CONSTITUTIONAL LAW CANS: First Term 2009

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PITH AND SUBSTANCE DOCTRINE

The first step in judicial review is to identify the "matter" of the challenged law in order to determine whether the law is constitutional or not. The general idea is that it is necessary to identify the dominant or most important characteristic of the challenged law.

Difficulty in identifying the "matter" of a statute is that many statutes have one feature (or aspect) which comes within a provincial head of power and another which comes within a federal head of power. Court then have to make a judgment as to which is the most important feature of the law and to characterize the law by that feature: that dominant feature is the "pith and substance" of the law; the other feature is merely incidental, irrelevant for constitutional purposes.

Bank of Toronto v. Lambe (1887)

- PC upheld a provincial law which imposed a tax on banks
- The dominant feature of the law was to raise revenue, and the PS of the law was taxation, not banking
- The impugned law was "in relation" to taxation, and merely "affected" banking

The PS doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction.

Examples:

- A provincial law in relation to insurance may validly restrict or even stop the activities of a federally-incorporated company
- A provincial law reorganizing municipalities may validly alter the interest payable on debt owed to out-of-province creditors
- A federal law in relation to navigation and shipping may validly regulate labor relations in a port

Framework of Analysis

Purpose

The process of characterization is not a technical, formalistic exercise, confined to the strict legal operation of the impugned law. The court will look beyond the direct legal effects to inquire into the social or economic purpose which the statute was enacted to achieve.

How to find the purpose?

- The preamble
- Intention of the statue or the legislative body that enacted it (i.e. the full or total meaning of the rule, judged in terms of the consequences of the action called for)
- Reference to the state of law before the statute and the defect in the law which the statute purports to correct
- Legislative history: it helps to place the statue in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it

Effect

In characterizing a statute (identifying its PS) a court will always consider the effect of the statute, i.e. how the statute changes the rights and liabilities of those who are subject to it. This simply involves understanding the terms of the statute, and that can be accomplished without going beyond the four corners of the statute. The search for PS will not remain within the four corners if there is reason to believe that the direct legal effects of the statute are directed to the indirect achievement of other purposes (see *Alberta Bank Taxation Reference*)

Central Canada Potash Co. v. Government of Saskatchewan (1978)

- The Court examined the effect of a provincial scheme for the proprationing of potash; finding that nearly all of the province's production was exported, and that the province had abundant reserves, the Court characterized the scheme as in relation to interprovincial and international trade rather than the conservation of a natural resource

Need for Flexible Interpretation

The doctrine of progressive interpretation: the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867. On the contrary, the words of the Act are to be given a progressive interpretation so that they are continuously adapted to new conditions and new ideas

The Constitution differs from an ordinary statute in that it cannot easily be amended when it becomes out of date, so that its adaptation to changing conditions must fall to a large extent upon the courts

Reference re Same-sex Marriage [2004]

- Issue: whether parliament's power over marriage would extend to legalizing same sex marriage
- Original understanding in 1867 would have been that marriage was by its nature a union between man and woman
- SCC denied that it was bound by the original understanding (frozen concepts reasoning)
- Court said that the Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life
- Canada in 2004 was a pluralist society, marriage is a civil institution
- A progressive interpretation of s. 91(26) let to the conclusion that it should be expanded to include same-sex marriage

R v. Blais [2003]

- The doctrine of progressive interpretation does not liberate the courts from the normal constraints of interpretation
- Constitutional language must be placed in its proper linguistic, philosophical, and historical contexts
- The interpretation of a constitutional provision must be anchored in the historical context of the provision
- Holding that the word "Indians" in the Natural Resource Agreements scheduled to the Constitution Act, 1930 originally excluded Metis and should be expanded on the basis of the "living tree" approach

Reference re Employment Insurance Act [2005]

- Challenge to the validity of the provisions of the federal Employment Insurance Act that granted maternity benefits to pregnant workers who left work to have a baby and parental benefits to mothers and fathers (natural or adoptive) who left work to care for a baby
- Federal power over 'unemployment insurance' was contained in s. 91(2A), added by amendment in 1940
- The first statute under s. 91(2A) did not provide for either maternity or parental benefits (the assumption at the time was that women would stop working)
- SCC declared that the Constitution can be adapted to reflect new social realities
- Those social realities included the evolution of the role of women in the labor market and the role of fathers in child care

Alberta Bank Taxation Reference [1938]

- The PC struck down an Alberta law which imposed a special tax solely on the banks (contrasted with *Bank of Toronto v. Lambe*)
- The PC concluded that the PS of this particular law was to discourage the operation of the banks in Alberta
- Its "matter" therefore came within "banking" and the taxing quality of the law was merely incidental
- The province's power to tax could not save the law, because its PS was not taxation
- Occassionally read as prohibiting provincial legislatures from "singling out" banks or other federal undertakings for special treatment; provincial laws "of general application" may validly apply to banks or other federal undertakings
- PC examined the impact on the banks of the tax and used the severity of the tax as one of the reasons for concluding that the statute should be characterized in relation to banking rather than taxation

The provincial law need not be of general application to apply validly to undertakings within federal jurisdiction. A law is characterized by its PS. The singling out of undertakings within federal jurisdiction is not conclusive of PS.

While a provincial law of special application to undertakings within federal jurisdiction is not necessarily invalid, it is also true that a provincial law of general application is not necessarily valid in its application to undertakings within federal jurisdiction.

Normally, a provincial law of general application which is in relation to a provincial matter may validly affect federal matters.
Exception: If the effect of a provincial law would be to impair the status or essential powers of a federally incorportated company, or to affect a vital part of a federally- regulated enterprise, then the provincial law. although valid in the generality of its applications, will not apply to the federally-incorporated company or federally-regulated enterprise.

Ward v. Canada [2002]

- The SCC had to characterize a federal law that prohibited the sale of baby seals
- A law regulating the marketing of seals would be within the provincial authority over property and civil rights
- But the court accepted evidence that the purpose of the law was the indirect one of limiting the killing of baby seals

- The Court accordingly held that the PS of the law was the management of the fishery, which came within the federal authority over sea coast and inland fisheries
- The law was therefore upheld

Canadian Western Bank v. Alberta [2007]

- The federal parliament enacted a Bank Act that allowed banks to promote certain kinds of insurance- federal parliament has the power to regulate banks, while insurance is subject to provincial power
- The provincial legislature expanded their insurance statute to affect the banks, banks argued that this power belonged to the federal government
- Bank was allowed to promote insurance
- SCC upheld both federal and provincial law
- Refused to apply interjurisdictional immunity- found that there was no contradiction in a technical sense
- Banks had been promoting insurance while both statutes (can comply to both by simply following the provincial law)

Legislative History

R v. Big M Drug Mart Ltd [1985]

- Illustrates the importance of legislative purpose in characterization
- The SCC held that the federal Lord's Day Act, which prohibited various commercial activities on Sundays, was a valid exercise of the federal Parliament's power over criminal law (the Act was struck down for a breach of the *Charter*)
- The criminal character flowed from its purpose, which was the religious one of the preservation of the sanctity of the Christian Sabbath
- The religious purpose could be discovered from the name and history of the Act
- The Court acknowledged that if the purpose of the statute had not been religious, but rather the secular goal of creating a uniform day of rest from labor, then the Act would have fallen under provincial rather than federal competence

R v. Edwards Books and Art [1986]

- The Court held that Ontario's Retail Business Holidays Act, which prohibited retail stores from opening on Sundays, was a valid exercise of the province's power over property and civil rights (the Act survived a Charter attack by virtue of s. 1)
- The Court discovered the secular purpose of the Act (providing a uniform pause day) in the legislative history, which consisted of the parliamentary debates and the law reform commission report that preceded the enactment of the Act

Actual Administration

Saumur v. Quebec [1953]

- There was a constitutional challenge to a municipal by-law which made it an offence to distribute literature in the streets of Quebec city without having previously obtained the written permission of the chief of police
- Such a law could have been passed for the purposes of protecting pedestrian traffic or controlling litter in the streets, and the minority in the SCC did uphold the law as being in relation to the streets (legitimate topic of provincial regulation)

- But the majority looked at the way in which the by-law was actually administered- on an application for permission, the chief of police would examine the contents of the material to be distributed, and would make his decision on the basis of whether he found the contents to be objectionable or not
- The chief of police was being used as a vehicle for censorship, and the by-law constituted an effective bar to the dissemination of literature by an unpopular minority group (Jehovah's Witness)
- So the by-law was classified in relation to speech or religion, and held that it was not within provincial jurisdiction

Efficacy

In characterizing a statute, it is relevant to look at the purpose of the statute and the effects. But courts should not pass judgment on the likely efficacy of the statute (courts are not concerned with the wisdom or policy of legislation). The classification must be based on the purpose and effects as understood by the legislators.

Re Firearms Act (2000): Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of power analysis

Ward v. Canada (2002)

- The SCC accepted the evidence of the federal government that the purpose of the ban on sale was not to regulate the marketing of baby seals but to limit the killing of baby seals by removing the commercial incentive to harvest them
- This invited the question of why the government did directly prohibit the killing of seals- Court held that this was an impermissible inquiry into the efficacy of the law
- The purpose of the legislation cannot be challenged by proposing an alternate, allegedly better, method for achieving that purpose

Colourability

The **colourability doctrine** is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction
Applies the maxim that a legislative body cannot do indirectly what it cannot do directly

Exceptions:

- Federal parliament cannot regulate the delivery of health care in provinces, but it can transfer cash and tax points to only those provinces whose health care plans comply with federal standards of universality, accessibility and mobility
- Neither the federal nor provincial government can delegate powers to each other, but each can delegate powers to agencies created by the other

Alberta Taxation Reference

- PC held that the legislation, although ostensibly designed as a taxation measure, was in reality directed at banking

R v. Morgentaler

- The SCC struck down a NS statute that required "designated" medical procedures to be performed in a hospital
- The designation had been accomplished by a regulation which listed nine medical procedures, of which the 4th was abortion
- The statute declared the purpose was to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all NS- so on the face of it seemed it seemed to be a health measure
- But the SCC held that the stimulus for the statute came from a proposal by Dr. Morgentaler to establish an abortion clinic in the province, and the court quoted evidence of the legislators' preoccupation with stopping the establishment of the Morgentaler clinic
- The court held that the statute and regulation were aimed primarily at suppressing the perceived harm or evil of abortion clinics and so were invalid criminal laws
- The court struck down the statute and regulation in their entirety, despite the fact that 8 of the 9 procedures had nothing to do with abortion
- The court regarded the 8 procedures as a smokescreen to conceal from a reviewing court the true purpose of the legislation

NECESSARILY INCIDENTAL

Each list of classes of subjects in s. 91 or s. 92 is exclusive to the parliament or legislature to which it is assigned. If either parliament or a legislation fails to legislate to the full limit of its power this does not have the effect of augmenting the powers of the other level of government. However, the governments can still enact similar or identical laws.

In US and Australia, the enumerated federal powers include an ancillary power (power to make all laws which are necessary for carrying into execution the foregoing enumerated powers). The Canadian Constitution does not include ancillary power. No such power is needed- PS doctrine enables a law that is classified in relation to a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body.

Papp v. Papp (1970): where there is admitted competence to legislate to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged.

The rational connection test allows each enumerated head of power to embrace laws that have some impact on matters entrusted to the other level of government and it provides a flexible standard which gives the enacting body considerable leeway to choose the legislative techniques it deems appropriate, while providing a judicial check on an unjustified usurpation of powers

General Motors of Canada v. City National Leasing

- As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained
- The court must measure the degree of encroachment of a legislative scheme on the other government's sphere of power, and then the court must determine how necessary the impugned provision is to the otherwise valid legislative scheme
- For minor encroachments, the rational connection test is appropriate
- For major encroachments, a stricter test (the truly necessary or essential) is appropriate
- The impugned law was the civil remedy in the federal competition statute

- This law did intrude into provincial power over property and civil rights, but only in a limited way
- Therefore, it was sufficient to test the validity of the law by the rational connection test, and in applying that test the court upheld the validity of the civil remedy
- The rational connection to the legislative scheme was that the civil remedy, by providing a means and an incentive to private enforcement, would improve the efficacy of the competition law

Reference re Goods and Services Tax (1992)

- SCC upheld the collection of provisions of the federal GST, which involved payment of tax on the value added to a good or service at each stage of production and distribution
- The provisions (whose only purpose was to collect the federal tax) were an intrusion upon provincial jurisdiction, but the provision was upheld under the necessarily incidental doctrine

DOUBLE ASPECT DOCTRINE

Double Aspect Doctrine: Subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91

- Acknowledges that some kinds of laws have both a federal and a provincial PS and are therefore competent to both the Dominion and the provinces
- The double aspect doctrine is applicable when the contrast between the relative importance of the two features is not so sharp. In other words, the double aspect doctrine is the course of judicial restraint- when the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either Parliament or Legislature

Examples

- SCC has upheld provincial highway traffic offences of driving without due care and attention and failing to remain at the scene of an accident as laws in relation to conduct on the roads, which is a matter coming within provincial power (property and civl rights); at the same time the SCC upheld very similar federal offences contained in the CC as laws in relations to the punishment of crime (*O'Grady v. Sparling [1960]*, *Stephens v. The Queen [1960, Mann v. The Queen [1966*)

- Securities regulation: SCC has upheld both a provincial and federal law, each creating an offence of issuing a false prospectus (*Smith v. The Queen [1960]*). Court also upheld both a provincial and federal law, each creating a civil remedy for insider trading (*Multiple Access v. McCutcheon* [1982]). The provincial power came from the characterization of the provincial law as regulating the trade in securities (property and civil rights). The federal power came from the characterization of the federal false prospectus offence as a "criminal law", and federal insider trading remedy as a corporate law coming within the federal power to incorporate companies

Double aspect doctrine gives rise to the possibility of conflict between a valid federal law and a valid provincial law. The resolution of such conflicts in favor of the federal law is the function of the "federal paramountcy" doctrine.

Hodge v. The Queen

- Subjects which in one aspect and for one purpose fall within s. 92, may fall in another aspect and for another purpose fall within s. 91
- There was an Ontario Liquor License Act that was stricter than the Federal Act
- Issue was whether the province had the power to enact the Act
- Court held that the federal and provincial government should be allowed to regulate the same subject based on different concerns or purposes
- Had concurrent jurisdiction on the same matter

Multiple Access Ltd. v. McCutcheon

- SCC upheld a provision of federal corporation law granting a civil remedy for insider trading, on the basis that the provision had a 'rational, functional connection' with company law
- Ontario Act prohibited insider trading in security regulation, Canada Corporation Act had an insider trading provision that was applicable to companies incorporated under the federal law
- Security regulation is conducted by each province, no comprehensive security regulation by the country
- Multiple Access was federally incorporated so the federal law applied, but the headquarters were in Toronto, so the Ontario law also applied
- Held that both the federal and provincial law applied (federal under POGG or trade and commerce, provincial because security regulation was historically part of provincial jurisdiction)
- Some provinces didn't have security statutes, so Canada needed to regulate it for that reason

INTERJURISDICTIONAL IMMUNITY

A law that purports to apply to a matter outside the jurisdiction of the enacting legislative body may be attacked in three different ways. The attack may go to:

- **The validity of the law:** a law may be invalid if the PS of the law comes within a class of subjects that is outside the jurisdiction of the enacting legislative body. The question of validity depends upon the characterization of the law.

- **The applicability of the law:** if a law purports to apply to a matter outside the jurisdiction of the enacting body, then court can acknowledge that the law is valid in most of its applications, but the law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body. If this argument succeeds, the law is not held to be invalid, but simply *inapplicable* to the extra-jurisdictional matter

- **The operability of the law:** can argue that a law that applies to a matter outside the jurisdiction of the enacting body, it is *inoperative* through the doctrine of paramountcy- where there are inconsistent federal and provincial laws, it is the federal law that prevails; paramountcy renders the provincial law inoperative to the extent of the inconsistency (so the attack is only available against a provincial law)

Federally-incorporated companies

An otherwise valid provincial law may not impair the status or essential powers of a federally-incorporated company.

John Deere Plow Co. v. Wharton [1915]: A provincial law prohibiting all extra-provincial companies from operating in the province was read down to exempt federally-incorporated companies

Federally-regulated undertakings

Undertakings engaged in interprovincial or international transportation or communication, which come within federal jurisdiction under the exceptions to s. 92(10), are immune from otherwise valid provincial laws which would have the effect of "sterilizing" the undertakings.

Toronto v. Bell Telephone Co [1905]: an interprovincial telephone company was held immune from provincial law requiring the consent of a municipality for the erection of telephone poles and wires

Rationale of Interjurisdictional Immunity

The interjurisdictional immunity cases do not concern provincial laws that single federal undertakings, works, persons or services for special treatment. In every case, the provincial law that was held inapplicable was a law of general application that was indisputably valid in most of its application. The theory behind the results is that each head of federal power not only grants power to the federal Parliament, but being exclusive, denies power to the provincial legislature.

Interjurisdictional Immunity or Pith and Substance Doctrine?

Pith and substance is the default position; interjurisdictional immunity should be applied with restraint.

Difficult to distinguish when the interjurisdictional immunity doctrine applies from when PS doctrine applies: works that are within the special and exclusive jurisdiction of parliament, are still subject to provincial statutes that are general in their application, provided, however, that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction.

IF the provincial law would affect the basic, minimum, unassailable core of the federal subject, then the interjurisdictional immunity doctrine stipulated that the provincial law must be restrained in its application (read down) to exclude the federal subject. If, on the other hand, the provincial law did not affect the core of the federal subject, then the PS doctrine stipulated that the provincial law validly applied to the federal subject.

McKay v. The Queen

- A municipal by-law prohibiting the display of signs on residential property was held inapplicable to federal election signs

Commission de la Sante et de la Security du Travail v. Bell Canada [1966]

- Held that Bell (an interprovincial undertaking) was immune from a provincial minimum wage law of the lesser ground that such a law "affects a vital part of the management and operation of the undertakings"
- The new 'vital part' test carved out a much broader field of immunity from provincial law than the old sterilization test, because the vital part test precluded the application of provincial laws that could not possibly paralyze or even impair the operation of the federally-regulated undertaking
- The decision meant that workers in federal industries were not protected by minimum wage laws (at the time no federal minimum wage- if there was, doctrine of paramountcy would apply)

Bell Canada v. Quebec [1988]

- SCC reaffirmed its commitment to the vital part test
- Issue: whether provincial occupational health and safety laws could apply to undertakings engaged in interprovincial transportation and communication
- SCC held that the provincial law was constitutionally incapable of applying to the federal undertaking, and had to be read down so that it did not apply to the federal undertaking
- Acknowledged that the law requiring the reassignment of a small number of workers (like the previous minimum wage issue) could not paralyze or impair the operation of the federal undertaking, but that it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of the undertaking, without necessarily going as far as impairing or paralyzing it
- Rejected the view that there could be concurrent provincial jurisdiction over a vital part of the federal undertaking
- In principle, a basic, minimum, and unassailable content had to be assigned to each head of federal legislative power, and since federal legislative power is exclusive, provincial laws could not affect that unassailable core
- Rival systems of regulation would be a source of uncertainty and endless disputes

Irwin Toy v. Quebec (1989)

- A Quebec law that prohibited advertising directed at children could apply to advertising on television, which is federally regulated
- Court held that the law was applicable to advertising on television
- Court acknowledged that advertising was a vital part of the operation of a television broadcast undertaking- but the vital part test only applies to provincial laws that purport to apply *directly* to federal undertakings
- Where a provincial law had only an "indirect effect" on the undertaking, the law would be inapplicable only if the law impaired a vital part of the undertaking
- An indirect effect falling short of impairment would not render the provincial law constitutionally inapplicable
- In this case, the provincial prohibition on advertising applied to advertisers, not to the media- since the effect of the law was indirect, it did not matter that it affected a vital part of the undertaking
- Discrepancy with *Bell 1988*: can argue that the court realized the test in *Bell 1988* was too tight a restriction on provincial power over federal undertakings

Canadian Western Bank v. Alberta (2007)

- Issue: whether Alberta's Insurance Act could constitutionally apply to the banks

- The Act required a deposit-taking institution (included federally-regulated banks, and provincially regulated trust companies and credit unions) to obtain a license from the province and comply with provincial consumer-protection laws in order to promote insurance to customers
- The federal Bank Act had been amended in 1991 to grant the banks the power to promote to their customers, majority of customers would buy it, this enhanced the security of the bank's portfolio loans
- The lending of money and the taking of security by banks were vital functions of banking, and the banks argued that that the close relationship of creditors' insurance to those functions made the promotion of insurance by banks a vital part of banking as well
- Court held that the vital part of an undertaking should be limited to functions that were essential or indispensable or necessary to the federal character of the undertaking; and that the promotion of insurance by banks was too far removed from the core of banking to qualify as a vital part of the banking undertaking
- Therefore Alberta Insurance Act could validly apply to the banks when they promoted insurance
- Consistent with *Irwin Toy*
- Interjurisdictional immunity would apply only if a core competence of parliament or a vital or essential part of an undertaking it duly constitutes would be impaired by a provincial law
- If the core competence or vital part would merely be affected (without any adverse consequence) by a provincial law, no immunity applied
- In no longer mattered whether the effect of a provincial law on the core or vital part was direct or indirect- in the absence of impairment, interjurisdictional immunity does not apply
- Impairment: adverse consequence that placed the core or vital part in jeopardy, although without necessarily sterilizing or paralyzing it

A court should favor, where possible, the ordinary operation of statutes enacted by both levels of government. The doctrine operated as a restraint on provincial power, which undermined the principle of subsidiary that decision-making should take place at the level of government closest to the individuals affected.

PARAMOUNTCY AND ORDER OF APPLYING CONSTITUTIONAL DOCTRINES

Federal paramountcy: where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails.

FP applies where there is a federal law and a provincial law which are (1) each valid and (2) inconsistent. Validity depends on the PS doctrine.

Inconsistency:

- A wide definition of inconsistency will result in the defeat of provincial laws in 'fields' which are covered by the federal law (judicial activism)
- A narrow definition will allow provincial laws to survive so long as they do not expressly contradict federal law (judicial restraint)

Frustration of Federal Purpose

Inconsistency where a provincial law would frustrate the purpose of a federal law- where there are overlapping federal and provincial laws, and it is possible to comply with both laws, but the effect of the provincial law would be to frustrate the purpose of the federal law

Bank of Montreal v. Hall [1990]

- Issue: whether there was a conflict between the federal Bank Act, which provided a procedure for the foreclosure of a mortgage held by a bank, and a provincial Act, which stipulated, as a prelude to foreclosure proceedings, that the creditor must serve on the debtor a notice giving the debtor a last opportunity to repay the loan
- In this case, bank had taken foreclosure proceedings in compliance with the federal law, but had not served notice in compliance with the provincial law
- It was not impossible for the Bank to obey both laws
- The sole effect of compliance with the provincial law would be to delay the bank
- SCC held that the bank was not obliged to obey the provincial law, because it was inconsistent with the federal law
- There was an actual conflict in operation and that compliance with the federal statute necessarily entails defiance of its provincial counterpart; the purpose of the federal law would be frustrated if the bank had to comply with the provincial law

Law Society of British Columbia v. Mangat [2001]

- Federal Immigration Act provided that, in proceedings before the Immigration and Refugee Board, a party could be represented by a non-lawyer
- BC's Legal Profession Act provided that non-lawyers were prohibited from practicing law (and appearing before a federal administrative tribunal)
- SCC acknowledged that a party before the Board couple comply with both laws by obeying the stricter provincial one
- But the purpose of the federal law was to establish an informal, accessible, and speedy process, and that purpose required that parties before the Board be able to retain counsel who spoke their language, understood their culture and were inexpensive
- This purpose would often be defeated if only lawyers were permitted to appear before the Board
- Compliance with the provincial law would go contrary to parliament's purpose

Rothmans, Benson & Hedges Inc. v. Saskatchewan (2005)

- The federal Tobacco Act prohibited the promotion of tobacco products, except as authorized elsewhere in the Act (a person may display, at retail, a tobacco product)
- Saskatchewan Tobacco Control Act banned the display of tobacco products in the premises in which persons under 18 were permitted
- SCC interpreted the federal permission to display as intended to circumsribe the prohibition on promotion, and not to create a positive entitlement to display
- That meant that a retailer could comply with both laws
- Both the general purpose of the Tobacco Act (address national health problem) and the specific purpose of the permission to display (circumscribe the general prohibition) remain fulfilled

Impossibility of Dual Compliance

Express contradiction occurs when one law expressly contradicts the other. For laws which directly regulate conduct, this occurs when it is impossible for a person to obey both laws; or compliance with one law involves breach of the other (*Smith v. the Queen (1960)*)

Multiple Access v. McCutcheon (1982)

- Issue: whether the insider-trading provisions of provincial securities law were in conflict with the insider-trading provisions of federal corporate law
- SCC answered 'no'
- Paramountcy only applies where there is actual conflict in operation, as where one enactment says "yes" and the other says "no": the same citizens are being told to do inconsistent things; compliance with one is defiance of the other
- Since the federal and provincial laws provided essentially the same remedy for essentially the same conduct, namely profiting from inside knowledge in the trading of stocks, there was no express contradiction
- The two laws were in harmony, imposing the same standards of conduct on persons dealing in corporate securities
- The rule of FP did not apply

M&D Farm Ltd v. Manitoba Agricultural Credit Corp [1999]

- Issue: whether the Manitoba Agricultural Credit Corp, which held a mortgage on the farm owned by P, had validly foreclosed on the mortgage
- Under the federal Farm Debt Review Act, P had obtained a 120-day stay of proceedings to halt any proceedings to recover the arrears owing by them to the corporation under the mortgage
- While the stay was in force, the corporation obtained a court order under the provincial Family Farm Protection Act granting permission to foreclose on the mortgage
- The corporation did nothing more until the federal stay expired, and then continued the proceedings and obtained title to the farm
- P argued that the court order granting permission to foreclose was a nullity, and that tall the steps that were followed were void
- SCC agreed with P and held that the foreclosure was invalid
- The effect of the stay, under federal law, was to prohibit any proceedings to enforce the mortgage
- Therefore, the court order granting permission to foreclose was directly prohibited by the federal law
- Since the court order for staying of proceedings was made under federal law, FP doctrine required that federal law prevails- there was an express contradiction between two court orders

Saskatchewan Breathayzer case [1958]

- The federal law provided that "no person is required to give a sample of breath" as evidence of driving while intoxicated, and a provincial law suspended the driving license of any person who refused to comply with a police request for a sample
- SCC, majority decided that the provincial sanction for a refusal to give a sample was not severe enough- merely the denial of a questionable privilege- to amount to a requirement of giving a sample

- Therefore, the provincial law did not contradict the federal law, and was not rendered inoperative

British Columbia v. LaFarge Canada Inc [2007]

- It was necessary to obtain approval from the Vancouver Port Authority (established under federal law) for the development of a marine facility on a site in the (federally-regulated) port of Vancouver
- However, the site was also in the boundaries of the city of Vancouver (established under provincial law)
- Issue was whether development also needed approval of the City under its land-use-by-law
- Court held that the mere requirement of municipal approval would give rise to 'operational conflict', and therefore it was not even necessary to seek the permission of the City (which had already informally approved the project)
- Until the City refuses a permit, dual compliance is not impossible here

Negative Implication

Note: only an express contradiction suffices to invoke the paramountcy doctrine. A provincial law that is supplementary or duplicative of a federal law is not deemed to be inconsistent with the federal law. Courts have thus rejected a covering the field test of inconsistency

PEACE, ORDER AND GOOD GOVERNMENT (POGG)

POGG power is residuary in its relationship to the provincial heads of power, because it is expressly confined to matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures. Any matter which does not come within a provincial head of power must be within the power of the federal parliament.

The Scope of POGG: Historical Development

Reconciliation between National Concern Doctrine and Emergency Power

Such subject matters as aviation, the national capital region and atomic energy each had a natural unity that is quite limited and specific in its extent. In contrast, if subject matters with sweeping categories as environmental pollution, culture or language were enfranchised as federal subject matters simply on the basis of national concern, then there would be no limit to the reach of federal legislative powers and the existing distribution of legislative powers would become unstable.

Only in emergency could the federal parliament assume the plenary power over the while of a sweeping category.

POGG has two separate functions:

1) It gives to the federal parliament *permanent* jurisdiction over distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern
2) POGG power give the federal parliament *temporary* jurisdiction over all subject matters needed to help deal with an emergency

National Concern

A matter of national concern must be of import or significance to all parts of Canada

Provincial inability test: the problem is beyond the power of the provinces to deal with it; need for a national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces.

Distinctiveness: for a matter to qualify as a matter of national concern, it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power

- The requirement is not a sufficient condition
- A distinct matter would also have to satisfy the provincial inability test

Newness: a matter arising for the first time, that the courts have yet to allocate to either a provincial or federal head of power cannot necessarily be justified under POGG

Laws Upheld:

1) Canada Temperance Act (Russel v. The Queen, AG Ontario v. Canada Temperance Federation)
2) Regulation of Aeronautics (Aeronautics Reference, Johannesson v. Rural Municipality of West St. Paul)
3) Regulation of Radio (Reference re Regulation and Control of Ratio Communication)
4) Development of national capital region (Munro v. National Capital Commission)
5) Ocean Dumping Control Act, which prohibited dumping waste inside the provincial water (R v. Zellerbach)
6) Narcotic Control Act's ban on possession of marijuana (R v. Hauser, R v. Malmo- Levine)
7) Regulation of nuclear electrical generating stations (Ontario Hydro v. Ontario)

Laws Struck Down:

1) Price, profit, and income control under the Anti-Inflation Act (Reference re Anti-Inflation Act)

Russell v. The Queen (1882)

- Issue: Temperance Act (federal statute) established a local-option temperance scheme
- PC upheld the statute on the basis that it did not fall within any of the provincial heads of legislative power

Local Prohibition Case

- Enunciated for the first time a "national dimensions" definition of POGG
- Distinguished between that which is purely local or provincial and that which has ceased to be merely local and has become a matter of national concern, in such sense as to bring it within the jurisdiction of parliament
- Concerned a provincial local-option temperance scheme that was similar to the federal one upheld in *Russell,* found that it fell under "property and civil rights" or "merely local or private"- inconsistent with *Russell* but double aspect doctrine application

AG Ont v. Canada Temperance Federation (1946)

- Between the decision in *Russell* and this case, POGG was held only applicable in emergencies, attacked the decision in *Russell*- in this case, same Act being challenged again
- Refused to overrule *Russell*
- Held that *Russell* had not been decided on an emergency power, and that POGG power was not confined to emergencies
- New test: If the subject matter of the legislation is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of Parliament as a matter affecting POGG, although it may in another aspect touch on matters specially reserved to the provincial legislatures

Johannesson v. Rural Municipality West St. Paul (1952)

- Court held that aeronautics satisfied the national concern test
- Relied on *Canada Temperance* dictum
- *Aeronautics Reference* had already decided that the federal Parliament had authority over aeronautics, but the decision had been based primarily on the existence of a British Empire treaty binding Canada. In 1947 the treaty was denounced and replaced with a new one to which Canada was a party

Munro v. National Capital Commission (1966)

- Court held that the national capital region that had been designed by federal legislation satisfied the national concern test
- It deals with a single matter of national concern

Re Anti-Inflation Act

- Upheld federal wage and price controls under the emergency branch of POGG power
- Majority of the court argued that in order to qualify as a matter of national concern, it must be distinct: it must have a degree of uniformity that makes it indivisible, an identity which makes it distinct from provincial matters and a sufficient consistence to retain the bounds of form (topic of inflation was too broad)

R v. Crown Zellerbach Canada Ltd.

- Marine pollution satisfied the national concern test
- The federal Ocean Dumping Control Act (prohibited dumping at "sea") was upheld in its application to marine waters within the boundaries of BC
- Marine pollution because of predominantly extra-provincial and international character and implications is clearly a matter of concern for Canada as a whole
- Four principles indicated:
  1) The national concern doctrine is separate and distinct from the national emergency doctrine of the POGG, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature
  2) The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of local or private nature in a province, have since in the absence of national emergency, become matters of national concern
  3) For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters

of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution

4) In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter

Ontario Hydro v. Ontario (1993)

- Atomic Energy Control Act
- Federal jurisdiction over atomic energy- extra-provincial and international character, strategic and security aspects of nuclear power in relation to national defence

Emergency Power

1) Emergency power can be exercised only in response to emergency
2) Temporary and not permanent
3) Regulation can be exercised after the war is over
4) No need to explicitly invoke the emergency as a justification
5) There must be a rational ground for the necessity of the regulation

Cases Upheld:

a) Fort Frances Pulp and Paper Co v. Manitoba Free Press Co
b) Reference re Anti-Inflation Act

Reference re Anti-Inflation Act

- The federal Anti-Inflation Act was upheld as an emergency measure
- The Act controlled increases in wages, fees, prices, profits and dividends
- Administered by federal tribunals and officials
- Scheme was temporary
- At the time when the programme was enacted, there had been a period of 20 months of double digit inflation and relatively high rates of unemployment
- But the Act itself did not assert the existence of an emergency
- There was evidence that an emergency didn't really exist, but the court carefully disclaimed any judicial duty to make a definitive finding that an emergency exists
- Held that the court would be unjustified in concluding that parliament did not have a rational basis for regarding the Anti-Inflation Act as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperiling the well-being of Canada as a while

Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co

- War Measures Act- allowed federal government to embark on extensive economic and other regulations
- The regime of price control which had been established during the first world war, and which was continued temporarily after the war, was constitutional
- In a "sufficiently great emergency such as that arising out of war, the POGG power would authorize laws which in normal times would be competent only to provinces

- On whether war time measures could be continued in times of peace: very clear evidence would be required to justify the court in overruling the decision of the Government that exceptional measures were still requisite

TRADE AND COMMERCE

Historical Development

S. 91(2) gives the federal Parliament the power to make laws in relation to "the regulation of trade and commerce"- despite the broad language, judicial interpretation has narrowed its application

S. 92(13) gives the province the power over property and civil rights in the province"

Courts have narrowed the two classes of subjects in s. 91(2) and s. 92(13) by a process of "mutual modification"- eliminated overlapping and made each power exclusive

Federal trade and commerce power is confined to (1) interprovincial or international trade and commerce, and (2) general trade and commerce

Laws upheld under regulation of interprovincial or international trade:

1) Canadian Wheat Board Act (Murphy v. Canadian Pacific Railway)
2) A regulation which limited the oil import to eastern part of Canada (Caloil v. AG Canada)

Laws struck down:

1) Canada Agricultural Products Standards Acts (R v. Dominion Stores)
2) Farm Products Marketing Agencies Act (Reference re Agricultural Products Marketing Act)

Laws upheld under general trade and commerce:

1) Federal regulation of federally incorporated (John Deere Plow Co v. Wharton, Multiple Access Ltd v. McCutcheon)
2) Federal trade mark protection (AG Ontario v. AG Canada, Kirkbi v. Ritvik Holdings Inc)
3) Federal Combines Investigation Act (General Motors of Canada v. City National Leasing)

Laws struck down:

1) A provision in the Trade Marks Act (MacDonald v. Vapor Canada)
2) A provision of the Food and Drugs Act (Labatt Brewing Co v. Canada)
3) Canada Agricultural Products Standards Acts (R v. Dominion Stores)

Provincial laws upheld under the power to regulate property and civil rights within the province/ matters of concern in the province:

1) Quebec Agricultural Marketing Act (Carnation Co Ltd v. Quebec Agricultural Marketing Board)
2) Ontario Farm Products Marketing Act (Reference re Agricultural Products Marketing Act)

Laws struck down:

1) Authority of the Manitoba Egg Producers' Marketing Board to decide the price of the eggs to be sold within the province regardless of whether they are coming from other provinces (Manitoba v. Manitoba Egg and Poultry Association)

2) Manitoba hog marketing scheme (Burns Food Ltd v. AG Manitoba)
3) Saskatchewan law and regulations imposing mineral income tax and royalty surcharge (Canadian Industrial Gas and Oil Ltd v. Government of Saskatchewan)
4) Saskatchewan potash produced within the province are destined for export (Central Canada Potash Co Ltd. v. Government of Saskatchewan)

Citizens Insurance Company v. Parsons (1881)

- PC upheld the validity of a provincial statute which stipulated that certain conditions were to be included in all fire insurance policies entered into in the province
- PC held that the statute was a valid law in relation to property and civil rights
- In did not come within the federal power over trade and commerce because that power should be read as not including the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province
- Regulation of trade and commerce includes political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and maybe general regulation of trade affecting the whole dominion

Reference re Board of Commerce Act [1922]

- Rejected the application of trade and commerce power
- The legislation included anti-combines provisions, and provisions regulating hoarding and excessive prices of certain necessaries of life
- Court suggested that trade and commerce power had not independent content and could only be invoked as an ancillary to other federal powers
- S. 91(2) did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by words in POGG, be free to engage in the Province

Toronto Electric Commissioners v. Snider [1925]

- Trade and commerce power rejected
- Federal labor laws in question
- Application of the ancillary theory made in *Reference re Board of Commerce Act*

The King v. Eastern Terminal Elevator Co [1925]

- Struck down a statute which regulated the grain trade
- Most of the grain is exported
- The federal statute had to fasten onto some local operations, and in particular to license and regulate grain elevators, in order to make the scheme effective
- The regulation of local works, such as elevators, made the entire scheme invalid

Proprietary Articles Trade Association v. AG Canada [1931]

- Upheld as "criminal law" a narrowed form of the anti-combines law (which had been redrafted following *Board of Commerce* case)
- Obiter: the words of s. 92(2) must receive their proper construction where they stand as giving an independent authority to parliament over the particular subject-matter

AG British Columbia v. AG Canada (National Products Act) [1937]

- A statute was held invalid which provided for the establishment of marketing schemes for those natural products whose principal market was outside the province of production

- PC held that the entire statute was invalid because it included within its purview some transactions which could be completed within the province (matter of property and civil rights)

Murphy v. Canadian Pacific Railway [1958]

- SCC upheld the validity of the federal Canadian Wheat Board Act, which provided for the compulsory purchase by the Canadian Wheat Board of all grain destined for market outside the province of production, and for the marketing, pooling of proceeds and equalizing them of the return to producers
- The transaction which gave rise to this case was an interprovincial one (a shipment of grain from one province to another)

First Branch: Regulation of Inter-Provincial and International Trade and Commerce

The Queen v. Klassen (1960)

- MCA had to decide whether the Act (same as in *Murphy*) could validly apply to a purely local work- a feed mill which processed locally-produced wheat and sold it as feed to local farmers
- The act imposed on producers a quota system which was designed to ensure equal access to the interprovincial and export market; it also applied to local processing and sale so that a producer could not obtain an unfair advantage by selling grain in excess of his quota to a local mill for locally-sold flour
- MCA held that the application of the Act to such intraprovincial transactions was valid
- It was incidental to the principal purpose of the Act, which was to regulate the interprovincial and export trade in grain

Caloi Inc v. AG Canada [1971]

- Confirmed the decision in *Klassen*
- SCC upheld a federal prohibition on the transportation or sale of imported oil west of the Ottawa Valley
- The purpose was to protect the domestic industry in the West from the then cheaper imported product
- This prohibition caught many transactions completed within a province
- The law was upheld as an incident in the administration of an extra-provincial marketing scheme and as an integral part of the control of imports in the furtherance of an extraprovincial trade policy

Limits of Provincial Power: Market Board Cases

Burns Food Ltd v. Agricultural Products Marking Act [1978]

- A federal marketing statute was upheld
- The statute was the federal element of interlocking federal and provincial statutes
- Extensive regulation of the egg market which is largely consumed within the province of production
- Important to note that the court was impressed that it was a cooperative scheme and had been agreed to by all eleven governments (who had executed complementary legislation)

Dominion Stores v. The Queen (1979)

- SCC struck down Part I of the federal Agricultural Products Standards Act

- The Act provided for the establishment of grades with appropriate grade names for agricultural products
- Part I of the Act did not make it compulsory to use the grade names for products marketed within the province of production, but if grade names were used, the appropriate federal standards had to be complied with
- Dominion Stores was charged with selling apples (locally produced) under the federally-established grade name "Canada Extra Fancy", which did not comply with the standards
- The company was acquitted on the ground that Part I of the Act was an unconstitutional attempt to regulate local trade
- Hogg argues it was wrongly decided

Second Branch: Regulation of Trade Affecting the Whole Dominion

Citizens Insurance Company v. Parsons (1881)

- PC suggested two categories of trade and commerce, including general regulation of trade affecting the whole dominion

John Deere Plow Co v. Wharton [1915]

- PC suggested that the federal parliament's power over some aspects of the incorporation of companies was derived from the general trade and commerce power

Labatt Breweries v. AG Can (1979)

- SCC struck down compositional standards for light beer which had been enacted under the federal Food and Drug Act
- These standards only became applicable through the voluntary use of the description "light beer"
- The application of the federal standard depended upon the use of a common description (light beer)

MacDonald v. Vapor Canada (1976)

- Issue over the validity of a federal law which prohibited, and provided a civil remedy for any "act" or "business practice" which was contrary to honest industrial or commercial usage in Canada
- SCC struck down the law
- The creation or extension of civil causes of action of an essentially contractual or tortious character was a matter within property and civil rights in the province
- The only federal aspect of the law was that it applied throughout Canada, but generality of application has never been sufficient in itself to shift a law dealing with property and civil rights in the province into a federal head of power

General Motors of Canada v. City National Leasing [1989]

- Challenged the validity of the civil remedy that had been introduced into the legislation in 1975
- Price discrimination in the financing of the purchase of vehicles by companies that lease fleets of cars and trucks; the transactions individually took place within a single province
- SCC held that the federal Competition Act was a valid exercise of the general trade and commerce power
- Applied the *Vapor* test (1-3), which consisted of:
    1) A general regulatory scheme
    2) Oversight of a regulatory agency

3) Concern with trade as a whole rather than with a particular industry
4) The legislation should be of the a nature that the provinces jointly or severally would be constitutionally incapable of enacting
5) The failure to include one or more provinces in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country

Trade-Marks and National Marks

CA 1867 confers on Parliament authority to legislate in relation to patents and copyrights, but the Act is silent with respect to trademarks. But Canada has had a Trade-marks Act since shortly after Confederation.

Canada Standard Trade Mark Case (1937)

- Upheld a federal statute that authorized the use of a "Canada Standard" designation to denote compliance with federal standards

Kirkbi v. Ritvik Holdings (2005)

- Manufacturer of LEGO sued the manufacturer of Mega Blocks- claiming that D had improperly passed off its Mega Blocks as LEGO
- Under s. 7(d) of the Trade Marks Act, a holder of an unregistered trade mark ca bring an action for passing off against a competitor who has branded its product in a way that causes confusion between D's produce and the trade mark holder's product
- D won the case on the ground that LEGO's interlocking system was a functional characteristic of the product that could not, as a matter of law, be a trade mark
- In the SCC, D challenged the constitutional validity of s. 7(d)- the civil remedy
- The Court determined the validity of the Act, passed the 5 part test set out in *City National Leasing*
- The national regulatory scheme embraced unregistered trade marks as well as registered ones, s. 7(d) was sufficiently integrated in to the regulatory scheme
- A valid exercise of the general trade and commerce power

THE CRIMINAL LAW POWER

S. 91(27) Gives the **federal Parliament** the power to make laws in relation to: <u>the criminal law, except the constitution of the courts of criminal jurisdiction, but including the procedure in criminal matters</u>

Three Essential Elements:

1) Valid criminal law purpose
2) Backed by prohibition
3) Penalty

Limits of federal criminal law power:

1) Margarine Reference [1949] (protection of dairy industry is not legitimate public criminal purpose)
2) Boogs v. The Queen (suspension of driver's license can also result from refusal to pay tax and fee- criminal penalty was too broad)
3) R v. Dominion Stores (citing Margarine Reference)

4) Labatt Brewing Co v. AG Canada (parliament was found to lack the power to specify the standard for a particular industry in the first place)
5) Ward v. Canada (the purpose of protecting seals against depletion found not to fall within the public criminal law purpose)

Broad criminal law power upheld:

1) RJR MacDonald v. Canada (parliament was allowed to ban advertising and promotion while leaving sale or consumption of tobacco products legal)
2) R v. Hydro-Quebec (protection of environment was found to fall within the public criminal law purpose)
3) Reference re Fire Arms act (purpose of protecting public safety)
4) R v. Malmo-Levine (ban could be supported by the necessity of prevention of harm to society as well as the need for protecting vulnerable groups)

S. 92(14) Gives the provinces the power to make laws in relation to: the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts (gives the provinces the power to enforce the Criminal Code, including the decisions to investigate, charge and prosecute offences)

S. 92(15) Gives the provinces the power to make laws in relation to the imposition of punishment, 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 (its an ancillary power- authorizes the creation of provincial offences only for the purpose of enforcing laws which are authorized under some other head of provincial power)

Broad provincial power upheld:

1) Bedard v. Dawson (ban on using a house as disorderly house and order to close the building- property and civil rights)
2) PEI v. Egan (automatic suspension of driver's license upon conviction of CC, despite provision in CC that allows the judge to restrict driving a vehicle in addition to any other punishment)
3) O'Grady v. Sparling (ban on driving a motor vehicle without due care and attention)
4) Ross v. Registrar of Motor Vehicles (provincial suspension of driver's license for violation of CC)
5) Nova Scotia Board of Censures v. McNeil (movie censorship, despite the ban on immoral, indecent, or obscene performance in CC)
6) Dupond case (provincial ban on parades or other gatherings)
7) Rio Hotel Ltd v. New Brunswick (provincial law authorized the board to attach conditions on nudity for live entertainment in the premises operated by the liquor license holders despite the ban on nudity and indecency in CC)
8) Chatterjee v. Ontario (civil forfeiture of a proceed of a crime under provincial law, despite the provision in the CC which authorized the judge to confiscate the proceeds of the crime upon conviction)

Limits to provincial power:

1) R v. Westendorp (ban on being on a street for the purpose of prostitution)

2) R v. Morgentaler (provincial attempt to prohibit abortion)

Historical Background

Reference re Board of Commerce Act [1922]

- Narrow definition of "criminal law"
- "The power was applicable only where the subject matter is one which by its nature belongs to the domain of criminal jurisprudence"
- Could be read as 'freezing' the criminal law into a mould established in 1867

Proprietary Articles Trade Association v. AG Canada [1931]

- Too wide a definition of "criminal law"
- "The federal power should not be confined to what was criminal by law in 1867, and that the power may extend to legislation to make new crimes…The criminal quality of an act cannot be discerned by intuition; not can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences"
- Also clarified that "Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92"
- The definition was too wide because it would uphold any federal law which employs prohibition and penalty as its primary mode of operation
- Upheld anti-combines (competition) laws under the criminal law power

Federal Criminal Law Power: Limits on Federal Power

Reference re Validity of s. 5(a) of the Dairy Industry Act (Margarine Reference) [1949]

- The law at issue prohibited the manufacture, importation or sale of margarine, the purpose was to protect the dairy industry
- PC held that although the law fitted the criminal form of a prohibition coupled with a penalty, the economic object of protecting an industry from competitors made the law in its PS in relation to property and civil rights
- A law therefore needs a criminal purpose
- The prohibition was not criminal unless it served a public purpose (public peace, order, security, health, morality, etc) which can support it as being in relation to the criminal law
- Should not be read as denying that the criminal law can serve economic ends- various forms of economic regulation have been upheld as criminal law

Boogs v. The Queen (1981)

- SCC struck down the federal Criminal Code offence of driving a motor vehicle while one's provincial license was suspended
- The law would have been unimpeachable if a provincial driver's license could be suspended only for breach of CC provisions concerned with fitness to drive
- But driver's licenses could also be suspended for breach of provincial regulations- failure to pay insurance premiums, civil judgments, taxes, license fees
- These regulations bore no relationship in practice or in theory to the owner's ability to drive and hence to public safety
- A criminal prohibition premised on such grounds was simply an enforcement measure for a variety of provincial regulatory and taxation regimes, and did not pursue the kind of public purpose set out in *Margarine Reference*

Ward v. Canada (2002)

- Protection of environment and protection of animals from cruelty are public purposes and will sustain laws enacted under criminal law power
- But the SCC held that a federal regulation prohibiting the sale of baby seals could not be upheld as a criminal law power, despite the fact that the purpose was to limit the killing of baby seals
- The court found that the law had been determined based on the concern about the depletion of the resource, through large-scale commercial harvesting, not based on the inhuman methods of killing
- The ultimate purpose of the law was to manage fisheries and that was not a purpose that could be sustained as criminal law

R v. Malmo-Levine (2003)

- Issue: the validity of the criminalization of the possession of marijuana
- SCC rejected the argument that a 'harm principle' was a requirement of a valid criminal law
- The presence of harm to others was not a requirement of a valid criminal law
- Harm to the accused and moral concerns were adequate bases for the enactment of criminal law
- A purpose that will qualify to sustain a law as a criminal law does not necessarily involve the prevention of harm to other human beings

Food and Drugs

Food and drug legislation making illegal the manufacture or sale of dangerous products, adultered products or misbranded products is within the criminal law power

Labatt Breweries v. AG Canada (1979)

- SCC held that the part of the federal Food and Drugs Act that authorized regulations prescribing compositional standards for food was unconstitutional
- Acknowledged that the criminal law power could be used to enact laws for the protection of health but found that the alcoholic requirement for light beer was not related to health
- Also acknowledged that the criminal law power could be used to enact laws for the prevention of deception but found that the specification of the compositional standards for light beer could not be supported on this ground either
- Unfortunate decision because it precluded a national regime of compositional standards for food

TOBACCO

RJR MacDonald Inc v. Canada [1995]

- SCC reviewed the validity of the federal Tobacco Products Control Act, which prohibited advertising of cigarettes and requirement the placement of health warnings on packages
- The Act contained a prohibition and penalty, but was there a criminal public purpose?
- The health warnings were held to be a valid exercise of criminal law power for the protection of public health
- While parliament could have prohibited the manufacture, sale and possession of tobacco products instead of advertising (advertising itself was not a dangerous act), court held that

the fact that parliament had chosen a circuitous path to its destination did not alter the PS of the law, which was criminal
- The power to prohibit the use of tobacco on account of its harmful effects on health also encompassed the power to take the lesser step of prohibiting the advertising of tobacco products
- So restrictions on tobacco advertising are a valid exercise of parliament's criminal law power

Environmental Protection

R v. Hydro-Quebec [1997]

- Environmental protection (which extends beyond the protection of human health) was a public purpose that would support a federal law under the criminal law power
- Majority upheld the Canadian Environmental Protection Act under the criminal law power

Competition Law

- The Combines and Fair Prices Act and the Board of Commerce Act were held to be unconstitutional in the *Board of Commerce* case (1921)
- The Combines Investigation Act, 1923 was upheld as valid criminal law in the *P.A.T.A.* case (1931)- "If parliament gunienly determines that commercial activities which can be so described as contrary to the public interest are to be suppressed in the public interest, then there is no reason why parliament should not make them crimes"
- In 1935 the prohibition of anti-competitive price discrimination which was added to the CC was upheld as a criminal law
- In 1951, parliament prohibited resale price maintenance, this was upheld by the SCC as a criminal law

Goodyear Tire and Rubber Co. v. The Queen (1956)

- In 1952, parliament authorized the courts to make orders prohibiting the continuation of illegal practices or dissolving illegal mergers, in addition to their power to impose conventional criminal sanction
- The constitutionality was challenged by P
- Upheld by the SCC as within the criminal law power

Gun Control

Reference re Firearms Act (2000)

- SCC held that the Act was a valid exercise of the criminal law power
- The purpose of the Act was to restrict access to inherently dangerous things
- Legislative history revealed a concern with violent crime, domestic violence, suicide attempts…
- The Act's requirements were all directed to public safety- licensing criteria included checks on criminal records, etc
- The Act's focus on public safety distinguished it from provincial property registration schemes

Criminal Law and Civil Remedy

The federal parliament has no independent power to create civil remedies akin to its power over criminal law. This means that if the PS of a federal law is the creation of a new civil cause of action, the law will be invalid as coming within the provincial head of power property and civil rights

MacDonald v. Vapor Canada (1976)

- SCC held that s. 7(e) of the federal Trade Marks Act was invalid on the basis it granted civil relief (injunction, damages, or accounting for profits) for breach of s. 7(e) (prohibited business practices contrary to honest industrial or commercial usage in Canada)
- Court described s. 7(e) as essentially an extension of tortious liability, which therefore came within property and civil rights in the province
- Where PS of a federal law is not the creation of a civil remedy, but is some other matter within federal power, there is no reason to doubt the validity of a civil remedy provided for enforcement of the law
- The remedy is valid as incidental to the main purpose of the law

R v. Zelensky (1978)

- SCC upheld a provision of the CC that authorized a criminal court, upon convicting an accused of an indictable offence, to order the accused to pay to the victim compensation for any loss or damage caused by the commission of the offence
- This power to award compensation had three civil characteristics:
  1) The order was made only at the request of the victim
  2) The amount of compensation related to the value of the victim's loss
  3) The order was to be enforced by the victim as if it were a civil judgment
- The majority emphasized that the order for compensation was to be made as part of the sentencing process in the criminal proceedings, not in a separate civil action
- But, court unlikely to uphold a separate civil right of action as ancillary to a criminal law

Criminal Law and Regulatory Authority

Will the criminal law power will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority?

A criminal law ordinarily consists of a prohibition which is to be self-applied by the persons to whom it is addressed. There is not normally an intervention by an administrative agency or official prior to the application of the law.

- The competition and insurance cases encourage the view that the criminal law power will not sustain a regulatory scheme which relies upon more sophisticated tools than a simple prohibition and penalty
- Where the law vested prohibitory or regulatory powers in an administrative agency, the courts held that these powers could not be sustained as criminal law

Re Nova Scotia Board of Censors v. McNeil [1978]

- SCC held that the censorship of films was not criminal

- Upheld NS censorship law as being the regulation of an industry within the province (property and civil rights)
- Minority held that the law was invalid as being a criminal law
- Majority said that censorship law did take the criminal form of a prohibition coupled with a penalty
- The salient characteristic of censorship is an administrative process that imposes a prior restraint on material deemed by the censorship tribunal to be offensive
- There is a prohibition coupled with a penalty on the sale or exhibition of uncensored material, but this is designed to enforce recourse to the administrative process

R v. Hydro-Quebec (1997)

- Hydro was prosecuted for violating an interim order that restricted the emission of a substance (PCBs) under the Canadian Environmental Protection Act
- The company argued that the Act was outside the criminal-law power of the federal parliament
- The majority upheld the Act as criminal law- because the administrative procedure for assessing the toxicity of substances culminated in a prohibition enforced by a penal sanction, the scheme was sufficiently prohibitory
- Dissent argued that although the protection of the environment was a legitimate purpose for a criminal law, this Act lacked the prohibitory character of a criminal law; there was no prohibition until the administrative process to classify the substance had been completed and it would be an odd crime whose definition was made entirely dependent on the discretion of the Executive

Re Firearms Act (2000)

- The purpose of gun control was public safety, typically a criminal purpose
- The purpose was effected by a prohibition of unregistered guns and unlicensed holders, and prohibition was backed by penalties
- However, it was argued that the Act was regulatory rather than criminal legislation because of the complexity of the regime and the discretionary powers vested in the licensing and registration authorities
- Court relied on the decision in *Hydro-Quebec* for the proposition that the criminal law power authorizes complex legislation, including discretionary administrative authority
- Court relied on *RJR-MacDonald* for the proposition that a criminal purpose may be pursued by indirect means

The Provincial Power to Enact Penal Laws

Province has the ancillary power to use penalties for enforcement of their legislation. However, the power requires the court to draw a distinction between a valid provincial law with an ancillary penalty and a provincial law which is invalid as being in PS a criminal law. The dominant tendency of the case law has been to uphold provincial penal legislation.

Bedard v. Dawson (1923)

- SCC upheld a provincial law authorizing the closing of "disorderly houses" which were primarily defined as houses in respect of which there had been CC convictions for gambling or prostitution

- On the face of it, the law appeared to be simply supplementing undoubted criminal laws by adding new penalties, but the court upheld the law as in relation to the use of property, and at most was aimed at suppressing the conditions likely to cause crime rather than at the punishment of crime

Provincial Secretary of PEI v. Egan (1941)

- SCC upheld a provincial law automatically suspending the driver's license of anyone convicted of the CC's impaired driving offences
- Held that the provincial law was in relation to the regulation of highway traffic and therefore within provincial competence

AG Canada and Dupond v. Montreal (1978)

- A municipal bylaw prohibiting all assemblies, parades or gatherings in the public domain of Montreal was upheld
- Majority held that the law was a valid regulation of the municipal public domain, and that its purpose was not punitive, but preventive of public disturbances
- Minority dissented on grounds that the by-law was a criminal law: it did not have a regulatory purpose, but was addressed to apprehend breaches of the peace and the maintenance of public order, exclusively criminal concerns

Westendorp v. The Queen (1983)

- Court struck down a municipal by-law that prohibited a person from remaining on the street for the purpose of prostitution, and from approaching another person for the purpose of prostitution
- The by-law made no attempt to control prostitution anywhere but on the streets, its purpose was to protect the users of the streets from the activities of prostitutes and their customers
- But the court condemned this line of reasoning, and held that the purpose of the by-law was an attempt to control or punish prostitution

In all the decisions in which provincial laws were upheld, the penalties were imposed in respect of matters over which the provinces ordinarily have legislative jurisdiction, such as property, streets, parks, business activity or corporate securities. This was an essential element of the decisions, because s. 92(15) confers a power that is merely ancillary to other provincial heads of power. Where the Court held in *Westendorp*, the provincial offence cannot be safely anchored in property and civil rights or some other head of provincial power, then it will be invalid.