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# CONSTITUTIONAL INTERPRETATION

### *Reference re Meaning of the Word “Persons” in Section 24 of the British North America Act, 1867 [1928] SCC*

|  |
| --- |
| **Issue:** whether women could be appointed to senate based on the meaning of ‘persons’ in relation to BNA |
| * Speaking not of ‘persons’ generally but of qualified persons, therefore question is whether female persons are qualified to be summoned to the Senate by GG * Interpretation: “as they are framed for the guidance of the people, their language is to be considered in its **ordinary and popular sense**” * “There can be no doubt that the word “persons” when standing along prima facie includes women.” Does the word “qualified” then, exclude women? → yes. * Off the bat denial that deciding desirability (To confirm legitimacy as a judge who is merely interpreting the constitution rather than imposing personal ideology) |
| * Example of tension between SCC and JCPC * Example of SCC jurisprudence up until 1970s (**formalistic, cautious, and technical)** |

***THEN:***

### *Edwards v. Canada (Attorney General) [1930] AC 123, 1 DLR 98 (PC)*

|  |  |
| --- | --- |
| **F** | *5 Petitioners asked gov’t to allow an appeal of the reference judgment above to JCPC; gov’t agreed and appeal was heard; October 18, 1929 the JCPC unanimously reversed the judgment of the SCC* |
| **RA** | “Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared...**The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits…[and] like all written constitutions it has been subject to development through usage and convention.”** – Lord Sankey |

### Constitution Act, 1982

**s. 52 (1)**: “The **Constitution of Canada is the supreme law of Canada**, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

→ effectively creates judicial review; similar to what would’ve been done under the doctrine of repugnancy

## Interpreting the Constitution Act, 1982

### *Reference re Secession of Quebec,* [1998] 2 SCR 217

|  |  |
| --- | --- |
| **I** | 1. Under the [Constitution of Canada](https://en.wikipedia.org/wiki/Constitution_of_Canada), can the [National Assembly](https://en.wikipedia.org/wiki/National_Assembly_of_Quebec), legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally? 2. Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? 3. In the event of a conflict between domestic and international law, which would take precedence? |
| **D** | No, no, no conflict ∴ unnecessary. |
| **RE** | 1. Constitutional framework includes **federalism, democracy, constitutionalism + the rule of law, and protection of minorities** – these are interdependent and interact; this framework prevents Quebec from asserting that it can unilaterally disrupt the structure of the Canadian constitution. However, if a nationwide referendum decided in favour of Quebec independence, the rest of Canada would have no basis to deny the right of Q to pursue secession. 2. The right to self-determination under int’l law does not specifically grant component parts of a sovereign state to unilaterally secede from its parent state; the right was meant to be exercised w/in an existing framework of states – e.g. for people under colonial rule or foreign occupation. Otherwise, so long as a people has the meaningful exercise of its right to self-determination *within* an existing nation state, there is no right to unilaterally secede 3. Because the int’l law on this topic is in line w/ domestic law, there is no need to consider this. |

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

|  |  |
| --- | --- |
| What would be the applicable amending formulae for specific senate reforms? | |
| **Senatorial Tenure** | * Engages interests of provs by changing fund’l nature or role of the Senate * Role of senate is to provide feedback and imposing set terms would undermine ability to do so |
| → s. 38 [7/50 amending procedure] |
| **Consultative Elections** | * Instituting elections for senate nominations would change const’l architecture b/c it would endow senators w/ popular mandate (inconsistent w/ the senate’s fund’l nature and role as a complementary leg’ve chamber of sober second thought) * S. 44 (unilateral fed’l amending procedure) is made subject to s. 42 * **Section 42(1)(b)** provides that **the general amending procedure** (s. 38(1)) applies to constitutional amendments in relation to “the **method of selecting Senators**” (includes more than the formal appointment of Senators & covers the implementation of consultative elections; covers entire process by which Senators are “selected” |
| → s. 38 |
| **Property Qualifications** | 1. Personal net worth of >$4k (s. 23(4), *CA,* 1867) can be repealed under unilateral federal b/c it updates const’l framework re: senate w/o affecting senate’s fund’l nature and role 2. Real property req’ment (s. 23(3)) would similarly not change fund’l nature and role *but* b/c it would render 23(6) inoperative (relates to Quebec senators), it would constitute an amendment to 23(6) |
| 1. → s. 44 [unilateral fed’l procedure] 2. → s. 43 [special arrangement procedure - consent of Quebec’s National Assembly] |
| **Abolition of Senate** | * Abolition of the Senate is not merely a matter relating to its “powers” or its “members” under s. 42(1)(b) and (c) of the Constitution Act, 1982. [This **provision captures Senate reform, which implies the continued existence of the Senate**. Outright abolition falls beyond its scope.] * Elimination of bicameralism would render mechanism of review inoperative and effectively change the dynamics of the constitutional amendment process. * fundamentally alter our constitutional architecture — by removing the bicameral form of government that gives shape to the Constitution Act, 1867 — and would amend Part V |
| → s. 41(e) [requires the unanimous consent of Parliament and the provinces] |

### *Reference re Supreme Court Act, ss. 5 and 6*

|  |  |
| --- | --- |
| 1. Whether s. 5 includes past members of Quebec bar or only applies to current members  * Eligibility req’ments: who gets to be appointed to SCC & Specific req’ments for Quebec judges * composition of SCC found to be const’lly entrenched * read the words in relation to what else the Supreme Court Act says (textual) | 1. If Nadon is not eligible under reading of s. 5, is it appropriate for the SCC to amend the relevant sections of the Supreme Court Act to allow otherwise.   No. **S. 5**: Composition is protected by amending formula; constitutional text, such that it can only be changed with respect to the 7/50 rule |

# FEDERALISM:

## Introduction to the Study of the Law of the Constitution, by A.V. Dicey (1885):

* A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of “state rights.”
* three leading characteristics of completely developed federalism flow from notion that unity and state sov’ty can be reconciled:

1. the supremacy of the constitution
2. the distribution among bodies with limited and co-ordinate authority of the different powers of government
3. the authority of the Courts to act as interpreters of the constitution

The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; Bench of judges is not only the guardian but also at a given moment the master of the constitution.

The Compact Theory

colonies had made a compact, ratified by the British Parliament, creating the Dominion and conferring powers and property and, after Confederation, they continued to exist as the new provinces

## T.J.J. Loranger, a Quebec judge: Elements of the ‘federal compact’:

by forming themselves into a federal association, under political and legislative aspects, they formed a central government, only for interprovincial objects

far from having created the provincial powers, fed’l power derived from provincial powers

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

* Fed’lism not an end in itself; rather it is valued or criticized b/c it is felt to promote or constrain other important valued and is believed to have certain effects
* As a doctrine assoc’d with other political values b/c it is thought to further the approximation of these values in practice∴ proposals for change can be judged by whether they serve/block these values
* Fed’lism can be assessed via 3 diff vantage points:

1. Community: localists vs. universalists
2. Democratic Theory: majoritarians vs. minority rights protectors

#### Madisonian Argument:

* One approach is concerned w/ protecting citizens from gov’ts (stresses preservation of liberty and minority rights against tyranny of maj) ∴ defends fed’lism b/c it ensures power is fragmented among competing gov’tal authorities

#### Montesqueieian Argument:

* stresses the advantages of smaller units in terms of governmental responsiveness and citizen participation

1. Functional effectiveness: Powers are allocated not according to what different communities need to express and protect themselves but rather according to a **division of labour criterion**: which level can most efficiently and effectively carry out any given responsibility of contemporary government

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

\*\* not necessarily tied to particular time periods \*\*

|  |  |  |
| --- | --- | --- |
| **Facet** | **Classical** (Pre-WWII, JCPC era) | **Modern** (Post-WWII era) |
| **Exclusivity** | Strong; prohibits as much overlap as possible; little interplay  Watertight compartments  Mutual modification – if you locate a jurisdiction to perform a certain law-making task, it *cannot* be contained w/in the opposing jurisdiction  (once it’s fed’l, it can’t be prov’l and vice versa); | More overlap & interplay; greater flexibility & less 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; exclusive ability to pass laws that deal predominantly with a subject matter within the enacting government’s catalogue of powers where spillover effects into other gov’t’s jurisdiction are ok |
| **Judicial Role** | Activism; w/ legal vacuums, judges must make law more often | Restraint; avoids the deregulatory tendencies of the classical paradigm by maximizing the ambit of the legislative powers available to the federal and provincial governments alike. |
| **Preserving provincial autonomy** | More autonomous (for both levels) by virtue of mutual modification  Tends to be more expansive towards prov’l powers | - allows legislation to have spillover effects on the other government’s areas of jurisdiction ∴ creates areas of social life subject to overlapping or concurrent powers - where overlapping federal and provincial laws come into conflict, the rule of federal paramountcy prevails so less autonomous |
| **Critique** | - complex social problems don’t fit neatly into jurisdictional boxes  - virtually any piece of leg’n could be ultra vires  - could create vacuums (flip-side of mutual modification) by hiving off parts of interconnected phenomena  - economically conservative (at a time when the trend was not to federally monitor the economy) | - can be employed in a manner that compromises provincial autonomy |

# INTERPRETING THE DIVISION OF POWERS

*The distribution of law-making abilities is exhaustive re: federalism concerns*

*By virtue of Charter rights, however, there are some things which neither government can do*

Challenging a statute on division of powers can take three routes: Validity//Applicability//Operability

## Validity : Characterization of Laws

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

### Pith and Substance Test:

|  |  |
| --- | --- |
| *Step* | *Process/What you’re looking at* |
| 1. identification of the **“matter”** of the statute (also called *characterization* of the law)   \*\*i.e. dominant characteristic | The legislation and its circumstances (statutory interpretation):   1. statutory context 2. **purpose** of the legislation, as illustrated by its legislative history or by government reports identifying a problem which triggered the legislation   \*\*\*this has been the dominant form of inquiry; such a focus turns in part on judicial attitudes of deference to legislatures and concerns about balance of powers in the fed’l system   1. **effects** of the legislation may also be relevant. |
| 1. delineation of the **scope** of the competing classes | Ss. 91 & 92 (Constitutional Interpretation):   * i.e. what falls under a certain head of power * room for discretion b/c there is opportunity for extensive overlapping regulation, because the constitution confers jurisdiction to make laws regarding certain classes of subjects, rather than jurisdiction over facts, persons or activities – difference between ‘health care’ (class) and ‘hospital’ (specific activity w/in the class) * courts often uphold overlapping legislation using the **“double aspect doctrine,”** whereby they acknowledge that some laws may have both federal and provincial purposes. |
| 1. **determination** of the class into which the challenged statute falls | * discretion in defining the scope of classes is not unlimited, for precedent plays an important role in constitutional adjudication * History, as well, may play a part in the definition of class boundaries, for some judges look to the meaning of words or practices in 1867 to guide them in interpreting the scope of the classes today * Precedent and history may assist the courts in defining the classes of powers, but they do not fix the boundaries of classes nor show whether a law should come within one class rather than another   + 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 governments |

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

* about sets of laws, not sets of facts
* “it has to look not merely at the thing legislated about, but the object or purpose legislated for.”
  + This sounds plausible, but is not as helpful as it seems // intention, purpose, object, consequences – they can all be construed or understood differently; it’s not a scientific exercise
  + Inevitably influenced by judicial attitudes and preconceptions about values regarding what is desirable
* Stare decisis will remove some uncertainty but classification will still have unpredictability

### *Starr v. Houlden*, [1990] 1 SCR 1366

SCC’s general approach to questions of validity in the fed’lism context: first step is identifying the matter

→ P+S is determined by considering leg’ve scheme, judicial precedent, and a “concept of fed’lism” comprised of the enduring values in the allocation of power between the two levels of gov’t

### Pith and Substance

#### Citizens Insurance Company v. Parsons (1881), 7 AC 96 (PC)

|  |  |
| --- | --- |
| **F** | * Parsons claimed that conditions of insurance K were void because they did not comply with Ont. legislation (it wasn’t in conspicuous type or ink) * insurers argued that the legislation was ultra vires for province to make the insurance company do these things. |
| **I** | *Whether the Ontario legislation which regulated a set of standard conditions was valid* |
| **RA** | trade and commerce (Fed’l) does not mean regulating K of a *particular* business or trade like fire insurance in a single province. Belongs to Ont. (92(13)) for property and civil rights |
| **RE** | * P+S: construed narrowly: regulation of insurance Ks w/in single province * Scope: 92(13) – broad sense of civil rights is read to mean legal rights vs. trade and commerce narrow sense in the regulation of trade affecting whole dominion or inter-prov’l trade * Fit: Fits best in 92(13)   + Then employs mutual modification   + No conflict → belongs to prov |

#### R v Morgentaler, [1993] SCC:

Illustrative of what a court will take into account in determining the matter or pith and substance of a law // also of the modern approach

|  |  |
| --- | --- |
| **F** | Abortion law – circumscribes places where abortions may be conducted |
| **I** | Whether the law was enacted as a valid measure of health care regulation or whether it was, in pith and substance, a criminal law measure. |
| **RA** | *Medical Services Act* and *Medical Services Designation Regulation* deal with abortion as a **socially undesirable practice** and are thus criminal law in pith and substance. Consequently, the acts are ultra vires the province of Nova Scotia. The appeal must therefore be dismissed and the acts struck down in whole as being invalid. |
| **RE** | Legal and practical effects: prevents privatization by prohibiting the private provision of designated services but also prohibits the performance of abortions in certain circs w/ penal consequences which makes it questionable  use of extrinsic materials to determine purpose: e.g. former s. 251 of crim code; overlap of the old prov’n’s legal effects = evidence of the ‘mischief’ // leg’ve history: events immediately preceding point to this being Morgentaler’s clinic |

#### AG Canada v AG Ontario (Employment and Social Insurance Act), [1937] PC

|  |  |
| --- | --- |
| **I** | Out of a fund created by the joint contributions of workers and employers, the federal *Employment and Social Insurance Act* provided for compulsory insurance against unemployment for workers |
| **D** | Whether the leg’n is a valid exercise of fed’l legislature (b/c it is a taxation measure) or is ultra vires (b/c it deals with insurance, a prov’l matter under property and civil rights) |
| **RA** | Act dealt with property and civil rights, because it dealt with insurance, which had always been a provincial matter, and because it regulated contracts and employment ∴ in its “pith and substance,” within s. 92 and it was not a response to an emergency that might be justified by p.o.g.g. |

## 

#### Reference re Employment Insurance Act (Can.), ss. 22 and 23 [2005] 2 SCR 669

|  |  |
| --- | --- |
| **F** | The *Employment Insurance Act* gave parental benefits which Quebec took to be an ultra vires exercise of the fed’l gov’t.  Que felt that this dealt directly w/ supporting families w/ children ∴ matter under 92(13) or a local and prov’l nature only (92(16))  Fed argued it was just an unemployment insurance matter (91(2A)) |
| **I** | Act ultra vires fed gov? |
| **D** | Valid under 91(2A) |
| **RA** | In pith and substance, the benefits were held to be a mechanism for providing replacement income during an interruption of work which is consistent w/ essence of fed’l jurisdiction to preserve workers’ economic security and ensure their re-entry into the labour market by paying benefits in the event of an employment interruption (whatever the source of the interruption). |
| **RE** | Interruption of employment will be regarded as unemployment regardless of its nature  Invocation of living tree: 91(2A) must be interpreted progressively and generously  Consistent with the purpose of the fed’l jurisdiction |

#### AG Canada v AG Ontario (Labour Conventions), [1937] PC:

|  |  |
| --- | --- |
| **F** | 1919: Canada signed the Treaty of Peace as a member of the British Empire to secure humane conditions for workers.  1930: International Labour Organization of the League of Nations adopted conventions about hours of work, minimum wages, and days of rest.  March and April 1935: Dominion government ratified these conventions and  June 1935: enacted these three statutes expressly to implement its treaty obligations. |
| **I** | Whether fed’l gov’t could enact leg’n in order to implement treaty obligations, regardless of the content of the leg’n (i.e. whether or not it could be located in fed’l list of powers) |
| **D** | Ultra vires. |
| **RA** | For the purposes of ss. 91 and 92, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and *as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained* |
| **RE** | Fed gov can enter into treaties whereas only legislatures can alter domestic law to perform obligs under treaty ∴ validity of leg’n can only be found under 91 and 92  Absurd result if fed couldn’t enact leg’n under its own authority for a certain matter but then could make an int’l treaty which had the same effect for that same matter |
| **Quote** | “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” |

### Double Aspect Doctrine

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

**Double Aspect Doctrine:**

* Gov’ts each get to occupy the field, regulating the same human activity, but motivated by different concerns which relate to their respective heads of power
  + Can be one law that occupies same field in different ways

Double-aspect = Modern paradigm b/c it allows for greater blurriness/sharing

* + Can be two laws which each occupy the same field of human activity
* Not a test but a characterization
* if the two rules call for **inconsistent behaviour** from the same people, they are in conflict or collision and both cannot be obeyed

→ federal paramountcy rule comes in (overrides prov’l leg’n)

#### Multiple Access Ltd. v. McCutcheon, [1982] SCC

|  |  |
| --- | --- |
| **P** | Multiple Access: Appellant/Δ/Company accused of insider trading  McCutcheon: Respondent/Π/Shareholder |
| **F** | * *Ontario Securities Act*, RSO: prohibited insider trading in shares trading on TSX * *The Canada Corporations Act,* RSC 1970: almost identical provisions, applicable to corporations incorporated under federal law. * shareholder action was initiated against insiders of Multiple Access Inc., a federally incorporated company, with respect to trades on the Toronto Stock Exchange, under *Ontario Securities Act* |
| **I** | 1. Does the Ontario statute validly apply to Multiple Access, or does it fall under exclusive fed’l jurisdiction b/c it is a fed’lly incorporated company?   **[*If both statutes are valid and applicable to the facts (double aspect)*]**   1. Does paramountcy mean prov’l statute are nonetheless inoperative? (fed’l Act would be advantageous for Multiple Access b/c limitation period for initiating an action under that statute had already elapsed.) |
| **D** | Both statutes are valid and applicable on the facts |
| **RA** | The double aspect doctrine is applicable when the federal and provincial legislation are roughly equal in importance and therefore there would be little reason to ‘kill one and let the other live’ |
| **RE** | *Pith and substance:*   1. prov’l law valid = securities 2. fed’l law valid = fed’l incorporation 3. Power of legislating re: incorporation of companies with other than prov’l objects belongs exclusively to fed’l parliament (covered under **POGG**); moreover, this fed’l power extends to matters which are part of the internal organization as opposed to commercial activities   *Application of Double-Aspect:*   * no simple dichotomy between legislation of a company law character and legislation affecting property and civil rights in the province * corporate-security federal and provincial characteristics of the insider trading legislation are roughly equal in importance   *IJI or Federal Paramountcy?*  Neither doctrine applies b/c no conflict |
| **ETC** | * Double-aspect has its origins in ***Hodge v. The Queen* (1883)**, (PC) [regarding leg’n regulating liquor trade: “subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.” * In ***Bell #2*,** Beetz J was troubled by the complexities and inefficiencies accompanying concurrent jurisdiction & was concerned that use of double-aspect doctrine would be effectively expanding areas where provs are subordinate to fed’l gov’t |

### Necessarily Incidental/Ancillary Doctrine (NID):

* 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.
* However, if the larger scheme is constitutionally valid, the impugned provision may also be found valid **because of its relationship** to the larger scheme.
* This will depend on how well the offending provisions are integrated into the valid legislative scheme.
  + If they are **not closely related**, they will be **severed and declared invalid**.
  + If they are **closely related**, they will be deemed “**necessarily incidental**” to the valid scheme and the law as a whole will be upheld.

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

#### General Motors of Canada Ltd. v. City National Leasing, [1989] 1 SCR 641

Notable case for holding that the Act is valid exercise of fed’l power over gen’l regulation of trade // also illustrative of NID

|  |  |
| --- | --- |
| **F** | Civil action brought against GM for contravening *Combines Investigations Act*; action brought under s.33.1  GM claimed s. was ultra vires b/c the creation of civil causes of action lies in prov’l jurisdiction under 92(13) |
| **I** | Is the impugned section of the otherwise valid fed’l act ultra vires? |
| **D** | Section upheld using NID |
| **RA** | S. 33.1 is a remedy bounded by the parameters of the Act; it does not create an open-ended private right of action. Section 33.1 is sufficiently integrated into the purpose and underlying philosophy of the Act because privately initiated and conducted proceedings can help fulfill the objectives of the legislation. |
| **RE** | 1. Validity of s. 33.1 (Does it encroach on prov’l power?)    1. Yes; Creates a civil right of action, which is generally a matter w/in prov’l jur    2. To what extent does it encroach?       1. Only a remedial prov’n – purpose to help enforce substantive aspects of the Act; remedial prov’ns typically less intrusive       2. Limited scope of action under 33.1 – doesn’t create a general cause but is rather limited by the provisions of the act       3. Well est’d that fed’l gov’t is not const’lly precluded from creating rights of civil action if they’re warranted 2. Act as a whole valid? Yes; validly enacted pursuant to fed’l power relating to trade and commerce 3. What is the relationship between 33.1 and the rest of the act?    * The correct approach is to ask whether it is functionally related to the general objective of the leg’n and to the structure and content of the scheme    * Necessary link between 33.1 and the act exists |
| **Quote** | “these doctrines and concepts [of watertight compartments and IJI] have not been the dominant tide of constitutional doctrines: rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.” |

#### Quebec (A.G.) v. Lacombe, 2010 SCC 38

|  |  |
| --- | --- |
| **F** | Δ possesses fed’l license to provide comm’l aerial and air taxi services out of Gobeil Lake; municipality where lake lies obtained injunction against Δ claiming the activity violated zoning restrictions  Zoning restrictions were contained in an amendment to general zoning by law for municipality – both enacted by municipality under authority of Quebec’s *Act* *respecting land use planning and development* |
| **I** | Are the zoning restrictions valid provincial legislation? |
| **D** | The zoning restrictions in question are invalid. |
| **RA** | The zoning restrictions were directed at removing aviation activities from the municipality ∴ fall o/s prov’l jurisdiction. They are not sufficiently integrated w/in a valid scheme to be saved under ancillary doctrine. |
| **RE** | Adds to the rational functional test set out in GM:  The **necessity test** should apply to **serious intrusions** on the powers of the other branch of government, while the **rational functional** test should apply to **lesser intrusion**s. The required degree of integration increases in proportion to the seriousness of the encroachment. |
| **A** | Amendments brought by by- law No. 260 do not meet the rational functional connection test in General Motors. It has not been shown that the amendments further the zoning purposes of by- law No. 210, in either purpose or effect. These amendments are simply, on their face and in their impact, **measures directed at removing aviation activities from a significant part of the municipality**. |

## Applicability: The Interjurisdictional Immunity Doctrine:

* Typically comes into play where a generally worded prov’l law is **valid** **in most of its applications** but in some it arguably overreaches and affects a matter falling w/in a core area of fed’l jurisdiction
  + Some kind of effect in fed’l jurisdiction that is w/in the core of a head of power’s
  + IJI protects certain matters that fall w/in fed’l jurisdiction from the impact or interference of otherwise valid prov’l laws – those matters said to be w/in that jurisdiction’s core
* When invoked, courts will ‘read down’ prov’l (or fed’l) statutes to protect the core of exclusive fed’l (or prov’l) powers from encroachment
* Reading down = a technique of interpretation used to save statutes from const’l challenge – words of the statue are interpreted to apply only to matters w/in the enacting body’s jurisdiction [often but not exclusively used w/ IJI]
* Accepted though contentious feature of Canadian fed’lism and has been applied in a broad range of different areas
* Note that the **core** of jurisdiction is immunized, **not the leg’n**
  + The consequence is that certain laws rendered **inapplicable**
  + It doesn’t matter whether or not there’s any leg’n coming out of that core (Creates the possibility of a gap)

### *McKay v. The Queen,* (1965) SCC

|  |  |
| --- | --- |
| **F** | * The appellants displayed a sign on their house in support of a candidate during the period of a federal election campaign * convicted of violating a municipal bylaw that prohibited the display of all signs in a residential area, except for certain specified exceptions, such as real estate signs and trespassing or safety signs. * The appellants **did not challenge the validity of the bylaw, only its application in the circumstances.** |
| **I** | Is the municipal bylaw applicable to campaign signs for candidates in a fed’l election? |
| **D** | on its proper construction by-law number 11737 does not prohibit the display of the sign displayed by the appellants during the period mentioned in the charge against them. |
| **RA** | just as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words effect a result which would be beyond its powers if brought about by precise words |
| **RE** | * The by law resulted in restrictions that were extremely general ∴ necessary to determine whether it was the intent of the leg’re to give provinces the power to regulate this specific type of sign * Contention that the bylaw provides” “during an election to Parliament, no owner of property shall display on his property any sign soliciting votes for a candidate at such election” – Clearly this would have been ultra vires → if it can’t enact this law explicitly, the very broad, general law cannot be read as to effect the same result * Does not fall w/in property and civil rights b/c seeking to influence others to vote is not a right enjoyed as a citizen |
| **ETC** | Instead of asking whether application of the bylaw would impair or sterilize the integrity of federal elections, Cartwright asked **whether the bylaw, had it been targeted specifically at signs erected during the course of federal election campaigns, would have been valid**. |

### 

### *Commission du salaire minimum v. Bell Telephone Co. of Canada (Bell #1),* [1966] SCC

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| --- | --- |
| **F** | QUE Min Wage Act gave the Commission du salaire minimum the power to regulate matters such as minimum wages, working hours, and working conditions. When the Commission sought to impose a levy on Bell Canada, the company refused to pay it, saying statute could not apply to it because of its undisputed status as a federally regulated undertaking. |
| **I** | whether the Quebec Minimum Wage Act applied to Bell Telephone, an undertaking within exclusive federal jurisdiction pursuant to ss. 92(10)(a) and (c) |
| **D** | **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. |
| **RA** | [A]ll matters which are a vital part of the operation of an interprovincial are subject to the exclusive legislative control of the federal parliament. |
| **RE** | 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, it followed that the Quebec minimum wage law could not apply to federal undertakings. |
| **ETC** | → initiated **a significant doctrinal change** by broadening the test for inter jurisdictional immunity applicable to federal undertakings. |

### 

### *Bell Canada v. Quebec (Bell #2),* [1988] SCC

|  |  |
| --- | --- |
| **F** | Quebec law gave a right to protective reassignment to pregnant worker; Bell contested its applicability |
| **I** | Whether the prov’l law could apply to the fed’lly regulated undertaking |
| **D** | The provincial law had to be read down so as not to apply to federally regulated undertakings such as Bell Canada. Since the working conditions and management of an undertaking are vital or essential parts of the undertaking, it follows that the Quebec Act could not apply to them. |
| **RA** | In order for the inapplicability of provincial legislation rule to be given effect, it is **sufficient that the provincial statute** which purports to apply to the federal undertaking **affects a vital or essential part** of that undertaking, without necessarily going as far as impairing or paralyzing it. |
| **RE** | * **basic minimum unassailable content (AKA the core)** of the jurisdiction over FRU = management of federal undertakings and their working conditions * exclusivity rule approved by Bell Canada 1966 = general rule against making works, things or persons under the special and exclusive jurisdiction of Parliament subject to provincial legislation, when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are subject   → exclusive power to legislate as to management of an undertaking includes the equally exclusive power to make laws regarding its labour relations. |
| **ETC** | * IJI applies but results in a gap, given that prov’l law inapplicable and no mandate to have a fed’l law take its place |

### *Irwin Toy Ltd. v. Quebec (AG),* [1989] SCC:

|  |  |
| --- | --- |
| **F** | Broadcaster = FRU // Irwin Toy = FIC  Quebec law prohibited advertisers from directing ads at kids <13 yo  Advertiser argued the law was inapplicable to the extent it applied to TV advertising and thereby affected a vital part of the management of broadcast undertakings |
| **I** | Whether the law was inapplicable because it affected a federally regulated undertaking |
| **D** | Law was applicable; narrowed approach to IJI found in Bell #2 |
| **RA** | The “affecting 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. |
| **RE** | * Since the provincial law at issue did not apply directly to broadcasters (it affected them indirectly through the prohibitions directed at advertisers), the majority applied the impairment test. * did not explain why the test should differ in this way (impression that the distinction was an unprincipled one, apparently produced by the majority’s desire to loosen the constraints) |

**After Bell #2 and Irwin Toy**→

1. Prov’l law directly affects federal undertaking in vital or essential part = prov’l law read down so that not applicable to that aspect of the fed’l undertaking **IJI**

**∴ easier to meet – you can affect something w/o sterilizing it**

1. Prov’l law indirectly affects fed’l undertaking in vital or essential part = prov’l law not read down, law is fully applicable **NO IJI**
2. Prov’l law directly or indirectly affects fed’l undertaking and fed’lly incorporated company so that sterilizes or impairs operation = prov’l law read down so that not applicable in that manner **IJI**

### *Canadian Western Bank v. The Queen in Right of Alberta,* 2007 SCC 22

|  |  |
| --- | --- |
| **F** | * CWB starts selling insurance. Thought they could be immune from prov’l leg’n that insurance vendors must comply with b/c banks are under federal jurisdiction. They state the insurance is central to their operations. * Banking regulated under 91(15), so it is a fed power. Banks sell insurance products. Parsons establishes insurance industry falls to prov jurisdiction. * The bank is arguing that A) they are immune from provincial laws and B) that the laws frustrate the purpose of the Bank Act (an attempt to bring up paramountcy). |
| **I** | Whether the *Alberta Insurance Act,* that regulates insurance agents in Alberta, is constitutionally inoperable or inapplicable to federally-regulated banks that promote the sale of insurance to their customers because of IJI or Paramountcy. |
| **D** | No conflict between the laws – insurance is not at the core of what banks do. Banks are not protected by interjurisdictional immunity, thus a bank selling insurance will have to comply with provincial regulations regarding insurance. |
| **RA** | Paramountcy does not apply because there is no operational conflict or frustration of purpose.  For IJI to apply, the prov law must have an intrusion on a “core” federal power; insurance is not at the core of the banking business, so is inapplicable. |
| **RE** | When can you apply IJI:   * Where there is a precedent for doing so * Have to determine what is at the core, and use IJI when provision touches on the vital/core of power…   *…the core of “what they do and what they are” that is specifically of federal interest.*  ***“certain minimum content” … “basic, minimum, unassailable content” … “authority that is absolutely necessary to enable Parliament to achieve the purpose for which exclusive legislative jurisdiction was conferred”***   * Can protect prov jurisdiction, but should be restrained to only protect areas where there is precedence (there isn’t much precedent on this) |

### *British Columbia (Attorney General) v. Lafarge Canada Inc.,* 2007 SCC 23

|  |  |
| --- | --- |
| **F** | Lafarge wants to develop a cement plant that will be integrated into the marine uploading facility. Ports are federal jurisdiction. The smoke stack is well in excess of the height allowed by the city. The residential members want Lafarge to obtain a City Development Permit. Federal Port Authority says this is not necessary because it is on public, federal property and falls within s.91(10) "navigation and shipping". |
| **I** | Whether the federal and provincial laws conflict. |
| **D** | Yes. Paramountcy applies |
| **RE** | *Paramountcy:*   * Are both laws valid? Pith and Substance shows that both the fed and prov laws are valid; fed under s.91(10) “navigation and shipping” and prov under matters of a local interest (92(16)) * Are the two laws inconsistent with each other? * Operational conflict? The case says yes bc the fed would allow project while the prov would not   + Corbett: this is not a true operational conflict; nothing requires the fed govt to issue the permit. So the prov prohibits (says no) but the fed does not require. * Frustration of federal purpose? Yes. The bylaws clearly frustrates (has different restrictions than the federal) |

#### NOTES ABOUT IJI FROM CWB AND LAFARGE:

Court declined to apply the doctrine, and for essentially the same reason— application of the provincial legislation at issue was **held not to encroach on a core** area of federal legislative jurisdiction

* **CWB:** insurance was held not to fall within the core of Parliament’s jurisdiction over banking;
* **Lafarge:** permitting a cement batching plant to be built on land owned by the port authority was held not to fall within the core of Parliament’s jurisdiction over navigation and shipping.
* affirmed the doctrine’s legitimacy and acknowledged that the doctrine **works to protect the exclusivity of both provincial and federal jurisdiction**— which had been uncertain before.
* tightened up the test that has to be met in order for the doctrine to be applicable, and expressed a preference for relying on the doctrine of federal paramountcy over IJI to resolve federalism disputes once the validity of the impugned legislation has been established.
* Order of doctrines—paramountcy first, then IJI
* Paramountcy allows for flexible, leaky interplay between levels of gov’t; it’s the dominant tide
* IJI is the undertow b/c of its rigidity
* Note that Western Bank and Insite did IJI first so if you’re making an argument about using IJI first, explain why using the case law

### *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39

|  |  |
| --- | --- |
| **F** | Fed’l act does not require prior permission to operate an airfield for private aviation; but if it is reg’d, then it becomes subject to federal standards  Two individuals constructed and registered their airstrip on their lot, in an area designated as an agricultural region under Que’s ARPALAA  s. 26 of ARPALAA prohibits use of land in designated areas for purposes other than agriculture w/o specific authorization – Parties didn’t obtain it  Commission then orders them to demolish airstrip |
| **I** | 1. S. 26 ultra vires? 2. Inapplicable insofar as it affects location aerodromes? 3. Inoperative by reason of conflict w/ fed’l law? |
| **D** | 1. Yes. 2. Inapplicable to the extent that it prohibits aerodromes in agricultural zones 3. Unnecessary to consider paramountcy b/c dealt with by (2) but wouldn't apply |
| **RE** | 1. **Pith and substance:** it’s about land use planning and agriculture ∴ valid 2. **IJI:**     1. **TRENCHING**: core of the head of power has already been identified: fed’l power over aeronautics includes power to determine at its core → yes.    2. **SERIOUS**: Whether the prov’l law **impairs** the fed’l exercise of core competence ∴ yes; significantly restricts/impairs fed’l power to control location   The impairment test established in *Canadian Western Bank* marks a midpoint between sterilization and mere effects.  “The move away from the “affects” test of *Bell Canada* reflects growing resistance to the broad application of interjurisdictional immunity based on modern conceptions of cooperative federalism and a perceived need to promote efficacy over formalism.”  *COPA* [45]: impairment suggests an impact that not only affects but that seriously or significantly trammels the federal power   1. **Paramountcy:** Can either arise from operational conflict or frustration of purpose |

IJI tests that come out of these cases up to *Irwin Toy* and after latest SCC Cases…

Prov. law **~~directly~~** ~~affects~~ impairs **federal undertaking** in **~~vital or essential part~~** protected core

→ prov. law read down so that not applicable to that aspect of the federal undertaking in core of federal jurisdiction **IJI**

Prov. law **~~directly or indirectly~~** **sterilizes or** **impairs** operation of **federal undertaking and federally incorporated company**

→ prov. law read down so that not applicable in that manner **IJI**

### *PHS Community Services Society* SCC

|  |  |
| --- | --- |
| **I** | Whether ss. 4(1) and 5(1) of *CDSA* are inapplicable to the extent they impair the province’s ability to make decisions about health care |
| **D** | IJI doesn’t apply for 3 reasons; CDSA provisions are applicable. |
| **RA** | IJI is a narrow doctrine. Its premise of watertight compartments and exclusive cores is in tension with the evolution of CDN const’l interpretation towards the more flexible concepts of double aspect and cooperative fed’lism. |
| **RE** | 1. Proposed core of prov’l power over health has never been recognized. Although it’s possible, cts are reluctant to identify new areas for IJI 2. Failed to identify a delineated ‘core’ of an exclusively prov’l power; there is considerable overlap w/ fed’l jurisdiction and the fact that the power is so vast makes it hard to carve out a core there 3. Application of IJI to a protected core of prov’l health power has the potential to create serious legal vacuums |

### *Marine Services International Ltd. v. Ryan Estate,* 2013 SCC 44

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| --- | --- |
| **F** | Ryan bros died when ship capsized; dependants applied for and rec’d compensation through prov’l act and also proceeding in negligence action under fed’l act  Under fed’l act, possible to commence add’l actions against other actors in negligence  Estates allege negligence of ship’s designer ∴ grounding cause o/s workers comp scheme but prov’l act precludes other legal actions |
| **I** | Whether a statutory bar of action in a prov’l workers’ compensation scheme can preclude a person to whom the bar applies from bringing a negligence action that is provided for by a fed’l marine negligence statute |
| **D** | Neither interjurisdictional immunity nor federal paramountcy applies in this case; the prov’l act is constitutionally applicable and operative |
| **RE** | Pith and Substance Analysis: *(Canadian Western Bank)* Not contested that both are valid  IJI (2 stage test from *COPA*):   1. Does the provincial law trench on the protected “core” of a federal competence?   → Yes. Maritime negligence law is part of the core federal power over s.91(10) “navigation and shipping” (*Ordon Estate v Grail* [1998] SCC)   1. Extent of trammeling?   *→* prov’l act does not impair that power; it *is not significant or serious*  Federal Paramountcy  Operational conflict? Both acts can operate side by side, no conflict  Frustration of Fed Purpose? Not met |

### *Bank of Montreal v. Marcotte,* 2014 SCC 55

|  |  |
| --- | --- |
| **F** | Group of consumers launched class action against several banks on the basis that conversion charges levied by the banks on credit card purchases made in foreign currencies violated Quebec’s consumer protection act (CPA)  Banks argues that relevant sections of CPA inapplicable via IJI  Alternatively, argued ss inoperative via FP b/c it frustrated purpose of fed’l banking scheme to provide for clear, comprehensive, exclusive national standards applicable to banking products and banking services offered by banks |
| **I** | Whether IJI applies to make s. 12 of CPA inapplicable  Whether FP applies to make s. 12 of CPA inoperative |
| **L** | s. 12 of CPA: requires that certain charges ancillary to one type of consumer credit must be disclosed  s. 272: remedies |
| **D** | IJI: Cannot be plausibly said that s.12 impairs or significantly trammels the manner in which Parliament’s legislative jurisdiction over bank lending can be exercised. ∴ IJI is not engaged  FP: Ss 12 & 272 do not provide for standards but rather articulate a contractual norm in Que; they support rather than frustrate the fed’l scheme |

## Operability: Paramountcy

Paramountcy looks at whether or not some incidental effects need to be dealt with, not just left in place

* 2 laws involved (prov’l vs. fed’l)
  + Triggered when there is a conflict between a prov’l law and a fed’l law
* 2 steps:
  + Validity inquiry of each law individually [pith and substance] // Start w/ the prov’l law, then to the fed’l law (only if you’ve got two valid laws, do you entertain the idea of paramountcy)
  + Conflict? → if there is a conflict, prov’l law is suspended (rendered inoperable) to the extent of that conflict

∴ all of the cases revolve around what constitutes a conflict

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A judicially created rule to deal with overlap and conflict modeled on s. 95 of CA, 1867: in cases of conflict between fed’l and prov’l laws, the fed’l law is paramount and the prov’l law is inoperative to the extent of the conflict. Prov’l law’s operation is merely suspended to the extent that it conflicts with federal legislation. If the federal legislation is repealed, the conflict disappears and the provincial law may once again be applied

### Ross v. Registrar of Motor Vehicles, [1975] SCC

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| --- | --- |
| **F** | Ross convicted of DUI  s. 238(1) of Crim code allowed TJ to make add’l orders for driving – judge ordered he was to be prohibited for 6 mos except for work and provided his license not be suspended  Registrar in Ont suspended his license for 3 mos in accordance w/ Ont Traffic Act  Ross brought action claiming Ont. Act inoperable b/c of conflict w/ Code; Registrar sought declaration that s.238(1) was ultra vires |
| **I** | 1. S. 21 Valid? 2. S. 238 Valid? 3. If both valid, is there conflict req’ing application of FP? |
| **D** | Both valid; no conflict b/c they can operate simultaneously. Order declaring license not to be suspended was unauthorized and must be ignored. |
| **RA** | There must be an express conflict, such that mutual compliance is impossible, in order for FP to apply. |
| **RE** | Criminal Code merely provides for the making of prohibitory orders limited as to time and place; if an order is made that applies during which a provincial licence suspension is in effect, there is no repugnancy. Both restrictions can apply. As long as the prov’l license suspension is in effect, the person doesn’t get to benefit from indulgences granted under fed’l leg’n but these are just permissive laws. |

### Multiple Access Ltd. v. McCutcheon, [1982] SCC

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| --- | --- |
| **F** | Ont. Act and Fed’l Act apply to share trading on TSX and FICs, respectively. |
| **I** | If both acts are valid, then does paramountcy apply, to make the Ont. act inoperable? |
| **D** | Both statutes are valid (via double aspect); no FP, the acts can operate concurrently. |
| **RA** | Duplication is the ultimate in harmony. Any resulting untidiness or diseconomy of duplication is the price we pay for a fed’l system in which economy often has to be subordinated to prov’l autonomy |
| **RE** | There is no frustration of purpose with duplicative laws; courts can already prevent double recovery, so it doesn’t matter that in certain circs, a Π can choose which act to use.  No good reason to invoke FP unless there’s impossibility of dual compliance |

### *M&D Farm Ltd. v. Manitoba Agricultural Credit Corp.,* [1999] SCC

|  |  |
| --- | --- |
| **F** | Stay of foreclosure proceedings issued pursuant to fed’l law and an order authorizing their commencement was issued pursuant to prov’l leg’n |
| **I** | Whether there was a conflict between the two sufficient to trigger FP |
| **D** | Yes. |
| **RA** | Where there is an express contradiction, FP will be triggered. |
| **RE** | Ct cannot simultaneously give effect to a stay of enforcement proceedings and a right to initiate foreclosure proceedings against the debtor = express contradiction |

### *Bank of Montreal v. Hall,* [1990] SCC:

“Conflict in operation” referred to in Multiple Access 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

|  |  |
| --- | --- |
| **F** | Hall contracted loans and gave interest in piece of farm equipment as security; Defaults on loan, and bank seized machinery (pursuant to fed’l *Bank Act,* ss. 178, 179) but failed to give notice of their intention to seize, established under Saskatchewan *Limitation of Civil Rights Act,* s. 27.  The operation of Sk leg’n terminated security interest and released Hall from further obligations. |
| **I** | Whether FP applied to make the impugned ss of the prov’l act inoperable |
| **D** | Yes; ss. 19-36 of the prov’l act inapplicable to security taken pursuant to ss. 178 and 179 of the fed’l *Bank Act.* |
| **RA** | Paramountcy inquiries should focus on whether operation of the provincial Act is compatible with the federal intent. Absent this compatibility, dual compliance is impossible. The two statutes differ to such a degree in the approach taken to the problem of realization that the provincial cannot substitute for the federal.  Focus on the **legislative scheme** to determine federal intent. |
| **RE** | 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 ∴ to require the bank to defer to the provincial legislation is to displace the legislative intent of Parliament |

### *Husky Oil Operations Ltd. v. MNR,* [1995] SCC:

validly enacted provincial legislation, in this case the Saskatchewan Workers’ Compensation Act, cannot apply to bankruptcies if it would have the effect of subverting the order of priorities for creditors’ claims set out in the federal Bankruptcy Act

### *Law Society of British Columbia v. Mangat,* 2001 SCC 67:

|  |  |
| --- | --- |
| **F** | *Immigration Act* permits non-lawyers to appear before the Immigration and Refugee Board but the BC *Legal Profession Act* prevented it |
| **I** | Whether there is a conflict sufficient to trigger FP |
| **D** | Federal intent was to improve access ∴ conflict |
| **RA** | Where there is an enabling federal law, the provincial law cannot be contrary to Parliament’s purpose. Because it would be impossible for a judge or an official of the IRB to comply with both acts, there is an express and operational conflict. FP triggered. |
| **ETC** | Writing for the ct, Gonthier noted that “the more supple paramountcy doctrine,” not interjurisdictional immunity, is the appropriate doctrine when dealing with alleged operational conflicts between valid provincial and federal laws |

### *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town),* 2001 SCC 40

|  |  |
| --- | --- |
| **F** | municipal bylaw that restricted the use of pesticides to specified locations for specified purposes; fed’l act regulates which pesticides can be registered for manufacture or use in Canada |
| **I** | Whether there was an operational conflict between the Municipal bylaw and the fed’l act |
| **RA** | Federal law is permissive legislation that does not purport to exhaustively regulate pesticides. There is no impossibility of dual compliance, nor does the bylaw displace or frustrate the purpose of the federal legislation. Therefore, there is no conflict that gives rise to federal paramountcy. |
| **RE** | permissive versus mandatory versus entitlement → these will figure in the examination of what the fed’l intent was |

### *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 1 THIS IS THE CURRENT STATE OF THE LAW

|  |  |
| --- | --- |
| **F** | Federal *Tobacco Act* s. 30(1) provides that, “[s]ubject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product related brand element.” Section 30(2) further provides that retailers may post signs indicating the availability and price of tobacco products.  Sk *Tobacco Control Act*, s. 6 bans all advertising, display and promotion of tobacco or tobacco-related products in any premises in which persons under 18 years of age are permitted |
| **I** | Whether s. 6 of *TCA* is sufficiently inconsistent with s. 30 of *TA*, to be rendered inoperative pursuant  to FP |
| **D** | No inconsistency that would render s. 6 inoperative. |
| **RA** | The test for paramountcy is inconsistency with federal intent; there are two ways this can manifest:   1. Impossibility of mutual compliance 2. Frustration of federal intent |
| **RE** | Overarching principle from *Multiple Access* is that provincial enactment cannot frustrate purpose of federal enactment; impossibility of dual compliance sufficient but not necessary for finding inconsistency   * purpose and effect of s. 30 is to define with greater precision the prohibition on the promotion of tobacco products * Parliament did not grant, and could not have granted, retailers a positive entitlement to display tobacco products for 2 reasons:   + As the criminal law power is prohibitory in character, provisions enacted pursuant to it, such as s. 30, do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament.   + difficult to imagine how granting retailers a freestanding right to display tobacco products would assist Parliament in providing “a legislative response to a national public health problem of substantial and pressing concern” (Tobacco Act, s. 4). |
| **A** | * **dual compliance is possible** in this case. A retailer can easily comply with both s. 30 of the Tobacco Act and s. 6 of The Tobacco Control Act in one of two ways: by admitting no one under 18 years of age on to the premises or by not displaying tobacco or tobacco-related products. * Section 6 of The Tobacco Control Act **does not frustrate** the legislative purpose underlying s. 30 of the Tobacco Act. Both the general purpose of the Tobacco Act (to address a national public health problem) and the specific purpose of s. 30 (to circumscribe the Tobacco Act ’s general prohibition on promotion of tobacco products set out in s. 19) remain fulfilled |

### Run-down of paramountcy:

*Rothmans* → over-arching principle = frustration of fed’l purpose

Test:

1. Dual compliance possible? (in reference to both individuals and other entities like courts, tribunals) if yes,
2. Frustration of parliamentary intent?

Look at things like positive entitlement, permissive vs mandatory if intend to cover the field must say so in explicit terms

…

*COPA* → Frustration test: require clear proof of purpose

…

*Marine Services:* uses language of inconsistency, same as conflict; paramountcy does not apply to inconsistency between common law and valid legislative enactment; you need two valid leg enactments // inconsistency & conflict used interchangeably

…

Do paramountcy first b/c of suppleness (*Canadian Western Bank*) and the modern paradigm – allowing for overlap – and then IJI.

# CRIMINAL LAW

## Federal Powers over Criminal Law

**2 issues** arise from the fact that this is a national power:

1. Scope of federal power
2. Extent to which the existence of the federal power has constrained provincial attempts to control local conditions of public order and morality

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

Modern starting point for discussion of federal criminal law power

Definition emerges of criminal law:

* 1. Relates to a valid criminal law purpose (non-exhaustive list: public peace, order, security, health, morality) **evil or injurious or undesirable effect upon the public against which the law is directed**.
  2. Prohibition and penalty (formal req’s)

The object was economic in this case and the public interest in the regulations was in the trade effects; the prohibition of manufacture, possession and sale was ultra vires but prohibition on importation upheld under fed’l power to regulate foreign trade

## Requirement of a Valid Criminal Law Purpose

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| **Case** | **Circumstances** | **Outcome** |
| *Boggs v The Queen,* [1981] SCC | Provision in Criminal Code made it an offence to drive if driver’s licence suspended. But licence suspensions could be imposed for various reasons (not just breaches of crim law). | → fails for lack of criminal law purpose (No discernible interest in the criminalization of provincial regulatory schemes) |
| *Dominion Stores Ltd. v. The Queen,* [1980] SCC | Fed’l leg’n creating nat’l grade names for agricultural products – made the use of grade names voluntary but made the *mis*use of the grade names an offence | → failed for lack of purpose |
| *Labatt Breweries of Canada Ltd. v. AG Canada,* [1980] SCC | Fed’l commodity standards for food but leg’n not directed either at the adulteration of food or false/misleading advertisement or labelling  No consumer protection purpose found | → failed for lack of purpose though the form of the law (dealt w/ details of production + sale in brewing industry) may have been an additional factor |
| *Ward v. Canada (Attorney General)*, 2002 SCC 17 | Regulation enacted under fed’l Fisheries Act prohibited sale of young harp seals and hooded seals; leg’ve hx suggested it was enacted for fisheries management rather than to criminalize killing and sale of seals | → failed for lack of purpose; regulation upheld under fisheries power |
| *R v. Malmo-Levine; R v. Caine,* [2003] 3 SCR 571 | prohibition of MJ possession in Narcotics Control Act | → upheld as having valid purpose of protecting vulnerable groups from self-inflicted harm |

### *RJR MacDonald Inc. v. Canada (Attorney General),* [1995] SCC: confirms broad scope of power – plenary, not frozen in time, allows exemptions, can attack ancillary activity

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| **F** | * Parl enacted *Tobacco Products Control Act,* which prohibited all advertising and promo of tobacco products offered for sale in Canada, except for foreign tobacco products in imported publications * Also req’d unattributed health warnings on all tobacco products * Violation was an offence punishable by summary conviction or indictment & could include jail time | |
| **I** | 1. Law ultra vires b/c it intrudes into prov’l jurisdiction over advertising in 92(13) or (16)?  2. Law infringed s.2(b)? | |
| **D** | 1. Intra vires as legit exercise of crim law  2. Unjustifiable infringement on freedom of expression | |
| **RE** | → evil = detrimental health effects caused by tobacco consumption (evidenced by s. 3 – Act’s purpose cl)   * No ‘health’ head of power; both levels of gov’t can legislate validly in the area * Scope of crim leg re: health matters is circumscribed only by req’s that leg’n contain prohibition w/ penal sanction & be directed at a legit public health evil * Fed’l crim law power to legislate w/ respect to dangerous goods also encompasses power to legislate w/ respect to health warnings on those goods | |
| Tobacco products and advertisement have always been legal | → fails; neglects the fact that criminal law not frozen in time |
| Parliament can’t legislate toward ancillary concern w/o targeting foremost concern | → fails; Parliament allowed to choose circuitous path to accomplish its goals as long as the goals are const’lly valid |
| Laws are regulatory not criminal (too many exemptions) | → fails; crim law may validly contain exemptions w/o losing status as crim law – exemptions delineate logical and practical limits to Parliament’s exercise of crim law power int his context |

## Requirement of a Criminal Form: Prohibition & Penalty

* Regulatory features may (but won’t always) prevent law from being upheld as valid crim law
* E.g. powers of licensing and prior inspection, involvement of an admin agency exercising discretionary authority in administration of law, detailed regulation and civil remedies
* Ct will allow deviation from strict form if there is a clear crim purpose

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| **Case** | **Outcome** |
| ***RJR*** | just b/c there were exemptions, didn’t mean it wasn’t crim law |
| ***R v Cosman’s furniture*** | detailed regulations for standards re: manufacturing babies’ cribs and cradles made pursuant to Hazardous Products Act (also an offence to sell w/o conforming to the standards) upheld b/c directed @ health + security of infants |
| ***Hydro-Quebec*** | regulatory scheme w/ large amt of admin discretion nonetheless satisfied formal req’ments |
| ***R v Zelensky*** | Ancillary civil remedies upheld – prov’n of crim code authorized ct to order an accused found guilty of indictable offence to pay compensation to victim |
| ***R v Swain*** | provs of Crim Code that provided for detention in a prov’l mental health institution of persons acquitted of an offence by reason of insanity were intra vires fed’l gov’t. Ct acknowledged that the provs were not designed to impose punishment but rather to prevent commission of further crimes & protection of public safety (however also found to violate s.7). |

### *R v Hydro-Quebec,* [1997] SCC: regulatory scheme w/ heavy admin discretion can satisfy form

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| **F** | Fed’l minister of the environment made an order restricting HQ’s emissions of PCBs, pursuant to the EPA. |
| **I** | Whether ss. 34 & 35 of EPA were ultra vires the federal government |
| **D** | Valid exercise of criminal law power. |
| **L** | **s. 34:** provides for regulation of subs on LTS; GIC given extensive powers to regulate every conceivable aspect of List of Toxic Substances  **s. 35:** allows Mins to make interim orders where a sub isn’t on LTS or where it isn’t being adequately regulated & Mins believe that immediate action is necessary |
| **RA** | A regulatory scheme with large measures of administrative discretion can meet the requirement of criminal form so long as it is consistent and promotes a valid criminal purpose. |
| **RE** | **PURPOSE:**   * Pollution is an evil that Parl can legit seek to suppress; one of the major challenges of our time & req’s action @ all levels of gov’t * Although this use of crim law may affect matters falling w/in prov’l ambit, this does not mean it’s encroaching on prov’l power   + Act does not preclude provs from exercising their own powers to control pollution independently or in supplement   + Analogous to use of crim law power to regulate food and drugs   + Both levels freqly work together to address such concerns   **PROHIBITION & PENALTY:**   * S. 34 defines situation where use of sub in LTS is prohibited, subject to penal consequences   **OVERBREADTH?**   * Definition of toxic subs not overbroad b/c nature of EP leg’n necessitates broad wording |

### Reactions to *Hydro Quebec:*

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| **PRO – Jean Leclair** | **ANTI – David Beatty** |
| * Even Quebec environmentalists encourage fed’l involvement b/c of lack of prov’l interest * as long as it’s directed towards a valid public purpose, that’s fine (formal req’s be damned) * Provinces can still enact leg’n, if it’s doing so for a purpose that relates to its valid heads of power even if the fed’l gov’t enacts leg’n directed toward a crim law purpose * Values being upheld are Canadian in a way that transcends race, ethnicity, gender, language, etc | * decision unjustifiably expanded the fed’l gov’ts crim law power by removing constraint of prohibition + penalty * Undermined fed’l-prov’l equilibrium of previous decisions in the environment * Allowing this, in a paradigm where paramountcy operates allows fed to dictate environmental policies to provs |

### *Reference re Firearms Act, (Can.),* [2000] SCC: pith and substance RE: 91(27)

In the pith and substance test, when you’re analyzing the statute (in order to determine its dominant characteristic), you’re looking at PURPOSE/PROHIBITION/PENALTY to see if it’s valid crim law

* *FA* banned and restricted use of certain types of firearms; also established a comprehensive licensing system for possession and use along w/ national registration system
* An offence under Code to not comply w/ the requirements
* AB challenged the law, arguing it was regulatory not criminal due to the complexity of the legislation and discretion given to the chief firearms officer // trying to regulate property

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| **Purpose** | Directed to enhancing public safety – guns are dangerous and pose a serious risk |
| **Prohibition + Penalty** | * ss. 91 and 112 prohibit possession w/o registration * backed by penalties |
| **Regulatory** | Although there are regulatory aspects, they’re secondary to the primary criminal law purpose   * does not give chief firearms officer undue discretion nor are the defences defined by an administrative body (holla back, HQ dissent!) * Inherently dangerous nature of firearms distinguishes the leg’n from prov’l regulatory schemes * cars and guns are used for primarily different purposes (cars used mainly as means for transportation and their danger is usually unintended and incidental to that use whereas guns pose a pressing safety risk in many if not all of their functions) |
| **Balance of Powers** | * Ct found that it didn’t upset balance of powers b/c effects on property rights were incidental * Act didn’t hinder ability of provinces to regulate the property and civil rights aspects of guns, nor did it precipitate the fed’l govt’s entry into a new field (gun control had been a subject of fed’l leg’n since confed) |

## *Reference re Assisted Human Reproduction Act,* 2010 SCC 61: 4-4-1 mixed decision

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| **Issue:** | Whether the Act was valid crim law, directed at curtailing practices that may contravene morality, create public health evils or put security of individuals at risk, or was directed at the regulation of the practice of medicine |
| **Result** | Cromwell (tie-breaker) finds ss 8,9 and 12 in purpose and effect **prohibit negative practices** associated with assisted reproduction and fall within the traditional ambit of the federal criminal law power. Similarly ss 40(1), (6) and (7), 41 to 43, and 44(1) and (4) set up mechanisms to implement s. 12 and are therefore **saved through necessary incidental doctrine**. |
| **McL (4)** | *Pith and substance: the prohibition of negative practices associated with assisted reproduction*  Purpose: Dominant thrust is prohibitory; emphasis on prevention of certain practices *//* aspects concerning provision of health services don’t rise to level of P&S; not preventing provinces from enacting leg’n promoting beneficial practices in the field  Effect: dominant effect is to create a regime that will prevent or punish undesirable practices; effects on provincial matters but are not its dominant purpose nor effect  Scope of fed’l criminal law → (prohibition, penalty, purpose) [AKA *Head of power/fit:*]  Prohibition + Penalty: **yes** – act has both.   * Use of a carve-out means that the excepted practice is not prohibited, not **positively allowed** by the fed’l law (i.e. permissive leg’n only) * Shared jurisdiction over health BUT fed’l gov’ts ability to pass law re: health must be limited (reappearance about prov’l jurisdictional concerns)   → In order to preserve balance of power, crim law for protection of health must address a legit public health evil (*RJR-MacDonald*)  Criminal Law Purpose: **public health evil**  Crim law can target conduct that Parl reasonably apprehends as a threat to our central moral precepts & general consensus that there should be regulation  Public health evils have 3 commonalities: [subtest to be applied if CL purpose is protection of health]  (a) Human conduct  (b) That has an injurious or undesirable effect  (c) On the health of members of the public  **Viewed as a whole, Statute is grounded in valid crim law purposes** |
| **Lebel&**  **Des (4)** | The Impugned provisions represent an overflow into provincial exclusive jurisdiction over hospitals, property and civil rights, and matters of a merely local nature: deal w/ the regulation of the management of hospitals, and several of the impugned provisions deal with subjects already governed by the Que Civil code, demonstrating that they are properly characterized as prov’l matters. |
| **Cromwell**  **(1)** | The impugned provisions as a whole are regulatory and best classified as relating to the establishment, maintenance and management of hospitals, property and civil rights in the province and matters of a merely local nature. |

### *Quebec (AG) v Canada (AG),* 2015 SCC 14: valid to overturn long gun registry & destroy data

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| **F** | * Parl instituted gun control act, then enacted the *Ending the Long-gun Registry Act* (ELRA) which sought to destroy the data on the fed’l registry * Quebec argued fed not allowed to use crim law power to destroy the records w/o making the data available to those provinces that wish to create their own registries |
| **I** | 1. Whether s. 29 (which ordered the destruction of the data) was ultra vires fed’l gov’t.  2. Does cooperative fed’lism prevent parl from legislating to destroy the data? |
| **D** | 1. Yes, valid leg’n  2. Cooperative fed’lism does not constrain fed’l leg’ve competence in this case |
| **RA** | When determining which head of power for a law which overturns a previously enacted scheme, attention must be paid to the proper classification of *that* scheme. Cooperative federalism does not impose a positive obligation to facilitate cooperation where the const’l div of powers authorizes unilateral action |
| **RE** | VALIDITY:   * Quebec argues that it is invalid to destroy the ability of the provinces to regulate in relation to the administration of justice, public safety, and crime prevention * **Repealing enactment is valid if the substance of what it is repealing is valid** * matter of s.29 is to determine what will happen w/ data collected under the repealed leg’ve scheme → b/c the **character of the registration scheme, including data collection, was found to be public safety**, then the **ELRA** provs which deal with the remains of the data **shares the same characterization** * Also in the firearms reference, ct rejected the argument that the data retention provisions had the purpose of regulating property ∴ this argument can’t be used for its destruction * The fact that the data destruction makes it more difficult for Quebec to begin its own registry ≠ encroachment on prov’l jurisdiction * Not contested that repealing criminal provisions constitutes a valid exercise of crim law power   COOPERATIVE FEDERALISM:   * The registry flows directly from fed’l leg’n and does not depend on any prov’l statute; may have been a diff story if this were truly a case of interlocking fed’lism * Cooperative fed’lism is a way of allowing greater flexibility by developing mechanisms through which there is a continuous redistribution of powers and resources w/o recourse to the cts or the amending process |
| **DIS** | * Would have partially allowed appeal * Leg’n was the result of a partnership w/ the provinces and where there is an **integrated scheme** requiring the exercise of both fed’l and prov’l leg’ve powers, the analytical framework re: div of powers needs to be adapted accordingly * the section’s true purpose is to ensure that the information on long guns can no longer be used for any provincial purposes. …the regulation of long guns and the use of information about them fall primarily within the provinces’ power to make laws in relation to property and civil rights. * **As a result, the pith and substance of s. 29 relates to the provinces’ power over property and civil rights** |

## Provincial Power to Regulate Morality and Public Order

In our federal system, Parliament’s power over criminal law is in tension with the need to respond to local conditions of public order and morality that may vary regionally

**Mechanisms for recognizing local interests in criminal law matters:**

* Section 92(14) gives the provincial legislatures jurisdiction over the administration of justice in the province (including provincial policing), combined with federal delegation to the provinces of the power to prosecute *Criminal Code* offences.
* Section 92(15) allows provinces to enact penal sanctions to enforce prov’l regulatory schemes that are validly anchored elsewhere in Section 92 // sanctions are ‘ancillary/attached’ to another head of power
* Judicial recognition of concurrency.

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* basic distinctions between Federal and Provincial laws as outlined in the jurisprudence:
  + Provincial laws are **regulatory**, **private** and **preventative**.
  + Federal laws are **penal**, **public** and **punitive**.
* Key issue: Whether the prov’l gov is *punishing* (vs prevention of injurious behaviour relevant to the public) and thus reaching into fed power
* Cases: Each regulates activities also regulated by CC and clearly within federal law power: {McNeil Dupond Westendorp Morgentaler Rio} 🡪 *Green = upheld by government*

### *Re Nova Scotia Board of Censors v. McNeil,* [1978] 2 SCR 662: double aspect area of regulating immoral films

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| **F** | * *Theatres and Amusements Act* est’d system for licensing and reg’ating films * All films had to be submitted to prov’l censor board prior to exhibition * Censor board had unfettered power to permit/prohibit/direct changes before showing * Sanction for breach was monetary penalty + revocation of theatre owner’s license |
| **I** | Is the NS *TAA* ultra vires the provincial legislature? |
| **D** | Majority of act upheld, but s. 32 which was applicable to both films and live performances, was struck down. (Virtually indistinguishable from crim code provision) |
| **RA** | **Double aspect area**– Regulating immoral films has two aspects.  Provincial and federal government *both* get to regulate immoral films, but on different basis. (Provincial – focus on effecting business premises/operation; Federal – morality) |
| **RE** | * Characterized as local business and trade regulation because: {Regulation of private business premises; prevention; private business; compared to criminal code} * The law lay within provincial jurisdiction because its primary purpose was characterized as the regulation of a private business premises, not a concern about public morality. * Preventative: The goal of the provision is not to punish one after the fact (punitive) – it is to prevent the show from being shown in the first place (preventative). |
| **DIS** | * **Board is asserting authority to protect public morals, to safeguard public from exposure to films, ideas + images it regards as morally offensive, indecent, and obscene → this is w/in the exclusive power of fed’l gov’t under enumerated authority to leg’ate re: crim law** * At best the Act is attempting to supplement crim law which is forbidden * Prov’l leg’n can extend to objects w/ moral considerations but the objects must, in themselves, be anchored in the prov’l catalogue of powers and cannot be in conflict w/ fed’l leg’n → no such anchorage * Not tied to competence re: licensing and use of premises or entry into occupations b/c the censorship of films takes place w/o relation to any premises + is a direct prior control of public taste * Extremely concerned about the freedom of expression |

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### *Dupond v. City of Montreal at al.,* [1978] 2 SCR 770: looting → city ordinance = intra vires

* After numerous public demonstrations, at times accompanied by violence, vandalism, and looting, MTL enacted a bylaw prohibiting parades or other gatherings that ‘endanger tranquility, safety, peace or public order’ in public places
* Gave city’s executive committee power to make ordinance prohibiting public gathering if reasonable grounds for believing it would endanger same; penalties for violation were fines + imprisonment
* **Held to be intra vires** as a regulation of municipal public domain
  + Public, not private space
  + Preventative character… for both McNeil and Dupond, characteristic is that it is about stopping these things before the event, proactive.
* Emphasized the preventive nature of regulations

### *Westendorp v. The Queen,* [1983] 1 SCR 43: law against soliciting prostitutes enacted by Calgary; Ultra vires – clearly crim law

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| **F** | By-law dealt gen’lly with regulation of the use of city streets and included provisions controlling soliciting or carrying on business, etc. on any street – breaches led to fines → added s. 6.1 that dealt w/ prostitution and provided for > fines and longer prison terms |
| **I** | Whether 6.1 is invalid for invading federal jurisdiction in relation to the crim inal law |
| **D** | The purpose of 6.1 is so patently an attempt to control or punish prostitution as to be beyond question…there is no property question here, no question even of interference with the enjoyment of public property let alone private property. |
| **RA** | By-laws that concern [temporary] activities that are disruptive nuisances come within jurisdiction covering matters of a local nature. |
| **RE** | **P&S:** bylaw is not about the control of streets. Rather, it is about the moral evil   * No double aspect area * The bylaw attacks the evil of prostitution per se, not as a type of street nuisance. * Reconciling this with *Dupond*   + **Problem:** Both sets of facts geographically limited, not prohibitive, and before-the-fact and not punishing   + **Answer:** Dupond is temporary (30 day). Westendorp is permanent.   ∴ the interpretation of Dupond is narrowed |

→ note that subsequent SCC cases continue the general pattern set out in Dupond of upholding prov’l laws using double aspect

### *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board),* SCC

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| **F** | * **provisions** of Liquor Control Act give the liquor licensing board power to attach conditions to liquor licences regulating and restricting the nature and conduct of live entertainment in license premises (i.e. nude and semi-nude dancing) * No penal sanctions (just have your license withheld) |
| **I** | Whether the provisions allowing for liquor licenses which also regulated nude dancing were ultra vires the provincial government |
| **D** | The license was related to the sale and marketing of alcohol, not to public morality ∴ act upheld. |
| **RA** | Double aspect area: provincial government – regulation of business/serving of alcohol; federal government – public morality |
| **RE** | * Prima facie related to property and civil rights * confirmed prov’s ability to prohibit nude entertainment as part of a liquor licensing scheme notwithstanding the related provisions in the code * Although there is some overlap w/ code, there is no direct conflict + possible to comply w/ both; can operate concurrently * Distinguished from Westendorp b/c entertainment provisions are only a part of comprehensive scheme regulating sale of liquor |

### *Morgentaler (Again):*

Recall: provincial leg’n held to be invalid; purpose was prohibition of abortion as a moral evil, rather than medical procedures.

### *Chatterjee v. Ontario (AG),* 2009 SCC 19

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| **F** | * *Ontario Civil Remedies Act* (OCRA) authorized forfeiture of proceeds of unlawful activity but does not require allegation or proof that any particular person committed any particular crime * Can be forfeited if, on a BofP, the property seen as ‘proceeds of crime’ * Police arrested C, searched car; found no drugs but found money and items related to drug trade → C never charged but AG applied for forfeiture under OCRA |
| **I** | Whether the Act was ultra vires for encroaching on fed’l crim law power |
| **D** | No. |
| **RA** | May be true that forfeiture has de facto punitive effects in some cases but its dominant purpose is to make crime in general unprofitable, to capture resources and help compensate private individuals and public institutions for costs of past crime which are valid provincial objects |
| **RE** | * Ct held that b/c the CRA was enacted to deter crime and compensate victims of crime, and deterring crime is broad enough to have both fed’l and prov’l can pursue * CRA attacks crime through in rem forfeiture not prohibitions and penalty |

### Note: Provincial Commissions of Inquiry and the Criminal Law Power

* Cases where prov’l laws seen as potentially undermining procedural protections offered to accused under crim law
* E.g. where prov’l commission of inquiry has been est’d to examine conduct that has also given rise to crim investigation or charges
* General pattern has been to find a **double aspect** w/ respect to subject matter of the inquiry
* Purpose other than investigation of specific crime; To the extent that the provisions have some impact on the setting up of provisions, the impact on fed power is deemed incidental

### *Starr v Houlden,* [1990] SCC:

Commission of inquiry found to be ultra vires b/c the terms of reference establishing the commission were narrow – named only 2 people – and incorporated similar language to crim code provisions. SCC characterized it as being a substitute police investigation and preliminary inquiry. Interference w/ fed’l interests in enactment of and provision for system of crim justice embodied in code b/c it bypassed protection accorded to an individual by crim code

**∴ ultra vires**

# PEACE, ORDER, AND GOOD GOVERNMENT

Two theories of POGG Power:

**Centralist theory, most notably advocated by Laskin in *Reference Re Anti-Inflation Act***: a general power to legislate over all Canadian matters, and the provincial heads of power were ‘carved out’ from this, and the federal heads of power were simply elaborations of what POGG could be *OR*

**Residual power theory** (this is the theory that exists today): It is a residual power, which is different from both the 91 and 92 heads. It stands on its own, and has 3 branches:

* 1. **Gap Branch**: for undisputedly federal matters that were overlooked by constitutional drafters but which they nonetheless could contemplate at the time. (Not as important b/c it doesn’t get to court as a play; uncontroversial)
  2. **The emergency branch**
  3. **The national dimensions/concerns branch**

## The Emergency Powers Branch of POGG

### Reference re Anti-Inflation Act [1976]: AUTHORITATIVE EMERGENCY BRANCH CASE

**ESTABLISHES REQUIREMENTS FOR EMERGENCY BRANCH (RATIONAL BASIS, CRISIS, TEMPORARY) AND NATIONAL CONCERN (NEW, INDIVISIBLE, IMPACT)**

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| **F** | * Federal government enacted the *Anti-Inflation Act*, which established a system of price, profit, and income controls. It applied to private sector firms with more than 500 employees, members of designated professions, construction firms with more than 20 employees, and other private sector firms. * The Act was also binding on the federal public sector, but applicable to the public sector of each province only if an agreement was made between the governments. * The Governor in Council directed a reference to the Supreme Court to see if the Act was *ultra vires* and whether the Ontario agreement, purporting to bind the Ontario public sector to the Act’s stipulations was valid. * Seven judges (written by Laskin) held that the Act was supportable under the P.O.G.G. power as emergency or “crisis” legislation; two held it was not (written by Beetz). |
| **RA** | * Emergency branch requirements [Laskin]: rational basis, crisis legislation, temporary. * National Concern branch requirements [Beetz]: new, distinctive unity/indivisibility, impact on provincial government. * Hogg: *Anti-Inflation* constitutes a clear precedent for the admission of social-science briefs in constitutional cases where legislative facts are in issue.   ME: 3 branches to pogg // strong criteria for when you can use the emergency doctrine // start of the doctrine of what will be req’d for using the national dimensions doctrine |
| **RE** | Laskin C.J. (plurality):  Holds that the Act is valid under the emergency branch, but does not address the National Concerns branch, which he thinks is separate and distinct.  **Test for Emergency legislation:**   1. Parliament has a **rational basis** for regarding the legislation as a temporary necessity to meet a situation of crisis imperiling the well-being of Canada as a whole and requiring Parliament’s stern intervention.    1. The Court need not, and cannot, determine the existence of an actual crisis as a matter of fact, and must only weigh external evidence to determine the minimum requisite **rational basis**. The correct standard is that of a **rational politician**.    2. The Court in this case looked at a study done by Statistics Canada which showed that both unemployment and cost of living had gone up, which was enough to meet the standard of rational basis. 2. The Act must be appropriately characterizable as **“crisis legislation”**, although explicit use of words like “emergency” is not required // economic crisis is fine    1. The Preamble of the Act mentioned “inflation has become a matter of *serious* national concern” which was held by the Court to be enough.    2. The range of possible emergencies requiring Federal action is diverse and expansive. 3. The Act’s effect must be **temporary** // emergencies arise and diminish, if it continues it’s just a shit state of affairs   It must be framed as temporary measure but can be subject to extension of its operation → can’t just grab prov’l jurisdiction permanently // while there’s no limit on the subject matter of the leg’n, there’s a time limit b/c otherwise it’s unconstrained  →**this is the scope of the emergency powers doctrine**  The majority also identifies a second list of factors that are **not required** for valid Emergency legislation:   1. The Act does not have to have immediate effect 2. The Act does not have to be actually effective    1. Whether the Act will accomplish its purposes is irrelevant 3. The Act does not have to be comprehensive or have full-coverage    1. The *Anti-Inflation Act* allowed for provincial opt-out in regards to public sector jobs    2. The Act does not have to address the whole crisis 4. Act doesn’t have to mention ‘emergency’ |
| **DIS** | Beetz:  Beetz does not think the Act meets the requirements of valid legislation under the Emergency branch of P.O.G.G.   1. He requires that the Federal government make it very clear that it is exercising the Emergency branch. The federal legislation has to give an “**unmistakable signal**” that it is being enacted under the Emergency branch. Ritualistic words like “emergency” are not required. Not even the slightest sense of ambiguity should be contendable. The court isn’t going to find the emergency. Accepts that inflation *may* be an emergency and that it’s possible to leg’ate pre-emptively, and that the leg’n is temporary but that’s not suff. 2. The legislation should be effective, or at least requires something more than just a rational basis.   → Note that Laskin doesn’t deal w/ national concern, leaves it open, Ritchie rejects but…  Beetz provides a substantive analysis on the National Concerns branch. He agrees with Laskin that it is distinct from the Emergency branch, and expounds the requirements of National Concern legislation:   1. The Act must legislate over a **new subject matter** (like aeronautics + radio)    1. “containment and reduction of inflation” is not new, but an aggregate of several subjects, some of which form a substantial part of provincial jurisdiction    2. It must be new, otherwise it’s under 91 or 92 2. The subject matter must be **unified –** can’t be an amalgamation of other heads of power; must be distinct and indivisible 3. The court must pay attention to the **impact on Provincial jurisdiction**, and the Federal government cannot attempt to minimize it   → ONCE IT’S A NATIONAL CONCERN, IT’S PERMANENT   * The subject matter of the Act was too amorphous and ambiguous to constitute a valid exercise of the National Concern branch of P.O.G.G. * Ritchie J, with Martland and Pigeon JJ concurred with Beetz on National concern, but found that the Federal government validly enacted the Act under Emergency. |

**Swinton, “The Supreme Court and Canadian Federalism: The Laskin-Dickson Years”**

Argues that the philosophical leanings and styles of Beetz (staunch federalist, who was not a big fan of expansive POGG power) clashed with CJ Laskin (centralist who favoured broad, liberal interpretations and flexibility in interpreting the constitution). This clash can be seen in the Anti-Inflation Case.

### Emergency Legislation after the *Anti-Inflation Reference:*

* In 1988, the Federal Government enacted the *Emergencies Act* giving it power to declare a national emergency over a range of different hypothetical circumstances, including public-welfare emergencies.
* Under this Act, the Governor in Council can declare an emergency but must concisely describe the state of affairs constituting the emergency and it must be confirmed by Parliament
* declaration cannot be made without prior consultation with affecting provincial governments and an agreement by the provincial Cabinet that the province is unable to deal with the situation
* “signals”
* This constrains future emergency leg’n but it doesn’t CHANGE the test for emergency branch leg’n b/c parliament cannot unilaterally change that; it’s a symbolic gesture

## The National Concern Branch of POGG

### Emergency vs. National Concern

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| --- | --- |
| **Emergency** | **National Concern** |
| Temporary Jurisdiction | Permanent jurisdiction |
| Over all subject matters needed to deal with an emergency | Over distinct subject matters which do not fall w/in any of the enumerated heads of s. 92 |
| Partial and temporary alteration of the division of powers | And which are of national concern |

### 

### The National Concern Doctrine after *Anti-Inflation*

The doctrine emerges again in two cases which play a role in the formulation of the federal P.O.G.G. power expounded in *R v Crown Zellerbach*:

* 1. In ***Hauser*,** the majority of the Court found that the constitutional **validity of the *Narcotics Control Act* rested in the federal P.O.G.G. National concerns branch, not the criminal power**, since narcotics were **not a problem at the time of Confederation** and they did not come within matters of a merely local or private nature. It fell within the “general residual power” in the same manner as aeronautics or radio.
  2. In ***Schneider***, Dickson J upheld the constitutionality of the *Heroin Treatment Act* of BC and made reference to the national concerns doctrine. He talked about what has come to be known the **“provincial inability” test**, in relation to that doctrine. He reasoned that heroin dependency, as opposed to drug traffic, was not **beyond the capacity of the province to legislate effectively**.

### R v Crown Zellerbach Canada Ltd., [1988] SCC

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| **F** | * 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 is defined by including the internal waters of Canada. * Respondent works in forestry industry, wanted to dump debris, changed the bed of the water to allow room for construction boats + charged under the act. * No contention that the waste was dispersed anywhere; totally w/in the provincial internal waters |
| **I** | Does the federal government have the authority to legislate to prevent marine pollution via the national concerns branch? |
| **D** | Intra vires b/c enacted via national concerns branch of POGG. |
| **RA** | National Concern doctrine can be used by the federal government to enact legislation where it is a matter that is beyond the competence of the provincial legislature. The matter must be distinct and indivisible, and the |
| **RE** | National Concern Doctrine: (refinement of Beetz from Anti Inflation)   1. Separate and distinct from nat’l emergency doctrine (which only provides a const’l basis for leg’n of a temporary nature) 2. New matters:    1. Applies to new matters which did not exist at Confederation **and**    2. matters which, although originally matters of local or private nature have since, in the absence of nat’l emergency, become matters of nat’l concern 3. Scope    1. a matter must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of prov’l concern    2. scale of impact on prov’l jurisdiction that is reconcilable w/ the fund’l distribution of leg’ve power under the constitution 4. In determining whether there’s enough singleness, it is relevant to consider the effect of a prov’l failure to deal effectively w/ the intra-prov’l aspects on extra-prov’l interests [**prov’l inability test**] // functional and conceptual (i.e. practical ability w/in their jurisdiction and willingness to do so)   Provincial Inabilities:   * National dimension exists when it is beyond the reach of the province. However, only the items beyond the reach of the province would fall under POGG. * existence of a national dimension does not justify legislation that is more than necessary to fill the gap in provincial powers ∴ Where it would be possible to deal with the problem by two legislatures the national dimension only justifies federal legislation addressed to the risk of non-cooperation * But Beetz in Anti-Inflation Act states that if a matter falls within the national concern doctrine of POGG, Parliament has exclusive jurisdiction of a plenary nature to legislate, including its intra-provincial aspects. |
| **DIS** | * It’s true that there is more action needed but not through POGG * Regulation of marine pollution is an aggregation of already distinct matters pulled together * much of what it’s doing, it could do by pulling together its other powers like fisheries, over inter and extra pollution, nav and shipping, and criminal law on toxic subs, and then adding ancillary regulations *without* going to the national concerns doctrine |

#### Jean Leclair: Quest for National Interest

* Argument that the exclusive authority to regulate the sources of marine pollution is carte blanche to regulate every conceivable activity
* Appearance that judges who address the issue of conceptual indivisibility don’t apply it to the matter claimed to be of a nat’l dimension but rather to the leg’ve means employed to regulate it
* The conceptual indivisibility of a particular matter should hinge upon whether the totality of leg’ve means necessary for its overall regulation amounts to an important invasion of prov’l spheres of power
* In terms of prov’l failure to deal effectively w/ control or regulation: reference to political incapacity, unwillingness, or legal inability to deal w/ a problem?
* Gives impression that CDN fed’lism meant to achieve functional efficiency to the exclusion of other normative concerns // also undermines initial distribution of powers

#### Implications of Marine Pollution is a Matter of National Concern for prov’l jurisdiction over pollution in prov’l marine waters?

* LeDain rules that it’s not a concurrent jurisdiction b/c it has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-prov’l aspects – but later says that the prov’l inability test must not go so far as to provide a rationale for the general notion that there must be a plenary jurisdiction in one order of gov’t or the other to deal w/ any leg’ve problem
* Why don’t gen’l trends in modern fed’lism that permit significant regulatory overlap (via DAD and NID) also apply to matters of nat’l concern under POGG and allow provinces to reg’ate pollution in prov’l marine waters?

#### Sujit Choudhry – Understanding the Provincial Inabilities Test

* those subject-matters where the provinces are unable to act alone—that is, when pursuing their self-interest requires them to act together.
* On this conception, the Canadian federation is imagined as a scheme for mutual advantage
* Properly understood, the statements of the Court [in Crown Zellerbach and General Motors] set out 3 situations of provincial inability

1. **Negative Extra-Provincial Externalities:** National Concern doctrine premised on the risk of inter-prov’l non-cooperation
2. **Collective Action Problems:** 
   1. **Inter-prov’l**
   2. **Public goods**
   3. **Federal-Provincial Collective Action Problems**
3. **True Provincial Inability:** Provinces really constitutionally incapable of regulating subject-matters, even if wiling to do so

**Similarity to principle of subsidiarity in EU?**

Powers should be distributed between the centre and regions according to the principle that decisions should be made @ lowest level of gov’t that is reasonably possible; seen as a check on the expansion of federalization that preserves the sov’ty of member states

## Jurisdiction over the Environment:

Uncertainty remains about the scope of fed’l jurisdiction over the environment…

### *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992]

Deals w/ fed’l jurisdiction over environmental assessment → is it a plenary power?

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| **F** | * Environmental Assessment and Review Process Guidelines, issued under fed’l Department of Environment Act * req’d fed’l depts and agencies (w/ 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 effects * If it could, there must be a public review by eviro assessment panel * Alta gov’t proposed a dam; approval given by fed’l minister of transport but minister did not subject project to EAss * Society brought an action to quash MoT’s decision and to compel him and Min of fisheries and Oceans to comply w/ guidelines |
| **I** | Whether the guidelines order purports to give fed’l gov’t general authority over the environment in such a way as to trench on the province’s exclusive leg’ve domain? |
| **D** | Intra vires, it would affect 91(10) navigable waterways, fisheries, and further down Indian lands – so feds do have jurisdiction to subject project to fed assessment. |
| **RA** | The environment doesn’t fit w/in the national concern doctrine. It’s not a plenary power. Whether an act is valid will depend on whether it’s linked to an appropriate head of power. One may legislate in regard to prov’l aspects, and the other fed’l aspects. Although local projects will generally fall w/in prov’l responsibility, fed’l participation will be req’d if the project impinges on an area of fed’l jurisdiction |
| **RE** | * Environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the ‘national concern’ doctrine * B/c it’s not a head of power, the exercise of leg’ve power, as it affects concerns relating to the environment, must be linked to appropriate heads of power * The extent to which enviro concerns may be taken into acc’t in the exercise of a power may vary from one power to another * Crown Zellerbach is read to be about ‘marine pollution’ only. |

→ Fed’l role re: regulation of toxic substances and activities harmful to the environment

Canadian Environmental Protection Act (CEPA) is an effort to regulate toxic substances

* regulates matters like nutrient contamination, int’l air pollution; specifies offences + punishments
* Centrepiece is its response to toxic substances
  + Involves potentially comprehensive or ‘life-cycle’ regulation
  + Detailed classification procedures
  + For toxic substances, it tracks + regulates every stage of their existence from creation to disposal
* *Hydro-Quebec*: SCC stated it was intra vires, under crim law power and avoided talking about national concern doctrine

#### Ontario Hydro v. Ontario (Labour Relations Board), [1993]:

Who had jurisdiction – fed or Ont – to issue a certificate for collective bargaining for employees at Ont’s nuclear generating stations: Fed’l gov’t regulating nuclear energy under POGG?

→ majority of the Court (4 to 3) held that the Canada Labour Code applied to employees employed on or in connection with those nuclear facilities; sources of federal jurisdiction were the declaratory power in s. 92(10)(c) and POGG

#### R v Malmo-Levine; R v Caine [2003] SCC

Issue of validity of prohibition of marijuana possession in NCA; in *R v Hauser* the ct upheld it as valid exercise of nat’l concern branch of POGG; ct revisited and concluded it was a valid exercise of crim law power, making it unnecessary to deal w/ residual powers questions, and POGG in particular

