

Federal Immunity from Provincial Laws: A Well-Tempered Inequality

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## **Division of powers doctrines, equal autonomy, and symmetry as a yardstick**

Egalitarian values and concepts of equality can exert profound effects on settled principles of law. The division of powers may be no exception. It is of course a key legal dimension in a more complex web of relationships between our orders of government. In a recent article,<sup>1</sup> Professor Ryder considered whether the prevailing doctrines for interpreting the division of powers ought to be measured against what he termed the principle of equal autonomy between the federal and provincial orders of government. This principle would not simply be an explanatory device by which to understand the jurisprudential doctrines in this area. Instead, courts would be called on as necessary to reshape established interpretive doctrines in order to bring them into conformity with the principle.

The related proposition that he put forward was that the principle of equal autonomy should selectively favour rules and doctrines that operate in a symmetrical or reciprocal fashion over those that fail to do so. Asymmetrical doctrines might be refashioned or replaced. For example, the well known pith and substance approach to characterizing and classifying legislation under the division of powers could pass muster because it applies the same way to federal and provincial legislation without distinction. Certain other doctrines display potential for reciprocal operation, but it would be incumbent on the courts to ensure they deliver symmetrical results.

As Professor Ryder indicated in an important footnote:

Whether the courts' commitment in theory to applying these doctrines symmetrically to federal and provincial powers is reflected in practice is open to debate that should be informed by sustained examinations of the pattern of results in the case law. Justice Deschamps, for one, is not convinced: in *Lacombe* [...] she stated that "in practice" the ancillary powers doctrine "has tended to benefit mainly the central government, and to such an extent that it has upset the balance of Canadian federalism" (citing Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5<sup>th</sup> ed. (Cowansville, QC: Éditions Yvon Blais, 2008) at 452-54).<sup>2</sup>

An appeal to symmetry as the standard by which to measure and safeguard equal autonomy could prove alluring. However, care has to be taken before assuming that it should operate axiomatically as a value in itself. At best it can perform a challenge function, prompting closer examination of a doctrine. If upon examination an explanation emerges, symmetry's normative

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<sup>1</sup> Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011), 54 S.C.L.R. (2d) 565. ("Equal autonomy")

<sup>2</sup> *Id.*, at p. 575, footnote 46. The ancillary powers doctrine serves to preserve the validity of legislative provisions that might otherwise fail the pith and substance test, provided they display sufficient connection to a larger, constitutionally valid statutory scheme, in light of the relative degree of the intrusiveness of their "overflow" onto the jurisdiction of other order of government.

function is satisfied. In other words, symmetry may make for a useful prosecutor of asymmetric doctrines, but should not be made the judge.

In any federal constitution some minimal measure of balance is inherent. On the one hand, it must not give carte blanche to the central (federal) order to unilaterally absorb, displace or commandeer the regional units. Nor on the other hand must it be a simple affair for a regional (provincial) government to be able to wield powers that could hamstring the centre:

It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.<sup>3</sup>

The expression “respective spheres” has long been associated in Canadian jurisprudence with our Constitution’s twin lists of legislative jurisdiction. The distributed legislative powers are found mostly (but not entirely) in Sections 91 and 92 of the *Constitution Act, 1867*, and for the most part (but not entirely), in the same form as originally enacted in 1867.

The respective spheres of legislative jurisdiction cannot be equal in the sense of being identical – indeed the opposite was intended. Each list is expressly said to be exclusive of the other. The drafters took care to turn to different sections in order to house those few subject matters where the possibility of concurrent jurisdiction was foreseen.<sup>4</sup>

Nor can the distribution be appreciated in any sense of “half and half”. The three dozen subject matters are so variegated as to be utterly incommensurate. It is that very feature that has meant that despite the stated exclusivity, there are myriad occasions when a law authorized by one head of power can intersect with a law authorized by another. The doctrine of mutual modification strove to mitigate the amplitude of the problem, but could never come close to overcoming it.

Egalitarian values have visibly left a mark, in that we think of the legislative powers as essentially co-ordinate. Like the orders of government themselves, there is no generalized relationship hierarchy or subordination. This egalitarian impulse affected the formative jurisprudence strongly. The case law ignored or displaced many structural cues in the constitutional text that could have pointed otherwise. Confederation was designed in the shadow of the American Civil War, by political leaders who did not want their own incipient experiment to fly apart for lack of strong central powers in the constitutional structure. As well, our colonial relation with the imperial metropolis, which Confederation did not radically transform, was of course hierarchical. Both influences worked in favour of strong – and unequally strong - central power. It was understood from acquaintance with the American model of federalism that to the

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<sup>3</sup> *Reference re Securities Act*, 2011 SCC 66, at para. 7.

<sup>4</sup> For instance, s.95 enables both orders of government to legislate in relation to agriculture as well as immigration.

extent that the “exclusive distribution model” in ss.91-92 did not preclude the issue, federal laws would trump provincial laws, just as it was understood that imperial laws trumped all. One dramatically asymmetric feature was to replicate the power of disallowance at the federal-provincial level, empowering Ottawa to stop valid provincial enactments in their tracks.<sup>5</sup> Another feature was that the lieutenant governors of every province would be appointed by the Governor General in Council (basically, by the federal government). Nevertheless, as far back as 1883, the Judicial Committee of the Privy Council soundly rejected the proposition that provincial legislatures could be viewed as any more of a delegate than either the federal or for that matter the imperial Parliaments. Provincial legislatures, like Parliament, were to be viewed as sovereign within their spheres. The proposition is almost boringly easy to state. The interesting challenges arise because the so-called two spheres are not separate to begin with.

Between co-ordinately situated provinces, symmetry and reciprocity can incontestably serve as objective yardsticks by which to measure whether and to what degree there exists a disparity of autonomy, including relative levels of reciprocal immunity from one another’s laws. Suppose that constitutional doctrine stipulated that the Manitoba government (or its Crown agent corporation) may claim no immunity (or for that matter full immunity, or something in between) from New Brunswick legislation that purports to bind the Crown in right of Manitoba. The legitimacy of the doctrine’s pattern of application could readily be measured by seeing whether the same level of immunity (whatever it happened to be) applies in theory and in practice to the ability of Manitoba laws to bind the Crown in right of New Brunswick.

However, that straightforward resort to a mechanical symmetry, whether as a yardstick or a goal, breaks down if we apply it too mechanically to doctrines dealing with the interpretation of legislative powers of the two different orders of government.

I propose to use three interpretive doctrines as devices for discussion – paramountcy, interjurisdictional immunity, and an area of case law that has received less recent attention in Canada, but has been much studied in Australia and the United States. It is best called intergovernmental immunity (the rules on whether federal statutes can bind provincial governments, and whether provincial statutes can bind the federal government).

However, before starting it may help to try to make two other matters clear.

### **Charter equality**

Might the equality guarantees in s.15 of the *Charter* speak to relations between orders of government?

Probably not.

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<sup>5</sup> *Hodge v The Queen*

The *Charter* is generally understood as an instrument designed to protect and benefit individuals and groups in their relations with the State. It would be disconcerting for a government to seize that shield as a sword by which to advance claims on its own behalf. To the extent that corporate bodies can make equality claims, an uncertain proposition in itself,<sup>6</sup> these would in all likelihood have to be bodies other than the Crown.

In *Rudolph Wolff*,<sup>7</sup> the Court had to determine whether a federal statute violated s.15 by requiring that the federal government be treated differently than a province. Claims against the federal government had to be pursued in Federal Court, unlike claims against a province. In Justice Cory's view, that differential treatment was not the sort of discrimination that the *Charter* was concerned with:

The impugned legislation granting the Federal Court exclusive jurisdiction over claims against the Crown in right of Canada does not distinguish between classes of individuals on the basis of any of the grounds enumerated in s. 15(1) nor on any analogous grounds.<sup>8</sup>

Another angle from which to view the bottom line in *Rudolph Wolff* is that:

With respect to the issue of whether the appellants have received unequal treatment, it must be apparent that the Crown cannot be equated with an individual.<sup>9</sup>

As well, the *Charter* perspective is that the application of identical rules to dissimilarly situated persons is not always what substantive equality (as opposed to a more formal version) strives for.

This leads us back to an earlier view of equality.

### **Dickey's equality under the law**

The weight of the expression Rule of Law owes much to Professor Dicey and his influential text, *The Law of the Constitution*, which went through many editions at the turn of the last century. He thought the expression had three meanings. The first was that in England only a breach of the law, and not some arbitrary command emanating from unbridled discretion, could result in punishment. The third was that the English constitution did not flow downwards from a special document on high, but had been pieced together from the same private law that applied between Englishmen themselves ("thus the constitution is the result of the ordinary law of the land.")

However, it is his second meaning, which he called "the idea of legal equality" that is of interest here. Its central passage has been recited in a 1968 Supreme Court judgment:

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<sup>6</sup>*Canada (attorney General) v. Hislop*, 2007 SCC 10, at paras. 72-73.

<sup>7</sup>*Rudolph Wolff & Co. Ltd. and Noranda Inc. v. Canada* [1990] 1 S.C.R. 695.

<sup>8</sup> *Ibid.* at p. [?]

<sup>9</sup> *Ibid.* at p.?

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161; *Musgrave v. Pulido*, (1879) 5 App. Cas. 102; *Governor Wall's Case*, (1802) 28 St. Tr. 51, a secretary of state, *Entick v. Carrington*, (1765) 19 St. Tr. 1030; K. & L. 174, a military officer, *Phillips v. Eyre*, (1867) L.R. 4 Q.B. 225; K. & L. 492, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.<sup>10</sup>

One feature that Dicey didn't mention was that of equality between citizens and the government itself. His point about suing officials came from the common law of torts.<sup>11</sup> He did not say much about suing the Crown for what an official did. The maxim that "The King can do no wrong" had long served a dual purpose. On the one hand it had kept the Monarch out of trouble, and preserved the royal dignity and feudal sensitivities about being tried in one's own court. The other is that no officer who did wrong could plead authority from above – among the wrongful things the King could not do was to authorize a minister or servant to misbehave. By the time that the concept of vicarious liability took off, the Crown managed to be left behind. It would require legislative action to extend vicarious liability to the Crown for acts of its agents and its servants in the scope of their employment.<sup>12</sup>

But by then a supple skill had been developed by the courts. Sometimes they saw ministers and officers and servants as vested in the raiments of authority – and sometimes not. Once impleaded in the royal courts if it turned out they had overstepped their powers, they found no shelter under the Crown's own shield to cover their exposure. As discussed further on, that same suppleness of vision – detaching the miscreant Crown agent from the Crown – has enabled Canadian courts to adroitly deploy a constitutional (division of powers) rule, namely the federal Crown's immunity from provincial statutory burdens. When a Crown servant pleads it where it

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<sup>10</sup> *Conseil des Ports Nationaux v. Langelier*, [1969] SCR 60, at p. 65 reciting from the 10<sup>th</sup> edition, at p. 193. See also *Roncarelli v. Duplessis* [1959] S.C.R. 121, at p.184, *per* Abbott J.

<sup>11</sup> Although he was proud of the Habeas Corpus Act, Dicey was otherwise not fond of administrative law's special writs and remedies. *Quaere* whether his sense of equality would be offended by a special tort that only public officials could commit, and the suggestion by Chief Justice Holt: "If public officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences." *Ashby v. White* (1703), 2 Ld. Raym. 938, at p. 956; 92 E.R. 126, at p. 137.

<sup>12</sup> *Bazley v. Curry*, [1999] 2 SCR 534; Geoffrey Lester, "Suing the Crown in Tort: Some Practical Points to Remember" (2000) 23 *Advoc. Q.* 444.

makes no sense, Canadian courts will find a way to say that she or he or it was not really on Crown business, but on some frolic of their own. Their sure-handed application of the rule and its exceptions may help explain why despite why its asymmetry has never bothered them.

### **Unwritten constitutional principle**

Neither the *Charter* equality nor Dicey's version of the rule of law have much to say on how to regulate federal-provincial relations, but a principle of equal autonomy could be proposed simply as an axiom, or an implicit corollary to the unwritten constitutional principle of federalism:

According to the federal principle, federal and provincial governments are coordinate (or equal in status) and autonomous within their respective spheres of jurisdiction. Thus, judicial interpretation of the division of powers that is faithful to the federal principle will give equal weight and consideration to the respective claims of provincial legislatures and the federal Parliament when they seek to exercise their autonomy to pursue distinct policy objectives within their respective spheres of guaranteed and exclusive legislative jurisdiction. In other words, implicit in the federal principle is the principle of equal autonomy.<sup>13</sup>

A claim to normative force could be advanced on the ground that the federalism principle ranks among small elite of unwritten constitutional principles endowed with "superordinate normative status".<sup>14</sup> If so, the case law that has guided the interpretation of the written provisions of the Constitution and that mediates the complicated panoply of relationships between the federal and provincial orders of government would answer from now on to a single meta-standard.

This amounts to a powerful proposition. The interpretive doctrines affecting the division of powers would be continuously scrutinized for compliance, adjusted and brought into alignment when departures were detected. Fidelity to precedent (*stare decisis*) and the incremental nature of adjudication would exert a moderating influence in buying time in which to reshape a non-conforming doctrine before proceeding to replace it, but might not amount to a genuine counterweight.

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<sup>13</sup> "Equal autonomy", footnote 1, p.574 (footnote omitted).

<sup>14</sup> *Id.*, at p. 573. In the *Reference re Secession of Quebec*, [1998] 2 SCR 217, the Court identified federalism, along with democracy, constitutionalism and the rule of law, and respect for minority rights, as underlying constitutional principles that sustain and inform the Constitution's written text and assist in its interpretation.

## Paramountcy

There is a prominent division of powers doctrine that has never paid obeisance to symmetry. The doctrine of paramountcy uniformly operates in favour of federal legislation and at the expense of provincial laws when the two overlap with inconsistent results. If equal autonomy were to be given pride of place, paramountcy would have to undergo radical reconstruction. Just how far it could be displaced if it was ever broken from its moorings is open to conjecture. In Canada the doctrine lacks an explicit textual anchor comparable to s.109 of the Australian Constitution, or the Supremacy Clause in Article VI of the Constitution of the United States. There might be nothing much to hold things steady if courts allowed some strong new current within the “dominant tide of constitutional interpretation” to start to pull it out to sea.<sup>15</sup>

Professor Ryder considered that a strong argument can be made for maintaining a general rule of federal paramountcy on the basis of practical considerations of predictability and compliance with the rule of law. However, it is not clear to me how a superordinate emphasis on measuring for symmetry, without no balancing factors, could dissuade itself from diagnosing paramountcy as a problem to be cured.

The erosion could start with *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 and *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113. In those judgments and in others, the Supreme Court has taught that paramountcy precludes provincial laws from frustrating a clear statutory articulation of federal legislative purpose, even where dual compliance would be possible.<sup>16</sup>

The Court’s view is that

[t]he standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission<sup>17</sup>

Incrementally, that high standard would be raised until it was quite out of reach. And yet such a trend would not reflect the thinking of any members of the Court. In *Lacombe*, in reasons that

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<sup>15</sup> The Supreme Court has used that image in several recent cases: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at paras. 36-37, citing *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 17; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 SCR 86, at para 4; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 SCR 453, at paras. 107, 110, 149; *Reference re Securities Act*, 2011 SCC 66, at paras. 57-62.

<sup>16</sup> In *Mangat*, federal immigration legislation provided that refugee claimants could be represented at their own expense by a lawyer or a non-lawyer in proceedings before a federal tribunal. Provincial legislation prohibited anyone except a lawyer from representing clients for a fee. Neither law required a non-lawyer to represent a claimant. The narrowest possible view of paramountcy (that it only arises where compliance with one law entailed defiance of the other) would consider that the doctrine was not engaged. However, the Court ruled that paramountcy *was* engaged because it was clear that the provincial prohibition against non-lawyers frustrated Parliament’s purpose.

<sup>17</sup> *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536, at para. 66.

dissented in the outcome but not on this point, Justice Deschamps observed that it was particularly important to avoid drifting into a lax or vague definition of the concept of conflict, because modern approaches to federalism give rise to frequent situations of overlap. However, there is nothing in her discussion of paramountcy to suggest that she considered *Mangat* lax or vague.<sup>18</sup> To the contrary, it formed a central part of her explanation of how paramountcy operates. More recently, on behalf of a unanimous Court it was Justice Deschamps who discussed and applied *Mangat*, in the *Bruyère* case<sup>19</sup>

If the Court were to reduce its understanding of the federalism principle to a series of mechanical inspections for symmetry, it would soon provide itself with an unpalatable choice. It could resile from the understandings vindicated in *Canadian Western Bank*<sup>20</sup> and reiterated in the *Securities Act Reference*.<sup>21</sup> That understanding is twofold. First, it takes to heart a critique of the classic form of dual federalism that prevailed during the tenure of the Judicial Committee of the Privy Council as Canada's chief jurisprudential architect. The critique is that the classic era emphasized too rigidly the role of courts in policing exclusivity ('watertight compartments'). Secondly, the understanding is that a more modern approach towards federalism has irreversibly overtaken the classic form. The modern approach entails (i) broader readings of both federal and provincial heads of power, along with the concomitant acceptance of more effects as incidental and therefore valid, as part and parcel of the pith and substance doctrine, (ii) a friendly impulse towards rescuing "overflow" provisions that could not survive on their own, by recourse to the ancillary powers doctrine, and (iii) a shedding of discomfiture at the prospect of proliferating areas of double aspect and their attendant overlaps. It might not be inaccurate to portray the Court as taking pride that this more modern landscape facilitates co-operative arrangements between the orders of government. It is a far cry from a time when interdelegation of any sort attracted judicial suspicion as some form of collusion between colonial orders of government to move the fence-posts the imperial legislator had hammered in on their behalf.<sup>22</sup>

The "dominant tide" finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government.<sup>23</sup>

The Supreme Court of Canada, as final arbiter of constitutional disputes since 1949, moved toward a more flexible view of federalism that accommodates overlapping

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<sup>18</sup> *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 SCR 453, at para. 118-

<sup>19</sup> *Lacombe*, at para. 119, and *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, 2011 SCC 60, [2011] 3 SCR 635

<sup>20</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at paras. 36-37

<sup>21</sup> *Reference re Securities Act*, 2011 SCC 66, at paras. 54-66.

<sup>22</sup> *Contrast R. v. Furtney*, [1991] 3 SCR 89, and *A-G Nova Scotia v. A-G Canada*, [1951] S.C.R. 31.

<sup>23</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at para.37.

jurisdiction and encourages intergovernmental cooperation – an approach that can be described as the “dominant tide” of modern federalism [...] <sup>24</sup>

If those understandings are not to unravel, the other option for placating an unrelenting appetite for symmetry would be to conscript the Court into a long and arduous task of chipping away at paramouncy by devising new sub-rules and exceptions through which to circumvent it. The project’s costs would be far-reaching. They would be borne in the first instance by Court itself, in disagreements between independent judges on how far and how fast to depart in specific cases from the law as everyone had known it for so long. As a court’s judgments become fractured and unpredictable, its institutional weight in the grander scheme of things declines. In the second instance, even well-intentioned reforms to a rule that has consistently operated with a high level of predictability will have unanticipated chilling effects on the cooperative federalism arrangements that the modern approach sets out to foster.

The politically accountable branches in both orders of government are well placed to negotiate trade-offs and to work around a legal given, even an “asymmetric” legal given, provided it is not shifting unpredictably under their feet, or worse yet, becomes perceived as susceptible to shifting after a bargain is concluded. Fortunately, the Court already knows that a requisite measure of predictability on its own part is a pre-requisite to enabling the other braches to go about their important part of the job, when it comes to an effectively functioning cooperative federalism. <sup>25</sup>

On recent occasions the judges have acknowledged the primary role of governments, as opposed to courts, as actors in maintaining and adjusting the balance that federalism, and especially co-operative federalism, requires:

A progressive interpretation cannot, however, be used to justify Parliament in encroaching on a field of provincial jurisdiction. To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court’s view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions. The task of maintaining the balance between federal and provincial powers falls primarily to governments. If an issue comes before a court, the court must refer to the framers’ description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to

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<sup>24</sup> *Reference re Securities Act*, 2011 SCC 66, at para. 57.

<sup>25</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at para 23:”To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential.”

modern-day realities, in a manner consistent with the separation of powers of the executive, legislative and judicial branches.<sup>26</sup>

This acknowledgement was echoed in *Canadian Western Bank* (at para. 24)<sup>27</sup> and the *Securities Act Reference* (at para 60).<sup>28</sup> Just as courts are rightly hesitant to allow structurally intuited judicial doctrines to amend the constitutional text, courts should hesitate to reflexively turn to symmetry, without more, in order to weigh and start amending interpretive doctrines whose pattern of application displays a high degree of consistent reliability.

That concern must not be mistaken for a claim that all existing doctrines are predictable and easy to apply.

This brings us to the doctrine known as interjurisdictional immunity.

### **Interjurisdictional Immunity**

It seldom happens that an entire doctrine emerges fully formed from a single judgment. In Canada the closest we may have come to this was on May 26, 1988, when the doctrine known as interjurisdictional immunity emerged in a single magisterial work, *Bell 1988*,<sup>29</sup> composed by Justice Beetz. His reasons for judgment surveyed almost a century of case law, braiding loose strands with compelling insight, and postulating a “more general rule” discerned from miscellaneous cases that had involved the interpretation of a limited number of heads of federal power.

Justice Beetz did not venture to predict whether (or why) the doctrine could be viably extrapolated to all other heads of federal power, or just some. Nor did he say whether (or why) it could work for some, or all, provincial heads of power. It is a significant loss to Canadian law that he left the Court a few months later. I am certain that his clarity of vision would have helped to dispel much of the uncertainty of application with which the doctrine later was associated.

Over the next twenty years a problem became evident. The doctrine’s content must be applied to each head of power according to a court’s admittedly subjective sense of what sort of minimal content (or “core”) must be mapped out within the larger ambit of the provision’s outer limits, in order to do justice to the requirement for exclusivity associated with the conferral of that particular power to Parliament (or potentially, to the provinces) The doctrine’s extension to a “new” head of power to which it has not been applied before gains little in the way of predictability from previous case law, because the items listed in Sections 91 and 92 of the

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<sup>26</sup> *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 10, *per* Deschamps J.

<sup>27</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at para. 24.

<sup>28</sup> *Reference re Securities Act*, 2011 SCC 66, at para. 60.

<sup>29</sup> *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749.

*Constitution Act, 1867* were framed with no great concern for the ease with which their outer boundaries could be distinguished from their essence. In a sense, the “easy” heads of power have already been taken, and they were not so easy in the first place.

Bell Canada was an interprovincial undertaking well known to the courts, and all agreed its phone rates fell exclusively within federal regulatory jurisdiction under s.91(29) / s.92(10) (a). But was that the only thing about Bell that provincial laws could not affect? In *Bell 1966*<sup>30</sup>, the Supreme Court had ruled that minimum wage requirements imposed by provincial labour legislation could not apply to Bell’s operations within that province, even though the federal labour legislation that did apply had no conflicting rules. In other words, the Court refused to see a “double aspect”. The Court’s decision would be singled out for special adverse treatment in the academic literature.<sup>31</sup> In 1988, a trilogy of cases gave the Court an opportunity to revisit the question, and if the critics had their way, to recant. At issue this time around was the applicability to Bell of rules in provincial occupational health and safety statutes.

In unanimous reasons for the Court, Justice Beetz derived five propositions:

- First, health as such was not foreseen as a matter in itself, but the case law had assigned it for the most part to provincial jurisdiction in relation to matters of a private or local nature.
- Second, the cases treated labour relations and working conditions as belonging in general to provincial power over property and civil rights, but with certain exceptions.
- Third, labour relations and working conditions occasionally would fall within the reach of federal jurisdiction (and if so, on an exclusive basis), and his study of the cases suggested that this occurred whenever they comprised an integral part of a “primary” jurisdiction of Parliament over certain matters, including interprovincial undertakings.
- Fourth, the case law held that the compensatory component of provincial worker compensation schemes (that is to say, the imposition of premiums on employers and the payment of benefits to injured employees), as opposed to preventive measures, was not constitutionally barred from applying to federal undertakings.
- Fifth, he considered that in a Constitution in which exclusivity in the allocation of legislative powers was textually embedded, double aspects must remain the exception and not submerge the rule.

In addition, a more open-ended doctrinal significance of *Bell 1988* lay in what Justice Beetz discerned as a “more general rule” at play among a miscellaneous assortment of cases. He considered that his third proposition – that on those occasions when labour relations as a matter, usually provincial, fell under federal jurisdiction, it did so on an exclusive basis – could be

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<sup>30</sup> *Commission du Salaire Minimum v. Bell Telephone Company of Canada*, [1966] SCR 767.

<sup>31</sup> See P.W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. Supp., vol 1. , at p. 15-30, footnote 133.

understood through a conceptual lens whose interpretive significance extended beyond that proposition:

It should however be noted that the rules stated in this third proposition appear to constitute only one facet of a more general rule: works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction: *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 ("*Bonsecours*"); *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 ("*Natural Parents*"); *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.<sup>32</sup>

The doctrine's conceptual roots predate the federally incorporated company cases<sup>33</sup> (to which its origins are often inaccurately attributed), to two late nineteenth century judgments of the Privy Council.<sup>34</sup> *Canadian Pacific Railway v. Notre Dame de Bonsecours*, [1899] A.C. 367, involved the interaction between an interprovincial railway and provincial legislation that imposed civil liability on landowners if and when an improperly maintained ditch they owned occasioned flooding damage to their neighbours. It was this early case which expounded that the management and operation of a federally regulated undertaking were off limits to provincial legislation. Provincial laws can apply to a federal railway provided their application would not affect the railway as a railway. The design of the rail bed and its ditching must not be interfered with, but the same concerns did not prevent provincial laws from attaching legal consequences to a failure to maintain a ditch in proper condition.

In plainer language, the upshot was that provincial laws could tell a federal railway what to do, provided they were not telling it how to operate a railway. It is here that we find the notion of "railway *qua* railway", which in the interpretation of other heads of power would morph into such concepts as "Indian *qua* Indian".<sup>35</sup> *Union Colliery Co. of British Columbia Ltd. v. Bryden*, [1899] A.C. 580, foreshadowed another feature of interjurisdictional immunity when it stated: "the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867".

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<sup>32</sup> *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 762.

<sup>33</sup> *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91.

<sup>34</sup> Jonathan Penner, "The Curious History of Interjurisdictional Immunity and its (Lack of) Application to Federal Legislation" (2011), 90 *Can. Bar Rev.* 1.

<sup>35</sup> *Dick v. The Queen*, [1985] 2 SCR 309, at para. 20.

As mentioned, Justice Beetz did not identify the other heads of power to which the interpretation of his more general rule could usefully apply. There is no doubt a *prima facie* expectation that a doctrine that can usefully apply to interpreting one head of power should be able to usefully apply to all. On one hand, a subsequent case, *Ordon Estate v. Grail*, portrayed the concept of a minimal core of exclusivity as inherent in any head of federal power.<sup>36</sup> Meanwhile, on the other hand, the prevailing attitude was that the doctrine did not apply to provincial heads of power.<sup>37</sup> But in either case no cogent explanation was forthcoming. It is this disparity that rightly called out for closer scrutiny. However, to scrutinize a doctrine should not have to mean condemning it. When symmetry is used as a measure, or better yet one measure among others, before blaming the doctrine as the problem, it may be worth asking whether the asymmetry can be understood and explained by reference to other factors.

In 2007 in *Canadian Western Bank*, the Court belatedly decreed the doctrine to be reciprocal in theory, while passages in the judgment disparaged its asymmetrical track record. This is not to say that its asymmetric pattern was seen as its worst flaw. The Court considers that the doctrine's principal limitations involve three features:

- (i) its focus on protecting exclusivity is incompatible with the modern acceptance of overlaps,
- (ii) it reduces the opportunities for cooperative federalism projects in which both orders of government can engage in joint regulation, and
- (iii) it tends to create unnecessary and possibly unintended legal vacuums by allowing only one order of government to make rules in areas where the double aspect doctrine would have allowed both of them to do so.<sup>38</sup>

One question that the Court has not yet asked is whether the doctrine's affinity for federal heads of power (a) should be attributed to some inherent failing in the doctrine itself (which is what some passages in *Canadian Western Bank* appear to say), (b) whether the problem lies in the

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<sup>36</sup> *Ordon Estate v. Grail*, [1998] 3 SCR 437. The Court extended the doctrine to interpret s.91(10) (navigation and shipping). Rules controlling civil liability for deaths or injury in boating accidents were therefore limited to the federal common law of admiralty (which could only be incrementally updated by the courts), as modified by federal statutes such as the *Canada Shipping Act*. Ontario's *Family Law Act*, which conferred a right of action to surviving relatives of the victim of a tort fatality, could not apply of their own force to boating mishaps in the province. It was had previously been supposed that double aspects would enable provincial statutes to operate provided they did not conflict with federal legislation.

<sup>37</sup> In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, La Forest J. in rejecting an argument that a provincial dam – a local work or undertaking- was immune from the federal *Navigable Waters Protection Act* used language suggesting that the doctrine was not reciprocal:

“What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation.”

<sup>38</sup> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, at paras. 62-64.

way that courts have deployed the doctrine (which is what other passages in *Canadian Western Bank* imply when they proclaim that courts could apply the doctrine to provincial powers while regretting that they have not done so), or (c) whether some as yet unidentified factor might be involved.

For instance, many interjurisdictional immunity cases involve comprehensive statutory regimes that regulate collective bargaining, occupational health and workplace safety. As Professor Elliott points out,<sup>39</sup> in enacting the *Canada Labour Code*, Parliament taken care (by means of a key definition in s.2) to limit its commands uniquely to a “federal work, undertaking or business that is within the authority of Parliament”. That may not be so must because Parliament always considers caution to be the better part of valour, as it may be a case of once bitten, twice shy. At one time, very long ago, it was supposed that Parliament’s reach over labour relations might extend quite broadly. Judicial conclusions to the contrary<sup>40</sup> came as a memorable shock.

By contrast, provincial statutes such as the B.C. *Labour Relations Code* and *Workers Compensation Act* define key terms (“employee” and “employer”), without regard to the limits of provincial jurisdiction. An asymmetry of outcomes might simply reflect this arguably legitimate diversity in drafting practices among equally autonomous legislators. One order of government prefers to minimize occasions on which its legislation can be found to overreach; the other finds it convenient to employ universal generic terms, in expectation that the courts will turn to interjurisdictional immunity and read down the wording as necessary. As far as the doctrine itself is concerned, the diagnosis might reveal nothing more serious than a mild case of asymmetry in, asymmetry out.

If that was the case, and yet courts felt compelled to adjust the doctrine in order to reduce the volume of asymmetrical outcomes, the most apparent solution would be to borrow from an approach that was endorsed in *R. v. Ferguson*,<sup>41</sup> a *Charter* case. Instead of reading down an overbroad provincial provision to halt its constitutionally impermissible applications, the courts could strike it down as *ultra vires*, while affording an opportunity to the legislator to rewrite the legislation in more constitutionally compliant terms:

The ball is thrown back into Parliament’s court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects.<sup>42</sup>

Before commencing that experiment, however, pause to consider whether the doctrine’s asymmetry has more legitimate roots. Some heads of legislative power are relatively discrete and self-contained, while others are set out in terms too vast in their potential scope for courts to be

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<sup>39</sup> Robin Elliott, “Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters – Again” (2008), 43 S.C.L.R. (2d) 433, at p. 487-488.

<sup>40</sup> *Reference ?*

<sup>41</sup> *R. v. Ferguson*, 2008 SCC 6, [2008] 1 SCR 96.

<sup>42</sup> *Id.*, at para. 65,

able to prudently discern and isolate a workable core of exclusivity within them. As the Supreme Court has explained,

The doctrine of interjurisdictional immunity has been applied to circumscribed areas of activity [...] It has never been applied to a broad and amorphous area of jurisdiction.<sup>43</sup>

This can help explain why the relatively open-ended federal criminal law power in s.91(27) could seldom if ever “benefit” from the doctrine, and why the courts have never thought to protect a core of federal exclusivity within the federal trade and commerce power in s. 91(2).<sup>44</sup> (There are no Canadian cases comparable to the “Dormant Commerce Clause” cases in American law.)

The most broadly worded head of power in the entire *Constitution Act, 1867*, is in s.92(13) “Property and Civil Rights in the Province”. Derived from the *Quebec Act, 1774*, the expression was understood at Confederation (and ever since) to be so compendious as to swallow the entire field of private law. Indeed it was for that very reason that most of the federal heads of power listed s.91 had to be expressly itemized. If they had not thereby been subtracted from s.92(13), they would surely have lodged within it - they could not have fallen past the vast net cast by s.92(13) into the federal residual clause (peace, order and good government).<sup>45</sup> If s.92(13) is the broadest, s.92(16) (matters of a merely local or private nature) is arguably the most amorphous. In an early encounter between two amorphous heads of power - s.92(16), and the federal residual power in s.91 (p.o.g.g.), - it was s.92(16) that emerged unscathed, and p.o.g.g. that was read down into a narrower and less amorphous shape:

If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.<sup>46</sup>

There may therefore be a legitimate explanation for the dearth of cases describing the inviolable core of provincial powers under of s.92(13) or s.92(16) as with the federal powers over the criminal law, or trade and commerce. The reason for making this point is not to promote the extension of the doctrine to new heads of power. Even in the interpretation of some heads of

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<sup>43</sup> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, at para. 60 (emphasis added).

<sup>44</sup> *Canadian Western Bank*, at para. 43.

<sup>45</sup> William Lederman, “Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation” (1975), 53 *Can. Bar Rev.* 597, at pp. 601-602.

<sup>46</sup> *Attorney General for Ontario v. Attorney General for the Dominion*, [1898] A.C. 348, at p.360 (*Local Prohibition*)

power to which it has already been applied, the rigidity of the doctrine's "no-go zone" mindset may not turn out in the long run not to strike a viable balance, especially where a high degree of co-operative federalism, with the attendant need to allow the other branches of government a margin of manoeuvre, becomes necessary to accommodate the affirmation of constitutional rights in a practicable manner..<sup>47</sup>

Instead, the conclusion simply that a mechanical approach to symmetry is not a reliable autopilot for replacing the more arduously judicial task of steering by a lodestar.<sup>48</sup>

### **Predictability as a doctrinal virtue**

As mentioned above, judges have acknowledged that

What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions.

In maintaining its institutional legitimacy, the Court on most occasions looks to the governments themselves, who are better placed in the scheme of things to advance political agendas on which they can then stand, fall, reverse course or compromise, as their responsiveness to popular moods sees fit. And to reiterate, governments can best negotiate and get along together when they expect the content of jurisprudential doctrines not to become blurry (or at least, not too blurry), and not to mutate too readily at the dictate of new doctrinal penchants, even an egalitarian penchant for making everything come out even.

There is another dynamic that reinforces the value of predictability. When a court sets out to try its hand at improving on an imperfect doctrinal formula, it may find the task elusive of completion. Consider the opening words from *Dunsmuir*, a 2008 administrative law judgment on the standard of review:

This appeal calls on the Court to consider once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals.<sup>49</sup>

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<sup>47</sup> It may prove a special hindrance in denying courts the requisite margins of sensitivity, flexibility and case-by-case pragmatism to navigate the complex federalism dimensions at the confluence of Section 35 of the Constitution Act, 1982, (recognizing and affirming aboriginal and treaty rights), s.91(24) (allocating legislative jurisdiction to Parliament in relation to Indians and lands reserved for the Indians), and constitutional provisions that confer proprietary and legislative authority over public lands and natural resources to provinces. See for example, Kerry Wilkins, "Dancing in the Dark: Of Provinces and Section 35 Rights After 2010" (2011), 54 S.C.L.R. (2d) 529.

<sup>48</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 56: "In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar."

<sup>49</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para. 1 (emphasis added).

It did not take long at all until new approach announced in *Dunsmuir*, which had improved upon improvements the Court had made before, became the subject of further judicial rumination expressing an impatient urge to bring about another significant improvement, this time to the to the by-then-problematic *Dunsmuir*:

However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. [...] it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists [...]<sup>50</sup>

At the risk of jumping ahead, I would also point to the fate of the Australian jurisprudence on intergovernmental (Crown) immunity. If anything is predictable for students of that law, it is that there will be no resting point any time soon for a judicial pendulum that started up in 1904 with a strong attraction toward broad immunity for each order of government from the laws of the other<sup>51</sup>, swung back *circa* 1920 towards no immunity at all,<sup>52</sup> reversed course to the point of embracing, by 1962, a strongly asymmetric view in favour of federal immunity from state laws,<sup>53</sup> only to shatter in fractured disarray in a 1997 judgment<sup>54</sup> in which seven members of the High Court wrote five sets of reasons. The current doctrine in Australia for the time being is to the effect that state laws cannot affect the Commonwealth's non-statutory "capacity" (rights, powers, privileges and immunities), but can regulate the exercise of that capacity. For present purposes it unnecessary to try to fathom the profundity of exactly what that means, It is enough to retain that symmetry as between states and the Commonwealth is still a step or two away, Only among the seven judges would have had the Court reduce Commonwealth immunity to place it on a par with the limits that other cases had placed on the effects that federal laws can have upon state governments.

The moral of the story is that the Australian doctrine's vagarious path has spawned a flourishing academic literature for generations, replete with earnest recommendations for what new direction it should take. Courts can sometimes become caught in a feedback loop, where fresh attempts to set the law on a more enlightened, steadier course become ever more difficult to resist with each attempt to accomplish a feat that the predecessors did not get right. Sadly, despite many impressive starts in all directions, the main loser may be the sort of consistent predictability that best helps governments themselves in exercising their respective equal autonomies through cooperative interaction.

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<sup>50</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at para. 34; *contra*, see the reasons of Cromwell J. concurring in the result but in strong disagreement on the point, at paras. 91-103.

<sup>51</sup> *D'Emden v. Pedder* (1904) 1 CLR 91. For overviews, see Catherine Penhallurick, "Commonwealth Immunity as a Constitutional Implication" (2001), 29 Fed. L.Rev. 151;

<sup>52</sup> *Amalgamated Society of Engineers v. Adelaide Steamship Co, Ltd.* (1920) 28 CLR 129

<sup>53</sup> *Commonwealth v. Cigamic Pty Ltd. (In Liquidation)* (1962) 108 CLR 372,

<sup>54</sup> *Re The Residential Tenancies Tribunal of New South Wales and Henderson: Ex Parte Defence Housing Authority* (1997) 190 CLR 410

## **Intergovernmental immunity**

Finally, we reach a set of rules that for many decades has featured much less prominently in Canada than interjurisdictional immunity. It also displays, at least at the surface, a curious asymmetry. It is only once we examine it more closely that we begin to understand how it may have endured in the jurisprudence so consistently for so long.

Like its more troubled counterpart in Australia, it owes its origins to a confluence of from two sources.

First, we inherited the presumption of Crown immunity from statutes. It operated as a common law rule in English law, sometimes viewed as a prerogative but mainly treated now as a rebuttable presumption of statutory interpretation. The most important thing to realize for our present purposes is that although it was a common law rule, it was not a rule of private law. For example, it was transplanted in Quebec as well as in other “common law” jurisdictions, because although private law in Quebec had been codified, public law had not. This will be significant in order to understand how the rule can play out as it currently does at the division of powers level. Just like the law rule in England, in Canada as well it is essentially a rule of public law. Despite the impressions that might be drawn from what Professor Dicey liked to say, he never denied that there was an unwritten body of public law in England. In fact he made a virtue of it. This presents special challenges for Canadians, whether they are trying to understand the extra-contractual (more or less, tortious) liability of public authorities in Quebec, or whether as here the issue involves a provincial legislature’s inability to unilaterally impose a new civil liability or other obligation on the federal government. The challenge is that although the English common law in England contained and controlled much of that country’s public law as well as much of its private law, the common law of England never paid much notice as to which was which:

Because the common law makes, in principle, no distinction between public and private law, the identification of the "public" common law can be a difficult task. <sup>55</sup>

Second, there is our federal framework to factor in. When Confederation came together, many of the conceptual building blocks were taken from the (second) great constitutional experiment in the United States. By 1867, American jurisprudence had been grappling for a century and a half with the question of whether and to what extent state laws could apply to the federal government and vice versa. For example, we took advantage of their case law to inscribe in our Constitution what for them was an unwritten rule, barring intergovernmental taxation. And yet it was only in relation to taxation that the rule was symmetrically reciprocal. Their doctrine then and now reflects is significantly asymmetrical, and arguably more than ours, in its treatment of intergovernmental immunity from laws other than taxation.

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<sup>55</sup> *Laurentide Motels Ltd. v. Beaufort*, [1989] 1 705 at [?].

One of the interesting features of our Canadian jurisprudence is that it is the only division of powers doctrine that has been built in Canada from start to finish by Canadian judges, “without any imprint being imposed by the Privy Council”.<sup>56</sup>

However, before approaching the Canadian rules more closely, it is necessary to digress in order to untangle a potentially confusing matter of nomenclature. If this source of confusion is not adequately dealt with at the outset, it will be sure to creep back in. This area is already sufficiently complex as it is. It also helps to give us a short but useful glimpse into how the corresponding rules in how two other federal countries – the United States and Australia - came into being.

### **Clarifying nomenclature and important underlying concepts**

Recall that the doctrine associated with cases such as *Bell 1966*, *Bell 1988*, and *Canadian Western Bank* is commonly referred to in English as “interjurisdictional immunity”, although its description in French - «doctrine de la protection des compétences exclusives»<sup>57</sup> most aptly captures its current significance. The English language expression worked its way into Canadian legal discourse from the title of Professor Gibson’s article in 1969.<sup>58</sup> The author’s principal topic had been whether statutes enacted by one order of government could legally bind the other. Quite logically, it examined case law on interpretative presumptions concerning statutes and the Crown, along with the additional dimension in countries such as Canada and Australia that are blessed with two orders of government. However, the cases that he collected and surveyed went far beyond the situation of governments or their servants and their agents. Professor Gibson looked at cases involving federally incorporated companies and federally regulated undertakings in the private sector, notably the much maligned *Bell 1966*. Often, they were not even acting as contractors for the government, let alone structural Crown agents (“Crown corporations”). And so in order to fit them in, Professor Gibson used a capacious label: “*federal instrumentalities*”.

Gibson’s approach in mixing such cases together (governments themselves, plus assorted “instrumentalities”) would be instantly familiar to students of American federalism. They likewise have been using the word “instrumentalities” in this context, and for nearly two hundred years. It was first used as a loose (deliberately loose) expression, chosen in a foundational federalism judgment - *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (*McCulloch*).

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<sup>56</sup> C.H.H.McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (1977), at p. 34. The *Dominion Building* case, as decided by the Privy Council, will be dealt with later on.

<sup>57</sup> *Québec (Procureur général) c. Canada (Ressources humaines et Développement social)*, 2011 CSC 60, [2011] 3 RCS 635, at paras 7-8.

<sup>58</sup> Dale Gibson, “Interjurisdictional Immunity in Canadian Federalism” (1969), 47 *Can. Bar Rev.* 40.

*McCulloch* is undeniably one of the most important federalism judgments ever. It has given rise to untold progeny. In Canada it is known for inspiring the prohibition enshrined in s.125 of our *Constitution Act, 1867*, which forbids one order of government from wielding its taxation powers against the other. Its legacy extends beyond federalism. It is *McCulloch* that deserves much of the credit whenever judges move beyond the confines of a narrow and literal approach to determining a constitution's meaning, and start instead from a broader and more purposive appreciation, drawn from its overall structure.<sup>59</sup> It is Chief Justice Marshall's proposition from *McCulloch* that echoes each time Canadian judges preface an interpretation of our *Charter* by proclaiming the crucial difference between construing a statute and expounding a Constitution. That is not something that the early Privy Council cases would likely have come up with.

An Australian writer portrays the creative genius of *McCulloch* in these words

From Marshall came the conclusion that sovereignty required some sort of independence of each government from the other, and from this came the concept, nowhere expressed in the Constitution, of intergovernmental immunity. That concept has proved one of the most durable constitutional ideas to be invented by judges, for it had no basis in constitutional text, or in historic theories of federalism. In an historic federation, the commands of the federal body could only be directed to the member states – an idea of the states being immune from such commands would have made no sense at all.<sup>60</sup>

- Claus, "Federalism and the Judges: How the Americans Made Us What We Are" (2000) 74 *Australian Law Journal* 107, at p. 111.

In *McCulloch*, Chief Justice Marshall artfully blended the notion of sovereign immunity (to be attributed, absent a monarch, to the People) with a written constitutional rule that ranked the laws of Congress above all state laws. At the same time, under the guise of protecting the federal government from potentially destructive state powers of taxation or regulation, the judgment managed to shield the actual litigant - a federally chartered bank which on close scrutiny would have borne little resemblance to any department of the federal government. He did so by portraying it as an "instrumentality" of Congress.<sup>61</sup> For good measure to his strong emphasis on

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<sup>59</sup> *Hunter v. Southam* [1984], 2 S.C.R. 145, at p. [?]: "Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'ulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). It is, as well, the approach I intend to take in the present case."

<sup>60</sup> Laurence Claus, "Federalism and the Judges: How the Americans Made Us What We Are" (2000), 74 *Austr. Law J.* 107, at p. 111.

<sup>61</sup> The Second Bank of the United States functioned as the federal government's banker, but its legal structural relationship to the government was that of a private corporation in which the government was never more than a

federal supremacy he added a moderating dose of symmetry, by conceding that the taxation bar must apply reciprocally. But that reciprocity did not extend to legislative powers of “regulation”.

*McCulloch* and its descendants have long been studied by Australian judges and commentators. Australian judges at an early era were inclined towards boldly drawing unwritten “implications” from its Constitution, only to lean away from the idea a generation later (and thus the pendulum was set in motion). Professor Gibson’s article references an Australian article on inter-governmental immunities, which of course refers to *McCulloch* and the word “instrumentality”.<sup>62</sup>

At the time of Professor Gibson’s article, *Bell 1966* (which he critically reviewed in the article) was perhaps more prominent and controversial in Canada than were the cases about statutes and the Crown.<sup>63</sup> But since both sorts of cases had been collected in the article, it was easy for the meaning of “interjurisdictional immunity” in his title to slip from its original focus on statutes and the Crown, to end up today as a catchword for assorted cases involving private companies, private sector banks, rules of private law (within the law of admiralty), First Nations individuals who probably do not think of themselves as servants of the Crown, and (most recently) a privately owned airstrip on privately owned land, on which only small privately owned aircraft would be likely to land.

It is worth noting that the focus of Gibson’s article was not on what we have come to call the doctrine of interjurisdictional immunity. It was, rather, on the question of whether and to what extent the laws of one government in Canada can be said to be binding on the other governments – in other words, the law relating to Crown immunity within the Canadian federation.<sup>64</sup>

The switch in meaning became permanent after *Bell 1988*. Bell Canada was a private company, not a part of the federal government or a Crown corporation, nor on the facts of the case was Bell Canada even a government contractor (which is often how private firms achieve the status of “federal instrumentality” in the American cases). Justice Beetz’ survey of the case law was concerned marginally at best with cases involving governments. Significantly, it made no mention whatsoever of the *Gauthier* case<sup>65</sup>, the progenitor of an abundant line of cases pronouncing on federal Crown immunity. Professor Gibson had dealt it with prominently in his article, as have all judges and commentators who addressed the topic before or after. For this

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minority shareholder. Harold J. Plous & Gordon E. Baker, “*McCulloch v. Maryland*: Right Principle, Wrong Case” (1957), 9 *Stanford L. Rev.* 710.

<sup>62</sup> G. Sawyer, “State Statutes and the Commonwealth” (1961), 1(4) *U. of Tasmania Law Rev.* 580, at p. 581.

<sup>63</sup> Certainly for labour lawyers, more was at stake on the private sector side of the case law. Apart from situations at the margins, there was little confusion about which laws applied to government employees. Parliament controlled labour relations among federal public servants, while provincial legislatures controlled labour relations among provincial public servants (this simplicity is not found in every federal system).

<sup>64</sup> Robin Elliott, “Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters – Again” (2008), 43 *S.C.L.R.* (2d) 433, at p. 455.

<sup>65</sup> *Gauthier v. The King* (1918), 56 *S.C.R.* 176

and other good reasons, the *Gauthier* line of case law cannot now be dealt with under the rubric of “interjurisdictional immunity”, which term Professor Gibson had originally applied to them

Ever since 1988, both the subsequent case law and the academic literature to which *Bell 1988* gave rise continue to use “interjurisdictional immunity” to describe the applicability of statutes to persons, things, activities, and even bodies of law (such as maritime law) that have more to do with the private sector than the Crown. In *Canadian Western Bank*, Justice Binnie grouped the cases under six rubrics, one of which he entitled “The Management of Federal Institutions”.<sup>66</sup> It is very brief portion of the judgment, listing the name and *ratio* of an occasional case or two that involved the federal Post Office or the RCMP, but without stressing any connection with Crown immunity as such. This is easy to understand. The Postal Service has its own head of federal power in s.91(5).<sup>67</sup> His brief parenthetical description of the *Keable* case, “(circumscribing a provincial public enquiry because “no provincial authority may intrude into its management”) makes no mention of the Crown. There is only one mention of the Crown as such, in an obscure surmise that Justice Binnie proffered about the federally chartered company cases:

Since the creation of corporations by letters patent issued by the Crown constituted an exercise of the Crown’s prerogative to create corporations, it would have seemed natural to the Privy Council to extend the Crown’s immunity to the entities it incorporated. Thus, to apply a province’s general statutes to these corporations could be conceived as interfering with the exercise of the prerogative of incorporation.<sup>68</sup>

In Canada, since the beginning there have been two relatively distinct lines of cases - distinct, although never “water-tightly” so. An attempt at this late day to meld them into a single doctrine at would exacerbate (as *McCulloch v. Maryland* still tends to do in the United States) the ability of courts to manage each with a satisfactory degree of consistent predictability.

I find it interesting that Chief Justice Dickson named them as two categories in the *OPSEU* case:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like Interjurisdictional and Crown immunity and concepts like “watertight compartments” qualify the extent of that interplay.<sup>69</sup>

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<sup>66</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at para 62.

<sup>67</sup> This accounts for the reasoning in *Letter Carriers’ Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178, and several of the judgments in *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248. In the latter case, however, Kellock J. added for good measure a reference to the *Gauthier v. The King* 56 S.C.R. 176, the archetypal Canadian case on Crown intergovernmental immunity from provincial statutes.

<sup>68</sup> *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at para 39 (emphasis added). At para. 41, Binnie J. refers again to “corporations created by the federal Crown” rather than corporations created by Parliament, or corporations created in accordance with federal legislation.

<sup>69</sup> *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2, at para. 27.p. (?)

In the context of federal-provincial interaction at the division of powers level, the expression “Crown immunity” could not have been intended to refer to the interpretative presumption that operates at a statutory level, where it affects the applicability of statutes of one order of government to the executive of that same order of government.

And so, it is necessary to use a new name, and to try to do so consistently. The obvious candidate is intergovernmental immunity, which is the term that is used in the title and throughout the frequently cited work by Colin McNairn<sup>70</sup>. McNairn’s useful text from 1977 methodically collected and reviewed the Canadian (as well as the Australian) cases on this topic. His expression intergovernmental immunity is to be preferred in this specialized context over “Crown immunity”, because that term has several other uses – it can refer (a) to the Crown’s traditional immunity from suit in its own courts; (b) to a more specific common law rule of substantive immunity from vicarious liability, which became a thorny issue in the second half of the 19<sup>th</sup> century and has since been the object of statutory law reform, and (c) to the statutory presumption as it operates within a single order of government.

The term intergovernmental immunity has been expressed in French as « immunité intergouvernementale ». <sup>71</sup>

### **Crown Immunity as an interpretive presumption (statutory level)**

There is a strong but rebuttable presumption at common law, inherited from England, to the effect that statutes are interpreted as not intending to place burdens on the Crown. The presumption affects generic phrases such as “no person may... without a licence”, “every manufacturer shall...”, “anyone who omits to...is liable to...” etc. The government (the Crown) will be exempted from statutory restrictions, obligations and liabilities absent express words or a necessary implication that the legislator clearly must have intended the opposite result. <sup>72</sup>

This does not prevent the Crown from availing itself of a generally worded statute - after all, the Crown has the same juridical capacity as an ordinary person <sup>73</sup>. If it so chooses, however, it will of course take the advantage as it finds it. That is to say that the advantage will come with those attendant qualifications and conditions, if any, that bear a so close a nexus to it that they cannot be unbundled. That the nexus must be close in order for the burden to attach was made clear in the leading *AGT* case, in which Chief Justice Dickson subscribed to the perspective that “the

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<sup>70</sup> C.H.H. McNairn, (1977) *Governmental and Intergovernmental Immunity in Australia and Canada*.

<sup>71</sup> *Renvoi relatif à la taxe sur le gaz naturel exporté*, [1982] 1 RCS 1004, at p. 1070, using «immunité intergouvernementale» in a translation of Prof. Hogg’s use of “intergovernmental immunity” in English, in relation to s.125 of the *Constitution Act, 1867*.

<sup>72</sup> For an extensive and recent treatment of this topic, see Hogg, Monahan & Wright, *Liability of the Crown* (4<sup>th</sup> ed., 2011) at ch. 15, pp. 395- 460.

<sup>73</sup> Whether conceived of as an individual, a corporation sole, a corporation aggregate, or some amalgam of those possibilities— English public law had its own small-c constitutional reasons not to be too precise.

benefit must have been intended to be conditional upon compliance with the restriction.”<sup>74</sup> *AGT* also refused to carve out a commercial activity exception, considering that this law reform measure, like other policy-laden amendments to rule, rightly belonged the legislative branch.

The presumption operates in parallel fashion at each level of government, whose legislative branch can alter it as they see fit in respect of its own executive. Parliament and most provincial legislatures have preferred to include it in their Interpretation Acts in substantively the same dimensions as the common law rule. Significantly however, two provincial legislatures have seen fit to reverse it. If this reversal proves to be a demonstrable improvement, other Canadian jurisdictions can be expected to follow suit. To leave the choice in each province to provincially elected legislators is defensible on policy grounds as well as according with the approach taken by the Supreme Court.

### **The presumption at the intergovernmental level**

*AGT* also confirmed that the presumption extends inter-governmentally as well, as an interpretive presumption. Federal statutes are interpreted as intending not to bind provincial governments, and the reciprocal presumption holds true. This aligns with the notion of comity between the two orders of government. At a practical level, it relieves each order of government from having routinely to inventory the potential negative effects that a new legislative proposal might impose upon the other.

### **Federal statutes can bind the Crown in right of a province**

*AGT* confirmed that if Parliament clearly does express an intention to render a federal statute binding on a provincial government, it faces no insurmountable constitutional barrier provided of course that its statute is valid.<sup>75</sup> This result accords with earlier authority.<sup>76</sup>

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<sup>74</sup> *Alberta Government Telephones v. Canada (Canadian Radio -television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, citing McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada*, at p. 11. The Canadian rule follows *Province of Bombay v. City of Bombay*, [1947] A.C. 58. Unlike Canadian courts that have left the policy merits of the rule to legislators, the Australian High Court amended rule in order to reduce the intensity of the presumption in *Bropho v. State of Western Australia* (1990), 171 C.L.R. 1. Interestingly, it was then faced with a problem of whether it should simply deem the amendment to be retroactive, because it realized that many statutes would have been drafted against a backdrop of the rule as it had previously been. When the legislature of Prince Edward Island decided to reverse the presumption, it did so on a prospective basis. How the Australian court could craft its intervention prospectively, while still denying at a more general level that it is beyond its role and powers to introduce prospective changes to the law, appears to have gone unnoticed.

<sup>75</sup> In terms of a succinct formula, it would not suffice to state that “This Act is binding on Her Majesty”, since that would be interpreted as meaning only the federal government. An example of a provision in a federal statute intended to apply to both orders of government is found in s.3 of the *Marine Transportation Security Act*: “This Act is binding on Her Majesty in right of Canada or a province.”

But are there no limits (taxing powers aside) on how far or how severely federal statutes might regulate, restructure, or otherwise burden a provincial government?

Of course there are limits. The pith and substance doctrine affords powerful lines of defence from a federal statute that singled out provincial governments for hostile treatment. Alarms would ring about the legislation's essential character. If the only objects of the law were provincial governments, would the legislation's purpose not turn out to be in relation to amending the constitution of a province? The Constitution expressly assigns to provincial legislatures exclusive jurisdiction over the enactment of statutory rules to alter the "constitution of the province".<sup>77</sup> Depending on the scenario, the doctrine of colourability could be engaged. If the statute's effects were draconian, or even if they were not but the incidence of its effects fell with suspicious disproportion upon provincial governments, this could throw the statute out of whatever of head of federal power was being invoked in asserting its validity.<sup>78</sup>

If that did not work, there is now a second line of defence. In light of the pronouncement in *Canadian Western Bank* that interjurisdictional immunity can be reciprocal, this could present an occasion to apply it. Unlike the vast scope of s.92(13) or the amorphous nature of s.92(16), the narrower and more manageable head of provincial legislative power in relation to reshaping its own governmental apparatus (its constitution, in the older English sense of the word), could well offer a source of protection for provincial autonomy.

The Australian position is somewhat similar. The rejection of unwritten limits to Commonwealth laws in the *Engineers* case has been tempered by case law that establishing the *Melbourne Corporation* principle, which protects states from Commonwealth laws that would single them out for special burdens or disabilities, or from laws of general application that would destroy or curtail their continued existence or their capacity to function as governments.<sup>79</sup>

American doctrine in this area must take account of the jurisprudential particularities flowing from the Tenth and Eleventh Amendments. The latter has in recent decades been understood in a more expansive way than would result from a literal reading of its text (which reaffirms a state's immunity from suits commenced by out-of-state claimants in the federal courts.) In the "new federalism" cases of the 1990's, these states' rights amendments underwent a resurgence in significance, but even so, state immunity from federal law never came close to the solid immunity that the federal government itself has long enjoyed from state laws. Congress can still

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<sup>76</sup> *Attorney General of British Columbia v. Attorney General of Canada* (1923), [1924] A.C. 222 (P.C.) ( *Johnny Walker* case), *A.-G. for Quebec v. Nipissing Central Ry. Co. and A.-G. for Canada*, [1926] A.C. 715, *The Queen in right of Ontario v. Board of Transport Commissioners* [1968] S.C.R. 118 (*Go-Train* case).

<sup>77</sup> Formerly in s. 92(1) of the *Constitution Act, 1867*, and currently in s.45 of the *Constitution Act, 1982*, subject to a small number of matters covered by the s.41 unanimity requirement, which an ordinary federal statute could not in any event unilaterally control.

<sup>78</sup> *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 SCR 783, at para. 18 and authorities cited there.

<sup>79</sup> *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31. As to whether more recent cases have reshaped the rule, see Amelia Simpson, "State Immunity from Commonwealth Laws: *Austin v. Commonwealth* and Dilemmas of Doctrinal Design" (2004) 32 U. Western Australia Law Rev. 44.

pass laws that regulate a state activity, for example by controlling a state's ability to market personal information that it gathered from its own regime of automobile diver licensing.<sup>80</sup> Among the things that Congress cannot do is to confer new rights upon individuals which can then enforce against a state itself by suing in state courts,<sup>81</sup> or to "commandeer" state officials by unilaterally imposing administrative duties on them to operate federal programs without the state's consent.<sup>82</sup>

In Canada, Parliament, devoid of the tremendously powerful commerce power available to Congress, is for the most part constitutionally incapable of conferring civil causes of action on individuals to be asserted against provincial governments, comparable to Congressional laws that might purport to give additional labour rights to state employees, exigible against their state employers in state governments. Nor in living memory has Parliament ever attempted anything on that scale. The existence of an express provincial head of power in relation to provincial offices and officers 92(4) would be a strong deterrent. Even during the era of the *Anti-Inflation Act*, the extension of restrictive measures to the provincial public sector was designed to be conditional upon an opt-in by each province, the parameters of which would be shaped through agreements.

Of course, this does not mean that a special constitutional rule is breached whenever Parliament does something that might make life more difficult for a province. Notably, for example, Parliament is free to amend or repeal federal legislation that was beneficial to a province, such as federal legislation implementing a federal-provincial cost-sharing arrangement. The driving principle at work is that of Parliamentary sovereignty,<sup>83</sup> just as that same principle precludes provinces from using simple statutes as the means by which to entrench an interprovincial arrangement among themselves beyond the possibility of unilateral withdrawals.<sup>84</sup>

### **Provincial statutes do not of their own force bind the federal Crown**

#### **The Gauthier line of cases**

Unlike their Australian colleagues who have struggled to cope from trend to trend, it may seem astonishing that Canadian judges could maintain a rule as consistently and for so long as they have done: provincial legislation does not of its own force bind the federal Crown.

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<sup>80</sup> *Reno v. Condon*, 528 U.S. 141 (2000). For an overview of the new federalism cases, see J.M. Pellicciotti, "Redefining the Relationship between the States and Federal Government: A Focus on the Supreme Court's Expansion of the Principle of State Sovereign Immunity", 11 *Boston U. Pub. Int. L. J.* 1 (2001-2002).

<sup>81</sup> *Alden v. Maine*, 527 U.S. 706(1999).

<sup>82</sup> *Prinz v. United States* 521 U.S. 898 (1997).

<sup>83</sup> *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525.

<sup>84</sup> *Reference re Securities Act, as a matter of constitutional principle, neither Parliament nor the legislatures can, by ordinary legislation, fetter themselves against some future legislative action* (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at pp. 12-8 ff.). *Inherently sovereign, the provinces will always retain the ability to resile from an interprovincial scheme and withdraw an initial delegation to a single regulator.* at para. 119,

It was in 1905 that the Exchequer Court (predecessor to today's Federal Courts) opined on the application to the Federal Crown of provincial legislation that conferred a direct right of action to assignees to whom a debt had been assigned. The Court refused to apply this rule to a debt of a federal public servant who had assigned his future salary as security for a loan. There were good public policy reasons for this refusal— it prevented third parties from acquiring undue influence over impecunious or financially imprudent public servants. Justice Burbidge went on, however, to address another consideration:

The only Legislature in Canada that would have power in that respect to bind the Crown, as represented by the Dominion Government, would, it seems to me, be the Parliament of Canada.<sup>85</sup>

A decade later, in *Gauthier v. The King* (1918), 56 S.C.R. 176, Chief Justice Fitzpatrick said much the same thing, as did Justice Anglin (as he then was):

... Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion....<sup>86</sup>

Half a century after that, Chief Justice Fauteux put it this way:

... la Couronne aux droits du Canada ne peut être liée par une loi émanant d'une législature provinciale...<sup>87</sup>

Two decades afterwards, Chief Justice Laskin gave the rule a memorable flourish:

... a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation.<sup>88</sup>

Canadian judges on other courts at various times have said exactly the same thing:

... I am of the opinion that there is no power in the Province by any of its enactments to bind the Crown in the right of the Dominion.<sup>89</sup>

... As provincial legislation it does not, nor could it, bind the Crown in right of Canada.<sup>90</sup>

It is occasionally suggested that the law has not yet been settled on this point and that many if not all the judicial pronouncements from the Supreme Court should some fine day be ignored or

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<sup>85</sup> *Powell v. The King* 9 Ex. Ct. R. 364, at p. 374.

<sup>86</sup> *Gauthier v. The King* (1918), 56 S.C.R. 176, at ?

<sup>87</sup> *La Reine c. Breton*, [1967] R.C.S. 503, at p. 506.

<sup>88</sup> *Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, at p. 72. See also *A.-G. Quebec and Keable v. A.-G. Canada*, [1979] 1 S.C.R. 218, at pp. 244-245.

<sup>89</sup> *Bowers v. J. Hollinger & Co.* [1946] 4 D.L.R. 186 (Ont. H.C.), at p. 196

<sup>90</sup> *Ontario (Director, Family Support Plan) v. Freyseng* (1994) 18 O.R. (3d) 361 (Prov. Div), aff'd (1994) 21 O.R. (3d) 642 (Gen. Div.). at para. 33.

swept aside as misleading *obiter dicta*.<sup>91</sup> However, in light of yet another recent addition to the case law, that vantage point appears far-fetched. In 2008, the British Columbia Supreme Court was not simply adding one more dictum to the pile when Justice Wedge identified the *ratio decidendi* of her decision in *Imperial Tobacco* on the following:

On the issue of whether the Provincial Crown has the power to legislatively bind the Federal Crown, the answer is quite clear that it does not.<sup>92</sup>

Justice Wedge held that the British Columbia Court of Appeal had decided an earlier case (*Hillcrest*)<sup>93</sup> on that same basis. Beyond that, she cited from the unanimous decision of the Supreme Court of Canada, in *Rudolph Wolff*, upon which she also relied:

It is beyond question that only the Parliament of Canada could enact statutes to provide that actions could be brought against the Crown in right of Canada.<sup>94</sup>

The *Imperial Tobacco* proceeding involved a motion by the federal government to strike a notice that several tobacco companies had filed, seeking to implead Canada as a third party in ongoing proceedings in which the companies themselves were the defendants. The main proceeding had been launched by the provincial government against the companies on the basis of alleged liability pursuant to special health care costs recovery statute that the province had enacted. Basically, the statute had created a new civil cause of action under which a “manufacturer” of tobacco became liable, on the basis of past as well as present “tobacco-related wrongs”. The companies alleged that Canada was a fellow manufacturer, and that its own breaches of a duty of care that it owed to them had caused or contributed to their liability to the province if indeed they were liable at all (which they denied). The companies sought an array of relief against Canada, involving declarations and orders for contribution and indemnity.

Canada denied that it was or had been a “manufacturer”, or that the provincial statute intended to bind it, and most significantly for present purposes, Canada maintained that even if the provincial statute did display such an intention, its intent was ineffective, in light of federal intergovernmental immunity. The province could not unilaterally impose a new form of civil liability on the Federal Crown. Justice Wedge agreed and decided the motion on that basis.

Given the result, the Attorney General of British Columbia asked that a special five-member panel of the British Columbia Supreme Court be assembled in order to hear the appeal and to be in a position to overrule its earlier precedent if indeed it was a precedent. The five member panel was duly assembled, but the Court of Appeal declined to take up the invitation to overrule itself,

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<sup>91</sup> P.W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. Supp., vol 1. , at pp. 10-19 to 10-21.

<sup>92</sup> *British Columbia v. Imperial Tobacco Canada Limited*, 2008 BCSC 419, 82 B.C.L.R. (4th) 362, 292 D.L.R. (4th) 353, at para. 40.

<sup>93</sup> *Federal Business Development Bank v. Hillcrest Motor Inn Inc.* (1988), 51 D.L.R. (4th) 464 (B.C.C.A.).

<sup>94</sup> *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695, at p. 700.

finding that it could dispose of the appeal on other grounds (Canada was not a manufacturer). However, it reversed the outcome in part on the basis of other issues.<sup>95</sup>

The matter eventually reached the Supreme Court of Canada. That Court restored the outcome reached by Justice Wedge, but on the basis that Canada was not a “manufacturer” under the statute. Although a constitutional question had been stated and argued as to federal Crown immunity, the Court found it unnecessary to pronounce upon it.<sup>96</sup>

For the time being, and perhaps for quite some time to come, the Canadian rule remains in place.

### **The rule in other countries**

The Canadian rule on federal intergovernmental immunity is not far from the rule in the United States, and not far from how the rule was stated in Australia during one of the swings of its jurisprudential pendulum.

In delivering the opinion of the United States Supreme Court in *Mayo v. United States*, Mr. Justice Stanley Reed compressed a great deal of case law into a single sentence when he stated that:

A corollary to this principle is that the activities of the Federal Government are free from regulation by any state.<sup>97</sup>

A recent United States District Court case helpfully encapsulates in a nutshell the case law that explains that it is only if and to the extent that Congress enacts legislation clearly displaying its intention to “waive” the federal government’s sovereign immunity that state laws can have binding application:

The law regarding waivers of the sovereign immunity of the United States is straightforward. Absent an express waiver, “the activities of the federal government are free from regulation by any state.” *United States v. State of Wash.*, 872 F.2d 874, 877 (9th Cir.1989) (quoting *Mayo v. United States*, 319 U.S. 441, 445, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943)). Any waiver of United States sovereign immunity must be unequivocal; it

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<sup>95</sup> 2009 BCCA 540, 98 B.C.L.R. (4th) 201, 313 D.L.R. (4th) 651,

<sup>96</sup> *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 145: “Having concluded that Canada is not liable under the TPA and the BPCPA, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.”

<sup>97</sup> *Mayo v. United States*, 319 U.S. 441, at p. 445 (1943), invoking *McCulloch v. Maryland*, 4 Wheat. 316, 427; *Ohio v. Thomas*, 173 U.S. 276, 283; *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 667; *Johnson v. Maryland*, 254 U.S. 51; *Arizona v. California*, 283 U.S. 423, 451. For post-*Mayo* cases see: *Hancock v. Train*, 426 U.S. 167 (1976); *United States v. Alaska Public Utilities Commission* 23 F. 3d 257 (9th Cir. 1994); *Rousseau v. U.S. Treasury Dept.* (Dist. Ct. New Jersey, 2010); *City of Fresno v. United States*, 709 F. Supp. 2d 288 (Dist. Ct. ED California 2010).

cannot be implied. *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992). Such a waiver "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *Ohio*, 503 U.S. at 615, 112 S.Ct. 1627 (citations and quotations omitted). Furthermore, only Congress can waive the sovereign immunity of the United States. *Cal. v. NRG Energy Inc.*, 391 F.3d 1011, 1023-24 (9th Cir.2004); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir.1998). It must do so explicitly in statutory text. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) ("[t]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text.").<sup>98</sup>

In Australia, a constitutional rule of thumb that held sway for several decades was the following:

[...] the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth.<sup>99</sup>

The rule in Canada may have been in place for a century, may have been uniformly described, but can it be explained on any sounder basis than "it's always been the rule?"

Yes.

### **Reconciling Gauthier and Dominion Building**

It is necessary to digress again, this time to put to rest an element of confusion that has lingered far too long. There is a Privy Council decision from 1933, *Dominion Building*,<sup>100</sup> that in the minds of some, has thrown the law into doubt, regardless of what Canadian judges have been saying during the eighty years since then. The contention is that *Dominion Building* overruled *Gauthier*. The peculiar part of the contention is that the Privy Council did so inadvertently, because it never mentioned *Gauthier*, or for that matter any federal-provincial dimension to the issue that was before it. Stranger yet, perhaps, the Ontario statute in question did not expressly purport to bind the Crown. At any rate, the doubt seems to have surfaced over 50 years ago, and has been handed on from Professor to Professor ever since.<sup>101</sup>

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<sup>98</sup> *City of Fresno v. United States*, 709 F. Supp. 2d 288 (E.D. California 2010).

<sup>99</sup> *Commonwealth of Australia v. Bogle*, [1953] HCA 10; (1953) 89 CLR 229 at 259 *per* Fullagar J. Of course, the rule as stated was not as drastic in its application as these extracts might suggest. When the government entered into a transaction (say, an ordinary contract to purchase good) the constitutional objections against state laws affecting things relaxed.

<sup>100</sup> *Dominion Building Corporation v. The King*, [1933] A.C. 533.

<sup>101</sup> Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 Can. Bar Rev. 40, at p. 51: The two leading decisions seem impossible to reconcile", citing for support Mundell, "Remedies Against the Crown" in *Law Society of Upper Canada Special Lectures* (1961) 149, at p. 155.

## Gauthier

The facts are amply recited in the reasons of Justice Cassel, in the Exchequer Court judgment.<sup>102</sup> Mr. Gauthier operated five fishing stations on a commercial scale, on the shores of Fighting Island in the Detroit River, near the U.S. border. Each November he harvested whitefish as they traveled to their spawning grounds. By the early 1900's, whitefish stocks were facing depletion. The federal fisheries department became desperate to secure access to a source of wild fish in order to supply a hatchery project for restocking purposes. Fighting Island afforded a unique location for that purpose. In 1909, Mr. Gauthier approached the provincial government and managed to secure a twenty-one year licence of occupation, for just over one thousand dollars.

It was known that international conservation measures would soon preclude commercial-scale fishing by Mr. Gauthier or anyone else. His occupation licence would be of no use for commercial fishing. What *was* valuable about it, however, was that that it enabled Mr Gauthier to hold the federal government over a barrel. He could still prevent the Minister from accessing the fishing stations for conservation efforts. In 1910, after much wrangling, the government reached an agreement to buy him out –his buildings and equipment and the occupation licence, all at a price to be determined by arbitration.

However, once the composition of the arbitration panel became known, but prior to any award, the Minister revoked the Crown's consent to submit to the arbitrators' jurisdiction. The motive for the abrupt about-face is not reported, but he may have had a premonition of some exorbitant award coming down the pipe. If so, the premonition was prophetic. The two remaining arbitrators carried on regardless of the withdrawal of the federal government's nominee, and went to evaluate the commercially worthless occupation license at ten thousand dollars, in addition to the value of the buildings and equipment. Mr. Gauthier demanded that the government pay up on what the government presumably saw as his 1000% windfall at taxpayers' expense. The government did not deny a breach of contract, but would prefer to take its lumps by allowing a court to quantify the damages and the value of the occupation licence.

The government's position was in keeping with its rights at common law, which recognized a party's right to revoke submission to arbitration prior to its outcome. However, the Ontario *Arbitration Act* had made submissions to arbitration for the most part irrevocable. The Act also stated its intention to apply to arbitrations to which "His Majesty" was a party.

The Supreme Court held that the expression His Majesty should be understood to refer only to Ontario. That is still good law. However, the various concurring reasons went beyond that. The proposition put forward by Chief Justice Fitzpatrick was that whenever federal rules had instructed that the federal Crown could be sued on the basis of provincial law, the provincial

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<sup>102</sup> *Gauthier v. R.* (1915), 15 Ex. C.R. 444, 33 D.L.R. 88 (Ex. Ct.)

rules at play would essentially be a frozen snapshot taken as of the date when the federal rules had first given the instruction. Subsequent provincial legislative changes would not flow through to the detriment of the federal Crown. As he put it, the federal Crown's obligations and liabilities fell to be determined

[...] according to the laws in force in the province at the time when the Crown first became liable in respect of such cause of action as is sued on. In other words, the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

### **Dominion Building**

This also involved a contract claim against the federal Crown, after a complicated real estate deal fell apart, with one side (the developer) seeking damages and the other (the federal Crown) denying that a binding contract had ever crystallized. The dispute took place in Toronto in the mid-1920's, and events unfolded at the same time as the King-Byng affair, with its propensity to generate sudden and unpredictable federal elections, changes of heart among Ministers, and hesitation among their deputies. It is unnecessary to try to detail the intricacies of the convoluted story here. A recent lively and well-researched account is accessible elsewhere.<sup>103</sup>

Had the deal come together as foreseen, a 26-floor skyscraper, the Empire's tallest building, would have risen at the corner of King and Yonge Streets in Toronto. In 1923 Canadian National Railways, a Crown corporation, had acquired a building at King and Yonge when it took over the Grand Trunk. By a sort of serendipity, the adjoining building, the Home Bank's headquarters, went up for sale because that Bank had gone spectacularly bust. A Mr. Forgie acquired an option to buy the Home Bank property on behalf of a holding company that he set up, called the Dominion Building Company. He then approached CNR with a plan. He would buy their building, put the two properties together, and erect a magnificent structure (it might even bear their name). They would of course have to evacuate their current building, but the skyscraper could be built within a year, and CNR would move in as a long-term tenant (30-year lease) and have the ground floor and several others. There was an additional facet to the plan. The federal Customs and Excise Department was on the look-out for more space in Toronto. A firm lease commitment from them for say, four additional floors, would be just the thing to help the developer to float a bond issue to help raise the financing needed for the grand scheme.

In July 1925 an Order in Council was passed, authorizing CNR to sell its property, with the proviso that the sale take place by September 15. But what with all the political turmoil in Ottawa and one thing or another, the anticipated authorization for the other Customs and Excise

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<sup>103</sup> Mark Osbaldeston, *Unbuilt Toronto 2: More of the City that Might Have Been* (2011, Dundurn Press Ltd), pp. 129-133 Mark Osbaldeston has recently pieced it together from contemporary news accounts and the many judgments that were rendered in the wake of the affair, as it was litigated up to the Supreme Court and back again several times, in addition to the trans-Atlantic judgment cited here which was little more than a way-station along the way.

Department lease failed to materialize. CNR moved out of its building in September, but Dominion Building and its backers were not yet ready with the cash to complete the sale. Federal officials extended the deadline once or twice, but by the time Dominion Building came forward to complete the purchase in February 1926, the Minister of Railways and Canals called the whole thing off. By then Dominion Building had exercised its option and bought the Home Office property, and wanted its lost profits as well. To add insult to injury, the government had not even returned a large deposit from the developer, claiming that it was forfeit. Dominion Building wanted over a million dollars for breach of contract.

The Supreme Court held against the developer, on the basis that the necessary offer and acceptance had never crystallized. It saw the Order in Council not as a binding acceptance of an offer, but a sort of authorization, contingent on the sale completing in September as originally foreseen. When the appeal reached the Judicial Committee of the Privy Council, things did not go as well for the government. But the government's counsel came up with a brand new argument that had never been raised below. He pointed out an old Ontario provision dating back to the fusion of courts of law and equity. It chose the more forgiving rules of equity to apply in courts of law. The old statute never said that it bound the Crown. The government hoped that if it could persuade the Privy Council that the rule did not apply to it, this might help to tilt the scales, in favour of its argument that when it gave the last extension it had made time of the essence.

The argument failed miserably. The Privy Council considered that the Crown had acquired all that it had bargained for in accordance with the rules of contract that applied at the time when it entered into the contract. Interpretive presumptions about statutes not taking away rights from the Crown were beside the point, except perhaps for situations of where a newly enacted statute would have the effect of striking at pre-existing contractual rights that the Crown had acquired before the statute was enacted. As for the intention of the parties – which is really what most contract cases turn on – the Board held that the course of their dealings with one another disclosed a series of deadlines and extensions, quite incompatible with the hypothesis that they had intended that time would be of the essence.

This makes for an interesting contract case, but it is a tremendous stretch to claim that in *Dominion Building* the Privy Council decided to abolish the doctrine of federal intergovernmental immunity. The Board's reasons for judgment give every appearance of being quite unaware of the existence of the issue, let alone deciding it one way or the other.

To be fair, however, there is indeed a significant difference of perspective to be reconciled between *Gautier* and *Dominion Bridge*. And Canadian courts have already reconciled it. For instance, President Jakkett (as he then was) of the Exchequer Court did an excellent job of reconciling both the cases in 1965, in *R.v. Murray*.<sup>104</sup>

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<sup>104</sup> *R.v. Murray* [1965] 2 Ex. C.R. 663, aff'd [1967] S.C.R. 262.

### **Gauthier and Dominion Building reconciled**

There is a choice between which two presumptions to bring to the interpretation of the federal public law rules that call for provincial private law to apply. Federal statutory provisions in this area tend themselves to silent on the point.

One presumption would favour a “frozen” incorporation by reference - a snapshot of provincial law that cannot be unilaterally altered subsequently by provincial amendment.

The other presumption is that the controlling federal rules intend to make a “dynamic” or “ambulatory” incorporation by reference, such that it would be the provincial law as amended from time to time by provincial legislation that becomes applicable .

Chief Justice Fitzpatrick had opted for a “frozen incorporation by reference” presumption in the absence of a clear signal to the contrary in federal legislation. *Dominion Building* is much more consistent with a “dynamic incorporation by reference” perspective.

And indeed it is the presumption in favour of dynamic incorporation that nowadays prevails.

In recent decades it has become clear that absent a contrary indication, federal statutory provisions that reference a body of provincial private law for determining the obligations or liabilities of the federal Crown, are as Rothstein J. explained in *Hood v. Canada* (1998), 162 F.T.R. 167, presumed to reference provincial law as modified from time to time by provincial legislation of general application , as well as by adjustments that occur to the common law.<sup>105</sup>

This may come as consolation to Justice Cassel of the Exchequer Court, who had actually suggested as much when he decided *Gauthier* in that Court. He thought that the frozen incorporation by reference route would be the wrong path for the law to choose:

If such a construction were placed on the "Exchequer Court Act" innumerable absurdities might arise, as the statute laws of the various provinces are from time to time repealed or varied.<sup>106</sup>

However, it is important to be clear that this does not mean that provincial legislatures can enact legislation that of its own force is binding on the federal Crown. The *Gauthier* line of cases say that they cannot this, and *Dominion Building* never said they could

Chief Justice Laskin put it this way over thirty years ago, in commenting on *Dominion Building*:

...the case originated in the Exchequer Court and involved a claim against the federal Crown for damages for breach of contract which was referred to that court under

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<sup>105</sup> *Hood v. Canada* (1998), 162 F.T.R. 167, following *Stuart v. Canada* (1988), 19 F.T.R. 59, and *Baird v. The Queen*, [1984] 2 F.C. 160 (C.A.).

<sup>106</sup> *Gauthier*, at para. 3 p?

statutory authority and the question of the applicable law governing the contract, if there was one, would be one of the questions before the Exchequer Court.<sup>107</sup>

In other words, he was stressing that provincial statutes could only apply to the federal Crown because a federal rule called on them to do so. This claim is not inherently limited to provincial statutes devoted to establishing or altering liability in contract or in tort. The proposition arguably covers any statutory command or prohibition, even if it is enforced in the first instance by some provincial official or provincial executive agency, because those provincial enforcement avenues cannot be completely immunized beyond the possibility of judicial review in a superior court.

### **Federal immunity: tempering devices**

The rule of federal Crown immunity from provincial statutes, similar as it might be to constitutional doctrines in the United States, and at times, Australia, has an admittedly stark aspect to it, particularly when we consider that it is not reciprocal. It is unlikely that it would ever have lasted as long as it has unless there were means by which it can be tempered. There are three avenues in which an appropriate measure of tempering takes place.

First, as the discussion about *Gauthier* and *Dominion Building* serves to show, it is Parliament itself that has in significant areas ensured that provincial statutes will shape the extent to which the federal Crown is accountable to defendants for alleged torts or breaches of contract. Federal legislation normally looks to provincial laws for direction to a significant extent. For example, s.32 of the *Crown Liability and Proceedings Act* sets as its default rule that “the laws relating to the prescription and limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province”.

It might be argued that this leaves federal Crown immunity in the hands of Parliament, and that naturally Parliament will tend to legislate to minimize Crown obligations to provinces and the people in them. However, once we think of the fact that it is the electors who live in each province who elect the Members of the House of Commons, and who can turn them out of office, the likelihood that oppressive use will be made of federal jurisdiction recedes to some degree. This is consonant with the current thinking of the Court, which looks to the politically responsive branches of government to maintain a viable federal balance. The “noise” of federal –provincial assertions, recriminations or denials that is often made for public consumption should not too quickly be taken as convincing evidence that things are wildly out of balance. It may also be the political medium through which balance is maintained. The significant extent of federal incorporation of provincial law may in practice turn out to be as firmly secured by politically responsive expectations as by judicial fiat.

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<sup>107</sup> *Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, at para 20 (emphasis added)

Another illustration can be found in federal grants to municipalities in lieu of local property taxes. Section 125 renders the federal Crown immune from municipal powers to tax federal lands and installations within their boundaries. And yet Parliament has commanded the federal Crown to do just that— more or less, to abide by a rule that no province could impose on it. This phenomenon provides a clear example of how political expectations operating through the agency of the politically accountable branches of government can “work around” – in this case effective reverse – a federal immunity, without the judiciary stepping in.

Second, it was mentioned earlier in connection with the maxim that the King can do no wrong, that courts are skilled separating a Crown servant or agent from the Crown’s own immunity from statute, as well as in tort, in appropriate circumstances. This can operate regardless of whether it involves the application of a statute enacted by the same order of government as the Crown actor, or whether the statute was enacted by the other order of government. A classic example would be that of federal Crown servants whose official duties require them to drive vehicles. It is one thing to drive a vehicle on behalf of the federal Crown, but when it comes to immunity from provincial legislation, it can turn out to be another thing to drive the carelessly:

The careless driving was in no manner in the furtherance of the Crown purposes of the militia. In driving carelessly, Stradiotto stepped outside Crown purposes and no longer was acting as agent. Accordingly, he could not claim immunity.<sup>108</sup>

For corporate Crown agents, a similar phenomenon can obtain. In one illustrative case, a federal Crown agency’s statutory mandate to broadcast was interpreted as falling short of a mandate to broadcast an obscene film. Consequently the broadcaster could not shelter from statutory rules against obscenity by pleading the shield of the Crown.<sup>109</sup>

Third, the benefit-burden nexus that applies when the Crown avails itself of statutes can often come to hand. If a Crown agency decides to engage in investing in the equity markets, it will also be seen to be buying into the insider trading rules as well.<sup>110</sup> The versatility that Canadian judges have brought to this area of law is such that provided there is a sufficiently close connection, the nexus can span the constitutional divide, by linking a benefit conferred by a federal statute with a burden or limitation found in provincial legislation.<sup>111</sup>

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<sup>108</sup> *R. v. Eldorado Nuclear Ltd* [1983] 2 SCR 551, at p. [?], re-explaining the *ratio* in *R. v. Stradiotto*, [1973] 2 O.R. 375 (C.A.).

<sup>109</sup> *Canadian Broadcasting Corporation v. The Queen*, [1983] 1 S.C.R. 339.

<sup>110</sup> *Sparling v. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 SCR 1015.

<sup>111</sup> *R. v. Murray* [1967] S.C.R. 262, as explained in *AGT v. CRTC*, [1989] 2 S.C.R. 225.

## **Splitting the atom of public Crown law**

To navigate through this area of law, the analytical starting point is always that federal Crown is subject to provincial statutory obligations and liabilities to the extent that federal rules call for them to apply.

But from a division of powers perspective, why would federal Crown liability be controlled uniquely by federal rules in the first place? Is not civil liability a matter assigned to s.92(13), property and civil rights?

An American judge has said that federalism “split the atom of sovereignty.”<sup>112</sup> That comes very close to how Canadian law views what Confederation did to the Crown. In addition, it is not only the Crown that split in two, but also the body of public law that houses the rules dealing the relationship between citizens and government (or in older vocabulary, subjects and the Crown). These are the rules that tell us in the first place whether private individuals and companies can sue the Crown or not, and if so, how:

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.<sup>113</sup>

The relationship between private law and public law in Canada is a two-step affair when it comes to governmental liability. Just as we use a two-step process in the pith and substance doctrine, so too here. First, we look to public law to tell us whether there is any liability and if so where to find the rules that will apply.

Justice Lebel explained it this way, while sitting on the Quebec Court of Appeal, in the *Proulx* case:

[Translation].... [...] When the delictual liability of the state or of a public body is in issue, the public law must be examined in order to determine the sphere in which the rules of liability that come from private law are to apply, and subject to what limits and conditions they will apply.<sup>114</sup>

Recall that what s.92(13) contains is jurisdiction to regulate private law, not public law. The expression “property and civil rights” was meant to serve

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<sup>112</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995), Kennedy J., concurring.

<sup>113</sup> *Quebec North Shore Paper v. C.P. Ltd.* [1977] 2 S.C.R. 1054, at p. 1063.

<sup>114</sup> *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, at para. 107 per L’Heureux-Dubé J., citing [1999] R.J.Q. 398 at p. 417. The majority judgment in the Supreme Court by Iacobucci and Binnie J.J., at para. 5, voices support for the analysis of Lebel J.A.

[...] as a compendious description of the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationship between the subject and the institutions of government.<sup>115</sup>

### **Which heads of power house the public law rules for Crown liability?**

The most satisfactory approach is that jurisdiction over the public law rules is to be found in the symmetrically distributed legislative jurisdictions to amend the “constitution” of a province, or of the federal government, respectively.

The provincial power, originally housed in s.92(1), is now found in 45 of the *Constitution Act, 1982*. The counterpart federal power is now found in s.44, (“..in relation to the executive government of Canada..”). This proposition finds support in *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2. There, the Court had occasion to consider the source of provincial jurisdiction to regulate the extent to which provincial public servants could engage in partisan federal political activities. The lower courts had looked to s.92(13). However, a majority of the Supreme Court suggested a different head of power, namely s.92(1) (amendment, from time to time, of the constitution of the province). This is the jurisdiction by which a legislature may enact rules bearing on the operation of the organs of government, including the powers, privileges and duties of its executive branch. The Court took note of an earlier case - *Fielding v. Thomas* [1896] A.C. 600 - that had attributed to that same head of power the ability to regulate the civil immunity of members of a legislative assembly. It is reasonable to expect that the civil immunity of the executive branch would also be found within that same head of power..

On the federal side, the counterpart possibility (rules amending the constitution in relation to the federal executive branch) was suggested by Professor Gibson.<sup>116</sup> Alternatively, it would have to continue to reside in the residual aspect of Section 91, where it must have been located prior to the enactment of the former s.91(1) in 1949.

### **Can the apparent asymmetry be explained ?**

According to the current rules, valid federal statutes enacted in relation can, if they express a clear intention to do so, pierce the veil of the public law dimension of provincial sovereign immunity, as it were, while provincial statutes cannot of their own force achieve the reciprocal effect. Can this be explained ?

Yes. Contrast the federal-provincial situation with how the issue might play out at the interprovincial level where we could indeed expect a high degree of symmetry. Here, ironically,

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<sup>115</sup> P.W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. Supp., vol 1. ch. 21.2 at p. 21-2

<sup>116</sup> Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 *Can. Bar Rev.* 40, at footnote 10, at pp. 42-43.

the imposition of symmetric reciprocity by the abolition of federal immunity would only engender further asymmetry.

If the reciprocal levels of immunity had to be “equal”, each province would continue to have (as it has under the current rules) one other rule-maker in addition to its own legislature, whose commands could bind it. The federal government would acquire ten additional bosses. A provincial government has relatively few occasions on which it is called upon to operate in any provincial territorial jurisdiction other than its own. The federal government must operate within territorial jurisdictions constantly. To subject its operations to inconsistent and fracturing effects of such a multiplicity of commanders would be to produce an effect quite unlike, and much more severe, than would be experienced by any province. There is no reason to assume that provincial policies reflected in provincial laws would be point in a single direction at any given time.

Nor, unless we were to make a cult of symmetry for its own sake, is the disparity of effect, at the operational level, sufficiently severe to justify the courts in introducing the sort of instability that the Australian rule has experienced. As we have seen, there are several existing checks and balances on how far the federal order of government could attempt to leverage the discrepancy in order to tip the balance of federalism. In addition, we are now thinking in terms of looking to the politically active branches of government as the primary actors in maintaining balance. We should not underestimate the pressures that can accumulate on the federal government, both internal and external, to steer it towards behaving as a good provincial citizen, and not like an outlaw, even if provincial legislation cannot constitutionally “force” it to

All in all, it is no major disappointment that the Supreme Court did not go out of its way to jump at the chance that *Imperial Tobacco* provided, as a pretext to embark on an exercise in symmetrification.

### **Conclusion**

Modern approaches to federalism have relaxed the emphasis on exclusivity. This in turn prompts interest in asymmetries that mark some interpretive doctrines. However, just as equality is not necessarily enhanced by treating differently situated entities in the same way, a mechanical application of symmetry as a compulsory yardstick can be no guiding principle unto itself. The longstanding rule of federal immunity from provincial statutes provides a case in point. Similar rules exist in other federal countries, and there has been no genuine confusion or inconsistency in the Canadian doctrine. The political branches of government know the rule, how to operate within it and how to work around it. It makes sense at the technical level of the division of powers. It comes equipped with levers by which a court can avoid inordinate results in specific cases. It is a well-tempered doctrine that will likely to continue to stand the test of time.