**Constitutional Summary – 2019 Winter – Professor Wright**

**Federalism**= the method of dividing powers so that the general and regional governments are each within a sphere coordinate and independent. Features: i) distribution of legislative powers between at least two levels/orders of government- one central (federal government) and several regional (provincial governments), ii) both orders are “coordinate and independent” (equal rank and importance) and iii) citizens subject to laws of both orders.

\*orders of government and not levels which would denote hierarchy.

\*\*The Federal government can give administrative power only to provincial legislature but not legislative power.

Canada has a federal system per the Preamble to the *Constitution Act, 1867*.[[1]](#footnote-1) Sections 91-95

**Division of powers**

|  |  |
| --- | --- |
| **S. 91 – Federal Legislative Authority**  | **S. 92 – Provincial Legislative Authority**  |
| The federal Parliament may make laws “for the peace, order and Good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces”POGG – peace, order and good government Residuary clause  | Assigns exclusive legislative authority over 16 classes of subjects to the provinces.  |
| Many subjects economic in nature. Many subjects relate to transportation. Our focus: * POGG (preamble)
* Trade and Commerce s. 91(2)
* Criminal Law s.91(27)
 | Our focus:* “property and civil rights in the province” s. 92(13)
* “matters of a merely local or private nature” s. 92(16)
 |
| 30 specific classes of subjectsIf a particular subject falls into federal jurisdiction, it cannot fall into provincial jurisdiction – exclusivity originally but this has changed now. | Other important heads of power: * “municipal institutions” s. 92(8)
* “administration of justice in the province” s.92(14)
 |

**Key Debates – Interpreting Sections 91 and 92 – important in understanding decisions in the courts**

**Provincial Equality –** views Canada as a compact of equal territorial units – granting more jurisdiction to the provinces – expected to be treated equally – provinces represent different political ideologies in the country. Strongly represented in Alberta.

**Pan-Canadian** – union of peoples (not territorial units) – favours granting the federal government more power – focuses on the people of the country as a whole, joined together in one large political community. Popular in Ontario.

**Two Nations** – English & French – compact of two nations, English & French; not of many territories. Favours granting special protections to the province of Quebec to protect their unique language, culture and legal system.

**Multi-national** – understands indigenous communities to be nations within Canada as well – favours giving indigenous groups special protections as well, just like Quebec.

Canada has a community and functional effectiveness view regarding the role of how to evaluate federalism. Allocation of power that promotes a prioritized political community; and allocation of power that leads to the most efficient, effective outcome.

**THE GENERAL FRAMEWORK FOR DIVISION OF POWERS[[2]](#footnote-2)**

1. Begin with **pith and substance** analysis of the impugned legislation.
	1. This 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.
		1. If the pith and substance of the impugned provision can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the court will declare it *intra vires*.
		2. If 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 division of powers.
	2. Understand that, the 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.
		1. At this stage of the analysis, the dominant purpose of the legislation is still decisive.
		2. Merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.
	3. Remember, P+S doctrine is based on the practical impossibility for a legislature to exercise its jurisdiction effectively without incidentally affecting matters within the jurisdiction of another level of gov’t.
	4. Remember, some matters are by their very nature impossible to categorize under a single head of power; they may have both provincial and federal aspects. The double aspect doctrine, which applies in the P+S analysis, ensures that the policies of the elected legislators of both levels of government are respected.
	5. **Double aspect doctrine** recognizes that both Parliament + Provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered.
	6. **Necessarily incidental / Ancillary powers doctrine** – for part of the law
	7. But sometimes, the powers of one level of government must protect against intrusions, even incidental ones by the other level. For this purpose, the courts have developed the doctrine of interjurisdictional immunity and federal paramountcy.
2. A broad use of the **IJI doctrine** would be inconsistent with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote.
	1. IJI should in general be reserved for situations already covered by precedent.
	2. In practice this means that it will be largely reserved for:
		1. those heads of power that deal with federal things,
			1. A federally regulated undertaking is an industry that falls to the federal government (e.g. aeronautics, radio, tv, interprovincial pipelines)
		2. persons or undertakings, or
		3. where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred
	3. In theory, a consideration of the IJI is suitable for consideration **after the pith and substance analysis,** in practice the absence of prior case law favouring its application to the subject matter at hand, will generally justify a court proceeding directly to the consideration of federal paramountcy.
	4. Even where IJI is available, the level of intrusion on the core of the power of the other level of government must be considered.
		1. To trigger the application of the immunity is not enough for the provincial legislation simply to affect that which makes a federal subject or object of rights specifically of federal jurisdiction.
		2. The difference between “affects” and” impairs” is that “affects” does not imply any adverse consequence whereas “impairs” does.
		3. For IJI to apply, requires an adverse consequence.
			1. It is when the adverse impact of a law adopted by one level of government increases in severity from affecting to impairing that the core competence of the other level of government or the vital or essential part of an undertaking it duly constitutes is placed in jeopardy.

Three types of Federalism Challenges – the burden is placed on the one challenging the law to prove that it is not consistent with the division of powers.

 **1**. **Validity** – if valid, *intra vires*, if not, *ultra vires*

 a. Pith and substance doctrine

 b. Double aspect doctrine

 c. Necessarily incidental/ ancillary powers doctrine

 **2.** **Operability**

 a. Federal paramountcy doctrine

 **3.** **Applicability**

a. Interjurisdictional immunity doctrine

In interpreting federalism issues, courts have available to them three different paradigms:

i) The classical paradigm – emphasis on exclusivity or “watertight compartments” with little/no room for overlap (mutual modification – if a federal power, must be read out of all provincial powers or vice versa)

 ii) Modern paradigm – allowance for overlap and interplay + courts are more deferential/hands off

iii) “Cooperative federalism” – allowance for overlap and interplay + courts also more deferential, where there is overlap, courts will favour inter-governmental cooperation - they act as “facilitators” of allocations of power worked out cooperatively. More prominent since 2007.

|  |  |  |  |
| --- | --- | --- | --- |
| **Type of Argument** | **Nature of Argument** | **Effect of Argument** | **Doctrines Relied On** |
| **Validity** | The legislation is **outside of the power** of the government that enacted it. (*Morgentaler*)  | The legislation is of **no force or effect.****Invalidity** = Permanently invalid (i.e., of no force or effect)  | A 1 Pith and substanceA 2 Double aspect doctrineB Necessarily Incidental/ Ancillary Powers Doctrine  |
| **Applicability** | In order to make this argument, we need to rely on the **assumption** that each of the subject matters in sections 91 and 92 have a **core meaning**. This core meaning cannot be interfered with by the other order of government. When we make an argument about the legislation being inapplicable, we argue that the **legislation intrudes on the core** of a subject matter of another order of government  | The parts of the legislation that are intruding on the core are inapplicable however the rest of the legislation might be applicable. We then read the statute narrowly.**Reading it down.****Inapplicable** = Permanently inapplicable – unconstitutional application precluded by reading down the law  | A Interjurisdictional Immunity (IJI)ONLY If there is a precedent. If no precedent, begin with federal paramountcy.  |
| **Operability**  | We are dealing with **provincial legislation** that is **valid and applicable**. Provincial legislation under this, conflicts with existing federal legislation. The conflict might conflict with an entire federal statute or just a part. We need to show that it is **impossible to comply with both pieces of legislation** at the same time. | The piece of legislation that is conflicting will be **inoperable to the extent of the conflict** with the other **federal legislation**.**Reading it in.** **Inoperative** = Operation suspended, only as long as conflict exists. | A Federal ParamountcyFederal Paramountcy only renders provincial powers inoperative (only 1 exception: s. 94) You can never challenge the operability of a federal law. |

**Remember:** In division of powers cases, there is a presumption of constitutionality. If it is possible to interpret the law in more than one way such that the law is sustained, it should be interpreted as such. Also, laws are presumed by courts to be valid, unless presumed otherwise. The burden is on the party who wants to knock it out.

**1. Validity:** the 1st type of federalism challenge.

Legislation is valid if it is enacted by the legislature that has the constitutional authority to enact it.

Validity issues usually come about because of i) disputes between governments (one level of gov’t thinks the other is overstepping on its constitutional authority, or ii) neither level of government wants to legislate on an issue[[3]](#footnote-3)) or iii) someone is accused of an offence and they raise the issue of validity as a defence[[4]](#footnote-4)

 If **challenging** the entire law, use the pith and substance doctrine.

 If **challenging** part of the law, use ancillary powers doctrine.

To determine whether to challenge the entire law or part of it, ask: is the provision integrated enough into a valid legislative scheme?

For validity we are asking if the law is constitutionally valid at all? To do this we need to know if the law comes within the matter of the enacting legislative jurisdiction.

 If **invalid**, the law is **struck down.**

**General Validity Checklist:**

1. Determine “**pith and substance**” of the impugned provision

2. **Assign** it under a head of power.

3. State that although it **appears invalid** because it is under the “wrong” head of power, it may be **saved by**:

 i) **incidental effects** (they are permitted)

 ii) **double aspect doctrine**

 iii) **necessarily incidental**/ **ancillary powers doctrine**

**A 1. Pith and substance doctrine**

 **FIRST: determine the law’s matter**

1. Characterize the law, identifying its “pith and substance”.

 2. Examine: i) purpose and ii) effects (legal and practical)

 **SECOND: assign the “matter” to one of the “classes of subject” in ss. 91 and 92.**

1.Determine how a law so characterised fits within the heads of power in ss. 91 and 92.

2. If the law is in pith and substance “in relation to” a “matter” that falls within the enacting government’s jurisdiction, it is intra vires, if not it is ultra vires.

3. Beware of double aspect doctrine. Ask yourself if “the contrast between the relative importance of the two features is not so sharp”. If the court finds the federal and provincial characteristics of the law to be of roughly equal importance then the DA doctrine provides a defence.

 4. May involve interpreting the heads of power.

**THIRD: incidental effects are permitted.** Pith and substance doctrine allows laws that have “incidental effects” on matters that fall outside the jurisdiction of the enacting government, provided the law is in “pith and substance” in relation to a head of power allocated to the enacting legislature. “Incidental effects” really only applies if there are “spill over” effects; so this is not that important.

**A 2. Double Aspect Doctrine**

**FIRST**: Double aspect doctrine recognizes that some laws (by nature) are impossible to categorize under a single head of power as they contain both federal and provincial subject-matter. Thus, the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial jurisdiction.

**SECOND:** Consequently both levels of government may enact laws on this matter, provided that the “pith and substance” of the statute is within the jurisdiction of the enacting body.

Essentially, when the courts view the two matters within a law as being of nearly equal importance, then the double aspect doctrine will apply so that the statute is within the authority of both the federal and provincial levels of government.

**THIRD**: when a particular legislative subject-matter can be said to have a double aspect (the subject falls within legislative competence of Fed and Prov) the federal legislation will only be paramount when there is a direct conflict with the relevant provincial legislation.

**B. Necessarily Incidental/ Ancillary Powers Doctrine**

**Key question (Omar):** Is the provision sufficiently integrated into a valid legislative scheme?

 If yes, then necessarily incidental and valid.

 If no, then more likely to be found invalid and severed from the broader legislative scheme.

The greater the extent of the encroachment, the greater the strength of the relationship between the provisions and act/ scheme needs to be.

**FIRST:** Provision **encroaches**, and if so, to what **extent**?[[5]](#footnote-5)

**First engage in a pith and substance analysis** because “mere incidental effects will not warrant the invocation of ancillary powers”.[[6]](#footnote-6)

**Second** assess the extent of the encroachment:

 The extent of the encroachment will have implications for step three.

**SECOND:** **Scheme** (**Act**) itself is **valid**?

**THIRD:** Sufficient integration into scheme (based on severity of intrusion)?

 **A.** If **marginal intrusion**, provision must be “functionally related”

 Ask: whether or not the provision is functionally related to the general objective of the scheme?

 **So:** the provision must **rationally further** the legislative scheme.

 **B.** If **more serious**, provision must be “truly necessary” or “integral”.

 The intrusion is an “either or” intrusion and not a “sliding scale.”

**Remember:** In division of powers cases, there is a presumption of constitutionality. If it is possible to interpret the law in more than one way such that the law is sustained, it should be interpreted as such. Also, laws are presumed by courts to be valid, unless proven otherwise. The burden is on the party who wants to knock it out.

**A 1. Pith and Substance Doctrine**

**Remember:** In division of powers cases, there is a presumption of constitutionality. If it is possible to interpret the law in more than one way such that the law is sustained, it should be interpreted as such. Also, laws are presumed by courts to be valid, unless proven otherwise. The burden is on the party who wants to knock it out.

Used to determine if law is “in relation to” a “matter” that “comes within” a “class of subjects” allocated to the enacting order of government.

If yes (a law is in relation to a matter that comes within a class of subjects of allocated to the enacting order of government) then the law is *intra vires*.

 If no (…) then the law is *ultra vires*.

**TWO STEPS:**

**FIRST**, the court must **determine** the law’s “matter”

 This is done by:

**Characterizing the law[[7]](#footnote-7)** also known as identifying its “**pith and substance**”. There is no single test for pith and substance, the approach must be flexible- a technical and formalistic approach is to be avoided.[[8]](#footnote-8)

 a. Its pith and substance is its **dominant** or **essential feature** or **character**

**“In relation to” = the law’s pith and substance**

If it affects something it can still be valid (in relation to taxation but affects banking = valid)

b**.** Its dominant or essential feature or character is **ascertained by** looking at:

1) **Purpose** – this is often key.[[9]](#footnote-9)

|  |  |
| --- | --- |
| Determined by **intrinsic** evidence  | Determined by **extrinsic evidence**  |
| * Text of law
* Law’s structure
* Purpose clauses
* Preamble[[10]](#footnote-10)
 | * Related laws
* Legislative history[[11]](#footnote-11) (can be relied upon if relevant and not inherently unreliable”
* Hansard evidence[[12]](#footnote-12)
* Be mindful of limited reliability of legislative history
* Reproduction of legislation earlier struck down[[13]](#footnote-13) helps support inference
 |

2) **Effects** – both **legal** and **practical**. Effects help illuminate purpose

**A. Legal** effects = how the law impacts “rights and liabilities” of those subject to it

It is determined from the terms of the law itself + often a good indicator of a law’s purpose

**B. Practical** effects = the “actual or predicted” consequences of the law’s *application*

1. Determined by evidence (although not clear what)

2. Court will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve – where it differs substantially from it’s purpose.

3. Is the legislation **colourable**? Legislation is colourable where the law’s purpose and legal effect differ substantially from practical effect. This might reveal the law has a different purpose. When a legislature attempts to enact a law outside the scope of its authority but frames the statute in such a way that it appears to fall under one of the legislature’s heads of power, it can be said that the legislature has “coloured” the statute in such a way as to achieve the objective it had envisioned. Invalid.

4. “An inquiry into the efficacy does not advance the pith and substance inquiry. The purpose of legislation cannot be challenged by proposing an alternate, allegedly better, method of achieving that purpose.”[[14]](#footnote-14)

 4. Even if the purpose and effects are the same, it doesn’t mean the law is invalid.

 **SECOND**, the court must **assign** the “matter” to one of the “classes of subject” in ss. 91 and 92.

This is done by determining:

The matter- if the law so characterized **fits** **within** the **heads** of power in ss. 91 and 92. This is where the paradigms are important – ensure to identify the paradigm/approach in use to understand the decision. If the law is in pith and substance “in relation to” a “matter” that falls within the enacting government’s jurisdiction, it is *intra vires*; if not it is *ultra vires*.

1. Do not always adopt an original intent approach

2. Use a “generous” and “progressive” (living tree) approach to interpreting ss. 91/92

3. Start with the terms (text) of the power and see if the impugned law is “consistent with its natural evolution”

4. Evidence of original intent is relevant but not conclusive.

5. Also consider judicial precedents in interpreting the power[[15]](#footnote-15)

b. Focus placed on precedent, which had already interpreted the relevant heads of power

c. May involve interpreting the head(s) of power

d. It is difficult to find a topic that does not fall within a subsection.

Section 92: Allows provinces to regulate the place for delivery

**THIRD: Incidental effects** **are permitted** because we are in the **modern paradigm**. The pith and substance doctrine permit laws that have “incidental effects” on matters that fall outside the jurisdiction of the enacting government, provided the law is in “pith and substance” in relation to a head of power allocated to the enacting legislature. “Incidental effects” really only applies if there are “spill over” effects; so this is not that important.

**Morgantaler (1993, SCC)**

After Morgantaler (1988) abortion no longer a crime in Canada

The NS Medical Services Act – prohibits the performance of designated medical services in places other than in credited hospitals.

Challenged the law on division of powers grounds – disguised criminal law which falls under federal jurisdiction – TJ and AP CJ agreed. Sopinka – agreed – law was invalid.

**NS argued**: Establishment, Maintenance and Management of Hospitals, Property and Civil Rights in the Province, Matters of a local or private nature.

**Morgantaler argued** – Criminal law

Applying Pith & Substance test:

1. Classifying the law – matter of the law is the laws leading feature/true character. Both purpose and effect relevant, but purpose is key. The laws dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished.
2. Legal effects – prohibits traditionally criminal conduct
3. Purpose –
	1. The law partially reproduced the federal law struck down by the SCC in 1988, supporting an inference that it was designed to serve a criminal law purpose.
	2. The legislative history of the law, including the circumstances surrounding its enactment, as well as Hansard, supported this conclusion. Evidence showed that the concern was over the establishment of an abortion clinic, NOT a concern over the establishment of private medical services.

Wright says – the legal effects argument and purpose (a) argument are inconsistent with precedents – provinces can create criminal law, and stiffen criminal law. Is there actually overlap here? No there isn’t, as the federal law was struck down.

**A 2. Double Aspect Doctrine**

The courts have established several matters that are considered “**double aspect**” and can be legislated by either provincial or federal government.

Those matters include:

* Entertainment in Taverns[[16]](#footnote-16), Gaming[[17]](#footnote-17), Interest Rates, Insolvency, Nude entertainment
* Maintenance of spouses and child custody
* Securities regulations[[18]](#footnote-18)
* Temperance (abstaining from alcohol)

Given this list, the double aspect doctrine has frequently been invoked in relation to public order, safety and morality.

This doctrine has never been applied in: the regulation of trade or labour regulations (*Bell No 2*)

Remember **the double aspect doctrine is not a free standing doctrine.** It’s a secondary doctrine that helps with the application of and is relevant to the application of the pith and substance doctrine.

Remember: **exclusivity of powers. In theory no overlap.** (Either legally or practically speaking)

 This blurring is created by things that did not exist in 1867 (internet) or a government was not clearly assigned to it.

Two types of overlap:

 1) De jure overlap

 = Overlap of jurisdiction legally, including ability to regulate the same “aspects” of the same subjects.

 2) De facto overlap (this is where **double aspect** doctrine tends to fall)

 = Overlap in practice only.

 This stems from the power to regulate different “aspects” of one subject.

Allows functional overlap but notional exclusivity.

Wright: The reality is double aspect has been approached in such a way that it allows the governments (provincial and federal) in function to adopt both laws in relation to things.

 E.g. **Dangerous driving**

Under **classical paradigm** it may fall under either the federal (criminal) or provincial power (power of property and civil rights- through conduct on provincial roads)

 This is where Double Aspect would come in and say:

 Dangerous driving is an *issue that has a double aspect.*

So the Fed gets to enact Criminal laws aimed at punishing DD while the Prov. Enact laws regulating (supposedly not punishing) on provincial roads.

 So in the end both end up regulating and therefore in reality they look much like the same thing.

Under classical paradigm we would assign the provision to just one but when we use the DAD we don’t have to engage in mutual modification. **In a sense it is providing a defence.**

**Limits to DA Doctrine:**

**Subject areas:**

Trade: parliament has exclusive jurisdiction over international trade and trade between provinces

Intra provincial trade: provinces have exclusive jurisdiction

Labor regulations: provincial exclusive jurisdiction

Aeronautics: exclusive jurisdiction for parliament

**Preserving Balance**: if DA is applied too often, there is the potential to take away from the provincial power. (Bell Canada v Quebec (Comission de la Sante 1988 SCC]

**A 2. Double Aspect Doctrine**

**(NB**: Courts have not used double aspect in areas of trade or labour relations. The court’s willingness to use double aspect is shaped by context and has varied both over time and between subject matters.)

Dickson in *Multiple Access* [1982 SCC] willingly creates areas subject to concurrent jurisdiction whereas Beetz in *Bell*, does not because of concerns over the use of federal paramountcy as well as double aspect to restrict provincial power.**)**

The courts have established several matters that are considered “**double aspect**” and can be legislated by either provincial or federal government.

The Privy Council acknowledged that “…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”[[19]](#footnote-19).

Hogg: It would perhaps be clearer if it had become known as the “double matter” doctrine, because it acknowledges that some kinds of laws have both a federal and provincial “matter” and are therefore competent to both the Dominion and the provinces.

 NB: A law can also have a double aspect in that it presents characteristics from more than one class of subject in the same list. (eg: provincial regulation of the legal profession has been attributed to both “property and civil rights in the province” and “the administration of justice in the province.”[[20]](#footnote-20))

**Hogg:** The courts have **not explained when it is appropriate** to apply the double aspect doctrine and when it is necessary to make a choice between the federal and provincial features of a challenged law. Lederman’s explanation seems to be the only plausible one: the double aspect doctrine is applicable when “the **contrast** between the relative importance of the two features is **not so sharp**.” When the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either level of government.

* Where the federal and provincial aspects are of roughly equally importance, then they should be recognized as applicable to the double aspect doctrine.
* This leads the courts into judgement calls, its just what happens.
* If the particular aspects of a subject are not of roughly equal importance, the government with the greater interest in the matter should get to regulate all of it.

 **The double aspect doctrine confers effective concurrency of power over some fields of law,** and gives rise to the possibility of conflict between a valid federal law and a valid provincial law. The resolution of such conflicts in favour of the federal law is the function of the “doctrine of **federal paramountcy**”.

**Applies** when (usually morality + property/ civil rights)**:**

 “Where the “**contrast**” between the federal and provincial aspects of a subject “**is not so sharp**”.

 **Not so sharp** = of roughly equal importance (Bill Lederman)”[[21]](#footnote-21)

 But if they’re not of equal importance, then the appropriate government should take it.

**Under Double Aspect:** There can be valid federal and provincial laws directed to the same persons, concerning the same things, but requiring from them different courses of conduct and thus have differing effects.

**When they do not conflict:** if these different courses of conduct do not conflict + their effects are cumulative then both rules may operate.

 **When they do conflict:** theprovincial law no longer operates.

Subject matters to which has been applied: *Highway Traffic Act*, moral regulations of films, videos, nude dancing, gaming, interest rates and insolvency, laws regulating public order, safety and morality.

Problems:

 Double jeopardy

 Issue of efficiency: what is the point of having two legislations that are the same?

**B. Necessarily Incidental/ Ancillary Powers Doctrine**

**Another analysis that helps you determine if a part of a law is valid.**

When you take a particular provision on its own and engage in a division of powers analysis, it is possible and likely that you could more easily find a validity problem. But if you take and view the provision in the context of a broader legislative scheme, the particular provision might be upheld because it is seen to have an important relationship with it, or be integrated into the broader scheme. So if its upheld it will depend on how the offending provision(s) is integrated into the broader legislation. If not closely integrated, then it will be declared invalid and severed from particular scheme. If integrated, it can be sustained even if take on its own terms; it can be seen as encroaching on the other scheme of government.

This is a well-established feature of SCC decision making. However, the SCC has not established what to do when challenging a group of provisions. Wright says: where there is a particular group of provisions that forms a cohesive part of a law, use the necessarily incidental doctrine. But where a group of provisions is an essential crux of the law, then you will likely use the pith & substance doctrine.

Permits one level of government to entrench on the other in order to enact a comprehensive regulatory scheme. Ancillary powers will only save a provision that is rationally and functionally connected to the purpose of the legislative scheme that it purportedly furthers. It is not enough to simply supplement it, it must further it.

The ancillary powers doctrine applies where a provision is, in pith and substance, outside the competence of its enacting body. The “pith and substance” doctrine necessitates that 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. A pith and substance analysis must first be confused. 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 ancillary powers doctrine is not to be confused with the incidental effects rule. “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.”[[22]](#footnote-22) For the Ancillary Powers doctrine to apply, the interference by the provision has to rise to the level that it is not valid under the “pith and substance doctrine.”

**Key question (Omar):** Is the provision sufficiently integrated into a valid legislative scheme?

(The point of this analysis is that even where a provision on its own encroaches, if it is obtained in an otherwise valid scheme, then it can be sustained so long as it is sufficiently integrated.)

 If yes, then necessarily incidental and valid.

 If no, then more likely to be found invalid and severed from the broader legislative scheme.

The greater the extent of the encroachment, the greater the strength of the relationship between the provisions and act/ scheme needs to be.

**TEST**: (by Dickson CJC from *General Motors v City National Leasing* [1989 SCC])

**STEP ONE:** Provision **encroaches**, and if so, to what **extent**?[[23]](#footnote-23)

**First engage in a pith and substance analysis** because “mere incidental effects will not warrant the invocation of ancillary powers”.[[24]](#footnote-24)

**Second** use these to assess the extent of the encroachment:

 i) Is the encroachment limited in nature/ **scope**?

 In GM it was limited.

 In Lacombe it was limited.

 ii) Did it create a new substantive provision?

 In GM it did not create a new substantive provision.

 iii) Is the provision actually **remedial**?

In GM it was remedial showing more limited encroachment. All the provision did in GM was to enforce provisions that already existed in the Act.

 iv) Does the Act itself or the language of the provision limit the reach of the \_\_? (in GM the civil cause of action)

 If yes, it further limits.

 v) **Precedent** applies?
 In GM it was not unprecedent to have civil causes of action.

 The extent of the encroachment will have implications for step three.

**STEP TWO:** **Scheme** (**Act**) itself is **valid**? (conduct full pith and substance analysis)

 In GM the *Combines Investigation Act* was valid under s. 91(2).

 In Lacombe the by-law was valid.

**STEP THREE:** Sufficient integration into scheme (based on severity of intrusion)?

 **A.** If **marginal intrusion**, provision must be “functionally related”

 Ask: whether or not the provision is functionally related to the general objective of the scheme?

In GM the answer was yes. The intrusion was in a limited way, therefore the functional relationship test was the appropriate one to use.

In GM the provision would improve the effectiveness of competition law; by providing a means for private enforcement of the law itself

In Lacombe the encroachment was not serious so the “rational functional test” was used. Found that the bylaw treated zones differently and did not rationally further the purpose of the legislative scheme.

 **So:** the provision must **rationally further** the legislative scheme.

 **B.** If **more serious**, provision must be “truly necessary” or “integral”

 GM suggests that the intrusion is an “either or” intrusion and not a “sliding scale.”

**Remember:** In division of powers cases, there is a presumption of constitutionality. If it is possible to interpret the law in more than one way such that the law is sustained, it should be interpreted as such. Also, laws are presumed by courts to be valid, unless presumed otherwise. The burden is on the party who wants to knock it out.

**Remedy:** for Validity is to hold that the law is of no force or effect.

**2. Applicability**

**A. Interjurisdictional Immunity Doctrine (IJI Doctrine)**

This doctrine is about protecting federal paramountcy. It goes against the embracing of overlap, and carves out exclusive jurisdiction. It should be used where a law is valid and therefore generally applicable, but over reaches in one or more of its applications, and in doing so improperly invades the core of the jurisdiction of the other government. This type of challenge is often the result of broadly worded legislation. If this doctrine is used and succeeds, the law is not invalidated, it is just read down. For example, Provinces cannot regulate labour relations where the result would be to impair the core of those federally regulated enterprises.

Having gotten to this stage, the underlying assumption is that the provision is valid.

The interjurisdictional Immunity Doctrine (IJI Doctrine) is an exception to the overlapping jurisdiction that flows from the pith and substance.

There is a core which cannot be impaired and a non-core which can probably be impaired.

Can those provincial laws apply to those federally regulated industries (even if broadly framed)?

 Absent the IJI Doctrine, the provincial government cannot encroach on that

For example, labour relations: Presumptively, labour relations fall under provincial jurisdiction, under property and civil rights. But we also have federally regulated industries. If we embrace complete overlap, we would say provinces can regulate labour relations within those federally regulated industries.

This doctrine got its start from protecting federally incorporated companies from provincial law, then started to protect federally regulated enterprises from provincial law, now its thought to protect (in theory) federal and provincial law as a whole. The SCC says that IJI protects the jurisdiction of core federal and provincial, however some critique that it never works for provincial jurisdiction.

**IJI Criticisms:**

1) It is at odds with modern paradigm’s (and cooperative federalism’s) embrace of overlapping allocations or jurisdiction.

2) It privileges federal jurisdiction in practice.

3) It is unnecessary, because feds can protect exclusive areas of federal jurisdiction with the federal paramountcy doctrine.

**Two Part Test[[25]](#footnote-25):**

**FIRST:** Does the law engage the protected “core” of a legislative power allocated to the other order of government – or a “vital or essential part of an undertaking” it constitutes?

 a. Must rely on precedent[[26]](#footnote-26) otherwise consider IJI after federal paramountcy.

b. In COPA, precedent repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power.

c. In Western Bank, at step one: whether application of the Alberta consumer protection law to the banks’ promotion of insurance impacts a “vital or essential” part of the banks (banks being a federally regulated undertaking).

But must focus more narrowly, on whether the law impacts a part of the banks’ operation that make them the object of federal regulation – namely their *banking* operations

d. So address focus. How narrow should we look?

In Western Bank, promotion of insurance is not a vital or essential part of banking operations of the banks; too far removed.

**SECOND:** If yes, would applying the impugned law “significantly trammel” or “impair it”?

(Note that there is currently a confusion about the basic test of the doctrine at this stage which has not been resolved. It is suggested that there are 2 types of analysis that should be engaged in, depending on what is involved)

1. One type: “if application of the law would “impair” the “basic, minimum, unassailable” core of a legislative power granted to the other (usually federal) order of government

 a. Identify if law impacts “basic, minimum, unassailable core”

i. ^ This is the “minimum, content necessary” to make the grant of the legislative power effective for its intended purpose

ii. Determine if there is an impairment of this core.

 To do this you must determine if there is some sort of “adverse consequence”

2. Another type: if application of the law would “impair” a “vital or essential part of an undertaking” constituted by the government

 a. Identify if law impacts part of vital or essential part of undertaking

 i. Vital or essential here means “absolutely indispensable”

 b. Determine if there is an impairment of this part.

**Remedy:** is generally to read down the law.

*Canadian Western Bank v Alberta*

Restricts the scope of IJI in 3 ways:

* Threshold raised from affects to impairs
* Restricted to situations covered by precedent
* Consider IJI after federal paramountcy.
	+ Exception: If there is a precedent applying IJI; apply IJI before federal paramountcy.

Two tests:

* One test: if application of law would impair the basic, minimum, unassailable core of a legislative power granted to the other (usually federal) order of government.
	+ 1. Identify if the law impacts basic, minimum, unassailable core
		- This is the minimum content necessary to make the grant of the legislative power effective for its intended purpose.
	+ 2. Determine if there is an impairment of this core
		- Involves an adverse consequence of some sort – a serious consequence or impact must occur.
* Purposive analysis – what is the purpose of the head of power itself, and does the law impact the minimum content necessary
* Another test: if application of the law would impair a vital or essential part of an undertaking regulated by the government
	+ 1. Identify if law impacts a vital or essential part of the undertaking
		- Vital or essential here means ‘absolutely indispensable’
	+ 2. Determine if there is an impairment of this vital or essential part of the undertaking

Application to Canadian Western Bank

* Banks = federally-regulated undertaking
* Focus on step one: whether application of the Alberta consumer protection law to the banks’ promotion of insurance impacts a vital or essential part of the banks?
	+ But, must focus, more narrowly, on whether the law impacts a part of the banks operations that make them the object of federal regulation – their banking operations.
* Here, promotion of insurance is not a vital or essential part of the banking operations of the banks, as it is too far removed.
* Fails at the first step of the IJI analysis – does it engage/impair the basic, minimum, unassailable core? No it does not.

*Quebec v COPA (SCC, 2010)*

**Facts**: Quebec residents constructed an airstrip on a lot that they owned – do not require permission to operate an airfield for private purposes (only commercial purposes) – BUT if you voluntarily elect to register your airstrip, then it is regulated under the federal act. Was built on agricultural zone – prohibited use of land for non-agricultural purposes in agricultural zones without permission. Owners were ordered to remove it.

**Issue**: Is this provincial law inapplicable to federally regulated aerodromes in this particular situation?

**Held**: By Majority: Yes, it is inapplicable here to the extent that it prohibits aerodromes in these zones.

**IJI Applied:**

* **Step 1**: Does the law trench on the protected core of a federal competence?
	+ Yes – precedent repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power.
	+ The test is whether the particular provincial law impacts the basic unassailable minimum of the power of the federal law – precedent says that the location of airstrips falls under federal act.
* **Step 2**: Is the effect of the exercise of the competence sufficiently serious to invoke IJI?
	+ Yes – the proper test is impairment = an impact that seriously or significantly trammels the federal power
	+ Here, the application of the law would impair the federal power because Parliament would be forced to legislate if it wanted to override the provincial law.

**Dissent: Deschamps** frames the issue in a different way – the focus should be on the impact on the activity itself, not parliament’s power to regulate the activity. The land reserved for agriculture use is only 4% of Quebec, so this would not impact the ability for people to participate in small scale aviation. Therefore, no evidence of impairment.

**3. Operability**

**A. Federal Paramountcy Doctrine**

 Suggests a hierarchy.

If there is a valid federal law + a valid provincial law that are overlapping in some context + there is a conflict. The provincial law becomes inoperative in as much as it conflicts with the federal law.

Presumption of constitutionality.

**Federal Paramountcy only renders provincial powers inoperative (only 1 exception: s. 94)**

“The doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency”[[27]](#footnote-27) It does not render the provincial law inoperative as a whole, only the part that conflicts.

“The doctrine of federal paramountcy. Under this doctrine, the federal law prevails when there is a genuine inconsistency between federal and provincial legislation, that is, when the operational effects of provincial legislation are incompatible with federal legislation. To determine whether such a conflict exists, first and foremost, it is necessary to ensure that the overlapping laws are independently valid. If so, then the court must determine whether their concurrent operation results in a conflict. In this case, the impugned provisions are independently valid. The only question is whether their concurrent operation results in a conflict.[[28]](#footnote-28)

Invalidity – permanently invalid – of no force and effect (Pith & Substance)

Inapplicable – permanently inapplicable – unconstitutional application precluded by reading down the law (IJI)

Inoperative – operation suspended, only as long as conflict exists – THIS APPLIES HERE (Federal Paramountcy)

When is there a Conflict?

A conflict will arise in one of two situations, which form the two branches of the federal paramountcy test:

 (1) there is an operational conflict because it is impossible to comply with both laws, or;

 So one law says “yes” and the other says “no”

Assessment under this branch is not limited to the actual words or to the literal meaning of the words of the provisions at issue

Rather, the provisions must be read properly based on the modern approach to statutory interpretation.

 If no conflict is found under the first branch, one may find conflict under the 2nd:

(2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

So the provincial law may frustrate the purpose of the federal law, even though it does not entail a direct violation of the federal law’s provisions

A provincial intention to interfere with the federal jurisdiction is neither necessary nor sufficient.

 The focus is instead on the effect of the provincial law.

Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form.

I.e. the province cannot do indirectly, what it cannot do directly.

 \*In keeping with “co-operative federalism” the doctrine of paramountcy is applied with restraint.

So absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws.

Hallsburry: The principle of federal paramountcy dictates that where there is an inconsistency, a conflict, or an incompatible operational effect between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of any inconsistency.[[29]](#footnote-29) *Multiple Access is* cited for the proposition that there is an inconsistency for the purposes of the doctrine if it is impossible to comply simultaneously with both provincial and federal enactments. The principle of paramountcy is applied in rare cases. Valid legislation should be upheld if possible. The validity of the legislation at issue is first dependent upon the outcome of the pith and substance analysis. In determining whether the principle of paramountcy applies, the:

First determination must be whether both opposing statutes were within the jurisdiction of their respective enacting body.

Then, the court must determine where there is an express or obvious conflict between both statutes or whether one statute merely duplicates the other.

 If mere duplication, then both statutes are valid.[[30]](#footnote-30)

If there is no obvious conflict between the impugned statutes, the court must analyze whether there could be an operational conflict such that it is impossible to comply with both laws.

Finally, if there is no obvious conflict and if there is no operational conflict, the court must examine the objective and purpose of the federal statute to ensure that the application of the provincial statute will not frustrate or be inconsistent with the legislative purpose of the federal law. The doctrine applies to statutes where the provincial legislature has legislated pursuant to its ancillary power to intrude on an area of federal jurisdiction and for situations in which the legislature acts within its primary powers, and Parliament acts pursuant to its ancillary powers. However, the doctrine of paramountcy should not be given too broad a scope. Even when parliament has legislated in a particular area, that does not prevent provincial legislation from “operating in the same area”.

Test for “Conflict”

 The challenge is knowing when a conflict exists so as to trigger the doctrine.

 Just need to satisfy one of the following:

 **1) Impossibility of dual compliance?**

Adopted in[[31]](#footnote-31) and affirmed in[[32]](#footnote-32)

First - Such that it’s actually impossible for citizens to comply with both of them. (One law requires A, while the other requires B)

This is a very hard test to satisfy - we tend to allow for overlap. This conflict is very narrow.

Requires Fed to actually create explicit conflicts

Involves an “actual conflict in operation as where one enactment says “yes” and the other says “no”; the same citizens are being told to do inconsistent things; compliance with one is defiance of the other”[[33]](#footnote-33)

 Moloney[[34]](#footnote-34) seems to expand application, with “substantive”, “contextual” approach

-in *Maloney*, M could have technically complied with both provisions, but at the conflict of either paying or not driving.

\*Compliance is more about complying with the law. (Cannot force payment Fed $12k and Prov $5K – by Court)

 **2) Impossibility of giving dual effect**

Whether or not the people who are required to give effect to or enforce the law can comply with both of the laws. For example, judges, administrative decision makers – can they do both of these things at the same time?

Yes, adopted in *Multiple Access* and affirmed in *Rothmans* although narrowly applied.

 But *Moloney* fails to mention so maybe it signals the abandonment of the test?

 **3) Frustration of federal purpose?**

Operation of provincial law would frustrate the purpose of the federal law

Suggested in *Hall* and affirmed in *Rothmans* (where it was the overarching test) and *Moloney*

 *COPA* suggests standard for invalidating on this basis is “high”

Said that “standard for invaliding provincial legislation on the basis of federal purpose is high”[[35]](#footnote-35)

 *Moloney* decreases importance in effect by expanding scope of IODC test?

1. Must determine the purpose of the federal law. (COPA)

 2. Must determine whether operation of the provincial law would result in a conflict. (COPA)

 **4) Federal Intention to cover the field?**

Whether parliament as intended to create a regulatory scheme that is exhaustive – for there to be no underlapping provincial legislation.

 Whether the Federal Government has tried to create a law that is exhaustive?

 Some suggestion of test in reasoning re federal purpose (Post – *Multiple Access* and *Hall*)

 A branch of the frustration test - Need “very clear statutory language”- Rothmans (contrast with Hall)

 **5) Duplication?**

 No, rejected[[36]](#footnote-36) in *Multiple Access*

 Is there simple duplication between federal and provincial norms?

 Duplication would be so broad so as to not need the rest

-No mechanism in the Constitution itself to deal with conflict with valid regional and federal law (other than 2 exceptions)

-It provides that in cases of conflict between federal and provincial laws, the federal law is paramount and the provincial law is *inoperative* to the extent of the conflict

-Note that: if a conflict is found to exist by virtue of the application of the paramountcy rule, the provincial law is not declared invalid.

 \*Its operation is merely suspended to the extent that, and for as long as, it conflicts with federal legislation.

 If the federal legislation is repealed, the conflict disappears, and the provincial law may once again be applied.

 \*\*Case usually turns on the definition used by the court for the word “**conflict**”

*Multiple Access v McCutcheon (1982, SCC)*

**Facts**: Insider trading issues – Ont Sec. Act prohibits insider trading on shares in the Toronto Stock exchange. Federal law almost identical but only applied to federally registered corporations. Multiple Access brought action against some employees for insider trading. Employees brought action that the provincial law is invalid because it duplicates the federal law.

**Held**: Dickson – no conflict and rejects duplication test – mere duplication without actual conflict is not sufficient to invoke the federal paramountcy doctrine.

* Affirms impossibility of dual compliance test: involves an actual conflict in operation as where one enactment says yes and the other says no – the same citizens are being told to do inconsistent things; compliance with one is defiance of the other.
* Impossibility of dual compliance here? No – the federal and provincial insider trading laws were virtually identical.
* Example of test being satisfied: court order under federal law grants custody of a child to one spouse, but court order under provincial law gives to the other spouse.
* Narrow definition of conflict is more consistent with the idea of cooperative federalism – governments are increasingly engaged in cooperative measures.

Court rejects duplication test and adopts the possibility of impossibility of dual compliance test.

*Bank of Montreal v Hall (1990, SCC)*

**Facts**: Federal bank act provided for a particular process/procedure for the foreclosure of a mortgage. Provincial law held a further step that provided the bank had to serve the debtor with a notice to let them know that they had one last chance to pay; and if this step was not followed, the debt didn’t need to be repaid. Hall had a piece of farm equipment as security, and the bank began mortgage foreclosure without serving the notice. The parties took to the courts to determine if the last step was required (requiring notice) or if it was inoperative.

**Issue**: Is there conflict between federal bank act and a provincial law sufficient to trigger federal paramountcy?

**Held**: Provincial law requiring notice before foreclosure proceedings rendered inoperative. Not technically impossible to require both laws. The only effect of the provincial law would be to delay the banks realization of the security interest – it would not prevent it from happening at all.

**LaForest**: Frames the issue as: whether there is an actual conflict in operation between the Bank Act and the Limitation of Civil Rights Act in the sense that the legislative purpose of parliament stands to be displaced in the event that the appellant bank is required to defer to the provincial legislation in order to realize on its security. The purpose of the federal law would be frustrated by the provincial law in delaying banks from realizing their securities.

Applying tests for Conflict:

Impossibility of dual compliance: Yes.

Frustration of Federal purpose: Seemingly yes, but unclear – is this an independent test?

Federal intention to cover the field? Some suggestion of test in reasoning as the federal purpose

Duplication: No.

*Rothmans, Benson & Hedges v Sask (2005, SCC)*

**Facts**: New federal legislation prohibited the promotion of tobacco products – except otherwise stated in the legislation for displaying tobacco products at retail stores. Province of Saskatchewan went further and prohibited the display at retail if people under 18 can be present in the store.

**Issue**: Does this provincial law interfere with the federal law?

**Held**: No – the provincial law is not inoperative

**Major**: Lays out two types of conflict sufficient to trigger federal paramountcy

* 1: If it is impossible to comply simultaneously with both laws?
* 2: Does the provincial legislation displace or frustrate parliaments legislative purpose?
* Relationship between tests: frustration of federal purpose framed as the overarching test; with the impossibility of compliance test as a branch of the frustration test.

Applying conflict test:

Is there an impossibility of dual compliance?

* No – the federal law did not create a positive entitlement to display tobacco products, and is it was possible to comply with both laws. Also, it was possible to give effect to both laws.

Is there a frustration of federal purpose?

* No, the provincial law did not frustrate, and in fact furthered, the objectives of the federal law. This rejects federal intention to cover the field claim; inappropriate to impute this intent to parliament ‘in the absence of very clear statutory language.’

*Quebec v COPA (again)*

Two-part test for frustration of federal purpose test of conflict:

1. Standard for invalidating (rendering inoperative) provincial legislation on the basis of frustration of federal purpose is high
2. Not enough if a permissive federal law is merely restricted by provincial law’s operation

*Alta v Moloney (2015, SCC)*

**Facts**: Moloney was uninsured to drive; responsible for accident while uninsured. Alberta had legislation that allowed it to compensate a 3rd party involved in the accident. Province obtained a default judgement for Moloney to repay the province of Alberta. He then went bankrupt; and was discharged (freed) from all of his debts. They suspended Moloney driver’s licence as part of the traffic safety act; he had to repay his loan before he could drive. Moloney challenged the suspension.

**Issue**: Is the provincial law dealing with driver’s licence suspension under the federal paramountcy doctrine as it rendered a federal law used to discharge debt inoperative?

**Held**: Yes, the provincial law is inoperative; where used to enforce a debt discharged by the federal government.

**Gascon**: Courts should have adopted a substantive, contextual approach in determining whether there is an impossibility of dual compliance (IODC). He expands the test of IODC, and finds it here; even though dual compliance is technically possible.

The federal law provides for the release of all debts; and the provincial law allows for the debt enforcement excluding the release of debts provided for by bankruptcy – so there is an impossibility of dual compliance.

**Cote** (dissent): Agrees that the law is frustrated but says the majority has conflated the two tests. An IODC exists only if there is an express contradiction that results directly from the wording of the two provisions. If there is any more substantive frustration, that should be dealt with under the frustration of federal purpose test, not the IODC test.

**Wright**: The issue here is the enforcement of the law – the province is using the provincial law to get access to a debt that the federal law does not allow it to access. Agrees more with the dissent.

**Peace, Order and Good Government (POGG)**

Interpretation of POGG (or any relevant heads of power) comes in at **Step 2** of the “**pith and substance**” doctrine.

**“91.** It shall be lawful for [Parliament] to make Laws for the **Peace, Order, and good Government of Canada,** in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces…”

Provides a residuary power – confers power on to the federal parliament to make laws in relation to all **matters not coming** **within** the classes of Subjects by this Act, assigned to the provinces. Three branches of the POGG power – Gap Branch (residuary power), Emergency Branch, National Concern Branch.

**Peace, Order, and Good Government: The Three Branches**

**1) Gap Branch (Residuary Power)**

i) Fills in gaps = a true “residuary power”.Allows for Federal regulation that doesn’t fall within enumerated powers within ss. 91 and 92.

 Few things fall within the gap branch, because of how “property and civil rights” power has been interpreted

 ii) Applies to:

 -Incorporation of companies with federal objectives

 -Offshore minerals outside of provincial boundaries

**2) Emergency Branch –** temporarily permits federal regulation in situations of national emergency

 So[[37]](#footnote-37):

 1) Temporary

 2) Rational Basis (make argument explaining why/ why not it is rational to enact given nature of the social problem + the government is responsible for making such a decision therefore judicial deference will most likely be applied)

 3) Outside jurisprudence – said emergency must be stated

 4) Also extrinsic evidence can be admitted into the courtroom. But deferential approach manifest in its application.

i) Allows for federal legislation to rectify existing and prevent potential emergencies[[38]](#footnote-38). Temporarily, the federal government gets jurisdiction over the particular matter for the length of the emergency – over any subject that would otherwise fall under provincial jurisdiction.

 Ask: What constitutes an “emergency”?

 -Clear examples: war, famine, insurrection

 -But not the Great Depression (the “New Deal”)

 -Who decides? Parliament or the Courts?

 ii) So far has only supported temporary laws

In recent years the POGG power has broadened and has been applied in peacetime to justify the control of rampant inflation.[[39]](#footnote-39)

 iii) Rational basis to declare emergency

 May be used where

“there can be said to be an urgent and critical situation adversely affecting all Canadians and being of such proportions as to transcend the authority vested in the Legislatures of the Provinces and thus presenting an emergency which can only be effectively dealt with by Parliament in the exercise of the powers conferred upon it by s. 91 of the BNA.”[[40]](#footnote-40)

 Also, the legislation must be “necessary” to address the emergency.

So look at “national concern” + temporary jurisdiction over all subject-matters needed to deal with an emergency

iv) Once the emergency branch is appropriately engaged, Parliament can enact any further legislation that deals with the emergency

*Reference: Anti-Inflation Act (SCC, 1976)*

**Facts**: Arose out of the decision of the federal government to impose a comprehensive program to regulate wage, price, and profit controls (Anti-Inflation Act). Applied to federal public service, public sector, provincial public sector employees where the relevant province opted in to the program. Everything they did were subject to the limits imposed on them by the Anti-Inflation Act. Program was administered by federal programs and officials, and was made explicitly temporary – it would expire at the end of 1978 if not renewed (it wasn’t).

**Issue**: The provincial public sector portion should fall under the provinces jurisdiction (not federal jurisdiction). Contrary to division of powers – brought by the public sector unions.

**Held**: The Act is valid under the emergency branch. It is not valid under the national concern branch.

**Notes**:

Federal argument: Main argument: inflation goes beyond the local/provincial, so the act is permissible under the National Concern Branch. Secondary argument: inflation = an economic crisis, so the Act is permissible under the Emergency Branch. The court agrees with their secondary argument (7-2 decision).

**Majority: Laskin CJ**: “The court would be unjustified in concluding, on all the material before it, that the Parliament of Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which, in its judgement, was temporarily necessary to meet a situation of economic crisis imperiling the well-being of Canada.”

* A few things to note:
	+ Rational basis standard
	+ Opponents must show absence of a rational basis
	+ An emergency does not actually have to exist – Parliament only has to believe that a national emergency exists
	+ Who decides? Parliament does, first and foremost.
	+ Not necessary for the proponents establish this; the opponents have to demonstrate the absence of a rational basis that an emergency does exist.
	+ An emergency will be presumed in the absence of evidence to the contrary.
	+ Therefore, the burden is on the opponent to satisfy that parliament lacked a rational basis OR the law is not rationally connected to alleviating the emergency claimed to exist.
	+ Laskin uses a deferential approach in his application
		- Treatment of evidence submitted
		- Little weight given to evidence of 39 leading economists denying that an emergency existed
		- He believes he saw enough evidence – with 10% inflation that year.
		- Dismisses suggestion that the Act itself does not support, and actually contradicts, emergency
			* No need to use the word emergency when using this power – it just needs to invoke language that is sufficiently indicative of something that is of serious national concern.

**Dissent: Beetz J: On Emergency**

* Impact of invoking emergency power is significant as it temporarily amends the constitution – temporarily transfers power to the federal government that they wouldn’t otherwise have.
* Should not be able to be exercised in ordinary form – something more should be required for its use
* No need to use the word emergency, but must invoke power in ‘explicit terms’ through an ‘unmistakable signal’ that they are relying on that power.
	+ This case does not use sufficiently clear language
* Emergencies Act – permanent legislation that is temporarily engaged – triggered by the federal cabinet – declaration of emergency has to be explicit, has to be described, then approved by Parliament, and provinces that would be impacted by the declaration.

**3) National Concern Branch -** permanently permits federal regulation

The largest potential scope

 Allows for Federal legislation in relation to national concerns

 So far:

 -Aeronautics qualifies[[41]](#footnote-41)

 -The national capital region qualifies[[42]](#footnote-42)

**TEST[[43]](#footnote-43)** comes from *R v Crown Zellerbach* [1988] Le Dain J writing for the majority of the SCC, distilled the case law on the national concern branch into the following four propositions:

 **FIRST:** The national concern branch is distinct from the national emergency branch.

 Although both fall under the POGG power, the two are governed by different criteria and authorize different kinds of legislation.

In particular, the emergency branch of POGG authorizes only temporary federal legislation, whereas the national concern branch authorizes permanent federal legislation.

 **SECOND:**

The national concern branch applies both to:

 a. New matters which did not exist at Confederation; and

-In dissent La Forest says newness matters – tips the scales in a finding of national concern

 -Le Dain doesn’t clearly say that this matters

b. Matters, that although originally of a local and private nature in a province, and so subject to provincial power, have since become matters of national concern, engaging federal power (in the absence of an emergency)

 **THIRD:**

To qualify as a matter of national concern under 2(a) or 2(b) ^, the matter must have both of the following features:

a. a “singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of a provincial concern” (which can be called the *cohesiveness* *test*) – defined boundaries, sufficiently containable on its own terms (not overly broad); and

b. “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (the *provincial impact test*)

- Something being new (from 2a/b) could help here; as the provinces would not have a strong claim to the regulation of it as a matter of historical practice

 **FOURTH:**

Finally, in determining whether 3(a) ^ is satisfied, it is relevant to consider what would be the effect on extra provincial interests of a provincial failure to deal effectively with the intra-provincial aspects of the matter (*the provincial inability/ failure test*).

This helps determine whether the matter has the requisite cohesiveness (“singleness, distinctiveness, and indivisibility”) from a functional (or practical) as well as conceptual point of view.

 Hogg says it’s “the most important factor” (Wright agrees)

 Le Dain J says only one indicia to consider

So what is involved:

 Externalities?

 If some provinces refuse to legislate what would happen?

 Practical inability?

-Matter of fact that provinces acting alone or together cannot properly regulate (for practical reasons)

 Legal inability?

-Can the provinces not act because they don’t have the jurisdiction? (i.e., legal/ constitutional inability)

 -This is the narrowest of all.

 And/Or provincial failure?

-Even if they are capable of regulating, if the provinces have fail to regulate alone or together, what might the federal government do.

 -The broadest.

*R v Crown Zellerbach*

Facts: Involved the Federal Ocean Dumping Control Act which prohibited the dumping of any substance at sea, unless a permit had been given and the dumping was done within accordance with the terms and conditions of that permit. Was aimed at preventing marine pollution. Federal government has jurisdiction of Canadian waters that fall outside of provincial boundaries. The sea was defined to include inland waters that actually fall within provincial boundaries (other than freshwater so no rivers, inland freshwater lakes, etc) but it would capture bays where rivers meet the ocean. Crown Zellerbach had a permit to dump wood waste but not at this specific site. No evidence to show that the wood waste had floated outside of provincial boundary waters.

Issue: Can the federal government regulate this?

Held: Marine pollution is clearly a matter of national concern to Canada as a whole and thus it is covered under the national concern branch. Allowed Parliament to extend powers to deal with pollution in provincial boundaries.

Le Dain J:

1. The national concern branch is distinct from the national emergency branch. Although both fall under the POGG power, the two are governed by different criteria and authorize different kinds of legislation. In particular, the emergency branch of POGG authorizes only temporary federal legislation, whereas the national concern branch authorizes permanent federal legislation. **Marine pollution is of national concern**.
2. The national concern branch applies both to:
	1. New matters which did not exist at Confederation; and
	2. Matters that, although originally of a local and private nature in a province, and so subject to provincial power, have since become matters of national concern, engaging federal power (in the absence of an emergency).
3. To qualify as a matter of national concern under 2(a) or 2(b), the matter must have both of the following features:
	1. A singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern (the cohesiveness test); AND – **Yes, marine pollution is sufficiently cohesive**. Because it is possible to distinguish freshwater pollution from saltwater pollution.
	2. A scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution (provincial impact test). **Deals with matters that would usually fall under federal jurisdiction and is drafted to only capture pollution in saltwater.**
		1. What is the status quo now?
		2. What are the implications of that status quo of the argument that this matter is of national concern?
		3. Would this so dramatically impact the balance of power?
4. Finally, in determining whether 3(a) is satisfied, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the intra-provincial aspects of the matter (the provincial inability/failure test). This helps determine whether the matter has the requisite cohesiveness, from a functional (or practical) as well as conceptual point of view. **Answer is unclear here; Le Dain doesn’t seem to apply it here. May be important; one indicia to consider but not a necessary requirement.**

What is the impact here, when a court decides that something is a matter of national concern?

* Results in federal government having exclusive jurisdiction over the matter.
* Or – it results in overlap instead – doesn’t restrict it just to federal government, provincial government still has some jurisdiction.
* What seems more in keeping with the modern paradigm? The overlap view.
* Provincial inability/failure to deal with a particular matter – what does this mean, how is this test done? Any of the following would be sufficient (Professor Sujit Choudhry – arguable point – not adopted by the SCC):
	+ 1. Negative extra-provincial externalities – are we dealing with a situation where the provincial government is making a decision that will or might negatively impact other provinces (neighbouring provinces or even the federal government – for ex. A province adopts a lax approach to env. reg. and pollution flows from Ont to Manitoba – this is a situation where federal jurisdiction is triggered under national concern).
	+ 2. Collective action problems (generally a form of failure, not inability) – engages 2 types of problem – inter-provincial, and federal-provincial collective action problems. There are certain types of regulatory regimes or schemes that need to be national in scope in order to be effective; but the prospect of an inter-provincial solution is un-realistic (for ex. Race to the bottom).
	+ 3. True provincial inability – deals with cases where it would actually be impossible for legal jurisdictional reasons for the provinces to actually adopt an inter provincial scheme to set the standard for the country (for ex. Regulation of pollution in the territorial sea).

**National Concern Branch: Cohesiveness**

|  |  |
| --- | --- |
| **What Qualifies**  | **What doesn’t qualify**  |
| * Aeronautics (*Johannesson* 1952 SCC)
* Radio (*Radio Reference* 1932 PC)
* Nuclear Energy (*Ontario Hydro* 1993 SCC)
* National Capital Region (*Munro* 1966 SCC)
* Marine Pollution (*Crown Zellerbach* 1988 SCC)
 | * Inflation (*Anti-Inflation Reference* (1976 SCC) – deals with too many subjects that would otherwise fall under provincial jurisdiction
* Health (*Schneider* 1982 SCC)
* Competition (*General Motors* 1989 SCC)
* Environment (*Friends of the Oldman River* 1992 SCC)
* Toxic Substances (Dissent in Hydro-Quebec 1997 SCC)
 |

**LAST**: what happens if a matter is found to be a national concern under the POGG power?

 One possibility: exclusive federal jurisdiction.

 Another possibility: overlapping jurisdiction

\*Second more in keeping with modern/cooperative paradigm

**THE CRIMINAL LAW POWER**

s. 91(27)

“... The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters”

Scope of Federal Power

 Impact on Provincial Power

Federal government defines the scope of the criminal law; provincial government (attorneys) enforces criminal code, and defines enforcement priorities.

 **Criminal Law Power: Early Interpretation**

 **Board of Commerce Case (1922, PC)**

-Narrow interpretation

 -Includes a subject that by its very nature belongs to the domain of criminal jurisprudence”

 -Does not extend to new public wrongs?

 ***PATA* Case (1933, PC)**

-Broad interpretation

 -Includes anything prohibited with penalties

 **Post PATA**

 -Law needed to prohibit something

 -There needed to be a penalty to back up the breach of the prohibition

*Margarine Reference (SCC, 1949)*

**Facts**: Pressure being put onto government to ban margarine to protect dairy farmers. Newfoundland wanted to protect the manufacturing of margarine, but the majority of provinces wanted to ban it to protect dairy industry.

**Issue**: Is this law valid under the federal criminal law power? (Can the federal government ban margarine?)

**Held**: Margarine law not valid under the criminal law power.

**Reasons**: Prohibition on the manufacture, sale and consumption of margarine; but because it has an economic objection, that makes the law, in pith and substance, regard property and civil rights. This encroaches on provincial jurisdiction.

Added third requirement: must be aimed at achieving a valid criminal law purpose. This is a substantive element. Valid criminal law purposes: public peace, order, security, health, morality (not exclusive ends to criminal law – courts can add to this list)

*RJR MacDonald v Canada (SCC, 1995)*

Facts: Federal tobacco products control act – prohibited 3 things: advertising of tobacco products, promotion of tobacco products, sale of tobacco without prescribed health warning on the package. Violation of the act was punishable by way of summary conviction or indictment. Regulated intra-provincial, which would usually fall under provincial jurisdiction. Act was challenged by RJR on federalism and charter grounds.

Issue: Was the law invalid on federalism grounds?

Held: 2 lower courts held that it was invalid. SCC says law is valid under criminal law power – LaForest J wrote for majority.

Reasons: Federal tobacco law is valid under the criminal law power. The power should be plenary – not be understood as being carved out of provincial jurisdiction, but as conferring power to the provinces.

Applying the Three P test:

1. Prohibition – act contains 3 prohibitions (advertising, promotion, selling without health warnings)
2. Penalty – satisfied – prohibitions are backed up by penalties.
	1. Prima facie case that this act is valid criminal law
3. But Purpose? Yes, the act targets the evil of the detrimental health effects of tobacco use. This is about health, but is this a valid criminal law purpose?
	1. Broad test to apply to determine whether something is a valid criminal law purpose: Is the prohibition with penal consequences directed at an ‘evil’ or injurious effect on the public?
	2. Although health is not articulated, it can still be a purpose.

*R v Hydro Quebec (SCC, 1997)*

Very broad reading of criminal law power. CEPA – environment is a valid criminal law purpose. Picks up on the exemption line of reasoning from RJR and takes it even further by accepting that it is OK for parliament to choose a very broad prohibition, and then delegate the prohibitions to provinces to regulate.

*Re Assisted Human Reproduction Act (2010, SCC)*

**Facts**: Enacted after extensive study – set up two broad categories of prohibitions. First, the prohibited activities (included: human cloning, payment of surrogates, etc. sections 8 & 9 are most important here – section 8 - using reproductive materials without consent, section 9 - using reproductive materials from minors). Second, the controlled activities (must be carried out in accordance with regulations, or performed with a licence), including: reimbursement of costs for surrogates, etc. Quebec enacted their own regulation in 2009 and challenged the 2010 act.

**Issue**: What is the scope of the criminal law power in this case?

**Held**: Court divided 4-4-1

**McLachlin** – for 4, uphold all legislation – whole act is valid under the criminal law power.

* Pith and substance test:
* Step 1: characterization
	+ To prohibit or punish inappropriate practices associated with assisted human reproduction
	+ Not the regulation of assisted reproduction in hospitals and labs
* Step 2: allocation
	+ First 2 Ps: prohibition and penalty? Yes. Prohibited activities provisions have both.
	+ Third P: Purpose: Yes – adopts a deferential approach to the purpose test.
		- Morality, health and physical security
		- McLachlin creates tests for some purposes:
			* Morality – parliament must have a reasonable basis to expect that the law will address a moral concern, and there must be a sufficient consensus in society that the concern is of fundamental important.
			* Health – law must address: 1) human conduct, 2) that may cause harm or elevate the risk of harm 3) to the health of members of the public.

**LaBel** – for 4, all struck down – they characterized the law a different way under step 1. Leads to different results in the allocation step under the purpose of the law. Something more is required to identify a purpose. The law must be aimed at suppressing an evil or safeguarding a threatened interest. Parliament must demonstrate that the evil is real and has concrete basis, and there is a reasoned apprehension of harm if not addressed.

**Cromwell** – split the difference – agreed partly with one group and partly with the other group

**Three Part Test[[44]](#footnote-44)** base comes from *Margarine Reference* and modified over time.

 The first two Ps (prohibition + penalty) and the third P (purpose) seem to work in tandem.

The more a federal law is directed at a central criminal law purpose (e.g. securing safety) the more likely it is that a court will be lenient as to the first two Ps and vice versa.

 1)A prohibition

Criminal law is a free-standing prohibition backed by penalties.

The further a law strays from this (e.g., with a detailed regulatory or licensing scheme- the more likely it is that it will not be a valid criminal law)

NB: *RJR*, *Hydro-Quebec* and McLachlin CJ in *RAHRA* give more room to Parliament than LeBel / Deschamps JJ and Cromwell J in *RAHRA* do

 2)Backed by apenalty

 The classic form being “thou shalt not”

 3) That has a valid criminal law purpose

 Paradigmatic example of criminal law is a law aimed at morally blameworthy/ harmful acts.

The further a law strays from this (e.g., by regulating the non-harmful aspects of assisted human reproduction, the less likely it is ok)[[45]](#footnote-45). It is unclear who’s view will be adopted over time: McLachlin or LeBel+Deschamps

But again, *RJR*, *Hydro-Quebec* and McLachlin CJ in *RAHRA* give more room to the feds

 But if view of LeBel and Deschamps wins:

- then criminal law must suppress conduct that is harmful or possesses a reasoned apprehension of harm

-and criminal law power does not allow Parliament to regulate conduct that is not itself harmful, in order to get at the harmful forms of the conduct

 -but the harmful conduct can be regulated

 So consider i) and ii) and McLachlin vs LeBel/ Deschamps as you go through these factors:

 i) “…some evil or injurious or undesirable effect upon the public against which the law is directed”[[46]](#footnote-46)[[47]](#footnote-47)

i) Criminal law extends to new crimes such that an affinity with a traditional criminal law concern is not required.[[48]](#footnote-48)

 ii) Colourable intrusion on provincial power may not take place if case law supports [[49]](#footnote-49)

 iii) Broad exemption in criminal law are OK and do not make the law regulatory[[50]](#footnote-50)

But note to i-iii) dissent in RJR: “ban on advertising/ promotion not ok because that activity is not sufficiently harmful; activity involved must pose a “significant, grave and serious risk to health, morality, safety or security” and this is not the case with advertising / promotion

So: RJR: allows Parliament to deviate from traditional form where there is a legitimate criminal law purpose and the nature of the issue is such that it cannot be dealt with via the prohibition and penalty form.

Form is defined broadly (can include regulatory legislation and exemptions when a clear criminal purpose is found, and content aimed at can be “evil”

 Protection of the environment is a valid criminal law purpose.[[51]](#footnote-51)

 Delegation of prohibitions are ok.

ii) Includes (non-exhaustive): public peace, order, security, public health[[52]](#footnote-52), morality.[[53]](#footnote-53)

 McLachlin for 4 adopts a deferential approach to purpose test.[[54]](#footnote-54)

Morality – Parliament must have a “reasonable basis to expect” that the law will address a moral concern; and there must be “a sufficient consensus in society” that the concern is of “fundamental importance”

Health –law must address: 1) human conduct; 2) that may cause harm or elevate the risk of harm; 3) to the health of members of the public.

[Mention subsidiarity here]------ side note -----

The principle of subsidiarity contemplates that decisions should, as far as possible, be made by the government closest to those impacted.

LeBel and Deschamps say subsidiary is an interpretive aid; a reason to favour the provinces[[55]](#footnote-55)

McLachlin CJ disagrees; subsidiarity does not apply to preclude Parliament from acting[[56]](#footnote-56)

Is the third P “Purpose” satisfied?

 No! The law must be aimed at “supressing an evil” or safeguarding a “threatened interest.

 Parliament must demonstrate that:

 -the “evil” is “real” and has a “concrete basis” and

 -there is “reasoned apprehension of harm”

 So regarding purpose:
 -Agreement about basic three P test, but not what the elements entail nor how to apply them.

 -RJR and Hydro-Quebec suggest interpreting the criminal law purposes broadly.

 -RAHRA suggests that some judges want limits

**ECONOMIC REGULATION**

**Provincial: Property and Civil Rights s. 92(13)**

Usually invoked alongside s. 92(16) “Matter of a local or private nature”

 S. 92(13)

Captures bulk (but not all) of private law.

The regulation of a particular business or trade within the province, except those specifically subject to federal jurisdiction (e.g., federally-regulated undertakings); *Citizens’ Insurance v Parsons* (1882 PC)

 Our focus is on s. 92(13)

 - The regulation of intra-provincial trade falls within the scope of s. 92(13), “property and civil rights”

 - The provinces can enact laws that impact interprovincial/ international trade

 - But interprovincial/ international trade cannot be the pith and substance of the law [[57]](#footnote-57)

*Carnation v Qamb (1968, SCC)*

Facts: Quebec statute that granted provincial board in Quebec to fix the price of raw milk that would be purchased by Carnation. Carnation argued that three provisions were invalid because most of the products they sold/shipped were outside of Quebec. Therefore, they had to pay higher prices than they would have in a free market. They believe that it should have fallen under federal jurisdiction.

Issue: Does the provincial board have the jurisdiction? Were the three orders issued under the provincial law valid?

Held: Martland J – Orders of provincial board are valid, even though most products are sold outside of Quebec.

* Ultimate destination of the product does not affect the validity of the statute – because it was directed by the transaction between farmers and carnation, which were in Quebec itself.
* It was realized that the economic cost would be a bit greater for Carnation to purchase milk here.
* Main object: regulation of a local, intra-provincial transaction (pith and substance)
* Notes:
	+ The regulation of intra-provincial trade falls within the scope of s 92 (13) – “property and civil rights”
	+ The provinces can enact laws that impact interprovincial and or international trade, provided that the pith and substance is intra-provincial
	+ But interprovincial/international trade cannot be the pith and substance of the law

**Federal: Trade and Commerce s. 91(2)**

Key power: trade and commerce (s. 91(2))

 Two branches of trade and commerce power:

 We focus more on the 2nd as it has developed more.

 1. Interprovincial and international trade

 Jurisdiction turns on location of transactions

 -Interprovincial/ international = federal

 -Intra-provincial = provincial

Federal regulation of intra-provincial transactions OK if good will cross provincial/ international borders

Intra-provincial transactions that have a marked impact on interprovincial/ international trade?

 Falls on property and civil rights

 2 “…general regulation of trade affecting the whole dominion”[[58]](#footnote-58)

 Roots in *Parsons* case

 But then largely neglected until the 1970s

 Fully revived in *General Motors* (1989, SCC)

 **Test** for “general branch” of trade and commerce[[59]](#footnote-59)

 Also in interpreted trade and commerce power[[60]](#footnote-60):

-A broad view of s. 91(2) – is possible on its face – but it would eviscerate the provincial powers and make some federal powers meaningless + the fed and prov powers are coordinate, not subordinate and so a fed head of power cannot be given a scope that would eviscerate a provincial legislative competence

-So trade and commerce power must thus be circumscribed + don’t confuse optimal policy with constitutional validity[[61]](#footnote-61)

 1. Law is part of general regulatory scheme?

 -*Combines Investigation Act* held yes. (embodied complex scheme of economic reg)

 -*Securities Act* yes

 2. Law is monitored by a regulatory agency?

 -Yes. Two regulatory agencies

 - *Securities Act* yes

 3. Law is concerned with trade as a whole?

 -Yes – concerned with competition in Canadian economy as a whole

- *Securities Act* – Fed encounters problems here. Lots of trades affected so general, but the *Act* regulates many things long treated as local. Not enough evidence that local has become national.

 4 Provinces could not enact it jointly or severally?

 -Yes, open borders and economic reality = ineffective provincial regulation of competition.

 - *Securities Act* – to some extent no.

 5. Failure to include one or more provinces in the scheme would jeopardize its success?

-Yes - If one province doesn’t regulate, or do so uniformly, market will be vulnerable.

- *Securities Act*- “day-to-day securities regulation would not founder”. Existence of optimization-scheme supports position.

- Absence of one of factors is not determinative

*General Motors of Canada Ltd v City National Leasing (1989, SCC)*

**Facts**: City National Leasing alleged that General Motors had engaged in price discrimination (which is prohibited under S 34.1 of the Combines Investigation Act, as a policy of selling products at an unreasonably low price with the intention of substantially lessening competition or eliminating a competitor). CNL brought an action under s 31.1 seeking damages against GM equivalent to its lost profits.

**Issue**: Is the Act valid under the federal trade and commerce power (expressed in s 91(2) of the Constitution Act, 1867)? Is s 31.1 integrated with the Act in such a way that it too is intra vires under s 91(2)?

**Held**: Federal competition law is valid under the general branch of trade and commerce (The Combines Investigation Act is valid under the second branch); and s 31.1 is constitutionally valid by virtue of being functionally related to the Act.

**Reasoning**: Used the second branch of the federal trace and commerce power. Second branch is stated above, with 5 steps to determining validity.

*Re Securities Act (2011, SCC)*

*Securities* designate a class of assets that conventionally include shares in corporations, interests in partnerships, debt instruments (bonds and financial derivatives).

**Facts**/Background: Provinces have the jurisdiction to regulate securities within their boundaries. Every province now has a securities regulator. The federal government also has powers that may affect securities (criminal law, bankruptcy, telecommunications, POGG).

Issue: Does the proposed Securities Act fall within the legislative authority of the Parliament of Canada?

Held: The proposed act is not valid under the general branch of the trade and commerce power. It does not fall within the legislative authority of Parliament.

Reasoning: First, pith & substance of act: To implement a comprehensive Canadian regime for the regulation of securities with a view to investor protection, the promotion of fair, efficient and competitive capital markets, and ensuring the integrity and stability of the financial markets.

Used second branch (general branch) of the federal trade and commerce power. 5 steps include: 1. Law is part of general regulatory scheme? Yes. 2. Law is monitored by a regulatory agency? Yes. 3. Law is concerned with trade as a whole? Fed encounters problems here. Lots of trades affected so general, but the *Act* regulates many things long treated as local. Not enough evidence that local has become national. 4. Provinces could not enact it jointly or severally? To some extent no, the provinces could act together, but there is no guarantee that they would stay together – but the Act goes beyond matters of national interest. 5. Failure to include one or more provinces in the scheme would jeopardize its success? “day-to-day securities regulation would not founder.” Existence of optimization-scheme supports position.

**Indigenous Peoples and the Division of Powers**

S.91(24): Confers on Parliament jurisdiction over “Indians, and Lands reserved for the Indians”

Indian includes:

 (1) Status “Indians” under the federal *Indian Act* + (2) Inuit[[62]](#footnote-62) + (3) Metis and non-status “Indians”[[63]](#footnote-63)

 “Indian”

Provinces cannot “single out” Indigenous peoples or “lands reserved for” them

Because the provinces would have been the most susceptible to fall prey to the local instincts of local governments to seize lands from Indigenous peoples. Thus, the Federal Gov’t sees itself as the “protector”. The land is held by the Provincial Crown in trust (if land is ever de-reserved, it is the province that retains ownership of it)

Unless IJI Doctrine is engaged.

Two issues:

 1) The scope of federal power under s. 91(24)

2) The scope pf provincial power

Underlying these issues: Indigenous peoples as self-governing + is consent required?

 Initially, answer was a clear no, but now sort of changing.

S. 35(1) of the Constitution Act, 1982: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”

Effect of this provision was that treaties and common law aboriginal rights are no longer subject to being extinguished by unilateral acts of Parliament

**So:**

**S. 91(24) Scope of federal jurisdiction[[64]](#footnote-64)**

 Scope of s. 91(24) is unsettled

 S. 91(24) protects at least a “core of Indianness” from provincial intrusion via IJI

 Aboriginal rights and title fall within this core

 This core includes:

 - “…matters touching on Indianness”

 - Includes at least “activities that are integral to the distinctive aboriginal culture of the group”

 - Aboriginal rights and title

**Scope of Provincial jurisdiction[[65]](#footnote-65)**

 Provinces lack the jurisdiction to “single out” “Indians, and lands reserved for the Indians”

 Provincial laws of general application generally apply to “Indians”, “lands reserved for” them

 Unless IJI is engaged

But, Aboriginal and treaty rights are not immune absolutely from provincial laws under IJI (but are protected from *unjustified* s. 35 infringements)[[66]](#footnote-66)

Still provinces cannot extinguish Aboriginal/ treaty rights altogether because the provinces cannot “single out” “Indians or Lands reserved for the Indians”[[67]](#footnote-67)

 However, provincial law *cannot extinguish* Aboriginal rights or Aboriginal title

This is because it would have to “single out” which is not OK + Aboriginal rights/ title fall within IJI-protected core

S. 35(1) of the Constitution Act, 1982: “The existing (i) aboriginal [rights] and (ii) treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”

s. 35(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada

Effect of this provision was that treaties and common law aboriginal rights are no longer subject to being *extinguished* by unilateral acts of Parliament

 - Not a source of rights, only affirms “existing Aboriginal and treaty rights”

 - Not subject to Charter restrictions.

 Appears after Charter so not subject to s.1 limitations or to s. 33 “notwithstanding clause”.

- Not subject to Parliamentary sovereignty claims (before 1982 could extinguish by statute/ post cannot extinguish by statute)

- Now, unilateral extinguishment is not permitted (*Borrows*, UNBLJ)

- Extinguishment only OK through consent of the community

- If law enacted pre-1982 then it may have extinguished

- In order for a right be existing, it had to exist in 1982.

Remember the Four Stages

 (1) “Separate Worlds”: Pre-Contact

 (2) Contact and “Nation-to-Nation Relations”

 a. Treaties

 b. Royal Proclamation of 1763

 (3) “Respect Gives Way to Domination”

 a. Various examples, including Indian Residential Schools

 (4) “Renewal and Recognition”

 a. Examples:

 i) Truth and Reconciliation Commission

 ii) Missing and Murdered Indigenous Women and Girls Inquiry

**So what we have so far:**

1. Aboriginal rights

 Aboriginal title as unique subset

 2. Treaty rights

 3. Indigenous law and s. 35(1) – John Burrows and others

 This is a label to distinguish the body of normal legal norms developed by Indigenous peoples themselves.

Different “Aboriginal Law” which is developed by Fed Gov’t and used without Aboriginal consent and against Aboriginal peoples.

***Sparrow* S. 35(1) Framework[[68]](#footnote-68)**

\*No longer possible for Federal Government to extinguish Aboriginal rights or treaty rights.

\*It is possible to justify infringements but no longer possible to extinguish altogether.

\*Case will turn on: “Well we, the Fed, extinguished your rights pre-1982”

The guiding principle of S. 35: Section 35(1) should be given a “generous and liberal interpretation”.[[69]](#footnote-69)

Doubts or ambiguity about s.35(1)’s interpretation should be resolved in favour of Aboriginal peoples. This is consistent with the Crown’s fiduciary duty to Indigenous Peoples and the “honour of the Crown” is at stake. [[70]](#footnote-70)

 **(1)** Has the *claimant* established an Aboriginal right (which includes title)?

 If not, the claim fails.

-In Sparrow, right to fish for commercial/ livelihood purposes not recognized but only a right to fish food + social/ceremonial purposes

-reference to “fishery constituting “*integral part*” of X’s *distinctive culture* (anticipates *Van der Peet*)

-Insert ***Van der Peet Test*** here

**(2)** If an Aboriginal right/ title is established, has the *government* established the right is not “existing” (was extinguished)?

 If yes, the claim fails.

 -Existing = not extinguished

 -Three ways to extinguish:

 i) By surrender(e.g., by treaty) pre-and post s. 35

-This will be a point of contention. Gov’t will say extinguished – Aboriginals will say it didn’t or they didn’t mean for it to

 ii) By constitutional amendment: pre-and post s. 35

 iii) By law: pre. S.35 only

 -All ^ 3 ways require “clear and plain intention”

 -Clear and plain intention = explicit language.

 -Simple regulation not enough.

 -In *Sparrow*, Aboriginal right not extinguished.

 **(3)** If the government has not established extinguishment, has the *claimant* established that the right was infringed?

 If not, the claim fails.

 Factors to consider:

 1. Limitation unreasonable?

 2. Undue hardship imposed?

 3. Preferred means of exercise of right denied?

 In the cases, this (3rd step) is usually satisfied if law significantly burdens preferred means of exercise

 **(4)** If the right has been infringed, has the *government* established that the infringement is justified?

 If yes, the claim fails.

 -Words “recognized and affirmed” in s. 35(1) = constitutional guarantee of rights

 -This is because “…treaties and statutes relating to Indians should be liberally construed”

 -But rights not absolute; limitations can be justified

 -The power to legislate must be reconciled with s. 35(1)

-Recognizing that rights are not absolute, and demanding justification for limits, is the best way to achieve this

 **(4)(a) Is the infringement justified?**

 Two step test for justification under s. 35(1)

Step one: is there a valid legislative objective? (generally narrower interpretation than what is accepted in *Charter*)

Yes to:

-conserving and managing natural resources;

-preventing harm; and

- “…other compelling and substantial objectives”

 - Such as: economic and regional fairness[[71]](#footnote-71)

 -Such as: recognition of historical reliance upon, participation in fishery[[72]](#footnote-72)

No to:

-“public interest” – that’s too vague

Step two: Is the breach consistent with the “honour of the Crown”, the “special trust relationship” that exists between Government and Aboriginal peoples.

a. When will the Crown’s fiduciary duty necessitate giving Aboriginal peoples priority over a resource in accordance of their right?

i. If the right is internally limited, then need more justification for infringing that right because total aboriginal priority over that resource “makes sense”. (right to fish for food and feed yourself)

Internal limitation is that rights holder only needs to fish as much as they need to feed themselves.[[73]](#footnote-73)

-With fishing, after conservation concerns satisfied, this requires priority to be given to the Aboriginal rights holder

-Priority over other users as a constitutional requirement to fish for food or ceremonial purposes. Can mean exclusive access.

 -Gets at underlying issue -> notion of special rights/ special entitlements

ii. If the right must be externally limited to bring it into balance with the rights of non-Aboriginal and CL perspective, then need less justification for infringing that right because total priority does not make sense. (e.g. right to fish commercially).

If the right is externally limited, the Government only has to show that the Government took Aboriginal priority into account. This may mean:[[74]](#footnote-74)

 -Accommodation (longer seasons, lower licence fees)

 -Consultation

 -Compensation

 -Proportionality with Aboriginal group participating in the resources

 b. Other factors to consider:

-As little infringement as possible to achieve objective? (Wright thinks this is where priority actually comes in)

***Van der Peet* Test[[75]](#footnote-75)**

Aboriginal rights are “recognized and affirmed” and thus protected by s. 35(1) “because of one simple fact: when Europeans arrived in NA aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. Section 35(1) should be interpreted purposively, keeping in mind “the reconciliation of the pre-existence of aboriginal societies with Crown sovereignty”

Basic test for Aboriginal right (*Van der Peet* test): “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right.”

Post Establishment 🡪 under the justification stage of the **Sparrow** test

1. For title, must be done at the beginning of the sparrow test (**Tsil**) = Duty to consult for title at beginning
2. For treaty rights or aboriginal rights, at the end of the test BUT seems inconsistent here and may be challenged in the courts

(To be **inserted** into **Stage 1 of** the ***Sparrow*** Framework)

**First,** at the characterization stage, identify the precise nature of the First Nation’s claim to an Aboriginal right based on the pleadings.

If necessary, in light of the evidence refine the characterization of the right claimed on terms that are fair to all parties.

Courts must consider:

 -nature of the activity being engaged in

 -the nature of the impugned law; and

 -the nature of the practice, custom or tradition

Guiding principles for the Court:

 -consider views of the Indigenous group involved

 -consider at a general, not a specific level

-In *Van Der Peet* the nature of the claim: right to exchange fish for money or other goods. Not a broad “commercial right”

**Second**, determine whether the First Nation has proved, based on the evidence adduced at trial:

a. the existence of pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right;

 b. that this practice was integral to the distinctive pre-contact Aboriginal society.

 Integral=

 -Central and significant part of what made the society “distinctive” (not “distinct”

 -Cannot be merely incidental or occasional things

 Need continuity over time

 -Time frame re continuity is pre-contact

 Metis?: date of effective control, not pre-contact

-Pre-contact evidence not strictly required; evidentiary rules need to be applied flexibly and with cultural sensitivity (e.g., to oral tradition)

-Continuity doesn’t mean rights are frozen in time

 i) manner of exercise can evolve

 ii) subject matter can, too, but proportionality in evolution needed

-Rights to be determined on a case by case, not universal basis.

-In *Van der Peet*: integral to the distinctive culture? No; pre-contact, exchange of fish was only incidental to fishing for food for Sto:Io. Only post-contact that exchange of fish took off.

**Third**, determine whether the claimed modern right has a reasonable degree of continuity with the “integral” pre-contact practice.

In other words, is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice.

 At this step, the court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right.

As will be discussed, the pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.

**Fourth and finally**, in the event that an Aboriginal right to trade commercially is found to exist, the court, when delineating such a right should have regard to what was said by Chief Justice Lamer in *Gladstone* (albeit in the context of a *Sparrow* justification), as follows:

“Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as:

- the pursuit of economic and regional fairness,

- and the recongition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard.

*In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.”

1. For title, must be done at the beginning of the sparrow test (**Tsil**) = Duty to consult for title at beginning
2. For treaty rights or aboriginal rights, at the end of the test BUT seems inconsistent here and may be challenged in the courts

**Aboriginal Title**

 A subset of Aboriginal rights

 What’s the difference?

1. Aboriginal rights are narrower
2. Aboriginal rights are also broader.

- Royal Proclamation of 1763 as source?

 Not (exclusively) since *Calder* (1973, SCC)

- Indigenous laws pre-contact/ sovereignty?

-“Intersocietal law” as best view of source?

 Difference between title and right?

 Aboriginal title: allows for exclusive use and occupation of land (includes right to hunt and fish)

When an individual has aboriginal title, they have the right to the economic benefits that come from the land. They have the right to use the land how they want and the right to occupy the land.

Aboriginal title does not equal ownership of land.

 Aboriginal rights may exist on lands which indigenous people do not have Aboriginal title

 Aboriginal rights don’t have to be tied to particular piece of land

 Aboriginal title was recognized as CL right pre- s. 35 in *Calder* and *Guerin*

**Aboriginal Title[[76]](#footnote-76)**

**Evidence:**

-Aboriginal rights demand a unique approach to treatment of evidence which accords due weight to “Indigenous perspectives”

 -This includes accepting oral histories and coming to terms with oral histories

 -The admission of oral histories would normally violate the evidence rule

 - Block admissibility of statements made out of court

 -Rules of evidence had to be adapted to realities of pre-sovereignty[[77]](#footnote-77)

**Aboriginal title as sui generis (unique in class by itself)**

Difference between aboriginal title and common law fee simple?

 1. Different source: occupation pre-sovereignty

 a. Fee simple derives from grant of the land from the Crown

 b. Fee simple can only take place after the assertion of sovereignty by the Crown

 2. Different permissible range of uses

 a. Includes right to exclusive use, occupation; not limited to practise integral to distinctive culture

 b. But uses of the land “must not be irreconcilable with the nature of the attachment to the land”

-Eg.: lands occupied for hunting. It would be irreconcilable with strip mining because it would not be possible to hunt anymore

c. Aboriginal title: legal protection for occupation in present day and the future. Implicit in this is the continuity of the connection between people and the land. Trying to protect this continuity

 i. Softened in *Tsilqot’in Nation* (2014, SCC)

 ii. Aboriginal title lands cannot be encumbered for future generations.

 3. Inalienable, except to the Crown

a. In order to pass title to 3rd party, the community must surrender the land to the Crown and then Crown must deal it to 3rd party.

 b. This puts the Crown under a fiduciary duty.

 c. If permission not given then use Sparrow test

 4. Held communally

a. Aboriginal title is a communal right and not a right that is held by individuals; it is collectively held by the members of a nation and for the benefit of present and future generations.

b. Decisions must be made communally. This usually requires that there is some body capable of making those decisions.

c. Communally; doesn’t mean land is undivided.

 Groups and individuals hold specific tracts of land.

But it is understood from the Aboriginal perspective that the allocation of rights is communal.

 5. Constitutionally protected under s. 35(1)

**TEST for Proof of Aboriginal Title[[78]](#footnote-78)**

**STEP 1 of SPARROW:** The claimant must show that they are acting pursuant to an Aboriginal Title protected by s. 35(1).

 1. Sufficient occupation prior to sovereignty.

(a) The enquiry here must take into account *both* Indigenous and common law perspectives. Occupation must be determined in a context specific and culturally sensitive way, approached from both a common law and indigenous perspective.[[79]](#footnote-79)

(i) To establish claim, claimant must show that there was sufficient occupancy when the Crown asserted sovereignty. (This is distinct from other Aboriginal rights which is time of first contact). Lamer’s rationale for this is that proof of Aboriginal title follows from the fact that the Aboriginal title is a burden on Crown’s underlying title. Any underlying title only crystalized at the time Crown sovereignty was asserted.

 (b) So how to establish sufficient occupation?[[80]](#footnote-80)

(i) What you need then is just strong presence manifesting in acts of occupation.

(ii) Should take into account Indigenous perspective:

1) Gleaned in part from Indigenous laws. Relevant to establish claims.

 (E.g. land tenure law, laws governing land uses.)

2) Look to: group size, manner of life, character of land, technological abilities

3) Intensity and frequency of use can vary with characteristics of the group.

 (iii) Common law perspectives as well.

 1) Occupation -> fences, buildings, cultivation

 2) Common law conceptions: look for possession and control.

 2. Continuity of occupation (if present occupation relied on as proof of occupation pre-sovereignty)

 -Do not need unbroken chain

 -Need “substantial maintenance of connection”

 -Nature of the group’s occupation can change as long as the connection is maintained.

 3. Occupation at sovereignty exclusive

 (a) Intention and capacity to maintain exclusive control

(i) Must be approached with caution, taking both Indigenous perspective and the relevant circumstances of the group.

 (ii) Nature of the land, nature of the occupation, relationship with surrounding groups

 (b) When can exclusivity be established?

 (i) Might have proof excluded

 (ii) Proof others requested and were granted permission to use the land.

 (iii) Lack of challenge by others to use and occupancy of the land

 (iv) Treaties between Aboriginal groups

 (v) Indigenous laws related to trespass or laws relating to permission to use the land

 (c) Recognizes the possibility of joint exclusivity and joint title between Aboriginal groups

 (d) Do not have to establish that land is integral or essential to a practice (unlike a right)

 4. (a contemplation): What about Aboriginal title and private Land? (*Tsilqot’in*)

 - Aboriginal title burdens the Crown’s underlying “title”

 - Every once in a while title goes against private land

 - What’s the situation there? Don’t know completely

 - FS is held in tenure on the grounds of Crown title

 - So it relies on the validity of Crown title

- Aboriginal title burdens the Crown’s underlying title that suggests land acquired through FS, including FS< can be subject to Aboriginal title.

 -Suspect that the Crown would have to provide compensation to the Indigenous group

**STEP 2 of SPARROW**: Does the Aboriginal title exist? (burden on Government/ 3rd parties)

If the Aboroginal title established, has the Government established that it is not existing? (i.e., was extinguished?)

 Where exists= not extinguished

 a. Three ways to extinguished:
 i. By surrender (i.e., by treaty) pre and post-1982

 ii. By constitutional amendment pre and post-1982

 iii. By law (pre 1982 only)

b. Extinguishment can occur only through an act that showed “clear and plain intention” on the Government to deny those rights.

 i. Clear and plain intention= basically explicit language

 ii. Simple regulation not enough

**STEP 3 of SPARROW**: Has the Aboriginal right been infringed?

If the Government has not established extinguishment, has the claimant established that the right/ title was infringed?
 Three factors to consider when determining if the right has been infringed:
 a. Is the limitation resulting from the law unreasonable?

 b. Does the regulation impose undue hardship?

 c. Does it deny Aboriginal peoples their preferred means of exercising the right?

 Three factors are not a cumulative test. Where 3rd factor is answered yes, generally seen to be an infringement.

**Step 4 of Sparrow:** Is the infringement justified? (burden on Government/ 3rd party)

If the right/ title has been infringed, has the Government established that the infringement was justified?

Words recognized and affirmed in s. 35.1 are constitutional guarantee of rights. This is in keeping with the honour of the Crown. But rights are not absolute, and limitations can be justified because the power to legislate must be reconciled with s. 35.1 and recognizing that rights are not absolute, but demanding justification for infringement is the best way to achieve reconciliation.

*Tsilhqot’in Nation v BC (2014)*

**Facts**:

**Issue**: Sought a declaration from the courts of their aboriginal title over 44,000km2 of land. Challenged the validity of the logging licence issued on the land.

**TJ Vickers** – affirmed existence of aboriginal title, assessed the scope of a potential claim for aboriginal title in fairly broad terms – refused to make the declaration that they were seeking based on procedural defects. Then lost in the court of appeal. Up to the SCC.

**McLachlin** – Declaration of aboriginal title issued, duty to consult was held to be breached. Central issue at the SCC: was there sufficient pre-sovereignty occupation of the land claimed?

* Occupation must be determined in a context-specific and culturally sensitive way; approached from both a common law and an indigenous perspective
* Intensity and frequency of use may vary with the characteristics of the group and the character of the land
	+ Including size, material resources, and technological abilities
	+ Norms and legal traditions of the community
* Intensive occupation is not needed; what is needed is a strong presence, manifesting in acts of occupation (common law looks for presence and control)
	+ Territory that was used regularly and exclusively
	+ Nature of the land in question – land here, while large in size, was mountainous and capable of only supporting a smaller group of people – so the semi-nomadic character of these people was driven in part by the nature of the land, and it’s carrying capacity.
* How does the Crown claim sovereignty over this territory?
	+ The doctrine of terra nullius never applied in Canada.
		- Terra nullius – no one owned the land prior to European discovery.
	+ They acquired it through assertion – title to all the land in question
* Step 3 of Sparrow framework – No infringement if the title holder consents to the infringement
* Where aboriginal title has been established, for an infringement to be justified:
	+ Refinements of the justification analysis
		- Duty to consult must be discharged for an infringement of Aboriginal title to be justified
		- Confirms broad objectives from Delgamuukw
		- There can be no justification if future generations are substantially deprived of the benefits of the land
		- Imports full proportionality analysis into the second step of the Sparrow test (consistency with the Crown’s fiduciary obligations)
			* That the infringement was necessary to achieve the crown’s goal – rational connection test
			* Benefits expected to flow from the achievement of the goal will outweigh the negative effects on the aboriginal title claim
* If an infringement is found that is not extinguished and the crown cannot show justification:
	+ Remedies
		- If aboriginal title is established, the Crown cannot proceed with approving developments unless:
			* The aboriginal title holder consents; or
			* The duty to consult has been satisfied and the infringement is justified under the Sparrow Test
		- Prior conduct might have to be reassessed, for example, by cancelling projects already started
		- Legislation might be rendered inapplicable
			* Not invalid entirely – just inapplicable in the situation it is applied to
* The SCC would prefer for the parties to negotiate these issues outside of the court
* But in some situations, the SCC has to be willing to make a declaration of title in specific circumstances – its possible they were growing frustrated in these circumstances that have been slow to change

**TRC Calls to Action**

43: Canada should fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation

47: Governments should repudiate concepts used to justify European sovereignty over indigenous peoples and lands, such as the doctrine of discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that rely on such concepts.

Canada did adopt and implement the UN Declaration on the Rights on Indigenous Peoples, but they took a certain view on it. UNDRIP Art. 32, part 2. They do not read it to confer a veto/consent – it is only read to confer a process. It guarantees the requirement of the duty to consult.

Two step test for justification under s. 35:

 1. Has the Crown fulfilled its duty to consult? (*Tsilqot’in*)

 a. If no, the infringement is necessarily unjustified.

b. Where aboriginal title lands are involved, “there is always a duty of consultation”. Requirement of the duty will vary by context (outlined in *Haida*), but will be more than mere consultation (must be deep consultation) and a fair compensation will ordinarily be required.

 2. Is there a valid legislative objective? Generally narrower than what is accepted in *Charter*)

 Yes to:

 -Conserving and managing natural resources

 -Preventing harm and

 -Other compelling and substantial objectives.

 3. Economic and regional fairness (*Gladstone*)

 4. Recognition of historical reliance upon, participation in, fishery by non-Indigenous (*Gladstone*)

 -The development of agriculture, forestry, mining and hydro electrical power (*Delgamuukw*)

 -The general economic development of the interior of BC (*Delgamuukw*)

 -Protection of the environment or endangered species (*Delgamuukw*)

 -The building of infrastructure (*Delgamuukw*)

 -The settlement of foreign populations to support those aims (Delgamuukw)

 \*This is altogher a form of reconciliation of prior title and Crown sovereignty

 \*Aboriginal title exists within broader socio-economic context

5. Is the breach consistent with the honour of the Crown? The “special trust relationship” that exists between government and Aboriginal peoples?

-Must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s Aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

 -Other considerations:

 i) As little infringement as possible to achieve the objective?

 ii) Fair compensation for expropriation?

**TREATY RIGHTS CLAIM**

Based on consensually assumed rights and obligations

* Pre-confederation (contact – 1867) – approx. 375 treaties negotiated between British Crown and indigenous people (ex. Peace & Friendship treaties) – needed indigenous peoples support to survive in new territory – gave them greater bargaining power. Hunting and fishing rights
* Post-confederation (1867 – 1973) – approx. 150 treaties – Crown took a more dominant role as the bargaining power shifted to them during this period. Treaties began to contemplate surrendering of land for the creation/reservation of land for particular communities.
	+ Treaties tended to be created orally, but the written text was created by British representative, often in England, sometimes in advance of the negotiation itself. Creating different perspectives of what was actually agreed to between the crown and indigenous communities.
* Modern era (1973 – present)
	+ SCC recognized aboriginal title in Calder.
	+ Comprehensive treaties (land claims agreements) -
		- 24 comprehensive treaties, 2 self-government agreements
	+ Specific treaties
		- Almost 500, with more than 100 still in negotiation
	+ One view - Treaties as ordinary contracts (subject to legislative extinguishment)
	+ Indigenous view - Treaties as special “sacred” not ordinary contracts (emphasis on Indigenous difference) Indigenous peoples see some treaties as covenants – but that the true terms should be recognized but the actual terms are unknown and debated about.

*R v Badger (1996)* – how should treaties be interpreted?

* Treaties are solemn promises, and sacred in nature
* Honour of the Crown is always at stake when engaged in a process of treaty interpretation
	+ Assume the Crown intends to fulfill its promises
	+ Courts should not sanction existence or appearance of sharp dealing (
* Treaties should be liberally construed
	+ Doubts resolved in favour of the indigenous peoples view
	+ Limitations should be interpreted narrowly
* Crown must prove extinguishment of the treaty right – using Sparrow – a clear and plain intention to extinguish treaty rights
* Because:
	+ Crown provided written text
	+ Inequal bargaining power when treaty was created
	+ To maintain the honour of the crown

*R v Marshall (1999) – Broad view of treaty interpretation*

**Facts**: Marshall was charged with 3 offences in the federal fish regulation (selling, fishing, without a licence, during closed season, with illegal nets). He admitted he did these things, but claimed a treaty right to trade, and hunt, fish and gather in support of that trade, under a Peace & Friendship treaty (from pre-confederation period). Treaty said nothing explicit about catching or selling fish. It did say, that the Mi’kmaq would not trade any commodities in any manner, except with truck houses. The provision effectively made them only trade with the British. Marshall was arguing that he had a positive right to trade based on this treaty. There was however, external evidence outside of the treaty that showed in effect, that the Mi’kmaq leaders thought they were agreeing to a positive right to trade.

**Issue**: Does Marshall actually have a positive treaty right to trade, including the right to hunt, fish and gather to support this trade.

**SCC**: ***The treaty is not limited to its written terms***. It did not encompass the full scope of what the parties had actually agreed to. There doesn’t need to be ambiguity in the provision before considering external evidence to determine what the parties actually agreed to.

* Documents of earlier meetings showed that the Crown had agreed to establish a truck house ‘furnishing with necessaires in exchange for their peltry.’ Reads into the treaty an implied term granting the Mi’kmaq the right to hunt, fish and gather, so they have something to trade at the truck house.
* But only a right for necessaries – only a right to necessities for life (to support a moderate livelihood - food, clothing, housing, a few amenities – not a crazy amount of wealth)
* Should treaty rights and aboriginal rights be treated differently?
* Is there an infringement here?
	+ Yes – if the government confers discretion into a regulatory scheme without language that infers ways in which treaty rights are respected, there will necessarily be an infringement.
	+ The regulation needed to say how the treaty right would be expected in order to avoid an infringement.
* R v Marshall #2 (1999, SCC)
* There was a request to re-hear the case, because people thought they got the decision wrong – they did not re-hear the decision, but clarified a few points:
	+ Only recognized a right to hunt, fish and gather things that would have been traded at the truck house in 1760.
	+ Only a right to do so for necessaries – in support of a moderate livelihood.

3 and 4 stages of the Sparrow framework also apply to treaty rights.

\*courts are generally cautious about enforcing rights that were purely economic in nature

What is a treaty?

 Parties: Crown and Indigenous group

 Agency: authority to bind

 Intention to create legal relations

 “Consideration”: obligations assumed by both sides

 Formality: “measure of solemnity”

**The TEST** for a treaty rights claim is the same as an Aboriginal rights claim subject to these considerations:

 1. Interpretation must give meaning and substance to the agreement. (*Marshall*)

 2. Treaties are not limited to their written terms. (*Marshall*)

 a. Written treaties sometimes do not reflect all that was agreed to.

 b. May read in implied terms.

 c. Interpretation must give meaning and substance to the agreement.

 3. Crown may include provinces depending on the wording of the treaty (*Marshall*)

4. Extrinsic evidence is admissible: external documents that provided account of meeting earlier to execution of this written treaty (*Marshall*)

 \*Crown may include provinces depending on wording of the treaty (*Grassy Narrows First Nation v Ontario* 2014 SCC)

**THE DUTY TO CONSULT – just read Haida!**

Arises prior to title claim or rights claim

Two roles:

**Interim**: Prior to the establishment of a treaty right - arises to protect Aboriginal rights/title to some extent prior to resolution of a claim

 **Post-recognition**: as part of the test for justification of a s. 35(1) infringement

 -Tsilqot’in: pre-condition to justifying an infringement to aboriginal title – via the Sparrow test

Source of the duty to consult is the honour of the Crown. The duty to consult is triggered in two situations:

 1) Pre-establishment of a right/title/ treaty right, when the *Haida* test is fulfilled

 2) Post-establishment of a right/title/treaty right, as part of the justification of the *Sparrow* analysis.

**Duty to Consult Framework**

 1. Is the duty to consult triggered?

 a. Pre-settlement of claim: the Haida test[[81]](#footnote-81)

 b. Post- recognition: by infringing a s. 35(1) right

 2. If so was the duty satisfied?

 a. What is the content of the duty on the facts?

 b. Was it satisfied on the facts?

 3. If not, what should be the result? (Depends where you are in the process)

***Taku River*** (2004) – pre-title establishment, DTC was complete, consent not required.

***Mikisew Cree*** (2005) – Treaty is not enough to exhaust DTC (historical one) -> low end DTC

***Beckman v Little Salmon*** (2010)- Expanded *Mikisew*. One clause did not have DTC -> modern treaties also require DTC. (Crown cannot contract out of DTC), treaties are not everyday contracts/ Low end DTC.

**Tsilqoti’in Nation** (2014) – title claim case, duty triggered and high-end DTC spectrum.

***HAIDA NATION*: TEST: Duty to Consult**

**1) When is the duty to consult triggered?**

**Pre Establishment** 🡪 *Haida Test* for when the duty to consult is triggered.

1. There is **Crown conduct** or a Crown decision
	1. Applies to federal and prov gov – but not to private parties (private action will not trigger DTC)
	2. Crown can delegate procedural/executor duty to private/public actors (Crown has continuing obligations)
2. The Crown has **real or constructive knowledge of a potential Aboriginal** rights/title or treaty rights claim; and
	1. There has to be a potential claim (if ***prima facie case*** or = credible claim) but if there is just a speculative claim that has no chance of success, and
	2. The Crown has to have real or constructive knowledge (or ought to know of the claim)
		1. Actual knowledge (an indigenous community has filed a claim in court; has asserted a claim during treaty negotiation process; treaty exists)
		2. In relation to an aboriginal right – reasonable expectation/knowledge of an aboriginal rights claim
3. The right/title **might be adversely impacted**
	1. Speculative impacts wont suffice; past wrongs wont suffice (existing wrongs)
	2. Or past decisions are made and the Crown does something else (new decision has to create a new additional level of adverse impact)
	3. There must be a claim in the here and now
	4. There must be link with impugned conduct and a current claim
* Post establishment, trigger for duty to consult is an actual infringement
* Pre establishment, trigger is the **Haida** test

Post Establishment 🡪 under the justification stage of the **Sparrow** test

1. For title, must be done at the beginning of the sparrow test (**Tsil**)
2. For treaty rights or aboriginal rights, at the end of the test BUT seems inconsistent here and may be challenged in the courts

**2) What is required to satisfy the duty?**

What is required to satisfy the Duty?

The Requirements vary with context. Duty falls on a spectrum.

<--consultation ---------- accommodation -----------consent -->

* 1. Varies with context
	2. Duty fall on a spectrum – mostly in consultation
		+ 1. **Consultation** = good faith (meaningful) discussions about potential and or real claims (constructive claims).
				1. By implication – this will require notice to the particular indigenous group that a decision is in the works that might impact a right
				2. Does not require consent – just a process of discussion (grounded in the honour of the Crown)
				3. Not under obligation to get **consent** from the indigenous community

Then can carry on to make decision

* + - * 1. **Consultation at the Lowest**: Notice to nation, provision of information to the nation about proposed decision or conduct, chance for discussion with the nation about the concerns they may have
				2. **Higher form of consultation** (deep consolation): formal participation of the nation in the decision making process itself

Requirements for written reasons – explaining the results of the consultation process (in relation to the particular reason)

Still open for the Crown to proceed without changing its position (but CONSENT NOT REQUIRED)

* + - 1. **Accommodation**: Usually accommodation coupled with deep consultation.
				1. Exists where the content of the DTC is strong enough to require modification in the Crown’s decision to accommodate the concerns of the community
				2. Requires the Crown to take positive steps to avoid or mitigate harms (right/title/treaty etc)
			2. **Consent**: (not available to rights/title/treaty not established yet)
				1. Need to actually get consent from the nation
	+ **Tsil**: only appropriate where rights and title interest established, and by no means necessary in every case
	+ **Dalgamuukw**: more broad (hunting and fishing in relation to title lands), including aboriginal rights cases
	+ **Consent not required for pre establishment cases**

**3) How do we know where on the spectrum the Crown falls?**

* The level of consultation is proportionate to:
	+ Strength of the claim
		- What’s the nature of the claim?
		- Aboriginal title claims demand more typically than aboriginal rights claim
		- Required level of consultation is the greatest where title is actually established
		- This requires the Crown to engage in a preliminary analysis as to the strength of he claim
			* Court must ask is there a strong claim here? (if yes, then duty is higher)
			* But if it is **dubious claim** – require less (notice is enough)
			* LOW BAR; **DUBIOUS CLAIM** IS ENOUGH TO TRIGGER CLAIM
			* But cannot be speculative
* Preliminary analysis: aboriginal right (**Van der Peet**); aboriginal title (**Delgumuukw**)
* To determine the strength of the claim
* There are indications of other sources of the strength of the claim (doc, treaty negotiation)
	+ Seriousness of the adverse impact on the aboriginal right, treaty right, title etc
		- This is the factor that usually results in the requirements of the duty to consult being modified significantly
		- If the breach is less serious or relatively minor, then lowers the requirements of the duty to consult
		- Modest fee to fish (small impact)
		- Serious impact – cutting lumber/clear cutting

**4) What happens if the duty isn’t satisfied?**

* Pre establishment (**Tsilhqot’in**)
	+ Injunctive relief
	+ Damages
	+ Order to satisfy the duty
* Post establishment (**Tsilhqot’in**)
	+ Obtain consent. If they get consent, no infringement.
	+ If they don’t get consent and they want to continue then have justify the infringement as per sparrow test
	+ If no consent, and no justification, various options: for example, court can order to reassess prior conduct/decision, legislation rendered inapplicable to right/title

In **Haida**: **Was the duty triggered here? Yes**

Prov knew about the claim (existing claim)

This claim would be seriously adversely affected

What would be required to satisfy the duty?

Consultation was inadequate – did not consult with **Haida** at all

* **Obiter** – because of the strength of **Haidas** claim and seriousness of the impact – might have to significantly accommodate the **Haida** community
* Talks about defacto sovereignty
	+ Talks about statement of affairs that the Crown has sovereignty but may not have sovereignty in law
	+ This language disappears from **Tsilquot’in**

|  |  |
| --- | --- |
| **Federal Powers s. 91** | **Provincial Powers s. 92**  |
| **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the **Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces**; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,**1.**Repealed. [(44)](http://laws-lois.justice.gc.ca/eng/Const/page-18.html#f44)**1A.**The Public Debt and Property. [(45)](http://laws-lois.justice.gc.ca/eng/Const/page-18.html#f45)**2. The Regulation of Trade and Commerce**.**2A. Unemployment insurance.**[(46)](http://laws-lois.justice.gc.ca/eng/Const/page-18.html#f46)Federal maternity and paternal benefit provisions are valid under s. 91(2A) the federal “Employment Insurance” Power.***Reference Re Insurance Act***(SCC 2005) **3.**The raising of Money by any Mode or System of Taxation.**4.**The borrowing of Money on the Public Credit.**5.**Postal Service.**6.**The Census and Statistics.**7.**Militia, Military and Naval Service, and Defence.**8.**The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.**9.**Beacons, Buoys, Lighthouses, and Sable Island.**10.**Navigation and Shipping.**11.**Quarantine and the Establishment and Maintenance of Marine Hospitals.**12.**Sea Coast and Inland Fisheries.**13.**Ferries between a Province and any British or Foreign Country or between Two Provinces.**14.**Currency and Coinage.**15. Banking,** Incorporation of Banks, and the **Issue of Paper Money.****16.**Savings Banks.**17.**Weights and Measures.**18.**Bills of Exchange and Promissory Notes.**19. Interest.****20.**Legal Tender.**21. Bankruptcy and Insolvency.****22.**Patents of Invention and Discovery.**23.**Copyrights.**24. Indians, and Lands reserved for the Indians**.**25.**Naturalization and Aliens.**26.**Marriage and Divorce.**27.**The **Criminal Law**, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.**28.**The Establishment, Maintenance, and Management of Penitentiaries.**29.**Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [(47)](http://laws-lois.justice.gc.ca/eng/Const/page-18.html#f47) | **92.** In each **Province the Legislature may exclusively make Laws** in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,**1**. Repealed. [(48)](http://laws-lois.justice.gc.ca/eng/Const/page-18.html#f48)**2**. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.**3.**The borrowing of Money on the sole Credit of the Province.**4.**The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.**5.**The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.**6.**The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.**7.**The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.**8.**Municipal Institutions in the Province.**9.**Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.**10.**Local Works and Undertakings other than such as are of the following Classes:(*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province: (*b*) Lines of Steam Ships between the Province and any British or Foreign Country: (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.**11.**The Incorporation of Companies with Provincial Objects.**12.**The Solemnization of Marriage in the Province.**13. Property and Civil Rights** in the Province.**14.**The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.**15.**The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.**16.**Generally **all Matters of a merely local or private Nature in the Province**. |

**Validity**

**A 1. Pith and Substance Doctrine Cases**

***R v Morgentaler*** [1993 SCC]

 **Held**: the *NS Medical Services Act* was *ultra vires* the province.

**Reasoning**: Nova Scotia tried to invoke “establishment… of hospitals” + “property and civil rights in the province” + “matters of a local or private nature” of s. 92. Morgentaler invoked just “criminal law” of s. 91.

**Ratio: Cited for**:

1. Court must take a flexible approach in interpreting the pith and substance of the law – not just the purpose of the law that matters, but also the legal and practical effects

 2. Provinces cannot replace criminal law

3. Provinces cannot replicate the language of the criminal law – doesn’t mean this cannot happen, on occasion it does

**Marmar:** Hansard does all the work. What the court said about Hansard is not a fact, it’s a proposition.

**Wright:** Sopinka did not properly apply legal effect, purpose (partially reproduced), but did propose (legislative history of the law)

**Wright 91(24) in slide**

***Re Employment Insurance Act (Can)*** [2005 SCC]

 **Facts:** validity of the maternity/paternity benefit provisions of the *Employment Insurance Act*

 **Ratio:** Recent example of how the SCC approached step 2 of the “pith and substance” doctrine.

 1. Criticizes the QC Court of Appeal for adopting an “original intent” approach to s. 91(2A)

 2. Invokes and affirms a “generous”, “progressive” (“living tree”) approach to interpreting ss. 91/92

3. Start with the terms (text) of the power and see if the impugned law is “consistent with its natural evolution”

4. Evidence of original intent is relevant, but not conclusive.

5. Also consider judicial precedents in interpreting the power.

**Cited for:** “generous reading of the words” – depending on the substantive issue underpinning the law

**Held**: Federal maternity and paternal benefit provisions are valid under s. 91(2A) the federal “Employment Insurance” Power.

**Validity**

**A 2. Double Aspect Doctrine**

***Multiple Access v McCutcheon* [1982 SCC]**

**Facts:** Ontario and Federal insider trading laws were basically the same. Claimants brought an action against insider traders under Ontario Securities Act. The Def. raised a division of powers argument to shield themselves from the claim.

 **Held:** Ontario insider trading law is valid.

 **Ratio:**

1. **Double aspect doctrine applies when** the “contrast between the relative importance of the two features [or aspects] is not so sharp” or “of roughly equal importance” citing (Lederman)

2. **Insider trading has a double aspect**.

 Company law aspect – impacts corporate powers, organization and management (POGG)

 Securities law aspect – because it impacts share trades (property and civil rights)

**Cite:** to show that duplication between federal and provincial legislation is not problematic in and of itself. Only when in conflict and there is an impossibility of dual compliance is there a problem.

***Law Society of BC v Mongat* [SCC 2001]**

**Issue:** At issue was a provision of fed immigration act that permitted non-lawyers to represent clients in proceedings before the immigration and refugee board, and a provision of the BC legal Profession Act which prohibited non-lawyers form practicing law.

 **Held:** DA applies Both fed and provincial powers are equally important.

 **Ratio:**

 **1.** **Also applied Lederman’s Test**

**2.** A law can also have a double aspect in that it presents characteristics from more than **one class of subject in the same list**.

**Validity**

**B. Necessarily Incidental/ Ancillary Powers Doctrine**

***General Motors v City National Leasing* [1989 SCC]**

**Facts:** CNL brought action against GM alleging it suffered losses as a result of a discriminatory pricing policy that constituted an anti-competitive behaviour prohibited by the *Combines Investigation Act*. Section 33.1 of the *Act* created cause of actions which are within the domain of the provinces to create. GM argued that s. 33.1 was beyond the jurisdiction of Parliament because civil causes of action fall within provincial jurisdiction.

**Held:**

1) S. 33 is *intra vires* the powers of the Provincial government.

2) *Combines Investigation Act* is valid under s. 91(2)

3) Functional relationship test is appropriate; civil remedy would improve effectiveness of competition law.

**Ratio:**

 **Cite for** 3-step-test for Necessarily Incidental/ Ancillary Powers Doctrine

***Quebec v Lacombe* [2010 SCC]**

**Facts:** At issue is whether bylaw enacted by QB municipality (which prohibited the construction and use of aerodromes within a particular part of the municipality) is valid.

**Held:** The bylaw was invalid. It entrenched on the Federal jurisdiction over aeronautics. The general zoning by-law was valid as provincial legislation under s. 92(13) but was not necessarily incidental to the bylaws as a whole.

**Ratio:**

 **Cite for**: “must engage in formal “pith and substance” analysis at step 1.

**Applicability**

**Interjurisdictional Immunity Doctrine (IJI)**

***Commission du Salaire Minimum v Bell Telephone Co of Canada* [1966 SCC]**

**Facts:** whether the *Quebec Minimum Wage Act*, which the Court accepted as valid provincial legislation, could constitutionally be applied to Bell Telephone, a **federally regulated communications undertaking** within exclusive federal jurisdiction pursuant to ss 92(10(a) and (c) of the *Constitution Act, 1867*?

**Held:** the Provincial Act could not apply to the Federally regulated undertaking.

**Ratio:**

 **Cite for**: **broadened the test for IJI** to apply to **Federally Regulated Undertakings**.

Generally worded provincial law does not apply to federal undertakings if it affects **vital** part of its operation or management.

***Canadian Western Bank v Alberta* [SCC, 2007]**

**Facts:** In 2000, Alberta enacted changes to its *Insurance Act* purporting to make federally chartered banks subject to the provincial licensing scheme governing the promotion of insurance products.

**Issues:**

1)Is the *Insurance Act* a valid exercise of provincial powers under s. 92(13)?

2) Does the Law fail on IJI?

3) Does federal paramountcy apply?

**Held:**  1) Yes.

 2) No.

 3) No.

**Reasoning:** Should not apply IJI here. The doctrine has many criticisms. Courts should favour the ordinary operation of statutes enacted by both levels of government. The immunity asked for by the banks is not acceptable in Canadian federal structure because it exposes danger of allowing IJI to exceed its proper limit and to frustrate the application of the PS/ Double Aspect doctrines.

**Held (Binnie/Lebel):** Consumer protection requirements in Alberta’s insurance law apply to insurance promotion by federally regulated banks

Basis of/ justification for IJI:

 It protects jurisdictional “exclusivity”, in keeping with the text of ss. 91 and 92

 Consistent with the “principle of federalism”

 But reasons to limit to the scope of IJI?

Six reasons, including that it is inconsistent with the flexible, “cooperative” federalism that the courts should promote in division of powers cases

 **Ratio: cite for:**

1) Threshold raised from “affects” to “impairs”

 2) Restricted to situations covered by precedent

 3) Consider IJI after federal paramountcy

 **Exception:** if there is a precedent applying IJI;

 If there is, apply IJI before federal paramountcy

***Quebec v Canadian Owners and Pilots Association* (COPA) [2010 SCC] Cite for**: **test for IJI**

**Facts:** Two guys built an airstrip under authority of federal act in an area prohibited from doing anything other than farming without prior authorization. The guys didn’t get authorization so were ordered to demolish their airstrip. They challenged the law.

**Issue:** Does IJI apply?

**Held:** Yes.

**Operability**

**Federal Paramountcy Doctrine**

***Multiple Access v McCutcheon* [1982 SCC] – also see Double Aspect Doctrine – conflict = impossibility of dual compliance**

**Facts:** Insider traders relied on federal paramountcy; so as try to exempt themselves from provincial securities law.

 **Held:** Ontario insider trading law is valid.

 **Issue:** 1) Can duplicate legislation operate at both the federal and provincial levels?

 2) Is duplication a kind of conflict that should give rise to federal paramountcy?

 **Held:**  1) Yes. 2) No.

 **Reasons:** As the laws were virtually identical, then it is not impossible to comply with both.

Example of impossibility of dual compliance: “court order under federal law grants custody of a child to one spouse, but court order under provincial law gives child to the other spouse”.

 **Ratio:**

**Cite for:**

 1. If provincial legislation merely duplicates the federal, but does not contradict it, then there is no conflict.

 2. Conflict = the impossibility of dual compliance.

***Bank of Montreal v Hall* [1990, SCC] – loosen test from *Multiple Access* ^**

**Facts:** Hall is a farmer who took out a loan against one of his machines (under the Federal *Bank Act*). He defaulted, and the bank seized the machine. Hall asserted that they violated provincial limitation of civil rights act, by not giving requisite notice before seizing the machine. By failing to follow the provincial legislation, Hall argues the Bank lost its security interest.

**Issue:** Whether there is an “actual conflict in operation” between the *Bank Act* (federal law) and the *Limitation of Civil Rights* *Act* (provincial law) in the sense that the legislative purpose of Parliament stands to be displaced in the event that the appellant bank is required to defer to the provincial legislation in order to realize on its security.”

**Held:** Yes. There is an actual conflict in operation. The purpose of the federal law would be frustrated.

***Rothmans, Benson & Hedges v Sask* [2005, SCC] – affirms two part test of Paramountcy**

**Facts:** There is federal legislation (*Tobacco Act*) enacted post RJR which prohibited the promotion of tobacco products, but allowed for displaying ads when at retail. Sask Gov’t steps in (*Tobacco Control Act*) and bans all advertising and promotion including the retail level. Tobacco companies try to use this as a shield to allow them to display the ads to children.

Note: the Fed Gov’t actually supports Sask and the SCC references this.

**Issue:** Is s. 6 of the *Tobacco Control Act*, sufficiently inconsistent with the federal *Tobacco Act*, so as to render the Provincial act inoperative pursuant to federal paramountcy?

**Held:** (Major J). No. Provincial tobacco law not inoperative.

**Reasons:** Provincial law is not inoperative as there is no conflict.

First: Fed law did not create a positive entitlement to display tobacco products, and so it was possible to comply with both laws. Also, it was possible to give effect to both laws.

Second: The provincial law did not frustrate, and in fact furthered, the objectives of the Federal law. Court rejects “federal intention to cover the field” claim. -> It is Inappropriate to impute this intent to Parliament in the absence of very clear statutory language.

**Ratio: Cite this for** establishing two types of conflict which are sufficient so as to have Paramountcy apply.

 1) If it is impossible to comply simultaneously

 2) If provincial legislation displaces or frustrates Parliament’s legislative purpose.

The relationship of the two tests: Frustration of federal purpose is framed as the overarching test; impossibility is one example

***Quebec v Copa* [2010 SCC]**

Established:

 1) The party seeking to invoke federal paramountcy has the burden of proof

 2) Two part test:

 1. Purpose

 2. Whether application of the law would be in conflict with federal law.

3) Standard for invaliding provincial legislation is high. It is not enough if a permissive federal law is merely restricted by provincial law’s operation.

***Alberta v Maloney* [2015 SCC]**

**Facts:** Alberta trying to recover money from Maloney which Alberta had spent covering the costs of damages that Maloney caused in car accident while he was uninsured in contravention of the TSA (Alberta’s *Traffic Safety Act*). However, Maloney had declared bankruptcy, (the Bankruptcy and Insolvency Act provides that upon discharge, M is released from all debts that are claims provable in bankruptcy. As a result of his bankruptcy discharge, M did not pay the fine in full and his licence was suspended.

 **Held:** Provincial law inoperative, to the extent that it is used to enforce a debt discharged in bankruptcy.

 **Reasons:** (Gascon J for **majority** of 7):

1. Courts should adopt a substantive, contextual, approach in determining whether there is an impossibility of dual compliance (IODC)

 Here it would literally be possible for M to comply (either pay the fee or just don’t drive)

 But contextual analysis; M is in a conflict.

 2. Seems to expand the application of the IODC test

 3. Find IODC here, even though actual compliance is technically possible.

 (Cote J for 2 dissent):

 **Dissent:**

1. Disagrees with majority’s IODC analysis; says it conflates the IODC test and the frustration of federal purpose test

2. An IODC exists only if there is an “express contradiction” that results directly from the wording of the two provisions

3. Consider any more substantive frustration under the frustration of federal purpose

**Peace, Order, and Good Governance**

***Reference re: Anti-Inflation Act [SCC 1976]* – Emergency Branch**

**Facts:** The *Anti-Inflation Act* established a system of price, profit and income controls. Applied to the federal public sector and applicable to each public sector of the provinces if agreement reached between each province and the federal government. Two successive years of double digit inflation increases. Program was administered by federal tribunals and officials. It was temporary. On the case law at the time, this kind of thing was under provincial jurisdiction.

**Issue:** Is the *Act* valid under emergency branch? Is it valid under national concern branch?

**Held:** The *Act* is valid under the emergency branch (Laskin CJ). The *Act* is not valid under national concern branch (Beetz J)

 **Majority (Laskin):**

Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperiling the well-being of Canada…”

 Two things to note re passage:

 1. Rational basis standard

 2. Opponents must show absence of rational basis

 Burden is on the opponents

 This burden can be satisfied if they show:

 -Parliament lacked a rational basis or;

 -The law is not rationally connected to alleviating the emergency claimed to exist

NB: no need to use the word emergency + Preamble is sufficiently indicative (uses the words serious national condition in the Act here)

 **Dissent (Beetz):**

Dissents on the emergency

Impact of invoking emergency power is significant – temporarily amends cons. Thus, cannot be exercised in ordinary form.

No need to use the word emergency but must invoke the power in “explicit terms” and “unmistakeable signal that relying on power”

 Language here was insufficient

 **Reasons – Ritchie**

 Need clear evidence that an emergency had not arisen

 So probably need to invoke both standards; clear evidence standard and rational basis

 **Cite for:**

 Established that to show there is an emergency must:
 1) Parliament must have had a rational basis to determine that an emergency existed.

 -Deference given to Parliament

 2) Burden is on opponent to show absence of rational basis. Shown by proving:

 Parliament lacked a rational basis or

 The law is not rationally connected to alleviate the emergency claimed to exist

 3) No need to use the word emergency in the legislation

***R v Crown Zellerbach Canada Ltd* [1988 SCC] – national concern test**

**Facts:** Ocean Dumping Control Act prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined as including the internal waters of Canada other than fresh waters.

 **Issue:** Is this ultra vires?

 **Held**: Marine pollution inside provincial boundaries covered by the national concern branch of POGG.

 **Dissent**:

 Marine pollution not cohesive enough.

 Can’t draw clear line between salt/ fresh H2O, pollution in one impacts the other

 Marine waters affected by coastal activity and deposits from the air

If marine pollution accepted as a matter of national concern then things impacting marine pollution which fall within provincial jurisdiction would be caught

***Schneider v R – Heroine Treatment Act ---*not a national concern *(***provincial inability test met, plus no state of emergency)

**Facts**: challenged the BC Heroine Treatment Act.

**Held**: BC within their powers; does not fall under POGG

**Reasons**: treatment of heroin dependency as distinct from illegal trade is not a matter of national interest and a dimension transcending the power of each province to meet and solve its own way; failure of one prvince will not endanger the other provinces; has not attained dimensions to be in the interest of national dominion; does not go beyond local or private concern or interest; nor has it reached a state of emergency.

***Friends of the Oldman River Society v Canada (Minister of Transport)*** – environment not a national concern (though prov. And fed. Can legislate particular aspects)

**Facts**: dealt with federal jurisdiction over environmental assessment. The Environmental assessment and review process guild line under the federal Dep of Environment required agencies to screen any activity that may have an environmental effect on an area of federal responsibility to determine whether it may give rise to adverse effects. The Alberta Gov. proposed to construct a dam, various procedures were conducted to asses the environmental impact, but the minister did not subject it to an environmental assessment per Department of the environment Act. The ministry attempted to have the project comply with the environmental assessment.

**Issue**: constitutional and statutory validity of the Guidelines Order as well as its nature and applicability.

**Held** (Beetz, Lamer and La Forest JJ. dissenting): The appeal should be allowed.

**Reasons**: environment does not have the requisite distinctiveness to meet the test under the National Concern Doctrine (marine pollution is different though per Zellerbach since it was predominantly extra provincial and international in character and implications, and possessed sufficient distinct and separate characteristics so as to make them parliament’s residual power).

**Criminal Law Power**

***Margarine Reference* [SCC 1949]** – adds 3rd requirement for a “criminal law”

**Facts:** Margarine seen to pose a threat to the dairy industry. Feds passed a law that banned margarine completely to protect the dairy industry. Reference was launched to determine the constitutionality of the law.

 **Issue**: Was the margarine law a valid criminal law?

 **Held:** no.

 **Reasons (Rand J):**

While the law met the PATA test, it is not a valid criminal law b/c it had a primarily economic objective of protecting the dairy industry, putting it within the property and civil rights power.

 **Cite for:** Established**: a third requirement for a law to be criminal**

 That is: A law must have some valid criminal law purpose.

-Must address “some evil or injurious or undesirable effect upon the public against which the law is directed”

 -Some criminal law purposes (not exhaustive): public peace, order, security, health, morality

***RJR MacDonald Inc v Canada (AG) [SCC 1995]***

**Facts:** Federal Tobacco Products Act prohibited: 1) advertising, 2) promotion and 3) the sale of tobacco products without prescribed health warnings. All 3 prohibitions were backed up by penalty.

**Held:** Federal tobacco law is valid under the criminal law power.

**Cite for**:

-Expansion of criminal law power under s. 91(27) (broadened *Margarine* test); deviation from traditional form because of nature and issue-> we can legislate to prohibit a social ill.

 -Affirms 3 P test. (Prohibition, Penalty, Purpose)

-Broadens test for criminal law purpose: prohibition with consequences directed at an “evil” or injurious effect on the public. Noting that health is not an enumerated power in ss. 91/92.

***R v Hydro-Quebec* [SCC, 1997]**

Held by La Forest (+4)

Cite for:

 1) Protection of environment is a valid criminal law purpose

 2) Delegated prohibitions are ok.

 This allows for exemptions, the scope of which are determined by federal legislators

 Delegates the true prohibitions to other federal decision makers.

***RAHRA* [2010 SCC] *Re Assisted Human Reproduction Act***

**Facts:** “prohibited activities” which were totally prohibited and “controlled activities” which were prohibited, unless certain regulations were satisfied and performed with a licence.

**Issue:** whether the impugned provisions of the *Act* are valid?

**Held**:

**McLachlin** (for 4):

The **whole Act is valid** under the criminal law power.

Pith and substance **step 1**: characterization

**P+S of the law is to prohibit or punish** inappropriate practices associated with assisted human reproduction.

 P+S here is not the regulation of assisted reproduction in hospitals/ labs.

Pith and substance **step 2**: allocation

**Prohibition and penalty are present** for both “prohibited activities” and “controlled activities”

**Purpose**? Yes. Adopts a deferential approach to purpose test.

**Morality** – Parliament must have a “reasonable basis to expect” that the law will address a moral concern; and there must be “a sufficient consensus in society” that the concern is of “fundamental importance”

**Health –** law must address: 1) human conduct; 2) that may cause harm or elevate the risk of harm; 3) to the health of members of the public.

**LeBel** and **Deschamps** JJ (for 4):

Alll challenged provisions are not valid criminal law.

Pith and substance step 1: characterization

 P+S of the provisions is the regulation of assisted human reproduction.

 Distinguish between P+S of prohibited and controlled activities provisions.

Is the third P “Purpose” satisfied?

 No! The law must be aimed at “supressing an evil” or safeguarding a “threatened interest.

 Parliament must demonstrate that:

 -the “evil” is “real” and has a “concrete basis” and

 -there is “reasoned apprehension of harm”

**Cromwell** breaks tie:

 Joins LeBel and Deschamps JJ in finding many of the challenged provisions not valid criminal law.

 But like McLachlin CJ finds ss. 8, 9, and 12 Ok.

Doesn’t explicitly adopt LeBel + Deschamps JJ’s purpose test but agrees with them that most of the *Act* is not valid criminal law, exceptions being ss 8, 9, 12

**Economic Regulation**

***Citizens Insurance Company v Parsons* (1881 PC)**

 **Cite for:**

1.Established that business in general is a matter of property and civil rights.

 2. Exceptions:

 -S. 91 lists some businseses (banks, shipping)

 -POGG (aeronautics, atomic energy)

 -Interprovincial transportation, communication, works, etc.

 -91(2); 91(27)

***Carnation Co Ltd v Quebec Agricultural Marketing Board* [1968 SCC]**

Facts: Marketing board was created as a corporation by the provisions of *Quebec Act*. Marketing scheme: price management. Way to bring stability to agricultural markets. Carnation purchases milk in Quebec but processes the milk in Ontario. Most of what they sell is on the international market. The Marketing Board’s interference has increased the cost of buying milk in Quebec, which has overall increased costs of doing business, thus has inter-provincial and international effects.

Issue: Did the QB agricultural marketing board infrgine on the legislative powers of Parliament under s. 91(2) “regulation of trade and commerce?”

**Held:** no. Order of provincial Board are valid even though most product sold outside Qubeec.

**Takeaways**:

 - The regulation of intra-provincial trade falls within the scope of s. 92(13), “property and civil rights”

 - The provinces can enact laws that impact interprovincial/ international trade

 -But interprovincial/ international trade cannot be the pith and substance of the law

**Reasoning**:

Justice Martland says: the ultimate destination of the product does not affect the constitutional scheme. It’s about the transaction which takes place wholly within the province. So fixing the price would have had an impact on the company, but so do other things such as labour costs because of labour regulations.

***General Motors v City National Leasing* (1989, SCC)**

**Held:** Federal competition law valid under the general branch of trade and commerce

**Cite for:** test for general branch

***Re Securities Act* (2011, SCC)**

**Held:** The proposed *Securities Act* is not valid under general branch of the trade and commerce power.

**Cite for**:

* A broad view of s. 91(2) – possible on its face – could eviscerate provincial powers, make some federal powers meaningless
* The federal and provincial governments are coordinate, not subordinate, and so a federal head of power “cannot be given a scope that would eviscerate a provincial legislative competence”
* The trade and commerce power must thus be circumscribed
* Also don’t confuse optimal policy with constitutional validity

**Aboriginal Right (which includes “title”) + Aboriginal Treaty Rights: Framework for all S. 35(1) Claims**

***R v Sparrow* [1990 SCC] – the “Test”**

**Facts:** Sparrow argued fishing regulations don’t apply to him because he has existing fishing rights due to aboriginal status. Feds say: *Fisheries Act* applies to all + fishing right has been extinguished. TJ found s.35 protected only existing treaty rights and there is no inherent right to fish. CA dismissed appeal. Appealed to SCC>

**Issue:** Does the *Fisheries Act* infringe s. 35? Is there an Aboriginal right to fish?

**Held:** Yes. Yes. New trial ordered.

**Established:** The *Sparrow Test* for determining the existence of an aboriginal right:

 1. The claimant must show that they are acting pursuant to an Aboriginal right protected by s. 35(1).

 2. The claimant must show that the right is “existing”

 3. The claimant must show that the right has been infringed.

 4. If the right is infringed, the burden shifts to the Gov’t to show the infringement is justified.

**Reasons**:

1) “Existing”: was interpreted as referring to rights that were not “extinguished” prior to the introduction of the 1982 Constitution. Here, the band had a clear right to fish for food. Extinguishment can only occur through acts that showed “clear and plain intention” on the government to deny those rights. The licensing scheme was merely a means of regulating the fisheries, not removing the underlying right.

2) “Recognized and affirmed”: Incorporates the government’s fiduciary duty to the Aboriginal people, which requires it to exercise restraint when applying its powers in interference with Aboriginal rights. It further suggests that Aboriginal rights are not absolute and can be encroached upon given sufficient reason.

***R v Van der Peet* [SCC, 1996] – Expands Step 1 of the *Sparrow Test***

**Facts:** Dorothy Van der Peet, a member of the So:Io Nation was charged for selling ten salmon that Charles Jimmy (her common-law husband) and his brother Steven had caught under their Native food fishing licence. Under the licence, Jimmy was forbidden from selling his catch. TJ held that the Aboriginal right to fish for food did not extend to the right to sell fish commercially. This was overturned at summary appeal but the conviction was restored at the Court of Appeal.

**Issue:** What is the test for determining an aboriginal right under s. 35? (aka, “what is the test for step one of the *Sparrow Test”*?)

**Held:** Sto:Io have no Aboriginal right to sell fish for money or other goods.

**Reasons:**

 **Step 1**: Identify nature of the claim

 -Right to exchange fish for money or other goods

 -Not a broad commercial right

 **Step 2:** Integral to the distinctive culture?

 -No; pre-contact, exchange of fish was only incidental to fishing for food for Sto:Io

 -Only post-contact that exchange for fish took off

**Established**:

 1) The Test ^

 2) General principles of s. 35(1)

-S. 35(1) should be given a “generous and liberal interpretation”. Doubts or ambiguity about s. 35(1)’s interpretation should be resolved in favour of aboriginal peoples

 -These principles are necessary to be consistent with Crown’s fiduciary duty

 3) Source of s. 35(1) rights

-Ab rights are “recognized and affirmed” because of one simple fact: “when Europeans arrived in NA, Ab people were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries”

 4) Purpose of s. 35(1)

 -The reconciliation of the pre-existence of Aboriginal societies with Crown sovereignty

***R v Gladstone* (SCC, 1996) – two refinements to step 4 of Sparrow**

**Facts:** The appellants were charged under the *Fisheries Act* with the offence of offering to sell herring spawn on kelp caught under authority of an Indian fishing licence. The licence permitted the sale of 5000 lb; the appellants were caught selling 4,200 lb. The appellants did not argue the facts but claimed that they had an aboriginal right to commercially exploit the herring and the regulation is contrary to 35(1).

**Held:**

 (1) There was a right to fish for commercial purposes that had not been extinguished.

 (2) Issue of justification sent back to trial court.

**Reasons:**

-Right to fish commercially not limited by its own terms. Only limited by other factors, eg. Availability of the resources and market

 -Giving exclusive rights here would completely absorb the fisheries

 -Rights with internal limits will allow for priority and exclusive access

 -For rights without an internal limit, priority would not need to be given in terms of exclusive access

**Established**

Two refinements to justification stage (step 4) of the *Sparrow Test*

(1) Aboriginal priority “makes sense” where the right is internally limited (eg. Right to fish for food). Internal limitation is that rights holder only needs to fish as much as they need to feed themselves.

-Where it isn’t (like right to fish commercially), the Gov only has to show that allocation took priority of aboriginal rights into account

 -No formula to determine how government can satisfy obligations, but some options:

 -Consultation?

 -Compensation?

 -Accommodation (e.g. reduced licence fees)?

 -Aboriginal priority taken into account?

 -Proportion of Aboriginal group participating?

 (2) Other “compelling and substantial objectives “recognized”? Yes to:

 -Economic and regional fairness

 -Recognition of historical reliance upon, participation in, fishery by non-Indigenous

**Result:** Not enough evidence on whether allocation of licences was justified so new trial ordered.

**Aboriginal Title**

***Delgamuukw v BC* (SCC, 1997) – what is protected by core of Indianness – Aboriginal right recognized in theory**

**Facts:** Can the province enact legislation that extinguishes aboriginal title before 1982? Prior to 1982 this was permissible for the feds but not sure about the provinces.

**Issue:** Did the provinces have the authority to extinguish title after confederation?

**Held:** No.

**Reasons:**

1) Scope of Fed Jurisdiction: Unsettled but protects at least a “core of Indianness” from provincial intrusion via IJI. Aboriginal rights and title fall within this core.

2) Scope of Provincial Jurisdiction: Provinces lack the jurisdiction to “single out” Indians and lands reserved for the Indians. Provincial laws of general application generally apply to “Indians”, “lands reserved for them” -> exception:

 If IJI is engaged. However, provincial law cannot extinguish Aboriginal rights or Aboriginal title at all.

3) Prov laws that attempt to extinguish aboriginal title would be caught by division of powers and IJI b/c extinguishing would necessitate singling out.

4) What falls within “core of Indianness”?

 -Does not include things like labour relations

 -Matters touching on Indianness

 -Includes at least “activities that are distinctive integral to the distinctive aboriginal culture of the group”

 -Aboriginal rights and title

***Delgamuukw v BC* (SCC 1997) – re: discussion of Aboriginal title again – established test for Aboriginal title**

 Treatment of evidence/ findings of fact

-Aboriginal rights “demand a unique approach to the treatment of evidence which accords due weight to” Indigenous perspectives

-Includes accepting oral histories

 -The TJ’s treatment of oral histories was inappropriate; orders a new

**Treaty Rights**

***R v Marshall* (1999 SCC) – the test for treaty rights is the same as the test for infringement of aboriginal right (sparrow). Test for justification is the same as well**

**Facts:** Marshall was caught fishing eels out of season and selling them for a profit and charged with violation of the *Fisheries Act*. He argued that he was trying to catch and sell the eels to support himself and his spouse, and that the previous 1708 *Indian Rundi Act* applied which stated Indians were entitled to do so by virtue of a right contained in the *Treaty of Peace and Friendship* entered into by the British Crown in 1760. **At issue was a "trade clause" in the treaty in which the Mi'kmaq promised not to trade with non-government individuals.** The trial judge concluded that the only enforceable treaty obligations were those set out in this 1760 treaty, and while the trade clause gave the Mi'kmaq "the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", **such right had disappeared with the disuse of the truckhouse system**. The Nova Scotia Court of Appeal **upheld the conviction**. Treaty seemed to impose a negative restraint on trading, not a positive entitlement

**Issue:** Does marshall have a **treaty right to trade**?

**Held: Yes** 🡪 Marshall had a positive right to trade which included positive rights to hunt and fish and gather in support of the trade. Marshall had a treaty right, which was violated unjustifiably.

* Documents of earlier meeting showed Crown had agreed to establish a truck house “furnishing … with necessaries, in Exchange for their Peltry”
	+ This supports claim that actual treaty terms included a positive right to trade at a truck house
	+ We must look beyond the written text to the broader context
	+ Looking at that there was an implied treaty

**BUT only right for necessaries** = have a right to do these things to make a moderate livelihood not to accumulate wealth

Finds right to hunt, fish, trap for the truckhouse but the govt does not have to keep the truck house there

* Truck house was the mechanism for trade not the right to trade

**Established – the test for treaty rights is the same as the test for infringement of aboriginal right (sparrow). Test for justification is the same as well**

1) Treaties are not limited to their written terms (written treaty was only negative right)

* Written terms do not reflect all that was agreed too
* May read in implied terms

2) Extrinsic evidence is admissible: external documents that provided account of meeting earlier to execution of this written treaty

3) interpretation must give meaning and substance to the agreement

**Clarification of the case:**

* Only right to hunt, fish, gather to trade at truck houses in 1760
* But there can be evolution
* Things fished for and hunted can change, but cant change completely in kind
	+ Ex: logging
	+ Explicitly said logging is not covered by previous case
	+ If you want to log, need to start a new claim
* We didn’t recognize hugely broad right
* Cant get rich
* Right to necessaries only (in later SCC clarification)
	+ Interpreted as right to moderate livelihood
		- Leaves it to govt to define moderate livelihood

Shows and reveals how the SCC can trigger outcomes that it did not anticipate

***Tsilqot’in Nation v BC* (2016 SCC) – infringements on s. 35 must be justified under *Sparrow Test* – Aboriginal right recognized in practice**

**Facts:** Indigenous group filed suit seeking a court declaration that would prohibit Carrier’s Lumber commercial logging operations in area, and establish their claim for Aboriginal title to the land, which was part of their historic territory.

**Held (McLachlin):** Departs from *Delgamuukw* on application of IJI to aboriginal and treaty rights. Aboriginal + treaty rights are not immune absolutely from provincial laws under IJI – but are protected from unjustified s. 35 infringements.

**Established:** infringements on s. 35 rights must be justified under *Sparrow Test*

1) Aboriginal title and treaty rights can be touched by provincial laws that might have previously engaged IJI. However, if there is an infringement of s. 35, this will now have to be justified under the Sparrow test. S. 35 only protects from unjustified infringements, this is less protection.

2) the provinces cannot single out Indians, or Lands reserved for the Indians. For this reason, the provinces still cannot extinguish.

***Tsilqot’in Nation v BC* (2016 SCC) – re: Discussion of Aboriginal title again**

**Facts:** Contestation over this title goes back 100 years. Despite Crown claiming sovereignty, aboriginals had little to no contact with setters. Eventually the settlors tried to survey and settle, who were rejected. Then nation then lived for 100 years without interference. In 1983, BC granted logging licence on their lands. The nation fought against this. They sought declaration of Aboriginal title. They challenged the validity of the logging licence on the ground that they had not been properly consulted.

**Issue:** Does the nation have Aboriginal title?

**Held:** Yes.

 **Central issue:** was there sufficient pre-sovereignty occupation of the land claimed?

 -McLachlin CJ rejects a “postage stamp” view of occupation

-Occupation must be determined in a “context-specific” and “culturally sensitive’ way, approached from both a common law and an Indigenous perspective

 -Intensity and frequency of use may vary with the characteristics of the group and the character of the land

-“intensive” occupation is not needed; what is needed is a “strong presence”, manifesting in acts of occupation

 **How was Crown sovereignty acquired?**

 -Not by discovery; terra nullius

 -Then how? Does CJC say?

 **What about Aboriginal title and private land?**

-Aboriginal title “burdens the Crown’s underlying title”; what are the implications for lands now held privately, for example in fee simple?

 -No infringement if the title holder consents

 **Refinements of the justification analysis**

-Duty to consult must be discharged for an infringement of Aboriginal title to be justified

 -Confirms broad objectives from *Delgamuukw*

 -There can be no justification if future generations are substantially deprived of the benefits of the land

-Imports full proportionality analysis into the second step of the Sparrow test (consistency with the Crown’s fiduciary obligations)

 **Comments about Remedies**

-If Aboriginal title is established, the Crown can’t proceed with (approving) developments unless:

 -The Aboriginal title holder consents; or

 -The duty to consult has been satisfied, and the infringement is justified under the Sparrow test

 -Prior conduct might have to be reassessed – for example by cancelling projects already started

 -Legislation might be rendered inapplicable

***Haida Nation v BC* (2004 SCC) – established duty to consult tests**

**Facts:** In 1961 the provincial government of British Columbia issued a "Tree Farm Licence" (TFL 39) over an area of land to which the Haida Nation claimed title. This title had not yet been recognized at law. The Haida Nation also claimed an Aboriginal right to harvest red cedar in that area. In 1981, 1995, and 2000 the Minister replaced TFL 39; in 1999 the Minister authorized a transfer to Weyerhauser Co. These actions were performed unilaterally, without consent from or consultation with the Haida Nation. The Haida Nation brought a suit, requesting that the replacement and transfer be set aside.

**Issue:** Is there a duty to consult where the title/right claim has not been resolved yet?

**Held:** Yes, the prov govt was required to consult the Haida re tree harvesting license before title was established.

**Reasons:**

Was the duty triggered? Yes. Had real knowledge about the impact on Haida, it was impacted negatively.

Was it satisfied? No, no consultation at all.

What would have been required to satisfy it? : given the strength of the case and serious impact of the licensing decision, the crown might have to sig accommodate the Haida to preserve their rights and title claims

**Established: -** duty to consult tests

Source of the Duty to Consult?

The honour of the crown

* Indp cause of action (breach of the crowns honor)

When is the duty to consult triggered?

1. There is crown conduct or a crown decision
	1. Not private parties
	2. Private parties do not have a duty to consult
2. The Crown has real or constructive knowledge of a potential Aboriginal rights/title or treaty rights claim; and
	1. Real = actually have knowledge of existing or potential claim
	2. Constructive = ought to know
	3. Crown has obligation to inform itself if there are potential claims to be made or claims existing
3. The right/title might be adversely impacted
	1. Past wrongs will not suffice
	2. There must be a claim in the here and now
	3. There must be link with impugned conduct and a current claim
* Post establishment, trigger for duty to consult is an actual infringement
* Pre establishment, trigger is the haida test

What is Required to satisfy the duty?

The Requirements vary with context. Duty Falls on a spectrum.

<--consultation ---------- accommodation -----------consent -->

* Consultation = good faith (meaningful) discussions about potential and or real claims (constructive claims). Also includes a duty of notice. Potentially impacted nation must be notified. Doesn’t require accommodation and consent
	+ Consultation at the Lowest: Notice to nation, provision of information to the nation about proposed decision or conduct, chance for discussion with the nation about the concerns they may have
	+ Higher form of consultation (deep consolation): formal participation of the nation in the decision making process itself
* Accommodation: something more than consultation. Usually coupled with consultation (have to do the consultation coupled with accommodation). What it means: to some extent the crown has to modify its decision, while with consultation there doesn’t need to be any modification. Take positive steps to avoid irreparable harm or minimize the potential harms that are possible
* Consent: need to actually get consent from the nation
	+ Haida: only appropriate where rights and title interest established, and by no means necessary in every case
	+ Dalgamuuk: more broad (hunting and fishing in relation to title lands)

How do we know where on the spectrum the crown falls?

* The level of consultation is proportionate to:
	+ Strength of the claim
		- Whats the nature of the claim
		- Aboriginal title claims demand more typically than aboriginal rights claim
		- Required level of consultation is the greatest where title is actually established
		- This requires the crwon to engage in a preliminary analysis as to the strength of the claim
			* Court must ask is there a strong claim here? (if yes, then duty is higher)
	+ Seriousness of the adverse impact on the aboriginal right, treaty right, title etc
		- This is the factor that usually results in the requirements of the duty to consult being modified significantly
		- If the breach is less serious or relatively minor, then lowers the requirements of the duty to consult

What happens if the duty isnt satisfied?

* Pre establishment (chilcoton)
	+ Injunctive relief
	+ Damages
	+ Order to satsfy the duty
* Post establishement (chilcoton)
	+ Obtain consent. If they get consent, no infringement.
	+ If they don’t get consent and they want to continue then have justify the infringement as per sparrow test
	+ If no consent, and no justification, various options: for example, court can order to reassess prior conduct/decision, legislation rendered inapplicable to right/title

**Essay Possibilities**

**S. 91/92 Debates:** Different perspectives about Canada as a political community/ nation.

Provincial equality (pro-provincial jurisdiction) vs. Pan-Canadian (pro-federal jurisdiction) vs. two nations (English and French, with protections for Quebec/ French minority) vs. three or more nations (with protections for Indigenous communities)

**Evaluating federalism** (Richard Simenon)

 Community: which allocation promotes a/ the prioritized political community?

 -Does it serve Indigenous people, Quebec, etc?

 -More important in Quebec

 Democracy: which allocation best promotes democratic participation, responsiveness?

 -Protecting minority rights

 -Reginal governments as a check against a tyrannical centralized government

 Functional effectiveness: which allocation leads to most efficient, effective outcomes?

 -Federalism frustrates or diminishes effective policy by governemnts?

 -Economic literature?

 -Most prominent outside of Quebec

 \*Canada fluctuates between preoccupation with community and functional effectiveness.

**Interpreting federalism**

 Democratic objections to judicial review

 Institutional competence objections

 Originalist vs generous/ progressive interpretation

**2. Interpreting the Divisions of Power**

**Principles**

* **Federalism:** The underlying principle and goal for the division of powers is federalism
* **Cooperative Federalism:** Idea that the balance of power between the jurisdictions (federal and provincial) should be maintained and **policed primarily by the governments themselves**, rather than the courts. This idea of cooperative federalism is associated with a higher level or overlap, and a much lower level of judicial intervention
* **Progressive Interpretation:** This principle takes the living tree approach. The constitution has roots which stay constant but the branches grow and evolve and respond to modern situations. i.e. Marriage in 1867 referred to a heterosexual couple, but in light of the modern day, we should interpret the word marriage to include homosexual marriages. The courts say we should interpret each of the subject matters of s91 and s92 in a way that allows them to evolve over time
* **Predictability:** There needs to be some level of certainty as to who has authority over what (rule of law concern)
* **Subsidiarity** (The Common Law Group)**:** This is the principle, held by some groups of people, that the most local level of government that CAN legislate on a matter SHOULD legislate on it

**Values**

* **Community:** Which community, federal or provincial is the most meaningful community in that situation. In regulation of culture or healthcare, is the more local community (provincial) the more meaningful one?
* **Efficiency:** Sometimes the courts will look at which level can most effectively and efficiently regulate on the issue
* **Democracy:** Which level of gov. would allow citizens to best contribute to the making of a decision that affects them?

**3. Challenging Legislation on Division of Powers Grounds: Arguments & Doctrines**

* There are three types of arguments that can be made in a divisions of power case; validity, applicability, operability
* Each argument relies on at least one doctrine
* The classic division of power dispute is between the Federal A.G and the A.G of a province, where one is arguing that the other has legislated outside of their jurisdiction (can be in either direction)

**Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism**

**By Hogg and Wright**

* + The debate has been dominated, explicitly/ implicitly by disagreements over:
	+ **1) Did the framers of the CA, 1867 intend for Canada, a highly centralized federal system or a loose confederacy of largely independent provinces?**
		- English-speaking academics from central Canada, suggest the framers of the Act intended Canada to be a highly centralized federal system
		- French-speaking academics from Quebec, suggests the framers of the Act intended Canada to be a loose confederacy of largely independent provinces
		- A. Answer rests on who we see to be the framer of the Con?
		- B. Historical record is weak making it difficult to determine the intentions of any of the framers
		- **C. probably the framers were sharply divided themselves on appropriate degree of centralization**
	+ **2) As drafted, does the CA, 1867 indicate that it was intended to form the foundation for a highly centralized federal system?**
		- **In favour of centralized view**
		- Outside s 91, other sections gave Fed huge powers
		- Was also more centralized than US Con., the only frame of reference at the time
			* Fed given power to regulate “trade and commerce” without qualification while US has “commerce with foreign nations and the several states/ indian tribes”
			* Several powers granted to states were granted to Fed (marriage, divorce, banking, peniternaries)
			* Provinces were given only enumerated powers leaving the residual power to the Fed. In the US the residual power is with the states.
		- Intended to be centralized – the distribution of power was structured to make the federal government fiscally dominant
			* Fed could levy indirect and direct taxes
			* Provinces only direct
		- **In favour of decentralized view**
			* 1. Giving the provinces the power under 92(13) “to make laws concerning ‘property and civil rights in the province’”
				+ This phrase prior to confederation meant a lot of thing
			* 2. Allocation of the residuary legislative power
			* Lysk: legislative competence to deal with a particular issue not covered by enumerated heads of power would depend entirely on whether the unassigned matter of legislation is in relation to “mattes of a merely local or private nature”
			* “there is a plausible argument that the CA 1867, includes not one but two complementary residuary powers. Thereby strengthening the decentralized view
			* Basically, conflicting purposes (centralized vs non-centralized) by framers to accommodate the various goals at the time.
	+ **3) Was the Privy Council biased in favour of the provinces in Canadian federalism cases? And if so has Canada been served well or poorly by that provincial bias?**
		- There is no doubt that the Privy Council favoured the provinces in federalism cases
		- *Hodge v The Queen* (1883) PC held the provinces were of coordinate status with the Fed Govt.
		- PC gave very narrow interpretartion to the Fed power to make laws for “the peace, order and good govt of Canada”
			* This pogg power was restricted to: 1) fill in the gap and 2) for emergency
		- Read Fed power “for trade and commerce” very narrowly but gave expansive interpretation to provinces to make laws relating to “property and civil rights in the province”
		- Subsidiarity gained support (principle that decision-making should be kept as close to the individuals affectd as possible)
		- The existence of Quebec is a strong reason for why more power was bestowed on the provinces
	+ **4) Has the SCC expanded the scope of federal powers and departed from the main lines of interpretation laid down by the Privy Council? If so, has Canada been served well or poorly by those expansions or departures?**
		- In the *Anti-Inflation Reference*, the SCC expanded the scope of the emergency branch of the pogg power, by accepting (the rather implausible) proposition that double-digit inflation was an emergency.
			* On this basis, the Court upheld temporary wage and price controls enacted by Parliament.
		- In *General Motors v City National Leasing* the SC breathed new life into the general branch of the federal trade and commerce power (s. 91(2)) by upholding federal jurisdiction over competition (anti-trust) law
		- SC has also expanded the federal power over criminal law upholding a CC provision that authorized an award of compensation to victims of crime (basically a civil remedy)
		- The two most important federalism cases since 1949 (when PC was replaced by SCC as highest court) are: (which granted new powers to the provinces)
			* **1) *Patriation Reference***[1981]- the SC held that there was a requirement of convention that a “substantial degree” of provincial consent be obtained before a constitutional change was taken to the UK for enactment into law. (prior to *Charter*)
			* **2) *Secession Reference***(of Quebec) [1998] – SC held that if a province voted to secede from Canada, the rest of Canada would come under a legal obligation to negotiate the terms of secession with that province.
				+ In effect this decision invented a new constitutional duty to negotiate with a province that had voted to secede. (the point was to soften the ruling that Quebec had no right to secede unilaterality)
		- Thus, the SC has expanded the main federal powers but this was as an inevitable result to correct the unsustainable PC restrictions.
			* Have given needed powers to the Fed Parliament, but they have not markedly altered the blance of power between Parliament and the Legislatures.

**Views on POGG:**

* Those who think POGG is not a residual concept; supports centralist view (Laskin)
* Opposite group thinks that if it’s truly a residuary power it supports a narrower reading (Beetz)

**The Shift to Co-Operative Federalism**

1. Great Depression tested the financial capabilities of all the provinces and exposed the fiscal limitations of the prov governments
2. Period of fed dominance during WWII introduced the era of co-op fed
3. A system of relationships amongst the gov leaders of the fed and prov govts
	1. Utulizing co op fed, “fiscally and politically strong provincial govts and a national govt armed with potent spending power created social programs in areas of prov jurisdiction”
	2. CPP – Canada pension plan was one of the social programs that flawlessly sourced the tenets of co-operative federalism and produced a framework that continues to benefit all Canadiasn
	3. POGG conferred more power to fed
4. **The creatiomn of the fed system in Canada was a political comrposmise between proponents of a national unity and proponents of diversity**
5. Prior to WWII is charactierzed as **watertight compartments**
	1. **Donald Smiley**, *The Federal Condition in Canada*:
		1. Watertight behaviour went against the fundamental goals of the Canadian fed system.
		2. Smiley explaisn that the consituttional distribution of powers between Parliament and the provinces underlies a situation in which the two orders of government are highly **interdependent**
			1. Since the Con bestows explicit powers upon particular levels of government, it is necessary for the PRvo and Fed govts to interact
	2. **Peter Hogg and Co-Operative Federalism**
		1. Wirtten about its benefits
		2. **Hogg** explains that the formal sturcutre of the Con seems to describe the existence of 11 separate legislative bodies that operate independtly of one another
			1. In certain fields this is exactly what happens
				1. BUT mechanisms such as **equalization grants** demonstrate that this is not always so
			2. Over time, changing conditions require the federal system to evolve and adapt in order to survive.
				1. **Change** through recourse to **courts** is time **consuming + incremental**
				2. Adaptation within the Fed system does not ordinarly occur through **constitutional amendment** as this process is highly demanding + lengthy
				3. Thus, Hogg: the efficient operation of the modern Canadian state demands a significant degree of co-operation

Such as interdependence of government polciies, equalizaiton of regional disaprities + constitutional adapttion

* 1. **WR Lederman**
		1. He stresses that the courts play an important role in the operation of co-operative federalism
		2. Interpretations of the Constituion that are supplied by the **judiciary** are important because it is these explanations that reform the judicial underpinnings of the Canadian federal system
			1. The **bargaining position of each resptivve level of government** is determined by legal interpretation
	2. **Breton’s Criticism of Co-Operative Federalism**
		1. **Competition is good**. “cooperation can easily degenerate into collusion, conspiracy and connivance”
			1. Meaning it **relocated negotiations** out of the political realm and into the offices of the executive and beautocracy
			2. **Separatism would thirve** within a federation that utilizes co-op fed since federations are inherently competitive
				1. Thus seperatists can claim the whole system does not work
			3. Fed will act way more unilaterally than the provinces working together

**Aboriginal Issues**

* **Four Stages**
	+ 1. Separate Worlds: Pre-Contact
		- seen as “pre-legal society” and “savages” before the colonizing influence of Europeans
		- this was found to be a mistake in 1973 Decision… “the Indians were there occupying… as their forefathers”
		- Terra Nulius (unoccupied land) principle – how did the settler state acquire sovereignty to this territory?
			* Idea that Gov’t acquired land by showing up and laying claim to the territory
	+ 2. Contact and “Nation-Nation Relations”
		- Treaties
		- Royal Proclamation of 1763
			* More cooperation between settlers and indigenous peoples
	+ 3. “Respect Gives Way to Domination”
		- Various examples, including Indian Residential Schools
		- “referred to as cultural genocide”
	+ 4. Renewal and Recognition
		- Examples:
			* Truth and Reconciliation Commission
			* Missing and Murdered Indigenous Women and Girls Inquiry

**Criticisms of *Van der Peet* Test:**

-Adopted a frozen rights approach, freezing Aboriginal rights in the past, and preventing from responding to contemporary circumstances

 -Pre-contact as a trigger is inappropriate

 -Cultural emphasis is inappropriate

 -Do you agree with any/ all of these criticisms

**TRC Calls to Action**

**43:** We call upon [all] governments [in Canada] to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation

**47:** We call upon [all] governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nulliius*, and to reform those laws, government policies, and litigation strategies that rely on such concepts.

**UNDRIP, Art. 26 (United Declaration Rights of Indigenous Peoples)**

1. Indigenous people have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.

**UNDRIP, Art 32 (United Declaration Rights of Indigenous Peoples)**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social cultural or spiritual impact.

**TRC REPORT: intro**

- First, cultural genocide

- AND moving them to reserves with no resources

-Residential schools

-then *White Paper* continued message of integration of Indian into Canadian society

-1996 *Report of the Royal Commission on* Aboriginal peoples urged Canadian to begin a process of reconciliation that would have set the country on a bold new path. Much has been ignored by Government however.

-2015 2nd chance to seize lost opportunity

-Reconciliation must support Ab peoples as they heal from the destructive legacies of colonization that has wreaked such havoc in their lives

 -Reconciliation through awareness, community involvement, dialogue

-2012 *Interim Report* recommended federal, provincial and territorial governments to undertake to meet and explore UN Declaration on the Rights of Indigenous peoples

-about healing surviros’ families, nations in ways that revitalize individuals as well as Indigenous cultures, languages, spirituality, laws and governance systems

 -honest history in education curriculum

**Commission Activities**

-TRC established in 2008. Mandated to: reveal to Canadians the complex truth about the history and the ongoing legacy of the church-run residential schools in a manner that fully documents the individual and collective harms perpetrated against Ab peoples and honours the resilience and courage of former students, their families and communities

-Guide and inspire a process of truth and healing, leading toward reconciliation within Ab families and between Ab peoples and non-Ab communities, churches, and governments, and Canadian generally.

**Calls to Action TRC makes following Calls to Action:**

 **-Child Welfare**

-to commit to reducing the number of Ab children in care by monitoring and assessing neglect investigations, providing adequate resources to Ab communities, ensuring social workers…,

 -**Education**

 -Repeal s. 43 of the CC

 -Develop with Ab groups a joint strategy to eliminate education + employment gaps

-Call upon Fed to draft new Ab education legislation with the full participation and consent of AB peoples. Including a commitment to sufficient funding for following principles: i) sufficient funding to close identified educational achievement gaps within 1 generation, parents involvement, culturally appropriate curricula, etc.

 **-Language and culture**

 -We call upon the Fed to acknowledge that Aboriginal rights include Aboriginal language rights

 -Fed to enact an Aboriginal Languages Act that incorporates:

 -Ab languages are a fundamental and valued element of Canadian culture and society

-Revitalizing, preserving and strengthening of Ab languages and cultures are best managed by Ab people and communities

 -Funding for Aboriginal language initiatives must reflect the diversity of Aboriginal languages

 **-Health**

 **-Justice**

-Establish a written policy that reaffirms the independence of the RCMP to investigate crimes in which the gov has its own interest as a potential or real party in civil lit

-We call upon fed, prov, ter, governments to review and amend their respective statutes of limitations to ensure that they conform with the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal peoples

 -Federation of law societies of Canada to ensure lawyers receive appropriate cultural competency training

 **-Reconciliation: Canadian Government and the *United Nations Declaration on the Rights of Indigenous Peoples***

Including: Fed in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use and understanding of Indigenous laws and access to justice in accordance with the unique cultures of AB peoples in Canada

 **-Church Apologies and Reconciliation**

 From Pope

 **-Professional Development and Training for Public Servants**

 **-Newcomers to Canda**

**-**to revise the info kit for newcomers and its citizenship test to reflect a more inclusive history of the diverse Aboriginal peoples of Canada, including info about the Treaties and the history of residential schools

**Wampum at Niagara: The Royal Proclamation, Canadian History and Self-Government**

First Nations were not passive objects, but active participants in the formulation and ratification of the *Royal Proclamation*

Royal Proclamation is part of a treaty between First Nations and the Crown which stands a spositive guarantee of FN self-government

Canadian Legal History from a FN Perspective

 -Not enough to use writing to interpret the principles of the Proclamation

A "natural understanding” of the Proclamation by First Nations prompts an interpretation that includes the promsies made at NIAgara. These promises are:

 -A respect for sovereignty of FN, the creation of an alliance, free and open trade and passage between Crown and FN, permission or consent needed for settlement of FN territory (same shall be purchase for use at some public meeting or assembly of Indians), mutual peace friendship and respect.

-The promises made at Niagara and their solemnization in proclamation and treaty demonstrate that there was from the outset considerable doubt about the Crown’s assertion of sovereignty and leiglsative power over Ab rights.

-Along with the Treaty of Niagara, the Proclamation is the most fundamental agreement yet entered into between FN and Crown, and much more than a unilateral declaration fo the Crown’s will.

-With K as an analogy the courts could view K doctrines governing the express terms of the RP / Treaty of Niagara as implied terms in later FN treaties

-The sui generis nature of treaty interpretation also increases the potential for additional matters to be annexed by statute to particular treaties

-thus the courts may read into subsequent treaties some further specific terms that alone make the promsies at Nagara effective

**Hogg lecture – March 21st, 2018**

* *Ktunaxa Nation v BC* (2017)
* **Facts**:
* Belief focused on land and the animals which were important to the Ktunaxa people.
* For 20 years, the developing company and the Crown, both wanted to develop the valley for skiing
* Removal of certain things and removal for the habitation of grizzly bears
* The proposed construction would drive the grizzly bear spirit out according to the elder
* So the Ktunaxa felt they could not negotiate any further
* Project approved to go ahead
* **Held:**
* SCC decided that the consultation was “reasonable”
	+ Reasonable was the standard of review for mixed fact and law and upheld Minister’s decision
* **At issue:** Religious belief in a piece of land the occupied
* Court treated it as if though it were a claim under “freedom of religion” s. 2(a) of Charter
	+ As if the claim was being made by anyone else. No special attention paid to the Aboriginal element
	+ They could continue holding whatever religious belief the Ktunaxa wanted – including that the spirit departed
	+ Freedom of religion is something that allows you to hold religious belief but what the Ktunaxa was trying to do was to protect the spirit of the grizzly bear itself
		- “this isn’t covered by freedom of religion” – says the SCC
	+ S.2(a) right appropriately balanced with disposing of it in the public’s best interest
* Perhaps tying the rights (religious rights) to property would have had large implications
*
* **Aboriginal Rights**
* **Treaties of Peace and Friendship in Atlantic Canada**
* *R v Marshall* [SCC 1973]
* The majority implicitly recognized the right to hunt and fish to obtain goods and trade. However, the right to trade was limited to trading in order to obtain necessaries, defined for the modern context as a right to secure “a moderate livelihood” or “food clothing, and housing supplemented by a few amenities” that is something *beyond “bare subsistence” but not enough for the accumulation of wealth*”
* Later rights recognized in treaties are limited not only by the definition of a moderate livelihood but also by the power of the government to enforce general laws intended to protect the resource or some other public important
* ***Royal Proclamation* 1763**
* - The proclamation acknowledged that there had been frauds and abuses in previous land dealings with aboriginal peoples, and in order to prevent these in the new territories, *prohibited all individual private purchases of lands reserved to the Indians under the Proclamation*.***Indian lands could be surrendered only to the Crown***at a meeting of the aboriginal collectivity called for that purpose.
* - The commitments in the *Royal Proclamation* were incorporated into the constitution of the Canadian state, implicitly as a guide to government policy, and explicitly in s. 25 of the *Con Act, 1982*.
* **Comprehensive Land Claims Policy and Modern-Treaty Making**
* *Calder v British Columbia* [1973]
* Majority ruled that the Nisga’a had aboriginal title at the time that the British acquired sovereignty over the area of the claim.
* -They failed to obtain a recongition of their aboriginal title, but the decision affirmed that with appropriate evidence aboriginal peoples could demonstrate a continuing aboriginal right to occupy and govern themselves in lands that they had traditionally occupied.
* **Aboriginal Rights**
* Aboriginal rights are collective rights belonging to the descendants of the aboriginal collectives that occupied this land before it was colonized by the Europeans, derived from practices, traditions and customs that were an integral part of the culture and structure of a distinctive aboriginal society.

*Delgamuukw v BC* [SCC 1997]

SCC ruled that TJ failed to give appropriate weight to oral evidence and history of the Ab communities- could only be redressed by new trial.

Lamer CJC: **aboriginal title** is a **collective right**, not an individual interest, and **can be transferred only to the Crown**

Aboriginal title holders **have the right to use the land for non-traditional purposes, but not in ways that are irreconcilable** with the unique relationship between land and people that is the basis of aboriginal title.

Limit on aboriginal title is analogous to limits on rights of life tenants (imposed by common law + equity doctrine of waste

Thus Ab title, unlike fee simple, **imposes stewardship obligations on the holder**

* - Collectivities claiming aboriginal title in particular lands must prove that the claimants’ ancestors had exclusive occupation of the land **prior to the date of assertion of** European sovereignty
* - The Court **asserted that “physical presence**”, “physical presence amounting to occupancy” or “use and occupation” **rather than the term “possession**” in order to **maintain a distinction** between the **quality of possession** required to establish aboriginal title and the **quality required** to establish rights by **adverse possession**.

**Honour of the Crown and the Duty to Consult**

*Tsilqot’in Nation v BC* [2014 SCC]

* - In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right.
* - Duty to consult does not give aboriginal collectivities a veto over development, but if a proposed action will infringe on proven Aboriginal rights, the Crown cannot proceed without the consent of the affected collectivity, unless it can show that the infringement is necessary to achieve some compelling and substantial public purpose, such as economic development, protection of the environment or endangered species, building of infrastructure, and settlement of foreign populations to support those aims.
* - Any infringement must be as minimal as possible
* - Crown doesn’t want to use “Possession” as it would have “adverse possession” implications and Aboriginal communities’ traditions don’t amount to the changing of landscaping usually needed for adverse possession at common law.

3 hr – 15 min reading period

3 parts/questions – 2 fact patterns, 1 essay

Essay – either division of powers or aboriginal treaty rights

1. *Secession Reference* [1998] SCC [↑](#footnote-ref-1)
2. *Canadian Western Bank v Alberta* [SCC 2007] [↑](#footnote-ref-2)
3. *Daniels Case* 2016 SCC [↑](#footnote-ref-3)
4. *Multiple Access v McCutcheon* [1982 SCC] [↑](#footnote-ref-4)
5. *General Motors v City National Leasing* [1989 SCC] [↑](#footnote-ref-5)
6. Quebec v Lacombe 2010 SCC [↑](#footnote-ref-6)
7. *R v Morgentaler* 1993 SCC – Sopinka J [↑](#footnote-ref-7)
8. *R v Morgentaler* 1993 SCC [↑](#footnote-ref-8)
9. *Quebec (Attorney General) v Lacombe* 2010 SCC for “purpose of the legislation and its effects” [↑](#footnote-ref-9)
10. *R v Morgentaler* 1993 SCC [↑](#footnote-ref-10)
11. Used in *R v Morgentaler* 1993 [↑](#footnote-ref-11)
12. Used in *R v Morgentaler* 1993 [↑](#footnote-ref-12)
13. *R v Morgentaler* 1993 [↑](#footnote-ref-13)
14. *Ward v Canada* 2002 SCC [↑](#footnote-ref-14)
15. *Re Employment Insurance Act (Can)*[2005 SCC] [↑](#footnote-ref-15)
16. *Rio Hotel Ltd v New Brunwsick (Liquor Licensing Board)* [1987 SCC] [↑](#footnote-ref-16)
17. *R v Furtney* [1991 SCC] and *Siemens v Manitoba*  [↑](#footnote-ref-17)
18. *Multiple Access Ltd v McCutcheon* [1982 SCC] [↑](#footnote-ref-18)
19. *Hodge v The Queen* [1883 PC]–first time in history the doctrine of double aspect was applied (in connection with Liquor Licences) [↑](#footnote-ref-19)
20. Law Society of BC v Mangat [↑](#footnote-ref-20)
21. Multiple Access v McCutcheon [1982 SCC] citing Lederman [↑](#footnote-ref-21)
22. *Quebec (Attorney General) v Lacombe* [2010] at para 36 [↑](#footnote-ref-22)
23. *General Motors v City National Leasing* [1989 SCC] [↑](#footnote-ref-23)
24. Quebec v Lacombe 2010 SCC [↑](#footnote-ref-24)
25. *Quebec v Canadian Owners and Pilots Association (COPA*) [2010] SCC for test overall [↑](#footnote-ref-25)
26. *Canadian Western Bank v the Queen in Right of Alberta* [2007 SCC] [↑](#footnote-ref-26)
27. *Rothmans, Benson & Hedges v Sask* [2005] SCC [↑](#footnote-ref-27)
28. Alberta v Maloney 2015 SCC [↑](#footnote-ref-28)
29. *Rothmans, Benson & Hedges v Sask* [2005] SCC [↑](#footnote-ref-29)
30. Multiple Access v McCutcheon [1982 SCC] [↑](#footnote-ref-30)
31. *Multiple Access v McCutcheon* [1982 SCC] [↑](#footnote-ref-31)
32. *Bank of Montreal v Hall* [1990, SCC] and *Rothmans, Benson & Hedges v Sask* [2005. SCC] [↑](#footnote-ref-32)
33. *Multiple Access v McCutcheon* [1982 SCC] [↑](#footnote-ref-33)
34. *Alberta v Moloney* [2015, SCC] [↑](#footnote-ref-34)
35. CJC McLachlin in *COPA* [↑](#footnote-ref-35)
36. *Multiple Access v McCutcheon* [1982 SCC] [↑](#footnote-ref-36)
37. *Re-Anti-Inflation Act* [↑](#footnote-ref-37)
38. *Canada Temperance Foundation* case (1946, Privy Council) [↑](#footnote-ref-38)
39. *Reference re Anti-Inflation Act* [1976 SCC] [↑](#footnote-ref-39)
40. *Reference re Anti-Inflation Act* [1976 SCC] [↑](#footnote-ref-40)
41. *Johannesson v the Rural Municipality of West St Paul* [1952, SCC] [↑](#footnote-ref-41)
42. *Munro v National Capital Commission* [1966, SCC] [↑](#footnote-ref-42)
43. *R v Crown Zellerbach* [1988] SCC and by Le Dain J for majority [↑](#footnote-ref-43)
44. *Margarine Reference* [SCC, 1949] [↑](#footnote-ref-44)
45. *RAHRA* [2010, SCC] [↑](#footnote-ref-45)
46. *Margarine Reference* [SCC, 1949] [↑](#footnote-ref-46)
47. *RJR MacDonald v Canada* [↑](#footnote-ref-47)
48. *RJR* [↑](#footnote-ref-48)
49. *RJR* [↑](#footnote-ref-49)
50. *RJR* [↑](#footnote-ref-50)
51. *R v Hydro-Quebec* [SCC 1997] [↑](#footnote-ref-51)
52. *RJR Macdonald v Canada* [SCC 1995] [↑](#footnote-ref-52)
53. *Margarine Reference* [SCC, 1949] [↑](#footnote-ref-53)
54. *RAHRA* [2010, SCC] [↑](#footnote-ref-54)
55. *RAHRA* [2010, SCC] [↑](#footnote-ref-55)
56. *RAHRA* [2010, SCC] [↑](#footnote-ref-56)
57. *Carnation v QAMB* (1968, SCC) [↑](#footnote-ref-57)
58. *Parsons*, (1881, PC) [↑](#footnote-ref-58)
59. *General Motors v City National Leasing* (1989 SCC) [↑](#footnote-ref-59)
60. *Re Securities Act* (2011, SCC) [↑](#footnote-ref-60)
61. *Re Securities Act* (2011, SCC) [↑](#footnote-ref-61)
62. *Reference whether “Indians” Includes “Eskimo”* (1939, SCC) [↑](#footnote-ref-62)
63. *Daniels v Canada* (2016, SCC) [↑](#footnote-ref-63)
64. *Delgamuukw v BC* (SCC, 1997) [↑](#footnote-ref-64)
65. *Delgamuukw v BC* [↑](#footnote-ref-65)
66. *Tsilqot’in Nation v* BC (2014, SCC) [↑](#footnote-ref-66)
67. *Tsilqoti’in Nation v BC* (2014, SCC) [↑](#footnote-ref-67)
68. *R v Sparrow* (SCC, 1990) [↑](#footnote-ref-68)
69. Van der Peet (SCC, 1996) [↑](#footnote-ref-69)
70. Van der Peet (SCC, 1996) [↑](#footnote-ref-70)
71. *Gladstone* [↑](#footnote-ref-71)
72. *Gladstone* [↑](#footnote-ref-72)
73. *Gladstone* [↑](#footnote-ref-73)
74. *Gladstone* [↑](#footnote-ref-74)
75. From *Lax Kw’alaams Indian Band v Canada* [2011 SCC] [↑](#footnote-ref-75)
76. *Delgamuukw v BC* (1997, SCC) [↑](#footnote-ref-76)
77. Delgamuukw v BC (1997, SCC) [↑](#footnote-ref-77)
78. *DelgamUukw v BC* (1997, SCC) [↑](#footnote-ref-78)
79. *Tsilqot’in Nation v BC* (2014, SCC) [↑](#footnote-ref-79)
80. *Tsilqot’in Nation v BC* (2014, SCC) [↑](#footnote-ref-80)
81. *Haida* Nation v BC (2004, SCC) [↑](#footnote-ref-81)