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Chief Justice John D. Richard

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Federal Court Jurisdiction

It is with great pleasure that I speak to you today about the jurisdiction of the Federal Court of Canada.

The Federal Court consists of two divisions, the Trial Division and the Court of Appeal. It is a national court, a bilingual court and a bi-juridical court. A judgment of the Court has force and effect across Canada. The court regularly sits across the country and has offices in seventeen locations throughout Canada. It is a court which is easily accessible.

Consistency of judgments across the country was one of the goals of the legislation establishing the Federal Court. Another of the goals was to enhance the rights of the citizen against the state by means of a judicial review proceeding which must be heard and determined without delay and in a summary manner.

The jurisdiction of the Federal Court of Canada is statutory. It was created in 1971 by the *Federal Court Act*, R.S.C. 1985, c. F-7, and is the

successor to the Exchequer Court of Canada, which was created in 1875. Both Courts were established under the authority of section 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, which confers upon Parliament the authority to establish courts for the better administration of the laws of Canada.

In *Thomas Fuller*, [1980] 1 S.C.R. 695 at 713, the Supreme Court of Canada stated that although

“...the basic principle governing the Canadian system of jurisdiction is the jurisdiction of the superior courts of the provinces in all matters federal and provincial [...] [t]he federal Parliament is empowered to derogate from this principle by establishing additional courts only for the better administration of the laws of Canada.”

The Federal Court has no jurisdiction except that assigned by statute. However, statutory language conferring jurisdiction on the Federal Court must be given a fair and liberal interpretation.

In *Canadian Liberty Net*, [1998] 1 S.C.R. 626 at 657, Mr. Justice Bastarache stated:

"These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been

compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada."

The Federal Court has an implied jurisdiction to exercise such powers as are necessary for the Court to exercise fully the jurisdiction expressly conferred by statute. It follows that jurisdiction cannot be conferred on the Federal Court by consent or by acquiescence.

Section 3 of the *Federal Court Act* provides that the Federal Court is a court of law, equity and admiralty and is a superior court of record having civil and criminal jurisdiction.

As a result, the Court may exercise the powers and enforce the remedies available to a court of equity when the subject matter is within its jurisdiction.

The jurisdiction conferred to the Federal Court of Canada to entertain criminal matters is rare but such a provision can be found in the *Competition Act*, R.S.C. 1985, c. C-34. It also supports its power to punish for contempt of court.

The Supreme Court of Canada has prescribed a three-pronged test for the determination of Federal Court jurisdiction. This is found in *ITO v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 766. The essential requirements are:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

In *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054 at 1065-6, the Supreme Court acknowledged the existence of

federal common law adequate to support Federal Court jurisdiction. The requirement for applicable and existing federal law could be satisfied by statute, regulation or common law.

For example, in the context of Aboriginal Law, the Supreme Court of Canada held in *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 337 and 340, that the law of aboriginal title is federal common law and constituted, with the *Indian Act*, a sufficient basis to support Federal Court jurisdiction.

The Federal Court may apply provincial law to proceedings within the Court's jurisdiction. In the *ITO* case, Mr. Justice McIntyre stated at pages 781-2:

"The Federal Court is constituted for the better administration of the laws of Canada. It is not, however, restricted to applying federal law in cases before it. Where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issue presented by the parties;"

As the authors of the *Federal Court Practice*, Sgayias, D. et al., (Toronto: Carswell, 2001) have noted at p.13, "a consequence of the limitations on the jurisdiction of the Federal Court is that not all related proceedings can be advanced in that Court. Where there are multiple claims or multiple parties, it is necessary to consider the jurisdiction of the Court in respect of each." Accordingly, proceedings against third parties or

co-defendants may fail for lack of jurisdiction even though the Court has jurisdiction against the principal defendant.

Having said this, the Federal Court has a broad jurisdiction. The jurisdiction of the Trial Division is to be found in sections 17 to 26 of the *Federal Court Act*, while the jurisdiction of the Court of Appeal is to be found in sections 27 and 28 of the same Act.

The Court's principal areas of jurisdiction are judicial review of decisions of federal boards and tribunals, claims by and against the federal Crown, maritime, aeronautics and intellectual property matters.

It must be noted that there are provisions in some 96 statutes, other than the *Federal Court Act*, that confer jurisdiction on the Federal Court.

Therefore, in deciding where to go with your claim, whether to the Federal Court or the Superior Court, you must ask yourself:

1. Is the matter within the jurisdiction of the Federal Court;
2. Is there a grant of exclusive jurisdiction to the Federal Court;
and,
3. If there is concurrent jurisdiction, where should I assert the claim?

It should be noted that the grant of exclusive jurisdiction to the

Federal Court cannot act to obstruct the role of the provincial superior courts. The provincial superior courts retain the jurisdiction to make a declaration on the constitutional validity of federal legislation.

Prior to 1992 and pursuant to section 17 of the *Federal Court Act*, the Federal Court had exclusive jurisdiction to entertain actions against the Crown in right of Canada. Since the 1992 amendments to the Act and except for the judicial review of federal boards and tribunals, concurrent jurisdiction is the rule and exclusive jurisdiction the exception. The courts of the provinces have, since 1992, the jurisdiction to entertain proceedings against the Crown.

I should add that you must consider the provisions of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50 as amended. The substantive provisions governing Crown liability in matters such as costs, interest, limitation periods and payment of judgments are now found in Part II of the Act.

Section 18 of the *Federal Court Act* gives the Trial Division exclusive original jurisdiction over judicial review of federal administrative tribunals except for those tribunals listed in section 28 where it is the Court of Appeal which has original jurisdiction.

The grounds of review and the relief which may be granted are very broad.

On an application for judicial review, the Court may make such interim orders as it considers appropriate pending the final disposition of the application. The criteria used by the Court in deciding whether to grant a stay in such circumstances are those which govern the granting of interlocutory injunctions: see *RJR-Macdonald Inc. v. Canada*, [1994] 1 S.C.R. 311.

The Supreme Court has held in *Reza v. Canada*, [1994] 2 S.C.R. 394 at 405, that while both the provincial superior courts and the Federal Court have jurisdiction to entertain a challenge to the constitutionality of provisions of the *Immigration Act*, it is appropriate for the provincial court to decline jurisdiction since Parliament has “created a comprehensive scheme of review in immigration matters and the Federal Court was an effective and appropriate forum.”

I should draw your attention to the fact that although there may be concurrent jurisdiction over some matters, such as intellectual property, it may not be open to the provincial court to grant all the remedies which are available in the Federal Court. By way of example, proceedings to impeach patents or expunge trade-marks must be entertained in the Federal Court.

An appeal lies to the Federal Court of Appeal from a final or interlocutory judgment of the Trial Division or the Tax Court of Canada. However, appeals against decisions of the Trial Division on judicial review applications in immigration matters can only be taken where the judge of

the Trial Division has certified that there is a serious question of general importance.

In April 1998, the new Federal Court Rules came into effect after broad consultation. The basic philosophy of the new rules is to promote the expeditious, cost-effective and just resolution of cases. The Trial Division now takes an active role in supervising proceedings and encouraging the resolution of disputes. The parties are no longer left to manage the pace of their litigation. If the parties fail to reach specific steps within a certain time, the Court will intervene. The anticipated impact is that cases will be resolved more quickly and, over time, more cases should be processed.

The new Rules, and our commitment to facilitate and accelerate proceedings, requires new roles for judges and an increased role for the Court's prothonotaries. It also requires us to make the most efficient use of our resources, which of course includes judicial resources.

Judges are now called upon not only to decide cases and dispose of motions, but also to act as a case management judge, conduct a status review, conduct a dispute resolution conference, which may include mediation, early neutral evaluation or a mini-trial, and also conduct pre-trial conferences. All of these must be conducted expeditiously.

Based on the experience of Ontario, British Columbia and Quebec, the Rules Committee of the Federal Court has been examining the possibility of amending the rules to provide for class proceedings.

The Rules Committee also considers changes to the Rules to keep up with technological advances that could increase the efficiency and ease of access to the Court. Currently, the Rules Committee is examining options for the electronic filing of documents with the Court and the use of the internet to allow public access to court information in both official languages.

I said earlier that the Court was a court of easy access. Here are some of its features:

- 1) Every person who is a barrister or solicitor in a province may practice as a barrister or solicitor in the Federal Court and is an officer of the Court. There is no need for a special call to appear before the Court in a province other than the one you were called in. Attorneys can represent their clients before the Court anywhere in Canada.
- 2) The principal office of the Court is in Ottawa, but there are sixteen other local offices established throughout Canada. Any document may be filed in any of the offices. The original is transmitted to the principal office and a certified copy is kept at the local office. Documents may be deposited by mail.
- 3) The Court registry officers are well trained and helpful.

- 4) A trial coordinator is available to arrange for urgent matters and there is always a duty judge.
- 5) Tele-conference and video-conference facilities are available and are frequently used.
- 6) Motions, known as Rule 369 motions, may be disposed of without personal appearance and be based on written representations. Any issue that may be the subject of an oral hearing may be dealt with in writing pursuant to Rule 369 if the parties agree. This is a very useful and widely used rule.
- 7) The Trial Division is prepared to sit in many locations across Canada to meet the needs and, when possible, the convenience of the parties.

Clearly, the success of this objective for the just, most expeditious and least expensive determination of a proceeding on its merits requires the support and co-operation of all members of the Bar who practise before this Court.

La contribution importante de la Cour fédérale au droit civil a été notée dans un colloque en 1991 par le professeur Denis Lemieux de l'Université Laval, qui a fait la remarque que l'apport le plus significatif de la Cour au droit civil a été de le confronter continuellement à la common

law, contact qui a été généralement stimulant pour les deux systèmes juridiques et pour le droit fédéral en général. Cette interaction devrait se généraliser à l'avenir avec l'appui des plaideurs et se refléter davantage dans la jurisprudence de la Cour de manière à ce que le droit fédéral puise aux racines de nos deux systèmes juridiques chaque fois que cela peut contribuer à assurer une meilleure justice.

There is an indispensable role for the Federal Court in Canada. I and my colleagues are proud to be members of a court that is a truly national, bilingual institution dispensing justice from coast to coast.