CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 1

PETER W. HOGG

Professor Emeritus, Osgoode Hall Law School
York University, Toronto

Scholar in Residence,
Blake, Cassels & Graydon, LLP,
Toronto

CARSWELL®

Library and Archives Canada Cataloguing in Publication

Hogg, Peter W.
Constitutional law of Canada

5th ed.

Updated once a year.
Issued also in non-looseleaf editions.
Continues: Constitutional law of Canada.
Includes bibliographical references and index.
ISBN 978-0-7798-1337-7 (loose-leaf)
ISSN 1914-1262

1. Canada – Constitutional law. I. Title.

KE4219.H65 2007a 342.71 C2007-902367-3
KF4482.H65 2007a

Composition: Computer Composition of Canada Inc.

THOMSON REUTERS

CARSWELL, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Customer Relations
Toronto 1-416-609-3800
Elsewhere in Canada/U.S. 1-800-387-5164
Fax: 1-416-298-5082
www.carswell.com
E-mail www.carswell.com/email

that timber be processed in Canada,[5] or that no Chinese or Japanese labour be employed in cutting timber.[6] This broad legislative power to dispose of a province's own property is consistent with the broad executive powers enjoyed by the province as proprietor.[7] This is the subject of the next section of this chapter.

29.3 Executive power over public property

The federal and provincial governments have full executive powers over their respective public properties. It is neither necessary nor accurate to invoke the royal prerogative to explain the Crown's power over its property. As a legal person,[8] the Crown in right of Canada or the Crown in right of a province has the power to do anything that other legal persons (individuals or corporations) can do.[9] Thus, unless there are legislative[10] or constitutional[11] restrictions applicable

5 *Smylie v. The Queen* (1900) 27 O.A.R. 172 (Ont. C.A.). The argument that this stipulation indirectly prohibited the export of unsawn timber to the U.S.A., a matter of "trade and commerce" under s. 91(2), was rejected on the basis that the province had the power under s. 92(5) to dictate the terms upon which it disposed of its property.

6 *Brooks-Bidlake v. A.-G. B.C.* [1923] A.C. 450. In other contexts this could be a law in relation to "naturalization and aliens" under s. 91(25). (Since the adoption of the Charter of Rights, such a law would be invalid for breach of the equality guarantee.)

7 S.I. Bushnell, Comment (1980) 58 Can. Bar Rev. 157, argues that provincial legislative power under s. 92(5) is limited in exactly the same way as other provincial legislative powers; and that provincial executive power as proprietor (see following text) is no wider than provincial legislative power. Indeed, he suggests that a province cannot deal with its property without legislative authority. D.E. Thring, "Alberta, Oil, and the Constitution" (1979) 17 Alta. L. Rev. 69 holds a similar view to Bushnell's. La Forest, note 1, above, 164-170, on the other hand, holds that provincial legislative power under s. 92(5) and executive power as proprietor are both akin to that of a private proprietor. A middle view, espoused by W.D. Moull, "Natural Resources: Provincial Proprietary Rights" (1983) 21 Alta. L. Rev. 472, 475-480, is that the province has the legislative power under s. 92(5) to *authorize* the inclusion of extraordinary terms in Crown contracts, but the terms will be effective only if inserted into Crown contracts. Section 92(5) would not empower the province to directly impose such terms by legislation. This seems to be the view which accords best with general principles, with the cases cited in notes 5 and 6, above, and with my view of the spending power, discussed in ch. 6, Financial Arrangements, under heading 6.8, "Spending power", above, which presents a close analogy to the present problem.

8 See ch. 10, The Crown, under heading 10.1, "Definition of the Crown", above.

9 La Forest, note 1, above, 143, 167. For a contrary view, see note 7, above.

10 An example of a legislative restriction would be provincial land acquired or set aside for a hospital. If the hospital purpose was imposed by statute, then any inconsistent executive dealing with the land would be illegal. The Crown's prerogative or common law powers may be displaced by a statute: *A.-G. v. De Keysers Royal Hotel* [1920] A.C. 508 (prerogative power of expropriation displaced by statute). Of course, a legislative restriction can always be removed or modified by statute.

11 An example of a constitutional restriction would be lands reserved for the Indians, which, although owned by the province, are subject to federal legislative power under s. 91(24): see ch. 28, Aboriginal Peoples, above.

to a piece of public property, it may be sold, mortgaged, leased, licensed or managed at the pleasure of the responsible government, and without the necessity of legislation.[12] The Crown's power to do these things is not a prerogative power, because the power is not unique to the Crown, but is possessed in common with other legal persons.[13] Moreover, in the role of proprietor, the Crown can (subject to market conditions) insist upon the inclusion in leases, licences or other instruments of any terms that a private proprietor could insist upon. These include terms that in other contexts would be outside the province's power to impose by legislation.[14]

A province's ownership of natural resources, such as oil and gas, or other minerals,[15] gives it much more power over the resources than it possesses over privately-owned resources. The exploitation of a provincially-owned resource can be controlled by the province, either by the province directly producing and selling the resource, or by the province granting permits, leases or licences that authorize private firms to produce and sell the resource. Obviously, the rate of production, the degree of processing within the province and (subject to market conditions) the price at which it is to be sold can be controlled by the province as proprietor. These matters could not necessarily be controlled in the case of privately-owned resources, because legislation would be necessary, and there are limits to provincial legislative power over natural resources, especially those resources destined for export from the province.[16] Similarly, a province can profit

12 La Forest, note 1, above, 19-21, argues persuasively that no legislative authority is necessary, although in practice of course each jurisdiction regulates the disposition of Crown lands by statute. For a contrary view, see note 7, above.

13 The term prerogative is sometimes used to include all of the common law powers of the Crown, but in my view it should not include those common law powers that are not unique to the Crown: see ch. 1, Sources, under heading 1.9, "Prerogative", above.

14 *A.-G. B.C. v. Deeks Sand and Gravel Co.* [1956] S.C.R. 336 (royalty that might have been ultra vires if enacted upheld as a contract). The conditions in *Smylie* (note 5, above) and *Brooks-Bidlake* (note 6, above) could have been imposed without authorizing legislation.

15 Throughout Canada, provincial governments have usually retained title to timber lands, issuing licences to permit their exploitation. As a result, most timber lands are still provincially owned. Most mineral rights in Ontario, Quebec and the Atlantic provinces are privately owned. Offshore resources are in effect owned by the federal government, which has the exclusive right to explore for and exploit them, although revenue-sharing and management agreements have been entered into with the coastal provinces: ch. 30, Natural Resources, under heading 30.3, "Offshore minerals", below. The provinces also have the power to expropriate privately owned lands or mineral rights, as Saskatchewan did in 1973 in order to gain greater control over its oil and gas: note 17, below.

16 *Central Can. Potash v. Govt. of Sask.* [1979] 1 S.C.R. 42, striking down provincial scheme for the prorationing of production and fixing the price of potash. Laskin C.J. for the Court emphasized (at p. 72) that the Government of Saskatchewan was acting "not under proprietary right but in pursuance of legislative and statutory authority directed to proprietary rights of others". Since this decision, provincial power to regulate natural resources has been enlarged by s. 92A of the Constitution Act, 1867 (added in 1982): see ch. 21, Property and Civil Rights, under heading 21.9(c), "Provincial power", above.

from the exploitation of provincially-owned resources in a variety of ways: by direct sales or by licence fees, rents or royalties. A province can profit from the exploitation of privately-owned resources only through taxes, and there are limits to provincial legislative power to levy taxes on natural resources.[17]

All Canadian governments are extensively involved in commercial activities, either directly or through Crown corporations. Governments sell liquor, electricity, insurance, books, wheat, eggs and other natural products. They own railways, airlines, pipelines, telephone systems and radio and television networks. Nor do a government's commercial activities have to coincide with the legislative power of that level of government. The activities are premised on powers which flow from the ownership and control of property, not on the catalogue of legislative powers which are independent of property ownership.[18]

29.4 Legislative power and proprietary interests

While a government's proprietary interests generally confer matching legislative and executive powers (as has been explained above), the converse proposition is not true. The existence of legislative power in respect of a particular subject-matter does not imply any proprietary rights in the subject-matter. In the *Fisheries Reference* (1898),[19] the Privy Council established this proposition by deciding that the grant of power over "fisheries" in s. 91(12) of the Constitution Act, 1867 conferred only legislative powers on the federal Parliament. Proprietary interests in fisheries were not thereby conferred upon the federal government, and proprietary interests could be held by provincial governments or private individuals.

The broad distinction between legislative power and ownership is obvious and may easily be illustrated. For example, the federal Parliament has legislative power over "banking" (s. 91(15)), "patents of invention and discovery" (s. 91(22)), "copyrights" (s. 91(23)) and "lands reserved for the Indians" (s. 91(24)), but the federal government does not own any banks or many patents or copyrights, and it is the provincial governments which have underlying title to Indian re-

17 *Can. Industrial Gas and Oil v. Govt. of Sask.* [1978] 2 S.C.R. 545, striking down a "mineral income tax" on oil produced on private land and a "royalty surcharge" on oil produced on Crown land. (Much of the Crown land had been expropriated from private owners, in order to make it subject to royalties, rather than taxation.) The Court held that the "royalty surcharge" was a tax rather than a royalty, because it was imposed on land already subject to oil leases, and the leases did not authorize the additional royalty. The additional royalty could only be imposed by legislation, which meant taxation. Since this decision, provincial power to tax natural resources has been enlarged by s. 92A(4) of the Constitution Act, 1867 (added in 1982): see ch. 31, Taxation, under heading 31.9, "Resource taxes", below.

18 Spending, lending, contracting and disposing of property are all alike in this respect: see ch. 6, Financial Arrangements, under heading 6.8, "Spending power", above.

19 *A.-G. Can. v. A.-G. Ont.* (Fisheries) [1898] A.C. 700.

serves.[20] The same point may be made about the power to declare local works to be "for the general advantage of Canada" (s. 92(10)(c)); such a declaration will assign to the Dominion the legislative authority over the local work, but will not by itself alter its ownership.[21]

Some of the implications of the distinction between legislative power and proprietary interests are less obvious. The exercise of legislative power over, say, fisheries, may severely limit the owner's enjoyment of the property, for example, by limiting the times and manner of fishing. Such a law is valid notwithstanding its incidental effects on proprietary rights.[22] But a federal law which is in pith and substance a modification of proprietary rights will be invalid as a law in relation to property and civil rights in the province (s. 92(13)).[23] Accordingly, where an exercise of federal legislative power purports to regulate proprietary rights, the issue will arise whether the purported regulation is a law in relation to fisheries (for example), or is a law in relation to property and civil rights in the province.

In the *Fish Canneries Reference* (1930),[24] for example, the Privy Council held that the federal power over fisheries did not extend to the regulation of fish canning and curing plants. In their lordships' judgment, the processing of the fish was a matter which fell within "property and civil rights in the province" rather than "fisheries".[25] The same reasoning has been used to limit the federal power over "agriculture" (s. 95); this power will not authorize laws governing the marketing of agricultural products, because the marketing of the product is a matter of property and civil rights in the province (or "trade and commerce" if it is interprovincial).[26] This reasoning was used as the basis for an attack on the provisions of federal company law which permit a take-over offeror to acquire compulsorily the shares of a dissenting minority of shareholders. It was argued that this was a "property" law, but in *Esso Standard v. J.W. Enterprises* (1963),[27] the Supreme Court of Canada upheld the law as one relating to the capital of a federally-incorporated company.

Just as federal powers are limited by the existence of provincial power over property, so the provincial power over property is limited by the existence of

20 See ch. 28, Aboriginal Peoples, under heading 28.1(c), "Lands reserved for the Indians", above.

21 The federal Parliament may, however, be able to expropriate the local work after it has been brought within its legislative power: note 33, below.

22 *A.-G. Can. v. A.-G. Ont.* (Fisheries) [1898] A.C. 700.

23 The federal law will also be held invalid if it is in pith and substance an exercise of proprietary rights. For example, in *A.-G. Can. v. A.-G. Ont.* (Fisheries) [1898] A.C. 700 it was held that the federal Parliament could regulate the times and manner of fishing in provincially owned fisheries, but could not grant leases of the fisheries conferring on the lessee the exclusive right to fish; the latter power was proprietary and was held by the province as owner of the fishery.

24 *A.-G. Can. v. A.-G. B.C.* (Fish Canneries) [1930] A.C. 111.

25 See ch. 30, Natural Resources, under heading 30.5, "Fisheries", below.

26 See ch. 21, Property and Civil Rights, under heading 21.9, "Marketing", above.

27 [1963] S.C.R. 144. To the same effect is *Multiple Access v. McCutcheon* [1982] 2 S.C.R. 161 (upholding federal "insider trading" law).

substance" was defined as something "deleterious to fish or fish habitat or to the use by man of fish". This definition provided the link between the proscribed conduct and the harm to fisheries which had been lacking in the offence struck down in *Fowler*. This enabled Martland J. for the Court to distinguish the earlier case, and uphold the validity of the offence in this case. Taken together, the two cases emphasize that the fisheries power will authorize the regulation of non-fishing activity only when there is clear connection between the regulated activity and a harmful effect on fisheries.[76]

(g) Marketing of fish

Federal power over fisheries does not extend to the processing and marketing of fish. In the *Fish Canneries Reference* (1930),[77] the Privy Council struck down a federal statute that required the licensing of fish canning and curing plants. Their lordships held that, once the fish were caught, they were a commodity like any other, and their processing and marketing came within the provincial jurisdiction over property and civil rights in the province (s. 92(13)).[78] Of course, interprovincial or international marketing would come within the federal jurisdiction over trade and commence (s. 91(2)).

In *Ward v. Canada* (2002),[79] the Supreme Court of Canada had to decide whether a federal law that prohibited the sale of seal pups was a valid exercise of the fisheries power. On its face, the law regulated the marketing of seals, which would be outside federal power. But the Court accepted evidence that the ban on sale was enacted as an indirect means of "curtailing the commercial hunting of young seals to preserve the fisheries as an economic resource".[80] The prohibition on sale was thought by government to be a more effective way of limiting the killing of young seals than a direct prohibition on killing them. The Court concluded that the pith and substance of the law was the preservation of the resource, and that it was a valid exercise of the fisheries power.

---

76 See also *R. v. Crown Zellerbach* [1988] 1 S.C.R. 399 (federal prohibition of dumping of waste at sea cannot be upheld under s. 91(12), because no clear link with harm to fisheries).

77 *A.-G. Can. v. A.-G. B.C.* (Fish Canneries) [1930] A.C. 111. This case has also been discussed in the previous chapter, Public Property, under heading 29.4, "Legislative power and proprietary interests", above.

78 Even the contracts between the processors of fish and the crews of fishing vessels come within provincial labour relations jurisdiction: *B.C. Packers v. CLRB* [1976] 1 F.C. 375 (C.A). See also *R. v. Allen* (2005) 257 D.L.R. (4th) 458 (N.S.C.A.) (upholding provincial law requiring licensed fishers to pay dues to a fisheries organization). However, federal jurisdiction continues while the fish are being transported from the fishing grounds to the shore: *R. v. Bodmer* (1981) 120 D.L.R. (3d) 699 (B.C. Co. Ct.) (upholding federal regulation of vessels used as fish packers).

79 [2002] 1 S.C.R. 569. McLachlin C.J. wrote the unanimous opinion of the Court.

80 *Id.*, para. 49.

30.6 Electricity

(a) Hydro-electricity

The provincial Legislatures have power over the generation and distribution of hydro-electricity, because dams,[81] generating stations and distribution systems are "local works and undertakings" within s. 92(10) of the Constitution Act, 1867.

In *Fulton v. Energy Resources Conservation Board* (1981),[82] the Supreme Court of Canada held that a proposed electricity substation and transmission line in Alberta, which would deliver 99 per cent of its output to customers within the province, was a local work or undertaking within provincial jurisdiction, even though it was to connect with a transmission line in British Columbia to enable power to be shared, especially during emergencies or periods of surplus. If a more substantial operational connection had existed between the two systems, the systems would have been classified as a single interprovincial undertaking and would have come within federal jurisdiction under s. 92(10)(a).[83] Jurisdiction over electrical distribution systems is thus governed by the same principles as jurisdiction over other media of transportation and communication, such as railways, pipelines and telephones.[84]

In *Re Upper Churchill Water Rights* (1984),[85] the Newfoundland Legislature purported to expropriate all the assets of a company that generated hydro-electricity at Churchill Falls in Newfoundland (Labrador) and transmitted the bulk of the production into Quebec. The Supreme Court of Canada struck down the legislation, because its purpose was to destroy a contractual right outside Newfoundland, namely, the right to receive power under a long-term contract between the generating company and Hydro-Quebec. The Court did not consider the

81 A dam is also subject to federal jurisdiction under s. 91(10) ("navigation and shipping") with respect to its effect on navigability: *Smith v. Ont. and Minnesota Power Co.* (1918) 44 O.L.R. 43 (A.D.); *Re Waters and Water Powers* [1929] S.C.R. 200, 226; and probably under s. 91(12) ("inland fisheries") with respect to its effect on the movement of fish. It has been suggested that a dam that spans a river forming a boundary between two provinces is within exclusive federal jurisdiction under s. 92(10)(a): [1929] S.C.R. 200, 225; but this is probably wrong, because a dam is not a work of transportation or communication to which s. 92(10)(a) is restricted: see ch. 22, Transportation and Communication, under heading 22.3 "Transportation and communication", above. An analogy is a mine which crosses a provincial boundary: compare *R. v. Belous* [1977] 6 W.W.R. 19 (Man. C.A.) (interprovincial mine within federal jurisdiction, but because of declaration under s. 92(10)(c)).

82 [1981] 1 S.C.R. 153.

83 *Re Town of Summerside and Maritime Electric Co. (No. 2)* (1983) 3 D.L.R. (4th) 577 (P.E.I.S.C. in banco) (submarine cable linking N.B. and P.E.I. electrical systems created federal undertaking).

84 See ch. 22, Transportation and Communication, especially sec. 22.7, "Related undertakings", above.

85 [1984] 1 S.C.R. 297.

question whether the continuous and regular transmission of power from Churchill Falls to Quebec converted the operation into a federal undertaking.

(b) Other kinds of electricity

Electricity generated from oil, gas, coal or other sources of energy than water power would be governed by the same constitutional principles as hydro-electricity. An exception, however, is electricity generated from nuclear power, which would probably come within federal jurisdiction for reasons explained in the earlier discussion of uranium.[86]

(c) Section 92A

It seems likely that the foregoing principles have not been changed by s. 92A(1)(c) of the Constitution Act, 1867, which was added to the Constitution in 1982.[87] Under s. 92A(1)(c), each provincial Legislature has the power to make laws in relation to:

> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

As a general proposition, this provision is declaratory of the pre-1982 law. The provision contains no express exception for the case where electricity is generated from nuclear power. However, in that case, the Supreme Court of Canada has held that it is the federal Parliament that has legislative authority over the operation and management of the nuclear plant.[88] Another exception to the provincial jurisdiction recognized by s. 92A(1)(c) would be the case where electricity is generated within an interprovincial undertaking.

The 1982 amendments also provided for the export of resources, including electricity. Before 1982, the province was incompetent to make laws in relation to the export of resources, that being a matter within the federal trade and commerce power.[89] Under s. 92A(2), each provincial Legislature has the power to make laws in relation to "the export from the province to another part of Canada" of (among other resources) electricity. This new power only applies to electricity

86 *Ont. Hydro v. Ont.* [1993] 3 S.C.R. 327; note 18, above. This case upholds federal jurisdiction over the nuclear power plant. Whether federal jurisdiction would extend to the distribution of the electricity is much less clear.

87 For analysis, see references in note 1, above.

88 Note 86, above.

89 *Can. Industrial Gas & Oil v. Govt. of Sask.* [1978] 2 S.C.R. 545; *Central Can. Potash Co. v. Govt. of Sask.* [1979] 1 S.C.R. 42.

which is exported "to another part of Canada".[90] The provinces remain incompetent to regulate the export of electricity from Canada. The new power is concurrent with the federal Parliament's trade and commerce power, and, in the event of conflict between federal and provincial laws, the federal law prevails.[91]

30.7 Environmental protection

(a) Divided jurisdiction

The environment,[92] comprising as it does "all that is around us", is too diffuse a topic to be assigned by the Constitution exclusively to one level of government.[93] Like inflation,[94] it is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction.

(b) Federal power

At the federal level, the most obvious sources of power are the following. The criminal law power (s. 91(27)) provides power to prohibit activities that are harmful to the environment. This power has been used to uphold the Canadian Environmental Protection Act, which established a regulatory structure for the identification and control of toxic substances.[95] The power over fisheries (s.

90 In the *Churchill Falls* case, note 85, above, the Court did not consider the applicability of s. 92A(2), presumably because the legislation in issue had been enacted before 1982 (although it had never been proclaimed in force). Even if that legislation could not itself be characterized as being in relation to the export of electricity, it seems likely that Newfoundland's objectives could now be achieved under s. 92A(2), by directly regulating the quantity or price of electricity to be exported to Quebec. See W.D. Moull, "Newfoundland Resources" (1985) 7 Supreme Court L.R. 419.

91 Section 92A(3) explicitly preserves federal power and explicitly declares federal paramountcy.

92 See B. Laskin, "Jurisdictional Framework for Water Management" in Ministry of Northern Affairs and National Resources, *Resources for Tomorrow* (Queen's Printer, Ottawa, 1961), 211; D. Gibson, "The Constitutional Context of Canadian Water Planning" (1968) 7 Alta. L. Rev. 71; H. Landis, "Legal Controls of Pollution in the Great Lakes Basin" (1970) 48 Can. Bar Rev. 66; P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972) 10 Osgoode Hall L.J. 647; D. Alhéritière, "Les problèmes constitutionnels de la lutte contre la pollution de l'espace atmospherique au Canada" (1972) 50 Can. Bar Rev. 561; D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U. Toronto L.J. 54; G.-A. Beaudoin, "La protection de l'environnement et ses implications en droit constitutionnel" (1977) 23 McGill L.J. 207; Monahan, *Constitutional Law* (2nd ed., 2002), ch. 11.

93 *Friends of Oldman River Society v. Can.* [1992] 1 S.C.R. 3, 63, 64, 70.

94 *Re Anti-Inflation Act* [1976] 2 S.C.R. 373, 458.

95 *R. v. Hydro-Québec* [1997] 3 S.C.R. 213; for discussion, see ch. 18, Criminal Law, under headings 18.5, "Environmental protection", and 18.12, "Criminal law and regulatory authority", above.