

ANNUAL SURVEY OF CANADIAN LAW

PART I

CONSTITUTIONAL LAW

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I. FEDERAL-PROVINCIAL RELATIONS

A. *Constitutional Review*

The previous article¹ outlined the events leading up to the initial meeting of the Constitutional Conference in February, 1968. The Conference has since met on five occasions: three times in 1969, once in 1970, and twice in 1971.

The most recent meeting in Victoria in June, 1971, ended with the entire exercise on the verge of collapse, which perhaps renders academic a detailed account of the earlier meetings. It will suffice to note that the discussions had moved into the area of distribution of legislative powers and that extensive consideration had been given to the matters dealt with in three additional working papers published by the federal government on the subjects of taxing powers, the federal spending power, and social security.²

At the meeting in February, 1971, the governments appeared to be very close to agreement on a number of important matters, including the perennial problem of an amending formula for the constitution, the associated matter of "patriation" of the constitution so that future amendments would not require recourse to the Parliament of the United Kingdom and the proposed entrenchment of certain basic political rights and fundamental freedoms in the constitution.

In consequence, a constitutional package was assembled for the June, 1971 meeting in Victoria in the form of a constitutional "charter." The Victoria charter included detailed provisions relating to the matters mentioned in the preceding paragraph, a provision taking the form of a revised section 94A of the British North America Act which was intended to go some distance toward meeting Quebec's demands in the area of social security, provisions relating to the Supreme Court of Canada and appointment of its judges, provisions relating to language rights, regional disparities,

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¹ 3 OTTAWA L. REV. 520, at 520-21 (1969).

² The papers, appearing under the name of the responsible minister, are publications of the Queen's Printer, Ottawa, and are as follows: HON. E. BENSON, *THE TAXING POWERS AND THE CONSTITUTION OF CANADA* (1969); RT. HON. P. TRUDEAU, *FEDERAL-PROVINCIAL GRANTS AND THE SPENDING POWER OF PARLIAMENT* (1969); RT. HON. P. TRUDEAU, *INCOME SECURITY AND SOCIAL SERVICES* (1970). (Earlier papers in the series are listed in the previous survey article, *supra*, note 1, at 521 n.8).

federal-provincial consultation, repeal of reservation and disallowance powers and a number of provisions directed toward a modernization of the constitution.

Agreement proved elusive at the Victoria meeting. The government of Quebec, which had sought greater control over social policy than the revised version of section 94A would have conceded, declared that it was not yet prepared to adopt a firm position. Accordingly, the official statement issued at the conclusion of the conference on June 16 recited that governments would recommend adoption of the charter to their legislatures if the charter, which was to be treated as a whole, was accepted by June 28, 1971. Before the deadline was reached, the Quebec government announced that it would not recommend acceptance.

At the time of writing, the future of the constitutional review remains unclear, but an early resumption of the constitutional meetings appears unlikely.

II. INSTITUTIONS

A. *Parliament and the Executive*

Fundamental questions concerning the relationship between the legislative and executive branches of government were presented to the Supreme Court of Canada in *Reference Re Criminal Law Amendment Act, 1968-69*.³ That act did not come into force when passed but provided, by section 120, that: "This Act or any of the provisions of this Act shall come into force on a day or days to be fixed by proclamation." Section 16 of the act repealed certain sections of the Criminal Code concerned with driving while under the influence of alcohol or drugs, and substituted a new group of sections. Included in the new provisions was a requirement for a compulsory breath sample. A penalty was imposed for failure to provide such sample, and it was further provided that upon request the accused be given a specimen of his breath sample in an approved container. Section 16 was subsequently proclaimed into force with the exception of three subsections, the excepted subsections being those which dealt with providing a breath sample to the accused and with the evidentiary effect to be given to the breath sample taken from him.

The reference to the Supreme Court was precipitated by a British Columbia decision,⁴ subsequently followed in Alberta,⁵ holding that the purported proclamation of part only of section 16 was invalid. The central issue was whether section 120 of the act conferred a discretion upon the Governor-in-Council only as to *time of operation* of the sections in their entirety, or whether it also conferred a discretion as to *content*. In the result, the Supreme Court divided five to four, the majority holding that use of the word "provisions" in section 120 authorized piecemeal proclamation into force of the sections in question.

³ 10 D.L.R.3d 699 (1970). See also Stenning, *The Breathalyzer Reference*, 12 CRIM. L.Q. 394 (1970).

⁴ *Regina v. Story*, 72 W.W.R. (n.s.) 477, 10 D.L.R.3d 614 (Sup. Ct. 1970).

⁵ *Regina v. Sourwine*, 72 W.W.R. (n.s.) 761 (Alta. Dist. Ct. 1970).

The minority was of the opinion that section 120 ought not to be interpreted to give the executive the right to make substantive changes in the provisions of the law as enacted by Parliament through the device of partial proclamation. Mr. Justice Martland, delivering the principal dissenting judgment, would have construed "provisions" in section 120 to mean that in proclaiming portions only of the act, the Governor-in-Council must proclaim the whole of any portion dealing with a specific subject matter. The contrary view (adopted by the majority in the instant case) meant that the executive could proclaim a subsection which created an offence, while declining to proclaim an accompanying subsection which established a defence. Referring to another section of the Criminal Law Amendment Act by way of example, Mr. Justice Martland observed, and counsel for the Attorney-General of Canada conceded,⁶ that the executive could proclaim a subsection creating an offence for the killing of an unborn child in the act of birth, while declining to proclaim the following subsection which provides a defence where the death was, in good faith considered necessary to preserve the life of the mother. The result would clearly be contrary to the intention of Parliament.

The majority of the Court took the position, nonetheless, that failure by the executive to live up to the expectations of Parliament was a matter in respect of which no remedy was available in the courts. The separate concurring reasons of Mr. Justice Laskin contain the most striking pronouncements on the theme of judicial reluctance to review the actions of the executive. He stated:

I think we should be very wary of judicializing the exercise of the very broad executive power conferred by Parliament in this case when it relates to the bringing into force of legislation . . .

Unless this Court can say with certainty what [the word "provisions"] means and that it cannot have the meaning reflected in the Proclamation that is under review here, its application is better left to the Executive to which Parliament has entrusted it . . .

To look at the proclaimed legislation in the light of a supposed parliamentary intention, gleaned from looking at the legislation as if it had been made effective without the conditional terms of s. 120, is to truncate that section and plunge into an abyss of speculation. Moreover, it is to make an assumption that there was a limited trust reposed by Parliament in the Executive, and further, that it lay with the Courts to enforce that trust. If there has been a failure to live up to Parliament's expectations on the manner in which the proclamation power should be exercised, the remedy does not lie with the Judges.⁷

Neither the principal majority reasons delivered by Mr. Justice Judson nor the separate concurring reasons of Justices Hall and Laskin, explore the reasons why the courts should exhibit so deferential an attitude toward the executive. No doubt the ultimate remedy lies with Parliament, but there is much force in the minority view that the onus should lie upon the executive to demonstrate to the satisfaction of the courts that Parliament did indeed intend to delegate to the executive such sweeping

⁶ *Supra* note 3, at 708.

⁷ *Id.* at 718.

authority—authority not only to determine the time of operation of an enactment dealing with a single subject matter but, in addition, to carve up that enactment by proclaiming it into law piece by piece.

B. *The Courts*

Legal literature during the survey period reflected continuing high interest in the constitutional role of the courts, with particular reference to the Supreme Court of Canada, and the process of selection of judges.⁸

An important legislative development during the survey period was the enactment of the Federal Court Act.⁹ The Act continues the Exchequer Court of Canada under the new name of the Federal Court of Canada, and effects important changes in its structure and jurisdiction. Previously the court consisted of a trial division only, with appeals going directly to the Supreme Court of Canada. Under the new legislation the Federal Court is divided into a Trial Division and an Appeal Division. The jurisdiction of the court has been revised and expanded. New areas of jurisdiction include criminal matters¹⁰ and concurrent jurisdiction in all cases where the Crown is a party to proceedings respecting bills of exchange or promissory notes,¹¹ and in cases relating to aeronautics and connecting works and undertakings.¹² The Trial Division is given exclusive original jurisdiction to grant prerogative writs or other relief against any federal board, commission or other tribunal,¹³ subject to a certain review jurisdiction reserved exclusively for the Appeal Division.¹⁴

A particularly noteworthy provision in the new act is section 41, which deals with the subject of Crown privilege. It contemplates two classes of documents. Where a minister of the Crown certifies by affidavit that a document should be withheld on grounds of public interest, the court may examine the document and decide whether or not the document should be withheld; production may be ordered if the court reaches the conclusion "that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit." Where, however, the minister's affidavit states that the document falls within a specified class—namely, that it is a document the production or discovery of which "would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada"—then

⁸ P. RUSSELL, *THE SUPREME COURT OF CANADA AS A BILINGUAL AND BICULTURAL INSTITUTION*; Lederman, *Thoughts on Reform of the Supreme Court of Canada*, 8 ALTA. L. REV. 1 (1970); Seyffert, *A Study of the Supreme Court of Canada as an Institution of Constitutional Law Reform*, 28 U. TORONTO FAC. L. REV. 17 (1970); Russell, *Constitutional Reform of the Canadian Judiciary*, 7 ALTA. L. REV. 103 (1969). See also *Supreme Court Review*, 7 OSGOODE HALL L.J. 1 (1969).

⁹ Can. Stat. 1970 c. 1

¹⁰ *Id.* § 3.

¹¹ *Id.* § 23. Jurisdiction on the subject matter is conferred by section 91(18) of the B.N.A. Act.

¹² *Id.* As to "works and undertakings," the section follows the wording of section 92(10)(a) of the B.N.A. Act.

¹³ *Id.* § 18.

¹⁴ *Id.* § 28.

the court is obliged to refuse discovery and the production without any examination of the document. The scope of the privilege would seem to be considerably broader than that recognized at common law.¹⁵ It should be noted, as well, that section 41 applies to the assertion of the privilege not merely in the Federal Court but in any court, and is not limited to actions in which the Crown is a party, or to documents which are in the possession of the Crown.

There were a number of decisions during the survey period, touching the constitutional provisions which relate to the courts, and in particular section 96 of the British North America Act. In every instance, the validity of the legislation was sustained.¹⁶

III. DISTRIBUTION OF LEGISLATIVE POWERS: JUDICIAL REVIEW

A. *Trade and Commerce*

In *Caloil Inc. v. Attorney-General of Canada*¹⁷ the Supreme Court of Canada was invited to consider the extent to which federal legislation can regulate trade in an imported commodity at the level of distribution for consumption within a province. Federal policy, as reflected in the National Energy Board Act¹⁸ and section 20 of the regulations made pursuant thereto, has been to restrict transportation of imported gasoline for consumption from east of a line running partly through Ontario and partly along the Ontario-Quebec border to any point west of that line. One feature of the policy, therefore, is a prohibition against transporting imported gasoline from one part of Ontario to another without the consent of the National Energy Board.

In initial proceedings in the Exchequer Court,¹⁹ the plaintiff succeeded in obtaining a declaration that the material provisions of the act and regulations were unconstitutional. President Jackett expressed the view that once goods are imported into Canada they ordinarily fall, from the point of view of trade regulation, into the same category as goods produced in Canada.²⁰ Federal authority would not normally extend to local trade within a province, whether the trade be in imported or in domestically produced products. He went on to point out that in any event section 20 of the regulations purported to apply not merely to imported gasoline but to "any motor gasoline."²¹

¹⁵ See, e.g., *Regina v. Snider*, [1954] Sup. Ct. 479, [1954] 4 D.L.R. 483; *Conway v. Rimmer*, [1968] A.C. 910, [1968] 1 A11 E.R. 874.

¹⁶ *Regina v. Moore*, [1969] 2 Ont. 677, 6 D.L.R.3d 465 (High Ct.); *Re Local Lines (Sudbury Ltd.)*, [1969] 2 Ont. 740, 6 D.L.R.3d 644; *Papp v. Papp*, [1970] 1 Ont. 331, 8 D.L.R.3d 389; *Reference Re Judicature Amendment Act, 1970 (No. 4)*, [1971] 2 Ont. 521; *Armich v. Armich*, [1971] 1 W.W.R. 207, 16 D.L.R.3d 326 (B.C. 1970).

¹⁷ At the time of writing the reasons of the Supreme Court had not yet been reported. Judgment was pronounced at the conclusion of the hearing, Nov. 24, 1970; reasons: May 10, 1971.

¹⁸ Can. Stat. 1959 c. 46.

¹⁹ *Caloil Inc. v. Attorney-General of Canada (No. 1)*, 15 D.L.R.3d 164 (1970).

²⁰ *Id.* at 173-74.

²¹ *Id.* at 174.

Following this decision, which was not appealed, section 20 of the regulations was amended to make it clear that the restriction on transportation of gasoline applied only to the imported product. In new proceedings instituted by the plaintiff in the Exchequer Court, Mr. Justice Dumoulin held that the legislative scheme was *intra vires*.²²

The appeal taken from the decision of Dumoulin was dismissed by the Supreme Court of Canada,²³ Mr. Justice Pigeon, delivering the reasons of the Court, characterized the enactment as "an incident in the administration of an extra provincial marketing scheme" and "an integral part of the control of imports in the furtherance of an extra provincial trade policy." This was not to deny provincial legislative competence in the area. Pigeon was prepared to concede (as Jackett had held in the first case) that provincial authority over transactions taking place wholly within the province is, as a rule, applicable to products imported from another country, as well as to local products. It was, in his opinion, an area of overlapping jurisdiction where provincial legislation would be valid in a clear field.

The second major development in this area during the survey period arose out of the "chicken and egg war." The principal combatants were Quebec and Manitoba, and the *casus belli* was a Quebec legislative scheme which required all eggs destined for consumption in that province to be sold to a producers' board, which board was given power to fix the price to be paid to producers and to control generally the conditions under which eggs could be marketed in the province. It was alleged that the scheme was being administered in such a way as to seriously discriminate against out-of-province producers shipping eggs into Quebec. As the controversy developed, other provinces contributed threats of retaliatory actions. The broad constitutional issue raised had to do with the extent to which a province may prohibit, regulate and control the marketing within its borders of agricultural products produced outside the province.

Despite pressure from Manitoba and other provinces to refer the validity of the Quebec legislative scheme to the Supreme Court of Canada, the federal government declined to do so. Manitoba then attempted to initiate proceedings itself in the Supreme Court of Canada, but the Court held that it lacked original jurisdiction to entertain such a suit.²⁴ As a means of getting the matter before the courts, the Manitoba government then hit upon the device of a reference to the Manitoba Court of Appeal of certain questions which were framed in terms of a proposed Manitoba statute, regulation, and order of a producers' board established under the statute, all of which duplicated as closely as possible the Quebec legislative scheme to which Manitoba objected. The proceedings were somewhat out of the ordinary in that the Attorney-General of Manitoba was nominally in the position of arguing in support of the "proposed" Manitoba legislative scheme although, of course, Manitoba sought a finding that such a scheme lay outside provincial competence.

²² *Caloil Inc. v. Attorney-General of Canada* (No. 2), 15 D.L.R.3d 177 (1970).

²³ [1971] 4 W.W.R. 37 (Sup. Ct.).

²⁴ As yet unreported. Decided: March 12, 1971.

The new tactic was successful. The court of appeal held²⁵ that the scheme was *ultra vires* the province as infringing upon the federal trade and commerce power, and also as impeding the free flow of trade between the provinces as guaranteed by section 121 of the British North America Act.²⁶ On appeal, the Supreme Court of Canada was unanimous in agreeing with the finding of *ultra vires* based on the trade and commerce power; but did not find it necessary to enter upon a discussion of section 121.²⁷

As to the trade and commerce aspect, the central issue pertained to the extent to which a province could, in exercising its well-established legislative authority over intra-provincial trade, at the same time control the marketing of a product coming into the province from elsewhere in Canada. In the *Shannon* case,²⁸ the Privy Council had appeared to support provincial jurisdiction to regulate dealings with products situate within the province, even though not necessarily produced there.²⁹ But in that decision, attention appeared to be focused on the local nature of the trade or business, rather than on the place of origin of the product or the course of trade in that product.

Earlier authorities had not clearly defined the constitutional limits of provincial regulatory power as a matter of intra-provincial trade. Room for debate remained, for example, as to the weight to be given to the marketing facts—in particular, the proportion of the product marketed within the province that was not locally produced. Would evidence of discriminatory treatment against out-of-province produce be decisive? What additional tests might prove useful in characterizing the provincial scheme as being “in relation to” inter-provincial trade and commerce, as opposed to merely “affecting” such trade?

The reasons of the Court, delivered by Mr. Justice Martland, cannot be said to have shed much new light on these questions. Nor was an extensive review and analysis of the earlier authorities undertaken. Citing

²⁵ Reference *re* Provincial Control of Agricultural Products, [1971] 3 W.W.R. 204 (Man.). In another decision during the survey period, the Manitoba Court of Appeal rejected an attack on the constitutional validity of the province's Fruit and Vegetable Sales Act: *see* Regina v. Loblaw Groceries Co., 6 D.L.R.3d 225 (1969). The act and regulations pursuant thereto were directed toward establishing minimum standards of grading and packaging of natural products. The legislation was wide enough to include persons in other provinces exporting to Manitoba. Upon a consideration of the act and regulations as a whole, however, the court was able to reach the conclusion that the legislative scheme did not disclose any attempt to regulate interprovincial trade, that the interprovincial feature was merely incidental to, and formed no part of, the pith and substance of the legislation, and that the legislation could not be said to concern the people of other provinces directly or substantially. *See also* Augustine's Farm Dairy v. Milk Comm'n, [1971] 2 Ont. 119, 17 D.L.R.3d 155 (1970).

²⁶ Section 121 provides that “All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.”

²⁷ Attorney-General for Manitoba v. Manitoba Egg and Poultry Ass'n 19 D.L.R.3d 169 (Sup. Ct. 1971).

²⁸ *Shannon v. Lower Mainland Dairy Products Bd.*, [1938] A.C. 708, [1938] 4 D.L.R. 81.

²⁹ *Id.* at 718-19, [1938] 4 D.L.R. at 84.

the Court's decisions in the *Ontario Farm Products* reference³⁰ of 1957 and the *Carnation* case³¹ in 1968, Martland stated:

Our conclusion was that each transaction and regulation had to be examined in relation to its own facts, and that, in determining the validity of the regulatory legislation in issue in that appeal, the issue was not as to whether it might affect the inter-provincial trade of the appellant Company, but whether it was made in relation to the regulation of inter-provincial trade and commerce. There was cited in the following passage from the reasons of Kerwin C. J. in the *Ontario Reference* (at p. 204):

Once a statute aims at "regulation of trade in matters of inter-provincial concern" it is beyond the competence of a Provincial Legislature.

It is my opinion that the Plan now in issue not only affects inter-provincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.

It is not entirely clear what the Court relied upon in reaching the conclusion that the scheme was one which "aimed at" the regulation of inter-provincial trade, as opposed to merely affecting such trade. Earlier in the reasons, the learned judge had noted that the producers' board was armed with the power to control the sale of eggs in Manitoba, brought in from outside Manitoba, by means of quotas, or even outright prohibition. Was actual or potential discrimination against the out-of-province product a factor of importance in the decision? It is noteworthy that in the separate concurring reasons of Mr. Justice Laskin (concurring in by Mr. Justice Hall), the finding of invalidity is reached independently of any question of discriminatory standards applied to out-of-province producers or distributors. On the other hand, the brief concurring reasons of Mr. Justice Pigeon are directed specifically to, and his conclusion as to invalidity based entirely upon, the consideration that an essential part of the scheme was:

not merely to subject eggs brought in from outside the province to the same trade regulations as those produced therein but, in effect, to enable the Manitoba producers through the Board to restrict by means of quotas the local sale of eggs produced elsewhere to whatever extent will best serve their interests, even if this means a complete prohibition of such sale. Thus the Plan is designed to restrict or limit trade between provinces as such.

³⁰ Reference *re* The Farm Products Marketing Act, [1957] Sup. Ct. 198, 7 D.L.R.2d 257.

³¹ *Carnation Co. v. Que. Agricultural Marketing Bd.*, [1968] Sup. Ct. 238, 67 D.L.R.2d 1.

B. *Transportation and Communication* ³²

The 1955 decision of the Supreme Court of Canada in the *Stevedoring* reference ³³ upheld the validity of section 53 of the federal Industrial Relations and Disputes Investigation Act, ³⁴ the effect of which is to make subject to the act collective bargaining and labour relations generally of "employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada." On the facts presented to the Court, the employees worked for an independent stevedoring company which performed services in connection with the loading and unloading of ships under contracts with seven shipping companies, all of whose ships operated on regular schedules between Canadian and foreign ports. On those facts, it was unnecessary to decide whether federal jurisdiction extended to purely local (that is, intra-provincial) shipping enterprises, and the remarks made obiter reflected a difference of opinion on that issue. ³⁵

That question—namely, whether the federal act applies to intra-provincial shipping enterprises—was presented to the Supreme Court of Canada during the survey period in *Agency Maritime Inc. v. Canada Labour Relations Board* ³⁶ and received a negative answer. The company in question owned and operated three coaster ships engaged in transportation of merchandise within the province of Quebec and had its head office and seven regional offices and port installations within the province of Quebec. It did not carry on business outside the province, but the evidence disclosed that on three occasions company ships had travelled beyond the territorial limits of the province to complete a cargo shipment, twice to Toronto and once to Nova Scotia.

It was argued that even if the company's maritime operations were intra-provincial, federal authority under section 91(10) (Navigation and Shipping) of the British North America Act extended to such operations. Mr. Justice Fauteux, delivering the judgment of the Court stated: "I am of the opinion, that in a case of the type presently before us, and, except in so far as the shipping aspect of the matter is concerned, the provisions of s. 91(29) and s. 92(10) (a) and (b) are collectively intended to exclude from the jurisdiction of Parliament maritime shipping undertakings whose operations are carried on entirely within the boundaries of a single Province." ³⁷

A further issue had to do with the amount and nature of extra-provincial traffic required to bring a transportation undertaking under federal

³² See, McNairn, *Transportation, Communication and the Constitution—The Scope of Federal Jurisdiction*, 47 CAN. B. REV. 355 (1969).

³³ Reference *re* Validity of Industrial Relations and Disputes Investigation Act, [1955] Sup. Ct. 529, 3 D.L.R. 721.

³⁴ CAN. REV. STAT. c. 152 (1952).

³⁵ The reference was heard by a full Court, and each member of the Court delivered his own reasons. For a discussion of the way in which the Court divided, see B. LASKIN, *CANADIAN CONSTITUTIONAL LAW* at 525-26 (3d ed. rev.).

³⁶ [1969] Sup. Ct. 851, 12 D.L.R.3d 722.

³⁷ 12 D.L.R.3d at 728-29 being a translation of [1969] Sup. Ct. at 859.

authority by virtue of section 92(10) (a), read with section 91(29) of the British North America Act, as an undertaking "connecting" the province with another or "extending" beyond the limits of the province.³⁸ It was argued that the three trips out of the province of Quebec were sufficient to attract federal jurisdiction in the instant case. On this issue, the provincial courts have generally taken the position that in the case of a transportation undertaking, the *percentage* of a company's traffic which crosses a provincial boundary is not decisive, but that the *character* of the traffic must satisfy certain standards of regularity in service offered.³⁹ The question had not reached the Supreme Court of Canada prior to the *Agence Maritime* case, and it is noteworthy that the Court appears to be content to accept the guidelines developed in the lower courts. Fauteux rejected the argument based on the three forays out of Quebec by the company's ships *not* on the basis that they formed an insignificant portion of the company's business, but on the basis that such extra-provincial trips were not made with reasonable regularity. The learned judge did not examine in depth the question of what service will be regarded as "reasonably regular" for the purpose at hand. He cited with approval, however, a lower court decision to the effect that extra-provincial trips need not be made in accordance with a printed timetable to satisfy the test, so long as the carrier offers constant and uninterrupted extra-provincial service to all those who ask for it.⁴⁰

Another problem raised in the *Stevedoring* reference⁴¹ had to do with the reach of federal authority to regulate the labour relations of employees who were not employed directly on the "connecting" undertaking but who performed work related thereto. On the facts considered in the reference, the employees were not employed by the shipping lines, which were undoubtedly subject to federal regulation, but by the stevedoring company, whose services were limited to the loading and unloading of the ships. The latter operation was held, nonetheless, to form an integral part of the shipping enterprise, with the result that the employees of the stevedoring company were held to be within federal legislative authority. The degree of integration which the courts will regard as sufficient to draw the related undertaking within federal authority can be difficult to predict. In the survey period the issue arose in *Regina v. Ontario Labour*

³⁸ Section 92(10)(a) reads as follows:

Local Works and Undertakings other than such as are the following Classes:—

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

³⁹ See, e.g., *Regina v. Toronto Magistrates*, [1960] Ont. 497, 25 D.L.R.2d 161 (High Ct.); *aff'd sub nom., Re Tank Truck Transport Ltd.*, [1963] 1 Ont. 272, 36 D.L.R.2d 636 (1961); *fol'd* in *Regina v. Cooksville Magistrate's Court*, [1965] 1 Ont. 84, 46 D.L.R.2d 700 (High Ct. 1964). *But cf.* *British Columbia Power Corp. v. Attorney-General of British Columbia*, 44 W.W.R. (n.s.) 65, at 143-71, 47 D.L.R.2d 633, at 707-33 (B.C. Sup. Ct. 1963).

⁴⁰ [1969] Sup. Ct. at 857-58, 12 D.L.R.3d at 726-27, in discussion of *Regina v. Cooksville Magistrate's Court*, *supra* note 39.

⁴¹ *Supra* note 33.

*Relations Board.*⁴² The group of Northern Electric employees concerned were "installers," whose work involved installation of telecommunication and related equipment, and the testing of such equipment to ensure that it was operational. The principal customer of the company was its parent, Bell Telephone, whose undertaking was subject to federal jurisdiction. Mr. Justice Lacourciere held, relying on the analogy of the *Stevedoring* reference, that the undertaking upon which Northern Electric's installers were employed was an integral and necessarily incidental part of the communication systems of its customers, and hence the installers' labour relations were subject to the federal statute.

Finally, it might be noted that during the survey period further authority was supplied for the proposition that community antenna television and broadcast distribution operations are wholly outside of provincial jurisdiction.⁴³

C. *The Declaratory Power*

In recent years Parliament has shown little disposition to make use of its power, under section 92 (10) (c) of the B.N.A. Act, to bring "works" within federal legislative authority by the simple expedient of declaring them to be for the general advantage of Canada or for the advantage of two or more provinces. The power represents one of the more striking centralist features of the Canadian constitution, and the federal government's reluctance to employ it in recent years is attributable to the same developments in federal-provincial relations that account for the atrophy of the federal power of disallowance. If the declaratory power is waning, it nevertheless received considerable attention during the survey period, being the subject of a book,⁴⁴ and the important decision of the Supreme Court of Canada in *Jorgenson v. Attorney General of Canada*.⁴⁵

In *Jorgenson*, the Supreme Court considered certain provisions of the Canada Grain Act⁴⁶ and the Canadian Wheat Board Act⁴⁷ which declared "elevators" as therein defined to be works for the general advantage of Canada. It was not contended that elevators could not be "works" within the meaning of section 92 (10) (c). The issue was whether the statutory declaration could properly be made applicable to elevators not in existence or under construction at the time the declaration was made and, if so, whether a "class" reference to such elevators was sufficiently specific to achieve the desired result.

The original legislation was enacted in 1925, and until 1950 the declaratory provision in the Canada Grain Act had been supported by a schedule to the act listing existing elevators individually. The material provisions of

⁴² [1970] 2 Ont. 654, 11 D.L.R.3d 640 (High Ct.).

⁴³ *Re Oshawa Cable T.V. Ltd.*, [1969] 2 Ont. 18, 4 D.L.R.3d 224 (High Ct.), *coll'g Re Public Utilities Comm'n*, 52 W.W.R. (n.s.) 286, 51 D.L.R.2d 716 (B.C. 1965)

⁴⁴ A. LAJOIE, *LE POUVOIR DECLARATOIRE DU PARLEMENT* (1969).

⁴⁵ [1971] 3 W.W.R. 149 (Sup. Ct.)

⁴⁶ CAN. REV. STAT. c 25 (1952).

⁴⁷ CAN. REV. STAT. c 44 (1952)

the enactments, however, purported to declare to be for the general advantage of Canada not only elevators "heretofore" constructed but also those "hereafter constructed" or "hereafter to be constructed."

Mr. Justice Laskin, speaking for the full Court, reasoned that since section 92(10)(c) did not prescribe any special method of identifying works sought to be made subject to a declaration, it was open to Parliament to identify such works, for example, by location or by description. This was true not only for existing works, but for those which had not yet been constructed. He stated:

The question is, simply, this: What existing works wholly situate within the province does the declaration embrace? In a particular case, it may be a proper conclusion on the construction of the declaration, being an Act of Parliament, that a certain work is not within it. Such a conclusion would not mean that the declaration is invalid, even if it proves to be ineffective as to the particular work.

The same approach commends itself to me in respect of works which are made the subject of a declaration "before their execution", that is, before they are completed. The issue of identification *ex post facto* may involve difficulties in precise description that would not arise in respect of executed works, but I do not think that any different principle is involved. The *maximum certum est quod certum reddi potest* has an analogical bearing here.⁴⁸

Earlier in his reasons Laskin distinguished, but did not appear to disagree with, an observation that had been made by Mr. Justice Duff in *Luscar Collieries Ltd. v. McDonald*⁴⁹ with reference to a provision in the federal Railway Act. Duff stated there that: "An affirmation in general terms, for example, an affirmation that all railways owned or operated hereafter by a Dominion company are works which ought to be or will be executed, as beneficial to the country as a whole, would be almost, if not quite meaningless, and could hardly have been contemplated as the basis of jurisdiction."⁵⁰ Yet if specificity sufficient for purposes of identification is the sole criterion, it is not altogether obvious why the future works of a named federally incorporated company, or of a class of federally incorporated companies, would not fully satisfy the test propounded by Laskin in the instant case. Is Parliament allowed to identify a work, existing or future, by describing the class to which it belongs, or the place where it is located, yet denied the power to identify the work in terms of who owns it?

D. *Indians and Indian Lands*

Following the Royal Proclamation of 1763,⁵¹ the Crown followed a policy of taking land surrenders in the form of "treaties" with the Indians of Canada in the territory west of Quebec. The federal government continued this policy after Confederation, and extended it to lands acquired from the Hudson's Bay Company in 1870. Virtually all of Canada between

⁴⁸ *Supra* note 45, at 158.

⁴⁹ [1925] Sup. Ct. 460. [1925] 3 D.L.R. 225.

⁵⁰ *Id.* at 476. [1925] 3 D.L.R. at 237.

⁵¹ See 6 CAN. REV. STAT. 6127 (1952).

the Quebec-Ontario boundary on the east and the British Columbia-Alberta boundary on the west has been the subject of such treaties of surrender entered into with the Indians.

In British Columbia the pattern has been different. Aside from the northeastern corner of the province, caught by one of the federal Indian treaties,⁵² and a portion of southern Vancouver Island surrendered during the colonial era,⁵³ the land making up the rest of the province has never been the subject of Indian treaties. The Indians of British Columbia have consistently maintained that as a consequence their interest in the land — variously referred to as “Indian title” or “aboriginal title” or “aboriginal rights” — has never been extinguished. The question has engaged the attention of colonial, provincial and federal governments, and has been the subject of inquiry by several royal commissions and parliamentary committees.

More recently the question has received judicial attention⁵⁴ and a test case is now on its way to the Supreme Court of Canada. The case, in which the plaintiff Nishga Indians seek a declaration that title to their tribal lands in an area of northwestern British Columbia has never been lawfully extinguished, is *Calder v. Attorney-General of British Columbia*. At trial the plaintiffs were unsuccessful⁵⁵ and the British Columbia Court of Appeal was unanimous in dismissing the appeal.⁵⁶ In the British Columbia courts various grounds for dismissing the action were put forward. It was held, *inter alia*, that existence of Indian title had not been established, that if such title existed, it had been extinguished, and that the courts of the province could not entertain the action in the absence of some legislative or prerogative act or course of dealing by the Crown which constituted recognition of the Indian title.

The ultimate disposition of the *Calder* case by the Supreme Court of Canada can be expected to have implications for unresolved Indian title questions in the other non-treaty areas of Canada. A recent report of the Dorion Commission supports the validity of Indian title claims in northern Quebec.⁵⁷

In *Surrey v. Peace Arch Enterprises Ltd.*⁵⁸ the issue raised was whether portions of an Indian reserve leased to developers became subject to by-laws of the municipality within which the reserve was situated (which by-laws provided for zoning, specifications for buildings, water services and sewerage disposal) and to regulations under the provincial Health Act. An amuse-

⁵² Treaty No. 8.

⁵³ In a series of fourteen Indian treaties concluded between 1850 and 1854. See generally the decision of the British Columbia Court of Appeal in *Regina v. White*, 52 W.W.R. (n.s.) 193, 50 D.L.R.2d 613 (1964); *aff'd* 52 D.L.R.2d 481 n.

⁵⁴ See the *White* case, *supra* note 53, and *Regina v. Discon*, 63 W.W.R. (n.s.) 485, 67 D.L.R.2d 619 (B.C. County Ct. 1968).

⁵⁵ 71 W.W.R. (n.s.) 81, 8 D.L.R.3d 59 (B.C. Sup. Ct. 1969).

⁵⁶ 74 W.W.R. (n.s.) 481, 13 D.L.R.3d 64 (1970).

⁵⁷ 4 RAPPORT DE LA COMMISSION D'ÉTUDE SUR L'INTÉGRITÉ DU QUÉBEC (Feb. 1971)

⁵⁸ 74 W.W.R. (n.s.) 380 (B.C. 1970)

ment park was being constructed on the leased reserve lands. The British Columbia Court of Appeal held that since the Indians retained a reversionary interest, the leased portion of the reserve continued to be "lands reserved for the Indians" within the meaning of section 91(24) of the British North America Act. Accordingly, Parliament retained exclusive legislative authority and provincial legislation and municipal by-laws relating to land use were inapplicable.

Many Indian treaties guaranteed to the Indians continued hunting and fishing rights on unoccupied Crown lands. In *Regina v. Moses*⁵⁹ the accused appealed a conviction under the Ontario Game and Fish Act, 1961-62,⁶⁰ basing his defence on the provisions of the Robinson-Huron treaty of 1850. It was held, following earlier authority,⁶¹ that the conviction should be quashed in that provincial legislation may not override Indian treaty promises.

Indian treaty promises are, however, subject to being overridden by inconsistent federal legislation. Thus in *Regina v. Francis*,⁶² where the accused was charged under federal fisheries legislation, a defence based on Indian treaty could not succeed.

In *Regina v. Swimmer*⁶³ the accused, a treaty Indian resident off the reserve, was charged with failure to pay the joint hospitalization tax and medical care premium as required under Saskatchewan legislation. The accused claimed the benefit of the "medicine chest" clause in Treaty 6, which reads as follows: "It is further agreed between Her Majesty and the said Indians . . . that a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent." In magistrates' court the accused argued, successfully, that this clause should be interpreted to mean that all Indians to whom Treaty 6 applies are entitled to receive all medical services, including medicine, drugs, medical supplies and hospital care, free of charge, and that they are therefore exempt from payment of taxes under the Saskatchewan Hospitalization Act and Medical Care Insurance Act. On appeal, the Saskatchewan Court of Appeal reversed, relying on its own interpretation of the medicine chest clause in an earlier case⁶⁴ to the effect that the clause imposed no obligation on the federal government to supply free medical and hospital services.

⁵⁹ [1970] 2 Ont. 314, 13 D.L.R.3d 50 (Ont. Dist. Ct. 1969).

⁶⁰ Ont. Stat. 1961-62 c. 48.

⁶¹ *Regina v. White*, *supra* note 53.

⁶² [1970] 3 Can. Crim. Cas. 165, 9 Can. Crim. (n.s.) 249, 10 D.L.R.3d 189 (1969). As to the position in the Yukon, *see Regina v. Smith*, 10 D.L.R.3d 759 (Y.T. Terr. Ct. 1969).

⁶³ [1971] 1 W.W.R. 756 (Sask. 1970).

⁶⁴ *Regina v. Johnston*, 56 W.W.R. (n.s.) 565, 49 Can. Crim. 203, 56 D.L.R.2d 749 (1966). The medicine chest clause is peculiar to Treaty No. 6, which covers part of the southern Saskatchewan and Alberta. For a decision concerning a treaty Indian in Manitoba, *see Manitoba Hospital Comm'n v. Klein*, 70 W.W.R. (n.s.) 79, 9 D.L.R.3d 423 (Man. 1969).

E. Family Law

During the survey period, the provisions of the federal Divorce Act⁶⁵ providing for orders of custody and maintenance as corollary relief in conjunction with a divorce decree withstood constitutional challenge in a number of decisions in the provincial courts.⁶⁶ The provisions of the federal statute do not, however, entirely oust provincial jurisdiction to vary or rescind an order for maintenance under a provincial statute⁶⁷ or to deal with the custody of a child of divorced parents.⁶⁸

F. Criminal Law and Criminal Procedure

Appellate court decisions during the survey period upheld two provisions of the Criminal Code as valid exercises of federal authority under section 91 (27) of the British North America Act. In *Regina v. Rush*⁶⁹ the provision challenged was section 296(b), which makes it an offence to possess property knowing it was obtained by an act that if it had occurred in Canada would have constituted an offence punishable by indictment. In *Regina v. Happeney*,⁷⁰ the Code provision impugned was section 590, which provides for the assigning of counsel by a court of appeal to act on behalf of the accused in a criminal appeal proceeding where it appears desirable that the accused should have legal aid.

IV. FUNDAMENTAL RIGHTS AND FREEDOMS

A. Civil Liberties and the Distribution of Powers

A constitutional challenge to a municipal by-law or provincial statute which prohibits certain types of conduct in public places is not infrequently taken on the alternative grounds that the prohibition constitutes an intrusion on exclusive federal power over criminal law,⁷¹ and that it infringes a fundamental freedom, interference with which lies beyond provincial competence. In two cases during the survey period such constitutional challenges were successful in the lower courts, but were not sustained at the provincial appellate court level.

In *Regina v. Beattie*,⁷² the impugned Toronto by-law prohibited, *inter alia*, boisterous conduct and use of abusive language in city parks. With reference to the argument that the by-law was *ultra vires* as being in restraint of freedom of speech, Mr. Justice Jessup, delivering the judgment of the

⁶⁵ Can. Stat. 1967-68 c. 24, §§ 11, 12.

⁶⁶ See *Niccolls v. Niccolls*, 68 W.W.R. (n.s.) 307, 4 D.L.R.3d 209 (B.C. Sup. Ct. 1969); *Whyte v. Whyte*, 69 W.W.R. (n.s.) 536, 7 D.L.R.3d 7 (Man. 1969); *Papp v. Papp*, [1970] 1 Ont. 331, 8 D.L.R.3d 389 (1969); *Heikel v. Heikel*, 73 W.W.R. (n.s.) 84, 12 D.L.R.3d 311 (Alta. 1970).

⁶⁷ *Armich v. Armich*, [1971] 1 W.W.R. 207, 16 D.L.R.3d 326 (B.C. 1970).

⁶⁸ *Bray v. Bray*, [1971] 1 Ont. 232, 15 D.L.R.3d 40 (High Ct. 1970).

⁶⁹ [1970] 1 Ont. 301, 8 D.L.R.3d 311 (1969).

⁷⁰ 2 N.B.2d 699, 12 D.L.R.3d 538 (1970).

⁷¹ B.N.A. Act, § 91(27).

⁷² 7 Can. Crim. (n.s.) 116 (Ont. 1969). Cf. *Regina v. Peters*, [1971] 1 Ont. 597, 16 D.L.R.3d 143 (1970); appeal to Sup. Ct. pending.

Ontario Court of Appeal, stated: "Assuming, without deciding, that freedom of speech is a domain exclusively within federal jurisdiction, the impugned section of the by-law cannot be struck down on that ground for the simple reason that it does not restrain the communication of ideas."⁷³

In *Regina v. Harrold*,⁷⁴ a Vancouver anti-noise by-law was challenged on the ground that it interfered with the religious practices of the accused, a member of the International Society for Krishna Consciousness. The findings of the County Court Judge, which were not challenged by the Crown, included the following:

The group, consisting of four to six adherents (and the Crown said sometimes up to 10 in number) were wont to go forth into the streets of Vancouver in accordance with their religious tenets, chanting their transcendental sounds (or mantra), to the accompaniment of a small drum and two or three cymbals, clothed in saffron robes and other manner of dress of the followers of their God Krishna, bringing their sublime message, as they described it, to the peoples of the city so that they too would benefit from the religious experience and achieve peace and serenity. The appellant and his group are obviously sincere and convinced of their religious tenets, going back into history, especially in India, some hundreds of years. The respondent does not contend otherwise than that the appellant and his group were following a *bona fide* religious belief, sincerely held and honestly being pursued at all relevant times, and that the chanting and sound of drums and cymbal were wholly within the mandate as revealed by their Master Lord Sri Chaitanya and that no other motive but a religious one is entailed. The group, during the period in question, would wend their way down Granville and Hastings Sts. in the downtown core of the city during the business hours of the week (and at other times and places), pausing at street corners on the sidewalk, sometimes up to an hour, to continue their chanting and to endeavour to project their message to the public.⁷⁵

Relying principally on the recent decision of the Supreme Court of Canada in the *Walter* case⁷⁶ the court of appeal rejected the argument that freedom of religion, in the material sense, was involved.

B. *The Canadian Bill of Rights*

In *Regina v. Drybones*,⁷⁷ the most important decision on the Canadian Bill of Rights⁷⁸ since its enactment in 1960, the Supreme Court of Canada finally laid to rest the theory that the Bill of Rights is merely an interpretative measure. The Bill of Rights, it is now clear, will render in-

⁷³ 7 Can. Crim. (n.s.) at 120.

⁷⁴ [1971] 3 W.W.R. 365 (B.C.); *rev'g* 75 W.W.R. (n.s.) 673, 16 D.L.R.3d 51 (B.C. County Ct. 1970).

⁷⁵ 75 W.W.R. (n.s.) at 676, 16 D.L.R.3d at 55.

⁷⁶ *Walter v. Attorney-General of Alberta*, [1969] Sup. Ct. 383, 66 W.W.R. (n.s.) 513. The decision is discussed in the previous survey article, 3 OTTAWA L. REV. 520, at 533-34.

⁷⁷ [1970] Sup. Ct. 282, 71 W.W.R. (n.s.) 161, 9 D.L.R.3d 473 (1969). See Leigh, Comment, *The Indian Act, the Supremacy of Parliament, and the Equal Protection of the Laws*, 16 MCGILL L.J. 389 (1970), and Smith, *Regina v. Drybones and Equality Before the Law*, 49 CAN. B. REV. 163 (1971).

⁷⁸ Can. Stat. 1960 c. 44.

operative pre-existing federal enactments that are inconsistent with the rights and freedoms enumerated in the Bill. In *Drybones* the court held a liquor provision in the Indian Act⁷⁹ to be inoperative on the ground that it infringed the right to "equality before the law and the protection of the law" as guaranteed by section 1(b) of the Bill of Rights.

In *Regina v. Smythe*,⁸⁰ the Supreme Court of Canada was invited to apply the same provision of the Bill of Rights to a section in the Income Tax Act which permitted the Attorney-General to elect whether to proceed by way of indictment or to prosecute by way of summary conviction. The accused was subject to more severe penalties where the proceeding was by way of indictment, and it was argued that this constituted a discrimination which was destructive of the concept of equality before the law. Mr. Chief Justice Fauteux, delivering the reasons of the Court, held that the provision in question was not in conflict with section 1(b) of the Bill of Rights. The learned judge observed that the provision in the Income Tax Act did not place any person or class of persons in a condition of being distinguished from any other member of the community, but applied without distinction to everyone. He was of the opinion, furthermore, that "the manner in which a Minister of the Crown exercises a statutory discretionary power conferred upon him for the proper administration of a statute is irrelevant in the consideration of the question whether the statute, in itself, offends the principle of equality before the law."

Due in part, no doubt, to its revitalization in *Drybones*, the Bill of Rights came before the courts relatively frequently during the survey period. Space limitations preclude a review of the decisions in this article, but it may be noted that as yet there has been no post-*Drybones* decision at the appellate court level holding a federal enactment to be inoperative.⁸¹

⁷⁹ CAN. REV. STAT. c. 149, § 94(b) (1952).

⁸⁰ As yet unreported. Judgement pronounced June 28, 1971, *aff'g* [1971] 2 Ont. 209.

⁸¹ Since the above was written, the Federal Court of Appeal has held section 12 (1)(b) of the Indian Act, *supra*, note 79, to be inoperative on grounds of discrimination by reason of sex within the meaning of the Canadian Bill of Rights. Under that section, an Indian woman who marries a non-Indian loses her status as an Indian for purposes of the Act. See *Lavell v. The Attorney-General of Canada*, as yet unreported. Judgment pronounced October 8, 1971.