Canada's constitution divides law making power between the Parliament of Canada and provincial legislatures. This is the essence of Canadian federalism. The division of legislative powers is done mainly by secs. 91-5 of the Constitution Act, 1867. The language of these sections is quite broad, using phrases like "Trade and Commerce," "Property and Civil Rights" and "Generally all Matters of a merely local or private Nature". In some cases the language granting law making power is antique – "Asylums" and Eleemosynary Institutions," for example. Still, in responding to a challenge that a particular law is beyond the constitutional power of either Parliament or a provincial legislature, a court must consult secs. 91-5 – even if they are antique and not precise, for they are the main sources by which law making power is given to Canadian legislatures.

A court that consults these provisions will scrutinize the opening words of secs. 91 and 92 particularly. These opening phrases use several concepts to create law making power, the main ones of which are:

- law making power is in relation to matters
- matters come within classes of subjects
- classes of subjects are assigned by the Constitution Act, 1867
- law making powers are exclusive.

These four concepts – in relation to, matters, coming within classes of subjects assigned by the Constitution Act, exclusivity – are not of universal intellectual interest, but they are crucial here because they are found in the text of the constitutional provisions that assign law making power to Canadian legislatures. For example, the opening words of s. 92 assigns power to the provincial legislatures in this way: In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say... Sixteen classes of subjects then follow. Section 91 grants law making power to Parliament in similar, if more convoluted language, and by using the same the same four concepts – in relation to, matters, coming within classes of subjects, exclusivity. T
he courts have built a method for dividing constitutional power out of this language and these four concepts. The method is now well settled. It is specific to Canadian federalism for two reasons: the language and the concepts used are specific to Canada's constitution; and the balance of power struck between the federal and provincial governments is a uniquely Canadian balance responsive to uniquely Canadian imperatives. Other federations confront similar problems of dividing and balancing power, but each solves this problem with its own technique to arrive at its own specific balance.

The concepts of 'matter' and 'in relation to' require some explanation."Matters" are constructed

by the courts. They are intellectual fabrications. Courts build them by taking a cue from the constitutional text, which requires that matters come within the 16 provincial and 31 federal "classes of subjects." To meet the requirement that a matter come within a class of subject, a court must insure that the matter it constructs is not too big. For example, 'the environment' is too big to be a matter. It does not come within any of the 16 provincial or 31 federal classes of subjects. But 'pollution of inland rivers by the dumping of substances in them' is a matter. So is 'control of the emissions of smokestacks of heavy industry'. These easily fit with in the enumerated classes of subjects.

Another way to think about this is that if 'the environment' were allowed to be a matter, it would be exclusively federal or exclusively provincial. This would disturb the necessary balance between federal and provincial governments that Canadian courts have found necessary for the Canadian federal system. Balance is really the whole point. All the rest is technique.

"In relation to" must be understood in light of an opposing concept – ancillary. The constitutional jurisprudence makes this clear. In relation to – meaning that the law is really all about this matter. The law is really all about this matter as opposed to "ancillary" to it. Ancillary – meaning that while the law may affect the matter, that is not its central focus, or what it is really all about. A law is in relation to a matter when its dominant or most important characteristics, its leading features, its pith and substance are really all about that matter. Perhaps the law affects the matter in an ancillary or incidental way; perhaps the law impacts on the matter in passing, or in ways that are beside the real thrust of the law, but that does not make the law "in relation to" the matter. Laws affect many things in a variety of ways, large and small. These side winds do not determine what matter a law is in relation to. That is determined by analysing the central focus of the law, what it is really all about.

In order to analyse what matter a challenged law is "in relation to" – to separate it from matters incidentally affected by the law – requires a "pith and substance analysis".

Pith and substance??? A pith and substance analysis scrutinizes the law to discover:

- the purpose of the law
- the legal effect of the law, that is, impacts that are expected to happen if the statute works as planned
- the practical effect of the law, that is, impacts the statute actually causes as it operates,

anticipated or unanticipated. The effects may arise from imperfect administration, discriminatory enforcement, or unanticipated side effects caused by the law on the universe of behaviours.

For example, in Saumur v. City of Quebec, [1953] 2 S.C.R. 299, the Court struck down a municipal by-law that prohibited leafleting because it had been applied so as to suppress the religious views of Jehovah's Witnesses. Similarly, in Attorney-General for Alberta v. Attorney-General for Canada, [1939] A.C. 117, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be to destroy banks, not taxation. However, merely incidental effects will not disturb the constitutionality of a law otherwise in relation to a matter that comes within the classes of subjects assigned to the enacting legislature.