The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 104 *Volume 104* Article 3

2022

Reference Re Genetic Non-Discrimination Act: How to Make Space for Some Certainty

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"An abundance of dissents . . . risks creating uncertainty in the applicable law. An abundance of concurring reasons could have the same effect, to the detriment of attempts to identify the principles to be drawn from a judgment."[1]

The above quotation is drawn from a 2019 speech in which Wagner C.J.C. discussed the significance of dissenting judgments. He placed the value of dissents in context by emphasizing that the role of judges "first and foremost, is to aim for clarity and provide guidance in our reasons".[2] According to the Chief Justice, this role requires a measure of "give-and-take" in the drafting of reasons.[3] Yet, citing to an article by Peter Hogg and Ravi Amarnath,[4] the Chief Justice also stressed that where "judges disagree, we have a responsibility to dissent and to explain why. To do otherwise would be to abdicate our judicial responsibility".[5] In the article to which the Chief Justice referred, Hogg and Amarnath argue that this responsibility follows from the fact that every individual judge is "the final judge of legality and

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1 Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, online: https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-07-04-eng.aspx [hereinafter Wagner, "Remarks"].

2 Wagner, "Remarks" online: https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-07-04-eng.aspx.

3 Wagner, "Remarks" online: https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-07-04-eng.aspx.

4 Peter W. Hogg & Ravi Amarnath, "Why Judges Should Dissent" (2017) 67:2 U.T.L.J. 126 [hereinafter "Hogg, Amarnath].

5 Wagner, "Remarks", online: https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-07-04-eng.aspx.

responsible to his or her own convictions about political morality".[6]

The *Reference re Genetic Non-Discrimination Act*[7] provides a case study in which judicial responsibility, as conceived by Hogg and Amarnath, conflicts with the judicial obligation to provide clarity in the law and to offer guidance. The Supreme Court of Canada divided three ways, reproducing the divisions from the *Reference re Assisted Human Reproduction Act*,[8] decided a decade earlier. *AHRA* did not provide a majority statement of the rule for determining what constitutes a valid exercise of the section 91(27) criminal law power. Neither, as we shall see, did the *Reference*. As a consequence, uncertainty in the law has persisted for 10 years and will persist until some members of the Supreme Court of Canada temper or set aside their own convictions, in the interests of providing lower courts, governments and litigants with guidance.

In order to avoid the kind of legal uncertainty that the *Reference* creates, Hogg and Amarnath's framing of the judicial role should be nuanced and the collective, rather than individual, responsibilities of judging should be foregrounded. Lon Fuller referred to the collective dimensions of adjudication when he wrote that the judicial decision-making process is "collaborative", in that it is "projected through time"[9] and undertaken by courts building upon one another's reasons. Similarly, according to classic common law theorists, the role of judges is to articulate reasoned formulations of the law and the law itself is "seen to be the expression or manifestation of commonly shared values and conceptions of reasonableness and the common good".[10] In this view, the primary responsibility of a judge is not to their individual convictions but to the development of law's reasons, for the good of the community. If courts were to give priority to this collective dimension of judicial reasoning, they would avoid writing fractured judgments that may fully express the individual views of judges, but have the effect of frustrating, rather than advancing the reasoned development of the law.

In this article, I will argue that the multiple sets of reasons in the *Reference* create uncertainty in the law governing the criminal law power and I will suggest arguments that, if adopted, would resolve this uncertainty. In Part I, I will summarize the case, including the three sets of reasons written by Karakatsanis, Moldaver and Kasirer JJ., respectively.

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[6] Hogg, Amarnath, at 130.

[7] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.) [hereinafter "*Reference*"].

[8] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61 (S.C.C.) [hereinafter "*AHRA*"].

[9] Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353, at 398.

[10] Gerald Postema, *Bentham and the Common Law Tradition*, 2d ed. (New York: Oxford University Press, 2019), at 7.

Part II will be organized around three spatial metaphors: the relationship of parts to the whole, breadth and line-drawing. Part II will first address an apparent disagreement in the federalism jurisprudence and in the *Reference* about the proper order for pith and substance analyses. I will argue that in some cases it is necessary to interpret an act as a *whole* before assessing its *parts*.

Second, Part II will turn to disagreements in the Court about the *breadth* of the criminal law power. I will argue that Karakatsanis J.'s expansive interpretation places in jeopardy federalism principles and that Kasirer J.'s criticisms of that interpretation were justified.

Part II will conclude by examining a disagreement between Kasirer and Karakatsanis JJ. about whether the test for validity under the criminal law power should include a *line-drawing* exercise. I will argue that this relatively narrow disagreement reveals a deeper debate about the appropriate role of courts in adjudicating disputes about the criminal law power. I will conclude that Kasirer J.'s view flows from an understanding of the judicial role that is consistent with the broader federalism jurisprudence.

I. AN UNUSUAL ACT, FRACTURED JUDGMENTS

The *Genetic Non-Discrimination Act*[11] originated in Bill S-201, a private member's bill entitled *An Act to prohibit and prevent genetic discrimination*.[12] The Act is short, comprised of 11 sections. Section 1 is the short title. Section 2 defines a genetic test. Section 3 prohibits making undergoing or refusing to undergo a genetic test a condition for providing an individual a good or service, entering into a contract with that individual or "offering or continuing specific terms or conditions in a contract or agreement" with an individual. Section 4 prohibits requiring an individual to disclose the results of a genetic test as a condition for entering into any of the activities identified in section 3. Section 5 prohibits anyone engaged in activities identified in section 3 from using or disclosing genetic test results, without the written consent of the individual who underwent the test. Section 7 sets out the penalties for infringing sections 3 to 5. Section 6 provides that sections 3 to 5 do not apply to physicians, pharmacists or other health care providers if they are engaged in "medical, pharmaceutical or scientific research in respect of an individual who is a participant the research".

Sections 8, 9, 10 and 11 were not at issue in the appeal. Section 8 amends the *Canada Labour Code* in order to provide protections in the employment context, similar to the ones set out in sections 3 to 5. Sections 9 and 10 amend the *Canadian Human Rights Act*, notably to include genetic characteristics as a ground of discrimination. Section 11 is comprised of "coordinating amendments", by virtue of which the changes to the *Canadian Human Rights Act* came into force at the same time as the Act.

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[11] S.C. 2017, c. 3 [hereinafter "Act"].

[12] *Reference*, at para. 5.

The Government of Quebec referred sections 1 to 7 to the Quebec Court of Appeal, asking whether they were *ultra vires* Parliament's section 91(27) jurisdiction. The Court of Appeal held that they were. According to a unanimous panel, the purpose of the provisions is to promote health by encouraging "the use of genetic tests in order to improve the health of Canadians by suppressing the fear of some that this information could eventually serve discriminatory purposes".[13] According to the Court of Appeal, this was not a valid criminal law purpose.[14] Furthermore, the Court of Appeal reasoned that the challenged provisions did not address genetic discrimination but rather "govern the type of information available for employment and insurance purposes".[15] The Court of Appeal concluded that regulation for this purpose also fell outside of the criminal law power.[16]

One of the interveners at the Court of Appeal appealed as of right to the Supreme Court of Canada. The Court divided three ways, and in what follows I will summarize the elements of each set of reasons that are most salient for the arguments I advance in this article.

1. The Reasons of Karakatsanis J.

Justice Karakatsanis (joined by Abella and Martin JJ.) held that the impugned provisions were valid under Parliament's section 91(27) criminal law power. Justice Karakatsanis opened her pith and substance analysis by citing *General Motors of Canada Ltd. v. City National Leasing Ltd.*[17] for the proposition that courts will generally first characterize the purposes of specific challenged provisions, rather than the "legislative scheme as a whole".[18] Her analysis of the text of the Act (or the "intrinsic evidence") looked first to the Act's short and long titles. From this analysis, she identified a two-fold purpose for the Act as whole: prohibiting and preventing discrimination on genetic grounds.[19] Justice Karakatsanis continued her examination of the intrinsic evidence by noting that the impugned provisions' prohibitions are of general application, insofar as they do not target a particular industry, but rather prohibit "conduct that enables genetic discrimination".[20] Justice Karakatsanis concluded her assessment of the intrinsic evidence by reasoning that the Act's definition of a genetic test focuses on tests that are health-related. This interpretation supported her reading of the Act's purpose. According to Karakatsanis

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[13] Quoted in *Reference*, at para. 12.

[14] See *Reference*, at para. 13.

[15] *Reference*, at para. 13.

[16] *Reference*, at para. 12.

[17] *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641, at 666-67 (S.C.C.) [hereinafter "*General Motors*"].

[18] *Reference*, at para. 28.

[19] *Reference*, at para. 35.

[20] *Reference*, at para. 36.

J., the prohibitions target "a broad range of conduct that creates the opportunity for genetic discrimination based on intimate personal information revealed by health-related tests".[21]

Justice Karakatsanis also looked to evidence extrinsic to the Act in order to identify its pith and substance. She analyzed Parliamentary debates and expert testimony before Senate and House of Commons Committees. She concluded that parliamentarians aimed at a specific mischief: "the 'gap' in the laws, which left individuals vulnerable to genetic discrimination and grounded the fear of genetic discrimination".[22] Moreover, Karakatsanis J. analyzed Parliament's decision to amend the *Canadian Labour Code* and the *Canadian Human Rights Act* by means of sections 8 to 11 of the Act.[23] She concluded that Parliament's objective was to adopt a coordinated approach. These provisions targeted genetic discrimination, while the impugned provisions aimed at precursors to this form of discrimination "namely, forced genetic testing and disclosure of the results of such testing".[24]

Justice Karakatsanis continued her pith and substance analysis by looking at the legal and practical effects of the Act's challenged provisions. In addition to the legal prohibitions and penalties that can be read off of the face of the provisions, she pointed to the likely effects on the operation of provincial laws that require the disclosure of genetic test results. She noted that, because of the doctrine of paramountcy, the Act would render inoperative any provincial law inconsistent with it.[25] According to Karakatsanis J., the main practical effects of the impugned provisions are to ensure that individuals can exercise free choice over whether to undergo genetic testing and over whether and how to give others' access to the results of tests they choose to undergo.[26] She reasoned that these practical effects of the provisions reduce the risk of genetic discrimination.[27] She further identified additional health-related effects (encouraging individuals to undergo testing) and benefits (early detection of health problems),[28] as well as impacts on insurance contracts.[29] She stressed that the effects of the provisions and the range of contexts to which they applied are broad. She reasoned, therefore, that the provisions' purpose was not the narrow one, accepted by the Court of Appeal, of regulating the

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[21] *Reference*, at para. 39.

[22] *Reference*, at para. 45.

[23] *Reference*, at para. 46.

[24] *Reference*, at para. 47.

[25] *Reference*, at para. 53.

[26] *Reference*, at para. 54.

[27] *Reference*, at para. 54.

[28] *Reference*, at para. 56.

[29] *Reference*, at para. 57.

insurance industry.[30]

Justice Karakatsanis summarized her pith and substance analysis by concluding that the impugned provisions' purpose was 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.[31]

With this purpose established, Karakatsanis J. turned to articulate the test for determining whether federal legislation is *intra vires* Parliament's section 91(27) power. The general elements of the test are uncontroversial. Legislation is *intra vires* the criminal law power if, in pith and substance, "(1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose".[32] Furthermore, the precedents are settled that establishing a criminal law purpose requires showing that an impugned law targets "an evil, injurious or undesirable effect" and demonstrating that such an effect is linked to a "public interest that can properly ground criminal law".[33] Justice Karakatsanis noted, moreover, that eight of nine judges in *AHRA* agreed that in order to show that a law targets this kind of effect, one needs to establish that the law responds to "a reasoned apprehension of harm".[34]

There was, however, sharp disagreement in *AHRA* about what precisely is required to demonstrate a reasoned apprehension of harm. Justice Karakatsanis accepted McLachlin C.J.C.'s "deferential posture" in *AHRA* (which attracted the agreement of three judges). This posture does not specify what is required to show "a reasoned apprehension of harm";[35] it only excludes certain considerations, such as the "degree of seriousness of harm" and questions about whether Parliament's use of the criminal law power is "appropriate or wise".[36] In addition, Karakatsanis J. expressly rejected what she described as LeBel and Deschamps JJ.'s requirement that courts assess "whether Parliament has identified and established conduct or facts that support the apprehended harm to which it has responded".[37] Justices LeBel and Deschamps (in reasons supported by two other judges in *AHRA*) imposed specific and more demanding requirements than did either McLachlin C.J.C. or Karakatsanis J. and I will describe these in more detail when I set out Kasirer J.'s reasons. Because the third set of reasons in *AHRA*, written by Cromwell J., did not

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[30] *Reference*, at paras. 58-62.

[31] *Reference*, at para. 65.

[32] *Reference*, at para. 67.

[33] *Reference*, at para. 74.

[34] *Reference*, at para. 75.

[35] *Reference*, at para. 79.

[36] *Reference*, at para. 79.

[37] *Reference*, at para. 77.

take a stance on the proper statement of the test there was no majority opinion on this issue. We shall soon see why uncertainty persists after the *Reference*.

For now, I conclude my summary of Karakatsanis J.'s reasons. She held that the law was *intra vires* because she found that Parliament acted on a reasoned apprehension of

> harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests traditionally protected by the criminal law: autonomy, privacy and the fundamental social value of equality, as well as public health.[38]

Autonomy, privacy and the protection of health are public interests that are well-established in the jurisprudence. By contrast, although various fundamental social values have been accepted in the criminal law power jurisprudence, no previous Supreme Court judgment has identified equality as such a value. Finally, Karakatsanis J. concluded that if legislation responds to a risk of harm to health, "the possibility that the law will also produce beneficial health effects does not negate that conclusion".[39] As a result, she characterized as "artificial" the distinction, drawn by the Court of Appeal, between the purposes of protecting health (which the Court of Appeal found to be a valid criminal purpose) and promoting health (which the Court of Appeal found to lie within the exclusive jurisdiction of the provinces).[40] We will see in our discussion of Kasirer J.'s reasons that this distinction was pivotal to his analysis, but for now we turn to consider the reasons of Moldaver J.

2. The Reasons of Moldaver J.

Justice Moldaver wrote a set of reasons, joined by Côté J., that concur in the result reached by Karakatsanis J., but diverge from her reasoning in important respects. According to Moldaver J., the pith and substance of the impugned provisions "is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing".[41] He expressly disagreed with Karakatsanis J.'s view that preventing discrimination formed part of the provisions' pith and substance.[42] He also rejected Kasirer J.'s view that the purpose of the impugned provisions was to promote beneficial health practices.[43] We shall soon see that Kasirer J. further reasoned that the provisions aimed to regulate insurance and employment contracts. Justice Moldaver disagreed with him on this point too, as he reasoned that regulating such contracts was a means chosen by Parliament to

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[38] *Reference*, at para. 80.

[39] *Reference*, at para. 101.

[40] *Reference*, at para. 100.

[41] *Reference*, at para. 114.

[42] *Reference*, at para. 115.

[43] *Reference*, at para. 143.

achieve a purpose, but not the dominant purpose itself.[44]

For present purposes, one additional aspect of Moldaver J.'s pith and substance analysis is significant. He cited to *Quebec (Attorney General) v. Canada (Attorney General)*[45] for the proposition that "where the challenge concerns a particular provision which forms part of larger scheme ... the 'matter' of the provision must be considered in the context of the larger scheme, as its relationship to that scheme may be an important consideration in determining its pith and substance".[46] Justice Moldaver followed this approach when he contrasted the absence of any mention of discrimination in the impugned provisions with its express inclusion in sections 8 to 10 of the Act.[47] He concluded that Parliament did not intend to regulate discrimination through the impugned provisions.[48]

Finally, Moldaver J. did not take a stance in the debate over the proper statement of the criminal law power test. He reasoned that the impugned provisions could be upheld under either of the versions of proposed by his colleagues.[49] As a consequence, no majority statement of the test can be drawn from the *Reference*. Three judges supported the Karakatsanis J. version (Karakatsanis, Abella and Martin JJ.), while four supported Kasirer J.'s version (Wagner C.J. and Kasirer, Brown and Rowe JJ.), and two did not pronounce on the issue (Moldaver and Côté JJ.).

3. The Reasons of Kasirer J.

Justice Kasirer's analysis of the Act's pith and substance focused on the wording of the impugned provisions, and more specifically, on what those provisions exclude. First, he noted that while the section 8 and 9 amendments to the *Canadian Labour Code* and the *Canadian Human Rights Act* expressly mention discrimination, sections 1 to 7 do not.[50] Significantly for our purposes, Kasirer J. treated the amendments in section 8 and 9 as "extrinsic evidence".[51] Second, although he accepted that those sections curtail circumstances in which discrimination can arise, their scope is limited: the provisions do not preclude the use of genetic information that has been voluntarily disclosed or "obtained through other means than a genetic test".[52] Justice Kasirer concluded that it would be unconvincing, therefore, to

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[44] *Reference*, at para. 116.

[45] *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, 2015 SCC 14 (S.C.C.) [hereinafter "*Quebec*"].

[46] *Quebec*, at para. 30.

[47] *Quebec*, at para. 123.

[48] *Quebec*, at para. 125.

[49] *Reference*, at para. 138.

[50] *Reference*, at para. 175.

[51] *Reference*, at para. 187.

[52] *Reference*, at para. 176.

describe the provisions' dominant purpose in terms of preventing discrimination.[53] Third, Kasirer J. reasoned that because the definition of "genetic test" was health-related, it did not encompass genetic tests undertaken for purposes unrelated to health, such as determining ancestry.[54] Fourth, Kasirer J. noted that section 6 exempted health care practitioners from the application of sections 3 to 5. He inferred from this exemption that Parliament sought to ensure that practitioners could use genetic test information for the benefit of patients. He concluded that this inference supported "the view that Parliament viewed genetic tests as beneficial and therefore something to be encouraged, with a view to improving the health of Canadians".[55] Justice Kasirer further reasoned that the limited health-focus of the provisions suggest that any legislative concern about privacy and autonomy "stands second — both in terms of purpose and effects — to Parliament's overarching objective of encouraging the well-being of Canadians".[56] This understanding of the provisions' pith and substance was supported by Kasirer J.'s reading of the Parliamentary debates.[57]

Justice Kasirer's interpretation of the effects of the provisions supported his reading of the text. He denied that the provisions' effects on either discriminatory practices or on individuals' privacy and autonomy interests were primary, and he concluded that they were incidental to the effect of promoting health.[58] Furthermore, Kasirer J. reasoned that the dominant effects of the impugned provisions were on the insurance industry.[59] He noted that "the principle of equal information" is an essential feature of the law of insurance contracts and that human rights provisions across Canada exempt insurers' use of health information from the application of prohibitions on discrimination.[60] Justice Kasirer concluded that the primary effect of the impugned provisions was on this aspect of insurance law regimes in the provinces.[61]

Justice Kasirer concluded his pith and substance analysis with this statement of the impugned provisions' purpose: "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 of genetic tests, the whole with a view to

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[53] *Reference*, at para. 176.

[54] *Reference*, at para. 185.

[55] *Reference*, at para. 182.

[56] *Reference*, at para. 223.

[57] *Reference*, at para. 200.

[58] *Reference*, at para. 214.

[59] *Reference*, at para. 215.

[60] *Reference*, at paras. 216-219.

[61] *Reference*, at para. 220.

promoting the health of Canadians."[62]

Justice Kasirer drew from the Lebel and Deschamps JJ.'s reasons in *AHRA* a three-step test for the criminal law power:

> First, does the impugned legislation relate to a "public purpose", such as public peace, order, security, health, or morality? Second, did Parliament articulate a well-defined threat to be supressed by the impugned legislation (i.e., the "evil or injurious or undesirable effect upon the public")? Third, is the threat "real", in the sense that Parliament has a concrete basis and a reasoned apprehension of harm when enacting the impugned legislation?[63]

Justice Kasirer accepted that the impugned provisions related to a valid public purpose: health.[64] He did not, however, find that there was a well-defined threat since, as we have seen above, he concluded that the primary purpose of the legislation was "to promote beneficial health practices".[65] He furthermore did not comment on the claim, conceded by the Attorney General of Canada, that threats to privacy and autonomy could constitute valid public purposes, since he concluded that any effects related to these threats were secondary to the primary purpose of the impugned provisions.[66] Finally, Kasirer J. concluded that even had Parliament identified a well-defined threat of harm, there was no "evidentiary foundation of harm", given that Parliament legislated to confer on Canadians the benefits identified above.[67] Justice Kasirer reasoned that in order to provide this foundation, Parliament would need to identify a harm and show how impugned legislation was rationally connected to it.[68] By articulating this standard, he implicitly rejected McLachlin C.J.C.'s refusal to articulate "any constitutional threshold level of harm"[69] and embraced the more stringent standard articulated by Lebel and Deschamps JJ. in *AHRA*.

II. THREE SPATIAL METAPHORS AND THREE POINTS OF DISAGREEMENT

In this Part, I will explore, through the medium of three spatial metaphors, three points of doctrinal disagreement in the *Reference*'s reasons. Spatial metaphors are pervasive in law and scholars have long examined the role of metaphors in legal reasoning.[70] Writing of customary law's communicative functions, Rod Macdonald

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[62] *Reference*, at para. 154.

[63] *Reference*, at para. 234.

[64] *Reference*, at para. 236.

[65] *Reference*, at para. 239.

[66] *Reference*, at para. 251.

[67] *Reference*, at para. 270.

[68] *Reference*, at para. 262.

[69] *Reference*, at para. 259.

[70] See *e.g.*, James Boyd White, *The Legal Imagination: 45th Anniversary Edition* (Wolters Kluwer, 2018), at 63. Perhaps the most famous spatial metaphor is of law's

went as far as to claim that "meaning in language is fundamentally metaphorical and not discursive".[71] I will not go quite that far. Instead, I will use three spatial metaphors — the relationship of parts to the whole; breadth; and line-drawing — as framing devices for examining doctrinal disagreements in the *Reference* about the pith and substance analysis, the scope of the criminal law power, and the significance of a distinction between protecting and promoting health. I will propose resolutions of these disagreements that, if adopted, might render the doctrines surrounding the criminal law power consistent with federalism principles and the wider federalism jurisprudence

1. The Relationship of the Parts to the Whole

My discussion of the first spatial metaphor — the relationship of parts to the whole — addresses a set of dueling precedents. As we saw above, Karakatsanis J. invoked *General Motors* for the proposition that "[g]enerally, the court will first look to characterize the specific provisions that are challenged, rather than the legislative scheme as a whole, to determine whether they are validly enacted."[72] By contrast, Moldaver J. invoked *Quebec* for close to the opposite proposition namely, that in circumstances where a specific provision is challenged, "the 'matter' of the provision must be considered in the context of the larger scheme, as its relationship to that scheme may be an important consideration in determining its pith and substance".[73] Justice Kasirer did not invoke any authority on this point, but he categorized the provisions of the Act that were not challenged as "extrinsic evidence".[74] As a consequence, not only did he not analyze the purpose of the challenged provisions in the context of the Act as a whole, he did not appear to treat the Act as a coherent piece of legislation. We will return to this point below.

In order to resolve the apparent contradiction in the authorities, we should distinguish between two kinds of cases. In the first, an impugned provision is, on its face, outside the jurisdiction of the enacting legislature. By contrast, in the second kind of case, a provision's effects on the division of powers can only be discerned by first identifying its purpose, and examining the provision in its legislative context assists in this exercise.

General Motors is an example of the first kind of case. Section 31.1 of the *Combines Investigation Act* created a civil right of action and, the Court reasoned,

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penumbra. For a survey of American judicial treatments of the metaphor, as well as H.L.A. Hart's discussion of it, see Burr Henly, "'Penumbra': The Roots of a Legal Metaphor" (1987) 15:1 Hastings Const. L.Q. 81.

[71] Roderick A. Macdonald, "Custom Made — For a Non-chirographic Critical Legal Pluralism" (2011) 26:2 Can J. L. & Soc. 301, at 322.

[72] *Reference*, at para. 28.

[73] *Quebec*, at para. 30.

[74] *Reference*, at para. 187.

these kinds of actions are squarely within the jurisdiction of the provinces.[75] By contrast, the provision at issue in *Quebec*[76] did not clearly fall within provincial jurisdiction.[77] Indeed, the Court in *Quebec* expressly noted that the Attorney General of Quebec did not claim that the provision dealt with a matter that was within provincial jurisdiction.[78] The Court therefore construed the provision's dominant purpose, and an assessment of the legislation as a whole assisted in the exercise. The Court characterized the matter of the challenged provision in light of the public safety objectives of the *Ending the Long-Gun Registry Act* as whole.[79] This analysis allowed the Court to proceed to its assessment of whether the provision was *intra vires* Parliament's section 91(27) power.

The provisions at issue in the *Reference* similarly do not clearly fall within provincial jurisdiction. Unlike the challenged provision in *General Motors*, one cannot easily read off of the face of the legislation the challenged provisions' impact on the division of powers. Indeed, Kasirer J. undertook an extensive analysis in order to arrive at his conclusion that the provisions were *ultra vires* because their objective was "promoting the health of Canadians".[80] He did not draw this conclusion by simply noting that the impugned provisions, on their face, regulated contracts and the provision of goods and services.[81] It follows from the above that the provisions should, therefore, have been situated in the context of the Act as a whole, for the purpose of determining their purpose.

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[75] *General Motors*, at 673.

[76] Bill C-19, *An Act to Amend the Criminal Code and the Firearms Acts* [Ending the Long-Gun Registry Act], 1st Sess., 41st Parl., 2012 (assented to April 5, 2012), c. 6, s. 29 . *Quebec*, at para. 34.

[77] That provision required "the destruction of all records contained in the registries related to the registration of long guns". *Quebec*, at para. 7.

[78] *Quebec*, at para. 34.

[79] *Quebec*, at para. 34.

[80] *Reference*, at para. 227.

[81] The disagreement between Moldaver and Kasirer JJ. on the application of *Ward v. Canada (Attorney General)*, [2002] S.C.J. No. 21, 2002 SCC 17 (S.C.C.) [hereinafter "*Ward*"] turns on this point. According to Moldaver J. (*Reference*, at para. 116), Kasirer J.'s reasons contravened the injunction in *Ward* that courts should not "confuse the law's purpose with the means chosen to achieve it". (*Ward*, at para. 25). Justice Moldaver reasoned that Kasirer J. confused the means chosen by Parliament (*i.e.*, regulating contracts and the provision of goods and services), with Parliament's dominant purpose. Yet, as Kasirer J. noted, he did not conclude that the provisions were *ultra vires* from the simple fact that Parliament adopted the "means" of regulating contracts and the provision of goods and services. Instead, he reasoned that these activities "are central to the impugned provisions, and are caught up in the expression of the legislative purpose". (*Reference*, at para. 226). As we have seen, Kasirer J. reasoned that that purpose fell within the exclusive jurisdiction of the provinces.

It should be noted that, despite Karakatsanis J.'s invocation of *General Motors*, she began her pith and substance analysis, not with the challenged provisions themselves, but with the Act's title in order to identify a two-fold purpose for the Act: "to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place".[82] Moreover, central to her analysis of the provisions was her assessment that Parliament intended with the Act to take a "coordinated approach to tackling genetic discrimination based on test results".[83] That assessment necessarily involved examining the Act as a whole, as the "coordination" in question involved the impugned provisions, as well as the sections that were not challenged. Furthermore, this approach to the pith and substance analysis was consistent with McLachlin C.J.C.'s reasoning in *AHRA*, which Karakatsanis J. relied on for other part of her analysis. The challenged provisions in *AHRA*, like the impugned provisions in the *Reference*, did not fall clearly within provincial jurisdiction. In interpreting them, McLachlin C.J.C. took the approach for which this article advocates. She first examined the legislation at issue as a whole, before turning to an assessment of the impugned provisions.[84] Justice Karakatsanis would, therefore, have been on firmer doctrinal ground had she cited to McLachlin C.J.C.'s reasoning in *AHRA* and to *Quebec*, instead of relying on *General Motors.*

Justice Kasirer's reasons raise a related issue about the relationship between the whole of an act to its provisions. His were the only reasons that concluded that the impugned provisions were *ultra vires* Parliament's authority under the criminal law power. Yet Kasirer J. did not proceed to apply the ancillary doctrine, which calls for an assessment of the extent to which individual provisions violate the division of powers and are integrated into an otherwise valid act. According to the doctrine, if provisions are sufficiently integrated — taking into consideration the extent of the infringement — they are constitutionally valid.[85] Application of the doctrine is standard, yet Kasirer J. and the Quebec Court of Appeal ended their respective analyses with the conclusion that the impugned provisions infringed the division of powers.[86] It is possible that Kasirer J. and the Quebec Court of Appeal were only concerned with answering the question, as posed by the Government of Quebec, about whether the specific provisions were *ultra vires* Parliament's criminal law power.[87] That, however, seems to be quite a narrow way of answering the question,

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[82] *Reference*, at para. 35.

[83] *Reference*, at para. 47.

[84] *AHRA*, at para. 18.

[85] *General Motors*, at 666-69.

[86] Renvoi relatif à la *Loi sur la non-discrimination génétique édictée* par les articles 1 à 7 de la *Loi visant à interdire et à prévenir la discrimination génétique*, [2018] J.Q. no 12399, 2018 QCCA 2193 (Que. C.A.).

[87] *Loi sur la non-discrimination génétique édictée* par les articles 1 à 7 de la *Loi visant à interdire et à prévenir la discrimination génétique*, [2018] J.Q. no 12399, at para. 1, 2018 QCCA 2193 (Que. C.A.).

as it does not address the constitutional validity of the provisions. Moreover, if courts in division of powers cases were to adopt this tight focus, and to follow Kasirer J.'s decision to treat unchallenged provisions of a statute as "extrinsic evidence", they may not assess whether it would be appropriate to examine impugned provisions in their full legislative context. Courts following this approach may, in other words, be led away from adopting the analysis proposed in this section.

2. A Question of Breadth

We have seen above that Karakatsanis J. used the language of deference to frame the debate about what is required to establish a "reasoned apprehension of harm".[88] Justice Kasirer, on the other hand, tied the debate to concerns expressed by LeBel and Deschamps JJ. in *AHRA* about the breadth of the criminal law power. Justice Kasirer cited to those judges when he noted that if the doctrinal test did not include the conditions set out in their reasons, the criminal law power would "risk becoming 'unlimited and uncontrollable'".[89] As a result, he reasoned, Parliament would be permitted "to make laws in respect of any matter, provided that it cited its criminal law power and that it gave part of its legislation the form of a prohibition with criminal sanctions".[90] In what follows, I will argue that Kasirer J.'s diagnosis is correct.

In order to highlight the risks entailed by Karakatsanis J.'s approach, I will first compare her interpretation of the criminal law power with LaForest J.'s interpretation in *R. v. Hydro-Québec*.[91] This comparison will highlight how expansive Karakatsanis J.'s reading of the criminal law power is. I will then discuss a cognate area of law, namely Parliament's emergency powers under the Peace, Order and Good Government clause, and I will identify risks that Karakatsanis J.'s expansive approach poses to federalism principles. Those risks, I will claim, correspond to the ones identified by Kasirer J.

(a) Hydro Québec and Colourability

Jeremy Webber has argued that LaForest J.'s reasons in *Hydro-Québec* represent a high-water mark in the Court's expansive interpretation of the criminal law power.[92] In that case, LaForest J. reasoned that "[t]he *Charter* apart, only one qualification has been attached to Parliament's plenary power over criminal law. The

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[88] *Reference*, at para. 78.

[89] *Reference*, at para. 263.

[90] *Reference*, at para. 263.

[91] *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.) [hereinafter "*Hydro-Québec*"].

[92] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Hart, 2015), at 160.

power cannot be employed colourably."[93] In other words, according to LaForest J., when Parliament invokes the criminal law power in enacting a law, it will only be *ultra vires* if, despite having the *form* of valid criminal law, the law is aimed at a matter that section 92 allocates to the provinces.[94] Commentators have noted that LaForest's interpretation of the criminal law power permitted extensive and largely uncontrolled federal regulation in areas of provincial jurisdiction.[95]

Justice Karakatsanis' interpretation of the criminal law power is as expansive as LaForest J.'s reading. As we have seen, Karakatsanis J. rejected the suggestion that Parliament should be required to identify and establish "conduct or facts that support the apprehended harm to which it has responded".[96] It is not, however, clear what she would affirmatively require Parliament to show in order to demonstrate that it has legislated in response to a reasoned apprehension of harm. The problem is perhaps most acute in respect of the public purpose of morality. In a passage from *AHRA*, cited by Karakatsanis J.,[97] McLachlin C.J.C. reasoned that "[m]oral disapprobation is sufficient to ground criminal law when it addresses issues that are integral to society."[98] It would seem that in order to satisfy this requirement, Parliament could, by enacting a prohibition, backed with a penalty, claim to express moral disapproval of an activity. It seems to follow, then, that the only way to limit Parliament's criminal law power in such circumstances would be to show that, despite a law's assuming a criminal law form, it aimed at a subject matter that was within exclusive provincial jurisdiction. In other words, federal legislation that adopted the appropriate criminal law form could only be found to be *ultra vires* the criminal law power if it were colourable.

(b) Comparing the Emergency Power

The jurisprudence on the emergency power branch of Parliament's Peace, Order and Good Government ("POGG") power includes a standard similar to the one enunciated by Karakatsanis J. in *Reference*. By examining the level of deference that Parliament receives and the breadth of jurisdictional authority it can exercise under

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[93] *Hydro-Québec*, at para. 121.

[94] See the discussion in Mark Carter, "Criminal Law in the Federal Context" Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 476, at 489-90 [hereinafter "Carter, 'Criminal Law'"].

[95] For a summary of the literature, see Carter, "Criminal Law", at 481-82. Particularly evocative is the following: "Morris Manning, for example, suggested that the trend bore out Albert Abel's characterization of the criminal law power as the 'floodplain clause which has enabled the Dominion Parliament to engulf whatever it will.'" Carter, Criminal Law", at 481-82.

[96] *Reference*, at para. 77.

[97] *Reference*, at para. 78.

[98] *AHRA*, at para. 50.

the section 91 emergency power, we can identify some consequences that may flow from Karakatsanis J.'s version of the criminal law power test.

In *Reference re: Anti-Inflation Act (Canada)*,[99] the Attorney General of Canada argued that there was in relation to the facts at issue "a reasonable apprehension" of an economic crisis that would "warrant federal intervention".[100] A majority of the Supreme Court seemed to adopt this standard when Laskin C.J.C. (in an opinion co-signed by three judges and concurred in by two others) set out the framework for assessing the challenged legislation. Chief Justice Laskin posed this question: "Does the extrinsic evidence put before the Court, and other matters of which the Court can take judicial notice without extrinsic material to back it up, show that there was a rational basis for the Act as a crisis measure?"[101] In some respects, this rational basis standard is more exigent, or at least more specific, than the one articulated by Karakatsanis J. for the criminal law power. The *Anti-Inflation Reference* framework specified the kinds of materials that the Court can look to in assessing whether Parliament has a rational basis upon which to act, whereas Karakatsanis J.'s "reasoned apprehension" standard does not. Nonetheless, I think it is clear from the wording of the two standards that they are comparable in the level of deference they accord to Parliament.

Parliament's jurisdictional authority under the POGG emergency power is extensive. In the *Anti-Inflation Reference*, Laskin C.J.C. described the POGG power as "operative outside of the powers assigned to the provincial legislatures".[102] Similarly, Ritchie J., writing for the concurring Justices, reasoned that the POGG power's emergency branch enabled Parliament to "invade the provincial area when the legislation is directed to coping with a genuine emergency".[103] These descriptions of the emergency power's extensive scope are echoed by the dissenting reasons, albeit in more polemical terms. Justice Beetz (joined by Grandpré J.) described the emergency power as authorizing a suspension of the constitution's division of powers,[104] since in his view, legislation under this power allows Parliament to "enter the normally forbidden area of provincial jurisdiction".[105]

The various reasons in the *Anti-Inflation Reference* seem to conclude that the emergency power is extensive because it is a branch of the POGG power. That is, the judges seem to conclude from the fact that the POGG power is residuary in nature that it is not constrained by the heads of power enumerated in sections 91 and

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[99] *Reference re: Anti-Inflation Act (Canada)*, [1976] S.C.J. No. 12, [1976] 2 S.C. R. 373 (S.C.C.) [hereinafter "*Anti-Inflation Reference*"].

[100] *Anti-Inflation Reference*, at 418.

[101] *Anti-Inflation Reference*, at 421.

[102] *Anti-Inflation Reference*, at 393.

[103] *Anti-Inflation Reference*, at 438.

[104] *Anti-Inflation Reference*, at 465.

[105] *Anti-Inflation Reference*, at 465.

92.[106] The actual source of the emergency power's extensive reach, however, is the deferential standard on which it is reviewed. As Peter Hogg noted, Ritchie J.'s concurring reasons place on the opponents of a law the onus of demonstrating that the measure is irrational.[107] This is a highly deferential standard that, according to Hogg's interpretation of how it was applied in the *Anti-Inflation Reference*, "means that the federal Parliament can use its emergency power almost at will".[108]

As we have seen, Karakatsanis J.'s "reasoned apprehension of harm" standard is similar to the one in the *Anti-Inflation Reference*, and her standard is not qualified or limited. Therefore, it opens itself to an interpretation that would result in the criminal law power's being given a reach as extensive as the POGG emergency power. Indeed, this is the interpretation of "the reasoned apprehension of harm" standard urged on the Court by the *amicus curiae* in the *Reference*. After referring expressly to the emergency powers jurisprudence, the *amicus curiae* stated: "[t]he party challenging the legislation must establish . . . that *no rational link* could be drawn between the prohibited activity and the alleged apprehended harm".[109]

The *amicus curiae's* reading is inconsistent with the principles underlying the division of powers. As the Court in *References re Greenhouse Gas Pollution Pricing Act* reasoned, the division of powers ensures that provincial governments can exercise the extensive authority allocated to them by the division of powers, in order to shape their societies.[110] The Court further reasoned that in order to be consistent with the principles underlying the division of powers "[f]ederal power cannot be used in a manner that effectively eviscerates provincial power".[111] If Parliament were to legislate pursuant to Karakatsanis J.'s interpretation of the criminal law power, it could potentially eviscerate provincial power, for two reasons.

First, the *scope* of Parliament's criminal law power would be open to an interpretation, such as the *amicus curiae*'s, that would leave it unconstrained (except perhaps, as per *Hydro Québec*, to the extent that specific legislation was to be found

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[106] For instance, after Laskin C.J.C. described the POGG power as "operative outside of the powers assigned to the provincial legislatures" he noted that the power "is also fed by a catalogue of exclusive enumerated powers which are declared to be paramount and thus diminish the scope of provincial legislative authority". *Anti-Inflation Reference*, at 393. Although it is not clear what precisely he meant by the expression "fed by", it is clear from the context that the POGG power is, in his view, independent of the enumerated heads of power.

[107] Peter Hogg, *Constitutional Law of Canada*, Student ed. (Toronto: Thomson Reuters, 2019), at 17-27 [hereinafter "Hogg, *Constitutional Law*"].

[108] Hogg, *Constitutional Law*, at 17-27.

[109] Factum of the Amicus Curiae in *Reference*, at para. 49.

[110] *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11, at para. 49, 2021 SCC 11 (S.C.C.) [hereinafter "*Greenhouse Gas Reference*"].

[111] *Greenhouse Gas Reference*, at para. 49.

colourable). Second, if Parliament were to legislate to the full extent of this unconstrained power, provincial legislation in all areas of section 92 jurisdiction would be susceptible to being rendered inoperative, by virtue of the doctrine of paramountcy.[112] Any such exercise of federal power would thereby eviscerate provincial jurisdiction.

I conclude this discussion by noting that Karakatsanis J.'s interpretation of the criminal law power has potential impacts on division of powers principles that are even more extensive than those of the emergency powers. We have seen above that some members of the *Anti-Inflation Reference* Court viewed the emergency power to be an exception to the constitutional division of powers. In this sense, the POGG emergency power is inconsistent with federalism principles. Yet given the existential threat that emergencies pose to a polity, the exercise of this kind of exceptional power may in some circumstances be justified.[113] And in any case, the Court in *Anti-Inflation Reference* did require that federal exercises of the emergency power be temporary.[114] By contrast, the criminal law power is not subject to temporal limits. As a consequence, if the emergency powers standard were to be incorporated into the criminal law power test, the impacts on provincial jurisdiction could be permanent. Therefore, if the criminal law power were to be interpreted in this way, it would, in the words of Kasirer J., be "unlimited and uncontrollable",[115] in terms of both scope and time frame. Because Karakatsanis J.'s version of the criminal law power test is open to this kind of interpretation, it is vulnerable to Kasirer J.'s criticism.

3. Drawing Lines

Line-drawing is the final spatial metaphor that I will consider in this article. It arises in relation to what is, at first glance, a narrow disagreement between Karakatsanis and Kasirer JJ. in the *Reference*. Yet the debate over line-drawing reveals deep disagreement in the Court about the appropriate role of the judiciary in deciding section 91(27) disputes. In what follows, I will argue that Kasirer J.'s position is consistent with the wider division of powers jurisprudence.

I begin with the disagreement about line-drawing. As we have seen above, Karakatsanis J. described as "artificial" the distinction that the Quebec Court of Appeal drew between the purposes of protecting and promoting health.[116] In contrast, Kasirer J. reasoned that this distinction is essential to limiting the scope of

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[112] As we have seen above, Karakatsanis J. recognized that validly enacted criminal law has the legal effect of being paramount over any conflicting provincial legislation. *Reference*, at para. 53.

[113] See, *e.g.*, Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), at 401.

[114] *Anti-Inflation Reference*, at 438.

[115] *Reference*, at para. 263.

[116] *Reference*, at para. 100.

the criminal law power.[117] According to him, if Parliament could satisfy the public purpose requirement by "merely respond[ing] 'to a risk of harm to health' or 'an injurious or undesirable effect'",[118] almost any federal law in relation to health could be upheld under the criminal law power. As long as such a law included a prohibition backed by a penalty, it would satisfy the doctrinal test "since many beneficial health services may also involve injurious or undesirable effects".[119] For Kasirer J., then, this line-drawing exercise was essential to the federalism analysis, while for Karakatsanis J., it was superfluous.

If we probe Karakatsanis J.'s reasons for taking the position she did, a wider disagreement about the proper role of the judiciary emerges. She dismissed the line-drawing exercise as merely semantic[120] because the promotion-protection distinction is irrelevant to the test that she adopted from McLachlin C.J.C.'s reasons in *AHRA*. According to Karakatsanis J., "[t]he relevant question is whether the law meets the criminal law purpose test—whether, in pith and substance, it responds to a risk of harm to health".[121] Moreover, one reason that Karakatsanis J. gave for adopting this test, and rejecting the one proposed by LeBel and Deschamps JJ., is that the latter involves second-guessing "the 'wisdom of Parliament' in enacting criminal law".[122] And this concern about overstepping the boundaries of the judicial role underwrites her avowedly deferential "reasoned apprehension of harm" standard.[123] Justice Kasirer disagreed with this position because he viewed it to be "overly deferential".[124] According to him, "[e]nsuring that Parliament can clearly identify the harm it seeks to supress and how the impugned legislation is rationally connected to that harm is not onerous and it does not amount to courts 'second-guessing' Parliament."[125]

Justice Kasirer's position in this debate is consistent with the wider federalism jurisprudence. Consider the doctrinal tests relating to two other open-ended federal powers: the national concern branch of POGG and the general trade and commerce power. These doctrinal tests resemble in important respects the one proposed by Kasirer J. For instance, when courts apply the relevant tests in those areas, they place an onus on those defending an impugned law to "present the court with a

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[117] *Reference*, at para. 244.

[118] *Reference*, at para. 244.

[119] *Reference*, at para. 244.

[120] *Reference*, at para. 101.

[121] *Reference*, at para. 101.

[122] *Reference*, at para. 77.

[123] *Reference*, at paras. 77-78.

[124] *Reference*, at para. 261.

[125] *Reference*, at para. 262.

factual matrix" in support of the jurisdictional claim.[126] Defenders of laws challenged as *ultra vires* would need to satisfy a similar burden under Kasirer J.'s criminal law power test as he would require an "adequate evidentiary foundation of harm".[127]

Moreover, defenders of federal laws in national concern and general trade and commerce cases are required to satisfy this onus of proof in respect of relatively open-ended doctrinal categories and empirical matters, much in the same way that their counterparts would be required to do under Kasirer J.'s test. For instance, the second step of the national concern test requires proof that a matter has the qualities of "singleness, distinctiveness and indivisibility". In order to satisfy this step, it must be shown that the matter is qualitatively different from matters of provincial jurisdiction,[128] and one factor to be taken into consideration is whether a province's failure to deal with the matter would give rise to "grave consequences". Similarly, the general trade and commerce test requires a showing that the matter at issue be of a "genuinely national scope".[129] Under the fifth step in that test, defenders of an impugned federal law must show that "a failure to include one or more provinces or localities in the scheme [would] jeopardize its successful operation in other parts of the country".[130] These elements of the national concern and general trade and commerce tests require courts to assess whether Parliament has identified matters (*e.g.*, "grave consequences") that are at least as difficult to ascertain as the "well-defined threat" in Kasirer J.'s proposed test. Furthermore, the national concern and general trade and commerce tests require that causal relationships be established (*e.g.*, showing that provincial action would jeopardize the successful operation of a federal scheme in other parts of the country) that are at least as complex as Kasirer J.'s requirement that legislation be rationally connected to a harm.

Authors often frame concerns about the role of courts in adjudicating constitutional matters in terms of the limited competence of judges to assess open-ended and contested concepts[131] and make empirical judgments.[132] These concerns can motivate arguments in favour of judicial deference to the political branches. Yet the force of such arguments is limited in the federalism context because the judiciary is in the best institutional position to resolve division of powers disputes since it can

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[126] *Greenhouse Gas Reference*, at para. 133.

[127] *Reference*, at para. 264.

[128] *Greenhouse Gas Reference*, at para. 148.

[129] *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, at para. 101, 2018 SCC 48 (S.C.C.) [hereinafter "*Securities Regulation*"].

[130] *Securities Regulation*, at para. 103.

[131] See, *e.g.*, Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale L.J. 1346.

[132] See, *e.g.*, Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281.

be a neutral arbiter, whereas the political branches of each order of government cannot.[133] Moreover, deference in this context can mean systematically favouring one party to a dispute, or one order of government, over another. Furthermore, concerns about judicial competence can be allayed, in a particular area of law, if we see that courts can, in cognate areas, competently adjudicate disputes that involve open-ended concepts and empirical assessments. In this section, I have argued that concerns about competence and arguments in favor of deference in the criminal law power context can be answered by pointing to the jurisprudence on the national concern branch of POGG and general trade and commerce powers. I conclude, therefore, that Karakatsanis J.'s reasons for opposing a less deferential approach can be answered, and Kasirer J.'s position in favour of a less deferential approach can be supported, by appeal to the Court's reasoning in these cognate areas.

III. Conclusions

In this article, I hope to have settled three disagreements in the *Reference.* The first related to the question of whether courts applying the pith and substance analysis to a *part* of a law should first examine the law as a *whole*. I have drawn a distinction between cases where a specific provision clearly infringes the division of powers and cases in which an infringement is not obvious. The analysis that flows from that distinction aims to provide guidance as to when courts should look to the legislative context in order to interpret a single provision that is challenged as being *ultra vires*.

The second disagreement was about the *breadth* of the criminal law power. I compared Karakatsanis J.'s understanding of that power to LaForest J.'s expansive interpretation of it in *Hydro-Québec*. I further juxtaposed Karakatsanis J.'s deferential standard with the "rational basis" test in the POGG emergency power jurisprudence. Through these comparisons, I aimed to highlight risks in adopting a judicial posture of deference in the section 91(27) context.

The third debate was over a *line-drawing* exercise and revealed deep disagreement in the Court about the appropriate role of the judiciary in adjudicating criminal law power cases. I concluded my analysis of that debate by arguing that Kasirer J.'s position was consistent with the wider division of powers jurisprudence.

I began this article by recommending that the Court resolve doctrinal uncertainty about the criminal law power that has persisted for a decade. With the foregoing, I have attempted to point the way forward. Although I would reject Kasirer J.'s approach to the pith and substance analysis in favour of the one proposed in this article, I would recommend that his approach to the criminal law power be adopted for two reasons. First, unlike Karakatsanis J.'s deferential stance, it does not put in jeopardy federalism principles. Second, the role that Kasirer J.'s approach envisions for courts is consistent with the one that courts play in the wider federalism

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[133] Hoi L. Kong, "Republicanism and the Division of Powers in Canada" (2014) 64:3 U.T.L.J. 359, at 392-93.

jurisprudence. This measure of consistency may allay concerns — implicit in arguments in favour of a more deferential approach — about whether courts are institutionally competent to make the judgments that his approach would require. I hope, ultimately, that with my use of metaphors and doctrinal arguments, I have made some space for certainty in the section 91(27) jurisprudence.