**1867** – Confederation and the BNA Act, 1867

Our journey in constitutional history starts here. The heads of power are enumerated under s. 91 and s. 92.

**POGG** – gap established  
**91(2)** - restricted

**1881** – Citizen’s Insurance Co. v. Parsons  
 [1881] UKPC 49, [1881] 7 A.C. 96

**Sir Montague Smith**

**Peace, Order, and Good Government**

*Parsons* established the gap-filling branch of POGG

“in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

Smith declared that the federal incorporation power arose from this gap-filling ability. POGG is default.

**91(2): Regulation of trade and commerce**

This section was restricted to:

1. International and interprovincial trade
2. General regulation of trade affecting dominion

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

**POGG** – gap reiterated

**1882** – Russell v. The Queen  
 [1882] UKPC 33, [1882] 7 A.C. 829

**Sir Montague Smith**

**Peace, Order, and Good Government**

Smith held that the CTA was a valid exercise of federal power under POGG. In essence, any law that could not be found to be allocated to the provincial heads of power under s. 92 must necessarily fall into the residual power granted to the federal government.

“The manner of bringing the prohibitions and penalities of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general and uniform concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it.”

**1883** – Hodge v. The Queen  
 [1883] UKPC 59, [1883] 9 A.C. 117

**Pith and Substance Analysis**

**Double Aspect Doctrine**

**Lord Fitzgerald**

**Pith and Substance Analysis**

Asking **(1)** what is the essential character of the law? And **(2)** does it relate to an enumerated head of power in section 91 or 92?

What is the essential character of the law?

* Look at purpose and legal effect of the regulation or law.
  + Purpose refers to what the legislature wanted to accomplish. It is relevant to determine whether the legislature was legislating within its jurisdiction or venturing into an area under provincial jurisdiction.
  + The legal effect refers to how the law will affect rights and liabilities.
    - E.g. in *Morgentaler*, the SCC found that, in substance, the legal effect was a criminalization of abortions.

“the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a **merely local character** for the good government of taverns… and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct.”

**Double Aspect Doctrine**

“subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91.”

Consequently, when a law has some overlapping characteristics between the two heads of power, it may still be valid.

**POGG** – concern established

**91(2) –** clarified

Doctrine of federal paramountcy

**December Notes:** The doctrine of federal paramountcy only applies to s. 91 and not POGG.

**1896** – AG Ontario v. AG Canada (Local Prohibition Case)  
 [1896] UKPC 20, [1896] A.C. 348

**Lord Watson**

**Peace, Order, and Good Government**

*Prohibition* established the national concern branch of POGG

POGG “ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92”

As an example, Lord Watson gives:

“Their lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

This branch of POGG is in **abeyance** until after World War Two. It is never used until then.

**91(2): Regulation of trade and commerce**

Dominion government did not have power to prohibit goods. Provinces did under 92(13).

“A power to regulate, naturally, if not necessarily, assumes unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation.”

**1922** – Board of Commerce Reference  
 [1921] UKPC 107, [1922] 1 A.C. 191

**POGG** – concern established

**91(2) -** clarified

**Viscount Haldane**

**Peace, Order, and Good Government**

The SCC, split 3-3, divided on this issue. The coalition led by Anglin pushed a POGG as Lord Watson interpreted. That is, a national concern branch. Duff, Indington, and Brodeur held that that branch was too broad and could potentially supersede the authority of the provincial legislatures.

**91(27) –** criminal law defined and restricted

Viscount Haldane held that POGG should only be used in one circumstance: the national emergency branch

“It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one.

**91(2): Regulation of trade and commerce**

Haldane held that this power was meaningless unless it was supporting another head of power under s. 91. It could not be used by itself to justify government action. Talking about *John Deere v Wharton*:

“that was because the regulation of the trading of the Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it. Where there was no such power in that Parliament… it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the Provinces.

**91(27): Criminal Law**

Robin Elliot: classic situation of the tail wagging the dog.

Criminal law was not of help in this matter. 91(27) only allows legislation “where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence.”

**POGG –** emergency branch established. Concern and gap thrown away

**91(2) –** new status as an ancillary power

**91(27) –** reiteration of Board of Commerce case

**1925** – Toronto Electric Commissioners v. Snider  
 [1925] UKPC 2, [1925] AC 396 (P.C.)

**Viscount Haldane**

**Peace, Order, and Good Government**

Viscount Haldane uses the platform to emphasize the national emergency branch of POGG. He says, “the mere fact that Dominion legislation is for the general advantage of Canada or is such that it will meet a mere want which is felt throughout the Dominion” will not make an Act valid.

Haldane justifies the ruling in Russell by saying that temperance was a national emergency back then.

“Their lordships think that the decision in *Russell* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginnings of s.91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell,* that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster.”

**91(2): Regulation of trade and commerce**

There is a reiteration of Haldane’s opinion in *Board of Commerce*:

“It is, in their Lordships’ opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces.”

**91(27): Criminal Law**

Haldane says, “It is obvious that these provisions dealt with civil right, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance. The Act is not one which aims at making striking generally a new crime.”

This is an example of an SCC ruling. It is important to notice the clear divide between the Anglin (pro-fed) and Duff (pro-prov) camps.

**1925** – The King v. Eastern Terminal Elevator Co.  
 [1925] SCR 434, 3 DLR 1; aff’g. [1924] Ex. CR 167

This is a rare case that was decided by the Supreme Court of Canada. Who the fuck thought it’d be a good idea to let British subjects make decisions. Anyways:

In the majority ruling, (1) POGG was denied as it was not a national emergency; and (2) 91(2) was denied as it was the direct regulation of elevators in modern-day Thunder Bay, which trenched upon 92(13). The Parliament of Canada could assume jurisdiction if it invoked its power with respect to works and undertakings under 92(10)(c). They subsequently did.

In the dissent, it was held that the Act could be upheld as a matter of national concern under POGG, citing *Russell*.

*What if this went to the JCPC?*

If this went to the JCPC, it is likely the majority ruling would have been upheld. The national concern branch of POGG was overruled twice before by Haldane in *Snider* and the *Board of Commerce case*.

**1925** – Proprietary Articles Trade Association v. AG Canada  
 [1931] UKPC 11, [1931] AC 310

**91(2) –** independent power returned to this head

**91(27) –** redefined and broadened

**Lord Atkin**

First, let’s establish how the *Board of Commerce Act, 1919* and the *Combines and Fair Prices Act, 1919,* are different from the *Combines Investigation Act, 1923*:

|  |  |
| --- | --- |
| ***Board of Commerce* and *Combines and Fair Prices Acts, 1919*** | ***Combines Investigation Act, 1923*** |
| * To investigate and restrain combinations, monopolies, trusts and mergers constituting a “combine”, and * To inquire into and enforce prohibitions against hoarding and profiteering. | * The investigation of alleged combines, * Creating and punishing the offence of assisting in the formation or operation of a combine * Reduction or abolition of customs duties which facilitate disadvantage to the public from an existing combine, and * Revocation of patents in certain cases * Facilitated the amendment of the *Criminal Code of Canada* by inserting s. 498 |

The latter act involved actual criminal punishments whereas the former act punished people for not following orders of the Board. The *Combines Investigation Act* essentially repeated the previous legislation, but did not employ the regulatory framework that was seen to be unconstitutional. They criminalized instead.

**91(27): Criminal Law**

Lord Atkin rejects Lord Haldane’s previous interpretation of criminal law in the *Board of Commerce case*. The only standard upon which criminal law is tested is whether there are penal provisions.

“Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?”

Criminal matters which are merely attempts to interfere with Provincial rights are still illegitimate.

**91(2): Regulation of trade and commerce**

Without the need to, Lord Atkin also shit on Haldane’s interpretation of 91(2) in the *Board of Commerce* case. He returned its independent power.

“Their lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgement in the Board of Commerce case under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgement. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter.”

**132 –** treaty power

**1932** – Reference re: Regulation and Control of Aeronautics in Canada  
 [1931] UKPC 93, [1932] AC 54

**POGG –** gap-filling power and national concern branches contemplated

**132 –** treaty power for empire treaties

Sankey does away with jurisprudence and looks at intent of drafters

**Lord Sankey**

**Peace, Order, and Goo d Government**

In the last few lines of the case, Sankey supports his logic of putting the treaty under s. 132 by saying that POGG furthers his logic. Namely that no specific words in either s. 91 or s. 92 refer to aeronautics and so must belong to Parliament. Additionally, aeronautics is a class of subject which has attained such dimensions as to affect the body politic of the Dominion. – *notice the parallel of language to Watson*

“There may be a small portion of field which is by not virtue of specific words in the *British North America Act* vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.”

**132: Treaty implementing power**

Dominion has jurisdiction over implementation of empire treaties.

**Sankey does away with jurisprudence**

Sankey uses a clever analogy of the range of sixty colours to illustrate how subsequent decisions can each affect the meaning of the Constitution. He says, “useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.” He emphasizes that although the Provinces agreed on a compromise to federate, the preservation of the rights of minorities was an important condition upon which they compromised. He says, “the process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the orginal contract upon which the federation was founded, or is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.” However, Sankey notes that “it must no less be borne in mind that the real object of the Act was to give the central government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a consistuent whole.”

**1937** – Canada v. Ontario (Labour Conventions)  
 [1937] UKPC 6, [1937] AC 326

**92(13) –** emphasize that labour relations is a Provincial matter

**132 –** treaty power ONLY for empire treaties

All Canadian treaties to be implemented according to division of powers

**Lord Atkin**

At this point in time, we no longer have the British treaties imposed upon us. The ship is sailing on rougher waters independently. Atkin starts with emphasizing the distinction between the formation of a treaty and the implementation. One is for executive branch, the other legislative.

**132 – Treaty implementing power**

It can’t be used. Canada is now an independent legal person.

* “For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.”
* “While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.”

There are three techniques used today to deal with this:

1. Federal state clauses – feds will do what they can to the extent that matters are under their jurisdiction, but no further guarantee
2. Reservation – feds don’t commit themselves to requirements to the extent that they don’t have jurisdiction
3. Consult extensively with the provincial governments ahead of time – but provinces don’t have to guarantee anything.

**92(13) – Property and Civil Rights**

As decided in *Snider*, labour relations falls to the provinces under this head of power. The totality of legislative powers must be used in order to implement the treaty. Both provincial and federal governments must cooperate.

**Peace, order and good government**

Atkin denies Watson’s understanding of POGG. That is, matters “attained such dimensions as to affect the body politic.” Directly contradicts Sankey’s use of POGG earlier. Atkin emphasizes how often the words of Watson have been used to justify federal encroachment of provincial powers. Atkin relies on the definitions of POGG set out by Haldane in *Snider* and *Board of Commerce*.

**1937** – BC v. Canada (The Natural Products Marketing Act)  
 [1937] AC 377, 1 DLR 691

**91(2) –** Parsons definition applied

**POGG –** national concern subsumed into national emergency

Provs and Feds were in agreement here yet the courts still heavily scrutinized them.

**Lord Atkin**

Atkin takes Duff’s summaries of 91(2) and POGG and agrees with them. This is an example of how Canada is a true federal state.

**91(2) – Regulation of Trade and Commerce**

Duff says that the feds cannot use 91(2) to regulate particular industries or trades. He says, “Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority” as in *Eastern Terminal Elevator*. Regulation under 91(2) must be general in nature.

91(2) can necessarily incidentally affect the heads of power under s. 92, but it cannot be used to pass sweeping regulation in respect of local trade.

**Peace, order and good government**

Gap-filling is A-OK.

Only “some matters” may attain such dimensions as to affect the body politic of the Dominion. It is subsumed into the national emergency branch.