

## Comments on Legislation and Judicial Decisions

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### Chronique de législation et de jurisprudence

FEDERAL JURISDICTION—A LAMENTABLE SITUATION.—It was entirely predictable that the decisions of the Supreme Court of Canada in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd*<sup>1</sup> and in *McNamara Construction (Western) Ltd v. The Queen*<sup>2</sup> would severely jeopardise the effective exercise of many aspects of the original jurisdiction of the Federal Court of Canada.<sup>3</sup> Since those cases were decided, six other cases have been decided by the Supreme Court on the constitutional limits of the jurisdiction of the Federal Court, and in more than fifty judgments rendered by both divisions of the Federal Court, the effect of the two principal decisions of the Supreme Court has had to be considered. Both the proliferation of litigation over such preliminary matters of comparatively little intrinsic importance, and the serious injustices perpetrated by the results of many of these cases, require, as a matter of urgency, remedial legislative action. This comment attempts an analysis of the burgeoning case law on the constitutional reach permitted to federal jurisdiction, and considers some possible methods of defusing many of the constitutional land-mines which the Supreme Court's interpretation of the British North America Act<sup>4</sup> has placed around much of the original jurisdiction of the Federal Court.

It will be recalled that in *Quebec North Shore* and *McNamara* the Supreme Court held that Parliament's constitutional authority to establish further courts "for the better administration of the laws of

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<sup>1</sup> [1977] 2 S.C.R. 1054.

<sup>2</sup> [1977] 2 S.C.R. 654.

<sup>3</sup> For a comment that was highly critical of these cases, see P.W. Hogg (1977), 55 Can. Bar Rev. 550. Nor have cries of lament been confined to contributors to the learned journals; see, for example, the comments by Collier J. in *Pacific Western Airlines Ltd v. The Queen*, [1979] 2 F.C. 476, at p. 490 (T.D.).

<sup>4</sup> 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

Canada”<sup>4a</sup> only enables it to confer jurisdiction upon the Federal Court to entertain claims that are “founded on some existing federal law”.<sup>5</sup> A law that has not been enacted by Parliament is not “a law of Canada” merely because its repeal or amendment is within the exclusive legislative competence of Parliament. Nor is the constitutional requirement of “a law of Canada” necessarily satisfied by those provisions in the Federal Court Act<sup>6</sup> which confer jurisdiction upon the Federal Court to decide cases involving designated subject-matter or specified parties. The Federal Court may only assume jurisdiction over a case if an affirmative answer is given to each of the following three questions. First, does the Federal Court Act, as a matter of statutory interpretation, confer jurisdiction over the dispute? Secondly, if it does, is the plaintiff’s claim founded on existing federal law? Thirdly, does Parliament have the constitutional authority to enact the substantive law in question? In other words, both the conferral of jurisdiction, and the substantive law upon which the court’s jurisdiction can operate must depend upon some valid federal law. The thrust of *Quebec North Shore* and *McNamara Construction* was to deny, in general terms, the existence of a body of federal common law that was co-extensive with the unexercised constitutional legislative competence of Parliament over matters assigned to it.<sup>6a</sup> Thus a law will normally only be a law of Canada for the purpose of section 101 of the British North America Act if it is enacted by or under federal legislation. Nonetheless, at least one exception to this restrictive definition of a law of Canada has been recognised. This is that the legal liability of the Crown in right of Canada always depends upon a law of Canada, even when it is not clearly based upon some federal statute, such as the Crown Liability Act.<sup>7</sup>

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<sup>4a</sup> *Ibid.*, s. 101.

<sup>5</sup> Per Laskin C.J.C. in *McNamara’s case*, *supra*, footnote 2, at p. 659.

<sup>6</sup> R.S.C., 1970 (2nd Supp.), c. 10.

<sup>6a</sup> But it would now appear from the recent decisions of the Supreme Court in *Rhine* and *Prytula*, *infra*, footnotes 34a and 43, that despite the contractual nature of the relationship between the parties, a plaintiff’s rights may be founded upon federal law provided that federal legislation has a sufficient “impact” upon them.

<sup>7</sup> R.S.C., 1970, c. C-38. One other possible exception may also be noted. Somewhat surprisingly there is authority for the proposition that the British North America Act, 1867 may itself be a law of Canada which the Federal Court has jurisdiction to administer. The question was most explicitly considered in *The Queen in the right of Canada v. The Queen in the right of the Province of Prince Edward Island*, [1978] 1 F.C. 533 (C.A.) in which P.E.I. claimed damages from the federal Crown for failing to perform its duties to provide a ferry service between the island and the mainland. The duty was contained in the terms under which P.E.I. was admitted to Confederation, an order in council made pursuant to s. 146 of the British North America Act, 1867. The case came before the Federal Court by virtue of its jurisdiction over intergovernmental disputes (s. 19).

The judgments in these cases left considerable room for argument about their precise scope. What was to be included in the term "federal law" was not totally clear, nor was the requirement that claims be "founded" on such a law. One context in which it was apparent that very serious difficulties might be encountered was in connection with suits involving multiple parties, only some of whose rights or liabilities fell within the constitutional limits of federal jurisdiction. This question has been the subject of a recent decision by the Supreme Court of Canada. The court's answer poses serious practical problems for litigants, proceeds upon some highly questionable constitutional reasoning and may so undermine the efficacy of much of the admittedly valid original jurisdiction of the Federal Court that there is little alternative left to Parliament except to return jurisdiction to the courts in the provinces.

This comment begins by considering the particular problems inherent in litigation involving multiple parties, some of whom may be sued only in the Federal Court, and then examines some of the wider implications of recent decisions for the future of federal jurisdiction.

### *Federal jurisdiction and multiple parties*

One question which has already arisen in a number of cases is whether the Federal Court can be empowered to determine the rights and duties of a party, which would otherwise fall outside federal

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The parties appeared content to accept that the Federal Court had jurisdiction, and Jackett C.J. concluded that it was not apparent on the face of the proceedings that the Federal Court lacked jurisdiction. He thought (at pp. 561-562) that the fact that the duty in question was not imposed by provincial law distinguished the case from *McNamara*. Moreover, he also thought it possible that s. 19 of the Federal Court Act both conferred jurisdiction and authorized the court to apply substantive federal law. Perhaps the easiest answer, though, was that the liability of the federal Crown is always a question of federal law. See *infra*, footnote 26.

The constitution is a law of Canada in the sense that it is the ultimate criterion of the rule of recognition by which the validity of both federal and provincial laws is determined. But it is clearly of a superior order to the federal laws which it authorizes Parliament to enact. It would, however, be odd to say that the Federal Court's jurisdiction to determine the constitutionality of a federal statute was contingent upon its holding it to be valid. See *Denison Mines Ltd v. Att.-Gen. of Canada*, [1973] 1 O.R. 797 (H.C.), where Donnelly J. held that the Federal Court Act removed the jurisdiction of provincial superior courts to determine the validity of a federal statute in a proceeding which otherwise fell within one of the heads of the exclusive jurisdiction of the Federal Court. It would also be inconvenient to require a party who wished to challenge a federal board's decision on the ground that it had acted *ultra vires* the statute or, alternatively, that the enabling legislation was invalid, to pursue these grounds in different courts. Contrast *Law Society of B.C. v. Att.-Gen. of Canada* (1980), 108 D.L.R. (3d) 753 (B.C.C.A.).

jurisdiction, by virtue of the fact that the right or liability in question arises out of an incident from which proceedings have properly been instituted in the Federal Court. For instance, in *Pacific Western Airlines Ltd v. The Queen*,<sup>8</sup> the owners and operators of an aircraft that had crashed at an airport in Cranbrook, British Columbia, sought to join as defendants to the action, the federal Crown, certain named Crown servants, the City of Cranbrook as the owner of the airport and the employer of other defendants whose negligence the plaintiffs alleged had contributed to the accident, the manufacturers of the aircraft and the suppliers of allegedly defective aircraft equipment. It was held that the Federal Court's jurisdiction was confined to claims founded on existing federal law and that only the claim against the Crown satisfied this test.<sup>9</sup> The court's jurisdiction was no greater in a case in which there were multiple defendants than it would have been had separate proceedings been instituted against each defendant. By virtue of the exclusive jurisdiction conferred upon the Federal Court over suits brought against the federal Crown,<sup>10</sup> legal proceedings would have to be instituted in more than one court. Some of the alarming implications of this result did not go unnoticed in the Trial Division by Collier J.:<sup>11</sup>

Multiplication of proceedings raises the spectre of different results in different courts. The plaintiffs then face the question, in respect of the defendants, other than the Crown: the court of which province, or perhaps more than one province? . . . There may well be other jurisdictional questions. I do not know the solution to any of them.

The situation is lamentable. There are probably many other persons who have claims arising out of this air disaster. The jurisdictional perils must be, to all those potential litigants, mystifying and frightening.

Despite the obvious potential hardships involved in this strict approach to the interpretation of British North America Act, 1867,

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<sup>8</sup> *Supra*, footnote 3; aff'd, [1980] 1 F.C. 86 (C.A.).

<sup>9</sup> The plaintiffs' contention that a cause of action in their favour arose out of breaches of certain provisions of the federal Aeronautics Act and the regulations made thereunder was rejected. Their argument, based on an analogy with maritime law, that there was a body of federal law called "aviation law" was also dismissed.

<sup>10</sup> Federal Court Act, *supra*, footnote 6, s. 17(1).

<sup>11</sup> *Supra*, footnote 3, at p. 490. Considerations of this kind prompted the Supreme Court of Canada in *The Sparrows Point v. Greater Vancouver Water District*, [1951] S.C.R. 396, to interpret the statutory jurisdiction of the Exchequer Court over claims for "damage done by any ship" in a generous manner by allowing the plaintiff to join the National Harbours Board as a joint tortfeasor with the ship. Contrast, though, *Bow, MacLachlan & Co. Ltd v. The Camosun*, [1909] A.C. 597 (admiralty jurisdiction of the Exchequer Court did not extend to a claim made by the defendant against a third party over which the court would have had no jurisdiction if it had been asserted by an independent claim).

section 101,<sup>12</sup> there can now be no doubt that it is the law.<sup>13</sup> This has been made abundantly clear by the recent decision of the Supreme Court of Canada in *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*<sup>14</sup> The plaintiff, Foundation, had brought an action in the Federal Court against the Crown in which it alleged that the Crown was in breach of a building contract and that it was liable in negligence for damage sustained by the plaintiff as a result of blasting operations carried out by another contractor, Fuller. The Crown then served a third party notice upon Fuller, in which the Crown claimed a contractual indemnity from Fuller for any damages for which it might be held liable to the plaintiff, or, in the alternative, for contribution or indemnity under the terms of the Negligence Act<sup>15</sup> of Ontario. The plaintiff had not joined Fuller as a co-defendant. The Crown's third party notice was struck out on the ground that it was not founded on federal law and was therefore outside the jurisdiction that could constitutionally be exercised by the Federal Court.

It will be recalled that the Supreme Court had held in *McNamara*<sup>16</sup> that in the absence of existing, substantive federal law, Parliament could not confer jurisdiction upon the Federal Court to entertain actions brought by the Crown. The federal Crown's right to sue in tort or upon a contract is founded on the applicable provincial law, albeit that Parliament may have unexercised legislative authority to amend the law applicable to the rights of the Crown. Since the adjudication of the rights asserted by the Crown in the main action in *McNamara* did not fall within federal jurisdiction, it followed *a fortiori* that any claim over for indemnity in respect of the

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<sup>12</sup> For a poignant example of the problems, see *Attorney-General of Canada v. DeLaurier* (1978), 93 D.L.R. (3d) 434 (Man. Q.B.), where the Crown's action was held out of time by the Manitoba court in which it was ultimately brought, after the decision in *McNamara* had made it clear that the proceedings already pending before the Federal Court had been instituted in the wrong forum.

<sup>13</sup> Earlier authorities supporting this position include *Anglophoto Ltd v. "The Ikaros"*, [1973] F.C. 483 (T.D.); *Desbiens v. The Queen*, [1974] 2 F.C. 20 (T.D.); *McGregor v. The Queen*, [1977] 2 F.C. 520 (T.D.); *Alda Enterprises Ltd v. The Queen*, [1978] 2 F.C. 106 (T.D.); *Attridge v. The Queen* (1978), 86 D.L.R. (3d) 543 (Fed. Ct T.D.); *Tomossy v. Hammond*, [1979] 2 F.C. 232; *Nichols v. The Queen* (an unreported judgment of the Trial Division rendered on Sept. 28th, 1979; No. T-3094-79); *Dolan v. The Queen* (an unreported judgment of the Trial Division rendered on April 29th, 1979; No. T-1180-79).

<sup>14</sup> (1979), 106 D.L.R. (3d) 193: the decision affirmed the judgment of the Federal Court of Appeal, [1979] 1 F.C. 877. See John B. Laskin and Robert J. Sharpe, *Constricting Federal Court Jurisdiction: A Comment on Fuller Construction* (1980), 30 U.T.L.J. 283, for an able discussion of many of the issues raised in this article.

<sup>15</sup> R.S.O., 1970, c. 296, s. 2(1).

<sup>16</sup> *Supra*, footnote 2.

loss, in the absence of any relevant federal law, must also fail. However, in *obiter dicta*, couched somewhat obliquely in tentative and narrow terms, Laskin C.J.C. stated:<sup>17</sup>

I would, however, observe, that if there had been jurisdiction in the Federal Court there could be some likelihood of proceedings for the contribution or indemnity being similarly competent, at least between the parties, in so far as the supporting federal law embraced the issues arising therein.

Quite apart from the fact the Chief Justice evidently did not intend these words to embody his final opinion on the matter, they could not reasonably be interpreted to mean that Parliament could constitutionally confer upon the Federal Court a pendent or ancillary jurisdiction to dispose of claims against other parties, simply because they arose out of the incident which gave rise to the main action which was founded on a law of Canada. For one thing, he appeared to envisage that the parties to the claim over should also have been parties to the principal action, and for another, that the claim over itself should be "embraced" by existing federal law. On the other hand, it might be said that if this were all that the Chief Justice meant, then it is difficult to understand why it needed to be mentioned at all as a separate problem to which so tentative a solution seemed appropriate. A claim that satisfied this latter test would surely generally be constitutionally sustainable as a cause of action founded on a law of Canada. What the Chief Justice may have had in mind is that if a federal statute can be interpreted as referentially incorporating into federal law some body of provincial law, then that will suffice to found federal jurisdiction.<sup>18</sup>

This dictum might have been used to prise open a fissure in the monolithic face of *McNamara*. It was, nonetheless, hardly surprising that the Federal Court subsequently disallowed third party claims for contribution and indemnity that arose out of a main action which was within the Federal Court's jurisdiction.<sup>19</sup> The judicial sense of

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<sup>17</sup> *Ibid.*, at p. 664.

<sup>18</sup> Cf. *Schwella v. The Queen*, [1957] Ex. C.R. 226, at p. 230, where, in deciding that the Exchequer Court had jurisdiction over a third party notice served by the Crown, Thurlow J. said: "Under [section 3 of the *Crown Liability Act*, S.C., 1952-53, c. 30], the law applicable for determining when the Crown is liable in the case of tort committed in the Province of Ontario is the law of that province and includes the provisions of the *Negligence Act*, which was in force when the *Crown Liability Act* came into effect." However, the authority of this case has now been undermined because the court identified the term "laws of Canada" with the scope of the legislative competence of Parliament. But see now the reasoning in *Rhine and Prytula*, footnotes 6a, *supra* and 34a and 43, *infra*.

<sup>19</sup> See, for example, *McGregor v. The Queen*, [1977] 2 F.C. 520 (T.D.); *Western Caissons (Quebec) Ltd v. McNamara Corporation of Newfoundland Co., Ltd*, [1979] 1 F.C. 509 (C.A.); see also *Lewis Insulations Ltd v. Goodram Bros. Ltd* (1978), 90 D.L.R. (3d) 311 (Ont. H.C.). Contrast, however, *Davie Shipbuilding Ltd v. The Queen*, [1979] 2 F.C. 235, at pp. 240-244 (T.D.).

fidelity to the pronouncements of the highest court in the land prevailed over a recognition that to require such claims to be pursued elsewhere was calculated to increase parties' costs, and to delay the final settlement of all the issues arising from the facts upon which the main action rested. By the time that the question reached the Supreme Court in the *Fuller* case, it would be difficult to deny that the decisions in *Quebec North Shore* and *McNamara* had already cast their shadow over it. However, the reasoning by which the Supreme Court concluded that the theory upon which those cases rested inexorably drove it to the unsatisfactory result reached in *Fuller*, deserves closer examination.

Apart from the two principal decisions in which the Supreme Court formulated the constitutional limitations of federal jurisdiction, the only authority upon which the court relied in *Fuller's* case was *The Bank of Montreal v. The Royal Bank of Canada*.<sup>20</sup> The issue in that case was whether the grant of jurisdiction to the Exchequer Court to determine "actions . . . of a civil nature . . . in which the Crown is plaintiff",<sup>21</sup> extended as a matter of statutory interpretation to a claim for indemnity by a party against whom the Crown was proceeding in the principal action. The Supreme Court held that since "the proceeding against the third party is a substantive proceeding and not a mere incident of the principal action",<sup>22</sup> the claim for indemnity was not encompassed by the suit brought by the Crown out of which the claim arose. The question in *Fuller*, however, did not depend upon the scope of the statutory jurisdiction of the Federal Court. Quite clearly, the claim made by the Crown fell within it.<sup>23</sup> The contested issue was whether the Crown's claim was founded upon federal law for the purpose of determining the constitutional scope of the court's jurisdiction. Precisely what the logical connection is between this, and the question decided in *The Bank of Montreal* is not easy to see. It can be conceded that if the claim for contribution in that case had been pursued in separate

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The question had already arisen in *Consolidated Distilleries Ltd v. Consolidated Exporters Corporation Ltd*, [1930] S.C.R. 531. In that case the Crown had sued the defendants in the Exchequer Court on certain bonds. The defendants' third party notice claiming contractual indemnity was struck out on the ground that their rights under the contract were not governed by a law of Canada. But see the judgment in *Schwella v. The Queen*, [1957] Ex. C.R. 226.

<sup>20</sup> [1933] S.C.R. 311.

<sup>21</sup> Exchequer Court Act, R.S.C., 1927, c. 34, s. 30(d).

<sup>22</sup> *Ibid.*, at p. 316. See also the cases on the admiralty jurisdiction of the Exchequer Court cited in footnote 11, *supra*.

<sup>23</sup> Federal Court Act, *supra*, footnote 6, s. 17(4)(a), provides that the Trial Division of the Federal Court has concurrent original jurisdiction "in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief".

proceedings, it could hardly have been said to be a civil action to which the Crown was plaintiff. It makes sense, therefore, to say that the Crown is still not "the plaintiff" when the claim is asserted by a third party notice to the principal action. However, even if the Crown had instituted separate proceedings for contribution in *Fuller*,<sup>24</sup> the argument that its claim was founded upon federal law would still be plausible. For a condition precedent to the Crown's right to contribution was its liability to the plaintiff in the main action,<sup>25</sup> a question that is indisputably one of federal law.<sup>26</sup> Whether the ability of a party to divide the grounds of his claim into separate proceedings founded respectively upon federal and provincial law should or should not be used as the test of the federal law basis of a cause of action, the issue is hardly resolved by *The Bank of Montreal* case. In any event, in *Fuller* federal and provincial law provided an inextricably mixed basis of the right asserted by the Crown against the third party.

A further point of difference between the *The Bank of Montreal* and *Fuller* is that the former was decided solely on a question of statutory interpretation. *Fuller*, of course, depended upon the constitutionality of a legislative provision, the interpretation of which, if valid, indisputably conferred the requisite jurisdiction upon the Federal Court to decide the Crown's claim. It would surely not have been unreasonable for the Supreme Court to have started its analysis with the familiar presumption in favour of the validity of Acts of Parliament, and to have concluded by finding that section 101 of the British North America Act should be interpreted to include a power to confer jurisdiction upon the Federal Court to decide those matters that could be fairly said to be necessarily incidental to the effective exercise of the jurisdiction that Parliament

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<sup>24</sup> A course which the Ontario courts, by a remarkable interpretation of the Negligence Act, have consistently denied to claimants for contribution who have been sued to judgment by the injured party. See *Cohen v. S. McCord & Co.*, [1944] O.R. 568; *Rickwood v. Town of Aylmer* (1957), 8 D.L.R. (2d) 702; *Paul Papp Ltd v. Fitzpatrick*, [1967] 1 O.R. 565. In *Fuller*, *supra*, footnote 14, however, Pigeon J. (at p. 205) said of these decisions: "I am not at all sure that the construction of the statute which gave this unsatisfactory result was correct." For a less radical view, see *Bates v. Illerburn* (1976), 70 D.L.R. (3d) 154, at p. 158, where it was suggested that *Cohen v. McCord* might not apply when a claimant for contribution against the federal Crown had been sued by the injured party in an Ontario court. Any other result would destroy the right to contribution because the federal Crown can only be sued in the Federal Court.

<sup>25</sup> This point was made clearly by Martland J. in dissent (*ibid.*, at p. 198) where he stated: "In order to succeed in its third party claim, the Crown must first establish its liability to Foundation. That liability involves 'federal law' as is pointed out . . . in *McNamara* . . .".

<sup>26</sup> See *McNamara Construction (Western) Ltd v. The Queen*, *supra*, footnote 2, at p. 662.



had quite validly conferred upon it.<sup>27</sup> However, the refusal of the court to consider the injustice to the litigants of its interpretation of section 101 could not be made clearer that it was by Pigeon J. when he stated that even if the Negligence Act precluded the Crown from instituting separate proceedings for contribution in the Ontario courts after being held liable in the Federal Court, the remedy was legislative reform, not constitutional manipulation.<sup>28</sup>

The Supreme Court's constitutional analysis in *Fuller* started from a quite different point. Pigeon J. reasoned that one of the fundamentals of the allocation of judicial power inherent in the British North America Act was that the superior courts in the provinces were to exercise general jurisdiction over both federal and provincial law. The disadvantages of a dual court system were avoided by a system of federal and provincial co-operation through the federal appointing power and provincial control over the administration of justice. Our constitution did not require the establishment of separate courts to administer provincial and federal law, although the creation of federal courts was expressly authorised. But since the establishment of such courts was not *necessary* (that is constitutionally mandated), how could it be argued that the inclusion of an ancillary power, of the kind described above, could be *necessary* for the exercise of Parliament's legislative authority?

What this amounts to, in effect, is a decision to give a very narrow interpretation to Parliament's constitutional power to create a federal court. Section 101 is seen as an exception to the dominant scheme of a unitary court system. Now it may be that Parliament was unwise to give the jurisdiction that it did to the Federal Court, and that American experience confirmed the undesirability of creating a separate federal court with wide original jurisdiction—some of it exclusive—over large areas of federal law. But it may well be thought that this is essentially a matter for Parliament to decide, and that once Parliament has spoken clearly it is appropriate for the Supreme Court to defer to its decision. To limit the jurisdiction that

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<sup>27</sup> Cf. P.W. Hogg, *Constitutional Law of Canada* (1977), pp. 81-82, 91-94, 209-211. See, however, *Consolidated Distilleries Ltd v. Consolidated Exporters Corporation Ltd*, *supra*, footnote 19, at p. 536, where Anglin C.J.C., writing for the majority of the court, squarely rejected the contention advanced in the text that jurisdiction over third party claims was "necessarily incidental" to the court's exercise of the jurisdiction properly conferred upon it by Parliament. Perhaps views have changed in the last fifty years about the proper location of the line dividing what is necessary from what is highly convenient in matters of procedure.

<sup>28</sup> *Supra*, footnote 14, at p. 206. Contrast the judgment of Martland J., at p. 200, where the "startling consequence" of the majority's view confirmed his dissenting interpretation of s. 101.

Parliament can confer upon the Federal Court so narrowly that it makes even those parts that are clearly valid so practically defective that drastic legislative reform becomes necessary,<sup>29</sup> seems a remarkable arrogation of power. No one would contend that the decision in *Fuller* produced a convenient result. The question is whether the court should have interpreted the constitution in such a way as to avoid it, or whether Parliament had created a problem which the court was right to leave to Parliament to solve.

If *The Bank of Montreal* case did not logically compel the decision in *Fuller*, the next question is whether there were other arguments, of at least equal rational cogency, which would have justified the court in disposing of the litigation in a manner that would have eased the problems of litigants who resort, whether by choice or legislative command, to the Federal Court. First, as Martland J. in his dissenting opinion pointed out, the Crown's right to recover contribution or indemnity did depend, in part at least, upon federal law. For the liability of the Crown to the plaintiff in the principal action, a matter that was disputed in that action and the third party proceedings, rested upon a question of federal law.<sup>30</sup> No support can be found in *McNamara* for the proposition that federal jurisdiction cannot extend to a claim that rests partly upon provincial law and partly upon federal law.<sup>31</sup> The implications of such a view, considered later in this comment, are so far reaching that it is difficult to believe that the Supreme Court has espoused it. Whatever may be the scope of any such ancillary jurisdiction, it ought at least to exist where the right may otherwise be unenforceable altogether, or where the inconvenience and burden of requiring the parties to resort to separate proceedings to litigate the legal questions that "derive from a common nucleus of operative fact" are such that a party "would ordinarily be expected to try them all in one judicial proceeding".<sup>32</sup> It may be noted that in the United States third-party

<sup>29</sup> This appears to have been the meaning of the following statement by Pigeon J. (*ibid.*, at p. 206): "If it is considered desirable to be able to take advantage of provincial legislation on contributory negligence which is not meant to be exercised outside the courts of the province, the proper solution is to make it possible to have those rights enforced in the manner contemplated by the general rule of the constitution of Canada, that is before the superior courts of the province."

In order to ensure that this will happen, Parliament may have to remove from the Federal Court much of its exclusive jurisdiction over civil litigation.

<sup>30</sup> See *supra*, footnote 26.

<sup>31</sup> In *McNamara* itself, the court (*supra*, footnote 2, at p. 663) did not regard the statutory requirement in the Public Works Act, R.S.C., 1970, P-38, s.16(1), which required the Minister to take security for the performance of a contract, as providing an adequate foundation in federal law of the Crown's claim against the surety. See further footnote 55, *infra*.

<sup>32</sup> *United Mineworkers v. Gibbs* (1966), 383 U.S. 715, at p. 725. Cf. Wright and Miller, *Federal Practice and Procedure*, (1969-), § 1444, where the learned

claims have been held to fall within the diversity head of federal jurisdiction in suits in which the plaintiff and defendant were diverse but where there was no diversity between the third party and the plaintiff or defendant in the main action.<sup>33</sup>

A second approach would be to enquire whether the reference to the liability of the Crown in the Crown Liability Act<sup>34</sup> could not be interpreted to encompass any rights available to the Crown, whether by means of a counter-claim by the Crown against the plaintiff or a claim over against a third party. For both of these in a real sense relate to the liability of the Crown, in so far as they may reduce the sum ultimately payable from the public purse in respect of the "common nucleus of operative fact", from which the Crown's liability in the main action derives. The "liability" of the Crown would thus mean its *net liability* after counter-claims and claims over against third parties had been taken into account. To allow all such claims to be disposed of in a single proceeding could also plausibly be said to conduce to the *better administration* of a law of Canada, namely, the Crown Liability Act itself.<sup>34a</sup> Thirdly, the court might have explored, as it has done in a number of cases which have examined the constitutionality of the maritime jurisdiction of the Federal Court, whether references in federal statutes to legal concepts that depend upon provincial law should not be regarded as referentially incorporating into federal law the appropriate provisions of provincial law. Thus when the Crown Liability Act speaks of the liability of the Crown in tort, since there is no independent body of substantive federal common law, liability is determined by the law of the relevant province. The substantive law designated by Parliament for deciding the case will thus satisfy the criterion of a law of Canada for the purposes of section 101, just as much as the express enactment in the federal statute of a body of substantive law would have done.

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authors (at p. 221) formulate the task of the courts in such cases as follows: "The decision ultimately will depend on a weighing of the court's desire to preserve the integrity of constitutionally based jurisdictional limits against the desire to dispose of all disputes arising from one set of facts in an action."

<sup>33</sup> For a discussion, see the citation to Wright and Miller, *op. cit.*, *ibid.*; a convenient overview is provided by Laskin and Sharpe, *op. cit.*, footnote 14, at pp. 286-290.

<sup>34</sup> *Supra*, footnote 7, s. 3(1).

<sup>34a</sup> This thought seems to have been accepted by Laskin C.J.C. in *Rhine v. The Queen and Prytula v. The Queen* (reasons for judgment released Dec. 2nd, 1980), when in upholding federal jurisdiction over claims for the repayment of money paid by the Crown under two statutory schemes, he said: "This is all a matter of the administration of a federal statute and is, therefore, within s. 101 of the British North America Act."

While different views can be held about the desirability of a dual court system, these should largely be resolved within the political process. If earlier authority did not compel the decision in *Fuller* it is difficult to see the fundamental constitutional values which justify the infliction of such serious inconveniences upon litigants. The Supreme Court, after all, remains a national court of appeal on questions of both provincial and federal law, and is the final court of appeal from both the Courts of Appeal in the provinces and from the Federal Court of Appeal. The same authority appoints the judges of the superior courts in the provinces as well, of course, as the judges of the Federal Court.

*“Founded upon existing federal law”*

The significance of the *Fuller* case clearly extends beyond the problems peculiar to litigation involving multiple parties.<sup>34b</sup> These represent but one type of case in which the importance of defining the relationship between a party's legal rights and a federal law will arise. Since the Supreme Court of Canada decided *Quebec North Shore* and *McNamara* there has been no shortage of cases in which the scope, limitations, and ambiguities of this touchstone of federal jurisdiction have been considered. The case-law demonstrates that the requirement that the litigation be founded upon existing federal law is far from self-applying.

Although the Crown Liability Act does not provide an exhaustive statutory code to govern all aspects of the substantive law regulating the liability of the Crown, any more than the common law has developed a comprehensive set of principles defining the legal obligations of the Crown under a contract to which it is a party, the Supreme Court in *McNamara* appears to have established that civil proceedings against the federal Crown are always founded on federal law.<sup>35</sup> If the constitutional boundaries of federal jurisdiction are to be determined exclusively by reference to whether the plaintiff's claim is founded upon a federal law, should it be assumed that in such a suit the Federal Court may decide any issue raised by the Crown as a partial or total defence to the plaintiff's claim, even though the defence is derived from a provincial statute or the general common law?<sup>36</sup> Suppose, for instance, that the Crown pleads that the

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<sup>34b</sup> However, in *Rhine* and *Prytula*, *ibid.*, the Supreme Court does not mention its decision in *Fuller*, *supra*, footnote 14.

<sup>35</sup> See *supra*, footnote 26.

<sup>36</sup> S. 11 of the Crown Liability Act, *supra*, footnote 7, may be relevant here. It provides that the Crown may raise as a defence to any proceedings brought against it under the Act, any defence that would be available in litigation between subject and subject. This may well incorporate relevant provincial law, and thus make it “a law of Canada” for this purpose.

plaintiff's own carelessness contributed to the injury that he suffered as a result of the negligent driving of a post office truck by an employee of the Crown?<sup>37</sup> What if the Crown seeks to avoid liability for breach of contract by pleading that it relied upon some misrepresentation by the plaintiff? Or suppose that the Crown seeks to reduce the quantum of contractual damages by relying upon the plaintiff's failure to mitigate its loss, or by asserting a set-off? There may, of course, be a question about whether a provincial statute applies, as a matter of interpretation, to the federal Crown.<sup>38</sup> It is also very doubtful whether a province may impose statutory liabilities upon the federal Crown.<sup>39</sup> However, a provincial law that is otherwise within the constitutional competence of a provincial legislature, may regulate the rights of the federal Crown when it seeks to avail itself of a right emanating from provincial law.<sup>40</sup> It is

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<sup>37</sup> Cf. *Murray v. The Queen*, [1965] 2 Ex. C.R. 663; [1967] S.C.R. 262, where the Crown's right to recover for the loss of a soldier's injuries inflicted partly as a result of the defendant's negligence, was held to be governed by provincial legislation. No question seems to have been raised in the Exchequer Court or the Supreme Court of Canada about the constitutionality of the jurisdiction of the Exchequer Court to entertain the Crown's tort claim. In the light of *McNamara and Fuller*, however, an interesting point was involved. While the Crown's cause of action was founded on the common law tort of *actio per quod servitium amisit*, the Exchequer Court Act, S.C., 1952, c. 98, s. 50, provided that for the purpose of claims by and against the Crown, a member of the armed forces shall be deemed a servant of the Crown. See Federal Court Act, *supra*, footnote 6, s. 37. See also the other cases cited at footnote 40, *infra*. *Quaere* whether this statutory extension of a common law cause of action would suffice to give a basis in federal law for constitutional purposes?

<sup>38</sup> Whether Crown immunity from the operation of a statute applies to the Crown in right of another level of government other than that which enacted the legislation is not altogether clear. However, in *The Queen in right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, Laskin C.J.C. clearly thought it did. For a further critical discussion of this question, see P.W. Hogg, *op. cit.*, footnote 27, pp. 176-177.

<sup>39</sup> See *Gauthier v. The King* (1918), 56 S.C.R. 176, at pp. 182 (per Fitzpatrick C.J.), 193-194 (per Anglin J.), although the inconsistent decision of the Privy Council in *Dominion Building Corporation Ltd v. The King*, [1933] A.C. 533 makes this a notoriously difficult area of constitutional law. See further Dale Gibson (1969), 47 Can. Bar Rev. 40, esp. at pp. 51-52; P.W. Hogg, *op. cit.*, *ibid.*, pp. 178-179. And see the statement by Laskin C.J.C. in *The Queen in right of the Province of Alberta v. Canadian Transport Commission*, *ibid.*, that "a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation. This does not mean that the federal Crown may not find itself subject to provincial legislation where it seeks to take the benefit thereof."

<sup>40</sup> *Murray's* case, *supra*, footnote 37 (provincial legislation restricting common law rights of recovery held to bind the federal Crown); *Toronto Transport Commission v. The King*, [1949] S.C.R. 510, at p. 521 (federal Crown may take the benefit of provincial contributory negligence legislation so as to reduce but not bar totally, its damages claim for negligence). The line may, however, be a fine one: see

surely impossible to imagine that even the narrowest reading of section 101 would deprive the Crown of the benefit of any applicable defences in provincial law, although it may be argued, by analogy with the reasoning in *Fuller's* case, that the Crown cannot assert in the Federal Court a counter-claim that is not based upon federal law, and which is capable of supporting an independent cause of action.<sup>40a</sup>

In the case of a suit brought under the Crown Liability Act, then, it can plausibly be argued that the statutory reference to the "liability" of the Crown must be interpreted to incorporate by reference the relevant law of the province that would otherwise govern the dispute.<sup>41</sup> When the facts which give rise to a cause of action are not all located in one province, and the laws of the provinces with which they are connected provide different solutions, then the law by which the "liability" of the Crown is determined, including any defences that may be available, should be interpreted to incorporate a reference to an appropriate choice of the rule. Since the forum of the action is the Federal Court, the question then arises about the choice of law rule applicable, particularly, of course, if the provinces involved have different conflict of laws rules.<sup>42</sup> In so far as a federal statute implicitly authorizes the Federal Court to develop its own conflict of laws rules in order to dispose of a dispute, the

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*Murphy's* case, *infra*, footnote 41, where provincial legislation had the effect of diminishing a defence available to the Crown at common law. Moreover, the effect upon the federal purse of provincial legislation which imposes a liability upon the Crown would seem little different from that which diminishes a defence or restricts a common law right. Different constitutional considerations may apply to a legal immunity or defence that is peculiar to the Crown.

Whether there are constitutional limitations upon Parliament's legislative power to define the civil rights and liabilities of the federal Crown is unclear. In *Nykorak v. Att.-Gen of Canada*, [1962] S.C.R. 331, federal legislation deeming a member of the armed forces to be a servant of the Crown was upheld, even though its consequence was to impose a liability in an *actio per quod* upon a private individual who, under provincial law, would not have been so liable. The court relied upon s. 91(7) of the British North America Act, 1867. Whether the "peace, order and good government" power, or the power in relation to public property and debt in s. 91(1A) would support the creation of a comprehensive federal code of Crown rights and liabilities in civil proceedings is far from certain.

<sup>40a</sup> *Att.-Gen. of Canada v. Rapanos Brothers Ltd* (1980), 29 O.R. (2d) 92 (H.C.) (provincial superior court has jurisdiction to determine whether defendant has a set-off against the federal Crown, but not a counter-claim).

<sup>41</sup> *Cf. The King v. Murphy*, [1948] S.C.R. 357, where the suppliant for a petition of right and a member of the armed forces were both found to have been at fault. It was held that the Ontario Negligence Act, *supra*, footnote 15, applied so as to reduce the suppliant's damages. The Crown was unable to rely upon the common law rule that the contributory negligence was a complete bar to his right of recovery. See also *The King v. Lapperiere*, [1946] S.C.R. 415.

<sup>42</sup> *Cf. Sivaco Wire and Nail Company v. Tropwood A.G.*, [1979] 2 S.C.R. 157, at p. 166, where Laskin C.J.C. stated that the body of Canadian maritime law

constitutional requirement of a law of Canada would thus appear to be satisfied.

In litigation in which the federal Crown is not the defendant, it may be extremely difficult to determine whether a plaintiff is founding a claim upon an existing federal law. There are, nonetheless, clear cases at both extremes of the spectrum. For example, a claim for damages in which the cause of action is breach of a duty imposed upon the defendant by a federal statute, is clearly constitutionally capable of being the subject of federal jurisdiction.<sup>43</sup> The decision in *Fuller* may well add a new dimension to the familiar, if difficult, problem of determining whether breach of a particular statutory duty gives rise to a cause of action in a person injured thereby, or whether the plaintiff must establish a cause of action based, for instance, on a nominate tort (typically negligence), of which breach of the statutory duty may be an ingredient.<sup>44</sup> For unless the plaintiff's claim is founded directly and exclusively upon the breach of the federal statute there may be significant jurisdictional difficulties.<sup>45</sup>

It would seem equally clear that a plaintiff cannot expand federal jurisdiction beyond its constitutional limits by basing a claim

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referentially incorporated by the Federal Court Act, s. 2, "embraces conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim". He concluded, without elaboration, that the conflicts rules to be applied to select the appropriate law to determine the dispute, were those of the forum. See also *Santa Marina Shipping Co. S.A. v. Lunham and Moore Ltd.*, [1979] 1 F.C. 25 (T.D.); *United Nations v. Atlantic Seaways Corporation*, [1979] 2 F.C. 541 (C.A.).

<sup>43</sup> See, for example, *The Queen v. Rhine*, [1979] 2 F.C. 651 (C.A.) aff'd by S.C.C., *supra*, footnote 34a (Crown's claim for repayment of advance paid pursuant to Prairie Grain Advance Payments Act, R.S.C., 1970, c. P-18, as am., arose from the statute that contained a comprehensive code regulating the terms of the advance and the obligations of the payee). And see *The Queen v. Sovereign Seat Cover Mfg. Ltd* (1980), 109 D.L.R. (3d) 494 (Fed. Ct C.A.). Cf. *Canadian Pacific Ltd v. United Transportation Union*, [1979] 1 F.C. 609 (C.A.) (constitutional requirements for federal jurisdiction satisfied in action for a declaration of the plaintiff's rights under a collective agreement made binding upon the parties by the Canada Labour Code: relief refused, because the Code entrusted such questions to the Labour Relations Board).

<sup>44</sup> See generally, Allen M. Linden, *Canadian Tort Law* (1977), Ch. 7, pp. 285-304.

<sup>45</sup> See, for example, *Pacific Western Airlines Ltd v. The Queen*, *supra*, footnote 8, where it was held that since the Aeronautics Act, R.S.C., 1970, c. A-3, and the Air Regulations imposed no duties for breach of which the plaintiffs could recover damages, the legislation did not provide a basis in federal law for the plaintiff's action against the defendants other than the Crown. And see *The Queen v. Saskatchewan Wheat Pool*, [1980] 1 F.C. 407 (T.D.) rev.'d by Fed. Ct C.A. in judgment rendered on Nov. 13th, 1980; *Haida Helicopters Ltd v. Field Aviation Ltd*, [1979] 1 F.C. 143 (T.D.); *McKinlay Transport Ltd v. Goodman*, [1979] 1 F.C. 760 (C.A.). See now *Rhine and Pryula*, *supra*, footnote 34a.

for a single loss upon two independent causes of action, unless each is founded upon existing federal law.<sup>46</sup> Unsatisfactory as it undoubtedly is to require a litigant to separate the bases of his legal rights, whether by causes of action or by parties, and pursue them in different proceedings, this is precisely what will have to be done if the Federal Court is chosen as a forum. It is of some comfort to know that the circumstances in which a plaintiff will be forced to proceed with a claim for damages in the Federal Court by virtue of its exclusive original jurisdiction are few.<sup>47</sup> The most important instance is when a plaintiff wishes to sue the federal Crown.<sup>48</sup> The result of the decisions of the Supreme Court of Canada so far considered in this comment would appear to require the possible institution of four suits in order to resolve all the issues of legal liability that may arise when the Crown is one of several defendants: (1) the plaintiff must sue the Crown in the Federal Court; (2) proceedings against other defendants must be instituted in a court in the appropriate province or abroad; (3) if held liable, the federal Crown can only sue for contribution in a provincial court; (4) other defendants can only claim contribution against the Crown in the Federal Court. A legal system capable of inflicting outrages such as these upon the parties to litigation over commonplace occurrences is manifestly functioning at an unacceptably low level. It would surely take some very special pleading indeed to convince an unfortunate

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<sup>46</sup> *Intermunicipal Realty and Development Corporation v. Gore Mutual Insurance Co.*, [1978] 2 F.C. 691 (T.D.) (claim arising under contract of marine insurance struck out to the extent that it was based upon negligent misrepresentation by an alleged agent of the defendant). See also *John A. MacDonald and Railquip Enterprises Ltd v. Vapor Canada Ltd*, [1977] 2 S.C.R. 134 (respondent's claim for injunctive relief inadmissible in the Federal Court to the extent that it depended upon violation of invalid federal enactment).

<sup>47</sup> See, Federal Court Act, *supra*, footnote 6, ss. 17(1), (3) (specified suits to which the Crown is party), s. 20 (industrial property). The Federal Court also has exclusive original jurisdiction to issue the prerogative orders of *certiorari*, prohibition, *mandamus*, and *quo warranto*, and to grant declarations and injunctions against federal boards, commissions or other tribunals, including suits in respect of such matters instituted against the Attorney General of Canada (s. 18). The Federal Court has a limited, but exclusive, jurisdiction to issue *habeas corpus* (s. 17(5)). The jurisdiction of the Federal Court of Appeal in certain public law matters is also exclusive (ss 28, 30).

The grant of exclusive jurisdiction to the Federal Court to issue *certiorari*, generally leaving in the superior courts in the provinces jurisdiction to issue *habeas corpus* in respect of federal agencies, has caused difficulties. See, for example, *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at p. 595. The Law Reform Commission of Canada has recommended that the statute should be amended to make clear that *certiorari* in aid of *habeas corpus* remains available in provincial superior courts: Report No. 14: Judicial Review and the Federal Court (1980), pp. 13-16 (Recommendation 2.5).

<sup>48</sup> *Ibid.*, s. 17(1).



client that such bizarre consequences are dictated by fundamental constitutional considerations.

The reasoning in *Fuller* would also seem to exclude from the jurisdiction of the Federal Court, cases in which a single cause of action depends upon questions of both federal and provincial law. The Crown's claim in *Fuller* itself was of this type. For while the right to contribution was created by provincial law, one of the issues upon which success depended was the liability of the Crown to the plaintiff, a question of federal law. Whether a plaintiff's right is founded upon existing federal law may often be difficult to determine. For instance, in one case<sup>49</sup> the Crown sued a student to recover a loan that had not been repaid. The loan had been made by a bank and guaranteed by the Crown. Federal legislation regulated many aspects of the transaction, including a statutory right in the Crown to be subrogated to the bank's rights against a defaulting borrower.<sup>50</sup> The Federal Court upheld federal jurisdiction over this action, although its reasoning appears dubious.<sup>51</sup> In another case,<sup>52</sup>

<sup>49</sup> *The Queen v. Prytula*, [1979] 2 F.C. 516 (C.A.); aff'd S.C.C., *supra*, footnote 34a.

<sup>50</sup> Canada Student Loans Act, R.S.C., 1970, c. S-17, and Canada Student Loan Regulations, SOR/68-345.

<sup>51</sup> In the Trial Division ([1978] 1 F.C. 198), the Crown's application for a default judgment was dismissed on the ground that the statement of claim rested upon provincial law, notwithstanding that the Crown's rights were, to a large extent, the subject of a federal statute. The Court of Appeal did not find it necessary to decide whether the Crown's legal rights were so closely derived from the statute as to satisfy the *McNamara* test of federal jurisdiction.

The Court of Appeal avoided the difficulty of analysing precisely the parts played by federal and provincial law in the Crown's cause of action. Instead, the court reasoned that the law governing the contract of loan between a bank and its customer is excluded from provincial competence by the British North America Act, s. 91(15), and that no post-confederation provincial law of general application could alter law continued in force by s. 129, the repeal, amendment or alteration of which was within the exclusive legislative power of Parliament. Thus, all the law applicable to contracts between a bank and its customers is federal law, whether or not it had been made the subject of federal legislation.

There are two difficulties with this analysis. First, it seems to assume that because banking is an exclusive federal matter, the general provincial law of contract (governing such questions as capacity and the rights of guarantors), cannot apply to the kind of transaction considered in *Prytula*. The court further supported its position by alluding to the possibility that provincial law might otherwise sterilize a federally regulated activity. This was surely erroneous, and was not supported by the S.C.C. when it affirmed the decision (see *supra*, footnote 49). See P.W. Hogg, *op. cit.*, footnote 27, pp. 81-83. Secondly, in so far as the court appears to equate the term "laws of Canada" with the scope of federal legislative competence, it is plainly inconsistent with *Quebec North Shore* and *McNamara*. Indeed, the reasoning in these cases would appear inevitably to support the first criticism.

A more limited version of this thesis was propounded in *Associated Metals and Minerals Corporation v. "The Ship Evie W"*, [1978] 2 F.C. 710 (C.A.), in which

Footnote 52, see next page.

the Federal Court assumed jurisdiction over a claim for the loss of goods that was made by the owner against an air carrier. The carrier's liability was derived from a contract of carriage, the terms of which were regulated by federal statute.<sup>53</sup> Moreover, the court also held that it had jurisdiction to enter judgment in favour of the owner's insurers, to whom the owner's claim has been assigned by way of subrogation.<sup>54</sup>

To what extent do the decisions in *McNamara* and *Fuller* suggest that the Federal Court lacks jurisdiction over cases involving elements of federal law and of provincial law which have not been referentially incorporated into federal law by federal legislation? A broad reading of *Fuller* would appear to indicate that a plaintiff's rights only constitutionally fall within federal jurisdiction if they are *exclusively* founded upon a law of Canada. It was, after all, quite clear that in that case the Crown's claim depended equally upon a federal law (its liability to the plaintiff) and upon provincial law (its contractual right to indemnity, or its right under the Ontario Negligence Act to contribution). Similarly, it might be argued that in

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Jackett C.J. stated, correctly, it is submitted, that the Federal Court has no jurisdiction when Parliament could enact, but has not done so, special laws in relation to a class of persons or subject matter; in the absence of such enactments the rights and obligations of those whose activities fall within an exclusive head of federal legislative competence are governed by general provincial law. He concluded, however, that maritime law was different in that it was never part of the general law of the provinces, and even if it had not been referentially incorporated into federal law by the Admiralty Act of 1934, it remained, by virtue of s. 129 of the British North America Act, non-statutory federal law. If this conclusion is correct, it is difficult to see on what basis the marine insurance legislation enacted by several provinces could be upheld, or how the general law of a province could apply to a contract to build a ship in the province. Moreover, if Jackett C.J. were correct it is difficult to understand why the Supreme Court of Canada in the *Tropwood* case, *supra*, footnote 42, approached so cautiously the constitutional scope of the Federal Court's jurisdiction in matters of maritime law. The Supreme Court has recently affirmed the Federal Court of Appeal's judgment, but on the ground that the jurisdictional test formulated in *Tropwood* was satisfied: (1980), 31 N.R. 584.

<sup>52</sup> *Bensol Customs Brokers Ltd v. Air Canada*, [1979] 2 F.C. 575 (C.A.).

<sup>53</sup> Carriage by Air Act, R.S.C., 1970, c. C-14.

<sup>54</sup> Cf. *The Queen v. Montreal Urban Community Transit Commission* (an unreported judgment of the Federal Court of Appeal rendered on March 19th, 1980: No. A-494-79), in which the Crown sued in the Federal Court upon its federal statutory right to be subrogated to the rights of a Crown employee whom, pursuant to federal statute, it had compensated for injuries caused by the respondent. Reversing the Trial Division, the court held that although provincial law governed the liability of the respondent for the injury sustained by the employee, "the federal statute has an important part to play in determining the rights of the parties, since without it appellant would not be able to maintain any right against respondent."

This argument sounds very like the dissent in *Fuller*; but how stands the matter after *Rhine* and *Prytula*?

*McNamara* the rights of the Crown depended both upon its contractual capacity (which, even though not in dispute in that case was fundamental, and, it might be thought, a question of federal law),<sup>55</sup> and the general provincial law of contract. If it were indeed the case that the Federal Court has no jurisdiction whenever the resolution of a dispute incidentally requires resort to provincial law

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<sup>55</sup> Although the common law never developed a comprehensive body of principles relating to Crown contracts, fragments of a "public law" of contract do exist. Thus, the Crown's contractual capacity is subject to a vague and unsatisfactory inability to fetter by contract the future discharge of the essential functions of the Executive: *Rederiaktiebolaget Amphitrite v. R.*, [1921] 3 K.B. 500. This principle would seem of general application in one form or another, to all public bodies: see de Smith's *Judicial Review of Administrative Action* (4th ed., 1980), pp. 317-320. And for the effect upon the validity or unenforceability of a contract made by the Crown without the requisite Parliamentary allocation of funds, see de Smith, *Constitutional and Administrative Law* (3rd ed., 1977), p. 599.

It should also be noted that the Public Works Act, R.S.C., 1970, c. 228, P-38 also makes certain provisions in respect of Crown contracts. For instance, s. 16(1) requires the Minister of Public Works to take reasonable care to ensure that sufficient security is given to the Crown for due performance by the contractor. In *McNamara*, *supra*, footnote 2, Laskin C.J.C. held, at p. 663, that this did not give a sufficient basis in federal law to confer jurisdiction upon the Federal Court to entertain a claim by the Crown to enforce the bond.

S. 17 of the same Act prohibits the payment of money by the Crown until the contract has been signed by the parties and the requisite security has been given. Would the Federal Court have jurisdiction to determine a claim by the Crown for the recovery of money paid in contravention of these provisions? Should the answer depend upon whether the Crown's theory rested upon a right to recover implicit in the statute itself, or upon an action for money paid that arose from an *ultra vires* payment by the Crown?

Consider also s. 36 of the Public Works Act which requires, subject to certain exceptions, that contracts be preceded by a public tender. If this restricts the capacity of the Crown to contract, does it give a federal law basis to the Crown's rights under those contracts to which the section applies?

But see now *Rhine* and *Prytula*, *supra*, footnote 43, where the Supreme Court held that federal statutes which regulated the parties' contractual rights and duties in much more detail did provide a sufficient "shelter" of federal law so as to give the entire relationship a basis in existing and applicable federal law.

An interesting comparison is provided by *Osborn v. Bank of the United States* (1824), 22 U.S. (9 Wheat.) 738, a key case on the interpretation of the phrase in Article III of the Constitution of the United States that extends the federal judicial power to "cases arising under . . . the laws of the United States". On one view of the Supreme Court's decision, federal jurisdiction over contracts to which the bank was party depended upon its incorporation under federal law, rather than upon the possibility that a challenge might be made to its federal authority. For a concise and penetrating analysis of the principal authorities on the "federal question" doctrine, see David P. Currie, *Federal Jurisdiction* (1976), Ch. 3. This reasoning, however, would seem of little applicability to Canada, where the reasons for conferring a separate court exercising federal jurisdiction have little to do with the protection of federally created rights, but much more with a concern that federal law should be uniformly and efficiently applied and interpreted.

which had not been incorporated into federal law, the cases left within the jurisdiction of the Federal Court over civil litigation would be few. For instance, in an action brought against the federal Crown for its vicarious liability for the torts of its servants, it will be necessary to establish an actionable tort by the servant,<sup>56</sup> a matter which will generally be governed by provincial law.<sup>57</sup> Moreover, even in a case like *Rhine*,<sup>58</sup> in which the court found the statutory scheme for the payment and recovery of the advances to be comprehensive, it might well be open to a payee to defend the Crown's claim for repayment by resort to common law contractual doctrines such as those relating to mistake, misrepresentation or capacity.

What test, then, is available for determining the constitutional limits of federal jurisdiction in cases in which elements of both federal and provincial law support the plaintiff's claim? One way in which the scope of the Supreme Court's decision in *McNamara* could be limited was suggested by Le Dain J. in *Bensol Customs Brokers Ltd v. Air Canada*.<sup>59</sup>

It should be sufficient in my opinion if *the rights and obligations of the parties are to be determined to some material extent by federal law*. It should not be necessary that the cause of action be one that is created by federal law so long as it is affected by it.

One objection to this formulation is that it lacks that degree of sharpness and clarity which jurisdictional rules should possess. Whether legal rights are *to a material extent* derived from federal law, is likely to require judicial elucidation in an unacceptably large number of cases. A second difficulty, of course, is whether this test has survived the decision of the Supreme Court of Canada in the *Fuller* case where, however, no reference was made to *Bensol Customs*. It would certainly seem that the test proposed by Le Dain J. is much closer to the dissenting judgment of Martland J. than to the majority opinion.<sup>59a</sup>

<sup>56</sup> Crown Liability Act, *supra*, footnote 7, s. 4(2).

<sup>57</sup> Thus, s. 17(4)(b) of the Federal Court Act, *supra*, footnote 6, which confers concurrent original jurisdiction upon the Federal Court over proceedings in which relief is claimed against a servant or agent of the Crown, has been held to be unconstitutional insofar as it permits claims for damages in tort which are not supported by federal law: see, for example *Tomossy v. Hammond*, [1979] 2 F.C. 232; *Pacific Western Airlines Ltd v. The Queen*, *supra*, footnote 8. *Quaere* whether it is nonetheless arguable that the references in the Crown Liability Act, *supra*, footnote 7, s. 3(1)(a) to the liability of the Crown for the torts of Crown servants amount to a referential incorporation into federal law of the applicable provincial law?

<sup>58</sup> *Supra*, footnote 43.

<sup>59</sup> *Supra*, footnote 52, at p. 583 (C.A.). Italics added.

<sup>59a</sup> See now, however, *Rhine* and *Prytula*, *supra*, footnotes 34a and 43, where the judgment of Laskin C.J.C. may indicate that the Supreme Court is willing to move towards a position similar to that adopted by Le Dain J.

The facts of *Bensol Customs* provide a useful context in which to examine the precise scope of the decision in *Fuller*. The plaintiffs were the owner of goods and their insurers who claimed as subrogees of the owner's rights against the carrier for the loss of the goods. The owner's statement of claim alleged that the carrier was liable by virtue of the Carriage by Air Act,<sup>60</sup> and in tort. The insurers, who were the only active plaintiffs, claimed that they were assignees by subrogation of whatever rights the owner had against the carrier. The litigation was instituted in the Federal Court pursuant to section 23 of the Federal Court Act which gives the court concurrent jurisdiction in respect of claims made "under an Act of the Parliament of Canada or otherwise in relation to any matter coming within . . . aeronautics and works and undertakings . . . extending beyond the limits of a province."<sup>61</sup> Pratte J. (with whom Hyde D.J. concurred) confined his judgment to the interpretation of section 23, and held that the owner's claim in contract was made "under" the Carriage by Air Act,<sup>62</sup> but that its claim in tort was not founded upon a federal law and should, therefore, be dismissed.<sup>63</sup> As regards the insurer's claim, he held that this, too, fell within section 23 since it was made, in part at least, under a federal statute. Le Dain J. agreed with the reasons for decision given by Pratte J., and proceeded to consider, in the terms quoted above, the constitutionality of the assumption of jurisdiction in the light of *McNamara*.

Following the decision in *Fuller*, however, the correctness of Le Dain J.'s approach looks highly suspect.<sup>63a</sup> In particular, the fact that an essential element in the insurer's claim was the federal law question of the carrier's liability to the owner would appear an

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<sup>60</sup> *Supra*, footnote 53. This Act gives effect to the Warsaw Convention; the most material provisions for the purposes of this litigation seemed to be that the carrier is liable for loss unless it proves that it was not at fault, and that conditions relieving the carrier of its liability under the Convention are void.

<sup>61</sup> The goods were allegedly lost while being carried between London and Montreal.

<sup>62</sup> The fact that the owner's cause of action was for breach of contract, rather than for breach of statutory duty, was not regarded by Pratte J. as fatal to federal jurisdiction. Since no statement of defence had been put in by the defendants, it is difficult to tell to what extent the issues in dispute were likely to turn upon the statutory provisions. Nor does the Convention comprehensively determine each and every condition that may be contained in an air waybill (see [1979] 1 F.C. 167, at pp. 177-178).

<sup>63</sup> Dismissal of this part of the statement of claim did not prejudice the court's jurisdiction to determine that part which was within the jurisdiction. Assuming that the liability in tort survives the Warsaw Convention, the owners of the goods would have to pursue any additional rights that they might have in tort in a provincial court. This is yet another instance of the inconveniences of the dual court system now operating in Canada.

<sup>63a</sup> But see *supra*, footnote 59a.

inadequate basis upon which to rest federal jurisdiction. If the Crown's right to contribution in *Fuller* was not founded on federal law (albeit that the Crown's liability to the plaintiff was a matter of federal law, and was a condition precedent to the right asserted), it is difficult to see why the insurer's claim was founded on federal law (albeit that whether there were any rights upon which the subrogation could operate depended upon federal law). As for the rights of the owner of the goods, since these derived from contract (albeit that federal law regulated the terms of the contract), it is not at all clear that they would now be held to be based upon federal law.

It is difficult to avoid the conclusion that the Supreme Court of Canada in *Fuller* has held that for a claim to be "founded on federal law", the plaintiff's cause of action must be for breach of a federal statutory duty. The only exception so far admitted is that the liability of the federal Crown always rests upon federal law. Thus, the reason why the Crown lost in *Fuller* was because its *cause of action* arose under provincial law. If this is the test, it at least has the merit of some certainty.<sup>64</sup> It is, however, quite a long way removed from the apparently wider wording of section 101 which speaks, it will be recalled, of "the better administration of the laws of Canada". It is also an interpretation that evidently did not occur to the Supreme Court when it had earlier decided a number of cases in which the federal Crown had sued in the Exchequer Court for the loss of the services of a member of the armed forces who had been injured by the negligence of the defendant.<sup>65</sup> Now it would have to be said that the Crown's cause of action was the ordinary law of tort, and the fact that the injured person is deemed by federal legislation to be a

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<sup>64</sup> This was the approach recently taken by the Federal Court of Appeal in *The Queen v. Sovereign Seat Cover Mfg Ltd*, *supra*, footnote 43, in which the court dismissed a motion by the defendants to strike out as beyond the jurisdiction of the Federal Court an action by the Crown to recover a development incentive grant. In the Trial Division the motion had been granted because "the payment of the incentive had been made under the terms of a contract between the parties, a contract constituted by the acceptance by the defendants of a written offer made to them by the plaintiff." The Federal Court of Appeal, however, interpreted the terms of the relevant legislation under which the payment was made, as not merely defining the parties' contractual rights, but as constituting the very legal rights, upon the breach of which the Crown based its cause of action.

The judgments of the Supreme Court in *Rhine* and *Prytula*, *supra*, footnotes 43 and 49 are equivocal on the question of whether the Crown must show that breach of a federal statute gives rise to a statutory cause of action or that a federal statute closely regulates the parties' contractual rights and duties.

<sup>65</sup> See, for example, *The King v. Richardson*, [1948] S.C.R. 57; *Murray v. The Queen*, *supra*, footnote 37. Nor was any constitutional objection made to the common law causes of action brought by the Crown in the Exchequer Court in *Toronto Transport Commission v. The King*, *supra*, footnote 39, and *Gartland Steamship Co. v. The Queen*, [1960] S.C.R. 315.

servant of the Crown would be as inadequate a basis for federal jurisdiction as was the liability of the Crown to the plaintiff in *Fuller*.

One other possible way of defining the relationship between a plaintiff's rights and federal law that is necessary to found federal jurisdiction was suggested in *The Queen v. Prytula*.<sup>66</sup> In that case, the Crown sued a student borrower for the repayment of a loan upon which the respondent had defaulted. The relevant federal legislation provided that when a bank made a "guaranteed student loan" (as statutorily defined), the Crown was liable to pay to the bank interest on the loan and to compensate the lending bank for any loss that it suffered on default.<sup>67</sup> The Act also empowered the Governor in Council to make regulations concerning "the subrogation of Her Majesty to the rights of a bank with respect to a guaranteed student loan".<sup>68</sup> For reasons already explained,<sup>69</sup> the Federal Court of Appeal finessed the issue of whether the Crown's claim was "founded" on the statute within the meaning of the decision in *McNamara*. Nonetheless, Heald J. formulated as follows the question that would have been relevant if the court had had to decide it:<sup>70</sup>

... unless the law impliedly creates a *new statutory liability* by the borrower to Her Majesty in an amount to be determined by reference to the loan contract, as opposed to merely conferring on the Crown the rights of the bank under the contract of loan, it is open to question whether the statute can be said to be the law that is being administered by a court when it is adjudicating on the claim by Her Majesty against the borrower from the Bank.

If the interpretation of the statute revealed that the first basis of the Crown's rights was correct, would this make the claim one that was "founded on existing federal law" as this criterion must be understood in the light of *Fuller*? If by a "new" statutory liability, what is meant is that had the statute not been enacted, the respondent could not have been sued by the Crown, it would seem that this would be insufficient. For in *Fuller* the Crown had been sued by the plaintiff in tort, and had the Crown Liability Act not been in force, it could not have been held liable. Nonetheless, the "new" liability created by that Act was an inadequate basis in federal law upon which to bring its claim for contribution within federal jurisdiction.

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<sup>66</sup> *Supra*, footnote 49.

<sup>67</sup> Canada Students Loans Act, *supra*, footnote 50.

<sup>68</sup> *Ibid.*, s. 13(j). This provision gives a firmer base in federal law for the Crown's rights than the insurer's rights in *Bensol Customs*, *supra*, footnote 52.

<sup>69</sup> See *supra*, footnote 51.

<sup>70</sup> *Supra*, footnote 49, at pp. 523-524.

The analysis suggested earlier would indicate that the proper question is whether the Crown's cause of action arises directly from a breach of statutory duty, rather than from the common law, albeit that the extent of the Crown's rights may be affected by relevant federal legislation.<sup>71</sup> Does the Student Loans Act so clearly and comprehensively define the rights and obligations of the parties that it can fairly be said to create a statutory cause of action? The scheme certainly does more than to authorize the Crown to give guarantees for loans made in specified circumstances. Nonetheless, the Crown's cause of action against the defaulting borrower would seem to be the common money count for the repayment of money paid to the borrower. The relevance of the legislation would then be to show either that the guarantee was not given voluntarily by the Crown, or that the forms prescribed by it and signed by the borrower constituted a "request" for the guarantee. This would defeat any argument that the Crown's payment to the bank constituted the "officious" conferral of a benefit upon the borrower such as will often defeat a restitutionary action.<sup>72</sup>

There is always an air of unreality about interpreting legislation to divine the legislature's "intention" on a matter about which it had clearly never thought. To require courts to perform this exercise in an area of notorious difficulty in order to apply a *constitutional* standard of jurisdiction seems little short of bizarre. Indeed, if the Supreme Court in *Fuller* has defined the permissible scope of federal jurisdiction by reference to the nature of the plaintiff's cause of action, it may have given an unwelcome lease of life to some of the lost arts of common law pleading. However, in the reasons for judgment in *Rhine* and *Prytula*—released as this comment was being submitted to the *Review*—the Supreme Court appears to have started to dig itself out of the hole created by *Fuller*. For despite the statement by Laskin C.J.C. that the federal statutes in those cases provided for the repayment of the money which the Crown was suing to recover, other remarks suggest that federal jurisdiction may extend beyond causes of action founded on a federal law. In particular, he emphasized the "overall scheme" created by the legislation, and noted that despite the "undertaking or contractual consequence" of the application of the statutes, "at every turn the *Act* has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law to govern the

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<sup>71</sup> Nor should it be critical whether the statute increased beyond that recoverable at common law the quantum of any amount that the Crown could claim from the defaulting borrower. And see *supra*, footnote 64.

<sup>72</sup> See *Owen v. Tate*, [1976] Q.B. 706. See further, Goff and Jones, *The Law of Restitution* (2nd ed., 1978), Ch. 14.



transaction". Since *Fuller* was not mentioned by the court, one can only speculate as to why in that case the Crown Liability Act had insufficient impact to support federal jurisdiction over the contribution claim.

*When is law "federal law"?*

If the decision in *Fuller* requires so close a relationship between legal rights and a federal law as has been suggested, then a more fruitful method of avoiding the inconvenient results described above may be to focus upon the question of whether any relevant federal legislation can be interpreted as incorporating into federal law the substantive provincial law by which the parties' legal relationship would otherwise be governed.

Of course, it will not always be easy to predict when the courts will interpret a federal statute to include a referential incorporation of provincial law. On the one hand, it seems clear that when the federal Crown is sued in tort, in the absence of some specific federal statute, the liability is determined by the provincial law that would have applied had the litigation been between subject and subject. The reference in the Crown Liability Act to the Crown's liability in tort is taken to refer to the applicable provincial law, and not to some substantive federal law of tort. On the other hand, it has been equally clear since *McNamara*, that references in the Federal Court Act to suits brought by the Crown do not incorporate wholesale into federal law, the relevant provincial law. Nor do they authorize the Federal Court to develop a substantive body of judge-made federal common law upon which federal jurisdiction could operate.

The incorporation by reference doctrine appears to have been developed most effectively on the admiralty side of the Federal Court's jurisdiction. In particular, in *Sivaco Wire and Nail Company v. Tropwood A.G.*,<sup>73</sup> the Supreme Court held that the Federal Court Act referentially incorporates certain aspects of maritime and admiralty law. Thus, the definition in section 2 of that Act of "Canadian maritime law" was said to include the section of the Admiralty Act of 1891<sup>74</sup> which, even though it was repealed before the Federal Court Act was enacted,<sup>75</sup> provided that "all persons shall have such rights and remedies in all matters" relating to admiralty that were enforceable by virtue of the British Colonial Courts of Admiralty Act, 1890. Jurisdiction to determine disputes arising from this substantive body of law was conferred upon the Exchequer Court.

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<sup>73</sup> *Supra*, footnote 42.

<sup>74</sup> S.C., 1891, c. 29, s. 4.

<sup>75</sup> Admiralty Act, S.C., 1934, c. 31.

After the Chief Justice in the *Tropwood*<sup>76</sup> case had expressly left open the question of whether an item of the Federal Court's admiralty jurisdiction which had not been covered by the 1891 Act was for jurisdictional purposes "a law of Canada", it is surprising to read how easily the Supreme Court disposed of the issue in *Antares Shipping Corporation v. The Ship "Capricorn"*.<sup>77</sup> The court held that the Federal Court had jurisdiction to entertain an action for the specific performance of a contract of sale of a ship, on the ground that the provision of the Federal Court Act dealing with claims to title, possession or ownership of a ship was an existing federal law upon which the court's jurisdiction could operate.<sup>78</sup> The single judgment, delivered by Ritchie J., is not, however, as explicit as it might have been about the basis of this conclusion. His Lordship appears to have regarded the grants of jurisdiction conferred upon the Federal Court by section 22 and 44 of the Federal Court Act as sufficient in themselves.<sup>79</sup> It is true that the following statement in *Tropwood*<sup>80</sup> might appear to support Ritchie J's view:

"What is important to notice is that the heads of jurisdiction specified in s. 22(2) are nourished, so far as applicable law is concerned, by the ambit of Canadian maritime law or any other existing law of Canada relating to any matter coming within the class of navigation and shipping".

However, it is clear from the rest of the judgment that the court did not decide that each element of the definition of "Canadian maritime law" in section 2 incorporated a substantive body of law on which

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<sup>76</sup> *Sivaco Wire and Nail Co. v. Tropwood A.G.*, *supra*, footnote 42, at pp. 162-163, where Laskin, C.J.C. inclined to the view that the Admiralty Act, 1934, *ibid.*, could provide a statutory foundation for maritime law.

<sup>77</sup> (1980), 30 N.R. 104. Although reasons for judgment in *Antares* and *Fuller* were given within eight days of each other, the cases pass, as it were, like ships in the night.

<sup>78</sup> In the Federal Court of Appeal, [1978] 2 F.C. 834, Le Dain J., relying upon a line of decisions in the United States, had held that actions for the specific performance of a contract of such type did not fall within s. 22 of the Federal Court Act, *supra*, footnote 6.

<sup>79</sup> *Cf.* the judgment of the Trial Division in *Antares*, [1973] F.C. 955; *Associated Metals and Mineral Corporation v. The Ship "Evie W"*, *supra*, footnote 51; *Benson Bros. Shipbuilding Co. (1960) Ltd v. Mark Fishing Co Ltd* (1978), 89 D.L.R. (3d) 527 (Fed. Ct C.A.); *Davie Shipbuilding Ltd v. The Queen*, *supra*, footnote 19; *The Queen v. Canadian Vickers Ltd* (1979), 28 N.R. 486 (Fed. Ct C.A.). See also *In the matter of a Reference as to the Legislative Competence of Parliament of Canada to Enact Bill No. 9, Entitled "An Act to Amend the Supreme Court Act"*, [1940] S.C.R. 49, at pp. 108-109, where Kerwin J. regarded the power of Parliament to confer admiralty jurisdiction upon the Exchequer Court as being co-extensive with its legislative competence under s. 91(10). In the light of *Quebec North Shore and McNamara*, the Supreme Court's difficulty now is to explain why admiralty law is "federal law" whereas other non-statutory law relating to federal subject-matter generally is not.

<sup>80</sup> *Supra*, footnote 42, at p. 161.

the jurisdiction conferred by section 22 operated. The holding was confined to a finding that section 2 included a reference to the Canadian Admiralty Act, 1891 and that this Act incorporates certain substantive admiralty law into the law of Canada. In *Antares*, the Supreme Court did not specifically consider whether the plaintiff's claim was governed by a law that fell within the jurisdiction of the English Court of Admiralty and which could have been referentially incorporated by the Admiralty Act, 1891, or, if it did not, whether the Admiralty Act, 1934 incorporated it.

The true basis of the court's judgment in *Antares* is thus obscure, although a broad reading of the decision might indicate that the references to admiralty jurisdiction and maritime matters in the Federal Court Act are to be regarded as incorporating English admiralty law, as amended by Canadian statutes, into federal law.<sup>81</sup> Thus, the only limits upon the Federal Court's jurisdiction are those contained in the relevant grant of legislative competence by the British North America Act, 1867, section 91(10), over shipping and navigation, and by the statutory definitions of jurisdiction contained in the Federal Court Act itself.

That this is indeed the position appears to have been confirmed by the recent decision of the Supreme Court in *Associated Metals and Minerals Corp. v. The Ship "Evie W"*<sup>82</sup> in which the court relied upon the broad statement quoted above from the judgment of Laskin C.J.C. in *Tropwood*. *Antares* and *Associated Metals* provide a sharp contrast with the narrow approach adopted by the Supreme Court to other heads of the Federal Court's jurisdiction. No less remarkable is the terseness with which the Supreme Court has dealt with the fundamental question of the extent to which the provisions of the Federal Court Act, other than the narrow question already decided in *Tropwood*, are to be interpreted as referentially embodying substantive law in addition to conferring jurisdiction.

### *Possible reforms*

The first ten years of the Federal Court's existence have produced a remarkably large number of jurisdictional difficulties. This comment has concentrated on the most important of those created by the limited constitutional power of Parliament to confer jurisdiction upon a federal court. The recent report of the Law Reform Commission<sup>83</sup> details the jurisdictional difficulties that have

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<sup>81</sup> Until its repeal as part of Canadian law in 1934, the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., c. 27 (U.K.), s. 3, provided an alternative source of Parliament's power to confer admiralty jurisdiction upon a court.

<sup>82</sup> (1980), 31 N.R. 584.

<sup>83</sup> Report No. 14, *op. cit.*, footnote 47, pp. 11-20.

arisen from the interpretation of the statutory terms which define the jurisdiction of the Federal Court over federal public authorities, a jurisdiction formerly exercised by the courts in the provinces. The application and the interpretation of sections 18 and 28 of the Federal Court Act which allocate jurisdiction between the Trial Division of the Court of Appeal have also attracted litigation on a scale that could scarcely have been anticipated when the statute was passed.

Amidst this avalanche of jurisdictional litigation, the suggestion that a dual court system for Canada is misconceived has obvious attractions. It is to be hoped that the Government will undertake a comprehensive assessment of the troubles that have beset the Federal Court, and attempt a dispassionate evaluation of the record overall, rather than respond in piecemeal fashion to particular difficulties. However, the combined effect of *Quebec North Shore, McNamara* and *Fuller* may well have caused such serious problems for parties to litigation in which the federal Government is one of several defendants, that an immediate amendment to the Act to make the whole of the Federal Court's section 17 jurisdiction concurrent would seem justifiable. The terms of section 17 would seem clearly to preclude reform by the administrative device of the federal Crown's attorning to the jurisdiction of a provincial superior court.

If, on the other hand, Parliament's considered view is that there is merit in maintaining the wide original jurisdiction of the Federal Court, amending legislation will be needed in order to give a base in federal law to the rights upon which it can constitutionally adjudicate. A Federal Court (Amendment) Bill might be drafted to achieve these aims by the wholesale incorporation into federal law of provincial laws in so far as their subject matter falls within federal legislative competence.<sup>84</sup>

*Clause 1*

- (1) Whenever the legal rights and liabilities of parties to litigation over which the Federal Court has been granted jurisdiction by virtue of any provision of the Federal Court Act or of any other statute enacted by the Parliament of Canada are not founded upon an existing federal statute or other federal law, it is hereby provided that the said rights and liabilities shall be determined in accordance with:
  - (a) the provisions of any applicable provincial statute to the extent that its subject-matter falls within the legislative competence of the Parliament of Canada, and
  - (b) in the absence of any such applicable provincial statute, and to the extent that it is within the legislative competence of the Parliament of Canada to modify or repeal it, the common law.

<sup>84</sup> That this is a constitutionally permissible technique is amply supported by the authorities assembled by Laskin and Sharpe, *op. cit.*, footnote 14, in notes 98 and 118. For a contrary view, though, see Kerr, *Constitutional Limitations on the Admiralty Jurisdiction of the Federal Court* (1979), 5 Dal. L.J. 568, at p. 577.

- (2) To the extent that it is necessary for the determination of the legal rights and liabilities of parties to litigation over which the Federal Court has jurisdiction to resort to the law of more than one Province or to the law of a foreign country, the said rights and liabilities shall be determined in accordance with the laws of that legal system which the common law relating to the conflict of laws makes applicable.

*Clause 2*

Any law which, pursuant to Clause 1, is applicable to a dispute over which the Federal Court has been granted jurisdiction is hereby incorporated into federal law and adopted as a law of Canada.

*Clause 3*

For the purpose of this Act,

- (1) "Statute" includes any law made under the authority of a statute.  
(2) "Common Law" in clause 1(1)(b) includes the common law rules relating to the conflict of laws.

### *Conclusions*

This comment has examined the role played by the Supreme Court in producing a state of affairs which has been judicially described as lamentable.<sup>85</sup> If the learned judge had chosen the word scandalous, he could surely not have been criticized for resorting to melodramatic hyperbole. Why then, has the court decided to interpret section 101 in a way that results in such obvious inconvenience and injustice to litigants? Certainly neither previous authority nor the specific language in the constitution was logically compelling. The answer must be that the court has attached a high priority to the strategic goal of maintaining the integrity of the unitary court system which it saw embodied in the overall scheme for the allocation of the judicial power in the British North America Act, 1867. It has chosen to pursue this value at the expense of the tactical objective of interpreting the constitution in a way which would smooth the administration of justice in the interests of those who choose or are forced to litigate in the Federal Court. It thus construed in a very narrow fashion the one exception to the unitary court system which the constitution very clearly contains.

Precisely why the court has not reacted in similar vein to the maritime jurisdiction conferred by Parliament upon the Federal Court is not easy to say. A list of reasons to account for this attitude might include the long historical association of the Exchequer Court with admiralty law, the strong reasons of expediency for ensuring the uniform development and application of the law, and its enforcement in a single court with powers to deal with its special procedural and remedial aspects, the international dimensions of the law relating to

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<sup>85</sup> By Collier J. in *Pacific Western Airlines Ltd v. The Queen*, *supra*, footnote 3.

ships and shipping, and the comparatively slight provincial interest in this area of the administration of justice.

In so far as the Supreme Court has decided to prefer the constitutional value of a unitary court system to the more immediate consideration of doing justice to particular litigants, it has not necessarily exceeded its proper role. But there is another constitutional interest which the court ought also to take carefully into account. This is that the legislative judgments of Parliament on matters of policy are entitled to judicial respect. Thus if Parliament has purported to exercise its constitutional authority on a subject assigned to it by the British North America Act, then the court should interpret the scope of the grant of power in a way which enables Parliament's policy to be effective. The most telling criticism of the decision in *Fuller* is that even though required neither by the text of the constitution nor by previous authority, the court has interpreted Parliament's powers so narrowly that it has rendered admittedly unimpeachable provisions of the Federal Court Act seriously defective.

The court has in effect forced the hand of Parliament to attempt to salvage what it will from the wreckage. It is to be hoped that the task of producing new legislation is regarded as important enough to warrant an expeditious and thorough response, and that the often painful experiences of the first ten years of the Federal Court will ultimately be turned to good account.

J. M. EVANS\*

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CONSTITUTIONAL LAW—CRIMINAL LAW—DIVISION OF POWERS—BRITISH NORTH AMERICA ACT.—The *Hauser* case<sup>1</sup> deals with the division of jurisdiction in criminal law between the federal and provincial governments. In our federal system, legislative and executive authority resides in both provincial and federal governments. These powers in relation to some matters are the exclusive jurisdiction of either one or the other government. In criminal law matters, both governments share both legislative and executive

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I wish to acknowledge with gratitude the helpful criticisms made of an earlier draft of this comment by Professor P.W. Hogg, of Osgoode Hall Law School, and Professor James C. MacPherson, of the Faculty of Law of Victoria University.

<sup>1</sup> *R. v. Hauser et al.* (1979), 46 C.C.C. (2d) 481 (S.C.C.).

functions. The *Hauser* case, though ostensibly about the division of legislative power in relation to criminal law, is really about the extent of executive power in relation to criminal law.

The power to legislate in respect of criminal law is divided in Canada between the federal Parliament and provincial legislatures by sections 91(27) and 92(14) of the British North America Act.<sup>2</sup>

The provincial power to legislate in the area of criminal law is incidental to the right to legislate in relation to other matters.<sup>3</sup> The provinces are not prevented from enacting legislation prescribing offences in relation to these other matters, and providing for the prosecution of those offences just as if they were crimes. Support for this proposition comes from section 92(15) of the B.N.A. Act, and the ancillary doctrine—that the power to prescribe offences and enforce them is necessarily incidental to the power to legislate in an area.<sup>4</sup> Thus, we have quasi-criminal provincial legislation such as the Game Acts, Motor Vehicle Acts, and so on.

Federally, it has been held that the power to legislate in respect of criminal law is not restricted to what was regarded as criminal in 1867<sup>5</sup>—that body of common law crimes, not statutorily defined in the federal Criminal Code.<sup>6</sup> The presently accepted definition of what is “criminal” was established in the *Margarine Reference*.<sup>7</sup> The test is: “Is the Act prohibited with penal consequences?”, “Does the prohibition serve ‘A public purpose which can support it as being in relation to criminal law?’”<sup>8</sup> Thus, the federal criminal power, section 91(27) has been used to support legislation such as the Combines Investigation Act,<sup>9</sup> the Juvenile Delinquents Act,<sup>10</sup> and in some instances, and for some purposes, the Narcotic Control Act<sup>11</sup>—a matter to which we will return later in more detail. It

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<sup>2</sup> 1867, 30 & 31 Vict., c. 3, as am. (U.K.), ss 91(27) and 92(14), hereinafter cited B.N.A. Act.

<sup>3</sup> Hogg, *Constitutional Law of Canada* (1977), p. 292.

<sup>4</sup> *Bedard v. Dawson*, [1923] S.C.R. 681; *Prov. Sec. P.E.I. v. Egan*, [1941] S.C.R. 396.

<sup>5</sup> Hogg, *op. cit.*, footnote 3, p. 279.

<sup>6</sup> R.S.C., 1970, c. C-34, as am.

<sup>7</sup> *Reference re validity of s. 5(a) of Dairy Industry Act (Margarine Case)*, [1949] 1 S.C.R. 1, [1949] 1 D.L.R. 433; aff'd [1950] 4 D.L.R. 689, [1951] A.C. 179.

<sup>8</sup> *Ibid.*, at p. 50 (S.C.R.).

<sup>9</sup> R.S.C., 1970, c. C-23, as discussed in *Proprietary Articles Trade Assn. v. Attorney-General for Canada*, [1931] A.C. 310.

<sup>10</sup> R.S.C., 1970, c. J-3, as discussed in *Attorney General for British Columbia v. Smith*, [1967] S.C.R. 702.

<sup>11</sup> R.S.C., 1970, c. N-1; with respect to constitutional authority for predecessor legislation see *Dutresne v. The King* (1912), 19 C.C.C. 414; *Exp. Wakabayashi, Exp. Lore kip* (1928), 49 C.C.C. 392.

suffices to say that the federal power to legislate in relation to criminal law has been used in a dynamic way to extend the legislative jurisdiction of Parliament.<sup>12</sup> We will see later how some of these chickens may come home to roost in an unsatisfactory way.

In terms of executive power in relation to the criminal law, it should be noted that the function of enforcing the law is an executive function of the Crown, the responsibility for which is, in our system, given to the Attorney General.<sup>13</sup> We have provincial Attorneys General and a federal Attorney General. The B.N.A. Act says nothing about the division of "executive power" in relation to the enforcement of the criminal law or the offices of Attorneys General. Although it is worthy of note that section 63 of the B.N.A. Act preserves the office of the Attorney General in Ontario and Quebec. Traditionally, the provincial Attorneys General have been the ones who have charge of the public process of prosecution—as opposed to the right of anyone to privately prosecute. Nevertheless, it has been suggested that the federal Attorney General does have the power to prosecute Criminal Code offences.<sup>14</sup> This traditional system and the extent of the federal Attorney General's power were questioned in the *Hauser* case.<sup>15</sup>

The constitutional issue in the *Hauser* case is the extent of the federal government's jurisdiction in the prosecutorial process. More particularly, the extent to which Parliament can delegate to the Attorney General of Canada, rather than the Attorneys' General of the provinces, the responsibility for conducting the prosecution of offences. The head to head conflict is as between section 91(27) of the B.N.A. Act, the federal legislative authority with respect to: "The criminal law . . . including procedure in criminal matters", and section 92(14) of that Act which gives the provinces exclusive legislative jurisdiction with respect to: "The administration of justice in the Province, including the Constitution, maintenance and organization of Provincial Courts, of civil and criminal jurisdiction."

The seed for the *Hauser* case was sown in 1969 with an amendment to the Criminal Code<sup>16</sup> which extended the definition of "Attorney General" to include the federal Attorney General where a proceeding was:

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<sup>12</sup> Hogg, *op. cit.*, footnote 3, pp. 281-283.

<sup>13</sup> *Ibid.*, pp. 277-278.

<sup>14</sup> *Ibid.*, p. 278.

<sup>15</sup> *Supra*, footnote 1, at pp. 488-489.

<sup>16</sup> S.C., 1969, c. 38, s. 2(2).



- a) Instituted at the instance of the government of Canada and conducted by or on behalf of the government of Canada,
- b) In respect of a violation or *conspiracy to violate* any act of the Parliament of Canada or regulation thereunder—other than the Criminal Code.

It was the constitutionality of that amendment which was in issue in the case. Prior to the 1969 amendment, the definition of Attorney General only gave the federal Attorney General jurisdiction to enforce the Code in the Northwest Territories and the Yukon.<sup>17</sup> No mention being made of other federal enactments.

The argument in support of the constitutionality of the amended definition of Attorney General was that it was "criminal law" or "procedure in criminal matters" or necessarily incidental thereto.<sup>18</sup> The broad proposition being that under section 91(27) the federal Parliament could, if it chose to, restrict or take away completely the traditional power of the provincial Attorneys General with respect to the Criminal Code.

To establish this position, counsel relied on *R v. Pelletier*.<sup>19</sup> In that decision, Mr. Justice Estey of the Ontario Court of Appeal, went so far as to suggest that the federal Attorney General's power to prosecute might stem from the federal "peace, order and good government" power or from some "previously somnambulant executive function".<sup>20</sup>

The Supreme Court of Canada refused leave to appeal the *Pelletier* case.<sup>21</sup>

The argument against the constitutionality of the provision, argued by the respondent in the *Hauser* case and six provincial Attorneys General, was that all violations of federal statutes were "crimes".<sup>22</sup> Further, that the federal government has no role to play in the "administration and enforcement" of criminal law, this being the responsibility of the provinces by virtue of section 92(14) of the B.N.A. Act,<sup>23</sup> it having been recognized by the Supreme Court of

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<sup>17</sup> *Hauser*, *supra*, footnote 1, at p. 500.

<sup>18</sup> *Ibid.*, at p. 489.

<sup>19</sup> (1974), 18 C.C.C. (2d) 516, 4 O.R. (2d) 677, 28 C.R.N.S. 129.

<sup>20</sup> *Ibid.*, at p. 542 (C.C.C.).

<sup>21</sup> [1974] S.C.R., p. x.

<sup>22</sup> *Supra*, footnote 1, at p. 532.

<sup>23</sup> *Ibid.*, at pp. 506-507, 532.

Canada in the *Dilorio*<sup>24</sup> case that the power to "administer" criminal justice includes the power of enforcement.<sup>25</sup>

Three provincial Attorneys General did not support this broad proposition.<sup>26</sup> They conceded that the federal government could legislate with respect to the enforcement procedure of statutes other than those enacted under section 91(27) of the B.N.A. Act as being a power necessarily incidental to legislation enacted under the other legislative heads. Thus, they would support the amendment insofar as the reference in the section to "Acts . . . other than the *Criminal Code*" did not include federal statutes enacted under the criminal law power as was the *Criminal Code* itself.

They recognized the expanded concept of the criminal law. If the federal Attorney General could not take away from the provincial Attorneys General the right to prosecute under the *Criminal Code* because it was "criminal" legislation, then the prohibition must extend to the other statutes enacted under the power of section 91(27) of the B.N.A. Act.

Having outlined the constitutional issue and the argument, we have to turn to the case itself because as we shall see, the issue was not joined in the *Hauser* case and it remains unresolved.

Consequently, what is also unresolved is the federal Attorney General's right to prosecute offences under a number of federal statutes.

I have purposely isolated this constitutional issue from the facts in the *Hauser* case because when we superimpose the issue on the facts, another secondary issue emerges. I said that the head to head issue, section 91(27) vs. section 92(14) was never joined in the *Hauser* case. In fact, the case was decided on the secondary issue that emerged when a distinction was drawn between federal enactments other than the *Criminal Code* on the one hand and federal enactments based on the federal criminal law power section 91(27) on the other.

*Hauser* was charged with possession of cannabis for the purpose of trafficking contrary to the Narcotic Control Act.<sup>27</sup> The charge was laid by an agent for the Attorney General of Canada acting under the supposed authority of section 2 of the *Criminal Code*. *Hauser's*

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<sup>24</sup> *Dilorio and Fontaine v. Warden of Common Jail of Montreal and Brunet* (1976), 33 C.C.C. (2d) 289, 73 D.L.R. (3d) 491, [1978] 1 S.C.R. 152.

<sup>25</sup> *Ibid.*, at p. 326 (S.C.R.).

<sup>26</sup> *Hauser*, op. cit., *supra*, footnote 1, at p. 535.

<sup>27</sup> *Supra*, footnote 11.

counsel knew that the federal power to legislate in the area of criminal law and procedure section 91(27) was circumscribed by the provincial legislative right to "constitute criminal courts and administer justice" by virtue of section 92(14) of the B.N.A. Act. He recognized that *if* the "administration of justice" were to encompass the powers traditionally exercised by the provincial Attorneys General, the federal government could not, under its criminal law power, legislate in relation to the prosecutorial process of criminal matters.

Thus, the secondary constitutional issue arose—is the prosecution of offences under the Narcotic Control Act the administration and enforcement of criminal justice? The defendant and six provincial Attorneys General said the prosecution of offences is by its nature the administration of criminal justice.<sup>28</sup> Three provincial Attorneys General conceded that it depended on whether the legislation you were enforcing was criminal legislation—and they argued that the Narcotic Control Act was criminal legislation.<sup>29</sup>

The federal Attorney General argued that the prosecutorial process was a part of criminal procedure in the sense of section 91(27) and not the enforcement and administration of criminal justice.<sup>30</sup> Further, that the Narcotic Control Act was not enacted under section 91(27) and the power to prosecute was not therefore an issue.

In their decisions, one Justice, Mr. Justice Spence, would have said yes to the broad proposition put by the federal Attorney General,<sup>31</sup> that Parliament could give to the federal Attorney General the responsibility for conducting criminal prosecutions in Canada if it wanted to do so. However, Mr. Justice Spence found it unnecessary to so decide in this particular case and his comments are *obiter*.

In the middle of the issue we have the majority. The decision written by Mr. Justice Pigeon is concurred in by three other judges. Pigeon J. recognized the principle that the court ought not to go further than is necessary in any particular case in expressing opinions on constitutional issues.<sup>32</sup> The majority decided it was not necessary to determine whether the federal government had jurisdiction over the prosecution of "criminal offences" or over prosecution of federal statutes other than the Criminal Code. Whatever the answer

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<sup>28</sup> *Supra*, footnote 1, at p. 532.

<sup>29</sup> *Ibid.*, at pp. 494, 534.

<sup>30</sup> *Ibid.*, at pp. 514, 532.

<sup>31</sup> *Ibid.*, at p. 487.

<sup>32</sup> *Ibid.*, at p. 491.

might be to those questions was not material to the case before them because the court was able to find that (1) the Narcotic Control Act was not criminal legislation—but valid legislation under another head of power namely, “peace, order and good government”, and (2) the power to conduct the prosecution of offences under statutes enacted pursuant to heads of power other than section 91(27) was necessarily incidental to those heads of power—it was not criminal legislation.

In a lengthy dissent on the other side of the issue, Mr. Justice Dickson found that the Narcotic Control Act *was* criminal legislation enacted under section 91(27) and that the conduct of prosecutions for criminal offences was within the provinces’ sphere of responsibility and could not be taken away.<sup>33</sup> Nor could the federal Attorney General be given a concurrent jurisdiction to prosecute.

The principal matter left unresolved by the *Hauser* decision is the question of whether or not the Parliament of Canada can vest in the federal Attorney General the responsibility for conducting the prosecution of criminal offences in Canada—or as Mr. Justice Spence seems to suggest, whether such right resides in the federal executive without need for legislative sanction.

The secondary matter is *if* the federal government *cannot* prosecute offences created by legislation enacted under section 91(27) will the expansionary nature of that head of power continue, or will it shrink and will statutes previously supported by section 91(27) now be supported by some other head of power—such as in the *Hauser* case—where the Narcotic Control Act moved from section 91(27) to peace, order and good government.

The *Hoffmann-LaRoche*<sup>34</sup> case is the first one which stems from the *Hauser* case. It exemplifies the importance that must be attached, since *Hauser*, to the question of under what head of power a particular federal statute is enacted, when the federal Attorney General is conducting a prosecution for an offence against that statute or a conspiracy to violate it. The *Hoffmann-LaRoche* case involved an alleged offence against the Combines Investigation Act.<sup>35</sup> The proceedings were brought by the Government of Canada, thus raising the issue whether or not the statute was enacted under section 91(27) of the B.N.A. Act, and therefore, a statute which on application of the *Hauser* case, may be beyond the prosecutorial purview of the federal Attorney General.

<sup>33</sup> *Ibid.* at pp. 537, 542.

<sup>34</sup> *The Queen v. Hoffmann-LaRoche Ltd.* not yet reported, Feb. 5th, 1980, (S.C. Ont., non jury).

<sup>35</sup> *Supra*, footnote 9.

The *Hoffmann-LaRoche* case highlights the difficulty that the *Hauser* case has created for the federal government in raising this secondary constitutional question by linking the right to prosecute with the question of whether or not the statute is enacted under the criminal law power.

The exercise of the executive function of prosecuting offences under a statute is an integral part of the administration of that piece of legislation, as Mr. Justice Linden said in *Hoffmann-LaRoche*:<sup>36</sup>

The capacity of the federal government to prosecute its own criminal laws, if this is felt to be desirable, is particularly necessary in the field of unfair competition legislation, for to forbid that might impair the efficacy of these laws. This type of criminal activity is often national in scope. Sometimes it may have an international dimension. These crimes frequently involve large corporations, which operate on a national and international scale. To prohibit the federal government from prosecuting these offenders might allow some of them to go unprosecuted in certain circumstances, for there is little incentive for the Attorney General of any one province to assume, at the enormous costs often involved, the burden of prosecuting unlawful activities which may be largely perpetrated in other provinces. The federal government must, therefore, be permitted to prosecute criminal activity of national scope, if it feels it must for the national good.

Consequently, I find that even if the *Combines Investigation Act* is founded on section 91(27), the federal authorities possess the power to institute and prosecute offences under that Act pursuant to section 2 of the *Criminal Code* and section 15(2) of the *Combines Investigation Act*, since both are validly enacted laws.

The *Hoffmann-LaRoche* case will undoubtedly go to the Supreme Court of Canada.

Mr. Justice Linden seems to be echoing a comment by Mr. Justice Spence in the *Hauser* case:<sup>37</sup>

Indeed, it is difficult to understand how much of the federal legislative field could be dealt with efficiently by other methods. Much of the legislation in such fields is in essence regulatory and concerns such typically federal matters as trade and commerce, importation and exportation and other like matters. The administration of such fields require decisions of policy and certainly would include the establishment of a policy as to the means of and methods of enforcement. It would be a denial of the basic concept of federalism to permit the provincial authorities to have exclusive control of the enforcement of such legislation and the sole determination as to how and when the legislation should be enforced by institution of prosecution or against whom such prosecution should be instituted. If the legislative field is within the enumerated heads in s. 91, then the final decision as to administrative policy, investigation and prosecution must be in federal hands. Perhaps the *Narcotic Control Act* is a prime example of this principle.

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<sup>36</sup> *Ibid.*, (trial transcript), at pp. 43-44.

<sup>37</sup> *Supra*, footnote 1, at p. 488.

It should be noted that Chief Justice Laskin dissented in the *Dilorio* decision<sup>38</sup>—which held that section 92(14) encompassed the responsibility for the enforcement of the criminal law. He did *not* take part in the *Hauser* case.

What really is in issue is the division of executive power not legislative power. Mr. Justice Estey suggested it in *Pelletier*<sup>39</sup>; Spence J. and Dickson J. recognized it in *Hauser*,<sup>40</sup> but came down on different sides of the issue—Linden J. clearly recognized it in *Hoffmann-LaRoche*.<sup>41</sup>

DOUGLAS C. STANLEY\*

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CONSTITUTIONAL LAW—DUTY OF ATTORNEYS GENERAL IN CONSTITUTIONAL LITIGATION—PERSUASIVE AUTHORITY OF LEGAL PERIODICALS.—The judgment of the Supreme Court of Canada in *A.G. of B.C. v. The Canadian Trust Co.*<sup>1</sup> is commendable for its clarity. Mr. Justice Dickson, rendering a unanimous decision of a seven man court, cut through the tangled confusion of cases dealing with the constitutional validity of provincial succession duty statutes. He held that it is within the legislative competence of a province, under section 92(2) of the British North America Act,<sup>2</sup> to tax on the basis of the residence of a beneficiary in respect of property situated outside the province which passes on the death of a person domiciled outside the province. In concluding that the residence of the beneficiary within the province constitutes a sufficient basis for imposing a succession duty even though the property is situated outside the taxing province and the deceased dies domiciled elsewhere, the Supreme Court of Canada has clearly indicated that the constitutionality of a succession duty statute is to be determined in precisely the same way as any other taxing statute. Rules of statutory construction and of the conflict of laws which the trial judge<sup>3</sup> and the

<sup>38</sup> *Supra*, footnote 24, at p. 293 (C.C.C.).

<sup>39</sup> *Supra*, footnote 19, at p. 523.

<sup>40</sup> *Supra*, footnote 1, at pp. 487-488, and 510-511.

<sup>41</sup> *Supra*, footnote 36, at p. 32.

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<sup>1</sup> [1980] 5 W.W.R. 591, [1980] C.T.C. 338 (S.C.C.). The case will be referred to as the *Ellett* case.

<sup>2</sup> 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

<sup>3</sup> (1978), 86 D.L.R. (3d) 267, [1978] 4 W.W.R. 162 (B.C.S.C.). For a comment on this decision see (1978), 56 Can. Bar Rev. 652.

British Columbia Court of Appeal<sup>4</sup> had mistakenly elevated to rules of constitutional law were stripped of this added role.

The upholding of a succession duty of an accessions type—one levied on the resident recipient without regard to the situs of the property or the domicile of the deceased—is not of merely ephemeral interest. Although British Columbia has repealed its statute, as have the six co-operating provinces which enacted succession duty statutes of an accessions type in 1972, the case effectively upholds the constitutionality of the existing Quebec statute<sup>5</sup> because it has a provision substantially similar to section 6A of the former British Columbia Act. Also, as Dickson J. noted, the provinces are free to reintroduce the repealed legislation.

A province can now levy succession duty which would be more difficult to avoid. If a province had been constitutionally confined to levying a direct tax on property within the province or upon a person benefiting from what is described as an artificial subcategory, “transmission of property” (personal property situated outside the province passing on the death of a person domiciled in the province to a resident or domiciliary of the province), land situated outside the province would be beyond the provincial taxing power. Although this case dealt with personal property situated in Alberta passing on the death of a person domiciled in Alberta to beneficiaries resident in British Columbia, the case unequivocally refers to all property situated outside the province passing to a resident beneficiary. The provincial power to levy a succession duty on resident beneficiaries with reference to all foreign property has clearly been established.

There are a number of interesting aspects of the *Ellett* case. I will comment on two of them. The first is that the case attracted a number of interveners. It was natural enough that the Attorneys General of Quebec, Nova Scotia, and Manitoba would intervene to support the Attorney General of British Columbia. What is surprising is that the Attorney General of Canada also intervened in support of the challenged provincial taxing provision. This gives rise to an important issue. Is the duty of the Attorney General of Canada solely to protect the constitutional powers of the Parliament of Canada or does he have a larger duty to attempt to insure that the constitution is construed to best reflect the political and economic needs of the country? This case indicates that the Attorney General

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<sup>4</sup> (1978), 94 D.L.R. (3d) 90, [1979] 2 W.W.R. 683 (B.C.C.A.). For an annotation of this decision see (1979), 4 E.T.R. 84.

<sup>5</sup> Loi sur les droits successoraux, L.Q., 1978, c. 37, art. 3. The *Ellett* case has already been applied by the Supreme Court of Canada in *Covert v. The Minister of Finance of N.S.* [1980] C.T.C. 437, to uphold An Act Respecting Succession Duties, S.N.S., 1972, c. 17.

of Canada is prepared, in some instances, to take the broader view of his duty. This is, it is submitted, commendable. The constitution is too important to the well-being of a federation to be entrusted solely to an unmitigated adversarial system. With the substantial and diverse case burden that confronts the Supreme Court of Canada, the court is entitled occasionally to submissions from the Attorney General of Canada and from his provincial counterparts which are not based simply upon either protection or aggrandizement of their respective legislative powers.

The primary duty of an Attorney General is undoubtedly to protect and enhance the constitutional powers of his own legislature. However, it is contended that there are occasions when there is a higher duty—a duty to the constitution itself—which should take precedence. This is particularly so in Canada because important constitutional issues may arise in litigation between private parties who naturally enough are pursuing their own self interest with no consideration for a rational development of the constitution. Recognition of cases in which the higher duty to the constitution should take precedence over the duty to protect the legislative power of his own jurisdiction will not be easy. However, it is contended that this case represents a good example of an appropriate recognition of this higher duty.

It should be noted that in this case the holding in favour of the constitutionality of the British Columbia taxing section which the Attorney General of Canada supported did not have its usual impact on the allocation of legislative powers. Generally, if a provincial power is enhanced through interpretation of the constitution, it means that the federal power is correspondingly diminished. This is not so in the field of direct taxation because it is an area of concurrent power. The federal power of taxation under 91(3) is unlimited except for section 125 of the British North America Act. A wider interpretation of direct taxation within the province simply increases the area of concurrent power with no diminution of the federal taxing power. It is not suggested that it is only in the area of concurrent power that the higher duty to the constitution should be recognized. It should occur in all those cases in which either an increase or a decrease in legislative power at one level will clearly fail to achieve a better overall allocation of legislative powers between the two levels of government. This will be a difficult assessment for an Attorney General to make. However, certainly as long as the Supreme Court of Canada has such a heavy case load and as long as there is no specialized constitutional law court, Attorneys General should be prepared to recognize a duty to the constitution which will occasionally override their duty to protect the constitutional powers of their respective legislatures.



The second interesting aspect of this case is that it exemplifies the change in attitude by the courts to the use of legal periodicals. Dixon J. quoted from four *Canadian Bar Review* articles and cited three other articles from this same journal with approval. This may be contrasted with thirty years ago when Rinfret C.J.C., in hearing *Reference re Validity of the Wartime Leasehold Regulations*,<sup>6</sup> remarked that "*The Canadian Bar Review* is not an authority in this Court".<sup>7</sup> This comparison overstates the change in the persuasive authority of legal periodicals which has occurred in the last thirty years. Professor Nicholls writing in 1950 showed that Canadian and English courts did make considerable use of legal periodicals<sup>8</sup> and that earlier practice of citing only texts, or texts by writers who were dead or who had held judicial office<sup>9</sup> was being generally discarded. Nevertheless, the last thirty years has witnessed a great change in the attitude towards legal periodicals. The current view is perhaps best described in a lecture delivered by the Honourable Brian Dickson who indicates that many judges far from being resistant to the citation of legal periodicals now regard them as invaluable because they examine and assess recent court decisions and suggest new avenues of thought.<sup>10</sup> He states:<sup>11</sup>

Judges do read and use legal periodicals, both Canadian and non-Canadian. The weight to be given a citation depends upon the cogency of the argument, the intellectual honesty of the scholarship, the thoroughness of the research and, yes, the reputation of the author.

One reason for the changed outlook is the volume of litigation and the proliferation of new statutes, regulations and of tribunals which compel judges to resort to legal periodicals to stay abreast of developments. Another is the relaxation of the doctrine of *stare decisis*. The Supreme Court of Canada no longer considers itself bound either by its own former decisions or those of the Privy Council when it was the ultimate appellate tribunal for Canada. This recognition of the creative role of the court means that legal

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<sup>6</sup> [1950] S.C.R. 124, [1950] 2 D.L.R.1.

<sup>7</sup> Nicholls, *Legal Periodicals and the Supreme Court of Canada* (1950), 28 Can. Bar Rev. 422. The writer stated that: "Possibly the Chief Justice's refusal did not represent the considered opinion of the court as a whole; even in his own case it may have been little more than a sign of impatience with the length or line of argument."

<sup>8</sup> *Ibid.*

<sup>9</sup> It was not clear from the old practice whether judicial appointment was regarded as tantamount to death or to the instantaneous acquisition of legal knowledge which operated both prospectively and retrospectively.

<sup>10</sup> *The Role and Function of Judges* (1980), 14 L. Soc. of Upper Can. Gaz. 138, at p. 165.

<sup>11</sup> *Ibid.*

<sup>11</sup> *Tort Law in America: An Intellectual History* (1980), p. 39.

periodicals and texts will become a more important source of law. In civil law jurisdictions, the role of the legal scholar in the development of the law has never been challenged. The civil law and the common law are thus coming closer together. Whether Canadian legal scholars will ever play as prominent a role as their continental counterparts in developing and moulding the law seems doubtful. Nevertheless, we in Canada can expect to see a strengthening of the symbiotic relationship between judicial decisions and scholarly legal writing such as has occurred in the United States. Professor G. Edward White has noted this symbiotic relationship in the field of American tort law and has stated that:<sup>11</sup>

Cases became the staple diet for classrooms, treatises, and law review articles; existing scholarship became a point of reference in judicial analysis; judicial innovations stimulated new scholarship.

It is to be hoped that the strengthening of this kind of relationship will prove equally fruitful in Canada.

GORDON BALE\*

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**HUMAN RIGHTS CODE OF BRITISH COLUMBIA—REASONABLE CAUSE FOR DISCRIMINATION—DISCRIMINATION AGAINST HOMOSEXUALS—FREEDOM OF THE PRESS.**—A curious decision of the Supreme Court of Canada has recently invoked the principle of freedom of the press to diminish the scope of provincial human rights legislation prohibiting discriminatory practices. Relatively quiescent in Canadian constitutional law, freedom of the press has suddenly emerged to sustain a newspaper's inviolate right to discriminate against any person or group it considers morally tainted. Indeed, so broadly phrased are parts of the majority judgment in *Gay Alliance Towards Equality v. The Vancouver Sun*,<sup>1</sup> that one is left wondering whether a newspaper could, notwithstanding provincial human rights legislation, institute a policy of racial discrimination in its acceptance and rejection of classified advertisements. But how could such a remarkable conclusion proceed from a judgment of the highest court in the land?

The story begins with an innovative provision in the Human Rights Code of British Columbia<sup>2</sup> which seeks to incorporate the

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<sup>1</sup> [1979] 2 S.C.R. 435.

<sup>2</sup> S.B.C., 1973, c. 119.

concept of reasonable cause into legislation prohibiting public discrimination. Section 3 of that legislation reads:

3. (1) No person shall

- (a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
- (b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,

unless reasonable cause exists for such denial or discrimination.

Subsection two (2) of the same section goes on to declare that race, religion, colour, ancestry or place of origin of any person or class of persons shall not constitute reasonable cause; and that the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency. It is clear, however, that subsection two (2) does not in any way mark the boundaries of what may be construed as unreasonable discrimination. It seeks only to declare, to place beyond any doubt, that the classical categories therein enumerated constitute prohibited grounds of discrimination. Beyond these categories, the notion of reasonable cause becomes the litmus test for distinguishing between legitimate and illegitimate forms of discriminatory practices.

It seems fair to suggest that what amounts to reasonable cause cannot be established *a priori*, unless one is prepared to use such a notion as a mere synonym for the sum of the classical categories mentioned in section 3(2) of the British Columbia Code. But such an arbitrary and restrictive interpretation would ignore the innate flexibility of the term "reasonable cause", a notion which was surely meant to play an important role in extending the protection accorded by the British Columbia Human Rights Code to individuals possessing generic characteristics not explicitly mentioned in the legislation.

As can be well imagined, the application of the notion "reasonable cause" to cases of public discrimination is fraught with some degree of unpredictability. An occasion to explore the application of reasonable cause to a concrete fact pattern was created by efforts of the Gay Alliance Towards Equality, a political association of homosexual men and women, to publish the following classified advertisement:

Subs to Gay Tide, gay lib paper \$1.00 for 6 issues. 2146 Yew Street, Vancouver.

As innocuous as this proposed advertisement may seem, the *Vancouver Sun* refused to accept it for publication on the grounds that it was offensive to public decency. Alleging an unreasonable discriminatory practice, the Gay Alliance Towards Equality took its complaint to the British Columbia Human Rights Commission which

in turn established a Board of Inquiry<sup>3</sup> charged with the responsibility to investigate the matter. The Board of Inquiry ultimately decided that the *Vancouver Sun's* refusal to publish constituted an unreasonable act of discrimination and was thus prohibited by the British Columbia Human Rights Code. On appeal, the Board's decision was overturned by the British Columbia Court of Appeal and a further appeal was taken to the Supreme Court of Canada.

The reasons for judgment for the Court of Appeal<sup>4</sup> bear strikingly little resemblance to those contained in the majority judgment of the Supreme Court of Canada,<sup>5</sup> although both courts came to the conclusion that the *Vancouver Sun* had not breached the British Columbia Human Rights Code. Whereas the decision of the Court of Appeal is predicated upon an interpretation of what constitutes reasonable cause, the bulk of the judgment in the Supreme Court rests upon a long discussion of the principle of freedom of the press in Canadian constitutional law. But it is to the former decision that we first turn, in an attempt to decipher the distinction between reasonable and unreasonable forms of discrimination.

### *Reasonable cause in the British Columbia Court of Appeal*

In the Court of Appeal, Branca J.A., rightly pointed out that the Board of Inquiry had found that the real reason for the refusal of the *Vancouver Sun* to publish the advertisement in question amounted to a personal bias against homosexuals held by various individuals within the newspaper's management. In its defense, the *Vancouver Sun* had insisted that its only motivation was to protect a certain standard of public decency. But, as Branca J.A. remarked, it is of little importance that the psychological reasons for discrimination against homosexuals are classed as a bias or as a motivation to protect the presumed sensibilities of the public:<sup>6</sup>

It seems to me that the real question for determination was not whether certain individuals within management had a bias against homosexuals or homosexuality which may have motivated the policy, but whether or not the resultant policy dealing with public decency even though motivated by a bias on the part of certain individuals constituted a reasonable cause for the refusal to publish. In other words, despite the fact that certain individuals may have had that bias and that bias might well have motivated the refusal, the vital question remained: did the resultant policy of the newspaper furnish reasonable cause

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<sup>3</sup> *Ibid.*, ss 16 and 17 describe the constitution and powers of a Board of Inquiry.

<sup>4</sup> (1977), 77 D.L.R. (3d) 487.

<sup>5</sup> *Supra*, footnote 1.

<sup>6</sup> *Supra*, footnote 4, at p. 494.

within the meaning of those words as used in s. 3 of the Human Rights Code which in that event might constitute a lawful ground for refusal.

In other words, the discrimination practiced by the *Vancouver Sun* has to be assessed in the light of standards far more objective than the subjective rationale of the newspaper itself. But where are these standards to be found? How do we determine that one form of discrimination is reasonable and another is not? On this point, Branca J.A. offered the following observation:<sup>7</sup>

Many people in our society may well entertain a bias or some predisposition against homosexuals or homosexuality on moral and/or religious grounds. It cannot therefore be justly said that a bias so held has no reasonable foundation. I think, equally, that certain people in our society may well think favourably of homosexuals and their sexual practices. That belief too, may well be held on reasonable grounds.

Mr. Justice Branca then goes on to find, however, that moral or religious predispositions against homosexuality, as presumably held by the management of the *Vancouver Sun*, constitute reasonable cause within the meaning of the British Human Rights Code. But such a conclusion raises a most serious difficulty. There are few issues in the body politic which are not attended by substantial differences of opinion. Since, following the logic of Branca J.A., these conflicting opinions may well all be held on reasonable grounds, is it proper to conclude that anyone of them can provide reasonable cause for an act of public discrimination? In the face of disagreement do we simply reduce the concept of reasonable cause to the point of no useful application?

It remains unclear whether such a conclusion was envisaged by Mr. Justice Branca, but, when returning to the notion of bias he states:<sup>8</sup>

If the bias was honestly entertained, then there was not an unreasonable bias. To go one step further, if the policy was motivated by an honest bias, why then is the policy unreasonable?

Surely an honest bias that women should never be allowed to practice law or that a black man is naturally inferior to a white man is hardly any more reasonable because of its honesty. To focus on the honesty of a bias in determining its reasonableness is to ignore the search for a more objective standard in judging the subjective opinion of any particular individual. It leads us to the strange conclusion that the very person who engages in a discriminatory act is also the person who assesses its reasonableness, so long as his motives are honest.

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<sup>7</sup> *Ibid.*, at p. 494.

<sup>8</sup> *Ibid.*, at p. 495.

Although perplexing, Branca J.A. did seem to conceive of the question of what constitutes reasonable cause as one step beyond the question of what constitutes a reasonable bias. Indeed, he chided the Board of Inquiry for having focused on the motives of the *Vanocuver Sun* to the exclusion of considering whether or not the discrimination practiced was reasonable from an objective point of view. Yet, having made this distinction, he shed little light on what might constitute this objective standard, beyond frequent references to the question of honesty.<sup>9</sup>

Robertson J.A. joined his brother Branca in finding that the concept of reasonable cause in the Human Rights Code created an objective standard. Even more so than Branca J.A., Robertson J.A. criticized the Board of Inquiry for having applied a subjective test as to what constitutes reasonable cause; that is, in focusing on the purported bias of the *Vancouver Sun* the Board of Inquiry failed to assess the discrimination in question against an objective standard. But, once again, the contours of this objective standard remain blurred and ill-defined. Even the criticism directed against the Board of Inquiry seems somewhat misplaced. The Board had essentially assessed the notion of public decency (which was, after all, the main defense of the *Vancouver Sun*) against the need to protect members of various minorities. In so doing, the Board had cited the lamentable history of severe discrimination practised against homosexuals, and emphasized the virtues of a community founded upon tolerance rather than fear of difference. In brief, the Board had balanced the valid concern for an acceptable level of public decency against the basic policy of the Human Rights Code, a policy designed not only to protect citizens against acts of public discrimination but also to encourage a healthy level of societal tolerance. The Board had not simply isolated the motives of the *Vancouver Sun* and arbitrarily declared them unreasonable, but had assessed these motives within the context of all the circumstances and in light of other valid social goals. Evidently, however, this procedure is to be

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<sup>9</sup> Mr. Justice Branca did refer to the fact that the Immigration Act, R.S.C., 1970, c. I-2, declared homosexuals to be undesirable potential immigrants. Presumably, Branca J.A. was speaking of s. 5(a) of that Act dealing with prohibited classes of immigrants, and in particular homosexuals and prostitutes. At the time of his judgment (June 10th, 1977), however, this entire Act had been repealed and replaced by the Immigration Act 1976, S.C., 1976-77, c. 52, which removed all reference to homosexuals as constituting a prohibited class of immigrants. If other laws are to be of assistance in establishing the objective meaning of reasonable cause under the B.C. Human Rights Code, it would perhaps be now more appropriate to refer to the Quebec Charter of Human Rights and Freedoms, L.Q., 1975, c. 6, which prohibits public discrimination based on sexual orientation. This category was added to the Quebec legislation by amendment to art. 10 of the Charter, Dec. 19th, 1977, L.Q., 1977, c. 6, several months after the judgment of Branca J.A.

frowned upon, according to Robertson J.A., in coming to terms with the concept of reasonable cause:<sup>10</sup>

How the Board distilled all this from the Code escapes me, but it does seem clear that what the Board has done is to add (by some quasi-legislative process which is not a function of the Board) homosexuality to the attributes of persons which are specifically protected in varying circumstances from discrimination by ss. 3(2), 4, 5(1), 6(1), 7, 8(2), and 9(2), that is to say, race, religion, colour, ancestry, place of origin, sex, marital status, age, political belief and conviction of an offence.

But, as already mentioned, the notion of reasonable cause was surely included in the British Columbia Human Rights Code so as to extend the protection accorded by the Code to individuals possessing generic characteristics not explicitly mentioned in the legislation. Would every finding of a Board of Inquiry which applied the test of reasonable cause so as to accord protection to members of a minority not explicitly mentioned in the Code amount to "some quasi-legislative process which is not a function of the Board?" To so hold is to emasculate the very effectiveness of the term "reasonable cause".

The one clear reference of Robertson J.A. as to how the notion of reasonable cause should be construed in order to amount to an objective standard is most disturbing in its possible ramifications:<sup>11</sup>

Of course, in applying the Code the "cause" must be considered in relation to the person and the circumstances. Also, it must be borne in mind that the members of majorities have rights and sensibilities. I do not think that it is the intention of the code that these are generally to be ignored for the benefit of those who are different. The words "unless reasonable cause exists" make this abundantly clear.

Human rights legislation has always been viewed as a means of protecting those who are different, as a means of countering the myth that the presumed will of the majority must always prevail. Are all those who are different (and outside the classical categories of prohibited discrimination) to receive no protection against discrimination merely because the majority must necessarily rule?

The distillation of new categories of prohibited discrimination through the application of the notion "reasonable cause" to diverse social conflicts is, from any angle, a difficult task. But so much depends upon the particular facts of each case that attempts to define abstract legal limits to reasonable cause can produce more pernicious than beneficial results. An American jurist once remarked that a "word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according

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<sup>10</sup> *Supra*, footnote 4, at p. 499.

<sup>11</sup> *Ibid.*, at p. 496.

to the circumstances and the time in which it is used".<sup>12</sup> How much more so does this apply to a notion such as reasonable cause.

In dissenting from the majority in the Court of Appeal, Seaton J.A. underscored the view that whether or not there exists reasonable cause for discrimination is primarily a question of fact. As intractable a problem as it may be, the distinction between a question of fact and one of law is of central importance to the application of reasonable cause under the British Columbia Human Rights Code. If the original decision of the Board of Inquiry that no reasonable cause existed for the discrimination practiced by the *Vancouver Sun* were a finding of fact, there clearly would have been no right of appeal from that decision to the British Columbia Supreme Court.<sup>13</sup>

The view that the question of reasonable cause is inextricably tied to the facts of a particular case, and hence some distance from a pure question of law, is not without jurisprudential support.<sup>14</sup> In the words of Lord Atkin: "There is no abstract conception of reasonableness and the conclusion is not to be reached on *a priori* reasoning."<sup>15</sup>

It is misleading to apply *a priori* reasoning to the notion of reasonableness because the application of such a notion to any particular case requires the weighing and assessment of a multitude of factors, a process rightfully left to the trier of fact. In usurping that function, the Court of Appeal has suddenly served notice on the British Columbia Human Rights Commission and any legally constituted Boards of Inquiry that they are not the sole judge of what is reasonable.

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<sup>12</sup> So wrote Mr. Justice Oliver Wendell Holmes in *Towne v. Erisner* (1917), 245 U.S. 418, at p. 425.

<sup>13</sup> The B.C. legislation, *supra*, footnote 2, (s. 18) establishes a right of appeal upon: (i) any point or question of law or jurisdiction; or (ii) any finding of fact necessary to establish the jurisdiction of a board of inquiry that is manifestly incorrect. A finding of fact which is irrelevant to the jurisdiction of a board of inquiry is, therefore, not subject to appeal.

<sup>14</sup> In an Australian case it was said: "Reasonableness is relative, and must be proportioned to the circumstances of the case considered as a whole." *R. v. Archdall and Roskrige* (1928), 41 C.L.R. 128, *per curiam*, at p. 136. In relation to a contract it has been said: "Reasonable is a relative term, and the facts of the case must be considered before what constitutes a reasonable contract can be determined." *Opera House Investment Pty Ltd. v. Devon Buildings Ltd* (1936), 55 C.L.R. 110, *per Latham C.J.*, at p. 116. Finally, the House of Lords remarked in 1942: "What is reasonable has consistently been held to depend on the actual conditions known at the time of decision." *Thomas Fattorini (Lancashire) Ltd v. Inland Revenue Coms*, [1942] A.C. 643, *per Lord Atkin*, at p. 656.

<sup>15</sup> *Thomas Fattorini (Lancashire) Ltd v. Inland Revenue Coms*, *ibid.*, at p. 656.



*Freedom of the press in the Supreme Court of Canada*

This inquiry into any objective standard of judgment implied by the notion "reasonable cause" did not emerge in the Supreme Court. In its place, the principle of freedom of the press was invoked, not only as an element in Canadian constitutional law which might restrict provincial legislative jurisdiction, but also as a canon of construction to be brought to bear on the interpretation of provincial legislation. Given that freedom of the press has played a minor role in Canadian constitutional law, unlike the role it has played in the United States by virtue of the First Amendment, it is odd that such a principle should be so prominently displayed. It is suggested by Martland J. for example, that a province may not have the legislative jurisdiction to enact a law which effectively obliges a newspaper to publish certain material, and in support of his contention he cites the well-known *Alberta Press* case of 1938.<sup>16</sup> Whilst it is true that provincial legislation must not encumber or restrict the general freedom of a newspaper to exercise editorial control over what it does or does not publish, such a general freedom does not exist *in vacuo*. As with any abstract principle, freedom of the press must be interpreted within the context of the purpose for which it was conceived. As the Supreme Court of Canada said in 1938:<sup>17</sup>

Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers: but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of The British North America Act and the statutes of the Dominion of Canada.

In the *Alberta Press* case, the legislation under scrutiny (An Act to Insure the Publication of Accurate News and Information) had empowered a provincial government official to order that a newspaper publish, *verbatim*, a predetermined government statement in respect of any government policy which the newspaper had allegedly misrepresented. Failure to comply with such an order exposed the newspaper to a further order prohibiting, for a prescribed period of time, its future publication. Clearly then, the proposition that freedom of the press cannot be restricted by provincial legislation was enunciated by the Supreme Court in the face of a provincial attempt to actually control and interfere with a newspaper's general editorial and political commentary.

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<sup>16</sup> [1938] S.C.R. 100.

<sup>17</sup> *Ibid.*, at p. 134.

Two subsequent decisions of the Supreme Court in the 1950's—*Switzman v. Elbling*<sup>18</sup> and *Saumur v. City of Quebec*<sup>19</sup>—further emphasized the importance of the general freedom of expression (which includes the narrower principle of freedom of the press). In both decisions, provincial legislation was found to interfere with that freedom and declared *ultra vires*. But the circumstances before the court were no less a direct assault on that freedom than was the case in *Alberta Press*. In *Saumur*, a by-law of the city of Quebec had sought to prohibit the distribution of religious pamphlets by the Jehovah Witnesses, and thus not only directly restricted freedom of expression but also freedom of religion. In *Switzman*, Quebec legislation had prohibited the publication of any material espousing or propagating communism or bolshevism. Together these two judgments tended to keep alive the notion that freedom of expression (and of the press) could not be interfered with by provincial legislation, although at no time was it ever declared that a provincial legislature lacked all jurisdiction to regulate any aspect whatsoever of a newspaper's operation.

More recently, general freedom of expression has not been tended to with great solicitude by the Supreme Court. In *McNeil v. Nova Scotia Board of Censors*,<sup>20</sup> provincial legislation which granted power to a board of censors to prohibited or censor the showing of motion pictures (which it considered immoral or indecent) was impugned as an invasion of the federal Government's jurisdiction over criminal law. Characterizing the censorship laws as pertaining to the regulation of intra provincial trade, the Supreme Court declared them *intra vires*. This judgment is noteworthy for the virtual total absence of any discussion or concern about freedom of expression, an absence which is all the more remarkable given the obvious effects of this type of provincial legislation upon that general freedom.<sup>21</sup>

Although not directly related to the narrower issue of freedom of the press, *Attorney General of Canada and Dupond v. Montreal*,<sup>22</sup> provides further evidence that the Supreme Court is reluctant to circumscribe provincial legislative jurisdiction by invoking any implied principle of freedom of expression in the British North America Act. Here the court upheld the validity of a Montreal by-law

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<sup>18</sup> [1957] S.C.R. 285.

<sup>19</sup> [1952] 2 S.C.R. 299.

<sup>20</sup> [1978] 2 S.C.R. 662.

<sup>21</sup> Mr. Justice MacDonald of the Nova Scotia Court of Appeal had placed considerable emphasis upon this aspect of the case; judgment reported in (1976), 14 N.S.R. (2d) 255, at pp. 236-237.

<sup>22</sup> [1978] 2 S.C.R. 770.

which prohibited (for a period of thirty days) the holding of any public assembly, parade or gathering. Such a by-law was viewed as a valid regulation of local conduct with a view to preserving the peace and public order. The majority rejected the argument that such regulation was in conflict with any fundamental freedom of speech, of the press, or of assembly and association. In the first place, reasoned the majority, questions of public assemblies are distinguishable from any question of freedom of speech or expression; moreover, freedom of expression and of the press were viewed as aggregates of several matters which, depending on the aspect, might come within federal or provincial competence.<sup>23</sup> All of this suggests that the Supreme Court was some distance from believing that provincial legislative competence should be fettered by any broad principle of freedom of expression.

All of these cases tend to support the conclusion that it is today incongruous to deny to a provincial legislature the jurisdiction to prohibit unreasonable discrimination in access to the classified advertisements section of a newspaper. To conclude otherwise raises a concern which goes far beyond the facts of this particular case.

If we accept the proposition that freedom of the press is so broad and fundamental a principle in Canadian constitutional law that no provincial legislation can seek to restrict the right of a newspaper to refuse to publish material contrary to its own views in its classified ads column, it follows logically that a discriminatory policy based on sex, race, colour or religion is also beyond the influence of provincial legislation. As Martland J. said:<sup>24</sup>

In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, the Sun adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propagates the views of the Alliance.

The *Vancouver Sun* could just as easily have adopted a position on the controversial subject of race or religion to explain its refusal of a similar advertisement for a black-supported or Jehovah Witness magazine, and then invoked the principle of freedom of the press to justify its actions.

Focusing exclusively on the question of legislative jurisdiction, how do we distinguish between a provincial law which prohibits racial discrimination in access to classified advertisements and one which prohibits discrimination based on sexual orientation? The

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<sup>23</sup> *Ibid.*, at pp. 796-797.

<sup>24</sup> *Supra*, footnote 1, at p. 455.

legislative subject matter is access to classified advertisements, not the particular type of discrimination. Either a provincial legislature has the jurisdiction to prohibit discriminatory practices in access to classified advertisements or it does not. If it does not, then not only sexual orientation, but even the classical categories of prohibited discrimination—race, colour, sex, religion—can stand unperturbed behind the constitutional veil of freedom of the press.

Yet, it seems unlikely that the specific categories of prohibited discrimination in the British Columbia legislation would prove ineffective in the context of classified advertisements. Would the Supreme Court find, for example, that a provincial legislature lacked the legislative power to prohibit racial discrimination in access to classified advertisements? If the answer is no, such a conclusion implies that the issue of provincial legislative jurisdiction was not the determining factor in the Supreme Court's restrictive interpretation of the notion "reasonable cause".

As already mentioned, however, there is a second sense in which freedom of the press is invoked in support of the majority judgment. It is argued that the term "reasonable cause", being vague and ambiguous, must be interpreted in the light of the principle of freedom of the press. But such a proposition is no less vague than the purportedly nebulous phrase in question, for, how are we to assess the importance of freedom of the press in the context of other valid social interests which come to bear on the intended scope of an ambiguous legislative provision? In this regard, another recent judgment of the Supreme Court, *Chernesky v. Armadale Publishers Ltd et al.*<sup>25</sup> can provide us with an edifying insight into what weight the Supreme Court is wont to attach to the principle of freedom of the press in the process of judicial interpretation. In *Chernesky*, the editor, owner and publisher of a newspaper found themselves embroiled in a libel suit because of the publication of a letter to the editor which had characterized the attitude of the plaintiff as racist. In its defense the newspaper argued that the content of the letter amounted to fair comment on a matter of public interest. The nub of the issue before the court was determining whether or not, in the circumstances of the case, the legitimate defense of fair comment was broad enough to include the newspaper within its ambit. A line of English authority had established that the defense of fair comment was only available to a defendant who honestly believed the views he had expressed. In *Chernesky*, however, the actual authors of the letter in question never testified at trial and were, in fact, then resident in another province. There was therefore no way to

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<sup>25</sup> (1978), 90 D.L.R. (3d) 321.

determine the subjective mental state of the authors of the letter. What, then, should be the position of the newspaper? Should the same test of honesty apply? If yes, the defendants were placed in a difficult position, for the evidence clearly established that the impugned statements did not represent their own honest opinions. In point of fact, they disagreed with the sentiments expressed, but did not believe that this should deter them from publishing the letter. They had simply published the letter in order to facilitate a complete public debate of the issues in question.

These circumstances might have suggested that the rule of honesty be applied to a newspaper in a manner different than to the actual authors of allegedly libelous statements. For example, a newspaper should perhaps be allowed to rely on the defense of fair comment if it honestly believed that those who wrote a letter were honestly expressing their true opinions. This possibility was arguably open to the Supreme Court, not only because the case law was open to divergent interpretations but also because it was predominantly English in origin with no Canadian authority precisely on point. To make no accommodation for the position of a newspaper could conceivably raise a substantial threat to free public debate, as was pointed out by Mr. Justice Dickson in his dissenting opinion:<sup>26</sup>

It does not require any great perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the views expressed, but defenceless if he did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press.

Notwithstanding this danger, the Supreme Court chose to interpret a common law principle in such a manner as to jeopardize vigorous public debate in that part of a newspaper devoted to letters to the editor.

One might, of course, distinguish the process of interpreting common law principles from that of interpreting legislative enactments. Yet, to this writer's knowledge, there exists no authority in Canadian law, constitutional or otherwise, supporting the contention that freedom of the press should be invoked in interpreting provincial legislation. True, there is a line of authority establishing that vague and ambiguous legislative provisions must be interpreted, if reasonably possible, in a manner which avoids a finding that they are

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<sup>26</sup> *Ibid.*, at p. 343.

*ultra vires* the legislative body which enacted them.<sup>27</sup> Beginning with the premise that it is unconstitutional for provincial legislation to tarnish the principle of freedom of the press, it might be argued that the phrase "reasonable cause" in the British Columbia legislation must be interpreted so as to leave that principle untouched. But, at this point, we have returned to the purely constitutional issue of how absolute the principle of freedom of the press really is. Given the context in which this freedom was originally invoked in the *Alberta Press* case and its subsequent interpretation, one is certainly in a position to question its purported inviolability.

On the issue of statutory interpretation alone, however, it is certainly curious to witness the change in attitude of the Supreme Court between the decision in *Chernesky* and that in the *Vancouver Sun* case. In the former, where the danger to vigorous public debate was manifest, the court placed little emphasis upon the principle of freedom of the press. In the latter, where the issue resolved into one of non-discriminatory access to classified advertisements, the court reinvigorated the principle and restricted the possible scope of the British Columbia Human Rights Code. This in face of the fact that non-discriminatory access to the classified advertisements of a newspaper is some considerable distance from interfering with the public dissemination of ideas and unrestrained political commentary.

### *Reasonable cause in the Supreme Court of Canada*

Faced with such unsatisfactory and tenuous applications of the principle of freedom of the press, one is tempted to seek the *ratio* of this judgment in the court's assessment, unattended by disquisitions on freedom of the press, of what constitutes reasonable cause for discrimination. Simply put, the majority judgment perhaps rests upon nothing more complicated nor profound than the proposition that discrimination against homosexual men and women is reasonable. But this returns us to the issue of whether the Board of Inquiry's application of the term "reasonable cause" involved a question of fact or one of law. On this ground alone, Chief Justice Laskin, who, in his dissenting opinion, characterized the Board's decision as to what constituted reasonable cause as a question of fact, would have denied to the courts the authority to interfere.

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<sup>27</sup> *A.G. Ontario v. Reciprocal Insurers*, [1924] A.C. 328, at p. 345; *Reference as to the validity of section 31 of the Municipal District Act, 1941, of Alberta*, [1943] S.C.R. 295, at p. 302; *Mackay v. The Queen*, [1965] S.C.R. 798, at p. 804; *R v. Somerville*, [1974] S.C.R. 387, at p. 393.

But even assuming that the Supreme Court of Canada (or any other court) were empowered to substitute its own opinion as to what is reasonable for that of the Board's, one still would have rightly anticipated a lengthy analysis of all the particular facts which had motivated the Board's decision in the first place. On this point the majority judgment is virtually silent. Indeed, the vast bulk of the reasons for judgment pertain to the issue of freedom of the press—a phantom from which the court never escapes. When the moment arrives to assess the meaning of reasonable cause, divorced from any concern for freedom of the press, Mr. Justice Martland offers but one simple phrase: "In my opinion the Board erred in law in considering that section 3 was applicable in the circumstances of this case".<sup>28</sup> But without any discussion of the tissue of facts which underpinned the original decision of the Board of Inquiry, has the Supreme Court of Canada not come perilously close to reaching its conclusion on *a priori* reasoning? The unsatisfactory nature of such a procedure is clear.

To justify its refusal to accept the advertisement proffered by the Gay Alliance Towards Equality, the *Vancouver Sun* had invoked its duty to protect the morals of the community by refusing to publish material which offended public decency. Yet, in examining the very newspaper in which the rejected advertisement would have appeared the Board of Inquiry documented the following facts:<sup>29</sup>

In the October 28th, 1974, edition of the Respondent newspaper, the day upon which the advertisement in question would have first appeared had it been accepted for publication, a number of advertisements appear in that part of the classified advertising dealing with theatres and movie houses. Without describing these advertisements in detail it is sufficient to note that a number of them reprint the warnings of the British Columbia Film Classification Director to the effect that the films advertised contain brutality, coarse language and are completely concerned with sex. One such advertisement warns of an orgy of sex and violence. One advertisement in particular contains two warnings, one with respect to each of the two films which apparently were being shown at the time on a continuous basis from 1:00 p.m. in the afternoon until 11:00 p.m. in the evening. The warning with respect to the first film is "group sex and lesbianism" and with respect to the second film "male nudity and sex". These advertisements were included as exhibits in the report of Ms. Ruff, the Director of the Human Rights Branch to the Minister of Labour and as such form part of Exhibit 3. Mr. Toogood testified that the Respondent newspaper was obligated to print the Classification Director's warnings, however, he conceded that the *Vancouver Sun* did not have to publish these advertisements which, in addition to the foregoing warnings, contained illustrations of pictures suggestive of the content warned of.

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<sup>28</sup> *Supra*, footnote 1, at p. 456.

<sup>29</sup> Cited in the dissenting opinion of Seaton J.A. in the B.C. Court of Appeal, *supra*, footnote 4, at p. 501.

In the face of such flagrant self-contradiction it is not surprising that Chief Justice Laskin, in his dissenting opinion, found it difficult to square purported concerns about public decency with this litany of vulgar advertising, whose offensiveness was even conceded by counsel for the newspaper. It is just such contradictions which are ignored and forgotten when a court approaches the term "reasonable cause" by way of a *a priori* argumentation. The die is already cast, there is little left to argue, when an individual's homosexuality is by definition considered to be reasonable cause for discrimination.

Clearly, the question of "reasonable cause" under the British Columbia Human Rights Code cannot be understood in isolation from the various fact patterns out of which disputes will necessarily arise. Moreover, it is certainly arguable that members of a validly constituted Board of Inquiry are in the best position to appraise the reasonableness of a discriminatory practice. This is not to say that the courts have no role to play. Evident errors of law, all can agree, must be corrected by appeal to the judiciary. But this particular decision—replete with its anomalous reference to the principle of freedom of the press and its perfunctory characterization of the *Vancouver Sun's* discriminatory practice as reasonable—should remind us all that an understanding of the penumbral areas of law demands more than a tautological demonstration of a predetermined truth.

RICHARD A. GOREHAM\*

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CONTRACTS—ECONOMIC DURESS—INEQUALITY OF BARGAINING POWER—QUO VADIS?—Economic duress has now been considered for the first time by a Canadian court in *Ronald Elwyn Lister Ltd v. Dunlop Canada Ltd*,<sup>1</sup> in the Ontario Court of Appeal. The proposition that a contract should be avoided because one party was induced to enter it as a result of economic pressure exerted by the other party has also recently been considered in three English decisions, *The Siboen and the Sibotre*,<sup>2</sup> *North Ocean Shipping Co.*

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<sup>1</sup> (1980), 27 O.R. (2d) 168 (Ont. C.A.); see the decision of the High Court in (1978), 85 D.L.R. (3d) 321.

<sup>2</sup> [1976] 1 Lloyd's L.R. 293 (Q.B.D.-Comm. Ct); Jack Beatson, (1976), 92 L. Q. Rev. 496.



*Ltd v. Hyundai Construction Co. Ltd, The Atlantic Baron*,<sup>3</sup> and *Pao On v. Lau Yiu*.<sup>4</sup> However, no satisfactory statement of a workable doctrine of economic duress has been formulated. It is the purpose of this comment to focus upon the economic duress aspects of the *Lister* case and to consider briefly the possible shape a doctrine of economic duress should take if it is to provide a practical means of relief for the victim of an unconscionable abuse of a superior bargaining position. That such a doctrine has a rightful place in the common law is suggested by the enormous corpus of American jurisprudence, as well as substantial academic comment, on the role of a legal principle which provides redress when subtle, if not insidious, pressures are brought to bear on the weaker party in the contractual nexus.<sup>5</sup>

Since the eighteenth century the American courts have developed a concept of economic duress, relying on the 1731 English decision, *Astley v. Reynolds*,<sup>6</sup> as well as on the later decision in 1844 of *Parker v. The Great Western Railway Co.*,<sup>7</sup> in which the abuse of a superior bargaining position by a common carrier operating on a monopolistic basis under a private statute was held to justify judicial intervention.<sup>8</sup> However, in England these decisions have been largely ignored, rather at common law duress was confined to actual or threatened violence to the person, as well as to goods where restitution only was involved, as in *Skeate v. Beale*.<sup>9</sup> And equity provided redress only in relatively well-defined fiduciary and confidential relationships where a superior party had exerted undue influence in order to achieve an unconscionable gain.<sup>10</sup> On the whole equity was unwilling to extend the scope of its protection to the

<sup>3</sup> [1978] 3 All E.R. 1170 (Q.B.D.); John Adams, (1979), 42 Mod. L. Rev. 557; A.G.G. (1979), 95 L. Q. Rev. 475; Brian Coote, (1980), 39 Camb. L.J. 40.

<sup>4</sup> [1979] 3 All E.R. 65 (P.C.—from Hong Kong); see Coote, *op. cit.*, *ibid.*

<sup>5</sup> John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law* (1939), 11 Tul. L. Rev. 345; *Economic Duress—An Essay in Perspective* (1947), 45 Mich. L. Rev. 253; *Unconscionable Coercion: The German Version* (1976), 89 Harv. L. Rev. 1041; John Dalzell, *Duress by Economic Pressure* (1942), 20 North Car. L. Rev. 237, 341; Robert L. Hale, *Bargaining, Duress and Economic Liberty* (1943), 43 Col. L. Rev. 603. The major American cases are found in J.W. Wade, *Cases and Materials on Restitution* (1958) and J.P. Dawson and G.E. Palmer, *Cases on Restitution* (1969).

<sup>6</sup> 2 Str. 915, 93 E.R. 939 (K.B.).

<sup>7</sup> 7 Man. & G. 252, 135 E.R. 107 (C.P.).

<sup>8</sup> Dawson, *op. cit.*, footnote 5 (Mich. L. Rev.), *passim*.

<sup>9</sup> (1841), 11 Ad. & E. 983, 113 E.R. 688 (K.B.). The authority of this case has been seriously questioned by Goff and Jones, *The Law of Restitution* (2nd ed., 1978), pp 185-186; see also *The Atlantic Baron*, *supra*, footnote 3, at p. 1182 and *Lister* (1978), 85 D.L.R. (3d) 321, at p. 348.

<sup>10</sup> Dawson, *op. cit.*, footnote 5 (Mich. L. Rev.).

victims of commercial "pressure", as the concept was called in the nineteenth century.<sup>11</sup>

In Canada a doctrine similar to economic duress, that is, practical compulsion, has been discussed in several cases,<sup>12</sup> but again the state of the law is inadequate. Thus, the appearance of economic duress in the courts and the recognition by the judiciary that contracts can be induced by threats other than those of physical violence is to be welcomed. Unwelcome, however, is the shape that appearance is taking. The test for economic duress as expressed by Kerr J. in *The Siboen and the Sibotre* and repeated with approval in the other two English decisions and in *Lister* is that there must be coercion of the victim's will so as to vitiate his consent to the contract; mere commercial pressure is not enough.<sup>13</sup> This approach is questionable.

### 1. *The Lister decision.*

If the legal issues in *Lister* were difficult, the fact situation was relatively straight-forward. Mr. and Mrs. Lister were franchised dealers for Dunlop products in Guelph and later also in Orangeville. Security for the franchise agreement consisted of a floating charge debenture for \$175,000.00, a demand promissory note for the same amount and a personal guarantee given by the Listers. In addition to being a Dunlop franchisee, Lister, personally, became an authorized distributor for "Autopar" automobile parts under an agreement with Chrysler Canada Ltd and sold the parts and accessories from his Dunlop stores. The Dunlop dealership was not sufficiently profitable to permit the Listers to discharge their indebtedness to Dunlop, which requested that they pay up about \$127,000.00 under the debenture and petitioned for a receiving order. A settlement was reached on May 31st, 1972 in which the Listers acknowledged their indebtedness to Dunlop and mortgaged three properties to secure the debt, which was due in two years. Dunlop, which had wrongfully seized the Autopar inventory, returned it to Chrysler which had

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<sup>11</sup> *Re Boycott* (1885), 29 Ch.D. 571 (C.A.); *Ormes v. Beadel* (1860), 2 Giff. 166, 66 E.R. 72 (V.-C.) and rev'd 2 De G.F. & J. 333, 45 E.R. 649 (L.C.); see *Winder*, (1966), 82 L. Q. Rev. 165.

<sup>12</sup> *Knutson v. Bourkes Syndicate*, [1941] 3 D.L.R. 593 (S.C.C.); *R. v. Premier Mouton Products Inc.* (1961), 27 D.L.R. (2d) 639 (S.C.C.); *George (Porky) Jacobs Enterprises Ltd v. City of Regina*, [1964] S.C.R. 326; *Eadie v. Township of Brantford* (1967), 63 D.L.R. (2d) 561 (S.C.C.); *Morton Construction Co. Ltd v. City of Hamilton* (1961), 31 D.L.R. (2d) 323 (Ont. C.A.); *Peter Kiewit Sons' Co. v. Eakins Construction Ltd* (1960), 22 D.L.R. (2d) 465 (S.C.C.); see also the leading Australian decisions, *Nixon v. Furphy* (1925), 25 N.S.W. (S.R.) 151; *Mason v. The State of New South Wales* (1959), 102 C.L.R. 108; *Sundell v. Emm Yonnoulatos* (1956), 56 S.R. (N.S.W.) 323.

<sup>13</sup> *Supra*, footnote 2, at p. 336.

started bankruptcy proceedings, and Chrysler accepted the inventory in full satisfaction of the Lister's indebtedness to them. The Listers were still indebted to Dunlop.

At trial, the Listers argued that they had been induced to enter the franchise by oral collateral warranties and fraudulent and negligent misrepresentations as to the profitability of the dealership. They further argued that the settlement was void because it was entered as a result of coercion exercised by Dunlop by virtue of its superior bargaining position derived from the Lister's indebtedness to the company, the wrongful detention of the Autopar inventory and the taking of bankruptcy proceedings by Chrysler. Rutherford J. dismissed the first three arguments on the grounds that no fraud was proved and that tortious liability was expressly excluded by a provision in the franchise agreement excluding all representations, statements, understandings and agreements other than those expressed in the contract. With respect to the settlement the learned judge found that the Listers had voluntarily agreed to it after taking independent legal advice and therefore were precluded from invoking the doctrine of inequality of bargaining power. Finally, he decided that the seizure of the Autopar inventory was wrongful because the Listers had not been allowed sufficient time to meet Dunlop's demand for the debt and awarded damages to the Listers for the wrongful seizure of the stock, as well as exemplary damages.

On appeal, two main issues were argued although a number of other issues were raised in the course of argument. The first question related to what period of time a creditor should permit his debtor to pay before proceeding to enforce the security. The majority in the Court of Appeal held that the debtor must be allowed a reasonable time to meet the demand and that in considering what is reasonable regard may be had to the facts as they appear to the creditor at the time of the demand. When Dunlop made the demand it was aware that the Listers had been in trouble for some time and been told that they would borrow no more money; moreover, the Listers had given Dunlop no indication as to when they would discharge the debt and had not asked for an extension of time. Thus, in the opinion of the court a reasonable time had transpired and Dunlop was entitled to enforce its security.<sup>14</sup>

The second issue arose from the refusal of Rutherford J. to set aside the personal guarantee and the settlement of May 1972. The Listers argued that Dunlop was estopped from relying on the guarantee because they had been assured by Dunlop that if they

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<sup>14</sup> *Supra*, footnote 1, per Weatherston J.A., at p. 176 (O.R.); Lacourciere J.A. concurs.

co-operated with the receiver it would not be enforced, thus they allowed the receiver to take possession rather than wait until a court order had been obtained. The court declined to accept that argument, stating that Dunlop had a contractual right to take possession without requiring an order.<sup>15</sup> The Listers further argued that they were not bound *personally* by the exclusion clause in the franchise agreement because the parties to the agreement were Dunlop and Lister Limited, thus the negligent misrepresentations as to the expected volume of business were not excluded vis-à-vis the Listers.<sup>16</sup> The majority in the Court of Appeal replied that the trial judge had made no specific finding of negligent misrepresentation; and, in any case, the Listers were precluded by the settlement from reverting to that argument now.<sup>17</sup>

Wilson J.A. disagreed. She noted that the learned trial judge had not dealt with the question of whether the exemption clause in the Dunlop-Lister Limited contract barred the Listers personally from suing on the basis of the pre-contractual representations.<sup>18</sup> The representations had been made to the Listers personally; the company had not existed at the time. In the absence of authority on the issue, Wilson J.A. opined that while Lister Limited may be bound by the exclusion clause in the franchise agreement, there is no reason why the Listers personally should be bound by a guarantee induced by negligent misrepresentation in the absence of the exclusion clause in that guarantee. Support for that approach was given by the Privy Council decision in *Mackenzie v. Royal Bank of Canada*<sup>19</sup> in which innocent misrepresentations (although after *Hedley Byrne v. Heller and Partners*<sup>20</sup> these would probably now be negligent misrepresentations) were held to avoid the guarantee.<sup>21</sup> It seems difficult to justify such an approach when one remembers that a guarantee is essentially parasitic on the main agreement. But, had the Listers subsequently affirmed their personal liability by entering the settlement? Wilson J.A. thought not and for two reasons: first, the settlement was entered into under a mistake which went to its root, that is, *both* parties believed the guarantee to be enforceable against the Listers.<sup>22</sup> Second, if the guarantees are unenforceable,

<sup>15</sup> *Ibid.*, at p. 177.

<sup>16</sup> Relying on *Esso Petroleum Co. Ltd v. Mardon*, [1976] 2 All E.R. 5 (C.A.).

<sup>17</sup> *Supra*, footnote 1, at pp. 177-178 (O.R.).

<sup>18</sup> *Ibid.*, at p. 182.

<sup>19</sup> [1934] A.C. 182.

<sup>20</sup> [1964] A.C. 465 (H.L.).

<sup>21</sup> *Supra*, footnote 1, at p. 184 (O.R.).

<sup>22</sup> *Ibid.*, at pp. 184-188; *Bell v. Lever Bros.*, [1932] A.C. 161 (H.L.); *Solle v. Butcher*, [1950] 1 K.B. 671 (C.A.); *Magee v. Pennine Insurance Co. Ltd*, [1969] 2 Q.B. 507 (C.A.).

the consideration for the settlement was Dunlop's forbearance to sue the Listers on the guarantees, but that is not good consideration.<sup>23</sup> But is it not well established that forbearance to enforce what is *bona fide* believed to be a valid claim is good consideration?<sup>24</sup>

It is respectfully submitted that Wilson J.A. has raised important legal issues and that further clarification of these is to be welcomed. However, it is to the final argument of the Listers that this comment is directed, that is, that the settlement was not enforceable because it was extracted from them through Dunlop's abuse of a superior bargaining position derived from the wrongful seizure of Autopar inventory and the consequent taking of bankruptcy proceedings by Chrysler.

## 2. What is economic duress?

At trial, Rutherford J. decided that mere inequality of bargaining power could not be successfully invoked by the Listers to avoid the settlement because throughout they had taken independent legal advice and had entered the settlement voluntarily—there was no coercion of their wills. In the course of his judgment the learned judge referred to a number of elements which should be considered in attempting to formulate a workable doctrine of economic duress: inequality of bargaining power, the absence of consent to the agreement, the consequences should the victim not submit, recourse to outside legal counsel and acceptance of the agreement as a final binding settlement.

The idea that a contract may be avoided because of the abuse by one party of a superior bargaining position has now been accepted by both English and Canadian courts, if little applied as yet nor well defined.<sup>25</sup> The predicament of the Listers is instructive as to the problems arising from the application of that concept. They had argued that they were the victims of an abuse of a superior bargaining position both initially in respect of the franchise agreement and subsequently in relation to the settlement. The trial judge was unwilling to accept this argument in relation to initial inequality of bargaining power because he found that the Listers were "experienced" small businessmen.<sup>26</sup> However, he was willing

<sup>23</sup> *Supra*, footnote 1, at p. 186 (O.R.).

<sup>24</sup> Treitel on Contract (5th ed., 1979), pp. 66-70.

<sup>25</sup> *Lloyds Bank v. Bundy*, [1974] 3 All E.R. 757 (C.A.); *Maccauley v. Schroeder Publishing Co. Ltd.*, [1974] 1 W.L.R. 1308 (H.L.); *McKenzie v. Bank of Montreal* (1975), 55 D.L.R. (3d) 641; aff'd 70 D.L.R. (3d) 113.

<sup>26</sup> (1978), 85 D.L.R. (3d) 321, at p. 332; on equality of bargaining power in relation to franchises see *U.S. v. Arnold, Schwimm & Co.* (1967), 388 U.S. 365; *Jima Ltd v. Mister Donut of Canada Ltd* (1972), 22 D.L.R. (3d) 645; aff'd (1975), 40 D.L.R. (3d) 303 (Ont. C.A.).

to concede that in respect to the settlement, "that counsel for the plaintiff have gone a long way toward persuading me that the principle of inequality of bargaining power enunciated by Lord Denning and adopted by our Court of Appeal is applicable to their case".<sup>27</sup> The Listers had agreed to the settlement because of the wrongful seizure and the bankruptcy proceedings and the promise that these issues would be resolved if they mortgaged their properties. Indeed, they had no other practical alternatives because while they could commence an action for the recovery of the inventory, such a course would be unreasonably prolonged at a time when immediate solutions were required, and moreover, as Rutherford J. said it was unlikely that the Listers could have avoided bankruptcy. However, after taking independent legal advice they voluntarily agreed to the settlement, thereby precluding reliance on the inequality of bargaining power argument.<sup>28</sup> The Court of Appeal saw no reason to interfere with this finding.<sup>29</sup>

The Listers may indeed have been "experienced" businessmen, but Dunlop was several generations of multi-national corporate experience ahead of them. In any case, there is no evidence that the Listers benefited from their experience. Like many franchisees they were probably in over their heads from the start. Yet the courts have pretended that small businessmen dealing with commercially sophisticated companies are nevertheless still commercial men dealing at arm's length and therefore deemed to have accepted the risks inherent in business transactions.<sup>30</sup> Should not the veil of commercial men dealing at arm's length be lifted to reveal the true bargaining positions of the parties? Every day inept small businessmen are unconscionably exploited by stronger, commercially sophisticated companies, yet the courts seem content to invoke their age-old chant, "freedom of contract".

That inequality of bargaining power lies at the root of economic coercion is trite but true. Although, it should be added that a superior bargaining power does not always reside with the big battalions, as has been suggested elsewhere, for example, a single tenant in an apartment block due for demolition can cause great loss to a landlord development corporation by refusal to vacate.<sup>31</sup> In *Lister* the initial and subsequent exercise of its superior position by Dunlop in relation to the franchise agreement and the settlement was at the root of the

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<sup>27</sup> *Ibid.*, at p. 347.

<sup>28</sup> *Ibid.*, at p. 349.

<sup>29</sup> *Supra*, footnote 1.

<sup>30</sup> *Ibid.*, see also *Photo Production Ltd v. Securicor Transport Ltd*, [1980] 1 All E.R. 556 (H.L.).

<sup>31</sup> Anon., (1968), 53 Iowa L. Rev. 892, at p. 906.

matter. The extent to which the courts should police such "bargains" must be faced sooner or later. Nor should the courts be blind to the implications of involvement because judicial intervention to check the abuse of a superior contractual bargaining position is tantamount to judicial regulation, no matter how trivial, of the control of economic power within society.

But the mere existence or exercise of a superior bargaining position in itself should not be the test for the presence of economic duress avoiding a contract. Like most grand principles, the concept is vague, uncertain and imposes a heavy burden of proof on the party invoking it; moreover, it provides no guiding standard for commercial self-regulation—after all, not all forms of commercial coercion are unlawful and some forms of business pressure are perfectly acceptable. Rather, regard should be had to a factual test which manifests that inequality and may be practically applied. We have noted earlier that both the English and Canadian courts in their respective economic duress and practical compulsion cases have adopted the test of coercion of the victim's will so as to vitiate his consent to the agreement. Indeed, in *Lister Weatherston J.A.* was quite content to cite at some length the view of the Board in *Pao On* as expressed by Lord Scarman in which the learned Law Lord summed up the law of duress.<sup>32</sup>

How workable is this test? How does one assess whether the intangible, incorporeal, immortal will of the particular plaintiff has really been overborne? How does one prove that assessment? Is this test not too subjective? Could one not argue—paradoxically—that the Listers had voluntarily entered the settlement because it provided a means of escape from the predicament? What does coercion of the will mean? The Listers were threatened with bankruptcy. Surely they were relieved to be presented with the settlement which was certainly a lesser evil than personal bankruptcy? That coercion of the will so as to vitiate voluntary consent is an inadequate measure of economic duress has been argued by such men as Holmes J. and Professor Karl Llewellyn in the United States on precisely this ground; that when faced with a worse alternative to submission to the threats, the victim gladly and voluntarily agrees.<sup>33</sup> Who would not?

Inherent in the problematical test adopted to date by the Anglo-Canadian courts is a more objective indication of whether or not the victim of economic coercion has succumbed to legal duress,

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<sup>32</sup> *Supra*, footnote 1, at pp. 178-179 (O.R.) and *supra* footnote 4, at pp. 78-79.

<sup>33</sup> *Union Pacific Ry. Co. v. Public Service Commission* (1918), 248 U.S. 67, at p. 70; Karl Llewellyn, *What Price Contract?* (1931), 40 *Yale L.J.* 704; see also Robert L. Hale, *op. cit.*, footnote 5, *passim*, and Dalzell, *op. cit.*, footnote 5, *passim*.

that is, by having regard to the nature and availability of alternative courses of action. Arguably, if the only alternative is insolvency or personal bankruptcy (or perhaps some lesser but still *commercially* unacceptable result), there will be economic duress. But, if the victim has opted to submit, despite the availability of other legal or commercial alternatives, simply because he thinks that submission is the safest commercial gamble, there is here mere business pressure of the sort characteristic of commercial life and no judicial redress is required. Professor Coote has argued that in *The Atlantic Baron* and in *Pao On* the real determinants in forcing the plaintiffs to submit were the extreme consequences of the threatened breaches of the respective contracts in those cases,<sup>34</sup> and while we would disagree with his case analysis on which he bases that assessment, we would agree with the principle which he has derived from his analysis.

*Lister* is an excellent example of this type of situation; the alternative to submission to the proposed settlement was bankruptcy, indeed, as noted earlier, Chrysler's halting of the bankruptcy proceedings was the *quid pro quo* for submission. What clearer case can there be for the presence of economic duress? That the Listers had received independent legal advice is beside the point.

What is economic duress? Economic duress is the unconscionable exercise of a superior contractual bargaining position to deprive the victim of commercially or legally viable alternatives to voluntary submission to the coercion. The prime factual determinant of its presence is the absence of alternatives other than insolvency or bankruptcy, which in turn points to the abuse of a bargaining position.

*Ronald Elwyn Lister Ltd v. Dunlop Canada Ltd* raises important legal issues, not least of which is the nature of economic duress. It is hoped that should economic duress be argued when the case is considered by the Supreme Court of Canada,<sup>35</sup> that the learned judges will fully consider the issues raised and not be content to adopt an impractical and inefficacious incantation such as coercion of the will so as to vitiate consent.

M.H. OGILVIE\*

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<sup>34</sup> *Supra*, footnote 3, at p. 45; see also Michael Trebilcock, *An Economic Approach to Unconscionability*, in *Studies in Contract Law*, ed. by Barry J. Reiter and John Swan (1980), p. 395.

<sup>35</sup> Leave to appeal to the Supreme Court was granted on March 27th, 1980.

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**BILL C-44: REPEAL OF THE SMALL LOANS ACT AND ENACTMENT OF A NEW USURY LAW.**—On July 22nd, 1980, only a day after its first reading, the House of Commons gave second and third reading to Bill C-44, "An Act to amend the Small Loans Act and to provide for its repeal and to amend the Criminal Code".<sup>1</sup> The Bill was not debated and its adoption had the unanimous support of all three political parties.<sup>2</sup> Any public discussion of the merits of the Bill was effectively forestalled by the haste with which it was rushed through the House. This failure to give interested parties an opportunity to study and comment on the Bill would be serious enough if the Bill only dealt with minor technical matters. But it does not. The Bill deals with questions of major social, economic, and legal importance which warranted careful examination. Even if one accepts the soundness of the objectives of the Bill, it does not follow that its technical implementation is equally unobjectionable or that the same goals could not have been realized in a less controversial manner. In the writer's view, the Bill is open to objections on both counts and may generate as many new problems as it was designed to resolve.

As its title indicates, Bill C-44 has two objectives. First, subject to some transitional provisions, it repeals the Small Loans Act<sup>3</sup> on a day to be determined by proclamation.<sup>4</sup> Secondly, it adds<sup>5</sup> a new section 305.1 to the Criminal Code which will make it an offence for a person to enter into an agreement or arrangement to receive interest at a criminal rate, the "criminal rate" being fixed at an effective annual interest rate exceeding sixty per cent.<sup>6</sup> These two components of the Bill will be discussed in turn. My object in this comment is merely to give some preliminary reactions to the Bill and not to subject the Bill to detailed analysis.

### 1. *Repeal of the Small Loans Act.*

The Small Loans Act was first adopted in 1939.<sup>7</sup> Since then more than forty years have elapsed and it is widely agreed that the Act is in need of extensive overhaul.<sup>8</sup> In the eyes of its critics—not

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<sup>1</sup> First Sess., 32 Parl., 29 Eliz. II, 1980.

<sup>2</sup> See H.C. Debates, July 21st, 1980, pp. 3145-3146; *ibid.*, July 22nd, 1980, pp. 3209-3210.

<sup>3</sup> R.S.C., c. S-11, as am.

<sup>4</sup> Bill C-44, s. 8.

<sup>5</sup> *Ibid.*, s. 9.

<sup>6</sup> S. 305.1(1) and (2), definition of "criminal rate".

<sup>7</sup> S. C., 1939, c. 23.

<sup>8</sup> Cf. Submission by the Canadian Consumer Loan Association to the (federal) Dept. of Consumer & Corporate Affairs *re* Proposed Revisions to the Small Loans Act, April 1974, esp. pp. i-v, with Canadian Consumer Council, First Annual

necessarily the same critics—it suffers from three major weaknesses.<sup>9</sup> First, its graduated rate ceilings have become totally unrealistic in the light of the rapid escalating cost of money. Secondly, the Act only applies to loans up to \$1,500.00 and therefore invites easy evasion of its provisions.<sup>10</sup> A more fundamental attack comes from a third group of critics who argue that rate ceilings are counterproductive and an economic absurdity. They are either too high and therefore serve no exclusionary purpose or they are too low, in which case they exclude borrowers from access to legitimate lenders and drive them into the arms of loan sharks. This school of thought essentially favours an unrestricted rate structure in which the market determines how much borrowers have to pay for their loans.

The first two criticisms could easily have been met by a revised Small Loans Act, and recommendations to this effect were already made by the Porter Commission in 1964 and by subsequent bodies that studied the question.<sup>11</sup> Even consumer loan companies, which initially favoured complete abolition of rate regulation, would have been willing to accept a revised rate structure as a second best solution.<sup>12</sup> Since Bill C-44 does not follow this route, it would be logical to conclude that the government shared the de-regulator's philosophy. This is probably an oversimplification of the various motives that influenced the authorities. Bill C-44 does not contain an official explanation of its rationales. It is an open secret however that

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Report, Appendix (Dec. 31st, 1969). See also Report of the Royal Commission on Banking and Finance (1964), pp. 382-383, and Special Joint Committee of the Senate and the House of Commons on Consumer Credit and the Cost of Living, Report on Consumer Credit (1967), esp. p. 5, 13, 22-24.

<sup>9</sup> Some detailed memoranda on the subject were prepared by the DCCA in connection with the abortive Bill C-16, The Borrowers and Depositors Protection Bill, 2nd Sess., 30th Parl., 25 Eliz. II, 1976, but were unfortunately not made public. Similar criticisms to those mentioned in the text have been made of comparable consumer credit rate legislation in the United States. The American literature is voluminous. For a valuable critique see Report of the National Commission on Consumer Finance, Consumer Credit in the United States (1972), ch. 6. See also William R. Waters in Jacob S. Ziegel (ed.), *Proceedings of the Seventh Annual Workshop on Commercial & Consumer Law* (1979), pp. 99-105, and Cayne & Trebilcock, *Market Considerations in the Formulation of Consumer Protection Policy* (1973), 23 U. of T. L. J. 396.

<sup>10</sup> The original Act only applied to loans up to \$500.00. The ceiling was raised to \$1,500.00 in 1956. See now Act, s. 2, definition of "loan".

<sup>11</sup> Royal Commission on Banking and Finance, *op. cit.*, footnote 8, p. 382; Joint Committee, *ibid.*, p. 5; Canadian Consumer Loan Association, *ibid.*, p. 22.

<sup>12</sup> Royal Commission on Banking and Finance, *op. cit.*, *ibid.*, pp. 19-20. While very critical of rate regulation it is significant that the CCLA did not recommend total repeal of the Small Loans Act: "At the same time, we believe that other provisions of the Act, covering licensing and reporting and establishing general standards and conditions for Small Loans activity, have served the consumer and the industry well and should be maintained in place with appropriate modifications". *Ibid.*, p. 19.

the credit unions have long been unhappy with the low rate ceilings and sought relief from this obstacle in their operations. From the perfunctory remarks during the first reading of the Bill,<sup>13</sup> it is a fair inference that the members of Parliament were responding to this pressure and not to any profound convictions about the virtues of a wholly de-regulated interest market.

The perfectly legitimate concerns of the credit unions could have been met by revising the step rates upwards. They did not require the total repeal of the Small Loans Act. Other alternatives were also available. For example, credit unions could have been excluded from the Act on the grounds that being member controlled and subject to fairly stringent provincial regulation there was no need for an additional layer of regulation.<sup>14</sup> Another possibility would have been to follow the British precedents and to replace the ceiling on rates with an unconscionability test while retaining the licensing provisions for otherwise unlicensed lenders and introducing additional monitoring devices. It is lamentable that these alternatives were not even raised, much less debated, during the lightning passage of the Bill. It is particularly difficult to understand the attitude of the NDP in view of its traditional concern with the problems of low income consumers. It would be interesting to speculate that Mr. Broadbent and his NDP colleagues had suddenly become enthusiastic converts to the Chicago school of market economics. It seems unlikely.<sup>15</sup>

Equally distressing is the fact that in sounding the death knell to the Small Loans Act the House of Commons ignored over a hundred years of Canadian experience. Prior to the 1850s the Provinces, like the United Kingdom, operated under a general usury ceiling. The law was repealed, in the case of Upper Canada, in 1858,<sup>16</sup> and, subject to some important exceptions, lenders were thereafter free to charge what the market would bear. This *laissez-faire* policy was restated in the first federal interest Act<sup>17</sup> and is still found in the

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<sup>13</sup> See esp. the remarks of M. Bussi res, Min. of State (Finance), H.C. Deb., July 21st, 1980, p. 3146, and compare H.C. Debates, Nov. 26th, 1979, pp. 1721-1722 (Gordon Gilchrist M.P.) and Proc. & Evid., Stand. Com. on Finance, Trade & Econ. Affairs, House of Commons, Nov. 8th, 1979, pp. 9 and 11 *et seq.* (Rae M.P.).

<sup>14</sup> There would have been a precedent for this step since the chartered banks have always been exempt from the Act. See Act, s. 2, definition of "money-lender".

<sup>15</sup> Indeed, in earlier years individual NDP members, notably Mr. Hazen Argue M.P., favoured a general rate ceiling for all loans. See *e.g.* Bill C-3 (1961) and H.C. Debates, Jan. 19th, 1961, pp. 1218 *et seq.*

<sup>16</sup> S. Prov. of Can., 22 Vic., c. 85.

<sup>17</sup> S.C., 1873, 37 Vic., cc. 70, 71.

present Act.<sup>18</sup> However, early complaints began to emerge from farmers and others about unfair lending practices and this led to the adoption of the disclosure requirements in the present Interest Act.<sup>19</sup>

An equally strong reaction manifested itself against the alleged depredations of "loan sharks" who were exploiting impecunious wage earners. This led to the adoption *inter alia* of the federal Money-Lenders Act of 1906,<sup>20</sup> pawnbroker's legislation at both the provincial and federal levels,<sup>21</sup> and, later, of the Unconscionable Transactions Relief Acts.<sup>22</sup> The Money-Lenders Act did not work well and there ensued a prolonged, if not overly celerious, search for a better substitute.<sup>23</sup> The substitute was found in the Small Loans Act of 1939.<sup>24</sup> The Act was adopted after detailed hearings before a committee of the House of Commons.<sup>25</sup> It was based on the sixth draft of the American Uniform Small Loan Law. The Uniform Law has exercised much influence in the United States and its principles apparently continue to obtain in the interest legislation of many of the American states.<sup>26</sup>

It may fairly be argued that the small loans legislation was spawned in an era of highly restricted consumer credit markets, in which there was a need to encourage the entry of legitimate lenders, and that the situation has altered radically. There is no longer a shortage of lenders (to continue this reasoning) anxious to cultivate the consumer market. The reverse is true. The credit market has become highly competitive. There is an embarrassment of riches.

It is no doubt true that the consumer credit market today is much more competitive than it was before the war. It is not true however

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<sup>18</sup> R.S.C., 1970, c. I-18, s. 2.

<sup>19</sup> *Ibid.*, s. 6.

<sup>20</sup> S. C., 1906, 6 Edw. VII, c. 32.

<sup>21</sup> The legislation still exists. See *e.g.*, R.S.C., 1970, c. P-5, and R.S.O., 1970, c. 341.

<sup>22</sup> The underlying concept appears to have been borrowed from the English Money-Lenders Act, 1900, 63 & 64 Vict., c-51, s. 1(1). Most of the Provinces now have such legislation. See further Davis, Comment (1972), 50 Can. Bar Rev. 296.

<sup>23</sup> See the evidence of K.R. MacGregor, Proceedings of the Special Joint Committee of the Senate and House of Commons on Consumer Credit, June 2nd, 1964, pp. 17 *et seq.*

<sup>24</sup> *Supra*, footnote 7.

<sup>25</sup> "The Banking and Commerce Committee of the House studied the problem for months and heard witnesses from all over Canada and several authorities from the U.S.A." MacGregor, *op. cit.*, footnote 23, p. 21.

<sup>26</sup> See Barbara A. Curran, Trends in Consumer Credit Legislation (1965), pp. 16 *et seq.* and compare NCCUSL, Uniform Consumer Credit Code (1968), art. 3. However, winds of change are evident here too as reflected in the recent adoption by New York State of a new Banking Law.

that low income consumers, financially illiterate consumers, and consumers who have overcommitted themselves no longer need protection. They are "rationed" consumers.<sup>27</sup> They may not be eligible for low cost credit or have exhausted their sources of supply. They are the ones that may be susceptible to exploitation or may only be able to obtain credit at rates that may compound their economic and social difficulties. The earlier interest rate legislation reflected these concerns and, to the extent that such legislation survives, continues to reflect it. The repeal of the Small Loans Act does not resolve these difficulties, any more than did the adoption of section 2 of the Interest Act in 1873. It will create a new vacuum which will have to be filled by the provinces or by new federal band-aids. In fact, the evidence is already at hand. As recently as 1978 Parliament adopted the Tax Rebate Discounting Act<sup>28</sup> in order to combat the allegedly unconscionable practices of tax rebate discounters.<sup>29</sup> Bill C-44 does not repeal this Act and it is specifically excluded from the new criminal usury provisions.<sup>30</sup> Bill C-16, the ill-fated Borrowers and Depositors Protection Bill introduced by the government in 1976, at least envisaged alternative policing measures to the repeal of the small loans ceilings;<sup>31</sup> Bill C-44 simply walks away from the problem.

## 2. *The New Criminal Usury Provision.*

It is still more difficult to reconcile the concept of a free market in interest rates with the new criminal usury provision. A similar provision already appeared in Bill C-16. The old and the new provisions were and are designed to combat loansharking.<sup>32</sup> Loansharking is said to be rampant in Montreal and other major Canadian cities and the usury provision was apparently requested by the Montreal police to assist them in their fight against the underworld.<sup>33</sup>

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<sup>27</sup> Consumers' Association of Canada, Submission to the Standing Committee on Health, Welfare and Social Affairs on Bill C-16, March, 1977, esp. paras 14 *et seq.*

<sup>28</sup> S.C., 1977-78, c. 25.

<sup>29</sup> Cf. Belobaba, *Regulating the Income Tax Discounter; A Study in Arbitrary Government* (1979), 1 Can. Taxation 21.

<sup>30</sup> See s. 305.1(8) of the proposed amendment to the Criminal Code, R.S.C., 1970, c. C-34, as am.

<sup>31</sup> *Viz.* by the imposition of strict disclosure requirements in credit advertisements, generous rights of prepayment without penalty, and the introduction of the concept of an "unwarranted rate" (s. 8) pursuant to which, if challenged, the burden would have rested on the credit grantor to justify his rate.

<sup>32</sup> On this aspect of Bill C-44, see H.C. Debates, *op. cit.*, footnote 2, p. 3146 (Hon. André Ouellet). The comparable provision in Bill C-16 was s. 37.

<sup>33</sup> See *inter alia* House of Commons, Standing Committee on Health, Welfare and Social Affairs, Minutes of Proceedings, Jan. 28th 1977 (Can. Assoc. of Chiefs of

Loansharking is not a term of art. Implicit in the proposed new section 305.1 of the Criminal Code is the assumption that any rate exceeding sixty per cent is extortionate and indelibly stamped with a criminal intent, including presumably the willingness to use violent collection methods to ensure repayment of the loan. These assumptions are demonstrably unsound. Assume an employee requests a loan of \$10.00 from another employee and promises to repay \$11 a week later. The one dollar charge if interpreted as interest, corresponds to an annual interest rate of approximately 520 per cent, which sounds extortionate. In fact it is not because the time spent by the fellow employee in making and collecting the loan would alone be worth a dollar. In any event it is economically unsound to stigmatize any cost of credit as extortionate if the borrower was a free agent and was not coerced into borrowing the money. To take another example, now somewhat dated American studies show<sup>34</sup> that an effective annual interest rate of 91.36 per cent would be necessary to enable a consumer loan company to lend \$100.00 repayable over a year with an eleven per cent return on equity after covering its total estimated costs. These figures were available to the Department of Consumer and Corporate Affairs and appear to have influenced the government in accepting a sixty per cent cut off point in section 305.1.

One is led to ask therefore why Bill C-44 should repeal the Small Loans Act on the one hand and in effect proscribe loans with a high built-in cost on the other. Was it because high cost loans were regarded as inherently objectionable, or was it because the draftsmen thought it a necessary price to fight loansharking?

One could accept the trade-offs if one was convinced that the impact on legitimate transactions will be marginal, that there are no practical alternatives to a criminal usury ceiling, and that the legislation will achieve its purposes. The available evidence falls far short of answering any of these questions satisfactorily.

In considering the potential impact of the Bill on lenders and other creditors it is important to note that the Bill is not confined to consumer transactions, since section 305.1 applies to all types of agreement and arrangement involving the advancement of credit, whether for commercial or consumer purposes. It also applies to

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Police) and Feb. 25th, 1977, Appendix "HWSA-2" (Brief by the Montreal Urban Community Police Dept). Both briefs raise important questions about the nature of loansharking and the best methods of combatting it, questions that cannot be pursued here.

<sup>34</sup> Consumer Credit in the United States, *op. cit.*, footnote 2, p. 144, Exhibit 7-16. The figures were compiled during the 1960s and, because of the intervening high rates of inflation, have presumably changed substantially since then. The 11% return on equity figure was obtained by the author from another source.

corporate borrowers.<sup>35</sup> It is surely not correct to assume that the aggregate costs of a "legitimate" commercial loan, if converted to an interest rate according to the statutory definitions, will never exceed the magical sixty per cent figure. One can visualize a variety of familiar commercial transactions where the forbidden boundary may be crossed. The danger to creditors will arise not from the fear of criminal prosecution, which may be slight because of the provision in section 305.1(7) that no prosecution shall be commenced under the section without the consent of the provincial Attorney General.<sup>36</sup> Rather the danger lies in the probability that the debtor will plead violation of the section as a common law defence<sup>37</sup> in a civil action by the creditor to collect his debt.

Section 305.1 also raises a significant number of technical points, and these must be briefly noted.

(a) "*Credit Advanced*". The section applies to all arrangements and agreements under which credit is advanced at a criminal rate. "Credit advanced" is defined in section 305.1(2) as:

"credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

"Credit advanced" is a new term in Canadian interest lexicography and, so far as I am aware, appears to have no exact counterpart in extant Canadian legislation. If I interpret the definition correctly it applies to vendor's credit, whether relative to a sale of goods or services, as well as to conventional loans, secured or unsecured. In view of the definition of "interest" in Bill C-44, it also clearly applies to land mortgage transactions. It is not so clear whether "credit advanced" includes a credit sale of land (as distinct from a sale of goods or services on credit). This will depend on how wide a meaning a court is willing to ascribe to "goods, services or benefits".<sup>38</sup> "Credit advanced" presumably also covers all forms of revolving lines of credit, credit card transactions, and arguably,

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<sup>35</sup> Unlike Bill C-16, whose amended definition of "borrower" in s. 2(1) was confined to a natural person and also excluded "lending transactions" in relation to a purchase of goods for resale.

<sup>36</sup> "Attorney General" is so defined in the Criminal Code, s. 2.

<sup>37</sup> On the ground that *ex turpi causa non oritur actio*. Cheshire & Fifoot's Law of Contract (9th ed., 1976), p. 345; S.M. Waddams, *The Law of Contracts* (1977), pp. 351 *et seq.*

<sup>38</sup> Italics mine.

public utility transactions in which the consumer is exposed to a "penalty" for late payment.<sup>39</sup>

(b) "*Criminal Rate*". This term is defined in the Bill<sup>40</sup> as:

"criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

An apparent ambiguity here is that the definition fails to indicate how the statutory interest formula is to be applied to open-ended credit and credit card transaction type accounts. If it is to be computed from the date each itemized transaction occurs to the actual date of payment then this may create difficulties for creditors who do not calculate charges on a daily balance basis.

(c) "*Interest*". This term is defined comprehensively as:<sup>41</sup>

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

This definition, as much as "credit advanced", is bound to provoke much anxious debate, even after allowing for the clarifying definitions of "insurance charge", "official fee", "overdraft charge" and "required deposit balance".<sup>42</sup> The definition clearly rejects the narrow definition of interest adopted by the Supreme Court of Canada in *A.G. Ontario v. Banfield Enterprises*<sup>43</sup> in favour of the economist's cost of loan concept previously popularized in the Small Loans Act<sup>44</sup> and other modern consumer oriented legislation. This may push a creditor with fixed charges across the threshold into the criminal rate territory since only the enumerated items, and

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<sup>39</sup> Penalties are expressly included in the definition of "interest". *Quaere* whether it may be argued that the penalty in such cases is not exacted pursuant to an "agreement or arrangement" (s. 305(1)) but pursuant to the approval of the appropriate public utility commission? Alternatively it may be argued that s. 305.1 does not apply at all since there is no agreement to advance credit in the first place. This argument would raise interesting possibilities for by-passing the section by disguising interest charges as penalties for late payment.

<sup>40</sup> S. 305.1(2).

<sup>41</sup> *Ibid.*

<sup>42</sup> All defined in s. 305.1(2).

<sup>43</sup> [1963] S.C.R. 570.

<sup>44</sup> S. 2, definition of "cost" of a loan.



not fixed charges as such, appear to be excluded from the all embracing definition of credit.

Enough said. It would be ironic if a bill that was designed to help credit unions and other non-banking financial intermediaries, and to fight loansharking, turned into a major headache for a large number of creditors previously exempt from any form of interest rate regulation. It is no less ironic that those committed to abolition of rate ceilings in the small loans area (where it is more manageable and certainly more justifiable) have endorsed its reintroduction for both commercial and consumer loans.<sup>45</sup>

### ADDENDUM

Subsequent to the preparation of this comment the Senate gave third reading to Bill C-44 on 17th December 1980 and the Bill received the Royal assent on the same day.<sup>46</sup> The Bill had previously been referred for study to the Senate's Standing Committee on Banking, Trade and Commerce<sup>47</sup> and, while some members of the Committee were unhappy with the second part of the Bill, the Committee ultimately recommended its adoption without amendment. However, the Committee received an undertaking from André Ouellet, Minister of Consumer and Corporate Affairs, that clause 9 would receive further study by the government and that amendments

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<sup>45</sup> Those interested in the vagaries of public policy making may find it instructive to ponder on the following reasons given by Mr. Gilles Marceau, Parliamentary Secretary to the Minister of Justice, in opposing a 1975 private member's bill by Mr. W. Kenneth Robinson, M.P., to amend the Criminal Code making loansharking a criminal offence:

"... This bill may come up against the current Interest Act which provides that, except otherwise legally indicated, people may agree upon interest or discount rates. The abrogation of this principle, civil in nature, by a bill with penal connotations may seem an extreme step.

It is clear that these involve serious social and economic problems which may be solved only by more sophisticated means than the creation of still another offence, a step which may be too simplistic, general and vague. For instance, if the provisions governing loan sharking were reinstated, freedom to enter into pecuniary obligations would be limited by strict penal provisions, while it might be less limited by civil and statutory proposals which would take into account:

- a) the needs and situation of the people seeking loans with high interest rates;
- b) the situation of the credit market;
- c) the use to which borrowed funds would be put."

H.C. Debates, May 20th, 1975, pp. 5938-5939.

<sup>46</sup> Debates of the Senate, Dec. 17th, 1980, pp. 1476-1478, 1485.

<sup>47</sup> Proc. Standg Com. on Banking, Trade & Commerce, Senate of Canada, 1st Sess., 32 Parl., 1980, Issues No. 21, 22, 24, 28, and 31.

to it, if thought desirable, would be included in the prospective omnibus Criminal Code amendments.

The Committee's witnesses were principally government officials. Only one consumer group, ACEF from Quebec, gave evidence and its representatives strongly opposed the repeal of the Small Loans Act. The Consumers' Association of Canada asked to be heard but, after some desultory correspondence, was advised that it was too late. Thus parliamentary democracy proceeds in its own peculiar fashion.

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