

Federal Security Interests 1999

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INTRODUCTION

[1] Following the Annual Meeting of the ULCC at Halifax in 1998, Doug Moen, as Director of the Commercial Law Strategy, and Roderick Macdonald, President of the Law Commission of Canada, commenced discussions about the possible involvement of the Law Commission in contributing to projects under the Commercial Law Strategy. Bradley Crawford, Q.C., a member of the Advisory Council of the Law Commission had earlier suggested that the Law Commission might undertake a project to examine the area of federal security interests.

[2] These discussions led to the Law Commission making a proposal to undertake a study of federal security interests. Arthur Close, Q.C. was asked to act on behalf of the ULCC in exploring the development of a project of this nature with the Law Commission of Canada. During the first few months of 1999, Messrs Macdonald and Close developed a list of various basic issues for consideration by the Law Commission. A decision to proceed with a preliminary investigation of federal security interests was also taken at this time and approved by the Law Commission at its June meeting.

[3] It was agreed to begin with two preliminary steps. First, the Law Commission would engage a constitutional law scholar -- in the instance Professor Stephen A. Scott of McGill University -- to prepare a summary opinion letter as to the constitutional jurisdiction of the Parliament of Canada to create and to enforce security interests. Second, it was decided that, once this first opinion was received, a small number of persons interested in federal security interests would be invited to a meeting in Toronto for the purpose of considering whether the project merited further development.

FEDERAL CONSTITUTIONAL AUTHORITY

[4] Professor Scott's views may be summarized as follows. The Parliament of Canada had a broad scope to create both consensual and non-consensual security interests, and has already done so. The Parliament of Canada also has a broad jurisdiction to legislate so as to incorporate international security interests set out in treaties. In a number of domains, Parliament may not only authorize persons to grant certain forms of security over their property to others, but may also grant certain institutions or organizations the power to take various kinds of security interest in the property of others. Through a number of devices not primarily developed for the purpose of creating a security interest, Parliament has also created a large number of interests in property that today function as security. Finally, the constitutional authority of the Parliament is, in theory, quite extensive, but as in

other domains, the likelihood of the courts upholding this federal authority would no doubt be inversely proportional to the scope of its purported exercise.

TORONTO MEETING

[5] On June 24, 1999 a meeting was held in Toronto to consider whether the Law Commission of Canada should pursue this initiative further. A number of scholars, practitioners, industry representatives and federal justice department officials were invited to the meeting. In all ten persons were able to attend. The objects of the meeting were (assuming the consensus view were to proceed): (i) to assist the Law Commission of Canada in determining how it might most effectively proceed with developing a "federal security interests" project; (ii) to identify the most fruitful lines of inquiry to undertake; (iii) to identify who should be others players invited to serve on a Study Panel for the project; and (iv) to identify the names of those who should be contacted with a view to engaging them to undertake necessary background work.

ISSUES DISCUSSED AT THE TORONTO MEETING

[6] At this meeting, two general types of substantive question were considered: (i) the scope of federal jurisdiction in theory; (ii) the dimensions of federal jurisdiction in actual practice. Prior to addressing these questions some preliminary issues were raised. The Law Commission was asked whether it had already taken a position of the need to create a uniform federal security interest -- to which a negative answer was given. The Law Commission was also asked whether it had taken a position on the need for the Parliament of Canada to maintain a presence in these fields. Again the Law Commission indicated that it had not taken any positions on the issue.

[7] First, as to the scope of federal jurisdiction in theory, the meeting considered: (i) What is a federal security interest as a matter of constitutional law? (ii) What is the scope of the jurisdiction of the federal Parliament either to create such interests or to sign on to international conventions creating such interests? (iii) What is a federal security interest as a matter of commercial law? (iv) In addition to statutes like the *Bank Act* and maritime legislation that appear expressly to create security interests, are there other statutes that creates legal devices that function (or can be deployed to function) as security? (vi) What, if anything, is the consequence of old doctrines like crown immunity and interjurisdictional immunity when they are applied to agencies, crown corporations and other federal governmental entities that seek to give (or to take) security?

[8] As to the dimensions of federal jurisdiction in practice, the questions considered were: (i) Is there a case for rationalizing and modernizing these diverse federal security interests among themselves? (ii) Substantively the questions are, for example, can banks, railways, shippers, and airlines actually find a common ground? (iii) If so, should Article 9 and the "substance of the transaction rule" be enacted as the central motif in the federal field? (iv) What can be done to achieve a better integration of provincial and federal interests? Can registries be made compatible? Should there be separate federal registries at all? (v) Is concern about federal security interests a false problem? Would it be better simply to

resolve all these problems of harmonization and integration through extensive amendments to the Bankruptcy and Insolvency Act?

[9] After discussion, the meeting agreed on the following framework as a checklist of topics that should be included in any overall study document of federal security interests. Six different types of topic area were proposed.

A. Security Interests Arising in the Context of Federally Regulated Enterprises: maritime law; federal railways; banks; aeronautics; etc.

B. Security Interests in Types of Property Created by Federal Legislation: patents; trademarks; copyrights; integrated circuit typography; etc.

C. Security Interests in Federal Property: federal enclaves such as parks, military bases, etc.; off-shore federal territory; federal personal property

D. Security Interests Arising in the Context of the Federal Power Over Indians and Lands Reserved to Indians: land; personal property; intellectual property

E. Non-Consensual Federal Security Interests: federal tax and other claims, whether charges, liens or deemed trusts; federally created non-consensual interests created in favour of persons other than the federal Crown

F. Bankruptcy Issues

FOLLOW UP

[10] Once this inventory of potential topics had been developed the discussion turned to considering what the next steps should be. The President of the Law Commission offered to prepare a summary of the meeting, forwarding it to all invitees. He also undertook to contact experts with a view to determining how best to launch and manage the needed research studies. Finally the President was charged with assembling a list of persons who might be invited to sit on a Study Panel to oversee the development and execution of the project.

[11] It was felt that as a first stage in project development two main research projects should be undertaken. One would involve a detailed study of existing federal security interests, grouped according to the framework just identified. The second would involve a detailed review of the constitutional authority of the Parliament of Canada to enact its own legislation or to adopt international conventions relating to security interests. Those present felt that the entire project would probably take somewhere in the range of 2 1/2 to 3 years to complete, with the first two pieces of research being completed by the summer of 2000.