FOUNDATIONS

What is a Constitution?

- Fundamental law, written or unwritten, organizing the government and exercise of sovereign powers
- About how we come together to form political entities
    - How government works, what they can do, relationships between govs/individuals/particular communities"

The" Canadian Constitution

- Interacts with Constitution of: Canada, Indigenous Nations and Provinces (many of which are largely unwritten)
- Constitution is the supreme law of Canada - any law inconsistent with the provisions is – to the extent of the inconsistency – of no force of effect
- Constitution includes:
    - Canada Act 1982
    - Royal Proclamation, 1763
    - Aboriginal & Treaty Rights
- Preamble – focus on Supremacy of God and rule of law
    - Natural law invocation – role of god in determining what is in constitution
    - Rule of law – unwritten principle
- Constitution Act, 1867 – similar in principle to UK constitution; unwritten principles

FUNDAMENTALS OF CANADIAN CONSTITUTION

Secession Reference (Quebec)

Significance

MAJOR CONSTITUTIONAL MOMENT/CRISIS

- QC's challenge to legitimacy; challenged idea that Canada was agreed to be political group at outset
- Jurisdictional argument – questions about the nature of political organization and courts role in supervising
- Fear that rule of law might 'run out' and not have an answer for this kind of problem
- Interventions – high level of engagement; many people/parties had a stake
- International law arguments – regions all over the world also have problem of feeling less committed to formal state

→ text produced by SCC in response is meaningful as it contains history, introduction of unwritten principles and deals explicitly with relationship between courts and political branches of government

HISTORY OF WRITTEN CONSTITUTION

- Characterized by adherence to rule of law, respect for democratic institutions, accommodation of minorities, and desire for continuity and stability

Confederation: initiative of elected representatives of people living in the colonies

- Diversity of races
- Federalism as political compromise
    - Canada East (QC) and Maritimes refused to join unless:
        - Federal division of powers

        - Education and property/civil rights assigned to provinces
    - Language rights
    - Bicameral legislature – wanted to ensure fed gov had regional representation
        - HoC – elected in rough accordance with population
        - Senate – every prov has set representative regardless of population changes
    - Web of mutual reliance – rise/fall together; communal effort

Patriation: *Charter* 1982 affirming rights and containing notwithstanding clause – meaning rights can be broached if needed (baked into idea of having rights in constitution)

- Aboriginal and treaty rights affirmed
- Amending formula – so that overseas permission isn't needed to make changes
- No change to basic federal structure
    - Division of powers set out in 1867 stays the same
    - BUT parliamentary supremacy (elected parliament in charge and can make any rules) shifts → constitutional supremacy (judicial review – parliament subject to limits)
        - Two tensions between who gets to answer what questions:
            - Federal/provincial authority
            - Courts/legislatures

UNWRITTEN PRINCIPLES

1. **Federalism**
    - Political power shared federal/provincially; Constitution Act assigns spheres of jurisdiction
    - Facilitates democratic participation by distributing governmental power; neither inherently superior
    - Federalism structure adopted at Confederation and enabled Francophone Canadians to form numerical majority in QC – therefore able to promote language and culture
    - Reconciling diversity with unity
2. **Democracy**
    - Enshrining right to vote in Charter
    - Representative/democratic nature of political institutions are assumed (not explicitly stated)
    - Political system of majority rule – federal parliament elected by popular franchise
    - Promotion of self-government; accommodates cultural/group identities
    - Function = enabling citizens to participate concurrently in different collectives and pursue goals both provincially and federally
    - Value consent of the governed, moral values, continuous discussion (incl. dissenting voices)
3. **Rule of law**
    - RoL promises stable, predictable and ordered society
    - Is supreme over government and private persons; no one is exempt
    - Requires positive laws to be made which preserve and embody normative order
    - Relationship between state/individuals must be regulated by law

→ requires all government action to comply with law (including Constitution); constitutional amendments require consulting minority interests before making changes that affect them

4. **Protection of minorities**
    - Diversity core value of constitution always (despite imperfect moments)
    - Protecting minority religious/education rights central consideration leading up to Confederation and enacting *Charter*

How Unwritten?

- Court has authority to read principles in to the text due to "oblique reference in preamble" – that the constitution is similar in principle to that of UK
- Written text still matters (cant dispense with it) but unwritten principles place substantive limits on gov action

4 principles operate symbiotically

- Federalism defines democratic majorities
    - Define which people are deciding what
- Democratic majorities made stable/predictable by rule of law
    - To organize affairs; ability to make plans/laws and act within legal system because rules are stable/predictable
- Rule of law protects rights of minorities
    - Bill of rights states no one can discriminate; treaty rights protected by law
- Rights of minorities protected by federalism
    - Regional minorities get authority over some issues

→ flourish through interconnections rather than in isolation

→ Observance/respect essential to ongoing development

ROLE OF COURTS AND POLITICAL BRANCHES

- Held that QC cannot secede **unilaterally**
- There is a duty to negotiate – no majority trumps any other and no absolute legal entitlement to secession (even if 100% of people wanted to)
    - Negotiation must be conducted in a way that protects the 4 principles
- What can be considered a clear majority on a clear question is a question for the political branches
    - Courts limited to their "proper role"

Factum of Grand Council Cree's

- Cree/Inuit not efficiently integrated culturally to polity of QC and therefore should have a choice of remaining in Canada in the event of secession
- GCC felt their position wasn't being considered
    - What 'majority' is being considered? Majority of GCC doesn't want to leave

DEMOCRACY & THE RIGHT TO VOTE

Secession Reference: NOT simple system of majority rule – constitutional rules are binding not in sense of frustrating will of majority but as defining the majority which must be consulted (federal/provincial division, individual/minority rights)

- Terms of the polity can change – but change happens within bounds of constitutional rules

PRIMER – PARLIAMENTARY DEMOCRACY

- Constitution preamble contains that the system will be similar in principle to UK Westminster model
- Representative democracy by election
    - Citizens elect MPs/MLAs to represent their district
        - MPs/MLAs (legislators) vote on laws
        - Executive is accountable to legislature
- * distinct from parliamentary supremacy/sovereignty* - democracy has direct representative votes on laws; supremacy/sovereignty carries idea Parliament can do whatever it wants (elected representatives of people in charge)
- **Parliament:** appointed Senate + elected House + Monarch (Governor General)

- **Provincial Legislature:** elected legislative assembly + Monarch (lieutenant governor)

Sources of Democratic Rights

Unwritten Constitutional Principles

- Requires that a clear majority on a clear principle requires negotiation to take place
- Ex – implications of "clear majority" in Secession Ref

Federalism

- *Tomey Homma* (1902) – stated that Japanese descendants could not vote in Canada – argument that only fed gov should be able to make calls on right to vote (battle of federal/provincial powers)

Legislation

- Decisions of various legislatures proposed changing this rule
- Major driver of increase in franchise (right to vote)
- Women's suffrage (1918; QC 1940)
- Unqualified franchise of Indigenous people (1960)
- Unqualified franchise of disabled people (1988)

***Charter* (s. 3-5)**

- One piece in big system containing source of democracy (created as part of 1982 constitution)
- Section 3: every citizen of Canada as right to vote in election
- Section 4: periodic elections for House and legislative assemblies must be held (and emergency extensions)
- Section 5: must have annual sitting of Parliament and each legislature

Sauvé v Canada (2002 SCC)

- Canada Elections Act denies franchise for those incarcerated 2+ years
    - Government concedes Section 3 infringement
- **ISSUE**: is infringement justified under s.1?
    - Whether government can establish this disenfranchisement as permitted under s.1 as "reasonable limit demonstratable justified in free/democratic society"
- **HELD**: NOT justified under s.1
- Gov theories to demonstrate rational connection:
    1. *Depriving inmates right to vote sends "educational message" about importance of respect for the law*
       → misrepresents nature of rights/obligations under the law and sends message more likely to harm than help respect for the law. "educational message" both anti-democratic and internally self-contradictory (denying citizen right to vote denies basis of democratic legitimacy)
       → excluding citizens runs counter to constitutional commitment and weakens gov ability to function as legitimate representative of all citizens
    2. *Allowing inmates to vote "demeans" political system*
       → Same as above; excluding certain class of people based on moral worthiness is inconsistent w/ democracy
    3. *Disenfranchisement is legitimate form of punishment*
       → punishment must fulfil punitive purpose including
       deterrence, rehabilitation – voting would actually help with rehabilitation in teaching democratic value/civic responsibility
       retribution and denunciation – not tailored to individual offender; therefore does not meet requirement

→ Legislatures retain power to limit modalities of democratic participation where can be justified; here – undermines legitimacy/effectiveness of gov and RoL; affects inmates arbitrarily and more likely to erode respect for RoL

DISSENT: believes would strengthen fundamental features of society. Is not the courts assessment to make but up to Parliament. Is not stereotyping as it is based on actions they have voluntarily taken (not personal characteristics)

Frank v Canada (2019 SCC)

- Canadians living abroad 5+ years ineligible to vote (residence requirement under Canada Elections Act)
    - Can only vote by means of special ballot when abroad
    - Gov concedes s. 3 infringement
- **ISSUE**: is infringement justified under s.1?
- **HELD:** NOT justified
    - As established in Sauve – deeming a citizen as having withdrawn from society means withdrawing from social contract is not legitimate basis for disenfranchisement. Such restriction weakens legitimacy of democracy
- AGC argues non-resident voters must be sufficiently connected to Canada (subjective commitment and extent which they are affected by laws) to maintain fairness of electoral system to resident voters

  → no evidence of harm these requirements are meant to address; timeline arbitrary; can be argued that non-resident who takes the trouble to vote by special ballot has demonstrated profound attachment

- Vague and unsubstantiated electoral fairness objective; In absence of evidence pointing to any concrete problem, justification boils down to argument based on worthiness
    - Non-residents deemed less worthy; worthiness cannot be used to justify disenfranchisement
    - Canada's history of progressive enfranchisement (originally restricted to property owning men 21+) should continue

→ right to vote is fundamental democratic right (not a mere privilege). Cannot be denied to citizens on basis they have chosen to "opt out" of community membership

DISSENT: Question is not of progression but reasonableness; the impugned limit is reasonable. Parliament must draw the line somewhere (as with age); courts are not to substitute judicial opinion for legislative ones where a precise line is drawn. Parliaments limiting is intended to preserve relationship between electors/communities (this is pressing/substantial objective)

BICAMERAL LEGISLATURE

- Parliament divided into two assemblies which share legislative powers

CANADIAN PARLIAMENT

House of Commons - elected

- Representation by population
- Only HoC can initiate bills that incur expense of public revenue (s. 53)
- Has greater constitutional amendment powers (s. 47(1))

Both the House and Senate must adopt a bill for it to become law (s. 55)

Senate - appointed

- Representation by region
- "sober second thought" on legislation adopted by House
    - Not worried about public favour
    - Attracted criticism/reform proposals due to thoughts this function was not happening and reflected same partisan spirit of House
- Other kinds of diversity may be represented here
    - Ones that are otherwise lacking in systems where elections only way of representing numbers
    - Became forum for ethnic, gender, religious, etc. groups who were under-represented in House

- *Composition:* 105-113 senators appointed by GG on advice of PM
    - Regional allocation (s. 22) – grouped together based on polities with similar interests
    - ON (24), QC (24), Maritimes/PEI (24[10 NS, 10 NB, 4 PEI]), West (24; 6 BC/AB/SK/MB), Territories (1 each), NFLD (6)
    - Holds equal representation regardless of population
- *Qualifications* (s. 23) – age 30-75, Canadian citizen, real/personal property worth at least 4k net, resident to province which appointed
    - Senators remain until age 75

Monarch (Governor General)

Edwards v Canada (1929 JCPC) – Persons case

- Constitution: "GG shall from time to time summon qualified persons to the Senate"
- **ISSUE:** does "persons" include women?
- **HELD:** SCC: no, JCPC: yes
    - "persons" came from barbarous time; appeal to history is not conclusive in this case
    - Took almost 100 years; gender parity in Senate by 2020

→ Constitution as "living tree" too avoid narrow/technical interpretations

- Since Persons case, have been other efforts to democratize the Senate

Provincial iniatives

- Alberta *Senatorial Selections Act* (ABSSA) [1987-2017; 2021-present]
    - Calls for there to be votes so Albertans can have a say in who they want representing them in Senate
    - Hopes that GG will be bound by (or at least need to consider) citizens views
- *Brown v Alberta* (1999)
    - Argues that the textual constitutional provisions on senate appointment violates the unwritten principles
    - Does not succeed

Federal Initiatives

- Constitutional amendment proposals: term limits
- Legislative proposals: honour provincial senatorial selections

Call for limiting terms OR requirement that fed obey prov initiatives asking for electives

Constitution Part V – Amending Procedure

General Amendment (s. 38 & 42)

→ requires substantial agreement between Parliament and prov leg

- "most of the time" formula – amendment may be made by proclamation issued by GG where authorized by:

A) **Resolution of Senate & House** – federal "checkmark"

B) **7/50 procedure** – requires consent of at least 7 provinces representing at least 50% of population
    - Almost always requires consent of ON/QC

- Large amount of support required to induce change to ensure legitimacy
    - Want it to be hard but not impossible
- Applies generally (s. 38) and to enumerated categories (s. 42)
    - Powers of Senate and method of selecting senators
    - Number of members by which a province is entitled to be represented in Senate and residence qualifications of senators
- A province may "dissent" (opt out) if it impacts legislature's property, powers or privileges
    - Amendment shall not have effect in a province where there is dissenting majority

- Resolution of dissent may be revoked at any time
- Compromise between "legitimacy and flexibility"
- General rule: if other formulas do not apply, this is the rule

Unanimous Consent (s. 41)

- Applies to things thought to be so essential to structure of government and constitution
  - Things we have pre-committed to in constitution
  - Accords highest level of constitutional protection and entrenchment

A) Resolution of Senate & House

B) Unanimous consent of provinces

- Applies to enumerated categories
  - Office of queen, GG, or provincial LGs
  - Aspects of provincial representation in the House
  - Use of English/French language
  - Composition of SCC
  - Amendment to this Part
    - Amending procedure itself cant be used as a "loophole" unless everyone agrees (*asking genie for more wishes)*

Special Arrangements (s. 43)

→ applies to amendments in relation to provisions of constitution applying to some but not all provinces

- Allows provinces directly affected to get together themselves
- Avoids the need for everyone to agree; affected polities can work out amongst themselves

Unilateral Amendment (s. 44 & 45)

→ allows unilateral amendment of gov institutions engaging in purely federal or provincial interests

- S. 44: subject to s. 41 and 42, Parliament can exclusively make laws amending the Constitution in relation to executive government of Canada or Senate and House
- S. 45: subject to s.41, legislature of each province may exclusively make laws amending constitution of the province
  - Provincial constitutions can amend their own constitutions themselves

Reference re Senate Reform (2014 SCC)

- Government of Canada asks court to answer following questions:

1) Can parliament unilaterally implement **consultative elections**?
   - Court holds this would reduce notion of constitutional amendment to a narrow approach inconsistent with broad/purposive manner which Constitution is understood and interpreted
     - Rejects argument that it is not a constitutional amendment; it is (despite no textual change)
   - Would be changing the architecture too much
     - Senate's role of sober second thought would be undermined by any hint of popular mandate

   → requires general amendment formula following 7/50
   - Argues falling under s. 44 but court holds s. 42 because it is specific method of selecting senators
2) Can Parliament enact **fixed terms** for senators?
   - Significant change to senatorial tenure would affect senate's fundamental role and nature
     - Current tenure meant to allow function for senators to act independently
   - Cannot be achieved unilaterally because involves fundamental components engaging interests of both fed and prov

   → requires general amending formula (s. 38) – not under enumerated categories of 42

3) How much provincial consent is required to **abolish** the senate?
    - Government argues s. 42 general formula applies – technically just making "powers" and "number of members" [listed in 42] both 0
        - Abolition not listed anywhere, so should be 'general'
    - Court holds unanimous consent (41) required
        - Changes basic bicameral architecture of government
        - Senate is required under all categories of Part V – taking it away effectively amends the amending procedure (*wishing for more genie wishes*)

→ majority of changes to senate contemplated in reference can only be achieved through amendments to Constitution – with substantial federal-provincial consensus

TWO MODES OF CONSTITUTIONAL CHANGE:

1. **Interpretation** (*Edwards*)
    - Use text, history (nature of political compromise; however recall Edwards "barbarous past") and structure (system as a whole)
2. **Formal amendment**
    - Sliding scale: unilateral (minor changes – ie quorum) ←→ unanimous (major changes – ie. Amending procedure)

RULE OF LAW & ROLE OF COURTS

- Object of public law is to bring actions of the state under control of the law
    - Remove arbitrariness

Rule of Law

- Fundamental principle of constitution; broad and necessary prerequisite. Must mean two things:

1) **Law is supreme** over both government and private individuals
    - In this way precludes arbitrary power
    - Gov officials subject to same laws as private citizens however due to their power they have an extra layer of legal obligations going beyond private citizen (those obligations = public law)
    - Public law is made up of: (1) constitutional law – places limits on law making activities, set ground rules for law making and (2) administrative law –ensure officials act within authority granted by statute -ordinary law
2) Requires creation and maintenance of actual order of **positive laws** which preserve/embody more general principle of **normative order**

Secession Ref: unwritten principles

- Orderliness
- Subjection to known legal rules → publicity as value within RoL
- Government accountable to legal authority
    - Shield against arbitrary state action
    - All public power must find it's ultimate source in a legal rule → dual function of granting/restraining power
- Stable, predictable and ordered society

Role of Courts

- Interpret and apply law
    - Decide what is required of us; not always self explanatory
    - Police if other powerful actors are adhering to RoL
- Trust in courts – institutional competence (some things for judiciary and some for parliament)

    - Tension between democracy and judicial review – when do we think elected reps should decide vs courts step in and ensure rules in constitution are being followed
    - Written vs unwritten principles – a lot of discretion involved in determining what unwritten mean/do
    - Access to justice is limited due to cost
- Constitutional status of courts – superior courts maintain independence from government

Roncarelli v Duplessis [QC PM] (1959)

- Prior to Charter – courts relied on basic understanding of RoL to condemn questionable use of statutory power
- Widespread discrimination against Jehovah's witness in QC – local bylaws prohibiting distribution of literature "Quebec's Burning Hate"
- PM condemned publication as contrary to public order for crime of sedition
    - Roncarelli paid bail for 400+ JW – PM publicly warned to stop – then cancelled his liquor license for his café

→ SCC implies duty of good faith in executing discretion; this was ex of untrammeled discretion contrary to RoL

Trial Lawyers v BC (2014)

- Custody/property dispute of couple – cant afford hearing fee
- S. 96 states core jurisdiction of superior courts cannot be removed
- S. 92(14) implies power of provinces to impose conditions on how/when people have access to courts
- Hearing fees denying people access to courts infringes on core jurisdiction of superior courts (s. 96)
    - Provinces do not have power under 92(14) to enact legislation preventing people from accessing courts
- DISSENT: courts don't have free range to micromanage gov policy choices that aren't unconstitutional
    - RoL meant to fill in gaps of express terms in constitution – no such gap exists in 92(14)

→ access to courts is essential to RoL – hearing fee scheme prevents access in manner inconsistent with s.96 and principle of RoL → provinces may impose hearing fees as part of administrative justice but does not extend to fees preventing access

FEDERALISM

- Shifting from federalism as unwritten principle/general idea to doctrines that emerge
- Sets out some minorities and makes them majorities
- Reflects a political bargain – designating power between two heads of government
- Primary responsibility for maintaining healthy federalism lies with government
    - Courts role is to facilitate cooperation, maintain federal balance and provide equal protection to autonomy of each governmental order

Who does Federalism Affect?

1) Advocates – looking to find solutions to problems in social world. Answer in part lies in division of powers
2) Legislators – knowing what their actual power/role is
3) Businesses, organizations, individuals, regulators – what laws apply to a business/activity
4) Restrained parties – parties who don't like a law; find an avenue to change it

KEY DOCTRINES

1) **Validity** – whether the law is within the jurisdictional competence of enacting power
- Pith/substance analysis
2) **Applicability** – some things so federal that province cannot apply
- Paramountcy
3) **Operability** – might have conflict between two valid fed/prov laws; frustrates purpose

INTERPRETIVE APPROACHES

- **Cooperative federalism** [modern approach to constitutional interpretation]
  - Tolerating large degree of overlap
  - Courts should favour ordinary interpretation of statues enacted by both levels
  - Avoid blocking measures furthering public interest in absence of conflict
  - Contrasted with historic "watertight compartments"
- **Mutual modification**
  - Can understand where prov power ends by seeing where fed begins (and vice versa)
- **Living tree**
  - Founded in roots but with flexibility to adapt to contemporary state

VALIDITY [*Morgentaler* Test]

1. Characterization

- **Pith/substance**
  - Legal effect + practical consequences
    - Direct legal effects – do x and get y penalty
    - Practical effects – how will actors behave differently bc this law exists
      - Who wins/loses in real world
  - Purpose – possible for statement of purpose =/= purpose in practice → colourability (is not about what it says it is)
    - Intrinsic evidence
      - Purposive clauses – extracted at face value reading text
      - General structure – 'four corners'
    - Extrinsic evidence – bigger picture, in context
      - History of context
      - "mischief/evil" trying to address
      - Related legislation
      - Hansard (transcripts of legal debate surrounding)
      - Evidence before legislature ("hard evidence")

2. Classification

- Intra vires / ultra vires

R v Morgentaler [1993 SCC]

- 1988: SCC strikes down *Code* prohibition on abortion on *Charter* grounds
- 1989: provincial NS gov enacts regulation prohibiting abortions outside a hospital
  - Argued ultra vires province due to criminal nature
- Issue: *is NS gov attempting to control quality/nature of health care or punish what it perceives to be a socially undesirable practice?*
- Federal – in that it has prohibition/penalty (criminal), public purpose (peace, order, health, morality)
- Provincial – in that it pertains to healthcare

1. **Characterization**: p/s found to be aimed at restricting/punishing abortion because it is socially undesirable
   - Stated purpose: prevent privatization, reduce costs, assure quality care
   - Actual purpose: replace criminal law

   → Colourable; court doesn't address bc invalid on its face

2. **Classification**: ultra vires province; falls to criminal law power of Parliament under 91(27)

POGG – Peace, Order and Good Governance of Canada

- S. 91 designates Parliament to make laws for the POGG of Canada – in relation to all matters not exclusively assigned/enumerated in s. 91/92
- 3 branches are identified by SCC
    - Monahan proposes 4th "matters of interprovincial concern" but it is understood to fall within national concern

1. Gap/Residuary Branch

- Power to legislate in relation to matters not included in any of the classes of subjects listed in 91/92
    - Anything not described is picked up, residually, by Parliament
- In regards to powers listed under 92 – gap branch picks up **(1)** matters that have the character/quality but happen outside the bounds of province or **(2)** matters listed under 92 but occur outside province
    - Ex – federally incorporated companies with provincial objects
    - Ex – *Re NFLD continental shelf* – in Canada but outside province; property and civil rights outside province

2. Emergency Branch

- Can suspend operation of s. 91/92 to give fed broad authority to do what is necessary in face of emergency
- 3 conditions to signify emergency: (1) explicit declaration (2) rational basis – on Parliament's behalf; court will not assess whether emergency existed (3) temporary – only short term action covered by power
- **Constitution** gives authority/defines scope – *Emergencies Act* is one legal mechanism to make action quick/easy

War Measures Act (1914-1988)

- Activated by Cabinet decree that "war invasion or insurrection (real or apprehended) exists
- Cabinet may then take measures it deems necessary or advisable for security, defence, peace, order and welfare of Canada → very broad; allows vast power without much justification
- WWI – banned publications, certain Canadians classified as "enemy aliens"
- WWI – censored newspapers, banned political/religious organizations, internment/deportation
- October Crisis – outlawed FLQ, expanded powers of arrest/detention

Emergencies Act (1988) → replaces War Measures Act

- Defines "national emergency" as urgent and critical situation of temporary nature that **(1)** seriously endangers lives, health or safety of Canadians and exceeds capacity/authority of province to deal with it or **(2)** seriously threatens ability of fed gov to preserve sovereignty, security and territorial integrity of Canada
- Establishes 4 categories of national emergencies
- Government must declare existence of emergency first to invoke power – check/bound on power
    - Procedure – provincial consultation → Parliamentary debate → Inquiry/Report to Parliament
- Places specific powers/time limits
- Subject to *Charter*

Re Anti-Inflation Act [1976 SCC] – leading case on emergency POGG branch

- Parliament implements *Anti-Inflation Act* (AIA) in response to high levels of inflation
    - Temporary price, profit and income controls
    - Scheme where provinces could 'opt in'
- Issue: addressing matters of property and civil rights
- **Majority** holds: valid "crisis" legislation
    - Temporary – just until can get inflation under control
    - Opt-in allows for preservation of some provincial autonomy
        - → however doesn't show "urgency" factor
    - Preamble – gives context of serious national concerns
    - "springboard" in federal powers (monetary policy, trade & commerce)

Majority/Dissent interpreting the same language differently; majority thinks indicative of emergency and dissent does not → however lots of overlap between opinions here

- **Dissent**: explicit declaration of emergency, but not sufficient

→ Both majority/dissent agree on points of (1) temporary measures (2) explicit declaration of emergency is required for this branch of POGG [disagree over whether it has occurred here] (3) need "rational basis" for declaration

Clarity Act (2000)

- Any proposal relating to the break-up of a democratic state is a matter of the utmost gravity and is of fundamental importance to all citizens
- HoC is to vote on whether a referendum question is "clear" and whether a "clear" majority had expressed itself in consultation with provinces, territories, Senate and Indigenous peoples

→ Secession Reference

3. National Concern

- Not for short term emergencies – carves out new pieces of federal authority to then become permanent part of constitutional balance
    - New areas of federal authority created under which new laws can be made which are paramount to prov → court has task of meaningfully protecting provincial power in face of paramountcy
- POGG NC & s. 92(13) property/civil rights seemingly cover a lot of the same content
- Test established in *Canada Temperance* (1946) which now functions as the definition of POGG national concern
    - Whether the matter of legislation "goes beyond local/provincial concern/interests and must, from its inherent nature, be the concern of the Dominion as a whole"
- 6 cases had cumulative effect of firmly establishing national concern branch:
    1. ***Johanneson* (1952)** – aeronautics satisfied NC test; inability for provinces to handle may have large consequences
    2. ***Munro* (1966)** – national capital region (area around Ottawa straddling ON/QC) maintenance of the region, provinces were fighting about zoning; fed step in because seat of government (in Ottawa) at stake
    3. ***Re: Anti-Inflation Act* (1976)** – inflation NOT covered by NC – too diffuse, not clear enough, and intrudes too many areas. Too hard to pin down exactly what fed would do; and huge intrusion on prop/civil rights
    4. ***Crown Zellerbach* (1988)** – marine dumping/pollution satisfies NC – where fresh/salt waters meet (marine water); intruded on prov concern but evidence it was a specific/identifiable environment of national significance
    5. ***Ontario Hydro* (1993)** – atomic energy/nuclear power – don't want patchwork of provincial regulations; safety was so interprovincial in nature fed needed control
    6. ***Hydro-Quebec* (1997)** – "the environment" NOT covered by NC – too broad a category

Crown Zellerbach – set out **framework to analyze proposed matters of national concern**. 4 firmly established conclusions:

1. National concern is separate/distinct from national emergency branch
2. Doctrine applies to both new matters (not existing at confederation) and matters which (originally assigned to provincial jurisdiction) have since, in absence of national emergency, become matters of national concern
3. For matter to qualify under doctrine – must have singleness, distinctiveness and indivisibility that clearly distinguish from matters of provincial concern *and* a scale of impact that is reconcilable with fundamental division of legislative power
4. In determining (3) – is relevant to consider what would be the effect on extra-provincial interests if province failed to deal effectively with intra-provincial aspects (provincial inability test) ← characterized as one indica of singleness/indivisibility

Reference re: Greenhouse Gas Pollution Pricing Act (GGPPA) [2020 SCC]

- Established fuel charge for carbon-based fuel and pricing mechanism for large industrial facilities
  - Only applied to province failing to meet sufficiently stringent pricing mechanism
- AB, ON, SK challenge constitutionality under federalism; Canada, BC argue constitutional under national concern
- Onus on Canada throughout to prove

PITH/SUBSTANCE: 3 categories which it may fall in to

1. Regulation of GHG emissions – broad formulation
2. Minimum national standards to reduce GHG emissions – national-standards based formulation
3. Minimum national standards of GHG price stringency to reduce emissions – national std. pricing-based formulation → court finds falls under 3
   - intrinsic evidence - title suggests pricing; preamble delineates specific pricing system as mischief aimed)
   - extrinsic evidence - events leading up show focus on GHG pricing; legislative debates also show focus)
   - legal effects – mechanism operates as backstop; doesn't come into operation unless stringency fails
   - practical effects – not particularly helpful for GGPPA – but fact provinces are legally allowed flexibility

CLASSIFICATION: POGG National Concern test revisited by SCC

1. **Threshold inquiry** – inherent national concern; matters which, by nature, transcend the provinces ("newness" not required)
   → *GGPA*: easily satisfies requirement; critical response to existential threat of climate change
2. **Singleness, distinctiveness & indivisibility** – 2 categories contributing to overall requirement
   a. *Specific/identifiable matter:* one distinct thing that is qualitatively different from provincial matters
      → specific, identified pollutant (unlike in *Hydro-Quebec*), interprovincial/international impact (like *Zellerbach*), GHG pricing qualitatively different from other regulatory mechanisms
   b. *Provincial inability*: constitutionally incapable of enacting; cant succeed without cooperation of all provinces; grave consequences if failure to cooperate
      → provinces constitutionally incapable, failure would jeopardize (carbon leakage – industries move to provinces with less stringent pricing), grave consequences
3. **Scale of impact on provincial jurisdiction** – intrusion on provincial autonomy balanced with consequence of denying federal authority; scale of federal intrusion must be reconcilable with fundamental distribution of power
   → real (but qualified) impact on provincial autonomy; grave, irreversible consequences of denying fed authority; reconcilable in providing flexibility/autonomy where possible

MAJORITY: GGPPA intra vires Parliament under National Concern POGG

DISSENT: characterizes p/s as regulating trade/industry within provinces → when characterized this way, uncontroversially falls within provincial jurisdiction

- Majority creates federal power "limited only by imagination" and is "corrosive of federalism"
- If following this, then why is there not federal "minimum standards" for other things affecting GHG pollution – home heating, public transit, road design, manufacturing/farm prices

FEDERAL CRIMINAL LAW POWER s. 91(27)

BRIEF HISTORY:

Re Board of Commerce Act (1922) – criminal law designed only for subject matter which by very nature is criminal → competition law ultra vires criminal law power **[narrows power]**

Proprietary Articles Trade Association (PATA) (1931) – broadening to allow criminal law in areas of authority as long as there is prohibition and penalty → competition law now found intra fires criminal law **[broadens power]**

Margarine Reference (1949) – combines elements of 2 approaches → to be upheld as criminal must have (1) prohibition (2) penalty (3) public purpose

CHEAT SHEET

Criminal Form (Prohibition, penalty) & public purpose [*Margarine Ref.*]

Form: circuitous approach acceptable [*RJR*]; prohibitions may include exceptions [*RJR*]; detailed regulation ok if true function is prohibition/penalty [*Hydro-QC, Re Firearms*]; not applicable to laws repealing criminal offence [*QC v Canada*]

Purpose: may include – public peace, order, security, health, morality [*Margarine*]; health [*RJR*]; environment [*Hydro QC*]

- List of purposes not frozen in time [*RJR; Hydro QC*]

Criminal power "plenary" but cant be employed "colourably" [*Hydro-QC*]

Margarine Reference (1949)

→ establishes **public purpose** as requirement for criminal law

→ public purpose = public peace, order, security, health, morality, general/injurious nature to be abolished/removed

- *Dairy Industries Act* – prohibits manufacture, import, sale of margarine
  - P/S found trade protection to dairy industry (NOT public health) – which falls to province
    → intrinsic evidence: location within dairy industry regulation
    → extrinsic evidence: margarine = butter in terms of safety, nutrition
    → prohibition/penalty: not found
    → pubic purpose: nothing of general/injurious nature to be abolished
- **Ultra vires Parliament** – except restrictions on import (under trade/commerce power)

RJR Macdonald (1995)

→ valid criminal law must have public purpose/ban harmful activity

- *Federal Tobacco Products Control Act* – packaging restrictions, health warnings; prohibited advertising/promoting (exemption for foreign products in imported publications)
  - Penalties ranging from 2k/6m prison – 300k/2yrs prison

CRIMINAL FORM – prohibition + penalty present; despite having 'circuitous' approach

- Practice of smoking/selling not banned (the "evil") ; intermediate measures acceptable
  - Not colourable attempt to regulate industry – no treatment of product quality, labour relations, etc.
- Fact there are exemptions does not detract from criminal form
  - Reasons for exemptions related to administrability

  Public purpose – aimed at serious health effects of tobacco; criminal law not frozen in time; broader attempt to address something harmful

MAJORITY: valid legislation under 91(27) → intra vires Parliament **DISSENT**: too far removed from the harm; regulatory measure → ultra vires

Hydro-Quebec (1997)

→ environmental protection = valid purpose under criminal form

- *Federal Canadian Environmental Protection Act* (CEPA) – procedure for defining "toxic" substances, extensive regulation of toxic substances, interim orders regulating substances not yet deemed toxic if immediate action required
- P/S – not colourable – aimed at combatting toxic substances that are national concern where provinces have inability to handle (extrinsic evidence proves risk)
    - Detailed regulatory framework
    - Telling industry how to function is incidental effect

CRIMINAL FORM –prohibition + penalty present

- Detailed regulation, BUT basic aim is to define prohibitions on use of substances

Public purpose – more environmental protection than health

- Focus on dangerous chemicals, not industry regulation – s.35 emergency provision confirms focus on health/safety [interim orders for new substances]

MAJORITY: holds intra vires Parliament

Re Firearms Act (2000)

- *Firearms Act* (1995) – Fed gov wants to introduce firearms registry; licensing regime and imposed conditions on gun ownership (including how to store firearms); failure to comply with licensing/registration = criminal offence
- AB appeals that this is ultra vires federal bc deals with private property; regulatory scheme not following criminal form of prohibition/penalty/purpose

SCC holds **– intra vires Parliament; criminal form met**

- P/S – enhancing public safety by controlling firearms through prohibitions/penalties
- Public purpose = gun control
- Criminal form
    - Prohibition/penalty for "possession w/o license"
    - Regulatory aspects secondary to criminal law purpose
        - Complexity is ok (*Hydro Quebec*)
        - Inherently dangerous nature of firearms (unlike cars, land titles)
- Law does not upset federal/provincial balance of power

POSTSCRIPT

- **2012:** Parliament introduces legislation to abolish long gun registry
    - QC objects – announced plans to create own registry → ask fed to turn over date re guns in QC → fed refuses, announces plan to destroy data
- **2015: QC v Canada** – reference re plan to destroy long gun registry data; federal plan found constitutionally acceptable
    - Criminal form doesn't apply to law *repealing* criminal offence
- **Federal gun buyback**: people in possession of weapons (that will be illegal) can sell back to government
    - Constitutional questions from provinces whether this is within crim power

CRIMINAL: topics are broad (health, environment, morality, public order) and form is narrow (prohibition & penalty)

POGG NATIONAL CONCERN: form is broad (regulatory power) and topics are narrow (minimum std. for GHG pricing)

PROVINCIAL PUNISHMENT, MORALITY & PUBLIC ORDER

- Provincial power is not crowded out in morality/public order even though associated w/ criminal power

Nova Scotia Board of Censors v MacNeil (1978)

- Province started a censor board w/ unfettered power to permit/forbid showing films [*Last Tango in Paris*]
    - Resulted in monetary penalties, revocation of theatre owner's license
    - McNeil (public citizen) challenged – arguing law was for criminal obscenity not regulation of business

MAJORITY: P/S about regulation, supervision and control of film business. (92(13)); More preventative than prohibitory

- Morality may differ across provinces; there is space for some kind of "local" morality legislation 92(16)
- Already criminal law dealing with showing obscene material – but doesn't preclude provincial legislation from coexisting
- Morality and criminality not coextensive – moral aim =/= business regulation "criminal"

DISSENT: P/S is determining decency (up to Parliament); provincial authority to regulate morality must be anchored in morality → here there is insufficient connection to property regulation

Dupond v Montreal (1978)

- Montreal protests – municipal bylaw allowed for orders to ban public gatherings due to threats to "safety, peace, or public order" – penalties of fines and imprisonments
- Dupond (public citizen) challenged

MAJORITY: intra vires provincial as regulation of municipal domain – local matter. Preventative character

DISSENT: ultra vires; local government trying to "create mini criminal code"; emphasized Draconian nature (rights concern)

→ later in *Westendorp* dissenting judge (Laskin) comments court decided this way bc measures were temporary and responding to local majority

Westendorp (1983)

- Calgary Bylaw 9022 restricting general business and trade in city streets
    - Specific provision s 6.1 imposed increased penalties pertaining to sex work
    - *"persons engaged in sex work often collect in groups on city streets and attract crowds… such activities are source of annoyance and embarrassment to members of public, interfere with right and ability to move freely and peacefully upon city streets"*
        - Effort to frame in different light to be intra vires provincial (for nuisance rather than morality)

HELD: struck down municipal bylaw for intrusion into federal criminal law power → seen as colourable

- Provision not about control of streets – but rather an attempt to punish sex work
- Doesn't deal with obstructions more generally
- "public nuisance" intrudes too far into criminal sphere - Many crimes interfere with ability to enjoy property

Rio Hotel v NB Liquor Board (1987)

- Provincial regulatory scheme attaching conditions to liquor licenses (*NB Liquor Control Act*)
    - Rio Hotel liquor license precluded nude performances; Fed Crim Code also had provisions re public nudity
    - Hotel owner challenges condition as relating to morality

HELD: Provision intra vires province; appropriately integrated into comprehensive scheme of regulation; not "intruded provision" (as in *Westendorp*) → relies on DAD (2 aspects of punishing for morality/regulatory) allows for both to regulate

- Local liquor board can regulate nudity as long as aim is within scheme – to safely serve liquor in establishments

Provincial Regulatory "Crimes"

- Provincial prohibitions cannot stand on their own in the sense of criminalizing conduct – must have some further regulatory objective
    - Must be anchored in provincial legislative powers and must serve valid regulatory functions
    - Prohibitions entailing penal consequences (esp. when only loosely tied to scheme) are scrutinized
- Provincial legislation unduly interfering with fundamental freedoms of religion, speech, expression, assembly/association requires extraordinary justification in local circumstances to be upheld as prov reg power

Edwards Books v The Queen (1986 SCC)

- Defining boundary between prohibitions pursuing provincial regulatory objectives vs criminal law:

1) Where provincial prohibitory legislation exhibits sufficient nexus/connection to provincial regulatory powers → *intra vires.* Factors indicating sufficient nexus:
    a. Created as part of comprehensive regulatory scheme (related to prov. Purposes [like business>moral])
    b. Whether p/s of legislation relates to prov powers; prohibition being means of enforcement
    c. Whether aims at regulatory control of property (as opposed to conduct occurring on property)
    d. Compelling, temporary local circumstance/emergency? – anticipation of crisis or to deal w/crisis
        i. If yes – concurrent jurisdiction to temporarily prohibit will be recognized to maintain order
2) Where nexus between prohibition and provincial regulatory power is tenuous/absent → *ultra vires*. Factors indicating absence of sufficient nexus:
    a. Prohibition end in itself – purpose of enforcing compliance w/ legislatures view of morality/sanctity
    b. Directed to standards of public order/safety through criminalizing activity perceived as public wrong
        i. Maintaining order through prohibition rather than protecting safety/rights from harm
    c. Intrudes into areas traditionally associated with criminal jurisdiction
        i. Ex: *Rio* – longer penalty and terminology describing traditionally criminal conduct

ECONOMIC REGULATION

CORE TENSION: federal trade and commerce (91(2)) and provincial property/civil rights (92(13))

Citizens' Insurance v Parsons (1881 JCPC) – creates Parsons branches

- ON *Fire Insurance Policy Act* challenged by insurance company as being ultra vires province

JCPC: *intra vires* province; engages in mutual modification (instead of DAD – which is less common w/economic regulation) – idea that we know where one power ends by looking to where the other begins (fed/prov powers moderate each other)

- Federal T&C does not include: power to regulate particular business/trade (such as business of fire insurance in single province)
- Federal T&C power does include (1) interprovincial/international T&C (2) "general" T&C affecting whole country [Parsons branch 1 & 2]

Carnation (1986)

- QC Agricultural Marketing Board regulating price of milk sold from farmers to processors (incl. Carnation)
    - Carnation exported most dairy to other provinces

HELD: *intra vires* province; orders not directed at regulation of interprovincial trade – p/s is to support QC dairy farmers, not to regulate trade → impacts on trade are incidental costs

- Ultimate destination of product could not affect validity because statute was directed at transaction taking place wholly within the province

Manitoba Egg Reference (1971) "chicken and egg war"

- Both ON and MN enact legislation to protect their respective markets; effectively shut out chicken/eggs from all provs
    - ON farmers produce cheap eggs; QC produce cheap chickens – export surpluses to each other and enact protection legislation against cheap imports; results in all other farmers in country being shut out of market

HELD: *ultra vires* province – affects interprovincial trade and was aimed at regulation of such trade

- Restricting/limiting free flow of trade between provinces invades Parliaments T&C

Re Agricultural Products Marketing (1978)

- Canadian Egg Marketing Agency (CEMA) created in response to previous decisions (carnation & MN egg ref)
    - Assigns each province a share of the national egg market
    - **Dovetails** prov/fed legislation – provinces control local aspects, fed control interprovincial trade aspects
        - "individual feathers" come together to achieve single objective

HELD: valid scheme – SCC invokes principle of exhaustiveness: idea that governments can come together and stay in respective lanes to achieve common goal (comes from original division of sovereignty in Constitution)

Federal Trade & Commerce Power

PARSONS BRANCHES – delineates what federal can legislate on

1) **Interprovincial or international trade**
    - Ex: *Margarine Ref, Dairy Industries Act* – forbade manufacture/import/sale; not valid exercise of criminal law power BUT "import" provisions upheld under T&C power (regulating imports/exports always valid for fed - regardless of aim)
        - Power to prohibit imports necessary to nation's jurisdiction over trade w/ other states
2) **"general" trade affecting whole dominion**
    - Regulation of particular industries excluded
        - Ex: *Labatt* – FDA set min/max alcohol content for "light beer"; Labatt exceeded max; ultra vires federal bc regulation of single industry (despite being national company/distribution/advertising)
    - Embraces regulation affecting national economy as a whole
        - *GM v CNL* – competition law; *Kirkibi* – TM law; *Pan Securities* – "systemic risk" in stock markets

GM v CNL (1989)

- *Combines Investigations Act* – prohibited anti-competitive practices; covered price discrimination, monopolies, misleading advertising

HELD: *intra vires* federal – p/s is regulating trade in general (not one specific industry); aim = to ensure healthy competition in Canadian economy

- **General T&C power** – designed to control aspect of economy that must be regulated nationally if it is to be successfully regulated at all
- **Indicia/factors** to consider in determining whether fed is acting within authority ↓

1. Act contains "regulatory scheme"
2. Scheme is under oversight of agency
3. Concerned with trade in general NOT specific industry
4. Provinces constitutionally unable to legislate
5. Interprovincial failure to cooperate would jeopardize scheme

Kirkibi (2005) (lego v mega bloks)

- *Trade Mark Act* – fed law prohibiting "passing off" – where one company sells goods trying to create impression it is a good produced by another company so they can enjoy the reputational benefits

HELD: *intra vires* federal – under 5 indicia (above) (3) – entire economy functions better if businesses can produce based on reputation; and customers better protected from fraudulent companies; (4) need national scheme for it to work

Re Pan-Canadian Securities (2018)

- *Re Securities Act* (2011) – federal law regulating every aspect of selling stocks. Scheme was comprehensive but provided that provinces could opt-in/out
    - P/S – regulate on an exclusive basis all aspect of trade in securities → ultra vires federal (specific industry, opt in option suggests any provinces non-participation would not jeopardize scheme)

  BUT – (obiter) something feels federal – managing "systemic risk"

  → parts of the law aimed at making sure entire economy doesn't collapse
    - Domino effect – failure in one part could cause cascading effects to whole economy

  → cooperative approach possible – dovetailing scheme
- **"cooperative system" (dovetailing) – interlocking fed/prov scheme**
    - Model *Capital Markets Act* (prov) → provinces would pass laws themselves (though fed wrote it)
    - Draft *Capital Markets Stability Act* (fed)

    1. *Characterization* (p/s) – regulation of nationally significant systemic risk → limited to serious threats to economy as a whole
    2. *Classification* (T&C, Parsons #2)

    (1) And (2) – "regulatory scheme" overseen by agency

    (2) ^^ same

    (3) concerned with trade in general NOT specific industry – concerned w/ domino effects not just stock market as a whole [like *GM* – stamping out risks/practices unhealthy to economy]

    (4) provinces constitutionally unable to legislate – can manage risk within own markets, but cannot regulate systemic risk across country

    (5) interprovincial failure to cooperate would justify

ANCILLARY POWERS

- Situations where specific provision looks ultra vires under normal p/s analysis but is connected to part of larger legislative scheme that is valid → "saved" as valid under Ancillary Powers Doctrine (APD) AKA necessarily incidental

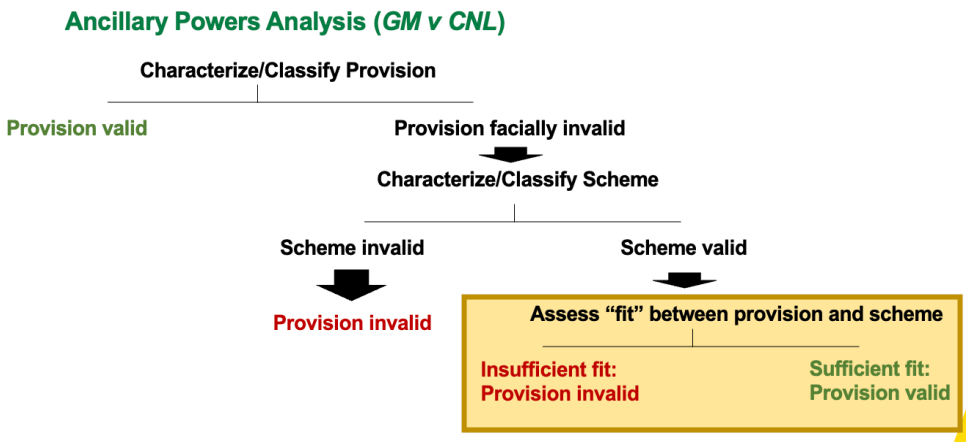
Ex: Grand Trunk Railway v Canada (1907) – federal statute prohibiting railways from "contracting out" liability for employee injuries (federalism problem - railways = federal; liability = provincial) → JCPC rules liability provision clearly deals w/ civil right BUT upheld as valid as the aim is at management/function of railways (truly ancillary to railway legislation)

- Traditionally - required a standard of necessity – show that Parliament's intervention was necessary/indispensable
- SCC has since introduced more flexible test – depending on context of case and degree of encroachment
    - When legislation encroaches only slightly → rational, functional connection test is required
        - Marginal intrusions found where – provision is reinforcing act, integrated into purpose/philosophy, fills gap in scheme. **Variable test of "fit":**

IF intrusion "marginal" – ex: "remedial" (*GM, Kirkibi*); "limited scope" (*GM, Kirkibi*); precedent (*GM → Multiple Access, Kirkibi*

THEN "functional connection" b/w scheme/provision required – ex: reinforces Act (*GM*); integrated into "purpose and

        - This test adopted in all SCC majority decisions
    - As degree of encroachment grows more serious, required degree of integration towards test of necessity
    - Particularly serious encroachment → standard of strict necessity



1. Assess validity of specific provision – valid → analysis complete; invalid → can it be saved by relationship to valid scheme

2. Assess validity of scheme – valid → necessary level of connection to provision; invalid → provision invalid; not saved

3. Assess level of fit b/w provision and scheme – not sufficiently integrated → provision struck down even under valid scheme; sufficiently integrated → provision may, under APD, be found valid

QC v Lacombe (2010)

- D owned/operated commercial aerodrome; municipal bylaw (no. 260) sought to ban use of aerodromes throughout municipality bc interfered w/ recreational use of land
- Bylaw stated purpose: balance interests of cottagers against commercial land use; P argues falls under zoning
  - SCC characterization: prohibit certain aviation activities
  - SCC classification: federal aeronautics jurisdiction (POGG) [*Johannesson*]

HELD: bylaw not upheld under APD; ultra vires province and not shown to actively further purpose of legislative scheme → no functional connection; "stand alone" ban – adding new prohibitions rather than supporting functionality of existing valid scheme – provision does not make other parts of the law work better; just adds new set of requirements

OPERABILITY/PARAMOUNTCY

FEDERALISM CONCERNS RESPECTING **VALID** LAWS

- **Paramountcy**: valid provincial laws are inoperative to the extent of any inconsistency with valid federal laws
  - Only works this one way; prov will always be struck down
- Distinction between acceptable overlap (ie DAD) and overlap that triggers paramountcy – 2 triggers:
  1) **Operational conflict** – physically cannot comply with both laws
     - *Impossibility of dual compliance test* (*Multiple Access*) – paramountcy should not be invoked except where one enactment says yes and the other says no. Where compliance with one is defiance of the other
  2) **Frustration of federal purpose** – dual compliance (although possible) frustrates federal purpose
- If federal purpose expresses intention to occupy provincial field → "covering/occupying the field" test

Explicitly concurrent legislative powers:

Agriculture, immigration, export of natural resources. → federal prevails

Old age pensions → provincial prevails

Ross (1975 SCC)

- *Criminal Code* s. 238(1) – valid criminal law penalizing driving offences → authorized judge to prohibit Ross from driving for 6m (except work commute) – order stated license would not be suspended
- ON *Highway Traffic Act* – valid provincial law - authorizes registrar to fully suspend those with criminal convictions for driving offences (Ross' is suspended for 3m)

→ No conflict found – no evidence fed intended to create affirmative right to drive or intended to "cover the field"
→ both laws valid and operative – stricter prov law not necessarily in *conflict* with less strict federal law
→ Ross can comply with both by not driving anymore

Multiple Access v McCutcheon **(1982 SCC)** – leading case on paramountcy doctrine

- D president/director of P (company) – used confidential information to insider trade securities
    - D argues prov leg is duplication of prov leg and therefore suspended inoperative (language in provisions almost identical)
- **Canada *Corporations Act*** – insider trading prohibited for federal corporations
  → viewed in context – regulates company law and within federal competence of company law (POGG gap branch)
  → in context may have double character and would apply DAD test
  → imposition of civil liability one reservation – however has general purpose and rational/functional connection with company law
  → *intra vires* Parliament
- **ON *Securities Act*** – valid 92(13) – prohibited insider trading on TSE
  → argument that validity pertains to fed incorporated companies and is beyond prov power
  → SCC holds provinces have well established power under property/civil to regular trade in corporate securities → federal incorporation does not render a company immune from general provincial application of securities regulation
  → are subject to provincial regulation so long as it does not "sterilize company and its functions/activities" or "impair status and essential capacities"
  → *intra vires* province

PARAMOUNTCY? → Not applicable because there is no actual conflict (impossibility of dual compliance) → provisions are merely duplicative not contradictory; duplication is "ultimate in harmony"

BMO v Hall **(1990 SCC)**

- Federal *Bank Act* – allowed BMO to seize farm equipment placed as collateral on loan to Hall → valid 91(15) [banking]
- SK *Limitation of Civil Rights Act* – required notice of intention to seize → valid 92(13) → BMO failed to give SK notice

PARAMOUNTCY? → Partially applies – provincial law inoperative only respecting bank act seizures – technically possible to comply wit both (federal law does not prohibit BMO from filling provincially-required notice) BUT dual compliance not possible because provincial law frustrates Parliament's purpose

- "essence" of *Bank Act* scheme – allow immediate seizure on default; Parliament's manifest intention was to create "sole" scheme for realizing debts owed to banks → provincial law still valid and carries on, just inoperative in regards to *Bank Act* seizures

Law Society of BC v Mangat **(2001 SCC)**

- M immigration consultant w/ law degree from India – he and others at his consulting company appeared as counsel/advocate on behalf of "aliens" before Immigration and Refugee Board (IRB)
- LS brings action seeking permanent injunction to prevent engaging in ongoing practice of law (pursuant to BC act)
- BC *Legal Professions Act* – prohibits non-lawyers from appearing as counsel for pay → valid 92(13) and 92(14) – regulation of profession and administration of justice
- Federal *Immigration Act* – permits non-lawyers to appear as counsel before IRB → valid 91(25) [naturalization and aliens]

PARAMOUNTCY? → Yes – provincial act inoperative; federal valid and paramount due to frustration of federal purpose
→ dual compliance possible "superficially" – federal law does not require hiring non-lawyer (can comply by not charging fee)
→ but contrary to federal purpose of informal, accessible (financially/culturally/linguistically) immigration process

Rothmans, Benson & Hedges v Saskatchewan (2005 SCC)

- Federal *Tobacco Act* – restricts promotion of tobacco products, except for "brand elements", price, availability → valid 91(27)
- SK *Tobacco Control Act* – bans all tobacco advertising in premises where minors may be present → valid 92(14)

PARAMOUNTCY? → No – possible to dually comply with stricter law by (1) not admitting minors on premises (2) not displaying tobacco related products

→ does not frustrate – prov does not grant positive entitlement (to make invalid under criminal 3P's)
→general purpose fed (address national health problem) and specific purpose of prov (circumscribe general prohibition on promotion of products) remain fulfilled → provincial appears to **fulfil same purposes** of fed (1) protect young people/others from inducements (2) protect health of young people by restricting access
→ no clear statutory language indicating intention to occupy field

Alberta (AG) v Moloney (2015 SCC)

- M uninsured and in car accident, province compensated and sought to recover, M claimed bankruptcy and was discharged → released from debts under *BIA*
- AB *Traffic Safety Act (TSA)* – AB can recover costs of victim compensation from uninsured drivers and may suspend license pending payment
- Fed *Bankruptcy and Insolvency Act* (*BIA*) – upon discharge following bankruptcy, individual released from all debts

PARAMOUNTCY? → Yes – provincial leg conflicted under frustration of federal purpose. Federal law creates positive entitlement (not just prohibition/penalty like *Benson & Hedges*); provincial law gives province a right that the federal law denies → fact that province could choose not to pursue claims does not avoid conflict

→ even if possible to comply with both BIA has purpose that is specific/rehabilitative; prov law allows to come after
→ prov provision creates new class of exempt debts that is not listed in federal scheme; impossible to apply with contravening federal law (means M would simultaneously be liable under provincial scheme and released from same claim under federal)

DISSENT: no operational conflict; due to indirect nature of conflict, must deal with under operational conflict rather than frustration of purpose → majority's approach conflates the two branches – can have serious adverse effect of increasing situations where fed law found paramount without in-depth analysis of parliament's intent

- If federal law is probative (as here) – question is what does it prohibit. If provincial law allows same thing = operational conflict; if not, shift analysis to second branch
- Dealing with conflicts under second branch advantageous bc legislative intent must be established and before declaring inoperative, court can consider whether fed gov supports operation of the law (*Rothmans*)
    - Facilitates intergovernmental dialogue and serves as safeguard for provincial autonomy

→ this approach more compatible with cooperative approach (*CWB*) and sets precedent that prov law rarely found inoperative in first branch of analysis

APPLICABILITY/INTERJURISDICTIONAL IMMUNITY

FEDERALISM CONCERNS RESPECTING **VALID** LAWS

- **Interjurisdictional immunity**: valid provincial laws are inapplicable to some federal people/things/places
  - In theory can run both ways (vice versa)
  - Creates space (esp for federal authority) to not be disrupted even if fed has yet to pass a law
- Rooted in idea of exclusive jurisdiction – rendering subject matter falling within exclusive power of one level immune from impairment by valid laws passed by other level
- General terms of provincial statute "read down" so as not to impair matters at core of federal jurisdiction

IJI ANALYSIS

- **Test**: provincial law impairs core of federal jurisdiction (or vice versa)
  - Inherently federal things, people, places, undertakings
- Heavy **reliance on precedent** *most important in analysis* - because IJI runs contrary to cooperative federalism, use is primarily reserved for situations with clear precedent
  → *Bonsecours* (1899) – municipal laws of cleaning ditches DO apply to ditches beside railways but ONLY IF they don't impair train operation
  → *Toronto Corporation* (1905) – municipal construction regulations do NOT apply to telephone poles (prov cannot regulate construction re: poles)
  → *Kellog's* (1978) – provincial laws prohibiting advertising through cartoons DO apply to TV ads (applies to content not infrastructure of communications)
  → *Air Canada* (1997) – provincial mark up on liquor served on planes DOES apply, but may NOT if affects food/water service (won't apply if affecting necessary element to air travel)
  → *COPA* (2010) – provincial "green belt" law does NOT apply to placement of aerodromes [companion to *Lacombe*] (can prohibit anyone else from building in green belt but not aeronautic facilities bc is inherently federal)

Canada Labour Code – delineates areas immune from prov

- *Interprovincial communications (telephone, cable, broadcasts)*
- *Banks*
- *Ferry and port services*
- *Airlines*
- *Interprovincial railways and highways*

Bell Canada v QC (1988)

- Whether a provincial labour legislation (compelling reassignment to pregnant worker) could apply to Bell (a company expressly agreed as constituting a federal undertaking)

HELD: Valid provincial legislation → principally treats working conditions and labour relations HOWEVER inapplicable to Bell Canada because it is an inherently federal entity → even though any application may not effect undertaking, and federal government has ability to enact paramount laws – still immune from provincial legislation that pertains to core functions of company

→ IID may be enacted if provincial statute affects vital/essential part of federal undertaking – doesn't necessarily ned to go as far as impairing/paralyzing it

CWB v Alberta (2007)

→ this case made many think that IJI would be done away to focus on cooperation; SCC upholds but under constraint

- Banks historical functions limited to deposits and loans - blurring of industries led to banks selling financial products they hadn't previously (insurance, securities)
- Federal *Bank Act* – allows banks to promote credit-related insurance
- AB *Insurance Act* – subjects banks to insurance sales regulation (licenses, training, ethics, sanctions)

ISSUE: does *Insurance Act* apply to CWB sale of insurance or are these sales at the core of banking?
→ **HELD**: promoting insurance cannot be considered indispensable/necessary to banking activities

- Does not apply IJI here but recognizes the doctrine with caveats for restraint moving forward
    - IJI contrary to "dominant tide" of federalism
        - Trend towards cooperative overlap, concurrency, democracy
        - Leads to uncertainty of how/if law will apply in certain contexts
        - Abstract discussion of "core" is confusing
        - Risk of legal vacuums
        - Not necessary in light of paramountcy

→ provincial legislation will be inapplicable to federal undertakings if that law "impairs" the "core" of federal power or vital/essential feature of the undertaking (impairment is necessary)

PHS Community Services ["Insite"] (2011)

- Provincial government established Insite "safe injection sites"
    - Uncontested evidence this program reduced HIV, Hep C and overdose deaths
- Federal *CDSA* prohibits trafficking/possession; minister refuses to grant exemption to Insite (therefore can be charged with possession/trafficking for having substances on site)
- *Are treatment decisions at "core" of provincial jurisdiction over healthcare?* – Does *CDSA* apply to Insite?

IJI? → NO – IJI applies to things, people, places, undertakings not broad areas; no precedent; no clear "core" to provincial power over health

→ health is broad/amorphous area of jurisdiction; no clear "core" as it is a broad area with a lot of provincial/federal overlap
→ SCC hesitant to distinguish new cores of power or expand doctrine in interest of evolving cooperative federalism
→ recognizing IJI here might produce vacuums/uncertainty

INDIANS AND LANDS RESERVED

Section 91(24) – exclusive federal authority for Indians and lands reserved for Indians

- ***Royal Proclamation* (1763)** – affirms colonial territory/governments/courts. Lands under FN authority were to be left alone (not for private purchase) but Crown reserves power to take further lands → greater quality of power/resources between settlers/FN at this time
- ***Constitution Act* (1867)** – policy gives way to explicit expropriation of land and assimilation of FN → major transformation in nature of relationship between Crown/FN
    - 91(24) enacted with aim of allowing government to continue colonial policy of acquiring lands
- **Treaties and Scrip –** more individualized land purchase with Metis
- ***Indian Act* (1876)** – created in response to a need to acquire land – to do so government knew would have to trade with FN → Now seen as enforced assimilation and violation of rights

Re Eskimos (1939 SCC)

- Severe poverty; QC and Fed both deny responsibility/jurisdiction for the group
    - QC paid relief monies and fed refused to reimburse; QC argues fed jurisdiction bc Eskimos fall under 91(24)

HELD: QC is correct – falls under Indians of 91(24)

→ complicated implications; federal ignored responsibility and when finally forced with authority enacted polices that were controlling/demeaning/cataloguing (number identification system bc couldn't understand naming system)

Daniels (2016 SCC)

Similar problem to Eskimos (from Federalism pov)

- Metis and non-status Indians in "jurisdictional wasteland" where again neither government would take responsibility
    - No one to hold accountable; Metis themselves bring action seeking declaration that:
      1) Metis and non-status Indians are "Indians" under 91(24)
      2) Federal Crown owes fiduciary duties to both groups
      3) Both groups have right to be consulted/negotiated w/ respecting certain rights/interests

  HELD → Metis and non-status Indians declared "Indians" under 91(24)
    - Cites concerns of jurisdictional wasteland to the importance of making a declaration in absence of conflict
    - Look to original intention of drafters – 91(24) written w goal of expanding land mass – would have had to include Metis/non-status (not a thing at the time)
    - Greater concern here (than *Eskimos*) for FN voices in relation to 91(24) purpose

→ Both these cases differ from other federalism cases in that governments are arguing over denying authority in a certain area – rather than establishing authority. What this looks like in practice:

Kashechewan First Nation Water Crisis

- Provinces generally assigned power over access to clean drinking water (public health) – with exception of FN reserves under 91(24)
- Oct 2005 – e coli contamination and evacuation on the reserve; both governments blame each other
- Federal commitment to end long-term drinking water crisis; nowhere near on track to meeting goal
    - Ongoing issue with no resolution
- Chalifour "national network of laws provide clean drinking water to all Canadians.. with the glaring exception of Aboriginal peoples on reserves"

→ division of powers creating a vacuum where neither level of government will address issue because "out jurisdiction"

Jordan's Principle

- Child (Jordan) born to Norway House Cree Nation (MB) w/complex medical needs
    - Physicians said could go home but spent life in hospital bc gov refused to pay for his home care (service that would have normally been provided to other Manitobans) – both levels denied responsibility
- **Principle**: whichever government department has first contact (w/service needs, FN child, etc.) pays and the money can be figured out later
    - Should never have another situation where child is deprivileged because gov fighting over money
- Rampant violations of principle in practice – fought about in court forever and still not fully resolved
    - HR complaint by AFN re discriminatory underfunding of family/children's health services (YK)

FEDERALISM AND RACE

Section 91(25): "Naturalization and Aliens"

Mangat – provincial legislation inoperative due to frustration of federal purpose to create equitable/accessible immigration refugee board process

Asian Immigration to Western Canada

- First wave of Chinese/Japanese immigration 1850s-1880s
- Facially discriminatory legislation 1870s-post WWII – explicitly treating people differently because of their race
    - Difference between legislation discriminating in impact vs facially
    - Not a law that happens to have disproportionate impact – rather specific treatment *because of* race

- Pervasive racism in law/policy/society
    - Denial of voting rights, economic restrictions on employment/licensure, internment/deportation, immigration restrictions

Bryden v Union Colliery (1899)

- BC *Coal Mines Regulation Act* originally prohibited children/women from working in mines and amended in 1890 to include no "Chinamen" → facially discriminatory
    - Women/children uncontroversial within labour jurisdiction 92(13) and 92(10)
    - Federalism problem arises with question of an attempt to regulate federal jurisdiction of "naturalization and aliens"

→ P/S = barring aliens and naturalized subjects not regulating coal mines (this is incidental effect) → *ultra vires* province

Cunningham v Tomey Homma (1903)

- Provincial law banning Japanese (naturalized or not) from voting → facially discriminatory

→ *intra vires* province – prohibition relates to voting and to race; not directly "alienage and naturalization"

- Not the courts job to determine whether or not this is a good idea; courts only role is deciding who has jurisdiction and here there is no meaningful conflict between HoPs

Quong Wing (1914)

- SK *Female Employment Act* barred any businesses owned/kept/managed by any Japanese/Chinamen/Oriental person from employing any woman/girl. Penalty of $100 fine or 2m imprisonment
    - QW charged for employing 2 white women
      → 92(13) [property/civil] or 91(25) [naturalization/aliens]?

MAJORITY: → *intra vires* province; p/s about protection of women/girls in employment 92(13); based on "race/blood" not naturalization/alienage (not like Bryden which was in p/s about naturalization/alienage)
→ question is solely about power of provincial legislature to pass the act; not the policy/justice of the act

DISSENT: 91(25) pertains under Bryden decision; no way the law can be interpreted to include naturalized citizens and only targeting aliens – because if so would be unconstitutional – paramountcy of Federal *Naturalization Act* (confers all political/other rights on naturalized subjects)

Re Persons of Japanese Race (1947)

- National *Emergency Transitional Powers Act* – continued emergency powers of *War Measures Act;* deported Japanese Canadian citizens on basis of race not immigration status → occurred under POGG Emergency branch
    - Engaged property/civil rights (people had things taken from them) but happened in "emergency"

→ deference to Parliament respecting (1) whether there is emergency and (2) what must be done to address it