Federalism and the McLachlin Court

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Introduction: Political Context

- 1990’s was a decade of relatively high political activity on federalism front
  - Meech Lake Accord (1987-90)
  - Charlottetown Accord (1992)
  - Sovereignty Referendum (1995)
  - Secession Reference (1998)
  - Clarity Act (2000)
Political Context

- Since *Clarity Act*, federalism issues have much lower political salience.
- Political focus has shifted:
  - post-911 response to terrorism
  - Afghanistan/Iraq
  - globalization
  - climate change
  - economic restructuring
- Main federalism political issue is push for national securities regulator.
Federalism at the SCC

- Political trends reflected at SCC
- ‘McLachlin Court’ decided 29 federalism cases since January 2000
- Significantly fewer number of federalism cases than during early 1980’s (average of 10 cases/yr during earlier period)
- Very few cases attracted political attention, or featured direct gov’t conflict
Federalism Consensus

- There is a broad consensus on the SCC on the main outlines of federalism review.
- Court was unanimous in 26 of the 29 cases (90%), as compared with overall unanimity rate of 74% during same period.
- During entire period no federal or provincial law or regulation ruled invalid on federalism grounds.
Federalism Consensus

- Court has consistently and clearly applied the “pith and substance” doctrine in a way that favours validity of legislation
  - P & S focuses on “main purpose” of legislation rather than incidental effects
  - Allows legislation to be upheld even if it incidentally affects matters beyond jurisdiction
  - See, e.g., Global Securities or Firearms Reference
Federal References

- Federal gov’t utilized reference power in cases of political controversy
  - Firearms Reference (2000)
  - Reference Re Same Sex Marriage (2004)
- Federal legislation unanimously upheld in all 3 cases
Areas of Disagreement

- Given Court’s overall deference, there is a tendency for federal and provincial laws to overlap.
- Need to resolve potential conflict between federal and provincial laws.
- Interjurisdictional immunity, paramountcy, and extraterritoriality have been main areas of disagreement on SCC.
Interjurisdictional immunity

- Court sharply cut back scope of interjurisdictional immunity doctrine in *Canadian Western Bank v Alta* (2007)
  - Requirement that provincial law impair the core of federal power
  - Court favours co-operative federalism
  - Conflicts in law resolved through paramountcy
  - Departure from Justice Beetz legacy, over strong dissents by Bastarache J.
Paramountcy

- Paramountcy applied to render provincial law inoperative in *Mangat*
- However, overall court is restrained in finding conflicts
  - *Rothmans* (2005) – provincial regulation banning promotion or tobacco products not in conflict with federal legislation
Paramountcy (cont’d)

- *Canadian Western Bank* (2007) – Alta insurance legislation not in conflict with federal banking regulation
- *Chatterjee* (2009) – Ontario forfeiture laws not in conflict with *Criminal Code*
Territorial Issues

- Deferential approach on validity gives rise to issues of extra-territorial application of/ conflict between provincial laws
  - Introduces ‘sufficient connection’ test to determine application of provincial law
  - Differs from ‘real and substantial’ rule for court jurisdiction
Territorial Issues

- *Unifund* "sufficient connection" test applied in *Imperial Tobacco* to uphold validity of provincial legislation holding tobacco manufacturers liable for medical treatment costs
Conclusion

- Court taking a generally deferential approach to federalism issues
- Broad consensus within the Court on federalism analysis
- Focus is on technical, doctrinal issues, rather than politically sensitive ones
  - Interjurisdictional immunity
  - Paramountcy
  - Territorial application of provincial laws