Table of Contents

1. INTRODUCTION TO CONSTITUTIONAL LAW

- The **Constitution** provides provisions which establish legally enforceable obligations and ground judicial decisions concerning the exercise of power

    - The highest form of **positive law** (distinguishes bw human law and scientific [universal/absolute] laws)
    - Const binds all levels of govt

- **Basic Concepts**
    - **Separation of powers**: separation b/w the 3 branches of govt (executive, judicial, legislative)
    - **Judicial review:** power of the courts in Canada to determine whether govt action is in compliance with Constitution. (s.96 – 101) -> includes References
    - **Parliamentary Sovereignty**: nothing higher than Act of Parliament, final word on law, and reliance on political rather than legal accountability – politicians accountable for legislation they pass.
    - **Constitutional Supremacy:** s 52 of *Constitutional Act 1867* states Constitution is supreme law of Canada, any law inconsistent is of no force/no effect; CAN. COURTS' PERSPECTIVE, not parliamentary supremacy

Sources of Constitutional Law

1. **Written constitutions** (ex. BNA Act, Constitutional Act 1982, Royal Proclamation1763)
2. **Common law** (Judge made law, common law tests, ordinary statutes)
3. **Constitutional conventions** (unwritten rules, enforced by political sanction, prescribes the way that legal power is changed.

Elements/Principles of Canadian Constitution

1. **Parliamentary democracy →** electing legal reps that represent society, self-govt, majority rule.

2. **Federalism →** poli power shared by 2 levels of govt

- Democratic participation through distribution of power
- Principle of federal: Coordinate Sovereignty (*See Hodge v Queen)*

3. **Respect for Individual & grp rights →** counters rule of majority

- Ensures that vulnerable minorities are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority.

4. **Aboriginal Rights** → Section 35 is not part of the Charter, it's a free standing section

5. **Constitutionalism and the rule of law** (implicit in the const) → s.52
    - **Constitutionalism principle:** requires that all govt action comply with the Constitution

Rule of Law *(See Imperial Tobacco)*

- **Rule of law principle:** all govt action must comply with the rule of law, including the constitution.
- Guarantees to the citizens of the country a stable, predictably and ordered society in which to conduct their affairs.
- protects individuals from arbitrary state action
- all exercise of legit public power must have a source in law and every state official or agency is subject to constraint of that law

Reference Re: Secession of Quebec (1998)

(*Principles of Federalism)*

Facts	SCC asked to rule on the legality of unilateral secession of Quebec from Canada
Issues	1. Under Constitution, can Quebec secede from Canada unilaterally? **No** 2. Does international law give Quebec the right to secede and do they have a right to self-determination? **No, this only refers to colonies.** 3. Does domestic or international law take precedence in secession? **Court did not answer this Q as first 2 Qs were in the negative.**
Ratio	There can be no unilateral secession without a constitutional amendment because nothing is above the const law. **Unilateral secession of Quebec would be unconstitutional**.
Analysis	Courts analysis was by applying the 4 principles of the const → SCC to turn these principles into the premises of a const argument to fill in gaps in the express terms of a constitutional text. • **Federalism:** Q has civil law legal system, but still bound by Const • **Democratic principle:** Quebec's position was that b/c of const. democracy, they could secede. o The rights of other provs and the fed govt can't deny Quebec the right to secession ,if the majority wants it, as long as Quebec respects the rights of others o SCC says referendum is not a binding outcome

	• **Constitutionalism & Rule of Law:** there can't cannot be unilateral secession w/o a constitutional amendment. Nothing above the constitutional law o that law is supreme over the acts of both govt and private persons→ one law for all • **Minority rights**: protecting French speaking minority rights
Judgement	**Q cannot secede on unilateral or intl law** (weren't marginalized enough for this) • SCC said it wouldn't allow one of the principles to trump another. • Secession requires a const amendment → Q has obligations to negotiate w/other provs to secede under the Constitution. • Quebec may be a distinct poli unit, but this is the same for all provinces. Also upholding right of minorities is a goal but no distinct people in Canada are more or less significant than the other.
General Notes	Regarding rule of law: In Quebec secession reference The court said its earlier insistence on the primacy of the written constitutional text, stating that unwritten principles "could not be taken as an invitation to dispense with the written text of the Constitution"

2. THE JUDICIARY (COURTS)

Judicial Independence

- important bc otherwise they cannot render just decisions on the other branches of government
- To ensure that judges can make impartial decisions and apply the law. In terms of separation of powers, its free from improper influence/interference of the executive and legislature (*Imperial Tobacco)*
- seen as a cornerstone of the integrity of the constitutional order and maintenance of separation of powers

- **Principles of Judicial Independence**: Financial security, Security of tenure, and Institutional independence

Reference Re: Provincial Court Judges (1997)

(Principle of Judicial Independence)

Facts	Provincial (inferior) court judges (and some accused from Alberta) challenged salary reductions (and other measures) by prov. legislatures as breach of judicial independence and therefore unconstitutional. *Charter* s. 11(d) formed the primary basis for the argument.
Issues	1. Whether salary reductions impinge upon the "financial security" aspect of judicial independence? **– Yes, SCC allows most aspects of the appeals, finding the method of salary reduction to breach judicial independence and that an independent commission should determine judges' salaries** 2. What is the constitutional basis for the guarantee of judicial independence with respect to provincial court judges?
Ratio	Judicial independence is a const principle that applies to ALL judges.
Analysis	Reduction would remove financial security and make judges more open to the influence of other branches **Judicial Independence:** • Sec 96-101 of Cons deal with producing legitimacy for the judicial branch. They're designed to ensure quality of independence and impartiality in the courtroom • BUT there's gaps in sec 96-101 → ex: it only protects the independence of judges of certain courts like superior and district, and even then not in a uniform/consistent manner • Lamer CJC and majority see the lack of a specific principle of judicial independence as a "gap", and base their decision on "unwritten norms", brought into play through the preamble to BNA Act, 1867. *Charter* s. 11(d) is too narrow – relevant only when exercising crim jurisdiction. Decision extend unwritten principle to inferior court judges. • judicial independence has grown into a principle that now extends to all court, not just the superior courts • Thus, judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Const
Judgement	The judicial salary reductions of the provinces involved were found to be unconst bc they hadn't been preceded by a report of judicial commission.

Judicial Review

- Refers to the power of the courts to determine whether action taken by a govt body or legal actor (ex: Parl or RCMP) is or isn't in compliance w/ the Constitution
    - When legislation is valid or not
- It's a principle of constitutionalism that govt action comply with the requirements of the cons

Criticism: JR involves unelected judges overturning the will of a democratically-accountable legislature on the basis of open-ended and abstract const guarantees

British Columbia v Imperial Tobacco Canada (2005)

(*Case is abt challenging written legislation using unwritten const principles;* ***Rule of Law****)*

Facts	• BC govt passed Tobacco Damages and Health Care Costs Recovery so the BC govt could sue manufacturers of tobacco products for the recovery of health care costs incurred by the govt in treating ppl suffering from tobacco related illness → govt needed this legs as a cause of action • Tobacco manufacturers challenged constitutional validity on 3 grounds: 1) Based on the division of powers bw parl and the prov legs → extra-territorial impact 2) Underlying principles of judicial independence • said the Act violated judicial independence bc it contained rules of civil procedure that fundamentally interfered with the adjudicative role of the court hearing an action brought pursuant to the Act • Say rules impinge on the courts fact-finding function → basically its biased 3) Rule of law.
Issues	1. Whether the court is free and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive/ legs branches of govt 2. **Sub issues:** Is the act constitutionally valid? Can the **rule of law** be used to find the Act invalid?
Ratio	Unwritten principles cannot be used on its own to attack a constitutional validity of legislation. However, a court may strike down a law in cases where judicial independence might be threatened.

Analysis	Constitutionality of legislation challenged on 3 grounds • **Extra territoriality** – NO, this is NOT *ultra vires* of the province. P+S fell under property & civil rights. • **Breach of judicial independence** – NO, this act still allows judges to reason independently and allow their rulings to stand without interference. o McLachlan said: its within the power of the legislature to enact laws as long as it doesn't fundamentally alter or interfere with the relationship bw the courts and the other branches of govt • **Breach of the rule of law - NO.** Rule of law is an unwritten principle, not an explicitly stated part of the constitution and thus, on its own, can't be used to attack constitutional validity of the legislation o The purpose of RoL isn't to undermine and challenge the constitution **Rule of Law:** Embraces 3 principles: 1. Law is supreme over govt officials and private indivs and preclusive of arbitrary powers ➢ Means legislation applies to all 2. Creation and maintenance of of an actual order of positive laws which preserve and embody the general principles of normative order ➢ Means legislation must exist 3. Relationship bw state and indiv be regulated by law ➢ Requires that state officials be legally founded **Rule of law requires that legislation be:** • Prospective, General in character, Not confer special privileges on the govt, and Ensure a fair civil trial • **Imperial Tobacco argue the Act is invalid bc it breaches these**
Judgement	The Act does not violate the independence of the judiciary and is **valid**

Rule of Law Comparison: *Quebec Secession vs. Imperial Tobacco*:

***Quebec Secession Reference*: 3 elements**	***Imperial Tobacco*: translating/applying the 3 elements**
	None of the principles that the rule of law embraces speak directly to the terms of legislation …..
Law is supreme over the acts of both government and private persons: one law for all.	The first principle requires that ***legislation*** be applied to all those, including government officials, to whom it, by its terms, applies.
Requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.	The second principle means that ***legislation*** must exist.
The exercise of all public power must find its ultimate source in a legal rule. I.e., the relationship between the state and the individual must be regulated by law.	The third principle, which overlaps somewhat with the first and second, requires that all actions by state officials' must be legally founded…

British Columbia (AG) v Christie

(Rule of law: access to justice)

Facts	*BC Social Service Tax Amendment* imposed a 7% tax on the purchase price of legal services. Christie challenged the constitutionality of tax, saying some of his low income clients wouldn't be able to retain his services then.
Issues	Whether general access to justice and legal services mandate a general right to counsel under the rule of law? → **No**
Ratio	The right to counsel is not recognized as an aspect of the rule of law, and therefore is not constitutionally guaranteed. The right to counsel is understood to apply to only criminal context.
Analysis	• The only constitutional guarantee of counsel in sec.10b of the Charter upon arrest/detention. Sec.7 of the Charter implies a right to counsel but doesn't support a general right to legal assistance. • Court says you can't frame general access to legal services as recognized as a **rule of law**

Judgement	

BC Trial Lawyers and CBA v. BC (2014)

(Rule of law: access to justice; IJI)

Facts	• Ms.V asked judge to relieve her from paying the hearing fee for a child custody matter. Judge said he'd wait till the end after hearing abt the parties means and circumstances • She was reasonably well off, but most of her savings got used up in legal fees so she couldn't afford the hearing fee ($3600) • The appellants challenge the Province's hearing fees on a number of grounds, including the rule of law and access to an independent judiciary.
Issues	Whether hearing fees imposed by the province that deny some people access to court are unconstitutional?
Ratio	The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the Constitution. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.

Analysis	• Provinces can impose hearing fees under s. 92(14) administration of justice
	• Section 96 restricts the legislative competence of prov legislatures and parl — neither level of govt can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction
	• The task of the superior courts is to resolve disputes between indivs and decide questions of private and public law. **But hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.**
	• the legislation bars access to the superior courts— by imposing hearing fees that prevent some indivs from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do
	  • this infringes on s.96
	  • the province's s.92 must be exercised in a manner that is consistent with the rights of indivs to bring their cases to the superior courts and have them resolved there

Judgement	• Majority (McLachlin +4): hearing fees that prevent people from accessing **courts infringe on the core jurisdiction of the superior courts** → unconstitutional • Also the rule of law – inextricably intertwined → access to justice and the rule of law are inextricably linked (majority decision)

3. CONSTITUTIONAL INTERPRETATION

Approaches to Interpreting the Constitution

1) **Historical** (originalism, intent of framers) → focus on the proper meaning to be given to a provision of the const
2) **Textual** → look at the present sense wording of the context or bill
3) **Doctrinal** → based on precedent
4) **Prudential** (practical) → argument abt cost & benefits, how best the govt task in question can be performed
5) **Ethical** → whether the fundamental values of society are properly reflected in the govt and institutions
6) **Structural** → where the constitutional principles interlink and interact.
    - Fact less and depends on simple logical moves from the entire constitutional context rather than from one of its parts

Watertight Compartment Theory

Classical Division of Powers Paradigm:

- Premised on a strong understanding of exclusivity
- Interpret so there's no overlap/interplay bw fed (s. 91) and prov (s. 92) powers
    - Each govt acts in "watertight compartments"
- The categories in s.91 & 92 were "exclusive legislative jurisdiction" of respective government
- Lord Atkin (***Labour Conventions case***): It is a metaphor to elude to the "impermeable jurisdictions of federal & provincial powers" like the watertight compartments that makes the "Canadian ship of state" run
    - However now, we are moving away from this perspective in accepting that powers & responsibilities of each government collides – and we use different division of power doctrines to reconcile

- the principle of **COOPERATIVE FEDERALISM** has been relied on to explain and justify relaxing a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government

Modern paradigm: premised on weaker understanding of exclusivity

- Prohibits either level of govt from enacting laws that in their P&S (dominant characteristic) is a regulation of a subject matter within the other level of govts jurisdiction
- The course of judicial restraint

Living Tree Doctrine

- Constitutional doctrine of interpretation that says a constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing the times.
- Courts should interpret constitution so as to recognize its evolutionary potential
- Courts take flexible view of const and legs, interpret so to allow effective governmental responses to important problems of public policy
- interpret the Constitution where there are gaps/ambiguity, in light of the present day situations; continually evolving doctrine
- Practical approach – not a historical approach

Edwards v AG Canada (Persons Case)

(Interpretational argument, living tree argument)

Facts	This was an action before Judge Emily Murphy to gain senate appointment for women. But, the BNA act precluded women from eligibility of being elected tp the upper chambers of HoC. Then they used the supreme court act to petition the govt for an Order-In-Council directing the SCC to rule on the constitutional question whether the term "qualified persons" in sec.24 of BNA act included women. Then the 5 women appealed to judicial committee of privy council in England → they reversed judgement. Women are persons yay!
Issues	Whether "qualified persons" in s 24 *BNA* include a woman – whether then, if women are eligible to be summoned to & become members of Senate? **Yes!**
Ratio	Interpretation is not bound by **original intent**, and is open to new interpretations & circumstances to adapt to changing times – **LIVING TREE DOCTRINE**

Analysis	• Initially, "persons" was read textually (in determining what encompasses "persons") AND historically (in what was meant when making the law to include "persons"). Then the Court determined it should be read through the **living tree doctrine** to encompass the modern day interpretation of PERSONS as including women. • They use the *Interpretation Act* to say male pronouns can be substituted with female → "person" is not a word importing masculine gender Evidence considered: 1. **External/Extrinsic:** Refers to evidence abt the intent of the legislations → "history" about why and how the legislation came about • Original meaning of "persons" included women, but **original intent** in 1867: women were NOT persons, in position of legal incapacity, and could not vote. 2. **Internal/Intrinsic:** Refers to argument and evidence drawn from the text of the statute • Derived from Act itself; "**Living Tree**" analogy – continued growth & expansion. Look to Preamble: "persons" & "members" throughout Act including women in meaning. • Court, in making its decision, considered: Object of Act – proving constitution for Canada; "persons" is ambiguous, may include members of either sex (constitution is gender neutral)
Judgement	• Qualified Persons" could be read broadly to include women • Lord Sankey said the constitution was "capable of growth and expansion within its natural limits"

Reference Re Same Sex Reference (2004)

(Living tree)

Facts	The discussion had started in the lower courts challenging s.15. So PM Chretien wanted to pass a bill allowing same-sex couples right to marry. But first he submitted a reference to the SCC to determine if it was appropriate to have 2 key sections in the legislation: 1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others. 2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.
Issues	Whether the word "marriage" in s 91(26) was "constitutionally fixed" according to its meaning in 1867
Ratio	The "frozen concepts" reasoning runs contrary to the fundamental principles of Canadian constitutional interpretation: that our Constitution is a **living tree** which, **by way of progressive interpretation, accommodates and addresses the realities of modern life.**
Analysis	The Meaning of Marriage Is Not Constitutionally Fixed • Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. • **A large and liberal, or progressive, interpretation ensures the continued relevance and, legitimacy of Canada's Const (LIVING TREE)**. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted. • The legislation is consistent with the *Charter* as it realizes the equality guarantee in s. 15(1). Recognition of the equality rights of one group cannot be a violation of the equality rights of another group. • The protection of religious freedom in s. 2(a) protects religious officials from having to officiate marriages which disagree with their religious convictions.
Judgement	• Court held that s. 1 of the Act was *intra vires* the power of the federal government under s. 91(26) of the *Constitution Act, 1867* but that s. 2 of the Act was *ultra vires*, properly falling within provincial jurisdiction over the "solemnization of marriage" (s. 92(12)).

4. FEDERALISM: Early Interpretation of the Division of Power

- Constitution helps divide power between federal government and provinces
- Division of powers – in turn gets interpreted by the courts
- Courts determine limits of legislative power
- Rule of law – legislation can limit executive powers

Citizens Insurance Company v Parsons (1881)

This case sets out the origins of the scope of s.91 (2)

Facts	Ont court enacted legislation about fire insurance policies → standard set of conditions Parsons brought an action against 2 fire insurance policies, written by 2 diff insurers, to recover compensation for losses caused by a fire in his store. Insurer refused to pay based on Parson's failure at the time to disclose info required by conditions in the policies. Parson said the conditions were void bc they didn't comply with the legislation. The insurance companies claimed the Ontario legislation was *ultra vires* the province because it fell under federal power over "Regulation of Trade and Commerce" s. 91(2). Trial and CA ruled for P, insurers appealed to SCC & PC.
Issues	Was Ontario's legislation regulating insurance *ultra vires* the province? - **No, prov power, s. 92(13).**
Ratio	Business & contractual issues that take place wholly within the provinces fall under s 92(12), while international interprovincial & general trade and commerce issues fall under s 91(2). **Federal gov does not have the right to regulate business within a province.**
Analysis	• The Act under consideration is NOT a regulation of trade and commerce; it deals with the contract of fire insurance, as between the insurer and the insured. • The power of Parliament to regulate trade and commerce should NOT be held inconsistent with power of the legislatures to regulate property and civil rights, s. 92(13) in respect to all matters of local and private nature. • Civil rights have to flow from the law (*narrow reading).* The words of the contract are sufficiently large to include these rights arising gotm the contract and that such rights aren't covered in s. 91

	• (*Broad reading)*For the legislation to be held under s. 91(2) it would have to be read very broadly, which would include ANY transaction regarding "trade and commerce" which would negate all purpose of s. 92(13).
	  • Broad reading should link regulation of trade to broader national interest. But here it doesn't comprehend power to regulate contracts of a particular business
	• Section 92(13) applies to business and contractual issues that take place wholly within the province.
	  • This matter deals with contracts falling within the matter of property rights
	Section 91(2) applies to international, interprovincial, general trade and commerce issues that impact the Dominion as a whole

Judgement	Contracts of indemnity made by insurers can't be considered trading contracts. The provincial Act is valid
General Notes	The power to negotiate contracts between private individual is within the jurisdiction of the province – if the province is to be sovereign, its powers need to be defensible against the broad powers of the federal gov. **This case established the idea that with respect to private dealings, the province is going to be the main player and the federal gov is going to prove its interests** **Under s.92(13) –** property & civil rights – provincial jurisdiction

The Temperance Trilogy

After Confederation there were a series of challenged concerning liquor regulatory schemes in Canada and the fed and prov govts couldn't agree **who had legs authority over the regulation and prohibition of alcohol.**

- PROV: Ont enacted *Liquor License Act 1876* which attempted to transfer powers over liquor licensing from the municipalities to a prov controlled Board of License Commissioners. → gave provs controlled over the regional sale of alcohol

- FED: Enacted *Canada Temperance Act 1878* that provided for an option for municipalities to opt-in to a prohibitionary scheme by plebiscite. The scheme banned the sale of liquor for consumption within the area that adopted the scheme and made contravention of the regulations a crim offense.

- These cases show that when/if there are conflicting/similar legislations bordering on the divison of powers, it doesn't necessarily mean that the fed power will always triumph. Prov powers are recognized and kept.
- AND THAT Both pieces of federal and provincial legislation can be valid; both legislatures in their respective jurisdiction governing the same areas can co-exist w/o in conflict → **Double Aspect**

Russell v The Queen (1887)

Facts	• Russel was a tavern owner who had a case brought against him bc of the federal *Temperance Act*. (PEI had opted into the fed prohibition scheme) • Russel said the Act was ultra vires feds powers, it should have fallen under sec. 92(9) taverns & saloons, 92(13) property & civil rights, and 92(16) matters of local nature o this Act would criminally convict him for selling alcohol during prohibition
Issues	Was *Canada Temperance Act* legislation regulating prohibition *ultra vires* the federal govt? – **No, act is valid**
Analysis	• Court held act *intra vires* Parliament under s 91(2) Trade & Commerce. • Reason for Parliament to pass the Act- should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors – view to promote temperance through uniform law throughout the Dominion – establishes POGG in the broadest sense
Judgement	Federal legislation upheld under federal residual, general power **(POGG**), temperance a matter of "national concern". → *broad interpretation*

Hodge v The Queen

*(The **double aspect doctrine** originated in the Hodge v Queen case)*

Facts	Hodge was a tavern owner who challenged the Ontario Liquor License Act, which prohibited the use of billiards tables during any time the alcohol sale was prohibited. He argued the subject matter was exclusive under fed juris and the act was ultra vires the prov jurisdiction.
Issues	Was *Ontario Liquor License Act ultra vires* the prov govt? – **No, act is valid**
Rule	**Double aspect**: "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." • Provinces considered "coordinate sovereigns"
Analysis	• Court looked to *Citizen's Insurance* to reduce the scope of the decision from Russel. They said that *CI* shows that subject matters can fall for one purpose in s. 91 and in another aspect and purpose in s.92 → **double aspect (overlap of fed and prov legs on the same subject matter)** • Hodge also said the Ont legs was improper and invalid delegation of authority to the licensing boards
Judgement	• Act is *intra vires* the prov powers under ss. 92(8)(15(16) and there was no conflict with the *Canada Temperance Act*. So both rules could co-exist • Recognized strong prov legs are autonomous within their own sphere and scope of power

Local Prohibition Reference

Facts	Reference took place after Ont passed the *Local Option Act* 1980, which was almost identical to the *Canada Temperance Act*. The prov statute gave municipalities the power to introduce prohibition (similar to the Canada Temperance Act). In 1894, while contemplating total prohibition, Ontario asked the courts about the legality of pieces of legislation.
Issues	Does the province have power to legislate prohibition?
Rule	Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by S.92 (unless proven necessary through POGG)

Analysis	• If a subject matter is broadly defined, it can have provincial and federal aspects (**double aspect doctrine**); if this happens, paramountcy is an issue
	• Fed argues POGG that *there is limit on its use as it touches matter of provincial jurisdiction
	  o But Fed can only rely on POGG for matters for national dimensions
	  o cannot use POGG where prov has power to legislate
	• there's a diff between "regulate" the trade & sale of liquor and to "prohibit" the trade and sale of liquor → in this case the legs is prohibiting AND authority to prohibit it is under s.92(13) property and civil rights

Judgement	Federal legislation upheld under POGG (as in *Russell*) but interpretation of POGG is narrowed (national concern as strictly confined to matters that are "unquestionably of Canadian interest and importance") and concurrency of federal & provincial legislation permissible up to a point of actual conflict, in which case (doctrine of **"paramountcy**").
General Notes	This case is **important** bc it **narrowed the federal POGG** power discussed in *Russell.* It upheld the *Russell* decisions but assed constraint to the scope of the power

Reference Re Board of Commerce Act & The Combines & Fair Prices Act 1919

(first intro to POGG)

Facts	• In the aftermath of WWII and the inflation and econ problems, ppl accused businessmen of conspiring to suppress competition that would have kept prices down and of having made undue profits in the process
	• So govt produced 2 bills:
	  • Board of Commerce Bill – set up Board of Commerce
	  • Combines and Fair prices Bill – set out the board powers
	
	*(**Combine:** a group of people or companies acting together for a commercial purpose.)*
	
	• The point of these Acts was to restrict 2 abuses:
	  1. Combines, monopolies, and mergers
	  2. Taking unfair profits or hoarding the necessity of life item (like clothes, food) for the purpose of unfairly increasing prices
	• Board had the power to make orders ceasing the formation/operations of combines and order to repay unfair profits
	  • Violation of order was indictable offence and fined $1000 or even imprisonment
	
	When at SCC level it was split 3/3 – therefore went to JCPC which determined it was not POGG, and fell within provincial jurisdiction.

Issues	• Whether the Board of Commerce had const authority to make specific orders setting profit margins for clothing prices in Ottawa • Whether federal government can deal with price fixing, and if this regulation can be derived from POGG? • Basically: Was the Board of Commerce legislation *ultra vires* the authority of Parliament? – **Yes, legislation ruled unconstitutional under powers listed.**
Analysis	• Federally this act could fall under trade& commerce, POGG (national interest), criminal law powers • Or prov 92 power of property and civil right (broad reading) **Majority (Haldane):** • Although in times of war etc the govt can take over s.92 powers…its also const possible during times of peace (POGG) → this further limits POGG power • Only in exceptional circumstances can powers of provinces be limited in such a way

	• The jurisdiction attempted to be conferred on the new Board of commerce appears to be ultra vires
	  o It implies a claim of title, to make orders prohibiting the accumulation of certain article required for everyday life.
	• It's not fed trade & commerce power bc T&C doesn't enable interference with particular trades (clothing industry here)
	  o Said they couldn't exercise that power to general industries
	  o This is a narrowing of the trade and commerce power
	• Judges think: the legislation which set up the Board of Commerce with all these powers is beyond the powers given to Parl by s.91 → Given the above understandings, regulation of business does not fall under any federal head of power and is captured within a provincial head of power
	
	<u>Dissent (Anglin):</u>
	
	only the federal government can effectively deal with matters of price fixing (provincial legislation hard to coordinate) – although property and civil rights – it was not local; could also have been done under POGG

<u>Judgement</u>	• Such regulation violates division of powers – also cannot be justified under POGG – just common economic motivation does not create justification (e.g.: to interfere with property and civil rights) or head of power • Federal statutes **not valid** → *Appeal dismissed*

Chart: Summary of Early Interpretation Cases

	Centralizing	Decentralizing
Late 19th cent	*Russell* (POGG)	*Parsons* (T&C, 92- P&C rights) *Hodge* (coordinate sov.) *Local Prohibitions Ref* (POGG narrowed)
1920s		*Bd of Commerce* (T&C, POGG, not applicable)
1930-32	*PATA* (Crim power, POGG) *Aeronautics* (s. 132, POGG) *Radio Ref* (POGG, s. 132)	
1937		*Labour Conventions* (s. 132, *POGG)* *Employment & Social Insurance* (POGG) *Natural Products* (T&C, 92-P&C rights)

S. 132 and Powers Relating to International Treaties/ Commitments

S. 132 of the *BNA Act, 1867:*

"The Parliament and Government of Canada shall have the Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

- This is about **implementing** treaties, not making them (governed by *Statute of Westminster)*
- Federal parl has the broad powers to implement those treaties and their respective powers
- The power to **make** international treaties is a matter of federal prerogative (i.e., belongs to the federal executive and is not governed by statute)

Reference re the Regulation and Control of Aeronautics in Canada (1932)

(POGG; gap filler)

Facts	• After WW1, convention on aeronautics signed by British on behalf of Canada. Parliament began regulating aeronautics in a comprehensive way claiming fulfilling s. 132 international obligations. • This regulation by Parl included licensing of pilots, aircrafts, and commercial services and regulations for navigation and safety
Issues	• Does the federal government have jurisdiction over regulating aviation in Canada? – **Yes, due to s. 132.**
Rule/Ratio	• Aviation was NOT anticipated at time of Confederation, does NOT fall under enumerated head of power, so any *gaps* are accounted for under POGG. • Parliament has jurisdiction to implement treaties as per s.132; • Aeronautics is fed – fall under POGG & s.91(2)- T&C (5)-postal (7)- military
Analysis	• Reference sent to the SCC to determine validity of this legs • Aeronautics was generally prov power but that the Parl has paramount (but not exclusive) authority to implement the convention under s.132 • **Appellants** says aeronautics can be brought under the s.91 powers of postal service and trade&commerce • **Respondents** say within s.92(13) of civil rights and property, and 92(16) generally all matters of a merely local and private nature in the provinces → Judge disagrees • Neither feds nor provinces were given such powers at Confederation. Aeronautics cannot fall completely within federal s. 91(10) "navigation and shipping" or provincial s. 92(13) "property and civil rights." Look to **POGG**, because airplanes are national concern. Section 132 gives Parliament power to fulfill international treaties. • **Judge** says that transport is something dealt within branches of both s.91 and 92, but neither section deals specially with aeronautics transport • Sec 132: gives parl/Govt all powers necessary for performing the obligations towards foreign countries arising under treaties bw the Empire and such foreign countries
Judgement	*Appeal allowed.* → Aeronautics is a matter of national interest (**POGG)**
General Notes	This case shows one of the branches of POGG to fill in "gaps" bc there was no notion of aviation/aeronautics in 1867

Reference re Regulation & Control of Radio Communication in Canada (1932)

(*Radio = POGG; Incorporates Living Tree)*

Facts	• Late 1920s Dominion government entered into a series of international agreements about radio. →signed treaty on its own • Characterized as a matter of national interest as Canada needed to assert its ability to implement its own international commitments (s. 132). • After enacting legislation to implement these agreements, the government made a reference asking whether it had the power to regulate radio. → SCC held yes, under POGG • Then they appealed to Privy Council
Issues	Does Parliament have the jurisdiction to regulate radio in Canada? - **Yes**
Rule/Ratio	Authority to control radio transmission/reception throughout Canada and to regulate the industry itself was deemed to be federal jurisdiction under POGG in the context of s. 132 power, *not* because the subject matter itself was under federal jurisdiction.
Analysis	• The leading consideration in the judgment of the board was that the subject fell within the provisions of s.132 of the BNA Act • Idea of Canada signing international agreement on its own was not thought of in 1867 thus CANNOT hold jurisdiction simply in federal obligation for international treaties in s. 132. Not able to draw a solid line between provincial and federal broadcasting, so power falls to Parliament via POGG. • Canada as a whole is amendable to the other powers for the proper carrying out of convention, and to avoid ppl infringing the stipulations of the conventions, its necessary Parl pass legislation • The argument of the prov depends on making a distinction bw transmitting and receiving instrument. → Judges think this can't be done bc you can't broadcast w/o doing both of these
Judgement	SCC held that radio commination was subject to the parl legs jurisdiction of the

AG Canada v AG Ontario (Labour Conventions) 1937

(*Only feds can have treaty power over s.91; incorporates Watertight Compartments)*

Facts	Reference about the validity of the *Limitations of Hours Work Act*, which said that 8 hrs a day and 48 hrs a week as max work hours. AND in 1919 Canada signed treaties and later had intl conventions setting out work hour restrictions → Reference over validity of federal legislation in this area Canada argued that s. 132 (treaty power) with analogy to Aeronautics and Radio, POGG in times of economic crisis and "trade and commerce" power. Provinces rebutted arguing subject of labour comes within s. 92.
Issues	• Is the legislation regulating labor *ultra vires* the Parliament of Canada? – **Yes, appeal allowed.** • Was it within the Dominion (federal) right to use s.132 (treaty power) of the Constitution to enact the above powers even though it infringed on s.92 of the provinces rights to autonomy?
Rule/Ratio	Section 91 does NOT grant the Parliament of Canada the power to implement labour reforms arising from treaties bc they do NOT have jurisdiction over labour.
Analysis	Parl relied on s.132 (treaty powers). • The provs, fearing a threat to their autonomy, all opposed of this power to permit the feds to legislate abt subject that would normally within s.92 prov powers • The judges who **agreed** to the Act said the powers of the treaty were given by s.132 to the Parl, and even if it did interfere with s.92 prov powers, POGG allowed the feds to implement treaties that didn't some within s. 132 **Majority:** • Making a treaty is an executive action, while the performance of its obligation and subsequent alternations of domestic law, requires legislative action • BUT in a federal state where the legislative authority is limited by a const document or is divided up bw diff legislatures, its hard to simply uphold exec decisions • So the treaty needs assent of the Parl AND prov legislatures • Parl can't, just by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth → LOL • Dismisses POGG argument and the s. 132 argument. Reject that s. 91 empowered the federal legislature to enact such labour reforms because this legislation is normally provincial within the class of subjects under s. 92.

	• NO such thing as treaty legislation; would not be correct to hold that Parliament may intrude on provincial jurisdiction over a matter simply because it agreed to do so with a foreign country.
Judgement	*Appeal Allowed* (dominion failed – provs won) → the Act is ultra vires the parl legs jurisdiction →Legislative powers need to remain distributed
General Notes	• **S.132** has no binding power anymore, because it was made at a time when Canada was still under the rule of the British Empire • Reverses previous decision regarding POGG power from *Radio Reference* and states authority in that case was NOT derived from POGG under s. 132, but from the fact that radio communication was subject matter within POGG. • *Labour Conventions* is BAD law but GOOD policy. • Inability of federal executive to implement treaties without provincial consultation remains the law. • What happened to idea of overlaps? → Ruled not to exist here bc labour is viewed as "**watertight" compartment**.

5. INTERPRETATIVE DOCTRINES

Interpreting the Division of Power (and challenges)

3 Arguments used to challenge statutes on the grounds of division of powers:

1. **"PITH AND SUBSTANCE**" – Challenge to the *validity* of a statute on the grounds that it is in its **dominant characteristic** (aka pith and substance) in relation to a **matter beyond enacting legislatures jurisdiction** and thus within the exclusive jurisdiction of the other level of govt

2. Limit the *applicability* of valid statutes → **IJI**
    a. Even if its within the jurisdiction, it can be read down/limited so it doesn't touch on matters at the core of the other level of govts areas of exclusive jurisdiction
    b. Doctrine of interjurisdictional immunity

3. Seeks to limit the *operability* of prov statutes → **Paramountcy**

- even if a prov law is valid and applicable, it can be rendered *inoperable* if it conflicts w/ a valid feds statutes that also applies to the same effect
    a. Aka **federal paramountcy** rule → works against the operation of prov statutes to protect the primacy of federal policies embodies in valid feds legislation

Is the Legislation Valid?

- Ask whether, in ***pith and substance***, the legislation is within a federal or provincial head of power (depending on which passed the impugned legislation). If so, it will be **valid**.

- Legislation will also be **valid** where it has:

    - an ***incidental effect*** on the other level's jurisdiction (merely incidental)
    - a ***double aspect*** → provision valid and balanced between both fed and prov
    - a more significant intrusion on the other level's jurisdiction but the intrusion is an ***ancillary*** part of legislation that is otherwise valid. → intrusion necessary

*** so long as legislation is (in pith and substance) within that level's heads of power, it may have some impact on the other level's jurisdiction and will still be valid.****

Three questions in the analysis of the division of powers:

Is the legislation valid?

(Pith & Substance, Double Aspect, Ancillary)

Is the legislation applicable?

(Interjurisdictional Immunity)

Is the legislation operative?

(Paramountcy)

Pith and Substance Analysis

The test for P&S analysis comes from ***Morgantaler*** and ***EI Reference:***

Step 1: Characterize the matter (without reference to heads of power)

- Pith and substance of a law is determined by examining both the **purpose** and **effect** of the law
  - i. Look at both *intrinsic* and *extrinsic* evidence for **purpose** of the legislation
    - *Intrinsic:* text of the statute, legislation as a whole
    - *Extrinsic:* legislative history (ex: amended act), govt reports, motivating events, looking at the intent
  - ii. **Effect** of the legislation
    - *Intrinsic:* Legal effect – how does the legislation impact the rights and liabilities of those it regulates
    - *Extrinsic:* Practical effect – actual or predicted impact of the legislation in operation

Step 2: Find it a home/assign it under a specific head of power (sec 91/92)

- Here you do the heads of power tests if needed.
- Trade & Commerce → General Branch Analysis (*GM*)
- Federal Criminal Law Power → Criminal form requirement (*Margarine Reference)*
- POGG → Test for National Concern Doctrine *(From Crown v Zellerbach)*

COLOURABILITY:

This doctrine is invoked when "a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction"

Colourable law: law which means something more than /diff from what its words seem at first glance to say

- Passing laws with an ulterior motive/purpose – made to look like it falls under its jurisdiction
- **Rule: "A legislative body cannot do indirectly what it cannot do directly." – Hogg**
- Ex: law can be worded to seem that its prov classifiable features of meaning, but only when the effects of it are assessed can one ascertain a fuller/diff meaning which supplies federally classifiable features → ie ***Morgantaler*** *case*

- **What is the "matter" of the impugned law? Is it within the jurisdiction of the enacting legislature?**
  - ⇨ If **YES**, but there are concerns regarding **overlapping jurisdiction,** the analysis continues and we must address the **types of overlaps: Double Aspect, Incidental Effect, Ancillary Doctrine** (*see below)*

R v Morgentaler (1993)

(Colourability; authority for P+S Analysis; 3rd Morgentaler case)

Facts	In 1989, NS govt passed *Nova Scotia Medical Services Act* which prevented abortions outside of hospitals/creation of private clinics. • M performed a bunch of abortions in his clinics and he was charged with 14 counts of violating the Act. He was acquitted at trial after TJ said that the legislation under which he was charged was beyond the provs legs authority to enact bc it was in **pith and substance** crim law. → decision upheld in appeal • M said he said the Act was unconst on the founds that its violated womens Charter rights to security of person and equality and that its an unlawful encroachment on the fed parl exclusive crim law jurisdiction. AND it was an abuse of the discretion by the prov cabinet and thus is in excess of jurisdiction
Issues	Whether the Nova Scotia Medical Services Act and the regulations made under the Act are ultra vires the province of Nova Scotia on the grounds that they are in pith and substance criminal law (therefore, fall under fed powers) – **Yes, Act is invalid**
Rule/Ratio	A law's "matter" is its leading feature or true characters, often described as its pith and substance.
Analysis	Prov tried to justify the Act under **health**: s.92(7) or s.92(16). However, the punitive action was under the federal head of power under criminal law. Province was trying to **color** the legislation as under the provincial head of power (health) – when it's actually under the fed head of power (crim). Pith & Substance Analysis to determine the **VALIDITY** of the Act: **Step 1: Characterization of the matter** **a) What is the purpose?**

	Intrinsic: In the Act itself, it said the goal was to maintain high-quality health care, womens health safety Extrinsic: No evidence of studies about cost/quality of health care **b) What is the effect?** Intrinsic: Prohibits abortion with penal consequences. Language similar to crim code Extrinsic: Restricts where someone can get abortion services; high fines, severe penalty • Purpose & Effect does not match up – it looks like a **colourability** issue. The real purpose was to prohibit abortions and it was coloured to make it look like a health-care issue, but it is a **criminal matter** • The P+S of the Act and the Regulation was to restrict abortions as a socially undesirable practice which should be supressed or punished **Step 2: What head of power does this matter fall under?** This falls under the federal head of power: under s.91 (27). Therefore this provincial Act is ultra vires, as in P+S this is a criminal matter under s.91(27).
Judgement	*Appeal dismissed* - the Act and the regulations are **criminal law** in pith and substance and consequently ultra vires the province of NS → invalid Act
General Notes	• The prov is allowed to pass such a law, but since they attached penal consequences to it, it is regarded as part of crim law • Even when the legal effect of fed and prov legislation is the same, its doesn't necessarily determine validity, bc provs can enact provisions with the same legal effect as fed legislation, as long as it's done in pursuit of a prov head of power → The prov can't limit, replace or supplement the crim law

Reference re Employment Insurance Act (2005)

(*Pith and Substance, Living Tree)*

Facts	This case involved concern over the validity of the maternity & parental benefit provisions of the *Employment Insurance Act* • Quebec govt believed that these provisions were directed at supporting families with children and thus fell within s.**91(13) Prop and civil rights or s.92 (16)** • Fed govt believed that the provisions were directed at providing replacement income for working moms and parents when their employment was interrupted with the arrival of a child. They said this fell within **s.91(2A) unemployment insurance**
Issues	Whether the maternity and parental benefit provisions of the federal *Employment Insurance Act* are valid - **Yes**
Rule/Ratio	The "matter" must be able to fit within the scope of a head of **power.**

Analysis	• when the const was amended, fed were given a position of jurisdiction over property and civil rights relating to unemployment insurance
	• A public unemployment insurance plan concerns insurance relating to contracts of employment and is a **social measure**
	
	• AG of Quebec's argument #1: was that its not an insurance issue bc theres no risk involved in maternity; it's a voluntary condition as opposed to an accident or illness
	  • Judge basically says that this is stupid explanation, and that pregnancy is no diff from any health related absence from work
	• Protecting against the loss of earnings that result from maternity is a social policy decision and its not incompatible with the concept of risk in the realm of insurance
	
	• AG of Quebec's argument #2: argues that pregnancy cant be characterized as an unemp situation bc a prego women isn't capable of being available for work
	  • Judge says this is dumb too
	  • Interruption of employment will be regarded as an unemp situation regardless of the nature of the unemp
	
	• AG of Quebec's argument #3: the social program under which maternity benefits are paid, is in pith and substance, a measure to assist families → judge says its an effect of the program but not its pith and substance

	THUS: In **pith and substance**, maternity benefits are a mechanism for providing replacement income during an interruption of work • This is consistent with the fed jurisdiction over unemployment insurance **Living Tree Approach:** • Court considers historical context of insurance, what was meant by the framers: • The jurisdiction of unemployment must be interpreted **progressively** and **generously**. Must be considered in the context of a measure that applies throughout Canada with the purpose to curb destitution caused by unemp and provide a framework for workers re-entry into the labour market • Progressive approach to adopt to new realities of a workplace in regards to maternity provisions in Employment Insurance Act • Social measure to preserve economic security: fits federally
Judgement	The impugned provisions are *intra vires* /valid under the federal govt 91(2A) powers

A. Double Aspect Doctrine

- Originates in *Hodge v Queen*

When 2 relatively similar rules may validly be found in legislation from both prov and fed jurisdiction, bc they are enacted for diff purposes and in diff legislative context which give them distinct constitutional characterizations.

- They can be regarding the same matter and directed to the same people, but differ on the course of conduct and effect
- When it fits under both head of power (when you're in the second part of pith and substance analysis and the act is valid but overlaps)
- Where the fed and prov features of the challenged rules are of roughly equivalent importance to that neither should be ignored respecting the division of legislative powers, the decision is made that the challenged rule could be enacted by either the federal Parliament or a provincial legislature
- **Conflict Test:** does abiding by one provision mean violating the other? This would trigger paramountcy.

- **Doctrine of Dominion paramountcy**: if under the double aspect theory, 2 laws in conflict with each other, meaning that one obeying one means disobeying the other, THEN the federal rule prevails and the prov one is rendered inoperative

→ this is a principle of constitutionalism. Fed law deemed more important in this case bc they have national reference/scope. Dominion paramountcy is called in the end points of s.91

Multiple Access Ltd v. McCutcheon (1982)

(Double Aspect; Paramountcy

- Judge trying to find a double aspect over regulation of insider trading in the securities of federally incorporated companies

Facts	• The *Ontario Securities Act* (prov law) prohibited insider trading in shares trading of the Toronto Stock Exchange (TSE). The fed ***Canada Corporation Act*** had almost identical provisions, applicable to corporations incorporated under federal law • A shareholder action was initiated against insiders of Multiple Access (MA), under the Ont ***Securities Act***, alleging that they took the opp to buy shares in the company relying on their knowledge that the CRTC would soon announce the grant of licenses to MA • The resp (McC) said that the regulation of securities trade in **fed incorporated companies** was a fed power. And they relied on the doctrine of **Dominion Paramountcy** to say the Ont Act was inoperative. • McC relied on the *fed Canada Corporations Act* which benefited them bc according to that Act, the limitation period for initiating an action under the fed statute has already passed
Issues	Whether ON Securities Act & Canada Corportaitons Act were both valid and can apply to federally incorporated companies in Ontario. **YES, both acts valid and both can apply!**
Rule/Ratio	Laws regulating the same matter can be valid – if there are both prov and fed features to the matter and co-exist without conflict → **Double Aspect Doctrine**
Analysis	Judge trying to find a double aspect over regulation of insider trading in the securities of federally incorporated companies **Double Aspect:** • Insider trading has a double aspect: o Provincial aspect - securities law (92(13))

	○ Federal aspect - federal company law (POGG) **The security-corporate prov/federal characteristics of insider trading legislation are roughly equal in importance and can both be valid.** • the court had to determine whether the relevant provisions of the Ont act and the Fed Act were both valid and that both applied to trading in Ont in the shares of federally incorporated comps • **majority held** that both statutes were valid and applicable on the facts • The DISSENT said the feds were invalid bc the regulations of securities transactions was a prov power under property and civil rights
Judgement	The application of provincial law did NOT displace the legislative purpose of Parliament; thus there is NO conflict between the provisions and no need for paramountcy.

B. Incidental Effect Doctrine

Applies when a provision, in P+S, lies within the competence of the enacting body (fed/prov) but TOUCHES (has **subsidiary effect)** on a subject assigned to the other level of govt. Such a provision WILL NOT BE INVALID merely because it has an **incidental effect** on a legislative competence that falls beyond the jurisdiction of its enacting body. **Mere incidental** effects will not warrant the invocation of ancillary powers. → *from Lacombe*

- You have to figure out if the act as a whole is valid (sometimes requires P&S analysis of the whole Act)
- An impact of a law that is not the dominant characteristic
- Generally permissible when legislation is otherwise **valid** under a pith & substance analysis
  - Ex: criminal provisions prohibiting abortions outside of hospitals (pre *Morgentaler, 1988*) had incidental effects on provincial jurisdiction over hospitals, health services, and health professionals

C. Ancillary Powers (Necessarily Incidental) Doctrine

Done after **Pith and Substance doctrine:** law is upheld if its dominant characteristic falls within the classes of subject matter allocated to the jurisdiction of the enacting govt → but in this case determines *ultra vires*/invalid

- **BUT** a law can have impact on matters outside the enacting legs jurisdiction as long as **these effects remain secondary or incidental features** of the legislations rather than its important feature

- Applies where a particular provision is impugned within a legislative regime that, when considered in isolation, appears to intrude on powers outside of enacting body's jurisdiction

- used in cases where the provision being challenged is part of a **larger scheme of legislation**
    - when the provisions is looked at alone, it intrudes into the jurisdiction of the other level of govt
    - but **in the big picture its const valid**, then the impugned provision may also be found valid bc of its relationship to the larger scheme
- if the impugned provisions integrated into the valid legislative scheme are closely reacted, they will be deemed "necessarily incidental" to the valid scheme and the law as a whole will be upheld
- this doctrine allows govts to intrude substantially on provs govts jurisdiction, as long as the most important features of their laws remain within govt jurisdiction → and vice versa
    - Ex: permissible federal impact on provincial power over property & civil rights (power to create new civil causes of action) in *General Motors;* not permissible provincial impact on federal power over aeronautics in *Lacombe*.

Rational Function Test (GM Test)

(*SEE CHART)*

We should consider the impugned provision and the competing (other) Act as a whole:

1. Determine whether the impugned provision can be viewed as intruding on powers outside the respective jurisdiction, and if so to what extent.
    - **Questions to ask:** What head of power is being encroached upon? What is the scope of that head of power? How serious is the impact?
    - Purpose is to ascertain the degree to which the provisions could be said to intrude on the prov power, so that this intrusion can be weighed in light of the possible justification for the section

2. Determine whether the overall regime is valid – **requires P&S analysis** (of Act)

- **Questions to ask:** What is the nature of the impugned provision? Is it a remedial provision? A substantive provision? What's the scope of the impact on the other head of power? Is there precedent?
    - If legislative regime is not valid (whole act invalid), analysis is over

3. Whether the provision can be const justified by reason of its connection with valid legislation
    - If sufficiently integrated, the provision will be valid. If not, the provision will be invalid.
    - **Questions to ask:** Is there a history of legislation (and courts upholding legislation on the matter in question?)

- **Test of "fit":** how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation
- To assess the correct standard the court must consider the degree to which the provision intrudes on prov powers
    - ⇨ **Minimal Intrusion = Rational Functional Test:**
        - Is the functionally related to the general objective of the legislation, and to the structure and content of the regulatory scheme?
        - **Serious Intrusion = Strict Necessity Test:** The test for validity will be stricter, with the enacting body required to show that the provision in question is **necessarily incidental** (truly necessary) to the regulatory scheme as a whole.

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

(*Ancillary powers doctrine; GM Test)*

Facts	• CNL brought action against GM alleging that it suffered losses as a result of a discriminatory pricing policy that constituted a kind of anti-competitive behavior prohibited by the *Combines Investigation Act* • GM argued that s. 33.1 of *Combines Investigation Act* was beyond the jurisdiction of Parl bc the creation of civil causes of action falls within prov jurisdiction in relation to "property and civil rights" 92(13) • This ruling held that the Combines Investigation Act (CIA) was a valid exercise of the fed power over the "general regulation of trade"
Issues	Whether the impugned provision is sufficiently integrated into the Act to sustain its constitutionality - **Yes**
Rule/Ratio	A law can infringe on the jurisdiction of another power if the infringement can be justified as being necessarily incidental (truly necessary) to the regulatory scheme as a whole.
Analysis	**Ancillary Powers Doctrine:** 1. What head of power is being encroached upon? What is the scope of that head of power? • Since this section (from a fed act) creates a civil right of action, it does appear to encroach on prov power → civil action is a prov power • **BUT** although the impugned provisions encroaches on prov power, the provisions is a **remedial one**; federal encroachment in this manner is not unprecedented and in this case, encroachment has been limited by the restrictions of the Act → **Minor Intrusion**

	2. Whether the act/regime is valid (P+S analysis). If not valid, the analysis is over. • *Combines Investigation Act* is **valid** 3. Is the impugned provision sufficiently integrated into the valid legislative act? • Minor Intrusion → Rational Functional Test • s 31.1 reinforces other sanctions of the Act, is bounded by parameters of the Act, and is fundamentally integrated into purpose of Act – therefore it is "functionally related" to act as a whole and is valid = TIGHT FIT
Judgement	**Held:** impugned provisions encroached on prov power in creating a civil right of action, but it was only a limited encroachment • The relationship bw the section and the Act is easily met for the section to be upheld (even if const invalid) *Appeal dismissed*

Quebec (AG) v Lacombe (2010)

(*NOT SAVED by Ancillary doctrine, IJI, POGG Powers)*

Facts	Bylaw #260 restricts Lacombe's use of water airdromes, for which he possesses, a federal license. Municipal bylaws enacted under authority of Quebec's *Act Respecting Land Use Planning & Development*, which prohibits use of aerodromes in certain zones. o *Lacombe*: is claiming that bylaw is ultra vires of fed OR alternatively, it's inapplicable due to IJI: this prov law is trenching on the core of the federal jurisdiction, aeronautics.
Issues	Whether bylaw #260 enacted by prov gov is *ultra vires*. **YES!**
Analysis	**Pith and Substance Analysis** 1) Characterize the subject matter: • Stated **purpose** is to find a balance between the activities of summer home owners and more commercial land uses • **BUT** extrinsic evidence (council meetings) and intrinsic evidence reveal the **narrow purpose** of bylaw is to effectively prohibits floatplanes from landing on the lake • The matter of the impugned legislation is, in pith and substance, **the regulation of aeronautics** 2) Assign to a head of power:

	• aeronautics is fed power, beyond prov powers → Aeronautics fits under POGG in fed power **Bylaw #260 deemed invalid through P+S analysis**. Next, try and save/validate it under **Ancillary Powers Doctrine:** **GM** Test: a rational functional test is applicable bc this is a serious intrustion on fed govt powers Bylaw No. 260 purports to regulate the location of aerodromes without reference to the underlying land use regime → functions as a stand-alone prohibition • THUS it was not sufficiently integrated into the provincial Act. → **not saved by Ancillary Powers Doctrine**
Judgement	Majority judgement Held: *Appeal dismissed* • the impugned portion of the provincial law at issue in this case falls outside the jurisdiction of the province and is *ultra vires* • it is not sufficiently integrated within a valid legislative scheme to be saved under the doctrine of ancillary powers ⇨ thus, the bylaw is INVALID

D. Interjurisdictional Immunity Doctrine (Applicability)

- **IJI** a doctrine which emphasizes exclusivity of jurisdiction
  - used when a generally worded law **is mostly valid but in some of its application it overreaches**, affecting a matter that falls under the other head of power
  - when this doctrine applies, prov laws aren't allowed to have an effect on matters falling within the core areas of fed jurisdiction AND there's NO double aspect to that matter → impairment
- The doctrine immunizes *some* powers from overlaps.
  - It does this by requiring the impugned (but valid) legislation to be "read down" so that it does not apply to matters regulated by the protected power (**issue of applicability**)

- Under IJI, feds can say a prov law is infringing on their head of power w/o even having a fed legislation in place. → doesn't require 2 existing pieces of conflicting legislation

- Doctrine is about "specific power": → hard to define a core for broad HoPs

Specific Powers	General Powers
• 92(10) (a), (b),(c) (+ 91(29)) – federal works & undertakings • 91(24) - Indians & Indian lands (but not Aboriginal Title lands) • 91 (15) – banking • 91(5) – postal services • 91(7) - military • POGG – aeronautics, federal corporations	• 91(2) – T&C • 91(27) – Criminal law • POGG

TEST FOR IJI: (From *Canadian Western Bank)*

Step 1*:* Should the doctrine apply? Is there precedent for applying it to the power in issue? If not, what is the nature of the power that parties wish to immunize? (*Canadian Western Bank*)

- Is it specific or general? Can you define a core? (*PHS)*

Step 2*: Does the impugned provision/legislation trench on the protected "core" of a federal/provincial competence?* (*COPA)*

- **core =** "basic, minimum (min content necessary to make the power effective for the purpose for which it was conferred) and unassailable content" is the core of legislative power (*Bell 2)*
    - The **core of a federal power** is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred
    - You want a specific narrow head of power so IJI is more likely to apply
    - **Minimum content** – the "minimum necessary to make the power effective for the purpose for which it was conferred. (*Canadian Western Bank)*

Step 3*: Does the impugned provision/legislation unacceptably interfere with a federal/prov competency?*

- **Test:** Whether the impugned provision/legislation *impairs* the federal/prov exercise of core competence
- If yes to #1, then determine whether the prov law's effect on the exercise of the protected fed power is *sufficiently serious* to invoke the doctrine of IJI (*COPA)*

Criticism of IJI:

- Goes against approach of cooperative & concurrent federalism which promotes coordination & overlap
- Difficult to define the "core" of a HoP always
- Inconsistent with the doctrine of P+S which allows incidental effect (*Insite)*
- Unnecessary bc parl also had paramountcy which can be used to protect its jurisdiction if needed

- IJI means that despite the absence of law enacted at one level of govt, the laws enacted by the other level cannot have even incidental effect on the so-called "core" of jurisdiction
    - Increases the risk of creating legal vacuums
- IJI is a narrow doctrine
    - Its premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism.

Bell #1: Commission du Salaire Minimum v Bell Telephone Canada (1966)

(*Broad scope of IJI)*

- This case determined the test for when IJI applies

Facts	The *Quebec Minimum Wage Act* gave the Commission, the power to regulate matters like min wage, working hrs, working conditions. Then when the Commission sought to impose a levy on Bell Canada, Bell refused to pay it saying the statue couldn't apply bc of its undisputed status as a federally regulated undertaking
Issues	Whether the Quebec Minimum Wage Act could apply to Bell, an undertaking within exclusive fed juris. Pursuant to s. 92(1)) - **No, provincial law could not apply to federal undertakings.**
Ratio/Rule:	A valid provincial law could NOT apply to federal undertakings if it affected a vital part of their operation or management
Analysis	• Issues related to employment contracts (ie pay, hours etc) qualified as vital parts (**core)** of the management and operation of an undertaking, it followed that the Quebec min wage law couldn't apply to federal undertakings • Act could not apply even though no federal minimum wage law existed at the time.

	• All matters which are vital part of the operation of an **interprovincial** undertaking (province to province) are the exclusive legislative control of the federal government.
Judgement	Court **held**: Q's min wage law couldn't apply to Bell/any other federal undertakings in Q, even tho no fed min wage law existed then
General Notes	This case, enlarged/broadened the scope of IJI to be applicable to federal undertaking • introduced the idea of a "core" jurisdiction

Bell #2: Bell Canada v Quebec (1988)

(*Narrow scope of IJI)*

Facts	Provincial *Quebec Act* gives right to protective reassignment to a pregnant worker. An employee of Bell, a federal telecommunications undertaking, wanted to use provincial health and safety legislation to receive a protective reassignment. Bell challenged • Prov says it has jurisdiction through 92(16) and (92(13)
Issues	Does the valid provincial legislation apply to Bell as a federal undertaking? – **No, law should be read down.**
Ratio/Rule:	Valid provincial laws of general application can apply to a federal work or undertaking, unless the application of these laws would impair the vital or essential elements of these undertakings. ➢ maintained the "affect on a vital part" or "core" test; discussed the idea of a core
Analysis	• The working conditions and labour relations and the management of federal undertakings, are matters falling within fed power s**. 91(29)** • Quebec Act is valid. Question is whether it is applicable. **NO**, **not to federal undertakings** Management of these federal undertakings and their labour relations are matters which are part of this basic and unassailable minimum, as these matters are **essential and vital elements (the CORE of s. 91(29))** of any undertaking. The effect of this prov law is that onto federal undertakings would constitute an encroachment of exclusive jurisdiction of Parliament**. To allow prov law to apply**

	concurrently would strip exclusivity of federal power of any distinct or meaningful content. o Prov law was **read down** so as not to apply to federally regulated undertakings such as Bell Canada. Since the working conditions/management of an undertaking are vital/essential parts of undertaking, prov act could not apply to them.
Judgement	• Provincial legislation was found to be inapplicable via IJI: thus prov law was **read down** so it didn't apply to federal undertakings
General Notes	• IJI if evoked reads down prov law – so it still applies to everything else, just not this particular part relating to a vital/core element of fed undertaking → simply became inapplicable but NOT inoperable • The exclusivity rule approved by **Bell #1**, does not apply ONLY to labour relations or to federal undertakings. It is one part of larger rule AGAINST making works, things or persons under the special and exclusive jurisdiction of Parliament subject to provincial legislation, when such an application would affect specifically the federal jurisdiction over such works, things, or persons are subject.

Canadian Western Bank v Alberta (2007)

(*IJI NOT applied; creates IJI test of "impairment to the core")*

Facts	Banks authorized to promote some types of insurance under federal Bank Act. Alberta makes prov *Insurance Act* to make banks subject to provincial licensing regarding promotion of insurance products. o Banks are trying to claim IJI: that *Insurance Act* is trenching on the core of the federal jurisdiction. The trial judge found IJI could not apply because the promotion of authorized insurance was not at the core of banking, and that the doctrine of federal paramountcy was also inapplicable because there was no operational conflict between the federal and provincial legislation.
Issues	Whether the provincial regulations in the *Insurance Act* apply to federal banks? - **Yes**
Ratio/Rule:	Sets out Test for IJI

Analysis	• The immunity argued for by the banks in this appeal isn't acceptable in the Cnd federal structure bc it exposes the dangers of allowing the IJI doctrine to exceed its proper limit → basically say IJI is too BROAD and list all "criticism for IJI"(*see above)* • When the adverse impact of a law adopted by one level of govt increases in severity from "affecting" to "impairing" (implies adverse consequences) that the "core" competence of the other level of govt is placed in jeopardy • Judge **holds** that: in the absence of impairment, the IJI doesn't apply → not sufficient intrusion (#3 of IJI test) • **Prov *Insurance Act* governing the promotion of insurance products does not impair upon the protected core of the federal banking power, thus, IJI does not apply**. Promotion of insurance is not vital & essential to the undertaking of banking.
Judgement	there's no conflict bw the prov or fed legs at issue and that the prov legs can therefore operate in relation to the banks in Alberta that which to promote "peace of mind" insurance to their customers → IJI not applied, Act applicable
General Notes	Courts don't like using IJI in general, because there is no protection on the fed matter in the head of power that the prov legislation is trying to legislate on – and by striking it down, there will be a legal vacuum that leaves the matter uncovered. That's why they prefer to read it down as well.

COPA: Quebec (AG) v Canadian Owners and Pilots Association (2010)

(*IJI applied; POGG; Lacombe precedent)*

- confirms the test from *Canadian Western Bank* and persistence of the doctrine.

Facts	Federal legislation allows for building private airstrips – no permission is required (permissive regime). Québec legislation protects agricultural regions, requires permission for alternate uses within those regions. Airstrip constructed on private land within a designated agricultural region and application of Québec legislation challenged. Provincial legislation was valid. Question was applicability of the Québec legislation

Issues	whether s. 26 of the Act, having been found valid, *applies* in a situation where it impacts on the federal power over aeronautics – **No, s.26 of the prov legs was ultra vires**
Ratio/Rule:	The location of aerodromes lies within the core of the fed aeronautics power

Analysis	• the prov legs limiting the non-agricultural land uses in designation agri regions is valid. BUT the prov law impairs the protected **core** of the fed juris of aeronautics.
	  • Its inapplicable bc it prohibits aerodromes in agri zones
	
	P+S Analysis (of s.26 of the Act)
	
	• Purpose of Act is to secure territory for agri practices and s.26 prohibits the use of those zones/territories for non agri use
	• Effect of s.26 mirrors its purpose, it prohibits non agri use on those zones unless pre-approved by the Commission
	• HOP = Provs:
	  • Land use planning and agriculture = s.92 (13) property and civil rights (provs) OR s. 92(16) matters of merely local/private nature, OR s.95 agriculture
	  o **Therefore, this is Valid prov law**
	
	IJI Test:
	
	Step 1:
	
	  • Aeronautics is a fed power under the **POGG** clause (back in 1867 it was a big deal enough to be included as its own subsection)
	  • the local aspects of aviation come under federal jurisdiction because the subject matter of aerial navigation is "non-severable"
	  • the federal jurisdiction over aeronautics encompasses the power to determine the location of aerodromes → this is the **core** of the federal aeronautics power
	  • aeronautics is a specific head of power → POGG
	• Precedent has repeatedly indicated that the location of aerodromes lies within the core of the fed aeronautics power*(Lacombe)*
	
	Step 2: Does s. 26 impair the exercise of the **core** of a federal power, in this case Parliament's ability to decide when and where aerodromes should be built.

	• YES it does!!!! → it's a major effect fyi
Judgement	IJI applies in this case bc the location of aerodromes lies at the **core** of the fed competence over aeronautics AND s. 26 impinges on this core in a way that impairs this fed power Legislation found to be inapplicable via IJI , *Appeal dismissed*

Insite - Canada v PHS (2011)

(IJI NOT applicable; prov health power; criticism of IJI)

Facts	Federal legislation (CDSA) applied to make safe injection facility in BC illegal. Insite challenged the applicability of the CDSA (amongst other grounds) Federal leg is valid. Question was applicability of the CDSA to activities under the provincial health power. A preliminary question was also discussed – whether it is appropriate to apply IJI to provincial health power.
Issues	Whether Insite is exempt from the federal criminal laws (under IJI) that prohibit the possession and trafficking of controlled substances either because Insite is a health facility within the exclusive jurisdiction of the Province, or because the application of the criminal law would violate the *Charter*.
Ratio/Rule:	**IJI Doctrine does not extend to provincial health power.**
Analysis	• Quebec AG argues that s. 4(1) and 5(1) of the CDSA are partially invalid bc they exceed parls jurisdiction to enact crim laws. Bc even tho the govt can criminalize the possession and trafficking of drugs in many contexts, prohibiting them in a medical context is ULTA VIRES the fed govt • **P&S analysis** determined that the law was valid in its exercise of fed crim power bc the protection of public health and safety from the effects of addictive drugs is a valid crim law purpose • The provisions have the incidental effect of regulating provincial health institutions BUT does not mean that they're constitutionally invalid. A valid federal law may have incidental impacts on provincial matters **IJI DOES NOT apply because:**

	a) proposed core of the prov power over health has never been recognize before → first case of this subject matter b) <u>you cant identify a delineated "core"</u> of an exclusively provincial power → bc prov healthcare power is so broad and extensive c) Application of IJI to a protected core of the provincial health power has the potential to create legal vacuums. Excluding the federal criminal law power from a protected provincial core power would mean that Parliament could not legislate on controversial medical procedures, such as human cloning or euthanasia.
<u>Judgement</u>	Applicability of the federal legislation upheld. It is not appropriate to apply IJI to provincial health power. - **(However, the Court ordered an exemption for Insite under s. 7 of the Charter).**

<u>Tsilhqot'in Nation v. British Columbia (2014)</u>

(IJI doesn't apply; Aboriginal Title)

<u>Facts</u>	The Tsilhqot'in Nation advanced a claim of Aboriginal title as well as claims of Aboriginal rights across a large territory.The action was provoked by proposed forestry activities in the claimed territories. The Supreme Court affirmed the trial court's findings of Aboriginal rights and title. It also found that the Crown breached its duty to consult the Tsilhqot'in Nation prior to the finding of Aboriginal title.
<u>Issues</u>	1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how?; 2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title?; and 3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada
<u>Ratio/Rule:</u>	IJI is of "limited application" and should be applied "with restraint" – (*Can Western Bank*)
<u>Analysis</u>	• Prov laws of general application apply to lands held under Aboriginal title. Provs have to regulate land use in the prov according to s.92(13), this includes land held by Aboriginal title • BUT this is const limited by s.35 and the fed power s. 91(24) "Indians, and Lands reserved for the Indians"

- the *Forest Act* says that the Crown can only issue timber licenses with respect to "crown timber" on "crown land". Not on private land, but the act doesn't say anything abt Aboriginal title land
- Judge says the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order*
- **So this land was "Crown land" under the Forest Act at the time the forestry license was issued**

Division of Power

- In constitutional terms, regulation of forestry is in "pith and substance" a provincial matter → under s. 92(13) property and civil rights
- But "Indians, and lands reserved for Indians" s. 91(24) is fed power
- THUS: forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over "Indians". → forestry on Aboriginal title land possesses a **double aspect**, with both levels of government enjoying concurrent jurisdiction

Judge Holds:

- This is not an issue concerning conflict of prov legislation trenching on a federal core(not an IJI problem) – but rather how far the prov. gov can go into regulating land that is subject to Aboriginal title (so between province & Aboriginals).
- Also NO paramountcy – because there is no conflict between the law of federal and provincial

Here, IJI would create serious practical difficulties:

1) Prov law would be unconstitutional if it impaired an Aboriginal right
2) applying IJI here to exclude provincial regulation of forests on Aboriginal title lands would produce undesirable results and may lead to legislative vacuums – some forests would be regulated under prov, some under federal, or no legislation

Possible outcome:

Court finds Aboriginal title exits in the land, and as a result, provincial laws can apply to the use of resources on that land. Thus, prov. regulation of general application will apply to exercises of Aboriginal rights and thus, **IJI for provincial**

	regulation should not be applied in cases where lands are held under Aboriginal title (federally regulated Indians)
Judgement	No IJI, *Forest Act* valid and applicable (if the land is proved to be ATL) • grants a declaration of Aboriginal title over the area at issue → first time ever by SCC

General Notes	• this case did have precedent of IJI from the *Delgwammuk* case
	• SCC judge didn't fully apply the IJI test , rather looked at it from s.95
	  o they went with a broader concept of aboriginal title
	• **who would make an argument for IJI?** --> the **fed govt** would bc the provs don't want IJI to apply, they want their prov legs to apply over aboriginal land
	  o the prov legs of the Forest Act didn't apply bc it only talked abt private and crown land, not aboriginal title land
	  o 94% of BC land is Crown
	  o Aboriginal ppl could also have argued for IJI bc they didn't want the prov legs to apply

Bank of Montreal v Marcotte

(Trend – narrowing of IJI; federal banking power)

Facts: Application of provincial consumer laws vs. Banks in regulating their visa cards
- Banks said: Doesn't apply to us because banks are federal jurisdiction – and visa cards are core of banking

Issue: whether the provincial consumer protection act applies to banks

Analysis:

- there is precedent from *Canadian Western Bank* → banking power can be immunized if you can establish that the impugned legislation impairs the core banking power of the feds
- Marcotte applies IJI but fails at the second step
- you cant really make a paramountcy analysis here

Judgement: Provincial Consumer Protection Act provisions regarding disclosure of credit card charges do not impair the core of the federal banking power

- **Court found that regulating visas were in the core of banking.**

E. Paramountcy Doctrine (Operability)

A doctrine of 'necessity' → here you MUST do P+S of competing Acts to determine validity

- The doctrine creates a rule that where TWO VALID PIECES OF federal and provincial legislation conflict, the federal legislation trumps the provincial statute.
- It does this by rendering the conflicting aspect of the impugned (but valid) provincial legislation inoperable for as long as the federal legislation exists.

Provides that in cases of conflict bw fed and prov laws, the fed law is paramount and the prov law is inoperative to the extent of the conflict

- Doesn't mean the prov law is declared invalid! Its operation is merely suspended to the extent that it conflicts with the fed legs
- Narrow reading of conflict: allows both fed and prov laws to operate unless its impossible for those subject to/responsible for giving effect to, the two to legs scheme to comply with both
  - Called: **express conflict** or **impossibility of dual compliance test**
- Broader reading of conflict: holds a valid prov law inoperative whenever it has an impact on a matter already regulated by a valid fed law
  - Called: **"covering the field"** or "**negative implication doctrine"**

PARAMOUNTCY TEST: (*Rothman Test)* → *here we do a P+S of the competing Act too*

1. **Dual Compliance - Can a person comply with both pieces of legislation simultaneously without conflict?**
   - Compliance of one legislation = defiance of other = NO DUAL COMPLIANCE

2. **Even if dually compliant, does prov legislation frustrate the purpose of the federal act?**

- *COPA:* Evidence regarding legislative purpose required before "intention to exclude" can be considered and engage frustration of purpose branch

- Mere duplication without actual conflict or contradiction isn't sufficient to invoke the doctrine of Paramountcy and render otherwise valid prov legs inoperative
- Paramountcy applies when the same citizen are being told to do inconsistent thing and compliance with one act is defiance of the other

Ross v Registrar of Motor Vehicles (1975)

(No paramountcy; dual compliance)

Facts	Under *fed crim code* (s.234), Ross convicted of impaired driving and included an order that he couldn't operate a motor vehicle in any prov for a set time. It didn't suspend his licence, just put limitations on it. BUT the Ont registrar suspended his license anyways for 3 months in accordance with the *Ontario Highway Traffic Ac.* Ross brought an action claiming that s.21 of the was **inoperative** because of its conflict with s.238 of the Criminal Code.
Issues	1. Whether s.21 of the Highway Traffic Act is valid - **YES** 2. Whether s.238(1) of the Crim is valid - **YES** 3. If both are valid, is there a conflict bw the 2 provisions requiring the application of the rule of federal Paramountcy, with the result that that prov legs would be inoperative - **NO**
Ratio/Rule:	If compliance of both is possible and legislative purpose is not frustrated, then paramountcy does not apply.
Analysis	**Paramountcy:** *1) Dual Compliance - Can a person comply with both pieces of legislation simultaneously without conflict?* • The crim code merely provides for the making of prohibitory orders limited to time and place. o IF an order is made regarding the time of suspension of a prov license is in effect there isn't rly repugnant → both legs can fully operate simultaneously • No impossibility of dual compliance here - you can abide the provincial law w/o violating federal laws – laws are not making the person do conflicting things o Crim code provides orders of licence suspension limited to time & place – and strictly speaking, by following the provincial legislation Ross can follow the federal legislation as well. *2) Even if dually compliant, does prov legislation frustrate the purpose of the federal act?* • No, prov legislation is not frustrating the purpose of federal legislation 2 laws can coexist and be susceptible of simultaneous obedience. BC it depends on the intention of the paramount legislature to express by its enactment what shall

	be the law governing the particular conduct or matter to which its attention is directed • so s.238 of CC wasn't intended to deal generally with the right to operate a motor vehicle
Judgement	- s.21 of Highway Traffic Act is VALID and operative legs - s.238 of Crim code is also VALID NO paramountcy argument

Multiple Access Ltd v McCutcheon (1982)

(No Paramountcy; Dual Compliance; Double Aspect; Insider Trading)

Facts	• The *Ontario Securities Act* (prov law) prohibited insider trading in shares trading of the Toronto Stock Exchange (TSE). The fed ***Canada Corporation Act*** had almost identical provisions, applicable to corporations incorporated under federal law • A shareholder action was initiated against insiders of Multiple Access (MA), under the Ont ***Securities Act***, alleging that they took the opp to buy shares in the company relying on their knowledge that the CRTC would soon announce the grant of licenses to MA • **Basically that both acts were valid and could operate bc of double aspect doctrine**
Issues	1) Whether the *Ontario Securities Act* was rendered inoperative to the extent that it overlapped with the almost identical provisions of the fed act *(Canada Corporation Act)*? 2) Whether duplicate legs could operate at both the federal and prov levels or was duplication a kind of conflict that should give rise to federal Paramountcy?
Ratio/Rule:	Mere duplication without actual conflict or contradiction isn't sufficient to invoke the doctrine of Paramountcy and render otherwise valid prov legs inoperative
Analysis	Insider Trading has **double aspect**: Prov – Securities Law → s.92(13) Fed – Companies Law → POGG **Paramountcy Analysis:** **1. No impossibility of dual compliance** • There is no conflict b/w prov & fed law here, both can operate – the citizen can comply with one w/o defying the other.

	• Since the federal and provincial laws provided essentially the same remedy for essentially the same conduct, namely profiting from inside knowledge in the trading of stocks, there was no express contradiction **2. Frustrating the purpose** • There is no true repugnancy in the case of merely duplicative provisions since it doesn't matter which statute is applied; the legs purpose of parl will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the prov law doesn't displace the legs purpose of parl
Judgement	Ss.113 and 114 of the Ontario Securities Act aren't suspended or rendered inoperative in respect of corporations incorporated under the laws of Canada by ss. 100.4 and 100.5 of the Canada Corporations Act – **No Paramountcy**

Bank of Montreal v Hall (1990)

(Paramountcy; broad approach)

Facts	• Hall was a farmer who contract loans from a bank and in return granted the bank a security interest on a piece of farm machinery pursuant to s.88 of the fed *Bank Act*. • Hall defaulted on loans and the bank seized the piece of machinery and brought an action to enforce its real property mortgage loan agreement • BUT the bank didn't follow the procedures from the prov *Limitations of Civil Rights Act*: o S.27 of it says: failure to give requisite notice of intention to seize resulted in the termination of the security interests and the release of the debtor from further obligations
Issues	• Whether the provisions of the provincial Act conflict with federal *Bank Act* triggering paramountcy? – **Yes.** • Whether BMO required to comply with the provincial legislation? – **No, provincial legislation ruled inoperative.**
Ratio/Rule:	Dual compliance is not the only mark of inconsistency. Provincial legislation that displaces or frustrates Parliament's legislative purpose is also inconsistent for the purposes of the doctrine of paramountcy.
Analysis	• La Forest J says after comparing these, there's an actual conflict in operation bw them o The fed *Bank Act* provides that a LENDER may, on default of his borrower, seize his securities BUT the *prov LCRA* forbids

	CREDITORS from immediately repossessing the secured article on pain of determination of the security interest ▪ Parl wished to guard against creating a lending regime whereby the rights of the banks would be made to depend solely on prov legs governing the realization and enforcement of security interests • THUS: compliance with the fed statute, entails defiance of its prov counterpart ❖ To require the bank to defer to the prov legs is to displace the legs intent of parl
<u>Judgement</u>	There's no room left for the operation of the prov legs and that legs should then be construed as inapplicable to the extent that it trenches on valid fed banking legs ➔ provs legs rendered inoperative
<u>General Notes</u>	• SCC: paramountcy only need where it is impossible to comply with both legislative enactments (*Multiple Access).* • There is clear "actual conflict in operation" – cannot comply with both pieces of legislation here, compliance with the provincial Act defeats the purpose of the federal Act. • <u>Distinguished from Ross</u> in that legislative purpose of federal Act actually being replaced. • Sometimes necessary to go farther that the dual compliance test if the legislative purpose is impacted or it directly interferes with exclusive powers (i.e. section 91 banking). • Parliament, under its power to regulate banking has enacted a complete code for the realization of a security interest and provincial legislation in this area frustrates the purpose of the federal legislation.

Rothman v Saskatchewan (2005)

(No paramountcy; dual compliance; Rothman's test)

- **Authority for paramountcy doctrine**

Facts	Federal tobacco legislation *Tobacco Act* 1997, s. 30 allowed retailers to display tobacco and tobacco related products, plus signs indicating availability and price of tobacco products. In 2002, SK passed provincial *Tobacco Control Act* which under s. 6 banned all advertising display and promotion of tobacco and tobacco related products in any premises in which persons less than 18 years of age are permitted. Rothmans brought action seeking the provincial tobacco control legislation be held inoperative by paramountcy.
Issues	Whether the provincial legislation conflict with the federal legislation triggering paramountcy - **No**
Ratio/Rule:	If compliance of both pieces of legislation is possible and the legislative purpose is NOT frustrated than the paramountcy doctrine is not triggered.
Analysis	• **Dual Compliance:** A retailer can easily comply with both provisions in one of two ways: (1) by admitting no one under 18 years of age on to the premises, or (2) by not displaying tobacco or tobacco related products. • **Prov act does not frustrate the purpose of the federal tobacco Act:** The provincial legislation simply prohibits what Parliament has opted not to prohibit in its own legislation and regulations. The provincial Act does NOT frustrate the legislative purpose underlying s. 30 of the federal Act. • Both have the general purpose of addressing a national health problem. Parliament did NOT grant retailers a positive entitlement to display tobacco products in its legislation.
Judgement	• The fed leg and the prov legs were both aimed at protecting young ppls health so there could be dual compliance o there was no frustration of purpose → No Paramountcy • Concerning Federal prohibition regulations, you may have to consider balancing other purposes that is not directly stated in the legislature (ex – in this case, the Fed. gov also had economic interests in mind of the tobacco industry that was not explicitly stated, but this was not available as an option in this case since it wasn't explicitly stated)

Federalism Values Regarding IJI and Paramountcy

- Do we need IJI? What federalism values are promoted by IJI and Paramountcy? What problems to each present?
- **Interjurisdictional Immunity:**
  - "Relying on federal paramountcy to resolve all dispute "relies on a spirit of contradiction between systems of regulation, investigation, inspection and remedial notices which are increasingly complex, specialized and, perhaps inevitably, highly detailed." – Beetz (*Bell #2).*
- Does the restricted application of IJI solve the problem; reconcile the supposed conflict in approaches?
  - "[T]he doctrine remains part of Canadian law but in a form constrained by principle and precedent. In this way, it balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority." – McLachlin CJ (*COPA*).
- **Paramountcy:**
  - "Duplication is 'the ultimate in harmony'. The resulting 'untidiness' or 'diseconomy' of duplication is the price we pay for a federal system in which economy 'often has to be subordinated to … provincial autonomy.'" – Dickson *(Multiple Access).*
  - "Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power a "core" of indeterminate scope – difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. – Binnie & LeBell *(Canadian Western Bank).*

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6. PEACE, ORDER, AND GOOD GOVERNMENT (POGG)

POGG = the power to legislate for the prevention of an emergency/in an emergency

- When the activity (ie aeronautics) in its inherent nature is a concern of the country as whole. The field of legislation isn't capable of division in any practical way
- distinguishing feature of the modern POGG interpretation has been the re-emergence of the national concern doctrine → allows for fed legislation in situations of national concern apart from emergencies (see *Temperance)*
- the **test for POGG** is found in the real subject matter of the legs: if it inherent nature be the concern of Canada as a whole → *aeronautics case and radio case*

- It's the nature of the legislation itself, not the existence of emergency, that must determine whether its valid or not
- **S. 91** also authorizes federal legislation in relation to subject maters not explicitly assigned to either level of govt (*radio reference)*

  ❖ provs argue that when POGG is too broad, it interferes and usurps their heads of power

<u>Three Branches of POGG</u>

1. Gap

- Where discrete subject, not mentioned in 91, 92
- Limited application
  - Eg, *Radio Reference* re treaty implementation
  - Eg, *Jones v NB* (CLG at 297) languages used in fed institutions

- cant exactly say POGG is broad head of power, bc there are specific head of power under POGG (where then IJI works)

- In *Russel* case we see POGG in its broadest form

2. Emergency → must be temporary legislation

3. National Concern → doesn't have any restriction to be temporary restriction

- Early cases (e.g., *Russell* (1882), *Local Prohibitions*(1896)), then overtaken by emergency branch
- *Canada Temperance*
-
- *Federation* (1946): , the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature **be the concern of the Dominion as a whole**
- E.g., Aeronautics is under national concern

TEST FOR EMERGENCY POWER

(From Anti-Inflation Reference)

i. **Is the power temporary?** → MAIN FACTOR
ii. **Is there a specific reference to an emergency? Go to (B)**
iii. **Is the government acting rationally? Is there extrinsic evidence to support their action (does the evidence conflict)?**

(A) When will there be an emergency power w/out a doubt?

- war, insurrection
- prevention or apprehension of war
- pestilence, plague, contagious disease
- consequences of war
- inflation [*Anti-inflation Act*]

(B) Factors to Examine

- Preamble
- Extrinsic evidence – studies and articles about the problem
- Judicial notice – Even if Parliament doesn't put forward extrinsic evidence, there are some things are so well known that the court can take judicial notice of them (ex: economic circumstances in Canada at the time)

Reference Re Anti-Inflation Act (1976)

(POGG; Emergency Powers Doctrine; Criticism of POGG (dissent)

- constitutionality of federal wage increase, national dimensions doctrine and emergency doctrines

Facts	SCC asked to determine the constitutionality of fed wage and price controls that applied In areas traditionally within prov jurisdiction • The act allowed the fed govt to argue its validity under either the national dimensions doctrine or the emergency doctrine (pogg). • The Act established system of price, profit, and income control • Binding on the fed public sector but also applicable to the prov public sector if an agreement had been made bw the fed govt and prov govt • Act says that inflation is contrary to the interests of all Canadians and is a serious national concern • This fed legs is challenged as involving unconst regulations
Issues	Whether the *Anti-Inflation Act* was valid legislation under either the national concern or emergency branches of POGG? – **Yes, valid under emergency branch.**
Analysis	**Majority (Laskin + 3)** • Extrinsic material and prevailing socio-econ situation, bearing on the circumstances In which the legs was passed, should be considered in determining whether the legs rests on a valid const base 1. Characterization of legislation as "containment and reduction of inflation." • Act valid under POGG via emergency branch, possibly also national concern but undecided. **2.** Emergency Doctrine Affects business with a province and could fall under s. 92(13) but fits under emergency doctrine because: - Preamble of Act talks about the seriousness of the current economic situation. - Extrinsic evidence – studies and articles about the problem, Consumer Price Index. → allowed "rational basis" - Judicial Note – Even without extrinsic evidence, some things are so well known (i.e. economic crisis in Canada) court may take judicial notice. Also not for the courts to judge the wisdom of the legislature. → fills in gaps - **Temporary nature of the legislation (REQUIRED).**

	(Dissent – Beetz): • Says the Act interferes with provincial property and civil rights and the law of contract → Its prima facie ultra vires • Characterized P+S as "property and civil rights", looks past preamble to the operation effect. • **Parl can combat inflation thru its own s.91 heads of power or by powers outside of s.92 BUT it cant, apart from a declaration of national emergency or const amendment, combat inflation with the powers exclusively reserved to the provs, in this case the power to make laws in relation to property and civil right** → which is what parl is doing by enacting this Act • The "**containment and reduction of inflation' is not a new subject matter! Its an aggregate of several subjects, some of which form a substantial part of prov jurisdictions.** o Its also lacking in specificity. Pervasive beyond bounds. o Its recognition as a fed power would render most prov powers void/null/worthless <u>CRITICISM OF POGG:</u> • We cant set the precedent that whenever something becomes national in scope, it outgrows its prov jurisdiction • <u>The consequences of such scope of power:</u> **The fundamental feature of the Const, the distribution of powers bw parl and prov would disappear** • "invent new matters by applying new names to old legislative purposes" → theres a lot of matters not explicitly listed in 91/92 • Matters within prov jurisdiction can be transformed by being treated as part of a larger subject or concept for which no place can be found within that jurisdiction
<u>Judgement</u>	**Held:** Act is VALID for POGG and bc of the circumstances under which it was enacted and its temporary character, it doesn't invade prov legs jurisdiction
<u>General Notes</u>	(*Laskin*) It was decided that legislation was valid as "crisis legislation" being for the POGG of Canada. The judges looked at **extrinsic evidence** (ex – Consumer Price Index) <u>to conclude that Parliament had a rational basis for regarding the Act was a measure, which was temporarily necessary to address an economic crisis.</u> • Parliament's authority to act as it did was supported by its jurisdiction over monetary policy and regulation of trade & commerce. It was therefore

	unnecessary to consider the national interest argument. Also looked to preamble of legislation • Even if the legislation is not temporary you need to look at circumstances during which the legislation was passed, it could still be justified in the circumstances and if the circumstances cease to exist, the legislation would no longer be valid. **After this reference, in 1985 Parl enacted the *Emergencies Act* which defines national emergency, which exceeds the capacity of prov or cannot effectively be dealt with under any other cnd law**

National Concern Doctrine

National dimensions/concern doctrine is a possible basis of const validity under POGG

1. The **national concern** doctrine **is separate and distinct** from the national **emergency** doctrine of [POGG]. Main feature of emergency power: a constitutional basis for what is necessarily legislation of a temporary nature.

2. The national concern doctrine applies to both **new matters** which did not exist at Confederation **and** to **matters that have become ones of national concern**, although originally matters of a local or private nature in a province, and no emergency;

3. For a matter to qualify as a matter of national concern in either sense it must have a **singleness, distinctiveness and indivisibility** that clearly distinguishes it from matters of provincial concern and **a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution**;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be **the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.**
    - **The prov failure to deal with the intra-prov aspects of matter could have an adverse effect on extra-prov interests** → this criteria isn't determinative
        - this test also determines whether a matter has the characteristics of singleness or indivisibility required to bring it within the national concern doctrine
        - ONLY the aspect of the problem that is beyond prov control can appeal to POGG bc pogg bestows only residual powers, the existence of a national dimension justifies no more fed legs than is necessary to fill the gap in prov powers

Test for National Concern Doctrine *(From R v. Crown Zellerbach)*

1. New
2. Singleness, distinctive, indivisibility (functional/conceptional)
3. Provincial inability (gap-filling, intra-prov cooperation)

Conceptual v functional Indivisibility

Conceptual indivisibility test: has to be applies to the matter of national interest, not the legs means employed to ensure its regulations

- Conceptual indivisibility should hinge on whether the totality of legs means necessary for its overall regulation amounts to an important invasion of prov spheres of power
- Approach used in *anti-inflation* by Beetz dissent

Test for indivisibility: consider what would be the effect on extra-prov interests of a prov failure to deal effectively with the control/regulation of the intra-prov aspects of the matter

R v Crown Zellerbach Canada Ltd (1988)

(POGG works; National Concern; Provincial Inability)

Facts	C was charged with dumping wood waste materials into the sea contrary to the federal *Ocean Dumping Control Act.* Trial judge found s.4(1) of the federal *Dumping Control Act* to be ultra vires and dismissed charges. Feds argue that this deals with national concerns over pollution.
Issues	Whether the control of pollution from dumping substances in marine waters (including prov waters) is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other prov waters - *Yes theres a weak distinction bc of scientific evidence of the distinction bw fresh water and salt water pollution*
Ratio/Rule:	Marine pollution was a matter of national concern bc it was predominantly extra-prov and intl in character and implications, and possessed sufficiently distinct and separate characteristics as to make it subject to POGG
Analysis	• the **purpose** of the Act is to regulate the dumping of substances at sea in order to prevent various kind of harm to the marine environment

	Positions:
	
	• **AG of Canada** says that control of dumping in prov marine waters is POGG c it's a matter of national concern.
	• **Characterization** of the matter is the **prevention of ocean or marine pollution**
	• the **resp** says that this act is controlling ALL DUMPING, even of non-pollutant stuff
	• **Judge** says its **necessary** to prohibit the dumping of ANY substance w/o permit, in roder to prevent marine pollution
	• Marine pollution is a national concern bc of its extra-prov and intl character and implications
	• The indivisibility of this matter is that its difficult to ascertain through visual observance the actual line bw where territorial sea and the internal marine waters of a state meet
	
	NCD Test
	
	o Dumping to pollute marine waters was held to be **sufficiently indistinguishable** from dumping to pollute fresh water to meet requirement of **singleness or indivisibility**.
	  o The Ocean Dumping Control Act distinguished between pollution of salt water and pollution of fresh water, therefore its impact on prov jurisdiction had ascertainable and reasonable limits.
	o **"Provincial inability test"** – lack of cooperation b/w provinces to pass legislation to tackle this problem
	o Marine pollution is a concern to Canada as a whole
	  o Marine pollution was held to be a matter of **national concern** b/c of its predominantly extra-provincial and international character.
	
	Dissent (La Forest) → Criticizes NCD/POGG
	
	• La Forest says that the activity in this case is a **local work and undertaking** (s.92 (10)) → matter is prov legs power
	• Ocean pollution doesn't meet the NCD test of being characterised by singleness, indivisibility, and distinctiveness
	
	• But the potential breadth of fed power to control pollution by use of its general power (POGG) is so great that it could just end up posing a const challenge of developing judicial strategies to confine its ambit

	• S. 4(1) is OVERBROAD! → Act prohibits the dumping of ANY substances in the sea, including provincial internal waters • By conceptualizing broad social, econ, poli issues in a way that all national matters are single indivisible lying outside a HoP, new HOP get created under the NCD, **thereby incidently removing them from prov jurisdiction/abridging the provs freedom of operation**
Judgement	In order for a matter to qualify as one of national concern under POGG, it must have **ascertainable and reasonable limits** insofar as its impact on prov jurisdiction is concerned (**Anti inflation reference)** THUS: s.4(1) of the Ocean Dumping Control Act is const valid as a matter within the NCD under POGG

	Le Dain	La Forest
The matter	Marine water pollution	Works and undertakings with provincial territory … but considers application of the test to "marine water pollution"
POGG? Scope of national concern	*Distinctiveness of the matter?* Yes - Marine vs fresh water pollution	*Distinctiveness of the matter?* No - Waters intermingle. No clear demarcation. And pollution comes from everywhere…
	Indivisibility? Yes - pollution might move; cannot see the border between territorial sea (fed, international obligation) and internal marine waters	*Indivisibility?* No - no evidence of extra-provincial effect, polluting effect of the dumping in issue. No provincial inability to address…
	Therefore, meets national concern. Must be able to regulate (all dumping) first, figure out whether there are extra-provincial effects later	Therefore, does not meet national concern. Insufficient protection for provincial powers, autonomy.

Friends of the Oldman River Society v Canada

(POGG; Gap case;

Facts	Alberta gov proposed to construct a dam on the Oldman River to create storage reservoir. Approval for project was obtained by Minister of Transport under the *Navigable Waters Protection Act*, however the Minister did not subject the project to an environmental assessment, which was contrary to relevant Federal Environmental Assessment Processes. Claimant wanted to support Fed jurisdiction and have approval thrown out based on breach. Prov argued that this was a project that is wholly within the prov and Federal Gov has no business at all giving authority for project
Issues	Whether the prov/fed gov has jurisdiction over the environment? **Generally, local env projects will fall within prov, but this overlapped with federal jurisdiction (Oceans, fisheries).**
Ratio/Rule:	Even if it's a local project/undertaking, federal participation is required if the project touches on an area of federal jurisdiction

Analysis	• Appellant (Ministers) argue the **pith and substance matter** of the fed guidelines is merely a process to facilitate federal decision-making on matter that fall within parl jurisdiction
	  o Says it gives feds general authority over the env in such a way as to trench on the prov exclusive legs domain
	  o It attempts to regulate the environmental effects of matters largely within the control of the provs, and consequently cant cost be a concern of parl
	• Judge the La Forest says the environment in its generic sense, encompasses the physical, econ, and social environment touching several HoP assigned to both levels
	• **Environmental control, as a subject matters, doesn't have the requisite distinctiveness to meet the test under the NCD**
	• Theres already various HoP which can undertake and address environmental concerns
	• BUT fed participation will be required if the project impinges on an area of fed jurisdiction as in this case

Judgement	*Appeal dismissed*
General Notes	This is an example of gap case: the environmental assessment process has not been dealt with under the constitution, so it can therefore be classified as a federal head of power under residual

7. ECONOMIC REGULATION

TRADE & COMMERCE POWERS FALL UNDER

- **Federal – s.91(2): Trade & Commerce**
  2 branches of federal power:
  a. International & inter-provincial trade & commerce (*Citizens Insurance v Parsons)*
  b. General trade & commerce (see ***General Motors*** for TEST)
- **Provincial – s.92(13): Property & Civil Rights**
  - Intra-provincial trade; local matters of trade & commerce

❖ **Privy Council said regulation of trade and commerce = regulation of trade in matters of inter-provincial concern** (*Citizens Insurance v Parsons)*

- **Advantages to having a central federal power:**
  → Laissez-faire approach – to freely exchange goods between provinces
  → Uniformity
  →Advantages of a national standard:
  i. Equal playing field among competitors
  ii. General consensus between consumers on knowledge of products - consistency

- **Advantages to have divided provincial powers:**
  →Historical outlook – how the country was built upon different provinces coming together as one
  → Protects against a dangerous sole power of the fed gov. – protects the "central gov" from exploiting resources from provinces (Hunger games reference)

The Constitution and the Economy

- Economy regulated in s. 91(2) trade and commerce and s. 92(13) property and civil rights
- S. 121 protects the free movement of goods across prov borders → one of the pillars of the Confederation scheme to achieve econ union
- Econ integration was a goal of federalism as the time of Confederation

- The attainment of econ integration is of central importance to the cnd Const. this was to be done through:
  - Creation of a central govt, the trade and commerce powers **, s.121** and the bldg. of a transcontinental railway → in conjunction were meant to form an econ union

- Balance bw 91(2) and 92(13) must lie somewhere bw an all pervasive interpretation of 91(2) and in interpretation that renders the general trade and commerce power to all intents vapid and meaningless

Case Law: Provincial Economic Regulation

Canadian Egg Marketing Agency v Richardson (1998)

(Barrier to Trade; Economic Regulation; Charter v Constitution)

Emphasizes s. 121 goal to form econ unit for whole of Canada and s.6 to further indiv (human) rights

Facts	Case regard the exclusion of egg producers in the North West Territories from Canada's national egg marketing scheme. The scheme is an interlocking of fed and prov legs. The fed portion of the scheme is administered by the Canadian Egg Marketing Agency Under the scheme, production and marketing quotas are based on egg production levels from 1972, when there was no egg production in NWT. Thus egg producers in NTW, like Richardson are prohibited by law form marketing or exporting eggs interprovincially or internationally Court looked at the purposes served by the mobility guarantees
Issues	Whether the *Alberta Law Society Act* violated s. 6 of the Charter - **Yes**

Analysis	Tension between that and s. 91/92 (division of powers);
	
	• **S. 6** responds to a concern to ensure one of the conditions for the preservation of the basic dignity of the person: mobility in the gaining of a livelihood
	• **Ss. 91 and 92** of the const are designed to regulate all manners of econ activity
	  o **Thus theres a tension in the purposes and text of ss. 91 and 92 of the const and s. 6 of the charter**
	  o The const sections authorize the development of distinct legal regimes in the provs but then s.6 says that an indiv has a right to pursue a livelihood throughout Canada w/o discrimination
	
	• In **P+S** its not aiming to exclude Richardson, so it doesn't trigger s. 6 of charter rights

	• **McLachlin** says that excluding NWT egg producers from national egg marketing scheme is a counter-productive impediment to their right to pursue their chosen livelihood in the prov of their choice
Judgement	Majority finds that purpose of the act does not violate s. 6

Carnation Co Ltd v Quebec Agricultural Marketing Board (1968)

(Economic Regulation; Provincial Power over Econ Regulation; Incidental Effect)

Facts	Quebec Agricultural Marketing Act created Board that producers of agricultural products in Quebec could apply to for approval of joint marketing plans and arbitration. Carnation (P) was milk company which sold most of milk outside the province. Board approved Carnation Company Milk Producers' Plan which bound all milk producers shipping to Carnation plants in Quebec and set up board to negotiate for products on marketing and sale of products. When there was no agreement on purchase price, Board arbitrated and made orders to set a price. Carnation argued price orders were invalid because they enabled Board to set price for Carnation to pay for product that will largely be exported out of Quebec, infringing on **federal "trade and commerce" power.**
Issues	Had the marketing board infringed on the fed powers of T+C under s.91(2)? **No; orders were *intra vires* province of Quebec.**
Ratio/Rule:	The legislation only affected extra-provincial T&C INCIDENTALLY. **Province can regulate T&C within the province even though it has affects outside the province as long as those affects are incidental.** The pith and substance of the legislation will help to determine if *intra vires*. We have to be concerned at what the legislation is **aimed at**, if it is aimed at trade outside the province or inside the province.
Analysis	**P+S** of *Quebec Agricultural Marketing Act* **Purpose** of this order was to regulate, on behalf of the Q dairy producers, their trade with A for the sale of their milk **Effect:** the increased price of doing business for Carnation inter-provincially; EVEN THOUGH the effect fell outside province but this was not enough to deem Board invalid (**merely incidental effect**)

	• Judge doesn't completely agree that just bc these order may have some impact upon Carnations interprov trade necessarily means that they const a regulation of trade and commerce within 91(2), to thus render them invalid • **Judge says**: this transaction has an **incidental effect** upon a company engaged in interprov trade and doesn't **necessarily** prevent its being subject to such control → **incidental effect!** • The P&S of Act was to regulate the price of milk within the province and the effects on T&C merely incidental • They did not restrict or control interprovincial trade, only the cost of doing business. • Act is also in P&S regulating specific businesses and so cannot be a federal matter. • Furthermore, the effect was not such as to alter the purpose of the Act.
Judgement	The three orders had the necessarily incident effect upon the cost of doing business in Quebec for a company engaged in interprov trade, but that by itself isn't enough to made the order invalid – *Appeal dismissed*

AG Manitoba v Manitoba Egg and Poultry Association (Manitoba Egg Reference) 1971

(Economic Regulation; Interprovincial Trade; P&S)

Facts	• ON produces a lot of eggs, QC produces a lot of chickens, and each sought protection of their products vis-à-vis their government. The provinces are regulating marketing schemes for eggs/chicken. In P&S they said it was related to intra-prov trade. • Manitoba govt made its own scheme (with a Manitoba Egg Producers Marketing Board) which controlled the marketing of extra provincial eggs in Manitoba. It applied to all eggs marketed within the prov regardless of whether they were produced in Manitoba o Board regulated marketing, set quotas, standards of sale and prices • Manitoba Court of Appeal said the scheme was not const valid, so Manitoba asked SCC for a reference
Issues	Whether the Manitoba scheme is *ultra vires* the prov legislature bc it trespasses upon the exclusive fed juris to legislate on the matter of regulating trade and commerce?

	➔ WHETHER it was made in relation to the <u>regulation</u> of interprov trade and commerce
<u>Ratio/Rule:</u>	Provinces cannot regulate interprovincial trade. If there are 2+ provinces involved in making a legislation it falls under federal trade & commerce powers.
<u>Analysis</u>	• Judge says in **pith and substance the plan/scheme not only affects the interprov trade in eggs BUT IT ALSO aims at the regulations of trade in eggs** → after P&S the purpose and effect of this legs was regulating inter-prov trade, which is ultra vires the prov power o Essential part of the scheme is to control and regulate the sale in Manitoba of imported eggs, thus its designed to limit the free flow of trade bw provs o SO its constitutes an invasion of the exclusive fed legs authority over 91(2) • The prov scheme is *prima facie* an invasion of fed s. 91(2) T&C power BECAUSE: o Its direct **purpose** is the regulation of importing eggs → prohibition of importation is beyond the prov legs jurisdiction (that's crim power) o To permit a prov to seek its own advantages by restricting its borders to entry of goods from others would be <u>to deny the aim of Confederation to form an econ union</u> • **<u>Rule (?):</u>** prov authority cannot extend to the control of extra-prov trade
<u>Judgement</u>	Plan *ultra vires* Prov 92(13); encroaches on Federal Power of s 91(2).

Reference Re Agricultural Products Marketing Act (1978)

(Distinguishes production and marketing)

Facts	Fed Minister of Agric & provs entered into an agreement to develop a **comprehensive national egg marketing scheme**, regulating the marketing of eggs in intra-prov, inter-prov, and export trade. → Those attacking the legislation alleged that the federal statutes encroached upon prov jurisdiction in relation to local/intra-prov trade & that the prov statutes reached into fed jurisdiction over inter-prov & export trade.
Issues	Can the Ontario government regulate production to complement a federal scheme aimed at inter-provincial trade of eggs? **– Yes.**
Ratio/Rule:	The province does NOT have the power to enact legislation that is aimed at regulating inter-provincial trade and commerce. Provinces CANNOT control production outside the province.
Analysis	**Held:** control of production is *prima facie* a matter falling within the prov jurisdiction (a local matter) • the **decision from *Carnation* proves** that prov jurisdiction over undertakings where primary agricultural products are transformed into other food products • Altho ***Manitoba Egg* said**: prov authority cannot extend to the control of extra-prov **trade**…**marketing** doesn't extend to production SO **prov control of production is prima facie valid** o **Judge is making a distinction bw trade and marketing** o Says this prov regulation isn't aimed at controlling the extra-prov trade • Even tho provs can't make use of their control over local undertakings to affect extra-prov marketing, this doesn't prevent the use of prov control to **complement** federal regulation of extra prov trade
Judgement	The marketing scheme here is as a **trade regulation** that is in its essence and purpose related to a prov boundary. - The destination of the eggs was irrelevant. One did not have to inquire whether most or even all of a producer's eggs would eventually leave the province. - The only relevant issue was that the prov had enacted production quotas rather than marketing quotas; marketing does not include production and therefore, **prov control of production is *prima facie* valid.**

Summary and Comparisons: Economic Regulation Case Law

Comparison between ***Carnation and Manitoba Egg****: these cases differ on the characterization of the matter when you do a pith and substance analyses on them*

- In **CARNATION** the wholesale marketing and prices of Quebec milk was controlled by Q law, regardless of whether the sale was export out of prov or sale within prov
    - Decision was that this scheme merely had some effect on inter-prov trade and was const/valid
- In **MANITOBA EGG**, all eggs sold in Manitoba were to be marketed and priced under Manitoba controlled whether they came from within/outside the prov
    - Decision was that the Manitoba legs was *in relation to* T&C as well as *affecting it* and thus unconst

Marketing Cases

	Characterization of provincial law	Held
Carnation (1968)	- although extra-provincial effect on trade in other provinces, board decisions are aimed at factors of production within province (price of milk; input cost to producers like labour)	*Intra vires* 92(13)
Manitoba Egg & Poultry (1971)	- although regulates sale and marketing of products wholly in the province, regulation is aimed at imports from other provinces	*Ultra vires* 92(13)
Agricultural Products Marketing Act, (1978)	- regulation of "production" is *prima facie intra vires* - although provincial production quotas are indistinguishable from those set by fed board in relation to extra-provincial trade, aim of provincial legislation is not interprovincial (+ scheme is cooperative)	*Intra vires* 92 (13)

Trade & Commerce TEST: Federal Economic Regulation

Citizens Insurance v Parsons on federal trade and commerce power:

i. Doesn't correspond to the literal meaning of the words "regulation of trade and commerce"
ii. Includes not only arrangements with regard to intl and interprov trade but also includes GROT affecting the whole dominion
iii. Doesn't extend to regulating the contracts of a particular business or trade

Two branches of federal trade and commerce power:

1) power over intl and interprov T&C → frequently used

- Similar questions as the limitation on provincial 92(13) powers: When does the subject of regulation pertain to flows between provinces, countries and when is it about what is going on within the province?
  - *The King v Eastern Terminal*

2) power of general trade and commerce affecting Canada as a whole → not frequently used

- Similar issues to POGG, national dimension: When does the matter have a national dimension?
- And, when is it a matter affecting "trade generally" as opposed to about a particular "trade" (e.g. from *GM*: Competition law as relating to all kinds of trade and commerce, as a feature of trade generally. Contrast *Parsons* – insurance as a particular trade rather than a feature of trade generally)
  - *MacDonald v. Vapor Canada*
  - *Labatt, General Motors, Kirkbi,*
  - *Securities reference*

Regulation of Interprovincial and International Trade

❖ The federal government has exclusive authority on the regulation of goods, persons, capital, or services crossing provincial or Canadian borders for a commercial purpose. The provinces have no power to regulate such trade; their power is limited to local trade – transactions, activities, or persons located or occurring "in the province".

TEST:

- If a scheme is aimed at the "general advantage of Canada" impacts intra-provincial transactions, the impact is justified if:
  1. Scheme is of national importance: the purpose is marketing internationally and interprovincially, and;
  2. It is necessarily incidental.

The King v Eastern Terminal Elevator Co (1925)

(NOT fed T&C; regulating profits not T&C; local undertaking)

Facts	• This case was a dispute bw farmers and terminal grain abt the arrangements established by the *Canada Grain Act* for compensating the terminal elevators for storing and cleaning the grain • If there was a surplus over 3% of the weight of grain, the elevators made fees for cleaning and storing. • There were complaints the elevators were making unfair profits from the surplus so s.95 (7) was added to the Act • This action was brought forth by the Board against of the terminal elevators after it refused to pay. D company said s.95(7) aka impugned provision was ultra vires
Issues	Whether s.95(7) of the *Canada Grain Act* was *ultra vires* the parliament? **No, *ultra vires* Parliament. It was directed regulating profits**
Ratio/Rule:	Just because a product is used primarily for export, or that a single province cannot adequately regulate the product does NOT mean Parliament can regulate matters of a merely local nature. Assuming there are other sufficient means within Parliament's jurisdiction to achieve the objective.
Analysis	**Pith & Substance** • **Subject Matter:** The **purpose** of this Act is to protect the external trade in grain, by ensuring the integrity of certificates issues by the Grain commission…and the beneficent effect and the value of the system provided by the legs as a whole is indisputable • **HoP:** S. 92(10) local works and undertakings also allows the govt regulate a local work like terminal elevators • Federal level doesn't get the power to regulate such local matters just because "no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme." **Dissent:** Anglin CJC • Say Act is valid – no single province could effectively legislate to cover the field (*provincial inability?)* – sees trade and commerce power as free-standing not subsidiary (requiring separate federal head of power) • Says the impugned section is necessarily incidental to the Act, designed to promote the attainment of the purposes of the Act → which is mainly to clean the grain up to regulatory standard

	• Judicial determination that the Dominion power lacks power to regulate the export of grain could create national emergency
Judgement	Act INVALID
General Notes	After this case, grain elevators were a local undertaking that fell under 92(10c) and were under fed power bc the were for the general advantage of Canada

Black and Co v Law Society of BC (1989)

(Economic Regulation; Mobility Rights and Trade barriers; Charter Violation)

Mobility rights case under s.6 of the Charter

Facts	• Challenge to their rule that prohibited partnerships between resident and non-resident lawyers (personal mobility)
	  o Black was not a cnd citizen, and before you could only be licensed to be a lawyer in Canada if you weren't a citizen.
	  o This rule prevented the partnership, even tho national firms were trying to make it into the prov markets
	• S. 6 = guarantees a citizen the right to pursue the gaining of a livelihood in any province
	• S.6 of Charter to address concerns re: barriers to interprovincial economic activity – here: violated

Issues	Whether the *Alberta Law Society Act* violated s. 6 of the Charter - **Yes**

Analysis	• The attainment of econ integration is of central importance to the cnd Const. this was to be done through:
	  o Creation of a central govt, the trade and commerce powers **, s.121** and the bldg. of a transcontinental railway → in conjunction were meant to form an econ union
	• Cnd citizenship carries with it certain inherent rights, including some form of mobility rights → right to enter and right to work in a province
	• This attribute of citizenship lies outside the civil rights powers of provs.
	  o Provs can't prevent a Cnd from entering it
	• S. 6 is not expressed in terms of the structural elements of federalism, but in terms of the rights of the citizen and permanent residents of Canada
	• Citizenship and nationhood are correlative

J)udgement	SCC concluded that the rule violated s. 6(2)(b) of the Charter and couldn't be upheld as a reasonable limit under s. 1

The Queen v Klassen (1960)

(interprov trade; valid fed T&C power)

Facts	• Federal legislation stated total quantity of grain delivered by a producer per year could NOT exceed the quota established by the Canada Wheat Board. This was done to enforce & maintain orderly international grain trade. • Klassen was small town manager of feed mill, charged with failing to record delivery of 296 bushels of grain. Klassen purchased the grain to make feed and delivered it himself. The grain was NOT at any time engaged in inter-provincial or export trade nor were the products been used in interprovincial or export trade. • Klassen convicted and appealed to CA, arguing that s. 45 of the *Canada Wheat Board Act*, which declared all elevators and other buildings used in the grain trade to be works to the general advantage of Canada was *ultra vires* in respect to his feed mill.
Issues	Is a scheme aimed at international and interprovincial trade able to regulate intra-provincial (within province) transactions? – **Yes.**
Ratio/Rule:	A marketing scheme for the "general advantage of Canada" under "trade and commerce" may infringe on intra-provincial property and civil rights if it is ancillary.
Analysis	The Scheme is characterized as: Wholly intra-provincial production and sale via elevator regulated as necessarily incidental to Wheat Board regime re extra-provincial/international trade. (Note: elevators declared national under 92(10)(c)) • The quota system infringing on intra-provincial trade is justified because it aims to regulate the amount of grain in the market as a whole and not just interprovincially. • Also grain products now traded intra-provincially may be trade inter-provincially in the future or after the initial transactions. • **Failure to regulate intra-provincial transactions regarding surplus in grain elevators would jeopardize the entire scheme.**
Judgement	*Intra vires* under 91(2) (Branch 1: interprov trade)

General Regulation of Trade

- **The General Regulation of Trade** doctrine emerged from *Citizens Insurance v Parson*s 1976, where the privy council said it was fed juris

Test to see if something falls under general regulation of trade (GROT)

- Test lies in the tension bw the GROT doctrine and the dominant mode of analysis in T&C cases which emphasize a need for an interprov /intl flow of products in order to justify fed regulation of local transactions intertwined with cross-border flow
- GROT allows for fed regulation of intra-prov transactions if there's sufficiently important national interest to warrant such regulation
- **Must** see if the fed measure regulates a national econ problem of interest of the whole country, even if it does so at the state of production/retailing in prov

- **THE TEST** requires judges to make controversial and difficult decisions abt the importance of the national interest at stake and the impact of fed regulations on prov autonomy in the con sphere

- Also whether the impugned measure dealt with interprov or intra-prov trade

Dickisons on the general trade power:

- The general trade and commerce power is used to apply legislation equally and uniformly throughout the country
- BUT the regulation of a single trade/business in the prov can't be questioned of interest throughout the whole country bc it lies at the very heart of local autonomy enshrined in the const
- When feds try to carry out regulations dealing with T&C, it overlaps and nullifies the jurisdiction conceded to the provs
- The GROT power is applicable when there's a single integrated national unity rather than a collection of separate local enterprises → this would still have incidental effects on property and civil rights, but the P+S of those legs will be national interest
- GROT is needed to improve econ welfare at large, regulate intl competition etc

General Branch Analysis (GM)

TEST of validity for legislation under GROT branch of T&C power: → to prevent encroachment on prov jurisdiction

5 factors that provide "a preliminary checklist of characteristics" of legislation that will fall under the general branch of T&C:

1. **The impugned legislation is part of a general regulatory scheme.(The Act contains a regulatory scheme).**

2. **The scheme is overseen by a regulatory agency.**

3. **The legislation must be concerned with trade as a whole rather than with a particular industry.** (*Laskin)*

(*Dickinson Adds)*

4. **The legs should be of a nature that the provs jointly or severally would be const incapable of enacting** →Look to govt reports, bna act etc
   - addresses the constitutional capacity of the provinces and territories to enact a similar scheme acting in concert

5. **The failure to include one to more procs or localities in a legs scheme would jeopardize the successful operation of the scheme in other parts of the country**

➔ *Note 1:* (Its inherently contradictory if certain provs or localities weren't included bc then it effectively would no longer be national legislation. A prov which isn't covered, then companies could just end up setting up there and evade the anti-competition regulations. So for the interest of the national econ, if you wanna regulate anti-competition, it has to apply nationally)

➔ *Note 2:* Provincial inability from National Concern Doctrine corresponds to #4&#5 of the GM Trade Branch test

Labatt Breweries of Canada v AG Canada (1980)

(Fed T&C Powers; GROT)

Facts	• Federal *Food and Drugs Acts* (1970) regulated the content of a variety of food and drug products. The standards set by the act were prescribed by regulations passed pursuant to the legislation (the enabling legislation!) • The **issue** was abt the regulations prescribing min and max alcohol content for beer marketed as "light beer" • Labatt marketed "special lite Beer" which exceeded the max allowable alcohol content • So Labatt challenged the validity of the Act. Feds justified it under 91(2), Pogg, and crim law power
Issues	Whether the federal food and drug labeling regulation was *ultra vires* because it impacted intra-provincial trade? – **Yes.**
Ratio	Parliament CANNOT regulate on a specific industry, and can only regulate trade and commerce as a whole.
Analysis	• **Majority** held that the first branch of *Parsons*, which gave the fed govt power over interprov and foreign trade, WAS NOT applicable bc this impugned regulation was concerned with production and local sale **Judge Esty**: said the subject matter P+S of this is focusing on regulating the local production of beer, which is a single industry. Not the sale/trade of the beer → so it's not general trade and commerce power. • The 2nd branch of *Parsons* of general trade power also wasn't applicable bc the fed T&C power should regulate each industry in every sector diff, thus its not a sweeping general sense • There's no federal "labelling power" standard → Labelling legs typically prescribes no standards for the production/marketing of a product o this would have no consumer protection purpose • judge found no basis for the legs in either crim law power o it wasn't aimed at protection of health or the prevention of deception • Not POGG power either bc it wasn't a matter of national concern Dissent:

	Laskin: found it valid on a broader ground under the authority of general trade power → parl should be able to enforce a common standards to equalize competitive advantages, and for broader interest of econ to regulate food and medicine.
Judgement	Majority held that the Act and regulations, insofar as they applied to light beers was *ultra vires*

General Motors of Canada v City National Leasing (1989)

(*Fed Econ Regulation; GROT; Ancillary Doctrine; Parsons case)*

Facts	• Sec 31.1 of the fed *Combines Investigation Act* creates a civil cause of action for certain infractions. BUT civil a cause of action is within the domain of the prov to create • CNL indirectly purchases vehicles from GM and finances the purchase thru GM's interest rate support programme. CNL alleges that GM had been paying preferential interest rate support to CNL's competitots. And that GM's exclusion of CNL from the prefential interst rate support program was a practice of price discrimination contrary to s.34(1) of the Combines Act, giving CNL action under s. 31.1.
Issues	Whether s.31.1 of the *Combines Investigation Act* is constitutionality valid? **Sub issue:** • Is the act valid under the fed T&C power • Is s. 31.1 integrated with the Act in such a way that it too is *intra vires* under 91(2) – **Yes, it's valid**
Ratio	**Infringement on provincial heads of power may be justified if it satisfies the test for the general branch of the federal trade and commerce power** • A scheme aimed at the regulation of competition is type of legislation that could not practically or constitutionally be enacted by a prov govt. It must be regulated federally
Analysis	• The actual words of s. 91(2) assign a very broad interpretation and scope of powers to the feds o The narrow interpretation" includes the poli arrangements in reagrs to trade requiring the sanction of parl, regulation in matters of inter-prov concern and general regulation of trade affecting the whole nation.

- CNL is trying to uphold the impugned provision s. 31.1 under the 2nd branch of federal T&C power from *Citizens Insurance*:
    - power of general trade and commerce affecting Canada as a whole

Indicia of valid exercise of general T&C power: serve to ensure that fed legs don't upset the balance of power bw fed and prov govt

- According to **GM Test** this legs is valid bc we're dealing with anti-competition legislation (regulatory scheme), which is of national interest for the whole dominion

Ancillary Powers Doctrine:

1. **Whether the impugned provision can be viewed as intruding on prov powers and to what extent → Does s. 31.1 encroach on prov powers?**
    - YES bc it creates a civil right of action, but it's a limited encroachment

2. **Establish whether the act or a severable part of it is valid**

➔ Here, we apply the GM Branch Analysis test to determine validity

i. Does s. 31.1 encroach on prov power?

- Yes, see above.

ii. Whether the Act contains a regulatory scheme

- YES. The existence of a regulatory scheme is evident through the whole Act
- Divided into 8 parts which list out the diff roles and regulatory bodies. Act embodies a complex scheme of econ regulation
- **Purpose of act** is to eliminate activities that reduce competition in the marketplace

iii. The validity of the regulatory scheme under the general T&C power

- The scheme regulating anti-competitive activities operates under the watchful gaze of a regulatory agency. The entire process is vigilantly observed and regulated.
- The scheme is national in scope, and local regulation would in inadequate

3. **Whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship (seriousness of encroachment)**

	• The *Combined Investigation Act* is a complex scheme of competition regulations aimed at improving the econ welfare of the nation as a whole. It operates under a regulatory agency. It's designed to control an aspect of the econ that must be regulated nationally if it's to be successfully regulated at all. → **provincial inability**
Judgement	The Combines Investigation Act as a whole is *intra vires* the Parl legs jurisdiction. S. 31.1 was an integral, well-conceived component of the econ regulation strategy in the Act. → *Appeal dismissed*

Reference re Securities Act (2011) – Securities Reference

(not GROT; provincial cooperation; GM Test; regulatory scheme)

Facts	• The Act, as proposed, does not seek to unilaterally impose a unified system of securities regulation for the whole of Canada. Rather, it permits provinces to opt in, if and when they choose to do so. • Every province and territory has its own securities laws and regulatory agency, each with a variety of responsibilities → under prop and civil rights power • Canada bases its argument that the proposed Act is constitutional entirely on the s. 91(2) general trade and commerce power
Issues	Whether the fed *Securities Act* is intra vires the fed legs authority - **No, invalid, as it was a mere duplication of prov legislation, only difference is that it was advocating for a cooperative scheme.**
Ratio	Feds cannot duplicate provincial legislation and advocate for a cooperative scheme to justify intrusion of prov jurisdiction.
Analysis	**P+S Analysis:** Purpose: to create a single Cnd securities regulator. To provide investor protection, contribute to the integrity and stability of Canada's financial system Effect: to duplicate and displace the existing provincial and territorial securities regimes (under 92(13)), replacing them with a new federal regulatory scheme. HoP: - the scheme will regulate many matters that also within the prov property and civil rights 92(13) **GM Test:** 1. **The impugned legislation is part of a general regulatory scheme.(The Act contains a regulatory scheme).** – yes in Parts 1 and 2

	2. **The scheme is overseen by a regulatory agency**. – yes there is a national securities commission 3. **The legislation must be concerned with trade as a whole rather than with a particular industry.** – court says yes, securities regulation does apply to Canada as a whole because: <u>preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a particular "industry" and engages "trade as a whole"</u> **4. The legislation should be of a nature that the provinces, jointly or severally, would be constitutionally incapable of enacting.** • The proposed Act reflects an attempt that goes well beyond these matters of undoubted national interest and concern and reaches down into the detailed regulation of all aspects of securities. In this respect, the proposed Act is unlike federal competition legislation • It would regulate *ALL* aspects of contracts for securities within the provinces • the provinces possess constitutional capacity to enact uniform legislation on most of the administrative matters covered by the federal Act • Prov argues that since they were doing it in the past, they can keep doing it despite new legs (means they are capable of it severally). And this is an opt-in regime which says provs can *choose* to be part of it. (**this undermines step 5**). And the feds are going into too much detail to overtake the prov power. **5. The failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.** • Because the main thrust of the proposed Act is concerned with the day-to-day regulation of securities, the proposed Act would not founder if a particular province declined to participate in the federal scheme. • Gov says this is the only way of ensuring national securities regulation for the benefit of the national govt • Doesn't pass on this step **bc of the opt-in feature** bc this option implies that not including all provs wouldn't jeopardize the scheme
<u>Judgement</u>	Act is ultra vires under the general branch of the federal power to regulate trade and commerce under s. 91(2) • This legs wasn't successful bc it went into too much details. Began dealing with contracts etc, which is under prov power o So the court says the feds cant do it under 91(2)

8. CRIMINAL LAW POWER (Federal)

- A crime is an act which the law, with appropriate sanctions, forbids → **Any prohibited act with penal consequences**
    - Ex: *Combines Investigation Act* was a valid exercise of federal crim power

- **A crime is a public wrong involving violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity**
- "criminal law is plenary in nature" → means full, complete, entire, absolute

	Federal	Provincial
To define **prohibitions**/offences, including standards of morality	- 91(27) • POGG in past, some matters which are later treated as criminal (early temperance cases, early controlled substances). Possible in future? • Regulatory heads of power (e.g fisheries)	92(13), 92(16)
To punish, **set penalties** in relation to those offences	91(27)	92(15) (imposition of punishment or fine for enforcing any law of the province)
Criminal **procedure**, procedure relating to enforcement of penalties	91(27) - Role of superior courts, s 96 also relevant	92(14) (administration of justice in the province, including organization of provincial court, both of civil and criminal jurisdiction… provincial crowns)

Criminal Law and Related Powers

Criminal	Regulatory
Prohibition: Simplest form is overall prohibition, nothing to regulate. - Can have exemptions	Once decision not absolutely prohibit - Detailed regulations - Administrative agency
Penalty: Can have ancillary civil remedies (like compensation) **Crime Prevention** cab be a purpose	More **civil remedies** • NB: regulatory scheme with administrative discretion can be under criminal law power • Ex: licensing

Pith & Substance: *In a P+S Analysis, this test goes in Step #2*

The **P+S** of crim law is to maintain and uphold public peace, order, security, health and morality (societal values beyond the merely prudish or prurient), protection of vulnerable groups

- The **CORE** of criminal law is the prohibition of conduct which interferes with proper functioning of society or which undermines the safety and security of society as a whole

- The crim law power has remained broad and relies on fed govt to enact supplementary legislation beyond the Crim Code → ex: health and safety legislation, combines legislation

- Parls power to legislate with respect to the crim law law must necessarily include the power to create new crimes

- crim law may validly contain exemptions for certain conduct without losing its status as a criminal law → exemptions help define crim by clarifying its contours (*RJR MacDonald*)

The Requirement of a Criminal Form *(Margarine Reference)*

- This has been one of the main constraints on fed crim power
- The **form**: standard form of crim law is a prohibition and penalty enforced by the courts
- There are regulatory features in in federal law which can prevent a crim law incapable of being upheld as an exercise of the crim power

P&S test for "criminal law" under s.91(27) (Margarine Reference):

Purpose (Matter):

- A valid criminal law purpose (the public evil): public peace, order, security, health, morality…..

Criminal Law purpose

i. What is the undesirable effect upon the public against which the law is directed?
ii. May be satisfied with a "typically criminal purpose"
iii. Prohibition & penalty preserving:
    - "Public peace, order security, health, **morality**" (***Margarine reference***)
    - "The protection of a clean env" (***Hydro-Quebec***)
    - "the protection of vulnerable groups "(***Malmo-Levine***)

Form: prohibition + penalty

The Limits of morality

Morality has traditionally been identified as a legitimate concern of the criminal law – but now just because an activity doesn't fall under conventional societal values doesn't mean it will be forbidden by crim law (***Malmo-Levine***)

Other Salient Doctrines

- Ancillary – a crim law may contain regulatory features, that are ancillary to crim powers
- Colourability – the true purpose of the statute –
  → prov law can't be colored to be crim (***Morgentaler***)
  → fed law can't be colored to make something of prov jurisdiction crim law

PROVINCIAL HEAD OF POWER

s.92(14): The administration of justice in the province...including...Provincial courts, both of Civil and of Criminal jurisdiction, and including procedure in civil matters in those courts.

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

Margarine Reference (1949)

Full name of case: *Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference)*

Facts	s.5(a) of the *Dairy Industry Act* made it an offence to manufacture, import, sell, or possess any margarine, to make it with anything other than that of milk or cream. A reference was brought to the SCC to determine whether that section was *ultra vires* Parliament.
Issues	Whether s.5(a) of the *Dairy Industry Act* was ultra vires of the Parl either in whole or in part. And if so, in what particulars and to what extent - **YES, Act ultra vires Parliament and struck down the criminal law portion of it.**
Ratio	Criminal laws must have both valid criminal objects (i.e. public peace, order, security, health, morality) while adhering to form requirements.
Analysis	**Pith and Substance:** • the **purpose of** this law (*DIA)* seems to be economic and legislative purposes : o gives trade protection to the dairy industry in the production and sale of butter; o to benefit one group of persons as against competitors in the business • **effect:** to forbid manufacture and sale for such an end is *prima facie* infringing on s.92(13) property and civil rights **P&S – Characterization:** the purpose of the act in this case was not related to any purpose such as public, peace, order, security, **health** or morality which would tend to support it as being in relation to crim law. The fed bears the onus of proving that the purpose was of health, and they failed. o **Was in P+S of regulation of economic activity s.92 (13).** The purpose was to give trade protection to dairy industry through regulation of manufacturing and selling of margarine (outlawing certain practices that create competition) even if there is a prohibition and a penalty.
Judgement	• the prohibition in P+S was aimed at regulating the dairy industry • the prohibition was *ultra vires* the fed parl

Health and Criminal Law

- Health is one of the ordinary ends served by the crim law, and crim law may validly be used to safeguard the public from any injurious or undesirable effects
- Scope of fed power to create crim legs with respect to health matters is broad. Only requirement is that legs must contain prohibition + penal sanction, and be directed at a legit public health evil → then its **valid legs**
    - And should be colourable(disguised with an ulterior motive) → no colourable intrusion on prov jurisdiction

- Parl can validly employ crim law power to prohibit/control the manufacture, sale, and distribution of products that present a danger to public health (includes labelling requirements) → ex: DRUGS
    - Includes power to legislate with respect to health warnings on dangerous goods

RJR MacDonald Inc v Canada (AG) 1995

(provides strong confirmation of the broad scope of the fed crim law power; see Rothmans)

Facts	• fed *Tobacco Products Control Act* → aimed at protecting health, young persons from tobacco products, and enhance public awareness of its hazards • Act prohibited all advertising and promotion of tobacco products sold in Canada. Also required display of health warnings • Violating the act constituted offence punishment of summary convictions/indictment/fines Tobacco companies challenged the constitutionality of the legs, saying it was ultra vires the fed govt bc it intruded on s. 92(13) and 92(16) prov laws AND on freedom of expression in the Charter Procedural history: TJ said ultra vires and Appeal said intra vires based on POGG (national concern doctrine)
Issues	Whether the *Tobacco Products Control Act* is ultra vires the fed parl → **No**, **its valid**
Ratio	Parl can validly employ crim law power to prohibit/control the manufacture, sale, and distribution of products that present a danger to public health • Fed parl has undisputed power to regulate unsafe food and products under the cirm law powers

Analysis	• Act is in P+S criminal law: o **Purpose:** prohibit advertising and promotion of tobacco products, and sale of them w/o warning labels → with penal consequences o **Effect:** crimal public purposes → targets the detrimental health effects caused by tobacco consumption. ▪ Shows concern for Canadian's public health = **valid concern** <u>Health:</u> • Note under a specific head of power, can be addressed by either fed or prov legs depending on the circumstances of each case and the scope of the health problem in questions • This Act isn't colourable either → THUS fits all the requirements for valid crim legs regarding a health matter • Theres no evidence that parl was trying on intrude on prov 92(13&16) powers (otherwise, wouldn't they just enact laws abt price control etc if they wanted to ban tobacco) • Outright legislative prohibition on the sale and use of tobacco products would be highly impractical → would lead to increased smuggling & crime • Parl can validly employ crim law power to prohibit/control the manufacture, sale, and distribution of products that present a danger to public health (includes labelling requirements) o Means parl can validly pass legs to prohibit the advertisement and sale of tobacco products without health warnings o This has the same underlying **public purpose:** <u>protecting Canadians from harmful and dangerous products</u> • The presence of exemptions didn't preclude a finding that the legislation was a crim law **<u>Dissent (Judge Major and Sopinka)</u>** • Doesn't agree that fed can prohibit ALL advertising and promotion of tobacco products • The **test** for something to be crim law: the activity which parl which to suppress thru crim sanctions must pose a significant, grave, and serious risk of harm to public health, morality, safety or security before it can fall within the purview of the crim law power • the Act lacks a typically criminal public purpose and *ultra vires* the parl under s.91(27)
Judgement	The Act is in P+S crim law for the purposes of protecting public health. ➢ *Intra vires* the parl power → *Appeal allowed*

R v Hydro-Quebec (1997)

(*very broad interpretation of HoP; POGG)*

Facts	D charged with violation of an interim order made by the fed Minister of Environment restricting its emissions of PCBs, under the fed *Environmental Protection Act*, which established a process for regulating the use of toxic substances Quebec said ss. 34 and 35 of the Act were ultra vires the feds • Feds said it was under crim and POGG powers
Issues	Whether ss. 45, 46 of *Environmental Protection Act* were ultra vires Fed Gov? **No, legislation/provisions are valid exercise of Fed Gov under crim law power.**
Ratio	A regulatory scheme with a large measure of administrative discretion satisfied the formal requirements of criminal law

Analysis	La Forest (+4, majority) – is in P&S prohibitory, satisfies criminal law requirements
	
	• Crim law needs to have a public **purpose** and **protection of clean environment** is a public purpose, sufficient to support a crim prohibition
	  o Protection of the environment and avoiding risk to human life
	• **The purpose of crim law is to underline and protect our fundamental values…stewardship of the environment is a fundamental value of society**
	• Fit as part of criminal law health purposes
	• Environmental protection as a valid criminal law purpose (all agree)
	
	• BUT crim law doesn't constitute an encroachment on prov legislative power, though it may affect matters falling within the prov govts ambit
	
	• ALSO: this fed crim power doesn't stop provs from exercising their power to regulate and control pollution of the environment either independently or to supplement federal action
	
	• Prov said the defn of "toxic substance: under s.11 was too broad
	  o Judge says that broad wording is unavoidable in environmental protection legislation bc of the breadth and complexity of the subject
	  o "toxic" is given the ordinary meaning in the Act
	• This provision is a procedure for assessing which substances can conceivably fall within the ambit of s.11

	○ This is a procedure to weed out, from the vast number of substances potentially harmful to the environment or human life, those only that pose significant risks of that type of harm **Dissent:** Lamer (+3,dissent) – is in P&S regulatory, cannot satisfy criminal law requirements. **P+S Analysis:** of part II of the Act • **Purpose:** The wholesale regulation by fed agents of any and all substances which may harm any aspect of the environment, or which may present a danger to human life or health ○ aimed at protecting the environment and human life and health from aby and all harmful substances by regulating these substances • **Effect:** an attempt to **regulate** environmental pollution than to **prohibit** or proscribe it → goes beyond s. 91(27) fed crim powers **Assign to HoP:** 91(27) → not rly, bc even tho it has a legit crim purpose, but doesn't contain prohibitions backed by penalties, bc it regulates rather than prohibits it • So the REAL aim is not to prohibit toxic substances or any aspect of their use, but simply to control the manner in which these substances will be allowed to interact with the environment POGG → not Pogg bc it fails the test of "singleness, distinctiveness, and indivisibility" (*Crown Zellerbach)*
Judgement	The provisions were valid exercised of the crim law power 91.27 The prohibition is enforced by a penal sanction and is underlined by a valid crim objective → thus valid crim legs *Appeal allowed*
General notes	The environment is a subject matter of shared jurisdiction → not assigned to a specific HoP

Reference re Firearms Act (2000)

(Criminal Law; Incidental Effect; Gun Control)

Facts	• Fed govt passed new gun control legislation, *Firearms Act* which banned/restricted the use of certain types of firearms. It also amended the existing crim code provisions related to firearms by establishing a comprehensive licensing system → failure to comply was a crim offense • In 1996 Alberta challenged Parliaments power to pass gun control laws, the court of appeal had 3:2 majority upheld to pass the law. Alberta then appealed in the Supreme Court.
Issues	Are the licensing and registration provisions for ordinary firearms in the federal *Firearms Act intra vires* Parliament under s. 91(27)? – **Yes.**
Ratio	The fed gov can draft legislation that mimics prov licensing/property matters **if** the underlying purpose is criminal in nature, or for some criminal objective. • **Safety is a valid crim purpose (in addition to Margarine reference rules)**
Analysis	• The essence of the challenge was that the scheme was regulatory rather than crim legislations bc of the complexity of the legs and the discretion given to the chief firearms officer • In P&S, of this act is directed to **enhancing the public safety by controlling access to firearms through prohibitions and penalties. This brings it under fed crim law power**. While the gun control law has regulatory aspects, they are secondary to its primary crim law purpose. (**Incidental**) o The regulation of guns as dangerous products is a valid purpose within the crim law power • Parliament did not enact *Firearms Act* to regulate guns as items of property. Act does not address insurance or permissible locations of use. Rather, Act addresses those aspects of gun control which relate to dangerous nature of firearms and the need to reduce misuse. o The intrusion of parl to prov rights is not so intrusive that it disrupts the balance of federalism → **incidental effect (valid but has an effect)** • Alberta argues the Act is regulatory rather than criminal legislation bc of the complexity of the law • Judge says complexity of the act doesn't detract from its crim nature • Gun control law didn't upset the balance of power bc <u>its effects on property rights were incidental</u>; the Act didn't hinder the ability of the provinces to regulate the property and civil rights aspects of guns
Judgement	• Gun control law fell within parls jurisdiction over crim law

Provincial Power to Regulate Morality and Public Order

Prov s. 92(15) allows the provs to enact penal sanctions, but the power is understood as an "**ancillary**" one, authorizing the use of penal sanctions to enforce prov regulatory schemes that are validly anchored elsewhere in the s.92 list of prov powers

- Some cases, fed has drafted crim laws in ways that allow them to be shaped by provinces in respond to local conditions
- Public order and morality (and safety) gives the proviince concurrent jurisdiction with respects to the sucject of crim law → **s.92(15):** allows prov to enact penal sanctions
- Provinces can regulate "around" the criminal law and have a double aspect in a number of ways
    - Attaching civil consequences, "preventative legislation"
    - Finding a valid provincial anchor
- The province can be critiqued for infringing on: Fed over criminal power itself and/or criminal investigative procedure

Re Nova Scotia Board of Censors v McNeil (1978)

(Prov regulation OK; double aspect)

Facts	Nova Scotia enacted the *Theatres and Amusement Act* which established a system for licensing and regulating the showing of films. Films had to be pre-approved by a censor board before showing in theatres. There was a monetary penalty for breaching the regulations. McNeil (private citizen) challenged and said the regulations that authorized the ban were *ultra vires* the prov legs jurisdiction, invading into fed crim power. Court agree, then Nova Scotia AG appealed to SCC
Issues	Whether the *Theatres and Amusement Act* is ultra vires the prov legislature (bc of its crim penalties) – **No, Act is valid**
Ratio	Legislation which authorizes the establishment and enforcement of a local standard of morality isn't necessarily an invasion of the federal criminal field
Analysis	**Majority – Judge Ritchie:** P+S: **Purpose**: to reinforce the authority vested in the prov appointed Board to perform the task of regulation which includes the authority to prevent the exhibition of films which the Board rejects as unsuitable for public viewing.

	Effect: read as a whole, the Act is primarily directed to the regulation, supervision, and control of the film business within Nova Scotia **HoP:** s. 92(13) property and civil matters • This Act isn't concerned with creating a crim offence. Its concerned with **regulating a business** (films) → this is a regulatory regime, just setting standards for local business (92 (13) and (16)) • It's concern with criminal morality is preventative NOT penal **<u>Dissent – Judge Laskin:</u>** • This is an unqualified power in the NS Board to determine the fitness of films for public viewing on considerations that may extend beyond the moral and may include poli, social and religious • **Held:** the determination of what is decent/indecent/obscene in conduct ot in publication, what is *morally fit* for public viewing, is a fed crim power only • The fed crim power already extends beyond the control of morality, to embrace anti-social conduct to behaviour • The **subject matter** of this is to give a prov authorized tribunal power to define and determine legality, what is permissible conduct and what isn't o This is **direct intrusion into** fed crim law • Board argues that its **purpose** was to exercise preventive power, with no penalty or fine o Court says that's sneaky bc even tho there to penalty for making the film or showing it. When a licensee breached they risked a monetary penalty or revocation of license • Prov only has powers regarding licensing
<u>Judgement</u>	• The Act is in P+S directed to s.92(13) AND 92(16) bc the determination of what is/isn't acceptable for public exhibition on moral grounds can change from area to area in a large country like Canada, thus it's also **valid** under "local and private nature in the province" *Appeal allowed*
<u>General Notes</u>	The Majority is saying that there's a double aspect, that more fed and prov have power to legislate in the field of criminal law

<u>Westendorp v The Queen (1983)</u>

(Prov crim regulations ultra vires; prohibitive effect; colourable; Morgentaler)

Facts	W charged with being on a street for the purpose of prostitution in violation of a Calgary bylaw. The bylaw controlled soliciting on the streets, and breaching it meant a fine or imprisonment. An amendment to the bylaw specifically prohibited prostitution on the streets
Issues	Is section 6.1 of the by-law *ultra vires* in that it deals with criminal law powers? – **Yes.**
Ratio	Provinces have the power to prevent crime provided that they are doing so through a head of power that is within their jurisdiction (the purpose behind the legislation CANNOT be criminal- if the legislation is colourable, it will be invalid).
Analysis	• s 6.1 stands out form all the other preceding provisions in the bylaw **P+S Analysis** • **Purpose** is to Patent attempt to control or punish prostitution • **Effect is prohibition of prostitution by making it an offense** • **HoP →** NOT dealing with property & civil rights. Falls under crim power • The bylaw is over-reaching which offends the division of legislative powers, there's no double aspect • Case similar to ***Morgentaler;*** City try to colour purpose as property & civil rights when it's actually dealing with crim law power • Property has nothing to do with prostitution, province was over-reaching with its powers. This was a **severable** provision of the bylaw prohibiting prostitution that was not integrated with the bylaw itself • Provinces can create offences under section 92(15) but those offences have to be in relation to a matter that can actually be dealt with by provinces (cannot regulate in regards to criminal law).
Judgement	By law was *ultra vires* the city. *Appeal allowed*
General Notes	*How can Westendorp be distinguished from McNeil?* • W was a bylaw didn't have as much of a broad regulatory scheme/regime unlike McNeil • Westendorp is susceptible to too much moral standards and take it too far.

Dupond v. City of Montreal (1969)

(Crim regulations intra vires province; preventative legislation)

Facts	After series of violent public demonstrations, Montreal passed by-law prohibiting parades or other gatherings that "endanger tranquility, safety, peace, or public order." Penalties included fines and imprisonment. Acting under authority from the by-law, the City imposed a prohibition of all public demonstrations for 30 days.
Issues	Was the City by-law, *ultra vires* because it represented criminal law? – **No, by-law *intra vires* City.**
Analysis	- **(Majority):** By-law is a regulation of the municipal public domain, a pre-eminently local matter. Focus is preventative rather than punitive. ⇨ Dupond was a temp ban on public demonstrations in Montreal on the basis that it could endanger public safety or order→ court upholds this on 92.(16), and that's it is preventative legislations - **(Dissent):** By-law is *ultra vires* attempt to reinforce the criminal law "a mini-criminal code." - Emphasized Draconian nature of the law in barring all gatherings, even those for innocent purposes.
Judgement	By law was *intra vires* the city. Court upholds this on 92.(16), and that's it is preventative legislations

Rio Hotel Ltd. v. New Brunswick Liquor Licensing Board (1978)

(Prov regulation upheld; dual compliance; double aspect)

Facts	NB Liq Control Act gave power to NB Liquor Board to restrict licenses to strip bars. Hotel owner challenged on constitutionality considering the relevant provision of the CC.; argued that was under federal jurisdiction and they could not legislate on nudity
Issues	Is section 6.1 of the by-law *ultra vires* in that it deals with criminal law powers? – **Yes.**

Analysis	• **(Dickson):** Distinguishes the provincial provisions and the CC provisions dealing with the regulation of strip bars. Matter is local in nature, **applies the Double-Aspect doctrine.** • There is overlap between the licence condition on nude entertainment and some provisions of the criminal code but **no direct conflict.** Possible to comply with both prov & fed law. → **Dual Compliance** • Doesn't see legislation as penal, in P&S connected to regulatory procedures related to liquor licensing. • If breached - there is only suspension or cancellation of license, not penal sanctions.
Judgement	Provincial legislation upheld. The legislation is *prima facie* related to property/civil rights within Province and to matters of a purely local nature
General Notes	Distinguished from *Westendorp* where the province was trying to colour property as what was really prostitution, here no colourability) (Distinguished from *Morgentaler* because in M it was P+S criminal law, here, it's regulatory

Chatterjee v. Ontario (AG) (SCC, 2009)

(valid prov legs; deterrence;

Facts	Provincial statute, *Ontario Civil Remedies Act*, adding a consequence that may occur under the CC: forfeiture of proceeds of crime. Laws related to seizure of property acquired by criminal means. Act does not require proof that any particular person committed any particular crime, rather enough to prove on balance of probabilities that proceeds of crime (without further specificity) Challenged on constitutional grounds. Province argued that they should be able to recoup cost since they are responsible for enforcing criminal law.
Rule	The province can legislate so land as those measures are taken in relation to a head of power competence and do no compromise the proper functioning of the criminal code ❖ **Deterrence can be a purpose of provincial law**
Analysis	BINNIE (for the court) – points to move away from interjurisdictional immunity, here operation of both statutes – province legislates re: property and civil rights,

	recuperate costs from crime on provinces, not in ordinary federal form of prohibition and penalty • You have to prove forfeiture through a balance of probabilities Provincial purpose: administration of criminal justice within the province completed by recouping costs, deterring crime. SCC found significant Double-aspect between provincial purpose and federal criminal power.
Judgement	Found *intra vires* with "valid provincial objectives."

Goodwin v Ontario (2009)

(Double Aspect; Ross; Chatterjee)

Facts	BC created an Automatic Roadside Prohibition (ARP) scheme. It utilizes breath samples to determine if someone is DUI. Failing the test or refusing to give a sample results in a 90 day license suspension
Issue	Whether the provincial legislative scheme invaded the federal government's jurisdiction over criminal law
Analysis	**P+S Analysis:** Is the ARP Scheme ultra vires the prov? Purpose: to prevent death and serious injury on public roads by removing drunk drivers and deterring impaired driving (and enhance highway safety) Effect: to provide a crim law response to drunk driving without engaging the charter and its attendant procedural protections ➔ Its defs has an *incidental effect* on criminal law bc it targets a specific crm activity and imposes serious consequences. BUT those consequences relare to the regulation of driving privielegs • Judge says: "the imposition of significant financial penalties and the loss of important privileges do not necessarily make legislation punitive. The legal effects can act as a deterrent to serve the goal of highway safety. Both are compatible with a regulatory licensing regime. • The fact that the means used to achieve a provincial purpose may engage different, or fewer, *Charter* protections than the means used to achieve a related federal purpose does not necessarily imply that the provincial *purpose* was to avoid or undermine *Charter* protections.

	P+S of the ARP scheme is the licensing of drivers, the enhancement of highway traffic safety & deterrence of persons from driving on hwys when their ability is impaired by alcohol Head of Power: • jurisprudence makes clear that a provincial statute will not invade the fed power over crim law merely because its purpose is to target conduct that is also captured by the *Criminal Code* → double aspect exists • Falls in s. 92(13) → property and civil rights Police officers have responsibility both for enforcing the criminal law and for seeking to maintain safety on the roads through the enforcement of provincial highway safety laws. The fact that they exercise their discretion to enforce one of these laws rather than another is consistent with police discretion generally.
Judgement	From a division of powers standpoint, the legislation is valid

Chart – Criminal Law Provincial legislation

Provincial legislation valid	Provincial legislation invalid
McNeil (1978): • censorship • provincial purpose - local standards in local transactions, conducting the business	*Westendorp* (1983) • ban of prostitution on streets • No valid provincial purpose; bylaw in issue not well integrated,- supplements/fixes crim law
Dupond (1978) • temporary ban on public demonstrations • provincial purpose – local matters; preventative rather than punitive	*Morgentaler* (1993) • Ban on abortions (etc) except in hospitals • No valid provincial purpose. Provisions, purpose are criminal law not hospitals/health.
Rio Hotel (1987) • liquor license condition prohibiting nude entertainment (extensive regulatory scheme) • provincial purpose – liquor control; prohibition well integrated, no punitive sanctions	
Chatterjee (2009) • forfeiture of proceeds of crime • provincial purpose - administration of criminal justice: recuperation of costs, deterring crime; significant double aspect	

Reference re Assisted Human Reproduction (2010)

Facts	• **Assisted Human Reproduction Act**: Federal legislation contains regulatory scheme aimed at prohibiting & regulating behavior relating to assisted human reproduction, but also to certain types of human genetic research standard of research • Feds - Crim Law **s.91(27)** VS. Prov - hospitals & health care under **92(16)** • Parts of the Act were agreed to be valid criminal law with a consensus by all SCC judges
Issues	Whether certain provisos from the *Assisted Human Reproduction Act* were *ultra vires* the fed parl? (a) The validity of the legislative scheme as a whole (b) The validity of the "controlled activities" prohibitions (c) The validity of the administrative provisions under the ancillary powers doctrine
Analysis	**Majority(** McLachlin**):** - impugned provision are valid criminal legs, • Ss. 5&7 are valid crim legs • Ss. 8-13 are valid but have an incidental effect on the regulation of medical research and practice. it the dominant subject matter of the legs is a crim purpose • Ss. 14-68 aren't crim law in P+S BUT are sufficiently integrated into the prohibition regime to be valid under the ancillary powers doctrine *The validity of the legislative scheme as a whole* **P+S Analysis:** *the pith and substance of the Act is properly characterized as the prohibition of negative practices associated with assisted reproduction (**held**)*. 1. **Characterize the matter:** the stated **purpose** is to prohibit the improper practices associated with assisted reproduction – practices which may undermine fundamental moral precepts that could lead to public health evils and threaten the security of indivs • Quebec argues NO, it's to legislate on health matters (prov jurisdiction) Intrinsic evidence (text of the statute): suggests that its dominant purpose is to prohibit inappropriate practices, rather than to promote beneficial ones

- Dominant thrust of the Act is prohibitory. The Act accomplishes its purpose of prohibiting reprehensible conduct by imposing sanctions → *meets requirements for valid crim law*
- These prohibitions do not prevent the provinces from enacting legislation promoting beneficial practices in the field of assisted reproduction
- These prohibitions give the Act its content and define its purpose.

Extrinsic Evidence: there was a Royal Commission on this issue

Effect: as an impact on the regulation of medical research and practice and hospital administration

- The dominant effect of the prohibitory and administrative provisions is to create a regime that will prevent or punish practices that may offend moral values, give rise to serious public health problems, and threaten the security of donors, donees, and persons not yet born.

- ***Incidental effect:*** while some of its effects may impact on provincial matters, neither its dominant purpose nor its dominant effect is to set up a regime to regulate and promote the benefits of artificial reproduction in hospitals and laboratories.

2) **Assign to HoP**:

- 91(27) - fed crim law bc there prohibition and penalty already. morality constitutes a valid criminal law purpose
- Health – double aspect power shared by both levels
    - criminal laws for the protection of health must address a "legitimate public health evil"

Three features of public health evils that crim law is grounded in
(1) human conduct (2) that has an injurious or undesirable effect (3) on the health of members of the public

Thus held: the *Assisted Human Reproduction Act*, viewed as a whole, is grounded in valid criminal law purposes.

- **Bc** the Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants

- the legislative scheme is not directed toward the promotion of positive health measures, but rather addresses legitimate criminal law objects

	Ancillary Powers Doctrine – GM Rational Function Test *1) Scope of the HoP in play (narrow/broad) → how serious is the intrusion (GM)* - the ancillary provisions fall under prov powers of s.92(13) and 92(16) → but these HoP are very broad and often seen as source of residual jurisdiction. So the intrusion is rendered less serious *2) the nature of the impugned provision* - Without the prohibition regime in ss. 5 to 13, these provisions would serve no purpose; they would establish an agency with nothing to enforce • The Act imposes federal rules on the practice of assisted reproduction, but it does not prevent the provinces from regulating this field • Also Parl has a legislative history of invoking crim law powers to uphold regulatory schemes (*Hydro-Quebec, Firearms Reference)* **Held:** the ancillary provisions constitute a minor incursion on provincial jurisdiction. Accordingly, the rational and functional connection test should be applied in this case. "*It need not be shown that the scheme would fail without the ancillary provisions; that would be a test of necessity. Rather, the ancillary provisions must themselves perform a function that complements the other provisions in the scheme, and they cannot have been tacked on merely as a matter of convenience."*
Judgement	The impugned sections of the Act are valid. The prohibitions in ss. 8 to 13 fall within the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. The remaining • sections are ancillary to this criminal law scheme reform a valid prohibition regime that is consistent
General Notes	The Majority is saying that there's a double aspect, that more fed and prov have power to legislate in the field of criminal law McLachlin Opinion: • "the act is a series of prohibitions followed by a set of subsidiary provisions for their administration" • "the pith and substance is to prohibit practices that would undercut moral values, produce public health evils, and threaten the security of donors = criminal law"

	• The approach McLachlin takes is to look at the Act as a WHOLE – the scheme of the Act <u>LeBel/Deschamps Opinion:</u> • "pith and substance connected with provinces exclusive jurisdiction over hospitals, property & civil rights" • The impugned provisions represent an overflow of the exercise of the federal <u>criminal law power</u>. Their <u>P+S</u> is connected with the provinces' exclusive jurisdiction over hospitals, <u>property & civil rights</u>, and matters of a merely local nature. • The impugned provisions affect rules with respect to the management of hospitals, since Parliament has provided that the Act applies to all premises in which controlled activities are undertaken • The approach LeBel/Deschamps looks at it here is the individual provisions <u>Cromwell Opinion: **DISSENT**</u> • "s. 8,9,12 prohibit negative practices associated with AR, and are criminal legislation" • "s.60, 61 create offences/criminal" • **Disagrees with McLachlin <u>and</u> Lebel/Deschamps:** o The approach Cromwell takes is that of LeBel/Deschamps is to look at the provisions to see if P+S they are valid, but Cromwell views the provision as a WHOLE o Matter of the challenged provisions as a whole of provincial jurisdiction • **But Cromwell strikes down certain provisions, and allows some – making** **It look like he took more so a provisionary approach like LeBel**

Long) Gun Registry (2015) - Quebec (AG) v Quebec (AG)

(*Fed Crim power)*

- the overall legislative scheme of gun control by the feds has been already upheld as valid

Facts	• Next in the saga on gun control – feds repealed provisions on long gun registry and provided for destruction of data • Qc intent to create own gun registry – wanted data related to long guns in the province – sought order against destruction and to hand information over Quebec that Parliament's legislative jurisdiction with respect to criminal law does not allow it to legislate for the destruction of the long-gun registration records without first making this data available to provinces seeking to establish their own registries - destruction of gun registry data was already held as valid
Issues	Whether s.29 of the *ELRA* is ultra vires the fed govt
Ratio	
Analysis	Court's conclusion in this case partly rests on the fact that the Canadian Firearms Registry ("CFR") flows directly from federal legislation and is not dependent on any provincial statutes. **Cooperative Federalism:** Quebec actively trying to instrumentalize this principle to get a remedy Quebec is basically asking the court to recognize that the **principle of cooperative federalism** prevents Canada and the provinces from acting or legislating in a way that would hinder cooperation between both orders of government, especially in spheres of concurrent jurisdiction. • But theres limits on the principles of cooperative federalism. The primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework (*Quebec Secession Reference)* • The principles of cooperative federalism cant be seen as imposing limits on the otherwise valid exersice of legislative competence (*Anti-inflation reference)* • Bc while flexibility and cooperation are important to federalism, they can't override or modify the separation of powers (*Securities Act Reference)*

	• Court **holds** that the principle of cooperative federalism does not prevent Parliament from exercising legislative authority that it otherwise possesses to dispose of the data. *Is Section 29 Ultra Vires Parliament's Criminal Law Power?* **P+S Analysis:** • **Purpose** of s.29 is simply to determine what will happen with the data collected under a now repealed legislative scheme → public safety (same subject matter as was in *Firearms reference)* **Effect** : s. 29 of the *ELRA* has the practical effect of making it more difficult financially for Quebec to create its own gun control regime s. 29 of the *ELRA* should be characterized as being in relation to criminal law. It therefore falls within the legislative competence of Parliament. **Majority** (Cromwell and Karakatsanis + 4) principle of cooperative federalism does not constrain federal legislative competence; while flexibility important cannot override or modify separation of powers – start with simple P+S analysis – valid under crim law power **Dissent**: gun registry- was partnership with provinces – data destruction ultra vires but no basis for ordering transfer → said s.29 was *ultra vires the fed* that it was s.92(13)
Judgement	The principle of cooperative federalism does not constrain federal legislative competence in this case, Quebec has no legal right to the data, and s. 29 of the *Act to amend the Criminal Code and the Firearms Act* (short title *Ending the Long-gun Registry Act* ("ELRA")), is a lawful exercise of Parliament's criminal law legislative power under the Constitution *Appeal dismissed*

FEDERAL SPENDING POWER

Mechanisms for Flexibility

- Spending power (Federal)
- Inter-governmental agreements
- Delegation

Spending Power

- **Related provisions of the Constitution (1867):**
  - **Section 91(3):** "the raising of Money by any Mode or System of Taxation"
  - **Section 91(A):** "The Public Debt and Property"
  - **Section 106:** "Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service."
  - **Section 36 (2), *Constitution Act, 1982* –** commitment to equalization payments: "Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

Federal Spending Power: The ability of the federal gov to spend $ beyond the limitations of its regulatory heads of power. Includes cost-sharing/block grants, equalization grants

  - Can be used to create national policies, standards via conditions on funding
- They CAN deliberate their federal spending power at issues which fall at provincial jurisidiction → they can use fiscal means to influence decision making and policy in areas which fall under prov jurisdiction
- Federal govt has the largest taxation power, which they can implement at the prov level.

Criticism:

- Less poli accountability
- Blurring of the lines of who has authority to deal with those fiscal matter

Constitutional Limits:

1) Tax power will not anchor all legislation spending those taxes (*UI Reference*) VS.
2) Spending Power not constrained by just having an impact on prov heads of power, and may even be directed at prov subject matter (*CAP Reference*)

- Sections: 91(1), 91(2), Ss. 53 & 54 (process of legislation money bill → ex: *Canada Assistance Plan)* s.32 (commitment to equalization payments)

3 Federal Policy Instruments in Creating Pan-Canadian Social Programs:

1. **Direct Federal Programs** - the provision of benefits directly to citizens
    - 3 formal amendments to constitutional division of powers gave fed gov complete authority over Unemployment Insurance, and substantial authority in area of pensions.
    - In addition, under **doctrine of spending power**, fed gov claimed a right to make payments to individuals, institutions or other govs for any purpose & argued that **they do not represent an invasion of prov jurisdiction as long as they do not constitute regulation of the sector.**
    - The **federal role in taxation** constitutes a powerful instrument in redistributive policies, especially with the development of a fuller array of refundable tax credits and benefits
        - Fed gov developed a significant direct present in social policy. (i.e. – unemployment insurance, Family allowances, CPP, etc)

2. **Shared-Cost Programs** - federal shared-cost programs in areas of prov jurisdiction
    - Under these programs, fed provide financial support to any prov mounting a program that met conditions or standards specified in federal legislation. In this way, the federal gov stimulated the expansion of key social services, and established a common framework for program design from coast to coast
    - Most shared-cost program grants come with conditions

3. **Equalization Grants** - equalization grants to poorer provinces
    - Equalization grants have always been unconditional; could be used to reduce prov taxes rather than enhance prov programs
    - Funds under equalization can be spent on any manner of prov program & don't have to comply with national standards.
    - Equalization payments could be substituted for prov tax revenues, and therefore allocated to tax freezes or reductions.

Canada Health Act

(Example of Federal Spending Power; Shared-Cost program)

The *Canada Health Act* defines conditions that must be met for federal payments to the provinces to be legal; these "conditional grants to the provinces allow the federal government to indirectly regulate social policy through the use of financial incentives, an end they are constitutionally precluded from achieving directly through legislative or "coercive" means." (Choudhry)

- Provinces have more significant powers over health (92(13), 92(16), 92(7))
- Parliament has some powers over health (crim power, 91(27))

Constitutional Challenges:

- Various conditions on delivery of medical care to get fed payments
- Conditional grants to provs allow fed gov to indirectly regulate social policy through the use of financial incentives, an end they are constitutionally precluded from achieving directly through legislative or "coercive" means
- Provs have more significant powers over health (92(13), 92(16), 92(7))
- Fed has some powers over health: crim power 91(27)

Intergovernmental Agreements

- Contract like (in the public domain), but also broad policy instruments. They cover all kinds of issues from delivery of services to the provisions of funds
- Agreements made by governments, but can't bind legislatures (decisions in *CAP*):
    - Because of the principle of parl sovereignty
    - "It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the Plan. To assert the contrary would be to negate the **sovereignty of Parliament**."
- Fed & prov govs enter into agreements on matters within their authority
- Courts are uncertain on how to enforce intergovernmental agreements
- Ex: Canada Assistance Plan – retains power of fed to amend/repeal Acts

Reference Re Canada Assistance Plan (BC) (1991)

(Federal Spending Powers; Parliamentary Sovereignty

This case dealt with the enforceability of intergovt agreements in a context where the fed govt has unilaterally altered its obligations to certain provs under the Canada Assistance Plan

Facts	• Gov of Canada entered into agreements (Canada Assistance Plan) with each of the prov govs in 1967. Fed gov decided to reduce its budget of CAP • S. 4 (amendment) of the Canada Assistance Plan authorized the feds to enter into agreements with the provs govts to pay contributions towards their expenditures on social assistance and welfare. The Plan had no provisions about the authority of Parl to amend the Plan • In 1990, the fed govt decided to limit its expenditures in order to reduce its budget deficit. It decided that payments due to those provs that didn't receive equalization payments (BC, Alberta, Ontario) wouldn't grow by more than 5% for the 1991/1992 fiscal yrs. BC took a reference to the BC Court of Appeal, which said that in order to change the terms of the agreement BC would have to consent
Issues	Whether the fed govt could unilaterally reduce its contributions to just 5% to those 'have" provs (basically amend CAP?) – **No. fed govt was required to obtain BC's CONSENT to change the agreement**
Ratio	**Parliament Sovereignty:** Every Act shall be so made as to give Fed the power of repealing or amending it and of revoking restricting or modifying any power, privilege or advantage thereby vested in or granted to any person
Analysis	• Majority invokes s. 42(1) of the fed *Interpretation Act* which says that Acts should be read so as to retain parls ability to amend, revoke, restrict, modify the Act → **this reflect the principle of PARL SOVEREIGNTY** • Prov govts can't bind parl from exercising its power to legislate amendments to the Plant • The parties also knew that the feds could amend the Plan under s.54 of Const and if they had intended to stop this process, they would have done so through clear language in the Agreement that the payment formula could not be changed. • Instead the payment formula wasn't included in the Agreement and placed in the statute through the amendment of s.42 • Therefore the natural meaning was given to the words "authorized to pay" that **the obligation is to pay what is authorized from time to time** • the Agreement is subject to the s.8 amending formula which obliged Canada to pay the amounts which parl has authorized Canada to pay pursuant to s.5 of the

	Plan. Hence, the payment obligations under the Agreement are subject to change when s.5 is changed • the parl amended the umbrella legislation unilaterally and they are allowed to to that bc of Parl sovereignty
Judgement	Canada acted in accordance with the Agreement and otherwise with the law which empowers the govt to introduce a money bill in Parl – *Appeal allowed* • **Limitation on CAP unconstitutional; resulted in regulation of a head of power outside of federal jurisdiction.** • Court rejects limitations on federal spending policy**.** Agreements made between the feds and province cannot restrict the sovereignty of Parliament (which decided to adjust the budget).

Delegation

- **Delegation:** The assignment of law-making powers (subordinate) and other functions (policy-making, decision-making, licensing, etc etc) to other bodies, both within a jurisdiction and outside of the jurisdiction
- Feds can get around the bounds of distribution of powers through **delegation of functions** to other levels of gov
- Delegation b/w gob through various devices: Permissive Approaches (*Coughlin*)
  1) **Administrative Delegation** – functions are delegated to admin bodies or tribunals (*Coughlin)*
  2) **Incorporation by reference** – When laws from other jurisdictions are incorporated from time to time into other provs
  3) **Conditional legislation** – where a law of one gov does not come into effect at the other level of gov w/o a meeting a certain condition (ex – approval by the other level of gov)

❖ Limiting Principle: *Delegatus non potest delegare* (delegates cannot further delegate their powers)

- Governments cannot delegate law-making powers to legislative bodies in other jurisdictions; i.e., can't make constitutional changes via delegation (*Nova Scotia Interdelegation* case, [1951] SCR 31). → bc this would switch the const division of power.

Coughlin v Ontario Highway Transport Board (1968)

(Delegated Power; Administrative Delegation; Carnation)

Facts	• Feds enacted the *Motor Vehicle Transport Act* which delegated power to prov hwy transport boards to regulate interprov trucking, a matter within fed jurisdiction under s.92(10)(a) [local undertakings] • Coughlin engaged only in extra-prov trucking and challenged the const of the delegation of power to the Ontario Hwy Transport Board to issue extra-prov operating licenses • The power to regulate intra-prov trucking was delegated to the prov board
Issues	Whether a provincial Board can decide whether a person may operate the undertakings of an interprov carrier of goods by motor vehicle within the limits of Ontario.
Ratio	Parliament may delegate upon a prov constituted board power to regulate a matter within the exclusive jurisdiction of Parliament
Analysis	Majority (Cartwright) • The wide powers of the Board are conferred on it from parl, not prov legislature o Board can proceed in the same manner as that prescribed from time to time by the Legs for its dealings with intraprov carriage/trucking • THUS this isn't a delegation of law-making power, instead it's the **adoption by parl, in the exercise of its exclusive powers, of the legs of another body as it may from time ot time exist** (which is held const valid) <u>Dissent (Ritchie)</u> • The authority given to the Board through the Act is in the same manner as treating the extra-prov undertaking as if it were a "local undertaking". **Effect** of the Act is **that the control of the regulation of licensing of a "connecting undertaking" is turned over to the prov authority (ie the Ont Hwy Transport Board** • By enacting the MVT Act parl relinquished all control over a field in which parl has exclusive jurisdiction and left the power to exercise control of the licensing of extra-prov undertakings to be <u>regulated</u> in such a manner as the prov might from time to time determine
Judgement	BC Board can regulate inter-prov trucking bc the fed power was delegated to it