

TRADE AND COMMERCE: CANADA'S ECONOMIC CONSTITUTION, MALCOLM LAVOIE (MONTREAL: MCGILL-QUEEN'S UNIVERSITY PRESS, 2023)

There is no shortage of constitutional drama in Canada. Politicians at the provincial level constantly rail against the federal government. Some provinces have gone so far as to enact laws that purportedly inoculate them from federal intrusion.¹ On the flip side, the federal government is always looking to impose its will on the provinces on everything from guns to securities to greenhouse gases. The average citizen just wants to buy cheap beer and doesn't understand why it is a crime to cross into another province to do exactly that. Now and then, these parties will resort to the courts to vindicate their positions. The parties will point to various sections of the Canadian Constitution, and the associated caselaw, to make the case that the law favours their position.

For some aspects of the economy, the case law seems consistent. Insurance is a provincial matter that falls under "Property and Civil Rights," or so said the *Parsons* case in 1881.² Fast forward to 2011, when the federal government's national securities regulator legislation was challenged, the result was a logical extension of *Parsons* and its progeny.³ As Justice Slater succinctly put it in the Alberta Court of Appeal's judgment on the question:

The securities industry is one of the "four pillars" of the financial sector of the economy. Three of those pillars (the securities industry, the insurance companies, and the trust companies) have historically been regulated by the provinces using their jurisdiction over "property and civil rights in the province". The fourth pillar, banking, falls under federal jurisdiction under s. 91(15) of the *Constitution Act*.⁴

A simple statement of the law necessitated a simple conclusion, something that the Alberta and Quebec Courts of Appeal reached and the Supreme Court of Canada affirmed.⁵

But for other parts of the economy, the case law seems inconsistent. One day, alcohol fell under the jurisdiction of the federal government, because of some "peace, order, and good government" interest.⁶ The next day, or, more accurately, two years later, alcohol fell under the auspices of the provinces.⁷ Lost in these two cases was the question of whether a citizen of one province could travel next door to buy cheaper beer. Over 130 years later, the Supreme Court answered the question with a resounding no!⁸ In fairness to the Supreme Court, it was being asked to develop, for the first time in a while, a new line of thinking that did not fit into the earlier case law, namely whether section 121 of the *Constitution Act, 1867* required free trade, or at least free-ish trade, among the provinces.⁹

¹ *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8; Bill 88, *An Act to Assert Saskatchewan's Exclusive Legislative Jurisdiction and to Confirm the Autonomy of Saskatchewan*, 3rd Sess, 29th Leg. Saskatchewan, 2023 (assented to 6 April 2023).

² *Citizens' Insurance Co v Parsons*, [1881] UKPC 49 at 55 [*Parsons*].

³ *Reference re Securities Act*, 2011 SCC 66 [*Re Securities SCC*].

⁴ *Reference Re Securities Act (Canada)*, 2011 ABCA 77 at para 2 [*Re Securities ABCA*].

⁵ *Re Securities SCC*, *supra* note 3, aff'g *Re Securities ABCA*, *ibid*, *Québec (PG) c Canada (PG)*, 2011 QCCA 591.

⁶ *Russell v R*, [1882] UKPC 33 at 43.

⁷ *Hodge v R*, [1883] UKPC 59.

⁸ *R v Comeau*, 2018 SCC 15 [*Comeau*].

⁹ *Ibid*; *Constitution Act, 1867* (UK), 30&31 Vict, c 3, s 121, reprinted in RSC 1985, Appendix II, No 5.

All of this leaves the casual observer to wonder if there is any systematic reason in the way the framers of our Constitution set out the powers in sections 91 and 92 (and any other relevant sections). In his new book, Professor Malcolm Lavoie makes the case that there is indeed a purposeful design that undergirds not only the division of powers between the provinces and the federal government, but also between all levels of government and the individual. In a nutshell, Lavoie argues that the Constitution allocates power to the level of government most capable of administering that power. Economic efficiency, both in terms of efficient administration of power as well as the overall health of the economy, is a very strong guiding factor in the way the Constitution allocates the various heads of power. While this case may have been made by previous authors, Lavoie's contribution is that he not only makes this case using theoretic political-economic tools, including the growing field of public-choice, he also refers to the historic record including the framers' statements as well as scholarly thinking at the time. With this he makes a cogent case for economic efficiency as a framework for the courts to look to when deciding on whether new legislation is ultra vires or not. He also makes the case that free trade among the provinces as well as a respect for property rights are two guiding values that the courts ought to pay more attention to. It is this package of findings that makes Lavoie's book a unique contribution to Canadian constitutional law scholarship.

The book is composed of ten chapters. The first chapter introduces the reader to the basic economic framework embedded in the Constitution. Chapter 2 then discusses the role property and property rights play in the Constitution, notwithstanding the absence of any explicit mention of property rights. Chapter 3 addresses the question of local autonomy and subsidiarity. Chapter 4 addresses economic relations among the provinces, while chapter 5 addresses how the national economy can be governed at the federal level. This leads to chapter 6, which makes the constitutional case for free trade among the provinces. Chapter 7 discusses the economic vision of the Constitution and where it stands in light of the modern economy, caselaw, and political values. Chapter 8 makes the case that notwithstanding these modern developments, the case for an economic efficiency vision of the Constitution is still appropriate for today's legal adjudications. In the last two chapters, the book returns to its two basic premises and key contributions, namely that a respect for property rights and free trade among the provinces should be key drivers of how the courts and policy-makers approach constitutional interpretation and adjudication among the competing parties.

Despite its subject matter and scholarly approach, the book is well-written and easy to read. Lavoie brings to the book both his scholarly acumen as well as his practical experiences litigating some of the very cases he discusses. In terms of his scholarship, I note that his first academic article dealt with the question of expropriations, or takings, a question that he explores in depth in the book when discussing the importance of property rights both historically and today.¹⁰ His subsequent scholarship on federalism, Aboriginal law, and property legal theory make appearances all over the book.¹¹ In addition to this prior

¹⁰ Malcolm Lavoie, "Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective" (2011) 42:2 Ottawa L Rev 31.

¹¹ See e.g. Malcolm Lavoie, "Property and Local Knowledge" (2021) 70:4 Cath U L Rev 637; Malcolm Lavoie, "Aboriginal Title Claims to Private Land and the Legal Relevance of Disruptive Effects" (2018) 83 SCLR (2d) 129; Malcolm Lavoie, "Understanding 'Trade as a Whole' in the *Securities Reference*" (2013) 46:1 UBC L Rev 157.

scholarship, it was his interest, as a scholar and as an intervenor, in the *Comeau* case that seems to have gotten him fired up to write the book.¹² In that regard, the book is both theoretically important as well as practical. The book is timely and relevant for the current politico-legal maneuverings taking place at the provincial and federal stages.

At present, for example, the constitutionality of the *Impact Assessment Act* is before the Supreme Court.¹³ The Supreme Court, having previously ruled that the federal government had the authority to impose a carbon tax,¹⁴ is now faced with the question of whether the federal government can effectively exert jurisdiction over any project that could have an environmental impact no matter how local the project is. The source of the tension is that the environment is not specified in the constitutional division of powers. As such, the courts have approached this question much like they did alcohol: sometimes it is provincial and sometimes it is federal.¹⁵ In a runup to the Supreme Court showdown, the Alberta Court of Appeal has already declared the *Act* to be “*ultra vires* Parliament,”¹⁶ arguing that to allow the *Impact Assessment Act* to stand would “reduce the plainly applicable provisions of s 92A, s 92(5), s 92(10), s 92(13), s 92(16) and s 109 to a subordinate status to federal authority.”¹⁷ Upholding the *Impact Assessment Act*, the Court of Appeal reasoned, would result in a “centralization of the governance of Canada to the point this country would no longer be recognized as a real federation. This is not what the framers of our Constitution intended. And it is certainly not what provincial governments agreed to either on patriation of the Constitution.”¹⁸ It is as if the Court had read Lavoie’s book!

The *Impact Assessment Act*, it should be noted, was one of the grievances cited in the Alberta Legislature when debating the passage of the *Alberta Sovereignty within a United Canada Act*.¹⁹ The member of the Legislature who cited the *Impact Assessment Act* prefaced his remarks by observing that:

Canada is a federal nation where the power to govern is divided between the federal government and the provincial governments across this nation. We are the second-largest nation in the world by geography, and we are a diverse people with unique languages and cultures. It is not possible to provide the government that this great nation needs and deserves by centralizing the power of government in one national body. Our founding fathers of Confederation understood this, so they crafted a constitution that recognizes this fact.

A strong federal system recognizes that national decisions need to be made by a national government and that the more local decisions must reflect the local realities and must be represented by the provincial levels of government. This federal relationship is not one of a parent-child relationship. Our federal system does not build in a power imbalance between a national government and the 10 provinces of this nation. The national

¹² Malcolm Lavoie, “*R. v. Comeau* and Section 121 of the *Constitution Act, 1867*: Freeing the Beer and Fortifying the Economic Union” (2017) 40:1 Dal LJ 189; *Comeau*, *supra* note 8 (Factum of the Intervener, Artisan Ales Consulting Inc).

¹³ *Reference re Impact Assessment Act*, 2022 ABCA 165, appeal as of right to the SCC, *Canada (AG) v Alberta (AG)* (22 March 2023); *Impact Assessment Act*, SC 2019, c 28, s 1.

¹⁴ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

¹⁵ See the Alberta Court of Appeal’s discussion of these issues and why the jurisprudence has led to the current challenge: *Reference re Impact Assessment Act*, 2022 ABCA 165.

¹⁶ *Ibid* at 425.

¹⁷ *Ibid* at 423.

¹⁸ *Ibid*.

¹⁹ Legislative Assembly, *Alberta Hansard*, 30-4 (30 November 2022) at 45 (Mark W Smith).

government and the provinces are partners, having been given different responsibilities and different capacities to make law in the governing of our great nation.²⁰

This statement and the Alberta Court of Appeal's statements, in contrast to the Supreme Court's upholding of the carbon tax, suggest that our federalism jurisprudence is at a critical juncture. In this regard, Lavoie's book not only provides the historical context for the division of powers, but also, especially in the later chapters of the book, a workable framework for when federal legislation such as the *Impact Assessment Act* should be upheld or struck down. Undoubtedly, there will be more cases to make their way through the courts as more and more federal and provincial legislation will be challenged on federalism grounds.

I should note that it is interesting that Canada has managed to maintain some semblance of a federal state, where the courts are willing to rule against the federal government's reach every now and then, as they did in the *Securities Reference*. In contrast, the United States, with its great constitutional declarations at its founding, has descended into a legal system where the presumption of power overwhelmingly resides with the federal government. This was not always so. As Lavoie points out, the framers were aware of the American constitutional design and sought to create a system that was somewhat different.²¹ Prior to the late 1930s, the United States Supreme Court see-sawed between upholding various pieces of federal legislation and striking down others, generating a jurisprudence similar to Canada's.²² Then in 1942, the US Supreme Court upheld the federal government's regulation of local farming by a farmer who grew some wheat for non-commercial reasons in excess of the farmer's allotted quota.²³ The US Supreme Court reasoned that if every farmer were to exceed their quota, even for non-commercial reasons, there would be an impact on the national wheat market, and this gave rise to federal jurisdiction.²⁴ This, of course, meant that no activity, however local, was immune from federal authority anymore. Indeed, since 1942, other than a smattering of cases, there has hardly been a federal piece of legislation struck down on federalism grounds.²⁵ What the Americans seem to lack is a sensible framework for making their federalism jurisprudence work. Canada, of course, had its own *Wickard* moment when the Manitoba Court of Appeal upheld similar agricultural legislation as applied to a similarly situated farmer.²⁶ In a comment on the case, Bora Laskin, an ardent proponent of expanding the federal government's power, rejoices at the prospect of the reasoning of *Klassen* being adopted as our own *Wickard* reasoning.²⁷ Yet Canada never did have its own *Wickard* moment. Although Chief Justice Laskin helmed the Supreme Court later on, his ability to effect much change in that direction did not materialize as he would have hoped. The discussion between him and Justice Beetz in the *Anti-Inflation Act* reference

²⁰ *Ibid* at 43.

²¹ Malcolm Lavoie, *Trade and Commerce: Canada's Economic Constitution* (Montreal: McGill-Queen's University Press, 2023) at 50.

²² For a good summary, see Robert J Pushaw Jr, "Enforcing Principled Constitutional Limits on Federal Power: A Neo-Federalist Refinement of Justice Cardozo's Jurisprudence" (2019) 60:3 *Wm & Mary L Rev* 937; Bruce Johnsen & Moin A Yahya, "The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism" (2004) 7:2 *U Pa J Const L* 403.

²³ *Wickard v Filburn*, 317 US 111 (1942).

²⁴ *Ibid* at 128–29.

²⁵ Pushaw, *supra* note 22 at 984.

²⁶ *R v Klassen* (1959), 20 DLR (2d) 406 (Man CA).

²⁷ Bora Laskin, Case Comment on *Regina v Klassen*, (1959) 37 *Can Bar Rev* 630 at 630, 635–36.

case shows that notwithstanding Chief Justice Laskin writing for the majority, Justice Beetz's reasoning is the more cogent of the two.²⁸ Chief Justice Laskin's moment to create his own framework fizzled out. His inability to justify an expansion of federal power in that case became an impediment to expanding the federal government's power. But perhaps, as Lavoie's book suggests, this may be explained by the specific designs of sections 91 and 92.

Having a working coherent framework for demarcating the line between the federal and provincial authorities is, therefore, crucial for maintaining the federal system that we have somehow managed to keep working for the past 156 years. Lavoie's arguments, which he develops in chapters 9 and 10, are exactly the type of arguments needed in the twenty-first century to make Canada a national economically integrated country that also respects local autonomy. Anyone interested in understanding why our Constitution is designed the way it is and why it ought to be that way should read this book.

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²⁸ *Reference Re: Anti-Inflation Act*, [1976] 2 SCR 373.

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