EXTRA-JURISDICTIONAL AUTHORITY OF PROVINCIALLY APPOINTED POLICE OFFICERS IN CANADA

A DISCUSSION PAPER

prepared under contract for
The Uniform Law Conference of Canada

by

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> "In a free and democratic society, it is essential that citizens know beyond any doubt the territorial jurisdiction of police officers who may attempt to deprive them of their liberty. It is equally as important for police officers to know with certainty their territorial jurisdiction."[1]

I. INTRODUCTION

[1] This Discussion Paper has been prepared in response to a request by the Chairperson of the Criminal Law Section of the Uniform Law Conference of Canada (ULCC), Mr. Glen Abbott, Q.C., and under the terms of an agreement between Professor Philip Stenning, of the Centre of Criminology, University of Toronto, and the ULCC, dated 25th January, 2001. This agreement set out the parameters for the Discussion Paper in the following terms:

> "The research project deals with the extra-territorial jurisdiction of police officers within Canada. Many police investigations require police officers to travel outside their home jurisdiction. The difficulty with the current law as it relates to the extra-jurisdictional authority of police is that police officers often lose their peace officer status when they travel outside their home jurisdictions. Police investigations in communities that straddle or are close to provincial boundaries often have an extra-jurisdictional aspect.
>
> There is an increasing trend to incidents of inter-jurisdictional crime. The investigation of incidents of organized crime is perhaps the most serious situation where the loss of police powers presents difficulties. It goes without saying that the police must be equipped with the necessary tools to deal with organized crime, which is not at all hindered by jurisdictional boundaries in carrying out its activities.
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> The analysis should consider the relevant laws of other common law jurisdictions for comparison purposes. The study should include noteworthy criticisms and concerns voiced by academics, the bar, judges and the public. For example the public will want to be assured that it will continue to have the normal protections and the necessary level of police accountability in any extra-territorial investigation.
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> The topic raises important constitutional issues. The discussion will explore the legal issues by providing an analysis of the existing laws and recommendations for legislative reform. The paper is to be prepared in time for the Criminal Law Section to consider [it] at the annual ULCC Conference in August 2001[2]."

[1] Bell, B.R. "Territorial Jurisdiction of Municipal and Regional Police Personnel in New Brunswick" (1984) 8 *Dalhousie Law Journal* 519-527, at 519.

[2] In order to allow time for translation, it was agreed that this paper would be submitted to ULCC by 30th June, 2001.

In addition to this guidance, the authors of this Discussion Paper were provided with a copy of a resolution submitted to the Criminal Law Section of the ULCC by the Manitoba delegate on the subject of "Provincial-Municipal Police - extra-jurisdictional authority" and Section 25 of the *Criminal Code* of Canada. The resolution included the following "RECOMMENDATION":

> "That Section 25 of the Criminal Code of Canada be amended to provide that provincially appointed peace officer status be maintained when a police officer leaves their host jurisdiction in furtherance of an officially sanctioned investigation or to provide assistance, in the capacity of a peace officer, in another jurisdiction. This status should carry all the protection and authorization as permitted by the province of appointment, including the right to carry a firearm. The jurisdictional extension could be authorized for seven days initially and may be further extended by obtaining a letter from the Chief Constable of the host jurisdiction."

This resolution was apparently subsequently withdrawn without being voted on.

[2] The preparation of this Discussion Paper has been guided by these two documents as well as by verbal discussions and e-mail correspondence with Mr. Abbott.

[3] In addition to the usual legal and other documentary research required for the preparation of this paper, we have also contacted, by telephone and e-mail, a number of police, government and academic informants in Canada and elsewhere[3], to obtain further information and insights on the topic of the paper.

[3] In this respect, we are particularly indebted to, and wish to express our gratitude to, the following: Commissioner Gwen Boniface and Supt. J. Carson of the Ontario Provincial Police; Ms. Christine Silverberg, former Chief of the Calgary Police Service; Ms. Laurie Vechter, legal counsel to the Hamilton-Wentworth Regional Police Service; Professor Jean-Paul Brodeur, Centre de Criminologie, Universite de Montreal; Dr. James Sheptycki, Durham University, England; Dr. Detlef Nogala of the Max Planck Institute and the University of Hamburg, Germany; Dr. Thomas Feltes, Federal Police Training Academy, Germany; Dr. Rafael Behr, Frankfurt University, Germany; Dr. Hartmut Aden, University of Hanover, Germany; Dr. Rosann Greenspan, University of California at Berkeley (formerly Director of Research for the Police Foundation in Washington, D.C.); Dr. Kim Rossmo, Director of Research for the Police Foundation; Detective Dan Bibeault, Fairfax County, Virginia; Mr. Nigel Hadgkiss and Mr. Stephen McBurney, National Crime Authority, Melbourne, Australia. We have also found Paul Ceyssens' looseleaf text *Legal Aspects of*

(a) The issues

[4] The issues addressed in this Discussion Paper, therefore, concern the possible ways in which extra-jurisdictional authority for provincially appointed police officers within Canada[4] may be legislatively provided for. Although the principal issue is the legal status and authority of police officers when outside their jurisdiction of appointment, other important related issues arise in these circumstances, most notably that of accountability. Specifically, when a police officer is working outside his jurisdiction of appointment, how is he or she to be held accountable for his or her actions and decisions? Is a police officer whose appointment is in Ontario, but who is working in neighbouring Manitoba, for instance, to be held accountable under the relevant laws and institutions (such as police complaint tribunals, etc.) of Manitoba or of Ontario? And which authorities, those of Manitoba or Ontario, will bear any vicarious civil liability for any wrongdoing which he or she may commit while outside his or her jurisdiction of appointment?

[5] It will be obvious that the answers to these secondary questions will largely depend on what the officer's legal status while engaged in extra-jurisdictional duties is considered to be, and that this in turn depends on how his status while engaged in such duties is conferred. It is necessary, therefore, before discussing the legal issues which arise in these circumstances, to consider briefly what the practices have been in this regard.

(b) Current practices

[6] In the relatively short time, and with the limited resources, available to us for the preparation of this paper, we have not been able to gain more than a rather anecdotal and impressionistic picture of how extra-jurisdictional work of police officers has typically been dealt with in Canada, and the extent to which practice in this regard varies from one jurisdiction to another within the country. From our inquiries, however, we have learned that the question of extra-jurisdictional authority of police in Canada has two distinct

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Policing (Saltspring Island, B.C.: Earlscourt Press, Update 11, November 2000) [hereinafter *Legal Aspects of Policing*], particularly pp. 1-35 – 1-42, extremely helpful.

[4] In this paper we do not consider the related issue of the authority of Canadian police officers when travelling outside Canada, or of foreign police officers operating within Canada.

aspects, depending on whether an officer is working in a province other than the province in which he or she holds his or her appointment (hereafter "extra-provincial authority") or is working in a jurisdiction within the province in which he or she holds his or her appointment, but which is not the jurisdiction of the officer's appointment (hereafter "intra-provincial authority"). Thus, for instance, the situation is different if a Thunder Bay, Ontario police officer needs to pursue an investigation in Sudbury, Ontario (intra-provincial), than if he or she needs to pursue an investigation in Winnipeg, Manitoba (extra-provincial). This is because in Ontario, as in several other provinces[5], the provincial policing legislation under which municipal, regional and provincial police officers hold their appointments, provides that all such police officers have authority throughout the entire province.[6] So long as the officer is pursuing an investigation within the province, therefore, even if it is not within the municipality in which he or she holds his or her appointment, no problem of extra-jurisdictional authority arises.

[7] As we shall discuss further below, however, a provincial Legislature cannot confer legal status or authority on a police officer while he or she is working in another province. So extra-provincial policing, except when undertaken by R.C.M.P. officers, who have jurisdiction throughout Canada even when performing provincial or municipal policing duties under contract[7], almost always presents a problem with respect to extra-jurisdictional authority. From our inquiries, we have learned that this problem is almost always "solved" through the use of short-term "special constable" appointments, which are provided for in all provincial police legislation. Thus, if the out-of-province police officer requires legal authority in his her own right[8] (as opposed to relying on the authority of officers who hold appointments within the province in which he or she needs to work extra-jurisdictionally), such legal authority is conferred by appointing him or her as a special constable for a specified time and purpose within the province in which he or she needs to work.

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[5] Alberta, British Columbia, Quebec, New Brunswick, Nova Scotia and Saskatchewan also follow this approach. With respect to New Brunswick, see Bell, *supra* note 1. The Royal Newfoundland Constabulary is a provincial police service, although its work is in practice largely confined to St. John's.

[6] Sub-section 42(2) of the Ontario *Police Services Act*, R.S.O. 1990, c. P.15.

[7] See Section 9 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, as amended by R.S.C. 1985, c. 8 (2nd Supp.) [hereinafter *RCMP Act*].

[8] This includes not only powers of arrest and search, etc., and the legal protections provided for those who exercise them, but also ancillary authority such as the right to carry a firearm.

[8] We have referred to the short-term, limited purpose special constable appointment as a "solution" to the problem of extra-provincial policing authority. In many respects, however, it is not a very satisfactory solution. For although such an appointment can be tailored to clothe the out-of-province officer with all the legal authority that he or she may need to do the particular police work at hand, it will frequently leave issues of accountability unresolved or not satisfactorily resolved. This is because special constables are typically not subject to accountability in the same way that regularly appointed municipal, regional or provincial police officers are.[9] The following three examples will illustrate this issue.

[9] Section 2 of the Ontario *Police Services Act* provides that for the purposes of the Act ""police officer" means a chief of police or any other police officer, but does not include a special constable" (appointed under section 53 of the Act).[10] Part VI of the Act dealing with public complaints against police, refers specifically to "complaints by members of the public about the conduct of police officers" (section 75), and similarly the jurisdiction of the Special Investigations Unit (SIU) under section 113 extends only to investigations "into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers" (subsection 113(5)). Thus, the provisions of Part VI providing for the handling of complaints against the police, and the jurisdiction of the SIU under section 113 of the Act, would not appear to be applicable to an out-of-province police officer who is acting in Ontario pursuant to a special constable appointment. This means that if some issue arises with respect to the conduct of such an out-of-province officer who is working alongside other police officers who hold regular appointments in Ontario, two entirely separate accountability mechanisms would

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[9] For further detail on this issue, see *e.g*. British Columbia Police Commission, *Special Provincial Constables: A Plan for Accountability* (Vancouver: B.C. Police Commission, 1991); Taylor, K., *The Role of Special Provincial, Special Municipal and Auxiliary Constables in British Columbia* - a research paper prepared for the Commission of Inquiry into Policing in British Columbia, 1994 (available from the B.C. Ministry of the Attorney General); British Columbia, Commission of Inquiry into Policing in British Columbia (Mr. Justice Wallace T. Oppal, Commissioner) *Closing the Gap: Policing and the Community – The Report, Volume 2* (Vancouver: The Commission, 1994), pp. F-32 - F-46; Manitoba Law Reform Commission, *Report on Special Constables*, Report No. 96 (Winnipeg: Manitoba Law reform Commission, 1996).

[10] In *R. v. Ambrose* [1999] O.J. No. 3607, the court held that, despite this definition, a special constable was acting in the execution of his duty as a "police officer" for the purposes of Section 9 of the Ontario *Trespass to Property Act* (which allows "police officers" but not others to use force in making an arrest).

be triggered. And of course, if the officer has subsequently returned to his or her home province, the ability of authorities in Ontario to effectively investigate his or her conduct in Ontario may be substantially impaired.

[10] The Ontario *Police Services Act* is certainly not unique in this respect. Similar problems arise from legislative provisions dealing with special constable status in other provinces. Section 1 of the British Columbia *Police Act*, for instance, similarly defines "municipal constable" and "provincial constable" so as to exclude a "special municipal constable" and a "special provincial constable" (appointed under sections 35 and 9 of the Act respectively). Section 50 of the Act provides that "The police complaint commissioner is to oversee the handling of complaints", but section 46 provides that ""complaint" means a complaint submitted under section 52…", and section 52 provides only that "A person may make a complaint (a) against a municipal constable, (b) against a chief constable or deputy chief constable, and (c) about a municipal police department." Thus, as in Ontario, a special constable is not subject to the same accountability procedures (and in particular the jurisdiction of the police complaint commissioner) with respect to public complaints as a regularly appointed municipal constable.

[11] Under the federal *RCMP Act*, the R.C.M.P. Public Complaints Commission has jurisdiction with respect to a complaint made against "any member or other person appointed or employed under the authority of this Act" (subsection 45.35((1)). This wording would appear to be broad enough to include persons who are appointed as "supernumerary special constables" under subsection 7(1)(c) of the Act. The jurisdiction of the R.C.M.P. External Review Committee, however, extends only to "members" of the R.C.M.P., and section 2 of the Act defines "member" to exclude supernumerary special constables. Similarly, the disciplinary procedures (including the "Standards" and "Code of Conduct") provided for by Part IV of the Act apply only to "members" of the Force (see e.g. sections 37 and 38).

[12] As we shall demonstrate in our legal analysis which follows, these difficulties are not insuperable, given the potential, in various forms, for the provincial Legislatures and the federal Parliament to legislate for novel criminal law policing arrangements.

[13] We have learned that in some cases, extra-provincial (as well as intra-provincial) police co-operation has been the subject of memoranda of understanding (MOU's) between the police services concerned. While we have not been able to actually see more than one of these MOU's (an extra-provincial one), we have been informed that they typically do not (and probably cannot) legally confer extra-jurisdictional authority on out-of-province police officers. This is because, as the courts have ruled on more than one occasion, the legal status of a police officer in Canada is governed by statute[11], so that without formal statutory sanction, an MOU cannot alter or add to a police officer's legal status. Consequently, while such MOU's can and do deal in some detail with logistical aspects of extra-provincial and intra-provincial police co-operation, they can offer little by way of a solution to the problem of extra-jurisdictional authority of police.[12]

The form of our analysis

[14] In the remainder of this Discussion Paper, therefore, as requested by the ULCC, we explore the possibilities for a legislative response to this issue. We begin, however, with a brief description of the recognized common law exceptions to the general principle that a police officer's legal status and authority is limited to the jurisdiction in which he or she holds his or her appointment. We then consider the various constitutional principles and constraints which would apply to any attempt to legislate for extra-jurisdictional authority of police officers, either through federal or provincial legislation. Because the general principles applicable to such a constitutional analysis are complex, we have included a description of these general principles as an Appendix to our paper. Readers who are not particularly familiar with these general principles are therefore advised to consult the Appendix before reading the constitutional analysis in Section III of our paper.

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[11] See *e.g*. *Nicholson. v. Haldimand-Norfolk regional Board of Commissioners of Police* [1979] 1 S.C.R. 311, at 320; *Bisaillon v. Keable and Attorney General of Quebec* (1980) 17 C.R. (3d) 193, at 202; P. Stenning, *Legal Status of Police* (Ottawa: Minister of Supply & Services Canada, 1982) [hereinafter *Legal Status of Police*].

[12] The one MOU which we did get to see, for instance, touched on this issue only through a provision in which the "receiving" jurisdiction undertook to "secure special constable designation" through the responsible provincial ministry for the out-of-province police officers.

[15] Following the constitutional analysis, we review the information we have been able to obtain, within the time and resources available to us, about the way the issue of extra-jurisdictional authority of police has been addressed in some other federal jurisdictions (Australia and the United States of America) and within the European Union. The paper ends with our conclusions and recommendations as to possible options for addressing this issue in Canada in the future.

II. COMMON-LAW: EXTRA-JURISDICTIONAL POLICING AUTHORITY IN CANADA

[16] In the absence of validly enacted legislation to the contrary, a police officer retains authority only within the jurisdiction of appointment. This common-law jurisdictional limitation on policing no doubt seeks "to ensure that police officers are limited in exercising their powers to the area over which those who have appointed them have responsibility [and to ensure] political as well as judicial scrutiny over those given power to restrict the liberty of the individual".[13] There is, however, a common-law exception to this general rule limiting policing authority to within the jurisdiction of appointment. This exception can be distilled from relevant cases on point into the following principle: a police officer will retain authority outside jurisdiction only where there is a continuous temporal and spatial connection, or "nexus", between activities outside jurisdiction and policing duties within jurisdiction.[14] In other words, a police officer operating outside the jurisdiction of appointment will be deemed without authority in the absence of a policing

[13] *R.* v. *Stewart* (1982), 66 C.C.C. (2d) 481 at 484 (N.B.C.A.) [hereinafter *Stewart*].

[14] See *Legal Aspects of Policing, supra* note 3 at c. 1.5. Policing legislation in Alberta expressly recognizes this principle. See *Police Act*, R.S.A. 1980, c. P-12.01, s. 38(4): "Where the territorial jurisdiction of a police officer is restricted under subsection (3), that police officer may, notwithstanding that restriction, carry out his functions and exercise his powers beyond that jurisdiction if he is in immediate pursuit of a person who he has reasonable and probable grounds to believe has committed an offence against any law that the police officer is empowered to enforce" [emphasis added]. Legislation in Newfoundland, Ontario, Prince Edward Island and Saskatchewan, by contrast, simply acknowledge that "a police officer has the powers and duties assigned to a constable at common law" or that "[e]very officer … shall have the powers of peace officers and constables with regard to the arrest and detention of offenders": *Royal Newfoundland Constabulary Act, 1992*, S.N. 1992, c. R-17, s. 8(3); *Police Services Act*, R.S.O. 1990, c. P.15, s. 42(3); *Police Act*, R.S.P.E.I. 1988, c. P-11, s. 5(2); *Police Act*, S.S. 1990, c. P-15.01, s. 36(2)(a). The remaining provinces do not refer to this common-law exception in corresponding legislation, directly or otherwise; however, given the absence of express language to the contrary, the lack of statutory recognition is not sufficient to constitute derogation from this common-law exception.

situation properly characterized as evincing a sufficient connection between jurisdictions.[15] The following delineates the formulation of this exception by the courts in Canada.

[17] The common-law "nexus" exception to jurisdictional limits on police authority has developed in response to situations of extra-jurisdictional police "pursuit". The leading case on this topic is *Roberge* v. *The Queen* (1983),[16] in which a member of the Quebec Provincial Police pursued a suspected impaired driver into the province of New Brunswick. In deciding that the Quebec police officer was authorized to arrest without warrant in the circumstances, a unanimous Supreme Court of Canada enunciated the following rule:

> "[A] police officer who had lawful authority to arrest a person under [s. 495] in one province and is pursuing that person, retains, for the purpose of s. 25(4), his status of a police officer in another province inasmuch as the pursuit had commenced lawfully in his jurisdiction and as long as such pursuit is fresh".[17]

The meaning of "fresh" pursuit was explicated by the Court in *R.* v. *Macooh* (1993):

> "Generally, the essence of fresh pursuit is that it must be continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction".[18]

The policy rationale for this exception was aptly described by Lamer J. in *Roberge*:

> "[I]t is in my view, seriously and unnecessarily hampering police work to reduce a peace officer to the rank of an ordinary citizen and to limit, by taking away part of his protection under s. 25, through a variation of the nature and purpose of what he is authorized to do, the force he is entitled to use dependent upon his moving a few feet further in pursuit of a criminal".[19]

The ruling in *Roberge* did, however, place a restriction on common-law authorized extra-jurisdictional police pursuit, encompassed in the following prescription:

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[15] It is important to note, here, that although a police officer may not retain authority extra-jurisdictionally he or she may make a lawful arrest as a private citizen in certain circumstances. See *Criminal Code*, R.S.C. 1985, c. C-46 as am. 2000, ss. 25(1), 31(1), 33(1), 129(b), 494(1) [hereinafter *Criminal Code*].
[16] 147 D.L.R. (3d) 493 (S.C.C.) [hereinafter *Roberge*] (*per* Lamer J. writing for the Court).
[17] *Ibid*. at 509. See also *R.* v. *Perley* (1987), 2 M.V.R. (2d) 316 (Q.B.), referring to the authority of a police officer terminating a validly initiated extra-jurisdictional pursuit on an Aboriginal reservation.
[18] 82 C.C.C. (3d) 481 at 491 (S.C.C.). Note that courts in Canada use the terms "fresh" and "hot" pursuit interchangeably. Indeed, the Court in *Macooh* adopts the above definition by R.E. Salhany in *Canadian Criminal Procedure*, 5th ed. (Aurora, Ont.: Canada Law Books, 1989) at 44 under the rubric "hot pursuit".

> "The police officer should endeavour to contact the local peace officers as soon as is possible, even during the pursuit, circumstances permitting. Once the local authorities have taken over the pursuit, he ceases to be a peace officer and becomes then a person assisting peace officers … and, as such, will continue enjoying the protection of s. 25(4)".[20]

[18] It is also settled law that "pursuit" may include circumstances where "hot pursuit" does not result. The leading case on this point is *Nolan* v. *The Queen* (1987),[21] in which military police officers followed and stopped a civilian on a public highway, who had been viewed moments earlier committing a traffic offence on military property. In a unanimous ruling, the Supreme Court of Canada found that while the events could not be characterized as "hot pursuit" given the absence of evidence demonstrating the accused attempted to evade the officers, there remained in the circumstances "such a clear nexus between the offence committed on the base and the detention off the base"[22] to warrant retention of authority beyond the jurisdictional boundary. In short, police officers may retain their status outside the jurisdiction in which they are appointed in cases of pursuit involving mere following.

[19] There is, however, case authority adopting a restricted interpretation of "pursuit". In *R.* v. *Crain* (1981),[23] a municipal constable pursued a vehicle outside jurisdiction and, after a foot chase, arrested the passenger on the charge of public intoxication. The New Brunswick Queen's Bench held that the constable was absent authority as a police officer to arrest the passenger because extra-jurisdictional authority granted to municipal police officers under the applicable policing legislation was limited to a matter a police officer is "investigating" or in relation to a suspect he or she is "pursuing". The court found that the proper target for arrest was the subject with respect to whom the extra-jurisdictional pursuit had been initiated, the suspect driver, and not the passenger. Although this case pertains to

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[19] *Roberge*, *supra* note 16 at 509.

[20] *Ibid.* at 510. New Brunswick is the only province imposing extra-jurisdictional notice requirements upon municipal and provincial police officers. See *Police Act*, R.S.N.B. 1973, c. P-9.2, s. 12(2):

> "A member of the Royal Canadian Mounted Police or a police officer appointed for a municipality or region who is investigating an alleged offence or otherwise discharging his responsibilities in a municipality or region policed by another police force shall, as soon as is practicable, notify the police force responsible for policing that municipality or region as to the purpose of the discharge of his responsibilities in that municipality or region".

[21] 41 D.L.R. (4th) 286 (S.C.C.) [hereinafter *Nolan*].

[22] *Ibid*. at 301.

jurisdictional limits established under provincial policing legislation, it is reasonable to assume that the underlying principle is applicable to the common-law exception. In short, valid extra-jurisdictional pursuit at common-law likely requires the subject which triggers pursuit within jurisdiction but continues or sustains pursuit outside jurisdiction to remain constant; that is to say, authority to engage in derivative policing activities is not likely granted under the umbrella of the common-law extra-jurisdictional policing exception.

[20] Defined in the manner presented above, it may simply be said that the common-law grants "extra-jurisdictional" authority to police officers in "pursuit". But the language of continuity and "nexus" affords an alternative interpretation: the common-law does not grant extra-jurisdictional authority *per se* but merely extends the bubble of jurisdiction within which the original incident triggers valid police pursuit to a point anywhere that this police authority is effected, or until the continuity of pursuit is broken.[24] This approach to the common-law exception is evident in the words of Callaghan J. in *R.* v. *Pile* (1982).[25] In considering whether the military police officer retained authority to arrest the suspect outside the defence establishment, His Lordship ruled as follows:

> "His powers arose from performing duties on the Base in respect of persons who are on the Base in relation to an incident which took place on the Base. Those duties were clearly within his function as a peace officer defined by the Code, s. 2 … The right to arrest is a necessary incident of the authority of a peace officer in the execution of his duty. When the right to arrest arises as a result of incidents on the Base, that right prevails until the arrest is effected anywhere within Canada. A military policeman, while acting as a peace officer and exercising authority or duties conferred upon him by the Act, is not subject to municipal or provincial territorial restraint so long as his actions arise as a result of incidents which took place on or in respect to the defence establishment. The vital element is the existence of a nexus between the *actus reus* of the alleged criminal offence and the defence establishment".[26]

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[23] 35 N.B.R. (2d) 464 (N.B.Q.B.).

[24] The reader may contend, however, that by imposing a reasonable notice requirement on a police officer engaging in pursuit beyond original jurisdiction, the court in *Roberge* implicitly recognizes the common-law exception as granting extra-jurisdictional authority; that is to say, a police officer in pursuit is not permitted to give complete effect to police authority originating within jurisdiction in every circumstance.

[25] 66 C.C.C. (2d) 268 (Ont. H.C.J.)[hereinafter *Pile*], in which a member of the military police followed a suspected impaired driver off the military base as a result of observations on the base.

[26] *Ibid*. at 275.

[21] It is clear, though, that whichever view of this common-law exception one adopts, it cannot bear the tools necessary to indicate the proper sphere of legislative authority for the enactment of legislation granting extra-jurisdictional authority to provincially-appointed police officers. It is therefore to the level of constitutional law, namely, the division of legislative powers in Canada, that this analysis must now turn.

III. CANADIAN CONSTITUTIONAL ANALYSIS

[22] The starting point in Canada for a legal analysis of the constitutional validity of hypothetical legislation purporting to grant extra-jurisdictional "peace officer" status to provincially-appointed police officers is the distribution of legislative powers between the federal Parliament and the provincial Legislatures, as delineated by the *Constitution Act, 1867*.[27] Put simply, the issue in a division of legislative powers[28] analysis is whether the suggested enactment would fall within the enacting body's law-making authority. The aim of this section, then, is to determine whether legislation granting provincially-appointed police officers extra-jurisdictional "peace officer" authority would be a valid exercise of federal power, or a matter which falls under provincial legislative competence. For a discussion of the general principles on which our constitutional analysis is informed, we refer the reader to the Appendix to our paper.

[23] We begin this part with an examination of the division of powers on the issue of policing generally; namely, the relationship between the enumerated heads of authority in the field of criminal justice; and, the meaning of "provincially-appointed" police in the context of criminal law enforcement. We then further explicate these analytical tools in terms of assessing the constitutional competence of provincial Legislatures and the federal Parliament to legislate in relation to the extra-jurisdictional authority of provincially-appointed police.

[27] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].
[28] [hereinafter 'division of powers'].

(A) FIELD OF CRIMINAL JUSTICE: CONCURRENT LAW ENFORCEMENT

[24] In the field of criminal justice, sections 91(27) and 92(14) of the *Constitution Act, 1867* are the key heads of enumerated legislative competence.[29] Section 91(27) is among the class of subjects that are assigned to the exclusive legislative authority of the federal Parliament "notwithstanding anything in this Act" and embraces:

> "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters".[30]

Section 92(14), by contrast, assigns to the provincial Legislatures the power to "exclusively" make laws in relation to

> "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts".[31]

While the assignment of power above is clearly "exclusive", the central theme in division of powers cases pertaining to these sections is the search for boundaries of authority over various overlapping matters comprising the criminal justice field. The courts have, indeed, recognized

> "a special relationship between ss. 92(14) and 91(27), a relationship that cannot be said to obtain between s. 92(14) and the other heads of power in s. 91. Sections 91(27) and 92(14) together effect a careful and delicate division of power between the two levels of government in the field of criminal justice".[32]

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[29] For a brief review of the constitutional elements and principles informing the division of powers analyses in this paper, see the Appendix. The Appendix provides a general analytical framework elucidating constitutional provisions and corresponding judge-made rules arising from the 1867 Act. It delineates the following relevant elements and doctrines: exclusive heads of legislative competence; concurrency and ancillary doctrines; federal paramountcy; federal residual authority; and, the pith & substance doctrine. An excellent and detailed analysis of the distribution of legislative powers in Canada can be found in P. W. Hogg, *Constitutional Law of Canada, 1999 Student Edition* (Scarborough: Carswell, 1999) [hereinafter Hogg]; P.W. Hogg, Constitutional Law of Canada, loose-leaf (Scarborough: Carswell, 1992 (updated 2000)) [hereinafter *Constitutional Law*]; P. J. Monahan, *Essentials of Canadian Law: Constitutional Law* (Toronto: Irwin Law, 1997); G. Stevenson, "The Division of Powers in Canada: Evolution and Structure" in R. Simeon, ed., *The Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) 71.

[30] *Constitution Act, 1867*, s. 91(27).

[31] *Ibid*., s. 92(14).

[32] See *e.g*. *R.* v. *Wetmore* (1983), 2 D.L.R. (4th) 577 at 594 (S.C.C.) (*per* Dickson J. dissenting, but not on this point) [hereinafter *Wetmore*]. See also comments *per* Dickson C.J. in *O'Hara* v. *British Columbia*, [1987] 2 S.C.R. 591 at 598 [hereinafter *O'Hara*] (writing for the majority):

[25] Of course, the issue in a division of powers analysis pertaining to the field of criminal justice remains one of characterization: is a particular matter to which a law relates a matter in relation to the administration of criminal justice, or a matter in relation to criminal law or procedure? In the context of law enforcement in the province, "it has long been established" by the courts in Canada that "a province is responsible for, and has control and supervision of law enforcement in the province with respect to provincial legislation and criminal law as defined by the federal Parliament". [33] It is equally evident, however, that the constitutionally valid object of "law enforcement in the province" does not authorize a province to legislate in relation to criminal law and procedure: "[enforcement] must be in accordance with federally prescribed criminal procedure and not otherwise".[34] The extent of provincial authority with respect to law enforcement in the province was succinctly framed by Dickson C.J. in *O'Hara*: "the province can appoint, control and discipline municipal and provincial police officers".[35] It is evident, then, that provincial authority to enforce the criminal law is a matter of constitutional law, not of federally delegated administrative powers.

> "A certain degree of overlapping is implicit in the grant to the provinces of legislative authority in respect of the administration of justice and in the grant to Parliament of legislative authority in respect of criminal law and criminal procedure. A matter may well fall within the legitimate concern of a provincial Legislature as pertaining to the administration of justice, and may, for another purpose, fall within the scope of federal jurisdiction over criminal law and criminal procedure".

[33] *O'Hara, ibid*. at 600. See *A.G. Que. and Keable* v. *A.G. Can.*(1978), 90 D.L.R. (3d) 161 at 192 (S.C.C.) [hereinafter *Keable*] (*per* Estey J. concurring):"the "administration of justice" authorizes a province to establish, maintain and operate such facilities as may from time to time be necessary for the effective enforcement of the criminal law"; *Di Iorio* v. *Warden, Jail of Montreal and Brunet* (1976), 73 D.L.R. (3d) 491 at 528 (S.C.C.) [hereinafter *Di Iorio*] (*per* Pigeon J. concurring): "[i]t is obvious that, in s. 91(27) of the *British North America Act, 1867*, [*Constitution Act, 1867*] the scope of "Criminal Law" and "Procedure in Criminal Matters" is narrowed by the allocation to the Provinces of jurisdiction over the "Administration of Justice" in all matters civil and criminal which has consistently been held to include detection of criminal activities"; *Di Iorio, ibid*. at 528 (*per* Dickson J. writing for the majority):

> "Under head 92(14) of our Constitution, as I understand it, law enforcement is primarily the responsibility of the Province and in all Provinces the Attorney-General is the chief law enforcement officer of the Crown. He has broad responsibilities for most aspects of the administration of justice. Among these within the field of criminal justice, are the Court system, the police, criminal investigation … The provincial police are answerable only to the Attorney General …".

See also *R.* v. *Whiskeyjack* (1984), 16 D.L.R. (4th) 231 (Alta. C.A.).

[34] *Keable, ibid.* See *O'Hara, ibid*. at 600:

> "[A] province may not interfere with federal interests in the enactment of and provision for a uniform system of criminal justice in the country as embodied in the *Criminal Code*. … This limitation on provincial jurisdiction is an acknowledgement of the federal nature of our system of self-government".

[35] *O'Hara, ibid*. at 598 affirming same statement from *A.G. Alta* v. *Putnam* (1981), 123 D.L.R. (3d) 257 at 266 (S.C.C.) [hereinafter *Putnam*] (*per* Dickson J. dissenting).

[26] Interestingly, an effect of this exclusive provincial jurisdiction to "appoint, control and discipline municipal and provincial police officers" is to inform the meaning of "peace officer" in section 2 of the *Criminal Code*[36] and, potentially, to place limits on the effective enforcement of the criminal law. The Supreme Court of Canada in *Nolan* unanimously recognized this relationship between appointment and empowerment to enforce the criminal law:

> "[I]t is important to remember that the definition of "peace officer" in s. 2 of the *Criminal Code* is not designed to create a police force. It simply provides that certain persons who derive their authority from other sources will be treated as "peace officers" as well, enabling them to enforce the *Criminal Code* within the scope of their pre-existing authority, and to benefit from certain protections granted only to "peace officers"".[37]

That is to say, limitations on the powers of provincially-appointed "peace-officers"

> "come not only from the *Criminal Code*, but also from the statutes from which those persons who are defined by s. 2 of the Code to be a peace officer derive their powers, for example, the Police Acts of the various Provinces …".[38]

One sees, then, that provincial "peace officer" status flows from exclusive authority under section 92(14) to appoint "police officers" in the province, and the empowerment of such police officers to make arrests, searches and seizures in the enforcement of the criminal law derives from exclusive federal authority under section 91(27). Put simply, status by provincial appointment precedes empowerment to enforce under the criminal law.[39]

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[36] Section 2 of the *Criminal Code* reads, in part:

> "peace officer" includes …
> (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process".

[37] *Nolan*, *supra* note 21 at 295 (per Dickson C.J. writing for the Court). See also comment by His Lordship referring to but not explicating the division of powers difficulties associated with interpreting s. 2 of the *Criminal Code* as conferring plenary "peace officer" authority to all persons enumerated in that section (*ibid*. at 296):

> "[T]o treat s. 2 of the *Criminal Code* as a broad grant of authority to thousands of persons to act as "peace officers" in any circumstances could well prompt a constitutional challenge. In the context of division of powers, legislation should be interpreted, when possible, so that it is not *ultra vires*. … I would therefore conclude that the definition of "peace officer" in s. 2 of the *Criminal Code* serves only to grant additional powers to enforce the criminal law to persons who must otherwise operate within the limits of their statutory or common law sources of authority" [emphasis added].

[38] *Pile*, *supra* note 25 at 275.

[39] See generally *Legal Status of Police*, *supra* note 11 at 95-98.

[27] The constitutional authority for the federal policing of offences enacted under the criminal law power has been established by the Supreme Court of Canada in a pair of cases decided the same day dealing with prosecutorial legislative competence. In *A.G. Can*. v. *C.N. Transportation Ltd.* (1983)[40] and *Wetmore*, a number of provincial Attorneys General argued that the impugned pieces of legislation were enacted pursuant to section 91(27) and, therefore, prosecutorial competence was restricted to the provinces given that the "administration of justice" covered the investigation and prosecution of crimes.[41] But the Court held that whether it was criminal legislation or not, the federal government could define who would prosecute federal enactments. In both cases the majority found that prosecution is a matter of criminal procedure reserved to the federal Parliament by section 91(27) on the basis of the following general rule: allocation of a substantive head of power to one legislative level carries with it the authority to administer any scheme under that head. In short, the power to make a law includes the power to enforce that law. Adopting the rule in *CN Transport* and *Wetmore*, it appears that provincial authority over policing of legislation enacted under the criminal law power – as noted above - is not exclusive, although the ability of the federal Parliament to create a national police force has never been completely articulated.[42] In other words, the constitutional authority for

[40] 38 C.R. (3d) 97 (S.C.C.) [hereinafter *CN Transport*] (Dickson J. dissenting).

[41] *CN Transport* and *Wetmore* answer the constitutional question left open by *R.* v. *Hauser* (1979), 46 C.C.C. (2d) 481 (S.C.C.) [hereinafter *Hauser*]. In *Hauser*, the right of the federal authorities to prosecute under what was then the Narcotic Control Act was challenged by way of the division of powers. The constitutional challenge first characterized the impugned enactment as criminal law and, second, argued that the exclusive authority to prosecute criminal matters was reserved to the provinces by s. 92(14). The majority of the Court held, first, that the Narcotic Control Act was properly characterized as falling within the p.o.g.g. power, not s. 91(27) and, second, that there was federal authority to legislate for the prosecution of offences not falling under the criminal law power. The question expressly left open by the majority was whether the provinces had exclusive control over prosecutions arising from enactments which depend for their validity on s. 91(27). *CN Transport* and *Wetmore* answer this question in the negative.

[42] No doubt the courts in Canada have acknowledged or implied the authority of the federal Parliament to create a national police force. See *e.g*. *Keable*, *supra* note 33 at 180 where the Supreme Court of Canada held that it was beyond the competence of a province to inquire into the administration and management of the R.C.M.P. In delivering the unanimous opinion on this issue, Pigeon J. stated: "Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned". This statement was quoted and reaffirmed by a majority of the Court in *Putnam*, *supra* note 35 (*per* Laskin C.J.). See also *O'Hara*, *supra* note 32 at 600: "[s]ince *Keable No. 1* and *Putnam*, then, it is clear that the boundaries of the "administration of justice" do not include the discipline, organization and management of the R.C.M.P."; *per* La Forest J. (dissenting, but not on this point) in *Scowby* v. *Glendinning*, [1986] 2 S.C.R. 226 at 245 [hereinafter *Scowby*]: "In [*Keable*], this Court held that Parliament had validly established the R.C.M.P. and that Parliament, therefore, had exclusive jurisdiction over its management and administration"; *R. & Archer* v. *White* (1955), 114 C.C.C. 77 (S.C.C.) at 81 (*per* Rand J concurring), a case recognizing the R.C.M.P. as "a police force for the whole of Canada to be used in the enforcement of the law of the Dominion … stamped with the characteristics of the Army". The point, here, is that the courts in

concurrent provincial and federal jurisdiction over the policing of legislation enacted under section 91(27) is also established.[43]

(B) THE MEANING OF "PROVINCIALLY-APPOINTED"

[28] The aim of this part is to elucidate the meaning of "provincially-appointed peace officer" for the purpose of the division of powers analysis to follow. More specifically, it addresses the question: are members of the R.C.M.P.,[44] where contracted to provide provincial and municipal policing services, "provincially-appointed peace officers"?[45]

[29] Each province in Canada has enacted legislation in the field of public policing. The provinces authorize public policing services in one or more of three forms.[46] The first form of such policing arises from legislation creating a provincial police force. Seven provinces in fact provide for provincial police agencies, however, only the provinces of Ontario,

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Canada have not as yet specifically articulated the constitutional basis for criminal law policing by federal agencies.

[43] The existence of concurrent authority to enforce the criminal law serves in part to protect against inadequate provincial enforcement; indeed, exclusive provincial authority to enforce the criminal law could render federal power in this field ineffectual. The corollary of concurrency in this context, though, is the possibility of total federal control over the enforcement of criminal legislation: "aptly framed legislation, reinforced by the doctrine of federal paramountcy, could exclude the provinces altogether from their traditional enforcement role" (*Constitutional Law*, *supra* note 29 at c. 19.7). However, the actualization of total federal control is unlikely for at least three reasons: first, it is questionable that even "aptly framed legislation" could meet the "express contradiction" test affirmed in *Multiple Access* v. *McCutcheon* (1982), 138 D.L.R. (3d) 1 (S.C.C.) [hereinafter *Multiple Access*] (although some constitutional law scholars contend that an "express covering-the-field clause would be effective": Hogg, *supra* note 29 at 404); second, the trend in Canadian federalism has been "in the direction of shared jurisdiction and functional concurrency", not "watertight compartments" (see Monahan, *supra* note 29 at 219, 223: "attempting to restore a set of watertight compartments would inevitably fail, since contemporary problems are inherently multifaceted and demand coordinated action from all levels of government"); and, third, to expunge provincial authority over criminal law enforcement by rendering federal authority paramount would be to resist over a century of criminal justice administration by the provinces: *per* Beetz J. in *Di Iorio*, *supra* note 33 at 540. Indeed, it is reasonable to conclude that federal legislation assuming total control over criminal law enforcement would be strongly resisted by the provinces; albeit the fact that the R.C.M.P. provides policing services under contract to seven out of ten provinces does seem to render nugatory any provincial sentiment in favour of provincial criminal law enforcement. In any event, there does not seem to be an "informed federal interest" to assume total control over the enforcement of criminal law in all parts of Canada: *Constitutional Law*, *supra* note 29 at c. 19.

[44] Royal Canadian Mounted Police.

[45] It is important to note that s. 2 of the *Criminal Code* deems a member of the R.C.M.P. a "public officer". However, this designation is of no relevance to this paper given that all "public officers" are acknowledged as "peace officers" for the purposes of the *Criminal Code*; that is to say, "the addition of the status of "public officer" is not very significant: "public officers" have no powers, privileges, protections, etc., which "peace officers" do not also enjoy": *Legal Status of Police*, *supra* note 11 at 98.

[46] The account that follows on forms of policing service in Canada is drawn from *Constitutional Law*, *supra* note 29 at c. 19; *Legal Aspects of Policing*, *supra* note 3 at 1-2; *Legal Status of Police*, *ibid*. at 69-77, 81-90.

Quebec and Newfoundland possess such organizations. In Ontario and Quebec, provincial police agencies enforce the *Criminal Code*, provincial legislation and municipal by-laws in rural parts of the province.[47] Policing legislation in Newfoundland, by contrast, provides a constabulary force with authority "throughout the province."[48] In the remaining provinces making provision for provincial police forces, the R.C.M.P. performs this function under contract.[49] The second form of public policing service in Canada derives from provincial legislation authorizing municipalities to create police forces. This authority arises from the requirement imposed upon municipalities to deliver "adequate and effective police services". All provinces except Newfoundland grant authority to municipalities to create municipal police agencies.[50] The third form of public policing authorized by provincial legislation, except policing legislation in Quebec, Newfoundland and Ontario, is by contract with the federal government under the terms of which the R.C.M.P. delivers policing services to the province.[51]

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[47] *Police Services Act*, R.S.O. 1990, c. P. 15 [Ont.]; *Police Act*, S.Q. 2000, c. 12 [Que.].

[48] *Royal Newfoundland Constabulary Act, 1992*, S.N. 1992, c. R-17, s. 8(2).

[49] *Provincial Police Act*, R.S.M. 1987, c. P150, ss. 2, 15(1) [Man.]; *Police Act*, R.S.N.S. 1989, c. 348, ss. 10(1), 11(1) [N.S.]; *Police Act*, R.S.P.E.I. 1988, c. P-11, ss. 1, 15(1) [P.E.I.]; *Police Act*, R.S.B.C. 1996, c. 367, as am. 2000, ss. 5, 14 [B.C.]. In Alberta, Saskatchewan and New Brunswick, by contrast, policing legislation does not create a provincial police force, but merely authorizes the R.C.M.P. to provide a provincial police service: *Police Act*, R.S.A. 1980, c. P-12.01, s. 21(1) [Alta.]; *Police Act*, S.S. 1990, c. P-15.01 [Sask.]; *Police Act*, R.S.N.B. 1973, c. P-9.2 [N.B.]. See also G. Marquis, "The RCMP and the Evolution of Provincial Policing" in R.C. Macleod and D. Schneiderman, *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994).

[50] Alta., s. 4; B.C., s. 3(2)(a); N.B., s. 3(2); N.S., s. 12(2)(a); Ont., s. 4(1), 5.1(1); Que., ss. 69-73; Sask., ss. 25, 26(1). In Prince Edward Island and Manitoba, the authority to establish a municipal police agency is found in municipal legislation. See *e.g*. *Municipalities Act*, R.S.P.E.I. 1988, c. M-13, s. 30(j); *City of Winnipeg Act*, S.M. 1989-90, c. 10, s. 453(1); *Municipal Act*, R.S.M. 1988, c. M225, s. 292.

[51] Provincial policing legislation of this form authorizes two types of agreements. In the first type, a province may contract, for a fee, the provision of policing services to the province. The services delivered by the federal force are the enforcement of the *Criminal Code*, provincial legislation, and municipal by-laws. These provincial policing contracts do not cover municipalities. In the second type of agreement, a municipality "rents" the R.C.M.P. to enforce the *Criminal Code*, provincial law and municipal by-laws within the municipality. It is important to note, however, that in most provinces where a municipality is permitted by law and seeks to have its policing services undertaken by the R.C.M.P. the corresponding provincial government enters into an agreement with federal authorities for the above mentioned purposes. See *e.g*. Man., ss. 15, 16; Sask., ss. 22(1); Alta., s. 22(1); B.C., s. 3(2)(b), 16. Other provinces permit a municipality to enter directly into an agreement with the federal government for policing services subject to the approval of the provincial minister responsible for policing. See *e.g*. N.S., ss. 17(1); N.B., s. 4; Sask., ss. 23(1) (where population greater than minimum size prescribed or less than 20,000).

[30] This arrangement to provide policing services to requesting provinces is also authorized at the federal level by sections 20(1) and (2) of the *RCMP Act*.[52] The effect is that, in providing provincial and municipal services, the R.C.M.P. is authorized under federal statute, in addition to provincial legislation. The constitutional basis for the provincial aspect of this R.C.M.P. service is located, as noted earlier, in provincial authority under section 92(14) of the *Constitution Act, 1867* to "establish, maintain and operate such facilities as may from time to time be necessary for the effective enforcement of the criminal law";[53] in other words, to "control and [supervise] law enforcement in the province with respect to provincial legislation and criminal law". [54] Indeed, it is clear that the R.C.M.P., when delivering provincial and municipal police services, is subject to the direction of the provincial minister responsible for policing on local criminal justice and provincial law enforcement matters.[55] The obverse of this policing arrangement, of course, is that members of the R.C.M.P. are regulated by the *RCMP Act*, regulations under that Act, and are responsible to the R.C.M.P. Commissioner, who must in turn account to the federal Solicitor General. The constitutional authority for the federal aspect of this contracting scheme is located in federal competence to establish and manage enforcement agencies to administer laws falling under a head of legislative power allocated exclusively to the federal Parliament.[56]

[31] It is, however, at the level of constitutional authority for the federal aspect of this provincial policing scheme that the answer to the question presented is to be found. The fact that the federal Parliament enjoys exclusive jurisdiction over the "administration and management" of the federal police means that provincial legislation cannot, despite concurrent jurisdiction over criminal law enforcement in the province, derogate from federal

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[52] *Supra* note 7. See *infra* note 58 and accompanying text.
[53] *Keable*, *supra* note 33 at 192.
[54] *O'Hara*, *supra* note 32 at 600.
[55] *Di Iorio*, *supra* note 33 at 528 *per* Dickson J. referring to the provincial Attorney General as the "chief Law Enforcement Officer" and concluding: "[t]he provincial police are answerable only to the Attorney General …". See *e.g*. Alta., s. 21(3) [R.C.M.P. under the general direction of the Minister]; N.B., ss. 1.1(3): "Subject to this Act and the regulations, the Minister may issue guidelines and directives to any police force within the Province for the attainment of the purposes of subsection (1)"; Sask., s. 21(1); N. S., s. 11(4):

> "A member of the Royal Canadian Mounted Police while acting as a member of the Provincial Police Service shall, subject to the terms of the agreement referred to in subsection (1), be under the general direction of the Solicitor General in matters respecting the operations, policies and functions of the Provincial Police Service".

authority to *appoint* and *empower* persons to enforce federal legislation. Put simply, concurrent jurisdiction over criminal law enforcement does not authorize encroachment on the other level of legislative competence in relation to the appointment of persons satisfying the definition of "peace officer". Indeed, to allow provincial Legislatures to extend the reach of legislation into the appointment and empowerment of federal policing agents in the field of criminal law would in effect be to allow it to legislate in an area of exclusive federal jurisdiction under section 91 of the *Constitution Act, 1867*. The only issue remaining here, then, is whether federal legislation in fact appoints R.C.M.P. members contracted to provide provincial policing services as federal policing agents, indeed, as "peace officers", or whether provincial legislation "feeds" peace officer status in the absence of pertinent federal provisions, upon approval of R.C.M.P. service contracts by requesting provinces; that is to say, R.C.M.P. members contracted to deliver provincial policing services are "empty" of federal policing status and, consequently, peace officer status, such that they become *de jure* provincial police agents upon execution of such agreements. Sections 9 and 20 of the *RCMP Act* evince the former position:

> 9. Every officer [member] and every person designated as a peace officer under subsection 7(1) is a peace officer in every part of Canada and has all the powers, authority, protection and privileges that a peace officer has by law until the officer or person is dismissed or discharged from the Force as provided in this Act, the regulations or the Commissioner's standing orders or until the appointment of the officer or person expires or is revoked.[57]
>
> 20. (1) The minister may, with the approval of the Governor in Council, enter into an arrangement with the government of any province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws in force therein.
>
> (2) The Minister may, with the approval of the Governor in Council and the lieutenant governor in council of any province, enter into an arrangement with any municipality in the province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the municipality and in carrying into effect the laws in force therein [emphasis added].[58]

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[56] *Keable, supra* note 33; *Putnam, supra* note 35; *Scowby, supra* note 42; *CN Transport, supra* note 40; *Wetmore, supra* note 32.

[57] See also ss. 3 and 4 of the *RCMP Act*, which read:

> 3. There shall continue to be a police force for Canada, which shall consist of officers and other members and be known as the Royal Canadian Mounted Police.
>
> 4. The Force may be employed in such places within or outside Canada as the Governor in Council prescribes.

[58] *RCMP Act*, ss. 9 and 20.

[32] It is evident from the above sections that the *RCMP Act* appoints *every* member of this force as "peace officers" throughout Canada, including for the purposes of provincial policing service agreements. Following the analytical framework enunciated in *Nolan* and *Pile*, the "peace officer" status of R.C.M.P. personnel flows from authority to appoint police officers to administer enforcement schemes attached to a substantive head of federal competence, including the criminal law power.[59] Of course, empowerment of such federal police agents to make arrests, searches and seizures in the enforcement of the criminal law also derives from exclusive federal authority under section 91(27), *Constitution Act, 1867*. Consequently, the authority of the R.C.M.P. to enforce provincial and municipal laws under contract, as the case may be, is *in addition to* the authority to enforce federal legislation throughout Canada, including the criminal law.[60] In other words, provincial authority to contract for federal policing services to administer criminal justice in the province does not *subtract from* extant R.C.M.P. authority to enforce federal legislation. Indeed, the language of sections 20(1) and (2) of the *RCMP Act* suggest this cumulative enforcement arrangement: "in *aiding* the administration of justice in the province *and* in carrying into effect the laws in force therein".[61]

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[59] The general rule that authority to administer enforcement schemes attaches to a substantive federal legislative sphere is tantamount, although not yet enunciated by the courts in Canada, to asserting the ancillary doctrine: the federal power of policing comes within the phrase "criminal law" in s. 91(27), on the basis that each sphere of federal authority includes the power of enforcement, because enforcement has a "rational, functional connection" with (low standard) or is "essential" (high standard) to the substantive content of each head of legislative power: *Multiple Access*, *supra* note 43; *Papp* v. *Papp*, [1970] 1 O.R. 331, 336 (O.C.A.). See also Appendix: Constitutional Elements & Principles, paras. 2 and 14-15.

[60] On the basis of this reasoning, the deeming of R.C.M.P. officers as "peace officers" in provincial policing legislation appears redundant. See *e.g*. *Police Act*, R.S.P.E.I. 1988, c. P-11, s. 18:

> 18. Every member of the Royal Canadian Mounted Police shall be deemed to be a peace officer with power and authority to investigate breaches of provincial statutes and offences under the *Criminal Code* and shall have the powers of peace officers and constables with regard to the arrest and detention of offenders.

It is also evident that the minister responsible for policing services in a given province does not possess the authority to restrict the territorial jurisdiction of "any [R.C.M.P.] police officer" in relation to acting as a "peace officer". Compare *e.g*., *Police Act*, R.S.A. 1980, c. P-12.01, s. 38(3):

> 38(3) Nothwithstanding subsection (2) ["a police officer has jurisdiction throughout Alberta"], where a commission is established in respect of a police service, the commission may restrict the territorial jurisdiction of any police officer of that police service.

[61] *Supra* note 15 [emphasis added]. See also s. 18 of the *RCMP Act* which reads, in part:

> 18. It is the duty of members who are peace officers, subject to the orders of the Commissioner, (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed and the apprehension of criminals and offenders and others who may be lawfully taken into custody. … [emphasis added].

Some provincial policing legislation expressly acknowledges the power cumulative nature of these provincial policing arrangements for the R.C.M.P.. See *e.g*. N.B., s. 2(1): "The Lieutenant-Governor in

[33] On the basis of the preceding reasoning, therefore, R.C.M.P. personnel employed under contract to deliver provincial policing services do not constitute "provincially-appointed peace officers". The corollary is, of course, that no extra-jurisdictional difficulties attach to R.C.M.P. personnel enforcing the criminal law under provincial policing agreements for the purposes of a division of powers analysis. It is plausible, though, that inter-jurisdictional problems may attach to R.C.M.P. officers in relation to the enforcement of provincial legislation or municipal by-laws, but that issue is beyond the scope of this paper. For the purposes of the division of powers analysis to follow, then, the category "provincially-appointed peace officers" comprises provincial and municipal police officers constituted under provincial legislation, not federal police personnel serving the *de facto* function of provincial and municipal policing agents.

(C) PROVINCIAL LEGISLATIVE COMPETENCE

[34] The purpose here is to discover whether legislation granting provincially-appointed police officers extra-provincial "peace officer" status would be a valid exercise of provincial legislative competence.[62] It is assumed in this part that the provinces possess the proper authority to legislate for extra-jurisdictional issues arising intra-provincially. The fact that the provinces can "appoint, control and discipline municipal and provincial police officers" is sufficient authority for this view.[63] The focus, then, is on the division of powers, namely, the territorial limitations that attach to the operation of provincial police extra-provincially. The first part illustrates that the provinces cannot legislate for extra-provincial policing authority. The second part examines the potential for extra-provincial policing effects achieved through provincial mutual assistance policing programs.

Council may enter into agreements with Canada for the employment of the Royal Canadian Mounted Police to enforce the law and to assist in the administration of justice in the Province".

[62] It is important to note that although the phrase "extra-provincial peace officer" is not used throughout the following discussion, this section refers only to the extra-provincial authority of provincially-appointed police officers in the investigation and enforcement of criminal law, not the laws of provincial origin.

[63] *O'Hara*, *supra* note 32 at 598.

(i) Within the Province

[35] The provinces enjoy exclusive jurisdiction over the subjects enumerated in section 92 of the *Constitution Act, 1867*, however, the exercise of this jurisdiction is subject to certain territorial limitations. One is the common-law rule of general application that the provinces lack the constitutional capacity to enact legislation having extra-territorial operation.[64] The other is the expression "in each province" found in the opening words of section 92 or, more specifically, the words, "in the Province" found in section 92(14).[65] It appears, then, that a province may not regulate extra-provincial activity. There is, however, the question of how literally the notion of territorial restriction is to be taken. Does "territory" refer to the physical space within the borders of a province or is the reference rather to a more conceptual notion of territory as a sphere of interest?[66]

[36] The courts in Canada, interestingly, have traditionally defined the legislative reach of the provinces in terms of both physical borders and spheres of interest. In terms of assessing the impact of the words "in each province" on legislative authority, the traditional approach entails determining the legislation's "pith and substance": where the pith and substance of the provincial enactment is in relation to matters which fall within the physical borders of the enacting province, extra-provincial incidental or consequential effects of legislation otherwise falling within a valid sphere of legislative interest will not render the enactment *ultra vires*.[67] In other words, extra-provincial consequences may be

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[64] See *e.g*. *McGuire* v. *McGuire and Desordi* (1953), O.R. 328 at 334 (C.A.) [hereinafter *McGuire*]: "[N]o provincial Legislature has any power to pass laws having any operation outside its own territory" . See also *Global Securities* v. *British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at 503 [hereinafter *Global Securities*] referring to *McGuire* with approval.

[65] Why is this language of territorial limitation relevant to the issue of division of powers in Canadian federalism? The answer is obvious: territoriality is an imperative criterion of the *Constitution Act, 1867*. To recall, section 92 of the 1867 Act stipulates that the provinces hold "exclusive" jurisdiction in accordance with the heads of legislative authority listed therein. But to establish the range of exclusive provincial legislative jurisdiction in the absence of express language denoting territorial limitation would likely render exclusiveness virtually nugatory and, therefore, the division of powers as between provincial governments under the various heads of prescribed authority. This is because exclusiveness could be interpreted as referring strictly to a sphere of interest. The words "in each province" are sufficient ground, then, to recognize the territorial limitation on provincial legislative competence as a constitutional imperative and not merely a phrase that can be avoided by sufficiently express language. See generally Edinger, *infra* note 75.

[66] See R.E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985), 7 Supreme Court L. Rev. 511 at 513.

[67] See *e.g*. *Ladore* v. *Bennet*, [1939] A.C. 468 (P.C.) [hereinafter *Ladore*]; *Re Upper Churchill Water Rights*, [1984] 1 S.C.R. 297 at 319. See also *Burns Food* v. *A.G. Man*., [1973] 1 S.C.R. 494; *Interprovincial Cooperatives* v. *The Queen*, [1976] 1 S.C.R. 477; *The Queen* v. *Thomas Equipment*, [1979] 2 S.C.R. 529.

validly accomplished by a provincial Legislature as an incidental effect of a law that is in relation to a matter residing literally within the territory of the province, and within an enumerated head of legislative power.[68] To determine whether the "pith and substance" of a provincial enactment is valid, then, one must also know where the conduct or matter sought to be controlled is situate, either within or outside of the province. If the conduct or matter sought to be controlled is within the province the enactment is valid, but if the conduct or matter is situate elsewhere the enactment is invalid. Put simply, incidental effects may attach to an otherwise valid provincial law operating within the physical limits of the province, but a law "in pith and substance" operating outside the province will be rendered *ultra vires*, even if cloaked in the proper head of legislative authority.

[37] The leading authority in Canada delineating the extent and scope of provincial legislative operability in the context of provincial police authority is *R.* v. *Schroeder* (1989).[69] In deciding whether an Ontario constable issuing a breathalyzer demand to a motor vehicle user situated in Quebec was within jurisdiction, the court said:

> "It is trite to observe that the Province of Ontario could not purport to appoint police officers to perform duties in another province … [T]he province has constitutional jurisdiction only with respect to the enforcement of laws "in force in Ontario and the criminal laws of Canada" in Ontario. There are … exceptions … under the heading of "hot pursuit", where the crime is committed or commenced in one province and the

[68] As a general proposition, it is clear that provincial legislation may not operate to regulate extra-provincial actors or activity. What is often difficult in determining whether the impugned enactment operates to regulate extra-provincial activity is "distinguishing extraprovincial activity from intraprovincial activity, and distinguishing the incidental effects of a statute from its pith and substance": Hogg, *supra* note 29 at 299. The correct approach, though, to distinguishing between a law's locale of operation and its incidental effects is exemplified in the classic case of *Ladore*, *ibid*., in which an Ontario statute amalgamated four municipalities experiencing financial difficulties to form the new City of Windsor. The impugned law in this case compulsorily dissolved all previous municipal debentures and issued the previous creditors with debentures of the new city bearing a reduced rate of interest. The argument was that the reduction in interest modified the rights of creditors residing outside the province. In characterizing the Ontario statute as being in relation to "municipal institutions in the province" (s. 92(8)), the Privy Council found that this exclusive sphere of power authorized the dissolution and creation of municipal institutions, including the destruction of old debt and its substitution by new debentures; concluding: "if for strictly provincial purposes debts may be destroyed and new debts created, it is inevitable that [creditors] should be affected whether the original creditors reside within or without the province". Even though the plan reduced the interest rates on bonds held by extra-provincial creditors, the law's pith and substance fell within the province's authority over municipalities. Incidental extra-provincial effects were irrelevant. In brief, a law operating within the territorial limits of the province may give rise to incidental effects outside the province. The corollary of *Ladore* is that a province may not operate to regulate matters beyond the borders of the province. See *McGuire*, *supra* note 64.

[69] 22 M.V.R. (2d) 307 (Ont. Prov. Ct.) [hereinafter *Schroeder*].

> police of that province pursue the suspect into another province and retain their status under the so-called "hot pursuit" rule".[70]

In short, a provincial Legislature has no constitutional authority to operate by law – that is to say, "create" – police officers with jurisdiction outside the province of the enacting body.

[38] On the basis of the above principles, provincial legislation purporting to grant extra-provincial authority to provincial police officers constituted by the same enacting body would fail under constitutional scrutiny on the one hand, at the level of "pith and substance", and the other, under the principle of territoriality. Under the "pith and substance" test, it is reasonable to assume that the purpose of granting extra-provincial authority would be found by the courts as addressing a problem legitimately falling within the ambit of "administration of justice in the province"; namely, the investigation and enforcement of laws the violation of which occurs "in the Province" by actors now outside the province. However, the legal effects of such legislation would conclusively demonstrate that the enactment mainly, or "in pith and substance" belongs to another legislative authority. That is to say, the legal effects of a provincial law purporting to grant extra-provincial authority to police officers of the same jurisdiction would show that the enactment's "dominant or most important" characteristic is to "appoint" and "control" provincial police officers to operate in the other province. Indeed, it would be difficult for the enacting province to demonstrate that this would not be a substantial legal effect. To recall, the appointment and control of provincial police officers is the exclusive authority of each province under section 92(14) of the 1867 Act.[71] It is important to recognize, moreover, that federal and provincial concurrency over the enforcement of the criminal law does not beget provincial authority to enforce the criminal law in another province. It is clear, then, that if a provincial law that grants such extra-provincial power is legislation of the kind – that is, in "pith and substance" – which falls within the "exclusive" authority of the province facing encroachment, it cannot properly belong to the enacting body's sphere of competence. In short, a provincial law that purports to grant extra-provincial police

[70] *Ibid*. at 310.
[71] *O'Hara*, *supra* note 32 at 598.

power in legal effect falls within the exclusive authority of the province facing intrusion and so cannot validly reside within the enacting body's domain of legislative competence.[72]

[39] On the other hand, provincial legislation purporting to grant extra-provincial authority to police officers of the enacting province would offend the principle of territoriality by permitting the operation of police authority to literally control conduct and actors residing beyond provincial borders. Furthermore, the exercise of this type of provincial police authority could not properly be described as a mere incidental effect of an otherwise valid law "operating within the province", unless legal fictions are employed. No doubt provinces could be allowed latitude by interpreting "operation" as applying solely to a sphere of interest, rather than physical space. Such legal fictions, however, might cost the law credibility. If they are unbelievable to the degree of absurdity, they might threaten the relevance of the division of powers in Canada. But discussions about the meaning of "operating within the province" are likely rendered academic in any event, since the decision in *Schroeder* unequivocally stands for the rule that provincial police cannot operate outside the physical limits of the home province, unless the common-law pursuit exception is triggered.[73] One sees, then, that whether the approach is by way of the territoriality principle or by way of assessing legal effects under the "pith and substance" doctrine, a province cannot validly enact legislation granting extra-provincial powers to provincially appointed police officer's originating from the enacting body's province.[74]

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[72] The ancillary doctrine may also be invoked by the enacting Legislature in attempt to uphold a provision purporting to grant extra-provincial police authority to police officers constituted by the same enacting body. The enacting Legislature could, first, concede that the impugned provision is not "in pith and substance" *intra vires* legislative authority, then argue that the law has a sufficiently close connection to the rest of the otherwise valid provincial policing legislation, so that it can be said to be merely incidental to the operation of the statute. But given the substantial encroachment on the other provincial legislative sphere, as noted above, it is unlikely that an extra-provincial policing provision could satisfy the most rigorous version of the ancillary doctrine as enunciated in *General Motors* v. *City National Leasing*, [1989] 1 S.C.R. 641 at 671. See also *Multiple Access*, *supra* note 43. Indeed, it is unlikely that a court would find such a provision to be "necessarily incidental" or "truly necessary" to the operation of the corresponding policing statute.

[73] Compare discussion under the rubric "Criminal Procedure" at para. 48, below.

[74] It is interesting to note that a province facing intrusion by extra-provincial police officers could also raise an "inter-jurisdictional immunity"-type argument (albeit the doctrine has only been applied as yet by Canadian courts in terms of immunizing federally-regulated undertakings from provincial law). It could assert immunity from the encroaching provincial legislation – that is, seek to render the impugned provision *inapplicable* as against the province facing intrusion – on the part of the undertaking affected by the law, namely, the appointment and control of provincial police in the province. The province facing intrusion could contend that such undertaking is "essential" to the regulation of policing in the province specifically and, more generally, the administration of (criminal) justice in the province. Compare *e.g. Ontario* v. *Canadian Pacific*, [1995] 2 S.C.R. 1028; *Air Canada* v. *Ontario*, [1997] 2 S.C.R. 581. See also *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927.

(ii) Mutual Assistance

[40] The principle of territoriality, as noted above, is one of general application at common law and is expressly made applicable to the provincial Legislatures by the language of "in each province" in section 92 of the *Constitution Act, 1867*. The principle consists, however, of a negative and a positive proposition. The negative proposition holds, that no province can, by its laws, operate out of its own territory. The positive proposition, by contrast, holds that every provincial Legislature enjoys exclusive jurisdiction within its own territory over matters falling within the enumerated heads of authority under section 92 of the 1867 Act. When provincial law is invalidated on the basis of territoriality, as noted above, it is because the negative proposition has been violated. The corollary of the positive proposition, of course, is that the provincial Legislatures are:

> "free to waive their exclusivity and to offer assistance to other [provinces] when persons or property are found within their territory, and so beyond the control of the other [province]. They are free to define the circumstances in which assistance will be given, the procedures that must be followed, and the forms of assistance available. They may decide to limit such assistance to particular [provinces] on conditions of reciprocity, or they may offer it to the world at large gratuitously in the hope of reciprocity".[75]

It is also important to recognize the implication of other heads of enumerated authority under s. 92 in the face of extra-provincial provincial policing activity. Although it is beyond the scope of this paper to examine multiple heads of provincial legislative authority in relation to extra-provincial policing intrusions, s. 92(13) ("Property and Civil Rights") seems most relevant. Indeed, if "[a] person cannot lawfully be arrested unless the person who arrests him can find justification in law for doing so" (*Stewart*, *supra* note 13 at 482 *per* La Forest J.A. writing for the court), it is clear that a person subject to extra-provincial policing could, in addition to invoking s. 92(14), also claim that at the moment of impugned police action the law granting extrajurisdictional authority encroached upon the exclusive authority of the province of intrusion to administer "property and civil rights" in the province, including the authority to administer provincial public complaints programmes and other similar regimes for managing disciplining proceedings against provincial police. A plethora of constitutional questions surrounding s. 92(13) would therefore arise from extra-provincial policing, including: if a person makes a complaint against the actions of an extra-provincial police officer, does the complaint proceed by way of the regime implemented in the province enacting extra-provincial police authority, or the province where the actions giving rise the complaint took place?

Finally, it is clear that a province facing encroachment could challenge the constitutionality of another province's legislation (purporting, for example, to grant extra-provincial authority to provincial police originating from the enacting body's jurisdiction). The leading case enunciating this Canadian constitutional principle is *Hunt* v. *T&N. plc* (1993), 109 D.L.R. (4th) 17 at 28 (S.C.C.) [hereinafter *Hunt*]:

> "[T]he jurisdiction to at least consider the constitutionality of another province's legislation can be found in the right of any superior court to consider and make findings of fact respecting the law of another jurisdiction for the purposes of litigation before it. This jurisdiction to consider the laws of another province seems to me to be even more clearly justified when both jurisdictions are Canadian and governed by our Constitution".

[75] E.R. Edinger, "The Constitutional Validity of Provincial Mutual Assistance Legislation: Global Securities v. British Columbia (Securities Commission)" (1999) , U.B.C.L. Rev. 169 at 173.

[41] The significance of provincial mutual assistance as the positive corollary of the territoriality principle has not gone unnoticed by the courts in Canada. There seems, indeed, to be authority for the view that the provinces are free to waive their exclusivity to administer schemes falling under the enumerated heads of authority in section 92 of the *Constitution Act, 1867*. The leading case on point is *Global Securities Corp*. v. *British Columbia (Securities Commission)* (2000),[76] in which a provision of the securities legislation in the province authorized the securities commission to order a "registrant" operating under the securities regime in the province to produce records "to assist in the administration of the securities law of another jurisdiction". The accused company argued that because the impugned section enabled the commission to turn evidence over to a foreign regulatory body, the purpose must be to assist the enforcement of foreign legislation and, therefore, must be *ultra vires* the province. In a unanimous ruling, the Supreme Court of Canada held that to state the purpose of the impugned enactment in this manner "confuses the purpose of the law with the means chosen to achieve that purpose".[77] Instead, the dominant purpose was found to be the enforcement of the province's securities legislation. The Court observed that in order to regulate effectively the intra-provincial securities market, the commission often required access to records located outside province, access that could most effectively be given by the regulatory agency in that jurisdiction. Also, if the commission expected this cooperation from extra-provincial regulators, the Court found, it must reciprocate, as the impugned provision permitted. The mere fact, then, that the province cooperated with a foreign authority was held not to change the law's pith and substance of seeking to effectively regulate intra-provincial aspects of the securities market.

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[76] *Supra* note 64. It is important to note that support for the positive corollary of the territoriality principle as applied to provincial objects can also be found in the earlier case of *Bonanza Creek Gold Mining Co*. v. *The King*, [1916] 1 A.C. 566 (P.C.) [hereinafter *Bonanza Creek*]. In this case, the Privy Council found that s. 92 of the *Constitution Act, 1867* enables a province to keep alive powers to incorporate companies with provincial objects having an ambit of vitality beyond the territorial boundaries of the province; however, the rights that such a company possesses outside the province of incorporation can only be those granted by the province facing intrusion. It appears therefore, in light of this ruling, that a province can legislate for "capacity"; in other words, the ability for provincial objects to function extra-provincially in circumstances where "operative" rights are granted by another province. Put simply, a validly established provincial object can attract rights from other provincial Legislatures. Extra-Provincial Corporations Acts also reflect this rationale. Such legislation permits an extra-provincial corporation to carry on business in the host province without obtaining a license. See *e.g*. *Extra-Provincial Corporations Act*, R.S.O., 1990, c. E. 27.

[77] *Global Securities*, *ibid*. at 503.

[42] The ruling in *Global Securities* is a rather clear affirmation of the power of provincial Legislatures to authorize extra-provincial arrangements in terms of a dominant intra-provincial purpose. Provided that a provincial Legislature does not legislate to grant actors within the province authority to operate outside the province (negative corollary of the territoriality principle), there is no unconstitutional trespass on provincial jurisdiction.[78] There does not seem in principle, then, any bar to provinces legislating to permit provincial police officers from entering into the enacting body's jurisdiction or, more generally, to enter into broader provincial mutual policing assistance agreements. If the dominant purpose is the intra-provincial administration of justice, the mere fact that a province is cooperating with other provinces in the pursuit of this purpose will not, adopting the reasoning in *Global Securities*, change the intra-provincial pith and substance of any laws enacted by the province to give effect to extra-provincial policing agreements. Moreover, even if one successfully demonstrates that provincial legislation giving effect to extra-provincial policing agreements is not in pith and substance provincial, the ruling in *Global Securities* indicates that if it is part of an otherwise valid scheme it will survive constitutional challenge. Of course, the fact that the Court found inter-jurisdictional cooperation among securities commissions indispensable to the effective regulation of intra-provincial securities markets informed their basis for finding that the impugned securities provision would satisfy even the most rigorous version of the ancillary doctrine ("necessarily incidental"). But it would not be too much of a stretch in the exercise of reason to apply the same rationale of the indispensable nature of inter-jurisdictional cooperation to intra-provincial policing, especially in light of the rise in the prevalence and sophistication of inter-jurisdictional crime. Besides, if informal cooperation by provincial policing officials in the form of MOU's is permissible, it seems illogical that a province cannot provide for extra-provincial policing assistance by legislative directive.[79] One sees, then, that the reasoning applied in *Global Securities* to mutual assistance agreements in furtherance of intra-provincial governance goals is potentially applicable to the field of provincial policing.

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[78] Put simply, the difference is between destroying exclusivity rights that reside in the province facing encroachment and creating operative rights (or permissions) for the world within the enacting province.
[79] The fact that seven provinces contract with the federal government to provide policing services also supports this contention. See paras. 29-30, above.

[43] As noted above, under the positive corollary of the territoriality principle, the provinces are free to define the circumstances in which assistance will be given and the procedures that must be followed. It is clear, then, that a host of questions would pertain to provincial (mutual) policing assistance agreements, including: If a province legislates to permit extra-provincial police officers to operate within the enacting body's territorial limits, what permissible circumstances and procedures would attach? Would provincial police officers operating across provincial borders retain their home status as police officers or would they become *de jure* provincial police officers in the province of intrusion for the purposes of executing police duties originating from home jurisdiction? In the case of complaints against the conduct of police officers acting extra-jurisdictionally, in which province would the complaints procedure reside: host or home jurisdiction? The aim, here, is not to adduce an exhaustive list of questions and issues that would attach to every permutation of provincial mutual policing agreements that could arise, but to elucidate the potential for such agreements as derived from the analysis in *Global Securities* and the positive corollary of the territoriality principle.[80]

[80] It is important to note that there may be authority for the view that there is a constitutional obligation on the provinces arising from the "full faith and credit" principle to offer mutual assistance to each other. The leading decision on this point is *Hunt*, in which a unanimous Supreme Court of Canada directed "courts in each province to give "full faith and credit" to the judgments of the courts of sister provinces" (*supra* note 74 at 41 citing *Morguard Investments Ltd*. v. *De Savoye* (1990), 76 D.L.R. (4th) 256 at 272 (S.C.C.)) [hereinafter *Morguard*]. Nothing in the *Hunt* ruling, however, reiterating the full faith and credit principle, suggests that the concept of full faith and credit should be limited to judgments from superior courts. Indeed, the Court expressly transforms this derivative of the comity principle in the context of Canadian judgments into a broadly justiciable constitutional principle. The principle, according to the Court, can be used both to modify the common-law and legislation (*Hunt*, *ibid*. at 40-41). La Forest J., writing for the Court, noted that while the traditional approach to the division of provincial powers required a statute to conform to the words "in the Province", "a requirement that involves a balancing under the "pith and substance" approach to determine if it exceeds provincial jurisdiction to enact legislation with extra-provincial effect", a situation of total autonomy would "fly in the face of the obvious intention of the Constitution to create a single country" (*ibid*. at 39 citing *Morguard*, *ibid*. at 271). His Lordship further stated: "[this intention] presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction" (*ibid*.). In addressing the extent to which a province may give extraterritorial effect to legislation, La Forest J. expressly recognized provincial competence to legislate in terms of a "full faith and credit" approach: "I see no reason why the provinces should not be able to legislate in the area" (*Hunt*, *ibid*. at 42). Admittedly, it is not clear from the *Hunt* decision whether provinces would be obligated to recognize the authority of extra-provincial police (but the court does refer to the "full faith and credit" principle as a constitutional imperative: *ibid*. at 40). But it does appear clear, nonetheless, that the provinces can legislate in the form of mutual policing assistance programs under the rubric of "full faith and credit", indeed, in terms of the basic goals of national "stability and unity" reiterated by the Court in *Hunt*.

(D) FEDERAL LEGISLATIVE COMPETENCE

[44] The object of this part is to determine whether the federal Parliament has the power to legislate for the extra-jurisdictional "peace officer" authority of provincial police officers. The meaning of "extra-jurisdictional" here includes both extra-provincial provincial policing and extra-jurisdictional provincial policing intra-provincially. Put simply, the focus is on *all* extra-jurisdictional "peace officer" policing by provincially-appointed police. Again, the fact that the provinces can "appoint, control and discipline provincial and municipal police officers"[81] supports the view that provincial Legislatures enjoy the authority to impose or remove territorial restrictions upon provincially-appointed police within the province.

[45] In accordance with the analytical form adopted in division of powers jurisprudence in relation to the field of criminal justice, the following examination of this issue first looks to the two domains of legislative authority under section 91(27), namely, criminal "law" and "procedure", then to the federal residual authority (p.o.g.g.).The first part illustrates that legislation purporting to grant extra-jurisdictional "peace officer" authority to provincially-appointed police officers would not satisfy judicial criteria to be deemed "criminal law". The second part illustrates that such legislation is "in pith and substance" investigatory, not a mode of proceeding. Moreover, it demonstrates that such federal legislation would drain the vitality of the plenary grant of power under section 92(14) of the 1867 Act, as proscribed by the courts. Given these features, it is found that such legislation would not likely be characterized by the courts as falling within the ambit of "criminal procedure". But, of greater importance to the issue presented here, this part also finds that the above *ultra vires* conclusions are rendered academic since such federal legislation could never take effect. This is because the extension of peace officer authority first requires the extension of provincial police officer status under provincial policing legislation. The third part concludes by showing that while the traditional branches of the p.o.g.g. power do not grant validity to such legislation, case authority and commentary suggest that a fourth, as yet not fully articulated by the courts, branch of the p.o.g.g. power might provide authority to the federal Parliament to legislate, in part, for this purpose.

[81] *O'Hara*, *supra* note 32 at 598.

(i) Criminal Law

[46] Under section 91(27) of the *Constitution Act, 1867*, the criminal law is the exclusive responsibility of the federal Parliament. While this power has been subject to dramatic variations in judicial interpretation over the years, in recent decades it has been recognized as conferring a very broad ambit of legislative authority on the federal Parliament.[82] Indeed, the courts in the criminal law field have not indicated the same kinds of concerns about the importance of limiting the intrusion of federal authority into areas of exclusive provincial competence as evidenced in the jurisprudence dealing with the other enumerated heads of authority under section 91. This sweeping character of the criminal law power is exemplified in *RJR-MacDonald Inc*. v. *Canada (A.G.)* (1995),[83] in which the issue was the constitutional validity of federal legislation that prohibited the advertising, promotion and sale of tobacco products unless the package included federally prescribed health warnings. The prohibitions in the enactment, interestingly, did not proscribe the distribution, sale or use of tobacco products, were not restricted to transactions that crossed provincial borders, and were applicable to all promotional dealings in tobacco products. This case illustrates that the criminal law power "has been treated by the courts as a plenary grant of authority, supporting federal regulation of matters that might otherwise fall within provincial authority as an aspect of property and civil rights in the province".[84]

[47] A federal law purporting to grant extra-jurisdictional authority to provincial police officers would not, however, satisfy the criteria for characterization as "criminal law" enunciated in case law. Although the courts have read section 91(27) as assigning to the federal Parliament exclusive jurisdiction over criminal law "in the widest sense of the term", three features of the impugned law must be present to "at least [give] a *prima facie* indication that the Act is criminal law". The three indicia of criminal legislation include: (i) a prohibition must attach to a particular activity; (ii) a penalty for breach must attach to the prohibition; and, (iii) the law must be enacted for a "criminal purpose". While the first

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[82] See *e.g*. *Reference re Firearms Act (Can.)* [2000] 1 S.C.R. 783; *R.* v. *Hydro-Quebec* [1997] 3 S.C.R. 213 at 233; *RJR-MacDonald*, *infra* note 83; *Wetmore*; *Scheider* v. *The Queen* [1982] 2 S.C.R. 112; *Boggs* v. *The Queen* [1981] 1 S.C.R. 49; *Labatt Breweries* v. *A.G. Can.* [1980] 2 S.C.R. 914; *Morgentaler* v. *The Queen* [1976] 1 S.C.R. 616; *Can. Federation of Agriculture* v. *A.G. Que.* [1951] A.C. 179 (P.C.) [*Margarine Reference*]; *Proprietary Articles Trade Assn*. v. *A.G. Can.* [1931] A.C. 310 (P.C.).

[83] [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

two of these necessary criminal law features are self-explanatory, the third requires further explication. The Supreme Court of Canada in recent years has formulated the "criminal purpose" in terms that ask "whether the prohibition with legal consequences is directed at an 'evil' or injurious effect upon the public".[85] In other words, any federal enactment that attaches a penalty to a prohibition will be valid as criminal law so long as it is directed at an "identifiable matter of legitimate public concern".[86] It is evident, then, that a federal law purporting to grant extra-jurisdictional authority to provincial police would not satisfy at least two out of the three criteria necessary to be characterized as criminal law and, therefore, such legislation would not be deemed to fall within the legislative competence of the federal Parliament under this rubric.

(ii) Criminal Procedure

[48] Section 91(27) expressly provides that the federal Parliament's exclusive authority over criminal law includes the procedure in criminal matters. In fact, the *Criminal Code* provides rules, *inter alia*, for the prosecution of criminal offences. The task here is to determine whether hypothetical federal legislation granting extra-jurisdictional authority to provincial police officers would be found by the courts as falling within the ambit of "criminal procedure". The difficulty is that, unlike the concise test articulated for determining whether an impugned enactment constitutes "criminal law", there exists no precise definition in Canadian case law specifying whether a law concerns "criminal procedure". The nebulous character of "criminal procedure" was aptly described by Dickson J. in *Di Iorio* v. *Warden, Jail of Montreal and Brunet* (1978):

> "The phrase "criminal procedure" does not lend itself to precise definition. In one sense, it is concerned with proceedings in the criminal Courts and such matters as conduct within the courtroom, the competency of witnesses, oaths and affirmations, and the presentation of evidence. Some cases have defined procedure even more narrowly in finding that it embraces the three technical terms – pleading, evidence and practice. In a broad sense, it encompasses such things as the rules by which, according to

[84] Monahan, *supra* note 29 at 290.
[85] *RJR-MacDonald*, *supra* note 83 at 364.
[86] Monahan, *supra* note 29 at 291.

> the Criminal Code, police powers are exercised, the right to counsel, search warrants, interim release, procuring attendance of witnesses". [87]

[49] The courts in Canada have, however, circumscribed the definitional ambit of "criminal procedure" not by precise definition, but by complementary analysis. The courts have delimited the content of this federal legislative domain by recognizing that the amplitude of the "criminal procedure" definition specifically, and the federal criminal law power more generally, is of necessity circumscribed by the exclusive authority conferred upon provincial Legislatures by section 92(14) of the 1867 Act. In recognizing the role of section 92(14) in limiting the scope of "criminal procedure" Dickson J., again in *Di Iorio*, stated:

> "Although I would reject the view which would outline procedure to that which takes place within the courtroom on prosecution, I am equally of the opinion that "criminal procedure" is not co-extensive with "criminal justice" or that the phrase "criminal procedure" as used in the [*Constitution Act, 1867*], can drain from the words "administration of justice" in s. 92(14) that which gives those words much of their substance – the element of "criminal justice"". [88]

In short, the meaning of "criminal procedure" cannot be equated with "criminal justice" nor defined in such a way as "to drain of vitality the plenary power of section 92(14)". [89] One sees, then, that the meaning of "criminal procedure" is a product of a delicate judicial division of power between sections 91(27) and 92(14) in the field of criminal justice. Indeed, it is clear that the content ascribed to "criminal procedure" is directly related in a mutually exclusive fashion to the content ascribed to "administration of justice in the province". To determine, then, whether federal legislation granting extra-jurisdictional "peace officer" authority to provincially appointed police officers falls within the ambit of "criminal procedure", one must look first to the scope of section 92(14).

[50] In the context of criminal law enforcement, the power of the provinces to initiate and conduct criminal investigations with provincially appointed police officers has been

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[87] *Supra* note 33 at 531.
[88] *Ibid.*
[89] *Hauser*, *supra* note 41 at 515.

found by the courts to be a central aspect of the administration of justice in the province.[90] In fact, it has been conclusively determined that the provinces have the power to decide whether and when to employ their provincial police in the enforcement of the criminal law in the province.[91] This jurisdiction is given exclusively to the provinces under section 92(14). The power, then, to initiate and conduct criminal investigations by provincial police within a particular province is a "free standing" and "independent source" of provincial power, which would be shorn of meaning if criminal investigations by provincially-appointed police officer were subsumed under "criminal procedure".[92] In other words, to say that "criminal procedure" encompasses the investigation of criminal offences by provincial police "would leave virtually nothing in the provincial authority to administer criminal justice".[93]

[51] It is evident, then, that if the provinces enjoy the exclusive authority to decide whether and when to employ their provincial police, the federal criminal law power in terms of criminal law policing is circumscribed generally as follows:

> "Criminal law is concerned with the statement of the legal principles which constitute the substance of the law. The criminal law gives or defines rights and obligations. Criminal procedure on the other hand, in its broadest sense, comprehends the *mode of proceeding* by which those rights and obligations are enforced".[94]

The meaning of "mode of proceeding" is, of course, itself circumscribed by the exclusive authority by the provinces to employ their respective police agencies in the initiation and conduct of criminal investigations. It includes, therefore, many aspects of criminal law enforcement, such as warrants, evidence, right to counsel, arrest, interim release – that is, the manner in which police powers are exercised – and not whether and when to conduct criminal investigations.

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[90] This is not to say, of course, that the federal Parliament cannot legislate to create a national police force to enforce the criminal law throughout the country pursuant to section 91(27). See discussion in the section "The Field of Criminal Justice: Concurrent Law Enforcement" at para. 24, above.
[91] *O'Hara*, *supra* note 32 at 598: "appoint, control and discipline provincial and municipal police officers".
[92] *Di Iorio*, *supra* note 33 at 531.
[93] *Wetmore*, *supra* note 32 at 593 (*per* Dickson J. dissenting, but not on this point).
[94] *Hauser*, *supra* note 41 at 515 [emphasis added].

[52] On the basis of the above reasoning, it is unlikely that the courts in Canada would locate a federal law purporting to grant extra-jurisdictional authority to provincially-appointed police officers within the ambit of "criminal procedure". Of course, this determination is contingent upon, *inter alia*, the characterization of the law, that is to say, its "pith and substance".

[53] As shown in the section on provincial legislative competence, the legal effects of such legislation would likely be dispositive of "pith and substance", notwithstanding any valid purpose that the federal government might articulate. The legal effects of federal law purporting to grant extra-jurisdictional "peace officer" authority to provincially-appointed police officers operating intra-provincially or extra-provincially would demonstrate that the enactment's "dominant or most important" characteristic is to "appoint" and "control" provincial police officers in the capacity to investigate within a given province. These legal effects would, of course, operate on two fronts. The first 'legal effects' front would demonstrate that such federal legislation grants provincial police appointed with intra-provincial limits the authority to operate in an investigative and enforcement capacity in relation to "peace officer" duties outside the jurisdiction of appointment. This effect is clearly in conflict with case authorities conclusively holding that the provinces maintain the exclusive authority to appoint and control their own provincial police officers including, as it were, placing intra-provincial territorial limits on operation.[95] Indeed, such legal effect would drain the power derived from "administration of justice"; in other words, it would render such "criminal procedure" – if such federal legislation were to be characterized this way – co-extensive with criminal justice, as case authorities proscribe.

[54] The second 'legal effects' front would illustrate that such federal legislation grants authority to provincially-appointed police officers to operate in an investigative and enforcement "peace officer" capacity outside the province of appointment. The law, by its form, would serve to virtually expunge the role of provincial borders in maintaining exclusive provincial authority as against other provinces to initiate and control criminal investigations within "each province". It would, indeed, be difficult for the federal

[95] *O'Hara*, *supra* note 32 at 598.

government to demonstrate that this would not be a "substantial" legal effect of such legislation.

[55] No doubt it is possible to contend that the second 'legal effects' front of such federal law – namely, providing extra-provincial authority to provincially appointed police - would not strip the provinces of the right to exclusively "appoint" and "control" *their* own police agencies within the province; in fact, to determine whether and when to operate *their* own policing agents in criminal law enforcement. It is, however, no argument to say that such federal legislation does not derogate from provincial authority to legislate for the administration of justice under section 92(14), merely because the provinces maintain the exclusive right to control their own police in criminal investigations, if the legal effect is a confusing array of policing figures not subject to the administrative authority and regimes of same province. Indeed, the federal Parliament could conceivably, under this kind of legislation, virtually reduce to nothing the provincial authority to administer criminal justice "in the province" by authorizing provincial police officers to act extra-jurisdictionally in the investigation and enforcement of the federal criminal law. That is to say, such legislation would create a *de facto* national (inter-provincial) police force by granting extra-jurisdictional authority to provincially-appointed police officers. If this legal effect were to be accepted as merely incidental to an otherwise valid "criminal procedure", the federal Parliament would essentially do indirectly what it is prohibited from doing directly, that is, territorially regulating and therefore appointing provincial police officers "in each province". One sees, then, that the legal effect of such legislation would be to "drain … the vitality of the plenary power" accorded to *each* province under section 92(14) to investigate and enforce the criminal law *exclusive* of other provinces.

[56] This notion of maintaining the administration of criminal justice within each province exclusive of other provinces also finds authority in de-centralized conceptions of federalism in Canadian jurisprudence.[96] The courts have repeatedly recognized that the ultimate decision as to whether or not to investigate or enforce the criminal law as against a particular individual requires a careful weighing of a multitude of local considerations,

[96] *Di Iorio, supra* note 33 at 540 (*per* Beetz J. concurring); *Wetmore, supra* note 32 at 594 (*per* Dickson J. dissenting, but not on this point).

including the seriousness of the conduct in light of community norms, the likely impact on the individual, the likely benefit to the community of doing so, and so on. A federal enactment purporting to grant extra-jurisdictional authority to provincial police officers would clearly derogate from this local dimension. For this reason as well, the courts would likely find that the legal effects of such federal legislation evince not the characteristics of "criminal procedure" but of "administration of [criminal] justice *in* the province".

[57] It is important to recognize, however, that the preceding conclusions are rendered academic. This is because federal legislation purporting to grant extra-jurisdictional peace officer authority to provincially-appointed police officers could never take effect under section 91(27) since peace officer status and authority would not be co-extensive. As noted earlier, the provinces enjoy exclusive authority over the appointment of provincial officers.[97] Indeed, to allow the federal Parliament to extend the reach of legislation into the appointment of provincial policing agents would in effect be to allow it to legislate in an area of exclusive provincial jurisdiction under section 92(14) of the *Constitution Act, 1867*.

[58] But this would essentially be the effect of federal legislation granting extra-jurisdictional peace officer authority to provincially-appointed police officers. To reiterate, provincial police officer – and therefore "peace officer" – *status* flows from exclusive legislative authority under section 92(14) to appoint police officers in the province, and the empowerment – "peace officer" *authority* – of such police officers to make arrests, searches and seizures in the enforcement of the criminal law derives from exclusive federal legislative authority under section 91(27). As stated earlier, 'status by provincial appointment precedes federal "peace officer" authority under the criminal law'. It is clear, then, that while federal legislation granting extra-jurisdictional peace officer authority may indeed empower provincial police officers, such empowerment cannot attach either extra-provincially or extra-jurisdictionally within the province in the absence of co-extensive provincial police officer status derived exclusively from provincial policing legislation.

[59] In other words, where a province legislates territorial limitations on provincial officers intra-provincially, any such officer acting extra-jurisdictionally will be empty the

[97] *O'Hara, supra* note 32 at 598.

provincially-designated police officer status to which section 2 of the *Criminal Code* attaches – that is, empowers - peace officer authority. By contrast, as noted earlier, the common law principle of territoriality and the words "in the province" prevent the provinces from legislating for extra-provincial police officer status and, as such, the attachment of federal peace officer authority also terminates at provincial borders. Put simply, if provincial police status is not co-extensive with federal peace officer authority the federal legislation cannot validly fill, as a matter of constitutional law, the void of provincial police officer status. The corollary is, of course, that where provincial police status is co-extensive with federal peace officer authority there is no need for legislation granting extra-jurisdictional peace officer authority to provincially appointed police officers.

[60] In sum, the courts would not likely find that federal legislation purporting to grant extra-jurisdictional authority to provincially-appointed police officers constitutes "criminal procedure" on two grounds. First, a federal law granting extra-jurisdictional criminal investigatory and enforcement powers to provincial police officers is not *ejusdem generis* with extant *modes of proceeding* by which the rights and obligations delineated by the criminal law are enforced. It would be difficult to contend, indeed, that a law permitting extra-provincial police authority is of the same family of procedures as evidence, warrants, bail hearings, procuring attendance of witnesses, and so on. Each of these "modes of proceeding" does not encroach upon exclusive provincial authority to investigate and enforce the criminal law as against other provinces. Second, federal legislation granting extra-jurisdictional police authority in the investigation of criminal offences would be a derogation on the plenary power that attaches to each province under section 92(14) to administer the criminal law exclusive of extra-provincial intrusion, and therefore would not be sensitive to local needs. For this reason, deeming such federal legislation as "criminal procedure" would be to render "criminal procedure" co-extensive with "criminal justice". But conclusions reached here pertaining to whether such federal law would constitute "criminal procedure" are nonetheless rendered academic because such legislation could never take effect under section 91(27). This is because the status of provincial police officers to which peace officer authority attaches is determined exclusively by provincial policing legislation, including the attendant territorial limitations that a province may

impose. Put simply, federal legislative attempts to empower provincial police officers to act as peace officers extra-jurisdictionally would not be valid because such officers cannot act extra-jurisdictionally in the absence of concomitant provincially appointed police officer status to which federal authority can attach. More importantly, to permit the federal Parliament to appoint provincial police officers to operate extra-jurisdictionally would be to allow it to do indirectly what it cannot do directly, that is, legislate in an area of exclusive provincial jurisdiction under section 92(14) of the 1867 Act. It is evident, then, that the federal Parliament cannot legislate in relation to the extra-jurisdictional authority of provincial police officers under the enumerated heads of authority under sections 91 and 92. Our analysis therefore now turns to the federal residual "p.o.g.g." authority.

[61] But before proceeding to determine whether the federal Parliament possesses legislative competence under the p.o.g.g. power to legislate for the extra-provincial peace officer authority of provincially appointed police, it is important to consider some existing provisions of the *Criminal Code* which might be thought, at first glance, to confer such authority. Section 487.03 and subsections 487(2) and (4) (relating to issuance and execution of search warrants), for instance, provide for extra-jurisdictional extensions in respect of such warrants. Before such warrants may be executed in another jurisdiction, however, an endorsement must first be obtained ("backing") from a justice of the host jurisdiction. These provisions thus do not provide support for the view that the federal Parliament can legislate more broadly for the extra-jurisdictional authority of warrants. They do not permit the exercise of extra-jurisdictional warrants *per se*, since intrusion on the exclusive provincial authority of the host jurisdiction to administer criminal justice as against other provinces requires authorization by a justice of the host jurisdiction.

[62] Section 514 of the *Criminal Code* deals with the execution of arrest warrants, and provides that:

> "514.(1) A warrant in accordance with this Part may be executed by arresting the accused
> (a) wherever he is found within the territorial jurisdiction of the justice, judge or court by whom or by which the warrant was issued; or
> (b) *wherever he is found in Canada, in the case of fresh pursuit.*

> (2) A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer." [emphasis added]

It will be evident that in the case of fresh pursuit, *but not otherwise*, subsection 514(2) recognizes an authority for any of peace officer to whom the warrant was originally directed to execute it extra-jurisdictionally. From our earlier discussion, it can be seen that this provision merely codifies an existing common law exception to the principle of jurisdictional territoriality, which has been recognized by the courts. It cannot, therefore be seen as indicative of a federal competence to legislate extra-jurisdictional authority of peace officers more generally. Where the situation is not one of fresh pursuit, section 528 of the *Criminal Code* provides for an endorsement procedure similar to that in section 487, just discussed, to allow for extra-jurisdictional execution of the warrant by peace officers "to whom it was originally directed". For the same reasons just canvassed in relation to section 487, this cannot be regarded as indicative of a federal competence to legislate any general extra-jurisdictional authority for police officers, absent an endorsement procedure in the province intruded upon[98].

[63] Section 476 of the *Criminal Code* provides that "where an offence is committed on the boundary of two or more territorial jurisdictions within five hundred metres of any such boundary or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any other territorial divisions". This provision also offers no support for the view that the federal Parliament has already legislated for extra-jurisdictional authority of provincially appointed police officers. In *R.* v. *Schroeder* (1989),[99] the court held that this provision must not be read as feeding the authority of a police officer extra-jurisdictionally. Rather, it merely deems the offence to have been committed in either jurisdiction. The court did not accept the view that Parliament intended to address the issue of police authority when enacting this special jurisdiction provision, and given the absence of "pursuit", the constable was deemed to possess no authority as a police officer to exercise a breathalyzer demand.

[98] Note that while sections 703 and 705 of the *Criminal Code* provide for warrants which "may be executed anywhere in Canada", unlike those provisions just discussed, neither provision purports to confer any extra-jurisdictional authority on police officers.

(iii) The p.o.g.g. power

[64] The p.o.g.g. power comes into play in relation to matters that clearly must fall outside the classes of subjects enumerated in section 92 of the *Constitution Act, 1867* and yet cannot be characterized as falling within any of the heads of authority listed in section 91. Since the distribution of legislative powers between the federal Parliament and the provinces is exhaustive, matters that do not fall within any of the listed heads of authority must, by definition, reside within the opening words of section 91.

[65] The issue of whether legislation granting provincially-appointed police officers extra-jurisdictional "peace officer" authority would be a valid exercise of federal or provincial power is considered above in relation to the relevant heads of authority listed under section 92 and 91, namely, sections 91(27) and 92(14). We have sought to explain why the federal Parliament could not legislate for any extra-jurisdictional authority of provincially appointed police officers under paragraph 91(27), and why provincial Legislatures could not legislate for extra-provincial authority of police officers appointed within their own province under paragraph 92(14). The focus here, then, is on whether the federal residual authority – the p.o.g.g. power –provides authority to the federal Parliament to legislate for the extra-jurisdictional peace officer authority of provincial police. It will be clear from the analysis below, however, that the matter of extra-provincial authority of provincial police does not satisfy the criteria of any of the three traditional branches of the p.o.g.g. power, namely: "emergency", "gap", or "national concern".

[66] For the emergency branch to be triggered, a matter to which legislation pertains must be characterized as a "national emergency" and such legislation must be temporary in nature. While the jurisprudence on point indicates a deferential attitude on behalf of the courts in assessing whether a national emergency exists, it is reasonable to assume that legislation such as the *Emergencies Act*[100] would likely guide the determination. In any

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[99] *Supra* note 69.

[100] R.S.C. 1985 (4th Supp.), c. 22. Section 3 of the *Emergencies Act* defines a "national emergency" as an urgent and critical situation of a temporary nature that

> (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

event, it is clear that federal legislation purporting to grant general extra-jurisdictional authority to provincial police officers could not be regarded as responding to an issue at the scale of a national emergency, nor would it likely be intended to be temporary in effect.

[67] The criterion of the "gap" branch would also not be satisfied. It is clear that federal legislation purporting to grant extra-jurisdictional peace officer authority to provincially appointed police would not fill lacunae in the scheme of the distribution of powers. The existence of police forces at both the national and provincial levels conclusively demonstrates the absence of any gap in the division of powers.[101]

[68] It is also evident that the national concern branch of p.o.g.g. is not applicable to the matter to which such hypothetical legislation would pertain: extra-jurisdictional "peace officer" policing by provincially appointed police. This matter does not possess the distinctiveness, and indivisibility typically found in the cases to satisfy this branch,[102] for example: nuclear energy, marine pollution, radio, aeronautics, and the national capital region. What is required here is that the federal legislation be aimed at a matter that has defined boundaries so that recognizing this matter as being subject to p.o.g.g. will not unduly interfere with or negate existing provincial regulatory powers. A grant of such general extra-jurisdictional authority for provincial police would be broad and all-encompassing and therefore would not likely satisfy the test for a single, distinct, and indivisible matter under this branch[103].

[69] It is not surprising that the matter of extra-jurisdictional authority of provincially-appointed police officers would not fall within any of the three traditional branches of

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(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada..

[101] Compare *e.g. Citizen's Insurance Co.* v. *Parsons* (1881).7 App. Cas. 96 (P.C.), in which it was observed that the enumerated heads of provincial power provided for the incorporation of companies with provincial objects but there was no equivalent enumerated federal power of incorporation.

[102] See *e.g. R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 [hereinafter *Crown Zellerbach*]; *Ontario Hydro* v. *Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *Reference Re Offshore Mineral Rights (British Columbia)*, [1967] S.C.R. 792.

[103] It is also important to recognize that unlike the jurisdiction based on enumerated section 91 powers, which may be concurrent with provincial jurisdiction, the power conferred by the national concern branch of p.o.g.g. is exclusive and includes intra-provincial aspects (*Crown Zellerbach*, *supra* note 102 at 432-33). Also, unlike the emergency branch, the effect of national concern is a permanent relocation of jurisdiction

p.o.g.g., despite the doctrine of exhaustiveness. The doctrine of exhaustiveness, which the distribution of power under sections 91 and 92 exemplifies, asserts that every conceivable law is competent to one level of government or another. The doctrine does not *necessarily* hold, though, that where issues or aspects derivative of matters already situate under one head of authority are sought to be legislated for by the other level of authority that such derivative matters *must* fall within either head of authority. The doctrine of exhaustiveness, as it would apply to extra-provincial policing, would simply ask whether the federal Parliament or provincial Legislatures can legislate with respect to the matter by reference first to the enumerated heads of authority, and then to the p.o.g.g. power if necessary. It would not ask then, it seems, whether the federal Parliament can legislate for the national deficiencies of exclusive provincial matters. Indeed, it may be that the federal Parliament has no authority to legislate with respect to extra-jurisdictional policing by provincially appointed police. The fact that federal peace officer authority does not attach to provincially appointed police officers in the absence of provincial legislation granting police officer status seems to support the view that the doctrine of exhaustiveness is inapplicable to this issue. It appears from the analysis above, indeed, that the federal Parliament cannot legislate for extra-provincial or intra-provincial extra-jurisdictional authority of provincially appointed police officers, and that provincial Legislatures cannot legislate for extra-provincial authority of police officers appointed within their own province.

[70] There is authority for the view, however, that the federal Parliament can legislate with respect to provincial objects that have significant effects extending beyond a single province. The leading authority suggesting this position is *Hunt* v. *T&L plc* (1993),[104] in which the issue involved the constitutional validity of a provincial statute prohibiting the removal from the province of documents pursuant to a judicial order from outside the province. La Forest J., writing for a unanimous Supreme Court of Canada, reconsidered the division of powers between the provinces, not as strictly adhering to the phrase "in each province" as found in section 92, but in terms of the "integrating character of constitutional

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over a matter. Existing provincial rules would be rendered invalid, not merely inoperative (as by paramountcy).

[104] *Supra* note 74.

arrangements".[105] His Lordship essentially reiterated that the traditional approach to treating the provinces as sovereign states "flies in the face of the obvious intention of the Constitution to create a single country".[106] The court concluded that this "integrating character" of our "constitutional arrangements" calls for the courts "in each province to give "full faith and credit" to the judgments of the courts of sister provinces".[107] La Forest J. clearly stated, however, that this constitutional imperative of "integrating arrangements" extends beyond the narrow issue of recognition by the courts of extra-provincial judgments. His Lordship signaled that this "integrating" feature is a "constitutional imperative" that is applicable to both provincial Legislatures and the federal Parliament.[108] In short, the Court found that the imperatives of the Canadian union confer authority on the federal Parliament and the provinces to enact laws for the purpose of maintaining and protecting the union.[109]

[71] This view that both the provinces and the federal Parliament can legislate is, of course, a departure from the national concern branch of p.o.g.g., which requires that if a matter falls within that branch, the provinces cannot legislate so as to affect vital aspects of such matters. The reasoning in *Hunt* suggests, then, an independent source of federal authority under p.o.g.g. This fourth branch, as it were, would permit the federal Parliament to legislate in relation to matters that are of inter-provincial concern, impact or significance. Under this branch, the federal Parliament may direct legislation "at persons, transactions, or activities within particular provinces, as long as it does so in order to remedy or deal with the inter-provincial impacts or effects of such matters".[110] More importantly, "this fourth branch does not negate or prevent" provincial Legislatures from enacting "laws on the same subject, provided that such provincial laws are aimed at a provincial aspect of the matter in question".[111]

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[105] *Ibid*. at 37 and 41 (citing from His Lordship's judgment for the Court in *Morguard*, *supra* note 80 at 272).
[106] *Hunt*, *ibid*. at 39 citing *Morguard*, *ibid*. at 271.
[107] *Hunt*, *ibid*. at 41 citing *Morguard*, *ibid*. at 272.
[108] *Hunt*, *ibid*. at 40-43.
[109] *Ibid*. at 38-42. See Monahan, *supra* note 29 at 242-246.
[110] Monahan, *ibid*. at 246. Professor Monahan refers to this fourth branch of p.o.g.g. as the branch dealing with "matters of interprovincial concern or significance" (*Ibid*. at 242).
[111] *Ibid*. at 246.

[72] On the basis of *Hunt*, then, it appears that both the federal Parliament and the provinces may be able to legislate in relation to the extra-jurisdictional authority of provincially appointed police as a means to deal with inter-provincial impacts or needs of criminal law enforcement. However, the implications of this case for the issue addressed here are unclear. Does *Hunt* stand for the rule that the federal Parliament can, in circumstances not yet clearly defined by the courts, provide for the extra-jurisdictional authority of provincially-appointed police for the purposes of protecting and maintaining the union even where provincial status is not co-extensive with federal authority? If not, we are in no better position than that stated earlier, which is that neither the federal Parliament nor provincial Legislatures can legislate for extra-provincial authority of provincially appointed police officers, and nor can the federal Parliament legislate for intra-provincial extra-jurisdictional authority of provincially appointed police officers.

IV. SOME FOREIGN PERSPECTIVES ON EXTRA-JURISDICTIONAL POLICE AUTHORITY

[73] In this part we describe briefly how some foreign jurisdictions respond to the issue of extra-jurisdictional policing in terms of legal rules and interpretations espoused. In the time, and with the resources, available to us we were able to obtain limited information about these matters, and it became clear that, as in Canada, there is very little by way of literature on the subject in other jurisdictions. The first part examines the most pertinent provisions of the European Schengen Convention granting inter-jurisdictional policing authority. The second part examines the inter-jurisdictional policing role of the National Crime Authority in Australia. The third part concludes with a discussion of judicial interpretations in the United States of America pertaining to the conditions necessary to exercise extra-jurisdictional police authority.

(a) Europe: The Schengen Convention

[74] The Schengen Convention is a declaration of cooperation under which several European nations, including France, Germany and the Benelux countries, have agreed to the abolition of checks at their common borders to encourage the free movement of persons. One of the consequences of abolishing border checks has been the need for

intensified cooperation between policing and legal authorities[112]. While the convention contains more than fifty articles relevant to this model of cooperation, the focus here will be on three articles relevant to the issue of extra-jurisdictional policing authority: mutual assistance, cross-border operations, and the authority to engage in hot pursuit.

[75] The most significant article in this group in terms of inter-jurisdictional police authority pertains to police cooperation. Paragraph 1 of Article 39 provides that the contracting parties to the agreement undertake that their police agencies "shall … assist each other for the purposes of preventing and detecting criminal offences". In short, police authorities governed by this agreement must provide assistance upon request. The term "assist" is not defined and therefore a broad obligation upon each contracting party to the convention would seem to attach. This plenary obligation is, however, subject to dual restrictions. The first limit on the general obligation to "assist" is the requirement that police officers act "in compliance with national legislation and within limits of their responsibilities". The provision evinces, in other words, that the Convention does not provide policing authority greater then that found under the national law where police operations requiring assistance are located. The second limit to the general obligation of assistance is the right to reject a request involving "the application of coercive measures".

[76] Article 40 is also of interest with respect to extra-jurisdictional policing authority as it distinguishes the power to observe from the power to enforce. This section permits the cross border observation of persons "presumed to have taken part in a criminal offence to which extradition may apply", although prior permission from the host country must be obtained. No permission is required, though, in circumstances of exigency. In any event, the policing authorities in whose territory the observation of subjects by extra-jurisdictional officers occurs must be notified immediately. This provision also provides that extra-jurisdictional police officers are permitted to observe a subject but do not obtain the authority under the Convention to arrest or to employ "coercive measures".

[112] The following discussion is drawn from A.H.J. Swart, "Police and Security in the Schengen Agreement and Schengen Convention" in H. Meijers et al. (eds.) *Schengen: Internalisation of Central Chapters of the Law of Aliens, refugees, privacy, security and the police* (Utrecht: Kluwer Law and Taxation Publishers, 1991); C. Joubert & H. Bevers, *Schengen Investigated* (London: Kluwer Law, 1996).

[77] The authority to pursue a suspect inter-jurisdictionally – the right of "hot pursuit" – is covered in Articles 41 to 43 of the Convention. This inter-jurisdictional power applies to persons observed committing or participating in an offence, or those persons escaping detention. The pursuing police officers are required to contact the authorities of the jurisdiction facing extra-jurisdictional intrusion by pursuit as soon as possible. This clause is, of course, identical to that set out in *Roberge*, *supra*. The only difference between the common-law rule in Canada and this provision is a restriction on the kinds of offences that are acceptable to justify "hot pursuit". The Convention permits each party to declare for which offences "hot pursuit" may be made in the corresponding state.

(b) Australia: National Crime Authority[113]

[78] In response to community and political concern about the prevalence of organized crime, Australian governments – Commonwealth (federal) and State – began to consider the need for a new law enforcement agency at the national level, equipped with coercive powers to effectively respond to inter-jurisdictional crime. The difficulty with addressing rising inter-jurisdictional crime arose, in part, from the jurisdictional difficulties faced by State police services investigating criminal activity going beyond State boundaries. A corresponding jurisdictional problem attached to the Commonwealth government as well: federal policing legislation could give jurisdiction to investigate only those areas within a head of power given to the Commonwealth Parliament under the Australian constitution. Indeed, the jurisdictional problems faced by the different levels of legislative authority in Australia are not unlike those experienced in Canada under the division of powers.

[79] The answer to the problem by the Australian federal government was the establishment of an organization comprised of expertise and special powers from all jurisdictional levels that would more effectively investigate increasingly sophisticated

[113] The following discussion is drawn partly from information supplied by e-mail communication: S. McBurney and N. Hadgkiss, including "Memorandum of Understanding for Assistance in Neighbouring States/Territories in Australia, 1999", information pertaining to the secondment of police officers to other police agencies in Australia, and a review of legislative support at each level of government for police operations beyond the territorial limits of a State or Territory. The remainder is informed by online: Parliamentary Joint Committee on the National Crime Authority <http://aph.gov.au/senate/committee/

criminal activity. The National Crime Authority (NCA) came into effect pursuant to the *National Crime Authority Act* (1984) and was subsequently underpinned by complementary legislation in each State and Territory. This legislation enabled the NCA to investigate relevant offences (as defined in the NCA Act) against Commonwealth, State and Territory legislation. In this way, it became a truly national crime-fighting agency.

[80] In addition to its own general powers of investigation under the NCA Act, the NCA also has access to State and Territory police powers by virtue of its capacity to employ seconded police officers. The NCA also has "general" and "specific" functions. Its general functions are intelligence gathering and analysis, investigation and the establishment and coordination of multi-jurisdictional task forces. Its "specific" functions, by contrast, are essentially investigative, but with attendant coercive powers to require persons to attend private hearings, to compel the production of documents and to compel persons to answer questions at hearings. In this respect, the NCA possesses the character of a Royal Commission; however, while the NCA has access to normal police powers of investigation, it can only use its coercive powers to investigate matters that have been referred to it from the Inter-Governmental Committee (IGC). The role of the IGC is viewed as preserving the national status of the NCA by maintaining the equal representation of State and Territorial interests with those of the Commonwealth government. It is important to recognize, though, that the NCA is an independent statutory authority with national functions. It serves the national interest by encompassing the interests of both the Commonwealth and State levels in the form of coordinated policing task forces. It is not a police force *per se*.

(c) United States of America[114]

[81] The general rule of police jurisdiction in the United States of America (U.S.) is the same as in Canada: the jurisdiction of a police officer "does not extend beyond the

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nca_ctte (date accessed: 4 June 2001); online: *Third Evaluation of the National Crime Authority,* 1998 <http://aph.gov.au/senate/committee/nca_ctte/3rd_eval (date accessed: 4 June 2001); G. Crooke, *The Future Direction of the National Crime Authority*, online: http://afp.gov.au/services/cst/nca/direction.htm.

[114] The following discussion is informed by H. R. Rappaport, "Law Enforcement: The Authority of Police as Private Citizens to Effectuate an Arrest of a Suspect Without a Warrant Outside of a Jurisdiction During an Undercover Operation" (1990) 26 Criminal Law Bulletin 262.

territorial limits of his or her municipality or jurisdiction"[115]. The courts in the U.S. have, however, devised an exception to this rule in the context of extra-jurisdictional policing by police officers acting as private citizens to effect arrests. The reasoning of the courts is as follows: a police officer outside of jurisdiction does not lose his or her identity as a private citizen and, as such, bears all the capabilities of a private citizen. It follows, then, that if the arrest by a private citizen is lawful in the circumstances, then an arrest by a police officer outside of his or her jurisdiction is also lawful. The courts in the U.S. have, indeed, been reluctant to hold that a police officer's lack of status in a given jurisdiction invalidates an accused's arrest if that arrest could have been exercised as a private citizen.

[82] The courts in the U.S. have recognized an exception to this rule: police acting outside jurisdiction but not in pursuit "may not utilize the power of their office to gather evidence or ferret out criminal activity"[116]. In other words, a police officer operating extra-jurisdictionally cannot hold him- or herself out as a police officer in order to observe unlawful activity. In sum, a police officer operating out-of-state may act undercover as a private citizen to observe criminal activity and effectuate arrest, but must not use the authority of the office for criminal investigative purposes outside the jurisdiction of appointment; that is to say, a police officer acting outside jurisdiction must not openly assert his or her official position in order to observe unlawful activity or to seize evidence.

[83] It is also interesting to note briefly that police officers who transport fugitives back to the original jurisdiction of arrest pursuant to an interstate compact maintain status wherever they are in the U.S. with such prisoners. In short, police officer status attaches to the fugitive, rather than to a territorial jurisdiction, for the duration of transport.[117]

V. CONCLUSION

[84] The principal aim of this paper has been to discuss what options may be available for the creation of legislation conferring extra-jurisdictional "peace officer" authority on provincially-appointed police officers. In considering this question, we particularly kept in

[115] *Ibid*. at 262.
[116] *Ibid*. at 265 citing *State* v. *Crum*, 323 So. 2d. 673 (Fla. App. 1975).
[117] E-mail communication: K. Rossmo, 14 June 2001.

mind the recommendation made to the Criminal Law Section of the Uniform Law Conference that section 25 of the *Criminal Code* should be amended to achieve this objective.

[85] We should emphasize at the outset of our conclusions that we have not attempted to make any assessment of the practical need for legislation to address extra-jurisdictional authority of police officers, or whether the current practices (described briefly in paragraphs 6-13, above) may be adequate to meet any needs for such extra-jurisdictional authority. Rather, our analysis has focused on the possible options for such legislation, should it be thought to be necessary. On the issue of whether such legislation may be necessary, we confine ourselves to the suggestion that, given the potential implications of such authority, both for the liberty of citizens and for effective accountability for the actions of police[118], such legislation should only be contemplated if it can be shown to be truly necessary to support effective policing and law enforcement.

[86] We have noted that the common law does provide some legal support for extra-jurisdictional authority of police officers in limited circumstances originating within the jurisdiction of appointment ("pursuit" and an investigation in progress). It is evident, however, that these limited common law exceptions do not adequately provide for all the circumstances in which extra-jurisdictional authority may be of assistance and value to the work of the police. For somewhat similar reasons, and also because they give rise to such unresolved issues of accountability and liability, we have concluded that temporary special constable appointments, as currently provided, do not offer a very satisfactory approach to the needs of the police for extra-jurisdictional authority. Consequently, legislative options are considered.

[87] Our legal analysis in the paper has therefore focused on the distribution of legislative powers, as delineated by the *Constitution Act, 1867*. In determining whether a law purporting to grant extra-jurisdictional "peace officer" authority would fall validly within the provincial or federal spheres of legislative competence, we have adopted the practice of the courts. We looked first to the provincial head of authority with respect to the

[118] For an expression of some of the concerns to which such legislation may give rise, see Bell, *supra* note 1.

"administration of justice in the province" (s. 92(14)), then to the federal power with respect to criminal law and procedure (s. 91(27)), and finally to the "p.o.g.g." power.

[88] An examination of this matter at the provincial legislative level reveals that while the provinces possess authority to legislate for jurisdictional limits intra-provincially, they cannot legislate to grant extra-provincial authority to provincially appointed police officers. The principle of territoriality and the words "in each province" found in section 92 of the 1867 Act, impose a constitutional imperative on the provinces to legislate 'within the province'. Consequently, a provincial Legislature has no constitutional authority to operate by law provincial police officers with jurisdiction outside the province of appointment.

[89] The positive corollary of the territoriality principle and recent case authority, however, suggest that the provinces are competent to legislate in the form of mutual policing assistance with extra-provincial effects. Provided that a provincial Legislature does not attempt to legislate to grant police officers appointed within the enacting province authority to operate outside the province (negative corollary), there does not seem in principle to be a constitutional bar to provinces legislating to provide police officers from other provinces with legal status and authority within the enacting province or, more generally, to enter into broader provincial mutual policing assistance agreements.

[90] Indeed, recent case authority affirms the power of the provinces to authorize extra-provincial agreements in terms of a "dominant intra-provincial purpose". But since the provinces would likely be free to define in various ways the circumstances in which policing assistance will be given and the procedures that must be followed, no attempt is made here to elaborate the various forms that such agreements could take. However, some serious questions arise. For example, would provincial police officers operating across provincial borders retain status as police officers pursuant to legislation of the province of origin or would they become *de jure* police officers in the province of intrusion? Clearly, these kinds of secondary questions about important accountability (and liability) issues would need to be carefully addressed and agreed upon. We note however, that such matters have been the subject of agreement in existing MOU's. But to have effect in determining

the legal status and authority of police officers such agreements would require a legislated foundation.

[91] Our analysis of federal legislative competence on this matter under the enumerated list, namely section 91(27), was divided into two parts: "criminal law" and "criminal procedure". The first part illustrated that federal legislation purporting to grant extra-provincial peace officer status to provincially-appointed police officers would not satisfy the judicial criteria necessary to be deemed "criminal law". The second part demonstrated that such federal legislation would not constitute "criminal procedure" for two reasons: first, the legislation would be "in pith and substance" investigatory, not a "mode of proceeding"; and second, the legal effects of such legislation would be to drain the vitality of the plenary grant of power under section 92(14) as proscribed by the courts – in other words, the legal effect of such legislation would be to render "criminal procedure" co-extensive with "criminal justice". But these analyses under section 91(27) are rendered academic, in any event, since such legislation could never take effect. Put simply, if provincial police officer status is not co-extensive with federal peace officer authority then federal peace officer authority cannot attach. That is to say, the federal Parliament cannot legislate with the legal effect of extending provincial police officer status extra-jurisdictionally since the provinces possess exclusive authority to "appoint" and "control" provincial police officers "in each province". Indeed, to allow the federal Parliament to legislate for the extra-provincial authority of provincially appointed police officers would be to constitutionally permit indirectly what the federal government cannot do directly; that is, to appoint provincial police officers "in each province", an area of exclusive provincial jurisdiction under section 92(14) of the 1867 Act. On this view, the federal Parliament cannot legislate to grant extra-jurisdictional peace officer authority to provincially appointed police unless authority to do so can be found under the "p.o.g.g." power.

[92] But our analysis under the traditional three branches of p.o.g.g. found that such federal legislation would not likely be validated. The criteria under the "emergency", "gap" and "national concern" branches would not be satisfied. There is, however, some indication in case law and commentary that suggests that the federal Parliament could possibly legislate on this matter under a fourth branch of p.o.g.g., which has nevertheless not yet

been fully or clearly articulated by the courts. The emerging case law with respect to this possible fourth branch suggests that both the provincial Legislatures and the federal Parliament could legislate with respect to inter-provincial criminal law enforcement needs and effects including, perhaps, conferring extra-provincial peace officer authority on a provincially appointed police officer. What is not so clear is whether, under this branch, the federal Parliament could legislate to extend provincial police officer status absent provincial legislation, in order to give extra-provincial effect to "peace officer" duties of provincial police.

[93] On the basis of the above analyses, we conclude that should legislation on this matter be thought to be needed, the Uniform Law Conference should give priority consideration to the following two options for addressing the issue of extra-jurisdictional authority of provincially appointed police:

(1) Mutual Assistance Programs

> The ruling in *Global Securities*, *supra*, clearly affirms provincial legislative competence to authorize extra-provincial agreements in terms of a dominant intra-provincial purpose.[119] On this view, we recommend that the provinces enter into mutual policing assistance programs. But to avoid the potential for a wide array of provincial policing agreements with varying degrees of effectiveness and enforcement willingness, we further suggest that such policing agreements take a standard form - i.e. model legislation which all provincial Legislatures would be encouraged to enact. Provincial policing legislation could adopt, for instance, a similar format to that of provincial securities legislation, including the development and incorporation of National Policy Statements, Uniform Policy Instruments, and so forth.[120]

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[119] See also *Bonanza Creek*, *supra* note 76 and accompanying text.

[120] In the field of provincial securities regulation, National Policy Statements are joint policy initiatives established by the "Canadian Securities Administrators", which is composed of representatives from the various provincial securities commissions (or other securities administrators). Uniform Policy Statements, by contrast, are joint policy statements of securities administrators from Ontario, Manitoba, Saskatchewan, Alberta and British Columbia associated with the former Uniform Act. While a few Uniform Act Policy Statements remain in force, they have been largely supplanted by National Policy Statements. For further detail of the "sources of securities regulation", see *e.g.* M.R. Gillen, *Securities Regulation in Canada*, 2nd

(2) National Crime Authority

> It is clear that while the Australian constitution divides the criminal law power differently than in Canada, the manner by which the National Crime Authority in Australia is constituted is directly applicable here. To recall, the NCA is an organization comprised of expertise from all jurisdictional levels (State and Territory) that effectively tackles policing problems the resolution of which is hampered by jurisdictional limitations. This agency came into effect pursuant to federal legislation and was subsequently underpinned by complementary legislation in each State and Territory. In light of the ruling in *Hunt*, which holds that both the provinces and the federal Parliament can "enact legislation directed at persons, transactions, or activities within particular provinces, as long as it does so in order to remedy or deal with the inter-provincial impacts of such matters"[121], we therefore recommend in the alternative that the provinces and the federal government adopt a similar model to that found in Australia for dealing with the inter-provincial aspects and jurisdictional difficulties of (provincial) policing. An equivalent federally constituted body in Canada would also have access to provincial police powers by employing seconded provincial police officers.

[94] We conclude our Discussion Paper by referring the reader back to the quote with which we began it, and emphasizing the author of that quote's insistence that in a democratic society in which human and civil rights are respected, it is essential that the authority and jurisdiction of the police be both as clear and accountable as possible, both to citizens and to the police themselves. We believe that the two options we have suggested offer the best hope of achieving these goals in providing for extra-jurisdictional authority for provincially-appointed police in Canada.

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ed. (Scarborough: Carswell) c. 3 at 87-99; *Consolidated Ontario Securities Act, Regulations and Rules (With Policy Statements, Blanket Orders and Notices),* 29th ed., (Toronto: Carswell, 2000) at 1049-1229.

[121] Monahan, *supra* note 29 at 246.

APPENDIX

CONSTITUTIONAL ELEMENTS AND PRINCIPLES[1]

(A) EXCLUSIVE HEADS OF LEGISLATIVE AUTHORITY

[1] While Part VI of the *Constitution Act, 1867*,[2] made up of sections 91 to 95, distributes legislative authority between the Legislatures of the provinces and the federal Parliament of Canada, sections 91 and 92 are the main sources of federal and provincial power respectively.[3] Both sections assign exclusive responsibility over "matters" coming within different "classes of subjects". Section 91 of this Act enumerates thirty heads of authority that are competent solely to the federal Parliament. A corresponding list of sixteen classes of subjects falling exclusively within provincial legislative authority is located in section 92. The closing words of section 91 evidence the relationship between the two sections:

> "any Matter coming within any of the classes of subjects enumerated in this Section shall not be deemed to come within the class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".[4]

In short, a particular "Matter" will fall within a "class of subjects" in only one list.

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[1] For an excellent and detailed analysis of the distribution of legislative powers in Canada, see P. W. Hogg, *Constitutional Law of Canada, 1999 Student Edition* (Scarborough: Carswell, 1999) [hereinafter Hogg]; P.W. Hogg, Constitutional Law of Canada, loose-leaf (Scarborough: Carswell, 1992 (updated 2000); P. J. Monahan, *Essentials of Canadian Law: Constitutional Law* (Toronto: Irwin Law, 1997); G. Stevenson, "The Division of Powers in Canada: Evolution and Structure" in R. Simeon, ed., *The Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) 71.

[2] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

[3] It is important to remember that the *Constitution Act, 1867* is not the only constitutional Act which assigns legislative powers, nor are ss. 91 to 95 the only sections in the 1867 Act assigning legislative powers to one or both levels of authority. See *e.g*. ss. 101, 109, 117 and 132 of the *Constitution Act, 1867*, *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28, reprinted in R.S.C. 1985, App. II, No. 11 [hereinafter *Constitution Act, 1871*] which assigns to Parliament legislative authority over territories, and the *Constitution Act, 1886* (U.K.), 49 & 50 Vict., c. 35 which empowers Parliament to provide for the representation of territories in Parliament. But since ss. 91 and 92 of the *Constitution Act, 1867* are dispositive of the question whether legislation pertaining to the extra-jurisdictional authority of provincially appointed police officers validly falls within federal or provincial legislative authority, the focus of this paper will be on these sections.

[4] *Supra* note 2, s. 91.

(B) CONCURRENCY & ANCILLARY DOCTRINES

[2] It would be misleading, though, to consider the federal and provincial classes of subjects as "mutually exclusive watertight compartments".[5] While sections 91 and 92 are each defined as "exclusive", the generality of the wording of the enumerated heads of authority gives rise in practice to substantial legislative overlap between the powers of the federal Parliament and those of the provinces.[6] The courts in Canada have responded to this potential for overlapping federal and provincial legislative authority by developing concurrency and ancillary doctrines. In brief, the doctrine of concurrency recognizes that both federal and provincial legislation, each validly located in a sphere of authority, may cover different "aspects" of a single matter.[7] The ancillary doctrine, by contrast, permits legislative power in certain circumstances to affect matters outside the competence of the enacting body; that is, to encroach on the competence of the other level of legislative authority. Stated in the negative, the ancillary doctrine acts as a potential limit to legislative encroachment on the other level of authority. In determining whether legislative competence may be exercised with an incidental effect on a matter outside of jurisdiction

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[5] See Monahan, *supra* note 1 at 103. The expression "watertight compartments" is generally attributed to Lord Atkin in *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 at 354 (P.C.): "While the ship now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure".

[6] Compare *e.g*. s. 92(2), which confers exclusive legislative authority to the provinces "in relation" to direct taxation, with s. 91(15), which confers to Parliament exclusive power to regulate banking. It is clear that a provincial law "in relation to" taxation can "affect" banking to some degree. See *e.g*. *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 [hereinafter *Lambe*], where provincial law imposing tax on corporations and banks was found to be within the sphere of provincial legislative authority. Overlapping legislation also arises in the field of criminal justice, which ss. 91(27) and 92(14) of the *Constitution Act, 1867* pertain. The difficulty is, of course, in drawing a fine line in specific contexts between potentially related heads of legislative power. See section "Determining Pith and Substance", below. For discussion of the relationship between the s. 91(27) and s. 92(14) "exclusive" heads of authority in the context of policing the criminal law, see section III(A): "The Field of Criminal Justice: Concurrent Law Enforcement" at 12, above.

[7] *Multiple Access Ltd*. v. *McCutcheon* (1982), 138 D.L.R. (3d) 1 at 17, 20, 23 (S.C.C.) [hereinafter *Multiple Access*]. The doctrine of concurrency derives in part from the "double aspect" doctrine: "subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91". See *Hodge* v. *The Queen* (1883) 9 App. Cas. 117 at 130 (P.C.); Hogg, *supra* note 1 at 355. It also flows from the "pith and substance" doctrine, which holds that where legislation falls within the competence of the enacting body, then the legislation is valid, irrespective of whether it also regulates a matter falling within the other level of law-making authority: *Global Securities*, *infra* note 9 at 500; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at 791[hereinafter *Firearms Reference*]. The process for deeming whether a matter validly falls within a sphere of legislative competence is illustrated in section (E): "Determining Pith & Substance", below.

> "the Court must measure the degree of encroachment of a legislative scheme on the other government's sphere of power, and then the Court must determine how necessary the impugned provision is to the otherwise valid legislative scheme. For minor encroachments, the rational connection test is appropriate. For major encroachments, a stricter test (such as "truly necessary" or "essential") is appropriate".[8]

[3] In terms of potential applicability, it is important to note that the ancillary doctrine does not discriminate between federal and provincial legislation. The Supreme Court of Canada has repeatedly stated that the provincial enumerated powers obtain exactly the same capacity as the spheres of federal legislative authority to "affect" matters allocated to the other level of government.[9] It is also important to recognize that the incidental effects test comprising the ancillary doctrine is not, unlike the concurrency doctrine, contingent upon the operation of both federal and provincial legislation in the same field.

(C) FEDERAL PARAMOUNTCY DOCTRINE

[4] But with the potential for concurrent expression of federal and provincial legislative authority in the same field comes possible conflicts in operation. Indeed, while the concurrency doctrine "opens the gates to the same field",[10] it does not help to resolve the issue of whether the two laws are in operational conflict. In response, the courts in Canada have developed the doctrine of federal paramountcy. Under this doctrine, where there are conflicting provincial

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[8] Hogg, *ibid*. at 383 referring to the proportionality test for assessing incidental effects as stated by Dickson C.J. (writing for a unanimous Court) in *General Motors* v. *City National Leasing*, [1989] 1 S.C.R. 641 at 671 [hereinafter *General Motors*]: "[a]s the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained". His Lordship also illustrates the ancillary doctrine as part of a three-step analysis to determine whether a law is *ultra vires*:

"The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers. If it cannot be characterized as intruding at all, i.e., if in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further.

If, on the other hand, the legislation is not in pith and substance within the constitutional powers of the enacting Legislature, then the court must ask if the impugned provision is nonetheless a part of a valid legislative scheme. If it is, at the third stage the impugned provision should be upheld if it is *sufficiently integrated* into the valid legislative scheme [emphasis added]" (*General Motors*, *ibid*. at 666-67).

See also *Papp* v. *Papp*, [1970] 1 O.R. 331 (Ont. C.A.); *R.* v. *Thomas Fuller Construction*, [1980] 1 S.C.R. 695; *Firearms Reference*, *supra* note 7at 798. See discussion at section (E): "Determining Pith and Substance", below.

[9] *General Motors*, *supra* note 8 at 670; *Global Securities Corp*. v. *British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at 500 [hereinafter *Global Securities*].

and federal laws both arising from valid spheres of legislative authority, the provincial legislation is rendered inoperative to the extent that it is inconsistent with the federal law. However, the test for inconsistency in Canadian constitutional law is defined very narrowly. The doctrine of paramountcy is triggered only where there is an "express contradiction" between valid provincial and federal legislation dealing with different "aspects" of the same field, such that "compliance with one law involves breach of the other".[11] In other words, where the federal Parliament validly enacts legislation on a particular topic, this does not preclude a province from enacting, under a valid enumerated head or heads of authority, a different law in the same field, a law that supplements the federal law, or a law that is merely duplicative of federal legislation.[12] In short, in the absence of an "express contradiction" in

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[10] *R.* v. *Gautreau* (1978) 88 D.L.R. (3d) 718 at 723 (N.B. A.D.); Hogg, *supra* note 1 at 404-406.

[11] *Smith* v. *The Queen* (1960), 25 D.L.R. (2d) 225 at 246 (S.C.C.); The "express contradiction" test was affirmed by the Supreme Court of Canada (*per* Dickson J. writing for the majority) in *Multiple Access*, *supra* note 6 at 23-24. See also *Clarke* v. *Clarke*, [1990] 2 S.C.R. 795. Note that the "express contradiction" threshold is not triggered merely by a conflict in objectives: there must be an actual conflict in operation, in the sense that dual compliance is impossible. Also, where there is no conflict in the operation of the competing legislation, both laws are complied with by following whichever enactment is stricter. See *e.g*. *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*]. The "express contradiction" test in *Multiple Access* replaces the previous "covering the field" (or negative implication) test for inconsistency, which signaled that federal legislation may be interpreted as "covering the field" and precluding provincial law in that field, even if such legislation is not contradictory of the federal law. The question under the "covering the field" test is whether the provincial law is in the same "field" or subject as the federal law. If the provincial law occupies the same "field" it is deemed to be inconsistent with the federal law and is rendered inoperative.

But see *Bank of Montreal* v. *Hall*, [1990] 1 S.C.R. 121 [hereinafter *Hall*] where La Forest J., who wrote the opinion of the Court, appears to broaden the definition of conflict to include inconsistent objectives. In the *Hall* case, the issue was whether a federal banking enactment, which outlined a procedure for the foreclosure of a mortgage was in "actual conflict" with a provincial Act that required the creditor, prior to foreclosure proceedings, to serve a notice on the debtor giving the debtor a final opportunity to repay the loan. The bank did not comply with the enactment prior to taking foreclosure proceedings. His Lordship found that there was an express contradiction, an "actual conflict in operation": "[t]here could be no clearer instance of a case where a compliance with the federal statute necessarily entails defiance of its provincial counterpart" (*Hall*, *ibid*. at 152, 153). The difficulty with this case is that there was no impossibility of dual compliance, which *Multiple Access* unequivocally asserts as the rule, since both laws could be complied with by following the stricter provincial law. See critique in Hogg, *ibid*. at 395. La Forest J. appears to use conflicting legislative objectives as a proxy for operational conflict, which makes the "express contradiction" test applied in this case very similar to the former "covering the field" approach (covering the subject or "field" is substituted by covering the objective). It is difficult, though, to discern whether the *Hall* case signals a willingness on the Court to widen the definition of inconsistency or if this case is distinguishable somehow on its facts. But since the *Hall* case did not disapprove of the ruling in *Multiple Access* and, indeed, purported to apply the same test, the *Multiple Access* approach to the "express contradiction" test will be assumed in the analyses conducted in this paper.

[12] Hogg, *ibid*. at 398.

function a valid provincial law is not deemed to be in conflict with valid federal law occupying the same field.[13]

(D) FEDERAL RESIDUAL AUTHORITY

[5] What if a matter does not come within any of the enumerated classes of subjects in sections 91 and 92? A matter will not fall within the specific classes of subjects in essentially two circumstances: first, where a matter falls outside the meaning attributed to each of the enumerated classes in section 92 and yet cannot be characterized as occupying any of the subjects listed in section 91; or, second, where a matter falls within the meaning of listed subjects in section 92 and yet cannot be characterized as being 'within the province'. The courts in Canada have responded to this potential abeyance by interpreting the 1867 Act as having distributed all possible legislative powers between the federal and provincial levels of government. This doctrine of exhaustive distribution, which holds that every conceivable law is

[13] The "inter-jurisdictional immunity" doctrine may be seen as an exception to this rule. The origin of this doctrine is located in cases dealing with federally incorporated companies and federally regulated undertakings in the fields of communication and transportation. See *e.g*. *John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330 (P.C.); *Great West Saddlery* v. *The King*, [1921] 2 A.C. 91 (P.C.); *Toronto v. Bell Telephone Co*., [1905] A.C. 52 (P.C.); *Registrar of Motor Vehicles* v. *Can. American Transfer* [1972] S.C.R. 811. The doctrine has also been involved to render provincial law pertaining to inquiries and police discipline inapplicable to the RCMP: *A.G. Que. and Keable* v. *A.G. Can.* (1978), 90 D.L.R. (3d) 161 (S.C.C.); *A.G. Alta*. v. *Putnam* (1981), 123 D.L.R. (3d) 257 (S.C.C.). The Supreme Court of Canada has, however, largely substituted the doctrinal language of these earlier cases for the following articulation: a provincial law is inapplicable to a federal undertaking if it "directly" applies to a "vital part" of that undertaking; where the provincial law merely exercises an "indirect" effect on the undertaking, the law will be inapplicable if it impairs or paralyzes the undertaking. An "indirect" effect under the threshold of impairment will not render the provincial law inapplicable to the federal undertaking. See *Irwin Toy*, *supra* note 11 at 957 where the Court held that while advertising was a "vital part of the operation of a television broadcast undertaking", which is under federal authority, a provincial prohibition on advertising applicable to advertisers constituted an "indirect effect" that did not impair operation of the undertaking. But there has been movement by the Court in recent years away from the language of even this test. See *e.g*. *Ontario* v. *Canadian Pacific*, [1995] 2 S.C.R. 1028; *Air Canada* v. *Ontario*, [1997] 2 S.C.R. 581, where the Court found that the federal undertaking in question was not immunized from provincial legislation because the part of the undertaking affected by the law was not "essential" to its operation.

It is important to note, however, that the "singling-out" of federal undertakings by provincial legislation is not dispositive. See *e.g*. *Lambe*, *supra* note 6, where the provincial taxing legislation in that case, although applicable to other corporations, did impose a special rate of tax on banks alone. What the above cases indicate, then, is that a provincial law of special or general application is not necessarily *invalid* in its application to federal undertakings. A provincial law will only be rendered *inapplicable* if the effect of the law would be to impair the essential powers of the federally regulated enterprise. Of course, where a provincial law directly conflicts – "expressly contradicts" – with federal law the paramountcy doctrine is triggered to render the provincial law *inoperative* to the extent of inconsistency. It is also interesting to note that the Supreme Court of Canada has not as yet applied the inter-jurisdictional immunity doctrine to immunize provincially regulated undertakings from federal law. Some cases in Canada have suggested that the doctrine is reciprocal (see *e.g*. *City of Medicine Hat* v. *A.G. Can.* (1985), 18 D.L.R. (4th) 428 (Alta. C.A.); Hogg, *ibid*. at 378).

competent to one level of government or the other,[14] in practice takes its form from the combination of express language found in sections 91 and 92 and judicial interpretation of the desired relationship between provincial and federal legislative authority.

[6] At the level of express language, aside from the generality of the wording found in the enumerated heads of authority, sections 91 and 92 also provide "catch-all" or residuary clauses. In the sphere of provincial legislative competence, section 92(16) serves as a potentially sweeping head of power by assigning to the provinces "[g]enerally all matters of merely local or private nature in the province".[15] The opening words of section 91, by contrast, evidence a residuary function by conferring on Parliament the authority

> "to make Laws for the Peace, Order, and good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; …".[16]

One sees, then, that the authority to make laws for the "peace, order, and good government of Canada"[17] is residuary in the sense that it is expressly confined to "matters not coming within" provincial heads of legislative authority. In other words, the expression "not coming within" subordinates the p.o.g.g. power to the classes of subjects in section 92 while, at the same time, deeming finite the scope of such subjects. The practice of the courts in Canada indeed reflects this explicit language. In determining whether a federal law is valid, for instance, the courts tend to look first to the provincial classes of subjects, and then to the list of federal authority; only if the matter does not fall within either list is resort to p.o.g.g. available.[18]

[7] At the level of interpretation, the language employed in section 92(16) of the 1867 Act in combination with the opening words in section 91 suggests the potential for

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[14] The exception to this doctrine is where a law is not sufficiently particular that it can be ascribed to a matter falling within a sphere of competence to which the enacting body is authorized to legislate.
[15] *Supra* note 2, s. 92(16).
[16] *Supra* note 4.
[17] This expression is most often abbreviated in the legal literature as "the p.o.g.g power", and is referred to as such throughout this paper. See Hogg, *supra* note 1 at 411; Monahan, *supra* note 1 at 99.
[18] Hogg, *ibid*. at 414.

constructing a broadly de-centralized and overlapping legislative arrangement between the federal Parliament and the provincial Legislatures, such that:

> "any matter which does not come within any of the specific classes of subjects will be provincial if it is merely local or private (s. 92(16)) and will be federal if it has a national dimension (s. 91 opening words)".[19]

[8] In fact, the courts in Canada have in at least two ways interpreted sections 91 and 92 largely in favour of the needs and idiosyncracies at the local level.[20] First, the courts have attributed an all-encompassing character to section 92(13), the provincial power over property and civil rights, interpreting it as including such regulation of legal rights - "that is, claims that one person may make on another or against the state – in one form or another". [21] This has the effect of rendering section 92(13) "prima facie [applicable] to any transaction, person, or activity that is found within the province".[22] Indeed, since all provincial legislation deals to some degree with legal rights, all provincial laws could be said to fall within the ambit of section 92(13). Second, the courts have increasingly recognized the importance of "shared jurisdiction and functional concurrency" over multi-faceted and complex subjects, reflecting a view permissive of provincial autonomy.[23] The concurrency doctrine and the high-threshold "express contradiction" test of the federal paramountcy doctrine are indicia of this permissive position. The point, here, is not that the trend towards functional concurrency has expunged the p.o.g.g. power; rather, that judicial conceptions of federalism influence the scope of the enumerated heads of authority with the ultimate consequence of determining the actual extent and importance of the p.o.g.g power. Put simply, the applicability of the federal residual authority is contingent upon the definitional ambits ascribed to the classes of subjects listed under provincial and federal competence.

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[19] *Ibid*. at 387.
[20] For a detailed discussion of the relationship between the p.o.g.g. power and the enumerated classes of subjects in ss. 91 and 92, see Monahan, *supra* note 1 at 104-106, 231-232; *Ibid*. at 411-414.
[21] This sweeping interpretation of s. 92(13) has rendered the potential residuary role of s. 92(16) quite unimportant in practice. See Hogg, *ibid*. at 414.
[22] Monahan, *supra* note 1 at 232. There are, however, two circumstances where a matter will not fall within the scope of section 92(13): first, where the matter falls squarely within one of the enumerated subjects in section 91; and, second, where the matter deals directly with rights of individuals outside the province and, thus, does not deal with a matter 'within the province'. See *ibid*. at 101, 232; R.I. Cheffins & P.A. Johnson, *The Revised Canadian Constitution: Politics as Law* (Toronto: McGraw-Hill, 1986) at 121-129.
[23] Monahan, *ibid*. at 219.

[9] Despite this potential under the *Constitution Act, 1867* for constructing a broadly de-centralized federal arrangement, it remains the case that the legislative powers in section 92 are limited to matters within the province. This means that matters not restricted to within "each province" must necessarily be national in dimension and therefore fall under the p.o.g.g. power. Evidencing this national dimension, the p.o.g.g. power has traditionally been invoked under three analytical heads or "branches": "emergency", "gap" and "national concern".

[10] The emergency branch of the p.o.g.g. power is activated where the matter to which the impugned federal legislation is directed is a "national emergency". While the courts have indicated that a deferential judicial attitude will attach to the determination of whether a national emergency exists, it is reasonable to assume that federal legislation such as the *Emergencies Act* will provide some guidance to the courts.[24] The final requirement of the emergency branch is that the impugned legislation must be temporary in nature.[25]

[11] The "gap" branch of the p.o.g.g. power simply addresses whether the impugned enactment would fill lacunae in the distribution of powers. The classic case illustrating the "gap" test is *Citizen's Insurance Co.* v. *Parsons* (1881),[26] in which it was observed that the *Constitution Act, 1867* grants powers to the provinces to make laws in relation to "the incorporation of companies with provincial objects", but there is no equivalent enumerated head of federal incorporation. The Privy Council held that because the provinces enjoyed exclusivity over the incorporation of provincial companies and so could not possess authority

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[24] R.S.C. 1985 (4th Supp.), c. 22. Section 3 of the *Emergencies Act* defines a "national emergency" as an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada.

Of course, federal authority under the constitution cannot be limited by an ordinary statute. The point, here, is that the definitions found in this Act would likely "serve to establish some boundaries around the kinds of circumstances or situations that would justify Parliament in invoking the emergency branch of POGG": Monahan, *ibid*. at 229. In short, it would be difficult to invoke the emergency branch of p.o.g.g. in support of federal legislation that does not fall within the definition of "emergency" as defined by Parliament.

[25] *Reference Re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373.

over the incorporation of companies with federal objects, the absence of a corresponding head of federal power permitted the federal legislation to fill the "gap".

[12] The last branch of the p.o.g.g. power traditionally invoked deals with matters of "national concern". The leading case on point is *R.* v. *Crown Zellerbach* (1988),[27] in which the Supreme Court of Canada held that marine pollution was a single matter of national concern. In order to fall within the ambit of "national concern" the court observed that a matter must

> "have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".

The Court has recognized that subjects such as nuclear energy, aeronautics, marine pollution, radio, and the national capital region all possess the required singleness, distinctiveness and indivisibility to fall within the ambit of matters of "national concern".[28]

[13] It is also important to recognize that unlike jurisdiction based on enumerated section 91 powers, which may be concurrent with provincial jurisdiction, the power conferred by the national concern branch of p.o.g.g. is exclusive and includes intra-provincial aspects.[29] Moreover, unlike the emergency branch of p.o.g.g., the effect of invoking "national concern" is a permanent allocation of jurisdiction over a matter. In other words, extant provincial regulations would be rendered invalid, not merely inoperative (as by paramountcy).[30]

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[26] 7 App. Cas 96 (P.C.).
[27] [1988] 1 S.C.R. 401 [hereinafter *Crown Zellerbach*].
[28] See *Ontario Hydro* v. *Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *Johannsesson* v. *West St. Paul (Rural Municipality)*, [1952] 1 S.C.R. 292; *Reference Re Regulation & Control of Radio Communication in Canada*, [1932] A.C. 304; *Reference Re Offshore Mineral Rights (British Columbia)*, [1967] S.C.R. 792 [hereinafter *Offshore*]; *Munro* v. *Canada (National Capital Commission)*, [1966] S.C.R. 663 [hereinafter *Munro*]. Compare *Friends of Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. See also Monahan, *supra* note 1 at 239-40; Hogg, *supra* note 1 at 417-28.
[29] *Crown Zellerbach*, *supra* note 27 at 432-33.
[30] Note that the court in *Crown Zellerbach* also signaled that the "national concern" branch may be triggered in circumstances where matters are "new" or where the provinces are unable to deal with a matter ("inability test"). But it is clear from the language of the Court that these indicia of "national concern" are not requisite characteristics to finding whether a matter falls within the ambit of this branch of p.o.g.g., as is the case with "distinctiveness" and "indivisibility". See Monahan, *supra* note 1 at 237; *Munro*, *supra* note 28; *Offshore*, *supra* note 28.

(E) DETERMINING "PITH & SUBSTANCE"

[14] How does one determine whether a law is a valid exercise of some head of legislative authority in the *Constitution Act, 1867*? There are two stages to answering this question: first, identify the "pith and substance" or "essential character" of the impugned law; and, second classify this "dominant or most important characteristic" by reference to the spheres of authority in the 1867 Act to determine whether the impugned legislation falls within the jurisdiction of the enacting body.[31] If it does, then the law is valid irrespective of incidental effects on matters outside the jurisdiction of the legislative authority. A contrary result will attach, though, if the pith and substance of the impugned enactment is adjudged to be a matter outside the competence of the enacting body. Characterization is therefore crucial.

[15] To determine pith and substance, two aspects of the impugned enactment must be examined: the purpose of the legislating body, and the legal effects of the legislation. In locating the purpose of the provision or statute, one inquires beyond the direct legal effects to look at the problems the law was enacted to address; that is to say, the "defect in the existing law (the "mischief") which the [enactment] purports to correct".[32] This "mischief" may be determined by reference to the legislation itself and the state of law before the enactment under ordinary rules of statutory interpretation, and "may also be ascertained by reference to extrinsic material such as Hansard and government publications".[33] The determination of legal effects, by contrast, involves consideration of how the impugned enactment will operate and how it will affect the rights and liabilities of those persons subject to it. The aim, here, is to determine "essential character" by reference to how the legislation sets out to achieve its purpose. Put simply, the issue is whether the impugned law is mainly in relation to a legislative sphere within the competence of the enacting body. If it is, incidental effects on spheres of authority outside competence are constitutionally irrelevant. The question becomes, then, whether the impugned law's effects are incidental, in which case they are constitutionally irrelevant, or

[31] The courts often refer to finding the "pith and substance" of the legislation and then proceed to determine whether the legislation is either supported by an appropriate head of power or is an encroachment on another Legislature's jurisdiction.
[32] Hogg, *supra* note 1 at 358.
[33] *Firearms Reference*, *supra* note 7 at 791.

whether they are so substantial[34] that they evince that the law is mainly, or "in pith and substance", legislation properly belonging to a sphere of competence at the other legislative level[35].

[16] It is important to reiterate, though, that the characterization of legislation is also imbued with policy choices that are themselves guided by topical conceptions of federalism. The ultimate question, then, in the determination of the invalidity or validity of an enactment is essentially reduced to the following form: "[i]s this the kind of law that should be enacted at the federal or the provincial level?"[36] Of course, the history of division of powers decisions by the courts in Canada serves as a guide to whether a given matter will be held to fall within a sphere of legislative competence. But in each case, the choice is not simply the combined interpretation of the impugned enactment's character and the application of prior judge-made rules on the division of powers, it is a decision which also reflects potentially shifting policy views.

[34] The "colourability" doctrine is sometimes invoked by the courts in Canada where the effects of the enactment diverge substantially from the stated aim; that is to say, where "a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction": Hogg, *supra* note 1 at 360. See *e.g.* *R.* v. *Morgentaler (No. 3)* (1993), 3 S.C.R. 463. But the language of "colourability" only serves to invite questions about improper motives on the part of enacting bodies. The "colourability" doctrine can, however, be reduced to the following simple rule, absent the connotations of improper legislative motive: substance, not form is dispositive of essential character. In other words, where the legal effects of the impugned enactment are so substantial that they show that the law is "in pith and substance" legislation falling within a head of authority at the other legislative level, the law will be deemed *ultra vires* the enacting body's competence. It is the language of this latter approach that will be adopted in the division of power analyses conducted in this paper.

[35] It is important to recognize the relationship between the ancillary and "pith and substance" doctrines. Under the "pith and substance" doctrine, a law falling within the legislative authority of the enacting body is *intra vires* irrespective of incidental effects on matters outside jurisdiction; however, if the effects are so substantial that they demonstrate that the law is mainly within a legislative sphere outside the enacting body's competence then the law will be deemed *ultra vires*. The ancillary doctrine, by contrast, holds that the incidental effects of a provision within an otherwise valid enactment are assessed against the degree of encroachment on the other legislative authority. Combining these two doctrines they read as the following successive analytical stages: (i) legislation that is in pith and substance within a sphere of legislative competence is valid irrespective of incidental effects (purpose and effects test); (ii) if the impugned provision is not in pith and substance within the authority of the enacting body, then it must be determined whether the provision is sufficiently integrated into an otherwise valid legislative scheme (low encroachment: "rational connection" versus high encroachment: "essential").

[36] W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 241 as cited in Hogg, *supra* note 1 at 363.