



IN BRIEF

PARLIAMENT'S GENERAL TRADE AND COMMERCE POWER

Publication No. 2018-32-E
19 August 2019

Francis Lord, Economics, Resources and International Affairs Division
Parliamentary Information and Research Service

Papers in the Library of Parliament's *In Brief* series are short briefings on current issues. At times, they may serve as overviews, referring readers to more substantive sources published on the same topic. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations in an objective, impartial manner.

© Library of Parliament, Ottawa, Canada, 2020

Parliament's General Trade and Commerce Power
(In Brief)

Publication No. 2018-32-E

Ce document est également publié en français.

CONTENTS

1	INTRODUCTION.....	1
2	BACKGROUND ON THE GENERAL TRADE AND COMMERCE POWER.....	2
3	DETERMINING WHETHER THE EXERCISE OF THE GENERAL POWER IS VALID.....	3
3.1	Analysis of the Pith and Substance of a Law	3
3.2	<i>General Motors</i> Test	4
4	CONCLUSION	6

PARLIAMENT'S GENERAL TRADE AND COMMERCE POWER

1 INTRODUCTION

The *Constitution Act, 1867*, recognizes the legislative autonomy of Canada's provincial legislatures.¹ In theory, this autonomy enables the provinces to pursue their objectives within their respective spheres of jurisdiction without interference from the other provinces or Parliament.² Parliament and the provincial governments are equally autonomous in affairs in which there is a common interest; the provinces are not subordinate to Parliament.³ The constitutional principle of federalism seeks to strike a balance between national unity and diversity in the Canadian confederation.⁴

Section 91(2) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction over “the regulation of trade and commerce.”⁵ That includes not only the authority to enact legislation pertaining to interprovincial and international trade but also the authority to enact legislation pertaining to the general regulation of trade in Canada.

Parliament's “general” trade and commerce power is both broad and narrow. It is broad because, in theory, Parliament can enact legislation that applies to all trade sectors across the country, such as with regard to competition, consumer protection and trademarks. It is narrow because Parliament must exercise its jurisdiction over trade in accordance with specific terms and conditions so that the provinces maintain their exclusive legislative authority over property and civil rights under section 92(13) of the *Constitution Act, 1867*.

This publication examines the nature of Parliament's general jurisdiction over trade and the process followed by a court of law to determine whether Parliament is justified in exercising that authority.

2 BACKGROUND ON THE GENERAL TRADE AND COMMERCE POWER

As early as 1881, the Judicial Committee of the Privy Council in London, England – Canada’s highest court of appeal at the time – clarified the scope of Parliament’s jurisdiction over trade in its decision in *Citizens Insurance Company of Canada v. Parsons*.⁶ In that decision, Sir Montague Smith recognized that the scope of federal legislative powers over trade was limited, first, to interprovincial and international trade, and, second, to the regulation of aspects of trade that apply to the entire country:

Construing ... the words “regulation of trade and commerce” by the various aids to their interpretation ... they would include political arrangements in regard to trade requiring the sanction of parliament, regulation in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.⁷

Sir Montague Smith deliberately rejected a literal interpretation of section 91(2) of the *Constitution Act, 1867* in order to maintain the provinces’ jurisdiction over property and civil rights.⁸ That jurisdiction, which is set out in section 92(13) of the *Constitution Act, 1867*, gives provincial legislatures the authority to legislate on almost all matters of private law⁹ – including the contract law, tort law, and property law. Sir Montague Smith tried here to reconcile the powers of the two orders of government by recognizing Parliament’s significant jurisdiction without neutralizing that of the provincial legislatures.¹⁰ The magistrate thus reduced the scope of section 91(2) of the *Constitution Act, 1867* by limiting Parliament’s jurisdiction to interprovincial and international trade and the “*general* regulation of trade affecting the whole dominion.” [Author’s emphasis]¹¹

While the first aspect of federal legislative authority over trade is relatively clear, such is not the case for Parliament’s general trade and commerce power. According to the Supreme Court of Canada and in keeping with *Parsons*, this general power allows Parliament to legislate only “where the national interest is engaged in a manner that is qualitatively different from provincial concerns.”¹² In other words, although a federal Act can be used to govern some aspects of intra-provincial trade under section 91(2) of the *Constitution Act, 1867*,¹³ the fact that a situation exists in more than one province does not constitute a valid reason to exercise federal trade jurisdiction.¹⁴ Rather, Parliament must justify the need to exercise its general jurisdiction over trade.¹⁵

3 DETERMINING WHETHER THE EXERCISE OF THE GENERAL POWER IS VALID

Compared to the Privy Council, the Supreme Court has tried to foster a flexible federalism that better incorporates considerations of public interest.¹⁶ The Court has proceeded from the principle that above all else, federalism must continue to guide the interpretation of the *Constitution Act, 1867* in order to protect the autonomy of both Parliament and the provincial legislatures, and that as a result, the concurrent application of federal and provincial legislation must in no way change the exclusive nature of the federal and provincial legislative powers set out in Part VI of the *Constitution Act, 1867*. According to the Court, the exercise of legislative power by one order of government must not drain the legislative power of another order of government of its essence and effectiveness.¹⁷

To maintain the provinces' exclusive jurisdiction over property and civil rights, the Supreme Court created a test, known as the *General Motors* test, after the court decision *General Motors of Canada Ltd. v. City National Leasing*, to determine whether a federal law constitutes a valid exercise of Parliament's general jurisdiction over trade.¹⁸ As with any analysis of constitutional validity based on the division of powers, before it can apply the *General Motors* test, the court must determine the pith and substance of the impugned federal law. The court must then determine whether the federal law concerns an issue of sufficient national importance using the five criteria of the *General Motors* test.

3.1 ANALYSIS OF THE PITH AND SUBSTANCE OF A LAW

When determining the constitutional validity of Parliament's or a province's exercise of legislative power from a division of powers perspective, the court must focus on the pith and substance, or the true character, of the impugned law.¹⁹ A court determines the pith and substance of a law by examining its purpose and effects:

A pith and substance analysis looks at both (1) the purpose of the legislation as well as (2) its effect. First, to determine the purpose of the legislation, the Court may look at both intrinsic evidence, such as purpose clauses, or extrinsic evidence, such as Hansard or the minutes of parliamentary committees.

Second, in looking at the effect of the legislation, the Court may consider both its legal effect and its practical effect. In other words, the Court looks to see, first, what effect flows directly from the provisions of the statute itself; then, second, what "side" effects flow from the application of the statute which are not direct effects of the provisions of the statute itself.²⁰

When only part of the law is being challenged, the pith and substance of the impugned provisions must be established to determine the jurisdiction under which they truly fall. If the impugned provisions infringe on the jurisdiction of an order of government other than the order that adopted those provisions, the court must determine whether they are still part of a valid legislative scheme. If so, those provisions will be considered constitutionally valid if they are “sufficiently integrated” with the scheme in question.²¹

In general, establishing the pith and substance of an impugned law is sufficient to determine under what jurisdiction it falls.²² In some cases, however, the court must interpret the scope of the power in question to determine whether it encompasses the pith and substance of the impugned law.²³ It is to that end that the Supreme Court developed a test to determine whether the pith and substance of a federal law truly falls under Parliament’s general trade and commerce power.

3.2 GENERAL MOTORS TEST

In 1989, in *General Motors*, the Supreme Court consolidated its previous jurisprudence²⁴ in order to come up with a new test to determine whether a federal law indeed falls under Parliament’s general jurisdiction over trade. Chief Justice Brian Dickson set out five criteria for determining the constitutional validity of exercising that power:

- The impugned legislation is part of a general regulatory scheme.
- The scheme is under the continuous oversight of a regulatory agency.
- The impugned legislation is concerned with trade as a whole rather than with a particular industry.
- The impugned legislation is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it.
- The failure to include one or more provinces or localities in the impugned legislative scheme would jeopardize its successful operation in other parts of the country.²⁵

The purpose of the *General Motors* test is to prevent Parliament from infringing on provincial jurisdiction while recognizing its unique ability to intervene in national trade issues.²⁶ The Supreme Court stated that the above-mentioned list is not exhaustive, that there tends to be overlap in the application of the criteria and that the fact that an impugned legislation does not meet one or more of these criteria is not necessarily determinative.²⁷

The first two criteria of the *General Motors* test differentiate federal power from provincial authority on a formal basis.²⁸ It is relatively simple to verify whether federal legislation presents a regulatory scheme that is national in scope and whether that scheme falls under the oversight of a regulatory agency. That being said, constitutional expert Peter Hogg has emphasized that the Supreme Court never really justified why, from a constitutional perspective, these two criteria should be part of analyzing the application of section 91(2) of the *Constitution Act, 1867*.²⁹ Noura Karazivan and Jean-François Gaudreault-DesBiens believe that these first two criteria are too easily satisfied.³⁰ Professor Hoi Kong, however, believes that the costs associated with administering such a scheme would encourage Parliament to intervene only when absolutely necessary.³¹

The third criterion establishes a requirement that the federal legislation be general in nature. The criterion indicates that in exercising its general jurisdiction over trade, Parliament should not target specific companies, industries or trade activities, but, rather, target issues that affect trade as a whole and that transcend local issues.³² For example, the Supreme Court has recognized the validity of federal legislation dealing with competition and trademarks. Relative to competition, a federal law cracking down on monopolistic practices was said to ensure “the existence of a healthy level of competition in the Canadian economy.”³³ The Court stated that this federal law treated the Canadian economy as “a single integrated national unit rather than as a collection of separate local enterprises.”³⁴ Relative to trademarks, the Court said that “there is no question that trade-marks apply across and between industries in different provinces.”³⁵

In contrast, the Supreme Court found that the federal Act to establish a pan-Canadian securities regulator was invalid. Indeed, the Court argued that “the preservation of capital markets to fuel Canada’s economy and maintain Canada’s financial stability”³⁶ was indeed an issue that affects trade as a whole, the impugned legislation sought to regulate all aspects of trading in securities, an area that has long been viewed as falling under provincial jurisdiction. Furthermore, the Court found that many aspects of the proposed regulation did not deal with general issues but with issues that strictly affected the securities market.³⁷

In 2011, the Supreme Court found that the application of the fourth criterion does not require deciding whether the impugned legislation is the best option for dealing with a particular issue. Rather, it involves establishing whether the provinces are constitutionally able to take the same action as a federal law.³⁸ For example, the Supreme Court noted that the provinces lacked the constitutional capacity to manage the systemic risks and to collect data at the national level, even if they were acting in concert.³⁹

The fifth criterion requires establishing that the federal legislative scheme is different from any action that could be taken by the provinces in that the failure to include one or more provinces or localities in the scheme would jeopardize its successful

operation in other parts of the country. For example, in *General Motors*, the Court said that “competition cannot be effectively regulated unless it is regulated nationally.”⁴⁰ In a subsequent decision, the Court underscored that the efficacy of trademark protection depended on the recognition of federal jurisdiction over the matter.⁴¹ In *Reference re Securities Act*, the Court supported federal regulation when it comes to meeting goals related to “fair, efficient and competitive markets and the integrity and stability of Canada’s financial system,”⁴² at least as far as national goals are concerned.

The Supreme Court’s application of the last two *General Motors* test criteria was criticized by commentators who want to promote the diversity of regional policies and protect provincial autonomy. They believe the Court was introducing efficiency considerations in order to determine which order of government is in the best position to regulate certain trade issues. Even if the federal government proved to be more effective than the provincial governments at regulating some trade issues, however, these critics believe that this type of consideration should not be used to undermine the exclusive jurisdictions of the provinces.⁴³

In 2018, the Supreme Court had the opportunity to once again apply the *General Motors* test criteria in the context of the securities market. A new episode in a long saga, *Reference re Pan-Canadian Securities Regulation*⁴⁴ concerned the constitutional validity of a proposed securities regulatory regime and a draft federal law entitled “Capital Markets Stability Act.”⁴⁵ The Supreme Court found that the draft legislation did indeed fall under Parliament’s general jurisdiction over trade. It found that the draft legislation was limited to controlling the systemic risks related to the securities market that could undermine the entire Canadian economy, a national issue that affects trade as a whole, without impacting the day-to-day aspects of the securities trade, which fall under provincial jurisdiction. The Supreme Court also found that, for constitutional reasons, the federal government’s participation is essential to regulating these risks because, even though several provincial governments had agreed to work together, one province could always refuse to adhere to an interprovincial regime or unilaterally withdraw from it.⁴⁶

4 CONCLUSION

At first glance, Parliament’s general jurisdiction over trade is very broad. However, the exercise of that jurisdiction is subject to strict conditions in order to protect the provinces’ jurisdiction in areas of common interest. The original purpose of this constitutional arrangement was to promote provincial autonomy and encourage a variety of approaches to trade regulation. However, this arrangement is now being challenged by globalization, which encourages the adoption of consistent regulations across the country to facilitate trade, attract foreign investment and coordinate government action on key issues, such as consumer protection.

NOTES

1. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.).
2. [Reference re Secession of Quebec](#), [1998] 2 S.C.R. 217, para. 58; and Peter Hogg, *Constitutional Law of Canada*, 5th ed. suppl., Vol. 1, Thompson Reuters, Toronto, 2016 (2007), pp. 5-2 and 5-5.
3. *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), p. 942, quoted in *Reference re Secession of Quebec*, para. 58.
4. See generally Hogg (2007), pp. 5-3, 15-12 to 15-14; and Eugénie Brouillet, "[The Federal Principle and the 2005 Balance of Powers in Canada](#)," *The Supreme Court Law Review*, Vol. 34, 2006, pp. 310–314. See also Dara Lithwick, [A pas de deux: The Division of Federal and Provincial Legislative Powers in Sections 91 and 92 of the Constitution Act, 1867](#), Publication No. 2015-128-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 8 December 2015; and Eugénie Brouillet, "[Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?](#)," *The Supreme Court Law Review*, Vol. 54, 2011, pp. 602 and 607–608.
5. *Constitution Act, 1867*, s. 91(2).
6. [Citizens Insurance Company of Canada and The Queen Insurance Company v. Parsons \(Canada\)](#), [1881] UKPC 49, (26 November 1881) 7 A.C. 96 [*Citizens Insurance Company of Canada v. Parsons*].
7. *Citizens Insurance Company of Canada v. Parsons*, quoted in [General Motors of Canada Ltd. v. City National Leasing](#), [1989] 1 S.C.R. 641, p. 656.
8. *Ibid.*, pp. 655–656.
9. Hogg (2007), pp. 21-1 to 21-4. According to Peter Hogg, provincial jurisdiction over property and civil rights includes general business conduct, insurance, professions, labour relations, marketing and securities. See also Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 5th ed., Éditions Yvon Blais, Cowansville, Quebec, 2008, pp. 474–476. [Available in French only]
10. [Reference re Securities Act](#), 2011 SCC 66, paras. 71, 73 and 74.
11. *Ibid.*, para. 75. Furthermore, as indicated in paragraph 72 of *Reference re Securities Act*,

An overly expansive interpretation of the federal trade and commerce power under s. 91(2) ... would subsume many more specific federal heads of power (e.g., federal power over banking (s. 91(15)), weights and measures (s. 91(17)), bills of exchange and promissory notes (s. 91(18)).
12. *Ibid.*, para. 46.
13. Hogg (2007), p. 20-16.
14. *Reference re Securities Act*, para. 83.
15. Brouillet (2006), pp. 323–324.
16. Hogg (2007), p. 15-3; and Brouillet (2006), pp. 314–320. See for example, [Mann v. The Queen](#), [1966] S.C.R. 238: the Supreme Court applied the double aspect doctrine to recognize the validity of provincial and federal laws establishing driving regulations, for example.
17. *Reference re Securities Act*, paras. 7, 57 and 61. With regard to the division of powers, Supreme Court jurisprudence has been criticized for its tendency to give extra weight to federal laws, thereby expanding the scope of Parliament's jurisdiction at the expense of that of provinces. See, for example, Bruce Ryder, "[Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers](#)," *The Supreme Court Law Review*, Vol. 54, 2011; Brouillet (2006); and Bruce Ryder, "[The End of Empire?: Federalism and Judicial Restraint](#)," *The Supreme Court Law Review*, Vol. 34, 2006.
18. [General Motors of Canada Ltd. v. City National Leasing](#), [1989] 1 S.C.R. 641.
19. *Reference re Securities Act*, para. 63; [Quebec \(Attorney General\) v. Lacombe](#), 2010 SCC 38, para. 20; and [RJR-MacDonald Inc. v. Canada \(Attorney General\)](#), [1995] 3 S.C.R. 199, para. 29.
20. [Kitkatla Band v. British Columbia \(Minister of Small Business, Tourism and Culture\)](#), 2002 SCC 31, paras. 53 and 54.
21. *Ibid.*, para. 58.

22. Jean Leclair, "[Please, Draw Me a Field of Jurisdiction': Regulating Securities. Securing Federalism.](#)" *The Supreme Court Law Review*, Vol. 51, 2010, p. 592.
23. *Reference re Securities Act*, para. 65.
24. [A.G. \(Can.\) v. Can. Nat. Transportation, Ltd.](#), [1983] 2 S.C.R. 206, pp. 267–268; and [MacDonald et al. v. Vapor Canada Ltd.](#), [1977] 2 S.C.R. 134, p. 165.
25. *General Motors of Canada Ltd. v. City National Leasing*, pp. 661–662. See also *Reference re Securities Act*, paras. 83 and 84; and [Kirkbi AG v. Ritvik Holdings Inc.](#), 2005 SCC 65, p. 315.
26. *Reference re Securities Act*, paras. 84 and 85; and *A.G. (Can.) v. Can. Nat. Transportation, Ltd.*, p. 268.
27. *Reference re Securities Act*, para. 81; *General Motors of Canada Ltd. v. City National Leasing*, pp. 662–663; *Kirkbi AG v. Ritvik Holdings Inc.*, p. 315; and *A.G. (Can.) v. Can. Nat. Transportation, Ltd.*, p. 268.
28. *Reference re Securities Act*, para. 83; and Malcolm Lavoie, "[Understanding 'Trade as a Whole' in the Securities Reference.](#)" *University of British Columbia Law Review*, Vol. 46, No. 1, 2013, p. 161.
29. Hogg (2007), p. 20-14.
30. Noura Karazivan and Jean-François Gaudreault-DesBiens, "[On Polyphony and Paradoxes in the Regulation of Securities Within the Canadian Federation.](#)" *Canadian Business Law Journal*, Vol. 49, No. 1, 2010, p. 24.
31. Hoi L. Kong, "[Republicanism and the division of powers in Canada.](#)" *University of Toronto Law Journal*, Vol. 64, No. 3, Summer 2014, p. 396.
32. *Reference re Securities Act*, para. 116. In paragraphs 19 to 36, the Supreme Court also maintains that Parliament's general jurisdiction over trade covers the emergent properties of the Canadian economy, that is, the issues that result from all trade activities, rather than from specific trade activities. See also Karazivan and Gaudreault-DesBiens (2010), pp. 15–16.
33. *General Motors of Canada Ltd. v. City National Leasing*, p. 678.
34. *A.G. (Can.) v. Can. Nat. Transportation, Ltd.*, p. 267.
35. *Kirkbi AG v. Ritvik Holdings Inc.*, p. 322.
36. *Reference re Securities Act*, para. 114.
37. *Ibid.*, paras. 114–116 and 121. See also [Renvoi relatif à la réglementation pancanadienne des valeurs mobilières](#), 2017 Q.C.C.A. 756 (CanLII), paras. 26 and 131 [available in French only]; and Hogg (2007), pp. 20-18 to 20-20.
38. *Reference re Securities Act*, para. 90.
39. *Ibid.*, para. 121.
40. *General Motors of Canada Ltd. v. City National Leasing*, p. 680.
41. *Kirkbi AG v. Ritvik Holdings Inc.*, p. 322.
42. *Reference re Securities Act*, para. 123.
43. Karazivan and Gaudreault-DesBiens (2010), pp. 16–21 and 25–28; and Jean Leclair, "[The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity.](#)" *Queen's Law Journal*, Vol. 28, 2003, pp. 421–422, 425–430 and 434–445. See also Lavoie (2013), paras. 7 and 10; and Brouillet (2011), p. 602.
44. Karazivan and Gaudreault-DesBiens (2010), pp. 3–8; [Renvoi relatif à la réglementation pancanadienne des valeurs mobilières](#), 2017 Q.C.C.A. 756 [available in French only]; and [Reference re Pan-Canadian Securities Regulation](#), 2018 SCC 48.
45. [Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System](#), July 2016; and Minister of Finance, [Capital Markets Stability Act – Draft for Consultation](#), January 2016.
46. *Reference re Pan-Canadian Securities Regulation*, paras. 95–96 and 113–116.