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.
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> 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.