INSTITUTE OF LAW RESEARCH AND REFORM

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BACKGROUND PAPER NO. 11

ADMINISTRATION OF FAMILY LAW

THE UNIFIED FAMILY COURT

CONSTITUTIONAL OPINIONS

May, 1978

PREFACE

This paper contains two opinions prepared for the Institute of Law Research and Reform. One was prepared by Professor W. R. Lederman, Q.C. in 1972. Its subject matter is the constitutional validity of a unified family court that includes judges appointed by the Governor General in Council and judges appointed by the Lieutenant Governor in Council. The second includes a number of opinions prepared by Professor P. N. McDonald in 1976 and 1977 which were consolidated in the present form in 1978. It touches on the same subject matter, and in addition deals with other questions which arose from time to time in the Institute's consideration of the subject.

The Institute is issuing this Background Paper for two reasons. The first is that its Report 25, Family Law Administration: The Unified Family Court, makes reference to these opinions and to the problems dealt with by them, and it is accordingly desirable that the opinions themselves should be made available as background information. The second is that the Institute thinks that they will be of value to those who are interested in constitutional law and in the unified family court.

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FEDERAL CONSTITUTIONAL PROBLEMS IN RELATION TO THE PROPOSED FAMILY COURT FOR ALBERTA

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In April, 1972, the Institute of Law Research and Reform of Alberta issued a working paper proposing for that province a unified family court. The unity desired is exclusive, original jurisdiction for the proposed family court over the whole range of family law matters, including for example divorce, alimony, maintenance and custody of children, juvenile offenses, and adoption. Appropriate appellate jurisdiction of course is also intended. A specific and complete list of the categories of family law involved is given in diagram 1 on page 20 of the Working Paper. The proposed single family court is intended to be a full-fledged court, and not a special tribunal of some sort that is not a court. The position is at present that the full range of family law issues is distributed among five different courts in Alberta. The distribution is such that, while each court has only part of the jurisdiction in family matters, there is also much overlapping and competition between the five courts in the matters respectively assigned. This causes confusion, forum-shopping, unnecessary expense, undue delay, and much frustration of efforts to develop a sophisticated judicial administration of family problems, an administration that would have a unity of methods and objectives that could bring real improvement in social conditions in this area. The shortcomings of the present system are described at length in the Working Paper, starting at page 23. Hence the proposal is made for a unified family court for Alberta.

But Canada is a federal country, and there are federal constitutional problems involved in the above proposal. The director of the institute has requested my opinion on the following question: "May a province establish a family court that is a superior court and that includes judges appointed by the Governor General in Council and also judges appointed by the Lieutenant Governor in Council, as long as the functions of the latter judges are confined to those functions which a province may validly confer on provincially appointed judges?" To the question as put, my answer is in the negative, but only because of the reference to a superior court including judges appointed by the Lieutenant Governor in Council. When it comes to characterizing the court as a superior court, the court is identified with the judges who are members of the court, they are one and the same. In other words, one is postulating a false dichotomy when one suggests there could be a superior court as a going concern, some of the judges of which were so limited in their powers as not to be superior court judges. The recent Victoria Medical Building Case[1] in the Supreme Court of Canada, among others, makes this point clear.

But, with reference to a single family court, too much is made of this point in the Working Paper. Assuming that we are speaking of a family court with full jurisdiction over the whole range of family law matters, my answer to the director's question would be in the affirmative if the question were altered to read as follows: "May a province establish a

single family court that includes judges appointed by the Governor General in Council and also judges appointed by the Lieutenant Governor in Council, as long as the functions of the latter judges are confined to those functions which a province may validly confer on provincially appointed judges?" In other words my opinion is that there may be a single family court, but that this would have to be a court composed of two sections or divisions, for the two different types of judges. This would not be difficult to arrange, and with such a court of two divisions it would be quite feasible substantially to attain the reform objectives explained in the Working Paper, without offense to the federal constitution of Canada. I now set out my reasons for this conclusion.

Generally speaking, while the B.N.A. Act divides legislative powers by subjects between the Parliament of Canada on the one hand and the Legislatures of the Provinces on the other, it does not divide judicial powers in the same way. Rather, in the main, the B.N.A. Act provides for a unitary judicial system. That is, it provides for one set of courts, province by province, which in each province administer justice on all subjects, whether the issues in a given case arise under provincial laws, federal laws, or a mixture of the two; and indeed many cases do involve a mixture. Moreover, this is true for both original and appellate judicial jurisdiction. Here then we have a most important feature of our great English

constitutional inheritance in Canada. Writing on this subject a few years ago I explained the background and purport of the judicial sections of the British North America Act in the following words.(2)

> "The British North America Act, 1867, states in its preamble that the original federating provinces "have expressed their Desire to be federally united into One Dominion under the Crown...with a Constitution similar in Principle to that of the United Kingdom." This passage looks not only to the future but also to the past. It reminds us that, before Confederation, the British North American colonies had already enjoyed a considerable history of self government under English constitutional principles. English governmental institutions--Governors, Councils, Assemblies, and Courts--had been authorized for the colonies either by decrees of the King and his Imperial Privy Council or by express statutes of the Imperial Parliament. Our particular concern here is with the courts. By the middle of the nineteenth century at the latest, and in some cases earlier, the British North American colonies had established superior courts on the model of the historic English Central Courts of Justice, usually by appropriate colonial judicature statutes approved in London. This means that the English superior court as it was after the Act of Settlement (1701) became in due course a most important feature of our great English constitutional inheritance.
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> The English judicial system is characterized by a separation of powers in favour of the independence of the judiciary--a separation of the courts from control or influence by either legislative or executive bodies. Sections 96 to 101 of the B.N.A. Act establish our Canadian superior courts, and a reading of these sections (quoted hereafter) reveals the hallmarks of several hundred years of English judicial development. The judges are to be appointed from the autonomous legal profession, they are not civil servants. They enjoy guaranteed salaries and permanent tenure until death or an advanced age (seventy-five years), whichever comes first. They can be removed earlier only by joint address of Senate and House of Commons for grave misbehaviour. The result is that our judges need only have regard to reason, conscience, and the evidence in their duty-bound endeavours to interpret laws according to the meaning and purpose expressed or implied in those laws. This is the essence of judicial independence.

The interesting thing is that this separation of powers permitted the establishment of an essentially unified judicial system for Canada in 1867 without offence to the federal idea. The existing courts in each province were continued by section 129 of the B.N.A. Act, subject to certain other provisions of the act that divided power and responsibility for the judicature between provincial and federal authorities. Section 92(14) gave the provinces "exclusive" legislative power over 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."

This is a very wide power, but it is subject to certain important subtractions in favour of the federal authorities. Criminal procedure is an "exclusive" federal legislative category by section 91(27); and sections 96 to 100, inclusive, make collaboration of the federal executive and Parliament necessary to complete the establishment of provincial superior, district, or county courts. Section 101 gives the federal parliament an overriding power to establish certain federal courts. These sections require quotation in full:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99(1). Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2). A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

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.

To summarize, the result is that minor courts in the provinces, such as those of magistrates or justices of the peace, are entirely within provincial control. District, county, or superior courts of the provinces, including provincial appellate courts, require the collaboration of provincial and federal authorities for their establishment and maintenance. Then at the apex of the structure is the "General Court of Appeal for Canada," the Supreme Court of Canada, entirely constituted by the federal parliament and executive.

There is not, generally speaking, any division of jurisdiction in these courts corresponding to the division of legislative powers between the provincial legislatures and the federal parliament. In general they "administer justice" concerning all types of laws, whether such laws fall legislatively within the purview of provincial legislatures or the federal parliament. Indeed, the final appellate jurisdiction of the Supreme Court of Canada in this plenary sense cannot be impaired or excluded by provincial legislation. It is true that the federal parliament could go a long way, perhaps all the way, in placing exclusive original jurisdiction to administer laws legislatively within its range in the hands of purely federal courts, under the closing words of section 101.

> To quite a limited degree this has happened in the case of the Exchequer Court of Canada, but, with this exception, there is no significant vertical division in the Canadian judicial system corresponding to the division between the separate systems of state and federal courts in the United States."

It has proven to be a matter of some complexity to work out the full and specific implications of the constitutional scheme for a single system of courts in Canada, province by province, with the Supreme Court of Canada at the apex of the structure by virtue of final appellate power in all respects over the whole country.(3) As a matter of official practise and judicial precedent at the highest level since 1867, the following seem to be the significant results.

(1) Though not mentioned in the B.N.A. Act, there are provincial courts of limited, special or minor jurisdiction which are not superior, district or county courts; for example, courts of magistrates or justices of the peace. These types of courts functioned before Confederation in the British North American colonies, and it is settled that the continuance of such courts, old or new, as part of the judicial system after Confederation, is necessarily implied in the Constitution. They are included in the general provincial power to constitute courts given in Section 92(14) of the B.N.A. Act.(4) These courts are constituted by provincial legislation, the judges are provincially appointed, and within the limits necessary to their character, they decide issues arising under provincial and federal laws, so far as

the federal division of legislative powers by subjects is concerned. Hereafter in this memorandum, I shall refer to these courts as limited provincial courts and to their judges as provincial judges.

(2) As has been explained, the establishment and maintenance of superior and district or county courts in each province calls for collaboration between the respective Provincial Governments and the Federal Government, at both the executive and the legislative levels. Under Section 92(14) of the British North America Act, appropriate provincial judicature statutes are required to create and define the structure of these provincial courts, including specification of the number of judges. All the officials of the court except the judges themselves are provincially appointed, but the judges must be federally appointed and paid. On the Federal side this means there must be statutory legislative authority from the Parliament of Canada setting judicial salaries and providing for their payment, as a statutory charge on the consolidated revenue fund.(5) When provincial and federal statutes have each done their part, as indicated, to create the position of judge for one of these provincial courts, then and only then may the Governor General in Council exercise the appointing authority, by virtue of the Royal Prerogative, and name a specific person to fill the position as judge.

In other words, for superior and district or county courts, the creation of the position of judge requires both provincial and federal statutory action, whereupon the appointment to fill the position is reserved to the Governor General in Council, in effect the Federal Cabinet. The Federal Parliament cannot be required to provide salaries for any number of superior district or county court judges, or for special types of such judges. The Federal Cabinet cannot be compelled to make appointments. Of course under the parliamentary system, if the Federal Government agrees to additional judges, or new types of judges, as specified by provincial legislation, the Federal Government will then procure statutory authorization from the Parliament of Canada for the salaries and will advise the Governor General to make the appropriate appointments. Clearly then here is one reason why the creation of a unitary family court in Alberta requires intergovernmental agreement between the Government of Alberta and the Government of Canada. The position has been accurately expressed by the Right Honourable Louis St. Laurent. when he was Minister of Justice. He said of the provinces: (6)

> "They are the ones who determine what courts they will have and how many judges constitute the bench of each court. Of course we have something to say in the matter. We do not admit that they can provide for any number of judges, a number that would be out of all proportion to the number required to handle the judicial business. But we try to meet the desires of the provincial authorities in providing sufficient judges for the courts which they organize as being the ones required for their local needs."

Hence forth in this memorandum I shall refer to the provincial superior and county or district courts as general provincial courts and to their judges (federally appointed by virtue of Section 96 of the B.N.A. Act) as federal judges.

(3) We come now to the jurisdictional tasks assigned to Canadian courts. With all courts except the Supreme Court of Canada itself, and special federal courts like the Federal Court of Canada (formerly the Exchequer Court), the respective provinces are here in a dominant position. They possess the general power to see to the administration of justice and to the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction. Accordingly, appropriate provincial judicature statutes may and do specify, for the limited provincial courts, the provincial district or county courts, and the provincial superior courts, what jurisdictional tasks they are respectively to discharge, including appellate as well as original jurisdiction. In other words, provincial laws specify the assignment of types or categories of provincial and federal laws to these courts, for authoritative interpretation and application to the persons and circumstances such laws contemplate by their terms. Hence a Provincial Government that wishes to simplify the assignment of family law issues within the full system of the courts of the province is in a powerful position to do so. This remains true, though there are two significant qualifications on the generality of what has just been said.

(a) With respect to laws on federal legislative subjects within Section 91 of the British North America Act, the Federal Parliament may assign those laws for interpretation and application to courts of its own choice, or, indeed, to tribunals that are not courts at all. But, if the Federal Parliament does not do this, then the provincial statutory assignments of jurisdiction are effective for the judicial administration of the federal laws. If the Federal Parliament chooses to speak, it may assign power to interpret and apply any federal laws to limited provincial courts, provincial superior courts, provincial district or county courts, or special federal courts. Examples of Federal statutes that use provincial courts are the Criminal Code itself, the Juvenile Delinquents Act, and the Divorce Act.(7) In such cases, the federal statutory assignments of jurisdiction to administer federal laws are of overriding effect, in relation to anything inconsistent in provincial statutes.(8) Family law subjects within exclusive provincial legislative power under Section 92 of the British North America Act are not affected by this federal power. Nevertheless, since several important family law matters are federal subjects of legislative power, the implications of the points just made for rationalizing the assignment of jurisdiction in family law matters must be faced. Again intergovernmental agreement is called for.

(b) There is a further constraint on the power of a Provincial Legislature to control the assignment of certain matters for adjudication to provincial courts. In this area of the jurisdiction of courts, a special doctrine

has developed by judicial precedent to the effect that there is a core of typical superior court jurisdiction that must be respected by a Provincial Legislature. In other words, there are certain types of laws that a province must assign for interpretation and application to a superior court. This is true whether it is dealing with the jurisdiction of provincial courts respecting substantive laws legislatively within provincial power under Section 92 of the British North America Act or legislatively within federal power under Section 91 of the British North America Act. (Divorce would be an example of the latter). This doctrine is well established in our constitutional law, though it has been much criticized. My own view is that the doctrine has a proper beneficial purpose, namely to preserve the position of the respective provincial superior courts, with their federally appointed judges, as the central pivot of a unitary judicial system for Canada, in spite of the fact that there are ten provincial legislatures each with the principal power to constitute the court systems generally in each province. For example, the law as to land titles is within provincial legislative power but the final interpretation and application for such property law must be given to the provincial superior court.

I develop the rationale for this special doctrine of constraint more fully in Appendix A. It is sufficient for present purposes to note here that the constraint means that there must be a superior court section of any proposed single

provincial family court that is to cover the full range of family law issues, a section that would have federally appointed judges with exclusive original jurisdiction over the class of superior court issues in the family area.

Though it has never been authoritatively determined, it is probable that the Federal Parliament is not under the same constraint as to typical superior court jurisdiction as are the Provincial Legislatures. In any event, the danger of the Federal Parliament ignoring the provincial superior and district or county courts is minimal, simply because these courts are headed by federally appointed judges. Indeed most of the adjudication respecting the Criminal Code of Canada is entrusted by that statute itself in the first instance to the limited provincial courts, headed by provincially appointed judges. So, since 1867, the Federal Parliament has primarily relied on the respective provincial court systems at all levels for the judicial administration of laws legislatively within federal power. The main exception is provided by the Federal Court of Canada (formerly the Exchequer Court of Canada), but this is an exception that proves the rule, since the jurisdiction of the Federal Court of Canada is very limited and special. These then are the two constraints on the general power of a province to give jurisdiction to Provincial Courts.

There are now certain further points to be made, in considering the constitution and the jurisdiction of courts, about the position of the provincial district or county courts.

The Supreme Court of Canada has made it clear in the recent Mackenzie Case[9] that where the federally appointed district or county judges have also been federally appointed as local judges of the provincial superior court, as authorized by provincial judicature statutes, they can then properly be assigned the power to decide superior court matters. By this device the district or county judges become superior court judges for purposes specified in the relevant provincial judicature statute. The Mackenzie Case was concerned with the granting of divorce, which is legislatively a federal subject in Canada.

Indeed, in the Mackenzie Case Mr. Justice Judson goes well beyond the local judge reasoning just explained. Since district or county judges are federally appointed, he takes the view that a province is free to rearrange jurisdictional tasks between the provincial superior court and the provincial district or county court as it sees fit, without offending the doctrine of constraint on provincial power to assign judicial judicial jurisdiction that has just been explained. Mr. Justice Judson's words are as follows:[10]

> "There is really no problem here. All County or District Judges are by the terms of their appointment ex officio local Judges of the Superior Court in the Province in which they are appointed. In British Columbia in that capacity they have long exercised functions assigned to them by provincial legislation, but never as trial Judges with complete control over the trial. The present legislation does give them this control in divorce actions but in their capacity as local Judges. It is still the Supreme Court that is functioning.

> I would go further and hold, contrary to the submission of the Attorney-General of Canada, that the Province of British Columbia is competent to empower the County Courts to exercise this jurisdiction and that no constitutional limitation would arise from s. 96 of the B.N.A. Act, if the Province were to choose to frame its legislation in this way."

Years earlier, Chief Justice Duff had spoken to the same effect in his opinion in the reference regarding the Adoption Act. He said:(11)

> "It is very clear to me, therefore, that, if you were justified in holding that by force of s. 96 the Provinces have been disabled since Confederation from adding to the jurisdiction of Judges not within that section, there would be equally good ground for holding that by force of s. 99 the Provinces are disabled from extending the jurisdiction of the County Courts and the District Courts in such a way as to embrace matters which were then exclusively within the jurisdiction of Superior Courts.
>
> Now, the pecuniary limit of claims cognizable by County Court Judges has been frequently enlarged since Confederation and nobody has ever suggested so far as I know that the result has been to transform the County Court into a Superior Court and to bring the County Court Judges within s. 99. Perhaps the most striking example of these enlargements of jurisdiction was that which occurred in British Columbia when the jurisdiction of the Mining Court, after the judgment of Mr. Justice Drake referred to above, was transferred to the County Court, and the County Court in respect of mines, mining lands and so on was given a jurisdiction unrestricted as to amount or value with all the powers of a Court of Law or Equity.
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> It has never been suggested, so far as I know, that the effect even of that particular enlargement of the jurisdiction of the County Courts of British Columbia was to deprive the County Court and County Court Judges of their characters as such and to transform them into Superior Courts and Superior Court Judges; or that s. 99 has, since these increases took place, been applicable to County Court Judges. In point of fact, as everybody knows, the practice has been opposed to this."

Personally I prefer the views of Chief Justice Duff and Mr. Justice Judson. At least in modern Canada, there is no longer any point in distinguishing between the two types of federally appointed judges for the purpose of a guaranteed core of jurisdiction for superior courts.

Finally, there is the matter of appellate jurisdiction to be discussed, as up to this point I have been speaking primarily of original judicial jurisdiction. The following two propositions seem to sum up the position. First, if some type of issue is improperly assigned by a province to a provincially appointed judge as a matter of original jurisdiction, this defect is not cured by appellate proceedings that lead directly or eventually to a superior court. This was made clear by the Supreme Court of Canada in the Olympia Case.(12)

In the second place, if a provincially appointed judge is properly given original jurisdiction to decide a given type of issue, then probably there may be an intermediate appeal to other provincially appointed judges confined to that issue. The Supreme Court of Canada suggested this might be so in the case of DuPont v. Inglis.(13) But, though I know of no direct authority on the issue, my opinion is that final appellate jurisdiction for a Province or for Canada is typically a matter for a superior court, even though the original jurisdiction in the type of issue concerned was properly assigned by provincial statute to a provincially appointed judge. These considerations are relevant to the points raised about appeals in the Working Paper on the Family Court in Alberta, starting at page 56.

We now consider a final topic that should be mentioned in this memorandum. I refer to determination of the procedure that is to obtain in the proposed single and comprehensive family court. I do not construe the question put to me by the Director for an opinion as calling for a detailed discussion by me of procedural problems. The Working Paper makes it clear that the proposed family court is intended to be a court at all levels so far as the essentials of its procedure are concerned. It should be noted too that procedure includes the subjects of remedies and enforcement.

Full power to lay down rules of civil procedure rests with the Provincial Legislature and full power to lay down rules of criminal procedure rests with the Federal Parliament. In addition, it seems that the Federal Parliament may specify overriding special civil procedure, if it chooses, for the trial of matters arising under civil laws legislatively within federal power under Section 91 of the British North America Act.[14] It is also my opinion that the general provincial power to constitute and organize courts authorizes the province to provide for the whole of the proposed family court the supportive services described in the working paper, for example those relating to counselling and conciliation. As in other respects, so in these matters of procedure, it is clear that a truly unified family court requires agreement between the Provincial Government of Alberta and the Federal Government.

I now offer in summary form my conclusions on the issues that have been explained and analyzed earlier in this memorandum.

(1) A provincial legislature may formally establish a single family court with comprehensive jurisdiction over family law matters.

(2) If provincially appointed judges are to participate as principal judicial officers in some of the work of the court, then the court is not in all respects a superior court and cannot be so described. Though a single court, it must have two divisions, one for federally appointed judges and one for provincially appointed judges. The latter division must be appropriately limited in the range of family law matters that its judges may decide. The chart on pages 42 and 43 of the Working Paper seems accurate in this regard. Also, for these purposes, district or county judges are in effect superior court judges.

(3) An effective single family court on the two-division plan requires detailed attention to the following elements:

(a) The selection of well-qualified judges, whether provincially or federally appointed;

(b) A rational scheme for the assignment to the divisions of the court of all family law matters, whether they arise under provincial or federal laws, or a combination of the two;

(c) A single code of procedure appropriate to deciding family law issues, but still essentially judicial in its character as procedure; and

(d) A single set of supportive welfare, counselling and conciliation services suitable for family law matters and available to both divisions of the court. Only when there has been substantial success in completing the particulars of laws covering these four elements will it be possible to speak of a truly unified family court in Alberta. A simple enactment in a provincial judicature statute to the effect that there is to be a single family court, albeit with two divisions, would only be a start--an expression of intention and hope. The particulars must be effectively worked out in all their detail as indicated. While the province may go some distance along this road alone, the co-operation of the Federal Government and Parliament are essential to real progress. This calls for federal-provincial intergovernmental agreement on the details of the four essential elements for unity just described. In other words the practise of co-operative federalism must be very real indeed if there is to be success in this matter.

(4) One final point is worth making. I explained early in this memorandum that the B.N.A. Act established a single judicial system, province by province, for Canada. The constitutional value implication here is that unified judicial administration of both federal and provincial laws is desirable for Canada, even though we are a federal country. In other words, such unified judicial administration of laws is the general policy of the B.N.A. Act itself concerning the judicial

system of Canada. Now the policy thrust of the proposal for a unified family court in Alberta is the same--it is fully in harmony with the general policy of the B.N.A. Act in this respect. It follows that the judicature sections of the B.N.A. Act should be construed, as far as this may reasonably be done, in favour of statutory arrangements for an integrated provincial family court as proposed in the Working Paper. This point is not diminished because our federal constitution provides only certain general guide lines in favour of a unitary judicial system. The constitution itself does not elaborate an effective unitary judicial system, in all essential particulars, for this or that subject area. Such full detail must be provided by both federal and provincial statutes and by rules of court which collectively make for effective judicial integration in a subject area like family law.

Appendix A

The following passages are extracts from an article I published in 1956 that are relevant to the problems now under discussion. The passages given below focus upon what jurisdiction may be given to provincial boards or tribunals rather than to provincial superior courts. This is basically the same issue as that raised by the extent of the permissible assignment of jurisdiction to limited provincial courts headed by provincially appointed judges.

(W. R. Lederman, "The Independence of the Judiciary", 34 Canadian Bar Review, 1956, p. 769 - 809 and 1139 - 1179. The passages quoted are from pages 1170 - 1171).

> "It is the nature of the law-applying task in issue that is crucial. One focuses on the statute or legislative scheme to be applied and asks--Is this statute of such a nature that clearly it ought to have a superior-court administration rather than a non-curial administration? If the answer is affirmative, then the statute in question must be committed to a provincial superior court for authoritative interpretation and application to the persons and circumstances contemplated by it. If the answer is negative, only then may the province commit the law-applying task to a non-curial provincial tribunal.
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> My submission is that this is the basis and purport of the judgments in the leading cases on section 96 of the B.N.A. Act. In Toronto v. York in 1938 it was decided that binding interpretation of a contract without limit and in the abstract was a typical superior-court task, and hence power to do this could not be given the Ontario Municipal Board, though the board could be given a price-fixing power, since that was not a legal task for which a superior court was appropriate or necessary. A power to fix or set prices is a delegated legislative power in these circumstances. In the recent case of Toronto v. Olympia, the ruling was that only a superior court was appropriate to interpret

and apply with finality provincial laws defining the types of property respecting which the owners were to be liable to direct provincial property taxation, whereas tax assessors and provincial tribunals that were not superior courts could finally interpret and apply the laws by which valuation of items of property assumed or admitted to be taxable was to be accomplished. Thus the issue of taxability was separated from that of valuation, though both involved the interpretation and application of provincial laws. In the John East case, it was held that the provincial statute there in question provided a new plan for the regulation of industrial labour relations by certification and collective bargaining--a scheme that was not by its nature appropriate for superior-court administration. Therefore it was intra vires the province to assign the administration of the statute to a purely provincial tribunal that was not a superior court. In short, the provincial superior courts do have an irreducible core of substantive jurisdiction assured to them in that there are some law-applying tasks within the scope of section 92 that must be entrusted to them.

It has been objected that this fixes on provincial governments a separation of powers respecting the mode of administration of provincial laws that is rigidly determined by the dead hand of history--the state of typical superior-court jurisdiction in 1867. It is true of course that, just as we have to look to English legal history for typical superior-court institutional characteristics, so we must pay some attention to the same history to determine typical superior-court jurisdiction. But this test of jurisdictional substance is not necessarily either rigid or out of tune with modern times because it has historical elements, as a careful reading of the John East case shows. The test of the John East case is, quite simply, to ask whether the provincial legislative scheme concerned is the sort of thing a superior court ought to administer. Of course this question has to be asked in the light of (i) the sort of institution a superior court is, and (ii) the sort of substantial jurisdiction that has been historically typical of superior courts. History is not a series of accidents, and the historical reasons for a given type of superior-court jurisdiction might still be valid, or there might be new reasons why such superior-court jurisdiction would make modern sense. Historical analogy is certainly involved, but there is a lot of history, and analogy

is itself a very flexible instrument. So, if historical analogy is employed with perception and imagination, there need not be any dead hand irrelevant to modern times resting on this guarantee of superior-court jurisdiction. In the John East case, Lord Simonds makes this very clear:

> 'It is legitimate therefore to ask whether, if trade unions had in 1867 been recognized by the law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word, the economic outlook had been the same in 1867 as it became in 1944, it would not have been expedient to establish just such a specialized tribunal as is provided by sec. 4 of the Act. It is as good a test as another of 'analogy' to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior and other courts.'"

Toronto v. York [1938] A.C. 415

Toronto v. Olympia Edward Recreation Club Ltd., [1955] S.C.R. 454.

Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1949] A.C. 134.

Footnotes

(1) A. G. for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd. [1960] S.C.R. 32, 21 D.L.R. (2d) 97.

(2) W.R. Lederman, The Courts and the Canadian Constitution, The Carleton Library No. 16, McClelland and Stewart Ltd., Toronto (1964) p.p. 1 - 4.

Regina v. Bush, (1888)15 O.R.398, per Street J. at 403-5. (Approved in Reference re Adoption Act, see footnote (4))

(3) Crown Grain Co. v. Day [1908] A.C. 504.

(4) Reference Re Adoption Act, [1938] S.C.R. 398, [1938] 3 D.L.R. 497.

Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1949] A.C. 134.

(5) Buckley v. Edwards, [1892] A.C. 387, at p.p. 392-3.

(6) Debates, House of Commons, Dominion of Canada, Session 1946, Vol. IV, p. 3732.

(7) R.S.C., 1970, c's C-34, J-3 and D-8 respectively.

A.G. for B.C. v. Smith [1967] S.C.R. 702.

(8) Valin v. Langlois (1879), 3 S.C.R.1.

In re Vancini (1904), 34 S.C.R. 621.

(9) Re Supreme Court Act Amendment Act 1964 (B.C.) A.G. of B.C. v. McKenzie [1965] S.C.R. 490, 51 D.L.R. (2d) 623.

Reference re Constitutional Validity of Section 11 of The Judicature Amendment Act, 1970 (No. 4) (Ontario) (1971) 18 D.L.R. (3d) 385.

(10) 51 D.L.R. (2d) p. 625.

(11) [1938] 3 D.L.R. 510-11

(12) Toronto v. Olympia Edward Recreation Club Ltd., [1955] S.C.R. 454.

(13) [1958] S.C.R. 535, 14 D.L.R. (2d) 417.

(14) A. G. of Alberta and Winstanley v. Atlas Lumber Co., [1941] S.C.R. 87, [1941] 1 D.L.R., 625.

Addendum (1978) to my Opinion of 1972 entitled "Federal Constitutional Problems in Relation To The Proposed Family Court For Alberta"

Because six years have passed, and Professor P.N. McDonald's Opinion was given after mine of 1972, I asked for the opportunity to make one additional point, since both opinions are now to be published.

Professor McDonald takes the view that the constitutional doctrine of specially reserved superior court subjects, the so-called section 96 doctrine, limits only the Provincial Legislatures and not the Federal Parliament. On page 13 of my 1972 Opinion, I said: "Though it has never been authoritatively determined, it is probable that the Federal Parliament is not under the same constraint as to typical superior court jurisdiction as are the Provincial Legislatures." Both before and since writing that in 1972, I have stated strongly in published essays that I think the section 96 doctrine does obtain against the Federal Parliament.[1] I would not now express the point as doubtfully as I did in 1972. Accordingly, Professor McDonald is correct to put my name to the view that the Federal Parliament is thus limited, for example with respect to divorce itself.

In any event, I submit that the point at least remains open and controversial, for which proposition there is clear Supreme Court of Canada authority in the case of Zacks v. Zacks (1973) 35 D.L.R. (3d), 420. In giving the unanimous judgment of the full court (a court that included

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1. "The Independence of the Judiciary" (1956) 34 Canadian Bar Review, at p. 1176-77.

   "The Supreme Court of Canada and the Canadian Judicial System" (1975) Transactions of The Royal Society of Canada, Fourth Series, Volume XIII, at p. 223-24.

Mr. Justice Laskin, as he then was), Mr. Justice Martland said (at p. 432)

> Because Rule 32(3) does not purport to confer upon the Registrar a power to adjudicate it is my opinion that the second constitutional question should be answered in the negative. In basing my opinion on this one ground, I do not thereby express disagreement with other grounds on which the respondent's contention is attacked, such as the fact that the Rule in issue was one made by the Supreme Court of British Columbia pursuant to a federal enactment, but it is not necessary to reach a final conclusion upon them.

I should think then that account should be taken of this genuine uncertainty, in planning for a unified Family Court in Alberta.

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Professor of Law
May 1, 1978

CONSTITUTIONAL PROBLEMS ASSOCIATED WITH A UNIFIED FAMILY COURT

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CONTENTS

The purpose of this opinion is to determine what arrangements can be made to establish a court with comprehensive jurisdiction in family matters without violating section 96 of the British North America Act. The matters to be assigned to the court include some within federal legislative jurisdiction and some within provincial jurisdiction.

1. Section 96 and Matrimonial Matters Within Federal Jurisdiction

The first question to be considered is whether divorce, and other matters within federal legislative jurisdiction, must be assigned to a court the members of which are appointed by the Governor General. In response, it seems reasonably clear that section 96 of the B.N.A. Act inhibits only the provincial legislature. As a result, those matters within federal jurisdiction may by federal statute be conferred on provincial appointees.

There is authority for the proposition that there is no limitation upon the kind of jurisdiction that Parliament may confer on federally appointed tribunals other than the section 96 courts. In R. v. Canadian Labour Relations Board, ex parte, Federal Electric Corp.[1] it was held by the Manitoba Queen's Bench that as a federal board, the Canada Labour Relations Board is not subject to the limitations that arise under section 96 of the B.N.A. Act. Justice Beetz would not go quite this far. Writing a concurring judgment in Attorney General for Canada v. Canard[2] he said that while Parliament is free to oust the jurisdiction of the provincial courts in all federal matters, it may confer only on courts established under section 101 the peculiar functions of a superior court. These might not be conferred upon "a minister, or any official or board of a non-judicial nature."[3]

Justice Beetz is joined in his opinion by Lederman, who argues

that laws within section 91 of the B.N.A. Act appropriate only for superior court administration must be assigned by the federal Parliament to a provincial superior court or to a federal superior court under section 101, and not to any other tribunal.[4] On the face of it, this may not appear to prevent the assignment of section 96 functions to a provincial appointee, because it has been held that in conferring additional jurisdiction on a provincial court, Parliament is in substance establishing a court under section 101 of the B.N.A. Act.[5] But such an assignment is precluded for it is part and parcel, indeed the basis of Lederman's argument that sections 97 to 100 inclusive of the B.N.A. Act apply to the federal superior courts. So it is that in selecting a tribunal which includes lay judges without tenure, Parliament cannot be said to be establishing a section 101 Court.

Laskin has described the Lederman view as without support in history, text or context,[6] and, as Chief Justice in the very case in which Justice Beetz took the same position, he expressed a view which goes beyond even the decision in the Canada Labour Relations Board case. He said flatly:[7]

> "Any constitutional limitation which might arguably reside in section 96 of the British North America Act, 1867 if provincial legislation was involved does not apply to the otherwise valid legislation of Parliament."

This was a reiteration of an opinion first expressed in the pages of the Canadian Bar Review,[8] and repeated as part of the ratio decidendi in Papp v. Papp.[9] According to the Chief Justice, Parliament may confer on provincially appointed tribunals duties of adjudication of a kind which the province (although acting otherwise within its legislative authority) cannot confer on them. He cites as an example the jurisdiction under the Criminal Code of provincially appointed magistrates. In agreement with this position are

Lefroy[10], Jordan[11], deSmith[12], and the legal advisors of the federal government.[13] Support is also to be found in the language, if not the ratio of Valin v. Langlois[14], and in the decision, if not the language of In Re Vancini.[15]

My own view, for reasons later expressed, is that the Lederman-Beetz position is incorrect. Beyond that, it is apparent that the weight of authority favours Laskin and that his view would be likely to prevail in the Supreme Court of Canada. In the result, it may be said with some confidence that divorce and other matters within federal jurisdiction may be assigned to provincially appointed judges. It becomes important then to determine the precise limits of substantive federal jurisdiction in matrimonial matters, for the problems posed in requesting this opinion disappear to the extent that the matters to be assigned to the unified family court fall within the legislative jurisdiction of Parliament.[16]

2. Federal and Provincial Jurisdiction in Relation to Matrimonial Matters

Divorce

There is, of course, no question that divorce itself is a matter within exclusive federal jurisdiction and that maintenance and custody provisions in the context of divorce are 'ancillary' to the power under section 91(26) of the B.N.A. Act.[17]

Judicial Separation and Restitution of Conjugal Rights

The question of legislative power in this area is somewhat unsettled. In 1923 the Saskatchewan Court of Appeal held that the subjects do not come within the jurisdiction of Parliament,[18] and in the same year the Appellate Division in Alberta, by way of obiter dictum, treated the law of judicial separation as subject to provincial amendment.[19] But the pendulum appears now to have swung in the other direction as the authority of the provincial legislature to alter the basis on which a decree of judicial separation may be granted has been denied by the Manitoba Court of Appeal[20] and by the British Columbia Supreme Court.[21]

In Salloum v. Salloum the British Columbia Supreme Court held that amendments of The Divorce and Matrimonial Causes Act in relation to the grounds for judicial separation are beyond the authority of the provincial legislature. The decision confirms the reasoning adopted by Power and Jordan in suggesting that section 91(26) is the applicable head of legislative power.[22] Under the Act of 1857, judicial separation was treated as a particular form of divorce. And insofar as it suspends certain obligations of matrimony, it deals with the legal relationship between a husband and wife and in that sense falls within the subject of marriage. What distinguishes judicial separation from other aspects of the marital relationship such as alimony and property rights, which have been held to fall within provincial jurisdiction, is that the latter deal with "civil rights arising out of a particular relationship"[23] and not with the relationship itself. Judicial separation effects a temporary discharge of the wife from her character as such.[24]

Nullity

It is an a fortiori proposition that with the exception of matters relating to solemnization, nullity is a matter falling exclusively within section 91(26), and the courts have so held in cases involving prohibited degrees of affinity[25], non consummation[26], and prior subsisting marriage.[27] There has been carved out an area of provincial jurisdiction over annulment of marriage based on the power under section 92(12), "Solemnization of Marriage". In exercise of its undoubted power over the formalities of the ceremony of marriage, the provincial legislature may establish conditions and prerequisites such as parental consent, and may attach the consequence of invalidity absolutely or conditionally.[28]

I should note in passing that laws providing for annulment of marriage on the grounds of non-consummation have not been suspended by the enactment of section 4(1)(d) of the Divorce Act. Annulment and divorce are distinct remedies

notwithstanding the common ground introduced by section 4(1)(d); one terminates a marriage and the other declares it never to have existed.[29]

Matrimonial Support

As an independent remedy, maintenance is a matter of civil rights and therefore within provincial jurisdiction, and not a matter of "marriage and divorce" under section 91(26) of the B.N.A. Act.[30] It has never been held that federal jurisdiction goes beyond making provision for maintenance in the context of proceedings for divorce or judicial separation.

It appears that provincial legislation may provide for maintenance in the context of divorce proceedings unless an order for maintenance is made under the Divorce Act.[31] In that context, the provincial laws are dealing with a matter that is ancillary to federal divorce jurisdiction, but it is doubtful that Parliament could provide for the administration of such laws in a unified family court.[32]

Property Rights

There is no doubt that property rights, during the subsistence of marriage and on termination, fall within the jurisdiction of the provinces under section 92(13). This was the decision of the Supreme Court of Canada in 1896 in Conger v. Kennedy[33], and of lower Courts in subsequent cases upholding provincial legislation which established the principle of separation of property.[34] Property rights are civil consequences and not essential conditions of the marital status. The moot point is whether Parliament enjoys an ancillary power to deal with the disposition of matrimonial property as a matter of relief corollary to divorce, judicial separation and nullity.[35] From one point of view, the question is academic because there is no legislation representing an exercise of the power.[36] It is a nice question, however, whether the section 96 problem might be avoided by an exercise of the federal ancillary power to the extent of

providing that provincial laws governing the disposition of property on dissolution shall be administered in the unified family court. By a more elaborate device, relying on the principle in Coughlin v. Ontario Highway Transport Board[37], Parliament might first adopt such provincial laws as its own and then assign jurisdiction in the manner suggested. The validity of either device is far from clear, but limitations of time preclude a search for answers.[38] It will be assumed that Parliament is free to assign for administration to provincially appointed tribunals only laws enacted by it or laws enacted by the United Kingdom Parliament and subject to its amendment, as, for example, the Matrimonial Causes Act, 1857. On this basis, the existence or otherwise of an unexercised federal ancillary power in relation to property matters is not pertinent.

Injunctions

The variety of grounds upon which the injunction is granted in matrimonial causes makes it difficult to pin down its constitutional place. The principle basis for an injunction, and one found at common law rather than under statute, appears to be enforcement of the right to come to the court for relief free from threats or pressures or intimidation by persons seeking to have the action abandoned or modified.[39] Clearly, this is a matter falling within "the Administration of Justice . . . including Procedure in Civil Matters" under section 92(14), but it is also part and parcel of the substantive federal jurisdiction in respect of divorce, judicial separation and nullity, for it is established that "with respect to matters coming within the enumerated heads of section 91, the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent."[40] In this sense, the right to freedom from pressure in pursuing matrimonial causes is "federal common law"[41] and the enforcement thereof may be provided for by federal statute.[42] However, as not all matrimonial causes fall within federal jurisdiction, the action for alimony as an independent remedy being the prime example,

the injunction, as a device for securing the integrity of proceedings, is not uniformly federal in its constitutional aspect.

The second major ground for awarding an injunction in matrimonial matters relates to the protection of property, and in this aspect the remedy is subject to exclusive provincial jurisdiction. Thus, courts may be said to be acting on a basis which is potentially subject to overriding provincial legislative power when the injunction is used to prevent interference with separate property,[43] to prevent a disposition of property which is seen to jeopardize a claim for maintenance,[44] or to protect the right of the deserted wife to remain in the matrimonial home.[45]

The result of the foregoing analysis is this: those matters which are clearly within exclusive provincial jurisdiction (or at best subject to an exercise of ancillary federal power) and therefore caught by section 96 of the B.N.A. Act are annulment for ceremonial failure, matrimonial support, division of property, and injunctions for protection of property rights or in the context of actions other than divorce, judicial separation and "federal nullity". The question then becomes, to what extent are these matters caught by section 96, that is to say, to what extent does the adjudicative power in relation thereto broadly conform to the type of jurisdiction exercised by the superior, district or county courts.

3. Section 96 and Matrimonial Matters within Provincial Jurisdiction

Nullity

In relation to nullity, case law is non-existent. The decisions in Roskiwich v. Roskiwich[46] and Re Schepull[47] establish that the power to grant judicial separation and to annul a marriage on the basis of affinity, respectively, are matters for a section 96 court. It may be by extrapolation from these cases

that Katz is able to say that actions for declaration of invalidity of marriage because of noncompliance with solemnization requirements must be heard in provincial superior courts.[48] It is known that prior to Confederation the Court for Divorce and Matrimonial causes, a superior court, exercised jurisdiction to declare nullity for failure to comply with the requisite forms or ceremonies of marriage required by the English Marriage Acts.[49] At one time it was thought conclusive that the justiciable issue had at Confederation been subject to superior court adjudication.[50] But there are indications now of a more flexible approach which makes it relevant to ask, among other things, whether any historical analogy has been weakened by changes in relevant circumstances and conditions, and whether the legal task in question is peculiarly appropriate to the institutional virtues and limitations of a superior court.[51]

Annulment for ceremonial failure is easily to be distinguished from both judicial separation, and annulment on other bases. In Kerr v. Kerr[52] Chief Justice Duff had this to say:

> "In the case of a marriage void by the law of the place where it was celebrated, on account of lack of essential formalities, a declaration that it is invalid has been described as 'merely a judicial ascertainment of facts'. It ascertains but does not change the status of the parties."

There is an analogy, I think, to the power of Justices of the Peace to order confiscation of slot machines, which was upheld in Re Johnson[53]. There Macdonald, J.A. said:

> "It is suggested that the Act gives power to a Justice of the Peace to settle a title to property . . . In my view,this is not what the Act directs. The real function of the Justice of the Peace is to hear evidence which may satisfy him that the machine seized is not a slot machine . . . If the Justice of the Peace is not satisfied that the machine is not a slot machine as defined, he must make an order of confiscation . . . The formal order which he makes adds nothing to what is already provided for in section 3. Under this section, no slot machine is capable of ownership, no person can have property therein, and no court shall recognize or give effect to any such rights. In other words, the property in a slot machine as defined by the Act,

> vests in the Crown, quite regardless of any confiscatory order the Justice of the Peace may make. . ."

Similarly, a declaration of nullity for lack of essential formalities adds nothing to what is provided for in the statute, namely that the marriage is void.

There are other features of the nullity jurisdiction which distinguish it from that typical of section 96 adjudication. Compliance with the statutory requirements is determined in the first instance by an administrative official. The concept of fault plays no part, as it does in divorce and judicial separation. Finally, the concept of a suit between parties is mitigated somewhat, in Alberta by the provision that suit may be brought only by the minor, and in other provinces by the fact that suit may be brought by any third party with a pecuniary or status interest, either during the lifetime of the spouses or even after their death.[54]

It may well be then that annulment for ceremonial failure is not a matter for the section 96 courts.

Matrimonial Support

I am quite confident that the jurisdiction to make an order of support as an independent remedy may be conferred upon provincially appointed judges of the Family Court.

The leading authority, of course, is the Adoption Act case,[55] in which the Supreme Court upheld the power of magistrates to award maintenance in favour of deserted wives and children. The principle basis for the decision was the perceived similarity to the jurisdiction of magistrates under the Poor Law system as it had developed in England. The similarity arose out of what Duff C.J. considered the distinctive point of view from which the provincial legislature envisaged the obligation to support a deserted wife. The obligation enforced was that of the husband to the community and of the community to the deserted

wife; it was not a matter simply of enforcing an obligation to the deserted spouse. In short, the subject-matter of adjudication was not "civil rights" but "public duties". So long as maintenance legislation reflects that approach, the Adoption Act case is sufficient authority for the conferral of jurisdiction upon provincial judges. As Duff C.J. himself said, it does not matter that there is no pecuniary limit. The analogy to the Poor Law system does not rest on any comparableness between the amounts available under the two legislative schemes. Nor would it seem to matter whether the proceedings are criminal in nature; enforcement by criminal proceedings merely emphasizes that the obligation is owed to the public. The courts have held, in any event, that proceedings under deserted wives' and childrens' maintenance statutes are not truly criminal in nature,[56] and accordingly that proof of materials facts is to be on a balance of probabilities.[57] The substitution of civil proceedings would not by itself change the essential character of the legislation. Finally, nothing in the stated rationale of the Adoption Act case would suggest that it does not cover maintenance awards in favour of a husband. It must be demonstrable only that the public has undertaken a responsibility to the husband and that the incidence thereof is required to be borne by the wife.[58]

What is said above may not be fully applicable, however, to the draft Matrimonial Support Act which is under consideration by the Institute. It appears to me that the draft statute does not envisage the subject from that distinctive point of view perceived by Duff C.J. There are a number of features of the draft act which might suggest to a court that it has created a new civil right as an attribute of marital status, this to replace the unilateral obligation of the husband to the community. The statute begins by creating a mutual obligation to support; the point appears to be not so much that persons should be supported but that the parties to a marriage should support. Nothing in the statute reflects the assumption of any obligation by the community. Section 4(3)

may deprive of support a spouse who has been guilty of misconduct but is nonetheless perfectly destitute. The award will reflect not only the need of the recipient but the means of the supporting spouse as well. The absence of any requirement to show desertion suggests strongly that the matter is treated as one of civil rights rather than public wrongs. The substitution of civil proceedings would be an obvious manifestation of a change in underlying philosophy.

The foregoing considerations make it pertinent to consider whether the jurisdiction to make orders of support is outside the scope of section 96 on any basis other than the Poor Law analogy. I think that quite apart from that historical precedent the jurisdiction does not broadly conform to the historical jurisdiction of the section 96 courts. In the Adoption Act case, Duff, C.J. was prepared to assume for the purpose of argument that the deserted wives' maintenance legislation was to be treated as on the same footing as alimony (by which he meant, I think, maintenance as a matter of civil right). On that assumption, he agreed with the Supreme Court of British Columbia in Dixon v. Dixon[59] that the legislation is analagous to pre-Confederation legislation by which the earnings of the wife, being the property of the husband, can be taken from him by a magistrate's protection order and placed under the control of the wife. This kind of generalization from specific instances of inferior court jurisdiction is quite in accordance with recent decisions respecting section 96.[60] Not only is the support order similar to an historical power of provincial appointees, but it is something that was not within the jurisdiction of superior courts at Confederation. In R. v. Vesey,[61] to which Duff C.J. referred with approval in the Adoption Act case, the New Brunswick Court of Appeal pointed out that the superior courts in England dealt with maintenance or alimony only as incidental to divorce and other matrimonial proceedings. It was not dealt with as a substantive right or independent remedy.[62] This difference in context is similar to that relied on in upholding the jurisdiction of Workmen's Compensation

Boards notwithstanding the historical determination by superior courts of the question whether an accident has occurred in the course of employment.[63] There are other aspects of the adjudicative power which distinguish it from that typical of superior and district courts. The power is essentially discretionary in nature, involving regard for a list of criteria rather than the application of any pre-determined formula.[64] It includes the authority to vary or set aside the provisions of a contract, something which the Superior Courts of law had no power to do .[65] Finally, although the draft statute creates a mutual right of support, this right appears to be enforceable only through the adjudicative machinery created by the legislation. To that extent, the adjudication is a "constituent element in the rights" created by the legislation and not a mere adjunctive process.[66]

I do not think that the section 96 question is affected by conferring on the Family Court power to make lump sum awards or to order the transfer of property from one spouse to another. Neither power would change the essential character of the adjudication or of the right created by the legislation. It is the determination of property rights and the enforcement thereof that has a strong association with the jurisdiction of superior courts.[67] The proposal does not give one spouse any interest in the property of the other; it creates a right that is purely <u>in personam</u>. The protection order involves an appropriation to the deserted wife of property belonging to the husband. It was upheld in the hands of a magistrate and described as of the same nature and effect in principle as maintenance.[68]

There may be a real problem, however, in the proposed power to order the charging of property or to order a transfer of property in trust. If the transfer is to be made only for the purpose of creating a fund from which the payments shall be produced, it does not differ in substance from the power to appropriate property in discharge of the support obligation. But if the

transfer is made to preserve property against the possibility of default, it suffers from the same association with section 96 jurisdiction as does the charging of property to provide collateral security. Both powers would authorize the Family Court to create an interest in property in the form of a charge and, presumably, to administer the realization of that charge. The courts have struck down on the basis of section 96 the conferral upon provincial appointees of jurisdiction to enforce liens and charges against land[69] and to enforce mortgages and agreements for sale.[70] Neither the novelty of the charge nor its limited area of application would be sufficient to avoid a finding of a conformity with the historical jurisdiction of superior courts. In A.-G. Ontario and Display Service Co. Ltd. v. Victoria Medical Building[71], the Supreme Court of Canada invalidated the adjudicative power of the provincially appointed Master under the Mechanics Lien Act. Chief Justice Kerwin said that although mechanics' liens were unknown at Confederation, the liens were enforced by a procedure with which the superior courts were familiar in foreclosure of mortgages by judicial sale. Judson J. said that the jurisdiction was precisely that of a section 96 Judge notwithstanding that it was "limited only to one particular field of litigation."[72] In considering this problem, I am aware that the courts are disposed to allow the addition to a specialized inferior jurisdiction of powers which taken in isolation might be described as those of a superior court,[73] but it is just possible that the charging and transfer powers might be the last straw.

A full range of enforcement remedies would not undermine the validity of support awards by provincially-appointed judges of the Family Court. If enforcement by execution and garnishment is provided for by making the support award enforceable as an ordinary judgment of the Supreme or District Court, this

does not make the Family Court a section 96 court .[74] As a matter of principle, powers of enforcement conferred directly on the Family Court should not give rise to any constitutional difficulty if the substantive adjudicating power itself is not an infringement of section 96.[75] In any event, justices of the peace enjoyed the power before Confederation to issue execution after rendering judgment in small claims proceedings.[76] The small claims jurisdiction with accompanying enforcement powers was upheld in Ganong v. Bailey.[77] And in Re Ritchie v. Ritchie,[78] a Judge of the British Columbia Family Court referred with approval to the powers of persons other than section 96 judges to issue garnishment orders and otherwise to enforce the judgments of Superior Courts.

Property Rights

The division of matrimonial property is almost certainly a matter for the section 96 courts. Unlike annulment, adjudication upon the separate property rights of husband and wife is post-confederation in origin, for the very principle of separation of property was first introduced in 1882. Nonetheless, history binds because there is a strong association of property matters generally with superior courts. Reference may be made to the cases striking down on the basis of section 96 the conferral upon provincial appointees of jurisdiction to determine questions of title to land in relation to which fraud has been alleged,[79] to enforce liens and charges against land,[80] to enforce mortgages and agreements for sale,[81] and to determine the legal right to retention of property.[82] And although separation of property is of statutory origin, the statues really do nothing more than make applicable to husband and wife the ordinary principles of property law.

There are instances of magistrates' involvement in property matters. The confiscatory authority upheld in Re Johnson[83] is not particularly helpful,

however, as the court made it plain that it was not really the function of the Justice to settle the title to property. As it happens, the only power of magistrates in matrimonial proceedings prior to Confederation was their power under section 21 of the Divorce and Matrimonial Causes Act to make an order protecting from any claims of the husband the earnings and property of a deserted wife.[84] Although the courts do generalize quite freely from specific instances of inferior court jurisdiction,[85] it is doubtful that the protection order would provide a foundation for the vesting in provincial appointees of general authority over matrimonial property, particularly as the protection order has been described as of the same nature and effect in principle as maintenance.[86]

What has been said thus far in relation to division of property assumes that it is the existing law of matrimonial property which would be assigned to a provincial appointee. Different considerations arise out of the majority proposal of the Institute of Law Research and Reform, which provides for an equal sharing of the economic gains made by husband and wife during marriage. In the administration of such a scheme, ownership of property must be determined, but this only for the purpose of calculating shareable gains.[87] A central feature of the jurisdiction would be valuation of property, and in that respect some comfort can be taken from O. Martineau and Sons Ltd. v. Montreal[88] upholding the authority of provincial appointees to assess compensation payable on expropriation. Finally, it is important that the proposal does not give one spouse an interest in the property of the other.

Looking at the proposal from the least favourable point of view, it is not impossible to contemplate its being likened for this purpose to the

award of alimony or maintenance as incidental to proceedings for dissolution of the marriage. The proposal substitutes a general rule of equality for the discretionary power of the court under the Divorce and Matrimonial Causes Act of 1857 to order the husband to secure to the wife such gross sum of money or such annual sum of money, as, having regard to her fortune (if any), to the ability of the husband and to the conduct of the parties, it should deem reasonable.[89] In Kazakewich v. Kazakewich[90] the Appellate Division in Alberta distinguished the jurisdiction of magistrates to grant alimony orders in favour of a deserted wife from the jurisdiction to grant alimony orders exercised by the Ecclesiastical Courts and afterwards entrusted by the Matrimonial Causes Act of 1857 to the superior court. The court held that maintenance allowances and alimony orders could be made only by section 96 courts. In the Adoption Act case,[91] the Supreme Court of Canada refused to follow Kazakewich, but did so only to the extent of upholding magistrates' power to award maintenance in favour of deserted wives and children. As a result, it was subsequently held in Waterman v. Waterman[92] that only the section 96 courts may make an order for alimony after the granting of a divorce. It is true that the British Columbia Court of Appeal in Armich v. Armich[93] refused to follow Waterman, but only to the extent of upholding the power of a magistrate to vary after divorce a maintenance order made prior to divorce in favour of a deserted wife. In the result, although protection orders and maintenance orders may be made by magistrates in favour of deserted wives, only a section 96 court may grant alimony upon the dissolution of a marriage. If alimony in that context is section 96 work, then it seems that division of property should be so a fortiori.

Apart from the doubt which analogy to alimony casts upon the validity of the majority proposal if administered by a provincially appointed judge, there

is the circumstance that the deferred sharing proposal operates only upon the termination of a marriage and leaves the ordinary principles of property law to operate during its subsistance. And it has been concluded already that the existing regime of property law may be administered only by a section 96 court.

Injunctions

The Supreme Court of Canada held in Tomko v. Nova Scotia Labour Relations Board[94] that a provincially appointed tribunal may be authorized to grant injunctions or orders equivalent thereto. However, none of the grounds leading to that conclusion apply to the case of injunctions in matrimonial matters. Here, injunctions would be granted to protect the same legal rights as were protected by the award of that remedy in superior courts at Confederation; the injunction is not part of a larger legislative scheme which makes provision for other devices to reconcile differences; the injunction would be awarded by a court following an adversarial procedure and not by a board making its own investigation of the issues; the remedy would be used to enforce common law rights rather than to support the precepts of legislation. In short, the reasoning in the strong dissenting opinion of Justice de Grandpre, that the power to grant an injunction is traditionally a power of a superior court, would be compelling if magistrates were authorized to grant injunctions in matrimonial matters.[95]

The Ontario Law Reform Commission suggests that Family Court judges may be given the power to require one spouse to enter into a recognizance not to molest or interfere with the enjoyment of civil rights by the other spouse, as an aspect of the common law of preventive justice historically administered by magistrates and justices of the peace. There is support for this position in a very recent judgment of the Family Court in Alberta. In Regina v. Jeschke[96]

the Judge bound over to keep the peace a husband who had come before him charged with common assault. Referring to the leading case of Haylock v. Sparke,[97] the Court said:

> "One interesting thing about the reference to the case however is that it sets up a common law precedent for a surety to keep the peace in a civil action. I am fully aware that the following comment is obiter, however, in a Family Court, which is involved with disputes between husbands and wives and, frequently, assaults, the nature of which may on occasion be criminal or otherwise, there is an invitation here in the proper case for a civil Provincial Court not coming within the purvey (sic) of the courts in s.96 of the B.N.A. Act, 1867, to take sureties to keep the peace".

In my view, the historical jurisdiction of magistrates to require a recognizance is quite different from the jurisdiction which the Ontario Commission proposes for its Family Court. In Family Court, the recognizance would be taken to protect the private or civil rights of the spouse. The common law of preventive justice, affirmed by the Supreme Court of Canada in MacKenzie v. Martin[98] was exercisable only for the prevention of conduct tending to a breach of the King's peace. The recognizance was an assurance to the public; the protection of private rights was purely consequential. What lead the Family Court in Regina v. Jeschke to think that the recognizance might be used to protect civil rights was the decision in Haylock v. Sparke that a Justice of the Peace had jurisdiction to require sureties for good behaviour in some cases of libels against private individuals. But it is clear from the Haylock case that sureties are required by a Magistrate "for the sake of the public",[99] and that they may be required of libellers only if the words used "directly tend to a breach of the peace or to scandalize the government".[100] Notwithstanding its form, a recognizance for the protection

of civil rights including the right to possession of property is more closely analogous to an injunction than to the sureties taken historically by magistrates.

Viewed as a form of injunction, the non-molestation order is conceded by the Ontario Commission to be beyond the jurisdiction of a provincially appointed judge. That view was expressed before the decision of the Supreme Court of Canada in Tomko v. Nova Scotia Labour Relations Board,[101] upholding the power of the Board to issue cease and desist orders, but as noted earlier the grounds for the decision in Tomko generally do not apply to the case of injunctions in matrimonial matters. Looking beyond that case there are essentially four negative factors to be overcome:

(i) The equitable remedies of declaration and injunction are associated historically with the superior courts only.[102]

(ii) The legal rights to be protected by the order are not of new statutory origin; they are the same common law rights as were protected by the award of the injunction in superior courts at Confederation.[103]

(iii) The order would be granted by a court following an adversarial procedure.[104]

(iv) Historically, magistrates and justices of the peace had no general involvement in matrimonial matters.[105]

There are two positive factors of uncertain import. First, it would not be necessary, presumably, for the applicant spouse to come with clean hands, to demonstrate that damages are not adequate, or to show that the balance of convenience favours granting of the remedy. In the Tomko case, the Supreme Court of Canada did make something of the absence of these requirements from the terms of the Trade Union Act granting the power to issue cease and desist

orders.[106] Second, the non-molestation order is designed essentially to preserve some measure of harmony in a relationship that the legislature wishes ultimately to preserve. The object is not solely to protect the inviolability of the person. In Tomko, Chief Justice Laskin noted the "individualistic" context in which injunctions are granted by the ordinary courts, and saw the cease and desist order, by contrast, as "a rational way of dealing administratively with a rupture of peaceful labour relations".[107]

I am afraid that in the end this must be a judgment call. There is no question that the picture would be brightened considerably if the provisions for a non-molestation order were placed in the context of a legislative scheme making provisions for various devices to reconcile differences and achieve a settlement.

4. Proposals for a Single Court with Comprehensive Jurisdiction

It has been shown that certain of the functions to be assigned to the unified family court (specifically, property matters and injunctions for certain purposes) are subjects of provincial legislative jurisdiction and at the same time matters caught by section 96 of the B.N.A. Act. This means that the judges authorized to perform those functions must be appointed by the Governor General. There are two means by which such appointment might be accommodated within the structure of a unified family court. The first would involve the appointment by the province to a family court of a single group of judges, each of whom is also appointed by the Governor General to perform the distinctively section 96 functions. The second would involve a family court including some judges appointed by the Governor General and other judges appointed by the province, with the latter being confined to the performance of functions not distinctively section 96 in nature. I will now consider the constitutional difficulties associated with each proposal.

Judges Having Dual Appointments

The question to be considered here is whether the Governor General may grant limited appointments to provincially appointed Judges which would enable them to undertake the matters which would otherwise have to be dealt with by a section 96 judge. This is described by one writer, correctly I think, as a question to which there is no answer in the decided cases.[108] He expresses the opinion, nonetheless, that nomination by the Governor General is sufficient to satisfy section 96 without a full appointment as a superior or district judge. The underlying philosophy of the section 96 cases appears to support this opinion. To the extent of its jurisdiction broadly conforming to the type exercised by superior, district or county courts, section 96 operates negatively against a provincially appointed tribunal. Equally, section 96 should operate positively in favour of a federally appointed tribunal to that extent. The point is that section 96 is concerned with substance and not form. The appointing power of the Governor General extends to all tribunals exercising a particular kind of jurisdiction by whatever names they may be known.[109]

Some light is thrown on this question by considering the implications of the principle which allows federal administrative tribunals whose members are appointed by the Governor General to exercise section 96 functions. Does this not prove that nothing more than nomination by the Governor General is required to satisfy section 96?

But again, the principle referred to seems quite beside the point when it is considered that Parliament is free to confer section 96 functions even on provincially appointed tribunals. This does suggest that it is something other than appointment by the Governor General which takes federal tribunals outside the operation of section 96. However, appointment by the Governor General

asserts itself again as the underlying rationale if it is accepted that when Parliament confers section 96 functions upon a magistrate, it is "appointing" him to the extent of those functions. There is certainly authority for that proposition. In Valin v. Langlois[110] it was objected that the members of the provincial superior court had never been appointed to exercise the special jurisdiction in controverted elections conferred by federal statute, and Chief Justice Ritchie answered that the Judges had been "appointed" to the special court by a statute to which the Crown had assented.[111] Lefroy makes the same point in submitting that the Dominion Parliament, by an act assented to by the Governor General, can certainly exercise any powers vested in the latter, including the power of appointment vested in the Governor General by section 96.[112]

When parliament gives section 96 power to a magistrate, it appoints him to that extent. Is this not precisely a "limited appointment" of the kind contemplated for the unified family court?

Unfortunately, no. The truth is that where federal legislative enactments are irvolved, section 96 is not satisfied by the fact of an appointment by the Governor General (actual or notional); section 96 simply does not apply. It is concluded later herein that sections 96 to 100 are inseparable in their application. Yet it is clear that sections 97 to 100 do not apply to adjudicators exercising powers conferred by Parliament.[113] As a necessary consequence, section 96 does not apply to those adjudicators. Section 96 does not apply for the simple reason that Parliament enjoys the power under section 101 to establish "additional courts" for the better administration of the laws of Canada.[114] It has been recognized that by

conferring additional jurisdiction on a provincial court (within or without section 96), Parliament can be said to be establishing a court under section 101.[115] What has not been generally recognized is that therein lies the explanation for the absence of any constitutional limitation under section 96 applicable to the otherwise valid legislation of Parliament.

It may be objected at this point that this reasoning carries with it the Lederman-Beetz view that as section 101 represents an exception to the implications of section 96, Parliament may confer only upon courts established under section 101, and not upon a minister or board of a non-judicial nature, the peculiar functions of a superior court. But this is not so at all. If a tribunal is what it does, as the section 96 cases essentially say,[116] then in giving section 96 functions to a minister or board, Parliament is ipso facto establishing a "court" under Section 101. It makes no sense to characterize a tribunal by virtue of its functions as a superior, district or county court (section 96) and not as a court (section 101).

The foregoing explains what appears to be a most peculiar rule, namely that while the provincial legislature (in the absence of overriding federal legislation) may confer jurisdiction in federal matters such as divorce only upon a section 96 court, Parliament may confer similar jurisdiction on any person or tribunal. What the provincial legislature lacks is the power under section 101.

This brings us back to the principal issue with the conclusion that there is no direct support for the proposed "limited appointment" in the circumstance that Parliament may repose section 96 functions in provincially appointed judges.

More to the point is the decision of the Supreme Court of Canada in AG for British Columbia v. McKenzie.[117] There provincial legislation provided for local judges of the Supreme Court (being the judges of the county courts), who were to exercise such jurisdiction as might be assigned by provincial legislation. The legislation in question authorized the local judges to grant divorces. The legislation survived a challenge based on section 96. How far does the case go in establishing the validity of this hypothetical arrangement: Provincial legislation provides for "family judges of the Supreme Court" to be appointed by the Governor General from the ranks of provincial magistrates and to exercise jurisdiction in all family law matters.

The McKenzie case overcomes two objections to the hypothetical proposal. The decision makes it clear that a judge may be given some section 96 functions without having all the powers of a section 96 court. Second, it establishes the corollary that an adjudicator need not be appointed as a section 96 judge in order to exercise section 96 functions; he need only be federally appointed. It is true that the county court judges in the McKenzie case were indeed appointed as local judges of the Supreme Court, but Chief Justice Ritchie based his opinion on the broader principle that it is only provincially appointed officials who are excluded from exercising jurisdiction broadly conforming to the type exercised by superior, district or county courts. I doubt that the McKenzie case is distinguishable on the basis that the judges given Supreme Court powers were at least appointed as county court judges.

There are, however, two further objections to the hypothetical proposal and these are not met by the decision in McKenzie. It was argued there that the legislation curtailed the unlimited right of selection under section 96 by restricting to judges of the county courts the persons eligible to be local judges of the Supreme Court. In answer, Chief Justice Ritchie said

that the province had really done nothing more than to allocate jurisdiction between two courts, the members of both being selected by the Governor General. The same could not be said of legislation making only provincially appointed magistrates eligible for appointment as family judges of the Supreme Court. It may be, however, that this does nothing more than to require the province to rely on the good will of the Governor General in making appointments in accordance with the expressed wishes of the province.

A more difficult problem lies in the fact that the unified family court would be required to exercise both section 96 and non-section 96 functions. This is not true of the local judges in the McKenzie case. To the extent that this requires a partial appointment by the province (for those non-section 96 matters within provincial jurisdiction), the "appointment" would be supplied by provincial legislation conferring jurisdiction.[118] Alternatively, the power of appointment in that respect might simply be delegated to the Governor General.[119] Accordingly, the need for a provincial appointment raises no real difficulty.

What is troublesome is the specter of a constitutional limitation which prevents the union of judicial (here used to describe section 96 powers) and non-judicial power, especially where this involves federal and provincial appointments of the same person to exercise the distinct powers. Laskin raises the question by asking whether the fact that an appointment under section 96 carries with it certain conceptions of function operates to preclude a province from reposing "non-judicial" duties in a section 96 judge, and refers the reader, without comment, to AG Australia v. The Queen and the Boilermaker's Society of Australia.[120] There the Privy Council held that nothing in the Australian Constitution justifies the union of judicial and non-judicial power in the same body. The reasons given apply with equal force to the BNA Act

because it too is structured in terms of legislative, executive and judicial power, and it too affirmatively prescribes in what courts certain judicial power may be vested. If the case is to be distinguished it can only be on the basis that judicial powers conforming and not conforming to the type exercised by superior, district, or county courts are not so incompatible as are judicial and non-judicial powers. It is no answer to say that no one questions the power of superior courts to perform those functions which are now vested in provincially appointed masters, for the Boilermakers case recognizes that matters incidental to the judicial function may be conferred on the courts.

Although the Boilermakers case does not appear to have been judicially considered in Canada, Justice Rand has arrived at an equivalent conclusion following a slightly different route. Referring to a provincial mining recorder upon whom it was argued judicial power of the type exercised by superior courts had been conferred, he said that either the officers under the statute would be required to be appointed by the Dominion, or the adjudicatory function notionally segregated and held to be beyond exercise by a provincial appointee. He continued:[121]

> "It would be a constitutional absurdity that the Dominion should appoint, in accordance with sections 96, 99 and 100, the officer of such a tribunal for his role as adjudicator of incidental disputes and the province appoint the same person for all other purposes."

This statement is susceptible of at least two interpretations: that it is constitutionally invalid for the Dominion and the Province to effect a dual appointment of the same person, or that it is valid but not required where the judicial power is merely incidental to the administrative functions to be performed under the statute.

In his opinion entitled "Federal Constitutional Problems in Relation to the Proposed Family Court for Alberta" Professor Lederman appears to agree

with the former interpretation, although he does not base his opinion in that respect upon the judgment of Justice Rand. He rejects the notion that judges appointed by the Lieutenant Governor to perform non-section 96 functions could sit on a superior court properly described.

The solution may be in a distinction drawn by Professor Geoffrey Sawer in commenting on the Boilermakers case. He suggests that there is no constitutional objection to a personal mixture of functions, which would see the Legislature creating two different tribunals, but appointing the same individuals to sit on both.[122] It is on this basis perhaps that the statement of Justice Rand can be reconciled with the cases upholding provincial legislation which confers upon section 96 courts, functions not typical of their jurisdiction. Among these is Re Wilson v. McGuire.[123] A division court was established by the province, with the province having the power of appointing judges to the court. The provincial legislation in question provided that the division court be presided over by the county court judges. As a result, the county court judges would exercise section 96 power in their capacity as such and would exercise different functions in their capacity as division court judges. The legislation was upheld. In commenting on the case, the editor of the Canadian Law Times described the arrangement as follows:[124]

> "Under this statutory commission every county court judge holds the division court in his own county, not as a county court judge ex officio, but as the person or official adopted and appointed by the Provincial Legislature on account of his credentials as a county court judge."

Here, then, was the Ontario Supreme Court sanctioning not a mixture of functions in one court, but a mixture of functions in one person appointed federally to one court and provincially to another. This concept explains why magistrates can exercise superior court jurisdiction under the Criminal Code. In exercising such jurisdiction, the magistrate acts as a separate court established under section 101 of the BNA Act.

My conclusion is this: The Governor General may grant limited appointments to provincially appointed judges to enable then to undertake section 96 matters, but (1) the appointments must be to a separate court, and (2) the Governor General must be free on the face of the legislation to appoint to that court persons other than the provincially appointed judges.

It is my opinion, unequivocally, that the limited appointments would necessarily carry with them the requirement that the appointees be selected from the bar of the province (section 97), that the judges be removable only on address of both houses (section 99), and that Parliament provide for salary (section 100). There are two major reasons for this conclusion.

The underlying philosophy of the section 96 cases is that a court is what is does and not what it is called.[125] There is no more reason to restrict the application of section 97 and 100 to courts designated by the names mentioned therein, than there is so to restrict section 96.

Secondly, the purpose of the Judicature sections of the BNA Act is to ensure that the persons to whom important judicial tasks are assigned should be legally trained, independent and impartial, and not simply that they should be federally appointed. The point is made by Professor Peter Russell:[126]

> ". . . [R]eference is made to the judicial decisions in which the courts have struck down provincial schemes assigning functions to provincially appointed officials or judges . . . . On their face these decisions may seem to turn solely on the federal appointing power in section 96, but in fact they have had a double rationale . . . . For in its headier, more ideological moments, the enforcement of section 96 has been linked with sections 99 and 100, and regarded as having the wider purpose of preserving for courts of law a primary role in applying laws . . . . Thus, it is found that in the first Privy Council decision, the Martineau case of 1932 . . . Lord Blanesburgh associated section 96 with sections 99 and 100 as 'the means adopted by the framers of the statute to secure the impartiality and the independence of the provincial judiciary'.

> A few years later, in the decision which capped the development of this doctrine, Lord Atkin found as the constitutional basis for his view that it would be invalid for the province to vest 'the functions of a court' in a provincial administrative board in the combined force of sections 96, 99, and 100, which he designated as the 'three pillars in the temple of justice'."

There are a number of other cases in which the same philosophy is expressed.[127]

The conclusion stated above is also supported by those who suggest that section 96 was not the central provision in the Judicature sections. It may have been included, says Laskin, on the basis of the theory that he who pays the piper should call the tune.[128] Again, it may have been included on the basis of a now defunct theory that the Governor General was the only representative of His Majesty in Canada.[129] In any event, there is nothing to suggest that it is sufficient to satisfy the requirements of section 96 alone.

The only suggestions to the contrary are to be found, first, in the rule that sections 97 and 100 do not apply to federal administrative tribunals or to the Federal Court of Canada and Supreme Court of Canada, and second, in the McKenzie case. As to the first, sections 97 to 100 do not apply for the simple reason that section 96 does not apply.[130] The implication that sections 96 may be segregated from the other Judicature provisions arises from the McKenzie case because there county court judges (to whom section 99 does not apply) were held competent to perform superior court work. The reason, however, was that patents issued to local judges by the Governor General expressly appointed them to that office "during good behaviour".[131]

Provincial and Federal Judges Appointed to a Single Court

In his Opinion for the Institute prepared in 1972, Professor W. R. Lederman expressed the view that a province may "establish a single family

court that includes judges appointed by the Governor General in Council and also judges appointed by the Lieutenant Governor in Council, as long as the functions of the latter judges are confined to those functions which a province may validly confer on provincially appointed judges." I agree with that conclusion. Professor Lederman did say, however, that the single family court "would have to be a court composed of two sections or divisions, for the two different types of judges." My own view is that there would be no constitutional requirement of two sections or divisions. I say that for three reasons.

First, Professor Lederman cites as authority his position the decision of the Supreme Court of Canada in AG for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd.[132], but that case is authority only for the proposition that superior court jurisdiction cannot be assigned to a provincially appointed judicial officer of a section 96 court (the Master). The Court did say that work cannot be "redistributed within the section 96 court itself and new work assigned to a provincially appointed judicial officer"[133], but what made the arrangement unconstitutional was the nature of the work assigned to the provincially appointed officer.

Second, Lederman's caveat is not made necessary by anything that may be inferred from the Boilermakers case[134] or from the judgment of Rand J. in A.E. Dupont v. Inglis.[135] Earlier I concluded from these cases that the Dominion and the province could effect a dual appointment of the same person only if he were appointed federally to one court and provincially to another. There would be no such requirement of appointment to distinct courts or to distinct divisions of one court where different individuals are appointed by the Dominion and the province respectively. The Privy Council and Justice Rand objected to the union of different kinds of powers in the same body, that is to say, in each member of a single group of judges.

Third, the decision of the Supreme Court of Canada in AG for British Columbia v. McKenzie[136] establishes that an adjudicator need not be appointed to a section 96 court in order to exercise section 96 functions; he need only be federally appointed. If the adjudicator need not sit on a section 96 court as such, there can be no objection to his sitting as a member of a court that includes judges appointed by the province. The McKenzie case indicates that section 96 is not designed to maintain the integrity of particular courts but only to require federal appointment of individuals exercising particular kinds of power.

Once it is determined in reliance on the McKenzie case that appointment by the Governor General is sufficient to satisfy section 96, there can be no objection to the federal appointees sitting as members of a court which also includes judges appointed by the province. This is clear from the accepted validity of arrangements by which provincial magistrates exercise section 96 powers conferred under the Criminal Code. If a single judge can exercise section 96 powers along with the powers of an inferior tribunal, then it follows a fortiori that such powers may be exercised respectively by different members of the same court without the necessity of their sitting in distinct divisions. Of course, it can be said that the magistrate acts as a separate section 101 court in exercising powers given by Parliament. But there is really nothing in this to distinguish it from federal and provincial appointees sitting on the same court. In the first place, the magistrate's capacity as a separate court is purely notional, there being no designation as such, and, in any event, the notion of a separate court is necessary only to avoid the Boilermakers rule which applies to a mixture of functions in one person and which is not apparently the basis for Professor Lederman's opinion.

5. Amendment of the Judicature Provisions of the B.N.A. Act

The question remains whether Parliament may amend the Judicature provisions of the British North America Act in order to allow for the organization of a unified family court along more straightforward lines and without the requirements of federal appointment, tenure and federal salary. Parliament may amend the Constitution under section 91 (1), "except as regards . . . rights or privileges . . . granted or secured to the Legislature or the Government of a province." What opinion has been expressed on the question is negative. In his case book, Laskin poses the question as moot,[137] but earlier on in the context of discussing limitations upon total legislative power he refers to "the protected tenure of judges under section 99."[138] Professor Lederman says it is "very doubtful" if the power under section 91 (1) reaches sections 96 to 101 of the B.N.A. Act,[139] and Gerin-Lajoie states that these provisions should be considered unalterable.[140]

It may be asked, what right or privilege of the government of a province is involved in the Judicature provisions. Surely rights or privileges are involved in security of tenure and salary, and it is at least arguable that there is involved in the appointing power of the Governor General the right of certain courts to exclusive adjudicative powers.[141] But this does not advance the position unless the superior, district, and county courts are to be considered part of "the government" of the province. There is ample authority for the proposition that "government" includes the entire apparatus of the state, being the legislative, executive and judicial branches.[142] In Valin v. Langlois[143], for example, Justice Fournier said:

> "One of the essential elements of the British Consitution, as of every regular government, is the creation of a judicial power, such power and the legislative and executive powers forming the three indispensable elements of every government."

Here, however, the reference is to "the Legislature or the Government," so that the judiciary must be included, if at all, by some understanding of "government" which does not include the legislative branch. It is not unreasonable to suggest that where legislature and government appear together, the latter includes all institutions for the execution of laws. The opinion has been expressed that there are only two functions to be performed in a legal system: making laws and applying them. On this view, the judicial tribunal or court merely offers one system or method of applying laws.[144] Laws are made by the legislature and executed by agencies of the government including the courts. There is another way of arriving at essentially the same conclusion. On almost any understanding of the term, "government" clearly includes the executive power, which in Canada is vested in the Queen,[145] and it is a fundamental proposition that the institutions described in section 96 are the Queen's courts: "The courts are, in fine, the tribunals of Her Majesty, charged with the execution of all the laws to which she has given her sanction in virtue of the new Constitution."[146] I do not think that the "government of a province" can be restricted to the Lieutenant Governor as Her Majesty's representative. If this restricted meaning were intended, specific reference would have been made to the Lieutenant Governor, as in section 92 (1). Finally, the context in which they appear suggests that the words "the government" should not be restricted to the legal entity which is capable of entering into agreements and holding property.

In any event, both Lederman and Gerin-Lajoie suggest that the "rights or privileges" secured by the Judicature provisions belong to the legislature or to the provinces as bodies politic, and not distinctly to the courts. Thus, in Lederman's view, the legislature is entitled to expect under sections 96 to 100 that when superior courts are constituted under

section 92 (14), there will be federal appointees to head those courts who would be superior court judges on the English Model.[147] Gerin-Lajoie makes a similar point with specific reference to sections 97 and 98, which give to the provinces as bodies politic the right to have their laws interpreted by persons sufficiently familiar with their legal systems.[148]

If there is a sound basis on which to rest a federal power of amendment in this regard, I think it lies in the circumstance that any proposed amendment would enhance rather than detract from provincial rights and privileges. It is a point well taken that the language of section 91 (1) does not exclude the provisions of the Constitution setting down rights or privileges, but only the rights or privileges themselves.[149] If section 96 were amended to provide in certain cases for appointment by the Lieutenant Governor, and section 99 to provide for tenure at the disposal of the provinces, and section 100 to authorize (but not require) payment of salaries by the provinces, the rights or privileges would certainly be altered and the superior and district courts, as individual institutions, might suffer, but the net effect would be to enhance the rights of the province as a body politic. This would not be a literal reading of section 91 (1), however.[150] The decision in the Nova Scotia Inter-delegation[151] case denies the power of Parliament to add to the legislative power of the provinces by delegating portions of its authority, but it is true that the impact of section 91 (1) was not considered in the judgment. Nothing is gained by the circumstance that the amendments would have to be framed in enabling terms so that any act done contrary to the present language of the Judicature provisions would be as a result of provincial initiative, for it is a basic proposition that jurisdiction cannot be conferred by consent.[152]

My opinion is that there is sufficient doubt of the power of Parliament to amend sections 96 to 100 to make it inadvisable to rely on amendment as a device for effecting a plan for a unified family court.

CONCLUSIONS

1. Notwithstanding the provisions of section 96, the federal Parliament may assign jurisdiction over divorce, judicial separation and nullity (except annulment for ceremonial failure) to provincially appointed judges, and sections 97 to 100 would not apply.

2. The judges receiving jurisdiction from Parliament would be competent to grant relief ancillary to the matrimonial causes, including injunctions to prevent pressure or intimidation.

3. For those matrimonial matters within provincial legislative jurisdiction, including nullity for ceremonial failure, matrimonial support, division of property, and injunctions for the protection of persons and property, regard must be had for the restrictions of section 96.

4. It is possible that jurisdiction to grant a decree of nullity based on conditions of solemnization and to make support awards as an independent remedy may be placed in the hands of a provincial appointee. It is very doubtful that a magistrate would be competent to deal with division of property (whether under the existing law of matrimonial property or under the proposed deferred sharing scheme) or to grant injunctions.

5. Accordingly, federal appointment is required for the performance of at least some of the duties contemplated for the unified family court.

6. Individual judges may be appointed federally for the performance of section 96 tasks and provincially for the performance of others. However, it may be necessary to constitute two distinct courts, and nothing on the face

of the legislation should restrict the freedom of choice of the Governor General in making appointments. The following arrangement is proper:

(a) Provincial legislation provides for "Family Judges of the Supreme Court" to handle division of property, and restraining orders for the protection of persons and property.

(b) Provincial legislation provides for a "Provincial Family Court" and assigns to it annulment for ceremonial failure and other non-section 96 matters such as maintenance of wives and children.

(c) Federal legislation assigns to either the Provincial Family Court or Family Judges of the Supreme Court, jurisdiction in divorce, judicial separation and nullity.

(d) The Governor General appoints the Family Judges of the Supreme Court, who are the same persons appointed by the Lieutenant Governor to the Provincial Family Court.

7. A single family court might be established by the Province to include some judges appointed provincially and other judges appointed federally, with the latter having exclusive jurisdiction to handle division of property and restraining orders (other than orders to secure the integrity of proceedings). It would not be necessary to divide the court into two separate sections or divisions.

8. Sections 97 (selection from the Bar), 99 (tenure) and 100 (federal salary) would apply to the Family Judges of the Supreme Court (#6) and to the federally appointed judges (#7).

9. Sections 96 to 100 are not subject to amendment by the federal Parliament under section 101, but only by the Parliament of the United Kingdom (requiring the concurrence of all the Provinces).

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FOOTNOTES

1 (1964), 44 D.L.R. (2d) 440.

2 (1975), 52 D.L.R. (3d) 548.

3 Ibid., 572.

4 The Independence of the Judiciary (1956), 34 Canadian Bar Rev. 769, 1139, at 1176 ff.

5 See In re Vancini (1904), 34 S.C.R. 621; Jordan, The Federal Divorce Act (1968) and the Constitution (1968), 14 McGill L.J. 209, at 231 n.

6 Canadian Constitutional Law (4th ed.), 762.

7 Supra n. 2 at 551.

8 Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case (1955), 33 Can. Bar Rev. 993, at 995.

9 (1970), 8 D.L.R. (3d) 389, at 397.

10 Canada's Federal System, 543.

11 Supra n. 5, at 229, 231, 234.

12 The Separation of Powers in New Dress (1966-67), 12 McGill, L.J. 491.

13 See Russell, Constitutional Reform of the Canadian Judiciary (1968-69), 7 Alta. L. Rev. 103, at 105, 106.

14 (1880), 3 S.C.R. 1. The legislation in this case involved a conferral of jurisdiction on provincial superior courts, and Chief Justice Ritchie noted pointedly that the judges were appointed, paid and subject to removal federally (at 21 and 35). Justice Taschereau, however, asked rhetorically whether Parliament might not enact that certain criminal offences be tried under magistrates' summary jurisdiction (at 75).

15 Supra n. 5. Here the Supreme Court upheld the power of magistrates under the Criminal Code on the basis that the Dominion Parliament can in matters within its sphere, impose duties upon any subjects of the Dominion, but without any express consideration of section 96.

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16 It should be noted that it is only by federal legislative action that the implications of section 96 are avoided. Though it is the case that in the absence of overriding federal legislation the provincial legislature may allocate jurisdiction in respect of federal matters, it does not follow that the provincial legislature, even on the Laskin view, may assign section 96 functions to provincial appointees. See Re Divorce Act, [1952] 2 D.L.R. 513; Katz, Constitutional Problems of a Unified Family Court System (1974), 6 Man. L.J. 211; Laskin, supra n. 8, at 995; Jordan, supra n. 5, at 234.

17 Zacks v. Zacks, [1973] S.C.R. 891; Jackson v. Jackson, [1973] S.C.R. 205.

18 Holmes v. Holmes, [1923] 1 D.L.R. 294.

19 O'Leary v. O'Leary, [1923] 1 W.W.R. 581.

20 Tarn v. Tarn, [1942] 3 W. W. R. 419.

21 Weber v. Weber (1974), 12 R.F.L. 105; Salloum v. Salloum, [1976] 5 W.W.R. 603.

22 Power on Divorce (2nd ed.) 223; Jordan, supra n. 5, at 262-266.

23 Harvey, C.J. in Lee v.Lee, [1920] 3 W.W.R. 530, at 534 (Alta. C.A.).

24 Salloum v. Salloum, supra n. 21. I should note that judicial separation has been held to be a matrimonial cause other than divorce for the purposes of section 26 (2) of the Divorce Act. Hurson v. Hurson (1970), 72 W.W.R. 318 (B.C.S.C.); Pettigrew v. Pettigrew (1972), 27 D.L.R. (3d) 500 (Man. Q.B.). These decisions do tend to contradict the view that judicial separation is included within the meaning of the word "Divorce" in section 91 (26). In the Hurson case, the Court relied partly on the decision in Holmes v. Holmes, [1923] 1 W.W.R. 86 (Sask. C.A.), to the effect that section 91 (26) does not include judicial separation. To that extent, however, Hurson is inconsistent with the more recent decision in Salloum v. Salloum, supra. In the Pettigrew case, Matas J. relied on Hurson v. Hurson. There is, of course, another basis altogether for the conclusion that judicial separation is a matrimonial cuase other than divorce within the meaning of section 26 (2): the Divorce Act deals with divorce a vinculo matrimonii and not divorce a mensa et thoro.

25 Re Schepull and Bekeschus and the Provincial Secretary [1954] 2 D.L.K. 5 (Ont. H. Ct.)

26 Re C. v. C. (1975), 17 R.F.L. 96 (B.C.S.Ct.); Hill v. Hill, [1976] 4 W.W.R. 210 (Man.Q.B.); Burton v. Burton [1945] 3 W.W.R. 765 (Alta. C.A.).

27 Keineker v. Guay, [1976] 4 W.W.R. 213 (B.S.C.Ct.); Mason v. Mason (1974), 15 R.F.L. 127 (B.C.S.Ct.).

28 Re Marriage Legislation in Canada, [1912], A.C. 880; Kerr v. Kerr, [1934] S.C.R. 72; A.G. for Alberta and Nielson v. Underwood, [1934] S.C.R. 635; Ross (Macqueen) v. Macqueen, [1948] 1 W.W.R. 258; Hobson v. Gray (1958), 25 W.W.R. 82.

29 Rose v. Rose (1970), 8 D.L.R. (3d) 45; Jackson v. Jackson, [1972] 2 W.W.R. 321; Liptak v. Liptak (1974), 13 R.F.L. 94. To the contrary, however, is the decision of the Manitoba Court of Queen's Bench in Hill v. Hill, [1976] 4 W.W.R. 210. The Manitoba Court cited no authority for its conclusion that the former right under the Matrimonial Causes Act to seek a decree for nullity for non-consummation has been replaced by the right to proceed under section 4(1)(d) of the Divorce Act.

30 Lee v. Lee, [1920] 3 W.W.R. 530 (Alta. C.A.); Laskin, supra n. 6, at 899. Power, supra n. 22, at 260, says, however, that "if the point should come before the highest courts it is obvious that it is one on which there is much scope for argument."

31 The maintenance and custody provisions of the Divorce Act have been sustained as "ancillary" or necessarily incidental" to the power under section 9(26) meaning that provincial laws might cover the same ground in the absence of conflicting federal legislation. See Zacks v. Zacks and Jackson v. Jackson, supra n. 17; Re Ritchie and Ritchie (1969), 3 D.L.R. (3d) 676, at 683; Armich v. Armich, [1971] 1 W.W.R. 207; Weist v. Weist, [1977] 1 B.C.L.R. 343. On the question of conflict, the authorities are clear that a maintenance order under the Divorce Act supersedes any existing order under provincial law and precludes any subsequent proceedings thereunder. Jackson v. Jackson, supra n. 17. Although there are conflicting decisions on the effect of the Divorce Act in the absence of any corollary order for maintenance, I think the better view is that provincial legislation is not affected unless and until an order is made under the Divorce Act. Hughes v. Hughes [1977] 1 W.W.R. 579 (B.C.C.A.). Decisions to the contrary are Richards v. Richards (1972) 26 D.L.R. (3d) 264 (Ont. C.A.) and Goldstein v. Goldstein [1976] 4 W.W.R. 646 (Alta. C.A.).

32 See n. 38 infra and accompanying text.

33 (1896), 26 S.C.R. 397.

34 Hill v. Hill [1929] 2 D.L.R. 41; Royal Bank of Canada v. Diamond [1929] 2 W.W.R. 267 (Man. K.B.).

35 The decision in Royal Bank of Canada v. Diamond, ibid, contains a reference to this statement by the Minister of Justice for Canada:" . . . [T]he power to legislate regarding divorce gives power to bring about a dissolution

of a marriage, but it does not include power to deal with property rights and obligations as between the divorced persons this being a matter of property and civil rights in the province." This was still the view of the federal ministry at the time of enactment of the Divorce Act, 1968. See, Jordan, supra n. 5, at 249, 250. Jordan is of the opinion that the disposition of marital property on dissolution of a marriage can be considered just as essential an incident of divorce as alimony, maintenance and custody. Supra n. 5, at 261. But in Osborne v. Osborne (1974), 14 R.F.L. 61, the Saskatchewan Queen's Bench denied that Parliament would have authority to deal with property on divorce, and said that section 11(1) of the Divorce Act must be interpreted accordingly.

36 The Divorce Act, of course, does not deal with division of property. This is true also, with certain exceptions , of the Divorce and Matrimonial Causes Act, 1857, which contains the substantive law of judicial separation and nullity. The exceptional provisions are sections 5 and 45 which provide for the application of marriage settlements, and for settlement of the wife's property in cases of adultery. In the context of divorce, these provisions are repealed by section 26(2) of the Divorce Act.

37 [1968] S.C.R. 569.

38 It is doubtful that provincial laws which govern, but are not directed to disposition on dissolution could be described as "ancillary" to legislation respecting dissolution. And apart from that, there would have to be some question whether Parliament is outside section 96 in assigning to a court for administration laws of Provincial enactment. Though not directly on point, the reservations of Chief Justice Campbell in Reference re Divorce Jurisdiction, [1952] 2 D.L.R. 513, at 525, are cause for scepticism: "Although unquestionably the Dominion may constitute courts or confer jurisdiction on existing Dominion or provincial courts, for purposes ancillary to Dominion substantive enactments, even if the Dominion thereby trenches upon what would ordinarily be the subject-matter of provincial legislation, I have not been shown any authority for the proposition that the Dominion can [do so] for the enforcement of a statute of colonial origin and merely Province-wide application." There is also the recent decision of the Supreme Court of Canada in Quebec North Shore Paper Co. v. Canadian Pacific Ltd. (1976), 71 D.L.R. (3d) 111, holding that the words "laws of Canada" in section 101 of the BNA Act do not include all laws within the legislative jurisdiction of Parliament but only laws enacted by Parliament or referentially incorporated by Parliament in federal laws. It is concluded later herein that Parliament's freedom from the limitations of section 96 is a consequence of the power enjoyed under section 101. If section 101 does not cover provincial laws unless referentially incorporated, then the section 96 problem is not avoided simply by providing that provincial laws shall be administered in the unified family court.

39 See Hastings v. Hastings (1971), 21 D.L.R. (3d) 244; Robinson v. Robinson, [1963] 3 ALL E.R. 813; Silverstone v. Silverstone [1953] 2 D.L.R. 513; Bromley, Family Law (4th ed.) 127.

40 A.G. for Alberta and Winstanley v. Atlas Lumber Co., [1941] S.C.R. 87 (per Rintret, J.), quoted in Laskin, supra n. 6, at 811.

41 This is Laskin's phrase; supra n. 6 at 793.

42 "Laws of Canada" referred to in section 101 of the BNA Act include federal common law. Quebec North Shore Paper Co. v. Canadian Pacific Ltd., supra n. 38.

43 See Donnelly v. Donnelly (1885), 9 O.R. 673; Shipman v. Shipman, [1924] 2 Ch. 140.

44 See Halsbury, (3rd. ed) 478.

45 See Plowman v. Plowman (1973), 9 R.F.L. 160 (N.S.W.S. Ct.); Silverstone v. Silverstone, supra n. 35; Bromley, supra n. 35, at 388, 389.

46 [1932] 1 D.L.R. 135.

47 Supra, n. 25.

48 Supra, n. 16, at 212 n.

49 Evans, Divorce and the Matrimonial Causes, 82.

50 In particular, Quance v. Ivy and Sons Ltd., [1950] 3 D.L.R. 656; Laskin, supra n. 6, at 785.

51 See Lederman, supra n. 4 at 1171, 1172; Laskin, supra n. 8, at 1010-1016.

52 Supra, n. 28.

53 [1953] 1 D.L.R. 284, rev'd on other grounds [1954] S.C.R. 127.

54 See Mendes Da Costa, Studies in Canadian Family Law, 687.

55 Reference Re Adoption Act, [1938] 3 D.L.R. 497.

56 Johnson v. Johnson, [1948] 3 D.L.R. 590; Howard v. Howard, [1957] 22 W.W.R. 619; Re Zwicker (1958), 40 M.P.R. 331.

57 Wark v. Wark, [1957] O.W.N. 609; Vatai v. Vatai (1963), 43 W.W.R. 212.

58 To introduce reciprocity may be to make a virtue of necessity in view of the recent decision of a California Court that unconstitutional sex discrimination is involved in an obligation of support imposed on fathers alone. Cotton v. San Diego, 59 Cal. App. (3d) 601 (1976).

59 (1932), 46 B.C.R. 375.

60 Canada Tungsten Mining Corporation Limited v. Reid, [1974] 1 W.W.R. 120 (N.W.T.S.C.); Re Telegram Publishing Co. v. Zwelling (1974), 1 O.R. (2d) 592.

61 [1938] 2 D.L.R. 70.

62 Power notes the suggestion in a Saskatchewan case, Holmes v. Holmes, [1923] 1 W.W.R. 86, that the idea of a separate and independent proceeding for alimony is not altogether foreign to English law. Power on Divorce (2nd ed.) 261. At best, this was an equitable jurisdiction, unknown at common law and not provided for in the Act of 1857 or its supplemental Act.

63 Kowanko v. Tremblay [1920] 2 W.W.R. 787 (Man. C.A.); A.-G. Quebec v. Slanec, [1933] 2 D.L.R. 289 (Que. K.B., Appeal Side).

64 In Tremblay v. Quebec Labour Relations Board (1967), 64 D.L.R. (2d) 484, the Supreme Court of Canada upheld the power of the Board to order dissolution of trade unions that were employer dominated notwithstanding the historical power of the Quebec Supreme Court to order dissolution of corporations on grounds of usurpation of corporate rights, or fraud and mistake in obtaining Letters Patent. The Appeal side of the Quebec Court of Queen's Bench, (1966) 55 D.L.R. (2d) 632, had given as its principle reason for upupholding the legislation the circumstances that the power involved discretion rather than application of predetermined rules. The Supreme Court also relied on the discretionary nature of the power. See also Hamilton v. Firestone Tire & Rubber Co. Ltd. [1954] O.R. 493.

65 Toronto v. York Township, [1937] 1 D.L.R. 175, at 192; Willis, Section 96 of the British North America Act (1940) 18 Can. Bar Rev. 517, at 543-544.

66 A.E. Dupont v. Inglis [1958] S.C.R. 535.

67 Heller v. Registrar, Vancouver Land Registration District, [1963] S.C.R. 229; C. Huebert Ltd. v. Sharman [1950] 1 W.W.R. 682; A.-G. for Ontario

and Display Service Ltd. v. Victoria Medical Building (1960), 21 D.L.R. (2d) 97 (S.C.C.) Colonial Investment and Loan Co. v. Grady (1915), 24 D.L.R. 176 (Alta. C.A.), Forest Hill v. Metropolitan Toronto [1958] O.R. 254.

68 Dixon v. Dixon, supra n. 59. See also Rousseau v. Rousseau, [1920] 3 W.W.R. 384, at 386-387 (B.C.C.A.)

69 C. Huebert Ltd. v. Sharman, supra n. 67; A-G for Ontario and Display Service Co. Ltd. v. Victoria Medical Building, supra n. 67.

70 Colonial Investment and Loan Co. v. Grady, supra n. 67.

71 Supra n. 67.

72 Ibid, 105.

73 Tomko v. Nova Scotia Labour Relations Board, (1977) 69 D.L.R. (3d) 250.

74 Enforcement through a Superior Court was a noted feature of the legislation upheld in Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. [1949] A.C. 134 and in the Tomko case, ibid. The fact that its decisions were to be made rules of court in order to take full effect was a consideration leading to the conclusion in the Slanec case, supra n. 63, that the Workmen's Compensation Board was not a section 96 court.

75 This seems to follow a fortiori from Re Ritchie and Ritchie (1969), 3 D.L.R. (3d) 676 (B.C. Fam Ct.) upholding the power of a family court judge to enforce maintenance orders made by the Supreme Court in divorce actions, on the basis that enforcement is to be put in a different category from the making of an order.

76 See, for example, An Act to regulate proceedings before Justices of the Peace in Civil Suits, S.N.B. 1834, c. 45 s. 63.

77 (1877), 17 N.B.R. 324.

78 Supra n. 75, at 680-681.

79 Heller v. Registrar, Vancouver Land Registration District, supra n. 67.

80 C. Huebert Ltd. v. Sharman, supra n. 67; A.G. for Ontario and Display Service Co. Ltd. v. Victoria Medical Building, supra n. 67.

81 Colonial Investment and Loan Co. v. Grady, supra n. 67.

82 Forest Hill v. Metropolitan Toronto, supra n. 67.

83 Supra n. 53.

84 See Dixon v. Dixon, supra n. 59, upholding this power in the hands of a magistrate against an alleged violation of section 96.

85 See in particular Reference Re Adoption Act, supra n. 55; Re Telegram Publishing Co. v. Zwelling (1974), 1 O.R. (2d) 592.

86 Dixon v. Dixon, supra n. 59; Re Adoption Act, ibid.

87 See Armstrong v. Armstrong [1939] 2 W.W.R. 177 (Sask. D. Ct.); See also Laskin, supra n. 6, at 784.

88 [1932] A.C. 113.

89 See Waterman v. Waterman (1960), 32 W.W.R. 650, at 653 (B.C. County Court).

90 [1937] 1 D.L.R. 548.

91 Supra n. 85.

92 Supra n. 89.

93 [1971] 1 W.W.R. 207.

94 (1976), 7 N.R. 317.

95 The dissenting judgment contains a reference to a statement by Justice Fauteux in Reference re the Magistrate's Court of Quebec [1965] S.C.R. 772, at 781, that it is ultra vires to confer upon a magistrate the power to grant an injunction.

96 (1977), 26 R.F.L. 105.

97 (1853), 22 L.J.M.C. 67.

98 [1954] 3 D.L.R. 417.

99 Supra n. 2, at 71.

100 Ibid, 72.

101 Supra n. 73.

102 In Re Jost and Manitoba Hydro (1976), 65 D.L.R. (3d) 495, the Manitoba Court of Appeal held that declaratory judgments are solely within the jurisdiction of Superior Courts.

103 In at least two cases, a section 96 characterization was avoided by the finding that a remedy granted historically by the Superior Courts was granted upon different grounds by the lower tribunal whose jurisdiction is challenged. Tomko v. Nova Scotia Labour Relations Board, supra; Tremblay v. Quebec Labour Relations Board, supra n. 64.

104 Departures from the purities of the adversarial system have been contributing factors in a number of section 96 cases: Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., supra; Kowanko v. Tremblay, [1920] 2 W.W.R. 787 (Man. C.A.), Brooks v. Pavlick, [1964] S.C.R. 108, A.E. Dupont v. Inglis [1958] S.C.R. 535 (absence of a lis inter partes); John East Iron Works, supra (a perceived need for experienced judgment); Tomko v. N.S. Labour Relations Board, supra (inquisitorial powers).

105 The only power of magistrates in matrimonial proceedings prior to Confederation was their power under section 21 of the Divorce and Matrimonial Causes Act to make an order protecting from any claims of the husband the earnings and property of a deserted wife. See Dixon v. Dixon, supra n. 59 In Reference Re Adoption Act, supra n. 55, Canada Tungsten v. Reid [1974] 1 W.W.R. 133, and Re Telegram Publishing Co. v. Zwelling (1974), 1 O.R. (2d) 592, it was the extensive involvement of magistrates before Confederation in the general area of the challenged jurisdiction that was instrumental in avoiding a section 96 characterization.

106 Supra n. 101 at 258.

107 Ibid, 257.

108 Cheffins, The Constitutional Process in Canada, 89.

109 See in particular Kazakewich v. Kazakewich [1937] 1 D.L.R. 548, at 570 (per McGillivray, J.A., Alta. C.A.)

110 Supra, n. 14.

111 Ibid, 34.

112 Supra n. 10, 543 n. See also the reference by Willis, Section 96 of the British North America Act (1940), 18 Can. Bar Rev. 517, at 521, to the "fundamental proposition that to increase the powers of a magistrate is to 'appoint' him with respect to those functions . . ." There is one problem with this theory. The provincial legislature may confer jurisdiction upon provincial superior courts in respect of section 96 matters without it being suggested that it thereby effects an appointment contrary to section 96. A.G. for British Columbia v. McKenzie, [1965] S.C.R. 490. I think the answer is simply this: appointment is not necessarily involved in conferral of jurisdiction. In Valin v. Langlois the Supreme Court held that Parliament could provide for superior court adjudication upon controverted elections either by constituting the superior court as a special court or by conferring special jurisdiction on the existing superior court. To the same effect is P.E.I. Potato Marketing Board v. Willis, [1952] 2 S.C.R. 392, particularly per Rand,J.

113 Laskin, supra n. 6, at 762. With the exception, of course, of the Superior, District and County Courts themselves.

114 In order to escape the conclusion that Parliament may not diminish the jurisdiction of the ordinary provincial courts, some writers have suggested that the word "additional" means "in addition to the general Court of Appeal" referred to in the earlier part of the section. Clement's Canadian Constitution (3rd ed.) 535-537; Gibson, Comment (1976), 54 Can. Bar Rev. 372 at 376. I doubt very much that that conclusion follows from interpreting the word to mean "in addition to the ordinary provincial courts", as it has been interpreted by Idlington, J., in Re References, 43 S.C.R. at 569.

115 As pointed out in Re Vancini, the majority of the Court in Valin v. Langlois held that the Dominion Controverted Elections Act (1874) established (though not in so many words) a Dominion Court as authorized by section 101. See also Jordan, supra n. 5, at 231 n. In Canard v. A.-G. Canada (1972), 30 D.L.R. (3d) 9, at 17 and 18, Dickson J.A. of the Manitoba Court of Appeal recognized that Parliament is acting under section 101 in establishing such tribunals as the Income Tax Appeal Board, Admiralty Court, Bankruptcy Courts, Labour Board, and Immigration Appeal Board.

116 See, for example, McLean Gold Mines Ltd., v. A.G. [1924] 1 S.L.R. 10, at 12, per Hodgins, J.A.: "For what else is [a Mining Commissioner] notwithstanding his designation, if in effect he exercises the jurisdiction, powers and functions of a Superior Court Judge?" Quoted in Willis, supra n. 112, at 527.

117 Supra n. 112. Followed and applied in Re Section 11 of the Judicature Amendment Act (1971), 11 D.L.R. (3d) 385 (Ont. C.A.)

118 Appointment by "statutory commission" is the notion developed in Valin v. Langlois, as to which see text accompanying n. 111, supra. See also (1883) 3 C.L.R. 20, 145-147; R. v. Carlisle (1903) 6 O.L.R. 718.

119 The validity of which is apparent from Ex parte Kleinys (1965), 49 D.L.R. (2d) 225 (B.C.S.Ct.).

120 [1957] C.A. 288.

121 A.E. Dupont v. Inglis [1958] S.C.R. 535, at 542.

122 Australian Federalism in the Courts, 165.

123 (1883) 2 O.R. 118.

124 (1883) 3 C.L.T. 145. To the same effect is R. v. Carlisle, supra n. 118.

125 Supra n. 116.

126 Constitutional Reform of the Canadian Judiciary (1968-69), 7 Alta. L. Rev. 103, at 107.

127 Kazakewich v. Kazakewich, supra n. 109, at 570 to 573; A.E. Dupont v. Inglis supra n. 121; Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. [1948] 4 S.L.R. 673, at 682; Re Schepull and Bekeschus and the Provincial Secretary, supra n. 25, at 10.

128 Supra n. 8.

129 See Russell, supra n. 126 at 119.

130 Supra.

131 Supra n. 112, at 498, 499.

132 Supra n. 67.

133 Ibid, 104.

134 Supra n. 120.

135 Supra n. 121.

136 Supra n. 112.

137 Supra n. 6, at 766.

138 Canadian Constitutional Law (3rd ed.), 74.

139 Supra n. 4, at 1165.

140 Constitutional Amendments in Canada, 161, 173.

141 Gerin-Lajoie describes the exclusiveness of the legislative power of the provinces under section 92 as a "right or privilege" enjoyed by the provinces.

142 A list of constitutional and political science texts in which the word is so defined is contained in the Factum of the Ontario Public Service Employees Union et al. prepared for the Anti-Inflation Act Reference, 50.

143 Supra n. 14, at 50, 51. See to the same effect Slanec v. Grimstead [1932] 3 D.L.R. 81, at 86.

144 Lederman, supra, n. 4, at 1167.

145 B.N.A. Act, s. 9.

146 Valin v. Langlois, supra n. 14, at 59 (per Fournier, J.), also at 20 (per Ritchie, C.J.)

147 Supra n. 4, at 1165.

148 Supra n. 140, at 173.

149 Ibid, XXIX

150 Referring to the exception in favour of the use of the English or the French language, de Mestral and Fraiberg point out that "from a literal reading of sec. 91(1), it does not appear that Parliament can add to these rights." Language Guarantees and the Power to Amend the Canadian Constitution (1966-67), 12 McGill, L.J. 502, at 509.

151 A.G. for Nova Scotia v. A.G. for Canada, [1951] S.C.R. 31.

152 Beauharnois Light, Heat and Power Co. Ltd. v. Hydro Electric Power Commission of Ontario [1937] O.R. 796 (C.A.); Toronto v. Bell Telephone Co. [1905] A.C. 52.