COMMENTS
COMMENTAIRES

CONSTITUTIONAL LAW—LIMITS OF FEDERAL COURT JURISDICTION—IS THERE A FEDERAL COMMON LAW?—The Federal Court Act[1] not only conferred upon the new Federal Court of Canada the jurisdiction formerly exercised by the Exchequer Court, it also conferred some important new jurisdiction on the Federal Court.[2] This expansion of the jurisdiction of the federal court system has given rise to a host of cases attempting to define the limits of the jurisdiction. These cases mainly turn on the language of the Federal Court Act. However, there is also a constitutional limit to the jurisdiction which can be conferred on a federal court, and that is the subject of this comment.

The British North America Act,[3] by section 101, empowers the federal Parliament to establish federal courts "for the better administration of the laws of Canada". This language does not authorize the establishment of courts of general jurisdiction akin to the provincial courts. Federal courts are confined to issues arising under "laws of Canada". It is well settled that the phrase "laws of Canada" does not mean all laws in force in Canada whatever their source, but means *federal* laws. The clearest example of a "law of Canada" is a federal statute, including of course a regulation or order made under a federal statute. Much of the subject matter of the jurisdiction of the Federal Court is governed by federal statute law, and this part of the court's jurisdiction raises no constitutional issue. But some of the subject matter of the court's jurisdiction is governed by provincial statute law or

---

[1] S.C., 1970-71-72, c. 1.

[2] Perhaps most important is the new power conferred by ss 18 and 28 to review the decisions of federal officials and agencies. Also important is the new power conferred by s. 23 over certain bills of exchange and promissory notes, aeronautics and interprovincial undertakings.

[3] (1867), 30 & 31 Vict., c. 3 (U.K.).

by the common law, and this part of the court's jurisdiction does raise a constitutional issue.

Until recently there was substantial judicial support for the view that a federal court could be given jurisdiction over any matter in relation to which the federal Parliament had legislative competence, even if that matter was not in fact regulated by federal statute law. On this basis the "laws of Canada" could include a rule of provincial statute law or a rule of the common law if its subject matter was such that the law could have been enacted or adopted by the federal Parliament.[4] This test of federal legislative competence gave to the undefined expression "laws of Canada" a meaning which was sound in principle and relatively easy to apply in practice. Yet, in two recent cases, the Supreme Court of Canada has rejected the test — and without substituting a satisfactory alternative.

The first of the two cases is *Quebec North Shore Paper Co.* v. *Canadian Pacific* (1976),[5] which was an action for damages brought in the Federal Court by the Canadian Pacific railway against the Quebec North Shore Paper Co., alleging the breach of a contract to build a marine terminal. The building of this facility by the paper company was part of a larger contract under which the railway undertook to transport the company's newsprint by water and land from a plant in Quebec to newspaper houses in Chicago and New York. The contract was made in Quebec and it specifically provided that it was to be interpreted in accordance with the laws of Quebec.

Section 23 of the Federal Court Act purported to confer jurisdiction on the Federal Court "in all cases in which a claim for relief is made or a remedy is sought under an Act of the Parliament of Canada or otherwise in relation to . . . works and undertakings . . . extending beyond the limits of a province . . .". This language was literally apt to include Canadian Pacific's

---

[4] *Consolidated Distilleries* v. *The King*, [1933] A.C. 508 is ambiguous on this point, but see *Logan* v. *The King*, [1938] 3 D.L.R. 145, at p. 155, per Kerwin J.; *Schwella* v. *The Queen*, [1957] Ex. C.R. 226, at p. 233, per Thurlow J.; *The Queen* v. *J. B. & Sons Co.*, [1970] S.C.R. 220, at pp. 232-233, per Pigeon J.; *Robert Simpson Montreal* v. *Hamburg-Amerika*, [1973] F.C. 1356, at pp. 1360, 1366, per Jackett C.J.; *Quebec North Shore Paper Co.* v. *Canadian Pacific*, [1976] 1 F.C. 646, at pp. 652-653, per Le Dain J.; *McNamara Construction* v. *The Queen*, [1976] 2 F.C. 292, at p. 303, per Thurlow J., at p. 313, per Ryan J. The last two decisions have now been reversed by the Supreme Court of Canada; they are the subject of this comment.

[5] (1976), 71 D.L.R. (3d) 111.

action. To be sure, the federal Parliament had not enacted any laws which would apply to the contract. However, as a matter of statutory interpretation, the words "or otherwise" in section 23 contemplated cases governed by law other than federal statute law. And, as a matter of constitutional law, the test of federal legislative competence was satisfied: because the contract was for the international transportation of goods, it was within the legislative competence of the federal Parliament. For this reason the Federal Court of Appeal had little difficulty in deciding that section 23 of the Federal Court Act was constitutionally effective in conferring jurisdiction over the action.[6] Le Dain J. for the court reasoned that, in its application to a contract within federal legislative jurisdiction, the Quebec civil law was a "law of Canada".

The Supreme Court of Canada unanimously reversed the decision of the Federal Court of Appeal. Laskin C.J., who wrote for the full Supreme Court bench of nine judges, held that the Quebec civil law could not be regarded as a "law of Canada" unless it had actually been enacted or adopted by the federal Parliament. He held that the words "for the better administration of the laws of Canada" in section 101 of the British North America Act did not mean matters within federal legislative competence. Instead, he said, "they carry, in my opinion, the requirement that there be applicable and existing federal law . . . upon which the jurisdiction of the Federal Court can be exercised".[7]

The Quebec law of contract, unlike that of the other provinces, rests on the statutory foundation of the Quebec Civil Code, which contains a code of the law of contract including rules of interpretation. Strictly speaking, therefore, all that was decided in *Quebec North Shore* was that provincial *statute* law could not be a "law of Canada". The question whether any part of the common law could be regarded as federal did not have to be decided. However, Laskin C.J.'s opinion made no mention of the statutory basis of the Quebec civil law, which suggests that the result would have been the same in a common law province where the law of contract was not statutory. The correctness of this inference is confirmed by the second recent decision of the Supreme Court of Canada.

The second case is *McNamara Construction* v. *The Queen* (1977).[8] This was an action for damages brought in the Federal

---

[6] *Supra*, footnote 4.

[7] *Supra*, footnote 5, at p. 120.

[8] Supreme Court of Canada, January 25th, 1977, not yet reported.

Court by the Crown in right of Canada (hereinafter referred to as the federal Crown) against a builder and an architect, alleging the breach of a contract to build a penitentiary in Alberta. Once again, the Federal Court Act was literally apt to include the action, because section 17(4) purported to confer jurisdiction over "proceedings of a civil nature in which the Crown or the Attorney-General of Canada claims relief". It was common ground that there was no federal statute law in point, and that the applicable law was the common law. However, the Federal Court of Appeal applied the test of federal legislative competence (over the federal Crown (section 91(1A)) and over penitentiaries (section 91(28))) to hold that the applicable common law was "federal".[9] The Supreme Court of Canada unanimously reversed, holding that the applicable law was not federal, and accordingly that the Federal Court could not, as a matter of constitutional law, assume jurisdiction over the proceedings. Laskin C.J. for the court followed *Quebec North Shore* in holding that the fact of federal legislative competence over the contract did not supply a sufficient constitutional basis for jurisdiction. Nor did the fact that the federal Crown was the plaintiff in the proceedings, because no "principle of law peculiar to it" was relevant.[10] Therefore, section 17(4) of the Federal Court Act had to be "read down" so as to remain within the limits prescribed by section 101 of the British North America Act.

Do the decisions in *Quebec North Shore* and *McNamara Construction* mean that there is no such thing as a federal common law,[11] and that the federal Parliament may only confer upon the Federal Court jurisdiction over controversies governed by federal statute law?[12] An affirmative answer would at least have the appeal of providing a clear definition of "laws of Canada" in section 101 of the British North America Act: "laws of Canada" would consist exclusively of federal statute law. But this does not

---

[9] *Supra*, footnote 4.

[10] *Supra*, footnote 8, at p. 9. On this point the court had to overrule a prior decision of its own, *Farwell* v. *The Queen* (1894), 22 S.C.R. 553, although Laskin C.J. also suggested that *Farwell* had not had to decide the point.

[11] The existence of a federal common law is also relevant to the scope of the Canadian Bill of Rights, although the closing language of s. 5(2) of the Bill, R.S.C., 1970, Appendix III (which seems apt to include common law as well as pre-confederation statute law) makes clear that federal legislative competence is the test.

[12] For the situation in the United States and Australia, see Hogg, Liability of the Crown (1971), pp. 224-226.

seem to be the meaning of the two cases, because in each of them Laskin C.J. expressly acknowledged the existence of a body of federal common law. In *Quebec North Shore* he gave as an example the law pertaining to the federal Crown (insofar as it is not statutory).[13] In *McNamara Construction*, where the federal Crown was the plaintiff, he explained that example as meaning the law pertaining to Crown "liability", not Crown rights: the difference is that "there were existing common law rules respecting Crown liability in contract and immunity in tort, rules which have been considerably modified by legislation"; whereas, claims by the Crown were governed by the ordinary law.[14] But if the distinction between rights and liabilities is crucial, the result is highly inconvenient. The Federal Court may be properly seized of an action against the federal Crown, but the federal Crown's counterclaim and third party notice will require a separate action in the provincial court system.[15]

Is there any principled basis for the distinction between Crown rights and Crown liabilities? Laskin C.J.'s example of Crown "immunity" in tort is not helpful: Crown liability in tort did not exist at common law and it now depends upon the fact that the federal Crown has been made liable by a federal statute;[16] although the statute does not codify the rules which are applicable, the relevant rules of the common law have been regarded as adopted by the federal statute.[17] Laskin C.J.'s example of Crown liability in contract is even less helpful: Crown liability in contract did exist at common law; and, while there were a few special rules applicable to the Crown, for the most part Crown liability in contract depended upon the same rules of the common law as applied between subject and subject.[18] It was (and is) no different from the Crown's right to sue in contract, which also depended for the most part upon the same rules of the common law as applied between subject and subject. Certainly, there were some common law rules which were peculiar to the Crown, but this does not support a distinction between Crown liabilities and

---

[13] *Supra*, footnote 5, at pp. 118, 120.

[14] *Supra*, footnote 8, at p. 9.

[15] Laskin C.J., *supra*, footnote 8, at p. 10 said that proceedings for contribution or indemnity could be competent "in so far as the supporting federal law embraced the issues arising therein". Presumably the qualifying phrase will exclude most such proceedings.

[16] Crown Liability Act, R.S.C., 1970, c. C-38, s. 2; Hogg, *op. cit.*, footnote 12, ch. 5.

[17] Gibson, Interjurisdictional Immunity in Canadian Federalism (1969), 47 Can. Bar Rev. 40, at pp. 46-49.

[18] Hogg, *op. cit.*, footnote 12, ch. 4.

Crown rights because the special rules concerned Crown rights as well as Crown liabilities.[19] Are we somehow supposed to segregate those rules which are peculiar to the federal Crown and call them "federal" laws, while characterizing the rules which are the same as the rules applicable between subject and subject as "provincial" laws? As a method of allocating jurisdiction between two court systems, such a distinction seems to me to be utterly unworkable.

In any event, what reason can be given for denying that the common law in fields of federal legislative jurisdiction is federal law — part of the "laws of Canada"? In the case of the federal Crown, the common law can probably only be changed by the federal Parliament. A provincial law purporting to diminish the federal Crown's rights, or to increase its liabilities, would probably be held incompetent to the province, and if couched in general terms would probably be held inapplicable to the federal Crown.[20] In what sense is it plausible to characterize the common law pertaining to the federal Crown as provincial? In the case of penitentiaries, or international transportation (and most other matters within federal jurisdiction), the common law can be changed by the provincial Legislatures as well as by the federal Parliament. But there is no reason to characterize the law pertaining to these matters as provincial, rather than as federal and provincial. Surely, in fields of concurrent authority the common law has a double aspect, and the dual classification would be more appropriate.

In my opinion the only workable and principled test for a "law of Canada" is the test of federal legislative competence which prevailed before *Quebec North Shore* and *McNamara Construction*. Indeed, this test is confidently asserted to be the law in Laskin's casebook on constitutional law, where he says:

> "Laws of Canada" must also include common law which relates to

---

[19] For example, at common law the Crown was immune from discovery, production of documents and costs, whether it was suing or being sued, limitation periods did not apply to suits by the Crown, and there were special prerogative remedies available only to the Crown: *op. cit.*, *ibid.*, pp. 28-37; the doctrine of Crown privilege was available whether the Crown was suing or being sued (and even when the Crown was not a party at all): *op. cit.*, *ibid.*, p. 41; and the rule that the Crown was not bound by statutes except by express words or necessary implication could occasionally be relevant in suits by the Crown as well as suits against the Crown: *op. cit.*, *ibid.*, pp. 180-183.

[20] *Gauthier* v. *The King* (1918), 56 S.C.R. 176, but compare *Dominion Building Corp.* v. *The King*, [1933] A.C. 533; and see Gibson, *op. cit.*, footnote 17, at p. 52.

> the matters falling within classes of subjects assigned to the Parliament of Canada.[21]

And, later:

> But, because the common law is potentially subject to overriding legislative power, there is federal common or decisional law and provincial common or decisional law according to the matters respectively distributed to each legislature by the B.N.A. Act.[22]

Neither *Quebec North Shore* nor *McNamara Construction* give any reason for rejecting this sensible approach. It is, of course, true that the competence test has the effect of enabling the Parliament to confer a broad jurisdiction on the Federal Court of Canada, and thereby to further develop a dual court system in Canada. Like many lawyers, I think that an extensive dual court system is an unwise development. But, as Laskin C.J. recently reminded us in the *Anti-Inflation Reference*,[23] the court should not be concerned with "the wisdom or expediency or likely success of a particular policy expressed in legislation". In any event the chief mischiefs of a dual court system are the necessity of two sets of proceedings to dispose of what is essentially one dispute, and the fostering of controversy as to which system has jurisdiction over a particular proceeding. Both those mischiefs are surely better remedied by the relatively clear rule of federal legislative competence than by the opaque rule now announced by the Supreme Court of Canada.[24]

P. W. HOGG*

* * *

LABOUR LAW — CONSTITUTIONAL LAW — THE BASIC JURISDICTION OF THE CANADA LABOUR RELATIONS BOARD — IS IT CONCURRENT WITH FEDERAL LEGISLATIVE POWER?

The Background of the Board's Basic Jurisdiction

As a result of the 1925 Privy Council decision in *Toronto Electric Commissioners* v. *Snider*[1] and the subsequent decision of

---

[21] Laskin, Canadian Constitutional Law (4th ed. rev., 1975), pp. 792-793; the same passage appears in the 3rd ed. rev., 1969, at p. 817.

[22] *Op. cit., ibid.* (4th ed.), p. 793; (3rd ed.), p. 817. See also the advocacy of a federal common law in Laskin, The British Tradition in Canadian Law (1969), pp. 129-130.

[23] [1976] 2 S.C.R. 373, at p. 425.

[24] I am grateful to Professor John Evans, who read a draft version of this comment and made many suggestions for its improvement.

* P. W. Hogg, of the Osgoode Hall Law School, York University, Toronto.

[1] [1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785 (P.C.).

the Supreme Court of Canada in *Reference re Legislative Jurisdiction over Hours of Labour*,[2] it is settled that under the Canadian constitution legislative power with respect to labour relations is divided between the federal Parliament and the provincial legislatures. Based on the *Snider* reasoning, it appears that the main source of such power is under the broadly defined head of "property and civil rights in the Province" which is a provincial matter.[3] Federal power in this area is an incident of more narrowly defined matters, such as interprovincial works and undertakings and banking, and residual matters, such as radio and aeronautics. In other words, the primary power over labour relations is provincial, while federal power in this area is merely incidental to federal power over a variety of matters.

Before the Privy Council decision in *Snider*, it was generally thought that the federal Parliament had plenary authority to legislate regarding labour relations. Parliament had acted accordingly and a significant federal presence had been established in this field, although the scope of federal regulation was much less comprehensive than today's typical labour relations legislation in Canada. Faced with much narrower room for federal action after *Snider* was decided, Parliament responded by fuller coverage of the area left to it by the *Snider* decision. It did so by changing the application of the statute from one limited according to certain sectors of the economy to one limited according to the scope of federal legislative power.[4]

The application of the federal legislation continues to be defined in terms of federal legislative power today. Labour relations at the federal level are governed by Part V of the Canada Labour Code[5] which applies to employment "upon or in connection with the operation of any federal work, undertaking or

---

[2] [1925] S.C.R. 505, [1925] 3 D.L.R. 1114.

[3] *Reference re Legislative Jurisdiction over Hours of Labour*, *ibid.*, also suggests that power over labour relations may be a local and private matter. There is no reference to local and private matters in *Toronto Electric Commissioners* v. *Snider*, however, *supra*, footnote 1. In *Attorney-General for Canada* v. *Attorney-General for Ontario* (*Labour Conventions* case), [1937] A.C. 326, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C.), in which the Privy Council indicates approval of the decision in *Reference re Legislative Jurisdiction over Hours of Labour*, Lord Atkin refers only to "property and civil rights" as the basis of provincial power in this area.

[4] An Act to amend The Industrial Disputes Investigation Act, 1907, S.C., 1925, c. 14, s. 1. For a fuller history of the development of federal labour relations legislation in Canada, see F. R. Scott, Federal Jurisdiction Over Labour Relations — A New Look (1960), 6 McGill L.J. 152.

[5] R.S.C., 1970, c. L-1, as am. by S.C., 1972, c. 18.

business".[6] "Federal work, undertaking or business" is defined as "any work, undertaking or business that is within the legislative authority of the Parliament of Canada".[7]

It is widely assumed that this means that Parliament has generally legislated up to the limit of its constitutional power over labour relations. Accordingly, it is assumed that the jurisdiction of the Canada Labour Relations Board is determined by the scope of federal power over labour relations, subject only to specific exceptions from jurisdiction included in the Canada Labour Code, such as a general exception of Crown employees.[8] Two 1975 decisions of the Federal Court of Appeal undercutting this assumption, and a policy-oriented decision of the Supreme Court in reversing one of them, make appropriate an examination of this proposition.

The Cannet Freight Cartage and Yellowknife Decisions

As a result of the decision of the Federal Court of Appeal in *Re Cannet Freight Cartage Ltd. and Teamsters Local 419*,[9] a ground has been opened up on which labour relations may fall outside the jurisdiction of the Canada Labour Relations Board, even though they fall within the constitutional jurisdiction of Parliament and are not within one of the specific exceptions to the Canada Labour Code. Because of the particular way in which the relevant business arrangements are made, the activity of the employer and employees may not be part of "the operation of" the federal activity that it is connected with.

In the *Cannet Freight Cartage* case, the Canada Labour Relations Board had certified the union as bargaining agent for employees of a company engaged in loading Canadian National Railway freight cars. The company was acting under contract with a related company which was engaged in the freight forwarding business. The freight forwarding business was carried on solely within Ontario and consisted of soliciting freight shipments from persons in the Toronto area and organizing these shipments into carloads. The Cannet Freight Cartage employees then carried out the physical task of collecting these shipments and loading

---

[6] *Ibid.*, s. 108.

[7] *Ibid.*, s. 2.

[8] *Ibid.*, s. 109(4). Crown employees would probably be excluded by virtue of s. 16 of the Interpretation Act, R.S.C., 1970, c. I-23, as am. by R.S.C., 1970 (2nd Supp.), cc. 10, 29; S.C., 1972, c. 17, s. 2, Sch. B, even if there were no specific exception in the Canada Labour Code.

[9] [1976] 1 F.C. 174, 60 D.L.R. (3d) 473, 11 N.R. 606 (C.A.).

them onto the freight cars. The Federal Court of Appeal held that such employees were not within the jurisdiction of the Canada Labour Relations Board.

In the second case, which has since been reversed, *Re City of Yellowknife and Public Alliance of Canada*,[10] the Federal Court of Appeal attempted to open up another ground on which labour relations falling within the constitutional jurisdiction of Parliament, and not specifically excluded from the Canada Labour Code, were nonetheless outside the jurisdiction of the Canada Labour Relations Board. In the *Yellowknife* case, the court held the Board to be without jurisdiction because the activity of the employer and employees was not a "work, undertaking or business" as Parliament intended to use those terms in the Canada Labour Code.

The Board had certified the union as bargaining agent for all municipal employees of the City of Yellowknife, other than firemen, policemen and specified key administrative personnel. The employees covered by the certification were engaged in providing normal local government services. In reversing the Federal Court of Appeal's decision, the Supreme Court of Canada[11] held that municipal employees in the territories were indeed engaged in a "work, undertaking or business" within the intendment of Part V of the Canada Labour Code.

The Constitutional Significance of the Cannet Freight Cartage Decision

At the outset in analyzing these cases, it is necessary to consider whether the *Cannet Freight Cartage* may illustrate, rather than undermine, the assumption that Parliament has given the Canada Labour Relations Board jurisdiction up to the constitutional limits of Parliament's power except with respect to those employees specifically excluded from the coverage of Part V of the Canada Labour Code. In the decision there is considerable discussion of the constitutional provisions governing the distribution of legislative power in Canada. Limits imposed by those provisions upon federal power are noted as a factor leading to the conclusion that the employees concerned are outside the federal Board's jurisdiction.

The decision does not note the possible distinction between the scope of federal legislative jurisdiction over labour relations

---

[10] [1976] 1 F.C. 387, 63 D.L.R. (3d) 753 (C.A.).

[11] (1977), 14 N.R. 72 (S.C.C.).

under the British North America Act and the scope of jurisdiction that Parliament has actually conferred on the Canada Labour Relations Board. The judgment could be interpreted as a decision that the employees concerned are outside the jurisdiction of the federal Board because they are outside the legislative power of Parliament.

The potential for an alternative interpretation of the *Cannet Freight Cartage* case becomes apparent when one reads the Federal Court of Appeal's decision in the *Yellowknife* case. On its face, this was also a decision which could be interpreted as one based on a lack of constitutional authority in Parliament. However, any such interpretation would turn that decision into patent nonsense. While, as the result has developed, the Federal Court of Appeal's decision in the *Yellowknife* case was wrong, this hardly justifies a conclusion that the decision was patent nonsense.

The City of Yellowknife is located in the Northwest Territories and is not within the boundaries of any province. Although a territorial government has been established with powers similar to those of provincial governments,[12] that government is purely a delegate of Parliament. Parliament has full legislative power in the territories and this power is not limited constitutionally by its mere delegation to a subordinate body. In other words, Parliament clearly has the constitutional power to regulate the labour relations of the City of Yellowknife. The Federal Court of Appeal's *Yellowknife* decision made sense only as a decision that Parliament has chosen not to exercise this power.

While the Federal Court of Appeal could certainly have made it clearer that their decision was purely an interpretation of the Canada Labour Code, and not an interpretation of the Canadian constitution, it is not hard to see what the court was saying once it is realized that the decision can have no constitutional significance. The decision turned on the conclusion that the City of Yellowknife and its employees do not come under Part V of the Canada Labour Code because it is not a work, undertaking or business.

In the Federal Court of Appeal's view, the terms "work" and "undertaking" had the same meaning as these words have in section 92(10)(a) of the British North America Act, because of the obvious intentional relationship between the jurisdiction of the federal Board and the limited sources of federal power in

---

[12] Northwest Territories Act, R.S.C., 1970, c. N-22, as am. by R.S.C., 1970 (1st Supp.), c. 48; S.C., 1974, c. 5.

this area. In section 92 of the British North America Act, municipal institutions are dealt with quite separately from works and undertakings. Therefore, works and undertakings do not encompass municipal institutions in that Act. On this basis, the court concluded that Parliament did not intend to refer to municipal institutions by the words "work" and "undertaking" in the Canada Labour Code. In the Federal Court of Appeal's view, the term "business" had a commercial or industrial connotation and did not cover a municipal institution either.

The decision in *Cannet Freight Cartage* cannot be so easily dismissed as a decision without constitutional significance. The judgments seem to regard the constitutional limits on federal power as decisive of the outcome. However, it is submitted that the decision cannot be viewed as a sound exposition of the constitutional limits on federal legislative power and is better interpreted, as the same court's decision in *Yellowknife* must be interpreted, as a mere elaboration of the meaning of the application provisions of the Canada Labour Code.

If viewed as an interpretation of the constitutional powers of Parliament, the decision of the Federal Court of Appeal in the *Cannet Freight Cartage* cannot be satisfactorily reconciled as a matter of constitutional principle with the decision of the Supreme Court of Canada in *Reference re Industrial Relations and Disputes Investigation Act*.[13] That case concerned the jurisdiction of the federal Board over stevedores engaged in loading ships destined for foreign ports. The mind of the Supreme Court was directed by the reference to the two distinct questions of whether these employees were within the constitutional power of Parliament and whether they were within the legislative scope of the jurisdiction conferred by Parliament upon the federal Board. Both questions were answered in the affirmative.

While a decision that persons engaged in loading freight cars which are destined for interprovincial travel are distinguishable from persons engaged in loading ships destined for international travel may be marginally justifiable as an interpretation of the application provisions of the Canada Labour Code, such a distinction cannot be justified as a basis for granting constitutional power to Parliament in the one case and denying it in the other. The basis for the distinction that is drawn in the *Cannet Freight Cartage* case is that the responsibility and the contractual arrangement for loading ships rested upon the shipping company which

[13] [1955] S.C.R. 529, [1955] 3 D.L.R. 721.

was engaged in an international undertaking, while the responsibility and the contractual arrangements for loading the freight cars rested upon the freight forwarding company which was a purely local operation.[14] If this distinction is constitutionally significant, it would mean that freight handlers could effectively contract themselves in and out of federal power by altering their contractual arrangements with shippers and shipping companies. Constitutional powers ought not to rest on such unstable footing.

The *Cannet Freight Cartage* case is also unsatisfactory as a decision based on constitutional principle when it is recalled that federal power over labour relations is an incidental power. While the decision is in line with earlier narrow views of the concept of federal incidental power,[15] it fails to take any account of the wider theory of federal incidental power developed in *Regina* v. *Klassen*.[16] Since inclusion of the Cannet Freight Cartage employees within federal jurisdiction would seem consistent with the *Klassen* theory of incidental power, some explanation of the rejection of this theory in favour of the older narrow view is called for if the *Cannet Freight Cartage* decision is to be taken seriously as an exposition of constitutional principles.

It is in the nature of an incidental power that it is capable of somewhat indefinite extension. The concept of what is incidental to matters within federal power expands as a function of the integration of activities clearly within federal power with activities not clearly within federal power. This is illustrated by the analysis of the Supreme Court in *Canadian Pacific Railway* v. *Attorney-General for British Columbia* (*Empress Hotel* case).[17] It was recognized that if the hotel operations in that case were integrated with the interprovincial railway operations of the Canadian Pacific Railway they could fall within federal power.

At the same time the *Empress Hotel* case established that mere corporate arrangements were not sufficient to bring a group

---

[14] No distinction for constitutional purposes can be made because the ships were engaged in international transportation while the freight cars were engaged in interprovincial transportation. International shipping lines and interprovincial shipping lines and railways are treated identically under section 92(10)(a) and (b) of the British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.), as federal matters.

[15] See, for example, *Montreal* v. *Montreal Street Railway*, [1912] A.C. 333, 1 D.L.R. 681 (P.C.).

[16] (1959), 20 D.L.R. (2d) 406, 29 W.W.R. 369, 31 C.R. 275 (Man. C.A.), leave to appeal refused, [1959] S.C.R. ix.

[17] [1950] A.C. 122, [1950] 1 D.L.R. 721, [1950] 1 W.W.R. 220 (P.C.).

of employees constitutionally within federal power. It would seem that the contractual arrangements involved in the *Cannet Freight Cartage* case should be no more constitutionally significant, one way or the other, than the corporate arrangements in the *Empress Hotel* case. Once these arrangements are eliminated as a factor, the Cannet Freight Cartage employees are constitutionally indistinguishable from the stevedores dealt with in the *Industrial Relations and Disputes Investigation Act* reference.

It must be admitted that a test based on integration of activity is also capable of manipulation by the actors involved. For instance, most telephone companies in Canada maintain arbitrary and artificial separation of physical operations and plants in order, they hope, to preserve provincial regulation. However, the impact of other practical considerations would seem to provide a natural restraint on manipulation of integration of activities merely to acquire or avoid a particular legislative competence. Again, to use the same illustration, if it were to be judicially determined that the service integration of telephone companies has made them a single interprovincial undertaking, it is inconceivable that they would dismantle that service integration in order to avoid federal jurisdiction. Contractual and corporate arrangements can be manipulated more readily and with a minimum of practical inconvenience.

It may be that the court in the *Cannet Freight Cartage* case has in mind this question of integration. The weakness of their judgment, if this is so, is that they find an absence of integration too easily on the basis of mere contractual arrangements.

The opinion of Heald J. is particularly unsatisfactory if it is intended to be constitutionally significant in light of an analogy which he draws to the case of grain elevator employees engaged in loading freight cars. Heald J. indicates that it could not be seriously argued that such employees would be within the jurisdiction of the federal board, but that this would be the logical consequence if the jurisdiction of the Board is extended to the Cannet Freight Cartage employees. If this means that grain elevator employees could not constitutionally be brought under the jurisdiction of the federal Board, then Heald J. seems to have made a rather serious oversight.

By virtue of section 43 of the Canada Grain Act,[18] most grain elevators that might be involved in loading grain on a

[18] S.C., 1970-71-72, c. 7.

freight car are works declared to be for the general advantage of Canada. The labour relations of all employees of such elevators would seem clearly to fall within federal legislative power, regardless of whether the employees were actually engaged in loading freight cars. Indeed, they would seem rather clearly to fall within the application provisions of the Canada Labour Code as well.

An Alternative Interpretation

If the *Cannet Freight Cartage* decision is unsatisfactory as an interpretation of the constitutional limits of the power of Parliament, does it admit of a reasonable interpretation that involves only a determination of the extent to which Parliament has delegated matters within its power to the jurisdiction of the Canada Labour Relations Board? It is submitted that it does.

The wording of section 108 of the Canada Labour Code deliberately plays upon the indefinite scope of the federal power over labour relations as an incidental power. It uses as a base the concept of a "federal work, undertaking or business" which is defined by section 2 of the Code as a "work, undertaking or business that is within the legislative authority of the Parliament of Canada". However, it is not simply the employees of a federal work, undertaking or business who are covered. It is "employees who are employed upon or in connection with the operation of any federal work, undertaking or business".

This wording seems to recognize the two-level implications of an incidental power. An incidental federal power involves a core of activity which is clearly within federal power and a penumbra of activity which falls within federal power because of its close relationship to activity in the core. Strictly speaking, it is only the power in the penumbra that is incidental.

It would seem that the definition of "federal work, undertaking or business" as one "within the legislative authority of the Parliament of Canada" might be interpreted as referring only to the core of federal power over labour relations, and not to the penumbra. If this definition refers to all works, undertakings or businesses within federal power, whether in the core or the penumbra, then the words in section 108 "employed upon or in connection with the operation of" a federal work, undertaking or business are unnecessary verbiage. It would be sufficient to say every employee of a federal work, undertaking or business since that would bring in everything within federal power by virtue of the definition.

On the other hand, if the definition refers only to activities in the core of federal power, then the wording from section 108 quoted above serves the purpose of bringing in activity in the penumbra. In other words, it brings in the truly incidental part of the federal power, that is, activities which are federal because of the relation or "connection" to activities which are clearly within federal power.

Viewed in this way, the operations of Canadian National Railway lie at the core, while the operations of Cannet Freight Cartage lie, if within federal power at all, in the penumbra. The decision in the *Cannet Freight Cartage* case can then be interpreted simply as a decision that the employees involved do not fall within the wording used in section 108 of the Canada Labour Code to bring employees in the penumbra within the jurisdiction of the Canada Labour Relations Board. This does not necessarily have constitutional significance since it is possible that the wording used in section 108 does not exhaust the possible relationships that can bring employees within the penumbra of federal legislative power over labour relations.

The decision in the *Cannet Freight Cartage* case admits of such an interpretation because it does, quite properly, concentrate upon the words of section 108 of the Canada Labour Code. This leaves the question of why the Cannet Freight Cartage employees do not fall within that wording.

Two possibilities are suggested on an initial reading of the judgment of Jackett C.J., with which Hyde D.J., expresses agreement. They are that the work is not connected with federal undertaking or that the work is not part of the operation of the federal undertaking.

Jackett C.J., uses the word "connection" repeatedly in a way that suggests it is the key to his decision. At the same time, he admits that there is a physical connection and he does not really bother to explain why a physical connection is not a "connection". If "connection" is the key word, it would seem to be sufficiently broad a word to encompass the entire relationship between activity at the core of federal power and activity in the penumbra. This would tend to give constitutional significance to the decision, while the basic premise of this analysis is that the decision is unsound if it is constitutionally significant.

An alternative interpretation which can be made of Jackett C.J.'s judgment is that the key word is "operation". Jackett C.J.

uses this word in what may be the key sentence of his decision when he states:[19]

> Just as clearly, a person working for a local businessman in a Province does not fall within those words even though his work, in connection with that man's purely local operation, requires that he perform a large part of all his services physically on the railway's right of way or rolling stock.

In other words, while Jackett C.J., repeatedly refers to the lack of connection between the employees of Cannet Freight Cartage and the railway, it is arguable that the real basis for his conclusion is not a lack of connection in itself. Indeed, the existence of a physical connection is admitted, as already noted. The real crux is that the employees are involved in their employer's local operation and are not part of the railway operations. It is only because of this involvement in the local operation, and not in the interprovincial operation, that the employees are not, in the terms of the statute, connected with the federal undertaking.

Heald J., uses the terms "operation" and "operator" repeatedly. His judgment can readily be interpreted as turning on the basis that the Cannet Freight Cartage employees are not part of the operation of the federal undertaking.

The view that "operation" is the key word in the statute also accords logically with the emphasis upon contractual relations in distinguishing the case of stevedores held to be within the jurisdiction of the federal Board in the *Industrial Relations and Disputes Investigation Act* reference.[20] It is common to define an operation on the basis of contractual relationships such as those between the forwarding company and Cannet Freight Cartage and those between the latter and its employees. Conversely, it would be uncommon to refer to the relationship between Cannet Freight Cartage and Canadian National Railway as an operation precisely because there was no contractual relationship between them.

If the *Cannet Freight Cartage* decision is interpreted in this way, it need not have constitutional significance. The term "operation" does not appear anywhere in the relevant provisions of the British North America Act. A limiting interpretation of that term has no obvious relevance to the scope of federal power.

---

[19] *Supra*, footnote 9, at pp. 177 (F.C.), 475 (D.L.R.).

[20] *Supra*, footnote 13.

The Relationship of Federal and Provincial Jurisdictions

A side issue which arises if this thesis is correct is whether the Cannet Freight Cartage employees would have recourse under the present state of the law to provincial labour relations jurisdiction, or would be left in a sort of limbo because they fall within federal power but not within the scope of federal legislation. It is arguable that the employees would be in limbo because federal and provincial power is mutually exclusive. On this basis, employees within federal power could not fall within provincial power and therefore would necessarily lie outside the jurisdiction of any provincial labour relations board.

The decision in *Letter Carriers' Union of Canada* v. *Canadian Union of Postal Workers*,[21] might be cited in support of the theory of mutual exclusiveness. In the *Letter Carriers'* case a local company had been engaged by the Post Office to handle and carry mail. The company's employees had applied to the Saskatchewan Labour Relations Board for certification. The Supreme Court held that the Saskatchewan Board had no jurisdiction since the employees were within federal jurisdiction.

The correct interpretation of the *Letter Carriers'* decision, however, would seem to be that the employees in question fell outside the jurisdiction of the provincial Board, not because they fell within the legislative power of Parliament over labour relations, but because they fell within the actual jurisdiction that Parliament had conferred on the federal Board. In other words, it is not a decision that the federal and provincial legislative powers over labour relations are mutually exclusive, but that, once Parliament has conferred jurisdiction on the Canada Labour Relations Board, there is a conflict with the corresponding provincial legislation. Under the doctrine of paramountcy, a conflict between federal and provincial legislation renders the provincial legislation inoperative to the extent of the conflict.

The view that provincial legislative power over labour relations is not limited constitutionally by the potential of federal legislative power in the same area, but only by conflict with an actual exercise of the federal power, is supported by the Supreme Court decision in the *Legislative Jurisdiction over Hours of Labour* reference.[22] This is also the general position where the

---

[21] [1975] 1 S.C.R. 178, 40 D.L.R. (3d) 105, [1974] 1 W.W.R. 452.

[22] *Supra*, footnote 2.

primary power in an area falls under "property and civil rights" while federal power arises incidentally in relation to other matters.[23]

If they have the strength to continue their efforts to unionize, therefore, the employees of Cannet Freight Cartage are probably not faced with any long term obstacle to union certification, whether the Federal Court of Appeal's decision is constitutionally significant or not. In the absence of jurisdiction in the Canada Labour Relations Board, they fall within the jurisdiction of the Ontario Labour Relations Board.

It is true that their employer might tactically attempt to forestall certification by the Ontario Board by rearranging its contractual relations to bring itself under the federal Board's jurisdiction. Because of the implications of paramountcy, such a tactic could be successful. It seems likely, however, that any further attempt to change jurisdictions would be disregarded as the sham that it is. After the employer has shown the connection of its activity with the operation of the federal undertaking, if it attempts this tactic to avoid provincial jurisdiction, it may be doubted that the Federal Court of Appeal would again allow it to escape the jurisdiction of the federal Board. If the employer does not attempt such evasion, the employees would gain certification from the Ontario Board.

The Attitudinal Role of the Federal Court of Appeal

The question of attitude of the Federal Court of Appeal in labour matters is the most distressing feature of that court's decisions in *Cannet Freight Cartage* and *Yellowknife*. While neither case contains any explicit indication of an anti-labour bias, the fact remains that in two cases within a short period of time two different benches of the Federal Court of Appeal have ruled in favour of employers in the tactical gamemanship of taking battles lost before the labour relations board to the courts. The court must realize that the practical effect of such gamemanship, even in a case like *Cannet Freight Cartage* where the employees have the legal alternative of an application to the Ontario Labour Relations Board, is often that union enthusiasm is exhausted by the proceedings. As a result, the employer tends to win his real objective which is simply to avoid unionization.

---

[23] See *Grand Trunk Railway* v. *Attorney-General for Canada*, [1907] A.C. 65 (P.C.), and *Attorney-General for Canada* v. *Canadian Pacific Railway and Canadian National Railway*, [1958] S.C.R. 285, 12 D.L.R. (2d) 625.

In awarding its decision to the employers, in these two cases the court adopted what is at best a narrow interpretation of the relevant legislation and at worst a dubious interpretation of the Canadian constitution. In view of the fact that there is a concurrence of federal and provincial legislation which indicates a virtually unanimous legislative judgment that employees ought to enjoy collective bargaining rights, and that both unions had a reasonable argument that they were within the jurisdiction of the federal Board since they were within federal constitutional power, it must be asked what objective the Federal Court of Appeal was seeking to further by this narrow approach.

While the decision in the *Cannet Freight Cartage* case might be viewed as an effort to preserve provincial jurisdiction, it does so only at the risk of serious confusion when the result is compared with that in the *Industrial Relations and Disputes Investigation Act* reference,[24] particularly in view of the tenuous distinction that is drawn. Since the *Industrial Relations and Disputes Investigation Act* reference was a Supreme Court decision, it must be questioned whether a court below the Supreme Court in the judicial hierarchy should introduce such a major turn around in the development of the law.

Under the doctrine of *stare decisis*, it is doubtful that the Federal Court of Appeal would claim any power to overrule a precedent set by the Supreme Court. Surely the same policy that gives rise to the doctrine of *stare decisis* requires that the court act with extreme caution in introducing a precedent on the basis of which a Supreme Court precedent may be potentially distinguished out of existence. This applies whether the decision in *Cannet Freight Cartage* is viewed as a constitutional one or purely an interpretation of the Canada Labour Code since the reference case involved both.

Since this is constitutionally an area of overlapping federal and provincial power, there would not seem to be any constitutional obstacle to legislative reform if the previous direction of the law is viewed as undesirable. Legislatures at both federal and provincial levels have always demonstrated constant readiness to act on needed changes in the law relating to labour relations. Thus, even if the court views part of its role as the introduction of change in the law where legislative action is unlikely to produce needed change, there would not seem to be any justification for the Federal Court of Appeal to have reversed the course of precedent in this case.

---

[24] *Supra*, footnote 13.

While it is true that the Federal Court of Appeal was established in part to reduce the workload of the Supreme Court of Canada in federal cases, this role is better performed by the elaboration of legal principles in line with the precedents established by the Supreme Court and by filling in gaps left by Supreme Court decisions, rather than by making sharp departures from Supreme Court precedents. If anything, such new departures only make more work for the Supreme Court by reopening for consideration a line of jurisprudence that might otherwise have been settled.

The Effect of the Supreme Court Decision in Yellowknife

The Supreme Court decision in *Yellowknife* throws little direct light on whether the decision in *Cannet Freight Cartage* is sound. Since the Federal Court of Appeal decision in *Yellowknife* clearly was not of constitutional significance, there was little occasion to review the respective delimitations of federal and provincial power over labour relations which are relevant to the possible constitutional significance of *Cannet Freight Cartage*. Since the issue of interpretation in *Yellowknife* was whether the municipality's activities were a "work, undertaking or business", there was little occasion to discuss the question of what constitutes a "connection with the operation of" any federal work, undertaking or business.

Pigeon J., delivering the majority opinion, does note the settled proposition, illustrated by the *Empress Hotel* case,[25] that "jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer". This may give some support to the view that the Federal Court of Appeal decision in *Cannet Freight Cartage* is defective in that it looks only at the identity of the contractual employer, and not at the operation itself. This in turn could support arguments both that the Cannet Freight Cartage employees were within the constitutional jurisdiction of Parliament and that they were part of the "operation" as that term is used in the Canada Labour Code.

More importantly, the attitude of the Supreme Court contrasts significantly with that indicated by the Federal Court of Appeal decisions. Pigeon J., quotes the preamble to the 1972 statute which enacted what is presently Part V of the Canada

---

[25] *Supra*, footnote 17.

Labour Code[26] as expressing the basic intent of the Code. He views this intent as ensuring that everyone enjoys the benefits of collective bargaining in fulfilment, subject to constitutional limitations, of course, of Canada's obligations under International Labour Organization conventions. It is a short step from recognition of this intent to the conclusion that Parliament did indeed intend to legislate up to the limits of its constitutional jurisdiction. Pigeon J., further states that "it would not be proper to seek to put a restricted meaning on any of the words 'work, undertaking or business' as used in the Labour Code". It is again a short step to the conclusion that it would not be proper to seek to put a restricted meaning on the words "in connection with the operation of" such a work, undertaking or business.

In his concurring opinion, Laskin C.J., favours resolving any ambiguity or doubt "in favour of inclusion rather than of exclusion". The Supreme Court with unanimity, therefore, expresses approval of a policy that favours a liberal and inclusive interpretation of the jurisdiction of the Canada Labour Relations Board.

When added to the tension between the *Cannet Freight Cartage* result and the decision in the *Industrial Relations and Disputes Investigation Act* reference,[27] these policy statements from the Supreme Court suggest that the *Cannet Freight Cartage* decision is wrong. The assumption of concurrence between the jurisdiction of Parliament over labour relations and the jurisdiction of the Canada Labour Relations Board, subject to express exclusions, may yet be valid.

ROBERT W. KERR*

* * *

CRIMINAL LAW—CRIMINAL PROCEDURE—INSTRUCTING A JURY ON THE POSSESSION OF STOLEN PROPERTY—CANADIAN CONTENT AND THE RULE IN R. V. SCHAMA; R. V. ABRAMOVITCH.—The question of what constitutes the proper instruction to a jury concerning the possession by an accused of recently stolen property has just been considered by the Supreme Court of Canada.[1] The

---

[26] *Supra*, footnote 5.

[27] *Supra*, footnote 13.

* Robert W. Kerr, of the Faculty of Law, University of Windsor, Ont.

[1] *Newton*, [1976] 3 W.W.R. 199, 28 C.C.C. (2d) 286.

decision represents a Canadian variation on the rule set out in the English case of *R.* v. *Schama; R.* v. *Abramovitch*[2] which rule has been followed, relatively uncritically, by Canadian courts since its promulgation by Reading C.J. in 1914.[3]

The material facts in *Schama and Abramovitch* are easily stated. Schama was found in possession of recently stolen property. On his trial he gave evidence explaining the possession as innocent. In dealing with these facts, Reading C.J., had this to say:[4]

> Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury thinks that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal. . . .

This rule has been frequently applied by English courts particularly in the years immediately following its promulgation[5] though even then it attracted some unfavourable comment.[6] Despite certain well-founded judicial reservations the rule continues to be relied on in English decisions.[7] Generally speaking, these reservations relate to the possibility of an instruction in the form of the rule leaving a jury with the impression that the burden of proof in a criminal trial involving an allegation of possession of recently stolen property may, at some stage, shift to the accused. This certainly was the concern of the English Court of Criminal Appeal in cases such as *Garth*[8] and *R.* v. *Hepworth*; *R.* v. *Fearnley*.[9]

---

[2] (1914), 11 Cr. App. R. 45, [1914-15] All E.R. 204. Hereafter cited as *Schama and Abramovitch.*

[3] All judicial designations are given as at the date of the decision.

[4] *Supra*, footnote 2, at p. 49 (Cr. App. R.).

[5] See for example *Aubrey* (1915), 11 Cr. App. R. 182; *Millington* (1915), 11 Cr. App. R. 86; *Badash* (1917), 13 Cr. App. R. 17, 87 L.J.K.B. 732; and *Brain* (1918), 13 Cr. App. R. 197.

[6] *Hamilton* (1917), 13 Cr. App. R. 32, 87 L.J.K.B. 734.

[7] *Booth* (1946), 175 L.T. 306, 90 Sol. Jo. 347; *Garth* (1949), 33 Cr. App. R. 100, [1949] 1 All E.R. 773; *Aves* (1950), 34 Cr. App. R. 159, [1950] 2 All E.R. 330; and *R.* v. *Hepworth*; *R.* v. *Fearnley* (1955), 39 Cr. App. R. 152, [1955] 2 All E.R. 918. All, interestingly, decisions of Lord Goddard, C.J.

[8] *Ibid.*, at p. 101 (Cr. App. R.).

[9] *Ibid.*, at p. 154 (Cr. App. R.).

Prior to the decision in *Newton*,[10] a decision of the Supreme Court of Canada, the rule had been frequently applied by Canadian courts. The first reported case in which it was applied in this country was a decision of the Nova Scotia Supreme Court in 1928[11] and it has been regularly followed since that time.[12] Our courts have shared, on occasion, the reservation expressed in *Garth*[13] but then *Garth* is, at least on one view, an endorsation of the rectitude of the rule if properly applied.[14] *Newton* may dramatically affect the way in which the rule is applied in Canada. To understand *Newton* a brief review of two cases prior to it is necessary.

In 1970 the British Columbia Court of Appeal decided in *Hodd*[15] that in those cases in which the Crown proved possession of recently stolen property, and the Crown had in its possession a statement[16] of the accused that a jury might find offered an explanation that might reasonably be true, the Crown had to follow one of two possible courses.[17] Either the Crown could withhold the statement[18] and elect not to rely on the inference arising from the proof of possession of recently stolen property or introduce the statement and be permitted to rely on the

---

[10] *Supra*, footnote 1.

[11] *Morton* (1929), 60 N.S.R. 302, [1929] 1 D.L.R. 720.

[12] See as examples *Searle* (1929), 24 Alta L.R. 37, [1929] 1 W.W.R. 491 (A.D.); *Koriney* (1931), 25 Alta L.R. 452, [1931] 2 W.W.R. 566 (A.D.); *R.* v. *Webb*; *R.* v. *Schwartz* (1936), 43 Man. R. 507, [1936] 1 D.L.R. 685 (C.A.); *Sullivan and Godbolt* (1946), 62 B.C.R. 278, [1946] 2 D.L.R. 759 (C.A.); *Bell*, [1966] 1 O.R. 637, 49 C.R. 153 (C.A.) and *Osherow*, [1972] 4 W.W.R. 755, 19 C.R.N.S. 246 (Alta S.C.); and see the following decisions of the Supreme Court of Canada: *Richler*, [1939] S.C.R. 101, [1939] 4 D.L.R. 281; *Ungaro*, [1950] S.C.R. 430, [1950] 2 D.L.R. 593; *Clay*, [1952] 1 S.C.R. 170, (1951), 13 C.R. 97; *Tremblay*, [1969] S.C.R. 431, 10 D.L.R. (3d) 346; and *Graham*, [1972] 4 W.W.R. 488, (1972), 26 D.L.R. (3d) 579.

[13] *MacQuarrie* (1964), 49 M.P.R. 418, 43 C.R. 97 (P.E.I.C.A.).

[14] *Supra*, footnote 7, at p. 101 (Cr. App. R.).

[15] (1970), 75 W.W.R. 413, 12 C.R.N.S. 200.

[16] The statement referred to here and in connection with the cases discussed *infra* is a statement in writing, unless the context otherwise indicates.

[17] In fact three, but only two are relevant for our purposes.

[18] In Canada the Crown has a discretion as to whether it will introduce a statement by the accused or not (*Hughes*, [1942] S.C.R. 517, [1943] 1 D.L.R. 1) and in practice it frequently does not introduce it. In England, introduction is favoured (*Storey* (1968), 52 Cr. App. R. 334, 118 New L.J. 373; and see Archbold, Criminal Pleadings and Evidence and Practice (38th ed., 1973), para. 1392).

inference.[19] As this brief statement of the issue shows, the decision in *Hodd* turned not on the question of the propriety of a charge in the words of the rule in *Schama and Abramovitch* but rather on the question of the tendering of a statement of the accused in the possession of the Crown being a necessary pre-condition which had to be satisfied before the Crown could rely on the inference arising from possession of recently stolen property. The Crown's application for leave to appeal the decision in *Hodd* to the Supreme Court of Canada was refused.[20]

Two years later the British Columbia Court of Appeal was faced with the same issue in *Graham*,[21] another case of possession of recently stolen property. The Crown proved possession in the accused and the recentness of the theft. The Crown refused to tender a statement by the accused, in the possession of the Crown, which statement a jury might have found offered an explanation that might reasonably be true. The accused did not give evidence. The trial judge charged the jury with the rule in *Schama and Abramovitch*. The British Columbia Court of Appeal, following its decision in *Hodd*, allowed the accused's appeal on the ground that if the trial judge were to charge the jury with the rule in *Schama and Abramovitch* then either the Crown should be required to put the accused's statement in evidence or the defence should be entitled to cross-examine the statement out.

The case was appealed to the Supreme Court of Canada.[22] By a four to three decision the court decided that in the circumstances before it the trial judge's decision was correct and that the Crown's discretion to decide whether or not to lead the statement should not be interfered with. The decision is not without some problem. The dissenting judgments support the decision in *Hodd*[23] and even the majority judgment allows some room for the principle articulated in *Hodd* on the narrow question of the admissability of such statements as part of the *res gestae*.[24] But putting the *res gestae* exception aside, it is hard to see how *Hodd* can be taken to have survived *Graham*.

---

[19] *Supra*, footnote 15, at pp. 422-423 (W.W.R.). I do not propose to discuss the correctness of the concept of the Crown "electing" to "rely" on an inference that arises from evidence proved.

[20] [1971] 5 W.W.R. 281, 15 C.R.N.S. 249.

[21] [1971] 2 W.W.R. 45.

[22] *Supra*, footnote 12.

[23] *Ibid.*, at pp. 586 and 595 (D.L.R.).

[24] *Ibid.*, at pp. 585-586 (D.L.R.).

In *Newton*[25] there was no evidence that an explanation had ever been offered.[25A] The facts of *Newton* are in all other material respects identical to those given earlier for *Hodd* and *Graham* and the trial judge refused to instruct the jury on the basis of the rule in *Schama and Abramovitch*. In the British Columbia Court of Appeal, and subsequently in the Supreme Court of Canada, all judges agreed that *Hodd* did not survive the Supreme Court of Canada decision in *Graham*. However the British Columbia Court of Appeal, three to two, found against the Crown appeal on the ground that in circumstances such as *Newton*, where there was no evidence that an explanation had ever been offered, then a direction in the terms of *Schama and Abramovitch* would constitute comment by the trial judge on the accused's failure to testify. Comment of this nature, though permitted of English judges, is prohibited in Canada by virtue of section 4(5) of the Canada Evidence Act.[26]

The Crown appealed to the Supreme Court of Canada where the case was heard by the full court of nine judges. There were three judgments. Those of Ritchie J.[27] and Pigeon J.[28] (who agreed with Ritchie J.) represent, with concurring judgments, the decision of seven of the nine.[29] Neither Ritchie J. nor Pigeon J. were impressed by the argument concerning section 4(5) of the Canada Evidence Act and their decisions did not turn on that issue.

For our purposes it is Pigeon J.'s judgment that is most instructive. His Lordship directed his attention to the question of what constitutes a proper direction to the jury in cases such as *Newton*. Having discussed the rule in *Schama and Abramovitch* he went on to consider its application in cases such as the one then before him. He held that in such cases the "... trial judge [should] give the direction omitting the words: 'in the absence of any reasonable explanation'. In circumstances of [cases like *Newton*], those words [are] unnecessary [as there is] no evidence of an explanation".[30] Though his view of section 4(5) caused him to arrive at a different conclusion Seaton J.A., in the court

---

[25] [1975] 2 W.W.R. 404, 21 C.C.C. (2d) 550.

[25A] *Ibid.*, at p. 415 (W.W.R.).

[26] R.S.C., 1970, c. E-10.

[27] *Supra*, footnote 1, at p. 200 (W.W.R.).

[28] *Ibid.*, at p. 207 (W.W.R.).

[29] I do not propose to discuss the judgment of Dickson J. (Laskin C.J.C., concurring).

[30] *Supra*, footnote 1, at p. 208 (W.W.R.).

below, is in agreement on this point with Pigeon J. Seaton J.A. made the point that without an explanation in evidence the possession of recently stolen property is really nothing more than circumstantial evidence from which the jury may, subject to the rule in *Hodge's*[31] case, draw an inference of guilt.[32] Accordingly "the explanation that might reasonably be true", to adopt the language of *Schama and Abramovitch*, is nothing more or less than a fact "inconsistent with any other rational conclusion" than guilt, to adopt the language of *Hodge's* case.[33] If this is so it follows that a Canadian trial judge, sitting with a jury, faced with circumstances such as those in *Newton*, should not refer to the question of an explanation at all. It is respectfully submitted that the reasoning of Pigeon J. is to the effect that such reference would amount to misdirection.

It should be pointed out that there would appear to be no reason why the decision in *Newton* would not apply with equal force to those cases in which an explanation is offered, but the explanation is not tendered in evidence.

JAMES P. TAYLOR*

* * *

WHAT IS "LAW"?—DIRECTIVES OF THE COMMISSIONER OF PENITENTIARIES AND SECTION 28 OF THE FEDERAL COURT ACT—THE TIP OF THE ICEBERG OF "ADMINISTRATIVE QUASI-LEG-

---

[31] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.

[32] *Supra*, footnote 25, at pp. 405 *et seq.* (W.W.R.).

[33] *Supra*, footnote 31, at p. 228 (Lewin C.C.). Though there is recent authority in England to the effect that there is no necessity for a special direction regarding circumstantial evidence (*McGreevy* v. *D.P.P.* (1973), 57 Cr. App. R. 424, [1973] 1 All E.R. 503) Canadian courts have consistently required a direction in the terms suggested in *Hodge's* case in those cases in which the Crown's case is comprised entirely of circumstantial evidence (see *Lizotte* v. *The King*, [1951] S.C.R. 115, [1951] 2 D.L.R. 754 and *Duscharm*, [1955] O.R. 824, 1 D.L.R. (2d) 732 (C.A.). Despite the wide language of these cases the rule would seem to be limited in Canada to the issue of identity: *Mitchell*, [1964] S.C.R. 471, 46 D.L.R. (2d) 384; and where there is direct evidence as well as circumstantial evidence an instruction in the terms of the rule may be avoided: *Ball* (1957), 21 W.W.R. 113, 25 C.R. 250 (B.C.C.A.). The failure to give the instruction may not constitute an appealable error due to s. 613(1)(b)(iii) of the Canadian Criminal Code, R.S.C., 1970, c. C-34, which provides that an appeal may be refused if, despite error, the appellate court is satisfied there was no substantial miscarriage of justice).

* James P. Taylor, of the Faculty of Law, University of British Columbia.

ISLATION".—The purpose of this comment is to call attention to a recent judgment of the Supreme Court of Canada which deals with the legal status of directives issued by the Commissioner of Penitentiaries and to place it in the context of the broader administrative law issue of "quasi-legislation". The focus will be fairly narrow and will leave to others the task of assessing the broader impact of the judgment on the development of Canadian administrative law. While narrow in focus, the field to be covered is not lacking in depth for, as will be seen, the Supreme Court has only touched briefly on an issue of considerable contemporary importance.

The appellants in *Martineau and Butters* v. *The Matsqui Institution Inmate Disciplinary Board*[1] were inmates in a federal penitentiary who sought judicial review in the Federal Court of Appeal of the decision of an inmate disciplinary board which had sentenced them to fifteen days solitary confinement with restricted diet and loss of privileges. Section 28(1) of the Federal Court Act[2] provides:

> Notwithstanding s. 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal....

Jurisdiction to review was thus dependent on a finding that the disciplinary decision was not one "of an administrative nature not required by *law* to be made on a judicial or quasi-judicial basis". Directive No. 213 issued by the Commissioner of Penitentiaries on May 1st, 1974 established a comprehensive procedural code[3] for inmate discipline involving serious offences. Written notice had to be given to the accused as well as a summary of the evidence alleged against him; he was to have an opportunity to make a full answer and defence to the charge against him including the right to give and call evidence and cross examine witnesses. Finally, and most importantly, section 13(d) of the Directive provided:

> The decision as to guilt or innocence shall be based solely on the evidence produced at the hearing and, if a conviction is to be registered, it can only be on the basis that, after a fair and impartial weighing of the evidence, there is no reasonable doubt as to the guilt of the accused.

---

[1] Supreme Court of Canada, judgment pronounced March 8th, 1977.

[2] S.C., 1970-71-72, c. 1.

[3] Directive No. 213, May 1st, 1974. There is no fuller reference.

The issue posed by the Supreme Court of Canada was whether the Directive was to be considered "law" within the wording of section 28 of the Federal Court Act. For the majority the answer was to be in the negative.[4] In speaking of directives, Mr. Justice Pigeon concluded:[5]

> It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative and not a legislative nature....
>
> In my opinion it is important to distinguish between duties imposed on public employees by statutes or regulations having the force of law and obligations prescribed by virtue of their condition of public employees. The members of a disciplinary board are not high public officers but ordinary civil servants. The Commissioner's directives are no more than directions as to the manner of carrying out their duties in the administration of the institution in which they are employed.

The minority refused to adopt this position which Chief Justice Laskin characterized as "... too nihilistic a view of law for me to accept". He conceded that many directives might deal with purely administrative matters but what was involved in this case was no routine rule of management but "carefully wrought rules of procedure" prescribed under statutory authority.

> The absence of a penal sanction for the rules or directives can be no more compelling on whether law is involved (with a corresponding duty of obedience) than in the absence of a penal sanction in respect of rules of procedure governing the orders of other tribunals which are found by the Courts to be quasi-judicial bodies whose decisions are reviewable under s. 28(1) of the *Federal Court Act*. The reviewing court imposes a sanction by the very fact of review. Moreover it is fallacy to contend that rules or directives are less a matter of "law" than are regulations whose breach is punishable. Rules of procedure of a tribunal are addressed to it and to those affected by the powers exercisable by the tribunal, and it would be odd, indeed, if a penal sanction was imposed upon tribunal members for failure to follow them. The sanction for obedience to them rests

---

[4] The reasons of the court were delivered by Pigeon J. with Ritchie, Beetz and de Grandpré JJ. concurring. Judson J. concurred separately and adopted the reasons of Jackett C.J. in the Federal Court of Appeal. That judgment had not dealt specifically with the legal status of the directives as such although Jackett C.J. did conclude that prison disciplinary decisions were not required to be made on a judicial or quasi-judicial basis "... even though they are required by administrative rules to be made fairly and justly". *Martineau* v. *The Matsqui Institution*, [1976] 2 F.C. 198, at p. 211. Thus technically speaking, the court was equally divided on the status of the Directive.

[5] At p. 7 of his judgment.

> on the vulnerability of the tribunal's decisions if made in disregard of its operating rules.[6]

Neither majority nor minority looked particularly closely at section 29(3) of the Penitentiary Act,[7] which gave the commissioner authority to make Directive No. 213 in the following terms:

> ... the Commissioner may make rules, to be known as Commissioner's directives, for the organization, training, discipline, efficiency, administration and good government of the Service, and for the custody, treatment, training, employment and discipline of inmates and the good government of penitentiaries.

The very words of the section would seem to make it clear that the directive power was to deal with matters relating to the prison service and with the discipline of inmates as well. It is true that section 29(1) provides that the Governor in Council may make regulations covering the same matters, yet the separate reference to inmate discipline would seem to run counter to the majority's characterization of directives as "... no more than directions as to the manner of carrying out their duties in the administration of the institution in which they are employed". If all that directives were to be concerned with were the obligations of public employees, one might have thought that the statutory authorization would have been similarly confined.

Be that as it may, the most startling omission from *Martineau* is the total lack of any consideration of the legal status of a directive under the Statutory Instruments Act.[8] This issue has been forcefully brought to public attention in the recent *Second Report of the Standing Joint Committee on Regulations and Other Statutory Instruments*.[9] The committee has concluded that it is satisfied that "directives" under the Penitentiary Act are not only "statutory instruments" but, in fact, "regulations", and as Mr. Justice Pigeon succinctly remarked in *Martineau*, "I have no doubt regulations are law".[10]

The definition section of the Statutory Instruments Act is a difficult piece of legislation to comprehend. Senator Godfrey,

---

[6] At pp. 5-6 of his judgment.

[7] R.S.C., 1970, c. P-6.

[8] S.C., 1970-71-72, c. 38.

[9] Second Report of the Standing Joint Committee of the Senate and House of Commons on Regulations and Other Statutory Instruments, (Ottawa, 1977).

[10] At p. 6 of his judgment.

a member of the joint committee has confessed, "I get a headache reading it" and the committee's joint chairman, Senator Forsey, is of the view that it exemplifies the legislative draftsman's ultimate confession: "When I drafted that God and I only knew what it meant; now God alone knows."[11] The committee has unanimously agreed that the definition of a statutory instrument is "incomprehensible and unworkable".[12] Yet it is possible to grasp the thrust of the committee's position on the commissioner's directives without becoming too ensnared in a semantic thicket in which the definition "is so hedged about with exceptions at one and the same time explicit in nature but obscure in meaning and with qualifications direct and indirect and so flawed with a triple negative that it is useless".[13]

The key section of the Statutory Instruments Act, section 2(1)(d), provides:

> "statutory instrument" means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued....

Lack of any specific reference to a "directive" is not necessarily fatal because, according to section 29(3) of the Penitentiary Act, the commissioner may make "... rules to be known as Commissioner's directives ...". Moreover, such rules are "expressly authorized" in the Act and in the preamble to Directive No. 213 it was stated that it was, indeed, issued pursuant to subsection 29(3) of the Penitentiary Act.

Once it is established that the document in question is a statutory instrument there are then two routes by which it can be deemed to be a regulation. Section 2(1)(b)(ii) of the Statutory Instruments Act provides that "regulation" means any statutory instrument "... for the contravention of which a penalty, fine or imprisonment is prescribed by *or under* an Act of Parliament". Section 2.29(n) of the Penitentiary Service Regulations,[14] made *under* section 29(1) of the Penitentiary Act,

---

[11] Minutes of Proceedings of the Standing Committee on Regulations and Other Statutory Instruments, Issue No. 2, October 31st, 1974, p. 23.

[12] Second Report, *op. cit.*, footnote 9, p. 13.

[13] *Ibid.*, p. 15.

[14] S.O.R./62-90 as am.

provides that any inmate commits a disciplinary offence who ". . . contravenes any *rule, regulation or directive* made under the Act". Section 2.28 of the Penitentiary Service Regulations provides a code of penalties for the punishment of inmates convicted of disciplinary offences. It would therefore appear that the test has been met — a penalty has been prescribed under an Act of Parliament for the contravention of a "directive" which must therefore be treated as a "regulation".

The second route to regulation status is via section 2(1)(b)(i) of the Statutory Instruments Act which provides that a "regulation" is a statutory instrument "made in the exercise of a legislative power conferred by or under an Act of Parliament". Although not directly referred to in *Martineau* it would no doubt be the contention of Mr. Justice Pigeon that a directive is made in the exercise of an "administrative" rather than a "legislative" power. While this distinction is, no doubt, often a difficult one to make, de Smith has provided us with a useful test.

> The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.[15]

Directive No. 213, inasmuch as it laid down a general code of procedure to be followed in disciplinary matters, would seem, according to this standard test, to be a legislative rather than administrative act. It might, alternatively, be argued that the effect of the directive must be taken into account. If the effect is solely to guide employees in the manner in which they are to exercise their powers, then it could be said that if the power does not affect non-employees directly, it is merely an internal management instrument and not legislative in effect. Yet to adopt this position here is to lose sight of reality. Directive No. 213 was not concerned with the "organization, training, discipline, efficiency, administration of the Service" (as provided for in directives under the first half of section 29(3) of the Penitentiary Act) but very specifically with the "discipline of inmates" (as provided for in directives under the second half of

---

[15] de Smith, Judicial Review of Administrative Action (3rd ed., 1973), p. 60.

section 29(3) of the Penitentiary Act). As such it cannot be said to be simply an instance of an instruction to staff, for a category which encompasses routine employment matters such as overtime pay, vacations, in-house training, promotion procedures as well as a comprehensive inmate disciplinary code is surely hopelessly overbroad and unworkable.[16]

In this regard it is interesting to note, as has been pointed out by the joint committee, that the "standing orders" made by the commissioner of the Royal Canadian Mounted Police under an identical enabling power to that authorizing commissioner's directives under the Penitentiaries Act, are universally regarded as regulations.[17] If these standing orders, which do not affect anybody but members of the Royal Canadian Mounted Police and are confined to internal organizational matters are now recognized to be regulations, then all the more so must commissioner's directives because they affect inmates as well as members of the Prison Service.

Closely allied to the question of the legal status of documents such as directives is the issue created by the widespread use of guidelines, circulars, directives and manuals. The use of "secret guidelines" respecting the entry of American deserters and draft dodgers to Canada in the late 1960's provided a major impetus for the setting up of the Special Committee on Statutory Instruments.[18] The committee recommended that "... all department directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny".[19] In its statement on the implementation of the committee's report the government committed itself to deal with the publication of departmental directives

---

[16] This analysis is drawn largely from the Second Report, *op. cit.*, footnote 9, pp. 17-18.

[17] At the moment the standing orders are exempt from publication by virtue of the Statutory Instruments Regulations "... but that exempt status has been voluntarily surrendered by the commissioner and standing orders will in the near future be dealt with fully as regulations under the Statutory Instruments Act, which necessarily means that they will be public documents unreservedly open to the public". Second Report, *op. cit.*, footnote 9, p. 17.

[18] Third Report of the Special Committee on Statutory Instruments (Ottawa, 1969). The report is popularly known as the "MacGuigan Report" after its Chairman, Mark MacGuigan, M.P. For a discussion of the use of guidelines in immigration, see pp. 24-27.

[19] *Ibid.*, p. 29.

and guidelines by means of a cabinet directive. Directives or guidelines which were "essentially legislative" would be incorporated into regulations.[20] Unfortunately, the definition of regulation in the new Statutory Instruments Act ostensibly designed to implement the committee's report, effectively undermined this commitment by containing exactly the same loopholes previously employed to avoid the publication of guidelines — "statutory instruments" have to be "expressly authorized" under an Act of Parliament, and "regulations" have to be made "in the exercise of a legislative power".

Immigration guidelines, for example, unlike Directive No. 213, are not conceded to be made under any specific statutory authority and are therefore characterized simply as internal instructions to staff and thus not made in the exercise of a legislative power.[21] Thus a guideline which spells out for immigration officers the meaning to be given to a term such as "crime of moral turpitude" and which has a direct and immediate effect on a would-be immigrant, does not have to be made public or subjected to parliamentary scrutiny. It amounts, to put it bluntly, to secret law. Ironically, the definition section is so weak that resort has not yet even had to be made to another "out" provided in the Statutory Instruments Act. Section 2(1)(d)(v) exempts any instruments "whose contents are limited to advice or information intended only for the use or assistance in the making of a decision or the determination of a policy or in the ascertainment of any matter necessarily incidental thereto . . .".

The possibility that the ample mantle of "natural justice" may, on occasion, provide an effective deterrent to "secret law" has recently been clearly demonstrated in a judgment of the Nova Scotia Supreme Court, Appeal Division, *Re Michelin Tires (Canada) Limited*.[22] There a manufacturer prepared to arrange his affairs on the strength of a definition made by the Minister of Finance under a tax Act. Without any publicity the definition was changed at a time when it was still possible

---

[20] Commons Debates, June 16th, 1970, p. 8155.

[21] The Standing Joint Committee has pointed out, however, that section 58 of the Immigration Act, R.S.C., 1970, c. I-2, does give authority for regulations and this may well be the source of the guidelines, rather than any inherent power to administer the Department. See, Second Report, *op. cit.*, footnote 9, p. 19.

[22] (1976), 15 N.S.R. (2d) 150. And see, H. N. Janisch, Secret Law Condemned (1976), 2 N.S.L.N. 19.

to take this change into account to minimize tax liability. By the time the change was known to the manufacturer it had committed itself to a course of action which would have made good sense under the old definition but exposed it to extensive tax liability under the new. This "cloud of secrecy" was roundly denounced by the court. Chief Justice MacKeigan noted that although there was no question of any requirement of publication under the Regulations Act,[23] this did not conclude the matter. "Where such formal issuance is not required", he remarked, "I would like to think that effective issuance involves some reasonable minimum publication, the nature and degree of which will depend on the kind of order and the persons to whom it is directed".[24]

More than thirty years ago R. E. Megarry noted the rise of what he dubbed "administrative quasi-legislation":[25]

> Not long ago, practitioners could live with reasonable comfort and safety in a world bounded by Acts of Parliament, Statutory Rules and Orders and judicial decisions. One of the tendencies of recent years is for this world to become an expanding universe. Decisions of administrative tribunals are comparatively well-known additions to the lawyer's burden. A more interesting and perhaps less well-known accretion consists of what may be called administrative quasi-legislation.

This "law-which-is-not-a-law" was seen to be a mixed blessing for it was "somewhat of a curate's egg". On the one hand, there was much to be said in favour of the announcement of policies and advanced rulings on doubtful points. On the other hand, there was something offensive about an "administrative gloss" on statutes and a process by which "... unrepealed words of the statute book may be emasculated not by the Legislature or the judiciary, but by mere administrative process". Yet the complexities of modern government were such that "quasi-legislation" was virtually inevitable, and what was needed was a recognition that this development take place publicly. "Perhaps the main objection to which administrative quasi-legislation is open", Megarry concluded, "is its haphazard mode of promulgation".[26]

---

[23] R.S.N., 1967, c. 266.

[24] *Supra*, footnote 22, at p. 176.

[25] R. E. Megarry, Administrative Quasi-Legislation (1944), 60 L.Q. Rev. 125, at pp. 125-126.

[26] *Ibid.*, at p. 128.

This type of haphazard promulgation is inevitable as long as informal law-making is not given the recognition it deserves. What is offensive about administrative guidelines and manuals is not their existence but their secrecy. Carefully thought out guidance as to the meaning to be given to "crime of moral turpitude", made openly, and thus subject to judicial review, is much to be preferred over *ad hoc* interpretations by individual immigration officers.[27]

Modern Canadian statutes provide many examples of "administrative quasi-legislation". What, for example, is the legal status of each of the following? Designated region orders made under the Regional Development Incentive Act?[28] Special area orders made under the Department of Regional Economic Expansion Act?[29] Designated area orders made under the National Housing Act?[30] Directions issued to the C.T.C. or C.R.T.C. under the proposed new transportation and communications legislation?[31] Ministerial prescriptions under the Anti-

---

[27] For a recent reassessment of the potential use of pre-determined policies, see D. J. Galligan, The Nature and Function of Policies within Discretionary Power, [1976] P.L. 332.

The classic articulation of the need to structure discretion by way of open policy statements and rules remains, K. C. Davis, Discretionary Justice (1969). For major contemporary developments in rule-making in the United States, see K. C. Davis, Administrative Law of the Seventies (1976), ch. 6.

For a proposal that greater use be made of policy statements and the like in the regulatory process, see H. N. Janisch, The Canadian Transport Commission: An Agency Study for the Law Reform Commission of Canada (forthcoming), ch. 7, "The Commission and Transportation Policy".

A particularly interesting Canadian development is to be found in s. 27 of the British Columbia Labour Code, S.B.C., 1973 (2nd Sess.), c. 122 as am., which provides for the formulation and publication by the Labour Relations Board of "general policies" for the guidance of the public and Board. Such policies are not, however, made binding on the Board and thus give it a flexible statutory power to fill the gap which all too often exists between formal regulations and individual adjudications. For an example of the exercise of this power, see Statement of Policy: Section 96 of the Labour Code (1976), 2 Can. L.R.B.R. 17.

[28] R.S.C., c. R-3, s. 3.

[29] R.S.C., c. R-4, s. 6.

[30] S.C., 1973-74, c. 18, s. 34(1)(a)(ii). These three, and several other examples, are discussed in the Second Report, *op. cit.*, footnote 9, pp. 16-17.

[31] Bill C-33, s. 3.2; Bill C-43, s. 9. It should be noted that similar "directions" in the Energy Supplies Emergency Act, S.C., 1973-4, c. 52, s. 2(2), are specifically declared to be "statutory instruments".

Dumping Act?[32] Ministerial guidelines under the Foreign Investment Review Act?[33]

The time has come to shed light on what the joint committee has called ". . . the twilight world of unpublished statutory instruments". Or, to use Megarry's analogy, it is time to take a closer look at the curate's egg to see whether it is indeed bad "only in parts".

H. N. JANISCH*

* * *

CONFLICT OF LAWS—THE 1976 HAGUE CONVENTIONS ON MARRIAGE AND MATRIMONIAL PROPERTY REGIMES.—The thirteenth session of the Hague Conference on Private International Law was held in The Hague from October 4th-23rd, 1976. The session was the largest yet to be held, and brought together representatives of twenty-eight member states, including Australia, which participated for the first time.[1] It was the third session in which Canada has participated since joining the Conference in 1968.[2] The agenda of the session was particularly heavy, and included three draft conventions on difficult choice of law subjects, as well as the usual deliberations on the future work of the Conference. The latter are of increasing delicacy, given the

---

[32] R.S.C., c. A-15, s. 11. Chief Justice Jackett is of the opinion that as these prescriptions are of a general application they should, more properly, be called "regulations". *In re Anti-Dumping Act and Danmore Shoe*, [1974] F.C. 22, at p. 24.

[33] S.C., 1973-74, c. 46, s. 4(2).

* H. N. Janisch, of the Faculty of Law, Dalhousie University, Halifax, N.S.

[1] The following States are now members of the Conference: Arab Republic of Egypt, Argentina, Australia, Austria, Belgium, Brazil, Canada, Czechoslovakia, Denmark, Federal Republic of Germany, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxemburg, Norway, Netherlands, Portugal, United Kingdom, United States of America, Spain, Sweden, Switzerland, Turkey, Yugoslavia.

[2] See generally Castel, Canada and the Hague Conference on Private International Law: 1893-1967 (1967), 45 Can. Bar Rev. 1. Canada has not yet signed or ratified a Hague Convention. It would appear that none of the conventions concluded before 1968 contained a "federal clause" (as to which see discussion *infra* pp. 594-595) considered relevant and acceptable to this country. The Advisory Group on Private International Law and Unification of Law, Department of Justice, Ottawa, is presently studying the post-1968 conventions with a view to determining the desirability and method of their implementation: [1975] Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference of Canada, Report of the Special Committee on International Conventions on Private International Law 261, at p. 262.

growing number of international and regional organizations which have taken up the task of unification of material or choice of law rules.[3]

In the result, the Conference agreed on the texts of two conventions relating to the Celebration and Recognition of the Validity of Marriages and the Law Applicable to Matrimonial Property Regimes.[4] The third choice of law subject, that of agency, proved to be more elusive, and a Special Commission has been instituted to continue the work of the thirteenth session on this subject in the summer of 1977.[5] The Conference also decided to retain as possible subjects of future conventions: legal aid and security for costs, negotiable instruments, legal kidnapping (unauthorized displacement of children in custody disputes), licensing agreements and know-how, and the revision of earlier conventions on the International Sale of Goods and the Regulation of Conflicts between the Laws of Nationality and Domicile.[6] It was also decided, by the narrowest of majorities, that the Conference would not undertake the formulation of a convention on contractual obligations. The proposal of the United States government to take up this subject, which was supported by the Canadian delegation, was opposed by a number of states as likely to lead to interference with the process of unification now under way in the European Common Market in this area.[7]

The two conventions on marriage and matrimonial property regimes represent the culmination of almost half a century of intermittent efforts to revise the Hague conventions of 1902[8] (on marriage) and 1905[9] (on the effects of marriage). These

---

[3] See Nadelmann, Conflicts between Regional and International Work on Unification of Rules of Choice of Law (1974), 15 Harv. Int'l L.J. 213; Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations (1976), 24 Am. J. Comp. L. 1, at pp. 1-3.

[4] Hague Conference on Private International Law, Thirteenth Session, Final Act, (Final Edition, The Hague, October 23rd, 1976), pp. 2 *et seq.*

[5] *Ibid.*, p. 14.

[6] *Ibid.*, p. 15.

[7] Commission IV, Procès-verbal No. 3, October 12th, 1976, para. 1-31. In the final vote on this proposal there were ten states in favour (Australia, Canada, Czechoslovakia, Egypt, Finland, Japan, Norway, Sweden, United States and Yugoslavia) eleven states opposed (Austria, Belgium, Denmark, Federal Republic of Germany, Greece, Ireland, Italy, Luxemburg, Portugal and Spain) and three abstentions (Netherlands, Switzerland, United Kingdom). *Ibid.*, para. 31.

[8] Martens, Nouveau recueil général de traités, Série II, t. 31, p. 706.

[9] Martens, *op. cit.*, *ibid.*, Série III, t. 6, p. 48.

conventions, which relied heavily on the nationality principle, had come into force for a small number of Continental European countries, but had not generally been well received.[10] It had been evident for some time that they would attract no further signatures.[11] The broadening of the membership of the Hague Conference to include states of widely different legal traditions, as well as a certain evolution in the conception of marriage, dictated the formulation of entirely new conventions. The fact that such conventions were concluded, in areas frequently seen as infused with principles of national public policy, is an indication of the skill and co-operation exhibited by the representatives to the Conference.

I. *The Convention on Celebration and Recognition of the Validity of Marriages.*

Conceptions of marriage still differ greatly in the contemporary world. Internal rules thus vary considerably from one jurisdiction to another; the roles of Church and State are far from uniform; while the national law, the law of the domicile and the law of the place of celebration all enjoy some favour as connecting factors. In the face of such differences the general attitude of the authors of the Hague marriage convention was "to favour in the international context the institution of mar-

---

[10] Lists of states then bound by the treaties are found in Wolff, Private International Law (2nd ed., 1950), p. 47, and Kegel, Internationales Privatrecht (3rd ed., 1971), p. 87. The conventions were denounced by France and Belgium for reasons set out by Wolff, *op. cit.*, p. 50 and Lerebours-Pigeonnière & Loussouarn, Droit international privé (9th ed., 1970), pp. 35, 36. Wolff described the marriage convention in particular as a "complete failure". *Op. cit.*, p. 312.

[11] Revision of the conventions was discussed during the VIth session (1928) and the modifications which were then proposed were raised again during the VIIth (1951) and VIIIth (1956) sessions, without ever being adopted. See Document préliminaire de juin 1956, Conférence de La Haye, Documents relatifs à la VIIIe Session (1956), II, p. 187. A proposal was made in 1960 during the IXth session to return to questions of personal status, and marriage was approved as a subject of a new convention as a result of subsequent discussions in the Xth, XIth and XIIth sessions in 1964, 1968 and 1972. See Conference de La Haye, Actes et Documents, IXth Session (1960), I, pp. 137, 161-162, 313; Xth Session (1964), I, pp. 79, 99-102; XIth Session (1968), I, pp. 47, 102-104; XIIth Session (1972), I, pp. 50, 93-94. The proposal to return to the subject of matrimonial regimes was made by Professor de Winter in 1968 and approved in 1972. See Actes et Documents, XIth Session (1968), I, pp. 47, 104-106; XIIth Session (1972), I, pp. 50, 93-94.

riage" (*favor matrimonii*).[12] This basic philosophy of the convention is subject to a number of qualifications, and is less evident in the final version of the convention than in earlier drafts. Its adoption did permit, however, incorporation into the convention of a "very radical change in the most widely used methods or techniques for ascertaining the validity of marriages".[13]

The basic technique of the convention is to provide, subject to a number of exceptions, that marriages entered into in conformity with the *lex loci celebrationis* shall be considered as valid in all contracting states (article 9). The role traditionally played by the national law or the law of the domicile in many jurisdictions is therefore eliminated. This fundamental provision relating to recognition is preceded, however, by an entire first chapter relating to the celebration of marriage, and is substantially qualified by a number of remaining articles in the second chapter relating to recognition.

Celebration of Marriages

Celebration of an international marriage may be hampered by the fact that the state in which celebration is sought insists on compliance with its own substantive requirements for marriage, or insists that each party provide adequate proof of capacity to marry according to his or her personal law. Many aspiring spouses are thereby driven into concubinage, unable, for financial or other reasons, to seek celebration elsewhere or to provide the requisite proof. Adhering to the principle of *favor matrimonii*, earlier draft proposals of the convention sought to create a general obligation for contracting states to celebrate marriage, excluding the right to refuse celebration on grounds of non-compliance with the *lex loci celebrationis* or non-compliance by a particular spouse with his or her personal law. The technique suggested was to require celebration whenever both spouses met the substantive requirements of the internal law of the state of the nationality or of the habitual residence of either.[14] Broadly speaking, if the

---

[12] Böhmer and Dyer, Report of the Special Commission on Marriage, Hague Conference on Private International Law, Marriage Preliminary Document No. 5, April 1976, p. 11. As to the principle of *favor matrimonii*, see Ehrenzweig and Jayme, Private International Law (1973), Vol. 2, Special Part, Jurisdiction, Judgments, Persons (Family), pp. 150-152; Swan (1974), 24 U. of T.L.J. 17. *Cf.* Maddaugh (1973), 23 U. of T.L.J. 117.

[13] Böhmer and Dyer, *op. cit., ibid.*, p. 13.

[14] Preliminary Draft Convention adopted by the Special Commission on marriage, Hague Conference on Private International Law, Marriage Preliminary Document No. 5, April 1976, art. 2.

conditions of one personal law were met, the marriage had to be celebrated. Prohibitions of the *lex loci celebrationis* could create no obstacle, and the traditional distributive application of the two personal laws was excluded. Celebration could be refused only where the marriage contravened the substantive requirements of the national laws and the laws of the habitual residences of both spouses.

These proposals proved unacceptable. Objections were raised both by states insisting on compliance with the substantive requirement of the local law for purposes of celebration[15] and by states favouring the distributive application of the personal laws.[16] Most objections were of the first variety, indicating the reluctance of many states to oblige their marriage officers to celebrate marriages invalid by the *lex loci celebrationis* though valid according to the foreign personal laws of the parties. Inclusion of a general public policy clause was not sufficient to overcome these objections, and in the final draft of the convention this entire first chapter on the celebration of marriages has therefore become optional. Those states willing to accept the provisions of the convention dealing with recognition of marriages (chapter II) need not accept those dealing with celebration (chapter I).[17]

The provisions of the first chapter are also substantially diluted. For those states willing to accept it, the chapter creates[18] an obligation to celebrate only in the case where both spouses meet the substantive requirements of the *lex loci celebrationis* and one of them is a national of that state or habitually resides there (article 3, paragraph 1). No obligation to celebrate according to the substantive provisions of a foreign law is therefore imposed, and a state would remain free to refuse to celebrate in case of non-compliance with the *lex loci celebrationis*. The principal effect is to exclude application, for purposes of celebration, of the prohibitions of the personal law of one party where the marriage is to be celebrated in the jurisdiction (by way of nationality or habitual residence) of the other party. Even

---

[15] See, *e.g.*, Marriage Preliminary Document No. 7, p. 2, para. 4 (United Kingdom).

[16] See, *e.g.*, Marriage Preliminary Document No. 7, p. 1, para. 3 (Federal Republic of Germany).

[17] Art. 16: "A Contracting State may reserve the right to exclude the application of Chapter I."

[18] The obligation to celebrate would continue to exist where the rules designated by the existing choice of law rules of the state of celebration were met (art. 3, para. 2).

here, however, a contracting state may reserve the right, by way of derogation from the basic provision of article 3, paragraph 1, not to apply its internal law to the substantive requirements for marriage in respect of a future spouse who neither is a national of that state nor habitually resides there (article 6). A German authority, in the event of such a reservation being made by that country, thus would not be obliged to celebrate the marriage of a German national to a Spanish national habitually resident in Spain who did not meet the provisions of Spanish law.

The chapter on celebration is therefore optional; it provides no barrier to application of the substantive prohibitions of the local law; and it allows in certain cases for a state to continue to insist on the distributive application of personal laws. The principle of *favor matrimonii* is not greatly advanced by these provisions. Canadian jurisdictions, which do not effectively screen prospective spouses to ensure compliance with their personal laws, would not be obliged by adoption of these provisions to change their existing practices.

By article 2 of the chapter, formal requirements for marriage are governed by the law of the state of celebration.

Recognition of the Validity of Marriages

The heart of the convention is found in the second chapter relating to recognition of the validity of marriages. This chapter is of universal application, in that it is applicable to the recognition in a contracting state of the validity of marriages entered into in any other state and not merely in other contracting states (article 7). The chapter will not, however, completely displace, in contracting states, existing private international law rules relating to marriage. Certain types of marriage are expressly excluded from the chapter's application,[19] and existing private international law is clearly intended to play a supplementary role even where the chapter is applicable.

As has been indicated, the essential provision is article 9, the first paragraph of which provides:

> A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be

---

[19] Marriages celebrated by military authorities, on board ships or aircraft, proxy marriages, posthumous marriages and informal marriages (art. 8). The respective roles of the personal and territorial laws in regard to such marriages are therefore not affected by the convention. As to consular marriages, see *infra*, footnote 20.

considered as such in all Contracting States, subject to the provisions of this Chapter.[20]

Parties who marry in a jurisdiction whose requirements they meet (and this includes requirements flowing from application of the celebrating state's private international law rules) are therefore in principle entitled to be treated as man and wife. Where a marriage certificate has been issued by a competent authority of the state of celebration, moreover, the marriage shall be presumed to be valid until the contrary is established (article 10).[21]

However, and it is here that *favor matrimonii* is limited, a recognizing state retains a faculty to refuse to recognize the validity of a marriage, valid by the *lex loci celebrationis*, where one of the grounds of article 11 is established. Article 11 thus constitutes a central core of grounds of non-recognition, as follows:

1. one of the spouses was already married;
2. the spouses were related to one another by blood or by adoption, in the direct line or as brother and sister;
3. one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation;
4. one of the spouses did not have the mental capacity to consent;
5. one of the spouses did not freely consent to the marriage.

It is open to a state to recognize the marriage even in the face of one of these grounds, though given their frequent occurrence in domestic law non-recognition would normally be expected. The section does exclude some grounds of nullity found in Canadian provincial law, such as uncle-niece, aunt-nephew relationships. Article 14 of the convention further provides, however, that a contracting state may refuse to recognize where such recognition is manifestly incompatible with its public policy ("ordre public"). The grounds of article 11 therefore do not represent an exhaustive codification of public policy. Any question as to the existence of article 11 grounds of non-recognition, for instance whether a spouse is already married or had attained

---

[20] Art. 9, para. 2 provides that a marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all contracting states, provided that the celebration is not prohibited by the state of celebration.

[21] It is not contemplated, however, that such contrary proof must necessarily be made in judicial proceedings. An administrative officer of a recognizing state could therefore conclude against the validity of the marriage by the *lex loci celebrationis*, even in the face of a marriage certificate. Commission III, Procès-verbal No. 5, para. 128-160.

the minimum age, will be determined by resort to the private international law rules of the recognizing state, which may or may not refer to the local law of that state.

It should further be noted that the basic provisions of articles 9 and 11 deal only with the case in which the marriage is *valid* by the *lex loci celebrationis*. The basic rule is therefore a validating one only, and not a complete reference to the *lex loci celebrationis*. The convention therefore does not cover the case in which the marriage is *invalid* by the law (and this again includes the private international law) of the place of celebration. Recognition will in this latter case therefore depend upon the residual private international law rules of the recognizing state. Such rules may be favourable to the recognition of the marriage, and article 13 of the convention clearly envisages the application of such rules in providing that the convention shall not prevent the application in a contracting state of rules of law more favourable to the recognition of foreign marriages. The residual rules of the recognizing state may, however, be unfavourable to the validity of the marriage, and in this case the convention provides no mechanism to save the marriage, regardless of the particular ground of invalidity.[22]

The chapter is interesting as well for its inclusion, for what is thought to be the first time in a Hague convention, of a specific article dealing with what has come to be known as the "incidental" or "preliminary" question. Article 12, paragraph 1 provides that the recognition rules of the convention are applicable even where the recognition is to be dealt with as an incidental question in the context of another question. Paragraph 2 of the same article, however, derogates from this rule of uniform application in providing that such rules need not be applied where that "other question" (the primary question) is governed under the choice of law rules of the forum by the law of a non-contracting state. A court of a recognizing state therefore would retain a faculty to set aside the rules of the convention if the question of the validity of the marriage was

---

[22] It should be noted in this regard that art. 11 of the convention, setting out the limited list of permissible grounds of non-recognition, does not therefore constitute a type of uniform law of marriage capacity for contracting states. A contracting state is limited to art. 11 grounds of non-recognition only in the case of the marriage being validity entered into by the law of the state of celebration, in accordance with art. 9, para. 1. See the discussion, *supra*, of art 11, and in the discussions at the Hague Conference, Commission III, Procès-verbal No. 5, October 9th, 1976, para. 57 (Mr. van Rijn van Alkemade) and 115 (Mr. Batiffol).

raised in the context of a principal legal problem which did not fall to be governed by the law of a contracting state. For non *favor matrimonii* states, *favor matrimonii* need not apply.

The convention contains no provisions relating to homosexual "marriages"[23] and this question would therefore presumably be dealt with through judicial definition of the concept of marriage found in the convention. Nor is there any specific provision relating to potentially polygamous marriages, which can therefore receive particular treatment only under article 14 relating to public policy.[24] It was also decided to exclude from the convention an additional chapter dealing with recognition of decisions relating to marriage. The problem was seen as of relatively little importance and the additional texts as possibly constituting a source of complications in the operation of the provisions relating to the recognition of marriages.[25]

Ratification and Implementation

Implementation of the entire convention in Canada would require a considerable measure of federal-provincial co-operation. While section 91(26) of The British North America Act, 1867[26] confers legislative jurisdiction over marriage and divorce to the federal government, section 92(12) provides that each provincial government shall have competence in matters of solemnization of marriage in the province. The convention deals with both formal and substantive conditions of marriage, and it is difficult to see how either level of government could be seen as having an exclusive power of implementing the treaty.[27] Ratification

---

[23] As to which see Veitch, The Essence of Marriage — A Comment on the Homosexual Challenge (1976), 5 Anglo-American L. Rev. 41.

[24] A proposed draft article which would have permitted a contracting state to reserve the right not to recognize the validity of a marriage celebrated under a law which permits polygamy if at the time of celebration either party was a national of or habitually resident within the recognizing state, was withdrawn during the Plenary Session. See Séance Plénière, Doc. trav. No. 10, art. 16.

[25] See Commission III, Procès-verbal No. 7, October 12th, 1976, para. 2-10.

[26] 1867, 30 & 31 Vict., c. 3 (U.K.).

[27] An argument could, however, be made in favour of exclusive federal competence to implement the convention to the exclusion of the first chapter, which is in any case optional. Federal implementation of chapter II, dealing with recognition of the formal and substantive validity of marriages celebrated abroad, would in this view not infringe provincial authority since the latter is limited to regulation of solemnization *in the Province*. Provincial authority to create choice of law rules relating to

by the federal government would presumably therefore have to be accompanied by joint federal-provincial legislation. This could be done, however, with respect to particular provinces only, since the convention contains the now standard clause (article 27) permitting a contracting state having two or more territorial units in which different systems of law apply to declare that the convention shall apply to all its territorial units or only to one or more of them. The convention could be implemented only vis-à-vis international marriages, and not interprovincial ones, since for countries such as Canada it need not be applied to the recognition in one territorial unit of the validity of a marriage entered into in another territorial unit (article 19).

The first chapter of the convention relating to celebration would become operative for marriages to be celebrated after its coming into force. The second chapter relating to recognition would be applicable regardless of the date on which the marriage was celebrated, though contracting states could reserve the right not to apply the chapter to a marriage celebrated before the date on which the convention entered into force for that state (article 15).

II. *The Convention on the Law Applicable to Matrimonial Property Regimes.*

The convention on the Law Applicable to Matrimonial Property Regimes is more complex than the convention on marriage. This is unfortunate, since complexity represents a very real obstacle to ratification and successful implementation. Complexity came to be unavoidable, however, as the authors of the

---

celebration of marriage would in this construction be unilateral, *i.e.*, be limited to creation of choice of law rules relative to domestic, but not foreign, celebration, as a necessary consequence of the language of s. 92(12) of the British North America Act. Judicial statements have been made in the Supreme Court of Canada, in upholding provincial solemnization rules, to the effect that the rules in question in no way purported to deal with marriages celebrated outside the province. See *Kerr* v. *Kerr and A.G. Ont.*, [1934] S.C.R. 72, at p. 74, per Duff C.J. ("These requirements apply to all marriages celebrated in Ontario, and to no marriages but those celebrated in Ontario, whether the parties to the marriage be domiciled in Ontario or elsewhere."); *A.G. Alta and Neilson* v. *Underwood*, [1934] S.C.R. 635, at p. 639, per Rinfret J. ("The statute of Alberta, in its essence, deals with those steps or preliminaries in that province. It is only territorial. It applies only to marriages solemnized in Alberta and it prescribes the formalities by which the ceremony of marriage shall be celebrated in that province. . . .").

convention sought to effect a compromise between the principle of nationality on the one hand and that of domicile or habitual residence on the other. This was referred to by the President of the Commission as the "main stumbling block" in the formulation of the convention,[28] and the difficulties were increased by the unsuitability of any relatively neutral third principle which could be resorted to (as was the case with respect to the marriage convention and the *lex loci celebrationis*). The main features of the convention can best be described under the following headings: Freedom of choice; absence of choice; mutability; protection of third parties; form; and ratification and implementation.

Freedom of Choice

A number of states parties to the Hague Conference exclude any possibility for the spouses to choose the law applicable to their matrimonial property regime. The governing law may be that of the husband's nationality or that of the matrimonial domicile, but in any case will be applicable imperatively.[29] This is in contrast with the attitude which has traditionally prevailed in most common law jurisdictions, as well as in France and Quebec, where the establishment of matrimonial property regimes is seen as essentially contractual in character, and in which party autonomy is largely unrestrained.[30] A principle of free choice of the governing law does therefore represent an escape from the nationality-domicile debate,[31] but raises equally controversial questions as to the appropriate role of party autonomy.

Article 3 of the convention adopts a principle of limited choice. The spouses may designate, before marriage, the law of the state of the nationality or habitual residence of either of them at the time of designation, or the law of the first state where one of them establishes a new habitual residence after the marriage. The latter provision in effect allows the parties to choose the law of their intended matrimonial home, and this choice will remain operative even though one spouse was prevented (by military

---

[28] Philip, Hague Draft Convention on Matrimonial Property (1976), 24 Am. J. Comp. L. 307, at p. 308. For a valuable comparative study of the problem see Droz, Les régimes matrimoniaux en droit international privé comparé (1974), III Recueil des Cours de l'Académie de droit international de La Haye, 1.

[29] Droz, *op. cit.*, footnote 28, at p. 48.

[30] Johnson, Conflict of Laws (2nd ed., 1962), pp. 307 *et seq.*; Castel, Private International Law (1960), pp. 105-106.

[31] Philip, *op. cit.*, footnote 28, at p. 309.

service, for example, or death) from establishing his or her first post-celebration habitual residence in that jurisdiction.[32] Designation of the applicable law shall be by express stipulation or arise by necessary implication from the provisions of a marriage contract (article 11).

Choice is therefore generally limited to jurisdictions with which the parties are closely connected at the time of celebration or with which a close connection is contemplated at the time of celebration and subsequently established. There is no possibility of the parties choosing another law for reasons best known to themselves. In this respect the convention appears more restrictive than recent Ontario and Quebec reform proposals.[33] The convention does, however, allow limited choice even in situations which are in no way international at their inception,[34] and allows a further option for the parties to designate with respect to all or some of their immoveables the law of the place where the immoveables are situated (article 3, paragraph 3).

Absence of Choice

Where the parties have not exercised their right to choose, what law should govern their regime? A large number of states look to the law of the common nationality of the spouses or, in the event of different nationalities, that of the husband at the time of marriage.[35] Common law jurisdictions, and Quebec, have traditionally looked to the husband's domicile at the time of

---

[32] Commission I, Procès-verbal No. 4, October 7th, 1976, para. 31.

[33] In Ontario, see An Act to reform the Law respecting Property Rights and Support Obligations between Married Persons and in other Family Relationships, Bill 6 (1st Reading, March 13th, 1977), 4th Session, 30th Legislature (Ont.), s. 57 of which provides for application of the "proper law of the contract", subject to application of specified Ontario mandatory rules relating to, *inter alia*, rights in the matrimonial home. The recommendations of the Ontario Law Reform Commission would have limited choice to the law of the habitual residence of one of the spouses at the time of marriage. Ontario Law Reform Commission, Report on Family Law (1974), Part IV, Family Property Law, p. 120. See also Baxter (1975), 25 U. of T.L.J. 236, at pp. 271 *et seq.* In Quebec arts 26 and 22 of the Civil Code Revision Office's Report on Private International Law (1976), would allow the same freedom of choice in marriage contracts as in other contracts, providing the contract could be said to be of "an international character". The Quebec provisions exclude free choice and call for application of the *lex loci actus* in cases where the juridical act in question is not of an international character.

[34] *Cf.* The proposals of the Quebec Civil Code Revision Office, *ibid.*

[35] Droz, *op. cit.*, footnote 28, at pp. 22-23.

marriage, at least with respect to moveable property,[36] while France has generally looked to the law of the matrimonial domicile established by the spouses on marriage.[37] The convention seeks to reconcile these conflicting views by first rejecting any discrimination against one spouse in favour of the other, and then adopting a basic principle of habitual residence, subject to important, and complicated, exceptions in favour of the national law.

Article 4, paragraph 1 of the convention thus provides that in the absence of a designated applicable law, the regime is governed by the internal law of the state in which both spouses establish their first habitual residence after marriage. Some doubt may thus exist at the time of celebration as to the applicable law but this is considered tolerable in order to localize the regime there where the spouses establish themselves *de facto*.[38] The law thus ascertained is applicable to both moveable and immoveable property and, absent specific choice of the parties of the *lex rei sitae* to govern their immoveables,[39] the regime is therefore treated as a unity, subject to only one governing law.

One of the main effects of article 4, paragraph 1 would thus be to prevent the application of their national law to spouses who established their first matrimonial home in a country of immigration. Since many such moves are experimental or prove to be of only temporary duration, nationality states argued against uniform application of the law of the country of immigration. Paragraph 2 of article 4 therefore allows for displacement of the

---

[36] Dicey and Morris, The Conflict of Laws (9th ed., 1973), Rule 117; Johnson, *op. cit.*, footnote 30, p. 318. See, however, for a recent case favouring the law of the first common domicile, *Martineau* c. *Vincent-Martineau*, [1975] C.S. 1137. As to immoveables there is common law authority in favour of the *lex situs*, though a contract implied from the terms of a foreign legal regime may prevail over the territorial law. See Dicey and Morris, *op cit.*, pp. 636, 646. Quebec law favours application of the law of the regime with respect to both moveables and immoveables. Castel, *op. cit.*, footnote 30, p. 107.

[37] Batiffol et Lagarde, Droit international privé (6th ed., 1976), t. II, para. 620.

[38] The proposal has some common features with the reform proposals of the Quebec Civil Code Revision Office, which would look first to the common domicile of the spouses at marriage and then, failing such domicile, to the first common domicile. Civil Code Revision Office, *op. cit.*, footnote 33, art. 26. As to recent Ontario proposals see the discussion of mutability, *infra*.

[39] See *supra*, p. ??.

law of the first common domicile by that of the *common* nationality of the spouses[40] in three separate cases. The first of these would be of by far the greatest importance in the Canadian context, and would allow for application of the law of the common nationality where the state of the common nationality had given notice to the Ministry of Foreign Affairs of the Netherlands of a declaration requiring the application of its internal law in all such cases.[41] If Italy filed such a declaration, Canadian courts would be obliged to apply Italian law *qua* national law to Italian couples establishing their first matrimonial domicile in a Canadian province. The declaration would be ineffective in such a case, however (by virtue of article 5, paragraph 2) if the spouses retained their habitual residence in the jurisdiction in which they had both had their habitual residence at the time of marriage for a period of not less than five years. If the Italian couple had been habitually resident in Ontario for five years prior to the marriage, and retained this habitual residence, the application of the national law would be displaced. In all cases of less permanent integration, however, Italian law would govern.

These are not elegant provisions, and the use of fixed time periods inevitably suggests a certain arbitrariness. As well, the national law so designated would continue to operate even in those cases where settlement in the receiving country had become fixed and permanent. At this point it becomes necessary to consider, however, the extent to which a law originally applicable to the regime may become supplanted by another, either through

---

[40] This will generally be that of both spouses prior to the marriage, but may also include cases of voluntary acquisition of a common nationality after the marriage, by one or both spouses (art. 17). If the spouses do not have their habitual residence in the same state, or have a common nationality, their regime is governed by the internal law of the state with which, taking all circumstances into account, it is most closely connected (art. 4, para. 3).

[41] The second case would be that in which the parties were of the common nationality of a non-contracting state which considered its internal law applicable, and where the parties established their first habitual residence after marriage in a state having filed such a "national law declaration" or in a non-contracting state whose private international law rules provide for application of the law of their nationality. The habitual residence principle is thus largely precluded for relations amongst nationality states, regardless of whether they are parties to the convention or not. The third case is simply that in which the parties do not establish their first habitual residence after marriage in the same state.

choice of the parties or because of changes in their habitual residence or nationality.[42]

Mutability

To protect allegedly weaker spouses and to ensure certainty of operation and dissolution, many jurisdictions have imposed a rule of the absolute immutability of marital property regimes. Such efforts to freeze the property relations of spouses are usually accompanied by private international law rules preventing the parties from choosing another law to govern their regime (one which would, for example, allow mutability), and preventing any change in the regime or in the applicable law as a result of a simple change of nationality or domicile.[43] The convention having adopted, however, a principle of party autonomy with respect to the formation of property regimes, it was normal to allow a similar freedom with respect to subsequent alteration of the applicable law. As well, even absent any agreement of the parties, it appeared inappropriate to retain a principle of the absolute permanence of the applicable law in cases where there had been a significant relocation of the marriage.

The freedom allowed the parties under the convention to change the law applicable to their regime is a simple reflection of the limited freedom they were allowed in choosing the law initially applicable to it. Article 6 of the convention, which parallels article 3 governing initial choice, thus allows the parties to designate the internal law of the state of the nationality or habitual residence of either of them at the time of designation, and, with respect to all or some of their immoveables, the law of the place where the immoveables are situated. This limited freedom of choice is available regardless of whether the law initially applicable was so by virtue of the choice of the parties or by virtue of an objective localization of the regime. Parties whose common national law is therefore initially applicable to their regime as a result of the provisions of article 4 of the convention are therefore perfectly free to choose the law of their habitual residence at the time of designation as a new governing law. This choice, moreover, will be effective with respect to the totality of their marital property (article 6, paragraph 2). Again, the principle of limited freedom of choice is seen as a

---

[42] It may also be noted that the convention does permit the non-application of the applicable law there where it is manifestly incompatible with the public policy ("ordre public") of the forum (art. 14).

[43] See generally Droz, *op. cit.*, footnote 28, at pp. 52-64.

means of reconciling fundamental differences of attitude between nationality states and states preferring a connecting factor of domicile or habitual residence.

The provisions of the convention dealing with automatic changes of the applicable law, absent any agreement of the parties, are also seen as effecting a certain reconciliation between nationality and domicile states. In principle, article 7 of the convention provides that any law originally applicable to the regime, by choice or otherwise, shall remain applicable notwithstanding any change of nationality or habitual residence, so long as the parties have not designated a different applicable law. However, where the spouses have neither designated the initially applicable law nor concluded a marriage contract (the simple conclusion of a contract even without a choice of law clause thus precludes any automatic change of the applicable law), a change of the applicable law will take place in three cases, as provided for by article 7, paragraph 2. The first two of these are the most important[44] and provide for the internal law of the state of the common habitual residence to become applicable, in place of the law previously applicable:

1) When that law is or becomes that of the spouses' common nationality. Spouses who emigrated from the state of their nationality and whose regime was first governed by the law of their first common habitual residence will find that the law of their nationality becomes applicable if they return to that state and establish habitual residence there. As well, immigrants from states whose national law was first applicable will find the national law supplanted by the law of their new habitual residence if they effect a change of nationality to that of the state of their habitual residence. The law applicable to the regime of a couple emigrating to and establishing habitual residence in Alberta will become the law of Alberta from the time of their acquisition of Canadian nationality.[45]

2) When, after the marriage, that habitual residence has endured for a period of not less than ten years. Any previously applicable law, by way of nationality or earlier habitual residence,

---

[44] The third deals with the rare situation in which the law of the common nationality became applicable initially because of the failure of the spouses to establish a first habitual residence after marriage in the same state (art. 4, para. 2(3)). In such a case, where a common habitual residence is eventually established, the law of that jurisdiction will become applicable.

[45] As to problems of non-unified jurisdictions, see *infra*.

is thus displaced by such a long-lasting *de facto* attachment. The couple emigrating to Ontario, absent any choice on their part and absent acquisition of Canadian nationality, will eventually, after ten years, find Ontario law applicable to their regime.

Automatic mutability being provided for in these cases, the convention also delineates the respective areas of operation of the old and new applicable laws. The basic rule is that changes in the applicable law have effect only for the future (article 8, paragraph 3). Property belonging to the spouses before the change is not subject to the new applicable law, and it is therefore possible for the parties to find on dissolution that different laws and different regimes are applicable to various items of their property. This makes for complexity, though there will be many cases in which the bulk of the marital property was acquired after the significant relocation which brought about a change in the applicable law. As well, the parties are expressly given the option, by article 8 of the convention, to subject at any time the whole of their property to the new law, thus avoiding the necessity of applying different laws to different items of matrimonial property. The exercise of this option is without prejudice to any previous choice of the *lex rei sitae* with respect to immoveables, and shall not adversely affect the rights of third parties.

Recent Ontario proposals would avoid all such complications, and the need for applying the law of a jurisdiction the parties had long since left, by submitting the ownership of moveable property to the internal law of the place where both spouses had their last common habitual residence, and the ownership of immoveable property to the *lex rei sitae*.[46] In Quebec, on the other hand, the Civil Code Revision Office has not proposed any variation in existing Quebec law, which does not admit that change of nationality or domicile can effect a change in the applicable law.[47] The Quebec solution provides the greatest certainty to the parties throughout the marriage and is relatively simple in operation, though difficulties may arise in ascertaining the content of the foreign law. The Ontario solution is still simpler,

---

[46] An Act to reform the Law respecting Property Rights and Support Obligations between Married Persons and in other Family Relationships, Bill 6, *supra*, footnote 33, s. 12. In favour of such a principle, see Baxter, *op. cit.*, footnote 33, at pp. 271 *et seq.*

[47] Civil Code Revision Office, *op. cit.*, footnote 33, art. 26. See also *Zamkovetz* v. *Korneychuk*, [1972] C.S. 855; *Proschek* v. *Prochazka*, [1973] C.A. 410.

and eliminates the need to apply a law with which the parties have long since lost touch, though at the expense of preventing them from relying on any property rights acquired before their arrival in the state of their last habitual residence. The Hague proposals represent a complex middle ground. Taken together with the provisions establishing the initially applicable law, and using the example of a couple emigrating to Canada from a nationality state, they would call for the continued application of the national law with respect to all property acquired by the couple prior to their acquisition of Canadian nationality or prior to their completing ten years of habitual residence in a Canadian province, whichever occurred first. From that time on, the law of the habitual residence would become operative, but only with respect to after-acquired property. The parties would be free, however, to expressly stipulate a new governing law, according to the conditions of article 6 and with respect to the totality of their property, or to stipulate at any time (and this might be years or decades after the relevant change of habitual residence or nationality) that a law which had become applicable by virtue of the provisions relating to automatic change should be applicable to the totality of their property.

Protection of Third Parties

The provisions of a matrimonial property regime may, operate to the detriment of third parties, as where a sale of property by a spouse is null and void for lack of marital authority. The local trader or third party may be expected to be familiar with disabilities imposed by the local law, but the goal of security of legal transactions requires that he be afforded some protection from disabilities forming part of a foreign matrimonial regime, at least where he has no reason to be on his guard. Since under the convention there will be many instances in which the law applicable to the matrimonial regime will not be that of the jurisdiction in which the spouses have localized their interests, it appeared necessary to provide a means of ensuring that third parties would not thereby be unfairly prejudiced.

One solution advanced, and only narrowly rejected, was to limit the scope of the convention exclusively to the relations of the spouses *inter se*, leaving each state free to take whatever protective measures it felt necessary.[48] Eventually, a provision *expressly* providing for the right of each state to take protective

[48] Commission I, Doc. trav. No. 5, and see also Procès-verbal No. 11, para. 45.

measures was adopted, subject however to a number of conditions. Article 9 thus provides that in principle the legal relations between a spouse and a third party are governed by the law of the regime. Yet the law (and by this is meant either legislation or case law[49]) of a contracting state may provide for the exclusion of the law of the regime in two cases: 1) where local requirements of publicity or registration have not been met, or, 2) where the third party neither knew nor should have known of the law applicable to the regime. In general, therefore, local third parties may be protected in cases of justifiable ignorance. Such protective measures can be applied, however, only in cases in which either the third party or the spouse relying on the law of the regime is habitually resident in the territory of the protecting state (article 9, paragraph 2). Protection may thus not be offered vis-à-vis all transactions occurring within the protecting state, but only with respect to those involving at least one local habitual resident.

In spite of the theoretical importance of this problem, experience has shown that it has not generated a great deal of litigation.[50]

Form

The provisions of the convention relating to form are of interest in that traditional choice of law methods are used only as a supplement to a material solution set out by the convention itself. Thus a marriage contract or a simple designation of an applicable law must in any event be in writing, dated and signed by both spouses (articles 12 and 13). In addition to this basic requirement, the marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime or with the internal law of the place where it was made (article 12). The designation of the applicable law must comply with the formal requirements for marriage contracts of either the internal law designated by the spouses or the internal law of the place where it is made (article 13).

Ratification and Implementation

Property laws presently affecting spouses are provincial in origin,[51] and federal ratification would normally therefore be

---

[49] Commission I, Procès-verbal No. 11, para. 43-44.

[50] See Wolff, *op. cit.*, footnote 10, p. 364; Commission I, Procès-verbal No. 11, para. 9 (Mr. Martens).

[51] While s. 91(26) of The British North America Act, 1867, *supra*, footnote 26, provides for federal competence in matters of marriage and

followed by provincial implementing legislation. As with the marriage convention, however, ratification and implementation could be in respect of particular provinces only, since a contracting state having two or more territorial units in which different systems of law apply may declare that the convention shall apply to all its territorial units or only to one or more of them (article 25). Again, the convention need not be applied to exclusively inter-provincial disputes, since in a federal state such as Canada there would be no obligation to apply the rules of the convention where the law of no other state was applicable by virtue of the convention (article 18).

Where the convention refers to the national law of a state having two or more territorial units in which different systems of law apply to matrimonial property regimes, this shall generally be construed as referring to the system determined by the rules in force in that state (article 16). The convention would apply only prospectively, to spouses who have married or who designate the law applicable to their matrimonial property regime after the convention enters into force for that state, unless that state by declaration extended the application of the convention to other spouses (article 21).

H. PATRICK GLENN*

---

divorce, s. 92(13) establishes provincial authority over property and civil rights in the provinces. See Law Reform Commission of Canada, Working Paper, in Studies on Family Property Law (1975), p. 1. The federal authority in matters of marriage and divorce has been held to extend to matters of custody and maintenance in divorce proceedings. See *Zacks* v. *Zacks*, [1973] S.C.R. 891, 35 D.L.R. (3d) 420; *Lapointe* v. *Klint*, [1975] 2 S.C.R. 539, 47 D.L.R. (3d) 474.

* H. Patrick Glenn, of the Faculty of Law, McGill University, Montreal.