Criminal Law Power

The criminal law power is a legislative power allocated to Canada's federal government via the *Constitution Act, 1867*. More specifically, section 91(27) of this *Act* gives Parliament exclusive jurisdiction over "The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including Procedure in Criminal Matters."[2] This means that legislation that falls within the scope of section 91(27) must come from the federal Parliament (and *not* provincial legislatures) to avoid being struck down as *ultra vires* — i.e. beyond the responsibilities legally allocated to the government.[3]

The Scope of Section 91(27)

The criminal law power is notably broad.[4] According to the Supreme Court's landmark judgment in the *Margarine Reference*, section 91(27) extends to any legislation that contains a prohibition, a penalty, and a valid criminal law purpose. In that case, for example, the Court held that a federal ban on the manufacture and sale of margarine was *ultra vires*, because the true purpose of the ban — protection of the dairy industry — didn't constitute a valid criminal law purpose.[5]

In general, however, all elements of the criminal law power test (prohibition, penalty, and purpose) have been interpreted liberally by the courts. Prohibitions can include exemptions[6] and regulations,[7] and while the list of valid purposes was originally framed to include "public peace, order, security, health, [and] morality,"[8] this is a non-exhaustive list — neither "frozen in time [n]or confined to a fixed domain."[9] As a result, recent decades have seen the emergence of new valid purposes alongside novel issues, such as environmental protection or the reduction of tobacco use through restrictions on advertising.[10]

Provincial Governments and the Criminal Law

Jurisdictional disputes will sometimes come up between the federal and provincial governments around the criminal law power. This is because section 92 of the 1867 *Act* sets out areas of provincial jurisdiction which can sometimes conflict or overlap with the federal criminal law power. Examples include section 92(13), which addresses "Property and Civil Rights in the Province,"[11] and section 92(16), which addresses "Generally all Matters of a merely local or private Nature in the Province."[12] Where it is unclear if a law falls under one of these sections or section 91(27), courts will resolve the lack of clarity by assessing the pith and substance of the legislation to determine 1) what the dominant characteristic of the law is, and 2) which head of power that characteristic falls under.[13]

Although Parliament has a monopoly over the creation of criminal law and procedure per section 91(27) of the 1867 *Act*, it is important to point out that provincial governments continue to play an important role in the implementation of criminal law. The administration of justice, for example, is placed within the purview of the provinces via section 92(14),[14] and they accordingly exert significant influence over criminal law through their "decisions

to investigate, charge and prosecute offences."[15] Moreover, the provinces also maintain control over prisons per section 92(6) of the *Act*, and can legislate punishments (including imprisonment) for provincial laws per section 92(15) — as long as such laws simply enforce other legislation within provincial jurisdiction).[16]

[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[2] *Ibid* at s 91.

[3] *Cambridge Business English Dictionary,* (Cambridge University Press, 2011) *sub verbo* "ultra vires", (online): <dictionary.cambridge.org> [perma.cc/8T2K-BSXV].

[4] *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC) at 201.

[5] Peter Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Thomson Carswell) at 18-5.

[6] *Supra* note 4 at 202.

[7] *Supra* note 5 at 18-30.

[8] *Reference re Validity of Section 5 (a) of the Dairy Industry Act*, 1948 CanLII 2 at 50.

[9] *Supra* note 4.

[10] *R v Hydro-Québec*, 1997 CanLII 318 (SCC).

[11] *Supra* note 1 at s 92.

[12] *Ibid*.

[13] See, for example, *Westendorp v The Queen*, 1983 CanLII 1 (SCC).

[14] *Supra* note 5 at 19-2.

[15] *Ibid* at 18-2.

[16] *Ibid* at 18-3.