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Current trends in Canadian federalism. Centripetal and centrifugal forces in Canadian division of powers

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Summary: 1.Introduction; 2. Canadian Federalism and the division of legislative powers; 3. Judicial interpretation of the division of powers; 4. Level of (de)centralization of Canadian federalism; 5. Future changes in the division of powers; 6. Conclusions.

1. Introduction

Canadian federalism is often described as the most decentralized in the world. This paper tries to identify elements of Canadian federalism which support and which go against this statement, to ultimately determine whether Canadian federalism is presently on a decentralizing (centrifugal) or centralizing (centripetal) course.

As pointed out by Ronald Watts, in determining the level of (de)centralization of a given federal scheme, the first task becomes that of clarifying which powers we want to analyze.

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Centralization or decentralization can refer both to the *legislative* powers assigned to each level of government (federal or provincial in Canada), or to the role played by the various components in *federal decision making*.[2] Also, we can analyze the level of (de)centralization by looking at the administrative bodies in a federal state and how federal institutions are more or less present locally. In this paper, however, I will focus only on the level of (de)centralization in the distribution of legislatives powers between federal Parliament and provincial legislatures in Canada as stemming from the Canadian Constitution and as shaped by the decisions of the Privy Council (hereinafter, "P.C.") and the Supreme Court of Canada (hereinafter, "SCC").

It is true that Canadian federalism is often defined as one of the most decentralized in the world. But in order to explore the real extent of this allegation, it is necessary to look beyond the content of the Canadian Constitution. Sections 91 and 92 of the *Constitution Act, 1867* list the legislative powers that the Founding Fathers assigned to the federal and the provincial legislatures respectively. But a mere reading of these provisions does not help to fully understand how legislative powers are distributed in Canada. We also need to turn to the interpretation of these provisions rendered by constitutional judges (both the P.C. and the SCC) over the time. Canadian federalism (or the interpretation given by judges to it) has gone through various stages, shifting its course from the federal to the provincial side and *vice versa* depending on the specific historical, economic, and political setting. If judges of the P.C. in the 1920s were unanimously in favour of granting more power to provincial legislatures, thus pushing back federal legislative intervention, in the 1970s (especially when Bora Laskin was Chief Justice of the SCC) there was a shift back to the center. At this time, we witnessed two clearly antonymic positions: that in favour of federal government assumed by Laskin C.J. (an Ontarian Jewish) and that in favour of provincial power embodied by Beetz, J. (a Franco-Quebecer Catholic). The most recent trend of the SCC, however, seems to have

[2] Ronald L. Watts, *Comparaison des régimes fédéraux,* 2nd edition, Montreal and Kingston, 2002, p. 73

slightly departed from this dualism in an attempt to keep a delicate balance between the two legislative poles.

My analysis will start with an overview of Canadian federalism and the division of powers as contained in the *Constitution Act, 1867*. I will then identify some of the most relevant federal and provincial "head of powers" and show how the judicial decisions of the courts have contributed to shape the Canadian separation of powers from that of "watertight compartments" of the 1920s to a more flexible trend, where courts allow (at certain conditions) one power to "invade" the sphere of competences of the other. I will point out how some federal powers (specifically, the federal spending power and the residual powers) are extremely controversial because of their broad scope, and this have brought provinces to call for a restriction of these powers that would otherwise grant the federal almost unlimited legislative jurisdiction. Next, I will explain the doctrines elaborated by the courts to interpret constitutional provisions (specifically, the doctrines of pith and substance, federal paramountcy, and interjurisdictional immunity). In my conclusion, I will argue that Canadian federalism is probably in a centrifugal course. Indeed, many elements can be used to confirm the point: the interpretative doctrines used by the courts work as a restraint to the otherwise very broad federal jurisdiction; also, the current trend of the SCC in deciding cases appears to be quite neutral if compared to the previous positions in favour of one level of government or the other which characterized past decisions; if nothing else, a quite diffuse acknowledgement on the part of Ottawa that not only Quebec but also western provinces are particularly sensible to how legislative powers are interpreted.

However, the above elements are not enough. Canadian federalism appears particularly interesting (as well as controversial) because of this continuous struggle that courts and governments

alike are constantly facing in trying to keep some balance in the delicate equilibrium between federal and provincial jurisdictions.

2. Canadian Federalism and the division of legislative powers

Canadian federalism was the legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. The federal-provincial division of powers was the legal recognition of this diversity. It helped to accommodate diversity by granting significant powers to provincial governments. As such, federalism was the political mechanism by which diversity could be reconciled with unity.[3]

Federalism has been identified by the SCC as one of the unwritten principles of Canadian constitutional system, along with democracy, constitutionalism and the rule of law, and protection of minorities.[4]

The Canadian Constitution defines the types of laws that may be enacted by the federal parliament and those that may be enacted by the provinces.[5] The basic division of powers is contained in sections 91 and 92 of the *Constitution Act, 1867*, which is the primary textual expression of the principle of federalism in Canadian Constitution agreed upon at Confederation.[6]

Some of the most important powers assigned by s. 91 to the federal Parliament have economic nature: public debt and property; trade and commerce; transportation and communication; direct and indirect taxation; banking. Also, federal parliament was granted legislative powers over marriage and divorce; criminal law, as well as the power to make laws for the peace,

[3] *Reference re Secession of Quebec,* [1998], 2 S.C.R. 217, §43
[4] *Secession reference,* cit., §55
[5] Peter Hogg, *Constitutional Law of Canada,* Toronto, 2009 (student edition) § 15(1)
[6] *Secession reference,* cit., §47

order, and good government of Canada (i.e. "p.o.g.g." powers). Conversely, provinces retained legislative powers over direct taxation within the provinces; incorporation of companies with provincial objects; property and civil rights in the province; all matters of local and private nature in the province; and local works and undertakings, among others. Also, provinces have exclusive jurisdiction over education. Agriculture and immigration, on the other side, are subject matters of shared jurisdiction between federal and provincial legislatures. By judicial interpretation, environment is also considered a subject matter of shared jurisdiction.[7]

Although it did not bring significant changes to the federal-provincial division of powers as described above, the *Constitution Act, 1982* introduced the constitutional amending formula (contained in ss. 38-49, or Part V) that was missing in the *Constitution Act, 1867*. S. 38(3) of the *Constitution Act, 1982*, provides that provinces can opt out of a constitutional amendment that derogates from that province's powers, rights or privileges, and that is unacceptable to them.[8] Also, s. 40 of the 1982 Constitution imposes upon the federal government an obligation to compensate any province that has opted out of an amendment transferring provincial legislative powers on education and other cultural matters from the provincial legislatures to the federal Parliament. I will now proceed with the analysis of some of the most controversial federal and provincial powers.

a. The general power: laws for the peace, order, and good government

S. 91 of the *Constitution Act, 1867*, reserves to the federal government 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...". These powers are commonly referred to as "residuary powers" and are also known as

[7] See *114957 Canada Ltd. (Spraytech) v. Hudson* [2001], 2 S.C.R. 241.
[8] Hogg, *Constitutional Law,* cit., §4(3)(d)

"p.o.g.g." powers. Along with the federal spending power, the p.o.g.g. power is one of the most controversial in the balance between federal and provincial jurisdiction.

During the 1920s, the P.C. used to construe the p.o.g.g. powers in a very limited way, consistently with the trend that valorized provincial powers and pushed back federal intervention.[9] The initial rigidity in the interpretation of section 91 was later relaxed, especially in the 1960s and 1970s, when the SCC in the *Anti-Inflation Act* outlined the new test for p.o.g.g. powers.[10] This decision is very interesting also because it shows the tensions within the SCC between Laskin C.J. (who favoured further extension of the p.o.g.g. powers) and Beetz C.J. (who thought that, by loosening too much the p.o.g.g. powers, there was a risk that the federal government would invade areas of provincial competence). In distinguishing between the "emergency" and the "national interest" branches of s.91, Beetz J. concluded that Parliament cannot enter the normally forbidden area of provincial jurisdiction unless it gives an unmistakable signal that it is acting pursuant to its extraordinary power."[11]

A quite widely shared opinion is that the residuary nature of the p.o.g.g. powers has been construed as part of a design to create a stronger central government in Canada.[12] Certain provinces (especially Quebec and the Western provinces) are pushing towards a revision of this federal residuary power which they believe is too broad and limits too much the legislative power of the provinces. This is also because p.o.g.g. powers can be used by the federal government to

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[9] Residuary powers could be used by the federal government only in case of war (*Fort Frances,* 1923) or highly exceptional or abnormal circumstances (*Board of Commerce* and *Snider*). The P.C. also rejected the use of residuary power to justify obligations arising under treaties entered by Canada (the "treaty making" power). See Hogg, *Constitutional Law,* cit., §17-2. See also *Attorney General for Canada v. Attorney General for Ontario* (Labor Conventions Case) [1937], AC 326. Concerning the so called treaty-making powers, the current rule is that the federal Parliament signs an international treaty. If the subject matter of the treaty falls within provincial jurisdiction, provincial legislatures will enact a statute accordingly. Otherwise, if it is a federal matter, the federal Parliament will issue an act.

[9] See *Re Anti-Inflation Act,* [1976], 2 S.C.R. 373

[10] See *Re Anti-Inflation Act,* cit.

[11] *Anti-Inflation Act,* cit. (Beetz J., dissenting)

[12] Hogg, *Constitutional Law,* cit., § 17.1. This is in open contrast with the equivalent clause contained in the US Constitution, which reserves all residuary powers to the States.

constitutionally justify legislative intervention in areas of traditional provincial jurisdiction like health.

b. Trade and commerce

S. 91(2) of the Constitution Act, 1867 confers upon the federal Parliament the power to regulate trade and commerce. Again, the wording chosen for this head of power seems to be quite broad, thus suggesting an intention to centralize as much as possible this legislative authority, but subsequent interpretations by the P.C. and by the SCC have provided new dimensions to it.[13]

Since the P.C. decision in *Parsons*, the federal trade and commerce power has been construed as confined to (i) inter-provincial and international trade, and (ii) "general" trade and commerce, whereas intra-provincial trade and commerce power falls under provincial power over property and civil rights of section 92(13).[14]

In the 1970s, the federal power over trade and commerce was extended by the SCC. Traditionally in favour of a stronger central government, Laskin C.J. did not want to "attenuate the federal trade and commerce power any further than has already been manifested in judicial decisions by denying Parliament authority to address itself to uniform prescriptions for the manufacture of food, drugs, cosmetics, therapeutic devices in the way, in the case of beer, of standards for its production and distribution according to various alcoholic strengths under labels appropriate to the governing regulations."[15]

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[13] See Hogg, *Constitutional Law,* cit., § 20-1. The provisions contained in s. 91(2) should be read in relation to s. 121 (the "common market" clause), which mandates the free circulation among provinces of all articles of growth, produce, or manufacture.

[14] See *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas 96. See also Hogg, *Constitutional Law,* cit., § 20-1. The second branch of this power is however weak. With a few exceptions, the federal Parliament has always lost when this argument has been invoked as constitutional anchoring for a given legislation. See *General Motors of Canada Ltd. v. City National Leasing* [1989], 1 S.C.R. 641.

[15] See *Labatt Brewing Co. v. Canada* [1980] 1 S.C.R. 914. See also *Caloil Inc. v. Canada (Attorney General),* [1971] S.C.R. 543

c. Provincial jurisdiction over property and civil rights

S. 92(13) of the *Constitution Act, 1867* reserves to the provinces exclusive jurisdiction over property and civil rights in the province. This is one of the most important provincial powers and it is sometimes construed as concurring with federal power over trade and commerce (s. 91(2)).

The scope of s. 92(13) was clarified for the first time by the P.C. as embracing all rights arising from contracts, and such rights are not included in express terms in any of the enumerated classes of subjects in s. 91.[16] At a time when the P.C. was attempting to expand provincial jurisdiction, *Parsons* set the standard whereby all day-to-day regulations of business are provincial (unless they relate to banks or inter-provincial companies).

S. 92(13) grants provinces very large powers. However these powers, although quite broad, are limited by the fact that provincial jurisdiction cannot extend beyond provincial borders.[17]

d. Federal spending power

Although it is neither defined nor specifically provided for in any head of power of ss. 91 and 92 of the *Constitution Act, 1867,* the federal spending power is described as the power of Parliament to make payments to people or institutions or governments for purposes on which it does not necessarily have the power to legislate (P.E. Trudeau, 1969). Its constitutional basis is identified in the following provisions of the *Constitution Act, 1867*: s.91 (federal power to make laws for the peace, order and good government of Canada); s.91(1A)(federal power to regulate public debt and property); s.91(3)(federal taxation power); s.106 (power to appropriate federal funds); ss.119 and 120 (federal payments to New Brunswick and Nova Scotia). Also, the federal spending

[16] See *Citizens Insurance v. Parsons,* cit.
[17] See *Churchill Falls (Labrador) Corp. Ltd. v. AG Newfoundland*, [1984] 1 S.C.R. 297

power can find a constitutional basis on s.36 of the *Constitutional Act, 1982* (federal power to make equalization payments), as well as on the decisions of the SCC.

Presently, the SCC recognizes the federal spending power in spite of these risks of intrusions into provincial legislative areas. However, at the time of the P.C. and of the "watertight compartments" idea, judges interpreted this power quite limitedly.[18] Yet, the much decentralized position of the P.C. was progressively abandoned, and in *Winterhaven* the Alberta Court of Appeals recognized that Parliament has the authority to legislate in relation to its own debt and property, and is entitled to spend the money raised through taxation in a chosen way. Also, it can impose conditions on that power, as long as the conditions do not amount in fact to a regulation or control of a matter outside federal authority.[19]

In the *CAP Reference,* the SCC clarified that the spending power is not a separate head of judicial review, and if a statute is neither *ultra vires* nor contrary to the Canadian Charter of Rights and Freedoms, the courts have no jurisdiction to supervise the exercise of this legislative power.[20] The response given by the SCC in this case shows that, when it comes to the federal spending power, political issues are often entrenched with more legal ones. Recent decisions of the Appellate Courts and the SCC have showed a certain consistency with the principles explained above.[21]

Because of the possibility of potential intrusions by the federal Parliament into provincial authority, the federal spending power remains one of the most controversial areas of federal

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[18] Hogg, *Constitutional Law,* § 5.3(c)

[19] See *Winterhaven Stables Ltd. v. Attorney General of Canada,* [1988], 53 D.L.R. (4th) 413. The issue in the case concerned the constitutional validity of a federal Income Tax Act and other spending statutes which were held *intra vires* the federal parliament as being direct taxation within a province. The AB Court of Appeals upheld the statutes on the basis of s. 91(1A) and concluded that, even if a statute affects matters of provincial competence, it does not amount to legislation in relation to it.

[20] See *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 525, at 85

[21] See *Syndicat national des employes de l'aluminium d'Arvida v. Canada (A.G.),* [2006] Q.J. no 12562. Here, the QC Court of Appeals confirmed that Parliament can intervene in a provincial field of jurisdiction through its spending power as long as the intervention is not an attempt to regulate the field.

jurisdiction. In the 1980s, when Premier Bourassa of Quebec was seeking reconciliation with Canada (at a time when relationship between Ottawa and Quebec were particularly tense), he announced that, in order for Quebec to accept the Constitution Act, 1982, one of the conditions was the limitation of the federal spending power.[22] Also, the Meech Lake Accord contained a provision that would have required the Government of Canada to provide reasonable compensation to provinces choosing not to participate in a national shared-cost program established by the federal government in areas of exclusive provincial jurisdiction, if the provinces carry on a program compatible with the national objectives.[23] The Charlottetown Accord would have contained a provision identical to that in the Meech Lake Accord, and would have left untouched the commitments of Canada set out in s. 36 of the *Constitution Act, 1982* (equalization and regional disparities).[24]

Despite the failure of both Meech and Charlottetown, the Government of Canada seems to be conscious of the complaints coming from provinces claiming that this federal spending power is too broad. In the 2010 Speech from the Throne, the Government affirmed that it will continue to respect provincial jurisdiction and restrict the use of the federal spending power.

e. Health

Health is another delicate issue in terms of division of powers. The *Constitutional Act 1867* does not contain a clearly defined jurisdiction, although traditionally health has been considered a subject falling within the legislative powers of the provinces.[25]

S. 92(7) of the *Constitution Act, 1867* reserves to the provinces the power to regulate the establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary

[22] Hogg, *Constitutional Law,* cit., par. 4(1)(c)
[23] See s. 7 of Meech Lake Accord
[24] See s. 16 of Charlottetown Accord
[25] See *Schneider v. British Columbia*, [1982] 2 S.C.R. 112

institutions in and for the province, other than Marine hospitals. By reading this provisions together with ss 92(13) (property and civil rights in the province) and 92(16) (matters of local or private nature in the province), provincial jurisdiction over health is rather broad.

At the same time, however, health is not seen as a monopoly of exclusive provincial jurisdiction.[26] Estey, J. explained that federal legislation in relation to health can be supported where the dimension of the problem is national rather than local in nature, or when a health concern arises in the context of a public wrong and the response is a criminal prohibition.[27] As a result, the federal Parliament can regulate health issues through its powers over criminal law matters, the p.o.g.g. powers, or the federal spending power.[28]

f. Taxation

The *Constitution Act, 1867* clearly divides the federal and legislative powers over taxation. S. 91(3) reserves to the federal Parliament the power to raise money by any more or system of taxation, whereas s. 92(2) reserves to the provinces the power over direct taxation within the provinces in order to the raising of a revenue for provincial purposes.

From the wording of these two sections, once again the feeling is that the Founding Fathers intended to put greater authority in the hands of the central Parliament. This power is construed as allowing the federal legislature to raise both direct and indirect taxes.[29] Provinces, conversely, can levy direct taxes only, within the province, and for provincial purposes. The clause "for provincial purposes" has rarely been used: once a province raises money, it can spend it however it deems it appropriate, even if the underlying purpose is federal. Therefore, the possibility to spend money

[26] *Renvoi sur la Loi sur la procréation assistée*, 2008, QCCA, 1167, §76
[27] See *Schneider,* cit.
[28] *Renvoi sur la Loi sur la procréation assistée,* cit., § 77
[29] However, this authority is reserved to Parliament only. The Executive does not have the power to raise taxes unless there has been a clear delegation in this sense by the Parliament.

implied in the last part of s. 92(2) greatly expands provincial powers over taxation to the point that scholars have compared this provincial "spending power" to the federal spending power.

g. Transport and communications

Transport and communication are two other subject matters where tensions between federal and provincial powers are strong. Pursuant to s. 92(10) of the *Constitution Act, 1867*, provinces have legislative jurisdiction over "local works and undertakings" but the same section excludes from provincial jurisdiction those works and undertakings connecting the province with any other province, or extending beyond the limits of the provinces (s. 92(10)(a)). By operation of s. 91(29) of the *Constitution Act, 1867*, such classes of subjects thus expressly excepted are brought under federal jurisdiction.

McLachlin J. explains the division of powers in this field in this way: "[P]rovinces have the right to control works and undertakings within their boundaries, including facilities related to the production of resources. Exceptionally, and only to the extent required to maintain interprovincial transportation and communication networks, the federal government, through s. 92(10)(a) has the power to regulate provincial works and undertakings. This interpretation is strengthened and confirmed by s. 92A."[30]

The SCC has moved towards a higher protection of provincial jurisdiction and affirmed that the preference for diversity of regulatory authority over works and undertakings should be respected, absent a justifiable reason that exceptional federal jurisdiction should apply, and the

[30] See *Westcoast Energy Inc. v. Canada (National Energy Board),* [1998], 1 S.C.R. 322 (McLachlin J. dissenting)

question whether an undertaking, service or business is a federal one depends in the nature of its operations.[31]

With regards to transport by land, provinces have jurisdiction to regulate traffic on provincial roads and highways (for example, provinces can set speed limits or other traffic regulations). But their legislative power cannot be used to restrict interprovincial traffic.[32] However, provincial regulation can apply to federally regulated undertakings if there is no impairment of the core of the activity (interjurisdictional immunity).[33]

Aeronautics is a field that has long been considered federal enclave. Constitutional justification comes from s. 91 of the *Constitution Act, 1867* (p.o.g.g. powers).[34] Similarly, transport by water (maritime law) is wholly federal.[35]

Radio-communications, on the other side, is an area falling completely within federal jurisdiction, although federal powers have been highly debated and some decisions of the SCC showed a split understanding of how, if at all, legislative powers in this field should be divided. The SCC has recognized that federal Parliament has exclusive powers to regulate the field regardless of the technology used (cable vision or coaxial cable). [36]

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[31] See *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53. Here, Rothstein J. for the majority held that an undertaking that performs consolidation and deconsolidation and local pickup and delivery service does not become interprovincial simply because it has an integrated national corporate structure and contracts with third party interprovincial carriers.

[32] For example, in *Winner* the province of New Brunswick enacted a legislation preventing a federally regulated transportation company to perform the activity of taking on and dropping off passengers, because this company was in direct competition with some local bus company. In terms of interjurisdictional immunity, the provincial enactment impaired the core of the federally regulated activity. See *Attorney General Ontario v. Winner,* [1954], AC 541

33 In *TNT Canada*, the Ontario Court of Appeals held that the ON Environmental Protection Law (which required special certificate of approval for the managing of hazardous substances) would apply to an interprovincial truck network. Because the provincial act did not impair the core of the federally regulated activity, the provincial law was applicable. See *Regina v. TNT Canada Inc.*, [1986], 37 D.L.R. (4th) 297

[34] See *Attorney General for Canada v. Canada Temperance Federation*

[35] See *Whitebread v. Walley,* [1990] 3 S.C.R. 1273

[36] *Dionne v. Quebec (Public Service Board),* [1978], 2 S.C.R. 191; *Capital Cities Communications Inc. V. CRTC* [1978]2 S.C.R. 141

Obviously, both telecommunication and inter-provincial transportation are greatly regulated at federal level. Although the application of the interjurisdictional immunity doctrine relaxes the federal monopoly, provinces seem to have troubles accepting this situation. Yet, it is fair to say that it would be unthinkable to have a scenario where aeronautics or interprovincial transportation by land would be regulated at provincial level. With regards to telecommunications, in particular, the Charlottetown Accord provided for negotiations between federal and provincial governments intended at agreeing on telecommunications and coordinate and harmonize their procedures of their respective regulatory agencies. As it is well known, the Charlottetown Accord failed, and provincial frustrations are left unresolved.

h. Criminal law

Criminal law is a very important area of competence for the federal government since s. 91(27) reserves to the Parliament of Canada the power to make laws in relation to criminal law and criminal procedure. Provinces only enjoy an ancillary jurisdiction pursuant to s. 92(14) (power to make laws for the administration of justice in the provinces, including the organization of provincial courts), and s. 92(15) (imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter).

Criminal law is relevant for the federal government not only for the powers attributed to it in criminal matters, but mainly because this federal jurisdiction can be used by the federal to make laws in areas traditionally reserved to provinces (like health or environment).

The SCC has upheld provincial laws having criminal nature, but only if penalties were imposed in respect of matters over which provinces have jurisdiction like streets, parks, etc,[37] or if provincial enactments were made in relation to property and civil rights in the province and only

[37] See *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)* [1987], 2 S.C.R. 59

incidentally affecting criminal law and procedure.[38] But at the same time the SCC has clearly stated that provincial power over criminal matters stemming from s. 92(15) is only ancillary and not as broad as federal jurisdiction pursuant to s. 91(27).[39]

i. Corporate and financial activities

S. 92(11) of the *Constitution Act, 1867* reserves to provinces the power to regulate the incorporation of companies with provincial objects. This is consistent with the general idea that whatever has local nature shall be regulated at provincial level.

The P.C. specified that a company incorporated in one province can exercise powers and rights outside the province. Continuing a trend that favoured the expansion of provincial powers, Viscount Haldane pointed out that the words contained in s. 92(11) preclude the grant of powers and rights in respect of objects outside the province, but they leave untouched the ability of corporations to accept such powers and rights if granted *ab extra.* [40]

S. 91 of the *Constitution Act, 1867* does not contain provisions in relation to the power for the federal to make laws for the incorporation of companies with objects other than provincial. For companies incorporated federally, this authority comes from the p.o.g.g. powers.[41] Banking (as well as incorporation of banks), on the other side, is a head of power expressly reserved to the federal Parliament by virtue of s. 91(15).

The power to make laws for the incorporation of a company is different from the power to regulate its day-to-day activity. Incorporation means creation of a company, bringing it to existence, conferring legal personality. Regulation of the activity of a company refers to the day-to-day ruling in

[38] See See *Chatterjee v. Ontario (Attorney General),* 2009 SCC 19 [2009] 1 S.R.C. 624
[39] See *Westerdorp v. The Queen,* [1983], 1 S.C.R. 43
[40] See *Bonanza Creek Gold Mining Co., v. The King,* [1916] 26 DLR 273
[41] See *Citizens Insurance v. Parson*, cit.

matters such as safety, consumer protection, etc. At provincial level, this power is granted by s. 92(13) – property and civil rights in the province.

j. Labour relations

The *Constitution Act, 1867* does not contain any specific provisions regarding labor relations. However, since *Parsons*, labor relations have been construed as a contract falling within provincial powers over property and civil rights, thus offering a very liberal interpretation of s. 92(13).[42] According to Beets J. (who once again shows his attitude to protect provincial powers), by way of exception Parliament may assert exclusive jurisdiction over labor relations if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.[43] Primary federal competence over a given subject can prevent the application of provincial law relating to labor relations only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.[44]

Regarding unemployment insurance, in the 1940s there was a modification of the *Constitution Act, 1867* by adding s. 91(2A) which brought into federal jurisdiction the power to regulate unemployment insurance. But until that date, unemployment insurance was still seen as provincial domain under s. 92(13) – property and civil rights in the province.[45]

3. Judicial interpretation of the division of powers

An analysis of Canadian federal system would be incomplete if we consider only the division of powers as stemming from ss. 91 and 92. Particularly interesting are also the decisions issued by the P.C., by the appellate courts and by the SCC. Because it belongs to the courts the authority to

[42] See *Citizens Insurance Co. of Canada v. Parsons*, cit.
[43] See *Montclam*, cit. Beetz J. cites *In re the validity of the Industrial Relations and Disputes Investigation Act,* [1955] S.C.R. 529 (the *Stevedoring* case).
[44] *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754
[45] See *Attorney General of Canada v. Attorney General of Ontario (Unemployment insurance reference),* [1937] AC 355

control the limits of the respective sovereignties, courts have always been concerned with the principle of federalism and have contributed to mould Canadian division of powers.[46]

Courts are the umpires of central and provincial legislative jurisdictions; therefore the decisions they have elaborated over the decades have been momentous in defining the scope of legislative powers for each level of government. Judicial review of legislation is the power to determine whether a law is valid (*intra vires*) or invalid (*ultra vires*) the powers of the body enacting it.[47]

The SCC has pointed out that the interpretation of legislative powers and how they interrelate must evolve and be tailored to the changing political and cultural realities of Canadian society. The definition and application of these powers and their interplay continue to be guided by the fundamental principles of Canadian constitutional order. Accordingly, the very functioning of Canada's federal system must constantly be readdressed in light of the fundamental values it was designed to serve.[48]

Courts have developed certain constitutional doctrines which have allowed managing the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. Among these doctrines, we count the "pith and substance", the "paramountcy" and the "interjurisdictional immunity."[49]

a. Pith and substance

The distribution of legislative powers between federal parliament and provincial legislatures set out in ss 91 and 92 of the *Constitution Act, 1867* gives legislative authority in relation to *matters*

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[46] *Secession reference,* cit., §56. It should be noted, however, that the Canadian Constitution does not provides a machinery for settling disputes about the distribution of legislative powers. It was the P.C. in the years immediately after 1867 that assumed the right to review the validity of legislation enacted by the Canadian legislative body. See Hogg, *Constitutional Law,* cit., § 5(5)(a)

[47] Hogg, *Constitutional Law,* cit., §15(1)

[48] *Canadian Western Bank v. Alberta,* [2007] 2 S.C.R. 3, § 23

[49] *Canadian Western Bank,* cit., § 24

coming within *classes of subjects.*[50] Classification of a law for purposes of federalism involves first the identification of the *matter* of the law, and then assigning it to one of the *classes of subjects* in respect to which the federal and provincial governments have legislative authority.[51] If the *matter* of the legislation at issue falls within the jurisdiction of the legislature that enacted it, the court will declare it *intra vires* and valid. Otherwise, it will be held *ultra vires* and invalid for violation of the division of powers.[52] A law's *matter* is its leading feature or true character, and this is called *pith and substance*.

Incidental intrusions into matters falling within the legislative power of the other level of government are proper and do not affect the validity of the law.[53] The rationale of the pith and substance doctrine lies on the ground that it is almost impossible for a legislature to exercise its jurisdiction over a matter without incidentally affecting matters falling within the jurisdiction of another level of government.[54]

Because courts are concerned with the *substance* of the legislation more than its *form*, they will invoke the *colourability doctrine* in cases where a statute bears the formal trappings of a matter within jurisdiction, but in reality it is addressed to a matter outside jurisdiction.[55]

The difficulty in identifying the *matter* of a statute is that many statutes have one feature coming within a provincial head of power and another coming within a federal head of power. This is called the *double aspect* doctrine. Therefore, subjects which in one aspect and for one purpose fall

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[50] Hogg, *Constitutional Law,* cit., § 15(4)
[51] See *R. v. Morgentaler,* [1993] 3 S.C.R. 463
[52] *Canadian Western Bank*, cit., § 26
[53] *Canadian Western Bank*, cit., § 28, citing *Global Securities Corp. V. BC (Securities Commission)* [2000]
[54] *Canadian Western Bank*, cit., § 29
[55] Hogg, *Constitutional Law,* cit., § 15(5)(g). For example, the SCC struck down a Newfoundland statute which expropriated the assets of a hydro-electric company in Churchill Falls, Labrador. Apparently, Newfoundland had the power to expropriate property situated within its borders, pursuant to s. 92(13) (regulation of "property and civil rights within the province"). Nevertheless, the SCC held that the *pith and substance* of the statute was to deprive the company of the capacity to fulfil a contract to supply electricity to Hydro-Quebec at below-market rates, and the nullification of the contract went beyond Newfoundland jurisdiction, since the contract created rights in Quebec. The statute was held invalid as a colourable attempt to interfere with the power contract. See *In Re Upper Churchill Water Rights* [1984] 1 S.C.R. 297. See also *Re v. Morgentaler*, cit.

within provincial jurisdiction of section 92 may, in another aspect and for another purpose, fall within federal jurisdiction of section 91.[56] The selection of one or the other feature as the *matter* of the statute will dispose of the case.[57] The double aspect doctrine recognizes that both federal and provincial legislatures can adopt valid laws on a given subject depending on the perspective from which the legislation is considered, i.e. depending on the various aspects of the matter in question.[58]

b. Paramountcy

If the *pith and substance* analysis helps to determine the constitutional *validity* of a law, the federal paramountcy doctrine assesses the *operability* of a statute. This doctrine recognizes that, in case of conflict between a federal and a provincial law, federal law prevails, and provincial law is rendered inoperative to the extent of the incompatibility.

The main difficulty in a federal paramountcy analysis consists in determining the degree of incompatibility needed to trigger the application of the doctrine. Indeed, a broad interpretation of the presumed incompatibility would expand the powers of the central government, but a narrower interpretation would give provinces more latitude.[59]

In *McCutcheon*, Dickson J. set the test for federal paramountcy: "[T]here would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no' (...) compliance with one is defiance of the other."[60] Therefore, the federal paramountcy doctrine will not be triggered in cases of mere duplication of norms at federal and provincial level. Valid federal and provincial legislations that are not conflicting can coexist (this is called *duplication* of law).

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[56] See *Hodge v. R.*, (1882-84) 9 App. Cas. 117, §30
[57] Hogg, *Constitutional Law,* cit., § 15(5)(a)
[58] *Canadian Western Bank*, cit., §30
[59] *Canadian Western Bank*, cit., §70
[60] See *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161

Conversely, if compliance with provincial legislation would frustrate the purpose of federal law - even if this does not entail a direct violation of the federal provisions - will be sufficient to trigger the application of federal paramountcy and render provincial law inoperative (incompatibility of purpose).[61]

c. Interjurisdictional immunity

The doctrine of interjurisdictional immunity stems from the recognition that the Constitution is based on an allocation of exclusive (not concurrent) powers to both levels of government, although these powers interact in real life.[62] The idea of interjurisdictional immunity arose in cases involving the applicability of provincial legislation to federally-incorporated and federally-regulated undertakings.[63] Pursuant to the elaboration of the doctrine made by the SCC in *Canadian Western Bank*, a provincial law would be inapplicable to the federally regulated subject (a work or undertaking, or a person in case of Aboriginal peoples) only if it "impairs" (and not just merely "affect") the "core" of the federal competence at issue on a case-by-case basis.

The SCC has cautioned that, while the Canadian federal structure justifies the application of the interjurisdictional immunity doctrine to certain federal activities, a broader application would create practical problems.[64] In fact, it might generate an unintentional centralizing tendency in

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[61] See *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121. This was also confirmed in *Rothmans, Benson & Hedges Inc. v. Saskatchewan* [2005] 1 R.C.S. 188. 2005 CSC 13. For example, in *Law Society of B.C. v. Mangat,* the federal Immigration Act provided that a party could be represented by a non lawyer in proceedings before the Immigration and Refugee Board. On the other side, British Columbia's Legal Profession Act provided that non lawyers were prohibited from practising law and appear before a federal administrative tribunal. The SCC pointed out that the purpose of the federal law was to establish an informal and easily accessible process, retaining inexpensive counsel who spoke the language and understood the culture of the parties. But this purpose would be defeated of only lawyers would be permitted to appear before the Board. Thus, compliance with provincial law would frustrate Parliament's purpose in enacting the Immigration Act, thus triggering a conflict in operation between federal and provincial law which rendered the provincial law inoperative in its application to proceedings before the Board. These doctrines have been confirmed also in the recent case of *Attorney General of British Columbia v. Lafarge Canada Inc.,* [2007] 2 S.C.R. 86

[62] *Canadian Western Bank*, cit., § 32
[63] Hogg, *Constitutional Law,* cit., § 15(8)(b)(c)
[64] *Canadian Western Bank*, cit., §42

constitutional interpretation. Because in the past the doctrine has been used to protect federal heads of powers from provincial intrusion, this effect would be incompatible with the flexibility of contemporary Canadian federalism.[65] The *Canadian Western Bank Court* clearly states that it does not favour an intensive reliance on the doctrine.[66]

4. Level of (de)centralization of Canadian federalism

Keith Rosen explains that "[n]othing in the concept of federalism (...) other than a vague notion that national government should be empowered to deal with national affairs and the state governments with local affairs, indicates how these powers should be divided. Hence, federal systems divide governmental powers differently. Even within the same country, and under the same constitution, divisions of powers shift and evolve."[67] Each federal system is unique and always evolving.

Although it is undisputed that Canada is a federal state, some commentators have observed that, according to the precise terms of the *Constitution Act, 1867,* the federal system is only partial because, at least on paper, the federal government retains sweeping powers which threaten to undermine the autonomy of the provinces.[68] We have already underlined that some federal powers are particularly contentious and overarching (particularly, p.o.g.g. and spending powers). Also, not only did the *Constitution Act, 1867* contemplated a very centralized system, but on several aspects provinces were actually subordinate to the centre.[69]

Determining whether Canadian federalism is on a decentralizing or centralizing course is not an easy task. The answer depends on several factors and on the perspective we decide to take when

[65] *Canadian Western Bank*, cit., §45
[66] *Canadian Western Bank*, cit., §47
[67] Keith S. Rosenn *Federalism in the Americas in comparative perspective,* (1994) 26 U. Miami Inter-American Law Review. 1
[68] *Reference re Secession of Quebec,* cit., §55. The SCC cites K.C. Wheare, *Federal Government* (4th ed. 1963)
[69] Hogg, *Constitutional Law,* par. 5(3)(a). For example, s. 90 gave the federal government the power to invalidate provincial statutes.

looking at the division of powers. In fact, the conclusion might be radically different if we examine the issue from a Quebec's (and maybe Alberta's) perspective or from Ottawa's standpoint.

From the Quebec's perspective, Canadian federalism is far from being one of the most decentralized in the world. Or, at least, decentralization is not guaranteed by the Constitution but is a concession of the central government.[70] At least theoretically, the federal government enjoys all the means to invade at will most of fields falling within provincial jurisdiction. In particular, the federal spending power, its powers over taxation and its declaratory power allows it to centralize powers with no limits. And if it does not take advantage of these almost unlimited powers, the reason is only political prudence. Therefore, provincial autonomy depends on the good will of the central government.[71]

I am not in a position to completely contradict such a strong statement. Maybe it is true that only political prudence is preventing the federal government to use all the powers constitutionally granted to it. But at the same time, it should not be disregarded that the SCC, as ultimate umpire of the Constitution, would probably not allow the federal government to go that far any more. We have already underlined how the decisions of the P.C. and the SCC have helped shaping Canadian federalism over the past century, although the approach used by the former was radically different than the latter. The P.C. has always proved to be consistent with the division of legislative powers and respected this faithfully. Lord Atkin framed the idea of "watertight compartments" whereby "the Dominion cannot (...) by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth (...) while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an

[70] See Brun, Tremblay, *Droit Constitutionnel,* Cowansville, QC, 2008., p. 434
[71] Brun, Tremblay, *Droit Constitutionnel,* cit., p. 434

essential part of her original structure."[72] This rigid interpretation of ss 91 and 92 was mitigated by the fact that the judges in the P.C. had a tendency to make their decisions favouring provinces and pushing back federal power. Therefore, although the division of legislative powers was strictly adhered to, the P.C. helped this process of decentralization by issuing decisions in favour of local powers.

On the other side, the SCC has been accused of being an exclusive federal creature[73] because the SCC has often adopted a federally-oriented approach especially during the 1970s. But most recent decisions of the SCC are showing a different trend. The SCC is showing a tendency to adapt the Constitution to the current Canadian political, economical and social situation. Binnie J. has recently stated: "The interpretation of the division of legislative powers and how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. Although the passage of time does not alter the division of powers, the arrangements of legislative and executive powers entrenched in the *Constitution Act, 1867* must be applied in light of the business realities of 2009 and not frozen in 1867. The current Canadian economy would be unrecognizable to the statesmen of 1867. A grown man is not expected to wear the same coat that fitted him as a child. Today's coat is of the same design, but the sleeves are longer and the chest is broader and the warp and woof of the fabric is more elaborate and complex."[74]

Similarly, the SCC has recently held that it discourages the resort to a federalist concept of proliferating jurisdictional enclaves (or interjurisdictional immunities) and favour, when possible, the ordinary operation of statutes enacted by both levels of government.[75] Although the doctrine is "neutral" or "reciprocal", jurisprudential application of the doctrine has produced asymmetric

[72] See *AG Canada v. AG Ontario,* page 554
[73] Brun, Tremblay, *Droit Constitutionnel,* cit., p. 411
[74] *Fastfrate,* cit. 89-90 (Binnie J. dissenting)
[75] See *Chatterjee,* cit.

results, being it invoked in favour of federal immunity at the expenses of provincial legislation.[76] Similarly, judicial doctrines of pith and substance, paramountcy, and interjurisdictional immunity offer interesting elements to assess the trend towards decentralization of Canadian federal system. The history of Canadian constitutional law has been to allow for a fair amount of interplay and overlap between federal and provincial powers. The current drift of the SCC is that, whenever possible, courts should favour the operation of statutes enacted by both levels of government,[77] thus saving statutes enacted at both levels of jurisdiction and maintaining a certain balance between the two legislatures.

Finally, it should be recalled that, differently from what happens in most federations, the recognition to provinces to secede from Canada is another element is support of the idea that Canadian federalism is much decentralized. The *Secession Reference* and the *Clarity Act* dictate the rules required for secession. Although unilateral secession is not allowed, and secession would require a constitutional amendment, still the possibility that this might happen is a confirmation of the higher powers granted to provinces.

Similarly, certain provinces are allowed to repel constitutional changes affecting their powers, rights, and privileges, thus moving provincial interests at a higher level.[78] The same compensation provision shows concern for controversial provincial matters in the area of education and culture. On the same level, there are other provisions of the Canadian Constitution that do not apply to all

[76] *Canadian Western Bank*, cit., §35, citing Hogg, *Constitutional Law,* cit., §15-34
[77] *Canadian Western Bank*, cit., §36 and 37
[78] S. 38(3) of the Constitution Act, 1982

provinces, thus acknowledging and recognizing that each single province has peculiar interests and needs that are different from the other provinces.[79]

5. Future changes in the division of powers

If tensions of French-Canadians nationalists are well known, western regionalism is also acquiring relevance. The former is based on a distinctive language and culture, whereas the latter is based on a different economic base of the four western provinces, whose economies depend upon the production of grain, wood, metal, oil, gas, and other natural resources. Because most of Canadian population is concentrated in Ontario and Quebec, federal policies have favoured manufacturing industries located in that area. Western Canadians have therefore invoked a reduction of federal powers (and an enhancement of provincial powers).[80] S. 92A was recently added having in mind the specific needs of some western provinces rich in natural resources. This provision mandates that provinces have exclusive jurisdiction over non-renewable natural resources (i.e. oil), forest resources, and electrical energy.

Also, proposals have been made to narrowly define or limit federal jurisdiction over p.o.g.g. powers and federal spending. But at the same time, it would be impossible to eliminate these powers altogether. The same identity of the state would be jeopardized if the federal government could not use its own money or legislate for the nation. Other proposals included the transfer to the provinces of some aspects of control over communications (especially cable TV), and marriage and divorce.[81]

We have already mentioned that the SCC has been accused of federal bias. These allegations could be mitigated through a change of the rules for appointment of Supreme Court Judges. Under

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[79] For example, s. 94 (uniformity of laws) and s. 97 (qualification of judges) of the Constitution Act 1867 do not apply to Quebec. A number of language provisions apply only to Manitoba, Quebec, and New Brunswick. See Hogg, *Constitutional Law,* cit., ∫4(5)
[80] Hogg, *Constitutional Law,* cit., par. 4(8)(a)
[81] Hogg, *Constitutional Law,* cit., par. 4(8)(b)

the present rules, provinces have no role in the selection of justices (although a pattern of regional representation has been maintained in the geographical origin of Justices). However, because the SCC decides constitutional disputes between federal and provincial governments a greater involvement at provincial level would help.[82]

In any event, Canada is a diverse country. Provinces greatly vary in size, wealth, and aspirations, which makes them often disagree on which objectives to pursue on first place. And if larger and wealthier provinces tend to push back federal intervention made through the spending power, smaller provinces heavily rely on federal funds for their survival.[83]

6. Conclusions

There is no absolute model of federation that can be applied universally. Federations have changed, and continue to change, with regards to the character and importance of economic and social diversities, their resources, etc...[84]

The *British North America Act* created a new Dominion under the name of Canada but did not create an independent state, and the federating provinces were all British colonies, although they enjoyed a certain measure of self-government in local affairs. The new federation however remained subordinate to the United Kingdom in international affairs and subject to imperial limitations in local affairs.[85] As a nation *in fieri,* it is understandable that the federal government reserved to itself broader powers, especially those having economic nature, considered of national interest. Coordination at central level was probably needed in order to build the country.

[82] Hogg, *Constitutional Law,* cit., § 8(4)
[83] Hogg, *Constitutional Law,* cit., par. 4(8)(b)
[84] Watts, *Comparaison des regimes federaux,* cit., 1
[85] Hogg, *Constitutional Law,* cit., § 3.1

But as outlined above, the analysis of Canadian federalism would be incomplete if we focus only on the division of powers as stemming from ss. 91 and 92 of the Constitution Act, 1867. The P.C. and the SCC have helped better define the scope of the division of powers, although these courts have shifted from an initial centrifugal to a more centripetal course, as it happens in many federal systems. But several elements lead to the conclusion that Canadian federalism is currently on a decentralizing course: the various doctrines adopted by the SCC (particularly, the interjurisdictional immunity); the pressure done by provinces on a limitation of federal powers like p.o.g.g. and federal spending, which might eventually lead to an amendment of the Constitution; or the possibility, however unlikely, that a province may secede, among others.