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A pas de deux: The Division of Federal and Provincial Legislative Powers in Sections 91 and 92 of the *Constitution Act, 1867*

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A PAS DE DEUX: THE DIVISION OF FEDERAL AND PROVINCIAL LEGISLATIVE POWERS IN SECTIONS 91 AND 92 OF THE CONSTITUTION ACT, 1867*

1 INTRODUCTION

The Canadian federation is divided between a central government and provincial and territorial governments. In discussions of the relationship between federal and provincial governments (unlike provinces, territories in Canada do not have inherent jurisdiction, but possess only the powers delegated or devolved to them by the federal government),¹ the term “levels of government” is often used. This term can be misleading, as it implies that one government is subordinate to the other. Instead, the federal government and the provincial governments are better described as “coordinate,” having equal authority and independence in their distinct spheres.²

In classical ballet, a *pas de deux* is a dance for two performers that involves solo variations by each partner that concludes with both partners dancing together to display their talent. The division of legislative powers between the federal Parliament and the provinces found in sections 91 and 92 of the *Constitution Act, 1867* can be understood as such a dance, where each partner has a sphere of legislative competence, yet interaction and cooperation are required for the federation to succeed.

This publication provides information on the division of federal and provincial powers by exploring relevant provisions of the *Constitution Act, 1867* and by outlining the role of the courts in negotiating this division.

2 HISTORY: SHALL WE DANCE?

Modern Canada began as a collection of colonies³ in British North America. These were economically and politically separate, though joined by their ties to Britain. By the 1860s, the leaders of the various colonies determined that the time had come to unite as one country. Two seminal meetings were held in 1864 that shaped the development of modern Canada.⁴ In September, leaders of Prince Edward Island, Nova Scotia, New Brunswick, and the Province of Canada composed of Canada West (now Ontario) and Canada East (now Quebec) met in Charlottetown to consider a confederation of all of British North America. They discussed what the federation should look like, how the government should be structured, how powers should be divided between the central government and the provinces, and how finances should be addressed.

A few weeks later, in mid-October, these delegates met again in Québec (this time, Newfoundland was also in attendance).⁵ At the Québec Conference, as in Charlottetown, delegates debated the structure and nature of a future union. Afterward, delegates from the colonies drafted a text known as the 72 Resolutions⁶ (or the Québec Resolutions), which set out the terms of what would become the Canadian federation. Many of the resolutions became part of Canada’s founding

document, the *British North America Act* (since 1982 known as the *Constitution Act, 1867*). These resolutions dealt in particular with the distribution of powers between a new federal Parliament and the provinces, the number of seats each province would have in a federal legislature, the financial structure of the new government, and the method and frequency of federal elections.

After the Charlottetown and Québec conferences, the provinces of Canada West and Canada East, New Brunswick and Nova Scotia passed union resolutions in their legislatures. The time had come to formalize the union. Between December 1866 and March 1867, delegates met again in London, England, to draft the text of Canada's constitution using the 72 Resolutions as a starting point. Passage came swiftly. The text of the bill was submitted to Queen Victoria on 11 February 1867 and was passed by the House of Lords by the end of that month. The bill also received swift passage by the British House of Commons. The *British North America Act* received Royal Assent on 29 March 1867. The Dominion of Canada, bringing together the provinces of Ontario, Quebec, New Brunswick and Nova Scotia, was born.

2.1 WHY FEDERALISM?

The decisions made at Confederation concerning the distribution of powers recognized that issues of a national or international nature would fall under federal jurisdiction, whereas issues of a local or provincial nature would fall under provincial jurisdiction. Some areas, such as agriculture, would have shared elements of jurisdiction (being both local and interprovincial). Of note, default legislative power, also known as residuary power, would belong to the federal Parliament (unlike in the United States or Australia, where the default power belongs to the states).⁷

The decision of delegates (now called the “Fathers of Confederation”) at the Charlottetown and Québec conferences to opt for a federal system in Canada came as the result of compromise. A centralized legislative union had been proposed by some, while others argued for the maintenance of the special identities of the provinces within a united country. As noted by constitutional law expert Peter Hogg, this tension between unity and diversity probably lies at the origin of all federal systems.⁸

As Hogg argues, one of the advantages of a federal form of government in a country as large as Canada is that local matters can be dealt with locally while the central government focuses on issues of national importance. He notes that “there would inevitably be diseconomies of scale if all governmental decision-making was centralized in one unwieldy bureaucracy.” As well, enabling provinces to exert significant jurisdiction over issues within the province allows for different preferences and interests to be pursued in different parts of the country.⁹

3 LEGISLATIVE AUTHORITY IN THE *CONSTITUTION ACT, 1867*

Sections 91 and 92 (and to a lesser extent sections 93 to 95) of the *Constitution Act, 1867* assign areas of legislative authority to the federal and provincial legislatures. The term “legislative authority” refers to the authority to enact valid laws without treading on the constitutionally assigned powers of another level of government. Areas of legislative authority are often referred to as “heads of power.”

However, determining whether a matter falls under federal or provincial jurisdiction is not always as easy as simply reading the text of the Constitution. This is for several reasons. First, numerous policy areas have arisen over time that were not explicitly assigned in the Constitution. Second, judicial interpretation has expanded certain sections of the Constitution beyond what might be expected from a plain reading of the language and, conversely, has narrowed other sections. Courts have also interpreted some policy areas as being areas of overlapping or “concurrent” jurisdiction.

3.1 FEDERAL HEADS OF POWER: SECTION 91

Broadly speaking, section 91 of the *Constitution Act, 1867* assigns matters that affect the entire country to the federal Parliament. Examples include the postal service, the military and currency. Some heads of power were assigned to the federal Parliament to ensure legal consistency across the country; this pertains to matters such as bankruptcy, divorce, and criminal law. For other matters, such as interprovincial ferries, navigation and shipping, and fisheries, federal heads of power cross provincial borders. As well, section 91 assigns to Parliament legislative authority over unemployment insurance, telecommunications, trade and commerce, banking, copyright law, and matters related to First Nations people – specifically, the registered (status) Indian population – and reserves, as well as several additional matters.

Two of Parliament’s important powers under section 91 are inferred rather than enumerated. These are the residuary power, discussed below, and the federal spending power. The spending power is inferred from sections 91(1A) (the public debt and property) and 91(3) (the raising of money by any mode or system of taxation). The spending power forms the basis for federal grants to the provinces and allows Parliament to spend funds outside of its areas of legislative authority.¹⁰

3.2 PROVINCIAL HEADS OF POWER: SECTION 92

Section 92 of the *Constitution Act, 1867* sets out the provincial heads of power. Generally, matters affecting a single province fall under provincial jurisdiction; examples include taxation in a province, the establishment and tenure of public officials in a province and the incorporation of companies in a province.

Section 92 contains fewer headings than its counterpart at section 91. Although this might initially seem to indicate that the federal Parliament is assigned legislative

authority over a wider range of matters, this is not necessarily the case. For one thing, section 92(16) assigns to the provinces legislative authority over “all matters of a merely local or private nature in the province.”¹¹ Just as importantly, section 92(13), “property and civil rights in the province,” has been interpreted very broadly, encompassing matters as diverse as insurance, many areas of business, the regulation of professions and trades, labour relations,¹² and certain areas of private law, including contract law.¹³

Some other matters over which the provinces have legislative authority under section 92 include the establishment of hospitals, municipal bodies, solemnization of marriage and the administration of justice (including the organization of provincial courts) in the province.

3.3 SHARED JURISDICTION – PENSIONS, AGRICULTURE AND IMMIGRATION: SECTIONS 94A AND 95

Section 95 of the *Constitution Act, 1867* explicitly establishes that the federal and provincial governments have concurrent jurisdiction with respect to immigration and agriculture. Provinces may enact laws relating to immigration and agriculture within the province so long as such laws do not contravene any federal legislation in those domains. Thus, federal legislation takes precedence in these areas.

In 1951, the addition of section 94A of the *Constitution Act, 1867* empowered Parliament to make laws related to old age pensions and supplementary benefits (social programs not considered at the time of Confederation in 1867), insofar as a province does not already legislate in that area. Where provincial laws do exist, they take precedence.¹⁴

3.4 RESIDUARY POWER

Residuary powers are assigned to the federal government through the wording of the opening sentence of section 91, before the enumerated powers are listed. The section enables the Parliament 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.

The fact that residuary powers are assigned to the federal Parliament and not the provinces distinguishes Canadian federalism from the American and Australian models, in which states are granted residuary powers.¹⁵

The federal residuary power, also known as the Peace, Order and Good Government (POGG) power, could potentially be read as assigning vast policy areas to the federal Parliament, since many topics could conceivably fall outside section 92's enumerated list. As mentioned earlier, however, section 92(13) (property and civil rights in the province) has been interpreted very broadly. Although the POGG power is residuary, it captures only those residual powers that have not already been captured in section 92(13) or possibly 92(16) (matters of a merely local or private

nature in the province). This means that in practice the scope of the POGG power is somewhat limited.¹⁶

The POGG power has been used as a basis for federal legislation in three areas: where there is a gap in the distribution of federal and provincial powers; for matters of national concern; and for emergency matters.

3.5 IN STEP: COOPERATIVE FEDERALISM

At the time of Confederation, in 1867, it was thought that federal and provincial jurisdiction over various heads of power would generally be exclusive. However, in many areas the federal government and the provinces must work together, or take complementary approaches, to ensure effective policy development and implementation. This is the dance of federalism, often referred to as “cooperative federalism.”

Cooperative federalism has become a cornerstone of Canadian federalism particularly since the Second World War and the emergence of modern demands for national standards “of health, education, income maintenance and other public services, most of which are within the territorially-limited jurisdiction of the provinces.”¹⁷ This has necessarily involved, among other things, “redistribution of government revenue through shared-cost programmes and equalization grants”¹⁸ to counter what would otherwise be regional disparities in wealth and services.

Generally, cooperative federalism involves what it implies: ongoing interaction between the federal and provincial governments (often through federal–provincial conferences and other more formalized mechanisms for intergovernmental relations), as well as consultation on the part of the federal government with the provinces before it commits itself to policies that affect the provinces.¹⁹

4 THE ROLE OF THE COURTS

Since 1867, there have been numerous occasions when the federal government and the provinces, in developing policies and programs, have stepped on each other’s jurisdictional toes. Moreover, societal progress and technological development have resulted in new fields of government involvement that were not contemplated in 1867, or that do not fit neatly into the division of powers found primarily in sections 91 and 92 of the *Constitution Act, 1867*. Using a number of interpretive tools, the courts have played an essential role in ensuring that the federal and provincial governments work within their respective jurisdictions to continue the *pas de deux* of Canadian federalism.

4.1 THE DIVISION OF POWERS AS BEING EXHAUSTIVE

Many policy areas of significant importance today were not seen as pressing issues for politicians in 1867. For example, although health care is a now major policy issue, it is referenced only indirectly in the Constitution. Some other matters were simply

not foreseen. Commercial aviation, for example, which has been interpreted as falling under the federal POGG power,²⁰ would not have been contemplated in 1867.

In spite of shifting priorities and the apparent development of “new” policy areas, the division of powers in the *Constitution Act, 1867* is assumed to be exhaustive.²¹

The importance of the exhaustiveness principle is that, by assuming that all matters fall under the authority of either the federal or the provincial governments, there is no possibility of a legislative void in which neither level of government may enact valid laws.

Where the Constitution does not explicitly assign a matter to federal or provincial jurisdiction, the courts may need to provide guidance by inferring jurisdiction on the basis of the existing provisions in the *Constitution Act, 1867*.²²

4.2 INTERPRETIVE TOOLS USED BY THE COURTS TO DETERMINE JURISDICTION

The courts have generally used three tools, or doctrines, to determine whether a federal or provincial law or program is properly within its jurisdiction: federal paramountcy, interjurisdictional immunity and concurrent jurisdiction.

- **Federal paramountcy:** This principle applies to situations of conflicting or inconsistent federal and provincial laws. If a validly enacted provincial law conflicts or is inconsistent with a validly enacted federal law, a court can declare that the provincial law is inoperative to the extent of the inconsistency.²³
- **Interjurisdictional immunity:** This principle is based on the idea that the heads of power have a “protected core” that the other level of government may not “trench,” or encroach, upon.²⁴
- **Concurrent jurisdiction:** As noted earlier, section 95 of the *Constitution Act, 1867* provides for concurrent jurisdiction, by which both levels of government can legislate, in the areas of immigration and agriculture. As well, both the federal government and the provinces are granted concurrent jurisdiction over old-age pensions (at section 94A of the *Constitution Act, 1867*). In addition, the Supreme Court has held that many other matters essentially require concurrent federal and provincial jurisdiction. One example is health care, an area not explicitly enumerated in the Constitution. In 1982, the Supreme Court of Canada stated that

“health” is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending on the circumstances of each case on the nature or scope of the health problem in question.²⁵

5 CONCLUSION

When the Fathers of Confederation arrived at the compromise of sections 91 and 92 of the Constitution, they might have thought that the divisions of powers between the federal and provincial legislatures would be more or less watertight. History has proven otherwise, and the challenge and beauty of Canada's union has been to maintain the dance of Confederation without any serious missteps. In our increasingly complex and interdependent world, this asks even more of the federal and provincial legislatures. Missteps can and do happen, but almost 150 years later the *pas de deux* of Confederation keeps apace.

NOTES

- * Martha Butler, of the Library of Parliament, also contributed to the preparation of this paper.
1. See the [Northwest Territories Act](#), R.S.C. 1985, c. N-27; the [Yukon Act](#), S.C. 2002, c. 7; and the [Nunavut Act](#), S.C. 1993, c. 28.
 2. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., Carswell, Toronto, 2007 (updated 2014, release 1), p. 5-2.
 3. The predominantly French Catholic Lower Canada (Canada East as of 1841) and the predominantly English Protestant Upper Canada (Canada West as of 1841), New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Vancouver Island and British Columbia (Vancouver Island and British Columbia merged in 1866).
 4. For more information see Parks Canada, [Conferences of 1864](#).
 5. The Newfoundland and Prince Edward Island representatives withdrew from the project (preferring for the time being to remain separate). P.E.I. joined Confederation in 1873, and Newfoundland joined in 1949.
 6. Library and Archives Canada, "[Documents: The Quebec Resolutions, October, 1864 \(The 72 Resolutions\)](#)," *Canadian Confederation*.
 7. Australia followed the U.S. model by leaving residual powers to its states (see *Commonwealth of Australia Constitution Act*, [section 51](#)).
 8. Hogg (2007), p. 5-14.
 9. *Ibid.*, p. 5-15.
 10. *Ibid.*, pp. 6-18 to 6-19.
 11. It should perhaps be noted that section 92(16) has not formed the basis for many matters being deemed to fall within provincial legislative authority. In fact, Peter Hogg has called the section "relatively unimportant" (2007, p. 21-24) particularly in comparison with section 92(13).
 12. With the exception of federal employees.
 13. Hogg (2007), "Property and Civil Rights" (ch. 21).

14. As originally enacted by the *British North America Act, 1951*, 14–15 Geo. VI, c. 32 (U.K.), which was repealed by the *Constitution Act, 1982*, section 94A reads as follows:

It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.

The current language including supplementary benefits was added in 1964 by the *Constitution Act, 1964*, 12–13 Eliz. II, c. 73 (U.K.).

15. David E. Smith, *Federalism and the Constitution of Canada*, University of Toronto Press, Toronto, 2010, p. 41.
16. Hogg (2007), “Residuary nature of power” (ch. 17, section 1).
17. Hogg (2007), p. 5-45.
18. Ibid.
19. See, for example, Claude Bélanger, “[Cooperative Federalism](#),” *Quebec History*, Department of History, Marianopolis College, Montréal, Quebec, 19 February 2001.
20. [Quebec \(Attorney General\) v. Canadian Owners and Pilots Association](#), 2010 SCC 39.
21. The Supreme Court of Canada held in the *Reference re Same-Sex Marriage* that the exhaustiveness principle is “an essential characteristic of the federal distribution of powers, [which] ensures that the whole of legislative power, whether exercised or merely potential, is distributed as between Parliament and the legislatures.” [Reference re Same-Sex Marriage](#), 2004 SCC 79, para. 34.
22. This generally happens in one of two situations. The first is when an individual or a class of litigants challenges a law on the ground that it falls outside of the legislative authority of the government that enacted it. The second is when a government refers a constitutional question to a court for determination, as in the *Reference re Same-Sex Marriage* mentioned above. If a court determines that a matter is within the legislative authority of the enacting government, the law is found to be “*intra vires*”; if not, it is found to be “*ultra vires*.” The Latin phrase *intra vires* means “within the powers”; *ultra vires* means “beyond the powers.”
23. Paramountcy applies only in very limited situations, however. One circumstance in which courts might apply the principle is when “compliance with one is defiance of the other,” meaning that the interaction of a federal and provincial law would result in “the same citizens ... being told to do inconsistent things.” *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, para. 11, citing *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, p. 191.
24. If a court determines that a challenged law has such a core, the court must then determine whether the effect of the law on the ability of the other level of government to exercise its power over the matter in question is so severe that interjurisdictional immunity should be invoked and the law declared *ultra vires*: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, paras. 26–27.

25. [*Schneider v. The Queen*](#), [1982] 2 S.C.R. 112, para. 142. The provinces have legislative authority over health care delivery stemming from their jurisdiction over hospitals (section 92(7)), property and civil rights (section 92(13)) and matters of a merely local or private nature in the province (section 92(16)). At the same time, the federal government has jurisdiction over many areas of health that pertain to public safety; these stem from its jurisdiction over criminal law (section 91(27)). As well, through cooperative federalism and reliance on the federal spending power, the federal government established certain universal norms in health care delivery across Canada in the [*Canada Health Act*](#). For more information on the federal role in health and health care, see Marlisa Tiedemann, [*The Federal Role in Health and Health Care*](#), Publication no. 2008-58-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 20 October 2008.