CANADIAN LEGAL FEDERALISM SINCE 1982

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La recherche[1] de **Peter Oliver** est dans le domaine du droit comparé, de l'histoire constitutionnelle et de la théorie, principalement en ce qui concerne le Canada, le Commonwealth et l'Union européenne. Il est particulièrement intéressé par les changements dans la compréhension de deux concepts théoriques centraux : la souveraineté et le système juridique. En 2005, il publie *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press), qui a reçu l'un des prix Peter Birks pour recherche juridique exceptionnelle. Sa recherche plus récente examine de plus près les questions liées au fédéralisme canadien. Avant d'arriver à l'Université d'Ottawa en 2007, Peter Oliver était titulaire d'une chaire de droit à la faculté de droit au King's College de Londres, où il a enseigné le droit public et la jurisprudence. En 2005-6, il a été chercheur invité à la Section du droit constitutionnel et administratif de Justice Canada. En 2006-7, il a été conseiller spécial, Affaires juridiques et constitutionnelles au Secrétariat des affaires intergouvernementales du Bureau du Conseil privé. Il a été auxiliaire juridique à la Cour suprême du Canada en 1990-1, chercheur Bolton à la Faculté de droit, Université McGill en 1991 et professeur invité à l'Université de Toulouse de 1996 à 2001. Il est encore professeur invité au King's College, Université de Londres.

ABSTRACT

This article considers the evolution of legal federalism over the past 30 years.[2] It observes that since 1982 we have seen: considerable stability in the interpretation of heads of power; a judicial policy of cooperative federalism whereby both federal and provincial legislatures are afforded considerable room to legislate; an enduring interjurisdictional immunity rule that is weaker and narrower in its application; and a conflict rule that grants federal paramountcy under narrowly construed terms. By way of counterpoint to enduring federal paramountcy we have seen: broad federal powers such as Criminal Law and General Regulation of Trade and Commerce interpreted less expansively; the ancillary doctrine applied more rigorously; and the *Charter of Rights and Freedoms* used to limit federal paramountcy where other rules of legal federalism do not necessarily avail.

RÉSUMÉ

Cet article examine l'évolution du fédéralisme juridique au cours des 30 dernières années.[2] Il observe que, depuis 1982, nous avons vu : une stabilité considérable dans l'interprétation des chefs de compétence, une politique judiciaire du fédéralisme coopératif où les assemblées législatives fédérales et provinciales bénéficient d'un grand espace pour légiférer, une règle de l'immunité durable intergouvernementale qui est plus faible et plus étroite dans son application, et une règle de conflit qui accorde la prépondérance fédérale sous des conditions strictement interprétées. En guise de contrepoint à la prépondérance fédérale durable que nous avons vu : de larges pouvoirs fédéraux, tels que le droit pénal et le règlement général de l'Industrie et du Commerce, interprétés de manière moins expansive, la doctrine auxiliaire appliquée de façon plus rigoureuse et la Charte des droits et libertés utilisée pour limiter la prépondérance fédérale où d'autres règles du fédéralisme juridique ne prévalent pas nécessairement.

LEGAL FEDERALISM

DEFINITION

What do I mean by "legal federalism". I am referring, basically, to the constitutional division of powers, the list of powers set out in ss. 91, 92, 93 and 95 of the *Constitution Act, 1867*.

Federalism was, of course, *not* the subject matter of the 1982 reforms, which are rightly remembered more for a new domestic amending formula, the *Charter of Rights and Freedoms*, and the aboriginal rights protected by s. 35 of the *Constitution Act, 1982*.[3]

To speak of legal federalism after 1982 we need to say a bit about legal federalism before 1982.

LEGAL FEDERALISM BEFORE 1982

This part comes to me quite easily. I studied Constitutional Law (with then-professor Irwin Cotler) in 1981-2. Anyone who studied constitutional law before April 17, 1982 knows that it was almost all about legal federalism: about the Judicial Committee of the Privy Council and the Supreme Court of Canada interpretations of the various heads of power; and about the emergence of various doctrines (for example, the pith and substance doctrine, according to which legislation is characterized according to its true nature and purpose). Perhaps most importantly, the Supreme Court of Canada moved from what was referred to as a "watertight compartments" view of the division of powers to the beginnings of what we now call cooperative federalism, characterized by the recognition that there are matters on which *both* Parliament *and* the provinces can legislate. Laws often have a "double aspect" such that viewed from one perspective and purpose they would be valid federal enactments and viewed from another perspective and purpose they would be valid provincial enactments.

A point which Professor Cotler was keen to emphasize was that prior to 1982 – and especially prior to the 60s and 70s when documents such as the *Canadian Bill of Rights* and the Quebec *Charter of Human Rights and Freedoms* appeared – legal federalism was often the surrogate means by which courts protected rights. So when British Columbia legislation in the 1890s sought to discriminate against Chinese workers, many of whom had built the Canadian Pacific Railway, the Privy Council invalidated the discriminatory legislation on legal federalism grounds.[4] When, during the 40s and 50s, Premier Duplessis and others displayed excessive zeal in persecuting, for example, Communists and Jehovah's Witnesses, the Supreme Court of Canada used the division of powers to invalidate the provincial laws and municipal bylaws. The cases of *Switzman*[5] and *Saumur*[6] come to mind.

So from the pre-1982 period I would like to underline:

1. The development of over a century worth of jurisprudence regarding the various heads of powers in sections 91 and 92.
2. The development of key doctrines such as the pith and substance doctrine.
3. The evolution from a watertight compartments view of the division of powers to the beginnings cooperative federalism based, for example, on the double aspect doctrine.
4. And the frequent use of legal federalism in the defence of human rights.

AFTER 1982

THE 1980S

After 1982 and the entrenchment of the *Charter of Rights and Freedoms* there was no further need to use legal federalism as a proxy for rights protection. And perhaps just as important, it was immediately clear in 1982 that the Supreme Court of Canada would have to devote a huge amount of time, energy and resources to developing virtually from scratch a jurisprudence around the *Charter* and the s. 35 rights for aboriginal peoples.

To my mind, many of the Supreme Court of Canada's legal federalism cases in the 1980s betray a considerable awareness of this new reality.

As early as 1982 when the Supreme Court decided the *Multiple Access* case,[7] Dickson J, as he then was, set out a test for when it is that federal and provincial laws are deemed to be in conflict such that federal law is paramount. The test in *Multiple Access* was, and is (because it is still the test), one of operational conflict, of one statute saying 'yes' and the other saying 'no', of one saying 'hot' and the other saying 'cold'. Such a strict test for what constituted 'conflict' reduced the incentive for parties to litigate on the basis of paramountcy for federal legislation. The *Multiple Access* test encouraged the coexistence of federal and provincial laws and was therefore a key part of the emerging cooperative federalism. And this is true despite the development of a second branch of the test for paramountcy in the *Bank of Montreal v. Hall* case.[8] This second branch is based on "frustration of Parliament's intention" which seems like a broad, easily-satisfied test, but the Supreme Court of Canada has repeated on numerous occasions subsequently that this branch of the test is not to be overused; that is, not overused so as to go against the dominant tide of cooperative federalism.[9]

While the 1982 paramountcy test discouraged federalism-based litigation, it by no means eliminated such litigation. Important cases emerged in the 1980s, even as the Supreme Court of Canada was highly preoccupied with developing *Charter* and s. 35 jurisprudence. What we see

in the legal federalism jurisprudence, perhaps in reaction, is clearer attempts than pre-1982 to codify the law under ss. 91 and 92. So in the *Crown Zellerbach* case[10] in 1988 the Court set out 4 key considerations regarding the Peace Order and Good Government power. In 1989 in the *General Motors* case,[11] Dickson CJC set out a carefully formulated 5-part test regarding the general regulation of trade and commerce, a test that was applied just a few months ago in the *Reference re Securities Act*.[12]

Separately, but just as significantly given my thesis about the Supreme Court of Canada de-emphasizing legal federalism by discouraging litigation, the Court in *General Motors* also set out the new terms of what constitutional lawyers refer to as "the ancillary doctrine". By virtue of this doctrine, provisions which might otherwise be declared invalid as having to do with the other level of powers – so the creation of a tort or delict in a federal statute, or the presence of international trade provisions in a provincial statute – could nonetheless be declared valid if their connection to an otherwise valid statute was at the very least rational as opposed to gratuitous. Once again this has had the result of validating more federal and provincial legislation and discouraging legal-federalism-based litigation.

So to summarize by the end of the 1980s we have:

1. Almost 125 years of jurisprudence clarifying the meaning of the various heads of power, and a further attempt post-1982 to codify some of the larger and more amorphous powers, such as Peace, Order and Good Government and the general regulation of trade and commerce.
2. The thinning out of the test for conflict between federal and provincial legislation and the corresponding reduction of cases of federal paramountcy.
3. The development of doctrines such as the ancillary power doctrine which, together with the double aspect doctrine, again reduced the chances of legislation, or parts of legislation, being declared invalid.
4. *All* this having the effect of stabilizing and clarifying legal federalism and of reducing the volume of litigation.

EXCEPTIONS TO THE EARLY POST-1982 TREND

While the general trend was toward stabilization and clarification, I should probably note two areas of legal federalism jurisprudence which were still in flux: a doctrine (interjurisdictional immunity) and a power: the Criminal Law Power.

Interjurisdictional immunity is in some ways the main relic of the days when legal federalism operated on the assumption of "watertight compartments". On the broadest version of interjurisdictional immunity, each and every power in sections 91 and 92 has a vital and essential core which is immune from the effects – even the secondary effects – of legislation based in the other side of the division of powers. In fact (as opposed to theory), interjurisdictional immunity precedents dealt principally with protecting federal people, things and undertakings situated in the province from generally applicable provincial legislation. So the doctrine served to insulate, for example, banks and federal transportation and communications undertakings from provincial consumer protection, health and safety at work and general labour laws.

However, against the grain of the 1980s federalism-lite trend, the Supreme Court of Canada continued to devote large amounts of time and energy to sorting out the interjurisdictional immunity doctrine, notably in cases such as *Bell 1988*[13] and *Irwin Toy*[14]. And there was little in these cases that demonstrated any prospect of this part of legal federalism analysis getting any simpler or clearer any time soon.

Regarding the Criminal Law power, s. 91(27), the Supreme Court in the 1980s had confirmed the Privy Council view that this power was to be understood "in its widest sense", but it was still important to determine the extent of this power. The existing jurisprudence made clear that valid criminal law required: 1) a prohibition, 2) a sanction and 3) a criminal public purpose. But important questions still needed to be decided. For example, in the *RJR Macdonald*[15] litigation in the 1990s it was necessary to decide whether criminal legislation must directly attack the perceived evil (in that case the health problems associated with tobacco products) or whether it could do so indirectly (by attacking the advertising of tobacco products, for example). In the *Hydro Quebec*[16] litigation, the Court had to decide whether criminal law is limited to the classic criminal law case of simple prohibition and clear sanction, or whether it could be extended to cover complex regulatory schemes.

The answer to both questions was 'yes' and those answers remain relevant, for example, to present and future initiatives by the federal government and Parliament to protect the environment.

So interjurisdictional immunity and criminal law were the exceptions, but the general trend regarding legal federalism was strong. Professors Monahan, Ryder and others[17] have regularly provided evidence of the general trend by pointing out how very few pieces of legislation, federal or provincial, were struck down on federalism grounds in the 80s, 90s and into this century.

LEGAL FEDERALISM IN THE 21st CENTURY

So, to summarize once again, by the turn of the century we had a Supreme Court of Canada general jurisprudential approach characterized by:

1. An ongoing tendency to validate both federal and provincial legislation with help from the double aspect doctrine, the ancillary doctrine and generally speaking an approach termed "cooperative federalism"
2. A narrowly construed test for federal paramountcy based essentially on operational conflicts of a yes/no variety.

But at the same time, we saw:

3. The continuing growth or consolidation of large federal powers such as Criminal law and (the general regulation of) Trade and Commerce; and
4. The continuing presence of a relic of the watertight compartments era in the form of the interjurisdictional immunity doctrine.

In 2007, the last of these – the interjurisdictional immunity doctrine – was brought into line with the general cooperative federalism trend, and this in what is arguably the most important federalism case of the post-1982 era, *Canadian Western Bank*.[18] You will remember that banking is an area of federal jurisdiction which historically benefits from interjurisdictional immunity. *Canadian Western Bank* involved the question of the applicability of provincial consumer protection legislation to the sale of insurance by banks. In the spirit of cooperative federalism, the court adjusted and downgraded the interjurisdictional immunity doctrine in the following ways:

- it adjusted the test so that it only applied to cases where provincial legislation impaired (rather than merely touched or affected) the vital and essential (or core) parts of, in that case, banking;
- it stated that interjurisdictional immunity should only apply in cases where precedents for it already existed (and in so doing it rejected the view that this doctrine applies in theory to all heads of power);
- and finally it changed the default order of analysis in legal federalism cases, moving the paramountcy question ahead of the interjurisdictional immunity question, and this consistent with the reduced importance of the that doctrine.[19]

The downgrading of interjurisdictional immunity in these ways introduced yet another factor having the effect of reducing the incentive to litigate legal federalism questions.

IS THE ERA OF COOPERATIVE FEDERALISM REALLY ONE OF DECLINE IN LITIGATION BASED ON LEGAL FEDERALISM?

One could be forgiven for thinking so. But the study and practice of legal federalism are still highly relevant, as recent case law has illustrated.

For instance, while *Canadian Western Bank* reduced the relevance of interjurisdictional immunity to cases where precedents for its application exist, those precedential situations are being litigated, as we have seen in the Quebec-based litigation involving federal aeronautics jurisdiction and provincial zoning laws. Federal interjurisdictional immunity applied in the recent *COPA* and *Lacombe* cases.[20]

One might then ask, if federalism litigation is still relevant, is it only relevant asymmetrically as the federal victories in recent aeronautics-related interjurisdictional immunity cases would appear to suggest. The answer would appear to be that cooperative federalism benefits the provinces as well.

For instance, cases such as *Chatterjee*[21] and *Rothmans*[22] demonstrate that the Supreme Court of Canada wishes to apply the double aspect doctrine generously and the paramountcy doctrine lightly.

Furthermore, recent indications are that the Supreme Court of Canada is acutely aware that unlimited expansion of federal powers such as Criminal law and the general regulation of trade, combined with the doctrine of federal paramountcy, would be a problem for a balanced approach to federalism.

For example, we saw in the recent *Reference re Securities* Act litigation[23] that the Court was unwilling to expand federal jurisdiction in the general regulation of trade and commerce at the expense of property and civil rights.

By way of further example, we saw in the *Assisted Human Reproduction Act Reference*[24] that a majority of the Supreme Court was inclined, first, to apply the ancillary powers doctrine with increased rigour, and, secondly, to interpret the criminal law power so as to limit that power's ability to crowd out provincial jurisdiction, in that case provincial jurisdiction over health.

But what of a case where federal criminal legislation is valid and where it contradicts provincial health choices. I am thinking here of course of the *Insite* litigation.[25] We saw in that case that rather than use an out-of-date legal federalism doctrine to protect the provincial health choices (as the British Columbia Court of Appeal[26] did by using an unprecedented provincial version of interjurisdictional immunity), the Supreme Court of Canada used the *Charter* as a backstop where no other legal federalism solution seemed available.

And so we see that we have come full circle. Whereas prior to 1982 legal federalism was regularly used as a proxy for rights protection, in the post 1982 era, the Court will not hesitate to bring *Charter* arguments to the fore where the recently stabilized and clarified rules of cooperative federalism cannot produce a satisfactory solution.

NOTES

[1] Professor of Law, Member of Public Law Group, Faculty of Law, University of Ottawa. This article is the lightly edited and footnoted text of a presentation at the CONSTITUTION @ 30 CONFERENCE at the University of Ottawa, April 17, 2012. The views expressed here are those of the author and not any other organization for which he has provided advice.

[2] This article expands and updates, albeit in summary form, Peter C. Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court" in A. Dodek & D. Wright, eds, *Public Law in the McLachlin Court: The First Decade* (Toronto: Irwin Law Inc. 2011): 167-200.

[3] It is true that: the amending formula can change the division of powers (and indeed s. 92A regarding provincial powers over non-renewable natural resources added in 1982 is an example of a new amendment to the division of powers); the *Charter* limits federal and provincial powers; and s. 36 constitutionalizes the federally significant equalization rules. However the federalism side of things is not what 1982 is remembered for, generally speaking.

[4] See *Union Colliery Co. v. Bryden* [1899] A.C. 580.

[5] [1957] SCR 285.

[6] [1953] 2 SCR 299.

[7] *Multiple Access Ltd v. McCutcheon* [1982] 2 SCR 161.

[8] [1991] 1 SCR 121.

[9] See *Canadian Western Bank v. Alberta* [2007] 2 SCR 3, para. 74.

[10] [1988] 1 SCR 401.

[11] *General Motors of Canada Ltd. v. City National Leasing* [1989] 1 SCR 641.

[12] [2011] SCC 66.

[13] *Bell Canada Ltd v. Quebec* [1988] 1 SCR 749.

[14] *Irwin Toy Ltd v. Quebec* [1989] 1 SCR 927.

[15] *R.J.R. MacDonald v. Canada* [1995] 3 SCR 199.

[16] *R. v. Hydro Quebec* [1997] 3 SCR 213.

[17] Patrick Monahan, "The Supreme Court of Canada and Canadian Federalism, 1996-2001" in P. Thibault, B. Pelletier & L. Perret, eds, *Les Mélanges Gérald-A. Beaudoin* (Cowansville: Yvon Blais, 2002); B. Ryder, "The End of Umpire: Federalism and Judicial Restraint" [2006] Sup Ct LR (2d): 345-377.

[18] [2007] 2 SCR 3.

[19] In cases where precedent dictates that interjurisdictional immunity should apply the Court would now seem to be free either to revert to the traditional order of analysis by putting interjurisdictional immunity ahead of paramountcy, or to put paramountcy first (particularly where the existence of a clear and substantial conflict obviates the need to take the analysis further).

[20] See *Quebec v. Canadian Owners and Pilots Association* [2010] 2 SCR 536 and *Quebec v. Lacombe* [2010] 2 SCR 453.

[21] *Chatterjee v. Ontario* [2009] 1 SCR 624.

[22] *Rothmans, Benson & Hedges Inc. v. Saskatchewan* [2005] 1 SCR 188.

[23] [2011] SCC 66.

[24] [2010] 3 SCR 457.

[25] *Canada v PHS Community Services* [2011] 3 SCR 134.

[26] [2010] 100 BCLR (4th) 269, 314 DLR (4th) 209, 250 C.C.C. (3d) 443, 207 C.R.R. (2d) 232, [2010] 2 W.W.R. 575.