A CHART FOR A CHARTER

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Constitutional revision is not a dead issue. It is only sleeping. A worldwide economic crisis has diverted attention in Canada as elsewhere to other problems for the time being. The necessity for solutions has not disappeared however. It had just been adjourned. The days of grace must not be wasted. Prophecy is a hazardous occupation but the whole course of our history justifies a confident prediction that the need to devise a satisfactory frame of government persists. In 1841 the Union of the Canadas[1], in 1867 the British North America Act[2] were responses to contemporary frictions. The decade of the 1960's saw a similar continuous frustrated groping.[3] What has been going on for a century will continue to go on until either the sources of discontent are eliminated or the nation dissolves.

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1 McArthur, *Lord Durham and the Union of the Canadas* in 4 SHORTT & DOUGHTY, CANADA AND ITS PROVINCES (1913); SHORTT, LORD SYDENHAM chapters XIII, XIV (1908); WITTKE, HISTORY OF CANADA 117 (1931).

2 Beauchesne, *Events Which Led to Confederation*, 10 CAN. BAR REV. 101 (1921).

3 The Report of the Tremblay Commission on Constitutional Questions in 1956 set out in detail Quebec's unhappiness with existing constitutional arrangements. The obsolescence of the fiscal arrangements made in wartime led to a 1962 report by the Royal Commission on Government Organization recommending an increased role for the Federal-Provincial Relations Division in the federal Department of Finance in connection with federal input to the Federal-Provincial Committee on Fiscal and Economic Matters, a continuing body which acted as secretariat to the periodic Federal-Provincial Conferences. Friction between claims of the two levels continued. In July 1967, Prime Minister Pearson announced an intention to hold a constitutional conference in early 1968, in November 1967 at the invitation of Premier Robarts the Confederation for Tomorrow Conference was held in Toronto and the provincial premiers agreed that the time had come for remodelling the constitution. In February 1968 the first meeting of the Constitutional Conference was held in Ottawa. This was followed at frequent intervals by other constitutional conferences of which some were in camera. The seventh and final meeting of the Constitutional Conference, June 14-16, 1971, resulted in the proposals known as the Victoria Charter, which proved abortive. An account of the later stages will be found in Special Joint Committee on the Constitution of Canada, Minutes of Proceedings and Evidence, May 28, 1970; Appendices A,B,C set out the conclusions reached at the first three meetings of the Constitutional Conference.

That latter must not happen. The final outcome, given the dimensions of the provinces, even the largest, would be either their formal absorption into the United States or more probably their survival as its feeble satellites.[4] Canadians, Americans, and indeed the world at large would be the losers. It is as I see it important for all that this continent not become a monolith, that there be an alternative to the American culture whatever its merits. Unless we get a more acceptable and a more serviceable constitution, that is bound to happen.

Preoccupation with immediacies marked the constitutional settlements of 1841 and 1867 and the tentatives of the 1960's. For that reason the former did not wear well and the latter would not have done so. We can leave to historians the shortcomings of 1841.[5] As for the 1867 Act, it is littered with spent provisions no longer of operational consequence.[6] Some of it rests on timebound assumptions like that about treaty making which gives no government in Canada explicit authority to pass laws for carrying into effect a treaty to which Canada is a party.[7] A very serious flaw is the overspecification of fields of competence to itemize currently sensitive particulars of the time, thus blurring the functional division of concerns between provinces and Dominion.

The merely obsolete items could be ignored as irrelevant even though inelegant. They do not themselves justify constitutional revision but if that is undertaken they should be scrapped in the interest

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4 Like all the other present-day imperial powers, the United States has turned to the client-state device instead of territorial expansion and classical colonialism, whose only clear post-World War I instance is Mussolini's Ethiopian adventure. (The trend from branching to franchising affords a curious analogy in business organization).

5 See WAITE, THE LIFE AND TIMES OF CONFEDERATION, c.4 (1962).

6 Of the 147 sections in the original B.N.A. Act 1867, only 79 continue to have any currency, 64 are spent, repealed or superseded by legislation contemplated by the Act itself and four are for practical purposes *functus officio* (e.g. sec. 6) ("The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec") or obsolescent, e.g. section 138 ("From and after the Union the Use of the Words 'Upper Canada' instead of 'Ontario', or 'Lower Canada' instead of 'Quebec' in any Deed, Writ, Process, Pleading, Document, Matter or Thing shall not invalidate the same").

7 Section 132 addresses itself exclusively to "Obligations . . . as Part of the British Empire . . . arising under Treaties between the Empire and . . . Foreign Countries". For an early statement of Canada's position, see TODD, PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES 199-218 (1880).

of tidying up the fundamental charter. What does make change imperative is the short-falls and overlaps traceable to preoccupation of the Fathers of Confederation with the issues of the 1860's. They were on the whole good statesmen but poor draftsmen. Unhappily a distant court totally unacquainted with either Canada or federal systems[8] had for decades the last say as to what they had wrought.[9] Parsing a basic instrument of government as it would a trust indenture, that court warped the fabric of relations between governmental levels. In 1949 the Supreme Court of Canada did become the Supreme Court for Canada.[10] Since then it has quietly repaired some of the damage.[11] But, restrained as they are by a proper respect for precedent, courts cannot escape the influence of past decisions or,[12] which is bad, of past verbiage in which decisions were swaddled. Only a new text will free them from those residues, a text which while retaining the leading principles on which confederation was based used fresh phrases to avoid implied carryover of stale cliches of construction.

My object is to propose provisions for incorporation in such a text. I shall confine myself to matters touching the allocation of legislative competence between the central and the member govern-

8 See the remarks of Edward Blake in a letter to one British Colonial Secretary quoted in Cannon *Some Data Relating to the Appeal to the Privy Council*, 3 CAN. BAR REV. 455 at 469 (1925).

9 *Nadan v. The King*, [1926] A.C. 482, [1926] 2 D.L.R. 177, [1926] 1 W.W.R. 801; cf. *Cushing v. Dupuy*, 5 App. Cas. 409 (1880); see 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 522 (1922). It was not until the adoption of the Statute of Westminister 1931, 22 Geo. V, c. 4 (U.K.) that Canada was empowered to eliminate appeals by leave, see *British Coal Corp. v. The King*, [1935] A.C. 500, [1935] 3 D.L.R. 401 and only in 1949 that she availed herself of that right. The meagre and inconclusive history of judicial review would seem to indicate that this was in accord with the contemporary intention, see STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 15-18 (1968).

10 Can. Stats. 1949 (2d sess.), c.37, s.3. See Laskin, *The Supreme Court of Canada: The First Hundred Years*, 53 CAN. BAR REV. 459 (1975).

11 See SMITH, THE COMMERCE POWER IN CANADA AND THE UNITED STATES, c.5 (1963); STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 28 (1968); but cf. Gibson, *—And One Step Backward: The Supreme Court and Constitutional Law in the Sixties*, 53 CAN. BAR REV. 621 (1975).

12 "A stock of juridical conceptions and formulas is developed, and we take them, so to speak, ready made." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 47 (1921), and see id. 19-20; see also STONE, THE PROVINCE AND FUNCTION OF LAW 196 (1946); cf. 1 GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 51 (2d ed. rev. 1954) ("Sans doute, dans sa mise en oeuvre, nous somme dominés, à notre insu, par l'autorité et la tradition et si je puis dire par cette hérédité professionnelle, qui nous enveloppe et nous etreint, comme une sorte de tunique de Nessus"); Livingston, *Abolition of Appeals from Canadian Courts to the Privy Council*, 64 HARV. L. REV. 104 at 111-112 (1950).

ments. They do not exhaust the catalogue of useful revisions. Nor can I here deal exhaustively even with them. I hope sometime to range more widely and delve more deeply but for now must attempt a simple outline of an alternative formula dealing with this core question of federalism. Even that demands a comparison with the provisions, notably[13] sections 91 and 92 of the British North America Act, which would be replaced. In that connection, some capsule comment on how existing provisions have worked and what changes and continuities may be anticipated under the alternative formula will be undertaken.

The permanent distinctive features of Canada have been her geography and her diverse societies. Ours is a vast land with a marginal location and a small population.

A political entity to play a part in the family of nations and, more important, to enjoy more than a mere subsistence economy needs a minimum critical mass. This both presumes and allows a common authority with the capacity to marshal human and material resources so that all contribute to and all share in the pool. The concentrations of private power consequent on our modern market economy can only be matched and mastered by political centers of comparable magnitude. Societies being like physical bodies subject to the laws of gravity, resistance to the pull exerted by a huge nearby mass depends on the exertion of a counterforce; the relevance of this for Canada is evident. Whether the united strength of Canada's people can suffice to meet the challenges of the other power structures, foreign or domestic, actual or potential, which circumstance our life has been doubted by some. In any event only such united strength would seem adequate. The minimum appropriate dimensions of federal power are determined by that consideration.

The imperatives of physical and economic geography tell in one direction, those of history and mores in another. The two solitudes label oversimplifies the reality it dramatizes. Besides Quebec's, there are some four to ten, depending on how one looks at it, regions in Canada with their own cultures, their own patterns of life and values, even of speech. The assumption latent in much that has been said and done is that Canada is just Ontario writ large. That is wrong. Even a brief visit to Victoria and Corner Brook — and many places in between — would prove that. The world over, even national and in a still greater degree regional traits have been blurred. Canadians have not escaped. Yet they are by no means homogenized. Although even within provinces accepted ways of behaving and thinking differ

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13 Sections 93, 94A, 95 and 96 to 101 inclusive would also be affected by the proposals made in this paper.

among sections, the differences are smaller than in the country as a whole. The more a central authority undertakes to impose a common standard on the relations and conduct of individuals in the ordinary affairs of daily life, the more a sense of frustration with the institutions of government grows. To avoid endemic discontent, power over such matters must be dispersed amongst power centers having at least a rough correspondence with the diverse social milieux. That variety of regional social attitudes is a blessing to be preserved and promoted.

The disparity in material resources is on the other hand a curse. The 1867 Act tried to do something about it but with only ephemeral success because the static solutions proposed became obsolete over time.[14] It has never ceased to inspire agitation and legislation.[15] To urge a uniform income level throughout Canada would be chimerical. If one were realized it would more likely be a swamp than a plateau. But there can be no happy partnership between plutocrat and pauper. Depressed areas are a drain on the national vigour. Their elimination is a legitimate, even an imperative national concern.

These three sets of conditions — the need for consolidating a certain amount of power in order to command respect in the economic and the international systems complicated as it is by our large area and relatively small population, the distinctive sense of identity of the various regions, the uneven distribution of wealth — are the background factors to reckon with in structuring a workable division of functions between the provincial and the federal levels. Indeed that would appear to have been the basic premise of the 1867 Act.[16] But it was an inarticulate premise. A random listing of

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14 Notably by sections 118 and 119, the former calling for annual lump sum and per capita payments of fixed amounts to each confederating province, the latter establishing a supplementary payment to New Brunswick for ten years. Lapse of time put an end to 119. A revised schedule of payments to the provinces was substituted in 1907 for that of 118 and the whole arrangement was repealed in 1950, 16 Geo. VI, c.6 (U.K.) and a different arrangement of financial subventions to the provinces of more flexible character substituted. On the significance of the financial arrangements as an inducement to Confederation, see Wallace, *Albert Smith, Confederation and Reaction in New Brunswick 1852-1882*, 44 CAN. HIST. REV. 285 (1963).

15 See MALLORY, THE STRUCTURE OF CANADIAN GOVERNMENT 358-359 (1971).

16 The "Toronto School" of historians has stressed the views of Upper Canadians active in the movement for Confederation which looked to a powerful central government and rather insignificant provincial fields of competence. See CARELESS, CANADA: A STORY OF CHALLENGE, p. 255 (1953); MARTIN, FOUNDATIONS OF CANADIAN NATIONHOOD, p. 339 (1955). Quebec writers take a different view, see 2 GROULX, HISTOIRE DU

minutiae misled later generations into approaching that Act not as a system but as a mere heap of items. Like it, what I would propose grounds itself on those three factors; it tries to bring into clearer relief their importance as the shaping principles of our national consensus.[17]

How the proposed and the existing schemes relate to those conditioning circumstances and to each other will be examined after a statement of the content of the former. The terms of the British North America Act about federal and provincial legislative powers respectively presumably are already familiar enough to my audience.

This then is suggested as a successor to section 91:[18]

Parliament may make laws about

1. The structure and functioning of the economy including but not limited to

a. money

b. credit institutions

c. transportation and communication facilities and services of substantial significance to more than one province.

d. labour, capital and commodity transactions having substantial effects on their respective markets in more than one province.

e. industrial and intellectual property.

CANADA FRANCAIS 283-289 (1960); 2 RAPPORT DE LA COMMISSION ROYAL D'ENQUETE SUR LES PROBLEMES CONSTITUTIONNELS (Commission Tremblay) 152-156 (1956). That the latter more clearly reflects contemporary sentiment is evidenced by a letter from Arthur Gordon to Edward Cardwell, written immediately following the Charlottetwon Conference, in which he notes the wish of the Canadian delegates that "all general legislation should be dealt with by, and all undefined powers of legislation reside in, a central Legislature . . . whilst the local assemblies were to be allowed to sink to the position of mere municipalities", which wish he shared but noted that they did not "harmonize with the interpretation" in the Martimes or by Lower Canadians, who wanted "the preservation of the existing Legislatures[;] a central Parliament to which the consideration of some few topics of general interest are to be confided under vigorous restraints, prompted by a jealous care for the maintenance of Provincial independence", quoted in 38 CAN. HIST. REV. 108-9 (1967).

17 "Il faudra cette fois, au lieu d'agir au petit bonheur, prendre le temps de réfléchir et de concevoir un régime fédéral valable dans lequel les régions sauront quels sont leurs droits et obligations et dans lequel l'Etat federal sera non pas faible, mais fort . . ." Jean Rey, *La vie politique* REVUE DES DEUX MONDES, Nov. 1975, p. 309. The remark, made in reference to Belgium, is equally applicable to Canada.

18 Except for sec. 91(24) "Indians and lands reserved for the Indians". Which is the proper level of government to deal with this would seem to be a matter as to which the wishes of the Indians (and the Innuit) themselves, if they can be ascertained, would seem to deserve perhaps not controlling but certainly substantial weight.

2. Abuses of the natural environment having substantial consequences in more than one pronince.

3. External affairs including the enforcement of the provisions of treaties made under section ( ).

4. The raising of money by any mode or system of taxation.

5. Subject to the provisions of this Constitution, the organization and operations of the federal government.

6. Except as provided by section ( ), the public debt and property.

7. The government of areas within Canada lying outside the boundaries of any province and of the National Capital Territory as defined in Schedule ( ).

8. Defense against war or insurrection.

To complete the statement of Parliament's powers would be added the following two new sections:

The power to make treaties is federal. It is co-extensive with the power of Parliament to legislate under (the preceding) section.

Federal moneys may be used for carrying out laws in relation to the powers granted to or recognized in the federal government by section ( ) and otherwise only as directed by the Canadian Economic Council except with the unanimous concurrence of the Provinces.

Section 92's replacement would read as follows:

Each provincial legislature may make laws operative within the Province as to anything not assigned by Section ( ) to Parliament as qualified by Section ( ). This power extends but is not limited to laws dealing with

1. The constitution of the Province.

2. Municipal and local authorities.

3. The raising of money by any mode or system of taxation.

4. Civil and criminal law and procedure without prejudice to the power of Parliament to provide for carrying out measures enacted in the exercise of powers given it by this Constitution.

Finally, an additional section to specify the relation between federal and provincial laws would read:

Federal laws are paramount except that as regards matters specified under subsection (1) paragraphs (c) and (d) and under subsection (2), of section ( ), if all relevant provinces have parallel provisions, the provincial law shall apply.

The marked change in language is deliberate. The object is to let and even make Canadian judges apply Canadian fundamental law to fit the Canadian setting without deference or indeed much reference to former utterances.

Yet the changes obviously go far beyond the merely verbal. I believe and hope to show that what is retained exceeds what is revamped. In large part a re-affirmation amounting on occasion to a revival of 1867's substance is sought. That attempt at revival, however, undeniably entails changing some things that were written into that Act and more that have been read into it. It extends both to details and to the general scheme.

The global pattern is brought into sharper relief in three main respects.

One gives express though qualified content to the paramountcy principle. When federal enactments and independently valid acts of the members overlap, other federal constitutions direct that the latter must give way.[19] That result, broadly essential to a functioning federalism, is reached here too but as a result of judicial construction[20] rather than clear text.[21] One of the new sections makes it explicit but adds flexibility not present in the all-or-nothing version current both in Canada and elsewhere. For those cases where the existence of federal competence is expressly conditioned on a problem affecting more than one province, a consensus of the provinces affected would have overriding effect. For this to happen, all of those affected must agree. Parallel action by some but not all affected provinces would not do. Since the qualification does not refer to the clause about external affairs, federal legislation bearing on international aspects would always govern. Identification of the relevant provinces and correlation of their acts with federal enactments can still raise questions calling for judicial settlement. They should be no more troublesome than those now present about the fuzzy contours

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19 See, e.g., COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT, sec. 109; BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY, Art. 31; CONSTITUTION OF INDIA, Art. 251; CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, Art. 133; U.S. CONSTITUTION, Art. VI, c.2.

20 "(Although) the British North America Act contains no provisions declaring that the legislation of the Dominion shall be supreme, as is the case in the constitution of the United States, the same principle is necessarily implied in our Constitutional Act, and is to be applied whenever, in the many cases which may arise, the federal and provincial legislatures adopt the same means to carry into effect distinct powers." *Hudson v. South Norwich*, 24 S.C.R. 143 at 149 (1895) (per Strong, C.J.); see *A.G. Can. v. A.G. B.C.*, [1930] A.C. 111 at 118.

21 The Quebec Resolutions did provide, "45. In regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede those made by the local Legislature, and the latter shall be void so far as they are repugnant to, or inconsistent with the former." During the unrecorded discussions in London with Colonial Office officials leading up to the introduction of the British North America Act, it disappeared except for a truncated retention in connection with agriculture and immigration which had under the Quebec Resolutions been federal but which became concurrent powers but with the qualification that "any Law of the Legislature of a Province . . . shall have effect . . . as long as and as far only as it is not repugnant to any Act of the Parliament of Canada". A curious clause of the British North America Act 1964, 12-13 Eliz. II, c.73 (U.K.) granting Parliament power to legislate old age pensions, etc., provides that "no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter" thus reversing the usual operation of paramountcy in the special context.

of paramountcy.[22] In recognizing the general principle of federal supremacy, the proposal is for the most part a codification of established doctrine.

That is not so of another primary feature. The substitute for section 92 would clearly give residuary power to the provinces and limit federal authority to what is expressly stated. The 1867 Act is equivocal about residuary power.[23] A former judicial tendency to attribute it to the federal domain[24] seems no longer to command assent.[25] Instead section 91's "peace, order and good government of Canada" formula and section 92(16) are read together to bifurcate it. The arrangement is almost unique. Most federal constitutions place it all in one or the other level. Ideally the Canadian type which looks to the relative weight of truly national and of more local concerns *is* ideal. In practice it requires a sublety of evaluation that may have been unreasonable to expect and that certainly was not forthcoming.[26] This it is that leads to the suggestion of resort to the workable though worse precedents elsewhere of picking a single recipient.

Why choose the provinces instead of the Dominion? That question goes to the very heart of the problem as to the kind of political

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22 The problem is not as to the consequences when paramountcy applies — it suspends the operation of provincial statutes without invalidating or annulling them — but as to the situations where it applies, a question of the nature of the relationship between the operative terms of the measures. See Laskin, *Occupying The Field; Paramountcy in Penal Legislation*, 41 CAN. BAR REV. 234 (1963); Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada*, 9 McGill L.J. 185 (1962-3).

23 A resolution for expressly giving residual powers to the provinces was rejected in the Quebec Conference, see CREIGHTON, JOHN A. MACDONALD, THE YOUNG POLITICIAN 378-380 (1952) but the Conference refrained from moving to state them as belonging to the Dominion, so that the matter was left dangling.

24 See *Re Initiative and Referendum Act*, [1919] A. C. 935, 48 D.L.R. 18, [1919] 3 W.W.R. 1; *Fort Frances Pulp & Paper Co. Ltd. v. Manitoba Free Press Co. Ltd.*, [1923] A.C. 695 at 705, [1923] 3 D.L.R. 629 at (dictum); cf. *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, [1932] 2 D.L.R. 81, [1932] 1 W.W.R. 563 (*semble*); see also, O'Connor, *Report to the Senate of Canada on the B.N.A. Act*, annex 1, pp. 60, 61 (1939).

25 "Head 16 contains what may be called the residuary power of the Province". Reference re Farm Products Marketing Act, [1957] S.C.R. 198, 7 D.L.R.2d 257 (per Rand, J.). See Report, Special Joint Committee on the Constitution of Canada, c.18 (1972); but see DAWSON, THE GOVERNMENT OF CANADA (4th ed, Ward) 89-91 (1970). Cf. *The King v. Sharkey*, 79 C.L.R. 121 (1949) discussing the limits on the application of an identical phrase in the Australian Constitution; note especially the observations of Latham, C.J. at pp. 137, 138.

26 See Abel, *What Peace, Order and Good Government?*, 7 WESTERN ONTARIO L. REV. 1 (1968).

association not simply that we should have but that we can maintain. Notions about what should be often only reflect unanalyzed emotions — fears of size, of remoteness, greater trust in one's near neighbours than in "those others". But, though these may have influenced my choice unwittingly, its conscious aim is to give each level of government powers adequate but not excessive for satisfying the essential conditions of living together. These, to repeat, are an effective presence in the economic and international arenas, a regional diversity of life styles, and adjustments to correct the uneven distribution of material resources. The last entails the creation of wholly new mechanisms. I have developed a plan for one, exposition of which must await another occasion but which is congenial to provincial residuary power. The first two essential conditions are not merely consistent with, they are dependent on that allocation. The phrase "peace, order and good government" disappears with its deceptively alluring ambiguity. The powers specified for the federal government include, however, most areas where it was given any effect[27] and some where its application is problematic.[28] They cover the management of the economy and of external relations comprehensively and more clearly than is now the case. All else is left to the provinces. Theirs is the determination of policies for Canada's plural societies, the sociologist's Canada, as contrasted with polices for Canada as a market, the economist's Canada.

What is envisaged basically resembles the European Common Market as contemplated by its founders plus attributes incident to international personality. A weaker federal government could not deal with the related national needs. A stronger one would threaten diversity of cultures and thereby hazard either the breakup of the confederation or high-handed imposition of unshared values on a sullen population. The possession of power seems always to invite its exercise and tempt its extension. A central government should have just enough to face up to independent power centres external to the political system. To permit continuing co-existence of central and member spheres of competence, residual power must be dispersed. If concentrated, its holder winds up the monopolist of public policy, whose implementation has always finally spawned authoritarian regimes. Even giving the residuary power to the members has not guaranteed their vitality.[29] But to bestow it on the central government would foredoom them.

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27 For a resumé of the principal areas of application, see LASKIN'S CANADIAN CONSTITUTIONAL LAW 191 (4th ed. rev. Abel) (1975).

28 See *Interprovincial Co-operatives Ltd. v. The Queen*, 53 D.L.R. 3d 321 (1975), (S.C.C.).

29 "There are today, few, if any, governmental functions performed by the states that are not subject either to the direct control of the national government or to

Along with precise formulations for paramountcy and residuary power, a third major structural innovation is the systematic grouping of itemized powers. There was, I have argued elsewhere,[30] a pattern hidden in the arrays of 91 and 92. The initial obscuring clutter was aggravated by the erosion of original connotations as they were rubbed down by *stare decisis*. [31] The classes of subjects have been seen not as the family groups they are but as isolates.[32] The placement in 91 of a few whose closer kinship was with 92's members facilitated such a disjunctive reading. The nominate spheres of control are rearranged under my proposal to eliminate static. They are focussed to emphasize how they team together toward the goals set by the conditioning circumstances of the Canadian scene. Thus recast, they invite application as a set, not as rivals.

Given these parameters of purpose and general structure, what functions are appropriately federal and what ones appropriately provincial? That question calls for an examination of the particulars, present and projected. Perforce perfunctory, it still should indicate how the changes would bear on existing law.

Most of the powers proposed for Parliament are specified and in terms special to it. Fewer of the provincial list are. Their having the residuary power dispenses with much elaboration.[33] With still

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the possibility of pre-emption by the national government. The concept of separate sovereignties within this country is largely a matter of history". Kurland, *The Supreme Court 1963 Term*, 78 HARV. L. REV. 143, 163 (1964); accord, *South Carolina v. Katzenbach*, 383 U.S. 301, 358, 15 L.ed. 2d 769, 804, 86 S.Ct. 803 (per Black, J. dissenting). The commerce clause and the due process clause between them have almost totally eclipsed the Tenth Amendment. Of the many recent decisions that could be cited, I mention only *Fry v. U.S.*, 44 L.ed 363, 95 S.Ct. 1975 (state employees' salaries subject to federal legislation); *Perkins v. Matthews*, 400 U.S. 379, 27 L.ed. 476, 91 S.Ct. 431 (extension of municipal boundary). See also text and note 83.

30 See Abel, *The Neglected Logic of 91 and 92*, 19 U. of T.L.J. at pp. 499-506 (1969).

31 STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 155-156 (1968).

32 The approach has been pervasive. Its full effect can be appreciated only by an examination of the complete pattern of constitutional decision but is illustrated by the technique of analysis in, e.g., *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, [1949] 1 D.L.R. 433 and *Reference re Alberta Statutes*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81.

33 The United States Constitution specifies no state powers at all, its only reference to them being limitations on their exercise imposed by Article 1, section 10. The residuary power was assumed to be with the states without express mention in the original Constitution, being inserted by the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." This Amendment

others added, virtually all those now existing continue to exist. Consideration of their fate is postponed for the moment in favour of attention to two items as to which comparable authority is given both levels.

For one, "The raising of money by any mode or system of taxation", the language of 91(3) has been borrowed.

The federal taxing power is in itself unaltered.[34] It may well be exercised differently because the conjoint operation of successor 91(6)[35] and the new section to which it refers channel significant parts of federal tax revenue to provincial treasuries. However, Parliament remains as free to tax as ever.[36] It must be to play its role as monitor of the economy.[37] Post-Keynsian thought has clearly accepted fiscal

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was not regarded, however, as doing more than was implicit in the original, see 5 WRITINGS OF JAMES MADISON (ed. Hunt) 387-388 (1904) (speech on introducing the motion for the first ten amendments).

34 For a somewhat dated discussion of its scope, see MacDonald, *Taxation Powers in Canada*, 19 CAN. BAR REV. 75 (1941). Questions would still remain whether a measure in form of a tax was really such or was a disguised regulation. Compare *In re Insurance Act of Canada*, [1932] A.C. 41, [1932] 1 D.L.R. 97, [1931] 3 W.W.R. 689 with *Readers Digest Assoc. (Canada) Ltd. v. A.G. Can.* (1965), 59 D.L.R. 2d 54, with it being sustained if the former and, if the latter, when, but only when, the regulatory power exercised is independently possessed by the Dominion, see *A.G. B.C. v. A.G. Can.*, [1924] A.C. 222, [1923] 4 D.L.R. 669, [1923] 3 W.W.R. 1249.

35 The matter to which this provision addresses itself might have been left, comparably with what is proposed with reference to the provinces, see infra. notes 58, 59, to fall within the coverage of the subsection immediately preceding, were it not for the need to make explicit the limitation on the use of public property, a limitation which would not have a provincial parallel.

36 That freedom, as well as that of the provinces, is limited by section 125 which provides that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation". No change in that respect is proposed. While a province may authorize taxation of property it or its agencies own, see *Re Taxation of University of Manitoba Lands*, [1940] 1 D.L.R. 579, [1940] 1 W.W.R. 145, and while the immunity may be waived or may be withheld from Crown corporations, cf. ASHLEY & SMAILS, CANADIAN CROWN CORPORATIONS 16 (1965), the American doctrine allowing one state to tax another's property, see *Kansas ex rel. Taggart v. Holcombe*, 85 Kon. 178, 116 p. 251, is excluded, wisely it is submitted.

37 "Dans un système caracterisé par l'instabilité économique le gouvernement fédéral ne peut plus considérer la taxation uniquement comme une source de revenus; elle devient avant tout un instrument de contrôle économique en vue de la stabilité. Dans un pays qui veut éviter l'inflation et les crises, elle est un moyen indispensable, car elle contribue très efficacement à décourager ou à stimuler l'activité du secteur privé . . . si la population canadienne désire que son économie démeure aussi libre que possible, il faut que le gouvernement fédéral, en assumant un rôle prédominant dans la lutte contra l'instabilité économique retienne tous les pouvoirs de taxation que lui reconnait présentement la constitution." LAMONTAGNE, LE FEDERALISME CANADIEN 255 (1954); *accord*,

policy as a critical component in the control of economic activity.[38]

Provincial power, however, would shed the condition that taxes be direct.[39] Some detours around that stumbling block have indeed been allowed[40] but other provincial revenue measures have tripped over it.[41] With the terms of section 121 left untouched,[42] nothing of value seems lost by elimination of the directness requirement.[43] As for the other main limitation on provincial taxing, that it be "within

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ONT. ADVISORY COMMITTEE ON CONFEDERATION, BACKGROUND PAPERS AND REPORTS 307 (accepting as a "basic postulate" "the continuing need for the retention of effective fiscal power by the federal government, in order that such powers be available to promote stability, growth and other national economic objectives") (1967).

38 MEADE, THE CONTROLLED ECONOMY, c.XXIII (1971); ROLL, THE WORLD AFTER KEYNES 68-71 (1968); *but cf.* GALBRAITH, AMERICAN CAPITALISM 83 (1952).

39 B.N.A. Act, sec. 92(1). The criteria of directness or indirectness are John Stuart Mill shiftability, *Cotton v. The King*, [1914] A.C. 176, 15 D.L.R. 283, 5 W.W.R. 662; see *Bank of Toronto v. Lambe*, 12 App. Cas. 575 (1887) plus history, *Halifax v. Estate of Fairbanks*, [1928] A.C. 117, [1927] 4 D.L.R. 945, [1927] 3 W.W.R. 493. This differs from the line drawn under the United States Constitution, see *Hylton v. U.S.*, 3 U.S. 171 (1796), where the term "direct" is also used in connection with taxation, Art. I, sec. 9, cl.4, but for a different purpose than in Canada. There is no similar constraint on either the states or the Commonwealth under the Australian Constitution.

40 See, e.g. *A.G. B.C. v. Kingcome Navigation Co.*, *[1934] A.C. 45*, *[1934]* 1 D.L.R. 31, [1933] 3 W.W.R. 353; *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 4 D.L.R. 81, [1943] 3 W.W.R. 113.

41 See, e.g. *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639; *Provincial Treasurer of Alberta v. Kerr*, [1933] A.C. 710, [1933] 4 D.L.R. 81, [1933] 3 W.W.R. 38.

42 The section calling for the admission "free" into each province of "Articles of the Growth, Produce or Manufacture" of other Provinces is aimed at preventing internal trade barriers. Its proscription is not limited to taxation nor indeed to provincial legislation, see *Murphy v. C.P.R.*, [1958] S.C.R. 626, 15 D.L.R. 2d 145, but so far as the latter is concerned, the Dominion's "trade and commerce" power is sufficient to prevent such action without invoking section 121, see *A.G. Manitoba v. Manitoba Egg and Poultry Assoc.*, [1971] S.C.R. 689, 19 D.L.R. [3d) 169, [1971] 4 W.W.R. 705 and the successor power in the proposed draft should be equally effective, unless indeed the exporting and importing provinces concurred on a barrier, in exercise of their overriding paramountcy grant. It would seem advisable however to retain it both to exclude that as a legitimate matter for provincial concurrence and also to exclude federal interprovincial barriers.

43 Articles 98 and 99 of the Economic Community Treaty speak of "turnover taxes, excise duties and other forms of indirect taxation" but in a context of authorizing the Commission and the Council to take steps against member states erecting hurdles to trade exchanges amongst themselves, see MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 105 (1972) such as are here already fully outlawed by Section 121.

the Province", the introductory sentence of new 92, authorizing provincial legislation "operative within the province" preserves its general content. It gives some leeway for re-examination of the older authorities[44] depending on what effect the courts see fit to give the word "operative". "In order to the raising of a revenue for Provincial purposes" has been invoked seldom and then unhappily.[45] There is little reason for depriving provinces of taxation as a form of regulatory device.[46]

Also, both Parliament and the provinces are given authority with respect to the organs of government at their respective levels.

Curiously the 1867 Act[47] gave Parliament no general power[48] to provide or prescribe machinery of government at the federal level. A

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44 Thus, with operation rather than location as the touchstone, the courts could take a fresh look at the legitimacy of death duties unembarrassed by the intricate and artificial rules attempting to assign a "situs" to intangibles, illustrated by the authorities referred to in LASKIN'S, CANADIAN CONSTITUTIONAL LAW (4th ed. rev. Abel 1975), c.X, sec. 4.

45 See *Russell v. The Queen*, 7 App. Cas. 829 at 837 (1882) ("The Act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to diminish or destroy revenue . . .") The observation was made in connection not with 92(2) but with the identical phrase in 92(9).

46 Revenue-raising purpose and whether a measure is a "tax" are obviously related. If intended revenue production is an essential ingredient of a "tax", a substantive test, taxing power cannot support an enactment which aims to discourage rather than to promote revenue-enhancing activity. If the device of imposing a pecuniary exaction on designated circumstances or events, a formal test, is critical, taxing power would allow its use regardless of its objective. The much quoted but essentially empty attempt at definition by Duff, C.J. in *Lawson v. Interior Tree, Fruit and Vegetable Committee*, [1931] S.C.R. 357, [1931] 2 D.L.R. 193 gives no guidance; the treatment of the forest protection fund levy on timberland owners in *A.G. B.C. v. Esquimalt & Nanaimo Ry.*, [1950] A.C. 87, [1950] 1 D.L.R. 305, [1949] 2 W.W.R. 1233 as a tax because "imposed compulsorily by the State and recoverable at the suit of the Crown" seem to reflect the formal test; and the materials cited, *supra* n.34 in discussing federal taxation speak variously. A reconciling view would be to treat it as a device, i.e. to use the formal test, but to require that if used for other than revenue raising, i.e. for regulatory purposes, the regulation must be one which it would be competent for the enacting legislature to undertake by other means.

47 Some assumption of the existence of such a power may be deducted from sec. 91(1) added by *British North America (No. 2) Act 1949*, 13 Geo. VI, c.81 (U.K.) giving as a Parliamentary class of subjects "The amendment from time to time of the Constitution of Canada", with several exceptions. One of them dealing with the duration of Parliament might support such an assumption were it not that it merely qualifies an express provision, sec. 50, to allow its relaxation by Parliament.

48 Several enumerated classes of subjects deal with special aspects, notably "(4). The borrowing of Money on the Public Credit; (5) Postal Service; (8) The fixing of and providing for the Salaries and Allowances of Civil and other officers of the Government of Canada; (28) The Establishment, Maintenance and Management

recent dictum has found the requisite basis in "peace, order and good government".[49] New 91(5) would make it explicit, but "subject to the provisions of this constitution". That would mean that the judiciary and the Canadian Equalization Council had their positions[50] constitutionally assured by the special sections dealing with them. More generally, it would forestall reliance on this clause to ride roughshod over the elsewhere assigned limits on federal authority. There is much sentiment for a constitutional bill of rights.[51] If confined as that of the United States long was[52] to curbs on federal action, that is a legitimate and may be a desirable addition. If included, it might, without the qualification, be misread as vulnerable to statutes concerning the "operations of the federal government".

The companion grant to the provinces of power to enact laws dealing with "the constitution of the province" incorporates the gist

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of Penitentiaries" and so much of (7) as speaks of "the Militia and Military and Naval Service." Sec. 101, the establishment of a federal court system does too. This might also be said of "(6) The Census and Statistics", a "double class of subjects" that has attracted little attention. "Statistics" as an independent grant was even completely overlooked by Lord Haldane in his opinion in the *Board of Commerce Case* where he mentioned it as something that "may well be" within Parliament's power as ancillary to "trade and commerce", [1922] 1 A.C. at p. 296. "The Census" would seem to be something that the Governor General *virtute officii* could undertake and indeed that probably even now a Lieutenant Governor could concern himself with, doubtless without any power to compel answers except as bestowed by a constitutional statue, cf. *Kelly v. Mathers*, 25 Man. R. 580 (1916) — a rather inconsequential limitation since census responses are usually voluntary. There is an assumption though not a bestowal of Parliamentary power in Sec. 131 ("Until the Parliament of Canada otherwise provides the Governor General in Council may from time to time appoint such officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act").

49 See *Jones v. A.G. Can.*, 7 N.B.R. 526, 534 (1974).

50 Provision for these would be made in detail in separate sections whose terms fall outside the scope of the present discussion.

51 See, e.g. Canadian Constitutional Charter, Victoria 1971, Arts. 1-4; REPORT OF THE SPECIAL JOINT COMMITTEE ON THE CONSTITUTION OF CANADA, c.9 (1972); *but cf.* CHEFFINS & TUCKER, THE CONSTITUTIONAL PROCESS IN CANADA 103 (2d ed. 1976).

52 The classic announcement of this doctrine by Chief Justice Marshall in *Barron v. Baltimore*, 7 Pet. 243 (1833) continued for over a century to be accepted as a basic premise, see *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.ed. 188 (1937). By its interpretation of the due process and equal protection clauses of the Fourteenth Amendment, however, the Supreme Court has engaged in a process of attrition which has practically drained it of substance, cf. Brennan, *The Supreme Court and the Meiklejohn Interpretation*, 79 HARV. L. REV. 3 (1965), although continuing to profess adherence at least to the view that there has not been a total "incorporation" of the first ten Amendments as a limitation on state action, see *Annot.*, 18 L.ed. 2d 1388 (1968).

of the present 92(1).[53] But it does more. It drops the exception about "the Office of Lieutenant Governor". The one notable use of that exception has been to scuttle popular participation in the legislative process.[54] Whether anyone may legislate about that office is a bit of a puzzle.[55] Scrapping the limitation would dispell the obscurity. More significantly, it would erase a symbol of federal hegemony.[56] The broad language proposed would moreover incorporate the substance of several other "classes of subjects" now set out in section 92 and dispense with their separate mention. This applies to Heads 3[57], 4[58], 5[59] and 6[60], to Head 7[61] insofar as the institutions there spoken of are publicly supported, and to everything in present 92 (14) except "procedure in Civil Matters" which another rubric would leave with the provinces. As regards the judicial branch, with which 92 (14) deals, provincial competence would even be enlarged because no longer hobbled by section 96. That section literally goes only to who shall appoint judges. By extrapolation,[62] it has resulted in fettering

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53 An assurance to the provinces of a "representative", a "parliamentary" or whatever basic type of government might be desired could be inserted as a separate provision in the constitution in much the same manner as the U.S. Constitution guarantees to the states a "Republican Form of Government", Art. IV, sec. 4. At present the maintenance of a parliamentary form of government may be implicit in the unamendable provision as to the lieutenant governor.

54 See *Reference re Initiative and Referendum Act*, [1919] A.C. 935, 48 D.L.R. 18.

55 Cf. LASKIN'S CONSTITUTIONAL LAW (4th ed. rev. Abel) 95 (1975). Since "there has never been any movement for reform of the office", SAYWELL, THE OFFICE OF LIEUTENANT GOVERNOR 262 (1957), no answer has been given in default of a question.

56 Cf. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 415 (1901).

57 "The borrowing of money on the sole credit of the Province." Compare sec. 91(4).

58 "The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers". Such officers may have assigned to them by Parliament the implementation of federal legislation, see *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, 68 D.L.R. 2d 384; in performing that function, they exercise "powers as a Federal Board", *R. v. Smith*, [1972] S.C.R. 359 at 366, 367, 23 D.L.R. 2d 222. Omission of express mention should not be construed to invite the wide extension of federal control approved in *Fry v. United States*, supra n. 29.

59 "The Management and Sale of the Public Lands Belonging to the Province and of the Timber and Wood Thereon".

60 "The Establishment, Maintenance and Management of Public and Reformatory Prisons in and for the Province".

61 "The Establishment, Maintenance and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than MarineHospitals". Comparable private institutions would be covered by the residuary clause.

62 It has been premised rather than systematically demonstrated that the appointing power consequentially conditions the assignment of decisional responsibilities. In

provincial initiatives in moulding the processes of dispute settlement.[63] No province is free to adopt, for example, an analogue to the Conseil d'Etat. Why bind them to an inherited pattern of adjudication not always well adapted to the positive programmes of contemporary government? With general control of their own constitutions, including courts and tribunals, they could flexibly adapt to felt needs. As a bonus, the phasing out of federal involvement with these provincial offices would, like the lieutenant governor change, remove a stigma of inferior status.

A more fundamental change which I should myself prefer would confide the responsibility for their constitutions to the provinces indeed, but not to the provincial legislatures. Instead each province would by appropriate special action[64] endow itself with an instrument of government within which ordinary legislation must be channeled, like the constitutions of the American states.[65] Really despite the

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Re County Courts of British Columbia, 21 S.C.R. 446 (1892), Strong, J., writing for the Court, said at p. 454, ". . . the whole power of legislating as regards the jurisdiction of provincial courts is entrusted to the provincial legislature". The case arose however in connection with territorial as contrasted with subject matter jurisdiction and had no effect when cited in argument to the Privy Council in *A.G. Ontario v. A.G. Canada*, [1925] A.C. 750, which without elaboration held invalid a provincial statute bearing on the nature of judges' duties. In *Reference re the Adoption Act*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497, the principle was taken as settled and that and subsequent cases have dealt only with its application.

63 See, for a thorough and thoughtful examination of the matter, PEPIN, LES TRIBUNAUX ADMINISTRATIFS ET LA CONSTITUTION, premier partie (1969).

64 So long as the lieutenant governor limitation with its exclusion of plebiscitary action, see supra n.54, remains in force, it is hard to see how the provinces could go further than the formula of relative immutability employed in the Canadian Bill of Rights, 8-9 Eliz. II, c.44, s.2 ("unless it is expressly declared by an Act . . . that it shall operate notwithstanding . . ."), with whatever moral and political restraint that may impose. Freed of that limitation, it would seem open to their legislatures to organize or recognize conventions to prepare drafts which after approval by referendum or after election of a new House, could be adopted, with any changes thought appropriate, as the constitution of the province by an Act including a provision requiring that any amendment of its terms would need prior approval by a referendum. Such a provision as a "manner and form" clause binding on future legislatures, *A.G. for New South Wales v. Trethgowan*, 44 C.L.R. 394 (1931), *aff'd* [1932] A.C. 526, 47 C.L.R. 97; *accord*, *Clayton v. Heffron*, 105 C.L.R. 214 (1960); WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA, c.XII (1970), would without discarding the concept of parliamentary supremacy, in practice give the province the substance of a constitution.

65 See, on the status of American state constitutions, *Ellingham v. Dye*, 178 Ind. 336, 99 N.E.11 (1912); 1 BRYCE, THE AMERICAN COMMONWEALTH 420 (1888). Cf. as to Australian state constitutions, *McCauley v. The King*, [1920] A.C. 691; *A.G. for N.S.W. v. Trethgowan*, 44 C.L.R. 394 (1931).

language of 92(1)[66] and the style of some provincial legislation,[67] no province now has anything that can properly be called a constitution. Such, if adopted, could and, in my view, ought to entrench civil liberties and might well contain special provisions about the role of municipalities. Those matters are important enough to warrant constitutional attention.[68] Regard for varying local sentiments and local situations suggests that a central authority not presume to impose procrustean standards. Both this item and the following one, "municipal and local authorities" would have to be reworded in the proposed draft were this better arrangement to be accepted.

The obvious argument against it is its impingement on the concept of parliamentary supremacy.[69] It does clearly impinge. Yet we have not had unalloyed Parliamentary supremacy since 1867. The courts check legislation from each level for constitutionality.[70] The pure form having already been abandoned, the degree of impurity would seem to raise only a question of policy.

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66 Subdivision V, being sections 58 to 90 inclusive of the British North America Act 1867 is captioned "Provincial Constitutions". Sections 58 to 67 inclusive deal with the office of lieutenant governor, section 68 names a city in each of the four original confederating provinces as "Seat of Government" and the others were almost exclusively preoccupied with the composition and procedures of the Legislature. It is a permissable although not a necessary inference that the expression in section 92(1) was understood in the same limited sense.

67 See R.S.B.C. 1960, c.71.

68 Both the Victoria Charter, Arts. 1 and 2, and the Report of the Special Joint Committee on the Constitution of Canada, c.9, contemplated inclusion of provisions on fundamental rights in a new federal constitution; and the latter, c.22, accepted the claims of municipalities for a clearer definition and assurance of their governmental role while feeling it a matter inappropriate for a federal constitution, to be left instead to the provinces. Bills of Rights and local government provisions regularly appear in state constitutions in the United States, see 3 REP'TS OF N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE, CONSTITUTIONS OF THE STATES AND THE UNITED STATES (1938); *cf.* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. rev.) Arts. I, VIII (1968).

69 See CHEFFINS & TUCKER, THE CONSTITUTIONAL PROCESS IN CANADA (2d ed. 1976). Kennedy, *The Judicial Process and Canadian Legislative Powers*, 25 WASH. UNIV. L.Q. 215 (1940); cf. Kerwin, *Constitutionalism in Canada* in SUTHERLAND (ed.) GOVERNMENT UNDER LAW 453 at 466 (1956). Australia, while in general following the American model in drafting her Constitution rejected the inclusion of a Bill of Rights on that very ground, see Dixon, *Two Constitutions Compared*, 28 A.B.A.J. 734 (1942).

70 The proposition that in Canada courts are concerned not with constitutionality but with *"vires"*, see RIDDELL, THE CANADIAN CONSTITUTION 7, n.2, (1923) leaves untouched the substance of the matter, namely, that they do in fact monitor statutory validity, and thus seems only a verbal quibble.

Existence is a prerequisite to action. No living organism can exist without some composition of its parts nor continue to exist without sustenance. Hence taxes and internal structure are needs common to the Dominion and the provinces and like powers to make provision for them in order. The functions of the two are where they differ. To enable their due performance, the grants of power as to them must correspondingly differ.

Sections 91 and 92 of the 1867 Act and the successor provisions of the present proposal both are so framed. The latter are in large measure a more compact restatement of the older formulas. Yet they do involve important shifts. These are in both directions so that it would be inaccurate to see them as aggrandizements of either level at the expense of the other. The notion is to give each level the strength to cope with the conditioning elements of the Canadian situation as to which it will be most effectual. The examination that follows seeks to indicate the consistency of both the restatements and the shifts with that objective.

The "peace, order and good government" clause, so loosely read sometimes as to make nearly everything federal,[71] was conversely at one time shrunk in application into virtual insignificance.[72] Its shimmering imprecision as a text is to be removed. Where recourse to it has been useful, precise authority is given — "defence against war or insurrection",[73] the government of the National Capital Territory[74] and other areas outside provincial boundaries[75], as much of

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71 In *Russell v. The Queen*, 7 App. Cas. 829 (1882) the court reasoned that, because Parliament deemed uniform legislation throughout the Dominion desirable and because no province, for want of power to legislate extraterritorially, could bring uniformity about, Parliamentary power existed. This line of reasoning, which would have opened up to federal control everything Parliament thought important enough to merit its provision of a uniform rule, was later explicitly repudiated, see, e.g. *In re the Board of Commerce Act*, 60 S.C.R. 456, 54 D.L.R. 354 (1920).

72 Thus it was taken to be dependent on the existence of an "emergency", see *Fort Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Co. Ltd.* [1923] A.C. 695, [1923] 3 D.L.R. 629 *accord*, *Toronto Electric Comm'rs v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5.

73 *Fort Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Ltd.*, *supra Co-operative Committee on Japanese Canadians v. A.G. Can.*, [1947] A.C. 87, [1947] 1 D.L.R. 577; *Reference re Validity of Wartime Leasehold Regulations*, [1950] S.C.R. 124, [1950] 2 D.L.R. 1.

74 See, *Munro v. National Capital Commission*, [1966] S.C.R. 663, 57 D.L.R. 2d 753. Note that the provision in speaking of the areas "outside . . . any province *and* . . . the National Capital Territory" makes a distinction which recognizes that the latter continues to be a part of the Provinces in which it is erected, thus respecting Quebec's repugnance to any diminution of her territory.

75 Cf. *Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, 65 D.L.R. 2d 353; see Poole, *The Boundaries of Canada*, 42 CAN. BAR REV. 100 (1964).

treaty enforcement as is of truly international concern,[76] federal government operations which had to rely on it for want of any other basis.[77] Federal companies legislation[78] must indeed find other support; this virtually reverses the present situation so that the presence of "federal" rather than of "provincial" objects would be crucial, but why other companies should receive federal charters is a mystery.[79] For the still unexplored field of environmental protection[80] where it might prove useful, there is express recognition of federal competence.

Had the true purpose of inserting the clause, namely, to serve as a counterpoise to section 92(16), been realized, one would be reluctant to drop it. The breakdown in practice of the divided residuary power has so irretrievably distorted the precedents that it seems advisable not to leave it cluttering up the text.

Rather than its empty promise, Parliament would get all authority requisite for management of the economy. The first numbered subdivision of new section 91 gives it and a bit more.

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76 Cf. Laskin, *Some International Legal Aspects of Federalism: The Experience of Canada* in CURRIE (ed), FEDERALISM AND THE NEW NATIONS OF AFRICA 389 (1964).

77 Supra, n. 48.

78 *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, 18 D.L.R. 353 found federal authority for the general incorporation of companies in the "peace, order and good government" clause with a helping hand from the "trade and commerce" clause.

79 The relevance of the clause was predicated in *John Deere Plow Co. v. Wharton, supra*, on the proposition that the limitation of the provincial power to "the Incorporation of Companies with Provincial Objects", B.N.A., sec. 92(11) prevented the provinces from erecting companies with the capacity for Dominion-wide activity, thus leaving a gap in power unless the Dominion could act; but *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566, 26 D.L.R. 273 almost immediately repudiated that proposition in recognizing that the limitation on capacity was not a territorial one, thus undercutting the reasoning of *John Deere*. Granted that a functional limitation of provincial power may result from the language of 92(11), cf. *Kootenay & Elk Ry Co. v. C.P.R.*, 28 D.L.R. 3d 385 (S.C.C.), that would mean simply that where the objects were federal, charters could be granted by the Dominion as a way of achieving its granted powers.

80 The relevance of the "fisheries" clause of sec. 91 for water pollution legislation is canvassed by the Supreme Court of Canada in *Interprovincial Co-operatives Ltd. v. The Queen*, 53 D.L.R. 3d 321 (1975); the judgment apparently finds some measure of federal competence in the area but its extent and particularly its consequences for provincial legislation uncomplicated by a basis for application of paramountcy is left uncertain because of the different analyses in the opinions of Laskin, C.J. and of Ritchie and Pigeon, J.J. On air pollution, see Alhéritiéne, *Les Problemes Constitutionelles de la Lutte contre La Pollution de l'Espace Atmosphérique au Canada*, 50 CAN. BAR REV. 560 (1972).

Section 91(2) of the 1867 Act could have.[81] The more weakly worded commerce clause in the United States Constitution[82] has sufficed for that, has indeed been extravagantly extended.[83] "Trade and commerce" could cover it all. Its use is discontinued only to avoid recourse to its unhappy past.[84] The nadir was ignominious relegation

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81 "Economic planning" and "controlled economy" are 20th century locutions. So far as I can ascertain, neither Marx, Mill nor Marshall (to name major 19th century figures) ever spoke in those terms. The concepts themselves were of course older both as theories and as practices. More notably developed under the influence of Colbert and longer maintained in France than in Britain, as "mercantilism", see 1 HECKSCHER, MERCANTILISM, chapters V, VI (trans. Shapiro) (1934), it was in the 19th century still vigorous on the continent, especially in Germany through List's advocacy, see GIDE & RIST, HISTORY OF ECONOMIC DOCTRINES 264 (trans. Richards, 2d ed. rev.), "Mercantilism", the label attached to the Colbertian system of active state direction of economic affairs, has a clear verbal affinity with "commerce", a kinship confirmed by such evidences as that Colbert's body of regulations for the economic sphere was styled Ordonnance de Commerce and that Adam Smith, addressing himself (adversely) in THE WEALTH OF NATIONS a century later to the tenets of the programme, wrote "Of the Principles of the Commercial or Mercantile System" (Book IV, c.1), using the terms in apposition. In 19th century Canada, as in Britain, while there were more "governmental interventions", to use Mill's expression, than we are accustomed to associate with what we simplify as a laissez-faire economy, they were particularistic and haphazard. For domestic enterprise, they were disfavoured in principle though present in practice. For foreign transactions, the situation was different. A large corpus of state controls persisted and was accepted generally by politicians as appropriate, less generally by writers about political economy. That, being the focal point of disputed policy, was the context in which the expressions "commercial" and "commerce" are commonly found in contemporary discussions, including those about the proposals for confederation. The circumstances of the times thus led to their appearance largely in a special setting and gave little occasion for applying them to domestic policies. A survey of what was said and written supports the view, however, that "commerce" was used as a generic description of measures relating to economic activity in, it is true, a special application but without indicating an intention of limitation to it. While, as seems likely, the Fathers of Confederation did not envisage much use of economic regulation, what use there might be had to be accommodated within the constitutional framework and "commerce" was the current term for subsuming it.

82 That clause, U.S. CONST. ART. 1, s.8, cl.3 does not mention "trade" and delineates "commerce" limitatively as that "with foreign Nations, and among the several States, and with the Indian Tribes". For what was envisaged by the grant, see Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

83 The Commerce Clause has been used to support federal control over e.g., the amount of grain the owner of a family farm can raise primarily for feed for his own livestock, *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.ed. 122 (1942), contract window washing on premises of industrial and commercial enterprises, *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173, 90 L.ed. 603 (1946); and minimum fee schedules for residential title searches, *Goldfarb v. Virginia State Bar*, 44 L.ed. 2d 572, 95 S.Ct. (1975).

84 An excellent survey of its misadventures is SMITH, THE COMMERCE POWER IN CANADA AND THE UNITED STATES, chapters 1-4 (1963).

to the status of a mere helper clause.[85] While the old wisdom of the *Parsons* case[86] is apparently being resurrected,[87] the courts should not be subjected to the chancy choice of following or distinguishing the intervening decisions. "Structure and functioning of the economy" is submitted as a more roundabout but, one hopes, more shrinkproof paraphrase.

The specifications under it emphasize the amplitude of the grant. They embrace in abbreviated version the majority of the classes of subjects in present section 91, as I shall show. Their being set out as non-exclusive illustrations confirms and emphasizes the breadth of the main head rather than inviting treatment as restrictions on it the way the collocation argument made parallel listing cut down "trade and commerce".

Besides 91(2) itself, all of the classes of subjects in 91(9) to 91(23) inclusive plus the referentially incorporated provisions of 92(10) (a) and (b) and the federally significant portion of section 95 are carried over as federal but not all the constructional twists they have suffered. Economic context and pluri-provincial impact are the parameters for what is created, transferred or withheld as the case may be.

"Industrial and intellectual property" widens 91(22) and (23) to include things like trade marks, trade names, trade secrets and common law literary property.[88]

"Money" epitomizes the contents of 91(14),[89] 91(20),[90] and "the issue of paper money" part of 91(14).[91] "Credit institutions"

85 See LASKIN'S CANADIAN CONSTITUTIONAL LAW 243 (4th ed. rev. Abel) (1975).

86 *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96 (1881).

87 See *MacDonald v. Vapor Canada Ltd.*, (Can. unrep. Jan. 30, 1976).

88 A Dominion competence to regulate trade marks has been indicated, based however not on 91(22) and 91(23) dealing respectively with "Patents of Invention and Discovery" and Trademarks" but on "trade and commerce", see *A.G. Ontario v. A.G. Canada*, [1937] A.C. 405, [1937] 1 D.L.R. 702; but trade secret protection is not a *legitimate* Parliamentary concern, see *MacDonald v. Vapor Canada Ltd., supra.* Such things as local delivery routes would not satisfy the primary quality of affecting "the structure and functioning of the economy"; but the more egregious appropriations of intellectual and industrial property characteristically involve firms or products or both whose markets is of national dimensions or at least hoped to be.

89 "Currency and Coinage".

90 "Legal tender".

91 Coupling "the Issue of Paper Money" with "Banking (and) the Incorporation of Banks", however odd it now appears, reflects the situation obtaining at Confederation and stubbornly maintained for many decades, under which the note issue of banks constituted a large part of the circulating medium of the

embraces the rest of 91(14), all of 91(16) and 91(21). Also together they cover 91(18) and very nearly all of 91(19). "Institutions" is used not as meaning "financial establishments" but the financial establishment,[92] that is to say, the whole body of mechanisms whose function is the supply of and dealings in credit. Credit as a commodity for inventory or sale so approximates "private money" that its control is essential to effective monetary management.[93] And most modern thought sees monetary management like fiscal management as a prime instrument in economic regulation, however much estimates of their relative importance differ.[94] The credit arrangements of the provinces themselves and of their municipalities[95] come more properly within the first two numbered clauses of new section 92 than here but could be expressly exempted if thought desirable.

The subjects discussed in the two preceding paragraphs must have a common value throughout Canada in order to be worth much anywhere. Uniformity is intrinsically important. Thus they are stated without qualification.

That is not so of their companions lettered (c) and (d) (nor of the environmental matters dealt with in new 91(2)). To bring them into play, the things regulated must have a substantial extraprovincial dimension. To adopt the language of Justice Pigeon in the *Caloil Case*, anything which "is an integral part of . . . control . . . in the

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country, see Shortt, *The Banking System of Canada* in 10 SHORTT & DOUGHTY (eds.) CANADA AND ITS PROVINCES 627 (1913). It was not until 1944 that this practice was terminated. See generally JAMIESON, CHARTERED BANKING IN CANADA (1953).

92 The Oxford English Dictionary gives, as the sixth definition "An established law, custom, usage, practice, organization or other element in the political or social life of a people; . . ." It is in this sense, rather than that of the seventh definition, "An establishment, organization or association instituted for the promotion of some object" that the expression has been chosen, a choice supported by the circumstance that it seems conformable also to the relative employment in the French language. Of course, if the term is thought to be ambiguous and a better one can be substituted, it should, for it is not suggested that the power be confined to the specification of formal structures.

93 *The Report of The Royal Commission on Banking and Finance* (Porter Commission) 1964, c.18, discusses the independence and need for comprehensive regulation of credit institutions.

94 See, e.g., HARROD, ECONOMIC DYNAMICS, c.10 (1973); MEADE, THE CONTROLLED ECONOMY, cc. XXII, XXIII (1971); ROSTOW, PLANNING FOR FREEDOM, c.9 (1959).

95 See *Ladore v. Bennett*, [1939] A.C. 468, [1939] 3 D.L.R. 1 (. . . legislation, if directed *bona fide* to the effective creation and control of municipal institutions, is in no way an encroachment upon the general exclusive power of the Dominion Legislature over interest; nor, the case held, over "bankruptcy and insolvency").

furtherance of an extra-provincial...policy"[96] would be for Parliament. It would, however, be confined, to adapt Chief Justice Laskin's expression in the *Vapor Canada Case* to "general regulatory scheme(s) to govern...relations going beyond merely local concern".[97] Both observations were made in cases dealing with "trade and commerce" but the...line of division they announce traces a principle appropriate for application beyond the context of trading transactions in which they were uttered. That broader application is made while incorporating the general principle.

Relations may "go beyond merely local concern", may have "substantial" significance, effects, or consequences, outside the province where the target segment of activity takes place.[98] Failure to appreciate that was the vice of the *Eastern Terminal Elevator Case*[99] and arguably of the *Board of Commerce Case*.[100] Conversely, to federalize activity of marginal extraprovincial impact because it steps over a provincial line[101] serves no real purpose. Consequences not cartography should be controlling.

New 91(1)(c) patently deals with the interprovincial works and undertakings now falling under 92(10)(a), the others and the Steamships of 92(10)(b)[102] also remaining federal but by virtue of

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96 *Caloil Inc. v. A.G. Canada*, [1971] S.C.R. 543 at 551, 20 D.L.R. 3d 472 at

97 *MacDonald v. Vapor Canada Ltd.* (unrep. dated 30 Jan. 1976).

98 The substantiality will necessarily be relative. A comparison of consequences within the province with those beyond the province would be involved. Failure to make such an analysis is a legitimate ground of reproach to the judgment of the Privy Council, [1954] A.C. 541, [1954] 4 D.L.R. 657, 13 W.W.R.N.S. 657 insofar as it reversed that of the Supreme Court of Canada [1951] S.C.R. 887, [1951] 4 D.L.R. 529, in *A.G. Ont. v. Winner*. Failure to provide materials as a basis of such analysis occasioned Laskin, J.'s reluctance to respond in *A.G. Manitoba v. Manitoba Egg & Poultry Ass'n*, [1971] S.C.R. 689, 19 D.L.R. 3d 169, [1971] 4 W.W.R. [1971] 4 W.W.R. 705. This relation is in fact taken into consideration under the bland and familiar concept of "incidental" or "consequential" effects, see *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. 2d 257, 319 (per Abbott, J.); *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, 67 D.L.R. 2d 1. It is not suggested that the weight assigned the two components be other than that which they seem to have received in the last two cases cited nor that the inquiry simply be into which predominates, only that the grounds on which assessment is made be more adequately revealed to and by the courts.

99 [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

100 60 S.C.R. 456, 54 D.L.R. 354, [1920] 3 W.W.R. 658 (3-3 decision) (per Duff, J.), [1922] 1 A.C. 191, 60 D.L.R. 513 [1922] 1 W.W.R. 20.

101 Cf. *R. v. Cooksville Magistrates Court; Ex p. Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84, 46 D.L.R. 2d 700. *A fortiori*, activities which have *no* extraprovincial potential seem best left to the provinces; *contra R. v. Canada Steamship Lines Ltd.*, [1960] O.W.N. 277; *R. v. Rice*, [1963] 1 C.C.C. 108.

102 The clause applies only to "Lines . . . between the Province and any British or Foreign Country".

Parliament's control over external affairs. 92(10)(c), the power to declare works for the general advantage of Canada, would be dropped. It already has fallen into virtual desuetude. Any "works" — and this would include undertakings — "wholly situate within the Province" which figure in "the structure and functioning of the economy" would as such be open to federal regulation without the formality of a declaration.[103] Why should others be?

New 91(1)(c) also sweeps up a number of present 91's classes of subjects — clauses 9,[104] 11[105] and 13.[106] Except for a completely dissociated bit of intraprovincial navigation and shipping, if such there be,[107] 91(10) would also fall within it. "Aeronautics", rather curiously erected as a constructive "class of subject" through the side door

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103 Thus, except for the straitened construction of "trade and commerce" in *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1, it should have been possible for Parliament to regulate the trade in grain, at the time Canada's staple and still a major component in the economy, without the need to resort to declaring all elevators in the country "works for the general advantage of Canada", see Canada Grain Act, R.S.C. 1970, c.G-16, s.174; cf. *Jorgenson v. A.G. Canada*, [1971] S.C.R. 725, 18 D.L.R. 3d 297.

104 Conceivably some "beacons" and "buoys" might be in bodies of water having little extraprovincial traffic but hardly any "lighthouses" would be. Sable Island could well be allowed to return to Nova Scotia; with the invention of radar, whatever basis may have once existed for assigning it to federal control has disappeared.

105 Although today "quarantine" brings to mind ideas of internal health measures (insofar as replacement of home by hospital medical care, has not rendered it an antiquated and unfamiliar notion), in the mid-nineteenth century the tragedies attendant on the arrival of Irish immigrants after the potato famine, see Parr, *The Welcome and the Wake*, 66 ONT. HIST. 101 (1974), and for a similar earlier crisis, see Bilson, *Cholera in Upper Canada 1832*, 67 *id.* 15 (1975), were a recent memory, to which quarantine laws, were an appropriate and traditional response, cf. Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 HARV. L. REV. 267 (1889). Note, the author's statement at p. 278, "Quarantine laws are, from their very nature, regulations of foreign and interstate commerce."

106 Regulation of intraprovincial ferries is within provincial competence, see *Owen Sound Transportation Co. v. Tackaberry*, [1936] 3 D.L.R. 272, [1936] O.W.N. 323.

107 The reasoning in *Agence Maritime Inc. v. Canada Labour Relations Board*, [1969] S.C.R. 851, 12 D.L.R. 3d 722, is confusing. In leaving to provincial control the labour relations of crews engaged purely in intraprovincial voyages, Fauteux, J. read section 92(10) (a), (b) of the B.N.A. Act 1867 as "excluding from the competence of Parliament enterprises of water carriage whose operations are carried out strictly within one province" but qualified it as subject to "certain exceptions . . . for what must be regarded as arising from the aspect navigation".

of "peace, order and good government"[108] would be on exactly the same basis as waterborne traffic. Since it is as elements in the "structure and functioning of the economy" that "transportation and communication facilities and services" are reserved for federal control, the programme contents of the communications media can be left to the provinces to regulate.[109]

New section 91 (1) (b) has however the chief part in revitalizing "trade and commerce". Co-ordination of labor, commodities and capital markets amongst the provinces in the way the treaty of Rome co-ordinates them in Europe, to the same ends of avoiding internal discrimination and creating external strength,[110] still as in 1867 requires the action of a central authority.

Over-specification weakened the force of the grant. "Weights and measures", section 91 (17), for instance, are elements in commodities tranactions for which a common standard is highly con-

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108 *Johanneson v. West St. Paul*, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609; accord, *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58, for a discussion see McNairn, *Aeronautics and the Constitution*, 49 CAN. BAR REV. 411 (1971).

109 Essentially the respective regulatory spheres of the federal government and the provinces would conform to the recommendations in the Report of the Royal Commission on Radio Broadcasting (Aird Commission) (1929) which were stultified by *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, [1932] 2 D.L.R. 81.

110 The Treaty (of Rome) Establishing the European Economic Community announced the following fundamental Principles: "Art. 2. The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living, and closer relations between he States belonging to it. Art. 3 for the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therin: (a) the elimination as between Member States, of customs duties and of quantitiative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) the establishment of a common customs tariff and of a common commercial policy towards third countries; (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; (d) the adoption of a common policy in the sphere of agriculture; (e) the adoption of a common policy in the sphere of transport; (f) the institution of a system ensuring that competition in the common market is not distorted; (g) the application of procedures by which the economic policeis of member states can be co-ordinated and disequilibria in theier balances of payments remedied; (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market; (i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living; (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources . . ."

venient if not indeed essential.[111] Failure to mention them merely removes excess verbiage.

The "agriculture" and "fisheries" classes of subjects are another story. In 1867 these were, particularly in certain provinces, the dominant as they continue to be important branches of economic activity.[112] Strengthening their position was for many a major attraction of Confederation. There was real concern with agriculture as an industry and fisheries as an industry.[113] The substituted conception of them as activities[114] has drained from these grants their original content.[115] Trivializing Dominion authority to the ploughboy behind the plough and the sportsman in the trout stream has not only degraded them; it has blinded the courts to looking at them as components of trade and commerce. With no special status, fisheries and agriculture would be open to Parliamentary regulation to just the same extent as all other gainful pursuits.

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111 "With us in England, the King's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:- . . . Secondly, the regulation of weights and measures. These, for the advantage of the public ought to be universally the same throughout the Kingdom, being the general criterions which reduce all things to the same or an equivalent value". 1 BLACKSTONE COMMENTARIES *274 (1765). The manifest commercial advantage of coordinating weights and measures has been a main argument for the even more extensive uniformity represented by the adoption of the metric system, see De Simone, *Moving to Metric Makes Dollars and Sense*, 50 HARV. BUS. REV. 100 (1972). It is noteworthy that land measurements are not included and that Quebec's *arpenteurs* have always dealt in *hectares*, not acres.

112 On the fisheries, INNIS, THE COD FISHERIES (rev. ed. 1954) is classic. Cf. Lawr, *The Development of Ontario Farming 1870-1914; Patterns of Growth and Change*, 44 ONT. HIST. 239 (1972); Reid, *Company Mergers in the Fraser River Salmon Canning Industry 1885-1902*, 56 CAN. HIST. REV. 282 (1975).

113 INNIS, *supra* devotes c.XI to a discussion of the situation in the years leading up to Confederation.

114 See *Lower Mainland Dairy Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933] A.C. 168, [1933] 1 D.L.R. 82 ("the agricultural operations of the farmers"), *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1 (contrasting "agriculture" and "a product of agriculture considered as an article of trade"); *accord A.G. Saskatchewan v. A.G. Canada*, [1949] A.C. 110, [1949] 2 D.L.R. 145; *A.G. Canada v. A.G.B.C.*, [1930] A.C. 111, [1930] 1 D.L.R. 194.

115 Ritchie, C.J. said by way of dictum in *The Queen v. Robertson*, 6 S.C.R. 52 at 120 (1882), "legislation in regard to 'inland and sea fisheries' contemplated by the British North America was . . . in reference . . . to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public; . . . in other words, all such general laws as endure as well to the benefit of the owners of the fisheries as to the public at large who are interested in the fisheries *as a source of national or provincial wealth*, such as those which the local legislatures were, previously to and at the time of confederation in the habit of enacting . . ." [emphasis supplied] but Lord Tomlin in *A.G. Canada v. A.G. B.C.*, *supra* rejected the contention that earlier legislation gave any guidance as to the content of this class of subjects.

To recur briefly to paramountcy, an overriding provincial parallelism should rarely affect regulations of labour, capital or commodities marketing relations. Environmental impacts[116] and transportation-communications links[117] are often localized even though crossing provincial lines. On the other hand, the market like the law is a seamless web responsive throughout to disturbances anywhere. Their different natures would therefore expose commercial regulations much less than the others to the qualification on paramountcy.

Maintaining a common international personality like creating a common market implies centralized authority.

One clause, "Defence against war or insurrection", embraces both present 91(4)[118] and fragments of "peace, order and good government".[119] The provisions for Parliamentary authority over "external affairs"[120] and that "the power to make treaties is federal" fill yawning gaps in the 1867 Act. The Statute of Westminister 1931 did too,[121] not as an amendment but as a supplement. Canadian treaties fell outside section 132 of the British North America Act, which speaks only of Empire treaties. The competence to implement the former is left at large.[122] The proposal clarifies this. In so doing, it restricts the treaty power itself to matters on which Parliament can legislate (including of course anything properly within the domain of external affairs).[123] Parliament's legislative authority on a treaty

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116 Cf. The CANADA WATER ACT, R.S.C. 1st supp. c.5, sec. 2(1) (adopting as the definition of "interjurisdictional waters" essentially the formula proposed in new 91(2)).

117 See Irwin, *Canadian Transportation Infrastructure*, 18 CAN. PUB. ADM. 603 and figures 3 and 4 (1975).

118 The potential of this clause as a support for federal legislation has been relatively neglected, resort being had, in cases where it might have seemed relevant, to the general clause instead. LASKIN'S CANADIAN CONSTITUTIONAL LAW 199 (4th ed. rev. Abel) (1975).

119 *Supra* n. 73.

120 The expression is adopted from the Commonwealth of Australia Constitution Act 1900, sec. 51(xxix), discussed in WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA 281 (4th ed. 1970); Lane, *The External Affairs Power*, 40 AUST. L.J. 257 (1967).

121 22 Geo. V, c.4 (U.K.). The development is discussed in GOTLIEB, CANADIAN TREATY MAKING 9 (1929).

122 See *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326, [1927] 1 D.L.R. 673.

123 The proper scope of the "external affairs" clause in the Australian Constitution, *supra* n. 120, has attracted judicial attention in *Airlines of N.S.W. Ptty. Ltd. v. New South Wales* (No. 2), 113 C.L.R. 54 (1964); *The King v. Sharkey*, 79 C.L.R. 121 (1949); *The King v. Burgess*, 55 C.L.R. 608 (1936). In a particularly full and illuminating discussion in the last case, Dixon, J. said, at pp. 668-669: "It is not easy to interpret and apply the power to make laws with respect to external

basis is equated strictly with the federal treaty making power so limited, thus avoiding the situation of the United States where the treaty loophole permits complete erosion of state authority.[124] Home rule would still prevail in home affairs, "external affairs" being limited to matters impinging on other nations' concerns. Even so, the formula integrates items at present scattered through the British North America Act. International transportation, communication, and commerce have already been mentioned. "Naturalization and Aliens" and "Immigration" are similarly affected, as is of course the obsolescent section 132. The primary question will be treaty validity. That hinges on what legislative powers the Dominion has, treaty or no treaty, always reckoning among them power over anything of international moment. The independent variable is the treaty power with enforcement a dependent variable.

Clothed with these controls over the economy and international relations as well as its own housekeeping, Parliament could do the jobs calling for a central authority. Those where diversity is critical would be left to the provinces.

Their position under the paramountcy clause has been developed and need not be repeated. That is also true generally for their altered taxing power and for their control over their own constitutions. It may, however, deserve mention that the former dis-

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affairs. Although it may enable Parliament to make laws operating outside the limits of the Commonwealth, it cannot be supposed that its primary purpose was to regulate conduct occurring abroad. Prima facie legislation confers rights and imposes duties to be enjoyed and fulfilled within the territory. In the case of such powers as that at present under consideration the presumption cannot confine the legislation to the Commonwealth in the same way as in the case of other powers. But the presumption cannot be reversed so that the power prima facie does not affect conduct within the Commonwealth and only that outside. I think it evident that its purpose was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external relations of the Commonwealth. The Commonwealth might under this power legislate to ensure that its citizens did nothing inside the Commonwealth preparatory to or in aid of some action outside the Commonwealth which might be considered a violation of international comity, as, for instance, a failure on the part of private persons to behave as subjects of a neutral power during a war between foreign countries. If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered a matter of external affairs".

124 See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 81 S.Ct. 922, 6 L.ed. 2d 218 [1961] (state law on interstate succession to realty supplanted).

penses with special attention to section 92(9) and the latter embraces the content not only of 92(1) and much of 92(14) but also of clauses 3 to 7 inclusive of the present Act.

Something more should be said about what giving them the residuary power does to certain enumerated "classes of subjects". In general, making the structure and functioning of the economy, "external affairs", Dominion organization and operations the criteria would both expand and contract both federal and provincial competence regarding several of them. The two-way shift of authority over agriculture and fisheries is illustrative. All of immigration would become federal; some of "interest" might become provincial. Company incorporation except for companies with federal objects would be wholly provincial, thus enlarging the existing grant. "Marriage and divorce", not just "solemnization" would too; these intimate personal relations, about which there is no broad consensus, were put in the federal list for very particular and rather odd reasons. Canada has gained nothing but lawsuits from an assignment of competence unique among federal systems. "Education" would continue a matter of provincial concern, without the clogs which in practice have been little if anything more than a slap in the face to Quebec. Each province would shape its own policies and programmes on old age and similar pensions although funds for them might be expected to become available through the operations of the proposed Canadian Equalization Council. Unemployment insurance would cease to be distinguished from other types of insurance.[125]

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125 Through influencing both consumption and the propensity to consume, unemployment insurance programmes do bear on the general level of economic activity; but their "stickiness" tells against their employment as a control. In any event, the amendment to the British North America Act, B.N.A. Act 1940, 3-4 Geo. VI, c.36 (U.K.) was not conceived in that sense but was proposed by the Rowell-Sirois Commission on welfare grounds, see REPORT, BOOK II, RECOMMENDATIONS 24-25 (1939) and pressed by MacKenzie King in anticipation of the 1940 election as calculated to appeal as a shield against feared post war unemployment, see 1 PICKERSGILL, THE MACKENZIE KING RECORD 60-61 (1960). The choice of priorities among redistributuve including social welfare policies would seem one more appropriately left to the provinces from the resources provided them; the clumsiness of unemployment insurance as an economic control weakens any assignment of it to the Dominion on that basis. Like other credit institutions, insurance enterprises would still be subject to control as to loan and investment policies. An impression arising from slipshod language in earlier opinions, cf. *A.G. Ontario v. Reciprocal Insurers*, [1924] A.C. 328, [1924] 1 D.L.R. 789, altogether outside federal regulation has been put at rest, see A. G. Ont. v. Wentworth Ins. Co., [1969] S.C.R. 779, 6 D.L.R. 3d 545.

On criminal law, Canada is out of step with the world.[126] The American contrast[127] if standing alone could be discounted; but Australia chose it as a model[128] and even Scotland after the Act of Union has maintained its local criminal law.[129] The ancestral Quebec Act explains the Canadian aberration.[130] Attitudes toward "old line crimes" are probably much the same throughout the country. Note that burglaries and rapes are punishable in all the Australian and American states. But in Canada there is no "domain of criminal law".[131] Sometimes the quality of the conduct affected, as touching on "public order, safety and morals",[132] sometimes the sanction it attracts, "prohibit(ion) with penal consequences"[133] is invoked to support federal control. These alternative legitimations have built into

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126 This is a slight overstatement since most of the criminal law is left to the central government in federal states, e.g. Austria and Switzerland, whose law derives from the European continental tradition, a situation consonant with the general approach of that system to criminal law, see VON BAR, HISTORY OF CONTINENTAL CRIMINAL LAW (trans. Bell) *passim* (1916).

127 "(A)n act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it has some relation to the exercise of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate." *U.S. v. Fox*, 95 U.S. 670, 673, 24 L.ed. 538, 540.

128 The *King v. Kidman*, 20 C.L.R. 425 (1915).

129 SMITH, BRITISH JUSTICE: THE SCOTTISH CONTRIBUTION, c.3 (1961); see also Gordon, *The Lord Advocate and the Crown Office*, c.V, in McLARTY (ed.) SOURCE BOOK OF ADMINISTRATIVE LAW IN SCOTLAND (1956).

130 "And whereas the Certainty and Lenity of the Criminal Law of *England* and the Benefits and Advantages resulting from the Use of it, have been sensibly felt by the inhabitants, from an experience of more than Nine Years, during which it has been uniformly administered; be it therefore enacted by the Authority aforesaid, That the same shall continue to be administered, and shall be observed as Law in the Province of Quebec, as well in the Description and Quality of the Offence as in the Method of Prosecution and Trial . . ." 14 Geo. III, c.83. For an account of the historical origins, see Sterling, *The Criminal Law Power and Confederation*, 15 U. of T. FAC. OF LAW REV. 1 (1957).

131 *Lord's Day Alliance v. A.G. B.C.*, [1959] S.C.R. 497, 19 D.L.R. 2d 97.

132 See *Russell v. The Queen*, 7 App. Cas. 829 (1882); *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 [1949] 1 D.L.R. 433 ("public peace, order, security, health, morality").

133 *Proprietary Articles Trade Ass'n v. A.G. Canada*, [1931] A.C. 310, 324, [1931] 2 D.L.R. 1.

"criminal law" a potential for universal control[134] like that the Americans have crammed into their commerce clause. Worse still, the overblown "criminal law" power throttles recognition of local values.[135] However much Alberta and Nova Scotia differ in the importance they respectively attach to the alteration of cattle brands and the disturbance of lobster pots, it is not theirs to say what shall be done, at least if Ottawa has spoken. Standards of behavious and more cogently of misbehaviour reflect our varied history and geography. The broad reaches of Canada fully as much as the narrow range of the Pyrenees witness, perhaps engender different ideas of right and wrong.

Old habit makes Canadians accept as natural this extraordinary assignment of criminal law to federal authority. Therefore it seems advisable not to leave the change to be deduced from the grant of residuary power but to flag it clearly. Enough would be left with

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134 *A.G. B.C. v. Smith*, [1967] S.C.R. 802, 65 D.L.R. 2d 82 demonstrates how far this can go. The Court there sustained the validity of the *Juvenile Delinquents Act*, R.S.C. 1952, c.160 with the consequence of rendering British Columbia legislation inoperative. The *Juvenile Delinquents Act* declaring that a juvenile should "be treated, not as a criminal" established "an offence to be known as a delinquency" to embrace the violation "of any Dominion *or provincial statute, or of any by-law or ordinance of any municipality*" (italics supplied). The paradoxical result was that the enactment — provincial statute or municipal ordinance — whose existence was critical for the definition of conduct as anti-social by assigning that character to it withdrew it from provincial concern. The prosecution frustrated was in fact for violation of provincial traffic laws. The case is discussed in McNairn, Note, 46 CAN. BAR REV. 474 (1968).

135 The Special Joint Committee on the Constitution of Canada felt the force of this consideration but could not bring itself to shift the power, suggesting instead the expedient of specific delegations. It said, "We believe that there is an even better reason for a Provincial role in the criminal law area than the clarification of concepts and the improved resolution of conflicts. The criminal law is, after all, an expression of the moral views and the mores of a people, and it is obvious that the views of Canadians in matters of behaviour differ considerably across the country, and often markedly from Province to Province. In the United States this is recognized by locating the criminal law power principally in the state governments with a mere supplementary power in the federal government. We see no need for so radical a change in Canadian federalism, but we can also see no reason why each province should not be able to regulate the conduct of its own people in matters such as the laws relating to the operation of motor vehicles, lotteries, betting, and Sunday observance . . . We favour greater freedom for the Provinces to control the behaviour of their people, and to experiment on a Province-wide scale . . . We have therefore decided to recommend, in this one area, a power of delegation from the Federal to the Provincial Legislatures. We believe it should be exercisable at the option of a single Province, subject to the concurrence of Parliament . . . (W) believe that the delegation of many subjects within the criminal law power to the Provinces would be beneficial in allowing people to have criminal legislation which more closely reflected the consensus in their part of the country as to socially tolerable behaviour. We see this as a gain for democracy, and in line with our other recommendations for fuller Provincial control over the quality and style of life." REPORT, c.27 (1972).

Parliament to let it attach penal sanctions to violation of the laws it is competent to make. 92(15) now does as much for the provinces[136] and, while that section is itself to be swallowed up by the new provision, it serves as a model. Cut loose from any "settled domain", criminal law loses all substantive content to become a description only of an enforcement technique. So considered, it is a corollary of and co-extensive with the right to enact the measures being enforced.

Though section 91(27) could disappear there could by virtue of clause 5 in successor section 92 still be federal penitentiaries. The restricted range of federal crimes probably would mean in practice a smaller federal penitentiary service.

Clause 4 of new 92 applies equally to non-criminal matters. For them, however, it is in line with what we now have. The "administration of justice" of 92(14) keeps its place but with the regulation of procedure enlarged to encompass all, and not just civil procedure. Rephrasing will, it is hoped, restore to "property and civil rights" its essential nature. A heritage, like criminal law, from the Quebec Act,[137] the historic content of the expression was the corpus of private law governing the reciprocal relations of persons[138] as distinguished from public law defining their relations with the state, conspicuously instanced by the criminal law. A telescoping of "property and civil rights" and "local and private", induced by the amplitude of each as mere verbal expressions, resulted for many years in neither having any clear meaning. A tendency has been emerging to recognize the distinction and to ascribe to "property and civil rights" the meaning above noted. The mention together of civil and criminal is intended to bring that meaning into stronger relief.

Endowed with the above powers, the provinces should be able to

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136 *Canadian Pacific Wine Co v. Tuley*, [1921] 2 A.C. 417.

137 14 Geo. III, c.63 ("And be it further enacted . . . That all His Majesty's Canadian Subjects, within the Province of Quebec . . . may . . . hold and enjoy their property and possessions, together with all Customs and Usages relative thereto, and all other of their Civil Rights, in as large, ample, and beneficial Manner, as if . . . [the Royal Proclamation of 7 October 1763 and orders under it] had not been made . . . and that in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the laws of Canada, as the rule for the decision of the Same"), cf. Stats. Upper Canada 1792, c.l; see *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96 (1881), *Saumur v. Quebec*, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.

138 "What the language is directed to are laws relating to civil status and capacity, contracts, torts and real and personal property in the common law Provinces, jural constructs springing from the same roots . . ." *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. 2d 257, 271 (per Rand, J.); *accord*, *A.G. Ont. v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570, 42 D.L.R. 2d 137. See TREMBLAY, LES COMPETENCES LEGISLATIVES AU CANADA ET LES POUVOIRS PROVINCIAUX EN MATIERE DE PROPRIETE ET DE DROITS CIVILS (1967) for a very full and thoughtful discussion of the subject.

provide the framework of varied regulation reflecting the variety of local values and views which must be respected if we are to continue to live together.

Correcting the resource imbalance among regions, the third conditioning circumstance of national life, is only tangentially affected by the provisions I have discussed. The most relevant is the limitation on Parliamentary control over federal property. Clearly a surplus available for distribution to the less wealthy provinces has to be accumulated and by federal action. The federal taxing power would be broad as great as ever, so accumulation would be as possible as ever. Tax proceeds would be useable only for properly federal programmes, however. In the post-war years, revenues have always far exceeded their cost and have been used for transfer payments. Employment of fiscal measures as a tool of economic control may be expected to continue to generate surpluses. Distribution is the problem. The provinces should not have to keep selling their birthrights for a mess of federal pottage. The Canadian Equalization Council would, I believe, solve this problem.

A description of it is one of many things which fall outside the subject and space limits of this discussion. Others to which I have given thought include the federal judicial establishment and the *inter se* relations of the provinces. Others still, on which I have not as yet any clear views, include the amending process, the fact and form of a Bill of Rights, and the British connection. The demarcation of federal and provincial competence which has been explored is only a fragment of a total constitution. But it is a very important fragment.

There is no near prospect of anything like the above being accepted. There is an absolute certainty that something along these general lines will ultimately come to pass or Canada will dissolve. Self-preservation being as strong an instinct with politicians as with the rest of us, they will stagger along bantering patchwork solutions at each other. Even if agreement on that basis can be reached, anything short of a fundamental remodelling taking account of the needs and conditions of national life will not suffice.[139] Those in authority will not discard familiar patterns until the very eve of a breakup. It may then be too late.

Like Noah, I seek to build an ark against the day when the flood comes.[140] Unlike Noah, I do not expect to be around to use it. But others will.

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139 "So long as we lack a clearly defined goal of national purpose, to which all are prepared to give allegiance, so long shall we remain within a rigid structure with chafing irritations; and the fault here lies 'not in our stars but in ourselves'. A key to change itself, a symbol of liberation, would not necessarily mean its use; that awaits a consensus on the goal to be postulated". Rand, *Canada 1867-1967*, 45 CAN. BAR REV. 392 (1967).

140 Cf. GENESIS V.