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The Ancillary Power Doctrine: An Analogy with Section 1 of the Charter

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Résumé

Cet article examine le rôle et l'avenir de la théorie du pouvoir ancillaire en droit constitutionnel canadien. Cette théorie s'applique dans le cas où une loi possède deux aspects : l'un dans la compétence du législateur qui l'a adoptée et l'autre, en dehors de celle-ci. Cette théorie, reconnue dans certains autres états fédéraux, n'a pas été unanimement reçue en droit constitutionnel canadien. L'auteur soutient que la théorie du pouvoir ancillaire est déjà reconnue dans plusieurs décisions portant sur le partage des compétences et qu'il est maintenant le temps de l'adopter formellement.

L'article comporte deux grandes parties. La première analyse les similarités et les différences entre le fédéralisme (ou partage de compétences) et la Charte. L'auteur démontre qu'il existe suffisamment de similarités entre les deux domaines

Abstract

This article examines the role and future of the ancillary power doctrine in Canadian constitutional law. The doctrine operates when a law has two aspects: one within the authority of the enacting legislature (or Parliament) and another outside its jurisdiction. The doctrine, although firmly established in other federal states, has not been unanimously adopted in Canadian constitutional law. The author demonstrates that the ancillary power doctrine has already been recognized in various federalism cases and argues that it should now be formally adopted.

The article is divided into two main parts. The first part explores the similarities and differences between the division of powers and the Charter. The author demonstrates that there are sufficient similarities between them to justify the incorporation of the "rational and

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pour que les critères de « rationalité et proportionnalité » utilisés sous l'article premier de la Charte soient transposés en matière de partage des compétences. Vu toutefois leurs différences, l'auteur prévoit que le test de l'article premier ne pourra être transposé sans modifications.

La deuxième partie de l'article élabore le « test de justification du pouvoir ancillaire ». Après une étude de la jurisprudence relative au partage des compétences, l'auteur démontre que le raisonnement employé pour conclure que telle ou telle mesure législative est valide ou non est insatisfaisant et parfois formaliste. Le test de justification du pouvoir ancillaire proposé permettra un raisonnement plus complet sur de telles questions. Fondé sur le modèle élaboré dans l'arrêt R. c. Oakes, le test est analogue à celui utilisé sous l'article premier de la Charte.

Dans sa conclusion, l'auteur suggère que le partage des compétences et la Charte ne doivent pas être considérés comme étant mutuellement exclusifs. Chacun de ces deux grands domaines devrait être plutôt considéré comme source d'inspiration pour solutionner les problèmes qui se posent dans l'autre.

proportional" test used under section 1 of the Charter in division of powers case law. In exploring the differences, the author concludes that the incorporation will require an adjustment in the application of the section 1 test.

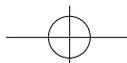
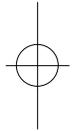
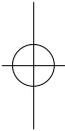
In the second part of the article, the author articulates the "ancillary power justification test". By reviewing case law dealing with division of powers issues, the author concludes that the reasoning adopted in deciding why a legislative scheme is valid or invalid is unsatisfactory and at times formalistic. The proposed ancillary power justification test would bring out more clearly the reasons for which a legislative scheme is constitutionally valid or not. Founded on the model enunciated in R. v. Oakes, the proposed test is analogous to the section 1 analysis used under the Charter.

The author concludes by suggesting that the division of powers and the Charter should not be viewed as mutually exclusive. Rather, each constitutional area should be considered as a source of inspiration for solving problems encountered in the other.



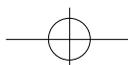
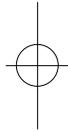
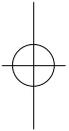
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In a federal state like Canada, “each level of government can expect to have its jurisdiction affected by the other to a certain degree”¹. Two propositions inform this permissible degree: first, neither level of government is isolated from the other; and second, neither level of government can be permitted to usurp the functions and jurisdiction of the other². The balance that must be maintained between the two levels of government is motivated by the fundamental and organizing constitutional principle Federalism³. This “lodestar”⁴ has acted as a guide throughout the history of constitutional challenges under the division of powers and has “exercised a role of considerable importance in the interpretation of the written provisions of our Constitution”⁵. The maintenance of the equilibrium between sections 91 and 92 of the *Constitution Act, 1867*⁶ has been guided by the principles of “balancing and federalism”⁷. Indeed, I take this to represent, in part, one of the underlying tensions in federalism: the diversity and representative democracy which would be achieved by a coalition model versus the effective and complete legislation that would be achieved by a unitary state model.

The equilibrium of Canadian federalism is challenged when a law trenches upon the division of powers. Trenching occurs in one of two ways. A law may either directly infringe the division of powers by expressly embracing matters outside the competence of the legislature or it may do so “indirectly by the silent approach, by refraining from explicit inclusion but then proceeding to an embracing application”⁸. The first form of trenching is textual (direct trenching). In this case, a provision, section or article of an otherwise *intra vires* legislative scheme is outside the jurisdiction of the

¹ *Reference re Firearms Act*, [2000] 1 S.C.R. 783, par. 16 (hereinafter *Firearms Reference*).

² *Id.*, par. 48.

³ Announced in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

⁴ *Id.*, par. 56.

⁵ *Id.*, par. 57.

⁶ *Constitution Act, 1867*, 30 & 31 Vict., U.K., c. 3, ss. 91-92, reprinted in R.S.C. (1985), App. II, No. 5.

⁷ *Firearms Reference*, *supra*, note 1, par. 26.

⁸ *A.G. Quebec v. Kellogg's Co.*, [1978] 2 S.C.R. 211, 217 (hereinafter *Kellogg's*).

enacting body. The second form of trenching is founded on the effects of the legislative scheme (indirect trenching). Even if the text of the legislative scheme is *intra vires*, an application of the scheme may reveal that it trenches upon the division of powers. This form of trenching is to be distinguished from merely “incidental effects” which do not constitute trenching *per se*. The thesis I propose is applicable to both forms of trenching and I will distinguish between them only when it is helping to the discussion. The distinction is important to keep in mind, however, as it influences such considerations as determining the degree of the infringement and the applicable remedy.

Canadian courts have developed several doctrines to maintain the equilibrium of federalism. In my opinion, there is one that best respects the fundamental principle of federalism: the ancillary power doctrine. This doctrine comes into play when a law has two aspects: one within the authority of the enacting legislature (or Parliament) and another outside its jurisdiction. This second aspect, be it indirect or direct trenching, is *prima facie* unconstitutional. However, it may derive validity from a secondary competence founded on the ancillary power doctrine. This doctrine acknowledges that in order to maintain effective legislative schemes, a trenching of the division of powers will sometimes be required⁹.

The ancillary power doctrine is recognized in several federal states. For the United States Congress, it is a power “to make all laws which shall be necessary and proper for carrying into execution” its enumerated powers¹⁰. For the Parliament of Australia, this secondary power extends to “matters incidental to the execution of any power vested by this Constitution in Parliament”¹¹. There is no similar provision in the *Constitution Act, 1867*. Nonetheless, the ancillary power doctrine does exist in Canadian constitutional law¹². As a matter of federal equilibrium, it permits the Provincial legislatures to trench upon the powers of the federal government as

⁹ See: François CHEVRETTE and Herbert MARX, *Droit Constitutionnel : Notes et jurisprudence*, Montréal, P.U.M., 1982, p. 306, who write that this doctrine rests on the idea of complete and efficient legislation.

¹⁰ *Constitution of the United States*, art. 1, s. 8, cl. 18.

¹¹ *Constitution of Australia*, s. 51, placitum XXXIX.

¹² See *e.g.*: *Global Securities v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 517, where Iacobucci J., writing for a unanimous Court, recognized, *in obiter*, the ancillary power doctrine (hereinafter *Global Securities*).



much as Parliament may trench on the powers of the Provinces¹³. Although the scope of the ancillary power doctrine and its criteria of application have never been articulated, it is clear that it is informed by the constitutional principle of federalism.

In the *Firearms Reference*, provincial interveners argued that the principles of balancing and federalism should be informed by considerations of “rationality and proportionality”¹⁴ from section 1 of the *Charter of Rights and Freedoms*¹⁵. Although it is my position that “rationality and proportionality” are clearly aspects of the balancing analysis required to maintain the equilibrium of federalism, the Supreme Court of Canada denied this analogy to the Charter. The Court held that:

*It seems far from clear to us that it would be helpful to apply the technique of weighing benefits and detriments used in s. 1 jurisprudence to the quite different exercise of defining the scope of the powers set out in ss. 91 and 92 of the Constitution Act, 1867.*¹⁶

Although the Court accepted that “it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power”¹⁷, it did not accept that the appropriate balance of federalism is maintained by applying the technique set out in section 1 jurisprudence. As will be demonstrated, the “technique of weighing benefits and detriments” is an intrinsic part of maintaining the equilibrium of federalism. I also aim to demonstrate that cases dealing with challenges under sections 91 and 92 of the *Constitution Act, 1867* do not undertake the “exercise of *defining the scope of the powers* set out in ss. 91 and 92”. Rather, the principle

¹³ In *Global Securities*, *supra*, note 12, the Court in *obiter* applied the ancillary power doctrine in favour of the province of British Columbia. See also: F. CHEVRETTE and H. MARX, *op. cit.*, note 9, p. 306. For an example of those opposed to extending the ancillary power doctrine to the provinces, see: *Kellogg's*, *supra*, note 8. Laskin C.J. held that insofar as the Constitution may be said to recognize an ancillary power, such a power resides only in the Parliament of Canada. See the contradiction in his argument at 217 where he writes: “the Parliament of Canada can no more trespass on a provincial field that can a Province encroach upon a federal field of legislative power”.

¹⁴ *Supra*, note 1. The argument was based on the work of D. BEATTY, *Constitutional Law in Theory and Practice*, Toronto, University of Toronto Press, 1995.

¹⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (hereinafter “Charter”).

¹⁶ *Firearms Reference*, *supra* note 1, par. 48 (emphasis added in Roman characters).

¹⁷ *Id.*



of federalism, through an application of the ancillary powers doctrine, exercises “*ad hoc* balancing” in respect of the legislative scheme and does not define and redefine the scope of powers themselves each time a law is challenged under the division of powers¹⁸. I shall return to this point below in more depth.

It must be recognized at the outset that “[c]e qui est partagé, ce ne sont pas les matières concrètes en tant que telles, c’est le *pouvoir de légiférer relativement à ces matières*”¹⁹. The power to legislate requires that the constitution “be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane”²⁰. The tensions between respecting the division of powers on an abstract plane and applying the *Constitution Act, 1867* on a realistic basis must be reconciled through a technique of balancing federalism. It is submitted that this necessarily requires an undertaking of the technique of weighing benefits and detriments. This technique was set out in *R. v. Oakes*²¹ for the Charter but has never been articulated for the division of powers.

A useful starting point for the articulation of this technique is to consider the effects of federalism on the people of Canada. Since the federal structure of Canada divides governmental power between Parliament and provincial legislatures, the Canadian community is subject to the laws of two legislatures²². From one community point of view, there is less concern with ensuring that each level of government enacts laws within its jurisdiction. Rather, the greater community concern lies in ensuring that the community is governed by effective and complete legislative schemes. Hence, from this point of view, any trenching of the division of powers should be motivated by concerns central to the better governance of

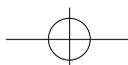
¹⁸ For the use of the terms “*ad hoc* balancing” and “definitional balancing”, see: Peter W. HOGG, *Constitutional Law of Canada*, Toronto, Carswell, 1999, p. 33-26.

¹⁹ F. CHEVRETTE and H. MARX, *op. cit.*, note 9, p. 279 (emphasis added).

²⁰ *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, par. 181 (hereinafter *Edwards Books*) (emphasis added). Although La Forest J. was speaking with regards to the Charter, his statement applies equally to the division of powers.

²¹ [1986] 1 S.C.R. 103 (hereinafter *Oakes*).

²² I do not exclude nor neglect considerations of legal pluralism. For the purposes of this paper, however, my focus is on the division of powers and thereby on Parliament and the provincial legislatures.



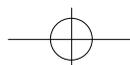


Canadian society. It cannot be forgotten that it is the Canadian public who is the beneficiary of the federal system, not the governments²³. Indeed, the constitutional principle of federalism is concerned, in part, with ensuring that legislative schemes properly function and not with a rigid application of the constitution's division of powers.

At this point, I should make clear my motivations for proposing a technique of weighing benefits and detriments to the division of powers. The first point, as I aim to demonstrate below, is that courts currently undertake this technique without disclosing it in their judgements. In this respect, my proposed technique simply seeks to bring to light the current underlying motivations in division of powers adjudication. Second, I should not be understood, nor do I intend the consequences of my proposed technique, to result in an expansion of Federal power to the detriment of Provincial power or *vice versa*. Although I do not adhere strictly to the federalism doctrine of "watertight compartments", I fully recognize the dangers inherent in the "double aspect" doctrine. The "watertight compartments" approach is in need of modification since it does not accommodate the realities of more complex and more numerous legislation. The double aspect doctrine, due to the federal paramountcy rule, has the danger of undermining the division of powers. As such, I adopt the constitutional principle of federalism as my "lodestar" in articulating a proposed technique which attempts to find a just middle between both doctrines. Finally, any reference to "effective" legislation schemes or "efficiency" includes not only a measurement of benefits and detriments but also democratic accountability. I remain fully aware of the initial motivations for Canadian federalism and its continuing benefits on the cultural and linguistic plain. Although more will be said on this below, I raise it now to diffuse any allegations that I support a view of federalism blind to the true spirit of its purpose.

In the same manner that Canada cannot be governed without legitimately limiting Charter rights, Canada cannot be governed

²³ See: Paul WEILER, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 *U.T.L.J.* 307, 319.



without a flexible understanding of the role of the division of powers. Community life “does not fit neatly into any scheme of categories or classes without considerable overlap”²⁴. As a result of this overlap, it is not uncommon for a law to have two aspects. For example, “[p]owers in relation to matters normally within the provincial field, especially of property and civil rights, are inseparable from a number of the specific heads of s. 91 of the [*Constitution Act, 1867*] under which scarcely a step could be taken [by Parliament] that did not involve them”²⁵. As a result, the *Constitution Act, 1867* must be flexible enough to adapt to new “social, political and historical realities often unimagined by its framers”²⁶.

Under the current mode of federalism review, recourse to the ancillary power doctrine is not normally undertaken. Rather, the constitutionality of a law with two aspects is informed by a determination of which aspect is primary in relative importance²⁷. The predominant aspect is the “pith and substance” of the law²⁸. Although this analysis is clearly undertaken in cases of direct trenching, I propose that it is also applicable and applied in cases of indirect trenching.

Currently, if the pith and substance of the law is within the jurisdiction of the enacting body, then the law is constitutional. As a result, I would suggest, there is significant difficulty in identifying the pith and substance of a law since the selection of one or the other aspect as predominant will dispose of the case. Since “the court in making its selection [is] conscious of the ultimate result”²⁹, the pith and substance determination is clearly influenced by more than what constitutes the primary aspect of the law. In my opinion, many other concerns influence this analysis. What I propose is a different analysis that will simplify constitutional challenges under the division of powers. My proposed mode of analysis will

²⁴ William R. LEDERMAN, “The Concurrent Operation of Federal and Provincial Laws in Canada”, (1963) 9 *McGill L.J.* 185.

²⁵ *Papp v. Papp*, [1970] 1 O.R. 331, 394 (C.A.) (hereinafter *Papp*).

²⁶ *Hunter v. Southam*, [1984] 2 S.C.R. 145, 155.

²⁷ See e.g.: *Global Securities*, *supra*, note 12 where the ancillary power doctrine is mentioned only in passing and in *obiter* after the pith and substance finding.

²⁸ This term was first used by the Privy Council in *Union Colliery Co. v. Bryden*, [1899] A.C. 580, 587 (P.C.), Lord Watson. There are many synonyms to the term “pith and substance”: see P.W. HOGG, *op. cit.*, note 18, p. 5-5 to 15-6.

²⁹ P.W. HOGG, *op. cit.*, note 18, p. 15-8.

make the pith and substance determination the first step of several in determining the constitutionality of a law which trenches upon sections 91 or 92 of the *Constitution Act, 1867*.

For the Charter, infringements³⁰ are subject to section 1. Section 1 of the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The method of imposing reasonable limits was outlined by Dickson C.J. and is commonly referred to as the “*Oakes test*”. This method of justifying infringements identifies the criteria the government must satisfy in order to warrant the infringement of a Charter right. The justification analysis I am proposing for division of powers trenching is analogous to the *Oakes test*.

In the first part of this article, I will examine the similarities and differences between the division of powers and the Charter. In a second part, I shall articulate the ancillary power justification test and show how it is already implicit in division of powers jurisprudence.

I. The Division of Powers and the Charter

The following comparative study does not purport to be exhaustive. Rather, it is undertaken to establish two points. First, I aim to demonstrate that there are sufficient similarities between the division of powers and the Charter to allow for an analogy to be drawn between the *Oakes test* and the ancillary power justification test I am proposing. Second, I equally aim to show that the differences between both constitutional questions require careful modifications to the *Oakes test* in order to adapt its analysis to the division of powers.

A. The Similarities

The constitution does not prohibit justified infringements. Experience in the field of both the Charter and the division of powers has demonstrated this. Beyond this preliminary analogy, there

³⁰ In this article, I shall be using the term “infringement” with respect to the Charter and the term “trenching” with respect to the division of powers. Both refer to the same concept and the use of separate terms aims only to simplify the discussion.

are many other similarities between both constitutional questions. My aim is to bring them to light by exploring four ideas. First, I will demonstrate that justifying trenches of the division of powers and justifying infringements of the Charter is achieved in a contextual forum that balances competing interests. Second, I will show that any justification analysis is made with respect to the law being challenged and not on some abstract theoretical plain. In this respect, contrary to the Supreme Court's statement in the *Firearm Reference*, a justification analysis does not aim to "define the scope of powers set out in ss. 91 and 92"³¹ but rather, as with the Charter, stretches the scope of legislative power in favour of the legislative scheme in question. Third, I aim to show that what I call the "guidance function" of courts applies with equal force for the division of powers as it does with the Charter. Fourth, I will demonstrate that for both constitutional questions, the required degree of justification is proportional to degree of infringement imposed by the legislative scheme being challenged.

1. Balancing Competing Interests

Rejecting the strict nature of the "watertight compartments" doctrine of federalism and without fully adopting the "double aspect" approach, I adopt the following view of sections 91 and 92 of the *Constitution Act, 1867*. Each enumerated legislative power encompasses both an unconditional power and a conditional power. The unconditional power is the core of that power (which will be analysed in greater detail below) and its exercise need never be subject to justification. It does not overlap with the legislative powers of the other level of government.

The conditional power, on the other hand, is akin to the penumbra of the unconditional power. By definition, it overlaps with and thereby infringes on an unconditional legislative power of the other level of government, be it directly or indirectly. The further from the core of the unconditional power, the closer the conditional power approaches the core of a competing unconditional power. As I shall demonstrate below, if the penumbra extends so far as to infringe upon the core of the unconditional power of the other level of government, then it falls outside the acceptable scope of conditional

³¹ *Firearms Reference*, *supra*, note 1, par. 48.



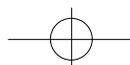
power. Indeed, the power is “conditional” because it derives validity only by recourse to the ancillary power doctrine in the context of the legislative scheme in question.

My conception of the unconditional power respects the doctrine of watertight compartments. Likewise, my conception of conditional power incorporates some of the motivations underlying the double aspect doctrine.

Having introduced these concepts, it follows that the various sections of a constitution cannot be read in isolation from one another. Each section must be interpreted in light of its historical and social context with regards to the other sections of the constitution. This context is essential to the process of balancing competing interests since it permits the delimitation of what is truly at play and also allows for the appropriate weight to be assigned to each of these interests³². Otherwise, the balancing process would be impossible since it remains in the abstract. Under section 1 of the Charter, the contextual balance that must be achieved is between an infringed right and a social objective manifested in a legislative scheme. For the division of powers, the nature of the competing interests is somewhat more complex. It is complicated by the fact that any federalism challenge will necessarily implicate two legislative powers. Indeed, no one legislative power is referred to without equally referring to another competing power. In this sense, the balance that must be achieved between competing interests is tri-polar since it requires equilibrium between both competing legislative powers and the social objective manifested within the legislative scheme.

The tri-polar aspect of the competing interests for the division of powers occurs when a law has two aspects, one within the authority of the enacting body and one outside of it, be it indirect or direct trenching. The aspect of the law within the authority of the enacting body is the unconditional power. The aspect of the law *prima facie* outside the authority of the enacting body is the exercise of the conditional power. For example, let us assume that the conditional power is founded in s. 91 (X) and that it trenches upon s. 92 (Y). That aspect of s. 91(X) that is trenching on s. 92(Y) is the conditional power of the legislative power X. Hence, the trenching

³² See the judgement of Wilson J. in *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326.





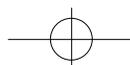
of X on Y will require a decision to be made between allowing the trenching for the sake of the legislative scheme in question or upholding the exclusive domain of Y. In deciding this, a proper equilibrium between provincial legislative power and federal legislative power must be maintained³³. In this respect, I wish to make clear that I am not proposing a technique blind to this equilibrium. Rather, I propose that the equilibrium can not only be achieved but that indeed it may be best achieved through the ancillary power doctrine. This doctrine recognizes that the exercise of s. 91 (X) alone cannot achieve a complete legislative scheme without infringing upon Y. As such, the ancillary power may permit the conditional power X to extend into the domain of Y for the purposes of the legislative scheme. Whether this exercise of the conditional power is justified will depend on a number of factors that I undertake to study below in Part 2.

The balancing process for competing powers recognizes that legislative powers are both constitutionally supreme and exclusive but not absolute. Indeed, the notion of a conditional power which, by definition, infringes on other unconditional powers, recognizes this. Therefore, in this respect, when applying the ancillary power doctrine, the question is not *whether* the division of powers should accommodate an infringement in favour of a more complete legislative scheme, but *when* and *to what extent* it should permit for the exercise of conditional legislative power. My proposed justification test, based on the ancillary power doctrine, will aid in answering “when” and “to what extent” by informing the tension between unconditional powers and infringing conditional powers with the principle of Federalism.

2. Justifying the Legislative Scheme vs. Redefining the Constitution Act, 1867

What is the consequence of finding a law with two aspects constitutionally valid? (Let us use the infringing conditional power X and the infringed unconditional power Y from the example above.)

³³ For a general study of the inherent challenges in maintaining such an equilibrium, see: Paul-André CRÉPEAU and Crawford B. MACPHERSON (eds.), *The Future of Canadian Federalism*, Toronto/Montréal, University of Toronto Press/P.U.M., 1965.





There are two possible scenarios. On the one hand, we could understand s. 91 (X) as now encompassing s. 92 (Y). In other words, the distinction between unconditional power and conditional power collapses. As such, the constitutional limits on powers are redefined each time a law with two aspects is held valid. On the other hand, we could understand the conditional power X as being permitted to trench upon the unconditional power Y for the very limited purpose envisioned in the challenged law. In other words, X is only permitted to extend to Y through legislation and not on some abstract theoretical plane. This latter approach does not redefine the constitution but rather justifies the trenching with respect to the legislative scheme, *not with respect to the unconditional power*. The correct approach, *i.e.* either justifying the legislative scheme or redefining the *Constitution Act, 1867*, lies in a proper understanding of the ancillary power doctrine.

The ancillary power doctrine is considered superfluous by some academics because “it does not seem necessary or helpful to introduce the concept of an ancillary power to explain results that can be just as easily be regarded as from well established rules of classification”³⁴. This position assumes that by classifying a law under s. 91 (X), infringements on s. 92 (Y) are inconsequential. In other words, the ambit of legislative power under s. 91 (X) is limitless so long as a law remains in pith and substance within the jurisdiction of s. 91. I proposed that this approach is incorrect since it extends the unconditional power of legislative jurisdiction rather than questioning why the conditional power is being exercised. Indeed, the rules of classification merely identify what is within and outside the unconditional power of a legislative body. They do not speak to the conditional powers implicit in sections 91 and 92 of the *Constitution Act, 1867*.

The method of redefining the line between unconditional power and conditional power infringing the division of powers is best left to the process of mutual modification. This interpretive process was introduced in *Citizens Insurance Co. of Canada v. Parsons* where the Privy Council held that “[i]t could not have been the intention that a conflict should exist; and, in order to prevent such a result, the

³⁴ P.W. HOGG, *op. cit.*, note 18, p. 15-36; see also: Bora LASKIN, “Peace, Order and Good Government Re-examined”, (1947) 25 *Can. Bar Rev.* 1054, 1060.

two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other”³⁵. Although articulated by the Privy Council, a strong adherent to the “watertight compartments” view of federalism, its dicta informs the distinction between conditional and unconditional power. The doctrine of mutual modification is used to resolve textual conflicts between heads of power. It defines each power so that it does not textually overlap with the other. The ancillary power doctrine addresses quite a different conflict. Whereas mutual modification addresses conflict between two unconditional powers, the ancillary power doctrine addresses conflict resulting from the *application* of legislative power, *i.e.* conflict between the exercise of conditional power and a conflicting unconditional power. In other words, a law with two aspects indicates that it addresses concerns falling under both section 91 and section 92. It does not mean that there is a conflict between two heads of power in and of themselves. As a result, there is no need to extend or reduce either unconditional power. Rather, it must be determined whether, and for the sake of the legislative scheme, trenching by the conditional power is justified.

This determination is achieved by applying the ancillary power doctrine. This doctrine recognizes that it is not the enacting body *per se* that is permitted to trench the division of powers; rather, it is the enacting body’s legislation. As such, the ancillary power doctrine is not solely concerned with rules of classification. Rather, the doctrine recognizes the limits of legislative jurisdiction and extends these limits with recourse to conditional power when mandated by the legislative scheme. The ancillary power applies when there is both a primary head of unconditional power insufficient to achieve an efficient legislative scheme and a secondary head of conditional power which could complete it. Whether the primary head of power will be permitted to have recourse to conditional power will be determined by recourse to the legislative scheme. Only if the scheme can justify the infringement will the extension be permitted. In this sense, the ancillary power doctrine effectuates “*ad hoc* balancing” of competing powers rather than “definitional balancing” of the ambit of these powers. In other words, the ancillary power doctrine determines when and in what contexts the conditional power can be exercised and not when and in what contexts the unconditional powers are modified.

³⁵ (1881), 7 A.C. 96, 108 and 109.

Section 1 of the Charter also effectuates *ad hoc* balancing. It is not because a Charter infringement was justified under section 1 for one legislative scheme that legislatures are granted a *carte blanche* to infringe Charter rights for all legislative schemes. Section 1 will justify an infringement of the Charter only if the legislative scheme itself can be justified. The section 1 balancing is “ad hoc in the sense that it is *unique to the particular limit* in the particular circumstances”³⁶. In other words, what is being justified is the exercise of legislative power, not legislative power itself. Similarly for the division of powers, any justification for trenching the *Constitution Act, 1867* is made within the specific and contextual forum provided for by the legislative scheme. For example, let us suppose a federal law falling under “general regulation of trade” (s. 91(2) of the *Constitution Act, 1867*) contains a provision for a civil remedy falling under “property and civil rights” (s. 92(13) of the *Constitution Act, 1867*). If this federal trenching on provincial powers is justified, it does not follow that Parliament will be permitted to provide for a civil remedy for all legislative enactments under s. 91(2). What will have been justified is the legislative scheme as a manifestation of the exercise of the conditional power and not the unconditional power Parliament exercised in enacting the law. The Supreme Court of Canada encountered such a legislative scheme in *General Motors of Canada v. City National Leasing*³⁷. The Court clearly justified the infringement with recourse to the legislative scheme as it recognized the civil remedy provision, in part, rendered the scheme more effective.

A balance is required between stretching the scope of legislative power to achieve efficient legislative schemes and the integrity of exclusive spheres of competence. The ancillary power doctrine, infused with the fundamental constitutional principle of Federalism, provides an opportunity to fulfill this balance. What I am proposing is a justification analysis for the ancillary power doctrine that will simplify the maintenance of federal equilibrium.

³⁶ Sidney R. PECK, “An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms”, (1987) 25 *Osgoode Hall L.J.* 1, 27 and 28 (emphasis added).

³⁷ [1989] 1 S.C.R. 641 (hereinafter *G.M. Canada*).

3. Allowing for the Courts' Guidance Function

In order for legal and political communities to govern themselves appropriately, “[i]t is absolutely essential that the court specify the variables it considers important to the validity or invalidity of a particular statute”³⁸. The proposed justification test for the division of powers would allow for dialogue between courts and legislatures by outlining these variables. The guidance function of courts both exists and is possible with Charter decisions because the *Oakes* test outlines the criteria for justifying a Charter infringement³⁹. When a court reasons why a law has failed the *Oakes* test, legislatures may reconsider how to reconcile Charter values with social objectives in light of those reasons. A judgement finding a law unconstitutional is not a veto on desired legislative policies. Rather, the judgement is an explanation as to why the particular legislative scheme is not at par with constitutional standards. By contrast, should a court merely conclude that an infringement is not a “reasonable limit demonstrably justified in a free and democratic society” without any further reasons, then no guidance would be possible since legislatures would remain clueless as to why the law is unconstitutional.

The reasoning employed in division of powers cases does not allow for the exercise of the courts' guidance function. Rather, the mode of reasoning is what I call the “nominative” method of judging. This method consists of judging with labels instead of judging with reasons. In other words, the reasoning justifying a trenching is more conclusionary than explanatory. Indeed, it is not uncommon to be unable to distil from a judgement much else than a declaration of pith and substance and a conclusion of constitutionality on that basis. The emphasis in division of powers judgements is on terminology rather than on the reasons of why a law is or is not constitutional. Courts utilize an apodictic method of adjudication by presenting their findings as rhetorically self-evident and without need of justification or reasoning. Although I will return below to explore in more depth the nominative method of judging, I underline at this point that it hinders the opportunity for guidance, an opportunity which is as much needed for the division of powers as it is for the Charter. Indeed, given that conditional legislative power involves an inherent uncertainty, legislatures must be guided by the

³⁸ P. WEILER, *loc. cit.*, note 23, 366.

³⁹ For a discussion of dialogue, see: P.W. HOGG, *op. cit.*, note 18, p. 33-12.

courts, interpreters of the constitution, as to when the exercise of that power is mandated and thereby justified.

4. The Core Analysis

The Charter offers different levels of constitutional protection for different exercises of a right. This was explored in *R. v. Keegstra*⁴⁰ as the Supreme Court of Canada reviewed the hate propaganda provision of the *Criminal Code*. Dickson C.J., writing for the majority, noted that “the s. 1 analysis of a limit upon s. 2(b) cannot ignore the *nature of the expressive activity* which the state seeks to restrict”⁴¹. In performing this analysis, Dickson C.J. emphasized that “[o]ne must ask whether the expression prohibited by s. 319(2) is tenuously connected to the values underlying s. 2(b) so as to make the restriction ‘easier to justify than other infringements’”⁴². At the core of freedom of expression lies the need to ensure that the truth and the common good are attained⁴³. Since hate propaganda, as an exercise of freedom of expression, diverts the search for the truth, it is less worthy of constitutional protection and as such it is easier to justify state intrusion on this form of expression.

At the core of a right is its truest “purpose”. For freedom of expression, this is the search for the truth. I submit that the core of a right may never be infringed nor justified since no “free and democratic society” would permit the core of a Charter right to be infringed. The only manner to impugn the core of a right is through the “notwithstanding” clause found in section 33 of the Charter.

Surrounding the core of a right is a sphere representing different levels of this right. The further from the core the exercise of a right, the further it is from the “purpose” of that right. The further from the purpose, the lesser the exercise of the right reflects Charter values and principles. Therefore, as *Keegstra* has demonstrated, the degree of protection belonging to the exercise of a right will be inversely proportional to its distance from its core⁴⁴. As a result,

⁴⁰ [1990] 3 S.C.R. 697 (hereinafter *Keegstra*).

⁴¹ *Id.*, 760 (emphasis added).

⁴² *Id.*, 761.

⁴³ *Id.*, 762.

⁴⁴ On this point, see: L’Heureux-Dubé J. in *R. v. O’Connor*, [1995] 4 S.C.R. 411, 485 and 486: “The greater the reasonable expectation of privacy and the more significant the deleterious effects from its breach, the more compelling must be

“[t]he government must shoulder a heavier justificatory burden when the Charter infringement is severe”⁴⁵. The level of appreciation applicable to the section 1 analysis varies according to the distance the infringement is from the core. As Professor Hogg has aptly summarized, there is “a close relationship between the *standard of justification* required under s. 1 and the *scope of guaranteed rights*”⁴⁶.

For the division of powers, the same core analysis applies. The case of *Peel (Regional Municipality of) v. MacKenzie*⁴⁷ is one illustration of how legislation coming too close to trenching upon the core of a power will be subject to strict review. The issue in *Peel* was whether Parliament could impose on municipalities the cost of supporting “juvenile delinquents”. The federal government argued that this fell within its authority under the criminal law. Municipalities, however, are clearly within the authority of the provinces. The Supreme Court’s concern with the implications of permitting Parliament to trench upon the provinces’ jurisdiction over municipalities was obvious. The Court held that the federal government had not demonstrated that Parliament could “impose a financial burden upon an institution [...] which is the creature of the Provincial Legislature and whose powers [...] are defined solely by provincial legislation”⁴⁸. The Court was of the opinion that municipalities were very close to the core of provincial power by requiring that the infringement be “essential” to the operation of the federal scheme.

As mentioned above, the “margin of appreciation”⁴⁹ applicable to a justification analysis is informed by the degree of the infringement or trenching. For example, the more the legislative scheme reposes on the conditional power, the greater will be the trenching on the unconditional power of the other level of government. As such, the greater the reliance on conditional power, the greater the encroachment and the less the margin of appreciation applicable to the justification of the exercise of that power. In *G.M. Canada*, the

the State objective, and the salutary effects of that objective, in order to justify interference with this right.”

⁴⁵ *Egan v. Canada*, [1995] 2 S.C.R. 513, par. 76, citing *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 1190.

⁴⁶ P.W. HOGG, *op. cit.*, note 18, p. 35-6 (emphasis added).

⁴⁷ [1982] 2 S.C.R. 9 (hereinafter *Peel*).

⁴⁸ *Id.*, 19.

⁴⁹ See: *Irwin Toy v. Québec*, [1989] 1 S.C.R. 927.

Supreme Court held that “[a]s the seriousness of the encroachment on [...] powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained”⁵⁰. The Court suggested in *obiter* that this constitutional balance is maintained by different tests applicable to different degrees of intrusion⁵¹. I favor simplifying this approach by proposing one test and subjecting it to different levels of appreciation. This is the method employed for the Charter. The structure of the *Oakes* test does not change according to the different levels of state intrusion. Rather, the *Oakes* test is applied with different levels of appreciation or severity depending on the degree of state intrusion. In short, the justification test I am proposing would govern all infringements of the division of powers in the same manner that the *Oakes* test governs all infringements of the Charter. I recognize that some heads of power have been interpreted under the “watertight compartments” doctrine and others with the “double aspect” doctrine. The ancillary power justification test I am proposing, along with my distinction between unconditional and conditional powers, incorporates some aspects of both federalism doctrines and attempts to find a just middle between them.

As the preceding analysis has aimed to demonstrate, there are several similarities between the Charter and the division of powers. These similarities will be used to draw from the *Oakes* test experience in articulating a justification test for the ancillary power doctrine.

B. The Differences

Although section 1 of the Charter will be the basis for the proposed test, it must be adapted in light of the division of powers and the constitutional principle Federalism. This requires an account of several significant differentiating aspects. The following analysis aims to outline some of these differences by exploring the following: first, the underpinnings of the Charter and the division of powers

⁵⁰ *G.M. Canada, supra*, note 37, 671.

⁵¹ *Id.*: “These cases are best understood as setting out the proper test for the particular context in issue, rather than attempting to articulate a test of general application with reference to all contexts.”

will be contrasted; second, an examination of when each justification analysis begins will be made; and third, the perspective through which a justification test must be considered will be analyzed.

1. The Underpinnings of the Division of Powers and the Charter

The context in which to consider the ancillary power doctrine justification test must be representative of the differences between the division of powers and the Charter. A useful starting point for assessing these differences is to refer to the preambles of the *Constitution Act, 1867* and the *Constitution Act, 1982*. The *Constitution Act, 1867*'s preamble makes no reference to the people of Canada. Rather, the emphasis is on the "Provinces of Canada", the "Welfare of the Provinces", and the "Desire to be federally united". The spirit of the *Constitution Act, 1867* clearly lies with government and their respective powers. In stark contrast reads the preamble to the *Constitution Act, 1982*. Although no explicit reference is made to the people of Canada, the message immediately preceding the Charter is nonetheless clear. It states that Canada is founded on principles recognizing the "supremacy of God and the rule of law". These principles are greater in importance to the power to legislate. They are fundamental and have, at least for the rule of law, international recognition. I propose that this can be construed as expressing a willingness to limit the scope of legislative powers for the respect of greater principles.

A review of sections 91 and 92 of the *Constitution Act, 1867* reveals that "functional effectiveness" was a factor in distributing legislative powers. Effectiveness, in this context, incorporates several considerations. Indeed, the Canadian federal structure "facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity"⁵². It is unrealistic to suppose that any division of legislative powers could achieve a perfect division. The ancillary power doctrine recognizes that "federalism is a political and legal response to underlying social and political realities"⁵³. Social and political realities are dynamic and shift over time. As such, the division of powers must be able to adapt to these

⁵² *Reference Re Secession of Quebec*, *supra*, note 3, par. 58.

⁵³ *Id.*, par. 57.



changes since the federal structure of Canada should facilitate effective legislative implementation, not hinder it. As such, the ancillary power doctrine allows the federal structure of Canada to evolve in order to meet changing realities.

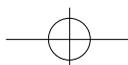
A need for flexibility exists in order to permit both levels of government to implement effective and complete legislative schemes. It must not be forgotten that from the perspective of the governed, the federal and provincial governments are different elements of a single system⁵⁴. Together, either through cooperation or independent action, both governments are responsible for governing Canada and responding to the needs of Canadians⁵⁵. The ancillary power doctrine, guided by a concern for effective legislation, while maintaining a respect for the spirit of Canadian federalism, aids both governments to respond to these needs all while recognizing that democratic participation requires that citizens know which level of government is responsible for what legislative domain.

The Charter, on the other hand, does not have as its purpose effective legislation *per se*. Rather, the justification analysis for Charter infringements must lie in the spirit of Charter values and principles. These Charter values require an infringement upon fundamental rights and freedoms of an individual to be justified by a government objective that benefits the members of Canadian society. Unlike the critical morality movement, Canada's utilitarian theory of rights infringement balances infringements in context. Canadian society, via a model of possibility, not opportunity, must be better served by limiting its own rights and freedoms than by upholding them. In this sense, the justification analysis under the *Oakes* test must be perceived through the state's role in relation to the individual. The state must demonstrate that the individual whose Charter rights are limited will be better served, in a communal sense, by limiting his or her rights.

The values protected by the Charter are also protected in other human rights documents. Indeed, many of the rights and freedoms guaranteed by the Charter are mirrored in international documents. In this sense, the Charter exists in a culture of human rights and therefore, although a product of Canada, cannot be said to be

⁵⁴ See: R.E. SIMEON, "Criteria for Choice in Federal Systems", (1983) 8 *Queen's L.J.* 131, 141.

⁵⁵ *Id.*



infused only with Canadian values. Often, decisions interpreting the Charter will refer to international materials in order to better appreciate the values underlying the rights in question.

The division of powers, on the other hand, is wholly a product of Canada. There is no recognized principle among federations as to which level of government should be empowered with which power⁵⁶. Some have suggested that, *grosso modo*, the Canadian division of legislative powers was “geographically” initiated⁵⁷. The power is Federal if its object is national, interprovincial, or international; Provincial if its object is intraprovincial. This geographical aspect to the division of powers was obliquely recognized by Le Dain J. in *R. v. Crown Zellerbach*. He held that “[t]he national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local and private nature in a province, have since [...] become matters of national concern”⁵⁸. Since the constitution’s division of powers and our conception of Federalism is purely Canadian unlike the Charter which must be interpreted in light of international norms and a human rights culture, the division of powers can be understood with reference to purely national and local concerns.

I have aimed to show that the underpinnings of the Charter and the division of powers differ in some important respects. Whereas the former is concerned primarily with limiting the scope of legislative power, the latter is devoted with recognizing and at times expanding this scope.

2. Determining When the Justification Analysis Begins

Section 1 of the Charter applies only after a law is found to infringe a protected right. In this sense, the justification analysis is undertaken with a quasi-presumption of unconstitutionality. Dickson C.J. identified this in *Oakes* when he wrote that “any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms”⁵⁹. I suggest that

⁵⁶ For *e.g.*, Canada’s constitution is an exception to other federal states regarding the residual power clause. In Canada, the power is federal, not provincial: introductory paragraph, s. 91, *Constitution Act, 1867*.

⁵⁷ See: F. CHEVRETTE and H. MARX, *op. cit.*, note 9, p. 286.

⁵⁸ [1988] 1 S.C.R. 401, par. 33 (hereinafter *Crown Zellerbach*).

⁵⁹ *Supra*, note 21, par. 63.

for the ancillary power doctrine, the analysis is undertaken with the opposite quasi-presumption.

Prior to applying the ancillary power doctrine, the law being challenged must be in pith and substance within the authority of the enacting body's unconditional power. If it is not, there is no infringement *per se*. Rather, the law is outside the scope of unconditional power of the legislature seeking to enforce it. This situation is tantamount to a legislative objective contrary to the Charter. In such a case, the Supreme Court has held that no *Oakes* analysis is mandated⁶⁰. Alternatively, if the law is in pith and substance within the authority of the enacting body, the second step is to determine if the law trenches the jurisdiction of the other level of government, be it directly or indirectly. If it does, then the exercise of the conditional power must be justified. Therefore, unlike the analysis under section 1 of the Charter, which is undertaken with a quasi-presumption of unconstitutionality, this same quasi-presumption does not exist for the ancillary power doctrine, or in the least, it does not exist with the same force. Although a trenching has been established in order to trigger the ancillary power doctrine, the law being challenged has already been classified as being of pith and substance within the authority of the enacting legislature. As a result, this lends some support to a finding of constitutionality.

By quasi-presumption, I should not want to be understood as referring to the burden of proof in constitutional challenges. Rather, my aim is to demonstrate that a justification analysis is undertaken from a different perspective for the division of powers. Indeed, there may be more of a margin of appreciation than with the *Charter*. As for the burden of proof, I foresee that the same two-part process would equally be applicable for the ancillary power doctrine: first, the claimant must show either that the law is not in pith and substance within the authority of the enacting legislature or that if it is, it trenches the division of powers by having recourse to the conditional powers by having recourse to conditional power; second, the enacting legislature must show that the encroachment is justified. More will be said on this below.

Although courts should undertake to consider the effects of a legislative scheme when determining its constitutionality, this

⁶⁰ See *e.g.* the discussion in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, on the government's objective under the first branch of the *Oakes* test (hereinafter *Vriend*). See also: *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

should not be a part of the pith and substance determination (unless the legislation is colourable)⁶¹. The justification analysis that I am proposing would make the pith and substance determination independent from considerations such as the effects of legislation. By clearly separating the process of characterizing pith and substance from other concerns, this will allow the pith and substance analysis to truly reflect the “true meaning of a law”, its “content or subject matter”, or the “leading feature” and not some ulterior motives in judging the validity of the legislative scheme⁶². In other words, a determination of whether one of the enumerated unconditional powers of a legislature has been exercised should remain free of considerations external to the legislative scheme itself. These other external considerations, proper to a determination of whether or not recourse has been made to the conditional power of the enumerated head, be it textually or in the effects of the scheme, should be undertaken only as a second moment.

3. The Different Perspectives in a Justification Analysis

As briefly reviewed above, for Charter cases, there is shift in who bears the burden of proof. Initially, the burden rests on the claimant in order to establish an infringement of the Charter. Once established, it is the state that bears the burden of demonstrating that the infringement is justified. In order to reflect this shift, there must equally be a shift in perspective. When a claimant is arguing that a Charter right has been infringed, the perspective through which the question should be considered is that of the individual. The Charter protects individual rights and freedoms from state intrusion. At this stage, the government’s objective in limiting a right has no bearing. Rights should be given full and ample meaning prior to the section 1 analysis so as to avoid limiting their ambit twice, *i.e.* both

⁶¹ On this point, see, *contra*, *Firearms Reference*, *supra*, note 1, par. 16: “To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the *legal effect* of the law” (emphasis added).

⁶² For an example of such ulterior motives, see the *Firearms Reference*, *supra*, note 1, par. 49: There requires a determination as to whether the “effects are *incidental*, in which case they are constitutionally irrelevant, or whether they are so *substantial* that they show that the law is mainly, or ‘in pith and substance’, [outside the authority of the enacting body]” (emphasis added). In my opinion, this distinction confuses the pith and substance determination.

prior to and at the section 1 analysis. Once the claimant has established, through the perspective of the individual, that a Charter right has been infringed, the perspective changes. Section 1 is not considered through the perspective of the individual. Rather, it is considered through the perspective of the government's objective in limiting the individual's Charter guarantee. This focuses on the legislative attempt to better Canada's "free and democratic society". Hence, Charter perspectives shift focus from the individual (to establish the infringement) to the government (to justify the infringement). As I intend to show, the opposite shift occurs for the division of powers.

Whereas the Charter is intended to constrain governmental action, the division of powers authorizes it. When a claimant argues that legislation is trenching the division of powers, the perspective through which the challenge should be considered is that of the government whose jurisdiction is allegedly trenched. This, like the Charter, imposes the burden on the party alleging the encroachment. Once a trenching has been demonstrated, the perspective should change. The ancillary power doctrine should be considered through the perspective of the individual as a member of Canadian society⁶³. This perspective is based on the tri-polar nature of federalism challenges. Since two powers are competing in the context of a legislative scheme, the balancing process should be informed from an individual's perspective so as to study the impact of federalism on the people of Canada. From this point of view, it is realized that the two levels of government are part of a single system. Since "functional effectiveness" is one of the goals of the division of powers, the justification analysis I am proposing should be guided by the following concern: "Will the people of Canada be better governed by allowing the encroachment?" In order to answer this question, a balancing of competing interests must be performed. As I have aimed to demonstrate, this balancing is between strict adherence to the division of powers and a complete legislative scheme. Hence, the perspectives used in the division of powers shift focus from the gov-

⁶³ On this point, see: P.A. FREUND, "Review and Federalism", in E. CAHN (ed.), *Supreme Court and Supreme Law*, p. 86 (1971): "The late Robert Benchey is said to have written a thesis at college on The Alaskan Fisheries Dispute as *Viewed through the Eyes of a Fish*. Something of the sort should be undertaken for American federalism. [...] We know too little of the *impact of the system on the individuals* for whom, with considerable effort, the complex mechanism is maintained" (emphasis added).



ernment (to establish the trenching) to the individual (to justify the trenching). As seen above, the opposite is true for the Charter.

This foregoing analysis of the differences between the division of powers and the Charter has aimed to demonstrate that in order to adapt the *Oakes* test to division of powers trenching justification, a shift in focus must be undertaken.

II. The Ancillary Power Justification Test

The foregoing analysis has aimed, through the discussion of similarities and differences, to demonstrate that the *Oakes* test will be a useful guide in articulating the ancillary power justification test. In this Part, I will first set the foundation for the proposed justification test and second, examine each branch of this test through a study of both division of powers and Charter jurisprudence.

A. Setting the Foundation

My aim in this section is to demonstrate that justification tests all share inherently similar characteristics. As a result, the *Oakes* test experience will be shown to be quite relevant to the application of the ancillary power doctrine. In order to support this position, I shall examine the following three points: first, I shall briefly review justification tests in general; second, I shall use case law examples to demonstrate the need for a more structured approach to division of powers infringement justification; third, I will support the promotion of my justification test by demonstrating that it is the next step the Supreme Court of Canada should take since it has begun introducing general tests to justify legislative encroachments on the division of powers.

1. The Nature of a Justification Analysis

A justification analysis will require certain questions to be answered. These questions are not contingent on what is being justified. Rather, the same questions can be used to justify an infringement of the Charter and a trenching of the division of powers. As a starting point, it is almost a natural reflex to question what is the objective of the legislative scheme. However, a valid objective, although a *sine qua non* to justifying a constitutional infringement, is in itself insufficient since it does not address the specifics of the

infringement itself. The means chosen to achieve a valid objective must themselves be reasonable; they must be proportional to the objective. The Court of Justice of the European Community regards the “principle of proportionality” as a general principle of law⁶⁴. Under the Charter, this proportionality principle is comprised of three components: first, the measures adopted must be rationally connected to the objective (rational connection); second, there must be proportionality between the deleterious effects of the measures that are responsible for the infringement and the objective as well as “a proportionality between the deleterious and salutary effects of the measures”⁶⁵ (proportionate effects); third, the means should minimally impair the jurisdiction of the other level of government (minimal impairment). In other words, the means employed to achieve the valid objective should keep the legislative scheme far from the core of the encroached power.

Upon a review of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁶⁶ and the *International Covenant on Civil and Political Rights*⁶⁷, Bleckman and Bothe came to the conclusion that there are several common elements to a justification analysis: “limitations are only permissible to protect another compelling valid interest and that limitation must at least be an appropriate means to protect that other interest”⁶⁸. Two elements were established pursuant to this review of the common components of a justification analysis. Both these elements are based on the principle of proportionality. The first element requires that there be “some *relationship* between the limitation and the goal of the limitation”⁶⁹. Under Canadian jurisprudence, this “relationship” is the rational connection criterion of the *Oakes* test. The second element requires that the “limitation [...] not be excessive”⁷⁰. I take

⁶⁴ F. G. JACOBS, “The ‘Limitation Clauses’ of the European Convention on Human Rights” in Armand L.C. DE MESTRAL, I. COTLER, D. KLINCK and André MOREL (eds.), *The Limitation of Human Rights in Comparative Constitutional Law*, Cowansville, Éditions Yvon Blais, 1986, p. 34.

⁶⁵ *Dagenais v. C.B.C.*, [1984] 3 S.C.R. 834, par. 95.

⁶⁶ 4 November 1950, 213 U.N.T.S. 221, E.T.S. No. 5.

⁶⁷ 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No.47.

⁶⁸ A. BLECKMAN and M. BOTHE, “General Report on the Theory of Limitations on Human Rights”, in A.L.C. DE MESTRAL, I. COTLER, D. KLINCK and A. MOREL (eds.), *op. cit.*, note 64, p. 107.

⁶⁹ *Id.*, 108 (emphasis added).

⁷⁰ *Id.*, 109.

this “non-excessiveness” to refer to the minimal impairment criterion of the *Oakes* test.

My aim in bringing to light these aspects of the principle of proportionality is to demonstrate that justification tests, such as the *Oakes* test, share common elements. Therefore, in outlining a justification analysis for trenching of the division of powers, I am taking consideration of these common components. It should be expected that my articulation of the ancillary power justification test will resemble in great part the spirit of the *Oakes* test.

2. The Nominative Method of Division of Powers Adjudication

As I mentioned earlier, cases dealing with challenges under the division of powers are often resolved through a nominative method of reasoning. This nominative method substitutes judgement with “reasons” with judgement with “labels”. The justification analysis I am proposing would render judgements more transparent as it would clearly outline many of the hidden concerns now underlying federalism judgements.

In reviewing federalism cases, Weiler has noted that often judgements are “shot through with [...] verbal formulae masquerading as legal guidelines [without a single sentence] which purports to show why one scheme is valid, but the other is not”⁷¹. As a result, “[t]he absence of reasoned justification [leaves] little or no legal basis for predicting [results]”⁷². The tactic of “short, sparsely reasoned and highly adjudicative opinions [...] detracts from the quality of the legal product which is the outcome”⁷³. An example of the nominative method of adjudication arose in the “chicken and egg war”⁷⁴.

⁷¹ Paul WEILER, “The Umpire of Canadian Federalism”, in Paul WEILER, *In the Last Resort; a Critical Study of the Supreme Court of Canada*, Toronto, Carswell, 1974, p. 155, at p. 161, critiquing the reasons (or lack thereof) of Martland J. in *A.G. Manitoba v. Manitoba Egg & Poultry Assn.*, [1971] S.C.R. 689 (hereinafter *Manitoba Egg Reference*).

⁷² P. WEILER, *loc. cit.*, note 23, 333.

⁷³ *Id.*, 365.

⁷⁴ This is the popular name for the *Manitoba Egg Reference*, *supra*, note 71. For a review of the political, economic, and legal aspects surrounding this case, see: P. WEILER, *loc. cit.*, note 23.

The legal issue in the *Manitoba Egg Reference* concerned the discriminatory application of provincial marketing quotas against out of province producers. Prior to the judgement in that case were two precedents on point. In 1940, the Supreme Court upheld provincial fixing of minimum and maximum prices of gasoline and fuel oil even if it was clear that the legislation was aimed at extra-provincial producers⁷⁵. In 1968, a Quebec legislative scheme required a non-Quebec based company to pay a significantly greater price for raw milk than Quebec-based producers⁷⁶. The Supreme Court upheld this scheme on the theory that each transaction and each regulation must be examined on its facts⁷⁷. Martland J., in that case, held that the orders were not “directed” at the regulation of interprovincial trade and that they merely had “some effect” upon the cost of doing business in Quebec⁷⁸. With these precedents, the Supreme Court heard the *Manitoba Egg Reference*. Instead of outlining what distinguished this scheme from precedent, Martland J. held that “the plan now in issue not only *affects* interprovincial trade, but it *aims at* the regulation of such trade [...] the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs”⁷⁹. The labels “affect” and “aim at” are examples of a nominalistic method of judging. Nowhere in the judgement is there an explanation of the meaning of these terms. Martland J.’s reasoning is more conclusionary than explanatory leaving the distinction between the *Manitoba Egg Reference* and precedent one of legal commentary.

A second and more historic example of the nominative method of adjudication is found in the two decisions of the Privy Council *Bank of Toronto v. Lambe*⁸⁰ and *A.G. Alberta v. A.G. Canada*⁸¹. In both cases, provincial acts imposed a direct tax on banks. Although direct taxation is within the jurisdiction of the provinces, banks are within the jurisdiction of the federal government. The question before the Privy Council in both cases was whether the provincial

⁷⁵ *Home Oil Distributors v. A.G. British Columbia*, [1940] S.C.R. 444.

⁷⁶ *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238 (hereinafter *Carnation*). Although the aim of the legislation in this case may not have been discriminatory, the effects of its application nonetheless distinguished between in- and out-of-province producers.

⁷⁷ See: P. WEILER, *loc. cit.* note 71, 160.

⁷⁸ *Carnation*, *supra* note 76, 254, cited in P. WEILER, *loc. cit.*, note 23, 335.

⁷⁹ *Manitoba Egg Reference*, *supra*, note 71, 703 (emphasis added).

⁸⁰ (1887), 12 A.C. 575 (P.C.) (hereinafter *Lambe*).

⁸¹ [1939] A.C. 117 (P.C.) (hereinafter *Alberta Taxation Reference*).

legislative scheme was valid as being a proper exercise of provincial power.

In *Lambe*, the legislative scheme imposed a tax on banks, insurance companies, and certain incorporated companies. The Privy Council held that “the tax now in question is demanded directly of the bank apparently for the *reasonable purpose* of getting contributions for provincial purposes from those who are making profits by provincial business”⁸². The nominalistic method in this case is demonstrated by the use of the key words “reasonable purpose”. No part of the judgement hints at what constitutes a “reasonable purpose” or why this scheme’s purpose is reasonable. Although we may speculate that it is because the law in question did not aim specifically at banks but rather included them as part of a general scheme (indirect trenching), the Judicial Committee did not outline this. Is a “reasonable purpose” commensurate with a valid objective? The shortcomings of this approach were evidenced some time later when the Privy Council had to consider a similar provincial scheme.

In the *Alberta Taxation Reference*, the provincial law differed slightly from that in *Lambe* as it applied a direct tax only to banks. The Judicial Committee could have relied on *Lambe* and reasoned that this provincial scheme did not support a “reasonable purpose”, but it did not. There is no mention of the term “reasonable purpose” in the judgement. Rather, the Privy Council rested on the doctrine of colourable legislation and determined that the “magnitude of the tax proposed for Alberta was such that, if it were applied by each of the provinces, it would have the effect of preventing banks from carrying on business”⁸³. Is the concern with the magnitude of the tax analogous to a minimal impairment criterion? This may be the suggestion of the Judicial Committee as it held that the encroachment went so far as to render the federal competence “valueless”⁸⁴. In other words, the provincial scheme intruded the very core of federal power to legislate on banks.

My aim in reviewing these two cases is to demonstrate the shortcomings of the nominalistic method of judging. Although there is a clear distinguishing to be made between the two provincial schemes, it does not appear in the judgement. In *Lambe*, the

⁸² *Lambe*, *supra*, note 80, 583 (emphasis added).

⁸³ *Alberta Taxation Reference*, *supra*, note 81, 132.

⁸⁴ *Id.*, 129.

Judicial Committee was concerned with the “reasonable purpose” of the legislative scheme. In the *Alberta Taxation Reference*, the concern lied with the “magnitude” of the scheme. This lack of consistency acts as a constant barrier to dialogue between courts and legislatures. The justification analysis I am proposing would help circumvent this. By outlining why the ancillary power doctrine does or does not permit trenching in favor of the legislative scheme in question, the reasoning behind a judgement would be made apparent and allow for the courts’ guidance function.

3. The Supreme Court of Canada and Generalized Justification Tests

Some prominent Supreme Court cases appear to establish a trend in favour of articulating general tests for deciding questions under the division of powers. I will review two cases to demonstrate this.

In *G.M. Canada*⁸⁵, the Supreme Court had to determine whether a legislative scheme was a valid exercise of the federal government’s power over “general regulation of trade” (s. 91(2) of the *Constitution Act, 1867*) or whether it was invalid as coming within the provinces jurisdiction over intraprovincial trade (s. 92(16) of the *Constitution Act, 1867*). The legislative scheme was upheld as a proper exercise of federal power. This judgement did not fall victim to the nominalistic method of adjudication. Instead, the Court applied a test to justify the law as coming within the general regulation of trade. The test is comprised of the following criteria:

- 1° the presence of a general regulatory scheme;
- 2° the oversight of a regulatory agency;
- 3° a concern with trade as a whole rather than with a particular industry;
- 4° the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting;
- 5° failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

⁸⁵ *Supra*, note 37.

In one sense, this is a justification analysis as it aims to justify a federal trenching on the provincial power to legislate on matters of intraprovincial trade. Furthermore, I submit that this test is analogous to the *Oakes* test. This should not be surprising. As I have aimed to demonstrate above, there are certain elements common to all justification tests. For example, branches 1^o, 2^o, and 3^o outline the “objective” of the federal legislative scheme. The scheme must have these objectives in order to be a proper exercise of “general regulation in trade”. If the scheme does not satisfy these objectives, then it cannot be justified. Branches 4^o and 5^o represent the “principle of proportionality”. The requirements of “provincial incapability” and “jeopardizing the successful operation of the scheme” are analogous to the minimal impairment branch of the *Oakes* test in the sense that if the federal legislative scheme is held valid, it is because its objective will be impossible to be effectively pursued by anyone else. The impairment is therefore minimal, a lesser one being devoid of effectiveness. In this sense, these requirements require that the federal scheme be far from the core of the province’s power to legislate intraprovincial trade. If the scheme does not satisfy branches 4^o and 5^o, then it can be said that the federal scheme is actually governing intraprovincial trade.

There is a second part to the *G.M. Canada* judgement that also constitutes a justification analysis. The Act in question, although a proper exercise of the federal power on general regulation of trade, contained a provision for a private remedy (direct trenching). This provision clearly fell within the jurisdiction of the provinces under s. 92(13) of the *Constitution Act, 1867*. When a particular provision of an Act is being challenged rather than the Act as a whole, the Supreme Court set out the “integration test” (which, in my opinion, is essentially one aspect of the ancillary power doctrine). The following steps were outlined. First, it must be determine whether the impugned provision intrudes on provincial powers, and if so, to what extent. Second, it must be established whether the Act is valid. If it is not, this ends the inquiry. If it is valid, it must then be determined whether the impugned provision is sufficiently integrated into the legislative scheme so that it can be upheld by reason of its relationship to the scheme.

The Court required the degree of integration into the legislative scheme to be proportional to the degree of intrusion into the jurisdiction of the other level of government. This relationship can be traced to my core analysis. On this point, the Supreme Court held

that in order to arrive “at the correct standard the court must consider the degree to which the provision intrudes on [...] powers”⁸⁶. The issue is not whether the Act is unconstitutional because it reaches too far but rather whether the provision is sufficiently integrated into the Act to sustain its constitutionality. In order to determine the issue, the Supreme Court considered the objective of the trenching and held that the purpose of the civil remedy was to help enforce the substantive aspects of the Act. This was a valid objective.

The Court’s integration test is also a justification analysis since it justifies federal intrusion into provincial jurisdiction. In determining whether the integration test was satisfied, the Supreme Court considered many of the same questions posed by the *Oakes* test. The Court considered the objective of the infringement and determined that it was to aid in the enforcement of the scheme. The Court then considered the rational connection between the provision and the objective by requiring that it be sufficiently integrated into the scheme. It also indirectly considered the minimal impairment criterion by requiring that the degree of intrusion be considered in determining whether the provision was sufficiently integrated.

It would appear from the two justification analyses undertaken in *G.M. Canada* that, contrary to what was said in the *Firearms Reference*, the “technique of weighing benefits and detriments used in s. 1 jurisprudence [*has been applied*] to the quite different exercise of defining the scope of the powers set out in ss. 91 and 92 of the *Constitution Act, 1867*”⁸⁷. A further example will support this.

I submit that the national concern aspect of the “peace, order and good government” clause in the introductory paragraph of section 91 of the *Constitution Act, 1867* is governed by a justification analysis. In *Crown Zellerbach*, the Supreme Court of Canada outlined the criteria. It should be noted from the outset, however, that this justification test differs from the *Oakes* test and the justification tests reviewed in *G.M. Canada*. The difference stems from the consequence of the justification. When the integration test in *G.M. Canada* was satisfied, it did not grant the federal government a new power. The test merely permitted Parliament to trench the division

⁸⁶ *G.M. Canada*, *supra*, note 37, 668.

⁸⁷ *Firearms Reference*, *supra*, note 1, par. 48.

of powers in respect of the legislative scheme in question. However, the consequence of satisfying the national concern test is much different. It actually creates a new power for Parliament. As a result, the conditions for satisfying this test are expected to be much more stringent because what is being justified is not a legislative scheme but rather the creation of a new federal power. In other words, what is being justified is not the exercise of a conditional power but rather the creation of a new federal unconditional power. These conditions are:

- 1° the matter must have a singleness, distinctiveness and indivisibility;
- 2° this matter must be clearly distinguishable from matters of provincial concern;
- 3° the scale of impact on provincial jurisdiction must be reconcilable with the fundamental distribution of legislative power under the *Constitution Act, 1867*⁸⁸.

Despite the difference between this test and the others reviewed above, there are nonetheless some analogies to be drawn from it. Branches 1° and 2° both limit and define what new federal power is being created. I make the analogy to the minimal impairment criterion in the *Oakes* test since the concern expressed by these two branches is to disallow any generous shift of power. On this point, the Supreme Court has said that 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”⁸⁹. This is similar to the notion of provincial incapability present in the “general regulation of trade” test from *G.M. Canada*. Once again, there is a clear emphasis that the core of provincial powers not be infringed, or in this case, shifted to the federal government. Branch 3° expresses a policy concern that a federal equilibrium be maintained. In my opinion, the analogy here lies with the last branch of the *Oakes* test which, as I will show below, represents a policy concern. Even if the objective is valid and the rational connection and minimal impairment criteria are satisfied, if the deleterious effects are too burdensome, then the legislative scheme does not satisfy the *Oakes* test. Similarly,

⁸⁸ *Crown Zellerbach, supra*, note 58, par. 33.

⁸⁹ *Id.*

even if the first two branches of the national concern test are satisfied, if the shift in power would disrupt federal equilibrium, the creation of a new federal power is denied.

The judgements in *G.M. Canada* and *Crown Zellerbach* demonstrate two things. First, the Supreme Court is leaning towards a less nominalistic and more thorough method of division of powers adjudication. Second, the justification tests articulated by the Supreme Court are analogous in several respects to the *Oakes* test and, more generally, to justification tests in general. Therefore, on the basis of this review, I have articulated the justification test for the ancillary power doctrine in a manner similar to the *Oakes* test. It reads as follows:

- 1° Is the objective of sufficient importance to warrant trenching the division of legislative power under the *Constitution Act, 1867*?
- 2° Are the means of the legal scheme proportional to the objective:
 - a. Are the measures adopted rationally connected to the objective?
 - b. Is federal equilibrium maintained having regard to the balance between the deleterious effects and both the objective and the salutary effects?
 - c. Does the exercise of the conditional power minimally encroach upon the core of the competing unconditional power?

B. Articulating the Justification Test

The ancillary power doctrine applies when a law is both found to be in pith and substance within the authority of the enacting body and trenches the division of powers. Only thereafter is each branch of proposed justification analysis considered. I will now review each branch of the ancillary power justification test with case law examples from both Charter and division of powers decisions.

1. Objective

The objective of a law is not the same as its pith and substance. A similar point is emphasized in Charter cases where a distinction



is drawn between the “object” of a legislative scheme and a state “objective”. The object is the overall goal of the legislation as manifested in the scheme, *i.e.* what the scheme aims to achieve. The objective, on the other hand, refers to the government’s goal in infringing the Charter. When applying the *Oakes* test, it is the objective that is relevant, not the object. The Supreme Court has emphasized that the “objective relevant to the s. 1 analysis is the *objective of the infringing measure*”⁹⁰ which must be of pressing and substantial concern in Canadian society.

I draw a similar distinction for the ancillary power justification test. The distinction is between the pith and substance of the legislative scheme and the state objective. The pith and substance for the division of powers is what the object is to the Charter. It requires a review of the overall legislative scheme viewed as a complete whole in order to determine the primary purpose. No distinction between those aspects of the legislative scheme *prima facie* valid and those *prima facie* invalid is made at the pith and substance stage. Rather, the distinction becomes relevant only to determine the government’s objective. In the same manner that the government’s objective under the Charter is its goal in infringing the Charter, the government’s objective under the ancillary power justification test is its goal in trenching (directly or indirectly) the division of powers.

The government’s objective must be related to the pith and substance of the law. For example, in *Big M* it was held that Parliament could not rely on an *ultra vires* purpose under section 1 of the Charter. Similarly, for the division of powers, the government’s objective in trenching the *Constitution Act, 1867* must itself be within its jurisdiction. If this were not the case, then the exercise of legislative power through a specific head could justify a direct and immediate end that would not be within its jurisdiction. This would be tantamount to justifying a Charter infringement with a state objective itself contrary to the Charter. This was clearly rejected by the Supreme Court in *Vriend*⁹¹. In that case, Alberta’s Human Rights Code omitted sexual orientation as a prohibited ground of discrimination. The Supreme Court required that, under the *Oakes*

⁹⁰ *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, 335 (hereinafter *RJR-MacDonald*) (emphasis added).

⁹¹ *Supra*, note 60.



test, the government's objective in infringing the section 15 guarantee account for omitting sexual orientation. Since it was determined that the objective was contrary to the Charter, it was immediately rejected⁹².

2. Rational Connection

The rational connection branch requires that the measures adopted in the legislative scheme be "carefully designed"⁹³ to achieve the objective. If they are not, then the measures may be "arbitrary, unfair, or based on irrational circumstances"⁹⁴. This analysis is not foreign to the division of powers. Laskin J.A., when member of the Ontario Court of Appeal, held that "[w]here there is admitted competence [...] to legislate to a certain point, the question of limits (where the point is passed) is best answered by whether there is a *rational, functional connection* between what is admittedly good and what is challenged"⁹⁵. The Supreme Court has adopted this "rational connection" criterion on a number of occasions⁹⁶.

As was reviewed under the Supreme Court's articulation of the "integration test" in *G.M. Canada* and my core analysis, the degree of infringement influences the degree of rational connection required to justify that infringement. The rational connection criterion has manifested itself in many forms in division of powers case law. It exists in judgements as requiring that the infringement be "essential to the efficacy of the law", or that it provides "a high degree of utility," or that it merely be a "simple aid to complete the law"⁹⁷. These different degrees of review for the rational connection

⁹² See also: *Rosenberg v. Canada*, [1998] 38 O.R. (3d) 577 (Ont. C.A.), where it was held that the objective of favouring heterosexual unions was itself discriminatory and could not form the basis of a justification under s. 1.

⁹³ *Oakes*, *supra*, note 21, par. 70.

⁹⁴ *Id.*, 139.

⁹⁵ *Papp*, *supra*, note 25, 335 and 336 (emphasis added).

⁹⁶ See *e.g.*: *R. v. Zelensky*, [1978] 2 S.C.R. 940, 995; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 183.

⁹⁷ See *e.g.*: *B.C. Electric Railway v. Vancouver, Victoria and Eastern Railway and Navigation*, (1913) 48 S.C.R. 98, 120; *Peel*, *supra*, note 47, 19: "demonstrated as essential to the operation of the legislated scheme"; *R. v. Thomas Fuller Construction*, [1980] 1 S.C.R. 695, 713: "limited to what is truly necessary for the effective exercise" [emphasis added]. See also generally: Luc HUPPÉ, "Le pouvoir accessoire en droit constitutionnel canadien", (1985) 63 *Can. Bar Rev.* 744.

criterion are explained by the relationship between “the seriousness of the encroachment [and] the test required to ensure that an appropriate constitutional balance is maintained”⁹⁸. Hence, “[t]he degree of relationship that is required is a function of the extent of the [...] intrusion”⁹⁹. Accordingly, the closer an infringement approaches the core of the infringed power, the stricter the rational connection criterion. For minor encroachments, the “simple aid” or “renders the law more complete” criterion may be appropriate. For major infringements, a stricter criterion such as “high degree of utility” or “truly necessary or essential” to the efficacy of the law is preferred¹⁰⁰.

An example of the rational connection criterion is found in *Fowler v. The Queen*¹⁰¹. In that case, the Supreme Court applied the “necessarily incidental” standard of review to the federal government’s trenching of the provinces power to legislate over property and civil rights. This strict rational connection criterion was required since the legislation contained “a blanket prohibition of certain types of activity [...] which does not delimit the elements of the offence so as to link the prohibition to any likely harm”¹⁰². The encroachment on the division of powers was grave since it was a blanket prohibition not aimed specifically at the harm in question. As a result of this degree of intrusion into the provincial sphere, the “necessarily incidental” standard of review was required. Furthermore, the Court determined that there was “no attempt to link the proscribed conduct to actual or potential harm”¹⁰³. This rendered the means chosen to achieve the objective irrational. The same concern with blanket prohibitions was present in *Oakes*. In that case, the blanket presumption of criminal intent to traffic irrespective of the amount of narcotics the person was in possession of did not satisfy the rational connection criterion.

A simple way to state the rational connection criterion is to require that the trenching *complement* rather than *supplement* the legislative scheme¹⁰⁴. The scheme, taken as a whole and evaluated

⁹⁸ *G.M. Canada, supra*, note 37, 671.

⁹⁹ *Id.*, 683.

¹⁰⁰ See generally: P.W. HOGG, *op. cit.*, note 18, p. 15-39; see also: L. HUPPÉ, *loc. cit.*, note 97, 750.

¹⁰¹ [1980] 2 S.C.R. 213.

¹⁰² *Id.*, 226.

¹⁰³ *Id.*

¹⁰⁴ See: *Papp, supra*, note 25, 394.



from the standpoint of coherency, must be more coherent and more efficient by allowing the trenching than by denying it. If it is, then the trenching complements the scheme. If it is not, then the trenching merely supplements the scheme. Distinguishing between what constitutes a complementing trenching and a supplementing trenching is achieved by an application of the doctrine of severability. Although I recognize that severability is a remedy for unconstitutional legislation, I believe it can equally be used as a litmus test for the rational connection criterion. If the trenching aspect of a law is not required to achieve the government's objective, then it is severable from the legislative scheme. Hence, if the trenching is direct (*i.e.* an *ultra vires* provision), the provision is severed from the law. If the trenching is indirect (*i.e.* *ultra vires* effects), then the application of the scheme is severed so that it does not apply to matters outside the jurisdiction of the enacting legislature. The Supreme Court would appear to support this position as it has held that the "correct approach [...] is to ask whether the provision is *functionally related* to the general objective of the legislation, and to the structure and content of the scheme"¹⁰⁵. It follows that if it is functionally related, then it complements the scheme, is not severable, and is therefore rationally connected.

3. Proportionate Effects

Under the *Oakes* test, the minimal impairment criterion is the third branch and the fourth branch is the proportionate effects criterion. I have switched the order of these branches for the ancillary power justification test. On the basis of my study of the differences between the division of powers and the Charter, it is my opinion that the balancing of deleterious effects against both the objective and the salutary effects should precede the minimal impairment criterion. As the *Oakes* test experience has demonstrated, a finding under one branch influences the finding under the other branches. For example, where the objective of infringing a Charter right is truly pressing and substantial, courts are more likely to be more lenient in assessing the minimal impairment criterion¹⁰⁶. As such, I am of the opinion that for the division of powers, the minimal

¹⁰⁵ *G.M. Canada, supra*, note 37, 683.

¹⁰⁶ On a related point, see the reasons of McLachlin J. in *RJR-MacDonald, supra*, note 90, 335: "If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised".



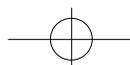
impairment branch should not be considered before the policy issues regarding the trenching have come to light. Since an encroachment renders a law *ultra vires* upon failing any one branch, the only way to ensure that minimal impairment is considered with an eye to policy considerations is to position the proportionate effects branch before the minimal impairment branch.

Since I believe the fourth branch of the *Oakes* test to be one of policy, I can explain why courts are reluctant to provide reasons for this last branch of the section 1 analysis. In my opinion, it is based on a conscious decision to refrain from engaging in active policy debates beyond those already implicit in the preceding branches of the *Oakes* test. Although the lack of reasoning undertaken at the proportionate effects branch could be explained by the hypothesis that there is nothing left to say after having considered the first three branches, this is unconvincing¹⁰⁷. The hesitation courts experience under this last branch of the *Oakes* test is best expressed by an unwillingness to say more. To fully reason the balance between the deleterious effects and both the salutary effects and the objective would be to open the policy door on the Charter, a door that deservedly has and should continue to remain shut.

Although policy has little place in the Charter, the same cannot be said for the division of powers. As explored in Part 1, the underpinnings of our federal structure and distribution of legislative powers aims at the better governing of Canadian society. As a result, when a law trenches sections 91 or 92 of the *Constitution Act, 1867*, a policy question guided by the principle of federalism must be answered. This question asks whether it is “better for the people [of Canada] that this thing be done on a national level, or on a provincial level”¹⁰⁸? If the legislative scheme being challenged is

¹⁰⁷ On this point, see: L.E. TRAKMAN, W. COLE-HAMILTON and S. GATIEN, “*R. v. Oakes* 1986-1997: Back to the Drawing Board”, (1998) 36 *Osgoode Hall L.J.* 83, 103: “*In every instance* in which the minimal impairment test was passed, the proportionality test was passed. In every instance that the minimal impairment test was failed, the proportionality test was either failed or not considered” (emphasis in original). See also *id.*, 120: “The Court tended to ignore the proportional effects test.”

¹⁰⁸ William R. LEDERMAN, “Classification of Laws and the BNA Act”, in *Legal Essays in Honour of Arthur Moxon*, Toronto, University of Toronto Press, 1953, cited in William R. LEDERMAN, *The Courts and the Canadian Constitution*, Toronto, McClelland and Stewart, 1964, p. 189.





provincial and the answer to the policy question is “the provincial level”, then the proportionate effects branch has been satisfied.

Policy concerns are present in many division of powers judgements. A few case law examples will support this assertion. In *Rio Hotel v. New Brunswick (Liquor Licensing Board)*¹⁰⁹, the constitutional question was whether a provincial prohibition of nude entertainment attached to a liquor licensing scheme could operate notwithstanding the more general but related prohibitions contained in the *Criminal Code*. The policy issue in this case was efficiency. Would the preventative measure contemplated in the provincial scheme be more efficient in achieving the prohibition of nude entertainment than the retroactive punitive measure contemplated in the *Criminal Code*? The Supreme Court opined that scheme adopted by New Brunswick would be more efficient in achieving the sought objective. Dickson C.J. concluded that “[a]lthough there is some overlap [...] there is no direct conflict. [...] The licence conditions in the instant case are only part of a comprehensive scheme regulating the sale of liquor in New Brunswick”¹¹⁰. In other words, this thing was better done on a provincial level since the salutary effects of the encroachment clearly outweighed its deleterious effects.

Policy concerns for legal uniformity have also been the subject matter of division of powers judgements. In *Whitbread v. Walley*¹¹¹, the issue was whether Parliament had jurisdiction to legislate for the tortious liability of both commercial vessels and pleasure craft whether used on tidal or non-tidal waterways. The concern for legal uniformity is apparent in the reasons of La Forest J.:

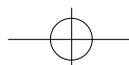
*[T]he very nature of the activities [...] makes a uniform maritime law which encompasses navigable inland waterways a practical necessity. [...] [T]his need for legal uniformity is particularly pressing in the area of tortious liability for collisions and other accidents that occur in the course of navigation.*¹¹²

¹⁰⁹ [1987] 2 S.C.R. 59.

¹¹⁰ *Id.*, par. 6 and 7.

¹¹¹ [1990] 3 S.C.R. 1273.

¹¹² *Id.*, 1294 and 1295 (emphasis added in Roman characters).



However, legal uniformity cannot extend to all matters, especially where there is no remote demonstration of a “practical necessity”¹¹³. In *Clark v. Canadian National Railway*¹¹⁴, Parliament attempted to establish a general prescription period for tortious liability resulting from railway incidents. Although the power to legislate for railways is within the jurisdiction of Parliament, the prescription period falls within the jurisdiction of the provinces. Unlike *Whitbread v. Walley*, Parliament was not able to justify the encroachment on provincial jurisdiction through legal uniformity. In the absence of a “practical necessity”, legislation cannot aim for uniformity for the sake of uniformity itself. Furthermore, the people of Canada were not benefited by this uniformity. Rather, the sole beneficiaries were the federal government and the railway companies. Instead of bettering Canadian society, the scheme would “massively disrupt and interfere with the course of personal injury litigation within the province where an accident occurred”¹¹⁵. Therefore, it was not the case that this thing was better done at the national level.

Beyond concerns for efficiency and legal uniformity, utilitarian considerations of cost and administrative accommodation could be permitted under the division of powers even if they hold no place under the Charter¹¹⁶. Since “the business of government is a practical one”¹¹⁷, the financial cost of avoiding an encroachment over allowing it should be a consideration under the ancillary power justification test. For example, financial repercussions have been the object of justification in Division of Power cases dealing with unconstitutional taxation schemes. In some circumstances, the Supreme Court did not warrant the return of revenues collected under unconstitutional schemes since, as a matter of policy, it was determined that to return the funds in such circumstances would significantly unbalance the budget¹¹⁸. Although the policy concern was of a remedial nature, the decision was premised on the fact that

¹¹³ For another example of legal uniformity, see: *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121.

¹¹⁴ [1988] 2 S.C.R. 680.

¹¹⁵ *Id.*, par. 54.

¹¹⁶ For e.g.: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

¹¹⁷ *Edwards Books*, *supra*, note 20, par. 81. Although La Forest J. articulated this statement with an eye to the Charter, it applies *a fortiori* to the division of powers.

¹¹⁸ See e.g.: *C.P. Air v. British Columbia*, [1989] 1 S.C.R. 1133; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161.



the salutary effects of allowing the encroachment outweighed the deleterious effects of correcting it.

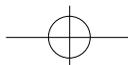
4. Minimal Impairment

The final branch of the justification test for the ancillary power doctrine is the minimal impairment criterion. Contrary to the *Oakes* test (where it is the third branch), it succeeds the policy examination rather than preceding it. As a consequence, the minimal impairment criterion should be more flexible since the policy reasons allowing for the trenching will already have been examined. This criterion should not be too strict since, especially in the context of the division of powers, it must be understood that the government must conceive its laws in such a way as to be general and have wide application. A consequence of wide application is that it incites overlap between the jurisdiction of the provinces and the federal government. This must be taken into account when assessing the minimal impairment criterion.

Minimal impairment has been considered in the context of division of powers adjudication. For example, it is an express concern in respect of provincial legislation affecting federal enterprises. It has manifested itself in the form of two doctrines. The “sterilization” doctrine allows provincial legislation to apply to federal enterprises so long as it does not sterilize them. In other words, it permits the province to trench up to the core of the federal enterprise. Clearly, this is a fairly relaxed minimal impairment criterion. The “vital part” doctrine offers more protection to federal enterprises from provincial legislation. It protects the management and operation of the federal undertaking even if the encroachment does not attain its core. As such, this manifestation of the minimal impairment criterion is more exigent than the former¹¹⁹.

The minimal impairment criterion was also central to a judgment reviewed above when discussing the nominalistic method of adjudication. In the *Alberta Taxation Reference*, the Privy Council held that the legislative scheme was colourable legislation. However, it is questionable whether the Judicial Committee’s concern was with colourability or rather with the magnitude of the tax proposed.

¹¹⁹ For a discussion of when each doctrine applies and in what circumstances, see: P.W. HOGG, *op. cit.*, note 18, p. 15-29.





Let us remember that the court noted that the magnitude of this taxation scheme “was such that, if it were applied by each of the provinces, it would have the effect of preventing banks from carrying on business”¹²⁰. In other words, the trenching by the conditional provincial power attained the core of Parliament’s power to legislate for banks. As noted above, no encroachment on the core of a power can ever be justified.

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* *

Constitutional law is not mutually exclusive. The division of powers has influenced and will continue to influence the Charter as has the Charter influenced and will continue to influence the division of powers. For example, the distinction between the “object” and the “effects” of legislation is a distinction that was drawn long before the Charter. Its origins are founded in division of powers case law although it is a distinction that is now equally a part of Charter adjudication. Another example supporting the influence between both constitutional questions is founded in the tests outlined in *G.M. Canada* and *Crown Zellerbach*. As my study of them has aimed to demonstrate, the tests are in many respects analogous to the *Oakes* test. It is questionable whether the Supreme Court would have opted for such generalized tests prior to the *Oakes* test experience.

The fundamental and organizing constitutional principle Federalism has been the “lodestar” by which I have articulated the ancillary power justification test. In demonstrating how the Charter and the division of powers overlap, I hope that it has become clear that “the technique of weighing benefits and detriments used in s. 1 jurisprudence [can and has been applied] to the [not so] different exercise of [balancing, not] defining the scope of the powers set out in ss. 91 and 92 of the *Constitution Act, 1867*”¹²¹.

In 1947, the Privy Council stated that whatever belongs to government belongs either to Parliament or to Provincial Legislatures *within the limits* of the *Constitution Act, 1867*¹²². Clearly, whatever

¹²⁰ *Alberta Taxation Reference*, *supra*, note 81, 132.

¹²¹ *Firearms Reference*, *supra*, note 1, par. 48.

¹²² *A.G. Ontario v. A.G. Canada* (Reference Appeals), [1947] A.C. 127, 581 (P.C.).



belongs to government will be informed by how we define and apply the limits of our *Constitution Act, 1867*. If we understand these limits through the constitutional principle of Federalism, we recognize that, like the Charter, constitutional questions cannot be determined in the abstract. They require a context that balances the encroaching conditional power with the competing unconditional power in light of the legislative scheme in question. This tri-polar context is what I have aimed to achieve in articulating the ancillary power justification test.

