

“PITH AND SUBSTANCE” RE-EXAMINED

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The concept of “pith and substance” occupies a central role in the framework for analyzing the constitutional validity of legislation; yet, the concept remains problematically mysterious. The conventional definitions often have a circular, question-begging quality, typically amounting to a direction to examine the law’s purpose and effects to identify its “matter.” At the same time, the determination of a law’s pith and substance is frequently decisive of its validity. As a result, disagreements about validity can seem to turn on a discretionary choice between equally valid ways of describing the legislation’s content.

This article aims to offer a non-mysterious account of pith and substance as a component of a normatively defensible framework for analyzing legislative validity. It proposes that we think of validity analysis as an instance of the more general legal problem of determining whether a given situation falls on one side or the other of a boundary created by a legal rule; from this starting point, the article explains the role that a summary of the relevant facts about the legislation—its “pith and substance”—can usefully play in the analytical process.

The article also assesses, in light of the proposed understanding of pith and substance, the recent federalism case law of the Supreme Court of Canada. Among other things, it suggests that, sometimes, what appears superficially to be a disagreement between the Justices about “what the legislation does, and why” is more productively viewed as a disagreement about what is and is not permissible under the Constitution.

Malgré la place centrale qu’il occupe dans le cadre d’analyse de la constitutionnalité d’une loi, le concept de « caractère véritable » demeure empreint de mystère, ce qui pose problème. Dans bien des cas, les définitions traditionnelles du concept sont tautologiques ; il s’agirait, selon elles, d’examiner l’objet et les effets de la loi pour déterminer la « matière » visée par celle-ci. » En même temps, la conclusion quant au caractère véritable d’une loi est souvent déterminante pour sa validité. Les désaccords sur la validité peuvent donc sembler reposer sur un choix discrétionnaire entre des descriptions différentes, mais tout aussi valables l’une que l’autre, du contenu de la loi.

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L'objet du présent article est de rendre compte du concept de caractère véritable, et le démystifier, en tant que composante d'un cadre d'analyse de la validité législative défendable sur le plan normatif. Selon l'auteur, l'analyse de la validité est un exemple d'un problème juridique plus général, celui de déterminer de quel côté d'une limite établie par une règle juridique se situe une situation donnée. Partant de cette prémisse, l'auteur explique l'utilité analytique d'un résumé des faits pertinents sur la loi, c'est-à-dire du constat de son « caractère véritable ».

L'auteur évalue, à la lumière de cette interprétation du concept de caractère véritable, la jurisprudence récente émanant de la Cour suprême du Canada en matière de fédéralisme. Il laisse notamment entendre que dans certains cas où un désaccord entre juges semble en apparence porter sur « ce qu'accomplit la loi et dans quel objet », il serait plus éclairant de le considérer comme un désaccord sur ce qui est et n'est pas permis en vertu de la Constitution.

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I. Introduction

The aim of this essay is to propose an understanding of “pith and substance,” a foundational concept within the framework for analyzing the validity of legislation under the division of powers set forth in the *Constitution Act 1867*. It may not seem immediately obvious that there is a need to be filled in this regard. After all, “pith and substance” is one of the most familiar concepts in Canadian constitutional law: it is notorious that the process of determining whether a law complies with the constitutional division of powers consists of two steps, the first of which is to “characterize” the law by examining the law’s purpose and effects, with a view to identifying the law’s “pith and substance.”² The concept has been in use in Canadian jurisprudence for more than a century;³ lengthy portions of judicial opinions in federalism cases are today devoted to an analysis of the pith and substance of the impugned legislation;⁴ and expositions of the concept can be found in both treatises and judicial opinions.⁵

Despite its familiarity, however, the meaning of the concept remains mysterious. For one thing, attempts to define the concept typically rely

² See e.g. Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law Inc, 2017) at 123 (“In step one, the court attempts to determine the ‘pith and substance’ of the law ... by examining both the purpose of the law and its effects”). The second step is to “classify” the law within one or another of the classes of subject allocated either to Parliament or to the provincial legislatures under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91, 92, reprinted in RSC 1985, Appendix II, No 5 [CA 1867]; see e.g. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 37 [Re Bill C-92].

³ *Russell v The Queen* (1882), 7 AC 829 at 840, 1882 CarswellNB 70 [Russell] (“true nature and character”); *Union Colliery Co of British Columbia v Bryden*, [1899] AC 580 at 587, [1899] UKPC 58 (“pith and substance”).

⁴ See e.g. the cases mentioned in Part IV-A *infra*.

⁵ See e.g. Monahan, Shaw & Ryan, *supra* note 2 at 123–24; Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) (loose-leaf updated July 2023) s 15:5; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville: Yvon Blais, 2014) at 462–66; and the cases mentioned in Part IV-A *infra*.

on synonyms such as "true nature and character,"⁶ "primary matter,"⁷ or what an impugned law is "really about."⁸ This definitional strategy is unhelpful, as it merely substitutes for one expression others which are no less question-begging. For another, judges tell us that "[t]here is no single test for a law's pith and substance"⁹ and commentators suggest that judicial "discretion" and "intuition" play important roles.¹⁰

The mysteriousness of "pith and substance" resides in large part in the doubt one may reasonably entertain as to whether a law really has an immanent nature and essence that can be summed up in a phrase in a non-conclusory and non-arbitrary manner. As a leading Australian constitutional law scholar wrote, commenting on Canadian practice, "the underlying essentialist idea that a complex piece of legislation has a single 'true nature and character' does not withstand close scrutiny[.]"¹¹

⁶ See e.g. *Russell*, *supra* note 3 at 840; *Ontario (Attorney General) v Reciprocal Insurers*, 1924 CanLII 460 (UK JPC) at 795 [*Reciprocal Insurers*]; *Whitbread v Walley*, [1990] 3 SCR 1273 at 1286, 1990 CanLII 33 (SCC); *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para 315, Brown J, dissenting [*Re GGPPA*]; Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) (loose-leaf updated July 2023) s 15:5. "Caractère véritable," a near-literal translation of this expression, is the term most commonly used in French to express the concept of "pith and substance."

⁷ See e.g. *Russell*, *supra* note 3; FE LaBrie, "Canadian Constitutional Interpretation and Legislative Review" (1950) 8:2 UTLJ 298.

⁸ See e.g. *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 3. For additional synonyms offered by the Supreme Court of Canada, see text accompanying note 72 below.

⁹ See e.g. *R v Morgentaler*, [1993] 3 SCR 463 at 481, 1993 CanLII 74 (SCC) [*Morgentaler*].

¹⁰ Monahan, Shaw & Ryan, *supra* note 2 at 124 ("the pith and substance analysis is highly discretionary"); Albert S Abel, "The Neglected Logic of 91 and 92" (1969) 19:4 UTLJ 487 at 489 ("intuitive"); see also Katherine E Swinton, *The Supreme Court and Canadian Federalism: the Laskin-Dickson years*, (Toronto: Carswell, 1990) at 27 (stating that judges have varied in the weight they have given to different factors in deciding upon the "matter" of an impugned law but that there has been "little discussion" by judges as to why a given approach was adopted).

¹¹ T Blackshield, "Working the Metaphor: The Contrasting Use of 'Pith and Substance' in Indian and Australian Law" (2008) 50:4 J Indian L Inst 518 at 519. The concept of "pith and substance," although used in Australia in early jurisprudence under that country's division of powers, was abandoned by the High Court in the mid-20th century (*ibid* at 520–21). The concept continues to play a role in the federalism jurisprudence of India and South Africa: see M P Jain, *Indian Constitutional Law*, 7th ed (Haryana: LexisNexis, 2014) at 562–65; V Bronstein, "Legislative Competence," in S Woolman and M Bishop, eds, *Constitutional Law of South Africa*, 2nd ed (Cape Town: JUTA & Co Ltd, 2013) (loose-leaf updated April 2014) s 15.3(a), quoting *DVB Behuising (Pty) Limited v North West Provincial Government*, [2000] ZACC 3 at para 36 (Const Ct S Afr) ("subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about").

Skeptics suspect that the articulation of a law's pith and substance is in fact a paradigm example of the "dormitive principle"—tautological reasoning passed off as analysis, under the cover of professional jargon.¹²

The skeptics' suspicion, if well-founded, would have discouraging implications for the practice of constitutional adjudication, and for the rule of law. Distinguished commentators have observed that the determination of pith and substance frequently disposes, for practical purposes, of the question of validity—once the judge has characterized the law in a particular way, the classification of the law within either federal or provincial power often seems to be a foregone conclusion.¹³ If the determination of a law's pith and substance is arbitrary, then it is difficult to avoid the conclusion that the ultimate assessment of validity or invalidity is also arbitrary.

In this essay, I aim to offer a non-mysterious account of "pith and substance." Such an account requires that we steer clear of two unhelpful notions: that "pith and substance" is an innate quality, or essence, of an impugned law, and that it is the end-goal of the characterization process to discern that essence. Instead, on the account I advance here, characterization should be understood as the process of identifying all of the features of the impugned legislation that are relevant in determining its validity. The best understanding of "pith and substance," when this phrase refers to a distilled expression of the conclusions of the characterization process, is that it facilitates subsequent reference to the relevant features of the legislation at later analytical stages, and calls attention to the questions about the scope of the heads of power that will need to be addressed through interpretation of substantive constitutional rules.

The remainder of this essay proceeds in three steps. I begin by explaining what is involved in the activity of defining the concept of "pith and substance" (Part II). Then, I develop an account of "pith and

¹² Felix S Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35:6 Colum L Rev 809 at 820. The "dormitive principle" fallacy invoked by Cohen is drawn from Molière, *The Imaginary Invalid* (1673). See also Paul C Weiler, *In the Last Resort; a critical study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) at 161 ("Constitutional law is shot through with ... verbal formulae masquerading as legal guidelines. These the individual judges apply in some mysterious fashion to produce a result which they tell us is the law, or at least the law for the time being."); Bora Laskin, "Peace, Order and Good Government' Re-Examined" (1947) 25:10 Can Bar Rev 1054 at 1086 (criticizing decisions of the JCPC as not reflecting "any inevitability in the making of particular decisions [but instead reflecting] conscious and deliberate choice of a policy which required, for its advancement, manipulations which can only with difficulty be represented as ordinary judicial techniques").

¹³ Hogg & Wright, *supra* note 5, s 15:5.

substance" as a component of a normatively defensible framework for analyzing the validity of legislation (Part III). As part of this account, I revisit the relationship between the concept of "pith and substance" and certain familiar federalism doctrines. Finally, Part IV examines the recent federalism case law of the Supreme Court of Canada, in light of the understanding of "pith and substance" put forward in Part III.

Although this essay notes the vulnerability of an essentialist understanding of "pith and substance" to legal realist criticism, I hope that readers will not mistake the arguments I advance for an attack on the enterprise of legal reasoning in general or on the possibility of principled reasoning in federalism cases in particular. On the contrary, the essay's goal is to explain the role that "pith and substance" can play in a framework of legal analysis in federalism cases that avoids the pitfalls of essentialism. The payoff of the suggested approach is greater clarity in the analysis and resolution of legal questions concerning the validity of legislation.

II. What we are looking for in an understanding of "pith and substance"

"Pith and substance" might at first glance appear to refer to an inherent property of a law: it may be tempting to think that any law has a pith and substance, just as a line segment has a midpoint and a body of matter has a centre of gravity.¹⁴ However, this way of thinking about "pith and substance," as the equivalent of a physical property, can lead us on a dead-end search for an innate essence of the legislation.

I propose that we instead begin the task of understanding "pith and substance" with the observation that "pith and substance" is a legal construct, much like "contract" or "fiduciary." Like other legal concepts, "pith and substance" has meaning within the context of a legal system in which the expression is used to formulate legal conclusions and to explain the legal consequences that flow from a given set of circumstances. As Hart explained, we cannot obtain useful insight into the meaning of a legal concept by pointing to a "counterpart in the world of fact" to which the concept corresponds,¹⁵ nor by replacing the words by which the concept is labelled with a synonymous phrase (such as "true nature and character" or "primary matter").¹⁶ Rather, the task of defining such a concept is accomplished by elucidating the manner in which the concept is properly

¹⁴ See e.g. Abel, *supra* note 10 at 489 ("Each measure has its own 'matter'").

¹⁵ HLA Hart, "Definition and Theory in Jurisprudence" in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 21 at 23.

¹⁶ *Ibid* at 33 ("If definition is the provision of a synonym that will not equally puzzle us, [legal words such as 'right,' 'duty' and 'corporation'] cannot be defined").

used in the legal system. Hart drew an analogy to the explanation of the concept of a “trick” in a card game:

Somebody says, ‘What is a trick?’, and you reply ‘I can explain: when you have a game and among its rules is one providing that when each of our players has played a card then the player who has put down the highest card scores a point, in these circumstances that player is said to have “taken a trick”.’ This natural explanation has not taken the form of a definition of the single word ‘trick’ ... Instead we have taken a sentence in which the word ‘trick’ plays its characteristic role and explained it first by specifying the conditions under which the whole sentence is true, and secondly by showing how it is used in drawing a conclusion from the rules in a particular case.¹⁷

To explain the meaning of “pith and substance,” similarly, involves explaining the circumstances under which conventional propositions in which the expression is used are true; and showing the role that the concept plays in drawing conclusions about the validity of legislation.

To this, I would add that the exercise of understanding “pith and substance” is not one of pure description; it is an exercise in interpretation—and therefore a partly normative exercise. In general, we seek an account of our legal practice that shows it “in its best light.”¹⁸ In particular, we aim to elucidate the role that the concept of “pith and substance” plays in a normatively attractive system of constitutional adjudication.

III. A non-essentialist understanding of “pith and substance”

This Part develops an understanding of “pith and substance” in three steps. First, I explain the general components of validity analysis: characterization, interpretation and classification. Second, I offer an account of the function of “pith and substance” insofar as the term refers to a summary of the conclusions reached in the characterization process. Third, I describe the relationship between the concept of “pith and substance” and certain federalism doctrines that commentators and courts have viewed as applications of the concept.

A) Characterization, interpretation and classification in general

The assessment of whether a given law comes within the authority of the body that enacted it (“validity analysis”) is a specific instance of the more general legal problem of determining whether a given set of circumstances

¹⁷ *Ibid.*

¹⁸ Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986) at 139.

falls on one side or the other of the boundary established by a legal rule. Examples are everywhere in law:

- Does the presence of a given object in a park violate a ban against "vehicles"?
- Is the relationship between parties A and B a "partnership" or are they merely co-owners of property?
- In the circumstances, did the accused's conduct constitute commission of the offence of "theft"?

As a general description, the process for answering such questions consists of three steps, of which the first two are to (1) identify the relevant facts; and (2) resolve issues concerning the scope of the rule. Once both of these have been done, it is possible to answer the question, i.e., to (3) determine on which side of the boundary the facts lie.¹⁹ In the context of validity analysis, these activities correspond to "characterization" of the impugned legislation; "interpretation" of the constitutional rules that allocate legislative power (most often, the rules under ss 91 and 92 of the *Constitution Act 1867*); and, finally, "classification."

Our principal concern in this essay is with the first step, which I have described (in the general method) as the exposition of "relevant facts." What is it that makes a fact relevant? The answer to this question is that the relevance of a fact depends on what is known (or alternatively, needs to be resolved through interpretation) about the scope of the rules against which the facts will later be measured. For example, if the issue to be decided is whether a given set of facts establish that the accused committed "theft," then—based on what is legally uncontroversial about the boundaries of the concept of "theft" in the relevant jurisdiction—whether the accused took an object, whose property the object was, and whether the accused took the object intentionally or by accident, are all presumably relevant. The colour of the object and what the accused ate for breakfast are irrelevant. On the other hand, if there is a question to be resolved at the interpretation stage about the scope of the applicable rules—for example, whether "officially induced error" is a valid defence, despite the principle that mistake of law does not negate *mens rea*²⁰—then facts that could have a bearing on the outcome of the case, depending on the resolution of the interpretive question, are also relevant. (In the example, these additional relevant facts include those concerning the

¹⁹ See e.g. Henry M Hart Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury: Foundation Press, 1994) at 350.

²⁰ This issue was presented in *Lévis (City) v Tétreault*, 2006 SCC 12 at paras 20–27.

status of the official, the individual's interactions with the official, and the individual's reliance on the official's advice.)

When the legal question to be answered concerns the validity of legislation, the facts of the situation are, for the main part, "facts" about the impugned law—its characteristics. What is a "relevant characteristic" of an impugned law depends on what either is uncontroversially known, or, alternatively, will need to be resolved through interpretation, about the boundaries of ss 91 and 92. This is the reason why characterizing a law involves describing its purpose and legal effects: not because the "essence" of a law consists in these features, but because the rules that are the product of the case law interpreting the heads of power in ss 91 and 92 refer to these features. For example, whether a federally enacted law prohibits something, and for what purpose it does so, are important in light of the rules defining the scope of s 91(27) (the criminal law power);²¹ whether a provincially enacted law imposes legal obligations on persons undertaking a commercial activity within a province, rather than a cross-border activity, is important in light of what is known about the scope of s 92(13) ("property and civil rights in the Province").²² If there is an issue to be resolved regarding the scope of a head of power that is potentially a source of authority for the legislation, the relevant features of the legislation also include those features which, depending on the resolution of the interpretive issue, could have an impact on the conclusion about validity.

In a nutshell, "characterization" is the process of summarizing what we need to know *about the legislation* in order to classify it. "Interpretation" is deciding what we need to decide *about the scope of the constitutional heads of power* in order to classify the legislation.

The definitions I have just provided of characterization and interpretation intentionally refer to the function each of them performs in the classification enterprise.²³ I am wary of definitions divorced from those functions, such as Abel's well-known description of characterization as the provision of an "abstract of the statute's content ... sufficien[t] to

²¹ See e.g. *R v Hydro-Québec*, 1997 CanLII 318 (SCC) at para 35 [*Hydro-Québec*]; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 35 [*Re AHRA*]; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 67 [*Re GNDA*].

²² *Shannon v Lower Mainland Dairy Products Board*, 1938 CanLII 250 (UK JCPC) at 84 [*Shannon*]; *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, 1930 CanLII 91 (SCC) at 364–65.

²³ Along these lines, see *Re GGPPA*, *supra* note 6 at para 317, Brown J, dissenting ("the purpose of characterization ... is to facilitate classification"); Hogg & Wright, *supra* note 5, s 15:5 ("the sole purpose of identifying the 'matter' of a law is to determine whether the law is constitutional or not").

inform anyone asking, 'What's it all about?'"²⁴ What kind of an abstract is required, and what content is sufficient, depends on who is asking, and why they want to know. Characterization is not the provision of a generic summary for a generic purpose, but rather a summary of what is relevant about the legislation in order to determine whether it comes within any of certain specific heads of power. As we have seen, what is relevant depends on what the heads of power are and what is known, or needs to be determined through interpretation, about the scope of those heads of power.²⁵

B) Purpose and effects

I have suggested that "purpose" and "effects" are relevant because the rules about the boundaries of the heads of power refer to those features of the legislation. I have described them as "facts about the law," but more needs to be said in order to avoid giving the misleading impression that the identification of these "facts" is a matter of mere observation.

In making sense of "purpose" and "effects," there is good news and bad news. The good news is that these concepts have conventional meanings and uses in law. Lawyers think of the task of interpreting a law as an activity directed at determining the effect of its provisions: what right, liability, power, duty or status does the law or a given provision of the law confer, upon whom or what, in what circumstances, and with what legal consequence?²⁶ The term "legal effect" is a useful label for the product of this legal analytical activity, to distinguish it from an analysis of the impacts of a law in the more generic sense of how the law may be expected to affect facts in the real world ("practical effects").²⁷

²⁴ Abel, *supra* note 10 at 490.

²⁵ Similar issue may be taken with Abel's contention that the characterization of a statute is the same, "whether [it was] enacted in New Brunswick, New Zealand or New Jersey" (see Abel, *supra* note 10 at 490). This does not seem to be right. We might well describe a law differently depending on whether the question is whether it (as a state law) violates the US Dormant Commerce Clause or whether (as a provincial law) it offends against s 121 or intrudes on s 91(2) of the *Constitution Act, 1867*, because different facts about the law may be relevant to these various inquiries.

²⁶ Hogg & Wright, *supra* note 5, s 15:9 ("how the statute changes the rights and liabilities of those who are subject to it").

²⁷ The way in which a law produces real-world impacts is through the creation and modification of the rights, liabilities, powers, duties and legal status of persons and entities—in other words, legal effects are the mechanism by which laws produce practical effects. As a generalization, under the rules that define the scope of the heads of power in ss 91 and 92, the real-world impact of the legislation is not directly relevant in determining whether a given law comes within a given class of subjects (see *Attorney-General of Saskatchewan v Attorney-General of Canada*, 1948 CanLII 317 (UK JCPC) at 149). Instead, with few exceptions, the relevance of "practical effects" in federalism-based

As for “purpose,” it is, according to the conventions of modern interpretation, an important guide to the legal meaning of a law’s provisions.²⁸ In answering the question whether an ice-cream vendor’s pedal-driven cart violates the “No vehicles in the park” rule, looking the word “vehicle” up in a dictionary is less useful than considering the reasons why it was desired to exclude “vehicles” from the park.²⁹

The bad news is that a law, like any intentional act, usually has multiple purposes.³⁰ Often, some of these purposes can also be described as means to the achievement of other, more general purposes.³¹ For example, the purposes of a law prohibiting tobacco advertising might be (A) to reduce the consumption of tobacco, with a view to (B) preventing the harm to human health associated with that consumption.³² The first, more specific purpose of reducing tobacco consumption can also be described as a means to the achievement of the second, more general purpose of protecting health. It is not the case that exactly one of “A,” “B” or “A in order to B” is the uniquely correct statement of the purpose of the legislation.

validity analysis resides in the light those effects may shed on what the legislation was intended to achieve—in other words, in what the practical effects of the legislation can tell us about the legislation’s purpose (see *Morgentaler*, *supra* note 9 at 482–83). In particular, the practical effects may reveal hidden purposes that differ from those stated in the text (such as a purpose clause or preamble) of the legislation itself (see *Morgentaler*, *supra* note 9 at 486j–87a). On the other hand, in the analysis of constitutional issues other than those relating to legislative *vires*, real-world impacts can be and often are relevant: for example, in the application of the doctrines of paramourty and interjurisdictional immunity, and in the analysis of the validity of legislation under the *Charter* and s 35 of the *CA 1982* (for paramourty, see e.g. *Law Society of British Columbia v Mangat*, 2001 SCC 67 at para 72; for interjurisdictional immunity, see e.g. *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at paras 37–38; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*CA 1982*]).

²⁸ *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) at para 21; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26.

²⁹ The “No vehicles in the park” example is from L Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) 71 *Harv L Rev* 630 at 663.

³⁰ Ruth Sullivan, *On the Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at 264 (“legislation normally has many purposes”).

³¹ Aharon Barak, *Purposive Interpretation in Law*, (Princeton: Princeton University Press, 2005) at 125–26 (see discussion of “multiple horizontal” and “multiple vertical” purposes).

³² See e.g. *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC) at paras 35–38 [*RJR*]. Another example: the purpose of a municipal legislative measure may be (A) to restrict the location of a cellphone tower (B) so as to allay residents’ health concerns about the tower. See *Rogers Communications Inc v Châteauguay*, 2016 SCC 23 [*Rogers*], in which the majority and dissenting judges disagreed about whether (A) or (B) was *the* purpose of the measure.

Often, disagreements about the characterization of an impugned law boil down to disagreements about how to describe the purpose of the law. In Part IV-B of this essay, I will have more to say about how to make sense of this type of disagreement. For now, it suffices to say that, according to the understanding of characterization developed here, what makes a given characteristic of the impugned legislation relevant are the rules that define the boundaries of the candidate heads of power. Some of these rules refer to legislative aims formulated at a relatively high level of generality (e.g., "public health", a permissible aim of criminal legislation enacted under s 91(27)³³), while others invite reference to features of the legislation which, if they are "aims" at all, are more specific and fall closer to the "means" extremity of the means-end spectrum. There is not a uniquely correct level of specificity at which "purpose" must be articulated in order to capture the "true essence" of a law. Rather, it is a question of what level of generality or specificity, or what kind of purpose, is made relevant by the rules delimiting the candidate heads of power, taking into account the interpretive issues about those rules that will later need to be resolved.

C) Pith and substance

In the current decision-making practice of the Supreme Court of Canada, the characterization analysis typically concludes with a statement of the "pith and substance" of the legislation, often a summary of the legislation's purpose and effects.³⁴ How should we understand this practice?

Within a non-essentialist analytical framework, one function of such a statement is to facilitate subsequent reference to the most relevant facts. We may describe this function as one of expository convenience. In addition, where interpretive issues about the scope of ss 91 and 92 will need to be addressed at the subsequent analytical stage, it is useful if the features of the legislation that trigger that need are highlighted; viewed in these terms, the practice promotes clarity and, therefore, rigour. Consider, for example, the situation in *R v Hydro-Québec*;³⁵ the pivotal legal issue to be resolved at the interpretive stage was whether the constitutional requirement that criminal law be "prohibitory" is satisfied where the impugned legislation does not define the prohibited sphere of conduct, but instead delegates to the Governor in Council the power to determine that certain acts are harmful and to promulgate regulations prohibiting those acts. This question arose, of course, because the impugned legislation in *Hydro-Québec* employed just that mechanism; one would reasonably expect this fact about the legislation, therefore, to be among those mentioned in the

³³ *RJR*, *supra* note 32 at para 32.

³⁴ See note 72 below for examples.

³⁵ *Hydro-Québec*, *supra* note 21.

characterization portion of the majority and dissenting judgments.³⁶ It could, in addition, be useful to conclude the characterization analysis with a phrase summarizing the law in terms that include that feature of the legislation, thereby facilitating the reader's understanding of the necessity and ramifications of the interpretive exercise to be undertaken at the next stage.³⁷

To serve its function of facilitating the reader's access to the relevant features of the impugned legislation, the summary statement should not pre-empt the interpretive issues through selective omission or one-sided wording. If "pith and substance" is done properly, it will not "effectively settle" the validity question,³⁸ at least in cases where the "facts about the law" lie close to the boundary or where the boundary is uncertain.

This is how we should understand the rationale for the rule (articulated by the Supreme Court of Canada) that heads of power should not be referred to in the articulation of pith and substance.³⁹ The rule is simply an application of what Hart and Sacks called the "cardinal principle of lawyerlike fact finding,"⁴⁰ namely that, in an exposition of the "relevant facts," one should avoid describing the facts in terms of legal categories if the very question the analysis as a whole is directed at answering is whether the facts fall within those categories.⁴¹

³⁶ *Ibid* at paras 149–50, La Forest J; *Ibid* at para 58, Lamer CJC and Iacobucci J, dissenting.

³⁷ I am using the scenario to illustrate the proposed method of analysis. I acknowledge that the judges who authored the majority and dissenting opinions in *Hydro-Québec*, *supra* note 21, did not follow this approach. The dissenting judges, for example, "classified" the legislation as falling outside the criminal law power because they were of the view that the legislation was "essentially regulatory in nature" (*ibid* at para 48); they did not directly address the interpretive question concerning the scope of 91(27).

³⁸ *Contra* Hogg & Wright, *supra* note 5, s 15:5. Hogg and Wright state that the third step, classification, is often "little more than a formality" (*ibid*, s 15:5). I agree with this proposition insofar as the relevant facts about the law have been identified and any relevant issues about the scope of the heads of power have been resolved. After all, the point of both of those activities—characterization and interpretation—is to do what needs to be done in order to classify the law. However, what those authors appear to be saying is that "pith and substance" alone often obviates the need for interpretation of the heads of power; this proposition (whatever its accuracy as an empirical description of judicial technique) is not consistent with the approach argued for here.

³⁹ *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 at para 16 [*Chatterjee*]. See also Abel, *supra* note 10 at 490 (criticizing "the tendency ... to speak of the 'matter' of a statute in terms of the 'classes of subjects' set forth in the BNA Act"); *Reference re Impact Assessment Act*, 2023 SCC 23 at paras 65–67, Wagner CJC [Re IAA].

⁴⁰ Hart & Sacks, *supra* note 19 at 351.

⁴¹ See Part IV below, in particular the text accompanying notes 80–82.

The Supreme Court of Canada sometimes describes the characterization process as if the "identification of pith and substance" were its end goal.⁴² Such descriptions may be unhelpful insofar as they promote an essentialist understanding of characterization as the search for an innate property of the legislation (its "dominant characteristic").

On the approach defended here, "pith and substance" instead serves a useful, but subsidiary function. An "abstract of the statute's content"⁴³ or brief statement of what the law does, and why⁴⁴ it promotes sound analysis by putting the relevant facts about the law into convenient relief, in a manner that does not prejudge disputed questions about the scope of the heads of power. The summary statement of the law's "pith and substance" is the packaging, in a convenient form, of the facts that were identified as relevant in the characterization process.

D) Implications for related doctrines

The standard doctrinal framework for validity analysis includes several distinct rules that commentators and judges have often considered to be related to or applications of "pith and substance." One of these rules even shares its name with the concept under examination in this essay: the rule that legislation may come within the power of its enacting legislature even if it "incidentally affects" matters within the jurisdiction of the other level of government is often referred to as the "pith and substance doctrine."⁴⁵ Two additional rules are those concerning ancillarity and colourability, which Abel described as "variations on ... the theme of identifying the statutory 'matter.'"⁴⁶ All three of these doctrines were

⁴² *Re IAA*, *supra* note 39 at para 61 ("At the characterization step, a court must consider the purpose and effects of the challenged law in order to identify its 'pith and substance'"); *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 31 [*Desgagnés*] ("the first stage of the analysis, characterization, requires courts to examine [an impugned law's] purpose and effects with a view to identifying its 'main thrust' or 'dominant or most important characteristic'"); *Re GGPPA*, *supra* note 6 at para 47 ("I will first consider the purpose and effects of the [impugned legislation] with a view to characterizing the subject matter—the pith and substance—of the statute."); *Re Bill C-92*, *supra* note 2 at para 39 ("At the first stage of the analysis, which involves characterizing the law, a court identifies the purpose and effects of the law in order to determine its main thrust or dominant characteristic").

⁴³ Abel, *supra* note 10 at 490.

⁴⁴ D W Mundell, "Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin" (1955) 33:8 *Can Bar Rev* 915 at 928 ("What in fact does the law do and why?"); see also *Re AHRA* *supra* note 21 at para 122.

⁴⁵ See the cases cited in note 47 below.

⁴⁶ Abel, *supra* note 10 at 494. Some have questioned whether specific doctrines regarding ancillary powers and colourability are needed at all. See e.g. Hogg & Wright, *supra* note 5, s 15:24 (concerning the ancillary powers doctrine: "no such power is needed");

developed by the Judicial Committee using language suggestive of an essentialist understanding of pith and substance. Their meaning within a non-essentialist framework needs to be explained; it is to this explanation that I now turn.

1) The “pith and substance doctrine”

I begin with the rule that legislation can be within the authority of its enacting legislature even if it “incidentally affects” matters within the jurisdiction of the other level of government. As previously mentioned, this rule is often referred to by the name “pith and substance doctrine.”⁴⁷ The need for the rule arises because any law can be connected in different ways to multiple classes of subject; yet, laws are not ultimately assigned to all of the heads of power with which they are in some way connected. A law is assigned to one class of subjects, rather than another, because of one or more of the connections that the law has with the first class of subject, and despite the connections that it has with the second.

A prime example of the application of the rule is the proposition that a federal law that otherwise meets the requirements for valid criminal law will not be found to come within s 92(13) merely because it affects the use that people can make of their property or limits their contractual freedom. Decisions of the Judicial Committee establish that the latter effects are “incidental” and do not prevent the law from being classified as

Reference Re Firearms Act, 1998 ABCA 305 at para 130 (“the colourability doctrine merges with pith and substance ... since the inquiry [ultimately involves] ascertaining the true character, the ‘matter’, of the legislation”), aff’d 2000 SCC 31.

⁴⁷ *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at para 26, 1987 CanLII 17 (SCC) (quoting with approval a description of the “pith and substance doctrine” as the principle “that a law ‘in relation to’ a provincial matter may validly ‘affect’ a federal matter”); *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 28 (“legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature’s jurisdiction without necessarily being unconstitutional”); *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 670, 1989 CanLII 133 (SCC) (“the doctrine that a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa)”); *Alberta v Putnam*, 1981 CanLII 206 (SCC) at 305, Dickson J, dissenting (describing the “pith and substance doctrine” as a “central canon of constitutional interpretation [, the rule that] a law ‘in relation to’ a provincial matter may validly ‘affect’ a federal matter”). There is some variation in the use of the expression “pith and substance doctrine”; sometimes, the expression is used to refer to the characterization approach described in the text accompanying note 2. See e.g. *Rogers*, *supra* note 32 at paras 36–56.

criminal law if the law otherwise has the features called for by the decisions interpreting s 91(27).⁴⁸

Within a non-essentialist analytical framework, how should we understand this proposition? I have proposed that we think of classification as driven by a combination of what I have called "facts about the law" and propositions about the scope of the candidate heads of power. Thus, if a law is prohibitory in form, that is a fact about the law; the law's purpose (for example, to suppress behaviour perceived by the legislature to be antisocial) is another fact about the law. If the activity prohibited by the law is, say, the sale of a particular commodity, that is yet another fact about the law. Once those "facts about the law" have been identified, the proposition that a law having such features comes within s 91(27), even though prohibiting the sale of something limits the contractual freedom of sellers as well as regulating their disposition of their property, is a proposition about the boundary between ss 91(27) and 92(13).

As mentioned in Part III-A, judicially-developed propositions about the scope of the heads of power (including of the boundary between them) make certain facts about the law relevant, and others irrelevant. This is how I suggest that we understand the determination that a given effect of the legislation is "incidental": it represents a determination about the boundary between the heads of power. As such, it represents an interpretation of ss 91 and 92, and is not simply an observation about what the legislation is (or is not) "really about."

Consider another example, involving a modern decision of the Supreme Court of Canada dealing with a different head of federal power. In *Rogers Communications Inc v Châteauguay*, the "facts" about the impugned municipal legislative measure included that it sought to restrict the location of a cellphone tower and that it did so in order to allay local residents' health concerns about the tower. The majority and dissent disagreed about which of these was "the purpose" of the legislation,⁴⁹ and the majority described its decision as resting on "the pith and substance doctrine."⁵⁰ In contrast to the majority's description, I suggest that we see *Rogers* as a decision about the scope of the candidate heads of power—ss

⁴⁸ *Proprietary Articles Trade Association v Canada (Attorney General)*, 1931 CanLII 385 (UK JCPC) at 12. See similarly *Russell*, *supra* note 3, the decision which most commentators regard as having introduced the "pith and substance doctrine" into Canadian law. In *Russell*, the Judicial Committee held that the prohibitory law in that case was not "in relation to" property and civil rights but merely "in some incidental way ... affect[ed]" those matters (para 20).

⁴⁹ *Rogers*, *supra* note 32: compare para 44, Wagner and Côté JJ, with paras 100–01, Gascon J, dissenting.

⁵⁰ *Ibid* at para 56.

92(13) and (16), on the one hand; and the federal telecommunications power, on the other hand. Following the decision, we know that a legislative measure that seeks to restrict the location of a cellphone tower, albeit with the ultimate purpose of allaying the health concerns of local residents, does not come within ss 92(13) or (16) but instead comes within the federal telecommunications power. That is, we know something that was not previously known about the boundary between those heads of power.

The non-essentialist approach helps us to see something that would otherwise be obscured, namely that, in deciding that certain features of the legislation are “incidental,” judges are making choices about the boundaries between the heads of power. To return to the example of criminal laws that restrict the use of property, it would have been possible for the Judicial Committee to draw the boundary between ss 91(27) and 92(13) differently; the result would have been to severely curtail the scope of s 91(27). As the Judicial Committee observed in *Russell*, “[f]ew, if any laws could be made by Parliament ... which did not in some incidental way affect property and civil rights.”⁵¹ The choice to reject the narrower reading of s 91(27) was supported by a judicial policy of seeking to give operational effect to each of the provisions of ss 91 and 92 and not allowing any of them to be obliterated by the others.⁵²

Similarly, in *Rogers*, the Court could have interpreted differently the scope of ss 92(13) and (16), but this would have had the effect of undermining the federal telecommunications power.⁵³ The outcomes of these cases are not inevitabilities dictated by an innate quality of the impugned laws, but instead represent choices about the scope of the heads of power in ss 91 and 92.

2) Ancillariness and colourability

The doctrines related to ancillary provisions and to colourability should similarly be understood as rules about ss 91 and 92. Specifically, these doctrines amount to propositions about (in the case of ancillariness) what is and is not permitted under ss 91 and 92 and (in the case of colourability) how the legal categories established by ss 91 and 92 should be interpreted. As rules concerning the content and boundaries of ss 91 and 92, these

⁵¹ *Russell*, *supra* note 3 at 839.

⁵² *Ibid* at 839–40, citing *Citizens Insurance Co of Canada v Parsons* (1881), 7 App Cas 96 at 107, [1881] 11 WLUK 93.

⁵³ A concern along these lines is alluded to in the majority reasons: see *Rogers*, *supra* note 32 at para 47 (“restricting significantly an exclusive power granted to Parliament”).

doctrines have the effect of making certain "facts about the legislation" relevant.

Consider the "ancillary powers doctrine." This doctrine comes into play when we are dealing with "composite" legislation,⁵⁴ i.e., legislation consisting of several parts, each fulfilling a particular function within an overall scheme. In connection with such legislation, the case law establishes that ss 91 and 92 empower Parliament and the provincial legislatures, respectively, to enact individual provisions that, if viewed in isolation, would come within the legislative authority of the other level of government, provided that the provisions are sufficiently connected with an otherwise valid legislative scheme.⁵⁵

The rule just described is, of course, a proposition about what is and is not permitted under ss 91 and 92.⁵⁶ The rule makes certain "facts" about the structure of the legislation relevant—in this case, the role played by certain individual parts within the overall scheme established by the legislation.

As for colourability, the relevant rule is that the content of the legal categories represented by the heads of power in ss 91 and 92 is to be understood in substantive rather than formal terms.⁵⁷ The rationale for

⁵⁴ Abel, *supra* note 10 at 491.

⁵⁵ *Attorney General of Ontario v Attorney General for the Dominion of Canada (Ontario)*, [1894] AC 189 at 200–01, [1894] UKPC 13 [*Re Voluntary Assignments*]; *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 667–70, 1989 CanLII 133 (SCC) [*General Motors*]; *Re AHRA*, *supra* note 21 at para 126; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 140–43. Another judicially-developed proposition relevant to composite legislation concerns the limits of the power conferred by s 91(27): the latter provision does not allow Parliament to enact a law the main provisions of which come within s 92, simply by adding penalties for non-compliance with those provisions: *Canada (Attorney General) v Alberta (Attorney General)*, 1921 CanLII 399 (UK JPC) [*Board of Commerce*]; *Toronto Electric Commissioners v Snider*, 1925 CanLII 331 (UK JPC) [*Snider*].

⁵⁶ Indeed, in some other constitutions, a similar result is obtained by means of explicit power-conferring provisions. See e.g. US Const art I, § 8, cl 18 ("The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); *Constitution of Australia*, s 51(xxxiv).

⁵⁷ The rule is valid as a generalization. In fact, some of the categories of legislation are defined in terms that are quite "formal": an example is federal jurisdiction under s 92(10)(c) and s 91(29) over works "declare[d] by Parliament to be for the general advantage of Canada". See Hogg & Wright, *supra* note 5, s 22:10 ("requirement of form rather than substance").

the rule is to prevent the undermining, through the use of formal devices, of the scheme of the division of powers.

This approach to legal categories is by no means unusual in our legal system.⁵⁸ For example, individuals can be partners in a business, and acquire the rights and liabilities of partners, even if they have sought to avoid this result by clothing their arrangements in the form of a “loan agreement.”⁵⁹ An individual can be the employee of another, even though their contract describes the former as an “independent contractor.”⁶⁰ To describe such legal categories as “substantive” does not mean that their application entails a search for the “essential character” of the parties’ relationship; rather, what is called for is an inquiry into what features of the situation are relevant in light of the purpose or values underlying the legal categories.⁶¹

Unsurprisingly, the courts in federalism disputes have determined that the values underlying the division of powers would be undermined if the “formal trappings of the legislation”⁶² were treated as conclusive, and other features of the legislation—such as its purpose, including evidence of aims not apparent on the face of the legislation⁶³—were treated as irrelevant.

⁵⁸ See e.g. Andrew Burrows, “Form and Substance: Fictions and Judicial Power” in Andrew Robertson & James Goudkamp, eds, *Form and Substance in the Law of Obligations* (Oxford: Hart Publishing, 2019) 17 at 19–22 (discussing various examples of the proposition in the English law of obligations).

⁵⁹ *Pooley v Driver* (1876), 5 Ch D 458, [1876] 11 WLUK 121.

⁶⁰ *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at paras 47, 49; *Belton v Liberty Insurance Co of Canada*, 2004 CanLII 6668 (ONCA) at para 11.

⁶¹ See generally Pey-Woan Lee, “Form, Substance and Recharacterisation,” in Andrew Robertson & James Goudkamp, eds, *Form and Substance in the Law of Obligations* (Oxford: Hart Publishing, 2019) 71 at 93 (arguing that the classification of a transaction involves not only construing it but also “examining the policy underpinnings of a particular legal category”).

⁶² Hogg & Wright, *supra* note 5, s 15:11; *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at 486, 1995 CanLII 69 (SCC).

⁶³ For example, in *Reciprocal Insurers*, *supra* note 6, the impugned provisions were part of the Criminal Code but their purpose and effect were to render obligatory an ostensibly voluntary scheme of business licensing that had previously been found *ultra vires*. In another case, *Lethbridge v Independent Order of Foresters*, 1940 CanLII 278 (UK JCPC) at 280, the legal effect of the challenged provincial provisions was to require the holder of a debt security to obtain the consent of the provincial executive in order to maintain court proceedings to enforce that security; although, thus described, the provisions might have been expected to come within s 92(14) (the administration of justice), they were ruled invalid because their purpose was to allow the province to fix the maximum rate of interest payable (a federal matter under s 91(19)). Finally, in *Morgentaler*, *supra* note 9, the court’s

In sum, a non-essentialist approach to characterization precludes an understanding of ancillariness and colourability as tools for determining what a challenged law is "really about"; we instead regard these concepts as referring to features of legislation that are made relevant by judicially-developed rules about the content and boundaries of ss 91 and 92.

E) The role of discretion

Today, few would deny that discretion plays a significant role in validity analysis. The point can be expressed in different ways, as, for example, when then-Professor Laskin asserted that "judicial decisions are the products of social and economic and political considerations for which the words of the British North America Act are merely the vehicles of communication"⁶⁴ and, along the same lines, that "constitutional adjudication involves considerations of policy and hence of social and political and economic beliefs."⁶⁵ In Lederman's famous formulation, the question for judges is "Who is the better physician, Federal Parliament or provincial legislature,"⁶⁶ to cure the "ailment" at which the impugned legislation is addressed?

At what stage of the analysis do these considerations arise? On the approach to validity analysis developed here, the "better physician" question is to be asked at the second stage, of determining what is permissible under ss 91 and 92, rather than at the first, of describing what the impugned legislation does, and why.⁶⁷

conclusion that the provincial legislation was *ultra vires* rested on extrinsic evidence of an actual purpose which differed from the purpose declared in the legislation.

⁶⁴ Bora Laskin, "Tests for the Validity of Legislation: What's the Matter" (1955) 11:1 UTLJ 114 at 127 [Laskin, "Tests for Validity"].

⁶⁵ *Ibid* at 123.

⁶⁶ W R Lederman, "Thoughts on Reform of the Supreme Court of Canada" (1970) 8:1 Alta L Rev 1 at 4.

⁶⁷ The approach suggested here differs in this regard from that propounded by Hogg and Wright, who suggest that, at the characterization stage, policy considerations appropriately (and even "inevitably") drive the identification of the most important characteristic of an impugned law (see Hogg & Wright, *supra* note 5, s 15:12). Hogg and Wright appear to be following Lederman; the latter, in a famous essay, suggested that "when a particular [impugned law] has features of meaning relevant to both federal and provincial classes of laws," the criterion for assessing whether the federal or provincial features are "more important" is whether the "well-being of the country" is better served if "this thing [is] done on a national level, or on a provincial level" (see W R Lederman, "Classification of Laws and The British North America Act" in W R Lederman, ed, *The Courts and the Canadian Constitution: A Selection of Essays* (Toronto: McClelland and Stewart, 1964) 177 at 189 [Lederman, "Classification of Laws"]). Yet, perhaps Lederman would have had sympathy for the approach defended here. After all, Lederman called, in the first instance, for identifying "[the] full or total meaning" of the law, the "distinct

The fact that there is a discretionary aspect to constitutional adjudication is not intrinsically problematic. What is recognized by the reference to discretion is that the questions presented in giving meaning to the words of the *Constitution Act 1867* cannot be satisfactorily resolved through the application of purely deductive logic or through semantic analysis of the words used to express the heads of power.⁶⁸ Sections 91 and 92 are not merely collections of words, but represent a scheme designed to achieve certain ends and reflecting certain values. Recognition of these ends and values supplies reasons for adopting, or resisting, particular readings of the provisions; the accumulated case law interpreting ss 91 and 92 is the product of the collective judicial effort engaged in this activity.

This characteristic of constitutional interpretation—that it involves choices—is not inimical to the rule of law.⁶⁹ What we want to avoid, however, are opaqueness and dissimulation.⁷⁰ This is ultimately what is problematic about an essentialist understanding of “pith and substance” and of characterization: the inquiry invited by such an understanding is unnecessarily obscure and insufficiently susceptible to reasoned argument. To the extent that “pith and substance ... is decisive of validity,”⁷¹ there is a risk that choices about the division of powers will have been disguised as inevitabilities following logically from the “true character” of the legislation.

features of meaning which it has” (*ibid* at 199.) This is what I would call characterization. And Lederman was no essentialist: he argued, in fact, that “words like ‘pith and substance’ and ‘essence’ should be dropped entirely because they suggest that as a matter of final truth in philosophy or logic there is only one correct classification of a challenged rule. As we have already seen, this is a fallacy” (*ibid* at 196).

⁶⁸ It has been suggested by some that this phenomenon is aggravated by the “open-textured” and even vague nature in which the words of the constitution are expressed (see Weiler, *supra* note 12 at 173–74). Yet, law in general is replete with open-textured and vague standards (e.g., reasonable, fiduciary, etc.). What we are describing here is an aspect of legal interpretation in general that, to be sure, is also an aspect of constitutional interpretation in particular.

⁶⁹ Compare Burrows, *supra* note 58 at 27. See also Laurence H Tribe, *Constitutional Choices* (Cambridge: Harvard University Press, 1985) at 267 (rejecting as “pretense” the proposition that “choices may be avoided by some interpretive or analytic magic” but arguing that in choosing we nevertheless “act out of obligation ... to commitments we have made ... to bodies of principles by which we feel bound”).

⁷⁰ Laskin argued: “Can it be doubted but that such evaluations had to be made in terms of social and economic and political considerations? The mere fact that the Privy Council rarely articulated these considerations did not mean that they were absent. It meant merely that it was not inclined to open them for debate or that it took their general acceptance for granted” (see Laskin, “Tests for Validity”, *supra* note 64 at 123–24).

⁷¹ Hogg & Wright, *supra* note 5, s 15:5.

IV. "Pith and substance" in the case law of the modern Supreme Court of Canada

I have suggested that, in the interests of sound analysis, we would do well to abandon the idea that the characterization of a law is a search for the law's "pith and substance," understood as the essence of the law. Instead, characterization should be understood as the process of identifying the features of an impugned law that are relevant for an assessment of its validity; this activity is analogous to the identification of the relevant facts as a step in determining on which side of a legal boundary a given situation falls.

Within this non-essentialist understanding of characterization, I have attempted to account for the contemporary judicial practice of concluding the characterization analysis with a summary statement of the purpose and effects of the impugned law (its "pith and substance"). However, until this point, I have not focused to a great extent on the Supreme Court of Canada's current understanding of "pith and substance." Instead, I have analyzed the concept largely from the standpoint of the general legal problem presented by the task of deciding disputes about the validity of laws. The task, and the problem, are almost as old as the *Constitution Act 1867*; the meaning of "pith and substance," therefore, is not to be found in the practice of today's Court alone but rather in an understanding and interpretation of the activity of validity analysis as undertaken over time—not only by the current Court but also by its predecessors, including the Judicial Committee. Nevertheless, I turn to a question that naturally arises: to what extent does the Supreme Court of Canada's recent case law reflect the non-essentialist approach for which I advocate in this essay?

A) The Supreme Court of Canada's current approach

While there are frequently disagreements among the members of the Supreme Court of Canada about what the "pith and substance" of a given law is, there is a remarkable degree of judicial consensus about the definition of "pith and substance" and about the methodology for ascertaining pith and substance.

The characterization section of an opinion typically contains four elements:

1. an explanation that the aim of the characterization exercise is to identify the "pith and substance" of the legislation; often this explanation is accompanied by synonymous expressions for "pith

- and substance,” such as “true character,” “dominant or most important characteristic,” or “main thrust”;⁷²
2. the exposition of certain principles, described further below, that the Court has articulated as governing the formulation of pith and substance;
 3. an analysis of the purpose and effects of the legislation, drawing on the legislation’s terms and preamble (“intrinsic evidence”) as well as material not forming part of the legislation, but normally contemporaneous with the enactment and shedding light on the problem or problems the legislation was intended to solve (“extrinsic evidence”);⁷³ and
 4. a concluding paragraph applying the governing principles to the findings of the preceding analysis of the law’s purpose and effects in order to arrive at a statement of the law’s “pith and substance.”⁷⁴

⁷² See e.g. *Re Bill C-92*, *supra* note 2 at para 39 (“main thrust or dominant characteristic”); *Re IAA*, *supra* note 39 at para 61 (“the precise ‘matter’ to which the law in question relates”); *ibid* at para 253, Karakatsanis and Jamal JJ, dissenting in part (“dominant or most important characteristic”); *Re GGPPA*, *supra* note 6, at para 51, Wagner CJC (“true subject matter,” “main thrust,” “dominant or most important characteristic”); *ibid* at para 315, Brown J, dissenting (“dominant purpose,” “leading feature,” or “dominant or most important characteristic”—Brown also uses the expression “abstract of the statute’s content” which is more useful, see below); *Re GNDA*, *supra* note 2121 at para 28, Karakatsanis J (“true subject matter”; “dominant purpose,” “leading feature or true character,” “dominant or most important characteristic”, “essence of what the law does and how it does it”); *ibid* at para 164, Kasirer J, dissenting (“leading feature”); *Re AHRA*, *supra* note 21 at para 19, McLachlin CJC (“dominant ‘matter’”); *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10 at para 23 [*Murray-Hall*] (“dominant purpose,” “dominant or most important characteristic,” “leading feature or true character”); *Ward v Canada (Attorney General)*, 2002 SCC 17 at para 17 [*Ward*] (“essential character”); *Desgagnés*, *supra* note 42 at para 31 (“main thrust,” “dominant or most important characteristic,” “matter to which it essentially relates”).

⁷³ See e.g. *Re Bill C-92*, *supra* note 2 at paras 42–90; *Re IAA*, *supra* note 39 at paras 78–108; *ibid* at paras 258–97, Karakatsanis and Jamal JJ, dissenting in part; *Re GGPPA*, *supra* note 6, at paras 58–79; *Re GNDA*, *supra* note 21 at paras 34–64; *ibid* at paras 172–220, Kasirer J, dissenting; *Re AHRA*, *supra* note 21 at paras 22–33, McLachlin CJC; *Murray-Hall*, *supra* note 72 at paras 35–64.

⁷⁴ See e.g. *Re Bill C-92*, *supra* note 2 at para 92; *Re IAA*, *supra* note 39 at para 109; *ibid* at para 298, Karakatsanis and Jamal JJ, dissenting in part; *Re GGPPA*, *supra* note 5 at para 80; *Re GNDA*, *supra* note 21 at para 65; *ibid* at para 227, Kasirer J, dissenting; *Re AHRA*, *supra* note 21 at para 34, McLachlin CJC; *Murray-Hall*, *supra* note 72 at para 64.

As just mentioned, the Court has developed a collection of principles governing the articulation of "pith and substance." Some of the principles include:

1. that the identification of pith and substance should be "flexible," rather than "technical" and "formalistic";⁷⁵
2. that pith and substance should be formulated "as precisely as possible,"⁷⁶ because an excessively vague or general characterization will defy classification; and
3. that, in order to guard against excessively results-oriented reasoning, characterization and classification must be kept distinct, and pith and substance should be formulated in terms that do not use the language of the classes of subjects in ss 91 and 92 themselves.⁷⁷

To summarize the foregoing, the Supreme Court of Canada understands pith and substance to be a statement of the "true nature and character" of the legislation, articulated in precise terms and arising from an examination of the legislation and the circumstances of the legislation's enactment, without reference to the heads of legislative power.

Some aspects of the Supreme Court of Canada's approach would appear to be more helpful than others. Given that the function of characterization is to identify the relevant features of the legislation, the extensive analysis of the law's purpose and effects found in the characterization section of most

⁷⁵ *Morgentaler*, *supra* note 9 at 481j. See also *Ward*, *supra* note 72 at para 18; *Re GGPPA*, *supra* note 6 at para 51; *Re IAA*, *supra* note 39 at para 254, Karakatsanis and Jamal JJ, dissenting in part; *Murray-Hall*, *supra* note 72 at para 24; *Desgagnés*, *supra* note 42 at para 128, Wagner CJC and Brown J, dissenting.

⁷⁶ *Re IAA*, *supra* note 39 at para 64; *ibid* at para 256, Karakatsanis and Jamal JJ, dissenting in part; *Re GGPPA*, *supra* note 6 at para 52. In the dissenting opinion in *Re GGPPA*, a different formulation is used: "precisely enough for it to be associated with a specific class of subjects" (*ibid* at para 316, Brown J, dissenting). See also *Re GNDA*, *supra* note 21 at para 163, Kasirer J, dissenting; *Re AHRA*, *supra* note 21 at paras 190–91, LeBel and Deschamps JJ; *Desgagnés*, *supra* note 42 at para 35 ("characterized with precision").

⁷⁷ *Re IAA*, *supra* note 39 at para 65 ("courts must not refer to the heads of power"); *ibid* at para 256, Karakatsanis and Jamal JJ, dissenting in part; *Re GGPPA*, *supra* note 6 at para 56 ("the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence"); *Chatterjee*, *supra* note 39 at para 16 ("In principle this assessment should be made without regard to the head(s) of legislative competence, which are to be looked at only once the "pith and substance" of the impugned law is determined").

modern opinions is to be welcomed.⁷⁸ On the other hand, as previously suggested, the continued framing of the identification of the “dominant characteristic” (or another synonymous expression) of the legislation as the end goal of the characterization exercise is to be regretted.⁷⁹

What about the governing principles developed by the Court in connection with pith and substance? My suggestion is that we can best make sense of these guidelines by bearing in mind the function of characterization in the overall legal analytical process.

Consider, for example, the rule that pith and substance should be articulated “as precisely as possible.” A useful way of thinking about this rule is that the summary of a law’s content must contain sufficient detail if it is to fulfil its function of bringing to the fore the relevant “facts about the legislation.” This understanding of the rationale for the rule can help us in determining whether the rule has been satisfied: in deciding whether a given summary of the content of an impugned law is “too general” or “too vague,” one is essentially asking whether anything relevant about the impugned law (in light of the constitutional standard against which that law will later be measured) has been left unsaid. The error is a species of the analytical mistake, in an exposition of the material facts of a case, of leaving out details that are relevant in light of the legal categories subsequently to be applied.

Another guideline—that against “referring to the heads of power” in characterizing the impugned legislation—is best understood as an admonition against pre-judging issues about the scope of the heads of

⁷⁸ The Supreme Court of Canada’s case law exhibits some equivocation about the role of “practical effects” in characterization. Some decisions appear to treat the description of a law’s “practical effects” as a component, alongside “purpose” and “legal effects,” of the overall description of the “true nature and character” of the legislation (see e.g. *Re Bill C-92*, *supra* note 2 at para 39; *Re GNDA*, *supra* note 21 at para 51; *Murray-Hall*, *supra* note 72 at para 25). Others are more circumspect. For example, in *Re IAA*, Chief Justice Wagner writes: “The practical effects of a law may shed light on [the impugned legislation’s] essential character. But in some cases, a law’s practical effects will not be particularly helpful in the characterization exercise” (see *Re IAA*, *supra* note 39 at para 104 [citations omitted]; see also *Re GGPPA*, *supra* note 6, at paras 77–78). In contrast to both of these approaches, which suggest that an investigation of practical effects either is or is not useful in determining the essence of the legislation, the approach suggested here proceeds on the basis that whether any given feature or effect of an impugned law is relevant depends on the rules that define the scope of the candidate heads of power. As a generalization, under the current specification of those rules, the practical effects of a law are irrelevant in validity analysis, except insofar as the purpose of the impugned legislation is relevant and the practical effects of the law may provide insight into the law’s purpose. See *supra* note 27.

⁷⁹ See *supra* note 42 and accompanying text.

power, and against thereby circumventing the analysis of those issues that would otherwise take place at the interpretive stage.⁸⁰ The rationale for the rule does not imply, however, that the characterization process is to be undertaken without regard for what the candidate heads of power are, or for the definitions that have been given to those heads of power through judicial interpretation. On the contrary, what "facts about the legislation" are relevant depends on what heads of power are being relied upon, and what the requirements are for legislation enacted under those heads of power. Far from being problematic, it is in fact indispensable to "glance ahead to the ... catalogue of potential heads of power,"⁸¹ as this is how one knows what features of the impugned legislation are material.⁸²

Finally, the latter observation also explains why (and in what way) the determination of "pith and substance" must be "flexible"—and why there is "no single test for pith and substance."⁸³ Characterization is flexible in the sense that the features of the legislation that are relevant vary according to the requirements of the particular candidate heads of power as developed in the case law. For example, if a given federal law is being measured against s 91(12) ("fisheries"), it is relevant if its aim is to "carry out economic goals and policies associated with fisheries as a resource";⁸⁴ on the other hand, for a different federal law regulating a different single industry, and being measured against, say, s 91(2), the economic aims of the federal law may be irrelevant, given the case law interpreting the latter provision.⁸⁵

There are both principled and practical reasons for the variation that has just been noted. A principled reason is that the relevance of a "fact about the law" is determined by the rules that define the scope of the head or heads of power against which it is being measured. These rules, in turn, represent interpretations of the heads of power, and thus vary according to the wording of and rationale for the particular head of power being

⁸⁰ See *supra* note 39 and accompanying text (*Re IAA*, *supra* note 39 at paras 65–67, Wagner CJC).

⁸¹ *Re IAA*, *supra* note 39 at para 65. The passage within which the quoted words appear could be read as expressing disapproval of "glancing ahead". On my understanding of the function of characterization, such disapproval is misplaced.

⁸² See generally Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (New York: Cambridge University Press, 2003) at 228 ("an important feature of legal reasoning that usually remains obscure [is] that facts can only be perceived as relevant or irrelevant when it is known how the legal issues are to be identified and framed.").

⁸³ See *supra* note 9.

⁸⁴ *Ward*, *supra* note 72 at paras 32–33.

⁸⁵ See e.g. *The King v Eastern Terminal Elevator Co*, 1925 CanLII 82 (SCC) at 447 [*Eastern Terminal*].

interpreted.⁸⁶ A practical explanation is that the “tests” for the various heads of power were developed at different times by different courts; it is reasonable to anticipate, even as a purely descriptive matter, that there will not be perfect alignment among them at any given moment as to the “facts about the legislation” that they make relevant.

Nevertheless, despite this variability, the relevance of a feature of the legislation remains an analyzable question. The summarization of a law’s content can thus be flexible, without being a matter of impressionistic intuition.

B) What disagreements about “pith and substance” are about

On the approach to characterization advanced in this essay, disagreements about characterization would normally be disagreements about “facts about the law.” They would also be relatively infrequent; what the legislature was trying to do is easier to determine than whether the legislature was allowed to do it.

An example of a disagreement about “facts about the law” is the disagreement between the majority and the dissent in *Reference Re Impact Assessment Act*,⁸⁷ regarding the characterization of one part of the impugned federal legislation. Ambiguity in the indicia of purpose within the legislation gave rise to a disagreement about whether this part of the legislation was directed at the management of specified types of “adverse effect”⁸⁸ or whether it instead served a wider array of social and economic purposes.⁸⁹ The Justices also disagreed about whether or not the legislation captured projects having even a trivial impact on matters within federal jurisdiction⁹⁰—in other words, about the legal effect of the legislation. These are indeed disagreements about “facts about the law.”⁹¹

⁸⁶ In cases where legislation is being measured against several candidate heads of power, the characterization of the legislation involves identifying facts that are relevant under the rules that define the scope of any of them. The situation is analogous to a criminal case where an accused is charged with several offences containing different elements: a summary of the relevant facts in such a case should include all of the facts that are relevant to any of the offences.

⁸⁷ *Re IAA*, *supra* note 39.

⁸⁸ *Ibid* at para 262, Karakatsanis and Jamal JJ, dissenting in part.

⁸⁹ *Ibid* at para 91, Wagner CJC. The Chief Justice also relied on extrinsic evidence, which he described as “confirm[ing] what [was] already apparent from the intrinsic evidence” (*ibid* at para 90) of the legislation’s purpose.

⁹⁰ *Re IAA*, *supra* note 39 at paras 270–80, Karakatsanis and Jamal JJ, dissenting in part; *ibid* at para 95, Wagner CJC.

⁹¹ In addition to these disagreements about “facts about the law,” the majority and dissent in *Re IAA*, *supra* note 39, also disagreed about what is permissible under s 91—i.e.,

Sometimes, however, what appear to be disagreements about "facts about the law" are more productively regarded as disagreements about what is permissible under the Constitution. In this part of the essay, I examine three recent cases that illustrate this point. A lesson to be drawn from these cases is that an essentialist approach to characterization, of which there remain vestiges in the Supreme Court of Canada's recent case law, can have the effect of obscuring the pertinent legal questions, which concern the choices to be made about the scope of the heads of power.

1) Reference Re *Greenhouse Gas Pollution Pricing Act*

In his majority decision on the constitutionality of the federal carbon-pricing scheme, Chief Justice Wagner described the pith and substance of the impugned legislation as "establishing minimum national standards of GHG [greenhouse gas] price stringency to reduce GHG emissions."⁹² Justice Brown's dissenting judgment criticized the "invocation of 'minimum national standards'" in the characterization of the legislation as a "rhetorical 'sleight of hand.'"⁹³ Justice Brown's concern was that the inclusion of "minimum national standards" prejudices the question of validity, given that, by definition, "only Parliament is *capable* of imposing minimum national standards."⁹⁴

Chief Justice Wagner's response, that the phrase "adds something essential to the pith and substance that goes to the true subject matter of the GGPPA [Greenhouse Gas Pollution Pricing Act], because the statute operates as a national backstop"⁹⁵ was in turn criticized by Justice Brown as question-begging and as resting on an "elusive" distinction between a "mere feature" of an impugned law and one definitive of the true nature and character of the legislation.⁹⁶

about the interpretation of the heads of power. These interpretive disagreements were of at least two types. The Justices disagreed, first, about what it is permissible (under the division of powers) for legislation to direct federal decision-makers to take into account when deciding whether to approve a project that has an adverse impact on matters within federal jurisdiction; and second, about whether the statutory definition of "adverse federal effects" corresponds to the scope of Parliament's authority under s 91. Regarding the first disagreement, compare *ibid* at paras 135–36, Wagner CJC; and *ibid* at paras 329–34, Karakatsanis and Jamal JJ. Regarding the second, compare *ibid* at paras 190–203, Wagner CJC; and *ibid* at paras 337–51, Karakatsanis and Jamal JJ.

⁹² *Re GGPPA*, *supra* note 6 at para 80.

⁹³ *Ibid* at paras 326–27.

⁹⁴ *Ibid* at para 329.

⁹⁵ *Ibid* at para 81.

⁹⁶ *Ibid* at para 328.

I would suggest that disagreements of this type should be approached by keeping in mind the function of characterization, which is to extract the facts about the legislation that are relevant to a determination of its validity, given what is known about the scope of the candidate heads of power and what must be decided about their scope at the interpretation stage.

In this case, is the “backstop” or “minimum national standards” feature of the impugned legislation relevant? The answer to this question is yes, because the position taken by the federal government (and disputed by the legislation’s opponents) is that the authority of Parliament under the “Peace, order and good government” (POGG) clause includes, under certain circumstances, the power to enact legislation having this characteristic. This disagreement gives rise to an interpretive issue about the Constitution; the existence of this interpretive issue is what makes the backstop characteristic of the legislation a relevant “fact about the legislation.”⁹⁷

I agree with Justice Brown that it would be an error to characterize an impugned law in a manner that prejudices its validity. However, this is not what Chief Justice Wagner’s characterization does. The fact that the legislation operates as a backstop does not prejudice the question whether such legislation is permissible under the POGG clause. The inclusion of this feature in the characterization of the legislation instead signals that a question requiring resolution at the interpretive stage will be under which circumstances, if at all, the POGG clause authorizes the federal Parliament to enact legislation to guard against insufficiently stringent legislation enacted by the provinces.⁹⁸

⁹⁷ The relevance of the “backstop” feature of the legislation in this case results from the specific head of power at issue, and the interpretive question that was raised in connection with this head of power. In a different scenario, the backstop feature of federal legislation may well not be relevant. Consider, for example, hypothetical federal legislation applying corporate governance requirements to federally-incorporated companies if and only if those companies are not subject to sufficiently stringent requirements under provincial securities law. This federal legislation could fairly be described as a backstop; yet, this characteristic is not relevant in this hypothetical scenario because there is no real doubt that the enactment of corporate governance rules for federally-incorporated companies comes within the federal incorporation power, regardless of whether the rules are a backstop.

⁹⁸ The majority Justices eventually resolved this interpretive question in favour of the existence of federal authority to enact backstop legislation where (among other conditions) the subject matter being dealt with is “predominantly extraprovincial or international in its nature or effects,” and “grave extraprovincial consequences” would follow from a failure of some provinces to enact sufficiently stringent legislation (see *Re GHGPPA*, *supra* note 6 at paras 151, 157).

With that being said, I can sympathize with Justice Brown's discomfort with Chief Justice Wagner's contention that what makes the reference to the backstop nature of the legislation appropriate is that that characteristic is "essential" to the "true subject matter" of the GGPPA. We will get farther, I suggest, if we think of the Justices' disagreement not as a disagreement about what the legislation is "truly about" but, instead, as a disagreement about what the POGG clause enables the Parliament of Canada to do—specifically, a disagreement about whether, and under what circumstances, that clause allows Parliament to enact backstop legislation on a matter with respect to which the provinces also have legislative authority.⁹⁹

2) Reference Re *Genetic Non-Discrimination Act*

The disagreement in *Re GGPPA* may be viewed as an example of a more general methodological issue concerning whether, and when, it is appropriate to include the "legislative means" in a formulation of pith and substance. The latter issue also arose in *Reference Re Genetic Non-Discrimination Act (Re GNDA)*.¹⁰⁰

In *Re GNDA*, the relevant part of the impugned legislation consisted largely of a series of prohibitions against various uses of genetic testing, or the results thereof, in connection with contracting and the provision of goods and services.¹⁰¹ The statute's brevity, the absence of any preamble or purpose clause, and the legislation's origins in a private member's bill complicated the exercise of articulating the objective of the prohibitions. Nevertheless, there was evidence to suggest that an important rationale for the Act was that the fear of the misuse of their information might dissuade Canadians from undergoing genetic testing beneficial for their health.¹⁰² The issue to be decided was whether the legislation came within Parliament's authority to enact "criminal law" under s 91(27).

In his dissenting judgment, Justice Kasirer described the pith and substance of the legislation as follows: "to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category

⁹⁹ Regarding this disagreement about the interpretation of s 91, much has already been written. See e.g. Jean Leclair, "'Tis a rock—a crag—a cape? A cape? say rather a peninsula!' The Supreme Court of Canada's Revisitation of the National Concern Doctrine" (2023) 180 SCLR 3.

¹⁰⁰ *Re GNDA*, *supra* note 21.

¹⁰¹ *Ibid* at para 36, Karakatsanis J; *ibid* at para 136, Moldaver J; *ibid* at para 203, Kasirer J, dissenting.

¹⁰² *Ibid* at para 43, Karakatsanis J; *ibid* at para 130, Moldaver J; *ibid* at para 202, Kasirer J, dissenting.

of genetic tests, the whole with a view to promoting the health of Canadians.”¹⁰³ The majority Justices, who would ultimately conclude that the legislation came within s 91(27), characterized the legislation differently and, in particular, omitted any reference to the “regulat[ion] of contracts [etc.]” from their respective formulations of the pith and substance of the legislation.¹⁰⁴

When is it permissible to refer to the means by which a law achieves its goals (here, according to Justice Kasirer, by “regulating contracts”) in the formulation of the pith and substance of the legislation? Justice Kasirer provided the conventional answer to this question, namely, that, in some cases, the “dominant characteristic [of the legislation] is closely tied-up in means[.]”¹⁰⁵ In short, the means employed by the legislation can be included in a statement of pith and substance if the pursuit of the legislation’s purpose by that means is the main thrust of the legislation.

There is something unhelpfully circular about the proposition that something (legislative means) is part of the legislation’s pith and substance if that thing is part of the main thrust of the legislation. The proposition is, I would suggest, another illustration of the perils of an essentialist understanding of pith and substance.

Instead, if the legislation pursues its goals via a particular mechanism (in *Re GNDA*, a prohibition against certain practices in connection with contracting¹⁰⁶), that is a “fact about the legislation.” Whether that fact is relevant depends on what is known about the scope of the candidate heads of power or needs to be resolved about their scope. What appears on the surface to be a dispute about characterization is more helpfully understood as a disagreement between the Justices about the extent of Parliament’s authority under s 91(27): is it permissible under that head of power to enact a prohibition against certain practices in connection

¹⁰³ *Ibid* at para 227.

¹⁰⁴ Justice Karakatsanis (writing for three judges) articulated the “pith and substance” of the impugned portion of the Act in a manner that emphasized its objectives, rather than the mechanism employed: “to protect individuals’ control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address fears that individuals’ genetic test results will be used against them and to prevent discrimination based on that information” (*ibid* at para 65). Justice Moldaver (writing for two judges) instead described the “dominant purpose” as the “protec[tion of] individuals from a serious threat to health” (*ibid* at para 116) and concluded that the pith and substance of the impugned portion of the Act was “to protect health by prohibiting [certain] conduct” (*ibid* at para 136).

¹⁰⁵ *Ibid* at para 226.

¹⁰⁶ *Re GNDA*, *supra* note 21 at para 36, Karakatsanis J; *ibid* at para 136, Moldaver J; *ibid* at para 203, Kasirer J, dissenting.

with contracting for the supply of goods or services, or for insurance, in order to pursue an aim related to public health or human dignity? In fact, given that many uncontroversially valid criminal law prohibitions can be understood as prohibiting certain contractual terms (e.g., combines, conspiracy, paid surrogacy, lotteries) or certain behaviours in connection with contracting (e.g., fraud, extortion), a different question regarding s 91(27) appears to be more consequential: should s 91(27) be interpreted (as Justice Kasirer later argues) as requiring the identification of a "well-defined threat" to the specified public interest, on the ground that, without such a requirement, federal power under s 91(27) would "in reality have no limits[?]"¹⁰⁷

In short, it seems to me that the pivotal legal question in *Re GNDA* is not, "what is the essential nature of the impugned legislation?" Rather, it is "what should the boundaries of s 91(27) be understood to be, in light of the case law interpreting that provision and the values underlying the division of powers?"

3) Reference *Re Assisted Human Reproduction Act*

In this case, the federal legislation contained a series of prohibitions in connection with assisted human reproduction.¹⁰⁸ Some of the prohibitions related to activities that were not intrinsically harmful (e.g., assisted insemination and IVF) and the legislation contemplated that regulations made by the Governor in Council, as well as licence conditions imposed by a federal agency, would define what was and was not prohibited in connection with these "controlled activities."¹⁰⁹ As in *Re GNDA*, the issue to be decided was whether the legislation was a valid exercise of the federal criminal law power (s 91(27)).

Hogg and Wright's observation that pith and substance is "often decisive of ... validity"¹¹⁰ is borne out by a brief glance at the two main opinions. Chief Justice McLachlin's characterization of the pith and substance of the legislation as "the prohibition of negative practices associated with assisted reproduction"¹¹¹ and Justices LeBel and Deschamps' rival conclusion that the pith and substance of the impugned provision was "the regulation of assisted human reproduction as a health

¹⁰⁷ *Ibid* at para 269, citing *Re AHRA*, *supra* note 21, LeBel and Deschamps JJ.

¹⁰⁸ *Re AHRA*, *supra* note 21.

¹⁰⁹ The legislation prohibited such activities unless carried out in accordance with the regulations and a licence (see *Assisted Human Reproduction Act*, SC 2004, c 2, ss 10–12; *Re AHRA*, *supra* note 21 at paras 93, 106, 109).

¹¹⁰ Hogg & Wright, *supra* note 5, s 15:12.

¹¹¹ *Re AHRA*, *supra* note 21 at para 34.

service”¹¹² leave little doubt as to the outcomes that each will reach as to whether the law could be classified under s 91(27).

On what did these competing characterizations rest? At first glance, the Justices appear to disagree about a “fact about the impugned law,” specifically its purpose. Chief Justice McLachlin wrote that the “dominant purpose [of the legislation was] to prohibit inappropriate practices.”¹¹³ By contrast, in the view of Justices LeBel and Deschamps, the purpose of the impugned provisions was instead to “establish mandatory national standards for assisted human reproduction.”¹¹⁴

An initial difficulty presented by this disagreement is that it appears to be about semantics. Another way of describing a “standard” is that it defines what conduct is or is not “appropriate.” The distinction between aiming to “prohibit inappropriate practices” and setting “standards” for a practice is elusive, at best.¹¹⁵

A closer look at the judgments reveals a more substantial disagreement between Chief Justice McLachlin and Justices LeBel and Deschamps. That disagreement is not about the impugned legislation, but rather about what it is permissible for legislation enacted under the criminal law power to do. An important premise of Justices LeBel and Deschamps’ reasoning, leading to their conclusion against validity, is that the activities being constrained by the legislation (the “controlled activities,” such as IVF) are not inherently harmful or dangerous.¹¹⁶ For her part, Chief Justice McLachlin catalogues numerous serious harms against which, in her view, the prohibitions contained in the legislation are directed.¹¹⁷

There is a genuine disagreement here; it is a disagreement about what must be harmful in order for a law enacted under s 91(27) to be valid. The legal issue is this: if federal legislation enacted in reliance on s 91(27) imposes, with regard to certain activities, restrictions as to the manner of carrying them out, must those activities be intrinsically harmful or dangerous in general or is it sufficient if the prohibited forms of those activities are harmful?

To be clear: this is not a disagreement about what the impugned legislation does, or about why the legislation does what it does. It is a

¹¹² *Ibid* at para 227.

¹¹³ *Ibid* at para 24.

¹¹⁴ *Ibid* at para 226. See also *ibid* at para 251.

¹¹⁵ See Ian B Lee, “The Assisted Human Reproduction Act Reference and the Federal Criminal Law Power” (2011) 90:2 Can Bar Rev 469 at 472.

¹¹⁶ *Re AHRA*, *supra* note 21 at para 251.

¹¹⁷ *Ibid* at paras 92, 97–98, 107, 111, 118–19.

disagreement about the extent of federal legislative authority under s 91(27)—a disagreement, in other words, about the interpretation of the latter provision.¹¹⁸

V. Conclusion

The ideas put forward here are not revolutionary. It was a century ago that the American legal realists denounced the role of "magic solving words" and "conceptual acrobatics" in legal reasoning,¹¹⁹ maintaining that such devices have the effect of disguising choices that should instead be defended on grounds of justice or policy. Half a century ago, Anglo-American legal theorists grappled directly with the implications for legal interpretation of the open-texturedness of language and the multiplicity and ambiguity of legal sources. They argued, for example, about whether the necessity of choosing between competing interpretations in "hard cases" amounts to the law "running out," leaving judges with residual freedom to legislate based on non-legal considerations, or whether judicial choice is instead governed by distinctive norms such that the exercise remains one of *doing* law rather than *inventing* law.¹²⁰

Re-examining "pith and substance" is an exercise in reflecting upon the implications of these legal intellectual developments of the 20th century for the appropriate use today of an analytical concept that was introduced into our jurisprudence in the 19th century. Modern jurists have internalized the realists' aversion to "transcendental nonsense."¹²¹ We are not embarrassed by the presence of choice in our practices of constitutional adjudication; yet, we find, at times, that the use of "pith and substance" in formulating legal conclusions has a question-begging quality.

I have suggested that an updated understanding of the function of "pith and substance" begins from the premise that validity analysis is an instance of the general legal problem of determining on which side of a legal boundary a given set of circumstances falls. In analyzing such problems, lawyers normally proceed by identifying the relevant facts of the situation and resolving, through interpretation, issues about the definition of the legal boundary. Once we appreciate that, in validity

¹¹⁸ For discussion of this disagreement concerning the scope of s 91(27), see Lee, *supra* note 115 at 472–79.

¹¹⁹ Cohen, *supra* note 12 at 820, 824; see also John Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35:6 Yale LJ 655.

¹²⁰ See e.g. Scott J Shapiro, "The 'Hart–Dworkin' Debate: A Short Guide for the Perplexed" in Arthur Ripstein, ed, *Ronald Dworkin* (Cambridge: Cambridge University Press, 2007) 22 at 30–31.

¹²¹ Cohen, *supra* note 12.

analysis, characterization of the impugned law is the analogous activity to the identification of the relevant facts, it becomes apparent that the goal of the activity is not to distill the content of the legislation into its “essence,” “dominant characteristic” or other similarly intrinsic quality, but rather to identify the features of the legislation that are relevant in light of what is either known, or needs to be determined through interpretation, about the boundaries of the heads of power.

If this approach to validity analysis were consistently followed, some disputes that, today, are cast as disagreements about the “true nature and character” of the impugned legislation would be seen differently, and more productively, as disagreements about the scope of the powers of Parliament and the provincial legislatures.¹²² The non-essentialist approach is no panacea; the disagreements would not magically go away. However, understood as raising interpretive issues about the constitutional division of powers, the disagreements would become less mysterious, and the choices involved would become more transparent and more amenable to reasoned argument.

¹²² See Laskin, “Tests for Validity”, *supra* note 64 at 125 (“The pivotal factor in constitutional adjudication is the elaboration of the content of the heads of legislative power”).