

# SUGGESTIONS FOR THE DECENTRALIZATION OF CANADA

Neil Finkelstein\* and Russell Cohen\*\*

Toronto

*The authors suggest that the primary guidepost for the distribution of legislative power should be whether a province, acting unilaterally, can regulate a particular subject matter effectively. If not, the matter should be within federal jurisdiction. Examples are international and interprovincial transport and trade, the monetary system, and matters which have attained a national dimension. Once these federal powers have been enumerated, the residual power, which will by definition include all matters which the provinces can unilaterally regulate effectively, should be left to the provinces. No provincial enumeration will be required.*

*Les auteurs suggèrent que le principe directeur pour le partage des compétences législatives devrait être de se demander si une province, agissant seule, peut réglementer une matière particulière d'une manière efficace. Si non, le matière doit être laissée dans le domaine fédéral. Des exemples sont le commerce et le transport internationaux et interprovinciaux, le système monétaire et les matières qui ont atteint une envergure nationale. Une fois que ces pouvoirs fédéraux auraient été énumérés, le pouvoir résiduel, qui comprendrait par définition tous les matières que les provinces peuvent à elles seules réglementer efficacement, doit être accordé aux provinces. Aucune énumération des pouvoirs provinciaux ne serait nécessaire.*

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\* Neil Finkelstein, of Blake, Cassels & Graydon, Toronto, Ontario.

\*\* Russell Cohen, of Blake, Cassels & Graydon, Toronto, Ontario.

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### *Introduction*

Our federal system is facing increasing economic and political pressures, raising nationwide calls for comprehensive constitutional reform. While the recent Quebec referendum of October 30, 1995 has again focused attention on Quebec's demands to revisit the existing constitutional order, voices of dissatisfaction with the federal system can also be heard in other provinces. British Columbia, Alberta, Ontario and Quebec each want greater local autonomy to craft and implement provincial programs, and allocate provincial resources according to local needs. That demand for decentralization will be exacerbated, not diminished, if Quebec ultimately separates. Without Quebec's weight to countervail that of Ontario in Parliament, other provinces will not submit to an Ontario-dominated central authority without significant decentralization.

While some federal and provincial initiatives may be underway,<sup>1</sup> the only official response from Ottawa has been the passage of Bill C-110, *An Act Respecting Constitutional Amendments*.<sup>2</sup> The Act gives to Ontario, Quebec, British Columbia, any two Atlantic provinces with 50 percent of the population of the Atlantic Provinces, and any two Prairie provinces with 50 percent of the population of the Prairie provinces,<sup>3</sup> a veto which would enable them to prevent a Minister from introducing a constitutional amendment without their consent.<sup>4</sup> The Prime Minister has now abandoned attempts to secure provincial support for a constitutional amendment recognizing Quebec as a distinct society, a belated response to the referendum.<sup>5</sup> Such cosmetic measures fail to engage with the voices for change; instead, they seek to stifle them.

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<sup>1</sup> See J. Simpson, "National Unity Quietly Bubbles on the Back Burner" *The Globe and Mail* (28 March 1996) A18.

<sup>2</sup> S.C. 1996, c.1.

<sup>3</sup> This would include Alberta.

<sup>4</sup> The Act limits only a Minister from introducing a constitutional amendment; it does not purport to prevent Parliament from approving any amendment, if introduced by some other means. The Act certainly raises the possibility that, in adding an additional threshold to the amending formula contained in the *Constitution Act, 1982*, it has amended the amending formula of the Constitution without complying with it.

<sup>5</sup> The Prime Minister concluded that none of the Premiers are interested in entering into "a great constitutional debate": E. Stewart, "PM Shelves 'Distinct Society' Concept" *The Toronto Star* (14 April 1996) A1. In our opinion, it is clear that the provinces have no desire to renegotiate Quebec's status in Canada. The provinces would only be willing to enter into constitutional talks if there is a genuine attempt by Ottawa to address substantive issues of provincial concern, not a further attempt to placate Quebec with highly symbolic gestures.

In this paper we provide some suggestions for the decentralization of Canada. We do not address the process by which constitutional change is to occur; that is for the politicians and their constituents to decide. Instead, we focus more narrowly to consider how economic forces and provincial demands for change can be met in a system that envisions a federal government as both relevant and necessary to the continued future of Canada. We explore which powers must be controlled and exercised by the federal government, the remainder to be controlled by the provinces, and what such a division would ultimately look like for Canada. Our proposal is a dramatic one; that only federal powers should be enumerated, and that the residual power should be left to the provinces along the lines of the American model. We acknowledge, as has been pointed out by some critics, that an examination of federal structures is "in large measure a matter of *a priori* belief, not a matter of rational argument."<sup>6</sup> Regardless, we believe that this is a workable and appropriate approach for Canada today, and we proceed with the goal of encouraging debate.

## Background

The *Constitution of Canada* and, in particular, the federal-provincial division of powers centred primarily in sections 91 to 101 of the *Constitution Act, 1867*, has served Canada well since Confederation. The scope of these powers has expanded and contracted at various points in our history through varying judicial interpretation and administrative arrangements, without the necessity for significant constitutional amendment. This evolutionary process, however, due to a confluence of economic and political forces, may no longer be enough to preserve national unity.

In our opinion, flexibility must remain a key component of any solution, regardless of how decentralized the federation that results. In this regard, we believe that broad heads of powers, rather than a detailed scheme,<sup>7</sup> have served Canada well thus far, and are more responsive to future

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<sup>6</sup> R.E. Simeon, "Criteria for Choice in Federal Systems" (1982-83) 8 Queen's L. J. 131 at 140. See also P.J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U.T. L. J. 47. Monahan states at 87-88:

The indeterminacy of federal theory means that any point on a continuum between 'provincialism' and 'nationalism' is consistent with the 'federal principle.' Accordingly, the selection of a particular point on this hypothetical continuum will simply reflect one's initial, controversial assumptions about the Canadian community.

<sup>7</sup> In our opinion, one of the problems with *The Charlottetown Accord*, *infra* footnote 60, also present in *A Quebec Free to Choose: Report of the Quebec Constitutional Committee of the Quebec Liberal Party* (Montreal: Quebec Liberal Party, 1991), [hereinafter *Allaire Report*], was the specificity with which provincial powers were enumerated. For example, we question whether heads of power like recreation and sports or tourism need to be detailed.

developments.<sup>8</sup> Regardless of the degree of specificity, however, there will always be a need for the resolution of jurisdictional disputes. Our history teaches us that constitutional adjudication and intergovernmental cooperation are two means of resolving these matters. The flexibility of these approaches, we suggest, must remain in any federal system; for even a decentralized Canada will require a flexible approach to resolving future disputes — of which there will undoubtedly be many. It is, therefore, instructive to consider the judicial ebbs and flows that have accommodated divergent interests thus far without significant constitutional amendment. It is with this in mind that we consider, briefly, the evolutionary development of the principal federal powers in Canada before turning to some suggestions for decentralization.

The Fathers of Confederation initially conceived of a more centralized federal system than that of the United States, which was undoubtedly an influential federal precedent. In fact, the *Constitution Act, 1867*, in several aspects, subordinates the provinces to the centre, in violation of the principle that in a federal state “the regions should be coordinate with the centre.”<sup>9</sup> Specifically, Professor Hogg points to the following features of the *Constitution Act, 1867*:

First, by s.90 the federal government was given the power to disallow (i.e., invalidate) provincial statutes. Secondly, by s.58, the federal government was given the power to appoint the Lieutenant Governor of each province (and, by s.92(1), the provinces were denied the power to alter that part of their constitutions). Thirdly, by s.96, the federal government was given the power to appoint the judges of the superior, district and county courts of each province. Fourthly, by s.93, the federal government was given the power to determine appeals from provincial decisions affecting minority educational rights, and the federal Parliament was given the power to enforce a decision on appeal by the enactment of “remedial laws”. Fifthly, by ss.91(29) and 92(10)(c), the federal Parliament was given the power unilaterally to bring local works within exclusive federal legislative jurisdiction simply by declaring them to be “for the general advantage of Canada”. None of these five matters is to be found among the federal powers in the earlier Constitution of the United States or in the later Constitution of Australia.<sup>10</sup>

<sup>8</sup> See P. Monahan, L. Covello and N. Smith, *A New Division of Powers for Canada: Final Report of the York University Constitutional Reform Project, Study No. 8* (Toronto: Centre for Public Law and Public Policy, 1992) at 11, who see the broad heads of power in ss. 91 and 92 as a source of constitutional strength, not weakness:

Indeed, it is precisely because of the flexibility inherent in the current division of powers that the country is able to operate under a set of categories drafted one hundred and twenty-five years ago. As new social, political, or economic problems have arisen, both levels of government have been able to adapt and respond to these new challenges. This is one of the great virtues of the 1867 *Act*, and a key explanation for its political durability.

The authors conclude that this flexibility is sufficient to resolve our current constitutional crises, and “[t]he suggestion that the division of powers needs to be comprehensively rewritten in order to ‘transfer jurisdiction,’ either to the provinces or to the federal government, is simply unfounded (*ibid.*).”

<sup>9</sup> P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (supplemented) (Toronto: Carswell, 1992) at 109-10.

<sup>10</sup> *Ibid.*

The strong centralist orientation of the *Constitution Act, 1867*, can also be seen in the textually broad federal trade and commerce power in s.91(2) and the residual or peace, order, and good government ("POGG") power in the opening words of s.91.<sup>11</sup> Unlike the more limited United States trade and commerce power,<sup>12</sup> s.91(2) makes competent to the federal government the "regulation of trade and commerce." The residual power, on its face, is also very expansive,<sup>13</sup> granting to the federal government the power to make "Laws for the Peace, Order and good Government of Canada." In the United States the residual power inheres to the states pursuant to Article X of the Constitution.<sup>14</sup> As we discuss, the judicial interpretation of the scope of these powers has ebbed and flowed, and has thus far accommodated, to some degree, the various conflicting provincial and federal interests.<sup>15</sup>

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<sup>11</sup> The opening words of s.91 read:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, 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; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated ...

<sup>12</sup> The United States Constitution, art. 1, s.8(3), restricts the Congress of the United States "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." However, as Hogg notes, "the United States Congress has more extensive powers than the Canadian Parliament over anti-trust, insurance, labour, marketing, securities regulation and transportation and communication", *supra* footnote 9 at 521.

Note also the Australia Constitution, where "the commerce clause (s.51(1)) is very similar to the American clause, but it has not received a similarly expansive interpretation, partly because of s.92, guaranteeing freedom of interstate trade" (Hogg, *supra* footnote 9 at 521); see, also, C.D. Gilbert, *Australian and Canadian Federalism 1867-1984* (Melbourne: Melbourne University Press, 1986).

<sup>13</sup> However, as Hogg incisively notes, "the actual extent and importance of the residue depends by definition on the extent and importance of the provincial powers which are subtracted from the residue", *supra* footnote 9 at 436.

<sup>14</sup> Art. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See M.A. Field, "The Differing Federalisms of Canada and the United States" (1992) 55 *Law and Contemporary Problems* 107 at 109, where she states:

In both countries the intent was that the government with the residual power would play the stronger role. The framers of the United States Constitution intended federal law to be supreme, but they also assumed that the subject matter of federal law would be limited, so that the residuary clause ... would have some content. ... But because in the United States governmental structure the tenth amendment was only a truism, granting to states only whatever power was not possessed by the federal government, expansions of federal power *ipso facto* cut down on what was reserved to the states. Eventually, federal powers in the United States were interpreted so broadly that little or nothing remained of the residuum.

<sup>15</sup> The following discussion is an oversimplification of the judicial treatment of the trade and commerce and POGG powers. Much has been written elsewhere, and we include this section only as an illustration of the evolutionary nature of judicial interpretation in this area.

# 1. *Trade and Commerce and POGG*<sup>16</sup>

Judicial interpretations in the Supreme Court of Canada immediately following Confederation were consistent with the centralist orientation of the text of the *Constitution Act, 1867*.<sup>17</sup> In both *City of Fredericton v. The Queen*<sup>18</sup> and *Severn v. The Queen*,<sup>19</sup> the Supreme Court of Canada gave a very wide interpretation to Parliament's power over trade and commerce.

The pendulum began to swing in the late 19th century, with Privy Council decisions like *Local Prohibition*<sup>20</sup> and *Citizens Insurance Co. v. Parsons*.<sup>21</sup> Restrictions were engrafted onto the major federal economic powers in these cases to limit their scope. *Parsons* limited the federal role in the regulation of trade and commerce to interprovincial and international trade, and the general regulation of trade affecting the whole Dominion.<sup>22</sup>

The attenuation of these federal powers started by these cases continued and reached their high watermark with the *Insurance Reference*<sup>23</sup> and *Proprietary Articles Trade Association v. Canada (A.G.)*.<sup>24</sup> In the *Insurance Reference*, the Privy Council held that "the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces."<sup>25</sup> This was distinct, and went beyond the *Parsons* formulation, which excluded from federal competence "the power to regulate by legislation the *contracts* of a particular business or trade ... in a single province".<sup>26</sup> [emphasis added] The *PATA* case went further still, reducing s. 91(2) to an ancillary power altogether which could only be used in conjunction with some other federal head of power.<sup>27</sup>

The subsequent expansion of federal power began following the New Deal cases,<sup>28</sup> and continued through the Second World War to the present day.

<sup>16</sup> See, generally, Hogg, *supra* footnote 9 at ch. 17 (POGG) and ch. 20 (trade and commerce); Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986) at ch. 6 (POGG) and ch. 8 (trade and commerce); and Whyte, Lederman and Bur, *Canadian Constitutional Law*, 3d ed. (Toronto: Butterworths, 1992) at ch. 7 (POGG) and ch. 8 (trade and commerce).

<sup>17</sup> See Finkelstein, *Case Comment on General Motors of Canada Ltd. v. City National Leasing* (1989) 68 Can. Bar Rev. 802 at 805.

<sup>18</sup> (1880), 3 S.C.R. 505.

<sup>19</sup> (1878), 2 S.C.R. 70.

<sup>20</sup> *Ontario (A.G.) v. Canada (A.G.)*, [1896] A.C. 348 [hereinafter *Local Prohibition*].

<sup>21</sup> (1881), 7 App. Cas. 96 [hereinafter *Parsons*].

<sup>22</sup> *Parsons*, *supra* footnote 21 at 113.

<sup>23</sup> *Canada (A.G.) v. Alberta (A.G.)*, [1916] 1 A.C. 588 [hereinafter *Insurance Reference*].

<sup>24</sup> [1931] A.C. 310 [hereinafter *PATA*].

<sup>25</sup> *Insurance Reference*, *supra* footnote 23 at 596.

<sup>26</sup> *Parsons*, *supra* footnote 21 at 113.

<sup>27</sup> In this case, the criminal law power, in order to uphold anti-combines legislation.

<sup>28</sup> The "new deal cases" in the Privy Council consisted of: *Can. (A.G.) v. Ont. (A.G.)*, [1937] A.C. 326 [hereinafter *Labour Conventions*]; *Can. (A.G.) v. Ont. (A.G.)*, [1937] A.C. 355 [hereinafter *Unemployment Insurance*]; *B.C. (A.G.) v. Can. (A.G.)*, [1937] A.C. 368

Federal legislation regulating interprovincial trade, though having an incidental effect on intraprovincial trade, was upheld in a number of cases by the Supreme Court of Canada;<sup>29</sup> and provincial legislation seeking to control the production of resources largely destined for the export market were struck down.<sup>30</sup>

Further evidence of an enhanced federal presence in the regulation of trade and commerce can be found in the recent judicial development of the general branch of the trade and commerce power.<sup>31</sup> Following Laskin C.J.'s influential dicta in *MacDonald v. Vapor Canada*,<sup>32</sup> where he suggested that the general branch of the trade and commerce could support legislation granting a civil remedy if it were connected to a regulatory scheme administered by a public agency,<sup>33</sup> Dickson C.J. upheld s.31.1 of the *Combines Investigation Act*<sup>34</sup> in *General Motors v. City National Leasing*.<sup>35</sup> Dickson C.J. held that the Act established a national regulatory scheme, it operated under the oversight of an agency, it was concerned with trade in general, not a particular industry or

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[hereinafter *Price Spreads*]; *B.C. (A.G.) v. Can. (A.G.)*, [1937] A.C. 377 [hereinafter *Natural Products Marketing*]; *B.C. (A.G.) v. Can. (A.G.)*, [1937] A.C. 391 [hereinafter *Farmers' Creditors Arrangement*]; *Ont. (A.G.) v. Can. (A.G.)*, [1937] A.C. 405 [hereinafter *Canada Standard Trade Mark*]. The Privy Council struck down all of the social and economic legislation referred to the Court, with the exception of the *Farmers' Creditors Arrangement Act* and the *Canada Standard Trade Mark* legislation.

<sup>29</sup> See, for example, *Caloil v. Canada (A.G.)*, [1971] S.C.R. 543, in which federal legislation prohibiting the transportation or sale of imported oil west of the Ottawa Valley was upheld, despite catching many intraprovincial transactions. See, also, *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, wherein a federal egg marketing scheme (involving interlocking provincial statutes) was upheld.

<sup>30</sup> See *Canada Industrial Gas and Oil v. Saskatchewan*, [1978] 2 S.C.R. 545, where the court struck down what it characterised as the province's attempt to fix the price of oil in the export market. See, also, *Central Canada Potash v. Saskatchewan*, [1979] 1 S.C.R. 42, where the Court struck down provincial legislation imposing production quotas on producers, noting that virtually all the potash was destined for export.

<sup>31</sup> Hogg, *supra* footnote 9 at 571, that until 1989, "the only unequivocal example of a valid exercise of the general trade and commerce power was the *Canada Standard Trade Mark* case," *supra* footnote 28. The Supreme Court of Canada refused to follow the *Canada Standard Trade Mark* decision in *Dominion Stores v. The Queen*, [1980] 1 S.C.R. 884, striking down a system of grades for agricultural products, and in *Labatt Breweries v. Canada (A.G.)*, [1980] 1 S.C.R. 914 [hereinafter *Labatt*], striking down compositional standards for light beer.

<sup>32</sup> [1977] 2 S.C.R. 134 [hereinafter *Vapor Canada*]. Laskin C.J. wrote the principal opinion striking down s.7(e) of the federal *Trade-marks Act*, R.S.C. 1970, c. T-10, now R.S.C. 1985, c. T-13, which prohibited business practices that were contrary to "honest industrial or commercial usage in Canada." The section had nothing to do with trade-marks but was a general proscription against unfair competition, which created a statutory tort enforceable by private action.

<sup>33</sup> See also Dickson J.'s minority concurrence in *Canada (A.G.) v. Canadian National Transportation*, [1983] 2 S.C.R. 206, where he would have upheld the conspiracy provision of s.32 of the *Combines Investigation Act* under trade and commerce. The majority upheld the federal prosecutorial power as ancillary to the criminal law power in s.91(27).

<sup>34</sup> R.S.C. 1970, c. C-23, s.31.1(1), now, s.36 of the *Competition Act*, S.C. 1986, c.26, Part II, which amended, re-numbered and re-named the *Combines Investigation Act*.

<sup>35</sup> [1989] 1 S.C.R. 641 [hereinafter *City National Leasing*]. For a more detailed discussion of the case see, Finkelstein, *Comment*, *supra* footnote 17.

practice, and the failure to include all provinces would jeopardize the efficacy of the Act.<sup>36</sup> *City National Leasing* represents a significant expansion of federal jurisdiction in the regulation of trade and commerce into the area of *intraprovincial* trade,<sup>37</sup> and perhaps a return to the constitutional roots of s.91(2).

The POGG power, similarly, went through a process of expansive interpretation followed by attenuation. The early case of *Russell v. The Queen*<sup>38</sup> (as explained by Lord Watson in the *Local Prohibition*<sup>39</sup> case), held out the possibility of a broad, if not unlimited, application of the POGG power in relation to a matter of national dimensions. Subsequent decisions, however, narrowed the application of POGG to emergencies.<sup>40</sup> This narrowing of the national dimensions doctrine persisted until the *Canada Temperance*<sup>41</sup> case.

<sup>36</sup> The "provincial inability" test, as it has been described, is discussed in greater detail in the final section of this paper. See, also, Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 Natl. J. of Const. L. 341 at 351: "The provincial inability test allows the more distant federal level of government to act only when the nearer provincial level cannot effectively do so" [hereinafter *Subsidiarity*].

<sup>37</sup> The transactions at issue in the case took place within a single province. As Hogg, *supra* footnote 9 at 536, "It is important to notice that the general branch of the trade and commerce power authorizes the regulation of *intraprovincial* trade. Indeed, there would be no need for a general branch of trade and commerce if it did not extend beyond interprovincial and international trade."

<sup>38</sup> (1882), 7 App. Cas. 829 (P.C.).

<sup>39</sup> *Supra* footnote 20.

<sup>40</sup> Legislation relating to wartime measures were upheld on the basis of the emergency branch of the POGG power, including wartime price controls (*Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*, [1923] A.C. 695) (Ont. P.C.); wartime rent controls (*Wartime Leasehold Regulations Reference*, [1950] S.C.R. 124); and the deportation of Japanese Canadians after the second world war (*Co-operative Committee on Japanese Canadians v. Canada (A.G.)*, [1947] A.C. 87 (P.C.)).

In contrast, the Privy Council did not find the following to qualify as emergencies (disregarding the "national dimension" branch of POGG discussed in the *Local Prohibition* case): anti-combines legislation (*Board of Commerce Act*, [1922] 1 A.C. 191); legislation for the settlement of industrial disputes (*Toronto Electric Commissioners v. Snider*, [1925] A.C. 396); a federal prohibition on the manufacture and sale of margarine (*Canadian Federation of Agriculture v. Quebec (A.G.)*, [1951] A.C. 179). See also the "new deal" cases, *supra* footnote 28, where the Privy Council rejected the argument that the depression qualified as an emergency, and struck down various social and economic statutes.

The so-called "gap" branch of the POGG power provides a power to make legislation in relation to the incorporation of companies with other than provincial objects (*Parsons*, *supra* footnote 21); the performance of obligations arising under treaties entered into by Canada on its own behalf, and not as part of the British Empire (*Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, though rejected in the *Labour Conventions Case*, *supra* footnote 28); the language of operation of federal institutions, including, the *Official Languages Act* (*Jones v. N.B. (A.G.)*, [1975] 2 S.C.R. 182); offshore resources (*Re Offshore Mineral Rights of B.C.*, [1967] S.C.R. 792 and *Re Newfoundland Continental Shelf*, 1 [1984] S.C.R. 86); and procedures for assessment of environmental impact of projects affecting federal heads of power (*Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3). See Hogg, *supra* footnote 9 at 439-41.

<sup>41</sup> *Ontario (A.G.) v. Canada Temperance Federation*, [1946] A.C. 193 [hereinafter *Canada Temperance*]. The new test for the exercise of the POGG power to address an issue of national dimensions or national concern was set out at 205-206:



Following the Privy Council's qualified interpretation of the POGG power, the Supreme Court of Canada embarked on a more ambitious and expansive development of the doctrine.<sup>42</sup> For the purposes of this paper, it is sufficient to point to the decisions in the *Anti-Inflation Act Reference*,<sup>43</sup> upholding peacetime wage and price controls; *R. v. Hauser*,<sup>44</sup> upholding narcotics legislation; and *R. v. Crown Zellerbach*,<sup>45</sup> upholding legislation prohibiting marine pollution, as illustrative of the point. In our opinion, the above decisions under the POGG power, and *City National Leasing* decided under the trade and commerce power, are consistent: they represent a logical progression in the expansion of both the second branch of *Parsons* and the national dimensions doctrine of the POGG power.<sup>46</sup>

## 2. The Spending Power

While the major federal powers have been read more widely in modern times than at their nadir at the beginning of the century, the real expansion of federal power has been centred around federal authority, nowhere explicit in the *Constitution, 1867*, to spend money by way of conditional grants in areas of provincial jurisdiction such as health, education and social services. The breadth of social and economic legislation covered by shared-cost programmes, and the magnitude of federal spending for those purposes, illustrates just how

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In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: *if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.* War and pestilence, no doubt, are instances; so, too, may be drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province [emphasis added].

<sup>42</sup> At this point, and for the purposes of the present discussion, it is unnecessary to distinguish between the so-called "national concern" branch and the "emergency" branch of the POGG power.

<sup>43</sup> [1976] 2 S.C.R. 373.

<sup>44</sup> [1979] 1 S.C.R. 984 [hereinafter *Hauser*].

<sup>45</sup> [1988] 1 S.C.R. 401. See also the decision in *Ontario Hydro v. Ontario (L.R.B.)*, [1993] 3 S.C.R. 327 [hereinafter *Ontario Hydro*], which held that the federal Parliament has jurisdiction over nuclear power by reason of the national dimensions branch of POGG and the declaratory power.

<sup>46</sup> See Finkelstein, *Case Comment*, *supra* footnote 17 at 813, where it is suggested that reconciling the principles enunciated in these two areas may be problematic. The broad degree of generality required to support federal legislation in *City National Leasing* seems to be at odds with the "singleness, distinctiveness and indivisibility" called for under the national dimensions doctrine.

profound federal expansion in this area has been.<sup>47</sup> In fiscal year 1996/97, for example, the Canada Health and Social Transfer ("CHST") relating to health, postsecondary education and social assistance programs will total about \$27 billion. Including equalization payments, this amount rises to about \$36 billion.<sup>48</sup>

Given the size and scope of these transfers, as a practical matter, there can be little question of the federal government's competence to exercise this power. In fact, despite the absence of explicit textual support in the *Constitution*, 1867, most commentators support a broad interpretation of the federal spending power.<sup>49</sup> The Supreme Court of Canada has also endorsed Parliament's power to make grants to the provinces for use in fields of provincial jurisdiction, including the power to impose conditions on the recipients.

In *Re Canada Assistance Plan*,<sup>50</sup> the Court held that federal legislation amending the Canada Assistance Plan by placing a five percent cap on the growth of federal contributions for British Columbia, Alberta and Ontario was constitutionally valid.<sup>51</sup> In the course of so deciding, Sopinka J., for the unanimous Court, rejected a challenge to the basis of the federal spending power raised by the intervening province of Manitoba. He stated:

The written argument of the Attorney General of Manitoba was that the legislation "amounts to" regulation of a matter outside federal authority. I disagree. The Agreement under the *Plan* set up an open-ended cost-sharing scheme, which left it to

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<sup>47</sup> The major transfers to the provinces that rely on the federal spending power relate to health and postsecondary education (EPF) and social assistance (CAP), and include the payment of equalization amounts to the "have not" provinces (Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Manitoba, Quebec and Saskatchewan). In fiscal year 1991/92 transfers amounted to about \$39 billion. See Department of Finance, Canada, *Federal Transfers to the Provinces* (Ottawa: Department of Finance, 1992) and T.J. Courchene, *Social Canada in the Millenium* (Toronto: C.D. Howe Institute, 1994) [hereinafter *Social Canada*] at ch. 4.

On April 1, 1996, EPF and CAP came to an end, and their funds were rolled into the Canada Health and Social Transfer (CHST). For a thorough examination of the CHST and its implications for Canada, see T. Courchene, *Redistributing Money and Power: A Guide to the Canada Health and Social Transfer* (Toronto: C.D. Howe Institute, 1995) [hereinafter *A Guide to the CHST*].

<sup>48</sup> Courchene, *A Guide to the CHST*, *supra* footnote 47 at 11.

<sup>49</sup> See Hogg, *supra* footnote 9 at 152, and the articles cited therein. Hogg states:

There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant, a loan or a commercial contract). There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects.

For the contrary view, see, for example, A. Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68 Can. Bar Rev. 448.

<sup>50</sup> [1991] 2 S.C.R. 525 [hereinafter *Re CAP*].

<sup>51</sup> Before the cap on CAP, the federal government paid 50 percent of all provinces' costs of carrying out welfare programmes that met the criteria set out in the federal legislation.

British Columbia to decide which programmes it would establish and fund. *The simple withholding of federal money which had previously been granted to fund a matter within provincial jurisdiction does not amount to the regulation of that matter* [emphasis added].<sup>52</sup>

This endorsement of the federal spending power is consistent with a number of earlier decisions (though none as explicit in their support), involving federal spending in areas of provincial jurisdiction.<sup>53</sup>

While both the courts and most commentators have supported the constitutionality of the federal spending power, the more difficult issues relate to the political consequences of the expansive use of this power by the federal government.<sup>54</sup> Commentators will continue to debate the appropriateness of the size, scope and conditions placed on federal transfers,<sup>55</sup> though few will question their significance in the development of Canada as a modern state.<sup>56</sup> At this point, we simply note the significant role that the spending power has played in the expansion of federal power. As Hogg states, shared-cost programmes "have effected a substantial shift in the distribution of power within confederation."<sup>57</sup>

<sup>52</sup> *Re CAP*, *supra* footnote 50 at 567.

<sup>53</sup> See, for example, *Winterhaven Stables v. Canada* (1988), 53 D.L.R. (4th) 413 (Alta. C.A.), which upheld the *Canada Health Act* and CAP, among other things; and *YMHA Jewish Community Centre v. Brown*, [1989] 1 S.C.R. 1532, upholding a federal job creation programme.

<sup>54</sup> Petter, *supra* footnote 49, writing as Professor Petter, takes a very critical view of the spending power. He states at 465.

The *raison d'être* of the federal spending power (and of conditional grants in particular) is to permit the federal government to use fiscal means to influence decision-making at the provincial level. In other words, it allows national majorities to set priorities and to determine policy within spheres of influence allocated under the Constitution to regional majorities. Thus, both by design and effect, the spending power runs counter to the political purposes of a federal system.

He would, however, support the continued, if not enhanced, use of unconditional equalization among provinces.

<sup>55</sup> For a number of provinces, federal leverage over a large portion of their budgets inhibits their pursuit of local priorities. For other, generally smaller, provinces, federal transfers ensure that they can offer comparable programs to those offered elsewhere in the country. In the following section, we consider some examples that illustrate the conflicts that can arise when the federal government imposes detailed and onerous conditions on federal grants for use in areas of provincial jurisdiction. Equalization transfers and unconditional block funding are, likely, partial answers to provincial complaints.

<sup>56</sup> See, for example, T.J. Courchene, *Celebrating Flexibility: An Interpretive Essay on the Evolution of Canadian Federalism* (Montreal: C.D. Howe Institute, 1995) [hereinafter *Celebrating Flexibility*], who states at 10-11:

[T]he exercise of the federal spending power has played a critical role in forging national programs in the social policy area as well as in preserving and promoting the internal common market. To be sure, the spending power has not been an unmixed blessing, but in many areas and on many occasions it has been used creatively. Indeed, one way of viewing the ongoing challenges the Canadian federation faces is to find alternative processes to compensate for the (fiscally triggered) demise of the spending power.

<sup>57</sup> Hogg, *supra* footnote 9 at 146.

In our opinion, the evolutionary process that has resulted in both contractions and expansions of federal legislative power under the *Constitution Act, 1867*, is no longer enough to preserve national unity. In the context of the massive expansion of federal conditional spending in areas of provincial jurisdiction, a confluence of political and economic forces demand more radical and comprehensive constitutional change.

### I. *The Forces of Change*

There are several political forces at work here.<sup>58</sup> The first is the desire in Quebec to be *maître chez nous*. Much has been written, and need not be repeated here, about the growth of Quebec nationalistic aspirations. The problem today is that Quebec has outgrown, or at least *believes* it has outgrown, its place in the federation, and is demanding an association with a looser fit. It is important to note that the demand in Quebec is not only for more local authority; equally importantly, Quebec demands less federal presence. For that reason, neither *Meech Lake*<sup>59</sup> nor *Charlottetown*<sup>60</sup> would have worked on a long term basis even if they had been implemented. *Meech Lake* would have expanded Quebec's legislative authority, but only at the margins.<sup>61</sup> It would not have transferred major areas of federal power to the province,<sup>62</sup> and would not have significantly

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<sup>58</sup> Hogg, *supra* footnote 9 at 88-89, identifies the following as forces for constitutional change that were not satisfied by the enactment of the *Constitution Act, 1982*, and which will lead to continuing efforts to adopt other amendments to the Constitution: (i) French-Canadian nationalism; (ii) western regionalism; and (iii) a demand by the aboriginal peoples of Canada for entrenchment of their traditional rights, the settlement of their land claims, and the entrenchment of an explicit right of self-government and a right to participate in the process of constitutional amendment, at least where aboriginal rights could be affected.

<sup>59</sup> *Meech Lake Constitutional Accord*, 30 April 1987 [hereinafter *Meech Lake Accord* or *Meech Lake*].

<sup>60</sup> *The Charlottetown Accord*, 28 August 1992 [hereinafter *Charlottetown Accord* or *Charlottetown*].

<sup>61</sup> Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988) [hereinafter *Meech Lake*] at 13, states:

While the "distinct society" clause by itself is mainly hortatory or symbolic, the [*Meech Lake Accord*] does go on to give concrete expression to the idea. The new immigration provisions (ss. 95A to 95E) give constitutional status to immigration agreements with individual provinces, which will enable Quebec to participate in the selection of its own immigrants, giving appropriate weight to their capacity to settle in a predominantly French-speaking community. The new Supreme Court of Canada provisions (ss. 101A to 101E) guarantee that at least three of the judges must come from Quebec (s. 101B(2)), thereby ensuring that a core of judges is familiar with Quebec's unique system of civil law. And, of course, the provisions for a provincial role in the selection of the Supreme Court judges (s. 101C), the limitation on the federal spending power (s. 106A) and the changes to the amending procedures (ss. 40-41), although applicable to all provinces, were driven by Quebec's concern to protect its society from national interference.

<sup>62</sup> Section 2(4) of the *Meech Lake Accord* states:

Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

diminished the federal presence apart from placing loose limits on the federal spending power.<sup>63</sup> Indeed, s. 2(4) of the *Meech Lake Accord* made it perfectly clear that nothing in the distinct society clause could be interpreted to diminish federal legislative authority. As such, in our judgment *Meech Lake* would have been no more than a temporary stopgap. Neither *Meech Lake* nor “*Meech Lake plus*” will successfully deal with the national unity issue now.

The *Charlottetown Accord* had many of the same flaws. *Charlottetown* was not in its terms limited to Quebec, but it was clearly Quebec driven. It provided too much in the sense that the rest of Canada perceived that Quebec was getting more than its fair share, and provided too little in that, even though it offered more than *Meech Lake*, it did not meet Quebec’s demand for substantially more real power.<sup>64</sup> That is really the point which both *Meech Lake* and *Charlottetown* missed. Quebec does not want symbols stitched to a constitutional suit that it already perceives as too tight. It wants real and substantial change in the federal-provincial division of responsibility.

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Commenting on s.2, Hogg, *Meech Lake*, *supra* footnote 61 at 14-15, states:

The new s.2 will have no significant impact on the distribution of powers between the federal Parliament and the provincial Legislatures. ... Subsection (4) of the new s.2 has a bearing on this issue as well. ... Since most of the legislative powers conferred on the federal Parliament or the provincial Legislatures are exclusive, it is usually the case that an increase in the powers of one level of government entails a corresponding diminution in the powers of the other level of government. ... Subsection (4) would be an obstacle to the use of s.2 to augment an exclusive legislative power, because it would be arguable that this constituted a derogation from the exclusive powers of the other level of government.

<sup>63</sup> Section 106A states:

(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

<sup>64</sup> *Charlottetown* provided for a Canada Clause, a reformed Senate, a recognition of Aboriginal peoples’ inherent right of self-government in Canada, and the following changes with respect to the powers of the federal and provincial governments:

- The federal spending power would be subject to a provincial opt out provision from new Canada-wide shared-cost programs, provided the province carried on a program compatible with the national objectives;
- Intergovernmental agreements would be subject to a mechanism protecting them from unilateral change;
- The federal government would be committed to negotiating immigration agreements with the provinces;
- The federal government would be committed to negotiating regional development agreements with the provinces;
- The federal government would be committed to negotiating agreements to coordinate and harmonize the regulation of telecommunications;
- The federal disallowance power would be repealed;

The second driving political force, equally as compelling as that in Quebec, is demand for change in the West.<sup>65</sup> The demand is most pronounced in British Columbia and Alberta, the strongest provinces financially, but the political feeling is present in Manitoba and Saskatchewan as well.

First, these provinces demand more local autonomy. To put it another way, they want less power (and "intrusion") at the federal centre, dominated in terms of electoral representation by Ontario and Quebec. Second, there is a growing north-south orientation as the western provinces, and indeed all Canadian provinces, focus on the Canada-United States trading relationship.<sup>66</sup> That is the result of a combination of physical geography, cross-border mobility, natural trade flows and, ironically, the positive actions of the federal government in entering into and implementing treaties like the *Canada-United States Free Trade Agreement* ("FTA") and the *North America Free Trade Agreement* ("NAFTA"). All of these have substantially shifted the focus of Canadians southward to the United States with a concomitant diminution of the east-west focus within Canada. Third, where Quebec sees a Canada comprised of two founding peoples, the other provinces see a country composed of ten equal provinces. As such, there can be no "special status" for Quebec.<sup>67</sup> Those items

- The federal declaratory power would be used only with the consent of the affected province;
- Provinces would have exclusive legislative jurisdiction over labour market development and training, cultural matters within the provinces, forestry, mining, tourism, housing, recreation, and municipal and urban affairs.

<sup>65</sup> Hogg, *supra* footnote 9 at 89, states that western regionalism is based "on the distinctive economic base of the four western provinces.... Two responses by western Canadians have inevitably been invoked. One is to seek to reduce the power of the federal government, which they cannot control, and to enhance the powers of the provincial governments, which they can control. The other response is to seek to make central institutions ... more responsive to regional interests".

<sup>66</sup> See Courchene, *Celebrating Flexibility*, *supra* footnote 56 at 43-45, and the sources cited therein, who states: "It is increasingly inappropriate ... to view Canada as a single national (east-west) economy. Rather, it is becoming a series of north-south, crossborder economies or, at least, the north-south (more generally international) dimension is being superimposed in a dominant way over the east-west dimension."

Courchene adds, at 47, "the point to be stressed is that provincial trade dynamics and policies increasingly are focused north-south (or perhaps outward), not east-west, and policy-making that fails to take this reality into account will go off the rails in spectacular fashion. ... The most important implication of adopting a north-south focus ... is that, in an increasing number of areas, an economic vision that emanates from the center — a set of policies meant to apply to all provinces and regions — is no longer appropriate, since Canada's regions are too economically diverse."

See also C. Massey, "Devolution or Disunion: The Constitution After *Meech Lake*" (1991) 29 *Osgoode Hall L. J.* 791 at 797.

<sup>67</sup> A recent CROP-Enviro-nics poll done for CBC Television News and Radio Canada's *Le Point* found that 91 percent of Canadians outside Quebec disagreed with the following statement: "As the only French-speaking province, Quebec should have special powers different from those of other provinces": R. McKenzie, "PQ Reluctant Guest if Ottawa Plays Host" *The Toronto Star* (14 April 1996) F7.

It has also been noted above that the Prime Minister has abandoned recent attempts to secure constitutional recognition of Quebec as a distinct society.

of distinctiveness that are already enshrined in the *Constitution Act*, such as the preservation of Quebec's civil law in s.129, cannot be expanded. Thus, what is given to one province must be given to all.

The third political force driving constitutional reform is the geographical and cultural differences which divide Canada along regional, provincial, economic and linguistic lines. It is all very well to say that Canada should focus upon what unites it, but the differences must be recognized and dealt with. These factors of geographical and cultural separation militate toward more local control.

Alberta's dispute with Ottawa in 1995 over whether there should be limited private health care to take financial pressure off the public system provides one example of these forces at play.<sup>68</sup> Dealing with this as an issue of constitutional responsibility, without becoming entangled in the ideological debate about "two-tier" health care, the issue is why a provincial government which is (i) physically removed from Ottawa by thousands of miles, (ii) dealing with a provincial matter (delivery of health care in Alberta) which does not have extra-provincial application or effects, and (iii) which is a major matter upon which the local Alberta electors will vote at provincial election time, should defer to Ottawa. The *Constitution* does not envisage health care being run from Ottawa,<sup>69</sup> the courts have not dictated that that happen in their division of powers decisions, the economics are such that Ottawa cannot effectively finance the programs in any event and, even if they could, one can legitimately ask why extra-provincial taxpayers should finance local matters in any event.

A second contentious recent example of Ottawa's intrusion into provincial spheres is the federal withholding of conditional grants when British Columbia imposed a three-month residency requirement for welfare recipients.<sup>70</sup> That

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<sup>68</sup> The dispute centred on whether private clinics operating in Alberta and charging a facility fee in addition to receiving public funds, were in violation of the *Canada Health Act*, R.S.C. 1985, c. C-6. Those patients who could afford to pay the facility fee could get quicker access to the procedures offered at the clinics.

See the following articles: Canadian Press, "Alberta Plan Rejected to End Health-Clinic Row" *The Globe and Mail* (07 November 1995) A6; A. Coyne, "Health Minister's Strong Stance Calls Premier's Bluff" *The Globe and Mail* (16 October 1995) A14; A. Mitchell, "Alberta Surrenders in Clinic Dispute" *The Globe and Mail* (12 October 1995) A2; T. Thanh Ha and S. Feschuk, "End Extra Health Fees, Marleau Demands" *The Globe and Mail* (07 January 1995) A1.

<sup>69</sup> Hogg, *Subsidiarity*, *supra* footnote 36, singles out the *Canada Health Act* as an example of legislation that does, perhaps, extend too far into the realm of regulation. He states at 354: "The *Canada Health Act* ... arguably does descend to too much detail in its prohibition of extra-billing by doctors and user fees by hospitals. It is still the case, however, that there is considerable room for variation in provincial healthcare plans."

<sup>70</sup> As of December 1, 1995, a three-month residency requirement was imposed on welfare applicants by British Columbia in a move designed to save the province \$25 million. British Columbia found itself on the receiving end of about 2,200 welfare recipients arriving each month from other provinces. The move was timed to coincide with the date after which the Canada Assistance Plan ceiling was reached and no more federal funds were available to British Columbia, a consequence of a cap placed on CAP funding for the richest provinces of British Columbia, Alberta and Ontario in 1990. Without federal CAP funding, British Columbia argued that it was not bound by the CAP's proscription on residency requirements.

provincial requirement may be subject to constitutional challenge as infringing the mobility rights guarantee in s. 6 of the *Charter of Rights*,<sup>71</sup> but the constitutional issue is a matter for the courts rather than Parliament to enforce.<sup>72</sup> Parliament can, of course, legitimately take the position that interprovincial mobility of people are matters of federal jurisdiction pursuant to both the POGG power and, possibly, as an attribute of Canadian citizenship pursuant to s. 91(25) of the *Constitution Act, 1867*.<sup>73</sup> All of that begs the question, however, of why

Their position is summed up by Social Services Minister Joy MacPhail, who told Ottawa: "You don't get to call the tune if you're not paying the piper." In response, Ottawa withheld over \$47 million, citing British Columbia in contravention of the CAP.

See C. McInnes, "British Columbia Offers Bus Fare if Welfare Denied" *The Globe and Mail* (10 February 1996) A6; C. McInnes, "British Columbia Sues Ottawa for Welfare Funds" *The Globe and Mail* (24 January 1996) A4; E. Greenspan, "British Columbia Fails to Sway Ottawa Over its Limits on Welfare" *The Globe and Mail* (08 December 1995) A1; E. Greenspan and C. McInnes, "British Columbia-Ottawa Disputes Heats Up" *The Globe and Mail* (06 December 1995) A4; E. Greenspan, "Axworthy Likely to Withhold British Columbia Funds" *The Globe and Mail* (05 December 1995) A4; R. Sheppard, "The Wrong Fight About Welfare" *The Globe and Mail* (13 November 1995) A15; M. Cerentig, "British Columbia Imposes Big Cuts To Welfare Cheques" *The Globe and Mail* (10 November 1995) A4; C. McInnes, "British Columbia Faults Ottawa for Welfare Policy" *The Globe and Mail* (09 November 1995) A9; C. McInnes, "British Columbia's Welfare Recipients Face Stricter Conditions" *The Globe and Mail* (07 November 1995) A13; C. McInnes, "British Columbia Sets Residency Provision For Welfare" *The Globe and Mail* (04 November 1995) A12.

<sup>71</sup> Section 6 states:

- (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of permanent resident of Canada has the right
  - (a) to move to and take up residence in any province; and
  - (b) to pursue the gaining of a livelihood in any province.
- (3) The rights specified in subsection (2) are subject to
  - (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
  - (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
- (4) Subsection (2) and (3) do not preclude any law that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

<sup>72</sup> Section 6(3)(b) exempts from s.6(2) "any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services." It would have to be determined whether a three-month residency requirement is a "reasonable" restraint on the right to "move to and take up residence in", or "pursue the gaining of a livelihood in" British Columbia.

<sup>73</sup> Section 91(25) gives to the federal Parliament power over Naturalization and Aliens. Hogg, *supra* footnote 9 at 1009, suggests that citizenship "is a matter within federal authority, probably under s.91(25) ... but possibly under the peace, order, and good government power", citing *Winner v. SMT (Eastern)*, [1951] 1 S.C.R. 887 at 919. The *Winner* case, more importantly, suggests that the right to move freely between provinces is a matter of federal concern as an attribute of Canadian citizenship. This issue was not addressed on appeal to the Privy Council, *Ontario (A.G.) v. Winner*, [1954] A.C. 541.



Parliament should be able to impose conditions on a provincial welfare plan to achieve its federal ends.<sup>74</sup>

In addition to the foregoing political factors generating a call for constitutional reform, there are economic factors at work as well.<sup>75</sup>

First, the present high levels of taxation and debt mean that Parliament cannot continue to finance health, education and social programs as it has in the past. Its share of the funding of these matters has decreased substantially since the 1970's.<sup>76</sup> At best, it can provide incremental funding, with the lion's share

<sup>74</sup> The argument is, perhaps, that provinces are only subject to conditions by accepting federal program funds, once 50 percent under the CAP, but reduced to about one-third for British Columbia, after the 1990 imposition of the cap on CAP. Provinces choosing not to accept conditional grants can impose any requirements they wish, subject of course to the *Charter*. The reality, however, is that provinces have little choice but to accept federal conditional grants. As Hogg, *supra* footnote 9 at 145, notes: "the federal offer is very difficult to refuse, because refusal would deny to the province the federal grant. Indeed, refusal of the grant wears an aspect of taxation without benefit, since the residents of a non-participating province would still have to pay the federal taxes which finance the federal share of the programme in the other provinces."

<sup>75</sup> In addition to the economic factors discussed in this paper, Courchene, *Celebrating Flexibility*, *supra* footnote 56, regards globalization (which has both economic and political dimensions) as another force of change. He states at 69:

At one level, globalization is inherently decentralizing because it enhances markets that themselves are inherently decentralizing. Within the government realm, the new technoeconomic paradigm is transferring power and sovereignty upward, outward, and downward from central governments of nation-states. On balance, these forces are likely to tilt the division of powers in federal systems toward greater decentralization. This is particularly true for Canada, where past and present fiscal profligacy means that the center cannot hold and the north-south regionalization of the economy implies that the center should not hold.

Courchene does not, however, support formal constitutional amendment as a response to these challenges. Rather, he states, "Canada's federal system is sufficiently flexible and adaptable to accommodate these pervasive forces of change ... [and] the sweeping and complex nature of this evolution cannot possibly be managed by a set of strategic changes in the formal distribution of powers" (at 69).

<sup>76</sup> Courchene, *A Guide to the CHST*, *supra* footnote 47, notes that federal funding for medicare has decreased from 50 percent to about 25 percent (at 76); and federal funding for CAP has decreased from 50 percent to a Canada average of 39 percent (29 percent in Ontario and 34 percent in British Columbia) (at 23). Quantifying the decrease in federal contributions is not uncontroversial. As an example, Courchene, *Social Canada*, *supra* footnote 47 at 215, suggests that "In cumulative terms, the 1986/87 to 1994/95 shortfall or offloading is (or will be) in the order of \$26.7 billion for EPF and \$8.5 billion for CAP, for an overall total of just over \$35 billion." In dollar terms, however, major federal transfers have grown from \$20 billion in 1982 to over \$35 billion in 1992: *Federal Transfers to the Provinces*, *supra* footnote 47 at 9.

One can also look to changes to the standard or base upon which transfers are calculated. As examples, the standard against which to compare fiscal capacities for the purpose of equalization has declined from the standard of the two richest provinces in 1957 to a national average in 1967 to a five province standard since 1982. With respect to health, postsecondary education and social services, federal contributions to both EPF and CAP have been capped. The CAP and EPF have been rolled into the CHST as of April 1, 1996. Total transfers under the CHST for 1996/97 will be about \$36 billion, down from \$38.5 billion under EPF and CAP for 1995/96.

of the burden remaining with the provinces. As such, when Parliament attempts to impose expensive and extensive regulatory requirements on the provincial purse through the use of conditional grants, the political forces described above generate local resentment.<sup>77</sup>

Second, there is duplication between the federal and provincial bureaucracies in the delivery of social programs within provincial regulatory jurisdiction.<sup>78</sup> Health and manpower training are two examples in a long list. The elimination of this duplication has been demanded many times by Quebec, and recently other provinces as well.

The foregoing factors are driving a significant call for constitutional reform. Before leaving this section, however, it should be noted that such reform, and particularly the decentralization which will be suggested here, comes at a price.

With the withdrawal of federal presence in areas of provincial jurisdiction will come a further significant reduction of federal funding.<sup>79</sup> Different provinces will have more autonomy to allocate their resources among programs, and to experiment with different forms of delivery,<sup>80</sup> but different provinces

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<sup>77</sup> The CHST signals some movement away from conditional grants to block funding. However, welfare residency requirements are still prohibited and provincial health spending must still comply with the five principles of the *Canada Health Act* (universality, comprehensiveness, accessibility, portability, public administration).

<sup>78</sup> From a constitutional perspective, however, duplication, as Hogg notes, *supra* footnote 9, "is 'the ultimate in harmony'." He further states:

The argument that it is untidy, wasteful and confusing to have two laws when only one is needed reflects a value which in a federal system often has to be subordinated to that of provincial autonomy. Nor does the latter value disappear when provincial law merely duplicates a federal law, because the suspension of a provincial law may create a gap in a provincial scheme of regulation which would have to be filled by federal law — a situation as productive of untidiness, waste and confusion as duplication (at 431).

We do not question the correctness of Professor Hogg's statement. Rather, the point we make is that from a practical perspective, the costs of such duplication are a factor that is heightening calls for the devolution to the provinces of various powers.

<sup>79</sup> R. Howse, "Federalism, Democracy and Regulatory Reform: A Sceptical View of the Case for Decentralization" (1994) Law and Economics Working Paper Series, No. 23, sees a direct connection between the amount of federal transfers and conditional grant programmes. He states:

While unconditional equalization payments aimed at compensating for a weaker tax base do, in theory, preserve [local] autonomy, in practice it will often be politically difficult to maintain a commitment to raising vast amounts of revenue from taxpayers nationwide, without some control of output. In order to get political "credit" for equalization, the central government must be able to ensure some national minimum levels of service are delivered across the federation, regardless of regional disparities. Thus in the Canadian context, although unconditional equalization payments are an important feature of fiscal federalism they are strongly and importantly linked in the public mind with national standards in social programs, which are in fact more directly related to various *conditional* grants (at 23).

<sup>80</sup> See, for example, the dicta of Brandeis J. in *New State Ice Co. v. Liebmann* 285 U.S. 262 (1932) at 311, where he states: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel

will also be able to afford different things. Disparity in welfare rates across Canada will increase, health care will not necessarily be uniform from one province to another, and social programs will vary considerably in both scope and availability. All this will diminish the ability or inclination of people to move into and take up residence in different provinces.<sup>81</sup>

In addition to mobility concerns,<sup>82</sup> there are also fundamental issues related to the attributes of citizenship in a modern state. Increasingly, social and economic benefits are seen as attaching to citizenship or membership in a state community, rather than being linked with one's particular geographic location. The argument is stated by Hogg as follows:

[A]s the basic needs of individuals come to be perceived as entitlements of citizenship, like political and legal civil liberties, then serious disparities in social services come

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social and economic experiments without risk to the rest of the country", cited in Hogg, *supra* footnote 9 at 107.

Hogg, also states:

... a more decentralized form of government can be expected to be able to identify and give effect to different preferences and interests in different parts of the country. ... A related point is that a province or state, being more homogeneous than the nation as a whole, will occasionally adopt policies that are too innovative or radical to be acceptable to the nation as a whole. In this way, a province or state may serve as a "social laboratory" in which new kinds of legislative programmes can be "tested". If a new program does not work out, the nation as a whole has not been placed at risk. If the programme works well, it will be copied by other provinces or states, and perhaps (if the Constitution permits) by the federal government. One can observe this kind of development with respect to social credit (which started in Alberta in 1935 and never took hold), medicare (which started in Saskatchewan in 1961 and became a national programme in 1968), family property regimes (which now exist in all provinces) and no-fault automobile insurance (which now exists in several provinces) (at 107-08).

<sup>81</sup> The Department of Finance, *Federal Transfers to the Provinces*, *supra* footnote 47 at 5, provides the following rationale for developing and maintaining national standards: Why might the national or federal government wish to influence provincial programs in this manner? One answer is familiar: to promote economic efficiency. If the federation is viewed as an economic union, the mobility of labour is an important condition for success. To illustrate, if Canadians are to move easily from province to province in search of the most productive employment opportunities, Canada-wide systems of education, health, and social programs, involving some national standards, are an important conditions facilitating mobility.

Similarly, Hogg, *Subsidiarity*, *supra* footnote 36 at 352-53, states:

Another disadvantage of provincial responsibility for health, education and welfare is the risk that provincial programs will be incompatible with each other, causing problems for citizens who move from one province to another. ... There is a national interest in removing barriers to interprovincial mobility so that citizens are free in fact, as well as in law, to move from one part of the country to another. ... *Mobility rights call for national standards*" [emphasis added].

<sup>82</sup> What is the relation between the guarantee of mobility in s.6 of the *Charter* and the erosion of national standards? Subsection 6(2) guarantees citizens and permanent residents the right to "move to and take up residence in" any province, and the right to "pursue the gaining of a livelihood in any province." Subsection 6(3) subjects that right to two limits:

to be seen as something like denials of social and economic rights. This kind of thinking calls for national standards for the provinces' programs of health, education and welfare. National standards can be achieved only with federal financial assistance.<sup>83</sup>

If there are significant restrictions on the federal spending power, and a substantial devolution of federal power and responsibility to the provinces, the poorer provinces will be able to provide less to their residents than wealthier provinces. That is simply a reflection of the fact that the concepts of local control on the one hand and national standards on the other are antonyms.<sup>84</sup> To the extent that one increases local control over spending, one decreases federal ability to formulate and implement national objectives and minimum standards, because, as Courchene states, "the golden rule of intergovernmental transfers is that if you want to continue to make the rules, you have to continue to supply the gold!"<sup>85</sup> Decentralization therefore comes at the cost of a diminished ability to maintain national standards, which will impact on the free flow of people in Canada, as well as the way in which Canadians define themselves.

## II. Suggestions for Decentralization

### A. Initial Assumptions

The suggestions in this article are predicated upon the following fundamental assumptions. First, Canada should have a national economy with mobility of goods, capital and people. Second, there should be a national ability to respond to

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(a) laws of general application other than those that discriminate on the basis of province of previous or present residence, and (b) laws providing for reasonable residency requirements as a qualification for the receipt of publicly funded social programs. Section 1 may provide a final saving grace for laws struck down under s.6(2), though its operation in relation to s.6(3)(b) is unclear.

If, as a consequence of a federal withdrawal of funds, a province's social spending decreases and its socio-economic infrastructure declines substantially, it could be argued that that poses a barrier to persons moving to and taking up residence in that province. However, if social entitlements and economic conditions were equally poor for residents and non-residents alike, though a barrier, it would be saved under s.6(3)(a) (see, for example, *Taylor v. Institute of Chartered Accountants* (1989), 59 D.L.R. (4th) 656 (Sask. C.A.): stringent certification laws applying to residents and non-residents upheld). On the other hand, as federal funding decreases, it would not be surprising that a province devotes more of its resources to its own residents, thus deliberately raising barriers to non-residents. Professional certification, trade qualification standards or other discriminatory laws directed at non-residents would likely be contrary to s.6(2) and would not be saved by s.6(3)(a), as they would not be laws of general application (see *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591: restrictions on Albertans' right to set up practice with non-residents struck down; and *Island Equine Clinic v. PEI* (1991), 81 D.L.R. (4th) 350 (P.E.I. C.A.): denial of veterinary subsidy to newcomers and outsiders struck down). Residency requirements related to publicly provided social services would have to be reasonable, or they too would be struck down under s.6(2).

<sup>83</sup> Hogg, *Subsidiarity*, *supra* footnote 36 at 352.

<sup>84</sup> The *Meech Lake Accord*, though providing for a limit on the spending power of the federal Parliament with respect to shared-cost programs, did reflect the necessity of national objectives or standards in s. 106A.

<sup>85</sup> Courchene, *A Guide to the CHST*, *supra* footnote 47 at 77.

national emergencies. Third, there should be federal authority to equalize, or at least redistribute, resources among provinces. The reality is that overall federal transfers will doubtlessly decline when Parliament can no longer claim political credit for the regulatory effects of conditional grants.<sup>86</sup> However, the constitutional ability to redistribute resources should remain. The extent to which the power is used should be left to political judgment. Fourth, anything that a province can locally regulate without the necessity of a dovetailing scheme from Parliament should be provincially regulated. Finally, no assumptions have been made one way or another about whether there should be national cultural institutions.

The assumption that provincial legislatures should be entitled to regulate exclusively in all areas where they can unilaterally do so, and accordingly constitutionally exclude Parliament from taking a regulatory presence in those areas, is the most critical of those underlying this article. Implicit in it is the proposition that Parliament will no longer be able to direct provincial policy in areas of exclusive provincial jurisdiction through conditional grants.

What that really means is that, to the extent the assumption is implemented, Parliament will no longer be able to establish minimum national standards. The full rigours of this limitation can be alleviated, of course, by preserving *some* federal ability in this regard. The *Meech Lake Accord* provides an example of such an alleviation. In the proposed amendment to s.106 of the *Constitution Act, 1867*, the *Meech Lake* proposal was to restrict the federal spending power by requiring Parliament to pay compensation to any province that chose not to participate in a shared cost program *provided* that province carried on a similar program or initiative which was "compatible with the national objectives". Any such alleviation must, of course, come at the expense of the assumption respecting local control. That is not a bad thing, but it is a compromise which must be recognized as such.

## B. *The Guiding Principles*

If the foregoing assumptions are valid, the major determinant of whether federal authority is appropriate is whether a province has the ability to act unilaterally. Put another way, the basic principle is that Parliament should have jurisdiction in relation to those matters which cannot be regulated by any province acting on its own. Anything which can be regulated locally on a unilateral basis, without the necessity of a federal dovetailing scheme, should come within exclusive provincial jurisdiction.

The "provincial inability" approach to the division of powers that we advocate emerges in two strands of constitutional jurisprudence: the general branch of the trade and commerce power, and the national concern branch of the POGG power. In *City National Leasing*, Dickson C.J. stated that "failure to include one or more provinces or localities... would jeopardize

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<sup>86</sup> See Howse, *supra* footnote 79.

the successful operation" of competition legislation in other parts of the country.<sup>87</sup> In *Crown Zellerbach*, Le Dain J. stated:

In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.<sup>88</sup>

As Hogg explains it, "[t]here are ... cases where uniformity of law throughout the country is not merely desirable, but essential, in the sense that the problem is beyond the power of the provinces to deal with it'. This is the case when the failure of one province to act would injure the residents of the other (cooperating) provinces."<sup>89</sup>

Other tests are, of course, possible.<sup>90</sup> Indeed, changes can be made to these proposals to modify their full rigour and leave room for the federal establishment of national standards in provincial social programs. Such permutations and combinations are a matter of political judgment and constitutional bargaining, and accordingly are beyond the scope of this article.

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<sup>87</sup> *City National Leasing*, *supra* footnote 35 at 662.

<sup>88</sup> *Crown Zellerbach*, *supra* footnote 45 at 432. Le Dain J. goes on to note that the "provincial inability" test was noted with apparent approval in *Labatt Breweries v. Canada (A.G.)*, *supra* footnote 31, *Schneider v. The Queen*, [1982] 2 S.C.R. 112, and *The Queen v. Wetmore*, [1983] 2 S.C.R. 284.

<sup>89</sup> Hogg, *supra* footnote 9 at 447, citing Gibson, "Measuring National Dimensions" (1976) 7 Man. L.J. 15 at 33. Hogg continues:

In the case of aeronautics [*Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292, the failure of one province to accept uniform procedures for the use of air space and ground facilities would endanger the residents of other provinces engaged in inter-provincial and international air travel. In the case of the national capital region [*Munro v. National Capital Commission*, [1966] S.C.R. 663 [hereinafter *Munro*]], the failure of either Quebec or Ontario to cooperate in the development of the national capital region would have denied to all Canadians the symbolic value of a suitable national capital. ... In the case of marine pollution [*Crown Zellerbach*, *supra* footnote 45], the failure of one province to protect its waters would probably lead to the pollution of the waters of other provinces as well as the (federal) territorial sea and high sea. In the case of nuclear power [*Ontario Hydro*, *supra* footnote 45], the failure of one province to enact adequate regulatory measures would expose the people of other provinces to the risk of an environmental catastrophe as well as the risks created by the proliferation of nuclear weapons.

<sup>90</sup> Provincial inability may also be related to the principle of subsidiarity, which is explicit in the *Treaty on European Union*. Hogg, *Subsidiarity*, *supra* footnote 36 at 341, describes subsidiarity as "a principle of social organization that prescribes that decisions affecting individuals should be taken as close to the individuals affected as is reasonable possible." In relating the principle to Canadian constitutional doctrine, he states: "The provincial inability test, with its high threshold of justification for federal action, plainly reflects a notion of subsidiarity. Power must be exercised at the provincial level, which is nearest to the people, unless the provinces are unable to deal effectively with the issue; only then may action be taken at the more distant national level. ... The provincial inability test allows the more distant federal level of government to act only when the nearer provincial level cannot effectively do so" (at 349-51).

Finally, the enumeration of powers that we suggest must be left to Parliament, as set out in the following section, is not necessarily exhaustive. While we do not specifically discuss these, it is clear that the regulation of the following matters could not be effectively exercised by a single province acting on its own: the postal service (s.91(5)), the census and statistics (s.91(6)), lighthouses, navigation, shipping, sea coasts and fishing in external waters (ss. 91(9), 91(10) and 91(12)), weights and measures (s.91(17)), and patents and copyrights, (which are explicit in ss. 91(22) and 91(23))), and other forms of intellectual property, like trade-marks, which are not.

There are other matters, presently federal, with respect to which provincial jurisdiction is likely amenable, for example, bankruptcy and insolvency (s.91(21)), marriage and divorce (s.91(26)) and penitentiaries (s.91(28)). However, we take no position on those issues in this paper.

Finally, in keeping with the assumptions stated above, the federal power of disallowance ought to be repealed, and the federal declaratory power in 92(10)(c), if not repealed outright, should be exercised only with the consent of the province in which the work is situated, as suggested in the *Charlottetown Accord*.

### C. *Matters to be left to Parliament*

#### 1. *Interprovincial Trade and Commerce, Including the Movement of People, Capital and Goods*

*Parsons* is the leading case on federal authority to pass laws in relation to trade and commerce pursuant to s. 91(2) of the *Constitution Act, 1867*, and should remain the law in this area. As stated by a majority of the Supreme

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Another way of determining which powers ought to be exercised at the federal level is suggested by Massey, *supra* footnote 66, who states:

The central government ought to possess plenary and exclusive authority over those aspects of government that will be imperfectly accomplished by reason of the externalities problem [[s]mall units of government will be tempted to adopt policies that produce benefits for their constituents paid for by residents of other jurisdictions (at 802)]. Aspects of government that are not plagued by this problem can properly be left to the provinces or, alternatively, shared with the central government. Accordingly, authority over such matters as national defence, foreign policy, fiscal and monetary policy, customs duties, external trade, and environmental or conservation matters ought to be vested exclusively in the central government (at 823).

Massey also outlines some of the philosophical rationales for vesting authority in local rather than centralized bodies:

There are three major ways in which autonomous smaller units of government can improve the liberty inherent in a democratic political process. They are better able to effectuate the interests and welfare preferences of the people. Their existence is indispensable to protection of optimal individual choice within the legitimate zone of authority of the democratic political process. Finally, they are calculated to preserve the spirit of democracy: the ideal that democratic governments do not operate upon people in an exogenous fashion, but are more akin to a cooperative association which claims the fealty of its members on the basis of mutual obligation and benefit (at 800-01).

Court of Canada as recently as 1978 in *Vapor Canada* in *obiter*, the courts should apply *Parsons* "in the widest aspects of its pronouncements".<sup>91</sup> Pursuant to *Parsons*, Parliament may regulate interprovincial and international trade, and matters of general interest to the Dominion.

The major limitation on federal authority contained in *Parsons* is that Parliament cannot regulate contracts of a particular business or trade, unless that business or trade itself comes within exclusive federal jurisdiction.<sup>92</sup> Thus, contracts in relation to banking (s. 91(15)) or interprovincial transportation (ss. 91(29) and 92(10)(a)) can be federally regulated.

Limitations to the first branch of *Parsons* have been extended by subsequent judicial decisions, primarily in the *Insurance Reference* of 1915, to exclude Parliament from the regulation not only of *contracts* of particular businesses or trades, but from the regulation of the businesses or trades themselves.<sup>93</sup> Notwithstanding the *obiter* in *Vapor Canada* signalling a desire to return to *Parsons*, the Supreme Court of Canada strongly reaffirmed the *Insurance Reference* limitation in *Labatt Breweries of Canada v. Canada (A.G.)*.<sup>94</sup> That limitation of the first branch of *Parsons* must therefore be taken to be good law.

Parliament should also retain jurisdiction to regulate interprovincial and international transportation by truck,<sup>95</sup> rail,<sup>96</sup> or ship pursuant to ss. 91(29) and 92(10)(a) and (b) of the *Constitution Act, 1867*.<sup>97</sup> Its jurisdiction

<sup>91</sup> *Vapor Canada*, *supra* footnote 32 at 164.

<sup>92</sup> *Parsons*, *supra* footnote 21 at 113.

<sup>93</sup> *Insurance Reference*, *supra* footnote 23 at 596.

<sup>94</sup> *Supra* footnote 31. Estey J., in striking down *Food and Drugs Act* compositional standards for light beer, characterized the operation of the regulations as follows:

Nowhere are the impugned statutory regulations or provisions concerned with the control or regulation of the extraprovincial distribution of these products or their movement through any channels of trade. On the contrary, their main purpose is the regulation of the brewing process itself by means of a "legal recipe ... . Indeed, if the industry is substantially local in character, as seems to be the case from the sparse record before the court ..., the regulations are, in fact, confined to the regulation of a trade within a province" (at 943).

<sup>95</sup> *Re Tank Truck Transport*, [1960] O.R. 497 (H.C.), *aff'd* without written reasons, [1963] 1 O.R. 272 (C.A.); see, also, *R. v. Cooksville Magistrate's Court ex parte Liquid Cargo Lines*, [1965] 1 O.R. 84 (H.C.); or interprovincial bus transportation: *Ontario (A.G.) v. Winner*, *supra* footnote 73; *Re Ottawa-Carleton Regional Transit Commission* (1983), 44 O.R. (2d) 560 (C.A.).

<sup>96</sup> Even a local railway line will be held to be part of an interprovincial undertaking where it is under common management with an interprovincial railway undertaking: *Luscar Collieries v. McDonald*, [1927] A.C. 925; and the use by a local commuter train service of CNR tracks under CNR control will make the commuter service part of the interprovincial undertaking: *Ontario v. Board of Transport Commissioners*, [1968] S.C.R. 118.

<sup>97</sup> See, generally, P.J. Monahan, "Constitutional Jurisdiction Over Transportation: Recent Developments and Proposals for Change" in Canada Royal Commission on National Passenger Transportation, *Directions: The Final Report of the Royal Commission on National Passenger Transportation* by L.D. Hyndman (Ottawa: Supply and Services, 1994); and McNairn, "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969) 47 Can. Bar Rev. 355.



in relation to aeronautics goes beyond that to encompass local flight as well.<sup>98</sup>

As regards communications Parliament clearly has jurisdiction in relation to interprovincial and international telecommunications.<sup>99</sup> But prior to the unanimous decision of the Supreme Court of Canada in *Téléphone Guèvremont v. Quebec*,<sup>100</sup> it was believed, wrongly, that regulation of local telecommunications was a provincial matter.<sup>101</sup> *Téléphone Guèvremont* was a local telephone company in Quebec. It was not a member of Stentor, and had no connections at any provincial border points. It was interconnected with Bell; however, and could send and receive information from across the country and around the world.

On the basis that its subscribers could send and receive interprovincial and international communications, the Supreme Court held it to be an interprovincial undertaking within the legislative authority of the federal Parliament. Accordingly, as Hogg states, the issue is now settled: All telephone companies are within federal jurisdiction.<sup>102</sup> Given the substantial local, interprovincial and international interconnections, that unified federal jurisdiction should continue.

As to the regulation of broadcast communications, again Parliament has exclusive jurisdiction in relation to interprovincial and international

<sup>98</sup> *Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (federal legislation over aeronautics is valid pursuant to the treaty power and, perhaps, POGG as well); *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292 (aeronautics falls under the POGG power); *Jorgenson v. North Vancouver Magistrates* (1959), 28 W.W.R. 265 (B.C.C.A.) (federal jurisdiction extends to purely intraprovincial airlines).

<sup>99</sup> *Toronto v. Bell Telephone*, [1905] A.C. 52 (Parliament has jurisdiction over Bell Telephone as it is an interprovincial undertaking under s.92(10)(a)); *Alberta Government Telephones v. CRTC*, [1989] 2 S.C.R. 225 [hereinafter AGT] (Company with operations only within the province of Alberta but connecting at the border with neighbouring systems and holding membership in Stentor is an interprovincial undertaking).

<sup>100</sup> [1994] 1 S.C.R. 878 [hereinafter *Téléphone Guèvremont*].

<sup>101</sup> See Hogg, *supra* footnote 9 at 598-99.

<sup>102</sup> Hogg, *supra* footnote 9 at 599. H.N. Janisch and R.J. Schultz, "Federalism's Turn: Telecommunications and Canadian Global Competitiveness" (1991) 18 Can. Bus. L.J. 161, argue that exclusive federal jurisdiction over telecommunications will undermine the capacity of the telecommunications industry to respond to global competition. They state:

In our judgment, Canada's embrace of a unitary form of monopoly regulation in the face of the emerging decentralized, truly federal, telecommunications industry structure is not simply a conceptual conflict. It threatens to reduce, if not undermine, the creative capacity of both our telecommunications system and its users to respond to the pressures of global competitiveness, pressures which themselves to a very large extent are telecommunications-based and driven. Moreover, we believe that monopoly federal regulation is not necessary to satisfy national telecommunications policy and regulatory objectives. In our view, Canada requires a truly federal, not a unitary, regulatory system and this system should incorporate a version of two-tier regulation in which multiple regulators co-exist within a hierarchical, but diverse, public policy system. Hierarchy is necessary to ensure that national policy needs can be met while diversity will permit legitimate provincial aspirations to be pursued (at 162).

broadcasting.<sup>103</sup> Further, given the nature of television and radio waves and the inability to fence them into provincial borders, that jurisdiction likely reaches down to purely local broadcasting as well.<sup>104</sup> Again, the nature of broadcasting over the airwaves (as opposed to cable) is such that federal jurisdiction should continue.

The matter may be somewhat different in relation to cable broadcasting. One may be able to make the case that the technology and infrastructure of cable systems, as opposed to that respecting hertzian radio waves, is amenable to some degree of provincial regulation. Cable broadcasting involves both the receipt of transmitted signals and the transmission of those signals through a cable delivery mechanism. It is arguable that a cable operator transmitting in the province only programmes originating with the cable company, and not received over the airwaves, is within provincial jurisdiction as a local undertaking under s.92(10). As Hogg notes, however, most cable companies transmit both programmes received over the airwaves and original programmes and, given the reluctance of the courts to divide jurisdiction over a single undertaking, they would therefore be considered an interprovincial undertaking.<sup>105</sup>

That being said, there is presently concurrent jurisdiction over some aspects of broadcasting as a practical matter, subject to paramount federal jurisdiction. Provinces cannot, however, aim their regulation at broadcasters in particular.<sup>106</sup> Thus in *Quebec (A.G.) v. Kellogg's*<sup>107</sup> and *Irwin Toy v. Quebec (A.G.)*,<sup>108</sup> the Supreme Court of Canada upheld provincial regulation of broadcast content. There is no reason why that should not continue.

Thus, in any constitutional reform effort, attention should be given to the different component parts of the current broadcasting regulatory regime to identify those areas which give the subject matter its federal character. All other parts, if there are any which can be so isolated, should come within provincial jurisdiction on at least a concurrent basis. Given the above discussion, provincial regulation could encompass some intraprovincial cable operations, as well as

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<sup>103</sup> *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (federal Parliament has jurisdiction to regulate and control radio communication pursuant to POGG and s.92(10)(a)); *Capital Cities Communications v. CRTC*, [1978] 2 S.C.R. 141 (Section 92(10)(a) provides federal Parliament with jurisdiction over broadcast television — no reference to POGG made).

<sup>104</sup> *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191 (striking down Quebec law authorizing provincial agency to license cable television systems within the province, and affirming exclusive federal jurisdiction over cable television). Hogg, *supra* footnote 9 at 591, states: "The need to allocate space in the frequency spectrum in order to avoid interference suggests that the power to regulate the interprovincial broadcaster must carry with it the power to regulate the intraprovincial broadcaster as well."

<sup>105</sup> Hogg, *supra* 9 at 594-97.

<sup>106</sup> Provincial regulation that either "sterilized" or singled out a federal undertaking would be *ultra vires*.

<sup>107</sup> [1978] 2 S.C.R. 211 (upholding a law prohibiting the use of cartoons in advertising, including television advertising, intended for children).

<sup>108</sup> [1989] 1 S.C.R. 927 (upholding a law prohibiting advertising directed at children, including television advertising).

content regulation of radio and television, provided it is not directed exclusively at those media.

The foregoing matters, except where scope for provincial jurisdiction is noted, are essential to the operation of a national economy, and no province acting alone can regulate them. No single province can regulate interprovincial trade, set interprovincial transport routes, or regulate telecommunications or broadcasting, which by their nature are not limited by provincial boundaries. Thus, no matter how decentralized a federation is thought to be desirable, it is an irreducible minimum that these classes of subjects be left to Parliament.

The implications of the foregoing are that some matters which are presently within federal jurisdiction may be excluded from it. For example, certain competition laws clearly transcend<sup>109</sup> provincial boundaries others do not.

Many of the provisions of the *Competition Act* are concerned exclusively with specific contracts. For example, provisions which regulate exclusive dealing and tied selling<sup>110</sup> are essentially concerned with specific contracts between a buyer and seller, and can be adequately dealt with by provincial consumer protection or fair trade practices laws.

Similarly, while certain kinds of federal securities laws may well be valid pursuant to the present *Constitution*, that potential power has remained consistently unexercised.<sup>111</sup> In its absence, highly sophisticated provincial securities laws have been promulgated and effectively applied.<sup>112</sup> While in theory existing legislative jurisdiction does not atrophy,<sup>113</sup> the federal failure to enter the field of securities regulation has left us with the experience that provincial schemes work. As Katherine Swinton states:

If a major indication of federal competence is provincial inability and harm, the record of past regulatory efforts is clearly important. In ... areas, such as securities regulation or the environment, the Court should consider the ability of the provinces to regulate and the harm of provincial inaction or diversity. In the securities area, for example, a good record of cooperation and harmonization among the provinces exists, with Ontario playing the leading regulatory role. This history of interprovincial cooperation should bring into question an argument for national regulation. Also, the values of

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<sup>109</sup> Examples of competitive matters which should remain federal are as follows. Mergers whose effects are substantially felt in more than one province, or abuses of dominant position felt in more than one province, are examples of such cases. *Canada Director of Investigation and Research v. Nutrasweet*, (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), for example, involved the commission of anti-competitive acts in the supply and sale of aspartame across the country, and the use of the company's United States patent to foreclose competition in Canada. If regulation of these matters were left to the provinces, the practical effect is that they would likely escape effective governance altogether.

<sup>110</sup> *Competition Act*, *supra*, s.49.

<sup>111</sup> See Canada Consumer and Corporate Affairs, *Proposals for a Securities Market Law for Canada* by P. Anisman *et al.* (Ottawa: Minister of Supply and Services Canada, 1979).

<sup>112</sup> *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161 (upholding an Ontario law applied to a federal company providing a remedy for insider trading).

<sup>113</sup> *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

provincial regulation, such as the experimentation in policy that may come in different jurisdictions, should not be forgotten. Moreover, the presence of federal jurisdiction does not guarantee uniformity of regulation or a policy more protective of the market.<sup>114</sup>

Consequently, the matter should be left in provincial hands, and the federal power explicitly recognized only if it is necessary in certain aspects. Where it is not, it should be excluded.

The courts have found federal power to incorporate federal corporations in the POGG clause,<sup>115</sup> because the provincial power in s. 92(11) of the *Constitution Act, 1867*, is limited to the incorporation of companies with *provincial* objects. The fact is, however, that there is no need for federal corporations. Provincial corporations can be given the powers of natural persons,<sup>116</sup> as federal ones can, and they can have full national and international mobility.<sup>117</sup> It may be necessary to ensure that no province can discriminate against corporations formed in other provinces, something which is automatically applied now *vis a vis* federal companies.<sup>118</sup> However, subject to that qualification, there is no real reason to permit federal incorporations today outside of industries which are themselves within exclusive federal jurisdiction, for example, banking or aeronautics.<sup>119</sup>

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<sup>114</sup> K. Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55 *Law and Contemporary Problems* 121 at 134-35.

<sup>115</sup> *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (B.C.S.C.) [hereinafter *Wharton*].

<sup>116</sup> For example, s. 15 of the *Business Corporations Act* (Ontario), R.S.O. 1990, c.B.16 [hereinafter *OBCA*], states that "A corporation has the capacity and the rights, powers and privileges of a natural person" (*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15(1) [hereinafter *CBCA*]). For the constitutional perspective, see Hogg, *supra* footnote 9 at 606, who concludes that "there is no functional limitation on the provincial power of incorporation" (citing *AGT*, where it was held that a provincially incorporated company was engaged in operating an interprovincial undertaking).

<sup>117</sup> *OBCA*, *ibid.* s. 16, states: "A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Ontario to the extent that the laws of such jurisdiction permit" (*CBCA*, *ibid.* s. 15(3)).

<sup>118</sup> *Wharton*, *supra* footnote 115, where it was held that a provincial law prohibiting extra-provincial companies (all companies not incorporated under the law of the province) from carrying on business in the province without a license was invalid. In other words, even though the law was generally valid, as being in relation to property and civil rights in the province, it could not sterilize or destroy the essential powers conferred on the companies by the federal Parliament.

<sup>119</sup> On the contrary, federal incorporations have been relied upon to try to resist, often unsuccessfully, provincial rules of general application. In fact, prior to the decision in *Canadian Indemnity Co. v. B.C. (A.G.)*, [1977] 2 S.C.R. 504, Professor Bora Laskin (as he then was) referred to the federally incorporated company as the "pampered darling of Canadian constitutional law." Finkelstein, *Laskin's Canadian Constitutional Law*, *supra* footnote 16 at 698. In *Canadian Indemnity*, a federally-incorporated insurance company argued that the creation of a B.C. Crown corporation with a monopoly over compulsory automobile insurance in the province impaired its status and essential powers. The Supreme Court rejected the argument at 519, holding that the federal company was subject to the regulation of a particular business or activity "in the same way as a natural person or a provincially-incorporated company. See also *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, where it was held that a provincial statute expropriating all of one

## 2. The Monetary System

If one makes the fundamental assumption that an efficiently functioning national economy is necessary to a viable nation. It follows that one must have an efficiently functioning monetary and banking system.<sup>120</sup> The monetary system is critical to facilitate the operation of any national economy, and it must be unitary in the sense of being within the control of a single regulatory jurisdiction. The central authority must be able to protect the currency, control inflation, and regulate interest rates and money supply. That cannot be achieved with different provinces making different, and possibly conflicting, decisions.

Parliament should thus retain its legislative jurisdiction in relation to currency<sup>121</sup> and interest,<sup>122</sup> banking and the business of banking,<sup>123</sup> and bills of exchange.<sup>124</sup> Further, deference must be paid to Parliament in this area with regard to determining the precise limits on its regulatory jurisdiction. Thus, in *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*,<sup>125</sup> when Beetz J., for the Supreme Court of Canada, sought to define the business of banking, one of the most important considerations was whether Parliament itself considered the matter at issue to be "banking." Beetz J. stated:

*Pioneer Trust* is not authorized by the *Bank Act* nor any other Act to use the ... words [bank, banker or banking] to describe its business or any part thereof including its chequing account service. If Parliament, which is the competent authority in the matter, wishes to prevent members of the public from mistaking any part of the business of *Pioneer Trust* and other trust companies for a banking business, it seems to me that it is because Parliament considers that it is *not* a banking business. I am also of the view that the opinion of Parliament should be considered as decisive in this case.<sup>126</sup>

particular federal company's assets, so that the company's objects could no longer be carried out, did not interfere with its status or essential powers. The Court held that the company, with its corporate structure left intact, could raise new capital and issue shares. The statute, however, was struck down on other grounds.

<sup>120</sup> In this regard, it is interesting to note the early United States decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), where the Supreme Court upheld the ability of the federal government to charter the second Bank of the United States. The Bank was established following the War of 1812, when the states seemed unable to deal with the monetary problems of a disrupted economy. The case involved an action brought by the state of Maryland for non-payment of an onerous tax on the issuance of bank notes, essentially a tax on the national bank. The Supreme Court struck down the state law, holding: (i) the federal government draws its power directly from the people, (ii) the necessary and proper clause provides Congress with a wide scope of authority to implement the enumerated powers, and (iii) state legislation interfering with these powers is invalid.

<sup>121</sup> Section 91(14); s.91(20) (legal tender).

<sup>122</sup> Section 91(19).

<sup>123</sup> Section 91(15).

<sup>124</sup> Section 91(18).

<sup>125</sup> [1980] 1 S.C.R. 433 [hereinafter *Pioneer Trust*].

<sup>126</sup> *Pioneer Trust*, *supra* footnote 125 at 463. See also p. 469, where Beetz J. noted that the definition of Indians (s.91(24)) and penitentiaries (s.91(28)) also comes from federal legislation.

It is true, of course, that the monetary system is not a discrete matter which is unaffected by other factors. As Beetz J. said in dissent in the *Anti-Inflation Reference*, arguing that inflation was not a sufficiently precise matter to come within federal jurisdiction:

The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.<sup>127</sup>

Thus, provincial decisions about taxation, spending, borrowing and debt levels, trade barriers and economic regulation, generally, all affect the value of the currency, interest, and inflation rates. Provincial institutions such as trust companies, *caisses de depot* and other near banks influence the banking system. Indeed the case was quite effectively made in *Pioneer Trust* that these institutions operate very similarly to banks even though they do not form part of the subject matter of s. 91(15) of the *Constitution Act, 1867*.<sup>128</sup>

However, although these provincial activities have incidental *effects* upon the monetary system, they are not *aimed* at it.<sup>129</sup> The point is that, while the provincial activities are valid and, indeed, necessary if the provinces are to fulfil their constitutional responsibilities, provinces should not have a direct role in regulating the monetary system. Only Parliament can, and should, have jurisdiction to directly regulate the monetary system. Only Parliament can monitor the effects of *all* the factors which operate upon the monetary system, including but not limited to provincial actions, in order to mitigate the effects of those factors by taking the appropriate counter-actions.

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<sup>127</sup> *Anti-Inflation Act Reference*, *supra* footnote 43 at 458.

<sup>128</sup> As was noted by Beetz J., there was testimony indicating that "99 percent of the actual business conducted by [Pioneer Trust] is identical to the business carried on by chartered banks" (at 445). Though concluding that Pioneer Trust was not in the business of banking, it was clear from the decision that there was a great deal of functional overlap between banks and near banks. Beetz J. stated at 470: "A great many of its other operations are not characteristic of the banking business although they are also carried on by chartered banks. The one operation carried on by *Pioneer Trust* which may be characteristic of the banking business, the chequing account service, is not exclusive to the business of banking."

<sup>129</sup> See, for example, *Carnation Co. v. Quebec (Agricultural Marketing Board)*, [1968] S.C.R. 238, where the Supreme Court upheld a provincial marketing scheme for the sale of raw milk by farmers to the Carnation company. Though Carnation shipped the bulk of its product out of the province, the Court held that the law was *in relation to* intraprovincial trade and merely *affected* interprovincial trade.

Two other decisions making this same point were referred to earlier in this paper. In *Canadian Indemnity*, *supra* footnote 119, it was held that the creation of a provincial Crown Corporation with a monopoly over the sale of compulsory automobile insurance was a matter within the competence of the province, even though it affected federal companies; and in *Kellogg's*, *supra* footnote 107, it was held that a provincial law restricting the use of cartoons in advertising directed at children was in relation to a matter within provincial competence, even though it affected television broadcasting. Many other decisions could be cited on this point, and are by Hogg, *supra* footnote 9 at 379.

### 3. Defence, Foreign policy and Treaty-Making

Defence, foreign policy and treaty-making are areas where no province can act alone.

As to defence, only a national government can offer a national response to an external threat.<sup>130</sup> Where the following matters are at issue, such as declaring or responding to declarations of war, implementing defensive measures pursuant to legislation like the *War Measures Act*<sup>131</sup> or performing weapons testing,<sup>132</sup> Parliament must be given broad jurisdiction.

The same arguments that are relevant to national defence apply with respect to foreign policy, even apart from treaty-making. It is up to the central authority, with its broader national perspective, to assess the advantages and the costs that arise from Canada's involvement in peacekeeping missions, trade missions (although, provincial participation has by practice become an important feature of these missions), membership and positions taken in international organizations such as the North Atlantic Treaty Organization ("NATO") and the United Nations ("UN"), granting or withholding recognition to new states, and the concomitant advantages and obligations which ensue from such decisions.

<sup>130</sup> Section 91(7) gives exclusive legislative authority to Parliament in relation to "Militia, Military and Naval Services, and Defence." As to the relationship between s.91(7) and the emergency branch of the POGG power, see Finkelstein, *Laskin's Canadian Constitutional Law*, *supra* footnote 16 at 345-47. See also Hogg, *supra* footnote 9 at 457, where he defines the relationship as follows: "In Canada, the defence power of s.91(7) should be regarded as the authority for legislation relating to the armed forces and other traditional military matters. The emergency branch of P.O.G.G. should be confined to the temporary and extraordinary role required for national regulation in time of actual war (or other emergency)."

<sup>131</sup> The *War Measures Act*, which was enacted in 1914 and remained in force until 1988, authorized federal regulation on an extremely broad scope of matters. It came into force when the government proclaimed "that war, invasion, or insurrection, real or apprehended, exists." The Act was proclaimed during each of the two World Wars, and again in October 1970 in response to the activities of the FLQ. The Act was repealed by the *Emergencies Act*, S.C. 1988, c.29.

The *War Measures Act* was upheld in a number of decisions. In *Re Gray* (1918), 57 S.C.R. 150 [hereinafter *Re Gray*], the Supreme Court upheld as constitutional the massive delegation of power from Parliament to the federal cabinet under the legislation. In *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*, *supra* footnote 40, the Privy Council held that price controls established during the First World War, and temporarily continued after its cessation, were valid. It was held that the POGG power, in times of great emergencies, authorized the passage of laws by the federal government that would normally be competent only to the provinces. In *Wartime Leasehold Regulations Reference*, *supra* footnote 40, rent controls imposed during, and continued until shortly after the Second World War, were upheld. And in *Co-Operative Committee on Japanese Canadians v. Canada (A.G.)*, *supra* footnote 40, the deportation of Japanese Canadians after the Second World War was upheld.

<sup>132</sup> In *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, the Supreme Court struck out a statement of claim as disclosing no cause of action, where it was alleged that a decision by the federal government to permit the United States to test its cruise missiles in Canada amounted to a violation of life, liberty and security of the person, contrary to s.7

Similarly, and related to our comments earlier about the federal role in regulating international trade, Parliament is in the best position to assess the costs and benefits inherent in the imposition of customs duties and tariffs. As the Privy Council stated in the *Johnny Walker* case: "The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries..."<sup>133</sup> Decisions about the need to protect indigenous industries, to secure local employment, to promote foreign investment, and to expand exports require the striking of a balance, which is dependent upon adopting a national perspective.

Treaty-making is a subset of foreign policy, but it requires separate treatment.<sup>134</sup> In Canadian law, a treaty is not recognized as part of the internal law of Canada until it is implemented by the enactment of a statute.<sup>135</sup> However, the subject matter of treaties often covers classes of subjects within exclusive provincial jurisdiction. The issue accordingly arises as to whether Parliament and the government of Canada have jurisdiction, not only to enter into treaties with foreign states, but also to implement them, where they relate to provincial matters. A balance must be struck between the following concerns: on the one hand, Canada is clearly limited in its ability to enter into international agreements affecting provincial powers to the extent it cannot implement them without the consent of ten provinces. Moreover, it faces the possibility of reneging on its international treaty obligations if a province changes its mind over the course of time and passes non-conforming legislation. On the other hand, to permit Parliament to legislate in areas of exclusive provincial jurisdiction in order to implement treaties constitutes a substantial federal intrusion into provincial affairs.<sup>136</sup>

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of the *Charter*. In striking the claim, however, the Court held that the *Charter* applies to cabinet decisions taken under the prerogative and rejected that a political questions doctrine is part of Canadian constitutional law.

<sup>133</sup> *B.C. (A.G.) v. Canada (A.G.)*, [1924] A.C. 222 at 225 [hereinafter *Johnny Walker*]. *Johnny Walker* also stands for the proposition that if a law is in pith and substance a regulatory scheme, which includes a customs duty intended to protect indigenous industries, s.125 of the *Constitution Act, 1867* (which provides that neither level of government can tax the land or property of the other), is inapplicable. See, however, *Alberta Natural Gas Taxation Reference*, [1982] 1 S.C.R. 1004, where the scheme, which was not administered by a board, and the funds were not carefully earmarked as part of a scheme of energy redistribution, was struck down.

<sup>134</sup> See, generally, Hogg, *supra* footnote 9 at ch. 11 and Finkelstein, *Laskin's Canadian Constitutional Law*, *supra* footnote 16 at ch. 7.

<sup>135</sup> As stated in the *Labour Conventions* case, *supra* footnote 28 at 347, "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action." See, also, Hogg, *supra* footnote 9 at 285-87.

<sup>136</sup> Swinton, *supra* footnote 114, sees the trade and commerce and POGG powers as bases for recognizing (or enhancing) Canada's current treaty implementation power. She states at 131:

For many concerned with Canada's position in the interdependent world, it is important that the federal government have the authority to enter into binding international agreements that the provinces cannot undermine. Also, those concerned argue that the federal government must have expanded jurisdiction to deal with a range of economic problems so that Canada itself becomes more integrated and less



In the *Labour Conventions*<sup>137</sup> case, the Privy Council weighed the issue in favour of a preservation of the federal-provincial balance of power, holding that Parliament can constitutionally enter into but not implement treaty obligations in areas of exclusive provincial jurisdiction. Lord Atkin stated:

It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by the Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy. ... *For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.*<sup>138</sup> [emphasis added]

The Supreme Court of Canada, in *obiter*, has on a few occasions signalled a willingness to reconsider the *Labour Conventions* case. In *Vapor Canada*, after reviewing both judicial and *ex cathedra* statements questioning the correctness of the *Labour Conventions* case,<sup>139</sup> Laskin C.J. was prepared to assume that Parliament had a treaty implementing power, though it had not been complied with in the present case. He stated:

fragmented economically, allowing the country to compete successfully in the international arena. Realistically, the best arguments to support these developments lie in the new general regulation of trade doctrine with regard to economic or trade issues, while the national dimensions doctrine is more likely to be invoked in relation to areas which go beyond economic, such as the protection of the environment.

<sup>137</sup> *Canada (A.G.) v. Ontario (A.G.)*, *supra* footnote 28. This was one of the "new deal" cases referred to above.

<sup>138</sup> *Labour Conventions*, *supra* footnote 28 at 351-52.

<sup>139</sup> Laskin C.J., reviewing the commentary on the case, stated at 168-69:

The *Labour Conventions* case is too well-known to require either quotation or statement of its holding. In *Francis v. The Queen*, [[1956] S.C.R. 618 at 621], the then Chief Justice of this Court, Kerwin C.J., speaking for himself and two other members, Taschereau and Fauteux JJ. (each of whom later became Chief Justice), said that it might be necessary in the future to consider (which I take to mean reconsider) the judgment in the *Labour Conventions* case. Lord Wright, who sat as a member of the Board in that case, said in a later *ex cathedra* comment ... that the Judicial Committee has expressed a view of ss. 91 and 92 of the *British North America Act*, [1867], in that case which he could not reconcile with the federal general power under the opening words of s.91, nor with what been said by the Privy Council in the *Aeronautics* case and in the *Radio* case. ...

In another *ex cathedra* statement, a former member of this Court, the late Mr. Justice Rand, also expressed the view that the residual power of the Parliament of Canada comprehended plenary authority to legislate to implement international obligations assumed by Canada, regardless of whether the subject-matter fell otherwise within or outside of federal competence. ...

Although the foregoing references would support a reconsideration of the *Labour Conventions* case, I find it unnecessary to do that here.

See also the criticism of the *Labour Conventions* case in Hogg, *supra* footnote 9 at 292-97.

In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation...<sup>140</sup>

In *Schneider v. The Queen*,<sup>141</sup> Dickson J. (as he then was), after citing both the *Labour Conventions* case and *Vapor Canada*, said:

There is nothing in the *Narcotic Control Act* to indicate that that Act or any part of it was enacted in implementation of Canada's treaty obligations under the terms of the Single Convention. ... The *Heroin Treatment Act* is not legislation falling within the scope of any federal power to legislate for the implementation of international treaties.<sup>142</sup>

In our opinion, experience should be the guide. The *Labour Conventions* case has stated the law in this area since 1938. While Parliament may have pushed the envelope somewhat in implementing the FTA and NAFTA (and the provinces may have been somewhat reluctant to challenge these actions given the intimations in *Vapor Canada* and *Schneider*), it is true as a general statement that Parliament has not sought to unilaterally implement treaty obligations in areas of provincial jurisdiction without provincial consent since at least 1938.

In that period, Canada has emerged as one of the major states in the world in terms of international influence. It is a member of the G-7, notwithstanding its small population in relative terms; it is a party to many major multilateral defence (NATO, NORAD) and trade (FTA, NAFTA, GATT) conventions; a charter member of the U.N.; and a significant contributor to U.N. peacekeeping forces, most recently in Haiti, Somalia and Bosnia. In our opinion, it therefore cannot be credibly argued that the *Labour Conventions* case has substantially limited Canada's international influence or prestige. On that basis, the present federal-provincial division of responsibility for treaty implementation could be continued and, to bring an end to the uncertainty, made explicit.

#### 4. *National Emergencies; National Concerns; Matters presently falling within the POGG*

At present, Parliament has jurisdiction to deal with national emergencies in relation to matters of economics,<sup>143</sup> defence,<sup>144</sup> health (for example, an epidemic of pestilence)<sup>145</sup> or, indeed, just about anything that no single province acting alone

<sup>140</sup> *Vapor Canada*, *supra* footnote 32 at 171.

<sup>141</sup> *Supra* footnote 88 (upholding B.C.'s *Heroin Treatment Act*).

<sup>142</sup> *Ibid.* at 135. At 134, however, Dickson J. stated that "the appellant's proposition [that 'even if the exercise of federal implementation of treaty obligations touches upon a provincial subject matter, it is competent to Parliament so to do in relation to a treaty as a matter of national concern'] is questionable in the face of Lord Atkin's judgment" in the *Labour Conventions* case.

<sup>143</sup> *Anti-Inflation Act Reference*, *supra* footnote 43.

<sup>144</sup> *Re Gray*, *supra* footnote 131; and *Fort Frances*, *supra* footnote 40.

<sup>145</sup> *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (Ont. P.C.), commenting on *Russell*, *supra* footnote 38.

can effectively deal with. In our opinion, subject to the colourability doctrine, judicial deference should continue to be paid to federal judgments about what constitutes an emergency, when it begins and ends, and what means are most effective to combat it.<sup>146</sup> Additionally, the means employed should be temporary.<sup>147</sup>

There are other matters falling under the POGG power that in our opinion should remain under federal control, either specifically enumerated as such, or under the general umbrella of matters achieving national dimensions. These would include aeronautics,<sup>148</sup> a national capital region,<sup>149</sup> offshore minerals resources,<sup>150</sup> marine pollution,<sup>151</sup> nuclear power,<sup>152</sup> and any other matter meeting the requisite criteria. Though seemingly quite broad if given a literal meaning, the courts have in fact interpreted the national concern branch of the POGG narrowly.<sup>153</sup> The test, as stated by Le Dain J. in *Crown Zellerbach*, is as follows:

For a matter to qualify as a matter of national concern ... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.<sup>154</sup>

In our opinion, applying such a test as the basis for determining whether a matter is of national concern and, thus, within the competence of the federal Parliament, poses little threat to local autonomy.

While we believe that Parliament should retain jurisdiction over national emergencies and matters of national concern, others aspects of the POGG

<sup>146</sup> See, for example, *Anti-Inflation Act Reference*, *supra* footnote 43; *Re Gray*, *supra* footnote 131; and *Fort Frances*, *supra* footnote 40. However, according to Hogg, *supra* footnote 9 at 461, "the federal Parliament can use its emergency power almost at will."

<sup>147</sup> See the *Anti-Inflation Act Reference*, *supra* footnote 43, where it was stated by Ritchie J. at 437 that "The authority of Parliament in this regard is, in my opinion, limited to dealing with critical conditions and the necessity to which they give rise and must perforce be confined to legislation of a temporary character." See, also, Beetz J. who stated at 461: "... the power of Parliament to make laws in a great crisis knows no limits other than those which are dictated by the nature of the crisis. But one of those limits is the temporary nature of the crisis." See, also, *Crown Zellerbach*, *supra* footnote 45 at 432. We recognize that permanent as opposed to temporary legislation may be desirable to prevent entirely the occurrence or recurrence of the emergency, on the basis that an ounce of prevention is worth a pound of cure. However, there is a federalism cost to permitting permanent federal legislation in areas which are presumptively exclusively provincial in the absence of an existing emergency.

Again, using experience as our guide, the present law requiring that the federal solution to an emergency be temporary has been in place at least since *Fort Frances*, in 1919, without resulting in any real and demonstrable hardship. Accordingly, the requirement of temporariness as a condition of legislation enacted under the emergency branch of the POGG power should remain in force.

<sup>148</sup> *Johannesson*, *supra* footnote 98.

<sup>149</sup> *Munro*, *supra* footnote 89.

<sup>150</sup> *Re Offshore Mineral Rights of B.C.*, *supra* footnote 40.

<sup>151</sup> *Crown Zellerbach*, *supra* footnote 45.

<sup>152</sup> *Ontario Hydro*, *supra* footnote 45.

<sup>153</sup> See the cases mentioned in the previous notes as, primarily, the only examples of valid exercises of the national concern branch of the POGG power.

<sup>154</sup> *Crown Zellerbach*, *supra* footnote 45 at 432.

should clearly be deleted from the catalogue of federal powers. Assuming our recommendations that the residual power be left to the provinces, as it is to the American states under the *United States Constitution*, "gaps" in the catalogues of powers would no longer exist to be filled by Parliament, as they were in *Hauser*.<sup>155</sup> Of course, if a matter formerly falling under the gap branch of POGG achieved a national dimension, it would remain under federal power.<sup>156</sup> On the other hand, there is no reason why matters coming within so-called gaps in the federal-provincial division of authority, which have not achieved national importance, should come within federal jurisdiction in the first place. If they are local, in the sense that they can be effectively dealt with by single provinces acting unilaterally, they should fall under provincial jurisdiction in any event.

### 5. *Citizenship and Immigration*

Matters respecting citizenship and naturalization should remain within exclusive federal jurisdiction, as it presently is under s. 91(25) of the *Constitution Act, 1867*.<sup>157</sup> That is particularly so given that mobility rights between provinces, and the rights of citizens to remain in Canada, is enshrined in s. 6 of the *Charter of Rights* and is immune to the legislative override in s. 33 of the *Charter*. No single province should have authority to open up the doors to all of Canada through the granting of citizenship. That is especially so if the other suggestions in this article are taken as part of a final mosaic, because it is illogical that one province should be able to grant an immigrant the unilateral right to move into another province, take up residence there, and call on its local resources and social programs. That is a matter which should be left to Parliament.

Immigration is a different matter. Again, using experience as a guide, it is clear that concurrent jurisdiction with federal paramountcy is workable in practice.<sup>158</sup>

<sup>155</sup> *Supra* footnote 44. Note that with the elimination of federally incorporated companies, as discussed above, it would no longer be necessary to rely on the "gap" branch of POGG for that purpose: *Wharton, supra* footnote 115.

<sup>156</sup> This might be the case with the *Narcotic Control Act* (*Hauser, supra* footnote 44). Critical commentary, however, from Hogg, *supra* footnote 9 at 452, among others, suggests that the Act is properly supportable as criminal law.

<sup>157</sup> Section 91(25) grants to Parliament legislative authority with respect to "Naturalization and Aliens." Query whether there is any special significance to be attached to the fact that the federal power under this section is in relation to "naturalization", not naturalized person; and "aliens", not alienage? It can probably be concluded that the authority of the federal Parliament over citizenship likely comes from s.91(25), despite the ambiguity of the wording, but perhaps under the POGG power as well: *Winner v. S.M.T. (Eastern)*, *supra* footnote 73 at 919, issue not mentioned on appeal to the Privy Council, [1954] A.C. 541. See, Finkelstein, *Laskin's Canadian Constitutional Law, supra* footnote 16 at 967-68; Hogg, *supra* footnote 9 at 1008-10.

<sup>158</sup> For example, the provisions of the *Meech Lake Accord*, which were acceptable to the federal government, read as follows:

95A. The Government of Canada shall, at the request of the government of any province, negotiate with the government of that province for the purpose of concluding an

It is therefore clear that, in principle at least, provisions similar to those in, say, the *Meech Lake Accords* were acceptable to the federal government and should be considered for inclusion in any constitutional reform package.<sup>159</sup>

## 6. Taxation, Spending and Equalization

Canada presently has unlimited taxing power in s.91(3) of the *Constitution Act, 1867* for the purposes of raising money. That should continue subject, to imposing a restriction similar to that which currently binds the province in s. 92(2): *that the money be raised only for federal purposes*. Such a limitation is

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agreement relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province.

95B. (1) Any agreement concluded between Canada and a province in relation to immigration or the temporary admission of aliens into that province has the force of law from the time it is declared to do so in accordance with subsection 95C(1) and shall from that time have effect notwithstanding class 25 of section 91 or section 95.

(2) An agreement that has the force of law under subsection (1) shall have effect only so long and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.

(3) The *Canadian Charter of Rights and Freedoms* applies in respect of any agreement that has the force of law under subsection (1) and in respect of anything done by the Parliament or Government of Canada, or the legislature or government of a province, pursuant to any such agreement.

95C. (1) A declaration that an agreement referred to in subsection 95B(1) has the force of law may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement.

(2) An amendment to an agreement referred to in subsection 95B(1) may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized

(a) by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement; or

(b) in such other manner as is set out in the agreement.

95D. Sections 46 to 48 of the *Constitution Act, 1982* apply, with such modifications as the circumstances required, in respect of any declaration made pursuant to subsection 95C(1), any amendment to an agreement made pursuant to subsection 95C(1) or any amendment made pursuant to section 95E.

95E. An amendment to sections 95A to 95D or this section may be made in accordance with the procedure set out in subsection 38(1) of the *Constitution Act, 1982*, but only if the amendment is authorized by resolutions of the legislative assemblies of all the provinces that are, at the time of the amendment, parties to an agreement that has the force of law under subsection 95B(1).

<sup>159</sup> Swinton, *supra* footnote 114, raises some concerns about intergovernmental agreements, in particular, their enforceability, their symbolic value, and issues related to unilateral amendment by Parliament. With respect to the current Quebec-Canada Immigration Agreement, she states at 140 and 143:

presently missing from the federal catalogue of powers. Limiting the purposes for which the federal Parliament could tax would create greater room for provincial taxation, which would become necessary in order to compensate provinces for the reduction in federal spending on provincial objects. In other words, federal rates of tax would decrease but provincial rates would increase. Regardless of the shift in relative tax revenues as between the federal government and the provinces, a centralized tax collection system should continue.<sup>160</sup>

The source of much federal-provincial friction is that a combination of federal authority in the POGG, the taxing power in s.91(3), the borrowing power in s.91(4), and jurisdiction in relation to the public debt and property in s.91(1A), enable Parliament to raise money and regulate in areas of exclusive provincial jurisdiction through the use of its spending power.<sup>161</sup> Through the use of conditional grants, Parliament effectively regulates (or at least has a

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One problem with such devices is their enforceability, an issue that Canadian courts have rarely considered. To the extent that these devices are easy to change or are unenforceable, they may be unsatisfactory to a province like Quebec which is seeking a lasting rearrangement of jurisdiction. ... [Furthermore,] Quebec would not be concerned only about the legal status of such agreements, but also about their symbolic status. A constitutionally enshrined change in jurisdiction is obviously a much clearer affirmation of Quebec's distinct nature than an intergovernmental deal.

With respect to the unilateral amendment of such agreements, she states:

*CAP Reference* indicates that parliamentary sovereignty reigns and that Parliament or a legislature has the ability to change its agreements without warning or in an unfair manner with the sanction being a political one, rather than a legal one. *CAP Reference* leaves it to the constitutional reform process to decide whether the Constitution should provide a mechanism for binding intergovernmental arrangements.

<sup>160</sup> At present, Quebec is the only province to collect its own personal income tax; Alberta, Ontario and Quebec collect their own corporate income taxes.

Howse, *supra* footnote 79 at 21-22, notes some of the benefits of a centralized tax collection scheme:

Even where the underlying intent is not to off-load responsibilities, governments may have strong reasons for not accompanying a devolution of authority over expenditures with a full transfer of revenue-raising responsibilities and capacities. There is a range of countervailing considerations that militate in favour of centralized revenue-raising. These include the importance of national fiscal policy in macroeconomic stabilization; limited tax collection and enforcement powers of lower levels of government; the possibility of a "race to the bottom" as jurisdictions cut taxes competitively to attract or retain investment; and the natural inclination of central governments not to surrender voluntarily the "power of the purse." ... Transfers from the federal government of actual tax revenues raised centrally, or a combination of equalization payments and tax room, have been much more prevalent.

<sup>161</sup> The constitutional basis for the spending power has been challenged by Petter, *supra* footnote 49, among others, and is discussed by Hogg, *supra* footnote 9 at 149-54. As stated in a previous section of this paper, Hogg supports Parliament's exercise of the spending power, through conditional grants, on objects within the competence of the province. The Courts have also upheld this right; *Re CAP*, *supra* footnote 50.

We do not dispute the correctness of this view. Rather, we suggest that any proposal for constitutional reform must involve a radical change to the federal Parliament's spending power. One means of accomplishing this is by limiting the federal government to collecting taxes only for expenditures on matters within federal jurisdiction.

significant presence) in such provincial areas as health,<sup>162</sup> labour and manpower training,<sup>163</sup> education,<sup>164</sup> and the provision of social services.<sup>165</sup>

A limitation of the federal spending power to matters within federal jurisdiction, or even in some less restrictive manner such as that proposed in the *Meech Lake Accord*,<sup>166</sup> would either completely, or at least substantially, diminish the federal presence in areas of exclusive provincial jurisdiction.<sup>167</sup> However, as Hogg notes, "[w]hat this overlooks is the wide disparity of wealth and hence of tax-raising capacity among the provinces. The fact is that unless federal grants are made to the poorer provinces their residents will have to accept either far higher levels of taxation or far lower levels of public services than the residents of the richer provinces."<sup>168</sup>

Thus, even if federal power to spend money on provincial objects is curtailed, there will still be a need to redistribute resources from the wealthier provinces to the poorer ones.<sup>169</sup> Parliament will require jurisdiction to make

<sup>162</sup> The *Canada Health Act*, *supra* footnote 68 at s.7, imposes five conditions on provincial health care schemes: universality, comprehensiveness, accessibility, portability, public administration. Hospital insurance and medicare, as Hogg, *supra* footnote 9 at 149, notes, is clearly within the legislative competence of the provinces. "Provincial authority over 'the establishment, maintenance, and management of hospitals' is explicit in s.92(7) of the *Constitution Act, 1867*. Provincial authority over the medical profession comes within 'property and civil rights in the province' in s.92(13) of the *Constitution Act, 1867*; as does provincial authority over a contributory insurance scheme: [*Unemployment Insurance*, *supra* footnote 29].

<sup>163</sup> *YMHA Jewish Community Centre v. Brown*, *supra* footnote 53 (upholding federal job creation programme, involving federal wage subsidies).

<sup>164</sup> There are no conditions imposed on provinces in spending funds relating to postsecondary education under the CHST (as was also the case under EPF).

<sup>165</sup> Under CAP, at one time a 50-50 shared-cost program, certain criteria in the operation of provincial welfare schemes had to be maintained in order for provinces to be eligible for federal funding. As of April 1, 1996, with the commencement of the CHST, provinces are prohibited only from the imposition of residency requirements for the receipt of welfare benefits.

<sup>166</sup> Section 106A, *supra* footnote 59, contained some limits on the exercise by Parliament of the spending power on new shared-cost programmes. Provinces could opt-out, with compensation, provided they enacted a provincial program compatible with the "national objectives."

<sup>167</sup> Petter, *supra* footnote 49 at 468, challenges the claim that with a withdrawal of federal "regulatory" presence in provincial areas will result in a withdrawal of federal transfers:

One of the strongest political claims made on behalf of the federal spending power is that the power is required to promote the principle of equalization. ... Its most common version maintains that conditional grants promote equalization both by guaranteeing all Canadians equal access to a minimal level of social services and by redistributing tax revenues from richer to poorer parts of the country. The problem with the argument is that it makes an unwarranted link between the principle of equalization and the need for federal interference in the delivery of particular social programs. If the federal government is concerned about the need to equalize the position of citizens across the country, it is free to achieve this goal through unconditional grants, either to provincial governments or directly to individuals.

<sup>168</sup> Hogg, *supra* footnote 9 at 151.

<sup>169</sup> Petter, *supra* footnote 49 at 469, notes that "[t]he degree of regional equalization achieved by [conditional] grants could be attained far less expensively by means of unconditional transfers".

equalization, or at least redistributive, payments. The difference between these payments and conditional grants is, of course, that equalization is unconditional and is thus divorced from federal regulation of matters falling within provincial jurisdiction. Grants would be unconditional, and based on the fiscal capacity of a province, which is presently the measure used for calculating equalization payments.<sup>170</sup> In fact, s.36 of the *Constitution Act, 1982*, provides a continued rationale for federal transfers to the provinces. It states:

36(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

In our opinion, broad-based federal transfers that are not keyed to any particular social or economic program,<sup>171</sup> that carry few conditions, and are largely composed of tax point transfers rather than cash grants,<sup>172</sup> would more effectively enhance provincial autonomy in areas of exclusive jurisdiction. Thus, placing a limit (either partial or absolute) on federal expenditures in areas of provincial legislative responsibility through conditional grants would not necessarily defeat a commitment to equalizing regional disparities.<sup>173</sup> However, with the elimination of national objectives for federal spending in areas of provincial jurisdiction, the concerns expressed above relating to mobility and national definition, must be kept in mind.

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<sup>170</sup> See Courchene, *Social Canada*, *supra* footnote 47 at ch. 4.

<sup>171</sup> Some of the advantages of block funding are discussed by Courchene, *A Guide to the CHST*, *supra* footnote 47 at 84, who states:

Block funding will facilitate the development of active labour market policies designed to facilitate the transition from welfare to work. Moreover, block funding also facilitates the merging of aspects of health and welfare (and social services) as part of the societal shift from "corrective" health toward the more holistic concept of well-being. These are major degrees of freedom that are not available under the status quo.

<sup>172</sup> Cash grants, more so than tax transfers, are the means by which the federal government foists its spending priorities on provinces. Provinces that do not comply with federal conditions in a shared-cost programme are denied the cash component of the transfer. The greater the cash portion, the greater the federal leverage over the provinces. See Courchene, *A Guide to the CHST*, *supra* footnote 47 at 77-78.

<sup>173</sup> Courchene, *A Guide to the CHST*, *supra* footnote 47 at 17, argues that the CHST serves a different role than equalization:

Now that all federal-provincial transfers are essentially unconditional, it makes analytic sense to view them in the aggregate. Nonetheless, their roles are quite different. The unconditional equalization transfers address horizontal imbalances at the provincial level, whereas the unconditional CHST transfers address, among other things, the vertical imbalance between Ottawa and the provinces.

In our opinion, by limiting the taxing power of the federal Parliament, the vertical imbalance would decrease, leaving, principally, issues of horizontal inequity to be addressed through an equalization program.



## 7. *Aboriginal Peoples*

It seems clear that, at least approaching the question of native affairs on the basis of a two level system of government (federal and provincial) and ignoring the issue of native self-government for the purposes of this article, the exclusive jurisdiction of native affairs should remain with Parliament. Politically, aboriginal peoples look to Parliament rather than the provinces, and indeed as indicated by the Cree vote in the 1995 Quebec Referendum, the natives will strongly resist any assertion of provincial jurisdiction.<sup>174</sup>

The present constitutional law is also clear that Parliament and the federal government owe special duties to aboriginal peoples. In *Guerin v. The Queen*,<sup>175</sup> Dickson C.J. recognized the unique relationship between the Crown and aboriginal peoples in Canada. He stated that "the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*."<sup>176</sup> Also, in *R. v. Sparrow*,<sup>177</sup> Dickson C.J. and La Forest J., for the Court, stated that in all dealings with aboriginal peoples "the Government has the responsibility to act in a fiduciary capacity." While the precise meaning of these references has not been determined,<sup>178</sup> there is, in any event, a special and enhanced obligation on the federal government when dealing with natives in Canada.

It is therefore suggested that there be no devolution of power to the provincial legislatures in this area.

## 8. *The Justice System*

### a. *Regulatory Authority: The Criminal Law*

Parliament has jurisdiction in s. 91(27) of the *Constitution Act, 1867* in relation to criminal law and, except for the constitution of courts of criminal jurisdiction,<sup>179</sup> criminal procedure.<sup>180</sup> One could, of course, argue that these are matters upon

<sup>174</sup> J. Gray, "Crees Vote 96.3% to Stay with Canada" *The Globe and Mail* (26 October 1995) A1. Grand Chief Matthew Coon Come stated that separating the Crees from Canada would be unconstitutional, illegal, undemocratic and a breach of human rights. See, also, S. Delacourt, "Beware 'People' Trap, Crees Warn" *The Toronto Globe and Mail* (11 December 1995) A5.

<sup>175</sup> [1984] 2 S.C.R. 335.

<sup>176</sup> *Ibid.* at 387.

<sup>177</sup> [1990] 1 S.C.R. 1075 at 1108.

<sup>178</sup> Hogg, *supra* footnote 9 at 681, suggests that "an obligation to consult with aboriginal people before their interests are affected by governmental action would seem to be a likely application of the notion [of fiduciary] in the Indian context...".

<sup>179</sup> It is arguable that Parliament has the power under s.101 to establish courts of original criminal jurisdiction notwithstanding that s.92(14) authorizes provincial courts of criminal jurisdiction, while s.91(27) expressly excludes criminal courts from federal competence. The paramount force of s.101 militates in favour of this conclusion: see *Ontario (A.G.) v. Canada (A.G.)*, [1947] A.C. 127. See also Finkelstein, *Laskin's Canadian Constitutional Law*, *supra* footnote 16 at 179; Hogg, *supra* footnote 9 at 174.

<sup>180</sup> In the companion cases of *Canada (A.G.) v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206 and *R. v. Wetmore*, *supra* footnote 88, the Supreme Court

which individual provinces acting unilaterally *could* regulate. Indeed, one can make the case that norms of behaviour are local matters, and criminal law should reflect local conditions and sentiments.<sup>181</sup> Indeed, this is the law in the United States and Australia, where criminal law falls under state jurisdiction.<sup>182</sup> As such, even matters as fundamental as whether to impose the death penalty are determined in the United States on a state by state, checkerboard basis.

The foregoing notwithstanding, in our judgment the liberty of the person is of such fundamental importance in Canada that it should be subject to national treatment. Matters of such importance should not be left to the chance of where an accused happens to reside. On the fundamental importance of liberty, Lamer J. (as he then was) said in the *B.C. Motor Vehicle Reference*:

It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law.<sup>183</sup>

We note that even the *Allaire Report* in Quebec, a substantially decentralist document, proposed that Canada retain a national criminal law.<sup>184</sup>

#### b. *Institutional Authority: Federal Appointment of Judges*

None of the serious proposals for constitutional reform in Canada<sup>185</sup> have suggested that the federal role in the appointment of judges which is presently contained in ss. 96-101 of the *Constitution Act, 1867* be eliminated. The real issue is whether that federal role should remain exclusive, or whether there should be a formal provincial role as well.

In the *Meech Lake Accord*, it was proposed that the Supreme Court of Canada as an institution be entrenched in the *Constitution Act, 1867*, and that

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definitively held that the power of the federal Parliament in relation to criminal law and criminal procedure in s.91(27) includes the power to prosecute, whether the offence is created under the criminal law power, or some other head. See Finkelstein, *Laskin's Canadian Constitutional Law*, *supra* footnote 16 at 208; Hogg, *supra* footnote 9 at 511-14.

<sup>181</sup> See Hogg, *supra* footnote 9 at 467-69.

<sup>182</sup> Criminal law is not one of the powers enumerated under the United States Constitution, and therefore forms part of the residue, which is competent to the states.

<sup>183</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 513.

<sup>184</sup> *Allaire Report*, *supra* footnote 7 at 39.

<sup>185</sup> See, for example, *Charlottetown*, *supra* footnote 60 and *Meech Lake*, *supra* footnote 54, where suggestions relate to an enhanced provincial role in the appointment of Justices to the Supreme Court of Canada. The *Allaire Report*, *supra* footnote 7, proposes that judges appointed to the Supreme Court (which would not hear appeals from Quebec superior court decisions, only constitutional issues) would reflect the *Meech Lake* proposals. See, also, *Report of the Special Joint Committee on a Renewed Canada* (1992), where similar amendments regarding the appointment of Supreme Court Justices are proposed. And see *The Victoria Charter* (1970), where a provincial role in the appointment of Supreme Court Justices is also suggested.

the exclusive authority to nominate appointees (but not the power to actually select from among the nominees to make appointments) be devolved to the provinces.<sup>186</sup>

Under the *Charlottetown Accord* it was similarly proposed in ss. 101 to 108 that there be a substantial provincial role in the appointment of Supreme Court judges.

Given the critical role that the Supreme Court of Canada plays in constitutional adjudication, and indeed the even more important role it will play in the future if there is a substantial reallocation of authority between Parliament

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<sup>186</sup> 101A. (1) The court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a superior court of record.

(2) The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges, who shall be appointed by the Governor General in Council by letters patent under the Great Seal.

101B. (1) Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the bar of any province or territory, has, for a total of at least ten years, been a judge of any court in Canada or a member of the bar of any province or territory.

(2) At least three judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total of at least ten years, been judges of any court of Quebec or of any court established by the Parliament of Canada, or members of the bar of Quebec.

101C. (1) Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province and are qualified under section 101B for appointment to that court.

(2) Where an appointment is made to the Supreme Court of Canada, the Governor General in Council shall, except where the Chief Justice is appointed from among members of the Court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada.

(3) Where an appointment is made in accordance with subsection (2) of any of the three judges necessary to meet the requirement set out in subsection 101B(2), the Governor General in Council shall appoint a person whose name has been submitted by the Government of Quebec.

(4) Where an appointment is made in accordance with subsection (2) otherwise than as required under subsection (3), the Governor General in Council shall appoint a person whose name has been submitted by the government of a province other than Quebec.

101D. Sections 99 and 100 apply in respect of the judges of the Supreme Court of Canada.

101E. (1) Sections 101A to 101D shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws under section 101 except to the extent that such laws are inconsistent with those sections.

(2) For greater certainty, section 101A shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws relating to the reference of questions of law or fact, or any other matters, to the Supreme Court of Canada.

and the legislatures, it stands to reason that both levels of government should have a voice in the selection of the adjudicators. In acting as referee between Parliament and the provinces, the Court would have a legitimacy it does not enjoy under the present system of unilateral federal nomination and appointment.<sup>187</sup> That the provinces desire a provincial role is illustrated by *Meech Lake* and *Charlottetown*.

The problem with *Meech Lake*, however, is that it did not contain a mechanism to break deadlocks.<sup>188</sup> Thus a recalcitrant government could refuse to deliver a list of nominees, submit an unacceptable list, or submit a list of one (thus transforming the nomination power into an effective appointment power). *Charlottetown* contained a mechanism to minimize the risk of such a deadlock taking place, and it can serve as a model:<sup>189</sup>

101D. (1) Where a vacancy in the Supreme Court of Canada is not filled and at least ninety days have elapsed since the vacancy occurred, the Chief Justice of Canada may in writing request a judge of a superior court of a province or territory or of any superior court established by the Parliament of Canada to attend at the sittings of the Supreme Court of Canada as an interim judge for the duration of the vacancy.

(2) Where a vacancy in the Supreme Court of Canada results in there being fewer than three judges on the Court who meet the qualifications set out in subsection 101B(2), no judge may be requested to attend as an interim judge under subsection (1) unless the judge meets those qualifications.

The above constitutional amendments, which were acceptable in both *Meech Lake* and *Charlottetown*, would give to the Supreme Court of Canada a renewed legitimacy required by it in its expanded constitutional role as the umpire of a decentralized Canada.

D. *Matters To Be Left To Exclusive Provincial Jurisdiction:  
The Residual Power*

We have enumerated above those powers that in our opinion must remain with the federal Parliament. The list is not exhaustive; but we believe it captures the essence of this proposal in that all are powers that cannot be effectively exercised by a province acting unilaterally. Matters not listed above, which could be regulated by a province acting alone, should be left to the provinces. The provincial powers would not be enumerated. While this may seem heretical

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<sup>187</sup> See Hogg, *supra* footnote 9 at 222-225.

<sup>188</sup> See Hogg, *supra* footnote 9 at 223.

<sup>189</sup> For the selection of Supreme Court Justices, *The Victoria Charter* of 1970 would have required agreement between the Attorney General of Canada and the Attorney General of the province, and in the case of a deadlock the choice would have been made by a nominating council.

in Canada, it is neither unusual nor threatening. Indeed, under the United States Constitution,<sup>190</sup> the residual power lies with the states rather than the central government. The Congress has only those powers which are specifically assigned to it, together with the power to do anything which is "necessary and proper" to achieve the enumerated ends.<sup>191</sup> Everything else, including criminal law and the police power, rests with the states. Even so, in many respects, the United States is a far more centralized federation than Canada.<sup>192</sup>

The consequence of reposing the residual power in the provincial legislatures is that many present powers exercised by the federal government will be lost to Parliament. That being said, certain of the matters falling to the provinces might, at some future time, be better suited to the federal government. The failsafe is our recommendation that a category of power headed "matters which have attained a national dimension," which presently resides in the P.O.G.G., should be left with Parliament. As such, if it can be argued at a future time that a previously local matter has attained a national dimension or has become an emergency, a federal presence in that field could be justified. Once the emergency ceases, or the matter of national concern evolves back to the point where it could be effectively regulated by a single province acting alone, those matters would once again fall to the provinces. Without the "watertight compartments"<sup>193</sup> of enumerated federal and provincial powers, more responsive legislative decisions could be taken by the appropriate level of government.

### Conclusion

With enhanced provincial authority, however, comes enhanced responsibility. As Courchene states:

Decentralization ... is anything but a "free lunch" for the provinces. For them, the challenge will be to show individual Canadians that they can take the national interest into consideration in their policies. Thus, in pursuing their own interests in the wake of their increase in autonomy (but not in revenues), the provinces must be prepared,

<sup>190</sup> And the Australian Constitution.

<sup>191</sup> See the United States decision of *McCulloch*, which is discussed, *supra* footnote 120.

<sup>192</sup> See Hogg, *supra* footnote 9 at 54, where he states:

... [T]he United States Congress has more extensive powers than the Canadian Parliament over anti-trust, insurance, labour, marketing, securities regulation and transportation and communication. ... At a technical level, the key to the difference lies in the absence from the Constitution of the United States of any state power equivalent to Canada's s.92(13). The states possess no enumerated powers, simply an undefined plenary power recognized by the tenth amendment. There is, therefore, no principled way to limit the reach of the commerce clause or of the Congress's other enumerated powers. At a deeper level, the difference undoubtedly reflects the prevalence of a more centralized conception of federalism in the United States.

Concerns with the unprincipled expansion of federal power in a decentralized Canada are, hopefully, addressed by our proposals and, in particular, in our guiding principle of provincial inability.

<sup>193</sup> *Labour Conventions*, *supra* footnote 28.

along with Ottawa, to play a much larger role in creating “national” programs or national public goods. Potentially, this is very much a positive-sum game, since the postwar approach of relying on Ottawa to deliver the national component of policy is decidedly inferior to an approach that combines both vertical (top-down) and horizontal (bottom-up) coordination and integration. The underlying message is, nonetheless, clear: if the provinces fail in this critical endeavour, Canadians almost certainly will demand that the pendulum of power swing back to the centre.<sup>194</sup>

The provinces must heed Courchene’s warning. Effective government demands that the long-term interests of all Canadians remain an integral component of provincial decision making. Local authority exercised without a national perspective will serve only to further undermine our federation. Thus, it is within the power of the provinces to ensure that the decentralization of Canada ultimately serves to enhance unity, rather than to destroy it.

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<sup>194</sup> Courchene, *Celebrating Flexibility*, *supra* footnote 56 at 70.