

CON LAW CHART 1: The Interpretation Doctrines - Validity, Applicability, Operability

Swinton: Outlined 3 step P&S test for **(1) VALIDITY**

Lederman: P&S an art, not science

Ryder: Classical & Modern Paradigm

(1) Laws Dominant Matter/Characteristic Effects & purpose (*Morgentaler; EI*):

Effects of enforcement:

- **Legal effects** (4 corners of legislation): how legal rights and abilities are affected
 - **Practical effects**: social and economic effects
- Purpose** (problem which the legislature is trying to address)
- **Intrinsic materials** (statute itself, preamble)
 - **Extrinsic materials** (Hansard related legislation, legislative history, background/surrounding circumstances)

As long as dominant characteristic is w/in enacting gov's jurisdiction, **incidental effects** may be tolerated (in accordance w **modern paradigm**- though this is for step 3) (*Lacombe*)

Say here if any **incidental effects** → law can affect other gov't jurisdiction & be *intra vires* as long as **DOMINANT CHARACTERISTIC** stays w/in assigned jurisdiction (*Emp. Insurance.; Modern Paradigm*)

Simeon: 3 perspectives of Federalism (Community; Democratic Theory; Functional Effectiveness)

Heads of Power:
(1) Crim
(2) POGG
See: Chart 2 & 3

(2) SCOPE OF COMPETING CLASSES

- Delineates scope of heads of power
- History, precedent (*framers intent*), federalism balance may play a role - (*Swinton*)
- But heads can expand & evolve w society in accordance w **Living Tree** doctrine (*Edwards*).
- This is seen in **Employment Act**
- **S. 91 = federal; S. 92 = provincial**

Double Aspect
Can be regulated at both fed and prov level for different but equally important reasons.
(Multiple Access)

(3) CLASS INTO WHICH IT FALLS

- Again, not logical, based on policy & judicial discretion (*Lederman*)
- **Incidental effects** may be tolerated (*Lacombe*)
- If colourable, not tolerated

Conclude if intra vires, consider if NECESSARILY INCIDENTAL or DOUBLE ASPECT DOCTRINE

Nec. Inc. TEST (GM)
Provision of valid leg. trenches into other gov. juris. Need connection between provision and home statute.
3 part test

(2) APPLICABILITY/IJI: Even if statute is in acting gov jur, may need to limit application/read down so no touch other gov BMuA core jur. Permanent!

(1) Provision valid? P&S Test. If IV, OK. If UV --> how much does it intrude? (Minimal; Moderate; High) **NB: AHR!**

(2) Rest of Leg. Valid? (P&S)
No? All struck down. Done.
Yes? Move to step 3...

(3) Relationship b/t invalid provision and home statute & level of trenching.
1) Min? Need rational/functional connection; **2) Mod?** Need necessarily incidental connection; **3) High?** Need truly necessary connection

IJI: Test from *COPA*. Reconciles and changes reasoning from *Bell 1, 2*, and *Irwin Toy*.

2 Part Test:

- (1) Does (1) the prov. law. 'trench' on a (2) BMuA core of fed competence (without which would be incapable of functioning - *Insite*)? If YES, step 2...
- (2) Is the effect of trenching serious enough to invoke IJI? (suff. serious = directly or indirectly **impairs** vital or essential part - *CWB*). More than "affects" (*Bell 1*) and less than "sterilize" (*COPA*)

(3) OPERABILITY: Conflict b/t two pieces of valid prov. and fed. leg? Fed law is paramount. If conflict: prov law read down to avoid it. If fed law is repealed, prov law becomes operable again (suspensory - less severe than IJI).

CWB: No clear precedent to go to IJI? Do doc of paramuncy instead. More supple (less chance of leaving legislative vacuum).

NOTE: (1) Only applies to conflict b/t laws, not b/t jurisdictional heads of power.
(2) Presump. of constitutionality applies (possible to read no conflict? Do it [*CWB*])

Insite: Cores need to be delineated from heads;
CWB: In theory reciprocal (applies to prov and fed), but in practice only ever limits prov leg. (IJI reserved for **precedent issues**):

- **FRU's** (bank hours of work + pay [*CWB*], telecom [*Bell 1*]), aviation (*COPA*), fed railways, land reserved for Indians, Indians [*Bell 2*], broadcasting (*Irwin Toy*)

McKay: **General words** must be given meaning that best suits scope and object of act; **Presump. of constitutionality** - equally plausible definitions? Court chooses whichever makes law valid.

2 step operability test laid out in *Rothmans* (reconciling *Hall* & *Multiple Access*).
****Overarching principle is frustration of federal intent (stat. interp) & conflict****
1) Impossibility of dual compliance (*MA*). Jump v. don't jump. Yes? Paramuncy. No? Step 2...
2) Frustration (contradiction) of Parliamentary Intent/purpose (*Hall*). Fed law is...
a) Permissive? Prov. law won't frustrate (*Spraytech, Rothman, Marine Serv.*)
b) Entitling? Will frustrate if prov. law limits the rights (*Mangat*)
c) Mandatory? More apparent at mutual compliance level, i.e. any infringement on mandatory law will be a frustration.

Operability cases: *Ross, Spraytech, Mangat, Hall, Rothmans* (reference big CAN)

CON LAW CHART 2: Heads of Power 1 (Criminal Law)

91(27) Fed. Juris.	Fed. Jur. (s. 91 (27))	Prov. Jur. (ss. 92(13-16; 27))	Cases
	Public Property	Private Property	Westendorp (prov lost) problem for Dupond (public property)
	Penal/punitive/prohibition	Regulatory	McNeil (preventative); Dupond ; Rio
	National	Local	Dupond (local matter)
	Behaviour	Business	McNeil (regulating a business); Rio
	Prohibition	Prevention	Chatterjee

Margarine - scope of crim. law head of power must have a (1) **prohibition** attached to (2) **penal sanctions/prohibition (form)** which are directed at a (3) **criminal law purpose (content)** - i.e prevention of harm to public
***Potential Criminal Law Purposes:** Public peace; Order; Security; Health; Morality.

Re: AHR: Leg. Fed (crim) or Prov (health)? **FED! b/c:** S. 91(27) requirements (**Margarine**):

1. Prohibition: P&S is prohibitory. OK w/regulation (changing tech + furthers criminal purpose)
2. Penalty: YES! regulation includes penalties.
3. Crim. law purpose? YES! **Morality** (importance of issue, not how to fix), **health**, **security** (unborn valid subject - **Morgantaler**).

NB: *Carve-outs are OK!* Fed laws. like this will have 'carve outs' for practices parl. does not wish to prohibit. Not positive allowances (not OK for crim, but simply non-prohibitions. Allowed).

NB: Confining CL to precise categories impossible. Must be responsive to reality.

Prov. power to regulate morality and public order.
 ss. 92(13) - prop. & civil rights; (14) - prov. jur. over justice in province; (15) - prov. govts may impose punishments via fine, penalty, or imprisonment for s. 92 offences, and; (16) - generally all matters of local or private nature in prov.

Dupond: City bylaw punished disruptive gatherings w/ fines and imprisonment. Found to be IV b/c a 'local matter'. Court finds double aspect, allows overlapping jurisdiction.
Dissent (Laskin): Bylaw is a 'mini CC'. Law is draconian.

Rio Hotel: No nude dancing in bar (lose liquor licence). IV b/c not morality; business regulation. Boosted by absence of penal sanctions. Distinct from **Westendorp**, which was clear case of colourable legislation. Here, licensing is only part of a comprehensive and historical liquor regulation scheme in NB.

RJR: Even though the target was advertising, still a legit. public evil (health) so crim. law OK. **Crim. law is not frozen in time and should be defined broadly (content), AND...**

- (1) the presence of **exemptions** does not exclude crim. law (form);
- (2) leg. cannot be colourable (ult. motive)

Hydro Quebec; Firearms Reference: Complex, regulatory schemes (even with administrative/institutional discretion) can be crim. law if leg. satisfies **Margarine** criteria.

Quebec (AG) v Canada (AG) - Feds want to scrap long gun reg. Quebec wants data for its own.

1. **Cooperative federalism** cannot constrain an otherwise valid exercise of power.
2. **Data destruction ultra vires fed?** No, important parts of act, which is valid crim. leg. (not prop. [prov], but public safety [fed]).

McNeil: NS Board of Censors bans film. **Not valid** (more regulatory than punitive). "Provincial authority defines what is permissible and what is not. Moral matters do not by themselves oust from prov. power, but it must be anchored in a valid provincial matter. Here they are not. Intrusion into crim. law" **Dissent:** This is reg. of film business, so OK. Morality aspect does not mean it is definitely criminal.

Westendorp: City bylaw restricts street prostitution. P&S found to not be control of streets/nuisance law (prov 92(13)) but moral evil (fed crim). Ultra vires. Reverses trend from **McNeil** & distinct from **Dupond** (Laskin distinguishes on facts: temp parades v. permanent prostitution)

Bedard: Prov leg. closing prostitution and gambling houses IV on property and nuisance grounds. + 'dampening of such conditions may reduce crime' (similar to **Chatterjee**)

Chatterjee: Prov. leg. allowing civil forfeiture of criminal goods. Only require BoP evidence of crime. IV b/c despite punitive aspects, dominant purpose is compensating victims and deterring crime.

NB: Provincial Commissions of Inquiry - Can compel testimony (not for use in against person in future proceedings). Case law has typically given double aspect to this process. Have been held up with a dominant purpose to identifying and preventing crime, rather than determine whether it has been committed. HOWEVER - **Starr v Houlden**: reversed that pattern b/c inquiry focused on single person and organization. Borrowed language from CC to create commission, and substituted itself for public inquiry and investigation. Commission and act creating it held UV (**Lamer**: "Prov. may not enact a public inquiry as a substitute for an investigation towards specific individuals for specific offences")

CON LAW CHART 3: Heads of Power 2 (Peace, Order, and Good Government [P.O.G.G.]

1) General Theory: Everything under fed juris. falls within opening words of s. 91. s. 92 is simply a list of subtractions from s. 92. s. 91 is an illustration of power granted in opening words (**Laskin, Russell**). This theory is discounted today.

2) Residual Theory: Has replaced General Theory. POGG is a separate head of power which houses what cannot be put elsewhere (not in s. 91 or appropriately provincial). Not a "mere grammatical prudence" (**Hogg**). **3 distinct branches...**

(1) Gap Branch: Only refers to drafting oversights. Things obviously federal but don't fit anywhere according to s. 91 or 92.
Do not confuse with new matters!

(2) Emergency Branch: Provides constitutional basis for nec. leg. of a temp. nature. Temp. alteration of division of powers b/t feds and prov.

E v NC - Crucial distinction

E: Temporary jurisdiction over all subject matters needed to deal with an emergency. Partial and temporary alteration of the division of powers.

NC: Permanent jurisdiction over distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which are of national concern

AIR (1976) - Laskin (Maj) - How to use EB:

1. Parl. has rational basis for concluding emergency
 - a) *Rational politician* standard
 - b) What did *RP* look at - extrinsic evidence
2. Leg. must be temp. (emerg. are temp)
3. **Ritchie** - challenger must provide evidence of no emergency

OK if - incomplete or optional (prov. choice) coverage, delayed response, no mention of emerg (crisis OK), ineffective measures.

Beetz Dissent - scathing! Look to Swinton

Agrees: E & NC diff & leg. **must** be temp.

Disagrees: "*crisis*" language OK. Requires *def finding and dec. of emerg. NC not enough.*

EB Requires: New matter, distinct and indivisible, doesn't swallow prov. jur. (these criteria affirmed in **CZ**)

(3) National Concern Branch: Separate and distinct from EB (**AIR; CZ**). Once matter is deemed NC, "Parl. has exclus. jur. of a plenary nature to legislate in relation to that matter, including it's intra-provincial aspects" (**Le Dain J, CZ**). Results in permanent grant of fed jur.

Must satisfy 3 criteria (Beetz AIR; CZ)

(1) **New matters** which didn't exist at confederation which, though originally local or private matters, have become matters of national concern (**CZ**)
(2) **Singleness, distinctiveness, and indivisibility.** Clearly dist. from province concern and not too much override of div of powers. Note diff. application b/t **Le Dain & La Forest** in **CZ**.

(3) **Provincial inability test** is 1 indicia for SDI requirement. Could provinces deal with on their own? What is the impact of them failing to do so on extra-prov interests? Ties to **principle of exhaustiveness (some level must leg.)**

Crown Zellerbach (1988) - Does the fed leg. jur. to regulate dumping at sea extend to the regulation of dumping in prov marine waters? **Apply NC test (Le Dain J):** Decided that marine pollution was a matter of national interest b/c "by visual observation the boundary between the territorial sea and the internal marine waters of a state" were impossible to distinguish, and b/c "marine pollution has its own characteristics and scientific considerations that distinguish it from fresh water pollution".

LeClair: Do you agree with Le Dain J's conclusion that *marine pollution is sufficiently indivisible* to constitute a matter of national concern?

Labour Conventions (1937) - "But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must...be dealt with by the totality of powers, in other words by co-operation b/t Dominion and the Provinces. 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."

Canadian Temperance Fed.(1946)

"If it... goes beyond local or provincial concern or interests and must...be the concern of the Dominion (e.g. *Aeronautics* and *Radio*), then it will fall within the competence of Fed. Parl. as a affecting the POGG of Canada, though it may still touch on prov. matters

Munro (1966): Argued **Johannesson** adopted NC doctrine **&** development of a National Capital Region under the impugned act was a 'single matter of national concern'

Employment and Social Insurance (1937)

PC held that b/c the Act, re: unemployment insurance in Canada, was permanent and did not deal with a special emergency, but rather, general worldwide conditions, it didn't meet criteria for emerg. legislation
ALSO: remember the connection b/t this case and the future Quebec EI case re: parental benefits...

Johannesson (1952) - Maintenance and development of air traffic, especially in the North, is essential to Canada's development. "It would be intolerable that such a national purpose might be defeated by a rural municipality"

Oldman River (1992) (CASE STUDY RE: POLLUTION) AB gov wanted to build dam but needed approval from fed gov. **Issue:** guidelines for assessment within fed jur? Court read down **CZ** as dealing with only marine pollution, not with pollution and the environment generally, and decided it was a matter of national concern. The legislation was **upheld** because it **related only to projects within or linked to something within federal jurisdiction.**

CON LAW CHART 4: Charter Analysis (S. 2(b))



CON LAW CHART 5: Charter - Application

(2) **Application:** Does the Charter apply? Ask: what entity/action is the source of the infringement?

Dolphin Delivery (1986): Public v Private; Vertical application; First time SCC held that **Charter does not apply to private actors**. Only applies to Gov (legislative, executive, and administrative branches). To hold otherwise would make the Charter apply to all private litigation, instead of the court being a neutral arbiter. Charter does apply to CL (s. 52), but only insofar as CL is the basis for a gov't action. This also extends to: Charter does not apply to the courts (court-based orders on CL).

1) Government Action

A) Gov Actors

i) Entities Controlled by Gov.

McKinney: LaFOREST (Maj): Universities NOT subject to Charter (not gov. actor/action) (Minimal state concept). About gov. control. Rejected the following: **Statutory creations** - would be too broad; **Public function (KEY)** - just having a public function isn't enough; **Gov nexus (part of state, public funding)** - insufficient. **WILSON (Dissent):** rejects 'minimal state'. 3 criteria for what ought to be restrained (University meets all 3). (1) "**control**" test - gov control?; (2) **Gov. function test** - does entity perform function recognized in modern times as government? (3) **Statutory authority and public interest test** - is the entity acting pursuant statutory authority in promotion of gov. objective and broader public interest?

Stoffman: Hospital not subject to Charter. No gov. control despite board members & regs by Minister and Provincial setup/programme. Routine control by board, not gov. Need routine control by gov.

Douglas College: Charter applies to college. Minister issues directions, approves bylaws, and fully appoints board. Part of apparatus of gov.

Lavigne: Council which negotiated union payments (made to political cause) found subject to charter b/c Min. of Ed. had full control over council's activities.

ii) Entities exercising gov. function

NB: Pay attention to facts! What features do and don't count as routine, direct control, etc...

GTVA: Translink/BC Transit subject to Charter. Controlled by Prov. (LG appoints board, can direct operations)"Gov. should not be able to shirk Charter obligs. by conferring powers on another entity (**Eldridge; Gadbout**)

B) Gov Acts

i) Entities implementing ...ing gov. programs

Godbout: Charter applies to municipalities. For Charter to apply outside Fed Gov., the entity must be acting in a truly governmental (rather than just public) capacity. Municipalities fit b/c: (1) councils are elected; (2) power to tax same as prov. or fed.; (3) can make, administer & enforce law; (4) derive existence and law making power from prov. gov. & prov. cannot shirk obligations by conferring powers on another authority. **Key: if you are designated as gov., everything you do is governmental action for the purposes of gov. (even quasi-private gov. employment relations)**

Eldridge: Deaf services in hospitals. Distinct from **Stoffman** b/c that was internal management, whereas this is statutory instrument administering policy *through* hospital (i.e. instigated by gov't.). Private entity may be subject to Charter if acting in "furtherance of a specific governmental program or policy". Gov can't escape Charter scrutiny via delegation.

ii) Entities exercising statutory powers of compulsion

Slaight: Charter applies to adjudicator acting pursuant to Canada Labour Code b/c he is a 'creature of statute' (derives all power from state). Applies to some adjudicative bodies (like tribunals), but not to the courts (**DD**)

Blencoe: Human Rights Commission subject to Charter (like Medical Services Commission in **Eldridge**; Adjudicator in **Slaight**). HRC not part of gov't apparatus, but - it exercised statutory powers of compulsion & was charged w/ implementing gov. program/policy, so Charter applies. ∴ Lengthy delay in processing sexual harassment claims = s. 7 violation.

2) Gov. Inaction

Vriend: Charter applies to human rights act that omits protection for sexual orientation. Threshold test demands only "some matter within the authority of the legislature". For under-inclusive leg. which discriminates through exclusion to be exempt would be illogical (via form over substance)

Dunmore: Leg. banning formation of trade unions & collecting bargaining an s. 2(b) violation. Gov. may have positive obligation to protect vulnerable groups by extending leg. so as not to allow private actors to violate rights. Contribution of private actors does not immunize (considered instead as part of whole context).

3) Application to the courts and common law

DD rule against courts & CL has/is being modified. CL must be consistent w/ Charter (e.g. to enforce the right to a fair trial?)

Swain: Reformulated CL to be in line with the Charter. When CL rules are relied upon by Crown in crim. proceedings, the Charter applies.

BCGEU: CJ of SCBC issued injunction on his own motion against picketing in front of courthouse. When this was challenged it was held that the Charter did apply b/c the motivation for the injunction (interference with access to courts; rule of law) was public, not private. Not what **DD** predicted - nuanced area.

Swain + BCGEU = Purely private, but in public context (reconcile them with DD) // Also, **Hill** - CL consistent w/ Charter? Yes (in **Hill**)