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Constitutional Law -- Limits of Federal Court Jurisdiction -- Is There a Federal Common Law?

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COMMENTS
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CONSTITUTIONAL LAW—LIMITS OF FEDERAL COURT JURISDICTION—IS THERE A FEDERAL COMMON LAW?—The Federal Court Act¹ not only conferred upon the new Federal Court of Canada the jurisdiction formerly exercised by the Exchequer Court, it also conferred some important new jurisdiction on the Federal Court.² This expansion of the jurisdiction of the federal court system has given rise to a host of cases attempting to define the limits of the jurisdiction. These cases mainly turn on the language of the Federal Court Act. However, there is also a constitutional limit to the jurisdiction which can be conferred on a federal court, and that is the subject of this comment.

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

¹ S.C., 1970-71-72, c. 1.

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

³ (1867), 30 & 31 Vict., c. 3 (U.K.).

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

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

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

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

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

⁵ (1976), 71 D.L.R. (3d) 111.

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

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

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

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

⁶ *Supra*, footnote 4.

⁷ *Supra*, footnote 5, at p. 120.

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

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

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

⁹ *Supra*, footnote 4.

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

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

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

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

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

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

¹⁴ *Supra*, footnote 8, at p. 9.

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

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

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

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

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

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

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

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

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

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

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

And, later:

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

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

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

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

²³ [1976] 2 S.C.R. 373, at p. 425.

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

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