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Note: A Brief History of Canadian Federal Court Jurisdiction

*Herbert A. Johnson**

At the time of Canadian confederation in 1867 there existed a system of superior courts in all of the provinces that dated to the settlement of each province as an independent colony. These tribunals were continued by Section 92(14) of the British North America Act, currently known as the Constitution Act, 1867. The Act also provided that the Canadian governor general, not a provincial official, would appoint the judges of the superior, district, and county courts of each province.¹ The superior court judges received good behavior tenure, and they are removable only by the governor general upon a joint address of the Federal Senate and House of Commons.²

Provincial superior courts continue to occupy a central place in the Canadian court structure. By virtue of Section 92(14), the provinces may empower their courts to adjudicate provincial and federal questions. Thus, Canada does not need a full-blown system of separate Federal Courts. Provincial superior courts were the major trial courts after confederation, subject to appeals either to the Supreme Court of Canada or to the Judicial Committee of the Privy Council. Even today, if a federal law does not specify which court shall exercise jurisdiction, it is presumed that the provincial superior courts are the appropriate forum.³

When the Supreme Court of Canada was established in 1875, the Canadian Parliament also instituted an exchequer court for the protection of the Crown's financial interests and the collection of taxes.⁴ In 1971 the Exchequer Court was replaced by the Federal Court of Canada, which absorbed its jurisdiction and also received a broader grant of jurisdiction in non-Crown litigation.⁵ The Federal Court of Canada is a court of law,

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1. CAN. CONST. (Constitution Act, 1867) § 96 (originally enacted at 30 & 31 Vict., ch. 3 (U.K.)).

2. *Id.* § 99. However, in 1961, the Constitution was amended to provide for a mandatory retirement when superior court judges reach the age of seventy-five. CAN. CONST. (Constitution Act, 1982) § 99(2).

3. See PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 135 (2d ed. 1985).

4. Supreme Court and Exchequer Court Act, 1875, S.C. ch. 11 (1875) (Can.); see Supreme Court Act, R.S.C., ch. S-26 (1985) (Can.) (codifying the 1875 legislation concerning the Supreme Court of Canada).

5. Federal Court Act, R.S.C., ch. F-7 (1985) (Can.). In addition, a Tax Review Board was

equity, and admiralty, and it also is designated a superior court exercising civil and criminal jurisdiction.⁶ This seemingly extensive grant of power is, however, subject to complex rules of constitutional and statutory construction.⁷

Like United States federal courts, the Federal Courts of Canada derive their existence from statutory and constitutional provisions. They have no inherent jurisdiction despite the Federal Court Act's reference to Federal Courts as "superior courts." However, the Federal Courts may exercise implied jurisdiction to the extent that the powers expressly conferred by a parliamentary statute require an exercise of jurisdiction.⁸ Finally, the consent of the parties will not confer jurisdiction upon a Canadian Federal Court.⁹

The Constitution Act of 1867, empowers the Canadian Parliament to organize a "General Court of Appeal for *Canada*."¹⁰ Consistent with British principles of parliamentary supremacy, the Supreme Court of Canada is a creature of statute. Thus, it lacks the constitutional status accorded to the United States Supreme Court. Section 101 of the Constitution Act, 1867, also authorizes "the Establishment of any additional Courts for the better Administration of the Laws of *Canada*."¹¹ Parliament has created only two lower courts: the Federal Court of Canada and the Tax Court of Canada.¹²

The laconic phraseology of Section 101 has given rise to judicial construction that generally limits its jurisdictional implications. The Supreme Court of Canada has held that the Federal Court can exercise jurisdiction only if the following conditions are met: (1) it is granted jurisdiction by a statute enacted by the Canadian Parliament, (2) an existing body of federal law necessary to the disposition of the case "nourishes" the Parliament's grant of jurisdiction, and (3) the law upon which the case is based must be a "law of Canada" as used in Section 101 of the Constitution Act of 1867.¹³ Although there is no express constitutional restriction upon Parliament's authority to create federal courts, these jurisdictional requirements arise from the nature of Canadian federalism. The Constitution Act of 1867 established a system of double enumeration of powers, the allocation of some legislative powers to the provinces and others to the central government. The second and third

established, and in 1980 it was redesignated the Tax Court of Canada. Tax Court of Canada Act, R.S.C. ch. T-2 (1985) (Can.).

6. Federal Court Act, R.S.C., ch. F-7, § 3 (Can.).

7. See DAVID SGAYIAS ET AL., FEDERAL COURT PRACTICE: 1995 1-2 (1994).

8. *Id.* at 4.

9. *Id.*

10. CAN. CONST. (Constitution Act, 1867) § 101.

11. *Id.* § 101.

12. See *supra* note 5 and accompanying text.

13. SGAYIAS, *supra* note 7, at 3 (quoting ITO - Int'l Terminal Operators Ltd. v. Miida Elec. Inc., [1986] 1 S.C.R. 752, 766).

jurisdictional tests require examination of Section 91 of the Constitution Act of 1867 to determine whether the law involved is within the legislative competence of the Canadian Parliament.¹⁴ Further, the substantive federal law must antedate the grant of jurisdiction to the Federal Court, and it must be a law of Canada. It is undetermined whether the Constitution Acts, which are British imperial statutes, can be subject to judicial review by the Federal Court of Canada.¹⁵

An additional limitation upon Federal Court jurisdiction exists by virtue of the constitutional position of provincial superior courts, mentioned in sections 96 through 100 of the Constitution Act, 1867. The Supreme Court has held that the Federal Court Act must be construed in such a way that Federal Courts do not remove the power to declare the validity of federal legislation from the provincial superior courts.¹⁶

In keeping with its descent from the old Exchequer Court, the Federal Court of Canada had exclusive jurisdiction of claims against the Crown until February 1, 1992, when the court's jurisdiction was made concurrent with that of the provincial superior courts.¹⁷ By judicial construction, claims against Crown officers may be joined to those filed in Federal Court against the Crown, and under certain circumstances, Crown corporations and their employees may also be sued in Federal Court.¹⁸

Section 18 of the Federal Court Act transfers judicial review authority over federal administrative tribunals from the provincial superior courts to the Federal Court. As to habeas corpus proceedings, provincial superior courts have refrained from intervening in federal matters if the Canadian Parliament has enacted a system of review; however, if no review procedure has been specified, the provincial superior courts will intervene with a habeas corpus writ.¹⁹ It is unclear whether these Federal Court judicial review proceedings authorized by Section 18 may be vulnerable to constitutional attack because they undermine the jurisdiction of provincial superior courts.²⁰

Section 22 of the Federal Court Act confers broad power over maritime litigation to the Federal Court of Canada. The Canadian Supreme Court has specifically refused to limit maritime jurisdiction by the narrow bounds of

14. See CAN. CONST. (Constitution Act, 1867) § 91 (defining the powers of the Canadian Parliament); *id.* § 92 (providing for the exclusive powers of provincial legislatures). For further discussion, see SGAYIAS, *supra* note 7, at 6-9.

15. SGAYIAS, *supra* note 7, at 9.

16. Attorney Gen. Canada v. Law Soc'y, [1982] 2 S.C.R. 307; SGAYIAS, *supra* note 8, at 3, 17, 27.

17. SGAYIAS, *supra* note 7, at 19.

18. See *id.* at 20-25.

19. See *id.* at 26-27. This practice seems to share some of the characteristics of preemption in U.S. federal-state statutory conflicts.

20. *Id.* at 28-29.

English admiralty practice.²¹ In determining the validity of the Federal Court's admiralty jurisdiction, judges have resorted to the definition of navigation and shipping in Section 91(10) of the Constitution Act, 1867.²²

Intellectual property issues covering copyrights, trade marks, and patents are within the exclusive jurisdiction of the Federal Court when the establishment or expungement of a right is involved.²³ On the other hand, actions for infringement are subject to concurrent jurisdiction of the Federal Court and the provincial courts.²⁴

Neither Canada nor Australia has adopted the United States's scheme of a parallel system of federal and state courts. Canada has clung to provincial court administration of federal laws much more tenaciously than has Australia, perhaps for some of the constitutional reasons discussed above. In both nations the state and provincial court systems provide the major portion of judicial resources available to those who litigate points of federal law. Australia and the United States share a fairly specific constitutional provision that outlines Federal Court jurisdiction. Canada's Constitution Act of 1867, however, avoids establishing a constitutional foundation for federal courts. It effectively provides more limitations on, rather than enhancements to, Federal Court jurisdiction.

21. See *ITO - Int'l Terminal Operators Ltd. v. Miida Elec. Inc.*, [1986] 1 S.C.R. 752, 774.

22. See *SGAYIAS*, *supra* note 7, at 32.

23. *Id.*

24. *Id.*