Division of Powers

The term ‘division of powers’ refers to the distribution of legislative jurisdiction under the Canadian Constitution. More particularly, the distribution is set out in various sections of the *Constitution Act, 1867*.[1] The key provisions are contained in sections 91 and 92 of the *Act*, although there are other relevant sections as well.

After the *Act* establishes the Parliament of Canada and the legislatures of the provinces, it then assigns particular enumerated powers to each of them. Under a doctrine of exclusivity, each level of government is granted exclusive powers with the implication that the other level of government is excluded from enacting legislation relating to those powers.

Generally, the federal list of enumerated powers in section 91 is concerned with national matters while the provincial list in section 92 is concerned with local matters. For example, the federal list includes the power to pass laws for the peace, order and good government of Canada; the regulation of trade and commerce; criminal law and procedure; direct and indirect taxation, banking; currency; defence; navigation; and copyright. The provincial list includes such matters as direct taxation; municipal institutions; local works and undertakings; the administration of justice; property and civil rights; and matters of a merely local and private nature in the province.

Some matters under section 92 are actually federal powers. By operation of section 91(29), any exceptions within section 92 are within federal jurisdiction. In particular, section 92(10) lists such exceptions thus providing federal jurisdiction over inter-provincial transportation and over communications. As mentioned earlier, sections 91 and 92 are not exhaustive in the sense that there are other sections assigning legislative jurisdiction as well. For example, jurisdiction over education is assigned to the provinces under section 93; concurrent jurisdiction (see concurrency) over agriculture and immigration is assigned to both Parliament and the provincial legislatures under section 95; as is jurisdiction over old-age pensions and supplementary benefits under section 94A. The authority to create a final court of appeal, as well as any additional court, is assigned to Parliament under section 101.

In examining the division of powers, however, it is misleading to rely on the written text of the *Constitution Act, 1867*. That is so because the written text provides only a basic understanding as to which level of government has the power to do what. Rather, a fuller understanding is gained through a study of the case law in which the Judicial Committee of the Privy Council (up to 1949) and the Supreme Court of Canada (since 1949) determine the scope of each enumerated power or head of jurisdiction. For example, the cases tell us that the federal authority to regulate trade and commerce extends to inter-provincial trade and so-called ‘general’ trade while the provinces have jurisdiction over intraprovincial trade.[2] Moreover, the cases also tell us what is meant by ‘interprovincial’ trade, ‘intraprovincial’ trade and ‘general’ trade.[3] This process of interpretation of the meaning of the written text of 1867 by the courts applies to most of the major or important enumerations in sections 91 and 92. Therefore, an awareness of the courts’ interpretations is vital to

realistically understand the division of legislative powers in Canada.

[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[2] See, for instance: *Reference re Securities Act*, 2011 SCC 66 at para 46.

[3] For 'interprovincial and 'intraprovincial' trade see generally: *Carnation Company Limited v Quebec Agricultural Marketing Board et al*, [1968] SCR 238, 1968 CanLII 82 (SCC); *Attorney-General for Manitoba v Manitoba Egg and Poultry Association et al*, [1971] SCR 689, 1971 CanLII 135 (SCC). For 'general' trade, see generally: *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, 1989 CanLII 133 (SCC).