Peace, Order and Good Government

The *Constitution Act, 1867* ("*Constitution*") has a chapter in it called the Distribution of Legislative Powers.[1] This chapter divides law making authority (heads of power) between the federal and provincial governments. If a government makes a law outside of its listed powers, that law is unconstitutional. The federal powers are listed in section 91 of the *Constitution* and, among others, the list includes powers like currency, navigation, copyrights, and the military.[2]

The introduction to section 91 includes a clause that grants Parliament additional law-making powers beyond its list. It reads:

"It shall be lawful for the Queen … to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[3]

The intention was that any area of law not originally divided between the provinces and Parliament would become Parliament's responsibility.[4] The Peace, Order and Good Government clause is popularly known as 'POGG'. POGG powers have since evolved to three branches of power that justify the use of the POGG clause:

- Emergency: "the temporary and extraordinary need for national regulation of a particular subject matter";
- Residual/Gap: "the power to make laws on matters that are not enumerated" in the *Constitution*; and
- National Concern: "the power to make laws in relation to matters that go beyond local or provincial concerns or interests, and are, due to their inherent nature, concerns of the Dominion of Canada as a whole."[5]

Emergency Branch

There are two requirements for the use of Parliament's emergency powers:

1. There must be a rational basis for the legislation; and
2. The legislation must be of a temporary nature.[6]

The Supreme Court of Canada ("SCC") listed these requirements when deciding whether a law passed by Parliament to combat inflation in the 1970s (that clearly encroached on provincial authority) using the emergency branch, was constitutional.[7] Past examples of emergencies include pestilence, drink or drug traffic, the carrying of arms, and the passing of the *War Measures Act* in response to World War I.[8]

Residual/Gap

The language of the POGG clause makes it clear that "any matter which does not come within a provincial head of power must be within the power of the federal Parliament."[9] The distribution of powers is thus exhaustive.[10] However, new, or unrecognized matters to the *Constitution* do not default to federal authority.[11] It must first be determined whether the matter fits under an existing head of power. For example, the environment has been found to fall within both provincial and federal heads of power.[12]

Gaps occur when the *Constitution* recognizes a matter "but fails to deal completely with the topic;" for example incorporating companies with national objects.[13] They also occur when a matter is outside of provincial authority, such as within federal institutions, or on land or waters that are Canadian but outside of any provincial boundary.[14]

National Concern

The SCC determined that if the real subject matter of a law "goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole," it will fall under the national concern branch.[15] Some examples include radio, aeronautics, marine pollution, and nuclear energy.[16] A court will consider the following points to determine if a matter is of national concern, making it permanently within federal jurisdiction:

1. Is the matter distinguishable from a national emergency which is only for legislation "of a temporary nature;"
2. Is it a new matter that did not exist at the time of Confederation, or a matter that although "of a local or private nature in a province" has become "matters of national concern;"
3. Does it have a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" and does it not encroach on provincial jurisdiction so much that it unbalances the distribution of law-making powers; and
4. In regard to its distinctive nature, how would other provinces be affected by "a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter."[17]

[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

[2] *Ibid* at s 91.

[3] *Ibid*.

[4] Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto, ON: Irwin Law, 2017) at 263. See generally *Constitution Act*, *supra* note 1 at ss 91-95 (these sections contain the constitutional distribution of legislative powers).

[5] Legal and Legislative Affairs Division & Parliamentary Information and Research Service, *Bill S-7: An Act to deter terrorism and to amend the State Immunity Act*, by Jennifer Bird & Julia Nicol, (Legislative Summary), Publication No. 40-3-S7-E (Ottawa: Library of Parliament, 26 April 2010) at 19, n 31.

[6] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 423, 427, 68 DLR (3d) 452 .

[7] *Ibid* at 380, 392.

[8] *Ontario (Attorney General) v Canada Temperance Federation*, [1946] 2 DLR 1 at 5-6, [1946] AC 193 ; Law and Government Division, *Emergencies Act*, by Peter Niemczak & Peter Rosen, PRB 01-14E (Ottawa: Library of Parliament, 10 October 2001) at 1.

[9] Peter W Hogg, *Constitutional Law of Canada*, 2017 Student Edition, (Toronto: Thomson Reuters Canada Limited, 2017) at 17-2.

[10] *Ibid*.

[11] *Ibid* at 17-7.

[12] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 67-68, 88 DLR (4th) 1.

[13] Hogg, *supra* note 9 at 17-7.

[14] Monahan, *supra* note 4 at 269.

[15] *Temperance*, *supra* note 8 at 5.

[16] Monahan, *supra* note 4 at 277.

[17] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 431-432, 49 DLR (4th) 161.