

CANADA / JUDGMENT

R. v. Crown Zellerbach Canada Ltd.

[1988] 1 SCR 401

COURT

Supreme Court of Canada

DECIDED

24 March 1988

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

R. v. Crown Zellerbach Canada Ltd.

Collection

Supreme Court Judgments

Date

1988-03-24

Report

[1988] 1 SCR 401

Case number

18526

Judges

Dickson, Robert George Brian; Beetz, Jean; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; Le Dain, Gerald Eric; La Forest, Gérard V.

On appeal from

British Columbia

Subjects

Constitutional law

Notes

SCC Case Information: 18526

Decision Content

r. v. crown zellerbach canada ltd., [1988] 1 S.C.R. 401

Her Majesty The Queen Appellant

v.

Crown Zellerbach Canada Limited Respondent

and

The Attorney General of Quebec and the Attorney General of British Columbia Intervenors

indexed as: r. v. crown zellerbach canada ltd.

File No.: 18526.

1986: June 26; 1988: March 24.

Present: Dickson C.J. and Beetz, McIntyre, Lamer, Wilson, Le Dain and La Forest JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Distribution of legislative powers -- Ocean pollution -- Dumping of waste in provincial marine waters -- Federal legislation prohibiting dumping of any substance at sea except in accordance with the terms and conditions of a permit -- Definition of sea in federal legislation including internal waters of Canada other than fresh waters -- Validity of federal legislation -- Whether ocean pollution a matter of national concern falling within Parliament's power to legislate in respect of the peace, order and good government of Canada -- Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, s. 4(1) -- Constitution Act, 1867, s. 91 "preamble".

During the conduct of its logging operations, respondent dumped woodwaste in the waters of Beaver Cove, an area within the province of British Columbia, and was charged with contravening s. 4(1) of the Ocean Dumping Control Act. The federal legislation prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined for the purposes of the Act as including the internal waters of Canada other than fresh waters. The respondent had a permit to dump under the Act, but it did not cover this site. The waters of Beaver Cove are navigable and flow into Johnstone Strait which is connected with the Pacific. There was no evidence of any dispersal of the woodwaste or of any effect on navigation or marine life. At trial, the Provincial Court judge dismissed the charges and the appeal by way of stated case was dismissed. Both the trial judge and the Court of Appeal held that s. 4(1) of the Act was ultra vires Parliament. This appeal is to determine whether s. 4(1) of the Act is constitutional in its application to the dumping of waste in waters, other than fresh waters, within a province.

Held (Beetz, Lamer and La Forest JJ. dissenting): The appeal should be allowed.

Per Dickson C.J. and McIntyre, Wilson and Le Dain JJ.: The Ocean Dumping Control Act is concerned with the dumping of substances which may be shown or presumed to have an adverse effect on the marine environment and may be characterized as directed to the control or regulation of marine pollution. The federal legislative jurisdiction under s. 91(12) of the

Constitution Act, 1867 with respect to seacoast and inland fisheries is not sufficient by itself to support the constitutional validity of s. 4(1) of the Act because that section, viewed in the context of the Act as a whole, fails to meet the test laid down by this Court in *Fowler v. The Queen*, [1980] 2 S.C.R. 213, and *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292. While the effect on fisheries of marine pollution caused by the dumping of waste is clearly one of the concerns of the Act, it is not the only effect of such pollution with which the Act is concerned. A basis for federal legislative jurisdiction to control marine pollution generally in provincial waters cannot be found in any of the specified heads of federal jurisdiction in s. 91 of the Constitution Act, 1867, whether taken individually or collectively.

Section 4(1) of the Ocean Dumping Control Act, however, is constitutionally valid as enacted in relation to a matter falling within the national concern doctrine of the peace, order and good government power of the Parliament of Canada. The national concern doctrine, which is separate and distinct from the national emergency doctrine, applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. In determining whether a matter has the requisite singleness, distinctiveness and indivisibility, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. The control of marine pollution meets the test. Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole. The pollution of marine waters, including provincial marine waters, by the dumping of substances is sufficiently distinguishable from the pollution of fresh waters by such dumping to meet the requirement of singleness or indivisibility. While in many cases the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow, marine pollution, because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations that distinguish it from fresh water pollution. Moreover, the distinction between salt water and fresh water as limiting the application of the Ocean Dumping Control Act meets the consideration, emphasized by a majority of this Court in the *Anti-Inflation Act* reference, [1976] 2 S.C.R. 373, that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.

Per Beetz, Lamer and La Forest JJ. (dissenting): Under its general power respecting peace, order and good government, Parliament may legislate for the control of pollution in areas of the ocean falling outside provincial jurisdiction, and in so doing, Parliament is not confined to regulating activities taking place within those areas. In an application of the doctrine of national dimensions of the general power, Parliament may take steps to prevent activities in a province,

such as dumping substances in provincial waters or emitting substances into the air, which pollute or have the potential to pollute the sea outside the province. Parliament's power to control ocean pollution under its general power may also be complemented by provisions made pursuant to the criminal law power. However, while Parliament may undoubtedly prohibit the dumping of anything into federal waters, such prohibitions against dumping substances into provincial waters must be linked to some federal power. Indeed, to respect the scheme of federalism provided by the Constitution, there must be an attempt to link the proscribed conduct and the actual or potential harm to what is sought to be protected--here, the ocean. In the present case, s. 4(1) of the Ocean Dumping Control Act was ultra vires Parliament as there was no evidence of any such link. The provision was a blanket prohibition against depositing any substance in waters without regard to its nature or amount.

The control of the environment is not a proper subject for incorporation into the peace, order and good government power under the national dimensions doctrine. All physical activities have some environmental impact. Possible legislative responses to such activities cover a large number of the enumerated legislative powers, federal and provincial. To allocate the broad subject-matter of the environmental control to the federal sphere under its general power would effectively gut provincial legislative jurisdiction and sacrifice the principles of federalism enshrined in the Constitution. Further, pollution is not a new phenomenon, and neither are many of the kinds of activities that result in pollution.

The same considerations apply to the creation of an environmental power restricted to the control of ocean pollution. Such subject is not marked by a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. Marine waters are not wholly bounded by the coast and cannot be demarcated clearly. Moreover, the proposed federal power would have an impact on provincial jurisdiction irreconcilable with the division of legislative power under the Constitution. Finally, Parliament already has extensive powers to deal with conditions that lead to ocean pollution wherever they occur. The difficulty with the impugned provision in this case is that it seeks to deal with activities that could not be demonstrated either to pollute or to have a reasonable potential of polluting the ocean. The provision simply overreaches and, in its terms, encompasses activities--depositing innocuous substances into provincial waters by local undertakings on provincial lands--that fall within the exclusive legislative jurisdiction of the province. The federal Parliament does not have such wide legislative power over local matters having local import taking place on provincially owned property. The prohibition in essence constitutes an impermissible attempt to control activities on property held to be provincial.

Cases Cited

By Le Dain J.

Considered: *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663; *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373; *R. v. Hauser*, [1979] 1 S.C.R. 984; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R.

914; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695; *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292; *Fowler v. The Queen*, [1980] 2 S.C.R. 213; *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; referred to: *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348; *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* (1976), 1 B.C.L.R. 97, *aff'd* [1984] 1 S.C.R. 388.

By La Forest J. (dissenting)

Fowler v. The Queen, [1980] 2 S.C.R. 213; *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292; *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388; *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *Re Canada Metal Co. and The Queen* (1982), 144 D.L.R. (3d) 124; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111; *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304; *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663; *R. v. Hauser*, [1979] 1 S.C.R. 984; *Schneider v. The Queen*, [1982] 2 S.C.R. 112.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91 "preamble", (9), (10), (12), (13), (27), 92(5), (10), (13), (16).

Constitution Act, 1871 (U.K.), 34 & 35 Vict., c. 28, s. 4.

Convention on the Law of the Sea (1982).

Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, signed by Canada on December 29, 1972, Art. I, III(3).

Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, ss. 2(1) "Convention", "dumping", (2), (3), 4(1), (2), 5(2), 9, 10, 13(1)(c), 28(3), Schedules I [am. SOR/81-721], II [am. *idem*], III.

Authors Cited

Beaudoin, G  rald A. "La protection de l'environnement et ses implications en droit constitutionnel" (1977), 23 McGill L.J. 207.

Gibson, Dale. "Measuring `National Dimensions'" (1976), 7 Man. L.J. 15.

Great Lakes Science Advisory Board to the International Joint Commission. 1980 Annual Report: A Perspective on the Problem of Hazardous Substances in the Great Lakes Basin Ecosystem, presented November 13, 1980, Toronto.

Great Lakes Science Advisory Board to the International Joint Commission. "Assessment of Airborne Contaminants in the Great Lakes Basin Ecosystem" in Appendix A & B of the 1980 Annual Report of the Great Lakes Science Advisory Board to the International Joint Commission, presented November 13, 1980, Toronto.

Hogg, Peter W. Constitutional Law of Canada. Toronto: Carswells, 1977.

Hogg, Peter W. Constitutional Law of Canada, 2nd ed. Toronto: Carswells, 1985.

Le Dain, Gerald. "Sir Lyman Duff and the Constitution" (1974), 12 Osgoode Hall L.J. 261.

Lederman, William R. "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 Can. Bar Rev. 597.

UNESCO. IMCO/FAO/UNESCO/WMO/WHO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Pollution (Gesamp). The Review of the Health of the Oceans. Reports and Studies No. 15, 1982.

APPEAL from a judgment of the British Columbia Court of Appeal (1984), 51 B.C.L.R. 32, 7 D.L.R. (4th) 449, [1984] 2 W.W.R. 714, 11 C.C.C. (3d) 113, 13 C.E.L.R. 29, dismissing an appeal by way of stated case from a judgment of the Provincial Court (1982), 11 C.E.L.R. 151, dismissing charges under s. 4(1) of the Ocean Dumping Control Act. Appeal allowed, Beetz, Lamer and La Forest JJ. dissenting.

T. B. Smith, Q.C., and D. R. Kier, Q.C., for the appellant.

Duncan W. Shaw, Q.C., and Brian D. Gilfillan, for the respondent.

Odette Laverdière, for the intervener the Attorney General of Quebec.

E. Robert A. Edwards, Q.C., for the intervener the Attorney General of British Columbia.

The judgment of Dickson C.J. and McIntyre, Wilson and Le Dain JJ. was delivered by

1. Le Dain J.--The question raised by this appeal is whether federal legislative jurisdiction to regulate the dumping of substances at sea, as a measure for the prevention of marine pollution, extends to the regulation of dumping in provincial marine waters. In issue is the validity of s. 4(1) of the Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, which prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined for the purposes of the Act as including the internal waters of Canada other than fresh waters.

2. The appeal is by leave of this Court from the judgment on January 26, 1984 of the British Columbia Court of Appeal (1984), 51 B.C.L.R. 32, 7 D.L.R. (4th) 449, [1984] 2 W.W.R. 714, 11 C.C.C. (3d) 113, 13 C.E.L.R. 29, dismissing an appeal by way of stated case from the judgment on May 26, 1982 of Schmidt Prov. Ct. J. (1982), 11 C.E.L.R. 151, who dismissed charges against the respondent of unlawfully dumping in the waters of Johnstone Strait near Beaver Cove in the province of British Columbia on the ground that s. 4(1) of the Ocean Dumping Control Act is ultra vires the Parliament of Canada.

I

3. The general purpose of the Ocean Dumping Control Act is to regulate the dumping of substances at sea in order to prevent various kinds of harm to the marine environment. The Act would appear to have been enacted in fulfilment of Canada's obligations under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, which was signed by Canada on December 29, 1972. That is not expressly stated in the Act, but there are several references to the Convention in the Act (see ss. 2(1), 4(2), 5(2), 9(6) and 28(3)), and Schedules I, II and III of the Act, with reference to "Prohibited Substances", "Restricted Substances" and "Factors To Be Taken Into Account In Granting Permits", appear to be modelled closely on Annexes I, II and III of the Convention. The Schedules of the Act have been amended to incorporate amendments to the Annexes of the Convention (see P.C. 1981-2509, September 16, 1981, SOR/81-721, September 21, 1981).
4. The concerns of the Act are reflected in the nature of the prohibited and restricted substances in Schedules I and II and in the factors to be taken into account by the Minister of the Environment in granting permits to dump, which are set out in ss. 9 and 10 of the Act and in Schedule III. What these provisions indicate is that the Act is concerned with marine pollution and its effect on marine life, human health and the amenities of the marine environment. There is also reference to the effect of dumping on navigation and shipping and other legitimate uses of the sea.
5. Section 4(1) of the Act, with the contravention of which the respondent was charged, reads as follows:
 4. (1) No person shall dump except in accordance with the terms and conditions of a permit.
 6. "Dumping" is defined by s. 2(1) of the Act as follows:
 2. (1) In this Act,
 - ..."dumping" means any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance but does not include

- (a) any disposal that is incidental to or derived from the normal operations of a ship or an aircraft or of any equipment thereof other than the disposal of substances from a ship or aircraft operated for the purpose of disposing of such substances at sea, and
 - (b) any discharge that is incidental to or derived from the exploration for, exploitation of and associated off-shore processing of sea bed mineral resources;
7. "The sea" is defined, for the purposes of the Act, by s. 2(2) and (3) as follows:
2. ...
- (2) For the purposes of this Act, "the sea" means
- (a) the territorial sea of Canada;
 - (b) the internal waters of Canada other than inland waters;
 - (c) any fishing zones prescribed pursuant to the Territorial Sea and Fishing Zones Act;
 - (d) the arctic waters within the meaning of the Arctic Waters Pollution Prevention Act ;
 - (e) any area of the sea adjacent to the areas referred to in paragraphs (a) to (d) as may be prescribed;
 - (f) any area of the sea, under the jurisdiction of a foreign state, other than internal waters; and
 - (g) any area of the sea, other than the internal waters of a foreign state, not included in the areas of the sea referred to in paragraphs (a) to (f).
- (3) For the purposes of paragraph (2)(b), "inland waters" means all the rivers, lakes and other fresh waters in Canada and includes the St. Lawrence River as far seaward as the straight lines drawn
- (a) from Cap des Rosiers to the western-most point of Anticosti Island; and
 - (b) from Anticosti Island to the north shore of the St. Lawrence River along the meridian of longitude sixty-three degrees west.
8. Sections 9 and 10 of the Act respecting the authority of the Minister of the Environment to grant permits to dump read in part as follows:
9. (1) Subject to subsections (4) and (5), the Minister may grant any permit required by this Act upon receipt of an application in prescribed form.
- ...
- (4) No permit may be granted under this section if the dumping or disposal described in the application is prohibited under any other Act of Parliament or if a licence or permit for such dumping or disposal is required under any such other Act and the licence or permit has not been obtained.

- (5) No permit may be granted in respect of a substance specified in Schedule I unless, in the opinion of the Minister,
 - (a) the substance is rapidly rendered harmless by physical, chemical or biological process of the sea and does not render normally edible marine organisms inedible or unpalatable or endanger human health or the health of animals;
 - (b) with respect to any substance specified in items 1 to 5 of that Schedule, such substance is contained in another substance in a quantity or concentration that does not exceed the maximum quantity or concentration prescribed;
 - (c) the dumping or disposal of a certain quantity of the substance is necessary to avert an emergency that poses an unacceptable risk relating to human health and admits of no other feasible solution; or
 - (d) where the substance is to be transformed by incineration or other means of thermal degradation, any substance that results from such transformation is
 - (i) a substance specified in Schedule I in respect of which a permit may be granted by virtue of paragraph (a) or (b), or
 - (ii) a substance that is not specified in Schedule I.

...

- 10. (1) Upon receipt of an application the Minister, in determining whether to grant the permit,
 - (a) shall take into account the factors set out in Schedule III; and
 - (b) may take into account any other factors that he deems necessary.
- (2) A permit shall contain such terms and conditions as the Minister deems necessary in the interests of human life, marine life or any legitimate uses of the sea and, without limiting the generality of the foregoing, may contain terms and conditions relating to such of the following as are applicable:
 - (a) the nature of the substance that may be dumped or disposed of and the quantity thereof;
 - (b) the method and frequency of dumping or disposal authorized including, if necessary, the date or dates on which dumping or disposal is authorized;
 - (c) the manner of loading and stowing the substance authorized to be dumped or disposed of;
 - (d) the site at which dumping or disposal may take place;
 - (e) the route to be followed by the ship or aircraft transporting the substance to the site of the dumping or disposal; and
 - (f) any special precautions to be taken respecting the loading, transporting, dumping or disposal of the substance.

9. Schedules I, and II, as amended by P.C. 1981-2509 of September 16, 1981, and Schedule III of the Act are as follows:

SCHEDULE I

PROHIBITED SUBSTANCES

1. Organohalogen compounds.
2. Mercury and mercury compounds.
3. Cadmium and cadmium compounds.
4. Persistent plastics and other persistent synthetic materials.
5. Crude oil and its wastes, refined petroleum products, petroleum distillate residues and any mixtures containing any of those substances.
6. High-level radioactive wastes or other high-level radioactive matter that may be prescribed.
7. Substances in whatever form produced for biological and chemical warfare.

SCHEDULE II

RESTRICTED SUBSTANCES

1. Arsenic and its compounds.
2. Lead and its compounds.
3. Copper and its compounds.
4. Zinc and its compounds.
5. Organosilicon compounds.
6. Cyanides.
7. Fluorides.
8. Pesticides and their by-products not included in Schedule I.
9. Beryllium and its compounds.
10. Chromium and its compounds.
11. Nickel and its compounds.
12. Vanadium and its compounds.
13. Containers and scrap metal.
14. Radioactive wastes or other radioactive matter not included in Schedule I.
15. Substances that by reason of their bulk would interfere with fishing.

16. Substances that, though of a non-toxic nature, may become harmful due to the quantities in which they are dumped, or that are liable to seriously reduce amenities.

SCHEDULE III

FACTORS TO BE TAKEN INTO ACCOUNT IN GRANTING PERMITS

1. characteristics and composition of substance
 - (1) Total amount and average composition of substance dumped (e.g. per year).
 - (2) Form (e.g. solid, sludge, liquid or gaseous).
 - (3) Properties: physical (e.g. solubility and density), chemical and biochemical (e.g. oxygen demand, nutrients) and biological (e.g. presence of viruses, bacteria, yeasts and parasites).
 - (4) Toxicity.
 - (5) Persistence: physical, chemical and biological.
 - (6) Accumulation and biotransformation in biological materials or sediments.
 - (7) Susceptibility to physical, chemical and biochemical changes and interaction in the aquatic environment with other dissolved organic and inorganic materials.
 - (8) Probability of production of taints or other changes reducing marketability of resources (fish and shellfish).
2. characteristics of dumping site and method of deposit
 - (1) Location (e.g. co-ordinates of the dumping site, depth and distance from the coast) and location in relation to other areas (e.g. amenity areas, spawning, nursery and fishing areas and exploitable resources).
 - (2) Rate of disposal per specific period (e.g. quantity per day, per week, per month).
 - (3) Methods of packaging and containment, if any.
 - (4) Initial dilution achieved by proposed method of release.
 - (5) Dispersal characteristics (e.g. effects of currents, tides and wind on horizontal transport and vertical mixing).
 - (6) Water characteristics (e.g. temperature, pH, salinity, stratification, oxygen indices of pollution--dissolved oxygen (DO), chemical oxygen demand (COD), biochemical oxygen demand (BOD)--nitrogen present in organic and mineral form including ammonia, suspended matter, other nutrients and productivity).
 - (7) Bottom characteristics (e.g. topography, geochemical and geological characteristics and biological productivity).

- (8) Existence and effects of other dumpings that have been made in the dumping site (e.g. heavy metal background reading and organic carbon content).
- (9) In issuing a permit for dumping, consideration should be given whether an adequate scientific basis exists for assessing the consequences of such dumping, as outlined in this Schedule taking into account seasonal variations.
- 3. general considerations and conditions
 - (1) Possible effects on amenities (e.g. presence of floating or stranded material, turbidity, objectionable odour, discoloration and foaming).
 - (2) Possible effects on marine life, fish and shellfish culture, fish stocks and fisheries, seaweed harvesting and culture.
 - (3) Possible effects on other uses of the sea (e.g. impairment of water quality for industrial use, underwater corrosion of structures, interference with ship operations from floating substances, interference with fishing or navigation through deposit of waste or solid objects on the sea floor and protection of areas of special importance for scientific or conservation purposes).
 - (4) The practical availability of alternative land based methods of treatment, disposal or elimination, or of treatment to render the matter less harmful for dumping at sea.
- 10. Section 13(1) of the Act provides:
 - 13. (1) Every person who contravenes section 4, 5 or 6 is guilty of an offence and is liable on summary conviction to a fine not exceeding
 - (a) one hundred thousand dollars, where the offence involves a substance specified in Schedule I;
 - (b) seventy-five thousand dollars, where the offence involves a substance specified in Schedule II; or
 - (c) fifty thousand dollars, where the offence involves any substance not specified in Schedule I or II.
- 11. The respondent was charged, in an information consisting of two counts, with contravening s. 4(1) of the Act, and thereby committing an offence under s. 13(1)(c) as follows:

Count 1: On or about the 16th day of August, A.D. 1980, in the waters of Johnstone Strait near Beaver Cove, Province of British Columbia, did unlawfully dump except in accordance with the terms and conditions of a permit in contravention of Section 4 of the Ocean Dumping Control Act, thereby committing an offence under Section 13(1)(c) of the said Act.

Count 2: On or about the 17th day of August, A.D. 1980, in the waters of Johnstone Strait near Beaver Cove, Province of British Columbia, did unlawfully dump except in accordance with the terms and conditions of a permit in contravention of Section 4 of the Ocean Dumping Control Act, thereby committing an offence under Section 13(1)(c) of the said Act.

12. The admitted facts concerning the location and nature of the dumping with which the respondent was charged are as follows. The respondent carries on logging operations on Vancouver Island in connection with its forest products business in British Columbia and maintains a log dump on a water lot leased from the provincial Crown for the purpose of log booming and storage in Beaver Cove, off Johnstone Strait, on the northeast side of Vancouver Island. The waters of Beaver Cove are inter fauces terrae, or as put in the stated case, "Beaver Cove is of such size that a person standing on the shoreline of either side of Beaver Cove can easily and reasonably discern between shore and shore of Beaver Cove." On August 16 and 17, 1980 the respondent, using an 80-foot crane operating from a moored scow, dredged woodwaste from the ocean floor immediately adjacent to the shoreline at the site of its log dump in Beaver Cove and deposited it in the deeper waters of the cove approximately 60 to 80 feet seaward of where the woodwaste had been dredged. The purpose of the dredging and dumping was to allow a new A-frame structure for log dumping to be floated on a barge to the shoreline for installation there and to give clearance for the dumping of bundled logs from the A-frame structure into the waters of the log dump area. The woodwaste consisted of waterlogged logging debris such as bark, wood and slabs. There is no evidence of any dispersal of the woodwaste or any effect on navigation or marine life. At the relevant time the only permit held by the respondent under the Act was one issued on or about July 28, 1980, effective until July 25, 1981, to dump at a site in Johnstone Strait some 2.2 nautical miles from the place where the woodwaste was dumped.
13. In the Provincial Court of British Columbia, Schmidt Prov. Ct. J. found that the waters of Beaver Cove in which the woodwaste was dumped are within the province of British Columbia. In support of this finding he referred to the judgment of the British Columbia Court of Appeal in *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* (1976), 1 B.C.L.R. 97, in which a majority of the Court held that the waters of Johnstone Strait, of which Beaver Cove forms part, are within British Columbia. (An appeal from this judgment was subsequently dismissed by this Court in *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388.) Schmidt Prov. Ct. J. held that the regulation of the dumping of woodwaste in the respondent's log dump area in Beaver Cove, as part of the respondent's logging operations, fell within provincial legislative jurisdiction under head 92(5) of the Constitution Act, 1867 --"The Management and Sale of Public Lands belonging to the Province and of the Timber and Wood thereon". He further held that the regulation of such dumping did not fall within federal legislative jurisdiction under head 91(10)--"Navigation and Shipping"--or under head 91(12)--"Sea Coast and Inland Fisheries". Applying this Court's judgment in *Fowler v. The Queen*, [1980] 2 S.C.R. 213, he concluded that s. 4(1) of the Act "makes no attempt to link the proscribed conduct to actual or potential harm to fisheries or to interference with navigation or shipping." Finally, Schmidt Prov. Ct. J.

rejected the respondent's contention that the Parliament of Canada had legislative jurisdiction to enact s. 4(1) under its treaty implementation power. Applying what was said by Laskin C.J. in *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, he held that there was not a sufficiently clear indication in the Act that it was enacted in implementation of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter. In the result, Schmidt Prov. Ct. J. held s. 4(1) of the Act to be ultra vires the Parliament of Canada and dismissed the charges against the respondent.

14. The appeal by way of stated case from this judgment was dismissed by unanimous judgment of the British Columbia Court of Appeal (Carrothers, Aikens and Macdonald JJ.A.) Macdonald J.A., delivering the judgment of the Court, rejected the appellant's contentions based on federal jurisdiction with respect to navigation and shipping and seacoast and inland fisheries for the same reason as that adopted by Schmidt Prov. Ct. J. Applying the judgments of this Court in *Fowler*, supra, and *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292, he concluded that the Act made no attempt to link the proscribed conduct to actual or potential harm to navigation or fisheries and thus failed to meet the test laid down in those cases. Macdonald J.A. also rejected the appellant's contention based on federal jurisdiction to implement treaties, in reliance on what was said by Laskin C.J. in *MacDonald v. Vapor Canada Ltd.*, supra. Macdonald J.A. held that the dumping of substances in Beaver Cove was a matter that fell within provincial legislative jurisdiction under heads 92(5), 92(13) and 92(16) of the Constitution Act, 1867. He rejected the contention that it was part of a new matter, referred to as pollution of the sea, which did not exist at the time of Confederation, and not being a matter of a merely local or private nature in the province, fell within the peace, order and good government power of the Parliament of Canada on the authority of the judgment of this Court in *R. v. Hauser*, [1979] 1 S.C.R. 984.

15. On the appeal to this Court the constitutional question was framed as follows:

Is section 4(1) of the Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, ultra vires of the Parliament of Canada, and, in particular, is it ultra vires of the Parliament of Canada in its application to the dumping of waste in the waters of Beaver Cove, an area within the province of British Columbia?

II

16. As the constitutional question indicates, the issue raised by the appeal is the constitutionality of the application of s. 4(1) of the Act to the dumping of waste in waters, other than fresh waters, within a province. The respondent concedes, as it must, that Parliament has jurisdiction to regulate dumping in waters lying outside the territorial limits of any province. It also concedes that Parliament has jurisdiction to regulate the dumping of substances in provincial waters to prevent pollution of those waters that is harmful to fisheries, if the federal legislation meets the test laid down in the *Fowler* and *Northwest Falling* cases. It further concedes, in view of the opinion expressed in this Court in *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, that Parliament has

jurisdiction to regulate the dumping in provincial waters of substances that can be shown to cause pollution in extra-provincial waters. What the respondent challenges is federal jurisdiction to control the dumping in provincial waters of substances that are not shown to have a pollutant effect in extra-provincial waters. The respondent contends that on the admitted facts that is precisely the present case. The respondent submits that in so far as s. 4(1) of the Act can only be read as purporting to apply to such dumping it is ultra vires and, alternatively, that it should be read, if possible, so as not to apply to such dumping. In either case the appeal must fail. The Attorney General of British Columbia, who supported the attack on s. 4(1), as applied to the dumping of waste in Beaver Cove, and with whom the Attorney General of Quebec agreed, made a similar submission that s. 4(1) should be read down so as not to apply to dumping in provincial waters. He submitted that the constitutional question should be answered as follows: "Section 4(1) of the Ocean Dumping Control Act is constitutionally inapplicable to marine waters within a province and, therefore, the definition of 'the sea' in s. 2(2) of the Act must be read to exclude from the term 'internal waters of Canada' in paragraph (b) those internal waters which are within a province."

17. In this Court the Attorney General of Canada did not contend that there was a sufficient connection between the Act and navigation to support the validity of s. 4(1) on the basis of federal jurisdiction with respect to navigation and shipping. He did submit, as I understood his argument, that there was a sufficient connection between the Act and the protection of fisheries to meet the test laid down in *Fowler and Northwest Falling*, but I did not understand him to place very great reliance on this submission. His principal submission in this Court was that the control of dumping in provincial marine waters, for the reasons indicated in the Act, was part of a single matter of national concern or dimension which fell within the federal peace, order and good government power. He characterized this matter as the prevention of ocean or marine pollution. His reliance on the specific heads of federal jurisdiction with respect to navigation and shipping and seacoast and inland fisheries, as well as others of a maritime nature, was rather as indicating, in his submission, the scope that should be assigned to federal jurisdiction under the peace, order and good government power to regulate the dumping of substances for the prevention of marine pollution. The Attorney General of Canada made it plain that he was not relying in this Court on ancillary or necessarily incidental power. His contention was that the control of dumping in provincial marine waters was an integral part of a single matter of national concern. Nor did he rely in this Court on the peace, order and good government power as a basis of federal jurisdiction to enact the Ocean Dumping Control Act in implementation of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter. He referred to the Convention and its Annexes as indicating the mischief to which the Act is directed and as supporting his characterization of the matter in relation to which the Act was enacted. In his factum the Attorney General of Canada also placed some reliance on the federal criminal law power under s. 91(27) of the Constitution Act, 1867, as a constitutional basis for the enactment of s. 4(1) of the Act as a measure for the prevention of injury to public health, but

I did not understand him to press this contention in his oral argument.

18. Before considering the relationship of the subject-matter of the Act to the possible bases of federal legislative jurisdiction something more should be said about the characterization of that subject-matter, according to the respective contentions of the parties. As I have indicated, the appellant contends that the Act is directed to the control or regulation of marine pollution, the subject-matter of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter. The respondent, on the other hand, contends that by its terms the Act is directed at dumping which need not necessarily have a pollutant effect. It prohibits the dumping of any substance, including a substance not specified in Schedule I or Schedule II, except in accordance with the terms and conditions of a permit. In my opinion, despite this apparent scope, the Act, viewed as a whole, may be properly characterized as directed to the control or regulation of marine pollution, in so far as that may be relevant to the question of legislative jurisdiction. The chosen, and perhaps only effective, regulatory model makes it necessary, in order to prevent marine pollution, to prohibit the dumping of any substance without a permit. Its purpose is to require a permit so that the regulatory authority may determine before the proposed dumping has occurred whether it may be permitted upon certain terms and conditions, having regard to the factors or concerns specified in ss. 9 and 10 of the Act and Schedule III. The Act is concerned with the dumping of substances which may be shown or presumed to have an adverse effect on the marine environment. The Minister and not the person proposing to do the dumping must be the judge of this, acting in accordance with the criteria or factors indicated in ss. 9 and 10 and Schedule III of the Act. There is no suggestion that the Act purports to authorize the prohibition of dumping without regard to perceived adverse effect or the likelihood of such effect on the marine environment. The nature of the marine environment and its protection from adverse effect from dumping is a complex matter which must be left to expert judgment.

III

19. Before considering the application of the federal peace, order and good government power it is necessary to express an opinion as to the effect of the judgments of this Court in *Fowler* and *Northwest Falling*, because of the particular reliance that was placed on them in the judgments below and in the argument of the respondent and the provincial Attorneys General in this Court.
20. *Fowler* was concerned with the validity of s. 33(3) of the Fisheries Act, R.S.C. 1970, c. F-14, which provided: "No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water." Martland J., delivering the unanimous judgment of the Court, referred to the authorities on the nature and scope of federal legislative jurisdiction with respect to seacoast and inland fisheries as

indicating that such jurisdiction is concerned with the protection and preservation of fisheries as a public resource, and to definitions of a fishery as indicating both the right of catching fish and the place where the right may be exercised. He then said at p. 224:

The legislation in question here does not deal directly with fisheries, as such, within the meaning of those definitions. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. Prima facie, subs. 33(3) regulates property and civil rights within a province. Dealing, as it does, with such rights and not dealing specifically with "fisheries", in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject-matter of sea coast and inland fisheries.

After emphasizing the very broad scope of s. 33(3), as covering "not only water frequented by fish but also water that flows into such water, ice over any such water and any place from which slash, stumps and other debris are likely to be carried into such water", Martland J. concluded as follows at p. 226:

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is ultra vires of the federal Parliament.

21. Northwest Falling concerned the validity of s. 33(2) of the Fisheries Act, which provided: "Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water." A "deleterious substance" was defined as one that would so affect the quality of water as to render it "deleterious to fish or fish habitat or to the use by man of fish that frequent that water." The validity of s. 33(2) was attacked on the ground, among others, that it was in relation to the pollution of water generally. The Court held that s. 33(2) was intra vires as legislation "aimed at the protection and preservation of fisheries" and distinguishable in this respect from s. 33(3), which had been declared to be ultra vires in Fowler. Martland J., again delivering the unanimous judgment of the Court, distinguished the two subsections as follows at p. 301:

Unlike subs. (2), subs. (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat. The basis of the judgment in the Fowler case is set out in the following passage:

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries.

In my opinion, subs. 33(2) was intra vires of the Parliament of Canada to enact. The definition of "deleterious substance" ensures that the scope of subs. 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

22. I agree with Schmidt Prov. Ct. J. and the British Columbia Court of Appeal that federal legislative jurisdiction with respect to seacoast and inland fisheries is not sufficient by itself to support the constitutional validity of s. 4(1) of the Act because that section, viewed in the context of the Act as a whole, fails to meet the test laid down in *Fowler and Northwest Falling*. While the effect on fisheries of marine pollution caused by the dumping of waste is clearly one of the concerns of the Act it is not the only effect of such pollution with which the Act is concerned. A basis for federal legislative jurisdiction to control marine pollution generally in provincial waters cannot be found in any of the specified heads of federal jurisdiction in s. 91 of the Constitution Act, 1867, whether taken individually or collectively.

IV

23. It is necessary then to consider the national dimensions or national concern doctrine (as it is now generally referred to) of the federal peace, order and good government power as a possible basis for the constitutional validity of s. 4(1) of the Act, as applied to the control of dumping in provincial marine waters.
24. The national concern doctrine was suggested by Lord Watson in the *Local Prohibition* case (*Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348) and given its modern formulation by Viscount Simon in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193. In *Local Prohibition*, Lord Watson said at p. 361:

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

In *Canada Temperance Federation*, Viscount Simon said at pp. 205-6:

In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion

Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

25. This Court's conception of the national concern doctrine of the federal peace, order and good government power, as enunciated in *Canada Temperance Federation*, is to be derived from the consideration or application given to the doctrine in the following cases: *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663; *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373; *R. v. Hauser*, *supra*; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; and *R. v. Wetmore*, [1983] 2 S.C.R. 284.
26. The national concern doctrine, as enunciated in *Canada Temperance Federation*, was referred to with approval by a majority of this Court in *Johannesson* as supporting exclusive federal legislative jurisdiction with respect to the whole field of aeronautics. In *Munro*, where the *National Capital Act* was upheld on the basis of the federal peace, order and good government power, Cartwright J., delivering the unanimous judgment of the Court said that the national concern doctrine had been adopted by this Court in *Johannesson* and that the development of the National Capital Region was "a single matter of national concern" (p. 671).
27. The national concern doctrine was the subject of important commentary in this Court in the *Anti-Inflation Act* reference. A majority of the Court (Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon and Dickson JJ.) upheld the Act on the basis of the emergency doctrine of the federal peace, order and good government power as legislation required to meet a "crisis" (the word used by Laskin C.J.) or "national emergency" (the words used by Ritchie J.) In the course of a comprehensive review of the judicial decisions with respect to the federal peace, order and good government power, Laskin C.J., with whom Judson, Spence and Dickson JJ. concurred, referred, with implicit approval, to the dictum of Viscount Simon in *Canada Temperance Federation*, but indicated that if he found, as he did, that the Act was valid on the basis of the emergency doctrine, as "crisis" legislation, he did not intend to express an opinion as to its possible validity on the basis of the national concern doctrine, on which the Attorney General of Canada had principally relied. He said at p. 419: "If it is sustainable as crisis legislation, it becomes unnecessary to consider the broader ground advanced in its support, and this because, especially in constitutional cases, Courts should not, as a rule, go any farther than is necessary to determine the main issue before them." He indicated, however, that he did not think it wise to attempt to define the scope of the federal peace, order and good government power in such precise or fixed terms

as to make it incapable of application to changing or unforeseen circumstances. There is, moreover, a hint that he was disposed to seek a unified theory of the peace, order and good government power and that he regarded the emergency doctrine as a particular application of the national concern doctrine. Referring to the use of the word "emergency" in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695, he said at p. 407: "Here then was a particular application of what Lord Watson said in the *Local Prohibition* case"

28. Ritchie J., with whom Martland and Pigeon JJ. concurred, held that the validity of the Act could rest only on the emergency doctrine of the peace, order and good government power and that the national concern doctrine, in the absence of national emergency, could not give Parliament jurisdiction with respect to matters which would otherwise fall within provincial legislative jurisdiction. He said that he was in agreement with what was said by Beetz J. with reference to the national concern doctrine. Beetz J., with whom de Grandpré J. concurred, was obliged to consider the contention based on the national concern doctrine because he was of the view that the validity of the Anti-Inflation Act could not be supported on the basis of national emergency. He held that the national concern doctrine applied, in the absence of national emergency, to single, indivisible matters which did not fall within any of the specified heads of provincial or federal legislative jurisdiction. He held that the containment and reduction of inflation did not meet the test of singleness or indivisibility. Referring to aeronautics, radio and the development of the National Capital Region as distinct matters of national concern, he said at p. 458:

I fail to see how the authorities which so decide lend support to the first submission. They had the effect of adding by judicial process new matters or new classes of matters to the federal list of powers. However, this was done only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters: if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers (*Parsons' case*) and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.

The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.

I should add that inflation is a very ancient phenomenon, several thousands years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it.

29. In *Hauser*, a majority of the Court (Martland, Ritchie, Pigeon and Beetz JJ.) held that the constitutional validity of the Narcotic Control Act rested on the peace, order and good government power of Parliament rather than on its jurisdiction with respect to criminal law. Pigeon J., who delivered the judgment of the majority, said that the principal consideration in support of this view was that the abuse of narcotic drugs, with which the Act dealt, was a new problem which did not exist at the time of Confederation, and that since it did not come within matters of a merely local or private nature in the province it fell within the "general residual power" in the same manner as aeronautics and radio.
30. In *Labatt Breweries*, in which a majority of the full Court held that certain provisions of the Food and Drugs Act and regulations thereunder were ultra vires, Estey J., with whom Martland, Dickson and Beetz JJ. concurred, had occasion to consider the peace, order and good government power as a possible basis of validity. He summed up the doctrine with respect to that basis of federal legislative jurisdiction as falling into three categories: (a) the cases "basing the federal competence on the existence of a national emergency"; (b) the cases in which "federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of a merely local or private nature", of which aeronautics and radio were cited as examples; and (c) the cases in which "the subject matter `goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole", citing *Canada Temperance Federation*. Thus Estey J. saw the national concern doctrine enunciated in *Canada Temperance Federation* as covering the case, not of a new subject matter which did not exist at Confederation, but of one that may have begun as a matter of a local or provincial concern but had become one of national concern. He referred to that category as "a matter of national concern transcending the local authorities' power to meet and solve it by legislation", and quoted in support of this statement of the test a passage from Professor Hogg's *Constitutional Law of Canada* (1977), at p. 261, in which it was said that "the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces."
31. In *Schneider*, in which the Court unanimously held that the Heroin Treatment Act of British Columbia was intra vires, Dickson J. (as he then was), with whom Martland, Ritchie, Beetz, McIntyre, Chouinard and Lamer JJ. concurred, indicated, with particular reference to the national concern doctrine and what has come to be known as the "provincial inability" test, why he was of the view that the treatment of heroin dependency, as distinct from the traffic in narcotic drugs, was not a matter falling within the federal peace, order and good government power. He referred to the problem of heroin dependency as follows at pp. 131-32:

It is largely a local or provincial problem and not one which has become a matter of national concern, so as to bring it within the jurisdiction of the Parliament of Canada under the residuary power contained in the opening words of the B.N.A. Act (now, Constitution Act, 1867).

There is no material before the Court leading one to conclude that the problem of heroin dependency as distinguished from illegal trade in drugs is a matter of national interest and dimension transcending the power of each province to meet and solve its own way. It is not a problem which "is beyond the power of the provinces to deal with" (Professor Gibson (1976-77), 7 Man. L.J. 15, at p. 33). Failure by one province to provide treatment facilities will not endanger the interests of another province. The subject is not one which "has attained such dimensions as to affect the body politic of the Dominion" (In re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54, at p. 77). It is not something that "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case)" per Viscount Simon in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193, at p. 205. See also *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663; *Re C.F.R.B. and Attorney General for Canada*, [1973] 3 O.R. 819. Nor can it be said, on the record, that heroin addiction has reached a state of emergency as will ground federal competence under residual power.

I do not think the subject of narcotics is so global and indivisible that the legislative domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction.

32. In *Wetmore*, where the issue was whether the federal Attorney General was entitled to conduct the prosecution of charges for violation of the Food and Drugs Act, Dickson J., dissenting, considered whether the applicable provisions of the Food and Drugs Act had their constitutional foundation in the federal criminal law power, or as was held in *Hauser* with respect to the Narcotic Control Act, in the peace, order and good government power. In rejecting the latter basis of jurisdiction, he referred to what was said concerning the national concern doctrine of the peace, order and good government power in the *Anti-Inflation Act* reference, *Labatt* and *Hauser* as follows at pp. 294-95:

In the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, Beetz J., whose judgment on this point commanded majority support, reviewed the extensive jurisprudence on the subject and concluded that the peace, order and good government power should be confined to justifying (i) temporary legislation dealing with a national emergency (p. 459) and (ii) legislation dealing with "distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern" (p. 457). In the *Labatt* case, *supra*, at pp. 944-45, Estey J. divided this second heading into (i) areas in which the federal competence arises because the subject matter did not exist at the time of Confederation and cannot be classified as of a merely local and private nature and (ii) areas where the subject matter "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole". This last category is the one enunciated by Viscount Simon in *Attorney-General for*

Ontario v. Canada Temperance Federation, [1946] A.C. 193, at p. 205. The one preceding it formed the basis of the majority decision in Hauser that the Narcotic Control Act, R.S.C. 1970, c. N-1, came under the peace, order and good government power as dealing with "a genuinely new problem which did not exist at the time of Confederation".

Applying these principles to the subject matter of the Food and Drugs Act, Dickson J. noted that there was no question of emergency or of a new matter that did not exist at Confederation and rejected the national concern doctrine of the peace, order and good government as a basis for the constitutional validity of the provisions in question for the following reasons at p. 296:

Finally, it cannot be maintained that ss. 8(a), 9(1) and 26 address a subject that goes beyond local or provincial interest and must from its intrinsic nature be the concern of the Dominion as a whole, as that concept has been interpreted in the cases. Their subject matter would clearly not satisfy the requirements cited by Beetz J. in the Reference re Anti-Inflation Act, supra, nor would it come within the criteria proposed by Hogg, Constitutional Law of Canada (1977), at p. 261, in a passage cited by Estey J. in Labatt, supra, at p. 945:

These cases suggest that the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to co-operate would carry with it grave consequences for the residents of other provinces. A subject matter of legislation which has this characteristic has the necessary national dimension or concern to justify invocation of the p.o.g.g. power.

The same factors that prevents ss. 8(a) and 9(1) from qualifying as "general regulation of trade affecting the whole Dominion" also stand in the way of characterizing them as legislation in relation to peace, order and good government under the Canada Temperance test. Aside from their purported application throughout Canada and from certain financial and logistical difficulties in enacting comparable provincial legislation, there is nothing inherently "national" in these sections. And as is demonstrated by a line of cases stretching from Re Insurance Act 1910 (1913), 48 S.C.R. 260, affirmed (sub nom. Attorney-General for Canada v. Attorney-General for Alberta (Insurance Reference)), [1916] 1 A.C. 588 to the Labatt case, supra, neither of these criteria separately or together is sufficient to validate a federal enactment under the peace, order and good government power.

33. From this survey of the opinion expressed in this Court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:
 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.
34. This last factor, generally referred to as the "provincial inability" test and noted with apparent approval in this Court in *Labatt, Schneider and Wetmore*, was suggested, as Professor Hogg acknowledges, by Professor Gibson in his article, "Measuring 'National Dimensions'" (1976), 7 Man. L.J. 15, as the most satisfactory rationale of the cases in which the national concern doctrine of the peace, order and good government power has been applied as a basis of federal jurisdiction. As expounded by Professor Gibson, the test would appear to involve a limited or qualified application of federal jurisdiction. As put by Professor Gibson at pp. 34-35, "By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the "P.O. & G.G." clause bestows only residual powers, the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. For example, federal jurisdiction to legislate for pollution of interprovincial waterways or to control "pollution price-wars" would (in the absence of other independent sources of federal competence) extend only to measures to reduce the risk that citizens of one province would be harmed by the non-co-operation of another province or provinces." To similar effect, he said in his conclusion at p. 36: "Having regard to the residual nature of the power, it is the writer's thesis that 'national dimensions' are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal because they involve either federal competence or that of another province. Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures, the "national dimension" concerns only the risk of non-co-operation, and justifies only federal legislation addressed to that risk." This would appear to contemplate a concurrent or overlapping federal jurisdiction which, I must observe, is in conflict with what was emphasized by Beetz J. in the *Anti-Inflation Act* reference--that where a matter falls

within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects.

35. As expressed by Professor Hogg in the first and second editions of his *Constitutional Law of Canada*, the "provincial inability" test would appear to be adopted simply as a reason for finding that a particular matter is one of national concern falling within the peace, order and good government power: that provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests. In this sense, the "provincial inability" test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine. It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment. The "provincial inability" test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem. In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.
36. Before turning to the question whether the pollution caused by the dumping of substances in marine waters, including those within a province, has the required singleness or indivisibility to fall within the national concern doctrine of the peace, order and good government power, some further reference should be made to the opinion expressed by three members of this Court in *Interprovincial Co-operatives Ltd.*, *supra*, concerning federal jurisdiction with respect to the pollution of interprovincial rivers, because of the particular reliance placed on it by the Attorney General of Canada. That case concerned the validity of *The Fishermen's Assistance and Polluters' Liability Act of Manitoba*, which created a statutory liability for damage caused to fisheries in the waters of the province by a contaminant discharged without lawful excuse into waters outside the province and carried by them into waters in the province. The Act further provided that it was not a lawful excuse for the discharge of a contaminant "that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the discharge occurred, if that regulatory authority did not also have jurisdiction at the place where the contaminant caused damage to the fishery." An action was brought for damage caused to fisheries in Manitoba by mercury discharged into waters in Saskatchewan and Ontario and carried by the natural flow of those waters into waters in Manitoba. Pigeon J., with whom Martland and Beetz JJ. concurred, held that it was beyond the legislative competence of the province to create a statutory right of action for damage caused in the province by acts outside of the province, just as it was beyond the jurisdiction of a province to authorize acts in the province which caused damage in another province. Observing that "Here, we are faced with a pollution problem that is not really local in scope but truly interprovincial" (p.

514), Pigeon J. held that control of the pollution of interprovincial rivers fell within the residuary jurisdiction of Parliament under the peace, order and good government power. Because of the nature of the Manitoba legislation and the facts of the case, I think it must be assumed, as submitted by the respondent, that in referring to the pollution of interprovincial rivers Pigeon J. had in mind pollution that crossed provincial boundaries. Moreover, the opinion that there was federal jurisdiction based on the peace, order and good government power to control the pollution of interprovincial rivers was not that of a majority of the Court. Ritchie J., the other member of the majority in favour of allowing the appeal, was of the view that the Manitoba statute was inapplicable to the defendants, in so far as it sought to deny a right arising outside of the province, but he declined to hold, with Pigeon J., that it was ultra vires as being in relation to a matter within federal legislative jurisdiction, a point which he said had not been argued. In the course of his reasons he did express the opinion that Parliament had jurisdiction to control pollution in interprovincial rivers but he referred only to s. 91(12) of the Constitution Act, 1867 as the basis of such jurisdiction.

V

37. Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole. The question is whether the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters. The Ocean Dumping Control Act reflects a distinction between the pollution of salt water and the pollution of fresh water. The question, as I conceive it, is whether that distinction is sufficient to make the control of marine pollution by the dumping of substances a single, indivisible matter falling within the national concern doctrine of the peace, order and good government power.
38. Marine pollution by the dumping of substances is clearly treated by the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter as a distinct and separate form of water pollution having its own characteristics and scientific considerations. This impression is reinforced by the United Nations Report of the Joint Group of Experts on the Scientific Aspects of Marine Pollution, Reports and Studies No. 15, The Review of the Health of the Oceans (UNESCO 1982) (hereinafter referred to as the "U.N. Report"), which forms part of the materials placed before the Court in the argument. It is to be noted, however, that, unlike the Ocean Dumping Control Act, the Convention does not require regulation of pollution by the dumping of waste in the internal marine waters of a state. Article III, para. 3, of the Convention defines the "sea" as "all marine waters other than the internal waters of the States." The internal marine waters of a state are those which lie landward of the baseline of the territorial sea, which is determined in accordance with the rules laid down in the United Nations Convention on the Law of the Sea (1982). The limitation of the undertaking in the Convention, presumably for reasons of state policy, to

the control of dumping in the territorial sea and the open sea cannot, in my opinion, obscure the obviously close relationship, which is emphasized in the U.N. Report, between pollution in coastal waters, including the internal marine waters of a state, and pollution in the territorial sea. Moreover, there is much force, in my opinion, in the appellant's contention that the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions. This, and not simply the possibility or likelihood of the movement of pollutants across that line, is what constitutes the essential indivisibility of the matter of marine pollution by the dumping of substances.

39. There remains the question whether the pollution of marine waters by the dumping of substances is sufficiently distinguishable from the pollution of fresh waters by such dumping to meet the requirement of singleness or indivisibility. In many cases the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow, and this is noted by the U.N. Report, but that report, as I have suggested, emphasizes that marine pollution, because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations that distinguish it from fresh water pollution. Moreover, the distinction between salt water and fresh water as limiting the application of the Ocean Dumping Control Act meets the consideration emphasized by a majority of this Court in the Anti-Inflation Act reference--that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.
40. For these reasons I am of the opinion that s. 4(1) of the Ocean Dumping Control Act is constitutionally valid as enacted in relation to a matter falling within the national concern doctrine of the peace, order and good government power of the Parliament of Canada, and, in particular, that it is constitutional in its application to the dumping of waste in the waters of Beaver Cove. I would accordingly allow the appeal, set aside the judgments of the Court of Appeal and Schmidt Prov. Ct. J. and refer the matter back to the Provincial Court judge. The constitutional question should be answered as follows:

Is section 4(1) of the Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, ultra vires of the Parliament of Canada, and, in particular, is it ultra vires of the Parliament of Canada in its application to the dumping of waste in the waters of Beaver Cove, an area within the province of British Columbia?

Answer: No.

The reasons of Beetz, Lamer and La Forest JJ. were delivered by

41. La Forest J. (dissenting)--The issue raised in this appeal involves the extent to which the federal Parliament may constitutionally prohibit the disposal of substances not shown to have a pollutant effect in marine waters beyond the coast but within the limits of a province.

Facts

42. My colleague, Le Dain J., has set forth the facts, the applicable legislation and the judicial history of the case, and it is sufficient for me to make reference only to the most salient of these factual matters.
43. The respondent, Crown Zellerbach Canada Limited, was charged with "dumping" contrary to s. 4(1) of the Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, which simply provides that no person shall dump except in accordance with the terms and conditions of a permit. "Dumping" is defined by s. 2(1) of the Act as "any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance..." (emphasis added).
44. The facts upon which the charge was based are briefly as follows. During the conduct of logging operations on Vancouver Island, British Columbia, Crown Zellerbach dredged woodwaste, consisting of water-logged logging debris such as bark, wood and slabs, from the ocean floor immediately adjacent to its dumping site in Beaver Cove and dumped it into deeper waters in Beaver Cove 60 to 80 feet seaward of the original dumpsite in a water lot area leased to the respondent by the province of British Columbia. There is no evidence of any dispersal of the woodwaste or of any effect on navigation or marine life. The respondent had a permit to dump under the Act, but it did not cover dumping at the new site. The waters of Beaver Cove are *inter fauces terrae*, the opposite shores at its entrance being approximately one half mile; they are navigable and flow into Johnstone Strait, which is connected with the Pacific.
45. It was not disputed that the bed of the water at the dumping site is within, and belongs to, the province; Reference re Ownership of the Bed of the Strait of Georgia and Related Areas, [1984] 1 S.C.R. 388. According to the respondent, the waters of Beaver Cove are over 100 km from extra-provincial waters. However, the application of the Act is not thereby restricted, for "the sea" in which dumping is prohibited is not confined to the territorial sea and beyond, but by s. 2(2)(b) of the Act includes the internal waters of Canada other than inland waters (see s. 2(3)), i.e., the marine waters from the coast to the baseline of the territorial sea.

46. In the courts below, the respondent contested the validity of s. 4(1) as going beyond federal legislative jurisdiction and invading the provincial domain. As my colleague has indicated, the courts below accepted this contention. The Crown in right of Canada appealed to this Court seeking to have the provision declared valid. The respondent continues to maintain that the provision is invalid, but adds that in any event it should not apply to the facts of this case.

47. The constitutional question to be determined was framed in the following terms:

Is section 4(1) of the Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, ultra vires of the Parliament of Canada, and, in particular, is it ultra vires of the Parliament of Canada in its application to the dumping of waste in the waters of Beaver Cove, an area within the province of British Columbia?

The Attorneys General of British Columbia and of Quebec intervened in support of the view that s. 4(1) is constitutionally inapplicable to internal waters within a province.

The Issues

48. The principal thrust of the appellant's submission is that the subject-matter of the Ocean Dumping Control Act is the control of ocean pollution. The control of ocean pollution, counsel for the appellant argued, is a matter that goes beyond local or provincial interests and is a matter of national concern to Canada as a whole and, as such, falls within Parliament's power to legislate in respect of the peace, order and good government of Canada. In the exercise of its jurisdiction to control ocean pollution, he continued, Parliament may prohibit the dumping of any substance, whether it is a pollutant or not, even in those areas of the sea that lie within the limits of a province. I propose to deal with this major issue later, confining myself at this point to a discussion of the further issues raised by the parties.
49. As subsidiary support for his principal submission, counsel relied on a number of heads of power under s. 91 of the Constitution Act, 1867 relating to the sea as exemplary of the types of matters falling within the general federal legislative power, specifically navigation and shipping (s. 91(10)), beacons, buoys and lighthouses (s. 91(9)), interprovincial and international ferries (s. 91(13)), and seacoast and inland fisheries (s. 91(12)). This subsidiary argument, I may say, at once proves too little and too much. Section 91(9) , for example, does not include intra-provincial ferries, and s. 91(12) expressly includes both sea and fresh water fisheries. Beetz J. (dissenting but on this point speaking for the majority) disposed of a similar argument out of hand in *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at pp. 458-59.
50. In this Court, counsel otherwise avoided reliance on the powers to legislate respecting fisheries or navigation as supporting s. 4(1). These arguments, as the courts below held, are untenable in light of the decision of this Court in *Fowler v. The Queen*, [1980] 2 S.C.R. 213. There the Court held ultra vires s. 33(3) of the federal Fisheries Act, R.S.C. 1970, c. F-14, which prohibited any person engaged in logging, lumbering and other operations from

putting woodwaste into water frequented by fish. Martland J., speaking for the Court, made it clear that for the provision to be justifiable as fishery legislation there had to be a link between the proscribed conduct and the actual or potential harm to fisheries. In his words: "It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries." (p. 226) As in the present case, there was no evidence of any such link. Both cases may be contrasted to *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292, where the Court upheld s. 33(2) of the Fisheries Act which prohibited depositing in water frequented by fish any substance deleterious to fish.

51. There was, if anything, even less to link the prohibition in the present case to navigation. The prohibition is obviously not directed to the activity of navigation, and there is no evidence to show that the dumping interferes in any way with the navigability of the water.
52. I see no more merit in the submission, which appeared in the appellant's written submission, that the prohibition in s. 4(1) is justifiable as criminal law, and it is significant that counsel rather ignored this submission in his oral argument. It may be true that some of the items listed in the schedules to the Act could be harmful to human health if dumped in water, and it is also true that a prohibition properly directed at the protection of health might be justifiable as an exercise of the criminal law power; see *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50. But it is difficult to see how the impugned provision preventing the dumping into marine waters of any substance, however innocuous, can be said to be aimed at the protection of health.
53. In the courts below, the appellant had also argued that the impugned provision could be supported on the basis of a federal treaty power as being intended to implement the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, which was signed by Canada on December 29, 1972. This argument was, however, rejected on the ground that, assuming such a power existed, it could not be used to support the impugned provision here having regard to Laskin C.J.'s statement in *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, at pp. 171-72, that there had to be a sufficiently clear indication in the Act that it was intended to implement a treaty. Counsel did not take up this argument in this Court, rightly in my view, because the Convention, unlike the Act, does not address pollution by dumping waste in the internal waters of a state, but is confined to dumping in the sea beyond the internal waters. Article III, para. 3 of the Convention defines "sea" as "all marine waters other than the internal waters of the States". I do not understand how the fact that Parliament has chosen to adopt a similar regime in internal waters not covered by the Convention can be of any assistance in determining whether it has authority to prohibit dumping in internal waters within the province. In fact, while there is a general obligation imposed on the contracting states under Article I of the Convention to promote the control of all sources of marine pollution, the practical steps to which these states pledge themselves in giving effect to this obligation are confined to "the dumping of waste or other matter that is liable to create hazards to human health, to harm living resources and

marine life, to damage amenities or to interfere with other legitimate uses of the sea." I fail to see, then, how the Convention can serve as justification for a blanket prohibition such as appears in s. 4(1) of the Act.

54. There remains, then, the appellant's argument that s. 4(1) is valid as legislation respecting ocean pollution under the peace, order and good government clause.
55. For his part, the respondent does not deny Parliament's power to regulate ocean pollution, but submits that s. 4(1) of the Act extends beyond the control of ocean pollution to encompass the dumping of all substances, whether pollutants or not. Much of the subject-matter of the section, the respondent continues, particularly as it relates to the facts of the present case, falls within the classes of subjects assigned exclusively to the provincial legislatures. The reality, it adds, is that while s. 4(1) deals with some matters falling within federal jurisdiction, such as extra-provincial dumping and extra-provincial pollution, which is clearly federal, it does not do so directly, but encompasses as well matters such as intra-provincial depositing of substances and intra-provincial pollution. It thus invades the following heads of provincial legislative power: provincial public lands (s. 92(5)), local works and undertakings (s. 92(10)), property and civil rights (s. 92(13)), and matters of a local or private nature (s. 92(16)).
56. I start with the proposition that what is sought to be regulated in the present case is an activity wholly within the province, taking place on provincially owned land. Only local works and undertakings are involved, and there is no evidence that the substance made subject to the prohibition in s. 4(1) is either deleterious in any way or has any impact beyond the limits of the province. It is not difficult, on this basis, to conclude that the matter is one that falls within provincial legislative power unless it can somehow be established that it falls within Parliament's general power to legislate for the peace, order and good government of Canada.

Peace, Order and Good Government

57. There are several applications of the peace, order and good government power that may have relevance to the control of ocean pollution. One is its application in times of emergency. The federal Parliament clearly has power to deal with a grave emergency without regard to the ordinary division of legislative power under the Constitution. The most obvious manifestation of this power is in times of war or civil insurrection, but it has in recent years also been applied in peacetime to justify the control of rampant inflation; see *Re: Anti-Inflation Act*, *supra*. But while there can be no doubt that the control of ocean pollution poses a serious problem, no one has argued that it has reached such grave proportions as to require the displacement of the ordinary division of legislative power under the Constitution.

58. A second manner in which the power to legislate respecting peace, order and good government may be invoked in the present context is to control that area of the sea lying beyond the limits of the provinces. The federal government may not only regulate the territorial sea and other areas over which Canada exercises sovereignty, either under its power to legislate respecting its public property, or under the general power respecting peace, order and good government under s. 91 (Reference re Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792) or under s. 4 of the Constitution Act, 1871 (U.K.), 34 & 35 Vict., c. 28. I have no doubt that it may also, as an aspect of its international sovereignty, exercise legislative jurisdiction for the control of pollution beyond its borders; see Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86.
59. In legislating under its general power for the control of pollution in areas of the ocean falling outside provincial jurisdiction, the federal Parliament is not confined to regulating activities taking place within those areas. It may take steps to prevent activities in a province, such as dumping substances in provincial waters that pollute or have the potential to pollute the sea outside the province. Indeed, the exercise of such jurisdiction, it would seem to me, is not limited to coastal and internal waters but extends to the control of deposits in fresh water that have the effect of polluting outside a province. Reference may be made here to *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, where a majority of this Court upheld the view that the federal Parliament had exclusive legislative jurisdiction to deal with a problem that resulted from the depositing of a pollutant in a river in one province that had injurious effects in another province. This is but an application of the doctrine of national dimensions triggering the operation of the peace, order and good government clause.
60. It should require no demonstration that water moves in hydrologic cycles and that effective pollution control requires regulating pollution at its source. That source may, in fact, be situated outside the waters themselves. It is significant that the provision of the Fisheries Act upheld by this Court in *Northwest Falling Contractors Ltd. v. The Queen*, *supra*, as a valid means of protecting the fisheries not only prohibited the depositing of a deleterious substance in water, but in any place where it might enter waters frequented by fish. Given the way substances seep into the ground and the movement of surface and ground waters into rivers and ultimately into the sea, this can potentially cover a very large area. Indeed, since the pollution of the ocean in an important measure results from aerial pollution rather than from substances deposited in waters, similar regulations could be made in respect of substances that so pollute the air as to cause damage to the ocean or generally outside the provinces. (For discussions of the interaction of air pollutants and the ocean, see IMCO/FAO/UNESCO/WMO/WHO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Pollution, Reports and Studies No. 15, *The Review of the Health of the Oceans* (UNESCO 1982), at p. 3 (hereinafter "U.N. Report"), at, *inter alia*, pp. 1-3 and 15; Great Lakes Science Advisory Board to the International Joint Commission, 1980 Annual Report: A Perspective on the Problem of Hazardous Substances in the Great Lakes Basin Ecosystem (1980), esp. at p. 22 (hereinafter "I.J.C. Report"); I.J.C. Report, Appendix A & B, "Assessment

of Airborne Contaminants in the Great Lakes Basin Ecosystem", esp. at pp. 1, 9 and 95. I should add that considerable administrative flexibility goes with the exercise of these powers. Thus considerable administrative control is given federal authorities by a power given by s. 33(4) of the Fisheries Act to exempt some pollutants in specified quantities in certain areas, subject to prescribed conditions. I see no reason why similar provisions could not be devised to control the pollution of the ocean.

61. The power above described can be complemented by provisions made pursuant to the criminal law power. Thus specific provisions prohibiting the deposit of particular substances could be devised in a manner similar to the prohibitions in the Food and Drugs Act, R.S.C. 1970, c. F-27. The combination of the criminal law power with its power to control pollution that has extra-provincial dimensions gives the federal Parliament very wide scope to control ocean pollution. While it would not be proper for me to enter into the validity of the provisions of the Clean Air Act, S.C. 1970-71-72, c. 47, which were upheld in *Re Canada Metal Co. and The Queen* (1982), 144 D.L.R. (3d) 124 (Man. Q.B.), those provisions do indicate that a combination of the general federal legislative power and the criminal power could go a long way towards prohibiting the pollution of internal waters as well as those in territorial waters and the high seas.
62. In fact, as I see it, the potential breadth of federal power to control pollution by use of its general power is so great that, even without resort to the specific argument made by the appellant, the constitutional challenge in the end may be the development of judicial strategies to confine its ambit. It must be remembered that the peace, order and good government clause may comprise not only prohibitions, like criminal law, but regulation. Regulation to control pollution, which is incidentally only part of the even larger global problem of managing the environment, could arguably include not only emission standards but the control of the substances used in manufacture, as well as the techniques of production generally, in so far as these may have an impact on pollution. This has profound implications for the federal-provincial balance mandated by the Constitution. The challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution.
63. These considerations underline the importance of linking the prohibition to the purpose sought to be achieved. At times, that link can readily be inferred, for example in the case of dumping noxious fluid into coastal waters. In other cases, such as the depositing of noxious solid material inland, cogent proof will be required. These ideas were felicitously put by Rand J. in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 333:

Conceding, as in the *Alberta Reference*, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment

to a matter in relation to which the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.

64. However widely one interprets the federal power to control ocean pollution along the preceding line of analysis, it will not serve to support the provision impugned here, one that, as in the Fowler case, *supra*, is a blanket prohibition against depositing any substance in waters without regard to its nature or amount, and one moreover where there is, in Martland J.'s words, at p. 226 of that case, "no attempt to link the proscribed conduct to actual or potential harm" to what is sought to be protected; in Fowler, the fisheries, here, the ocean. As in Fowler, too, there is no evidence to indicate that the full range of activities caught by the provision cause the harm sought to be prevented. Whether one views this in terms of protecting federal marine property or as an attempted application of the national dimensions doctrine in the matter somewhat akin to that in the Interprovincial Co-operatives case, *supra*, the second proposition of Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia (the Fish Canneries case)*, [1930] A.C. 111, at p. 118, has relevance here. It reads:

(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario v. Attorney-General for the Dominion* ([1896] A.C. 348).

(Cited by Martland J. in Fowler, *supra*, at p. 220.) Here, Parliament may undoubtedly prohibit the dumping of anything into federal waters, but unless a more comprehensive theory for applying the national dimensions doctrine can be found, prohibitions against dumping substances into provincial waters must be linked to some federal power.

65. Why Parliament should have chosen to enact a prohibition in such broad terms is a matter upon which one is left to speculate. It may be that, in view of the lack of knowledge about the effects of various substances deposited in water, it may be necessary to monitor all such deposits. We have no evidence on the extent to which it is necessary to monitor all deposits

into the sea to develop an effective regime for the prevention of ocean pollution. A system of monitoring that was necessarily incidental to an effective legislative scheme for the control of ocean pollution could constitutionally be justified. But here not only was no material advanced to establish the need for such a system, the Act goes much further and prohibits the deposit of any substance in the sea, including provincial internal waters. If such a provision were held valid, why would a federal provision prohibiting the emission of any substance in any quantity into the air, except as permitted by federal authorities, not be constitutionally justifiable as a measure for the control of ocean pollution, it now being known that deposits from the air are a serious source of ocean pollution? See U.N. Report, *op. cit.*, at p. 15; I.J.C. Report, *op. cit.*, at p. 22. Here again an excerpt from Lord Tomlin's judgment in the *Fish Canneries* case, *supra*, at pp. 121-22, also cited by Martland J. in *Fowler*, *supra*, at pp. 224-25, may usefully be cited. It reads:

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters. In their Lordships' view, therefore, the appellant's second contention is not well founded.

66. Counsel for the appellant did not, of course, frame the issue in the manner in which I have thus far discussed it. I have examined it in this way, however, to show that on a more traditional approach to the underlying issues than he suggests Parliament has very wide powers to deal with ocean pollution, whether within or outside the limits of the province, but that even if one stretches this traditional approach to its limits, the impugned provision cannot constitutionally be justified. It requires a quantum leap to find constitutional justification for the provision, one, it seems to me, that would create considerable stress on Canadian federalism as it has developed over the years. What he argues for, we saw, is that the dumping of any substance in the sea beginning, apparently, from the coasts of the provinces and the mouths of provincial rivers falls exclusively within the legislative jurisdiction of Parliament as being a matter of national concern or dimension even though the sea-bed is within the province and whether or not the substance is noxious or potentially so.
67. Le Dain J. has in the course of his judgment discussed the cases relating to the development of the "national concern or dimension" aspect of the peace, order and good government clause, and I find it unnecessary to review that development in any detail. It is sufficient for my purpose to say that this development has since the 1930s particularly been resorted to from time to time to bring into the ambit of federal power a number of matters, such as

radio (*In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304), aeronautics (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292), and the national capital region (*Munro v. National Capital Commission*, [1966] S.C.R. 663), that are clearly of national importance. They do not fit comfortably within provincial power. Both in their workings and in their practical implications they have predominantly national dimensions. Many of these subjects are new and are obviously of extra-provincial concern. They are thus appropriate for assignment to the general federal legislative power. They are often related to matters intimately tied to federal jurisdiction. Radio (which is relevant to the power to regulate interprovincial undertakings) is an example. The closely contested issue of narcotics control (cf. *R. v. Hauser*, [1979] 1 S.C.R. 984, and *Schneider v. The Queen*, [1982] 2 S.C.R. 112, per Laskin C.J.) is intimately related to criminal law and international trade.

68. The need to make such characterizations from time to time is readily apparent. From this necessary function, however, it is easy but, I say it with respect, fallacious to go further, and, taking a number of quite separate areas of activity, some under accepted constitutional values within federal, and some within provincial legislative capacity, consider them to be a single indivisible matter of national interest and concern lying outside the specific heads of power assigned under the Constitution. By conceptualizing broad social, economic and political issues in that way, one can effectively invent new heads of federal power under the national dimensions doctrine, thereby incidentally removing them from provincial jurisdiction or at least abridging the provinces' freedom of operation. This, as I see it, is the implication of the statement made by my colleague, then Professor Le Dain, in his article, "Sir Lyman Duff and the Constitution" (1974), 12 *Osgoode Hall L.J.* 261. He states, at p. 293:

As reflected in the *Munro* case, the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92. It is possible to invent such matters by applying new names to old legislative purposes. There is an increasing tendency to sum up a wide variety of legislative purposes in single, comprehensive designations. Control of inflation, environmental protection, and preservation of the national identity or independence are examples.

69. Professor Le Dain was there merely posing the problem; he did not attempt to answer it. It seems to me, however, that some of the examples he gives, notably the control of inflation and environmental protection, are all-pervasive, and if accepted as items falling within the general power of Parliament, would radically alter the division of legislative power in Canada. The attempt to include them in the federal general power seems to me to involve fighting on another plane the war that was lost on the economic plane in the Canadian new deal cases. My colleague Beetz J. has, in *Re: Anti-Inflation Act*, *supra*, fully supported this way of viewing things in rejecting the control of inflation as a proper subject for incorporation into the peace, order and good government clause under the national dimension doctrine. (His was, we saw, a dissenting judgment, but on this issue too, his views were shared by a majority of the Court.) He there revealed the fallacy of looking at inflation

as a single source of federal power in the following passage, at pp. 457-58:

In my view, the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern.

I fail to see how the authorities which so decide lend support to the first submission. They had the effect of adding by judicial process new matters or new classes of matters to the federal list of powers. However, this was done only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters: if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers (Parsons' case) and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.

The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.

I should add that inflation is a very ancient phenomenon, several thousand years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it.

70. What was there said by Beetz J. seems to me to apply, a fortiori, to the control of the environment, a subject more germane to the present issue. All physical activities have some environmental impact. Possible legislative responses to such activities cover a large number of the enumerated legislative powers, federal and provincial. To allocate the broad subject-matter of environmental control to the federal government under its general power would effectively gut provincial legislative jurisdiction. As I mentioned before, environment protection, of course, encompasses far more than environmental pollution, which is what we are principally concerned with here. To take an example from the present context, woodwaste in some circumstances undoubtedly pollutes the environment, but the very depletion of forests itself affects the ecological balance and, as such, constitutes an environmental problem. But environmental pollution alone is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable. The problem is thus not new, although it is only recently that the vast amount of waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere and water to absorb and assimilate it on a global scale. There is thus cause for concern and governments at every level have begun to deal with the many activities giving rise to problems of pollution. In Canada, both federal and provincial levels

of government have extensive powers to deal with these matters. Both have enacted comprehensive and specific schemes for the control of pollution and the protection of the environment. Some environmental pollution problems are of more direct concern to the federal government, some to the provincial government. But a vast number are interrelated, and all levels of government actively co-operate to deal with problems of mutual concern; for an example of this, see the Great Lakes study in the I.J.C. Report, *op. cit.*

71. To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the principles of federalism enshrined in the Constitution. As Professor William R. Lederman has indicated in his article, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 Can. Bar Rev. 597, at p. 610, environmental pollution "is no limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implications". If, he adds, it "were to be enfranchised as a new subject of federal power by virtue of the federal general power, then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial powers". And I would add to the legislative subjects that would be substantially eviscerated the control of the public domain and municipal government. Indeed as Beetz J. in *Re: Anti-Inflation Act*, *supra*, at p. 458, stated of the proposed power over inflation, there would not be much left of the distribution of power if Parliament had exclusive jurisdiction over this subject. For similar views that the protection of environmental pollution cannot be attributed to a single head of legislative power, see P. W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at pp. 392 and 598; Gérald A. Beaudoin, "La protection de l'environnement et ses implications en droit constitutionnel" (1977), 23 McGill L.J. 207.
72. It is true, of course, that we are not invited to create a general environmental pollution power but one restricted to ocean pollution. But it seems to me that the same considerations apply. I shall, however, attempt to look at it in terms of the qualities or attributes that are said to mark the subjects that have been held to fall within the peace, order and good government clause as being matters of national concern. Such a subject, it has been said, must be marked by a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In my view, ocean pollution fails to meet this test for a variety of reasons. In addition to those applicable to environmental pollution generally, the following specific difficulties may be noted. First of all, marine waters are not wholly bounded by the coast; in many areas, they extend upstream into rivers for many miles. The application of the Act appears to be restricted to waters beyond the mouths of rivers (and so intrude less on provincial powers), but this is not entirely clear, and if it is so restricted, it is not clear whether this distinction is based on convenience or constitutional imperative. Apart from this, the line between salt and fresh water cannot be demarcated clearly; it is different at different depths of water, changes with the season and shifts constantly; see U.N. Report, *op. cit.*, at p. 12. In any event, it is not so much the waters, whether fresh or salt, with which we are concerned, but their pollution. And the pollution of marine water is contributed to by the vast amounts of effluents that are poured or seep into fresh waters

everywhere (*id.*, at p. 13). There is a constant intermixture of waters; fresh waters flow into the sea and marine waters penetrate deeply inland at high tide only to return to the sea laden with pollutants collected during their incursion inland. Nor is the pollution of the ocean confined to pollution emanating from substances deposited in water. In important respects, the pollution of the sea results from emissions into the air, which are then transported over many miles and deposited into the sea; see *id.*, at p. 15; I.J.C. Report, *op. cit.*, at p. 22. I cannot, therefore, see ocean pollution as a sufficiently discrete subject upon which to found the kind of legislative power sought here. It is an attempt to create a federal pollution control power on unclear geographical grounds and limited to part only of the causes of ocean pollution. Such a power then simply amounts to a truncated federal pollution control power only partially effective to meet its supposed necessary purpose, unless of course one is willing to extend it to pollution emanating from fresh water and the air, when for reasons already given such an extension could completely swallow up provincial power, no link being necessary to establish the federal purpose.

73. This leads me to another factor considered in identifying a subject as falling within the general federal power as a matter of national domain: its impact on provincial legislative power. Here, it must be remembered that in its supposed application within the province the provision virtually prevents a province from dealing with certain of its own public property without federal consent. A wide variety of activities along the coast or in the adjoining sea involves the deposit of some substances in the sea. In fact, where large cities like Vancouver are situated by the sea, this has substantial relevance to recreational, industrial and municipal concerns of all kinds. As a matter of fact, the most polluted areas of the sea adjoin the coast; see U.N. Report, *op. cit.*, at pp. 3-4. Among the major causes of this are various types of construction, such as hotels and harbours, the development of mineral resources and recreational activities (*id.*, at p. 3). These are matters of immediate concern to the province. They necessarily affect activities over which the provinces have exercised some kind of jurisdiction over the years. Whether or not the "newness" of the subject is a necessary criterion for inventing new areas of jurisdiction under the peace, order and good government clause, it is certainly a relevant consideration if it means removing from the provinces areas of jurisdiction which they previously exercised. As I mentioned, pollution, including coastal pollution, is no new phenomenon, and neither are many of the kinds of activities that result in pollution.
74. A further relevant matter, it is said, is the effect on extra-provincial interests of a provincial failure to deal effectively with the control of intra-provincial aspects of the matter. I have some difficulty following all the implications of this, but taking it at face value, we are dealing here with a situation where, as we saw earlier, Parliament has extensive powers to deal with conditions that lead to ocean pollution wherever they occur. The difficulty with the impugned provision is that it seeks to deal with activities that cannot be demonstrated either to pollute or to have a reasonable potential of polluting the ocean. The prohibition applies to an inert substance regarding which there is no proof that it either moves or pollutes. The prohibition in fact would apply to the moving of rock from one area of provincial property

to another. I cannot accept that the federal Parliament has such wide legislative power over local matters having local import taking place on provincially owned property. The prohibition in essence constitutes an impermissible attempt to control activities on property held to be provincial in Reference re Ownership of the Bed of the Strait of Georgia and Related Areas, *supra*. It may well be that the motive for enacting the provision is to prevent ocean pollution, but as Beetz J. underlines in Re: Anti-Inflation Act, *supra*, Parliament cannot do this by attempting to regulate a local industry, although it can, of course, regulate the activities of such an industry that fall within federal power, whether such activities are expressly encompassed within a specific head of power, e.g., navigation, or affect areas of federal concern, e.g., health under the criminal law power, or cause pollution to those parts of the sea under federal jurisdiction. But here the provision simply overreaches. In its terms, it encompasses activities--depositing innocuous substances into provincial waters by local undertakings on provincial lands--that fall within the exclusive legislative jurisdiction of the province.

75. Finally, it was argued that the provision might be read down to apply to federal waters only, but I do not think this is possible. One need only look at the broad definition of "the sea" in s. 2(2) and (3) to appreciate the comprehensive reach of the Act. Besides, it is well known that many bays and other internal bodies of waters in Canada fall within the limits of the provinces. Many of the federal internal waters are located in the Arctic and have been expressly dealt with by the federal government.

Disposition

76. I would dismiss the appeal with costs and reply to the constitutional question in the affirmative.

Appeal allowed, Beetz, Lamer and La Forest JJ. dissenting.

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitors for the respondent: Davis & Company, Vancouver; Brian D. Gilfillan, Vancouver.

Solicitors for the intervener the Attorney General of Quebec: Odette Laverdière and Alain Gingras, Ste-Foy.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/306/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-crown-zellerbach-canada-ltd-1988>

Prepared on 28 October 2026 · Esheria