BANKRUPTCY—BANKRUPTCY ACT, SECTION 107—BRITISH COLUMBIA CORPORATION CAPITAL TAX ACT, SECTION 38—PROVINCIAL LIENS IN BANKRUPTCY CONTEXT: *Bank of Montreal* v. *Titan Landco Inc.*

Stuart Roebuck*

The decision of the Supreme Court of British Columbia in *Bank of Montreal* v. *Titan Landco Inc.*[1] raises some disturbing issues with respect to provincially legislated liens in a bankruptcy context.

Facts

Titan Landco Inc. (''Titan'') carried on the business of buying and selling real estate. It executed a debenture in favour of the Bank of Montreal (the ''Bank'') purporting to be a fixed charge on all of Titan's real estate (the ''Debenture''). The court determined that notwithstanding the specific fixed charge terms contained in the Debenture, because the Bank permitted Titan to deal with its real estate assets in the ordinary course of business, the Debenture actually constituted a floating charge.

The Debenture was registered, and four supplemental debentures were registered, in the Companies Office, respectively, on September 5, 1980, December 15, 1980, February 11, 1982, August 12, 1982 and February 22, 1983.

Titan's corporate taxes, levied pursuant to the Corporation Capital Tax Act,[2] were in arrears for its 1981 and 1982 fiscal years. Section 38 of the Act provides as follows:

> 38.(1) The tax imposed or assessed under this Act is a lien and charge in favour of the Crown on the entire assets of the corporation, or the entire assets of the corporation in the hands of a trustee, effective as of the close of the fiscal year of the corporation for which the tax is imposed, and has priority over all other claims of every person except claims secured by liens, charges or encumbrances registered prior to that date.

*Stuart Roebuck, of the Ontario Bar, Toronto, Ontario.

[1] (1989), 34 B.C.L.R. (2d) 114, 72 C.B.R. (N.S.) 262 (B.C.S.C.).

[2] R.S.B.C. 1979, c. 69.

The court determined that the floating charge contained in the Debenture only crystallized on the date the Bank made demand for repayment upon Titan.

Pre-Bankruptcy Priority

The court held that "[i]t is common ground that the lien created by s. 38 arises and attaches at the end of the fiscal year of the corporation and that it ranks subsequent to claims secured by liens, charges and encumbrances registered at that time. . .".[3] The court further held that although the Bank's charge was registered, it was not "secured" within the meaning of section 38 of the Corporation Capital Tax Act which, the court stated, referred only to fixed charge security and crystallized floating charge security. As a result, the court concluded that in the non-bankruptcy or pre-bankruptcy context, the provincial lien ranked in priority to the Bank's security.

Post-Bankruptcy Priority

On October 29, 1987, as a result of a bankruptcy petition filed by Foothills Properties Inc. in respect of a judgment it had obtained against Titan, Titan was adjuged bankrupt and a trustee in bankruptcy was appointed.

Section 107(1)(j) of the Bankruptcy Act[4] provides that, upon bankruptcy, provincially created liens become preferred claims. The court held that the provincial Crown in matters of bankruptcy is bound by the scheme of distribution established by the Bankruptcy Act. As a result, one assumes the provincial Crown lien, which ranked in priority to the Bank's charge in a non-bankruptcy context, would rank as a preferred claim subsequent in priority to the Bank's crystallized charge in a bankruptcy context.

The court, however, held that the provincial lien was not terminated on a constitutional basis for *all* purposes in a bankruptcy context. The court stated:[5]

> When the Bank of Montreal's security attached on crystallization to the property of Titan Landco Inc. there was a prior existing statutory lien. The property interest the bank took was limited to whatever equity Titan had remaining when the bank security attached. The bank, then, is not entitled to the amount attached by the Crown's lien. The Crown is not entitled to the amount as it is not a secured creditor for these purposes. The money is left as property of the bankrupt for the trustee to distribute according to the Bankruptcy Act.

In essence, the court determined that, although the provincial *lien* was converted on bankruptcy into a preferred claim and therefore no

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[3] *Supra*, footnote 1, at pp. 117 (B.C.L.R.), 265 (C.B.R.).

[4] R.S.C. 1985, c. B-3.

[5] *Supra*, footnote 1, at pp. 120-121 (B.C.L.R.), 268 (C.B.R.).

longer ranked in priority to the bankrupt's secured creditors, the *assets* which were subject to the lien became the property of the bankrupt estate, to be distributed according to the scheme of distribution set out in section 107 of the Bankruptcy Act.

The decision of the court in *Titan* ensured that a pool of funds was made available to the bankrupt's estate from which the provincial Crown, as a preferred creditor, might well benefit upon the distribution of the bankrupt's estate. Although the provincial Crown would only benefit, if at all, to the extent of a prorated share of the sum it would have received under its lien had *Titan* not been petitioned into bankruptcy, the effect of the provincial lien in a bankruptcy context would, according to the decision in *Titan*:

(i) not only convert the provincial Crown's claim into a preferred claim under section 107 of the Bankruptcy Act; but also

(ii) afford a degree of benefit to preferred and potentially unsecured creditors of the bankrupt, by bringing within the bankrupt's estate those assets which were subject to the provincial lien.

Analysis

The first problem with this decision is that it ignores any notion that the Bank may well have enjoyed a valid second charge against the assets of Titan subsequent in priority to the provincial lien.

For example, assume that a debtor issues a chattel mortgage charging a specific asset in favour of secured creditor A. Assume further, that the debtor then issues a General Security Agreement in favour of secured creditor B. In theory, when secured creditor B enforces its security, and crystallizes its charge, it will enjoy a second charge against the specific asset already charged in favour of secured creditor A. This would be the case, notwithstanding that when the security issued in favour of secured creditor B crystallized, there was no equity remaining in the specific asset charged in favour of secured creditor A capable of being encumbered in favour of secured creditor B. In the event that the security of secured creditor A is for some reason determined to be ineffective or invalid, then (barring issues of law which would restrict either the issuance of such security or its enforceability, and barring collateral agreements affecting priority among secured creditors A and B or the debtor which might affect their relative priority status) the claim of secured creditor B to the specific asset charged firstly by secured creditor A, would be upgraded from a second charge to a first charge on the said asset.

The court in *Titan*, however, simply held that the Bank's Debenture failed to charge any of Titan's assets, as the equity in Titan's assets was already subject to a prior existing provincial lien when the Bank's Debenture crystallized. As a result, there was no equity in Titan's assets capa-

ble of being charged in favour of the Bank when the Bank's Debenture crystallized, and the Bank obtained no charge against those assets of Titan which were subject to the existing provincial lien.

The second problem with the decision in *Titan* is that the Crown, other preferred creditors, and potentially unsecured creditors may realize a "windfall" on account of the decision. It appears that the ostensible purpose of the court's decision was to preclude the Bank from realizing a "windfall" as a result of the prior existing Crown lien becoming a subsequent preferred creditor's claim upon Titan's bankruptcy. Although the court clearly states that the secured creditor ought not to enjoy a "windfall", the court does not explain why it is preferable for a preferred creditor, or unsecured creditor of a bankrupt, to enjoy such a "windfall".

The third problem with the decision in *Titan* involves the court's reasoning in respect of the operation of provincial legislation in a bankruptcy context. In support of its decision, the court stated that even in a bankruptcy context, provincial legislation "may . . . operate to define the rights of secured creditors".[6] This is clearly the case in Ontario, as the Personal Property Security Act[7] most certainly has application in determining the relative priorities of secured parties registered pursuant to that Act in a bankruptcy context. It is quite another matter, however, to assert that provincial legislation can be employed to determine the relative priorities not of secured creditors whose priority ranking is not specifically provided for in the Bankruptcy Act, but in respect of preferred, or unsecured creditors whose priority ranking is specifically provided for in the distribution scheme set out in section 107 of the Bankruptcy Act.

The Saskatchewan Court of Appeal in *Paccar Financial Services Ltd.* v. *Sinco Trucking Ltd. (Trustee of)*[8] dealt with the same issue raised in *Titan* regarding the operation of provincial legislation in a bankruptcy context. The fact situation before the Saskatchewan Court of Appeal was as follows:

(i) Sinco Trucking Ltd. ("Sinco") was a bankrupt;

(ii) Paccar Financial Services Ltd. ("Paccar") leased 4 trucks to Sinco Trucking Ltd. under a "true" lease not intending as security;

(iii) Sinco sold the trucks to bona fide purchasers without notice;

(iv) Amongst other matters, the court held that Paccar's interest in the trucks was subordinated to that of the bona fide purchasers without notice by applying provincial legislation.

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[6] *Ibid.*, at pp. 120 (B.C.L.R.), 268 (C.B.R.).

[7] R.S.O. 1980, c. 375.

[8] (1989), 73 C.B.R. (N.S.) 28 (Sask. C.A.).

The Court of Appeal dealt with the issue before it as follows:[9]

> Section 49(2) [now s. 69(2)] of the Bankruptcy Act provides that a secured creditor can realize or otherwise deal with the security as if the bankruptcy had not occurred. Section 50(1) [now s. 70(1)] provides that the rights of secured creditors are not affected by the bankruptcy and s. 107 provides that the distribution of proceeds is subject to the rights of a secured creditor. It will be noted that these sections preserve the rights of secured creditors. They do not define what rights a secured creditor has in the collateral. A determination of what rights a secured creditor has in the collateral is made under provincial law; in this case, the Act. Section 50(6) [now s. 72(1)] of the Bankruptcy Act recognizes this integrated scheme. That section reads as follows:
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> > (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.
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> It is now clear that a legal integration of the Bankruptcy Act and the provincial laws relating to property and civil rights is not only permissible but desirable and essential. Mr. Justice Beetz, in concurring with Mr. Justice Spence, stated at page 808-809 of *Robinson v. Countrywide Factors Ltd.*, supra [[1978] 1 S.C.R. 753, [1977] 2 W.W.R. 111]:
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> > . . . I am of the view that s. 50, subs. (6) of the *Bankruptcy Act* provides a clear indication that Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws. . .

The Supreme Court of Canada on July 13, 1989 delivered its judgment in *The Queen in right of B.C.* v. *Henfrey Samson Belair Ltd.*[10] This case involved a provincial deemed trust in a bankruptcy context and not, as in *Titan,* a provincial lien. Nevertheless, it is interesting to note that the Supreme Court declined to consider the underlying issue raised in *Titan,* as it would apply to a provincial deemed trust scenario, *i.e.* if the province is divested of its trust property by reason of a conflict between provincial deemed trust legislation and the scheme of distribution contained in the Bankruptcy Act, does that deemed trust property devolve to the secured creditor or is it to be distributed to unsecured creditors in accordance with the scheme of distribution contained in the Bankruptcy Act. As a result, the issue raised in *Titan* and the problems with that decision commented upon herein, have not as yet been addressed by the Supreme Court of Canada.

Conclusion

The issue of whether a provincial lien could rank in priority to a secured creditor's claim in a bankruptcy context appeared to have been

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[9] *Ibid.*, at p. 42.

[10] [1989] 5 W.W.R. 577 (S.C.C.).

settled by the Supreme Court of Canada in *Re Bourgault: Deputy Minister of Revenue of Quebec* v. *Rainville*.[11] The decision of the court in *Titan*, by imbuing the provincial Crown lien with the residual capacity of maintaining assets in the bankrupt's estate, notwithstanding the claims of secured creditors, appears to:

(i) conflict with the Supreme Court of Canada decision in *Rainville*;

(ii) imbue a provincial lien in a bankruptcy context with the residual capacity to maintain assets in the bankrupt's estate, notwithstanding that the lien itself has been converted into a preferred claim and no longer charges the assets;

(iii) ignore any possibility that a secured creditor may enjoy a charge on assets in which no equity remains on the date the secured creditor's charge fixes or crystallizes, in the event that prior encumbrances prove invalid or ineffective by virtue of registration or execution deficiencies, or by operation of law;

(iv) afford provincial liens in a bankruptcy context a status which in some jurisdictions is not even afforded provincial deemed trusts—the arguably more efficacious vehicle for protecting provincial Crown claims in a bankruptcy context;

(v) undercut the value of a secured creditor's security in a bankruptcy context by yet another legislated unregistered encumbrance; thus creating further confusion and uncertainty in the secured creditor's risk assessment and credit analysis of its customer.

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CONSTITUTIONAL LAW—DIVISION OF POWERS—CONSTITUTION ACT, 1867, SECTION 91(2)—VALIDITY OF SECTION 31.1, COMBINES INVESTIGATION ACT: *General Motors of Canada Limited* v. *City National Leasing; Quebec Ready Mix Inc.* v. *Rocois Construction Inc.*

Neil Finkelstein*

Introduction

On April 20, 1989, the Supreme Court of Canada handed down unanimous decisions in *General Motors of Canada Limited* v. *City National Leasing*[1] and *Quebec Ready Mix Inc.* v. *Rocois Construction Inc.*[2] The

[11] [1980] 1 S.C.R. 35, (1980), 33 C.B.R. (N.S.) 301.

*Neil Finkelstein, of the Ontario Bar, Toronto, Ontario.

[1] (1989), 93 N.R. 326 (S.C.C.).

[2] (1989), 93 N.R. 388 (S.C.C.).

two cases raised the same issue about the validity of section 31.1 of the Combines Investigation Act,[3] and the primary judgment was delivered in *City National Leasing*. *Quebec Ready Mix* raised a further issue which will not be addressed here about the jurisdiction of the Federal Court of Canada.

Section 31.1(1) reads as follows:

> 31.1(1) Any person who has suffered loss or damages as a result of
> (a) conduct that is contrary to any provision of Part V, or
> (b) the failure of any person to comply with an order of the Commission or a court under this Act
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> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Section 31.1 created a civil cause of action for damages plus the costs of investigation for breaches of (1) the criminal proscriptions in Part V of the Act; and (2) court orders or orders of the Restrictive Trade Practices Commission (The Commission). A plaintiff did not have to await a conviction in order to sue for breach of the criminal prohibitions, and did not even have to wait for the Attorney General to commence a prosecution. The plaintiff could commence an action without regard to the activities of the regulatory authorities. For breaches of the civil prohibitions in Part IV.I, the plaintiff had to await (1) prosecution by the Director of Investigation and Research under the Act, (2) an order by the Commission, and (3) a breach of that order.

Dickson C.J.C., writing for a unanimous Supreme Court of Canada, upheld the Combines Investigation Act generally pursuant to the federal trade and commerce power in section 91(2) of the Constitution Act, 1867 and, further, held that section 31.1(1) was sufficiently integrated into the statutory scheme to be valid trade and commerce as well.

City National Leasing implicitly overrules the Privy Council's decision in *In re The Board of Commerce Act, 1919, and The Combines and Fair Practices Act, 1919*[4] (*Board of Commerce*) on the trade and commerce point. In *Board of Commerce*, the Supreme Court of Canada and the Privy Council considered the validity of precursor legislation to the Combines Investigation Act. The legislation established a board to administer a scheme directed at the investigation and restriction of monopolies and the regulation of commodity prices and profits. The legislation applied throughout Canada, unlimited as to time.

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[3] R.S.C. 1970, c. C-23 (now s. 36 of the Competition Act, S.C. 1986, c. 26, Part II, which amended, re-numbered and re-named the Combines Investigation Act).

[4] (1920), 60 S.C.R. 456, 54 D.L.R. 354, aff'd, [1922] 1 A.C. 191, (1921), 60 D.L.R. 513 (P.C.)

The Supreme Court of Canada split on the validity of the legislation, with three judges supporting it on the basis of section 91(2) and the peace, order and good government power, and three declaring it *ultra vires*. Viscount Haldane, speaking for the Privy Council, struck down the legislation. He said that it was not criminal law, because it did not relate to a subject "which by its very nature belongs to the domain of criminal jurisprudence",[5] and it could not be supported under section 91(2). In the course of his reasons, Viscount Haldane relegated trade and commerce to a subordinate head to be invoked only in aid of some other independent head of federal power. He said:[6]

> It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell* v. *The Queen* . . . appears to recognize this as constitutionally possible, even in time of peace, but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. . .
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> In the case of Dominion companies their Lordships in deciding the case of *John Deere Plow Co.* v. *Wharton* . . . expressed the opinion that the language of s. 91, head 2, could have the effect of aiding Dominion powers conferred by the general language of s. 91. But that was because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it.

That comment can be contrasted with those of Dickson C.J.C. in *City National Leasing*, where he took the opposite position and upheld competition legislation on trade and commerce grounds:[7]

> It is evident from this discussion that competition cannot be effectively regulated unless it is regulated nationally. As I have said, in my view combines legislation fulfills the three indicia of national scope as described in *Canadian National Transportation*: it is legislation "aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises", it is legislation "that the provinces jointly or severally would be constitutionally incapable of passing" and "failure to include one or more provinces or localities would jeopardize successful operation" of the legislation "in other parts of the country".

City National Leasing is clearly more consonant with Canada's constitutional roots. The Fathers of Confederation intended Canada to have a strong central government. Section 91 of the Constitution Act, 1867 gives Parliament exclusive authority to make laws for the peace, order and good government of Canada in relation to all matters not assigned to

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[5] *Ibid.*, at pp. 198 (A.C.), 518 (D.L.R.).

[6] *Ibid.*, at pp. 197-198 (A.C.), 516-517 (D.L.R.) To the same effect, see *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, at pp. 409, [1925] 2 D.L.R. 5, at p. 13.

[7] *Supra*, footnote 1, at p. 369.

the provinces, in effect giving residual power to Parliament (as contrasted with the United States where the residual power is in the hands of the states), and as well specific exclusive jurisdiction to legislate in relation to, *inter alia*, all of the major economic levers of nationhood,[8] a national criminal law,[9] a broad declaratory power in section 92(10)(c)[10] and, most importantly for our purposes, a broad general power in section 91(2) to regulate "trade and commerce". The unrestricted language in section 91(2) can be contrasted with article I, section 8 of the United States Constitution which limits Congress to the regulation of interstate commerce.

Trade and Commerce Generally; the Jurisprudential Backdrop

Initially, The Supreme Court of Canada gave a broad sweep to the trade and commerce power in *Severn* v. *The Queen*[11] and *City of Fredericton* v. *The Queen*.[12] The reach of *City of Fredericton* was considerably attenuated by the approach taken by the Privy Council in *Russell* v. *The Queen*,[13] and *Severn* was demolished in *Bank of Toronto* v. *Lambe*.[14] Statements in *In re Prohibitory Liquor Laws*[15] show that the Supreme Court of Canada's views on the scope of the trade and commerce power died hard.

Modern courts start from the proposition that the *locus classicus* of the federal trade and commerce power is Sir Montague Smith's judgment in *Citizens Insurance Co.* v. *Parsons*.[16] The first branch of *Parsons* confirmed Parliament's authority to regulate interprovincial and export trade. The second left open the possibility that Parliament could enact "general regulation of trade affecting the whole dominion".[17] *Parsons*

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[8] Control of currency and coinage in s. 91(14); banking, interest, and the issuance of paper money in s. 91(15), (16), (19) and (20); bills of exchange in s. 91(18); and bankruptcy and insolvency in s. 91(21). This broad enumeration was turned on its head by Sir Montague Smith in *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. CAs. 96, at p. 112 (P.C.), where he used it in support of an argument cutting down the scope of the trade and commerce power in s. 91(2).

[9] S. 91(27), as contrasted with the United States where criminal law is a state jurisdiction.

[10] *Cf. Ontario Hydro* v. *OLRB*, unreported, Ontario Divisional Court, released June 12, 1989. See generally, N. Finkelstein, Laskin's Canadian Constitutional Law (5th ed., 1985), p. 627; P. Hogg, Constitutional Law of Canada (2d ed., 1986), pp. 491-493; C.H. McNairn, Transportation, Communication and the Constitution, The Scope of the Federal Jurisdiction (1969), 47 Can. Bar Rev. 355, at pp. 387-388.

[11] (1878), 2 S.C.R. 70.

[12] (1880), 3 S.C.R. 505.

[13] (1882), 7 App. Cas. 289 (P.C.).

[14] (1887), 12 App. Cas. 575, at p. 586 (P.C.).

[15] (1895), 24 S.C.R. 170, rev., [1896] A.C. 348 (P.C.).

[16] *Supra*, footnote 8.

[17] *Ibid.*, at p. 113.

precluded Parliament from regulating contracts of a particular business or trade, as distinct from the trade or business itself.

The cases since *Parsons* have attenuated its pronouncements, holding that not only is Parliament precluded from regulating contracts of particular businesses or trades, but also the particular businesses or trades themselves. As well, at least until *City National Leasing*, the courts refused to give significant scope to the second branch of *Parsons* in respect of general trade and commerce.[18]

Thus in *Attorney General for Canada* v. *Attorney General for Alberta*[19] (*Insurance Reference*), Viscount Haldane said, without citing any relevant authority, that "it must now be taken that . . . [section 91(2)] does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces". This remains good law today as evidenced by the Supreme Court of Canada's decision in *Labatt Breweries of Canada Ltd.* v. *Attorney General for Canada*.[20]

The slow resurrection of the trade and commerce power following *Board of Commerce* began in *Proprietary Articles Trade Association* v.

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[18] In fact, the second branch of *Parsons* has served as a constitutional support in only two cases by a final appellate court prior to *City National Leasing*: *John Deere Plow* v. *Wharton*, [1915] A.C. 330, (1914), 18 D.L.R. 353 (P.C.) (incorporation of companies with federal objects) and *Attorney General for Ontario* v. *Attorney General for Canada* (Canada Standards Trade Mark), [1937] A.C. 405, [1937] 1 D.L.R. 702 (P.C.); *cf. Dominion Stores Ltd.* v. *The Queen*, [1980] 1 S.C.R. 844, (1979), 106 D.L.R. (3d) 581 (national standards marks). In general, to illustrate the judicial attitude, in *Attorney General for Ontario* v. *Attorney General for Canada*, [1896] A.C. 348, at p. 363 (P.C.) (local prohibition), Lord Watson considered whether the Canada Temperance Act could be supported by, *inter alia*, s. 91(2). He relied upon *Toronto* v. *Virgo*, [1896] A.C. 88 (P.C.), a case involving construction of a muncipal charter rather than a constitution, to hold that the power to regulate in s. 91(2) did not include the power to prohibit:

> The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactents of the Canadian statute of 1886 as regulations of trade and commerce.

This can be compared with the statement of Strong C.J.C. in *Huson* v. *South Norwich* (1895), 24 S.C.R. 145, at p. 149, that the "difference between regulating and licensing and prohibiting is one of degree only" and the characterization by Marshall C.J. in *Gibbons* v. *Ogden*, 22 U.S. 1, at p. 196 (1824), of the power to regulate as being "to prescribe the rule by which commerce is to be governed".

[19] [1916] 1 A.C. 588, at p. 596, (1916), 26 D.L.R. 288, at p. 192 (P.C.).

[20] [1980] 1 S.C.R. 914, (1979), 110 D.L.R. (3d) 594.

Attorney General for Canada,[21] a case which, until *City National Leasing*, was the cornerstone of the constitutional validity of federal combines legislation.

Lord Atkin, speaking for the Privy Council, distinguished the legislation under review in *Board of Commerce* from that before him in *Proprietary Articles Trade Association* on the basis that the *Board of Commerce* legislation empowered an administrative board, as opposed to a court, to prohibit specific accumulations, force sales at prices fixed by the board, and limit profits. Here there was a general definition section, a general condemnation, and penal consequences flowed from judicial determination rather than administrative action. He upheld the legislation as criminal law, rejecting Viscount Haldane's notion that there was a fixed domain of criminal law, and left open the possibility that it could have a trade and commerce basis as well. This possibility remained undecided until now. The courts since *Proprietary Articles Trade Association* have consistently upheld competition legislation which has come before them on criminal law grounds.[22]

Laskin C.J.C.'s majority judgment in *MacDonald* v. *Vapor Canada*[23] was the first indication that the Supreme Court of Canada was willing to consider seriously a trade and commerce basis for competition law. There, the plaintiff alleged that a former employee had violated section 7(e) of the federal Trade-marks Act,[24] which prohibited business practices which were "contrary to honest industrial or commercial usage in Canada". Section 7(e) thus had nothing to do with trademarks. It was a general proscription against unfair competition. In effect, like section 31.1 of the Combines Investigation Act, it created a statutory tort enforceable by private action.

While Laskin C.J.C. struck down section 7(e), his judgment laid the foundation for the movement away from *Board of Commerce*. His concern was not that section 91(2) could not support competition law, but rather that the enforcement of section 7(e) was unconnected to any regulatory scheme administered by a public agency.

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[21] [1931] A.C. 310, [1931] 2 D.L.R. 1 (P.C.).

[22] For a general review, see N. Finkelstein, Comment (1984), 62 Can. Bar Rev. 182. The cases are: *Reference re section 498A of the Criminal Code*, [1936] S.C.R. 363, [1936] 3 D.L.R. 593, aff'd on appeal, [1937] A.C. 368, [1937] 1 D.L.R. 688, [1937] 1 W.W.R. 317 (P.C.); *Reference re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379, [1936] 3 D.L.R. 607; *Goodyear Tire and Rubber Co.* v. *The Queen*, [1956] S.C.R. 303, (1956), 2 D.L.R. (2d) 11; *R.* v. *Campbell*, [1966] S.C.R. v, (1965), 58 D.L.R. (2d) 673, aff'g (1964), 46 D.L.R. (2d) 83 (Ont. C.A.).

[23] [1977] 2 S.C.R. 134, (1976), 66 D.L.R. (3d) 1. For a comment on this case, see P. Hogg (1976), 54 Can. Bar Rev. 361. See also Finkelstein, *loc. cit.*, footnote 22.

[24] R.S.C. 1970, c. T-10, now R.S.C. 1985, c. T-13.

In his minority concurrence in *Attorney General of Canada* v. *Canadian National Transportation*,[25] Dickson J. picked up on these points and would have upheld the conspiracy provision of section 32 of the Combines Investigation Act as valid trade and commerce.[26] The key to his characterization is contained in the following paragraph of his judgment, which draws its support in part from *Vapor Canada*:[27]

> In approaching this difficult problem of characterization it is useful to note the remarks of the Chief Justice in *MacDonald* v. *Vapor Canada Ltd.* . . . in which he cites as possible *indicia* for a valid exercise of general trade and commerce power the presence of a national regulatory scheme, the oversight of a regulatory agency and a concern with trade in general rather than with an aspect of a particular business. To this list I would add what to my mind would be even stronger indications of valid general regulation of trade and commerce, namely (i) that the provinces jointly or severally would be constitutionally incapable of passing such an enactment and (ii) that failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.

Thus Dickson J. held that the indicia for a valid exercise of the general trade and commerce power are:

(1) the presence of a national regulatory scheme;
(2) the oversight of regulatory agency;
(3) a concern with trade in general rather than an aspect of a particular business;
(4) a constitutional incapability of the provinces, either jointly or severally, to pass a particular enactment;
(5) a situation where failure to include one or more provinces or localities would jeopardize the successful operation of the entire scheme.

Thus, even prior to *City National Leasing*, one could see an ever-expanding view of the scope of section 91(2) from its nadir in *Board of Commerce* through to *Vapor Canada* and *Canadian National Transportation*. However, the Supreme Court of Canada in the latter two cases did not have to uphold squarely legislation on that basis. In *Vapor Canada*, the tone of Laskin C.J.C.'s reasoning was decidedly federalist, but his decision was against the federal legislation. In *Canadian National Transportation*, Dickson J. wrote only a minority concurrence. Laskin C.J.C., speaking for the majority, upheld federal prosecutorial power as ancillary to the criminal law power in section 91(27) of the Constitution Act, 1867. Thus, he did not have to deal with section 91(2).

City National Leasing

With the groundwork that had been laid in *Vapor Canada* and *Canadian National Transportation*, the Supreme Court of Canada in *City National Leasing* had little trouble upholding the Combines Investigation Act on

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[25] [1983] 2 S.C.R. 206, (1983), 3 D.L.R. (4th) 16.

[26] For a comment on Dickson J.'s judgment, see Finkelstein, *loc. cit.*, footnote 22.

[27] *Supra*, footnote 25, at pp. 267-268 (S.C.R.), 62 (D.L.R.).

the basis of section 91(2). Clearly the Act met the five criteria gleaned from those two cases.

First, the Act, established a national regulatory scheme. As stated by the Chief Justice, the "presence of a well orchestrated scheme of economic regulation is immediately apparent on examination of the *Combines Investigation Act* ".[28] The Act identified and defined anti-competitive conduct, established an investigative mechanism through the Director of Investigation and Research, and provided an extensive range of criminal and administrative redress.

Second, apart from section 31.1, the scheme operated under the oversight of an agency.

Dickson C.J.C. rolled the last three of the five criteria together, those being (1) a concern with trade in general, (2) a constitutional incapability of the provinces, either singly or together, to pass a particular enactment, and (3) a situation where failure to include all the provinces would jeopardize the scheme. Dickson C.J.C. pointed out that these criteria all share a common theme. They are indicators that the scheme in question is national in scope, and that local regulation would be inadequate.

As to the statute's generality, the Act was concerned with commercial practices which are not peculiar to any particular place, business or industry. For example, civil proscriptions against abuse of dominant position or refusal to deal, or criminal prohibitions against misleading advertising or predatory pricing, are not endemic to any particular business or class of business. They cut across industrial lines and apply to the economy as a whole. Their purpose is to ensure a healthy level of competition in the Canadian economy throughout the country.

As to the last two criteria, Dickson C.J.C. took judicial notice that the "deleterious effects of anti-competitive practices transcend provincial boundaries",[29] and contrasted the generality of the Combines Investigation Act with the specificity of the impugned Food and Drugs Act[30] regulations struck down in *Labatt Breweries of Canada Ltd.* v. *Attorney General of Canada*.[31]

As an aside, it is troubling that Dickson C.J.C. distinguished *Labatts* in one sentence on the basis that "the legislation regulated a single trade or industry",[32] and apparently approved the case.[33] *Labatts* is a difficult case. In *Labatts*, the federal Cabinet was empowered by the Food and

[28] *Supra*, footnote 1, at p. 362.

[29] *Ibid.*, at p. 366.

[30] R.S.C. 1985, c. F-27.

[31] *Supra*, footnote 20.

[32] *Supra*, footnote 1, at p. 366.

[33] See, in particular, *supra*, footnote 1, at p. 380, where the Chief Justice appears to affirm the correctness of *Labatts*.

Drugs Act to pass regulations setting national standards for, *inter alia*, light beer. The regulation prohibited any person from marketing beer with greater than 2.5% alcoholic content as light beer. Estey J., speaking for a majority of the Supreme Court of Canada, struck down the legislation as detailed regulation of particular industries by means of a series of codes.

That characterization is not at all clear. In his dissenting reasons in *Labatts*, Laskin C.J.C. characterized the regulation entirely differently, viewing it as national standards regulations of a type which fortifies the Canadian economic union:[34]

> I do not press any perfect analogy to the prescription of common standards for an article of food which is produced throughout the country and which is also imported from abroad, but it does appear to me that if Parliament can set up standards for required returns for statistical purposes, it should be able to fix standards that are common to all manufacturers of foods, including beer, drugs, cosmetics and therapeutics devices, at least to equalize competitive advantages in the carrying on of business concerned with such products. . .
>
> The operations of Labatt Breweries and of other brewers of beer extend throughout Canada, and I would not attenuate the federal trade and commerce power any further than has already been manifested in judicial decisions by denying Parliament authority to address itself to uniform prescriptions for the manufacture of food, drugs, cosmetics, therapeutic devices in the way, in the case of beer, of standards for its production and distribution according to various alcoholic strengths under labels appropriate to the governing regulations.

One would have hoped that, in light of Laskin C.J.C.'s further comments in *Kripps Pharmacy*,[35] Dickson C.J.C. would have taken the opportunity here to signal a willingness to reconsider *Labatts* in a proper case.

Another case of relevance to the section 91(2) discussion is *Reference re Anti-Inflation Act*.[36] *City National Leasing* states that a degree of generality is a prerequisite for valid federal legislation in this area. On the other hand, the *Anti-Inflation Reference* illustrates that a federal statute can become *too* general to be supported by the national dimensions doctrine of the peace, order and good government power and thus, I suggest, by its first cousin, *Parsons*'s second branch.

In the *Anti-Inflation Reference*, the purpose of the Act was to contain and reduce inflation. To achieve this end, it regulated profit mar-

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[34] *Supra*, footnote 20, at pp. 921-922 (S.C.R.), 599 (D.L.R.).

[35] Laskin C.J.C. appears to have subsequently opened up the *Labatts* decision to reconsideration by his remarks for a majority of the Supreme Court of Canada in *R. v. Wetmore*, [1983] 2 S.C.R. 284, at p. 288, (1983), 2 D.L.R. (4th) 577, at p. 58. See Finkelstein, *loc. cit.*, footnote 22, at pp. 194-196; N. Finkelstein, Laskin's Four Classes of Liberty (1987), 66 Can. Bar Rev. 227, at pp. 256-257.

[36] [1976] 2 S.C.R. 373, (1976), 68 D.L.R. (3d) 452. See Finkelstein, Laskin's Four Classes of Liberty, *ibid.*, at pp. 254-256.

gins, prices, dividends and compensation in the private and federal public sectors. A public board was established by the Act to implement the legislation.

The Act was clearly economic regulation designed to combat an economic problem of national dimensions. It applied throughout Canada, was limited as to time, did not attempt to regulate any particular trade or business, or groups thereof, and no province acting alone could do what it purported to do. It is true that a province could enact the particular provisions and apply them to the private or provincial public sectors in the province. However this would not have been effective as an inflation-fighting device. While intraprovincially produced goods would be caught, unregulated goods produced elsewhere and imported into the province would continue to feed inflation therein, thereby frustrating any provincial scheme.

Laskin C.J.C., speaking for four of the nine judges, including Dickson J., acknowledged the possibility of anchoring the legislation in the federal trade and commerce power. However the five remaining judges rejected the national dimensions doctrine, and therefore implicitly rejected the trade and commerce power, as a constitutional support.

The rationale for this rejection was not clearly articulated by either Ritchie J. for three judges in his minority concurrence or by Beetz J. for the two dissenters, but Beetz J. came the closest to articulating a reason. He said that where a program is all-embracing, as is the Anti-Inflation Act, the test of validity is the nature of the specific subject matter covered and its effect, not the legislation's ultimate purpose. In the *Anti-Inflation Reference*, many of the subjects of regulation such as labour, production and capital markets fell within provincial jurisdiction under section 92(13). Parliament was thus precluded from entering the field in this broad way regardless of its purpose.

I would argue that the fact that the Anti-Inflation Act touched many subjects in their anti-inflationary aspect is a virtue, not a vice. The generality which should have anchored the regulation in the national dimensions doctrine or the trade and commerce power would have preserved provincial jurisdiction. If the federal legislation had been more specific, such as by regulating particular trades instead of the private sector generally, it would have been harder to argue that the Act was designed for the broad purpose of combatting inflation.

By contrast, Laskin C.J.C. (with, *inter alios*, Dickson J. concurring) specifically adverted to the trade and commerce power. His most telling statement in that regard is as follows:[37]

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[37] *Ibid.*, at pp. 426-427 (S.C.R.), 498-499 (D.L.R.).

> Since no argument was addressed to the trade and commerce power I content myself with observing only that it provides the Parliament of Canada with a foothold in respect of "the general regulation of trade affecting the whole dominion", to use the words of the Privy Council in *Citizens Insurance Co.* v. *Parsons* [(1881), 7 App. Cas. 96] at p. 113. The *Anti-Inflation Act* is not directed to any particular trade. It is directed to suppliers of commodities and services in general and to the public services of governments, and to the relationship of those suppliers and of the public services to those employed by and in them, and to their overall relationship to the public. With respect to some of such suppliers and with respect to the federal public service, federal legislative power needs no support from the existence of exceptional circumstances to justify the introduction of a policy of restraint to combat inflation.
>
> The economic interconnection with other suppliers and with provincial public services, underlined by collective bargaining conducted by, or under the policy umbrella of trade unions with Canada-wide operations and affiliations, is a matter of public general knowledge of which the court can take judicial note.

In my view, and subject to a comment referred to below made by Dickson C.J.C., the Anti-Inflation Act meets all five of the criteria for validity pursuant to section 91(2) established by the Chief Justice in *City National Leasing*. It (1) established a national regulatory scheme, (2) was overseen by a federal board, (3) was concerned with the operation of the economy in general rather than with any particular business, (4) the provinces could not as a practical matter enact an effective statute similar to the Anti-Inflation Act, and (5) the failure to include all the provinces would have jeopardized the scheme.

That being said, it must be noted that, in responding to an argument that section 31.1 "tilts the constitutional balance . . . in favour of Parliament",[38] Dickson C.J.C. said:[39]

> It is also worth mentioning that *in itself s. 31.1.* does not share the characteristics of provisions that were not upheld as exercises of the general trade and commerce power: . . . (b) regulating a series of individual trades by various regulations or trade codes applicable to each individual sector (*re Anti-Inflation Act*). . .

At first blush, this paragraph seems to say that *City National Leasing* may not have implications for statutes like the Anti-Inflation Act. However there are difficulties with such a construction of the paragraph. First, it does not appear to be an accurate characterization of the Anti-Inflation Act. As indicated above, the Act was highly general in nature. It was not a series of "trade codes".

Second, Dickson C.J.C. was careful to say in the underlined portion of the quotation that "in itself, s. 31.1" does not share those characteristics. That may well be so, having regard to the fact that section 31.1 merely creates a new statutory cause of action. However I would argue that the Combines Investigation Act as a whole shares the charac-

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[38] *Supra*, footnote 1, at p. 379.

[39] *Ibid.*, at pp. 379-380. (Emphasis added).

teristics of the Anti-Inflation Act for the reasons set out above. If the Chief Justice is saying the opposite, and I am not persuaded that he is, he does not clearly articulate the reasons for his conclusion.

Third, elsewhere in his judgment the Chief Justice makes the following tantalizing comment:[40]

> On the other hand, competition is not a single matter, *any more than inflation* or pollution. The provinces too, may deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like. The point is, however, that Parliament also has the constitutional power to regulate intraprovincial aspects of competition.

I would suggest that *City National Leasing* can be read as opening the door to a move away from the view of the five judges in the *Anti-Inflation Reference* that such legislation could only be upheld in a peacetime emergency. The case stands as support not only for a wider view of the trade and commerce power, but also for the national dimensions element of the peace, order and good government power. In 1947, Laskin was forced in an article to call the peace, order and good government power the "favourite whipping boy" in Canadian constitutional law.[41] That may no longer be true. The general power has been reinvigorated in the last fifteen years. Inflation legislation was upheld on the basis of that power in the *Anti-Inflation Reference*, narcotic control legislation in *R.* v. *Hauser*,[42] and pollution legislation in *R.* v. *Crown Zellerbach*.[43] I would suggest that *City National Leasing* is a logical progression in the expansion of both the second branch of *Parsons* and the national dimensions doctrine of peace, order and good government power.[44]

The most difficult aspect of *City National Leasing* is the validity of section 31.1. of the Combines Investigation Act. The section creates a civil cause of action which is unconnected with the system of regulatory

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[40] *Ibid.*, at p. 371. (Emphasis added).

[41] B. Laskin, Peace, Order and Good Government Re-Examined (1947), 25 Can. Bar Rev. 1054, at p. 1054.

[42] [1979] 1 S.C.R. 984, (1979), 98 D.L.R. (3d) 193.

[43] [1988] 1 S.C.R. 401, (1988), 49 D.L.R. (4th) 161.

[44] The difficulty is that the court does not say in *City National Leasing* that this is what it is doing. Thus it may be that *City National Leasing* and the *Anti-Inflation Reference* do not sit comfortably together. On one hand, *City National Leasing* requires a broad degree of generality as a constitutional support for federal legislation. On the other, five of nine judges in the *Anti-Inflation Reference* held that legislation which appears to fall within Dickson C.J.C.'s five criteria can nevertheless be too general to be supported by the national dimensions doctrine. On this view of the two cases, Parliament must tread a fine line. If the legislation is too specific, it will run afoul of the *Insurance Reference* and *Labatts* and be struck down. If it is too general, catching a great many provincial subject matters in its sweep (and we do not know how many is too many), the legislation will also be struck down, this time for being overly broad. The cases do not indicate when a constitutionally permissible degree of generality shades into a unconstitutionally broad one.

oversight. One could characterize it in the words of Laskin C.J.C. in *Vapor Canada*[45] to the effect that its "enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency. . .".

Dickson C.J.C. upheld section 31.1. In the course of his reasons, he said:[46]

> I am of the opinion that the necessary link between s. 31.1 and the *Act* exists. Section 31.1 is an integral, well-conceived component of the economic regulation strategy found in the *Combines Investigation Act*. Even if a much stricter test of fit were applied—for instance, one of "necessarily incidental"—s. 31.1 would still pass the test. Under the test of "functionally related" the section is clearly valid.

I have some difficulty with the Chief Justice's statement that section 31.1 would pass the necessarily incidental test. No reasons are given for this conclusion. I would argue to the contrary that the section is clearly severable from the rest of the Act. The Act can stand alone and operate quite well without section 31.1. As to section 31.1 itself, in practical terms it operates independently of the overall regulatory scheme.

A plaintiff claiming to have been damaged by breaches of the criminal proscriptions in Part V does not have to wait until the Director of Investigation and Research takes action. The plaintiff does not even have to make a complaint. He can simply institute civil proceedings without notice to the Director, the Attorney General or any other regulatory authority. On this view, one could argue that the section does not bear a close enough relationship to the overall regulatory scheme, and is thus invalid.[47]

On the other hand, one could argue, as Dickson C.J.C. did in a broad sense, that, having regard to the purpose of the Act as a whole and the fact that section 31.1 is a remedial provision, the section is sufficiently integrated into the scheme to be valid. He is clearly right that it is "functionally related to the general objective of the legislation".[48] If that is the test, the section passes it.

The difficulty that I have with Dickson C.J.C.'s judgment is not with his conclusion, but rather with his reasoning. Specifically, I quarrel with the fact that he tests the "functional relationship" of section 31.1 to the rest of the Act by reference to "the extent of the provision's intrusion into provincial powers".[49]

I would submit that the degree of intrusion into provincial powers should not be an issue in the analysis. The proper approach to determining the constitutionality of section 31.1 is, as with any other statutory

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[45] *Supra*, footnote 23, at p. 165 (S.C.R.), 25 (D.L.R.).

[46] *Supra*, footnote 1, at pp. 373-374.

[47] See Finkelstein, *loc. cit.*, footnote 22, at pp. 192-193.

[48] *Supra*, footnote 1, at p. 373.

[49] *Ibid.*

provision, to (1) characterize the "matter" of both section 31.1 and the Act as a whole, (2) assess the degree of integration of section 31.1 into the legislative scheme, and then (3) decide whether there was a sufficient connection between section 31.1 and the Act generally to uphold the provision. Dickson C.J.C. performed steps (1) and (2). However, as to step (3), one gets the sense that the major issue was that of provincial "intrusion" or "encroachment", not one of determining the constitutionally required nexus between section 31.1 and the rest of the Act. The Chief Justice said:[50]

> Here the court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. *In arriving at the correct standard the Court must consider the degree to which the provision intrudes on provincial powers.*

The difficulty is that there is no federal "encroachment" on provincial subject matters where a matter is within the federal catalogue of powers in section 91. Put another way, the issue is not whether the legislation affects (or "encroaches upon") provincial subjects, but rather whether its object and purpose is *in relation to* a federal one.[51] As stated by the Privy Council in *Hodge* v. *The Queen*:[52]

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[50] *Ibid.*, at p. 355. (Emphasis added). Dickson C.J.C. goes on to recognize, at p. 357, that a number of cases over the years have formulated different verbal tests for the appropriate nexus between the impugned legislation and the scheme to which it is attached. Dickson C.J.C. put it this way, at p. 357: "In different contexts courts have set down slightly different requirements, viz.: 'rational and functional connection' in *Papp* v. *Papp*, [1970] 1 O.R. 331; *R.* v. *Zelensky*, [1978] 2 S.C.R. 940; 21 N.R. 372, and *Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161; 44 N.R. 181; "ancillary", "necessarily incidental" and "truly necessary" in the *Regional Municipality of Peel* v. *MacKenzie* . . .; "intimate connection", "an integral part" and "necessarily incidental" in *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115; 28 N.R. 107; "integral part" in *Clark* v. *Canadian National Railway Co.*, [1988] 2 S.C.R. 680; 89 N.R. 81; 89 N.B.R. (2d) 116; 226 A.P.R. 116; "a valid constitutional cast by the context and association in which it is fixed as a complementary provision" in *Vapor Canada*, . . . ; and "truly necessary" in *R.* v. *Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695; 30 N.R. 249." Dickson C.J.C. rationalizes those various tests on the basis that the degree of nexus required varies depending upon the degree to which the impugned federal provision encroaches on provincial powers.

[51] See, for example, *Carnation Company Ltd.* v. *Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, (1968), 67 D.L.R. (2d) 1; *Multiple Access* v. *McCutcheon*, [1982] 2 S.C.R. 161, (1982), 138 D.L.R. (3d) 1; *Gold Seal Ltd.* v. *Dominion Express Co.* (1921), 62 S.C.R. 424, 62 D.L.R. 62; *Canadian Indemnity Co.* v. *Attorney General for British Columbia*, [1977] 2 S.C.R. 504, (1976), 73 D.L.R. (3d) 111; *Reference re Validity of s. 6 of the Saskatchewan Farm Security Act, 1944*, [1947] S.C.R. 394, [1947] 3 D.L.R. 689, which distinction was adopted on appeal in *Attorney General for Saskatchewan* v. *Attorney General for Canada*, [1949] A.C. 110, [1949] 2 D.L.R. 145 (P.C.).

[52] (1883), 9 App. Cas. 117, at p. 130 (P.C.). This principle is also reflected in Chief Justice Marshall's statement in *Gibbons* v. *Ogden, supra*, footnote 18, at p. 90:

> . . . subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

On Dickson C.J.C.'s test, the issue of whether the legislation is in relation to a federal subject matter ceases to be determinative. The heart of the inquiry is converted into an assessment of the impact of the legislation on provincial power.[53] This in effect revives the old "trenching doctrine" enunciated by the Privy Council in *Tennant* v. *Union Bank*.[54] It presumes that Parliament can impinge upon the provincial catalogue of powers in section 92 when it legislates in relation to a subject matter in section 91. This approach was criticized by Laskin:[55]

> [The use of the trenching doctrine] . . . to explain a privileged encroachment on provincial legislative authority is purely gratuitous because once a court is satisfied that impugned legislation carries a federal "aspect" no invasion of provincial legislative authority exists.

In principle, then, the true test is stated by Rand J. for the majority of the Supreme Court of Canada in *Attorney General of Canada* v. *Canadian Pacific Railway and Canadian National Railway*:[56]

> Powers in relation to matters normally within the provincial field, especially of property and civil rights, are inseparable from a number of the specific heads of s. 91 . . . under which scarcely a step could be taken that did not involve them. *In each case the question is primarily not how far Parliament can trench on s. 92 but rather to what extent are property and civil rights within the scope of the paramount power of Parliament.*

Federal legislation which touches upon matters which, standing on their own, might not be in relation to federal subjects within section 91, might nevertheless become so because they are either necessarily or rationally[57] connected to the attainment of admittedly federal objects. Validity should be determined by reference to the connection between the legislation and the attainment of the federal objects, not by reference to provincial interests. This is supported by the wording of section 91, which establishes exclusive fields of jurisdiction for Parliament, and is reinforced by the closing words of section 91 which state that any matter coming

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"All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

[53] This has, of course, been done in other cases. See *Attorney General for Manitoba* v. *Attorney General for Canada*, [1929] A.C. 260, [1929] 1 D.L.R. 369; *Attorney General for Canada* v. *Readers' Digest Association (Canada) Ltd.*, [1961] S.C.R. 775, at p. 793, (1961), 30 D.L.R. (2d) 296, at p. 312.

[54] [1894] A.C. 31 (P.C.).

[55] *Loc. cit.*, footnote 41, at p. 1060.

[56] [1958] S.C.R. 285, at p. 290, (1958), 12 D.L.R. (2d) 625, at p. 628. (Emphasis added).

[57] See, for example, the cases cited in Dickson C.J.C.'s quotation excerpted, *supra*, footnote 50, for some of the formulations which have been used.

within any of the classes of subjects enumarated in section 91 shall be deemed not to come within section 92.

In the result, Dickson C.J.C. upheld section 31.1 on the basis that it was sufficiently integrated into the valid Combines Investigation Act scheme and did not overly intrude into provincial spheres. He held that (1) remedial provisions like section 31.1 are typically less intrusive in relation to provincial powers, (2) the section 31.1 action has a limited scope, being confined to the four corners of the Act, and (3) Parliament is not precluded from creating civil causes of action in any event.

Conclusion

City National Leasing is a foundation case in Canadian constitutional law. It reinvigorates a central federal power and implicitly overrules a major relic from Privy Council days.

My major criticism is that Dickson C.J.C.'s "provincial encroachment" test as a criterion of validity of federal legislation should be reconsidered. At best, it simply adds a new verbal test to the myriad of old ones. At worst, it reflects an attitude that federal power exists in some cases only where it is unobtrusive. That is not true to the scheme of sections 91 and 92 of the Constitution Act, 1867 or even to the central thrust of *City National Leasing* itself.

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FEDERAL JURISDICTION—PENDENT PARTIES—
ABORIGINAL TITLE AND FEDERAL COMMON LAW—
CHARTER CHALLENGES—REFORM PROPOSALS:
Roberts v. *Canada*.

J.M. Evans and Brian Slattery*

Introduction

Nearly twenty years after its foundation, the Federal Court of Canada is still struggling for acceptance by the legal profession. Some critics attribute this to the disappointing quality of the court's jurisprudence and the dubious nature of certain appointments to its bench. Whatever merits these criticisms may have—and they can be overstated—they do not go to the heart of the problem. The fundamental reason for the court's difficulties is that its existence challenges the pre-eminent position long enjoyed by superior courts in the essentially unitary judicial

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*J.M. Evans and Brian Slattery, both of Osgoode Hall Law School, York University, North York, Ontario.

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system established by the Constitution Act, 1867.[1] As La Forest J. has recently noted in a different context: "They may not, in strictness, be national courts, but they are the ordinary courts of the land to which the citizen customarily turns when he has need to resort to the administration of justice."[2]

The Federal Court's apparently endless jurisdictional difficulties are both a symptom and a cause of the problem. The most important difficulties stem from the widely held judicial view that the constitutional status of superior courts should be protected, and that Parliament's power to create courts of federal jurisdiction under section 101 of the Constitution Act, 1867 accordingly ought to be narrowly construed. This approach is equally evident in the strict interpretation placed by the courts on various provisions of the Federal Court Act[3] itself.

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[1] Ss. 96-100.

[2] *Ontario (A.G.)* v. *Pembina Exploration Can. Ltd.*, [1989] 1 S.C.R. 206, at p. 225.

[3] R.S.C. 1985, c. F-7. See, for example, *Northern Pipeline Agency* v. *Perehinec*, [1983] 2 S.C.R. 513, where the issue was whether the Federal Court's exclusive jurisdiction in s. 17(2)(*b*) over cases in which "the claim arises out of a contract entered into by or on behalf of the Crown" applied to proceedings for breach of contract instituted against a Crown corporation, an agency of the Crown. The court held that it did not. The approach to the interpretation of the Act was formulated by Estey J. as follows (at pp. 521-522):

> The transfer of jurisdiction to the Federal Court of Canada, *inter alia*, in all cases where relief is claimed against the Crown, signifies an exception to the general rule [that the superior courts of the provinces have general jurisdiction over federal and provincial matters]. There remains, however, as a fundamental principle of the court system as structured by the *Constitution Act, 1867, a presumption of jurisdiction in the provincial courts*. (Emphasis added).

See also, *Law Society of B.C.* v. *A.-G. Can.* (1980), 108 D.L.R. (3d) 753 (B.C.C.A.) (Federal Court's power to grant a declaration as "relief" against the Crown and the Attorney-General pursuant to ss. 17(1), 18(*b*)) does not include a declaration of invalidity: this point of statutory interpretation was left open in the Supreme Court of Canada, [1982] 2 S.C.R. 307, at p. 326); *Minister of Indian Affairs and Northern Development* v. *Ranville*, [1982] 2 S.C.R. 518 (s. 96 judges always act as such for the purpose of s. 2(*g*) of the Federal Court Act, and are therefore unreviewable by the Federal Court); *R.* v. *Miller*, [1985] 2 S.C.R. 613 (Federal Court's exclusive jurisdiction under s. 18(*a*) to issue *certiorari* against "a federal board, commission or other tribunal" does not include *certiorari* when used in aid of *habeas corpus*); see, *infra*, footnote 95.

The courts' generous approach to the constitutional and statutory scope of the Federal Court's jurisdiction in respect of Canadian maritime law provides a sharp contrast: see, for example, *ITO-International Terminal Operators Ltd.* v. *Miida Electronics Inc.*, [1986] 1 S.C.R. 752; for a comment on this decision, see H.P. Glenn (1987), 66 Can. Bar Rev. 360; earlier cases are reviewed by J.M. Evans (1981), 59 Can. Bar Rev. 124, esp. at pp. 148-150. See also *infra*, footnotes 9 and 16.

For an excellent overview of the Federal Court's jurisdiction, see D. Sgayias *et al.*, Federal Court Practice 1988 (1987), Part I. The Supreme Court has recently reaffirmed the importance of the essentially unitary court system in Canada's constitutional structure: *Ontario (A.G.)* v. *Pembina Exploration Can. Ltd.*, *supra*, footnote 2.

The jurisdictional problems afflicting the Federal Court became apparent in three decisions handed down by the Supreme Court of Canada in the late 1970s: *Quebec North Shore*,[4] *McNamara Construction*,[5] and *Thomas Fuller Construction*.[6] These decisions held that two requirements must be met before the Federal Court may assume jurisdiction in a case. The first stems from the fact that, unlike the superior courts, the Federal Court is a statutory court and has no inherent jurisdiction. So, the court may only entertain a matter if the Federal Court Act or some other federal statute gives it jurisdiction. We may call this the *statutory requirement*. However, Parliament does not have an unlimited power to confer jurisdiction on the Federal Court. Its power is strictly confined by the wording of section 101 of the Constitution Act, 1867, which authorizes Parliament to create "additional Courts for the better Administration of the Laws of Canada". The Supreme Court focused on the phrase, "Laws of Canada", and held that it referred only to *federal* laws, to the exclusion, in particular, of provincial laws.[7] Thus, even where the statutory requirement is satisfied, it must further be shown that a proceeding is squarely grounded on "applicable and existing federal law"[8] before the Federal Court can entertain it. We may call this second hurdle the *constitutional requirement*.

The next question is what sort of law can be said to constitute "federal law". Acts of Parliament and federal subordinate legislation obviously qualify. The court also held that the common law relating to matters within federal jurisdiction may in some cases constitute federal law, and it cited as an example the common law rules governing the liability of the federal Crown. However, the court rejected the broader proposition that a law was federal merely because Parliament had the constitutional power to amend or replace it. In other words, the constitutional reach of federal judicial power was not coterminous with federal legislative competence.[9] Thus, a party suing the federal Crown could be required by statute to resort to the Federal Court, because the common

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[4] *Quebec North Shore Paper Co.* v. *Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054.

[5] *McNamara Const. (Western) Ltd.* v. *The Queen*, [1977] 2 S.C.R. 654.

[6] *The Queen* v. *Thomas Fuller Const. Co. (1958) Ltd.*, [1980] 1 S.C.R. 695.

[7] In contrast, provincial legislatures are empowered by section 92(14) of the Constitution Act, 1867 to confer jurisdiction upon inferior provincial courts over matters falling within federal legislative competence: *Pembina Exploration Can. Ltd.*, *supra*, footnote 2.

[8] *Quebec North Shore Paper Co.*, *supra*, footnote 4, at pp. 1065-1066 (per Laskin C.J.C.).

[9] Maritime law is something of an exception: see footnotes 3 and 16. The court has interpreted both the statutory grant of jurisdiction and the federal nature of the law that nourishes it as co-extensive with Parliament's power to legislate in matters of navigation and shipping, conferred by s. 91(10) of the Constitution Act, 1867.

law respecting Crown liability qualified as federal law. However, the Federal Court would not generally have jurisdiction over a suit by the federal Crown against another party, as for breach of contract or in tort, because its rights would not normally depend upon a law of Canada, but upon provincial law.[10]

The Supreme Court further ruled that these strict constitutional limitations would not be relaxed to enable the Federal Court to decide the legal rights and duties of a third party or a co-defendant in a proceeding otherwise governed by federal law and within the court's jurisdiction.[11] If the legal rights and duties of the added party are not "based" on federal law, but are only "affected" by it, then a separate proceeding must be instituted in a provincial court, even though the claim against the party defendant or third party arises from essentially the same facts as the main action.

These constitutional restrictions on federal jurisdiction have caused litigants serious inconvenience, expense and delay. The most egregious problems have arisen in multi-party litigation involving the federal Crown, due largely to section 17(1) of the Federal Court Act, which gives the court *exclusive* jurisdiction in all cases where relief is claimed against the federal Crown.[12] A plaintiff who is suing the federal Crown in the Federal Court, as section 17(1) requires, will normally be unable to join another party, such as a Crown servant, as a co-defendant unless the co-defendant's liability also depends on federal law. For the same reason, the Crown as defendant cannot serve a third party notice because claims to contribution or indemnity do not rest on federal law. Separate proceedings must be instituted for this purpose in provincial courts, which, of course, will not be bound by the findings or result of the main action. Moreover, the federal Crown cannot be made a party defendant, served with a third party notice, or subjected to a counterclaim in proceedings for relief instituted by a private litigant in a provincial court. This is because claims against the Crown must be brought in the Federal Court under section 17(1).

Two Supreme Court decisions released in 1980 suggested that some relief from this jurisdictional nightmare might be on its way. In *Rhine*[13]

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[10] If the Crown's claim is so closely regulated and defined by a federal statute that its rights can be said to be "based" on federal law, the action will be within the jurisdiction of the Federal Court: see the contract cases of *Rhine* and *Prytula*, *infra*, footnotes 13 and 14, and the tort cases cited *infra*, footnote 53.

[11] *Thomas Fuller Const., supra*, footnote 6.

[12] The court is also given *concurrent* jurisdiction in civil proceedings in which either the Crown or the Attorney General of Canada claims relief (section 17(5)(*a*)), or relief is sought against Crown officers or servants for anything done or omitted in the performance of their duties (section 17(5)(*b*)).

[13] *Rhine* v. *The Queen*, [1980] 2 S.C.R. 442 (Can.).

and *Prytula*[14] the court upheld federal jurisdiction over cases where the Crown was claiming as the guarantor of contractual debts incurred pursuant to federal statutory schemes providing financial assistance to wheat farmers and students respectively. The court stated that, even though the Crown's claim was contractual in nature, the transaction from which it arose was so extensively regulated by federal legislation that the legal rights and liabilities in question could be said to be based on applicable and existing federal law.

Additional evidence that the court might be relaxing its rigid stance was provided in 1986 by the judgment in *ITO-International Terminal Operators Ltd.* v. *Miida Electronics Inc.*[15] In this case the Supreme Court upheld the jurisdiction of the Federal Court to entertain an action for damages brought by the owner of goods against terminal operators in Montreal for loss of its goods, which were stored with the defendants after being unloaded from the carrying vessel. This was not the first case in which the court had taken a generous view of the Federal Court's statutory jurisdiction in matters of Canadian maritime law, and of the federal character of that law.[16] However, two points made by McIntyre J. seemed potentially relevant to other aspects of federal jurisdiction on which the court previously had been distinctly parsimonious.

First, he stated that, while maritime law might not historically have included an action in tort for the loss of goods on land,[17]

> . . . cargo handling and incidental storage before delivery and before the goods pass from the custody of a terminal operator within the port is *sufficiently linked* to the contract of carriage by sea to constitute a maritime matter within the ambit of Canadian maritime law as defined by section 2 of the *Federal Court Act*.

The idea that a statutory grant of jurisdiction could be interpreted to include matters "integrally connected"[18] might well be extended to other provisions of the Federal Court Act.

Second, McIntyre J. stated that, if a case is in "pith and substance" within the Federal Court's statutory jurisdiction, the court may determine a question of provincial law arising incidentally in a dispute otherwise governed by federal law.[19] Taken together with *Rhine* and *Prytula*, this holding suggested that the Federal Court could constitutionally entertain cases where the rights of the parties were neither so exclusively, nor

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[14] *Prytula* v. *The Queen, ibid.*

[15] *Supra*, footnote 3.

[16] See, for example, *Sivaco Wire & Nail Co.* v. *Tropwood A.G.*, [1979] 2 S.C.R. 157; *Antares Shipping Corp.* v. *The Ship "Capricorn"*, [1980] 1 S.C.R. 553. And see *supra*, footnote 3.

[17] *Supra*, footnote 3, at p. 775. (Emphasis added).

[18] *Ibid.*, at p. 774.

[19] *Ibid.*, at p. 781.

so closely regulated by a law of Canada as earlier jurisprudence seemed to require.[20]

Despite these decisions, the law of federal jurisdiction has remained basically a shambles. For instance, a municipality seeking to recover monies paid to Ontario under an unconstitutional provision of a federal statute[21] was recently obliged to institute two separate sets of proceedings, one against the federal Crown in the Federal Court[22] and the other against Ontario in the provincial courts.[23] Not surprisingly, the consequent waste of resources attracted judicial criticism.[24]

Several current developments, however, offer some small hope of respite. We begin with an analysis of the recent decision of the Supreme Court of Canada in *Roberts* v. *Canada*,[25] which continues the trend toward greater flexibility in applying the jurisdictional requirements. We then examine the new phenomenon of Charter challenges to the exclusive character of the Federal Court's jurisdiction in certain areas, which, as we have seen, is at the root of many difficulties. Finally, we offer some brief comments on reforms to the Federal Court Act contained in the recently introduced Bill C-38.

Roberts v. *Canada*

This case arose from a dispute between two Indian bands over title to a certain Indian reserve. The plaintiff band sought a declaration from the Federal Court that the reserve belonged to it, alleging that the Federal Crown had unlawfully awarded the reserve to the second band, and thus breached its fiduciary duty to hold the reserve for the plaintiff band. There was an ancillary claim against the second band for a permanent injunction restraining it from trespassing on the reserve. The defendant band applied to have the action against it struck, arguing that the Federal Court lacked jurisdiction over this branch of the proceeding.[26] The case, then, presented the problem seen earlier, where a party that is required to pursue its claim against the Crown in the Federal Court

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[20] See especially *Thomas Fuller Const.*, *supra*, footnote 6.

[21] Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 20(2).

[22] *Peel (Regional Municipality)* v. *Canada* (1988), 55 D.L.R. (4th) 618 (F.C.A.), where the claim failed because the payment to the province did not discharge a *legal* obligation of the federal Crown to maintain juvenile delinquents.

[23] *Peel (Regional Municipality)* v. *Ontario* (1988), 49 D.L.R. (4th) 759 (Ont. H.C.), where the claim succeeded.

[24] See especially, *ibid.*, at p. 769. In the event, it has not proved necessary for a separate claim to be made for contribution between the two levels of government, because the federal Crown was held not liable to make restitution to the municipality.

[25] [1989] 1 S.C.R. 322, (1989), 57 D.L.R. (4th) 197.

[26] This summary of the facts is based on the account given in the judgment of the trial court: [1987] 1 F.C. 155, at pp. 159-160.

under section 17(1) of the Federal Court Act is faced with the argument that a closely-related claim against a private party cannot be resolved at the same time.

In a judgment written for a four-judge panel of the Supreme Court,[27] Wilson J. rejected the defendant band's argument and dismissed its motion, effectively holding that the Federal Court had jurisdiction over the entire claim. She found that section 17(3)(*c*)[28] of the Federal Court Act supplied the statutory basis of the court's jurisdiction, following here the reasoning of the majority of the Federal Court of Appeal.[29] With respect to the constitutional requirement flowing from section 101 of the Constitution Act, 1867, she held that the case was sufficiently founded on federal law to enable the Federal Court to exercise its statutory jurisdiction. This was because the action depended upon a federal statute (the Indian Act), a federal Order in Council setting aside the reserve for one of the bands, and "the common law of aboriginal title which underlies the fiduciary obligations of the Crown to both Bands".[30] We shall examine these holdings more closely in short order. But first, the court's general approach to the jurisdictional question demands some attention.

(1) *The Jurisdictional Test*

When can the Federal Court properly assume jurisdiction in a case? On this point, Wilson J. reiterated the test formulated by McIntyre J. in the *ITO* case.[31] This postulates three criteria:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the Constitution Act, 1867.

This formula is rather puzzling, for, as Wilson J. herself noted, the third element appears to overlap substantially with the second. That is, the section 101 requirement, which is the subject of the third branch, is the direct source of the requirement of "an existing body of federal law", addressed in the second branch. Nevertheless, Wilson J. suggested a way of differentiating them:[32]

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[27] Dickson C.J.C., Beetz, Lamer and Wilson JJ.; Le Dain J. heard the appeal, but took no part in the judgment.

[28] R.S.C. 1970 (2nd Supp.), c. 10, now renumbered in R.S.C. 1985, c. F-7 as s. 17(4).

[29] [1987] 2 F.C. 535, Hugessen and Urie JJ.; MacGuigan J. agreed, but also thought that there was an alternative source of jurisdiction.

[30] *Supra*, footnote 25, at pp. 340 (S.C.R.), 210 (D.L.R.).

[31] *ITO—International Terminal Operators Ltd.* v. *Miida Electronics Inc.*, *supra*, footnote 3, at p. 766.

[32] *Supra*, footnote 25, at pp. 330-331 (S.C.R.), 203 (D.L.R.) (Emphasis added).

> [T]he second element, as I understand it, requires a *general body of federal law* covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands, and the third element requires that the *specific law* which will be resolutive of the dispute be "a law of Canada" within the meaning of s. 101 of the *Constitution Act, 1867*.

With respect, this suggestion merely compounds the original confusion. There seems to be no constitutional or logical rationale for requiring both a general body of federal law covering the area of the dispute, and a particular federal law dispositive of the dispute. This emerges clearly later in the decision, where Wilson J. is obliged to merge the two branches of the test in applying them to the facts of the case.

In reality, the *ITO* formula is flawed and potentially misleading. It was originally presented by McIntyre J. as a summary of the criteria laid down in the *Quebec North Shore*[33] and *McNamara Construction*[34] cases. However, as already noted, these decisions support only two general requirements: (1) there must be a statutory grant of jurisdiction by the federal Parliament; and (2) the action must be founded on existing federal law, whether statute, regulation, or common law.[35]

Of course, each branch of this two-fold test has sub-elements which may require separate treatment in particular instances. For example, the second requirement demands not only the presence of federal law but also a strong link between that law and the issues to be decided in the case. This may, indeed, have been the point that McIntyre J. intended to make. But to elevate these sub-elements into distinct requirements, as the *ITO* formula apparently tries to do, overlooks their essential integrity and introduces a superfluous and misleading dimension into an area of the law that has already attracted more than its fair share of confusion.

Nevertheless, the Supreme Court seems unduly drawn to tripartite versions of the jurisdictional test. We see further evidence of this tendency in the recent case of *Ontario (Attorney General)* v. *Pembina Exploration Canada Ltd.*[36] There La Forest J. stated that the following three conditions must be satisfied:[37]

> (a) Parliament has legislative authority over the subject matter of the case;
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> (b) the empowering statute confers jurisdiction over the case; and
>
> (c) the case is governed by "existing and applicable federal law".

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[33] *Supra*, footnote 4.

[34] *Supra*, footnote 5.

[35] *Quebec North Shore, supra*, footnote 4, at p. 1066; *McNamara Const., supra*, footnote 5, at p. 659.

[36] [1989] 1 S.C.R. 206.

[37] *Ibid.*, at p. 219. Perhaps Wilson J. had in mind the need for federal legislative authority over an area when she referred in *Roberts* to "a general body of federal law".

Here, it is the first branch of the test that appears superfluous, merely spelling out a requirement implicit in the third branch. The latter, which stipulates that the case must be governed by existing federal law, tacitly requires that the federal law in question be validly enacted by Parliament or its delegate, or, in the case of federal common law, that it operate within the federal legislative sphere. In either case, Parliament must have authority over the subject matter of the action.

(2) *The Statutory Requirement: Interpreting Section 17*

As seen earlier, the court in *Roberts* held that a statutory basis for jurisdiction could be found in section 17(3)(*c*) of the Federal Court Act.[38] This states that the Federal Court has exclusive jurisdiction over "proceedings to determine disputes where the Crown is or may be under an obligation, in respect of which there are or may be conflicting claims". Wilson J. reasoned that the Crown had the obligation to hold the reserve for the use of one of the two Indian bands advancing conflicting claims to it, and that these facts brought the case squarely within the wording used in the section. So doing, she rejected the argument that the section applied only to interpleader proceedings.

Unfortunately, this generous interpretation by the court may not be of assistance to most litigants seeking to join a co-defendant with the federal Crown before the Federal Court. For it can be argued that section 17(3)(*c*) only applies where there are two or more parties, each claiming to be the sole beneficiary of the same obligation owed by the Crown. This limitation could prevent the section from applying to any but the rarest of cases beyond interpleader proceedings.

Consider a situation which bears some similarity to the case at hand. An aboriginal nation claims that it has unextinguished aboriginal rights to lands located within a province, and further, that the federal Crown has breached its fiduciary duty to ensure that the lands are held for the benefit of the aboriginal group. The provincial Crown does not acknowledge this claim, and continues to grant rights over the lands to lumbering and mining interests. The federal Crown, which has jurisdiction over lands reserved for the Indians under section 91(24) of the Constitution Act, 1867, denies that the lands in question fall under its authority, or that it has any fiduciary responsibilities relating to them. The aboriginal nation's claim to the land thus has two prongs, directed respectively at the provincial Crown and the federal Crown. Since most of the evidence relevant to one prong of the claim will apply to the other, the entire claim obviously should be heard a single proceeding. But which court has jurisdiction?

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[38] *Supra*, footnote 28.

The claim that the federal Crown has breached its fiduciary obligations must apparently be pursued in the Federal Court, which by virtue of section 17(1) has exclusive jurisdiction over claims against the federal Crown. But under current case law[39] the plaintiff will be unable to join the provincial Crown as a co-defendant because section 17 does not enable the Federal Court to grant relief against a province. Worse, insofar as the action against the federal Crown requires the court to determine whether land claimed by the provincial Crown is subject to aboriginal rights, there is authority for the proposition that, since the main burden of such a ruling will fall on the province, the Federal Court cannot even hear the action against the federal Crown.[40]

The plaintiff may, of course, seek recourse against the province in a provincial court, but there it will have to meet the argument that the federal Crown cannot be joined to the action because of the Federal Court's exclusive jurisdiction over claims against the federal Crown.[41] The upshot of this argument would seem to be that the federal Crown cannot be brought before *any court* to respond to the substantive claim.

This remarkable result may perhaps be avoided by arguing that, if the action is not within the jurisdiction of the Federal Court, the reason must be that the action is not, in substance, one in which relief is claimed against the federal Crown. It follows that, even though the federal Crown is named as a co-defendant, the provincial court has a residual jurisdiction which has not in this instance been displaced by the Federal Court Act.[42]

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[39] *Lubicon Lake Band* v. *The Queen*, [1981] 2 F.C. 317 (T.D.); *Joe* v. *Canada* (1983), 49 N.R. 198 (F.C.A.), affirmed, [1986] 2 S.C.R. 145.

[40] *Joe* v. *Canada*, *ibid.*

[41] *Ominayak* v. *Norcen Energy Resources Ltd.* (1987), 44 D.L.R. (4th) 355 (Alta. Q.B.).

[42] Compare *Joe* v. *Findlay* (1978), 87 D.L.R. (3d) 239 (B.C.S.C.), where Berger J. in *obiter dicta* stated (at p. 243) that, if it became necessary, the federal Crown could be joined as a party to litigation in a British Columbia court between a member and an Indian band:

> Such joinder would simply be for the purpose of having all parties before this court and avoiding a multiplicity of proceedings. It would not constitute a claim against the Crown within the meaning of section 17(1) of the *Federal Court Act*.

See also *Uukw* v. *The Queen* (B.C.S.C., February 24, 1986; aff'd B.C.C.A., April 26, 1986), where the federal Crown was added as a co-defendant at the instance of the province of British Columbia, against which the plaintiffs sought declarations of their ownership of and jurisdiction over certain lands, and an injunction to restrain further interference with their rights. The courts were obviously impressed by the desirability of the federal Crown's being bound by the judgment, because the province might later wish to claim contribution or indemnity from the federal Government. However, it is difficult to determine the precise basis for the conclusion that section 17(1) did not exclude the British Columbia courts' jurisdiction to add the federal Crown as a defendant. The explanation may be that the Crown was added because the case raised constitutional ques-

Does section 17(3)(*c*), as interpreted in *Roberts*, provide an alternative escape route from this maze? It could be argued that our example involves conflicting claims with respect to an obligation owed by the Crown within the section's meaning. That is, the aboriginal nation claims that the federal Crown has breached its fiduciary obligations regarding the land, while the provincial Crown effectively denies this, claiming that the land belongs to it alone. The difficulty with this argument, however, is that the provincial government clearly does not assert that the federal Crown owes *it* a fiduciary obligation in respect of the land. By contrast, in *Roberts* both plaintiff and defendant bands claimed to be the true beneficiary of the Crown's fiduciary obligation. That is they both claimed the benefit of the *same* obligation. So, if section 17(3)(*c*) only applies where there are multiple parties each claiming sole benefit of a federal obligation, the section cannot help resolve the puzzle posed by our example.

More promising is the approach to section 17(1) taken by Reed J. in *Marshall* v. *The Queen*,[43] which in *Roberts* won the acceptance of Joyal J. at first instance[44] and also of MacGuigan J. in the Court of Appeal.[45] This permits a co-defendant to be joined to proceedings in the Federal Court against the federal Crown when the two claims are "so intertwined that findings of fact with respect to one defendant are intimately bound up with those that would have to be made with respect to the other".[46] This approach to the *statutory* grant of jurisdiction is, of course, similar to that rejected in earlier jurisprudence in respect of the *constitutional* limits on federal jurisdiction.[47] The rationale in both contexts is the obvious efficiency and fairness of deciding in one proceeding all the claims arising from a common factual matrix.

This broader interpretation of section 17(1) finds support in the provision's wording. As Reed J. pointed out,[48] the section gives the

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tions, and the principal relief sought was a declaration; see the *B.C. Law Society* case, at footnotes 3 and 91. However, not all the issues in the case were constitutional, and the plaintiffs were seeking a declaration of right, not a *Dyson* -type declaration of invalidity.

See also *Beauvais* v. *The Queen*, [1982] 1 F.C. 171, at p. 179 (T.D.), where Walsh J. suggested that it would be "manifestly contrary to natural justice to conclude that no court has jurisdiction to grant an injunction against the Band Council, if on the facts such an injunction is justified and necessary".

[43] [1986] 1 F.C. 437, at p. 449 (T.D.).

[44] [1987] 1 F.C. 155, at p. 167 (T.D.).

[45] [1987] 2 F.C. 535, at pp. 545-546 (C.A.).

[46] *Supra*, footnote 43.

[47] *Thomas Fuller Const., supra*, footnote 6.

[48] *Supra*, footnote 43, at pp. 447-448, where Reed J. neutralized the presumption of statutory interpretation that, as a mere statutory court, the Federal Court's jurisdiction was to be strictly construed, with the "large and liberal" purposive presumption contained now in the Interpretation Act, R.S.C. 1985, c. I-21, s. 12.

Federal Court jurisdiction in all *cases* where relief is claimed against the federal Crown, rather than simply over all *claims* against the federal Crown.[49] In other words, the statute is construed as providing that, when a claim is made against the federal Crown, the Federal Court has exclusive jurisdiction over the whole case, including claims against other co-defendants that are so closely related that, as a matter of justice and convenience, they should be decided in a single proceeding.

The Supreme Court's decision in *Roberts* represents an important advance toward the acceptance of the *Marshall* doctrine. While Wilson J. stopped short of basing her judgment on the doctrine, she apparently gave it her blessing. After quoting at some length from the judgment of Reed J., she stated:[50]

> There is clearly a substantial policy component involved in the resolution of this jurisdictional problem. Practical considerations enter in and concern over the undue extension of federal court jurisdiction where the federal Crown is not the sole defendant has to be balanced against the need for the expeditious resolution of litigation at reasonable cost. *Marshall* seems to strike an appropriate balance by requiring the claim or claims against the private litigant to be inextricably linked with those against the Crown. In addition, where such link exists serious problems of *res judicata* which could arise in subsequent litigation in the provincial courts are avoided.

In the event, she found it unnecessary to resolve the issue definitively, and upheld the Federal Court's jurisdiction solely under section 17(3)(*c*).

It is unfortunate that the Supreme Court was not prepared to settle a matter of such practical importance, which has divided the judges of the Federal Court. Indeed, only four months before the Supreme Court heard *Roberts*, the Federal Court of Appeal in *Varnam* v. *Canada*[51] decisively, but "not without regret",[52] brought down the kite that Reed, Joyal and MacGuigan JJ. had been bravely flying. The court found that the weight of previous authority was against the broader approach to section 17(1), and that the concept of "intertwining" was too vague a basis upon which to build a jurisdiction that was not clearly conferred by the wording of the statute.[53] *Varnam* was not mentioned in the *Roberts* judgment.

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[49] Reed J.'s construction of s. 17(1) echoes the interpretation of the constitutional scope of federal jurisdiction in the United States:

> It has long been held, however, that the Article III grant is broader than merely a grant over federal "claims" but encompasses all claims in "cases" arising under federal law.

(*Lentino* v. *Fringe Employee Plans, Inc.*, 611 F.2d 474, at p. 478 (3d Cir. 1979)).

[50] *Supra*, footnote 25, at pp. 333 (S.C.R.), 204-205 (D.L.R.).

[51] [1988] 2 F.C. 454 (C.A.).

[52] *Ibid.*, at p. 461 (per Hugessen J.).

[53] The other objection raised in *Varnam* to the Federal Court's jurisdiction was that the tort allegedly committed by the co-defendant, the College of Physicians and Surgeons of British Columbia, was not sufficiently related to a breach of a federal statutory

It will presumably only be a matter of time before the issue returns to the Supreme Court.[54]

When a serious jurisdictional doubt is raised in the course of litigation, it is generally better for the court to clarify the law then and there, rather than postpone deciding the question until some future case. Moreover, the jurisdictional point at stake here is relatively self-contained, and has been adequately defined in litigation over several years. In this respect, *Roberts* recalls the older style of Supreme Court judgment which generally sought to avoid deciding anything but the narrowest point needed to dispose of a case. Ironically, Wilson J. often seems to go out of her way, especially in Charter cases, to address a wide range of issues, sometimes in very expansive terms.[55]

(3) *The Constitutional Requirement*

Wilson J. affirmed the doctrine that the Federal Court may only exercise jurisdiction over a dispute if the parties' rights are squarely founded on existing federal law. She rejected the test formulated by Le Dain J. in the Federal Court of Appeal's decision in *Bensol Customs Brokers Ltd.* v. *Air Canada*,[56] where he said:[57]

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

Wilson J. likened this approach to that adopted in the United States, where federal courts have been held to possess jurisdiction over questions and parties not otherwise within federal jurisdiction, because they are pendent or ancillary to a claim that clearly is within federal jurisdiction. While conceding that this was in some ways an attractive concept,

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duty to satisfy the constitutional requirement that parties' rights must be founded on federal law. The court found no error in the trial judge's refusal to strike the claim on this ground. The application of the *Rhine* and *Prytula* test (*supra*, footnotes 13 and 14), has proved difficult to apply in tort actions. For a liberal approach see, for example, *Oag* v. *Canada*, [1987] 2 F.C. 511; *Bradasch* v. *Canada* (F.C.T.D., March 1, 1989, doc. no. 7-773-788); *Kigowa* v. *Canada* (F.C.T.D., July 28, 1989, doc. no. 7-612-689). The continuing validity of the narrower approach adopted in *Stephens' Estate* v. *Minister of National Revenue* (1982), 40 N.R. 620 (F.C.A.), must now be regarded as dubious.

[54] *Varnam* has been applied in *Wilder* v. *Canada* (F.C.A., June 7, 1988, doc. no. A-1005-1087). However, the question will become much less important if Bill C-38 is enacted; see *infra*, pp. 840-841.

[55] Wilson J.'s judgments that come to mind in this context include *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441; *R.* v. *Jones*, [1986] 2 S.C.R. 284; *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30.

[56] [1979] 2 F.C. 575 (C.A.).

[57] *Ibid.*, at p. 583. (Emphasis added by Wilson J. when citing it in *Roberts, supra*, footnote 50, at pp. 333 (S.C.R.), 205 (D.L.R.)).

she concluded that it "does not appear to find support in the existing jurisprudence of this Court, nor indeed in the wording of s. 101 of the *Constitution Act, 1867* ".[58]

Nevertheless, Wilson J. went on to find that in the case at hand the plaintiffs' claim was based exclusively on existing federal law. She identified three sources of law governing the right to possess the reserve: (1) the salient provisions of the Indian Act; (2) the federal executive act setting aside the reserve for one of the bands; and (3) the common law relating to aboriginal title which underlies the Crown's fiduciary obligations. While the first two sources of law were clearly federal, the third required closer consideration.

Wilson J. began by considering the argument, accepted by Hugessen J. in the Court of Appeal,[59] that the law of aboriginal title qualified as federal law because Parliament had exclusive authority over "Indians, and Lands reserved for the Indians".[60] In reaching this conclusion, Hugessen J. had invoked the Supreme Court's decision in *Derrickson* v. *Derrickson*,[61] where Chouinard J. held that the right to possess Indian reserve lands fell solely within federal legislative competence, and further was immune from the application of provincial law, by way of exception to the general constitutional doctrine that there are no exclusive federal "enclaves".[62]

However, in Wilson J.'s opinion, the *Derrickson* ruling did not lead necessarily to the conclusion that the law governing Indian lands was "federal law". She stated:[63]

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[58] *Supra*, footnote 25, at pp. 334 (S.C.R.), 205 (D.L.R.). We are puzzled by Wilson J.'s statement at the conclusion of her discussion of *Marshall* and *Bensol* that "[w]hether the Federal Court could, in this case, entertain the claim of the Plaintiff Band pursuant to s. 17(1) without at least implicitly adopting a pendent and ancillary jurisdiction approach is a question which need not be answered in this case" (at pp. 334 (S.C.R.), 206 (D.L.R.). The difficulty is that Wilson J. described, and rejected, the American pendent and ancillary jurisdiction doctrine as a method of expanding the constitutional requirement that cases in the Federal Court must be founded on federal law. However, Wilson J. also held that, in the present case, federal law provided the *sole* basis for the plaintiffs' rights; therefore, adopting the *Marshall* approach to s. 17(1) could not require accepting the pendent and ancillary approach to the constitutional limitations on the Federal Court's jurisdiction. Nor does it follow that the adoption of *Marshall* logically, or as a matter of policy, necessarily requires the approval of *Bensol*.

[59] *Supra*, footnote 45, at pp. 539-540.

[60] Constitution Act, 1867, s. 91(24).

[61] [1986] 1 S.C.R. 285, at p. 296.

[62] See P. Hogg, Constitutional Law of Canada (2nd ed., 1985), pp. 558-560; *Air Canada* v. *British Columbia*, [1989] 1 S.C.R. 1161. But compare *Bisaillon* v. *Keable*, [1983] 2 S.C.R. 60, at pp. 104-109, where the court held that in criminal proceedings the rule regarding the protection given to the identity of police informers was paramount over any provincial statute, even though Parliament had not given the common law rule a statutory basis.

[63] *Supra*, footnote 25, at pp. 338 (S.C.R.), 209 (D.L.R.).

> While I do not question the soundness of Chouinard J.'s conclusion that provincial legislation cannot apply to Indian lands because of the exclusive federal legislative power . . ., it does not, in my view, address the issue before us which is: is the law of aboriginal title a "law of Canada" within the meaning of s. 101?

Taking up that issue, Wilson J. observed that federal law was not confined to federal legislation, but also included federal common law. The precise question to be resolved, then, was "whether the law of aboriginal title is federal common law".[64] Her answer is worth quoting in full:[65]

> I believe that it is. In *Calder* v. *Attorney-General of British Columbia*,[66] this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in *Guerin*,[67] aboriginal title pre-dated colonization by the British and survived British claims of sovereignty. The Indians' right of occupation and possession continued as a "burden on the radical or final title of the Sovereign": *per* Viscount Haldane in *Amodu Tijani* v. *Southern Nigeria (Secretary)*.[68] While, as was made clear in *Guerin*, s. 18(1) of the *Indian Act* did not create the unique relationship between the Crown and the Indians, it certainly incorporated it into federal law by affirming that "reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart".

The passage, at first sight, seems to attempt the tricky manoeuvre of changing horses in mid-stream, seizing the tail of a passing statutory pony from a perch in a common law saddle. Closer examination suggests, however, that Wilson J. is really making two distinct points: first, the common law of aboriginal title qualifies as federal common law in its own right because of its particular nature and origins; and second, in any case, the special fiduciary relationship flowing from aboriginal title has been incorporated into federal statute law by the Indian Act. On either count, then, the law can be considered federal.

This interpretation is supported by Wilson J.'s final summary:[69]

> I would conclude therefore that "laws of Canada" are exclusively required for the disposition of this appeal, namely the relevant provisions of the *Indian Act*, the act of the federal executive pursuant to the *Indian Act* in setting aside the reserve in issue for the use and occupancy of one or other of the two claimant Bands, and the common law of aboriginal title which underlies the fiduciary obligations of the Crown to both Bands.

This passage clearly identifies the common law of aboriginal title as federal law in its own right, quite apart from the provisions of the Indian Act.

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[64] *Ibid.*, at pp. 340 (S.C.R.), 210 (D.L.R.).

[65] *Ibid.*

[66] [1973] S.C.R. 313.

[67] *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335.

[68] [1921] 2 A.C. 399, at p. 403 (P.C.).

[69] *Supra*, footnote 25, at pp. 340 (S.C.R.), 210 (D.L.R.).

What is the precise basis of this holding? The judgment is far from being explicit on this point. But the rationale appears to be as follows. As Wilson J. noted, the common law of aboriginal title arose from the very process whereby the Crown assumed sovereignty over Canada. As a result, it took force uniformly throughout the various colonial territories that now make up Canada, applying alike in jurisdictions otherwise based on English and French law. Upon Confederation, this body of common law passed into the federal sphere of authority by virtue of section 91(24) of the Constitution Act, 1867. In this manner, the common law of aboriginal title—and indeed the common law governing aboriginal and treaty rights generally—became federal common law.[70] To put the point precisely, it became a body of basic *public* law operating uniformly across the country within the federal sphere of competence. In this respect, then, the law of aboriginal rights resembles the law of Crown liability, which Laskin C.J.C. earlier singled out as a prime example of federal common law.[71]

Federal Jurisdiction And The Charter

As a result of the Supreme Court's previous assaults on federal jurisdiction, the most troublesome feature of the Federal Court Act has been the *exclusiveness* of much of the jurisdiction granted to the Federal Court. In two distinct lines of cases, the Charter has become the focus of attempts to restore a concurrent jurisdiction to provincial courts.

(1) *Crown Litigation*

Dywidag Systems International Canada Ltd. v. *Zutphen Brothers Construction Ltd.*, a case currently under appeal to the Supreme Court of Canada, is representative of the first line of authorities. The litigation arose from a dispute among the federal Crown, its contractor, Zutphen, and a sub-contractor, Dywidag, about the respective liability of the parties for loss suffered by Dywidag in performing its sub-contract. Dywidag brought an action in the Federal Court against the Crown, and a separate

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[70] For fuller development of these points, see B. Slattery, Understanding Aboriginal Rights (1987), 66 Can. Bar Rev. 727, especially at pp. 736-741.

[71] See *Quebec North Shore*, *supra*, footnote 4, at p. 1063, where Laskin C.J.C. stated:

> It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature.

See, further, *McNamara Construction*, *supra*, footnote 5, at p. 662.

proceeding in the Supreme Court of Nova Scotia against Zutphen. Zutphen and the Crown each took the position that, if it were held liable to Dywidag, it would claim an indemnity from the other. Since the Crown was unable to issue a third party notice against Zutphen in the Federal Court proceeding,[72] Zutphen sought to add the Crown as a third party to the provincial court action, in an effort to prevent a multiplicity of proceedings. Zutphen argued that the Federal Court's exclusive jurisdiction over claims against the Crown infringed the subject's rights under the Charter.

The Nova Scotia Court of Appeal[73] granted Zutphen leave to add the Crown as a third party. It held that a statutory scheme under which the Crown could sue a subject in a provincial court but could not itself be sued by a subject was a denial of equality contrary to section 15 of the Charter, which could not be justified under section 1.

It is certainly easy to sympathize with the sense of frustration provoked in lower courts by the injustices and inefficiencies resulting from the Supreme Court's narrow view of federal jurisdiction. However, it would be rash to predict that the Supreme Court will uphold the reasoning in *Zutphen Brothers*. Courts in other jurisdictions have generally held that the Crown and its subjects are not comparable for the purpose of section 15.[74] Indeed, in two cases, the broad immunity of the federal Crown from suit outside the Federal Court has been specifically upheld.[75]

Nonetheless, this particular difficulty can be surmounted by reformulating the argument. The contention would be that, by barring proceedings against the federal Crown in provincial courts, Parliament has meted out unequal and prejudicial treatment to plaintiffs suing the federal Crown, in the specific case where their claim involves multiple defendants. They alone, among plaintiffs with claims against multiple defendants, cannot have their case heard in a single court proceeding, but are obliged to resort to complex and costly litigation before a variety of courts.[76]

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[72] See, *Thomas Fuller Const., supra*, footnote 6.

[73] (1988), 35 D.L.R. (4th) 433 (N.S.S.C. App. Div.).

[74] See, for example, *R.* v. *Stoddart* (1987), 37 C.C.C. (3d) 351 (Ont. C.A.); *Wright* v. *Canada (A.G.)* (1987), 46 D.L.R. (4th) 182 (Ont. Div. Ct.); *Leighton* v. *Canada*, [1989] 1 F.C. 75, at pp. 82-83 (T.D.).

[75] *Ominayak* v. *Norcen Energy Resources Ltd.* (1987), 44 D.L.R. (4th) 355 (Alta. Q.B.); *Rudolf Wolff & Co. Ltd.* v. *The Queen* (1987), 10 A.C.W.S. 217 (Ont. H.C.J.), affirmed (March 7, 1988, Ont. C.A.), leave to appeal to the Supreme Court granted (1988), 30 O.A.C. 77.

[76] Indeed, counsel for Zutphen seems also to have put the argument in this way: *supra*, footnote 73, at p. 444. See also, *Colangelo* v. *Mississauga (City)* (1988), 53 D.L.R. (4th) 283, at pp. 296-297 (Ont. C.A.); *Peaker* v. *Canada Post Corp.* (1989), 68 O.R. (2d) 8, at pp. 14-17 (H.C.J.); *cf., Suche* v. *The Queen* (1987), 37 D.L.R. (4th) 474, at p. 484, where this argument was applied to s. 1(*b*) of the Canadian Bill of Rights.

Even in this form, however, the argument may be problematical in the particular circumstances of the *Zutphen Brothers* case. The difficulty arises from the decision in *Andrews* v. *Law Society of British Columbia*,[77] where the Supreme Court suggested that the main thrust of section 15 was to protect the politically, socially and economically disadvantaged from discrimination by virtue of their personal characteristics.[78] The question, then, is whether persons who have been wronged by the federal Crown, and are required to pursue their claims in potentially costly and cumbersome proceedings, meet this description. On the one hand, it can be argued that individuals with grievances against the Crown have historically been placed in a position of disadvantage relative to other litigants, and that section 17(1) perpetuates and reinforces that position of disadvantage. The argument may be particularly strong where the plaintiffs belong to a group which has suffered discrimination on other grounds, such as aboriginal peoples. On the other hand, it may be said that the fact that the federal Crown is a potential defendant cannot be a personal characteristic of the plaintiffs who allege that section 17(1) of the Federal Court Act discriminates against them. In addition, the procedural difficulties and inconveniences associated with suits against the Crown are arguably not the kinds of historical disadvantage contemplated by section 15, especially since there is no reason to believe that the otherwise socially vulnerable are disproportionately represented in this class of litigants.

Nonetheless, the disposition of the appeal in *Zutphen Brothers* should not necessarily be regarded as a foregone conclusion. The court's previous eagerness to take the constitutional knife to pare the scope of federal jurisdiction suggests that it may be willing to use the Charter to remove what is arguably the most immediate cause of litigants' problems with the Federal Court: the exclusiveness of its jurisdiction. However, the problem may be better framed as one of procedural fairness rather than of equality. The essence of the complaint in *Zutphen* is surely that Parliament has denied litigants *a fair hearing* by preventing them from bringing their case before a court with jurisdiction to dispose of all related claims arising out of it.

Section 7 of the Charter is not of assistance in *Zutphen Brothers* because the plaintiff had not been deprived of life, liberty and security of the person. However, section 2(*e*) of the Canadian Bill of Rights

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[77] [1989] 1 S.C.R. 143.

[78] See, *ibid.*, especially at pp. 152-153, 174-175, but note the broader approach of La Forest J., at pp. 194-196. See also *Reference re Workers' Compensation Act, 1983 (Nfld.), ss. 32, 34* (1989), 56 D.L.R. (4th) 756 (S.C.C.). For an argument supporting judicial intervention under the Charter to restore injured workers' rights to sue in tort, see D. Beatty, Shop Talk: Conversations about the Constitutionality of Our Labour Law (1989), 27 Osgoode Hall L.J. 381, at pp. 415-423.

appears more promising. It seems plausible to argue that, by preventing the joinder of all defendants and the resolution of all relevant claims between the parties, section 17(1) of the Federal Court Act deprives a party "of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

It is, of course, true that "a fair hearing" normally connotes a procedure that affords to those affected the essential participatory rights of parties at a trial or, where appropriate, an appeal before a court of law. It could hardly be said that section 17(1) deprived the plaintiff in *Zutphen* of a fair hearing in this sense.[79] However, the fair hearing guaranteed by section 2(*e*) of the Bill of Rights is one that accords with "the principles of fundamental justice". This latter phrase has been given an expansive meaning in the context of section 7 of the Charter, where, admittedly, it appears in its own right, and not as a modifier of a requirement of a fair hearing.

There is already some evidence to suggest that the introduction of the Charter has sparked a judicial revival of the Bill of Rights.[80] It seems arguable that, where appropriate, the interpretation given to words in the Charter should shape the meaning that the same words have in the Bill of Rights. For present purposes, the most relevant decision may be *Morgentaler* v. *The Queen*,[81] where it was said that, under section 7 of the Charter, the procedural arrangements in the Criminal Code for the approval of abortions had to meet minimal standards of efficiency, expeditiousness and functional aptness.[82] If this reasoning can be extended to other decision-making contexts, it seems plausible to argue that, by preventing the disposition of related claims in a single proceeding, section 17(1) results in the denial of a fair hearing in accordance with the principles of fundamental justice, contrary to section 2(*e*)) of the Bill of Rights.

This argument was rejected summarily by the Ontario Court of Appeal in *Danard* v. *The Queen*,[83] essentially on the ground that the Federal Court Act and the Crown Liability Act actually *created* the right to sue the Crown. The statutory limitations upon the forum for its enforcement

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[79] See, however, *Beauvais* v. *The Queen*, [1982] 1 F.C. 171, at p. 179 (T.D.), where it was said that to conclude that neither the provincial court nor the Federal Court could enjoin an Indian Band Council was "manifestly contrary to natural justice".

[80] *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *MacBain* v. *Lederman*, [1985] 1 F.C. 856 (C.A.); *In re Immigration Act, 1976 and In re Kahlon*, [1985] 2 F.C. 124 (T.D.); *National Anti-Poverty Organization* v. *Canada (A.G.)* (1988), 21 F.T.R. 33; however, the Federal Court of Appeal reversed this decision on May 15, 1989, and leave to appeal was refused by the Supreme Court of Canada, Nov. 23, 1989.

[81] *Morgentaler* v. *The Queen.*, [1988] 1 S.C.R. 30; see also, *Wilson* v. *Medical Services Commn. of B.C.* (1988), 53 D.L.R. (4th) 171, at pp. 196-198 (B.C.C.A.).

[82] *Ibid.*, esp. at pp. 61-63, 121-122.

[83] (1984), 14 D.L.R. (4th) 124 (Ont. C.A.).

thus *regulated* its exercise, rather than *deprived* the plaintiff of a hearing. A similar argument can be found in American constitutional law in the context of the Due Process clause. The doctrine is described as requiring claimants "to take the bitter with the sweet".[84] The standard riposte is that, while the constitution may not require the legislature to create a right, if one is created, the statutory procedure for resolving disputes must meet the standards of procedural fairness required by the constitution.[85]

The Supreme Court of Canada has been prepared to give section 7 of the Charter an expansive interpretation in connection with the administration of justice, as an area for which the courts have particular responsibility.[86] Given the judicial role in creating the imbroglio surrounding the law of federal jurisdiction, section 2(*e*) of the Bill of Rights may suggest itself to the court as an appropriate means of restoring a little sanity and order.

(2) *Charter Challenges to Federal Administrative Action*

A successful use of the Charter or the Bill of Rights to remove the exclusiveness of the Federal Court's jurisdiction under section 17(1) may thus enable all the related claims arising from a common set of facts to be decided in a single piece of litigation. However, the Charter may have a much less beneficial effect upon the Court's virtually exclusive jurisdiction to subject federal administrative agencies to judicial review.[87]

As matters stand, this area of federal jurisdiction possesses a rare degree of coherence. The Supreme Court has accepted that, under section 101, Parliament may withdraw the function of reviewing federal administrative bodies from the superior courts of the provinces, at least when review is not sought on constitutional grounds.[88] And, generally speaking, defining the jurisdictional boundaries between the two branches of our court system has proved far less troublesome in administrative law than in civil litigation involving the federal Crown. It is interesting to note, however, that the fact that Indian band councils may derive their authority from customary law, as well as from federal statute, has raised doubts about the reviewability of their decisions under section 18 of the Federal Court Act.[89]

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[84] See especially the dissenting judgment of Rehnquist J. in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

[85] *Cf.*, *Goss* v. *Lopez*, 419 U.S. 565, at pp. 572-575 (1975).

[86] See, in particular, *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486.

[87] Section 18 of the Federal Court Act is the key provision.

[88] *Canada Labour Relations Board* v. *Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, at p. 154.

[89] Thus, in *Isaac* v. *Bédard*, [1974] S.C.R. 1349, at pp. 1378-1381, Laskin J. in a dissenting judgment doubted whether even a band council elected under s. 74 of the

This state of relative harmony may be short-lived. Looming on the horizon is the question whether Charter challenges to federal administrative action enjoy the same exemption from exclusive federal jurisdiction as challenges based on the constitutional division of powers. The point has arisen in a number of cases, but the courts have not yet provided a clear answer.[90]

The background to the issue lies in two earlier Supreme Court decisions. In *Attorney General for Canada* v. *Law Society of British Columbia*[91] and its sequel, *Canada Labour Relations Board* v. *Paul L'Anglais Inc.*,[92] the Supreme Court held that Parliament could not give the Federal Court exclusive jurisdiction to determine the constitutional validity or applicability of federal legislation under the division of powers.[93] Thus, a party to a certification proceeding before the Canada Labour Relations Board

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Indian Act was a "federal board, commission or other tribunal" for the purpose of s. 18 of the Federal Court Act on the ground that it "has some resemblance to the board of directors of a corporation" (at p. 1379); despite the width of the definition of federal tribunals contained in s. 2(*g*), non-governmental bodies were not included in s. 18, even though they may possess powers conferred by federal legislation. In the alternative, he held, the band simply *assumed* jurisdiction over Mrs. Bédard by virtue of customary law; it did not purport to exercise any statutory power.

Nonetheless, it has since been held in the Federal Court, and provincial courts, that band councils (but not bands) fall within s. 18: see, for example, *Sabattis* v. *Oromocto Indian Band* (1986), 32 D.L.R. (4th) 680 (N.B.C.A.); *Beauvais* v. *The Queen, supra*, footnote 79; *Trotchie* v. *The Queen*, [1981] 2 C.N.L.R. 147 (F.C.T.D.). Indeed, in affirming the Trial Division's judgment in *Gabriel* v. *Canatonquin*, [1978] 1 F.C. 124, Pratte J. said there was no merit in the appellants' contention that the Federal Court lacked jurisdiction because the subject-matter of the dispute, the validity of an election of the band council, was governed by customary law, not federal statute: [1980] 2 F.C. 792, at p. 793.

[90] See, for example, *Re Lavers and Minister of Finance* (1985), 18 D.L.R. (4th) 477 (B.C.S.C.) (upholding provincial superior courts' jurisdiction in Charter cases); *Re Bassett and Government of Canada* (1987), 35 D.L.R. (4th) 537 (Sask. C.A.) (jurisdiction assumed without discussion: *B.C. Law Society, infra.*, footnote 91, applied to division of powers point); *Re Gandam and Minister of Employment and Immigration* (1982), 140 D.L.R. (3d) 363 (Sask. Q.B.); *Pecheries MPQ Ltée* v. *Hache* (1986), 25 D.L.R. (4th) 66 (N.B.Q.B.) (upholding exclusive Federal Court jurisdiction when Charter question raised in proceeding otherwise within its jurisdiction); *Le Groupe des éleveurs de volailles de l'Est de l'Ontario* v. *Chicken Marketing Agency*, [1985] 1 F.C. 280, at pp. 303-304 (T.D.) (doubtful).

[91] [1982] 2 S.C.R. 307.

[92] *Supra*, footnote 88.

[93] Even though the Constitution is not a "law of Canada" for the purposes of s. 101 of the Constitution Act, 1867, the Federal Court may decide constitutional questions relating to the administration of an otherwise valid federal statute which arise in proceedings to review a federal agency. However, since only valid federal laws count as "laws of Canada", the Federal Court paradoxically may not have jurisdiction to entertain a challenge to the validity of the statute in its entirety. See further, *Northern Telecom Canada Ltd.* v. *Communications Workers of Canada*, [1983] 1 S.C.R. 733.

may go to a provincial court to challenge the Board's jurisdiction on the ground that the employees in question are engaged in an entirely provincial work or undertaking.

Questions about the constitutional division of powers arise comparatively rarely in connection with the operation of federal regulatory schemes or the authority of federal tribunals. The decisions in *British Columbia Law Society* and *Paul L'Anglais* seem therefore to have made relatively few inroads into the Federal Court's exclusive jurisdiction to review most federal administrative action. However, the Court's role would be seriously eroded if its jurisdiction over Charter challenges to federal administration were also held to be concurrent with that of provincial courts.

This could mean, for instance, that inmates of federal penitentiaries could elect between the Federal Court and a provincial court when invoking the Charter to challenge decisions of either prison disciplinary tribunals or the National Parole Board. A similar choice would be available to unsuccessful claimants for refugee status, or other persons refused entry into Canada or subject to deportation under the Immigration Act. The loss of exclusive federal jurisdiction in the areas of immigration and refugee law would enable litigants to avoid the cleverly drafted limitations on judicial review contained in the new amendments to the Immigration Act.[94]

It is fair to point out that the Supreme Court's recent expansion of the scope of *habeas corpus* has already made important inroads into the Federal Court's exclusive jurisdiction to review federal tribunals with power over personal liberty, even on non-constitutional grounds.[95] However, Charter-protected rights that potentially may be affected by a regulatory scheme or administrative action obviously extend well beyond the interest in personal liberty that is protected by *habeas corpus*. Examples might include claims that a social benefit limited to particular groups violates section 15, or that a site inspection or a demand for information by administrative officers is an unreasonable search contrary to section 8. Also affected would be claims that the principles of fundamental justice are breached by a federal tribunal that is insufficiently indepen-

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[94] R.S.C. 1985, c. I-2, ss. 83.1-85.1 (as added by S.C. 1988, c. 35, s. 20). It could, perhaps, be argued that these provisions so restrict a litigant's access to the Federal Court to vindicate a Charter right that they are in themselves unconstitutional. See also, *Peiroo*, *infra*, footnote 95.

[95] See *R.* v. *Miller*, [1985] 2 S.C.R. 613: this and the companion cases of *Morin* v. *SHU Review Committee*, [1985] 2 S.C.R. 662, and *Cardinal* v. *Director of Kent Institution*, [1985] 2 S.C.R. 643, are discussed by J.M. Evans, Developments in Administrative Law: the 1985-86 Term (1987), 9 S.C.L.R. 1, at pp. 14-20; see also, *R.* v. *Gamble*, [1987] 2 S.C.R. 595. The Federal Court has no general statutory jurisdiction to issue the writ of *habeas corpus*. See, however, *Peiroo* v. *Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.), where the court exercised its discretion

dent of the interested department, or is saddled with an institutional design or procedure hopelessly inappropriate to its functions.[96]

There is an attractive simplicity in the view that the Constitution is the Constitution, and that if the Federal Court cannot be given exclusive jurisdiction over division of powers questions, the same holds for the Charter. However, there are substantial arguments on the other side.

First, when federal legislation is challenged on division of powers grounds, it is clearly desirable that there should be an opportunity for disputes to be filtered through courts composed of judges appointed from the Bar of the province, for this gives some assurance that the strength of the provincial interest will be fully appreciated. This kind of consideration is irrelevant in Charter cases, where the appropriate level of government is not in issue.

Second, the Charter grounds invoked in attacking the proceedings of a federal tribunal will often be closely related to standard administrative law arguments. Consider, for example, the double-barrelled argument that a federal agency failed to comply with the common law duty of fairness or, in the alternative, violated the principles of fundamental justice enshrined in section 7 of the Charter.[97] If litigants were allowed to pursue the Charter argument in a provincial superior court, when the administrative law issue could normally only be decided in the Federal Court, a serious dilemma would arise. Should the provincial court decide the Charter issue, simply because everyone has the constitutional right to raise such issues in provincial courts? Or should it stay the proceeding pending the Federal Court's disposition of an application for review, on the ground that, since only the Federal Court can dispose of both Charter and non-Charter issues, it is the more appropriate forum? Or should the provincial court assert a pendent jurisdiction to decide both issues itself, since they are intertwined and arise from a common core of fact?

Experience to date with fragmented jurisdiction makes it easy to imagine the tangle into which the law would be drawn if *Paul L'Anglais* were extended to Charter issues. Only the most compelling reasons of constitutional policy should induce the courts to subvert the legislative

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to refuse a writ of *habeas corpus* on the ground that, despite the need for leave, an application under s. 18 of the Federal Court Act provided an equally effective remedy; moreover, the review provisions of the Immigration Act constituted a complete code, which the courts should not permit to be by-passed lightly by applications to the provincial court for *habeas corpus*.

[96] *Supra*, footnotes 81 and 82.

[97] An important example is *Howard* v. *Stony Mountain Institution Inmate Disciplinary Court*, [1984] 2 F.C. 642 (C.A.); appeal to the Supreme Court of Canada dismissed for mootness, [1987] 2 S.C.R. 687

decision to give the Federal Court exclusive jurisdiction over broad areas of federal public law.

Reform

If the Supreme Court of Canada is not yet prepared to hoist the Federal Court out of the jurisdictional pit in which it now finds itself, are the prospects of a legislative rescue any brighter? In fact, reforming the Federal Court Act has been on the agenda of the Justice Department for some years, but more pressing issues of constitutional law and policy always seem to have taken precedence. However, on September 28, 1989 the House of Commons gave first reading to Bill C-38, an Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof.

The Bill rejects the suggestion emanating from some quarters that the Federal Court should be abolished.[98] Instead, it removes many of the troubling jurisdictional problems that have plagued the Court, without abandoning the essentials of the original scheme: a federal court with jurisdiction over broad areas of federal public law and other matters within Parliamentary competence. Of immediate relevance is clause 3, which amends section 17(1) and (2) so as to make the jurisdiction of the Federal Court concurrent in all cases where relief is claimed against the federal Crown, except where otherwise expressly provided.

The effect of this amendment is to enable plaintiffs with a claim against the federal Crown to proceed against all possible defendants in a provincial court, where the federal Crown, as defendant, will be able to counter-claim or issue a third-party notice. The fact that one court in a single proceeding will be able to dispose of all claims arising from the same transaction will be of great value to both Crown and subject. The potential advantages to the Crown are specifically protected by clause 16. This provides that, in proceedings in the Federal Court against the federal Crown, the court, on the application of the Attorney General of Canada, shall stay the matter if the Crown wishes to make either a counter-claim or a third party claim that is outside the court's jurisdiction. If Bill C-38 is enacted before the Supreme Court of Canada decides *Zutphen Brothers*[99] and *Rudolph Wolff*,[100] these appeals will presumably become moot.

Welcome as it is, Bill C-38 is not a panacea. Private litigants suing the federal Crown may still be faced with a difficult choice. On the one hand, they may be tempted to institute their claim in the Federal Court

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[98] See, for example, the speech of the Attorney General of British Columbia, Mr. Bud Smith, reported in Lawyers Weekly, September 1, 1989.

[99] *Supra*, footnote 73.

[100] *Supra*, footnote 75.

because, for instance, they can get a much earlier date for trial than in a provincial court. On the other hand, the possibility that the Crown may apply for a stay to enable it to pursue a counter-claim or a claim against a third party may make this course of action risky, given the additional delays and costs entailed.[101] Note that it will not be possible to hedge one's bets by instituting a claim against the Crown in a provincial court while proceedings in respect of the same cause of action are pending in the Federal Court.[102]

It is beyond the scope of this comment to discuss the Bill's important reforms to the exclusive administrative law jurisdiction of the Federal Court.[103] Suffice it to say that significant improvements in the operation of the court should result from the introduction of a statutory remedy of judicial review at both levels of the Federal Court, with its own statutory grounds and standing requirement. Other welcome changes include the power to grant interim relief, the slightly expanded definition of "federal board, commission or other tribunal", and the assignment to the Trial Division of the task of reviewing at first instance most federal administrative bodies. The responsibility for ensuring that the Charter does not further fragment the Federal Court's jurisdiction in this area will now rest squarely with the courts.

Finally, the Bill has not resolved the question left open in *Roberts*[104] of whether the Federal Court has a statutory jurisdiction over parties joined as co-defendants with the federal Crown, where their liability is founded in federal law and arises out of essentially the same facts. However, if a plaintiff is always free to take proceedings against all co-defendants in a provincial court, the practical significance of the question is greatly reduced.

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[101] However, a plaintiff whose proceeding in the Federal Court is stayed need not suffer the further prejudice of the continued running of the limitation period if either proceeding is recommenced in the appropriate provincial court within one hundred days after the stay. See clause 16, adding a new s. 50.1(3) to the Federal Court Act.

[102] Clause 28, amending and renumbering as s. 21(2) what is currently s. 21(3) of the Crown Liability Act. On the propriety in other contexts of the grant of a stay because proceedings are pending in the Federal Court, see, for example, *Shell Canada Ltd.* v. *St. Lawrence Seaway Authority* (1987), 58 O.R. (2d) 437 (H.C.J.); *cf. Reference re Constitution Act, 1987, s. 92(10)(a)* (1988), 64 O.R. (2d) 393 (C.A.).

[103] See clauses 4-8 in particular. However, if "relief" against the Crown in s. 17(1) includes *Dyson*-type declaratory relief, then Bill C-38 reduces the Federal Court's area of exclusive jurisdiction in federal administrative law by authorizing the institution in a provincial court of an action directly challenging the validity of a federal regulation or order in council, for example. See *supra*, footnote 3.

[104] *Supra*, footnote 25.

Conclusion

The Federal Court Act, 1971 was an extraordinarily poorly designed piece of legislation, especially since many of its defects were anticipated by commentators and brought to the attention of the Minister of Justice of the day, Mr. John Turner. It was less easy to predict, however, that the Supreme Court of Canada would, until recently, take nearly every opportunity to reduce the Federal Court's jurisdiction through a narrow interpretation of both the Constitution and the Federal Court Act itself.

It will take a concerted effort by the judiciary, the Justice Department, and Parliament if the Federal Court is to realize its potential to be a valuable institution within the Canadian court system: in other words, to be a part of the solution, not part of the problem.