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## The Relevance of Government Practice in Constitutional Decision-Making: A Review of the Supreme Court's Federalism Jurisprudence

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## The Relevance of Government Practice in Constitutional Decision-Making: A Review of the Supreme Court's Federalism Jurisprudence

### Abstract

This article explores the role of government practice in the Supreme Court of Canada's ("SCC") constitutional jurisprudence. With the exception of conventions, practices of government actors are not usually thought to have constitutional force or significance. However, a systematic review of the SCC's federalism decisions from the last five decades reveals that government practice has a gravitational pull in the Court's decision-making. This article investigates the ways in which justices understand and attribute significance to government traditions or practices when resolving jurisdictional challenges. It also explores possible explanations for why justices might believe government practices are relevant to validity determinations.

# The Relevance of Government Practice in Constitutional Decision-Making: A Review of the Supreme Court's Federalism Jurisprudence

SARAH BURNINGHAM\*

This article explores the role of government practice in the Supreme Court of Canada's ("SCC") constitutional jurisprudence. With the exception of conventions, practices of government actors are not usually thought to have constitutional force or significance. However, a systematic review of the SCC's federalism decisions from the last five decades reveals that government practice has a gravitational pull in the Court's decision-making. This article investigates the ways in which justices understand and attribute significance to government traditions or practices when resolving jurisdictional challenges. It also explores possible explanations for why justices might believe government practices are relevant to validity determinations.

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\* Assistant Professor, College of Law, University of Saskatchewan. Special thanks to Isabelle Larocque for invaluable research assistance. Thank you to Dwight Newman and Leah Howie for reading and providing comments on an earlier draft of this article, and thank you to Michael Plaxton and Keir Vallance for many helpful conversations on this topic. Finally, thank you to Susan James and the editors at the OHLJ for their assistance.

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**CONSTITUTIONAL LAW IS OFTEN** thought of as written text, or perhaps more specifically, the product of judicial interpretive techniques applied to written text. To the extent that practices of governmental actors are constitutionalised, these are usually understood to be unenforceable conventions “distinct from the ordinary ‘law of the constitution.’”<sup>1</sup> Practices of governmental actors are not generally thought to have constitutional force or significance more broadly. Through a systematic review of federalism jurisprudence from the last fifty years, this article investigates the ways in which justices of the SCC conceive of, and attribute significance to, government traditions or practices when resolving jurisdictional challenges. This article concludes that government practice has a gravitational pull in at least some kinds of constitutional decision-making. The nature of that pull—the different ways in which justices of the Court understand government practice to be relevant—is explained and categorised in this article.

This article has three related objectives. First, the article identifies what role, if any, past practice plays in validity cases involving sections 91 and 92 of the *Constitution Act, 1867*.<sup>2</sup> Based on an exhaustive review of SCC decisions from the last five decades, this article develops a taxonomy of uses to which government practice is put in validity cases. This taxonomy forms the bulk of the article. The

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1. Michael Plaxton, “The Caretaker Convention and Supreme Court Appointments” (2016) 72 SCLR (2d) 455 at 456.
  2. (UK), 30 & 31 Vict, c 3. Jurisprudence and judicial commentary on applicability and operability have been excluded from the study. This study is empirical and systematic, evaluating validity jurisprudence in the previous five decades in order to make the claim that the use of past practice is an observable trend found in a significant portion of this case law. Thus, given the structured nature of the study and the number of cases assessed, the study was limited to validity to ensure manageability. Additionally, validity is a discrete topic, and can thus be uncoupled and discussed separately from other division of powers doctrines. Future research should be undertaken to confirm that the patterns identified in this article hold true in the context of applicability and operability jurisprudence.

other two objectives focus on understanding why justices might appeal to past practice to resolve validity claims. Second, the article asks how justices explain the relevance of past practice to validity determinations. As discussed below, justices have not clearly or consistently explained how and when past practice is relevant. While it seems that justices instinctively find practice appealing, they have not articulated a broader theory to explain why it should exert a pull in validity cases (and indeed, they may have no grand cohesive theory at all). Finally, the article asks: Even in the absence of express explanation, can judicial references to prior government activity—particularly when it is employed as an interpretative tool—be satisfactorily explained?

An example illustrates these objectives: Imagine that a provincial statute prohibits private clinics from providing abortions.<sup>3</sup> When a court considers whether the province has constitutional jurisdiction to pass such legislation, does it matter that the federal government has historically regulated abortion and that provinces have not traditionally acted in this area? If this prior activity matters, how do justices understand and articulate its significance? These are the questions that occupy this article.

To date, how government practice informs federalism cases has received little, if any, scholarly attention outside of the cooperative federalism context. Addressing that gap, this article contributes to the literature on constitutional interpretation by highlighting the relevance of actual practice to judicial decision-making.

A few preliminary comments are in order. First, this article focuses on federalism and not *Charter* case law. As *Charter* jurisprudence matures and settles, it has become clear that its sometimes-overlooked constitutional twin, federalism, has not been dislodged in terms of relevance and importance. Many modern complexities will be resolved—or impeded—by federalism, including the massive challenge of implementing effective environmental legislation.<sup>4</sup> Recent doctrinal developments in division of powers law affirm the ongoing evolution in this area.<sup>5</sup> Accordingly, identifying how courts decide federalism disputes and which factors are given weight in federalism cases remains a pressing concern.

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3. See *R v Morgentaler*, [1993] 3 SCR 463 [*Morgentaler*].

4. See e.g. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544; *Reference re Environmental Management Act*, 2020 SCC 1; *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.

5. See e.g. *Canadian Western Bank v Alberta*, 2007 SCC 22; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 [*Quebec v Canada*]; *Alberta (Attorney General) v Moloney*, 2015 SCC 15.

Second, this article focuses on the Court's descriptions of past practices and its explanations for why those practices are legally significant. Accordingly, I have not confirmed the existence of these practices with reference to secondary material; the Court's description of, and attention to, a practice is of interest, not the actual, verifiable existence of that practice in the historical record.<sup>6</sup> Additionally, this article does not provide a normative argument for or against the use of government practice in constitutional interpretation.<sup>7</sup> This article's novel contribution lies in its exhaustive and systematic investigation of validity jurisprudence and its development of a taxonomy to organise and understand the different uses to which past practice is put in these federalism cases.

Finally, I must address the relationship between the trends identified in this article and cooperative federalism. While cooperative federalism is discussed in a little more detail later in this article, the topic does not receive substantial attention, as surprisingly few cooperative federalism cases met the requisite criteria for inclusion in this study (*i.e.*, section 91 or 92 validity cases that referenced practice).<sup>8</sup> The topics of cooperative federalism and past practice intersect, united by the common theme of judicial deference to government activity.

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6. Similarly, this study does not include cases in which a party appealed to practice, but members of the Court did not pick up on that party's argument. Indeed, legislative practice may play a vital behind-the-scenes role in many cases, as it may shape how parties frame the challenge or lead parties to concede the constitutionality of certain provisions. For example, it appears that the parties in *Rio Hotel* agreed that certain *Criminal Code* provisions were valid on the basis of historical federal legislative practice. See *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59 at 63-64, Dickson CJC [*Rio Hotel*]; *Criminal Code*, RSC 1985, c C-46.

7. See Part III, below.

8. Only one major cooperative federalism case met the inclusion criteria. See *Quebec v Canada*, *supra* note 5. It is discussed in more detail in Part II(C) of this article. For writing on cooperative federalism in Canada, see *e.g.* Johanne Poirier, "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45 RDUS 47; WR Lederman, "Some Forms and Limitations of Co-Operative Federalism" (1967) 45 Can Bar Rev 409; Eugénie Brouillet, "The Supreme Court of Canada: The Concept of Cooperative Federalism and Its Effect on the Balance of Power" in Nicholas Aroney & John Kincaid, eds, *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press, 2017) 135; Nigel Banks, "Co-Operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991) 29 Alta L Rev 792; Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23 Const Forum 1; Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 391.

In cases of cooperative federalism, the obvious justification for courts to value government practice is deference to negotiation and agreement undertaken and reached by political equals. This study reveals that, even without that negotiated element, justices still pay attention to practice and consider it relevant to jurisdictional determinations. That is, unilateral practice, in the face of acquiescence or possibly even objection, is frequently given some deference by the justices of the Court; the fact of the practice itself matters, regardless of whether it is negotiated. It may be that focusing on negotiation to understand or justify outcomes in cooperative federalism cases is misguided: rather, this study suggests that justices find the practice itself to be important, with or without negotiation.

Judicial attention to practice is consistent with both cooperative and dualist paradigms. Federal–provincial cooperation in Canada is often informal and political, as opposed to formal and legalised.<sup>9</sup> In recent years, SCC jurisprudence has leaned toward encouraging and lauding these cooperative practices, though not uniformly.<sup>10</sup> Gaudreault-DesBiens and Poirier observe that “[s]uch schemes are regarded with startling benevolence by courts, which are clearly at pains not to disrupt collaborative efforts displayed by the other two branches.”<sup>11</sup> The phenomenon of judicial deference to practice in cooperative cases aligns with this broader trend. Similarly, judges or scholars subscribing to dualist conceptions of federalism can likewise justify judicial reliance on practice in the course of constitutional decision-making on the basis that unilateral practices are appropriate exercises of exclusive jurisdiction. Future research in this area should investigate the ways in which judicial references to government practice correspond with, or challenge, dualist or cooperative conceptions of federalism.

The article proceeds in three parts. First, the project and methodology are described. Second, the results of the study are discussed generally, followed by a more detailed taxonomy of uses, with examples provided. The concluding section focuses largely on one particular use of past practice (as an interpretative tool) and considers possible explanations for why justices might use past practice in this manner.

## I. PROJECT DESCRIPTION AND METHODOLOGY

I reviewed the Court’s sections 91 and 92 validity jurisprudence from the last fifty years and identified twenty-eight cases in which at least one justice of the Court

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9. Gaudreault-DesBiens & Poirier, *supra* note 8 at 398-99.

10. Poirier, *supra* note 8 at 89-90.

11. Gaudreault-DesBiens & Poirier, *supra* note 8 at 399-400.

referenced government practice or non-practice.<sup>12</sup> Government practice was defined broadly as activity—including statutory and non-legislative activity—previously undertaken by a government and related somehow to the impugned statute or statutory provision.<sup>13</sup> I also included express references to government non-practice. That is, if a justice noted an absence of prior activity by a government in the area, the case was included in the study, based on the theory that how justices treat non-practice provides insight into whether they think practice is significant. For example, if a justice believes a history of non-practice by the enacting government weighs against finding validity, the justice has implicitly attached significance to the presence of practice.

Because the Court has not articulated the role of practice in a conceptually coherent manner, justices generally do not clearly identify or isolate practice in their discussions. Rather, things that may constitute past practice are frequently referred to in brief and ambiguous language. As a result, in some cases, I had to exercise judgment about whether the justice had described government practice at all, thus warranting inclusion in the study. Discretion was exercised in favour of inclusion, rather than exclusion.<sup>14</sup>

Note also the article is concerned with justices' treatment of government practice, not with consideration of judicial precedent. The article focuses on the significance justices attach to, for example, a history of federal regulation of abortion, and not judicial references to prior court decisions upholding that federal legislative activity. The latter is precedential reasoning, a common and well-accepted interpretive technique. The former—referencing the fact of

12. The period covered in the study is 1 January 1968 to 1 August 2018. The fifty-year period ensured a large sample size while retaining manageability. Cases were gathered using a “snowball” technique. First, a research student consulted two leading constitutional texts to develop an initial list of relevant cases. See Peter W Hogg, *Constitutional Law of Canada*, 2018 student ed (Thomson Reuters Canada, 2018); Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (LexisNexis Canada, 2017). The student then read those cases, included all validity decisions cited therein, and canvassed this second round of cases for additional judgments not yet identified. They repeated this process until no new cases were discovered. Finally, the student searched legal databases for any additional cases on point that had not turned up in the prior searches. Very few additional cases were discovered. In total, sixty-nine validity cases from the last five decades were collected. Reviewing those cases, I identified twenty-eight cases in which government practice or non-practice was referenced by at least one justice. For the list of cases, see Appendix A.
13. In this article, the term “government practice” is used interchangeably with “legislative activity,” “past practice,” “legislative practice,” “historical activity,” and other similar terms.
14. See *e.g. MacDonald et al v Vapor Canada Ltd* (1976), [1977] 2 SCR 134, Laskin CJC [Macdonald]. This case was ultimately included in the study.

government practice itself—is not widely recognised as an existing or legitimate interpretive technique.

Limitations of the study must be noted. First, the study seeks to identify broad trends in judicial thinking and posit some plausible explanations for judicial reference to practice. Accordingly, majority, minority, and dissenting decisions receive relatively equal attention. Second, because the article aims to expose broader trends and develop generalised categories, the specific practice at issue (including its longevity) is generally not identified nor is the time period in which the practice originated (*e.g.*, pre-Confederation or post-Confederation). The more generalised focus of the article means it is impossible to reach firm conclusions about the extent to which references to practice correspond with originalist reasoning.

A final note on terminology is in order. This article uses the language of “enacting government,” to refer to the government (*i.e.*, federal or provincial) that has enacted the impugned legislation, and “opposing government,” to refer to the other level of government. Of course, in any particular case, the other level of government may not be legally opposing in the sense that the constitutional challenge may come from a private third party, but this terminology simplifies reference to the governments in a given case.

## II. RESULTS

A review of cases reveals that legislative practice is sometimes relevant to validity decisions, though reference to it is inconsistent and unpredictable, and judicial explanations regarding its significance are brief, inadequate, or sometimes non-existent.<sup>15</sup> While justices referred to legislative practice (or non-practice) in about 40 per cent of the validity cases from the last fifty years (twenty-eight of sixty-nine total cases), the Court has not provided conceptually clear instruction on when and how legislative practice assists in the resolution of validity claims. However, after reviewing the cases, some general observations can be made about the significance attached by SCC justices to legislative practice (or non-practice) in validity cases.

First, it is clear that practice—even long-standing practice—does not, by itself, imbue a government with jurisdiction. For example, Justice Lamer, writing a separate concurring decision in *Ontario Hydro v Ontario (Labour Relations Board)*,<sup>16</sup> observed:

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15. For graphs illustrating results, see Appendix B.

16. [1993] 3 SCR 327 [*Ontario Hydro*].

There is no doctrine of laches in constitutional division of powers doctrine; one level of government's failure to exercise its jurisdiction, or failure to intervene when another level of government exercises that jurisdiction, cannot be determinative of the constitutional analysis. In this respect, I would adopt the statement of Reed J. in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1985] 2 F.C. 472 (T.D.), at p. 488:

The fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time, however, does not mean that there is thereby created some sort of constitutional squatters rights. (Refer: *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032 for a case in which unconstitutional action had remained unchallenged for ninety years.)<sup>17</sup>

More recently, the Court referred to the same principle in *Reference Re Securities Act*:

A long-standing exercise of power does not confer constitutional authority to legislate, nor does the historic presence of the provinces in securities regulation preclude a federal claim to regulatory jurisdiction (see *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at p. 357, *per* Lamer C.J.)<sup>18</sup>

And indeed, the Court's decisions comply with this principle: In no case under study did legislative practice solely determine jurisdiction.

Some references to government practice appeared to be merely throw-away lines.<sup>19</sup> However, in other instances, legislative practice appeared to play a role in validity determinations. I have identified three ways in which this information is used by justices of the Court: (1) to understand the purpose of the impugned statute; (2) to interpret the constitutional text; and (3) to fulfil some other role in the validity analysis. Each category, with examples, is discussed in detail below.

Before turning to these specific categories of use, additional general observations can be made. The historic presence of the enacting government in a legislative area was often predictive of a finding of jurisdiction. In six of twenty-eight cases, a majority of the Court upheld the enacting government's claim to jurisdiction and, in the course of its discussion, referred to the government's previous activity

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17. *Ibid* at 357.

18. 2011 SCC 66 [*Securities Reference*] at para 116.

19. See *e.g.* *Rio Hotel*, *supra* note 6 at 68, Estey J ("[h]istorically, some provinces have in the past prohibited all forms of entertainment and all activities other than the consumption of the alcoholic beverages in these licensed premises" (*ibid* at 68)); *Morgentaler*, *supra* note 3 at 491, Sopinka J ("since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy," citing *Morgentaler v The Queen*, [1976] 1 SCR 616 (*ibid* at 672)). The Court also stated that "[t]his legislation deals, by its terms, with a subject historically considered to be part of the criminal law—the prohibition of the performance of abortions with penal consequences. It is thus suspect on its face" (*Ibid* at 512).

in that area.<sup>20</sup> In only one case did a majority of the Court arguably find that the enacting government lacked jurisdiction despite a history of legislating in the area (and in that case, the majority panel referred to the long-standing practice of the opposing government in that area of the law in coming to its conclusion that the impugned statute was unconstitutional).<sup>21</sup> Thus, while justices insist that no doctrine of laches<sup>22</sup> exists in division of powers jurisprudence, it is interesting to observe that, when faced with long-standing practice by one government, the Court tends to recognise that government's constitutional competence to act.<sup>23</sup> The historic absence of the enacting government from an area, or the historic presence of the opposing government in the area, was less predictive of the outcome. In four cases, a lack of legislative practice by the enacting government was not fatal to the jurisdictional claim.<sup>24</sup> In five cases, a majority of the Court denied the enacting government's claim to jurisdiction, in part because the opposing government had previously acted in the area.<sup>25</sup> In four cases, a majority found the enacting government had jurisdiction despite the presence of legislative practice by the opposing government.<sup>26</sup> References to government practice have decreased over time, with nine cases each decade in the 1970s and 1980s, five cases in the 1990s, two cases in the 2000s, and three in the 2010s. It is not clear why references to practice have decreased, but it may be that validity analysis has

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20. See *Reference re Firearms Act (Can)*, 2000 SCC 31 [*Firearms Reference*]; *Caloil Inc v Attorney General of Canada*, [1971] SCR 543 [*Caloil*]; *Whitbread v Walley*, [1990] 3 SCR 1273 [*Whitbread*]; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 [*Big M*]; *The Queen v Zelensky*, [1978] 2 SCR 940 [*Zelensky*]; *Di Iorio v Warden of the Montreal Jail* (1976), [1978] 1 SCR 152 [*Di Iorio*].
  21. *Scowby v Glendinning*, [1986] 2 SCR 226 [*Scowby*].
  22. The “doctrine of laches” is defined by Black’s Law Dictionary as “[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought.” See Bryan A Garner, *Black’s Law Dictionary* (Thomson Reuters, 2019) sub verbo “laches.”
  23. This outcome could be explained by justices applying an implicit or “lite” version of laches. It could also be explained by governments understanding their jurisdictional boundaries and acting accordingly.
  24. *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 [*RJR-MacDonald*]; *Reference re Employment Insurance Act (Can)*, ss 22 and 23, 2005 SCC 56 [*Employment Reference*]; *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 [*GM v CNL*]; *Attorney General of British Columbia v Canada Trust Co et al*, [1980] 2 SCR 466 [*BC v Canada Trust*].
  25. *Scowby*, *supra* note 21; *Morgentaler*, *supra* note 3; *MacDonald*, *supra* note 14; *Robinson v Countrywide Factors Ltd* (1977), [1978] 1 SCR 753 [*Robinson*]; *Securities Reference*, *supra* note 18.
  26. *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662 [*Nova Scotia Board of Censors*]; *AG (Can) v Can Nat Transportation, Ltd*, [1983] 2 SCR 206 [*Canadian National Transport*]; *R v Wetmore*, [1983] 2 SCR 284 [*Wetmore*]; *R v Hauser*, [1979] 1 SCR 984 [*Hauser*].

become tighter and more doctrinal, leaving less room for fuzzy, under-developed concepts with no clearly articulated role.

The following sections of the article discuss the specific categories of use identified above and provide examples of each type.

#### A. TO IDENTIFY LEGISLATIVE PURPOSE

In nine of the twenty-eight cases under study, justices used prior legislative activity to identify the “pith and substance” (or purpose) of the impugned legislation at the “characterization” step of the validity analysis.<sup>27</sup> Two variations of this theme exist. In the first—and more common—scenario, the justices used the enacting government’s practice to inform characterization, while in the second scenario, justices referenced the *opposing* government’s practice to determine the law’s pith and substance.

*R v Big M Drug Mart Ltd* illustrates the first scenario. While the *Charter* aspects of that case are perhaps better known, the claimant also challenged the federal Sunday closing legislation on division-of-powers grounds. The statute’s validity turned on whether its purpose was secular or religious, as only the latter constituted a proper exercise of the federal criminal law power.<sup>28</sup> Chief Justice Dickson, writing for a majority of the Court, concluded that the law was religious in nature, on the basis that observance of the Christian Sabbath had been mandated for centuries in English law, which was the predecessor of the

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27. *Firearms Reference*, *supra* note 20; *Hauser*, *supra* note 26, Pigeon J; *Securities Reference*, *supra* note 18; *Big M*, *supra* note 20; *Zelensky*, *supra* note 20; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 [*Edwards Books*]; *Attorney-General for Manitoba v Manitoba Egg and Poultry Association et al*, [1971] SCR 689, Laskin J (as he then was); *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, LeBel & Deschamps JJ [*Re AHRA*]; and possibly *MacDonald*, *supra* note 14, Laskin CJC. Validity is a two-step inquiry: Identifying the “pith and substance” or “dominant thrust” of the legislation under consideration, and then assigning that matter to a head of power, which may require delineating that head of power. See *Morgentaler*, *supra* note 3 at 481.

28. *Big M*, *supra* note 20 at 355.

impugned federal statute.<sup>29</sup> The legislative history of Sunday closing laws was thus relevant, and indeed vital, in determining the primary purpose of the federal statute. This use of legislative practice is uncontroversial, as it is now accepted that judges may refer to a statute's legislative history in order to ascertain its meaning.<sup>30</sup>

The second scenario—in which justices invoked the opposing government's legislative practice to ascertain the pith and substance of the enacting government's statute—occurred less frequently. For example, in *Securities Reference*, because the proposed federal law largely duplicated provincial regulation of securities, the Court concluded that the federal law was directed at the same objective as the provincial legislation, namely, the exhaustive regulation of securities.<sup>31</sup>

Justices LeBel and Deschamps employed the same reasoning in *Reference Re Assisted Human Reproduction Act*, a case dealing with the validity of federal legislation regulating assisted reproductive technologies.<sup>32</sup> After reviewing the provincial regime governing medical professionals and certain medical practices, Justices LeBel and Deschamps observed that the federal law extensively overlapped with the provincial regulatory scheme.<sup>33</sup> They relied on this fact, in part, to conclude that the law was aimed at “the regulation of assisted human reproduction as a health service.”<sup>34</sup>

While the justices' reasoning is not particularly detailed in these two cases, the theory seems to be that the enacting government, by implementing

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29. *Big M* can be contrasted with *Edwards Books*, another Sunday closing case, though one involving provincial legislation. In *Edwards Books*, past practice (the custom of closing on Sunday for religious reasons) was not determinative of the law's pith and substance. Chief Justice Dickson found that the alignment of the Christian Sabbath with a socially and culturally accepted “pause day” was a matter of historical happenstance rather than an indication of the law's religious purpose. See *Edwards Books*, *supra* note 20 at 739-52. By finding that the past practice had little relevance to the law's pith and substance, *Edwards Books* is unique in the cases under study. In other cases that referenced legislative practice at the characterization stage, the legislative history or past practice was highly influential and essentially predictive of the law's pith and substance.
30. See *e.g. Re Anti-Inflation Act*, [1976] 2 SCR 373; *Morgentaler*, *supra* note 3. The investigation into legislative history has opened up since the 1980s with the loosening of restrictions on extrinsic evidence. See A Wayne MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” (2001) 80 Can Bar Rev 241 at 264.
31. *Ontario Hydro*, *supra* note 18 at paras 93-106.
32. *Robinson*, *supra* note 27 (where the Court split 4-4-1, with decisions authored by Chief Justice McLachlin, Justices LeBel and Deschamps, and Justice Cromwell (who wrote for himself)).
33. *Ibid* at paras 224-26.
34. *Ibid* at para 227. Chief Justice McLachlin found that the federal impact on research and medical practice was a mere incidental effect of the legislation and did not reflect its dominant purpose (*ibid* at paras 31-32).

a statutory scheme similar or identical to that of the opposing government, has accepted the opposing government's articulation of the problem as well as its preferred approach. Thus, the enacting government has implicitly endorsed the opposing government's intended purposes, effects, and selected means to achieve particular ends. In other words, by essentially duplicating another statute, the enacting government has adopted that statute's "dominant thrust." It follows that a court would understand the impugned legislation with reference to the opposing government's statutory scheme. The enacting government has invited that scrutiny by mirroring the approach of the opposing government.

## B. TO AID INTERPRETATION OF SECTIONS 91 AND 92 OF THE CONSTITUTION ACT, 1867

In a handful of cases, justices used legislative practice as an interpretive aid to give meaning to the text of sections 91 and 92. In these cases, legislative practice was used in conjunction with other interpretive tools, such as textual analysis, originalism or founders' intent reasoning,<sup>35</sup> or reliance on precedent. Sometimes, justices expressly set out how legislative practice was relevant to constitutional interpretation; in other cases, the relevance was unexplained or ambiguous. This use of legislative practice appeared more frequently in cases from the 1970s and 1980s. Several cases illustrate this category of use.<sup>36</sup>

First, in *Scowby v Glendinning*, the Court considered a challenge to section 7 of the *Saskatchewan Human Rights Code*,<sup>37</sup> which affirmed the rights to *habeus corpus* and to be free of arbitrary detention. Justice Estey, writing for the majority, found the provision *ultra vires* (in so far as it applied to arrest for *Criminal Code* offences) because it dealt with a historically criminal law subject.<sup>38</sup> After citing several *Criminal Code* provisions dealing with arrest and detention, he wrote:

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35. See Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism?'" (2016) 42 Queen's LJ 107. Oliphant and Sirota suggest that originalism should be distinguished from founders' intent reasoning. New originalism "seeks to ascertain the meaning its text had at the time of its entrenchment. Unlike the (subjective and private) intentions of the framers, this meaning was objective and public" (*ibid* at 126).

36. See also *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929 [*Ontario Home Builders*]; *Robinson*, *supra* note 25, Beetz J.

37. *Saskatchewan Human Rights Code*, SS 1979, c S24.1.

38. It is worth noting that Justice La Forest, dissenting, also attached significance to historical practice, though he focused on provincial practice (*e.g.*, the enacting government's practice). He observed that sanctions for improper police behaviour, in the form of civil claims, had a long history in provincial law. He also stated that the law should not "be frozen in this particular form." *Scowby*, *supra* note 21 at 260.

[T]hese [federal] *Code* provisions are advanced to illustrate that the type of action taken by the provincial legislature in s. 7 has been, almost since the advent of Confederation, taken by the Parliament of Canada in the exercise of its exclusive sovereignty over criminal law. That is not to say that repetition produces constitutionality. It does, however, illustrate that the community through its elected representatives, and in the course of its criminal law enforcement system, has for at least a century regarded the arrest and detention provisions in the *Criminal Code* as illustrations of the broadly defined approach to criminal law in the authorities, some of which have already been cited. Words in legislation, and more particularly, words employed in constitutional documents, take on meaning from the context in which they are employed in daily life. The words “criminal law” and “criminal procedure” are no exception. These words have long been accepted by legislature and courts alike in the community as including legislation with reference to arrest and detention, arbitrary or otherwise. To the extent that these activities form the core and substance of *habeas corpus*, they have had criminal law connotations in our criminal jurisprudence in Canada and in its British predecessor from which our criminal law has evolved for over seven hundred years.<sup>39</sup>

In Justice Estey’s view, the fact that the federal government had long dealt with arrest and detention in criminal law shed light on the proper interpretation to give “criminal law” and “criminal procedure” in section 91. Notice that, under Justice Estey’s conception, the practice did not attain constitutional status merely by virtue of its existence. Rather, Justice Estey referred to it in the course of applying a common interpretive technique—namely, textual interpretation. In other words, Justice Estey found the practice to be significant, not because it gave rise to jurisdiction in its own right (indeed, he emphasised that repeated practice did not crystalize into constitutional law), but because it assisted him in understanding the meaning of the text of the Constitution. In his view, text and practice are symbiotic: How words are understood dictates practice, and practice informs how those words are understood. While legislative tradition was not independently significant, *Scowby* demonstrates how practice might influence application of common interpretive techniques.

Similar reasoning is found in *Di Iorio v Warden of the Montreal Jail*. Quebec, acting pursuant to its *Police Act*,<sup>40</sup> established a commission to investigate organised crime. Under the relevant statutory scheme, those who refused to testify faced sanction, including jail time.<sup>41</sup> Justice Dickson, writing for five justices, found that the province had the power to constitute such commissions under its jurisdiction over “the administration of justice in the province,”

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39. *Ibid* at 240-41.

40. *Police Act*, SQ 1967-1968, c 17, s 19.

41. *Di Iorio, supra* note 20 at 183-84.

pursuant to section 92(14) of the *Constitution Act, 1867*. In his view, it mattered that the provinces had, since Confederation, understood their powers under this competence expansively and acted accordingly.<sup>42</sup> He observed that the province had previously set up and empowered similar bodies.<sup>43</sup> This practice informed his view that the founders intended for the province to retain these powers following Confederation.<sup>44</sup> Justice Dickson concluded:

Both the federal and provincial governments have accepted for over a century the status of the provincial governments to administer criminal justice within their respective boundaries. The provincial mandate in that field has consistently been recognized as part and parcel of the responsibility of a provincial government for public order within the province....It seems late in the day to strip the provinces of jurisdiction in respect of criminal justice which they have exercised without challenge for well over one hundred years. That is not to say that jurisdiction in the strict sense can come through consent or laches; however, history and governmental attitudes can be helpful guides to interpretation.<sup>45</sup>

Much like Justice Estey in *Scowby*, Justice Dickson in *Di Iorio* used legislative practice to inform or supplement other interpretive techniques (in this instance, what seems to be an appeal to founders' intent). However, at times, some of his language is stronger than that found in *Scowby*—as in, for example, the above quoted paragraph—and borders on imbuing the practice with stand-alone significance, despite his insistence that laches forms no part of division of powers law.

In *Whitbread v Walley*, Justice La Forest for the Court upheld provisions of the federal *Shipping Act*<sup>46</sup> and relied on non-constitutional precedent to do so. He referred to cases regarding the Federal Court's jurisdiction over particular

42. *Ibid* at 200.

43. *Ibid* at 203-04.

44. *Ibid* at 203-06. In his separate concurring decision, Justice Beetz also referred to pre- and post-Confederation practice in the course of upholding the provincial law (*ibid* at 223).

45. *Ibid* at 205-06. Chief Justice Laskin dissented in *Di Iorio*: In his view, legislative practice (both federal and provincial) before and following Confederation did not provide insight into the meaning of the words in the Constitution, at least in the context of that case. He wrote:

[The province's argument] appears to be founded on the history of pre-confederation and post-confederation legislation respecting public inquiries (see 1844-46 (Can.), c. 38; C.S.C. 1859, c. 13, s.1; 1986 (Can.), c. 38, ss. 1 and 2), and the exclusion from post-confederation federal legislation of the words "the administration of justice therein", which were included in the pre-confederation inquiries legislation. This, in my opinion, begs the question because it does not give an answer to the scope of the power in relation to "the administration of justice in the Province" in the context of the *British North America Act* (*ibid* at 166).

46. *Canada Shipping Act*, RSC 1970, c S9.

disputes (and not cases regarding the federal government's constitutional jurisdiction), noting that these cases were not "irrelevant to a determination of the scope of Parliament's legislative jurisdiction over navigation and shipping"<sup>47</sup> because the federal government could only empower the Federal Court to deal with matters within its constitutional competence.<sup>48</sup> He added:

Parliament's power to enact collision regulations has never been challenged; nor... has it ever been contended that these regulations do not apply to vessels on inland waterways. They are in fact routinely applied to determine the tortious liability of such vessels... It follows that the tortious liability of the owners and operators of these vessels should be regarded as a matter of maritime law that comes within the ambit of Parliament's jurisdiction in respect of navigation and shipping.<sup>49</sup>

Justice La Forest was influenced by long-standing legislative practice, including the fact that provincial governments had not objected to those federal enactments and that judges had previously applied the legislation in non-constitutional cases without expressing doubts about its constitutionality. As in *Scowby* and *Di Iorio*, legislative practice was relevant to the outcome, but unlike in those two cases, it was not used to assist in textual interpretation or originalism-type reasoning. Rather, Justice La Forest in *Whitbread* came close to finding legislative practice significant in its own right, though without expressly acknowledging this.

One might contrast Justice La Forest's discussion in *Whitbread* to Chief Justice Laskin's dissent in *Robinson v Countrywide Factors Ltd*, where the Chief Justice observed that prior cases resolving issues of statutory interpretation—and not constitutionality—provided no assistance on the constitutional issue.<sup>50</sup> He wrote: "There are numerous illustrations in other branches of the law where practices carried on for some time without objection on constitutional grounds were brought to an end when the constitutional question was raised directly."<sup>51</sup> These competing statements illustrate the justices' inconsistent treatment of practice.

Finally, the line of cases concerning federal competence to prosecute offences also includes references to legislative practice. Provinces have historically prosecuted criminal offences in Canada.<sup>52</sup> The federal government only asserted

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47. *Whitbread*, *supra* note 20 at 1289.

48. *Ibid* at 1290.

49. *Ibid* at 1296.

50. *Robinson*, *supra* note 25 at 774-76.

51. *Ibid* at 774.

52. Provincial activity in this area mostly took the form of actual practice, though some provincial legislation existed. See Nancy E Brown, "Balancing the Powers to Prosecute in Canada: Comment on *A.G. Canada v. C.N. Transport* and *R. v. Wetmore, Kripps Pharmacy*," Case Comment, (1984) 29 McGill LJ 699 at 704-05.

jurisdiction over prosecutions in the late 1960s.<sup>53</sup> The Court considered and ultimately upheld the federal government's jurisdiction to prosecute in a line of cases from the 1970s and 1980s.<sup>54</sup> For Justice Dickson, who dissented in these cases, it mattered that the federal government was attempting to step into an area historically occupied by the provinces.<sup>55</sup> Much like his decision in *Di Iorio*, he emphasised that constitutional competence was not granted by laches, but that governmental practice still warranted consideration. For example, in *R v Hauser*, he wrote:

The enactment of s. 2(2) of the *Criminal Code* may be viewed as not only an attempt to intrude into matters traditionally reserved for the provincial Attorneys General, but also as a breach of the bargain struck at the time of Confederation. No practical reasons have been advanced for setting aside the practices and customs of one hundred years... From the material before us, it would not appear that the arrangement existing between the federal and provincial authorities, to which I have referred earlier, had created any difficulties over the years. This, of course, does not decide the matter because we are dealing here essentially with constitutional power and not with the effect of alleged federal acquiescence, but the considerations I mention are by no means irrelevant.<sup>56</sup>

Similarly, Justice Dickson dissented again four years later in *R v Wetmore*, observing:

If, as the Attorney General of Canada contends, the provinces have for over one hundred years been exercising, if not usurping, a jurisdiction not properly theirs, the provinces would seem to have been blissfully unaware of the fact, so also the Federal Crown. One can look in vain among the Confederation Debates, subsequent case law, the text books, other writings on the Constitution for any firm assertion on the part of the Attorney General of Canada that the primary and, indeed, exclusive, prosecutorial authority in criminal cases rests, and has always rested, with the Federal Crown. Where is there a federal statement to this effect: "We, by virtue of s. 91(27) of the Constitution, have suffered you, the provinces, to prosecute criminal cases but we, at any time, can deny you that right."<sup>57</sup>

Chief Justice Laskin, writing for the majority in *Wetmore* and its companion case, *AG (Canada) v. Canadian National Transportation, Ltd*, disagreed with Justice Dickson. In his view, provincial prosecutions had continued following

53. See *Criminal Law Amendment Act, 1968-69*, c 38, s 2(2).

54. *Hauser*, *supra* note 26; *Canadian National Transport*, *supra* note 26; *Wetmore*, *supra* note 26.

55. Regarding Chief Justice Dickson's federalism decisions, Bryan Schwartz has observed that he "was prepared to give some respect to the actual practice of democratic accountable branches of government as a guide to interpreting the constitution." See Bryan Schwartz, "Dickson on Federalism: The First Principles of His Jurisprudence" (1991) 20 Man LJ 473 at 474-75.

56. *Hauser*, *supra* note 26 at 1032-33.

57. *Wetmore*, *supra* note 26 at 303.

Confederation as a “practical accommodation” under the authority of section 129 of the *Constitution Act, 1867*, which provided for the continuance of laws in force in the colonies prior to Confederation.<sup>58</sup> The ongoing provincial practice, he emphasised, neither undermined federal claims to jurisdiction nor imposed any type of constitutional barrier or limitation on federal power.<sup>59</sup> Chief Justice Laskin expressly noted the lack of provincial efforts “to assert an independent provincial authority to control prosecutions of the criminal law,”<sup>60</sup> which he believed would be expected if the provinces had, in fact, retained jurisdiction in this field.<sup>61</sup> Although Justice Dickson’s decisions in these cases more robustly embrace the significance of practice, Chief Justice Laskin did not completely reject the idea that practice could play a role in validity determinations. Indeed, the Chief Justice took pains to explain why the practice in the context of these cases was not determinative, suggesting that he may well have given practice more weight in cases where the practice has clearly “crystalized,” such as when it is accompanied by an express assertion of provincial authority in the area. It appears that the Chief Justice wanted additional indicia of the practice’s value before assigning it weight.

These cases demonstrate another type of gravitational pull that legislative practice may have in validity determinations. While repeated practice does not, by itself, elevate that practice to the status of constitutional law, justices occasionally use practice to inform or facilitate other interpretive techniques or attach some significance to it in the course of determining the scope of sections 91 and 92.

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58. *Canadian National Transport*, *supra* note 26 at 221, 225, 235.

59. *Ibid* at 225, 235.

60. *Ibid* at 225.

61. *Ibid*.

### C. OTHER INSTANCES OF IMPACTING VALIDITY DECISIONS

On occasion, justices referred to legislative practice for some purpose other than those discussed above.<sup>62</sup> In particular, practice may have evidentiary value or may satisfy an additional component of the validity analysis.

Regarding the first type of situation, justices have found that legislative practices may be evidence of governments' factual claims. For example, Chief Justice Lamer in *Ontario Hydro* observed that federal failure to exercise jurisdiction could undermine the government's factual claim that federal competence over the subject matter was necessary (an element of the national concern branch of POGG—or “peace, order, and good government”—power and of the section 92(10)(c) declaratory power, the heads of power at issue in that case).<sup>63</sup> Only a handful of federal heads of power employ some form of provincial inability test, and thus, the evidentiary use of legislative practice may be confined to those few heads of power.

On occasion, members of the Court have attributed significance to historical practice when considering particular aspects of the validity analysis. For example, in *Reference re Firearms Act*, the Court stated that the “balance of federalism” must be considered when weighing jurisdictional claims.<sup>64</sup> The federal gun control law did not upset the jurisdictional balance, the Court ruled, relying in part on the fact that the federal government had historically regulated firearms. The Court wrote:

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62. See also *Nova Scotia Board of Censors*, *supra* note 26 at 679-86 (per Chief Justice Laskin (dissenting), referring to both the *Criminal Code* and precedent in finding that the federal government has jurisdiction over the obscenity-type regulation at issue); *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 173-75 (per Justice Dickson (as he then was), observing in passing that provinces have historically regulated securities in Canada, but with no significance expressly attributed to it); *Caloil*, *supra* note 20 at 551-52 (per Justice Pigeon, referring to long-standing legislation when finding that the trial judge had erroneously found the entire scheme—not just the impugned provisions—to be invalid). See also *RJR-MacDonald*, *supra* note 24 at para 204 (per Justice Major, dissenting on the federalism issue):

I disagree that affinity with a traditional criminal law concern has no part to play in the analysis, whether the conduct proscribed by Parliament has an affinity with a traditional criminal law concern is a starting point in determining whether a particular matter comes within federal criminal competence. Cases such as *Morgentaler*, *supra*, and *Knox Construction*, *supra*, demonstrate that courts will often look for an affinity with a traditional criminal law concern, or affinity with activities historically recognized as criminal, to determine whether a certain exercise of legislative power falls within the field of criminal law.

63. *Ontario Hydro*, *supra* note 16 at 357.

64. *Firearms Reference*, *supra* note 20 at para 48.

[T]his law does not precipitate the federal government's entry into a new field. Gun control has been the subject of federal law since Confederation. This law does not allow the federal government to significantly expand its jurisdictional powers to the detriment of the provinces.<sup>65</sup>

Under the framework articulated in that case, legislative practice does not directly contribute to the meaning of the constitutional text—but by acting as an indicator or perhaps determinant of jurisdictional balance—it still plays a role in setting the scope of the heads of powers.

Somewhat similarly, in *Reference re Assisted Human Reproduction Act*, Chief Justice McLachlin employed the ancillary doctrine<sup>66</sup> to determine whether certain regulatory provisions of the impugned federal act could be upheld because of their connection to the rest of the *intra vires* scheme. In applying the ancillary doctrine test from *General Motors of Canada Ltd v City National Leasing*, she observed that a prior intrusion into the opposing government's jurisdiction meant that the intrusion under consideration was more likely to be a minor one, rather than a major one. She wrote:

Finally, I turn to Parliament's history of legislating in the field occupied by the ancillary provisions. Parliament has long sought to address issues of morality, health, and security. As discussed above, it has also invoked the criminal law power to uphold regulatory schemes. Of particular relevance is Parliament's history of administering and enforcing these statutes, often by way of licensing bodies like the Agency: see *Firearms Reference*, *Hydro-Québec*. These historical comparisons suggest that the ancillary provisions constitute only a minor intrusion on provincial powers.<sup>67</sup>

Though a bit unclear, Chief Justice McLachlin seems to attribute significance to both legislative practice and judicial precedent. Her approach may be at odds with *GM v CNL*, which developed the modern ancillary doctrine test. In that case, Chief Justice Dickson referred only to the fact that past intrusions of this nature had been upheld, not to the fact that they had been committed in the

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65. *Ibid* at para 53.

66. Ancillary doctrine salvages an otherwise unconstitutional provision because that provision is a crucial element of a larger, valid statutory scheme. See *GM v CNL*, *supra* note 24.

67. *Re AHRA*, *supra* note 27 at para 136. This finding has implications for the standard of connection required between the act and the provisions. The standard is less stringent in cases of minor intrusions. In other words, minor intrusions are easier to justify and thus more likely to be upheld.

first place.<sup>68</sup> The difference matters: The former rests on the Court's decisions to legitimise the invasion, while the latter relies on the government's own actions to validate the intrusion. It is worth noting that Justices LeBel and Deschamps in *Re AHRA* took issue with Chief Justice McLachlin's reasoning:

The Chief Justice applies three criteria to justify the overflow from federal jurisdiction. In *General Motors*, Dickson C.J. did in fact identify three factors that justified the impugned overflow in that case: the provision was a remedial one, such overflows were not unprecedented, and the overflow in that case was limited. We do not believe that these factors can be applied automatically without reference to the context, however. Indeed, it would be surprising if a past overflow from the jurisdiction of one level of government could serve to justify subsequent overflows without eroding the heads of power concerned.<sup>69</sup>

Justices LeBel and Deschamps also appear to mischaracterise Chief Justice Dickson's decision in *GM v CNL*. Because the Court has not clearly isolated practice as a significant factor, there is a real risk that justices may confuse references to practice with references to precedent, which is what occurred here. Instead of calling for a discretionary and circumstance-dependent application of the *GM v CNL* factors (which may present problems in practice), Justices LeBel and Deschamps could have criticised the Chief Justice's decision by pointing out that she departed from *GM v CNL* when looking to practice rather than precedent. Given the split bench in *Re AHRA* and the lack of clarity in the Chief Justice's reasoning on that point, it seems unlikely that, going forward, the Court will be open to more wide-spread use of historical practice in ancillary doctrine determinations.

Finally, and unexpectedly, practice was rarely paired with cooperative federalism. I anticipated that the Court would endorse cooperative federalism schemes on the basis that they aligned with existing practice, but this reasoning was generally not present in the cases under study. Only one case included in the study dealt with cooperative federalism in depth, *Québec v Canada*, which

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68. *GM v CNL*, *supra* note 24 at 673. The Chief Justice in *GM v CNL* wrote:

The third relevant fact is that it is well-established that the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted. This Court has sustained federally-created civil actions in a variety of contexts: see *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331 (allowing the federal Crown to sue a private party for the loss of services of a member of the armed forces); *Jackson v. Jackson*, [1973] S.C.R. 205; *Zacks v. Zacks*, [1973] S.C.R. 891 (upholding the corollary relief provisions of the *Divorce Act* respecting alimony, maintenance or custody); and *Multiple Access Ltd. v. McCutcheon*, *supra* (upholding a civil remedy against directors and officers of federally incorporated companies who engaged in insider trading).

69. *Re AHRA*, *supra* note 27 at para 195.

concerned the federal government's decision to repeal the long-gun registry and destroy the data gathered pursuant to it. Québec argued that the destruction of the data was *ultra vires* and sought an order compelling the federal government to hand over the information. The majority of the Court found in favour of the federal government, while dissenting Justices LeBel, Abella, Wagner, and Gascon, found that, because the data was the product of a cooperative scheme, the federal government lacked jurisdiction to unilaterally destroy it.

The majority and dissent in *Québec v Canada* differed on the significance attributable to the existence of a cooperative practice. For the majority, the cooperative practice that developed could not displace the rigid contours of the constitutional text. They noted that cooperative federalism is both a descriptive and legal principle, one that “has been invoked to provide flexibility in separation of powers doctrines.”<sup>70</sup> However, they adopted a more traditional, “watertight compartments” view of federalism in observing that “[t]he principle of cooperative federalism...cannot be seen as imposing limits on the otherwise valid exercise of legislative competence.”<sup>71</sup> Accordingly, cooperative practices must give way to the recognised constitutional authority to act unilaterally.

The dissent took quite a different view, finding that the existence of a cooperative practice must play a role in the analysis. Having found the existence of a partnership between the federal and provincial government geared at creating, sharing, and using data for gun control purposes, the dissent observed that the validity analysis must take into account the federalism principle and the need to respect cooperative federalism arrangements.<sup>72</sup> In finding that cooperative practice could (and did) impose certain obligations on governments, the dissent elevated a particular type of practice—cooperation—and recognised that it had the power to shape constitutional duties and powers. In the absence of cooperative practice, the federal government could have acted unilaterally, but the cooperative relationship changed the equation. Cooperative practice thus had the power to affect constitutional boundaries.

#### D. GOVERNMENT PRACTICE AND “LIVING TREE” CONSTITUTIONALISM

In several cases, the enacting government sought to introduce legislation either in an area it had previously not legislated on or in a form that differed substantially from past iterations. On multiple occasions, members of the Court indicated that historic absence from a field did not preclude a successful jurisdictional

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70. *Québec v Canada*, *supra* note 5 at para 17.

71. *Ibid* at para 19.

72. *Ibid* at paras 148-56.

claim,<sup>73</sup> but, sometimes, an enacting government was unsuccessful in its attempt to move into the new area.<sup>74</sup> However, in no case did a “substantial difference” (as characterised by the Court) between the enacting government’s past legislation and the impugned statute prove fatal to its jurisdictional claim. In several cases, members of the Court observed that the heads of powers in sections 91 and 92 were not “frozen in time.”<sup>75</sup>

In four of the decisions contemplated by this study, the “living tree”<sup>76</sup> doctrine was expressly referenced in relation to federalism issues.<sup>77</sup> In three of these cases, the enacting government sought to extend its jurisdiction in new ways (whether into a new area or in a new form), and it was successful in two of those cases. Consider, for example, the *Reference re Employment Insurance Act*, in which the Court considered the validity of a federal law providing for maternity and parental benefits to workers. Justice Deschamps, writing for the Court, rejected the argument that federal jurisdiction was confined by the manner in which it had been exercised previously.<sup>78</sup> According to Justice Deschamps, the way the government had legislated in the past did not constrain its ability to exercise that competence in novel ways in the future, or, to put it in the “practice” language used in this article: the type or mode of past practice did not limit the types of future practice permitted in that same area.

One might be tempted to argue that Justice Deschamps’s decision—in so far as it suggests that practice reveals little about the content or scope of jurisdiction—undermines my claim in this article that the Court pays attention to past and existing government practice. However, her reasoning addresses the importance of *the details* of the practice, which is not at odds with the claim that the practice, in itself, attracts judicial interest.

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73. See e.g. *Ontario Hydro*, *supra* note 16 at 357-58.

74. See e.g. *Securities Reference*, *supra* note 18.

75. See e.g. *RJR-MacDonald*, *supra* note 24 at para 28, La Forest J, at para 204, Major J (criminal law power); *Zelensky*, *supra* note 20 at 951, Laskin CJC (criminal law power); *GM v CNL*, *supra* note 24 at 668, Dickson CJC (the trade and commerce power); *BC v Canada Trust*, *supra* note 24 at 478, Dickson J (as he then was) (provincial taxing power); *Martin Service Station Ltd v Minister of National Revenue* (1976), [1977] 2 SCR 996 at 997, 1006, Beetz J (federal jurisdiction over unemployment insurance).

76. *Edwards v Canada (Attorney General)* (1929), [1930] 1 DLR 98 at 106 (PC).

77. *Employment Reference*, *supra* note 24 at para 9; *Securities Reference*, *supra* note 18 at para 56; *Ontario Home Builders*, *supra* note 36 at para 145, La Forest J, concurring; *Ontario Hydro*, *supra* note 16 at 409, Iacobucci J, dissenting, citing Peter W Hogg, “The Charter of Rights and American Theories of Interpretation” (1987) 25 Osgoode Hall LJ 87 at 97-98; *BC v Canada Trust*, *supra* note 24 at 467, 478-79, Dickson J (as he then was).

78. *Employment Reference*, *supra* note 24 at paras 39, 47, 49.

One of the more surprising findings of this study is that justices did not treat legislative practice as a type of living tree constitutionalism. Prior to undertaking the study, I predicted that references to practice would appear alongside living tree reasoning. For example, one might predict that the Court would point to government practice as a changed social or political reality (or as a reflection of that changed reality) that warranted application of living tree reasoning. However, this type of reasoning did not manifest in the cases under study. In fact, legislative practice was rarely paired with living tree constitutionalism, and the two were on occasion presented as opposing forces, such as in Justice Deschamps's decision in *Reference re Employment Insurance Act*, discussed above. In that case, legislative practice was opposed to living tree constitutionalism; taking a frozen-in-time approach based on past practice that restricted the federal head of power, in contrast to a dynamic living tree approach, not constrained by past modes of practice. Under Justice Deschamps's conception, living tree constitutionalism could be thwarted or frustrated by honouring or adhering to legislative practice.

### III. CONCLUSION

A review of SCC decisions from the last 50 years reveals that government practice is not irrelevant to jurisdictional claims. Judicial references to practice, at least on occasion, appear to be more than just throw-away lines or rhetorical flourishes. Justices sometimes discuss practice in ways that imbue it with significance (even though they do not afford it the status of a primary determinant), and the outcomes of cases tend to align with existing practice. To be clear, the exact nature of past practice's significance is ambiguous and judicial reliance on it is variable and dependent, rather than consistent and independent.

Judicial reference to government practice falls into one of three general categories. First, government practice is used at the characterization step of a validity analysis, to assist in identification of a law's pith and substance. The Court has expressly acknowledged the relevance of legislative practice to this exercise and routinely considers the legislative history of statutes at this stage. Second, justices occasionally use historical practice when addressing secondary aspects of validity analyses, for example the jurisdictional balance requirement or the ancillary doctrine. The Court has not articulated a clear position on use of past practice for these purposes, and the disagreement between the justices in *Re AHRA* suggests that this approach is controversial and may be subject to reconsideration in the future. Third, justices refer to legislative practice when interpreting the meaning of sections 91 and 92 of the *Constitution Act, 1867*.

As discussed above, government practice appears to play a concrete, though supplemental, role in interpretation. The case law suggests that it may have a “plus value” in interpretation, even though it falls short of a stand-alone interpretive technique.

How might one explain justices’ appeal to government practice in interpretation? Consideration of practice does not fit easily with usual and well-accepted interpretive techniques.<sup>79</sup> Although the Court has not explained why references to practice assist interpretation of the constitutional text, it is worth asking whether a plausible explanation for this use of practice can be identified. The following discussion, which canvasses possible explanations, is preliminary and far from exhaustive. Still, it is intended to provide a basis for further academic dialogue on the topic. Six alternative explanations are offered: Justices are giving effect to, or are engaged in, a type of interpretation of (1) customary law, (2) originalism, or (3) traditionalism. Alternatively, the trend is explained by the Court’s discomfort with deciding federalism questions, either because these are (4) political questions, (5) there is room for coordinate construction in this area, or (6) the Court is using practice as a screen to give effect to other values.

The first suggestion—that justices are giving effect to, or are engaged in, interpreting customary law—can be dismissed fairly safely. The argument might be that justices are merely recognizing customary law when they affirm long-standing government practice.<sup>80</sup> However, this explanation is unsatisfactory given the Court’s express rejection of laches or an equivalent in the division of powers context. Nor does this explanation fit with practice’s “plus value” status, as one would expect practice to be the sole or primary determinant, rather than a supplemental factor, were justices simply recognizing customary law.

An alternative explanation might be that the justices are employing a form of originalist interpretation. Originalism, as discussed by Léonid Sirota and Benjamin Oliphant, requires interpretation of the constitution with reference to the “public meaning” of the words at the time the statute was enacted.<sup>81</sup> Originalism and judicial consideration of practice clearly have some intersection.

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79. See Marc O DeGirolami, “The Traditions of American Constitutional Law” (2020) 95 *Notre Dame L Rev* 1123 at 1126-34 (discussing Philip Bobbitt’s study on constitutional methodology). See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982).

80. For a discussion of customary law in separation of powers disputes in the United States, see e.g. David J Bederman, *Custom as a Source of Law* (Cambridge University Press, 2010) at 108-13.

81. “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50 *UBC L Rev* 505 at 506-07.

A pre-Confederation practice may shed light on the original public meaning of a particular word or phrase. If practice is treated as a mechanism to ascertain the original meaning of text, and valued only for its ability to do so, it may be thought of as “just another form of originalism.”<sup>82</sup> Because this study focused on general trends rather than specific details of practices, it is not possible to say whether the practices in the cases considered were always pre-Confederation practices. But certainly, justices did not always pair practice with originalist reasoning. Practice and originalism, while sharing some conceptual overlap, do not align entirely. If practice is significant in its own right, then even practices which developed after Confederation are still influential. For an originalist, practices post-dating the enactment of the Constitution are irrelevant to the interpretive exercise.<sup>83</sup> Originalist reasoning may explain some judicial references to historical practice, but it is not clear that it explains all of the cases under study.

It is possible that justices could be engaged in traditional interpretation. American scholar Marc O. DeGirolami describes traditionalism as an interpretive technique that “focuses on practices, rather than abstract principles or general tests, as informing constitutional meaning.”<sup>84</sup> DeGirolami’s recent article reviews traditionalism in American constitutional jurisprudence, finding that long-standing practices exert a legal pull, though he observes that “[t]he interpretive influence of a tradition is presumptive only and may be overcome by other considerations.”<sup>85</sup> While this description has some appeal, justices did not describe their reasoning as “traditionalist” and, further, traditionalism does not perfectly explain the cases under study. DeGirolami observes that traditionalism is a free-standing interpretative technique, whereas justices often referenced practice in the course of engaging with other interpretative techniques. That is, practice seems to have a “plus value” that piggy-backs on other techniques but is not generally treated as an independent analytical aid.

Decisions that align with, rather than depart from, practice may suggest that justices are more comfortable endorsing arrangements that governments have come to themselves, rather than imposing new arrangements upon them. As noted earlier, the Court’s modern embrace of cooperative federalism as an interpretive principle also reinforces the conclusion that the Court prefers,

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82. Bederman, *supra* note 80 at 109.

83. For a description of the distinction between traditionalists and originalists, see DeGirolami, *supra* note 79 at 1166–67.

84. *Ibid* at 1125. See also Cass R Sunstein, “Against Tradition” in Fred D Miller Jr, Ellen Frankel Paul & Jeffrey Paul, eds, *The Communitarian Critique of Liberalism* (Cambridge University Press, 1996) 207.

85. DeGirolami, *supra* note 79 at 1125.

at least to some extent, to defer to government practice. This article has revealed that the Court's reluctance to upset existing practice extends outside the cooperative realm, where one could plausibly attribute judicial deference to the value placed on government negotiation and compromise. Rather, this deference extends to unilateral practices that are undertaken by the enacting government without objection from the opposing government (and possibly in the face of objection). This reluctance to intervene in the status quo may reflect a deeper discomfort with the Court's role as an arbitrator of federalism disputes.

The idea that federalism disputes are political questions—and thus inappropriate for judicial review—can be found in American and some Canadian scholarship.<sup>86</sup> The idea relies on the notion that, as between two sovereign governments, political negotiation is the preferred mechanism of dispute resolution; or, as Patrick Monahan put it in his 1984 article: “The claim is simply that federalism issues are inescapably political and there is no plausible reason for removing them from the political arena.”<sup>87</sup> For example, in his 1974 book *In the Last Resort*, Paul Weiler argued that as “social and political change rendered the specific sections of the frozen constitution outmoded,”<sup>88</sup> federalism jurisprudence became less legalistic and more policy-oriented, to the point that talking about applying the law was essentially illusory.<sup>89</sup> As a result, he concluded, a “judicial umpire” was not needed to oversee the contemporary Canadian federation.<sup>90</sup> Rather, Weiler proposed, “the better technique for managing conflict is continual negotiation and political compromise.”<sup>91</sup> In Weiler's view, the Court's recent tendency to uphold legislation suggested that the Court itself was aware of the need for “judicial restraint in the area of federalism.”<sup>92</sup>

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86. See Richard Simeon & Beryl A Radin, “Reflections on Comparing Federalism: Canada and the United States” (2010) 40 *Publius* 357 at 363; Lynn A Baker & Ernest A Young, “Federalism and the Double Standard of Judicial Review” (2001) 51 *Duke LJ* 75; Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Carswell, 1974) at 164-85; Patrick J Monahan, “At Doctrine's Twilight: The Structure of Canadian Federalism” (1984) 34 *UTLJ* 47. See also Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (UBC Press, 2006). See also Léonid Sirota, “Federalism and Democracy: A Defence of Federalism-Based Judicial Review” (2012) [unpublished], online: [www.ssrn.com/abstract=2162161](http://www.ssrn.com/abstract=2162161) (arguing that federalism disputes are properly resolvable by courts).

87. Monahan, *supra* note 86 at 96.

88. Weiler, *supra* note 86 at 172.

89. *Ibid* at 173.

90. *Ibid* at 172-79.

91. *Ibid* at 175.

92. *Ibid* at 179.

This article's account of judicial attention to government practice may suggest an underlying unease on the part of the judiciary with federalism review, and a desire to alleviate that unease by giving effect to existing government practice. In this way, the phenomenon discussed in this article may support Weiler's claim that the Court has moved away from active intervention in federalism cases due to its awareness of the political nature of these disputes. However, given the long-standing tradition of judicial review of federalism issues in Canada and the lack of express confirmation by the Court that these issues are largely political in nature, a satisfactory explanation for judicial references to practices cannot rest solely on claims of the non-justiciability of federalism.

Alternatively, coordinate construction—the theory that, in addition to courts, governments have a legitimate role to play in constitutional interpretation—might explain judicial appeal to government practice. Dennis Baker explains the principle this way:

Coordinate interpretation means that each branch of government—executive, legislative, and judicial—is entitled and obligated to exercise its constitutional powers in accordance with its own interpretation of what the constitution entails.... [T]he interpretive power is shared between institutions in the course of an unfolding process of constitutional interpretation (in stark contrast to the unilateral “lightning strike” of interpretive authority claimed by judicial supremacists). For the coordinate theorist, it is only through repeated inter-institutional exchange that enduring constitutional principles emerge.<sup>93</sup>

The cases under study revealed a pattern of preferring arrangements already developed by government and deferring to de facto exercises of jurisdiction. One might be inclined to read into this pattern the Court's implicit endorsement of a government's view of the scope of its jurisdiction. In other words, references to government practice could signal justices' belief that governments have a legitimate say in their legal authority: Governments' interpretation of the division of powers is entitled to some respect. Again, this explanation appears lacking, as the justices do not describe what they are doing in these terms, nor does it account for the inconsistent references to practice. If governments have a legitimate role to play in determining the scope of their own powers, one would expect government practice to be referenced in all validity decisions.

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93. Dennis Rene Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (McGill-Queen's University Press, 2010) at 4-5. Baker's description of coordinate construction largely involves scenarios in which a legislature responds to a judicial ruling, rather than this sort of scenario wherein a court is confronted with long-standing government practice.

Finally, it is possible that justices use practice to draw on ideas or values that are important to constitutional or intergovernmental arrangements, even if those ideas or values are not capable of precise elaboration (or, alternatively, justices are uncomfortable articulating these values and ideas expressly because they have previously stated that these values do not play a role in the validity analysis). In other words, it may be that government practice acts as a “stand-in” or proxy for certain values or ideas to which the Court desires to give effect. For example, a court that endorses existing government practice may be giving effect to the value of efficiency. Without the benefit of evidence about the economic benefits and costs of alternative arrangements (the sort of evidence the Court has indicated is not relevant to the resolution of federalism disputes),<sup>94</sup> justices may be inclined to assume that the current arrangement reflects the most efficient state of affairs. That is, the government that can act at the lowest cost has done so and the other level of government has refrained from acting because of the higher costs to it. Thus, endorsing the status quo may seem to approve and value (what is perceived to be) the most efficient solution to the problem. If this is the case, then “practice” is really a “back door” that allows the Court to consider values like efficiency, which it is not otherwise permitted to consider. Relatedly, justices might be using existing practice as a “stand-in” for pragmatism or restraint. Because federalism decisions in the modern era can have profoundly expensive and tumultuous implications for government policy and organization, the Court may be reluctant to upset the “apple cart.” An endorsement of existing practice gives primacy to values of moderation, restraint, and certainty. However, if this is what justices are really doing when they appeal to practice, then the Court is obscuring the values and principles that actually have weight in federalism cases.

None of the possible explanations canvassed above completely justify judicial references to government practice. While some parts of the theory resonate for each explanation, some other parts do not. The underlying commonality for all explanations, though, is the idea that courts owe some deference to the existing arrangements that governments have developed. For scholars who argue that courts ought to respect government traditions or conceptions of constitutional responsibilities, they may take comfort in this review of cases, which has revealed a consensus among many SCC justices: Governments’ own practices matter to the resolution of federalism issues.

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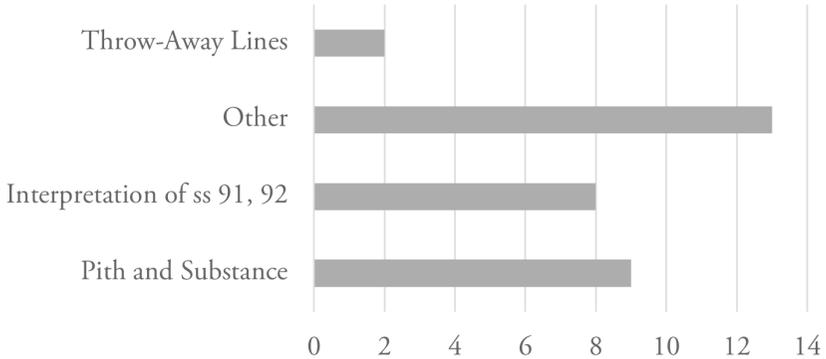
94. See e.g. *R v Comeau*, 2018 SCC 15 at para 83; *Securities Reference*, *supra* note 18 at para 90.

#### IV. APPENDIX A – LIST OF CASES

1. *AG (Can) v Can Nat Transportation*, [1983] 2 SCR 206.
2. *Attorney General of British Columbia v Canada Trust Co*, [1980] 2 SCR 466.
3. *Attorney-General for Manitoba v Manitoba Egg and Poultry Association et al*, [1971] SCR 689.
4. *Caloil Inc v Attorney General of Canada*, [1971] SCR 543.
5. *Di Iorio v Warden of the Montreal Jail* (1976), [1978] 1 SCR 152.
6. *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641.
7. *MacDonald et al v Vapor Canada Ltd* (1976), [1977] 2 SCR 134.
8. *Martin Service Station Ltd v Minister of National Revenue* (1976), [1977] 2 SCR 996.
9. *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161.
10. *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662.
11. *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929.
12. *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327.
13. *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14.
14. *R v Big M Drug Mart*, [1985] 1 SCR 295.
15. *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713.
16. *R v Hauser*, [1979] 1 SCR 984.
17. *R v Morgentaler*, [1993] 3 SCR 463.
18. *R v Wetmore*, [1983] 2 SCR 284.
19. *Reference Re Assisted Human Reproduction Act Reference*, 2010 SCC 61.
20. *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56.
21. *Reference Re Firearms Act (Can)*, 2000 SCC 31.
22. *Reference Re Securities Act*, 2011 SCC 66.
23. *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59.
24. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199.
25. *Robinson v Countrywide Factors Ltd* (1977), [1978] 1 SCR 753.
26. *Scowby v Glendinning*, [1986] 2 SCR 226.
27. *The Queen v Zelensky*, [1978] 2 SCR 940.
28. *Whitbread v Walley*, [1990] 3 SCR 1273.

## V. APPENDIX B – RESULTS

FIGURE 1: WHEN IS PRACTICE MENTIONED?



NOTE: Because practice is mentioned multiple times in some cases, results do not total 28.

FIGURE 2: HOW PRACTICE RELATES TO OUTCOME



NOTE: The results do not total 28, as some cases did not fit within any of these descriptions and some cases fit within multiple descriptions, due to differences between majority and dissenting opinions.