# CONSTITUTIONAL LAW

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## I. FEDERAL-PROVINCIAL RELATIONS

### A. *Constitutional Review*

At the invitation of Ontario, a meeting of representatives of all ten provincial governments—styled the "Confederation of Tomorrow Conference" —met in Toronto at the end of November, 1967, for the purpose of exchanging views on the nature and direction of the Canadian federation.[1] At the Conference a wide-ranging discussion of constitutional matters was initiated, and it was resolved to establish a continuing committee of heads of provincial governments to further the discussions, with particular attention to problems of constitutional change, regional disparities and language practices and rights.[2]

The federal government entered the picture by convening a federal-provincial constitutional conference in early February, 1968. As with the Confederation of Tomorrow Conference, but for the first time in the case of a major federal-provincial conference, the proceedings were covered by all communications media, including radio and television. In addition to the matters that had been noted for special attention at Toronto,[3] a major item on the agenda was the federal proposal for an entrenched bill of rights in the Canadian constitution.[4] The meeting achieved a limited consensus on language rights[5] and adopted proposals for carrying forward the process of constitutional review under the supervision of a continuing Constitutional Conference composed of the Prime Ministers and Premiers or their delegates, assisted by a continuing committee of officials, and with a secretariat to be formed by the federal government, after consultation with the provinces, to serve both the Constitutional Conference and the continuing committee of officials.[6] The constitutional review would include consideration of the following questions: (a) official languages; (b) fundamental rights; (c) distribution of powers; (d) reform of institutions linked with federalism, including the Senate and the Supreme Court of Canada; (e) regional disparities;

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[1] See THE CONFEDERATION OF TOMORROW CONFERENCE, PROCEEDINGS AND THEME PAPERS (1967).

[2] *Id.*, PROCEEDINGS at 232.

[3] See text accompanying note 2.

[4] See A CANADIAN CHARTER OF HUMAN RIGHTS and text accompanying note 14.

[5] PROCEEDINGS OF THE CONSTITUTIONAL CONFERENCE, FIRST MEETING 545 (1968).

[6] *Id.*, 547.

(f) amending procedure and provisional arrangements; and (g) mechanisms of federal-provincial relations.[7] A second meeting of the Constitutional Conference, originally scheduled for December of 1968, was postponed to February of 1969 due to the illness of the Premier of Quebec.

Apart from the conference proceedings themselves, worthy of particular note are the federal government's position papers published during the survey year relating to constitutional matters.[8]

B. *Offshore Rights*

On a reference by the Governor in Council as to legislative jurisdiction and proprietary rights off the coast of British Columbia, the unanimous decision of the Supreme Court of Canada in November, 1967, was in favour of federal ownership and control.[9] It held that with respect to lands, minerals and other natural resources of the sea bed and subsoil seaward from the low-water mark, both within the limits of the territorial sea[10] and beyond in the continental shelf off British Columbia, proprietary rights, as well as legislative jurisdiction, accrued to Canada rather than to the province.

The federal government had indicated its intention to enter into negotiations with the provincial governments concerning off-shore rights after the judgment of the Supreme Court had been obtained, and in December of 1968 the Prime Minister outlined his government's proposals for delineating federal and provincial areas of offshore administration and revenue-sharing.[11] In brief, it involves establishing so-called "mineral resource administration lines" in coastal waters, with administration and revenues on the landward side to go to the adjacent province, while administration and one-half of the revenues from the seaward side would be in federal hands. The remaining half of the revenues from resources seaward of the line would be made available to the provinces on such basis as the provincial governments might themselves agree upon.

At the close of the survey year, the negotiations had not been brought to a conclusion.

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[7] *Id.*

[8] The papers, appearing under the name of the responsible minister, are publications of the Queen's Printer, Ottawa, in 1968, and are as follows: Rt. Hon. L. B. Pearson, FEDERALISM FOR THE FUTURE; Hon. P. E. Trudeau (then Minister of Justice), A CANADIAN CHARTER OF HUMAN RIGHTS; Hon. P. Martin, FEDERALISM AND INTERNATIONAL RELATIONS; Hon. M. Sharp, FEDERALISM AND INTERNATIONAL CONFERENCES ON EDUCATION. See also Rt. Hon. P. E. Trudeau, THE CONSTITUTION AND THE PEOPLE OF CANADA (1969), published for the second meeting of the Constitutional Conference in February, 1969.

[9] Offshore Mineral Rights Reference, [1967] Sup. Ct. 792, 65 D.L.R.2d 353, 62 W.W.R. (n.s.) 21. As to the position of provinces other than British Columbia, see 3 H.C. DEB. 3354-56 (1968). For a general discussion of the background and the issues, see Head, *The Canadian Offshore Minerals Reference: The Application of International Law to a Federal Constitution*, 18 U. TORONTO L.J. 131 (1968).

[10] Three nautical miles; *see* Territorial Sea and Fishing Zones Act, Can. Stat. 1964, c. 22, § 3.

[11] See 3 H.C. DEB. 3342-45 (1968) and further discussion 3 H.C. DEB. 3411-14 (1968).

## II. INSTITUTIONS

### A. *Parliament and the Legislatures*

The preamble to the British North America Act, 1867, [12] reminds us that the Canadian constitution was to be "similar in principle to that of the United Kingdom." Yet the problems of federalism so dominate our constitutional experience that apart from questions of Crown liability and immunities [13] it is comparatively seldom that our attention is focused upon principles or conventions adopted from the constitution of the United Kingdom. During the survey year, two developments in this latter category occasioned considerable debate.

Supremacy of Parliament, the most fundamental of these inherited constitutional principles, came under examination in connection with the federal government's proposal for a constitutionally entrenched bill of rights that would restrict the legislative powers of federal and provincial legislative bodies alike. [14] Should the ultimate decision on the desirability and wisdom of particular legislative measures remain with the legislative branch, or should it be transferred to the judiciary? On this issue, the first meeting of the Constitutional Conference in February, 1968, failed to reach a consensus.

In the same month, the federal government was plunged into a major constitutional controversy arising out of its defeat in the House [15] on third reading of a bill to amend the Income Tax Act. The opposition maintained that the government, having been defeated on a major fiscal measure, was under a constitutional duty to resign or to recommend dissolution. The government took the position that convention required neither of these courses of action, and in due course it introduced a motion to the effect that the House did not regard the defeat as a vote of non-confidence in the government. [16] The latter motion eventually passed, [17] resolving a crisis that had totally absorbed the attention of the House for more than a week.

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[12] B.N.A. Act, 1867. Unless otherwise indicated, all references below to the B.N.A. Act are references to this Act, as amended.

[13] Legal developments relating to the position of the Crown in litigation are not reviewed in this article. Worthy of note, however, are two decisions in the survey year relating to injunctive relief against, respectively, a corporate Crown agent and a minister of the Crown: Nat'l Harbours Bd. v. Langelier, 2 D.L.R.3d 81 (Sup. Ct. 1968), and Carlic v. Reginam, 62 W.W.R. (n.s.) 229 (Man. 1967). Questions relating to Crown liability and immunities are to some extent themselves subject to special considerations in a federal state: *see, e.g.*, La Reine v. Breton, [1967] Sup. Ct. 503. And *see, generally*, Gibson, *Interjurisdictional Immunity in Canadian Federalism*, 47 CAN. B. REV. 40 (1969).

[14] See, A CANADIAN CHARTER OF HUMAN RIGHTS, *supra* note 8, and the PROCEEDINGS OF THE CONSTITUTIONAL CONFERENCE, FIRST MEETING, *supra* note 5, at 265-331.

[15] 6 H.C. DEB. 6896 (1967-68).

[16] *Id.* at 6903, 6921.

[17] 7 H.C. DEB. 7077-78 (1967-68).

B. *The Courts*

During the survey year, valuable contributions were made to the legal literature relating to the role and functioning of the courts in determining the constitutional validity of legislation, [18] with the Supreme Court of Canada as the prime focus of attention. [19] The status, structure and the role of the Supreme Court as a constitutional tribunal are among the matters under examination in the current federal-provincial discussions on constitutional review. [20]

## III. Distribution of Legislative Powers: Judicial Review

A. *General*

(i) Inter-delegation

In 1950 the Supreme Court of Canada concluded that delegation of legislative power between Parliament and provincial legislatures was unconstitutional. [21] However, the Court has not since invoked the doctrine to strike down legislation, even though its failure to do so has on occasion appeared to tolerate the achievement by indirect means of that which the Court had stated could not be accomplished directly. [22] The year under review provided a further example of the Court's apparent determination to confine the ban on inter-delegation within narrow bounds.

The case was *Coughlin v. Ontario Highway Transport Board*, [23] and the delegation issue arose in connection with the federal Motor Vehicle Transport Act [24] which purported to adopt by reference provincial enactments and regulations relating to motor vehicle transport. It was clear on principle that there could be no objection to Parliament borrowing, for purposes of one of its own measures, the terms of an *existing* provincial enactment. This type of adoption by reference is, after all, nothing more than a convenient way of incorporating the "referred-to provisions" into the federal statute without having to repeat them word for word. But the federal legislation under consideration in *Coughlin* went further in that it contemplated anticipatory adoption by reference of *future* provincial enactments—that is, those not yet

[18] B. Strayer, Judicial Review of Legislation in Canada (1968), reviewed by Mr. Justice Laskin, 19 U. Toronto L.J. 86 (1969).

[19] J. Brossard, La Cour Suprême et la Constitution (1968). *See also Supreme Court Review*, 6 Osgoode Hall L.J. (1968), and Leigh, *The Supreme Court and the Canadian Constitution*, 2 Ottawa L. Rev. 320 (1968).

[20] See *Federalism for the Future*, *supra* note 8, at 26 *et seq.*, and *The Constitution and the People of Canada*, *id.* at 38 *et seq.*

[21] Attorney-General of Nova Scotia v. Attorney-General of Canada, [1951] Sup. Ct. 31, [1950] 4 D.L.R. 369.

[22] Prince Edward Island Potato Marketing Bd. v. H. B. Willis Inc., [1952] 2 Sup. Ct. 392, [1952] 4 D.L.R. 146, Lords Day Alliance of Canada v. Attorney-General of British Columbia, [1959] Sup. Ct. 497.

[23] [1968] Sup. Ct. 569, 68 D.L.R.2d 384. See Lysyk, Comment, 47 Can. B. Rev. 271 (1969).

[24] Can. Stat. 1953-54 c. 59.

in existence at the time the federal measure became law. The result would be that a change subsequently effected in provincial law for local purposes would automatically change federal law on the subject without prior review by Parliament, or by any federally constituted body. The validity of the arrangement was upheld, a majority [25] of the Court holding that anticipatory adoption by reference did not fall within the constitutional prohibition against inter-delegation.

(ii) Paramountcy

Given a subject matter of legislation with a double aspect, either federal or provincial legislation pertaining to it will be valid if the field is clear. But where there are both federal and provincial enactments, the former will prevail and the latter be rendered inoperative to the extent that the two measures are in conflict. The question of what amounts to "conflict" for purposes of the paramountcy doctrine has been well litigated in recent years. The Supreme Court of Canada has set the trend of current decisions by declining to find such a conflict where the federal and provincial enactments could be distinguished as to scope, [26] and could live together in the sense of not requiring inconsistent results. [27]

A striking example of the distance the courts were prepared to go to avoid finding inconsistencies of result flowing from federal and provincial enactments was provided by the 1958 decision of the Supreme Court of Canada in *Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)*, [28] and that decision has now been reviewed and carried a step forward by the Alberta Appellate Division in *Regina v. Tenta.* [29] In both cases, the federal enactment in question was Criminal Code section 224(4), which relates to offences involving vehicle operation while influenced by alcohol or drugs, and which provides that no person shall be required to give a breath sample in that connection. [30] In each case, under the provincial enactments, a person refusing to give a breath specimen at the request of a police officer could have his operator's licence suspended. However the Alberta enactment [31] under con-

[25] The Court divided five-to-two.

[26] O'Grady v. Sparling, [1960] Sup. Ct. 804; Stephens v. The Queen, [1960] Sup. Ct. 823; Smith v. The Queen, [1960] Sup. Ct. 776; Mann v. The Queen, [1966] Sup. Ct. 238. For an example from the lower courts during the survey year, *see* Regina v. Persky, 1 D.L.R.3rd 36 (B.C. Sup. Ct. 1968).

[27] Validity of Section 92(4) of the Vehicles Act 1957 (Sask.), [1958] Sup. Ct. 608; Attorney-General for Ontario v. Barfried Enterprises Ltd., [1963] Sup. Ct. 570. *Cf.* McKay v. The Queen, [1965] Sup. Ct. 798.

[28] Validity of Section 92(4) of the Vehicles Act 1957 (Sask.), [1958] Sup. Ct. 608.

[29] [1968] 4 Can. Crim. Cas. Ann. (n.s.) 237, 67 D.L.R.2d 536 (Alta.).

[30] CRIM. CODE § 224(4): "No person is required to give a sample of . . . breath . . . for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings."

[31] An Act to Amend The Vehicles and Highway Traffic Act, Alta. Stat. 1966 c. 108, § 3. (Substantially the same provisions now appear in Alta. Stat. 1967 c. 30, § 185).

sideration in *Tenta* went further in two respects than the Saskatchewan provision which was upheld in the earlier case. The Alberta act provides for conviction of an offence following upon failure to give a breath specimen when required, whereas the Saskatchewan act had simply provided for a licence suspension by a board, without prior conviction. Again, under the Alberta statute, conviction and licence suspension is automatic where refusal to submit to the test has been established, whereas under the Saskatchewan enactment the board retained a discretion, after inquiry, in respect of suspension.

In a two-to-one decision, the appeal court upheld the validity of the Alberta enactment. However, Mr. Justice Johnson, speaking for the majority, felt able to rely on only one of two lines of reasoning advanced in the Saskatchewan case to escape the coils of the paramountcy doctrine. In view of the more stringent provisions of the Alberta enactment which effectively compelled the taking of a breath test, it could not be concluded (as had Justice Rand in the Saskatchewan case) that the breath test was not "required" by the terms of the provincial enactment. Justice Johnson did, however, adopt the alternative ground (put forward in the earlier case by Justice Fauteux) [32] which was to the effect that the code section rendered breath tests non-compulsory *only for the purposes of that section*, and therefore did not preclude provincial legislation requiring such tests *for provincial purposes*. The nature of the distinctively provincial purposes served by compelling such breath samples was not elaborated upon.

The decision of the Ontario Court of Appeal in *Re Wentworth Insurance Co.* [33] illustrates that on occasion potential inconsistency of result may yet require a choice to be made between federal and provincial statutes. In this case, the competing enactments were certain provisions of the Ontario Insurance Act[34] and of the federal Winding-up Act,[35] the issue being which was to govern the distribution of securities deposited with the responsible minister under the provincial statute as a prerequisite to obtaining a licence thereunder for carrying on the business of insurance in Ontario. Mr. Justice Laskin, giving the reasons of the court, held that insofar as the Ontario statutory provisions purported to provide a scheme of distribution on insolvency they were invalid per se as an invasion of the exclusive federal power to legislate upon bankruptcy and insolvency. But further, even if it were assumed that these provisions would be valid in a clear field, they could not be administered compatibly with the rules for distribution laid down by the federal act, and it followed that the former must be regarded as superseded by the latter.

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[32] And concurred in by three other members of the Court.

[33] 69 D.L.R.2d 448 (Ont. 1968). *Appeal dismissed, sub nom.* Attorney General for Ontario v. Policyholders of Wentworth Ins. Co. (Sup. Ct. June 30, 1969).

[34] ONT. REV. STAT. c. 190 (1960).

[35] CAN. REV. STAT. c. 296 (1952).

B. *Heads of Legislative Power*

(i) Trade and Commerce

Judicial construction of the trade and commerce head of federal power [36] has in the past rendered legislation concerned with marketing regulation highly vulnerable to challenge on constitutional grounds. At an early stage, the regulation of particular trades within a province was held to be beyond the reach of Parliament as relating not to trade and commerce but to property and civil rights. [37] An enactment purporting to regulate both extra-provincial and intra-provincial aspects of a trade or business would be struck down, whether federal [38] or provincial, [39] for failing to respect the constitutional barrier. And where the inquiry related to the limits of provincial legislative competence, there was authority for the proposition that a transaction might take place within a province and yet not constitute an "intra-provincial" transaction that would be subject to provincial control. [40] Furthermore, a provincial regulatory scheme establishing a pooling arrangement for the purpose of equalizing returns to producers ran the risk of being struck down on the ground that it involved indirect tatxation, [41] an exclusive federal preserve. [42] Two decisions in the survey year upheld provincial regulatory enactments in the face of such obstacles.

In *Carnation Co. v. Quebec Agricultural Marketing Board* [43] the Supreme Court of Canada had under consideration a Quebec enactment, [44] the provisions of which created a marketing board empowered, *inter alia*, to approve joint marketing plans and to arbitrate disputes arising in connection with such plans. The board had approved a plan binding milk producers who shipped milk and dairy products to the Carnation company's plants in Quebec, and it subsequently arbitrated disputes as to the purchase price of milk to be purchased by the company from the producers. Within the province the company operated an evaporated milk plant and a receiving station. At the former, raw milk was processed into evaporated milk, and the major part of such production was shipped and sold outside Quebec. From the receiving station, milk might either be sent to the plant for processing or be skimmed. In the latter case, the butterfat was sold to other manufacturers, and the skim milk was sent to a plant operated by the company in Ontario for processing

[36] B.N.A. Act, § 91(2).

[37] *Id.* § 92(13).

[38] *E.g.*, Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.).

[39] *E.g.*, Lawson v. Interior Tree Fruit & Vegetable Comm., [1931] Sup. Ct. 357, [1931] 2 D.L.R. 193.

[40] Reference *re* The Farm Prods. Marketing Act (Ont.), [1957] Sup. Ct. 198, 7 D.L.R.2d 257.

[41] Lower Mainland Dairy Prods. Sales Adjustment Comm. v. Crystal Dairy Ltd., [1933] A.C. 168, [1933] 1 D.L.R. 82 (P.C.); Lower Mainland Dairy Prods. Bd. v. Turner's Dairy Ltd., [1941] Sup. Ct. 573, [1941] 4 D.L.R. 209.

[42] B.N.A. Act, § 91 (3). *Cf. id.* at § 92(2).

[43] [1968] Sup. Ct. 238, 67 D.L.R.2d 1.

[44] Quebec Agricultural Marketing Act, Que. Stat. 1955-56 c. 37, *as replaced by*, Que. Stat. 1963 c. 34.

into skim milk powder. The company attacked the legislation and the orders made by the board thereunder on the ground that the board's ability to set prices to be paid by the company for a product, the major portion of which, after processing, would be exported from Quebec, constituted an encroachment on the field reserved exclusively for the Parliament of Canada under the trade and commerce power.

The company's submission did not find favour with the Supreme Court, which was unanimous in upholding the validity of the orders and of the legislation. Justice Martland, delivering the judgment of the Court, observed that while the orders might "affect" the company's interprovincial trade, the material question was whether they were made "in relation to" the regulation of trade and commerce. [45] While he agreed that a trade transaction completed in a province was not necessarily, by that fact alone, subject only to provincial control, it was also true that the fact that a transaction which incidentally had some effect upon a company engaged in interprovincial trade did not necessarily prevent its being subject to such control. Each transaction and each regulation must be examined in relation to its own facts, and the orders here in question "were not . . . directed at the regulation of interprovincial trade." [46]

The other constitutional test of provincial competence in the area of marketing legislation came in *Regina v. Ontario Milk Marketing Board.* [47] Under challenge were certain provisions authorizing pooling arrangements in the marketing of milk, and it was argued that the legislative scheme, which involved equalization of returns to producers, constituted a form of indirect taxation and consequently was beyond the powers of the province. Mr. Justice Lieff rejected this argument, holding the case before him to be indistinguishable from a 1960 decision of the Supreme Court of Canada to the same effect, [48] and which decision he considered to be totally incompatible with earlier authority on point. [49]

(ii) Banks and Banking

In *Breckenridge Speedway Ltd. v. The Queen*[50] the Appellate Division of the Alberta Supreme Court was invited to rule on the constitutional validity of that province's Treasury Branches Act. [51] The original act authorizing establishment of the treasury branches was passed in 1938, and by the time of these proceedings there were sixty-one such branches operating in Alberta. The evidence established that the branches exercise many of the functions commonly associated with the business of banking, including

[45] Adopting the familiar distinction drawn by Duff, J., in another connection, in Gold Seal Ltd. v. Dominion Express Co., 62 Sup. Ct. 424, at 460 (1921).

[46] [1968] Sup. Ct. 238, at 254, 67 D.L.R.2d 1, at 15.

[47] 2 D.L.R.3d 346 (Ont. High Ct. 1968).

[48] Crawford v. Attorney-General for British Columbia, [1960] Sup. Ct. 346.

[49] 2 D.L.R.3d 346, at 372-73. The earlier decisions referred to are cited *supra* note 41.

[50] 64 D.L.R.2d 488 (Alta. 1967).

[51] ALTA. REV. STAT. c. 344 (1955), *originally*, The Treasury Branches Act, Alta. Stat. 1938 c. 3.

the taking of monies on deposit and the making of loans. In the result, two members of the court held The Treasury Branches Act invalid as encroaching upon exclusive federal legislative power over banks and banking,[52] while the other three judges refrained from dealing with the constitutional question. The latter took the position that whether or not the act was invalid, money lent by a branch was recoverable because a borrower in receipt of the proceeds of an ultra vires loan transaction could not be heard to impugn the transaction. An appeal pending in the Supreme Court of Canada had not been disposed of at the end of the survey year.

(iii) Navigation and Shipping

The courts have generally taken the position that the navigation and shipping head of federal legislative power[53] is to be widely construed,[54] and the decision in *Regina v. Nova Scotia Labour Relations Board*[55] is in harmony with that attitude. By virtue of section 53 of the federal Industrial Relations and Disputes Investigation Act,[56] this act is made applicable to those employed, *inter alia,* upon businesses carried on in connection with navigation and shipping. In the case at hand, the main portion of the employer's business—dredging, marine construction and salvage—was carried on with dredges and floating craft operating all over eastern Canada. The dispute, however, had to do not with the boat crews but with the employees at one of the company's depots for maintenance and repair of its floating craft. It was held that the work of the employees at the depot was an integral part of the company's shipping operations, and consequently within exclusive federal legislative jurisdiction, with the result that a certification order made under the provincial statute[57] must be quashed.

(iv) Works and Undertakings

In *The Queen v. Board of Transport Commissioners*[58] the issue for the Supreme Court of Canada was whether the tolls to be charged by the province of Ontario for its new commuter service, operating over Canadian National Railways trackage within Ontario, were subject to the jurisdiction of the Board of Transport Commissioners under the federal Railway Act.[59] The C.N.R. itself, of course, is generally subject to federal jurisdiction, and the short constitutional point was whether the commuter service also fell within the legislative authority of the Parliament of Canada or whether, on the

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[52] B.N.A. Act, § 91 (15) & (16).

[53] B.N.A. Act, § 91(10).

[54] Paquet v. Corp. of Pilots of Quebec Harbour, [1920] A.C. 1029, 54 D.L.R. 323 (P.C.); Montreal v. Montreal Harbour Comm'r, [1926] A.C. 299, at 312-13 (P.C.); Re Validity and Applicability of the Industrial Relations and Disputes Investigation Act, [1955] Sup. Ct. 529, at 535 (per Kerwin, C.J.). *See also* Regina v. Picard, 65 D.L.R.2d 658 (Que. 1967).

[55] 68 D.L.R.2d 613 (N.S. Sup. Ct. 1968).

[56] CAN. REV. STAT. c. 152 (1952).

[57] Trade Union Act, N.S. REV. STAT. c. 295 (1954), *now,* N.S. REV. STAT. c. 311 (1967).

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

[59] CAN. REV. STAT. c. 234 (1952).

other hand, the commuter operation could be viewed as a distinct local entity severable for constitutional purposes from the overall operations of the trans-continental railroad. The Government of Ontario was authorized to operate the commuter service under provincial statute, [60] Ontario owned the rolling stock to be used in operating the service, and train crews would be those of the C.N.R. performing services for the Ontario Government on an agency basis under a contractual arrangement.

The Supreme Court was unanimously of the opinion that the regulatory power over the commuter service fell within exclusive federal legislative competence. The joint opinion of the Court stated that:

> In the present case, the constitutional jurisdiction depends on the character of the railway line, not on the character of a particular service provided on that railway line. The fact that for some purposes the Commuter Service should be considered as a distinct service does not make it a distinct line of railway. From a physical point of view the Commuter Service trains are part of the overall operations of the line over which they run. It is clearly established that the Parliament of Canada has jurisdiction over everything that physically forms part of a railway subject to its jurisdiction. [61]

The decision of the Privy Council in the *Empress Hotel* case, [62] holding a hotel operated by a railway to be a separate undertaking, was distinguishable in that a hotel's services are not a part of the railway system in this physical sense.

(v) Indians and Indian lands [63]

The most serious split in the Supreme Court in the constitutional cases it decided during the survey year occurred in *Daniels v. White* [64] where the Court, by a majority of five-to-four, upheld the conviction of a Manitoba treaty Indian under the federal Migratory Birds Convention Act [65] for duck hunting on his reserve out of season. Recent decisions of the Court [66] had established that conflict between the terms of the federal act and the terms of an Indian treaty guaranteeing to the Indians a right to hunt for food at all seasons of the year, must result in the treaty promise being overridden, with the result that the latter provided no defence in law to a charge under the act. But there was an additional factor presented in this case concerning the effect of a clause contained in the so-called "Natural Resource Agree-

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[60] An Act to provide for the Establishment and Operation of Commuter Services, Ont. Stat. 1965 c. 17.

[61] [1968] Sup. Ct. 118, at 127, 65 D.L.R.2d 425, at 432.

[62] C.P.R. v. Attorney-General for British Columbia, [1950] A.C. 122, [1950] 1 D.L.R. 721, (P.C. 1949).

[63] For a general discussion of the constitutional issues in this area, see Lysyk, *The Unique Constitutional Position of the Canadian Indian*, 45 CAN. B. REV. 513 (1967).

[64] [1968] Sup. Ct. 517, 64 W.W.R. (n.s.) 385, 2 D.L.R.3d 1.

[65] CAN. REV. STAT. c. 179 (1952).

[66] Sikyea v. The Queen, [1964] Sup. Ct. 642, 49 W.W.R. (n.s.) 306, and The Queen v. George, [1966] Sup. Ct. 267, 47 Can. Crim. 382, [1966] 3 Can. Crim. Cas. Ann. (n.s.) 137.

ments", entered into between the governments of each of the prairie provinces and the government of Canada, and given overriding constitutional effect by section 1 of the B.N.A. Act of 1930.[67] This clause, number 13 in the Manitoba agreement, reads as follows:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[68]

The majority of the Court construed the clause as a guarantee *only on the part of the province*, so that it could not be invoked against federal legislation derogating from the hunting "right" to which the clause referred.

Conflict between Indian treaty guarantees and another federal statute, the Fisheries Act,[69] was raised in the British Columbia case of *Regina v. Cooper*.[70] The conviction was upheld, the court holding "with regret"[71] that the rulings of the Supreme Court of Canada with respect to the Migratory Birds Convention Act could not be distinguished in law from the question presented under the Fisheries Act.[72]

As to provincial legislation and Indian hunting rights, the Supreme Court has held[73] that a provincial enactment may not derogate from a right guaranteed by the terms of an Indian treaty. In *Regina v. Discon*[74] it was argued that in areas of British Columbia which had never been the subject of treaties of surrender entered into with the Indians, aboriginal hunting rights existed which were not subject to extinguishment by provincial legislation. It was held, *inter alia*, that the existence of aboriginal rights was dependent upon the applicability of the Royal Proclamation of 1763[75] to what is now British Columbia, and that the proclamation could not be held so applicable because the territory in question was unknown to the Crown in 1763.

(vi) Criminal law

The continuing difficulty experienced by the courts in delimiting the extent to which provincial legislation may penalize particular kinds of conduct as a matter of public health, without encroaching on the exclusive federal power to legislate in relation to criminal law,[76] was illustrated during the

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[67] 6 CAN. REV. STAT. 6344 (1952).

[68] *Id.* at 6350.

[69] CAN. REV. STAT. c. 119 (1952).

[70] 1 D.L.R.3d 113 (B.C. Sup. Ct. 1968).

[71] *Id.* at 117.

[72] *See also* Regina v. Rider, 70 D.L.R.2d 77 (Alta. Magis. Ct. 1968), where the conviction was under the National Parks Act, CAN. REV. STAT. c. 189 (1952).

[73] Regina v. White, 52 D.L.R.2d 481n (Sup. Ct. 1965), *aff'g*, 50 D.L.R.2d 613, 52 W.W.R. (n.s.) 193 (B.C. 1964).

[74] 63 W.W.R. (n.s.) 485 (B.C. County Ct. 1968).

[75] 6 CAN. REV. STAT. 6127 (1952).

[76] B.N.A. Act, § 91(27).

survey year by conflicting appellate court decisions as to the validity of provincial enactments making it an offence to be found in possession of L.S.D. In *Regina v. Snyder* [77] the Alberta courts upheld the material prohibition in that province's statute, [78] whereas the British Columbia Court of Appeal in *Regina v. Simpson* [79] felt impelled to hold the corresponding provision in the British Columbia enactment [80] ultra vires.

Another area of difficulty, with civil liberties overtones, relates to the extent to which provincial legislation may concern itself with the protection of public morals and, more specifically, the extent to which censorship may be imposed to that end. In *Hlookoff v. Vancouver* [81] the object of the alleged censorship was a publication named the Georgia Straight, one of the class of publication sometimes referred to as the "underground press." The plaintiff publishers sought relief in respect of a licence suspension by the chief licence inspector pursuant to the Vancouver Charter. [82] Two broad arguments were directed against the validity of the provision. Firstly, it was said to be ultra vires as an interference with freedom of expression, also referred to as freedom of speech with its ancillary right of freedom of the press. Secondly, it was argued that the legislation was in relation to morality or, more narrowly, obscenity, and therefore an encroachment on the field of criminal law. Neither argument found favour with the court. As to the former, having reached the conclusion that the true nature and character of the enactment related to property and civil rights, the court was of the opinion that incidental encroachment upon freedom of the press was not precluded. The "essential core" or "inner boundary" [83] of freedom of expression that could not be breached by provincial legislation was confined to public or political affairs and religious matters. [84] As to the second ground of attack to the effect that legislation directed against obscenity ought to be

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[77] 61 W.W.R. (n.s.) 112 (Alta. Sup. Ct. Chambers 1967), *aff'd without written reasons*, 61 W.W.R. (n.s.) 576 (Alta. 1967).

[78] The Public Health Act, ALTA. REV. STAT. c. 255 (1955), *as amended by*, Alta. Stat. 1967 c. 63, § 42(2)(c).

[79] 1 D.L.R.3d 597 (B.C. 1968). The *Snyder* decision was before the British Columbia Court of Appeal in the instant case. *Id.* at 601.

[80] Health Act, B.C. REV. STAT. c. 170 (1960), *as amended by*, B.C. Stat. 1967 c 21, § 4, *enacting*, § 80B.

[81] 63 W.W.R. (n.s.) 129 (B.C. Sup. Ct. 1968). At these proceedings before Verchere, J., the Attorneys-General of British Columbia and of Canada were represented, the latter supporting the plaintiff's contention that the material provision of the Vancouver Charter, quoted *infra* note 82, was ultra vires. In earlier proceedings before Dohm, J., the constitutional aspects were not dealt with: 65 D.L.R.2d 71 (B.C. Sup. Ct. Chambers 1967).

[82] B.C. Stat. 1953 c. 55, § 277 which states:

"The Chief Licence Inspector shall have power at any time summarily to suspend for such period as he may determine any licence if the holder of the licence:—

. . . .

(*c*) Has, in the opinion of the Inspector, been guilty of such gross misconduct in or with respect to the licensed premises as to warrant the suspension of his licence.

[83] 63 W.W.R. (n.s.) 129, at 134.

[84] Adopting the reasoning in Koss v. Konn, 36 W.W.R. (n.s.) 100, at 123-25 (B.C. 1961).

characterized as criminal law, the reasoning of the court is less clear. Would the decision have been the same if the Vancouver Charter had purported in terms to authorize newspaper licence suspensions for the publication of obscene matter?

On the latter point, the *Hlookoff* decision may be compared with *Regina v. Board of Cinema Censors,* [85] in which a Quebec statute, entitled "An Act respecting publications and public morals," [86] was held to be ultra vires. The act had purported to authorize the provincial Board of Cinema Censors to make an order of censorship declaring a magazine an immoral publication within the meaning of the act, thereby depriving its distributor of the right to own and distribute the magazine in the province. The court reached the conclusion that obscenity was exclusively within the federal legislative sphere as a matter of criminal law, and that to support the provincial legislation as dealing primarily with ownership or possession of property in the province would be to justify an unwarranted intrusion into the field of criminal law. [87]

(vii) Other

Periodical literature appearing during the survey year included valuable articles on the federal residuary [88] and declaratory [89] powers, and on constitutional issues related to the Divorce Act, 1968. [90]

## IV. Fundamental Rights and Freedoms

The area of fundamental rights and freedoms in Canadian constitutional law presents certain problems of classification. For the most part, judicial consideration of issues related to civil liberties has taken place in the context of the process of allocating a particular subject matter to an enumerated head of section 91 or 92 of the British North America Act—typically, either to the federal criminal law power or to the provincial power to legislate in relation to property and civil rights. Some of the developments canvassed in Part III of this article under the sub-heading of "Criminal Law" are illustrative of this approach. [91] Somewhat arbitrarily perhaps, the subject of freedom of religion has been reserved for discussion in this part under the

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[85] 69 D.L.R.2d 512 (Que. C.S. 1967).

[86] Qué. Stat. 1950 c. 12, *now,* Publications and Public Morals Act, Que. Rev. Stat. c. 50 (1964).

[87] 69 D.L.R.2d 512, at 522.

[88] Abel, *What Peace, Order and Good Government?,* 7 Western Ont. L. Rev. 1 (1968).

[89] Hanssen, *The Federal Declaratory Power under the British North America Act,* 3 Man. L.J. 87 (1968).

[90] Jordan, *The Federal Divorce Act (1968) and the Constitution,* 14 McGill L.J. 209 (1968).

[91] *See especially,* the review of the decisions in *Hlookoff v. Vancouver* and *Regina v. Board of Cinema Censors,* in the text accompanying notes 81-87. As to the issue of freedom of the press, touched on in the *Hlookoff* case, see also Tollefson, *Freedom of the Press,* in Contemporary Problems of Public Law in Canada 49 (O. Lang ed. 1968).

sub-heading of "Civil Liberties and the Distribution of Powers." Additional sub-headings have been allocated to the Canadian Bill of Rights [92] (which, of course, is applicable only to federal laws) [93] and to the specific topic of language rights.

Noteworthy publications during the survey year in generally related areas include the McRuer Report on civil rights, [94] and a special issue of the *Canadian Bar Review* on human rights. [95]

### A. Civil Liberties and the Distribution of Powers

In *Walter v. Attorney-General of Alberta* [96] the Supreme Court of Canada was presented with an opportunity to reconsider the question of whether freedom of religion, as such, represents a distinct constitutional value assignable exclusively to either the federal or provincial spheres of legislative jurisdiction. Earlier leading decisions of the Supreme Court [97] were decided in the 1950's, at a time when members of the Court were more disposed to deliver individual reasons for judgment than is presently the fashion in that tribunal. One result was an embarrassment of riches in the way of opinions concerning legislative competence in the area of religion, with no clear majority for any of the principal contending theories.

At issue in the *Walter* case was the validity of Alberta's Communal Property Act, [98] which restricted the holding of land on a communal basis. It was not seriously argued that the legislation was concerned with land holdings other than the Hutterite colonies, [99] the latter accounting for almost half a million acres of land in Alberta at the time of this litigation. Nor was it disputed that communal land holding was a tenet of the Hutterite faith. The legislation, it will be immediately apparent, could be sustained in either of two ways. The first was to characterize it as a land-tenure enactment, and accordingly in relation to property under section 92(13) of the B.N.A. Act. The second was to view the Alberta act as relating to religion, and to assign the latter subject matter to the provincial sphere as a matter of civil rights, still within section 92(13). In the Appellate Division of the Alberta Supreme Court, two judges took the first position, [100] two the second, [101] and

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[92] Can. Stat. 1960 c. 44.

[93] *Id.* § 5(2).

[94] Ontario Royal Comm'n Inquiry into Civil Rights, Report No. I (1968). And see Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values*, 18 U. Toronto L.J. 351 (1968).

[95] *International Year for Human Rights 1968*, 46 Can. B Rev., 543-720 (1968).

[96] 66 W.W.R. (n.s.) 513 (Sup. Ct. 1969), *aff'g*, 60 D.L.R.2d 253 (Alta. 1967), *aff'g*, 54 D.L.R.2d 750, 54 W.W.R. (n.s.) 385 (Alta. Sup. Ct. 1966).

[97] Saumur v. Quebec, [1953] 2 Sup. Ct. 299; Birks v. Montreal, [1955] Sup. Ct. 799; Switzman v. Elbling, [1957] Sup. Ct. 285.

[98] Alta. Rev. Stat. c. 52 (1955) *as amended.*

[99] *Cf.* the definitions of "colony" and "communal property" in § 2 of The Communal Property Act., *Id.*

[100] 60 D.L.R.2d 253 (Alta. 1966) (per McDermid & Smith, JJ.).

[101] *Id.* (per Johnson & Kane, JJ.).

the fifth member [102] of the court agreed in the result without making an election between the two analyses.

In the Supreme Court of Canada Mr. Justice Martland, delivering the reasons of the full Court, had no difficulty in classifying the enactment as relating to the right to acquire land, and therefore within provincial competence as a matter of property law. While he also undertook an analysis of the views expressed in earlier Supreme Court decisions on the subject of legislative competence in the area of religion, Justice Martland refrained from expressing an opinion on the matter in the case at hand. On the question of what might properly be regarded as a matter of religion, in the material sense, he stated: "Religion, as the subject matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship. But it does not mean freedom from compliance with provincial laws relative to the matter of property holding." [103] No reference was made to the Court's decision in 1963 in *Robertson & Rosetanni* v. *The Queen* [104] where consideration was given to the comparable question of the scope of the "freedom of religion" clause in the Canadian Bill of Rights. [105]

B. *The Canadian Bill of Rights*

For the most part, arguments based on the Canadian Bill of Rights [106] received short shrift from the courts during the survey year. The Bill of Rights was held not to entitle a convicted person to obtain a transcript of the trial proceedings free of charge for appeal purposes. [107] Nor did obtaining evidence in the form of tape recordings taken from a wire tap involve a violation of the bill. [108] Nor was the bill violated where an accused was not advised of his right under section 2(*c*)(ii) to retain and instruct counsel without delay. [109] Where the right to counsel had been clearly denied, however, a person who then pleaded guilty and was sentenced would be entitled to a new trial, despite the heavy onus resting on an accused who seeks leave to change his plea to one of not guilty at that stage. [110]

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[102] *Id.* (per Porter, J.).

[103] 66 W.W.R. (n.s.) 513, at 521.

[104] [1963] Sup. Ct. 651.

[105] *Supra* note 92, § 1(*c*). *See generally*, Driedger, *The Canadian Bill of Rights*, in CONTEMPORARY PROBLEMS OF PUBLIC LAW IN CANADA 31 (O. Lang ed. 1968).

[106] *Supra* note 92.

[107] Collinge v. Gee, 64 W.W.R. (n.s.) 321 (B.C. 1968); *aff'd*, [1968] Sup. Ct. 948, 64 W.W.R. (n.s.) 512. The Bill of Rights point was not discussed in the reasons for judgment of the Supreme Court of Canada.

[108] Regina v. Pearson, 66 W.W.R. (n.s.) 380 (B.C. Sup. Ct. 1968).

[109] *Re* Vinarao & *Re* Ramirez, 63 W.W.R. (n.s.) 93, 99 (B.C. 1968).

[110] Regina v. Ballegeer, 1 D.L.R.3d 74, 66 W.W.R. (n.s.) 570 (Man. 1968). On the right to counsel generally, see Tarnopolsky, *Right to Counsel in Canadian Law*, 17 BUFFALO L.R. 1 (1967).

At the time of writing, the Supreme Court of Canada had not yet delivered judgment in the case of *Regina v. Drybones*,[111] on appeal from the Northwest Territories. In what promises to be a landmark decision, the Court will have an opportunity to rule on two vitally important issues: firstly, the effect of direct conflict between the Bill of Rights and the terms of another federal enactment and, secondly, the scope of section 1(*b*) guaranteeing the right to "equality before the law and the protection of the law."

C. *Language Rights* [112]

In latter 1967 the Royal Commission on Bilingualism and Biculturalism issued the first volume of its final report, [113] and legislative recommendations therein contained were reflected to some extent in the federal government's proposals for an entrenched bill of rights, put before the first meeting of the Constitutional Conference in early 1968. [114] A further step toward implementation of the commission's recommendations was taken in October when the proposed federal Official Languages Act[115] received first reading in the House of Commons. There has been some debate as to the constitutional validity of certain provisions contained in the proposed enactment. [116]

In *Regina v. Murphy*, [117] it was held that a province could not competently enact legislation respecting the use of language in criminal proceedings. Moreover, a provision in the Canada Evidence Act [118] making "laws of evidence in force in the province" applicable to criminal proceedings would not have the effect of adopting by reference a section in the New Brunswick Evidence Act [119] which empowers a judge to order that proceedings be conducted in the language of a party requesting such an order. This was so because, although a provision relating to language to be used in a criminal case was in relation to "procedure in criminal matters" (and therefore within federal legislative jurisdiction by virtue of section 91(27) of the B.N.A. Act), it was not a law respecting that branch of procedure known as evidence, and hence was not caught within the adoptive effect of the Canada Evidence Act section. Mr. Justice Hughes, delivering the judgment of the court, delineated the respective boundaries of evidence and of procedure in the following terms:

> Evidence has been defined as the part of procedure which signifies those rules of law whereby it is determined what testimony is to be admitted, and

[111] 64 D.L.R.2d 260, 61 W.W.R. (n.s.) 370 (N.W.T. 1967). For a discussion of the issues presented in the Drybones case, see Lysyk, Comment, 46 CAN. B. REV. 141 (1968).

[112] For a general treatment of the constitutional issues, see Marx, *Language Rights in the Canadian Constitution*, 2 REV. JURID. THÉMIS 239 (1967).

[113] REPORT OF THE ROYAL COMM'N ON BILINGUALISM AND BICULTURALISM (1967).

[114] See A CANADIAN CHARTER OF HUMAN RIGHTS, *supra* note 8, at 26-27.

[115] Can. Stat. 1959, c. 54.

[116] See *e.g.*, letter from the Hon. J. T. Thorson to the Prime Minister, 16 CHITTY'S L.J. 325 (1968), and reply thereto, 17 CHITTY'S L.J. 1 (1969).

[117] 69 D.L.R.2d 530 (N.B. Sup. Ct. 1968).

[118] CAN. REV. STAT. c. 307, § 36 (1952).

[119] An Act to Amend the Evidence Act, N.B. Stat. 1967 c. 37 § 23C.

> what rejected in each case, and what weight is to be given to the testimony admitted. Procedure, on the other hand, includes in its meaning whatever is embraced by the three technical terms, pleading, evidence and practice. Practice in this sense means those legal rules which direct the course of proceedings to bring parties into the Court, and the course of the Court after they are brought in. [120]

In the absence of a valid applicable enactment, the position was governed by English law as received in New Brunswick, which required that trials be conducted in English in the provincial courts. On this last point, the same conclusion had been reached earlier in the survey year in the British Columbia case of *Regina v. Watts.* [121]

[120] 69 D.L.R.2d 530, at 532.
[121] 69 D.L.R.2d 526 (B.C. Sup. Ct. 1968).