

VALIDITY

Pith & Substance

What is the dominant characteristic of the legislation?

Consider: legislative intent or purpose of the legislation

- ▶ Intrinsic evidence - preamble to the legislation and text of the legislation itself
 - ▶ Extrinsic evidence - legislative debates
- Consider also:
- ▶ Legal effect - looking only at the statute
 - ▶ Practical effect - impact on society

Check for colourability: is the law's true purpose different from what it claims to be its purpose? (look at practical effects vs. alleged purpose)

Scope of Heads of Power

Which heads of power are relevant and what are their requirements?

Federal Heads of Power

- s.91 - POGG (*Anti-Inflation, Crown Zellerbach*)
- s.91(2) - General and Inter-Provincial Trade and Commerce (*Parsons, Labatt, GM v CNL, Kirkbi, Manitoba Egg, Margarine*)
- s.91(3) - Taxation (*Re Canada Assistance Plan*)
- s.91(5) - Postal Service
- s.91(11) - Quarantine
- s.91(15) - Banking
- s.91(21) - Bankruptcy
- s.91(24) - Indians and Indian Lands
- s.91(25) - Naturalization and Aliens
- s.91(27) - The Criminal Law (*Margarine, RJR, Hydro-Quebec*)

Provincial Heads of Power

- s.92(7) - Health Care
- s.92(8) - Municipal Institutions
- s.92(13) - Property and Civil Rights (*Parsons, Russell, RJR MacDonald, McNeil, Lacombe, COPA*)
- s.92(14) - Administration of Justice
- s.92(15) - Imposition of Punishment (*Morgentaler, McNeil, Dupond, Rio Hotel, Chaterjee, Westerndorp*)
- s.92(16) - Generally all matters of a local or private nature (*McNeil, Securities Act, Dupond, Westerndorp*)

Federal Criminal Law

- Prohibition
- Penalty/Punishment
- Public purpose

Provincial Punishment, Morality, and Public Order

- Prevention
- Regulatory (e.g. licencing)
- Private purpose

Federal Trade & Commerce

- Parsons Branch 1: interprovincial or international trade and commerce
- Parsons Branch 2: "general" trade and commerce affecting the whole dominion

General T&C Power Indicia (*GM v CNL*)

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

Gap/Residual Branch (POGG)

- Matters not included in enumerated classes of s. 91 or s. 92

Emergency Branch (POGG)

- Temporary
- Explicit Declaration of Emergency
- Rational basis for belief in national emergency

National Concern Branch (POGG)

- Not a temporary emergency
- New or newly national issue
- Singleness, distinctiveness and indivisibility
 - singleness - can it stand on its own or does it share a purpose with another head of power?
 - distinctiveness - is it distinct from provincial powers?
 - indivisibility - is it indivisible or an aggregate of powers?
 - consider: scale of impact
- Provincial inability

Other Considerations

Incidental Effects:

Applies when the pith & substance of a provision or legislation is within the enacting body's jurisdiction but touches on a subject assigned to the other level of government.

Double Aspect:

Applies when a matter cannot be categorized under a single head of power and both federal and provincial governments can legislate on it for different but equally important purposes. Double aspect matters: highways, temperance, trading, nudity obscenity, gaming, interest rates, insolvency & environment.

Ancillary Doctrine:

Applies when the pith & substance of a legislation is within the enacting government's jurisdiction but a provision within it intrudes into the jurisdiction of the other level of government. Provision is saved if it is sufficiently integrated with the rest of the legislation.

Three-stage analysis:

- Validity of the impugned provision & the degree of intrusion
 - does the provision intrude on the other level of government's jurisdiction? (do a pith & substance analysis)
- Validity of the legislation overall
 - Is the legislation as a whole valid? (do a pith & substance analysis)
- Nature of attachment test
 - is the provision sufficiently integrated into the entire legislation?
 - The standard of attachment increases proportionally with the degree of intrusion:
 - minimally intrusive - functional standard
 - moderately intrusive - necessarily incidental standard
 - highly intrusive - true necessary standard

Additional Notes

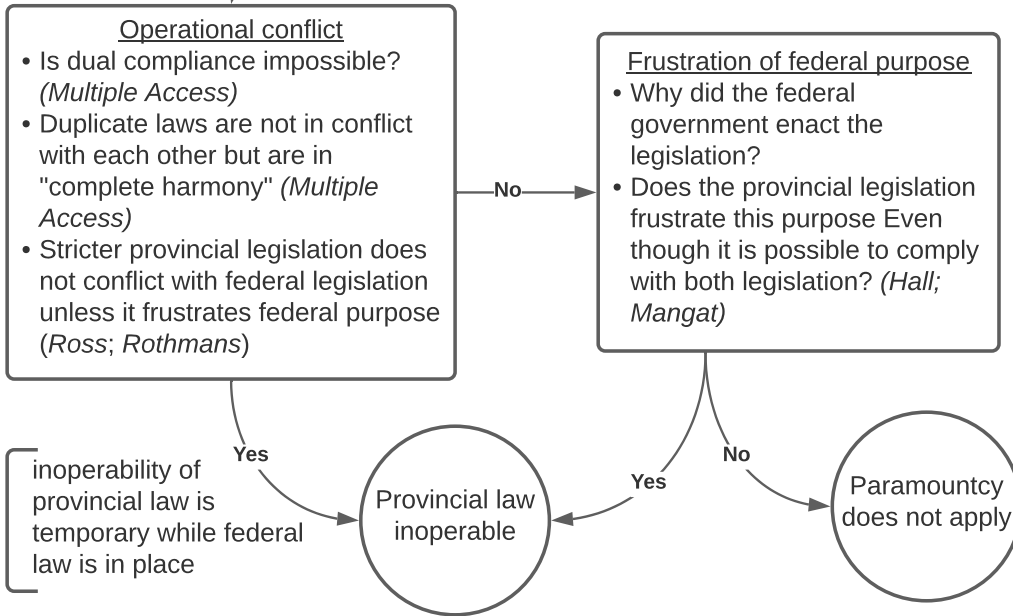
- Federal legislation not aimed at an evil/public injury does not have valid criminal purpose
- Criminal law legislation can be circuitous (not outright prohibitory) and is not undermined by exemptions
- Environment fails singleness, distinctiveness and indivisibility test (not under national concern branch)
- federal and provincial cooperation = no validity issues

OPERABILITY & APPLICABILITY

OPERABILITY (Paramountcy Doctrine)

Applies when there is conflict between valid provincial legislation and valid federal legislation. The federal legislation is paramount and renders the provincial legislation inoperable to the extent it conflicts with the federal legislation.

Is there conflict between the two valid legislations?



Relevant Cases

Paramountcy invoked:

- *Mangat* - prov. law prohibiting non-lawyers to appear as counsel; fed. law allowing it
- *Hall* - prov. law required delay in seizing assets; fed. law allowed immediate seizure.
- *Moloney* - prov. law allowed prov. to recover from uninsured driver who went bankrupt; fed. law allowed total control over debts & bankruptcy

Paramountcy did not apply:

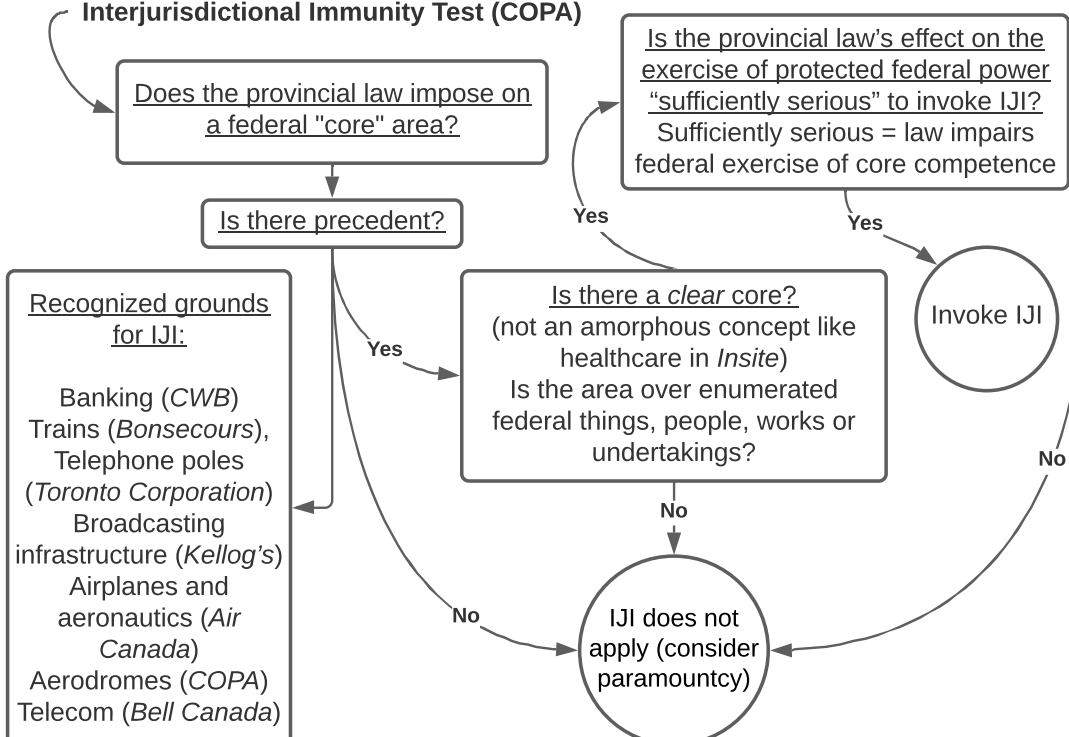
- *Multiple Access* - prov. law prohibiting insider trading on TSX; fed. law prohibiting insider trading by fed. incorporated co.
- *Rothmans* - stricter prov. law banning all tobacco ads vs. fed. law prohibiting tobacco ads except foreign products
- *Ross* - prov. law suspending driving for 3 mos; fed. law prohibiting driving for 6 mos. w/ exceptions

APPLICABILITY

(Interjurisdictional Immunity)

Applies when a level of government has a "basic unassailable minimal content" in an area that cannot be intruded upon by the other level of government. Theoretically available for both provincial and federal government but has traditionally been applied only to the federal government. The inapplicability of the provincial legislation is permanent regardless of whether federal legislation exists in the area. Courts have been reluctant in applying IJI because it goes against the dominant trend of modern federalism and can create legislative vacuums.

Interjurisdictional Immunity Test (COPA)



Relevant Cases

- *CWB*: prov. insurance regulation applies to banks selling insurance b/c insurance not at the "core" of banking
- *Kelloggs*: prov. restrictions on ads apply to TV ads b/c the protected core is about infrastructure of TV not content
- *Air Canada*: prov. liquor mark-ups apply to airlines b/c liquor is not at the core of what airlines do
- *Bonsecours*: prov. laws on clearing ditches apply near railway as long as they do not relate to structure form of ditches (essential to railway)
- *Insite*: safe injection sites are not immune from federal regulation (*CDSA*) because health is too amorphous to be a "core" area