15 Legislative Competence

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15.1 INTRODUCTION

This chapter explores how the division of power amongst national and provincial governments in our Constitution affects the validity of legislation. Legislative competence is an important issue in all constitutional regimes with federal characteristics.\(^1\)

The South African Constitution allocates legislative powers between central and provincial governments on the basis of the subject matter of the legislation.\(^2\) According to the Final Constitution\(^3\), the nine provincial legislatures in South Africa are entitled to legislate, \textit{inter alia}, on a number of subjects that are listed in schedules 4 and 5 of the Final Constitution.\(^4\) These subjects are called ‘functional areas’. National and provincial governments share legislative competence in functional areas listed in schedule 4. Schedule 4 embraces crucial matters like ‘health services’ and ‘housing’. The functional areas in schedule 5 are usually the exclusive domain of provincial and local governments. Residual matters, not mentioned in either schedule, are reserved for the national legislature.\(^5\) For example, foreign affairs would be the preserve of the national government.\(^6\)

In all litigation that turns on questions of legislative competence, one must first determine the subject matter of the legislation under scrutiny. In some cases this

\(^1\) South Africa is a state with federal characteristics. However, only governmental practice married to judgments of the Constitutional Court will, over time, determine where South Africa rests on a continuum of states with different degrees of decentralization. For a discussion of the contours of various models of federalism and their influence on South Africa’s political structures, see S Woolman, T Roux and B Bekink, ‘Cooperative Government’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, June 2004) Chapter 14.

\(^2\) See R L Watts ‘Forward: States, Provinces, Lander, And Cantons: International Variety Among Sub National Constitutions’ (2000) 31 \textit{Rutgers L J} 941, 950. See also R L Watts ‘Is the New South African Constitution Federal or Unitary’ in B de Villiers (ed) \textit{Birth of a Constitution} (1994) at 75-88. (This analysis of the Interim Constitution would still be relevant as Constitutional Principle XVIII.2 provided that ‘the powers and functions of the provinces’ could not be substantially reduced by the Final Constitution).

\(^3\) Constitution of the Republic of South Africa Act 108 of 1996 (‘Final Constitution’ or ‘FC’).

\(^4\) FC s 104(1)(b)(i) and 104(1)(b)(ii).

\(^5\) FC s 33(1)(a)(iii).

\(^6\) See Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) (‘Liquor Bill’) at para 46.
assessment is straightforward. For example, in In re National Education Policy Bill 1995, the National Education Policy Bill was automatically characterised as being about ‘education’. Other cases are more difficult. The categorisation of legislation may raise challenging questions of statutory interpretation that force the Court to engage delicate political issues.

If Parliament or a provincial legislature is held not to have had the competence to pass specific legislation, the resulting law will be invalid. In many cases about provincial powers, there is only an apparent conflict between specific provincial and national legislation. Thus, the first step in all competence and conflicts cases is always to examine both legislative schemes individually to determine whether they are independently competent. If either the provincial legislation, or the national legislation, or both, fail the test of competence, the offending statute or statutes are invalid and the conflict is illusory. On the other hand, in some cases both pieces of conflicting legislation will be fully competent and valid: as we have already noted, our Constitution allows for vast and important areas of concurrent national and provincial legislative competence. (The resolution of such conflicts is dealt with in the next chapter.) It must, however, be remembered that legislative conflict presupposes that the conflicting legislation is competent and valid. The question of competence is always logically prior to the question of conflict.

This chapter starts by explaining the way in which the Constitution regulates the division of powers between the national legislature and the provincial legislatures. It then explores three major interpretive issues: (1) the categorisation function; (2) the scope of the section 44(2) override; and (3) the scope of the incidental power.

15.2 The Legislative Authority of the Republic

In South Africa, the legislative authority of the national sphere of government is vested in Parliament by FC s 44. The legislative authority of the provincial sphere of government is vested in the provincial legislatures in terms of FC s 104. There is at least one signal difference in the way the Final Constitution treats the two kinds of authority. FC s 43 reads:

When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

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1 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC).
2 Act 83 of 1995.
3 See DVB Behuising (Pty) Limited v North West Provincial Government and another 2001 (1) SA 500 (CC), 2000 (4) BCLR 347(CC) (‘DVB Behuising’).
4 See FC Schedule 4 of the FC.
6 FC s 43.
In principle, a provincial legislature is also only bound by the Final Constitution when it legislates. However, in cases where a particular province has passed a Provincial Constitution, that province is bound by both the national and the provincial Constitution in question.

(a) Schedule 4: Concurrent legislative competence

The functional areas listed in schedule 4 cover fields of concurrent legislative competence. Both the national and the provincial legislatures may pass legislation that fits into these functional areas. For example, both the national legislature and a provincial legislature may pass valid legislation about ‘housing’.

Things are not always so simple. A complex provincial legislative scheme may contain a provision that intrudes into a matter that should be regulated nationally. It would obviously be undesirable to be too rigid about disallowing such provisions where they are necessary for the coherence of legislation. In other federations, judges have needed to find creative judicial solutions in order to preserve the element of common-sense flexibility that is necessary to avoid legislative paralysis. South Africans are assisted by the following specific provision in the Final Constitution:

1 FC s 104(3).
2 FC s 104(3).
3 The areas of concurrent legislative competence listed in Part A of schedule 4 are ‘Administration of indigenous forests; Agriculture; Airports other than international and national airports; Animal control and diseases; Casinos, racing, gambling and wagering, excluding lotteries and sports pools; Consumer protection; Cultural matters; Disaster management; Education at all levels, excluding tertiary education; Environment; Health services; Housing; Indigenous law and customary law, subject to Chapter 12 of the Constitution; Industrial promotion; Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence; Media services directly controlled or provided by the provincial government, subject to section 192; Nature conservation, excluding national parks, national botanical gardens and marine resources; Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence; Pollution control; Population development; Property transfer fees; Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5; Public transport; Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law; Regional planning and development; Road traffic regulation; Soil conservation; Tourism; Trade; Traditional leadership, subject to Chapter 12 of the Constitution; Urban and rural development; Vehicle licensing; Welfare services’. Part B of schedule 4 includes ‘the following local government matters to the extent set out in section 155(6)(a) and (7): Air pollution; Building regulations; Child care facilities; Electricity and gas reticulation; Firefighting services; Local tourism; Municipal airports; Municipal planning; Municipal health services; Municipal public transport; Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law; Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto; Stormwater management systems in built-up areas; Trading regulations; Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems’.

4 The national legislature has the power in terms of FC ss 44(1)(a(a) and 44(1)(b(b). The provincial legislature has the same power in terms of FC s 104(1)(b(b).

Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.1

The scope of this power (referred to as the ‘incidental power’ in this chapter) raises interesting interpretive questions that will be looked at in more detail below.2

(b) Schedule 5: Exclusive provincial legislative competence.

Schedule 5 of the Final Constitution contains a list of discrete and (it is fair to say) relatively minor functional areas of exclusive provincial legislative competence.3 Some functional areas possess slightly broader implications: for example, ‘provincial cultural matters’. One or two, like ‘liquor licenses’, may have material financial implications.

The provincial legislatures have the power to pass legislation for their provinces with regard to any matter within a functional area listed in Schedule 5.4 The general rule is that the national parliament does not have the power to legislate in these areas.5 This rule is subject to an exception contained in FC s 44(2). This proviso allows the national legislature to ‘intervene’ and to legislate in Schedule 5 areas when the legislation is:

Necessary to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

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1 FC s 104(4). See also FC s 44(3) which states: ‘Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.’

2 M Chaskalson and J Klaaren have suggested that there is also an incidental power that enables provincial legislation to have some operation outside the territory of a particular province. See M Chaskalson and J Klaaren ‘Provincial Government’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, and S Woolman (eds) Constitutional Law of South Africa (1st Edition, RS5, 1999) 4-2.

3 Part A of Schedule 5 lists the following areas of exclusive provincial competence: ‘Abattoirs; Ambulance services; Archives other than national archives; Libraries other than national libraries; Liquor licences; Museums other than national museums; Provincial planning; Provincial cultural matters; Provincial recreation and amenities; Provincial sport; Provincial roads and traffic; Veterinary services, excluding regulation of the profession’. Part B of Schedule 5 includes ‘the following local government matters to the extent set out for provinces in section 155(6)(a) and (7): Beaches and amusement facilities; Billboards and the display of advertisements in public places; Cemeteries, funeral parlours and crematoria; Cleansing; Control of public nuisances; Control of undertakings that sell liquor to the public; Facilities for the accommodation, care and burial of animals; Fencing and fences; Licensing of dogs; Licensing and control of undertakings that sell food to the public; Local amenities; Local sport facilities; Markets; Municipal abattoirs; Municipal parks and recreation; Municipal roads; Noise pollution; Pounds; Public places; Refuse removal, refuse dumps and solid waste disposal; Street trading; Street lighting; Traffic and parking.’

4 FC s 104(1)(b)(ii).

5 FC s 44(1)(a)(ii).
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When FC s 44(2) applies, the national legislation automatically prevails. If the subsection does not apply, the national legislation will be invalid.

For this reason disputes about Schedule 5 powers will tend to be disputes that are primarily about legislative competence rather than conflict. *Ex Parte President of the Republic of South Africa in re: Constitutionality of the Liquor Bill* illustrates this point. The judgment, which deals with a Schedule 5 area, focuses on competence rather than conflict.

(c) Exclusive national legislative competence and assignment of powers by the national legislature.

“The national level of government has exclusive power in respect of all matters other than those specifically vested in the provincial legislatures” by the Constitution. The general principle is that residual matters outside the scope of the functional areas in Schedules 4 and 5 are the preserve of the national legislature. The Final Constitution also contains provisions that specifically empower the national legislature to enact legislation. For example, the security services must be ‘structured and regulated by national legislation’ in terms of FC s 199(4).

It must, however, be remembered that valid provincial legislation can regulate matters that are reasonably necessary for, or incidental to, the effective exercise of a power concerning a matter listed in Schedule 4. Consequently, provincial powers can bleed into areas of exclusive national jurisdiction. A provincial legislature can also acquire extra powers by assignment: Parliament may ‘assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.’ Finally, a provincial legislature may play an advisory role in matters outside its authority.

(d) Other provincial legislative powers

Provincial legislatures have the power to pass and to amend provincial

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1 FC s 147(2).
3 Liquor Bill (supra).
4 The words ‘exclusive national legislative competence’ are not used in the Final Constitution. But see the substance of the formulation in *First Certification Judgment* (supra) at fn 163.
5 Ibid at para 256.
7 FC s 104 (4).
8 The implications of FC s 104 (4) are dealt with at 15.2 infra.
10 FC s 104(5).
Constitutions. They may pass legislation with regard to ‘any matter for which a provision of the Constitution envisages the enactment of provincial legislation.’ They can assign any of their legislative powers to a municipal council in their province. (Other specific competences in respect of local government are dealt with in the chapter on ‘Local Government’. The provinces possess limited provincial taxing powers. A provincial legislature may impose:

(a) Taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and
(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

These powers ‘may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour.’ Furthermore, provincial taxes ‘must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.’ Hence, provincial taxing powers are subject to national legislation that may significantly restrict their ambit. However, as Chaskalson and Klaaren argue, the national legislature may not completely ‘extinguish the provincial taxing power.’ They also note that the taxing power conferred by s 228 is a legislative competence which is additional to that conferred by s 104. Thus provincial taxes need not be limited to taxes in respect of matters falling within schedules 4 and 5.

Parliament has passed the Provincial Tax Regulation Process Act to regulate provincial taxes.

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1 FC s 104(1)(a).
2 FC s 104(1)(b)(iv). See also First Certification Judgment (supra) at para 256.
3 FC s 104(1)(c).
6 FC s 228 (1).
7 FC s 228 (2)(b).
8 FC s 228(2).
10 Ibid.
11 Act 53 of 2002
12 A full analysis of this Act is beyond the scope of this chapter. But for commentary on the Act when it was still in Bill form see Prof P Surtees ‘Bill Would Allow South African Provinces to Impose Taxes’ Worldwide Tax Daily (11 June 2001), available at: (http://www.deneysreitz.co.za/news/news-.asp?ThisCat=5&ThisItem=76) (28 January 2004)
15.3 INTERPRETIVE ISSUES

(a) The Categorisation Function: Allocating Legislation to Functional Areas

According to the Constitutional Court in DVB Behuising, assigning legislation to functional areas 'involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the legislation is about.' An analysis of the subject matter of legislation is not just a global assessment of an entire Act. Different parts of a legislative scheme may be split up and characterized in different ways. The DVB Behuising Court writes:

A single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence.

1 DVB Behuising (supra) at para 36. In Canada, Albert Abel has argued that the process of categorization should be divided into the following three separate steps that should not be conflated. (1) Identify the matter of the legislation; (2) Delineate the 'scope of the competing classes' in the Constitution; (3) Determine the class into which the legislation falls. Swinton believes that it is impossible to keep these three questions apart. The answers to the initial questions are 'affected by the ultimate objective of linking the statute to the classes of subjects in the constitution.' K Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib, J D Whyte (eds) Canadian Constitutional Law (Vol 1 1994) 143, 144.

The outcomes of categorisation analysis can sometimes be unexpected. In German Television, the Land (Province) of Hamburg had given a broadcasting monopoly to Norddeutscher Rundfunk. 12 BVerfGE 205 (1961). The problem was whether the federal government was entitled to make provision for broadcasts into the province which would have the effect of subverting this monopoly. The national government was unsuccessful despite the fact that 'telecommunications' was an area of exclusive federal authority under the Basic Law. In its interpretation the Court explored the constitutional 'text, context, structure, purpose, and history [which] combined to give the provision for exclusive federal power over telecommunications a narrower scope than an untutored observer might have expected'. David Currie The Constitution of the Federal Republic of Germany (1994) 38. Currie writes:

As a textual matter, said the Constitutional Court, the term 'telecommunications' [embraced only] 'the technical processes of transmitting signals,' not the field of broadcasting as a whole. This conclusion was confirmed, the Court added, by the use of the broader term broadcasting ('Rundfunk') in connection with freedom of expression in Article 5(1). Moreover, radio and television programming was a cultural matter, and the 'fundamental decision' of the Basic Law to leave cultural matters to the Lander (by omitting them from the list of federal powers) made it impossible to uphold federal authority over anything cultural in the absence of clear language. In addition, the reason for the grant of federal authority was to prevent the 'chaos' that might result from disuniform regulation of such matters as the location and strength of transmitters and the allocation of frequencies; there was no comparable need for uniformity with respect to the content of broadcasts. Tradition was not to the contrary since the Lander had disputed the exercise of federal authority over programming throughout the Weimer period; and the record of the Constitutional Convention confirmed that the cultural side of broadcasting was not within the new grant of federal power. Accordingly, the monopoly granted by Hamburg was invalid as to the technical aspects of transmitting radio and television signals but valid as to everything else; and for similar reasons the competing federal network could be authorised only to transmit signals, not to determine what was to be transmitted.'

Ibid at 37-8. It is essential to note that in German constitutional law there is a pattern of powers being construed against the central government and in favour of the provinces. Ibid at 38. Our law contains no such presumption.

2 DVB Behuising (supra) at para 63.
When characterizing legislation, the Constitutional Court has expressly adopted a purposive approach to interpretation. The Court has also said that the effects of the law are relevant and that statutes should be looked at in historical context. With respect to categorization, it is not just a matter of what the Court has said, but what it actually does. For example, a functional approach to categorisation dominates the analysis in *Liquor Bill*. (These approaches are discussed below. The section on different models of federalism in the next chapter is also relevant to characterization.)

(i) Presumptions and politics

Federal constitutions tend to reflect pragmatic responses to political cleavages or pressures. South Africa is no exception. It is fair to say that from the start of constitutional negotiations the African National Congress championed strong national government at the expense of provincial powers. Opposition parties with strong regional support — the Inkatha Freedom Party in KwaZulu-Natal and the National Party in the Western Cape — advocated decentralized distributions of power. The Constitutional Court has been strikingly even-handed in its treatment of federalism cases. The two *Certification* judgments demonstrate the Court’s desire to maintain a dignified distance above the political fray.

The Court has correctly attempted to use rigorous legal discipline in order to insulate itself from the claim that it pursues a particular political agenda. The history of the characterization issue in *DVB Behuising (Pty) Limited v North West Provincial Government and another* can be used to support the proposition that

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1 See *DVB Behuising (Pty)* (supra) at para 36; *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iqikhakanyiswa Amendment Bill of 1995; Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC) at para 19.
2 Ibid at para 36.
3 Ibid.
4 *Liquor Bill* (supra).
5 See 15 infra
9 First Certification Judgement (supra) and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* 1997(2) SA 97 (CC); 1997(1) BCLR 1 (CC) (‘Second Certification Judgement’). South Africa does not have judges who are associated with an aggressive federalist stance. In some countries judges develop definite profiles in division of powers matters. For example in Canada, Katherine Swinton has contrasted the ‘centralist’ views of Judge Bora Laskin with the federalist or provincial vision of Judge Jean Beetz. K Swinton ‘The Supreme Court and Canadian Federalism’ ( supra) at 229-234.
classification questions are not merely questions of politics. There are objectively better and worse legal answers to federalism questions.\(^1\)

In the court a quo in *DVB Behuising*, Mogoeng J held that:

(a) Provincial legislatures have a ‘clearly defined and very limited legislative authority’ and have to operate ‘within the strict parameters’ of that authority. (b) In construing the powers of provincial legislatures the relevant provisions of the Constitution must ‘be given a strict interpretation. This is necessary to ensure that no provincial legislature is allowed to exercise the authority it does not have and thereby usurp the functions of Parliament.’\(^2\)

In light of these initial conclusions, Mogoeng J had to establish whether an apartheid Proclamation made under the Black Administration Act fell under national or provincial competences in terms of the Interim Constitution. He found that the Proclamation was predominantly about ‘land, land tenure or ownership, the registration of deeds and the establishment and abolition of townships’\(^3\) (national competences) rather than ‘housing’, ‘local government’, ‘trade’ and ‘industrial promotion’ (provincial competences).

When the case came before the Constitutional Court, Justices O’Regan, Sachs and Goldstone expressed concern about the consequences of a finding that would place the Proclamation within the sphere of provincial competence. Despite this fear, they were unable to support Mogoeng J’s finding that the predominant legal subjects of the Proclamation were national competences.\(^4\) They could not do so because the argument that the Proclamation chiefly regulated ‘local government’ issues was more compelling.

The Constitutional Court made it clear that there is no presumption in the text that would assist judges in deciding how to categorise legislation. On behalf of the majority of the Court, Justice Ngcobo wrote:

I respectfully disagree with the view expressed by Mogoeng J to the effect that the functional areas of provincial legislative competence set out in the schedules should be ‘given a strict interpretation’. In the interpretation of those schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas

\(^1\) There is a level of indeterminacy in characterisation questions. When the different methods of interpretation run out, William R Lederman suggests a last resort: ‘In the making of these very difficult relative-value decisions, all that can rightly be required of judges is straight thinking, industry, good faith and a capacity to discount their own prejudices. No doubt it is also fair to ask that they be men [and women] of high professional attainment, and that they be representative in their thinking of the better standards of their times and their countrymen [and women].’ William R Lederman ‘Classification of Laws and the British North America Act’ in R Lederman *Continuing Canadian Constitutional Dilemmas* (1981) extracted in P Macklem, R C B Risk, C J Rogerson, K E Swinton, L E Weinrib, J D Whyte *Canadian Constitutional Law* (Vol 1 1994) 166, 169.

\(^2\) *DVB Behuising* (supra) at para 16 (Ngcobo J). The judgment of the court a quo in *DVB Behuising (Pty) Ltd v North West Provincial Government and Another*, Bophuthatswana High Court, case No 308/99, 27 May 1999, is not yet reported.

\(^3\) *DVB Behuising* (supra) at para 16.

\(^4\) Ibid at para 102.

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must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.1

(ii) A functional approach

When judges use a functional approach to federalism problems they consider how different levels of government can function most effectively within the given framework of a constitutional scheme. Decisions are ‘guided by . . . beliefs about the optimal balance of power between the federal and provincial governments.’2 Judges explicitly weigh the ‘values of uniformity and diversity’3 in specific contexts.

In *Liquor Bill*, the Bill under scrutiny had been passed by the National Legislature.4 It was referred to the Constitutional Court by the President for a finding on its constitutionality.5 The Bill aimed to regulate comprehensively ‘the manufacture, distribution and sale of liquor on a uniform basis’ throughout South Africa.6 This objective was fraught with difficulty. ‘Liquor licenses’ is, after all, an exclusive provincial legislative competence listed in Schedule 5.7

The initial question in this case was one of characterisation. It was necessary to establish the scope of the term ‘liquor licenses’ in Schedule 5 in order to determine whether the national legislature had strayed into an area of exclusive provincial legislative competence. Categorisation is always a problem because the topics in the schedules are not watertight and discrete. For example, the functional area ‘liquor licenses’ overlaps with the concurrent functional areas ‘trade’ and ‘industrial promotion.’8 Despite this natural linguistic overlap, the Court found that an analysis of the overall constitutional scheme reveals that Schedule 5 matters need to be interpreted as having distinct identities which can be differentiated from other functional areas.9

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1 Ibid at para 17. The majority of the Constitutional Court is protective of provincial legislative power and respectful of democracy. Ngcobo J acknowledges that: ‘The North West legislature is itself a democratic institution and, it was fully entitled to make the legislative choice [that it did]’ (at para 69). The minority have a much more interventionist position. They engage with the situation created by the legislation and try to achieve the best substantive outcome. The majority’s position is easier to defend— but there may be some justification for the minority approach in our broken legislative reality.
3 Ibid.
4 B 131B-98.
5 *Liquor Bill* (supra) at para 2.
6 Ibid at para 21.
7 Ibid at para 38.
8 Ibid at para 48.
9 Ibid at para 56.
The Court’s functional approach in *Liquor Bill* becomes even more evident when the Court distinguishes matters on the basis of whether they require regulation ‘inter-provincially,’ as opposed to intra-provincially. It concludes ‘that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.’ The functional area ‘liquor licenses’ is consequently interpreted to mean ‘intra-provincial liquor licenses.’

The elegance of this analysis becomes evident when it is applied to the *Liquor Bill*’s ‘three-tier’ structure. The Bill contains schemes of regulation for (1) control of manufacturing or production of liquor, (2) distribution and (3) retail trade in liquor. The *Liquor Bill* Court concludes that both manufacturers and distributors of liquor are likely to operate across provincial boundaries:

If production and distribution of liquor were to be regulated by each province, manufacturers and distributors would require licences from each province for the purpose of conducting national trading, and possibly a national licence for export.

On the other hand, retail trade in liquor rarely operates across provinces and it is appropriate for it to be regulated provincially. As a result, retail licensing was held to be exclusively within the legislative competence of the provincial legislatures. Thus, it could not be interfered with by the National Legislature in the absence of a ground to be found in FC s 44(2).

One should keep in mind that not all characterisation problems are the same. The fact that *Liquor Bill* involved the delineation of an exclusive provincial legislative competence had an important impact on the Court’s reasoning. The reasoning of judgment would not apply to the interpretation of Schedule 4 competences because the Constitution regulates those areas so differently.

It is interesting to note that the *Liquor Bill* Court chose not to mention the Constitutional Principles. (The way in which the Constitutional Principles form a background to the Constitutional text and their interpretive role is discussed elsewhere in the book.) The text of Constitutional Principle XX1.1 would have made a compelling addition to *Liquor Bill*’s functional arguments. The Principle states:

The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

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1. Ibid at para 53.
2. Ibid.
3. Ibid at para 75.
4. Ibid at para 73.
5. Ibid at para 74.
6. Ibid at para 80. This category includes ‘micro-manufacturers whose operations are essentially provincial.’ Ibid at paras 84 and 88.
7. See 15.3(b) infra.
8. But see *Liquor Bill* (supra) at para 52 (Alluding to the principles).
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The Court’s reluctance to breathe new life into the Principles is understandable. However, they could have meaningful interpretive force in the context of federalism.

(iii) The purpose and effect of the legislation

The Constitutional Court ‘has regard to’ the purpose and effect of legislation when categorising it in terms of functional areas. The purpose of a statute is what the law ‘was enacted to achieve.’ Although the following statement was made in the context of Schedule 6 of the Interim Constitution, the form of analysis remains the same under the Final Constitution. The DVB Behuising Court wrote:

If the purpose of legislation is clearly within schedule 6, it is irrelevant whether the Court approves or disapproves of its purpose. But purpose is not irrelevant to the schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the provincial legislature.

The preamble and the legislative history of a statute are also relevant in establishing the purpose of legislation. The effect of legislation may also be relevant. For example, in Texada Mines v AG BC the Canadian Supreme Court wrote that:

Where a provincial tax had the effect of making a commodity too expensive to sell in interstate commerce, the tax was held to relate to the Canadian federal power of interprovincial commerce.

(iv) An historical approach

Legislative history is a useful tool to help establish the purpose of legislation and hence its characterisation. The Court is also receptive to, although not necessarily persuaded by, broader historical arguments presented to it. In Liquor Bill, the Minister of Trade and Industry argued that Parliament had the competence to

1 DVB Behuising (supra) at para 36.
2 Ibid.
3 Schedule 6 of the Interim Constitution listed functional areas in which the provinces had legislative competence.
4 Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature (supra) at para 19.
5 DVB Behuising (supra) at para 36.
6 [1960] SCR 713.
8 DVB Behuising (supra) at para 36.
pass the Liquor Bill in the light of the ‘history of overt racism in the control of the manufacturing, distribution and sale of liquor’ in South Africa. Historical arguments about apartheid land law figured prominently in all the judgments in *DvB Behuising*. Historical analyses also pay attention to an Act’s social context.

**(b) Interpreting the Scope of the Section 44(2) Override**

FC Section 44(2) provides:

- to maintain national security;
- to maintain economic unity;
- to maintain essential national standards,
- to establish minimum standards required for the rendering of services, or
- to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

In the *First Certification Judgment*, the Court held that the ‘power of intervention [under 44(2)] is defined and limited. If regard is had to the nature of the schedule 5 powers and the requirements of s 44(2), the occasion for intervention by Parliament is likely to be limited.’ This dictum implies that the five requirements for intervention will be interpreted narrowly. (The Court does hedge its bets slightly by using the word ‘likely’.) The Justices are somewhat less equivocal in the *Second Certification Judgment*: They speak of the ‘compelling importance of the matters referred to in’ FC s 44(2). This phrase implies that intervention will not be easily countenanced under this subsection.

There is, however, one possible interpretation of *Liquor Bill* that suggests that FC s 44(2)(b) may be more easily satisfied when economic activity is understood to take place at a national level rather than an intra-provincial one. Cameron AJ wrote:

In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level.

The Justices are correct to be concerned about the possibility of provincial powers being used to create barriers to trade within the national economy. But provincial legislation need not create barriers. A province may want to deregulate a sector in order to allow operators easier access. In such a case, it is hard to

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1 *Liquor Bill* (supra) at para 32.
2 *First Certification Judgement* (supra) at para 257.
3 *Second Certification Judgement* (supra) at para 106.
4 *Liquor Bill* (supra) at para 76.
imagine why, in principle, the national government would be able to intervene in order ‘to maintain economic unity.’ It must be remembered that the Court said that ‘the desirability from the national government’s point of view of consistency’ cannot, on its own, warrant FC s 44(2) intervention. That said, in some cases such provincial deregulation could cause intervention to be justified on the basis of the need to ‘maintain essential national standards’ (FC s 44(2)(c)); or to ‘establish minimum standards required for the rendering of services’ (FC s 44(2)(d)).

Acting Justice Cameron’s statements are set against the background of an industry that most agree requires a high level of regulation. Indeed, the Minister of Trade and Industry convinced the Court that multiple regulators across the country would be inimical to the maintenance of economic unity in the context of the liquor manufacturing and distribution sectors. Readers must locate the reasoning of the judgment in its particular context.

(c) Interpreting the Scope of the Incidental Power.

(i) The Current Source of the Incidental Power

FC Section 104(4) states that:

Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in schedule 4, is for all purposes legislation with regard to a matter listed in schedule 4.

FC 44(3) reads the same with respect to national legislative authority:

Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in schedule 4 is, for all purposes, legislation with regard to a matter listed in schedule 4.

I refer to both of these powers as ‘incidental’ powers. Acting Justice Cameron has stated that ‘[t]he phrase ‘reasonably necessary for, or incidental to’ should be interpreted as meaning ‘reasonably necessary for and reasonably incidental to’.’

(ii) Implicit Use of the Incidental Power in DVB Behuising

The incidental power was an important factor in the outcome of DVB Behuising. The case arose because the North West Provincial legislature purported to repeal Proclamation R293 of 1962 in the North West Province. The Proclamation, which had been issued in terms of the Native Administration Act 38 of 1927, was a relic of old apartheid land law that was based on a policy of residential segregation. It made provision for the establishment of special types of

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1 FC s 44(2)(b).
2 Liquor Bill (supra) at para 81.
3 Liquor Bill (supra) at para 79.
4 Liquor Bill (supra) at para 81.
5 DVB Behuising (supra) at para 41.
townships on land held by the South African Native Trust in which African South Africans could only acquire inferior types of insecure tenure. The proclamation also contained provisions relating to the control of trading and other activities in the affected townships.¹

The constitutional analysis in DVB Behuising is complicated by the transitional provisions that affected the Proclamation in question.² However, one of the central issues turns on a simple question of categorization. Could the proclamation be classified as fitting into the list of legislative competences of the provinces as set out in schedule 6 of the Interim Constitution?

The majority of the Court held that the Proclamation ‘[disclosed] an orchestrated scheme for the establishment, management and regulation of informal townships and establishment of local government.’³ The Proclamation was found in substance to be in the functional areas of ‘regional planning and development, urban and rural development and local government’: all are provincial competences under the Interim Constitution. However, these areas were not the only functional areas engaged by the Proclamation. The Proclamation also contained provisions that dealt with land tenure. Land tenure is a national competence. Justice Ngcobo held for the majority:

¹ DVB Behuising Pty Ltd sold houses to individuals in the North West. As a result of the repeal of Proclamation R293 of 1962 in the North West, the limited tenure rights known as ‘deeds of grant’ that new home-owners acquired could not be registered. Consequently the banks refused to provide finance for these new buyers. DVB Behuising argued that the repeal of parts of the Proclamation was beyond the legislative competence of the North West legislature. DVB Behuising (supra) at para 3.

² The case illustrates the operation of IC s 235 of the Interim Constitution, particularly ss 235(6) and (8). The Constitutional Court had previously explained the role of IC s 235 by saying:

The overall purpose to be achieved through the application of s 235 [was] a systematic allocation of the ‘power to exercise executive authority’ in terms of each of the ‘old laws’, to an authority within the national government or authorities within the provincial governments. The purpose of this power is clearly to provide a mechanism whereby a fit can be achieved between the old laws and the new order. Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 84.

The power to exercise executive authority in respect of Proclamation R293 of 1962 had been assigned to the North West by Government Notice 110 of 1994. The assignment could only have been made under s 235(6)(b) of the Interim Constitution – and was only made, in respect of the parts of the Proclamation that fell within the legislative competences listed in schedule 6 of the Interim Constitution. Schedule 6 of the Interim Constitution exhaustively listed the legislative competences of provinces. Hence the assignment only applied in the areas of concurrent competence between the national and the provincial government.

The definition of ‘provincial legislation’ in the Final Constitution includes ‘legislation that was in force when the Constitution took effect and that is administered by a Provincial Government’. FC s 239. Consequently in as far as the assigned Proclamation falls within the functional areas listed in schedule 6 (‘and does not deal with matters referred to in paragraphs (a) to (e) of s 126(3)) it is provincial legislation and it can be validly repealed by the North West legislature. Ibid at para s 20 and 26.

Hence the central question in DVB Behuising became whether the proclamation dealt with a matter that was listed in schedule 6 of the Interim Constitution. This same type of characterization exercise would have occurred in all cases of provincial legislative competence under the Interim Constitution.

³ Ibid at 48.
I am satisfied that the ‘tenure’ and deeds registration provisions of the Proclamation were inextricably linked to the other provisions of the Proclamation and were foundational to the planning, regulation and control of the settlements. These provisions were an integral part of the legislative scheme of the Proclamation and accordingly fell within schedule 6.1

Hence, the tenure provisions were within the competence of the provincial government.

In the minority judgment, Justices O’Regan, Sachs and Goldstone expressed doubt about this characterization of the subject matter:

There is much to be said, in our view, for the proposition that [the tenure provisions] are provisions regulating matters which fall outside schedule 6 of the Interim Constitution. It is clear that ‘land tenure and registration’ are not functional areas within the scope of schedule 6 as Mogoeng J observed. We accept that regulating the allocation of sites for trading and residential purposes are matters which fall within the functional areas of local government and/or urban development. Similarly, we accept that establishing a township involves creating sites and selling them or leasing them to the public and even attaching specific conditions to title. However, the proposition that it is an integral part of local government or urban development to establish specific and limited forms of land tenure or procedures for their registration, seems much less certain. In our view, the functional area of urban development requires the process of land alienation and allocation within the framework of the land tenure and registration system provided nationally. We find it hard to accept that establishing novel forms of land tenure or registration is an aspect of the functional area concerned with local government or that concerned with urban development.2

This statement does not really get to grips with the force of the majority judgment. The majority see the tenure issues as integral to the particular legislative scheme in the proclamation and thus validly part of the assignment to North West Province. The general proposition ‘that it is an integral part of local government or urban development to establish specific and limited forms of land tenure or procedures for their registration’3 is dubious at best. More importantly, it is not the proposition defended by the majority of the Court. The majority holds that the tenure provisions were an integral part of a legislative scheme that was predominantly within functional areas of provincial competence.

One problem with DVB Behuising is that although the reasoning of the majority judgment is convincing, it provides no clear system for establishing the scope of the incidental power.4 Readers of the judgment might think that there are no meaningful doctrinal grounds for judges to regard a particular power as incidental to a provincial power or to regard the matter as one that should be reserved for the national legislature. As I will show below, there are indeed better — and worse — ways of delineating incidental powers.

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1 Ibid at 96 (Madala J, concurring). DVB Behuising (supra) at para 58 (Ngcobo J).
2 Ibid at 102.
3 Ibid.
4 This result may flow from the fact that the Court was not called upon to decide a simple question of provincial legislative competence using the sections of the Constitution that provide for the incidental power. (The provision dealing with incidental power in the Interim Constitution was 126(2).) Rather it was confronted with a messy case involving high apartheid legislation and transitions through both the Interim and Final Constitutions.
A second problem with the majority judgment is that it does not explore the proper perspective for looking at a legislative scheme when assessing whether provisions — which are essentially out of place in a piece of provincial legislation — are acceptable on the basis of the incidental power. The perspective you adopt plays an important role in determining what you see. The broader your perspective, the more likely you are to see the provisions under scrutiny as necessary or incidental to a broader scheme. As you narrow your focus, the less likely the provisions are to appear necessary and redeemable. If you fixate exclusively on the problematic provisions, the possibility of incidentality or necessity disappears altogether. The next section looks at how this problem of perspective can best be approached.

(iii) Approaching the incidental power

Comparative law must be used with caution in federalism cases. Each federal system reflects pragmatic and context-specific responses to political power relations in a particular country.1

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture) involves ‘culturally modified trees’ which are heritage objects of significance to many of the aboriginal peoples of Canada.2 The Heritage Conservation Act is a statute of the province of British Columbia.3 It provides for the protection of heritage objects in the Province and gives administrative discretion to a Minister to consent to destruction of these artefacts in some circumstances.4 In Kitkatla Band, the Minister had made an administrate decision allowing a logging company to cut down approximately 40 out of 120 culturally modified trees in a specific area.5

The aboriginal litigants attacked the Heritage Conservation Act on federalism grounds. It was common cause that the Act was within provincial jurisdiction: ‘property and civil rights’ within the province. However, in Canada, ‘Indians and Land reserved for the Indians’ is a national competence.6 Hence the litigants argued — unsuccessfully — that the power to allow for the removal or alteration of Native American cultural objects was beyond the scope of the provincial legislature. They contended that the Act should be struck down ‘to the extent

1 Ex parte Speaker of the National Assembly: In re Dispute concerning the Constitutionality of certain provisions of the National Education Policy Bill of 1995 1996 (3)SA 289 (CC); 1996 (4) BCLR 518 (CC); at paras 21-3. Each federation creates and responds to its own functional problems. Despite this initial caveat, a number of Canadian cases provide useful heuristic devices for exploring the limits of our incidental power.
3 R.S.B.C 1996, c. 187
4 Ibid at para 37.
5 Ibid at para 64.
6 Ibid at para 29.
that it [allowed] for the alteration and destruction of native cultural objects.\textsuperscript{1} The province argued that the Heritage Conservation Act was within provincial competence and that ‘any intrusion into federal jurisdiction [was] simply incidental and constitutionally permissible.’\textsuperscript{2}

In Canadian jurisprudence, subject classifications for division of powers purposes are known as ‘pith and substance’ analyses. Identifying the ‘pith and substance’ of a law involves finding ‘the dominant or most important characteristic’ of that law.\textsuperscript{3} Canadians also speak of the ‘pith and substance’ of a legislative scheme when describing the dominant purpose of a particular provision.\textsuperscript{4} The different parties in \textit{Kitkatla Band} wanted to employ different methods of identifying the ‘pith and substance’ of the Heritage Conservation Act. As Judge LeBel stated:

There is some controversy among the parties to this case as to the appropriate approach to the pith and substance analysis where what is challenged is not the Act as a whole but simply one part of it. The appellants [the band] tend to emphasize the characterization of the impugned provisions outside the context of the Act as a whole. The respondents and interveners take the opposite view, placing greater emphasis on the pith and substance of the Act as a whole. The parties also disagree as to the order in which the analysis should take place; the appellants favour looking at the impugned provisions first, while the respondents and interveners tend to prefer to look at the Act first.\textsuperscript{5}

This statement clearly illustrates the need for a relatively straightforward and uncontroversial method of analysis. What must be incidental or necessary to what? The Canadian Supreme Court has set out a useful analytical framework in \textit{General Motors of Canada Ltd. v. City National Leasing}.\textsuperscript{6}

First, the \textit{City National Leasing} test requires the court to inquire into the subject matter of the specific provisions that are being challenged (hereafter referred to as the ‘impugned provisions’).\textsuperscript{7} The impugned provisions need to be interpreted naturally in context, but after that, their role has to be looked at in isolation for the purpose of characterisation.\textsuperscript{8} If the impugned provisions ‘can stand alone’ because they are within the powers of the particular legislature, they need ‘no

\textsuperscript{1} Ibid at para 1 (Emphasis added).
\textsuperscript{2} Ibid at para 37.
\textsuperscript{3} P W Hogg \textit{Constitutional Law of Canada} (Volume 1, 3rd Edition, 1992) 15.7. See also R I. Watts \textit{Federalism: The Canadian Experience} (1997) 45-6 (‘Many statutes have one feature or aspect that comes under a provincial, and another under a federal, head of power. For example, a law prohibiting careless driving has a criminal aspect, which is federal, and a highway regulation aspect, which is provincial. The courts make a judgment as to the most important feature of the law and characterize the law by that primary feature- its ‘pith and substance.’)\textsuperscript{4} See \textit{Kitkatla Band} (supra) at para 58 and \textit{General Motors of Canada Ltd. v. City National Leasing} (‘City National Leasing’)\textsuperscript{[1989]} I S.C.R. 641, 58 D.L.R. (4th) 255. See 15 infra. .
\textsuperscript{5} Ibid at para 55.
\textsuperscript{7} \textit{Kitkatla Band} (supra) at para 58.
\textsuperscript{8} \textit{City National Leasing} (supra) at para 42.
other support'. If not, it is necessary to continue with the analysis.\(^1\) If the impugned provisions intrude into the exclusive legislative sphere of another level of government, it is necessary to establish the extent of the incursion. That is, the court must determine how invasive the intrusion is.\(^2\)

Second, the Court must ask whether the impugned provision is part of a broader legislative scheme that is within the competence of the relevant legislature. Once it is clear that the provision does intrude, the point of the exercise is to establish whether the impugned provision can be construed as valid in the context of the broad legislative scheme. (Identifying the scheme is a conceptual matter. It may include the entire statute. It may only consist of part of a statute that could have been enacted alone and can be severed from the rest of the law.\(^3\) In some cases a regulatory scheme may embrace a number of statutes intended to govern different aspects of a common field.) Once the scheme has been identified, it is necessary to decide whether the subject matter of the scheme is within the power of the enacting legislature.

If the legislative scheme is within the competence of the relevant legislature, 'the relationship between the particular impugned provision and the scheme' comes under scrutiny. The court then asks 'how well [is] the provision integrated into the scheme of the legislation and how important [is it] for the efficacy of the legislation.'\(^4\)

At this stage the Canadian courts engage in a proportionality exercise. Earlier we asked how far the impugned provision pushes the boundaries of the appropriate legislative sphere. The more the provision encroaches, the more essential the provision must be to an otherwise valid legislative scheme in order to be considered incidental. The less it intrudes, the easier it will be to persuade a court that it should survive.\(^5\)

\(^1\) Kitkatla Band (supra) at para 57. See also City National Leasing (supra) at para 44.

\(^2\) City National Leasing (supra) at para 46.

\(^3\) Ibid at para 48. Dickson CJC wrote:

> A regulatory scheme may be found in only a part of the act in question, if that part can stand alone, or it may found in the entire act. The portion of the statute necessary to establish the existence of a regulatory scheme will not always be easy to discern. In those instances where a challenged provision, taken alone, comprehends a complete regulatory mechanism, the provision itself constitutes the appropriate starting point. In other cases, it will be necessary to examine the entire statute before a regulatory scheme may be identified. Once the presence of a regulatory scheme has been shown it will be necessary to determine its constitutional validity.

\(^4\) Ibid at para 49.

\(^5\) Ibid at para 53. Dickson CJC wrote:

> In numerous cases courts have considered the nature of the relationship which is required, between a provision which encroaches on provincial jurisdiction and a valid statute, for the provision to be upheld. In different contexts courts have set down slightly different requirements, viz.: 'rational and functional connection' in Papp v. Papp, [1970] 1 O.R. 331; R. v. Zeleny, [1978] 2 S.C.R. 940, and Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; 'ancillary', 'necessarily incidental' and 'truly necessary' in the Regional Municipality of Peel v. MacKenzie, supra; 'intimate connection', an integral part and necessarily incidental' in Northern Telecom Ltd v. Communications Workers of Canada, [1980] 1 S.C.R. 115; 'integral part' in Clark v. Canadian National Railway Co., [1988] 2 S.C.R. 680; a valid constitutional cast by the context and association in which it is fixed as a complementary provision'
(iv) **The Point Beyond which the Incidental Power Cannot Go**

The Canadian approach seems sensible. Moreover, it coheres with the majority judgment in *DVB Behuising*. When interpreting the scope of the incidental power, it seems best to start with a broad assumption that almost any impugned provision can be saved (and found to be ‘legislation with regard to a matter listed in schedule 4’ in terms of FC ss 44(3) or 104(4)). This assumption is justified because any incidental power automatically operates in an area of de facto provincial and national concurrency. When a court needs to draw a line beyond which a provincial legislature cannot go, it is not appropriate to limit the scope of the incidental power. Section 146 of the Final Constitution (which regulates conflicts between provincial and national legislation) is the more appropriate place for the analysis.1

(v) **Another Approach**

Another rule of thumb has been suggested to help define the scope of the incidental power. Where the ‘end’ intended by the legislation is competent, the ‘means’ are likely to be acceptable.2

(vi) **The scope of the incidental power in relation to schedule 5 competences.**

No specific constitutional provision regulates powers that are ancillary to Schedule 5 competences. However, in *First Certification Judgment* the Court states:

> The provinces would necessarily also be the repository of powers incidental to the powers vested in them in terms of NT schedule 5.3

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3 See *First Certification Judgment* (supra) at para 244. The Court wrote:

> Although the NT does not specifically authorise provinces to enact legislation authorising the imposition of user charges, such a power would be within the express or implied power to legislate with regard to matters reasonably necessary for or incidental to the effective exercise of an NT sch 4 or 5 competence. It cannot seriously be suggested that provinces cannot pass legislation making provision for a user charge for abattoirs, health services, public transport etc. In so far as charges might be raised which are unrelated to the actual use of services provided, they would be within the general power to impose rates and levies.

Ibid at para 438.
Our discussion of incidental powers demonstrates that provincial legislatures may sometimes validly legislate in areas of exclusive national legislative competence. The opposite contention, that the national legislature can legislate incidentally in the area of Schedule 5 functional areas, is more controversial. In *Liquor Bill*, Acting Justice Cameron wrote:

Determining the place of section 44(3) in the constitutional scheme, and in particular its relationship to the exclusive provincial legislative competences in schedule 5, is not free from difficulty. On one approach, section 44(3) authorises an enlarged scope of encroachment on the exclusive competences by permitting national intrusion into schedule 5 where this is reasonably necessary for, or incidental to the effective exercise of a schedule 4 power.¹

The question of the affect of FC s 44(3) on Schedule 5 competences was ultimately left unanswered.

(d) When is Competence Tested?

The determination of competence would appear to be a one-off test that applies at the date that the legislation was passed. For example, legislation that was competent when it was passed cannot later become incompetent. This position coheres with the attitude to assignment taken by a number of commentators when they talk about assignment of legislative powers by the national legislature to the provinces.² They argue that even if the national legislature retracts an assignment of its powers, the provincial legislation properly made under the assignment remains valid.

Although the above approach seems to be the most coherent, the answers to these questions are not self-evident. For example, take the case of a legislative provision that is valid by virtue of the incidental power. What happens if that provision is left standing while the rest of the legislative scheme upon which it depends is repealed? Can the hypothetical provision survive on the basis that it was valid at the time that it was originally enacted? It is reasonable to conclude that the provision would be invalidated on the grounds that it is no longer ‘reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in schedule 4.’³

¹ *Liquor Bill* (infra) at para 44.
³ FC s 104(4).