



**BACKGROUND PAPER**

# THE DISTRIBUTION OF LEGISLATIVE POWERS: AN OVERVIEW

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*The Distribution of Legislative Powers: An Overview*  
(Background Paper)

Publication No. 2019-35-E

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## EXECUTIVE SUMMARY

The distribution of legislative powers among the various levels of government is a key feature of federalism. To guide this distribution, the *Constitution Act, 1867* divides legislative powers between the Parliament of Canada and the provincial legislatures. Most of these powers are set out in sections 91 to 95 of the *Constitution Act, 1867*.

However, simply reading these provisions is not usually enough to determine which level of government has jurisdiction over which area. As new areas emerge and legislative authority becomes increasingly complex, questions remain, notably the following: Which areas fall under the jurisdiction of each level of government? Does a given level of government have the necessary authority to make laws in these areas? Fortunately, Canadian courts are regularly asked to consider these issues and, over time, have established some interpretive principles. The answers, nonetheless, remain complex.

This background paper focuses on the distribution of legislative powers between Parliament and the provincial legislatures in selected areas. First, it briefly describes the provisions of the *Constitution Act, 1867* that concern legislative powers. Second, it examines how certain powers were assigned to the appropriate level of government in light of the interpretive principles established by the courts.

Legislative jurisdiction in Canada is a very broad issue. The paper does not look at the interpretive principles themselves or list every legislative power. Instead, it provides an overview of the distribution of powers in certain areas selected because of their greater complexity. The paper examines topics or legislation that fall under the aegis of both Parliament and the provincial legislatures, and cases where laws or legislative provisions have been ruled constitutional even though they infringe on the other level of government's jurisdiction.

Finally, it is important to note that the principles for interpreting the distribution of powers are constantly evolving. There are various reasons behind this evolution, such as the emergence of new areas for legislative action and the recognition that Indigenous peoples have an inherent right to self-government. In constitutional law, the metaphor of a living tree is often used to describe Canada's Constitution as a set of documents that must adapt to new situations and new social realities. The provisions of the *Constitution Act, 1867* dealing with the distribution of powers are no exception to this concept.

# THE DISTRIBUTION OF LEGISLATIVE POWERS: AN OVERVIEW

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## 1 INTRODUCTION

The distribution of legislative powers is an inherent part of all federal systems. It determines which level of government can legislate in the various areas of law. In Canada, the distribution of powers between the Parliament of Canada, which can enact legislation that applies to the entire country, and the provincial legislatures, which can pass legislation that applies within their respective boundaries, is set out in sections 91 to 95 of the *Constitution Act, 1867*.<sup>1</sup> The provinces are not subordinate to the Parliament of Canada, as they are fully independent in the areas of jurisdiction that are assigned exclusively to them.

It is worth noting that, pursuant to the *Constitution Act, 1867*, Canada's three northern territories do not have any jurisdiction in their own right. Under the Constitution, Parliament has full legislative jurisdiction over the territories, although it has delegated much of this power to the territorial legislatures. Likewise, the powers of municipalities derive from provincial powers that have been delegated to them.

This paper provides a brief outline of the distribution of powers among the different levels of government in Canada and summarizes the judicial interpretation of selected areas of jurisdiction.

## 2 THE DISTRIBUTION OF POWERS UNDER THE *CONSTITUTION ACT, 1867*

### 2.1 OVERVIEW

The distribution of powers provided for in sections 91 to 95 of the *Constitution Act, 1867* is deemed to be exhaustive. This means that any new area of legislative activity must be considered part of a power already set out in the *Constitution Act, 1867*, even if this area did not exist in 1867.

Simply reading the *Constitution Act, 1867* is not sufficient to determine whether a given legislative area is under federal or provincial jurisdiction. Judicial interpretation has been necessary to clarify the constitutional powers of the various levels of government.<sup>2</sup>

Moreover, some powers have been interpreted very broadly, such as the provincial power to legislate in relation to property and civil rights. Other powers have been interpreted more narrowly, such as Parliament's general power to regulate commerce (see below).

## 2.2 SECTIONS 91 TO 95

Section 91 of the *Constitution Act, 1867* sets out the areas of jurisdiction exclusive to Parliament. These areas include matters that affect the entire country, such as military and naval service and currency. Other areas were assigned to Parliament to ensure legal consistency across the country, such as bankruptcy, divorce and criminal law. In addition, in its introductory paragraph, section 91 grants Parliament the power 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.<sup>3</sup>

Parliament has exercised this “residual” power in areas where there is a gap in the distribution of powers for matters of national concern and in emergency situations.<sup>4</sup>

Section 92 sets out the areas of provincial jurisdiction, including taxation within the province, prisons, hospitals and municipalities. The provincial legislative power that has been interpreted most expansively is section 92(13), the power over property and civil rights. This power enables provinces to legislate on matters as varied as the regulation of professions, labour law, contract law and consumer protection.<sup>5</sup> Finally, the provinces can also make laws respecting “all Matters of a merely local or private Nature in the Province.”<sup>6</sup>

While recognizing the principle of federal paramountcy where laws are inconsistent, section 92A provides that each province has legislative jurisdiction over the exploration for non-renewable natural resources in the province, development, conservation and management of its non-renewable natural resources and forestry resources, as well as certain activities in relation to electrical energy facilities and sites.<sup>7</sup>

Section 93 of the *Constitution Act, 1867* expressly assigns education to the provinces, but this power is subject to provisions that protect certain religious minorities, although these provisions are subject to specific exceptions.<sup>8</sup>

Section 94A of the *Constitution Act, 1867* enables Parliament to make legislation respecting old age pensions and supplementary benefits, but provincial laws take precedence over federal laws in this area.<sup>9</sup> Finally, section 95 provides that jurisdiction over agriculture and immigration is shared between the two levels of government.

Some powers that would normally belong to one level of government may be exercised by the other if they apply to certain people or areas. For example, labour law is normally under provincial jurisdiction, but federal labour legislation applies to businesses and employers that are under federal jurisdiction.<sup>10</sup>

### 3 THE DISTRIBUTION OF POWERS IN SELECTED AREAS

#### 3.1 CRIMINAL LAW

Under section 91(27) of the *Constitution Act, 1867*, all matters relating to criminal law are under Parliament's exclusive jurisdiction. Parliament has exercised this power when it enacted criminal legislation, notably the *Criminal Code* in 1890, as well as other criminal laws. As discussed below, Parliament's power to enact criminal law enables it to legislate in other areas, such as health and the environment. However, this legislation must not interfere with matters under provincial jurisdiction and must:

- have a valid criminal law purpose, such as public peace, order, security, health or morality;
- be connected to a prohibition; and
- be backed by a penalty for violations.<sup>11</sup>

The following are examples of subjects that fall under Parliament's power to make criminal laws:

- **Tobacco:** Federal laws prohibiting the advertising and promotion of tobacco products have been found constitutionally valid.<sup>12</sup>
- **Drugs:** Parliament has the power to make legislation respecting drugs. For example, it enacted the *Controlled Drugs and Substances Act*, which prohibits the production, importation, sale and possession of illegal substances, and the *Food and Drugs Act*, which regulates the production and sale of food and drugs for medical purposes.
- **Firearms:** The Supreme Court confirmed that the *Firearms Act*, whose purpose is "enhancing public safety by controlling access to firearms," is a valid exercise of Parliament's power under section 91(27) of the *Constitution Act, 1867*.<sup>13</sup>
- **Rules of procedure and evidence:** The power to legislate in relation to criminal procedure is the exclusive jurisdiction of Parliament under section 91(27) of the *Constitution Act, 1867*. Indeed, the *Criminal Code* contains a number of provisions on criminal procedure. Moreover, the *Criminal Code* grants Parliament the exclusive authority to make legislation concerning the rules of evidence.<sup>14</sup>

It is important to note that, while the rules of criminal procedure fall within federal jurisdiction, some powers are granted to the provinces under the “Administration of Justice in the Province” heading (discussed below), as is the power to legislate criminal penalties that enforce provincial laws.<sup>15</sup>

Parliament and the provincial legislatures share jurisdiction over prisons. While section 91(28) gives Parliament the power to establish, maintain and manage penitentiaries (for prison sentences of two years or more), the power to establish, maintain and manage prisons in a province (for sentences of less than two years) is assigned to the provinces by section 92(6).

### 3.2 ADMINISTRATION OF JUSTICE

While section 91(27) provides that Parliament has jurisdiction over criminal procedure, the provinces generally enforce the *Criminal Code* – for example, by conducting investigations, laying charges and undertaking prosecutions. Section 92(14) gives the provinces jurisdiction over the “Administration of Justice in the Province.” The courts have interpreted this power to extend to criminal law, giving provinces authority over provincial police forces (and the rules governing them) and the prosecution of *Criminal Code* offences.<sup>16</sup>

The administration of justice power that is exclusive to the provinces also encompasses civil and criminal courts. This includes the power to constitute, maintain and organize provincial courts. Furthermore, section 91(27) expressly excludes “the Constitution of Courts of Criminal Jurisdiction” from Parliament’s criminal law power. However, the provinces’ administration of justice power must not impinge on Parliament’s exclusive power to appoint superior court judges.<sup>17</sup>

### 3.3 ENVIRONMENT

The *Constitution Act, 1867* does not include a distinct legislative power regarding the environment. As a result, both Parliament and the provincial legislatures can legislate in this area, so long as they stay within their respective jurisdictions. To determine which level of government may deal with an environmental matter, it is necessary to identify the power enumerated in the *Constitution Act, 1867* that best matches the essence of the legislative or regulatory measure in question. The Constitution indicates whether that power is granted to Parliament or the provincial legislatures.

For example, Parliament has jurisdiction over environmental matters where the dominant characteristics of the laws in question correspond to “Sea Coast and Inland Fisheries,”<sup>18</sup> “Navigation and Shipping,”<sup>19</sup> and federal public property.<sup>20</sup> The dominant characteristic or purpose of the law is important: for example, if a law relates to fisheries only incidentally, it may not be within federal jurisdiction. Parliament can also enact environmental legislation under its power to “make Laws for the Peace, Order, and good Government of Canada.”<sup>21</sup>

In addition, Parliament can pass environmental laws under its exclusive jurisdiction over criminal law. This power was confirmed in cases such as *R. v. Hydro-Québec*, where the Supreme Court upheld certain provisions of the *Canadian Environmental Protection Act*<sup>22</sup> that prohibit “specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances.”<sup>23</sup>

The provinces can generally legislate on many environmental issues under their property and civil rights power and their jurisdiction over matters of a merely local or private nature in the province, among others.<sup>24</sup> As a result, since authority over the environment is shared, the Supreme Court has ruled that the federal and provincial governments can adopt coordination mechanisms in this area, particularly for environmental assessments.<sup>25</sup>

### 3.4 NATURAL RESOURCES

Unlike the environment, natural resources are generally associated with specific powers under the *Constitution Act, 1867*. However, some areas may fall under the jurisdiction of both levels of government, such as mines and minerals and the forest industry, for example. Still, it is important to note that these powers are limited on reserves and lands where Indigenous peoples have title.<sup>26</sup>

The provinces can generally legislate in relation to natural resources under their powers regarding taxation,<sup>27</sup> local works and undertakings,<sup>28</sup> property and civil rights in the province,<sup>29</sup> and matters of a merely local or private nature in the province.<sup>30</sup> In 1982, section 92A was added to the *Constitution Act, 1867*, expanding the areas of exclusively provincial jurisdiction to include exploration for non-renewable natural resources in the province; development, conservation and management of non-renewable resources and forestry resources in the province; and development, conservation and management of sites and facilities in the province for the generation and production of electricity.<sup>31</sup>

As noted above, territories do not exercise constitutional powers in their own right pursuant to the *Constitution Act, 1867*. Rather, jurisdiction over natural resources has been devolved to the governments of the Northwest Territories and the Yukon. While many responsibilities have been transferred from the federal government to the Nunavut government, Parliament has yet to devolve natural resources powers to that territory.

Parliament can regulate natural resources on federally owned property, such as national parks, military bases and the sea that lies beyond the geographic boundaries of any province or territory.<sup>32</sup> It also has jurisdiction to regulate natural resources on First Nations reserves.<sup>33</sup> Parliament can also make legislation affecting natural resources using its jurisdiction over the regulation of interprovincial and international trade and commerce,<sup>34</sup> taxation,<sup>35</sup> sea coast and inland fisheries,<sup>36</sup> the listed

exceptions to the provinces' local works and undertakings power,<sup>37</sup> and laws for the peace, order and good government of Canada. In addition, Parliament can invoke its declaratory power under section 92(10)(c) to claim jurisdiction over natural resources. For example, in the *Nuclear Safety and Control Act*, Parliament declared that it has jurisdiction over nuclear energy and nuclear substances.<sup>38</sup>

### 3.5 TRANSPORT AND COMMUNICATIONS

Parliament and the provincial legislatures share jurisdiction over transport and communications works and undertakings. Section 92(10) of the *Constitution Act, 1867*, which grants the provincial legislatures jurisdiction over local works and undertakings (with some exceptions), was interpreted to share legislative power over transport and telecommunications depending on location. Under sections 92(10)(a) and 92(10)(b) of the *Constitution Act, 1867*, a transport undertaking generally comes under a province's jurisdiction if it is located within that province's boundaries. But if the undertaking extends beyond those boundaries, it falls under federal jurisdiction.<sup>39</sup> Moreover, as noted above, Parliament can also invoke its declaratory power under section 92(10)(c) to assert its legislative authority over works and undertakings that are not usually under its jurisdiction.

The question of whether a work or undertaking is under federal jurisdiction also depends on the nature of the operation.<sup>40</sup> This is a key difference between transport and communications. While communications enterprises can operate and provide international and interprovincial communication services from a fixed point, transportation companies cannot do so unless they operate the service themselves.<sup>41</sup> Furthermore, the transportation sector is complex: for example, businesses that deliver their own goods or storage businesses that pick up and deliver beyond their province's boundaries do not fall within the exceptions set out in sections 92(10)(a) and 92(10)(b).<sup>42</sup>

In addition, jurisdiction over some means of communication and modes of transport was assigned to a particular level of government or to both under specific powers. Two examples are:

- **Broadcasting**, which is both interprovincial and international in scope, is under exclusive federal jurisdiction pursuant to section 92(10)(a), section 91(29) and the "peace, order, and good government" clause.<sup>43</sup> However, some provincial legislation, such as consumer protection laws, can apply to this area of jurisdiction.<sup>44</sup>
- **Aviation** is under the exclusive jurisdiction of Parliament pursuant to its power to make laws for the peace, order and good government of Canada.<sup>45</sup> This is true even when an aviation company operates within the boundaries of a single province.<sup>46</sup>

### 3.6 INDIGENOUS AFFAIRS

Section 91(24) of the *Constitution Act, 1867* grants Parliament exclusive legislative jurisdiction over “Indians, and Lands reserved for Indians.”<sup>47</sup> Accordingly, Parliament can make laws that apply only to “Indians,” even if the purpose of these laws would normally fall within provincial jurisdiction if they applied to non-Indigenous persons.<sup>48</sup>

Historically, Parliament used this power primarily for “status Indians.”<sup>49</sup> For instance, the federal government enacted various laws respecting Indians and lands reserved for them, including the *Indian Act*, which governs many aspects of the lives and lands of status Indians.<sup>50</sup>

In *Daniels v. Canada (Indian Affairs and Northern Development)*, the Supreme Court ruled that Métis and non-status Indians are “Indians” within the meaning of section 91(24) of the *Constitution Act, 1867*.<sup>51</sup> Despite this decision, the federal and provincial governments have yet to accept responsibility for Métis and non-status Indians. While this case did not establish a legal duty to provide programs and services to Métis and non-status Indians, the federal government did commit to work with them to create a partnership “based on recognition of rights, respect, and partnership – in order to meaningfully advance the work of reconciliation.”<sup>52</sup>

Despite the federal government’s exclusive jurisdiction over “Indians,” provincial laws of general application in most cases still apply to “Indians” and on reserves.<sup>53</sup> The Supreme Court rejected the “enclave” theory, according to which Indian reserves are sheltered from all provincial legislation.<sup>54</sup> For example, provincial laws on topics as varied as motor vehicles,<sup>55</sup> hunting<sup>56</sup> and labour issues were found to apply on Indigenous reserves in the absence of relevant federal legislation.<sup>57</sup>

It is worth noting that some Indigenous peoples claim an inherent right to self-government – that is, a right that derives not from the *Constitution Act, 1867*, but from their own systems of governance and their historical occupation of the lands that now make up Canada. Such rights, which cannot be extinguished, “do not owe their existence to any other level of government.”<sup>58</sup> Accordingly, the federal government adopted the Inherent Right Policy in 1995 to guide self-government negotiations with Indigenous communities, which led to land claims agreements (also called “modern treaties”) and self-government agreements. These agreements are constitutionally protected delegations of major federal government powers to signatory First Nations, including powers over education, land management and policing.<sup>59</sup>

### 3.7 HEALTH

The power to legislate in relation to health does not have a specific heading in the *Constitution Act, 1867* and had to be linked to other areas of jurisdiction. In 1982, the Supreme Court called health an “amorphous topic” that can be addressed by both federal and provincial legislation.<sup>60</sup> More recently, the Supreme Court reiterated this state of affairs in *Carter v. Canada (Attorney General)*, ruling that health is an “area of concurrent jurisdiction” and that, as a result, both levels of government can pass health legislation, depending on the circumstances and focus of the legislation.<sup>61</sup>

The provinces exercise very broad health powers under several provisions of the *Constitution Act, 1867*, including section 92(7), which gives the provinces exclusive jurisdiction over establishing, maintaining and managing hospitals, asylums, and charitable institutions and hospices within their boundaries. In addition, the training and accreditation of doctors and other health professionals is understood to be a provincial responsibility. This power also enables the provinces to pass legislation respecting health insurance and workplace health and safety, except in federally regulated workplaces.<sup>62</sup>

As for Parliament, its exclusive health-related jurisdiction is limited to “Quarantine and the Establishment and Maintenance of Marine Hospitals” under section 91(11) of the *Constitution Act, 1867*. However, most federal health legislation arises from federal jurisdiction over criminal law and the federal spending power. Indeed, the *Canada Health Act*, which concerns federal funding for certain health services and the criteria that provincial laws must satisfy to receive full funding under the Canada Health Transfer, was enacted under Parliament’s spending power. The use of this power remains controversial according to some constitutional experts.<sup>63</sup>

As indicated above, the federal criminal law power enables Parliament to pass laws to prohibit conduct and products that are potentially dangerous to public health, such as the consumption of certain drugs and substances. The *Food and Drugs Act*, the *Cannabis Act* and the *Tobacco and Vaping Products Act* were enacted under this power. In addition, Parliament’s jurisdiction over “Patents of Invention and Discovery,” set out in section 91(22) of the *Constitution Act, 1867*, enables it to regulate pharmaceutical patents, which “has been held to extend to the compulsory licensing of the manufacture of patented drugs so as to improve access by bringing prices down to competitive levels.”<sup>64</sup>

Finally, Parliament’s power to make laws for the peace, order and good government of Canada may enable it to pass health legislation in emergency situations or respecting matters of national importance.<sup>65</sup>

### 3.8 THE FAMILY

As is the case with health, legislative authority over family law is not assigned exclusively to either Parliament or the provincial legislatures. Some aspects of family law are included in section 91 (setting out areas of federal jurisdiction) of the *Constitution Act, 1867*, while others are found under section 92 (setting out areas of provincial jurisdiction). Section 91(26) gives Parliament exclusive jurisdiction over marriage and divorce, while section 92(12) grants the provincial legislatures exclusive power to legislate in relation to the solemnization of marriage. The underlying nature of legislation must therefore be examined to determine whether it falls within the jurisdiction of one level of government or the other.

There may be some confusion about the difference between “marriage” and the “solemnization of marriage.” The difference is that Parliament’s authority over marriage concerns the fundamental conditions of marriage, such as the capacity to marry, while the provincial legislatures’ solemnization power concerns the criteria for the ceremony itself, the officiant’s authority, the need for parental consent for minors and the licensing requirement.<sup>66</sup>

Moreover, provincial jurisdiction over property and civil rights and matters of a private nature gives significant family law powers to the provinces. These powers concern issues such as the separation of married and common-law couples, property division, adoption, alimony, parenting arrangements and the impact of marriage on spouses’ estates.<sup>67</sup>

However, where these matters pertain directly to divorce, Parliament is also empowered to legislate in relation to alimony and parenting orders when they are ancillary to its divorce power, as the Supreme Court confirmed in several cases.<sup>68</sup>

### 3.9 COMMERCE

Parliament’s jurisdiction over the “Regulation of Trade and Commerce” is provided in section 91(2) of the *Constitution Act, 1867*. While this power – which may seem broad at first glance – is assigned to Parliament alone, the provincial legislatures have exclusive jurisdiction over intra-provincial commerce under section 92(11) of the *Constitution Act, 1867*. As a result, the courts have limited Parliament’s jurisdiction to two areas.

First, Parliament’s jurisdiction over commerce enables it to make legislation respecting interprovincial and international trade.<sup>69</sup> Second, Parliament has a “general” commerce power and can therefore enact legislation concerning commercial matters that affect the entire country.<sup>70</sup>

While the first area involves clear geographic boundaries, the limits on the second area are more difficult to define. The Supreme Court has set out five criteria that legislation must meet to fall within Parliament's general commerce power.<sup>71</sup> Such legislation is considered constitutional if:

- it is part of a general regulatory scheme;
- the scheme it is part of is monitored by the continuing oversight of a regulatory agency;
- it is concerned with trade as a whole rather than with a particular industry;
- it is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
- the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.<sup>72</sup>

These criteria, which are not an exhaustive list of the factors to be considered, must be evaluated on a case-by-case basis. Furthermore, the fact that federal commerce legislation meets one or more of these criteria does not by itself make that legislation constitutional.<sup>73</sup>

### 3.10 BANKING

Under section 91(15) of the *Constitution Act, 1867*, Parliament has the authority to legislate in relation to banking, the incorporation of banks and the issue of paper money. Parliament has exercised this power by enacting legislation such as the *Bank Act*. Parliament's exclusive jurisdiction to legislate in relation to "Savings Banks" is set out in section 91(16).

In addition, in *Canadian Pioneer Management Ltd. et al. v. Labour Relations Board of Saskatchewan et al.*, the Supreme Court ruled that the question of what constitutes a bank must be decided based on the definition in federal legislation, not the day-to-day operations of an institution.<sup>74</sup> As a result, while credit unions, trust companies and *caisses populaires* carry out similar activities to those of banks, they do not fall within Parliament's jurisdiction.

Despite Parliament's exclusive jurisdiction over banking, some provincial legislation enacted under a power assigned to the provincial legislatures can apply to banks, if it is consistent with the relevant federal legislation. For example, in *Bank of Montreal v. Marcotte*,<sup>75</sup> the Supreme Court found that some provisions of Quebec's *Consumer Protection Act* apply to banks, as they do not impair or significantly interfere with the exercise of Parliament's jurisdiction.<sup>76</sup>

### 3.11 LABOUR

Despite its vast scope, legislative jurisdiction over labour is another power that is not specifically listed in the *Constitution Act, 1867*. The power to make legislation in relation to labour relations stems primarily from the provinces' exclusive jurisdiction over property and civil rights provided in section 92(13) of the *Constitution Act, 1867*.<sup>77</sup>

However, Parliament has the authority to pass labour relations legislation for sectors under its jurisdiction, which together account for about 6% of Canada's workforce.<sup>78</sup> As a result, numerous federal labour laws have been enacted and enforced, the most important being the *Canada Labour Code*.

Businesses and employers under federal labour and employment jurisdiction include banks, marine and air transportation businesses, radio and television broadcasters, most federal Crown corporations, and private businesses necessary to the operation of a federal Act.<sup>79</sup> The federal government also has jurisdiction to regulate labour relations in federal departments and agencies.<sup>80</sup>

In cases where the connection to the federally regulated business is unclear, Parliament has jurisdiction over labour matters only if it is established that the work being performed is an integral part of the federally regulated business.<sup>81</sup>

### 3.12 CONCURRENT JURISDICTIONS

While the courts have interpreted some legislative powers as concurrent, the *Constitution Act, 1867* also specifically provides for concurrent powers. Sections 94A and 95 of the *Constitution Act, 1867* set out shared jurisdictions for immigration, agriculture, and old age pensions and supplementary benefits.

#### 3.12.1 Immigration

Immigration is an area under shared jurisdiction pursuant to section 95 of the *Constitution Act, 1867*. This provision expressly makes federal legislation paramount in the event of any conflict with provincial legislation. For example, federal jurisdiction was exercised in the case of the *Immigration and Refugee Protection Act*, which includes provisions

setting out the broad strokes of who should be admitted to Canada for what purposes, the recourse available to those unauthorized to stay, and how unsuccessful applicants are to be removed.<sup>82</sup>

The provinces and territories play a limited role in the selection of certain immigrants under provincial nominee program agreements.<sup>83</sup> These agreements enable the provinces and territories to nominate immigrants using selection criteria based on regional interests. The system works differently in Quebec. The *Canada–Québec Accord Relating to Immigration and Temporary Admission of Aliens* delegates responsibility for selecting economic immigrants to the Quebec government, as well as responsibility for the reception and integration of permanent residents.<sup>84</sup>

While immigration is a concurrent jurisdiction, Parliament has exclusive legislative authority for “Naturalization and Aliens” under section 91(25) of the *Constitution Act, 1867*. As a result of this exclusive jurisdiction, Parliament alone determines the conditions that foreign nationals must meet to obtain Canadian citizenship.<sup>85</sup> The key federal legislation in this regard is the *Citizenship Act*.

### 3.12.2 Agriculture

Section 95 of the *Constitution Act, 1867* also provides that agriculture is under the concurrent jurisdiction of Parliament and the provincial legislatures and that federal laws take precedence in case of conflict. In addition, Parliament’s legislative authority over some agriculture-related sectors stems from other areas of jurisdiction, including its criminal law power, which enables it to legislate in the area of food safety, and its trade and commerce power, which permits it to enact laws governing interprovincial trade in agricultural products.<sup>86</sup>

Agriculture encompasses a fairly wide range of topics, and the courts have often been asked to rule on which “Laws in relation to Agriculture” lie within the power set out in section 95 of the *Constitution Act, 1867*. The courts have generally construed this provision somewhat narrowly. For example, the courts have generally excluded matters relating to the marketing of agricultural products from the scope of section 95.<sup>87</sup>

### 3.12.3 Old Age Pensions and Supplementary Benefits

Finally, section 94A, which was the result of amendments made to the *Constitution Act, 1867* in 1951 and 1964, provides for concurrent jurisdiction over old age pensions and supplementary benefits.<sup>88</sup> The Canada Pension Plan was made possible by federal jurisdiction in this area.

This provision is an exception to the federal paramountcy principle in that it expressly states that no federal legislation “shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.”<sup>89</sup> As a result, provincial legislation takes precedence in cases of inconsistency.

### NOTES

1. [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.).
2. For more information on the judicial interpretation of the distribution of powers, see 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.
3. *Constitution Act, 1867*, s. 91.
4. Lithwick (2015).
5. Peter W. Hogg, "Property and Civil Rights," Chapter 21 in *Constitutional Law of Canada*, 5<sup>th</sup> ed., Carswell, Toronto, 5 November 2019.
6. *Constitution Act, 1867*, s. 92(16).
7. *Ibid.*, s. 92A.
8. See, as an example, *Constitution Act, 1867*, s. 93A. It is important to remember that the power to legislate in relation to education may also be negotiated in self-government agreements with Indigenous communities. Section 35 of the *Constitution Act, 1982*, recognizes that Canada's Indigenous peoples have an inherent right to self-government. The *Agreement with Respect to Mi'kmaq Education in Nova Scotia* and the *Anishinabek Nation Education Agreement* are examples of such agreements. See [Constitution Act, 1982](#), being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11; Government of Canada, [Agreement with Respect to Mi'kmaq Education in Nova Scotia](#), Background; and Government of Canada, [Anishinabek Nation Education Agreement](#).
9. *Constitution Act, 1867*, s. 94A.
10. Hogg (2019), "Labour relations," Chapter 21.8.
11. [Reference re Firearms Act \(Can.\)](#), 2000 SCC 31, para. 27.
12. [RJR-MacDonald Inc. v. Canada \(Attorney General\)](#), [1995] 3 SCR 199.
13. *Reference re Firearms Act (Can.)*.
14. The provinces cannot pass laws that affect the admissibility of evidence in criminal matters. In addition, under the principle of federal paramountcy, rules of evidence adopted by the provinces that are inconsistent with those enacted by Parliament do not apply to criminal proceedings.
15. *Constitution Act, 1867*, ss. 92(14) and 92(15). An example would be a fine or penalty imposed for contravening a provincial rule.
16. [O'Hara v. British Columbia](#), [1987] 2 SCR 591; and [Di Iorio v. Warden of the Montreal Jail](#), [1978] 1 SCR 152.
17. Section 96 of the *Constitution Act, 1867*, provides as follows: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."
18. *Constitution Act, 1867*, s. 91(12). This power was exercised in enacting the [Fisheries Act](#), R.S.C. 1985, c. F-14, in which Parliament provided a legislative framework for "the conservation and protection of fish and fish habitat, including by preventing pollution." (s. 2.1).
19. *Constitution Act, 1867*, s. 91(10).
20. *Ibid.*, s. 91(1A).
21. *Constitution Act, 1867*, s. 91. In *R. v. Hydro-Québec*, the Supreme Court of Canada noted that the federal power to legislate for peace, order and good government can be invoked to "enact a wide variety of environmental legislation in dealing with an emergency of sufficient magnitude to warrant resort to the power." (*R. v. Hydro-Québec*, [1997] 3 SCR 213, para. 115).
22. This legislation is now entitled the *Canadian Environmental Protection Act, 1999*.
23. [R. v. Hydro-Québec](#), [1997] 3 SCR 213, para. 130.

24. For example, the Prince Edward Island government recently passed the *Plastic Bag Reduction Act*, which is designed to “reduce waste and environmental damage resulting from single-use checkout bags” in Prince Edward Island. See Prince Edward Island, [Plastic Bag Reduction](#).
25. [MiningWatch Canada v. Canada \(Fisheries and Oceans\)](#), 2010 SCC 2, para. 41.
26. For more information, see Dwight Newman, *Natural Resource Jurisdiction in Canada*, LexisNexis Canada Inc., Toronto, 2013.
27. *Constitution Act, 1867*, s. 92(2).
28. *Ibid.*, s. 92(10).
29. *Ibid.*, s. 92(13).
30. *Ibid.*, s. 92(16).
31. *Ibid.*, s. 92A.
32. *Ibid.*, s. 91(1A).
33. *Ibid.*, s. 91(24).
34. *Ibid.*, s. 91(2).
35. *Ibid.*, s. 91(3).
36. *Ibid.*, s. 91(12).
37. *Ibid.*, s. 92(10)(a).
38. [Nuclear Safety and Control Act](#), S.C. 1997, c. 9, s. 71.  
Section 92(10)(c) of the *Constitution Act, 1867*, provides for exceptions to provincial jurisdiction over local works and undertakings, including works located within a province that are “declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.” See also section 91(29), under which Parliament may make legislation in relation to the exceptions set out in the list of classes of subjects assigned exclusively to the legislatures of the provinces.
39. In general, works and undertakings that extend from one province into another are within Parliament’s jurisdiction, even if the total distance involved is very short. On this point, see [Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.](#), 44 OR (2d) 560, 4 DLR (4<sup>th</sup>) 452 (CanLII), in which the Court of Appeal for Ontario found that a bus service serving both Ottawa, Ontario, and Hull, Quebec, is an interprovincial work or undertaking that is under Parliament’s jurisdiction pursuant to section 92(10)(a) of the *Constitution Act, 1867*, and therefore that labour relations matters are subject to the *Canada Labour Code*.
40. [Northern Telecom v. Communications Workers](#), [1980] 1 SCR 115 (CanLII), p. 132.
41. [Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters](#), 2009 SCC 53, paras. 60 and 61.
42. Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6<sup>th</sup> ed., Éditions Yvon Blais, 2014, VI-2.271. [Available in French only]
43. [Reference re Regulation and Control of Radio Communication](#), [1931] SCR 541; and [Rogers Communications Inc. v. Châteauguay \(City\)](#), 2016 SCC 23, para. 42.
44. See, for example, [Attorney General \(Que.\) v. Kellogg’s Co. of Canada et al.](#), [1978] 2 SCR 211; and [Irwin Toy Ltd. v. Quebec \(Attorney General\)](#), [1989] 1 SCR 927.
45. [Reference re legislative powers as to regulation and control of aeronautics in Canada](#), [1930] SCR 663.
46. Guy Régimbald et al., “Constitutional Law: Division of Powers,” *Halsbury’s Laws of Canada*, 2019 Reissue, LexisNexis Canada, p. 541.
47. *Constitution Act, 1867*, s. 91(24). Note that “Indian” refers to all of Canada’s Indigenous peoples. See on this topic [Daniels v. Canada \(Indian Affairs and Northern Development\)](#), 2016 SCC 12.
48. Hogg (2019), “Provincial legislative power,” Chapter 28.2. Under this power, Parliament adopted the first version of the *Indian Act* in 1876.
49. A person registered in the Indian Register under section 6 of the *Indian Act* is deemed to have Indian status and be entitled to certain rights and benefits, and to have access to programs and services provided by the federal, provincial and territorial governments. See [Indian Act](#), R.S.C. 1985, c. I-5.

50. Brittany Collier, [Spending and Jurisdiction for First Nations, Métis and Inuit Peoples](#), HillNotes, Library of Parliament, 26 January 2016.
51. *Daniels v. Canada (Indian Affairs and Northern Development)*, para. 57.
52. Indigenous and Northern Affairs Canada, [The CAP/Daniels Decision – Frequently asked questions](#).
53. Hogg (2019), “Provincial legislative power,” Chapter 28.2.
54. See, for example, *R. v. Francis*, [1988] 1 SCR 1025; *Cardinal v. Attorney General of Alberta*, [1974] SCR 695; and *Four B Manufacturing v. United Garment Workers*, [1980] 1 SCR 1031.
55. *R. v. Francis*.
56. *Dick v. La Reine*, [1985] 2 SCR 309; and *Kruger and al. v. The Queen*, [1978] 1 SCR 104.
57. *Four B Manufacturing v. United Garment Workers*, [1980] 1 SCR 1031.
58. Assembly of First Nations, [Affirming First Nations Rights, Title and Jurisdiction](#), Report from the National Policy Forum, September 2018.
59. See, for example, the *Nisga’a Final Agreement* (S.C. 2000, c. 7), signed in 1999, which gives the Nisga’a Nation the power to make legislation in relation to child and family services, education and police services, among other areas.
60. *Schneider v. The Queen*, [1982] 2 SCR 112, p. 142.
61. *Carter v. Canada (Attorney General)*, [2015] SCC 5, para. 53.
62. Martha Butler and Marlisa Tiedemann, [The Federal Role in Health and Health Care](#), Publication no. 2011-91-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 20 September 2013.
63. See the description of the doctrinal debate in Hoi L. Kong, “Chapter 20 – The Spending Power in Canada,” in *The Oxford Handbook of the Canadian Constitution*, ed. Peter Oliver et al., Oxford University Press, New York, 2017.
64. Hogg (2019), “Federal power over health,” Chapter 32.2.
65. Butler and Tiedemann (2013).
66. Brun, Tremblay and Brouillet (2014), p. 507.
67. Hogg (2019), “Distribution of powers,” Chapter 27.1; and Brun, Tremblay and Brouillet (2014).
68. See, for example, *Jackson v. Jackson*, [1973] SCR 205; and *Zacks v. Zacks*, [1973] SCR 891.
69. Régimbald et al. (2019), pp. 489–494.
70. *Ibid.*, p. 490.
71. *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.
72. *Ibid.*
73. *Ibid.*
74. *Canadian Pioneer Management Ltd. et al. v. Labour Relations Board of Saskatchewan et al.*, [1980] 1 SCR 433.
75. *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725.
76. For more information on the constitutional arguments raised in this case, see Adriane Yong, [Banks and Consumer Protection: Not Exclusively Parliament’s Jurisdiction](#), HillNotes, Library of Parliament, 18 February 2015.
77. Hogg (2019), “Labour Relations,” Chapter 21.8.
78. Government of Canada, [Federally Regulated Businesses and Industries](#).
79. *Ibid.*
80. Brun, Tremblay and Brouillet (2014).

81. For example, in *Construction Montcalm Inc. v. Minimum Wage Commission*, the Supreme Court decided that the fact that an independent contractor's employees were helping build an airport runway was insufficient for federal legislation to apply to them, as they were not responsible for designing or operating the runway, merely building it. As a result, this work was not an integral part of Parliament's jurisdiction over aeronautics. See [Construction Montcalm Inc. v. Min. Wage Com.](#), [1979] 1 SCR 754.
82. Sandra Elgersma, [Immigration Policy Primer](#), Publication no. 2015-42-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 November 2015.
83. Government of Canada, [Immigrate as a provincial nominee](#).
84. Canada compensates Quebec for the reception and integration services it provides. See Government of Canada, [Canada–Québec Accord Relating to Immigration and Temporary Admission of Aliens](#), 5 February 1991; and Julie Béchar, [Immigration: The Canada–Québec Accord](#), Publication no. 2011-89-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 April 2018.
85. Béchar (2018).
86. Donald Buckingham, "Agriculture," *Halsbury's Laws of Canada*, 2018 Reissue, LexisNexis Canada, 2018.
87. Buckingham (2018).
88. *Constitution Act, 1867*, s. 94A.
89. *Ibid.*