Constitutional Principles, Interpretation, and Architecture

At a glance: The constitution is the supreme law of Canada; any law incompatible with the constitution is of no force or effect. There are several legitimate sources of constitutional authority in Canada:

- Indigenous Constitutionalism
- Treaty Relationships (and the treaties themselves)
- Pre-Confederation Documents (Royal Proclamation 1763)
- Quasi-Constitutional statutes (Bill of Rights, Supreme Court Act)
- Unwritten Constitutional Principles
- Constitutional Conventions
- Case Law
- Constitutional Culture (the dominant tide)

Reference Re Secession of Quebec: This reference question asked whether the constitution allows for Quebec to secede should they so desire. The reference question was initiated due to rising Quebec separatism. The court found that the constitution did not allow secession but it should be changed should Quebec demand it.

- The court stated that unwritten constitutional principles should be used to interpret the constitution.
- The constitution sets up a robust system of federalism which by its very nature envisions a united country.
- The constitution also holds unwritten values such as respect for democracy and subsidiarity. Therefore, should the majority of Quebec desire to leave the constitution should be changed to allow it.

Note: In the more recent case *British Columbia v Imperial Tobocco Canada Ltd* (2005) the supreme court stepped away from embracing the unwritten principles of the constitution.

Reference Re Senate Reform: This reference question asked whether the government could commit to "consultative elections" for the senate. The senators would still be appointed by the governor general but with the understanding that they would choose the person elected by the majority. In this way, the law would not require a constitutional amendment as the mechanism of appointment would go unchanged. The court held that the change would be unconstitutional.

- The Senate is designed to be a body of "sober second thought." The framers intended that senators be appointed; any change to this model in form or substance would require a constitutional amendment.

At a glance:

- Living tree) the meaning of the constitution changes with shifts in understanding of words and Canadian values
- Dead tree) Aka: originalism. The constitution should only mean what was intended when it was written. Any changes are to be made by the democratic system, not the courts.

Reference Re Persons: S. 24 of the constitution states that the governor general will appoint "qualified persons" to the senate. Traditionally, the governor general only appointed men to the senate. This reference question asks whether the appointment of women to the senate would violate the constitution. The supreme court held that it would.

Edwards v AG Canada: This case supplanted the understanding of persons expressed in the *Persons* reference. Women were allowed to be senators.

- Interpreters of the constitution are bound by the words but not the original intent of those words in toto.
- Though "qualified persons" may have originally meant 'men,' this fact is not dispositive of the issue.
- Living tree doctrine enshrined into Canadian Law.
- Women can serve on the senate.

National Federation of Independent Businesses v Sebelius: This US case held that Obamacare was constitutionally valid law by the US congress. The court held that the mandate to buy health insurance was a valid use of Congress's taxing power. It did however, strike

down a part of the law which would force states to accept a restructuring of medicaid.

- US federalism is mostly the same as in Canada.
- Canadian federalism is distinct in that local and federal powers are enshrined in the constitution. US constitution is mostly about federal power.

Federalism

At a glance: The division of powers in the Canadian constitution is absolute. The federal heads of power (s. 91) and the provincial heads of power (s. 92) were intended as "watertight compartments." Over time, this view dissapeared as it became untenable. The heads of power have such a degree of overlap that effective laws must often encroach on the jurisdiction of another level of government.

Many of the cases in this section deal with economic regulation. s. 91(2) of the constitution gives power over trade and commerce to the federal government. s. 92(13) gives power of property and civil rights to the provinces. The inescapable overlap of these two heads of power motivates most of the cases below.

Citizens Insurance v Parsons: Parsons owned a business in Ontario which was insured by Citizens. When the business burned, Citizens refused to pay as Parsons did not disclose another policy on the business. An Ontario statute governing contracts meant Citizens would have to pay up. Citizens argued that the statute was ultra vires because it encroached on federal jurisdiction over trade and commerce. Parsons argued that the statute fell under the provincial authority over property and civil right. Parsons won.

- The early constitutional cases dealt with overlapping powers by interpreting some heads broadly and others narrowly.
- The property and civil rights power was interpreted broadly, whereas the trade and commerce power was read narrowly.

Russel v The Queen: This case is important as it is the first to deal with the residual POGG power. Russel violated the federal temperance act which prohibited alcohol. Russel held that the act violated provincial authority over, inter alia, matters of a local or private nature and the raising of funds from saloon licenses (s. 92(9)). The federal government argued that the act was valid as it full under ensuring "peace order and good government" (POGG). Russel lost.

- POGG power trumps provincial jurisdiction
- Test for using POGG is whether the matter is of "national concern." Temperance is of national concern.

Hodge v The Queen: An Ontario statute made it illegal to operate a billiard table where alcohol was sold. Hodge operated a billiard table in his licensed tavern. Hodge was convicted under the Ontario statute. Hodge argued that the Ontario statute was ultra vires as temperance legislation was federal jurisdiction according to *Russel.* Rusell lost, the act was valid.

- This case established the double aspect doctrine: where an act in one way falls under provincial jurisdiction, yet in another aspect falls under federal jurisdiction, it may be valid.
- The Ontario act was aimed at licensing taverns (provincial jurisdiction) but also encroached on federal temperance law.

Reference Re The Board of Commerce Act: The federal government set up the Board of Commerce to set limits on profits from clothing sales. This legislation sought to limit the price of clothing for consumers. The federal government argued that the acts governed a matter of national concern under POGG. The privy council held that this board encroached on provincial jurisdiction.

- POGG is only to be used in an emergence such as war or famine.
- Judgement based on *Parsons* case.
- Federal authority must stay in its watertight compartment.

Fort Frances Pulp and Paper Co. v Manitoba Free Press: The outbreak of WWI meant that there was a radically increased demand for newspaper. The federal government thus enforced

maximum paper prices to prevent price increases due to high demand. After the end of the war, the government repealed all emergency acts except for the restrictions on paper prices. Fort Frances objected that since the emergency was over, the law should not be valid. Fort Frances lost, the paper price control was valid.

- Price controls do infringe on provincial jurisdiction but are allowed under the emergency power of POGG.
- Though the war had ended, there was still increased demand for newsprint which necessitated the price controls under POGG.

Toronto Electric Commissioner v Snider: The federal government created a board to regulate labour disputes. The board had the power to prevent lockouts and give orders to employers and employees. When the board tried to intervene in a dispute between Toronto Electric and its employees, Toronto Electric argued that the federal act was ultra vires. Toronto Electric submitted that the act infringed on provincial authority over property and civil rights. Toronto Electric won, the Act was ultra vires.

- The double aspect doctrine was inapplicable according to the PC.
- The power over trade and commerce does **not** broadly overlap with property and civil rights.

POGG: The emergency POGG power is not in the listed heads of power. Rather, it stems from the wording of the constitution itself. The POGG power allows the federal government to make sweeping legislation on matters of national concern. The POGG power cannot be used under "normal circumstances" (*Board of Commerce*). POGG is available when there is a sudden danger to the social order (*Fort Frances*) or extraordinary peril to the national life (*Snider*). *Russel* seems to stand as an exception since temperance can hardly be seen as "sudden" or imperilling the social order. In its time however, *Russel* was seen as addressing a pressing matter of public life. In summary, for POGG to be used there must be:

- An emergency which:
- Impacts the nation as a whole (not a specific area)

Additionally, POGG is used to justify federal jurisdiction over matters not foreseen in the constitution (gap branch). Aeronautics was found to be federal jurisdiction under POGG. POGG also applies to matters of national concern where provinces would be unable to legislate effectively (national concern branch).

The New Deal Cases

At a glance: Throughout the great depression the federal government attempted to implement policies to provide relief to struggling Canadians. These policies were generally found to be ultra vires as they fell under property and civil rights (92(13)). These new deal cases led to shift in constitutional culture as many Canadians felt shafted by the current system's inability to solve the economic crisis.

AG Canada v AG Ontario (Labour Conventions): The federal government attempted to implement sweeping reforms to labour laws through treaty obligations. The federal government inherited from England the power to make treaty obligations to foreign countries on behalf of the Dominion. The federal government signed a treaty which sought to limit work hours. The federal government purported to exercise its treaty power to implement the reforms. The government lost.

> "The Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth." - Lord Atkin

- The federal government cannot bypass the Constitution's federalism through its treaty power.

AG Canada v AG Ontario (The Employment and Social Insurance Act) The federal government attempted to implement a social security system. To avoid having the act found ultra vires, the federal government implemented the plan as a "tax" under the taxing power (s. 91(3)). The plan failed as the privy council ignored the pretence of a "tax;" viewing the plan as an insurance system falling under property and civil rights.

- This case established the "pith and substance principle." An act should be viewed as falling under whatever it aims at in pith and substance, not whatever it claims to be aimed at.

AG British Columbia v AG Canada (The Natural Products Marketing Act): The federal government attempted to normalize prices of certain products by controlling production. The scheme regulated the production and selling of resources that were mainly sold into a province outside where they were produced (think Alberta oil). The government argued that the scheme could not be ultra vires as it fell under interprovincial (*Parsons*) trade and commerce. The supreme court and privy council agreed that the act was ultra vires.

- The act infringes on property and civil rights.
- Reading down double aspect doctrine: An act cannot be considered valid in one aspect (trade and commerce) if it so seriously impacts another aspect (property and civil rights).

Federalism: Pith, Double Aspect, IJI, Paramountcy, and POGG

Pith and Substance: The constitution defines which powers fall under federal and provincial jurisdiction. The heads of power are however, ambiguous. The courts must engage in a characterization process to find which head the impugned legislation falls under. The pith and substance of the law is the thing at which it is primarily aimed. Pith and substance helps the courts characterize legislation to decide under which head of power it falls.

Double Aspect: In some cases, federal and provincial heads of power are quite similar. This means that sometimes federal and provincial statutes exist which govern substantively similar areas of law. In other words, a law falls under provincial jurisdiction in one aspect, yet under federal jurisdiction in another aspect. In order to not hinder the legitimate exercise of power, the courts will find that federal and provincial laws governing the same thing are both valid.

Ancillary Powers: In exercising their jurisdiction over an area of law, either level of government must often implement larger regulatory schemes. These schemes have many parts which must all act together to properly regulate the thing in question. In some cases, a larger scheme is intra vires but an ancillary piece of the scheme is ultra vires. In these cases, the courts will sometimes find the whole scheme intre vires so as to allow for effective legislation.

Incidental Effects: This doctrine is similar to Ancillary powers but addresses a different case. Incidental effects applies to legislation where the impugned part of a regulatory scheme incidentally touches on another head of power. This case is distinct because it applies only to parts of legislation which in pith and substance apply to a head of power outside the enacting body.

Inter-Jurisdictional Immunity: This doctrine attempts to curb permissive nature of the other doctrines to safeguard the (not so) watertight compartments of power. This doctrine applies to legislation which in some way infringes on a **core** area of jurisdiction of another body. IJI does not strike down a law, but rather reads it down. When IJI is applied it leaves the larger scheme intact but specifies that it cannot be applied to a specific area. The test for IJI is whether the impugned part of a scheme **impairs** a core function of another body's regulatory role. Tests for IJI are the federal purpose test (*BMO v Hall*) and the impossibility of dual compliance test (*Multiple Access*).

Paramountcy: The constitution is largely silent on what to do with valid but conflicting federal and provincial laws. The federal paramountcy doctrine means that in these cases, the federal legislation trumps the provincial. There are several tests for paramountcy:

- Impossibility of dual compliance: Can a citizen comply with the provincial and federal laws
- Duplication: does the provincial legislation duplicate the federal
- Impossibility of dual effect: Can a judge apply both rules fully in any given situation
- Frustration of federal purpose: Does the provincial law frustrate the purpose of federal legislation (doing indirectly what they

cannot do directly)
- Federal intent to occupy the field: Has the Parliament made it's intention to occupy a field of regulation entirely (a complete regulatory scheme).

POGG: This doctrine is a favourite of the federal government as it is quite open to interpretation. There are three main branches of POGG:

- Gap branch: parliament has control over heads of power which did not exist at confederation (Aeronautics, Radio).
- Emergency branch: *re anti-inflation.*
- National Concern: *Russel, Johannesson v. Rural Municipality of West St. Paul, Munro v. National Capital Commission,*

R v Morgentaler: The supreme court had recently legalized abortion in Canada. Nova Scotia could not make abortion ilegal unilaterally as it fell under the federal criminal law power (s. 91(27)). Instead, Nova Scotia purported to exercise the provincial jurisdiction over hospitals (s. 92(7)) to make access to abortion more difficult. Nova Scotia passed a law that would make it ilegal to perform certain medical procedures, including abortion, in a private clinic. The purpose clause in the act itself claimed that the aim of the statute was to prevent a two-tier health-care system. Morgantaler sued, claiming that the act was aimed at stopping him from opening his planned abortion clinic. Morgantaler won.

- In determining the pith and substance of a law, the court considers the direct legal affects as well as the policy motivation behind the law.
- The court used hansard as evidence: most of the debate over the law in the legislature was directly related to the permissibility of abortion on moral grounds.
- The act was, in pith and substance, criminal law.

Multiple Access v McCutcheon: Multiple Access committed insider trading in Ontario. There are almost identical federal and Ontario statutes prohibiting insider trading. The waiting period of the federal statue had expired by the time the insider trading was discovered and only the Ontario statute could be used to convict. Multiple Access argued that the Ontario statute was substantively identical to the federal statute and therefore necessarily encroached on federal jurisdiction. Multiple Access lost, the Ontario and federal statutes are both valid.

- **Double aspect doctrine:** when a statute can fall under both provincial and federal heads of power and the provincial and federal statutes do not conflict, they are both valid.
- An act can validly fall under multiple heads of power.

General Motors v City National Leasing: Parliament passed the Combines Investigation Act to curb anti-competitive practices. Part of the act created a civil action for anti-competitive pricing. City National sued General Motors for discriminatory pricing with the civil action enabled by the federal act. General motors argued that the act was ultra vires as civil actions fell under provincial property and civil rights. General Motors lost, the act is valid.

- This case applied the ancillary powers doctrine.
- The civil action was an integral part of the otherwise intre vires law. Furthermore, the effect on provincial jurisdiction was minor.

Quebec v Lacombe: An aerodrome was built on Gobeil lake in Quebec. Aeronautics is federal jurisdiction. Quebecers who ownned summer homes on the lake disliked the aerodrome and lobbied to have it removed. The municipality passed a bylaw which banned Aerodromes on the lake. The municipality argued that the Ancillary powers doctrine applied as the ban was part of the larger valid scheme governing zoning. The municipality lost.

- **Rational Functional test:** Ancillary powers only applies where the impugned part rationally and functionally furthers the legitimate goals of the scheme.
- Ancillary powers does not apply where the impugned part of a legislative scheme is not an integral part of that scheme.
- Incidental effects does not apply when the target of a scheme is directly aimed at usurping the power of another body.

Canadian Western Bank v Alberta: Banking is under federal jurisdiction (s. 91(15)). Alberta passed a law regulating the sale of "peace of mind insurance." Canadian Western Bank argued that IJI should apply to stop Alberta from trenching on the federal banking power. The bank lost.

- Peace of mind insurance is not at the core of banking.
- IJI should be a doctrine of last resort.

Quebec v Canadian Owners and Pilots Association: Two brothers built an airstrip in Quebec and registered it with the federal government. The airstrip was located in an agricultural zone according to a Quebec act which prohibited non-agricultural use of land in designated zones. The Quebec government ordered the airstrip to be demolished. The Association argued that IJI applied to protect federal jurisdiction over aeronautics. The association won, the act could not apply to airfields.

- The court applied the IJI test by answering the following questions:
  - Does the legislation infringe on the power of another body (the feds in this case). > yes
  - Does the legislation infringe on the core of the power of another body. > yes
  - Is the infringement serious enough to impair the power of the other body to fulfil its core function. > yes

Note: In the recent supreme court cases *Bank of Montreal v Marcotte* (dealing with banking provincial regulations on banks) and *Canada v PHS Community Services Society* (dealing with safe injection sites) the supreme court has cautioned against using IJI. The court stated that IJI works against the dominant tide of cooperative federalism. Basically, IJI is a valid doctrine but should be used as a matter of last resort.

Multiple Access Contd: This case also applied the duplication test for federal paramountcy. Since the Ontario legislation only duplicated the federal legislation it was valid.

Bank of Montreal v Hall: Hall took out a loan from BMO and used a piece of farm equipment as collateral. Hall defaulted on the loan and the bank immediately repossessed the piece of equipment. A Sask. statute required banks to go through a legal process before they could recover collateral. A federal statute allowed banks to take collateral with no legal process. Both laws were valid. Sask. argued that paramountcy should not apply as the bank could comply with both laws. The federal law did not **mandate** that banks recover property immediately, it only allowed it. Therefore, complying with the Sask. statute did not violate the federal law. Sask. lost, the provincial statute is invalid.

- Dual compliance is possible, but this does not dispose of the issue.
- The purpose of the federal law is to decrease the cost of recovery for banks to allow for lower interest rates to consumers. The Sask. law frustrates the federal purpose and is therefore invalid.

Rothmans, Benson & Hedges v Saskatchewan: The federal Tobacco Act limited advertising of tobacco products. The federal law made an exception for displaying prices of tobacco products in establishments where those products are sold. The Sask. Tobacco Control Act banned all advertising of tobacco in businesses open to minors. The tobacco companies sued, arguing that federal paramountcy left the Sask. law inoperative. The Tobacco companies lost, both laws are valid.

- There is no impossibility of dual compliance.
- The provincial law furthers the purpose of the federal law, it does not frustrate it.

Alberta v Maloney: Maloney received a traffic ticket under the Alberta TSA. The TSA allows the Alberta government to revoke a driver's license for refusal to pay. Maloney declared bankruptcy which disallows creditors from recovering debts according to the Bankruptcy and Insolvency Act. Maloney sought to have the provincial law declared invalid according to federal paramountcy. Maloney won, the provincial statute was inoperable. Both the majority and dissent agreed that the provincial law clearly frustrates the federal purpose of removing fiduciary obligations but the court was split over whether there was an impossibility of dual compliance.

- The majority held that dual compliance was

not possible because the provincial law denied a **right** granted by the federal law.
- The court noted that in cases of paramountcy it is assumed that parliament intends its laws to be compatible with provincial statutes.
- The dissent argued that dual compliance was possible because Maloney could simply give up driving.

Reference Re Anti-Inflation Act: In the late 1970's Canada experienced soaring inflation rates. The federal government wanted to impose sweeping economic reforms to curb inflation. The proposed federal scheme would trench of provincial jurisdiction over property and civil rights. The federal government posed a reference question asking if the scheme could be allowed under the emergency POGG power. The majority ruled in favour of the act.

- Less of an emergency is needed for emergency POGG branch if the intrusion on provincial competence is less severe.
- The majority framed the question as one of degree: the federal government seeks to extend its power over monetary policy to deal with the economic crisis. Since POGG would only extend an existing power, the bar for what constitutes a serious emergency was lowered.
- Beetz J. dissenting argued that using POGG is a slippery slope and should be avoided. Practically everything impacts the economy, so using POGG in this way could pave the way for massive federal overreach.
- Beetz also proposed an explicitness test for POGG. Under this test, parliament must explicitly declare something an emergency in order to use the emergency branch of POGG.

R v Crown Zellerbach: A federal act sought to prevent ocean pollution in accordance with Canada's international treaty obligations by prohibiting dumping. The federal government has control over coastal waters at a sufficient distance from the provincially-controlled coastline. Zellerbach runs a logging business which stores logs in a cove totally within provincial waters. Zellerbach scooped wood-wasted from the shore and put it a small distance out to sea (still within provincial waters). Zellerbach was charged with dumping. The federal government argued that the federal act was allowed by the national concern doctrine of POGG. The majority ruled in favour of the federal government.

The national Concern test for POGG is met where the impugned legislation:

- relates to matters which did not exist at confederation (ex: Aeronautics) or which were merely local at confederation but have since become national. OR:
- The thing regulated is singular and distinct to make it discernible from local mat- ters (test for national concern branch). Ocean dumping is singular and distinct.
  - Provincial inability test: In order to conclude whether the matter meets the singleness standard one must consider the effects of a provincial failure to regulate the matter would have on other provinces. (marine pollution cannot be effectively regulated by the provinces)

Economic Regulation

Carnation v Quebec Agricultural Marketing Board: The quebec agricultural board was set up to regulate the selling of milk in Quebec. The act was aimed mostly at protecting milk producers by ensuring prices. Carnation purchased milk in Quebec which was then processed in Ontario and sold internationally. Carnation argued that the board was ultra vires as it interfered in interprovincial trade (trade and commerce, *Parsons*). Carnation lost.

- An act is not ultra vires solely due to incidental effects on other heads of power.
- The act was not aimed at impacting interprovincial trade, it had these effects incidentally.

AG Manitoba v. Manitoba Egg and Poultry Association: Ontario produced a surplus of eggs. Quebec produced a surplus of chickens. Each province passed a scheme to protect producers of their respective poultry products. The marketing boards were technically objective but clearly gave

preference to producers in their own province. These boards both hurt Manitoba, which produced a surplus of chickens and eggs. To force the issue, Manitoba copied the Quebec act and sued itself to get the issue before the supreme court. The court found the act ultra vires, which resulted in striking down the Quebec and Ontario marketing boards.

- The pith and substance of the marketing boards was to shaft producers outside the province.
- The acts go far beyond incidental effects.

Canadian Industrial Gas and Oil v. Government of Saskatchewan: The oil embargos stemming from the Yom Kippur war drastically increased oil prices. Sask. was a net-producer of oil. Sask. passed a law that capped profits on oil sales to what they were before the oil crisis. Effectively, the new law meant that any profits from the oil crisis would go to the government. CIGO sued, stating that the law was indirect taxation and therefore ultra vires the province. CIGO won, the law is invalid.

- The law governs the price of a commodity destined almost exclusively for export.
- The law directly interferes in the selling of a product to an outside market.

Central Canada Potash v. Government of Saskatchewan: This case is almost identical to *CIGO*. Sask. implemented supply control over potash with American producers. The Sask. scheme set minimum prices at which potash could be sold. CCP sued, arguing that the act was on interprovincial/export trade. CCP won, the act was ultra vires.

- A province may not regulate the price of an export good.
- Differentiated from *CIGO* as it deals with price for export rather than profits on production. Production occurs within the province, price is directly related to trade.

Labatt Breweries v Canada: The federal government passed the *Food and Drugs Act* which stated that a beer must have no more than 2.5% alcohol to be labelled "lite." Labatt sold a lite beer with 4% alcohol. Labatt sued, arguing that the law was ultra vires. Labatt won.

- The court mainly focused on dismantling federal claims:
  - The government claimed that the act was regarding health and safety
  - The government claimed the act was criminal law. The court argued it was regulatory, not criminal.
- The court then argued that the federal government could not pass regulatory laws targeting a single industry (*General Motors*).

Criminal Law

At a glance: Criminal law is a federal power (91(27)). Much debate occurs around the extent to which the federal government can use this power. The legal test for whether something is valid law is (*re firearms*):

- it must have a valid criminal purpose (order, security, health, morals, peace);
- it must be backed by a prohibition; and
- it must have a penalty (more than mere monetary compensation).

Margarine Reference: Butter producers lobbied to make margarine ilegal. The federal government wanted to pass a sweeping law making margarine ilegal to sell, produce, or import. The reference question addressed whether such a law is justified under parliament's criminal law power. The court found that the law would not be valid criminal law.

- There must be some public evil which a criminal law seeks to prohibit.
- There is therefore a two step test for whether something is valid criminal law:
  - Is it prohibitory (*Labatt*)?
  - Does it concern a public evil?

RJR MacDonald v Canada: The federal government passed the Tobacco control act which criminalised some forms of tobacco advertising. RJR Macdonald sued, stating that the act was regulatory and ultra vires the parliament. Additionally, RJR claimed that the requirement to include unattributed health warnings was a violation of charter protected speech. RJR lost, the act was

valid but the pieces about health warnings were of no force or effect.

- The public evil (smoking) does not need to meet some level of seriousness to justify use of criminal law.
- The public evil need not be made directly ilegal (a ban on all cigarettes)

R v Hydro-Quebec: Hydro-Quebec dumped PCBs into the St. Maurice river. Hydro was charged under the federal Canadian Environmental Protection Act. Hydro argued that the federal law was regulatory and therefore ultra vires the parliament of Canada. This case created the test for **Colourability.** Hydro lost, the act was valid.

- The law is in pith and substance aimed at protecting human life from harmful substances (a public evil). It is therefore valid criminal law.
- A law is colourable when it disguises its purpose to intrude on another level of governments' jurisdiction. The test for colourability is whether the law serves a legitimate public purpose. The act in this case had a legitimate public purpose and was therefore not colourable.

Reference Re Firearms Act: The federal government wanted to create a gun registry. The proposed scheme would legislate that anyone with a gun had to register the gun with the federal government. Alberta claimed that the act would be ultra vires as it is, in pith and substance, a regulatory scheme aimed at property (property and civil rights are provincial). The federal government contended that a gun registry would be valid criminal law, the public evil being gun violence. Alberta replied to the federal argument by contending that only law-abiding citizens would register guns so the act could not prevent gun violence, and therefore the act was not criminal law. The court answered that the act would be valid criminal law.

- The federal government can use the criminal law power to create some types of regulatory schemes.
- The act is in pith and substance aimed at public safety by prohibiting the evil of gun crime.
- The act meets all three tests for valid criminal law.

Reference Re Genetic Non-discrimination Act: The federal government passed the Genetic Non-discrimination act which prohibited requiring genetic testing as a part of gaining access to goods, services, or contracts. The most obvious example of an offence under the act would be if an insurance company were to provide different rates based on a person's genetic profile. Quebec posed a reference question on the act which found the act ultra vires. The reasoning that the act is ultra vires is that contracts and employment are provincial jurisdiction. The question was then appealed to the supreme court.

- The federal government can use the criminal law power in a way that directly encroaches on provincial jurisdiction if the law meets the test for the criminal law power.
- Genetic discrimination is a clear public evil, which the act punishes with a penalty.

Morality and Public Order

At a glance: Since the criminal law is aimed at legislating to prevent evil, the question naturally arises: to what extent can provinces legislate based on morality? The courts have determined that there is some room for provincial legislation in this area. As long as the provincial statute on morality is not in pith and substance criminal law (by creating a criminal penalty) it is valid provincial law. This mostly applies to provincial regulatory schemes which set standards for how specific industries can act based on moral grounds. It is important to note that these kinds of regulations are ultra vires the parliament.

- Law on public morality with a punishment: criminal law, intre vires parliament, ultra vires the provinces
- Regulations on public morality: regulatory law, intre vires the provinces, extra vires the parliament.

Nova Scotia Board of Censors v McNeil: The board of censors was the body charged with regulating movie theatres in Nova Scotia. The

act enabling the board gave them wide discretion over how the movie industry could operate. Reg 32 stated that "indecent or improper performance" would not be allowed in Nova Scotia theatres. This regulation was used to block the semi-pornographic film *Last Tango In Paris* from being shown in Nova Scotia. Mcneil argued that the provincial board was effectively exercising criminal law to punish a public evil. McNeil succeeded in having Reg 32 struck, but the Act and the board were found intre vires.

- Reg 32 seeks to prevent a public evil by instituting a penalty. This is clear criminal law, ultra vires the province.
- The province still has a right to regulate its industries. Regulatory boards are permitted to issue licenses and prohibitions as long as they do not apply criminal penalties.

Dupond v City of Montreal: The city of Montreal passed local ordinances to prevent rioting and public disorder. The prohibitions were strikingly similar to criminal code prohibitions on rioting. Quebec argued that the regulation of public order fell under provincial jurisdiction as well as federal criminal jurisdiction (Double aspect). Quebec won, the bylaw was valid.

- Provinces are allowed to prohibit activities that have propensity to lead to crime to ensure public order. This does not constitute criminal law.

Westerndorp v The Queen: Westerndorp approached an undercover cop on Calgary street to solicit prostitution. She was charged under a by-law which prevented being on the street for the purpose of prostitution. Westerndorp argued that the law was in pith and substance criminal law and therefore ultra vires the province. The province argued that the law was aimed at preventing crowds in the streets which were a public nuisance. The law was found colourable. Westerndorp won, the by-law is ultra vires the province.

- Provinces cannot create laws for public order that are clearly an attempt at criminal law.
- The law was colourable, it purported to be for the prevention of nuisance but in reality sought to prevent the mischief of prostitution. If the province really wanted to prevent crowds it would prevent any two people from meeting on the street.

Rio Hotel v New Brunswick: New Brunswick's liquor licensing board required establishments which sold liquor to comply with public nudity regulations. Rio Hotel challenged the board, stating that the board's regulations on nudity were similar to criminal code sections on public nudity and were in pith and substance criminal law. The hotel was motivated to challenge the regulations as "exotic dancers" could increase liquor sales. The court held that the Act enabling the board was valid.

- Double aspect applied. The Act is about liquor regulation as part of property and civil rights regulations AND the public evil of nudity.
- The board was regulatory and could not impose criminal penalties.

Chatterjee v Ontario: Chatterjee was pulled over for a minor traffic infraction in Ontario. In a search incidental to arrest, police discovered over $20,000 in cash and equipment for a weed grow op (weed was illegal at the time). The Civil Remedies Act of Ontario allowed the provincial government to seize assets believed to be involved in or the proceeds from crime. Chaterjee challenged the law stating that it was in pith and substance criminal law.[1] Chaterjee lost, the Act was intre vires the province.

- The act is in pith and substance an attempt to compensate public and private victims of crime and to prevent the conditions for crime to occur (*Dupond*).
- The law regards property and civil rights
- The law does not include a criminal penalty (forfeiture is a form of fine).

[1] Chaterjee also claimed a violation of charter rights which is not discussed here

91 - Federal Heads of Power

1A) The Public Debt and Property.

2) The Regulation of Trade and Commerce.

2A) Unemployment insurance.

3) The raising of Money by any Mode or System of Taxation.

4) The borrowing of Money on the Public Credit.

5) Postal Service.

6) The Census and Statistics.

7) Militia, Military and Naval Service, and Defence.

8) The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9) Beacons, Buoys, Lighthouses, and Sable Island.

10) Navigation and Shipping.

11) Quarantine and the Establishment and Maintenance of Marine Hospitals.

12) Sea Coast and Inland Fisheries.

13) Ferries between a Province and any British or Foreign Country or between Two Provinces.

14) Currency and Coinage.

15) Banking, Incorporation of Banks, and the Issue of Paper Money.

16) Savings Banks.

17) Weights and Measures.

18) Bills of Exchange and Promissory Notes.

19) Interest.

20) Legal Tender.

21) Bankruptcy and Insolvency.

22) Patents of Invention and Discovery.

23) Copyrights.

24) Indians, and Lands reserved for the Indians.

25) Naturalization and Aliens.

26) Marriage and Divorce.

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

28) The Establishment, Maintenance, and Management of Penitentiaries.

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2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3) The borrowing of Money on the sole Credit of the Province.

4) The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6) The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8) Municipal Institutions in the Province.

9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10) Local Works and Undertakings other than such as are of the following Classes:

- **a)** Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
- **b)** Lines of Steam Ships between the Province and any British or Foreign Country:
- **c)** Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11) The Incorporation of Companies with Provincial Objects.

12) The Solemnization of Marriage in the Province.

13) Property and Civil Rights in the Province.

14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15) The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16) Generally all Matters of a merely local or private Nature in the Province.