

Constitutional Law

Summary | Fall 2024 | Professor Kene

UNWRITTEN PRINCIPLES

These principles, along with extant caselaw, inform judicial interpretation of the “spheres of jurisdiction” allocated to each level of government (*Secession Reference*).

Federalism: A method of dividing power so that the federal and provincial governments are coordinate and independent. Federalism balances forces tending towards diversity and those pushing for unity (*Canadian Western Bank*). It fosters cooperation and overlap, but it also prevents each level of government from acting in a completely unrestrained way (*Canadian Western Bank*).

Democracy: A political system of majority rule.

Constitutionalism and the Rule of Law: All government action must comply with the constitution.

Respect for Minorities: The constitution is entrenched beyond the reach of majority rule. Constitutional provisions protect minority languages, religions, and education.

Entrenchment: The Constitution is difficult to amend.

Subsidiarity: The level of government closest to the issue should legislate.

MODES OF INTERPRETATION

Historical originalist (*Reference Re Meaning of the Word “Persons”*)

- Perceives the meaning of legislation as “frozen”
- Views heads of power as “watertight compartments”

Progressivist / Living Tree (*Edwards v. Canada, Reference Re Employment Insurance Act*)

- A progressivist interpretation traces the “natural evolution” of the head of power (*Reference Re Employment Insurance Act*). Heads of power can “be adapted to contemporary realities” (*Reference Re EIA*).

- The literal meaning of the text and the intentions of the drafters are important as starting points, but do not limit the meaning of a provision (*Reference Re Employment Insurance Act*).

Cooperative Federalism (*Reference Re Pan-Canadian Securities Regulation*)

- Where possible, courts should adopt a harmonious reading of statutes enacted by the federal and provincial governments, to allow them to operate concurrently. This is premised on the presumption that Parliament intended its laws to co-exist with provincial laws (*Reference Re Pan-Canadian Securities Regulation*, 2018).
- As a result of cooperative federalism, doctrines such as pith and substance, double aspect, and ancillary powers have been applied more flexibly. Federal paramountcy and interjurisdictional immunity have been applied with more restraint.
- Still, cooperative federalism cannot override the division of powers.

VALIDITY

If a law violates the division of powers, it will be “of no force and effect” (*Constitution Act 1982 s.52*).

Validity: arguing that a law is *ultra vires*

- Pith and substance doctrine
- Double aspect doctrine
- Ancillary powers doctrine

Remedy: invalid legislation will be struck down.

CHARACTERIZATION: STEP 1 OF VALIDITY TEST

Most laws do many things. Therefore, any given piece of legislation will have several possible characterizations. For example, a law could protect the environment, regulate the purchase and sale of certain products, promote activities that benefit public health, *and* suppress a perceived threat.

At this stage of the analysis, one must first identify those possibilities. Then, in light of all the evidence, one must decide which is the “dominant thrust” of the law and which purposes or effects do not “rise to the level of pith and substance” (*AHRA*).

The “dominant thrust” of the law is the characterization most consistent with the law’s legal and practical effects, the overall functioning of the scheme, the circumstances surrounding the law’s enactment, and any speeches or statements made by the drafters (*Morgentaler*, *AHRA*).

Pith and substance statements usually take the form of “To do [purpose] by means of [effects].” For example, “To protect health by prohibiting conduct that undermines individuals’ control over the intimate information revealed by genetic testing” (*Moldaver J in Re Genetic Non-Discrimination Act*)

General Rules

- “To determine which characterization is correct, one must ask, ‘**what in fact does the law do and why?**’” (*Reference Re AHRA*)
- Pith and substance must be described as precisely as possible, because vague characterizations could lead to confusion and an erosion of provincial powers (*Reference re AHRA*).
- A pith and substance analysis must be flexible, not overly formalistic or technical (*Morgentaler*).
- To avoid results-driven reasoning, it is essential to keep characterization and classification separate (*GGPPA*).
- **Note:** Most federalism cases turn on which characterization of the impugned legislation the Court accepts.

a) Purpose

- To identify the dominant purpose of a legislative scheme, one must consider both text and context: it is necessary to look inside and outside the “four corners” of the impugned law (*Morgentaler*).
- The Court can consider intrinsic evidence, including the title of the act, the preamble, and the purpose statement (*Morgentaler*). The Court can also consider extrinsic evidence, such as history, Hansard, comparisons with other relevant legislation, public speeches, and other circumstances or events surrounding enactment (*Morgentaler*).
- Characterization should hinge on the *dominant* purpose of the legislation, not an ancillary purpose (*Morgentaler*).
 - Ex: In *Morgentaler*, the dominant purpose was to suppress the perceived public harm or evil of abortion clinics. The law targeted abortion specifically, not healthcare generally. Just one year before the Nova Scotia *Medical Services Act* emerged, Dr. Morgentaler had opened a private abortion clinic, and Hansard suggested the Act was aimed at this “mischief.” The legislation also sought to prevent the development of a two-tiered medical system, but this aim was incidental to the central objective.

- Ex: In *Reference Re Securities Act*, the dominant purpose as stated in the preamble was “to implement a comprehensive Canadian securities regime.”
- Ex: In *Genetic Non-Discrimination Act*, the purpose was “to prohibit and prevent genetic discrimination” generally, as stated in the legislation’s title (Karakatsanis J). Parliamentary debates focused on devastating health consequences arising from people foregoing genetic testing for fear their information would be used against them.
- Ex: In *Reference Re Anti-Inflation Act*, the purpose was to curtail inflation, which was a Canada-wide phenomenon at the time the legislation was devised and enacted.
- Ex: In *GGPPA*, the purpose was to establish minimum standards of greenhouse gas price stringency. The title and preamble made it evident that the Act’s purpose was more precise than merely reducing greenhouse gases. Pricing was a key element of the scheme.

b) Effects

The task of characterizing a law cannot end with identifying its dominant purpose. One must also examine its legal and practical effects (*Morgentaler*).

i) Legal Effects

Legal effects flow directly from the terms of the legislation (*Re GGPPA*, *Re Genetic Non-Discrimination Act*).

→ Ex 1: In *Morgentaler*, the legal effects were a) imposition of fines for abortions performed out of hospital and b) denying public health coverage for the performer and recipient of abortion services.

→ Ex 2: In *CIGO v Saskatchewan*, the legal effects were to a) impose a “mineral income tax” b) empower a provincial minister to determine the wellhead value of the oil and whether deductions should apply, and c) to impose a “royalty surcharge” on oil produced in the province.

→ Ex 3: In *Reference Re Securities Act*, the legal effect was to create **an opt-in securities regulation scheme**, allowing provinces to choose to participate.

→ Ex 4: In *GGPPA*, the legal effects were to impose a “benchmark and a backstop.”

- Benchmark: a minimum reduction in greenhouse gas emissions each province must meet.

- Backstop: If provinces fail to meet minimum reduction in emissions, the federal government would impose fuel charges and set a cap on emissions for large facilities, rewarding the production of emissions below the cap and penalizing production of emissions above the cap.

→ Ex 5: In *Re Genetic Non-Discrimination Act*, the legal effects were to prohibit genetic testing requirements and non-consensual uses of genetic tests and to impose penalties for violations (Karakastanis J).

→ Ex 6: In *Reference Re Anti-Inflation Act*, the legal effect was to create a temporary system of price, profit, and income controls that was binding on activities of businesses operating in the federal public sector, but **would only bind provinces if they opted in**.

ii) Practical Effects

Practical effects flow from the application of the legislation, but are not overtly identified in the text of the provisions (*Re GGPPA*, *Re Genetic Non-Discrimination Act*). Concrete data is not required; reasoned predictions about how the legislation will affect the division of powers is permissible (Securities Act, GGPPA).

→ Ex 1: In *Morgentaler*, the denial of healthcare coverage under the *Nova Scotia Medical Services Act* would prevent women from receiving abortions by forcing them to shoulder the cost.

→ Ex 2: In *CIGO v Saskatchewan*, the legislation's application would result in the provincial government acquiring the benefits of increases in the value of oil produced in the province.

→ Ex 3: In *Reference Re Securities Act*, the practical effect was that **"once a sufficient number of jurisdictions opt in, the current provincial and territorial securities regulation schemes will be displaced."**

→ Ex 4: In *GGPPA*, the legislation in practice only prohibited two things: not implementing a GHG pricing scheme and failing to implement a sufficiently stringent pricing scheme. The legislation had no practical effect on provinces that designed sufficiently stringent pricing schemes to meet minimum carbon reduction requirements.

→ Ex 5: In *Re Genetic Non-Discrimination Act*, the practical effects were to give individuals control over whether to undergo testing and over access to results.

Note: often, you can deduce the practical effects from the situation giving rise to the challenge.

c) Colourable?

- Legislation may be “colourable” when its effects diverge substantially from its purported aim (*Morgentaler*).
- A gap between the purpose of a legislation and the effect will render the legislation suspect (*Morgentaler*).
- Courts apply the doctrine of colourability with restraint, because the term has pejorative connotations.

Legislation	Characterization	Reasons	Classification
CRIMINAL LAW s.91(27)			
Assisted Human Reproduction Act (<i>Ref Re AHRA</i>)	“The prohibition of negative practices associated with assisted reproduction” Dissent (Lebel & Deschamps): Regulation of assisted human reproduction as a health service	McLachlin J: “The dominant thrust of the Act is prohibitory, and the aspects concerning the provision of health services do not rise to the level of pith and substance” Purpose: “to prohibit a number of practices which Parliament considers immoral and/or a risk to health security” Effect: To “carve out from the broader field of assisted reproduction conduct that Parliament considers criminal.” (s.5-9 impose absolute prohibitions on conduct that is always reprehensible. S.10-13 prohibit conduct that is only reprehensible in certain situations.)	s.91(27): Criminal Law  Dissent would have classified AHRA under s.92(13).

Genetic Non-Discrimination Act (<i>Ref Re Genetic Non-Discrimination Act</i>)	Karakatsanis J: To protect individuals' control over information disclosed in genetic testing and to prevent discrimination based on such information Kasirer J dissenting: To regulate contracts, particularly contracts of insurance and employment, in order to encourage Canadians to undergo genetic tests without fear that those tests will be misused so their health can ultimately be improved"	Intrinsic Evidence: Provisions do not target a particular industry, but prohibitions are of general application and target specific behaviours that create the opportunity for genetic discrimination Extrinsic Evidence: Focus of Parliamentary debates was devastating health consequences resulting from people foregoing genetic testing out of fear that personal health information will be revealed	s.91(27): Criminal Law  Karakatsanis J: Parliament is entitled to use criminal law power in response to a "reasoned apprehension of harm." Act responds to threats to public interests historically protected by criminal law: autonomy, privacy, and social equality. Kasirer J dissenting: ultra vires s.91(27). Any threat to which criminal law responds must be real – it must have a concrete undesirable effect on the public.
Federal Dairy Industry Act s.5 (<i>Margarine Reference</i>)	To protect the butter industry by prohibiting the sale of margarine, a butter alternative.	Purpose: Not to protect the public against harmful effects of margarine. Evidence had emerged indicating margarine was not harmful. Instead, the purpose was to protect local dairy farmers by regulating the sale and importation of margarine – a particular trade.	s.91(27): Criminal Law  No criminal purpose; regulated a particular intraprovincial trade.

Tobacco Control Act <i>(RJR MacDonald)</i>	To safeguard the public from “detrimental health effects caused by tobacco consumption” by regulating tobacco advertising.	Purpose: To protect public health by reducing tobacco consumption, a problem of substantial and pressing concern. Legal Effects: Prohibited all advertising and promotion of tobacco products in Canada without health warnings (exemption for foreign products), subject to penalties ranging from fines to imprisonment. Practical Effect: Manufacturers cannot sell tobacco products without health warnings on packaging.	s.91(27): Criminal Law  Note: the SCC distinguished the <i>Tobacco Control Act</i> from the <i>Dairy Industry Act</i> because the <i>Tobacco Control Act</i> regulated a trade for the dominant purpose of suppressing a real threat to public health. There was no real threat targeted by the <i>Dairy Industry Act</i>.
Hydro-Québec <i>(Reference Re Canadian Environmental Protection Act)</i>	To protect the environment by prohibiting the dumping of toxic substances.	Purpose: Protection of the environment and human life and health. Effects: Empowered federal ministers to decide which substances were “toxic” and prohibit their dumping. These prohibitions were enforced by penalties. Also allowed the Governor in Council to prescribe regulations dealing with every conceivable aspect of toxic substances from manufacturing to importation to sale and use.	s.91(27): Criminal Law  Dissent: <i>ultra vires</i> s.91(27). Form was regulatory, not prohibitive.
POGG (Federal Residuary Power)			
Greenhouse Gas Pollution Pricing Act <i>(Re GGPPA)</i>	To establish minimum carbon pricing standards to reduce Greenhouse Gas Emissions.	Purpose: To establish minimum standards of greenhouse gas price stringency. a) Intrinsic Evidence: the preamble described the <i>pricing</i>	POGG National Concerns Branch 

		of carbon as a “core element” of the regulatory scheme and discussed pricing mechanisms at length. b) Extrinsic Evidence: the First Ministers had recently enacted a group on Carbon Pricing Mechanisms and entered into an international agreement to reduce emissions by adopting carbon pricing standards. Legal Effects: Require federally regulated entities to pay fines for engaging in specified activities that result in GHG emissions; does not prohibit performance of such activities altogether. No legal effect on provinces with sufficiently stringent pricing schemes. Practical Effects: Only prohibits two possible things – not implementing a GHG pricing scheme or implementing an insufficiently stringent one.	
TRADE AND COMMERCE s.91(2)			
Federal Combines Investigation Act <i>(General Motors)</i>	To protect Canada as an economic unit by identifying, defining, and establishing remedies for anti-competitive behaviour.	Purpose: Prevention of anti-competitive behavior. Legal Effects: Elucidates prohibited conduct, creates an investigatory procedure, and establishes a remedial mechanism. Practical Effect: Creates a civil cause of action for losses suffered due to anti-competitive acts such as price discrimination	s.91(2) ✓ Larger act is in pith and substance valid. [Although s.31 encroaches on property and civil rights by creating a civil cause of action, it is valid because it is functionally related to the larger scheme. See ancillary powers

			doctrine]
Canada Securities Act (Reference Re Securities Act)	To promote Canadian economic welfare through detailed regulation of day-to-day aspects of trading in securities.	Purpose: “To implement a comprehensive Canadian securities regime” (in preamble) Legal Effect: Establishes a federal securities regulation scheme. Practical Effect: Once a sufficient number of provinces opt in, current provincial and territorial securities regulation schemes will be displaced.	s.91(2) ✗ Not just concerned with trade and commerce as a whole. Encroached on s.92(13): aimed at local, day-to-day aspects of a particular industry – securities – historically regulated by the provinces.
Canada Agricultural Product Standards Act (Dominion Stores)	To regulate intraprovincial product labelling through an ostensibly voluntary marketing scheme that in effect required compliance due to coexistent provincial legislation.	Purpose: Purported to establish a voluntary system of grades and trade names. Legal Effect: Imposed mandatory quality standards on products that used federal-grade trade names. These standards were only mandatory for provinces if they voluntarily chose to use the trade name. Practical Effect: An Ontario law made the trade names in the federal Act mandatory. Thus, Ontario producers would have to use the trade names per the Ontario law, which would require them to abide by the quality standards in the federal law. Dominion Stores was consequently charged with an offence under the federal law for complying with valid provincial legislation.	s.91(2) ✗ Estey J did not state that the whole Act was invalid, but he held that the charge of Dominion Stores for violating the provisions of the federal act was invalid and could not be defended under s.91(2).

Canadian Wheat Board Act (<i>Klassen</i>)	To provide an export market for surplus grains by imposing a quota system and marketing regulations.	Purpose: To regulate interprovincial trade respecting surplus grains. Legal Effect: Regulated manner of grain delivery within provinces. s.16(1) required grain owners to record deliveries in a specific manner. Practical Effect: Ensures grain channels are not clogged and creates equal delivering opportunities. If a grain producer sold grain and the delivery was not recorded, he could sell more than his quota limit to another intraprovincial grain producer. This would hurt the extraprovincial market for surplus grain.	91(2) ✓ Although the delivery recording requirement seriously encroaches on provincial power to regulate specific trades, it is indispensable to the broader scheme, which is valid under s.91(2).
PROPERTY AND CIVIL RIGHTS s.92(13)			
Quebec Agricultural Marketing Board (<i>Carnation</i>)	To help farmers sell their products more effectively by resolving price disputes and setting prices for agricultural products when necessary.	Purpose: To support farmers' milk sales within Quebec. Effect: To set a price for a transaction occurring within the province. The product would ultimately be sold outside the province. Practical Effect: Carnation would buy milk from Quebec farmers – this transaction would occur within the province, and this is the transaction for which the Board set a price. However, Carnation would go on to sell that milk outside the province. Thus, the Agricultural Marketing Board's actions had follow-through effects on interprovincial trade.	s.92(13) ✓ The ultimate destination of a product would not impact the validity of a provincial action or law setting the price for a transaction occurring within the province.

Saskatchewan Oil Act (<i>Canadian Industrial Gas and Oil Ltd. v Government of Saskatchewan</i>)	To regulate the production of oil destined for export and capture the economic benefits of increased oil values.	Legal Effect: a) To tax the difference between the “wellhead price” and the price sold and b) To empower the Minister to fix the price receivable by Saskatchewan oil producers on a product with almost no local market Practical Effect: The practical effect was to force producers to sell at wellhead price and thereby fix the price of oil destined for export. Extrinsic Evidence: a) Oil prices had recently risen in Saskatchewan. b) 98% of oil produced in Saskatchewan was designed for export. Purpose: To “drain off” benefits that would have accrued to intraprovincial oil producers.	s.92(13) ✗ This was an invalid provincial attempt to regulate interprovincial trade and commerce. Note: Here, the ultimate destination was important because the province was fixing the price for sales occurring outside the province. In <i>Carnation</i>, the ultimate destination was not as important because the Board set a price on a transaction occurring within the province.
Nova Scotia Medical Services Act (<i>Morgentaler</i>)	“To suppress the perceived public harm or evil of abortion clinics.”	Stated Purpose: “The prohibition of the privatization of certain medical services in order to maintain a single high-quality health care delivery system in the province.” Legal Effects: Prohibition of abortions outside hospitals. Practical Effects: Suppression of Dr. Morgentaler’s activities. Surrounding Circumstances: The legislation was enacted only a year after Morgentaler opened his clinic. This,	s.92(13) ✗ This was an invalid provincial attempt to enact criminal law.

		combined with other extrinsic evidence, indicated that the true purpose was to target abortion. Colourability: Because there was a gap between the stated purpose (prevention of two-tiered healthcare system) and the effects (prohibition of abortion outside hospitals), the Court found the legislation colourable. If the legislation truly aimed to prevent privatization of healthcare, it would have prohibited all surgeries outside hospitals. Instead, the law targeted abortion specifically.	
BC Environment Management Act (Reference Re BC Environment Management Act)	To set conditions for, and if necessary prohibit the carriage of heavy oil through an interprovincial undertaking (pipeline).	Stated Purpose: local environmental protection Legal Effect: set conditions for and if necessary prohibit the possession control of increased volumes of heavy oil in the Province. Practical Effect: posed an "existential threat" to the Trans Mountain pipeline.	s.92(13) ✗ This was an invalid provincial attempt to regulate interprovincial trade and commerce.
PROVINCIAL POWER TO REGULATE MORALITY AND PUBLIC ORDER ss. 92(14), 92(15), and 92(16)			
Calgary Bylaw 6.1 (Westendorp)	Larger Act (Bylaw 9022): To promote public order on city-streets by regulating behaviours such as soliciting, business, trade, and occupation. New Addition (Bylaw 6.1): A patent attempt to control or	Stated Purpose: To prevent activities which were “a source of annoyance and embarrassment to members of the public” Extrinsic Evidence: Bylaw 9022 dealt generally with street control within the provinces. It was amended to include bylaw 6.1, which prohibited prostitution. Form: The prohibition was only “activated” by an offer of	s.92(15) ✗ This was an invalid provincial attempt to enact criminal law.

	punish prostitution.	sexual services. Thus, it obviously did not target street control generally. The amendment was an “intruded provision” — the scheme “might just as well have been left in its original form.”	
Nova Scotia Theatres and Amusements Act (McNeil)	Majority: Preventing performances that do not comply with provincial standards of propriety by authorizing compliant films and rejecting noncompliant ones. Dissent: “The determination of...what is morally fit for public viewing.”	Purpose: To regulate film exhibition within the province Legal Effect: Gave a censor board “unfettered” power to ban films based on morality and impose penalties such as fines and revocation of entertainment license. Practical Effect: Rejection of films that do not conform to Board standards (not “criminal form”)	s.92(13) ✓ Alternatively 92(16) ✓
Ontario Civil Remedies Act (Chatterjee)	“Creates property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effect of criminality”	Legal Effect: Authorizes the forfeiture of proceeds of unlawful activities, including proceeds of crime. Practical Effect: Allows the provincial government to identify and confiscate profits of crime. This may incidentally affect s.91(2) without doing violence to the division of powers.	s.92(13) ✓

S.121: STEP 1A OF VALIDITY TEST

After having characterized a piece of federal legislation, determine whether it violates section 121 by applying the *Comeau* test. If so, it will be invalid. A provincial law that affects interprovincial trade and commerce may be invalid either due to a violation of s.121 or due to encroachment on federal power over general trade and commerce (s.91(2)).

s.121 of the *Constitution Act* 1867 provides that “all articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be **admitted free** in each of the other Provinces”

***Gold Seal v. Alberta* (1921)**

→ A provision of the ***Canada Temperance Act*** prohibited the importation of alcohol into provinces with liquor bans. The Court held that the provision did not violate s.121.

→ Anglin J interpreted “admitted free” **narrowly**: it only meant that laws cannot subject goods to tariffs when carried from one province to another.

***R v. Comeau* (2018)**

→ The New Brunswick ***Liquor Control Act*** prohibited NB residents from possessing liquor not purchased within the province.

→ Comeau was charged under this Act with possessing alcohol sourced from another province. He argued that the Act violated s.121. He contended that s.121 barred any impediment to interprovincial commerce.

→ The Court held that the NB Act did not violate s.121, as its primary purpose was not to restrict trade. It aimed to supervise liquor consumption within the province, and the impact on trade was an ancillary effect.

→ The Court defined the ambit of s.121. It prohibits tariffs and their functional equivalents, meaning laws that impose burdens upon goods crossing provincial borders.

The *Comeau* Test for s.121 Violations

The party alleging that a law violates s.121 must prove on a balance of probabilities:

1) That the essence or purpose of the law is to restrict or prohibit trade across provincial borders, like a tariff.

→ The law must a) distinguish goods in a manner related to them coming in from outside the province and b) subject them to additional costs for that reason.

→ The burden imposed need not be a monetary charge. A prohibition on bringing in liquor from other provinces would be a burden.

2) That the *primary* purpose of the law is restriction of trade.

- Most laws, including the legislation in *Comeau*, fail this step. Usually, restrictions on trade are incidental effects. S.121 does not capture laws that only affect interprovincial trade incidentally.
- However, a law whose main purpose is to restrict cross-border trade will be invalid.

CLASSIFICATION: STEP 2 OF VALIDITY TEST

A provincial law needs a provincial home. If the law is enacted by a province, determine whether the characterization best pertains to s.92(13) or s.92(15). Try s.92(13) first, because it is very broad. If not, proceed to 92(15).

A federal law needs a federal home. If the law is enacted by Parliament, determine whether the characterization best pertains to s.91(2), s.91(27), or POGG.

General Principles

- “The **validity of a legislative provision must be tested against the specific characteristics of the head of power** under which it is proposed.” (*Hydro Québec*)
- “Each constitutional head of power has its own **peculiar characteristics** and raises concerns peculiar to itself in assessing the balance of Canadian federalism” (*Hydro Québec*)

Scope Analysis

- To classify a piece of legislation within a given power, we must determine whether it is “sufficiently broad to support a provision so characterized” (*Reference Re EIA, Parsons*).
- According to *Reference Re EIA*, we must interpret the heads of power progressively. This means that the objectives of the drafters are important, but only as a starting point. We must also consider the “natural evolution of the power” and “how it may be adapted to contemporary realities” (*EIA*).

Federal Heads of Power

s.91(2): Trade and Commerce

Scope: Narrow (*Parsons, Re Securities Act*)

→ This head of power must be interpreted narrowly. If understood according to the literal meaning of the words, it could eviscerate many provincial powers (banking, property and civil rights, etc).

Often Conflicts With: s.92(13)

General Principles: This head of power has two branches: a) interprovincial trade and b) general regulation of trade affecting the whole dominion (*Parsons*). This head of power does not extend to regulation of contracts of a particular business or regulation of particular trade (*Parsons*).

First Branch: Interprovincial and International Trade

→ It is permissible for the federal government to regulate in relation to intraprovincial transactions that have a marked impact on interprovincial trade (*Klassen*).

- Ex: In *Klassen*, the *Canada Wheat Board Act* required grain producers to record deliveries made within the province in a very specific manner and to abide by federally mandated production quotas. This was permissible because the effect on intraprovincial trade was secondary to the dominant purpose of the Act, which was to protect the extraprovincial grain surplus market. Without the provisions regulating intraprovincial grain transactions, the whole scheme would be unworkable.

→ It is also permissible for the federal government to prohibit international or interprovincial shipment of a product (*Murphy, Caloil*), as long as the prohibition does not violate s.121 (*Comeau*)

- In *Murphy*, a farmer purchased grain in Manitoba and tried to ship it to BC. The Canada Wheat Board Act prevented him because it granted the Board exclusive power to transport grain between provinces. This was intra vires the federal government because it was necessary for the larger scheme.

- In *Caloil*, the federal government had legislation prohibiting the shipment of “any gasoline” between Canada and Quebec, but Caloil obtained a ruling that this was an invalid incursion on property and civil rights. Then, the regulations were amended, because they were specifically limited to “oil to be imported.” This was valid under s.91(2). The Court held that the interference, “restricted as it is to an imported commodity...cannot be termed ‘an unwarranted invasion of provincial jurisdiction.’”

→ *Dominion Stores* demonstrates that Parliamentary control over trade and commerce does not extend to imposing product/marketing standards on purely intraprovincial transactions.

- Dominion Stores was charged under the federal *CAPSA*, but the charge was found invalid. Dominion Stores had sold apples with a federal trade name, but the apples did not meet the quality standards required for use of that name under *CAPSA*. The *CAPSA* standards purported to be voluntary for intraprovincial sellers, but provincial legislation required sellers to use the federal trade names. Thus, in effect, the federal legislation imposed mandatory restrictions on the marketing of a particular product within the province.

Second Branch: General Regulation of Trade and Commerce

Test (*Parsons, General Motors, Re Securities Act*):

1) Is the impugned law (part of) a general regulatory scheme?

- A well-integrated scheme has three key features: elucidation of prohibited conduct, creation of an investigatory procedure, and establishment of a remedial mechanism (*General Motors, Re Securities Act*).

2) Is the scheme monitored by a regulatory agency?

3) Is the law concerned with trade as a whole rather than with a particular industry?

- Anti-competitive practices affect trade as a whole (*General Motors*).
- Ex: The *Securities Act* failed at this stage. While it did promote general Canadian economic welfare, it was *predominantly* concerned with detailed regulation of day-to-day aspects of a particular industry – the securities industry (*Re Securities Act*).
- Ex: Setting milk prices for transactions occurring within the province concerns a particular industry (*Carnation*).
- Ex: Prohibition of margarine sale was regulation of a particular trade (*Margarine Reference*).

- Ex: Imposing conditions on fire insurance contracts concerns a particular trade (*Parsons*).
- Ex: Mandating standards for the labelling, packaging, sale and advertising of specified products produced and sold within the province concerns a particular trade (*Labatt*).

4) Would the provinces be unable to enact such a scheme jointly or severally?

- Since Canada is for economic purposes a large marketplace, provincial legislation regulating anti-competition would be ineffective (*General Motors*).
- The scheme must “be something that the provinces, individually or in concert, could not achieve” (McLachlin J in *Re Securities Act*)
- The focus is whether provincial regulation would be possible, not whether it would be efficacious (*Re Securities Act*). Efficaciousness is not a consideration in division of powers analysis (*Re Firearms Act*)

5) Would failure to include one or more provinces in the scheme jeopardize its success?

- Weak rules respecting anti-competitive behaviour in one province could distort the fairness of the entire Canadian common market (*General Motors*).
- The opt-in scheme suggests the regulation system would not collapse if a province were not included (*Re Securities Act*)

Note: Absence of one of the above factors will not necessarily make a law invalid. A case by case analysis is required.

Note: Under s.91(2), the federal government has power over “trademark legislation.” However, mandating production standards to be met if products are using certain labels is not trademark legislation (*Labatt*).

s.91(27): Criminal Law

Scope: Very Broad (*RJR MacDonald Inc v Canada* (AG), *R v Hydro-Québec*, and *Reference Re Firearms Act* (Can)).

→ “Provided it is not a colourable intrusion upon provincial jurisdiction (ie. one not supported by a valid criminal law purpose), Parliament is entitled to use the criminal law power to safeguard the public from [injurious or undesirable] conduct” (*Re AHRA*).

→ The criminal power has often served as a plenary grant of authority supporting federal regulation of matters that might otherwise come within 92(13) or 92(16).

Ex: The *Firearms Reference* demonstrates that directing legislation at a moral evil associated with a subject that might otherwise come within provincial jurisdiction can give the federal government power over that subject.

- Interpreted progressively: “criminal law must be able to respond to new and emerging matters of public concern” (Re *AHRA*).
- Susceptible to concurrent legislation, as many subject matters coming within criminal power are very broad – “health” “environment” (*Hydro-Québec*). Thus, classifying a subject under s.91(27) will not prevent the provinces from legislating on the same subject under one of their heads of power (*Hydro-Québec*).

Often Conflicts With: s.92(13), ss.92(14),(15),(16)

General Principles:

- Legislation that serves a historically valid criminal law purpose is more likely to come within s.91(27) (*Morgentaler*).
- The main issues are usually: is there an “evil” sufficient to ground a valid criminal purpose? Is the form regulatory or prohibitive? When is regulatory form sufficient to make a law beyond the scope of criminal power?
- Criminal law “seeks by discrete prohibitions to prevent evils falling within a broad purpose,” such as the protection of health (*Hydro-Québec*).

Test: 3P (*Firearms Reference*, *Margarine Reference*, *Hydro-Quebec*, *AHRA*)

Paradigmatic example: a law aimed at morally blameworthy behaviour or conduct liable to cause significant harm. The more a law deviates, the less likely it is to be criminal.

Form: A Prohibition Backed by a Penalty (*Proprietary Articles Trade Association, Re Firearms Act*)

→ Prohibitions with **exemptions** do not necessarily negate the criminal law form of the act (*RJR MacDonald*)

→ **Discretionary** features also do not negate the criminal law form of an act (*Hydro-Québec*)

→ In *Hydro-Québec*, the Canada *Environmental Protection Act* prohibited dumping of “toxic substances” identified at the Minister of the Environment’s discretion. In light of the penalties attached and the pressing criminal law purpose, this discretionary feature did not negate the criminal character of the Act.

→ The more **complex or detailed** a scheme is, the more likely it will be regulatory in form. However, a regulatory form does not necessarily make a law *ultra vires* s.91(27). If there is a strong criminal purpose, deviations from the “prohibition and penalty” form are permissible (*R v. Swain, R v. Hydro-Québec*).

→ However, in *Re AHRA*, certain “**controlled activities**” provisions (ss.10-18 and more) were found *ultra vires* due to **lack of criminal form**. These sections **prohibited certain activities only if not carried out under license and in licensed premises**. Still, the “dominant thrust” of the larger Act was prohibitory.

→ In *Re AHRA*, McLachlin J held that **it is illogical to classify offences as “criminal” or “not criminal” based on whether they “prohibit danger” or “produce benefits,”** as this is a false dichotomy. Prohibiting danger will necessarily produce benefits.

→ Form requirements do not apply to legislation repealing criminal offences (*Quebec AG v Canada AG*).

Substance: A Valid Criminal Law Purpose (*Margarine Reference*)

→ At this stage, one must “**look for some evil or injurious effect** upon the public against which the law is directed” (*Margarine Reference*).

→ The “evil or injurious effect” may be related to “social, political, or economic concerns” – public peace, order, security, health, and morality are the ordinary but **not exclusive** ends served by criminal law (*Margarine Reference*)

→ What constitutes a criminal law purpose will constantly be **evolving**, as the criminal law power requires a “living tree” interpretation. We must be “**careful not to freeze the definition in time**” (*RJR MacDonald*).

→ In *RJR MacDonald*, the Court rejected the argument that a law must be *ultra vires* s.91(27) because it lacked affinity with a traditional criminal law concern. Criminal law must necessarily extend to encompass new dangers.

→ At a minimum, there must be some threat to public order, safety, health, morality, or fundamental social values (*Margarine Reference*). However, it is unclear whether the “evil or injurious effect” must meet a certain **threshold of concreteness or seriousness**.

A) “Reasonable Apprehension of Harm”: To determine whether there is a valid criminal law purpose, the court asks whether Parliament responded to a reasoned apprehension of harm in relation to the protected interest (Karakatsanis J in *Re GDNA*).

→ In *Re AHRA*, McLachlin J held that “human conduct causing harm is the fundamental stuff of the criminal law. **No constitutional threshold level of harm**, as such, constrains Parliament’s ability to target conduct causing these evils.”

→ In *Re GDNA*, Karakatsanis J advocated a deferential approach: if Parliament says there is a reasonable apprehension of harm, the Court should accept that proposition unless there is evidence to the contrary.

B) “Reasonable Apprehension of Harm” + Evidentiary Basis: Alternatively, the court asks whether Parliament articulated a “well-defined” threat to be suppressed. A threat is well-defined if Parliament had an evidentiary basis **and** reasoned apprehension of harm when enacting the legislation (Kasirer J in *Re GDNA*).

→ In *Re GDNA*, Kasirer J and three other justices would have held that an “evil” targeted by criminal law must be **well-defined**. The *GDNA* would have been ***ultra vires*** s.91(27), because there was **no evidentiary foundation** for the threat of harm.

Note: Apply both tests, as the SCC split 5:4 on this issue in *Re GDNA*, and the jurisprudence in this area is still in flux.

Examples of Criminal Purposes:

→ In ***Margarine Reference***, the SCC held that laws “interdicting a substantial part of the economic life of one section of Canada for the benefit of another” is not a valid criminal law purpose. (Found laws prohibiting margarine sale ultra vires federal power)

→ In ***Malmo-Levine***, the SCC held that “protection of vulnerable groups from self-inflicted harms” associated with marijuana possession was a valid criminal purpose. (Upheld prohibition of marijuana possession under Narcotics Control Act).

→ In ***Firearms Reference***, “enhancing public safety by controlling access to firearms” was a valid criminal law purpose, given that firearms are often used dangerously (*Re Firearms Act*).

→ Although the gun control legislation affected matters under property and civil rights, those effects were incidental – the Act did not “upset the balance of federalism,” as it did not hinder the ability of the provinces to regulate aspects of guns relating to property and civil rights.

→ In ***RJR-MacDonald***, preventing detrimental health effects associated with tobacco use was a valid criminal law purpose.

→ In ***Hydro-Quebec***, the Court held that pollution was an “evil” that Parliament can legitimately seek to suppress.” Thus, protection of a clean environment was a valid criminal purpose.

→ In ***Re AHRA***, McLachlin J held that “prohibiting practices which Parliament considers immoral and/or which it considers a risk to health security” was a valid criminal purpose.

→ In ***Re GDNA, Karakatsanis J*** held that the suppression of behaviours creating opportunities for genetic discrimination was a valid criminal purpose. The law responded to fears that individuals’ genetic test results would be used against them. Suppressing reasonably apprehended harm was a valid criminal purpose.

→ In ***Re GDNA, Kasirer J*** held that it was insufficient for a law to target *some* public evil or threat. The ‘harm’ targeted had to be “well-defined,” meaning both reasonably apprehended *and* grounded in evidence. Kasirer J found that Parliament failed to articulate a well-defined threat arising from genetic testing. Thus, suppression of this alleged harm was not a valid criminal purpose.

POGG will be invoked in two situations:

- 1) When the subject matter cannot be classified within an existing head of power.
- 2) When Parliament enacts legislation that they state responds to a national emergency.

S.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

i) National Concerns Branch

Apply when the legislation responds to an enduring issue that requires sustained federal oversight (Crown Zellerbach).

Scope: Could be broad based on text of s.91, but this branch has been judicially limited (Crown Zellerbach, CGGPPA).

Effect: Assigns **permanent** power over the matter to the federal government, as though the matter were a “new” head of power added to s.91. For instance, *Johannesson* endowed the federal government with power to legislate in relation to aeronautics.

General Principles: Applies to both **new matters** – those that did not exist at confederation – and **evolved matters** – those that have “attained such dimensions” as to transcend local concern and affect the Dominion as a whole.

Matters of national concern: aeronautics (*Johannesson*) radio (*Radio Reference*) Hydro (*Ontario Hydro*) national capital region (*Munro*) marine pollution (*Crown Zellerbach*)

National Concerns Branch Test

Prerequisites: Is the law a candidate for application of NCD? (*Crown Zellerbach*)

a) Is the problem likely to endure, or is it a temporary issue?

→ In *Crown Zellerbach*, the Court held that marine pollution was an enduring issue requiring sustained federal oversight.

b) Is it a new or evolved matter?

→ Dumping of toxic waste in oceans is a new matter, as it was not accounted for in 1867 Division of Powers (*Crown Zellerbach*)

Test (GGPPA)

1. Threshold Step: Is the matter of sufficient national importance to the country as a whole to warrant consideration as a national concern? (GGPPA).

→ The national concerns branch does not allow for federal legislation merely because a matter is “important.”

→ In GGPPA, the matter was sufficiently important to warrant consideration as a national concern, because climate change is “a threat of the highest order to the country, and indeed to the world.”

2. Cohesiveness Test: The law must relate to a specific and identifiable matter that is qualitatively different from matters of provincial concern (GGPPA).

a) Singleness and Distinctiveness: Matter must be qualitatively different from matters of provincial concern (CGPPA)

→ Greenhouse gases are a specific and precise type of pollutant that can be scientifically distinguished from other atmospheric pollutants (GGPPA).

→ Marine pollution was “single and distinctive” because it posed unique challenges compared to freshwater pollution and therefore warranted specific regulatory treatment (*Crown Zellerbach*)

→ Environmental protection as a whole is not a matter of national concern due to lack of distinctiveness (*Friends of the Oldman River Society*)

b) Indivisibility: The matter has predominantly extraprovincial and international effects which cannot be severed from its intraprovincial effects (GGPPA); provincial inability

→ Greenhouse gas emissions are “precisely the type of **diffuse and persistent substances with serious deleterious extraprovincial effects**” that warrant invocation of the national concerns doctrine (*GGPPA*)

→ Marine pollution was “indivisible” due to the difficulty of ascertaining the boundary between federal and provincial waters by visual observation (*Crown Zellerbach*)

Note: The existence of international treaty obligations may be a factor in showing that the matter has interprovincial impacts and is qualitatively different from matters of provincial concern (*GGPPA*).

3. Provincial Inability Test:

a) Legislation must be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting

→ In *GGPPA*, the Court held that the provinces would be constitutionally incapable of establishing a binding outcome-based system for carbon pricing.

b) Failure to include one or more provinces would jeopardize successful operation of scheme in other parts of the country

→ The Court in *GGPPA* held that failure to include one province would jeopardize the scheme – any province’s refusal to implement a sufficiently stringent pricing mechanism could undermine carbon reduction everywhere in Canada.

c) A province’s failure to deal with the matter must have grave extraprovincial consequences

→ Federal action was held indispensable, as without federal law there would be nothing to prevent one province from another province’s failure to take sufficient action (*GGPPA*)

4. Provincial Impact Test: Does the proposed matter have a scale of impact on provincial jurisdiction that is reconcilable with the division of powers? This requires a balancing exercise: the matter will only be a national concern if its **intrusion** on provincial heads of power is outweighed by the **gravity of harm** that would result if Parliament were unable to address the matter at a national level (*GGPPA*).

→ In *GGPPA*, the Court held that there was a clear impact on provincial autonomy – applying the NCD would effectively create a new area of concurrency in which federal law is paramount.

→ However, the intrusion was justifiable, as the federal law does “precisely – and only – what the provinces cannot do: protect themselves from the risk of grave harm if some provinces were to adopt insufficiently stringent GHG pricing standards”

Note: Identifying a new matter of national concern gives Parliament permanent exclusive jurisdiction, but the double aspect doctrine may apply.

ii) National Emergency Branch

Apply when the legislation responds to a temporary crisis (Re Anti-Inflation Act)

Scope: Narrow – only for emergencies – but applied deferentially.

Effect: Temporarily suspends ordinary division of powers. Parliament may enact legislation that invades provincial jurisdiction while the emergency lasts.

Note: “It is true that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not” (*Canada Temperance Federation*)

Test: Rational Basis

Note: If Parliament says there was a rational basis for enacting emergency legislation, the Court should accept that proposition *prima facie* (*Re Canada Temperance Act*, *Re Anti-Inflation Act*).

Litigants must prove either:

a) Parliament lacked a rational basis for the enactment of emergency legislation

→ An emergency is “an urgent and critical situation adversely affecting all Canadians” (*Re Canada Temperance Act*)

→ There **does not actually have to be an emergency**, but there has to be a rational basis for Parliament to believe there was one (*Anti-Inflation*).

→ **Issues:** Does extrinsic evidence show there was a rational basis for enacting the legislation as a crisis measure? Was it reasonable for Parliament to take the view that this was a necessary measure beyond the scope of provincial government? (*Anti-Inflation*)

b) There is an emergency, but the legislation is not rationally connected to it

- The requisite degree of rational connection is that the legislation is necessary to “rectify or prevent” emergency (*Re Canada Temperance Act*).
- Here, textual evidence such as the preamble should be examined.
- **Issues:** Does the preamble support the federal contention? Does the form of the act belie the contention? (*Anti-Inflation*)
- It is not necessary that the preamble use the language “emergency.” Words such as “serious” and “necessary” will suffice (*Anti-Inflation*).

Application in *Re Anti-Inflation Act*:

1) Did the form of the Act belie the federal contention (that the Act responds to national emergency)?

→ No, the form was comprehensive for employees of the federal sector consistent with Parliament’s belief that there was an emergency. The Act provided for comprehensive coverage of employees of the federal sector. The opt-in scheme was reasonable.

2) Does the preamble support the federal contention?

→ Yes. It does not matter that the preamble did not use the word “emergency” – **words such as “serious” and “necessary” indicate that Parliament saw itself as responding to a national emergency.** The preamble stated that the legislation responded to a “matter of serious national concern.”

→ The preamble states that inflation is “a matter of serious national concern.”

3) Does extrinsic evidence show that there was a rational basis for the Act as a crisis measure?

→ Remember, the evidence does not have to indicate that there was actually an emergency. It only has to show that Parliament believed there was one.

→ In *Re Anti-Inflation*, the Court looked to Statistics Canada reports and economists’ studies to determine that there was a rational basis for the Act as a crisis measure.

4) Was it reasonable for Parliament to take the view that this was a necessary measure beyond the scope of the provincial government?

→ Yes. Inflation is a monetary phenomenon and policy relating to monetary matters affecting the whole country come within federal power. Parliament was not enacting legislation with no anchorage.

→ The fact that there had been other periods of rising inflation in which similar action was not taken is immaterial.

iii) Gap Branch

Apply when a law does not come within any enumerated head of power.

Scope: Broad in theory but curtailed in practice due to the scope of s.92(13).

Rule: The POGG power is residuary. This means it catches all matters not enumerated in the division of powers.

Application: If a federal law **cannot be classified under any federal head of power** (ie. s.91(27) or s.92(2)), check whether it pertains in pith and substance to a provincial power enumerated under s.92 (ie. s.92(13) or s.92(14) (15) (16)). If the law **also cannot be classified under a provincial head of power**, the law will **come within federal residuary power** (the POGG gap branch).

Purpose: The purpose of the residuary power is to ensure that there are no constitutional lacunae or gaps. The residuary power usually catches matters omitted from the original division of powers.

Examples: The gap branch has been applied to allow Parliament to legislate in relation to incorporation of companies with federal objectives (*John Deere Plow Co v Wharton*), offshore minerals outside provincial boundaries (*Re Newfoundland Continental Shelf*), and aeronautics (*Johannesson*).

Provincial Heads of Power

s.92(13): Property and Civil Rights

Scope: Broad

→ s.92(13) is interpreted broadly (*Parsons*).

→ However, matters “intrinsic to a field of federal jurisdiction” are not within provincial jurisdiction, even if they have elements of property and civil rights (*Re BC Environmental Management Act*).

General Rules:

→ s.92(13) gives the provinces exclusive jurisdiction to legislate to particular trades and industries (*Parsons*).

→ Provincial legislative authority does not extend to fixing prices for extra-provincial transactions (CIGO). However, setting prices for intraprovincial transactions is constitutionally permissible, even if such an action has incidental effects on interprovincial trade (*Carnation*).

→ Protectionist schemes the essential measure of which is to restrict sale of imported products will be beyond the scope of s.92(13) (*Manitoba Egg*).

→ Provincial legislative authority does not extend to setting prices or controlling production for goods primarily destined for the export market (*Potash*).

Key Cases:**Parsons**

→ Legislation imposing conditions on fire insurance contracts was found intra vires the province under **s.92(13)**.

Chatterjee

→ Provincial laws can deter crime as long as in pith and substance they relate to property and civil rights.

→ In *Chatterjee* a law permitting forfeiture of proceeds of crime was **valid under s.92(13)**. The law did not impose penalties such as fines or imprisonment; instead it confiscated property, which indicated that protection of personal property was the dominant purpose.

Carnation

→ Regulations that apply only to intraprovincial transactions will be **within s.92(13)** (*Carnation*). In *Carnation*, the *Agricultural Marketing Board* was created to help farmers sell products more effectively.

– The Carnation Company would buy milk from Quebec farmers (a transaction occurring within Quebec). The Board set prices for this transaction, and Carnation argued that setting prices was beyond the scope of the province because the milk would ultimately be exported.

→ The Court held that the provincial Board could validly set such prices despite the fact that the milk was largely destined for export.

Manitoba Egg

→ Manitoba enacted a scheme controlling the pricing of imported products.

→ It was a protectionist scheme: the pith and substance was to protect agricultural production within the province by imposing onerous labelling, packing and pricing conditions on imported eggs.

→ The legislation was **beyond the scope of s.92(13)**.

→ Incidental effects on interprovincial trade are permissible (*Carnation*), but when the essential measure of an Act is to restrict the sale of imported goods, it will be ultra vires the province as an unconstitutional incursion into s.91(2).

CIGO v. Saskatchewan

→ Saskatchewan imposed a “mineral income tax” and a “royalty surcharge” on oil sold for a price higher than the “wellhead value.”

→ The effect was to fix prices for oil, and 95% of the oil would be sold outside the province.

→ This law was **ultra vires s.92(13)**.

Central Canada Potash

- Saskatchewan implemented a potash prorationing scheme setting potash prices and quotas. The goal was to stabilize the Saskatchewan potash market, but most potash was produced outside the province. However, the potash market was predominantly extraprovincial.
- Central Canada Potash was unable to fulfill an export contract because the law limited how much potash they could sell.
- The Court held that this legislation was ultra vires s.92(13). Provinces cannot enact laws that in pith and substance operate by setting prices for extraprovincial transactions and imposing quotas on goods for export.

Morality and Public Order (s.92(15))

s.92(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.

Scope:

- s.92(15) allows penalty schemes that include fines, imprisonment, and other penalties (*McNeil, Westendorp*)
- Penalty schemes enacted under s.92(15) must be “validly anchored” by a provincial power under s.92 (*McNeil*)
- Clear **replication or supplementation** of criminal law will be found ultra vires (*Westendorp, Morgentaler*)
- Otherwise, case law demonstrates a wide berth given to provinces under s.92(15) (*McNeil*)

Key Cases:

McNeil: A law with ancillary effects on criminal law has to have a valid provincial anchor.

- The Nova Scotia *Theatres and Amusements Act* gave a censor board unfettered power to ban films based on morality and impose penalties for violation, including revocation of license. The Act was upheld as **an exercise of provincial power to impose punishments (s.92(15)), validly anchored in s.92(13).**
- The majority characterized the act as the regulation of a business within the province to prevent performances that do not comply with provincially-enacted standards of propriety. Therefore, the imposition of a penalty could be anchored in s.92(13).
- However, one regulation that replicated the criminal prohibition of indecent theatrical performances was ultra vires.

Westendorp:

- The SCC struck down a municipal bylaw regulating street prostitution as an intrusion into federal jurisdiction over criminal law.
- The bylaw was integrated into a larger scheme dealing with the regulation of city-streets generally.
- However, this particular bylaw (no.6), added in a recent amendment, was only “activated” by an offer of sexual services. It was accordingly characterized as a “direct attack on prostitution...there is no property question here.”
- The bylaw could not be upheld under the ancillary powers doctrine, as it was not integrated into the larger valid scheme – it was an “intruded provision” with “a completely different order from the preceding sections and all those succeeding it”

Rio Hotel

- SCC upheld provincial prohibition of nude entertainment in licensed premises. Rio Hotel argued the law dealt in pith and substance with public morality, a criminal law subject reserved for the federal government.
- Dickson J characterized the law as regulation of entertainment as a means to boost alcohol sales within the province and accordingly anchored the law in s.92(13) and s.92(16).

Morgentaler

- The *Nova Scotia Medical Services Act*, which aimed to prohibit the performance of abortions outside hospitals, was struck down as a colourable intrusion on criminal law power. The law could not be validly anchored in a head of power relating to morality and public order.

Like in *Westendorp*, the legislation in *Morgentaler* was only “activated” by a specific behaviour which Parliament had deemed morally reprehensible. If the law in *Westendorp* truly sought to regulate street control generally, it would not have only targeted prostitution. Likewise, if the law in *Morgentaler* truly sought to prevent the emergence of a two-tiered healthcare system, it would have prohibited not only abortion but any surgical practice from being performed outside a hospital.

National Resources (s.92A)

(1): In each province, the legislature may exclusively make laws in relation to:

- a) exploration for non-renewable natural resources in the province;
- b) development, conservation, and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources....but such laws may not authorize or provide for discrimination in prices or supplies exported to another part of Canada.

Double Aspect Doctrine?

→ **Rule:** The power of one level of government to legislate in relation to one aspect of a matter takes nothing away from the power of the other level of control another aspect within its own jurisdiction (*Reference re Employment Insurance Act*, s 22 and 23 at para 8)

→ Only apply when there is a federal statute AND a provincial statute relating to the same general subject matter (ie. insider trading, the environment), and you have determined that they are both individually valid.

→ For instance, in *Multiple Access*, the impugned legislation had “both a securities law and a companies law aspect.” The corporate law aspect of the law fell under s.91(2). The securities law aspect fell under s.92(13). Neither aspect was “dominant.” Accordingly, the Court found that the *Canada Corporations Act* and the nearly identical *Ontario Securities Act* were valid, the former under s.91(2) and the latter under s.92(13).

→ *Lederman Test*:

- If the aspects of the law are “of roughly equal importance,” the laws can both be valid under their respective heads of power (remember, at this point you have ALREADY characterized and classified each law.)

Incidental Effects Rule?

- A law may have an impact on matters outside the enacting legislature's jurisdiction as long as those effects remain secondary or incidental features of the legislation rather than its most important feature (*Canadian Western Bank, Lacombe*)
- A law that incidentally affects matters beyond the jurisdiction of its enacting body will be valid if it is in pith and substance validly anchored in a head of power (*Lacombe*)

Ancillary Powers Doctrine?

- This doctrine determines whether an individual provision is valid by virtue of its relationship to a larger regulatory scheme (*GM, Lacombe*).
- There is a 3-step test from *General Motors*:
- **Step 1:** Does the provision encroach on another level of government?
 - Ex: In *General Motors*, the impugned provision of the federal *Combines Investigation Act* created a civil right of action and thereby encroached on provincial powers over property and civil rights.
 - Ex: In *Lacombe*, the impugned provision was a zoning bylaw prohibiting the construction of aerodromes. McLachlin J found that this provision intruded on federal jurisdiction over aeronautics.
 - **Note:** If there is no intrusion, the provision is "unimpeachable" and the investigation need go no further (*General Motors*).
- **Step 1A:** If so, is the intrusion "marginal" or "serious"?
 - The narrower the affected head of power, the more serious the intrusion. The broader the affected head of power, the less serious the intrusion (*General Motors*).
 - Narrow heads of power: s.91(2) – Trade and Commerce (*Parsons*). Broad heads of power: s.92(13), 91(27).
 - Ex: in *General Motors*, the intrusion was marginal, because the provision was remedial, and it did not create a general cause of action: its effect was limited.
- **Step 2:** Is the provision contained in a valid regulatory scheme?
 - **Note:** In *Reference Re AHRA*, the majority held that to avoid unnecessary complexity, it made more sense to **analyze the validity of the whole scheme before applying the ancillary powers doctrine** to determine whether individual impugned provisions were valid by virtue of fit.

- Ex: In *Lacombe*, McLachlin J found that because the impugned bylaw was part of a valid provincial zoning scheme, it was necessary to determine whether the bylaw could be upheld by virtue of its relationship to the whole.

- **Step 3: Fit Test**

- The degree of “fit” required depends on the degree of intrusion.

Marginal Intrusion → Rational and Functional Connection

- If the intrusion is “**marginal**,” the individual provision must be **rationally and functionally connected** to the objective of the larger scheme.
- This means that the provision must **actively further** the legislative scheme (*Lacombe*). A provision that **merely supplements** a larger scheme is not rationally connected (*Lacombe*).
 - Ex – Passed Rational Connection Test: In *General Motors*, the provision helped enforce the substantive aspects of the Act and therefore was valid.
 - Ex – Passed Rational Connection Test: In *AHRA*, the administrative provisions were rationally and functionally connected to the larger act, as they aimed to enforce the substantive provisions.
 - Ex – Failed Rational Connection Test: In *Lacombe*, bylaw no. 260, which prohibited aerodromes above a specific lake, did not further the objective of the broader zoning legislation.
 - a) The “first principle” of general zoning legislation is to “treat like areas alike.” Bylaw no. 260 was fundamentally inconsistent with that principle, because the bylaw functioned by treating similar parcels of land differently.
 - b) The bylaw did not **fill a gap** in the larger scheme, **enhance a feature** of the scheme, or **remove any inconsistency or uncertainty** in the scheme. Thus, it was not **functionally related**.

Serious Intrusion → Necessarily Incidental

- If the intrusion is “**serious**,” the individual provision must be “**truly necessary**” or “**integral**” to the larger scheme.

PITH AND SUBSTANCE CONCLUSION

For these reasons, I conclude that the pith and substance of the law comes within the scope of [section] / is beyond the scope of [section]. Therefore, it is / is not a valid exercise of federal / provincial power under section [section].

OPERABILITY

Operability will be an issue when a provincial law and a federal law are both valid, but they overlap. If there is an operational conflict, the federal legislation is paramount and the provincial law is inoperative. This means the provincial legislation is suspended for the duration of the conflict (*Rothmans*).

The paramountcy doctrine must be applied with restraint, as cooperative federalism encourages cooperation wherever it is constitutionally permissible. This means that “conflict” should be defined narrowly (*Moloney*).

Paramountcy Case Law

Note: When a provincial law is stricter than a federal law, there will be conflict only if the provincial law frustrates the federal purpose (*Hall*). If there is a stricter provincial law but it has the same objective as the federal law, there will be no conflict (*Ross, Rothsmen*). In *Hall*, La Forest J merged the “impossibility of dual compliance” test and “frustration of federal purpose” test:

“Dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament’s legislative purpose” (La Forest J, *Hall*)

Following *Hall*, the Court in *Mangat* held “where there is an enabling federal law, the provincial law cannot be contrary to federal purpose.”

Thus, when a federal law says yes and a provincial law says no, there will only be a conflict if the provincial law frustrates the federal purpose. If the stricter provincial law shares or furthers the federal purpose, there is no conflict.

The Court in *Moloney* held that the conflict need not be explicit in the text of the legislation. The focus should be whether the **effect** of the provincial law undermines the **purpose** of the federal law.

Paramountcy does not apply to duplicate legislation that is complementary (*Multiple Access*)

Provincial laws that are stricter than permissive/general federal legislation (but there is compatibility in purpose) (*Rothmans*)

Ross (provincial law stricter than federal law, but both have same objective → no conflict as both laws had same objective)

- *Criminal Code* granted federal government discretionary power to suspend license in limited times/places when someone receives a DUI
- ON *Highway Traffic Act* required the province to suspend license altogether for someone who receives a DUI
- Ross was convicted of impaired driving, and the trial judge restricted his driving privileges to Monday-Friday 8:30-5:30 pursuant to the *Code*
- However, the ON registrar of motor vehicles suspended Ross's license for three months altogether pursuant to the *Highway Traffic Act*.
- Pigeon J found no operational conflict. Dual compliance was not impossible – one could comply with both the stricter provincial law and the more relaxed federal law by complying with the stricter one (ie. not driving). The provincial law did not frustrate the federal purpose, as both laws aimed to deter impaired driving.

Multiple Access (duplication → never conflict)

- The Ontario Securities Act had almost identical provisions to the Canada Corporations Act. Both provisions aimed to restrict insider trading. McCutcheon initiated action against Multiple Access for insider trading under the Ontario law. Multiple Access argued the law was inoperable.
- Dickson J found no conflict, as duplication is “the ultimate in harmony.” He held there is no good reason to speak of paramountcy unless “one law says yes and the other says no.”

Hall (permissive federal law + prohibitive provincial law → impossibility of dual compliance when stricter provincial law frustrates federal purpose)

- The Federal Bank Act permitted the bank to seize personal property when a debtor defaults on a bank loan. The provincial Limitation of Civil Rights Act prohibited the bank from seizing personal property without notice of seizure.
- Hall had granted the bank a security interest on a piece of machinery in exchange for a bank loan. When he defaulted, the bank seized the machinery pursuant to the federal law. However, this was prohibited under the provincial law, as the bank had not provided notice of seizure.
- La Forest J found that because the provincial law forbids a creditor from doing what the federal legislation allows, dual compliance was impossible.
- Also, the provincial law **frustrated the federal purpose**: the federal law aimed to facilitate debt collection while the provincial law sought to impede debt collection.

Rothsman (permissive federal law + prohibitive provincial law → no conflict when both have same objective)

→ Saskatchewan law banned all advertising, display, and promotion of tobacco within the province; federal law prohibited tobacco promotion but permitted exceptions.

→ The provincial law was stricter, but it furthered the federal objective of protecting the public against harms of tobacco use. Thus, the Court found no operational conflict.

Moloney (provincial legislation compelled payment of debt; federal legislation released debtor from obligations → indirect conflict + frustration of federal purpose → paramountcy)

→ Alberta legislation permitted the province to suspend Moloney's drivers license as a means of debt enforcement. Federal legislation released Moloney from his debt obligations because he had declared bankruptcy.

→ The purpose of the federal law was to release bankrupt people from debt. The effect of the provincial law was to compel debt payment. **Gascon J** held that this was an operational conflict, and the provincial law frustrated the federal purpose. Accordingly, the federal law was paramount.

→ **Cote J** dissented, holding that there was no "operational conflict" in this case. He stated that operational conflict must be direct – the provincial law only directly affected the ability to drive, not the payment of debt. However, he would have held that the federal law was paramount because the provincial law frustrated the federal purpose.

✓ **Impossibility of Dual Compliance** (or operational conflict, express contradiction)

- Whether it is impossible for people subject to both federal and provincial enactments to comply with both
- **Express Contradiction Test** [*Multiple Access*]: one says "yes" and other says "no"
 - i. Mere duplication without actual conflict or contradiction is insufficient to invoke paramountcy and render otherwise valid provincial legislation inoperative
 - ii. Conflict *ONLY* arises where compliance with one law leads to defiance of the other (impossibility of dual compliance)
 - 1. Gascon J: "one law says yes and the other says no" [*Moloney*]
 - 2. Gascon J: Contradiction can be *indirect* (don't need conflict in true sense, but conflict can arise where person *wants* to engage in prohibited conduct) – it is superficial to look at conflict like this [*Moloney*]
 - 3. Cote J: Superficial possibility of dual-compliance suffices for finding NO operational conflict – there is *only* operational conflict where provincial law allows the very thing prohibited by federal law (that is "one says yes, the other says no") [*Moloney*]

✓ **Frustration of Federal Purpose**

- Whether permitting provincial enactment to operate in circumstance would frustrate the purpose underlying the federal enactment
- No “repugnancy” in duplicative provisions because Parliament’s purpose remains fulfilled [*Multiple Access*; *Hall*]
- **Test for Frustration of Purpose:**
 - i. Provincial legislation that displaces Parliament’s intent is incapable of achieving Parliament’s intent and is inoperable [*Hall*]
 - ii. Not open to provincial legislature to qualify right GIVEN and defined in federal statute [*Hall*]

Case	Federal Law	Provincial Law	Test	Conflict?
<i>Ross</i> 1975 SCC	Permits person convicted of DUI to drive in limited times and places	Prohibits person convicted of DUI from driving altogether	Is dual compliance impossible? Did parliament purport to cover the field? Does provincial leg. frustrate federal purpose?	No: can comply with both by complying with stricter. No. No. Complementary: both laws aim to deter impaired driving.
<i>Multiple Access</i> 1982 SCC	Limits insider trading	Limits insider trading	Is dual compliance impossible? Does provincial leg. frustrate federal purpose?	No. No.
<i>BMO v. Hall</i> 1990 SCC ¹	Permits bank to seize personal property	Prohibits bank from seizing personal property without notice	Is dual compliance impossible?	Yes. “One says yes, one says no.”

¹ Distinguishable from *Ross* and *Rothmans*, in which the stricter provincial law was fine. In this case, the stricter provincial law is found to be frustrating the purpose of the federal law which wants a uniform debt enforcement scheme.

	when debtor defaults on loan		Does provincial leg. frustrate federal purpose?	Yes. Makes the federal goal of alleviating debt more difficult.
<i>Rothmans</i> 2005 SCC	Banned display of most tobacco products but permitted display of some exceptions	Banned display of all tobacco products	Is dual compliance impossible? Does provincial leg. frustrate federal purpose?	No. Can comply with stricter. No. Both laws intend to protect public against harms of tobacco.
<i>Moloney</i> 2015 SCC	Released Moloney from debts because he had declared bankruptcy (Releases debts in bankruptcy)	Suspended Moloney's license until he paid the province back for paying off the victim of his car crash (Enforces debts in bankruptcy)	Is dual compliance impossible? Does provincial leg. frustrate federal purpose?	Yes (Majority and minority disagreed) Yes (Majority and minority agreed)

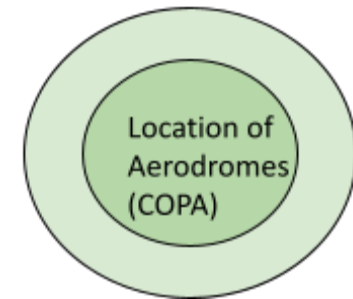
INTERJURISDICTIONAL IMMUNITY

→ Interjurisdictional immunity is a relic of the “watertight compartments” era of constitutional interpretation. Thus, it should be applied as a last resort – only if a federalism dispute cannot be resolved with a validity or operability analysis (*Canada Western Bank*).

→ Keep in mind: a protected “core” is a carved-out area of content within a head of power. For example, “aerodromes” is a federal power. However, “location of aerodromes” is within the “core” of that power (*COPA*).

→ When IJI is invoked, a generally worded law will be “read down” so that it no longer impairs the federal “core” (*COPA*).

Federal Aeronautics Power



Test for IJI (*COPA*, *Canada Western Bank*)

(1) Does the law engage a protected “core” of a federal power? (*COPA*)

First, the Court must decide whether the legislation engages a protected “core” of a federal competence (*COPA*). A “core” is the basic, minimum, and unassailable content of the federal power – the authority absolutely necessary for Parliament to fulfill the legislative objective (*Bell Canada*, *CWB*).

“Core” areas must be defined by precedent (*CWB*).

Ex: in *CWB*, Alberta legislation relating to “peace of mind insurance” did not trench on the “core” of federal power over banking.

Ex: in *COPA*, Quebec legislation prohibiting the use of certain intraprovincial lands for any purpose other than agriculture did trench on the federal “core” power to determine the location of aeronautics.

Ex: in *Bell No 2*, a provincial environmental regulation prohibiting the burning of smoke as a nuisance for residents was found applicable to a federally regulated railway undertaking.

Ex: in Lafarge, permitting a cement plant

(2) Does the provision impair the federal core? (COPA)

For IJI to be engaged, a provincial law cannot merely “affect” a federal core (CWB). The provincial law must impair the core, which means that it “trammels” or “adversely effects” the federal undertaking. “Impairs” is more than “affects,” but less than “sterilizes.”

Ex: Alberta’s *Insurance Act* merely affected the federal undertaking of banking – it did not engage a protected “core” nor impair the federal power (CWB).

Ex: In *COPA*, the impairment was significant because in practice it could prevent Parliament from exercising its power to decide when and where aerodromes are used.

Result: A finding of IJI means that the legislation is “read-down” so as not to trench on the core area (COPA).

Core Areas: aeronautics (COPA), not peace of mind insurance (CWB), federal elections, telecommunications, interprovincial railways, postal service, banking, navigation and shipping, Aboriginal peoples and lands, RCMP, federal parks, the military, navigation and shipping (Lafarge)

federal elections, telecommunications undertakings, interprovincial railways, and trucking undertakings, as well as to the postal service, banking, aeronautics, navigation and shipping, the military, Indigenous peoples and lands, the RCMP, federal parks, and even criminal procedure.

Key Cases:

Bell Canada

→ Bell Canada, a federally regulated entity, argued that they were immune to a Quebec law reassigning a pregnant worker.

→ Beetz J held that management of working conditions and labour relations came within the “core” of federal power to regulate banks (s.92(15)).

CWB

- Canada Western Bank was selling peace of mind insurance, but broadly worded provincial legislation limited the promotion of this insurance product.
- CWB argued that they were immune to the provincial law, because banks are a federal undertaking and insurance is central to their operations.
- The SCC found that the provincial law did not trench on a “core” federal power, as selling insurance had never been recognized as a “core” of banking in previous caselaw.
- The SCC also raised the threshold for invoking IJI from “affects” (Bell) to “impairs.”

COPA

- A Quebec law authorized a provincial board to designate certain plots of land as “agricultural” and prohibit the use of those lands for any non-agricultural purposes.
- Thus, when two Quebec residents constructed an airstrip on their land and registered it with the federal Minister of Transport, the provincial agriculture board ordered the demolition of the airstrip.
- The SCC held that a) deciding the location of aerodromes is a protected core of federal power over aeronautics, and b) the Quebec law impaired this core, because in practice it could prevent the establishment of an aerodrome in a federally designated locale, and it could order the demolition or transport of a federally sited aircraft. The law was “read down.”