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What is Constitutional Law?

Other Sources of Constitutional Law

- Pre-Confederation Documents
 - *The Royal Proclamation of 1763*
- Quasi-Constitutional Statutes
 - *The Canadian Bill of Rights*, S.C. 1960, c. 44
 - *Supreme Court Act*, R.S.C. 1985, c. S-26
- Unwritten Constitutional Principles
 - Ex. The Prime minister was not written about
- Constitutional Conventions
 - Ex. Governor general signs into law the acts the parliament passes – conventions say she must sign if it is passed
- Case Law
- Constitutional Culture

3 Branches of Government: Constitutional Rules

- Legislative
 - [Governor General, Senate ('sober second thought'), House of Commons]
 - Power to make law (Discuss/pass legislation)
 - See sections 17 - 57 *Constitution Act, 1867*
- Executive
 - Power to implement law
 - [Prime Minister, Governor General, + Cabinet (policy/govern)]
 - See sections 9 - 16 *Constitution Act, 1867*
- Judicial
 - Power to interpret law [superior courts]
 - See sections 96 – 101 *Constitution Act, 1867*

Unwritten Constitutional Principles

What is a reference case? *Supreme Court Act RSC 1985*

- **53.**
 - (2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter...
 - Opinion of Court
 - (4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred...
- Controversies?
 - Refusing to answer: *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698

Reference re Secession of Quebec (1998) 2 SCR 217

Facts:

1) Early controversies: Confederation, amending power and the nature of federalism

- At confederation, an amending formula was left out of the Constitution Act of 1867
 - Came from the British Statute – British parliament changes it
 - Thinking in 1867 - Not in charge of changing our own Constitution

2) Quebec's Quiet Revolution

- Quebec was unsure the confederation was working – not enough powers were being held by Quebec + too much by the federal government

3) PQ and the 1980 Referendum

- 1980 Referendum – Quebec wants out
- Federalists win – Trudeau says the constitution will be changed to help Quebec – he had in mind the Charter + the amending formula

4) *Patriation Reference*, [1981] 1 S.C.R. 753

- *Patriation reference* – says they only need a substantial majority of the provinces (Quebec pulled out)

5) *Veto Reference*, [1982] 2 S.C.R. 793.

- Veto reference – cannot go ahead without Quebec – however they can (only needed the substantial majority)
- 6) Meech Lake Accord and Charlottetown Accord
- Meech Lake/Charlottetown – distinct society clause for a section of the constitution for Quebec - deal dies
- 7) 1995 Referendum

- 1995 Referendum – second referendum
 - Lost by 0.5% to stay in Canada
 - Liberal government decides to have a reference case asking whether one can leave Canada

Issue:

- Whether under the constitution, the National Assembly, legislature, or government can effect the secession of Quebec from Canada unilaterally

Decision:

- If Quebec left Canada (it is in the constitution) therefore it would be a constitutional amendment – look to the amending formula → Quebec never agreed to the amending formula + constitution change of 1981
- Therefore, need to be open minded on the constitutional values – one reason they turned to the constitution principles
- The underlying principles have as much weight to them as other constitutional principles – they have normative, substantive force – **according to these principles they can leave** (Quebec never agreed to the amending formula + constitution change)

Analysis:

- Situations may arise that are not expressly dealt with by the text of the constitution
 - Constitution must evolve new situations and realities
 - Needs to be capable of change (needs a function that allows it to govern the anticipated)
- Constitution does not foreclose the (s.52) possibility of unwritten principles
- Preamble of the Constitution of 1867 – has a constitution similar to that of the UK
 - There is no British Constitutional document – all of British law forms the Constitution (standards, laws, conventions, etc.)
 - **This suggests Canada also has elements that are unwritten**
- Metaphors → living tree, life blood, breathe life into the constitution, architecture
- There are 4 fundamental (unwritten) principles that are relevant to addressing the question:
 - **Federalism** (enable citizens to pursue goals at both a provincial and a federal level)
 - **Democracy** (self-government – must be accountability to the public through institutions)
 - **Constitutionalism and the rule of law** (government action must abide by rules of law; constitution is a safeguard for rights and freedoms against laws subject to change)
 - **Respect for minorities**
- These unwritten principles lead to the conclusion that **3 main things must happen** for secession to occur:
 - 1) Must be a clear question, 2) must be a clear majority to answer the question, 3) if these are met then there is a duty for the entire nation to negotiate in good faith
- **Situations may arise that are not dealt with expressly by the text of the constitution – it must evolve to new situations and realities and must be capable of change**
- Controversies about unwritten constitutional principles:
 - They are open to interpretation – judicial power – concern about judges having this much power
 - Takes away power from elected representatives (written law – legislation)
- Following this, the Court lays out **two specific types of questions that they will not answer:**
 - 1) questions that fall outside the proper role of the courts; and
 - 2) questions that fall outside of the Court's expertise: interpretation of the law.

Reference re Senate Reform (2014) SCC 32

Constitution Act, 1867: s. 24 The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

Issue:

- Can parliament unilaterally implement a framework for consultative elections for appointments to the Senate? Can they set fixed terms? Can they remove Constitutional requirements about Senators?

Analysis:

- Parliament cannot unilaterally achieve most of the proposed changes to the Senate, which requires the consent of at least seven provinces representing half of the population; abolition requires the consent of all the provinces

- **Internal architecture:** the individual elements of the constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole; changes the form over substance
- **Part V of the Constitution tells us how to amend it** – including which changes Parliament and the provincial legislatures can make unilaterally, which require consent, and which require unanimous agreement (this change is beyond the scope of the unilateral federal amending procedure)

Decision:

- SCC view: The Senate’s fundamental nature of providing **sober second thought would be significantly altered** – conclude that elections would constitute an amendment to the constitution + require substantial provincial consent w/o the right to opt out – would alter the architecture of the Constitution
- In conclusion – the consultative election *would* amend the Constitution – the Senates role would be changed from a complimentary body of sober second thought to a legislative body endowed with a popular mandate in a political arena
- “The desirability of these changes is not a question for the Court; it is an issue for Canadians and their legislatures. **“Courts job is to tell what is constitutional or not;** this differs from politics and what is best for Canadians – concern is the constitution (because of the legitimacy of courts making these decisions) court is different from legislatures because they are not elected – want to make a distinction between politics and law.

British Columbia v Imperial Tobacco Canada Ltd. [2005] 2 SCR 473 [Criticisms of Unwritten Principles]

- “in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.”
- “The rule of law is not an invitation to trivialize or supplant the Constitution’s written terms.”
- Here criticisms are emerging from unwritten principles – **the primacy of the written text is what matters and not unwritten constitutional principles.** ‘The rule of law is not to trivialize or supplant the Constitution’s written terms’
- ‘Protection from unjust/unfair legislation lies not in the underlying principles of the Constitution, but in its actual text and the ballot box’

BC v Christie 2007 SCC 21

- Do unwritten constitutional principles (the rule of law) provide a general right to legal counsel and access to justice?
- Charter s. 10 – everyone has a right on arrest or detention to b) retain and instruct counsel without delay and to be informed of that right
- Christie: Constitution protected the right for everyone to afford a lawyer
 - If cannot afford – government has to pay; Rule of law depends on access to legal services
- Started with the written text
 - Section 10: there is not a *right* to state funded lawyers
 - Only says there is right **during** arrest or detention
 - Therefore, there is not a right to general circumstances
- Only says there is a right during arrest or detention, therefore not a right in general circumstances. **Specificity in the Constitution overrides the general**

Constitutional Interpretation

Living tree doctrine:

- Used by Judges who felt at liberty to extrapolate (draw conclusions) and interpolate (incorporate) words and meanings written in the text of the Constitution. Find it necessary to give the Constitution its true meaning and purpose.
- Maintain legitimacy through updating/keeping up with social change: If some parts of the constitution are no longer practiced, then the rest of it can be seen as illegitimate
- Judicial independence matters (need/have ability to make unpopular decisions)
- Do not change the words: just interpret them to keep up with social change

Dead tree doctrine:

- ‘Doctrine of original intent’ (Justice Scalia) believes judges should stick as closely as possible to what they believe was intended by the framers. Consistency. Would be a constraint on judicial power. Not up to judges to change the Constitution (this is for elected officials) – they are to interpret it
- Stick to what they framers intended – stability; Constraint on judicial power; Consistency; Covers what readers would have understood the text to mean at that time when it was drafted

'Persons Case' Constitution Act, 1867 S. 24

- **24.** *The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.*
- At this point a woman had never been a senator and so they were not worried about making the distinction and putting 'man'
- Government lawyer argument: Qualified persons – refers to a more specific subset
- Why is it relevant that in 19th century, Britain women could not hold public office?
- So clear the framers that the word person would be fine to use instead of men as a woman had never been a senator and therefore they were not worried in making the distinction
- Framers intention:
 - Law comes from those who create it
 - Framers created it – the intention matters, we need to understand what the law is trying to do
 - The intent/meaning of the drafters matters
- Judges say they do not care if women are in the senate but in abiding by the law
- Originalism – meaning of the bodies that created it at the time they created it; fixed + unchangeable by judicial interpretation. If you do not like the meaning, then change the constitution

Reference re Meaning of the Word 'Persons' in Section 24 of the BNA, 1867

Issue:

- Does the word 'persons' in section 24 of the BNA 1867 include female persons? More specifically, are women eligible for appointment to the Senate of Canada?

Decision:

- **Unanimous decision that women are not eligible** for appointment by the Governor General to the Senate of Canada because they are not '*qualified persons*'

Analysis: (Originalism view) Anglin CJC

- Precedent? The statute affects the word Senator and in section 23 pronouns 'he' and 'his' were used; in *Charlton v. Lings* on whether 'every man' included women also, the application for Lord Brougham's Act came up (in which he stated that all words importing the masculine gender shall be deemed and taken to include Females, and the singular to include the plural, and vice versa, unless contrary as to Gender or Number is expressly provided) however the court unanimously decided that the word man in the statute did not include women
- Here they used *Chorlton v. Lings* and concluded that there is a common law incapacity of women to exercise such public functions as those of a member of the Senate

Edwards v Canada (Attorney General) [1930] AC 123 (PC) [Determining Meaning of Words]

Facts:

- The appellants brought the case before the court to have the SCC rule that based on s.24 women could be considered candidates for the Senate. The first decision was the women were excluded from the meaning of "persons". The word "persons" in s.24 does include women in the Privy Council decision.

Issues:

- Whether the words 'qualified persons' in s.24 of the BNA 1867 include a woman, and whether women are eligible to be a member of the Senate.

Decision:

- 'Persons' in s.24 includes both males and females, therefore women are eligible to be summoned and become members of the Senate

Analysis: (Lord Sankey)

- When determining the meaning of a word in an Act must consider:
 - **External evidence** (previous legislation/decided cases)
 - Distinguished from Chorlton – also should not interpret BNA Act on early English/Roman law
 - Precedent from English lords and Roman law
 - Some are statutes and some are 'statutes'
 - Difference between English law and the constitution that actually governs a country
 - **Internal evidence** (derived from the Constitution itself – specific section and others)
 - Constitutional Statute itself
 - Other sections elsewhere in the constitution – where persons are used, vs. where he is used
 - S. 21 notes that the Senate be composed of 72 members. The word member is not confined to male persons. Looking at the sections as a whole there is nothing in those sections themselves upon which the Court could

conclude definitely that women are to be excluded from the Senate. Show sections that distinguish where only males are included – s.41 refers to males 21 and upward; again in s. 84, and again in s. 133 where it refers to ‘person’ and must include females as well (use of English or French)

- **The BNA planted in Canada a living tree capable of growth and expansion within its natural limits.** Living tree doctrine – if they actually meant “only men” would have said “only men” – they meant “qualified persons” which at the time was men, but can evolve

Ratio:

- Should not cut down the tree with narrow interpretation → instead should use a large liberal interpretation

Constitutional Architecture

National Federation of Independent Business v Sebelius (SC of US) 2012 (Medicaid)

- The Federal Government can only exercise the powers granted to it – that the Constitution specifically states which powers and functions the Federal government holds, means that it does not grant other powers. The Bill of Rights made this clear – the powers not delegated to the Federal Government are to be held by the states
- **‘Police power’** – the general power of governing, possessed by the States but not by the Federal government. States are to govern those powers that affect people’s daily lives; this also provides a check on the power of the Federal Government
- **Congress may tax and spend – giving it influence over areas where it cannot directly regulate**
 - **May offer funds to the states and may have conditions pending on those offers (such as adopted policies)**

American vs. Canadian Federalism

- Same:
 - Law/politics; federalism (division of powers); spending power (Federal government has ability to spend money outside of its jurisdiction); deference (respect for congress); subsidiarity (local government is close to the people; responsive to local interests)
- Different:
 - residual power: in Canada both levels of government take authority from Constitution but the Federal gets the residual power; in US: the powers not delegated to Federal Gov. are held by the states (the states have the residual power)
- **Not concerned with the policy of the law; but with the constitutionality of the law**
 - **Not whether it is good or bad, but whether the law was created constitutionally**
- US Supreme Court sees division of powers as a limitation of power
- Subsidiarity: Local government is close to the people; Responsive to local interests
- Spending power: Government has the ability to spend money + to spend money outside of its jurisdiction
- Deference: Need to be deferential to congress; Need to take a stance of respect
- Residual power: Where is the power that is not enumerated and listed
 - In US the federal government is giving powers by constitution; state governments have the residual power
 - The states do not give the powers; it is the people themselves
 - In Canadian government the federal government gets the residual power
 - After both levels are given powers, the left over power is deferred to the federal

Confederation: Debating the Intent of the Framers

- Framers interested in creating a strong, central government – why?
 - Prevent wars – civil war was caused by too many powers in the states (banded together in order to overtake central government)
 - Modeled off of the UK government – one central parliament in London – not federalism
 - Protection of minority groups – too much power in local governments means that minority groups will be vulnerable
- Section 92
 - Language is used to narrow the rights of the provinces
 - Section 91 is not narrowed – seeing it broadly in ‘general grants of power’
- Power of disallowance (section 56)
 - Federal government can disallow provincial acts
 - It has effectively died since it has not been used in so long; although it is still in the constitution
 - Constitutional conventions – power is not to be abused
- Given many issues are missing in both section 91 + 92 there is now **shared responsibility between levels of government**

The Building Blocks of Federalism

- What is missing → aeronautics, intellectual property, radio

- What overlaps between 91 + 92? → taxation, marriage, criminal law/criminal procedure, property

Modern Canadian Federalism

- Expanding role of government
 - Government does more today than they could have expected them to do in 1867
- Cooperative federalism
 - Concurrency, Overlap, and Shared Responsibilities
 - Blurred Lines: National, Provincial, and Local
 - Both levels of governments need to work together in order to achieve policy outcomes
 - Local issues that become national issues
 - National issues that become local
- Dealing with shared jurisdiction if the rise of the spending power
 - Might not have jurisdiction there but spend their money there. Ex. Education; healthcare; childcare
- Executive federalism
 - Agreements made upon different levels of government, to sort out issues of overlap + messiness
 - Criticism – limits citizen participation as there are already negotiations happening between the different levels of government
- Asymmetrical federalism
 - Is Canada a product of this?
 - Different relationships between the federal government and different provinces
 - Ex. How Canada treats their relationship with Quebec
 - Provincial equality – shouldn't provinces be treated on an equal basis

Federalism Theory

- Advantages
 - National unity. Allows for a protection of minority rights. Efficiency in given powers to some provincial governments since they are directly affected – allows provincial governments to solve their own problems (some provinces may have different problems than other ones). Separation of powers – allows for checks and balances over the different levels. Since there are smaller local governments, people feel more involved. Diffusion of power prevents negative effects of having all of the power centralized into a small group of people – ex. corruption
- Disadvantages
 - Confusion between who has which powers – inefficiency (Costly – spending money to have 10 different departments in 10 different provinces). No sense of unity – strain sense of national purpose. Different provinces are different – cannot treat them the same

Interpreting the Division of Powers

- 3 ways to challenge statutes on the grounds of a division of powers
 - 1) A challenge to the validity of a statute on the grounds that it is in its dominant characteristic (or 'pith and substance') in relation to a matter beyond the enacting legislature's jurisdiction and therefore within the exclusive jurisdiction of a different level of government
 - 2) Seeking to limit the applicability of valid statutes – statute may have to be limited or 'read down' so it does not touch matters at the core of a different level of government's areas of exclusive jurisdiction (interjurisdictional immunity) – often used more to protect the exclusivity of the federal heads of power
 - 3) Seeking to limit the operability of provincial statutes – a law can be inoperative if it conflicts with a valid federal statute that also applies the same facts (federal paramountcy rule)

The Privy Council's Early Federalism Jurisprudence

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

Facts:

- Ontario enacted legislation about fire insurance policies, specifying a set of conditions to be a part of all fire insurance policies. Parsons brought an action to recover compensation for losses caused by a fire to his hardware store to 2 different insurers. Insurers refusal to pay were based on Parson's failure to disclose information required by conditions in the policy.
- Parson claimed the policies did not comply with the Ontario legislation. The insurers argue the legislation was *ultra vires*

Issues:

- Whether the insurance legislation was *intra vires* the province

Decision:

- Act is valid; decision for plaintiff upheld

Analysis: (Gwynne J)

Federalism Theory →

- **Coordinate federalism:** each level of equally sovereign in their respective spheres
- **Principle of mutual modification:** Need to read the two sections together in order to understand the meaning behind it. There are instances throughout sections 91 and 92 overlap and therefore it must have been foreseen that a definite distinction could not be attained. Believes it could not have been an intention that conflicts would exist, therefore the two sections which overlap must be read together to arrive at a reasonable construction of the language

- **Specific should override the general**

Interpretation of s. 92(13)

- s. 91(18) – specific types of contracts with federal j – therefore not *all* contracts
- Parsons believed contracts deal with s. 92(13) ‘property and civil rights’ – specific types of contracts
- In s. 94 if there were a narrow construction of ‘civil rights’ then the dominion parliament could legislate in regards to all contracts in all provinces, therefore extending to Quebec, even though they are governed by their own Civil Code
- Role of Quebec Law → ‘**Civil rights**’ are also mentioned in Act 14 of the Quebec Act, that those within Quebec are able to enjoy their civil rights as had done before – these are used in their largest sense

Interpretation of s. 91(2)

- Gives Parliament exclusive power to regulate trade + commerce
- Here, an insurance company sells to make a profit + it is by nature a commercial activity – commerce and the selling of insurance is a trade: Contracts are not a part of trade + commerce → it is a civil right
- Contract of indemnity (insurance) can hardly be considered trading contracts – cannot be ‘trade and commerce’ (91(2))– this is not used in an unlimited sense (or else other classes of subjects would be unnecessary such as banking, bills of exchange and promissory notes)
- Have to read this section more narrowly → there are other specific examples of trade + commerce in s. 91, so why would those be necessary if s. 2 covered it all (ex. s. 91(18) encompasses specific types of contracts under exclusive federal power)
- If provinces [s. 92(13)] have civil rights, then they cannot be trade and commerce
- S. 91(2) is limited to interprovincial/international trade + general regulation in all the dominion

Ratio:

- The dominions authority to legislate for the regulation of trade and commerce does not include the power to regulate by legislation the contracts of a particular business or trade (such as fire insurance) – this falls under s. 92(13) – read broadly
- 91(2) has 2 branches: any trade taking place inter-provincially or internationally and general regulation of trade affecting the whole Dominion – read more narrowly [any other business falls within the province under s. 92(13)]

Russell v The Queen (1882) 7 AC 829 (PC) (Temperance Act)

**** origin of the POGG power debate – The Dominion does have power to trump provincial powers if there is a nationally critical concern and a need for uniform legislation to deal with it**

Facts:

- A private citizen began a criminal prosecution against Russell under the Canada Temperance Act for selling liquor in violation of its terms
- The Canada Temperance Act (1878) was enacted by the Dominion, wherein by a vote for local option there would be a prohibiting of retail sales of liquor
- Provided banning of alcohol sales, but allowed it to be decided locally
 - Argument: This must be property + civil rights (encompassing s. 92(13))
- The three sections of 92 referred to were 9, 13, and 16

Issue:

- Whether the federal government has the authority to enact the *Canada Temperance Act*, or whether the Act falls within provincial legislation

Decision

- Federal government has the authority to enact the Act. The Act does not violate any heads of power under s. 92

Ratio

- Parliament is allowed to enact laws for the good of the country under POGG even if it affects Property and Civil Rights (s. 92(13) (problematic aspect considering pogg is a residual (rather than an enumerated) power); and it does not violate s. 92(16) because the problem is not a matter within local jurisdiction (ex. in pith + substance the law is not aimed at a specific province) because it is a uniform

- Parliament can use POGG to limit provincial rights: under this decision the PC ruled that Parliament could use POGG to 'trump' provincial powers if there is a need for uniform legislation to address a nationally pressing concern [broad reading of POGG expanded beyond its original intention?]

Analysis: (Sir Montague Smith)

- Court said it was not local since the right to vote was given to every area in Canada, not any specific ones – therefore, a national matter
- Falls under safety or morality – s. 91 (pogg)
 - Concerned with alcohol as a national epidemic
 - Pogg cannot be used for permanent matters
- Section 9 (shop, saloon, tavern, auctioneer, and other licenses in order to the raising of revenue for provincial, local, or municipal purposes)
 - The Act in question is not fiscal/one for making money (a by-product of it does diminish revenue)
- Section 13 (property + civil rights)
 - Has a legal aspect similar to poisonous drugs and explosive substances (which can be deemed as property) however a law placing restrictions on their sale on the grounds the use of them is dangerous to the public and cannot be deemed a law in relationship to property
 - It is a **public order and safety issue** – therefore, these laws do not belong to civil rights
- **Privy council says liquor is not property – must determine what the law is in relation to**
 - Does not matter it interferes with property (incidental interference is not relevant/sufficient)
 - When classifying need to understand what the true nature and character of the law is (the pith and substance)
- Section 16 (generally all matters of a merely local or private nature in the province)
 - The condition that the Act was prescribed by 'local option' does not convert the Act into a merely local matter; the object/scope is still general to promote temperance throughout the Dominion

Hodge v The Queen (1983) 9 AC 117 PC

**** double aspect doctrine**

***Key: the possibility of jurisdictional overlap was expressly recognized as implicit in the structure of the Constitution of 1867**

***Hodge confirms we do not have hierarchical federalism; we have autonomous federalism**

Facts:

- A challenge to Ontario's *Crooks Act (Liquor License Act 1876)* which transferred the powers over liquor licensing from municipalities to new created Boards of License commissioners (appointed + controlled by the provincial government)
- Hodge was charged with allowing billiards to be played in his tavern, contrary to the regulations made by the license commissioners for Toronto
- Hodge challenged the act that it conflicted with power under 91(2) and that provincial legislature could not delegate law-making powers to the Boards of Commissioners – argument based on *delegatus non potest delegare* (a delegate may not delegate)
- Different tavern keeper made a 3rd challenge that a province could not impose imprisonment with hard labor as punishment, since s. 92(15) spoke only of imprisonment
- Argued that in Russell, the Parliament had control over liquor

Issue:

- Is this Act ultra vires of the powers of the province?

Decision:

- No – all grounds dismissed

Ratio:

- Subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91 (the double aspect doctrine): Because subjects fall in both domains does not mean it is being ultra vires or within the other domain, as long as both laws can be adhered to
- The Dominion and the provinces are equal in kind, and each supreme within their spheres – Provincial legislatures are not merely delegates or subordinates of the Imperial/Dominion parliament but enjoy plenitude of power within the limits of their defined subject matter
- Assuming a provincial legislature possesses certain powers, it is possible to assume further that it can also delegate those powers

Analysis:

Lord Fitzgerald (PC)

- **The double aspect doctrine** (subjects for which in one aspect fall in section 92 can also fall in 91 in another aspect) – can regulate two things from two different perspectives

- S. 4+5 of the Act tend to be matters of merely local nature in the Province + similar to the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments (s. 92(16)) and the imposition of fines/penalty/imprisonment (92(15))
- Powers intended by the Act are regulations of a mere local character for the good government of taverns + to preserve municipality, peace, and public decency – does not interfere with s. 91(2)
- As a legal matter – cannot delegate powers given to you, unless explicitly allowed to do so when one received their delegating powers
- Provinces are not delegates; they both have their own spheres – they are equal and autonomous to each other – they are each supreme within their spheres

Note:

- Example: drinking + driving can fall under both provincial + federal jurisdiction → federal is concerned with the criminal aspect; provincial is the ability to operate a car (92(13)) and matters of a local or private nature (92(16)) (impound car/jurisdiction over licenses)
- Double aspect doctrine: both levels of government can regulate the same topic, just from different aspects
- ***92(15) 'Provinces can impose penalties for a breach of provincial law'**

THE GREAT DEPRESSION + THE NEW DEAL CASES (P. 167-187)

Reference re The Board of Commerce Act, 1919 + The Combines Fair Prices Act, 1919 [1922] (PC)

*** Unless state of emergency declared, matters that deal w/ individual, local regulations are under province; POGG jurisdiction under s 91 restricted to war time/temporary/famine/req'd by pogg, not normal conditions**

****Haldane shrinks pogg into an emergency case**

Facts:

- *The Board of Commerce Act* and the *Combines and Fair Prices Act* were enacted by the Federal government in 1919 in order to restrict abuses of both combines, mergers, and monopolies, and the taking of unfair profits or hoarding the 'necessaries of life' including food and clothing for the purpose of unfairly increasing prices
- The board had extensive powers to investigate/make orders (ex. cease operations of combines/orders to repay unfair profits), and violations were considered indictable offences for which the penalty was a fine of not exceeding \$1000 for each day of the offence or a term in prison not exceeding 2 years
- The resistance the board encountered resulted in them arranging a reference to the SCC to determine its constitutional authority in this situation

Issue:

- Whether the Combines Act is valid?

Decision:

- The Parliament is not of authority to enact such a law

Ratio:

- Criminal law power is only applicable where the subject matter is one by its very nature belongs to the domain of criminal jurisprudence
- Only under necessity in exceptional circumstances can the liberty of the individuals be restricted by Parliament
- **Pogg is available to meet special conditions in wartime and on a temporary basis, but not under normal circumstances**

Analysis: SCC (split decision)

- Half would have upheld it under 92(2) – and that profiteering is so evil, no one province could effectively cope; could have also been upheld under pogg
- Half say regulation of prices in a store fall under 91(13) – if it were valid, any statute could fall under Federal power – too broad

Analysis: (Viscount Haldane)

- Here the laws were confined to morality, leaves out economic or social ills. Federal government does not have the ability to create criminal laws about new behaviors
- If provincial powers are adequate in regulating the issue, there is no need for the federal government to override their powers
- This has not been enacted under special circumstances/for a temporary purpose, but to continue without time-limit and to apply throughout Canada
- The Dominion can trump provincial powers if there is a nationally critical concern and a need for uniform legislation to deal with it (Russell) even during time of peace → cannot interfere under normal circumstances
- Here, the Board is given the power to inquire into individual cases and not merely as the result of applying principles to be laid down as of general application

- Dominion cannot first attempt to interfere with 92, then attempt to justify this by enacting ancillary provisions, designed to be new phases of dom. Crim law.

Fort Frances Pulp and Paper Company v Manitoba Free Press Company [1923] AC 695 (PC)

****When war is over, based on clear evidence, must repeal all interfering legislation, or it is *ultra vires*; however, there may be exceptions where certain measures are concerned with consequences arising out of war and may produce effects remaining after war is over; may be held for a reasonable amount of time**

Facts:

- (This case shares the same social/economic background of the *Board of Commerce* case, but with different legislation)
- The *War Measures Act* (1914) was enacted by the federal government and gave them power to do whatever was considered necessary for the security, defense, peace, order, and welfare of Canada – limited to the existence of a real or apprehended war, invasion, insurrection
 - Under this act there was a government regulation on the prices of newsprint – leading to the creation of the Paper Controller (1917) (made the initial decision) and the Paper Control Tribunal (who heard the appeals)
- The Controller made an order about prices and ordered the Fort Frances company to repay whatever it had received from the Manitoba Free Press in excess of these prices
- An action was brought by the Manitoba Press Company when Fort Frances refused to pay, and both the trial judgment and the appeal affirmed the claim – Fort Frances then appealed directly to the PC

Issues:

- After the war is ended at what point does the federal government continue to have power over previously provincial matters? Is the War Measures Act *ultra vires*?

Decision:

- Upheld under POGG since wartime conditions might still be in effect; appeal dismissed

Ratio:

- The temporary exercise of power by the federal government can be ended after the exceptional circumstances cease to exist, under the requirement that there must be very clear evidence showing the crisis has passed
- There may be exceptions under the circumstances where certain measures are concerned with consequential conditions arising out of war, which may continue to produce effects remaining in operation after war itself is over
- POGG available in cases of “sudden danger to social order arising from outbreak of war; when national life requires preservation; exceptional necessity”

Analysis: (Viscount Haldane)

- During the war (Board of Commerce Act)/special circumstances allow for an interference and federal power may trump → during these exceptional events pogg involves effort on behalf of the whole nation + interests may be subordinated; the overriding powers become applicable to those provincial aspects (power of province not being taken away; new aspects are being introduced)
- During war: public need uninterrupted information in newspapers. Need to ensure supply to avoid shortage.
- BUT the war is over, and there is no justification for continued exercise of exceptional interference which becomes *ultra vires*. Need clear evidence that crisis had wholly passed
- Late 1919, the war has passed

Toronto Electric Commissioners v Snider [1925] (PC)

***Snider is why we have provincial regulations of labor standards (only 6% of employees are federally regulated)**

Facts:

- The *Industrial Disputes Investigation Act* was a federal act that applied to mining, transportation, and communications undertakings, as well as public service utilities, and limited to those with more than ten employees
- If an employee/employer was in dispute about the conditions of work, they could apply to the Minister of Labor for the appointment of a Board of Conciliation and Investigation – whose goal was to inquire into the dispute and attempt to effect a settlement
- A board was appointed to inquire into a dispute between the Toronto Electric Commissioners and some of its employees, which resulted in the commissioners seeking an injunction alleging the act was *ultra vires* the Parliament
- At trial court the claim was upheld, then was reversed in the court of appeal
- Court of appeal reasoning: The act was valid under s. 91(2) for the reasoning that to deprive the city of electric power is to disturb and hinder the national trade and commerce and to endanger public peace, order, and safety and under s. 91(27)
- Court of appeal dissent: Under POGG there are two grounds – emergency branch and matters of general Canadian interest and importance. This act is not a response to an emergency. The act plainly invades the specified domain of provincial legislation

Issues:

- Whether the *Industrial Disputes Investigation Act* (1907) was valid or whether it was *ultra vires* the federal gov't

Decision:

- Appeal allowed; injunction allowed; Act was ultra vires the federal government

Ratio:

- The situation at hand is not so pressing that provincial powers are inadequate to deal with it; the federal government is not authorized to trump the provincial powers under s.92 unless there is a pressing concern (pogg)
- Labor relations are civil + local matter; POGG available when extraordinary peril to national life of Canada as a whole, highly exceptional

Analysis: (Lord Haldane)

- Pogg available when "extraordinary peril to the national life of Canada, as a whole"; Such instances are "highly exceptional"; *Russell* explained as a "menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous."
- It is obvious the provisions under the *Industrial Disputes Investigation Act* (which could appoint a Board anywhere in Canada) dealt with civil rights; and it was not within the federal government's power to make this a criminal matter merely by imposing ancillary penalties
- It is clear that s. 91(2) (trade and commerce) cannot be relied on as enabling the federal government to regulate civil rights in the provinces

R. Simeon and I. Robinson, State, Society, and the Development of Canadian Federalism (Toronto, 1990)

- Prime Minister Bennett (1930-1935) was not worried about consulting provincial governments, nor was he worried about the details of the constitutional divisions of power – confident that the constitutional grounds for his 'New Deal' legislation could be found in the BNA Act
 - o A series of radio speeches outlining a 'New Deal' for Canada
 - o Major changes in national economic and social institutions – changes that had to be brought about by the federal government
- The focus on fiscal arrangements meant during the first phase of the Depression there was little intergovernmental discussion of fundamental reform to the federal constitution
- An amending formula was only discussed because it had to be dealt with as a part of **the Statute of Westminster (1931)** (British law clarifying the powers of Canada's parliament, granting them full legal freedom except in the areas they chose to remain subordinate to Britain – essentially had the act of making the Dominions sovereign nations)
- When King (1935-1948) was elected into government he was more responsive of provincial objections that Bennett's new legislation was an encroachment on provincial jurisdiction → would not enact reforms w/o unanimous consent
- No amending formula was negotiated – did not have unanimous consent (New Brunswick)

The Statute Of Westminster (1931)

[2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.]

- ** Under number 4 – PC can no longer pass laws about Canada; still have control over the Constitution
 - o Could not figure out an amending formula – Constitution Act of 1982 is when this changes
- PC still overseeing Canadian law

Hope for POGG? [Aeronautics/Radio]

- *Reference re Aeronautics* [1932]: federal jurisdiction?
 - o Finds federal jurisdiction under s. 132, s. 91(2), and pogg

- 132 (treaties) because Canada was a part of the British empire; 91(2) trade and commerce; and pogg [National Concern branch]
- *Reference re Radio* [1932]
 - “Being...not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91...” [i.e. pogg]
 - Example of the residuary clause working
 - New subject matter therefore must fall within the residuary capacity of pogg
 - Call it the ‘gap branch of pogg’ → therefore falling to federal regulation

* When King came into power (1935) he referred all (6) of Bennett’s statutes to the SCC (along with two other acts) then to the PC—the only statutes that were determined as being *intra vires* were *The Farmers’ Creditors Arrangements Act*, the *Criminal Code* amendments, and the Canada Standard provisions of the *Dominion Trade and Industry Commission Act*

Lord Atkin: “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.” (Labor Conventions)

AG Canada v AG Ontario (Labor Conventions) [1937] (PC)

*** Could not use trade and commerce (Parsons) and could not use pogg (Snider)**

***S. 132 Treaty Power must adhere to the watertight compartments set out in ss. 91+92**

Background:

- 1930-33 → Depression, unemployment (30%), draught
- Immense pressure to act → in US Roosevelt’s ‘New Deal’

Facts:

- A reference about the validity of the *Limitation of Hours Work Act* (8-hour day and 48 hours a week), the *Weekly Rest in Industrial Undertakings Act* (rest period of 24 hours for industrial workers), *Minimum Wages Act* (Governor in Council authority to establish minimum wages)
- In 1919, Canada signed the Treaty of Peace as a member of the British Empire to secure human conditions; in 1930 the International Labor Organization and the League of Nations adopted conventions about hours of work, minimum wages, and days of rest
- In March + April 1935, the federal government ratified those conventions and enacted the three statutes to explicitly implement treaty obligations
- In the SCC there was a 3-3 division – went to the PC

Issues:

- Was this enactment of those statutes outside of the federal governments jurisdiction?
- Valid based on s. 132? Under 91/92? On national dimensions?

Decision:

- Each are considered ultra vires

Ratio:

- The federal government cannot merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth → treaty making powers does not breach the division of the two governments [watertight compartments]
- If Canada incurs obligations and when legislation is concerned, they must when they deal with provincial classes of subjects be dealt with by the totality of the powers (a cooperation of federal and provincial governments)
- S. 132 is not about the power of Canada to enter treaties, but about treaties to do with the British Empire → Parliament has right to engage in treaty, NOT right to legislate it into s 92

Analysis:

- SCC [*intra vires*] used Radio and Aeronautics References to hold that the treaty came within s. 132 giving federal government exclusive power to implement its terms even through subject matter that would otherwise come within s. 92 (like R+A). Pogg gave dominion power to implement them
[Treaty Obligations 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.]
- SCC [*ultra vires*] because the conventions were adopted by Canada on her behalf; do not come within s. 132; provincial consent is necessary for the validity of a treaty if it comes within s. 92

Analysis: (PC) Atkin

S. 132

- Must distinguish between the 1) formation and 2) performance of the obligations constituted by a treaty (in s.132 only makes a reference to performance) → s. 132 is not about the power
 - In the British Empire – formation of a treaty is an executive act, and the performance requires legislative action
 - Cannot be disputed that the creation (formation) of the obligations undertaken in treaties are the function of the executive alone
 - Executive body allows Canada to enter into treaties, although Parliament must pass laws to implement the treaty (if falls within provincial jurisdiction, then provinces must implement them)
- In 1867 the UK never imagined Canada would have treaty making abilities
 - This section is applicable to treaties signed by the British Empire
 - Argument (provincial) here is that the treaties that Canada enter into are not covered in s.132

S. 91/92

- Valid under 91/92? SCC say exemplify Aeronautics + radio. PC says
 - Aeronautics: imposed treaty btw BE and foreign countries = not applicable
 - Radio: matters did not fall under s 91/92 = not applicable
- The distribution of power is based on classes of subjects, if treaty deals w/ that class = fall under that legislation. Treaty must bow to water tight compartments of 91/92.

Pogg

- Not an emergency, cannot call something a new issue and therefore allow fed. gov't to have control over it
- Snider → Labor relations are civil + local matter; POGG available when extraordinary peril to national life of Canada as a whole, highly exceptional

Notes:

- Use treaties to determine uniformity between countries – Even those areas that are under provincial powers
 - Provinces do not have power to enter into treaties
 - If leave these powers to provincial government, then there could be issues of implementing treaty promises
- In 1867 the UK never imagined Canada would have treaty making abilities
 - This section is applicable to treaties signed by the British Empire
 - Argument (provincial) here is that the treaties that Canada enter into are not covered in s.132
- Living tree doctrine argument
 - Does not allow you to change words → cannot change British Empire to Canada
 - In the persons case, the question was whether women are persons
 - Living tree is not applicable here

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

***The limits of spending power**

Facts:

- The federal *Employment and Social Insurance Act* provided for compulsory insurance against unemployment for workers
- The SCC held the act invalid (4 to 2)

Issues:

- Is this act valid under federal jurisdiction?

Decision:

- Entire Act is considered *ultra vires*
- Appeal dismissed

Ratio:

- Cooperative federalism (provinces design a program, create legislation, federal funds it)
 - **Federal spending power → can spend money outside of their jurisdiction, however cannot legislate outside area**
- If the pith and substance of a legislation invades civil rights within the province (or other classes of subjects) the legislation will be invalid – otherwise the federal government has an easy passage into the provincial domain
- This is a regulation of a local trade, not interprovincial

Analysis:

- SCC
 - Act dealt with property and civil rights s. 92(13) because it dealt with insurance and because it regulated contracts and employment (Parsons)
- SCC dissent
 - A taxation measure under s.91(3) – there was no constitutional restriction against the federal government spending public money for the benefit of the individuals
- PC

- 91(3) deals with public debt + public property → the raising of money by system of taxation
 - Federal Spending power: “the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities”
 - Ability to raise and spend money as they like (spending power) however cannot create legislation by using their power to spend outside of their jurisdiction
 - Do not want to incentivize them to legislating outside of their jurisdiction
 - Cannot expand jurisdiction by implementing treaties/having treaty making powers – metaphor
- An act intended to be permanent; does not rise to level of national emergency (Snyder); not war/famine – cannot use POGG
- Federal legislation may be framed in a way as to invade rights within the province (or other classes of subjects given to the powers of the province)

AG British Columbia v AG Canada (The Natural Products Marketing Act) [1937] (PC) [POGG restricted]

*Do not want Parliament to expand their jurisdiction unilaterally

Facts:

- Purpose of the *Natural Products Marketing Act* was to establish regulation of natural products for the benefit of producers and to establish effective marketing arrangements and to impose pooling (merging) to equalize prices in particular products and areas
- Act was limited to products where the principal market was outside the province of production and products that were (in some part) exported
- [Regulating prices/sales/trade relationships of agricultural products → about regulating at a local level; within provinces]

Issue:

- Is the federal Act ultra vires? – 91(2) or 92(13)?

Decision:

- Act invalid; falls under 92(13); appeal dismissed

Ratio:

- The federal government cannot acquire jurisdiction to deal in the sweeping way (in which these enactments operate) with such local and provincial matters by legislating at the same time respecting external and interprovincial trade; and of traders and producers engaged in trade which is exclusively local to the same authority

Analysis:

SCC

- Parsons, Insurance Reference, Montreal Street Railway
 - From these decisions s.91(2) does not encompass the regulation of particular trades or occupations or of a particular kind of business
 - It does however embrace the regulation of external/international trade and the regulation of interprovincial trade
- Hodge, Local Prohibition Reference
 - The enactments relate to local and provincial matters and therefore are beyond the jurisdiction of parliament → Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate
 - These enactments also operate by way of the regulation of dealings in particular commodities – these are not general regulations of trade as a whole
- Board of Commerce and Snider
 - We cannot think that sweeping regulation in respect of local trade is incidental to the regulation of external trade/interprovincial trade
- Local Prohibition Reference
 - Not all matters that are of national concern can be regulated by the federal government – only those that are a matter of national concern ‘in such sense’ as to bring them within the jurisdiction of the Parliament (difficult/delicate task applying this principle)

PC

- S. 92(13) Property + civil rights → We understand that the provisions cover transactions in any natural product which are completed within the province – Even though there is interprovincial aspect, it reaches into regulation of intra-provincial trade (trade w/in provinces; completion of transaction w/in province)
- If not brought within one of the class subjects in s.91 it is beyond the competence of the federal government
- Cannot be within s.91(2) – trade + commerce
 - The regulation of trade and commerce does not allow the regulation of individual forms of trade or commerce confined to the province

Class Notes:

- Do not want federal government to be able to expand their jurisdiction unilaterally
- Pogg restricted → Trade and commerce restricted – to true international trade
- Parsons also hold – economic activity at provincial levels
- P. 183 → speaks of ‘pogg’ by talking about ‘general power’ [Referring to Russel and to Fort Frances]

Note:

- Subsequent to this → decided we needed our own power = **END PRIVY COUNCIL**

AG British Columbia v AG Canada [1937]

- The amendments to the Criminal Code prohibited two kinds of conduct:
 - o 1) Selling goods and prices that discriminated among competitors
 - o 2) Selling goods at prices designed to eliminate competitors
- Both provisions held valid in the SCC
- Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear as criminal ‘in their own nature’

Dominion Trade and Industry Commission Act

- This act included 2 major parts:
 - o 1) Authorized administrative approval for agreements among businesses to restrict undue competition
 - o 2) Established a national trademark (the Canada Standard) to be used to identify products that complied with standards set by the federal government
- SCC found both parts invalid (Duff)
 - o Part 1 relied on his judgment in Natural Products Marketing Reference
 - o The standard was not a trademark but a civil right of a new character – federal government has no authority to create a civil right of a new kind
- PC said the second part could be upheld until s.91(2)
 - o Should be no reason why the federal government could not extend the creation of juristic rights in new fields – if they can be brought fairly within their classes of subjects

Farmers Creditors Arrangements

- Established administrative boards with powers to impose compromises/extensions of farmers’ obligations to their debtors
- Upheld under s.91(21) – federal power to legislate about bankruptcy and insolvency

King’s Reign (p. 182)

- Best explanation for his inactivity during the Depression was national unity – believed the principal threat lay in French-English conflict
 - o Federal inaction minimized federal-provincial conflicts related to language, however it increased criticism from those who saw the nation through lenses of region/class
- Deemed essential the federal government expand its jurisdiction
- Agreement that the solution to economic/constitutional crisis lay in a centralization of federal powers

PITH + SUBSTANCE (P. 207)

- Analysis of what is in the statute itself and what is relevant outside; looking at intrinsic evidence, wording of the statute itself, statement of objectives and purposes, as well as extrinsic evidence ie. Legislative

K. Swinton, The Supreme Court and Canadian Federalism: The Laskin-Dickson Years 1990

Competing Classifications → Broken down into 3 steps

1) Identification of the ‘matter’ of the statute

- Starting place is the statutory context
- Purpose of the legislation – legislative history (HANSARD), government reports identifying a problem that triggered the legislation
- The effects of the legislation
- The dominant form of inquiry is into purpose – the problem underlying the legislation which the legislature is trying to address

2) Delineation of the scope of the competing classes

- There can be overlapping regulation – the ‘double aspect doctrine’ – some laws may have both federal and provincial purposes
- Cannot be complete ‘watertight compartments’ between federal and provincial governments

- Precedent plays a role in constitutional adjudication; history may also play a role in the definition of class boundaries
- 3) A determination of the class into which the challenged statute falls**
- Precedent/history only assist in defining the classes of powers, however they do not determine whether a law should come within one class rather than another
- The court's final decision about boundaries and matters within them is guided by federalism concerns – beliefs about optimal **balance of power** between the federal and provincial governments

W.R. Lederman, 'Classification of Laws and the BNA Act' 1981

- The classes of subjects are not classes of fact but **classes of law**

The Application of Sections 91 and 92 of the BNA Act

- There is an impossibility for the mutual exclusion that was strived for in the concluding words of s. 91
 - For example – that a will made by an unmarried person becomes void once that person marries
 - Is this a rule of 'marriage' (s.91(26)) or of 'property and civil rights' (s.92(13)) – in England/Canadian common law provinces it occurs in 'Wills Acts' as a provincial law, therefore must be characterized under s. 92(13) vs. in Private International Law, English and Canadian courts determine the rule about marriage voiding a pre-nuptial will is deemed to be a matrimonial law (federal law)
- From the examples above, determination of which classification is used for a given purpose must be made on **non-logical grounds of policy** and justice by the legal authority with the duty and power of decision in that respect– as logic displays equivalent logical value of all possible classifications – logic does not assist in a choice between them – it must be then asked **whether it is better for the people that this entity be classified on a provincial or national level**
- Judges making these decisions of classification must have straight thinking, industry (diligence), good faith, and the ability to overlook their prejudices
- Judges rely on precedents of a challenged law (stare decisis) – however they must understand the changing conditions and how classifying features may also change → changing economic and social conditions with a different moral climate give to the laws new features of meaning by which they may be classified
- 'Subject-matter' refers to meaning, and you must construe meaning before you can talk about subject-matter and can only know what is subject-matter when you have settled meaning; Must also look to object/purpose of the legislation
- Colourability → A law may be worded to make it seem like it only has provincially classifiable features of meaning and only when the effects of the law are assessed can one understand a different meaning which supplies federally classifiable features
- A rule of law for purposes of the distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that respect → is it better for the people that this thing is done on a national or provincial level [use policy background decisions to decide where things should go]
- Judges do not merely get to decide whether laws are unconstitutional or characterized in the wrong jurisdiction *
 - Need to still follow the words of the constitution
 - Application of the test
 - Precedent – common sense

Canadian Western Bank v Alberta [2007]

"It is now well established that the resolution of a case involving the constitutionality of legislation in relation to the division of powers must always begin with an analysis of the "pith and substance" of the impugned legislation ...

This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates.... If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.

To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law ... To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose Equally, the courts may take into account the effects of the legislation....

The fundamental corollary to this approach to constitutional analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional."

R v Morgentaler [1993] 3 SCR 463, 107 DLR (4th) 537

Facts:

- Between October 26 and November 2, 1989 the respondent performed 14 abortions at his private clinic, and was charged with 14 counts of violating the *Medical Services Act*
- The *Medical Services Act* received Royal Assent on June 15, 1989 which prohibited the privatization of certain medical services to maintain a high-quality health-care delivery system – and the *Medical Services Designation Regulation* included abortion. Despite these actions, Morgentaler opened his clinic
- During trial he argued the Act and regulation were of no force on the grounds they violate women's Charter rights to security of the person and equality and they are an unlawful encroachment on the federal's exclusive criminal law jurisdiction
- Acquitted at trial after the judge held the Act was in pith and substance criminal law, and this decision was upheld by the appeal court

Issue:

- Whether the Nova Scotia *Medical Services Act* and the regulation made under the Act are *ultra vires* on the ground that they are in pith and substance criminal law (s. 91(27))

Decision:

- Appeal dismissed

Ratio:

- **Pith and substance:** Purpose – relevant intrinsic and extrinsic information; Legal effects – how the legislation affects the rights and liabilities of those subject to its terms; Matter – determined by the law's dominant purpose
- **'Colorable'** legislation – when the courts determine that legislation on its face addresses matters that are within its jurisdiction but in pith and substance it is directed at matters outside its jurisdiction → [Sopinka J did state the colourability doctrine was not relevant to his analysis]
 - The *Medical Services Act* on its face appeared to deal exclusively with a matter within provincial legislative competence (delivery of medical services) but this title and stated purpose masked its real purpose which was to punish the provision of abortion as a public evil

Analysis: (Sopinka J)

- Appellant relies on ss. 92(7), (13), and (16) – which gives provincial authority over hospitals, property and civil rights, and all matters of a merely local or private nature

Classification of Laws: First identify matter, then assign it to a "class of subjects"

1) What is "Matter" – Determine the dominant purpose

- Look at the preamble or 'purpose' section; background context ('mischief rule' – the mischief they were trying to prevent); whether it mentions others action/how it works with those; legislative history (Hansard)
- "Leading feature or true character" often described as pith and substance
- The legislation's dominant purpose/aim is the key to constitutional validity
- How the **legislation as a whole affects the rights and liabilities** of those subject to its terms – often a good indicator of the purpose of the legislation

2) Purpose and Effect (Legal + Practical effects)

A) "Legal Effect" or Strict Legal Operation

- How the legislation as a whole affects the rights and liabilities of those subject to its terms = indicates purpose (does it create an entitlement; establish a system; enforce a prohibition)

B) The use of extrinsic materials (The actual/predicted practical effect)

- Look beyond legal effect to inquire into social or economic purposes which statute was enacted to achieve
- Other effects → ancillary effects that occur

The central feature of the proposed law was the prohibition of Dr. Morgentaler's proposed clinic on basis of a common and almost unanimous opposition to abortion clinics

3) The scope of Applicable Heads of Power

A) The Criminal Law: Any law that has its dominant characteristic the prohibition of an activity, subject to penal sanctions, for a public purpose such as peace, order, security, health or morality

B) Provincial Health Jurisdiction: does confer on NS power over health care in province generally ie. cost/efficiency, nature of health care delivery, and privatization of medical services

C) The Regulation of Abortion: subject for criminal law (since mid 19th century) bc interference w/ pregnancy is criminal

Application of Principles to Case at Bar

- The central purpose and dominant characteristic is the restriction of abortion as socially undesirable practice which should be suppressed or punished

- Legal Effect: The legislation expressly prohibits performance of abortion in *certain* circumstances w/ penal consequences, which is traditionally crim law. The present legislation prohibiting traditionally criminal conduct is a question of validity on its face
- Extrinsic Evidence
 - Duplication of Criminal Code Provisions: Provincial legislation has been held invalid when it contains language that is “virtually indistinguishable” from that found in Code. But this does not necessarily determine validity, raises an inference, the more duplication = the stronger inference that dominant purpose is criminal = strong inference
 - Background: events leading up support assertion that legislation does not relate to provincial jurisdiction over health. Strengthen inference that impugned act designed to serve crim law purpose
 - Court of Events: Catalyst for gov action was rumoured proposal of Morgentaler’s clinic and this was the mischief it wanted to correct
 - Hansard: Demonstrates that prohibition of clinic = central concern of members who spoke, common opposition of free-standing clinic, clinic viewed as public evil. NS submits it was concerned about privatization, costs and quality of health, and policy against tier system of health access, but this was absent through hansard
 - SO: purpose/true nature relate to matter of crim law
- Searching for Provincial Objectives:
 - Privatization concerns were incidental to paramount purpose
 - Concern for health and safety of women = no record to indicate that abortions pose danger
 - Privatization concerns were not brought up until second reading of act
 - No evidence regarding cost-effectiveness or quality of medical services delivered at private clinic
 - NS propose against surgeries outside hospital, but why didn’t act prohibit surgeries generally then?
 - If provinces policy were to prohibit performance of any surgical procedures outside hospitals, it would have said so (based on reasoning in *Westendorp*)
 - The fines were not measure for enforcement, but penalties to punish abortion clinics as inherently wrong

Notes:

- Caution on using Hansard
 - Contradictory statements are said
 - Want to judge the law – and not the opinions of those who created it
 - Should it matter what they said or what they did do in the creation of the legislation
- **Colourability:** being mindful of what the legislation says versus what it is intended to do. Does the ‘meat and bones’ match the purpose of the act. Pith and substance is not about the they say they’re doing but about what they are doing.

Pith and Substance Test

→ True nature of the law; determine which section it fits into

- 1. Want to determine the **dominant purpose** – using analytical steps (intrinsic/extrinsic evidence)
 - Intrinsic (text itself): Look to the preamble (if there is one) or the ‘purpose section’; Whether it mentions other acts – how it works with those
 - Extrinsic (outside of words): Background context – ‘mischief rule’ (the mischief they were trying to prevent; Legislative history – Hansard evidence; history/events leading up to it; policy studies/Canadian reports
- 2. **Legal and practical effects** of the law
 - Legal effects: what the law does – how the legislation as a whole affects the rights and liabilities of those individuals effected – create an entitlement, establish a system, enforce a prohibition
 - Practical effect: other effects (not necessarily rights/liabilities) – ancillary effects that occur → flow from the legal effects
- 3. Pith and substance **conclusion**
 - Statement about what the pith and substance is once this information is canvassed – this is where you classify whether the law should fall in either 91 or 92
 - Scope of the applicable heads of power

[Matter is determined by the law’s *dominant purpose*: “incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.” (CWB)]

DOUBLE ASPECT DOCTRINE

WR Lederman ‘Classification of Laws and the British North American Act’ 1981

- Courts deal with the overlapping of federal + provincial categories by limiting the generality of the classes of laws by 'mutual modification'
- Ex. Regulation of trade + commerce is reduced to 'regulation of interprovincial and international trade and commerce'; and property + civil rights are to be rendered 'property + civil rights except those involved in interprovincial and international trade and commerce'
- Double-aspect theory: When federal and provincial features of challenged rule are of equivalent importance, challenged rule can be enacted by both the Fed and the Prov under separate aspects
- Requires different conduct. If they are merely cumulative and non-conflicting, then both rules may operate. If they conflict/call for inconsistent behavior, federal prevails (Doctrine of Paramountcy) and the provincial law is inoperative (not invalid – may resume if the federal law is repealed)

"The **double aspect doctrine**, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question." – *Canadian Western Bank*

Multiple Access Ltd. v McCutcheon [1982] 2 SCR 161

*Double aspect doctrine used over doctrine of paramountcy [laws are of equal importance; no conflict]

Facts:

- The Ontario Securities Act 1970 prohibited insider trading in shares trading on the Toronto Stock Exchange, and the Canada Corporations Act 1970 had almost the same provisions, applicable to corporations incorporated under federal law
- Shareholder action was initiated against insiders of Multiple Access Ltd, a federally incorporated company, and the shareholder initiated proceedings under the Ontario Securities Act
- The respondents argued that the Ontario statute could not validly apply to their case because the regulation of the trading in shares of federally incorporated companies was in exclusive federal jurisdiction – relied on paramountcy to assert that the Ontario provision were rendered inoperative by the provisions of the Canada Corporation Act that deal with the issue

Issues:

- Whether fed act and provincial act are both applicable? Does one need to be struck down?

Decision:

- Both statutes are valid and applicable on the facts

Ratio:

- The double aspect doctrine applies when the contrast between the relative importance of the two features is not so sharp – when the powers of both heads of government are of equal importance there would seem little reason when considering validity to kill one and let the other live
- Prov and Fed "insider trading" legislation is equal, no need to kill one

Analysis: (Dickson J)

1. Are the provisions of the Canadian Corporates Act ultra vires the Parliament of Canada in whole or in part?

- Resist regarding them as redundant to Ont. Legislation. Must be analyzed on its own. Also, many provinces do not yet have insider trading legislation, so striking down fed = potential gap in present regulatory schemes; provinces would have no protection
- Does the matter in P&S fall w/in classes allocated to parliament?
 - Yes – deals with company law of federal companies, subject matter that is not w/in exclusive jurisdiction of provinces
 - Legislating federal companies = dominion. (*John Deere Plow co v Wharton 1915*) under POGG
 - it was established that the power of legislation with reference to the incorporation of companies with other than provincial objects belongs exclusively to the Dominion Parliament as a matter covered by pogg
 - Extends to maintenance of the company, which is directly affected by insider trading
 - A statute may fall under several heads.
 - Securities legislation clearly has double character. The insider trading provisions have both securities law and companies law aspect and would adopt double aspect doctrine to validate both sets of leg. Provisions
- Doctrine applicable when the contrast btw the relative importance of the two features is not so sharp – when the fed and prov. characteristics of legislation are roughly equal in importance, little reason to kill one/let only one live

2. Whether Ontario provisions are inapplicable to insider trading of securities of federally incorporated companies as per interjurisdictional immunity and/or are inoperative by overlapping provisions as per federal paramountcy? Neither doctrine applies.

Double Aspect Doctrine: Both apply to their own spheres.

- Prov: 92(13): buying and selling shares on stock exchange in Toronto is subject to prov. Legislation. Protects people who buy/sell shares in open market; contracts; property rights

- Fed: (91(2): regulate corporation w/ national business objective. Protects shareholders of federally incorporated companies; prohibit harmful behavior; pogg: federal government has jurisdiction over incorporation of federal companies

Dissent: (Estey)

- The 3 dissenting judges decided that the federal provisions were invalid, and characterized the legislation as the regulation of securities falling within provincial jurisdiction over property and civil rights rather than as regulation of the functional aspects of a federally incorporated company

Notes:

- **The double aspect doctrine has its origins in Hodge v The Queen (1883)**
- In most cases, the double aspect doctrine is not analyzed in the way Lederman proposed – usually application entails the court evidencing a willingness to characterize very similar federal provincial and federal enactments in different ways and in such a manner as to allow courts to uphold both aspects as valid
- Ex. Law Society of British Columbia v Mangat – federal allowed non-lawyers to represent clients in proceedings before the Immigration and Refugee Board, however a provision in the BC Legal Profession Act did not allow non-lawyers to.
 - Decided that both features were of equal importance and so neither should be ignored and parliament should be allowed to determine who may appear before the tribunals it has created
- Courts have insisted that jurisdiction to pass laws in relation to the regulation of trade or in relation to labor relations is exclusive rather than concurrent

ANCILLARY DOCTRINE [Octopus Tentacle]

Necessarily Incidental

- The pith and substance doctrine results in a law being upheld if its dominant characteristic falls within the classes of subject matter allocated to the jurisdiction of the enacting government
 - A law may have an impact on matters outside the enacting legislature's jurisdiction so long as these effects remain secondary or incidental features of the legislation rather than its most important feature
- The ancillary doctrine is used in cases where the provision being challenged is part of a larger scheme of legislation – when the impugned legislation is examined in isolation it appears to intrude into the jurisdiction of the other level of government
 - If the larger scheme of which the impugned provision is part is constitutionally valid then the impugned provision may also be found valid because of its relationship to the larger scheme
 - Will depend on how well the offending provisions are integrated into the valid legislative scheme – if closely related they will be deemed necessarily incidental to the valid scheme and the law as a whole will be upheld

Ancillary Doctrine

- [The ancillary powers doctrine is not to be confused with the **incidental effects rule**. The ancillary powers doctrine applies where, as here, a provision is, in pith and substance, outside the competence of its enacting body. The potentially invalid provision will be saved where it is an important part of a broader legislative scheme that is within the competence of the enacting body. The incidental effects rule, by contrast, applies when a provision, in pith and substance, lies within the competence of the enacting body **but touches on a subject** assigned to the other level of government.]
- Ancillary doctrine test – General Motors case would be cited
 - Save the law because of the 'dominant tide of constitutional doctrines' (p. 243)
 - Judges do not like to chop off branches of law – because it prevents/strikes down democratically elected laws
- A law can still be constitutional if branches or pieces of it are not within its level – can save it or can sever them
- **If too many parts** of it are *ultra vires* the entire law can be deemed as **unconstitutional**
 - The world of overlap contrasted with watertight compartments
 - Both levels of government need to deal with the same issues
 - How does pith and substance allow for overlap?
- Pith and substance of the overall law/act is inside its jurisdiction
 - When a particular sections pith and substance is outside its jurisdiction
 - This is when the ancillary doctrine applies – if that particular section is *ultra vires* can be saved

*General Motors of Canada Ltd. City National Leasing [1989] 1 SCR 641 *Sets out ancillary doctrine test; general regulation of trade (s. 91(2))*

Facts:

- City National Leasing (CNL) brought a civil action against GM alleging that it suffered losses as a result of a discriminatory pricing policy that constituted a kind of anti-competitive behavior prohibited by the Combines Investigation Act – GM argued that s. 31.1 was beyond the jurisdiction of the parliament because the creation of civil causes of action falls within provincial jurisdiction in relation to property and civil rights

- S. 31.1 allowed people who are harmed to sue one another (provincial – 92(13))
- [This ruling is notable for its holding that the Combine Investigation Act (now the Competition Act) is a valid exercise of the federal power over the general regulation of trade
 - It is also notable for setting out the general approach to the necessarily incidental doctrine]

Issues:

- When the constitutional challenge is focused on a single provision of a larger legislative scheme, how is the constitutional validity of the provision to be determined?

Decision:

- Act is a valid exercise of general trade and commerce under 91(2) and is functionally related, even if incidental

Ratio:

- Steps in the analysis to determine if a single provision is constitutional valid should be:
 - 1) the court should determine whether the impugned provision can be viewed as intruding on provincial powers and if so to what extent
 - 2) the court must establish whether the act is valid and if the scheme is not valid then that is the end
 - If the scheme of the regulation is valid then the court must determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship – requires considering the seriousness of the encroachment on provincial powers in order to decide on the proper standard for such relationship

Analysis:

1. Whether impugned provision is intruding into provincial powers?

- It does encroach – 92(13) – important power

What is the degree of the intrusion?

What is the seriousness of the encroachment on provincial powers?

- 1) Less intrusive because it is **remedial provision**, not substantive in act (its purpose is to help enforce the substantive aspects of the Act)
- 2) Limited scope of the action – does not create a general cause of action; its application is limited by the provisions of the act
- 3) It is well established that federal can create rights of civil action where such measures may be shown to be warranted

2. Is the Act Valid?

- Yes, under general trade + commerce
- Competition Act constituted a scheme of regulation validly enacted by Parliament pursuant to 91(2)

3. Is provision constitutionally justified by reason of its connection w/ valid leg? (“fit test”)

How well is it integrated into the scheme; How important is it for the efficacy of the legislation?

Note: It’s a balance: if impugned provision only encroaches marginally on provincial powers, then a “functional” relationship may be sufficient to justify provision. If highly intrusive, then stricter fit test needed. [the seriousness of the encroachment should reflect the seriousness of the test required to ensure that an appropriate constitutional balance is maintained]

- The provision intrudes, in a limited way, on the important provincial power over civil rights (a strict test such as ‘truly necessary’ or ‘integral’ is inappropriate) → Whether the provision is functionally related to the objective of the legislation and to the structure + content of the scheme
 - Necessary link btw. Provision and act = functionally related; would pass with a more-strict test
 - It is a remedy bounded by parameters of the act; is integrated into the purpose and underlying philosophy of the act; and does not create open-ended private right of action

Note: In a federal state, overlap is to be accommodated and expected. Allow for judicial restraint in proposing strict tests which result in striking down leg. Both provincial and federal governments have equal ability to legislate in ways that may incidentally affect other government’s sphere of power.

Quebec Attorney General v Lacombe 2010 SCC 38

*For provisions (ancillary powers doctrine) to be valid; they must further the legislation and not be supplementary

Facts:

- A bylaw was added by way of an amendment to the municipality’s general zoning bylaw, for the purpose of prohibiting the construction and use of aerodromes within a particular part of the municipality which included Gobeil Lake
- This bylaw was enacted after vigorous lobbying by the owners of summer homes and other users of a recreational lake (Gobeil Lake)

Issues:

- The validity of a bylaw enacted in 1995 by a municipality in Quebec (Bylaw 260)

Decision:

- The amendments to the bylaw do not meet the rational functional test from *General Motors*
- Therefore, the amending bylaw is not valid

Ratio:

- In order for provisions to be valid (ancillary powers doctrine) they must further the valid legislative scheme and not only compliment it
- It also cannot function as a stand-alone provision and must instead work to further the objectives of the legislation it is under; can be used to fill in a gap that the original legislation is missing

Analysis: (McLachlin J)

- P+S of general zoning by-law is regulating the use of land (92(13)) → it is valid
- 1. P&S: Amendment prohibits construction of aerodromes in lake zone, while permitting their construction in other zones. P&S is regulation of aeronautics [legal/practical effects; context] – prohibition of aerodromes on Lake Gobeil
- 2. Assign Matter to Head of Power: aeronautics falls to federal jurisdiction (pogg – regulation of airplanes/airports)
- 3. Is it ancillary?
 - a. How far is the intrusion – is it a marginal or serious encroachment?
 - i. Is a prohibition the most serious interference?
 - b. What is the rational functional reason for this intrusion – seems to be the more important question
 - i. This bylaw fails on the rational function side of the test
 1. A blanket ban of aerodromes across the entire municipality was not a rational purpose – could have only banned on vacation areas, and it may have been saved in this particular case
 2. This blanket ban does not further the objectives of the zoning law, and there is a lack of connection on the areas affected
 - c. Conclusion: Amendments on face + Impact are directed at removing aviation activities form part of municipality
- **The Ancillary Powers Doctrine**
 - Ancillary powers will only save a provision that is rationally and functionally connected to the purpose of the legislative scheme that it purportedly (actively) furthers – not enough that the measure supplement the legislative scheme
- **Application of the ancillary powers doctrine**
 - Are the amendments valid because they are ancillary to valid provincial provisions – do these amendments further the purposes of the legislative scheme or merely supplement it?
 - Are the amendments a functional part of the whole
 - Zoning legislation has as its purpose the regulation of land use – functions by establishing zones, or regions where particular activities may be conducted, therefore seeking to establish a rational and fair basis upon which land users may predicate their behavior. It also must treat similar areas similarly and avoid stand-off prohibitions → the underlying purpose is to rationalize land use for the benefit of the general populace
 - A close examination of the purposes and effects of the bylaw 260 reveals it does not further the objectives of the zoning law generally
 - The bylaw bans the use of aerodromes throughout the municipality and not just confined to vacation areas – there is a lack of connection between the nature of the areas affected and the ban on aerodromes
 - The bylaw 260 treats different parcels the same by broadly banning water aerodromes throughout the municipality, and similar parcels differently
 - It does not function as zoning legislation but rather a stand-alone prohibition
 - Does not fill a gap the original bylaw is missing, does not remove or fix an inconsistency, does not enhance the bylaw

Dissent: (Deschamps)

- Dissented on the basis that a municipality has powers under 92(13) to regulate land use in what it considers to be the best interests of its residents – relied on the double aspect doctrine

INTERJURISDICTIONAL IMMUNITY [Castle Walls]

- This doctrine is intended to emphasize exclusivity of jurisdiction → there is a tension between overlap + ‘exclusivity’
 - Comes into action typically when a generally worded provincial law is clearly valid in most of its applications but in some of its applications it arguably overreaches, affecting a matter falling within a core area of federal jurisdiction

- This doctrine protects certain matters that fall within federal jurisdiction from the impact or interference of otherwise valid provincial laws
- When this doctrine is invoked there is often a 'reading down' of the provincial/federal statute in order to protect the exclusive opposite level from encroachment
 - Reading down – a technique of interpretation used to save statutes from constitutional challenge – the words of the statute are interpreted to apply only to matters within the enacting body's jurisdiction
- This doctrine originated in cases involving federally incorporated companies and federally regulated undertakings – held that provincial laws would have to be restricted in their application if they would have the effect of impairing the status or essential powers of a federally incorporated company
 - S. 92(10) Federal undertakings – ex. post, airplanes, RCMP, banks, railways, telecommunications
 - When a provincial affects a vital or essential part of the federal undertaking then that provincial law **does not apply/inapplicable** to that undertaking
 - Does not strike down the law – just does not apply to the federal workers → it is **inapplicable** to them
- Do not want provincial legislation to impair or sterilize the operations of an interprovincial communications undertaking
- *Bell #2*
 - IJI to apply where a provincial law "affects a vital or essential part" of federal undertakings (or vice versa) – provincial law affected minimum wage, Bell Canada said it could not affect them because it was an essential part of the undertaking
 - Argument here is that minimum wages do not apply to federal workers
 - Budgeting/allocating resources are fundamental to how businesses are run – vital or essential

Canadian Western Bank v The Queen in Right of Alberta [2007] 2 SCR 3

***Interjurisdictional immunity must impair a core area of the opposite jurisdiction [changed from 'affect']**

Facts:

- In 2000, Alberta enacted changes to the *Insurance Act* and included federally incorporated banks to fall under these provisions as well to ensure people had 'peace in mind' in insurance at both provincial and federally incorporated banks
- The federally incorporated banks took action against this Act saying their insurance was only bound by the Bank Act which fell under 91(15) of the Constitution and that the Insurance Act was constitutionally inapplicable by virtue of the interjurisdictional immunity doctrine, or inoperative by virtue of the doctrine of federal paramountcy

Issue:

- Whether this case should be determined by virtue of the doctrine of interjurisdictional immunity?

Decision:

- Concluded there is no conflict between the provincial and federal legislation at issue and that the provincial legislation can therefore operate in relation to the banks in Alberta which seek to promote 'peace of mind'
- Appeal dismissed
- **In the absence of prior case law favoring IJI application to the subject matter at hand, a court proceeding to the consideration of federal paramountcy will generally be justified**

Ratio:

- When the application of the provincial legislation at issue is not held as enough to impair on a core area of federal legislative jurisdiction, then the doctrine of interjurisdictional immunity should not be applied
 - Test changed from 'affects' [Bell] to 'impairs'
- Here, promoting 'peace of mind' in insurance is not seen as enough to fall within the core of the federal government's jurisdiction over banking
- **'A court should favor, where possible, the operation of statutes enacted by both levels of government'**

Analysis: (Binnie and Lebel)

[What is IM? AND why we don't like it]

- This power is exclusive because the constitution expressly specifies this, and this exclusivity pre-empts that of the legislatures and their general and specific application in so far as such laws affect a vital part of their undertaking.
- In practice, seems to be invoked in favor of federal immunity at expense of provincial legislation; although it is meant to be reciprocal
- We have seen federalism as putting great emphasis on the interplay between federal and provincial powers (Dickson CJ in OPSEU)
 - The concepts such as IJI and 'watertight compartments' have not been the **dominant tide** of constitutional doctrines and rather the undertow against the strong pull of pith and substance and the aspect doctrine (we are

- not understanding the purpose and effect of the law but rather using these to justify why one level of governments' law should overrule another)
 - The dominant tide is principled in the concern that a court should favor the ordinary operation of statutes enacted by both levels of government
- The sweeping immunity argued for by the banks is not acceptable. It **exposes dangers of allowing IM to exceed proper limit and frustrates application of P&S analysis and double aspect doctrine**
 - Broad application creates practical problem and is inconsistent with what P&S, double aspect are designed to promote
 - Requires arbitrarily defining "core" of an indeterminate scope. Not compatible with incremental approach of Canadian constitutional interpretation → difficult to define, except on a case-to-case basis; Canadian constitutional interpretation favors an incremental approach
- Effect: law cannot have incidental effects, despite absences at other levels
- Legal Vacuum: IM does not allow jurisdiction to step in in situations where fed hasn't occupied the field IM doesn't allow prov to apply (then there'd be no law!)
- The court does not favor intensive reliance on this doctrine, nor is it acceptable as first recourse in division of powers dispute [Restricted Application of IM]
 - In *Bell*: In order for legislation to be inapplicable, it is sufficient that the 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.
 - We say affect is not strong enough because does not imply adverse impact. → When the legislation of one government impairs (Adversely impacts) the core competence (vital or essential) of the other level of government, that core is placed in jeopardy [In the absence of impairment, IM does not apply]
 - Qualifiers: applied with restraint, after P&S and double aspect have been applied. Core is based on existing case law that shows past application has been considered absolutely indispensable or necessary to enable that jurisdiction to achieve the purpose for which exclusive legislative jurisdiction was conferred
 - What is the core?
 - The basic, minimum and unassailable content" (minimum = necessary to make the power effective for the purpose for which it was conferred)
 - Claimants must locate the promotion of "peace of mind" insurance at the core of banking.
 - Look at what the framers intended 'banking' to mean → there are core notions of banking we have to hold onto
 - The promotion of peace of mind insurance can hardly be said to be vital or essential to "banking"
 - Claimant must demonstrate that legislation IMPAIRS core competence of undertaking – based on existing case law in past application has been considered absolutely indispensable or necessary to enable that jurisdiction to achieve the purpose for which exclusive legislative jurisdiction was conferred (can't add new competence)

Notes:

- Courts do not like to use IJI
 - By not using IJI we do not have to determine the core feature of banking
 - Want overlap/concurrency between the two levels of government
 - Centralization – tends to favor the federal government
 - Want to use it only in a limited way [not acceptable as first recourse in division of powers dispute] – prefer P+S, double aspect, and paramountcy
- Because of those reasons Courts limit its scope
 - Changes test from affects to impairs
 - 'In general' limit to decided cases - Needs to be prior case law
 - Prefer pith and substance and paramountcy

Quebec (Attorney General) v Canadian Owners and Pilots Association 2010 SCC 39 [Test for IJI]

Facts:

- Two residents of Quebec build airstrip on an agricultural lot they owned – under the federal Aeronautics Act the construction/operation of an airfield for private aviation is not subject to a requirement of prior permission [registration is option – if do public can land there – they registered it]
- Under s. 26 of the provincial *Preservation of Agricultural and Agricultural Activities Act* this violates use of agricultural land for non-agricultural function [without authorization from the Commission] – were ordered to demolish the strip
- Challenged that s. 26 was ultra vires/inapplicable as it affected the location of aerodromes (IJI) or inoperative by conflicting with federal law (paramountcy)

Issues:

- Does s. 26 interfere with/impair the federal power over aeronautics (IJI doctrine)

Decision:

- The doctrine of interjurisdictional immunity is applicable in this case as the location of aerodromes lies at the core of the federal competence over aeronautics and s. 26 impinges on this core in way that impairs this federal power

Ratio: (IJI Test)

- 1) Does the provincial law trenches on the protected 'core' of a federal competence
- 2) If so, then to determine whether the law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of IJI [The test to determine how serious an interference must be, is whether the provincial law impairs the federal exercise of the core competence (Canadian Western Bank)]
 - Must be seriously or significantly restricting to federal power → If yes, then law is *inapplicable* by virtue of IJI

Analysis:

- Dominant purpose of the entire provincial Act was the preservation of agricultural land and therefore *intra vires* – the aerodromes was incidental interference therefore the law is still *intra vires*

Does s. 26 trench on the protected core?

- Aeronautics has been held to a matter of national importance and hence supported under POGG power – extending from operation of aircraft to the operation and regulation of the design/location of airports
- Airports and aerodromes together constitute a network of landing places that facilitate air transportation and ensure safety – therefore it is understood that the federal jurisdiction over aeronautics encompasses the power to determine the location of aerodromes
- To determine whether a power lies at a protected core, we must determine if the subject comes within the essential jurisdiction – the 'basic, minimum, and unassailable content' of the legislative power in question
 - In Canadian Western Bank it was held that IJI should be reserved for situations already covered by precedent
- **Here precedent is available – the court has held the location of aerodromes lies within the core of the federal aeronautics power**
 - In Johannesson, the court held that the location of aerodromes is an essential and indivisible part of aeronautics
 - Long-standing precedent establishes that where aircraft may take off and land is a matter protected by the doctrine of IJI, there the Act in question trenches on the core of the federal aeronautics power [interprovincial/nationally connected]

Does s.26 unacceptably impair a federal core competency?

- Does the application of the provincial legislation impair the power of parliament to regulate the establishment of private aerodromes?
- S. 26 does impair the federal power to decide when and where aerodromes should be built, as it prohibits the building of aerodromes on agricultural lands without prior authorization – and the effect may be to prevent the building of a new aerodrome or require demolition of an existing one
- Taking the power out of the hands of one government and handing it to another is a core feature of impairment
- The doctrine of federal paramountcy would allow parliament to override provincial zoning legislation for establishing aerodromes, however this Act would seriously affect the manner in which the power could be exercised as parliament would have to legislate for each specific location of particular aerodromes

Dissent: (Deschamps)

- Agree private aerodrome locations fall within the core of federal jurisdiction, however **formulated the 'impairment' question differently** and asked whether application of that legislation would impair the activity of small-scale aviation – therefore would determine that allowing s.26 to apply in the circumstances would not impair the activity of small-scale aviation and that the requested immunity should not be granted

Canada v. PHS Community Services Society, 2011 SCC 44 [Insite]

"In summary, the doctrine of interjurisdictional immunity is narrow. Its premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism. To apply it here would disturb settled competencies and introduce uncertainties for new ones. Quite simply, the doctrine is neither necessary nor helpful in the resolution of the contest here between the federal government and the provincial government."

[*Attempt at reversing IJI to apply to provincial law; rendering the federal one inapplicable]

- Does the criminal code apply inside the Insite?
 - Maybe federal criminal provisions cannot get inside this healthcare facility
- Held the fed law is valid, but treatment services in not a core competency for provincial jurisdiction over healthcare
- Essentially the court responded with the idea again that they do not like IJI

- Interjurisdictional immunity operates to prevent laws enacted by one level of government from impermissibly trenching on the “unassailable core” of jurisdiction reserved for the other level of government.
- While interjurisdictional immunity remains an extant constitutional doctrine, this Court has cautioned against excessive reliance on it. A broad application of the doctrine is in tension with the modern cooperative approach to federalism which favors, where possible, the application of statutes enacted by both levels of government. As such, this Court in *Canadian Western Bank* held that the doctrine must be applied “with restraint” and “should in general be reserved for situations already covered by precedent”. We note that there is no precedent for the doctrine’s application to the credit card activities of banks.
- In the rare circumstances in which interjurisdictional immunity applies, a provincial law will be inapplicable to the extent that its application would “impair” the core of a federal power. Impairment occurs where the federal power is “seriously or significantly trammel[ed]”, particularly in our “era of cooperative, flexible federalism”

OPERABILITY – THE PARAMOUNTCY DOCTRINE

- In Canada the constitution is silent on the issue of how to deal with the overlap and conflict between national and provincial laws with three exceptions:
 - S. 95 of the Constitution Act of 1867 – recognizes agriculture and immigration as areas of concurrent jurisdiction and provides that provincial laws should have effect only to the extent that they are not ‘repugnant’ to any Act of Parliament
 - S. 92A, added by constitutional amendment in 1982, confers on provincial legislatures a concurrent power to enact laws in relation to the export of natural resources to other provinces, subject to the paramountcy of federal legislation in the case of conflict
 - Section 94A added by amendments provides for concurrency in relation to old-age pensions and supplementary benefits but provides a form of **provincial paramountcy** by stating that no federal law ‘shall affect the operation of any law present or future of a provincial legislation in relation to any such matter’
- **Paramountcy:** A judicially created rule filling the gap on how to deal with overlap/conflict modelled on the rule found in s. 95
 - Provides that **in cases of conflict the federal law is paramount and the provincial law is inoperative** to the extent of the conflict
 - This does not make a provincial law invalid, its operation is simply suspended to the extent that it conflicts with federal legislation [If the federal law is appealed, the provincial law may re-operate as before]
- **Key issue is how to determine whether conflict exists between the two levels**
 - Use the ‘express conflict’ or ‘impossibility of dual compliance’ test
 - A narrow reading of conflict which allows for both federal and provincial laws to operate unless it is impossible for those subject to, or responsible for giving effect to, the two legislative schemes to comply with both
 - The ‘covering the field’ test or ‘negative implications’ doctrine
 - Broad reading – holds a provincial law inoperative whenever it has an impact on a matter already regulated by a valid federal law
 - Can also define it as an incompatibility of legislative policies or objectives
 - Focus is on the intention of the legislature that enjoys the benefit of paramountcy

Paramountcy Test:

- 1) Both laws valid? [Multiple Access]
 - a. In pith and substance is it valid?
 - b. Does the double aspect doctrine apply?
- 2) Is there conflict/inconsistency between the laws? [Hall]
 - a. Is it impossible to comply with both?
 - b. Does Provincial frustrate federal purpose?

Ratios:

- McCutcheon: if there are two laws that conflict, then the federal paramountcy principle applies. Duplication is not enough.
- Hall: If the purpose of the law frustrates intent, then to the extent of the frustration occurs then it is of no force or effect
- Rothmans: If the purpose of the law furthers the intent (although it is more onerous) and it is possible to comply w/ both, then both can exist

Multiple Access Ltd. v McCutcheon [1982] 2 SCR 161

***Rejection of the covering the field test; duplication w/o conflict is not enough [impossibility of dual compliance needed]
[Cited for determining the validity of the tests]**

Facts:

- Ont. Securities Act prohibited insider trading in Shares trading on the Toronto Stock Exchange, and the Canada Corporations Act had almost the same provisions, applicable to corporations incorporated under federal law. Shareholder initiated proceedings against MA under the Ont. SA's. MA relied on paramourcy to say the provincial Act was rendered inoperative since MA was federally incorporated [advantageous as the federal Act's limitation period had expired]
- Both Act's *intra vires* to their respective levels of power

Issues:

- Is the Ontario legislation rendered inoperative to the extent that it overlapped with virtually identical provisions of the federal act?

Decision:

- No – not rendered inoperative because the double aspect doctrine applies

Ratio:

- **Duplication without actual conflict or express contradiction is not enough to invoke the doctrine of paramourcy** and to render otherwise valid provincial legislation inoperative → Two things doing the same thing is the 'ultimate in harmony'
- If impossible to comply with both, then paramourcy applies [impossibility of dual compliance]

Analysis: (Dickson J)

- Henry J (trial) took a narrow (modern) approach to the conflict with the result of leaving to the provinces ample legislative room
 - Approach (proposed by Martland J in *Smith v The Queen*) that acts might be punishable under both provisions and therefore the provisions overlap, however when there is no conflict in the sense that compliance with one law involves breach of another, it would then appear they can operate concurrently
 - Believed double liability would be avoided by cooperation between administrators and the ordinary supervision of the courts over duplication of proceedings before them
- Justice Morden (appeal) adopted the older view that the authorities establish one of the implications of federal paramourcy to be that provincial duplicative legislation is suspended and inoperative
 - Lederman – if both levels are duplicates, then every situation covered by one is likely covered by the other, and there is no provincial room left, given full operation of the federal law
- Dickson J (SCC) – There is no true inconsistency in the case of merely duplicate provisions since it does not matter which statute is applied – the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked
 - Duplication without actual conflict/contradiction is not enough to invoke the doctrine of paramourcy and to render otherwise valid provincial legislation inoperative = harmonious duplication
 - Conflict = impossibility of dual compliance → one says yes, other says no [high test; difficult to achieve]

Bank of Montreal v Hall [1990] 1 SCR 121 [purposive approach]

*** If compliance with provincial statute frustrates Parliament's legislative purpose, then dual compliance is impossible**

Facts:

- Hall was a farmer and contracted loans from a bank and in return granted the bank a security interest on a piece of farm machinery pursuant to what was then s. 88 of the federal *Bank Act* (now s. 178) [*Intra vires* – federal controls banks]
- Hall defaulted on his loan and the bank, pursuant to the provisions of the *Bank Act*, seized the piece of machinery and brought an action to enforce its real property mortgage loan agreement
- The bank did not follow the procedures established under s. 27 in the *Limitations of Civil Rights Act*, which are that failure to give the mandatory notice of intention to seize results in the termination of the security interest and the release of the debtor from further obligations [*Intra vires* – provincial controls civil limitations and property and civil rights]
- In the QB the chamber judge decided that the bank did not have to comply with the provincial legislation, however the appeal court reversed that decision

Issues:

- Whether the provincial legislation was rendered inoperative because of a conflict with federal legislation

Decision:

- Appeal allowed – Parliament, under its power to regulate banking, has enacted a complete code that defines and provides for the realization of a security interest → There is no room left for the operation of the provincial legislation and therefore it should be construed as inapplicable to the extent that it trenches on valid federal banking legislation
- Ss. 19-36 of the *Limitation of Civil Rights Act* are inoperative to security taken pursuant to ss. 178 and 179 of the *Bank Act*

Ratio:

- If compliance with provincial statute frustrates Parliament's legislative **purpose**, then dual compliance is impossible

Analysis:

- *McCutcheon* test for conflict: Is there an actual conflict in operation?
- [Frustration of purpose is a conflict that should trigger the paramountcy doctrine]
- 1. Examine Provincial Legislation/purpose: a judge must determine when, and if a security/article is to be seized – procedure is laid out for a creditor to follow to take possession of his security
- 2. Examine Fed Legislation: Assigned the bank an immediate right to seize and sell those goods, subject only to the conditions required by the Bank act.
- There is actual conflict before them. Compliance with fed entails defiance of provincial counterpart. Cannot require bank to defer to provincial legislation = displace intent of parliament.
- Dual compliance is impossible when application of provincial statute frustrates parliament's leg. Purpose. (which is to have a uniform banking system across Canada)
- Parliament has made a complete code and there is no room left for provincial. That legislation should be construed as inapplicable to the extent that it trenches on valid federal banking legislation.

Notes:

- Dual compliance is possible by giving notice before seizing securities – can comply with both but the purpose of the federal Act is frustrated when the provincial Act is adhered to

Rothmans, Benson, & Hedges Inc. v Saskatchewan [2005] 1 SCR 188

***Purpose of one furthers intent of another + can comply with both; both can exist**

Facts:

- Parliament enacted the *Tobacco Act* in 1997 and s. 19 prohibits the promotion of tobacco products and tobacco-related brand elements except as authorized elsewhere in the Act or its regulations; s. 30(1) provides that any person may display, at retail, a tobacco product or an accessory that displays a tobacco related brand element; s. 30(2) further provides that retailers may post signs indicating the availability and price of tobacco products
- In 2002 the *Tobacco Control Act* came into force in SK, and s. 6 of that Act bans all advertising, display, and promotion of tobacco/related products in any premises where persons under 18 are permitted [More-strict standard than what the Tobacco Act imposed]

Issues:

- Can both Act's be complied with at the same time? Or is s. 6 of the SK Act sufficiently inconsistent with s. 30 of the federal Act as to render it inoperative

Decision:

- No inconsistency between the relevant provisions of the two acts and therefore not to be rendered inoperative; purpose of federal Act is not frustrated by the compliance with the provincial Act

Ratio:

- If the purpose of the Act furthers the intent (although it is more onerous) and it is possible to comply with both, they both can exist

Analysis: (Major J)

- Examination of the character of s. 30 of the Tobacco Act (Fed.)
 - Clear that the purpose and effect is to define with greater precision the prohibition on the promotion of tobacco products contained in s. 19
 - S. 30 did not grant retailers a positive entitlement to display tobacco products
 - The Tobacco Act is directed at a public health evil and contains prohibitions accompanied by penal sanctions → The Tobacco Control Act also has a similar purpose, but it more-strict

Can a person simultaneously comply with s.6 of the Tobacco Control Act and s.30 of the Tobacco Act?

- It is obvious that a person can comply with both Acts
 - By admitting no one under 18 on the premises or by not displaying tobacco/tobacco-related products
- The Tobacco Control Act simply prohibits what Parliament has opted not to prohibit in its own legislation and regulations
- For an impossibility of dual compliance to exist, s. 30 would have to require retailers to do what the Tobacco Control Act prohibits – to display tobacco or tobacco-related products to young persons

Does s. 6 of the Tobacco Control Act frustrate parliament's purpose in enacting s.30 of the Tobacco Act?

- Both the general purpose of the Tobacco Act (to address a national public health concern) and the specific purpose of s. 30 (to circumscribe the general prohibition set out in s. 19) remain fulfilled
- Namely, s. 6 of the Tobacco Control Act seems to further at least 2 stated purposes of the Tobacco Act
 - To protect young persons from inducements to use tobacco products and to protect the health of young persons by restricting access to the products

PEACE, ORDER, AND GOOD GOVERNMENT (p. 323-335)

- Since the 1930s, the distinguishing feature of the modern interpretation of pogg has been the re-emergence of the national concern doctrine – which was first introduced by Lord Watson in the *Local Prohibition* case
 - Using it in a form that allows for federal legislation in situations of national concern apart from emergencies
- The national concern doctrine was given a modern formulation by Viscount Simon in *AG Ontario v Canada Temperance Federation* [1946] → affirming Russell
'The true test must be found in the real subject matter of the legislation if it such that it **goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion** as a whole then it will fall in the competence of the Dominion Parliament as a matter affecting peace, order, and good government'
 - Used to reaffirm the validity of Russell and also reject that Russell was based upon a finding that temperance constituted a national emergency
- The **national concern doctrine** [issues with national dimensions] as set out in *Canada Temperance Federation* was applied to validate federal legislation in two cases decided by the Supreme Court in the 50s and 60s
 - 1) In *Johannesson v Rural Municipality of West St. Paul* [1952] – [aeronautics]
 - A case involving the controlling of the location of airports – the majority referred to the doctrine as supporting federal legislative jurisdiction with respect to the whole field of aeronautics
 - 2) In *Munro v National Capital Commission* [1966]
 - The Supreme Court unanimously upheld the National Capital Act on the basis of the federal pogg power → national capital region as a 'single matter of national concern'
- **Gap branch** → If not covered under provincial powers, federal can step in
 - The *Radio Reference* used the opening words in s. 91 to suggest that it authorizes federal legislation to subject matters not explicitly assigned to either level of government [Gap branch]
 - *Jones v AG New Brunswick* [1975] [gap branch]
 - Issue was the Official Languages Act which provided for equal status of French and English in federal institutions
 - Legislation was unanimously upheld on the basis that federal institutions are "clearly beyond provincial reach and therefore fall within the opening words of s. 91 because of the residuary power"
- **Emergency branch**
 - Fort Francis; Board of Commerce
- The uncertainty about the pogg scope
 - *Reference re Anti-Inflation Act* – this Act was drafted in a way that allowed the federal government to argue its validity under either the national dimension doctrine or the emergency doctrine

Reference re Anti-Inflation Act [1976] 2 SCR 373, 68 DLR (3d) 452

*Emergency doctrine

Facts:

- (Trudeau enacts price/wage control – zap)
- The Anti-Inflation Act established a system of price, profit, and income controls – 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 – also to public sector if agreement was made w/ province

Issues:

- Whether this act is supportable under pogg as an emergency or 'crisis' legislation?

Decision:

- Act is valid for pogg and does not invade provincial legislative jurisdiction due to its temporary nature

Analysis: (Laskin)

- The general power in the opening section of 91 (pogg) is fed by other enumerated federal powers considered to be paramount [Include the relation to the regulation of trade and commerce, in relation to banking and the issue of paper money, in relation to interest, to the raising of money by any mode of system of taxation, and to the borrowing of money on public credit; under *Canada Temperance Case* [economic crisis sufficient enough to warrant intervention]
- 1. Did act **contradict content** because it excluded provincial public sector from scope, notwithstanding that it is framed as temporary measure?
Purpose: bringing businesses w/in the act which are of strategic importance to the containment and reduction of inflation in Canada

Reasonable policy to allow provinces to contract into program under own admin if that was their preference. Co-operative federalism allowed (*Board of Commerce*)

Adding provisions to include public sectors does not indicate they did not act with urgency

• 2. Is federal contention assisted by **preamble?**

Preamble: inflation = matter of serious national concern, necessary to restrain profit margins, prices, etc.

Preamble is sufficiently indicative that Parliament was introducing a far-reaching program prompted by view of serious national condition

Preamble is a base, but not enough to decide validity on

• 3. Does **extrinsic evidence/judicial notice** back it up?

The social and economic policy and hence governmental and legislative judgment.

Not court to decide if there was national emergency, but to decide if there was **rational basis that supports parliaments assertion that there was a national emergency**

Court did have **rational basis** for regarding anti-inflation act as measure to temporarily necessary to meet situation of economic crisis imperiling wellbeing of Canada and requiring parliament's intervention

If there is a clear fact in the world **judicial notice** will be taken even if not put in front of them

• 4. Is it a tenable argument that exceptional character could be lent to the legislation beyond that of local or provincial concerns because Parliament could reasonably take view that it was necessary measure to fortify action in other areas of federal authority, such as monetary policy?

The fact that inflation has been rising, inflation is a monetary phenomenon and that monetary policy is w.in fed jurisdiction, allows parliament of Canada, in these circumstances, to act over monetary policy

• Parliament entitled – inflation = monetary phenomenon/monetary policy is in exclusive federal jurisdiction; trade + commerce; so by using pogg federal government is proceeding from federal legislative power bases

Dissent: (Beetz)

- [Starting premises] The Act and the Guidelines directly interfere with classes of matters which have been held to come within exclusive provincial jurisdiction – property and civil rights, and the law of contract; and this interference is not incidental but on a large scale
- [Problems w/ gap theory] If the containment and reduction of inflation goes beyond local provincial concern and falls within pogg then Parliament could move to prevent or control any other efficient method reasonably connected with the control of inflation [salaries, wages, tuition; inventories/ration food → anything to prevent hoarding profits]
- [Hypothetical consequences] Agrees that inflation was the occasion/reason for the enactment of the Act, however not that inflation is the subject-matter/true characteristics of the Act → clearly a law relating to the control of profit margins, prices, dividends, and compensation
- Property and civil rights are the pith and substance of the Anti-Inflation Act and Parliament cannot, aside from national emergency or from constitutional amendment, fight inflation with powers exclusively reserved for Provinces
- Disagree that the National Concern Doctrine and the Emergency Doctrine amount to the same
 - National Concern applies if certain heads (ex. Aeronautics) were added to the categories of subject matters under s. 91 when it is found by the Courts that a class of subjects not enumerated in either sections and is not of a merely local nature – this effect once applied is permanent
 - The Emergency Doctrine allows Parliament to make laws in crisis but is limited by the temporary nature of the crisis
- If this power is used it must be explicit and not leave any parts up to interpretation – if overriding a provincial power, there must be a signal that is acting pursuant to its extraordinary power
 - **Test of explicitness:** What is required is an indication/proclamation in the title, the preamble, or the text which cannot leave any doubt, given the nature of the crisis, that the federal government aims to act on the basis of that power
- [Degree of unity] → Distinctiveness, singleness, and indivisibility

Notes:

- How Beetz dissent became the law → Arguments about national concern becomes the law in *Zellerbach* and also an *Emergency Act* is passed where if the government is to operate under emergency powers it must do so explicitly

R v Crown Zellerbach Canada Ltd [1988] 1 SCR 401 (p. 323)

***Problems w/ national concern doctrine; provincial inability test**

Facts:

- Validity of s. 4(1) of the federal Ocean Dumping Control Act, which prohibits dumping of any substance at sea except in accordance with its terms and conditions of a permit; the respondent carries on logging operations on Vancouver Island and maintains a log dump on a water lot leased from the provincial Crown for the purpose of log booming and storage

- The only permit the respondent had was one to dump at a site in Johnstone Strait (2.2 miles from where the wood-waste was dumped)
- The trial court found s.4(1) ultra vires and dismissed the charges; the court of appeal dismissed the appeal

Issues:

- Is the act ultra vires in regulating of dumping of waste in waters within a province?

Decision:

- Not ultra vires – problem involves federal competence and is saved by national dimension doctrine

Analysis: (Le Dain)

- Purpose: regulate dumping of substances at sea in order to prevent various kinds of harm to marine environment. (Act appears to fulfill international treaty obligations)
 - However not expressly stated in the act, only references were made
- CZ says there is no federal jurisdiction to control dumping in provincial waters of substances not shown to have pollutant effect
- AG say act is single matter of national concern, or pogg dimension: prevention of ocean and marine pollution. CZ says to prohibit dumping of ANY substance = no in accordance with purpose
- Le Dain – purpose: directed to control regulation of marine pollution. Necessary to prevent ANY dumping substance without permit so that authority can determine before dumping occurs, whether it has an adverse effect on the marine environment.
- Le Dain – s. 91: seacoast and inland fisheries is not sufficient by itself to support constitutional validity of Act. No justification found in S. 91.
- **National concern doctrine:** (p. 326)
 - 1. Separate and distinct form national emergency doctrine [emergency branch] – which is temporary
 - 2. Applies to both new matters, and matters which existed at confederation of a local or private nature, but in absence of national emergency, become matters of national concern
 - 3. Must have singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable w/ the fundamental distribution of leg power → cannot be broad categories w/ too many elements (ex. Environment); must be carefully defined and a single issue that other issues are not flowing from
 - 4. **Provincial inability test** –
 - Is it reconcilable with the fundamental distribution of legislative power?
 - Relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively w/ control or regulation of the intra-provincial aspects of the matter. Necessary to fill the gap of provincial powers
- National concern doctrine applies because:
 - 1) Interprovincial regulation: Federal jurisdiction to legislate for pollution of provincial waters applies because it reduces the risk that citizens of one province would be harmed by non-cooperation of another province.
 - 2) [Distinguishable] Marine pollution has its own characteristics that distinguish it from fresh water pollution
 - 3) [Single/Indivisible]: Marine pollution by ocean dumping is a separate form of water pollution

Dissenting: (La Forest):

- Only a local matter, not an emergency requiring grave proportions that displace ordinary divisions of power. Prohibition not linked to purpose: because prohibits ANY dumping.
- **Environment falls under mixed jurisdiction**
- The challenge then for the courts, will be to allow the federal government sufficient scope to acquit itself of its duties to deal with national and international problems while **respecting the scheme of federalism**
- Does not meet SDI test [**insufficiently discrete**] – Marine waters are not wholly bounded by the coast – can extend upstream into long rivers – without a clear limit, handing too much power; The line between salt and fresh water cannot be demarcated clearly; Pollution of the ocean is not confined to pollution emanating from substances deposited in water
- Fed cannot regulate a local industry to control ocean pollution – can only regulate activities on an industry falling within federal power

POGG and the Environment: Friends of the Oldman River Society v. Canada (Minister of Transport) [1992] 1 S.C.R. 3.

- Environmental regulation: classic example of double aspect
 “I agree that the Constitution Act, 1867 has not assigned the matter of “environment” to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.”

“It must be recognized that the environment is not an independent matter of legislation under the Constitution Act, 1867 and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty”.

- The environment is not a discrete constitutional subject
- The question is not ‘where does the environment fall’ – the question is ‘whether the legislation has footing in the other jurisdiction’ → Depending on what the law’s dominant characteristic is

POGG Summed Up

Emergency Branch

- Temporary in scope
- Flexible in nature: authority extends as far as is necessary given the emergency
- Applicable in war
- Potentially available in social or economic emergencies – *Re Anti-Inflation Reference*

Gap Branch (new matters) and National Concern (matters that have since become national concern)

- Usually a permanent addition to s. 91
- Subjects must possess
- nationwide importance
 - singleness, distinctiveness and indivisibility – as determined by the “provincial inability test” [Crown Zellerbach]

PROVINCIAL POWERS OVER ECONOMIC REGULATION

Carnation Co Ltd. v Quebec Agricultural Marketing Board [1968] SCR 238, 67 DLR (2d) 1

***Incidental effects do not determine constitutionality – what matters is what the legislation is ‘in relation to’**

***Regulation of production in province**

Facts:

- The Marketing Board was created through the provisions of the *Quebec Agricultural Marketing Act* and was empowered to approve joint marketing plans, and to arbitrate any dispute arising in the course of carrying out a joint marketing plan
- The Act provided that 10 or more producers of agricultural products could apply to the Marketing Board for approval of a joint plan for the marketing of one or more classes of farm products if the plan was supported by a vote of at least 75% in number and value of all producers concerned
 - Board made of Quebec dairy farmers
 - Responsible for negotiating contracts w/ corporate client’s like Carnation Milk
 - Now Carnation must buy it from a board (reduces their bargaining power)
- Price imposed in Quebec has effect on distribution of product in other markets. Product is shipped out of province = Fed power: Inter-provincial trade
- The appellant (Carnation) believes the orders made by the Board are invalid because they enable it to set a price to be paid by the appellant for a product the **major** portion of which will be used for **export out of Quebec** – and they believe this constitutes s. 91(2) the regulation of trade and commerce and therefore the setting of prices by the board is *ultra vires*
- Quebec – P+S → purpose was to deal with sale/purchase of milk in Quebec – not the interprovincial aspects

Issues:

- Whether the Quebec Agricultural Marketing Board had infringed on the exclusive legislative powers of Parliament under s. 91(2) to regulate trade and commerce

Decision:

- The Board merely had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade – but this is not sufficient enough to make the orders invalid
- In this case, the orders under question were not directed at the regulation of interprovincial trade, they did not assert directly to control or to restrict such trade, and there was no evidence that they did control or restrict it; purpose was to improve bargaining position for Quebec producers [sale/purchase of milk in Quebec]
- Appeal dismissed

Ratio:

- Must **distinguish between the effects of the legislation and whether it was made in relation to the regulation of trade and commerce, based on each case’s own facts** → Need to determine the type of control that is being enabled and whether it is interprovincial or mainly confined to transactions taking place within the province
- Incidental effects do not determine constitutionality – what matters is what the legislation is ‘in relation to’

Analysis: (Martland)

- The creation of the Quebec Carnation Company Milk Producer's Board and empowering it to negotiate on the behalf of milk producers for the sale of their products to the appellant is analogous to the creation of a collective bargaining agency in the field of labor relations
 - The purpose of the order was to regulate (on behalf of Quebec producers) their trade with the appellant for the sale to it of their milk in Quebec; the object was to improve their bargaining position (92(13)+(16))
 - Most provincial legislation governing labor disputes does not seem to require negotiation through arbitration, however there is no doubt that this would be constitutional
- The two other orders made by the Marketing Board were the proper prices to be paid to the producers
 - The price determined by the orders having bearing upon the appellant's export trade is unquestionable as it affects the cost of doing business, but labor costs affect the cost of doing business of any company which may be engaged in export trade and there would be little doubt as to the power of the Province to regulate wage rates within a Province
 - It is not the possibility that these orders might 'affect' the appellant's interprovincial trade which should determine their validity, but rather whether they were made in relation to the regulation of trade and commerce
- As in the *Ontario Reference* – 'once a statute aims at regulation of trade in matters of interprovincial concern' it is beyond the competence of a Provincial Legislature
- **Agrees that a trade transaction completed in a province is not necessarily subject only to provincial control, however also holds the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control of the Province**

AG Manitoba v Manitoba Egg and Poultry Association

***Marketing/controlling sale of goods from outside coming into province = ultra vires**

Facts:

- Ontario has a surplus of cheap eggs and Quebec has a surplus of cheap chicken. The surplus producers were interested in the market of neighboring jurisdictions. The producers in these jurisdictions were not thrilled – they made a board (of Ontario producers) that sets a price floor for sale of chickens in Ontario; giving preference to products coming from within province (so that Ontario producers of chickens do not suffer great losses by competing w/ Quebec).
- Mirror image in Quebec. Ontario farmer must sell eggs through Quebec board, restricted by floor price.
- Result: [adverse effects on farmers from other provinces] Manitoba is losing access to two markets in eastern Canada. Manitoba starts its own carbon copy scheme – asked for a reference (SCC) to get a precedent from Canada saying that its scheme was unconstitutional. Then Canada must strike down 2 other schemes.
- Scheme → Only through the Manitoba Egg Producers' Marketing Board that any eggs could be sold or offered for sale regardless of where they were produced; for the control of marketing of extra-provincial eggs in Manitoba

Issue:

- Is there a distinction between Carnation case and this egg marketing scheme? In pith and substance is the egg marketing scheme is different than the milk marketing scheme in Carnation?

Decision:

- Manitoba's scheme is unconstitutional (so succeed in getting decision from SCC)

Ratio:

- Unlike Carnation the dominant purpose of the scheme is to **regulate or control the flow of agricultural goods from outside coming into the province**. Trend: Production of good = local matter, but Marketing/Sale of good = raise concerns of interprovincial trade

Analysis:

- Is this scheme meant to regulate production w/in Manitoba or to regulate trade?

Flow of trade:

- It is aimed to restrict or limit the free flow of trade btw provinces. The scheme goes beyond provincial authority because it concerns goods coming from outside province → Unlike Carnation case, which regulates production
- The purpose was to limit cheap eggs from coming into the province – made directly in relation to the regulation of interprovincial trade → not only affects interprovincial trade; was made in relation to it
 - Carnation incidentally affected interprovincial trade but was made in relation to the sale/purchase of milk intra-provincially
- Production: The purpose is not the regulation of production

Re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198.

[response to egg scheme]

The marketing of agricultural products = both local and interprovincial aspects. Must negotiate framework together with provincial and federal to make constitutional scheme

- production and marketing quotas
 - Regulation of production = provincial
 - Marketing = federal matter *if market beyond province*
- Affect v control
 - Qualitative distinction between legislation that “affects” inter-provincial trade vs. legislation to “control” inter-provincial trade
- As a result: Encourage co-operative federalism
 - These court decisions push federal and provincial governments to work together

Ratio: Both levels fed/provinces developed integrated scheme that deals with production quotas and marketing of agricultural goods w/in Canada. Courts want to foster this type of **cooperative arrangement**. Best balance of power? One that is negotiated by both parties

REGULATION OF NATURAL RESOURCES

- see s. 92(5) → provincial jurisdiction deals with timber
- s. 109 →
 - Only talking about the provinces referenced to in the section (109)
 - At signing these provinces agreed to federal control of natural resources – after amendment, even playing field
 - Cannot use living tree argument to **change** the words → can only use it to interpret them
- 1905 → Alberta joined therefore does not get jurisdiction over mines + minerals until after the Natural Resources Transfer Agreements
- National Resources Transfer Agreements, 1930
- Canadian Industrial Gas and Oil v. Government of Saskatchewan, [1978] 2 S.C.R. 545
 - Why a different result from Carnation?
- Central Canada Potash v. Government of Saskatchewan, [1979] 1 S.C.R. 42 – “production” vs. “price fixing”
- see s. 92A

Canadian Industrial Gas and Oil Ltd. v Government of Saskatchewan [1978] 2 SCR 545, 80 DLR (3d) 449 [CIGOL]

Facts:

- The provincial legislation was enacted following the sharp rise in the price of oil on the world market which occurred in 1973
- First, production revenues from freehold lands were subjected to a ‘mineral income tax’ which was 100% of the difference between the price received at the well-head and the basic well-head price
- Second, all petroleum and natural gas in all producing tracts within the Province were expropriated and subjected to a ‘royalty surcharge’ → The well-head value for the purposes of royalty surcharge is the higher of the price received at the well-head and the price per barrel listed
- The consequences of this application is that the government of SK will acquire the benefit of all increases in the value of oil produced above the set basic well-head price fixed by the statute
- 98% of all crude oil produced in SK is destined for export either to Eastern Canada or the US
- (In practice – every time the price of oil goes up, SK gets the benefit)
- The validity of the statutes was challenged by the appellant → They were unsuccessful in seeking to obtain a declaration of their invalidity at both trial and on appeal

Issues:

- The legislation also relates to the **regulation of interprovincial and international trade and commerce**, a matter over which the federal Parliament has exclusive power under s. 91(2)

Decision:

- The statutory provisions and the Regulations and orders enacted and made relating to the mineral income tax and the royalty surcharge are *ultra vires* of the province of SK; Appeal allowed

Ratio:

- S fixes price to be charged for oil at well head (located in province). Regulating price to be charged at a point – and that point is w/in province. Carnation involved point of sale btw. Cow/tanker trucks. Purpose: to maximize the return for Saskatchewan citizens. This is a public resource, and the profits should be enjoyed by public not oil companies. Effect has

substantial effect on export markets. Sask. Trying to fix the price for a commodity of which 98% is being sold outside province.

Analysis: (Martland J + 6)

- Practically all of the oil to which the mineral income tax or the royalty surcharge becomes applicable is destined for interprovincial or international trade
- The **effect of the legislation** is to set a floor price for SK oil purchased for export by the appropriation of its potential incremental value in interprovincial and international markets, or to ensure that the incremental value is not appropriated by persons outside the province
- The **actual purpose of the legislation** is to drain off substantial benefits that would have accrued to the producers due to the sudden and unprecedented price of crude oil [colorable]
- In both of tax and the royalty, the Minister is empowered to determine the well-head value of the oil which is produced which will govern the price at which the producer is compelled to sell the oil – on the export sales of a commodity that has almost no local market in SK → This involves the regulation of interprovincial trade and trenches upon s. 91(2)
- This is not similar to *Carnation Co* – the effect of the regulations was to increase the cost of milk purchased by Carnation in Quebec and processed there, mostly for sale outside Quebec
 - In *Carnation*, the legislation indirectly affected the export trade in the sense that its costs of production were increased, however it was **designed to establish a method for determining the price of milk sold by Quebec milk producers to a purchaser in Quebec, who processed it there**
 - In this case, the legislation is **directly aimed at the production of oil for export and has the effect of regulating the export price since the producer is compelled to obtain that price on the sale of his product**
- P+S of the legislation → to control international trade

Dissent: (Dickson + 1) [not colorable]

- Language of the statutes does not disclose an intention of the Province to regulate, control, or impede marketing or export of oil from SK → also because there are no obstacles to the free movement of goods [as in Manitoba eggs]
- There is also no extraneous evidence to form the basis of an argument that the legislation in its effect regulated interprovincial or international trade because production/export of oil increased after the legislative scheme was implemented
- Consumers were unaffected – only way to affect them would have been to freeze the price of oil
- Believes SK had a legitimate and reasonable interest of its own to advance in enacting the legislation in question, and the effect on the extra-provincial trade in oil is indirectly and incidental to the manifest revenue-producing object of the legislation

Notes:

- In 'Resource Taxation and the SCC' it was noted that the reasoning behind the indirect taxation was that the tax is paid by the purchaser (and that this is an attempt to regulate trade because the purchaser is a consumer), and because the purchaser is a non-resident of the province – therefore, the court reasoned that the producer has not borne the tax
- However, Martland's decision was that the appellant was entitled to recovery of the sums paid of the monies collected without legal authority – the producers are entitled to tax monies which they have not paid

Central Canada Potash Co. Ltd. v Government of Saskatchewan [1979] 1 SCR 42, 88 DLR (3d) 609

Facts:

- Saskatchewan instituted a potash pro-rationing scheme in 1969, when almost all potash was sold outside the province, with about **64% going to the US** [to increase prices to international markets]
- The scheme controlled production through licenses, which prevented Central Canada Potash from fulfilling one of its contracts [Setting minimum prices]
- The trial judge found the regulations ultra vires, however the appeal judge upheld their validity

Issues:

- Whether the SK pro-rationing scheme controlling the production of potash, established pursuant to the *Mineral Resources Act* is ultra vires?

Decision:

- Appeal with respect to constitutional validity allowed, declaration of invalidity by trial judge restored

Ratio:

- Scheme in which Sask. wanted to regulate production of potash (Set price charged in foreign markets). Has substantial control over potash, and how it pulls those levers effect price charged abroad. Struck down: **price fixing**. Pith and substance effects extra-provincial markets/interprovincial trade = dominion power (s 91.2)
- S. 91.2 Trade and Commerce: Interprovincial trade and Trade with foreign countries (*Parsons*)
- S. 91.2 Trade and Commerce: General regulation of Trade (*Parsons*)

Analysis: (Laskin)

- 'Production' vs 'price fixing'

Production

- The only market the schemes had any significance in was the export market, as there was hardly any SK market for the mineral
- This is not about the production of a local good – but about the price of export of a local commodity
- Extra-provincial markets/international trade = s. 91(2)

Price Fixing

- What is evident from the *Potash Conservation Regulations* was that the government of SK wanted to regulate the marketing of potash through the fixing of a minimum selling price applicable to the permitted production quotas
- There was no concluded transactions of sale and purchase in the province as in *Carnation*; it was out of province and offshore sales that were the principal objects of the licences and directives
 - The documentary evidence proves this – the directive stated the purpose was for consumption within or without SK
- CJ Culliton – believed that natural resources and the mineral wealth of the province were subject to provincial regulatory control alone and that production controls were matters within exclusive provincial authority
 - Admitted by all that the Potash industry was facing problems and if not solved would have a detrimental effect of the industry and Province – therefore the potash industry had the right to seek assistance from whatever Government had the power to assist; since natural resources are exclusively within the province, the industry turned to the province, which implemented controlled production and established minimum prices – in pith and substance these programmes were directed to a matter within provincial jurisdiction
 - If not, then the right to control potash production and minimum prices rests with the federal government – however the federal government does not have the power to control the production of potash or to set a price, therefore if these programmes are held to be ultra vires then it is by the determination of the validity of the ultimate effects of the programmes and not by their true character and nature
- Do not agree with Culliton that the consequence of invalidating the provincial scheme is to move to the federal government to control productions of minerals in the Province and the price to be charged
 - The constitution does not determine that legislation held to be invalid in a province may be validly enacted by the federal government
- **The situation is different where a province establishes a marketing scheme with price fixing as its central feature – it has been held that the Province does not have control over the marketing of provincial products in interprovincial or export trade**
- As in the *Canadian Industrial Gas*, and may also be said of potash that the 'legislation is directly aimed at the production of potash destined for export and it has the effect of regulating the export price since the producer is compelled to obtain that price on the sale of his product'
- When governments act in good faith, as here, to invoke authority to realize desirable economic policies, they must understand they have no open-ended means of achieving their goals when there are constitutional limitations on the power under which they purport to enact
- The courts will approach the task of appraisal of the constitutionality of social and economic programmes with sympathy and regard for consequences of holding them ultra vires, however if the appraisal results in a clash with the constitution then they must be held ultra vires

Notes on Proprietary Rights

- In the *Potash* case, reference was made to the fact that SK was acting in a regulatory capacity rather than as a proprietor

Note on Section 92(A)

- 92(a) was added in 1982 to grant the provinces additional powers over natural resources
 - To authorize provinces to legislate for the export of resources **to other provinces** subject to Parliament's paramount legislative power in the area as well as to allow indirect taxation in respect of resources so long as they do not discriminate against other provinces
- 92A(2) would not have changed *Canadian Industrial Gas and Oil and Potash* – because that was international export (retained under 92A(3)) → Change here, **export to other parts of Canada** (this used to be interprovincial trade)

Note on Offshore Minerals

- Also uncertainty about the coastal provinces to control the exploration for and exploitation of natural resources in coastal waters
- Reference re *Offshore Mineral Rights* in BC decided that the coastal waters of BC were within federal jurisdiction
 - The federal government had the rights of ownership under *pogg* and had the right to explore and exploit resources on the continental shelf beyond the territorial sea

- In **Re AG Can** it was decided that the waters between the mainland of BC and Vancouver Island were within provincial jurisdiction as they had been included in the colony of BC at the time of its creation and therefore formed part of the province when it entered confederation
- **Reference re the Seabed and Subsoil of the Continental Shelf Offshore** Newfoundland held the right to explore for and exploit minerals on the continental shelf was within federal jurisdiction under pogg because NF had no jurisdiction over it at the time it entered Confederation

GENERAL REGULATION OF TRADE

Labatt Breweries of Canada v AG Canada [criminal law is broad, but subject to its constitutional limits]

***Cannot target 'single industry' under 'general trade and commerce'**

Facts:

- The federal *Food and Drugs Act* regulated the content of a variety of food and drug products
- Section 6: where a standard has been prescribed for food, no person shall label, package, sell, or advertise any article in such a manner that is likely to be mistaken for such food, unless the article complies with the prescribed standard
- Labatt marketed 'special lite beer' which exceeded the maximum allowable alcohol content, therefore they challenged the validity of the Act and regulations
- Local beer being made and sold locally – interfering with economic trade within a province – Parsons said this is provincial

Issue:

- At issue here were regulations prescribing minimum and maximum alcohol content for beer marketed as 'light beer'

Decision:

- The Court split 6 to 3 finding the Act and regulations, as they applied to malt liquors and beer, ultra vires

Ratio:

- The federal government cannot enact laws targeting a 'single industry' with local character under s. 91(2)'s 'general trade and commerce' branch

Analysis:

- The federal government sought to justify it under the trade and commerce power, and in addition relied on its criminal law and pogg powers
- The Court held that the first branch of Parsons, giving the federal government power over interprovincial and foreign trade, was not applicable here as the impugned regulation was concerned with the production and local sale
- Not with the control and guidance of the flow of articles of commerce through the distribution channels
- It is not in relation to the export of this commodity – majority of the product is not
- Also could not be justified under the second branch of Parsons, the general trade power
- What clearly is not of general national concern is the regulation of a single trade or industry
- The impugned provisions were concern with the production process of a single industry that was substantially local in character
- Also no basis in criminal law or pogg
- Was **not directed at the protection of health** or prevention of deception; there was no matter of national concern

*General Motors of Canada Ltd v City National Leasing [1989] 1 SCR 641, 58 DLR (4th) 255 [*Ancillary doctrine test]*

Facts:

- Section 31.1 creates a civil cause of action for certain infractions of the Act
- S. 31.1 Any person who has suffered loss or damage as a result of
 - A) Conduct that is contrary to any provision of Part V, or
 - B) The failure of any person to comply with an order of the Commission or a court under this Act
- May sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section
- [A civil cause of action is within the domain of provinces to create]
- GM manufacturers automobiles and trucks; City National Leasing leases across Canada fleets of automobiles and trucks in competition with other national fleet leasing companies; CNL purchases most of its vehicles from franchised GM dealers but does not purchase from GM directly; CNL received interest rate support offered by GM; during this time they alleged GM had also been paying 'preferential' interest support to competitors of CNL; it is further alleged that the exclusion of CNL

from the preferential interest rate support was a practice of price discrimination contrary to s. 34(1)(a) of the Act (cannot give preferential pricing when dealing with the same products) giving CNL an action under 31.1

Issue:

- The constitutional validity of s. 31.1 of the *Combines Investigation Act* (Competition Act)
- Can s. 31.1 be upheld by virtue of its relationship with the *Combines Investigation Act*
 - Is the act valid under trade and commerce power (91(2)); and is 31.1 integrated with the Act in such a way that it too is intra vires under 91(2) – general trade and commerce branch
- (Could there be a possibility in using pogg as a back-up branch)

Decision:

- Found 31.1 to be intra vires the federal parliament
- The entire Act is intra vires under section 91(2) (under the second branch of that power) the power over general trade and commerce
- S. 31.1 is constitutionally valid by virtue of being functionally related to the Act – it is an integral part, well-conceived component of the economic regulation strategy found in the Act
- Would pass both the functionally related test (proper test for limited intrusion) and also the necessarily incidental test
- Appeal dismissed

Ratio:

- This Act is a complex scheme of competition regulation aimed at improving the economic welfare of the nation as a whole, it operates under a regulatory agency, it is designed to control an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all
- Use of 5 factors to determine if it falls under “general” trade and commerce. Must justify them on case by case basis (use the facts).

Analysis: (Dickson)

- This comes under s. 92(13) – need to use the general regulation of trade
- 2 branches of s. 91(2) since Parsons
 - Power over international and interprovincial trade and commerce
 - Power over **general trade and commerce** affecting the Canada as a whole
- It is under the second branch that CNL wish to uphold s. 31.1
- The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless
- From *Macdonald v Vapor Canada* Laskin CJ determined 3 hallmarks of validity for legislation under the second branch of the trade and commerce power
 1. The impugned legislation must be part of a **general regulatory scheme**
 2. The scheme must be monitored by the continuing **oversight of a regulatory agency**
 3. The legislation must be concerned with **trade as a whole** rather than with a particular agency (Labatt)
- Two factors were added to these in *Canadian National Transport* (Dickson J)
 - 4. The legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting provincially (**incapable of provincial enactment**)
 - 5. The **failure to include one or more provinces** or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country
 - (**Last 2 – provincial inability test)
- These 5 factors help ensure the enactment is one of **a national economic concern** and not just a collection of local ones – help distinguish between matters relating to trade and commerce and those of a more local nature – help protect provincial jurisdiction [Non-exhaustive list – just factors to consider (a contextual, analysis based list)]
- **Ancillary doctrine test is applied** [Determined the impugned provision encroached on provincial powers, but that the encroachment was limited]

The second step is to establish whether the Act contains a regulatory scheme

The validity of the regulatory scheme

- Using the *Canadian National Transportation criteria*
 1. Whether the regulatory scheme operates under the oversight of an agency
 2. Whether the Act is concerned with trade in general
 3. Whether the provinces would be constitutionally incapable of enacting combines legislation
 4. Whether the failure to include one or more provinces or localities would jeopardize the successful operation of the Act
- If it is valid, then is the provision sufficiently integrated w/ scheme that it can be upheld by virtue of that relationship? (look at seriousness of encroachment on prov. Powers)

- The presence of a **well-orchestrated scheme** (many parts to it) of economic regulation is apparent on examination of the Act; it is in evidence throughout the entire Act
- The purpose is to eliminate activities that reduce competition in the marketplace – the entire Act is geared at achieving this objective
- It is clear that the Director exercises a significant degree of control over the operation of the Combines Investigation Act
- The next 3 criteria are also met – they all share a common theme – indications that the scheme of regulation is national in scope and that local regulation would be inadequate
- Competition is one of crucial importance for the national economy
 - Competition policy can be seen as ensuring that the differing regional advantages will accrue to the nation as a whole in terms of lower prices, better quality and variety, and increased opportunities for Canadians
- This Act is part of a legislative scheme aimed at deterring a wide range of unfair competitive practices that affect trade and commerce generally and is not limited to a single industry, commodity, or area [**Need a balance of the powers between federal and provincial jurisdiction**]
- Yes, s.31 is a remedial provision. It does not create a general cause of action but rather one limited by the Act. Parliament is constitutionally allowed to create rights of civil action when they are warranted. s.31 is sufficiently related to the valid federal scheme of the Act.

FEDERAL POWERS OVER CRIMINAL LAW

Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference) [1949] SCR 1, 1 DLR 433

***Narrows the scope of what is criminal – 3rd P added = “Public purpose”**

Facts:

- Section 5(a) of the *Dairy Industry Act* (Federal Act) states: no person shall, import into Canada, or offer, sell, or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream

Issues:

- Whether section 5(a) of the *Dairy Industry Act* is *ultra vires* of the Parliament of Canada either in whole or in part and if so what particular or particulars and to what extent

Decision:

- Although the prohibition of manufacturing, possession, and sale of margarine was *ultra vires* Parliament, the **prohibition of importation could be upheld under the federal government’s power to regulate foreign trade**
- ULTRA VIRES

Ratio:

- Federal criminal law power is understood in respect of the need to identify the **evil or injurious effect** at which a **penal prohibition** was directed – must determine whether the legislation (in P+S) has an underlying criminal **public purpose**, not one that falls in provincial jurisdiction [public peace, security, order, health, morality]

Analysis: (Rand J)

- The issue depends on the validity of the contention that this is a provision of criminal law
- A crime is an act which the law forbids; we can look for some **evil, injurious, or undesirable** effect upon the public against which the law is directed – this effect may be social, economic, or political interests
- Is the prohibition enacted with a view to a public purpose which can support it as being in relation to criminal law?
- [Public peace, security, order, health, morality]– HOWEVER these do not appear to be the object of parliamentary action here
- The object – **is economic** (attempting to regulate property); and the **legislative purpose is to give trade protection to the dairy industry in the production and sale of butter** – The Dairy Industry Act is clearly aimed to the regulation of the Dairy Industry → To forbid the manufacture and sale for this end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces (92(13)) [if only use 2 Ps could encroach on provincial jurisdiction]
 - [benefiting one group (Dairy Industry) against competitors]
- To use this as a support for the legislation in the aspect of criminal law would mean the federal government by forbidding the manufacture or sale of particular products could not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another
- **In pith and substance, the legislation here is aimed at regulating the dairy industry**

RJR MacDonald Inc. v Canada (Attorney General) [1995] 3 SCR 199, 127 DLR (4th) 1

[Qualification added to criminal law → as long as it’s not employed colourably]

Facts:

- The purpose *Tobacco Products Control Act* 1988 was to prohibit all advertising and promotion of tobacco products offered for sale in Canada, *with an exemption for advertising of foreign tobacco products in imported publications*; it also required the display of unattributed health warnings on all tobacco products and precluded manufacturers from putting other information on tobacco products. Violation constituted an offence punishable by way of summary conviction or indictment, with penalties ranging from a fine not exceeding \$2000 or 6-months imprisonment to \$300 000 and 2 years
- Two tobacco companies challenged the constitutionality of the legislation seeking declarations that it was ultra vires as an intrusion into provincial jurisdiction over advertising grounded in s. 92(13) and 92(16)
- Trial judge found it ultra vires; Court of Appeal concluded it was intra vires [under pogg] not under criminal law power

Issues:

- Whether the Tobacco Products Control Act is *ultra vires* the federal government

Decision:

- Legislation is *intra vires* under criminal law power; Appeal dismissed

Ratio:

- To **create criminal legislation with respect to health is broad**, what is required is that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil
 - As long as it is not 'colorable' then it is valid criminal law

Analysis: (La Forest J)

- The criminal law power is plenary in nature and this court has always defined its scope broadly; and has been careful not to freeze the definition in time or confine it to a fixed domain
- Taking into account the broad definition, the pith and substance is criminal law – it is clear that the legislation was to prohibit advertisement of tobacco products, the promotion of tobacco products, and the sale tobacco products without printed health warnings
- In the Margarine Reference attention was drawn to the need to identify the evil or injurious effect at which a penal prohibition was directed → Here, the **evil targeted by Parliament is the detrimental health effects caused by tobacco consumption – this is apparent in s. 3's 'purpose' clause – prevention of something that kills people**
 - The concern here is the protection of Canadians from the hazards of tobacco consumption
- Given this fact, Parliament can validly employ criminal law to prohibit tobacco manufactures from inducing Canadians to consume these products
- 'Health' is not an enumerated head under the Constitution Act, however (Schneider) **health is an amorphous topic which can be addressed by valid federal or provincial legislation**, depending on the circumstances on the scope or nature of the health problem
- (Margarine) To create criminal legislation with respect to health is broad, all that is required is that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil
- There is no evidence of an ulterior motive – if wanted to control the industry as an industry would have enacted provisions related to quality, pricing, labor relations
- This differs from Margarine, where the prohibition was not really directed at curtailing a public evil but was in P+S aimed at the regulation of the dairy industry
- It is clear that Parliament could prohibit the manufacture and sale of tobacco products considering that they constitute a danger to public health [however not a practical policy consideration], therefore it follows that they may also validly legislate to prohibit the advertisement of tobacco products – the same effect is being legislated – the protection of Canadians from harmful and dangerous products
- **The P+S is criminal law for the purpose of protecting public health and that Parliament has authority under s. 91(27) to enact this legislation**
 - 'An affinity with a traditional criminal law purpose' unnecessary
 - Want room for expanding (living tree); values may change

Dissent: (Major J)

- Agrees about the placing of warnings on tobacco products however does not agree that Parliament under criminal law powers is entitled to prohibit all advertising and promotion of tobacco products and restrict use of tobacco trademarks '
 - **There must be an affinity with traditional criminal law**
- Only prohibiting some – 65% of tobacco ads come from international markets
- Disagree that persuading the public using advertisement constitutes criminal conduct
- Legislation that prohibits advertising of a product that is legal and licensed lacks a criminal public purpose and therefore is ultra vires

Facts:

- Hydro-Quebec was charged with violation of an interim order made by the federal Minister of the Environment restricting its emissions of PCBs. The order was made under part II of the Canadian *Environment Protection Act* which established a process for regulating the use of toxic substances. Hydro Quebec claimed the two sections of the Act (34+35) that were crucial to the making of the interim order and therefore to the charges were ultra vires. The federal government attempted to support the act under pogg and criminal law powers.
- Once a priority listed substance is found to be toxic the Ministers of the Environment and Health may recommend adding it to the List of Toxic Substances; where a federal-provincial advisory committee has the opportunity to provide its advice, and the substance may be added to the list – s. 34 provides for the regulation of substances on the List of Toxic Substance including civil and criminal penalties; where a substance is not on the List and where the Ministers believe immediate action is necessary, s. 35 allows for the making of ‘interim orders’ without going through the usual procedure

Issues:

- Whether s. 34 + 35 of the Act are ultra vires the federal government

Decision:

- The impugned pieces of legislation are intra vires the Parliament under s.91(27)

Ratio:

- Environmental protection is handed to Rand J’s list of public purposes [Margarine Reference]
- We are dealing **with prohibitions accompanied by penal sanctions, not concerned with whether these may incidentally affect property and civil rights but whether the prohibitions are directed at a public evil**

Analysis: (La Forest)

- Environment can be controlled by both – same with health
- Did not want to deal with pogg argument –national concern doctrine
- Better to put environmental protection in criminal law rather than pogg – under pogg there would be ‘profound issues respecting the federal structure of our Constitution’ would be handing over the entire ‘regulation of toxic substances’ to federal government; cannot merely regulate as they see fit – **have a more-narrow field to regulate in criminal law** (fit within 3 P’s)
- Only one qualification has been attached to Parliament’s plenary power over criminal law (RJR MacDonald) – that is **cannot be employed colourably** – must look into the purpose of enacting the legislation in order to determine this
- Pollution is an evil that Parliament can legitimately seek to suppress
- The protection of the environment is a major challenge – it is an international problem and requires action by the government at all levels
- The **purpose of criminal law is to underline and protect our fundamental values** – the stewardship of the environment is a fundamental value to our society
- The national concern doctrine operates by assigning full power to regulate an area to Parliament – criminal law does not work this way – rather it seeks to prevent evils falling within a broad purpose by using prohibitions – aimed at a broad area to ensure it is not a colorable attempt to deal with a provincial area
 - This does not preclude provinces from exercising powers to regulate and control pollution – can also work with federal government
- **Purpose of the sections:** part II deals with the control of toxic substances that may be released into the environment under certain restricted circumstances through prohibitions with legal sanctions
- **Intention:** to affect only those substances that are dangerous to the environment
- **The broad purpose + effect of part II** is to provide a procedure for assessing whether out of the many substances that may potentially fall within s. 11 that some should be added to the List and then to determine whether to prohibit the use of this substance – there is a need for a broad definition of ‘toxic’ (it is still bound by the substances being toxic)
- This prohibition is enforced by penal sanction and is undergirded by a valid criminal objective
- Province **cannot have exclusive powers under property + civil rights** to control the environment in a manner that **prevents Parliament from exercising the leadership role expected of it and its role in protecting basic values** of Canadians
- Regulations are needed in order to enforce prohibitions

Dissent:

- Nothing in the act suggests that **‘toxic’ is to be defined by an criteria other than those given in s. 11 and therefore if this substance (which could essentially be anything)** poses a risk to human health/life or to the environment then it qualifies as toxic and may be the subject of federal regulation
- Therefore, believe the P+S to be the regulation of all substance which may harm any aspect of the environment which may present a danger to human life

- Believe these provisions are **more an attempt to regulate environmental pollution than to prohibit** it, therefore extending beyond the scope of criminal law (distinguishing between the 2 is more an art than a science)
- Have a legitimate criminal purpose but are not intending to merely prohibit pollution, but to regulate it
- Also there are regulatory bodies and they are being given discretion to deal with substances based on their expertise on whether they are harmful or not harmful – seems regulatory
- S. 34 is not ancillary to existing prohibitions and it is not prohibitory in nature itself; there is no offence until an administrative agency intervenes
- Do not prohibit toxic substances but control the manner in which these substances will be allowed to interact with the environment – there is no general prohibition
- National concern branch in pogg – legislation failed on the singleness, distinctiveness, and indivisibility

Reference Re Firearms Act [2000]

Facts:

- In 1995, the federal government passed new gun control legislation – the *Firearms Act* which amended existing criminal code provisions, established a comprehensive licensing system for the possession/use of firearms and a national registration system for all firearms → Failure to comply was made an offence under the Criminal Code
- New scheme – regulation of all firearms; regulation of licence conditions
- Alberta Court of Appeal challenged to the federal government’s power to enact the gun control law → scheme was regulatory (regulating property) rather than criminal legislation – because of the complexity of the legislation and the discretion given to the chief firearms officer
- The fact that the Act is complex does not detract from its criminal nature
- Does not give the firearms officer undue discretion – the offences are not defined by an administrative body, they are clearly stated in the Act

Issue:

- Does the federal government have the power to enact the gun control law?

Decision:

- Yes. Court of appeal upheld the legislation; which was confirmed on appeal to the SCC

Analysis:

- SCC decision (2 step test – pith and substance; is it applied under a head)
 - The law in P+S is directed to **enhancing public safety by controlling access to firearms** through prohibitions and penalties
 - Look not at efficacy or policy of law – what does the law say/what are its dominant effects
 - Not subject to a discretionary scheme
 - Regulating guns as dangerous things and not as property
 - Some moral laws are about the rights of society – not rights or wrongs
 - The laws **regulatory aspects are secondary (incidental)** to its primary criminal purpose
 - The intrusion into provincial jurisdiction over property + civil rights is not so excessive as to upset the balance of federalism
- To be valid criminal law – public purpose must be connected to a **prohibition backed by a penalty**
 - The Firearms Act prohibits the possession of a firearm without a registration certificate, so did the Criminal Code – these prohibitions are backed by penalties
- Gun control was also distinguished from provincial regulatory schemes for the registration of motor vehicles and land titles – because of the inherently dangerous nature of firearms
 - Provincial legislatures regulate motor vehicles, not as dangerous products, but as items of property and as an exercise of civil rights
- **The primary uses of cars and firearms are fundamentally different**
 - Cars = transportation; danger to public is an unintended and incidental effect
 - Firearms = are inherently dangerous – a pressing safety risk in many if not all of their functions
- The Act is not to regulate guns as items of property – insurance/permissible locations of use are not regulated, however the aspects of gun control related to the dangerous nature of firearms are
- An appropriate balance must be maintained – [as affirmed in Reference re Secession of Quebec]
 - Gun control law does not upset the balance because its effects on property rights were incidental – the Act did not hinder the ability of the provinces to regulate the property and civil rights aspects of guns
 - Gun control has been a subject of federal legislation since confederation

Reference re Assisted Human Reproduction Act, 2010

- 2004 – regime passed by Parliament regulating use of assisted human reproduction
- Court says a number of practices are prohibited (i.e. Cloning humans); some are prohibited without a license (i.e. need license/certain environments/requirements); Established mechanism to oversee regulation + licensing of scientific acts
- Quebec arguments saying this is *ultra vires*:
 - Regulating hospitals is a provincial manner
 - Regulating scientific practice in hospitals is not a prohibition
 - Property and professions are being regulated – doctors are regulated by the provinces (*Parsons* – provinces regulate professions)
- **Majority – McLachlin**
 - Determining P+S of the entire Act – determine if provisions that are not *intra vires* can be saved by the ancillary doctrine – determined these were saved and deemed *intra vires*
 - **Parliament may validly employ regulations as part of a criminal law provided they target a legitimate criminal purpose – *RJR MacDonald; Hydro-Quebec***
- **Dissent:**
 - Too far removed from suppressing an evil – similar to dissent in *RJR MacDonald*
 - Not criminal enough – cannot be based on consistency or efficiency
 - Disagreement continues between regulation and criminal law power

PROVINCIAL JURISDICTION OVER MORALITY + PUBLIC ORDER

- 92(13) – provinces have power over property + civil rights
- As a result of s. 92(14) the provinces have jurisdiction over the administration of justice in the province (including provincial policing) along with the federal delegation to prosecute Criminal Code offences
- Federal government (through conditional legislation) has also drafted criminal laws in ways that allow them to be shaped by the provinces to respond to local conditions
- There is also judicial recognition of concurrent provincial jurisdiction in matters that may also be the subject of criminal law
 - S. 92(15) allows the provinces to enact penal sanctions, but the power is understood as an ancillary one – use of them to enforce provincial regulation schemes that are validly anchored elsewhere in s. 92 powers
- 92(16) – generally all matters of a merely local or private Nature in the Province

Re Nova Scotia Board of Censors v McNeil [1978] 2 SCR 662

Facts:

- The *Nova Scotia Theatres and Amusements Act* and the regulations enacted under it established a system for licensing and regulating the showing of films. The regulations required that all films be submitted to the provincial censor board prior to their exhibition with the board having the power to allow or prohibit the showing of the film, or allow showing with directed changes
- Sanction for the breach was a monetary penalty and revocation of a theatre's license
- After the Board banned 'Last Tango in Paris' a private citizen sought declaration that the provisions and the regulations were *ultra vires* the provincial legislature

Issues:

- Whether the provisions and regulations of the act are *ultra vires* the provincial legislature

Decision:

- Act is not *ultra vires*; valid under 92(13) and perhaps 92(16)

Ratio:

- Legislation which authorizes the establishment and enforcement of a local standard of morality is not necessarily an invasion of the federal criminal field; **morality is not exclusive to criminal law**

Analysis: (Ritchie)

- When the Act + Regulations are read as a whole it is found that they are primarily directed to the regulation, supervision, and control of the film business within Nova Scotia including the use and exhibition of the films
- Therefore, the impugned provisions are enacted for the purpose of reinforcing the authority vested in a provincially appointed board to perform the tasks of regulation – including the authority to prevent exhibition of films that have been rejected as unsuitable for viewing by provincial audiences
- Legislation is the exercise of provincial authority over transactions taking place wholly within the province
- Whether the province is able to regulate the exhibition and distribution of films within its own boundaries which are deemed unsuitable for local viewing on grounds of morality

- **The Act is not concerned with creating a criminal offence or providing for its punishment, but rather regulating a business within the Province to prevent exhibition in theatres on the grounds it fails to conform to local standards of morality**
- Legislation which authorizes the establishment and enforcement of a local standard of morality is not necessarily an invasion of the federal criminal field; morality is not exclusive to criminal law
- Even if it was criminal it is still preventative rather than penal – allowed under *Bedard v Dawson*
- In P+S is directed towards property and civil rights and therefore valid under s. 92(13) – may also be viewed as a matter of local and private nature in the Province (92(16)) since the standards from one area to another for what is acceptable on moral ground may vary (Secession reference – recognizing diversity)

Dissent: (Laskin CJC)

- Determining public viewing of films on considerations that may extend beyond public morality and include political, social, religious
- The determination of what is decent, obscene, morally fit for public viewing for art, films, live performances is within **the exclusive power of the federal government under criminal law power**
- Federal power in relation to criminal law extends beyond morality and is wide enough to embrace anti-social conduct or behavior
- This is a case where provincially authorized tribunal defines and determines what is legally permissible and what is not – this is a direct intrusion into criminal law
- When a licensee who disobeyed the order is at risk of cancellation of his license and of a penalty – therefore cannot say that no offence is created

Dupond v City of Montreal [1978]

***Regulating a local matter**

- City of Montreal passed a bylaw prohibiting parades or other gatherings that 'endanger tranquility, safety, peace, or public order' and an ordinance prohibiting public gatherings if thought to endanger safety, peace, or public order – the penalties were fines and imprisonment
- This bylaw/ordinance were found to be *intra vires* as a regulation of the municipal public domain as a local matter – the preventative character was emphasized
 - o Still regulating from a provincial head – local matter (92(16))
- Laskin dissented here as well – mini-criminal code [concerned about free speech]

Westendorp v The Queen [1983] 1 SCR 43

Facts:

- Westendorp charged with being on the street for the purpose of prostitution in contravention on s. 6.1(2) of a Calgary bylaw
- Bylaw was mainly concerned with use of city streets including solicitation provisions – penalties were fines and imprisonment according to the gravity of the infractions; it was amended to add s. 6.1 which dealt with prostitution (also 6.1(3) – cannot approach another for the purpose of prostitution) – the fines/imprisonment were heftier for these sections
- Reasoning – prostitutes often collect in groups which are a source of annoyance and embarrassment to the public

Issues:

- Does 6.1 invade federal authority in relation to criminal law therefore making it *ultra vires*

Decision:

- Appeal allowed; 6.1 invades federal authority in relation to criminal law → *ultra vires*

Analysis: (Laskin)

- 6.1 stands as an intruded provision – it is completely different from preceding sections. If wanted to deal 'control of the streets' would have to deal with the congregation of persons on the streets unrelated to what they were saying/doing. Here it is activated only by what a person says/does in relation to offering sexual services – there is no violation by congregating or obstructing but by the offer of sexual services. This prohibition is what makes it inherently criminal.
- A **colorable law** -- this is an obvious attempt to control or punish prostitution – there is no enumerated provincial head of power which this provision is attempting to regulate – nothing to do with property or the interference with public property
 - o **There is no valid provincial purpose for which the law is regulating**
- A province cannot translate a direct attack on prostitution into street control through the reliance on public nuisance
- Here there is an overreaching which offends the division of powers

What is the difference between Westendorp and Dupond?

- SCC: this is not a matter of protecting property or local or nature (as in Dupond), this is prohibiting in general communications for the purposes of prostitution. This looks like classic use of criminal law. Prohibiting a type of behavior

that members of society find offensive. It is not creating a disturbance, or undermining public order. It is contrary to public morality.

Rio Hotel Ltd v New Brunswick (Liquor Licensing Board) [1987] 2 SCR 59

**** Double aspect doctrine**

- SCC upheld provisions of the Liquor Control Act which gave the Board the power to attach conditions to liquor licenses regulating and restricting the nature and conduct of live entertainment in licensed premises.
- A license was issued to a hotel owner restricting nude performances – he argued the issue related to public morality and therefore fell within the jurisdiction of federal parliament under 91(27) because the Criminal Code had enacted several provisions relating to public nudity
- **SCC confirmed provinces ability to prohibit nude entertainment as part of the liquor license notwithstanding related provisions of the Criminal Code**
- This legislation has a purpose entirely different from that sought to be served by criminal law – has to do with the types of entertainment available as a marketing device for the sale of liquor within the province – **'double aspect doctrine'**
- This legislation prima facie relates to property and civil rights within the Province and to matters of a purely local nature – it is only seeking to regulate the forms of entertainment that may be used as marketing tools by owners to boost alcohol sales – there is overlap but no direct conflict and it is possible to comply with both this and criminal code provisions
- **Here it is part of a regulatory scheme for the sale of liquor in New Brunswick**

Chatterjee v Ontario (Attorney General) 2009 SCC 19

- Issue was the constitutionality of Ontario's *Civil Remedies Act* (CRA) which authorizes the forfeiture of proceeds of unlawful activity. It does not require allegation/proof that the person committed a crime, property may be forfeited on a balance of probabilities if it demonstrated that the property constituted the proceeds of crime in general
- The police arrested the appellant because did not have front license plate and found a warrant for a breach of probation and when searching his car incidental to the arrest found money (\$29 000) and items associated with illicit drug trade and a smell of marijuana but no drugs– he was never charged with any offence relating to the drug-related activity, however they applied for forfeiture of the seized money under the CRA
- As stated in *Canadian Western Bank* 'a court should favor, where possible, the operation of statutes enacted by both levels of government'
- The CRA was enacted to deter crime (both governments can pursue) and compensate victims (provincial competence)
 - o Crime imposes huge costs on provincial treasuries – if provinces have to bear the costs to the community of criminal behavior, they should be able to use deterrence to suppress it
- P+S it to make crime unprofitable, to capture resources tainted by crime, and to compensate private individuals/public institutions for the costs of past crime – **these are valid provincial objects** (not colorable) – **it is about property not punishing criminal conduct**

Reference re Securities Act 2011 SCC 66

Facts:

- This Act creates a single scheme governing the trade of securities throughout Canada subject to the oversight of a single national securities regulator
- Canada and Ontario believe it can be upheld under the general branch of 91(2); however, Alberta and Quebec believe it is a matter falling within s. 92(13); other opponents say under 92(16)
- This is an area of classic provincial jurisdiction

Issues:

- Determine whether the *Securities Act* falls within the legislative authority of the Parliament of Canada

Decision:

- No – the Act is not valid under the general branch of the power to regulate trade and commerce under s. 91(2)

Analysis:

- Canada has shown that aspects of the securities market are national in scope and affect the country as a whole – however considered in its entirety the proposed Act is chiefly directed at protecting investors and ensuring the fairness of capital markets through the day-to-day regulation of issuers and other participants in the securities market – these matters have long been considered local concerns subject to Provincial legislation over property and civil rights within the province
- A fundamental principle of federalism is that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another – rather a balance must be struck which allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres

- Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension
- The preamble of the Act states that its immediate purpose is to create a single Canadian securities regulator – s. 9 states the underlying purposes are to provide investor protection, to foster fair, efficient and competitive capital markets, and to contribute to the integrity and stability of Canada’s financial system
 - The Act includes certain requirements, duties, civil remedies, and regulatory and criminal offences pertaining to securities
 - Single set of laws pertaining to securities, under the oversight of a single national regulator
- The act does not seek to unilaterally impose a unified system of securities regulation for the whole of Canada – it allows provinces to opt in, the hope being that all or most will

Federal Government Position

- View the Act as a constitutional exercise of general power to regulate trade and commerce (91(2)) – believe it does not invoke other heads of power
- Do not contend that provisions of the Act that might be viewed as falling within provincial powers are valid because they are ancillary to the exercise of federal powers
- Securities markets have evolved and this has given rise to risks and concerns that can only be dealt with on a national level – this brings these markets within the general trade and commerce power

Provincial Position (AB, QB, MB, NB)

- The scheme of the Act falls under the provincial power or property and civil rights and also trenches on the jurisdiction over s. 92(16) – matters of a merely local or private nature (regulation of contracts, property, and professions)
- Believe the Act is thinly disguised as an attempt to regulate a particular industry (the securities industry)

Provincial Position (BC, SK)

- Do not oppose the idea of a national securities regulator as long as it is achieved in a manner that respects the division of powers – believe federal-provincial cooperation would be the best way to achieve securities regulation

Purpose:

- To create a single Canadian securities regulator
- To provide investor protection; to foster fair, efficient, and competitive capital markets
- To contribute to the stability and integrity of Canada’s financial system

Effects:

- Direct: establish a federal securities regulation scheme – wants all provinces to eventually join –and as once a sufficient number opt in the current regulation schemes will be effectively displaced
- To be included in the regulatory scheme, provinces must suspend their own securities laws - this will produce follow-through effects which are to subsume the existing provincial schemes governing securities under the federal regulation scheme
- The effect of the provisions is to duplicate legislation schemes enacted by provincial legislatures exercising their jurisdiction over property and civil rights under s. 91(13)
 - HOWEVER – duplication of provincial provisions does not mean that there is no federal aspect that can support the Act – Canada says it includes provisions that go beyond provincial powers – controlling systemic risks (‘domino effect’ risks with a chain of negative economic consequences)

Main Thrust:

- To regulate, on an exclusive basis, all aspects of securities trading in Canada including the trades and occupations related to securities in each of the provinces which can be protecting investors and ensuring the fairness of the markets through the regulation of participants

Using the GM Test to determine if Act falls under General Trade + Commerce:

- The first 2 are clearly met – regulatory scheme/body under oversight of a regulator
- *If we answer the next 3 affirmatively then the **double aspect doctrine is achieved***
- 3: It does go beyond a particular industry and engages trade as a whole (many businesses have trades/stocks); however, it also reaches beyond these matters and descends into the detailed regulation of all aspects of trading in securities (a provincial matter); the facts do not support Canada’s assertion that the area of economic activity has transformed so much that it now falls to be regulated under a different head of power – conclude that day-to-day regulation of securities within the provinces remains a matter of property and civil rights
- 4: Addresses the constitutional capacity of the provinces to enact a similar scheme in concert; because provinces could always withdraw from an interprovincial scheme there is no assurance that they could effectively address issues of national systemic risk and competitive national capital markets on a sustained basis – the provinces together **lack the constitutional capacity** to sustain a viable national scheme aimed at **national goals such as management of systemic risk or Canada wide data collection** – provinces cannot manage systemic risk; only federal

- However, Canada goes beyond these matters and is attempting to regulate all aspects of securities; including all aspects of contracts for securities within the provinces, all aspects of public protection and professional competence within provinces – this Act overreaches the legislative interest of the federal government
- 5: Because the Act is concerned with day-to-day regulation, the proposed Act would not fail if a province declined to participate; the opt-in feature also contemplates the possibility that not all provinces will participate – weighing against Canada’s argument that the success of the legislation requires all parties participate

Does the Act address a matter of national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns?

- No – the Act regulates contracts + property matters within each province; the provisions of the Act that relate the concerns of controlling the Canadian securities market as a whole may be valid on their own, **however they cannot extend beyond constitutional validity to the full extent of the proposed Act**
 - P+S is about the day-to-day regulation of securities
 - Cannot regulate in a way that would undermine provincial jurisdiction
- Jurisprudence acknowledges that securities regulation may possess federal aspects, it has generally viewed basic securities regulation within provinces as a local matter of property and civil rights

Ratio:

- Economic importance and preserving the character of the securities market may support federal intervention that is different from what the provinces can do, however they do not justify a wholesale takeover of the regulation of the securities industry
- It is not the incidental effects that are of question for validity, rather the main thrust that goes beyond the federal power

Notes:

- A cooperative approach allowing a scheme that recognizes the provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available – however it is not the Court to suggest the way forward by suggesting an alternative scheme, but they can note the growing practice of resolving this problem with seeking cooperative solutions