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THE DISTRIBUTION OF LEGISLATIVE POWERS: AN OVERVIEW

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Revised by Isabelle Brideau, Laurence Brosseau and Allison Lowenger

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AUTHORSHIP

3 January 2022	Isabelle Brideau	Legal and Social Affairs Division
	Laurence Brosseau	Legal and Social Affairs Division
	Allison Lowenger	Legal and Social Affairs Division
16 October 2019	Isabelle Brideau	Legal and Social Affairs Division
	Laurence Brosseau	Legal and Social Affairs Division

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The Distribution of Legislative Powers: An Overview
(HillStudies)

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EXECUTIVE SUMMARY

The distribution of legislative powers among the various levels of government is a key feature of federalism. To guide this distribution, the *Constitution Act, 1867* divides legislative powers between the Parliament of Canada and the provincial legislatures. These powers are set out in sections 91 to 95 of the *Constitution Act, 1867*.

However, simply reading these provisions is not usually enough to determine which level of government has jurisdiction over which area. As new areas emerge and legislative authority becomes increasingly complex, questions remain, notably the following: Which areas fall under the jurisdiction of each level of government? Does a given level of government have the necessary authority to make laws in these areas? Canadian courts are regularly asked to consider these issues and, over time, have established some interpretive principles. The answers, nonetheless, remain complex.

This HillStudy focuses on the distribution of legislative powers between Parliament and the provincial legislatures in selected areas. First, it briefly describes the provisions of the *Constitution Act, 1867* that concern legislative powers. Second, it examines how certain powers were assigned to the appropriate level of government in light of the interpretive principles established by the courts.

Legislative jurisdiction in Canada is a very broad issue. The paper does not look at the interpretive principles themselves or list every legislative power. Instead, it provides an overview of the distribution of powers in certain areas selected because of their greater complexity. It also examines topics or legislation that fall under the aegis of both Parliament and the provincial legislatures, and cases where laws or legislative provisions have been ruled constitutional even though they infringe on the other level of government's jurisdiction.

Finally, it is important to note that the principles for interpreting the distribution of powers are constantly evolving. There are various reasons behind this evolution, such as the emergence of new areas for legislative action and the recognition that Indigenous peoples have an inherent right to self-government. In constitutional law, the metaphor of a living tree is often used to describe Canada's Constitution as a set of documents that must adapt to new situations and new social realities. The provisions of the *Constitution Act, 1867* dealing with the distribution of powers are no exception to this concept.

THE DISTRIBUTION OF LEGISLATIVE POWERS: AN OVERVIEW

1 INTRODUCTION

The distribution of legislative powers is an inherent part of all federal systems. It determines which level of government can legislate in the various areas of law. In Canada, the distribution of powers between the Parliament of Canada, which can enact legislation that applies to the entire country, and the provincial legislatures, which can pass legislation that applies within their respective boundaries, is set out in sections 91 to 95 of the *Constitution Act, 1867*.¹ The provinces are not subordinate to the Parliament of Canada and have areas of jurisdiction that are assigned exclusively to them.

It is worth noting that, pursuant to the *Constitution Act, 1867*, Canada's three territories do not have any jurisdiction in their own right. Under the Constitution, Parliament has full legislative jurisdiction over the territories, although it has delegated much of this power to the territorial legislatures through devolution.

Similarly, the powers of municipalities derive from provincial powers that have been delegated to them.

This HillStudy provides a brief outline of the distribution of powers among the different levels of government in Canada and summarizes the judicial interpretation of selected areas of jurisdiction.

2 THE DISTRIBUTION OF POWERS UNDER THE *CONSTITUTION ACT, 1867*

2.1 OVERVIEW

The distribution of powers provided for in sections 91 to 95 of the *Constitution Act, 1867* is deemed to be exhaustive. This means that any new area of legislative activity must be considered part of a power already set out in the *Constitution Act, 1867* even if this area did not exist in 1867.

Simply reading the *Constitution Act, 1867* is not sufficient to determine whether a given legislative area is under federal or provincial jurisdiction. Judicial interpretation has been necessary to clarify the constitutional powers of the various levels of government.²

Moreover, some powers have been interpreted very broadly, such as the provincial power to legislate in relation to property and civil rights. Other powers have been interpreted more narrowly, such as Parliament's general power to regulate commerce (see section 3.9 of this HillStudy).

2.2 SECTIONS 91 TO 95

Section 91 of the *Constitution Act, 1867* sets out the areas of jurisdiction exclusive to Parliament. These areas include matters that affect the entire country, such as military and naval service, and currency. Other areas were assigned to Parliament to ensure legal consistency across the country, such as bankruptcy, divorce and criminal law. In addition, in its introductory paragraph, section 91 grants Parliament the power to make laws for

the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.³

While the precise meaning and implications of “Peace, Order, and good Government” has been subject to a great deal of debate and legal interpretation, Parliament has exercised this “residual” power in areas where there is a gap in the distribution of powers for matters of national concern and in emergency situations.⁴

Section 92 sets out the areas of provincial jurisdiction, including taxation within the province, prisons, hospitals and municipalities. The provincial legislative power that has been interpreted most expansively is section 92(13), the power over property and civil rights. This power enables provinces to legislate on matters as varied as the regulation of professions, labour law, contract law and consumer protection.⁵ Finally, the provinces can also make laws respecting “all Matters of a merely local or private Nature in the Province.”⁶

While recognizing the principle of federal paramountcy where laws are inconsistent, section 92A provides that each province has legislative jurisdiction over exploration for non-renewable natural resources in the province, development, conservation and management of its non-renewable natural resources and forestry resources, as well as certain activities in relation to electrical energy facilities and sites.⁷

Section 93 of the *Constitution Act, 1867* expressly assigns education to the provinces, but this power is subject to provisions that protect specific religious minorities in some provinces.⁸

Section 94A of the *Constitution Act, 1867* enables Parliament to make laws respecting old age pensions and supplementary benefits; however, provincial laws take precedence over federal laws in this area.⁹ Finally, section 95 provides that jurisdiction over agriculture and immigration is concurrent between the two levels of government.

In certain cases, powers that would normally be vested in one level of government may be exercised by the other if they apply to certain people or areas. It is not a question, here, of Parliament or the provincial legislature interfering in the jurisdiction of the other body, but rather of each exercising its own competence on matters or persons

under its jurisdiction. For example, labour law is normally under provincial jurisdiction, but federal labour legislation applies to businesses and employers that are under federal jurisdiction.¹⁰

3 THE DISTRIBUTION OF POWERS IN SELECTED AREAS

3.1 CRIMINAL LAW

Under section 91(27) of the *Constitution Act, 1867*, all matters relating to criminal law are under Parliament's exclusive jurisdiction. Parliament has exercised this power when it enacted criminal legislation, notably the *Criminal Code* in 1890, among other criminal laws. However, to be considered a valid exercise of its criminal law power, the federal legislation must

- have a valid criminal law purpose, such as public peace, order, security, health or morality;
- be connected to a prohibition; and
- be backed by a penalty for violations.¹¹

Parliament's power to enact criminal law enables it to legislate in other areas, such as health and the environment. The following are examples of subjects that fall under Parliament's power to make criminal laws:

- **Tobacco** – Federal laws prohibiting the advertising and promotion of tobacco products have been found constitutionally valid.¹²
- **Drugs** – Parliament has the power to make laws respecting drugs. For example, it enacted the *Controlled Drugs and Substances Act*, which prohibits the production, importation, sale and possession of illegal substances, and the *Food and Drugs Act*, which regulates the production and sale of food and drugs for medical purposes.
- **Firearms** – The Supreme Court of Canada confirmed that the *Firearms Act*, whose purpose is “enhancing public safety by controlling access to firearms,” is a valid exercise of Parliament's power under section 91(27) of the *Constitution Act, 1867*.¹³
- **Rules of procedure and evidence** – The power to legislate in relation to criminal procedure is the exclusive jurisdiction of Parliament under section 91(27) of the *Constitution Act, 1867*. Indeed, the *Criminal Code* contains a number of provisions on criminal procedure. Moreover, the *Criminal Code* grants Parliament the exclusive authority to enact legislation concerning the rules of evidence.¹⁴

It is important to note that, while the rules of criminal procedure fall within federal jurisdiction, some powers are granted to the provinces under the “Administration of Justice in the Province” heading (discussed below), as is the power to legislate criminal penalties that enforce provincial laws.¹⁵

Parliament and the provincial legislatures share jurisdiction over prisons. While section 91(28) gives Parliament the power to establish, maintain and manage penitentiaries (for prison sentences of two years or more), the power to establish, maintain and manage prisons in a province (for sentences of less than two years) is assigned to the provinces by section 92(6). Sentences for offences arising from federal statute may be served in provincial institutions and, in turn, those arising from provincial legislation in federal penitentiaries, depending on the duration of the sentence.

Institutions for juveniles fall under provincial jurisdiction. The federal *Young Offenders Act* applies to persons aged 12 to 17 inclusive charged with offences arising from federal statutes, including the *Criminal Code*. Provincial young offenders Acts govern youths charged with offences under provincial statutes.

3.2 ADMINISTRATION OF JUSTICE

While section 91(27) of the *Constitution Act, 1867* provides that Parliament has jurisdiction over criminal procedure, the provinces generally enforce the *Criminal Code* – for example, by conducting investigations, laying charges and undertaking prosecutions. Section 92(14) gives the provinces jurisdiction over the “Administration of Justice in the Province.” The courts have interpreted this power to extend to criminal law, giving provinces authority over provincial police forces (and the rules governing them) and the prosecution of *Criminal Code* offences.¹⁶

The administration of justice power that is exclusive to the provinces also encompasses civil and criminal courts. This includes the power to constitute, maintain and organize provincial courts. Furthermore, section 91(27) expressly excludes “the Constitution of Courts of Criminal Jurisdiction” from Parliament’s criminal law power. However, the provinces’ administration of justice power must not impinge on Parliament’s exclusive power to appoint superior court judges.¹⁷

3.3 ENVIRONMENT

The *Constitution Act, 1867* does not include a distinct legislative power regarding the environment. As a result, both Parliament and the provincial legislatures can legislate in this area as long as they stay within their respective jurisdictions. To determine which level of government may deal with an environmental matter, it is necessary to identify the power enumerated in the *Constitution Act, 1867* that best matches the essence of the legislative or regulatory measure in question. The Constitution indicates whether that power is granted to Parliament or the provincial legislatures.

For example, Parliament has jurisdiction over environmental matters where the dominant characteristics of the laws in question correspond to “Sea Coast and Inland Fisheries,”¹⁸ “Navigation and Shipping,”¹⁹ and federal public property.²⁰

The dominant characteristic or purpose of the law is important; for example, if a law relates to fisheries only incidentally, it may not be within federal jurisdiction.

Parliament can also enact environmental legislation under its power to “make Laws for the Peace, Order, and good Government of Canada.” This was confirmed by the Supreme Court in a reference regarding the federal *Greenhouse Gas Pollution Pricing Act*. According to the Court, global warming causes harm beyond provincial boundaries and is a matter of national concern since, in the absence of federal legislation binding on the provinces, there is nothing to protect Canadians from the repercussions of a province taking insufficient measures to limit greenhouse gas emissions.²¹

In addition, Parliament can pass environmental laws under its exclusive jurisdiction over criminal law. This power was confirmed in cases such as *R. v. Hydro-Québec*, where the Supreme Court upheld certain provisions of the *Canadian Environmental Protection Act*²² that prohibit “specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances.”²³

The provinces can generally legislate on many environmental issues under their property and civil rights power and their jurisdiction over matters of a merely local or private nature in the province, among others.²⁴ As a result, since authority over the environment is shared, the Supreme Court has ruled that the federal and provincial governments can adopt coordination mechanisms in this area, particularly for environmental assessments.²⁵

3.4 NATURAL RESOURCES

Unlike the environment, natural resources are generally associated with specific powers under the *Constitution Act, 1867*.

The provinces can generally legislate in relation to natural resources under their powers regarding taxation;²⁶ local works and undertakings;²⁷ property and civil rights in the province;²⁸ and matters of a merely local or private nature in the province.²⁹ In 1982, section 92A was added to the *Constitution Act, 1867*, expanding the areas of exclusively provincial jurisdiction to include exploration for non-renewable natural resources in the province; development, conservation and management of non-renewable resources and forestry resources in the province; and development, conservation and management of sites and facilities in the province for the generation and production of electricity.³⁰

As noted above, territories do not exercise constitutional powers in their own right pursuant to the *Constitution Act, 1867*. Rather, jurisdiction over natural resources has been devolved to the governments of the Northwest Territories and Yukon. While many responsibilities have been transferred from the federal government to the

Nunavut government, Parliament has yet to devolve natural resources powers to that territory. In 2019, the federal and the Nunavut governments agreed to the principles of a final devolution agreement that would lead the official transfer of responsibilities for Nunavut's natural resources to the territorial government.³¹

Parliament can regulate natural resources on federally owned property, such as national parks, military bases and the sea that lies beyond the geographic boundaries of any province or territory.³² It also has jurisdiction to regulate natural resources on First Nations reserves.³³ Parliament can also make laws affecting natural resources using its jurisdiction over the following areas:

- the regulation of interprovincial and international trade and commerce;³⁴
- taxation;³⁵
- the sea coast and inland fisheries;³⁶
- listed exceptions to the provinces' local works and undertakings power;³⁷ and
- laws for the peace, order and good government of Canada.

In addition, Parliament can invoke its declaratory power under section 92(10)(c) to claim jurisdiction over natural resources. For example, in the *Nuclear Safety and Control Act*, Parliament declared that it has jurisdiction over nuclear energy and nuclear substances.³⁸ The declaratory power remains in active use regarding nuclear facilities, which would otherwise be within the province's powers.

3.5 TRANSPORT AND COMMUNICATION

Parliament and the provincial legislatures share jurisdiction over transport and communication works and undertakings. Indeed, section 92(10) of the *Constitution Act, 1867* takes a territorial approach to transportation and communication, granting provincial legislatures jurisdiction over "Local Works and Undertakings" except for "Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

Thus, under sections 92(10)(a) and 92(10)(b), a transport or communication undertaking generally comes under a province's jurisdiction if it is located solely within that province's boundaries. But if the undertaking extends beyond those boundaries, Parliament has jurisdiction over it.³⁹

However, Parliament can invoke its declaratory power under section 92(10)(c) to assert its legislative authority over works and undertakings that are not usually under its jurisdiction. In the over 472 occasions in which the declaratory power has been invoked, the majority has applied to the approval of local railway routes.⁴⁰

Other provisions in the *Constitution Act, 1867* that allocate jurisdiction over transportation to Parliament include the following:

- beacons, buoys, lighthouses and Sable Island (section 91(9));
- ferries between a province and any British or foreign country or between provinces (section 91(13));
- certain public works and property in each province that were transferred to Canada, including canals, public harbours, railways and military roads (section 108); and
- navigation and shipping (section 91(10)).⁴¹

In 2012, the Supreme Court decided that federal jurisdiction over shipping undertakings is not absolute but must be examined in light of section 92(10) in order to divide legislative authority over transportation and communication works and undertakings based on the territorial scope of their activities.⁴² Further, aviation is under the exclusive jurisdiction of Parliament pursuant to its power to make laws for the peace, order and good government of Canada.⁴³ This is true even when an aviation company operates within the boundaries of a single province.⁴⁴

Telecommunications and broadcasting, which are both interprovincial and international in scope, fall under exclusive federal jurisdiction pursuant to section 92(10)(a), section 91(29) and the “peace, order and good government” clause.⁴⁵ However, some provincial legislation, such as consumer protection laws, can apply to this area of jurisdiction.⁴⁶ Further, the Court of Appeal of Quebec has confirmed that the exclusive federal jurisdiction over telecommunications extends to online communications, clarifying a certain degree of legal uncertainty regarding constitutional jurisdiction over the Internet.⁴⁷

3.6 INDIGENOUS AFFAIRS

Section 91(24) of the *Constitution Act, 1867* grants Parliament exclusive legislative jurisdiction over “Indians, and Lands reserved for Indians.”⁴⁸ Accordingly, Parliament can make laws that apply only to “Indians,” even if the purpose of these laws would normally fall within provincial jurisdiction when applied to non-Indigenous persons.⁴⁹

Historically, Parliament used this power primarily for people who held status under the *Indian Act*,⁵⁰ which governs many aspects of the lives and lands of individuals with status. In addition, the federal government has enacted various other laws respecting First Nations people and lands reserved for them.⁵¹

The Supreme Court has ruled that Inuit, Métis and non-status First Nations people fall under the responsibility of the federal government under section 91(24) of the *Constitution Act, 1867*.⁵² While Supreme Court rulings did not establish a legal duty

to provide programs and services to Métis and non-status First Nations individuals, the federal government did commit to work with them to create a partnership “based on recognition of rights, respect, and partnership – in order to meaningfully advance the work of reconciliation.”⁵³

Despite the federal government’s exclusive jurisdiction in this era, provincial laws of general application in most cases still apply to Inuit and status First Nations people, as well as on reserves.⁵⁴ The Supreme Court has rejected the “enclave” theory, according to which First Nations lands (reserves) are sheltered from all provincial legislation.⁵⁵ For example, provincial laws on topics as varied as motor vehicles,⁵⁶ hunting⁵⁷ and labour issues⁵⁸ were found to apply on reserves in the absence of relevant federal legislation.

Indigenous peoples have an inherent right to self-government – that is, a right that derives from their own systems of governance and their historical occupation of the lands that now make up Canada. The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. Negotiated self-government agreements provide Indigenous communities with control over their internal affairs and may include the power to make decisions about program and service delivery in areas such as language and culture. The *Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*⁵⁹ (the Inherent Right Policy) was launched in 1995 to guide self-government negotiations with Indigenous communities. Self-government can be negotiated as part of a modern treaty. Modern treaties are signed where pre-1975 treaties or other legal mechanisms have not addressed Indigenous peoples’ land rights. Modern treaties are negotiated, constitutionally-protected agreements between the federal, provincial/territorial governments and Indigenous groups. Self-government agreements can also be stand-alone arrangements or be negotiated in a specific area, such as education.⁶⁰ There are currently 25 self-government agreements across Canada involving 43 Indigenous communities. Two self-government agreements in education, involving 35 Indigenous communities, also exist.⁶¹ Currently, there are about 50 self-government negotiation tables active across the country at various stages of the negotiation process, which in many cases are being negotiated in conjunction with modern treaties.⁶²

Matters closely related to self-government, such as jurisdiction over lands and peoples and regulation of traditional activities, have also emerged through jurisprudence.⁶³

3.7 HEALTH

The power to legislate in relation to health does not have a specific heading in the *Constitution Act, 1867* and has had to be linked to other areas of jurisdiction. In 1982, the Supreme Court called health an “amorphous topic” that can be addressed by both

federal and provincial legislation.⁶⁴ More recently, the Court reiterated this state of affairs in *Carter v. Canada (Attorney General)*, ruling that health is an “area of concurrent jurisdiction” and that, as a result, both levels of government can pass health legislation, depending on the circumstances and focus of the legislation.⁶⁵

The provinces exercise very broad health powers under several provisions of the *Constitution Act, 1867*, including section 92(7), which gives the provinces exclusive jurisdiction over establishing, maintaining and managing hospitals, asylums, and charitable institutions and hospices within their boundaries. In addition, the training and accreditation of doctors and other health professionals is understood to be a provincial responsibility. This power also enables the provinces to pass legislation respecting health insurance and workplace health and safety except in federally regulated workplaces.⁶⁶

As for Parliament, its exclusive health-related jurisdiction is limited to “Quarantine and the Establishment and Maintenance of Marine Hospitals” under section 91(11) of the *Constitution Act, 1867*. However, most federal health legislation arises from federal jurisdiction over criminal law and the federal spending power. Indeed, the *Canada Health Act*, which concerns federal funding for certain health services and the criteria that provincial laws must satisfy to receive full funding under the Canada Health Transfer, was enacted under Parliament’s spending power. The use of this power remains controversial according to some constitutional experts.⁶⁷

The federal criminal law power also enables Parliament to pass laws to prohibit conduct and products that are potentially dangerous to public health, such as the consumption of certain drugs and substances. The *Food and Drugs Act*, the *Cannabis Act* and the *Tobacco and Vaping Products Act* were enacted under this power. In addition, Parliament’s jurisdiction over “Patents of Invention and Discovery,” set out in section 91(22) of the *Constitution Act, 1867*, enables it to regulate pharmaceutical patents, which “has been held to extend to the compulsory licensing of the manufacture of patented drugs so as to improve access by bringing prices down to competitive levels.”⁶⁸

Finally, Parliament’s power to make laws for the peace, order and good government of Canada may enable it to pass health legislation in emergency situations or respecting matters of national importance.⁶⁹

3.8 FAMILY

As is the case with health, legislative authority over family law is not assigned exclusively to either Parliament or the provincial legislatures. Some aspects of family law are included in section 91 of the *Constitution Act, 1867*, while others are found under section 92. Section 91(26) gives Parliament exclusive jurisdiction over marriage and divorce, while section 92(12) grants the provincial legislatures exclusive power

to legislate in relation to the solemnization of marriage. The underlying nature of legislation must therefore be examined to determine whether it falls within the jurisdiction of one level of government or the other.

There may be some confusion about the difference between “marriage” and the “solemnization of marriage.” The difference is that Parliament’s authority over marriage concerns the fundamental conditions of marriage, such as the capacity to marry, while the provincial legislatures’ solemnization power concerns the criteria for the ceremony itself, the officiant’s authority, the need for parental consent for minors and the licensing requirement.⁷⁰

Moreover, provincial jurisdiction over property and civil rights and matters of a private nature gives significant family law powers to the provinces. These powers concern issues such as the separation of married and common-law couples, property division, adoption, foster care, child protection services, alimony, parenting arrangements and the impact of marriage on spouses’ estates.⁷¹

However, where these matters pertain directly to divorce, Parliament is also empowered to legislate in relation to alimony and parenting orders when they are ancillary to its divorce power, as the Supreme Court confirmed in several cases.⁷²

3.9 COMMERCE

Parliament’s jurisdiction over the “Regulation of Trade and Commerce” is provided in section 91(2) of the *Constitution Act, 1867*. While this power – which may seem broad at first glance – is assigned to Parliament alone, the provincial legislatures have exclusive jurisdiction over intra-provincial commerce under section 92(11) of the *Constitution Act, 1867*. As a result, the courts have limited Parliament’s jurisdiction to two areas.

First, Parliament’s jurisdiction over commerce enables it to enact legislation respecting interprovincial and international trade.⁷³ Second, Parliament has a “general” commerce power and can therefore enact legislation concerning commercial matters that affect the entire country.⁷⁴

While the first area involves clear geographic boundaries, the limits on the second area are more difficult to define. The Supreme Court has set out five criteria that legislation must meet to fall within Parliament’s general commerce power.⁷⁵ Such legislation is considered constitutional if

- it is part of a general regulatory scheme;
- the scheme it is part of is monitored by the continuing oversight of a regulatory agency;
- it is concerned with trade as a whole rather than with a particular industry;

- it is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
- the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.⁷⁶

These criteria, which are not an exhaustive list of the factors to be considered, must be evaluated on a case-by-case basis. Furthermore, the fact that federal commerce legislation meets one or more of these criteria does not by itself make that legislation constitutional.⁷⁷ In a recent Supreme Court case applying the above framework, the Court upheld the constitutionality of a creative scheme for federal–provincial cooperation on securities regulation.⁷⁸

3.10 BANKING

Under section 91(15) of the *Constitution Act, 1867*, Parliament has the authority to legislate in relation to banking, the incorporation of banks and the issue of paper money. Parliament has exercised this power by enacting legislation such as the *Bank Act*. Parliament’s exclusive jurisdiction to legislate in relation to “Savings Banks” is set out in section 91(16).

In addition, in *Canadian Pioneer Management Ltd. et al. v. Labour Relations Board of Saskatchewan et al.*, the Supreme Court ruled that the question of what constitutes a bank must be decided based on the definition used in federal legislation, not on the day-to-day operations of an institution.⁷⁹ As a result, while credit unions, trust companies and caisses populaires carry out similar activities to those of banks, they aren’t federally regulated. However, legislation was adopted under the federal *Bank Act* in 2012 to allow for the creation of federal credit unions,⁸⁰ paving the way for credit unions to convert to a federal charter while still being member-owned and run as cooperatives.

Despite Parliament’s exclusive jurisdiction over banking, provincial legislation enacted under a power assigned to the provincial legislatures can apply to banks if it is consistent with the relevant federal legislation. For example, in *Bank of Montreal v. Marcotte*,⁸¹ the Supreme Court found that some provisions of Quebec’s *Consumer Protection Act* apply to banks since they do not impair or significantly interfere with the exercise of Parliament’s jurisdiction.⁸² This landmark decision indicated that banks need to consider both provincial and federal consumer protection laws in their dealings, and they will continue to be a focus of federally regulated financial institutions as they try to determine the scope of provincial laws that might apply to them.

3.11 LABOUR

Despite its vast scope, legislative jurisdiction over labour is another power that is not specifically listed in the *Constitution Act, 1867*. The power to enact legislation regarding

labour relations stems primarily from the provinces' exclusive jurisdiction over property and civil rights provided in section 92(13) of the *Constitution Act, 1867*.⁸³

However, Parliament has the authority to pass labour relations legislation for sectors under its jurisdiction. As a result, numerous federal labour laws have been enacted and enforced, the most important being the *Canada Labour Code*.

Businesses and employers under federal labour and employment jurisdiction include banks, marine and air transportation businesses, radio and television broadcasters, most federal Crown corporations, and private businesses necessary to the operation of a federal Act.⁸⁴ The federal government also has jurisdiction to regulate labour relations in federal departments and agencies.⁸⁵

In cases where the connection to the federally regulated business is unclear, Parliament has jurisdiction over labour matters only if it is established that the work being performed is an integral part of the federally regulated business.⁸⁶

With respect to human rights violations, different jurisdictions have human rights laws in place and specific agencies tasked with enforcing such legislation. Federally regulated employees file complaints with the Canadian Human Rights Commission, with a tribunal working in conjunction to investigate unresolved issues and matters of public interest related to human rights infringements. Each Canadian province and territory has its own human rights body and anti-discrimination framework that apply to provincially regulated activities. Not all provinces and territories in Canada offer identical human rights protections.⁸⁷

3.12 EDUCATION

The first part of section 93 of the *Constitution Act, 1867* states, "In and for each Province the Legislature may exclusively make Laws in relation to Education." Under the federal laws that created them, the three territories now have comparable delegated powers. Section 93 also enshrined public funding for separate schools for Protestants and Catholics. Many provinces have since renegotiated their relationships with separate schools. Alberta, Ontario and Saskatchewan still provide public funding for Catholic schools.

The federal government provides financial support for post-secondary programs and the instruction of Canada's official languages. Section 23 of the *Canadian Charter of Rights and Freedoms* ensures the right to instruction in French or English to the children of francophone and anglophone minority communities in all of Canada's provinces.⁸⁸ Moreover, the federal government has assumed educational responsibilities in at least three areas of jurisdiction. The first pertains to the education of military personnel and their children, in accordance with section 91(7), which encompasses "Militia, Military and Naval Service, and Defense." Additionally,

Correctional Service Canada is responsible for education, ranging from basic education to the post-secondary level, in federal penitentiaries. Furthermore, the *Indian Act* contains education provisions that define the educational authority and responsibilities of the federal Minister of Indigenous Services.⁸⁹ Although the country's educational system is highly decentralized, the Council of Ministers of Education, Canada was formed in 1967 by the provincial and territorial ministers responsible for education to provide a forum in which they could discuss matters of mutual interest, undertake educational initiatives cooperatively, and advocate for more local interests with national educational organizations, the federal government, foreign governments and international organizations.⁹⁰

3.13 CONCURRENT JURISDICTIONS

While the courts have interpreted some legislative powers as concurrent, the *Constitution Act, 1867* also specifically provides for concurrent powers. Sections 94A and 95 of the *Constitution Act, 1867* set out concurrent jurisdictions for immigration, agriculture and old age pensions and supplementary benefits.

3.13.1 Immigration

Immigration is an area under concurrent jurisdiction pursuant to section 95 of the *Constitution Act, 1867*. This provision expressly makes federal legislation paramount in the event of any conflict with provincial legislation. For example, federal jurisdiction was exercised in the case of the *Immigration and Refugee Protection Act*, which includes provisions

setting out the broad strokes of who should be admitted to Canada for what purposes, the recourse available to those unauthorized to stay, and how unsuccessful applicants are to be removed.⁹¹

The provinces and territories play a role in the selection of certain immigrants under provincial nominee program agreements.⁹² These agreements enable the provinces and territories to nominate immigrants using selection criteria based on regional interests. The system works differently in Quebec. The *Canada–Québec Accord Relating to Immigration and Temporary Admission of Aliens* delegates responsibility for selecting economic immigrants to the Quebec government, as well as responsibility for the reception and integration of permanent residents.⁹³

The *Immigration and Refugee Protection Act* outlines parameters for consultation between the federal government and the provinces with respect to the number of immigrants admitted in each class, and their distribution over the country considering regional, economic and demographic needs and which measures should be taken to facilitate their integration into Canadian society.⁹⁴ The federal government may also

consult with the provinces on immigration policies and programs to facilitate cooperation and to consider the effects these may have on the provinces.⁹⁵

While immigration is inherently a concurrent jurisdiction, Parliament has exclusive legislative authority for “Naturalization and Aliens” under section 91(25) of the *Constitution Act, 1867*. As a result of this exclusive jurisdiction, Parliament alone determines the conditions that foreign nationals must meet to obtain Canadian citizenship.⁹⁶ The key federal legislation in this regard is the *Citizenship Act*.

3.13.2 Agriculture

Section 95 of the *Constitution Act, 1867* also provides that agriculture is under the concurrent jurisdiction of Parliament and the provincial legislatures, and that federal laws take precedence in case of conflict. In addition, Parliament’s legislative authority over some agriculture-related sectors stems from other areas of jurisdiction, including its criminal law power, which enables it to legislate in the area of food safety, and its trade and commerce power, which permits it to enact laws governing interprovincial trade in agricultural products.⁹⁷

Agriculture encompasses a fairly wide range of topics, and the courts have often been asked to rule on which “Laws in relation to Agriculture” lie within the power set out in section 95. The courts have generally construed this provision somewhat narrowly. For example, the courts have for the most part excluded matters relating to the marketing of agricultural products from the scope of section 95.⁹⁸

Effective food system governance requires addressing policy coherence and coordination across an array of sectors such as agriculture, trade, public health, finance, environment and fisheries while also communicating between the federal government, the provinces and, in some cases, municipalities. A functioning agricultural framework is contingent on governments working cooperatively, as shown by several examples in recent years.⁹⁹

3.13.3 Old Age Pensions and Supplementary Benefits

Finally, section 94A, which was the result of amendments made to the *Constitution Act, 1867* in 1951 and 1964, provides for concurrent jurisdiction over old age pensions and supplementary benefits.¹⁰⁰ The Canada Pension Plan, first introduced in 1965, was made possible by federal jurisdiction in this area. Provinces were entitled to reject the federal government’s plan and establish their own contribution-based pension scheme, but only Quebec has ever done so.¹⁰¹

This provision is an exception to the federal paramountcy principle since provincial legislation takes precedence in cases of inconsistency.¹⁰²

NOTES

1. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.).
2. For more information on the judicial interpretation of the distribution of powers, see Dara Lithwick, [A pas de deux: The Division of Federal and Provincial Legislative Powers in Sections 91 and 92 of the Constitution Act, 1867](#), Publication no. 2015-128-E, Library of Parliament, 8 December 2015.
3. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 91.
4. Dara Lithwick, [A pas de deux: The Division of Federal and Provincial Legislative Powers in Sections 91 and 92 of the Constitution Act, 1867](#), Publication no. 2015-128-E, Library of Parliament, 8 December 2015.

When it is actually employed, “Peace, Order and Good Government” tends to cover subject matter that diverges from the areas covered in the list that follows the opening clause or domains that have developed since Confederation (such as pollution, or climate change).
5. Peter W. Hogg, “Chapter 21 – Property and Civil Rights,” *Constitutional Law of Canada*, 5th ed., 5 November 2019.
6. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 92(16).
7. *Ibid.*, s. 92A.
8. See, as an example, *ibid.*, s. 93A. It is important to remember that the power to legislate in relation to education may also be negotiated in self-government agreements with Indigenous communities. Section 35 of the *Constitution Act, 1982*, recognizes that Indigenous peoples in Canada have an inherent right to self-government. The *Agreement with Respect to Mi’kmaq Education in Nova Scotia* and the *Anishinabek Nation Education Agreement* are examples of such agreements. See [Constitution Act, 1982](#), being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11; Government of Canada, [Agreement with Respect to Mi’kmaq Education in Nova Scotia](#), Background; and Government of Canada, [Anishinabek Nation Education Agreement](#).
9. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 94A.
10. Peter W. Hogg, “Chapter 21.8 – Labour Relations,” *Constitutional Law of Canada*, 5th ed., 5 November 2019.
11. [Reference re Firearms Act \(Can.\)](#), 2000 SCC 31, para. 27.
12. [RJR-MacDonald Inc. v. Canada \(Attorney General\)](#), [1995] 3 S.C.R. 199.
13. [Reference re Firearms Act \(Can.\)](#), 2000 SCC 31, para. 27.
14. The provinces cannot pass laws that affect the admissibility of evidence in criminal matters. In addition, under the principle of federal paramountcy, rules of evidence adopted by the provinces that are inconsistent with those enacted by Parliament do not apply to criminal proceedings.
15. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), ss. 92(14)–92(15). An example would be a fine or penalty imposed for contravening a provincial rule.
16. [O’Hara v. British Columbia](#), [1987] 2 S.C.R. 591; and [Di Iorio v. Warden of the Montreal Jail](#), [1978] 1 S.C.R. 152.
17. Section 96 of the *Constitution Act, 1867* provides as follows: “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”
18. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 91(12). This power was exercised in enacting the Fisheries Act, in which Parliament provided a legislative framework for “the conservation and protection of fish and fish habitat, including by preventing pollution.” See [Fisheries Act](#), R.S.C. 1985, c. F-14, s. 2.1.
19. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 91(10).
20. *Ibid.*, s. 91(1A).
21. [References re Greenhouse Gas Pollution Pricing Act](#), 2021 SCC 11, para. 191.
22. This legislation is now entitled the *Canadian Environmental Protection Act, 1999*. See [Canadian Environmental Protection Act, 1999](#), S.C. 1999, c. 33.

23. [R. v. Hydro-Québec](#), [1997] 3 S.C.R. 213, para. 130.
24. For example, the Prince Edward Island government recently passed the *Plastic Bag Reduction Act*, which is designed to “reduce waste and environmental damage resulting from single-use checkout bags” in Prince Edward Island. See Prince Edward Island, [Plastic Bag Reduction](#).
25. [MiningWatch Canada v. Canada \(Fisheries and Oceans\)](#), 2010 SCC 2, para. 41.
26. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 92(2).
27. *Ibid.*, s. 92(10).
28. *Ibid.*, s. 92(13).
29. *Ibid.*, s. 92(16).
30. *Ibid.*, s. 92A.
31. Government of Canada, [Nunavut devolution](#).
32. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 91(1A).
33. *Ibid.*, s. 91(24).
34. *Ibid.*, s. 91(2).
35. *Ibid.*, s. 91(3).
36. *Ibid.*, s. 91(12).
37. *Ibid.*, s. 92(10)(a).
38. [Nuclear Safety and Control Act](#), S.C. 1997, c. 9, s. 71.

Section 92(10)(c) of the *Constitution Act, 1867* provides for exceptions to provincial jurisdiction over local works and undertakings, including works located within a province that are “declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.” See also section 91(29), under which Parliament may enact legislation in relation to the exceptions set out in the list of classes of subjects assigned exclusively to the legislatures of the provinces.
39. In general, works and undertakings that extend from one province into another are within Parliament’s jurisdiction, even if the total distance involved is very short. On this point, see [Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.](#), 44 O.R. (2^d) 560, 4 D.L.R. (4th) 452 (CanLII), in which the Court of Appeal for Ontario found that a bus service serving both Ottawa, Ontario, and Hull, Quebec, is an interprovincial work or undertaking that is under Parliament’s jurisdiction pursuant to section 92(10)(a) of the *Constitution Act, 1867*, and therefore that labour relations matters are subject to the *Canada Labour Code*.
40. Peter W. Hogg, “Chapter 22 – Transportation and Communication,” *Constitutional Law of Canada*, 5th ed., 5 November 2019.
41. Patrick J. Monahan, Byron Shaw and Padraic Ryan, “Chapter 12 – The Constitution and Transportation,” *Constitutional Law*, 5th ed., 2017.
42. [Tessier Ltée v. Quebec \(Commission de la santé et de la sécurité du travail\)](#), 2012 SCC 23, para. 24.
43. [Reference re legislative powers as to regulation and control of aeronautics in Canada](#), [1930] S.C.R. 663.
44. Guy Régimbald et al., “Constitutional Law: Division of Powers,” *Halsbury’s Laws of Canada*, 2019 Reissue, p. 541.
45. [Reference re Regulation and Control of Radio Communication](#), [1931] S.C.R. 541; and [Rogers Communications Inc. v. Châteauguay \(City\)](#), 2016 SCC 23, para. 42.
46. See, for example, [Attorney General \(Que.\) v. Kellogg’s Co. of Canada et al.](#), [1978] 2 S.C.R. 211; and [Irwin Toy Ltd. v. Quebec \(Attorney General\)](#), [1989] 1 S.C.R. 927.
47. [Procureur général du Québec c. Association canadienne des télécommunications sans fil](#), 2021 QCCA 730 (CanLII).
48. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 91(24). Note that the term “Indian” refers to all Indigenous peoples in Canada. For more on this topic, see [Daniels v. Canada \(Indian Affairs and Northern Development\)](#), 2016 SCC 12.

49. Peter W. Hogg, "Chapter 28.2 – Provincial Legislative Power," *Constitutional Law of Canada*, 5th ed., 5 November 2019. Under this power, Parliament adopted the first version of the *Indian Act* in 1876.
50. A person registered in the Indian Register under section 6 of the *Indian Act* is deemed to have Indian status and be entitled to certain rights and benefits, and to have access to programs and services provided by the federal, provincial and territorial governments. See [Indian Act](#), R.S.C. 1985, c. I-5.
51. Brittany Collier, "Spending and Jurisdiction for First Nations, Métis and Inuit Peoples," *HillNotes*, Library of Parliament, 26 January 2016; and Sara Fryer and Olivier Leblanc-Laurendeau, [Understanding Federal Jurisdiction and First Nations](#), Publication no. 2019-51-E, Library of Parliament, 29 November 2019.
52. [Reference as to whether "Indians" includes in s. 91 \(24\) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec](#), [1939] S.C.R. 104; and [Daniels v. Canada \(Indian Affairs and Northern Development\)](#), 2016 SCC 12, para. 57.
53. Government of Canada, [The CAP/Daniels Decision – Frequently asked questions](#).
54. Peter W. Hogg, "Chapter 28.2 – Provincial Legislative Power," *Constitutional Law of Canada*, 5th ed., 5 November 2019.
55. See, for example, [R. v. Francis](#), [1988] 1 S.C.R. 1025; [Cardinal v. Attorney General of Alberta](#), [1974] S.C.R. 695; and [Four B Manufacturing v. United Garment Workers](#), [1980] 1 S.C.R. 1031.
56. [R. v. Francis](#), [1988] 1 S.C.R. 1025.
57. [Dick v. La Reine](#), [1985] 2 S.C.R. 309; and [Kruger and al. v. The Queen](#), [1978] 1 S.C.R. 104.
58. [Four B Manufacturing v. United Garment Workers](#), [1980] 1 S.C.R. 1031.
59. Government of Canada, [The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government](#).
60. See, for example, the *Nisga'a Final Agreement Act*, signed in 1999, which gives the Nisga'a Nation the power to make laws in relation to child and family services, education and police services, among other areas. [Nisga'a Final Agreement Act](#), S.C. 2000, c. 7.
61. Government of Canada, [Self-government](#).
62. Ibid.
63. See [Alberta \(Aboriginal Affairs and Northern Development\) v. Cunningham](#), 2011 SCC 37; and [R. v. Pamajewon](#), [1996] 2 S.C.R. 821.
64. [Schneider v. The Queen](#), [1982] 2 S.C.R. 112, p. 142.
65. [Carter v. Canada \(Attorney General\)](#), 2015 SCC 5, para. 53.
66. Martha Butler and Marlisa Tiedemann, [The Federal Role in Health and Health Care](#), Publication no. 2011-91-E, Library of Parliament, 20 September 2013.
67. See the description of the doctrinal debate in Hoi L. Kong, "Chapter 20 – The Spending Power in Canada," in Peter Oliver et al., ed., *The Oxford Handbook of the Canadian Constitution*, 2017.
68. Peter W. Hogg, "Chapter 32.2 – Federal Power over Health," *Constitutional Law of Canada*, 5th ed., 5 November 2019.
69. See Martha Butler and Marlisa Tiedemann, [The Federal Role in Health and Health Care](#), Publication no. 2011-91-E, Library of Parliament, 20 September 2013.
70. Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., 2014, p. 507 [AVAILABLE IN FRENCH ONLY].
71. Peter W. Hogg, "Chapter 27.1 – Distribution of Powers," *Constitutional Law of Canada*, 5th ed., 5 November 2019; and Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., 2014.
72. See, for example, [Jackson v. Jackson](#), [1973] S.C.R. 205; and [Zacks v. Zacks](#), [1973] S.C.R. 891.
73. Guy Régimbald et al., "Constitutional Law: Division of Powers," *Halsbury's Laws of Canada*, 2019 Reissue, pp. 489–494.
74. Ibid., p. 490.
75. [General Motors of Canada Ltd. v. City National Leasing](#), [1989] 1 S.C.R. 641.

76. Ibid.
77. Ibid.
78. [Reference re Pan-Canadian Securities Regulation](#), 2018 SCC 48.
79. [Canadian Pioneer Management Ltd. et al. v. Labour Relations Board of Saskatchewan et al.](#), [1980] 1 S.C.R. 433.
80. Section 2 of the *Bank Act* states that a “federal credit union” is a bank that, within the meaning of section 12.1, is organized and carries on business on a cooperative basis.
81. [Bank of Montreal v. Marcotte](#), 2014 SCC 55.
82. For more information on the constitutional arguments raised in this case, see Adriane Yong, “Banks and Consumer Protection: Not Exclusively Parliament’s Jurisdiction,” *HillNotes*, Library of Parliament, 18 February 2015.
83. Peter W. Hogg, “Chapter 21.8 – Labour Relations,” *Constitutional Law of Canada*, 5th ed., 5 November 2019.
84. Ibid.
85. Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., 2014, p. 507.
86. For example, in *Construction Montcalm Inc. v. Min. Wage Com.*, the Supreme Court decided that the fact that an independent contractor’s employees were helping build an airport runway was insufficient for federal legislation to apply to them, as they were not responsible for designing or operating the runway, merely building it. As a result, this work was not an integral part of Parliament’s jurisdiction over aeronautics. See [Construction Montcalm Inc. v. Min. Wage Com.](#), [1979] 1 S.C.R. 754.
87. For a comparative look at different human rights mechanisms across Canada, see Canadian Centre for Diversity and Inclusion, [Overview of Human Rights Codes by Province and Territory in Canada](#), January 2018.
88. [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
89. Section 114(2) of the *Indian Act* specifies that the Minister has the authority to “establish, operate and maintain schools for Indian children.”
90. Sandra Vergari, “Safeguarding Federalism in Education Policy in Canada and the United States,” in *Publius: The Journal of Federalism*, Vol. 40, No. 3, Summer 2010, pp. 534–557.
91. Laurence Brosseau, [Immigration Policy Primer](#), Publication no. 2020-05-E, Library of Parliament, 9 December 2019.
92. Government of Canada, [Immigrate as a provincial nominee](#).
93. Canada compensates Quebec for the reception and integration services it provides. See Government of Canada, [Canada–Québec Accord relating to Immigration and Temporary Admission of Aliens](#), 5 February 1991; and Julie Béchar, [Immigration: The Canada–Quebec Accord](#), Publication no. 2011-89-E, Library of Parliament, 5 April 2018.
94. [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27, s. 10(2).
95. Ibid., ss. 10(1)–10(2).
96. Julie Béchar, [Immigration: The Canada–Quebec Accord](#), Publication no. 2011-89-E, Library of Parliament, 5 April 2018.
97. Donald Buckingham, “Agriculture,” *Halsbury’s Laws of Canada*, 2018 Reissue.
98. Ibid.
99. In 2018, a five-year, \$3-billion investment called the Canadian Agricultural Partnership by federal, provincial, and territorial governments was tabled to strengthen the agricultural sector. National supply management initiatives in the egg and dairy sectors are widely considered another example of successful cooperation in agriculture across jurisdictions. See Sarah Berger Richardson and Nadia Lambek, “[Federalism and fragmentation: Addressing the possibilities of a food policy for Canada](#),” *Canadian Food Studies*, Vol. 5, No. 3, September 2018, p. 37.
100. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 94A.

101. The province created the Quebec Pension Plan in 1965–1966, which is similar to the Canada Pension Plan in most regards.
102. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), s. 94A.