FEDERAL JURISDICTION OVER SUPPORT AFTER DIVORCE

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I. INTRODUCTION

Under the Canadian constitution, legislative jurisdiction in relation to matters of family law is presently divided between the federal Parliament and the provincial legislatures. By virtue of section 91(26) of the B.N.A. Act, the federal Parliament has the exclusive power to legislate in relation to "marriage and divorce", with the exception of "the solemnization of marriage in the province". The latter is within express provincial competence under section 92(12). The generally held view is that the "marriage and divorce" power is limited to the creation and dissolution of the status of marriage, and matters which are necessarily incidental thereto. Other matters of family law have been held to fall within the responsibility of the provinces.

A national law of divorce and corollary relief came into effect with the enactment of the Divorce Act[1] by Parliament in 1968. Prior to that date, the provision of maintenance as corollary relief had been governed by provincial legislation in Alberta, British Columbia and Ontario and elsewhere by received English law or by pre-Confederation colonial legislation.[2] At the time the Divorce Bill was under debate, there was some controversy regarding federal competence in relation to support after divorce,[3] and these constitutional questions have continued to cause difficulty.

There are three main areas in which constitutional problems arise in relation to federal provisions for material support after divorce to a spouse or child. First, there are several issues concerning the interpretation of the present maintenance provisions of the Divorce Act. Arguments as to the scope of federal jurisdiction are relevant to this. Secondly, questions about the scope of federal jurisdiction are also relevant to potential reforms which could be made to the Divorce Act; for example, in relation to the division of marital property. Thirdly, the concurrent jurisdiction of the provinces over some matters of family law creates difficulties of competing legislation and orders, and hence of the application of federal paramountcy.

The present analysis is directed to the scope of federal jurisdiction and excludes the interaction of federal and provincial law. After a preliminary

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[1] R.S.C. 1970, c. D-8.

[2] *See* POWER ON DIVORCE 515-20 (2d ed. J. Payne 1964).

[3] Jordan, *The Federal Divorce Act (1968) and the Constitution*, 14 McGILL L.J. 209, at 247-50 (1968).

review of the constitutional framework for support after divorce and of the theory of ancillary powers, some major questions about the scope of federal jurisdiction will be examined. These concern the forms in which material support may be awarded, the temporal dimension of support awards, and the persons who may be subjects of such awards. Finally, some comments will be made on the prospects for constitutional change in this area.

At various points, the constitional problems concerning support overlap those concerning the other element of corollary relief, orders for the custody of children, and also more general issues in the field of family law. The special constitutional problems concerning custody orders will not be examined in detail, since these have been discussed elsewhere.[4] However, where it is appropriate, the analysis will be framed in a broader context.

II. The Constitutional Framework

A. *Introduction*

In the catalogue of provincial powers under section 92 of the B.N.A. Act, the only explicit reference to matters of family law is to "the solemnization of marriage in the province" under section 92(12). It is, however, established that the obligation to provide material support for a spouse or child is a matter within provincial legislative competence.

This competence has been explained in several different ways. The problem of support can be regarded as falling within the general provincial power over matters of private law conferred by section 92(13), because it concerns the mutual rights and duties of family members. This view was expressed by Martland J., delivering the judgment of the Supreme Court of Canada in *Zacks v. Zacks*.[5] It was said that alimony and maintenance, together with the custody of children *could* be considered as "civil rights". On the other hand, to the extent that there is an issue of public responsibility to oversee the care of persons in distress, a claim for jurisdiction may rest upon provincial authority over "the administration of justice in the province" under section 92(14). This argument was advanced by Duff C.J., delivering the earlier opinion of the Supreme Court of Canada in *Reference re Adoption Act*.[6] It was suggested that legislation providing for the support of neglected children and deserted wives is related to the control of "social conditions having a tendency to encourage vice and crime".[7] Yet another possible ground for provincial jurisdiction

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[4] Colvin, *Custody Orders Under the Constitution*, 56 Can. B. Rev. 1 (1978).

[5] [1973] S.C.R. 891, at 900, 10 R.F.L. 53, at 60, 35 D.L.R. (3d) 420, at 426-27.

[6] [1938] S.C.R. 398, at 403, [1938] 3 D.L.R. 497, at 498-99, 71 C.C.C. 110, at 112-13.

[7] *Id.* The power over matters of education conferred by s. 93 was mentioned as another basis for provincial competence in relation to the support of children.

emerged from the decision of the Supreme Court of Canada in *Attorney-General for Ontario v. Scott*[8] which held that the field of family maintenance orders is included within "matters of a merely local or private nature in the province" under section 92(16).[9]

Despite the difficulties involved in identifying the precise source of legislative competence, it is now indisputable that legislation providing for the support of a spouse or child is *intra vires* the legislatures of the provinces. At the same time, the federal Parliament may legislate upon maintenance, where this is *ancillary* or *necessarily incidental* to its enumerated power in relation to "marriage and divorce" under section 91(26) of the B.N.A. Act. The possibility of ancillary powers as a ground for federal intervention was raised in the *Adoption Reference*.[10] Subsequently, the Supreme Court of Canada, in *Jackson v. Jackson*[11] and in *Zacks v. Zacks*,[12] declared valid the provisions regarding orders for corollary relief in sections 10 and 11 of the Divorce Act on this ground. Presumably, the same reasoning would apply if Parliament were to use its power under section 91(26) to enact legislation relating to nullity, or perhaps even to judicial separation,[13] with provisions for corollary relief.

B. *The "Marriage and Divorce" Power*

In relying upon the ancillary doctrine to validate the corollary relief sections of the Divorce Act, the Supreme Court of Canada may have implicitly endorsed the commonly held view that the primary federal "mariage and divorce" power is a power to legislate only in relation to changes in marital status. Thus, the marriage power has generally been regarded as limited to the creation of marriage, including the subjects of capacity, consent and consummation, but excluding matters of solemnization.[14] It has been traditionally supposed that the legal consequences of marriage, such as rights and duties in relation to property, maintenance and custody, fall outside the primary power conferred by section 91(26).

If the "marriage and divorce" power is limited in this way, and federal competence in relation to material support is justifiable only on the basis of ancillary powers, then provision for support must be connected to proceedings under federal jurisdiction which effect a change of maritial

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[8] [1956] S.C.R. 137, 1 D.L.R. (2d) 433, 114 C.C.C. 224.

[9] *Id.* at 141, 1 D.L.R. (2d) at 436, 114 C.C.C. at 227 (*per* Rand J.); [1956] S.C.R. at 147, 1 D.L.R. (2d) at 447, 114 C.C.C. at 239 (*per* Abbott J.).

[10] *Supra* note 6, at 402, [1938] 3 D.L.R. at 498, 71 C.C.C. at 112.

[11] [1973] S.C.R. 205, at 211, [1972] 6 W.W.R. 419, at 421, 29 D.L.R. (3d) 641, at 644.

[12] *Supra* note 5, at 900-01, 10 R.F.L. at 61, 35 D.L.R. (3d) at 427. The question was considered more fully in this case than in Jackson v. Jackson, *supra* note 11.

[13] There is some disagreement as to whether judicial separation falls within the scope of the "marriage and divorce" power, but the stronger argument is for federal competence. *See* note 38 *infra*.

[14] *See In re* Marriage Legislation in Canada, [1912] A.C. 880, 81 L.J.P.C. 237, 107 L.T. 330.

status.[15] The kind of connection which has to be established will be examined later. A counter-argument is sometimes advanced for a much broader interpretation of the "marriage and divorce" power. This suggests that federal authority over marital relationships is sufficiently broad to cover their legal consequences; it is limited only by 92(12). This argument has been directed primarily towards the marriage power. Still, it will be examined in some detail since, if correct, it has major implications for the divorce power as well. The inference would be that if the marriage power is sufficiently broad to cover the legal relationships of married persons, then the divorce power might equally extend to the legal relationships of divorced persons. Thus the federal power to make provision for support would not be ancillary to proceedings for dissolution, it would be effective *proprio vigore*.

Although there has been no detailed analysis of the scope of the federal marriage power by our highest appellate tribunals, an argument for the exclusion of consequential items could be based on the affirmations of provincial competence in the decisions of the Supreme Court of Canada in the *Adoption Reference*[16] and in *Conger v. Kennedy*.[17] In the latter case, it was held that the subject of matrimonial property fell within the power of the Legislative Assembly of the North-West Territories to pass ordinances in relation to "property and civil rights in the territories". Although the immediate issue in the case concerned delegated rather than sovereign power, the North-West Territories Act[18] provided that territorial powers should not be in excess of those conferred upon the provinces by the B.N.A. Act.

Mention should also be made of the series of decisions of provincial appellate courts which held that matrimonial property,[19] alimony[20] and damages for adultery,[21] all fall under provincial jurisdiction and not under "marriage and divorce". In *Hill v. Hill,* Hyndman J.A. said:

> In my opinion the intent and meaning of the distribution of powers was to give the federal Parliament the exclusive right to legislate as to who shall or shall not be capable of marrying; and the provincial what the individual rights of the parties shall be within the Province after marriage.[22]

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[15] This applies to competence in relation to marriage as well as divorce. Hence, federal ancillary jurisdiction will only cover provision for support as an incident of matrimonial proceedings which are under federal jurisdiction; such as, a decree of nullity for voidable marriages. The legal consequences of marriage are excluded from the primary and ancillary marriage powers.

[16] *Supra* note 6.

[17] 26 S.C.R. 397 (1896).

[18] R.S.C. 1886, c. 50, s. 13(1).

[19] Hill v. Hill, 24 Alta. L.R. 105, [1929] 2 W.W.R. 41, [1929] 2 D.L.R. 735 (C.A.).

[20] Rousseau v. Rousseau, [1920] 3 W.W.R. 384 (B.C.C.A.); Lee v. Lee, 16 Alta. L.R. 83, [1920] 3 W.W.R. 530, 54 D.L.R. 608 (C.A.); Holmes v. Holmes, 16 Sask. L.R. 390, [1923] 1 W.W.R. 86, [1923] 1 D.L.R. 294 (C.A.).

[21] Mitchell v. Mitchell, 44 Man. R. 23, [1936] 1 W.W.R. 553, [1936] 2 D.L.R. 374 (C.A.); Mowder v. Roy, [1946] O.R. 154, [1946] 2 D.L.R. 427 (C.A.).

[22] *Supra* note 19, at 113, [1929] 2 W.W.R. at 48, [1929] 2 D.L.R. at 741.

This view was expressed more succinctly by Harvey C.J. who said that "it is not the subject of 'husband and wife' but of 'marriage and divorce' which is assigned to the Dominion Parliament".[23]

The argument for a much broader scope to the marriage power has recently been advanced by Katz,[24] and given qualified approval by Hogg.[25] Both writers have drawn attention to the decision of the High Court of Australia in the *Marriage Act* case,[26] where a broad interpretation was given to the similar federal marriage power under the Australian constitution.[27]

The main issue in the *Marriage Act* case was the validity of certain provisions of the Commonwealth Marriage Act, 1961,[28] regarding the legitimation of children by a subsequent marriage and the legitimation of children of a void marriage. The court was divided on whether the challenged sections could, on any reading of the marriage power, be regarded as within its scope. The majority held that the sections were a valid exercise of the marriage power, with a minority taking the view that one or more of the sections were more properly characterized as legislation with respect to legitimacy or inheritance. On the scope of the marriage power itself, there was substantial agreement that competence extended, at least to some degree, to the mutual rights and obligations of family members.[29] There was, however, no clear consensus on the precise scope of the power, doubts being expressed particularly about the subject of marital property.[30] However, the majority could find no good reason for limiting the scope of the power to the creation of marriage and excluding the legal consequences for the relationships between the parties and their children. Indeed, Kitto J. took the view that the subject of marriage was co-extensive with "the subject of what marriage amounts to in law".[31]

The greatest caution, however, needs to be exercised in drawing analogies between the constitutional law of Australia and of Canada, the constitutional structures of the two countries being very different. Under

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[23] Lee v. Lee, *supra* note 20, at 88, [1920] 3 W.W.R. at 534, 54 D.L.R. at 612.

[24] Katz, *The Scope of Federal Legislative Power in Relation to Marriage*, 7 OTTAWA L. REV. 384, at 392-96 (1975).

[25] P. HOGG, CONSTITUTIONAL LAW OF CANADA 371, 375 (1977).

[26] Attorney-General of Victoria v. Commonwealth of Australia, 107 C.L.R. 529 (1962). For a discussion of this case, *see* Sackville & Howard, *The Constitutional Power of the Commonwealth to Regulate Family Relationships*, 4 FED. L. REV. 30, at 40-53 (1970).

[27] Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict., c. 12, s. 51(xxi).

[28] Marriage Act 1961, (Cth.).

[29] *Supra* note 26, at 554 (*per* Kitto J.), at 560 (*per* Menzies J.), at 580 (*per* Windeyer J.), at 602 (*per* Owen J.). *But see contra* at 549 (*per* McTiernan J.). Dixon C.J. did not express an opinion on this point. Curiously, Taylor J. claimed that Canadian law supported his conclusion, and cited (at 562) the reasoning at first instance in Hill v. Hill, [1928] 4 D.L.R. 161 (Alta. S.C.). *See also* Hill v. Hill, [1928] 3 W.W.R. 673, [1929] 1 D.L.R. 423 (Alta. S.C. 1928) (trial on a different issue).

[30] *Supra* note 26, at 554 (*per* Kitto J.), and at 580 (*per* Windeyer J.).

[31] *Id.* at 554.

the Canadian constitution, those matters which fall squarely within the enumerated heads of section 91 of the B.N.A. Act are thereby withdrawn from provincial competence. However, Commonwealth powers in Australia are not exclusive, unless by express declaration or necessary implication.[32] One of the powers regarded as concurrent between the Commonwealth and the States is marriage. The recognition of a matter as falling within the scope of the marriage power does not therefore carry the drastic implications for the authority of the Australian states which it would for the provinces of Canada.

In the face of a broad interpretation of the Canadian marriage power, some vestiges of provincial competence over family law might be rescued by judicial recognition of a limited sphere of concurrent jurisdiction. It has been contended that, for concurrency to be recognized, the following conditions must be met:

> (1) the provincial and federal categories of power must overlap logically in their definitions; (2) the challenged law must be caught by the overlap, that is, it must exhibit both provincial and federal aspects of meaning; and (3) the provincial and federal aspects of the challenged law thus manifest must be deemed of equivalent importance or value.[33]

The final condition substantially limits the scope for the operation of concurrent powers. A finding of *ultra vires* could well result for any provincial legislation which was directed primarily towards, and had a substantial impact upon, marital relationships.

Under these circumstances, it is not surprising that the consistent trend in the Canadian cases has been to characterize provincial legislation on matters such as custody and maintenance as falling outside the field of marriage, and to justify federal competence merely on the basis of ancillary powers. Essentially, what the courts have done is to interpret and modify the words of section 91(26) in the light of the provincial powers enumerated in section 92.[34]

The theoretical rationale behind the position taken by the Canadian courts is a distinction between marital status and the legal consequences attached to that status. In upholding the validity of various items of "consequential" provincial legislation, it has been asserted several times that the legislation did not determine or affect the status of the parties.[35] For this reasoning to be tenable, however, it must be possible to define the

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[32] *See* Latham, *Interpretation of the Constitution* in ESSAYS ON THE AUSTRALIAN CONSTITUTION 1, at 12-14 (2d ed. R. Else-Mitchell 1961).

[33] Lederman, *The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada*, in THE FUTURE OF CANADIAN FEDERALISM 91, at 104 (P.-A. Crépeau & C. Macpherson eds. 1965).

[34] For the classic statement on the doctrine of mutual modification, *see* Citizens Insurance Co. v. Parsons, 7 App. Cas. 96, at 109, 1 Cart. B.N.A. 265, at 273 (P.C. 1881).

[35] Mitchell v. Mitchell, *supra* note 21, at 27, [1936] 1 W.W.R. at 555, [1936] 2 D.L.R. at 376-77; Hill v. Hill, *supra* note 19, at 108-09, [1929] 2 W.W.R. at 44, [1929] 2 D.L.R. at 738; Holmes v. Holmes, *supra* note 20, at 396, [1923] 1 W.W.R. at 91-92, [1923] 1 D.L.R. at 299-300.

essential status of marriage in a manner independent of those legal consequences which are subject to provincial variation. Otherwise, it cannot be said which aspects of status the federal Parliament controls. A supposed difficulty in formulating a definition of this kind may have been a factor which influenced the judges in the Australian *Marriage Act* case. Kitto J. expressed the problem clearly when he contended that "it is the essence of marriage, from a legal point of view, that it produces, or provides a pre-requisite for, the legal recognition of family relationships".[36]

Nevertheless, the status of marriage can be defined independently of those legal consequences which are within the authority of the provinces. The starting point for the definition of marriage in the common law has been the statement of Lord Penzance in *Hyde v. Hyde*: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others."[37] There are three elements to this definition: (1) exclusive life-long consortium (2) voluntarily undertaken (3) between a man and a woman. The only respect in which the marital status of a person, in this sense, is subject to provincial control is through the requirements regarding solemnization which may be enacted under section 92(12) of the B.N.A. Act. None of the elements which have been listed as defining the status of marriage includes matters which fall under provincial jurisdiction because they are "consequential".[38] In *Hill v. Hill* Harvey C.J. was able to endorse the statement of Lord Penzance as a definition of marriage, and then to conclude: "While the rights of husband and wife have changed materially in the last century through the action of the Courts and the Legislatures yet I do not see how it can successfully be contended that the essential status of 'Marriage' has been thereby affected . . .".[39]

From a legal standpoint, this essential status is imbued with largely symbolic rather than instrumental meaning. The primary function of marriage as a legal institution becomes the formal legitimization of the

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[36] *Supra* note 26, at 554.

[37] L.R. 1 P. & D. 130, at 133, 35 L.J. P. & M. 51, at 58, 14 L.T. 188, at 189 (D. 1866).

[38] A possible exception is judicial separation, which involves releasing the parties from their duty to cohabit, and therefore seems to affect their marital "status" as it is defined above. If consortium is recognized as a fundamental element of the marital relationship, by reference to which the status of marriage is defined, judicial separation should be within federal competence. It amounts to a partial dissolution of the marriage. However, the courts have disagreed on whether it alters the marital status of the parties or merely their consequential rights and duties. In Holmes v. Holmes, *supra* note 20, it was suggested that judicial separation is a matter within provincial responsibility. On the other hand, federal authority was upheld in Tarn v. Tarn, [1942] 3 W.W.R. 419, [1942] 4 D.L.R. 632 (Man. K.B.), and in Salloum v. Salloum, [1976] 5 W.W.R. 603 (B.C S.C.). In the *Salloum* case, separation was directly in issue. Hinkson J. held *ultra vires* sections of the British Columbia Family Relations Act, 1972, which purported to revise the grounds for judicial separation. In Siebert v. Siebert, 82 D.L.R. (3d) 70 (B.C.S.C.), Spencer J. indicated a preference for provincial competence, but felt that *Salloum* should be followed.

[39] *Supra* note 19, at 109, [1929] 2 W.W.R. at 44, [1929] 2 D.L.R. at 738.

relationship of the parties and not the regulation of their mutual rights and obligations. This is, however, no objection to the argument that the status of marriage can, with one exception, be defined independently of its consequences. The only necessary legal consequence is an incapacity to enter into other such formally legitimated relationships.

In addition to the authority of the cases, there are finally strong historical arguments in favour of the narrower interpretation of the marriage power. When Parliament was originally granted jurisdiction in relation to "marriage" under the B.N.A. Act, a limited meaning seemed to have been intended. The justification for a federal power was said to be the need to avoid problems of conflict of laws concerning marital status, and it was suggested that the power excluded matters of property and civil rights.[40] Furthermore, since Confederation, Parliament has made no attempt to enter the field of the consequences of marriage. Such historical arguments are not conclusive against federal competence, but, as Dickson J. said in *Di Iorio v. Warden of the Common Jail of Montreal*, "history and governmental attitudes can be helpful guides to interpretation".[41] This, in conjunction with the trend of the cases, makes it unlikely that a broader marriage power will be recognized in the present constitutional law of Canada.

The scope of the federal marriage power has been analyzed in some detail in order to establish clearly the significance of the reliance, by the Supreme Court of Canada, on ancillary divorce power as the ground for validating the corollary relief provisions of the Divorce Act. This reliance does not merely represent a view of federal power over maintenance and custody as being sufficient to handle the matters at issue. It indicates that federal competence must rest upon an ancillary jurisdiction and is not capable of expansion on another basis. If the legal consequences of marriage are not within the scope of the "marriage and divorce" power, then neither are the legal consequences of divorce, except in so far as these can be regarded as incidental to divorce proceedings.

Apart from the restrictions which this imposes on the Parliament of Canada, the major implication is that the legal consequences of divorce, like those of marriage, are within provincial jurisdiction. Thus even after divorce, the subjects of support and custody are within the competence of the legislatures of the provinces. Provincial statutes, rules and orders will not be invalid, though they will be rendered inoperative by virtue of federal paramountcy in the event of conflict with federal pronouncements.[42]

C. *Ancillary Powers*

The theory of ancillary powers states that some federal legislative schemes contain provisions which are potentially severable and which,

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[40] *See* Jordan, *supra* note 3, at 212-13.

[41] [1978] 1 S.C.R. 152, at 206, 35 C.R.N.S. 57, at 81, 8 N.R. 361, at 390 (1976).

[42] *See* Attorney-General of Ontario v. Attorney-General of Canada (*Voluntary Assignments* case), [1894] A.C. 189, at 200-01, 5 Cart. B.N.A. 266, at 280-81 (P.C.).

standing alone, would be characterized as concerning matters within exclusive provincial rather than federal jurisdiction. Their constitutional legitimacy, therefore, depends upon their connection to the remainder of the legislative scheme.[43]

The ancillary doctrine is, however, one of the more controversial areas of constitutional law. The cases offer few coherent statements of principle. There have even been some suggestions that the doctrine is meaningless, or that it might lead to the undue restriction of federal power. For example, concern that federal power might be unduly restricted seems to underlie the distaste for the doctrine expressed by Laskin J.A., as he then was, in upholding the validity of the custody provisions of the Divorce Act.

> I do not myself favour the language of "trenching" and of "necessarily incidental" or "ancillary"... through which effectuation of exercises of federal legislative power have been certified. Convenient as that language may be to signal situations in which the doctrine of exclusiveness of jurisdiction does not apply but that there is rather a legislative field with gates of entry for both Dominion and Province, it is not sufficiently neutral in its acknowledgement of a common domain.[44]

Distaste for at least some usage of the ancillary doctrine was also expressed by Judson J. in *Nykorak v. Attorney-General of Canada*.[45] However, Judson J. was addressing himself to the use of the doctrine even in situations where the challenged provisions, standing alone, would be held to fall squarely within the enumerated federal power, notwithstanding an incidental effect upon a field of provincial jurisdiction. For this reason, he considered "meaningless"[46] the reasoning in the classic case of *Grand Trunk Railway v. Attorney-General of Canada*.[47] In that case the Privy Council upheld the competence of Parliament to enact legislation prohibiting railway companies within federal jurisdiction from "contracting out" of liability to pay damages for personal injury to their servants. The competence of Parliament was upheld on the ground that the provision was properly ancillary to railway legislation. Yet, it must be doubted whether, in any event, it would be within provincial competence to enact such legislation. Federal competence in this regard is likely to be exclusive. The complaints of Laskin J.A. seem to go a step further, and to be addressed to any usage of the ancillary doctrine.

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[43] The remainder of the scheme will usually be found in the same enactment. However, it may also be permissible to consider other statutes which form part of an integrated legislative scheme. *E.g.*, there may be some question about the validity of the Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, in the light of *Di Iorio, supra* note 41. One way in which the R.C.M.P. Act could be upheld is on the basis of enforcement powers which are ancillary to s. 91(27) of the B.N.A. Act. In support of this claim, the connection between the R.C.M.P. Act and the Criminal Code, R.S.C. 1970, c. C-34, would be stressed.

[44] Papp v. Papp, [1970] 1 O.R. 331, at 335, 8 D.L.R. (3d) 389, at 393 (C.A.).

[45] [1962] S.C.R. 331, at 335, 37 W.W.R. 660, at 665-66, 33 D.L.R. (2d) 373, at 375.

[46] *Id.*

[47] [1907] A.C. 65, 7 C.R.C. 472 (P.C.).

The rationale for the use of the ancillary doctrine in relation to the corollary relief provisions of the Divorce Act is presumably that they are potentially severable and that, even as incidents of the dissolution of marriage, support and custody are matters within provincial jurisdiction. Concurrent federal jurisdiction is admitted because of the connection to a scheme for the dissolution of marriage.

Laskin J.A., on the other hand, would have preferred simply to characterize corollary relief as falling within the primary federal power in relation to divorce. However, as the passage quoted above indicates, he did not mean that the subject was thereby to be excluded from provincial competence. Rather, he was suggesting that it manifested both federal and provincial aspects which permitted concurrent jurisdiction. His conclusion regarding the basic nature of the relationship between federal and provincial power was the same as that later reached by the Supreme Court of Canada in *Jackson v. Jackson*[48] and *Zacks v. Zacks*.[49] These later decisions appear to have effectively repudiated his attempt to avoid use of the ancillary doctrine in reaching a result of concurrency. In any event, his approach would not have avoided the requirement that the provision for support or custody be connected to divorce proceedings, and hence would not have had the extensive implications of a broader interpretation of the "marriage and divorce" power.

The value of the ancillary doctrine is that it signals a requirement to look closely at the relationship between the primary and the marginal provisions. This necessitates an examination of what overall policy the legislation embodies and how the marginal provisions fit into that policy. It may therefore be questioned whether federal legislation in relation to corollary relief would be valid in the absence of federal legislation on the dissolution of marriage. If it were held that mere federal responsibility for divorce, as opposed to actual legislation on the subject, is sufficient to ground competence in relation to corollary relief, then the relevance of the ancillary doctrine would be called into doubt. It would seem simpler just to describe the constitutional position as one of concurrent jurisdiction. The assertion of ancillary power as the foundation of federal competence should mean that a connection must be established to substantive divorce legislation.[50]

The question of where a constitutional link can be sought for ancillary legislation is important to a general understanding of the theory of ancillary powers. However, it should not make a difference to the immediate problem of the scope of present federal competence over support after divorce. This is because the primary field of federal competence has been fully occupied by the Divorce Act.

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[48] *Supra* note 11.

[49] *Supra* note 5.

[50] Ancillary federal jurisdiction to regulate intraprovincial trade is attached to s. 91(2) of the B.N.A. Act. Federal regulation of intraprovincial trade in a product would surely not be valid in the absence of related regulation of interprovincial or international trade. Whether this holds in all situations where federal jurisdiction is validated through the ancillary doctrine is unclear.

It remains to be seen what kind of connection to the dissolution of marriage must be established. The courts have not provided any clear formulation of a test for determining the validity of a purported exercise of ancillary power. The most stringent test would be whether the challenged provision is essential for the effective operation of the remainder of the legislative scheme. This form of the doctrine was enunciated by the Privy Council in the *Voluntary Assignments* case.[51] It was on this ground that the Manitoba Court of Appeal held valid certain federal controls on the wheat trade in their application to intraprovincial trade.[52] However, the Supreme Court of Canada does not seem to have used this test to restrict the exercise of ancillary powers. When a similar problem concerning federal control of intraprovincial trade in oil arose in *Caloil Inc. v. Attorney-General of Canada*, interference with local trade was upheld merely as "an integral part of the control of imports in furtherance of an extraprovincial policy".[53] The vital factor seems to have been that the impugned regulation was an integral part of a scheme of which the *purpose* was "clearly outside provincial jurisdiction and within the exclusive federal field of action".[54]

The suggestion that a valid ancillary provision must be essential for the operation of a legislative scheme was expressly rejected in one of the fullest judicial statements of the doctrine, by Rand J.

> [L]egislation on a principal subject matter within an exclusive jurisdiction may include as incidents subordinate matters or elements in other aspects outside that jurisdiction. The instances in which this power has been upheld seem to lead to the conclusion that if the subordinate matter is reasonably required for the purposes of the principal or to present embarassment to the legislation, its inclusion to that extent is legitimate. This may be no more than saying that the incidental has a special aspect related to the principal. Actual necessity need not appear as the contracting-out case shows;[55] it is the appropriateness on a balance of interests and convenience, to the main subject matter or the legislation.[56]

Although the ancillary provisions need not be essential for the implementation of the primary provisions, the test remains a functional one. An exercise of ancillary power is valid because of its contribution to the operation of the primary provisions.

In *Zacks v. Zacks*[57] approval was given to the following words of Laskin J.A. from *Papp v. Papp*:

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[51] *Supra* note 42.

[52] The Queen v. Klassen, 29 W.W.R. 369, 31 C.R. 275, 20 D.L.R. (2d) 406 (Man. C.A. 1959).

[53] [1971] S.C.R. 543, at 551, [1971] 4 W.W.R. 37, at 43, 20 D.L.R. (3d) 472, at 478.

[54] *Id.* at 550, [1971] 4 W.W.R. at 43, 20 D.L.R. (3d) at 478.

[55] Rand J. is referring to Grand Trunk Ry. v. Attorney-General of Canada, *supra* note 47.

[56] Reference *re* Validity of Industrial Relations and Disputes Act (Can.), [1955] S.C.R. 529, at 548-49, [1955] 3 D.L.R. 721, at 742.

[57] *Supra* note 5, at 904-05, 10 R.F.L. at 63-64, 35 D.L.R. (3d) at 429.

> Where there is admitted competence, as there is here, to legislate to a certain point, the question of limits (where the point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged.[58]

This is perhaps the most liberal test for the exercise of ancillary power. The statement is misleading, however, if it involves admitting ancillary jurisdiction merely because it is convenient to deal with provincial matters alongside federal matters.

Convenience is certainly a relevant factor in grounding ancillary jurisdiction, as Rand J. indicated in the passage quoted above. However, the weight of authority suggests that federal interests must be balanced against provincial interests. This balance may be struck in different ways at different times. The highly restrictive approach which was taken earlier to federal ancillary jurisdiction over intraprovincial trade[59] has been significantly tempered in modern times.[60] Nevertheless, the validation of federal legislation through the ancillary doctrine has generally been accompanied by a stress on the importance of the federal interests at stake. It is not every federal interest in a matter of provincial responsibility which will ground ancillary jurisdiction. The federal interest must be sufficient to outweigh the interest of the provinces in their spheres of exclusive responsibility.

The theoretical principles which have been enunciated clearly leave room for disagreement concerning their application to the scope of federal competence in relation to material support after divorce. In some measure, this scope has been determined by judicial authority, but much remains in question. The proper balance of federal and provincial interests cannot be resolved by analytical methods alone. It must be struck in terms of its implications for the administration of family law and for the nature and operation of the Canadian confederation as a whole.

The position which is taken here is that a clear connection to the primary federal matter of divorce proceedings must be established in order to ground ancillary jurisdiction. That connection must be more than the convenience of dealing with the relationship of ex-spouses and their children under the Divorce Act. Convenience alone would effectively give Parliament a general jurisdiction over the legal consequences of divorce, and undermine the traditionally provincial responsibility for the legal relationship of family members. This would also establish a novel precedent for the use of the ancillary doctrine. This result would present serious implications for the established division of powers in other fields, such as the regulation of trade and commerce. There may be benefits for the administration of family law in bringing all parts of the field under one

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[58] *Supra* note 44, at 335-36, 8 D.L.R. (3d) at 393-94.

[59] *See* Attorney-General of British Columbia v. Attorney-General of Canada (Reference *re* Natural Products Marketing Act, 1934), [1937] A.C. 377, [1937] 1 W.W.R. 328, [1937] 1 D.L.R. 691 (P.C.); The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

[60] *See* notes 52, 53 *supra*.

legislative jurisdiction, but such benefits should be conferred by formal constitutional amendment, not by juridical action.

Nevertheless, it is contended that there is federal competence to enact certain provisions concerning rights and obligations in relation to support after divorce. Parliament, as the creator of divorce, has a responsibility to see that material needs which are related to a divorce are met. The dissolution of marriage will often either cause or aggravate economic disruption in the lives of the spouses and their children. Yet, it should not involve the loss of support or rights to support which would have been available in the context of marriage. Parliament therefore has a responsibility to ensure that needs are met, at least during a period of adjustment. Provisions to meet this responsibility can be regarded as an integral part of, and reasonably required for, a scheme for the dissolution of marriage which functions smoothly and is socially just.

D. *Conclusions*

The scope of the federal "marriage and divorce" power has not yet been clearly determined by the highest appellate tribunals. However, the weight of authority is to the effect that this is a power to legislate only in relation to the creation and dissolution of the status of marriage, together with matters necessarily incidental thereto. The power to legislate generally in relation to the legal consequences of marriage and divorce is exclusively provincial. This view has been expressed in several decisions of provincial courts of appeal concerning the legal consequences of marriage. It may also be implicit in some decisions of the Privy Council and the Supreme Court of Canada on the extent of provincial competence and the grounds on which the corollary relief provisions of the Divorce Act are valid. It has been held that these provisions are valid as an exercise of ancillary jurisdiction which is attached to the marriage and divorce power.

An alternative view is that the "marriage and divorce" power is a grant of plenary authority over marital relationships, including their legal consequences. This rests upon an analogy with the constitutional position in Australia. The analogy, however, ignores major differences between the constitutional structures of the two countries. Under the Australian constitution, legislative power over marriage and divorce is concurrent, while under the Canadian constitution it is exclusively federal. Acceptance of the broader interpretation of the "marriage and divorce" power in Canadian law could drastically limit the competence of the provinces. This limitation would run counter to the authority of the cases, the intention of the fathers of Confederation, and the traditional conception of the respective spheres of federal and provincial responsibility.

If federal competence in relation to corollary relief upon divorce rests upon an ancillary jurisdiction, it is upheld only because of its operative connection to the primary constitutional subject, the dissolution of marriage. It is therefore as a supplement to divorce proceedings, as a means of dealing with needs which arise from a marriage and its

dissolution, that provision for material support after divorce is *intra vires* Parliament. Some implications for the practical scope of federal legislative power will be examined in the remainder of this paper.

III. THE FORM OF SUPPORT

A. *Introduction*

Under sections 10 and 11 of the Divorce Act, a court may make an order for the financial maintenance of a spouse or a child of the marriage. Section 10 provides for an interim order pending the hearing and determination of the petition. Section 11 provides for a permanent award, in the form of an order to secure or to pay a lump sum or periodic sums. Although doubts about the validity of these sections have now been removed, it remains uncertain whether they could be amended to provide for the making of orders in relation to the division of marital property.[61]

An order for secured maintenance is an order which affects property, of course, but it has not been viewed as an order in relation to property. This is presumably because such a claim is awarded on the same basis, financial need, as an order to pay maintenance only and because the owner can still discharge his obligations by paying whatever monetary sums have been ordered.[62] An order to secure such sums against property relates to the enforcement of a claim rather than to its basic character.

For the reasons given in the preceding part, federal competence to enact legislation in relation to the division of property upon divorce would have to rest upon the same restricted ground of ancillary power which has validated the existing legislation. It will be argued that there is a limited federal competence with respect to property as a form of support. However, these issues are complex. The arguments to be presented will also be relevant to a problem, to be discussed later, concerning the criteria for awarding a lump sum.

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[61] The present discussion will only concern the transfer of property rights as a form of support. A divorce may also raise questions of existing property rights. It may be argued that Parliament, as the creator of divorce, has a responsibility to ensure that such questions are resolved for the future separate relationship of the parties. However, it is unnecessary to reach a conclusion on this for present purposes.

[62] A scheme for the "deferred sharing" of property which operated by way of a claim to the *value* of assets rather than to specific property would also enable obligations to be discharged through the payment of monetary sums. However, such a claim would be determined with reference to the difference between respective property holdings rather than financial need. The better view is therefore that legislation to implement such a scheme would be legislation "in relation to" property. Whether or not it would be in relation to property, there would still be a question as to whether it would be in relation to the incidents of divorce. *See* pp. 557-62 *infra*.

B. *Maintenance and Property under the Divorce Act*

When the Divorce Bill was before Parliament, provisions which would have allowed a division of marital property were considered.[63] The Special Joint Committee on Divorce had been of the opinion that the division of property could be dealt with as an ancillary matter,[64] and provision to this effect was made in the draft bill prepared by the Committee.[65] However, the subject was eventually excluded because of governmental doubts about the extent of federal competence.

In debate in the House of Commons, Justice Minister Trudeau took the view that the main obstacles to legislating in relation to property were practical difficulties stemming from the constitutional division of powers:

> It is certain that some possessions, those which perhaps come from the marriage tie itself, could be regulated under federal jurisdiction. But in practice, since it will be very difficult to distribute these possessions which are often worth little in comparison with the personal property of the husband and wife, it would have been a mistake to try to decide how property should be divided by the present legislation.[66]

Before the Senate Committee on Banking and Commerce, Mr. Trudeau appeared to indicate that the whole question of marital property was *ultra vires* Parliament.[67] In this respect, he was echoing the views of two Deputy Ministers of Justice.[68]

In the result, a formal division of marital property upon divorce can only be obtained in those jurisdictions where relevant provincial or territorial legislation is in force.[69] There would not appear to be any conflict between such legislation and the provision for financial support under the Divorce Act. Therefore, the paramountcy rule does not render provincial legislation inoperative in divorce proceedings.[70]

As a substitute for the power to make orders under the Divorce Act which directly concern property, the courts have sometimes induced

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[63] *See* Jordan, *supra* note 3, at 246-50, 261.

[64] REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE 27 (1967).

[65] *Id.* at 162.

[66] H.C. DEB. 27th Parl., 2nd Session at 5088-89 (Dec. 5, 1967).

[67] PROCEEDINGS OF THE STANDING COMMITTEE ON BANKING AND COMMERCE No. 23, at 224 (Feb. 1, 1968).

[68] *See* PROCEEDINGS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE No. 12, Appendix 26, at 622-23 (Jan. 31, 1967) (E. Driedger); PROCEEDINGS OF THE STANDING COMMITTEE ON BANKING AND COMMERCE No. 23, at 208 (Jan. 31, 1968) (D. Maxwell).

[69] *See* Family Relations Act, S.B.C. 1978, c. 20, ss. 43-45; The Marital Property Act, S.M. 1978, c. 24, s. 12; The Family Law Reform Act, 1978, S.O. 1978, c. 2, ss. 3-13; Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 5; QUEBEC CIVIL CODE, art. 1257-1450 (1974); Married Women's Property Act, R.S.S. 1965, c. 340, *as amended by* S.S. 1974-75, c. 29, s. 1, to be superseded upon proclamation of The Matrimonial Property Act, S.S. 1979, c. M-6.1; Matrimonial Property Ordinance R.O.N.W.T. 1974, c. M-7; The Matrimonial Property Act, S.A. 1978, c. 22.

[70] Weist v. Weist, 1 B.C.L.R. 343, at 349, 30 R.F.L. 395, at 400 (S.C. 1977).

property arrangements by resorting to their power, under section 12(b) of the Divorce Act, to impose "terms, conditions or restrictions" in a corollary relief order. It is settled that a court does not have the power to order a transfer of property in lieu of a lump sum,[71] or to order that a spouse be permitted to occupy the other's property.[72] However, it appears permissible to order that financial payments will be deemed to be satisfied by some kind of voluntary property arrangement. For example, in *Chadderton v. Chadderton*,[73] the husband was ordered to secure a lump sum in favour of the wife by means of a mortgage on his half-interest in the matrimonial home, with periodic principal payments and with interest on the unpaid principal. It was further ordered that the interest would be satisfied by the wife remaining in occupation of the premises, and that the lump sum would be satisfied by the husband conveying his half-interest to her.[74]

This kind of arrangement with respect to periodic maintenance was sanctioned by the Supreme Court of Canada in *Van Zyderveld v. Van Zyderveld*.[75] That case involved, *inter alia*, an appeal from an order that the husband pay to the wife $400 per month and that he would be deemed to have paid $300 per month upon permitting her and the children to remain in the matrimonial home. The husband objected that maintenance payments had been fixed at such a level that he could only meet them by allowing the wife to reside in the house. This, he contended, was in effect to give her its use or to require a division of property for her use, and therefore exceeded the jurisdiction conferred by the Act. Martland J. denied this objection on principle.

> The Court has power under s. 12(b) to impose terms and conditions, and it did so here. The terms and conditions imposed were clearly devised so as to provide an inducement for the appellant to allow his wife and children to continue and reside in his house, but in my opinion the Court had the power to do what it did. . . . In my opinion the order of the Appellate Division does not involve any division of property between the appellant and the respondent. The appellant retains his ownership of the matrimonial home. . . . The order under appeal does not divide the property but seeks to continue the use of the property by the wife and children as their residence.[76]

A similar issue would arise if an order for a lump sum as maintenance required a payment which could only be made by the sale of property. There is no reason why an otherwise acceptable claim to financial support under the Divorce Act should be denied because of the particular state of a spouse's assets. An order in relation to maintenance does not become an

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[71] *See* K. v. K., [1975] 3 W.W.R. 708, 20 R.F.L. 22, 53 D.L.R. (3d) 290 (Man. C.A.); Chadderton v. Chadderton, [1973] 1 O.R. 560, 8 R.F.L. 374, 31 D.L.R. (3d) 656 (Ont. C.A. 1972); Switzer v. Switzer, 70 W.W.R. 161, 1 R.F.L. 262, 7 D.L.R. (3d) 638 (Alta. C.A. 1969).

[72] *See* Keddy v. Keddy, 45 D.L.R. (3d) 609 (N.S.C.A. 1964).

[73] *Supra* note 71.

[74] *Id.* at 570-71, 8 R.F.L. at 385, 31 D.L.R. (3d) at 666-67.

[75] [1977] S.C.R. 714, [1976] 4 W.W.R. at 734, 23 R.F.L. 200.

[76] *Id.* at 719-20, [1976] 4 W.W.R. at 738-39, 23 R.F.L. at 204-05.

order in relation to property merely because it can only be met by actions which concern property. By analogy to *Van Zyderveld*, it should make no difference if such an order for a lump sum was coupled with a provision that payment of the sum would be deemed to be satisfied by a conveyance of property and if the order was intended to be an inducement to make a conveyance.[77]

Since the passage of the Divorce Act, there have been divergent expressions of opinion on whether the division of marital property is within the jurisdiction of Parliament. There have been several judicial statements doubting federal competence.[78] However, the Law Reform Commission of Canada has taken the view that it would be *intra vires* for Parliament to provide for a division of property acquired during a marriage, "as a matter of the economic consequences of dissolution of marriage".[79]

The Commission made these basic recommendations with respect to property matters:

> Parliament should confer power on the court in dissolution proceedings to:
> (a) transfer ownership of property from one spouse to the other;
> (b) transfer rights to the use of property from one spouse to the other;
> (c) require the establishment of trusts, the giving of mortgages and other necessary or desirable steps to secure or make effective its orders regarding property;
> for the purpose of equalizing the property position of each spouse with respect to property acquired by either spouse after the date of the marriage.[80]

Subsequently, Justice Minister Basford stated that, unless the provinces moved expeditiously to reform the law of marital property, there would be increasing pressure on Parliament to implement these recommendations.[81]

C. *The Division of Property as an Incident of Divorce*

It may be wondered why there should be any question about the authority of Parliament to deal with property as an incident of divorce. When the High Court of Australia faced the question in *Lansell v.*

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[77] *But see* Nash v. Nash, [1975] 2 S.C.R. 507, 16 R.F.L. 295, 2 N.R. 271 (1974), which held that the Divorce Act does not permit an order to pay periodic maintenance and provide security unless the order also directs that the maintenance be paid out of the lump sum.

[78] *See* Spooner v. Spooner, 89 D.L.R. (3d) 685, at 690-91 (Sask. C.A. 1978); K. v. K., *supra* note 71, at 717, 20 R.F.L. at 31, 53 D.L.R. (3d) at 298; Krause v. Krause, [1976] 2 W.W.R. 622, at 631, 23 R.F.L. 219, at 227, 64 D.L.R. (3d) 352, at 360 (Alta. C.A. 1975); Osbourne v. Osbourne, 14 R.F.L. 61, at 66 (Sask. Q.B. 1974).

[79] LAW REFORM COMMISSION OF CANADA, REPORT ON FAMILY LAW para. 3.10 (1976).

[80] *Id.* at 41-42.

[81] H.C. DEB. 30th Parl., 2nd Session, at 420 (Oct. 25, 1976). Schemes for deferred sharing are now in force in Manitoba, Ontario, Prince Edward Island, Quebec, Alberta and British Columbia. However, several of these schemes are not as broad in scope as that proposed by the Law Reform Commission. The law of marital property in Saskatchewan and the Northwest Territories has been reformed by allowing judicial discretion to make orders for the transfer of assets.

Lansell,[82] it had no doubts about Commonwealth competence to enact a scheme for judicial discretion to make orders with respect to the division of property. The reservations which have been expressed regarding the use of Australian constitutional precedents do not apply in this context, where the recognition of a matter as falling within ancillary federal power would not exclude it from provincial jurisdiction. Moreover, academic writers have tended towards the view that the matter is within the competence of the Parliament of Canada. Jordan takes the view that "the disposition of marital property can be considered just as essential an incident of divorce as the other corollary matters and thus legitimately within the purview of Parliament".[83] Hogg similarly contends that the connection between the dissolution of marriage and the disposition of property is no less than that involved in other forms of corollary relief.[84]

The argument presented here is that Parliament can deal with property as a form of support in the same way that it can deal with maintenance, that is, as a means of meeting needs for support which are related to a change of marital status. Nevertheless, since doubts about federal competence have influenced the development of divorce legislation in Canada, the grounds for these doubts should be examined. Unfortunately, they have rarely been spelled out in any detail, but they may concern historical differences between the positions of maintenance and property rights in relation to divorce and to marriage.

Orders for the division of property have not historically occupied the same position as orders for maintenance in relation to corollary relief upon divorce. At the time of Confederation, for example, the practice in the common law world was to meet the needs of a spouse by arming the divorce court with power to order maintenance but not to dispose of property, unless the property was that to which a spouse was otherwise entitled.[85] When federal competence regarding maintenance and custody was upheld in *Zacks v. Zacks*,[86] Martland J. made reference to a court's power to make such orders under the English Matrimonial Causes Act, 1857.[87] He thought that it was "proper to have regard to this in deciding the intended scope of the power to legislate on divorce given by the British North America Act to the Parliament of Canada".[88] Clearly, consideration of the legal position in 1867 would not assist a claim for federal competence in relation to the division of marital property as a general source of support, and it might be contended that this test would be conclusive against such a claim.

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[82] 110 C.L.R. 353, 38 A.L.J.R. 99 (1964). At issue was the validity of s. 86(1) of the Commonwealth's Matrimonial Causes Act, 1959 (Cth.).

[83] *Supra* note 3, at 261.

[84] *Supra* note 25, at 375.

[85] *See* Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85, ss. 32, 45 (U.K.).

[86] *Supra* note 5.

[87] *Supra* note 85.

[88] *Supra* note 5, at 902, 10 R.F.L. at 62, 35 D.L.R. (3d) at 428.

This argument was raised with respect to Australia in *Lansell v. Lansell*, but was rejected.[89] The unanimous conclusion of the High Court was that, although it was proper to refer to circumstances at the time the Commonwealth was established in order to ascertain the minimum content of a head of power, these circumstances could not fix its outer limits. This would also be the likely response if the argument was attempted before Canadian courts. Similar arguments in relation to other heads of power in section 91 of the B.N.A. Act have generally been unsuccessful:[90] for example, in relation to criminal law,[91] bankruptcy,[92] and banking.[93]

In the *Alberta Bill of Rights* case, Viscount Simon was scathing in his criticism of the contention that the meaning of the heads of power was determined by the practice at confederation.

> To take what may seem a frivolous analogy, if "skating" was one of the matters to which the exclusive legislative authority of the Parliament of Canada extended, it would be nothing to the point to prove that only one style of skating was practised in Canada in 1867 and to argue that the exclusive power to legislate in respect of subsequently developed styles of skating was not expressly conferred on the central legislature.[94]

The same position should apply in the context of ancillary powers. Any other conclusion would make nonsense of the principle that "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits".[95]

A more substantial argument against federal competence in relation to matters of marital property might attempt to draw upon the historically different positions of maintenance and property rights in the marital relationship. At common law, a husband was obligated to provide his wife and children with the necessaries of life.[96] The doctrine of unity of legal

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[89] *Supra* note 82.

[90] It has sometimes been asserted that an exception may be found in the opinion of the Privy Council in Attorney-General of Canada v. Attorney-General of Ontario (*Labour Convention* case), [1937] A.C. 326, [1937] 1 W.W.R. 333, [1937] 1 D.L.R. 702. *See* P. HOGG, *supra* note 25, at 96-97; LASKIN'S CONSTITUTIONAL LAW 64 (4th ed. rev. A. Abel 1975). At issue in that case was whether the power conferred on Parliament by s. 132 of the B.N.A. Act to implement domestically all international obligations incurred under Imperial treaties could extend to Canadian treaties. The negative answer which was given by the Privy Council should stand as a denial that the words of the B.N.A. Act can be judicially amended in the light of circumstances changed since Confederation. It should not be taken to imply that the proper interpretation of those words is fixed forever by the circumstances of 1867.

[91] Proprietary Articles Trade Ass'n v. Attorney-General of Canada, [1931] A.C. 310, at 324, [1931] 1 W.W.R. 552, at 560, [1931] 2 D.L.R. 1, at 9 (P.C.).

[92] Attorney-General of British Columbia v. Attorney-General of Canada (Reference *re* Farmer Creditors Arrangement Act, 1934), [1937] A.C. 391, at 402-03, [1937] 1 W.W.R. 320, at 326, [1937] 1 D.L.R. 695, at 700-01 (P.C.).

[93] Attorney-General of Alberta v. Attorney-General of Canada (Reference *re* Alberta Bill of Rights), [1947] A.C. 503, [1947] 2 W.W.R. 401, [1947] 4 D.L.R. 1 (P.C.).

[94] *Id.* at 516-17, [1947] 2 W.W.R. at 410, [1947] 4 D.L.R. at 9.

[95] Edwards v. Attorney-General of Canada, [1930] A.C. 124, at 136, [1929] 3 W.W.R. 479, at 489, [1930] 1 D.L.R. 98, at 106-07 (P.C.).

[96] P. BROMLEY, FAMILY LAW 496, 582 (5th ed. 1976).

personality prevented the wife from enforcing these obligations directly, in the sense of obtaining an order against the husband, apart from proceedings for some matrimonial decree. The existence of the obligation, however, was the root of the recognition of a wife's agency of necessity, so that she could pledge her husband's credit for the purchase of necessaries for herself and the children. Although a wife's enforceable right to direct financial maintenance in the absence of matrimonial proceedings is a creature of statute, such a right has long been conferred throughout the common law world by legislation relating to deserted wives and children. Thus, it is possible to argue that rights and obligations of financial support have been generally recognized as fundamental elements relating to the legal consequences of marriage, and that the present maintenance provisions of the Divorce Act merely seek to continue these rights and obligations in the context of dissolution.

Prior to the emergence of separate property regimes in the late nineteenth century, the transfer of property rights from the wife to the husband had a long history in the common law.[97] The theory was that the husband's acquisition of the wife's rights balanced his obligation to support her. However, a re-arrangement of property rights to favour the economically dependent or weaker spouse has not historically been related to the legal consequences of marriage. Although there has been a recent legislative trend in this direction, it has taken a variety of forms in different jurisdictions. It could be contended that federal provision for a division of property on divorce might introduce a new element into the relationship of the parties which was not present during the marriage itself.

It seems that the nature of the connection between marriage and property has, more than anything else, given rise to doubts about federal competence to legislate in relation to the division of property on divorce. For example, Bushnell has argued:

> It is the marriage relationship which creates family obligations, and the divorce must recognize existing obligations, and, at most, enforce them by court order. If, at the time of the divorce, new obligations were imposed, then the legislation which did so would be *ultra vires* the Dominion Parliament.[98]

As Deputy Minister of Justice, E. A. Dreidger also expressed the opinion that rights and obligations in relation to property are outside the basic elements of the marital relationship over which Parliament has competence.

> These matters do involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage.[99]

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[97] *Id.* at 429-36.

[98] Bushnell, *Family Law and the Constitution*, 1 CAN. J. FAM. L. 202, at 226 (1978).

[99] *Supra* note 68.

Similar considerations may also be reflected in the reservations expressed by two judges in the Australian *Marriage Act* case[100] as to whether marital property could fall within even a broad interpretation of legislative authority over marriage. Kitto J. said: "Whether a law operating by reference to the married status, a Married Women's Propery Act for example, is also a law upon marriage is a question of a different kind, and I say nothing about it."[101] Windeyer J. thought that the variety of rules about marital property "indicates that none of them is, as personal relationships and family obligations are, of the essence of the estate of matrimony". He also considered that marital property rights are "extrinsic" consequences affixed to the status of marriage.[102]

It is worth noting that the reservations held by these two Australian judges prevented neither of them from upholding the validity of the Commonwealth scheme for judicial discretion to make orders respecting the division of property upon divorce, when the High Court faced the issue in the *Lansell* case.[103] Although the argument which has been considered above provides some ground for distinguishing maintenance from property in relation to divorce proceedings, Bushnell may be impetuous when he claims that it resolves the issue. It remains to be seen whether the Canadian courts would consider the distinction sufficiently great to break the consitutional connection with matters ancillary to divorce. In this context, it should be noted that the present sections 10 and 11 of the Divorce Act already extend the traditional rights and obligations of marriage in making an order for maintenance available in favour of either spouse, and that these sections have been upheld.

If the courts did entertain serious doubts as to the validity of the analogy between maintenance and property, they might find comfort in the general legislative trend in recent years towards some re-distribution of property rights to favour the economically dependent or weaker spouse. It would not be surprising, in the final analysis, if the courts were to conclude that there is really little difference between an order to provide support through the conveyance of an interest in the matrimonial home and an equivalent lump sum payment. Indeed, an order with respect to property could be the most effective way of ensuring that family members continue to receive support following a divorce. Its exclusion from federal competence would rest upon a distinction which, in this context, is tenuous and should be rejected. The better view, therefore, is that it would be *intra vires* the Parliament of Canada to legislate in relation to the division of marital property as an incident of divorce.

However, it is not every scheme for the division of marital property which would fall within the scope of ancillary divorce power. Presumably there would be no difficulty about a provision equivalent to that respecting

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[100] *Supra* note 26.
[101] *Id.* at 554.
[102] *Id.* at 581.
[103] *Supra* note 82.

maintenance in the present section 11(1) of the Divorce Act. That section vests a discretion in the court to make an order "if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them". It is thus oriented towards the circumstances surrounding the divorce. On the other hand, it is likely that a federal regime of community property, to take effect during the subsistence of the marriage, would be *ultra vires*. It would involve legislation in relation to the consequences of marriage, not to the incidents of divorce. Such legislation could only be upheld on the broad interpretation of the marriage power which was earlier rejected.[104]

The major problem arises with the "deferred sharing" regime, in which there is separate property during the marriage but a division upon divorce according to relatively fixed, pre-determined criteria. This type of scheme was recommended for federal implementation, by the Law Reform Commission of Canada, on the basis of an equal division of assets acquired during marriage.[105] This too could well exceed the scope of federal authority.

It has been argued that Parliament, under its ancillary divorce power, can confer rights to support to meet needs which arise from a dissolution of marriage and can legislate in relation to the division of property for this purpose. The rationale for federal competence with respect to support as an "incident" of divorce is that its provision is designed to contribute to the efficiency and justice of a scheme for the dissolution of marriage. However, rights under a "deferred sharing" scheme would not necessarily depend on the existence of needs which are related to a divorce. Nor would the amount of an award be determined primarily by the condition and prospects of the parties in relation to such needs. The time of divorce would simply be used as a point at which to give effect to rights which arise from the marital status. This would seem to concern the consequences of marriage and divorce rather than the "incidents" of divorce in the constitutional sense.

D. *The Lump Sum Award*

It has been suggested that the introduction of a scheme for the "deferred sharing" of marital property would be beyond federal competence. If this is correct, it also provides a constitutional justification for the refusal of the courts to fix the amount of a lump sum award under the present section 11(1) of the Divorce Act on the basis of a simple division of the value of certain assets of the parties. MacKeigan C.J. stated: "Awards of lump sums for maintenance seem usually to be used as devices to ensure equitable division of matrimonial assets acquired during the marriage."[106] In a subsequent case, however, the Chief Justice

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[104] *See* pp. 547-48 *supra*.

[105] *See* notes 79, 80 *supra*.

[106] Connelly v. Connelly, 9 N.S.R. (2d) 48, at 56, 47 D.L.R. (3d) 535, at 540 (C.A. 1974).

expressed the view that an order would be invalid "if it were not issued *bona fide* to provide maintenance and were rather an attempt by the judge to redistribute the matrimonial assets in accordance with his ideas of equity".[107]

The conclusion that section 11(1) should not be used for this purpose could be reached simply through interpretation of the Divorce Act. However, constitutional considerations may provide an additional reason for the invalidity of this kind of award and have been noted in some cases. For example, in *Krause v. Krause*, Moir J.A. said:

> In my opinion Parliament has a jurisdiction to authorize a maintenance order as an incident to a decree of divorce. Parliament may not have the power to redistribute capital assets acquired during the marriage. It is only when a lump sum is a proper way to provide maintenance or when a lump sum is necessary to put a person in a particular position that a lump sum award should be made .... Maintenance has always had a particular meaning in the law .... It does not mean a sharing of capital assets. It is doubtful that Parliament could legislate such a division.[108]

Moir J.A. seems to be expressing here the same view with respect to capital as that which has already been argued with respect to property. Parliament has competence to authorize an order for support to be made, as an incident of divorce, in order to deal with the needs of family members which arise from the marriage and divorce. An order which is made regardless of needs cannot properly be regarded as "incidental" to a divorce.

E. *Conclusions*

In the preceding part, it was concluded that the primary federal power over "marriage and divorce" is a power to legislate in relation to the creation and dissolution of the status of marriage and that the legal consequences of marriage and divorce are excluded. Thus, federal competence in relation to support after divorce rests upon an ancillary jurisdiction to make provision for needs which arise from the marriage and its dissolution.

It has been argued that Parliament, in making provision for such needs, is not excluded from legislating in relation to marital property. The doubts which have often been expressed about federal competence in this respect seem to rest upon the historical differences between the positions of maintenance and property rights in the marital relationship. These differences are narrowing, and in any event, the distinction between

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[107] Johnson v. Johnson, 10 N.S.R. (2d) 624, at 625, 20 R.F.L. 12, at 13 (C.A. 1974).

[108] *Supra* note 78, at 630, 23 R.F.L. at 227, 64 D.L.R. (3d) at 360. This statement was approved by Farris C.J. in Carmichael v. Carmichael, 27 R.F.L. 325, at 330, 69 D.L.R. (3d) 297, at 302 (B.C.C.A. 1976). *See also* Osbourne v. Osbourne, *supra* note 78, at 66.

maintenance and property is tenuous and unacceptable when applied to the provision of support as in incident of divorce.

The ancillary divorce power, however, cannot be used to rewrite the marriage contract by conferring rights and imposing obligations at the time of the dissolution of marriage, regardless of needs, merely because a change of status has occurred. It is therefore doubtful whether federal competence in relation to the division of marital property as a form of support extends beyond provision for orders to be made if it is appropriate in the light of circumstances of need. The same reasoning should govern the criteria upon which a lump sum award is made under the present maintenance provisions of the Divorce Act.

IV. The Temporal Dimension

A. *Introduction*

The determination of the scope of the ancillary divorce power of Parliament has important implications for the commencement, variation and duration of permanent maintenance orders under the Divorce Act. An order for material support under the Act must operate with respect to needs which are substantially connected to a change of marital status in order to be constitutionally valid.

Under section 11(1) of the Divorce Act, a court has the power to make an order for corollary relief "upon granting a decree nisi". Under section 11(2), an order may be varied "from time to time" or rescinded, by the court which made it, if circumstances have changed. Thus, once a court issues a decree, it has the jurisdiction to make a maintenance order and, having done so, it has an indefinite jurisdiction thereafter to amend its order.

It is the original jurisdiction which has caused the most difficulty in the cases. Questions have sometimes arisen concerning jurisdiction to make an order after the decree *nisi* has been issued. This involves interpretation of the Divorce Act itself, but interpretation must take into account the limitations on the competence of Parliament to deal with support after divorce. The position which will be taken here is that there is no constitutional barrier to a court exercising original jurisdiction to make an order subsequent to the decree *nisi*, so long as it is still dealing with needs which can be regarded as arising from the marriage and divorce.

The subsequent indefinite jurisdiction to vary an order has caused much less difficulty in the cases, but some comments will be made about it after original jurisdiction is discussed. At this stage, however, it should be noted that the argument that Parliament is restricted to dealing with needs which arise from the marriage and divorce relates to the conditions under which jurisdiction can be assumed under a federal statute. Once jurisdiction has been validly assumed, other considerations may be relevant in determining its ultimate limits. The power to increase an award

because additional needs have arisen may therefore be regarded consitutionally as an incident of the power to make the original award.

However, the foundation of federal competence remains federal responsibility to ensure that needs which can be regarded as originating in a marriage and divorce are met. Such needs may eventually cease to have a sufficiently substantial connection to these events to sustain federal competence. This may mean that, where a person can become economically independent, Parliament can only provide for support to be received during a period of adjustment.

B. *Original Jurisdiction*

Although provision for an order for corollary relief "upon granting a decree nisi" has been held to be *intra vires* the Parliament of Canada,[109] there is a question as to the meaning of these words to which constitutional arguments are relevant. Do they mean simultaneously with the granting of the decree *nisi*? Alternatively, is there some subsequent jurisdiction? And if there is subsequent jurisdiction, how far does it extend? These questions do not merely involve problems of statutory interpretation. The connection with the divorce proceedings becomes more tenuous as there is movement away from the granting of a decree *nisi*. The argument, therefore, becomes stronger that the court is not dealing with matters arising from the divorce but is rather assuming jurisdiction over the relationship of persons merely on the basis that they have been divorced in the past. Once jurisdiction is defined in this way, it must be doubtful whether it falls within the competence of Parliament to deal with matters which are incidental to the dissolution of the marriage. Section 91(26) of the B.N.A. Act gives Parliament authority to deal with *marriage* and not with the general legal relationship of married persons, similarly it gives Parliament authority to deal with *divorce* and not, except as an incident, with the legal relationship of divorced persons.[110]

These constitutional considerations are relevant to interpreting the Divorce Act using the principle of "reading down". As stated by Cartwright J.:

> [I]f an enactment . . . is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted.[111]

If it is thought that a broad interpretation of the words "upon granting a decree nisi" could authorize a court to make an original award at any time

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[109] Zacks v. Zacks, *supra* note 5.

[110] *See* pp. 542-54 *supra*.

[111] McKay v. The Queen, [1965] S.C.R. 798, at 803-04, 53 D.L.R. (2d) 532, at 537-38.

after the issue of the decree, even in relation to circumstances which arose after the divorce, and if it is thought that such an authorization would be *ultra vires,* then the section should be "read down" so as to keep it within the legislative competence of Parliament.

Uncertainty about whether a court has jurisdiction to make an original award subsequent to the decree *nisi* has led to the common device of the "in case" award. This involves the court making an award of nominal maintenance, usually $1 per annum, in order to preserve jurisdiction to make a more substantial award later through the procedure for variation. The question of the validity of a nominal award, and also the question of the significance of a refusal to grant maintenance at the time of the decree *nisi,* will be examined after a discussion of the situation where the decree *nisi* simply did not include a maintenance order. It is this last situation which has attracted the fullest, although still inconclusive commentary in the appellate courts.

A situation in which the decree *nisi* did not include a maintenance order first came before the Supreme Court of Canada in *Zacks v. Zacks.*[112] Martland J. rejected the contention that an order relating to corollary matters would have to be made simultaneously with the granting of the decree *nisi.*

> It is my opinion that when it was provided that the court could deal with those matters "upon granting a decree nisi of divorce" it was meant that it was only when a divorce was granted that the court acquired the necessary jurisdiction to deal with those subjects. The words did not mean that those subjects could only be dealt with at exactly the same time that the decree *nisi* for divorce was granted.[113]

Martland J. did not indicate that he saw any constitutional difficulty in this respect. Nevertheless, his words should not be taken as a blanket approval for jurisdiction to make an order at any time subsequent to the divorce. The *Zacks* case involved the validity of an order which, although not made at the time of the decree *nisi,* was very closely connected to it. On granting the decree, the trial judge declared that the wife and children were entitled to receive maintenance from the husband, and referred the question of *quantum* to the registrar for his recommendation. The matter had not been completed by the time the decree absolute was obtained. The registrar then made a recommendation, and the immediate issue in the case was the jurisdiction of the court to make an order on this basis. Answering in the affirmative, Martland J. declined to endorse the argument of counsel for the Attorney-General of Canada that an order for corollary relief could be made at any time after the decree *nisi.*[114] He stressed that situations where no application had been made at the time of divorce, or where an application had been refused, were not at issue and that he expressed no opinion thereon. In two subsequent cases, the Supreme Court of Canada

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[112] *Supra* note 5.

[113] *Id.* at 912, 10 R.F.L. at 69, 35 D.L.R. (3d) at 435.

[114] *Id.* at 914, 10 R.F.L. at 70-71, 35 D.L.R. (3d) at 436.

has upheld the extension of jurisdiction beyond the narrow circumstances of the *Zacks* case. However, it has continued to stress a close connection to divorce proceedings and to avoid endorsing the proposition that there is an indefinite jurisdiction to make an original award.

In *Lapointe v. Klint,*[115] the wife had petitioned for maintenance, but she was abroad at the time of dissolution proceedings. In her absence, counsel asked that the issue of maintenance be reserved. Both the decrees *nisi* and absolute contained provisions to this effect. She applied for maintenance soon after the decree absolute, and the Supreme Court held that in these circumstances there was jurisdiction to make an award. The judgment of the Court was again delivered by Martland J., who seemed to view the facts as essentially the same as those in the *Zacks* case. After noting that the matter of maintenance had been raised at the time of divorce, he concluded:

> In my opinion the issue as to the granting of maintenance, although incidental to and dependent upon the granting of a decree of divorce, may be dealt with by the Court separately from the issue as to the granting of such decree. If the Court decides that a party to the divorce proceedings is entitled to maintenance, or is entitled to have that issue determined, . . . dissolution does not prevent it from dealing with the corollary relief aspect thereafter. . . . The Court having derived jurisdiction to deal with that matter when the decree *nisi* is granted, in the absence of some express provision in the Act to the contrary, is not deprived of the power to deal with the issue which has come before it because the decree is made absolute, if that issue is still undetermined.[116]

In *Vadeboncoeur v. Landry,*[117] jurisdiction to make an award was upheld even when no application had been made at the time of dissolution and the decrees *nisi* and absolute were both silent on the subject. However, the wife had been awarded interim maintenance, and the trial judge found that the lack of an appropriate permanent order was due to oversight or misunderstanding in the dissolution proceedings. In deciding that there was jurisdiction in these special circumstances, Beetz J. declined to express an opinion on the possibility of indefinite original jurisdiction. He emphasized that the petition was based on needs existing at the time of divorce and was prepared promptly thereafter to correct the mistake.

> In the case at bar, the petition is not based on needs arising after the dissolution of the marriage bond, nor was the wife's petition considered and denied for lack of merit when the decree *nisi* was granted, nor, finally, was the matter of her needs and support not raised during the proceedings; it was in fact raised and determined in favour of the respondent, on an interim basis, before the decree *nisi*. The petition for alimony is based on needs that existed at the time of the dissolution of marriage. . . . Respondent's right to alimony would normally have been dealt with when the decree *nisi* was granted, and it was only by an oversight that this did not happen and the issue remained unsettled. Respondent submitted her petition two months after the decree absolute was granted — in my opinion, a reasonable lapse of time — after she learned of a

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[115] [1975] 2 S.C.R. 539, 2 N.R. 545, 47 D.L.R. (3d) 474 (1974).
[116] *Id.* at 545, 2 N.R. at 550, 47 D.L.R. (3d) at 477-78.
[117] [1977] 2 S.C.R. 179, 23 R.F.L. 360, 68 D.L.R. (3d) 165 (1976).

> fortuitous omission in the proceedings taken to dissolve her marriage. The purpose of her petition was to remedy this omission.[118]

Beetz J. indicated that his reasoning was only intended to be sufficient for the case at hand, and it cannot be assumed that any of the circumstances to which he referred constitute necessary conditions for the making of an order subsequent to the divorce; he did not consider the issues within a constitutional framework. Nevertheless, it may be significant that he stressed the circumstance that the petition was based upon needs existing at the time of divorce. If this were taken to be, at least ordinarily, a necessary condition for the court to assume jurisdiction, it would be in line with the constitutional argument which has been presented.

In several decisions of appellate courts in the western provinces, jurisdiction to make a maintenance award has been upheld in circumstances where the matter was never raised in any way during the divorce proceedings. The only one of these decisions which appears consistent with the present reasoning is *Fiedler v. Fiedler*.[119] Sinclair J.A. of the Alberta Appellate Division took the view that it was a logical extension of the reasoning in the *Zacks* and *Lapointe* cases to assume jurisdiction to hear an application for maintenance "within a reasonable time after the granting of the decree absolute, having regard to all the circumstances of the case".[120] He did not detail the circumstances which made it appropriate to assume jurisdiction in that case. In a subsequent decision,[121] however, he noted that the trial judge in the *Fiedler* case had found that the wife, who was not present in the divorce proceedings, had not understood her legal position until after the hearing.[122] In any event, it may be felt that it is implicit in the reference to reasonable time that the court will ordinarily still be dealing with circumstances which were present at the time of divorce.

There are some similarities between the *Fiedler* case and the case of *Re Kravetsky and Kravetsky*.[123] In that decision, Matas J.A. did not regard the time lag of nearly two and a half years between the dates of the decree and of the application for maintenance as "unreasonable".[124] However, there was evidence that the wife had agreed at the time of divorce that she did not require maintenance.[125] Matas J.A. indicated that he was making an order in consideration of the factors mentioned in section 11(2) of the Divorce Act. That section authorizes variation of an award on the basis of changed circumstances. Hence, jurisdiction was apparently assumed on a

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[118] *Id.* at 187, 23 R.F.L. at 366, 68 D.L.R. (3d) at 171.

[119] [1975] 3 W.W.R. 681, 20 R.F.L. 84, 55 D.L.R. (3d) 397 (Alta. C.A.).

[120] *Id.* at 707-08, 20 R.F.L. at 110, 55 D.L.R. (3d) at 422.

[121] Goldstein v. Goldstein, [1976] 4 W.W.R. 646, 23 R.F.L. 206, 67 D.L.R. (3d) 624 (Alta. C.A.).

[122] Fiedler v. Fiedler, [1974] 6 W.W.R. 320, 16 R.F.L. 67, 48 D.L.R. (3d) 714 (Alta. S.C.).

[123] [1976] 2 W.W.R. 470, 21 R.F.L. 211, 63 D.L.R. (3d) 733 (Man. C.A.).

[124] *Id.* at 478, 21 R.F.L. at 219, 63 D.L.R. (3d) at 741.

[125] *Id.* at 471, 21 R.F.L. at 212, 63 D.L.R. (3d) at 735.

basis which, on the argument which has been presented here, would be *ultra vires* Parliament.

The broadest original jurisdiction has been claimed in another decision of the Alberta Appellate Division, *Goldstein v. Goldstein*.[126] The wife applied for maintenance for herself and the children more than two years after the decree absolute and more than three years after the decree *nisi*. She admitted that she had not requested maintenance at the time of the divorce because she had no need of it, being in business, and that she was now making application because of changed circumstances.[127] A majority of the Appellate Division, Sinclair J.A. dissenting, held that there was no limitation on the time within which an order might be sought. McGillivray C.J. said:

> [O]nce the phrase: ". . .upon the granting of a decree of divorce" comes to be interpreted as it has been by the Supreme Court, as being incidental to, and dependent upon, the granting of a decree, but [having] no relation to time, then it seems unnecessary to speak of an application being made within a reasonable time, whatever that phrase could mean in the context of the myriad situations which might arise in the affairs of a former husband and wife.
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> . . . .
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> In my view, once a divorce is granted, the Court is thereafter in a position, as an incident of that divorce, to regulate as a matrimonial matter, the affairs of husband and wife and children, and we should so hold.[128]

This decision has been subsequently approved in an *obiter dictum* of Seaton J.A. in *Hughes v. Hughes*[129] and followed in some decisions at the first instance.[130]

While the reasoning of McGillivray C.J. may be attractive as a simple matter of statutory interpretation, it misses the constitutional issue. If section 11(1) of the Divorce Act is to be given a more restrictive interpretation, this may not be because of the actual words used in that section. It may be because of inherent limitations on the legislative competence of Parliament to deal with support after divorce, and the requirement that a statute be interpreted, where possible so as to keep it within the powers of the enacting body. As the Chief Justice indicated, his position involves the proposition that, once a divorce is granted, the court

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[126] *Supra* note 121. For a discussion of the case, *see* Ziff, Note, 9 OTTAWA L. REV 406 (1977).

[127] *Supra* note 121, at 648, 23 R.F.L. at 208, 67 D.L.R. (3d) at 625.

[128] *Id.* at 651-53, 23 R.F.L. at 211-13, 67 D.L.R. (3d) at 628-30.

[129] 1 B.C.L.R. 234, at 236, [1977] 1 W.W.R. 579, at 581, 72 D.L.R. (3d) 577, at 578-79 (C.A. 1976). *See also* Paradis v. Blanchard (unreported, Que. C.A., Apr 3, 1978, no. 09-000807-776) which upheld jurisdiction to make an award nine years after the decree *nisi*, on the basis of circumstances of need which had arisen subsequently.

[130] *See* Gavrilovich v. Gavrilovich, [1978] 3 W.W.R. 15, 84 D.L.R. (3d) 553 (B.C.S.C.), Brouillard v. Brouillard, 19 O.R. (2d) 464, 85 D.L.R. (3d) 314 (H C. 1978) *But see* Lipman v. Lipman, 19 O.R. (2d) 486, 3 R.F.L. (2d) 49, 85 D.L.R. (3d) 558 (H.C. 1978), where *Fiedler* and *Kravetsky* were treated as the operative authorities, but their reasoning was adapted to the proposition that there is jurisdiction to make a subsequent original award where there was evidence of an "intention" to claim maintenance at the time of the divorce.

has a general power to regulate, as an incident of the divorce, the affairs of the parties and their children. This is, however, an untenable application of the doctrine of ancillary powers. Parliament cannot confer jurisdiction to deal generally with the relationship of divorced spouses under its ancillary powers, any more than it could deal generally with their relationship when they were married. Where an original maintenance award is made because of circumstances which have arisen since the divorce, the court is not dealing with the incidents of their change of marital status.

McGillivray C.J. gave two additional reasons for his conclusion. First, since provincial legislation is inoperative after divorce, "it cannot be thought that it was intended by Parliament that a spouse and children would be without recourse if no application were made for maintenance when a decree nisi was granted".[131] Secondly, it would bring the law into disrepute if Mrs. Goldstein were denied a remedy when someone who had obtained a nominal award at the time of divorce could later have applied for it to be increased.[132] The second of these points will be dealt with later in this part, but his statements of the law in both respects may be questioned.[133]

The dissenting opinion in the *Goldstein* case is more compatible with the argument which has been presented, although it complicates the issue by distinguishing between the claims of a spouse and of a child. Sinclair J.A. held that the wife's application would have to be made within reasonable time. However, he felt that the claims of the children stood on a different footing.

> It is axiomatic that a child is under a disability, and, accordingly I do not believe that in divorce proceedings, whether by failure to make a claim, or by waiver, a parent can forfeit the right of a child to maintenance under the Divorce Act should such become necessary for his or her welfare at any stage. . . . I believe such an application may be made on behalf of a child of a marriage at any time it is in the best interest to do so.[134]

There may be more scope under the Divorce Act to deal with the needs of a child than those of a spouse, but this can be explained in terms of practical considerations. It is unnecessary to resort to arguments of public policy. When a maintenance order for a child is first sought some time after a divorce, there will rarely be any question about whether the condition of dependency was present when the marriage was dissolved. A child ordinarily has a continuing need throughout its infancy for material support from its parents. However, a maintenance order may not be sought

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[131] *Supra* note 121, at 651, 23 R.F.L. at 211, 67 D.L.R. (3d) at 628.

[132] *Id.*

[133] On the position with respect to a nominal award, *see* pp. 572-53 *infra*. On the effectiveness of provincial legislation in the circumstances following a divorce, *see* Hughes v. Hughes, *supra* note 129, and Toole v. Toole, 14 N.S.R. (2d) 537, 27 R.F.L. 63 (C.A. 1976). In any event, provincial legislation could only be superseded within the limited sphere of federal competence.

[134] *Supra* note 121, at 658, 23 R.F.L. at 218, 67 D.L.R. (3d) at 635.

or made at the time of divorce because the parent who obtains custody is able to support the child without assistance. If assistance is later required and an order is obtained under the Divorce Act, it will be because of the parent's new circumstances rather than those of the child.[135]

In these decisions at the provincial appellate level, hardly any consideration was given to constitutional issues. If such consideration had been given, perhaps the results would have been different. Bushnell has doubted the constitutional correctness of the decision in the *Goldstein* case.[136] He contends that it gives effect to a right to maintenance arising out of the marriage relationship rather than out of the divorce. However, he reaches this conclusion against the background of a general analysis of the scope of federal legislative power which is unduly restrictive. He takes as the proper test for the exercise of ancillary power the statement of Rand J. that the challenged part should be "reasonably required" for the purposes of the principal legislation.[137] He also doubts that the execution of divorce policy reasonably requires any provision with respect to corollary matters.[138] At most, Bushnell will only admit to provision for the making of orders at the time of divorce,[139] for the purpose of "allowing the procedural convenience of joining an application for an order with the divorce petition and the enforcement of the order across the country".[140]

Bushnell's concern with the divorce proceedings rather than with the related circumstances is inconsistent with the reasoning of the Supreme Court of Canada in the *Zacks*, *Lapointe* and *Vadeboncoeur* cases. In addition, the test of what is "reasonably required" for the purposes of the principal legislation necessitates further consideration of the particular policy which Parliament is found to be executing. As the above argument suggests, this test allows the extension of federal competence over support but restricts that competence to the needs which arise from marriage and divorce, in relation to original jurisdiction to make an order. These needs ordinarily exist at the time of divorce. The rationale for this ancillary jurisdiction rests upon the recognition that Parliament, as the creator of divorce, has a responsibility to see that divorce does not involve a loss of support that was available during the marriage. It should therefore have the power to make provision for support as part of a scheme for the dissolution of marriage which was presumably intended to be fair to all concerned and to cause no more disruption than necessary.

It has been said that the competence of Parliament, in relation to original jurisdiction, is restricted to needs which "ordinarily" exist at the time of divorce. This is because it may be legitimate to extend this

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[135] This would not be the case with an adult child, who after the divorce of his parents, becomes unable to provide himself with the necessaries of life. It is doubtful whether Parliament has the competence to legislate in relation to this situation.

[136] *Supra* note 98, at 224.

[137] *Supra* note 56. *But see* accompanying text.

[138] *Supra* note 98, at 215.

[139] *Id.*

[140] *Id.* at 225.

competence to future needs which are reasonably foreseeable at the time of divorce. This argument has important implications in relation to subsequent jurisdiction after an application has been refused at the time of divorce, and in relation to the validity of nominal awards.

In the cases of *Zacks*, *Lapointe* and *Vadeboncoeur*, the Supreme Court of Canada was careful to note that the situation where maintenance had been refused at the time of the decree *nisi* was not at issue. Moreover, in *Re Kravetsky and Kravetsky*,[141] Matas J.A. distinguished an earlier decision[142] which held that there was no subsequent jurisdiction, on the ground that in that case no order had been made at the time of divorce after a hearing on the merits. MacDougall feels that there is authority "for the narrow proposition that the issue of maintenance cannot be revived where the judge who granted the decree *nisi* expressly refused to make a maintenance order".[143] Whatever the merits of this view with respect to simple statutory interpretation, from a constitutional standpoint conferring a general jurisdiction to make a subsequent award would exceed federal competence. Rights and obligations in relation to the circumstances of the divorce would normally have been determined in the refusal to make an award at the time of the decree and the subsequent application would be made with reference to new circumstances.

It may be, however, that an order is refused, despite the determination of a right to support, because the person who would be obligated to provide it is unable to do so. If a subsequent application is made because his circumstances have changed, the order will still be made with reference to needs related to the divorce. In such a case there should be no constitutional barrier to a court exercising jurisdiction under the Divorce Act.

In addition, an order may be refused at the time of the decree *nisi* because need for support has not been established, even though this lack of need is essentially transitory. For example, although there is an underlying condition of material dependency, the economically weaker spouse could be temporarily employed. Where employment would not be expected to continue, Parliament should be competent to reopen the matter when the reasonably foreseeable change of circumstances materializes. Parliament would be legislating, not in relation to new circumstances which have arisen since the divorce, but in relation to a continuing state of affairs which originated in the marriage and divorce.

Similar considerations will apply where nominal maintenance is awarded or where the question of maintenance is reserved. Essentially, both procedures permit the court to keep the question of maintenance under review and to make an award subsequent to the the decree *nisi*.

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[141] *Supra* note 123, at 473, 21 R.F.L. at 219, 63 D.L.R. (3d) at 741.

[142] Daudrich v. Daudrich, [1972] 2 W.W.R. 157, 5 R.F.L. 237, 22 D.L.R. (3d) 611 (Man. C.A. 1971).

[143] MacDougall, *Alimony and Maintenance*, in STUDIES IN CANADIAN FAMILY LAW: SUPPLEMENT 1977, at 111 (D. Mendes de Costa ed. 1977).

In order to be constitutionally valid, a nominal award or a reservation should only be used where there are special reasons for keeping the issue of maintenance open. These may involve the incapacity of a spouse to fulfill obligations of support which have been established in relation to the divorce. They may also involve a reasonable prospect that a realistic maintenance order will be an appropriate way of dealing, at some time in the future, with a state of affairs which is present at the time of divorce but which ought not to be dealt with then. On the other hand, a nominal award or a reservation which is made for no other reason than to keep the question of maintenance open would be *ultra vires* federal jurisdiction.

Similar statements about the propriety of nominal awards have been made in several cases. For example, in *Lee v. Lee*, Trywhitt-Drake J. said:

> While the practice of making an "in case" order can be justified, perhaps, in cases where the applicant spouse might be unable for one reason or another to live independently in the distant future, I think it would be teratogenical to extend it to all cases so that such a disposition becomes a matter of course. In my respectful opinion, the practice of making such orders should be restricted to circumstances where the applicant can show the likelihood, in the future, of his or her inability to maintain herself (or himself), and that the other spouse — or the actual status of marriage itself — has some positive responsibility in the matter.[144]

In *Wong v. Wong*, it was held that a nominal award would also be proper "where the husband's lack of present means constitutes the only reason for not making an order".[145] Thus, the present reasoning follows the lines of criticisms which have sometimes been advanced of the automatic award of nominal maintenance, and it provides a constitutional foundation for these criticisms.

C. *Variation and Duration*

The argument that Parliament is restricted to making provision for needs arising from a marriage and divorce concerns original jurisdiction to make maintenance orders and has been developed at the beginning of this part. It was suggested that once jurisdiction has been validly assumed, other considerations may be relevant in determing its ultimate limits.

Section 11(2) of the Divorce Act allows the original court to vary its corollary relief order. In *Skjonsby v. Skjonsby*,[146] the Alberta Appellate Division held that the question of the basic validity of this section has been implicitly resolved by the decision of the Supreme Court of Canada in *Jackson v. Jackson*.[147] In the latter case, the Supreme Court directed a further hearing, eight years after a divorce had been granted, on the merits

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[144] [1972] 3 W.W.R. 214, at 219, 7 R.F.L. 140, at 145 (B.C.S.C.).

[145] [1972] 6 W.W.R. 161, at 165, 8 R.F.L. 345, at 349, 30 D.L.R. (3d) 378, at 382 (B.C.S.C.). The reasoning in *Lee* and *Wong* was approved in LaBrash v. LaBrash, 10 R.F.L. 308, 35 D.L.R. (3d) 147 (Sask. Q.B. 1973).

[146] [1975] 4 W.W.R. 319, 18 R.F.L. 95, 53 D.L.R. (3d) 602 (Alta. C.A.).

[147] *Supra* note 11, at 211, [1972] 6 W.W.R. at 421-22, 29 D.L.R. (3d) at 644.

of an application by an ex-spouse for the continuation of maintenance payments for an adult daughter enrolled in full-time education. The Alberta Appellate Division held that this decision, together with the decision in *Zacks v. Zacks*[148] that section 11 as a whole is *intra vires* Parliament, are conclusive authority as to the validity of section 11(2). Nevertheless, in none of these cases was there any detailed examination of the constitutional foundation of federal provision for the variation of an order.

In most situations, the power to vary an order under section 11(2) of the Divorce Act will raise no constitutional difficulties. For example, if the rising cost of living requires that an award be increased in order to maintain the same level of support, the court which varies an order upward is still dealing with the needs which grounded its original jurisdiction. The situation would be the same if an order was varied downward on the basis of reduced needs of the recipient spouse. Such variation could extend to rescission of an order when there was no longer need for support. The difficulty arises where an application is made for upward variation on the ground that new circumstances of need have arisen since the divorce. In order to sustain federal jurisdiction here, the power to vary an order will have to be regarded as an incident of the power to make the original order.

The alternative to such indefinite federal jurisdiction would be a provision under provincial legislation for an order to be made with respect to the new circumstances. The result would be the regulation of the affairs of the same persons by two orders which, although complementary, would operate within very different legal frameworks. This could give rise to considerable practical difficulties. For example, where the provincial order was made by a court other than that which made the divorce order, separate applications might have to be made for any variations justified by changes in the cost of living. Moreover, a divorce order has automatic national effect; an applicant who sought the same effect for a provincial order would have to resort to the machinery of reciprocal enforcement.

In order to avoid these difficulties it seems reasonable that Parliament should be able to retain the jurisdiction which it assumed in relation to the circumstances of the divorce. The argument is that, by submitting their affairs to federal jurisdiction, the parties ought to be able to refer back to that same jurisdiction for any re-determination which is required in the light of changed circumstances. They ought not to be forced to seek a new determination within a very different legal framework. This seems to be a legitimate application of the doctrine of ancillary powers.

There are, however, temporal limits to the responsibility of Parliament for the economic disruption which follows a divorce. Needs which, in their origin, may be regarded as a product of the dissolved marriage may, in their continuation, come to be regarded as the result of failure to seek independence and adjustment to the loss of support. Unless a condition of dependency is incurable, support as an incident of divorce

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[148] *Supra* note 5, at 901, [1973] 5 W.W.R. at 296, 35 D.L.R. (3d) at 427.

cannot be used to guarantee economic security for life. In order to maintain federal competence, some part of the condition of dependency must still be regarded as, in substance, a consequence of the dissolved marriage.

This will mean that where an order for periodic maintenance under the Divorce Act is made in favour of a spouse, it can only operate until that time when the spouse can reasonably be expected to maintain himself or herself and adjust to the loss of support which was available during the marriage. Similarly, where a lump sum is held to be an appropriate way of meeting the needs of a spouse, its value should be determined with reference to the period of time for which support is expected to be required. As a matter of policy, this approach to the duration of maintenance orders has in fact been recommended by the Law Reform Commission of Canada.[149] Its recommendation may well express the constitutional limits of federal power.

The constitutional problem of the duration of orders does not arise in quite the same way with respect to support for a child. For the purpose of grounding federal ancillary jurisdiction, the dependency of a child for whom support has been received under the Divorce Act can be regarded, for its duration, as a consequence of the marriage of which the child is, or is treated as, an offspring. The constitutional problem is who has the competence to determine the temporal limit of a child's legal dependency for the purposes of ancillary divorce jurisdiction. The answer appears to be that it is a matter within federal competence. Section 2 of the Divorce Act defines a "child of the marriage" as a child who is under sixteen years, or sixteen or over but unable to withdraw himself from the charge of his parents or to provide himself with the necessaries of life. In *Jackson v. Jackson*,[150] the Supreme Court of Canada held that there was jurisdiction under the Act to hear an application for maintenance in respect of a child who had attained the age of majority under provincial legislation.

D. *Conclusion*

It has been argued that the federal Parliament has the power to legislate, as an incident of divorce, in relation to needs of two kinds: (1) those which arise from a marriage and divorce and either exist at the time of divorce or are then reasonably foreseeable; (2) needs which arise from a subsequent change of circumstances where there is already in effect a federal order providing for needs of the first kind. There is no constitutional reason why the original application should have to be made at the time of, or within a certain period from, the divorce, although clearly the claim that it is made with reference to needs related to the change of status will become weaker as time progresses. Moreover, needs which

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[149] *Supra* note 79, at para. 3.16, and at 43.

[150] *Supra* note 11, at 211, [1972] 6 W.W.R. at 421-22, 29 D.L.R. (3d) at 644.

could once be regarded as a product of the marriage and divorce may later change in character. The foundation of federal competence is the responsibility to see that divorce does not involve a loss of support which would have been available during marriage, but this responsibility should only continue for as long as a condition of dependency can still be regarded as, in substance, a consequence of a dissolved marriage.

The boundaries which have been described do not permit easy determination of the precise scope of federal competence. However, practical difficulties in relation to the division of legislative powers are hardly unique to family law. In some respects, it has been possible to show how distinctions which have been drawn have already been recognized for other purposes. It should finally be emphasized that the conclusions are not only relevant to a theoretical analysis of the scope of federal legislative power. They carry major implications for the interpretation of the sections relating to maintenance in the present Divorce Act. Indeed, it must be doubted whether there can be any satisfactorily reasoned interpretation of these ambiguous sections without reference to constitutional considerations.

V. The Family Unit

The scheme of the Divorce Act treats the unit being dissolved as the nuclear family consisting of the husband, wife and children, not simply the marital partnership. For this reason, orders under section 10 or 11 may be made for the maintenance and custody of "the children of the marriage", as well as for the maintenance of either spouse. In treating the nuclear family as the basic unit of jurisdiction, the Act follows the approach adopted in the divorce legislation of most other jurisdictions. For example, provision regarding the children of the marriage was included in the English Matrimonial Causes Act, 1857.[151] In *Zacks v. Zacks,* Martland J. thought that it was proper to have regard to this provision in determining the intended scope of section 91(26) of the B.N.A. Act.[152] The decisions of the Supreme Court of Canada in *Jackson v. Jackson*[153] and *Zacks v. Zacks*[154] are conclusive authority for the competence of the federal Parliament to legislate in relation to the incidents of the dissolution of the nuclear family. The *Jackson* case also established that Parliament may determine, for this purpose, the temporal limits of the dependency of a child.[155] This part will comment briefly on the following two constitu-

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[151] 20 & 21 Vict., c. 85, s. 35.

[152] *Supra* note 5, at 902, [1973] 5 W.W.R. at 296-97, 35 D.L.R. (3d) at 428. *See* text accompanying notes 85-88 *supra.*

[153] *Supra* note 11.

[154] *Supra* note 5.

[155] *See* pp. 573-74 *supra.*

tional problems concerning the persons who may be subjects of a maintenance award under federal legislation.

First, there may be some question as to who can validly be treated as a child of the marriage. *Prima facie*, this may be thought to include a child born of unmarried parents who was legitimized by their subsequent marriage,[156] or an adopted child. In both situations the child is in the same legal position in relation to the spouses as a natural child of the marriage would be. Section 2 defines a child of a husband and wife as including "any person to whom the husband or wife stand *in loco parentis* and any person of whom either the husband or wife is a parent and to whom the other of them stands *in loco parentis*". This raises clear problems with respect to the effect of a custody order under the Divorce Act upon the custodial rights of a natural parent. This issue, however, falls outside the scope of the present study.[157] In relation to maintenance, the validity of the provision seems to have been assumed by Ritchie J. in *Jackson v. Jackson*,[158] and, although the issue was not debated in that case, its validity may be defended. By definition, marriage is intended to be a life-long relationship. Therefore, a spouse who assumes a parental role in the context of a marriage, including, presumably, some financial responsibility, should not expect this responsibility to cease on divorce. Furthermore, it seems reasonable that the responsibility should be dealt with as an incident of the divorce proceedings, as it would in the case of a natural parent.

Secondly, the issue of whether the legislative authority of Parliament is restricted to the nuclear family, or whether it may include the extended family requires investigation. For example, sometimes a spouse will assume a role of filial responsibility in relation to a dependent parent of the other spouse. It may be argued that, by analogy to the position in relation to children of the marriage, this responsibility should not cease upon divorce and that the conferral of relevant jurisdiction would be *intra vires* Parliament. On the other hand, this undertaking has a more tenuous connection with marriage as it is commonly understood. This is reflected in the distinction drawn between the nuclear and extended families. With respect to children who are not the natural offspring of one of the spouses, Parliament has extended the limits of a class of persons who are ordinarily immediately associated with marriage. However, a purported assumption of federal jurisdiction over dependent parents and other relatives of either spouse would involve legislation in relation to an entirely different class of persons. It may well be that their inclusion would stretch the ancillary divorce power too far.

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[156] Mohammed v. Mohammed, 26 R.F.L. 110 (Ont. C.A. 1976).

[157] For a comment on the problem, *see* Colvin, *supra* note 4, at 14-15.

[158] *Supra* note 11, at 213-15, [1972] 6 W.W.R. at 424-25, 29 D.L.R. (3d) at 646-47. 424-25.

VI. THE CONSTITUTIONAL FUTURE

"Marriage and divorce" do not fit easily into the structure of federal power under the B.N.A. Act. It is generally understood that the Canadian Confederation rests upon a basic division between federal control of the national economy and external affairs, and provincial control of the framework of social life.[159] Thus, Abel has said in relation to the logic of internal governmental powers in sections 91 and 92:

> [I]t was the patterns, values and institutions of everyday community contact that were indicated as the legitimate domain of the provinces .... Broadly, the federal "classes of subjects" had regard to Canada as an economy, the provincial to Canadians as members of societies.[160]

The heart of the provincial domain has sometimes been described as encompassing "culture".[161] In constitutional discourse, this concept seems to carry the meaning which is prevalent in the social sciences: a distinctive pattern of social thought and action which is transmitted within a group of people and manifested in their collective life-style and sense of identity.[162] It is believed that the regions of Canada exhibit a pluralism which has made appropriate the allocation to the provinces of authority over cultural matters.

Against this background, two fields of federal power under the B.N.A. Act appear anomalous: criminal law under sections 91(27) and 91(28), and marriage and divorce under section 91(26). Special considerations lay behind their placement. It has been suggested that federal control of criminal law was an historical residue of the introduction of English criminal law into Quebec prior to Confederation.[163] As already noted,[164] the grant of the federal "marriage" power was intended to avoid problems of conflict of laws concerning marital status. The "divorce" power could perhaps have been regarded as a logical extension of the marriage power, and justifiable for the same reason. However, at the time of Confederation, when divorce could only be obtained in some jurisdictions by private legislation, it was defended on the ground that it would make marriages more difficult to terminate.[165]

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[159] *See, e.g.*, recommendations in SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA, FINAL REPORT 1 (1972) [hereinafter cited as FINAL REPORT]; COMMITTEE ON THE CONSTITUTION, CANADIAN BAR ASSOCIATION, TOWARDS A NEW CANADA 63 (1978) [hereinafter cited as NEW CANADA]; TASK FORCE ON CANADIAN UNITY, A FUTURE TOGETHER 85 (1979).

[160] Abel, *The Neglected Logic of 91 and 92*, 19 U. TORONTO L.J. 487, at 501 (1969).

[161] *See, e.g., supra* note 159 *passim*.

[162] For a general discussion of the concept of culture, *see* A DICTIONARY OF SOCIOLOGY (G. Mitchell ed. 1968) and A GLOSSARY OF SOCIOLOGICAL CONCEPTS (D. Weeks ed. 1972).

[163] *See* Abel, *supra* note 160, at 500.

[164] *See* text accompanying note 40 *supra*.

[165] *See* Jordan, *supra* note 3, at 213, and Abel, *supra* note 160, at 502.

Consistency in the recognition of marital status is desirable, but to seek to achieve this end by creating a broad sphere of exclusive federal competence is to use a sledgehammer to crack a nut. It is therefore not surprising that the "marriage and divorce" power has become one of the leading candidates for transfer to provincial jurisdiction in a package of constitutional reform.[166] The Special Joint Committee on the Constitution[167] and the Canadian Bar Association Committee on the Constitution,[168] for example, have both recommended that the whole of family law should fall within provincial responsibility.

In order to reduce or avoid the problem of conflicting rules of recognition, the Special Joint Committee urged "an agreed common definition of domicile".[169] The C.B.A. Committee, on the other hand, doubted whether uniform provincial legislation could be obtained with respect to divorce, and proposed a consitutional provision for the national recognition of a decree granted within a province with which at least one of the parties had a substantial connection.[170]

At the First Ministers' Conference on the Constitution in February, 1979, one of the few matters on which agreement was reached was jurisdiction over family law.[171] It was decided that a negotiated package of constitutional reform would include the transfer to the provinces of the bulk of the "marriage and divorce" power. The federal Parliament would retain jurisdiction only in relation to the national recognition of divorce decrees.

The broader implications of this constitutional reform with respect to marriage and divorce lie beyond the scope of this paper. However, there would be advantages in relation to capacity to legislate concerning support for family members. For example, under the proposed arrangements, a general legislative scheme for rights to support after divorce could be designed simply as a matter of social policy. There would not be the complications which are introduced on the federal side by the inherent limitations of ancillary jurisdiction and on the provincial side by the rule of federal legislative paramountcy.

It has been argued that the federal Parliament can confer original jurisdiction to make support orders only to meet those material needs

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[166] There does not appear to be much active support for a similar transfer of jurisdiction over criminal law, especially after Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662, 25 N.S.R. (2d) 128, 84 D.L.R. (3d) 1, and Attorney-General of Canada v. City of Montreal, [1978] 2 S.C.R. 770, 5 M.P.L.R. 4, 84 D.L.R. (3d) 420, which have expanded provincial competence in this field.

[167] FINAL REPORT, *supra* note 159, at 76-77.

[168] NEW CANADA, *supra* note 159, at 135-38.

[169] FINAL REPORT, *supra* note 159, at 77.

[170] NEW CANADA, *supra* note 159, at 137-38. The focus on "substantial connection" rather than domicile was intended to take account of developments in the common law rules of recognition. Presumably, there could be an equivalent provision with respect to marriage. *See* Indyka v. Indyka, [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L. 1967).

[171] The Globe and Mail (Toronto), February 1, 1979, at 1, col. 5, and at 2, col. 5.

which can be regarded as a consequence of the marriage and its dissolution, and only for a period during which some part of a person's needs can continue to be so regarded. Beyond this, Parliament would not be dealing with support as an incident of the dissolution of marriage but, rather, as a matter of the legal consequences of marriage and divorce. The claims which have been expressed for broader federal competence suggest that there are arguments supporting a more extensive provision for support under divorce legislation which should at least be considered on their merits. At present, however, policy arguments must be subordinated to constitutional considerations.

Whether or not there would be major disadvantages to provincial assumption of exclusive responsibility for support after divorce may depend upon the validity of the analysis of present federal competence in relation to the division of marital property. It was argued that there is no consitutional objection to Parliament providing for orders to be made with respect to the transfer of property upon divorce as a form of support. However, it was concluded that, since federal provision must remain within the bounds of what is incidental to the dissolution of marriage, a "deferred sharing" regime would be *ultra vires* Parliament. If this is wrong, the loss of federal competence to implement such a scheme might well be regretted.

The present situation of provincial legislation on the division of marital property is chaotic. Some provinces have conferred wide judicial discretion to make orders upon divorce, others have preferred to establish principles for deferred sharing. Moreover, the range of assets which is subject to deferred sharing differs from province to province. In a mobile society, in a field of crucial importance to the ordinary person, a field in which substantial rights and duties depend upon actions which are often taken without legal advice, variations of provincial law should be acceptable only if they reflect genuine differences in the character of regional society. It is not immediately apparent, however, that the heterogeneity of marital property regimes does reflect such differences. It seems just as likely to be the result of random differences in the opinions and ideas of law-makers.

There is much to be said, therefore, for the core of uniformity which would result from the federal implementation of the proposals of the Law Reform Commission of Canada for the equal sharing upon divorce of all assets acquired by the parties during their marriage.[172] Their implementation would render inoperative any provincial legislation in so far as it conferred less extensive rights to a division of property upon divorce. Provincial legislation would remain operative only to the extent that it conferred supplementary rights; for example, in relation to a division of property brought into the marriage, or in relation to a division on the separation of the parties.

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[172] *See* text accompanying notes 79, 80 *supra*.

The disadvantages of federal withdrawal from the field of marriage and divorce are minimal if the ancillary jurisdiction of Parliament is as limited as has been suggested. For example, the mere conferral of judicial discretion under the Divorce Act to make orders with respect to property would do little more than add to the existing chaos. Federal action would, of course, ensure that at least some reformed regime of marital property is in force in all provinces, but it seems inevitable that the present trend of provincial action will soon attain this result. Furthermore, there seems little to be gained from national criteria with respect to maintenance since these are so highly discretionary and since maintenance orders would, in practice, be made in light of property distributions which can vary from province to province.

If there is a major disadvantage to federal withdrawal, it could be the loss of automatic national effect of a maintenance order. However, even under the present Divorce Act, enforcement of an order outside its province of origin is dependent on registration in another court through which it is to be enforced. An alternative exists for the enforcement of a provincial maintenance order through the machinery established by reciprocal enforcement legislation.

In the result, it may appear that the federal Parliament has little power in relation to support after divorce which is worth retaining. The provinces already possess plenary powers in relation to family maintenance and marital property. The simplification which would follow federal withdrawal from the field would benefit those who are responsible for making and implementing the law and, of greater significance, those who are subject to it. Legal complexity is an acute problem in a field such as family law, which has a major impact upon the organization of everyday life. This fact renders the problem of the divided jurisdiction especially serious as it hinders public understanding of the law.

The benefits of simplification could also be achieved through the transfer of authority over matters of family law from the provincial legislatures to the federal Parliament. However, the allocation of any particular item of legislative power must be considered in the context of a confederation which broadly distinguishes between a sphere of federal economic and provincial cultural competence. From this standpoint, there can be no question that primary responsibility for family law should lie with the provinces.

Moreover, there can be little doubt that the provinces will continue to exercise at least some responsibility for family law. In the present political climate, it is difficult to conceive of a renunciation of provincial powers in this field, whereas it seems entirely possible that provincial competence could become exclusive. With respect to support after divorce, any adverse consequences of this constitutional reform are outweighed or offset by the resulting simplification.