CASE COMMENTS AND NOTES

THE "FEDERAL ENCLAVE" FALLACY IN CANADIAN CONSTITUTIONAL LAW

While one is hesitant to take issue with so distinguished a judicial statesman as Chief Justice Bora Laskin, his dissenting opinion in *Cardinal* v. *A. G. of Alberta*[1] contains remarks which, if misconstrued, could have unfortunate consequences for Canadian constitutional law. The remarks relate to the applicability of provincial laws within federally-owned lands in a province, such as Indian reserves, national parks and military establishments. Laskin J., as he then was, referred to Indian reserves as federal "enclaves", and seemed to suggest that other federal lands have a similar status. By doing so he may unintentionally have contributed to the fallacy that provincial laws have no operation within the territorial boundaries of provincially-sited federal property. That notion, it is submitted, is both mistaken and destructive; if it were accepted, it could seriously undermine the ability of the provinces to carry out their constitutional responsibilities.

The *Cardinal* case involved a prosecution for selling game contrary to the provisions of the Alberta Wildlife Act.[2] The accused, who was a registered Indian, argued in defence that since both the hunting and the sale in question had taken place on an Indian reserve, they were exempt from the operation of the provincial statute. The Supreme Court of Canada rejected this defence and convicted the accused. Laskin J. dissented, supported by Hall and Spence JJ.

The central issue was whether the British North America Act, 1930,[3] by which the natural resources of the western provinces were transferred to provincial ownership, authorized the application of provincial game laws to Indian reserves. The transfer agreements which were given constitutional force by that Act provided that Indian reserves should remain federal property, but stipulated that certain provincial game laws should apply to Indians. The question in dispute was whether that stipulation included activities on reserve lands. Whereas the majority of the Supreme Court interpreted the provision as applying to Indians anywhere in the province, including reserves, Mr. Justice Laskin construed it as not including reserve lands.

This comment is not concerned with that central issue, important though it undoubtedly is, but rather with certain observations made by Mr. Justice Laskin relating to the applicability of provincial laws to Indian reserves and other federal lands *in the absence of* express legislative provisions such as the British North America Act, 1930. He stated:[4]

> Indian reserves are enclaves which, so long as they exist as reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada.

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[1] (1974) 40 D.L.R. (3d) 553 (S.C.C.). Mr. Justice Laskin's dissenting opinion was concurred in by Hall and Spence JJ.

[2] R.S.A. 1970, c. 391.

[3] 20 & 21 Geo. V, c. 26.

[4] *Supra*, n. 1, at 569.

He then went on to assert that other federally owned property is subject to similar immunity. Indian reserves, he pointed out, are:[5]

> . . . no more subject to provincial regulatory authority than is any other enterprise falling within exclusive federal competence.
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> I do not wish to overdraw analogies. It would strike me as quite strange, however, that when provincial competence is denied in relation to land held by the Crown in right of Canada (see *Spooner Oils Ltd. et al* v. *Turner Valley Gas Conservation Board* [1933] 4 D.L.R. 545 at p. 557, [1933] S.C.R. 629), or in relation to land upon which a federal service is operated (see *Reference re Minimum Wage Act of Saskatchewan* [1948] 91 C.C.C. 366 at p. 370, [1948] 3 D.L.R. 801 at p. 804, [1948] S.C.R. 248), or in relation to land integral to the operation of a private enterprise that is within exclusive federal competence (see *Campbell - Bennett Ltd.* v. *Comstock Midwestern Ltd.* [1954] 3 D.L.R. 481, [1954] S.C.R. 207, 71 C.R.T.C. 291), there should be any doubt about the want of provincial competence in relation to lands that are within s.91(24).

The Crown in the right of Canada owns many different types of real property within the boundaries of every province: Indian reserves, national parks, federal penitentiaries and hospitals, public harbours, airports, federal office buildings, certain roads and canals, and so on. The notion that each of these is a federal "enclave", offering sanctuary from the general laws of the province, is novel. If it were adopted by the courts, it would extend the limits of interjurisdictional immunity well beyond its present bounds.[6] It would mean, presumably, that in the absence of federal legislation incorporating provincial law by reference, provincial legislation would not affect commercial transactions carried out on public wharves or wills made by prisoners of federal penitentiaries or automobile accidents occurring in national parks.

The majority of the Supreme Court of Canada rejected the "enclave" concept, so far as Indian reserves are concerned, in the *Cardinal* case.[7] The purpose of this comment is to assert that the notion is equally invalid with respect to other categories of federal property.

Apart from special provisions such as those contained in the British North America Act, 1930, interjurisdictional immunity under the Canadian constitution has previously been recognized in only three types of situation, none of which offers a sound basis for the "enclave" notion.

I. TAX IMMUNITY OF CROWN PROPERTY

This is the only type of immunity for which the British North America Act expressly provides.[8] Section 125 states: "No lands or property belonging to Canada or any Province shall be liable to taxation."[9] While it imposes an important restriction on the provincial (and federal) law-making powers, it is difficult to see how this section could provide any support for an "enclave" theory. It ap-

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[5] *Id.* This is not the first time Laskin J. has expressed similar views. As a member of the Ontario Court of Appeal he stated, *obiter dictum*, that a previous Court of Appeal decision had held the *Ontario Highway Traffic Act* to be inapplicable to roads owned by the federal Crown in Ottawa: *R.* v. *Taggart* [1966] 1 O.R. 764, at 767. The previous case, *R.* v. *Red Line Ltd.* (1930), 66 O.L.R. 53, did not in fact reach such a conclusion. Although it was held that federal legislation could validly place restrictions on the categories of persons who could use the federally owned roads, the question of whether the provincial statute could control speed limits, rules of the road, etc., was left conspicuously open.

[6] *See:* D. Gibson, *Interjurisdictional Immunity in Canadian Federalism,* (1969) 47 Can. Bar Rev. 40.

[7] *Supra,* n. 1 at 559, *per* Martland J.

[8] Section 121, which prohibits interprovincial customs duties might be regarded as providing a form of interjurisdictional immunity, but it offers no possible support for an "enclave" theory.

[9] *See:* G. V. LaForest, *Allocation of Taxing Power Under the Canadian Constitution,* at 150, *ff.,* and G. V. LaForest, *Natural Resources and Public Property Under the Canadian Constitution,* at 162-3.

plies only to the taxation of government property. Non-tax legislation is not affected.[10] Forms of taxation other than property taxation are permitted.[11] Even property taxation is valid if it is assessed against the interest of private individuals or corporations who use or have some interest in Crown property, rather than against the Crown or Crown agency itself.[12]

Two cases offer particularly striking illustrations of the narrow limits placed on section 125. In *Re Rush & Tomkins Construction Ltd.*[13] it was held that a contractor must pay provincial sales tax on consumable goods purchased for use in construction work for the federal government within a national park in the province, even though the federal Crown would undoubtedly bear the ultimate brunt of the tax. Materials which remained as a permanent part of the construction were conceded by the parties to be exempt from the tax, however, presumably because they constituted Crown property.[14] In *Montreal* v. *A.-G. of Canada*[15] the Privy Council held that a municipal tax on a tenant of federal property was valid, even though it would, according to the arrangement between the Crown and the tenant, reduce the revenue received by the Crown under the lease.

II. GENERAL CROWN IMMUNITY

It is sometimes alleged that in addition to the special tax protection afforded by section 125, the Crown in the right of one order of government in Canada possesses a general immunity from laws passed by another order of government. Mr. Justice Fauteux of the Supreme Court of Canada once asserted, *obiter dictum,* that:[16] "The Crown in the Right of Canada cannot be bound by a provincial statute". The writer has contended, in an earlier study of interjurisdictional immunity, that this assertion is not supported by the authorities.[17] The cases establish beyond plausible dispute that the federal Crown is subject to at least certain provincial laws, and there is some judicial support for the view that the Crown enjoys no general interjurisdictional immunity at all.

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[10] A rather broad interpretation was given to the term "taxation" by the Supreme Court of Canada in *The Queen* v. *Breton* (1968) 65 D.L.R. (2d) 76, in which it was held that the federal Crown was not bound by a city bylaw requiring property-owners to keep sidewalks adjacent to their property in good repair because, *inter alia,* the bylaw constituted "taxation" within the meaning of section 125. However, that decision was based on certain ancillary features of the legislation, which allowed the city to make necessary repairs on default by the land-owner, and to collect the cost from him "as a tax, and in the same manner, and with the same privileges as all other taxes."

[11] A federal customs duty on provincially owned liquor has been held to be valid, in spite of section 125, because it does not constitute property taxation: *A.-G. for British Columbia* v. *A.-G. for Canada* [1924] A.C. 222 (P.C.). LaForest, *Natural Resources & Public Property Under the Canadian Constitution,* at 163, claims that:

> A province, however, could not levy a tax against the federal government, whether categorized as a property tax or not; the paramountcy doctrine prevents this.

It is submitted that this observation is based on a misconception of the principle of federal paramountcy, which does not come into operation until the Parliament of Canada has passed legislation inconsistent with the provincial law in question.

[12] *Smith* v. *Vermillion Hills* [1916] 2 A.C. 569 (P.C.); *Montreal* v. *A.-G. for Canada* [1923] A.C. 136 (P.C.); *Calgary & Edmonton Land Co.* v. *A.-G. of Alberta* [1911] 45 S.C.R. 170 (S.C.C.); *Provincial Municipal Assessor* v. *Harrison* [1971] 3 W.W.R. 735 (Man.Q.B.).

[13] (1961) 28 D.L.R. (2d) 441 (B.C.S.C.).

[14] *Id.* at 443.

[15] [1923] A.C. 136 (P.C.).

[16] *The Queen* v. *Breton* (1968) 65 D.L.R. (2d) 76, at 79 (S.C.C.). The statement seems to have been concurred in by Taschereau C.J.C. and Abbott, Martland & Ritchie JJ.

[17] Gibson, *supra,* n. 7.

The susceptibility of the federal Crown to provincial laws has been considered by the courts in three different contexts: (a) where provincial law has been incorporated by reference in a federal statute, (b) where the federal Crown is deemed to have submitted to provincial jurisdiction, and (c) where neither of these conditions prevails. Each situation will be discussed separately.

A. *Incorporation by Reference*

The Parliament of Canada sometimes enacts, expressly or impliedly, that provincial laws should apply to the federal Crown in certain circumstances. Where that is the case the matter is beyond doubt.[18] The only legal difficulties that arise in such cases concern the extent to which provincial laws were intended to apply[19] and the date as of which provincial laws were intended to operate.[20]

B. *Submission*

Where federal authorities choose to invoke a provincial statute in litigation, they are bound by all provisions of that statute, whether or not they are favorable to the Crown. The federal Crown is deemed to have submitted to provincial jurisdiction in such cases.[21] In *A.-G. of Canada* v. *Tombs*[22] an action by the federal government under the Ontario Highway Traffic Act[23] was held to be subject to the one year limitation period imposed by that Act. It seems, in fact, that an action by the federal Crown which is not governed by special prerogative rules is subject to *all* relevant laws of the province in which the matter arose. A negligence action by the federal Crown has, for example, been held to be governed by provincial contributory negligence legislation,[24] and an action by a federal Crown agency to foreclose on a mortgage has been held to be subject to provincial debt adjustment legislation.[25]

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[18] *The King* v. *Murphy* [1948] S.C.R. 357, per Kerwin, J. at 361. See also note 6 above, at 46-9. Incorporation by reference has also been held to result in the application of provincial laws to private individuals within federal property of various types: *R.* v. *Glibbery* (1962) 36 D.L.R. (2d) 548 (Ont. C.A.) (military base); *R.* v. *Hughes* (1958) 122 C.C.C. 198 (Alta. D.C.) and *R.* v. *McMahon* (1963) 14 D.L.R. (2d) 752 (Alta. S.C.) (national park); *R.* v. *Johns* (1962) 39 W.W.R. 49 (Sask. C.A.) (Indian reserve).

[19] In *The Queen* v. *Breton* (1968) 65 D.L.R. (2d) 76 (S.C.C.), for example, it was held that the federal Crown Liability Act, which imposes tort liability on the Crown "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property" did not oblige the Crown to comply with provincial laws concerning the repair of faulty sidewalks adjacent to a landowner's property. The Court explained that the Crown Liability Act referred only to "the clearly identified and well-known duty established by the general laws and common in all territorial jurisdictions to persons owning, occupying, possessing or controlling property", rather than to "all those duties which, by specific enactment by way of exception to the general law, any provincial Legislature may now or in the future seek to impose . . . ." See note 6 above at 45-6, n. 22.

[20] *See* Gibson, *supra* n.6, at 46-9.

[21] *Id.* at 49-50.

[22] [1946] 4 D.L.R. 516 (Ont. C.C.), later reversed on other grounds.

[23] R.S.O. 1937, c. 288.

[24] *The Queen* v. *Murray* [1965] 2 Ex. C.R. 663 (Ex. C.C.), aff'd. (1967) 60 D.L.R. (2d) 648 (S.C.C.).

[25] *Reid* v. *Canadian Farm Loan Board* [1937] 4 D.L.R. 248 (Man. K.B.).

The authorities are not unanimous about the extent to which federal participation in various types of activity should be regarded as submission to provincial jurisdiction, however, especially where there has been no litigation on behalf of the Crown. In *Deeks, McBride Ltd.* v. *Vancouver Associated Contractors Ltd.*[26] an attempt was made to invoke provisions of the provincial Mechanics Lien Act[27] against federal Crown land registered under the provincial Land Registry Act,[28] on the ground that by registering its title under the provincial Act the Crown had submitted to all other relevant provincial laws. The British Columbia Court of Appeal refused to apply the provincial law. The court expressed some doubt about the correctness of the mortgage foreclosure case mentioned above and concluded that the case was at least distinguishable from a situation where no Crown litigation was involved:[29]

> . . . [T]his view goes considerably beyond the principle . . . that if the Dominion invokes a provincial statute, it must invoke it as a whole. The Loan Board was not invoking any statute, but ordinary principles of equity. But I think the case can be distinguished from the present case in that there the Dominion was invoking the jurisdiction of the provincial Court. Here it is in a purely passive role.

These remarks are difficult to accept. On what rational ground can it be said that the federal Crown is deemed to have submitted to those provincial laws which happen to have been enacted by the same statute it is relying upon, but not to laws embodied in another statute or general principles of common law or equity if they are equally relevant to the transaction in question? Why should the federal Crown be deemed to have submitted to provincial jurisdiction by engaging in litigation, but not by availing itself of the convenience of registering its land under provincial laws? While the mortgage foreclosure case contained some indefensibly broad *dicta* in support of federal susceptibility to provincial law,[30] the *Deeks* case seems to go too far in the other direction. A decision by the Supreme Court of Canada will be required to clear up the confusion caused by these two cases. But even in the present state of uncertainty, it is undeniable that by undertaking certain activities within a province the federal Crown will be construed as impliedly submitting to at least some relevant provincial laws.

C. *Other Situations*

What is much less certain is whether the federal Crown is generally immune from provincial laws *in the absence of either incorporation by reference or submission.* The Supreme Court of Canada and the Privy Council have reached opposite conclusions. The Supreme Court held in *Gauthier* v. *The King*[31] that the federal Crown was not bound by an Ontario statute making agreements to arbitrate contractual disputes irrevocable. On the other hand, the Privy Council reached a different conclusion a few years later in *Dominion Building Corporation* v. *The King*[32] in which the federal Crown was required, in the absence of either submission or incorporation by reference, to abide by an Ontario statute concerning the time for performance of a

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[26] [1954] 4 D.L.R. 844 (B.C.C.A.).

[27] R.S.B.C. 1948, c. 205.

[28] R.S.B.C. 1948, c. 171.

[29] *Supra*, n. 26, at 847.

[30] Dysart J. claimed in that case, for example, that the Crown in the right of Canada is not entitled to claim the benefit of prerogative rights granted to the Crown by provincial laws, being in no better position within the province than a "foreign" sovereign: *Reid* v. *Canadian Farm Loan Board* [1937] 4 D.L.R. 248, at 252 (Man. K.B.).

[31] (1918) 56 S.C.R. 176.

[32] [1933] A.C. 533.

contract. The *Dominion* case made no reference to the *Gauthier* case, and there has been no attempt by the Supreme Court of Canada to reconcile the decisions since then.

The writer is of the opinion that the *Dominion Building* case should be regarded as overruling *Gauthier,* and that even where there is neither submission nor incorporation by reference, the federal Crown is subject to all relevant provincial laws unless it can bring itself within one of the other two categories of immunity. This is not the place to debate that question, however.[33] The point is that even if *Gauthier* should be upheld the most it would establish would be that *the Crown and its agents* are exempt from the operation of statutes passed by another order of government in the absence of submission or incorporation by reference. This is a far cry from saying that parcels of federal land constitute "enclaves" within which the provincial writ cannot run.

III. IMMUNITY ARISING FROM DISTRIBUTION OF LEGISLATIVE JURISDICTION

Most instances of interjurisdictional immunity arise as corollaries of the manner in which law-making powers are distributed between the Parliament of Canada and the provincial legislatures under the British North America Act.[34] Such immunity can occur in three different circumstances.

A. *Provincial legislation aimed at matters under federal jurisdiction.*

This is the most obvious area of exemption. If a province enacted a statute regulating the noise caused by aircraft taking off and landing in the province, the statute would be wholly inoperative because it purported to deal with aviation, which is a matter within the exclusive legislative jurisdiction of the Parliament of Canada. Similarly, provincial statutes enacting special provisions for national parks, Indian reserves, defence establishments, and so on, would probably be ruled *ultra vires* on the ground that they dealt with subjects beyond the competence of the province.

B. *General provincial legislation affecting essential aspects of matters under federal jurisdiction.*

Even if a province were to enact a *general* anti-noise statute aimed at every type of noisy activity and every locality in the province, it would be inapplicable to noise caused by aircraft operating within the province.[35] The reason for this is that no provincial statute is permitted to operate so as to affect any "essential" or "integral" aspect of an enterprise under federal jurisdiction,[36] and the noise produced by aircraft would undoubtedly be regarded as integral to their operation. Although the cases betray some judicial confusion about what does and what does not constitute an "integral" or "essential" characteristic of a federal operation,[37] it is clear that this is an important source of interjurisdictional immunity.

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[33] *See* Gibson, *supra,* n.6, at 51-2.

[34] 30-31 Victoria, c. 3.

[35] It was held in *R.* v. *Rice* [1963] 1 C.C.C. 108 (Ont. Mag. Ct.) that general anti-noise legislation of a municipality could not be applied to the noise caused by outboard motor racing because "navigation and shipping" is a federal responsibility. While the case probably goes too far in the direction of immunity, there can be little doubt that a similar result would be reached in the case of aircraft noise.

[36] *Commission du Scolaire* v. *Bell Telephone Co. of Canada* (1967) 59 D.L.R. (2d) 145 (S.C.C.), per Martland J., at 153.

[37] The writer has difficulty reconciling the decision in the above case with the Supreme Court's later ruling in *Carnation Co. Ltd.* v. *Quebec Agricultural Marketing Board* (1968) 67 D.L.R. (2d) 1 (S.C.C.). See note 6, at 55.

The provincial statute is not declared invalid in these situations; the federal enterprise is simply held to be immune from its provisions. In *R. v. Smith*,[38] for instance, the Ontario Court of Appeal suggested that although provincial game laws were generally valid, they would not apply to a soldier carrying out his official duties on a federal military reserve.

It is important to understand that this form of immunity is not based on the fact that federally-owned property is involved. Even private air-fields would be exempt from provincial anti-noise laws,[39] and an on-duty soldier would be immune from provincial hunting laws even while on provincially-owned land.[40] Conversely, where a soldier is not on duty, the fact that he is hunting on federal land affords no defence to breach of provincial game laws.[41] This type of immunity derives from the nature of the activity, rather than from the location of its occurrence; it provides no basis for an "enclave" theory.

Nevertheless, it is this category of immunity that seems to have given birth to the "enclave" fallacy. The chief source of confusion lies in an overlap between the federal government's legislative powers and its proprietary rights.[42] The British North America Act gives the Parliament of Canada exclusive legislative jurisdiction over federal Crown property.[43] Some have construed this provision to mean that it is only federal laws which may operate within the geographic limits of such federal property. This is not the case, however. This section merely means that the Parliament of Canada may exclusively make *property laws* with respect to such property. There is nothing to prevent general provincial statutes which do not essentially affect the *proprietary rights* of the federal Crown from being extended to federal lands. The cases concerning immunity of federal property from provincial statutes, which will be reviewed in the following paragraphs, contain no suggestion of immunity in other than proprietary matters.

There can be no doubt that provincial laws may not derogate from the property rights of the federal Crown or its agents unless there has been submission or incorporation by reference. The province has no power to grant federally-owned land to others,[44] or to subject federal land to legislation

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[38] [1942] 3 D.L.R. 764, at 766 (Ont. C.A.).

[39] In *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292 (S.C.C.) it was held that a municipal by-law concerning the location of air fields was constitutionally invalid with respect to a privately-owned field.

[40] *R. v. Anderson* (1930) 54 C.C.C. 321 (Man. C.A.); *R. v. Rhodes* [1934] 1 D.L.R. 251 (Ont. S.C.). But note that in *R. v. Stradiotto* [1973] 2 O.R. 375 (Ont. C.A.) it was held that a soldier driving on duty was subject to provincial careless driving legislation, since compliance would not, as in the case of driver licensing provisions, interfere with the carrying out of his military duties.

[41] *R. v. Smith* [1942] 3 D.L.R. 764 (Ont. C.A.).

[42] *See*, generally, G. V. LaForest, *Natural Resources and Public Property Under the Canadian Constitution*, 190-5.

[43] S. 91(1A): "The public debt and property." There are also some proprietary powers associated with s. 91(24): "Indians and lands reserved for the Indians." The provinces have somewhat equivalent legislative jurisdiction with respect to their property under s. 92(5): "The management and sale of the public lands belonging to the province . . . ", and perhaps also under s. 92(16): "Generally all matters of a merely local or private nature in the province."

[44] *Burrard Power Co. Ltd. v. The King* [1911] A.C. 87 (P.C.).

such as the Mechanics Lien Act, which imposes the risk of loss of title,[45] or even to prevent the federal Crown from acquiring lands that would otherwise pass to it by altering the laws of escheat.[46] It is probable that the federal Crown would not be obliged to comply with provincial laws concerning conveyancing or registration of title, or imposing other duties on landowners.[47]

After property once owned by the federal Crown has been transferred to someone else in whole or in part, it would seem reasonable that the immunity would end, to the extent of the interest transferred, since legislation concerning the transferred interest would no longer be in relation to Crown rights. Generally speaking, the cases support that proposition. It has been held, for example, that a provincial tax on the leasehold interest of a private lessee of federal Crown land is valid,[48] even where, because of the terms of the lease, it affects the amount of rent paid to the Crown.[49] And in *McGregor* v. *Esquimault & Nanaimo Rwy.*[50] the Privy Council held that land ceded to the federal Crown by British Columbia and later granted by the federal Crown to a private railway company could legally be taken away from the company and transferred to someone else by the provincial legislature.

However, the somewhat more recent decision of the Supreme Court of Canada in *Spooner Oils Ltd. et al.* v. *Turner Valley Gas Conservation Board et al.*,[51] casts a shadow of doubt on these cases. The plaintiff in the *Spooner* case held a mineral lease with respect to land in the Turner Valley in Alberta. When the lease was granted the land was owned by the federal Crown, but title had subsequently passed to the province pursuant to the Resource Transfer Agreements and the British North America Act, 1930. The province had then established a Gas Conservation Board which ordered a reduction of the quantity of natural gas extracted by the plaintiff. The plaintiff resisted the Board's order, and the dispute eventually reached the Supreme Court of Canada. That court affirmed the plaintiff's right to extract as much natural gas as it wished in compliance with the terms of its lease, without regard to the order of the Gas Conservation Board. The chief reason for reaching that conclusion was that the British North America Act, 1930 obligated the provinces to which natural resources were transferred by that Act to honor all prior leases and other transactions, and not to "affect" them by legislation or otherwise. In the course of expressing the Court's reasons for judgment Duff C.J.C. stated that even before the British North America Act, 1930 was passed, and while the

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[45] *Richert* v. *Larkin* [1928] 3 D.L.R. 266 (Alta. S.C.); *Bain* v. *Director, V.L.A.* [1947] O.W.N. 917 (Ont. H.C.); *Deeks* v. *Vancouver Associated Contractors Ltd.* [1954] 4 D.L.R. 844 (B.C.C.A.); *B.A.C.M. Ltd.* v. *Parkland Builders Contracting Ltd.* (1971) 18 D.L.R. (3d) 377 (Sask. Q.B.). The same conclusion has been reached with respect to privately owned land which, like a section of an inter-provincial pipeline, is an essential part of an enterprise under federal legislative jurisdiction; *Campbell - Bennett Ltd.* v. *Comstock Midwestern Ltd.* [1954] 3 D.L.R. 481 (S.C.C.).

[46] *A.-G. of Alberta* v. *A.G. of Canada* [1928] A.C. 475 (P.C.); *Trusts & Guarantee Co.* v. *R.* (1916) 54 S.C.R. 107 (S.C.C.).

[47] *The Queen* v. *Breton, supra,* n.19.

[48] *Smith* v. *Vermillion Hills* [1916] 2 A.C. 569 (P.C.).

[49] *Montreal* v. *A.-G. of Canada* [1923] A.C. 136 (P.C.).

[50] [1907] A.C. 462 (P.C.).

[51] [1933] S.C.R. 629 (S.C.C.).

title to the land in question remained in the federal Crown, the province could not have passed legislation restricting the extraction of minerals by lessees of the Crown:[52]

> The right of the lessee . . . is to take from a specified tract of land, which is leased to him for that purpose alone, certain substances and to convert them to his own use. Until so taken, they remain, subject to his right to take them during the specified term, the property of the Dominion. To take away this right or to prohibit the exercise of it, would be to nullify *pro tanto* the statutory enactment creating the right.

Chief Justice Duff purported to distinguish the *McGregor* case on the ground that it involved a complete transfer to private hands of the Crown's entire interest:[53]

> As respects tracts of land held in fee simple, totally different considerations apply. Such tracts have ceased to be the public property of the Dominion . . .

It is hard to understand, however, why provincial legislation depriving someone of a federally-granted ownership right would not ". . . nullify . . . the statutory enactment creating the right", if legislation depriving him of a federally-granted leasehold right would. Even more difficult to reconcile with the *Spooner* decision are the cases holding that a province may tax leasehold interests granted to private persons by the federal Crown.[54] Duff C.J.C. indicated that he regarded these cases as distinguishable, but he offered no satisfactory explanation as to why they were.

The *Spooner* case was the strongest authority cited by Laskin J., in connection with his "enclave" remarks in the *Cardinal* case.[55] If future courts should choose to follow it in preference to the *McGregor* decision and the tax cases, it would constitute a significant expansion of interjurisdictorial immunity. It would not support an "enclave" approach, however; at most the case prevents provincial interference with the *property* aspects of land to which the Crown in the right of Canada retains title.

That this type of immunity arises from the proprietary nature of the provincial law in question, rather than from the fact that it is sought to be applied on federal land, is well illustrated by a pair of cases concerning contractors constructing buildings for the federal government on federal Crown land. In *Ottawa* v. *Shore & Horowitz Construction Co. Ltd.*,[56] it was held that such a contractor does not have to obtain a building permit in compliance with provincially-authorized laws, because to require compliance would interfere with the ownership rights of the federal Crown. On the other hand, it was held in *Re Rush et al.*[57] that a contractor must pay pro-

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[52] *Id.* at 643.

[53] *Id.* at 644. A second basis for distinguishing the cases suggested by Duff C.J.C. was the absence of federal legislation in the *McGregor* case. However, the fact is that both cases involved similar federal legislation authorizing the conveyance in question.

[54] *Smith* v. *Vermillion Hills, supra,* n.48; *Montreal* v. *A.-G. of Canada, supra,* n.49.

[55] *Supra,* n.1, at 569. The other two cases cited offer no support for an "enclave" approach. *Campbell - Bennett Ltd.* v. *Comstock Midwestern Ltd.* [1954] 3 D.L.R. 481 (S.C.C.) merely establishes that land which is an integral part of a pipeline operation under federal jurisdiction cannot be subjected to provincial Mechanics Lien legislation. *Reference re Minimum Wage Act of Saskatchewan* [1948] 3 D.L.R. 801 (S.C.C.), which Laskin J. said established that "provincial competence is denied . . . in relation to land upon which a federal service is operated" seems, with respect, to have nothing to do with land.

[56] (1960) 22 D.L.R. (2d) 247 (Ont. H.C.).

[57] (1961) 28 D.L.R. (2d) 441 (B.C.S.C.). It seems to have been conceded, however, that "any tangible property which became incorprated into and formed part of the finished work" would be immune from the tax (at 443).

vincial sales tax on goods purchased for use in construction for the federal government within a provincial park in the province, even though the federal Crown would undoubtedly bear the ultimate brunt of the tax. While the statute involved in the former case could be described as a "property law", the latter could not.

Apart from "property" laws, therefore, it seems very clear from the cases that provincial laws of general application operate within federal property in the province. A soldier, hunting for his own private purposes on a federal military base in Ontario, has been held to be subject to provincial laws.[58] Provincial liquor laws apply to the private activities of individuals on federal government wharves.[59] The provincial legislature may legislate to control privately created nuisances within federally-owned public harbours, or other federal property.[60] Provincial authorities may issue business licences[61] or grant a ferry monopoly[62] with respect to federal harbours. Although most of these pronouncements are from provincial courts, their cumulative effect is sufficient to negate the possibility of federal "enclaves."

C. *Federal legislation granting express immunity*

The constitutional principle of federal "paramountcy" affords another opportunity for interjurisdictional immunity. If the Parliament of Canada were to pass a provision relating to some matter under federal jurisdiction, and that provision were inconsistent with some general provincial enactment passed pursuant to some valid head of provincial competence, the federal provision would take priority over the provincial, even if it were merely ancilliary to the subject in question and not an essential or integral feature of it. In such cases the provincial law would cease to apply to the federal enterprise. For example, while it has been held that in the absence of federal laws on the subject a federal railway company must abide by municipal laws relating to the obstruction of ditches since the question is not essential to the operation of a railroad,[63] there can be little doubt that if the federal Parliament chose to enact that federal railways need not comply with such local laws, they would cease to have effect.[64]

In the *Smith* case, mentioned above, Robertson C.J.O. commented:[65]

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[58] *R.* v. *Smith* [1942] 3 D.L.R. 764 (Ont. C.A.).

[59] *Coté* v. *Quebec Liquor Commission* [1931] 4 D.L.R. 137 (Que. K.B.).

[60] *Re Vancouver Charter* (1957) 24 W.W.R. 323 (B.C.S.C.). In the *Spooner Oils* case, *supra*, n.51, in which the lessee of a mineral lease with respect to federal Crown land was stated to be free from provincial restrictions on the quantity of minerals extracted, Duff C.J.C. conceded, at 646, that "the amenability of occupants of Crown property to provincial laws in respect of nuisances . . . might possibly . . . be subject to different considerations."

[61] *R.* v. *Karchaba* (1965) 52 D.L.R. (2d) 438 (B.C.C.A.).

[62] *Toronto Transit Commission* v. *Aqua Taxi Ltd. et al* (1957) 6 D.L.R. (2d) 721 (Ont. S.C.).

[63] *C.P.R.* v. *Notre Dame de Bonsecours* [1899] A.C. 367 (P.C.).

[64] *A.-G. of Canada* v. *C.P.R. & C.N.R.* [1958] S.C.R. 285 (S.C.C.). The provincial laws involved in that case involved the title to minerals underlying railway rights-of-way.

[65] *Supra*, n.58, at 766. In *R.* v. *Powers* [1923] Ex. C.R. 131 (Ex. C.C.) it was held that federal legislation could validly exempt property of the federal Soldier Settlement Board from the operation of provincial laws.

> . . . no doubt the Dominion Parliament, under its power to make laws in relation to Militia Military, & Naval Services & Defence, could pass laws in relation to this Camp Reserve that would prevail over any provincial legislation with which it was in conflict.

If it chose to exercise this power to its full extent, it would be possible for Parliament to turn some of its property into virtual enclaves. Suppose, for example, that it were thought desirable as part of a program of rehabilitation for prisoners in federal penitentiaries to govern all aspects of the prisoners' legal relationships with others by a federal Civil Code. Parliament would in that case probably be constitutionally justified in declaring that provincial laws have no operation within federal prisons. The legitimacy of such legislation would depend on whether the courts would agree that the immunity provision was "necessarily incidental" to the carrying out of some head of federal legislative jurisdiction. A declaration by Parliament that all contracts made by individuals within a national park should be subject to federal rather than provincial law would not likely be upheld since it would be difficult to demonstrate that such a provision is necessarily incidental to the regulation of federal parks. Even the hypothetical immunity law for federal penitentiaries might for the same reasons be held inapplicable to legal relationships between prison employees while on the premises, although it must be noted that the courts have been quite generous to the legislating authority in deciding whether particular provisions are necessarily incidental to the overall legislative scheme.[66]

While admitting that Parliament's ability to invest certain of its properties with immunity from provincial laws might, in some cases, come close to creating federal "enclaves", it is important to point out that Parliament has shown little inclination to do so. Express federal assumption of civil jurisdiction within federal Crown property is uncommon.

It is submitted on the basis of the foregoing discussion that although there are some situations in which the federal Crown and enterprises under federal jurisdiction are exempt from the operation of provincial laws, there is no justification for claiming the existence of federal "enclaves" possessing general territorial immunity, except in the rare cases where Parliament has expressly created such enclaves in furtherance of some legitimate legislative goal.

Although this comment was written in response to remarks by Mr. Justice Laskin in the *Cardinal* case, it would be wrong to suggest that Mr. Justice Laskin or his concurring brethren would support a full-blown "enclave" theory. In the *Cardinal* case itself Mr. Justice Laskin was careful to point out that in his view the provincial legislation in question had *proprietary* consequences:[67]

> [T]he present case concerns the regulation and administration of the resources of land comprised in a reserve, and I can conceive of nothing more integral to that land as such.

He also made it clear that he was not purporting to determine:[68]

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

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[66] *E.g.: A.-G. of Canada* v. *C.P.R. & C.N.R., supra,* n.64.

[67] *Supra,* n.1, at 569-70.

[68] *Id.* at 569. *See: Re Nelson* (1974) 46 D.L.R. (3d) 633 (Man. C.A.); *Natural Parents* v. *Sup't. of Child Welfare,* S.C.C., Oct. 7, 1975, as yet unreported. (Since reported (1975) 6 N.R. 491. -eds.)

In the more recent case of *Canada Labour Relations Board* v. *C.N.R.*[69] Chief Justice Laskin held, on behalf of the entire court, that federal labour law does not apply to the employees of a resort hotel owned by a publicly owned federal railway company, and carrying on business within Jasper National Park. By unavoidable implication, that decision acknowledged the applicability of at least some general provincial laws to activities within the territorial limits of federally-owned land.

The writer's concern is not, therefore, that Chief Justice Laskin or the Supreme Court of Canada will place intolerable restrictions on the operation of provincial laws within federal property, but rather that his use of the unfortunate term "enclave" in the *Cardinal* case may further muddy an already turbid stream of jurisprudence.

— Dale Gibson°

[69] Decided April 2, 1974, so far unreported. (Since reported (1974) 45 D.L.R. (3d) 1, 1 N.R. 547. -eds.)

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