CONSTITUTIONAL LAW
VALIDITY ANALYSIS

A. Pith & Substance (*Morgentaler*)

1. What is the Matter?
- Mischief the leg is intended to respond to (problem it is trying to address)
- Look at: Statute, Social context, Hansard (*Mortgentaler*)

2. Purpose + Effect
- How the leg purports to address the problem
- Not about wisdom of the method of addressing the problem (not up to the Court)
- Look at: **Preamble**, **legal** (intention w/i 4 corners of leg; how the leg as a whole affects the rights and liabilities of those subject to its terms. It is determined from the terms itself) and **practical effect** (actual econ and soc effects)

3. Applicable Heads
- Look at 91 (Regular or POGG)
- Look at 92

*Conclude on P+S; consider counterargs

B. POGG
Branches: Gap, National Concern, Emergency
Note: POGG = residual = no more than necessary

Is the prob and the leg temp/time-limited?

YES, then **Emergency** (*Re Anti-inflation Act*)

6 facets of emergency:

1. Context (of the legislation); Like Mortgentaler, this open door for social science information
2. Coverage (how broad is the leg); It has to be narrow enough to fill the gap, but not overbroad (especially in relation to the economy)
3. Signal (how is the gov telling everyone that they are trying to deal with an emergency)
4. Circumstances (is this a problem that is already happening; or is this preemptive)
5. Overlap (how deeply does it trench into prov powers; is it the least invasive)
6. Duration (how long will entrench)

NO, then **National Concern** (*Crown Zellerbach + Russell*)

Definition: "Whether the matter of the legislation goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole" (*Ont v Can Temper*)

Test:

1. Temp legislation would not be effective
2. New matter that didn't exist at confed or a rise of an old matter to national concern
3a. Matter is has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern
3b. In determining s, d, and i: is reg of the matter beyond prov ability? (prov inability test)

POGG is residual, so national concern justifies no more fed leg than necessary to fill the gap

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Two pieces of legislation

C. Double Aspect
(*Hodge*; *Multiple Access*)

Are the two pieces of legislation (fed/prov):

+ anchored in different heads of power?
+ governing the same activity, but diff aspects of it?
+ each statute has a different purpose?
+ NOT in conflict? (as long as prov does not permit what the feds have prohibited); if conflict, use paramountcy

NO, then goto **Para-mountcy Test**

YES, then **both pieces of leg are valid** (intra vires the enacting branch of gov)

Rationale: Worried about the *Parsons* Test giving too much power to one side; compromise between *Parsons* and *Russell.*

An attempt to recognize the ways in which the constitution is going to have to reconcile with social change.

Allows laws to run in parallel.

91 and 92 are not watertight compartments (middle way that works with executive federalism).

To note:
- Double aspect as mirror of Paramountcy
- Necessarily incidental not a mirror of IJI, but could be indicative of result

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One piece of legislation

D. Necessarily Incidental (*GM*)

1. How much does the provision intrude on the other jurisdiction?

Although we can expect some overlap, consider:

(A) Degree: How much it limits the other branch (does provision address a specific wrongdoing? Then limited)

(B) Importance (eg. POGG or P+CR?)
  (i) Remedial? Then it's a limited incursion
  (ii) Creates a right? Then more extensive incursion

2. Is the Act itself valid?

As per test at left (is the Act itself intra vires the enacting body)

NO, then end analysis

YES, then **(3) is the provision sufficiently integrated into the valid scheme?**

(if not sufficiently integrated, the provision can be severed w/o affecting the validity of the larger scheme)

Per #1, MINOR encroachment? Then low threshold

- Functionally related? Only necessary to show rational connection between provision and Act

Per #1, MAJOR encroachment? Then high threshold

- Truly necessary? Necessary to show that Act cannot function without the provision
- Will likely lead to Operability analysis