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Canadian Legal Inheritances/Sources of Law:

- Aboriginal, Common law and Civil law all form the backdrop to Canadian Public Law
- 3 levels (Constitution: SCC -> Acts: eg. Criminal Code -> Bylaws/Regulations: Sub laws)
- Federal acts can be changed if a new government comes in by a majority- but they have to go through parliament
- Regulations are passed by virtue of going up the chain- draw power from acts as well. Regulations and by laws do not have to go through the federal or provincial levels.

Aboriginal

Aboriginal Sources of Law

- Not many countries have recognized aboriginal sources of law
- Original inhabitants – which is why it exists as a source of law [Public pg. 43 (9) (10)]

Conquest versus Settlement (Canada compared to Australia where there was conquest)

Connolly v Woolrich (1867)

- A marriage under Indian custom between European and Indian is valid. Recognized continuing legitimacy of Aboriginal legal systems, but this was by an large not the direction

Mitchell v. MNR [2001]

- 1982 constitutionalization of aboriginal rights (s. 35)

- McLachlin CJ: assertion of sovereignty meant an "obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen* [1984]…" (Para 9)
- Aboriginal interests and customary laws assumed to survive unless: 1) incompatible with Crown's assertion of sovereignty, 2) surrendered voluntarily through treaty 3) government extinguished them.
- Common law creation: "the common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment…" (Para 11)

- But *Constitution Act, 1982* s. 35(1) moved aboriginal rights from common law status to constitutional status – "However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives." (Para 11)

*Public pg. 43

Delgamuukw v. BC [1997]

- Exploration of aboriginal title – existing rights under s. 35(1) of Constitution Act, 1982. Gitksan or Wet'suwet'en tribes claimed title: "an interest in land that arises by virtue of an aboriginal group's historic association with those lands" (p. 46)
- Lamer CJ: two principles – "first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land." (Para 117)
- Title arises from prior occupation of land – two ways: "first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law." (Para 126)
- Not irreconcilable with nature of aboriginal connection to land – for example, if group establishes occupation because it is a hunting ground, they can't do something that would destroy the capacity to hunt (e.g. strip-mine it) or if there's ceremonial/cultural significance, they can't built a parking lot (Para 128). But this doesn't mean they can only use the land in the way they have historically done (132)
- **The test for the proof of aboriginal title:** "In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty; (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive." (Para 49)

*Public pg. 44

- Part of constitutional law is attempting to figure out how to deal with conflict- Aboriginal law may come into conflict with other types of laws. Should the aboriginal law govern or the statutory law of Canada or a particular province govern? How do you determine how to resolve such conflicts?
- *Tsilhgot'in Nation v B.C*. [2014] is an example of the conflict.

Common Law and Civil Law

- Quebec stull operates under the **Civil Law system**- comes from Rome and France civil law- a codified law and rules that are written and everyone tries to follow.
- **Common law**- judge made law – based on previous interpretations built up over time based on judge's decisions which are published and added to as cases develop and more decisions are rendered. That's not to say that we don't try to codify things (ie. Criminal code- a set of rules that dictate what is a crime in Canada). We also have statutes and acts that are also a form of listed rules. BUT you cant take the criminal law and just read it and know how to interpret it- you still have to consider previous decisions and cases to know how to interpret the code.
- **Common law system has infiltrated the civilian system more than the other way around (ie. With judges having to practice for 10 years first before becoming a judge)**
- In civil law judges are more of investigators.

Rules of Reception: Settlement versus Conquered/ceded

Cooper v. Stuart (1889 – P.C.)

- New South Whales was unoccupied without settled inhabitants or settled law. Laws adopted as settlement develops. In such a case, England by statute may declare what parts of the common and statute law of England will apply. Even if they don't declare it, the law of England will from the outset become the law of the colony.
- If the laws are reasonably applicable to the colony, they will apply until modified. If they aren't, England used its Discretion = modified for specific circumstances – extent to which English law is introduced into British colony varies according to circumstances.

- Application: Difficulties applying rules in Canada; Quebec is a hybrid of both common and civil (laws are written in both languages- you need to find a common ground when interpreting and reading both. Shared Meaning when there is ambiguity*

*Public pg. 48

Common law v. Equity/Courts of Chancery

- Chancery/Equity = separate system from common law; informal, conscience-based
- There were two courts in England: Chancery/Equity Court & Common Law Court
- If the common law was felt to be unjust/unfair then people could appeal to the courts of chancery- eventually they fused the two courts together: they still both existed but under one umbrella.
- Certain concepts and ideas have only been developed in the equity courts (ie. Fiduciary Duty)

Re DeLaurier (1934) SCC P pg 60- common law vs equity

- **Facts:** Roman Catholic parents making appeal for 10-yr child in Protestant care. Relied on *Infants Act* RSO 1927: father has ultimate say as to religious faith in which child is educated
- **Held:** Father's authority in this respect, which is recognized at common law, is limited by the rules of equity, which by virtue of the *Judicature Act* now prevail in Ontario as in England. These rules of equity recognize "the welfare of the child as the predominant consideration" (p. 61)→ this is what prevails

Guerin v. Canada (1984) SCC- Gov't has fiduciary duty to Aboriginals

- **Facts:** whether Chief and Band Councilors can recover damages from Crown for leasing of their land. *Indian Act*, s. 18(1) basically says lands should not be sold, alienated, leased, etc. until sold to the Crown.
- **Issue:** Crown liability – is there a trust? ("…the existence of an equitable obligation is the *sine qua non* for liability" – p. 62)
- *Fiduciary Duty*: one party obligated to act for benefit of another, and this obligation comes with discretionary power; party thus empowered becomes a fiduciary (equity supervises the relationship).
- Dickson J: Nature of Indian title and the applicable statutory scheme for disposing of land means Crown has an **equitable obligation to deal with the land for the benefit of the Indians.** This is a fiduciary duty – if Crown breaches, liable to Indians in the same way as if there were a trust.

- Depends on the idea that land is **inalienable except to the Crown**. Effect of s. 18(1) is that Parliament confers upon Crown the discretion to decide "where the Indian's best interests really lie." (p. 64) This discretion means that courts have jurisdiction to regulate the relationship between the Crown and the Indians.

*All 9 Supreme Court judges sat in on this case. There were also many interveners.

*Public pg. 61

K.L.B. v. British Columbia, 2003 SCC (pg 64)-Foster Care Case

- **Facts:** Children abused in foster homes.
- **Issue:** Did government breach a **fiduciary duty to the foster children** and, if so, can they be held liable for tortuous conduct of foster parents to children who government has placed under their care? (Several grounds under which they might be found liable – one is **liability for breach of fiduciary duty**.)
- **Held:** The government does have a fiduciary duty to the foster children but it did not breach this duty. (It was merely negligent and was not disloyal/serving someone else's interest).
- McLachlin CJ: The relationship is fiduciary – Superintendent of Child Welfare and children for whom they are legal guardian. But what is duty? Government's view wins out: duty is to "avoid certain harmful actions that constitute a betrayal of trust" not, as appellants argued, "to act in the best interests of foster children."
- Lays out when and how fiduciary duties arise: trusts, relationships of discretionary power and trust, aboriginal peoples – para 40.
- **Not like fiduciary duty to aboriginal peoples**, where the duty arises from public law and requires "using due diligence in advancing particular interests of aboriginal peoples". Instead, a **"a private law duty arising simply from the relationship of discretionary power and trust between the Superintendent and the foster children**" (para 41) the content of which is based on similar cases.
- Not all fiduciary duties impose the same obligations on the Crown – i.e. the content of the duty may vary.

*Public pg. 64

Example Exercise: No vehicles allowed in the park sign. Follow previous common law or enforce bylaw (civil)

Constitutional Themes

- Supreme law. One paramount law, The UK does not operate under constitutionalism they don't have a supreme law- they have laws but not a super law.
- Constitutionalism doesn't necessarily equate with democracy (you can have democracy without a constitution)
- Canada was not a constitutional democracy until 1982- we brought it home from England and adopted the constitution- everyone is subject to that law – including the government.
- Separation of powers- the UK can make laws that do no apply to the government because they do not have a supreme law – our constitution protects us from such actions.

Constitutionalism

- Referring to the supremacy of the law. It's a meta law – it's the law for making law, it regulates the institutions that make law, the processes whereby this is done.

What is constitutionalism?

Definitions:

- Hogg: "Constitutionalism conveys the idea of a government limited by law; similar to concept of the rule of law. A society in which government officials must act in accordance with the law."
- Kay: "constitutionalism is the name given to the trust which men (and women) repose in power of words engrossed on parchment/paper like the charter for example and we all have to follow it. The importance of a constitutional document in words is built on".
- Marshall C.J., *Marbury* v. *Madison* (1803): "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

Functioning:

- -Constitutionalism creates a hierarchy of laws (ordinary laws divided into statute and common laws)
- It makes possible a democratic political system by creating an orderly framework within which ppl may make political decisions. **Idea is to diffuse power** – entrench power in a document or an idea, not a person or an institution.
- -Constitution protects minorities against the tyranny of the majority (The majority here being associated with the simple majority of the legislature). So that vulnerable groups are given the institutions and rights necessary to maintain there identifies against assimilation pressures from majority. Some people though are concerned over entrenching certain values and how it can establish a tyranny of the majority.
- -A Constitution may provide an added safeguard for fundamental human rights and individual freedoms, which might otherwise be susceptible to government interference.
- -Constitution provides for a division of political power that allocates power amongst different levels of gov't

Quebec Secession Reference (1998) SCC (pg. 105)

- SCC sets out its understanding of the principle of "constitutionalism" or "constitutional supremacy"- this concept has been linked to the ROL principle. (See ROL section below)
- Court gives 3 reasons why a constitution is entrenched beyond the reach of simply majority rule:
    1. A constitution provides a safeguard for fundamental human rights and individual freedoms, which might otherwise be susceptible to government interference.
    2. A constitution seeks to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to promote their identities against the assimilative pressures of the majority.
    3. A constitution provides for a division of public power that allocates political power amongst different levels of government.

*The first two listed- we didn't really have before we got the constitution, but the third has always been in place/has always been relevant – always a federal power. Is there any importance with the order of how these are listed? Are the first 2 listed because they are most recent?
*Para 78 Public pg 106
*See also *B.C. v Imperial Tobacco Canada ltd* [2005]

Canada's Constitution

- -The constitution of Canada is a variety of enactments- for our sake we just need to know there are two constitution acts – but these aren't the only two.
- -The first recital of the preamble of the *Constitution Act, 1867:* "Whereas the provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom…" – operating along lines similar to those found in the UK, but different because were federally united. Something about the UK and how It operates will be brought into Canada. It acknowledges that Canada may grow and change. (this preamble provides context)

- **Patriation Reference 1981: A federal union with "a Constitution similar in Principle to that of the United Kingdom"** may well embrace responsible government and some common law aspects of the United Kingdom's unitary constitutionalism, such as the rule of law and Crown prerogatives and immunities.

***The 1982 Constitution Act does not have an overall general preamble**

- -Subsection 52(1) of the *Constitution Act, 1982:* "The Constitution of Canada is the supreme law of Canada, and any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." It expresses in writing (1st time) principle of constitutionalism. It affirms the primacy of the constitution of Canada: provides info for what the constitution includes, but does not tell us everything. It then lists 3 things that the constitution includes:

- "The Constitution of Canada is the supreme law of Canada, and any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
- Section 52.2 Recognizes (not limited to) that the constitution of Canada "includes":
  - The Canada Act 1982
  - The Constitution Act, 1982
  - The thirty other Acts and orders, including the Constitution Act, 1867, referenced in the schedule
  - Constitutional amendments (of which ten have been enacted since 1982). Actual amending of it is controlled and spelled out.
- The constitution of Canada also includes: " the global system of rules and principles which govern the exercise of constitutional authority in the whole and every part of the Canadian state." –*Partriation Reference* (1981) pg. 874 – allowed Canada to make decisions on changing the constitution on our own.

- Other Sources:
- A substantial part of the rules of the Canadian constitution are written. They are contained not in a single document called a constitution, but in a great variety of statutes and orders in council. -- *Patriation Reference* (1981) These include: The *Constitution Act, 1867* (U.K.), The *Manitoba Act, 1870* (Can.), The *Constitution Act, 1871* (U.K.), The Imperial Orders in Council admitting British Columbia into the Union, May 16, 1871 and Prince Edward Island into the Union, June 26, 1873, The *Alberta Act,* 1905 (Can.), The *Saskatchewan Act,* 1905 (Can.), The *Constitution Act, 1930* (U.K.), The *Statute of Westminster, 1931* (U.K.), The *Newfoundland Act,* 1949 (U.K.), The *Constitution Act, 1982* (U.K.)

*__Everyone of these documents forms part of the constitution__- so we see how it becomes complicated.
*When you make amendments to the constitution you have to follow a certain process. The parliament of the day can make changes to the different acts but then they appear to be a part of the constitution- so does that mean that the parliament is not a part of the constitution (entrenched) or is it a legislative provision?

Constitutional Supremacy

The doctrine of constitutional supremacy carries with it certain implications that speak to other aspects of public law:

An entrenched constitution Implies:

1. **Hierarchy of law**: Constitution is a supreme law, a diff law from other laws. Legislation must comply with the supreme law. Ordinary law contains its own hierarchy between statute law (written laws enacted by legislation) and common law (private law principles developed over time by judicial precedent). For its part, statute law is binding to the extent that it is not inconsistent with the constitution.

2. **Need for adjudication**: Judges decide whether laws meet the requirements of the constitution. A system of constitutional supremacy requires an independent body with interpretative power

3. **Counter-majoritarianism**: against tyranny of majority. Cons Suprem Provides a check on the majority in a democracy. It places limits on, or obstacles in the way of the majority preferences. The adjudicative body that interprets and enforces the constitution must recognize the function of ruling against majority preferences. In a system of Cons Suprem the power to interpret and enforce the constitution against majority preferences must be present.

4. **Amendment** – amendments can be difficult. In many countries it's proven almost impossible. So getting that right, being able to amend when needed, yet still having it entrenched, is a fine balance. Constitutions cannot be amended in the same way that legislation is enacted. You must have a "Super Majority" in order to amend the constitution. The **amending formula in Part V of the Constitution Act** turns largely to federalism. It requires majorities of federal and provincial legislature to agree on proposed changes.

Unwritten Constitutional Principles

Quebec Secession Reference (1998)

- **Issue:** Can Quebec secede? Does international law allow it to? If domestic and international law conflict, which would take precedence?)
- Established the four unwritten constitutional principles: "These principles inform and sustain the constitutional text; they are the vital unstated assumptions upon which the text is based." (Para 49) Cannot be considered in isolation from one another.
- Court reaffirmed previous decision in *Provincial Judges Reference*: Court said principles can't be used to dispense with written text, but preamble invites courts to fill in the gaps in the written text.
- Before answering the reference questions, the Court identities four fundamental principles underlying our constitutional structure

- Four unwritten principles:
    1. Federalism
    2. Democracy
    3. Constitution and Rule of Law
    4. Protection of Minorities

- **Facts:** Quebec wanted to break apart from Canada and be on its own. This would require amendments to the constitution.
- **Secession:** the efforts of a group or section of a state to withdraw itself from the political and constitutional authority of the state. In federal state-secession takes the form of a territorial unit seeking to withdraw from the federation.
- The constitution does not have a say in whether or not a province can/should secede, but an act of secession would purport to alter the governance of Canadian territory in a manner, which undoubtedly is inconsistent with our current constitutional arrangements.
- The right to secede unilaterally= the right to effectuate succession without prior negotiations with the other provinces and the federal government.
- In Canada, the constitutional amendment falls to the responsibility of democratically elected representatives. The negotiation process must be conducted with an eye to the constitutional principles we have outlined above. Which must inform the actions of all the participants in the negotiation process (Quebec Majority and the rest of Canada). If a party does not follow the protocol, expected behaviours for negotiation, there could be internal ramifications and it would influence the recognition process.
- There are many factors to consider when thinking of secession- national economy means national debt, boundary issues, linguistic and cultural factors, etc.

Constitutionalism and Rule of Law (Public pg. 91)

Constitutionalism:

- -Constitutionalism in Canada - s. 52(1) of the *Constitution Act, 1982:* All government action must comply with the Constitution (it is the supreme law). The rule of law principle requires that all government action must comply with the law, including the constitution.
- -The constitution binds all government (federal and provincial – including the executive branch)
- -Constitution may not be legitimately circumvented by resort to a majority vote in a province-wide referendum- this misunderstands the meaning of "popular sovereignty" and the essence of a constitutional democracy- which demand more
- -Constitutionalism makes possible a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it
- -Constitutionalism similar to the rule of law, but not identical
- *Patriation Reference* at pp. 805-6- "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" – the idea of order is important, laws create order- generally they do. In some instances they may not necessarily create order.
- Secession Reference (paras 72, 75, 78)

Does the rule of law have a normative force- can it be used to invalidate legislation? Can these unwritten principles be used to stop governments from doing certain things?

Rule of Law:

- The rule of law principle requires that all government action must comply with the law, including the Constitution. Ensures fair civil trials. The rule of law is a foundational principle. We are all subject to the same laws. Public officials get their power from the laws and cannot operate outside of those laws.

- The ROL vouchsafes to the citizens of the country a stable, predictable, and ordered society in which to conduct their affairs – it provides a shield for individuals from arbitrary state action.
- The ROL provides 3 principles. (see *BC v Imperial Tobacco*)
- The ROL has been around a lot longer than the 1982 constitution

- SCC holds that the Rule of law does not:
- -Permit challenges to content of legislation; only limits actions of executive and judicial branches (see ***Imperial Tobacco*** at para 60) it does not confer special privileges on government. Imperial argued that the rule of law means legislation is prospective and general (there is a universal character to legislative provisions)
- -Include a general right of access to legal services; or right to counsel in proceedings before courts and tribunals dealing with rights and obligations (see ***Christie*** pg. 102 at paras 20-21, 27)

Tobacco and *Christie* case are examples of where the courts had to back it up because the government was going too far with the unwritten principles. The court said in both cases you can't really use ROL as a sword to strike down legislation that was validly enacted. Court said if you are going to secede, you need to have proper referendum with a clear Q – which is part of the ROL so it did have some connection, but not in the way they initially tried to argue.

Roncarelli v Duplessis (1959) (Public pg. 92)

- **Facts:** Bar owner in Montreal had a liquor license and he lost it because he was helping out Jehovah's witnesses. The premier of the province wanted to revoke his license so he could no longer help them.
- **Issue:** When public figure uses power granted by statute to "deliberately and intentionally" destroy the business interest of a citizen, does that citizen have legal redress? – **SCC says NO b/c of ROL in Canada**

- **Held:** "[N]o legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature of purpose of the statute. […] 'Discretion' necessary implies good faith in discharging public duty." (P. 89) The statute awards official discretionary power (to deny/cancel permit), but decisions made in using that power must be based "upon a weighing of considerations pertinent to the object of administration." (p. 89) The decision must be based on the purpose of the discretionary power.

- SCC comes up with a doctrine that used ROL in a way to curb or control this excessive power that the executive was trying to employ. They found any idea/constant and that was enough to stop what he was doing.
- Use of rule of law becomes important for this case. 94 – R used his power as premier to say that the liquor license board needed to pull his license, and it was a grossly misuse of power as he was punishing him for an act wholly irrelevant to the statute.

*This demonstrates an early instance of the ROL in the courts.

"fundamental postulate of our constitutional structure" (Public pg. 94)

B.C. v. Imperial Tobacco [2005] (Public pg 95) sets out the principles of ROL (pg 97)

- **Facts:** BC Act authorized BC government to take action against tobacco manufacturers for the recovery of health care costs. Act gives government a reverse burden of proof – defendant manufacturer must show that its breach of duty did not give rise to exposure giving rise to disease. Because the proposed legislation would make tobacco manufacturers pay for all smoking related healthcare injuries. It was argued that this law is unconstitutional and that it cannot be enacted. Tobacco Company argued that the law was contrary to the ROL. Tobacco Company said that in order for ROL to be meaningful it really should only apply prospectively (in the future). Because we cant guide behavior that we have already embarked on - if we want to change behavior we start now and enact the law now and move forward. We can't be going back in time and penalizing the manufactures for actions that were legal at the time they occurred. We could make them pay from now on. But not for medical expenses already incurred.
- **Issue:** Is the act constitutionally valid? Does it violate 1) territorial limits on provincial legislative jurisdiction; 2) principle of judicial independence; 3) principle of the rule of law? (Prof: Does the rule of law have normative force? Can it be used to invalidate legislation?)
- **Ratio**: Three principles of ROL (pg. 97 par 58):
    1. Law is supreme over the acts of both government officials and private persons – the law is supposed to act on all of us, and we all need to govern our behavior according to law.
    2. ROL requires the creation/maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order
    3. The relationship between state and individual must be regulated by law – so that not only does the law apply to all horizontally, but it also applies vertically between the state and individual.
- **Courts denied appellant's (imperial Tobacco) suggestion that ROL was:**
- Is prospective: They argued that legislation should be prospective, but retroactive statutes are common.
- Is general; ex, there is a universal character to legislative provisions. Other laws target groups.
- Does not confer special privileges on government. It can, ex, *Air Canada*, legislation aimed at particular industry with identifiable members.
- Ensures fair civil trial. There's no constitutional right like this.

*The only hope they had was to use an unwritten law to try and strike down the court/law

*Public pg. 95

B.C. v. Christie [2007] (Public pg.102)

- **Facts:** Social service Tax Amendment Act imposing a 7% tax on the purchase of legal services- purpose of the tax was said to help fund legal aid in BC. Christie (litigation lawyer) wanted to have the tax declared unconstitutional because as a lawyer who does Pro Bono work (his salary was low) and the act required him to submit tax to the government even though some of the fees in which had been levied had not been paid to him yet. BC seized $ from his bank account without attempting to workout a payment schedule with him. His claims are for effective access to the courts, which he states, necessitates legal services. – Christie must show that the Constitution mandates this particular form of quality of access. The courts say he has not done this.
- Embraces three principles in Imperial Tobacco.
- **Issue:** whether general access to legal services in relation to court/tribunal proceedings dealing with rights/obligations is a fundamental aspect of ROL. - **in this case NO.**
- **Ratio:** ROL doesn't include a general right of access to legal services; or general right to counsel in proceedings before courts and tribunals dealing with rights and obligations. (However, in Imperial tobacco- the court left open the possibility that the ROL may include additional principles).

*The ROL is a fundamental principle. The court described it as a "fundamental postulate of our constitutional structure"

In this case it was argued that the ROL includes a general right of access to legal services. – This was not accepted by the court. (pg. 104)

How common-law works: Courts make common law decisions, which become precedent, then lawyers use those decisions and refract them into a new decision. So it's often lawyers that push the envelope- they see how far the principle can be pushed/applied to a new situation. You take the concepts and make them apply to new situations. *Tobacco* and *Christie* are examples of this. **Court said ROL says that only criminal law can be prospective. Noncriminal laws can work retrospectively.** Income tax law is a classic example of where laws are created and applied retrospectively. Other than criminal law there is no connection between ROL and prospectivity.

Constitutional Conventions

- -"Those parts of the Constitution of Canada which are composed of statutory rules and common law rules are generally referred to as the law of the constitution." -*Patriation Reference*, 1981 (Public Pg 83)
- The majority of the SCC made the following findings about the conventions of the Constitution:
  1. Conventions come into existence on the basis of three factors:
     a. A practice or agreement developed by political actors
     b. A recognition by political actors that they are bound to follow the convention
     c. The existence of a normative reasons (purpose) for the convention (called it a "substantial provincial agreement" in the federal nature of Canadian democracy)
  2. Although part of the Constitution, conventions are not "law", and as such cannot be enforced by the courts. They acquire and retain their binding force by agreement, and ultimately in the realm of politics. However, courts may recognize a convention.
- -Constitutional conventions are **political, rather than legal, rules of conduct**. They are not usually written, but they are not like unwritten principles because they are not judiciable, they cannot be dealt with in a legal form.
- -Important parts of the constitution of Canada not found in the law of the constitution are "conventions of the constitution" – *Dicey*, 1885
- In the past 25 years, the SCC has developed the role of **unwritten constitutional principles**.

*Don't go to the unwritten rules first, go to the constitution and try to find a written rule first.

- **Not enforced by Courts:**
- Conventional rules are not enforced by courts. Courts are bound to enforce legal rules; other institutions of government, and ultimately the electorate, may enforce conventions. It's the political will of the people to enforce the convention (you can vote the electorate out if you don't like them). Conventional rules are an important part of our constitution, but not enforceable by the courts – they are not judge made they are deemed or determined by the actors involved.
- -Generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules

- -The courts can define the perimeter of what is convention and what is law (because they have to know what is law and what is convention). The people who work with the conventions (Harper) are also trying to draw this boundary line so sometimes they conflict.
- -Being based on custom and precedent, constitutional conventions are usually unwritten rules, although some of them may be reduced to writing
- See, for example *Manitoba Language Rights Reference* (1985) (public pg 454), *New Brunswick Broadcasting* case (1993) (pg. 192), *Provincial Court Judges Reference*, (1997) (pg. 318) and the *Quebec Secession Reference* (1998)
- *New Brunswick Broadcasting*- concerns about "unexpressed, unwritten concepts" (See Lamer, McLachlin; La Forest dissent). Should recorders be allowed in courtrooms? New ROL principle developed here.

*The cases above emphasize where the ROL really began to be developed by the courts.

- **Requirements for establishing a convention**: In the *Patriation Reference*, the SCC adopts a passage from Jennings, The Law and the Constitution (Public pg. 86): - [this discusses how you craft the boundary line between conventions and law]
    - What are the precedents/rules?
    - Did the actors believe that they were bound by a rule?
    - Is there a reason for the rule?

*When you live in a society like ours, you have to expect that some of it will be convention (a rule but its not written down). You will never in our society get everything written down. But you want to keep everything inside the boundary (convention) to a minimal because you want more things to be law (written/recorded)

*black line= boundary line

Manitoba Language Rights Reference, at pp. 747-52:

- -Law is supreme over the acts of both government and private persons
- -Rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order
- -Exercise of all public power must find its ultimate source in a legal rule (subsequent alteration in Secession Reference: "relationship between state and individual be regulated by law.")
- **Facts:** Manitoba is constitutionally bound to pass all of its laws in both languages since it has become a province. It hasn't passed any of them in French. Court told them that they must start to do this and the dilemma that faced the court was that if they deemed Manitoba's laws unconstitutional because they aren't in both languages, then Manitoba would have no laws…this would be anarchy.

- **Issue:** The ROL also says that there has to be some order and some proper law. ROL said both things- so how do they do both?
- **Held:** So the court told Manitoba that they have 1 year to clean up their act.

Provincial Court Judges Reference (1997) pg. 318

- **Facts:** Tried to pass a law across the board to all Gov't employees to cut salaries including Provincial court judges. Who then got together in each of the provinces and said you cannot do that to us – we are special. SCC said yes you are right, you are protected by judicial independence….which became an unwritten ROL.
- **Issue:** was it not right of the SCC to protect their own? Favoritism?
- -because every other Gov't worker took a salary cut. Independent bodies were set up between the judicial and governing bodies to deal with salaries to avoid future incidents like this.
- -There was a lot of academic commentary and criticism around how it was bit rich of the Gov't to create these unwritten principles and give them so much weight without them being recorded and people being able to look them up.
- -Our sense of judicial independence is so strong; once judges are appointed to the bench they don't like being told what to do – entitlement

Exercise of Public Power

- **Separation of powers** *(Different meaning in Canada than in USA- The idea of separation is that there should be checks & balances- in a democracy you create multiple sources of power – with each wanting the most power- this creates a system of fairness. We don't have a strict separation of powers because of responsible Gov't – it is strong but not absolute) Constitution divides/separates powers but not strictly*
- **Legislative power** *(Check on this power is done by the Exec and Judic. Although our system puts more emphasis on the Judic to check. The Exec and Judic act as though they are the same thing but they are not. Judiciary is the only check (other than voting every 4 years) and its hard to go to court so not much is done)- MP's*
- **Executive power** *(Main check on power is Judiciary- ex. Can you challenge in court about whether or not your country should go to war? NO so you cant vote them out. But them what does it mean to say there is an illegal war? You could go to court to assess whether a war is illegal) – Ministries*
- **Judicial power** *(judiciary checks themselves. Because there is a hierarchy, with the SCC at the top. Legisl and Judic are engaged in a dialogue and if the judiciary says a law is unconstitutional then the legislature redrafts the law. Other check- judiciary can be forced out of office by the legislative branch if they are really bad)*

- The parliamentary system contemplates an overlapping between the legislature and the executive.
- The PM and members of his/her cabinet who comprise the executive council "advising" the head of state, are elected members of the legislature.
- While the constitution does not expressly provide for the separation of powers, the functional separation among the 3 branches of governance has frequently been noted.

Legislative Power

- -Legislative branch is divided between the federal legislature/parliament (composed of elected house of commons and the appointed senate) and the elected legislatures of each province. Both levels of legislature derive their power to make laws from Canada's constitution. We have the lower legislative chamber/house of commons (elected representative) and an upper legislative chamber/senate (elites appointed by crown) and then the crown as the head of state. Senate also has a rep from each province.
- -Decision-making is prospective (oriented to the future), broad in impact (oriented to public interest/interests of large groups), and open ended in range of outcomes.
- -Constitution has supreme power over parliament and the provincial legislatures, however the latter remain supreme over the executive branch. Most of the executive's authority derives from delegation under statutes enacted by legislature.

- Similar to UK constitution; **key characteristics**:

➢ **<u>Parliamentary sovereignty</u>**: Parliament is sovereign, but now subject to the confines of the Charter, and therefore judicial oversight and judicial review. This is/was the basic constitutional rule of British constitutional law that Canada's founders adopted.

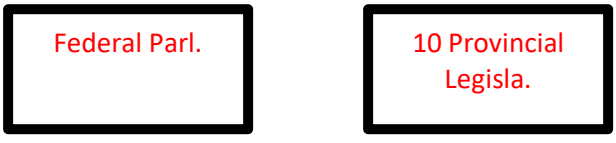
Babcock v Canada (AG) [pg. 116] –Parliamentary Supremacy

- **Facts:** Treasury board of Canada set the pay of department justice lawyers in Toronto at a higher rate than those elsewhere. The Vancouver lawyers were mad and brought an action to the SC of BC saying that the Gov't breached their contract of employment and their fiduciary duty towards them. The parties exchanged lists of relevant documents as required by the SC of BC. After delivering the documents, the Gov't changed its position on disclosure of documents.
- **Issues:** What is the nature of the cabinet confidentiality and the process by which it may be claimed and relinquished? Is s. 39 of the *Canada Evidence Act* constitutional?
- **Ratio:** S. 39 of the *Canada Evidence Act* was Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim cabinet confidentiality in the context of judicial and quasi-judicial proceedings. Respondents argue that s. 39 is of no force or effect by reason of one or both of the preamble to the Constitution Acts- they challenge the constitutionality of the section and cite the unwritten ROL- however it was believed that the ROL does not apply in this case.

➢ **<u>Federalism:</u>** the regulatory authority over different aspects of Canadian society is shared by federal and provincial spheres; recognizes the diversity of Canada's component parts and province's autonomy to develop their societies within their judicial spheres.

- The court recognized federalism as an unwritten principle of the Canadian constitution describing it as a means of recognizing regional cultural diversity at the founding of Canada. – Specifically with Quebec being a French speaking society.
- Matters under federal law include: criminal, trade and commerce, banking
- Matters under provincial law include: hospitals, municipalities, property and civil rights (contract, tort, family)
- The main textual source of the division of powers is **ss. 91 and 92** of the *Constitution Act 1867*
- With interpreting the constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, to guide them. Federalism principle has exercised a role of considerable importance in the interpretation of the written provisions of our constitution.

- S. 33 of the Charter allows parliament or a provincial legislature to enact legislation in contravention (violation) of certain charter rights if the legislation contains an explicit declaration pursuant to S. 33. The effect of S.33 colloquially refereed to as the **"notwithstanding clause"** of the charter, was to reassert parliamentary sovereignty, albeit in an attenuated form.



*Federal parliament and provincial legislature are equal when it comes to certain subjects – plenary power- this is a big part of our federal system.

Advantages of Federalism:

- To disperse power
- Controls any attempts at a dictatorship or tyranny in the central government. Act as a check.
- It is also a social laboratory, idea that you can take some policy initiatives and try them out at a local level (provincial).
- Plenary power – they have the power within their legislative jurisdiction to enact laws, and these powers are sovereign.
- Municipal power is not sovereign; at any time the provincial power can take away statutes in municipalities.
- Aboriginal power is often reduced and controlled by federal parliament.
- Territorial governments, Yukon, Northwest Territories, they are not sovereign – they are controlled by the federal government.

Executive Power

- Decision-making shares features of both legislative and judicial decision-making and is the most difficult to define.
- Executives are at both the federal and provincial levels. Executives include all ministries of government and their employees – the civil service. Also the armed forces and crown corporations
- Subordinate to legislature; All law-making authority/power must come from statute/laws (except royal prerogative) passed by legislature
- Members drawn from legislature; government continues only so long as have confidence of legislature
- In addition to this the executive creates bodies that provide for the enactment and operation of policies through these bodies.
- Executive action must comply with the provisions of the constitution because it can be authorized only by statutes that themselves are consistent with the constitution.

*Some people argue that the executive branch dominates the Canadian Gov't – that the PM and premier exercise an authority over their parties and over the legislatures that is unusual.

Doucet-Boudreau v. Nova Scotia

- Long history of procrastination on building these schools for minority French lang. instruction; so a trial judge in NS made an order that the government should bill the school, and the judge would be basically involved to a certain extent. Judges should not be entitled as overseers of the executive; they can make judgment on the law, but not as overseers.
- The court agreed to this; said that the Courts cannot usurp the role of other governments. In the end they said that this injunction was acceptable and it didn't cross the line.

Canada (PM) v. Khadr (pg 112)

- **Decision:** Para 39 – "for the following reasons" – Canada infringed Mr. Khadr's section 7 rights (right to liberty), so that's the Court's signal to the executive that it has done wrong (by allowing him to stay in Cuba). "we leave it to government how best to respond…"
- Court said, you're wrong gov't, but we are going to let you decide how to deal with this wrongful behavior. You are responsible for the foreign affairs and conformity with the charter. And many people complained that this was the hollowest decision of the SCC.
- The SCC gave with one hand and took away with the other. In the remedy of the situation they exercised restraint by putting the check on themselves.
- It worked he was brought back to Canada, but is still in prison here.
- Para 36 – executive isn't exempt from constitutional scrutiny. It's for the executive and not courts to address how to exercise power, but the courts do have the authority to determine if the prerogative power (over foreign affairs) is correct.
- The conduct of foreign affairs lies with the executive branch of government. The courts however, are charged with adjudicating the claims of individuals who claim that their charter rights have been or will be violated by the exercise of the governments discretionary powers: *Operation Dismantle*.

- Sets boundaries of the prerogative power: conduct of foreign affairs=executive's decision, except if there's a *Charter* conflict then that also becomes judiciable (Courts can examine this in terms of the charter).
- This makes us wonder what if a convention offends the charter? No case law on this as of yet.
- All we need to understand is the idea that there are times when judges go too far, and the *Doucet-Boudreau v. Nova Scotia* case is as far as they have gone.

*This case differs from Burns, Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy (of having the government fix their misgivings) will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the court.

Judicial Power

- Decision-making is retrospective (oriented to past events), localized in impact (oriented to individual disputes) and narrow in outcome (oriented to the application of principles to facts to produce the "right" outcome).
- Under s. 101 parliament is accorded the authority to create courts for the better administration of the laws of Canada (laws passed by parliament itself)
- Superior courts (ss. 96-101) – these courts have assumed the role of ensuring that the executive government acts within its delegated statutory authority.
- Provincial courts (s. 92(14))
- Federal Court (s. 101)
- Supreme Court of Canada (s. 101)

Process of Constitutional Amendment (P 125; Constitution 1982)

Amendment prior to 1982

- Controlled by UK Parliament
- British North America Act -- a UK Statute
- *Colonial Laws Validity Act* 1865: Imperial UK statutes prevail over inconsistent colonial laws
- Statute of Westminster 1931
- Canada Act, 1982

Post-1982: Part V, Constitution Act, 1982

- **5 Procedures/ways to change Canada's Constitution**: General; Unanimity; Some-but-not-all; federal unilateral; and provincial unilateral

***You can see that with the 5 different procedures difficulties will arise**.

General 7/50 Procedure

- Residual: default position in most cases (section you resort to if one of the other sections wont apply)
- Section 42 matters must use this general procedure
- Agreement of both Houses of Parliament and at least 7 provinces (2/3 of provinces, 50% of population)
- In practice: at least 1 Western Province, at least 1 Atlantic Province and Quebec or Ontario
- No veto power (but see statutory changes made by *Constitutional Amendment Act* (1996): Quebec, Ontario *and* B.C. *and* 2 Atlantic Provinces with 50% pop *and* 2 Prairie Provinces with 50% pop

*You need to get 7/10 provinces to agree to the amendment and 50% of the pop.
*The general procedure for amendments

➢ S. 38(3): Provincial Opt Out

- Only when amendment derogates from provincial powers
- Up to 3 provinces (7/50 Rule)
- S. 40 – Guaranteed compensation when amendment is made that transgresses for education and cultural matters. So if 7 provinces agree to change an educational provision, giving the feds more power, and three provinces disagree with that, then by law they can get some compensation for not getting the benefit that the feds are giving the others.

*Because you only need 7/10 provinces, there could be 3 provinces that don't want the specific constitutional amendment so they provide an "opt out" where you could then not have the amendment affect your province

➢ S. 42: 7/50 rule in specific situations

- No opt out (you must use the 7/50 formula when you are amending these various things (listed in s. 42)
    1. Principle of proportionate representation in the House of Commons - But, grandfathering minimum seats does not require 7/50 amendment: *Campbell v. Canada*
    2. Senate Powers and Method of Selecting Senators
    3. Senators per province and residence qualifications
    4. Supreme Court of Canada (other than its composition) – s 38
        - But, *Supreme Court of Canada Act* can be changed by ordinary legislation
    5. Parliament's power to extend existing provinces (with consent) and establish new provinces or territories (likely could be done under s. 43)

*s. 38 it's a residual power but according to s.42 there are certain issues where it must be used

S. 41: Unanimity Procedure. Applies to 5 specific matters:

1. Office of the Queen, the Governor General and the Lieutenant Governor of a province
2. Minimum number of seats per province in House of Commons ("Senate floor")
3. Use of English and French (subject to s. 43)
4. Composition of Supreme Court of Canada (Ineffective?)
5. Changes to Part V (amending the amendment procedure)

*Only amendments in certain areas cannot be achieved by the 7/50 formula and require a unanimous vote. The areas listed in s.41 require a unanimous vote (you have to go through every legislative assembly & parliament)

S. 43: Consent of affected provinces ("Some but not all")

- *Hogan v. Newfoundland*: Rights of minority are entrusted to the majority, but protection is provided by the more complicated procedure
- BUT, s. 45 gives province exclusive right to amend "constitution of the province"
- Anything that can be characterized as constitution of province should be dealt with under s. 45;
- Alternatively: s.43 applies to anything found in the *Constitution Acts*, and s. 45 applies to issues outside those acts.
- The structure is designed not to prevent constitutional amendment but to ensure, by making the process more difficult than the passage of amendment to any other bill, that the rights are given "due regard and protection" (pg 145).

*If the amendment only applies to some provinces but not all, then only those provinces need to agree. So there is buy in from the federal government and the provincial legislatures involved. The tricky part is determining whether or not an issue is going to only effect some provinces and not others/all of Canada.

Two More Amendment Procedures

-Exclusive powers ss. 44, 45- if it is an amendment only involves the feds then they can pass that in house through ss. 44. Similarly if each province can do the same under ss. 45- to pass laws that only regard their government

- Federal power over federal executive and Houses of Parliament (s. 44)
- Anything related to executive and House of Commons that's not already covered in 41 and 42 can be done by the feds and you do not need approval at all.
- Provincial power of "constitution of the province" (s. 45)
- Both of these Subject to ss. 41-42. No special majority needed for these
- "relate to own level of government, don't engage the interests of the other level"- See *Senate Reference*, para 48

Bill C-22

- Bill C-22, currently before the House of Commons, proposes to change the formula in the Constitution Act, 1867 that determines the number of seats each province will have in the House of Commons. The existing formula, set out in s.51 of the Constitution Act, 1867, allocates seats based on "representation by population" (or the principle of proportionate representation), although exceptions are made to ensure that the number of seats to which smaller provinces are entitled does not diminish over time. Because of these exceptions, if s.51 were not amended, the provinces with the fastest growing populations (Ontario, B.C. and Alberta) would see their number of seats in the House of Commons fall below the number they should have based solely on the principle of representation by population.
- Bill C-22 proposes to put in place a revised formula that will better reflect the principle of "rep by pop" or proportionate representation. It does this by altering the formula so that, after the next decennial census, the number of seats in B.C. and Alberta would be increased so that their proportion of the seats in the House of Commons will match their proportion of the Canadian population. Under the Bill C-22 formula, Ontario's proportion of seats would increase as well, but Ontario's seats would still be significantly less than the number of seats necessary to match its proportion of the Canadian population.
- The federal government is taking the position that Bill C-22 can be enacted by Parliament alone without the consent of any provincial legislatures. Members of the opposition have argued that Bill C-22 cannot be enacted without applying the 7/50 formula.
- What provisions in Part V of the Constitution Act, 1982 could be cited in favour of the federal government's position? What provisions in Part V of the Constitution Act, 1982 could be cited in favour of the opposition's position? In your view, what is the legally correct position regarding which amending procedure in Part V of the Constitution Act, 1982 is applicable?

Reference re Senate Reform [2014]

- **Main Idea:** what can the feds do under ss. 44, what power do they have?
- SCC asked to rule on whether parliament could use unanimity procedure (ss.44) to change term limits of senators; to allow consultative elections (either via federal legislation or framework provincial legislation); to repeal property requirements for senators; to abolish the senate- This idea of electing senators is outside ss.44 but falls within s.48 and 32
- Court denied Harper government virtually all proposed reforms (Except for property requirement in all provinces but Quebec)
- General amending formula required for all changes except abolishing senate which would require unanimous consent under s. 41

- The entire court speaks in one voice here. Look at the first sentence of the courts opinion-strong wording is used to refer to the historical importance of the senate- which insinuated that the courts will not accept the amendment
- There is an internal architecture to the constitution and it was this architecture that gave rise the unwritten rules and because of this we have democracy and the ROL, and the courts build on this idea in their write up. This entire case is about substance over form and they are convinced that the Harper government is trying to change it to go form over substance.
- Constitution is more than just the words that are there. It has a shape to it. Subheadings and parts are important components of the architecture
- Par 49 the courts dissection of the idea of electing senators (which is one of the proposals) in par 20 the court goes through the whole idea of electing and reject the idea that an election can be done through the fed exclusive process. They do it in 3 ways: through the architecture of the constitution, look at the language/test of the amending section itself, and then look at the text of competing sections.

Hogan v. Newfoundland (Attorney General) 2000 NFCA (pg 137)

- Example of the "some but not all" procedure
- **Facts:** Province wanted to remove denominational schools. Province held a survey on issue of secularizing education system – amendment of Term 17 of the Terms of Union between Canada and Newfoundland. 72% in favor. Amended resolution passed unanimously in both Houses and was proclaimed. Used s. 43 procedures for amending (some but not all). Appellants said s. 38 procedure was required. Court presumed, with deciding, this was a constitutional amendment of a minority right (s. 93, rights and privileges of denominational schools.) Term 17 not the same as freedom of religions – it granted special rights to certain classes of individuals, but these are not fundamental rights. (Para 78, p. 140)
- Rights of the minority are entrusted to the majority, but protection is provided by the more complicated amendment procedure.

- **Issue:** What is required to amend a right, including a fundamental right.
- **Held:** s. 43 was the appropriate procedure for amending the provision in question. (Did not decide which amendment procedures to use for Constitution generally). **Deciding among procedures should be based on "the scope of the application of the provision" and not "the type, nature or subject matter of the provision."**
- Courts have no supervisory role over political aspects of constitutional negotiations (as per Secession Reference), pg 142.

Heirarchy of Changes:

-Unanimity
-7/50
-Some but not all
-Exclusive

Structure of Canadian Court System

Basically 4 types of courts. Judge appointments depend on the court level. Sometimes, creation, organization and appointments of judges in a court are all done by 3 different levels. Our system is complicated.

- **Provincial Courts** - s 92(14) – judges are appointed provincially.
    - Ontario Court of Justice = provincial court
    - Preliminary inquiries and minor offences
    - Low level courts

- Just because something may be called an "Ontario court" does not mean its provincial
- Deals with provincial and federal matters (cc = federal statute)
- S. 92(14) Exclusive power to provinces in ADMINISTRATION OF JUSTICE IN THE PROVINCE (constitution, maintenance, organization, procedure of civil and criminal provincial courts)
- SCC has used S.96 to limit powers of provinces to create non-S.96 courts of their own because this undermines the unity of the court system. Provinces appoint and pay salaries of non-superior provincial courts. S*ee*: ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (Provincial Judges Reference)***, Re Residential Tenancies Act.

- **Section 96 Courts:** Courts created by provinces with judges appointed by federal government.
  - **S. 96** Governor General appoints Judges to Superior, District and County Courts aka **S.96** Courts/Superior Courts/Provincial Superior Courts S.100 Federal government pays salaries, etc. of these judges. (Part 7 of the 1867 Act)
  - Ontario superior court, Alberta Queens Bench, County Court in Nova Scotia
  - They will always include the superior courts in each province and the appellate courts
  - If the judges are appointed by federal government then it's a Section 96 court. This is the only way to distinguish a 96 court from a provincial court

- **Federal Court** – and Fed CA under s 101
  - **S. 101**, Parliament can establish courts for better administration of laws. Federal court is one of these made courts-->Supreme Court (general court of appeal), Federal Court, the Federal Court of Appeal and the Tax Court of Canada. Created by federal statute, ex "Supreme Court Act", "Tax Court of Canada Act", etc.
  - Decided to make a system of courts that deal with particular matters- particular federal laws: Immigration, tax court, IP, admiralty, main jurisdiction of the federal court
  - Does not really deal with CC
  - Jurisdiction of the court has to be specifically spelled out
  - Federally appointed judges
  - Federal courts exist throughout Canada

- **Supreme Court of Canada**
  - Separate entity itself because of s.101- parliament may provide a general court of appeal for Canada
  - Court of general jurisdiction – it can hear any type of matter from the lower courts
  - Federally appointed judges

*We also have fed and prov. Administrative tribunals- they can be appealed in the courts. This is called judicial review. Tribunals may have their own internal appeal process.

Judicial Appointments and Independence

- Judicial independence as an aspect of Canadian public law/democracy -- *Provincial Judges Reference* – parliament is responsible for the salaries – it's in the Constitution their salaries.
- Aspects of judicial independence: two dimensions and three core characteristics
- "Judging the judiciary"
- The following are the most common ways that judges get appointed. They are not mutually exclusive- you can combine them.

Different models:

- Executive appointment

Executive makes the appointment – but how do they determine who will be the potential appointment?

- *Confirmation hearings* (US federal appointments)

Ex. US appointments on TV- basically a public job interview

- *Advisory committees* (Canadian federal appointments)

Committees are created usually by statutes that put forward candidates for appointment but they are only an advisory body- they don't say you HAVE to appoint the suggested person

- *Nominating committees* (Canadian provincial appointments)

Have a bit more power than an advisory committee – puts forth a candidate

- *Public interviews of candidates* (South African Constitutional Court appointments)

Public is more involved, not just the senate. You have a group selected from the public to interview candidates

- *Direct elections* (partisan or non-partisan) (in the US, first adopted in Georgia in 1812; 22 of 34 states elected judges by the time of the Civil War; now used by ~30 states)

In the USA they have judicial elections – ballot box at election time- you pick judges and mayors

- *Retention elections* (in the US, the "Missouri Plan," adopted in 1940, now used by ~16 states; also used in Japan)

Elections with ballots – judges are elected first and then you vote to keep them in that position

Appointment of Provincial Court Judges (P 302)

- More than 1,000 judges and JOP's Appointed by statute, executive appointment, often from a short-list provided by an independent advisory committee (AG must appoint only candidates on short list provided by JAAC: s. 43(11)

*Cannot recall an instance where LG refused the referrals made by AG. Candidates must be a bar member for 10 years. Committee is composed of 2 prov. Judges, 3 lawyers, 7 persons appointed by AG no lawyers/judges (usually someone with an interest in justice), member of judicial council (senior judge). Committee itself needs to develop its own process and procedures on what to do in the event of a dispute. AG can reject list and ask for a new list – they cannot put forward their own candidates though. Committee in place for 3 years.

- Takes into account: Professional qualifications + Experience + Community Awareness+ Demographics
- Ex, the 13 member Judicial Appointments Advisory Committee (JAAC) created by s.43 of the Ontario *Courts of Justice Act* . Written and public criteria that sets out process for appointment of prov. judges
- Improvements? too much gov't discretion; no formal transparency or accountability; allegations of patronage (ex, appointment of political supporters); pool of "recommended" candidates is too large and gives too much flexibility to the minister; not democratic enough; no legal requirement that the minister choose from among those recommended, appointment process is 'policy' not 'law'

Appointment of Superior Court and Federal Court Judges (P 303-310)

- *You have the federal court system and then the superior court system in each province
- Superior court judges (~1000) appointed by the GG pursuant to s. 96 of the *Constitution Act, 1867* – see *Judges Act*

*Judges who are not part of the federal system but govern how the federal court makes appointments. Eligibility set out in S.3 must be a barrister for 10 years, etc,

- Federal court judges (~50) appointed by GG pursuant to s. 5.2 of the *Federal Courts Act*. GG appoints them, but the final apt is basically a rubber stamp, usually the PM/PM's office puts forth recommendation. - must be a lawyer for 10 years or judge if superior court.
- Constitution and statutes silent on the appointments process
- Judicial Appointment Committee (JAC) for Superior Court judges that assesses lawyer candidates, advises Minister of Justice on each (recommended or unable to recommend), Minister of Justice makes decision taking into account advice

*Each committee consists of 8 members representing the bench (judges already there), bar member, law enforcement officer (has to be there for federal appointments), and community members

Appointment of SCC Judges (P 310)

- Appointed by the Governor in Council pursuant to s.4(2) of the *Supreme Court Act*
- *This spells out the requirements for appointment to SCC. Processes created on an Ad Hoc basis. Full process isn't always followed (public appointment step is sometimes skipped). We are kind of in a transition phase right now with our process as we see how the USA does it – very public and feel we need to make ours more public.
- Constitution and statutes silent on the appointments process- but now we see *Reference re SC*
- Process followed for Rothstein appointment in 2005-6: short list provided by advisory committee, nominee chosen by PM and Minister of Justice, hearing before Parliamentary committee to interview nominee prior to appointment
- Process for Justice Cromwell? PM bypassed intended parliamentary hearings to proceed immediately with appointing Cromwell. Or for Karakatsanis and Moldaver? Wagner? Nado? Gascon?
- Improvements? SCC judges should be more accountable to the public in the appointment process, since they effectively 'legislate.' Another criticism is that it drives the politics underground and seems apolitical on the surface.
- The attempt at a public interview seems like process is transparent, but really it's the PM who decides who is appointed. Not a lot that the committees can prepare in two days after the announcement of nominees and their days of hearing.
- **Improvements?** Not a transparent process. Too wide of a range of selection. No clarity on how to move up in the federal court ladder. The process for appointment is not spelled out anywhere. Not set in stone or legislation. The whole process is Ad Hoc (whoever is in power can make changes). Transparency does not necessarily equal good quality judging. We need more rigorous methods like USA. The designated representation of 3 Ontario, 3 Quebec, 2 West, 1 East is not actually recorded anywhere- what if we didn't follow it? If we are going to make it transparent than go all the way and make it transparent.

Minister of Justice, Proposal to Reform the Supreme Court of Canada Appointments Process

Overriding objective of the appointments process must continue to be to ensure that the best candidates are appointed, based on merit

- Needs of the Court in terms of expertise are also an important consideration
- Supreme Court of Canada bench should reflect the diversity of Canadian society
- Appointment of Supreme Court judges is within the constitutional authority of Governor-in-Council
- Judicial independence ensures that legal claims are adjudicated by fair, impartial and open-minded judges who are not beholden to any group, interest or stated public position
- Transparency is accomplished by enhancing public knowledge and understanding of the process and can be seen as a goal in itself
- Transparency does not require candidates to be subject to direct, public questioning
- Government's proposal consists of a 4-stage process:

1. Minister would conduct consultations as under the current process, developing an initial list of candidates (5-8 names)

2. Advisory committee would be established as each vacancy arises to reflect the regional nature of the appointments – committee would provide an unranked short list of 3 candidates. A full record of the consultations conducted to be kept

i. Advisory committee composition:
   1. MP from each recognized party
   2. Retired judge
   3. Nominee of the provincial Attorney General from the region of vacancy
   4. Nominee of the law societies
   5. 2 prominent Canadians (neither lawyers nor judges)

3. Minister would complete further consultations and provide advice to the Prime Minister who would make his recommendation to Cabinet

4. Minister would appear before the Justice Committee after the appointment to explain the appointment process and the professional and personal qualities of the appointee

- Conservative Party rejected the Liberal plan, in favor of a more active parliamentary involvement in Supreme Court judge selection
- Conservative PM (Harper) announced a hybrid selection process, including elements of he Liberal plan plus pseudo-parliamentary questioning of the nominee
    - PM nominated Justice Rothstein based on the short list of candidates, before being appointed a special committee questioned him in a public (televised) hearing
- Canadian Bar Association criticized this, though it seemed to please most observers
- Justice Cromwell of Newfoundland and Labrador was spared the parliamentary hearing in order to proceed immediately with the appointment as Parliament had been prorogued and the Supreme Court of Canada had been left with only 8 judges
- There are 4 imminent mandatory retirements among the Supreme Court of Canada justices, and the appointment process is anticipated to be similar to Rothstein's

Judicial Independence

Judicial Independence is a constitutional doctrine closely tied to the separation of powers. It is essential to the achievement and functioning of a free, just, and democratic society based on the principles of constitutionalism and the ROL. It ensures that judges are not biased and insulates them from retaliation of other branches of government for their decisions. It also preserves the separation of powers between the 3 branches by depoliticizing the relationship between the judiciary and the other 2. There is no Judicial Independence phrase in our constitution so you need to carve it out:

- Constitutional sources (Proof of judicial independence?):
    1. ss. 96, 99-100 of the *Constitution Act, 1867* (superior courts)- section spells out tenure and salaries for judges. Courts say that this shows there is a law in the constitution that tells us judges are to be independent. S.99 says judges can stay until 75. S.100 says federal judge salaries are to be fixed by parliament. This points to independence but really only of federal judges.

    2. s. 11(d) of the *Charter* (for courts trying offences)- involves criminal charges- language in the provision points to the judiciary being an **independent** tribunal aka independent judge. This would encompass both provincial and federal however it only regards criminal matters- thus it does not constitute a source of constitutional judicial independence.

    3. Unwritten principle, recognized and affirmed by preamble to the *Constitution Act, 1867* (all other courts and actions): *Provincial Judges Reference*-In preamble of the 1867 constitution act taken from England it says that judicial independence is an unwritten principle and we adopted this from England.

*It is a long argument to say that we have judicial independence in Canada- it is not clearly laid out anywhere – you have to take the above 3 in conjunction. There are some statutory provisions that help to guarantee judicial independence- because they are not constitutional they could be altered but they do provide some insinuation that JI is constitutional. If JI is important than it should be enforced in supreme law (constitution)

Legal Guarantees of Judicial Independence

- Superior court judges: ss. 96-100 of the *Constitution Act, 1867(*salaries are spelled out= protection)
- Federal Court judges: *Federal Courts Act,* s. 8; *Judges Act*, s. 10; preamble
- SCC judges: Supreme Court Act, s. 9; *Judges Act*, s. 9; preamble
- Administrative quasi-judicial tribunals: *Ocean Port* 2001 SCC; *Bell Canada* 2003 SCC (CBIV)
- Provincial court judges: s. 11(d) of the *Charter;* preamble; *Provincial Judges Reference*
- Justices of the peace: preamble; *Ell* v. *Alberta* 2003 SCC (CBI, pg. 338)- should JOP's have independence too? Do JOP serve the same job as judges? → Yes they do so they should

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Ell v Alberta (2003) SCC

- • Issue – Does judicial independence apply to justices of the peace?
- • SCC returned to the issue of judicial independence. They say that judicial independence has grown to cover all courts, not just superior courts.
- • The scope of the principle must be interpreted in accordance with its underlying purposes – create a strong judiciary capable of upholding the rule of law and public confidence in the administration of justice.

Judicial Independence, 3 Core Characteristics

- Assessing Independence
- • SCC says the test to determine whether independence exists is asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independence status (from Mackin v New Brunswick). This is an objective test.
- As such independence includes both actual independence and conditions sufficient to give rise to a reasonable perception of independence on the part of a reasonable person.
  - The independence of judges has two aspects: an institutional aspect and a personal aspect. Here, no one is saying the integrity of the Federal Court is compromised; it's the personal interaction between the judge and the official that's the issue.

1. **Security of Tenure**: not at the risk of being fired for unpopular decisions, etc. Every judge has to have job protection and not be subject to the whims of the people. But you do need some way to remove judges that are doing a poor job--for judges, termination requires a high burden (this involves the role and composition of the Canadian Judicial Council). It is in our constitutional text. Downfall is that having judges in power until they are 75- some may get complacent.

Report of the Canadian Judicial Council to the Minister of Justice Under Section 63(1) of the Judges Act Concerning the Conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R v T. Theberge

- • Facts - Judge made a comment about the Holocaust. People complained he is biased against Jews. He also made comments about the different qualities of men and women. The comments about men and women are the real focus of the decision to remove him as a judge.
- • Chief Justice McEachern said that he is unable to find that Bienvenue is biased against Jews. He says, however, that his comments about men and women may affect his decisions.
- • Minority – it isn't enough that a judge has a predilection (a bias). Everyone does. The real question is whether the judge puts that bias aside when making judging decisions.
- • They hold that just because the judge admitted his predilection in the trial, doesn't mean he was "putting it to work to the detriment of the litigants".
- • They say there is no evidence his predilection affected his judgment or that it would continue to do so in the future.

- What about judges that have predilections about abortion, gun issues, environmental issues, business, etc? Should they all be removed too?

2. **Financial Security**: potential for risk that judges will tailor their judgments to get wages increased by carrying favor, or that they will be vulnerable to bribery, etc. You need security to attract quality candidates
   - *Provincial Judges Reference:* 3 elements of financial security (paras. 133-135 P348):
   - Salaries can be reduced/increased/frozen but you have to follow a process (par. 133)
   - Judiciary isn't allowed to engage in negotiations over pay with the executive/legislature representatives. (par. 134)
   - Any reductions in pay can't go below min level required for a judge.
   - Features and role of Judicial Compensation Committees (JCC)- Provincial judges are not protected by parliament like federal appointees are so they need a commission that acts as an independent body for judicial salaries.

3. **Administrative Independence**: Courts themselves have control over the admin decisions that are crucial to exercise of judicial functioning (assignments of judges, sittings of the court…)

***If you don't have these, you don't have judicial independence. First 2 are most important**

2 Dimensions (Dimensions within which the characteristics operate)
- Individual Independence -- personal
- Institutional Independence – the courts as a body (the institution as a whole)

Provincial Judges Reference, 1997 (P 318, 348)
- Despite existence of s. 11(d) of the *Charter* and ss. 96-100 of the *Constitution Act, 1867*, judicial independence is at root an unwritten constitutional principle. It's exterior to the particular sections of the *Constitution Acts* -- recognized and affirmed by the preamble to the *Constitution Act, 1867*.
- Origins can be traced to the *Act of Settlement* of 1701 [para 83]
- Preamble: textual recognition of the principle of judicial independence [para 95]
- **Judicial independence has grown into a principle that now extends to all courts, not just the superior courts of this country [para 106, pg 322]**: Supported on the basis of the presence of s. 11(d) of the Charter -- protect JI only when Provincial courts exercising jurisdiction in relation to offences, but express provisions of the Constitution are elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867 [para 107]
- **Conclusion:** express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada.
- ***Is it all obiter?:*** "since the parties and interveners have grounded their arguments in s. 11(d), I will resolve these appeals by reference to that provision." [para 109]

Provincial Judges Reference – Dissent: La Forest J.
- Grave reservations about the Court entering into a discussion of the effect of the preamble to the *Constitution Act, 1867* in this case, notably because "minimal reference was made to it by counsel who essentially argued the issues on the basis of s. 11(d) of the *Charter*." [para 297]
- "All the more troubled since the question involves the proper relationship between the political branches of government and the judicial branch." [para 302]

- Judicial Independence: Section 11(d) of the Charter and ss. 96-100 of the *Constitution Act*, *1867* do not comprise an exhaustive code of judicial independence; agrees that Constitution embraces unwritten rules, including rules that find expression in the preamble of the *Constitution Act, 1867* -- from *New Brunswick Broadcasting*
- Disagrees that preamble is a source of constitutional limitations on the power of legislatures to interfere with judicial independence

Constraints on Legislative and Administrative Action

- The role independent judicial review plays in a democracy
- Limits of judicial review and judicial oversight: *Operation Dismantle* and *Doucet-Boudreau*
- Legitimacy and dialogue theory in the judiciary post-*Charter*
- **Main concern**: engage with debates about the legitimacy of law-making by the judiciary
- Respective roles of executive, legislature and judiciary in development, interpretation and application of the law
- Implications of separation of powers for common law reasoning, statutory interpretation, and constitutional interpretation
- Relationships between common law, statutes, the constitution and public policy
- What do we mean by "policy"? What do we mean by "judicial activism"?

*What's the role of the judiciary and should it have this role? We give a lot of legitimacy to judges in Canada, accepting their decisions and just moving on. – we must still be critical we cant take this for granted.
*in some way judges are making laws through their judgments. Interpretation of laws involves judges.

Past Exam Q: Give an example of where the executive acts in a judicial manner or legislative manner, vice versa

Judicial Review

**This developed over time – judicial review: judges have power to review governmental action. It is something we decided to have – we could have a system without it.*

Marbury v. Madison (USSC, 1803; Public, p. 437)

- Basis for judicial review in US
- **Issue:** whether an Act, repugnant to Constitution, can become "law of the land"
- Constitution as supreme law; courts guardians of constitution
- What is the source of constitutional supremacy and judicial review in Canada?

*This case created the idea of the supreme law of constitutionalism and that it is the judges role to make sure that all laws and state action comply with the constitution. It is emphatically the provinces and judges who say what the law is – basis of judicial review. (pg. 436 para 2) – Not every country has to grant judicial review- we have come a long way since this case.

Examples:

- *Re Drummond Wren* (P 9): restrictive covenant prohibiting transfer of property to Jewish people – Judge says this is racist and changes it.
- *Re Noble and Wolf* (P 12): judge says this is bad, but as a judge I am not empowered to deal with this situation, this is something the legislature needs to deal with. He makes the opposite decision here. Says the judge does not come up with public policy.
- These two examples pose the question of whether judges should be at the forefront of public policy decision-making, or should they just sit aside and apply the law in a passive manner.

Constitutional Judicial Review

- Is more controversial than judicial development of the common law, judicial interpretation of ordinary statutes (ex, *Roncarelli*), or judicial review of administrative decision-making (ex, *Baker*). Why?
    - Nature of constitutional language and issues
    - Supremacy of constitution (s.52, *Constitution Act, 1982*)
    - Judges are unelected, unaccountable and unrepresentative- concern if they are making laws
    - Tension between the rule of law and democracy
    - See *Bush v Gore* (USSC 2000) deciding the next president became a matter for the USSC

Constitutional judicial review deals with more controversial issues (assisted suicide etc), Issues that affect the population as a whole.

Types of Constitutional Challenges to Legislation or Executive Action-Things Judicially Reviewed

- Unwritten principles: Secession Reference, Prov. Judges Reference, *Ocean Port* (Public, p. 253) (but limited in scope by cases such as Imperial Tobacco and Christie)- challenge to the BC legislation dealing with healthcare recovery – example of judicial review
- Federalism/division of powers: Part V, ss.91-95 of the *Constitution Act, 1867*- who has the right to pass legislation in a particular area (prov or fed?) judiciary could always pronounce on who could legislate in a particular area
    - s. 91 sets out federal powers, s. 92 sets out provincial powers
- Rights: (take up the bulk of judicial review now- we have a series of rights that can be judicially review- not just charter rights. Judiciary can review and challenge the provisions made in the area)
    - Language rights: e.g. s.133 *Constitution Act, 1867*; *Manitoba Ref* (Public, pg. 454)
    - Aboriginal and treaty rights: s.35 *Constitution Act, 1982* (judicial review of rights different from charter rights)
    - Denominational school rights: e.g. s.93 *Constitution Act, 1867*
    - *Charter of Rights and Freedoms*: e.g., *Provincial Judges Reference*, *Vriend* (Public, pg. 461)- can review rights spelled out in the charter

*We have come a long way since *Marbury v Madison*- this list above shows all the things subject to judicial review

Legitimacy of Constitutional Judicial Review

- Unavoidable tension between constitutionalism and democracy
- When and to what extent should the courts defer to the democratically accountable branches of government?
- Does the body of elected legislators have the authority to pass/enact the law in dispute within the federal system of government? Regardless that they have the power to enact the law under the constitution.
- What are the appropriate limits on judicial law-making in constitutional cases? What should be kept out of the courts? The following place limits on what the judiciary may do:
    - **Justiciability** (operation dismantle) & **Enforcement**; how far do you go to enforce division between judicial review and the separation between judiciary and other branches
    - ***Vriend***
    - **McLachlin 2004 Speech** (public pg. 466)- discusses concepts of judicial review and what the role of the judiciary is
    - **La Forest (Dissent) *Provincial Judges Reference*** (public pg. 470)- spells out tensions/difficulties in assessing where the judiciary's role should end and the other branches begin

*Tension between what judges decide and what the politicians do. Judicial review is not always black and white. Politicians are elected by the people, why should judges (who aren't) able to block democratic rights?

- Dialogue Theory – addressing what the courts can do to restrain or refine administrative action. Article in law journal analyzed SCC cases in which they involved charter rights and looked at how the end decision influence the legislature. In all cases where legislature is struck down, the

legislature has the ability to respond- A chance to rethink their policy and rewrite it. There is almost always some room to maneuver even if the SCC strikes down something.- its not the be all and end all of the matter. – So they claimed this whole thing to be a "dialogue". BUT There was lot of criticism to this "dialogue" classification - its not really dialogue because legislation doesn't have to respond or they may not be able to respond, etc and dialogue has to be between two people and its not really between two people- SCC says but it is. **Judicial review enhances democracy through encouraging this use of "dialogue"** – Iacobucci (Vriend)

Vriend v Alberta, 1998 SCC (P 461)

- **Facts:** gay challenge to some school board provisions. Alberta Human Rights code prevented discrimination on a number of grounds- race, sex, physical or mental disability, religion, etc. Basis of challenge that Albert Human Rights code missing sexual orientation. Argued Alberta law was unconstitutional, because s. 15 of Charter has been interpreted to include sexual orientation.
- **Decision**: Alberta law unconstitutional. Alberta Human Rights act should contain sexual orientation. (Note: HR Act is broader than Charter. It also applies to private citizens, which Charter doesn't.). SCC decided to read sexual orientation into Alberta's Human Rights Code from now on and back in time. – even if it is not explicitly stated in the code.
- **Reasons:** Feds and provinces chose to give Courts role in **interpreting Charter** and declaring legislation invalid under s. 52. **Directly address concerns about undemocratic nature of judicial review** (462) "Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed." (para 136) **Charter has meant more "dynamic interaction" between branches of government** (para 138). Those who created the legislature and the code are elected by the people. But the courts are not. So why should SCC be able to change this provision? Or read it how they want to? We have a problem if the SCC has the power to come along and just change the act (essentially).
- **McLachlin 2004** speech (CBII, P466): Courts define precise contours of division of powers btw fed and provincial governments; rule on legislation deemed unconstitutional for violation of Charter (therefore define scope of constitutional rights/freedoms); and exercise de facto supervision over the hosts of admin tribunals created by parliament/legislatures.
- **La Forest dissent,** *Provincial Judges Reference* (1997 SCC; CBII, p. 411). Creating a constitutional requirement upon a very narrow reading of constitution that may also be historically inaccurate. **La Forest's concern is that this is going too far in judges creating law.**
- S.33 of 1982 Constitution Act "notwithstanding provision" – provinces can enact a provision to override the constitutional provision of the charter- NOT used very often – override only lasts 5 years and then you would have to reassess. Thus it doesn't end the dialogue
- **Iacobucci** says this case demonstrates dialogue between courts and legislature. Critics challenge how this is dialogue if Alberta HAS to put this in their code now.

Remarks of the Right Honourable Beverley McLachlin Respecting Democratic Roles – 2004 Speech

- Argument – Courts have gone beyond their proper role. They shouldn't go against the will of elected representatives.
- Response – The will of elected representatives is to strive in good faith to discharge their role in a manner consistent with the Constitution. But sometimes, their efforts are called in question, and someone must arbitrate the dispute. That "someone" is the judicial branch → In fact, the terms of the constitution call on judges to be arbitrators. In 1982 the elected representatives gave us the power to do this.
- Argument – Judges are pursuing a particular political agenda.
- Response – There is no evidence of this. If they do, their judgements are likely to be overturned in appeal. A visit to any courtroom in the country is unlikely to reveal judges acting as politicians. Just because their decisions have political implications does not mean that they are assuming a political role.
- Argument – Judges should apply the law, not make the law or rewrite the law.

- Response – The law does not apply itself. The Charter is abstract, there is no clear demarcation between applying the law, interpreting the law, and making the law.
- Argument – Judges are making decisions that should be made by elected representatives, who alone possess the necessary legitimacy for law-making and the institutional competence to weigh all the factors that must be considered in making difficult choices of public policy.
- Response – When a legal issue is before the court, not deciding is not an option. When a citizen claims the state has violated their right, the courts must referee. They do so with the necessary deference to legislative and executive expertise

Judicial Review - *Justiciability*

- **Justiciability** – *there are some things that courts will not touch because they are political rather than justiciable.* There may be some overlap between what is political and what is justiciable, but they are also distinct realms. Consider in the US, when the Court was tasked with deciding the outcome of an election- Vriend v Alberta

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Operation Dismantle v. The Queen (1985)(public pg 439)

- **Facts:** P (charitable, non-nuclear proliferation group) argued that cruise missile testing in the Arctic (Canada) was unconstitutional based on s. 7 of Charter – right of life, liberty and security of person (Accelerates potential for going to war). PM said the president could use the land- its empty in the Arctic.

  Operation Dismantle is a group against going to war – they lay out a claim against the government for allowing the project. Crown seeks motion to strike out Statement of Claim (argue its not a judiciable matter – decision to go to war is up to cabinet and is not subject to legal remedy). It is a matter of the crown to decide about issues of defence.

Wilson J: Justiciability

Discusses what justiciability means in a modern area. The term needs new meaning now that we have the charter.

- More than just difficulties of evidence or proof? Should a court decide a particular matter? Government argues in operation dismantle that it is a nonjusticiable issue – WILSON says that a potential argument is that no one can get the evidence about whether it is a dangerous activity or not. Gov't argues that there is no way that you can tell this is going to lead to more war – WILSON does not accept this argument- the classic lack of evidence argument
- Whether government policy violates Charter rights? - Appropriate question for courts
- **Justiciability= Moral and political considerations are not within the court's purview to assess.** Not because it's impossible for a court to do so (not an issue of competence), but it's not their place. Assessing legislation, whether you think its good or bad is a matter for the executive or legislature (not courts)
- However, once the Charter is engaged, that changes things. Once person raises a Charter challenge (ie. That the decision impinges on their right to safety), Cabinet isn't insolated. A litigant can frame something legally (attach the claim to a right) and not politically so that it is relevant to the court. Court says these are issues worth hearing. Justiciability is essentially a filtering method for the courts.
- But is merely raising it as a Charter challenge sufficient to get courts involved? "At the very least, it seems to me, there must be a strong presumption that government action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face."

- So if only connection to Charter is an *incidental effect (chance that something MAY happen- ie. war)*, then the Courts can back away. **There was nothing in statement of claim to show that the risks set out in the statement of claim were anything more than speculative.** (Cruise missiles weren't armed). She goes on to say that if facts were different and there was a more direct risk, court might get involved. But as of right now it is a matter for the state to deal with. Not the courts
- *In a world with a charter- framing legal claims as seen here, becomes much easier. This is why we see a bunch of controversial claims being litigated in courts these days.

Judicial Review - Enforcement

What can the courts do with regards to enforcing their judgments? – Another conflict with Gov't action

Doucet-Boudreau v. Nova Scotia (2003) (Public pg. 446)

- **Facts:** Court Overseeing Remedy – Further Encroachment on legislative rights? Nova Scotia's requirement under s. 23 of the *Charter* to build French-language schools (says right to primary and secondary schooling in one of two languages, based on there being a certain number where it's practical. S. 1 does not save the gov't where there's a big enough requirement.) – Gov't just didn't build the schools. NS challenged this decision adding another 5 years of delay by the time it went to SC.
- Trial decision, LeBlanc J.: "The Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondents' compliance with this Order. The Respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine."

- **Issue:** Having ordered a provincial government to build French-language schools (in accordance with s. 23 of Charter) can NS SC order updates on progress? Is this one of the remedies available under **s. 24(1)** of *Charter*?
- **Decision:** Ordering updates okay. "**A superior court may craft any remedy that it considers appropriate and just in the circumstances**." (Para 87, Public 450). NS now has to provide updates on their progress in building the schools. SCC split 5-4 on "okaying" this reporting remedy.

- **Majority:**
    - s. 24(1) – just and appropriate remedy; Rule of law hollow w/o enforcement – court's proper role (para 31); s. 23 rights are different because positive obligation on executive
    - Effective, pragmatic remedy: no remedy would be more time-consuming and costly. But also respected separation of powers – judges not controlling where schools should be constructed, how, etc. Just required government to report on its progress of building schools.
    - Pg. 447 the charter requires effective response of remedies and full protection of charter rights and this may require creating novel remedies.
    - This is a fair remedy – we want to monitor the situation so we don't have the same problem 5 years down the road. We are not controlling anything about how the project is to be done, we just want updates. – we are not overstepping. There's no point in saying NS breached a right and then giving a remedy that has nothing to do with the breach. NS can no longer drag their feet.

- **Dissent:** this did take the judiciary too far into the executive realm
    - Separation of powers/*functus officio*- once a court makes a decision it is done. Must be carried out.
    - Court oversight should be used as last resort
    - Order vague and unclear
    - N.S. not intransigent – issue was how to comply with s. 23 of *Charter*
    - This dissent demonstrates an old fashioned view of judicial restraint. Judges say something and then the exec. or leg. respond to what was said.
    - Litigants used the courts as a PR stint.

NOTE: This decision is very interesting- and it is clear that this was a close call/borderline case decision. It has to be novel- it has to be based on enough factors that allow courts to take on a slightly different role. Majority

felt that these factors were satisfied. The dissent have set a higher threshold than the majority for when it is appropriate for the courts to do this/take on this greater role. BUT dissent is not saying that the courts can never take such a role. THIS CASE IS SIMILAR TO OD in that the courts are grappling with their jurisdiction.

Manitoba Language Rights Reference (1985) – page 454

- **Facts:** S. 23 of *Manitoba Act, 1870* required enacting, printing and publishing all Acts of legislature in French and English. Manitoba only doing English.
- **Issue:** Regarding the remedy- If SCC declares all laws invalid, it leaves the Province without any law. It leaves the government without any basis – MLAs had been legislatively summoned on the basis of an English-only law.
- **Remedy:** created temporary validity for English-only laws. During the period of time, Manitoba had to fix it by enacting all the laws in English and French. Give them a year to get this done and then check back in with them. This was an individualized remedy- specially tailored. It was a novel remedy.

- **Reasons: Judiciary has duty to ensure gov't complies with Constitution. But if they declare all unilingual Acts of legislature invalid, Manitoba will be in legal vacuum. This would undermine the rule of law. Rule of law has two meanings:**
    - Law is supreme over gov't as well as private individuals and thereby preclusive of influence of arbitrary power.
    - "The rule of law requires the creation and maintenance of **an actual order of positive laws** which preserves and embodies the more general principle of normative order" (p. 400)
- Court shows respect to the democratic process, but not total deference/respect – it's the ultimate arbiter, but also having a facilitating dialogue.

*This case further talks about drawing a line of what the judicial role should be. SCC said Manitoba's behaviour was unconstitutional and it needs to re-enact all provision to be in both languages.

Division of Powers – Interpretation

- Two recognized ways in which constitutional evolution occurs in Canada even in the absence of formal amendments to the written text of the constitution. The first of these involves an approach to interpretation that permits the judiciary to read constitutional text in light of changes in society and contemporary uses of language. In constitutional interpretation there are 2 general approaches:

➢ **Historical/Originalist Approach**- the constitution should be understood as having a single, unchanging meaning – the meaning intended by those who wrote & ratified it- this provides the constitution with stability.
➢ **Progressive/Living Tree Approach**- favoured by the SCC. Makes sense of the text at the time it is being interpreted. The text should be seen as a living tree, capable of growth and change.

- *The "**living tree**" metaphor: courts use it when they want to be progressive. Seemingly our view on what this means has changed over time. Why is the "living tree" so important to a constitution but not a statute – **difficulty of changing the constitution is not the same as changing a statute.** Also, we want a constitution to be more rigid and last longer, which is why we have to approach it differently than we do a statute.

Public pg. 129-137

Legislative Power in a Federal State

*What is it that makes federalism? In Canada, how does that translate to division of power issues?

- Power is divided between two or more levels of government that are coordinate (equal in status) and autonomous; plurality of power
- Legal recognition of territorially-based diversity

- Federalism recognizes diversity – things that are more suited to a national, federal entity are areas that the feds should have the power to legislate (s 91 – regulation or trade and commerce, census and stats, defense and military, currency and coinage…).
- S. 92: local, provincial level. Ex., management and sale of public lands, maintenance and management of prisons for the province, municipal institutions for the province, licenses related to shops and taverns, property and civil rights in the province, etc.
- Requires a written and entrenched constitutional division of powers adjudicated by a neutral arbiter
- Legislatures are not supreme like the UK Parliament; rather, law-making power (legislative jurisdiction) is divided – "sovereign"- b/c of our division of powers we are different from UK we are a federation they are not. In some ways our legislature has never been supreme like theirs because it is subject to judicial review
- Laws are valid only if they fall within the enacting government's assigned areas of jurisdiction
- s.92 lays out exclusive powers of federal legislature (parliament)

Sidenote: Federalism almost precedes the charter, if you have a problem that is also a charter problem, the court will almost always want to hear the federalism part first. If it's the wrong jurisdiction then the whole thing is void. We have a lot more jurisprudence of divisions of power issues over times and the court has developed its own ways of interpreting those types of problems- Courts treat these problems differently because they are constitutional problems. Constitutions are not statutes – the interpretation of constitutional provisions has to be somewhat different than statute interpretation.

Simeon, "Criteria for Choice in Federal Systems" (1982-3)

Key idea: whether judges will interpret certain tests (validity, applicability, operability) narrowly or broadly depends on their values – these values drive normative dynamics of interpretation of division of powers

- Perspective of **community**, where the question is asked "what implications do different forms of federalism have for different images of the ideal or preferred community with which people identify and to which they feel loyalty? **{localists v universalists}**
  - Is Canada one community, a union of 10 communities, or two distinct national-ethnic communities (of course there are other communities but this is how its represented in our constitution)
  - Do we share wealth/resources? Or each to his own?
  - 1930s: English academics concerned with effectives (functionalism)
  - 1960s: rise of provincial nation-building, esp. in Quebec

- Perspective of **democratic theory**: "does federalism promote democracy; do different conceptions of democracy generate different images of the good federal system?" **{economies of scale v pathologies of size}**
  - What level can most efficiently carry out any given responsibility – does the system increase overall responsiveness? Economic planning? Environmental protection? Welfare system? Heavy organizational and decision costs?
  - Goal of functional perspective is to maximizing capacities of governments to satisfy citizen's needs
    - Debate is over whether the arrangement increases uncertainty, thereby increasing decision-making costs, spend money on procedural bureaucracy rather than substantive policy
  - Community-national-regional based debates are a distraction either because they undermine attempts to get the functional correct, OR because they undermine cross-regional communities (workers v. owners; farmers v. factory workers; producers v. consumers)
  - Arguments within about whether its too decentralized (bad for business because of different provincial regulations; bad for welfare because no central coordinating body, no shield against external capital in provinces)
  - Some say also too centralized – too overloaded and hence ineffective

- Vantage point of **functional effectiveness**: "does it enhance or frustrate the capacity of government institutions to generate effective policy and respond to citizen needs?" **{majoritarians v protectors of minority rights}**
  - What are consequences of different fed arrangements for difference conceptions of democracy i.e. participation, responsiveness, liberty, and equality

- Democratic justification for federalism:
  - Protect citizens from reach of governments (US focus) which emphasizes liberty (but federalism might create even more government, which some see as negative)
  - Smaller units increase participation and government responsiveness because smaller you get the more responsive system is (but capacity to achieve goals might go down); hence need for a composite provincial, federal system
- Also criticizes federalism:
  - Reducing accountability (governments can pass the buck)
  - Frustrating national majority rule (unlikely to have all provinces and feds be run by same party, which would happen in unitary system)
  - Also frustrates non-regional majorities/minorities based on things like class
- On the other end federalism frustrates provincial majorities to act because they cant access all those things held by feds – Quebec can do sovereignty the way it wants; Alberta cant control its resources how it wants, etc.
- So all this means that if you think interests are divided regionally (and that democracy best happens when the interests of a region are homogeneous) then you want strong provinces

If you think that interests are divided evenly across the country (like class, NDP support) then you'll probably support strong federalism

Challenges to Statutes on Division of Powers Grounds

*Three ways of challenging statutes on the basis of division of powers

1. Validity

*Validity always comes first with the others to follow (whether 2 or 3 comes first is not specified). You must determine whether the statute is valid or void before going to the next two aspects. It must be valid to move on because the following 2 might not apply to certain entities/people. Courts may find majority of statute valid but a part that is void so they cut that part out.

- **Doctrines:** pith and substance (necessarily incidental; double aspect; ancillary: mutual modification)
- **Remedy:** declaration of invalidity (would have no force/effect) pursuant to s. 52 *Constitution Act, 1982*, in whole or in part (severance)

*Remedy for validity is very different from the remedies for the other two.

Examples:

- 1. B.C. Coal Mines Regulation Act, 1890, s.4: "No boy under the age of 12 yrs, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground. Applies to Chinese by birth, by naturalization and British subjects by birth but of Chinese race."- this was found to be void
- 2. B.C. Provincial Elections Act, 1897, s. 8: "No Chinaman, Japanese, or Indian…is entitled to vote in the province of British Columbia in a provincial election. Applies to all residents whether born in Canada or naturalized."- this was found to be valid law

2. Applicability

- *Does a particular statute apply or not? Does it apply to a particular situation?
- **Doctrine:** interjurisdictional immunity - holds that on some occasions, for some entities, a statute may not apply. Ex, Bell Canada. – very complicated doctrine
  - Some entities can be immune from legislation and it shouldn't apply to them because they have attributes that give them super powers. (ex. Some federally incorporated companies like Bell – developing telecommunication lines across the country- have been successful in a few cases whereby they argue they should not be bound by provincial laws relating to workplace safety because they are a federal entity and thus should be protected by federal laws and if the feds wants to implement workplace safety laws then hey would be bound by those. They argue they should be immune to Ontario Workplace Act because they work across boundaries so that Act/Labor law they should be exempt from or inapplicable to them. So this shows how that particular law does not apply to the particular entity. You could argue immunity from provincial laws but no provincial entity could argue immunity from federal laws- but then the

government argued that this is silly it should be able to go both ways- but there is no case where this has been successfully argued.

- **Remedy:** reading down

*The courts have pushed for IJI to be downplayed because it is so complicated but this hasn't really been followed

3. Operability

- *Does the particular statute operate in the situation? Given the factual background.
- **Doctrine:** paramountcy: when two **valid** applicable laws dealing with similar issues conflict, it needs to be determined which should apply. Federal laws should prevail over provincial laws (suspended operation of provincial law for duration of conflict)
- **Remedy:** suspension of operation- provincial law will be held at bay while the federal operates. But if the conflict ever goes away between the fed and prov law then the prov law will bounce back

*The main problem is deciding when the two laws are at conflict in the first place. Paramountcy is more of an issue of timing.

1. Validity: "Pith and Substance" – Determining the Validity of Statutes

- Validity of legislation depends on whether it is "in relation to" a "matter" falling within the "classes of subjects" allocated to the enacting level of government's jurisdiction by the *CA, 1867* (see Swinton, Constitutional, p. 207; Lederman p. 210) For example, a law is proposed for terrorism – we know that criminal law is covered by federal government we need to decide whether the proposed law falls under criminal matter.
- Judges have to: 1) determine the "matter" of a challenged statute; 2) interpret the scope of the "classes of subjects" (or heads of power) in sections 91 & 92; and then 3) assign the statute to the head or heads of power that embrace the statute's subject matter (C 214)
- How do judges determine the "matter" of a statute?
- Search for "dominant feature" or "pith and substance" or true meaning (as opposed to disguised meaning: see the "colourability doctrine")
- Focus is on the purpose of the law and its legal effects; assessed by examining (what specifically they may look at to determine pith and substance)

    - Legislative scheme, including preamble or purpose clauses
    - Legal effects- What are the effects that transpire from this law?
    - Previous state of the law
    - Legislative history (Hansard record of debates- previous debates in the House related to the law to see why laws were enacted, inquiries, reports)
    - Precedent
    - Values- what's going on here and are there some values related to federalism?

- **Value-laden process;** formalistic legal reasoning cannot alone determine results
- Choice is between federal or provincial jurisdiction: "who is the better physician to prescribe in this way for this malady?" (Lederman at C210)
- Need to consider relative value of national uniformity vs. provincial diversity, local vs. central administration (Need to consider the ideals of the court)
- *Union Colliery v. Bryden [1899 JCPC]*: "Their Lordships…are of the opinion that the whole pith and substance of the enactments…"- BC was trying to argue that these were a part of their labor laws- but legislature said the pith and substance of the laws are fed. So we use Pith and Substance as an analysis. **This was where the term came from.**

- Every federal system: In determining a division of powers case on validity grounds - the weight the judges attach to local aspect versus the national aspect can vary – and this is where a tension arises.
- s. 91/92 of 1867 Act- look at the language of these sections to get a clue as to what the "pith and substance" is meaning. Is it just a synonym for the matters being introduced in the proposed laws?
- All subjects/activities?

*Every fed system has to divide up their powers in some way. What we have done in Canada is divide up our powers to each but we haven't really decided on how we would handle new things that come up. Fed deals with anything to do with "peace, order, good gov't". Province deals with anything to do with local or private matters. So it could be said that anything new that comes up under either of these 2 "catch all" umbrellas would go to the specific branch.

Key Cases (some examples of cases where the court engages in Pith & Substance analysis):
- *Starr v. Holden* [1990] pg. 207 & 214 of the Cons. Book
- *R v. Morgentaler* [1993]
- *R v. Westendorp* [1983]
- *Kitkatla Band v. B.C. (Min of Small Business, Tourism and Culture)* [2002]
- *Quebec (A.G.) v. Canadian Owners and Pilots Association* [2010]

*Recall activity from class with "no cars, or vehicles allowed in the park" problem

R. v. Morgentaler 1993 SCC (Constitutional, p. 215)
- **Facts:** M set up abortion clinic in NS and gov't passed *Medical Services Act* to ban private abortion clinics. M charged with violating act. Trial judge and NSCA found legislation was *ultra vires* the jurisdiction of the province (it was in pith and substance criminal law and so an invasion of exclusive federal jurisdiction to pass criminal laws [s.91(27)]. NS said it was valid provincial health law and this was *intra vires;* because it relied on power to make laws in relation to hospitals [s. 92(7)], the medical profession [s.92(13)], and health [ss.92(13) and (16)]. Abortion has normally been a crim law matter.
- **Decision:** Legislation is in pith and substance a matter of criminal law. This is not the proper use of prov. law

- **Reasons:** Central purpose of legislation is to restrict abortion as undesirable practice. Don't just look at legislation to determine P&A; also its effects, background, legislative history, Hansard evidence (extrinsic evidence), etc. "If the means employed by the legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose." (76 online). Consider what the legal effects/rights or obligations that will fall upon people will be. As the courts look deeper they see that it was not as benign as it may have appeared to be on the surface. Doesn't look like a medical health matter. NS was trying to criminalize something which is not their power.

NOTE: this was the real kicker in the case. There was nothing mentioned publicly about the other practices or procedures.

Question: How would you argue for/against the result in *Morgentaler*? i.e., in this context, what weight would you attach to the values of national uniformity and provincial diversity, respectively? To a vigorous or deferential approach by the courts to the task of judicial review of legislation on federalism grounds?
- They could license and regulate the administration of abortions (which is already being done) but they were not in the right to criminalize it. In Ontario there was the passing of the "Safe Streets Act" prohibiting squeegee guys from being on the street- the act was also challenged in a similar way to *Morgentaler*. A lot of extrinsic evidence seems to suggest that Ontario was offside. There was enough in the law that the court was able to say that this is legislation related to safety on the streets (Which is a provincial matter). Provincial law allows provincial laws/provisions to have consequences like criminal laws (jail time, etc).

- *Laterman Article* (scholarly article which attempts to reconcile this issue)- talks about intention. What is the legislatures intention (pg. 212) "it is virtually impossible…. being most statutes". The glean intension from one person can be problematic. (pg. 213) " When a particular rule has meaning relevant to both…." – which is what NS thought with the abortion law. He talks would it be beneficial for the people for this to be a provincial or federal matter? – in a federal state you need to ask this question. Should it stay a federal matter or be given to the provinces and give them the power to shape the law more specifically?

Ref. re Employment Insurance Act 2005 SCC (Constitutional, p. 226)

- **Facts:** *Act* dealt with giving parental benefits (allowed voluntary absences from work- not insurance; mothers were not "absent" from work, rather "unavailable"). Quebec claimed it was a matter to do with families and children, and fell under property and civil rights - s.92(13). Not "insurance;" mothers not "absent" from work, rather "unavailable"). Feds claimed it was essentially unemployment insurance, which is theirs under s. 91(2A).
- **Decision:** P&A directed at providing replacement income because of interruption of work due to birth of a child. Upheld impugned provisions.
- **Reasons:** Assisting families is an *effect* of the legislation but it is not its P&A. [Para 67]. P&A here: providing replacement income during interruption of work. Related to federal jurisdiction over unemployment insurance.
- "…it is necessary to consider the essential elements of the power and to ascertain whether the impugned measure is consistent with the natural evolution of that power." [Para 44]
- No constitutional head of power is "static" but just because society changes doesn't mean we can change powers assigned to governments [Para 45]. Need progressive and generous interpretation of jurisdiction over employment insurance [Para 47]. Workforce has changed – more women – and this means we can't view pregnancy/missing work as just a matter of private responsibility but a matter for employment
- **Look at:** words used in their legal meaning and historical elements.

*Quebec took issue on a division of power basis. Under S. 92 the feds took out employment insurance from "Property and Civil Rights" section and put it under S. 91 (2A). Quebec said fine you can take that but you only get employment insurance as it was understood in 1930 when first made. Feds said no- living tree idea- we get Employment Insurance whatever it may be at any given time. Courts wanted progressive interpretation – they do not believe in originalism.

- Employment Insurance Act is an example of how the court tries to move with the times and stay current with society.

Pith and Substance Doctrine: Incidental Effects and Double Aspect

- Since validity is determined by a statute's dominant characteristic, legislatures may pass valid laws that have "incidental" effects on the other level of government's jurisdiction
- Despite the exclusivity of legislative powers, many activities are subject to overlapping federal and provincial powers and laws
- Ex, the former abortion prohibition in the *Criminal Code* was valid criminal law even though it had substantial ("incidental") effects on health care, the medical profession and hospitals (*Morgentaler*)
- Where federal and provincial laws are of equal importance, both may exist as subjects can have both federal and provincial purposes

S. 91 Fed- Immigration, Criminal, Banking, Income Tax

S. 92 Prov- Licenses, Employment, Property and Civil Rights (rights of a person from the Gov't)

Sometimes you get a part of a law in S.91 that influences an area of law covered in S.92. As long as the effect is incidental to its main grounding then it can also affect the other jurisdiction. But if it has such a large affect that is should not belong in the original section- this is what court means by **Incidental Effect**

You can have things properly enacted in each of these (heads of power) that seem to deal with the same matter –**Double Aspect**

Ie. Licensing of automobiles (S. 92) but then criminal laws also deal with automobiles (S. 91). Lord Fitzgerald commented further on this (pg. 108)

*These concepts show why the "Watertight Compartments" view does not work

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Incidental Effects*: GM v. City National Leasing 1989 SCC (Constitutional, p. 242)*

- **Facts:** Basis of the legislation - quasi-criminal federal legislation to limit monopolization. Civil remedy: companies to sue other companies if they thought they were engaged in monopolistic behavior. Allowed the feds to control that kind of behavior by big companies.
- Tort law is a matter of property and civil rights in the province [s.92(13)]- (*Const. pg. 245)*
- Act as a whole is in relation to the general regulation of trade [s.91(2)]- (*Const. pg. 246)*
- **Issue**: Challenge to the validity of the civil remedy provision (s.31.1) of the *Combines Investigation Act.* Is the impugned provision sufficiently well-integrated into, functionally related [lesser test], or necessarily incidental to [strictest], the scheme as a whole?
- Application:
    - The provision on its face does encroach on provincial jurisdiction (but its limited by the restrictions of the Act)
    - Federally valid law under trade and commerce power.
    - Necessary link between s 31.1 and the Act exists and it's integrated into the purpose and underlying philosophy of the Act.
    - **DICKSON:** If it doesn't intrude at all (From one s. to another- provincial or federal) then its not a problem, the act or whatever you are looking at must be valid, and you must ask whether or not the part that does encroach is sufficiently integrated to the act as a whole? Pg. 245

Double Aspect Doctrine: *Multiple Access v. McCutcheon 1982 SCC (Constitutional, p. 237)*

- A subject that falls within s 91 can also fall under s 91, and visa versa (240). Finding two laws, both valid, but under different heads of power.
- **Facts:** Ontario Securities Act prohibiting insider trading, and Canada Corporations Act almost identically prohibiting insider trading. The federal trading provisions would only include those that are incorporated federally. Most companies in Canada are provincially operated. The respondents are alleged insider traders (so here it isn't the gov'ts fighting over this).
- Challenge to the ability of Ontario legislation (Securities Act) to regulate alleged insider trading on the TSE of shares in federally incorporated companies; Insider trading also regulated by federal *Corporations Act.*
- **Decision:** Both statutes are valid; both can apply and operate; insider trading at issue has a "double aspect"
- Can both statutes apply? Can both operate or do they conflict, giving rise to federal paramountcy?
- Not appropriate to think of them as necessarily incidental – but they both have the ability to be enacted under different heads of power (so they can still be valid). Insider trading is dealt with in both jurisdictions; the court says these aren't watertight compartments.
- So insider-trading provisions are legitimately a securities matter which is legitimately a provincial matter, but it is also a valid power under trade and commerce in federal power. So both insider-trading remedies are lawful.

Pith and Substance, Incidental Effects, Double Aspect Steps:

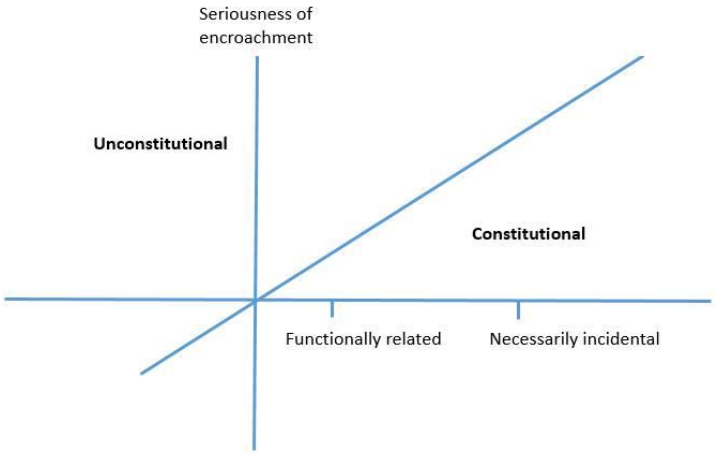
1. Determine the "matter" of a challenged statute;
2. Interpret the scope of the "classes of subjects" (or heads of power) in sections 91 & 92; and then
3. Assign the statute to the head or heads of power that embrace the statute's subject matter

- As described in *GM, Kitkatla,* etc.
    1. Do the impugned provisions intrude into the other head of power, and to what extent?
    2. If the impugned provisions intrude into the other head of power, are they nevertheless part of a valid scheme from the "home" jurisdiction?
    3. If the impugned provisions are part of a valid "home" legislative scheme, are they sufficiently integrated with the scheme?

2. Applicability of Laws - IJI

- Unlike validity, the laws themselves have been found to be valid in these types of cases. Either a fed or provincial law are valid, so the question becomes what to do in cases where there is a conflict in the law and they cant meet the requirements of both? Which one is applicable?

Interjurisdictional Immunity-*looks at it from an entity that comes into contact with the law. In certain circumstances, just as we as citizens have federal and provincial laws that apply to us, certain entities other than people (ie companies) can find themselves in both spheres at any given time. But certain entities have a shield at the core that protect them from some specific laws (ie. Prov laws or Fed laws). Some Provincial laws can have immunity at its core that protects it from some federal laws.*



As the encroachment gets more serious the connection has to be greater. If your encroachment is large than it has be necessarily incidental.

Main doctrine = Interjurisdictional Immunity (IJI)

- Difficult, complicated, sometimes incoherent
    - Compare to Double Aspect/Incidental Effects: increases federal power
    - Where provincial laws offend/interfere with a basic component of a federal undertaking or power or entity, then IJI says that that federal power is immune to that law.
- **Remedy**: reading down

Origins: constitutional text; jurisprudence:

C.P.R. v. Corp. of Parish of Notre Dame de Bonsecours [1899]

- Quebec law related to clearing of ditches throughout the province. CPR challenged this law saying that since they are a federal entity (tracks run through country) they shouldn't need to comply. In obiter Watson said that they have to comply, but there may be areas of law or operations of the railway that are immune to provincial laws (but they didn't decide it then) such as construction, repair of railway, etc. those may be immune from general provincial laws

John Deere Plow Co. v. Wharton [1915]

- Obiter in 1899 then becomes the law here/the holding of the court; required all companies provided in the provinces to obtain a license for agricultural company. John Deer challenged it saying that it shouldn't apply to a federal company – and court agreed, that there was this doctrine of exclusive area of competence. They have federal laws to follow and those laws make them immune to the provincial laws. – THIS DEMONSTRATES IJI (some fed undertakings immune to prov. laws)
- The law is valid to all other operations in Quebec, individuals, etc., but federally incorporated enterprises are immune from that.

Toronto v. Bell Telephone Co. [1905]

- Where IJI starts to "gel" as a concept

McKay v. R. (1965) (Constitutional, p. 251)

- **Facts:** Pith and substance of Bylaw? Municipal bylaw that prohibits signs on property – municipality wanted streets to be aesthetically pleasing. But a federal election happens and people want to put up signs. So question here was how does municipal bylaw interact with federal election process? Can municipal bylaw apply to fed election? And if so, how?
- **Majority** decides that there's no way for municipality to do this. Because of IJI that citizens are immune from this municipal bylaws during federal elections.
    - No municipal bylaws can pierce the core of election laws because elections are of course important to democracy. For many this was the beginnings of IJI
- **Dissent:** Incidental Effect?
    - This would be within the provincial power of property and civil rights – therefore not that different.
- Today this would probably be characterized as an issue of paramountcy – and in Canadian Western Bank we see that paramountcy is looked at first.

Commission du Salaire Minimum v. Bell ("Bell #1") [1966]

- These cases reaffirm the incoherency of this doctrine.

From "sterilization" to "affecting a vital part": the *Bell Canada* cases

- Prior to *Bell* the court basically held the opinion that the fed law should be "sterilized" from provincial laws – effectively, provincial laws were seen as potentially dramatically changing and affecting fed law. But, in *Bell* we see a bit of a relaxation of the standard – the immunity was extended just to matters that dramatically alter or effect the fed law.

Bell Canada #1 [1966] (C 255)

- Quebec sought minimum wage law for all employees in province (no federal minimum wage law)
- Bell Canada refused to pay the higher wage and said that because they are a fed entity the fed laws should guide them not prov.
- Provincial law must impair without necessarily sterilizing the federal law.
- The court came up with this idea saying that if the law (provincial law) affects a vital part of a federal undertaking then it does not apply. This really enforced the IJI concept

Bell Canada #2 [1988] (C 257) – RIGOROUS DEFENCE OF IJI

- Quebec health and safety laws re employees (re-assignment of pregnant workers)
    - Protecting pregnant workers; they should be reassigned to avoid spending all this time in front of this radiation tube because there was evidence to show that it could harm the fetus.
    - Valid under s 92, so issue here. Bell is a federal corporation and takes offence to this law. Bell said that they were immune from such laws because they are federal and this is a vital part of the undertaking of the company. Quebec cant tell us how to run our company- they cant tell us where to assign our workers

- SCC (Bets) agrees and sets a pretty stringent standard about how all of this should unfold. He says that any law that "affects essential part of the very management and operation of such undertakings" – the law is therefore inapplicable in this particular case because this specific law affects labour conditions and relations and this is an essential part of the federal entity
    - He thought if you didn't have something like IJI then the federal power could be weakened. Gives federal power this immunity over general provincial laws.
- So IJI becomes this essential and integral component of a division of powers analysis

Development of IJI--Loosening Federal Stranglehold?

Irwin Toy v. Quebec (1989) (C. 263, note 4) – very convoluted decision – narrow IJI

- **Facts:** Quebec Consumer Protection law prohibits advertisers from creating ads for persons <13yr old, including TV ads. Broadcasting advertisements are federally regulated, but advertisements targeted at children are provincially regulated. Irwin Toy doesn't want to follow the provincial law. But it is valid. It's a provincial law of general application that affects a federal undertaking. It indirectly affects because its only advertisers who broadcast were under the broadcaster act but the law in Quebec was all advertisers.
- **Decision:** Test modified where law applies *indirectly* to provincial undertaking -- law must "sterilize or impair" as opposed to "affect" a vital part/the core aspect of the federal law. Court says that where a law indirectly prevents a provincial undertaking – then it needs to sterilize the undertaking – forget the affects test (main standard) if it's indirect. Thus different/higher threshold in this case for the test compared to in the Bell Cases
- Therefore these standards fall like this:
    - Sterilizes = indirect law
    - Impairs
    - Affects = direct law

*You must assess whether it directly or indirectly affects

- **Reasons:** The court throws in an additional twist here – because Irwin Toy was relying on TV advertising, the provincial law does not directly apply to an undertaking (**there is an indirect effect here: going through the broadcaster to get to the consumer**). The court brings back the "**Sterilization**" test in this case – Irwin Toys has to be sterilized by the provincial law. **So, if the law applies directly (CPR/QC) then it is thought to be affecting a vital part, but indirectly (Irwin – broadcaster – province), then "sterilization" test applies.**
- **Note:** Many critics of this position. Generally, it is thought that the court is trying to reign in the IJI by bringing back this other test. Is it reducing the effect of IJI? Hogg thought this different test is Ludacris.

Recent Cases -- Death of IJI?

Canadian Western Bank v. Alberta (2007) (Constitutional, p. 264) ****BIG TURNING POINT – get rid of test***

*Belief that IJI is going to die a slow death. It was a dead branch that is just going to drop off. But there have been a series of cases proving otherwise. This case did change IJI but did not kill it off. Has made IJI less important – but you still need to be aware of it.

- Bank insurance vs. consumer protection. Federal bank didn't want to comply with provincial legislation governing the sale of insurance, challenged the applicability of Alberta *Insurance Act*. Alberta statute is clearly valid but banks are within exclusive federal jurisdiction pursuant to s.91(15). Banks claimed IJI, argued that the Alberta Act must be read down so as not to touch a matter at the "core" of federal jurisdiction (bank relies on *Bell #2).* Alberta said no, the banks need to comply with the act just like everyone else dealing with insurance. – Banks had recently started dealing with insurance – they had taken it on.
- **Decision:** SCC rejects bank's argument, and finds the statute applicable.
- **Reasons:** Court goes back to the *Bell* 1 standard – from now on **a provincial law must actually impair, without necessarily sterilizing a vital and essential part of the undertaking**. So "impairs" becomes a new standard between the "sterilize" and "affect vital part" standards. (paragraph 48). In other words, provincial laws can impair a non- vital part. Effectively, the court also got rid of the whole "direct" vs. "indirect" debate. Until this case, it was always about a fed entity challenging a provincial law. In this case, the court says that the doctrine could conceivably work both ways - provincial entity could seek immunity from federal law.

- **What the Court said** (Seven things to highlight the change in IJI):
    1. Para 33 - IJI is a doctrine of limited application. Don't want it to be a commonly used approached. Existence supported both textually and by doctrine of federalism.

2. Para 36 – they are not all in favour of a strong version of IJI. Dominant tie of federalism is for cooperation – legitimate view that each entity has power within its own jurisdiction – to bolster s91 and 92.
3. Para 35 – IJI is reciprocal – to protect provincial heads of power from federal encroachment, but also visa versa. It was always assumed that IJI was immunity the feds had, and provinces didn't have.
4. Para 37 – reference to the dominant tide – court should favour the ordinary operation of statutes enacted by both levels of government – IJI works around a statute, so this goes against it. If you find two statutes valid, then we should promote that – harmonious view of federalism, and IJI takes away from that. IJI should not be relied on very often.
5. Para 78 –Change order of analysis. Consideration of IJI is up for consideration after pith and substance analysis – we all still flow this path of lets do validity analysis, pith and substance, IJI, then paramountcy – but court here suggests that we should just go from validity to a paramountcy analysis if need be, and leave IJI for a last approach. Strong signal that its downplaying importance of IJI. Promoting a strong ideal of double aspect.
6. Para 48 - If we have IJI, we are going to make sure that provincial law needs to impair it, not just affect it – impair implies a negative influence, not just affect it (but not quite so high as sterilizing). Has to be an impairment of the core aspect of the undertaking
7. Para 77 – IJI is limited and should be reserved for situations already covered by precedent. Not to apply to new situations as much; and conceptually they need to be exactly like the situations already covered by precedent.

B.C. (A.G.) v. Lafarge Canada Inc (C 271, notes)

- Public Debt and property 91(1A) and navigation and shipping 91(10) vs. municipal zoning by-laws
- IJI doctrine should not be used when the legislative subject matter presents a double aspect.

A.G. (Can.) v. PHS Community Health (Insite) (2011) SCC

- Whether IJI allows B.C. clinic to exempt itself from Controlled Drugs and Substances Act by virtue of provincial, reciprocal, IJI?
- SCC ultimately determines that federal criminal law not inapplicable to provincial health program because provincial "core" over health not recognized nor defined
- Provincial attempt to do what the courts suggested. Ultimately PHS was successful but on Charter grounds

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Maritime Services International v. Ryan (2013) SCC- most recent case using IJI

Facts:

- • Ryan brothers died when their ship, the Ryan's Commander, capsized while returning from a fishing expedition off the coast of Newfoundland and Labrador
- • Their widows and dependents applied for and received compensation under the province's Workplace Health, Safety and Compensation Act
- • Ryan Estates commenced an action against Universal Marine Limited, Marine Services International Limited and its employee P, alleging negligence in the design and construction of the Ryan's Commander, as well as against the Attorney General of Canada, alleging negligence in the inspection of the vessel by Transport Canada
- •Marine Services and P applied to the Workplace Health, Safety and Compensation Commission for a determination of whether the action was prohibited by virtue of the statutory bar of action contained in s. 44 of the WHSCA.
- The Commission held that the action was statute barred by s. 44.

Procedural History:

- •Supreme Court, Trial Division, overturned the decision of the Commission, holding that the doctrines of IJI and federal paramountcy applied and therefore that s. 44 must be read down to allow the action to proceed.

- •The majority of the Court of Appeal upheld the trial judgment.

SCC Analysis:

- •Statutory bar at s. 44 of the WHSCA applies on the facts of this case
- •S. 44 is constitutionally applicable and operative and, as such, bars the action initiated by the Ryan Estates against Marine Services and P
- •A two-pronged test must be met to trigger the application of this doctrine.
    - The first step is to determine whether the impugned legislation trenches on the core of a head of power listed in ss. 91 or 92 of the Constitution Act, 1867. (MET)
    - If the impugned legislation trenches on the core of a head of power, the second step is to determine whether the encroachment is sufficiently serious. The impugned legislation must impair rather than just affect the core (NOT MET)
- •IJI does not apply to the case at bar
- •The WHSCA, which establishes a no-fault regime to compensate for workplace-related injury, does not frustrate the purpose of s. 6(2) of the MLA, which was enacted to expand the range of claimants who could start an action in maritime negligence law. The WHSCA simply provides for a different regime for compensation that is distinct and separate from tort

*To try the reciprocal use of IJI is never easy. Especially with regards to criminal law. As a province you may want to choose another area of law to argue first for and IJI and then attempt to create one with regards to criminal law.

Conclusions on IJI

- Origins and Early Development -- significant role both vertically (especially in relation to federal undertakings) and horizontally (covering many federal subject matters)
- What explains this reversal of approach from Bell 2 to Western Bank and then now?
- Recent revisions due to Canadian Western Bank, Lafarge, COPA, Insite & Marine Services Inter:
    - Federalism values; IJI must evolve in keeping with changing cultural and political realities; federalism is process, not static; doctrine now treated as exceptional
    - Paramountcy to be preferred – diminution/reduction of IJI over time?
    - Still important re Aboriginal rights vs. provincial subject matters

- Even more recent revisions in *Canadian Pilots and Owners Association* and *Lacombe* – airlines are protected; are they different? Provinces still unable to gain immunity from fed laws? And what about the *Insite* case?
- The SCC offered a rigorous defence of the IJI doctrine in *Bell #2*, expanded its application in the ensuing two decades, then cast doubt on the value of the doctrine in its 2007 decisions in *Canadian Western Bank* and *Lafarge,* and now seems to be returning back to a middle ground (*Canadian Owners and Pilots Association* and *Lacombe*)
- How would you describe the status of the IJI doctrine after *Canadian Western Bank* and *Lafarge*? After *COPA* and *Lacombe*?

Quebec v. Canadian Owners and Pilots Association (COPA) on course website

- Reserve some lands for non-development – well planned scheme of zoning. People wanted to put aero-dromes in places that were not zoned for airports.
- Court says they could do it because:
    - Limited to precedent – all kinds of precedent for airports to be immune from provincial laws
    - Ignored the idea of the double-aspect and going straight to paramountcy – but this was a double-aspect.
- Have they now weakened the Western Bank doctrine? Mixed opinions on this.

3. Operability: Doctrine of Paramountcy

- Rules for Conflicting Statutes - Paramountcy
    - Required in all federal systems – trump card the feds have in light of a conflict
    - Prerequisite: need valid laws in both spheres; inconsistent results

**In every federal system you have to have a way of navigating through such conflicts. You can make federal laws superior (which is what we have chosen) or you can have a hybrid system- you just need to have some method. Think of the federal law as "trump". How you decide how your paramountcy will operate will effect other things such as balance of power. If you have federal power act as a trump then it means there is a potential for federal power to increase under S.91 at the expense of provincial power. Especially if you broadly define what conflict is. Any broad def'n of conflict will increase the Fed legislations power. Thus we need to be careful when we say two laws are in conflict with one another*.

- **Paramountcy Arises when:**
    - The provincial law at issue is valid;
    - The federal law at issue is valid;
    - Both laws apply to the facts; and
    - They conflict

- **Key issue is when and what is conflict?** Is the conflict sufficient to give rise to a paramountcy issue? It's not always easy to establish if there is a paramountcy issue. If the definition of "issue" is that any time a disagreement occurs (this is very broad/vauge) versus a definition in which conflict occurs only when the laws go in separate directions. Then perhaps paramountcy should apply.

Effects of Paramountcy

- The federal law prevails (is paramount); the provincial law is suspended, rendered inoperative to the extent of the inconsistency
- Provincial law is not invalid; not inapplicable: **it is inoperative** (does not operate over specific conflict)
- Will come back into force if conflicting federal law is amended or repealed (prov. law can spring back into place if conflict goes away- because prov. law was valid all along it was just held to the side b/c of the conflict.

*You can see the similarities between this and IJI. Although with IJI immunity applies to particular entities – it had an affect on individuals (corporations, undertakings) whereas paramountcy applies more to the legislation itself (EVERYONE who faces the legislation in question will not have to comply with the said provincial law, etc) its not as piece made as IJI.

Ross v. Registrar of Motor Vehicles (1975) (C pg 273)- Narrow Approach

- **Facts:** Ross got DUI. Crim Code = trial judge can make decision on when he can/cannot drive (judge chose to let him drive only during work hours); Ontario Highway Traffic Act = automatic suspend license for 3 months. Both are valid laws
- Pith and Substance of Provincial Act? Federal Act?
- Pg 275: **Pigeon** -- "Both legislations can fully operate simultaneously...[A]s long as the provincial license suspension is in effect, the person gets no benefit from the indulgence granted by federal legislation."
- Ability to have flexible sentencing – not allowing someone to drive except for work so that it wouldn't deprive him from making a living – so he was only allowed to drive within certain assigned hours, according to his criminal code sentence.

- Pg. 277: **Judson dissent** -- "Criminal Code and Highway Traffic Act are in direct conflict". – if he feels they conflict then how would you reconcile them? – we would need to look at the policy considerations behind the two legislation – CC – they wanted judges to be able to tailor sentences- do we want to take this away from them?
- **Decision:** SCC said there is no conflict. Both legislation can operate simultaneously. The stricter of the two will apply that is unfortunate for the accused. So the prov. law would prevent him from enjoying the leniency that the judge was going to grant him in allowing him to only drive to work. 3 month suspension.

NOTE: the law itself is not in conflict in the sense that it gives the individual (judge) discretion to do certain things. The law is not in conflict- the judge's decision is what was in conflict. The judge could have said 3 months suspension and end it at that. It was up to the judge. If the judge had not done what he did there would be no issue. The discretion given to the judge is not part of the law in question and thus does not relate to paramountcy (paramountcy would only look at the two laws – which weren't in conflict)

Multiple Access 1982 SCC (C pg. 277) (above)- Narrow Approach

*This case limits the power of paramountcy so that feds do not have as much as what a broader interpretation of paramountcy would give them.

- Two statutes regulate insider trading in shares of federally incorporated company in identical fashion
- Valid provincial law: *Securities Act* (prohibits insider trading in Ontario)
- Valid federal law: *Canada Corporations Act* (prohibits insider trading in the shares of federally incorporated companies)
- Is duplication a form of conflict?
- "Express contradiction" or "impossibility of dual compliance" test
    - 280, 281 – "**actual conflict in operation**" – when one says yes and other says no, or when compliance with one is defiance of the other, etc. Usually what happens is the stricter of the two laws will prevail.

DICKSON- tries to narrow paramountcy. Before he gets to this test he states that laws duplicate each other and we shouldn't have that in a federal system. Just because you have 2 things that do the same thing that does not mean you have a conflict. Then he goes on to create a test for paramountcy. You need to have **actual conflict in operation** not just any conflict. If you can live with the stricter of the two laws then you are fine and they are not in conflict. It is only if it is actually impossible to follow both laws.

Bank of Montreal v. Hall 1990 SCC (C pg. 282)- Broad Approach

- **Facts:** ***Valid federal law***: *Bank Act* (seizing property if a debtor defaults). ***Valid provincial law***: Sask. *Limitation of Civil Rights Act* (security interests valid and enforceable only if notice given of intention to seize property; debtor has right to judicial hearing before enforcement- bank has to give notice before taking peoples property- this hearing process was put in place under LCRA) – province deciding that it wants to protect its debtors. Both apply to the facts (enforcement of a bank security interest in Saskatchewan). Hall (whose property was going to be taken) used the LCRA process as a defence. Bank said oh there is a conflict here and we are federal so we get to do what we want.
- **Issue:** is there a conflict leading to federal paramountcy even though it is possible to comply with both?
- **Decision:** Yes, provincial law must be suspended in its application to bank security interests
- **Test for conflict**: incompatibility with federal legislative purpose
    - 285: Court saying yes there needs to be actual conflict in operation, but what we mean by conflict now is that its potentially a conflict when the provincial statute can frustrate the purpose of the federal statute. So they seem to be adopting the dissent of Multiple Access but still using the same phrasing that Dickson used.
    - So this raises a challenge as to what paramountcy is now.

- **LA FOREST**: picks up on Dicksons judgment and says we first need to see if there is an actual conflict in operation. He takes this to mean that paramountcy applies when the legislative

purpose of parliament stands to be displaced. – NOT what Dickson meant. La Forest interpreted "actual conflict in operation" differently than Dickson. He saw it how he wanted to.

*To follow the stricter of the two the bank would have had to follow the Sask law (go through hearing process)

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*Rothmans, Benson & Hedges 2005 SCC (C pg. 289) (**MAIN CASE ON PARAMOUNTCY**)*

- *Case acknowledges that both the two approaches from the previous cases are good and will work.
- **Facts:** Sask passed a law regulating tobacco product packaging. Existing federal laws already regulate tobacco advertisements, displays, etc (*Tobacco Act*); Sask's law took this even further by implementing a prohibition on retail display rights (*Tobacco Product Control Act*). The big tobacco companies challenged the provincial law, using P as the main argument.
- ***Valid provincial law***: s. 6 of the Sask. *Tobacco Product Control Act* (prohibits retail displays) – cigarettes need to be behind opaque screens. Rothmans challenges this by saying it goes against federal law. ***Valid federal law:*** s. 30(1) of the federal *Tobacco Act* (permits retail displays). Both apply to the facts
- **Issue:** Two questions necessary: 1) can a person simultaneously comply with the provincial and the federal law? [Yes, just follow stricter provincial law.] 2) Does the provincial law frustrate the Parliament's purpose in enacting its law? [No, it supports it.]-
- **Decision:** Provincial law not so inconsistent with federal law as to render it in operable.
    - See also *Canadian Western Bank* (paras. 69-75) and *Lafarge* (paras. 75-85), (C pg. 293 note 1) both of which apply the same approach; also *Marine Services International (2013)*
- Reasons: **Two-step approach to paramountcy – impossibility of dual compliance or frustrating the federal purpose** – either is sufficient.
- Impossibility of dual compliance is sufficient but not the only test of inconsistency.
- Frustrating federal purpose: Para 21 – "subject only to its own regulation" just because the feds didn't talk about having an opaque screen doesn't mean they covered the field. Court is saying that yes the federal act is comprehensive, but it's not saying that no other province can also under its head of power deal with tobacco.
- If there were actual conflicts that were directly challenging an existing provision in the fed act, there would be P. But because the SK law addressed a gap, there is not conflict and frustration.
- Feds never actually complained about the provincial law in this case- which usually they do

***We are now going to adopt in Canada that you can examine paramountcy be either frustrating the purpose (broad understanding- tipping power to feds) or you the possibility of dual compliance.**

Flow Chart of Operability/Paramountcy:

- 2 pieces of legislation
- Anchored in S.91 and S.92
- Same action- must both deal with the issue at hand
- Conflict? (there has to be some kind of conflict – if no conflict then no paramountcy issue)

Express Contradiction:
- Narrow Test
- Can you abide by both simply by applying the stricter of the two?

→

- If the answer to previous Q is **NO** then **YES** there is an express contradiction and you have a paramountcy issue and the Fed law operates.
- If the answer is **YES** and then **NO** there is not an express contradiction then you need to look at does the provincial statute frustrate the purpose of the Federal law?

→ If **NO** then both laws operate

Tessier v Quebec (headnote) SCC

Facts:

- Tessier argued that its part of the federal

stevedoring activities are government's jurisdiction

over shipping, with the result that its employees should be federally regulated.

- The CSST (workplace safety board) concluded that T's activities came under provincial jurisdiction.
  - Upheld by the Commission des lésions professionnelles
  - Overturned by the Superior Court
  - The Court of Appeal allowed the appeal and agreed that provincial regulation applied, based primarily on the findings that:

- Stevedoring represented only a minor part of T's overall operations
- That it did not have a special stevedoring division
- That T had not adduced evidence of the nature of its contractual or organizational relationships with the federal shipping companies it serviced

Analysis:

- Labour relations is presumptively a provincial matter (Toronto Electric Commissioners v Snider, 1925) Federal government has jurisdiction to regulate labour relations in 2 circumstances:
  1. When the employment relates to a work, undertaking, or business within the legislative authority of Parliament
  2. When it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction
- If the employees performing the work do not form a discrete unit and are fully integrated into the related operation, then even if the work of those employees is vital to the functioning of a federal undertaking, it will not render federal an operation that is otherwise local if the work represents an insignificant part of the employees' time or is a minor aspect of the essential ongoing nature of the operation.
- In this case, T devoted the majority of its efforts to provincially regulated activities. Its essential operational nature is local, and its stevedoring activities, which are integrated with its overall operations, form a relatively minor part of its overall operation. As a result, T's employees are governed by provincial occupational health and safety legislation.

Federalism: Peace, Order and Good Government Power (POGG)

- 3 Branches: Gap, Emergency; National Concern

→ POGG only comes up when an issue that is not enumerated comes to mind and the gov't is trying to bring in new legislation.

History

- Origin -- s.91, *Constitution Act, 1867:* "It shall be lawful for [Parliament] to make Laws for the Peace, Order and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing…" [the enumerated list of s.91 powers follows]
- Is this a general power?
- S. 91 and 92 are not the only sections that divide up power- but they are the main ones
- **NOTE:** We have discussed criminal and POGG from S. 91 view/side keep in mind there is still S. 92 view
- POGG is now an independent source of power for the federal government. It is listed right under s.91. Judiciary took it upon themselves to create an independent source of power from the opening statement under s.91

Russell [1882] PC (Constitutional, p. 104)

- Upheld federal *Canada Temperance Act* as a valid exercise of s. 91 powers and referred to POGG as a "general power"
    - Attempts to legislate in the area of alcohol – a federal act that prohibited the sale of liquor if a locality wished to opt in (and the act would govern in their particular area/jurisdiction).
    - Purpose of the law was the idea of public safety.

- 105 – court first indicated there is this POGG power. "few, if any laws can be made by…which did not in some incidental way affect property and civil rights…exclude parliament from the exercise of this general power" – acknowledgement that maybe there's this general power of POGG over the government.

    - 106- general scope of law; not just local. General power where there's some need or thought that parliament might want to legislate in matters of general concern to the entire country, where uniformity is important.

Local Prohibition [1896] PC (Constitutional, p. 114)

- POGG power has two branches: emergency and national concern (or national dimension)
- ("some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion…")
    - 114 bottom – "the general authority given to parliament…it is declared…"
    - 115 - "their lordships…justify parliament in passing laws for their regulation"
    - POGG might also be used in something that might usually only be covered in s 92 (local matter) then becomes a matter of national concern.

-"All federal laws have to deal with POGG" p.105 first instance where the highest court hinted at the idea. Pg. 114 the local prohibition reference- the privy council is developing the idea further "general authority given to the…"

- "these enactments appear to their lordships…" – suggesting that there may be this power- as long as the matter was of national importance- that federal legislature could enact provisions. (pg. 115)

Radio Reference [1932] (Constitutional, p. 163)

- Convention regulating radios -- entered into by Canada
- s. 132 -- not relevant (compare with *Aeronautics Reference*)
- POGG: fills gap left by s. 132's restriction to U.K.
    - Must be some power to allow Canada to enter into treaties independently – and the power for Canada to enforce treaties came through this POGG power.

2 references in the early 20th C – about who has the power to enact legislation related to aeronautics and the Radio reference. With both it was who has the power within Canada to regulate such things? With aeronautics, the UK had entered into a treaty on our behalf. With Radio reference is a similar thing – except for the first time Canada signed the treaty themselves. How does Canada (Federal parliament) get the power to regulate radio since it is not in s.91 or s. 92. So the court said well the POGG power can be used to fill in the gaps in the legislative structure to s.91.pg. 164 "being there not mentioned…in relation to all matters not coming into the provincial subject matter" It was obvious by this that the GAP filling component of POGG was in effect. It also suggested that National Concern and Emergency branch coalesced right after the radio reference into this strong argument for POGG. You can see the development early on of these 3 branches to the power.

Gap Branch

- Ever federal system has to allow for slotting in new subjects into the units- things that are not discussed at all – they can add it in where they want it.
- Fills conceptual gaps, or completes incomplete assignments of power; rarely invoked; only examples in the case law are:
    - Incorporation of companies with national objects
    - Offshore resources
    - Use of language in, or regulation of the administration of, federal government departments (*Oldman River* [1992] SCC, Constitutional, p. 342)
    - Power to implement international treaties? see s.132 of the *Constitution Act, 1867*; (*Radio Reference* [1932]; *Labour Conventions* [1937], Constitutional, p. 171)

Emergency Branch

- More inventive judicial developments- idea that there will always be instances in a countries life where there is a crises that could affect the very fabric of society. They belong federally because you want a national response to such an issues- ie. War
- Gives Parliament temporary jurisdiction to enact any legislation it believes is necessary to address a crisis. Limitations imposed by the federal division of powers on Parliament's legislative jurisdiction are temporarily suspended for the duration of an emergency
- Who determines whether an emergency exists? Can Parliament's decision to exercise emergency powers be challenged?
- Status of provincial laws and provincial powers during emergency?

*Things that you want the central government to deal with. How would you define an emergency and what constitutes an emergency? If the feds are trying to get power they may constitute something as an emergency which actually isn't one.

- "New Deal" Legislation
    - *Natural Products Marketing Act* (1937) (Constitutional, p. 177)
    - Marketing and pooling arrangements to equalize prices throughout Canada
    - SCC -- POGG only in extraordinary situations
    - JCPC: not federal T&C power; not POGG
    - Anti-Inflation Reference (1976) – most recent application of the emergency doctrine.

K Swinton – The Supreme Court and Canadian Federalism: The Laskin-Dickson Years

- Laskin favoured view of federalism with strong central government.
- Beetz searches for principles and rules to confine the exercise of judicial discretion. Overall, he was much more protective of provincial rights.
- Doesn't like national concern branch because it takes matters permanently away from provinces. He prefers the emergency branch, but it shouldn't be used arbitrarily!

National Concern Branch

- The court has said that some subject matters can be so concerning that they become a concern for the nation as a whole- even if they were originally a subject for provincial legislature (ie. Started as a S.92 matter- but they can become bigger)
- *Local Prohibition*: "some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

- Revived in Canada Temperance Foundation [1946] PC (Constitutional, p. 295): "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…then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms."
- The court is now reluctant to use this power much because of its effects on the division of power in section 91 and 92.
    - Dicta in *Local Prohibition* case mostly ignored by PC for a half century
    - *Snider* (1925) PC (Constitutional, p. 142) explained *Russell* as an example of the emergency branch of POGG ("…the evil of intemperance" was a "menace to the national life" requiring Parliament "to intervene to protect the nation from disaster.")
    - 1937 "New Deal" cases all denied existence of POGG national concern branch

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AG BC v AG CANADA (NATURAL PRODUCTS MARKETING ACT) (1937) (Con, p. 177) ***"New Deal case"***

- **Facts:** ac to establish regulation of natural products for the benefit of producers, to establish effective marketing arrangements, to impose pooling to equalize prices.
- **Decision**: act is invalid
- **Reasons:** relate to matters that are in substance local and provincial (property & civil rights)
- POGG Power is only available in extraordinary situations

POGG – Contemporary Approaches

History:

- Occurred shortly after Trudeau's October Crisis. Trudeau had minority government in 1972.
- Knew he had regained confidence of a majority of Canadians and wanted a majority; engineered a defeat of a budget (NDP wouldn't support parts of it, PCs would not support other elements, but knew Canadian people would support budget); during the campaign could say both PCs and NDP have defeated us, here's the budget, give me another mandate to govern
- During the campaign, PC leader (Robert Stanfield) based platform on inflation and need for wage and price controls. Trudeau was against these during the campaign. Government employees would be stuck – no wage increases. Even more controversially, government would be able to set prices for things without letting free market reign. At time OPEC oil crisis – inflation between 10-14% (the highest it's ever been) for at least twenty months. Unemployment in Canada was also high (10 or 11%).
- Trudeau wins. As soon as he's elected says he's going to implement wage and price controls. (Argued later that the situation was different – needed to institute controls once he got in because it was no longer just OPEC, but Canada's manufacturing sector was causing inflation.) (Trudeau paid a huge political price for this. Lost in the next election.)
- Price controls seemed quite Draconian (harsh). That became the legislation that formed the basis of this reference. Intended to control wage increases in the public sector and fees and prices for certain areas of the economy – large companies and professions. Salaries of MPs, civil servants frozen. Also included cost cutting measures. It was a whole regulatory scheme that would have federal tribunals monitoring wages and prices.
- Legislation was to take effect for 3 years – expire by 1978 unless there was a need to continue to expand them.
- At time, 8/10 provinces agreed with the legislation. BC and Sask didn't agree but didn't object either. Everyone knew there was a crisis.
- The act was actually terminated early (before 3 years were up)
- Truduea never recovered from the fallout of this legislation (because he initially said it was ridiculous to regulate wage control- he lost the next election) but the court did put its stamp of approval on this legislation.

Anti-Inflation Reference [1976] (Constitutional, p. 303)

- **Issue:** Whether Act was *ultra vires* and whether Ontario agreement to apply it to the public sector was valid. Some provinces felt it was not valid because inflation was too sweeping to be dealt with only by feds – need cooperation. (Can social and economic circumstances provide support for Parliament legislating for **POGG of Canada?)**

Breakdown of Judges decisions:

Two Main Issues

	Emergency	**National Concern**	**Notes**
A. Laskin (Judson, Spence Dickson)	Valid Emergency ("crisis")	Available	"Rational basis" to show temporary, necessary measure;
B. Beetz - dissent (de Grandpré) Notes how the misuse of this power could be a problem	No Emergency	No - Inflation too broad, diffuse, not distinct or indivisible	Preamble – gov't did not believe emergency existed N.B. See approach for national concern
C. Ritchie (Martland, Pigeon)	Valid Emergency	No	Need "very clear evidence" -- onus on opponents
Summary	- 7 judges say emergency (A+C) - 2 no emerg (B)	- 5 judges say no (B+C) - 4 say yes (A)	National concern is all obiter due to 7 judges upholding legislation on basis of emergency

7 of the judges say that you don't need to say that there is an emergency for there to be one. **Dissent** says how can you make a claim to us that there is an emergency if you aren't prepared to even call it an emergency?

Emergency – **Majority** (Substance over form)

- **Laskin** (pg 305-7): Judicial notice - term used in evidence law; it entitles court's to pronounce on something without receiving any evidence. Usually restricted to strictly objective facts (ex. What the weather was that day; what day of the week it was, etc. – crown/defense does not need to prove those things) Look beyond just the text. Judges say it is not up to them to decide if there is an emergency or not -as long as there is rationale basis that the government can point to then they are the ones who make this political decision.
- Laskin asks whether you can take judicial notice of an emergency. Can take notice of the inflation rate, of all kinds of other objective facts. But is it an objective fact that it's an emergency? There are certain things that we all would assume to be a national emergency. The court is not going to take judicial notice about inflation being a national emergency but we just need some form of rationale basis to view it this way. So in some situations if you cant take judicial notice than you just need a rationale basis.
- Most of the government's argument was on the basis of national concern, but Laskin says this is not crucial. It doesn't matter that government did not say there was an emergency. In any case, government can't just say it and have us take it as fact. On the flip side, if they don't mention it, Court can still determine that there was an emergency (308)
- Attorney general of Canada in an oral argument ended up using both prongs of POGG power – that it went beyond local and engaged national concerns; dealing with monetary system (national reach and scope) and its an economic crisis, there's a peril to the economic stability of Canada as a result of this high inflation, and Canadian intervention is required.
- **But all government needs to show is that there is a rational basis for applying POGG (309). Persuade court there is a rational basis for the legislation fitting under emergency branch of POGG**.

- **Test: Ritchie** said you need clear evidence, but not on side of government, but on side of opposition to show there's not an emergency. So the bar is quite low. They're not going to bring in lots of evidence to figure it out. As long as there is some basic rational basis for it, we'll accept it. Sometimes the emergency can be so clear they will take judicial notice of it.

Emergency **Dissent**

- **Beetz** – 317 – the nature of the crisis should be written down; It must be expressly stated that there is an emergency. Taking power from prov. and giving it to feds is a big deal. He's basically flabbergasted that you wouldn't claim in any of written materials that there's an emergency, and then you try to uphold the legislation on the basis that there's an emergency – he says at the very least you need to signal that there's an emergency.

National Concern

- Not addressed by **Laskin** (C305) – because he upheld it as an emergency
- **Beetz** (for 5 members of the Court): only matters that are sufficiently specific, distinct and indivisible qualify (p. 314)
    - **National concern branch**, once you find a power to be upheld under POGG, it **modifies the powers permanently**. Federal nature can easily disappear if it national concern branch is interpreted too broadly, he says.

*Important because this will become the way to approach the national concern branch. Ideas of specificity are important. If you don't control the national concern branch, you are way worse off than if you don't control the emergency branch, because the **concern branch is permanent**. If you don't specify, the feds could grab that power in so many areas. The entire economy would be up for grabs for Fed regulation- rendering most prov. powers void.

- Inflation does not pass muster: too diffuse (wordy), "totally lacking in specificity" (p. 314)
    - i.e., the broader a subject-matter of national concern, the less likely it falls within the national concern branch of POGG
    - is this a specific, distinct indivisible thing, or is this diffuse, lacking in specificity? Court is trying to decide how this branch should work.
    - Effects and the scale become an important thing as well. Acts dealing with inflation cover so many other fields – inflation lacks specificity he says.
- New matters -- degree of unity
- Distinct from Provincial matters

* Real concern for Beetz minority is a concern of overreach regarding the concern and emergency branches. **BEETZ is all for provincial autonomy.** – Think of his upbringing (small town boy)

Anti-Inflation Reference [1976] – Concluding Remarks

*One of the first constitutional cases in which the court became americanised by looking to external evidence to make the decision better. In *Morgantaller* they looked at extrinsic evidence- that would not have occurred if it hadn't been done in this case.

- Extrinsic Evidence/Standard of Review – to help the court make better decisions
    - Professional economic study -- inflation not serious problem
    - 5 Judges: Parliament did have rational basis to assert legislation temporarily necessary to meet economic crisis
    - Court does not have duty to determine whether emergency exists
    - Judicial Notice in Exceptional Times
    - Rational Basis in Others (or "very clear evidence")
    - Onus on legislative opponents

- 309 – could they say that the country was in an economic crisis in 1975? Economic evidence. Court's response is that the court cannot be concluded on the judgment of an economist on the question of the validity of the exercise of legislative power – this cannot be determined by economists or the courts, because it's a political matter.
- Evidence helps establish whether there is a rational basis, and that's about it.

* In terms of emergency, the standard is pretty low. According to SCC all he had to do was have a rationale bases for why it was a state of national emergency

Important Q to remember for these cases: What you are ultimately asking yourself→ How do you decide whether a federal law is available under the POGG power or is it a matter truly for provincial jurisdiction? And what is the consequence if you decide that a federal law with the subject matter of a provincial law goes ahead under the POGG power

What do we come away with?

- **Emergency branch**: will include war, pestilence and plague, temporary in nature, only need be a rational basis (judicial determination). There's also the *Emergencies Act*
- **National concern branch**: not as well formed as emergency branch.

Contemporary POGG Power: National Concern

R v. Crown Zellerbach [1988] (C 323) – Court divided on distinctiveness

- **Facts:** Ocean Dumping Control Act: no dumping at sea- (federal act)- allows the federal parliament jurisdiction over inland marine waters (waters that belong to a province but because of tide and such are salt water. Waters that are inside provincial boundaries) "Sea" = inland marine waters. International Convention: Prevention of Marine Pollution. Defence= Act ultra vires Federal Parliament

MAIN IDEA: Charged with dumping an improper substance in and inland marine body of water- NOT a government against government conflict – it is Crown Zellerbach that is being charged with this offence. The way to defend themselves they say this law exceeds the jurisdiction of federal parliament. The province should be charging us not federal. It is not a valid federal law. Court finds it valid under the national concern branch of the POGG clause. They cannot find another head of power the act falls under- it is not criminal (although some aspects of it are criminal- pg .325), it is not to do with fisheries pg. 326 (which is also federal).

*This issue of pollution is not under the GAP power because pollution is not a new issue. It is a property and civil rights problem that the province should deal with.

- **Issue:** Is the federal prohibition on dumping in marine waters without a permit in s.4(1) of the *Ocean Dumping Control Act* (now s.125 of the *Canadian Environmental Protection Act*) valid?
- Dumping at issue occurred in provincial marine waters
    - Why did the validity of the challenged law depend on whether its pith and substance was a matter falling within the national concern branch of POGG? (in other words, why couldn't the provision be upheld pursuant to the enumerated heads of power in s.91 (such as fisheries or criminal law))?

- Why couldn't the provision be upheld as an exercise of the gap branch of POGG?
    - p. 543-544 says this is regulatory, not criminal or fisheries. It's about pollution. Only way to uphold is POGG.

- **Test for National Concern:** before a subject matter can be allocated to the national concern branch of POGG it must:
    1. Go beyond provincial or local interests and be of concern to the nation as a whole;

2. "Have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern"; and
    - this is where you get the problem of gap and no gap. These are things that have typically and historically belonged in the principal realm- but something has happened to make them of national concern (can be both new or old concerns). Comes from Beetz's judgment. A national Concern branch should be tightly bounded- you still need to keep in mind s.92 and provincial powers granted to the provinces. IF what you are going to grant to the federal powers gives them too much flexibility to do things that are going to take most power from provinces then you cant do it.
3. "A scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power" (per Le Dain J. at Constitutional, p. 326; see also Beetz J. in the *Anti-Inflation Reference*)

- 326 - Idea that the national concern branch mainly deals with these things that may once have been provincial, but have now reached a general national aspect of national concern. Doesn't say why or when. Singleness, distinctness, and indivisibility become the key operative words here (relate back to Beetz). Would it become a problem that is more national in scope? (ie. If Ontario interfered with river pollution- rivers connecting to other provinces- could this turn into a national concern? YES)
- In determining (2), ("singleness" or "indivisibility"), it is relevant to consider the **"provincial inability test": that is, will the failure of a province to deal effectively with the subject matter have negative consequences outside the province?** If so, this strengthens the case for allocating the matter to the national concern branch of POGG (Constitutional, p. 326-7)
    - If the province fails to deal with its own in-land waters, how does this affect the rest of Canada? Including other provinces and Canada itself. If the province's inability to do something doesn't have an affect on the rest of the country then that probably means that the national concern branch doesn't apply – but if it's the reverse and the provinces cant do something and its affecting extra provincial interests then it's a national concern.

* This expands Beetz's Approach in the Anti Inflation Case. The test also emphasizes that the national concern branch is separate from the emergency branch. Emergency branch is temporary legislation.

- Result of Case:
    - As if the words "ocean (or inland marine) pollution" (like temperance, aeronautics, the national capital region, and nuclear power) have been added to the federal list of exclusive powers in s.91
    - Implications for provincial regulation of ocean pollution?
    - Implications for further growth of federal environmental jurisdiction?

Judges: SCC Split on whether the Marine Pollution lacked the distinctness required for national concern test (step 2 of test) Majority said it does have a singleness and distinctiveness -they distinguish salt water pollution from fresh water pollution they are different and there is scientific body that says these waters are different. The dissent (LA FOREST) said no pollution is pollution its all one – too broad. Zellerbach said that we cant tell what is salt and what is fresh water when we dump the pollution in. If there is not set out way to tell then how are we supposed to guide our behavior.

Dissent (329)

- On what basis did La Forest J. (dissenting) find that ocean pollution could not be allocated to the national concern branch of POGG?
- Jean Leclair's criticism of the majority's ruling (Constitutional, p. 335)

*Once you find national concern, this has profound implications for the balance of power. As the court found in this case, once you find national concern it is a permanent decision. – Permanent increase in fed powers. (pg. 331). It's a slippery slope. Feds could misuse this power and so you see the court backing a way from

POGG. Havent seen any further allowed use or growth by the SCC of the National Concern Branch. Feds have tried using National Concern in other areas and have not succeeded at SCC level.

Hydro Quebec Case (C 345) Note 3

- Also an environmental prohibition. Hydro Quebec (like Zellerbach) was charged with polluting. One of their defenses was that it was improper federal legislation and they don't have the power to just generally deal with pollution under the POGG power and they won this argument. But ultimately they lost because the court said we aren't going to uphold this under POGG power but we will under criminal power. It was this case that made the court realize the concern expressed by both dissents (Anti- inflation and Zellerbach) you need to be very careful upholding something under the national concern branch because of the permanent change in the structure of our federal system. For more than 20 years there has not been a national concern branch case- some have tried but no one has succeeded.

You must consider the effect of a statute when identifying its "pith and substance"

-Majority of the court looked at the administration of the Canadian environment protection act (finding only a small number of toxic substances under regulation) to reinforce the conclusion that it was a criminal law

POGG and federal environmental regulation after *Crown Zellerbach*

- *Friends of the Oldman River Society* [1992] (C 342) – does Parliament have the power to require environmental assessments of provincial projects?- as long as they meet criteria under Zellerbach then the feds get their grounding power to pre assess for potential environmental concerns.
- Canadian Environmental Assessment Act (1992)
- *Hydro-Quebec* [1997] (C 345 note) – does Parliament have jurisdiction to regulate toxic substances, in what is now Part V of *CEPA*, from "cradle to grave"?
    - Hydro was charged criminally for dispersing pollutants into river water – federal government says that legislation is constitutional because it was relevant under criminal power and POGG National concern power.
    - But SCC moves away from POGG here – 345 – unnecessary to look at this power.
    - The court is now a bit reluctant to go into the national concern power because of its effect on the division of powers in s 91 and 92. They much prefer to find a specific head of power in 91 rather than use national concern power.
- *Species at Risk Act* (2002)- likely to only fit under the national concern branch (using POGG power).

POGG Power – Concluding Remarks

- Federal POGG power: centralizing federal tool? Or honest and realistic acknowledgment of power?
- Provincial inability Test (Choudhry C pg 338):
    - Dickson's Court. Feds can only act in those circumstances where the provinces are unable. 3 situations of provincial inability:
    - Negative extra-provincial externalities (diff btw who makes decision and who bears costs/benefits – impacts the decision)
    - Collective action problems
    - True provincial inability (constitutionally incapable of regulating certain matters)
- Compare with overuse (?) of criminal law power -- *R. v. Hydro Quebec*

POGG is only a residual clause: you should only go there if you don't have a specific head of power to go with.

Federalism: Criminal Law Power

Definition:

What is criminal Law? What is the extent of the Criminal Law Power? (Basic layperson definition)

- Punishment of antisocial behaviour
- Concerned with morality, social values, harm to others/self

- Deterrence of behaviours that are inconsistent with social values
- Mechanism of social control
- Concerned with serious transgressions (more so than other areas of law) so serious that it is a state matter.
- Try to remove vengeance from the individual sphere.

Background

- Exclusive federal jurisdiction to make laws in relation to "criminal law … including procedure": **s.91(27)**
  - Tells us that criminal law is a federal head of power – this is unusual in a federal state – Ex in US & Australia each state has power over criminal law. But Canada decided it wanted a national unified criminal law. It makes sense that criminal law should be consistent across a country – something it aspires to as a whole, and sets as universal values. On the other hand, subnational laws protect from a strong central power (US), and state laws do end up matching each other for the most part. In Canada the concerns over provincial autonomy had to do with preserving religion and culture – criminal law was not as important.
  - NOTE: what is carved out of this section is the constitution of the courts – provinces have the power to deal with criminal matters in provincial and superior courts of each province. BUT the federal government retains power over criminal procedure.

- Provinces have an "ancillary" power to include punitive provisions ("fine, penalty or imprisonment") in otherwise valid provincial laws: s.92 (15)
  - Shifts into quasi-criminal zone because they have the power to take away people's liberties and imprison people for breach of provincial laws. One of the most extreme sections that a state can wield and we have given it to both the federal government and the provinces.

*Criminal law power is much bigger now. But how far can the definition be pushed? The fed Gov't often tries to push the jurisdiction over criminal law too far.

Margarine, Hydro and Firearms cases show that one of the problems with a broad definition of criminal law is that you can bring in a lot of things that are not traditional criminal law. It is because of the triple P test and the expansion of purpose and prohibition, that the courts have allowed the expansion of criminal law powers. Retraction of POGG has been filled by an expansion in criminal law.

Issues:

These are certainly not watertight categories and there are a number of issues that arise…

-
  - Overlapping jurisdiction?
  - Fed Gov't have the power over criminal law & provinces have quasi criminal powers which can lead to tension. As each jurisdiction expands, more clashing

  - Ease of federal expansion by "criminalization"?
  - If you define criminal law broadly, too many things could be criminalized and the feds can grab more power. Have courts made it too easy for matter to become criminalized?

  - Ease of provincial expansion by "regulation," broadening "property rights"?
  - Can provinces expand their criminal power by adding regulations with punishments like fines and imprisonments? Is that an expansion into federal jurisdiction?

  - Incidental effect vs. technique of mutual modification?
  - Hinges on which of these views the court takes.

Definition: "Crime":

- *Board of Commerce* [1922] PC (C 133): "very nature belongs to the domain of criminal jurisprudence"- pg 136
  - First attempt by the Privy Council to define "crime" was in the *Board of Commerce Case* – case involving the first attempt at anti-combines legislation – Combines Affair Crisis Act 1919. Challenged as ultra vires because it was not really a crime, it was business. Tautological definition "criminal law is criminal law" everyone knows what it is when they see it so I don't have to define it further.

- *P.A.T.A.* [1931] PC (C 159): any law containing a prohibition and a penalty = form of criminal law (**don't need to know the facts here)**
  - As long as federal government sets out something with a prohibition and a penalty, then that's a valid criminal law – so leaves it very open as to what federal law can criminalize. Up to parliament to figure out what society wants to criminalize or not, and there might be new crimes that we don't know yet so we don't want to box ourselves in. We need to give parliament that flexibility to enact criminal laws.
  - This second definition by the privy council of "crime" focuses on criminal law being in form only- as long as the form meets the requirement of criminal law it meets the requirement of being criminal law under 91(27)
  - **ATKIN's** Standard: "is the act prohibited with penal consequences?" This is about as broad as it can be. Anything can be prohibited with penal consequences. This could just be a fine. P. 160 only common nature is that they are prohibited & penalized – criminal law is not frozen in time, it can evolve and change, and it will. This is a useful thing for the privy council to note, because originalists would suggest that crimes need to be as defined in 1867 – Atkin is speaking to the living tree – what is a crime evolves with society.
  - PATA test lasted for a very long time, despite being so broad.

Margarine Reference [1949] SCC (C 422): criminal form and public purpose

- Margarine was illegal for about 70 years, and even once it was decriminalized, it could not look anything like butter (up until early 90s). This was all done in order to protect dairy farmers. This industry is still highly regulated. Government was trying to control the importing of dairy products.
- Provinces said this was outside the government powers. The feds said that it was criminal – prohibit and punish under PATA – criminalized the production and possession of margarine.
- This case narrowed the test. Had to have a public purpose which can support it being in relation to criminal law ex: public peace, order, security, health, morality (not exclusive). That allows the court to find that this legislation did not meet any of the public purposes, this is economic/trade law that the feds stuck a punishment on to pass as criminal.
- There is a concern from the court that by having a simplistic view of the criminal law would lead to too much expansion of the criminal power - "slippery slope".
- **New standard is:** Prohibition, Penalty (both concerned with the form of the law), and Purpose (concerned with the substance of the law)
- 423 – The PPP (prohibition, public purpose, and a penalty). **They added the idea of a public purpose; must be a prohibition and a penalty (criminal law form) but there's now some content built in, there must be a public purpose to the law.** Public peace, order, security, health, morality, those are the ordinary but not exclusive ends served by that law.

*This is where we still are today. The rest of the cases just take this "triple P" definition, and apply it. NOTE that it is not enough for a crime to be in the CC, it needs to meet the constitutional test

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RJR MacDonald v. Canada (AG) SCC [1995] (Constitutional, p. 425): prohibition with penal sanction directed at legitimate public evil or injurious effect (eg, protection of public health); can be accomplished "second-hand", ex, via advertising/warnings

- Para 46 – Prohibition part expanded so that you don't have to prohibit the base act, activity or substance but can prohibit secondary act, activity or substance (e.g. don't ban tobacco but things related to it)

- Challenge to federal legislation TPCA, which sought to regulate the advertisement of cigarettes. The purpose was to protect health, protect children. Prohibited Advertisements, Promotion of Tobacco Products, and Sale of Tobacco Products without proper warning. RJR was charged for not complying with this law, and challenged these 3 sections on the basis that these are not criminal laws – advertising and sales are regulatory provisions not criminal laws and that should be something that the provinces should be doing under property and civil rights. Resounding **split between the majority and the dissent → majority upheld under the criminal law power.**

Criminal Law Power: scope

Margarine Reference (C 422) (criminal form and public purpose)

- **Facts:** Feds pass prohibitions on manufacturing margarine in federal *Dairy Industry Act*
- Does this have some kind of evil, undesirable or injurious aspect? Trade Protection? Forbidding manufacture/sale of certain items?
- **Issue:** Is the section of the Dairy Industry Act ultra vires of the Parliament of Canada either in whole/part and if so what particular and to what extent?
- **Rand J:** emphasizes need for criminal purpose as well formal requirements of prohibition and penalty, in order for a fed law to be upheld as an exercise of the criminal law power.
    - Prohibition isn't enough in a unitary system.
- Need criminal form (prohibition/penalty) and public purpose. Prohibition with penal sanction directed at legitimate public evil or injurious effect (eg, peace, order, security, health, morality)
- **Decision**: Prohibition of margarine within Canada was ultra vires parliament but preventing importation was intra vires their power to regulate foreign trade. (Affirmed in Canadian Federation of Agriculture v. AG for Quebec). Concern over trade products.
    - Finds that this leg is actually about trade protection. Clearly worried about floodgates.

- **Note:** *R v Malmo-Levine; R v Caine*
- Court upheld prohibition of possession of weed in narcotic Control Act as a valid exercise of the criminal law power by treating the protection of vulnerable groups from self-inflicted harms as a valid public purpose (pg 424 - para 76-77).

RJR MacDonald v. Canada (Attorney General) (C425)

- **Facts:** *Tobacco Products Control Act* – prohibited all advertising/promotion; health warnings required. Fines and imprisonment possible sanctions.
    - They claim the act was improperly federal b/c it wasn't dealing with fed matters but more provincial matters (marketing and sale of products). Tobacco company argues that it is regulation dressed up in criminal clothing – it sets out how we can advertise, where we can advertise and what it needs to say- this is purely regulatory.
        - **Majority** deals with this by saying that (p427) if it was regulatory; there are lots of other things that it would do. If parliament's intention was to regulate the industry it would have spoken to product quality, pricing, labour relations, board of oversight etc. that is needed when regulating an industry. This is just one tiny element and all of the legislation deals with the same concern. The company still has freedom (federally) in all other aspects of the business. It is not a regulatory scheme.

- **Issue:** Can Parliament use criminal law power to prohibit manufacture, sale or possession of dangerous products, including tobacco?

Majority:

7 judges find this to be valid criminal law-

- Parliament can legislate under criminal law power to prohibit the advertisement of tobacco products on the ground that these products constitute a danger to public health (impractical to ban sale of tobacco altogether, so the government can tackle this issue in a peripheral way).
- **La Forest** outlines formulaic requirements for criminal law power. Prohibition must deal with some injurious effect (here, its to protect Canadians fro harmful/dangerous effects of tobacco- he focuses on this); scope of federal power to create legislation with respect to health matters is broad. **Still PPP – prohibition, penal sanction, public purpose. – "Triple P".**
- Argue first that it's a plenary power and that fact of prohibition and penalty make it prima facie criminal; second, Margarine reference says that protection of health is a valid purpose for criminal law (One of the examples given by **RAND** in the margarine reference)
- Criminal law can be used to get at something in a kind of peripheral way – but in the circumstances there's practical pragmatic reasons to do it this way; there's no way we could ban tobacco in Canada, and the cons would be worse than what we'd achieve by banning it.
    - P. 427: if a given piece of legislation contains all the elements and is not a colourable intrusion on provincial law, then it is valid. (Colourable = almost fraudulent/backdoor/improper.

Dissent:

- Parliament is not entitled (under criminal law power) to prohibit all advertising/promotion of tobacco products and restrict the use of tobacco trademarks.
- Finds that this is a regulatory measure aimed at reducing tobacco consumption and therefore ultra vires. Prohibition of advertising criminalizes expression; no criminal harm by advertising (not a significant, grave, and serious danger to public health. Focuses on the ads themselves, whereas majority just focuses on tobacco threat.)
- Characterizes the public purpose step very differently from the majority. Requirement of "a significant, grave and serious risk of harm to public health, morality, safety or security"
- Trying to put the bar of criminal public purpose a little higher – floodgates
- If feds really wanted to criminalize tobacco, should have done so. If the feds want to curtail this evil, under criminal law power then curtail the evil – prohibit tobacco (same as they did with margarine). Principled decision.
        - **Majority (in response)** says this just drives it underground, you can't really prohibit tobacco it is too prevalent. This wouldn't achieve the desired effect. Pragmatic decision instead.
- So **differences between majority and dissent two-fold**: ratcheting up of public purpose standard, and isolated the actual legislation dealing with advertising (How can that ever be thought of as criminal? Run advertising through the criminal law matrix)
    - Another counter argument: to be truly criminal, you can't have exemptions – this exempted foreign cigarettes in foreign publications. Truly crimes are universal and you don't get exemptions from a crime, this goes against the very notion of a crime and the rule of law
        - **Majority** says no, there are actually exemptions – ex. Abortion is illegal unless it is done at an accredited facility. (Today we have examples around medical marijuana). And once crimes can have exceptions this legislation is ok.

***This case demonstrates how the reach of criminal law has expanded to prohibit things you can't really prohibit, by coming at it indirectly by legislating parts of it. Don't have to criminalize the thing itself, just criminalize the essence of the thing.**

R. v. Hydro-Québec [1997] (C 433)

- This failed under POGG but passed under criminal law
- **Facts:** Canadian Environmental Protection Act (CEPA) -- regulatory scheme re toxic substances. Ministerial order restricting PCBs. The PCBs were only banned on an interim order, subject to being officially declared toxic.
    - Not clear what was prohibited: List of Toxic Substances - consultative process; interim order process where urgent/short-term action required; once defined as "toxic": regulations governing release, how manufactured, imported, processed, used, sold, etc.
    - Penalties weren't even in the Act itself.
- **Purpose**? "Protection of clean environment; major public challenge of times"
- **Form?** Procedure assessing toxicity *culminates* in prohibition and penal sanction
- The prohibition is not always clear and that gives rise to the concern that this doesn't fit within the normal criteria for the criminal law power.

Hydro Quebec were charged with dumping under CEPA. They challenged it on a federal basis. Cannot be a federal law because the law is largely silent on what is toxic and what is not. They state that toxic substance is- entering or may enter the environment, where it has or may have a lasting effect, constituting or may constitute danger to health of Canadians. Doesn't seem right that a criminal law is uncertain- need to know what is criminal or not by reading the act.

- **Issue:** Were ss.34-35 (about banned substances) ultra vires the criminal law power? (How can you have a crime for something that you don't know is criminal until an order in council says it is?)

Majority

- The courts holding that the prohibition doesn't need to be spelled out specifically in the statute, it can be added in and changed in a regulation; para 23 (?) "Protection of health is clear but I entertain no doubt that the protection…sufficient to support the criminal provision" – new public purpose is the protection of a clean environment.
- The approach to this act is legitimate – they need to be aware of new health concerns.
- The argument is made that because Regulations don't have to be read in parliament – are executive orders that can be established at any time- It is wrong in form to allow the executive to just create criminality by virtue of executive orders.
    - **Majority** says this is ok because what is toxic is constantly changing, science is changing, it would be too cumbersome. It is more efficient, and safer to leave it broad. The prohibition is indirect, will change over time.
- **LA FOREST** gives a good into to federalism – simple proposition that a validity of a proposition must be held against the head of power…
- Para 123 – majority says that the protection of the environment is a public concern – expansion of the list in the margarine reference.
- Provinces can still regulate environment – it is not one body taking power away from another,
    - This is a more modern view about co-operative federalism – if the province isn't taking an issue then they hesitate to say it is outside the scope.

Dissent:

- Not criminal form: no prohibition until administrative order made (para 47 pg 441). Provincial exemption: presumption that's regulatory, not criminal. It looks so much like a regulation that it cant fit under criminal law- it is close to the line (para 47)
- **Key point**: with all other prohibitions, it is the act of dumping itself which is prohibited; here the act only becomes prohibited once an administrator reviews it
- Works with the triple P test, but for pragmatic reasons they find that the prohibition does not need to be on the face. (Similar to what was found in RJR). Not very often that you would allow criminal laws to be made this way)

Firearms Reference [2000] (Constitutional, Note p. 445)

- **Facts:** Register all firearms; license all firearm owners (Chretien proposed the reference and argued their constitutional basis for dong so what criminal law) Alberta challenged this, saying gun registration system was entrenching on provincial power (all kinds of other provincial licensing and registration systems dealing with property). Argued that the licensing and registration regimes gave so much discretion to administrators as to be considered regulatory rather than criminal law (though they had been put in the Crim Code). Registering something is property and civil rights- how can it be criminal law? The evil here is a gun, how does telling the gov't you have one deal with evil?
- **Issue**: – does Parliament have the ability to legislate for this under the criminal law power. Is the Gun registry a valid piece of legislation?
- **Decision:** Valid criminal law power. (JC: Unanimous court privileges its clear purpose for public safety over the formal requirements thereby continuing trend in *Hydro-Quebec*.)

Reasons:

- **Applied** *Margarine Reference* test – there's a prohibition (no gun without license), penal sanction and purpose (restrict access to inherently dangerous objects/public safety – not to license property).
- Relied on facts that criminal background checks were done, etc. Clearly about public safety.
- Guns distinguished from cars; not regulating guns as items of property. This was a prohibition with penal sanction directed at inherently dangerous item; not regulatory despite complexity of legislation since still meets requirements of prohibition, penal sanction and criminal public purpose. (Complex regulatory nature not a problem because we have the CEPA and FDA)
- **Distinguished** from Hydro Quebec – that was toxic substances we don't know are toxic until science tells us so. Here, it's clearly laid out in CC.

The court said it is a complex matter that needs creative ways to prohibit

- Rex Murphy - "Cosmetic legislation" – not a licensing and regulation problem – this does nothing to fix the harm it purports to.
    - REMEMBER - Have to separate the usefulness from the constitutionality – the court is not weighing in on the value of the law – this is left to the politicians
    - Para 33: gun control has traditionally been considered criminal law because guns are dangerous. Protects public safety.
        - This legislation meets the purpose the same way that the advertisement in RJR did – if you are trying to regulate something that is widely used you have to come at it indirectly.

- **Note:** One of Alberta's arguments was similar to tobacco companies' argument in Tobacco case. If you really think guns are dangerous why not ban guns? **Because of their use.**

Assisted Human Reproduction Act Reference [2010] SCC (Que Ct. Appeal, Constitutional, p. 448):

- 4-4-1 Split SCC decision

**Some criminal and some regulatory

NOTE: it is an unfortunate decision because there is no clear decision – puts in limbo where the criminal law power stands and lacks certainty.

- 4 want triple P
- 4 wants purpose refined a little
- Cromwell plays both sides

- Maybe the court is starting to realize that it has been a bit too broad in its interpretation of criminal law power and will reign it back in.

- **Facts:** After several failed attempts, feds in 2004 passed *Act*. Certain practices completely banned/prohibited (cloning, animal/human hybrids, etc.), payment for surrogacy. Some practices just regulated (where services can be performed, etc.) Quebec did not like some of the aspects of this legislation – the ones that were more regulatory. (Did not take issue with prohibitions). Because they felt that it took away a number of provincial provisions. It was the broader context of the act that Quebec took issue with. Case goes to the Quebec Court of Appeal
- Federal government argued not on POGG but on Criminal Law power – mirror to anti-inflation legislation argued emergency but it looked like it would argue national concern.
- Quebec raised a series of provincial powers it infringed - hospitals, 92(13) – property?, 92(16) – general
- **MCLACHLIN 4**: finds the broader purpose behind the act says that it is properly criminal.
- Para 24/25 the dominant purpose is to prohibit inappropriate practices, rather than suggest beneficial ones.
- Para 33 – while it has beneficial aspects (regulations), neither its dominant effect nor its dominant purpose are regulatory.
- Just because it is criminal doesn't mean that it can't benefit people – we all benefit from criminal law.
- **CONCLUDES** that the pith and substance is properly prohibition therefore it meets the triple P requirement. The real reason behind the law is to meet these concerns around health.
- Go through the categories from the margarine references – morality and health and security are all key aspects of this legislation.
- See paras 16-17 (approach to pith and substance); 24, 32-33 (dominant purpose); 35-36 (approach to criminal law power); 41-43, 61-63 (criminal purpose);
- **DISSENTING 4** a huge part of the impugned provisions are purely regulatory**.** Hard to see a criminal law purpose in those provisions. Don't have the same purpose as the unchallenged prohibitory provisions (Quebec did not challenge these)
    - para 239/240 when they go to examine the scope fo the criminal law power they have a problem with the prohibition – hard to find a real evil to be criminally prohibited in these regulations.
    - Concern about expanding the criminal law poser to anything labelled criminal law
    - Has to be some evil or reasonable apprehension of harm and they could not see them in the suspect/impugned provisions
- Very divergent views – the Quebec judges are the ones that are concerned about provincial autonomy.

- paras 217, 227 (approach to criminal law power); 233-237 (criminal purpose); 239-240 (evil as element of criminal law); 255

CROMWELL decision (Wins) (paras 282-end)- really good but doesn't help us understand what to do about criminal law power. A good example of the artificiality of the federalism analysis. To say that there is one dominant purpose for an entire piece of legislation is artificial – but just looking at the regulatory provision is also artificial – have your answer before you start.)

- Cromwell goes through and finds a purpose for each of the impugned provisions – includes some, leaves out others as ultra vires.
- Honest about how we should go about this

- This case lays out the methodical differences

    - **McLachlin** groups says normally look at the suspect provisions and do your analysis there, but because of the complexity of the matter you look at the act as a whole first and only about the specific provisions if there is a problem
    - Label group comes at it from the traditional approach – just looks at the suspect sections.
    - Cromwell looks at the purpose of each of the provisions on their own.

- Historically courts have tried to come up with a global assessment
- This is the last case where they pronounced on the criminal law power so we are left in a state of uncertainty.

NOTE: They have pulled back on using POGG power and have used criminal law power more.

Provincial Power to Enact Penal Laws

- *Nova Scotia Board of Censors v. McNeil* [1978] (Constitutional, p. 452)

- **Facts**: film censorship regime in NS. NS has a theatre and amusements act, which allowed the provincial government to preview films and other broadcasting media. Similar to a sensor board. The board has employees who would preview every board to be showed in the province and people would sit and watch the films and decide ratings and what would be cut, etc. This case arose after the sensor board banned the film "Last Tango in Paris" which was a bit too risky for the 70's. McNeil was a film operator in Halifax and didn't like that the film was banned and not banned in other provinces. So he took the sensor board to court and when it got to SCC it was a constitutional argument that the board laws were laws that were criminal laws and NS therefore did not have the power to have such laws.
- **Issue:** Is provincial film censorship criminal?

Majority (upholds law)

- **Form?** No prohibition with penalty; prior restraint -- administrative process (penalty only reinforces administrative regime - the prohibition only comes if you don't go through prior restraint process (submitting your film 1st to be sure it complies with law; therefore not really criminal law)
- **Purpose?** Morality and criminal law not co-extensive; provinces can trench on areas that are seen to be concerned with morality
- Preventative not penal – the prohibition only occurs if you fail to meet the process.
- Censorship laws = prior restraint laws – the company has to send their film in to the boar and board makes a prior determination of whether the film is okay or not → this is prior restraint. BUT this is not what criminal laws are. The prior restraint law is dealing with property which is a provincial matter. Just because the laws touch on morality (what is right or wrong to watch) just because there is a moral connection to the law does not make it a criminal law and under s.92 does not say that provincial laws cannot be moral. It just hinges them but does not establish their jurisdiction.

Dissent (Laskin)

- Determining what is decent is within exclusive power of feds, b/c moral considerations are involved. Any act that involves punishment if you breach moral offences = criminal, federal. Provinces morality laws must be anchored in section 92.
- Triple P idea- Criminal laws have to have a certain form: prohibition, penalty and purpose. If you don't have that form you are not criminal.
- Thought it was ridiculous that they were provincial laws because they were quasi criminal. They were deciding what was good and what was bad or wrong and right.

NOTES: Federal power over criminal law seems to expand over these cases. The provincial also seems to expand over areas that seem quasi criminal. The local nature of the laws – one of the reasons for criminal law in S.91 because we wanted uniformity across the country and each of these sensory laws deal with a contained boundary. Because provincial law only affects the province does that mean it is not infringing on criminal law power? Would we want instead to have a uniformed broadcasting law across the country? Should it be federal? **SOMETHING TO THINK ABOUT.**

Once you give someone an inch they will take further and so with the feds this occurred with the provinces. The idea of prevention vs prohibition. If you are trying to prevent something the provinces can normally do that but if you are trying to prohibit something that is normally criminal/federal. The provinces cannot be using the Triple P approach.

Westendorp v. R [1983] (C 456)

- *Odd decision. Stands out from general power of allowing the growth of provincial quasi criminal law. Because it is very clumsy in terms of the cities approach to a problem.
- **Banks* case learned from *Westendorp*
- **Facts:** Calgary passed bylaw-preventing prostitution on specific street (provincial law), saying it was a traffic problem. The prostitution by law was added to bylaws about not being able to sell things on the street (t-shirt stand, hotdog stand). Feds challenged on the basis that it was an unconstitutional attempt to take over criminal jurisdiction (Calgary as delegated provincial power). There is an overreach that offends the division of legislative power. It is not a standalone provision dealing with prostitution it was part of a street safety bylaw and they threw in the extra prostitution part. But the province could not do this as prostitution is not property civil rights it is prostitution.
- **Purpose** Bylaw 6.1 was not anchored in sec 91 proper and civil rights – it was too focused on street prostitution.
- **Held:** Invalid exercise of criminal power. (Ultra vires)
- **Reasons** (**LASKIN CJC**): If this really was to deal with traffic on the street, it would have dealt with obstruction or congregations of persons, but it said prostitutes. Slippery slope: if we allow this as way to regulate streets, why couldn't cities also regulate drugs and assaults too!

Criminal Law Power – Contemporary Context – *R. v. Banks* (2007)

- *Never got to SCC. Court of Appeal upheld this law as being constitutionally valid.
- **Intro:** double aspect – not possible, without more, to say that *Ontario Safe Streets Act* etc is an exercise of the federal criminal law power. Legislative spheres overlap; must show not within provincial competence (paras. 29, 31).
- **Facts:** Ontario got rid of highway traffic act and imposed safe streets act. "No person shall solicit in an aggressive manner while forgoing the streets" and then the act lists scenarios where you are not allowed to demonstrate solicit behavior. Each of the situations though are all connected to sidewalks or roadways or some form of public property and so they are anchored there in that way. Provinces are legitimately allowed to enact rules about how you act on streets so here they didn't go quite far enough to encroach criminal law. **But the Q here is whether or not they did**? Ontario learned from Calgary here. A bunch of kids were charged with 3(2)(f) because they were squeegeeing at a traffic light. Unlike *Morgantaller* and *Westendorp* the court limited the appeal on constitutional grounds to that provision only. So they could only focus on 3(2)(f) for this appeal. So by limiting it like this that already leads you to think that it will be upheld constitutionally because if you read the provision It deals with cars stopped at traffick lights and the others deal more with other matter regarding safety.

NOTE: there is definitely though, a bit like NS gov't, there is a bit of a focus on why this law needed to be enacted and so the court acknowledges the need to crack down on squeegeeing. Like in *Morgantaller* it was prostitution and here is squeegeeing. It was not as clear-cut bias in this case

Arguments 3 judges shoot down the arguments of unconstitutionality.

- Double Aspect- Banks argues this is criminal law→ you are punishing people for behavior that parliament has talked about. Court of appeal said well just because it has aspects that look like criminal law there is a thing called double aspect and provinces can enact laws that look criminal as long as they are anchored in the particular head of power provincially. This is double aspect. Court had to find that it was a legitimate provincial law because or else double aspect would not cover them. Of course property and civil rights deals with roadways etc. It only going to look at the specific subsection and not other parts of act which helps to frame the answer.

- There was an amendment made to this act because it was to broad – this is going to cover so many activities that seem to be so legitimate (What about people selling poppies) so they amendment the legislation to allow for those activities to be excluded from the act. So Banks argued that you yourself admit that you are focusing in on a particular kind of activity. Court of appeal said you are asking about the original act so we are going to ignore the amendments – what happens when down the line someone is charged under the amended part? Why wouldn't you just deal with it now?
- Next argument was about legislative history.
- Argument looks at expert evidence -the act is not really going to reduce concerns about road safety. Courts said okay but the we don't assess the efficacy or plausibility of laws (that is not our role)

- Sections 92(13) and (15) give province competence to enact legislation regulating the "use of streets… and public spaces by the public, in vehicles or on foot, in the interest of safety, efficient circulation, and public enjoyment and convenience" and to enforce with fines, etc. (para. 32).
- Actions take place "on roadway"; provincial law can forbid harassment and intimidation (traditional activities) where part of promoting safe use of streets and public spaces (paras. 41-2).
- Cannot take into account legislative changes since accused were charged under original provisions (paras. 46, 48).
- Legislative history not clear either way – supports argument that legislation enacted to ensure peaceful use of streets, etc. (paras. 56ff); compare "no person shall remain on the street for purpose of prostitution" (*Westendorp*) and "no person shall, while on a roadway, solicit a person who is stopped…" (*Banks*).
- Expert evidence does not detract from legislature's competence to define activities that are hazardous to street use (paras. 65ff).

Chatterjee v. Ontario (AG) [2009] (Constitutional, p. 460)

- **Facts:** ON *Civil Remedies Act* allows police to confiscate property they think is proceeds of unlawful activity (either federal or provincial). C was stopped by the cops for breaking his parole (cop found weight scales, $20,000 and other things smelling like weed) so they took them without charging criminally, under the Act.
- **Purpose?** To prevent crime (prof thinks differently though; is a provincial attempt to enact criminal laws in the guise of territory laws)
- Court favors ordinary operation of statutes by both levels of government. SCC upheld Act.

NOTE: The reason that this was upheld with regards to its all part of the corollary that the provincial gov't if they anchor it in property they can prevent things that look like crimes. Does not think this case was a great decision. Currently concerns with this decisions are coming out now in BC. Could go back to SCC. With anchoring these things and having them be similar to criminal law but not criminal law you also don't get the protections that you would if it was criminal law. Just think of it as another piece of the pie that the provinces have under s. 92

Provincial Power to Enact Penal Laws -- Summary

Difficult to draw line between:

1. Valid provincial penalty provisions [s.92(15)] used to enforce laws that are in pith and substance grounded in some other s. 92 head of power: eg *Dupond* 1978 SCC (C 455 n.3); *McNeil* 1978 SCC; *Chatterjee v. Ontario (AG)*; and always have to be grounded in proper provincial head of power. This shows the growth of provincial power in Ontario (on one side) but how do you show that they have crossed a boundary and are encroaching on criminal power?
2. Provincial laws that are invalid because in P&A they are aimed at proscribing and punishing social evils, and thus are an invasion of exclusive federal jurisdiction to pass criminal laws: eg, *Westendorp*; *Morgentaler* (C, p. 215)
    - Dominant tendency is towards concurrency or overlapping jurisdiction in relation to criminal law broadly defined – pith and substance is crucial to the analysis. We are seeing more double aspect and the courts are striking down laws less than they used to.