LEGISLATIVE JURISDICTION WITH RESPECT TO ANTI-DISCRIMINATION (HUMAN RIGHTS) LEGISLATION IN CANADA*

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I. THE ENACTMENT OF ANTI-DISCRIMINATION LEGISLATION

It is possible to trace the first anti-discrimination legislation to pre-Confederation times. As early as 1793, the first Legislative Assembly of the Province of Upper Canada enacted: "An Act to prevent the further introduction of Slaves and to limit the term of contracts for servitude within this Province".[1] Although this statute affirmed the ownership of slaves then held, it did provide that the children of slaves, upon reaching the age of twenty-five years, would be set free. In 1833, this legislation was superseded by the Imperial legislation known as the Abolition of Slavery Act,[2] which applied to all parts of the British Empire. However, for almost a century after that, the trend at the federal, provincial and municipal levels was to enact discriminatory legislation. Paralleling the legal disabilities of the non-whites were those of women who did not have the franchise before World War I and were not even considered "persons" for the purpose of appointment to the Canadian Senate until after 1930.[3]

Although there were a few provincial prohibitions of racial and religious discrimination enacted in the 1930's,[4] it was not until after World War II that prohibition of discrimination was undertaken by Canadian legislatures. Amongst the first of these were The Saskatchewan Bill of Rights Act, 1947[5] and the Ontario Racial Discrimination Act of 1944,[6] the Fair Employment Practices Act, 1951,[7] and the Fair Accommodation Practices Act, 1954.[8]

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[1] S.U.C. 1793 (2nd Sess.), c. 7.

[2] 3 & 4 Wm. IV, c. 73.

[3] *See* the decision of the Judicial Committee of the Privy Council in Edwards v. Attorney General for Canada, [1930] A.C. 124, [1929] All E.R. Rep. 571, *rev'g* [1928] S.C.R. 276, [1928] 4 D.L.R. 98, deciding that women are "persons" for the purposes of s. 24 of the B.N.A. Act and thus eligible to become members of the Senate of Canada.

[4] *See, e.g.*, the amendment to the Ontario Insurance Act, S.O. 1932, c. 24, s. 4, and the amendments to the British Columbia Unemployment Relief Act, 1932, S.B.C. 1932, c. 58, and Unemployment Relief Act, 1933, S.B.C. 1933, c. 71.

[5] S.S. 1947, c. 35.

[6] S.O. 1944, c. 51.

[7] S.O. 1951, c. 24.

[8] S.O. 1954, c. 28.

The result since has been that by 1975 every province in Canada had established a Human Rights Commission to administer comprehensive and consolidated[9] anti-discrimination legislation and, in 1977, a Human Rights Commission was established at the federal level to administer the Canadian Humans Rights Act.[10] Since anti-discrimination legislation is now in force at both the federal and provincial levels and no detailed study of the question of legislative jurisdiction has been published, this article is an attempt to fill that void.

II. THE BRITISH NORTH AMERICA ACT

Apart from the protection for Protestants and Catholics in the organization of their own school systems, and for Anglophones and Francophones in the use of their languages in the courts and legislatures of Quebec and Canada, the B.N.A. Act contains no provisions specifically providing for or prohibiting discrimination. In addition, although the preamble to the B.N.A. Act, which proclaims "a Constitution similar in Principle to that of the United Kingdom", might have led to a constitutional application in Canada of "equality before the law" as a part of "the rule of law", which is one of these principles, this was never done. Even after the specific enactment of an "equality before the law" clause in section 1(*b*) of the Canadian Bill of Rights, the Supreme Court has not, apart from one occasion,[11] given any effect to that clause other than as meaning the equal application of the laws of the land, in the sense only that everyone, regardless of status as an ordinary citizen on the one hand, or as an agent of the government on the other, is subject to the same laws before the same courts.[12] Furthermore, except in the case of hotel keepers and common carriers, neither the civil law of Quebec nor the common law of the other nine provinces, treated discrimination as being unlawful. Finally, there is no subject like "discrimination" or "anti-discrimination" or "equality of access" listed as a class under either of sections 91 or 92 of the B.N.A. Act. Therefore, anti-discrimination laws have to be treated as a "matter" coming within one of the "classes of subjects" listed under either section.

The two main provisions one might look to are section 91(27) ("Criminal Law") and section 92(12) ("Property and Civil Rights"). As will be indicated later, apart from these two "general" classes of subjects, other specifically listed heads of power may also be a basis of

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[9] Saskatchewan did not consolidate its various human rights acts into one Code until 1979.

[10] S.C. 1976-77, c. 33.

[11] Regina v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473 (1969).

[12] Attorney-General of Canada v. Lavell, [1974] S.C.R. 1349, at 1365-66, 38 D.L.R. (3d) 481, at 494-95 (*per* Ritchie J.).

legislative jurisdiction for enacting discriminatory laws or anti-discrimination legislation.

The scope of the federal power over the Criminal Law has been given a very wide interpretation. As early as 1903, in a case dealing with Sunday observance,[13] the Judicial Committee of the Privy Council declared that criminal law in its widest sense is reserved for the exclusive jurisdiction of Parliament. Any act which is prohibited with penal consequences is a criminal act. This is so even when the federal criminal legislation affects "Property and Civil Rights". The only limitation is that Parliament cannot use this otherwise extensive power for a "colourable" purpose of invading provincial jurisdiction.[14] As a result, although there appears to be no doubt that Parliament can create new crimes, such as unlawful competition,[15] where there is some question whether Parliament is resorting to a colourable device to invade the jurisdictions of the provinces, the Supreme Court of Canada may very well apply the test of whether the law is aimed at "some evil or injurious or undesirable effect upon the public",[16] such as laws relating to "public peace, order, security, health, morality".[17] Using either the widest possible definition of the criminal law power, or even the narrower one, it has been suggested that Parliament could have used this power to make the practice of discrimination a crime in Canada.[18] Nevertheless, this has never happened and, considering the minimal efficacy of a criminal law approach in overcoming discrimination and its possibly retrograde effect, it is extremely unlikely that the federal criminal law power will ever be resorted to for this purpose.

Leaving aside, then, the federal criminal law power, it is necessary to consider next the provincial power over "Property and Civil Rights". If one analyzes the spheres of activity which are foci of human rights codes, one sees that all are essentially matters within that class of subjects. Thus, employment and wage discrimination involve contractual rights and might, although it was never so found, involve rights the infringement of which could be the subject of an action in tort or delict. The matters of leasing or purchasing land or housing accommodation or commercial accommodation involve the laws of contract and of property, and occasionally such laws as those of agency. The matter of access to

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[13] Attorney-General for Ontario v. Hamilton Street Ry., [1903] A.C. 524, 72 L.J.P.C. 105 (1893).

[14] *In re* The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919, [1922] 1 A.C. 191, 60 D.L.R. 513 (P.C. 1921); Attorney-General for Ontario v. Reciprocal Insurers, [1924] A.C. 328, [1924] 1 D.L.R. 789 (P.C.).

[15] Proprietory Articles Trade Ass'n v. Attorney-General for Canada, [1931] A.C. 310, [1931] 2 D.L.R. 1 (P.C.).

[16] Reference *Re* Valididity of Section 5(*a*) of the Dairy Industry Act (*Margarine* case), [1949] S.C.R. 1, at 49, [1949] 1 D.L.R. 433, at 473 (1948) (*per* Rand J.).

[17] *Id.* at 50, [1949] 1 D.L.R. at 473.

[18] P. HOGG, CONSTITUTIONAL LAW OF CANADA 424 (1977).

goods, services and facilities customarily available to the public also involves contract and property law and might even involve such tort issues as occupiers' liability. As will be outlined below, all of these, unless a specific federal nexus can be found, are "matters" within the "class of subject" in section 92(13) of the B.N.A. Act, known as "Property and Civil Rights",[19] supported on occasion by section 92(16) ("Matters of a merely local or private Nature") and section 92(10) ("Local Works and Undertakings"). Thus, in the early leading case of *Citizens Insurance Co. v. Parsons*,[20] the Judicial Committee of the Privy Council held that the law of contract was within the jurisdiction of the provinces under section 92(13). Cases since then have applied this without question and are too numerous to mention here.[21] Similarly, "property" is so obviously within section 92(13) that the courts have automatically assumed that the only question is the *reach* of provincial legislation concerning property, and not whether provincial property legislation is valid as such.[22]

On the other hand, it has to be noted that almost every head of legislative power included under section 91 *affects* property and civil rights. Thus, if a federal law is upheld as being valid in *relation to* "trade and commerce" it will be so even though contractual or property rights are involved. Similarly, bills of exchange, promissory notes, interest, bankruptcy and insolvency are all listed in section 91 as classes of subjects within exclusive federal power.

Therefore, the proposition that is put forth here is that laws prohibiting discrimination are essentially within the jurisdiction of the provinces, unless related to one of the thirty-one classes of subjects listed in section 91, or unless they are in relation to a matter having been determined by the courts to have come within the jurisdiction of Parliament through the "Peace, Order and Good Government" clause in the opening paragraph of section 91.

Because of its overall importance in the determination of the legislative jurisdiction of Parliament on the one hand, and the provincial legislatures on the other hand, and because discrimination in this field has been one of the first and main concerns of the various human rights commissions, the jurisdiction with respect to the matter of employment will be examined first.

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[19] This is why an Ontario County Court decision, Regina *ex rel.* Nutland v. McKay, [1956] O.W.N. 564, 5 D.L.R. (2d) 403, which upheld the validity of Ontario fair accommodation legislation, must be correct, while a decision of a Quebec Sessions of the Peace Judge, who held in Regina v. Lafferty, 8 C.R.N.S. 570 (1969), that Quebec fair employment legislation was *ultra vires*, must be wrong.

[20] 7 App. Cas. 96, 51 L.J.P.C. 11 (1881).

[21] *See, e.g.*, the cases listed *supra* note 14.

[22] *See, e.g.*, Bédard v. Dawson, [1923] S.C.R. 681, [1923] 4 D.L.R. 293; Walter v. Attorney-General for Alberta, [1969] S.C.R. 383, 3 D.L.R. (3d) 1; Morgan v. Attorney-General for Prince Edward Island, [1976] 2 S.C.R. 349, 55 D.L.R. (3d) 527 (1975).

III. Jurisdiction with Respect to Employment and Remuneration

At the time of Confederation the employment relationship was not considered to be a major sphere of government regulation. The laws of contract and tort (within the jurisdiction of provincial legislatures) determined the employment relationship. Soon thereafter, however, in addition to certain provincial statutes prohibiting child and female labour under certain conditions, both the provincial legislatures and the federal Parliament enacted statutes concerning labour relations, collective bargaining and industrial disputes. Provision was made for boards of investigation and conciliation. The major statute came just after the turn of the century with the enactment by the Parliament of Canada of the Industrial Disputes Investigation Act, 1907,[23] which was an "Act to aid in the prevention and settlement of strikes and lockouts in mines and industries connected with public utilities". The Act covered all mines in the country and all agencies of transportation and communication, as well as public service utilities. In addition, it provided that any dispute, in whatever business or trade, could be referred to a federal board under the provisions of the Act. During the currency of this Act, although some reference was made to provincial boards of investigation and conciliation, the National Labour Boards were widely accepted.[24] Then, after ten of the twelve Canadian judges who considered the constitutional validity of the Industrial Disputes Investigation Act had concluded that it was *intra vires*,[25] in January, 1925, the Judicial Committee of the Privy Council held, in the case of *Toronto Electric Commissioners v. Snider*,[26] that the Act was *ultra vires*.

In the course of his judgment, Viscount Haldane, after referring to the "primary object of the Act" being the resolution of disputes concerned with, *inter alia*, "wages or remuneration, or hours of employment; sex, age or qualifications of employees, and the mode, terms and conditions of employment; the employment of children or any person, or classes of persons, . . . etc.", stated that such a statute, "it is clear, . . . is one which could have been passed, so far as any Province was concerned, by the Provincial Legislature under the powers conferred by s. 92 of the British North America Act [because] its provisions were concerned directly with the civil rights of both employers and employed

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[23] S.C. 1907, c. 20.

[24] For a survey of this period from Confederation to 1925, *see* the seminal article on this issue by F.R. Scott, *Federal Jurisdiction over Labour Relations — A New Look*, 6 McGill L.J. 153 (1960). For an excellent recent discussion of this whole field, *see* S. Wynton Semple, *Parliament's Jurisdiction Over Labour Relations*, 11 U.B.C.L. Rev. 232 (1977).

[25] Scott, *supra* note 24, at 158.

[26] [1925] A.C. 396, [1925] 2 D.L.R. 5 (P.C.).

in the Province''.[27] He then went on to dismiss contentions that Parliament had jurisdiction to pass this legislation either under the criminal law or trade and commerce powers, listed in section 91, or the ''Peace Order and Good Government'' clause in the opening paragraph of section 91.

A few months later, the Supreme Court of Canada, without direct reference to the *Snider* case, but clearly basing its reasons upon it, gave judgment on questions referred to it by the federal Cabinet concerning legislative jurisdiction to implement a draft convention of the Internatinal Labour Organization limiting hours of labour in industrial undertakings — *In the Matter of Jurisdiction over Hours of Labour*.[28] In the unanimous decision on behalf of the court, Duff J. advised as follows:

> Under the scheme of distribution of legislative authority in the British North America Act, legislative jurisdiction touching the subject matter of this convention is, subject to a qualification to be mentioned, primarily vested in the provinces.[29]

He went on in fact to suggest three qualifications which were:

> [(1)] [A]s a rule a province has no authority to regulate the hours of employment of the servants of the Dominion Government.
> [(2)] [A]s regards those parts of Canada which are not included within the limits of any Province, the legislative authority in relation to civil rights generally, and to the subject matter of the convention in particular, is the Dominion Parliament.
> [(3)] It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of s. 91, No. 29, and s. 92, No. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings. The effect of such legislation by the Dominion to execution of its power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force.[30]

It will be seen that his first two qualifications have subsequently been affirmed, and that the third has been affirmed on numerous occasions, although his qualification to it, *i.e.*, that the provincial legislation in relation to federal works or undertakings ''remains inoperative so long as the Dominion legislation continues in force'' has been restricted considerably. In other words, as long as the scope of this federal jurisdiction under sections 91(29) and 92(10) can be ascertained, provincial labour relations legislation would be inapplicable even in the absence of federal legislation.

Before dealing with more recent examples of the scope of federal power, it is necessary first to make reference to the 1937 decision of the

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[27] *Id.* at 401, 403, [1925] 2 D.L.R. at 6, 8.
[28] [1925] S.C.R. 505, [1925] 3 D.L.R. 1114.
[29] *Id.* at 510, [1925] 3 D.L.R. at 1115.
[30] *Id.* at 510-11, [1925] 3 D.L.R. at 1116.

Judicial Committee of the Privy Council, which also concerned a reference regarding legislative jurisdiction to implement conventions of the International Labour Organization, and which has come to be known as the *Labour Conventions* case.[31] The main point dealt with by the Judicial Committee was whether Parliament had jurisdiction to implement foreign treaties, *i.e.*, labour conventions concerning weekly rest, minimum wages, and limitations of hours of work. The Judicial Committee held that even though it was the federal executive that had power to enter into and ratify foreign treaties, the implementation of the subject matter of these had to follow the internal distribution of legislative power. In respect to the subject matters here, as in the *Snider* case and the *Hours of Labour Reference*, the essential jurisdiction was that of the provinces.

As a result of the *Snider* decision, Parliament enacted a new Industrial Disputes Investigation Act in 1925.[32] The application of the statute was changed from one limited according to certain "important" sectors of national concern to one limited according to the scope of federal legislative power, essentially that set out by Duff J. in the *Hours of Labour* reference. This legislation, in turn, was revised in 1948 into the Industrial Relations and Disputes Investigation Act[33] which, in turn, was replaced in 1966-67 by Part V of the current Canada Labour Code.[34] Since the jurisdiction section of the I.R.D.I. Act, section 53, is now set out in the Canada Labour Code without substantive change, in sections 2, 108 and 109(1) and (4), these provisions are set out here:

> 2. In this Act
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:
> (*a*) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
> (*b*) a railway, canal, telegraph or other work or undertaking, connecting any province with any other or others of the provinces, or extending beyond the limits of a province;
> (*c*) a line of steam or other ships connecting a province with any other or others of the provinces, or extending beyond the limits of a province,
> (*d*) a ferry between any province and any other province or between any province and any other country other than Canada;
> (*e*) aerodromes, aircraft or a line of air transportation;
> (*f*) a radio broadcasting station;
> (*g*) a bank;

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[31] Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.).

[32] S.C. 1925, c. 14.

[33] S.C. 1948, c. 54.

[34] S.C. 1966-67, c. 62. Now R.S.C. 1970, c. L-1, Part V, *as replaced by* S.C. 1972, c. 18, s. 1.

> (*h*) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and
> (*i*) a work, undertaking or business outside the exclusive legislative authority of provincial legislatures. . . .
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> 108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.
> 109. (1) This Part applies in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of employees of any such corporation, except any such corporation, and the employees thereof, that the Governor in Council excludes from the operation of this Part.
> . . . .
> (4) Except as provided by this section, this Part does not apply in respect of employment by Her Majesty in right of Canada.

The validity of the Industrial Relations and Disputes Investigation Act came to be determined by the Supreme Court of Canada in a reference known as *Re Validity and Applicability of the Industrial Relations and Disputes Investigation Act* (the *Stevedoring* case).[35] The federal government referred the constitutional validity of the Act after a dispute had arisen between two unions for certification as the bargaining agent of the employees of the Eastern Canada Stevedoring Company Limited. The company was engaged in furnishing stevedoring and terminal services for shipping companies in several eastern ports. In Toronto the services were rendered in connection with the loading and unloading of ships, all of which operated on regular schedules between ports in Canada and ports outside Canada, at least during the season. One union had entered into a collective bargaining agreement with the company, pursuant to the federal Act, in 1953. The collective agreement was renewed the following year but, two days before this renewal, another union had been certified by the Ontario Labour Relations Board as the bargaining agent for the same employees. The first union then applied to quash those proceedings and, in order to settle the resulting dispute between Ontario and Canada, the order of reference was made. As was too often the case in the 1950's, every one of the nine members of the Supreme Court of Canada rendered a separate judgment and, although two of the judges (Rand and Locke JJ.) held that the Act did not apply to the employees of the company (Locke J. thought that it applied to the stevedores but not to the office staff), and although these two emphasized that strictly local or provincial works, undertakings, services or businesses could not be included, all nine held that, subject to the application of the Act to the circumstances of any particular case, its scope, as set out in section 53 thereof, was *intra vires*.

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[35] [1955] S.C.R. 529, [1955] 3 D.L.R. 721.

Although, as mentioned, each of the nine judges gave a separate judgment, the gist of these is such that they would have agreed with the following two summations. Mr. Justice Estey reviewed the leading authorities since the *Snider* case and concluded:

> [T]here is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations. . . . This jurisdiction . . . includes those situations in which labour and labour relations are (*a*) an integral part of or necessarily incidental to the headings enumerated under s. 91; (*b*) in respect to Dominion Government employees; (*c*) in respect to works and undertakings under ss. 91(29) and 92(10); (*d*) in respect of works, undertakings or businesses in Canada but outside of any province.[36]

With reference to the application of this legislative jurisdiction, Mr. Justice Abbott asserted:

> [T]he determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.[37]

As was mentioned earlier, all of the members of the Supreme Court declared that the application of section 53 would depend upon the circumstances of any particular case. The big issue since the *Stevedoring* case has been what particular application to give to the words "employed upon or in connection with" in the opening paragraph of section 53. The question was perhaps best put in that case by Mr. Justice Taschereau:

> [I] think it quite impossible to say in the abstract, what is and what is not '*in connection with*' . . . I can imagine no general formula that could embrace all concrete eventualities. . . . Each case must be dealt with separately.[38]

Before dealing with this issue as it has applied to the categories set out by Mr. Justice Estey, it would be pertinent to deal first with a subsequent decision of the Supreme Court of Canada which gives more explicit content to the assertion of Mr. Justice Abbott with respect to the scope or effect of a finding that a work, undertaking, service or business is federal. That case, *Commission du Salaire Minimum v. Bell Telephone Co. of Canada*,[39] concerned the application of the Quebec Minimum Wage Act to the company, which had long been recognized as an undertaking within section 92(10)(*a*), and which had also been declared by the Parliament of Canada to be a work for the general advantage of Canada under section 92(10)(*c*). Mr. Justice Martland gave the unanimous decision of the Supreme Court to the effect that the Quebec legislation did not apply to this federal undertaking. He gave the gist of the judgment in these terms:

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[36] *Id.* at 564, [1955] 3 D.L.R. at 755-56.
[37] *Id.* at 592, [1955] 3 D.L.R. at 779-80.
[38] *Id.* at 542, [1955] 3 D.L.R. at 736-37.
[39] [1966] S.C.R. 767, 59 D.L.R. (2d) 145.

> In my opinion all matters which are a vital part of the operation of an interprovincial undertaking as a going concern are matters which are subject to the exclusive legislative control of the federal parliament within s. 91(29).[40]

It was at this point that he adopted the summation of Mr. Justice Abbott in the *Stevedoring* case referred to above.

Mr. Justice Martland went on to hold specifically that the federal power to legislate in this case was not just an ancillary power, but rather an exclusive power in the sense that even in the absence of specific federal legislation, provincial laws would not apply. In reaching this conclusion, he had to deal with the 1919 decision of the Judicial Committee of the Privy Council in *Workmen's Compensation Board v. Canadian Pacific Railway*,[41] holding that provincial workmen's compensation legislation applied even to such a federal undertaking as a steamship operating in international waters. However, said Mr. Justice Martland, the *Workmen's Compensation Board* case had not at all dealt with any argument that this was an undertaking within section 92(10)(*b*). In addition, he suggested that the British Columbia Workmen's Compensation Act did not purport to regulate contracts of employment but rather that

> [w]hat it did do was to create certain new legal rights which were to be in lieu of all rights of action to which the employee or his dependants might otherwise have been entitled at common law or by statute.[42]

In other words, he was suggesting that workmen's compensation legislation was a statutory scheme established in place of normal rights in tort.

He then went on to deal with the very words of Mr. Justice Duff in the *Hours of Labour* reference quoted earlier, where the latter had suggested that regulation of employment on federal works and undertakings was an ancillary power in the sense that in the absence of federal legislation, provincial legislation could apply. However, Mr. Justice Martland suggested that the exact issue did not have to be determined in that case and he felt that the *Saskatchewan Minimum Wage Act* case,[43] which will be discussed later, and the *Stevedoring* case bore "a closer relationship to the circumstances of the present case". He therefore concluded with this "view":

> In my opinion, regulation of the field of employer and employee relationships in an undertaking such as that of the respondent's, as in the case of the regulation of the rates which they charge to their customers, is a "matter"

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[40] *Id.* at 772, 59 D.L.R. (2d) at 148-49.

[41] [1920] A.C. 184, 48 D.L.R. 218 (P.C. 1919).

[42] *Supra* note 39, at 774, 59 D.L.R. (2d) at 150.

[43] In the Matter of a Reference as to the Applicability of the Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office, [1948] S.C.R. 248, [1948] 3 D.L.R. 801.

> coming within the class of subject defined in s. 92(10) (*a*) and, that being so, is within the exclusive legislative jurisdiction of the Parliament of Canada.[44]

With these main parameters in mind, it is now possible to consider federal jurisdiction with respect to the employment relationships (including fair employment practices provisions) in relation to three categories of employees: employees of the Crown in right of Canada; employees of federal Crown corporations; and employees who are employed "upon or in connection with the operation of any federal work, undertaking or business". The jurisdiction with respect to the first group is the most clear, therefore it will be dealt with first. Since, as will be shown in the course of discussing the third group, the position of the second group is somewhat more obscure, the second group will be dealt with last.

A. *Employees of the Crown in Right of Canada*

After the statement by Mr. Justice Duff in the *Hours of Labour* case[45] to the effect that, although the primary jurisdiction with respect to employment is provincial, the province had no authority to regulate the employment of "servants of the Dominion Government", there was no serious challenge to that proposition until after World War II when the Saskatchewan Court of Appeal held that the Saskatchewan Minimum Wage Act applied to an employee of a postmistress, and the issue was referred to the Supreme Court of Canada as *Re Applicability of the Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office*.[46] Although the six members of the Supreme Court rendered five separate judgments, all agreed that it was not competent to a provincial legislature to legislate as to hours of labour and wages of Dominion servants whether there was or was not applicable federal legislation in existence. In the *Commission du Salaire Minimum* case referred to earlier, Mr. Justice Martland gave the unanimous decision of the Supreme Court. He was of the view that the conclusion in the Saskatchewan case was properly stated in the headnote of the Supreme Court Report of the case, thus it must be taken as accurate. This headnote reads:

> The employee became employed in the business of the Post Office of Canada and therefore part of the Postal Service. His wages were, as such, within the exclusive field of the Parliament of Canada and any encroachment by provincial legislation on that subject, must be looked upon as being *ultra vires*, whether or not Parliament has or has not dealt with the subject by legislation.[47]

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[44] *Supra* note 39, at 777, 59 D.L.R. (2d) at 153.
[45] *Supra* note 28.
[46] *Supra* note 43.
[47] *Supra* note 39, at 776-77, 58 D.L.R. (2d) at 153.

The result is that the employment relationships of federal Crown employees concerning hours of work, conditions of work, wages and benefits and, of concern here, fair employment practices, are subject to the jurisdiction of Parliament and not that of the provinces. Their labour relations are exempted from Part V of the Canada Labour Code by section 108(3) thereof, to be dealt with under the Public Service Staff Relations Act,[48] while fair employment practices are now covered by the Canadian Human Rights Act.[49]

B. *Employees Who are Employed "Upon or In Connection With the Operation of Any Federal Work, Undertaking or Business"*

Two questions arise with respect to the employment herein discussed: (1) What is a "federal work, undertaking or business"? and (2) What is employment "upon or in connection with the operation of" these? As will be seen, in some circumstances the answer to one question provides the answer to the other, but in some instances it does not.

To begin, however, it is important to keep in mind two important principles enunciated in a recent decision of the Supreme Court of Canada, *Canada Labour Relations Board v. City of Yellowknife*.[50] The case concerned the question of whether the Canada Labour Relations Board was the proper body to certify a collective bargaining agent for the employees of the City of Yellowknife in the Northwest Territories. Chief Justice Laskin (Judson J. concurring) held that the Canada Labour Code, Part V, clearly applied because of the "all-encompassing legislative authority of the Parliament of Canada in the Northwest Territories".[51] Mr. Justice Pigeon, however, in whose judgment five other Justices concurred, based his decision on the definition of a "federal work, undertaking or business". One of the two fundamental principles, he declared, was that in addition to the fact that activities of municipal corporations involve "works and undertakings", the term "business" must include "anything which is an occupation or duty which requires attention . . . [and] is often applied to operations carried on without an expectation of profit".[52] Also in line with this, he suggested, there should be no distinction "depending upon whether the employer is a private company or a public authority",[53] although for certain purposes under the Canada Labour Code a distinction was made between the government and a government corporation as the employer. It appears that this particular clarification of the scope of the term "business" is quite straight-forward and needs little further clarification. His second

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[48] R.S.C. 1970, c. P-35.
[49] S.C. 1976-77, c. 33.
[50] [1977] 2 S.C.R. 729, 76 D.L.R. (3d) 85.
[51] *Id.* at 731, 76 D.L.R. (3d) at 86.
[52] *Id.* at 738, 76 D.L.R. (3d) at 91.
[53] *Id.*

point, however, is the principle which will be expanded upon in this part and which must be kept in mind throughout: this is that "jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer".[54] Three leading cases illustrate this fundamental principle.

The first of these is known as the *Empress Hotel* case.[55] The issue was whether the British Columbia Hours of Work Act applied to the employees of the Empress Hotel in Victoria, owned by the C.P.R. company. The Judicial Committee of the Privy Council held that mere corporate arrangements were not sufficient to bring a group of employees within federal jurisdiction. Since the hotel operations were not an integral part of the railway company's works or undertakings connecting British Columbia with other provinces, being in the "general hotel business" and not operated "solely or even principally for the benefit of travellers on the [C.P.R. system]", and since the hotel was not within the section 92(10)(*c*) declaration under the federal Railway Act, the regulation of the hours of work of the hotel employees was held to be within the exclusive legislative authority of the British Columbia Legislature.

A very similar set of circumstances, although involving other issues, arose in what has come to be known as the *Jasper Park Lodge* case.[56] At issue was an application for certification made to the Canada Labour Relations Board to represent the employees at the Jasper Park Lodge. The question was whether the Industrial Relations and Disputes Investigation Act (subsequently included as Part V of the Canada Labour Code) applied to the employment situation. It was argued that the Jasper Park Lodge was the subject of a federal declaration under sections 91(29) and 92(10)(*c*) of the B.N.A. Act. Without going into all the details, the main question was whether the Jasper Park Lodge could have been included in the terms used in the declaration as "other transportation works". However, Chief Justice Laskin, who delivered the judgment of the Supreme Court, felt that although those terms could include the "offices and other buildings" which would be "necessary and convenient for the purposes of national railways", this could not include the hotel, which was no different in law than the Empress Hotel in the earlier case. The second question was whether the company had been established to operate Jasper Park Lodge "on behalf of the government of Canada" for the purposes of section 54 of the Industrial Relations and Disputes

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[54] *Id.* at 736, 76 D.L.R. (3d) at 90.

[55] Canadian Pacific Ry. v. Attorney-General for British Columbia, [1950] A.C. 122, [1950] 1 D.L.R. 721 (P.C. 1949). It should be noted that there has not been any question for many years that the employment of railway workers is within federal jurisdiction. *See, e.g.*, Grand Trunk Ry. v. Attorney-General of Canada, [1907] A.C. 65, 76 L.J.P.C. 23 (1906).

[56] Canada Lab. Rel. Bd. v. Canadian National Ry., [1975] 1 S.C.R. 786, 45 D.L.R. (3d) 1 (1974).

Investigation Act (now section 109 of Part V of the Canada Labour Code). The Chief Justice went on to say that although the company had been wholly owned and controlled by the federal government since 1919, it was nevertheless clear that there is no agency relationship between the Crown and the railway within the terms of the words "on behalf of". The Chief Justice referred to the Financial Administration Act[57] to indicate that since there was no express provision in any applicable legislation making the railway an agent of the Crown, it could not be intended to be included within those "Crown corporations" which were listed as "agency corporations". Despite the fact that the railway was a proprietary corporation of the federal government, and despite the fact that as a railway and with respect to its operations incidental thereto, it came within sections 91(29) and 92(10) of the B.N.A. Act, Jasper Park Lodge was not a "transportation work" and so its employment relationship with its employees came to be determined by the province where it was situated.

The third Supreme Court decision applicable here is *The Queen (Ontario) v. Board of Transport Commissioners* (the *Go-Train* case).[58] The Government of Ontario decided to operate a commuter service using railway tracks and train crews of the Canadian National Railway. The Supreme Court unanimously held that constitutional jurisdiction depended on the character of the railway line, not on the character of a particular service provided on that line. Although there was no question on the part of counsel for the province that the train crews would be subject to federal labour laws, not provincial, this case went further to hold that even the tolls to be charged were subject to federal jurisdiction and that the commuter service did come within the jurisdiction of Parliament. It should be added here that the much earlier decision of the Supreme Court of Canada in *Luscar Collieries Ltd. v. McDonald*,[59] held that even a local work such as a provincial railway could become a part of a federal undertaking by being put under the same management through an agreement with the federal railway. Similarly, in 1976, in the case of *Canadian National Railway Co. v. Board of Commissioners of Public Utilities*,[60] the Supreme Court held that a wholly intraprovincial bus service operated by the C.N.R. company in Newfoundland, as a substitute for rail services, was subject to federal regulation.

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[57] R.S.C. 1970, c. F-10.

[58] [1968] S.C.R. 118, 65 D.L.R. (2d) 425 (1967).

[59] [1925] S.C.R. 460, [1925] 3 D.L.R. 225, *aff'd* [1927] A.C. 925, [1927] 4 D.L.R. 85 (P.C.).

[60] [1976] 2 S.C.R. 112, 59 D.L.R. (3d) 71 (1975). *See also* Quebec Ry., Light & Pwr. Co. v. Beauport, [1945] S.C.R. 16, [1945] 1 D.L.R. 145 (1944), where the Supreme Court of Canada held that tolls charged by the company in respect of its intraprovincial bus line (which came within ss. 91(29) and 92(10)), were within federal jurisdiction.

To summarize, then, one should return to the principle enunciated by Mr. Justice Pigeon in the *Yellowknife Municipal Employees* case: "Jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer",[61] unless the employer is the Crown (the *Saskatchewan Minimum Wage Act* case),[62] or a Crown corporation which is an agency of the Crown or is specifically brought within the terms of section 109 of the Canada Labour Code (the *Jasper Park Lodge* case).[63]

Whether a particular work, undertaking or business will be considered intraprovincial, and therefore within the jurisdiction of the province, or extraprovincial, and so federal,[64] does not seem to be determined by the proportion of extraprovincial business. Thus, it has been held that even though the extraprovincial business of a trucking company was not a substantial part of its business, as long as it was "continuous" and "regular" it was beyond the jurisdiction of the province, and one need not consider the question of percentages or volumes.[65] On the other hand, where the extraprovincial business was purely casual, it was held to be, from a practical point of view, an intraprovincial business.[66] Similarly, in *Agence Maritime Inc. v. Canada*

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[61] *Supra* note 50, at 736, 76 D.L.R. (3d) at 90.

[62] *Supra* note 43.

[63] *Supra* note 56.

[64] The Supreme Court of Canada in Registrar of Motor Vehicles v. Canadian American Transfer Ltd., [1972] S.C.R. 811, 26 D.L.R. (3d) 112, held that ever since the *Winner* case, [1954] A.C. 541, [1954] 4 D.L.R. 657 (P.C.), it was clear that the legislative powers of a province do not in any way cover any extraprovincial regulation of the motor transport trade.

[65] *Re* Tank Truck Transport, [1960] O.R. 496, 25 D.L.R. (2d) 161 (H.C.), *aff'd* [1963] 1 O.R. 272, 36 D.L.R. (2d) 636 (Ont. C.A. 1961). *See also* Regina v. Borisko Bros. Quebec Ltd., 9 C.C.C. (2d) 227, 29 D.L.R. (3d) 754 (1969), where the Quebec Court of Sessions of the Peace held that the ratio of internal to external activity could never be the main criterion. In this case about 5% of the volume of business was carried out in Quebec and the rest was external. In *Re* Pacific Produce Delivery & Warehouses Ltd., [1974] 3 W.W.R. 384, 44 D.L.R. (3d) 130, the British Columbia Court of Appeal held that the labour relations of a trucking firm which operated an international service "to a reasonably substantial extent" as an integral and inseverable part of its operations, were beyond provincial jurisdiction. Another Ontario High Court decision even held a trucking company to be within federal jurisdiction although only 1.6% of its loads and only 10% of its total mileage was engaged in extraprovincial haulage. The court held that even though its extraprovincial business was casual and unscheduled, since it provided extraprovincial service consistently whenever its customers applied for it, the company was subject to the federal Industrial Relations and Disputes Investigation Act. Regina v. Cooksville Magistrate's Court, *ex parte* Liquid Cargo Lines Ltd., [1965] 1 O.R. 84, 46 D.L.R. (2d) 700 (H.C. 1964).

For a further and more recent affirmation of the principles and cases discussed here, *see* the Quebec Court of Appeal decision in *Re* Attorney-General of Quebec and A & F Baillargeon Inc., 97 D.L.R. (3d) 447 (1978).

[66] Regina v. Manitoba Lab. Bd., *ex parte* Invictus Ltd., 65 D.L.R. (2d) 517 (Man. Q.B. 1967).

Labour Relations Board,[67] the Supreme Court of Canada held that the labour relations of an employer, carrying on a business of cargo shipping operations between Montreal and ports along the St. Lawrence River, were not within federal jurisdiction even though on three isolated and exceptional occasions the ships made trips beyond the territorial boundaries of Quebec. On behalf of the court, Mr. Justice Fauteux noted that although section 91(10) should be interpreted broadly, these were operations that were wholly within provincial boundaries and so subject to provincial certification. It should be pointed out that unless the extraprovincial aspects of the business in question are inseparable from the intraprovincial business, the intraprovincial enterprise will not come within federal jurisdiction.[68]

This brings us to the issue of the extent to which the operations of an employer are sufficiently integrated with a federal work, undertaking or business to be considered to come within federal jurisdiction. This raises the question posed earlier about the application of the terms "employed upon or in connection with" used in section 108 of the Canada Labour Code. The dividing line between employment which is "upon or in connection with the operation of any federal work, undertaking or business" and that which is not can be illustrated by a series of cases dealing with postal delivery, telephones, uranium mines, navigation, and aeronautics. These will be dealt with in turn.

A recent leading case involves delivery of mail under contract. In *Letter Carriers' Union of Canada v. M & B Enterprises Ltd.*,[69] the Supreme Court unanimously held that persons employed in carrying mail as employees of a company doing such work under a contract with the Post Office were covered by section 108 of the Canada Labour Code, although their employer operated a local business as well. The company concerned derived 90% of its income from such mail contracts. Mr. Justice Ritchie, who gave the unanimous decision, emphasized that it

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[67] [1969] S.C.R. 851, 12 D.L.R. (3d) 722.

[68] In the case of Regina v. Peace Bridge Brokerage Ltd., 35 C.C.C. (2d) 488 (Ont. Cty. Ct. 1977), the accused operated a customs brokerage and delivered goods, upon arrival from the United States, to points wholly within Toronto. An Ontario County Court held that as the delivery operations were severable from the main undertaking of clearing the shipments through customs, this was not an undertaking extending beyond provincial boundaries and so the Ontario Public Commercial Vehicles Act was applicable. A case similar to the *Peace Bridge Brokerage Ltd.* case is the decision of the Federal Court of Appeal in *Re* Cannet Freight Cartage Ltd. and Teamsters Local 419, [1976] 1 F.C. 174, 60 D.L.R. (3d) 473 (1975). The court held that the employees of the company, which provided local pickup in Toronto and transmitted these to its own warehouses, on premises rented from the C.N.R. from where the freight was loaded onto cars rented from the C.N.R., were not subject to the jurisdiction of the Canada Labour Relations Board because the business was not "an integral part of or necessarily incidental to the effective operation of a railway" and the employees in question "were not employed upon or in connection with the Canadian National Railway". *Id.* at 177-78, 60 D.L.R. (3d) at 475.

[69] [1975] 1 S.C.R. 178, 40 D.L.R. (3d) 105 (1973).

was irrevelant that the employees were not strictly employed by the federal government: it was sufficient that the nature of the work was essential to the function of the Post Office and indeed, the work was supervised and controlled by Postal authorities. The Court held that exclusivity of employment was not a pre-condition to federal jurisdiction and that the character of the operation was defined by reference to the fact that it was part of a federal concern, *i.e.*, the Postal Service.[70]

In *Regina v. Ontario Labour Relations Board, ex parte Northern Electric Co.*,[71] the Ontario High Court held that the installation of telephone communication equipment by Northern Electric for customers operating transmission and communications networks, (the primary one being the parent company, Bell Telephone), was an integral and essential part of interprovincial undertakings within section 92(10)(*a*), and so fell within federal jurisdiction. On the other hand, in a case two years earlier, *Regina v. Ontario Labour Relations Board, ex parte Dunn*,[72] the High Court had also held that the manufacturing operation of this same subsidiary company of Bell Telephone was not an integral part of Bell's federally regulated operations. These operations were clearly severable because Bell could quite easily have made use of another company. Therefore, the employees were subject to provincial labour legislation.

In 1956, in the case of *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*,[73] it was held that jurisdiction to certify a union of the company's employees rested with the Canada Labour Relations Board, and not the provincial board, because uranium mines had been included in a section 92(10)(*c*) declaration concerning atomic energy, and were probably also within the "Peace, Order and Good Govern-

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[70] This decision must be compared with and, indeed, must be considered as limiting, if not overruling, a decision of the Manitoba Court of Appeal in *Re* Jessiman Bros. Cartage Ltd. and Letter Carriers' Union of Canada, [1972] 1 W.W.R. 289, 22 D.L.R. (3d) 363 (1971). One third of the 300 employees of the company were engaged in delivery of mail for the Post Office pursuant to a contract with the federal government. Nevertheless, a majority of the Court of Appeal held that the company was an independent contractor and not an agent of the federal government, so its employees were subject to the Manitoba Labour Relations Board.

[71] [1970] 2 O.R. 654, 11 D.L.R. (3d) 640. Appeal quashed [1971] 1 O.R. 121, 14 D.L.R. (3d) 537 (C.A. 1970). In a subsequent application before the Canada Labour Relations Board, the company (by then called Northern Telecom) objected to jurisdiction on, *inter alia*, constitutional grounds and, when the Board rejected the objection, Telecom applied to the Federal Court of Appeal under s. 28 of the Federal Court Act to set aside the Board order. The court dismissed the application. [1977] 2 F.C. 406. On 28 June, 1979, the Supreme Court of Canada dismissed an appeal. 98 D.L.R. (3d) 1. It should be noted that both decisions appear to be based on the insufficiency of evidence submitted by the company to support its contention that the Board was outside its jurisdiction. Nevertheless, both courts referred approvingly to the judgment of Lacourcière J. in the High Court, as well as to the *Montcalm* and *Commission du Salaire Minimum* cases for summations as set out in this paper.

[72] [1963] 2 O.R. 301, 39 D.L.R. (2d) 346 (1963).

[73] [1956] O.R. 862, 5 D.L.R. (2d) 342 (H.C.).

ment'' clause of section 91 of the B.N.A. Act.[74] On the other hand, in the case of *Bachmeir Diamond and Percussion Drilling Co. v. Beaver Lodge District of Mine, Mill and Smelter Workers*,[75] the Saskatchewan Court of Appeal held that the company, which had been engaged by Eldorado (a Crown corporation declared to be for the general advantage of Canada under section 92(1)(*c*)) for the purposes of diamond and percussion drilling, was not supplying services which were an integral part of or necessarily incidental to the ''production, refinement or treatment of uranium ore'' as described in the declaration. Therefore, the employees of the company engaged in these drilling operations were subject to provincial jurisdiction.

Regarding navigation and shipping, it was made clear both in the *Stevedoring*[76] case and the *Agence Maritime*[77] case that the terms ''navigation and shipping'' in both section 91(10) of the B.N.A. Act and section 2 of the Canada Labour Code, refer to extraprovincial navigation and shipping. In addition, enterprises of a provincial or ''local'' nature, even though taking place on or under waterways, have been held to be unrelated to ''navigation and shipping''.[78] On the other hand, as in the *Stevedoring* case, where the courts decided that certain activities were ''carried on for or in connection with navigation and shipping'', these were held to be within section 91(10) of the B.N.A. Act.[79]

A number of decisions in the 1970's, concerned with employment related to aeronautics, shows a fairly clear distinction between federal jurisdiction and provincial. Thus, the Alberta Court of Appeal held[80] that

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[74] Similarly, in Regina v. Bealous, [1977] 6 W.W.R. 19, the Manitoba Court of Appeal held that a company carrying out mining works which were situated in both Manitoba and Saskatchewan and which had been declared under s. 92(10) (*c*) to be for the general advantage of Canada, was subject only to federal jurisdiction in matters of employee safety.

[75] 35 D.L.R. (2d) 241 (1962).

[76] *Supra* note 35.

[77] *Supra* note 67.

[78] In the case of Underwater Gas Dev. Ltd. v. Ontario Lab. Rel. Bd., [1960] O.R. 416, 24 D.L.R. (2d) 673, the Ontario Court of Appeal held that provincial labour relations applied to the employees of the company which was engaged in the establishment and servicing of oil and gas drilling sites, by means of ships, the location of which was solely intraprovincial. The court held that this was a provincial enterprise of a local nature unrelated to ''navigation and shipping''. Similarly, in Attorney-General for Canada v. Les Services d'Hôtellerie Maritimes Ltée, [1968] C.S. 431, the Quebec Superior Court held that a vessel leased by the Quebec government to be used as a hotel, and which was permanently moored on Quebec Crown property, was solely a local work or undertaking unrelated to ''navigation and shipping''.

[79] The Nova Scotia Supreme Court held, in the case of Regina v. Nova Scotia Lab. Rel. Bd., *ex parte* J.B. Porter Co., 68 D.L.R. (2d) 613 (1968), that the employees of the Dartmouth depot of the company were subject to federal labour relations legislation because the company itself carried on dredging work, marine construction and salvage throughout eastern Canada.

[80] *Re* Field Aviation Co. and International Ass'n of Machinists & Aerospace Workers Local 1579, 49 D.L.R. (3d) 233 (1975).

the labour relations of a company whose business comprised aircraft servicing, repair and maintenance at Calgary airport fell within federal jurisdiction because the operations of the company were intimately connected with aeronautics. Similarly, The Federal Court of Appeal held[81] that a private company, operating at Montreal International airport in the business of parking and refuelling of private and commercial planes, was within federal jurisdiction because the activities were necessarily incidental to and an integral part of transportation by air. So, too, the British Columbia Court of Appeal held[82] that the labour relations of a company engaged in the business of selling aircraft, were governed by the Canada Labour Code, even though, since the code specifically protected the right to sue for arrears of wages, a salesman could proceed to do so under the British Columbia Payment of Wages Act. The full reach of federal jurisdiction with respect to employment integrally bound up with operations of an airport is illustrated in a case[83] concerned with municipal employees working on the maintenance of an airport and its runways. Even though the wages of these employees were paid by the city and the airport was leased by the city from the Crown, the employees were held subject to federal jurisdiction because their functions were an essential and integral part of the operations of the airport.

On the other hand, the Quebec Court of Appeal held[84] that employees of a company, which provided porter service at an airport, were not subject to federal jurisdiction because passengers contracted individually for these services, and they were not incidental to or an integral part of the operations of the airport.[85] Similarly, an Ontario High Court held[86] that a taxi service between Toronto and Toronto International Airport was not an integral part of the federal undertaking, even though the taxi company had entered into a lease with the Government of

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[81] Butler Aviation of Canada Ltd. v. International Ass'n of Machinists & Aerospace Workers, [1975] F.C. 590 (App. Div.).

[82] *Re* Staron Flight (1972) Ltd. and Board of Indus. Rel., [1978] 1 W.W.R. 132, 82 D.L.R. (3d) 215 (B.C.C.A. 1977).

[83] *Re* City of Kelowna and C.U.P.E. Local 338, [1974] 2 W.W.R. 744, 42 D.L.R. (3d) 754 (B.C.S.C.).

[84] Murray Hill Limousine Service v. Batson, [1965] B.R. 778, 66 C.L.L.C. 538.

[85] In the recent case of *Re* Canadian Airline Employees' Ass'n and Wardair Canada (1975) Ltd., [1979] 2 F.C. 91, 97 D.L.R. (3d) 38, the Federal Court of Appeal held that where something is done, not as an integral part of the operation of a federal undertaking and so reasonably incidental to such operation, but rather as the subject of a separate local business it cannot be regulated by Parliament merely because, if it were done as an integral part of the federal undertaking, it could be regulated by Parliament. Thus, although an air carrier can sell space directly to passengers, where it does not do so but sells the space wholesale to another who retails it, the selling activities of that other do not come within the jurisdiction of Parliament.

[86] *Re* Colonial Coachlines Ltd. and Ontario Trans. Bd., [1967] 2 O.R. 25, 62 D.L.R. (2d) 270, *aff'd* [1967] 2 O.R. 243, 63 D.L.R. (2d) 198 (C.A.).

Canada. In a similar vein, the Canada Labour Relations Board held[87] that the employees of a company, which was a subcontractor in the building of a parking lot on federal government property at Toronto International Airport, were subject to provincial legislation, since a parking lot was not a sufficiently integral part of the airport facility and was not essential to the aeronautics operations.

Assertion of federal jurisdiction through the aeronautics power has led recently to the determination of one of the thorniest problems in this area: that of employment in the construction of a federal work, undertaking or business. Three recent decisions, the most recent that of the Supreme Court of Canada, have dealt with this matter. These will be discussed in chronological order.

In *Regina v. Baert Construction Ltd.*,[88] the Manitoba Court of Appeal held that the mere fact that construction work was being done on federal Crown land, pursuant to a federal Crown contract, was not determinative of the jurisdictional question, because Parliament could not have contemplated the different standards that would be applied to employees depending upon where and for whom the employee was engaged. Soon after the *Baert* case, the Alberta Supreme Court held,[89] that employees engaged in the construction of an air terminal at Calgary were subject to provincial labour legislation. The court did not feel that the construction work was an integral part of "aeronautics" and that the words "upon . . . a federal work", in section 108(1) of the Canada Labour Code, did not include just anyone working at the physical location, but rather that the word "upon" related to "operation" and the employees here were not employed "upon . . . the operation of any federal work".

Both of these decisions were upheld in what is the most recent and authorative decision on this issue, that of the Supreme Court of Canada in

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[87] Toronto Auto Parks (Airport) Ltd. v. C.U.P.E., [1978] 2 Can. L.R.B.R. 416.

[88] [1975] 3 W.W.R. 347, 51 D.L.R. (3d) 265 (1974). The case was concerned with a conviction for failure to pay minimum wages under Manitoba statutes. The construction company had contracted with the federal government to construct buildings on federal Crown land, an Indian reserve. The company did not perform work exclusively for the federal government, nor were the employees in question engaged solely on the particular project. The company argued that the matter of wages was governed by the federal Fair Wages and Hours of Labour Act (R.S.C. 1970, c. L-3) and the Regulations thereunder, which provided that every contract made with the government of Canada for the construction, remodelling, repair or demolition of any work was subject to the Act and Regulations. As it turned out, the minimum wages required under the federal Act were significantly lower than those required under the provincial statutes. The court held that there was no conflict between the federal legislation and the provincial legislation because the former contemplated the possibility of supplementary provincial legislation. Although the contract required a certain minimum federal standard, the court asserted, this did not render provincial statutes, which imposed a higher obligation, inoperative.

[89] *Re* Plumbing, etc., Local 496 and Vipond Sprinkler Co., 67 D.L.R. (3d) 381 (1976).

Construction Montcalm Inc. v. Commission du Salaire Minimum.[90] The question in this case was whether certain Quebec wage decrees, applicable to employment in the construction industry in Quebec, could constitutionally be enforced against a Quebec construction company in respect of its employees engaged in the carrying out of a contract on federal Crown land for the construction of runways for the new Mirabel airport. By seven to two, the Supreme Court held that the Quebec legislation did apply. The main point of division between the majority and the dissenting judges was whether a distinction could be made between the construction of an airport and the operation or maintenance of a completed airport. Chief Justice Laskin, with Spence J. concurring, thought that such a distinction could not be made, whereas Mr. Justice Beetz, on behalf of all the other members, did proceed to make it.

The Chief Justice relied upon earlier authorities, to be discussed more fully in the next section, which he suggested indicated that provincial legislation could not interfere with the structure or management of a federal work, nor could provincial legislation regulate the use of federal Crown property. Moreover, he suggested, the province could not alter or modify the terms and conditions of a federal Crown contract entered into with a third party.

Mr. Justice Beetz, on the other hand, referring to four of the cases discussed above, set out the following important propositions:

> The question whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon J. in [*Yellowknife Municipal Employees* case]. . . . But, in order to determine the nature of the operation, one must look at the normal or habitual activity of a business as those of 'a going concern', [Martland J. in the *Bell Telephone Minimum Wage* case . . .], without regard for exceptional or casual factors; otherwise the Constitution could not be applied with any degree of continuity and regularity: . . . [the *Agence Maritime* case]; the *Letter Carriers'* case.[91]

Based upon these propositions, he proceeded to explain that in his opinion "construction of an airport is not in every respect an integral part of aeronautics":

> To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case. This is why decisions of this type are not subject to municipal regulation or permission. . . . Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the

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[90] [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641 (1978). A recent decision of the Saskatchewan Queen's Bench applied the *Montcalm* case to hold that, although the *operation* of an interprovincial pipeline was a federal undertaking, the labour relations connected with the *construction* of a pipeline, up to the point where the National Energy Board grants a certificate authorizing it to be operated, are within provincial jurisdiction. *Re* Henuset Rentals and the United Association of Journeymen, [1979] 2 W.W.R. 727, 96 D.L.R. (3d) 651.

[91] *Montcalm*, *id*. at 769, 93 D.L.R. (3d) at 653.

> various buildings, runways and structures, and other similar specifications, are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect on its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing airports stand on a different footing.[92]

He then went on to refer to some earlier cases holding that provincial safety regulations could be applicable to federal works or undertakings and continued:

> In my opinion, what wages shall be paid by an independent contractor like *Montcalm* to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business.[93]

Beetz J. distinguished the earlier decisions concerning non-applicability of provincial law to the construction of federal works and undertakings as being concerned only with "those directions which result in the structural alteration of a federal work, or in the creation of new works, or, presumably and *a fortiori*, in the prohibition of new works".[94] In the case at bar, however, he felt that the impugned legislation did "not purport to regulate the structure of runways", rather he felt, "the application of provincial law would neither interfere with the operation of a federal undertaking nor result in the dismemberment of a federal work".[95]

He went on to lay considerable stress on the practical difficulties that would arise if "constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project". He suggested that this would produce great confusion:

> For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.[96]

To do this would be, he suggested, "to disregard the elements of continuity . . . and to focus on casual or temporary factors, contrary to the *Agence Maritime* and *Letter Carriers'* decisions".[97]

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[92] *Id.* at 770-71, 93 D.L.R. (3d) at 654.
[93] *Id.* at 771, 93 D.L.R. (3d) at 655.
[94] *Id.* at 773, 93 D.L.R. (3d) at 656.
[95] *Id.* at 773, 774, 93 D.L.R. (3d) at 656, 657.
[96] *Id.* at 776, 93 D.L.R. (3d) at 658.
[97] *Id.*, 93 D.L.R. (2d) at 658-59.

Mr. Justice Beetz then dealt with the second contention, that provincial law could not apply to federal Crown lands. He rejected this on the basis that the only limitation on a province to make laws in relation to "Property and Civil Rights", under section 92(13) of the B.N.A. Act, was the territorial limitation imposed by the words "in the province". The limitation upon this provincial power, implicit from exclusive federal powers in section 91 of the Constitution, including the power in head 1A to make laws in relation to the "Public Debt and Property", operated, he suggested, as a limitation *ratione materiae*, not as a territorial limitation. He referred to the earlier Supeme Court decision in *Cardinal v. Attorney-General of Alberta*,[98] where Mr. Justice Martland, writing for the majority of the court, held that if provincial legislation is within the limits of section 92, and not in relation to any subject matter under section 91, it is applicable everywhere in the province, including Indian reserves, even though Indians and Indian reserves might be affected by it. Mr. Justice Beetz asserted that the Quebec legislation in the *Montcalm* case did not relate to federal property and "[f]ederal Crown lands do not constitute extra-territorial enclaves within provincial boundaries any more than indian [*sic*] reserves".[99]

Finally, Mr. Justice Beetz dealt with the third contention on behalf of Montcalm, which was that the field was occupied by the Fair Wages and Hours of Labour Act. However, he suggested:

> [T]he Act does not forbid the Crown from entering into a contract with a contractor who pays more than the minimum to his employees. Nor does the Act prevent the operation of provincial law providing for the payment of minimum wages or actual wages equivalent to or in excess of the minimum federal requirement.[100]

He then relied upon the recent Supreme Court decision in *Ross v. Registrar of Motor Vehicles*[101] to conclude that this submission "cannot succeed unless the impugned provisions are in conflict with the *Fair Wages and Hours of Labour Act*. . . . *Montcalm* had to prove that federal and provincial law were in actual conflict for the purposes of this case. It did not so prove."[102]

Obviously, the last two points discussed by Mr. Justice Beetz have important implications with respect to jurisdiction over accommodations and facilities, and with respect to "contract compliance" respectively, and will be dealt with further under those headings. However, it is necessary first to complete this part by referring to two recent decisions directly concerned with the question of whether provincial human rights legislation applies to employment concerned with federal works, undertakings or businesses.

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[98] [1974] S.C.R. 695, 40 D.L.R. (3d) 553 (1973).
[99] *Supra* note 90, at 777-78, 93 D.L.R. (3d) at 660.
[100] *Id.* at 779-80, 93 D.L.R. (3d) at 661.
[101] [1975] 1 S.C.R. 5, 42 D.L.R. (3d) 68 (1973).
[102] *Supra* note 90, at 780, 93 D.L.R. (3d) at 661.

The earlier of these is a decision of the British Columbia Supreme Court in *Re Culley and Canadian Pacific Airlines Ltd.*[103] A female flight attendant of the company laid a complaint before the British Columbia Human Rights Commission on the ground that the airline's rule that female flight attendants may not work on aircraft flights after the thirteenth week of pregnancy constituted discrimination on the basis of sex. The court granted a writ of prohibition against a Board of Inquiry proceeding to deal with the complaint. Counsel for the British Columbia Commission relied mainly upon the *Workmen's Compensation Board* case referred to earlier.[104] However, Mr. Justice Macdonald held that "[that] case stands as authority for the application of the Workmen's Compensation Act in the circumstances considered by the Privy Council", but that the *Commission du Salaire Minimum* case[105] decided that the issue to be determined is whether the fair employment practices provision in the British Columbia Human Rights Code was "in essence a regulation of some of the terms of employment of employees in a federal undertaking".[106] He concluded that it was "legislation respecting employer and employee relations [and therefore] cannot apply to persons employed by C.P. Air".[107] Clearly, in light of what has been discussed above, the decision is correct.[108]

A more recent case, *Canadian Pacific Limited v. Attorney-General of Alberta*,[109] arose from a complaint of discrimination brought before the Alberta Human Rights Commission. It concerned employment at the railway company's "Frog Shop", the principal object of which was to receive, maintain and repair certain components of railway track known as "frogs",[110] and whose other object and purpose was to receive and supply certain items of used railway track and equipment. Mr. Justice Kirby accepted that the activities he was concerned with were clearly distinguishable from the *Empress Hotel*[111] and *Jasper Park Lodge*[112] cases, and that the activities at issue before him were "clearly a vital part of the operations of Canadian Pacific Railway lines in the Provinces of

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[103] [1977] 1 W.W.R. 393, 72 D.L.R. (3d) 449 (1976).

[104] *Supra* note 41.

[105] *Supra* note 39.

[106] *Supra* note 103, at 397, 72 D.L.R. (3d) at 452.

[107] *Id.* at 398, 72 D.L.R. (3d) at 453.

[108] The British Columbia Court of Appeal specifically so affirmed in a decision rendered on 22 January, 1980, and not yet reported — *Re* Forest Indus. Flying Tankers and Kellough. The court held that the British Columbia Human Rights Act did not apply to labour relations in respect of an enterprise engaged in the field of aeronautics, even if the aircraft concerned were exclusively engaged in such activities in the British Columbia forest industry as fire suppression, patrolling, environmental evaluation, ambulance service and senior executive inspections.

[109] 79 C.L.L.C. 14,202, 100 D.L.R. (3d) 47 (Alta. S.C. 1979).

[110] These are installed as part of the railway tracks to enable trains and other rolling stock to move from one track to another.

[111] *Supra* note 53.

[112] *Supra* note 54.

Saskatchewan, Alberta and British Columbia, and therefore come within the railway's works and undertakings".[113] Nevertheless, he held that the fair employment practices provision in the Alberta Individual's Rights Protection Act "embraces fundamental human rights which transcend employer-employee relations with respect to works and undertakings in the operation of railways, and come within the ambit of civil rights over which the province has exclusive jurisdiction under Section 92(13) of the *B.N.A. Act*".[114] Mr. Justice Kirby gave no reason for this conclusion. In view of what has been said earlier, it is suggested that this decision must be wrong.[115]

C. *Employees of Federal Crown Corporations*

Sections 109(1) and 4 of the Canada Labour Code purport to apply Part V (the labour relations part), and Part I (the "fair employment practices" part, which has now been replaced by the Canadian Human Rights Act) to the employees of "any corporation established to perform any function or duty on behalf of the Government of Canada". Section 109(1) allows the Governor in Council to exclude corporations from the provisions of Part V. However, section 109(2) provides that the Governor in Council may only exclude those corporations "in respect of which a Minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or approve some or all of the terms and conditions of employment of persons employed therein". Subsection (3) of section 109 then goes on:

> Where the Governor in Council excludes any corporation from the operation of . . . [Part V of the *Canada Labour Code*], he shall, by order, add the name of that corporation to Part I or Part II of Schedule I to the *Public Service Staff Relations Act*.

Presumably, therefore, the employees of all federal Crown corporations are subject either to the Canada Labour Code or to the Public Service Staff Relations Act[116], as far as their labour relations are concerned, and to the Canadian Human Rights Act, as far as fair employment practices are concerned. Whether this is, in fact, the case with respect to all Crown corporations must now be faced.

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[113] Furthermore, he referred to *Commission du Salaire Minimum*, *supra* note 39; *Field Aviation*, *supra* note 80; *City of Kelowna*, *supra* note 83; and *Re Culley*, *supra* note 103, but made no distinction between these and the case before him.

[114] *Supra* note 109, at 14,202 (p. 15,203 of transfer binder 1979), 100 D.L.R. (3d) at 55.

[115] On January 16, 1980, the Alberta Court of Appeal did so hold and allowed the appeal. [1980]2 W.W.R. 148.

[116] R.S.C. 1970, c. P-35.

By far the leading decision of the Supreme Court of Canada on this issue is the *Jasper Park Lodge*[117] case. It will be recalled that the first argument in favour of federal jurisdiction over the labour relations of the employees of the Lodge was that the Lodge was subject to a federal declaration under sections 91(29) and 92(10)(*c*) of the B.N.A. Act. The second was: "that the [C.N.R. Co.] was a corporation established to perform a function or duty on behalf of the Government of Canada so as to bring it and its employees at Jasper Park Lodge within Part I of the federal Act".[118] The Act in question was the I.R.D.I. Act and, as indicated earlier, section 54 thereof was essentially the same as the present section 108(2).

The nub of the question was whether the railway company operated the Lodge "on behalf of" the Government of Canada or merely "for" the government. Chief Justice Laskin, who gave the unanimous judgment of the Court, suggested that the words "on behalf of" were words of agency. Even though such agency "is normally expressed in the legislation establishing the agent, it may also be shown by necessary intendment under the terms of the legislation".[119] The fact of ownership of the capital stock and the ultimate control of the direction of the railway was an important factor, but not sufficient for determination of this case. It was necessary, therefore, to refer to the Financial Administration Act.[120] Section 66(1) of this Act defines a "Crown corporation" as "a corporation that is ultimately accountable, through a Minister to Parliament for the conduct of its affairs, and includes the corporations named in Schedule B, Schedule C and Schedule D". The Act specifies three types of Crown corporations: "departmental", "agency" and "proprietary". These are listed in Schedules B, C and D respectively.[121]

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[117] *Supra* note 56.

[118] *Id.* at 790, 45 D.L.R. (3d) at 4.

[119] *Id.* at 795, 45 D.L.R. (3d) at 8.

[120] R.S.C. 1970, c. F-10.

[121] Furthermore, s. 66(3) of the Financial Administration Act is important here:

> The Governor in Council may by order add to:
>
> (*a*) Schedule B any Crown corporation that is a servant or agent of Her Majesty in Right of Canada and is responsible for administrative, supervisory or regulatory services of a governmental nature;
>
> (*b*) add to Schedule C any Crown corporation that is an agent of Her Majesty in Right of Canada and is responsible for the management of trading or service operations on a quasi-commercial basis, or for the management of procurement, construction or disposal of activities on behalf of Her Majesty in Right of Canada; and
>
> (*c*) add to Schedule D any Crown corporation that
>
> (i) is responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public, and
>
> (ii) is ordinarily required to conduct its operations without appropriations.

Since the railway corporation is included in Schedule D, Laskin C.J.C. stated, then, "the absence of any express provision in any applicable legislation making it an agent of the Crown reinforces the disclaimer of agency".[122] He noted that by section 66(3)(*c*) of the Financial Administration Act "only a Crown corporation that is a servant or agent of Her Majesty in Right of Canada and is responsible for the management of specified activities may be added to Schedule C".[123] This, he concluded, "under the disclaimer of Crown agency, would exclude [the C.N.R. Co.] from eligibility for inclusion in Schedule C".[124]

Based, therefore, upon this decision, it would appear clear that employment relationships, including fair employment practices, of "departmental corporations" in Schedule B of the Financial Administration Act, and the "agency corporations" in Schedule C thereof, are within federal jurisdiction. Of the "proprietary" corporations listed in Schedule D, those that are expressly defined as agents of the Crown in their constituent Acts would also come within federal jurisdiction. In addition, any "proprietary" corporation in Schedule D, which comes within the definition of a "federal work, undertaking or business" as defined earlier herein, would also come within federal jurisdiction. This would include such "proprietary" corporations in Schedule D of the Financial Administration Act as Air Canada, Canadian Broadcasting Corporation, Eldorado Aviation Ltd., Eldorado Nuclear Ltd., Export Development Corporation, Canadian National Railways, The St. Lawrence Seaway Authority, Seaway International Bridge Corporation Ltd. All of these would come within federal jurisdiction unless they were engaged in a work, undertaking or business which is of a local or provincial nature, severable from their main operations, and, not casual. The question that would remain is whether other corporations in Schedule D, like the Cape Breton Development Corporation would, in the absence of an express provision that such a corporation is an agent of the Crown, be considered to be included.

IV. Accommodation — Residential, Commercial and Public

As mentioned at the beginning of this article, access to or provision of accommodation involves the laws of contract, property, sometimes agency, perhaps occasionally such tort law as that relating to occupiers' liability. All of these are essentially within the provincial sphere of jurisdiction as "matters" coming within section 92(13) of the B.N.A. Act ("Property and Civil Rights") unless it can be shown that the "matter" concerned *merely affects* "Property and Civil Rights", but is

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[122] *Supra* note 56, at 796, 45 D.L.R. (3d) at 8.
[123] *Id.* at 797, 45 D.L.R. (3d) at 9.
[124] *Id.*

actually "*in relation to*" a federal power under section 91. Analogous to the jurisdictional situation with respect to employment, the exceptions to the sweep of provincial legislative power that have to be considered are: (a) property owned by the Crown in Right of Canada; and (b) the property of federal works, undertakings, services or businesses.

A. *Federal Crown Property*

The constitutional basis for federal power to regulate the use of its own property is found in section 91(1A) ("The Public Debt and Property"). A number of cases since 1930 indicate the scope of this federal power.

The earliest of these is *Rex v. Red Line Ltd.*,[125] where the Ontario Court of Appeal held that regulations, under the Federal District Commission Act, forbidding the operation of commercial vehicles on lands acquired for the Commission, were *intra vires*. Although only one judge, Orde J.A., made reference to section 91(1) of the B.N.A. Act (now section 91(1A)), the full panel held that federal Crown land was removed from provincial regulation. Middleton J.A. stated:

> The right of the Dominion to control and regulate its own property appears to me to be incontestable. . . .
>
> The law of property and civil rights as assigned to the Province . . . has no application to the Crown.[126]

The earliest relevant decision of the Supreme Court of Canada is *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*.[127] This case concerned the applicability of Alberta gas conservation legislation to the oil company's operations. The company held a lease from the federal government of a tract of Crown land for the purposes of drilling for and extracting petroleum and natural gas. The Supreme Court of Canada held unanimously that federal law superseded and rendered inoperative any provincial regulation. The Court suggested that to hold otherwise would have been tantamount to permitting the province to alter the terms of the contract between the federal Crown and the oil company and even nullifying the effect of valid federal provisions.

It is not absolutely clear, however, whether this judgment can be taken so far as to assert that provincial legislation could not touch federal Crown property at all or whether it was invalid only to the extent that there was existing federal legislation. Thus, Chief Justice Duff, in giving the unanimous decision, said the following:

> The *Dominion Lands Act* and the Regulations enacted pursuant to it, give statutory effect to plans for dealing with Dominion public lands, including lands containing petroleum and natural gas. . . . It is not competent to a

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[125] 66 O.L.R. 53, 54 C.C.C. 271 (1930).
[126] *Id.* at 62, 54 C.C.C. at 280.
[127] [1933]S.C.R. 629, [1933]4 D.L.R. 545.

> provincial legislature *pro tanto* to nullify the regulations, to which Parliament has given the force of law in execution of such plan. . . . Indeed, an administrative order, which the legislature has professed to endow with the force of statute, directed against a tract of public land, the property of the Dominion, held by a lessee under the [federal] Regulations . . . which professed to regulate the exercise, by the lessee, of his right to take gas and petroleum from the demised lands, would truly be an attempt to legislate in relation to a subject reserved for the exclusive legislative jurisdiction of the Dominion by s.91(1), [now s.91(1A)] "The Public . . . Property" of the Dominion.[128]

In the *Montcalm* case discussed earlier, Chief Justice Laskin relied upon the statement in the *Spooner Oils* case for the following proposition:

> Federal public property is within the exclusive domain of Parliament under s.91(1A), and whether or not the words "public property" therein carry a wider significance than what is comprehended by federal Crown property, the fact that what we have here is federal Crown property is itself enough to exclude provincial legislation from any regulatory control over it and what is done on it.[129]

On the other hand, Mr. Justice Beetz, in the *Montcalm* case, seemed to indicate that the ratio of the *Spooner Oils* case was only that provincial legislation could not nullify "valid federal provisions", and that the case "depended on the special provisions of an agreement between the Government of Canada and Alberta confirmed and given the force of law by the British North America Act, 1930".[130]

Three cases decided after *Spooner Oils*, but before *Montcalm*, offer support for the view of Laskin, C.J.C., at least to the extent that the concern here is with jurisdiction over property, and not over employment which was the main issue in *Montcalm*.

In *Deeks McBride Ltd. v. Vancouver Associated Contractors Ltd.*,[131] the British Columbia Court of Appeal held unanimously that a mechanics' lien, lodged under provincial legislation, could not be filed against federal Crown land even though the certificate of title had been registered under the British Columbia Land Registry Act, because section 91(1A) of the B.N.A. Act gives the Dominion exclusive legislative authority over Dominion property.

The case of *City of Ottawa v. Shore & Horwitz Construction Ltd.*[132] was concerned with whether a construction company, which was engaged by a federal Crown agency to erect a barracks on federal Crown

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[128] *Id.* at 643-44, [1933] 4 D.L.R. at 558.
[129] *Supra* note 90, at 764, 93 D.L.R. (3d) at 649.
[130] *Id.* at 779, 93 D.L.R. (3d) at 660.
[131] 14 W.W.R. 509, [1954] 4 D.L.R. 844.
[132] [1960] O.W.N. 137, 22 D.L.R. (2d) 247 (H.C.).

land, was obliged to obtain a building permit from the city. Mr. Justice Donnelly held that it was not.[133]

A 1962 decision of the Supreme Court of Canada illustrates the extent of federal jurisdiction over Crown property. At the same time, it indicates the distinction that has to be drawn between jurisdiction over such property rights as leasing or the granting of concessions on the one hand, and jurisdiction over the employment relationships of a particular operation, even though occurring on federal Crown land, on the other. In *Desrosiers v. Thinel*,[134] the Supreme Court upheld a conviction for operating a taxi service within the limits of an airport in violation of the federal Airport Vehicle Control Regulations. Although the question in issue was whether the Regulations were within the scope of the legislative authority conferred by Parliament, Mr. Justice Abbott, who gave the decision of the Court, referred to the airport as being the property of the Crown in the Right of Canada, and declared that this included landing strips and buildings as well as the "access roads leading from the landing strips and buildings to public roads outside the property".[135] These "vehicular approaches within an airport are properly subject to control in the interests of proper management and have not the full character of public highways upon which the public has the right to pass and re-pass".[136] Therefore, although the provinces may have jurisdiction with respect to the employment services of taxi, limousine or porter enterprises,[137] it is the federal government, as owner of the airport property, that determines who may have the right to conduct commercial operations on the airport.[138]

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[133] *Id.* at 138-39, 22 D.L.R. (2d) at 251, when he stated:

> The barracks built by the accused firm and the land on which they were located were owned by the Crown in the Right of Canada and formed part of the Public Debt and Property over which s. 91(1A) of the *B.N.A. Act* excludes the Province from any legislative authority and over which the Government of Canada has the exclusive right to legislate. . . .

[134] [1962] S.C.R. 515, 33 D.L.R. (2d) 715.

[135] *Id.* at 517, 33 D.L.R. (2d) 717.

[136] *Id.*, 33 D.L.R. (2d) at 718.

[137] As in the *Murray Hill Limousine* case, *supra* note 84, or the *Colonial Coach Line* case, *supra* note 86.

[138] This distinction is perhaps best illustrated by the decision of the Alberta Supreme Court in Midvalley Constr. Ltd. v. Board of Indus. Rel. of Alberta, [1974] 6 W.W.R. 575, which upheld the jurisdiction of the Alberta Labour Relations Board over the employment of construction workers on a highway being built in Banff National Park. At the same time, however, the court approved the following statement of the Board:

> The Board is of the opinion that the control, operation and management of public property in the National Park falls within the jurisdiction of the Federal Government, however, the carrying out of the construction work by the respondent . . . is a matter which is incidental and subordinate to the jurisdiction of the Federal Government under s. 91 of the *B.N.A. Act*. In other words, the construction of the highway and streets in Banff National Park in the Province of Alberta is provincial in character and is distinguishable and separate from the management, control and operation of the public property which is not a concern of the respondent contractor.

Id. at 576.

To summarize then, what Chief Justice Laskin said in the *Montcalm* case about "[f]ederal public property [being] within the exclusive domain of Parliament under section 91(1A)"[139] and that being "itself enough to exclude provincial legislation from any regulatory control over it and what is done on it",[140] must be correct. To the extent that one is concerned with federal regulation of the use of the property, what was held by the majority in *Montcalm* is not relevant. Rather, that case indicates that provincial labour relations legislation can apply to employment on a construction project, even if it does take place on federal Crown property.

In other words, although it may seem anomalous, what is clear from the cases discussed herein is that although the labour relations of employees at the Jasper Park Lodge, and therefore the fair employment practices concerned therewith, are within the jurisdiction of the Province of Alberta, the fair accommodation practices provisions in the Canadian Human Rights Act apply to whatever residential, commercial or public accommodation is offered at the Lodge. At the same time, however, it has to be noted that apart from National Parks, and perhaps defence-related property, there is not much residential or commercial accommodation involved. As far as public accommodation and facilities are concerned, perhaps this is extended somewhat to such federal Crown property as airports and federally owned buildings. That federal Crown property which constitutes Indian reserves will be dealt with separately.

B. *The Property of Federal Works, Undertakings or Businesses*

There is, of course, no case directly on point to indicate the reach of provincial fair accommodation practices provisions to federal works, undertakings, or businesses. However, a number of leading cases, from the turn of the century to *Montcalm*, seem to indicate quite clearly that provincial legislation (including fair accommodations provisions) cannot reach the basic property rights of such undertaking, at least if the property concerned is an integral part of the undertaking.

The earliest of these are four decisions of the Judicial Committee of the Privy Council. In a case which has come to be known as the *Bonsecours* case,[141] it was held that the province could not regulate the physical structure of a ditch, which was on company property and which formed part of the authorized works. On the other hand, the Judicial Committee also held that the Quebec law, which required that the ditch be cleaned, was *intra vires* the provincial legislature. A few months later the Judicial Committee held, in *Madden v. Nelson and Fort Sheppard*

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[139] *Supra* note 90, at 764, 93 D.L.R. (3d) at 649.

[140] *Id.*

[141] Canadian Pacific Ry. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367, 68 L.J.P.C. 54.

Railway,[142] that the British Columbia Cattle Protection Act, which provided that unless a federal railway company erected proper fences it would be responsible for cattle injured or killed, was *ultra vires*. Complementary to the *Madden* case was the decision, in *Grand Trunk Railway v. Attorney-General for Canada*,[143] that it was within the jurisdiction of Parliament to provide that federal railway companies could not "contract out" from liability to pay damages for personal injury to their servants. A few years later, in *City of Toronto v. Bell Telephone Co.*,[144] the Judicial Committee held that the company came within the jurisdiction of Parliament not just because of a section 92(10)(*c*) declaration, but also because it came within sections 91(29) and 92(10)(*a*) and, as such, could enter upon the streets and highways of the City of Toronto to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways, without the consent of the municipal corporation.

Two more recent decisions, both by the Supreme Court of Canada indicate, respectively, the scope and the limits of federal jurisdiction.

In *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*,[145] the Supreme Court held that the Trans-Mountain Oil Pipeline Co., coming within the exclusive jurisdiction of Parliament by sections 91(29) and 92(10)(*a*), was not subject to the British Columbia Mechanics' Lien Act, because such provincial legislation would permit the sale of the undertaking piecemeal and nullify the purpose for which it was incorporated. Mr. Justice Rand stated: "The mutilation by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism . . . ."[146]

On the other hand, the Supreme Court of Canada recently held, in *Canadian National Railway v. Nor-Min Supplies Ltd.*,[147] that the Ontario Mechanics' Lien Act did apply to a quarry owned by the company. This conclusion, according to Chief Justice Laskin, who gave the decision of the Court, was based on the crucial findings that the maintenace of the quarry was only "a matter of convenience" for the company, and that the quarry did not come within the section 92(10)(*c*) declaration "as other transportation works". The fact that the quarry was a source of supply for railway purposes did not, in the circumstances, make it an essential or integral part of the C.N.R.'s transportation system, at least (and this could be an important qualification) in the absence of previous federal legislation.

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[142] [1899] A.C. 626, 68 L.J.P.C. 148.

[143] *Supra* note 55.

[144] [1905] A.C. 52, 74 L.J.P.C. 22 (1904).

[145] [1954] S.C.R. 207, [1954] 3 D.L.R. 481.

[146] *Id.* at 216, [1954] 3 D.L.R. at 489.

[147] [1977] 1 S.C.R. 322, 66 D.L.R. (3d) 366 (1976). *See also* the recent Alberta Court of Appeal decision in Western Indus. Contractors Ltd. v. Sarcee Devs. Ltd., 98 D.L.R. (3d) 424 (1979), holding that although a lien cannot be placed against the interest of an Indian band in reserve lands, where the lien is against the leasehold interest of an Alberta company in certain property physically situated on an Indian reserve, such a lien may be filed.

In addition to the limitation set out by Chief Justice Laskin in the *Nor-Min* case, it has to be noted that in both the *Bonsecours* and *Bell Telephone* cases, the Judicial Committee did state that not all provincial legislation touching the property of a federal work, undertaking or business was excluded, and that provincial laws of general application, which do not touch the essentials of the operation, could be applicable. This is perhaps best expressed in the following quotation from the judgment of Estey J. in the *Campbell-Bennett* case:

> [A] province cannot, by legislation, impose requirements upon a Dominion corporation that would substantially impair its power or capacities to accomplish the purpose for which it was incorporated under Dominion legislation. . . .[148]

However, it was quite clear in that case that, apart from the principle expressed by Estey J., a federal work, undertaking or business "is ordinarily subject to provincial laws of general application".[149]

Does this mean, then, that provincial fair accommodation practices provisions constitute "provincial laws of general application"? That question cannot be answered without considering what is involved in the accommodation in question. Thus, in the light of the *Empress Hotel, Jasper Park Lodge, Campbell-Bennett* and *Nor-Min* cases, it can be suggested that where the accommodation or facility is an integral part of the operations of the enterprise and is, in addition, carried on on property owned by such enterprise, then the Canadian Human Rights Act would apply. Otherwise, it would be subject to provincial human rights codes. Perhaps some examples of the distinction herein suggested could be given. Thus, despite the fact that the Empress Hotel is owned by an interprovincial railway, it is not an integral part of the enterprise and the fair accommodations practices of the hotel, just as its fair employment practices, would be subject to the jurisdiction of British Columbia. On the other hand, the accommodation and facilities available on a railway, such as dining car services or sleeping accommodation, being an integral part of the operation of the railway, would be subject to the Canadian Human Rights Act. An interesting question would concern public accommodation (facilities) on such premises as railway stations. These, unlike National Parks and airports, are not part of the property of the federal Crown, and so would be characterized by a decision whether such commercial enterprises as barber shops, restaurants or stores, on these premises, are to be deemed an integral part of railway transportation services. This brings us to our next topic.

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[148] *Supra* note 145, at 219, [1954] 3 D.L.R. at 492.

[149] *Id.* at 218, [1954] 3 D.L.R. at 492.

V. Goods, Services and Facilities Customarily Available to the Public

The terms "services" and "facilities" overlap somewhat, at least to the extent that the physical locale may be a part of the service offered. In some cases what is more important is the type of human activity involved, and in others it is the kind of physical facility or accommodation that is provided. On the other hand, there is an aspect of the provision of "services", which is more analogous to the provision of or trading in "goods", than to the provision of "services" related to "facilities and accommodation". In any case, although one might argue that the provision of services is more analogous to the employment relationship, while the provision of facilities is more analogous to accommodation and property, the discussion in the previous two parts indicates that the following kinds of distinctions can be made.

Unless the provision of services and facilities is an integral part of a federal work, undertaking or business, it would come within the jurisdiction of the provinces as being a "matter" of either "Property and Civil Rights" (section 92(13)), or "Matters of a merely local or private Nature" (section 92(16)), or "Local Works and Undertakings" (section 92(10)). Therefore, excluded from provincial jurisdiction would be only such "services and facilities" as those provided by the government of Canada, or a private federal work, undertaking or business, where such service or facility was an integral part of such an enterprise, or was provided by a private enterprise on federal Crown property, pursuant to a lease or concession by the government. Thus, as was argued earlier, although the employment relationships at Jasper Park Lodge are subject to provincial jurisdiction, the services and facilities there offered are probably subject to federal jurisdiction. To take the matter even further, it is suggested that although a private company operating a restaurant on an airport would be subject to the jurisdiction of provincial commissions in the event of an allegation of discrimination in employment, it would nevertheless be subject to federal jurisdiction if the allegation concerned discrimination in the provision of services or facilities.

As indicated above, to the extent that services are less integrally tied to facilities or public accommodation, but take on more the nature of a commercial transaction, the jurisdiction with respect to them is the same as with respect to the purchase and sale of "goods". To that extent we are less concerned with the federal power under sections 91(29) and 92(10), than we are with the federal power in relation to "Trade and Commerce" (section 91(2)). From as early as 1881, in the case of *Citizens Insurance Co. v. Parsons*,[150] it has been clear that the terms "Trade and Commerce", in section 91(2) of the B.N.A. Act, do not include all aspects of trade and commerce, but merely those which are

[150] *Supra* note 20.

international or interprovincial. In other words, there is an intra-provincial aspect which comes within "Property and Civil Rights" (section 92(13)) and "Matters of a merely local or private Nature" (section 92(16)). It is beyond the scope of this study to attempt to analyze and discuss the many cases that have tried to draw the dividing line,[151] except to say that it would be difficult to think of reasons why the legislative jurisdiction with respect to discrimination in the provisions of "goods and services" should be any different than that drawn between the federal "Trade and Commerce" power on the one hand, and the power of the provinces on the other, essentially under section 92(13) and (16), to regulate intraprovincial trade.

VI. Advertising, Notices, Signs and Symbols

To the extent that an advertisement or, for that matter, any notice, sign or symbol published or broadcast is concerned with employment, accommodation or any of the other activities or physical facilities covered by human rights legislation, the jurisdiction with respect thereto must be the same as that with respect to the activities or facilities concerned. On the other hand, to the extent that any of these messages is concerned with an idea or a policy apart from such prohibited acts, issues of jurisdiction over expression could arise. That is a huge topic in itself and beyond the scope of this article. For present purposes perhaps it would be sufficient to add that, generally, the provinces can assert jurisdiction through tort laws on defamation, while Parliament has jurisdiction through its criminal law power.[152] Also, until recently, there may have been some argument that Parliament's jurisdiction with respect to broadcasting[153] extended to the regulation of all content, including advertising. However, in the recent decision of *Attorney-General for*

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[151] For a detailed discussion, one can turn to the basic texts: P. Hogg, Constitutional Law of Canada 267-75 (1977); Laskin's Canadian Constitutional Law 221-65 (4th ed. rev. A. Abel 1975); J. Whyte & W. Lederman, Canadian Constitutional Law 8-1 to 8-78 (2d ed. 1977). For an extensive study devoted to this topic, now unfortunately somewhat dated, *see* A. Smith, Commerce Power in Canada and the United States (1963). For a recent article on the marketing aspects, *see* T.B. Smith, *Chickens and Eggs: Marketing and Trade and Commerce Power*, in The Constitution and the Future of Canada, [1978] Special Lectures L.S.U.C. 135.

[152] For a discussion of "hate literature" and freedom of expression, and for a list of other sources on the topic, *see* W.S. Tarnopolsky, The Canadian Bill of Rights 185-94 (2d ed. 1975).

[153] *See* the cases from *Re* Regulation and Control of Radio Communications in Canada, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.), to the most recent decisions in Capital Cities Communications Inc. v. C.R.T.C., [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609 (1977), and Public Serv. Bd. v. Dionne, [1978] 2 S.C.R. 191, 83 D.L.R. (3d) 178 (1977).

Quebec v. Kellogg's Co.,[154] the Supreme Court held that provincial legislation could prohibit the use of cartoons in advertising intended for children as being valid provincial consumer protection legislation. In other words, it is the message, not the medium, that largely determines the legislative jurisdiction with respect to advertising, publication and probably even broadcasting.

VII. Indians and Lands Reserved for Indians

Section 91(24) of the B.N.A. Act gives Parliament jurisdiction with respect to "Indians, and Lands reserved for the Indians". However, as will be indicated below, this does not mean that provincial laws of general application cannot affect Indians; rather a provincial legislature cannot enact legislation *in relation to* Indians, or *in relation to* Indian reserves. The leading case on this subject is now *Cardinal v. Attorney-General of Alberta*.[155] The appellant, who was a Treaty Indian, sold a piece of moose meat to a non-Indian at his home on an Indian reserve in Alberta. He was charged with unlawful trafficking in big game contrary to the Alberta Wildlife Act. The question in the case was whether the Wildlife Act was *ultra vires* the provincial legislature to the extent of its application to an Indian reserve. The Supreme Court held, by six to three, that the provincial Act did not relate to Indians, *qua* Indians, and was validly applied in this case.

Mr. Justice Martland, who gave the judgment of the majority, held that:

> [Section 12] of the [Alberta Natural Resources Agreement of 1929, between the Government of Canada and the Government of Alberta] made the provisions of the *Wildlife Act* applicable to all Indians, including those on reserves, and governed their activities throughout the Province, including reserves. By virtue of s.1 of the *British North America Act, 1930*,[1156] it has the force of law, notwithstanding anything contained in the *British North America Act, 1867*, any amendment thereto, or any federal statute.[157]

Mr. Justice Laskin disagreed on the effect to be given to these provisions. However, the more important issue for our purposes here is the disagreement between them on the matter of whether or not Indian reserves were "enclaves" beyond the reach of provincial law. It is this point that will be given further attention.

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[154] [1978]2 S.C.R. 211, 83 D.L.R. (3d) 314.

[155] *Supra* note 98.

[156] By which ownership of natural resources, which had been withheld at the times of the creation of the prairie provinces, was transferred to them.

[157] *Supra* note 98, at 710, 40 D.L.R. (3d) at 564.

Mr. Justice Laskin put aside the question of whether,

> in the absence of federal legislation, provincial legislation touching the personal status and relationships of persons on a reserve, as for example, respecting marriage or custody or adoption of children, is validly applicable; or, similarly, whether provincial commercial law would apply, absent federal legislation.[158]

Rather, he stated:

> The present case concerns the regulation and administration of the resources of land comprised in a reserve, and I can conceive of nothing more integral to that land as such. If the federal power given by s.91(24) does not preclude the application of such provincial legislation to Indian reserves, the power will have lost the exclusiveness which is ordained by the Constitution.[159]

He expounded the "enclave" principle thus:

> Where land in a Province is, as in the present case, an admitted Indian reserve, its administration and the law applicable thereto, so far at least as Indians thereon are concerned, depend on federal legislation. Indian reserves are enclaves which, so long as they exist as reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada.[160]
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> . . . .
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> Since federal power in relation to "lands reserved for the Indians" is independent and exclusive, its content must embrace administrative control and regulatory authority over Indian reserves. Hence, not only provincial game laws but other provincial regulatory legislation can have no application, of its own force, to such reserves, at least where it is sought to subject Indians thereon to such legislation.[161]

Persuasive as these declarations may be, they were explicitly rejected by Mr. Justice Martland for the majority. After drawing a distinction between the *Union Colliery*[162] case and that of *Cunningham v. Tomey Homma*[163] as being the difference between provincial laws "in relation to" a federal subject, and laws which merely affect a "matter" within federal jurisdiction, he propounded the following:

> A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s.91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which provincial legislation could have no application. . . . [I]f provincial legislation within the limits of s.92 is not construed as being legislation in relation to [Indians and Indian reserves] it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian Reserves might be affected by it. My point is that s.91(24) enumerates classes of subjects over which the federal Parliament has

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[158] *Id.* at 717, 40 D.L.R. (3d) at 569.
[159] *Id.* at 717-18, 40 D.L.R. (3d) at 569-70.
[160] *Id.* at 716, 40 D.L.R. (3d) at 568-69.
[161] *Id.* at 718, 40 D.L.R. (3d) at 570.
[162] Union Colliery Co. v. Bryden, [1899] A.C. 580, 68 L.J.P.C. 118.
[163] [1903] A.C. 151, 87 L.T. 572 (P.C. 1902).

> the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of the Province to enact legislation, otherwise within its powers, is to be excluded.[164]

What this case would seem to illustrate is that provincial legislation relating to employment would apply to Indians, at least as long as it was not legislation *in relation to* "status Indians" under the Indian Act.[165] On the other hand, it would appear that provincial legislation cannot affect rights in relation to Indian land, even though provincial laws of general application, including fair practices provisions, could affect personal property rights of Indians, if for no other reason than because of s.88 of the Indian Act, which provides for "incorporation" of provincial laws to apply to Indians to the extent that they are not in conflict with the Indian Act.

A very recent decision of the Supreme Court of Canada dealt specifically with the issue of employer-employee relations on an Indian Reserve and re-affirmed the *Cardinal* approach. The case of *Re Four B Manufacturing Ltd. v. United Garment Workers of America*[166] was concerned with a review of a certification by the Ontario Labour Relations Board, on the grounds, *inter alia*, that the Board was without jurisdiction to apply the Ontario Labour Relations Act to the company or its employees on the reserve. The company had been incorporated in Ontario, but operated a shoe manufacturing plant on an Indian reserve, pursuant to a permit from the federal Department of Indian Affairs. The permit required the company to give preference to the employment of band members and, to this end, the company was granted money from the federal government's Indian Economic Development Fund. By a majority of seven to two, the Supreme Court of Canada upheld the dismissal of the application for review.

Mr. Justice Beetz, who gave the decision of the majority, started out with the following proposition:

> With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and

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[164] *Supra* note 98, at 703, 40 D.L.R. (3d) at 559-60. *See* the comment supporting the majority decision by Dale Gibson, *The 'Federal Enclave' Fallacy in Canadian Constitutional Law*, 14 ALTA. L. REV. 167 (1976).

[165] R.S.C. 1970, c. I-6.

[166] 30 N.R. 421, 80 C.L.L.C. 12,019 (S.C.C. 1979). The Divisional Court decision is to be found at 17 O.R. (2d) 80, 79 D.L.R. (3d) 576 (1977). A 1974 decision of the Ontario Labour Relations Board, Plumbers, etc. v. Yellow Jacket Welding Co., [1974] O.L.R.B. Rep. 709, appears to be in line with the *Four B* case. In that instance the employees, some of whom were Indians, were engaged in the construction of a storage facility on an Indian reserve. Their labour relations were held to be subject to provincial jurisdiction on the basis that the physical presence of a facility on a reserve was irrelevant: it was not functionally or necessarily incidental to the operation of the reserve, and s. 88 of the Indian Act contemplated the application of provincial laws of general application to Indians, at least in the absence of federal legislation superseding that of the province.

> businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses. . . .[167]

He then went on to assert:

> There is nothing about the business or operation of *Four B* which might allow it to be considered as a federal business: the sewing of uppers on sports shoes is an ordinary industrial activity which clearly comes under provincial legislative authority for the purposes of labour relations. Neither the ownership of the business by Indian shareholders, nor the employment by that business of a majority of Indian employees, nor the carrying on of that business on an Indian reserve under a federal permit, nor the federal loan and subsidies, taken separately or together, can have any effect on the operational nature of that business. By the traditional and functional test, therefore, the *Labour Relations Act* applies to the facts of this case, and the *Board* has jurisdiction.[168]

He then proceeded to state that the matter of labour relations of these employees was not related to "Indianness" and that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians.

Finally, he dealt with the contention that the Canada Labour Code occupied the field. However, after referring to the key provisions previously discussed in this article, sections 2 and 108(1), he concluded that the "*Code* does not provide for this case".[169] In his opinion "[u]nder the functional test *Four B* is not a federal work, undertaking or business, within the meaning of the *Canada Labour Code*"[170] and, to the suggestion that Indians were "federal persons", he adopted the reasoning of Morden J. in the Divisional Court:

> Section 108 of the *Code*, by its language, is directed at federal activities, operations or functions and not at the position of individuals or a class of individuals, who might be considered to be 'federal' persons or at their relationships.[171]

The dissenting judgment of Chief Justice Laskin appears to dwell overwhelmingly on the issue of whether "the combination of circumstances which govern the operation of the factory in the present case",[172] *i.e.*, all the various connections to Indians and to the reserve,

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[167] *Four B*, *id.* at 426, 80 C.L.L.C. at 12,020-21. As authority for this proposition, he referred to all the leading cases discussed earlier in this article: *Snider*, *supra* note 26; *Stevedoring*, *supra* note 35; *Commission du Salaire Minimum*, *supra* note 39; *Saskatchewan Minimum Wage Act*, *supra* note 43; *City of Yellowknife*, *supra* note 50; *Letter Carriers'*, *supra* note 19; *Montcalm*, *supra* note 90.

[168] *Supra* note 166, at 426-27, 80 C.L.L.C. at 12,021.

[169] *Id.* at 431, 80 C.L.L.C. at 12,023.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 440, 80 C.L.L.C. at 12,027.

referred to above by Mr. Justice Beetz,[173] are such as to bring these labour relations within the Canada Labour Code. He concluded that they came within the opening words of section 2, "an undertaking or business that is within the legislative authority of the Parliament of Canada"[174] and therefore "an undertaking or business outside the exclusive legislative authority of provincial legislatures".[175] With this decision he did not have to deal with the question of whether Parliament had or could "occupy the field". Clearly he would support the conclusion that it *could*.

Thus, it would appear that provincial fair employment practices legislation would apply to Indians, even working on an Indian reserve, as long as it was not *in relation to* Indians and as long as Parliament had not "occupied the field".

All of the cases, including *Four B*, have rather carefully limited their application to instances where there is no preclusive federal legislation, and where the provincial legislation is *not in relation to* Indian lands or Indians *qua* Indians. All of this would support the further argument that provincial fair accommodation practices provisions do not apply to Indian reserves. This is supported by two lower court decisions.

The earlier of these is *Corporation of Surrey v. Peace Arch Enterprises*,[176] where it was held that Peace Arch Enterprises, who had leased land from the Crown in right of Canada on an Indian reserve, were not required to comply with the British Columbia Health Act in their construction of an amusement park and restaurant facilities on this leased land; otherwise the provincial Act would have related to the *use* of Indian land. It is interesting to note that in the *Cardinal* case, Mr. Justice Martland specifically referred to the *Peace Arch Enterprises* case and explained it as meaning: "Once it was determined that the lands remained lands reserved for the Indians, provincial legislation relating to their use was not applicable."[177]

A recent decision in the Nova Scotia Supreme Court seems to be even more directly on point. In *Millbrook Indian Band v. Northern Counties Residential Tenancies Board*,[178] the question was whether the Nova Scotia Residential Tenancies Act applied to the applicant band's reserve. Mr. Justice Morrison referred, *inter alia*, to the *Cardinal* case and the *Peace Arch Enterprises case*, to conclude that the provincial legislation could not apply to an Indian reserve. He went on to quote one of the leading authorities[179] on the constitutional position of the Canadian

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[173] *See* text accompanying note 168, *supra*.

[174] *Supra* note 166, at 440-41, 80 C.L.L.C. at 12,027.

[175] *Id.* at 441, 80 C.L.L.C. at 12,027-28.

[176] 74 W.W.R. 380 (B.C.C.A. 1970). *See also Sarcee Devs.*, *supra* note 147.

[177] *Supra* note 98, at 705, 40 D.L.R. (3d) at 561.

[178] 28 N.S.R. (2d) 272, 84 D.L.R. (3d) 174 (S.C. 1978), *aff'd* 28 N.S.R. (2d) 268, 93 D.L.R. (3d) 230 (C.A. 1978).

[179] K. Lysyk, *The Unique Constitutional Position of the Canadian Indian*, 45 CAN. B. REV. 513, at 552 (1967).

Indian who, in summarizing the case law applicable thereto, concluded that: "Provincial legislation may not, of course, relate to Indian lands, and section 87 [now s. 88] of the Indian Act does not touch upon the distribution of legislative authority in this respect."[180]

As a result, provincial fair employment practices provisions might apply to Indians, at least in the absence of preclusive federal legislation, but provincial fair accommodation practices provisions would not. However, even federal provisions would not appear to apply, because section 63(2) of the Canadian Human Rights Act[181] provides: "Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act."

VIII. Contract Compliance and Special Programmes (Affirmative Action)

"Special programmes", for the purpose of eliminating or reducing disadvantages suffered by groups which are the concern of anti-discrimination legislation, or "for the promotion of their welfare", have been adopted in the Canadian Human Rights Act[182] (section 15), the Northwest Territories Fair Practices Ordinance[183] (section 14), and the Human Rights Codes of British Columbia[184] (section 11(5)), New Brunswick[185] (section 13), Nova Scotia[186] (section 19), Ontario[187] (section 6a), Prince Edward Island[188] (section 19) and Saskatchewan[189] (section 47). It goes without saying that the Commission concerned can only adopt or approve such programmes as are within its jurisdiction. The only jurisdiction with a real "contract compliance" provision, in the sense of enabling the government to require anyone contracting with it to comply with human rights legislation, is to be found in section 19 of the Canadian Human Rights Act:

> 19. The Governor in Council may make regulations respecting the terms and conditions to be included in or applicable to any contract, licence or grant made or granted by Her Majesty in right of Canada providing for
> (*a*) the prohibition of discriminatory practices described in sections 5 to 13; and
> (*b*) the resolution, by the procedure set out in Part III, of complaints of discriminatory practices contrary to such terms and conditions.

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[180] *Supra* note 178, at 282, 84 D.L.R. (3d) at 182.
[181] S.C. 1976-77, c. 33.
[182] S.C. 1976-77, c. 33.
[183] R.O.N.W.T. 1974, c. F-2.
[184] S.B.C. 1973 (2d Sess.), c. 119.
[185] R.S.N.B. 1973, c. H-11.
[186] R.S.N.S. 1969, c. 11, *as amended*.
[187] R.S.O. 1970, c.318, *as amended*.
[188] S.P.E.I. 1975, c. 72.
[189] R.S.S. 1978, c. S-24-1.

Thus far there has been no jurisprudence directly on point. However, somewhat similar federal legislation, *i.e.*, the Fair Wages and Hours of Labour Act,[190] has constituted an important aspect of two of the cases referred to earlier.[191] Before discussing these, it would be useful to consider the two provisions in the Act which were at issue in those cases:

> S.2 In this Act
> "fair wages" means such wages as are generally accepted as current for competent workmen in the district in which the work is being performed for the character or class of work in which such workmen are respectively engaged; but shall in all cases be such wages as are fair and reasonable and shall in no case be less than the minimum hourly rate of pay prescribed by or pursuant to Part III of the *Canada Labour Code*; . . . .
> S.3(1) Every contract made with the Government of Canada for construction, remodelling, repair or demoliton of any work is subject to the following conditions respecting wages and hours:
> (*a*) all persons in the employ of the contractor, sub-contractor, or any other person doing or contracting to do the whole or any part of the work contemplated by the contract shall during the continuance of the work be paid fair wages;
> . . . .

In *Regina v. Baert Construction Ltd.*,[192] the Manitoba Court of Appeal was concerned with the application of provincial minimum wage legislation to employees employed in construction on an Indian reserve, pursuant to a contract with the Department of Indian and Northern Affairs. The court held that the provincial law applied. The judges considered the Fair Wages and Hours of Labour Act and concluded that this legislation was not in conflict with the provincial legislation in that the federal Act merely set minimum standards and did not render inoperative provincial statutes which imposed a higher obligation.[193]

The *Baert* case was specifically approved by Mr. Justice Beetz in the *Montcalm* case.[194] It will be recalled that in that case, too, the question concerned the application of provincial labour legislation, including minimum wages, to the construction contract of the federal government

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[190] R.S.C. 1970, c. L-3.

[191] *Baert, supra* note 88; *Montcalm, supra* note 90.

[192] *Supra* note 88.

[193] Thus Matas J.A. declared:

> It is apparent, from a reading of the *Wages Act* and Regulations, that Parliament intended to set a floor for wages payable on any federal contract, but left open the possibility of payment of higher wages depending on the area in which federal work was to be carried on. In the case at bar, the Province has stipulated rates which the Legislature has considered fair for Manitoba by enacting legislation on the subject. Payment of a contractor of those rates would not contravene federal legislation. On the contrary, the provincial statutes supplement federal legislation and would be in accordance with the intention of the *Wages Act*. . . .

Id. at 351, 51 D.L.R. (3d) at 271. Mr. Justice Matas relied upon one of the leading articles on concurrency and paramountcy, W. Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada*, 9 McGILL L.J. 185 (1963).

[194] *Supra* note 90, at 782, 93 D.L.R. (3d) at 662-63.

for the building of the runways at Mirabel International Airport. Again, since that contract was governed by the Fair Wages and Hours of Labour Act, the relationship of it to provincial legislation was one of the key elements in the decision of the Supreme Court of Canada. Chief Justice Laskin argued that the Fair Wages and Hours of Labour Act was a condition of the contract with the federal goverment and so it was "not within the competence of the Province to extend its minimum wage legislation to such a federal Crown contract".[195] He suggested that: "This would be tantamount to adding a term to it and I think it is clear that a Province cannot alter or modify the terms and conditions of a federal Crown contract entered into with a third party."[196] However, Mr. Justice Beetz, for the majority, disagreed. He suggested that the Act did not forbid the federal Crown "from entering into a contract with a contractor who pays more than the minimum to his employees",[197] nor did the Act, in his opinion, "prevent the operation of provincial law providing for the payment of minimum wages or actual wages equivalent to or in excess of the minimum federal requirement".[198] Mr. Justice Beetz then summarized his views rejecting Montcalm's argument that the provincial law was inoperative:

> [I]t was incumbent upon *Montcalm* to establish that it could not comply with provincial law without committing a breach of the federal Act. *Montcalm* did not even attempt any such demonstration. It argues in its factum that the federal Act provides not only for wages but also for overtime, unfair labour practices, etc., and that, in several instances, such provisions "*may*" differ from those of provincial law. This is not good enough. *Montcalm* had to prove that federal and provincial law were in actual conflict for the purposes of this case. It did not so prove.[199]

What does all of this indicate in determining the applicability and validity of section 19 of the Canadian Human Rights Act? The following points are suggested:

(1) It is quite clear that section 19 is essentially a valid expression of the federal power over "Public Debt and Property" (section 91(1A) of the B.N.A. Act).

(2) With respect to a person, thing or activity otherwise within the jurisdiction of Parliament, the Canadian Human Rights Act would apply even without resorting to section 19.

(3) Even though the employment relationships of enterprises which are not "federal works, undertakings, services or businesses" are within the jurisdiction of the provinces, when they are engaged in fulfilling contracts with the federal government on federal Crown property, it would appear that provincial legislation will be applicable to them only

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[195] *Id.* at 766, 93 D.L.R. (3d) at 651.
[196] *Id.*
[197] *Id.* at 779, 93 D.L.R. (3d) at 661.
[198] *Id.* at 779-80, 93 D.L.R. (3d) at 661.
[199] *Id.* at 780, 93 D.L.R. (3d) at 661.

to the extent that it does not conflict with applicable federal legislation. In other words, there may be *some* argument that where the federal legislation applies a higher standard and, presumably, where the provincial legislation is in direct conflict, then the federal will prevail.

(4) Since all the anti-discrimination legislation in Canada is very similar, both as to the protected classification of individuals and as to the type of activity or facility concerned, it is difficult to see where conflict could arise. It is true that some categories of people are covered by the federal Act and not by some provincial Acts, or vice versa, but that alone does not constitute a conflict. If the federal Act covers a group which a provincial Act does not, that is not conflict, and again the reverse would be true. The only area where there might possibly be conflict would be between the adoption of a "special programme" which might be ordered by a Tribunal, pursuant to section 41(2)(*a*) of the Canadian Human Rights Act on the one hand and, on the other, those few provinces which do not yet have provision for such "special programmes".

(5) Even with respect to matters which do come within provincial jurisdiction, such as a construction contract to be carried out for the federal government on federal Crown property where there is no preclusive federal legislation, the inclusion of the requirements of section 19 in a federal "contract, licence or grant" would still be a valid contractual term. In that case, although it would be impossible to *compel* submission to the complaint procedures of the Canadian Human Rights Act, as contemplated in section 19(*b*), some pressure towards compliance with the Canadian Human Rights Act arises out of the compulsion connected with breach of contract remedies. In the alternative, of course, in these instances, the wiser course might very well be to lay a complaint with the appropriate provincial Human Rights Commission.

(6) If the federal government should decide to bring action upon the contract, it should be noted that pursuant to section 17(4) of the Federal Court Act[200] the federal government could do so in the Federal Court of Canada, since the suit is based upon existing federal law: *McNamara Construction (Western) Ltd. v. The Queen*.[201] It would appear that the Canadian Human Rights Act, just as the Fair Wages and Hours of Labour Act, would satisfy this requirement of pre-existing federal legislation.

(7) Finally, since "contract compliance" has proved to be an important "outreach" in the enforcement of human rights legislation in the United States, there is no reason why the provinces should continue to refrain from enacting a provision comparable to that in section 19 of the Canadian Human Rights Act.

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[200] R.S.C. 1970, c. 10 (2nd Supp.).

[201] [1977] 2 S.C.R. 654, 75 D.L.R. (3d) 273.

IX. CONCLUSION

The prohibition of discrimination is a "matter" concerning primarily "property and civil rights" or "matters of a merely local and private nature" or "local works and undertaking" — all three being "classes of subjects" listed in section 92 of the B.N.A. Act as coming within the exclusive legislative authority of the provinces. Therefore, human rights legislation in Canada, which prohibits discrimination with respect to employment, residential and commercial accommodation, goods, services, facilities and public accommodation, and publication or broadcasting with respect thereto, is essentially within the legislative jurisdiction of the provinces. Where, however, the employment, service, facility, accommodation, or publication with respect thereto, is integrally bound up with a federal work, undertaking, service or business, it will be within the jurisdiction of Parliament, because it is then a "matter" coming within section 91 of the B.N.A. Act.

The result of the above propositions is that, as far as concerns employment, to use the words of Mr. Justice Beetz in the *Four B Manufacturing* case, "exclusive provincial legislative competence is the rule" unless, by the "functional test of the nature of their operations and their normal activities", the undertakings, services or businesses "can be characterized as federal".[202] (Without going into detail, the appended data indicate the scope of federal jurisdiction.) As far as goods, services, facilities and accommodation "customarily available to the general public" (section 5 of the Canadian Act) are concerned, only those which are provided as an integral part of the operations and normal activities of federal undertakings, services or businesses, would come within the federal Act: all others are within the jurisdiction of the provinces. The same would hold true with respect to residential and commercial accommodation. (Obviously, as far as residential accommodation is concerned, apart, possibly, from that to be found on national parks, armed forces bases, or Indian reserves, all is within the jurisdiction of the provinces.) Finally, what has been said above with respect to jurisdiction in relation to the provision of goods and services, applies even where these are provided to the federal government. Therefore, although the government could, as part of the terms of its contracts, forbid the conduct proscribed by the Canadian Human Rights Act, enforcement would be for breach of contract and not by virtue of the enforcement provisions set out in the federal Act, *ex proprio vigore*.

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[202] *Supra* note 166, at 426, 80 C.L.L.C. at 12,020-21.

APPENDIX

Province	Canadian Human Rights Commission employment jurisdiction			
	Private industries under federal jurisdiction[a]	Persons under the Public Service Employment Act[b]	Federal government enterprises[c]	Canadian Forces[d]
Newfoundland	10,430	5,865	5,915	867
P.E.I.	2,201	1,507	1,092	1,011
Nova Scotia	17,829	16,803	5,291	12,267
New Brunswick	16,163	8,359	7,213	4,400
Quebec	141,071	52,918	38,523	10,978
Ontario	202,947	127,573	42,872	22,953
Manitoba	37,679	12,484	14,096	4,090
Saskatchewan	13,760	8,289	4,666	1,638
Alberta	39,101	18,085	9,551	7,450
British Columbia	67,319	26,636	8,150	8,416
Yukon & N.W.T.	1,500	2,334	1,216	318
Outside Canada	—	1,934	8,355	6,287
Total: Men and Women	550,000	282,787	146,940	80,675
Women	202,489	95,922	49,842	4,522
Men	347,511	186,865	97,098	76,153
Women as % of total	36.8%	33.9%	33.9%	5.6%

— Not Available

[a] Includes certain enterprises in the following industry categories: railway transport and services, air transport and services, road transport and services, water transport and services, services incidental to transportation, pipeline, gas and electric power, telephone communication, cable communication, radio and television, grain operation and milling, banking, uranium and other mining, and other. Source: Estimated (to account for non-response) from unpublished data for 1977 from Surveys Division, Labour Canada.

[b] Mainly persons working in government departments, including civilians working for the Department of National Defence and the RCMP who are not members of those forces. Source: Public Service Commission, *Annual Report 1977, Public Service Commission of Canada*, Table 2 (Minister of Supply and Services Canada, 1978)

[c] Mainly persons working in Crown corporations. Data on women are estimates. Source: Statistics Canada, Federal Government Section, *Federal Government Employment, July - September, 1977*, Cat. No. 72-004 (Statistics Canada, Ottawa, 1978).

[d] Regular Canadian Forces Personnel. Source: Unpublished data from Personnel Information Systems, Department of National Defence.

[e] Comprises Regular Members, Special Constables and Civilian Members of the RCMP. Source Unpublished data from Organization and Personnel, Royal Canadian Mounted Police.

Estimated number of persons who come under the jurisdiction of the Canadian Human Rights Commission for employment matters, by province and type of agency, showing such persons as a percentage of the total employed labour force, Canada, 1977.

Canadian Human Rights Commission employment jurisdiction				Total Employed Labour Force[h]	Canadian Human Rights Commission employment jurisdiction as % of total employed labour force
RCMP[e]	Military Reserves and Cadet Instructors List[f]	Other federal agencies[g]	Total		
				(thousands)	%
632	989	1,079	25,777	161	16.0
127	296	281	6,515	45	14.5
655	2,314	6,992	62,151	298	20.9
583	1,349	1,078	39,145	232	16.9
1,245	6,216	4,869	255,820	2,504	10.2
3,689	8,374	29,350	437,758	3,762	11.6
1,023	1,309	2,211	72,892	433	16.8
1,642	959	1,701	32,655	402	8.1
1,810	1,520	2,773	80,290	853	9.4
3,728	3,680	2,541	120,470	1,065	11.3
334	56	1,461	7,219	NA	NA
72	6	4,977	21,631	—	—
15,540	27,068	59,313	1,162,323	9,754	11.6[i]
879	4,957	20,119	378,730	3,642	10.2[i]
14,661	22,111	39,194	783,593	6,113	12.5[i]
5.7%	18.3%	33.9%	32.6%	37.3%	—

[f] Includes 22,122 Primary Reserves and 4,926 Cadet Instructors List personnel These reserve personnel receive a stipend from the Department of National Defence conditional upon their attendance at regularly scheduled training sessions. Source: Unpublished data from Personnel Information Systems, Department of National Defence

[g] Includes Atomic Energy of Canada, Atomic Energy Control Board, Bank of Canada, Economic Council of Canada, Cape Breton Development Corporation, National Research Council, Canada Council, National Arts Centre Corporation, National Film Board, Atlantic Pilotage Authority, Loto Canada, National Capital Commission and others. Data on Women are estimates Source: Estimated from data published in the source mentioned in footnote e

[h] Excludes the unemployed. Numbers do not add up to the total due to independent rounding Source Statistics Canada, Labour Force Survey Division, *The Labour Force, December, 1977*, Cat No 71-001 (Statistics Canada, Ottawa, 1978), p. 59.

[i] In calculating this percentage, persons in the Yukon and Northwest Territories and those outside Canada were excluded from the total.

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