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Canadian Federal Courts and the Constitutional Limits
of Their Jurisdiction

Stephen A. Scott*

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* Of the Bar of the Province of Quebec and of the Faculty of Law, McGill University. This article was originally prepared for delivery at *New Directions in Maritime Law 1980*, a conference held at the Faculty of Law, Dalhousie University, 30-31 May 1980.

Introduction

Article 8 of the *Rules of Oleron* decrees as to general average: "The master is bound to say to the merchants: 'Signors, we cannot escape without throwing out the wines and the goods.'"¹ Later, it requires that the master and a third of his crew, on coming ashore, must swear on the Gospels "that he did it of no malice, but to save their lives, the ship, the goods, and the wines." Maritime law, these extracts seem to show, places wine in a category by itself: on a par at least with all other cargo taken in the aggregate: and perhaps even (since it specifies wine as one of four things to be saved) on an equal footing with the ship itself and the crew. This proof of the traditional good sense of the admiralty bar inspires my first foray into the complex and important legal specialty which you practise. It also gives me much reason for optimism as to the standard of conviviality which may be expected at your conferences, and which may assist you in overlooking the deficiencies of the non-initiate whom you very kindly invite to meet with you.

Indeed, a frank admission that (the term being on its face ambiguous) I find it necessary every so often to check *Scrutton on Charterparties* to see whether the "charterer" of a ship is its lessor or lessee, will, I hope, convince you of the full extent of my diffidence at addressing this distinguished gathering of practitioners and scholars of maritime law. Your invitation to one so little acquainted with your specialty as I am, in itself testifies eloquently to your concern with the grave constitutional problems afflicting the jurisdiction of the Federal Court of Canada.

A day's browsing in Gilmore and Black on *The Law of Admiralty*, — and especially its first chapter on History and Jurisdiction, — has dispelled any notion I might have entertained that I could present to you to-day anything like a working manual specifying exactly what proceedings a maritime law practitioner can, consistently with the Canadian Supreme Court's reading of *The British North America Act, 1867*, bring in the Federal Court of Canada, as the Canadian statute book now stands. Each type of proceeding, or claim, will plainly require careful statutory analysis and detailed historical consideration of authority, judicial and extrajudicial. But I hope that the general reflections I offer here, and my review of the authorities, can assist you in dealing with particular cases as they arise. I hope, too, that the profession can succeed in persuading the Supreme Court to reconsider, from first principles, its position on the constitutionally permissible jurisdiction of Canadian federal courts: a position, I shall try to show, adopted in error, upon inadequate consideration, and with the most widely mischievous consequences for the administration of justice in Canada.

¹ Quoted in G. Gilmore & C. Black, *The Law of Admiralty*, 2d ed. (1975), 244.

That position, of course, as enunciated in 1976 and developed in later cases, limits the exercise of Canadian federal court jurisdiction to the administration of what, for the sake of brevity, I shall call "*substantive federal law*". Let me interject a few observations about terminology. The Supreme Court of Canada has not, itself, in the context of its decisions on constitutionally-permissible federal court jurisdiction, consecrated the term "substantive federal law". It has used these various terms: "applicable and existing federal law"; "existing federal laws"; "existing and applicable federal law". A Canadian federal court (the Supreme Court holds) can, constitutionally, exercise the "jurisdiction" Parliament purports to confer upon it, *if, but only if, such "federal" law exists*. In short, a "federal" court can administer only "federal" law.

How, then, as a matter of terminology, are we to designate the body of law which a court, — *any* court, — applies, in order to determine, on the legal merits, the right of any claimant to be granted that which he claims? The normal, and natural, word is "substantive" (in which concept I am prepared to include as much, or as little, "procedural" law as may be thought convenient). So (like other writers) I shall add the qualifying adjective "substantive" and employ the composite term "substantive federal law". "Substantive federal law" seems to me to be a fair and accurate description of what the Supreme Court has said the constitution requires in order that a Canadian federal court can, lawfully, *actually* exercise the judicial jurisdiction Parliament has purported to confer.

The contrast, in short, is between (1) "*jurisdictional*" rules, — rules which define the right, or power, to hear and determine a claim, — and (2) "*substantive*" rules, or rules which govern the way in which that claim is to be disposed of. The two being linked by s. 101 of the *Act* of 1867, — partly by the very words of that section, partly by (I think) judicial construction, — we must examine *both* (1) "*jurisdictional*" (or, if you prefer, "*prima facie jurisdictional*") rules, *and* (2) "*substantive*" rules, in order to dispose of the jurisdictional issue, and before continuing on (should that prove constitutionally possible) to the merits. But we must have two distinct terms if we are to address the two distinct questions, (1) Has Parliament *purported* to empower the federal court to hear and dispose of the claim in question? and (2) Is there law in conjunction with which that purported "jurisdiction" can operate, so as to permit, constitutionally, the exercise of the *purported, or prima facie, jurisdiction*? Hence the term, "jurisdictional" for the *rules which purport to define power to hear and determine*; "substantive" for the *rules which indicate the disposition of a claim on the merits*.

My apologies for the use of what is, after all, normal terminology, must seem obsessive. If so let me explain my anxiety. Though the Supreme Court insists that, before federal judicial jurisdiction can be constitutionally exercised, there must be both an adequate jurisdictional grant by some

statute governing the jurisdiction of the court, and also adequate (substantive) federal law, we have begun to see what to me was, from the beginning, a perfectly predictable phenomenon. *Statutes which on their face do no more than purport to confer jurisdiction to hear and determine claims are being read as enacting also the necessary "substantive" law federal law governing the proper determination of such claims.*² This expedient, though it will solve some problems, will create many others, not the least of which is that it will tend to make Canadian statutory interpretation completely haphazard and unpredictable. All the more, then, because a single provision can be read,—sometimes fairly, sometimes not,—as purporting, simultaneously, to (1) confer a jurisdiction to hear a claim, *and* (2) create the right to that which will be claimed,—all the more, I say, is it necessary to keep the two things conceptually distinct, and to ask, separately, whether each has occurred, and how.

Let us, then, consider, on principle and on authority, the position of Canadian federal courts.

Canadian courts,—that is, courts within the aggregate Canadian constitutional system,—are normally arranged in a bipartite classification: "federal courts" and "provincial courts". A tripartite classification is

² Ritchie J., giving the reasons for judgment of the Supreme Court of Canada in *Antares Shipping Corp. v. Ship Capricorn* [1980] 1 S.C.R. 553, 559 said this of s. 22(2)(a) of the *Federal Court Act*, R.S.C. 1970, Supp. II, c. 10: "With all respect, I am on the contrary of opinion that the provisions of s. 22(2)(a) of the *Act* constitute existing federal statutory law coming within the class of subject of navigation and shipping and expressly designed to confer jurisdiction on the Federal Court for claims of the kind here advanced by the appellant." The claim was for specific performance of an agreement to sell a ship and for damages for breach of that agreement. On its face, s. 22(2)(a) is a grant of judicial jurisdiction and not an enactment of substantive law. The treatment of s. 22(2), and its enumeration of items or heads of judicial jurisdiction, as enactments of substantive law, is explained by Le Dain J., in *Skaarup Shipping Corp. v. Hawker Industries Ltd* [1980] 2 F.C. 746 (C.A.) as enactments of substantive law by referential incorporation, under s. 42 of the *Federal Court Act*. The Court was concerned with an action by shipowners against ship repairers, seeking damages for breach of contract and tort in connection with the repair of a ship; in so far as the claim was based on contract the issue was whether the Federal Court could entertain the action under s. 22(2) (n) of the *Federal Court Act*, which deals with "any claim arising out of a contract relating to the construction, repair or equipping of a ship". Le Dain J., speaking for the Court (Pratte, Heald and Le Dain JJ.), said: "Once a particular claim is found to come within the terms of a head of jurisdiction in section 22(2), there is, in my opinion, necessarily substantive Canadian maritime law to support the claim. This results from the terms of the definition of Canadian maritime law in section 2, and, in particular, the words 'or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and Admiralty matters', and from the fact that, because of the terms of section 22(1) of the *Act* ('all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law'), the specific claims set out in section 22(2) amount to a declaration by Parliament of claims that are considered to be made under and governed by Canadian maritime law as defined by section 2 and made part of the laws of Canada by section 42."

however possible, under which some few and (since the abolition of the Privy Council appeal) unusual instances can be placed in a third category of courts neither “federal” nor “provincial”. I shall say something more of these unusual instances or special cases in due course, since they shed light on important questions of principle.

“Provincial courts” are those created by the legislatures of the several Canadian provinces under s. 92.14 of *The British North America Act, 1867*:

92.14 The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts,

or continued by s. 129 of that *Act* under their authority:

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

(The restriction as to pre-Confederation Imperial statutes was implicitly removed by the *Statute of Westminster, 1931*.³)

What, then, of “federal” courts? Though the concept is capable of some refinement, this working definition is simple enough and adequate for most purposes: a Canadian “federal court” is simply a court created by, or under, an Act of the Parliament of Canada. The federal legislative authority

³This is so despite the reservation contained in s. 7(1) of the *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.). In *British Coal Corporation v. The King* [1935] A.C. 500, 520 (P.C.) Viscount Sankey refers to s. 129 of *The British North America Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), along with the *Colonial Laws Validity Act, 1865*, 28 & 29 Vict., c. 63 (U.K.), as imposing “limitations” on the Dominion Parliament which were “abrogated by the Statute [of Westminster]”. His Lordship then goes on to deal with s. 7 of the *Statute of Westminster*. Again, in *A.-G. Ontario v. A.-G. Canada* [1947] A.C. 127, 146 (P.C.) (concerning the abolition of appeals to the Privy Council), Lord Jowitt reviewed the position as it had been before the *Statute of Westminster* and, having discussed the *Colonial Laws Validity Act, 1865*, noted that s. 129 of *The British North America Act, 1867*, “precluded any alteration of Imperial Acts”. At the conclusion of his judgment for the Board, which upheld the Canadian Parliament’s power to repeal the relevant pre-Confederation Imperial Acts — *i.e.*, the *Judicial Committee Acts, 1833*, 3 & 4 Wm. IV, c. 41; *1844*, 7 & 8 Vict., c. 69 (U.K.) — his Lordship discussed the effect of s. 7 of the *Statute of Westminster*. See the Supreme Court’s decision in the same case, [1940] S.C.R. 49, 53 *per* Duff C.J.C., 100 *per* Davis J., 114 *per* Kerwin J. See also *Nanaimo Community Hotel v. Board of Referees* [1945] 3 D.L.R. 225 (B.C.C.A.).

primarily relevant is, of course, s. 101 of *The British North America Act, 1867*:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

But it is at least arguable that there are other pertinent sources of federal legislative jurisdiction to create courts: the federal “residuary” power under s. 91 of the *Act* of 1867; the particular grants of substantive legislative authority in s. 91 and elsewhere in the *Act* of 1867 and its amendments; as regards territory not forming part of any province, s. 4 of *The British North America Act, 1871*; and possibly others as well. I shall consider these in due course.⁴

Lord Jowitt provides the most pithy summary of the general position:

It must be remembered that in the provincial courts the subject-matter of litigation may arise as well under Dominion as under provincial legislation. The judicial and legislative spheres are not coterminous, provincial courts determining all questions except those for which a special court is set up under s. 101, whether the rights of the parties spring from the common law or Dominion or provincial statutes.⁵

Perhaps it is as well to add Viscount Haldane’s reminder:

If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King’s Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.⁶

The “King’s Courts of justice”, in this context, are primarily and in the first instance the *provincial* courts, and, more particularly, the provincial *superior* courts (in the absence of a competently-established provincial inferior court properly invested — concurrently or exclusively — with the pertinent jurisdiction).

Although the Supreme Court of Canada, the “General Court of Appeal for Canada” contemplated in s. 101 of the *Act* of 1867, is a “federal court” within my definition, I shall not deal at large with it. It must suffice to say that the federal Parliament’s power to provide “from Time to Time” for the “Constitution, Maintenance, and Organization” of this Court allows Parliament to constitute a tribunal having exclusive and ultimate, appellate, civil and criminal jurisdiction, with respect to such matters as Parliament thinks fit, notwithstanding any contrary provincial laws.⁷ I cannot resist this

⁴ See *infra*, Part III.

⁵ *A.-G. Ontario v. A.-G. Canada*, *supra*, note 3, 151.

⁶ *Board v. Board* [1919] A.C. 956, 962-3 (P.C.), applied in *Three Rivers Boatman Ltd v. Conseil canadien des relations ouvrières* [1969] S.C.R. 607.

⁷ *Crown Grain Co. v. Day* [1908] A.C. 504; *A.-G. Ontario v. A.-G. Canada*, *supra*, note 3.

opportunity, however, to point to those provisions of the *Supreme Court Act*⁸ which empower that Court to amend pleadings⁹ and receive further evidence.¹⁰ I wonder whether any of its judges have considered how *these* provisions would stand, constitutionally, if dealt with on the same principles which their Lordships find proper to be applied to other Canadian federal courts. *Any* amendment, and *any* new evidence, must in strictness of law alter the issues, or claims, or basis of decision. But *pure appellate* jurisdiction, I submit, allows only the *reconsideration* of the case *exactly* as it stood below. Anything beyond that is, strictly speaking, the exercise of *original*, not appellate, jurisdiction, even when occurring incidentally to the exercise of appellate jurisdiction. Of course powers of amendment; — powers to take new evidence; — are very convenient. They save time and trouble for everyone. They save much cost to litigants. They are now, I should think, normal incidents of modern appellate courts. But can that matter? Do these very considerations avail litigants in other federal courts, when they desire to file counterclaims or third party claims, or claims amongst co-defendants, not founded on substantive federal law (itself a restricted concept of obscure extent)? These considerations do not (the Supreme Court holds) avail, because no incidental jurisdiction can constitutionally be permitted.¹¹ If this is true for one branch of s. 101, why not for both? I should gladly concede this, however: the Supreme Court of Canada can be in no *worse* position than any “Court for the better Administration of the Laws of Canada”. So the Supreme Court of Canada *can*, constitutionally, amend pleadings, and *can*, constitutionally, admit new evidence, — but *only* as pertains to claims

⁸ R.S.C. 1970, c. S-19.

⁹ Sections 50, 51.

¹⁰ Section 67.

¹¹ See, generally, *infra*, Parts II and III. Even before *Quebec North Shore Paper Co. v. Canadian Pacific Ltd* [1977] 2 S.C.R. 1054, the Privy Council and the Supreme Court had shown unwillingness to allow incidental judicial jurisdiction on matters governed by laws outside federal legislative authority. The new development imposed the further constraint that there must also be federal substantive law. In *R. v. Thomas Fuller Construction Co. (1958)* [1980] 1 S.C.R. 695, 712 *per* Pigeon J.: “It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the Superior Courts of the Provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional courts only for the better administration of the laws of Canada. Such establishment [of jurisdiction to hear third-party proceedings in the Federal Court of Canada, claiming relief under provincial contributory negligence legislation] is not therefore necessary for the administration of these laws. Consequently, I fail to see any basis for the application of the ancillary power doctrine which is limited to what is truly *necessary* for the effective exercise of Parliament’s legislative authority. If it is considered desirable to be able to take advantage of provincial legislation on contributory negligence which is not meant to be exercised outside the courts of the province, the proper solution is to make it possible to have those rights enforced in the manner contemplated by the general rule of the Constitution of Canada, that is before the Superior Court of the Province.”

on *substantive federal laws, and no further*. I shall watch with interest the progress of counsel who in the Supreme Court objects to amendments, or to new evidence, on these grounds.

Let me close this introduction by returning, briefly, to the summer of 1976. I first heard by word of mouth of the *Quebec North Shore Paper* decision, imposing upon Canadian federal courts, as a constitutional condition of their jurisdiction, the existence of substantive federal law. Shortly afterwards I read the judgment, and the following autumn talked about it at dinner with a group of the maritime law bar. If I now give you these first impressions, it is not to claim special prescience, but on the contrary to argue that the problems to which the new doctrine has given rise were largely foreseeable from the start, though I see no evidence in the law reports that they were either foreseen or taken into account when the doctrine was laid down. What is more, it seems to me that they are still not fully understood. I leave you to judge how far my prognostications have proved sound. They were these.

1. Even accepting the basic premise that purely provincial laws were *not* "Laws of Canada", and could *not* be enforced in Canadian federal courts, there would be enormous confusion, much of it unnecessary, about what were "Laws of Canada".

(The Supreme Court, I had noticed, treated the action before it as if the pertinent articles of the *Civil Code* were *provincial* statutory provisions. No consideration was given to whether the case could be disposed of on the basis that all the law necessary to create a cause of action was in truth "pre-Confederation" law, continued by s. 129 of the *Act* of 1867 distributively under federal *and* provincial jurisdiction, according to their respective legislative authorities. Yet the Court acknowledged that in *some* cases, at least, the common law could be federal law. The obvious test cases seemed to me ones where, on principle and authority, a common law rule, "received" English statute, or pre-Confederation enactment, created a right, or a right of action, which, on principle, a *provincial legislature could not destroy*. The first examples which occurred to me were connected with exclusive federal legislative authority with respect to "Banking" and "Copyrights": the right of a depositor against a banker to recover the sum deposited; or the old "common law" copyright in unpublished manuscripts. How could the laws conferring *these* rights be said to be "*provincial laws*"? Yet the province can, generally, legislate as to the contract of loan; and a bank deposit is a loan of money.)

2. Great strain would be placed on the language of statutes. The courts would have a strong inducement to find substantive law to have been created whether the terms of an enactment admitted of it or not. Statutes on their face doing no more than conferring jurisdiction to hear and determine claims would probably be read as enacting substantive law as to the disposition of

those claims. It might become a very serious problem to know any longer when a statute created a right of action and when it did not. There would be a grave cost in certainty and predictability of the law, and therefore in the capacity of counsel to advise clients.

3. Both the legislature and the judiciary being engaged in creating substantive law in order to “feed” or “nourish” (in Chief Justice Laskin’s language) federal court jurisdiction, many questions would arise as to the nature and scope and incidents of the causes of action thereby created (questions for example as to evidence; limitations; scope of liability and rights of contribution; uniformity as amongst provinces) *and the extent of supersession of other rights of action*. The general interest of a legal system being economy and simplicity, the new doctrine would on the contrary encourage duplication and multiplicity of laws and rights of action.

4. There is no reason why Parliament should not enact substantive law *precisely in order* to enable laws on matters within its jurisdiction to be administered in its courts. Yet if it tried to do too much of it, some judges at least would start having second thoughts, and begin to ask whether that was not a colourable motive for enacting statutes! Suppose, for example, that Parliament simply enacted that, every time it conferred jurisdiction on the Federal Court of Canada, it should be understood as having simultaneously enacted substantive law. How would the judges react to that? Suppose that it tried this in a more sophisticated form,—creating phantom or sterile “causes of action”, designed to be administered in federal courts, with no inconvenient by-products. [See Appendix.] How would the courts react to that?

5. The federal courts, and perhaps ultimately other courts (having to consider how far laws administered by them were superseded), would be burdened with a substantial volume of case law arising from the new doctrine. The Supreme Court itself would probably feel itself obliged to give leave to appeal in many of these cases especially if it disagreed with them. Probably there would be at least a few “s. 101” cases in the Supreme Court of Canada every year.

6. Litigation in the federal courts would become more costly and uncertain than ever, both as to jurisdiction and as to merits. If the Supreme Court of Canada will not retrace its footsteps we have (I believe) only seen the *beginning* of this burgeoning field of litigation. Fresh expedients adopted will produce not the expected cure but merely more difficulties. Patchwork will not do; only outright repudiation of the new doctrine will provide satisfactory results.

I. The *Consolidated Distilleries* Cases: Legislative Jurisdiction over the Subject-Matter as the Constitutional Test of Permissible Federal Judicial Jurisdiction.

Before 29 June 1976, when the Supreme Court of Canada rendered its landmark decision in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd*¹² the leading cases on the constitutional position of Canadian federal courts were, of course, two arising from certain bonds given, in February 1924, by Consolidated Distilleries Ltd to the Crown in right of Canada.

In the principal actions,¹³ the Crown sought judgment on the bonds against Consolidated Distilleries.

In third-party proceedings,¹⁴ Consolidated Distilleries sought judgment against Consolidated Exporters Corp., under an alleged agreement whereby the latter agreed to indemnify the former against any loss, damages or expenses which the former might suffer or be put to by reason of these bonds.

The bonds had been given "in pursuance of the provisions of the Inland Revenue Act"¹⁵ of Canada, "in respect of the export of certain spirits which had, pursuant to... the said Act... been deposited in an excise bonding warehouse..., and on which, accordingly, no excise duty had been paid".¹⁶ The spirits were removed from the warehouse for export. The bonds were accordingly given to ensure that export actually took place: indeed they were given in penal sums equal to twice the duty payable.

In the principal actions, the Privy Council¹⁷ agreed with the Supreme Court of Canada¹⁸ and the Exchequer Court of Canada¹⁹ that the Exchequer Court of Canada had, on the true construction of its governing federal statute,²⁰ judicial jurisdiction to hear and determine the Crown's claim; and also that the Parliament of Canada had the legislative authority to empower

¹² *Ibid.*

¹³ *Consolidated Distilleries Ltd v. The King* [1933] A.C. 508 (P.C.), *rev'g* (*sub nom. Consolidated Distilleries Ltd and Hume v. The King; Consolidated Distilleries Ltd and Smith v. The King*) [1932] S.C.R. 419, *aff'g* *The King v. Consolidated Distilleries Ltd* [1931] Ex. C.R. 85. A proceeding concerning a stay of execution is reported at [1931] Ex. C.R. 125.

¹⁴ *The King v. Hume; Consolidated Distilleries Ltd v. Consolidated Exporters Corp.* [1930] S.C.R. 531, *aff'g* (*sub. nom. The King v. Consolidated Distilleries Ltd and Consolidated Exporters Corp.*) [1929] Ex. C.R. 101.

¹⁵ R.S.C. 1906, c. 51.

¹⁶ The words are those of Lord Russell in *Consolidated Distilleries Ltd v. The King*, *supra*, note 13, 512. The phrase "in pursuance of" may be noted. The bonds were given to comply with requirements of the *Act*; but it is not said that the *Act* created the right of action upon the bonds.

¹⁷ *Consolidated Distilleries Ltd v. The King*, *supra*, note 13.

¹⁸ *Consolidated Distilleries Ltd and Hume v. The King; Consolidated Distilleries Ltd and Smith v. The King*, *supra*, note 13.

¹⁹ *The King v. Consolidated Distilleries Ltd*, *supra*, note 13.

²⁰ *Exchequer Court Act*, R.S.C. 1927, c. 34, s. 30.

the Exchequer Court to do so. It may be remarked that, in the result, the Privy Council reversed the judgment of the Supreme Court of Canada, as it found, on the merits, that, for reasons not now material (but amounting in substance to the fact that the spirits had indeed been exported, even if not in accordance with the undertaking as to destination, and the bond in fact cancelled) no liability to the Crown existed.

In the third-party proceedings, on the other hand, the Supreme Court of Canada²¹ agreed with the Exchequer Court of Canada²² in construing in the light of the legislative authority of Parliament the Exchequer Court rules providing for the impleading of third persons: and in concluding, on that basis, that the Exchequer Court of Canada had not judicial jurisdiction to hear and determine the claim by Consolidated Distilleries against Consolidated Exporters. This proceeding was accordingly dismissed.

In defining the judicial jurisdiction constitutionally exercisable by the Exchequer Court of Canada under s. 30(d) of the *Exchequer Court Act*²³ then in force, Lord Russell of Killowen, who spoke for their Lordships in the principal action, *Consolidated Distilleries Ltd v. The King*,²⁴ employed the phrase for which the case has become known: "some subject-matter, legislation in regard to which is within the legislative competence of the Dominion".²⁵ The literal meaning of this phrase gives no difficulty, and it seems easy enough to show that it was intended to mean exactly what it says. First let me quote s. 30 in full:

30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada

- (a) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information *in rem*, and as well in *qui tam* suits for penalties or forfeiture as where the suit is on behalf of the Crown alone;
- (b) in all cases in which it is sought at the instance of the Attorney General of Canada, to impeach or annul any patent of invention, or any patent, lease or other instrument respecting lands;
- (c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; and
- (d) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

²¹ *The King v. Hume; Consolidated Distilleries Ltd v. Consolidated Exporters Corp.*, *supra*, note 14.

²² *The King v. Consolidated Distilleries Ltd and Consolidated Exporters Corp.*, *supra*, note 14.

²³ R.S.C. 1927, c. 34.

²⁴ *Supra*, note 13.

²⁵ *Ibid.*, 522.

The following propositions are laid down in black and white by Lord Russell of Killowen. Indeed I construct them almost exclusively of quotations, simply taking excerpts and arranging them in a convenient order.

1. These were "actions to enforce the liability on bonds executed in favour of the Crown in pursuance of a revenue law enacted by the Parliament of Canada."²⁶
2. "It was conceded by the appellants (and rightly, as their Lordships think) in the argument before the Board, that the Parliament of Canada could, in exercising the power conferred by s. 101 [of the *Act of 1867*], properly confer upon the Exchequer Court jurisdiction to hear and determine"²⁷ such actions.

²⁶ *Ibid.*, 520. The description of the proceedings as being *in pursuance* of the federal statute seems carefully-chosen and recurs in the judgment of the Privy Council and in those of the courts below. Thus Lord Russell, *supra*, note 16 and accompanying text, uses it in his opening statement of the facts. In the Supreme Court of Canada, Duff J., speaking for the bench of only four judges who participated in the judgment, uses the similar phrase "obligation contracted *pursuant to* the provisions of a statute of that Parliament or of a regulation having the force of statute", *supra*, note 13, 422 [emphasis added]. MacLean J., in the Exchequer Court of Canada, *supra*, note 13, 88 had said that "the subject matter of this action arises directly from legislation enacted by the Parliament of Canada in respect of Excise".

²⁷ *Ibid.*, 520. In the Supreme Court of Canada, Duff J., speaking for himself, Rinfret and Lamont JJ., said, *supra*, note 13, 422: "I find no difficulty in holding that the Parliament of Canada is capable, in virtue of the powers vested in it by section 101 of the *British North America Act*, of endowing the Exchequer Court with authority to entertain such actions as these. I do not doubt that 'the better administration of the laws of Canada', embraces, upon a fair construction of the words, such a matter as the enforcement of an obligation contracted pursuant to the provisions of a statute of that Parliament or of a regulation having the force of statute. I do not think the point is susceptible of elaborate argument, and I leave it there."

Anglin C.J.C., who agreed (though he dissented as to cross appeals concerning the trial judge's refusal of interest), wrote, *supra*, note 13, 421: "I never entertained any doubt whatever as to the jurisdiction of the Exchequer Court in these cases to hear these appeals. If authority to hear and determine such claims as these is not something which it is competent for the Dominion, under s. 101 of the *British North America Act*, to confer upon a court created by it for "the better administration of the law of Canada", I would find it very difficult to conceive what that clause in the *B.N.A. Act* was intended to convey."

In the Exchequer Court of Canada at trial, Maclean J. had held, *supra*, note 13, 88-9: "There can be no doubt but that the Parliament of Canada had jurisdiction to legislate in respect of Customs and Excise, and the subject-matter of this action directly arises from legislation enacted by the Parliament of Canada in respect of Excise". After distinguishing the decision of the Supreme Court of Canada in the third-party proceedings, Maclean J. continued: "There can be no question as to the competency of the Parliament of Canada to legislate in respect of the subject of Excise, and I do not think there is any doubt as to the jurisdiction of this court in any proceedings arising under the *Excise Act*. In this particular matter the bonds sued upon were required by a law enacted by the Parliament of Canada in respect of a matter in which it had undoubted jurisdiction. In my opinion, the judgment of the Supreme Court of Canada is, without qualification whatever, against the contention of the defendants."

3. "The point as to jurisdiction accordingly resolves itself into the question whether the language of the Exchequer Court Act upon its true interpretation purports to confer the necessary jurisdiction."²⁸ "Each case as it arises must be determined in relation to its own facts and circumstances."²⁹
4. "In regard to the present case their Lordships appreciate that a difficulty may exist in regard to sub-s. (a). While these actions are no doubt 'cases relating to the revenue,' it might perhaps be said that no law of Canada is sought to be enforced in them."³⁰
5. "Their Lordships, however, have come to the conclusion that these actions do fall within sub-s. (d)... They think that in view of the provision of the three preceding subsections the actions and suits in sub-s. (d) must be confined to actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion. So read, the sub-section could not be said to be ultra vires, and the present actions appear to their Lordships to fall within its scope."³¹
6. "The Exchequer Court accordingly had jurisdiction in the matter of these actions."³²

I draw your attention most particularly to the reasons given by Lord Russell of Killowen for *refusing to rely on sub-section (a)* as the basis of the Exchequer Court's jurisdiction over these proceedings. There was (Lord Russell said—so responding to counsel, who had argued the point) *doubt that any law of Canada was being enforced* in the actions. Therefore his Lordship relied on sub-section (d), because the suit (which was on its face a suit "of a civil nature at common law in which the Crown is plaintiff") related

²⁸ *Supra*, note 13, 520.

²⁹ *Ibid.*, 521. This statement directly follows their Lordships' reservation that they are anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by s. 30 of the *Exchequer Act*, beyond what is necessary for the decision of this particular case.

³⁰ *Ibid.*, 511 *per* Lord Russell, rejecting counsel's argument: "the bonds having been given in compliance with a law of Canada, actions to enforce them were actions to enforce that law." See also the passages quoted, *infra*, note 31.

³¹ *Ibid.*, 521-2. In the Supreme Court of Canada, Duff J. had said, *supra*, note 13, 422: "As to the jurisdiction of the Exchequer Court, in so far as that depends upon the construction of the *Exchequer Court Act*, something might be said for the view that these cases are not within the class of cases contemplated by subsection A of section 30; but that is immaterial because they are plainly within subsection D."

Anglin C.J.C. had said, *supra*, note 13, 421: "That the Dominion Parliament intended to confer such jurisdiction on the Exchequer Court, in my opinion, is clear beyond argument, the case probably falling within clause (a); but, if not, it certainly is clearly within clause (d) of s. 30 of the *Exchequer Court Act*."

³² *Ibid.*, 522.

to "some subject-matter, legislation in regard to which is within the legislative competence of the Dominion." So read, Lord Russell insisted, the sub-section *could not be said to be ultra vires*. In other words, on the terms of sub-section (d), — *by contrast with sub-section (a)*, — enforcement of any "laws of Canada", — let alone federal *statute* law, — was *utterly irrelevant*. But sub-section (d) *was no less constitutionally valid on that account*.

Whether the Privy Council was right or wrong may of course quite legitimately be debated. What their Lordships actually *did* decide admits of little discussion, particularly when the report of argument is read. Their Lordships upheld the constitutional validity of the power given by federal statute to a Canadian federal court to hear and determine *an action at common law on a bond given to the federal Crown pursuant to federal statute*.

It is, in my view, idle to deny that the Privy Council's actual *ground* of decision in *Consolidated Distilleries Ltd v. The King*³³ was that the *subject-matter of the litigation was within federal legislative jurisdiction* — the presence or absence of substantive federal law being held irrelevant. Nor can anything, save confusion, be gained by trying to explain away that case on its facts. Better, if need be, to overrule it frankly. Certainly the language of the pertinent statutory provisions, as they were collected and quoted by their Lordships from the *Inland Revenue Act* and *Regulations*, affords no plausible basis for finding a federal *statutory* cause of action on the bonds. Whether or not, under the *Quebec North Shore Paper* doctrine, a common law cause of action can ever suffice: and whether, if it can, the circumstances of the *Consolidated Distilleries* case did and do provide an instance where a common-law cause of action indeed suffices for recovery in a federal court, — these are difficult questions which I shall address in due course. I would only note now that, about six months after *Quebec North Shore Paper*,³⁴ the Supreme Court of Canada, dealing with a construction bond in *McNamara Construction (Western) Ltd v. The Queen*,³⁵ reaffirmed the Privy Council's *result* in *Consolidated Distilleries* as correct, though distinguishing and explaining it in a way that I find, in all honesty, — I am not using a pejorative epithet, — unintelligible — seeming however to *stop short of asserting that in the earlier case there had been a federal statutory cause of action*.³⁶ But in law, as in life, one cannot have one's spirits and drink them too.

³³ *Ibid.*, 508.

³⁴ *Supra*, note 12.

³⁵ [1977] 2 S.C.R. 654, *rev'g* [1976] 2 F.C. 292 (C.A.).

³⁶ The explanation of *Consolidated Distilleries*, and the distinction drawn between the circumstances of that case and those in *McNamara Construction* may be found, *ibid.*, 633 *per* Laskin C.J.C.

Before leaving the Privy Council's disposition of the principal actions in *Consolidated Distilleries*, I would remark upon the caution exercised, through Lord Russell, by their Lordships, who declared themselves to be "anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by s. 30, beyond what is necessary for the decision of this particular case."³⁷ Their Lordships' construction of sub-section (d) of s. 30, confining it, in the context of the three preceding subsections, to "actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion",³⁸ of course leaves open the possibility that there could be such a thing as a Crown suit involving a subject-matter *outside* federal legislative authority, and as to which the jurisdiction of the federal court would be open to question both on statutory and constitutional grounds.

It does seem to me, and the point was taken in argument before the Privy Council,³⁹ that *all* rights of action by the Crown in right of Canada are *necessarily* "Public... Property" within the meaning of item no. 1A (formerly item no. 1) of s. 91 of *The British North America Act, 1867*:⁴⁰ since a proprietary right, and the totality of the remedies to which it gives rise, are correlative.⁴¹ If this is so, the Parliament of Canada would *always* have legislative authority with respect to all the Crown's legal remedies, since they would be "Public... Property" and so subject to its legislative authority. Possibly the Privy Council wished to leave this open. Possibly, too, since the Parliament of Canada, being restricted in its legislative authority, cannot simply create in favour of the federal Crown any legal rights and remedies it pleases, the Privy Council did not wish to broach the problems created by proceedings which might be brought by the federal Crown in a federal Court to enforce statutory provisions which proved to be *ultra vires*.⁴² In such

³⁷ *Supra*, note 13, 521.

³⁸ *Ibid.*, 522.

³⁹ See the argument for the Crown, *ibid.*, 511 *per* Rowell, K.C., Frank Gahan, and Plaxton, K.C. (who are mistakenly described as appearing for the "appellants"): "The bonds being the property of the Dominion, the Dominion had exclusive power to legislate as to the method of enforcing them: *Burrard Power Co. v. The King*, [1911] A.C. 87 (P.C.)." Tilley, K.C., for the appellants, replied, *ibid.*, 512: "The legislative power of the Dominion under s. 91, head 1, of *The British North America Act, 1867*, with regard to 'the public debt and property' does not extend to all property which it may acquire."

⁴⁰ "The Public Debt and Property", which appeared as item no. "1" in *The British North America Act, 1867*, was renumbered "1A" by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.), which added a new item or head, numbered "1".

⁴¹ *Ashby v. White* (1704) 2 Ld. Raym. 938, (1702) 3 Ld. Raym. 320 (pleadings), 92 E.R. 126, 92 E.R. 710 (Q.B.); *rev'd* (1705) 1 Bro. P.C. 62, 1 E.R. 417 (H.L.). See also *Ashby v. White* (1704-05) 14 How. St. Tr. 695 (H. Com., H.L., Q.B.).

⁴² What, for example, was the effect of the dismissal by the Supreme Court of Canada of the proceedings in *MacDonald v. Vapor Canada Ltd* [1977] 2 S.C.R. 134? After a statement of the nature of the proceedings, Laskin C.J.C., speaking for the Court, takes the point about the jurisdiction of the Federal Court, and says at p. 139: "It is trite law that the

cases, it might be that a very strict (if perhaps purist and even pedantic) reading of s. 101 of the *Act* of 1867 would require that the proceedings be dismissed, not on the merits, but for want of judicial jurisdiction to entertain them at all! We can only speculate as to its reasons; but the Privy Council stopped short of affirming, *tout court*, the constitutional validity of subsection (d) of s. 30 of the then *Exchequer Court Act*. Instead it affirmed its validity with the qualification about legislative *vires* over the subject-matter of the litigation.

Taken by itself, the Privy Council's decision on the principal actions in *Consolidated Distilleries*, whilst affirming that Parliament *could* create courts to hear and determine "actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion",⁴³ would *not* have established that Parliament could *never* go any further. In the *Board of Commerce Case*,⁴⁴ the Privy Council had held *ultra vires* federal statutes creating a "Board of Commerce" with far reaching powers to control trading. These statutes were held outside federal legislative authority arising under the "residuary" power, as well as outside the federal powers to regulate trade and commerce and to enact criminal law (ss. 91.2 and 91.27 of the *Act* of 1867). This being once decided, s. 101 could obviously avail nothing; and Lord Haldane, for the Board, said:

For analogous reasons their Lordships think that s. 101 of the *British North America Act*, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.⁴⁵

These observations plainly show that Parliament has not unrestricted authority, under s. 101 of the *Act* of 1867, to establish courts of any and every kind. But they do not carry the matter very far. In particular, they give no guidance as to how far, when Parliament does create a *bona fide* "judicial establishment [as] a means to some end competent to the latter", it may

Federal Court, being a Court established pursuant to s. 101 aforesaid 'for the better administration of the laws of Canada', can only be endowed with such jurisdiction as flows from laws competently enacted by Parliament." His Lordship then points out that the question of the validity of the impugned provisions would arise, at p. 140: "even if it were the provincial superior Courts that were charged with enforcement of the substantive provisions... . Legislation sought to be enforced in provincial Courts must, of course, be legislation which it was competent for the enacting Legislature to pass". The case then proceeds with consideration of the construction and validity of the substantive provisions.

⁴³ *Supra*, note 13, 522.

⁴⁴ [1922] 1 A.C. 191 (P.C.).

⁴⁵ *Ibid.*, 199.

confer incidental jurisdiction, such as jurisdiction to hear and determine pertinent counterclaims, issues amongst co-defendants, and claims against third persons.

Before *Quebec North Shore Paper*, then, by what authority could it be said that Parliament was constitutionally excluded from confiding to federal courts the exercise, even incidentally to the disposition of litigation properly before them, of jurisdiction over proceedings founded on laws lying under exclusive provincial legislative authority?

The authority, such as it was, consisted essentially of the Supreme Court's decision in the third-party proceedings in the *Consolidated Distilleries* case. In *The King v. Hume; Consolidated Distilleries Ltd v. Consolidated Exporters Corp.*,⁴⁶ decided about two years before it dealt with the principal actions, the Supreme Court of Canada affirmed a judgment of the Exchequer Court,⁴⁷ dismissing third-party proceedings by Consolidated Distilleries Ltd against Consolidated Exporters Corp.; the former claiming, in virtue of an alleged contractual agreement, indemnity from the latter against the Crown's claim.

Undeniably the third party proceedings were dismissed by the Supreme Court on constitutional grounds. But s. 101 was applied to the *construction* of the Exchequer Court rules which allowed third parties to be impleaded; and where constitutional limitations are adduced in aid of construction, the resulting decision is not always treated as a conclusive precedent on the matter of *vires*.⁴⁸

Still, the third-party proceedings *were* dismissed on the basis of the constitutional limitations upon Parliament's power under s. 101 of *The British North America Act, 1867*, and I am not concerned to quibble about the status of the decision as a precedent. Anglin C.J.C. spoke for a majority of the Supreme Court of Canada, consisting of himself and Rinfret, Lamont, and Cannon J.J.; Newcombe J. dissented vigorously. The Chief Justice's reasons were these: I quote them fully because so much is made to turn on them:

In construing the rules of the Exchequer Court, however, attention must always be paid to s. 101 of the *British North America Act (1867)*, which authorized the creation of that Court, and to the terms in which Parliament has conferred jurisdiction on it. It is not conceivable that, by mere rule of court, it should have been intended to enlarge the jurisdiction thus conferred, so as to embrace matters which it would not be otherwise competent for that Court to hear and determine. S. 101 of the *British North America Act* reads as follows:

⁴⁶ *Supra*, note 14.

⁴⁷ *The King v. Consolidated Distilleries Ltd and Consolidated Exporters Corp.*, *supra*, note 14.

⁴⁸ See, e.g., *Gregory & Co. v. The Quebec Securities Commission* [1961] S.C.R. 584; it is not clear that this necessarily depends on non-compliance with requirements to give notice of constitutional questions.

The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

It is to be observed that the "additional courts", which Parliament is hereby authorized to establish, are courts "for the better administration of the laws of Canada." In the collocation in which they are found, and having regard to the other provisions of the *British North America Act*, the words, "the laws of Canada," must signify laws enacted by the Dominion Parliament and within its competence. If they should be taken to mean laws in force anywhere in Canada, which is the alternative suggested, s. 101 would be wide enough to confer jurisdiction on Parliament to create courts empowered to deal with the whole range of matters within the exclusive jurisdiction of the provincial legislatures, including "property and civil rights" in the provinces, although, by s. 91(14) of the *British North America Act*,

The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts

is part of the jurisdiction conferred exclusively upon the provincial legislatures.⁴⁹

After quoting s. 30 of the *Exchequer Court Act* (which, the Chief Justice asserts "outlines [the Exchequer Court's] general jurisdiction", and *as to the validity of which, it may be remarked, he suggests no doubt*) his Lordship continues:

While there can be no doubt that the powers of Parliament under s. 101 are of an overriding character, when the matter dealt with is within the legislative jurisdiction of the Parliament of Canada, it seems equally clear that they do not enable it to set up a court competent to deal with matters purely of civil right as between subject and subject. While the law, under which the defendant in the present instance seeks to impose a liability on the third party to indemnify it by virtue of a contract between them, is a law of Canada in the sense that it is in force in Canada, it is not a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it. The matter is purely one of exclusive provincial jurisdiction, concerning, as it does, a civil right in some one of the provinces (s. 92(13)).

It would, therefore, in our opinion, be beyond the power of Parliament to legislate directly for the enforcement of such a right in the Exchequer Court of Canada, as between subject and subject, and it seems reasonably clear that Parliament has made no attempt to do so. What Parliament cannot do directly, by way of conferring jurisdiction upon the Exchequer Court, that court cannot itself do by virtue of any rule it may pass. It follows that, even if, *ex facie*, rule 262 of the Exchequer Court might be broad enough to include a third party procedure in a case such as that now before us, it cannot have been intended to have any such effect, since so to construe it would be to attribute to the Exchequer Court an intention, by its rules, to confer upon itself a jurisdiction which it would transcend the power of Parliament to give to it.

On this short ground the present appeal should be dismissed.

While it might conceivably be convenient in some cases to have the Exchequer Court exercise, by way of third party procedure, a jurisdiction such as that here invoked, it certainly cannot be said that it is "necessarily incidental" [*City of Montreal v. Montreal*

⁴⁹ *Supra*, note 14, 534-5.

Street Railway [1912] A.C. 333, 344-6 (P.C.)] to the exercise by that court of the jurisdiction conferred upon it by Parliament, that it should possess power to deal with such matters, even where they arise out of the disposition of cases within its jurisdiction. On the other hand, in many cases, and not at all improbably in the present case, it would be highly inconvenient that the Crown should be delayed in its recovery against the defendant liable to it while that defendant litigated with the third party a claim — possibly very contentious — to be indemnified by it.⁵⁰

What, then, does the Supreme Court decide on the third-party proceedings? I urge you to examine the Chief Justice's words with the utmost care. He begins by speaking in terms of two categories.

Anglin C.J.C. contrasts (1) "laws enacted by the Dominion Parliament *and within its competence*" with (2) "[laws on] the whole range of matters *within the exclusive jurisdiction of the provincial legislatures*" [emphasis added]. The obscurity of this passage comes chiefly from the ambiguity of the word "and": is it, here, conjunctive or disjunctive?

Matters (or laws on matters) within exclusive, or concurrent, *federal* legislative authority are obviously, — are *by hypothesis*, — not in the latter of two contrasted categories. For that which is federal cannot be exclusively provincial. So laws on matters within exclusive or concurrent federal authority must either fall into the *former* of Chief Justice Anglin's two categories, or else they are *not contemplated at all* in the passage making this contrast. The first hypothesis seems more plausible if not demonstrable.

But when his Lordship goes on to speak of "a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it", the meaning of the Court's judgment becomes much clearer. The phrase "Laws of Canada" in s. 101 of the *Act* of 1867 must then, apart from federal statutory enactments, embrace *at least* such "pre-Confederation" laws as are continued, by s. 129 of the *Act* of 1867, under exclusive, or even concurrent, federal legislative authority. The word "and", in the first of the two contrasted categories, must then be disjunctive.⁵¹ "And" means that the two classes are added: *laws enacted by the Dominion Parliament and [laws within] its competence*. Alternatively, Anglin C.J.C. has simply restated his criterion in wider terms, making "power to amend" the test of what is a law of Canada.

The difference between the criterion laid down by the Privy Council in 1933, and that laid down by the Supreme Court in 1932 would then come to this. The Privy Council holds that Parliament can empower Canadian federal courts to hear and determine actions and suits "in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion". The Supreme Court holds *at least* that

⁵⁰ *Ibid.*, 535-6.

⁵¹ "Or", a word which can present similar difficulties, would perhaps have been more suitable here.

Parliament can empower Canadian federal courts to hear and determine actions and suits founded upon “a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it”. It is possible to interpret these two definitions in such a way that they are not precisely co-extensive, but I do not think that exegesis of the opinions can clarify the matter much further. If stress is laid on Anglin C.J.C.’s phrase denying that “Laws of Canada” under s. 101 cover “the whole range of *matters within the exclusive jurisdiction* of the provincial legislatures” [emphasis added], the two definitions can be understood as covering more or less the same ground.

On the assumption that “Laws of Canada” under s. 101 of the *Act* of 1867, whatever they *include*, do *not* include laws relied on in actions or suits *outside* the Privy Council’s criterion, — *i.e.*, actions and suits in relation to some subject-matter, legislation in regard to which is *not* within the legislative competence of the Dominion, the following must be considered for *possible* inclusion.

Each of the following categories is defined as including any rule or body of rules, which expressly or impliedly, referentially or otherwise, is incorporated therein or enacted or given force of law thereby; and, where applicable, the old laws of New France can be treated as falling into categories 2, 3 and 4:

1. *Canadian federal statutory enactments*
Acts of the Parliament of Canada and enactments competently made thereunder.
2. *Common law continued under federal legislative authority*
Rules of the common law (including those of equity), insofar as these are, by s. 129 of the *Act* of 1867, continued under federal legislative authority, exclusive or concurrent.
3. *Local pre-Confederation enactments continued under federal legislative authority*
Pre-Confederation statutory enactments of the predecessor provinces or territories, insofar as these were, by s. 129 of the *Act* of 1867, continued under federal legislative authority, exclusive or concurrent.
4. *“Received” “English” statutes continued under federal legislative authority*
Statutory enactments of England, of Great Britain, or of the United Kingdom, in force in Canada, not *proprio vigore* as exercises of the supreme, Imperial, legislative power, *but only “received”, in virtue of common law rules or statutory enactments* (normally as part of the *corpus* of “English law” in force) and *subject to repeal or amendment by local or “colonial” legislatures*:—the whole insofar as the said

enactments were, by s. 129 of the *Act* of 1867, continued subject to federal legislative authority, exclusive or concurrent.

5. *Imperial statutes subject to federal legislative authority*

Statutory enactments of England, of Great Britain, or of the United Kingdom, in force in Canada *proprio vigore*, that is to say as direct exercises of the authority of the "Imperial" Parliament, but which the Parliament of Canada now has (or at some material time had) authority, exclusive or concurrent with that of the Provinces, to amend, repeal or alter by unilateral federal statute; such enactments being of two possible classes:

- (i) those enacted before Confederation, and accordingly contemplated by the words in parentheses in s. 129; and
- (ii) those enacted since Confederation.

6. *Provincial enactments applying to matters within federal legislative authority*

Enactments of the legislatures of the Canadian provinces or made under their authority, insofar as they apply to matters under exclusive or concurrent federal legislative authority, (that is, save as the Parliament of Canada, in virtue of any exclusive or concurrent legislative power, provides otherwise).

There is a seventh category that I would include within "Laws of Canada" under s. 101 of the *Act* of 1867, but which requires that this phrase be read as covering at least every law in the Canadian constitutional system which is *not* a law of a *province* (in the sense of a law which a province can amend, repeal, or alter):

7. *Imperial statutes and other rules of law subject to neither unilateral federal nor unilateral provincial legislative authority*

Statutory enactments of England, of Great Britain, or of the United Kingdom, and other statutory or non-statutory rules of law, in force in Canada,

- (i) which cannot be repealed or altered either by the Parliament of Canada or by the legislature of one or more provinces, or
- (ii) which can be repealed or altered by the Parliament of Canada, but only with the concurrence of the legislatures of one or more provinces.

Let me make a few observations on this classification, which, I hope, is one which can assist orderly analysis and discussion.

In particular, I am concerned to distinguish the question, *What in truth is provincial law?*, from the question, *Can provincial law ever be law "of Canada" within s. 101 of the Act of 1867?*

Even if the second question is to be answered in the negative, we should have much less confusion than we do if more care and attention were devoted to the first question, which seems to me to have been treated rather too summarily. Indeed the first question seems to have been obscured by the debate on the second.

As to the second question, then, when once the decision has been taken to read the word "Canada" in s. 101 of the 1867 *Act* to mean the *federal jural entity*, not the *sovereign nation state*, I readily concede that he who proposes to treat provincial laws as "Laws of Canada", even for limited purposes only, must admit that he has retreated at least from the core to the margins of the concept of a law "of Canada". Indeed, as we shall see, the Supreme Court of Canada now takes the position that it is altogether *impermissible* to treat a provincial law, when operating of its own force, as a law "of Canada" within s. 101 *even when the provincial law applies to federal matters* (by which I mean matters lying within the exclusive or concurrent legislative authority of the Parliament of Canada, and as to which the Parliament of Canada can legislate as it pleases). As we shall see, *Quebec North Shore Paper* decides, if it decides anything, that the mere power of the Canadian Parliament to displace a provincial law, — to derogate from it, or to exclude its application altogether, in some or all circumstances, — does *not* make it a federal law, *even in its application to those matters from which the Parliament of Canada can exclude it at will*.

Yet even if this be so, — and at this stage I am concerned neither to approve nor to dispute the proposition, — *we must still decide what is a provincial law*.

It is here, on the first question, that care and attention are more than ever needed.

Whatever else the concept of "provincial law" may or may not embrace, *provincial statutory enactments* are clearly the purest instances of provincial law. For whatever *else* they may or may not be, *provincial statutory enactments are undeniably provincial law*. I have put them in a category by themselves, not only because they are the clearest instances of "provincial law", but because they are obviously the most sensitive *vis-à-vis* s. 101 of the 1867 *Act*. In reading *Quebec North Shore Paper*, indeed, I find it difficult to escape the feeling that the doctrine laid down in that case was addressed, at least in intention, essentially to provincial statute law.⁵² In that case,

⁵²See, e.g., the observations in *Quebec North Shore Paper*, *supra*, note 11, 1065 *per* Laskin C.J.C. that "when provincial law is applied to disputes involving persons or corporations engaged in enterprises which are within federal competence it applies on the basis of its independent validity". This, and the subsequent discussion, is true of provincial legislation. But the laws continued by s. 129 of the *Act* of 1867, and subsequent Imperial statutes, are law independently of any kind of provincial action; and, indeed, in the case of laws of the classes continued by s. 129, are anterior to the very existence of the provisions

“provincial law” and “provincial legislation” seem to be treated as synonyms.⁵³ The Chief Justice writes as if he has it in mind to prevent enforcement of provincial *legislation* in s. 101 courts, though if we look at the result, rather than the reasons given,⁵⁴ the case goes further.

We surely need to be able to decide what are “provincial” laws if we propose to exclude their enforcement as such from Canadian federal courts. In seeking to interpret s. 101 of the *Act* of 1867, we cannot even know what is meant by the various suggested tests, still less choose amongst them, let alone apply them in any coherent or intelligible manner, if we do not achieve a satisfactory classification of laws.

Provincial statutory enactments, then, — that is, laws in category 6, — whatever else they may or may not be, are plainly “provincial laws”. Putting aside the question whether or not *they* can ever be “Laws of Canada” within s. 101 of the 1867 *Act*, what of the other classes of rules?

What of the common law? Local pre-Confederation enactments? “Received” English statutes? Imperial statutes in force in Canada of their own authority?

As you will see, my scheme of classification treats all of these four classes of laws distributively, as “Laws of Canada” or “laws of the Provinces” precisely in the measure that the Parliament of Canada, or the legislatures of the provinces, as the case may be, can amend or alter them. A single rule of law may thus, at the same time, be *both* federal *and* provincial law if both lawmaking institutions, for *some* purposes or even for *all* purposes, have authority to amend, repeal, or alter that rule. In short, I classify rules of these four kinds, — *all of them rules which the province never enacted as law*, — *all of them rules which in no sense depend on provincial legislative action for their initial jural existence or continuing legal force*, as federal law precisely to the extent of their application to federal matters. Indeed, s. 129 of the *Act* of 1867 seems to me to *impose* this result for categories 2, 3 and 4.

What is more, I find it difficult to see what other coherent or workable test could be found. The matter cannot, I think, properly be dealt with by saying that if a given rule, — be it a rule of the common law, or of a local pre-Confederation enactment, or of a “received” English statute, or of an Imperial statute in force *proprio vigore*, — applies to provincial matters *in*

themselves. These are laws of “unitary” jurisdictions, continued distributively under federal and provincial authority, according to their respective jurisdictions.

⁵³ Immediately after the words quoted, *ibid.*, Laskin C.J.C. begins to speak of provincial “legislation”. That word is twice used, and then the Chief Justice reverts to the word “law”.

⁵⁴ The cause of action could, it seems, have been made out completely on “pre-Confederation” law continued under s. 129 of the *Act* of 1867. The case on its facts would establish that that is insufficient, even where the transaction was one as to which Parliament could have re-enacted the pre-Confederation law, which could accordingly be argued, with great plausibility, to be law of Canada *pro tanto*.

more circumstances than it applies to federal matters, the rule is, merely for that reason, a rule of pure provincial law, and *vice versa*. Such an approach seems to me to have little to commend it, and indeed to verge on the unmanageable. Even where a rule, or set of rules, in categories 2, 3, 4 or 5, is one which the provincial legislature *could (but does not) wholly supersede by means of a provincial enactment*, which provincial enactment *if made would then apply to all matters, federal as well as provincial*, it still does not seem to me that such a rule, or set of rules, is on that account purely provincial (any more than the converse would be true, and one tried to stamp laws in categories 2, 3, 4 and 5 with a purely *federal* character). What is more, those who insist that, even insofar as it applies to matters within federal legislative authority, a *provincial statutory enactment is not a law "of Canada" merely because the Parliament of Canada abstains from superseding it*, are in a peculiarly unsuitable position to argue that, *simply because a provincial legislature could, if it chose, repeal a common law rule, — or a pre-Confederation local enactment, or a "received" English enactment, or an Imperial enactment, — the rule of law in question is on that account pure provincial law*.

How, then, did my seven categories stand under the *Consolidated Distilleries* cases?

For reasons upon which I shall elaborate in due course, and in which practical considerations play a significant and (I think) legitimate part, — I would read Anglin C.J.C.'s 1930 judgment for the majority of the Supreme Court in the third-party *Consolidated Distilleries* proceedings, in the sense favourable to the wider scope for "Laws of Canada" under s. 101 of the 1867 *Act*: that is, as excluding constitutionally from the jurisdiction of Canadian "federal courts" *such matters and only such matters* as lay, using his own words, within "the whole range of *matters within the exclusive jurisdiction of the provincial legislatures*".

But however Chief Justice Anglin's opinion in the third-party case be interpreted, it cannot be over-emphasized that Lord Russell's judgment in the Privy Council in 1933 is in any event a *wider, later*, and (as far as it goes) *definitive* statement of constitutionally permissible federal judicial jurisdiction. Surely, — if one really is concerned with the effect of the authorities as they stood immediately before the *Quebec North Shore Paper decision*, — the Privy Council's statement prevails over anything inconsistent to be found in the Supreme Court's decision of 1930.

In sum, I submit, with respect, that under Lord Russell's test for constitutionally-permissible federal court jurisdiction, — "actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion", — a Canadian federal court could, by the Parliament of Canada, constitutionally be authorized to hear and determine proceedings founded on laws in all or any of my first six

categories. As to the seventh, its inclusion, I concede, would require an extension of Lord Russell's test for constitutionally permissible federal judicial jurisdiction, though not necessarily an extension of Chief Justice Anglin's test for "Laws of Canada" in its last-stated form (*i.e.*, laws on matters *not* within exclusive *provincial* jurisdiction).

That this was the effect of the authorities as they stood immediately before the decision of the Supreme Court of Canada in the *Quebec North Shore Paper* seems to me as clear as can be. In essentials, at least, it was the premise on which the *Federal Court Bill* was passed.⁵⁵ It was also a thesis accepted and cogently stated by the learned judges of the Federal Court of Canada⁵⁶ until they were overruled by the Supreme Court of Canada, which has rejected it to a substantial degree and replaced it with a new doctrine which, to me, remains unclear in important respects, and unsatisfactory in all.

Speaking as one who defended the former thesis in parliamentary hearings on the *Federal Court Bill*,⁵⁷ I remain, despite and even because of the *Quebec North Shore Paper* decision and its offspring, a devoted adherent of the old position, which I think correct in principle and sound in practice. But we must now turn to the new one.

II. The *Quebec North Shore Paper* Doctrine: The Constitutional Requirement of an Elusive Substantive "Federal Law".

On 29 June 1976, the Supreme Court of Canada,⁵⁸ reversing the Federal Court of Appeal,⁵⁹ dismissed, for want of jurisdiction in the Federal Court of Canada, an action by Canadian Pacific Ltd and Incan Ships Ltd against Quebec North Shore Paper Co. and Quebec and Ontario Transportation Co. seeking damages for breach of a contractual obligation to build a rail car marine terminal at Baie Comeau, Quebec. The action had been instituted under s. 23 of the *Federal Court Act*:

23. The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy is sought under an Act of the Parliament of Canada or otherwise in relation to any matter coming within any following class of subjects, namely bills of exchange and promissory notes

⁵⁵ See The Senate of Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*. Second Proceedings on Bill C-172, intituled *An Act Respecting the Federal Court of Canada*, 26 November 1970, 3d Sess., 28th Parl.

⁵⁶ *Robert Simpson Montreal Ltd v. Hamburg-Amerika Linie Nord-deutscher* [1973] F.C. 1356 (C.A.); *The Queen v. Canadian Vickers Ltd* [1976] 1 F.C. 77 (T.D.) (motion to dismiss third-party notice). Other proceedings in the latter case were decided and subsequently reported in *McNamara Construction, supra*, note 35.

⁵⁷ *Supra*, note 55.

⁵⁸ *Quebec North Shore Paper, supra*, note 11.

⁵⁹ [1976] 1 F.C. 646 (C.A.).

where the Crown is a party to the proceedings, aeronautics, and works and undertakings connecting a province with any other province or extending beyond the limits of a province, except to the extent that jurisdiction has been otherwise specially assigned.⁶⁰

The ground of dismissal was that there was no "existing and applicable federal law... upon which the jurisdiction of the Federal Court can be exercised",⁶¹ this being, in the Court's opinion, a constitutional requirement under s. 101 of the *Act* of 1867. It rejected the argument "that judicial jurisdiction under s. 101 is co-extensive with legislative jurisdiction under s. 91 and, therefore, s. 23 must be construed as giving the Federal Court jurisdiction in respect of the matters specified in the latter part of the section, even in the absence of existing legislation, if Parliament has authority to legislate in relation to them."⁶² Chief Justice Laskin, having stated the circumstances in which the *Consolidated Distilleries* cases arose, quotes extensively from them. Lord Russell's famous phrase constitutionally sustaining s. 30 (*d*) of the then *Exchequer Court Act* as to "actions and suits in relation to some subject matter, legislation in regard to which is within the legislative competence of the Dominion" is read by Laskin C.J.C. as not "doing anything more than expressing a limitation on the range of matters in respect of which the Crown in right of Canada may, as plaintiff, bring persons into the Exchequer Court as defendants. It would still be necessary for the Crown to found its action on some law that would be federal law under that limitation."⁶³ Even if the Privy Council's 1933 opinion itself, on its face, allowed this reading, which I think it does not,⁶⁴ the *facts* of *Consolidated Distilleries* present a major, — perhaps insurmountable, — obstacle to the Chief Justice's reading of that case. The Chief Justice, in *Quebec North Shore Paper*, does not seem to address the question *how, consistently with his explanation of the case, the Privy Council could, in Consolidated Distilleries, have sustained the jurisdiction of the Exchequer Court: unless it be in a passage in which he distinguishes "Crown law":*

It would still be necessary for the Crown to found its action on some law that would be federal law under that limitation. It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature. Crown law does not enter into the present case.⁶⁵

⁶⁰ R.S.C. 1970, Supp. II, c. 10.

⁶¹ *Supra*, note 12, 1066.

⁶² *Ibid.*, 1058.

⁶³ *Ibid.*, 1063.

⁶⁴ See, *supra*, Part I.

⁶⁵ *Supra*, note 12, 1063.

Difficult as it is to see why the common law should be federal law when the Crown is concerned, but not in other cases, this explanation seems, in any case, quickly to have broken down. In the second of the new line of Supreme Court decisions, *McNamara Construction (Western) Ltd v. The Queen*,⁶⁶ the Crown in right of Canada had, in the Federal Court of Canada sued three defendants: a contractor on a construction contract to build a Young Offender's Institution in Drumheller, Alberta; an Alberta firm of architects which had prepared the plans, specifications, and tender documents upon which the construction contract was based; and also the Fidelity Insurance Co. of Canada, which had provided a surety bond to the Crown in respect of McNamara's obligations under the construction contract. I am at a loss to see how the jurisdiction of the Federal Court of Canada on this last claim could in any plausible way be distinguished, on the facts, from the jurisdiction of the Exchequer Court of Canada, under the corresponding provision of its Act, to enforce a surety bond exacted to ensure due export of bonded spirits, — the latter upheld constitutionally by the Exchequer Court itself, by the Supreme Court of Canada, and by the Privy Council.⁶⁷ Yet, in *McNamara Construction*, all three claims were dismissed on the basis that there was no "applicable federal law involved in the cases in appeal to support the competence of the Federal Court to entertain the Crown's action".⁶⁸ The Chief Justice distinguished *Consolidated Distilleries* in this way:

I take the same view of the Crown's claim on the bond as I do of its claim against *McNamara* for damages. It was urged that a difference existed because (1) s. 16(1) of the *Public Works Act*, now R.S.C. 1970, c. P-38 obliges the responsible Minister to obtain sufficient security for the due performance of a contract for a public work and (2) *Consolidated Distilleries v. The King* ... stands as an authority in support of the Crown's right to invoke the jurisdiction of the Federal Court where it sues on a bond. Neither of these contentions improves the Crown's position. Section 16(1) of the *Public Works Act* stipulates an executive or administrative requirement that a bond be taken but prescribes nothing as to the law governing the enforcement of the bond. The *Consolidated Distilleries* case involved an action on a bond given pursuant to the federal *Inland Revenue Act* and, as the Privy Council noted "the subject matter of the actions directly arose from legislation of Parliament in respect of excise" [See [1933] A.C. 508, 521 (P.C.) *per* Lord Russell].⁶⁹

To me, this is simply to draw a distinction where no difference has been shown to exist. Simply stated, both statutes required exaction by the Crown of a bond from the subject as a condition of the Crown's doing something it need not, or even could not otherwise do. I am aware of not a single particle of legislation which gave a stronger statutory basis to the Crown's claim in

⁶⁶ *Supra*, note 35.

⁶⁷ *Supra*, notes 13 and 14.

⁶⁸ *Supra*, note 35, 662.

⁶⁹ *Ibid.*, 663.

the *Distilleries* case than to its claim in *McNamara*. Certainly none is cited or relied on in the reported judgments.

So much for the Privy Council's decision in the *Consolidated Distilleries Case*. I leave it to you to say whether it is still good law; and, if so, whether it stands for more than the jurisdiction of the Federal Court constitutionally to enforce the right of the Crown to recover on bonds given pursuant to revenue legislation for the due export of liquor removed from warehouses. *Stet pro ratione voluntas*.

My purpose in Part II is to try to ascertain the basic nature of the *Quebec North Shore Paper* doctrine, from the decisions of the Supreme Court of Canada itself. In later sections I shall try to examine, in some detail, what is the nature of a substantive enactment; what are "Laws of Canada"; and what is a "Court for the better Administration" of those laws, and to consider the case-law of the Federal Court of Canada on these points. For the moment, however, I wish to try to ask and answer some basic questions about the doctrine as the Supreme Court itself has stated it.

What may compendiously be described as the *Quebec North Shore Paper* doctrine, as the Supreme Court of Canada has laid it down, may be found, at my latest reckoning, in six cases, whose dates (which are important in considering the authority of Federal Court decisions) are these:

1. *Quebec North Shore Paper v. Canadian Pacific Ltd.*,⁷⁰ 29 June 1976;
2. *McNamara Construction (Western) Ltd v. The Queen*,⁷¹ 25 January 1977;
3. *Tropwood A.G. v. Sivaco Wire & Nail Company*,⁷² 6 March 1979;
4. *Antares Shipping Corp. v. Ship Capricorn*,⁷³ 13 December 1979;
5. *R. v. Thomas Fuller Construction Co. (1958)*,⁷⁴ 21 December 1979;
6. *Aris Steamship Co. v. Associated Metals & Minerals*,⁷⁵ 22 April 1980.

In this Chapter I wish to ask four basic questions as to the essential nature of the *Quebec North Shore Paper* doctrine requiring that a federal court proceeding be based upon some substantive federal law, as the Supreme Court of Canada has enunciated that doctrine.

- A. *Can common law, local pre-Confederation enactments, "received", English statutes, and Imperial statutes ever constitute substantive "federal law"?*

⁷⁰ *Supra*, note 12.

⁷¹ *Supra*, note 35.

⁷² [1979] 2 S.C.R. 157.

⁷³ *Supra*, note 2.

⁷⁴ *Supra*, note 11.

⁷⁵ [1980] 2 S.C.R. 822.

The statements of the Court are conflicting. In *Quebec North Shore Paper*, the Chief Justice, delivering judgment for the Court, referred to “common law” as federal law in the passage, quoted above, dealing with so-called “Crown law”.⁷⁶ Again, towards the end of his judgment, in interpreting the pertinent phrase in s. 101 of the *Act* of 1867, he said:

The word “administration” is as telling as the plural word “laws”, and they carry, in my opinion, the requirement that there be applicable and existing federal law, whether under statute or regulation or common law, as in the case of the Crown, upon which the jurisdiction of the Federal Court can be exercised.⁷⁷

Another reference to the adequacy of common law rules as “federal” law is found in the Chief Justice’s reasons for the Supreme Court in *McNamara Construction*:

In the *Quebec North Shore Paper Company* case, this Court referred to what I may for convenience call Crown law as follows: ... [His Lordship now quoted all save the first sentence of the passage, reproduced above, concluding, “Crown law does not enter the present case.”]

This passage cannot be taken as saying that it is enough that the Crown is a party to a contract, on which it is suing as a plaintiff, to satisfy the requirement of applicable federal law. The situation is different if Crown liability is involved because in that respect there were existing common law rules respecting Crown liability in contract and immunity in tort, rules which have been considerably modified by legislation. Where it is not the Crown’s liability that is involved but that of the other party to a bilateral contract, a different situation prevails as to the right of the Crown to compel that person to answer process issued out of the Federal Court.

It was the contention of the Attorney-General of Canada on behalf of the Crown that the construction contract, being in relation to a public work or property, involved on that account federal law. What federal law was not indicated. Certainly there is no statutory basis for the Crown’s suit, nor is there any invocation by the Crown of some principle of law peculiar to it by which its claims against the appellants would be assessed or determined.⁷⁸

So, in the context of Crown liability, the common law may (it seems) be “federal” law. Crown liability, it must be remembered, is largely liability at common law. That is the case, notably, with most claims for recovery of specific property, restitutionary claims, and claims in contract. To argue that such claims are statutory merely because federal statute removed the need of the Crown’s *fiat* to allow proceedings to be brought against it by way of petition of right,⁷⁹ or because federal statute substituted simplified modes

⁷⁶ *Supra*, note 11, 1063.

⁷⁷ *Ibid.*, 1065-6.

⁷⁸ *Supra*, note 35, 662-3.

⁷⁹ See *Petition of Right Act*, R.S.C. 1970, c. P-12, a procedural enactment. See especially s. 3 (form of petition of right, read with Schedule to the *Act*); s. 9 (consequences of failure by the Crown to defend or demur); and s. 10 (read with the definition of “relief” in s. 2).

of procedure for petition of right,⁸⁰ would simply mean resort to one more desperate expedient.

By contrast with the Chief Justice's indication for the Court that (at all events in *some* circumstances) the common law may be "federal" law, Pigeon J., speaking for a majority of six judges in *Thomas Fuller Construction*⁸¹ (Martland J., being dissentient), declared: "It is settled that in s. 101 the expression "Laws of Canada" means laws enacted by Parliament."⁸² Perhaps this was not meant to be exhaustive. It is interesting to note that the Chief Justice was absent from the hearing and decision of this case.

My own view of the matter is, of course, set out above in Part I, notably in connection with my seven-category classification. I suspect that the Supreme Court means, or will decide that it means, that, in appropriate circumstances, the common law should be treated as "federal law". The problem is that the appropriate circumstances, as the Supreme Court sees them, so far seem exceedingly restricted.

The Federal Court of Appeal, in at least one case which did not involve what Laskin C.J.C. calls "Crown law"), has clearly held the common law to be "federal law". In *The Queen v. Prytula*⁸³ it affirmed the jurisdiction of the Federal Court to entertain an action brought by the Crown in right of Canada as guarantor subrogated in the rights of a lender (a bank) against a borrower who had defaulted in his obligations under an agreement of loan contracted pursuant to the *Canada Student Loans Act*. Heald J., speaking for the Court (Heald and Urie JJ., and MacKay D.J.), wrote this:

The question is, therefore, whether adjudicating on the rights so conferred on Her Majesty as against the borrower is the administration of a "provincial" or a "federal" law.

Prima facie, when a person, whether Her Majesty or not, loans money to another, the right of the lender to enforce repayment depends on the proper law of contract that governs contractual relations between ordinary persons [See *The Queen v. Murray* [1967] S.C.R. 262, and *Her Majesty in right of Alberta v. C.T.C.* [1978] 1 S.C.R. 61, 72-3 *per* Laskin C.J.C.]; and that law is a "provincial" law, which can only be changed, as such, by a provincial legislature.

Parliament, however, has exclusive legislative jurisdiction to make laws in relation to "banking" and a law, the purpose of which is to change the rights under a contract falling within that field, is within the legislative power of Parliament and not within the legislative power of a provincial legislature. [See *A.-G. Canada v. A.-G. Quebec (Bank Deposits Case)* [1947] A.C. 33 (P.C.)] Any law so made would be a "federal" law.

Moreover, if there was, at the time as of which sections 91 and 92 of *The British North America Act, 1867* became applicable in relation to Manitoba, a body of law in relation

⁸⁰ See *Federal Court Act*, R.S.C. 1970, Supp. II, c. 10, s. 48 and Schedule I (offering the choice of style: "Statement of Claim" or "Declaration").

⁸¹ *Supra*, note 11.

⁸² *Ibid.*, 707.

⁸³ [1979] 2 F.C. 516 (C.A.), *aff'd* (1980) 116 D.L.R. (3d) 385 (S.C.C.).

to “banking” (separate from the ordinary law of contract) on which the Bank’s right to recover from a borrower depended, such body of law would be “federal” law. Similarly, if Parliament has, since Confederation enacted such a law it is, of course, a federal law. Here, assuming the validity of the *Canada Student Loans Act*, it would seem clear that the law that makes Her Majesty the successor to the Bank in its claim against the borrower is “federal” law. However, unless that law impliedly creates a *new statutory liability* by the borrower to Her Majesty in an amount to be determined by reference to the loan contract, as opposed to merely conferring on the Crown the rights of the Bank under the contract of loan, it is open to question as to whether that statute can be said to be the law that is being administered by a court when it is adjudicating on the claim by Her Majesty against the borrower from the Bank. In view of the conclusion which I reach subsequently herein, it is not necessary to answer that question in order to determine the issue raised in this appeal.

To be more specific, the question here is whether the law of contracts continued in Manitoba by section 129 is a “provincial” law or a “federal” law in so far as it related to “banking” contracts.

The relevant parts of sections 91 and 92 read as follows:⁸⁴

His Lordship now quotes s. 91, introductory words and item 15, and s. 92, introductory words and item 13, and continues:

It would seem to be clear that a contract whereby a banker makes a loan to a customer is a matter coming within the subject “banking”. [See *A.-G. Alberta v. A.-G. Canada (Alberta Bill of Rights Case)* [1947] A.C. 503, 516 *et seq.* (P.C.) *per* Viscount Simon]. If that is correct, the concluding words of section 91 require that such a bank loan contract “shall not be deemed” to come within section 92(13) whether or not Parliament has enacted any law with regard thereto under section 91(15). In such a case, if full play be given to the concluding words of section 91, a post-Confederation provincial law of general application does not alter law continued by section 129 in so far as it applies to a matter coming within the section 91 class of subjects... . In so far as a law is applicable to a matter coming within “banking”, it can, therefore, only be “repealed, abolished or altered” by Parliament and it cannot be “repealed, abolished or altered” by a provincial legislature (section 129 of *The British North America Act, 1867*)...; and it is, therefore, a “federal” law and not a “provincial” law for the purposes of section 101 of *The British North America Act, 1867*, even though it is part of a general law in relation to property and civil rights that was continued in the province by section 129.

Provincial legislative authority over civil obligation, — more particularly over contractual obligation, — not excluding the relations *inter se* of lender and borrower, — is, of course, the general rule. And provincial authority is normally exclusive. But there are important exceptions — one being legislative jurisdiction with respect to “Banking”. Here the authorities appear conclusive: the essential cause of action of lender against borrower for repayment of money lent is, where the loan flows from banker to customer or from customer to banker, *indestructible by provincial legislation*.⁸⁵ The province, it seems clear (putting aside competent laws of

⁸⁴ *Ibid.*, 523-5.

⁸⁵ *A.-G. Canada v. A.-G. Quebec (Bank Deposits Case)* [1947] A.C. 33, 46 *per* Lord Porter: “In their [Lordships’] view, a Provincial legislature enters on the field of banking

general application such as laws of judicial procedure, or laws of inheritance) can neither prevent such obligations from being contracted; nor prevent them, once having been contracted, from being enforced even in the provincial courts. To that extent common law rules, dealing with the obligations *inter se* of lender and borrower, are under exclusive federal legislative authority. Pre-Confederation statutory rules, such as those in the *Civil Code of Lower Canada* (now Quebec), must of course stand on the same footing.

In these circumstances, then, — where *provincial* authority is absolutely excluded, — it seems especially bizarre to deny that common law, or pre-Confederation statutory, rules are “Laws of *Canada*” within the meaning of s. 101 of the 1867 *Act*.

So, — although my argument, as elaborated in Part I, is of course more general, — it seems to me that the reasoning of the Federal Court of Appeal is specially apt (and deserving of acceptance by the Supreme Court of Canada) where the federal legislative jurisdiction is *exclusive*. (In any case, I shall shortly offer alternative grounds for reaching the same result on the facts in *Prytula's Case*.)

Indeed, because the reasoning of the Federal Court of Appeal addresses itself to cases where federal legislative authority to alter the common law is *exclusive*, it is possible to distinguish *Prytula's Case* from those, like *McNamara Construction*, where (though Parliament if it chose could presumably re-enact or alter the law applicable as between the subject and the “federal Crown”) provincial legislation of general application, if enacted, would apply until excluded: federal jurisdiction thus being demonstrably *concurrent only*. Similarly, *Quebec North Shore Paper* could be distinguished in the same way, though it involved not common law but local pre-Confederation statute law (and even the pre-Confederation character of the law was overlooked or assumed to be irrelevant). I would not willingly distinguish, for purposes of s. 101 of the 1867 *Act*, *exclusive* federal jurisdiction from *concurrent* federal jurisdiction. But I concede that the distinction is a possible one; and indeed that it is at this point that the

when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking.”

A.-G. Alberta v. A.-G. Canada (Alberta Bill of Rights Case) [1947] A.C. 503, 518 (P.C.) per Viscount Simon for the Board: “But in any event, it appears to their Lordships to be impossible to hold that it is beyond the business covered by the word “banking” to make loans which involve an expansion of credit. Legislation which aims at restricting or controlling this practice must be beyond the powers of a provincial legislature. It is true, of course, that in one aspect provincial legislation on this subject affects property and civil rights, but if, as their Lordships hold to be the case, the “pith and substance” of the legislation is “banking”... this is the aspect that matters.”

argument for affirming s. 101 jurisdiction becomes (as I think) quite unanswerable.

By accident or by design, in sum, a very restrictive view has since 1976 prevailed, in the Supreme Court of Canada, as to what are "Laws of Canada" within the meaning of s. 101 of the 1867 *Act*. More particularly, a very restrictive view as to what common law rules, and what local pre-Confederation enactments, are to be treated as having been continued under federal authority by s. 129 so as to be "Laws of Canada" under s. 101. Perhaps s. 101 is indeed being read *independently* of s. 129. The restrictive view is apparent, at any rate, when common-law rules and pre-Confederation enactments concern matters as to which legislation of a *general* nature,—notably civil liability,—could be enacted *only* by provincial legislatures. These laws, it seems, are then treated as *purely provincial* regardless of the circumstances of their operation. A distinction has, it is true, been drawn in cases involving the Crown. Common law liability *of* the Crown is distinguished from common law liability *to* the Crown. The rules imposing the former, but not the rules imposing the latter, are said to be "federal law". This distinction is one I cannot fathom at all, just as I do not see how "Crown law" differs from other law in any way pertinent to s. 101. It seems to me arbitrary, and to underscore what I consider the bizarre nature of the whole *Quebec North Shore Paper* doctrine. No coherent or comprehensive analysis seems to me ever to have taken place.

Nevertheless, whatever be the fate of common-law rules, "*received*" *English statutes*, if "*received*" under common law rules, must stand on the same footing and share the same fate. If "*received*" instead under local pre-Confederation enactments, English statutes should stand on the same basis as the latter. (That, I have argued, is in principle the same basis as the common law.) If "*received*" under federal legislation, they would stand on the same basis as the latter. Indeed, these would in substance be cases of referential enactment, considered below.

Pre-Confederation Imperial statutes will, I should imagine,—as the current doctrine stands,—be dealt with by the Court on more or less the same basis as that upon which it deals with pre-Confederation local enactments. In other words, as things stand, it will look at *general* jurisdiction over the subject-matter of the legislation, without too much attention to particular applications (unless possibly when this would result in giving the federal court jurisdiction in a particular case where the underlying subject matter happens exceptionally to be purely provincial). *Post-Confederation Imperial statutes* (in force *proprio vigore*) should, but may not, stand in the same position as those enacted before Confederation.

Under the *Quebec North Shore Paper* doctrine, more than ever, our intricate body of law on the constitutional foundations of our legal system (concerning "reception" and like matters, and interwoven with the

constitutional and territorial history of each province and territory) must be rescued from neglect and misunderstanding and kept at the fingertips of bar and bench. To illustrate this point, let me reproduce s. 4 of the *Manitoba Supplementary Provisions Act*, being chapter 124 of the *Revised Statutes of Canada, 1927*; this provision remains in force, unconsolidated and unrepealed:

Subject to the provisions of this Act, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province, in so far as applicable to the Province, and in so far as the said laws have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of Great Britain applicable to the Province, or of the Parliament of Canada.

The common law, and English statute law as at the prescribed date, are, *by direct enactment of the Parliament of Canada*, put into force in the Province of Manitoba as they relate to matters within the jurisdiction of the Parliament of Canada. This, of course, was done as part of a post-Confederation scheme of concurrent federal and provincial legislation to make more contemporary the Manitoba reception date. But within the scope of "matters within the jurisdiction of the Parliament of Canada", the Province could not constitutionally vary the operation of s. 4 in any way. The language of s. 4 seems quite wide enough to effect an enactment, by reference, of the common law rules entitling a lender to recover judgment against a borrower for a sum of money lent, when the lender is a banker and the borrower is his customer, or *vice versa*.⁸⁶ If so, the causes of action *stand ultimately on a federal statutory basis*, and can, consistently with s. 101 of the 1867 Act, be confided by Parliament to the Federal Court of Canada. Since the report of *Prytula's Case* suggests that the loan was governed by the laws of Manitoba, it would appear that *Prytula's Case* independently of any other ground, can be affirmed by the Supreme Court of Canada on the basis of *Tropwood A.G. v. Sivaco Wire & Nail Co.*⁸⁷

B. *Must the federal law give a complete right of action, or title to the remedy sought, or power in the court to give it?*

As a matter of common sense, if a federal court can administer only federal law, it should be necessary to show *that the federal law gives a complete right or legal basis to whatever is claimed*. Some useful definitions are given by Lord Diplock in another context:

The existence of the two separate summonses and judgments makes it necessary to distinguish between absence of jurisdiction in the court and absence of cause of action in the plaintiff. It is helpful to start by defining some relevant terms for the purposes of

⁸⁶ See authorities cited, *ibid.*

⁸⁷ *Supra*, note 72; see, *infra*, note 94 and accompanying text.

this case. "An action" is an application to a court by a plaintiff for the grant of specified relief against the defendant. "A cause of action" is a state of facts the existence of which entitles the court to grant to the plaintiff the relief applied for in the action. "Jurisdiction" is the right of the court to enter upon the inquiry as to whether or not a cause of action exists in the plaintiff and, if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief applied for. Conversely, lack of jurisdiction is absence of any right in the court to enter upon such an inquiry at all.⁸⁸

Certainly much language is used in the Supreme Court which would suggest this natural formulation of the *Quebec North Shore Paper* rule: that is, that a complete title under federal law to the remedy sought is a condition precedent, under s. 101 of the *Act of 1867*, to the due exercise of federal court jurisdiction. In *Quebec North Shore Paper*, for instance, it is stated⁸⁹ that "there is no Act of Parliament of Canada under which the relief sought in the action is claimed". In *McNamara Construction*⁹⁰ it is said that "there is no statutory basis for the Crown's suit." Still, *Consolidated Distilleries* is treated as good law, and, unconvincing as the proffered interpretation of it may be, the Supreme Court never quite explains it as being a case where jurisdiction was affirmed because "federal law" *actually created the Crown's cause of action on such bonds*. Laskin C.J.C., indeed, quoting Lord Russell, is content to say that "the subject matter of the actions directly *arose from* legislation of Parliament in respect of excise".⁹¹ Again, in an effort to explain why the common law *liabilities* of the Crown *arose from federal law*, whilst its common law *rights* did *not*, Laskin C.J.C., refers to the fact of *legislative interventions on the subject* of Crown liability — *not* going so far as to assert (what could not fairly be asserted) that all such liability (notably contractual liability) was statutory. In the passage explaining his above-quoted observations in *Quebec North Shore Paper* concerning "Crown law" he says:

This passage cannot be taken as saying that it is enough that the Crown is a party to a contract, on which it is suing as a plaintiff, to satisfy the requirement of applicable federal law. The situation is different if Crown liability is involved because in that respect there were existing common law rules respecting Crown liability in contract and immunity in tort, rules which have been considerably modified by legislation. Where it is not the Crown's liability that is involved but that of the other party to a bilateral contract, a different situation prevails as to the right of the Crown to compel that person to answer process issued out of the Federal Court.⁹²

It may be, then, that in some circumstances enough admixture of federal statute law in the common law soup, so to speak, will suffice to give the whole a federal flavour. There are already decisions in the Federal Court to

⁸⁸ *Rediffusion (Hong Kong) Ltd v. A.-G. Hong Kong* [1970] A.C. 1136, 1151 (P.C. (H.K.)).

⁸⁹ *Supra*, note 11.

⁹⁰ *Supra*, note 35, 663.

⁹¹ *Ibid.*, quoting, *supra*, note 13, 521 [emphasis added].

⁹² *Ibid.*, 662.

this effect.⁹³ But, in the nature of things, no one can tell for sure till the tasting is finished — at the Supreme Court level, and on a case by case basis, with a maximum of insecurity to the litigant.

C. *What is needed for enactment by referential incorporation?*

Referential enactment has enormous potential to create legal rights, as you will have discovered from the *Tropwood Case*,⁹⁴ an action for damage to goods shipped by sea to Canada. Vast bodies of law can be enacted at a single stroke. First, of course, it is necessary to find the provision purporting to incorporate by reference and to enact what is so incorporated. An unconditional affirmation that a given body of rules has the force of law suffices. Thus I am prepared to accept that s. 42 of the *Federal Court Act* uses language which fairly enacts law. Section 42 reads as follows: "Canadian maritime law as it was immediately before the 1st day of June 1971 continues subject to such changes therein as may be made by this or any other Act."

The difficulty with s. 42, of course, is that *ex facie* it affirms nothing more than the *continued* existence of what was the law *immediately before 1 June 1971*. But no adequate body of substantive "federal" maritime law, — as the Supreme Court understands "federal" law, — appears to have been *actually* in force *at that date*: if by an "adequate" body of law we mean a body of law capable of providing, coherently and consistently, for the disposition of the cases on the merits. So some expedient is made necessary if the requisite substantive federal law is to be provided.

⁹³ See *Bensol Customs Brokers Ltd v. Air Canada* [1979] 2 F.C. 575 (C.A.) *per* Pratte and Le Dain J.J., and Hyde D.J. The appellants' claim had as its legal foundation both a federal statutory cause of action and, as an additional necessary element, the law concerning subrogation. See, generally, the reasons of Pratte J. (Hyde D.J. and Le Dain J., concurring), and the additional reasons of Le Dain J. who, after quoting from the Supreme Court's reasons in *Quebec North Shore Paper*, *supra*, note 11, and *McNamara Construction*, *supra*, note 35, continued at pp. 582-3: "There is nothing in this language to suggest that the claim must be based solely on federal law in order to meet the jurisdictional requirement of s. 101 of the *B.N.A. Act*, and I do not think we should apply a stricter requirement to the words "made under" or "sought under" in section 23 of the *Federal Court Act*. There will inevitably be claims in which the rights and obligations of the parties will be determined partly by federal law and partly by provincial law. It should be sufficient in my opinion if the rights and obligations of the parties are determined to some material extent by federal law. It should not be necessary that the cause of action be one that is created by federal law so long as it is one affected by it."

See also *The Queen v. Saskatchewan Wheat Pool* [1978] 2 F.C. 470 (T.D.) *per* Smith D.J., where, though the duty was one created by federal statute, the learned trial judge appears to have accepted the proposition that the remedy in damages for its breach was created by the common law; his Lordship nevertheless affirmed the jurisdiction of the Federal Court to hear and determine the damage claim.

⁹⁴ *Tropwood A.-G. v. Sivaco Wire & Nail Co.*, *supra*, note 72.

A workable solution could, I think, have been found with a little ingenuity.

Since the definition, in s. 2, of "Canadian maritime law", includes the law that "would have been... administered" by the Exchequer Court "if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters", it would be grammatically possible to read s. 42 as pointing *outside* the narrow compass of English and Canadian sources (common law and statutory) of traditional maritime law. Instead, s. 42 could be read as *including and enacting*, — on a province-by-province basis, — the whole body of provincial law (however defined), as that law stood immediately before 1 June 1971, *for application to maritime and admiralty matters*. What is more, the concluding words of s. 42, which make the referential enactment which it effects "subject to such changes therein as may be made by this or any other Act", would admit of a construction which would subject the *corpus* of law so enacted subject to changes made *from time to time* by competent legislation: *not only federal legislation, but provincial as well*. (Contrast the words "any other Act" in s. 42 with the words "any other Act of the Parliament of Canada" in the definition of "Canadian maritime law" (s. 2).) The result would be to apply, to a case in the Federal Court, the same comprehensive *corpus* of law as would apply if the litigation occurred in a provincial court. That *corpus* would include, apart from any pertinent federal legislation, — and any laws continued under federal authority by s. 129 of the 1867 Act or otherwise, — all relevant valid and applicable provincial law, as it may stand from time to time. [The emphasis in the foregoing quotations is of course mine.]

Faute de mieux (*mieux* being the repudiation of *Quebec North Shore Paper* with its concomitant problems), or even in company with *mieux* (so long as anything short of the Privy Council's solution prevails), such a construction would have enormous advantages for the Canadian legal system in terms of predictability, simplicity, and consistency: these solutions being of course limited to matters governed by "Canadian maritime law".

In any case, the Supreme Court of Canada does not take that course. In *Tropwood*, it proceeds directly to the definition of "Canadian maritime law" found in s. 2 of the *Federal Court Act*:

In this Act...

"Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of the Parliament of Canada ...

Let me emphasise that by itself this is merely a definition, and nothing more. *No law is enacted* except a definitional provision. Section 2 merely says what "*Canadian maritime law*" will mean when the term is used

elsewhere, as it is for instance in s. 22(1) to define the scope of a grant of jurisdiction to the Federal Court of Canada. Section 2, by itself, *can enact no substantive law*. The Supreme Court, in *Tropwood*, is not explicit as to the means by which, "Canadian maritime law" as defined in s. 2, is enacted as a substantive body of law. The Chief Justice, curiously enough, refers to the definition in s. 2 as being "supplemented" by s. 42. That seems to me the wrong way round. Section 42 is the substantive provision, and s. 2 contains the definition. Section 2 supplements s. 42 and not *vice versa*. At all events, though the Chief Justice never explicitly says how "Canadian maritime law" was enacted, the best inference from his judgment seems to me that this occurred through s. 42.

Let us turn, then, to the definition of "Canadian maritime law" to see just what has been enacted by s. 42. As to this, the Chief Justice, for the Court, comes to this conclusion:

This definition of Canadian maritime law in s. 2 refers to the law that was administered by the Exchequer Court "by virtue of the *Admiralty Act* or any other statute". The reference to the *Admiralty Act* is undoubtedly to the Act of 1934, but the *Admiralty Act* of 1891, although it was repealed, may certainly be considered as "any other statute" by virtue of which law was administered by the Exchequer Court on its admiralty side. If therefore there was a deficient incorporation of admiralty law by the Act of 1934, the same cannot be said of the Act of 1891.⁹⁵

In order to reach back to *The Admiralty Act, 1891*, of Canada,⁹⁶ and, through it, to the substantive provisions of the Imperial statute, the *Colonial Courts of Admiralty Act, 1890*,⁹⁷ the Supreme Court of Canada thus reads "law that was administered by the Exchequer Court of Canada on its Admiralty side" as "law that has at any time been administered by the Exchequer Court on its admiralty side". An unnatural reading is given to words in the imperfect tense; and, what is worse, we are told in effect that *all the statutes ever administered by the Exchequer Court are re-enacted as substantive law by the Federal Court Act*. This bizarre result is of course really meant to result in implied re-enactment only of a few useful provisions, notably ss. 3 and 4 of the *Canadian Act* of 1891, which give us our needed basic body of substantive maritime law:

3. In pursuance of the powers given by "*The Colonial Courts of Admiralty Act, 1890*," aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act.

4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-

⁹⁵ *Ibid.*, 163.

⁹⁶ S.C. 1891, c. 29.

⁹⁷ 43 & 54 Vict., c. 27 (U.K.).

tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty court, as elsewhere therein, have all rights and remedies in all matters, (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under "*The Colonial Courts of Admiralty Act, 1890.*"

This entire result, I point out, seems to be founded on s. 42 of the *Federal Court Act*, which, *ex facie*, and in its normal and natural sense, simply continues maritime law as it existed immediately before 1 June 1971.

The scope of the "Canadian maritime law" enacted as substantive law, by reference through s. 42 of the *Federal Court Act*, has arguably been held by the Federal Court of Canada to go beyond any rule of law that ever was actually administered by the Exchequer Court of Canada to include those that (using the language of the definition of "Canadian maritime law") "would have been administered if that Court had had, on its admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters".⁹⁸ Furthermore, the classes of matters enumerated in the jurisdictional grants of s. 22(2) are now held to have been conclusively declared by Parliament to

⁹⁸ See *Benson Bros Shipbuilding (1960) Ltd v. Mark Fishing Co.* (1978) 89 D.L.R. (3d) 527 (F.C.A.) per Pratte and Urie JJ., and MacKay D.J., and *The Queen v. Canadian Vickers Ltd* [1980] 1 F.C. 366 (C.A.) per Jaccett C.J., Pratte J. and Lalande D.J.

In *Benson*, 531 per Pratte J., for the Court: "The admiralty jurisdiction of the Exchequer Court, therefore, extended to a claim for building a ship on the condition that the ship be under arrest at the time of the commencement of the action. If the Court had had unlimited jurisdiction in maritime matters, it appears to me that its jurisdiction in such a matter would not have been limited to the cases where the ship was under arrest at the time of the institution of the action." His Lordship went on to offer alternative grounds for the result.

In *Canadian Vickers*, 370-1 per Jaccett C.J., for the Court:

"As I read section 42, what is, subject to statutory changes, "continued" is

- (a) the law that was administered by the Exchequer Court by virtue of *The Admiralty Act, 1934*,
- (b) the law that was administered by the Exchequer Court on its Admiralty side by virtue of any other statute, and
- (c) the law that would have been administered by the Exchequer Court if it had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters.

It is clear from the decision of the Supreme Court of Canada in *Tropwood* that item (b) is not restricted to a law that was so administered immediately before the enactment of the *Federal Court Act*. What this Court held in *Benson* is that section 42 operates to continue a law that was administered by the Exchequer Court and does not merely operate to continue such a law to the extent that the Court had jurisdiction to apply it at some time in the past. In my opinion, this is the plain meaning of section 42 when the substantive provisions of the *Federal Court Act* are read independently of the jurisdiction provisions, as in my view they should be."

His Lordship went on to support his result on other grounds. It will be remarked that, though there is some suggestion that the law to be continued under item (b) must have had at least some prior administration in the Exchequer Court — even if not in the cases to which it will now be applied — such a restriction is hard to justify.

be matters of "Canadian maritime law" for the purposes of ascertaining the scope of substantive "federal law" enacted by s. 42.⁹⁹

An enormous body of substantive law, necessarily uncertain in extent and in content, has thus been held to have been enacted by Parliament by these extraordinarily tortuous methods. If it has been enacted *generally* as Canadian law, it should be *generally* enforceable in provincial courts; and the impact on the laws otherwise applicable in any given province must be serious.¹⁰⁰ If *per contra* this body of substantive law is held to have been enacted only for administration in the Federal Court, the results of litigation will often depend upon whether proceedings are brought in the Federal Court or in provincial courts. The potential for forum shopping seems enormous.

Any port in a storm. The consequences of *Quebec North Shore Paper* have evoked what I consider to be desperate expedients whose full cost to the legal system are very far from fully revealed. The interests of the legal system lie in the greatest possible certainty, simplicity, and economy. *Quebec North Shore Paper* maximizes uncertainty, complexity, and cost.

And if its object was to minimize interference with the provincial legal systems, will it have achieved even that? For it will invite actual federal legislation, and has already induced the courts to find massive legislation by implication, both in order to enable the exercise of federal judicial jurisdiction.

Before leaving the topic of enactment by referential incorporation, I would merely underscore the inherent vagueness of such phrases, found in *Tropwood*,¹⁰¹ as "a body of federal law, be it statute, common, or other,

⁹⁹ *Skaarup Shipping Corp. v. Hawker Industries Ltd*, *supra*, note 2, perhaps explains the finding, in *Antares Shipping Corp. v. Ship Capricorn*, *supra*, note 2, that s. 22(2)(a) of the *Federal Court Act* was "existing federal statutory law coming within the class or subject of navigation and shipping and expressly designed to confer jurisdiction on the Federal Court for claims of the kind here advanced by the appellant."

¹⁰⁰ This would be the case especially if s. 42 enacts a uniform Canadian law, superseding provincial laws where it is applicable. Without attempting a definitive assessment of s. 42, one might suggest the following for discussion. (1) Section 42 ought to be read as continuing "Canadian maritime law" as defined in s. 2, but only exactly "as it was in force immediately before the 1st day of June 1971". (2) It is continued "subject to such changes therein as may be made by this or any other Act." This of course includes later Federal statutes. (3) Sections include, on admiralty and maritime matters, provincial laws as they stand from time to time. Note that the definition of "Canadian maritime law" concludes: "as that law had been altered by the Act or any other Act of the Parliament of Canada", while s. 42 continues Canadian maritime law, as it was before 1 June 1971 "subject to such changes therein as may be made by this or any other Act". Why not read this last as including provincial statutes? The *Interpretation Act*, R.S.C. 1970, c. 1-23, s. 28, seems to contemplate the possibility of such a reading. One might achieve the result that the identical law would prevail wherever the litigation occurred — in the Federal Court of Canada or in provincial courts.

¹⁰¹ *Supra*, note 72, 161 and 163.

competently enacted or recognized by Parliament, upon which the jurisdiction could be exercised”, or “a body of law, which can be *attributed to federal competence*, upon which the jurisdiction can operate” [emphasis added]. Bodies of substantive law may, on quite tenuous grounds, be found to have been adopted by Parliament as federal law. For example, almost anything can be said to be “recognition”. The law, on any view, is wholly unpredictable. Still, through *Tropwood*, most traditional maritime law business is back in the Federal Court of Canada. *Tropwood* now is the leading case on Federal Court jurisdiction in maritime law matters, but it must be read with a growing list of other decisions.

D. *What is a “substantive” enactment?*

Under the *Quebec North Shore Paper* doctrine there can be no exercise of Canadian federal court jurisdiction unless in conjunction with substantive federal law. Obviously this invites counsel and courts to strain the language of statutes, to find creation of the necessary substantive law. Of that we have already seen some evidence. The logical conclusion of the process is to treat *all* jurisdictional grants as enactments of substantive law. That would be a sort of “Catch 101”: no exercise of jurisdiction without substantive law; but every grant of jurisdiction *is* substantive law. The result would be to get rid of the jurisdictional difficulties created by the *Quebec North Shore Paper* doctrine, but at the cost, to the legal system, of multiplying causes of action, with the problems I raised earlier. If you are going to say the grants of *jurisdiction to entertain* claims are, in themselves, creations of *substantive law to govern those claims*, why bother to ask for the substantive law at all?

The predictable process of straining jurisdictional grants into substantive enactments may have begun with *Antares Shipping Corp. v. Ship Capricorn*,¹⁰² where Ritchie J., speaking for the Supreme Court, held that both on the true construction of the *Federal Court Act*, and constitutionally, the Federal Court could hear and determine an action for a declaration that the purported sale of a ship by one defendant to another was void, a declaration that a concluded sale to plaintiff existed, and orders for specific performance by delivery and by execution of a bill of sale. Whether this result can be explained as following from the enactment of substantive “Canadian maritime law” found in *Tropwood*, I do not presume to say. The Federal Court of Appeal has proposed such an explanation.¹⁰³ Moreover, s. 44, partly relied on by the Court, is pertinent. What is of great interest was that Ritchie J. explicitly said that s. 22(2)(a) of the *Federal Court Act* had enacted the necessary federal substantive law. Overruling Le Dain J., he said for the Supreme Court:

¹⁰² *Supra*, note 2, 566.

¹⁰³ *Skaarup Shipping Corp.*, *supra*, note 2. “Canadian maritime law” thus becomes independent of its historical scope.

With all respect, I am on the contrary of opinion that the provisions of s. 22(2) (a) of the *Act* constitute existing federal statutory law coming within the class of subject of navigation and shipping and expressly designed to confer jurisdiction on the Federal Court for claims of the kind here advanced by the appellant.¹⁰⁴

I quote s. 22(2)(a), and submit, with respect, that its terms afford not the slightest basis for treating it as an enactment of substantive law:

22(1) The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any claim or question arising out of one or more of the following:

(a) any claim as to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein... .

To me, this is no more nor less than a grant of judicial jurisdiction. What is more, if s. 22(2)(a) creates substantive law, why not the rest of the jurisdictional provisions in the *Federal Court Act*, including the ones considered in *Quebec North Shore Paper* and *McNamara Construction*? If we embark upon such a course of statutory construction, the result, obviously, must be complete uncertainty as to what is and what is not substantive law in this country. Words cease to mean anything; we are in an Alice in Wonderland world. Perhaps Ritchie J. merely meant to rely on the substantive maritime law found, in *Tropwood*, to have been enacted by reference. Section 22(2)(a) is, after all, a particularization of s. 22(1), which covers, generally, claims for relief under "Canadian maritime law".¹⁰⁵ That may have been meant: it was not said.

There is in the *Tropwood Case*, this obscure passage:

Since the present case is admittedly governed by the Federal Court Act, it is that Act to which we must look to determine whether the jurisdiction now reposed in the Federal Court to try what I may compendiously call admiralty matters relates to a body of law, which can be attributed to federal competence, upon which the jurisdiction can operate.¹⁰⁶

It is given emphasis by Ritchie J. in *Antares*¹⁰⁷ at the outset of his remarks to the effect that s. 22(2)(a) creates substantive law. I should have thought that, to find the *grant of jurisdiction to the Federal Court* one looks first to the *Federal Court Act* (though other federal statutes may of course confer judicial jurisdiction, and other legal sources may amplify the terms of all or

¹⁰⁴ *Supra*, note 2, 110.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Supra*, note 72, 163.

¹⁰⁷ *Supra*, note 2, 111.

any of the grants). But to find Canadian substantive law, one looks to the whole of Canadian statute law and other sources of federal law (depending on one's view of the scope of "federal law"). The *Federal Court Act* is primarily, not a source of substantive law, but an *Act* which constitutes a court and defines the kinds of claims it is to deal with. Exceptional cases (e.g., s. 42) apart, it is only in this sense that the *Federal Court Act* has anything to do with substantive law. Essentially the *Act* says what are the subjects with which the Federal Court is to concern itself, and the procedural manner of so doing. And there is nothing remarkable about that. It is what we should expect.

With this general notion of the *Quebec North Shore Paper* doctrine, let us then continue a systematic examination of the position of Canadian federal courts.

III. What are federal courts, and whence comes the legislative authority to constitute them?

Courts constituted by the legislatures of the provinces, or continued under their legislative authority by s. 129 of *The British North America Act, 1867*, or otherwise, are properly described as "provincial courts"; the terminology results directly from the *Act* of 1867 itself.¹⁰⁸ That is so even though the power to appoint the judges of some of them—and those doubtless the most important—is by s. 96 of the *Act* of 1867 confided to the Governor-General of Canada—*i.e.*, to the federal executive government; a situation which it explains, if it does not excuse, the unfortunate colloquialism whereunder provincial courts subject to s. 96 are sometimes referred to as "federal courts".

At the outset of my discussion I offered a working definition of a "Canadian federal court": simply, a court created by or under an Act of the Parliament of Canada. For most purposes,—for almost all purposes,—this definition (which we may call the strict, or narrow, definition) is satisfactory. It can be employed if we are prepared to work with a tripartite classification of "Canadian" courts,—by which I mean the aggregate of all the courts within the Canadian constitutional system. Under a tripartite scheme there would be "federal" courts; "provincial" courts; and "other" courts.

The possibility of courts which are neither "provincial", nor "federal" under the strict or narrow definition, cannot be excluded. Before the abolition of the Privy Council appeal, the judicial jurisdiction of the Queen in Council was certainly not constitutionally that of a "provincial" court. Through most of its history it would have been regarded *neither* as "federal" nor provincial but as "Imperial". Yet, from the time of the *Statute of*

¹⁰⁸ *The British North America Act, 1867*, 30 & 31 Vict., c. 3, ss. 92.14, 96 *et seq.* (U.K.).

Westminster, 1931, as events proved, its authority (as long as it lasted) continued (to all intents and purposes) subject to the legislative authority of the Parliament of Canada.¹⁰⁹ Again, the original judicial jurisdiction of the Queen in Council¹¹⁰ to settle boundary disputes has never, so far as I am aware, been *formally* abolished; if it survives, its jurisdiction is not that of a "provincial" court. So too, it is at least arguable that the Governor-General in Council is granted power of a judicial character by s. 93(3) of the *Act* of 1867, when an appeal is taken to him. If on such occasions the Governor-in-Council, is by direct operation of Imperial statute, generically, a court (for the purposes of the rules of natural justice, for instance, or for the purposes of *certiorari* and prohibition), what is the nature of that court? Other cases can be envisaged.

As I have said, a *tripartite* classification of courts is workable. But cogent arguments can be advanced for a *bipartite* classification, in which *all courts not "provincial" are federal*.

In 1912, Earl Loreburn, when in *A.-G. Ontario v. A.-G. Canada*¹¹¹ he spoke for the Privy Council on the subject of legislative authority to require the courts to give opinions on reference cases, wrote of the *Act* of 1867 that "there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the *Act* to assume that any point of internal self-government was withheld from Canada."¹¹² Even the appellate judicial jurisdiction of the Queen in Council was, in the 1947 reference on abolition of appeals,¹¹³ effectively classified as a matter concerning what we may call "ultimate appellate jurisdiction"; and this subject, in turn was treated as falling within s. 101 of the *Act* of 1867, the Imperial legislation being simply "an external constitutional limitation."¹¹⁴

The "residuary" authority of the federal Parliament, under s. 91 of the *Act* of 1867, embraces all legislative jurisdiction not conferred upon the provinces, at all events if the federal authority in question is not independently conferred upon Parliament by other distinct provisions. Therefore a "court" not within provincial legislative authority (in virtue of

¹⁰⁹ *A.-G. Ontario v. A.-G. Canada, supra*, note 3.

¹¹⁰ "It is certain that the original jurisdiction in cases of this kind relating to boundaries between provinces... is in the King and Council"; in *Penn v. Baltimore* (1750) 1 Ves. Sen. 444, 27 E.R. 1132, 1134 (H.L.) *per* Lord Hardwicke. It is not clear from the report whether, *e.g.*, *Re Labrador Boundary* [1927] 2 D.L.R. 401 (P.C.), was litigation in the Privy Council by virtue of its original jurisdiction, or a mere reference to the Judicial Committee for its opinion, under s. 4 of the *Judicial Committee Act, 1833*, 3 & 4 Wm. IV, c. 41 (U.K.).

¹¹¹ [1912] A.C. 571 (P.C.).

¹¹² *Ibid.*, 581.

¹¹³ *A.-G. Ontario v. A.-G. Canada, supra*, note 3.

¹¹⁴ *Ibid.*, 153.

s. 92.14 of the *Act* of 1867, or in virtue of s. 129 read with s. 92.14, or otherwise), would, it seems, fall within federal legislative authority. That authority, if not s. 101 of the 1867 *Act*, might perhaps be some other specific grant of substantive authority; but very likely it would be the federal residuary power. So a cogent case can be made for a bipartite classification of “Canadian” courts; even, I think, if some outside provincial authority are not subject to alteration by unilateral federal act.¹¹⁵

If we prefer a bipartite classification, it would be convenient to define a “federal court” as a “Canadian” court other than a “provincial” court. This definition I shall call the wider or “liberal” definition of “federal court”.

I propose, in this part of my discussion to establish, if I can, the following.

— *First, unless for some reason it must be construed otherwise*, any substantive legislative power includes the power to provide for adjudication on matters within its scope — whether by creating institutions called “courts” or otherwise.

— *Second*, with the sole exception of s. 91.27 (which excludes “the Constitution of Courts of Criminal Jurisdiction” from Parliament’s power with respect to “The Criminal Law”), the enumerated heads of s. 91 and all other grants of federal legislative authority, are *at least prima facie* apt to confer authority to provide for adjudication.

— *Third*, s. 92.14 of *The British North America Act, 1867* does not, by itself and without more, suffice to prevent Parliament from so employing any part of its legislative power as to create courts.

— *Fourth*, s. 101 of the *Act* of 1867 *may* indeed exclude the creation of courts from Parliament’s powers of *substantive* legislation under the *Act* of 1867; but it can only have that effect if it is read as *exhausting* Parliament’s powers, under the *Act* of 1867, to create courts.

— *Fifth*, in construing Parliament’s substantive powers it will almost inevitably be necessary to reject any interpretation which would lead to the conclusion that s. 101 serves no purpose, — adds nothing, — when it empowers Parliament to provide “for the Establishment of any additional Courts for the better Administration of the Laws of Canada.” In other words, Parliament’s substantive powers probably cannot enable it to create courts if the result will be that the relevant part of s. 101 is thereby rendered superfluous. The reason why (it is submitted) the relevant part of s. 101 is *not* superfluous, even when substantive powers are read to permit the creation of courts, is (at least) this: Parliament is by s. 101 empowered to create courts of criminal jurisdiction, which otherwise it could not do, by reason of the exception in s. 91.27.

¹¹⁵ Consider, e.g., the appellate tribunal established by s. 93(3) of the *Act* of 1867.

— *Sixth*, in any event, there are, outside the *Act* of 1867, certain powers which enable the Parliament of Canada to create courts or otherwise confer judicial jurisdiction.

You will, I think, appreciate that *to the extent that Parliament can create courts in virtue of its substantive legislative powers*, it becomes altogether unnecessary to rely on s. 101 — whatever its scope may be held to be.

Let me, then, begin.

The Parliament of Canada, in constituting or authorising the constitution of a court of law, does not always, and need not, point to the alleged source of its authority. Even if it does point specially to some power, in law Parliament must normally be taken to rely on all authority enabling it to enact what it purports to enact. Ordinarily it is taken for granted that Parliament's authority to create courts lies in s. 101 of the *B.N.A. Act, 1867*:

The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

As a rule, that is quite sufficient. But it is well worth asking whether s. 101 is the *only* source of Parliament's authority to constitute courts.

What of the various grants of authority to make substantive laws on particular subjects — either in virtue of specific sources of legislative authority (under s. 91 or otherwise), or in virtue of the residuary authority in s. 91?

Do these "substantive powers" permit the Parliament of Canada to create courts having jurisdiction to deal with matters coming within those classes?

At first sight Parliament's claim to create courts under its substantive powers seems irresistible. (Indeed the same may be said of a similar claim by the legislatures of the *provinces*.) The power to enact substantive laws is the power to create rights and obligations; whether these be absolute or *sub modo*. Thus in *Dupont v. Inglis*,¹¹⁶ the Supreme Court of Canada held *intra vires* provincial legislation defining mining rights, *and providing for adjudication by provincial officers* (at first instance and on appeal) of certain disputes regarding the staking of claims. Mr Justice Rand, speaking for the Court, made the following observations:

I think it desirable to enquire first into the real character and content of the rights which the statute creates and the means it furnishes to give them recognition. The statute is dealing primarily with Crown lands; it would, in my opinion, be within provincial power to dispose of such land, over which legislative jurisdiction is exclusive, on any terms or conditions to be determined by, or in the absolute judgment or discretion of,

¹¹⁶[1958] S.C.R. 535.

any functionary whatever; the award or adjudication, in that case, would itself be a constituent element in the rights created: does the Act here evidence such an intendment? Its language creates rights, but *sub modo*; consistently with equality of treatment, tribunals have been set up with officers, *ex officio* justices of the peace, to make determinations while the land still remains within the title of the Crown. The recorder is an officer of the Department; the Commissioner, although not declared a departmental officer, is a statutory officer. His decisions on disputes are only part of a general supervising function. This comprehensive administration taken with the provisions expressly excluding resort to the ordinary Courts, except by appeal under s. 144, indicates that the determinations by the statutory officers are integrated in the rights provided, that, including those given by the Court of Appeal, they inhere in the rights as conditions of their creation.¹¹⁷

This can, I think, be no less applicable to the Parliament of Canada.

Moreover, (quite apart from the integration of adjudication in substantive rights) power to enact substantive laws *prima facie* includes power to constitute officers and other public authorities to administer those laws. That is settled in Canada beyond discussion. As regards the power to “delegate” *even legislative authority itself*, I need only quote the famous phrase of Sir Barnes Peacock, when giving the judgment of the Privy Council in *Hodge v. The Queen*,¹¹⁸ insisting, as regards a provincial legislature, that within its “limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institutional body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.” Again, his Lordship remarked that “how far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.”¹¹⁹ What then of conferring *judicial* power? One thing at least seems beyond dispute. It is manifestly impossible to deny to the Parliament of Canada the authority to impose upon its officers and other public authorities the *obligation to act judicially* in the exercise of *all or any* of the powers conferred by Parliament upon them. It is clear also that Parliament when creating courts is free to do so without designating them by that very word. Thus when legislation, either expressly or inferentially, grants a power with the obligation to exercise it judicially, the legislature is, in contemplation of law, creating a body which is in substance a court, even if the term “court” is nowhere employed. Hence, for example, the amenability of such a statutory body to *certiorari*; a remedy designed to control inferior “courts”. *Certiorari*, I submit, properly lies to control inferior judicial tribunals because in law *they are courts* — *not* despite the fact that they are not.

¹¹⁷ *Ibid.*, 539-40.

¹¹⁸ (1884) 9 App. Cas. 117, 132 (P.C.).

¹¹⁹ *Ibid.*

Denying that substantive legislative powers may be employed to create courts must therefore involve highly embarrassing consequences. To *admit* constitutionally the use of substantive legislative authority to create *bodies endowed with statutory powers and obliged to exercise them judicially* (with a procedure perhaps indistinguishable from that of any superior court), — whilst at the same time *denying* that the very same substantive authority constitutionally permits the creation of “*courts*”, — involves a distinction which, if not completely arbitrary, will become little more than a matter of nomenclature.

But though, *at first sight*, power to create courts resides in *every* grant of substantive powers of legislation, the difficulty is that certain provisions *specifically* deal with the creation of courts, by the Parliament of Canada (s. 101) and by the provincial legislatures (s. 92.14) respectively. *Expressio unius est exclusio alterius*. It is a permissible (though a rebuttable) inference that these provisions deal *exhaustively* with the power to create courts, so far at least as the *Act* of 1867 is concerned. That I would concede without hesitation.

I would however emphasize immediately, that even if s. 101 is exhaustive of Parliament's powers *under the Act of 1867* we shall *still* be obliged to consider the possibility, or indeed the actuality, that powers to create courts, or to confer judicial jurisdiction, derive from sources *outside* the *Act* of 1867. The *Colonial Courts of Admiralty Act, 1890*¹²⁰ conceivably offers an instance, though on balance it seems to me that it simply confers jurisdiction on courts independently created. Or again, take *The British North America Act, 1871*, which *inter alia* provides, by s. 4: “The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.” As this is a later enactment, s. 101 of the *Act* of 1867, taken by itself, offers no conclusive answer to those who would read s. 4 of the *Act* of 1871 as conferring an independent power to create courts. Indeed, in *Riel v. The Queen*,¹²¹ Lord Halsbury, L.C. relied on the *Act* of 1871 as the constitutional basis of the federal legislation governing the judicial system of the North-West Territories. (That does not, of course, prove that the legislation could not have been sufficiently supported by s. 101 of the *Act* of 1867, read *either* with s. 91.27 thereof (“Criminal Law” and “Procedure in Criminal Matters”) *or* with s. 4 of the *Act* of 1871.) Section 5 of the *Colonial Laws Validity Act, 1865*¹²² was suggested as a possible source of provincial legislative authority in *Fielding v. Thomas*.¹²³

¹²⁰ 53 & 54 Vict., c. 27 (U.K.).

¹²¹ (1885) L.R. 10 App. Cas. 675 (P.C.).

¹²² 28 & 29 Vict., c. 63 (U.K.).

¹²³ [1896] A.C. 600, 610 (P.C.) *per* Lord Halsbury.

In sum, it is a very bold assumption that the *only* federal legislative authority to create courts is that which resides in s. 101 of the *Act* of 1867.

But is s. 101 exhaustive *so far as the Act of 1867 is concerned*? In this connection, it is worth recalling that *one* “substantive” head of federal legislative power *does* explicitly *exclude* the power to create courts. That is head 27 of s. 91: “The Criminal Law except the Constitution of Courts Criminal Jurisdiction, but including the Procedure in Criminal Matters.” This at least arguably invites (I do not say conclusively imposes) the inference that there is no such exclusion as regards the *other* heads of federal legislative authority.

In any event, if the power to create courts is to be excluded from the various federal legislative powers to enact substantive law, that must (it seems) be a result which flows from s. 101 of the *Act* of 1867. The provisions of s. 92.14 conferring on the provincial legislatures exclusive authority with respect to: “The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts” do not seem, by themselves, sufficient to accomplish this result; and this is so for various reasons. I think them important.

First, the powers enumerated in s. 91 are granted “notwithstanding anything in this Act”.¹²⁴

Second, if s. 92.14 is by itself sufficient to deny Parliament power to create courts of *civil* jurisdiction, it should also suffice by parity of reasoning to deny the power to create courts of *criminal* jurisdiction; yet special words are included in head 27 of s. 91 to produce this result: “except the Constitution of Courts of Criminal Jurisdiction”. It is an elementary canon of statutory interpretation that these words ought, if possible, be given some effect, and not held to be superfluous. What purpose can they serve unless it be to ensure the creation of criminal courts is *prima facie*, left to the provincial legislatures, and (subject to s. 101) exclusively to them?

There is a *third* reason. To hold s. 92.14, by itself and without more, capable of excluding the power to create courts from the grants of substantive federal legislative authority (especially from those in the

¹²⁴ The words of s. 91 are explicit and should need no gloss. But if any judicial authority be required, it is provided by Lord Atkin speaking for the Privy Council in *Proprietary Articles Trade Assoc. v. A.-G. Canada* [1931] A.C. 310, 326-7 (P.C.): “If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92.14, “the administration of justice in the Province”, even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice.”

enumerated heads of s. 91) proves *too much*. It might well be taken to prove not only that the Parliament of Canada cannot employ its substantive legislative powers to create *new* courts, but to prove also that it cannot regulate the *procedure in federal matters in the provincial courts*. After all, s. 92.14 includes amongst provincial legislative powers not merely “the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction”, but also “Procedure in Civil Matters in those Courts”. So far as s. 92.14 is concerned, both these matters, — the constitution of courts on the one hand and civil procedure therein on the other, — stand on an equal footing. The result would be hard to avoid, that if s. 92.14, by itself, is held to exclude from the grants of federal legislative authority the power to create *new* courts, it would at the same time and on same reasoning, exclude federal legislation *regulating procedure in provincial courts*, even as regards proceedings where the subject matter is federal in the strictest sense. Such a result would be repugnant to a consistent jurisprudence of the highest authority and of the longest standing.¹²⁵ Moreover, to deny the Parliament of Canada power to regulate proceedings, albeit in provincial courts, upon laws enacted by it (and even those continued under its legislative authority), would be a step not merely novel but repugnant to the plainest principle. Permit me to digress for a moment on this subject.

The power to enact law on a given subject is in its very essence the power to define rights and obligations, liabilities, privileges, powers and immunities on that subject. It cannot possibly be maintained with the least plausibility that an attempted exercise of such a power is *a priori* either *within*, or *outside*, the authority conferred, accordingly as the law made is *general*, or *specific*, in its terms. An enactment which (say) imposes upon a carrier a specified liability to the holder of a bill of lading, does not alter its constitutional character merely by the degree of detail by which it spells out his obligations. It is of the same constitutional character, whether it contents itself with providing merely in general terms that the carrier shall in certain cases be liable in damages, or whether it defines the right in the utmost detail, giving all the circumstances in which, methods by which, and officers by whom the obligation shall be enforced — even the goods or other property answerable for the obligation — and even (it may be) with all the specificity of a code of procedure. In the enactment of rights and obligations, extremism in the pursuit of specificity is no constitutional vice; moderation in the pursuit of specificity is no constitutional virtue. One may gladly accept the convenience of establishing comprehensive procedural rules, and even of

¹²⁵ See, e.g., *Cushing v. Dupuy* (1880) L.R. 5 App. Cas. 409, 415 (P.C.); and, for a modern case, *Proprietary Articles Trade Assoc. v. A.-G. Canada*, *ibid.*

It is also implicit or explicit in the cases upholding the power of Parliament to confer new jurisdictions and impose new duties on the provincial courts; see, e.g., the cases collected in 7 Can. Abr. (2d) Nos 962-7, and Nos 1081-92.

enacting them separately from so-called “substantive” rules. One may also acknowledge that the provincial legislatures have been entrusted with the power to make procedural rules as regards *all* civil actions in provincial courts *whatever* the source of the substantive law — and concede that this power will on occasion oblige the courts to decide whether or not the limits appropriate to “procedure” have been exceeded. None of this, however, detracts from this essential truth: an authority entrusted with the power to enact laws on a given subject cannot be taken to have been limited *impliedly* as to the specificity of its enactments. Indeed, where procedural and substantive enactments *are* separately made, it is often a matter of arbitrary decision whether given provisions are included in the one or in the other. To take an example, the provisions respecting the privilege for law costs in Quebec are divided between the *Civil Code* and the *Code of Civil Procedure*; and yet they might just as readily all have been included in the one or the other. As the Privy Council observed in *Exchange Bank of Canada v. The Queen*,¹²⁶ in 1886, in discussing the relationship of the provisions of the *Civil Code*, and of the then *Code of Civil Procedure* (*i.e.*, that of 1867), concerning privileges:

The appellants at the Bar have pressed somewhat too absolutely the argument that a Procedure Code is not intended to enact substantive law, and that this part of the Procedure Code is only intended to give directions to the Courts how to carry the rules of the Civil Code into effect. Some of the articles of the Procedure Code (e.g., art. 610) do create or establish rights not touched by the Civil Code. The two Codes should be construed together in this part just as if the articles of the Procedure Code followed the corresponding articles of the Civil Code.

So reading them, we find that the main purpose of this part of the Procedure Code is to carry into detail the principles laid down in the Civil Code, which are repeated in the form of directions how money is to be distributed. And where fresh classes of priorities are established, they are subordinate classes not interfering with the larger classification of the Civil Code. Of course it could be no part of the Procedure Code to contravene the principles of the Civil Code, and it is clear from art. 605 that the two were believed to be working in harmony. And when the Procedure Code is found to overlap the Civil Code, and so it becomes necessary to modify the one or the other, the fact that the function of the Procedure Code is in this part of it a subordinate one favours the conclusion that it is the one to be modified.¹²⁷

If, then, Parliament can, to the extent it thinks fit, *control procedure and jurisdiction*¹²⁸ in federal matters in *provincial* courts, I cannot see (unless in consequence of the argument with which I shall deal in a moment) why its “substantive” legislative powers should not, with equal legitimacy, be employed *to create new courts outright* to deal with the same matters. Indeed in *Valin v. Langlois*,¹²⁹ the Privy Council seems to have thought federal control of the jurisdiction and procedure of provincial courts in

¹²⁶ (1886) L.R. 11 App. Cas. 157 (P.C.).

¹²⁷ *Ibid.*, 169.

¹²⁸ *Supra*, note 125.

¹²⁹ (1879) L.R. 5 App. Cas. 115 (P.C.).

federal matters, and federal establishment of new courts with respect to federal matters, to stand on the same footing.¹³⁰

I have defended, at some length, the power of the Parliament of Canada to employ its substantive legislative authority to regulate jurisdiction and procedure in federal matters in provincial courts. I have done so not only because of the intrinsic importance of the question (and its potential use as regards maritime matters) but also because it seems to me that if this power exists despite the provincial authority defined in s. 92.14 of the *Act* of 1867, so equally does Parliament's power to employ the like substantive authority to create federal courts outright — *unless of course s. 101 is taken to exhaust, so far as the Act of 1867 is concerned, the federal legislative authority to create courts.* That really is decisive.

The decisive question is then whether or not s. 101 is to be held to cover the whole ground of Parliament's court-creating power under the *Act* of 1867.

Is s. 101 properly to be construed as exhaustive? The *Quebec North Shore Paper Case* and its offspring assume, rather than decide, that it is. If s. 101 is *not* exhaustive, and if federal courts *can* be created under the substantive grants of federal legislative power, very important consequences indeed must follow. The phrase "Courts for the Better Administration of the Laws of Canada" becomes irrelevant whenever another power can be relied on. The "other" power must normally be a grant of substantive authority, and in deciding whether any given grant will support Parliamentary conferral of any given judicial jurisdiction, the only question is one which is the same as that which applies to *any* federal statute: *is the statute enacted in relation to some subject matter within federal legislative authority?* In deciding the latter question, it seems plain that a law which says (for example) who is to hear claims arising from collisions of ships is no less a law *in relation to* such collisions than is a law which specified the parties who are to be liable for such collisions and the measure of their liability. Similarly a law which says who is to hear disputes as to contracts to construct terminals, is no more, and no less, a law "in relation to" such terminals than is a law prescribing the liability on such contracts. Both laws are within the substantive federal legislative power, — *or neither is.* If so, the *Quebec North Shore Paper* doctrine seems to me *to depend first and primarily, on the correctness of its "threshold" assumption that s. 101 of the Act of 1867 is exhaustive of Parliament's power under that Act to create courts,* and only secondarily, and once that assumption has been accepted, on the *true construction* of s. 101.

Is the assumption of the exhaustive character of s. 101 well-founded? That is not an easy question. Anyone who maintains that s. 101 is

¹³⁰ *Ibid.*, 118-21.

not exhaustive (of Parliament's court-creating powers under the 1867 *Act*) must expect to be asked what purpose is then served by that portion of s. 101 which empowers Parliament to provide for "the Establishment of any additional Courts for the better Administration of the Laws of Canada". A theory which would have it, in effect, mean nothing; which would have it add nothing to and subtract nothing from powers already found elsewhere in the Act, is a theory likely to find little favour in any court of law. Let me, therefore, suggest that, though it is of course carefully drafted in very general language, the presence of the second branch of s. 101 is necessary to restore to the Parliament of Canada the power to create courts of criminal jurisdiction, which, by reason of the exception from s. 91.27, has been denied to Parliament in the general scheme of distribution of legislative authority found in ss. 91 and 92.

On the other hand, what consequences follow if s. 101 *is* found to be exhaustive? It seems to me that then *every* officer or body constituted by federal statute and amenable to *certiorari*—that is to say, *every* officer or body of a judicial nature—being, in contemplation of law, a "court"—nomenclature being no substitute for analysis!—must be held to be an "additional" court "for the better Administration of the Laws of Canada". I cannot see why (for example) *inferior* courts could be created under "substantive" legislative powers, but *superior* courts could not.

I would submit that, on balance, s. 101 is better read as *not* exhausting Parliament's power, under the 1867 *Act*, to create courts. If that is so, Parliament's power to create courts, and to confer judicial jurisdiction, is (*regardless* of the ambit of s. 101) coextensive with *its power of law-making*—not merely coextensive with *substantive federal law*. If so, *Quebec North Shore Paper* is wrongly decided, *regardless* of the proper scope of s. 101.

A word lastly on *territorial* courts—or, more generally, courts exercising jurisdiction *in respect of* the territories. Whether Parliament's power arises under s. 101 of the *Act* of 1867,—or under s. 4 of the *B.N.A. Act, 1871*,—or even under the federal "residuary" power,—or, indeed, under two or more of these powers, it must be indisputable that federal legislative authority as to courts for the territories is both comprehensive and absolute.

Courts aside, in the territories, there is no competing provincial authority on any subject. Federal legislative authority on *all* subjects (whether the complement to its Canada-wide authority be derived entirely from the *Act* of 1871, or partly from the residuary power) follows *ipso facto*.

In a strictly *bipartite* classification of courts, those established by Parliament for the territories must be considered federal courts. If a *tripartite* classification be found necessary to explain certain phenomena,

territorial courts might well be instances of the *tertium quid*—neither strictly federal, nor provincial. Consider, for example, the question whether s. 133 of the *Act* of 1867 applies to guarantee free use of the English and French languages in territorial courts. Section 133 provides that “either of those languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec”. Is a territorial court a “Court of Canada” within the meaning of s. 133? Is it, in any event, a court of Canada “established under *this Act*”—*i.e.*, the *Act* of 1867?

Whatever be the true construction of s. 133 of the 1867 *Act*, the territories should, it seems, present no problems on the jurisdictional issues with which we are concerned. Where Parliament creates courts *in and for* the territories, its authority to do as it pleases in prescribing their jurisdiction follows clearly from one or more of the three sources I have mentioned above. Where Parliament (as with the Federal Court of Canada) creates courts exercising jurisdiction *outside the territories but in respect of* the territories, the same appears to me to be true. (If Beetz J. should, on behalf of the Supreme Court, assert that, as regards federal legislative authority exerted in respect of the territories *but outside the boundaries of the territories themselves*, the territories are a *subject in relation to which*—rather than a *place in which*—the federal Parliament exercises exclusive legislative jurisdiction,¹³¹—at all events when Parliament deals with matters normally within provincial jurisdiction,—I think I would cheerfully acquiesce.) Possibly, though not necessarily, that may shift the basis of legislative authority as amongst the three sources I have mentioned.

Lest you, too hastily, conclude that my discussion on the territories is no more than the cadenza of an enthusiastic lawyer, I refer you to *Alda Enterprises Ltd v. The Queen, Commissioner of the Yukon Territory, Government of the Yukon Territory, and Town of Faro*,¹³² an action in negligence seeking damages against the alleged owners and operators of a sewer and water system, in consequence of damage sustained through the subsidence of land upon which plaintiff's hotel was built, the pipes having failed and water having escaped into the permafrost. The action, brought in the Federal Court of Canada, was dismissed by Collier J. as against the Town, for what of “existing and applicable federal law”, though it was allowed to go forward as against the Crown on the basis of the *Crown Liability Act*.

¹³¹ *Construction Montcalm Inc. v. Minimum Wage Commission* [1979] 1 S.C.R. 754; *Cardinal v. A.-G. Alberta* [1974] S.C.R. 695. The analogy would be with federal Crown land or with Indian reservations. These analogies could not avail as regards the operation of federal laws *within* the territories but might, arguably, do so *outside* them.

¹³² [1978] 2 F.C. 106 (T.D.).

I am not concerned with the question whether there was, under the terms of the *Federal Court Act* or *Rules*, any statutory basis for Federal Court jurisdiction over the Town. Perhaps there was not. But it seems to me astounding that the claim should be dismissed on the ground that the claim was not founded on "Laws of Canada" within the meaning of s. 101 of the *Act* of 1867. Even assuming, without deciding, that s. 101 of the 1867 *Act* was the only constitutional basis for Federal Court jurisdiction *quoad* the Yukon, the short answer is that *all* the Yukon's laws are "Laws of Canada" within the meaning of s. 101: and that this is true *whatsoever* be the source of Parliament's power to enact, — or authorize, through subordinate legislative authorities, the enactment, — of all or any of the Yukon's laws.

IV. Postscript: *Rhine's Case* and *Prytula's Case*

On 2 December 1980, — some six months after the delivery of this paper, — the Supreme Court of Canada unanimously dismissed appeals in two cases:¹³³ *Rhine v. The Queen*, — a claim by the Crown in right of Canada for repayment of a sum allegedly owing in consequence of an advance made, in pursuance of the *Prairie Grain Advance Payments Act*,¹³⁴ to a grain producer in respect of undelivered grain; and *Prytula v. The Queen*, — a claim by the Crown in right of Canada as guarantor subrogated in the rights of a lender, namely a bank which, pursuant to the *Canada Student Loans Act*,¹³⁵ had lent to the appellant a sum which she failed to repay. Laskin C.J.C. delivered the reasons of the Court, which dealt with both cases, these having been argued together. In both, the jurisdiction of the Federal Court of Canada was affirmed.

The Supreme Court of Canada reaffirmed the position that "there must be existing and applicable federal law to support the claims made in these cases by the Crown, otherwise, there would not be conformity with the provisions of s. 101 of the *British North America Act, 1867*".¹³⁶ Although, in the course of its finding that the necessary federal law existed, the Court emphasized the two statutes pursuant to which the monies had been paid, it did not suggest that these created statutory causes of action; indeed, it seems implicitly acknowledged that they did not. So far from insisting upon the constitutional necessity of a complete title by federal statute to the relief claimed, the Court refers to *the common law itself* as being, in certain (undefined) circumstances, *federal law*. Yet the reasons give so much emphasis to the two statutes as to compel the conclusion that, without them,

¹³³ (1980) 116 D.L.R. (3d) 385 (S.C.C.) *per* Laskin C.J.C., Martland, Ritchie, Dickson, Estey, McIntyre and Chouinard JJ.

¹³⁴ R.S.C. 1970, c. P-18.

¹³⁵ R.S.C. 1970, c. S-17.

¹³⁶ *Supra*, note 133, 387. This was stated to be the effect of *McNamara Construction*, *supra*, note 35.

the necessary "federal law" would not exist. The Court does not, however, give any test for ascertaining just what rôle statutes must play if they can stop short of creating a complete cause of action. This, surely, vindicates my expressed concern that "in some circumstances enough admixture of federal statute law in the common law soup, so to speak, will suffice to give the whole a federal flavour But, in the nature of things, no one can tell for sure till the tasting is finished — at the Supreme Court level, and on a case by case basis, with a maximum of insecurity to the litigant."¹³⁷

The Chief Justice summarizes the reasons of the Court in a "Conclusion" covering both appeals:

The short answer to the issues raised by the appellants in the two cases is that each of the statutes with which they are respectively concerned provides for the advancing of federal funds or federally guaranteed funds to eligible individuals, as defined in the respective statutes and Regulations, and also for repayment and the means for enforcing repayment. This is all a matter of the administration of a federal statute and is, therefore, within s. 101 of the *British North America Act, 1867*. Consequently, it supports jurisdiction in the Federal Court under s. 17(4)(a) of the *Federal Court Act*.¹³⁸

The role of statutory provisions is explained separately for each of the two appeals. In *Rhine's Case*, the account is followed by an afterthought about the common law:

The *Prairie Grain Advance Payments Act* has, as its stated purpose, the making of advances to grain producers in respect of grain not yet delivered to the Canadian Wheat Board. It is part of a scheme for the regulation of the grain trade

Under the *Prairie Grain Advance Payments Act*, a producer may apply to the Canadian Wheat Board (which is an agent of the Crown) for an advance payment under a prescribed form. Various details of the applicant's business or operations must be disclosed as stipulated in s. 4. The applicant must give an undertaking in respect of delivery of grain or in respect of repayment if grain is not delivered, and upon default proceedings may be taken against him. The statute provides for a lien upon the grain in respect of which an advance is made and Mr. Robinette conceded that in this respect there would be valid federal law to support the jurisdiction of the Federal Court. However, since the claim here is not for enforcement of a lien but rather for repayment upon default in accordance with the undertaking, it is contended that there is simply the enforcement of an ordinary contractual obligation which owes nothing to federal law other than its origin in the statutory authorization to make the advance.

I do not agree that the matter can be disposed of in such simple terms. What we have here is a detailed statutory framework under which advances for prospective grain deliveries are authorized as part of an overall scheme for the marketing of grain produced in Canada. An examination of the *Prairie Grain Advance Payments Act* itself lends emphasis to its place in the overall scheme. True, there is an undertaking or a contractual consequence of the application of the Act but that does not mean that the Act is left behind once the undertaking or contract is made. At every turn, the Act has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law to govern the transaction which became the subject of litigation in

¹³⁷ *Supra*, pp. 171-2.

¹³⁸ *Supra*, note 133, 390.

the Federal Court. It should hardly be necessary to add that "contract" or other legal institutions, such as "tort" cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law.¹³⁹

If the common law can sometimes be federal law for the purposes of s. 101 of the *Act* of 1867, when is that so? Why should the common law not satisfy the requirements of s. 101 in this case, without there being need to rely on any statute at all? And, *whatever* the constitutional requirement may be, if it is satisfied here, why was it not equally satisfied in *McNamara Construction*?¹⁴⁰ The Chief Justice attempts, — in my submission quite unsuccessfully, — to explain and distinguish that case:

In the *McNamara* case, there was no such statutory shelter within which the transactions there were contained as there is in the present case. The contracts in the *McNamara* case had no statutory base and, in so far as the Crown was also suing there to enforce a surety bond, this was merely in pursuance of an administrative requirement for the taking of such a bond to secure contract obligations in favour of the Crown.¹⁴¹

After quoting from the reasons of the Court in that case, the Chief Justice concludes: "[t]here is, therefore, a wide gulf between the situation in the *Rhine* case, now before this Court, and the situation in the *McNamara* case."¹⁴² Surely (assuming legislation to be a constitutional requisite) the performance bond in *McNamara Construction* was given pursuant to statute. If s. 101 does not constitutionally require that the statute create a cause of action, what is it that the statute must do? And what purpose is served by making such a distinction? Is the matter simply one of *quantum* of statutory involvement, and how is that to be measured?

Rhine's and *Prytula's Cases* may represent a relaxation of the *Quebec North Shore Paper* doctrine, but provide no justification for it, whether in point of law or in point of policy. Nor is an acceptable test laid down. We are told, perhaps *obiter*, that common law may sometimes be federal law. But we are not told when; nor why in some instances, but not in others equally subject to federal legislative authority. And, of course, we are apparently told that statute law is (normally?) an essential ingredient, but not what its function must be, nor, indeed, how conspicuous must be its presence.¹⁴³

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¹³⁹ *Ibid.*, 387-8.

¹⁴⁰ *Supra*, note 35.

¹⁴¹ *Supra*, note 133, 388.

¹⁴² *Ibid.*, 389.

¹⁴³ *Ibid.*, 389-90; the nature and role of the federal statute administered in *Prytula's Case* are set out in these terms: "The legislation in the *Prytula* case, the *Canada Student Loans Act*, and the Regulations thereunder provide for bank loans to students which carry a Government guarantee of repayment to the lending bank upon the borrower's default and also entitle the Crown to be subrogated to the bank's rights against the defaulter. As in the case of the legislation in the *Rhine* case, so too here an agreement in a prescribed form must be executed, save that here the agreement is between the student borrower and the lending

Appendix
Federal Causes of Action Act
Preliminary draft — 18 November 1976

An Act to create civil and criminal causes of action in conjunctions with other enactments conferring, or purporting to confer, jurisdiction on federal courts.

1. This may be cited as the *Federal Causes of Action Act*.
2. In this Act,
 - “corresponding cause of action” means, in the case of a cause of action contemplated by paragraph 8(i), the similar cause of action contemplated by paragraph 8(ii); and in the case of a cause of action contemplated by paragraph 8(ii), the similar cause of action contemplated by paragraph 8(i).
 - “court in Canada” means a court constituted by *The British North America Act, 1867*, or established thereunder, or continued thereunder; whether such court sits in Canada or elsewhere;
 - “enactment” has the same meaning as in the *Interpretation Act*;
 - “federal court” means a court in Canada other than a court established by the legislature of a Province or continued under its authority;
 - “foreign laws” means laws other than the following:
 - (i) *The British North America Act, 1867*
 - (ii) laws enacted under, or continued under, its authority;
 - (iii) Imperial statutes not coming within (i) or (ii).
 - “Imperial statutes” means legislation, extending of its own force to Canada as part of the law of Canada or of any part of Canada, made by or under the authority of the Parliaments of England, Great Britain, or the United Kingdom;
 - “laws” includes both rules enacted by or under a statute, and common law rules;
 - “laws of Canada” has the same meaning as in s. 101 of *The British North America Act, 1867*;
 - “relief” includes relief of every description without exception: civil and criminal, public and private; common law remedies and equitable remedies; including (for the avoidance of doubt) declaratory relief and prerogative remedies.
3. Whenever the following circumstances occur:
 - (i) an enactment confers, or purports to confer, upon a federal court, jurisdiction to hear and determine a claim for relief in any matter; and

bank; the Government is not a direct party to the agreement but is a guarantor under the statute and a subrogee of the bank under Regulations authorized by s. 13(j) of the statute.

As is correctly pointed out by the respondent in its factum, the *Canada Student Loans Act* and the Regulations thereunder govern every aspect of the relationship between the borrowing student, the lending bank and the guaranteeing government. Resort must necessarily be had to the statute and Regulations to support any legal claims, whether by the bank or by the Government, or to determine the liability of the borrowing student. Moreover, subrogation of the Crown to the claim of the bank is expressly dealt with. The prescribed form of agreement between the student and the bank emphasizes this by the student's signed assertion that “I understand my obligations under this Act and the Regulations and ... I shall repay my total indebtedness as required by the Act and Regulations.” Once it is accepted, as it is here, that the Act and Regulations are valid, I do not see how it can be doubted that there is here existing and applicable federal law to underpin the jurisdiction of the Federal Court.”

- (ii) a right to that relief arises under laws other than laws of Canada; *provided*, that where such other laws are foreign laws, a claim for relief thereunder is one which may properly be heard and determined by a court in Canada;
 - (iii) a right to that relief does not, apart from this Act, arise under the laws of Canada; and
 - (iv) the Parliament of Canada has legislative authority to create such a right: then in every such case this section, operating with that enactment, creates that right.
4. Every right created by s. 3 is a complete cause of action created by Act of the Parliament of Canada.
 5. Save as the Parliament of Canada by reasonable intendment otherwise provides, every right created by s. 3 is, as well in its essential character as in all its incidents, identical in every respect with the corresponding right contemplated in paragraph 3(ii).
 6. Sections three, four and five of this Act apply and have effect as if the laws contemplated in paragraph 3(ii) were in terms expressly re-enacted at length in this Act.
 7. No right created by s. 3 may be enforced elsewhere than in the court contemplated in paragraph 3(i).
 8. Proceedings brought or judgment obtained upon either
 - (i) a cause of action created by s. 3, or
 - (ii) a cause of action arising otherwise than upon s. 3,shall suspend, supersede, or otherwise affect the corresponding cause of action as if the two were one.
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