

COMMERCIAL LAW—FLOATING CHARGES AND FIXED CHARGES OF
AFTER-ACQUIRED PROPERTY: *The Queen in the Right of British
Columbia v. Federal Business Development Bank.*

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The Progeny of Holroyd v. Marshall

It might seem strange to the casual observer that more than one hundred years after the House of Lords recognized, in *Holroyd v. Marshall*,¹ the concept of an equitable mortgage or charge on after-acquired property,² judges and academic lawyers are still debating the nature and scope of the concept. While the House of Lords did not appreciate the fact at the time, it is now clear that the court provided the conceptual basis for two different, but related types of equitable security devices: floating charges³

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¹ (1862), 10 H.L.C. 191, 11 E.R. 999.

² See G. Curtis, *The Theory of the Floating Charge* (1941-42), 4 U.T.L.J. 131.

³ Equity draws a distinction between an equitable mortgage and an equitable charge. A mortgage is a security agreement under which the debtor transfers an interest in the collateral to the mortgagee on the understanding that it is to revert to him on discharge of the obligation secured. In the case of a charge, the debtor retains his property but encumbers (hypothecates) it as a method of securing his obligation to the charge holder. However, an equitable charge is proprietary in nature and is not simply a licence to seize the charge property upon default by the chargor. The practical result of the distinction between the two types of equitable security devices is that an equitable mortgagee can foreclose whereas the chargee cannot.

A floating security and a fixed security can be in the form of a mortgage or a charge. The early decisions describe floating securities as equitable mortgages. See, for example, *Evans v. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979, per Buckley L.J., at p. 999 (C.A.). However, it is now usual to view them as charges in Canada since the remedy of foreclosure is rarely sought. Nevertheless, Professor Gough, *Company Charges* (1978), pp. 75-76, has concluded:

No doubt, whether the floating security exists as a mortgage or charge depends on the intention of the parties expressed in their contract, but, conceptually speaking,

and fixed equitable mortgages on after-acquired property. The potential usefulness of the floating charge was early recognized and rapidly exploited.⁴ Shortly after the beginning of this century, floating charges became the centre piece of most secured, long term corporate financing transactions where a significant portion of debtors' assets were other than fixed, tangible property. In jurisdictions that have not enacted Personal Property Security Acts the dominance of the floating charge remains unchallenged by any other common law or equitable security device.⁵ This is not to say that the conceptual underpinnings of the floating charge have been fully developed. Clearly, this immensely popular security device continues to suffer from a surprising amount of conceptual retardation with the result that some of its basic features remain clouded in obscurity and controversy.⁶ However, the willingness of the courts to mould the law applicable to floating charges in such a way as to enhance its value as a facilitator for securing loan capital for trading companies, encouraged its use and minimized the uncertainty associated with the conceptual underdevelopment of the device.

either would seem possible. Seeing, however, that a floating security is commonly given over stock-in-trade and book debts, it is thought preferable in most cases to regard a floating security as existing in terms of an assignment or mortgage, since the whole beneficial title would appear to be appropriated or right to possession transferred [to the fullest extent possible under an equitable mortgage].

Compare E. Sykes, *The Law of Securities* (1962), pp. 616-617, where the author characterizes the floating security as "an equitable charge and therefore a hypothecation".

⁴ It is generally assumed that the first judicial recognition of the floating charge as a distinct type of security device came in 1870 in *Re Panama, New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318. See R. Pennington, *The Genesis of the Floating Charge* (1960), 23 Mod. L. Rev. 630, at p. 643.

⁵ While Ontario was the first province to enact a Personal Property Security Act, floating charges have remained an important financing device in that province since the Corporation Securities Registration Act, R.S.O. 1980, c. 94 was not repealed and the Personal Property Security Act, R.S.O. 1980, c. 375, s. 3(c), excludes from its scope "a mortgage, charge or assignment whose registration is provided for in the *Corporation Securities Registration Act*". This exclusion was a constant source of confusion and difficulty involving principally the question as to whether particular transactions were governed by and were therefore to be perfected under the PPSA or the CSRA. In 1981 the OPPSA was amended (s. 66a added by S.O. 1981, c.2, s.1) so as to permit registration of corporation securities in the Ontario Personal Property Registry and to bring those so registered within the scope of the Act. See generally the judgment of Houlden J.A. in *Euroclean Canada Inc. v. Forest Glade Investments Ltd.* (1985), 49 O.R. (2d) 769 (Ont. C.A.).

⁶ One of the hotly contested conceptual issues that remains to be settled is whether or not the holder of a floating charge acquires any proprietary interest in the debtor's property prior to crystallization. On one side of the argument is Professor Gough, *op. cit.*, footnote 3, p. 71, who contends that until crystallization the charge holder acquires no proprietary interest in the collateral: "The assignment of present and future property by way of floating security causes no equitable proprietary interest to arise immediately in the present property nor subsequently in the future merely on its acquisition. Upon redemption there is no restoration of any proprietary interest from creditor to debtor."

The fixed equitable mortgage or charge on after-acquired property, however, did not receive the attention that was lavished on its sibling. Indeed, it would not be too much of an overstatement to assert that in England the fixed equitable mortgage or charge was so ignored as a device for business financing⁷ that it failed to progress beyond infancy except in the context of security assignments of accounts. While this device received a somewhat more sympathetic reception in Canada, its development was retarded by the colonial mentality that prevailed in Canada during the first three or four decades of this century and by the attractiveness of floating charges. Only very recently did circumstances present an opportunity to a Canadian court of appeal to focus attention on the other offspring of *Holroyd v. Marshall*. This opportunity came in *The Queen in Right of British Columbia v. Federal Business Development Bank*,⁸ a case that came before the British Columbia Court of Appeal in 1987.

The Facts

The facts of the case were very simple. Arcrite Lighting Ltd., a small corporation with few if any fixed assets, borrowed money from the Federal Business Development Bank. The loan was secured by a "mortgage debenture" providing, *inter alia*, for a "fixed and specific mortgage and charge" on certain specified personal property of little realizable value and on the company's stock-in-trade. The agreement provided that Arcrite could "continue to make sale of inventory and stock-in-trade. . . in the ordinary course of business. . . until the Bank shall notify it in writing to cease doing so".

Arcrite Lighting Ltd. engaged in the sale of inventory and in the process of so doing collected taxes that it was under statutory obligation

See also W. Gough, *The Floating Charge: Traditional Themes and New Directions*, in P.D. Finn (ed.), *Equity and Commercial Relations* (1987), p. 239. The proponents of the position that a special form of equitable proprietary interest does vest in the charge holder when the collateral is acquired by the debtor are no less authoritative. See E. Sykes, *op. cit.*, footnote 3, pp. 616-617; J. Farrar, *World Economic Stagnation Puts Floating Charge on Trial*, [1980] *Company Lawyer* 83, at pp. 84-85; R. Goode, *Legal Problems of Credit and Security* (1982), pp. 12-13. See also M. McLelland, *Commentary*, in Finn, *op. cit.*, *supra*, p. 278.

Another area of debate is the efficacy of "automatic crystallization" clauses. See Gough, in Finn, *op. cit.*, *supra*, pp. 250, 260-263; Farrar, *loc. cit.*, *supra*, at pp. 87-88; J. Farrar, *The Crystallisation of a Floating Charge* (1976), 40 *Conveyancer* 397; A.J. Boyle, *The Validity of Automatic Crystallisation Clauses*, [1979] *J.B.L.* 231; R. Goode, *op. cit.*, *supra*, pp. 35-42; *The Queen in Right of B.C. v. Consolidated Churchill Copper Corp.* (1978), 90 D.L.R. (3d) 357, [1978] 5 W.W.R. 652 (B.C.S.C.).

⁷ The description requirements prescribed by the Bills of Sale Act (1878) Amendment Act 1882, s. 4, made the fixed equitable mortgage almost useless as a financing device where the collateral was owned by non-corporate debtors.

⁸ (1987), 43 D.L.R. (4th) 188, [1988] 1 W.W.R. 1 (B.C.C.A.).

to collect and remit to the Government of British Columbia pursuant to the Social Service Tax Act.⁹ The company failed, however, to remit the tax with the result that the Crown acquired by virtue of section 18(2) of the Act "a lien and charge on the entire assets" of the company which "has priority over all other claims" other than a lien arising under the Employment Standards Act.¹⁰ This lien affected some of the stock-in-trade seized by the Federal Business Development Bank upon default in payment by Arcrite. The Crown claimed priority to the proceeds of the sale of the seized assets on the basis of its statutory lien. The failure to remit the tax occurred after the "mortgage debenture" was executed.

The Issues before the Court

Counsel for both litigants argued the case on the basis that the outcome of the priority contest would be determined by the characterization of the security interest held by the Federal Business Development Bank. If the interest was a floating charge, the statutory lien had priority; if it was a fixed charge, the lien, which arose later in time, would be subordinate to the charge. Counsel for the Federal Business Development Bank argued that the Bank held a fixed charge on the stock-in-trade subject to a licence to sell in the ordinary course of business. Counsel for the Crown argued that, notwithstanding that the security agreement between Arcrite and the Federal Business Development Bank purported to create a "fixed and specific mortgage and charge", the security interest held by the Bank was in law a floating charge because Arcrite had the contractual right to sell the inventory in the ordinary course of business. McLachlin J.A. succinctly summarized the principal question before the court:¹¹

These submissions raise the question of whether the law recognizes a fixed charge subject to a licence to deal with the goods charged in the ordinary course of business. If the answer to that question is affirmative, the further question arises of whether such a charge gives the charge holder priority over the Crown's lien on the facts of this case.

The Conclusions of the Court

The majority of the court, composed of McLachlin and Wallace J.J.A., answered the principal question in the negative. They did not, however, base their conclusion that the statutory lien had priority only on the characterization of the Federal Business Development Bank's security interest. McLachlin J.A. went further to hold that "[w]hether F.B.D.B.'s charge is regarded as floating or fixed, it does not entitle F.B.D.B. to priority over the Crown's lien".¹² She reasoned that a licence to sell in

⁹ R.S.B.C. 1970, c. 388.

¹⁰ S.B.C. c. 1980, c. 10.

¹¹ *Supra*, footnote 8, at pp. 216 (D.L.R.), 30 (W.W.R.).

¹² *Ibid.*, at pp. 227 (D.L.R.), 41 (W.W.R.).

the ordinary course of business contained in a fixed charge "must be taken as encompassing the ordinary incidents of business, including statutory liens arising as a result of sales tax".¹³ Wallace J.A., while agreeing with this position, provided a somewhat different legal basis for it. He found that Arcrite was the agent of the Federal Business Development Bank for the purpose of carrying on business. Accordingly, the Federal Business Development Bank impliedly authorized its agent to collect and remit tax, and was therefore "responsible to the Crown for the loss caused by the agent's wrongful conduct in failing" to do so.¹⁴ In a strong dissent, Lambert J.A. proceeds on the basis that the litigation would have to be resolved in favour of the Bank should the court conclude, as he did, that the Federal Business Development Bank's mortgage was a fixed charge with a licence to deal with the collateral in the ordinary course of business.

The Focus of the Comment

The focus of this comment is not on the relative priorities of fixed security interests and statutory liens. This is a subject that has many aspects, not the least of which is the specific wording of the particular statute creating the lien.¹⁵ The comment has been designed to bring into question the reasoning of the court on the issue of characterization of the Federal Business Development Bank's security interest. In particular, it addresses the conceptual and public policy considerations that are involved in the determination of whether or not the law should recognize the existence of a fixed security interest coupled with a licence given to the debtor to deal with the collateral in the ordinary course of business.

The public policy features of the issue that confronted the court in this case are not confined to the law of equitable mortgages or charges. They are endemic to the Personal Property Security Acts which have been adopted in four Canadian jurisdictions¹⁶ and to the Draft Personal Property Security Act proposed in a White Paper recently released by the British Columbia Ministry of Finance and Corporate Relations.¹⁷ In effect, this legislation treats all charges, including floating securities, as

¹³ *Ibid.*

¹⁴ *Ibid.*, at pp. 232 (D.L.R.), 46 (W.W.R.).

¹⁵ See generally, British Columbia Law Reform Commission, Report on the Crown as Creditor: Priorities and Privileges (1982); W. Bogart, Statutory Claims on Personal Property Security Legislation: A Proposal (1983), 8 Can Bus. L.J. 129; A. Hardy, Crown Priority in Insolvency (1986).

¹⁶ Ontario: R.S.O. 1980, c.375, as am. by S.O. 1981, c.2, and S.O. 1981, c.58; Manitoba: S.M. 1973, c.5, as am. by S.M. 1976, c.61, s.10; S.M. 1978, c.21, and S.M. 1979, c.32; Saskatchewan: S.S. 1979-80, c.P-6.1, as am. by S.S. 1980-81, c.72; and S.S. 1983, c.11; Yukon: R.S.Y.T. 1980 (2d), c.20, as am. by S.Y.T. 1982, c.30.

¹⁷ British Columbia, Ministry of Finance and Corporate Relations, Draft Personal Property Security Act and Commentary (1988).

fixed charges. The legislatures that have enacted Personal Property Security Acts have implicitly declared that, as a matter of public policy, there is nothing objectionable to having a fixed charge on stock-in-trade of a debtor coupled with a licence to deal with the collateral in the ordinary course of business.

The Conceptual Analysis of the Court

The majority of the court concluded that conceptually it is not possible to have a fixed charge on assets coupled with a licence granted to the debtor to deal with the collateral in the ordinary course of business, even though the parties expressly declare in the security agreement that this is the type of interest that has been granted to the secured party. They based this conclusion on academic authority and on what they perceived to be sound legal reasoning supported by judicial precedent. McLachlin J.A. summarized and apparently approved of the reasoning put forward by Professor Gough in *Company Charges*:¹⁸

[T]he thrust of Gough's objection seems to be that when one combines a charge on future-acquired property with the notion of a licence in the debtor to unilaterally discharge the charge, the amalgam is simply too weak to support the conclusion that there exists the "final and irrevocable appropriation" essential to creation of a fixed charge. To put it another way, the concept of a charge on property which is not yet in existence and which can be removed by the unilateral act of the debtor, is so chimeric as to deprive the word "fixed" of its ordinary meaning. What is the finality? Where is the irrevocability? Where indeed is the appropriation by the charge holder who remains as unaware of the charge's demise as he was of its birth? . . . The generally accepted view, represented by Gough, is that such a charge should be regarded as floating rather than fixed because it involves no final and irrevocable appropriation of property to the creditor.^{18a}

In a carefully reasoned dissenting judgment, Lambert J.A. concluded that the law of British Columbia recognizes the validity and efficacy of a "fixed charge over present and future stock-in-trade and inventory of the borrower" which "reserves to the borrower the right to make sales of the stock-in-trade and inventory in the ordinary course of business until the lender notifies him that the sales must stop".¹⁹ He concluded that both offspring of the principle in *Holroyd v. Marshall* are available as inventory financing devices. Whether a particular security agreement provides for one or the other is determined by a finding as to the intentions of the parties to the agreement. If the agreement provides for a fixed charge, the wishes of the parties are to be respected. He rejected the proposition, inherent in the majority conclusion, that when parties contract for a fixed equitable charge they must choose between having no charge at all or having a charge of a very different type from

¹⁸ *Op. cit.*, footnote 3.

^{18a} *The Queen in Right of British Columbia v. F.B.D.B.*, *supra*, footnote 8, at pp. 218-219 (D.L.R.), 33 (W.W.R.).

¹⁹ *Ibid.*, at pp. 214 (D.L.R.), 28 (W.W.R.).

that described in their contract. In some situations, a mortgage of "undertakings and goodwill" of a corporate debtor will be treated as a floating charge because these types of assets cannot be separate from the corporate debtor and in order to realize on them receivership proceedings will be required. However, where the collateral is only stock-in-trade and inventory there is no need to use a floating charge.

Both the majority of the court and Lambert J.A. relied on judicial precedent as support for their positions. McLachlin J.A. quoted the familiar dicta from early English decisions in which the characteristics of the floating charge are described.²⁰ Lambert J.A. pointed to a decision of the Supreme Court of Canada²¹ and a decision of the British Columbia Court of Appeal²² in which fixed equitable charges on inventory were not treated by the courts as floating charges. He stated that binding judicial precedent dictates the conclusion that he had reached and that it was "not open to the court, in this case, to conclude that a fixed charge over stock-in-trade, coupled with a right to sell the stock-in-trade in the ordinary course of business, is contrary to law, or that such a charge must be treated as if it were a floating charge".²³ The majority of the court sought to distinguish the Canadian authorities relied upon by Lambert J.A. by noting that in these cases the issue before the courts was not characterization of the mortgage but rather the right of the mortgagor to sell mortgaged stock and pass good title in the ordinary course of business to customers of the mortgagor.

It is suggested that the position taken by the majority of the court, while justifiable on the basis of non-binding, but widely accepted judicial pronouncements and academic analysis²⁴ as to the essential difference between a fixed and a floating charge, demonstrates a failure to appreciate the full significance of *Holroyd v. Marshall*. What was so important about the decision of the House of Lords was the rejection in the context of equitable charges or mortgages on future property of the proposition, firmly established as a rule applicable to legal mortgages, that in order for a mortgage or charge on future property to come into

²⁰ *Evans v. Rival Granite Quarries Ltd.*, *supra*, footnote 3, per Buckley L.J., at p. 999; *Re Yorkshire Woolcombers' Assn. Ltd.*, [1903] 2 Ch. 284, per Vaughan Williams L.J., at p. 295 and per Farwell J., at p. 289 (C.A.). She also noted with approval the position taken, *inter alia*, in *Siebe Gorman & Co. v. Barclays Bank Ltd.*, [1979] 2 Lloyd's Rep. 143 (Ch. D.); *Great Lakes Petroleum Co. v. Border Cities Oil Ltd.*, [1934] 2 D.L.R. 743, [1934] O.R. 244 (Ont. C.A.); *R. v. Lega Fabricating Ltd.* (1980), 126 D.L.R. (3d) 148, 29 B.C.L.R. 161 (B.C.C.A.).

²¹ *Dedrick v. Ashdown* (1887), 15 S.C.R. 227.

²² *Stave Falls Lumber Co. v. Westminster Trust Co.*, [1940] 4 D.L.R. 382, [1940] 2 W.W.R. 241 (B.C.C.A.).

²³ *Supra*, footnote 8, at pp. 190 (D.L.R.), 5 (W.W.R.).

²⁴ Lambert J.A., *ibid.*, at pp. 212 (D.L.R.), 27 (W.W.R.), found support for his position, in R. Goode, *Hire-Purchase Law and practice* (2nd ed., 1970), in which Professor Goode states, at p. 673:

existence the debtor must specifically appropriate the property to the contract after it has been acquired.²⁵ McLachlin J.A.'s insistence on a "final and irrevocable appropriation of the property to the creditor"²⁶ as a prerequisite to the existence of a fixed equitable charge betrays an unwillingness to give full scope to the flexibility that the House of Lords introduced into the law of equitable mortgages and charges.

Lambert J.A. saw no conceptual difficulty in recognizing automatic attachment of an equitable mortgage on after-acquired property, functioning along with a licence under which the debtor was conditionally and temporarily empowered to dispose of the encumbered property. If the attachment can occur without specific appropriation because the parties have agreed that this should occur, why cannot a release of the security occur in accordance with the intention of the parties? Lambert J.A. saw no reason in principle why these two features cannot operate in tandem if the security agreement so provides. He also concluded that there was nothing in the early English cases relied upon by the majority that denied validity to this conclusion. He noted that in these cases "the *floating* charge, with a *right* to sell a mortgaged asset in the ordinary course of business, is contrasted with a fixed charge, with a *licence* to sell a mortgaged asset in the ordinary course of business".²⁷ A floating charge implicitly carries with it the right on the part of the debtor to deal with the collateral in the ordinary course of business. A fixed mortgage or charge requires a specific licence if the debtor is to be able to dispose of the collateral free from the interest of the mortgagee or chargee. There is nothing "in the English Cases that suggests that a clear intention to create such a fixed charge, clearly expressed in the instrument, is a nullity, and that the parties must have a floating charge no matter what they intended".²⁸

It is true that the ability to dispose of assets in the ordinary course of business is a characteristic of a floating charge but it does not follow that a floating charge is the only available method. A fixed charge on stock with an express or implied power to deal with the stock in the ordinary course of the dealer's business seems perfectly permissible.

However, it appears that Professor Goode either had a change of mind or decided to succumb to the overwhelming pressure of English judicial and academic opinion to the contrary. In, *Legal Problems of Credit and Security* (1982), Professor Goode states, at p. 16:

It would be open to the creditor to stipulate that no item of stock was to be disposed of without the creditor's prior written consent, but in most cases the debtor company would find it impossible to live with such a restriction. A blanket consent *in advance* would not do, for this would be incompatible with the existence of a fixed security and would make the charge a floating charge.

²⁵ See Curtis, *loc. cit.*, footnote 2.

²⁶ *Supra*, footnote 8, at pp. 219 (D.L.R.) 33 (W.W.R.).

²⁷ *Ibid.*, at pp. 212 (D.L.R.), 26 (W.W.R.).

²⁸ *Ibid.*

It is suggested that the majority of the court too readily accepted the conceptual analysis of Professor Gough and the statements of principles contained in cases where the issue before the court was not the conceptual possibility of having a fixed charge with a licence to deal, but was the legal incidents of floating charges expressly created by the terms of the agreements between debtors and mortgagees. When one examines the issue before the court in the light of the principles established in *Holroyd v. Marshall*, it is not obvious that Lambert J.A.'s conclusions are antithetical to established principles of equitable mortgages. It would appear that the majority of the British Columbia Court of Appeal relied too much on a bit of simplistic logic: if the law permitted a fixed charge with a licence to deal, there would have been no need for the courts to invent the floating charge. However, this proposition cannot withstand close analysis. The great practical value of the floating charge is apparent in the context of a situation where a debenture is secured by a mortgage on the entire property or "undertaking" of a trading company or on a substantial portion of its business assets. To a judiciary conditioned by the principle that a mortgage involves the transfer of ownership of the collateral from the mortgagor to the mortgagee, it was inconceivable that the parties to such a broadly-based mortgage agreement could have intended to give to the mortgagee the control over the company's freedom of action that ownership of all or a substantial portion of its assets would entail. The floating charge was invented to address the conceptual dilemma produced on the one hand by the need for some form of effective security device to be used with debentures, and on the other the need to allow the debtor to carry on its trading activity without substantial interference by holders of such security. However, merely because the fixed equitable mortgage was not well-suited to the needs of the English trading companies, which were the primary beneficiaries of the invention of the floating charge, it does not follow that the less suitable fixed equitable mortgage that contains a licence to deal is a conceptual impossibility. There is no good commercial reason why the parties to a fixed equitable charge or mortgage should be presumed to have intended a floating charge merely because the security agreement contains a licence to deal with the inventory collateral in the ordinary course of business. The power which a fixed charge gives to the charge holder over the encumbered assets, while more than that acquired by the holder of a floating charge, is not inconsistent with the commercial interests of the debtor so long as it is coupled with a licence allowing the debtor to dispose of the inventory in the ordinary course of business.²⁹

²⁹ In *Toronto-Dominion Bank v. Hayworth Equipment Sales Ltd. and Commerce-UD Inc.* (1987), 65 C.B.R. (N.S.) 1, the Alberta Court of Appeal found no difficulty in giving efficacy to a fixed chattel mortgage on a specific truck held by the mortgagor as

The Public Policy Considerations

McLachlin J.A. was not content to base her conclusion solely on legal precedent and conceptual analysis. She found a public policy reason why a fixed charge on inventory with a licence given to the debtor to dispose of the collateral in the ordinary course of business should be found to be in law a floating charge.³⁰

It would be unfair and inconsistent to permit a debenture holder to grant to a debtor the right to carry on business, while insulating him from the usual legal incidents of doing business, such as seizure and sale by creditors and liens incidental to the business imposed by statute. . . . By a single compact between debtor and creditor, the usual remedies of the law upon which those dealing with business persons rely—seizure, garnishment and liens—would be negated.

This concern for unsecured creditors was not shared by Lambert J.A. He pointed out that under section 178 of the Bank Act³¹ a debtor can give a fixed charge on stock-in-trade, and in the context of this type of financing "there is nothing that would indicate that. . . problems have presented difficulties to the suppliers, or customers, or general creditors of businesses which have given that kind of charge to a chartered bank".³²

It is difficult to support McLachlin J.A.'s conclusion that it is necessary to reject the concept of a fixed charge on inventory in order to protect the priority position of the Crown. Indeed, as noted above, she ruled that even if the charge held by the Federal Business Development Bank were a fixed charge it would not have priority over the statutory lien created under the British Columbia Social Service Tax Act. In any event, legislatures clearly have the power to legislate priority for statutory liens over any type of security interest, whether fixed or floating. One cannot so readily dismiss her concern for the position of unsecured creditors such as workers. So far as wage claims are concerned, however, nothing short of statutory protection will be adequate whatever the characterization of the financing device used by the secured creditors of the employers. This has been recognized by enlightened legislators in a few jurisdictions in Canada.³³

inventory where the mortgage contained a power to sell the vehicle in the ordinary course of the mortgagor's business. The court gave priority to the specific mortgage holder over a prior floating charge holder where the specific charge was taken before crystallization of the floating charge.

³⁰ *Supra*, footnote 8, at pp. 224-225 (D.L.R.), 38-39 (W.W.R.).

³¹ S.C. 1980-81-82-83, c. 40.

³² *Supra*, footnote 8, at pp. 199-200 (D.L.R.), 14 (W.W.R.). What Lambert J.A. failed to note, however, is that section 178(6) of the Bank Act gives to an insolvent debtor's employees and to certain types of an insolvent debtor's suppliers a limited priority over a bank holding a fixed section 178 security.

³³ See, for example, Employment Standards Act, *supra*, footnote 10; Bank Act, *supra*, footnote 31, s. 178(6)(a).

The priority position of suppliers is not so easily addressed. There is no empirical evidence to support the suggestion of McLachlin J.A. that to treat an inventory charge as fixed "might materially reduce and constrict business and the flow of wealth".³⁴ Presumably she is suggesting that this legal conclusion would result in a significant reduction of the availability of unsecured credit to business enterprises.³⁵ As Lambert J.A. notes, suppliers do not treat customers who have obtained financing under a floating charge any differently from customers who have acquired financing under a section 178 Bank Act security interest.

There remains, nevertheless, the problem of fairness. It is not at all obvious that a legal system should allow one group of creditors to gain through security agreements complete priority over subsequent creditors whose continued support of debtors is no less important to the maintenance of commercial activity.³⁶ The real difficulty with the approach taken by McLachlin and Wallace J.J.A. is that their refusal to recognize the efficacy of a fixed charge on inventory does very little to address any unfairness that exists between secured and unsecured creditors of business debtors. There will be a few situations in which an unsecured creditor will be able to enforce a small judgment against a debtor prior to crystallization of a floating charge.³⁷ It is now well established that if an unsecured creditor can obtain and *fully* enforce his judgment³⁸ against

³⁴ *Supra*, footnote 8, at pp. 225 (D.L.R.), 39 (W.W.R.).

³⁵ By the same token, there is no empirical evidence to support the contention of Lambert J.A. that if a business like that of Arcrite cannot give fixed security interests over its stock-in-trade and inventory, "then it will not be able to find funds to expand its business to new outlets, or to new lines of products, or perhaps, to carry on at all"; *ibid.*, at pp. 197 (D.L.R.), 12 (W.W.R.).

³⁶ This position calls into question the entire system of personal property security law. This is a matter well beyond the scope of this comment. However, for a brief examination of the issues involved, see generally, R. Goode, *Is the Law Too Favourable to Secured Creditors?* (1983-84), 8 Can. Bus. L.J. 53; J. Valley, *Receivership: The Contest Between Secured and General Creditors*, in M. Springman and E. Gertner (eds.), *Debtor-Creditor Law: Practice and Doctrine* (1985), p. 424, at pp. 434-435.

³⁷ Examples of situations in which this was successful are found in *Evans v. Rival Granite Quarries Ltd.*, *supra*, footnote 3; *Great Lakes Petroleum Co. v. Border Cities Oil Ltd.*, *supra*, footnote 20. Both of these cases involved fact patterns in which the difference between the fixed and floating charge made a significant difference to the ability of an unsecured creditor to enforce a money judgment against intangible collateral. However, they are of largely historic rather than practical significance. It is now well-established that a secured creditor can take a fixed charge on accounts of the debtor and yet leave the debtor free to deal with the debts as though they were collateral under a floating charge. See *Evans Coleman & Evans Ltd. v. R.A. Nelson Const. Ltd.* (1958), 27 W.W.R. 38 (B.C.C.A.). Consequently, there is no reason for a secured party to use a floating charge where the collateral involved is accounts. He can have the priority of a fixed charge holder, but can give to the debtor the freedom that he needs to carry on his business.

³⁸ In *Imperial Oil Ltd. v. Abilene Contracting Co. Ltd.* (1966), 56 W.W.R. 757, the British Columbia Court of Appeal concluded that if a floating charge crystallizes at any

the debtor before the floating charge has crystallized, the unsecured creditor takes priority. However, in the greatest number of cases the reason a supplier is not paid is because the business has become insolvent or is otherwise in serious financial trouble. When these conditions prevail the charge-holder will crystallize the charge and thereby take priority as soon as there is any threat to the collateral by the unsecured creditors. Professor Gough, the academic authority relied upon by the majority, has recently written the following in response to those who contend that automatic crystallization of floating charges is unfair to unsecured creditors:³⁹

It is hard to see the force of this argument, when even the floating charge in its traditional form without automatic crystallization permits security to be taken over the whole of the company's present and future assets. The only particular difference as against unsecured creditors is that execution creditors are automatically postponed. This, it is submitted, is of little significance since it is unlikely that a traditional floating chargee will stand by and permit executions without intervening by appointment of a receiver to postpone execution creditors and, in any event, unsecured creditors almost invariably prefer to enforce payment against insolvent companies through winding-up procedures rather than through judgment and execution.

It is clear that judicial acceptance of the concept of a fixed charge on stock-in-trade will have little effect on the position of unsecured creditors.⁴⁰ If there is a need to inject a greater measure of fairness into the legal system so that the unsecured creditors are placed in a more

time after seizure of goods subject to a floating charge under a writ of execution, "at least up to the time of sale, the resulting specific charge takes priority over the seizure" (per Davey J.A., at p. 760). It also approved of the proposition that crystallization of a floating charge any time prior to an order *nisi* (or its equivalent) under garnishment proceedings results in the charge holder having priority. Davey J.A. provided the legal basis for these conclusions, at p. 760:

The reasoning rests upon the principle that an execution creditor has no greater rights in the property of his debtor than the debtor himself, and that the debtor's property is subject to the debenture holder's rights under the floating charge, which entitle him to a specific charge upon the seized property if and when the floating charge crystallizes before execution is completed.

³⁹ Gough, in Finn, *op. cit.*, footnote 6, p. 262.

⁴⁰ The plight of the unsecured creditors of a debtor which has given a floating charge was early recognized by the English courts. For example, in *Re London Pressed Hinge Company, Ltd.*, [1905] 1 Ch. 576 (Ch. D.), Buckley J. observed, at p. 582:

This being the law, the fact is that the appointment of a receiver does not, as between the execution creditor and the debenture-holder, disappoint the execution creditor of anything which otherwise would be his right. For from those authorities it results that the creditor never had any right as between himself and the debenture-holder to enforce payment in priority to the debenture-holder. If he availed himself of his legal right to judgment and execution the debenture-holder could intercept his execution. In fact the unfortunate creditor had no right enforceable by legal process in cases where the equity of redemption was of no value, notwithstanding the fact that his money or his goods had gone to increase the property included in the security. His right to look for payment from the company rests only upon the expectation that the debenture-holder would not put an end to the company's authority to pay the creditor in the ordinary course of business.

advantageous priority position relative to secured creditors, something much more drastic than refusal to recognize fixed charges on stock-in-trade will be required. This was recognized in the Cork Committee Report,⁴¹ which identified as one of the objections to the use of floating charges the fact that this type of security agreement "enables a company, apparently in possession of assets of great value, to obtain credit from suppliers and others, and to continue to trade on borrowed money, while the semblance of wealth on the strength of which such credit is obtained is falsified by the existence of the charge which is capable of being enforced at any moment".⁴² The Committee recommended that a fund equal to ten per cent of the net amount which would otherwise be payable to the holder of a floating charge from realization of the assets subject to the charge would be set aside and distributed *pari passu* among the ordinary unsecured creditors.⁴³

The Effect of Personal Property Security Acts

It is relevant to raise the question as to what approach to characterization would have been applied by the court had the case arisen in a jurisdiction that has enacted a Personal Property Security Act. The answer to this question may be of particular interest in British Columbia in view of the fact that the British Columbia Ministry of Finance and Corporate Affairs has recently released a White Paper proposing that current personal property security law of the Province, including the law relating to fixed and floating equitable mortgages and charges, be replaced with a Personal Property Security Act.⁴⁴ A short answer to the question can be stated without difficulty: the outcome would have been much closer to the position taken by Lambert J.A. than that taken by the majority of the court. This requires further elucidation.

As a starting point, it is important to appreciate that there is no such thing as an equitable mortgage or charge under a Personal Property Security Act.⁴⁵ The legislation eliminates the distinction between legal and equitable interests. All security interests are conceptually the same. This is so without regard to the terms of the agreements that provide for them, the circumstances in which they arise and whether they attach to

⁴¹ Insolvency Law and Practice (Report of the Review Committee, Chairman, Sir Kenneth Cork) Cmnd 8558 (1982).

⁴² *Ibid.*, p. 32.

⁴³ *Ibid.*, p. 347.

⁴⁴ *Supra*, footnote 17.

⁴⁵ Hereafter references will be made to sections of the Draft British Columbia Personal Property Security Act, 1988, *ibid.*, (referred to as the "Draft Act"), and to the Saskatchewan Personal Property Security Act, *supra*, footnote 13 (referred to as the Sask. PPSA). Reference is made to the Saskatchewan legislation because it is the Personal Property Security Act currently in force that is very similar to the British Columbia Draft Act.

existing or to after-acquired property. There is only one type of interest that arises under a PPSA security agreement: a security interest.⁴⁶ All types of security agreements, whatever their form, are treated as creating or providing for a security interest. It follows from this that there can be no such thing as a floating charge under a Personal Property Security Act. Parties are free to enter into a security agreement that purports to create a floating charge, but the effect of doing so is neither to create a non-specific equitable charge nor to invoke the complex matrix of vague concepts characteristic of floating charge law.⁴⁷ A Personal Property Security Act recognizes only two legal states for security interests: attached but unperfected, and perfected.⁴⁸ It recognizes no intermediate state of perfected, but non-specific or floating. If the parties by agreement postpone attachment, the security interest is unperfected until attachment. It is not a non-specific present interest with a quasi-perfected status. Crystallization, so important to the priority position of a charge holder under current British Columbia law, has no similar significance under a Personal Property Security Act. At best, crystallization involves a decision on the part of the secured party to enforce his security interest, usually by the appointment of a receiver as provided in the legislation.⁴⁹

It is clear, therefore, that the Federal Business Development Bank charge on the stock-in-trade of Arcrite would be a fixed security interest on each item of inventory that would automatically attach as soon as Arcrite acquired an interest in the item.⁵⁰ Since the security interest would not be equitable but statutory, its priority position would not be regulated by the rules of equity. Priority among successive security interests in the inventory would be determined by the set of priority rules prescribed by the Act. Customers of Arcrite seeking protection from the Federal Business Development Bank's security interest would not have to rely on the terms of the licence granted by the Federal Business Development Bank to Arcrite. Any sale by Arcrite in the ordinary course of its business would result in the buyer taking free from the Federal Business Development Bank's security interest.⁵¹

The position of the unsecured creditors of Arcrite under a Personal Property Security Act cannot be simply stated nor can it be directly equated with the position of unsecured creditors of debtors who have

⁴⁶ Draft Act, s.2; Sask. PPSA, s.3.

⁴⁷ Nor, apparently, does it have the effect of postponing attachment until crystallization. See *Royal Bank of Canada v. G.M. Homes Inc.* (1984), 10 D.L.R. (4th) 439 (Sask. C.A.); *Euroclean Canada Inc. v. Forest Glade Investments Ltd.*, *supra*, footnote 5.

⁴⁸ Draft Act, ss. 12 and 19; Sask. PPSA, ss. 12 and 19.

⁴⁹ Draft Act, Part 5.

⁵⁰ Draft Act, s. 12; Sask. PPSA, s. 12.

⁵¹ Draft Act, s. 30(2); Sask. PPSA, s. 30(1).

encumbered their assets with either fixed or floating equitable charges. The Personal Property Security Acts contain no specific provisions giving priority to unpaid employees or to Her Majesty asserting priority on the basis of a statutory lien. If priorities for these types of interests are to be provided as a matter of public policy, they must be included in other legislation.⁵² So far as other unsecured creditors are concerned, the general rule is that if the security interest in the inventory of the debtor is perfected before the inventory is seized or attached under judicial proceedings or made subject to a charging order or equitable execution or before the debtor becomes bankrupt, the holder of the security interest has priority. However, failure to meet the perfection requirements of the Act renders the security interest subordinate to the interests of creditors who have invoked judgment enforcement measures or subordinate to the debtor's trustee in bankruptcy.⁵³

The principle underlying this approach is recognition that the judgment enforcement system provides measures to unsecured creditors through which they can elevate their status to something that for priority purposes *vis-à-vis* secured creditors is roughly equivalent to that of a secured party. If an unsecured creditor can cause the collateral to be seized under execution, attached under garnishment proceedings or be made the subject of a charging order or equitable execution before a competing secured party has perfected his security interest in the collateral, the unsecured creditor has priority. The Personal Property Security Acts embody no public policy assumption that one type of creditor is more meritorious or more important to business activity than another. In this respect it takes a hands-off position by giving priority to the creditor who first acquires the requisite status, which in the case of a secured creditor is perfection of his security interest, and in the case of an unsecured creditor is seizure of the collateral.

There is one very important difference between the position of certain types of suppliers under a PPSA regime and their position under existing British Columbia law. This difference is not a product of a more or less sympathetic approach to unsecured creditors. It results from the fact that certain types of suppliers can place themselves in a much better position under a PPSA regime because it is much easier for them to become secured creditors and to have priority over prior secured creditors such as the Federal Business Development Bank. Under existing British Columbia law, a supplier of inventory can acquire a first priority secured position with respect to the inventory by selling goods to the business under conditional sales contracts. However, as a practical matter, this is not realistic in many cases unless each item of inventory

⁵² The Acts do not generally address priorities between security interest and liens. See Draft Act, s. 4(b); Sask. PPSA, s. 4(a).

⁵³ Draft Act, s. 20; Sask. PPSA, s. 20.

supplied has a high unit value. In order to ensure this first priority it is necessary for the supplier to file a conditional sales contract and a financing statement with respect to each shipment, if not each item of inventory supplied.⁵⁴ The administrative cost of doing this is likely to be prohibitive. However, under a PPSA regime, the supplier can usually acquire a first priority status with respect to all of the collateral it supplies to a debtor simply by registering a single financing statement and by giving a written notice to any prior secured party who has registered a financing statement.⁵⁵ In addition, it can have with little extra effort the same priority with respect to most types of proceeds of the inventory that it has with respect to the inventory itself.⁵⁶ In summary, therefore, the effect of a Personal Property Security Act is to permit certain types of creditors who, under existing law, would be unsecured to become secured creditors with purchase money security interests. As such they have priority over prior general financiers who have not provided purchase money credit.

It will not be every creditor of a business that can become a secured creditor with a purchase money security interest. Suppliers of services, for example, have nothing in which to take a purchase money security interest. In the nature of things, secured creditors will be able to perfect their security interests before unsecured creditors can obtain judgment enforcement proceeding affecting the collateral. Consequently, a Personal Property Security Act cannot be viewed as the appropriate vehicle to implement a policy of providing a greater balance between secured creditors and subsequent unsecured creditors of a business debtor. However, generally it would appear that, with the possible exception of a situation in which a secured creditor seeks to prevent an unsecured creditor from enforcing a judgment at a time when the business debtor is not insolvent and is carrying on business,⁵⁷ the position of an unsecured

⁵⁴ Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373, ss. 2-5. Registration is not necessary for priority over a prior security interest; see s. 25(d).

⁵⁵ Draft Act, ss. 34(2) and 43; Sask. PPSA, ss. 34(2), 44, and Personal Property Regs., R.R.S., c. P-6.1, s. 5. Under the Saskatchewan system, inventory collateral can be described on a financing statement in generic rather than specific terms. Accordingly, a single financing statement describing the collateral as, for example, electrical appliances, would be sufficient to perfect a security interest in all electrical appliances supplied by a manufacturer to a dealer during the life of the registration. Under the system, the registering party chooses the registration life for his financing statement. He may choose any period from one to twenty-five years, or infinity. See Personal Property Regs., *supra*, s. 5 (b).

⁵⁶ Draft Act, ss. 28 and 34(2), but see s. 34(5); Sask. PPSA, ss. 28 and 34(2), but see 34(4).

⁵⁷ The Draft Act specifically recognizes the power of the debtor to pay his unsecured creditors even though the secured party has a perfected security interest in the money or instrument used by the debtor to make the payment and even though the recipients of the money or instruments are aware of the existence of the security interest. See Draft Act, s. 31(1)-(2); Sask. PPSA, ss. 31(2).

creditor under a PPSA regime is not worse than that of an unsecured creditor under current British Columbia law in a case where the debtor has given a floating charge on his assets. In one respect, however, the position of an unsecured creditor is weaker under a PPSA regime. This is an unintended but inevitable by-product of modern, simplified personal property registration law. Since it is much easier under a PPSA regime for secured creditors to take and perfect their security interests in collateral, unsecured creditors and trustees in bankruptcy have fewer opportunities to find and exploit weaknesses in the perfection status of secured creditors. This feature will be most apparent in British Columbia when the current Byzantine system of registration requirements is replaced by a single notice registration system of the proposed Personal Property Security Act.

Conclusion

The decision of the House of Lords in *Holroyd v. Marshall* provided the conceptual basis for the development of two very useful equitable security devices. Experience in the United States demonstrates that if the concept of an equitable mortgage or charge on after-acquired inventory and other non-fixed assets of business enterprises had not been recognized by the courts or had not been allowed to develop, it would have been necessary for the legislature to provide a statutory device that gives to secured creditors the necessary protection against business insolvency and to business debtors the freedom to carry on business without substantial interference by their secured financiers.

Of the two progeny of *Holroyd v. Marshall*, the floating charge has received by far the greatest amount of favourable treatment. The attention lavished on floating charges along with the apparent reluctance of the courts to permit the full development of fixed equitable charges on inventory collateral is very likely a product of the novelty of the concept of automatic attachment of a charge or mortgage to after-acquired property that the House of Lords accepted in *Holroyd v. Marshall*. The common law requirement of specific appropriation, a prerequisite to the attachment of a legal mortgage, was not easily discarded in the context of fixed equitable mortgages and charges even though the House of Lords concluded that it was not necessary. It was not difficult to accept the concept of a non-specific or floating charge on inventory since appropriation is not involved; the charge does not attach to any particular item of collateral. It was much more difficult to accept the concept of a fixed equitable charge on this type of collateral since a fixed security at common law required specific approval of the charge-holder each time an item of inventory was to be sold by the debtor. A general approval given in advance of the sales ran counter to the fixed nature of the security interest. It was this reasoning that led the majority of the British Columbia Court of Appeal to accept the position, apparently established in

English law, that it is conceptually impossible to have a fixed charge on inventory. Even though the parties contract for such a charge, they must be deemed to have intended a floating charge.

It is the objective of the author of this comment to demonstrate that Lambert J.A. is correct in his conclusion that this rigid, common law oriented approach to fixed equitable securities is conceptually unsound and that the public policy justification put forward by the majority of the court for it, fairness towards unsecured creditors, does not withstand close analysis. If there is a need to inject greater fairness into the legal system so that unsecured creditors are given an enhanced opportunity to enforce their claims against the assets of insolvent debtors, specific statutory measures will be required. The approach adopted by the majority is at best only marginally efficacious.

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CONSTITUTIONAL LAW—DIVISION OF POWERS—INTERJURISDICTIONAL IMMUNITY, READING DOWN AND PITH AND SUBSTANCE: *Ontario Public Service Employees Union v. Attorney-General for Ontario*.

Robin M. Elliot*

Introduction

Within the large body of jurisprudence that has grown up around the distribution of legislative power between Parliament and the provincial legislatures is a small but by no means insignificant collection of cases in which otherwise valid provincial legislation has been held not to apply in certain contexts because of what might be called the strongly federal character of these contexts.¹ Included within this collection are a

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¹ A reasonably complete list of the cases in this collection is provided below. The headings under which the cases appear reflect the areas of federal jurisdiction that gave the context in question its "strongly federal character".

(1) *Dominion Companies: John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.) (Provincial company law inapplicable to federally incorporated company); *Great West Saddlery Co. v. The King*, [1921] A.C. 91 (P.C.) (Provincial company law inapplicable to federally incorporated company); *Attorney-General of Manitoba v.*

Attorney-General of Canada (Manitoba Securities), [1929] A.C. 260 (P.C.) (Provincial securities legislation inapplicable to federally incorporated company).

(2) *Federal Undertakings*

- (a) Motor Transport: *Attorney-General of Ontario v. Winner*, [1954] A.C. 541 (P.C.) (Provincial highway regulations inapplicable to interprovincial bus service); *Re Tank Truck Transport*, [1960] O.R. 497 (Ont. H.C.), aff'd without written reasons, [1963] 1 O.R. 272 (Ont. C.A.) (Provincial labour law inapplicable to interprovincial transport undertaking); *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811 (Provincial transport regulations inapplicable to interprovincial transport company); *Re Ottawa-Carleton Regional Transit Commission* (1983), 44 O.R. (2d) 560 (Ont. C.A.) (Provincial labour law inapplicable to interprovincial bus passenger service).
- (b) Telephone: *Corporation of the City of Toronto v. Bell Telephone Company of Canada*, [1905] A.C. 52 (P.C.) (Municipal road law inapplicable to interprovincial telephone company); *Commission du Salaire Minimum v. The Bell Telephone Company of Canada*, [1966] S.C.R. 767 (Provincial labour law inapplicable to interprovincial telephone company).
- (c) Radio and Television: *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2d) 716 (B.C.C.A.) (Provincial public utilities legislation inapplicable to radio and television undertaking).
- (d) Pipelines: *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207 (Provincial mechanic's lien legislation inapplicable to interprovincial pipeline undertaking).
- (e) Aeronautics: *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 66 D.L.R. (3d) 610 (Ont. C.A.) (Municipal zoning legislation inapplicable to airport lands); *Forest Industrial Flying Tankers Ltd. v. Kellough* (1980), 108 D.L.R. (3d) 686 (B.C.C.A.) (Provincial human rights legislation inapplicable to aeronautical undertaking).
- (3) *Postal Service: Re Minimum Wage Act (Sask.)*, [1948] S.C.R. 248 (Provincial labour law inapplicable to postal employees); *Letter Carriers' Union of Canada v. C.U.P.W.*, [1975] 1 S.C.R. 178 (Provincial labour law inapplicable to postal employees).
- (4) *Armed Forces: R. v. Anderson* (1930), 54 C.C.C. 321 (Man. C.A.) (Provincial motor vehicle regulations inapplicable to on-duty Armed Forces personnel on base); *Attorney-General of Canada v. St. Hubert Base Teachers' Assn.*, [1983] 1 S.C.R. 498 (Provincial labour law inapplicable to teachers hired by Department of National Defence).
- (5) *Indians and Lands Reserved for Indians: R. v. Jim* (1915), 26 C.C.C. 236 (B.C.S.C.) (Provincial wildlife law inapplicable to Indian hunting on reserve); *Surrey (Dist.) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.) (Municipal health legislation inapplicable on lands reserved for Indians); *R. v. Isaac* (1976), 13 N.S.R. (2d) 460 (N.S. App. Div.) (Provincial wildlife law inapplicable to Indian hunting on reserve); *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 (Provincial adoption law inapplicable in certain respects to Indian children); *Re Whitebear Band Council* (1982), 135 D.L.R. (3d) 128 (Sask. C.A.) (Provincial labour law inapplicable to Indian Band Council and its employees); *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 (Provincial family property law inapplicable to matrimonial home of Indians on reserve); *Paul v. Paul*, [1986] 1 S.C.R. 306 (Provincial family property law inapplicable to matrimonial home of Indians on reserve).
- (6) *R.C.M.P.: Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218 (Provincial public inquiries legislation inapplicable to R.C.M.P. in certain respects); *Attorney-General of Alberta v. Putnam*, [1981] 2 S.C.R. 267, (Provincial legislation re complaints against police inapplicable to R.C.M.P.).
- (7) *Federal Elections: McKay v. The Queen*, [1965] S.C.R. 798 (Municipal sign by-law inapplicable to federal election signs).

number of well-known cases like *John Deere Plow Co. v. Wharton*,² *McKay v. The Queen*,³ *Commission du Salaire Minimum v. Bell Telephone Co.*⁴ and *Attorney-General of Alberta v. Putnam*.⁵ In each of these and the other cases in this group the provincial legislation was acknowledged to be valid in some if not most of the contexts in which it would or could be applied. In the particular context in question, however, the legislation was held not to be applicable. The language used in many of these cases suggests that the court was primarily concerned with the effect that the provincial legislation would have on the party seeking to limit the scope of its application. Hence, in *John Deere Plow Co. v. Wharton*,⁶ the Privy Council said that "the status and powers of a Dominion Company as such cannot be destroyed by provincial legislation". In *Commission du Salaire Minimum v. Bell Telephone Co.*,⁷ the Supreme Court of Canada was concerned that the provincial legislation not affect "a vital part of the management and operation of the [federal] undertaking". And in *Attorney-General of Alberta v. Putnam*,⁸ it was the "administration and management" of the Royal Canadian Mounted Police that the Supreme Court wished to preserve untouched by the provincial legislation. Common to all of these cases, however, was the perception on the part of the court that to allow the provincial legislature to extend the reach of its legislation into the context in question would in effect be to allow it to legislate in an area of exclusive federal jurisdiction under section 91 of the Constitution Act, 1867. And that the court was not prepared to do.

In his textbook, *Constitutional Law of Canada*,⁹ Peter Hogg has grouped these cases together under the heading "Interjurisdictional Immu-

(8) *Criminal Law: Scowby v. Glendinning*, [1986] 2 S.C.R. 226 (Provincial human rights legislation re arrest and detention inapplicable to persons enforcing federal criminal law).

² *Supra*, footnote 1.

³ *Supra*, footnote 1.

⁴ *Supra*, footnote 1.

⁵ *Supra*, footnote 1.

⁶ *Supra*, footnote 1, at p. 341.

⁷ *Supra*, footnote 1, at p. 774.

⁸ *Supra*, footnote 1, at p. 272.

⁹ (2d ed., 1985), pp. 329-332. The origin of the term "interjurisdictional immunity" is not explained by Professor Hogg. To the best of my knowledge, it is not a term that has been used in judicial opinions until very recently, and its use in the recent cases can probably be attributed to Hogg himself. It should be noted, however, that Hogg was not the first person to use the term in this context. Dale Gibson used it in an article he wrote in 1969, *Interjurisdictional Immunity in Canadian Federalism* (1969), 47 Can. Bar Rev. 40. The primary focus of this article was on interjurisdictional immunity in the context of the Crown, a context in which the term makes sense as a variation of the term "Crown immunity". However, Gibson also discussed the cases dealing with the applicability of provincial legislation to what he called "federal 'instrumentalities'", by which

nity", and it is apparent from his discussion of them that he sees them very much as a discrete body of cases, standing apart from the main body of division of powers jurisprudence. Moreover, he makes it clear that, in his view, the "doctrine of interjurisdictional immunity", which he says they assert, has no place in Canadian constitutional law. It is, he argues, both "unprincipled and perverse".¹⁰ It is unprincipled because, as he puts it, "it is inconsistent with the basic pith and substance doctrine—that a law 'in relation to' a provincial matter may validly 'affect' a federal matter".¹¹ And it is perverse because:¹²

... the federal Parliament can, if it chooses, easily protect undertakings within federal jurisdiction from the operation of provincial laws by enacting appropriate laws which will be paramount over conflicting provincial laws. A case could be made for some degree of immunity for provincially regulated undertakings from federal law, on the ground that the provinces cannot protect their undertakings from federal law, but it has recently been suggested that the doctrine works solely in favour of federal undertakings.

Concern about the "doctrine of interjurisdictional immunity" has also been expressed from time to time by judges of the Supreme Court of Canada.¹³ The basis of such judicial concern, when it is expressed, is the same as that underlying Professor Hogg's first criticism of the "doctrine"—that it is inconsistent with the pith and substance doctrine. It is Hogg's view that in recent years the court has in fact been acting on that concern; he says there has been a "tendency in the latest cases in the

he meant "federally incorporated companies, employees of the federal Crown, and enterprises within federal legislative jurisdiction", (at p. 52) and he used the term in the context of these cases too, albeit, it would appear, with some misgivings. (Like Hogg, he is troubled by the reasoning in those cases, like *Commission du Salaire Minimum v. Bell Telephone Co.*, *supra*, footnote 1, in which the provincial legislation was held to be inapplicable—see pp. 53-56).

My own view is that if the term "interjurisdictional immunity" is used—as I believe Professor Hogg uses it—to describe the *rationale* for holding provincial legislation to be inapplicable in certain contexts, it is misleading. Using it to describe the *rationale* suggests that "federal 'instrumentalities'" are able to avoid the rules and regulations prescribed by provincial legislation because they are somehow analogous to, and are therefore entitled to the same kinds of preferential treatment as the Crown in its various manifestations. This is not, however, the basis upon which the courts have held provincial legislation to be inapplicable in certain contexts. That basis is, as I argue in the main body of this comment, the pith and substance doctrine. It is no doubt true that the *effect* of holding provincial legislation to be inapplicable is to grant certain entities immunity from the rules and regulations that that legislation prescribes. But the effect of a decision is not the same thing as the *rationale* therefor. To use a term that fits one to describe the other can cause confusion and mistakes in analysis.

¹⁰ *Ibid.*, p. 332.

¹¹ *Ibid.*, p. 331.

¹² *Ibid.*

¹³ See, for example, Martland J. (dissenting) in *McKay v. The Queen*, *supra*, footnote 1; Dickson J. (dissenting) in *Putnam v. Attorney-General of Alberta*, *supra*, footnote 1.

Supreme Court of Canada to limit interjurisdictional immunity by liberal application of the pith and substance doctrine".¹⁴ My own view is that he is wrong about this,¹⁵ but, be that as it may, it is clear that one important and influential member of the court, Dickson C.J.C., considers the concern to be a valid one and one on which the court *ought* to act. As he put it in his dissenting judgment in *Attorney-General of Alberta v. Putnam*:¹⁶

A central canon of constitutional interpretation is the "pith and substance" doctrine; a law "in relation to" a provincial matter may validly "affect" a federal matter. To grant federal employees immunity from valid provincial laws of general application would run counter to this fundamental principle of interpretation.

More recently, in *Ontario Public Service Employees Union v. Attorney-General of Ontario*,¹⁷ the Chief Justice expanded the basis of his concern about the "doctrine of interjurisdictional immunity" to include Professor Hogg's contention that the "doctrine" is "perverse". He also made it clear that he is prepared not simply not to extend that "doctrine" into new and different contexts, but also to overrule earlier decisions in which it was employed. Moreover, while he did not speak for the court on this aspect of the case, he did attract the support of another

¹⁴ *Op. cit.*, footnote 9, p. 332. In support of this assertion he cites *Attorney-General of Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Four B Manufacturing Ltd. v. United Garment Workers*, [1980] 1 S.C.R. 1031.

¹⁵ I think he is wrong for two reasons. First, he ignores the decisions in *Keable and Putnam*, *supra*, footnote 1, in which the R.C.M.P. succeeded in obtaining immunity from provincial legislation. (See also *Derrickson v. Derrickson*, *supra*, footnote 1, and *Paul v. Paul*, *supra*, footnote 1, in which provincial legislation was held not to apply to Indians on Indian reserves. These cases post-date Hogg's text.) Second, I think he reads too much into two of the three cases on which he relies: *Construction Montcalm Inc. v. Minimum Wage Commission*, *supra*, footnote 14, and *Four B Manufacturing Ltd. v. United Garment Workers*, *supra*, footnote 14.

In the former, the court held that provincial minimum wage legislation was applicable to a construction company building a runway for an airport. I do not consider this case to fit the description Hogg gives it—that it is one in which "interjurisdictional immunity" was avoided "by liberal application of the pith and substance doctrine". The court rejected the proposition that the undertaking seeking immunity from the provincial minimum wage legislation was in fact a federal undertaking; it was, the court held, a provincial undertaking, one to which the provincial legislation clearly applied. It was on that basis, not on the basis of "a liberal application of the pith and substance doctrine", that the court avoided "interjurisdictional immunity".

The latter decision was to the effect that provincial labour legislation applied to a business owned and operated by Indians on an Indian reserve. However, as in *Construction Montcalm*, the court rejected the proposition that the business was a federal undertaking entitled to claim immunity from that legislation. The case cannot be said to have been decided on the basis of a "liberal application of the pith and substance doctrine" any more than *Construction Montcalm* can.

¹⁶ *Supra*, footnote 1, at p. 305.

¹⁷ [1987] 2 S.C.R. 2.

of its members. For reasons that will be explained below, the *O.P.S.E.U.* case was not one in which a discussion of the "doctrine of interjurisdictional immunity" was, strictly speaking, called for. Nevertheless, the fact that the Chief Justice used the case as an opportunity to express what for him are evidently strongly held views on the matter, coupled with the fact that in it he was able to attract additional support for those views, makes it an important case for anyone who considers the question of whether or not those views are well-founded to be worth examining.

The O.P.S.E.U. Case

At issue in the *O.P.S.E.U.* case was the validity of certain provisions of the Public Service Act of Ontario.¹⁸ These provisions prohibit civil servants in Ontario from engaging in a variety of political activities at both the provincial and the federal level. The challenge to their validity was based on a number of different grounds. Some of these grounds focused on the effect of the impugned provisions on individual rights and freedoms,¹⁹ others on the division of powers between Parliament

¹⁸ R.S.O. 1970, c. 386 (now R.S.O. 1980, c. 413).

¹⁹ The challengers relied on sections 2, 3 and 15(1) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, and on the concept of an implied bill of rights. The Supreme Court refused to hear the Charter arguments because "all of the activities in the case were pre-*Charter* and neither of the Ontario courts had heard *Charter* arguments" (per Dickson C.J.C., *supra*, footnote 17, at p. 14).

The Supreme Court did deal with the argument based on the implied bill of rights. Beetz J., with McIntyre, LeDain and La Forest JJ. concurring, rejected it on its merits, holding that, while "neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of [the] basic constitutional structure" contemplated by the Constitution Act, 1867, which structure includes certain basic rights and freedoms, "the impugned legislation is in essence concerned with the constitution of the province and with regulating the provincial public service and affects federal and provincial elections only in an incidental way", (at p. 57). That Beetz J. was prepared to accept that one can imply certain basic rights and freedoms out of the Constitution Act, 1867—he specifically mentions "the right of discussion and debate"—is surprising, to say the least, given his judgment in *Attorney-General of Canada v. Dupond*, [1978] 2 S.C.R. 770. In that case, speaking for a majority of the court, he held, at p. 796, that none of freedom of speech, assembly, association, the press or religion "is so enshrined in the Constitution as to be above the reach of competent legislation"; see also Estey J. in *Attorney-General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 364. This statement in *Dupond* has generally been taken to mean that the Supreme Court had rejected the theory of implied rights (see, for example, Hogg, *op. cit.*, footnote 9, pp. 637-638). Apparently, however, that theory still has some life in it. What practical utility it has, of course, remains to be seen. Now that we have the Charter, it seems likely that it will be relevant only in those cases in which a section 33 override clause has been used.

Dickson C.J.C.'s response to the implied bill of rights argument is perplexing. He characterized it in his judgment as "The *Fraser* Argument" and appeared to view it as being directed not at the validity of any of the provisions of the Public Service Act, but at the scope of those provisions. (The reference to *Fraser* is, of course, a reference to

and the provincial legislatures.²⁰ One of the grounds, and the only one of interest to us here, was that these provisions could not "constitutionally be construed so as to extend to or embrace the core of a federal matter such as federal elections".²¹

Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, the case in which the court, speaking through Dickson C.J.C., addressed the question of whether, and if so when, it is permissible for the federal government to discipline federal civil servants who speak out against the federal government and its policies.) Hence he says, "in determining the proper scope of applications of the restrictions on political activity contained in the Public Service Act, the relevant decision-makers, and in particular any grievance arbitrator, must interpret the scope of the Act in light of the principles set out in *Fraser*", (at p. 26). He himself expresses no view on what the proper scope of these restrictions might be. Where Dickson C.J.C. stands on the implied bill of rights is not clear. Neither is it clear where Lamer J. stands on this issue; he says that he agrees with both Dickson C.J.C. and Beetz J. on this aspect of the case.

²⁰ The judgments suggest that there were at least three arguments based on the division of powers. The first two were summarized by Beetz J. in the following terms (*supra*, footnote 17, at p. 30):

The main challenge to the impugned provisions was that they allegedly relate to federal elections, a field reserved to the exclusive legislative competence of Parliament. It was alternatively submitted that even if the impugned provisions are otherwise valid as relating to a provincial object, they cannot constitutionally be construed so as to extend to or embrace the core of a federal matter such as federal elections.

The third argument, which is mentioned only in the judgment of Dickson C.J.C., (*ibid.*, at p. 24) was that the prohibitions on political activities were overbroad in that they applied "to all civil servants, or in some instances to all Crown employees, without distinguishing between the types of jobs employees perform" and covered "too wide a range of political activities".

None of these arguments was successful. Beetz J., again with McIntyre, LeDain and La Forest JJ. concurring, held (*ibid.*, at p. 37) that the impugned provisions "can be fully grounded in section 92(1) and (4)". (Section 92(1), which has since been replaced by section 45 of the Constitution Act, 1982, authorized provincial legislatures to amend the "Constitution of the Province"; section 92(4) authorizes them to legislate in relation to "the Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers"). Dickson C.J.C. held that both the Act as a whole and the impugned provisions could be anchored in section 92(4) and section 92(13) ("Property and Civil Rights in the Province"). Lamer J. held that the Act was authorized by section 92(4).

The manner in which the court dealt with the second argument is examined at some length in this comment. Suffice it to say at this juncture that it was rejected. The third argument was disposed of summarily by Dickson C.J.C. on the ground that "overreach in the sense here used is simply not arguable in a distribution of powers case" (*ibid.*, at p. 24).

²¹ *Supra*, footnote 17, at p. 30. This is an odd way to describe what the challengers were looking for. They were *not* looking for the court to give a narrow construction to the impugned provisions of the Act—they wanted the court to invalidate and strike out all references to the federal order of government. They were not dealing in this case with generally worded provincial legislation the scope of which could be limited to protect an area of federal jurisdiction; they were dealing with specifically worded legislation that, on its face, touched on an area of federal jurisdiction.

In support of this argument, the challengers relied heavily on *McKay v. The Queen*,²² a decision of which Professor Hogg is especially critical. In that case a sharply divided Supreme Court held that a generally worded municipal bylaw prohibiting the erection of signs on residential property could not constitutionally be applied to home-owners who put up signs supporting the candidates of their choice in a federal election. Integral to the reasoning of the majority was its willingness to limit the focus of its inquiry to the impugned application of the bylaw. Cartwright J. even went so far as to redraft the bylaw so that it applied only to signs erected during a federal election campaign. A bylaw of that character, he said, would clearly be beyond provincial jurisdiction, because only Parliament could prohibit "a political activity in the federal field".²³

The resemblance between *McKay* and the *O.P.S.E.U.* case is obviously a close one and it is hardly surprising that the challengers relied on it to the extent that they did. Of particular importance to them was the assertion that political activities in the federal field could not be prohibited by a provincial legislature. It is worth noting, however, that, at least for our purposes, the cases were different in one significant respect. In *McKay*, the impugned bylaw did not speak directly to the erection of signs during a federal election. In *O.P.S.E.U.*, the impugned statute did speak directly to the participation of provincial civil servants in federal political activities. As a result of this difference, the remedy sought in *O.P.S.E.U.* was not the same as the remedy sought in *McKay*. In *O.P.S.E.U.* the remedy sought was to have the reference to federal political activities struck out of the legislation, not to have the legislation interpreted in such a way as to restrict the scope of its application to a narrower range of situations than its language would allow. In short, *O.P.S.E.U.* was not a case in which Professor Hogg's "doctrine of interjurisdictional immunity" could be applied.

In the result, *McKay* proved incapable of carrying the day for the challengers in *O.P.S.E.U.* Beetz J., who wrote for four of the six members of the court who participated in the judgment,²⁴ was apparently satisfied that *McKay* had been correctly decided. It was his view, however, that the *O.P.S.E.U.* case could be distinguished from *McKay*, not on one but on three different grounds. The first was the nature of the prohibitions created by the two enactments. In *McKay*, he says, "[t]he

²² *Supra*, footnote 1. The challengers also relied on *Re Minimum Wage Act (Sask.)*, *supra*, footnote 1; *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Attorney-General of Quebec and Keable v. Attorney-General of Canada*, *supra*, footnote 1. Neither Beetz J. nor Dickson C.J.C. dealt with any of these cases in their respective judgments, however.

²³ *Ibid.*, at p. 804.

²⁴ Concurring with Beetz J. were McIntyre, LeDain and LaForest JJ.

prohibition. . . was an absolute one, and it was enforced with penal consequences".²⁵ Here,²⁶

. . . by contrast, the political activities contemplated by the impugned provisions are not made unlawful. These provisions are in the nature of detailed regulations. Failure to comply with them is a ground for dismissal. No other sanction is prescribed. The public servant who is not prepared to accept them can resign.

Acknowledging that "[t]he distinction between prohibition and regulation is admittedly more frequently made in administrative law than in constitutional law", Beetz J. says that it is nevertheless relevant in a case in which "what has to be measured is the impact, direct or indirect, of provincial legislation upon a federal area of legislative competence".²⁷ Here the fact that the provincial legislation is regulatory rather than prohibitory, he says, supports the view that its effect on "the subject of federal elections and the right of federal electors to engage in political activities" is merely "indirect and incidental".²⁸

Beetz J. also distinguishes *McKay* on the ground that the municipal bylaw at issue there was subject to overriding federal legislation. He notes the reference in that case to a provision of the Canada Elections Act²⁹ that imposed conditions on anyone who wished to post a sign or poster during a federal election campaign, and argues that "Parliament had implicitly recognized the right" to erect such signs.³⁰ Hence, he says, the bylaw "collided with a paramount provision" of a federal statute.³¹ In this case, however, "it has not been argued that the impugned provisions were in conflict with any federal enactment".³²

The third point of distinction between the two cases noted by Beetz J. is that "the provisions which are impugned in the case at bar present distinguishing features which are almost unique in that they form part of

²⁵ *Supra*, footnote 17, at p. 51.

²⁶ *Ibid.*

²⁷ *Ibid.*, at p. 52.

²⁸ *Ibid.*

²⁹ S.C. 1960, c.39, s. 71.

³⁰ *Supra*, footnote 17, at p. 52.

³¹ *Ibid.* Beetz J.'s willingness to find a conflict between the municipal bylaw and the provision of the federal statute is no less surprising than his willingness to accept the theory of implied rights (see *supra*, footnote 21). The Supreme Court of Canada has held that the only basis upon which it is appropriate to apply the paramountcy doctrine is when there is "express contradiction" between the provincial and federal legislation (see, in particular, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 185-191; see generally Hogg, *op. cit.*, footnote 9, pp. 355-367). It is difficult to see how the test of "express contradiction" could be said to have been satisfied in *McKay*. Significantly, Beetz J. makes no reference to any of the jurisprudence relating to the paramountcy doctrine. It is worth noting that neither the majority nor the minority in *McKay* was prepared to apply the paramountcy doctrine in that case.

³² *Ibid.*, at p. 53.

an integrated scheme of both orders of government in Canada".³³ He points out that the federal Public Service Employment Act³⁴ contains restrictions on the ability of federal civil servants to participate in political activities similar to those found in Ontario's Public Service Act. To accept the challengers' argument in this case, he says, "would be to create a constitutional gap which neither level of government would be able to fill since obviously, it is not open to Parliament to determine the terms and conditions under which provincial servants hold office in Ontario any more than it is open to Ontario to do the same with respect to federal civil servants".³⁵

With *McKay* out of his way, Beetz J. had little difficulty concluding that the impugned provisions are valid even insofar as they restrict the ability of provincial civil servants to participate in federal political activities. "[I]f Ontario wanted to ensure the impartiality of its public servants", he says, "it had no choice but to include political activities in the federal field in the impugned provisions. . . . The effect of these provisions on federal political activities is not only incidental, it is necessarily incidental".³⁶

Dickson C.J.C., with Lamer J. concurring, takes a markedly different approach to the *McKay* argument from that taken by Beetz J. He begins his analysis of this aspect of the case (which he divides into two parts, one headed "'Interjurisdictional Immunity'" and the other "*McKay v. The Queen*"') with a critique of "the doctrine of interjurisdictional immunity".³⁷ Both in its organization and in its content, this critique

³³ *Ibid.*

³⁴ R.S.C. 1970, c. P-32, s. 32.

³⁵ *Supra*, footnote 17, at p. 53.

³⁶ *Ibid.*, at pp. 54-55.

³⁷ Dickson C.J.C. describes the "doctrine" as positing that "legislation enacted by one order of government cannot interfere with, or have an impact on, subject matters under the jurisdiction of the other order of government" (*ibid.*, at p. 16). So formulated, this "principle" goes beyond what cases like *MacKay* stand for and is one that would be impossible to accept as valid (assuming one equates validity with consistency with existing doctrine). If that is truly the "doctrine" the Chief Justice is seeking to challenge, then there is no disagreement between the two of us.

A more accurate, if somewhat less precise, formulation of the "doctrine" to be extracted from cases like *McKay* is that suggested in the opening sentence of this comment (as embellished by the remaining sentences in the same paragraph). (See also the excerpt from Chouinard J.'s judgment in *Derrickson v. Derrickson*, *supra*, footnote 1, quoted *infra*, footnote 45). That formulation would, I think, be acceptable to Professor Hogg (who, it is worth noting, never really provides us with a formulation of the "doctrine of interjurisdictional immunity" of his own). Given the cases that Dickson C.J.C. provides as support for the "doctrine"—he cites *John Deere Plow Co. v. Wharton*, *supra*, footnote 1, and *Commission du Salaire Minimum v. Bell Telephone Co.*, *supra*, footnote 1—it is likely that that formulation would be acceptable to him too. Whether it would be or not, it is clear that what concerns him is the reasoning and results in these cases; that is certainly what concerns Professor Hogg. I therefore attach little signifi-

closely parallels that found in Hogg's text. The Chief Justice incorporates, by direct quotation, both of Hogg's complaints about the doctrine. He also notes what he perceives to be the tendency in recent Supreme Court of Canada judgments not to apply the doctrine. He then indicates that "[i]n light of these decisions, I am not prepared to extend the doctrine of interjurisdictional immunity into a field—federal elections—which is unrelated to either the company law cases or the federal undertakings cases, the two historical roots of the doctrine".³⁸

When he comes to consider *McKay* itself, he acknowledges that it might be possible to distinguish it from the *O.P.S.E.U.* case, not on any of the bases suggested by Beetz J.,³⁹ but on the basis that there was "arguably a lack of nexus between the [aesthetic] purpose of the bylaw and its application to federal election signs".⁴⁰ However, he says, "my own view is that [*McKay*] was wrongly decided".⁴¹ He expressly agrees with the dissenting judgment of Martland J. in that case "to the effect that the bylaw was in relation to property, that it was of general application and that it could permissibly have an incidental effect on certain activities in a federal election campaign".⁴² Professor Hogg's contention that the majority judgment in *McKay* is inconsistent with the pith and substance doctrine is noted and agreed with, as is his assessment that that judgment is difficult to reconcile with a number of other division of powers decisions from the 1960s and 1970s. He specifically mentions the decision in *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*,⁴³ in which, by a narrow margin, the Supreme Court upheld a prohibition in a provincial labour relations statute against trade

cance to the manner in which the Chief Justice formulates his "doctrine of interjurisdictional immunity". What is significant is that he, like Professor Hogg, has difficulty with the notion that otherwise valid provincial legislation can be held not to apply in certain contexts because of the strongly federal character of those contexts.

³⁸ *Supra*, footnote 17, at pp. 18-19.

³⁹ *Ibid.*, at p. 21. Dickson C.J.C. only considers the first of the three grounds of distinction used by Beetz J., that based on the prohibition/regulation dichotomy (see text *supra*, footnotes 25-29). Of this dichotomy (which he describes in terms of prohibition and "curtailment") he says: "I fail to see [its] significance, in a federalism sense" (*ibid.*, at p. 21).

Although he does not deal with the other two of Beetz J.'s grounds of distinction as grounds of distinction, elsewhere in his judgment Dickson C.J.C. does refer to the fact that Parliament has enacted in respect of the federal civil service a set of provisions very similar to sections 12-16 of the Public Service Act. In his view, the existence of this parallel set of provisions at the federal level was an indication of federal approval of provisions such as sections 12-16 and, as such, counted in favour of the latter's validity (*ibid.*, at pp. 19-20).

⁴⁰ *Ibid.*, at pp. 21-22.

⁴¹ *Ibid.*, at p. 22.

⁴² *Ibid.*

⁴³ [1963] S.C.R. 584.

unions making donations from the dues they collected to political parties; the latter term was not defined in the legislation, but the court took it to include federal as well as provincial political parties. The Chief Justice concludes by saying that *McKay* should be overruled.

Interjurisdictional Immunity, Reading Down and Pith and Substance

I have no quarrel with the result in *O.P.S.E.U. v. Attorney-General of Ontario*. I agree with Beetz J. that if a provincial legislature wishes to ensure that its public servants will be perceived to be impartial—an objective it surely must be entitled to pursue—it has to be able to regulate the political activities of those servants in both the provincial and the federal spheres. The question I wish to address in this comment is whether Professor Hogg's criticisms of *McKay* and the other cases with which it is associated are valid. It is my view that they are not. The analytic approach reflected in them is *not* inconsistent with the pith and substance doctrine; on the contrary, it is entirely consistent with that doctrine. Nor are the cases "perverse" in the sense in which Professor Hogg uses that term—or in any other sense.

The pith and substance doctrine requires that legislation that is challenged on division of powers grounds be characterized in terms, not of any "incidental effects" it may have, but of its "leading feature", "true nature and character" or "dominant or most important characteristic". So defined—and this is the way in which Professor Hogg defines it⁴⁴—the doctrine says nothing about *how one identifies the legislation that is to be characterized*. It merely tells us how we are to go about characterizing the legislation that we are to characterize.

Implicit in Professor Hogg's assertion that cases like *McKay* are inconsistent with the pith and substance doctrine is the assumption that generally worded legislation must be characterized *in light of all of its possible applications*. His objection to *McKay* is not that the majority in that case was wrong in concluding—as it did—that a municipal bylaw directed specifically at the erection of signs during a federal election campaign was *ultra vires*. He expresses no opinion at all on the correctness of that conclusion. His real objection is to the fact that the majority chose to carve out of all of the possible applications of the bylaw the one application that was vulnerable to challenge and to limit the focus of its inquiry to that one application. The problem he has with the decision is not that the majority failed to apply the pith and substance doctrine; it is that the majority applied that doctrine *to the wrong thing*.⁴⁵

⁴⁴ *Op. cit.*, footnote 9, p. 313.

⁴⁵ It is clear that Martland J., who wrote the dissenting judgment in *McKay*, saw the problem in these terms. The gist of his reasoning, with which Hogg says he agrees (*ibid.*, p. 329), is contained in the following two excerpts (*supra*, footnote 1, at pp. 811-812):

The real question, therefore, is whether it is appropriate in division of power cases in which the attack is limited to some but not all of the applications of the legislation at issue, to limit the inquiry to the validity of those applications. Is it appropriate, in other words, to let the nature of the attack define the scope of the inquiry? I believe that it is.

... in my opinion, provincial legislation in relation to the use of property, which, in its pith and substance, is in relation to property and civil rights in the province, and which is of general application, is not only valid, but can apply even though, incidentally, it may affect the means of propaganda used by an individual or by a political party during a federal election campaign.

... The decision in *Great West Saddlery Company Limited v. The King*, [1921] 2 A.C. 91, to the effect that a federally incorporated company was subject to the provisions of the Ontario Mortmain & Charitable Uses Act, is an answer to the suggestion that, if the municipality could not have enacted a by-law aimed exclusively at federal election signs, then a general by-law could not be applicable to them. *The essential feature of the by-law in question here is that it is of general application* and, admittedly, valid. (Emphasis added).

That the majority in *McKay* applied the pith and substance doctrine to the impugned application seems clear enough. That the courts have done so in all of the other cases in which provincial legislation has been held inapplicable in certain contexts is not so clear. As noted in the first paragraph of the main body of this comment, the language used in many of these cases suggests that the courts are concerned solely with the effect of the impugned application on the entity seeking to have the provincial legislation held inapplicable, not with determining the pith and substance of that application. Two points need to be made about this feature of these cases. The first is that the effect of legislation is a relevant consideration in applying the pith and substance doctrine (see generally, Hogg, *op. cit.*, footnote 9, pp. 320-321). The second is that, on a careful reading of a good many of these cases, it becomes apparent that the discussion of the effect of the impugned application is, in fact, directed at determining its pith and substance. Hence, in *John Deere Plow Co. v. Wharton*, *supra*, footnote 1, one finds Viscount Haldane saying, at p. 343:

In the opinion of their Lordships it was not within the power of the provincial Legislature to enact these provisions in their present form. It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the Province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the Province should, under a statute of general application regulating procedure, give security for costs. *But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under s. 92 to the provincial Legislature.* (Emphasis added).

Another example is provided by *Commission du Salaire Minimum v. Bell Telephone Co.*, *supra*, footnote 1, a "federal undertaking" case. There, one finds Martland J., speaking for the court, saying at p. 771:

The Minimum Wage Act (of Quebec) is a statute which, inter alia, purports to regulate to an extent the wages to be paid by the respondent to its employees. *If the regulation of the wages paid to its employees by an undertaking within the excepted classes in s. 92(10) is a "matter" coming within those classes of subject, then (by*

I begin my discussion of this question by noting that, although Professor Hogg is troubled by the "doctrine of interjurisdictional immunity", he seems quite content with what he calls the "reading down doctrine".⁴⁶ That doctrine, he says, "requires that, whenever possible, a statute is to be interpreted as being within power. What this means in practice is that general language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power".⁴⁷ Of this doctrine, he says:⁴⁸

The general idea that a law should not be held to be wholly invalid just because it overreaches the limits of jurisdiction in certain respects is obviously in accord with a properly restrained role for the courts. Reading down allows the bulk of the legislative policy to be accomplished, while trimming off those applications which are bad.

Implicit in both his description of what the "reading down doctrine" requires and his approval of it is an acceptance of the notion that courts *can* limit the focus of their inquiry in division of power cases to certain only of the applications of the legislation in question. This apparent inconsistency could perhaps be explained if one could find a plausible basis for distinguishing the "reading down doctrine" from the "doctrine of interjurisdictional immunity", but it is difficult to see what that basis would be. The two doctrines seem simply to be different ways of describing the same phenomenon.⁴⁹ The "reading down doctrine" speaks to what happens to legislation some of the applications of which are

virtue of s. 91(29), it is within the exclusive legislative authority of the Canadian Parliament. (Emphasis added).

Still another example is *Derrickson v. Derrickson*, *supra*, footnote 1, one of the cases involving "Indians and lands reserved for the Indians". In his reasons for judgment in that case, Chouinard J., who spoke for the full panel of seven, makes it clear that it is the pith and substance of the impugned application of the provisions of the Family Relations Act, R.S.B.C. 1979, c. 121, that he is looking for when he says, at p. 296:

The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative powers under s. 91(24) of the Constitution Act, 1867. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands. When otherwise valid provincial legislation, given the generality of its terms, extends beyond the matter over which the legislature has jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning which will confine it within the limits of the provincial jurisdiction. (Emphasis added).

⁴⁶ This "doctrine" is discussed in the section of his text immediately preceding that in which "the doctrine of interjurisdictional immunity" is discussed; *op. cit.*, footnote 9, pp. 327-329.

⁴⁷ *Ibid.*, p. 327.

⁴⁸ *Ibid.*, p. 328.

⁴⁹ It is interesting—and, I think, significant—to note that Hogg discusses the *McKay* case under both headings, "Reading Down" and "Interjurisdictional Immunity": (*ibid.*, footnote 9, pp. 328, 329-330).

considered to be *ultra vires*—it is interpreted in such a way as to have its reach limited to those applications which are considered to be *intra vires*. The “doctrine of interjurisdictional immunity” speaks to what happens to the entity to which the legislation cannot be applied constitutionally—it is given immunity from the legislation. But both doctrines involve the courts in limiting the focus of their inquiry—that is, in limiting the characterization process—to some only of the applications of the legislation in question.

This ambivalence on Professor Hogg’s part about the propriety of courts limiting the focus of their inquiry in this way clearly dilutes the force of his criticism of cases like *McKay*. But it does not establish the correctness of the view that courts are entitled so to limit the focus of their inquiry. What does establish the correctness of that view is, quite simply, the need to ensure that the division of powers prescribed in the Constitution Act, 1867, is respected. To insist that courts *always and only* focus on legislation viewed in light of the full range of its possible applications would not only put that division of powers at risk, it would also be highly illogical.

That the division of powers would be put at risk if courts were barred from limiting the scope of their inquiry to some only of the applications of the legislation in question is clear enough. Legislation that would be beyond the power of the federal Parliament or a provincial legislature to enact if enacted on its own would be within that body’s power to enact if it were subsumed within an enactment of broader application that, *viewed broadly*, can be characterized in different—and more favourable—terms. If it is the case—and for present purposes I leave open the question whether it should be—that a municipal government cannot, for aesthetic or any other reasons, enact a bylaw prohibiting or regulating the erection of signs during the course of a federal election campaign, why should that government be able to accomplish its goals—*precisely the same goals*—simply because it has chosen to prohibit the erection of a wide variety of other kinds of signs as well? If, as Dickson C.J.C. said recently in another division of powers case, “[i]t is obvious. . . that a constitutionally invalid provision will not be saved by being put into an otherwise valid statute”,⁵⁰ it must be equally obvi-

⁵⁰ *Attorney-General of Canada v. C.N. Transport*, [1983] 2 S.C.R. 206, at p. 270.

⁵¹ The characterization given to a particular application of a law will clearly be affected by the broader legislative context within which it is found. To the extent that the purpose underlying the generally worded provision is seen to be an “important” one for the order of government in question (in the sense of being at the core of one of its heads of power), and to the extent that the government’s ability to achieve that purpose is affected by its being able to apply its law in the context in question, the characterization given the application is likely to be a favourable one (for example, to result in the application being upheld as valid). Although, as I have noted above, the *O.P.S.E.U.* case was not one in which “the doctrine of interjurisdictional immunity” was applica-

ous that a constitutionally invalid provision will not be saved by being subsumed within a generally worded enactment that is otherwise valid. Parliament and the provincial legislatures are authorized by the Constitution Act, 1867, to legislate in relation to "matters" coming within certain "classes of subjects". If a particular "matter"—prohibiting the erection of signs during a federal election campaign, for example—comes exclusively within one of the "classes of subjects" assigned to Parliament, then it is beyond the power of a provincial legislature to legislate in relation to it. The mere fact that the "matter" is lumped in with one or several provincial "matters" in a generally worded bylaw cannot, in and of itself, be enough to make it disappear as a distinct "matter". Form cannot so easily be permitted to triumph over substance. It is, of course, possible that a change in form can bring about a change in substance.⁵¹ But it need not do so.

It is worth noting that the willingness to focus on particular applications of legislation reflected in cases like *McKay* is not the only technique the courts have used to protect the division of powers from the risk of circumvention implicit in generally worded legislation. Another technique is that adopted by Rand J. in *Saumur v. City of Quebec*.⁵² Confronted by a municipal bylaw forbidding the distribution of literature on city streets without the permission of the chief of police, with no standards being provided in the bylaw to the chief of police to indicate on what basis he was to exercise his discretion, Rand J. said:⁵³

Conceding, as in the *Alberta Reference*, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: *the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter in relation to which the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers.* Where the language is sufficiently specific and can fairly be interpreted as applying only to matters within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms, and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of admin-

ble, the point I am making here is reflected quite clearly in Beetz J.'s conclusion that "[i]f Ontario wanted to ensure the impartiality of its public servants, it had no choice but to include political activities in the federal field in the impugned provisions"; *supra*, footnote 17, at p. 54.

⁵² [1953] 2 S.C.R. 299.

⁵³ *Ibid.*, at p. 333 (Emphasis added).

istration and by no expedient which ignores that requirement can constitutional limitations be circumvented.

Unable because of the "broad and general terms" used in the bylaw to determine its true "subject matter", Rand J. struck the bylaw down.

Still another technique, and one that bears a very close resemblance to that of isolating and characterizing particular applications of a law, is refusing to ascribe a single "matter" to a piece of legislation. This technique was used by Beetz J. in *Reference re Anti-Inflation Act*⁵⁴ to avoid the implications for provincial jurisdiction over the economy of accepting the federal government's argument that the entire Act should be characterized as being in relation to the containment and reduction of inflation. It is also reflected in the unwillingness of Beetz J. in *Attorney-General of Canada v. Dupond*⁵⁵ to characterize the municipal ordinance in question in that case as being in relation to one or more of the fundamental freedoms, and the unwillingness of Estey J. in *Scowby v. Glendinning*⁵⁶ to see "human rights" as a single undifferentiated "matter" for division of powers purposes.

The illogicality of precluding courts from focusing on particular applications of generally worded legislation can best be demonstrated by an example. Suppose that, instead of enacting the bylaw that came under scrutiny in *McKay*, the municipal government in Etobicoke had decided to create something of an exception for signs erected during the course of a federal election campaign. Hence, rather than prohibiting the erection of such signs under the general part of the bylaw, a special provision was incorporated in the bylaw prescribing certain limitations on the erection of such signs (for example, relating to size or whether they can be illuminated). It is clear that such a provision would have a far less significant effect on the erection of such signs than the bylaw the municipal government in Etobicoke in fact enacted, and, for that reason, represent a far less dramatic incursion into an area of federal jurisdiction.⁵⁷ And yet no one would doubt that a homeowner who wished to challenge that provision—and that provision alone—would be entitled to do so. It hardly makes sense, then, not to allow the homeowner in *McKay* to challenge the application to the erection of such signs of the generally worded—and completely prohibitory—bylaw that the municipal government in Etobicoke did enact.⁵⁸

⁵⁴ [1976] 2 S.C.R. 373. Beetz J. spoke for the majority of the court on this issue.

⁵⁵ *Supra*, footnote 19.

⁵⁶ *Supra*, footnote 1.

⁵⁷ This assertion is based on the assumption, which I take to be valid, that the question of whether one can erect such signs during a federal election lies closer to the core of Parliament's jurisdiction over federal elections than the question of how big such signs can be or whether they can be illuminated.

⁵⁸ One might even argue that the legislative product emanating from both Parliament and the provincial legislatures would be improved if it were made clear to them

It is important at this juncture to return to the pith and substance doctrine and to emphasize the point made earlier about what it does and does not prescribe. What it does prescribe is *how* the characterization process is to be carried out. What it does not prescribe is *what* it is that is to be characterized. In practice, that is left to the challenger to identify. The challenger will identify whatever it is that looks to be most vulnerable to attack.⁵⁹ That may be a group of statutes,⁶⁰ one entire statute,⁶¹ a group of sections within a statute,⁶² a single section,⁶³ a subsection,⁶⁴ a part of a subsection,⁶⁵ a regulation,⁶⁶ a single order⁶⁷ or—as in *McKay* and cases like it—a particular application of the statute or some part thereof. And as a rule, the court will take what the challenger gives it. The pith and substance doctrine does not require that the court select any particular component of the legislation and focus its inquiry on that component. It merely requires that, once the relevant component has been identified, the characterization be based on the “leading feature” or “dominant or most important characteristic” of that component.⁶⁸ The pith and substance doctrine does not, therefore, stand in the way of the argument I am advancing here.

It must be said, however, that even if that were not the case—even if, contrary to the view I have just expressed, the reasoning in cases like *McKay* is inconsistent with the pith and substance doctrine—that would

that, if called upon to do so, courts will not hesitate to focus their attention on particular applications of a law. If Parliament and the provincial legislatures are not given this message, there is reason for them to believe that they are better off enacting broadly worded legislation even though such legislation may not be very effective. If they know that there is nothing to be gained in constitutional terms from enacting broadly worded legislation, they will be more inclined to enact more finely tuned—and hence effective—legislation.

⁵⁹ I use the term “challenger” here somewhat loosely. It is intended to include not only private parties who attack the validity of legislation on division of powers grounds, but also governments who use the reference power to raise division of powers issues.

⁶⁰ See, for example, *Ref. re Alberta Statutes*, [1938] S.C.R. 100.

⁶¹ See, for example, *Jones v. Attorney-General of New Brunswick*, [1975] 2 S.C.R. 182.

⁶² This was the case in *O.P.S.E.U. v. Attorney-General of Ontario*, *supra*, footnote 17.

⁶³ See, for example, *Boggs v. The Queen*, [1981] 1 S.C.R. 49.

⁶⁴ See, for example, *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134.

⁶⁵ See, for example, *Ref. re s.5(1) of the Dairy Industry Act*, [1949] S.C.R. 1.

⁶⁶ See, for example, *Caloil Inc. v. Attorney-General of Canada*, [1971] S.C.R. 543.

⁶⁷ See, for example, *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238.

⁶⁸ This does not, of course, mean that the court will ignore everything but the target of the challenger’s attack. To characterize the target properly, the court will have to examine it in the context in which it is found in the legislation in question.

not make that reasoning wrong. The pith and substance doctrine, whatever content one gives it, is nothing more than a judicially created means to a constitutionally mandated end. The end is the preservation of the division of powers established by the Constitution Act, 1867, and it is that end, not the means used to further it, to which the courts must give priority should the two come into conflict. And, as I have argued above, they will come into conflict if the pith and substance doctrine is taken to preclude courts from limiting the focus of their inquiry to some only of the applications of a law. In these circumstances, when put to the choice between that doctrine and the reasoning in cases like *McKay*, it is the former, not the latter, that must be jettisoned.

To this point I have limited my remarks to Professor Hogg's—and Dickson C.J.C.'s—claim that the “doctrine of interjurisdictional immunity” is “unprincipled”. What of the claim by Professor Hogg—to which Dickson C.J.C. has now lent his name as well—that the “doctrine” is “perverse”? That claim appears to be based on the combined effect of two propositions: (1) that the “doctrine” only operates against provincial legislation, and (2) that Parliament can easily protect itself from encroaching provincial legislatures by enacting paramount federal legislation. For the purposes of this comment I need not consider in any detail the second of these propositions. Suffice it to say that I believe it to be of dubious validity.⁶⁹ Insofar as the first is concerned, its validity would be open to question even if one were prepared to accept Professor

⁶⁹ I say this primarily because of the decision of the Supreme Court of Canada in *Dick v. The Queen*, [1985] 2 S.C.R. 309. At issue in that case was the applicability to a non-status Indian hunting off his reserve of a provision of the Wildlife Act, R.S.B.C. 1979, c. 433. Beetz J., speaking for the full panel of five judges who sat on the case (one of whom was Dickson C.J.C.) was prepared to assume that the Wildlife Act affected the accused *qua* Indian. Having made this assumption he went on to hold that, “in order to preserve [the Act's] constitutionality, it would be necessary to read it down to prevent its applying to appellant in the circumstances of this case” (at p. 321). (Note that this is a clear endorsement of the continuing viability of “the doctrine of interjurisdictional immunity”, at least in the context of Indians. See also, in this regard, *Derrickson v. Derrickson*, *supra*, footnote 1, and *Paul v. Paul*, *supra*, footnote 1). Later in his judgment, Beetz J. notes that provincial labour laws “which are couched in general terms and which, taken literally, would apply to federal works and undertakings” had been read down to ensure that they did not “regulate such works and undertakings under some essentially federal aspects” (at p. 322). Several cases are cited in support of this assertion, including *Commission du Salaire Minimum v. Bell Telephone Co.*, *supra*, footnote 1, and there is nothing to suggest that Beetz J. in any way disapproves of them. On the contrary, he clearly considers them to have been correctly decided. It is clear, therefore, that Beetz J. does not share Hogg's opinion that “the doctrine of interjurisdictional immunity” is unprincipled.

Beetz J. then turned to s. 88 of the Indian Act, R.S.C. 1970, c. I-6, and it is in the course of discussing the significance of that provision that he raises doubts about the validity of the second of Hogg's two propositions. Section 88 provides as follows:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that

Hogg's suggestion that there is a distinct "doctrine of interjurisdictional immunity". The decision of the Supreme Court of Canada in *Jabour v. Law Society of British Columbia*,⁷⁰ in which it was held that the Combines Investigation Act⁷¹ did not apply to provincial law societies, bears a very close resemblance to cases like *McKay*.⁷² But if one rejects the notion that such a distinct doctrine exists—if, as I have argued one should do, one lumps the cases Professor Hogg discusses under the heading "Interjurisdictional Immunity" together with those he refers to under the heading "Reading Down"—it is clear that this proposition is not valid. Federal legislation is as susceptible to being "read down" as provincial legislation. In fact, the first example Professor Hogg provides of a case in which the "reading down doctrine" has been applied, *Quebec North Shore Paper Co. v. Canadian Pacific*,⁷³ involved federal legislation. So too did one of the other examples he cites, the *Stevedore Reference*.⁷⁴ And these are by no means the only such examples that could be given.⁷⁵ It is not the case, therefore, that cases like *McKay* are "perverse".

To argue that courts should be entitled to limit the focus of their inquiry in division of power cases to some only of the applications of

such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act. (Emphasis added).

If the concluding words in this provision, Beetz J. says "it would not be open to Parliament in my view to make the *Indian Act* paramount over provincial laws simply because the *Indian Act* occupied the field. Operational conflict would be required to this end." (at p. 328). The implication of this assertion is that Parliament can only protect itself from encroaching provincial legislatures by enacting legislation that satisfies the test of operational conflict or "express contradiction" (see Hogg, *op. cit.*, footnote 9, pp. 355-367). Simply stating that provincial legislation is not to apply in a particular context, which is what Parliament had done in the concluding words of s. 88, will not suffice. This suggests that it is *not* easy—certainly not as easy as Professor Hogg seems to think it is—for Parliament to protect its turf from over-reaching generally worded provincial laws.

⁷⁰ *Supra*, footnote 19.

⁷¹ R.S.C. 1970, c. C-23.

⁷² So, too, does *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, in which, rather than striking down the impugned provisions of the Canada Agricultural Products Standards Act, R.S.C. 1970, c. A-8, Estey J., for the majority, simply held that they were "inapplicable to the events as alleged in the charge laid against the appellant. . . [I]n my view, s. 3 has no validity in relation to purely intraprovincial transactions and in that respect is *ultra vires*" (at pp. 865-866). In support of this choice of ruling Estey J. cites one of the better known "interjurisdictional immunity" cases, *Re Minimum Wage Act (Sask.)*, *supra*, footnote 1.

⁷³ [1977] 2 S.C.R. 1054.

⁷⁴ *Ref. re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529, especially at pp. 535, 566 and 582.

⁷⁵ See, for example, *Singbeil v. Hansen* (1985), 19 D.L.R. (4th) 48 (B.C.C.A.), in which provisions of the Canada Shipping Act, R.S.C. 1970, c. S-9, were read down to protect important aspects of provincial jurisdiction under s. 92(13).

the legislation in question is not, of course, to argue that the courts should exercise the power to read legislation down with any particular degree of frequency. The question of how often the courts will exercise a power is quite separate and distinct from the question of whether the power exists. Each case in which the power is invoked will have to be examined on its own merits. The question, as I have already suggested, and as the courts appear, at least implicitly, to have acknowledged,⁷⁶ will be one of characterization, of determining, as the pith and substance doctrine requires, the "leading feature" or "dominant or most important characteristic" of the impugned application.⁷⁷ For what it is worth, my own view is that, by and large, the courts have done a good job in this area. On occasion, when dealing with provincial legislation, I think they have been overly protective of federal jurisdiction. That was certainly true in *Scowby v. Glendinning*,⁷⁸ in which a majority of the Supreme Court of Canada held that a provision of the Saskatchewan Human Rights Code⁷⁹ that created a right to be free from arbitrary arrest or detention was invalid to the extent that it purported to apply to police officers engaged in the enforcement of the federal criminal law. It was also arguably true in the *Manitoba Securities* case,⁸⁰ in which the Privy Council held that a provincial licensing scheme for companies seeking to raise capital was inapplicable to federally incorporated companies. But most of the cases in which federal or provincial legislation has been read down have, I would argue, been correctly decided, including *McKay*

⁷⁶ See *supra*, footnote 45. It is worth noting that the approach suggested here—that is, determining the pith and substance of the impugned application—does not entail acceptance of the notion, of which former Chief Justice Laskin was so fond, that there are federal "enclaves" into which provincial legislation can never enter. (See B. Laskin, Canadian Constitutional Law (4th ed. rev., 1975), p. 523, and his judgments in *Cardinal v. Attorney-General of Alberta*, [1974] S.C.R. 695; *Natural Parents v. Superintendent of Child Welfare*, *supra*, footnote 1; *Four B Manufacturing Inc. v. United Garment Workers*, *supra*, footnote 14 (all of which related to Indian Reserves) and his judgment in *Construction Montcalm Inc. v. Minimum Wage Commission*, *supra*, footnote 14 (which related to federal public property)). That notion, which never received the support of a majority of the judges of the Supreme Court, is clearly inconsistent with the approach that I am suggesting. It would require the courts to hold provincial legislation inapplicable in these "enclaves" even if the applications in question would not be characterized as being in relation to a "matter" within exclusive federal jurisdiction. However, it is clearly not necessary, in order to reject this notion, to reject the proposition that provincial legislation should in some contexts be held not to apply because of the strongly federal character of those contexts. If the approach that I am suggesting is adopted, one can at the same time reject the "enclave" notion and accept this proposition.

⁷⁷ There is no need here to discuss how it is that the courts determine the pith and substance of an impugned enactment. See generally Hogg, *op. cit.*, footnote 9, pp. 313-325 and 334-337, as well as *supra*, footnote 51.

⁷⁸ *Supra*, footnote 1.

⁷⁹ S.S. 1979, c. S-24.1.

⁸⁰ *Attorney-General of Manitoba v. Attorney-General of Canada*, [1929] A.C. 260 (P.C.).

v. *The Queen*.⁸¹ While it may be open to municipal governments to regulate for aesthetic reasons the erection of signs during a federal election campaign, it should not be open to them, for those same or any other reasons, to prohibit the erection of such signs outright. That is something that only Parliament should be empowered to do.

Conclusion

The point I have attempted to make in this comment is admittedly a narrow one—that it is not inappropriate for courts in division of powers cases to limit the focus of their inquiry to some only of the applications of the legislation in question. The reason for making it is that Professor Hogg's contention that it *is* inappropriate for courts to do so has been formally endorsed by Dickson C.J.C. and Lamer J. As things stand at the moment, these two appear to be the only members of the Supreme Court of Canada who agree with Professor Hogg. But there is always the possibility that others may be tempted to throw their lot in with him as well. Before that occurs, it is worth pointing out that there is another—and, I submit, better—view of the matter.⁸²

⁸¹ *Supra*, footnote 1. If the decision in this case is difficult to reconcile with *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, *supra*, footnote 43, then the solution is to overrule that decision, not *McKay*. It is worth noting that, at least on my reading of *Imperial Oil*, the court did not receive any argument to the effect that the provincial legislation in that case should be read down so as not to apply to contributions to federal political parties. The challengers in that case argued that the provincial legislation should be declared *ultra vires* in its entirety. The decision in that case may not, therefore, be as difficult to reconcile with the decision in *McKay* as Hogg, *op. cit.*, footnote 9, and Dickson C.J.C. suggest.

⁸² After this comment was written, the Supreme Court of Canada rendered its decisions in three cases in which the "doctrine of interjurisdictional immunity" was invoked by federal undertakings against generally worded provincial legislation regulating health and safety in the workplace. In each of the three cases, *La Commission de la Santé et de la Sécurité du Travail v. Bell Canada*, *Canadian National Railway Company v. La Commission de la Santé et de la Sécurité du Travail* and *Alltrans Express Ltd. v. The Workers' Compensation Board of British Columbia* (all decided on May 28, 1988), a unanimous court held that the provincial legislation could not be applied constitutionally to the federal undertaking. Beetz J. wrote for the same panel of six judges in each case, the other five being Dickson C.J.C., Lamer, Wilson, Le Dain and La Forest JJ. In the *Bell Canada* case, in which he develops the principles he applies in all three cases, Beetz J. responds to some of the criticism that has been directed at the "doctrine of interjurisdictional immunity" by Professor Hogg and others, particularly that directed at its application in favour of federal undertakings. He makes it clear that he considers that criticism not to be well-founded. The fact that Dickson C.J.C. and Lamer J. join with Beetz J. may be thought to signal a change of heart on their part about the propriety of holding generally worded legislation inapplicable in certain contexts; if it does, that change of heart is to be welcomed. It should be remembered, however, that in his judgment in the *O.P.S.E.U.* case, Dickson C.J.C. indicated a willingness to live with the "doctrine of interjurisdictional immunity" when it was applied in favour of federally incorporated companies and federal undertakings (see text accompanying footnote 38). There is reason to believe, therefore, that the Chief Justice's opposition to the "doctrine" remains intact.