parliament meant to apply in Canada (*e.g. British North America Act*, *Canada Act 1982*)
* Canadian Statutes – laws passed by the Government of Canada
  + Two primary documents:
    - *Constitution Act, 1867*
    - *Constitution Act, 1982*
  + These statutes are **entrenched** (hard to change)

1. Case or common law

* Law created by judges

1. Prerogative and privilege

* Powers accorded to the Crown and Parliament at common law

1. Conventions

* Patterns of political behavior that have come to be regarded as obligatory, punished by political sanction (as opposed to sanction of law)
* Allows for change 🡪 **promotes flexibility without disturbing stability**

1. Unwritten principles
2. Indigenous law

# Part II – Federalism

## Chapter 8 – Interpreting the Division of Powers

* Three types of arguments can be used to challenge statutes on the ground of division of powers

1. **Validity**
   * A challenge to the *validity* of a statute on the grounds that it is in its dominant characteristic (or “pith and substance”) in relation to a matter beyond the enacting legislature’s jurisdiction and thus within the exclusive jurisdiction of the other level of government.
   * Can be made equally against either federal or provincial statutes.
2. **Applicability** 
   * Even if a statute is within the enacting legislature’s jurisdiction, it may have to be limited in its application (or “read down”) so as not to touch matters at the core of the other level of government’s areas of exclusive jurisdiction.
   * Doctrine of **interjurisdictional immunity**
     + Has been used far more often to limit the applicability of provincial statutes than federal statutes, but the doctrine can be used to protect the core areas of jurisdiction of both orders of government
3. **Operability**
   * Even if a provincial law is valid, and even if it is applicable, it will be rendered inoperative if it conflicts with a valid federal statute that also applies to the same facts
   * Doctrine of **federal paramountcy**
     + Works against the operation of provincial statutes to protect the primacy of federal policies embodied in valid federal legislation

### I. Values Informing the Interpretation of the Division of Powers

Subsidiarity – matters are best dealt with in the lowest level of government possible

“Law-making and implementation are often best achieved at a level of government that is not only effective, but closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” – L'Heureux-Dubé

#### R. Simeon, “Criteria for Choice in Federal Systems”

* Federalism is often associated with other political values
  + Proposals for change in a federal system like Canada’s can be judged by whether they serve or block wider values

1. **Community**
   * What implications do different forms of federalism have for different images of the ideal or preferred community with which people identify and to which they feel loyalty?
   * The competing images of community can be summarized in terms of a conflict between three drives:
     + Country-building
     + Province-building
     + Two-nation or Quebec nation-building
   * This perspective is the overwhelming focus of practitioners and students of Canadian federalism
2. **Functional effectiveness**
   * Does federalism enhance or frustrate the capacity of government institutions to generate effective policy and respond to citizen needs?
   * Tends to be individualist
   * The constitutional problem is to allocate powers and erect machinery that maximizes the capacity of governments collectively to satisfy citizen needs
     + Some argue that the system is too ***decentralized***
       - *For example, businessmen argue that they are hampered by differing provincial regulations*
     + Some argue it is too ***centralized***
       - No remote central government can adequately take into account the interests of all sectors and regions
     + Many functionalist arguments suggest that sharing and overlapping of responsibilities among governments imposes unacceptably high decision costs
3. **Democratic theory**
   * Do different conceptions of democracy generate different images of the good federal system?
   * Democratic views of federalism support both a high degree of decentralization and of overlapping between governments
   * Critiques of federalism
     + “Executive federalism” in which relations are conducted primarily through the negotiations of political executives limits citizen participation and effectiveness
     + It frustrates majority rule
       - It inhibits the emergence of national majorities or of majorities and minorities based on non-regional cleavages, such as class
       - It frustrates provincial majorities because
         * The national government has forced policies, or
         * The lack of provincial resources and jurisdiction frustrates provincial attempts to pursue their own goals

#### B. Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations”

* **Classical paradigm** 
  + Premised on a **“strong” understanding of exclusivity**: there shall be no overlap or interplay between federal and provincial heads of power
  + The heads of power should be **“mutually modified”** so as to avoid overlapping responsibilities
  + Each level of government must act within “watertight compartments”
    - Spillover effects will not be tolerated
      * It will be ruled *ultra vires* or “read down”
  + Leads to **judicial activism** – more legislation is *ultra vires*
  + Associated with the pre-World War II Privy Council Era
  + Weaknesses of the classical paradigm
    - Social problems do not fit neatly into jurisdictional boxes
    - Can give rise to a legislative vacuum 🡨 comprises the principle of exhaustiveness
* **Modern paradigm**
  + Premised on a **weaker understanding of exclusivity**: prohibits each level of government from enacting laws whose dominant characteristics (“pith and substance”) is the regulation of a subject matter within the other level of government’s jurisdiction
  + If a law is in pith and substance within the enacting legislature’s jurisdiction, it will be upheld notwithstanding that it might have **spillover effects (incidental effects)** on the other level of government’s jurisdiction
  + Associated with the Supreme Court of Canada’s post-war jurisprudence
  + Leads to **judicial restraint** – less legislation is struck down
  + Weaknesses of the modern paradigm
    - Can compromise provincial autonomy
      * Where overlapping federal and provincial laws come into conflict, the rule of federal paramountcy provides that the federal law prevails

### II. Validity: Characterization of Laws

#### A. Pith and Substance

#### K. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years

* Sections 91 and 92 of the *Constitution Act, 1867* distributes legislative powers between the national and regional governments
  + Section 91 – federal classes of subjects (30)
    - *Examples – “sea coast and inland fisheries”, “regulation of trade and commerce”, “the criminal law”*
  + Section 92 – provincial classes of subjects (15)
    - *Example – “property and civil rights in the Province”*
* In deciding the validity of a law, a court engages in a process of **classification** to determine whether the law comes within a federal or provincial class of powers

1. **Identification of the “matter” of the statute**

* Court looks to
  + Statutory context
  + Purpose of the legislation 🡨 dominant form of inquiry
    - Legislative history
    - Government reports
  + Effects of the legislation
  + *“Inevitably, the focus on purpose or effects turns, in part, on judicial attitudes of deference to legislatures and concerns about the balance of powers in the federal system.”*

1. **Delineation of the scope of the competing classes**

* *“While the Fathers of Confederation may have wished for exclusivity of legislative powers or ‘watertight compartments’ between federal and provincial governments, it became clear early in the interpretation of the constitution that there must be some overlap or entanglement between federal and provincial regulation”*
* Court looks to
  + Precedent
  + History (the meaning of words or practices in 1867)
  + Federalism concerns – beliefs about the optimal balance of power between the federal and provincial governments

1. **A determination of the class into which the challenged statute falls**

* *“Often, the court’s ultimate decision about boundaries and the matters within them is guided by federalism concerns—by beliefs about the optimal balance of power between the federal and provincial government.”*

#### W.R. Lederman, “Classification of Laws and the British North America Act”

* The enumerated “subjects” or “matters” in ss 91 and 92 are classes of laws, not classes of facts
* *“Many rules of law have one feature that renders them relevant to a provincial class of laws and another feature which renders them equally relevant logically to a federal class of laws.”*
  + *Example – Is the rule that a will made by an unmarried person becomes void if and when he marries a rule of “marriage” (s 91(26)) or of “property and civil rights” (s 92(13))?*
* The decision as to which classification is to be used for a given purpose has to be made on non-logical grounds of policy and justice
  + In many cases it all depends on the **“subject-matter” (meaning)** of the rule
* Colourable law – one which really means something more than or different from what its words seem at first glance to say
* *“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.”*
  + If we assume that the purpose of the constitution is to promote the well-being of the people, then the questions must be asked, Is it better for the people that this thing be done on a national level, or on a provincial level?
    - The **rules of precedent** should be remembered
* *“Changed economic and social conditions and a different moral climate will give to present or proposed laws new features of meaning by which they may be classified and may also alter judgments on the relative importance of their several classifiable features”*

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| Citizens Insurance Company v Parsons (1881)(PC) |
| Facts – Ontario enacted legislation about fire insurance policies. Two insurance companies refused to pay Parsons to compensate for losses caused by a fire because Parsons failed to disclose information required by the conditions of the policies. Parsons claimed that the conditions were void because they did not comply with the Ontario legislation, and the insurers argued that the legislation was *ultra vires*.  Procedural history – Parsons succeeded at trial, at the ONCA, and at the SCC. The insurers appealed to the PC.  Who won? Parsons  Issue – Is the legislation about fire insurance policies beyond the power of the provincial legislature?  Holding – The Ontario legislation is valid.  Ratio – **Mutual modification**  *“It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections [ss 91 and 92] must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other.”*   * **Classical paradigm**   Reasoning – Pith and substance test:  Does the impugned Act fall within any of the classes of subjects enumerated in s 92, and assigned exclusively to the legislatures of the provinces? If it does not, it can be of no validity.   * The Act relates to matters coming within the class of subjects in s 92(13), **“Property and civil rights in the province”**   Assuming the Ontario Act to relate to the subject of property and civil rights, do its enactments and provisions come within any of the classes of subjects enumerated in s 91?   * The federal government’s authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and there its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by s 92(13). |

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| R v Morgentaler (1993)(SCC) |
| Facts – The Nova Scotia *Medical Services Act* and the regulation made under it prohibited the performance of abortions outside hospitals, and denied health insurance coverage for abortions performed in violation of the prohibition. The stated purpose of the Act was “to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians.” Morgentaler was charged under the Act.  Who won? Morgentaler  Issue – Is the Nova Scotia *Medical Services Act* and the regulation made under the Act *ultra vires* the province of Nova Scotia on the ground that they are in pith and substance criminal law?  Holding – The Act and regulation are criminal law in pith and substance and consequently *ultra vires* the province of Nova Scotia. Any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary.  Ratio – If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose mask the legislation’s true purpose. When legislation on its face addresses matters that are within its jurisdiction, but in pith and substance it is directed at matters outside its jurisdiction, the legislation is **“colourable”**.  Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be “colourable”.  Reasoning – The legislation’s legislative history, the course of events leading up to the Act’s passage and the making of the regulation, the Hansard excerpts and the absence of evidence that privatization and the cost and quality of health care services were anything more than incidental concerns, lead to the conclusion that the legislation was aimed primarily at suppressing the perceived public harm or evil of abortion clinics.  Pith and substance test:  What’s the ‘matter’?   * **A law’s matter is its leading feature or true character, often described as its pith and substance** * The approach must be flexible and a technical, formalistic approach is to be avoided * The purpose and effect of the law are relevant, but the legislation’s dominant purpose or aim is often the key to constitutional validity * **The legislation’s central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished**   Purpose and effect   * Evidence of the “effect” of legislation can be relevant to (1) establish “legal effect” and (2) establish “practical effect” * Legal effect can be determined from the legislation itself * Practical effect can be determined from background and circumstances surrounding the enactment (extrinsic materials) * Duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law – **the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose** * Extrinsic evidence demonstrates that **the central feature of the proposed law was prohibition of Morgentaler’s proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics per se**   Scope of the applicable heads of power   * Parliament has exclusive legislative jurisdiction over criminal law * The provinces have general legislative jurisdiction over hospitals, the medical profession and the practice of medicine, and health matters within the province * The prohibition of abortion with penal consequences has long been considered a subject for the criminal law |

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| AG Canada v AG Ontario (The Employment and Social Insurance Act) (1937)(PC) |
| Facts – The federal *Employment and Social Insurance Act* provided compulsory insurance against unemployment for workers out of a fund created by the joint contributions of workers and employers.  Procedural history – The SCC held the Act invalid, as it dealt with property and civil rights, because it dealt with insurance. The dissent characterized the Act as a taxation measure, justified under s 91(3).  Who won? AG Ontario  Issue – Can the legislation be supported under the enumerated heads (1) the public debt and property and (3) the raising of money by any mode or system of taxation?  Holding – The whole Act is *ultra vires*.  Ratio – Any legislation that disposes of taxation is not necessarily within Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s 92, and, if so, would be *ultra vires*.  Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence.  If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. |

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| Reference re Employment Insurance Act (Can.) (2005)(SCC) |
| Facts – The federal government created maternity and paternity benefit provisions as part of the *Employment Insurance Act*. Quebec argued that the provisions were directed at supporting families with children, and therefore fell within s 92(13) “Property and Civil Rights”. The federal government argued that the provisions were directed at providing replacement income for working mothers and parents when their employment was interrupted as a result of the birth or adoption of a child, and fell within “Unemployment Insurance” in s 91(2A).  Issue – Does the provision, in pith and substance, fall within the jurisdiction assigned by the constitutional amendment?  Holding – The provisions are in pith and substance mechanisms for providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child, and assisting families is an **incidental effect** of the provisions.  Reasoning – Providing replacement income during an interruption of work is consistent with the essence of the federal jurisdiction over unemployment insurance. The decision to offer women the possibility of receiving income replacement benefits when they are off work due to pregnancy is a social policy decision that is not incompatible with the concept of risk in the realm of insurance. To limit a public unemployment insurance plan to cases in which contributors are actively seeking employment or are available for employment would amount to denying its social function. |

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| AG Canada v AG Ontario (Labour Conventions) (1937)(PC) |
| Facts – The *Limitation of Hours Work Act*, the *Weekly Rest in Industrial Undertakings Act*, and the *Minimum Wages Act* were enacted by the federal government in accordance with the Treaty of Peace and the conventions adopted by the International Labour Organization of the League of Nations.  Who won? AG Ontario  Issue – Are the Acts, enacted by the federal government in ratification of the treaty, valid?  Holding – The Acts are *ultra vires* of the Parliament of Canada.  Ratio – There is no such thing as treaty legislation; as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. The Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution that gave it birth.  *“While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.”*  Reasoning – In a federal State, the obligations imposed by treaty may have to be performed, if at all, by several Legislatures. |

#### B. Double Aspect Doctrine

#### W.R. Lederman, “Classification of Laws and the British North America Act”

* Mutual modification – a process of limiting the generality of the classes of laws in ss 91 and 92 to eliminate some of the encroachment of one upon the other
* In spite of all that can or should be done by mutual modification, some overlapping inevitably remains. Where this occurs, one of two things has been done:

1. The nature of the challenged law relevant to a provincial class of powers has been completely ignored as only an **“incidental affectation”** of the provincial sphere

* Involves a judgment that the provincial (or federal) feature of the law is quite unimportant relative to its federal (or provincial) feature

1. **Double aspect doctrine** – when the court considers that the federal and provincial features of the challenged rule 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 either the federal Parliament or a provincial legislature

* **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**
* If two rules call for inconsistent behavior from the same people, they are in conflict and both cannot be obeyed
  + Dominion paramountcy – in the event of conflict between a federal law and a provincial law each valid under the double-aspect theory, the federal features of the former law are considered more important

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| Multiple Access Ltd v McCutcheon (1982)(SCC) |
| Facts – The Ontario *Securities Act* and the *Canada Corporations Act* contained almost identical provisions prohibiting insider trading. A shareholder action was initiated against insiders of Multiple Access Ltd, a federally incorporated company, under the Ontario Act. The insiders alleged that the Ontario Act could not validly apply, and in the alternative, the doctrine of paramountcy renders the Act inoperative. The limitation period for initiating an action under the federal statute had elapsed.  Who won? Multiple Access Ltd (shareholders)  Issue – Is the Ontario Act and the federal Act valid?  Holding – Both statutes were valid and applicable on the facts. The impugned insider trading provisions have both a securities law and a companies law aspect, and the double aspect doctrine can be applied.  Ratio – The regulation of trading securities is a double aspect area.  Test for applying the double aspect doctrine:   1. Is each piece of legislation, by itself, valid? 2. If both pieces of legislation are valid and equally important, a double aspect area exists.   Reasoning – Declaring the federal act invalid would create a potential gap in the present regulatory schemes that might be exploited.  Note – Courts have been reluctant to identify many areas as double aspect areas because the balance between provincial and federal law-making jurisdiction would be interrupted if the doctrine of paramountcy were frequently used. |

#### C. Necessarily Incidental

* **The necessarily incidental/ancillary doctrine is used in cases where the provision being challenged is part of a larger scheme of legislation**
  + When the impugned provision is examined in isolation, it appears to intrude into the jurisdiction of the other level of government
  + 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
    - Depends on how well the offending provisions are integrated into the valid legislative scheme
      * Not closely related 🡪 severed and declared invalid
      * Closely related 🡪 deemed “necessarily incidental” to the valid scheme and the law as a whole will be upheld
  + 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 jurisdiction

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| General Motors of Canada Ltd v City National Leasing (1989)(SCC) |
| Facts – CNL brought a civil action against GM under s 33.1 of the *Combines Investigation Act*. GM argued that s 33.1 was beyond the jurisdiction of Parliament because the creation of civil causes of action falls within provincial jurisdiction in relation to “property and civil rights”.  Who won? City National Leasing  Issue – Is the particular provision sufficiently integrated into the Act to sustain its constitutionality?  Holding – The provision is sufficiently integrated into the Act.  Ratio – Necessarily incidental doctrine test:   1. **Is the provision valid?**  * If it is valid, i.e., if in its pith and substance the provision is federal (provincial) law, and if the act to which it is attached is constitutionally valid (or if the provision is severable and it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further 🡪 the provision and the act are constitutionally unimpeachable * If the impugned provision can be characterized as intruding to some extent on provincial powers, how much does it intrude? A lot   A middling amount  A little   1. **Is the act (or a severable part of it) valid?**  * If the scheme is not valid 🡪 end of the inquiry * If the scheme is valid 🡪 must then determine if the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship  1. **Is the provision sufficiently integrated with the scheme?**  * If the impugned provision intrudes a lot 🡪 there must be a **truly necessary connection** between the provision and the Act * If the impugned provision intrudes a middling amount 🡪 a **necessarily incidental connection** must exist * If the impugned provision intrudes a little 🡪 a **“rational, functional connection”** must exist   A certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate.  OPSEU v Ontario (Attorney General) – Professor Hogg has offered two strong reasons to doubt the value of the doctrine of interjurisdictional immunity:   1. The theory that federal heads of power not only confer power on the federal Parliament, but also operate “defensively to deny power to the provincial Legislatures” is inconsistent with the basic pith and substance doctrine 2. The immunity of federal undertakings seems unnecessary because the federal Parliament can easily protect undertakings with federal jurisdiction from the operation of provincial laws by enacting appropriate laws which will be paramount over conflicting provincial laws   *These doctrines [interjurisdictional immunity and Crown immunity] and concepts [“watertight compartments”] have not been the dominant tide of constitutional doctrines: rather they have been an undertow against the strong pull of pith and substance, the double aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.*  Reasoning – Necessarily incidental test:   1. The provision appears to encroach on provincial power to some extent. However, the provision is a remedial one, federal encroachment in this manner is not unprecedented and, encroachment has been limited by the restrictions of the Act. The provision intrudes a little. 2. The Act constituted a scheme of regulation validly enacted by Parliament pursuant to its power to enact laws in relation to trade and commerce. 3. The necessary link (rational, functional connection) between s 31.1 and the Act exists. |

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| Quebec (AG) v Lacombe (2010)(SCC) |
| Facts – Zoning restrictions contained in a by-law under Quebec’s *Act respecting land use planning and development* prevent Lacombe from providing commercial aerial and air taxis services out of Gobeil Lake. Lacombe argues the zoning restrictions are *ultra vires*, or alternatively that they are inapplicable by virtue of the doctrine of interjurisdictional immunity or inoperative because they conflict with federal law.  Who won? Lacombe  Issue – Is the impugned portion of the provincial law valid? If not, is it sufficiently integrated within a valid legislative scheme to be saved under the doctrine of ancillary powers?  Holding – The impugned portion of the provincial law is *ultra vires* and is not sufficiently integrated within the legislative scheme to be saved under the doctrine of ancillary powers.  Ratio – The ancillary powers doctrine is not to be confused with the incidental effects rule or the double aspect doctrine. 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. 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.  Reasoning – Validity test   1. Determine the “matter” of the legislation.  * Consider (1) the purpose of the legislation and (2) its effect * Purpose may be determined by intrinsic evidence (purposive clauses and the general structure of the act) and extrinsic evidence (Hansard or other accounts of the legislative process) * Effect is found in the legal effect of the text and the practical consequences that flow from the application of the statute (*R v Morgentaler*) * The matter of the impugned legislation is, in pith and substance, the regulation of aeronautics.  1. Assign this matter to one or more heads of legislative power.  * If the matter comes within one of the heads of power allocated to the provinces, then the impugned law is valid * If it does not, consider whether the *prima facie* invalid law is saved by the doctrine of ancillary powers * Laws that relate in pith and substance to aeronautics fall outside provincial jurisdiction.  1. Consider whether the *prima facie* invalid law is saved by the doctrine of ancillary powers (*General Motors of Canada Ltd v City National Leasing*)  * Ancillary powers doctrine – the law accepts the validity of measures that lie outside a legislature’s competence, if these measures constitute an integral part of a legislative scheme that comes within provincial jurisdiction * The ancillary powers doctrine is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme * The rational functional test is applicable to this case, and the impugned provision is not rationally and functionally connected to the general zoning purposes of the by-law. The amendments do not further the zoning purposes of the by-law, in either purpose or effect. |

### III. Applicability: The Interjurisdictional Immunity Doctrine

* The interjurisdictional immunity doctrine emphasizes **exclusivity of jurisdiction** (unlike the validity doctrines)
* Typically comes into play in situations **where a generally worded provincial law is clearly valid in most of its applications, but in some of its applications it arguably overreaches**, affecting a matter falling within a core area of federal jurisdiction
* Where the doctrine of interjurisdictional immunity applies 🡪provincial laws are not allowed to have an effect on matters falling within core areas of federal jurisdiction, and there is no double aspect to the matter related
  + Courts will “**read down**” provincial (or federal) statutes to protect the core (“basic, minimum and unassailable content” that is immune from incursion) of exclusive federal (or provincial) powers from encroachment
    - The words of the statute are interpreted to apply only to matters within the enacting body’s jurisdiction
  + **Presumption of constitutionality – legislators are assumed to intend to act constitutionally; if it is possible to give a statute a constitutional interpretation, it should be interpreted in this manner**
* *“The principal question in any case involving exclusive federal jurisdiction is whether the provincial statute* ***trenches****, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. Where a provincial statute trenches upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations.”*

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| McKay v The Queen (1965)(SCC) |
| Facts – McKay displayed a sign on their house in support of a candidate during a federal election campaign, and was convicted of violating a municipal bylaw that prohibited the display of all signs in a residential area, except for certain specified exceptions. McKay challenged the application of the bylaw in the circumstances.  Who won? McKay  Issue – Is the municipal bylaw applicable in the circumstances?  Holding – It was not the intention of the Council to enact a by-law restricting the owner of property from displaying any sign soliciting votes for a candidate during an election to Parliament. The bylaw is valid, but it cannot regulate the posting of federal election signs.  Ratio – Two rules of construction are of assistance in construing the by-law:   1. General words are to be understood according to the subject matter it deals 2. If words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted **(Presumption of constitutionality)**   The legislature cannot by using general words effect a result which would be beyond its powers if brought about by precise words.  Reasoning – Parliament has exclusive power of legislation over Dominion controverted elections. |

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| Commission du salaire minimum v Bell Telephone Co of Canada (Bell #1) (1966)(SCC) |
| Who won? Bell Telephone Co of Canada  Issue – Can the Quebec *Minimum Wage Act* apply to Bell Telephone, an undertaking within exclusive federal jurisdiction pursuant to s 92(10)(a) and (c)?  Holding – A Quebec minimum wage law could not apply to Bell or other federally regulated undertakings operating in the province, even though no federal minimum wage law existed at the time.  Ratio – All matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal parliament.  Reasoning – Issues related to employment contracts, such as rates of pay and hours of work, qualified as vital parts of the management and operation of an undertaking.  Note – This ruling initiated a significant doctrinal change by broadening the test for interjurisdictional immunity applicable to federal undertakings. In earlier cases, the courts had applied the same test for federally incorporated companies and federal undertakings—namely, the “sterilization” or impairment test. On this test, a valid provincial law could apply to federal undertakings or federally incorporated companies so long as it did not impair their status or essential powers. After *Bell #1*, a valid provincial law could not apply to federal undertakings if it affected a vital part of their operation or management. |

Principles of interjurisdictional immunity:

1. When the provincial law **directly** affects federal undertakings in a **vital and essential part** 🡪 law will be read down so it’s not applicable to the federally regulated undertaking (*Bell #1*)
2. When the provincial law **indirectly** affects federal undertakings or federally incorporated companies in a **vital and essential part** 🡪 law will not be read down and will be fully applicable (*Irwin Tory Ltd v Quebec (AG)*)

* Interjurisdictional immunity does not apply

1. When the provincial law **directly or indirectly** affects federal undertakings or federally incorporated companies in a way that **sterilizes or impairs** their operation 🡪 law will be read down

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| Bell Canada v Quebec (Commission de la santé de la sécurité du travail) (Bell #2) (1988)(SCC) |
| Holding – The double aspect doctrine does not apply, because both legislators have legislated for the same purpose and in the same aspect. The provincial law must be read down so as not to apply to federally-regulated undertakings such as Bell Canada.  Ratio – Works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction.  Double aspect doctrine – “ought to be applied only with great caution”   * The exclusive legislative powers listed in ss 91 and 92 are worded extremely broadly, and there is a risk that the two fields will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation * **Double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction – where the multiplicity of aspects is real and not merely nominal**   **The decision in *Bell #1* is correct.**  Basic and unassailable minimum content – essential and vital elements of any undertaking   * Created by the exceptions in s 92(10) to create **exclusive** classes of subject, those of federal undertakings, to which a basic, minimum and unassailable content has to be assigned to make up the matters falling within these classes   Relying on paramountcy would lead to uncertainty and endless disputes about whether a conflict exists between the most trivial federal and provincial regulations   * Interjurisdictional immunity leads to less uncertainty |

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| Irwin Toy Ltd v Quebec (AG) (1989)(SCC) |
| Facts – A Quebec law prohibited advertisers from directing advertisements at persons less than thirteen years of age. An advertiser argued that the law was *ultra vires* to the extent that it applied to television advertising and thereby affected a vital part of the management of broadcast undertakings.  Holding – Application of the Quebec law is upheld.  Ratio – The “vital part” test properly determines the scope of the interjurisdictional immunity doctrine when a provincial law applies *directly* to a federal undertaking. However, the narrower **sterilization or impairment test** should be followed when a provincial law applies *indirectly* to the undertaking.  Reasoning – The provincial law did not apply directly to broadcasters (it affected them indirectly through the prohibitions directed at advertisers). The law does not impair or sterilize the operation of broadcast undertakings. |

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| Canadian Western Bank v Alberta (2007)(SCC) |
| Facts – The doctrine of interjurisdictional immunity was invoked by a bank (a federally regulated undertaking).  Issue – Does “peace of mind” insurance fall within the core (basic and minimum unassailable content) of banks?  Holding – The doctrine of interjurisdictional immunity cannot be invoked because “peace of mind” insurance does not fall within the core of Parliament’s jurisdiction over banking.  Ratio –  The existence of interjurisdicional immunity is **supported textually and by the principles of federalism**   * Rooted in references to “exclusivity” throughout ss 91 and 92 * Its modern application expresses a continuing concern about risk of erosion of provincial as well as federal competences * The doctrine seeks to avoid, when possible, situations of concurrency of powers   In theory, the **doctrine is reciprocal**: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from federal encroachment   * However, jurisprudential application of the doctrine has produced “asymmetrical results” (the doctrine has been invoked in favour of federal immunity)   The doctrine of interjurisdictional immunity has not been the **dominant tide** of constitutional doctrines (*OPSEU v Ontario (Attorney General)*)  A broad application of the doctrine creates problems   * It is **inconsistent with flexible federalism/cooperative government** and the constitutional doctrine of pith and substance, double aspect and federal parmountcy * Excessive reliance on the **doctrine would create serious uncertainty** – the abstract definition of a “core” is not compatible with the tradition of Canadian constitutional interpretation, which favours an **incremental approach** * It increases the risk of creating “**legal vacuums**” because despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called “core” of jurisdiction * A broad use of the doctrine creates an unintentional **centralizing tendency** * **The doctrine is superfluous** in that Parliament can always make its legislation sufficiently precise to leave those subject to it with no doubt (federal paramountcy)   It is not enough for the provincial legislation simply to “affect” that which makes a federal subject or object of rights specifically federal jurisdiction. The difference between “affects” and “impairs” is that the former does not imply any adverse consequence whereas the latter does.  It is when the adverse impact of a law adopted by one level of government increases in severity from “affecting” to “**impairing**” (without necessarily “sterilizing” or “paralyzing”) that the “core” competence of the outer level of government (or the vital or essential part of an undertaking it duly constitutes” is placed in jeopardy, and not before.  **The direct-indirect distinction in *Irwin Toy* has been erased.**  It is not appropriate to *always* begin by consideration of the doctrine of interjurisdictional immunity.   * **Interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent** * This means that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensible or necessary * If a case can be resolved by a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach |

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| British Columbia (Attorney General) v Lafarge Canada Inc (2007)(SCC) |
| Facts – The doctrine of interjurisdictional immunity was invoked by a port authority (a federally regulated undertaking).  Holding – The doctrine of interjurisdictional immunity cannot be invoked because permitting a cement batching plant to be built on land owned by the port authority does not fall within the core of Parliament’s jurisdiction over navigation and shipping.  Ratio – Interjurisdictional immunity should not be used where the legislative subject matter presents a double aspect.  Note – The courts have moved away from this idea because it would mean that the doctrine of interjurisdictional immunity could almost never be applied. |

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| Quebec (AG) v Canadian Owners and Pilots Association (2010)(SCC) |
| Facts – If an aerodrome is registered under the federal *Aeronautics Act*, it becomes subject to federal standards and is available to anyone who needs to land. Under the Quebec *Act respecting the preservation of agricultural land and agricultural activities*, the use of lots in a designated agricultural region for any purpose other than agriculture without specific authorization is prohibited. COPA members did not obtain authorization and were ordered to demolish an airstrip. COPA challenged the order on the ground that s 26 of the Quebec Act is *ultra vires* or inapplicable.  Who won? Canadian Owners and Pilots Association  Holding – The Quebec Act is valid, but inapplicable to the extent that it prohibits aerodromes in agricultural zones because it impairs the protected core of the federal jurisdiction over aeronautics. The doctrine of federal paramountcy has no application.  Test – Interjurisdictional Immunity   1. Does the provincial law **trench** on the protected core of a federal competence? Does federal jurisdiction over aeronautics encompass the power to determine the location of aerodromes  * Parliament has power over aeronautics – this aspect of federal jurisdiction extends to the location and design of airports/aerodromes   Does this power lie at the protected core (the “basic, minimum and unassailable content”) of federal power?   * Precedent is available – the location of aerodromes lies within the core of the federal aeronautics powers  1. Is the provincial law’s effect on the exercise of the protected federal power **sufficiently serious** (*i.e.* does it **impair the federal exercise of the core competence**)to invoke the doctrine of interjurisdictional immunity?  * The prohibition does impair the federal power to decide when and where aerodromes should be built (the effect may be to prevent the establishment of a new aerodrome or require the demolition of an existing one) * The prohibition does not *sterlilize* Parliament’s power |

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| Canada (AG) v PHS Community Services Society (2011)(SCC) |
| Facts – The Insite safe injection facility provides medical services to intravenous drug users in the Downtown Eastside of Vancouver and was created by local, provincial and federal authorities. Insite is hailed as an effective response to the catastrophic spread of infectious diseases, and the high rates of deaths from drug overdoses. The federal government failed to extend Insite’s exemption from the operation of criminal laws in the *Controlled Drugs and Substances Act*. The claimants brought an action for declarations that the *CDSA* is inapplicable or that its application results in a violation of s 7 rights under the Charter.  Who won? PHS Community Services Society  Issue – Is Insite exempt from the federal criminal laws that prohibit the possession and trafficking of controlled substances?  Holding – The *CDSA* is applicable, but its application to the activities at Insite violate the Charter.  Ratio – **The doctrine of interjurisdictional immunity is narrow. Its premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism.**  The doctrine of interjurisdictional immunity remains in a form constrained by principle and precedent   1. The doctrine is in tension with the dominant approach that permits concurrent federal and provincial legislation 2. The doctrine is in tension with the emergent practice of cooperative federalism – courts should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest 3. The doctrine may create legislative “no go” zones where neither level of government regulates   The doctrine of interjurisdictional immunity, in principle, is not confined to federal powers. However, courts are reluctant to identify new areas where interjurisdictional immunity applies.  Reasoning –  The impugned provisions are *intra vires*   * The fact that the law at issue in this case has the incidental effect of regulating provincial health institutions does not mean that it is constitutionally invalid   The provisions are applicable   * **The doctrine of interjurisdictional immunity has never been applied to a broad and amorphous area of jurisdiction** * The proposed core of the provincial power over health has never been recognized in the jurisprudence. * The provincial health power is broad and extensive. Such a vast core would sit ill with the restrained application of the doctrine called for by the jurisprudence. * Application of interjurisdictional immunity to a protected core of the provincial health power has the potential to create legal vacuums. |

### IV. Operability: The Paramountcy Doctrine

* For most subjects of legislation, no paramountcy rule is specified in the Constitution
  + The drafters may have thought that no overlap would occur or that any problems of conflict would be solved in the political arena
  + The judicially created doctrine of federal paramountcy fills this gap
* **Federal paramountcy** – in cases of conflict between federal and provincial laws, the federal law is paramount and the provincial law is *inoperative* to the extent of the conflict
  + The provincial law is not declared invalid, its operation is merely suspended to the extent that it conflicts with federal legislation
    - If the federal legislation is repealed, the provincial law may once again be applied
* **Key issue – whether a conflict exists between federal and provincial laws**
  + Narrow reading of conflict – “express conflict” or “impossibility of dual compliance” test
    - Focuses on the individuals, corporations, or legal decision makers who must tailor their behavior to the legislative dictates
  + Broader reading of conflict – “covering the field” test or the “negative implication” doctrine
    - A valid provincial law is inoperative whenever it has an impact on a matter already regulated by valid federal law
    - Parliament, by legislating in a particular area, has enacted a code that was intended to be complete and thus by implication was intended to oust the operation of any provincial laws

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| Ross v Registrar of Motor Vehicles (1975)(SCC) |
| Facts – Ross was prohibited from driving for six months except in the course of employment and going to and from work by a trial judge under the *Criminal Code*. The Registrar of Motor Vehicles in Ontario suspended Ross’ license in accordance with the Ontario *Highway Traffic Act*. Ross claimed that s 21 of the Ontario Act was inoperative because of its conflict with the Code.  Who won? Registrar of Motor Vehicles  Issue – If both pieces of legislation were valid, was there a conflict between the two provisions requiring the application of the rule of federal paramountcy?  Holding – The Ontario Act is valid and operative.  Ratio – If both legislations can fully operate simultaneously, there is no repugnancy (conflict).  Reasoning – The Code merely provides for the making of prohibitory orders limited as to time and place. If such an order is made in respect of a period of time during which a provincial license suspension is in effect, there is, strictly speaking, no repugnancy.  Test – Paramountcy   1. Are both laws **valid**? 2. Are the laws in **conflict**?  * Conflict can be defined in different ways – look to cases  1. If both laws are valid, and there is a conflict, the provincial law is **inoperable to the extent of the conflict** |

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| Multiple Access Ltd v McCutcheon (1982)(SCC) |
| Facts – The Ontario *Securities Act* and the *Canada Corporations Act* contained almost identical provisions prohibiting insider trading. A shareholder action was initiated against insiders of Multiple Access Ltd, a federally incorporated company, under the Ontario Act. The insiders alleged that the Ontario Act could not validly apply, and in the alternative, the doctrine of paramountcy renders the Act inoperative. The limitation period for initiating an action under the federal statute had elapsed.  Who won? Multiple Acces Ltd (shareholders)  Issue – Can duplicate legislation operate at both the federal and provincial levels, or, is duplication a kind of conflict that should give rise to federal paramountcy?  Holding – The Ontario act is not rendered inoperative.  Ratio – There is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless.  *“Duplication is “the ultimate in harmony”. The argument that it is untidy, wasteful and confusing to have two laws when only one is needed reflects a value which in a federal system often has to be subordinated to that of provincial autonomy.” – Peter Hogg*  **Paramountcy only applies where there is actual conflict in operation as where one enactment says “yes” and the other says “no”.** |

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| M & D Farm Ltd v Manitoba Agricultural Credit Corp (1999)(SCC) |
| Facts – A stay of proceedings was issued pursuant to federal law and an order authorizing the commencement of foreclosure proceedings was ordered pursuant to provincial legislation. The creditor could comply with both laws by refraining from initiating proceedings until the stay was lifted, but once it sought to initiate foreclosure proceedings, an impossibility of dual compliance arose. A court cannot simultaneously give effect to a stay of enforcement proceedings and a right to initiate foreclosure proceedings against the debtor.  Holding – An express contradiction existed, and the doctrine of federal paramountcy was triggered.  Ratio – An express contradiction will exist if a court cannot simultaneously give effect to both the federal legislation and the provincial legislation. |

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| Bank of Montreal v Hall (1990)(SCC) |
| Facts – Hall defaulted on a loan from Bank of Montreal. Bank of Montreal seized a piece of farm machinery Hall had granted the bank as security interest pursuant to the federal *Bank Act*. Bank of Montreal did not follow the procedures in the Saskatchewan *Limitation of Civil Rights Act* and give requisite notice of intention to seize.  Procedural history – The chambers judge determined that the bank did not have to comply with the Saskatchewan Act. The Saskatchewan CA reversed.  Who won? Bank of Montreal  Issue – Is the provincial legislation rendered inoperative because of a conflict with the federal legislation?  Holding – There was a conflict and the provincial legislation is rendered inoperative.  Ratio – Dual compliance will be impossible when application of the provincial statute can fairly be said to **frustrate Parliament’s legislative purpose**.  A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict.  **“Conflict in operation” that is necessary to give rise to federal paramountcy can be satisfied by either an impossibility of dual compliance or an incompatibility of legislative purposes.**  Reasoning – Parliament’s legislative purpose was that of creating a security interest susceptible of uniform enforcement by the banks nationwide. Parliament wished to guard against creating a lending regime whereby the rights of the banks would be made to depend solely on provincial legislation governing the realization and enforcement of security interests.  Parliament has enacted a complete code that at once defines and provides for the realization of a security interest. |

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| Law Society of British Columbia v Mangat (2001)(SCC) |
| Facts – A provision of the BC *Legal Profession Act* prohibits non-lawyers from appearing as counsel for a fee and provisions of the federal *Immigration Act* permit non-lawyers to appear as counsel before the Immigration and Refugee Board.  Holding – To require “other counsel” to be a member in good standing of the bar of the province or to refuse the payment of a fee goes contrary to Parliament’s purpose in enacting the provisions.  Ratio – Where there is an enabling federal law, the provincial law cannot be contrary to Parliament’s purpose.  Reasoning – Parliament provided that aliens could be represented by non-lawyers acting for a fee, and in this respect it was pursuing the legitimate objective of establishing an informal, accessible, and expeditious process, peculiar to administrative tribunals. |

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| Spraytech v Hudson (Town) (2001)(SCC) |
| Facts – A municipal bylaw restricts the use of pesticides to specified locations for specified purposes. The federal Act regulates which pesticides can be registered for manufacture or use in Canada.  Holding – The bylaw was not rendered inoperative because the federal Act is permissive legislation that does not purport to exhaustively regulate pesticides.  Ratio – If a federal law is permissive, as opposed to mandatory, there is no conflict that gives rise to federal paramountcy.  Reasoning – There is no impossibility of dual compliance, nor does the bylaw frustrate the purpose of the federal legislation. |

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| Husky Oil Operations Ltd v MNR (1995)(SCC) |
| Ratio – The more supple (**flexible**) paramountcy doctrine, not interjurisdictional immunity, is the appropriate doctrine when dealing with alleged operational conflicts between valid provincial and federal laws.  Note – Arguments based on applicability (interjurisdictional immunity) protect the core of exclusive areas of federal jurisdiction from provincial encroachment, whether or not Parliament has actually passed legislation in the area. Arguments based on operability (paramountcy) protect existing federal legislative policies from being disrupted by conflicting provincial legislation. |

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| Rothmans, Benson & Hedges Inc v Saskatchewan (2005)(SCC) |
| Facts – The federal *Tobacco Act*’s purpose is to provide a legislative response to a national public health problem of substantial and pressing concern. Section 19 of the Act prohibits the promotion of tobacco products and tobacco product-related brand elements, except as authorized. Section 30 provides that any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element. The Saskatchewan *Tobacco Control Act* bans all advertising, display and promotion of tobacco or tobacco-related products in any premises in which persons under 18 are permitted.  Who won? Saskatchewan  Issue – Is the Saskatchewan Act sufficiently inconsistent with the federal Act so as to be rendered inoperative pursuant to the doctrine of federal legislative paramountcy?  Holding – The federal Act and the provincial Act were enacted for the same health-related purposes and there is no inconsistency between the two provisions at issue.  Ratio – A 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. Impossibility of dual compliance is sufficient but not the only test for inconsistency.  Test – Paramountcy   1. Can a person simultaneously comply with the provincial legislation and the federal legislation? 2. Does the provincial legislation frustrate Parliament’s purpose in enacting the federal legislation? Consider **federal intent**  * Permissive federal intent 🡪 likely no frustration * Mandatory federal intent 🡪 likely frustration   Reasoning – Parliament did not grant retailers a positive entitlement to display tobacco products.   * As the criminal law power is essentially prohibitory in character, provisions enacted pursuant to it, such as s 30 of the *Tobacco Act*, do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament. * An interpretation of s 30 as granting retailers an entitlement to display tobacco products is unsupported by, and perhaps even contrary to, the stated purposes of the *Tobacco Act*.   Dual compliance is possible in this case.  A judge called upon to apply one of the statutes does not face any difficulties in doing so occasioned by the existence of the other. The judge can proceed on the understanding that the provincial Act simply prohibits what Parliament has opted not to prohibit in its own legislation and regulations.  The provincial Act does not frustrate the legislative purpose underlying the federal Act.  Note – It’s unclear what happened to the “occupying the field” test |

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| British Columbia (Attorney General) v Lafarge Canada Inc (2007)(SCC) |
| Holding – The provincial legislation (a municipal zoning and development bylaw) conflicted with the *Canada Marine Act* and is thus rendered inoperative.  Reasoning – The impossibility of dual compliance test was satisfied because a judge could not have given effect both to the federal law and the municipal law. The frustration of the federal purpose test was satisfied because the federal act authorized the Vancouver Port Authority to make its decision about the project and has enabled Lafarge to proceed on the basis of that authorization.  Note – Has the court substituted the intention to cover the field test for the frustration of the federal purpose test in the case? |

## Chapter 9 – Peace, Order, and Good Government

* The federal government has power to make laws for POGG of Canada in relation to all matter not coming in exclusive legislation of the provinces.
  + This is set out in the Preamble to s 91
* Two ways of reading what “POGG words” do:

1. **General theory of POGG: The entire universe of law-making power is given to the federal government, little exceptions are taken out of that universe to give to provincial government.**
   * Section 91 just contains illustrations of the swath that’s given to the federal government
   * Taking enumerated heads of power out of s 91 would not affect powers of federal government at all
   * Strongly centralist picture 🡪 broad read into federal power
   * Not the theory currently adopted by the courts, but still has some resonance
   * Advocated by Laskin (a strong centralist)
     + Lederman and Simeon tell us: Everyone is influenced by the perspective they come from
2. **The residuary theory of POGG: Sections 91 and 92 contain slots (heads of powers) that law-making powers can be fit into. POGG is another slot, which contains every law that doesn’t fit anywhere else.**
   * The words in the opening of s 91 are a separate and additional head of power.
   * POGG is not mere grammatical prudence (Lederman)
   * Three branches make up this separate head of power (below) – confirmed in the *Anti-Inflation Reference*

* Three branches of POGG (the scope)

1. **Gap** – allows POGG powers to be used for legislative oversights (drafting mistakes)
   * Three steps:
     + Oversight
     + Has to be something the drafters could have comprehended
       - For example, the power to incorporate companies with federal objects could have been comprehended, whereas airports could not
       - NOT NEW
     + Un-controversially federal
   * Just a corrective device – something that should have been included, but wasn’t
2. **Emergency** – temporary jurisdiction over all subject matters needed to deal with an emergency
3. **National Concern** – permanent jurisdiction over distinct subject matters which do not fall within any of the enumerated heads of s 92 and which are of national concern

#### K. Swinton, “The Supreme Court and Canadian Federalism: The Laskin-Dickson Years”

* Laskin’s Centralist Vision
  + Invited results favouring a strong central government
    - Believed that the opening words of s 91, the “peace, order and good government” clause, constituted the “general power,” while the enumerated powers in s 91 were illustrative only
  + Felt the Court had not properly applied the aspect doctrine
    - Felt that a court should focus on the object or purpose of legislation, asking whether the law had a federal or provincial “aspect,” with the result that concrete subjects like the wheat trade, for example, might be regulated by both levels of government—albeit from different aspects as permitted by the classes of law-making powers set out in ss 91 and 92 of the constitution
  + Particularly disliked the “trenching doctrine” or the “necessarily incidental doctrine”
  + Rejection of the territorial approach to jurisdiction which would fence off subjects for exclusive federal or provincial jurisdiction
  + Believed that problems once local in nature could take on a federal aspect, as they became more complex or spilled over provincial borders
    - Courts should interpret the constitution so as to recognize this evolutionary potential
    - In judicial review under the constitution, courts should take a flexible view of the instrument, interpreting it so as to allow effective governmental responses to important problems of public policy
* Beetz’s Classical Federalism
  + Searched for principles and rules to confine the exercise of judicial discretion
  + Protective of provincial rights and cautious about departing from precedents which provided safeguards for provincial autonomy
  + His vision of the constitution was guided by a concern for provincial autonomy, but his reading of that document was influenced by a classical vision of the federal system
  + A Quebecois Point of View
    - Proposed that the *British North America Act* was a document designed to protect the French-speaking minority of Quebec from majority domination in certain areas important to the preservation of the Francophone culture—specifically religion, language, laws, and education
    - Expressed that the Privy Council’s interpretation (treating the opening words of s 91 as residuary and subordinate) was correct
    - Quebecois were concerned with the national dimensions power and the increasing tendency to find concurrent powers between federal and provincial governments

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| Reference re Anti-Inflation Act (1976)(SCC) |
| Facts – The federal *Anti-Inflation Act* established a system of price, profit, and income controls that applied to some private sector firms, members of designated professions, and construction firms. The Act was binding on the federal public sector, but applicable to the public sector of each province only if an agreement was made between the federal and provincial governments. The preamble mentioned that the containment and reduction of inflation had become a matter of serious national concern. The Governor in Council directed a reference to the SCC to determine whether the Act was *ultra vires* and whether the Ontario agreement, purporting to make the Act applicable to the Ontario public sector, was valid.  Issue – Were the social and economic circumstances upon which Parliament can be said to have proceeded in passing the Act such as to provide support for the Act in the power of Parliament to legislate for the peace, order and good government of Canada?  Holding – The Act was supportable under POGG power as emergency or “crisis” legislation.  Ratio – Laskin’s (remember: centralist) eight factors of the emergency branch:   1. **Parliament has a rational basis**  * It is not up to the Court to decide whether there is an emergency; the Court just has to decide if Parliament had a rational basis in deciding that the circumstances the legislation dealt with was based on an emergency  1. **“Crisis legislation” – reduced sense**  * The court will look for something of a serious nature on the face of the legislation, but it’s a fairly easy threshold to pass (doesn’t have to be explicitly about the emergency)  1. OK if only addresses a small part 2. OK if parts enforced only at option of provinces 3. OK if doesn’t mention “emergency” 4. OK if don’t act immediately 5. OK if not effective 6. **Must be temporary**  * No piece of legislation that is not temporary has been found to be emergency legislation under POGG * Emergencies are not the norm – if something is the norm it’s not an emergency (but what counts as temporary?)   Reasoning – The provisions respecting the provincial public sector are not an indicator that the Government and Parliament were not seized with urgency or manifested a lack of any sense of crisis in the establishment of the programme.  The preamble is sufficiently indicative that Parliament was introducing a far-reaching programme prompted by what in its view was a serious national condition.  The extrinsic evidence and other matters of which the Court can take judicial notice show that there was a rational basis for the Act as a crisis measure.  Parliament was entitled to act as it did from the springboard of its jurisdiction over monetary policy and with additional support from its power in relation to the regulation of trade and commerce.  Note – Beetz (not a centralist) and the national concerns branch (from his dissenting judgment) – test asks that what you’re giving the federal government permanently be distinctive (so it won’t result in doing in the fact that we have division of powers)   * The legislation must be  1. New – on a new matter  Distinguishes it from the gap branch 2. Degree of unity – distinct and indivisible  This is a power grab that permanently assigns jurisdiction to the federal government; it can’t be a sloppy distinction between what the federal government does and what provinces do 3. Not swallow up provincial jurisdiction   Don’t want to give the federal government something that effectively amounts to a turnover of provincial jurisdiction |

#### Note: The Anti-Inflation Case and Extrinsic Evidence

* The *Anti-Inflation Reference* constitutes a clear precedent for the admission of social-science briefs in constitutional cases where legislative facts are in issue (Hogg)
* Reports of the royal commissions and law reform commissions, government policy papers and even parliamentary debates are admissible

#### Note: Emergency Legislation After the Anti-Inflation Reference

* Parliament enacted new legislation to deal with national emergencies in 1988 (the *Emergencies Act*)
  + The statute defines a natural emergency as an urgent and critical situation of a **temporary nature**
  + The declaration of an emergency must concisely describe the state of affairs constituting the emergency and it must be confirmed by Parliament
  + The declaration cannot be made without prior consultation with affected provincial governments and an agreement by the provincial Cabinet that the province is unable to deal with the situation
  + The legislation seems to reflect Beetz J’s concern about “signals”
* Note – This legislation does not impact constitutional jurisdiction. The constitutional scope of emergency legislation has not changed just because Parliament has passed legislation committing itself to more onerous provisions.

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| R v Crown Zellerbach Canada Ltd (1988)(SCC) |
| Facts – Section 4(1) of the *Ocean Dumping Control Act* prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined for the purposes of the Act as including the internal waters of Canada other than fresh waters. The general purpose of the Act is to regulate the dumping of substances at sea in order to prevent various kinds of harm to the marine environment. Crown Zellerbach carries on logging operations on Vancouver Island and maintains a log dump on a water lot leased from the provincial Crown. Crown Zellerbach dredged wood-waste from the ocean floor immediately adjacent to the shoreline at the site of its log dump in Beaver Cove and deposited it in the deeper waters of the cove approximately 60 to 80 feet seaward of where the woodwaste had been dredged. Crown Zellerbach did not hold a permit to dump where the woodwaste was dumped. The company was charged with violating the Act. The attorney general of Canada submitted that the control of dumping in provincial marine waters was part of a single matter of national concern.  Who won? Crown  Issue – Is s 4(1) of the *Ocean Dumping Control Act* valid?  Holding – Section 4(1) of the Act is constitutionally valid as enacted in relation to a matter falling within the national concern doctrine, and it is constitutional in its application to the dumping of waste in the waters of Beaver Cove.  Ratio – The national concern doctrine of the peace, order and good government power:   1. The national concern doctrine is **separate and distinct** **from the national emergency doctrine**, which is chiefly distinguishable by the fact that is provides a constitutional basis for what is necessarily legislation of a temporary nature. 2. The national concern doctrine applies to both **new matters** that did not exist at Confederation and to matters that, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of a national concern. Two ways in which the matter could be new: completely new (e.g. space travel, the internet) or could be new in that it was around then, but was only merely of local matter (e.g. math literacy) 3. For a matter to qualify as a matter of national concern in either sense it must have a **singleness, distinctiveness and indivisibility** that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.  * **Singleness** – Does it make sense to describe it as one matter as opposed to many matters? * **Distinctiveness** – Is there a distinctiveness between this matter and other matters, or does it seep into other areas of jurisdiction? * **Indivisibility** – Does it hang together so as to make it clear what you don’t have jurisdiction over?  1. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.   **“Provincial inability” test**   * One of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine * A national dimension exists whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. * The entire problem will not fall within federal competence – only that aspect of the problem that is beyond provincial control would do so. * The “provincial inability” test’s utility lies in assisting in the determination whether a matter has the requisite singleness or indivisibility from a **functional** as well as a **conceptual** point of view.   Reasoning – Marine pollution is a matter of concern to Canada as a whole. The distinction between the pollution of salt water and the pollution of fresh water is sufficient to make the control of marine pollution by the dumping of substances a single, indivisible matter. The pollution of marine waters by the dumping of substances is sufficiently distinguishable from the pollution of fresh waters by such dumping to meet the requirement of singleness or indivisibility.  Note – La Forest J dissenting: Ocean pollution is not a sufficiently discrete subject upon which to found the kind of legislative power sought here. |

#### Sujit Choudhry, “Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy”

* The basic intuition underlying the provincial inability test is that the federal government can act only in those circumstances in which the provinces are unable to act.
* Talk about when talking about national concerns branch
* Three circumstances that can be described as situations of provincial inability:

1. **Negative extra-provincial externalities** – the disjuncture between the entity that makes a decision and the entities that bear the costs of a decision means that that decision is made differently than it would be where the costs were strictly private

* Because costs can be shifted onto other entities, an entity may engage in more of an externality-causing activity than they otherwise would.

1. **Collective action problems** – two types exist:

* *Inter-provincial collective action problems* – for certain types of regulatory regimes to be effective, they must be national in scope, and the possibility of an inter-provincial solution is either unrealistic or infeasible
  + Two examples
    - Races to the bottom – all provinces must buy into a coordinated regime of environmental or labour regulation or the scheme fails, because if one province is non-compliant, the rational response of other provinces would be to compete by adopting lax public policies
    - Public goods – potential beneficiaries have an incentive to free ride—that is, to consume goods without contributing to the cost of producing them
* *Federal provincial collective action problems* – some policy concerns straddle the division of powers between the provinces and the federal government, rendering either level of government constitutionally incapable of regulating the problems alone

1. **True provincial inability** – where provinces really are constitutionally incapable of regulating subject-matters, even if willing to do so (*e.g.*, provinces are constitutionally incapable of regulating activity in parts of Canada that lie outside the ten provinces)

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| Friends of the Oldman River Society v Canada (Minister of Transport) (1992)(SCC) |
| Facts – The federal Environmental Assessment and Review Process Guidelines required all federal departments and agencies that have a decision-making authority for any proposed activity that may have an environmental effect on an area of federal responsibility to screen the proposal to determine whether it may give rise to any potentially adverse environmental effects. The Alberta government proposed to construct a damn on the Oldman River. Approval for the project was obtained from the federal Minister of Transport, but the Minister did not suvject the project to an environmental assessment. The Society brought an action to quash the decision of the Minister of Transport to compel that Minister and the Minister of Fisheries and Oceans to comply with the Guidelines.  Who won? Friends of the Oldman River Society  Issue – Have the *Guidelines Order* crossed the line which circumscribes Parliament’s authority over the environment?  Holding – The decision of the Minister of Transport is quashed.  Ratio – The *Constitution Act, 1867* has not assigned the matter of “environment” *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.  Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction.  Reasoning – The exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. |

## Chapter 11 – Criminal Law

### I. Federal Powers over Criminal Law

* Section 91(27) of the *Constitution Act, 1867* assigns responsibility over criminal law to the federal Parliament

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| Federal Criminal Law | Provincial Criminal Law |
| Prohibition  Penal  Punishes  Public property cast to it | Regulatory  Preventative  Revokes licenses  Tends to be about regulation of private property |

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| Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference) (1949)(SCC) |
| Facts – Section 5(a) of the *Dairy Industry Act* is as follows:  5. No person shall  (a) manufacture, important into Canada, or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream. …  Issue – Is s 5(a) of the *Dairy Industry Act* *ultra vires* of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?  Holding – The prohibition of manufacture, possession, and sale of margarine is *ultra vires* Parliament, although the prohibition of importation can be upheld under the federal government’s power to regulate foreign trade.  Ratio – **Scope of the criminal law head of power**  Criminal laws have three aspects:   1. **Criminal law purpose** – enacted with a view to a public purpose: public peace, order, security, health, morality; these are the ordinary though not exclusive ends served by that law 2. **Prohibition + penalty (form)** 3. **Penalty**   Reasoning – The object of the Act is economic and the legislative purpose is to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is *prima facie* to deal directly with the civil rights of individuals in relation to particular trade within the provinces.  Note – *Labatt Breweries of Canada Ltd v AG Canada*  In this case, the form of the law, which was regulatory in nature, may have contributed to the Court’s reluctance to characterize the legislation as criminal law. |

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| RJR MacDonald Inc v Canada (Attorney General) (1995)(SCC) |
| Facts – The federal *Tobacco Products Control Act* prohibited all advertising and promotion of tobacco products offered for sale in Canada, with an exemption for advertising of foreign tobacco products in imported publications. As well, the legislation required the display of unattributed health warnings on all tobacco products and precluded manufacturers from putting other information on tobacco products. Violation of the provisions of the Act constituted an offence punishable by way of summary conviction or indictment, with penalties ranging in seriousness from a fine not exceeding $2,000 or six months’ imprisonment to a fine not exceeding $300,000 or two years’ imprisonment. Two tobacco companies challenged the constitutionality of the legislation.  Who won? RJR MacDonald Inc  Issue – Is the legislation *intra vires* the federal government?  Holding – The legislation is *intra vires* as a legitimate exercise of the criminal law power, but its central provisions are of no force and effect as unjustifiable infringements of freedom of expression.  Ratio – The criminal law power is plenary in nature and the Court has always defined its scope broadly.  Health is amorphous in nature and Parliament and the provincial legislatures may both validly legislate in this area.  If a given piece of federal legislation contains a prohibition accompanied by a penal sanction and is directed at a legitimate public health evil, and if that legislation is not otherwise a “colourable” intrusion upon provincial jurisdiction, then it is valid as criminal law.  Parliament may validly employ the criminal law power to prohibit or control the manufacture, sale and distribution of products that present a danger to public health, and Parliament may also validly impose labeling and packaging requirements on dangerous products with a view to protecting public health.  The criminal law is not “frozen as of some particular time”.  Parliament is allowed to choose a “circuitous path” to accomplish its goals as long as the goals are constitutionally valid.  The criminal law may validily contain exemptions for certain conduct without losing its status as criminal law.  Reasoning – The Act is, in pith and substance, criminal law. Parliament’s purpose in enacting this legislation is a concern for public health and, more specifically, a concern with protecting Canadians from the hazards of tobacco consumption. It contains prohibitions accompanied by penal sanctions, and is not colourable.  Note – Major J dissenting:  The broadly based exemptions contained in the Act, combined with the fact that the Act does not engage in a typically criminal public purpose, leads to the conclusion that the prohibitions on advertising cannot be upheld as a valid exercise of Parliament’s criminal law power. |

#### Note: The Requirement of a Criminal Form

* The standard form of criminal law is prohibition and penalty enforced by the courts. The presence of regulatory features in a federal law—such as powers of licensing and prior inspection, involvement of an administrative agency exercising discretionary authority in the administration of law, detailed regulation, and civil remedies—may make the law incapable of being upheld as an exercise of the criminal power.
* However, in cases where a clear criminal law purpose has been found, courts have allowed some deviation from the strict form of prohibition and penalty:
  + *RJR MacDonald* – the presence of exemptions
  + *R v Cosman’s Furniture (1972) Ltd* – detailed regulations
  + *R v Hydro*-*Quebec* – a regulatory scheme with a large measure of administrative discretion
  + *R v Zelensky*/*Goodyear Tire and Rubber Co v The Queen* – ancillary civil remedies
  + *R v Swain* – departure from the criminal form of prohibition and penalty allowed where the purpose of the law is the prevention of a crime

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| R v Hydro-Quebec (1997)(SCC) |
| Facts – Hydro-Quebec was charged with violation of an interim order made by the federal Minister of the Environment under Part II of the Canadian *Environmental Protection Act*. The Act established a process for regulating the use of toxic substances. Hydro-Quebec claimed that the two sections of the Act that were crucial to the making of the interim order and hence to the charge (ss 34 and 35), were *ultra vires*.  Who won? Crown  Issue – Are the impugned provisions valid legislation under the criminal law power?  Holding – The impugned legislation is a valid exercise of the criminal law power.  Ratio – Only one qualification has been attached to Parliament’s plenary power over criminal law: the power cannot be employed colourably.  Reasoning – The protection of a clean environment is a public purpose within Rand J’s formulation in the *Margarine Reference*. The power to regulate a substance is not so broad as to encroach upon provincial legislative jurisdiction—broad wording is unavoidable in environmental protection legislation because of the breadth and complexity of the subject. The criteria found in s 11 are simply a “drafting tool”. Sections 34 (which authorizes the Governor and Council to make regulations setting forth the restrictions imposed on those using or dealing with such substances and 35 (which deals with emergency situations) do not constitute an invasion of provincial regulatory power.  Note – Lamer CJC and Iacobucci J dissenting:  The pith and substance of Part II of the Act lies in the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health. Although the protection of the environment is itself a legitimate criminal public purpose, the legislation is essentially regulatory in nature and therefore outside the scope of s 91(27). Wholesale regulatory authority of the type envisaged by the Act is inconsistent with the shared nature of jurisdiction over the environment.  Regulatory features:   * There is no offence until an administrative agency “intervenes” * Equivalency provisions – deferring to provincial regulatory schemes on the basis that they are “equivalent” to federal regulations made under s 34(1) creates a strong presumption that the federal regulations are themselves also of a regulatory, not criminal, nature * The impugned provisions involve no general prohibition |

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| Reference re Firearms Act (Can.) (2000)(SCC) |
| Facts – The federal *Firearms Act* banned and restricted the use of certain types of firearms and established a comprehensive licensing system for the possession and use of firearms and a national registration system for all firearms. Failure to comply with the licensing and registration requirements was made an offence under the *Criminal Code*. The province of Alberta challenged the federal government’s power to enact the new gun control law by a reference.  Issue – Is the scheme valid criminal legislation?  Holding – The gun control law falls within Parliament’s jurisdiction over criminal law.  Reasoning – The law in “pith and substance” is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties.  Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. The criminal law purpose is connected to a prohibition backed by a penalty. The fact that the Act is complex does not necessarily detract from its criminal nature, and gun control is distinguished from provincial regulatory schemes for the registration of motor vehicles and land titles because of the inherently dangerous nature of firearms. The gun control law does not upset the balance of power because its effects on property rights are incidental. |

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| Reference re Assisted Human Reproduction Act (2010)(SCC) |
| Facts – The federal *Assisted Human Reproduction Act* contains two types of prohibitions: absolute prohibitions (ss 5 to 9) and other prohibitions, referred to in the Act as “controlled activities” (ss 10 to 13). The controlled activities sectoms prohibit various activities, unless they are carried out in accordance with regulations made under the Act, under license, and in licensed premises. The prohibition regime is followed by provisions that do not in themselves purport to create criminal offences, but are directed to administering and enforcing the primary criminal law prohibitions. The Attorney General of Quebec concedes that the absolute prohibitions are valid criminal law.  Who won? Federal government  Issue – Is the legislative scheme as a whole valid?  Are the “controlled activities” prohibitions valid?  Are the administrative provisions valid under the ancillary powers doctrine?  Holding – The appeal is allowed. However, some sections exceed Parliament’s legislative authority, whereas others do not.  Ratio –  Criminal prohibitions may permit exceptions, and exceptions may take the form of a regulatory scheme.  The use of a carve-out only means that a particular practice is *not* prohibited, not that the practice is positively *allowed* by the federal law. If a province enacted stricter regulations than the federal government, there would be no conflict in operation between the two sets of provisions since it would be possible to comply with both.  The extent or comprehensiveness of a criminal law regulatory scheme does not affect its constitutionality.  Reasoning – McLachlin CJC  Is the legislative scheme as a whole valid?  Pith and substance test:   1. Pith and substance: the prohibition of negative practices associated with assisted reproduction  * While the Act will have beneficial effects and while some of its effects may impact on provincial matters, neither its dominant purpose nor its dominant effect is to set up a regime to regulate and promote the benefits of artificial reproduction in hospitals and laboratories.  1. Scope/fit: criminal law  * Does the matter satisfy the three requirements of valid criminal law: (1) a prohibition (2) backed by a penalty; (3) with a criminal law purpose? * Prohibition backed by a penalty: The Act imposes prohibitions backed by penalties (even though some of the provisions permit exceptions – federal laws may involve large carve-outs for practices that Parliament does not wish to prohibit) * Criminal law purpose: Morality, public health evils and security are capable of supporting criminal laws. The Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants. This is a valid criminal law purpose, grounded in issues that our society considers to be of fundamental importance. The legislative scheme is not directed toward the promotion of positive health measures, but rather addresses legitimate criminal law objects.   Are the “controlled activities” prohibitions valid?   * The form of ss 8 to 14 is itself insufficient to remove these sections from the scope of the federal criminal law power * The unpublished nature of the regulations cannot take an otherwise valid criminal regulatory scheme outside the federal criminal law power * In pith and substance the prohibitions in ss 8 to 13 come within the scope of the federal criminal law power and are valid criminal law. Together with ss 5 to 7, these provisions form a valid prohibition regime that is consistent with the general pith and substance of the Act as a whole.   Are the administrative provisions valid under the ancillary powers doctrine?   * In pith and substance, many of these provisions do not come within Parliament’s criminal law power. However, these provisions support the criminal law prohibitions in ss 4 to 13 and are valid under the ancillary doctrine. * Ancillary powers doctrine:  1. Severity of the extrajurisdictional incursion  * Scope of the heads of power in play (property and civil rights and matters of a merely local or private nature) – very broad * Nature of the impugned provision – none purport to create a substantive right (function merely to assist in enforcing the Act), tailored to a small corner of the vast topography of the provincial power over health, designed to supplement, rather than exclude, provincial legislation * History of legislating on the matter in question – Parliament has long sought to address issues of morality, health, and security * **The ancillary provisions constitute a minor incursion on provincial jurisdiction – the rational and functional connection test should be applied**  1. Rational and functional connection test  * Sections 14 to 19 fill a gap by addressing the practical considerations inherent in the functioning of the scheme; the other provisions are entirely subsidiary   Factors that determine the severity of an extrajurisdictional incursion:   1. Scope of the heads of power in play  * Broad heads of power lend themselves to jurisdictional overlap 🡪 less likely to give rise to highly intrusive provisions (intrusion will generally be less serious) * Narrow heads of power 🡪 quite susceptible to have provisions ‘tacked-on’ to legislation which is validated under them (intrusion will generally be more serious) * If provision intrudes on a broad head of power 🡪 intrusion will generally be less serious because it does not overwhelm the jurisdiction of the other level of government * Intrusion on a narrow legislative competency 🡪 more serious because it threatens to obliterate that head of power  1. The nature of the impugned provision  * Remedial (designed to help enforce the substantive aspects of the Act, but not in itself a substantive part of the Act) 🡪 less serious * Limited in scope 🡪 less serious * Meant to coexist with legislation enacted by the other level of government (as opposed to replace legislation introduced by the other level of government) 🡪 less serious  1. History of legislating on the matter in question  * History of legislation (from the enacting body) in the area supports the legitimacy of the impugned provisions and suggests they will not prove unduly intrusive on the other level of government   Note – LeBel and Deschamps JJ wrote a separate judgment, in which they characterized the pith and substance of the Act as the regulation of assisted human reproduction as a health service. They found that the ancillary powers doctrine did not apply. Cromwell J wrote another separate judgment, in which he characterized the pith and substance as the regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction. However, he found that some provisions were valid as they did not share the constitutional characterization of the impugned provisions viewed as a whole. |

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

* Various mechanisms exist for giving recognition to local interests in criminal law matters

1. Section 92(14) gives the provincial legislatures jurisdiction over the administration of justice in the province (including provincial policing) and the power to prosecute *Criminal Code* offences is delegated to the provinces
2. In some cases, the federal government itself has drafted its criminal laws in ways that allow them to be shaped by the provinces to respond to loca conditions
3. Judicial recognition of concurrent provincial jurisdiction in matters that may also be the subject of criminal law
   * Section 92(15) allows the provinces to enact penal sanctions, but the power is understood as an “ancillary” one, authorizing the use of penal sanctions to enforce provincial regulatory schemes that are validly anchored elsewhere in the s 91 list of provincial powers
     + The cases that follow turn on the issue of what constitutes a valid provincial anchor and the extent to which the courts are willing to recognize a double aspect with respect to matters covered by the *Criminal Code*

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| Re Nova Scotia Board of Censors v McNeil (1978)(SCC) |
| Facts – The Nova Scotia *Theatres and Amusements Act* and regulations enacted under it established a system for licensing and regulating the showing of films, Sanction for breach of the regulations was a monetary penalty and revocation of a theatre owner’s license. McNeil sought a declaration that the provisions of the Act and the regulations were *ultra vires* the provincial legislature.  Who won? Attorney General of Nova Scotia  Issue – Is the province clothed with authority under s 92 to regulate the exhibition and distribution of films within its own boundaries which are considered unsuitable for local viewing by a local board on ground of morality?  Holding – The legislation is, in pith and substance, directed to property and civil rights and therefore valid under s 92(13). Its validity is also sustained under s 92(16) as a matter of a “local and private nature in the Province”.  Ratio – Morality and criminality are far from co-extensive and legislation which authorizes the establishment and enforcement of a local standard of morality in the exhibition of films is not necessarily “an invasion of the federal criminal field”.  The provincial Government in regulating a local trade may set its own standards which is no sense exclude the operation of the federal law.  Reasoning – The Act and Regulations are primarily directed to the regulation, supervision and control of the film business within Nova Scotia. The Act is not concerned with creating a criminal offence or providing for its punishment, but rather in so regulating a business within the Province as to prevent the exhibition in its theatres of performance which do not comply with the standards of propriety established by the Board.  Note – Laskin CJC dissenting:  The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing, whether in films, in art or in a live performance is within the exclusive power of Parliament under its authority to legislative in relation to the criminal law. |

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| Dupond v City of Montreal et al (1978)(SCC) |
| Facts – The City of Montreal passed a bylaw prohibiting parades or other gatherings that “endanger tranquility, safety, peace or public order” in public places and thoroughfares. One section of the bylaw gave the city’s executive committee the power to make an ordinance prohibiting public gatherings if there were reasonable grounds to believe that the gatherings would endanger “safety, peace or public order.” The penalties provided for violation of the bylaw and ordinance were fines and imprisonment. The executive council imposed a prohibition on all public demonstrations for 30 days, and both the bylaw and ordinance were challenged by Dupond.  Who won? City of Montreal et al  Holding – The bylaw and ordinance are *intra vires* as a regulation of the municipal public domain, a pre-eminently local matter.  Reasoning – The challenged enactments are distinguished from the *Criminal Code* provisions dealing with breach of the peace because of their preventative character. |

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| Westendorp v The Queen (1983)(SCC) |
| Facts – Westendorp challenged the constitutionality of s 6.1 of By-law 9022 of the City of Calgary after she was charged with being on the street for the purpose of prostitution in contravention of the by-law. The bylaw dealt generally with the regulation of the use of city streets. Section 6.1 dealt specifically with prostitution.  Who won? Westendorp  Issue – Does the bylaw invade federal authority in relation to criminal law?  Holding – The municipality has overreached, offending the division of legislative powers.  Ratio – The rule coming out of *Dupond* is limited because *Dupond* related to a municipal anti-demonstration by-law which was also emphasized as being of a temporary nature.  Reasoning – There is nothing in By-law 9022 which invigorates s 6.1 which must stand on its own merit as a valid municipal by-law. Section 6.1 is of a completely different order from its preceding sections and all those succeeding it. It is specious to regard s 6.1 as relating to control of the streets because the offence arises only by proposing or soliciting another for prostitution. If a concurrency of legislative power was established (going beyond a double aspect principle), a Province or municipality could usurp exclusive federal legislative power. |

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| Rio Hotel Ltd v New Brunswick (Liquor Licensing Board) (1987)(SCC) |
| Facts – The New Brunswick *Liquor Control Act* gave the Liquor Licensing Board the power to attach conditions to liquor licenses regulating and restricting the nature and conduct of live entertainment in licenses premises. A license was issued to Rio Hotel with a condition precluding nude performances, and the hotel owner argued that the condition related to public morality and therefore fell within the exclusive jurisdiction of Parliament under s 91(27).  Who won? New Brunswick (Liquor Licensing Board)  Issue – Is the Act *ultra vires* the provincial government?  Holding – The province is able to prohibit nude entertainment as part of a liquor licensing scheme notwithstanding the related provisions in the *Criminal Code*.  Reasoning – The legislation is *prima facie* related to property and civil rights within the Province and to matters of a purely local nature as the Legislature seeks only to regulate the forms of entertainment that may be used as marketing tools by the owners of licensed premises to boost sales of alcohol.  The provincial regulatory scheme relating to the sale of liquor in the Province can, without difficulty, operate concurrently with the federal *Criminal Code* provisions.  There is no colourable intrusion upon a federal head of jurisdiction. |