

By section 91(2) of the Constitution Act, 1867 the federal Parliament was given the power to make laws in relation to the “regulation of trade and commerce”. **Regulatory Schemes and the Trade & Commerce Power**

It is well-established that there are several indicia for characterizing a matter as a valid exercise of the general trade and commerce power. As Dickson J. noted in *A.G. Canada v. CN Transport Ltd.* (*A.G. Ca. v. C.P. Transport Co.*), [1983] 2 S.C.R. 206, the indicia are:

1. The presence of a national “regulatory scheme”
2. The oversight of a regulatory agency
3. The concern with trade in general, not a particular aspect of a business
4. Whether the provinces jointly or severally would be constitutionally incapable of passing the enactment
5. Whether the failure to include one or more provinces would jeopardize successful operation in other parts of Canada.

The constitutional concept of a “valid regulatory scheme” is part of the arsenal of techniques constitutional law utilizes to overcome the difficulties of divided jurisdiction in a federal state.

That being said, there has been surprisingly little pronouncement on what “constitutes a regulatory scheme”. This is even more surprising when one considers that a “regulatory scheme” is also required in the context of indirect tax. However, by examining the factual context of all of the trade and commerce and taxation cases, it may be seen that certain characteristics are present whenever a regulatory scheme exists.

First, the party being regulated has caused the need for the regulation and receives some benefit from the regulation. In the *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 and *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 cases, it was the appellants’ economic activities that caused chaotic markets. It was also the appellants who benefited from the introduction of order into these markets. In the tax cases, the appellants do some activity which causes the need for regulation. For example, in *Allard Contractors v. Coquitlam (District)*, [1993] 4 S.C.R. 371, gravel truck operators caused damage to the municipal roads which required levying a tax on those truck operators.

Second, the challenged statute delineates certain required or prohibited conduct, creates an investigatory procedure supervised by public regulators, and establishes remedial or punitive mechanisms. In *General Motors v. City National Leasing*, [1989] 1. S.C.R. 641, the orders at issue prohibited conduct - activities which tended to reduce competition in the marketplace. In the tax cases, businesses are prohibited from operating without a licence, and to obtain a licence one must pay a tax. Where there is a prohibited conduct in a regulatory scheme, there must also be a punitive sanction either a fine or other sanction. In *Macdonald v. Vapour Canada Ltd.*, [1977] 2 S.C.R. 134, Chief Justice Laskin stated that:

One looks in vain for any regulatory scheme in s.7 let alone s. 7(e) [of the challenged legislation]. Its enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency which would at least lend some colour to the alleged national or Canada-wide sweep of s.7(e). The provision is not directed to trade but to the ethical conduct of persons engaged in trade or business, and, in my view, such a detached provision cannot survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely local concern. Even on the footing of being concerned with practices in the context of trade, its private enforcement by civil action gives it a local cast because it is as applicable in its terms to local or intraprovincial competitors as it is to competitors in interprovincial trade.

Third, the major elements of the regulatory scheme should be statutory. A totally discretionary ability to regulate, coupled with an absence of any specific legislation on how to regulate, should not be upheld as a regulatory scheme. There is no reason to believe that the regulatory scheme must be found within one statute: in the tax case *Ontario Home Builders*, the regulatory scheme was found in any provincial legislation from the *Planning Act* to the *Fire Marshalls Act*. Laskin C.J.C.s comment above, such a detached provision cannot survive alone unconnected to a general regulatory scheme is also indicative of the courts attention to this element.

Finally, as is obvious, the scheme must be a national regulatory scheme. In either its design or effect the regulatory scheme should not be limited to one local area. Moreover, the effect of the legislation should be regulating interprovincial trade more than it does intraprovincial trade (see Laskin C.J.C.s comments above). Presumably ancillary effects on intraprovincial trade would be acceptable.