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DOMINION STORES AND LABATT BREWERIES: SIGNALS OF A RETURN TO THE THEORY OF PROVINCIAL RIGHTS

By Howard L. Kushner

I. INTRODUCTION

Over the last few years allegations of bias in matters involving constitutional issues have been made against the Supreme Court of Canada. It has been suggested that the Supreme Court has a federalist tilt which has resulted in decisions that have increased the scope of federal legislative powers at the expense of provincial legislative powers. These charges have reached such a magnitude that both academic and judicial voices have responded, denying any bias.

Against this background, it is interesting to note two recent decisions of the Supreme Court that appear to have revived the "provincial rights" philosophy so prevalent in the decisions of the Privy Council. The results of Dominion Stores Ltd. v. The Queen (hereinafter Dominion Stores) and Labatt Breweries v. A.G. of Canada (hereinafter Labatt's) suggest not merely a restrictive reading of the second category of the federal "Trade and Commerce" power, but also a narrow interpretation of the necessarily incidental doctrine and the emergence of a theory of provincial paramountcy. Although these two decisions may be applauded by those who support the provincial rights philosophy, those who are familiar with the problems which resulted


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1 Hogg, Is the Supreme Court of Canada Biased in Constitutional Cases? (1979), 57 Can. B. Rev. 721.


3 By "provincial rights" I am referring to a method of interpretation which appears primarily concerned with establishing the necessary limits of federal power in the interests of the authority that must be conceded to the provincial governments if they are to be able to discharge their own constitutional responsibilities. This approach may be contrasted with the "functional necessities" approach which attempts to develop a more dynamic relationship between the two spheres of power by taking a more realistic account of functional necessities. See LeDain, Sir Lyman Duff and The Constitution (1974). 12 Osgoode Hall L.J. 261 at 262.


6 The second category of the federal "Trade and Commerce" power may be defined as that part of the "Trade and Commerce" power which is encompassed by the phrase "the general regulation of trade affecting the whole dominion." See infra. text accompanying notes 44-64.
from the Privy Council’s narrow reading of the powers contained in section 91 of the British North America Act may justifiably feel that old battles once thought to have been fought and won must now be fought again.\(^7\)

The purpose of this comment is to show that all three of the above-noted doctrinal developments are open to serious question. The restrictive reading of the second category of the trade and commerce power results in its being rendered effectively meaningless. The narrow interpretation given to the “necessarily incidental” doctrine throws the law in that area into a state of confusion. The theory of provincial paramountcy developed represents a violent break with established doctrine. Perhaps most disturbing of all is that these developments occurred without the careful, critical analysis one would have expected from the Supreme Court.

II. THE CASES

The facts of Dominion Stores are relatively straightforward. The case concerned the enforcement of the standards to be met in the marketing of agricultural products, a matter on which both levels of government have legislated. At the federal level, there is the Canada Agricultural Products Standards Act,\(^8\) consisting of three parts. Part I, entitled “Standards,” authorizes the Governor in Council to make regulations establishing standards with appropriate grade names for any class of agricultural product and prohibits any person who sells, offers for sale or has in possession for sale an agricultural product from using the grade name unless he complies with the relevant standards.\(^9\) Part II, entitled “International and Interprovincial Trade,” makes the use of the grade names mandatory for international and interprovincial sales. Part III, entitled “Administration,” permits the appointment of inspectors and makes it an offence to violate any provision of the Act.\(^10\) Thus, in an interprovincial transaction, a seller of agricultural products must use the federally established grade names whereas in an intra-provincial transaction, a seller of agricultural products need not, at least under federal legislation, adopt the federally established grade names. Should an intra-provincial seller, however, choose to use the federally established grade names, then the seller must comply with the standards established for the grade name.

Operating side by side with the federal legislation, there exists in Ontario, where the marketing in question occurred, a provincial statute, the Farm Products Grades and Sales Act.\(^11\) This Act and the regulations thereunder make the use of the same federally established grade names compulsory for the intra-provincial sale of farm products. Section 10 of the Act makes con-

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\(^7\) One need only read Cory, “Difficulties of Divided Jurisdiction,” Royal Commission on Dominion-Provincial Relations (Rowell-Sirois Report) (Ottawa: King’s Printer, 1939), Appendix 7, to see how short a distance we have truly travelled.


\(^9\) Id., s. 3(1).

\(^10\) Id., s. 3(2).

\(^11\) Id., s. 13(1).

\(^12\) R.S.O. 1970, c. 161.
travention of any provision of the Act or regulations an offence. Thus, dovetailing legislation has been enacted which requires the use of the same standard for all sales of agricultural products, whether they be local, interprovincial or international in character. The charge against Dominion Stores was that it had in its possession for sale an agricultural product (apples) under a grade name (Canada Extra Fancy) which did not meet the standards for that grade. The charge was laid under the federal act by federal inspectors.

Dominion Stores Ltd. successfully moved to quash the information on the ground that Part I of the federal Act was ultra vires the federal Parliament because it was legislation which regulated trade and commerce within the province and thus fell within section 92(13) or 92(16) of the B.N.A. Act. The Crown appealed to Mr. Justice Grange of the Ontario High Court, who allowed the appeal on the ground that Part I was a valid exercise of the Trade and Commerce power under section 91(2) of the B.N.A. Act. Mr. Justice Grange drew an analogy between the federal Parliament establishing a national trademark “Canada Standard,” the validity of which was upheld in the Trademarks case, and the establishment of national agricultural standards. Dominion Stores Ltd. appealed to the Ontario Court of Appeal, which upheld the decision of Mr. Justice Grange. The Ontario Court of Appeal adopted the reasons of Mr. Justice Grange and in addition held that the provisions of Part I were necessarily incidental to the effective operation of the scheme established by “maintaining the integrity of the national standards grade and to prevent the misuse of the grade and confusion.”

Dominion Stores Ltd. then applied for and was granted leave to appeal to the Supreme Court of Canada. The constitutional question fixed by order of Mr. Justice Pigeon was: “Is Part I of the Canada Agricultural Products Standards Act, R.S.C. 1970, c. A-8, ultra vires in whole or in part?” The Supreme Court of Canada in a 5-4 split reversed the Ontario Court of Appeal and held that the federal act was inapplicable to local sales. It is not entirely clear if the majority held the legislation to be ultra vires and therefore inapplicable or merely inapplicable. Mr. Justice Estey, speaking for the majority, rejected the analogy drawn between “Canada Standard” and “Canada Extra Fancy.” Although the former fell within the second category of trade and commerce, the latter, he said, did not. He also held that the necessarily incidental doctrine could not be applied to federal legislation that

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14 A.G. Ont. v. A.G. Can., [1937] A.C. 405, [1937] 1 D.L.R. 702, 67 C.C.C. 342. In this case the Privy Council upheld federal legislation establishing a national trademark as being within the class of subjects enumerated in s. 91(2). For a further discussion, see infra, text accompanying notes 30-43.
16 Id. at 497 (O.R.), 267 (D.L.R.), 128 (C.C.C.).
17 Supra note 4, at 402 (N.R.), 285 (C.C.C.).
18 The majority decision was delivered by Estey J. with Martland, Pigeon, Beetz and Pratte JJ. concurring. Laskin C.J.C. delivered the dissent with Ritchie, Dickson and McIntyre JJ. concurring.
19 See infra, text accompanying notes 82-103.
affected local trade. Further, he appeared to adopt a doctrine of provincial paramountcy, determining the applicability of federal legislation by the existence of provincial legislation. The Chief Justice, speaking for the minority, held that the second category of trade and commerce applied to “Canada Extra Fancy” in the same manner as it applied to “Canada Standard.” The Chief Justice rejected the application of the necessarily incidental doctrine but for different reasons than those of Mr. Justice Estey. As to the existence of a doctrine of provincial paramountcy, the Chief Justice left the matter open.

Approximately one week after the judgment in Dominion Stores was delivered, the Supreme Court in Labatt’s had another opportunity to discuss the scope of the second category of trade and commerce and its application to commodity standards legislation. The case involved the use by the plaintiff of the label “Labatt’s Special Lite” for a beer that did not qualify as a “light beer,” a grade standard defined in a regulation passed under the Food and Drugs Act. Labatt Breweries was seeking a declaration that the label “Special Lite” was not misleading. The brewery was successful at trial before the Federal Court of Canada, but the decision was reversed by the Federal Court of Appeal. The brewery appealed to the Supreme Court where it argued first that the name “Special Lite” was not likely to be mistaken for a “light beer” and second, that the federal act and regulations thereunder which established standards for “light beer” were ultra vires the Parliament of Canada.

Before the Supreme Court, Labatt Breweries was unsuccessful on the first issue but was successful on the constitutional argument. Mr. Justice Estey, again speaking for a majority of the Court, held that the second category of the trade and commerce power could only apply where the matter in question is of general interest throughout the Dominion and has no application to the marketing and production of goods for sale. He also rejected the arguments advanced by the Attorney General of Canada which were based on the peace, order and good government power and the criminal law power. Mr. Justice Pigeon, in his dissent, upheld the validity of the regulation under the second category of the trade and commerce power, on the

1 Supra note 4, at 411-12 (N.R.), 293-94 (C.C.C.).
21 Id. at 421 (N.R.), 284 (C.C.C.).
22 Supra note 5.
23 Food and Drug Regulations, C.R.C. 1978, c. 870, regs. B.02.130[S], B.02.134[S].
26 Supra note 5, at 526. Only Mr. Justice Ritchie found the label “Special Lite” was not misleading.
27 The majority decision was delivered by Estey J. with Martland, Dickson, Beetz and Pratte JJ. concurring. Ritchie J. delivered a separate judgment but concurred with Estey J. on the constitutional issues. Pigeon J. delivered a dissent with McIntyre J. concurring. Laskin C.J.C. delivered a separate dissent.
28 This comment does not deal with the peace, order and good government or criminal law arguments advanced on behalf of the federal government.
basis that, from a constitutional law point of view, there was no difference between legislation which established the standards “light beer” and “Canada Standard.” The Chief Justice in his dissenting judgment held that the legislation and regulations were *intra vires* the federal Parliament. He based his decision on the existence of a federal trade power which was not limited to the international or interprovincial marketing of goods.

III. TRADEMARKS v. COMMODITY STANDARDS

*Dominion Stores* provided an opportunity for the Supreme Court to resolve an issue that has intrigued trademark lawyers: what is the nature and function of a trademark? Is it intended to indicate the “source or origin” of the goods distributed in association with the mark or is it an indication of the quality or characteristics of the goods sold in association with the mark? Is a trademark to be regarded “as a species of property including the right of disposition on the part of its owner; as a limited species of property as indicating origin and, hence, as something in which the public has an interest; or that it is property serving, not as an indication of origin, but as a guarantee of quality?”

Although one may forgive the Court for its refusal to resolve this crucial and difficult question in a case involving agricultural product standards, the Court cannot be forgiven for its refusal to discuss the relationship between a national trademark, such as “Canada Standard,” and a national commodity standard, such as “Canada Extra Fancy.”

In the *Trademarks* case, the Privy Council, on appeal from the Supreme Court, was asked whether the 1935 *Dominion Trade and Industry Commission Act* was *ultra vires* the Parliament of Canada. The Supreme Court had unanimously held that sections 14, 18 and 19 were *ultra vires*. Sections 18 and 19 of that Act provided that the words “Canada Standard” or initials “C.S.” were a national trademark vested in Her Majesty in right of the Dominion of Canada. This mark could only be used under the prescribed conditions, including the condition that the commodity to which such trademark was applied should conform to the requirements of a commodity standard established under the provisions of an act of Parliament. However, as stated by the Supreme Court in that case, this so-called “trademark” was not a trademark in any proper sense of the term as it was understood in 1935. At that time a trademark was viewed as an indicator of the origin of goods placed on the market, and the protection given to a trademark was intended to be a protection to the producer or seller of the goodwill in his business and of his reputation in his trade. The function of the initials “C.S.” as declared by section 18(1) was something entirely different. The application of the

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31 *Supra* note 14.


34 As a result of legislative amendments which permit the use of certification marks and allow the licensing of trademarks (see the *Trade Marks Act*, R.S.C. 1970, c. T-10, ss. 23-25, 49) it may be argued that the “origin” function of trademarks is no longer the sole or even primary function of a trademark.
initials “C.S.” to a commodity represented that the commodity met the standards prescribed for that commodity. Section 19(1) permitted any producer, manufacturer, or merchant to apply the national trademark to any commodity produced, or manufactured, or sold by him provided that the commodity conformed to the appropriate statutory qualifications. Section 19(2) made it a criminal offence to apply the mark to any commodity which did not meet the statutory qualifications. The Privy Council upheld the validity of sections 18 and 19, holding that the sections were within section 91(2) of the B.N.A. Act: regulation of trade and commerce.\(^\text{36}\) It is submitted that this peculiar type of mark serves neither an “origin function” nor a “property function,” but rather is of the nature of a commodity standard, by which the quality of an item is guaranteed through the use of a defined designation.\(^\text{36}\)

A comparison of trademarks, certification marks and the “C.S.” designation reveals a transfer of concern from product origin to product quality. The current view of trademarks, put forward by the Department of Consumer and Corporate Affairs in their working paper on trademark law revision,\(^\text{37}\) is that a trademark is not an indicator of product quality but rather is an indicator of the legal entity which has an economic interest in ensuring that products distributed in association with the trademark will continue to possess satisfactory characteristics. The trademark owner has, if not complete freedom, certainly a large measure of discretion to vary the quality of an item sold under the mark.\(^\text{38}\) The product quality control on a trademark is essentially regulated by the marketplace: a lowering of product quality may well result in a corresponding decrease in the value of the trademark. The “C.S.” designation differs from a regular trademark in that the control placed upon “C.S.” is not upon the person who may use the mark but rather on the quality of the product sold under the mark. By government regulation standards are established for the “C.S.” designation of any item. This makes the “C.S.” designation more comparable to a certification mark than a trademark. A certification mark is used to distinguish wares or services of a defined standard from wares or services that are not of that standard.\(^\text{39}\) Certification marks are registered with the Registrar of Trade Marks, and a change in the defined standard requires filing an amendment with the

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35 The present equivalents of ss. 18 and 19 of the Dominion Trade and Industry Commission Act, S.C. 1935, c. 59 are ss. 3, 4, 5, and 8 of the National Trade Mark and True Labelling Act, R.S.C. 1970, c. N-16.

36 At the present time regulations passed pursuant to the National Trade Mark and True Labelling Act, id., establish standards for a variety of items including: measuring cups, C.R.C. 1978, c. 1136, babcock test bottles C.R.C. 1978, c. 1135, and jewelled watches C.R.C. 1978, c. 1141.


38 The exact extent of a trademark owner’s discretion to vary the quality of his goods is not entirely clear. See Wilkinson Sword (Canada) Ltd. v. Juda (1967), 34 Fox Pat. C. 77, 51 C.P.R. 55 (Ex.). See also Hanak. The Quality Assurance Function of Trademarks (1975), 65 The Trade Mark Rptr. 318.

Registrar. Thus, a certification mark has aspects of “product quality” control in that the mark indicates a specified standard which cannot be varied as easily as a trademark. Although the certification mark is registered with a government official, the government neither establishes minimum standards nor tests the items to ensure that the items conform to the standard. A certification mark also has an “origin” function in that the owner of a certification mark determines by means of a licensing scheme who may use the mark.\textsuperscript{40} The “C.S.” designation differs from a certification mark in that no “origin” control is imposed but rather a “product quality” test is adopted.

Another difference between trademarks, certification marks and “C.S.” is found in the means adopted to ensure that the designation in question is not misused. For both trademarks and certification marks, redress is by way of civil action under the \textit{Trade Marks Act} or by way of the common law action of passing off.\textsuperscript{41} With respect to the “C.S.” designation, criminal proceedings may be brought by the Attorney General should the initials be misused.\textsuperscript{42}

These differences indicate that the “Canada Standard” designation is very similar to a commodity standard designation such as “Canada Extra Fancy.” Both establish a national standard, signified by a national name which traders, at least on a local level, may choose to use and which, if improperly used, subjects the trader to penal sanctions. This similarity was noted by the Chief Justice in \textit{Dominion Stores} and by Mr. Justice Pigeon in \textit{Labatt’s}.\textsuperscript{43} Mr. Justice Estey’s dismissal of the similarities of “Canada Standard” and “Canada Extra Fancy” on the basis that “Canada Standard” is a trademark misconstrues the nature of both designations. The same function is served by both designations, and a similar method of enforcement is adopted. To find one designation to be within the legislative jurisdiction of Parliament and the other not on the basis of the use of the phrase “trademark” is to elevate form over substance and permits Parliament to determine the constitutional validity of its own actions. The similarity in function, purpose and penalty suggests that the legislative authority which authorizes Parliament to create “Canada Standard” should also authorize it to create “Canada Extra Fancy” or “Light Beer.”

IV. GENERAL REGULATION OF TRADE

If “Canada Standard” or “Canada Extra Fancy” or “Light Beer” were to be upheld under section 91(2) with respect to local transactions without relying on the application of the necessarily incidental doctrine, they would have to be supported under the second category of “trade and commerce,” the general regulation of trade affecting the whole dominion. This category,

\textsuperscript{40} This “origin” function may become even less significant if the proposed amendments to the \textit{Trade Marks Act}, R.S.C. 1970, c. T-10 contained in the Senate Bill S-11, 1978-79 (30th Parliament, 4th sss.) are passed. See especially s. 21 of the proposed amendments.

\textsuperscript{41} Fox, \textit{supra} note 30, chs. IX, XII.


\textsuperscript{43} \textit{Supra} note 4, at 417-18 (N.R.), 281-82 (C.C.C.) and \textit{supra} note 5, at 533.
like the first, has its origins in the case of *Citizens Insurance Company of Canada v. Parsons*, where the Privy Council indicated that if no restraint were placed upon the phrase "regulation of trade and commerce," it would permit Parliament to enact "minute rules for regulating particular trades," severely restricting (if not emasculating) any provincial power over local trade. Thus, the phrase was interpreted to include merely "political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be... general regulation of trade affecting the whole dominion," leaving the regulation of local trade to the Provinces under sections 92(13) or 92(16) of the *B.N.A. Act*. Although the second branch of 91(2) has seldom been invoked successfully by the federal government, it has not been completely ignored. The general power was sufficient to permit the federal Parliament to establish a national trademark and to "prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers." Acknowledgment of this "general power to regulate trade" is also found in *Bank of Toronto v. Lambe*, *Hodge v. The Queen*, *Toronto Electric Comm'rs v. Snider* and in *Reference Re Natural Products Marketing Act*. Yet even in those cases which recognized the existence of the second branch of 91(2), there was no attempt to properly delineate the scope of the power. This failure to define the scope of the second category continued up until the mid-1970's. Only recently, in two judgments delivered by Chief Justice Laskin, has there been an attempt to give the second category some content. In the *Anti-Inflation Act Reference* the Chief Justice, by way of *obiter dicta*, specifically referred to "the general regulation of trade affecting the whole dominion" as a head of power which would justify the introduction of a policy of restraint to combat inflation. Subsequently, in *MacDonald v. Vapour Canada*, speaking for a

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44 (1881), 7 App. Cas. 96.
45 Id. at 112.
46 Id. at 113.
48 (1887), 12 App. Cas. 575 at 586 (P.C.).
49 (1883), 9 App. Cas. 117 at 131 (P.C.).
52 Even in the *Parsons* case, supra note 44, at 113, the Privy Council abdicated its role of deciding the scope of the second category when Sir Montague Smith stated:

> Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when completely exercised by the Dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects. [Emphasis added.]

It is no wonder that Estey J., in *Labatt's*, supra note 5, referred to the phrase "general regulation of trade" as a mere afterthought.
majority of the Court, he suggested that unless a federal act fulfilled the following conditions it could not be upheld under the second category of 91(2):

(1) the impugned section of an Act was part of a regulatory scheme administered by a federally appointed agency, and

(2) the enforcement of the scheme was not left to the chance of private redress without public monitoring by the continuous oversight of a regulatory agency.54

In Dominion Stores, neither the judgment of Mr. Justice Estey, nor the dissent of the Chief Justice truly addresses the issue of the proper scope of the second category of 91(2). Both judgments accept the authority of the Privy Council’s Trademarks decision but either distinguish the case on its facts (Mr. Justice Estey) or apply the case without any discussion of the tests to apply (Chief Justice Laskin). It is submitted that neither approach is satisfactory. To distinguish the Trademarks case on the basis of factual distinctions is to misconstrue the true nature of the “national” trademark; for, as has been indicated above, what was actually created by the Dominion Trade and Industry Commission Act was a commodity standard for manufactured goods. To simply apply the case without a discussion of the scope of the second category of 91(2) is to continue the court’s failure to define the proper role of the second category.

Shortly after the decision in Dominion Stores was handed down, the Supreme Court, in Labatt’s, had another opportunity to discuss the scope of the second category of trade and commerce and its application to commodity standards legislation. Mr. Justice Estey, speaking for a majority of the Court, stated that the test to determine whether the second category of the trade and commerce power applies is whether the matter is a question of general interest throughout the Dominion. However, he qualified this test by stating that

(1) the regulation of a single trade or industry is not of general national concern regardless of whether it is a national company,

(2) the regulation of the elements of commerce such as contracts of an individual trade is not of general national concern, and

(3) unrestricted geographic play of an Act is not sufficient.55

Mr. Justice Estey made no reference to the Chief Justice’s comments in MacDonald v. Vapour Canada regarding federal agencies and federal enforcement.

An additional complication in the interpretation of the second category of 91(2) arises out of the relationship between transactions involving the “marketing” of goods and the scope of the first category of 91(2). Attempts to uphold federal legislation which dealt with trade and commerce in a non-


55 Supra note 5, at 517-18.
marketing sense were consistently rebuffed by the Privy Council\(^6\) as not falling within either category of 91(2). Any marketing legislation which has been upheld under 91(2) has been characterized as being legislation within the first category of 91(2). Thus, marketing legislation has been excluded from the concept of general regulation of trade. Further, control of production is seen as being *prima facie* a matter of provincial jurisdiction and therefore not within the scope of 91(2),\(^7\) apparently on the assumption that since production occurs at a local level, it could not be a matter of general interest. Consequently, the second category of 91(2) has no application to production and marketing legislation. The first and second categories of 91(2) are seen as being mutually exclusive. This perception of the limited scope of 91(2) raises two questions: first, why must the second category of 91(2) be read so restrictively as to exclude “marketing legislation”, and second, how does one establish whether legislation which establishes commodity standards in respect of goods to be marketed is “marketing legislation” or “labelling legislation”? Each of these questions will be addressed in turn.

As indicated earlier, the historical justification for a restricted interpretation of the scope of 91(2) has been the fear that to interpret the words “regulation of trade and commerce” literally would deny the provinces any power over local trade. Thus, the basis of the interpretation is rooted in the “provincial rights” philosophy, as a means of preserving local autonomy. Yet if one were to approach the interpretation of section 91(2) from a different constitutional law perspective, for example co-operative federalism or functional necessities, one might well interpret section 91(2) differently. It is submitted that the dissent of the Chief Justice in *Labatt’s* reflects a constitutional view concerned with preserving a national power with respect to trade which would not be limited to the marketing of goods. Nor should the Chief Justice be criticized for presenting his view, for it merely reflects a different perception of Canada than that adopted by the Privy Council (and apparently by Mr. Justice Estey). Unfortunately, the Chief Justice does not indicate the scope of the second category of section 91(2), nor does he indicate the test to be used to determine if federal legislation falls within the second category. In his dissenting judgment in *Labatt’s*, the Chief Justice supports the validity of compulsory commodity standards legislation, not on the basis of a scheme of public control in association with a regulatory authority, a route suggested in *MacDonald v. Vapour Canada*, but on the basis that the legislation is a method of equalizing competitive advantages for businesses concerned with the manufacture of food, drugs, cosmetics and therapeutic devices.\(^8\) No case authority is cited by the Chief Justice to support his interpretation of section 91(2) other than a reference to comments

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\(^7\) In *Labatt’s*, supra note 5, at 516, Estey J. adopts the comments of Pigeon J. in *Re Agricultural Products* (1978), 84 D.L.R. (3d) 257 at 324.

\(^8\) Supra note 5, at 537.
in the *Board of Commerce* case in which the Privy Council indicated that Parliament could acquire statistical information on trade activities.\(^{50}\) Thus, one is no further ahead as a result of the Chief Justice’s judgment than one was with the 1937 Privy Council decision on trademarks. However, if one adopts the reasoning of Estey J., then the second category of 91(2) is a mere afterthought, to be given little if any effect;\(^{60}\) the phrase “regulation of trade and commerce” in 91(2) would be read as the regulation of the interprovincial or international marketing of goods and the *Trademarks* case stands as an unexplained anomaly.

Although the different interpretations of the second category of 91(2) adopted by the Chief Justice and Mr. Justice Estey may derive from differing views on their role in interpreting the constitution (provincial rights, cooperative federalism, functional necessities), both the Chief Justice and Mr. Justice Estey seem inclined to the view that marketing legislation should be treated as coming exclusively within the first category of 91(2).\(^{61}\) Why that is so is never made clear. Could not some product locally produced or manufactured be an item of concern to the Dominion as a whole, for example the mining and marketing of uranium? Certainly the declaratory power in section 92(10)(c) indicates that the “local” existence of a work does not preclude the work from having national importance. The *Parsons* case itself recognized the “double aspect” doctrine by suggesting that the general power when properly exercised could affect property and civil rights in a province. Possibly no situation has arisen where a matter of general interest to the Dominion has existed with respect to local production or marketing. Yet the Court’s analysis seems to preclude the application of the second category in all future cases.

A second question which arises, if the authority of the *Trademarks* case is to be maintained, is how one distinguishes between “agricultural products standards,” “food products standards,” “drug products standards” and “manufactured products standards” legislation. The latter has been declared *intra vires* the federal Parliament under section 91(2) by the Privy Council; the other three, as a result of the *Labatt’s* and *Dominion Stores* cases, have been declared *ultra vires* in so far as intra-provincial transactions are concerned on the basis that such legislation is “marketing” legislation. No satisfactory distinction is given in *Dominion Stores*, but in *Labatt’s* both Mr. Justice Estey and Mr. Justice Pigeon attempt to explain the difference. One route, suggested by Mr. Justice Estey, is to distinguish between labelling legislation and marketing legislation. Any legislation which goes beyond

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\(^{59}\) Id.

\(^{60}\) *Supra* note 52.

\(^{61}\) See the Chief Justice’s comments in *MacDonald*, *supra* note 54, at 163 (S.C.R.), 24 (D.L.R.), 27 (C.P.R.), where in reference to the federal trade and commerce power, he states:

> The bearing they [the marketing cases] do have, however, is in indicating that regulation by a public authority, taking the matter in question out of private hands, must still meet a requirement, if federal regulatory legislation is to be valid, of applying the regulation to the flow of interprovincial or foreign trade.
requiring disclosure of contents to prescribing standards and the maintaining of some scheme of quality control is characterized as marketing legislation.\footnote{Supra note 5, at 522.} In essence, legislation which establishes a scheme of quality control is marketing legislation. Yet this distinction does not adequately explain the Trademarks case which established a national commodity standard by prescribing standards for certain manufactured goods. Another basis of distinction may lie in the product to be labelled; namely food versus a manufactured item. Yet Mr. Justice Pigeon, in his dissent, rejects this line of reasoning by stating that no distinction could be drawn between the legislation at issue in the Trademarks case and those sections of the Food and Drugs Act which establish standards,\footnote{Id. at 532.} and both are valid under section 91(2). Another distinction could be between a scheme which is compulsory in nature versus a scheme which is voluntary. Yet the scheme closest to being compulsory was the food and drugs legislation that established quality standards for a variety of beers and prohibited the sale of beer that did not meet the prescribed standards, and Mr. Justice Pigeon upheld the legislation. The distinction seized upon by Mr. Justice Pigeon, by which the Agricultural Products Standards Act became ultra vires, was the existence of similar provincial legislation. Since provincial “commodity standards” legislation would appear to be valid as being legislation in relation to local transactions, and since local transactions come within the concept of intra-provincial marketing, the federal legislation must be legislation in relation to intra-provincial marketing. If this is the reasoning adopted by Mr. Justice Pigeon, it ignores the “double aspect” doctrine and permits federal legislation to be characterized and declared ultra vires on the basis of the existence of provincial legislation, suggesting a concept of provincial paramountcy.\footnote{See infra, text accompanying notes 82-103.}

The results of the Dominion Stores and Labatt’s cases suggest that, contrary to the Trademarks case, the Federal Parliament has no jurisdiction to establish commodity standards for items produced or marketed within a province. The second category of section 91(2) has no application to either the production or marketing of goods. Any implication that one might have drawn from the majority decision in Vapour Canada that the general trade and commerce power has some substantive content has apparently been refuted. The majority of the Court did not perceive any need to maintain a federal power to encourage and assist in the development of a national economy, but rather adopted an analysis which weakens the federal power over the national economy. In pursuit of provincial rights, the second category of 91(2) has been reduced in content to a lesser state than that in which it existed prior to Dominion Stores.

V. NECESSARILY INCIDENTAL DOCTRINE

As noted above, the second category of 91(2) was not the only basis upon which the legislation in the Dominion Stores case could have been
upheld. The necessarily incidental doctrine could also have been used to reach this result. As stated by Brooke J.A. for the Ontario Court of Appeal:

In our view, the pith and substance of this legislation is the regulation of export and interprovincial trade. We think the provisions of Part I, sec. 3(2) are necessarily incidental to the effective operation of the scheme established by maintaining the integrity of national standards grade and to prevent the misuse of the grade and confusion.\(^{65}\) [Emphasis added.]

This approach was, however, rejected by both Mr. Justice Estey and Chief Justice Laskin. Estey J. referred to The King v. Eastern Terminal Elevators Co. as establishing that Parliament is not empowered to regulate local trade simply as part of a scheme for the regulation of international and interprovincial trade.\(^{66}\) Laskin C.J.C. appeared to accept the argument advanced by Dominion Stores that:

in view of the existence of the Farm Products Grades and Sales Act, R.S.O. 1970 C. 161 covering intra-provincial transactions, and which was therefore valid provincial legislation under governing case law, Part I could not be swept into the provisions governing export and international trade as being “necessarily incidental” under the line of authority dealing with that concept.\(^{67}\)

It is submitted that this summary dismissal of the application of the necessarily incidental doctrine was both unfortunate and possibly without foundation. It is unfortunate because it is a doctrine often stated as a basis for upholding legislation but rarely with any reasons given. In fact, it is used more often as a statement of a conclusion which automatically results in a decision upholding (or denying) the validity of challenged legislation. Its dismissal may be without foundation due to the following comments by the Supreme Court in the Trademarks case:

If confined to external trade and inter-provincial trade the section [section 14, which provided that an agreement between persons engaged in any specific industry, entered into in order to modify wasteful or demoralizing competition existing in such industry, may be approved by the Governor General in Council] might well be competent under head No. 2 of section 91; and if the legislation were in substance concerned with such trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of competent provisions might also be competent.\(^{68}\)

Applying similar reasoning to Dominion Stores, if section 3 of the Agricultural Products Standards Act could be seen as being necessary in order to prevent the defeat of valid provisions regarding interprovincial and export trade, by protecting and preserving the integrity of national standards, and yet at the same time permit the use of a national standard in local trade, then section 3(2) ought to have been found to be intra vires the federal Parliament.

The “necessarily incidental doctrine,” which is sometimes seen as being equivalent to the “ancillary doctrine,” has been defined as follows:

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\(^{65}\) Supra note 15, at 497 (O.R.), 267 (D.L.R.) 127 (C.C.C.).


\(^{67}\) Id. at 419 (N.R.), 282-83 (C.C.C.). Quaere what line of authority is the Chief Justice relying on?

\(^{68}\) Supra note 33, at 382 (S.C.R.), 608 (D.L.R.), 178-79 (C.C.C.).
Provincial Rights

Provisions in a Dominion statute which directly intrude upon provincial classes of jurisdiction and which, standing alone, would be incompetent to the Dominion, may nevertheless be valid as being necessarily incidental to full-rounded legislation upon a Dominion subject-matter, or to the effective exercise of an enumerated Dominion power, or to prevent the scheme of an otherwise valid Act from being defeated.

Accepting the above definition of “necessarily incidental,” how does one determine whether a particular section of an act falls within the scope of the necessarily incidental doctrine? Chief Justice Laskin had an opportunity to comment upon this when he was a member of the Ontario Court of Appeal. In the case of Papp v. Papp an issue arose as to the validity of those provisions of the federal Divorce Act which related to the custody of children whose parents were involved in a divorce proceeding. Laskin J.A. said:

I do not myself favour the language of “trenching” and of “necessarily incidental” or “ancillary”, found in the two Privy Council cases and through which effectuation of exercises of federal legislative power have been certified. Convenient as that language may be to signal situations in which the doctrine of exclusiveness of jurisdiction does not apply but that there is rather a legislative field with gates of entry for both Dominion and Province, it is not sufficiently neutral in its acknowledgement of a common domain. The terse phraseology of the grants of legislative power does not fall to be measured by dictionary meaning alone. The Constitution is a working instrument addressed to legislative bodies, and its implementation in legislation must be seen as a social assessment by the enacting body of the scope of the power which is invoked in any particular case. Where there is admitted competence, as there is here, to legislate to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational functional connection between what is admittedly good and what is challenged.

. . .

the legislation must be taken as a whole and evaluated from the standpoint of its coherency as an integrated federal scheme. [Emphasis added.]

The test of whether there is a rational, functional connection between what is admittedly good and what is challenged was referred to and apparently adopted by the Supreme Court in Zacks v. Zacks. Accepting it to be the correct test, one then ought to look at the Agricultural Products Standards Act as a whole, evaluated from a standpoint of its coherency as an integrated federal scheme. It is submitted that in addition to establishing product standards for inter provincial and export trade (clearly within section 91(2)),

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60 There is some doubt whether this doctrine applies to provincial legislation. See the comments of Laskin C.J.C. in A.G. Quebec v. Kellogg's Co., [1978] 2 S.C.R. 211 at 216-17, 19 N.R. 271 at 275-76, 83 D.L.R. (3d) 314 at 316-17; but see Ladore v. Bennett, [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566 (P.C.), wherein the doctrine is applied to provincial legislation.


72 Id. at 335-36 (O.R.), 393-94 (D.L.R.).

an additional purpose of the legislation was to facilitate the establishment of a uniform national standard in order to assist the producer, seller and purchaser of agricultural products. Obviously, what is important in any such scheme is the maintenance of the uniformity and integrity of the standard. Certainly section 3(1) of the Act, wherein local producers and sellers are permitted but not compelled to adopt these standards, and section 3(2), wherein the integrity of the standard is maintained, would appear to be within the test laid out in *Papp v. Papp*. Possibly compulsory legislation, in the intra-provincial sphere, would overstep the requirements of a rational functional test. However, this analysis, based upon a “rational functional connection,” was not adopted by the Court.

Mr. Justice Estey's judgment, wherein he relies on a number of cases decided in the 1920's and 1930's offers a historical but questionable treatment of the necessarily incidental doctrine. He fails to discuss the more recent marketing cases such as *Re Farm Products Marketing Act*, 74 *Murphy v. C.P.R.*, 75 and the *Queen v. Klassen*, 76 in which a more functional 77 interpretation of the power of the federal Parliament to regulate local trade under section 91(2) is adopted. Mr. Justice Rand in the *Farm Products* case recognized that regulation of particular trades lies exclusively within the legislative jurisdiction of the provinces subject to such incidental intrusion by the Dominion as may be necessary to prevent the defeat of Dominion regulation. This functional approach was expanded in *The Queen v. Klassen*, in which federal legislation which restricted the right of local wheat growers to ship their wheat to local elevators was upheld on the basis that it was necessary in order to ensure the orderly marketing of the grain and maintain the quota system. Are these cases no longer reflective not only of the approach but also of the attitude which the Court will adopt in respect of federal legislation which affects local transactions? Does the reliance on *King v. Eastern Terminal Elevators* suggest a return to the watertight compartments and the restricted interpretation of section 91(2), so characteristic of the Privy Council era?

The Chief Justice's apparent rejection of the necessarily incidental doctrine on the basis of similar or identical provincial legislative provisions appears to conflict not only with the approach taken but also the result reached in *Papp v. Papp*, in which “custody legislation” existed at both the federal and provincial level. How does “similar” provincial legislation affect the rational functional connection test? Is it being suggested that if similar legislation exists at both levels then the existence of a need for federal legislation disappears? Is it being suggested that in order to establish that a need exists for federal legislation, the federal authorities must show a need not merely on the theoretical level but also in actuality? There may be some authority in support of this latter proposition that the “necessarily incidental” doctrine requires an actual need for legislation, not merely a theoretical need.

In Browne's book, *The Judicial Committee and The British North America Act*, the author, in discussing various interpretative doctrines adopted by the Privy Council when interpreting the *B.N.A. Act*, refers to the "Ancillary Doctrine" and states that "in these judgments [Montreal v. Montreal Street Railway]* and Fish Canneries case* Lord Atkinson and Lord Tomlin suggested that legislation should not be classified as ancillary to a federal statute unless it was clear that the provincial legislature would refuse to pass such legislation. Thus, where a province has enacted similar or identical provisions to those which the federal authorities claim to be within the scope of the necessarily incidental doctrine, the need for the federal provision no longer exists. The concern or purpose that prompted the federal legislation has been satisfied by valid provincial legislation. Of course, this raises the question of what the result is where only some but not all of the provinces have enacted similar legislation. Is the federal Act *ultra vires* in some provinces and *intra vires* in others, or *ultra vires* in all or *intra vires* in all?

Again, as with the general trade and commerce power, the concern at least of the majority of the Court appears to be directed to limiting federal powers in the interest of preserving provincial powers. Although the concern may be justified in that a broad interpretation of the necessarily incidental doctrine results in converting mutually exclusive powers into concurrent powers, any limitations or restrictions placed upon the doctrine ought surely to be consistent both with the doctrine itself and with previous case authority. Mr. Justice Estey's limited reference to the functional doctrine and his rejection of it without reference to the post-1950 cases suggests the movement to a new functional approach to "trade and commerce" may be reversed. The danger with this approach is that not only would it strike down all compulsory commodity standards legislation but also any voluntary commodity standards legislation and might also render ineffective all forms of complementary legislation. Adopting Estey J.'s analysis, what would happen if the provinces repealed their legislation? Would the federal government be powerless to protect the integrity of their standards? It would seem so.

The Chief Justice's apparent rejection of the doctrine based on the existence of provincial legislation suggests a further limitation upon the doctrine, one that can easily be used to advantage by a province. Since the basis of the necessarily incidental doctrine is that both jurisdictions could pass the legislation in question, the provinces now appear capable of rendering federal legislation *ultra vires* by merely enacting identical provincial legislation. Where before, the enactment of identical legislation by both the provincial and federal legislatures resulted in at most a declaration of inoperability with respect to the provincial legislation, it now appears possible that the federal legislation will be declared *ultra vires*. On the other

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hand, one might argue that since the application of the necessarily incidental doctrine results in federal legislative expropriation of provincial jurisdiction, the need for the federal legislation should be clear and compelling. In the case of agricultural products, because of the existence of provincial legislation, that compelling need may no longer exist. However, should the provincial legislation be repealed or not be enforced, then a compelling need for federal legislation could be demonstrated.

VI. PROVINCIAL PARAMOUNTCY AND COLOURABILITY

The most interesting aspect of the *Dominion Stores* case, and one which most clearly reflects the Court’s concern not to interfere with provincial rights, is the emphasis the majority places on the existence of provincial legislation establishing standards for agricultural products. For the majority, the issue before the court was not the question of whether Part I of the federal statute was *ultra vires* the federal Parliament. According to Mr. Justice Estey, “The precise issue facing the court in this proceeding is whether or not, in these circumstances, a charge may be laid under the federal statute.”82 The decision of the majority answers the latter question without specifically answering the question of validity. Estey J. concludes his judgment by finding the federal legislation “inapplicable.”83 Although Estey J. uses the phrase *ultra vires*, it is not entirely clear whether he has found Part I *ultra vires* and therefore inapplicable or merely inapplicable. He states:

> It is not necessary to determine, in my view, whether Part I is *ultra vires* the Parliament of Canada in toto and we are not invited by the appellant to so. It is sufficient if it is found to be inapplicable to the events as alleged in the charge laid against the appellant under the federal statute. It may be that Part I has at least a partial validity in that the grading program of s. 3 is integrated with the international and interprovincial trade program which is the subject of Part II of the statute, but in my view, s. 3 has no validity in relation to purely intra-provincial transactions and in that respect is *ultra vires*. This was the course followed in the interpretation of legislation by Kellock, J., in somewhat similar circumstances in the *Reference as to the Applicability of The Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office*, [1948] S.C.R. 248 at p. 268.84

His reference to the *Saskatchewan Post Office* case as a case of “similar circumstances” further supports the view that to Estey J., and thus to the majority, the issue is the applicability of legislation and not the validity of legislation. In the *Saskatchewan* case, the issue was the applicability of valid provincial minimum wage legislation to federal postal employees. Thus, by analogy, the issue in the *Dominion Stores* case is the applicability of valid federal legislation to local transactions.85 If the distinction between legislation

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82 Supra note 4, at 407 (N.R.), 289 (C.C.C.).
83 Id. at 412 (N.R.), 294 (C.C.C.).
84 Id. at 412-13 (N.R.), 294 (C.C.C.).
85 Estey J.’s reference to the *Saskatchewan Post Office* case as a case of similar circumstance is also questionable. At issue in the Saskatchewan case was the matter of inter-jurisdictional immunity, namely the extent to which the federal crown or its agencies are bound by provincial legislation. No such issue arose in either *Dominion Stores* or *Labatt’s*. Further, in the *Saskatchewan Post Office* case provincial legislation was held to be inapplicable whereas in *Dominion Stores* federal legislation was held to be inapplicable. Quaere whether the doctrine applies against federal legislation? See comments
in relation to a matter and legislation which affects a matter is a valid distinction, then it is inaccurate to say any federal legislation which affects local transactions is ultra vires. It would appear, however, that Estey J. is saying that any federal legislation which affects local transactions is inoperative whenever valid provincial legislation on the same matter exists. Certainly that appears to be the interpretation placed upon the majority judgment by the dissenters. In his dissent in the Labatt’s case the Chief Justice referred to the decision of the majority in Dominion Stores in the following terms:

I did not understand that the majority in the Dominion Stores case took any position on the validity of Part I of the federal Act; rather that majority appeared to find it inapplicable in the face of provincial legislation, a view which I, and those who joined with me in dissent, did not share because it was our opinion that, on the record, there was no issue raised as to the application of provincial legislation.86

The result of Dominion Stores, the method of analysis adopted by the majority, and the dissenter’s interpretation of the judgment all appear to suggest a new doctrine of interpretation for Canadian constitutional law: a doctrine of provincial paramountcy.

Paramountcy is a constitutional doctrine used to reconcile conflicts which arise when federal and provincial legislation meet. The present rule is one of federal paramountcy; thus, when valid but inconsistent (or conflicting) federal and provincial laws exist, the federal law prevails and the provincial law is inoperative.87 However, it would appear from Dominion Stores that it is now possible to assert a form of provincial paramountcy. The federal legislation permitted the use of the established grade names; the provincial legislation required the use of the established grade names. In Mr. Justice Pigeon’s view, it was this compulsion by provincial legislation that caused the federal legislation to be inapplicable.

The retailers being compelled by the provincial statute to apply the grade name, the federal inspectors claimed the equivalent in practical terms of the right to enforce the provincial statute concerning grade requirements specifications, by claiming violations of the federal standard. The conclusion of the majority in this Court rejected this as unwarranted federal interference in what was in truth the administration of the provincial statute.88

As more figuratively put by Mr. Justice Estey: “[t]he parasite and not the host thereby becomes the bigger and more important animal.”89


86 Supra note 5, at 535.

87 First, ... there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, ... if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail, Grand Trunk Railway of Canada v. A.G. of Canada, [1907] A.C. 65 at 68, 7 C.R.C. 472 at 474.

88 Supra note 5, at 533.

89 Supra note 4, at 407 (N.R.), 290 (C.C.C.).
The theory of paramountcy per se does not require the resolution of conflict in favour of the federal government, although all modern federal constitutions adopt the rule of federal paramountcy.\footnote{Hogg, Constitutional Law of Canada (Toronto: Carswell, 1977) at 102.} One could adopt a rule of provincial paramountcy or a rule of mixed paramountcy, wherein certain (or all) provincial powers would prevail over some federal powers, but would not prevail over other federal powers. To a limited extent, provincial paramountcy may already exist in Canada with respect to old age pensions.\footnote{See s. 94A of the British North America Act, 1867, and comments thereon, Laskin, Canadian Constitutional Law (4th ed. Toronto: Carswell, 1975) at 24-25.} To those persons who favour strong regional units and a less powerful central government, provincial paramountcy would be a welcome concept. The establishment of any such doctrine in Canada, however, raises a number of general questions. What purpose is served in adopting two rules of paramountcy? Is the doctrine to be applied universally or only to situations in which a person could be charged under either a federal act or provincial act for substantially the same offence? How do the two rules of paramountcy interact? In applying the doctrine of federal paramountcy, the first step is to independently determine the constitutional validity of the provincial and federal acts in question and then, and only then, determine if they conflict. In the \textit{Dominion Stores} case, the reverse approach is adopted, as the federal legislation is first characterized in light of the existing provincial legislation.\footnote{The presence of the provincial Act did not itself invalidate the federal action, but it forms part of the surroundings to be scrutinized in discerning the substantive core of the federal legislation.” Supra note 4, at 409 (N.R.), 291 (C.C.C.).} How important is the existence of uniform provincial legislation? Suppose, for example, that some of the provinces had adopted different standards. Would the differing provincial legislation result in a declaration of inapplicability for some provinces but not for others?

These questions and many more are left unanswered in the \textit{Dominion Stores} case. What is clear from the case is the Court's concern with what has been euphemistically called “federal intrusions”\footnote{The phrase adopted by the western provincial Premiers in their report, \textit{Report on the Western Premiers' Task Force on Constitutional Trends} (Victoria: Queen’s Printer, 1977).} into provincial matters. The Court was concerned that the federal legislation would render provincial legislation “futile” or “ineffective,” that federal “shadow legislation” could frustrate provincial regulation of trade.\footnote{Supra note 4, at 410 (N.R.), 292 (C.C.C.).} It is submitted that these concerns go to the wisdom of a particular piece of legislation and not to its constitutionality. The courts have repeatedly stated that it is not their role to comment upon the wisdom or propriety of any piece of legislation, yet the tenor of the judgment is one of improper federal actions which, if permitted, would destroy provincial legislative jurisdiction.

An alternative interpretation of the majority judgment in \textit{Dominion Stores}, which is consistent with past interpretative doctrines and permits the Court to review the propriety of the legislation in question, is that the Court applied the doctrine of colourability. This doctrine may be applied whenever
a statute bears the formal trappings of a matter within the jurisdiction of the legislature, but in reality is addressed to a matter outside the jurisdiction of the legislature. The doctrine is expressly referred to by Mr. Justice Estey when he explains why the Court must examine provincial legislation when characterizing Federal legislation:

The court is, however, entitled, and indeed required, to examine the interrelationship of federal and provincial legislation if it appears that Parliament has incorporated provincial enactments into its own legislation in an effort to colour (to adopt the language of the Privy Council) it so as to enter a field which, by our constitution, rests solely within the legislative competence of the provinces.95

No reference was made in the judgment to the presumption of constitutionality.96 It has been suggested by Professors Hogg97 and Abel98 that application of the colourability doctrine should not be seen as the Court attributing to the legislature improper motives. Yet the Court must invariably do so as the doctrine is premised on the theory that although the legislation in question appears valid and could properly fall within the Legislature's powers, the legislation is invalid because the purpose intended was improper. The Court in applying this doctrine must become involved in passing on the wisdom of the legislation.99

Estey J. supports his interpretation by reference to the historical development of the provincial and federal legislation. According to Professor Corry in his study prepared for the Royal Commission on Dominion-Provincial Relations, both the provinces and the Dominion felt that the establishment and maintenance of a uniform standard for agricultural products was beneficial and that the Dominion government was the body equipped to coordinate the matter.

However the confusion which differing provincial and federal grades and separate uncoordinated administration would introduce into this field of regulation is so great that the desirability of avoiding it is conceded everywhere as a matter of principle. . . Consequently, the provinces which have enacted separate legislation do not propose to enact separate grades and a duplicating force of officials. Their intention is to enact the federal grades and standards as their own and to appoint Dominion inspectors and field staff as provincial officials.100

Thus it was not a question of shadow federal legislation but shadow provincial legislation. No province was compelled to adopt the federal standard and Parliament is unlikely to adopt ten different standards in order to claim a national standard. Thus, to characterize the federal Parliament's actions as improper when it permits the standards it has established for interprovincial trade to be used for intra-provincial trade (subject to a penalty for misuse) and to ignore the province's original support of the federal

95 Id. at 406 (N.R.), 289 (C.C.C.).
97 Supra note 90, at 87.
100 Corry, supra note 7, at 15.
action is both unfortunate and unfair. Although legislative jurisdiction cannot be conferred upon one legislature by another, it is questionable to attribute improper motives to one set of legislators when a scheme has been adopted by both jurisdictions in an attempt to achieve that which neither could achieve acting independently.

Whether it be called provincial paramountcy or colourability, the technique of analyzing the applicability of federal legislation, given the existence of provincial legislation, appears to be established in the Labatt's and Dominion Stores cases. Even the minority in the Dominion Stores case does not dismiss the importance of provincial legislation. The Chief Justice, while upholding the validity of the federal legislation, suggested that a defence of obedience to provincial legislation might be pleaded.\(^{101}\) Whether this is a defence founded upon some principle of constitutional law or a specific example of some general criminal law defence\(^{102}\) remains to be explained. Subsequently in the Labatt's case the Chief Justice indicated that no issue was raised in the Dominion Stores case as to the applicability of provincial legislation, implying that the issue of constitutional validity of legislation (which was the express question before the Court in Dominion Stores) can be separated from the issue of the applicability of the legislation to a particular set of facts.\(^{103}\) But this approach also implies that the existence of provincial legislation may affect the interpretation or operability (as opposed to the constitutionality) of federal legislation. The Chief Justice did not reject the analysis of the majority in Dominion Stores upon any doctrinal basis, but on the basis that no issue was raised as to the application of provincial legislation. It is arguable, therefore, that to both the majority and the minority the application of federal legislation may be dependent upon the existence of provincial legislation. It appears that a doctrine of interpretation substantially similar to a concept of provincial paramountcy has been established.

VII. CONCLUSION

A review of the judgments of the Court in the Dominion Stores and Labatt's cases clearly reveals the concern of the Court to protect those areas of jurisdiction which are conceded to be contained within section 92 of the B.N.A. Act. To a majority of the Court provincial control over local trade is of paramount concern, a matter which must be protected from federal legislative intrusions at all costs. Thus, the emasculation of the federal general trade power, the restrictive interpretation of the necessarily incidental doctrine and the creation of a concept of provincial paramountcy are justified on the basis that federal legislation which affects local trade must be at least ineffective if not invalid.

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\(^{101}\) "What the appellant's legal position would have been if it had claimed by way of defence that it was obeying provincial legislation is not a question that arises here, and I leave it open." Supra note 4, at 421 (N.R.), 284 (C.C.C.).

\(^{102}\) For example, an application of the defence of due diligence to an offence of strict liability.

\(^{103}\) Supra note 5, at 535.
Although Professor Hogg in his article on the constitutional bias of the Supreme Court concluded that “there is no basis for the claim that the Court has been biased in favour of the federal interest in constitutional legislation,” he also found that from December 23rd, 1949 to June 1st, 1979, of the thirty-seven federal statutes challenged in the Supreme Court of Canada only four were held to be unconstitutional in whole or in part, whereas twenty-five of sixty-five provincial statutes were found unconstitutional or inoperative. In a period of approximately six months the Supreme Court has invalidated or struck down three federal statutes in whole or in part, almost equalling the number that were struck down in the previous thirty-one years. In each case strong arguments could have been advanced and were advanced in favour of the legislation. It is submitted that these cases are important not so much for the doctrinal positions developed therein (for if anything they confuse rather than clarify the law), but for the new attitude of the Court reflected in the judgments. It is an attitude which suggests a return to the “provincial rights” philosophy of the Privy Council period according to which those matters which are clearly seen to be within provincial competence, such as local trade, are to remain immune from any federal legislative power.

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104 Hogg, supra note 1, at 739.
105 The date of abolition of appeals to the Privy Council.
106 In addition to Dominion Stores and Labatt’s, the Supreme Court in Fowler v. The Queen (1980), 32 N.R. 230, [1980] 5 W.W.R. 511, held that s. 33(3) of the federal Fisheries Act was ultra vires the federal Parliament. During this time period the Supreme Court also held federal proposals which would have substantially altered the nature of the Senate to be ultra vires: Reference Re Legislative Authority of Parliament to Alter or Replace The Senate, [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1.