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# THE CASE FOR A GREATER FEDERAL ROLE IN THE ENVIRONMENTAL PROTECTION FIELD: AN EXAMINATION OF THE POLLUTION PROBLEM AND THE CONSTITUTION

BY PAUL EMOND\*

## I. *Introduction*

Canadians are faced today with an environmental crisis of major proportions. Even if we discount all but the most optimistic predictions about the future of our natural environment it is clear that we must move quickly to ensure that a favourable ecological balance is found. Yet one of the major stumbling blocks to effective environmental action is the apparently confusing and often contradictory way in which the BNA Act divides legislative responsibility between the provincial and federal governments. Until we know who is and should be responsible for what, it is impossible to hold either level of government accountable.

But the question of legislative responsibility for pollution abatement is not an easy one to answer. Because the constitutional draftsmen did not recognize pollution as a problem, whatever principles we can glean from a constitutional inquiry will not necessarily point to a single solution. Judicial interpretation of one head of legislative power often suggests one answer, while interpretation of another suggests a completely different one. Thus, the constitution itself lacks a sense of coherency of purpose. Even assuming it is possible to extract certain coherent principles of legislative responsibility from an analysis of the constitution and subsequent judicial interpretation, this may not necessarily correspond to the realities of the problem. Pollution was not an issue in 1867 and there is no reason to think that heads of the BNA Act that seem to touch on the problem reflect a conscious national effort to assign legislative competence between the two levels of government.

Pollution means different things to different people. To some it is primarily an economic problem, to others it is a social malaise, and to still others it is some combination of the two. Given such diverse and often conflicting definitions of pollution, it is almost impossible to identify the components of the problem that will enable us to suggest an optimal sharing of legislative power. Thus, whether we begin with the constitution and try to extract principles that suggest an appropriate sharing of powers to deal with pollution, or whether we begin with the problem and try to identify the component parts which can then be fitted into the existing division of power framework, we come up against the same impasse. Neither the constitution nor the problem suggest any easy

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solutions. Notwithstanding these difficulties, the most profitable way to tackle the problem is to begin with an analysis of the scope of the problem<sup>1</sup> and then look at the constitutional heads of power that touch on it. The constitution will not tell us precisely how to deal with this problem, but it will set the parameters within which any suggested solution must fall.

## II. *Pollution: Two Dimensions*

Pollution is not a single problem. It is not just fouled water or dirty air; rather it encompasses almost every aspect of our daily living. It is an aesthetic problem, a noise problem, a planning problem. It is not useful to list all the manifestations of pollution—there are hundreds. What is useful is to try to delineate its major dimensions, and in this regard there seem to be two: an economic and a social one.

### (a) *The Economic Dimension*

The economic argument is a familiar one<sup>2</sup> and runs as follows. Pollution control is directly opposed to economic growth in the sense that as the controls on production become stricter, growth becomes more expensive and therefore less attractive. Tough controls force companies, governments and individuals to internalize many costs such as sewage treatment that were formerly externalized into the environment. When people are forced to absorb these costs and include them in the price of the product, the product becomes more expensive and less competitive, and eventually all the facilities associated with the production and distribution of that product begin to decline. When we consider that we are living in a highly competitive world in which great emphasis is placed on costs per unit, efficiency, and balance of trade, pollution abatement is not very attractive from an economic point of view. There is little incentive to start cleaning up your own environment if your neighbour can continue to pollute and reap the economic benefits by successfully competing against you.

By not passing tough pollution laws, it may be possible for governments to lure new businesses into their jurisdiction, this in turn tends to create an anti-depollution competition among governments. The competition may be confined initially to a local area but pressures will force this competition to spread beyond local boundaries and encompass provinces and even states. Pollution may be confined to one locality, but because each locality is linked economically, pollution control or the lack of it in one area has important consequences for each other area. Companies in the same industry all compete in the same markets. If one company in one jurisdiction is allowed to pollute at will, its costs will be less than those of another company in another jurisdiction which must treat its wastes and will have a substantial advantage over its competitors. Unless the pollution is so serious as to disrupt other economic

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<sup>1</sup>This is an approach suggested by Lyon and Atkey, in *Canadian Constitutional Law in a Modern Perspective* (Toronto: University of Toronto Press, 1971) at 680. [hereinafter Lyon, *Canadian Constitution*].

<sup>2</sup>The most recent exposition of it is contained in The Joint Committee of The House of Commons and Senate Report on The Constitution (Queen's Printer, 1972) [hereinafter The MacGuigan Report].

activity, there is no economic incentive for the responsible government to impose tough pollution controls for its citizens are enjoying the benefits of high employment and prosperity. Economic pressure is on the environmentally conscious province to relax its anti-pollution laws so that its companies may compete successfully in national and international markets.

A point that is often made in connection with these arguments is the universality of the pollution problem. Many types of air and water pollution transcend provincial boundaries, thus making a decision to clean up by one province doubly expensive. For example, if a lower stream province implements strong antipollution laws and an upper stream province refuses to adopt a similar policy, the lower stream province will have to bear the cost of both its own and its neighbour's pollution. Even if this province does not decide to clean up its rivers, it is forced to bear the burden of living with another jurisdiction's garbage.

The lack of any economic incentives to clean up, the spillover consequences emanating from the competitiveness of pollution control, and the major interprovincial aspects of pollution all suggest that it makes good sense economically to give the federal government primary responsibility for the problem. The federal government can provide the incentive to clean up by making it more economically attractive to curb pollution. If the whole country embarks on a pollution control program, no particular province or community is handicapped by destructive competition. The economic arguments favouring federal control break down into three parts—the federal government's broad overview of the problem, its ability to design and implement uniform incentives and its resources to pay for a solution.

Because the federal government has the unique ability to assess and deal with the economic well being of the country as a whole, it should have responsibility for such economically important activities as pollution control. By adopting appropriate pollution abatement standards Parliament can ensure the economic viability of the country, while making an appreciable contribution to pollution control. Similarly, federal responsibility to alleviate regional economic disparity also suggests that federal involvement in pollution should be paramount.

Closely linked with the first point is the government's ability to deal with a lack of incentive for pollution abatement. The MacGuigan Report rationalized federal control primarily in terms of this point. It argues:

Because of the disparities in economic terms between the Provinces in Canada, to fail to have a paramount federal power would be to invite Provinces to compete for industrial development on the basis of more relaxed pollution laws. It is only recognizing the obvious to suggest that some economically weaker Provinces would be unable to resist the temptations.<sup>3</sup>

Rather than leaving market forces to create a disincentive for pollution control, the Report argues that the federal government must provide the incentive by negotiating or imposing a uniform solution on the provinces. Such a solution could be in terms of economic incentives such as tax advan-

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<sup>3</sup>*Id.*, at 92.

tages or effluent fees, or it may take the form of absolute or qualified prohibitions of certain deleterious substances.

Finally, although the argument that the government with the financial resources should assume responsibility has an obvious flaw in it, it is a convincing one. Rationally, there is no reason why the most prosperous government is best suited to deal with the problem. In fact, if that argument is taken to its logical extreme, the federal government would have primary responsibility for almost all problems because it has unlimited taxing power. But the concept of federalism is based on the idea that one level of government is able to deal with certain problems better than another level because each problem is peculiar to the constituency that each government represents. Unless some attempt is made to determine whether or not a problem properly comes under the purview of a particular level of government the federal process becomes a sham. Nevertheless, the argument must not be dismissed too quickly. Because the present resource balance between governments is less than optimally flexible, a solution that does not deviate dramatically from this recognized fact must be sought.

From an economic perspective almost every pollution problem affects all Canadians. Since the federal government represents the whole country, it follows that it should have the responsibility for finding and implementing an appropriate solution. Federal control means the ability to design "an all encompassing multi-use agency that most administrators feel would be ideal."<sup>4</sup> From an economic point of view this makes a great deal of sense.

#### (b) *The Social Dimension*

It is a gross oversimplification to think of pollution as merely an economic problem, for if the social aspects of pollution are overlooked, one's view of the most appropriate legislative solution can be distorted. An important link between pollution control and the values held by social groups exists and may be verified by examining the history of some of the earlier abatement laws. Pollution control began at the level of government which was most responsive to the needs of relatively small groups of people, the municipal government. Most city noise ordinances for example date back to the 1930's<sup>5</sup> long before noise pollution had become a fashionable topic for debate. Anti-dumping bylaws also originated with local governments, some as far back as the nineteenth century. By tracing the development of provincial involvement with pollution control in Ontario, one sees that the Ontario Water Resources Commission only assumed control over water pollution from municipal governments that lacked either the financial ability or the desire to solve serious sewage disposal or water supply problems. Not only were municipal governments the first to become concerned, but each became involved in ways that best exemplified the social needs of their constituents. Some cities such as Toronto emphasized abatement and control while others such as Montreal

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<sup>4</sup>D. Gibson, *Constitutional Context of Canadian Water Planning* (1969), 7 Alberta L. Rev. 71 at 86.

<sup>5</sup>The City of Toronto noise bylaw, Bylaw 14913, adopted by City Council March 14, 1938.

did not.<sup>6</sup> Local and provincial involvement in the pollution problem has preceded federal interest and local solutions have varied according to the social aspirations of the local group. Both phenomena suggest that pollution has an important and even dominant local or regional aspect to it.

Consider for a moment just how many parts of the problem are local or regional in nature. Land use and land use planning fall into this category. Included here are such environmental issues as zoning ordinances, regulation of sand, gravel and limestone pits and quarries and provision for solid waste disposal and land fill operations. Questions of aesthetics, noise pollution and most aspects of air pollution are also local issues. Water supplies and waste disposal have traditionally been a municipal concern and all but the most serious sources of industrial pollution have been under local or regional jurisdiction. Most regulation of recreational activities such as pleasure boating, snowmobiling and cottaging is also dealt with at the provincial level. Each of these aspects of pollution that are regulated at the local and provincial levels are all manifestations of the social aspect of pollution that is so closely tied to the social well-being of individuals and groups.

The emphasis on the social dimension naturally leads us to the conclusion that local and hence provincial governments should have primary legislative responsibility for the problem. Because local governments represent a reasonably well defined group with identifiable social needs, they have a special appreciation of the problems and therefore should have the responsibility to find and implement solutions to them. These governments are better able to assess and reconcile the conflicting aspirations within their society. They are directly accountable to the people who will be affected by their decisions and will adopt solutions that are socially acceptable. Indeed, when one focusses on the social aspect of pollution, federal interests are much less important.

But of course this line of reasoning can only take us so far. Up to a point different groups can choose different life styles, but after that, one group's choice will spill over and have some adverse effects on another group. As we pointed out earlier, pollution in its broadest sense knows no boundaries and one group's chosen life style may detract from another's. In this same vein, it is also clear that a decision to sacrifice environmental protection in favour of a higher economic standard of living must be limited to decisions which will not seriously impair any groups well-being. It would be unconscionable not to put some limits on the amounts and kinds of pollution one group can choose to live with. Thus, constraints must be imposed for the well-being of other societal groups affected by pollution as well as for the protection of the group that chooses economic development at the expense of the environment.

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<sup>6</sup>The City of Toronto, for example, provides primary and secondary treatment for 100% of its sewage. Montreal dumps 91.6% of its sewage untreated into the St. Lawrence River. Instead of spending heavily on an Expo and preparation for the Olympics, Toronto has been busy building sewage treatment plants, and separating its storm and sanitary sewers.

Looking first at spillover effects, it is apparent that not all kinds of pollution affect adjacent groups. For example urban planning, noise, and aesthetics seem to be rather localized in terms of their effects. We may abhor the planning policies of a particular area but surely that is its choice. They have to live with these policies and if that is what they want, that is what they should get. Other kinds of pollution such as air and water pollution are not confined to the source area. Various kinds of effluents and emissions travel great distances and can often have a rather dramatic effect on the quality of life in communities several and sometimes even hundreds of miles away. This pollution easily transcends municipal boundaries and occasionally provincial and national boundaries. For example, most people would find it offensive that one group can, for purposes of maximizing their own enjoyment, substantially interfere with the enjoyment of another group. One example that immediately comes to mind within the municipal context is the nickel refineries at Sudbury. It would almost be most unfair to give the tiny towns of Copper Cliff and Falconbridge primary legislative responsibility over the air pollution emitted from the refineries in these two towns. The air pollution affects so many people that are unable to participate in the town decision-making process, it would be unreasonable to leave their fate in the hands of these municipal officials. Society demands involvement from a higher level of government to represent the interests of these affected people—in this case the provincial government. However, given such an enormous problem with such profound effects on so many people, it might be possible to carry this argument one step further and suggest that the federal government should become involved in the problem. Parliament has an interest in protecting the general well-being of all Canadians and if one group begins affecting the well-being of a large enough group of Canadians then it seems that Parliament not only has the power but the responsibility to intervene and regulate the problem. An easier case conceptually is mercury contamination or D.D.T. In both cases the spillover effects are so obvious and so adverse that we do not hesitate to demand federal legislation to control them.

The distinction between spillovers that adversely affect large numbers of people and problems affecting the social well-being of all Canadians easily becomes blurred. These spillovers almost invariably create a serious health problem for the group creating the problem as well as for those affected by it. In the health sphere the federal government clearly has legislative competence. It certainly extends into the area of food and drugs and would perhaps cover pollution that has a less direct effect on health. Many kinds of industrial pollution fall into this category. Thus, the social aspects of pollution point in the direction of local or provincial legislative responsibility with the caveat that when spillover effects become great or the pollution seriously threatens the well-being of Canadians, Parliament should have concurrent legislative responsibility.

(c) *The Interdependence of the Economic and Social Dimensions*

While examining pollution in terms of an economic and a social dimension may be useful to the extent that it highlights the main character-

istics of the subject matter, it is important to note that these two characteristics are not mutually exclusive. It is impossible to separate one from the other. It is possible to identify each characteristic, but they are both so closely related to each other that we cannot assign legislative responsibility over one aspect to one level of government and responsibility over the second aspect to the other government. Federal regulation of the economics of pollution will have a profound effect on the social aspects of the problem and vice versa. This, of course, should come as no surprise. It is typical of most highly complex problems. In some ways, economic regulation will affect social policies because social well-being is intimately tied up with economic prosperity. And the social aspect has, as one of its many components, an economic element. If we focus on the social aspect, it seems clear that policies in this area may encourage or discourage economic development depending on the kind of life style to be promoted by that policy.

This interrelationship does not extend to all parts of pollution control. It is easy to envisage, for example, that such economically related activities as the regulation of navigation or control over works and improvements on navigable lakes and rivers will not interfere substantially with the social aspects of pollution. Nor is there any direct relationship between the regulation of aesthetics or some kinds of land-use planning and economic interests in pollution. Within certain narrowly defined areas, regulation of one aspect of pollution will be confined to that aspect and the spillover will be minimal. For the most part, however, the overlap between the two aspects is considerable.

#### (d) *A Suggested Solution*

If pollution does break down into an economic and social dimension which are in turn a reflection of the pervasive and particularistic characteristics of the problem, what does this mean in terms of an optimal solution to the question of legislative responsibility? The answer is fairly obvious. The Federal and Provincial governments should share responsibility with the Federal responsibility confined to regulating the economic and the broad, social well being aspects of pollution and the provincial responsibility confined to finding particular solutions to particular pollution problems. Theoretically then, the federal government should design a broad framework that establishes certain minimum standards for pollution control that would solve the economic and larger social problems and the provincial and local governments should direct their efforts at refining or upgrading these standards so that they better reflect the social needs of their constituents. Such a solution requires a high degree of co-operation between the two levels of government. It also envisages a much broader federal role in the overall solution than we have seen in the past. Constitutional limitations, however, may preclude the federal government from assuming such broad regulatory powers. The next section will explore the extent to which the constitution permits us to construct such a solution and examine the legal details of the solution.



### III. *The Constitutional Implications of an Expanded Federal Pollution Control Role*<sup>7</sup>

Before looking at the existing constitutional framework for pollution control, it is important to identify three main themes that run throughout the following analysis and are of special relevance to pollution control. These three themes are: (1) the socio-economic paradox of the BNA Act, (2) the confused legislative responsibility for the problem and (3) the recent enlargement of federal powers.

Because pollution divides neatly into an economic and social dimension, it follows that we should look at the constitutional heads of power from a socio-economic perspective. However, when we adopt this approach, we discover an interesting paradox. From our previous discussion, one would expect that because the economic aspects of pollution seem to fall naturally under federal jurisdiction, federal power to deal with environmental problems would emanate from those heads of the BNA Act that purport to confer on Parliament the power to regulate the economy. But the constitutional head dealing with the economic sphere, the trade and commerce power, has never received liberal, expansive treatment at the hands of the courts, and therefore, cannot support federal initiative in the pollution area. In fact, to the extent that the federal government relies on the trade and commerce power, one can predict with some degree of certainty that these attempts will be doomed to failure. The federal government's social interest in the problem, on the other hand, is important but not extensive; it is confined to a general concern for the well-being of all Canadians. Yet the constitutional powers that seem to be designed to deal with these social interests, namely the peace order and good government and criminal law powers have recently been transformed from relatively narrow, well-defined powers to very expansive ones. It is on the basis of these "social" powers<sup>8</sup> that the federal government will most likely find the authority to deal with what for it is primarily an economic problem.

The second comment that should be made is closely related to the first point. Because of the paradox and apparent contradiction within the constitution, political responsibility over pollution is obscure. Both governments have

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<sup>7</sup>The following articles were very useful to me in the preparation of this section: D. Gibson, *Constitutional Context of Canadian Water Planning* (1969), 7 *Alberta L. Rev.* 71 [hereinafter Gibson, *Constitutional Context*]; B. Laskin, "Jurisdictional Framework for Water Management", *Resources for Tomorrow Conference* (1961), Background Papers 211 [hereinafter, Laskin, "Jurisdictional Framework"]; L. McGrady, *Jurisdiction for Water Resource Development* (1967), 2 *Man. L. Journal* 219 [hereinafter McGrady, *Water Resource*]; B. A. Stamp, "Constitutional Problems of Interprovincial Rivers", in D. Gibson, ed., *Constitutional Aspects of Water Management* (University of Manitoba: Agassiz Centre, Research Report No. 2, 1968); S. Stein, *Environmental Control* (1971), 14 *Canadian Public Administration* 129 [hereinafter Stein, *Environmental Control*]; Systems Research Group, *The Role of Canadian Constitutional Law As a Framework for Environmental Control Policy* (1970) [hereinafter S.R.G., *Environmental Control*].

<sup>8</sup>The interrelationship between social and economic problems that was discussed *supra*, makes it difficult to designate any particular head of power as either a social or economic head. Nevertheless, I think there is some validity in approaching the problem and the federal heads of power from these two perspectives and the peace, order and good government criminal law powers seem to fall into the social, well-being category.

a role to play but the precise limits of each role is not apparent from a reading of the constitution. The advantage of such a loose, vaguely defined framework is that it leaves governments free to negotiate a solution in light of the special difficulties of regulating such a complex, and diverse problem. The advantage is only realized, however, if both governments are willing to deal with the problem in a meaningful way. It soon becomes a disadvantage if either government refuses to participate in finding a solution. Because neither government is obviously responsible for inaction, each can blame the other under the banner: "We'd love to help but constitutionally our hands are tied. The other level of government has jurisdiction over the problem." When the argument is used by the provinces in conjunction with their lack of resources it can become a fairly convincing one. What must be done therefore, is to delineate clearly constitutional responsibility between the two governments.

Finally, one more point should be kept in mind. Federal powers, especially under the peace order and good government head, have gradually been extended. Perhaps this springs from the recognition that most problems in some way concern all Canadians and therefore require some involvement from the federal government. Whatever the reason federal powers have recently been undergoing a rather dramatic resurgence. This growth has not necessarily been at the expense of the provincial governments, however. Their powers have been growing too—although to a lesser extent. The court, recognizing a need for government involvement in a multitude of new areas, has tended to uphold government legislation unless it clearly infringes on the legislative power of the other level of government. Thus, as federal involvement has increased, its constitutional powers have expanded and the justification for greater federal involvement has grown.

Although the British North America Act (BNA Act)<sup>9</sup> makes no specific reference to environmental control, analogous issues suggest that both the federal and provincial governments share legislative<sup>10</sup> jurisdiction over the problem. However, because pollution primarily affects property rights, the provincial governments must be regarded as having primary legislative responsibility.<sup>11</sup> But pollution was not an issue in 1867 when the BNA Act was enacted and consequently the Constitution really has very little to tell us about who *should* deal with the issue. That can only be determined by a close analysis of the problem and, as we have shown, such an analysis suggests that the federal government should assume a far more active and positive role in environmental control. However, that role must be justified in terms of the existing constitutional division of powers. Unless we can demonstrate that there is ample justification and that the federal government can no longer avoid responsibility for the problem by denying jurisdiction, then our demand for a greater federal role will fall on deaf ears.

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<sup>9</sup>The British North America Act, 1867, 30 and 31 Victoria c. 3 as amended.

<sup>10</sup>For a discussion of the proprietary rights in the environment see: Gibson, *Constitutional Context*, *supra*, note 4 at 72-81; Stein, *Environmental Control*, *supra*, note 7 at 140-41; and Laskin, "Jurisdictional Framework", *supra*, note 7.

<sup>11</sup>British North America Act, 1867, 30 and 31 Victoria c. 3, as amended s. 92(13).

### *Federal Legislative Powers*

The heads of power under the BNA Act that may support federal involvement in the environmental control field fall neatly into two distinct categories—conceptual powers and functional powers.<sup>12</sup> The first provides for general federal competence to legislate over a broad range of important activities, which by analogy include environmental quality; the second specifically gives Parliament control over certain activities that are closely related to pollution in the sense that they may be adversely affected by, or may in fact contribute to the pollution problem. Included in the first category are the federal power to make laws for the peace, order and good government of Canada,<sup>13</sup> criminal law,<sup>14</sup> trade and commerce,<sup>15</sup> and taxing and spending powers.<sup>16</sup> The second group includes works and undertakings,<sup>17</sup> navigation and shipping<sup>18</sup> and sea coast and inland fishing,<sup>19</sup> harbours and rivers and lake improvements.<sup>20</sup>

#### (1) *The Conceptual Powers*

##### (a) *Peace, Order and Good Government: s. 91*

The general federal legislative power has had a very stormy history. Judicial interpretations of the section have fluctuated from expansive to restrictive. Today, however, it seems to be undergoing a revival that may eventually take it beyond its earliest, most expansive interpretations.

At first blush the introductory statement of section 91 of the BNA Act seems to give the Federal Parliament wide legislative powers over a whole range of activities. It provides that Parliament has the power “. . . to make laws for the Peace, Order and Good Government of Canada, in relation to all matters not coming within the head of subjects of this Act assigned exclusively to the Legislature of the Provinces . . .”<sup>21</sup> In *Russell v. The Queen*<sup>22</sup> the Judicial Committee of the Privy Council adopted the apparent interpretation of the section and upheld federal temperance legislation on the ground that it dealt with public order and safety throughout the nation and did not fall within an exclusive provincial power under “property and civil rights” or “all matters of a merely local or private nature in the province.” The federal general power, therefore, was able to support legislation dealing with any matter not specifically “within the province” if it was desirable to establish a uniform law throughout the Dominion. This approach was very short lived. Only fourteen years after

<sup>12</sup>The division of federal powers into conceptual and functional powers is discussed in Lyon, *Canadian Constitution, supra*, note 7 at Chapter 10.

<sup>13</sup>British North America Act, 1867, 30 and 31 Victoria c. 3, as amended.

<sup>14</sup>*Id.*, s. 91(27).

<sup>15</sup>*Id.*, s. 91(2).

<sup>16</sup>*Id.*, s. 91 (1A).

<sup>17</sup>*Id.*, s. 91(29) and s. 92(10).

<sup>18</sup>*Id.*, s. 91(10).

<sup>19</sup>*Id.*, s. 91(12).

<sup>20</sup>*Id.*, s. 108.

<sup>21</sup>*Id.*, s. 91.

<sup>22</sup>(1882), 7 A.C. 829.

*Russell* was decided, the Privy Council in the *Local Prohibition* case,<sup>23</sup> effectively relegated the general power from its lofty position as the primary grant enumerated heads in both section 91 and section 92. Lord Watson, however, did not preclude federal initiative in all local or provincial matters; he left the door ajar by speculating that certain of these matters, "might attain such dimensions as to affect the body politic of the Dominion" and thus justify "the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."<sup>24</sup> This approach was further restricted by Duff, J. *In Re the Board of Commerce Act*.<sup>25</sup> In that case the learned judge stated:

[W]hile for the purpose of dealing with a matter of interest to the whole Dominion in the sense of being a matter affecting or pertaining to the public order and good government of the whole Dominion . . . , Parliament may legislate so long as its enactments are of such a character that they do not deal with matters from a provincial point of view within the specific classes of subjects enumerated in section 92 (that is the first fifteen heads), it is not within its power under the residuary clauses to enact legislation which from the provincial point of view falls within any one of such classes.<sup>26</sup>

Duff J.'s interpretation suggests that impugned legislation would stand only if it did not fall within any of the provincial enumerations and was national in scope. On appeal to the Privy Council, Viscount Haldane stated that critical emergency circumstances must exist before the general power could be used to abrogate a provincial power enumerated under section 92.<sup>27</sup>

For the next twenty-five years the "emergency" doctrine dominated judicial interpretation of the general powers.<sup>28</sup> Thus, in *Fort Frances Pulp and Power Company v. Manitoba Free Press*,<sup>29</sup> the court, in a rare example of upholding federal legislation, held:

In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may invoke effort on behalf of the whole nation. . . .<sup>30</sup>

Very few pieces of federal legislation could ever be supported under such a restrictive test. For example, legislation to establish national conciliation services in vital industries<sup>31</sup> and to end the chaos in the marketing of wheat<sup>32</sup> was held *ultra vires*.

<sup>23</sup> *A.-G. for Ontario v. A.-G. for Canada*, [1896] A.C. 348.

<sup>24</sup> *Id.*, per Lord Watson at 361.

<sup>25</sup> *In Re The Board of Commerce Act and The Combines and Fair Prices Act*, (1920), 60 S.C.R. 456, 54 D.L.R. 254; rev'd [1922] A.C. 191.

<sup>26</sup> (1920), 60 S.C.R. 456 per Duff, J., at 511. Also quoted in A. Abel, *What Peace Order and Good Government? (1968)*, 7 U. of W. Ont. L. Rev. 1 at 12, n. 33 [hereinafter Abel, *What Peace*].

<sup>27</sup> [1922] 1 A.C. 191 at 200.

<sup>28</sup> For a good discussion of this era see B. Laskin, *Peace Order and Good Government Re-examined* (1947), 25 Can. Bar Rev. at 1054.

<sup>29</sup> [1923] A.C. 695.

<sup>30</sup> *Id.*, per Viscount Haldane at 703-04.

<sup>31</sup> *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396.

<sup>32</sup> *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.

The "emergency doctrine" has been effectively eliminated by a recent trend of cases beginning with the *A.-G. for Ontario v. Canada Temperance Federation*.<sup>33</sup> Viscount Simon stated:

The true test must be found in the real subject of the legislation; if it is such that it goes beyond local or provincial concern or interests and must, from its inherent nature, be a concern of the Dominion as a whole, 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 Legislature.<sup>34</sup>

The test does not require "that the problem dealt with be one of uniform and universal interest through the length and breadth of the land,"<sup>35</sup> only that the subject matter extend beyond provincial interest and concern the Dominion as a whole. There is also authority that the court "ought not to examine too closely the correctness of value judgments which Parliament has been forced to make."<sup>36</sup> In *Co-operative Committee on Japanese Canadians v. A.-G. for Canada*<sup>37</sup> Lord Wright argued that:

Very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of *ultra vires*, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.<sup>38</sup>

Thus there is a tendency to assume that the legislation is valid unless there are compelling reasons to the contrary. Relying on these two lines of argument the courts have held that federal legislation dealing with aeronautics,<sup>39</sup> telecommunications,<sup>40</sup> atomic energy<sup>41</sup> and the beautification of the national capital<sup>42</sup> may all be supported under the general peace order and good government power.

More recently the court was prepared to rely on the general powers to support a federal claim to mineral rights off the British Columbia coast.<sup>43</sup> The Supreme Court reasoned that because the subject matter did not come within the classes of subjects assigned to the provincial legislatures under section 91, it "may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression the peace order and good government

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<sup>33</sup> [1946] A.C. 193.

<sup>34</sup> *Id.*, per Viscount Simon at 203.

<sup>35</sup> See Abel, *What Peace, supra*, note 26 at 2.

<sup>36</sup> B. L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968) at 143.

<sup>37</sup> [1947] A.C. 87.

<sup>38</sup> *Id.*, at 101-02.

<sup>39</sup> *Johannesson v. West St. Paul*, [1952] S.C.R. 292.

<sup>40</sup> *In Re Regulation and Control of Radio Communication in Canada*, [1932] 2 D.L.R. 81, [1932] A.C. 304.

<sup>41</sup> *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 362, 5 D.L.R. (2d) 342 (Ont. H.C.).

<sup>42</sup> *Munro v. National Capital Commission*, [1956] S.C.R. 666. See also *Porter v. The Queen*, [1946] 1 Ex. C. R. 200.

<sup>43</sup> *Reference Re Ownership of Off Shore Mineral Rights*, [1967] S.C.R. 792.

of Canada."<sup>44</sup> Any compunction the courts may have had about extending federal power under the general head seems to be gone.

One particular case, the *Pronto Uranium*<sup>45</sup> case, suggests that the courts may have already gone beyond their earlier centralist position and therefore deserves special attention. In that case McLennan, J. relied on Rand J.'s statement in *Ref. Re Validity of Industrial Relations and Disputes Investigation Act*:

It would be incompatible with the power of Parliament [for the provincial government] to legislate in respect of the control of atomic energy for the peace, order and good government of Canada if labour relations in the production of that substance did not lie within the regulation of Parliament.<sup>46</sup>

Once the court says that Parliament has legislative competence to deal with a particular matter it seems to follow that it also has legislative competence to deal with related or associated activities. This statement recognizes the functional interrelationship of different activities. If a government has control over the primary activity, jurisdiction is extended to include secondary activities that are closely related to it. Given the functional interrelationship of most activities, including pollution control, it may be possible to bring all aspects of pollution abatement under a uniform federal regulatory once the federal Parliament can establish jurisdiction over some part of the field.

One part of the problem that may support such an approach under the peace order and good government power is public health. Reference was made in the *Margarine* case to ". . . competent Dominion public health legislation under the peace, order and good government clause of section 91"<sup>47</sup> thus suggesting that federal initiative to avert a public health crisis including regulatory measures would be *intra vires*. By establishing jurisdiction over the health aspect of pollution, legislative control could then be extended under the *Pronto* doctrine to include regulation of the economic aspects of pollution.

Clearly, the general power would provide an innovative and politically courageous federal government with some compelling legal arguments to support strong environmental protection legislation. The courts, in recent years, have not hesitated to uphold important federal legislation under this head. The rationale for this approach is not hard to find. Rather than relying exclusively on a strict interpretation of the constitution and subsequent Privy Council decisions which may have little relevance to the practicalities of problems before it, the Supreme Court seems to be adopting a much more pragmatic, realistic approach. If an important (not necessarily national) activity requires a high degree of central, co-ordinated control, that is lacking at the provincial level and there are sound reasons why the provinces could not properly assume such control, then the court has been prepared to uphold the needed federal

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<sup>44</sup>*Id.* It should be noted, however, that this comment is *obiter* because the court found that the territorial sea did not belong to British Columbia at the time of Confederation and that they had not since acquired it. For a good discussion of the case see I. Head, *The Canadian Offshore Mineral Reference* (1968), 18 U. of T. L.J. at 131.

<sup>45</sup>*Pronto Uranium Mines Ltd.*, *supra*, note 41.

<sup>46</sup>*Reference Re Validity of Industrial Relations and Disputes Investment Act*, [1955] 3 D.L.R. 721, per Rand, J., at 746-47.

<sup>47</sup>*Reference Re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 at 78, as quoted in Laskin, "Jurisdictional Framework", *supra*, note 7 at 218.

legislation.<sup>48</sup> The ramifications for this new approach in the environmental field are far reaching indeed. Parliament, now finds itself in a very enviable bargaining position. It can demand that the provinces co-operate and if they refuse, can pass legislation that will impose solutions on them.

(b) *Criminal Law Powers: s. 91 (27)*

The scope of the federal criminal law power has never been defined by the courts with any degree of precision. Several tests have been adduced by the courts, but none are definitive. A useful starting point for this study is the Privy Council's statement in *Proprietary Articles Trade Association v. A.-G. for Canada*.<sup>49</sup>

'Criminal law' means 'the criminal law in its widest sense' . . . The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intention,—nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences? . . . The domain of criminal jurisprudence can only be ascertained by what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.<sup>50</sup>

This loose test suggests two broad criteria: sufficient blameworthiness (as defined by Parliament) and a general prohibition<sup>51</sup> (not regulation) by way of sanctions.

(i) *Blameworthiness*

Parliament's power to define blameworthiness has been widely construed. In the *Reference Re Section 498 of The Criminal Code* case<sup>52</sup> Chief Justice Duff stated:

. . . in enacting laws in relation to matters falling within the subject of criminal law, . . . Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear in a court of law to be 'in their own nature'

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<sup>48</sup>S. Stein, in *An Opinion on the Constitutional Validity of the Proposed Canada Water Act* (1970), 28 U. of T. Fac. of Law Rev. 74 at 80 concludes that the "crucial question of fact is whether or not the subject matters dealt with under the legislation in question have truly reached a level of *national interest and concern*." The test of "national concern" is far more difficult for the federal government to meet than one that I have formulated.

<sup>49</sup>[1931] A.C. 310 at

<sup>50</sup>*Id.*, at 324 per Lord Atkin (emphasis added). This passage is quoted in B. Laskin, *Canadian Constitutional Law* (3rd ed. Toronto: Carswells, 1966) at 850 [hereinafter Laskin, *Constitutional Law*], and Varcoe, *The Constitution of Canada* (Toronto, Carswells, 1965) at 125-261 [hereinafter Varcoe, *Constitution of Canada*].

<sup>51</sup>H. Landis, in an article entitled, *Legal Controls of Pollution in the Great Lakes Basin* (1970), 48 Can. Bar Rev. 66 elaborates on the prohibitory aspect at 122 where he states: "The essence of the criminal law is prohibition of a general nature, not control and regulation of an individual case and this is the main advantage of the exercise of this jurisdiction." [hereinafter Landis, *Legal Controls*].

<sup>52</sup>[1936] S.C.R. 363; [1937] A.C. 368.

criminal. The jurisdiction in relation to the criminal law is plenary, and enactments passed within the scope of that jurisdiction are not subject to review by the courts.<sup>53</sup>

Lord Atkin, defined the federal criminal law power in a like manner:

There is no other criteria of 'wrongness' other than the intention of the legislature in the public interest to prohibit the act or omission made criminal.<sup>54</sup>

However broadly the courts have interpreted the blameworthiness element it would be a mistake to think that there are not some limits to this aspect of the federal power. In this regard, it seems that there are two discernible limiting principles. One focuses on the problem of federal legislative encroachment into provincial territory, the other becomes embroiled in the difficult task of drawing distinctions between social and economic problems.

The first principle confines federal criminal law to legislation that is in "pith and substance" a criminal matter or that complements legislation supported under one of the other federal heads of power. Thus the criminal law power may, on its own, support federal legislation<sup>55</sup> or it may be used to affix criminal sanctions to other competent federal legislation.<sup>56</sup> In *Board of Commerce* Lord Haldane perceived a distinction between subjects which, by their very nature, belong to the realm of criminal jurisprudence and those subjects that do not. A general law making incest a crime, he reasoned, would fall naturally into the criminal law category. As G. P. Browne noted, "Lord Haldane presumed the existence of an *a priori* 'domain of criminal jurisdiction': because 'criminal laws' have an 'essential character,' there must be predetermined limits to the federal parliament's sphere of legislative authority."<sup>57</sup> Lord Haldane relied on this formula to strike down federal legislation in *Toronto Electric Commission v. Snider*<sup>58</sup>

The penalties for breach of the [federal] restrictions did not render the statute the less an interference with civil rights in its pith and substance. The Act is not one which aims at making striking, generally, a new crime.<sup>59</sup>

Presumably if the purpose of the Act had been to make striking a crime, then it could have been upheld under section 91(27) in the same way that a statute making incest a crime could be upheld. Less than ten years later Lord Atkin in the *Proprietary Articles* case rejected such a "definition" as being too difficult to apply.<sup>60</sup> The last vestiges of Lord Haldane's attempted distinction were swept away by Chief Justice Kerwin in the *Lords Day Alliance* Case: "In constitutional matters there is no general area of criminal law and in every case the

<sup>53</sup>*Id.*, at 366.

<sup>54</sup>*A.-G. for British Columbia v. A.-G. for Canada*, [1937] A.C. 368, [1937] 1 D.L.R. 688 as quoted in Laskin, *Constitutional Law*, *supra*, note 50 at 850.

<sup>55</sup>Such as s. 165 of The Criminal Code which deals with public nuisance.

<sup>56</sup>See, for example s. 19 of the *Arctic Waters Pollution Act*, R.S.C. 1970, supp't #1, c. 2.

<sup>57</sup>G. Browne, *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press, 1967) at 100. [hereinafter Browne, *Judicial Committee*].

<sup>58</sup>[1925] A.C. 396.

<sup>59</sup>*Id.*, at 408.

<sup>60</sup>*Proprietary Articles Trade Assoc. v. A.-G. for Canada*, [1931] A.C. 310.



pith and substance of the legislation must be looked at.”<sup>61</sup> Today, subject matters that have an “essential character” of criminality about them are confined generally to the criminal code.

Developing criteria regarding the encroachment aspect of the criminal law power has not been easy. Those used by the courts—“pith and substance”, “truth and substance” and “colourable” have been less than satisfactory. One of the best attempts to lay down a general rule was made by Lord Atkin in *A.-G. for British Columbia v. A.-G. for Canada*:<sup>62</sup>

... Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in section 92. It is no objection that it does in fact affect them. If a genuine to amend the criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which apart from the amendment, he could lawfully do.<sup>63</sup>

Some degree of interference is an obvious consequence of enacting any criminal legislation. Lord Atkin draws the line between constitutional and unconstitutional interferences between federal legislation that “affects” provincial powers and legislation that encroaches on provincial powers. The former is *intra vires*, the latter is not: a rather tenuous distinction, to say the least! Whether the court was prepared to phrase the interference in terms of an affect or an encroachment, hinged on whether or not the court felt the attacked legislation could be supported under some other federal head of power. Legislation that could not was quickly thrown out by the courts. For example, the Privy Council adopted this line of reasoning to defeat federal legislation in the *Reciprocal Insurers Case*.<sup>64</sup>

The Parliament of Canada cannot by purporting to create legal sanctions under s. 91 (head 27) appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.<sup>65</sup>

The legislation under attack in the *Proprietary Articles Trade Association* case could be supported on some other ground and therefore was valid. Although the legislation in both cases dealt with similar problems and although the Privy Council reached a different decision in each case, this did not indicate inconsistency in the application of the criminal law power; rather, it suggested a defect in the way in which the court analysed the problem in light of other federal heads of power.<sup>66</sup> If the legislation could be upheld under another head

<sup>61</sup>*Lord's Day Alliance of Canada v. A.-G. for British Columbia* (1959), 19 D.L.R. (2d) 97, [1959] S.C.R. 497 at 102, 503.

<sup>62</sup>[1937] A.C. 368. See also *A.-G. for British Columbia v. Smith*, [1967] S.C.R. 702.

<sup>63</sup>*Id.*, per Lord Atkin at 375-76.

<sup>64</sup>*A.-G. for Ontario v. Reciprocal Insurers*, [1924] A.C. 328.

<sup>65</sup>*Id.*, per Duff, J. at 342. Although similar “regulatory” legislation involving the Combines Investigation Act was permitted to stand. See *Proprietary Articles Trade Association v. A.-G. for Canada* [1931] A.C. 310, [1931] 2 D.L.R. 1.

<sup>66</sup>Here it is interesting to note Browne's comment that wherever there was a conflict between the criminal law and the trade and commerce power, the ambit of s. 91(27) was restricted. Browne, *Judicial Committee, supra*, note 57 at 105-06.

of power there was no question that Parliament could enforce the legislation through criminal sanction validly enacted pursuant to section 91(27). If it could not, the criminal powers could not be used to save it.

The second principle used to block out the limits of the criminal law power relates to the proper subject matter of the criminal law. The groundwork for this principle was laid by Mr. Justice Rand in the *Margarine Reference* case.<sup>67</sup> Rand J., in deciding that federal legislation prohibiting the manufacture and sale of margarine even when confined to a single province was invalid, suggested that "the ordinary though not exclusive ends served by [the criminal power]" include "public peace, order, security, health, morality."<sup>68</sup> The court went on to find that the criminal prohibition in the case was not related to health (the government admitted that margarine did not present a danger to health), but dealt with an economic object. Because the ends were not the proper subject matter of the criminal law, it followed that the legislation was invalid. The *Standard Sausage* case,<sup>69</sup> decided 15 years before the *Margarine Reference* case, mitigates against some of the harshness of Rand J.'s reasoning by upholding Dominion legislation although some of the prohibited substances were considered harmless. We can only conclude from this decision that either the courts are most reluctant to substitute their opinion for Parliament's regarding a health danger or they recognize that the criminal law has a legitimate role to play in the economic sphere.<sup>70</sup>

By focussing on the public health aspect of pollution, the criminal law power may support a variety of different Federal anti-pollution laws. There was no doubt in Professor Laskin's mind that "If there were any crisis of public health, whether arising from pollution of water or otherwise, Parliament could certainly deal with it."<sup>71</sup> This proposition seems to be supported by two decisions. In the first, *Canadian Federation of Agriculture v. A.-G. for Quebec*,<sup>72</sup> the Supreme Court suggested that if federal legislation had as its express object the elimination of substances which had "some evil or injurious or undesirable effect upon the public" the legislation could reside within an aspect of the criminal law power.<sup>73</sup> Support for this position may also be found in the courts' decision to uphold the federal Food and Drugs Act which established standards of food purity and took other measures to prevent food adulteration.<sup>74</sup>

## (ii) Prohibition versus Regulation

In addition to focusing on some kind of blameworthy conduct, the Privy

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<sup>67</sup>*Reference Re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1. <sup>68</sup>*Id.*, at 50.

<sup>69</sup>*Standard Sausage Co. v. Lee*, [1934] 1 D.L.R. 706.

<sup>70</sup>Laskin, *Constitutional Law*, *supra*, note 50 at 851.

<sup>71</sup>Laskin, "Constitutional Framework", *supra*, note 7 at 218.

<sup>72</sup>[1949] S.C.R. 1 at 50, [1931] A.C. 179 (P.C.).

<sup>73</sup>It would be wrong, however, to rely too heavily on this dicta. Generally the courts have not upheld federal marketing legislation. In the *Federation of Agriculture* case, although the federal legislation was protective in nature and had the support of the Federation, it was struck down in the basis that it directly affected the civil rights of individuals in relation to trade within a province. *Id.*, at 196.

<sup>74</sup>*Standard Sausage Co. v. Lee*, *supra*, note 69.

Council also required in the *Proprietary Articles Trade Association* case that a criminal law be prohibitory rather than regulatory. Criminal sanctions designed to prohibit certain wrongful conduct are constitutional, whereas sanctions used to regulate conduct are not. Needless to say, the distinction is a fine one. It seems to depend on the way in which we look at a problem. From the broader perspective a criminal sanction may very well be thought to regulate; however, from a narrower point of view the law may prohibit a certain aspect of an individual's overall conduct. For example, a law against discharging a substance with more than x parts/million of Y substance is regulatory in the sense that it doesn't prohibit an activity, nor does it make it an offence to discharge lesser amounts of substance. Looked at in terms of a whole manufacturing process, the law regulates the way in which a product is manufactured to the extent that certain activities which are likely to contravene the law are forbidden and others are not; but it does not prohibit manufacturing. However, if we focus on the narrower issue of effluent and emission quality, certain kinds of effluents are prohibited, others are not. Discharges above a standard are not merely regulated, they are absolutely forbidden. Finally, it should be noted that the Supreme Court in *Goodyear Tire & Rubber Co. of Canada v. The Queen* was not impressed with the company's argument that a prohibition order enjoining further illegal combinations was invalid because the criminal law powers refers only to the punishment and not the prevention of crimes.<sup>75</sup> In upholding Parliament's right to prevent crimes, the court went on to say that merely because similar acts are also punished under the criminal code does not preclude further federal action under its criminal powers.<sup>76</sup>

What are the prospects for a stronger federal anti-pollution role under the criminal law powers? Most commentators agree that this power, combined with the general power, provide the federal government with a very convincing argument for comprehensive, all encompassing environmental protection legislation.<sup>77</sup> I would be more skeptical. The criminal law power is not that broad. It certainly will not support comprehensive legislation on its own unless that legislation defines pollution specifically as a crime and confines remedial measures to prohibitions of certain conduct. That kind of legislation may be appropriate in some situations for some types of pollution, but it will be grossly

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<sup>75</sup>[1956] S.C.R. 303 at 308. Mr. Justice Rand, in a concurring opinion, opened the door for a more innovative federal role. "It is accepted that head 27 of s. 91 of the Confederation Statute is to be interpreted in the widest sense, but that the breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adopted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable." Quoted in E.S. Binavince, *Economic Growth Through Constitutional Safeguards: The Canadian Experience* (1971), 17 McGill Law Journal 189, [hereinafter Binavince, *Economic Growth*].

<sup>76</sup>It would appear, therefore, that a potential polluter could not escape liability under a federal criminal sanction by arguing that the section 165 of the criminal code (common nuisance) and section 165A (Bill C-189, 1970 creating an offence for the discharge of noxious matter into interprovincial waters) have precluded further activity in this area.

<sup>77</sup>See for example, Stein, *supra*, note 48 and Stamp, "Constitutional Problems of Interprovincial Rivers", *supra*, note 7.

inadequate if what is needed is a multi-levelled attack on the problem that employs various regulatory and remedial tools. The criminal law power role in a comprehensive federal regulatory scheme is primarily complementary. It will support criminal law sanctions within the scheme but not the scheme itself.

(c) *Federal Taxing Power: s. 91(3)*

Section 91(3) confers authority on Parliament to raise money "by any Mode or System of Taxation". Taxes may be used in two different ways in the environmental field to raise revenue and to help influence individual behaviour. The two roles are very closely linked and in fact it is often impossible to distinguish one from the other.

Whatever role we choose for the taxing power, many hurdles must be overcome before the court will uphold it. The mere use of the word "tax" in a statute does not necessarily mean that a legal tax is in fact being levied. As we have seen before, federal legislation must not be a "colourable" attempt to trench on provincial jurisdiction over property and civil rights. Two cases amply illustrate the vulnerability of federal taxing legislation to this kind of an attack. First, in *In Re The Insurance Act of Canada*,<sup>78</sup> the Privy Council held that a federal attempt to intermeddle with the conduct of insurance business under the guise of legislation imposing Dominion taxation would be struck down. The licensing feature of the Act invaded a field of exclusive Provincial authority, insurance, and therefore the whole Act fell.<sup>79</sup> The second case involved a federal attempt under the Employment and Social Insurance Act of 1935 to provide a comprehensive scheme of unemployment insurance.<sup>80</sup> The Privy Council rejected the federal government's argument that the obligations imposed by the Act on employers and employees were a form of tax and decided that in pith and substance the Act was an insurance Act affecting the civil rights of employers and employees and was accordingly within the exclusive competence of the provincial legislation. As the Privy Council had warned<sup>81</sup> taxes imposed by the federal government for "provincial purposes" could not stand. Thus we have a further affirmation by the courts of the principle that a particular head of power such as taxing cannot be used to justify an invasion into the provincial legislative sphere nor can they be linked with such an invasion. On its own, the taxing power may not be able to support a fairly limited range of anti-pollution legislation. It certainly could not be the sole justification for a comprehensive regulatory scheme. It could, however, be used to extend the Canadian Income Tax Act to provide exemptions, tax holidays, and accelerated depreciation of capital assets for all types of pollution abatement equipment.<sup>82</sup> Similarly, the Act could be amended to eliminate, or at least reduce the tax advantages presently enjoyed by the primary extractive industries and thus encourage more

<sup>78</sup> [1932] A.C. 41 (P.C.).

<sup>79</sup> *Id.*, at 52.

<sup>80</sup> *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 355 (P.C.).

<sup>81</sup> *Caron v. The King*, [1924] A.C. 999 (P.C.).

<sup>82</sup> Provision is presently made for certain classes of property acquired for purposes of water pollution prevention or abatement. The Canadian Income Tax Act, R.S.C. 1970 c. I-S, Schedule B-Capital Cost Allowances, Class 24.

recycling.<sup>83</sup> Or, the federal government could follow Ontario's example<sup>84</sup> and refund the federal sales tax paid on pollution abatement equipment.

One way to avoid judicial interference is to rationalize a regulatory scheme in terms of some other head of power and merely use the taxing powers to justify the taxing aspects of an already legal scheme. Thus the taxing aspect would be complementary rather than primary. As part of an integrated scheme taxes could be levied on effluent quality as an effluent charge. Leaving aside the problem of how one would determine the appropriate charge, this would have the obvious advantage of helping to guarantee the economic viability of the program and determining behaviour patterns. Polluters would automatically reduce their effluent to the point where money spent on more pollution abatement equipment would no longer result in a net saving through reduced effluent charges. New developments in technology that reduced the cost of emitting cleaner water or air would immediately be adopted by industry because expenses incurred to install these new devices would be more than recouped through further reductions in the amount of tax paid. The money raised through this scheme would not necessarily cover the costs of administering the whole regulatory program for it is unlikely and even undesirable that the taxes should be levied with only this end in mind. However, funds would be raised this way and they could be used to help cover administration, research and development costs.

As appealing as this tax scheme may seem, it may face judicial opposition on constitutional grounds. First, a federal tax on such a novel item as effluent quality rather than on normal things such as persons, goods or transactions, may be deemed to be a penalty. As a penalty, it may still be supported under the criminal law power, but runs the further risk of being struck down as regulatory rather than prohibitory. Secondly, an effluent tax used to administrative costs would have to meet all the indicia of taxation as set out by the court in the *Tree Fruit* case.<sup>85</sup> In that case, a provincial administrative agency attempted to defray its operating costs by imposing levies on the marketing of certain commodities. Duff J. held that the levies were taxes since they were enforceable by law, imposed under the authority of the legislature, imposed by a public body and made for a public purpose.<sup>86</sup> The similarities between an effluent charge and a levy are obvious. Although the charge also influences behaviour, if the revenue is used for administration purposes, it would seem to meet all four criteria. Public purpose need not be solely for the direct support of the government; it would also include government designed regulatory programs.<sup>87</sup>

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<sup>83</sup>The practice of implementing social and economic policy through taxation has been criticized by the Carter Report as creating distortions in the economy. If, however, we continue to use our Income Tax Act in this manner it has great potential as a device for encouraging more investment in pollution abatement equipment.

<sup>84</sup>Pollution Abatement Incentive Act, R.S.O. 1970, c. 352.

<sup>85</sup>*Lawson v. Interior Tree, Fruit & Vegetable Committee*, [1931] S.C.R. 357, [1931] 2 D.L.R. 193.

<sup>86</sup>*Id.* The case is discussed in Laskin, *Constitutional Law*, *supra*, note 50 at 669. A similar holding was also made in *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708, [1938] 4 D.L.R. 81.

<sup>87</sup>See S.R.G., *Environmental Control*, *supra*, note 7, for a good discussion of these points.

Like the criminal powers the taxing powers may be used either on its own to justify specific tax measures to alleviate pollution, or in conjunction with other federal powers to legitimize the taxing aspects of a comprehensive pollution abatement scheme. The real effectiveness of both powers, lies in their complementary rather than primary role.

(d) *The Federal Spending Power*

A related power that may be used by Parliament to control pollution is the federal spending power.<sup>88</sup> Under this power, Parliament can attach conditions to the terms on which it disposes of its real and other property. When disposing of public funds, for example, Parliament can use conditional grants in aid to regulate various types of activity where it does not have clear jurisdiction. Professor La Forest, commenting on the extent of this power, notes that:

In addition to the subsidies guaranteed under various constitutional instruments, the federal parliament pays the provinces vast subsidies under authority of federal statutes. Again it makes extensive grants to individuals, organizations, and public authorities as well as to the provinces, not only for schemes falling under other federal heads of power, but for many ordinarily governed by provincial law. By attaching conditions to such grants, it can powerfully influence the scope and direction of such schemes.<sup>89</sup>

The constitutionality of the spending power was reviewed in the *Unemployment Insurance* case<sup>90</sup> and although the court struck down the Unemployment Insurance Act, it did so on the basis that the Act dealt with the civil rights of the labour force in each province, not because the spending power and conditional grants established under it were an exercise in jurisdiction over public property, beyond the capacity of Parliament. Nevertheless, Parliament may not directly invade the realm of provincial authority under the guise of its spending power. The Privy Council, upholding a Supreme Court decision<sup>91</sup> held:

That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. . . . If on the true view of the legislation it is found that in reality, in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would provide the Dominion an easy passage into Provincial domain.<sup>92</sup>

Despite this strong warning to Parliament, it has not precluded co-operative arrangements with the provinces which have had a pronounced effect on provincial decision-making.

The scope of this federal power is as broad as the imagination of federal administrators. Notwithstanding the usual caveat regarding federal encroach-

<sup>88</sup>British North America Act, 1867, 20 and 31 Victoria, c. 3 as amended. "The Public Debt and Property."

<sup>89</sup>G. V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 136-37 [hereinafter La Forest, *Natural Resources*].

<sup>90</sup>*A.-G. for Canada v. A.-G. for Ontario*, [1936] S.C.R. 427.

<sup>91</sup>*Reference Re Employment & Social Insurance Act*, [1936] S.C.R. 427.

<sup>92</sup>[1937] A.C. 355 at 366-67.

ment, various conditions could be attached to federal subsidies that would guarantee a high degree of federal influence on the environmental protection policies of those provinces that accepted the money. If a province is free not to participate, it cannot complain as easily about federal encroachment. This would be one easy way of establishing federal abatement standards in all the participating provinces.

(e) *The Trade and Commerce Power: s. 91(2)*

If there is one stumbling block that may stop the federal government from developing a comprehensive regulatory scheme it is the trade and commerce power. The pollution problem, as we argued earlier, has an important economic dimension which seems to fall naturally within the purview of the federal government. One might have expected that the primary source of federal regulatory power in the commerce sphere would flow from the trade and commerce power, but unfortunately this power has been given a very restrictive interpretation by the Privy Council.

The power was first considered in *Citizens Insurance Co. v. Parsons*,<sup>93</sup> a case that examined the validity of an Ontario statute that purported to provide uniform conditions for all insurance contracts related to property and civil rights in the province. Sir Montague Smith, delivering the judgment of the Judicial Committee asserted:

Construing therefore the words 'regulation of trade and commerce'. . . . They would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.<sup>94</sup>

Taking their cue from this interpretation of the trade and commerce power, later courts have held that the power should be restricted "in order to afford scope for powers which are given exclusively to the provincial legislator"<sup>95</sup> because if the words were taken in their widest sense they would authorize federal legislation that would "seriously encroach upon the local autonomy of the province."<sup>96</sup> In the *Board of Commerce* case,<sup>97</sup> Lord Haldane went so far to restrict the trade and commerce power that Professor McWhinney commented that the "power was available only to 'aid' the Dominion in an exceptional situation to exercise the powers conferred by the general language of section 91, that where no power was possessed by the Dominion Parliament independently of the trade and commerce section, the trade and commerce section would not operate."<sup>98</sup> Mr. Justice Anglin recognized the depths to which their power had been relegated in *The King v. Eastern Terminal Elevator Co.*<sup>99</sup> when he said that the power had been "denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction." Generally Federal

<sup>93</sup> (1881), 7 A.C. 96.

<sup>94</sup>*Id.*, at 112.

<sup>95</sup>*Bank of Toronto v. Lambe* (1887), 12 A.C. 575 at 581.

<sup>96</sup>*City of Montreal v. Montreal Street Railway*, [1912] A.C. 333 at 334.

<sup>97</sup>*In Re The Board of Commerce Act and the Combines and Fair Prices Act*, 1919, [1922] A.C. 191.

<sup>98</sup>E. McWhinney, *The Canadian Constitution Under the Impact of Judicial Review*.

<sup>99</sup>[1925] S.C.R. 474 at 442 as quoted in *Id.*

regulation for international and interprovincial trade remained,<sup>100</sup> but Parliament could not legislate for the regulation of a particular trade or business,<sup>101</sup> nor could the regulation relate to any intraprovincial aspect of the trade<sup>102</sup> unless it was trade and commerce affecting "the whole Dominion of Canada."<sup>103</sup>

With the trade and commerce power, we see just how far judicial paranoia over federal encroachment will take us. Judicial restrictions imposed on either the criminal or taxing powers were mild in comparison to what the court has done to trade and commerce. At least there, the courts were prepared to accept that both heads of power could play a limited role in terms of supporting their own federal legislation. Here, no such concessions were made. Trade and commerce may help extend federal legislation once it has been established under another head such as peace, order and good government, but it will not support its own legislation.

Two lines of argument may be used to remove some of the strictures of these earlier decisions. The most interesting possibilities for a revived trade and commerce power may come through an extension of the definition of trade affecting the "whole Dominion of Canada". Recent decisions suggest that the courts have not yet clearly defined the limits of this phrase,<sup>104</sup> and there is still some room for flexibility. Historically, one decision of the Privy Council, *John Deere Plow Co. v. Wharton*<sup>105</sup> attempted to set down some guidelines in this matter. John Deere, a federally incorporated company, successfully rebutted a shareholder's charge that it had not complied with provincial regulations by arguing in part that the provincial legislation violated federal powers over trade and commerce and hence was invalid. The Board, in a surprisingly broad decision accepted the company's argument and

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<sup>100</sup>*Lawson v. Interior Tree, Fruit and Vegetable Committee*, [1931] S.C.R. 357, [1931] 2 D.L.R. 193; *Citizen Insurance Co. v. Parson* (1882), 7 A.C. 96; *Gold Seal Ltd. v. Dominion Express* (1921), 62 S.C.R. 424, 435, and e56-58. It was quite clear, however, that the legislation could not relate to any aspect of intraprovincial trade: *A.-G. for British Columbia v. A.-G. for Canada*, [1937] A.C. 377. As prospective markets for many products were impossible to define at the time potential legislation would be passed, federal involvement in this area was seriously curtailed. See also, *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.

<sup>101</sup>Varcoe, *Constitution of Canada, supra*, note 50 at 85 cites a number of cases to support this proposition.

<sup>102</sup>Duff, C.J.'s statement in *Re Natural Products Marketing Act*, [1936] S.C.R. 398; aff'd [1937] A.C. 377 at 412 (a case dealing with legislation that purported to regulate the marketing of natural products) is strong support for this point.

"The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of trade which is exclusively local to the same authority."

<sup>103</sup>There is a thread of support for this proposition beginning with *Citizen Insurance Co. v. Parson* (1882), 7 A.C. 96, and reinforced in *Russell v. The Queen* (1882), 7 A.C. 829; *Bank of Toronto v. Lambe* (1887), 12 A.C. 575; and *Toronto Electric Commission v. Snider*, [1925] A.C. 396.

<sup>104</sup>See A. Smith, *The Commerce Power in Canada and the United States* (1963), at 77. Noted in Binavince, *Economic Growth, supra*, note 75 at 196.

<sup>105</sup>[1915] A.C. 330 (P.C.).



supported Parliament's grant to such companies. However, there was a certain degree of ambivalence in the decision. At one point in the decision Lord Haldane boldly extended the trade and commerce power to enable Parliament "to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitation should be placed to such powers",<sup>106</sup> while at a later point he seemed to retract or at least qualify this statement to the extent that these "powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the province generally."<sup>107</sup> One commentator has discounted the apparent broad scope of this decision for two reasons.<sup>108</sup> First it was decided at a time (1915) when federal leadership in western Canada was extremely strong, unlike the present situation. And secondly, subsequent decisions have amply illustrated, that *John Deere* was, if anything, the exception that proves the rule. However, today when it is becoming more and more essential that the federal government be given sufficient powers to co-ordinate an effective anti-pollution and resource development program, the courts might be prepared to accept their earlier decision to help justify a stronger federal role.

The recent decision in the *Farm Products Marketing*<sup>109</sup> case suggests a second way in which the courts may be willing to permit a greater federal regulatory role under the trade and commerce head, namely, by extending the definition of international and interprovincial trade to include trading activities that have an extraprovincial aspect to them. Mr. Justice Rand stated that new rule as follows:

That demarcation must observe this rule, that if in a trade activity, including manufacture or production, there is involved a *matter of extraprovincial interest or concern* its regulation thereafter in the aspect of trade is by that fact put beyond Provincial powers.<sup>110</sup>

The crucial point here is the definition to be given to "extraprovincial interest or concern". Both Mr. Justice Locke's "flow theory"<sup>111</sup> and Mr. Justice Kerwin's decision in the same case, give the federal Parliament some reason to be optimistic here. Kerwin, for example, seemed to be prepared to come down on the side of federal legislation because "[i]t is, I think, impossible to fix any minimum proportion of such last mentioned sales or intended sales as determining the jurisdiction of Parliament."<sup>112</sup> The flow theory also suggests that as long as there is some (no matter how small) extra provincial interest, regulation is beyond provincial powers and once an interprovincial aspect is established, Parliament can then rely on Duff's assertion in *The Natural Products Marketing* case that "the regulation of trade and commerce . . . embrace[s] the regulation of external trade and regulation of interprovincial trade and *such ancillary legislation as may be necessarily incidental to the*

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<sup>106</sup>*Id.*, at 340.

<sup>107</sup>*Id.*, at 341.

<sup>108</sup> Binavince, *Economic Growth*, *supra*, note 75 at 197-98.

<sup>109</sup> *Reference Re the Farm Products Marketing Act*, [1957] S.C.R. 198.

<sup>110</sup>*Id.*, per Rand, J. at 210.

<sup>111</sup>*Id.*, at 231.

<sup>112</sup>*Id.*

*exercise of such powers.*"<sup>113</sup> Although such legislation also affects property and civil rights in the province, it will still be upheld under the trade and commerce power.

The picture as far as Parliament is concerned, may not be quite as bleak as it once was. Nevertheless, it seems clear that although the power is undergoing some judicial revision it would still be premature for Parliament to rely on it too heavily for environmental protection purposes.

(f) *Conclusion*

Before going on to an analysis of the functional federal powers, it would be useful to stop and comment briefly on two important characteristics of the conceptual power. First, judicial interpretation seems to have distorted any optimal role that these powers might have played. Because of the nature of pollution and the makeup of our federal system, Parliament's main concern in the environmental protection field is primarily with the economic aspect and, to a lesser extent, the social aspects of the problem when they reach interprovincial proportions. With regard to the social part, there is ample federal regulatory authority under the criminal law power and, as judicial interpretation expands the head, under the peace, order and good government power. Regulatory powers to deal with the economic part of the problem however, have been sadly lacking. Without any real prospect of a significant expansion of federal authority under the trade and commerce power, Parliament, if it wishes to regulate the economic part, is forced to look for its authority under regulatory heads that are designed to deal with the social aspect of pollution. There is some doubt whether or not the criminal power may be extended into this area. First, there is dicta to suggest that the role of the criminal law power is social well-being rather than economic, and secondly, whatever its role, it is complementary rather than primary. It may be used to prohibit a particular activity, but except for a few clear-cut criminal code type situations, this will have to be done in conjunction with a broader regulatory scheme that is justified on some head other than criminal power. Similarly, the federal taxing and spending powers would not support primary federal activity in the economic sphere.

Parliament is left with only one possible head of power to fulfill its economic "obligations" in the pollution control field, the peace, order and good government power. Recent cases have expanded this power considerably until today it has become the primary federal power for both social and economic regulation. Thus, more federal involvement in the economic aspects of pollution must be justified on the basis of this general power. It is difficult to know whether judicial distortion of the respective roles for trade and commerce and the general power is of anything more than tactical significance.

Secondly, and this point has already been alluded to on numerous occasions, the criminal, taxing and spending powers have a rather limited role to play on their own. Their strength lies in complementing a general regulatory scheme by ensuring enforcement, influencing behaviour and contributing to

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<sup>113</sup> *Reference Re Natural Products Marketing Act* [1936] 3 D.L.R. 622, S.C.R. 398 at 410 (emphasis added).

the economic viability of the scheme. By themselves, each head of power may support important and essential federal anti-pollution legislation, but not a comprehensive regulatory scheme.

## (2) *Functional Powers*

In addition to the more general federal powers discussed above, Parliament may use its authority over certain specific activities to implement a comprehensive scheme for environmental control. No one head of power by itself in this category confers sufficient power on the central government to support comprehensive legislation, but cumulatively they are a significant weapon in the central government's arsenal of powers.

### (a) *Works and Undertakings: s. 91(29) and s. 92(10)*

Section 91(29) assigns to the federal authorities jurisdiction over certain classes of works and undertakings that are excepted from provincial jurisdiction in section 92(10). The excepted classes are:

- 92(10) (a) Lines of steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;
- (b) Lines of Steam Ships between the Province and any British or Foreign Country;
- (c) Such Works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the advantage of two or more of the Provinces.

There are two elements within this broad grant of powers to Parliament. First, Parliament has jurisdiction over interprovincial and international communication, shipping and some modes of transportation; and secondly it may acquire jurisdiction over intraprovincial works by the appropriate statutory declaration.

### (i) *Extraprovincial classes*

Several strong court decisions have guaranteed exclusive federal jurisdiction over the extraprovincial classes, and have effectively excluded any specific provincial or local role. The court held in *City of Toronto v. Bell Telephone Co.*<sup>114</sup> that telephone company compliance with municipal by-laws prior to entering city streets to install its facilities was not required. A similar holding was made by the court in *A.G. for Ontario v. Winner*<sup>115</sup> where an interprovincial bus line was not deemed to be subject to provincial regulation of routes and fares. This decision, however, did not exclude provincial highway laws of general application.

The courts have been very generous in defining the extent of federal power in this area and in fact have made some significant intrusions into fields that are normally reserved for the provinces. Federal jurisdiction over international shipping for example has enabled Parliament to regulate the

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<sup>114</sup> [1905] A.C. 122.

<sup>115</sup> [1954] A.C. 541.

labour relations of persons engaged in all aspects of international shipping.<sup>116</sup> Similarly, federal jurisdiction over Canada's largest telephone company, Bell Canada, was extended to "all matters which are a vital part of an inter-provincial undertaking as a going concern . . . within s. 91(29)."<sup>117</sup> Nevertheless, legislation must deal with the interprovincial or international nature of the works or undertakings and does not extend to such undertakings as hotels that are not part of the transportation system.<sup>118</sup>

## (ii) *Statutory Declaration*

A statutory declaration that a work is for the general advantage of Canada, or for the general advantage of two or more Provinces under section 92(10) (c) may be used by the federal government to enlarge its powers.

Although a declaration may be attacked as a colourable device to appropriate powers outside federal legislative capacity, the courts have held that ". . . Parliament is the sole judge of the advisability of making [a] declaration as a matter of policy."<sup>119</sup> Provincial attacks against the broad use of this power have focussed on the distinction between work and undertaking<sup>120</sup> and argued that the declared activity is an undertaking rather than a work and therefore not covered by section 92(10) (c). But again judicial interpretation has not significantly circumscribed federal competence. Works and undertakings are to be read disjunctively.<sup>121</sup> In *Montreal v. Montreal Street Railway*<sup>122</sup> the Privy Council asserted that ". . . works are physical things not services, while an undertaking is not a physical thing but "an arrangement under which of course physical things are used."<sup>123</sup> The declaratory power under section 92(10) (c) may only apply to a "work", but the distinction between a work and an undertaking is vague and it is unlikely that a "work" would be held to be an "undertaking" so as to make the declaration inoperative. There is precedent for the declaratory power with respect to grain elevators and warehouses,<sup>124</sup> an international bridge<sup>125</sup> and a local railway.<sup>126</sup> Once the power has been used for one activity, it may be extended

<sup>116</sup>*Investigation Act and Its Applicability in Respect of Certain Employees of Eastern Canada Stevedoring Co. Ltd.*, [1955] S.C.R. 526, [1955] 3 D.L.R. 721. See also *Grand Trunk Railway v. A.-G. for Canada*, [1907] A.C. 65.

<sup>117</sup>*Commission du Salaire Minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767. In this case the court excluded provincial minimum wage laws from applying to Bell Canada.

<sup>118</sup>*C.P.R. v. A.-G. for British Columbia*, [1950] A.C. 122, [1950] 1 D.L.R. 721.

<sup>119</sup>*Luscar Collieries Ltd. v. McDonald*, [1925] S.C.R. 460 at 480, 484, [1925] 3 D.L.R. 225 at 239, 244. From this it follows that the exercise of a declaration of power is not of itself reviewable by the Courts. See *The Queen v. Thumbiert* (1959) 20 D.L.R. 335.

<sup>120</sup>Laskin, *Constitutional Law*, *supra*, note 50 at 509. See also *C.N.R. v. Trudeau*, [1962] S.C.R. 398.

<sup>121</sup>*A.-G. for Ontario v. Israel Winner* [1954] A.C. 541.

<sup>122</sup>[1912] A.C. 333.

<sup>123</sup>*Id.*, at 342.

<sup>124</sup>Canada Grain Act, R.S.C. 1970, c. G-16.

<sup>125</sup>*Van Buren Bridge Co. v. Madawaska and A.-G. for New Brunswick* (1958), 15 D.L.R. (2d) 763.

<sup>126</sup>*Montreal v. Montreal Street Railway*, [1912] A.C. 333.

to similar activities by simply adding them to the designated activity.<sup>127</sup> Laskin notes that the effect of a declaration is:

. . . to bring within federal authority not only the physical shell of the activity but also the integrated activity carried on therein; in other words, the declaration operates on the work in its functional character.<sup>128</sup>

What constitutes an "integrated activity" is a question of fact for the court to determine.

The potential of the declaratory power as a planning tool to control potential works as well as pre-existing ones is limited. Duff, J. defined the object of the phrase "such works as . . . are *before or after their execution* declared by the Parliament of Canada . . ." to mean:

. . . not to enable the Dominion to take away jurisdiction from the provinces in respect of a given class of potential works; works that is to say, which are not in existence which may never come into existence and the execution of which is not in contemplation; the purpose of the provision is rather to enable the Dominion to assume control over specific existing works, or works the execution of which is in contemplation.<sup>129</sup>

Before Parliament can assume control over works, it would seem that they would have to have reached at least the advanced planning stage. The inability of the federal authorities to take control of the scheme before this point in time may mean that the initial planning and policy decisions will be made by the provinces. From the federal point of view the power is necessarily a reactive one. Its whole purpose is to enable Parliament to respond to inter-provincial and international problems that result from legitimate provincial activity. If there is an interprovincial aspect to a proposed provincial project, Parliament is better advised to negotiate some solution with the province or immediately assume control under another head of power. Waiting until a project has begun and then acting under the declaratory power is not a very sensible way to deal with environmental problems.

The political problems of employing this tool to extend federal jurisdiction may preclude its future use except in exceptional circumstances.<sup>130</sup> Unless a particular problem reaches crisis proportions, it is unlikely that any provincial government would tolerate federal intrusion by this technique. From the provincial point of view, there has always been something distasteful about such blatant federal intrusion into provincial jurisdiction. In fact, it may be argued that the declaratory power has only developed because something was needed to counterbalance the strictures placed on the trade and commerce power. It was really only designed for exceptional circumstances and would not have received such widespread use if it had not been the lack of a viable alternative to the useless trade and commerce power. Now that peace, order

<sup>127</sup> *Regina v. Chamney* (1972), 25 D.L.R. (3d) 1.

<sup>128</sup> Laskin, *Constitutional Law*, *supra*, note 50. Schwartz in an article entitled *Fiat by Declaration—s. 92 (10)(c) of the British North America Act (1960)*, 2 Osgoode Hall Law Journal 1 at 8 adds that if the courts apply the doctrine of "necessary incidental task" they must build in a "remoteness factor".

<sup>129</sup> *Luscar Collieries Ltd. v. McDonald*, [1925] S.C.R. 460 at 476.

<sup>130</sup> See McDougal, "The Churchill Division: An Examination of its Implications" (1971), unpublished paper.

and good government has appeared on the scene again, the *raison d'être* for widespread use of the declaratory power is gone.

(b) *Navigation and Shipping: s. 91(10)*<sup>131</sup>

Federal power over navigation and shipping has undergone rather ambivalent treatment by the courts; at times it has been closely checked, at other times it has enjoyed a fairly broad interpretation. The most reasonable explanation for this development is that, in fact, the powers should be read disjunctively as conferring jurisdiction over navigation and over shipping.<sup>132</sup> If we adopt this approach we see that the shipping aspect has, like trade and commerce, suffered restrictions at the hands of property and civil rights.

(i) *Navigation*

The extent of the federal navigation power is summarized by Laskin in the following passage:

The navigation power of Parliament extends inland to intraprovincial waters as well as to interprovincial and international waters. It embraces, of course, protection of public rights of navigation recognized by the common law, and also any extension or modification of such rights. The authority of Parliament in relation to navigation is not affected by the fact that the title is in the Crown in right of a Province.<sup>133</sup>

The result of this wide power is that every navigable body of water in Canada is subject to exclusive federal control over all matters concerning navigation. Where federal legislation exists,<sup>134</sup> all provincial structures must conform to it and where no such legislation exists, the provincial governments may not obstruct or hinder navigation in any way.<sup>135</sup> Federal legislation may sanction and even direct the erection of any works or other operations that pertain to navigability.<sup>136</sup> In fact federal power may even be invoked to create new public rights of navigation where none previously existed over privately owned river beds, although not through water on provincial Crown lands.<sup>137</sup> There is, however, “. . . provincial power to control or use waters in provincial rivers and to develop or authorize development of water power within the province so long as there is no prejudice to and there is compliance with federal navigation authority.”<sup>138</sup>

The extent to which the navigation power may be extended to regulate activities which only incidentally affect navigation is far from clear. In assessing the general scope of the power, the courts have said that it is to be construed

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<sup>131</sup>Section 91(9) gives Parliament jurisdiction over “beacons, buoys, lighthouses . . .” as well.

<sup>132</sup>See, S.R.G., *Environmental Control*, *supra*, note 7 at 4.

<sup>133</sup>Laskin, “Jurisdictional Framework”, *supra*, note 7 at 216.

<sup>134</sup>For example, Navigable Waters Protection Act, R.S.C. 1970, c. N-19.

<sup>135</sup>*Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222.

<sup>136</sup>Laskin, *Constitutional Law*, *supra*, note 50 at 526.

<sup>137</sup>*Id.*, at 527-28. See also *Fort George Lumber Co. v. G.T.P. Railway* (1915), 24 D.L.R. 527.

<sup>138</sup>Laskin, “Jurisdictional Framework”, *supra*, note 7 at 218.

widely.<sup>139</sup> Notwithstanding some encouraging comments in these earlier cases, the better view seems to be that the navigation power will only justify federal jurisdiction over matters that are concerned primarily with navigation itself.<sup>140</sup> Thus, Parliament is competent to pass legislation designed and intended for the improvement of navigation or to provide facilities for navigation, but may have difficulty legislating with respect to power production,<sup>141</sup> flood control and land reclamation. The higher the degree of inter-relationship between these activities and navigation, the more likely the federal legislation will be upheld. Where the line is to be drawn, however, is still a matter of conjecture. In *Reference Re Waters and Water Power*, Duff, J. suggested that federal jurisdiction over water power works extending beyond provincial boundaries could be supported under section 92(10) (a).<sup>142</sup> If the works were merely local or provincial in nature rather than interprovincial, Parliament may be forced to supplement its navigation power by relying on the declaratory power in section 92(10)(c) and declaring the works for the general advantage of Canada.

### (ii) *Shipping*

Federal authority to regulate shipping has never achieved the same degree of prominence as the power over navigation. It seems to have suffered the same fate as the trade and commerce power with the result that federal jurisdiction is confined to interprovincial and international shipping. In the *Queddy River* case, there was some indication that even if there was no explicit federal navigation power, one could be construed from the federal trade and commerce power in much the same way as the U.S. navigation and shipping power developed.<sup>143</sup> However, by linking shipping with trade and commerce, shipping seemed doomed to suffer the same highly restrictive interpretation as trade and commerce. The result has been that federal jurisdiction in this field is confined almost exclusively to the physical aspects of navigation with no regulatory control over intraprovincial or local shipping.<sup>144</sup>

The net effect of this power for pollution control purposes is still remarkably broad.<sup>145</sup> The federal government, for example, could legislate under section 91(10) to prohibit or limit deposits of debris, rubbish, sawdust, cinders or any other deleterious substance. Parliament must, however, concern itself with pollution abatement in an interprovincial or international shipping context; it cannot deal with local or provincial water pollution problems under this head.

### (c) *Sea Coast and Inland Fisheries: s. 91(12)*

Legislative jurisdiction over fisheries is divided between the two levels of government. The Dominion government, under section 91(12), has extensive

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<sup>139</sup>*Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; *Montreal v. Montreal Harbour Commission*, [1926] A.C. 229.

<sup>140</sup>Gibson, *Constitutional Context*, *supra*, note 7 at 83.

<sup>141</sup>*Booth v. Lowery* (1917), 54 S.C.R. 491 at 424.

<sup>142</sup>[1929] S.C.R. 200, [1929] 2 D.L.R. 481.

<sup>143</sup>*Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222 per Strong, J. at 235.

<sup>144</sup>See for example Canada Shipping Act, R.S.C. 1970, c. 7.

<sup>145</sup>Landis, *Legal Control*, *supra*, note 51 at 96.

powers to control the regulatory aspects of fishing while provinces "... may legislate on the proprietary aspects not only of provincially owned but also of privately owned fisheries in the province by virtue of section 92(13)..."<sup>146</sup> The cases have interpreted this division of powers to mean that the federal government may determine fishing seasons and public rights, and make conservation and anti-pollution regulations, while the provincial authorities control private fishing rights and the processing and selling of fish once they are caught. Many problems arise, however, when one puts this apparently simple distinction to test in specific cases.

The best statement of the distinction was made by the Privy Council in *A.-G. for British Columbia v. A.-G. for Canada*.<sup>147</sup> The Board in affirming its earlier interpretation of one aspect of the *Fisheries* case,<sup>148</sup> held that:

... [section 91(12)] does not confer on the Dominion any rights of property, but that it does confer an exclusive right on the Dominion to make restrictions or limitations by which public rights of fishing are controlled, and on this exclusive right provincial legislation cannot trench. It recognized that the Province retains a right to dispose of any fisheries the property in which the Province has a legal title, so far as the mode of such disposal is consistent with the Dominion's right of regulation, but it held that even in the case where proprietary rights remain with the Province, the subject matter may be of such a character that the exclusive power of the Dominion to legislate in regard to fisheries may restrict the free exercise of provincial rights.<sup>149</sup>

This suggests that conflicts between the federal regulatory powers and provincial powers over proprietary rights are to be resolved in favour of the former. Nevertheless, as Laskin points out, there is a "strong current in the cases against federal interference with proprietary rights, and hence Parliament may not confer exclusive rights to fish (unless on federal Crown land) nor may it authorize use of private or provincial Crown land in connection with its otherwise competent fishing regulations."<sup>150</sup> Whatever the precise limits of each jurisdiction, there seems to be little doubt that Parliament may legislate in respect to the pollution of fishing waters provided the legislation has as its main purpose the preservation and protection of fisheries. Thus, if prohibitions against the deposit of deleterious substances to protect fishing, incidentally affected "property and civil rights", such legislation could be upheld as valid federal law making. Before one places too much faith in section 91(12) as an important weapon in the federal constitutional arsenal over pollution, it may be that the inherent restrictions of the power, namely, that it must deal with fisheries will preclude it playing anything more than a very limited role. One commentator has assessed the potential of this jurisdiction as a basis for significant federal action as "almost nil".<sup>151</sup>

<sup>146</sup> *La Forest, Natural Resources, supra*, note 88 at 165.

<sup>147</sup> [1914] A.C. 153, 15 D.L.R. 308.

<sup>148</sup> *A.-G. for Canada v. A.-G. for Ontario et al.*, [1898] A.C. 700.

<sup>149</sup> [1914] A.C. 153 per Viscount Haldane at 172. Also quoted in Laskin, *Constitutional Law, supra*, note 50 at 543.

<sup>150</sup> Laskin, "Jurisdictional Framework", *supra*, note 7 at 218. As authority for this proposition Laskin cites *A.-G. for Canada v. A.-G. for Quebec* (1921), 1 A.C. 413.

<sup>151</sup> McGrady, *Water Resource, supra*, note 7.



No dispute arises over federal jurisdiction of tidal fishing waters because the public has a right to fish these waters and thus there were never any property rights attaching to them. As La Forest points out, "The public right to fish overrides the property right flowing from the ownership of the subsoil and the Dominion has exclusive capacity to regulate this right."<sup>152</sup>

(d) *Canals, Public Harbours and Rivers and Lake Improvements: s. 108*

Public harbours and canals as enumerated in the third schedule of the BNA Act were transferred to the Dominion by section 108.<sup>153</sup> There has been a great deal of litigation over the meaning of the clause "Public Harbours" but its precise limits are still not settled.<sup>154</sup> However, it is now settled law that the interest transferred to the Dominion was the property in the harbours as they existed at Union, including the property in the beds and foreshores of the harbours.<sup>155</sup> This was a logical and sensible approach for it would have been impossible for the Dominion to perform such duties as conservation if it did not own the bed of the harbour.

Although the federal government may have exclusive jurisdiction over most harbours<sup>156</sup> this does not give it a very effective weapon for pollution control purposes. Like the other specific heads of power it merely gives the federal government control over one very limited aspect of the problem. This may be useful if integrated into a broader scheme, but on its own it is of no real significance. Notwithstanding the limited nature of the federal role with respect to harbours, it has made little or no effort to deal with the problem. Harbours are administered by Harbour Boards under the National Harbour Board Act,<sup>157</sup> and each Board is responsible for regulating harbour activity. For the Harbour Boards to assume even the limited pollution control role assigned to them by the constitution and Parliament they would require substantially more funds than they are able to generate through tolls on water freight. Parliament must decide either to bring harbours within the ambit of a federal anti-pollution scheme or provide local boards with the financing to deal with water pollution.

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<sup>152</sup>La Forest, *Natural Resources*, *supra*, note 88 at 166.

<sup>153</sup>The items in the third schedule that have a bearing on water resource planning are:

1. Canals . . .
2. Public Harbours.
3. Lighthouses and piers . . .
4. Steamboats, dredges and public vessels.
5. Rivers and lake improvements
10. . . . lands set aside for general public purposes.

<sup>154</sup>La Forest, *The Meaning of "Public Harbours" in the Third Schedule of the B.N.A. Act, 1867* (1963), 41 Can. Bar Rev. 519. See also La Forest, *Natural Resources*, *supra*, note 88.

<sup>155</sup>*Holman v. Green* (1881), 6 S.C.R. 707.

<sup>156</sup>Ontario and British Columbia have recently entered into an agreement with the federal government redefining which harbours come under federal jurisdiction and which do not. The Ontario agreement was entered into on September 26, 1961 and put 27 harbours under federal jurisdiction.

<sup>157</sup>R.S.C. 1970, c. N-8.

Schedule three also gives the Dominion Parliament control over "Rivers and Lake Improvements". By using the plural only for rivers, an argument existed that the Constitution had assigned control over lake improvements and the entire rivers to Parliament. Lord Herschell quickly disposed of this argument in the *Fisheries* case.<sup>158</sup> He reasoned that the subjects within the schedule were, for the most part, works or constructions, that rivers and lake improvements were coupled together, and that the difficulty of determining where a river began and ended would make such a transfer impracticable. Since Lord Herschell's statement, the question has not arisen again and there does not seem to be any doubt that federal control is limited to the structures and not the rivers. Within this context, room for water pollution abatement would be extremely limited.

(e) *Conclusion*

The functional powers are, as the name suggests, limited to specific activities and would play an important secondary role in an environmental protection scheme but not a primary one. Most things that come under these heads of power would, by their very nature, be included in any comprehensive federal regulatory scheme. Federal legislative control over these items seems to be relatively clear and it is difficult to envisage any jurisdictional problems with respect to them.

IV. *Conclusion*

From the preceding two sections, two themes emerge: first, a need, based on economic and social well being grounds, for a greater federal involvement in environmental protection and secondly, the constitutionality, based primarily on the general and criminal law powers, for such involvement. Unfortunately the precise bounds of the federal role are difficult to map out. Certainly it should be extensive<sup>159</sup> and it should comprise strong enforcement mechanism to ensure that pollution is alleviated.

Within the parameters of a federal solution, the provinces must be free to establish their own priorities for environmental control. Thus, effluent standards should not be permitted to drop below the federal minimum, but they could, if the provinces wished, be set much higher. Similarly, provincial authorities must be free to enforce their own higher standards through their own regulatory machinery. Disputes between provinces with differing standards could be handled by an on going commission made up of representation from the provinces and the federal government.<sup>160</sup>

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<sup>158</sup> *A.-G. for Canada v. A.-G. for Ontario*, [1898] A.C. 700 at 710-11.

<sup>159</sup> The *Canada Water Act*, R.S.C. 1970, 1st supp. c. 5 and the *Clean Air Act*, S.C. 1970-71-72, c. 47 are important steps in the right direction, but they do not go far enough in terms of designing and implementing a broad regulatory structure that encompasses all the tools available to the federal government for dealing with pollution.

<sup>160</sup> This would alleviate the problem of unconstitutional provincial legislation that imposes standards of conduct on neighbouring provinces. See *Province of Manitoba v. Interprovincial Co-operatives Ltd. et al.* (1972), 30 D.L.R. (3d) 166.

The constitutionality of a strong federal role in the environmental protection field is undisputable. Similarly, the arguments in favour of immediate federal action in this area are compelling. What is needed now is for the federal government to recognize these facts and take the initiative in designing and implementing a comprehensive pollution control plan that will make a real contribution to improving our natural environment.