The Chilling Effect of Section 96 on Dispute Resolution

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It is perhaps inevitable that lawyers should regard courts as the principal forum of dispute resolution. Confidence in the superiority of judicial techniques of dispute settlement is a dominant theme of Anglo-Canadian legal ideology.[1] Indeed, so persuasive is the influence of the adversarial model, characterized by the application of principle to conflicting rights in accordance with established jurisdictional and evidentiary rules, that mechanisms such as conciliation and arbitration are often analyzed not as genuine alternatives to judicial decision-making but rather as secondary, specialized solutions to problems arising in particularized legal relationships.[2]

It is evident from a brief examination of the *Constitution Act, 1867*[3] that its framers participated in this sanguine vision. In contrast to the rather elliptical description of other major governmental institutions, the judiciary figures explicitly in eight distinct sections and implicitly in another. Two of these provisions concern the distribution of legislative authority between the federal and provincial governments. Section 92(14) assigns to the provinces jurisdiction over:

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[1]See for example P.C. Weiler, "Judges and Administrators: An Issue in Constitutional Policy" in P. Gall, ed., *Proceedings of the Administrative Law Conference*, U.B.C. (Vancouver: U.B.C. L. Rev., 1981) at 379.

[2]Such sentiments have attracted considerable support in Canadian legal commentary. Emmett Hall writes:

> The courts of law occupy the pivotal point in the scales of justice. They apply the concept of the "rule of law" rather than the "rule of men" to the controversies which men and women cannot otherwise settle peacefully. They represent the substitution of the authoritative power of reason, knowledge, wisdom and experience to the settlement of conflicts between citizens and between the state and its citizens.

In *Report of the Survey of the Court Structure in Saskatchewan and its Utilization Done Pursuant to Order in Council 474-73*, 1974 at 4.

[3](U.K.) 30 & 31 Vict., c. 3 [hereafter *Constitution Act, 1867*].

> The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts both of civil criminal jurisdiction including in Procedures, Civil matters in those Courts.

This grant of authority in favour of the provincial legislatures is qualified by an analogous (although not precisely coincident) power in section 101 which enables the federal Parliament to:

> 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.

Substantive jurisdiction over the establishment and constitution of the judiciary is not unfettered. Certain limitations are prescribed by sections 96-100, which govern the appointment, payment and tenure of superior court judges. Since these judicature provisions have exerted a profound impact on the development of alternative adjudicative agencies, it is worthwhile to reproduce them in their entirety:

> 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.
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> 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.
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> 98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.
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> 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.
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> 99(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office on attaining the age of seventy-five years, or on the coming into force of this section if at that time he has already attained that age.
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> 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.

Interpretation of these provisions stipulating the jurisdictional and institutional aspects of the post-Confederation judiciary is informed by an ideological perspective implicit in the preamble to the *British North America Act, 1867*, according to which the constituent colonies were to be:

> federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom.

However, while trust in the primacy of the judiciary is a pervasive value espoused by Canadian legal analysis, it is not one which commands unanimous assent. Complaints about the quality of judicial decision-making and the particular institutional characteristics of courts enjoy a history equal in longevity to the judiciary itself. As Roscoe Pound observed in 1906:

> Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor, and the king exhorts that the peace be kept better than has been want, and that "men of every order readily submit...each to the law which is appropriate to him.[4]

While criticisms of judicially devised dispute resolution techniques are various and diverse, a number of common themes emerge. Chronic dissatisfaction can be detected concerning the prohibitive cost of litigation, delay, inefficiency, inadequate funding and what has been described as intellectual, geographic and economic inaccessibility.[5]

As an alternative to a regime of judicial administration, a dispute resolution role has gradually been assumed by non-curial bodies such as boards and tribunals, which are generally conceded to possess certain advantages in relation to speed, procedural informality, expertise, flexibility in approach, a superior range of remedial and enforcement powers and the capacity to implement policy. Such factors underlay arguments favouring expansion of the jurisdiction of non-judicial bodies. Endorsement of the conferral of such authority on other than traditional dispute resolution forums should not, however, be perceived as symptomatic of a generalized aversion to judicial decision-making but rather as the perhaps inevitable acknowledgement that the characteristic institutional features of the court system, while conducive to the discharge of certain tasks, may be insensitive to the mediation of increasingly complex social problems. The judicial structure is not obsolete. On the contrary,the courts perform an indispensable service, one which is enhanced by recent developments such as the enactment of the *Canadian Charter of Rights and Freedoms*.[6] The continued

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[4]"The Causes of Popular Dissatisfaction with the Administration of Justice" [address delivered at the annual convention of the American Bar Association, 1906] quoted in *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987) (Chair: T.G. Zuber) at 51.

[5]For a full discussion of these matters, see the recent *Report of the Ontario Courts Inquiry, ibid.*

[6]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereafter *Charter*].

existence of the judiciary is mandated by ideological adherence to the principle of the rule of law. At the same time, it would be foolhardy to deny that the administration of justice is a task which cannot be undertaken wholly by courts. In this sense, a comparison of curial and non-curial decision-makers involves not a juxtaposition of mutually exclusive and antagonistic agencies but rather a congruence of distinctive but complementary entities.

Constitutional Framework

If one agrees that there is a worthwhile function to be performed by non-curial bodies in dispute resolution, the impact of the constitutional framework on the assignment of adjudicative responsibilities must be considered. In Canada the exercise of executive and legislative powers is contingent on the terms of a written constitution which impose jurisdictional constraints on both levels of government. As a result, the question "ought we to confide dispute resolution authority to bodies other than the court system traditionally conceived?" must be prefaced by an anterior inquiry: "Can we constitutionally allocate such duties to non-curial bodies?" In a federal regime the political significance attached to social objectives and collective aims is, in this sense, subordinate to the dictates of the legal framework. Thus, for example, the extent to which either the federal or provincial governments can achieve social welfare goals is dictated by the distribution of legislative and executive authority effected by sections 91 and 92. As the Supreme Court has itself acknowledged:

> however worthy the policy objectives, it must be recognized that we, as a Court, are not given the freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it.[7]

In view of the textual language governing the division of legislative powers in the constitution, this position is unassailable. The desire to implement social policy cannot function as a justification for *pro tanto* amendment of the constitutional instrument. However, is this consideration germane to the issue of governmental capacity to designate and invest non-curial bodies with adjudicative responsibilities?

If one could bring to constitutional analysis a mind unfettered by any knowledge of precedent, one might legitimately conclude that not only does the original confederating pact not prohibit experimentation and innovation in the establishment of dispute resolution mechanisms, it actively encourages it.[8] The concept of "separation of powers" according to which a clear and inviolable line demarcates the executive, judicial and legislative spheres is alien to Canadian constitutional ideology premised,

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[7] *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 750, Dickson J.

[8] See generally J. Willis, "Administrative Law in Canada" (1939) 53 Harv. L. Rev. 251; B. Laskin, "Municipal Tax Assessment and Section 96 of the *British North America Act*: The Olympia Bowling Alleys Case" (1955) 33 *Can. Bar Rev.* 993; B. Laskin, "Provincial Administrative Tribunals and Judicial Power — The Exaggeration of Section 96 of the *British North America Act*" (1963) *41 Can. Bar Rev.* 446; H. Brun & D. Lemieux, "Politisation du pouvoir judiciaire et judiciarisation du pouvoir politique: la séparation traditionnelle des pouvoirs a-t-elle vécu?" (1977) 18 *C. de D.* 265.

as it is, on the theory of responsible government.[9] The absence of any doctrine mandating the exclusivity of legislative, executive and judicial functions ought to mean in principle that the capacity of government to delegate judicial functions to non-curial bodies is unrestricted.[10] Furthermore, the law-making powers of both Parliament and the provincial legislatures are, within the limits imposed by the federal principle and the *Charter*, plenary and ample.[11] Each level of government is acknowledged to possess the capacity to enforce its own laws: in the case of the provinces as a corollary of the legislative power assigned by section 92(14); in that of Parliament, as a necessary, adjunct of the grants of authority conferred by section 91.[12] Together these factors would appear to support the conclusion that in the implementation and administration of validly enacted laws, both federal and provincial legislatures are absolutely free in their choice of adjudicative agency.

This position, however, can be seriously maintained only by the detached observer who regards the absence of express constitutional limitations as dispositive. There are proscriptions on the adoption of public administration devices — boundaries which are not literally apparent in the constitutional text but which have been generated by case law as constitutional imperatives extrapolated from sections 96-100 of the *Constitution Act, 1867*. While these judicature provisions constitute an integrated body of indicia applicable to superior courts,[13] it is section 96 mandating federal executive appointment of superior, district and county courts which has attracted greatest

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[9]See generally P. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell Co. Ltd., 1985) chs 7 & 9; *A.-G. Que.* v. *Slanec and Grimstead*, [1933] 2 D.L.R. 289 (Que. C.A.); *Ottawa Valley Power Co.* v. *A.-G. Ont.*, [1936] 4 D.L.R. 594 (Ont. C.A.).

[10]It has been established since *Hodge* v. *R.* (1883), 9 A.C. 117 (P.C.) that the maxim *delegatus non potest delegare* is inapplicable to the delegation of legislative authority by Parliament or the provincial legislature to a subordinate agency or, by extension, to the executive or the judiciary. The absence in Canada of any constitutional restrictions on delegation based on a constitutional "separation of powers" stands in contrast to the American position. Willis notes, *supra*, note 8 at 262-63:

> In a country where all legislatures are fettered by the doctrine of separation of powers, an administrative tribunal is an obvious legal impossibility....That doctrine which exists either expressly or impliedly in the constitutions of every state, as well as of the United States, holds that an attempt to mingle powers belonging to two or more of the three basic departments in one officer or body is unconstitutional and void.

However, the prohibition on such transfer is only notional:

> It is only the doctrinal port from which the modern law set sail. Faced with the vague doctrinal prohibition against vesting "judicial power" in "non-judicial officers" American courts have been forced by the pressure of felt needs to declare that, while "judicial power" cannot be conferred on non-judicial officer, "administrative" or "quasi-judicial" power can be. The result has been a myriad of cases attempting to frame a test which shall distinguish between these two indistinguishables.

[11]*Hodge* v. *R.*, *supra*, note 10 at 132; see also *Bank of Toronto* v. *Lambe* (1887), 12 A.C. 575; *Union Colliery* v. *Bryden*, [1899] A.C. 580; *Murphy* v. *C.P.R.*, [1958] S.C.R. 626.

[12]See *A.-G. Can.* v. *CN Transportation*, [1983] 2 S.C.R. 206; *R.* v. *Wetmore*, [1983] 2 S.C.R. 284; *Proprietary Articles Trade Association* v. *A.-G. Can.*, [1931] A.C. 310.

[13]See *Dupont* v. *Inglis*, [1958] S.C.R. 535; R. Elliot, "Constitutional Law — Judicature — Is Section 96 Binding on Parliament?" (1982) 16 *U.B.C. L. Rev.* 314; see also R. Elliot, "New Brunswick Unified Criminal Court Reference" (1984) 18 *U.B.C. L. Rev.* 127.

commentary and which has exerted the most significant impact on the development of alternative schemes of dispute resolution.[14]

At first blush, it is difficult to imagine that the constitutional responsibility of the federal executive to appoint judges of superior courts would or should generate controversy. Appointment provisions contained elsewhere in the *Constitution Act, 1867* have tended, in legal terms, to be perceived as relatively innocuous, although politically such provisions may assume critical proportions in defining the appropriate balance of power between federal and provincial authorities.[15] Moreover, the historical record surrounding the inclusion of sections 96-100 in the constitution fails to yield any indication of the significance which would eventually be attributed to them. The predecessor of the current judicature sections is comprised in numbers 31 to 37 of the Quebec Resolutions (1864), number 33 of which stipulates:

> The General Government shall appoint and pay the Judges of the Superior Courts in each Province, and of the County Courts in Upper Canada and Parliament shall fix their salaries.

According to this proposal, federal appointment was a necessary corollary of federal financial participation in the maintenance of the superior court system. Federal appointment could thus be justified as an instance of political compromise:

> It is not an unreasonable reading of the Judicature sections of the *B.N.A. Act* that section 96 was far from being the pivotal provision to which the others were subordinate. Rather it appears that section 96 was a projection of section 100 or, at least to be read in conjunction with it. If the Parliament of Canada was to fix and provide the salaries of provincial judges, it might properly appoint them.[16]

Conceived in this light, it might be argued that the judicature provisions and, in particular, section 96 were to serve no higher purpose than to assign to the central

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[14] Although the constitutional validity of the dispute resolution jurisdiction of non-curial bodies is often referred to as a section 96 problem, it is more properly described as a problem arising from the operation of sections 96-100. As W.R. Lederman has stated in "The Independence of the Judiciary" (1956) 34 *Can. Bar Rev.* 1139 at 1172:

> Surprise is expressed that a mere appointing power can mean so much. I do not think the implied guarantee of jurisdiction rests on so slender a foundation. It arises from the cumulative effect of all the judicature sections....The only peculiar thing that s. 96 does is to provide a single negative test of whether the provincial tribunal whose jurisdiction is being challenged is a superior court.

See also D. Matas, "Validating Administrative Tribunals" (1984) 14 *Man. L.J.* 245.

[15] For example section 24 of the *Constitution Act, 1867* provides:

> The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a Senator.

Additional appointment powers may be discovered in sections 58 and 66 which provide for the appointment of Lieutenant-Governors and Administrators by the Governor General in Council. Litigation in respect of these appointment provisions is uncommon: *Re Legislative Authority of Parliament to Alter or Replace the Senate*, [1980] 1 S.C.R. 54; *Edwards* v. *A.-G. Canada*, [1930] A.C. 124.

[16] B. Laskin, "Municipal Tax Assessment and Section 96 of the *British North America Act*," *supra*, note 8 at 997-98.

government power to select candidates of a particular judicial class and to impose on the federal treasury a major expense associated with the administration of justice.[17] Certainly, the scant evidence which can be gleaned from the confederation debates expresses an attitude favourable to federal appointment for what are essentially political and pragmatic reasons: federal appointment would ensure a better choice of appointees since the candidates would likely be drawn from Parliament; such an appointment power would obviate the impact of local pressure on judicial decision-making; and, finally, federal appointment would relieve the provinces of a significant financial burden.[18]

As thus interpreted, the extent of federal involvement in the selection, remuneration and tenure of superior court judges represents a marked departure from the tenets of classical federalism. Sections 96-100 operate as centralizing influences in a political regime otherwise characterized by division and mutual exclusivity in the assignment and exercise of governmental powers. The non-federative quality of the judicature provisions is not unique; the powers of disallowance[19] and appointment of Lieutenant-Governors[20] vested in federal authorities may be regarded as centrist elements qualifying the distribution of legislative authority. And, it may be asserted with a certain degree of confidence that were one to attribute to the judicature provisions a political purpose beyond the modest goals identified in the preceding paragraph, it would parallel the philosophy colouring centralizing influences in the structure of legislative and executive institutions.[21] That is, it may not be unreasonable to discern in sections 96-100 a desire on the part of the architects of Confederation to avoid the confusions of a dualist, federalist court system by adopting the English model of a unitary judiciary. According to this rationale sections 96-100 are designed to ensure the existence of courts seized with an integrated jurisdiction involving the resolution of disputes generated by both federal and provincial law. This reasoning has received the endorsement of the Supreme Court of Canada:

> Under s. 92(14) of the *B.N.A. Act*, the provincial legislatures have the legislative power in relation to the administration of justice in the province. This is a wide power but subject to subtraction in favour of the federal authority. S. 92(14) and ss. 96-100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the supe-

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[17] See discussion of this point by G. Pépin, "The Problem of Section 96 and the *Constitution Act, 1867*" in C.F. Becton & A.W. MacKay, eds, *The Courts and the Charter* (Toronto: Univ. of Toronto Press, 1986) 223 at 227-28.

[18] Laskin, "Municipal Tax Assessment and Section 96 of the *British North America Act*," *supra*, note 8 at 998.

[19] The *Constitution Act, 1867*, ss 55-57.

[20] The *Constitution Act, 1867*, s. 58.

[21] Examples of centralizing instances of legislative authority may be discovered in section 92(10)(a) of the *Constitution Act, 1867* — the declaratory power, and section 94 which allows the federal Parliament to "make Provision for the Uniformity of all or any of the Law[s] relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick."

> rior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.[22]

Accordingly, the requirement of federal appointment of superior court judges is intimately connected with the imposition of federal adjudicative responsibilities on such bodies. As Fournier J. observed in *Valin* v. *Langlois*, "if the courts were to have been exclusively at the service of local governments then the latter would have been left to choose and remunerate the officers on whom the federal government could impose no duties."[23] This historical analysis of section 96 speaks compellingly as to the anticipated progress of federal/provincial relations in the post-Confederation era and the importance attached to the centrifugal effect of the judicature provisions.[24] It says little, however, about the constitutional status of non-curial agencies in other than an apparently permissive way. If the principal objective of section 96 and related provisions were simply to guarantee the integrity of a two-tiered judicial system and to ensure continuation of superior courts empowered to discharge responsibilities imposed by both federal and provincial legislation, its significance would be exhausted by institutional examination. While section 96 affirmatively demands the federal appointment of superior court judges, it need not necessarily, according to this historical view, preclude the establishment of non-curial decision-makers whose substantive jurisdiction depends on the division of legislative authority in sections 91 and 92. Such a view derives support from section 101 of the *Constitution Act, 1867* which permits Parliament to establish additional courts "for the better administration of the laws of Canada." It might logically be presumed that the explicit federal power to create alternatives to the traditional superior court system, when read in conjunction with the parallel provincial authority contained in section 92(14), could be relied on to support the validity of an administrative system of dispute resolution co-ordinate with the integrated structure envisaged in sections 96-100. Such a theory does not render section 96 nugatory; it does however, limit its circumference to an institutional sphere. As Laskin observed:

> The *B.N.A. Act* did in fact set up a distinction among classes of courts by reason of the terms of section 96...the distinction in the *B.N.A. Act* was one respecting courts in their institutional character, and however difficult it

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[22]Per Dickson J., *Re Residential Tenancies Act*, *supra*, note 7 at 728.

23(1879), 3 S.C.R. 1.

[24]As elaborated by R.A. MacDonald, "The Proposed 96B: An Ill-Conceived Reform Destined to Failure" (1985) 26 *C. de D.* 251 at 263:

> In matters of Judicature, sections 93, 94, 96, & 101 are analogous hegemonic provisions. The former two provisions are today probably spent, but they reflect the centralist preoccupation prevalent at Confederation. Section 96 was meant to minimize provincial (even more than federal) legislative influence on nominations to senior judicial positions and section 101, in combination with the opening provisions of setions 91 and 94, was intended to ensure that Parliament maintained authority over the organization of courts whenever the national interest or the uniformity of judicial interpretation so required.... The proposnents of a legislative union may well have failed to establish a unitary Parliament, but they did achieve a judicial union under the control of the Governor General.... It is surely the case on an ordinary reading of the *Constitution Act, 1867*, that far from an equlaization of powers a preponderance was to be accorded to the federal authority both the distirbution of legislative powers and the establishment of the judiciary.

> given case to distinguish between an inferior and a superior court otherwise than by reference to jurisdiction, the difficulty is far from the same where the distinction to be made is between a court and an administrative agency not organized by the province in the same way as a court. It may, of course, be urged that, to appreciate the difference between administrative agency and court, some criteria of each are necessary. But this much can be said at this time. If there is warrant for construing section 96 in terms of function, surely this cannot be done to the exclusion of advertance to institutional form. It is fully consonant with the terms of section 96 that, if the province chooses to establish adjudicating agencies non-curial in form and organization, there is no warrant for striking down their jurisdiction on the ground that they are charged with functions which might have been or which had been discharged by courts.[25]

However, in this instance, the impact of history on judicial interpretation has been negligible. Particularized and temporally-limited concerns associated with section 96 have receded and, rather than implicating non-federalist and institutional values uniquely Canadian in substance, section 96 has come to be regarded as a provision importing far more profound considerations. It is now accepted as a constitutional surrogate of one aspect of the rule of law: the independence of the judiciary. The thesis that federal appointment of members of superior, district and county courts was intended to secure an administration of justice by a body of neutral and impartial decision-makers was first advanced by the Privy Council in 1932:

> It cannot be doubted that the exclusive power of that section conferred on the Governor-General to appoint the judges of the superior, district and county courts in each Province is a cardinal provision of the statute. Supplemented by s. 100, which lays on the Parliament of Canada the duty of fixing and providing the salaries, allowances and pensions of these judges, and also by s. 99 which provides that the judges of the Superior Courts shall hold office during good behaviour, being removable only by the Governor-General on address of the Senate and House of Commons, the section is shown to lie at the root of the means adopted by the framers of the statute to secure the impartiality and the independence of the Provincial Judiciary. A court of construction would accordingly fail in its duty if it were to permit these provisions and the principle therein enshrined to be impinged on in any way by Provincial legislation.[26]

Five years later, sections 96, 99 and 100 were described by the Privy Council as "three principal pillars in the temple of justice and they are not to be undermined."[27]

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[25] B. Laskin, "Municipal Tax Assessment and Section 96 of the *British North America Act*," *supra*, note 8 at 999-1000. An example of the institutional approach is provided by *Labour Relations Board (Sask.)* v. *John East Iron Works Ltd.*, [1949] A.C. 134 (P.C.). See also Willis, *supra*, note 8 at 263-70.

[26] *Martineau & Sons Ltd.* v. *City of Montreal*, [1932] A.C. 113 at 121, Lord Blanesburgh. It should be noted however that the "independence" protected by section 96 and identified by the Privy Council in *Martineau* is far removed from the contemporary understanding. According to Willis, *supra*, note 8 at 267, the Privy Council saw "independence" as a guard against discrimination against an extra-provincial litigant.

[27] *Toronto Corp.* v. *York Corp.*, [1938] A.C. 415 at 426 (P.C.).

These sentiments have not been approved unanimously. In recent years, assimilation of section 96 with the concept of judicial independence has been greeted with some skepticism.[28] However, this view has been reiterated on a sufficient number of occasions to place its authenticity apparently beyond dispute.[29]

The equation of section 96 with judicial independence is not a self-evident proposition. Leaving aside, for the moment, the problematic issue of what is meant by the phrase "judicial independence,"[30] section 96 and the remainder of the judicature provisions entrench only the institutional indicia of superior courts: method of appointment, security of remuneration and tenure, and requirement of legal training. In order to relate these criteria of identification to concepts of judicial independence it is necessary to refer to provisions located elsewhere in the *Constitution Act, 1867*. In evaluating the extent to which the judicature provisions advance the goal of judicial independence, emphasis has been placed on the preamble to the *Constitution Act, 1867* which declares that Canada shall have "a constitution similar in principle to that of the United Kingdom," a phrase has been interpreted as implicitly incorporating the rule of

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[28] See for example the comments of Estey J. in *Re B.C. Family Relations Act*, [1982] 1 S.C.R. 62 at 93-94:

> Behind that simple provision [s. 96] lie many real as well as fanciful theories as to its role and purpose in our Constitution. The generally accepted theory has been that the national appointment of superior, county and district court judges was designed to ensure a quality of independence and impartiality in the courtroom where the more serious claims and issues in the community arise; and an aura of detachment said to be analogous to that of the royal justices on circuit from Westminster is thought to be the aim of the authors of section 96....Duff C.J. reviewed the same argument in the *Adoption Reference*...but evidently did not find it compelling....Whatever its purpose [s. 96] its presence has raised difficulties of application since confederation.

[29] As the Supreme Court of Canada recently observed in *McEvoy* v. *A.-G. N.B. & A.-G. Can.*, [1983] 1 S.C.R. 704 at 720:

> The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act,1867* and cannot have less importance and force in the administration of criminal law than in the case of civil matters.

Association of section 96 with judicial independence is certainly conventional academic wisdom: see Elliott, *supra* at note 13; Lederman, *supra* at note 14. It is assumed in any proposals for reform of section 96: see the proposals of the Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978); those of the federal government, *Provincial Administrative Tribunals and the Constitution* (Supply and Services Canada, 1983); the Canadian Bar Association, *A Response to the Minister of Justice and Attorney General of Canada on the Discussion Paper: The Constitution of Canada, A Suggested Amendment Relating to Provincial Administrative Tribunals* (1984); the Canadian Bar Association Committee Report, *Independence of the Judiciary in Canada* (1985)

[30] As Pépin, *supra*, note 17 at 271, note 40 observes:

> It is often difficult to determine its origin, based on a plurality of foundations that have not the same legal authority (constitution, statute, constitutional convention, tradition, public opinion, etc.)

It is evident that judicial independence may be addressed from at least two perspectives: first, that of the citizen who asserts a right of access to a judiciary which is both independent and impartial. It is this concept of independence which is accorded constitutional status in R. v. *Valente*, [1985] 2 S.C.R. 673 at 685:

> Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. ...[Independence] conotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

Objective guarantees supporting "adjudicative" independence consist in security of tenure and remuneration. Second, there is another aspect of judicial independence, what might be termed "administrative" independence which encompasses control of caseload, court personnel, allocation of courtrooms, assignment of judges and related matters. The extent of judicial freedom from executive .interference in these areas is less clear. See J. Deschnes, *Masters in their Own House: a Study on the Independent Judicial Administration of the Courts* (1981).

law. It is this ideological commitment to the rule of law which has informed judicial construction of sections 96-100, and, as a result, it has been accepted that the judicature provisions represent an effort to reproduce in Canada the English conception of judicial independence modified by the fact of federal political organization.[31] As thus expounded, the assimilation of the judicature provisions to judicial independence of superior courts derives from formal guarantees. "It flows from the belief that executive appointment, selection from the appropriate bar, life-time tenure, and protection of salary and pension entitlements serve to insulate section 96 judges from political pressure."[32] The extent to which such purely institutional guarantees either were intended to or do in fact protect judicial independence may be the subject of disagreement. What is of importance is that it is now apparently unquestionable that sections 96-100 represent the bulwarks of institutional independence, a thesis which, in contrast to earlier arguments related to federalism and the judiciary, has profound implications on the capacity of both legislatures to establish alternative dispute resolution mechanisms.

The Chilling Effect of Section 96

If the objective of section 96 were simply to embody in summary fashion the civil libertarian value of an independent judiciary, its impact on decision-makers other than superior courts would be minimal. It would merely exist as a guarantee of federal appointment in favour of superior court judiciary. However, as elaborated by successive judgments, interpretation of section 96 has not been restricted to its contextual significance,[33] but has also been construed as restricting the capacity of both federal and provincial governments to invest non-curial agencies (including inferior courts) with the jurisdiction and powers analogous to those possessed by superior courts at the date of confederation.[34] Despite some initial tentativeness, it is now clear that sections 96-

[31]This thesis receives fullest exposition by Lederman, *supra* at note 14. It is however obvious that a significant distinction exists between English and Canadian notions of judicial independence. As A.S. De Smith, *Constitutional and Administrative Law*, 1st ed. (London: Longman, 1971) at 365-66 has noted:

> In Britain, the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion.

In contrast, in Canada it is assumed that the independence of the judiciary relies on formal, rather than conventional, constitutional guarantees. See the discussion by E. Colvin, "The Executive and the Independence of the Judiciary" (1987) 51 *Sask. L. Rev.* 229.

[32]MacDonald, *supra*, note 24 at 258.

[33]Literally section 96 simply secures the integrity of a particular method of appointment, payment and tenure of superior court judges from legislative incursions. See for example, *Tomko* v. *Labor Relations Bd. (N.S.) et al.*, [1977] 1 S.C.R. 112; *Jones* v. *Edmonton Catholic School District no. 7 et al.*, [1977] 2 S.C.R. 872; *A.G. Quebec et al.* v. *Farrah*, [1978] 2 S.C.R. 638; *Corp. of the City of Mississauga* v. *Regional Municipality of Peel*, [1979] 2 S.C.R. 244; *Canadian Broadcasting Corp.* v. *Quebec Police Comm.*, [1979] 2 S.C.R. 618; *Re Residential Tenancies Act*, *supra* at note 7; *Crevier* v. *A.G. Quebec*, [1981] 2 S.C.R. 220; *Massey Ferguson Industries Ltd.* v. *Government of Saskatchewan*, [1981] 2 S.C.R. 413; *Re B.C. Family Relations Act*, *supra* at note 28; *Capital Regional District* v. *Concerned Citizens of British Columbia*, [1982] 2 S.C.R. 82; *McEvoy* v. *A.-G. N.B.*, *supra* at note 29; *Re Attorney General of Quebec and Grondin*, [1983] 2 S.C.R. 364.

[34]While it has been clear since its inception that section 96 qualifies provincial legislative authority derived from section 92(14), the extension of section 96 to Parliamentary jurisdiction was not affirmed by the Supreme Court of Canada until 1983 in the decision of *McEvoy* v. *A.-G. N.B.*, *supra* at note 29. The subjection of Parliament to the constraints of section 96 has been the object of severe criticism — see MacDonald, *supra*, note 24 at 261-64. As long as sections 96-100 are viewed as exceptions to the federalist principle, the immunity of Parliament from its requirements is evident. However, with the shift in emphasis and adherence to a view of section 96 as a guarantee of judicial independence, its application to the federal government would appear to be logically demanded: see Elliott, *supra* at note 13.

100 do not simply denote institutional indicia of superior courts. Courts, therefore, when interpreting section 96, have refused to limit its impact only to those judicial bodies specifically enumerated or to agencies which, in light of their responsibilities, could be characterized as institutional equivalents. Instead, a functional significance has been attached to section 96 which now connotes a range of tasks which are intimately and exclusively associated with the historical (pre-confederation) jurisdiction of superior courts and which cannot be transferred to other bodies — whether inferior courts or non-curial agencies such as administrative tribunals — which do not conform to the institutional criteria of superior courts as constitutionally defined. Consequently, a modified "separation of powers" doctrine has developed in favour of superior courts according to which superior courts possess a protected core of jurisdiction comprised of both adjectival and substantive elements. Although the essential elements of superior court jurisdiction have presumably not been exhaustively delineated, four broad areas can be identified: judicial review of constitutional powers;[35] judicial supervision of the exercise of statutory powers;[36] a guaranteed core of criminal jurisdiction;[37] and an entrenched jurisdiction in relation to civil matters.[38]

It might legitimately be asked why apparently institutional concerns have been amalgamated with functional considerations. A partial answer is provided by reference to the powers of English superior courts at common law, which were roughly classifiable into three distinct spheres: a jurisdiction in relation to specified substantive matters; a technical and remedial jurisdiction consisting in, for example, the authority to grant declarations, injunctions and to determine questions of law on appeal; and finally, the power to determine the extent of its own jurisdiction. There is, however, adequate reason to question whether the traditionally understood attributes of a superior court are relevant in Canada. As one commentator has observed, "The constitutional division of powers, the structure of sections 96 and 101, and the principle enshrined in *Valin* v. *Langlois* suggest that the common law theory of a superior court cannot be grafted without nuance on to the meaning of superior court in section 96."[39]

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[35]See for example *British Columbia Power Corp* v. *British Columbia Electric Company* [1962] S.C.R. 642. However, the extent to which section 96 protects an entrenched constitutional review jurisdiction is unclear. For example, while both *Canadian Labor Relations Board* v. *Paul L'Anglais Inc.* [1983] 1 S.C.R. 147 & *Solicitiro General of Canada* v. *Law Society of British Columbia et al.* [1982] 2 S.C.R. 307 indicate that Parliament not preclude provincial superior courts from engaging in review of constitutionality, section 96 was not advanced in support of this proposition.

[36]*Crevier*. v. *A.-G. of Quebec*, *supra* at note 33.

[37]See *McEvoy* v. *A.-G. N.B.*, *supra* at note 29. The ambit of superior-court criminal jurisdiction is extremely problematic. While there is evidence that pre-confederation inferior courts exercised jurisdiction concurrent with superior courts in relation to certain serious offences, the Supreme Court of Canada in *McEvoy* determined, without the benefit of any historical evidence, that:

> There is no doubt that jurisdiction to try indictable offences was part of the superior court's jurisdiction in 1867; none of the parties suggests otherwise. Nor does anyone argue that inferior courts had concurrent jurisdiction to try indictable offences in 1867 (at 717).

Of course, to the degree that the classification of offences as either indictable or summary conviction was not a feature of Canadian criminal law until 1892, this assertion is unimpeachable! However, had the court examined the jurisdiction of pre-confederation courts in relation to felonies, the status of the proposed Unified Criminal Court might well have been different. See M. Hatherly, *A Survey of Pre-Confederation Courts of Criminal Jurisdiction in New Brunswick, Nova Scotia and Ontario* (N.B. Dept. of Justice, 1986) [unpublished]. The result of *McEvoy* is potentially disastrous in terms of the contemporary jurisdiction of provincial courts over a wide range of indictable offences

[38]See for example *Re B.C. Family Relations Act*, *supra* at note 28; *Re Residential Tenancies Act*, *supra* at note 7.

[39]MacDonald, *supra*, note 24 at 276.

However, concentration on function may be justified pragmatically as the logical consequence of the contemporary view of section 96. If section 96 engages values related to judicial independence rather than institutional structure, the line demarcating superior courts from other decision-makers must rely on functional rather than formal criteria. Otherwise, the implicit proscription inherent in section 96 could be easily evaded by a simple transformation of the decision-making context. Function, of course, assumes even greater materiality when the impugned decision-making authority is vested in an inferior court, because of its high degree of structural similarity to superior courts.

How does the functional view of section 96 promote judicial independence? Proponents of the present view of section 96 argue that the judicature provisions of the constitution concede to federal authorities a right of participation in the workings of superior courts which exercise significant responsibilities in relation to the administration of justice, and preclude both levels of government from derogating from this status by infringement on or elimination of entrenched spheres of jurisdiction. This analysis, in turn, guarantees to each citizen that significant legal issues will be adjudicated on by agencies constitutionally immune from political pressure and influence. Judicial interpretation of section 96 thus relies on the validity of three propositions: first, that each individual is entitled to a right of access to an independent curial body in respect of certain matters; second, that only section 96 courts are constitutionally competent to provide this forum; and finally, as a necessary corollary, that the association of superior courts with an independent judiciary exerts a negative impact on both federal and provincial dispute resolution experimentation. The importance of this latter point cannot be underestimated. If section 96 exists merely to qualify the federal principle of division of authority between equal and co-ordinate bodies by granting to the federal government control over the institutional structure of superior courts, then Parliament ought not to be prevented by section 96 from establishing novel tribunals competent to exercise traditional superior court jurisdiction. With, however, emphasis on the correlation between a functional view of section 96 and judicial independence, logic demands that both Parliament and the provincial legislatures respect the entrenched core of superior court jurisdiction.[40]

Attention to functional, rather than formal, indicia requires a determination of which powers may properly be said to be within the exclusive purview of superior courts. Some effort to establish guidelines to govern this inquiry may be discovered in the judgment of the Supreme Court of Canada in *Re Residential Tenancies Act*.[41] According to Dickson J., evaluation of the status of the impugned decision-making body is undertaken by reference to three interdependent matters:

Is the power broadly conformable to the jurisdiction formerly exercised by section 96 courts? If not the law is *intra vires*. If the power is identical or analogous to a power exercised by a section 96 court at confederation, one should proceed to step two. Can the function still be considered a "judicial one" when viewed within the institutional

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[40] See *McEvoy*, *supra* at note 29.

[41] *Supra* at note 7.

setting in which it appears? If not, the law is *intra vires*. If so, one should proceed to the third step. If the power or jurisdiction is exercised in a judicial manner, is that power merely subsidiary or ancillary to the general administrative function of the tribunal or necessarily incidental to the achievement of a broader policy goal of the legislature in which case it will be valid, or is it the sole or central function of the tribunal, in which case it will be held to be invalid?[42]

There can be little doubt that judicial construction of the judicature provisions has had a significant and inhibiting effect on the establishment of alternative dispute resolution mechanisms. It is apparent that judicial interpretation of section 96 is unduly insensitive to the particular merits of public, as opposed to judicial, administration. This proposition should not be understood as reflecting a judicial unreceptivity to experimentation in dispute settlement. Indeed, on more than one occasion, the desirability of summary procedures and specialized expertise have been explicitly acknowledged by the Supreme Court itself. For example, Estey J. observed:

> A permissive view is, of course, more easily adopted when the constitutional scan is directed to an administrative tribunal operating under a statute which outlines the policy of the legislature and which leaves much of the implementation and application of that policy to a board appointed sometimes with a qualifying background related to the regulated field. But it has almost equal importance and value when the programme outlined in the enabling statute lends itself to interpretation and application in the quick and relatively less expensive summary procedures of the so-called inferior tribunals. The rights and duties created by such statutes frequently are of a kind or are directed to a sector of the community so as to be better and more expeditiously realized and interpreted by the less formal and less demanding procedures of the provincial court. It is not to denigrate the role of the superior court or its efficacy in the modern community. It is only to say that the highly refined techniques evolved over profound difficulties arising in the community are unnecessary for the disposition of much of the traffic directed to the magisterial courts by contemporary provincial legislation. That traffic can sometimes bear neither the cost nor the time which sometimes inevitably must be borne or devoted by the parties to causes in the courts of general jurisdiction...and the county courts.[43]

Appreciation of arguments militating in favor of an expanded role for decision-making bodies other than superior courts has not, however, precluded a rigorous application of the *Residential Tenancies* test, denying to the two legislatures what one commentator has termed "flexibility with respect to both the central constitutional functions of superior courts...and the various functions which resided in superior courts in 1867 merely by reasons of the circumstances of the day"[44] and occasioning the

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[42]MacDonald, *supra*, note 24 at 276-77.

[43]*Re B.C. Family Relations Act*, *supra*, note 28 at 106-07.

[44]N. Lyon, "Is Amendment of Section 96 Really Necessary?" (1987) 36 *UNB LJ* 79.

invalidation of a number of administrative boards and inferior courts.[45] Application of this standard has additionally introduced a regrettable element of uncertainty in the exercise of legislative power. It should not be forgotten that invalidation of either inferior courts or administrative tribunals represents the subordination of legislative competence to the institutional provisions of the constitution. While the primacy of institutional sections over the exercise of legislative authority is not unprecedented,[46] it might modestly be suggested that the judiciary should be reluctant to deny legislative choice as to the appropriate public administration vehicle when substantive jurisdiction is conceded and when the result is the preservation of judicial hegemony in relation to certain matters. Judicial tentativeness is particularly to be encouraged when:

> decisions are...made after the provincial legislation has come into force and sometimes many years after the institution in question has been granted the impugned function. The administration of civil, criminal and administrative justice is inconsistent with such uncertainty concerning the devolution of so-called judicial responsibilities to courts of justice and to administrative bodies that are not made up of persons with the status of judges who are appointed, named and recalled by federal authorities.[47]

It is the perceived inability to circumvent the implied prohibition against conferral of superior court jurisdiction on inferior bodies which has generated demands for reform of section 96.[48] It is not my intention, however, to assess the various proposals which have been advanced, since it is my view that the apparent necessity for revision of the judicature provisions is founded on a fallacy: that the restrictive impact of section 96 on the elaboration of alternative dispute resolution techniques is the result of

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[45]Some idea of the range of decision-makers invalidated by application of section 96 is provided in the following catalogue: Quebec Transport Commission — *A.G. Que.* v. *Farrah*, *supra* at note 33; Quebec Professions Tribunal — *Crevier* v. *A.G. Que.*, *supra* at note 33; Ontario Residential Tenancy Commission — *Re Residential Tenancies Act*, *supra* at note 7; Nova Scotia Residential Tenancies Board — *Burke* v. *Arab*; *A.-G. N.S.*(1981), 130 D.L.R. (3d) 38 (N.S.C.A.); Alberta Landlord and Tenant Tribunal — *Re Constitutional Questions Act*, [1978] 6 W.W.R. 152 (Alta. C.A.); Manitoba Clean Environment Commission—*Texaco* v. *Clean Environment Comm.*, [1977] 6 W.W.R. 70 (Man. Q.B.); New Brunswick Municipal Tax Assessment Tribunal — *Minister of Municipal Affairs* v. *L'Eveque Catholique* (1972), 24 D.L.R. (3d) 534 (N.B.C.A.).

[46]See for example *Re Initiative and Referendum Act*, [1919] A.C. 935; *Credit Foncier Franco — Canadian* v. *Ross*, [1937] 3 D.L.R. 365 (Alta. C.A.); *Alberta Natural Gas Reference* (1982), 42 N.R. 361 at 387: "The legislative powers conferred by Part VI (ss 91-95) must be regarded as qualified by provisions elsewhere in the Act. Otherwise those other provisions are meaningless."

[47]Pépin, *supra*, note 17 at 249-50. Pépin continues at 263-64:

> The uncertainty created by the caselaw on section 96 is incompatible with the importance of the exercise of judicial functions in our society. It is unacceptable that the powers bestowed on courts of justice and bodies not made up of "section 96 judges" can be so easily impugned, rightly or wrongly, by lawyers who are simply seeking to paralyze an institution and buy time; the utility and effectiveness of the institutions in question are sapped by these legal challenges, which are a gold mine for lawyers but which do nothing to enhance the reputation of our judicial system. It may be inevitable that the legislation dealing with social relations is complex but it is unacceptable that citizens seeking a rapid and economical determination of their rights are exposed to judicial jousting occasioned by the rules of interpretation of section 96, rules whose purpose is to allow judges to determine, often many years after enactment of a statute, if the authority chosen by the legislator to settle disputes is legally able to do so....Is it necessary to pay such a high social price in order to preserve for federal authorities the power to appoint judges to the principal provincial courts, a power above and beyond that to appoint judges to the federal courts, and notably to the Supreme Court of Canada and this at a time when the number of cases inspired by section 96 is likely to increase?

[48]*Supra* at note 29.

constitutional imperative, and that when invoked to invalidate accretions of authority to tribunals and inferior courts which encroach on the traditional powers of superior courts the judiciary is merely fulfilling the intention of the framers of the constitution. Rather, my concluding remarks will attempt to demonstrate that current judicial interpretation of section 96 is not mandated by either logic or the constitutional context and that the criteria developed to ascertain the scope of section 96 are neither objective nor value-neutral. Instead, it is arguable that such standards conceal a deliberate choice between two competing adjudicative models — a choice designed to achieve two objectives: the preservation of the favoured position of superior courts[49] and the promotion of the legitimacy of judicial review of the exercise of executive discretion[50] I shall further attempt to show that the overt preference in favour of superior court decision-making manifest in section 96 jurisprudence relies on a fundamentally flawed conception of independence which is indifferent to recent legal developments, of which the most significant is the *Charter of Rights and Freedoms*.

With respect to the first proposition — that section 96 jurisprudence reflects not constitutional necessity but an unarticulated pursuit of judicial hegemony in the field of dispute resolution to the detriment of an integrated structure of public administration — consideration of the criteria applied to distinguish and identify superior court functions proves that, while framed in terms overtly indifferent to the competing merits of varieties of decision-making, they in fact permit the interjection of considerable latitude and subjectivity. The initial phase of the *Residential Tenancies* test demands characterization of the functions performed by the impugned decision-maker as either judicial or non-judicial. The division between the two was explained by the Supreme Court of Canada in the following terms:

> The hallmark of a judicial power is a *lis* between parties in which a tribunal is called on to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the community as a whole.[51]

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[49]This is a trend evident in decisions such as: *R.* v. *Thomas Fuller Construction Ltd.*, [1980] 1 S.C.R. 695; *Northern Pipeline Agency* v. *Perehinec* (1984), 4 D.L.R. (4th) 1.

[50]The assertion of judicial control over the exercise of executive power is most pronounced in administrative law. However, equally compelling evidence may be discovered in recent cases upholding judicial review in relation to executive actions conventionally regarded as immune from court-ordered scrutiny: see for example *Air Canada* v. *A.-G. of B.C.*, [1986] 1 S.C.R. 539; *Carey* v. *The Queen in Right of Ontario et al.*, [1986] 1 S.C.R. 637; *Operation Dismantle Inc.* v. *R.*, [1985] 1 S.C.R. 441; *Century 21 Ramos Realty Inc. and Ramos* v. *R.* (1987), 56 C.R. (3d) 150 (O.C.A.), leave to appeal to S.C.C. refused 1 June 1987.

[51]*Re Residential Tenancies Act*, *supra*, note 7 at 743. This distinction is no doubt an echo of the thesis advanced by D.M. Gordon, "Administrative Tribunals and the Courts" (1933) 49 *L. Q. R.* 94 at 106-08:

> A tribunal that dispenses justice, i.e., every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by "law."...In contrast, non-judicial tribunals of the type called "administrative" have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency....A judicial tribunal looks for some law to guide it; an "administrative tribunal," within its province, is law unto itself.

However, this distinction is itself undermined by case law. As observed in *Shell Company of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275 (P.C.) at 297: *(continued)*

Such reasoning is predicated on the assumption "that there can be a distinction between the Rule of Law and the Rule of Men and that this distinction is crucial to distinguishing courts from tribunals."[52] Whether such an assumption retains any validity will be discussed subsequently. It is sufficient to note merely that a cursory examination of section 96 case law illustrates that the dichotomy between law and policy is neither self-relevatory nor inherent in the power itself. Identical functions have been alternatively classified as judicial and administrative with little convincing evidence offered in support.[53] This suggests, in turn, that categorization of the function is guided by a prior determination of the relative worth of the scheme under review for which the differentiation between judicial and non-judicial functions serves as a rationalization.

It is acknowledged that categorization of the impugned power is not conclusive. Even if it is conceded that the function under examination is judicial, it must further be determined whether it is analogous to that exercised by a superior court at confederation. While reference to historical conditions is no doubt intended to facilitate the assumption by inferior bodies of novel judicial functions (since the historical jurisdiction of superior courts is obviously circumscribed), application of this criterion is problematic, often compelling an hypothesis as to jurisdiction in the face of sparse or conflicting historical data. Such a retrospective projection on pre-confederation legislation, drafted in indifference to the philosophical concerns claimed to be embodied in section 96, suffers from several immediately obvious defects. First, it introduces undesirable and unjustifiable anomalies in the administration of laws between the various provinces.[54] For example, the Supreme Court of Canada has found the activities of the Ontario Residential Tenancies Commission to be contrary to section 96 while subsequently upholding the functionally parallel jurisdiction of the Quebec Rental Board,[55] leading one commentator to observe:

> It is legitimate to ask whether the Supreme Court would have emasculated the Ontario commission had counsel for the provincial government mentioned the legislation in force in Lower Canada, under which the Recorder's Courts in 1867 dealt with landlord and tenant disputes; it was this historical argument that enabled the Quebec Rental Board to avoid the shadow of section 96. Logically, how can the Quebec Rental Board terminate a lease if the granting

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51*(Continued)*

In that connection it may be useful to enumerate some negative propositions on this subject::

1. A tribunal is not necessarily a court in this strict sense because it gives a final decision;
2. Nor because it hears witnesses on oath;
3. Nor because two or more contending parties appear before it between whom it has to decide;
4. Nor because it gives decisions which affect the rights of subjects;
5. Nor because there is an appeal to a court;
6. Nor because it is a body to which a matter is referred to by another body.

[52]MacDonald, *supra*, note 24 at 268.

[53]See for example the inconsistent conclusions reached in *Re Residential Tenancies Commission, supra* at note 7 & *Re Attorney General of Quebec and Grondin, supra* at note 33.

[54]A problem most acutely felt in Quebec since due to the abolition of County Courts in 1953, section 96 has hindered jurisdictional expansion of Provincial courts: see G. Pépin, "Chronique" (1978) 38 *Rev. du B.* 478.

[55]See authorities cited *supra* at note 53.

> of this power to an Ontario rental commission or even a judge named by the Lieutenant Governor of this province is forbidden by section 96? How can this peculiar situation be justified in light of the different reasons explaining the presence of section 96 in the *Constitution Act, 1867*?[56]

Of course it might be argued that such discrepancies are latent in any event; a certain measure of inter-provincial differentiation in the content and application of law is anticipated and condoned by the constitutional distribution of legislative authority. However, such diversity is conventionally the product of deliberate political choice; it is more difficult to sustain when the divergence is judicially imposed on the basis of no higher principle than historical accident. Further, with the inclusion of Parliament within the ambit of section 96, an unwarranted degree of administrative disparity is introduced into the enforcement of what was otherwise implicitly intended to be a national, uniform scheme (an outcome particularly marked in the field of criminal law). In this context, neutral discrepancies begin to approximate inequalities which are clearly arbitrary, and potentially contrary to section 15 of the *Charter*.[57]

More generally, one may question the value and utility of the historical approach. Normally Canadian courts have repudiated a literal adherence to historical circumstance when elaborating the scope of constitutional provisions.[58] Rejection of an historically-determined interpretive methodology is usually premised on the assumption that history, in at least the constitutional context, proves too little:

> There is no final certainty as to what the framers meant by the use of these phrases. The records of the time have not preserved all their opinions on all points. Clear statements of the views of some on particular points have come down to us; of the views of others, nothing is known....There is a further limitation in all historical interpretation of political constitutions which are to govern the distant future. The framers of the constitution could not foresee the revolutionary economic and social changes that have since taken place and therefore could have no intention at all covering them....The intentions of the founders cannot, except by chance, provide solutions for problems of which they never dreamed.[59]

The same objection is germane when assessing the merits of recourse to history as a means of amplifying the content of section 96. However, a further point must be made. It is not only the case that the relatively sparse nature of extant historical data

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[56]Pépin, *supra*, note 17 at 240.

[57]Section 15(1) of the *Charter* provides in part: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."

[58]See for example, *A.-G. Ont.* v. *Winner*, [1954] A.C. 541; *Gosselin* v. *The King* (1903), 33 S.C.R. 255. However, it must be admitted that on certain occasions, the pre-confederation context has been treated as dispositive of the scope of certain power-conferring provisions in the *Constitution Act, 1867*: see for example, *Bank of Toronto* v. *Lambe* (1887), 12 A.C. 575; *A.-G. Can.* v. *A.-G. B.C.*, [1930] A.C. 111 (Fisheries Reference).

[59]*Report of the Royal Commission on Dominion-Provincial Relations*, 1940, Book I excerpted in N. Finkelstein, ed., *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986) vol. I at 27.

may be inadequate to respond to the institutional concerns engaged by section 96. Historical evidence may also prove too much. Reliance on the pre-confederation jurisdiction of superior courts as a means of distinguishing between those bodies to which the constitutional guarantees of tenure, remuneration and appointment attach and those inferior agencies not contemplated by the judicature provisions is apt to be ill-founded. In this case, history is simply too indiscriminate to provide guidance. First, even as a matter of historical accuracy, there is ample reason to believe that the dividing line between superior courts and inferior bodies has been too narrowly drawn. As MacDonald has noted:

> even were one to believe that section 96 protects the most distinctive attributes of the superior court...we often forget that this conception of a court is neither the only acceptable conception nor the conception out of which the common law tradition emerged. At the time of Confederation, several competing superior court jurisdictions existed in England: most notably, courts of Common Law, of Equity, Mercantile Courts and Ecclesiastical Courts. The subsumption of these competing jurisdictions into a hierarchical arrangement crowned by a unitary and omnicompetent Superior Court was only the achievement of the *Judicature Acts* towards the end of the nineteenth century.[60]

More significantly, the historical test is non-selective. Even were the traditional jurisdiction of superior courts that supposed by the conventional analysis, reference to history in this light is over-inclusive, failing to differentiate between those functions intimately related to the particular inherent status of the superior court and those assigned on a pragmatically contingent basis. As Noel Lyon has remarked, the *Residential Tenancies* test proceeds on:

> the unstated assumption that all powers and functions vested in superior courts as of 1867 are to be reserved to those courts because of their entrenched independence....There are many functions...which were regarded as superior court matters in 1867 simply because the young colonies either lacked the resources or saw no need to establish other professional courts to share some of these ordinary burdens...[but] the absence of other competent courts is not a constitutional reason for vesting certain functions in superior courts. Yet by using the 1867 situation as a benchmark we have elevated circumstances into constitutional principle.[61]

By failing to discriminate between logical nexus in respect of tasks performed by superior courts at the date of confederation because of innate institutional attributes

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[60] MacDonald, *supra*, note 24 at 279. The accuracy of this observation is borne out by the question of characterization of the appellate function: see D. Mullan, "The Uncertain Constitutional Position of Canada's Administrative Appeal Tribunals" (1982) 14 *Ottawa L. Rev.* 239; R.D. MacDonald, "Comment — Constitutional Law — Validity of Legislation — Privative Clause Ousting Judicial Review" (1983) 17 *U.B.C. L. Rev.* 111.

[61] *Supra*, note 43 at 80-81.

unique to those bodies and historical exigency which dictated that certain functions be assigned to superior courts because of the absence of any viable alternative, the historical test confuses empirical description with normative prescription.

The defects inherent in a purely historical approach to the definition of a "superior court" are, to a certain extent, ameliorated by the interposition of institutional considerations. As the third phase of the *Residential Tenancies* inquiry concedes:

> It is possible for administrative tribunals to exercise powers and jurisdiction which were once exercised by the s. 96 courts. It will all depend on the context of the exercise of the power. It may be that the impugned "judicial powers" are merely subsidiary or ancillary to general administrative functions assigned to the tribunal...or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature....In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal.[62]

Appraisal of the institutional context in which the judicial powers conferred on the challenged agency are exercised allows a considerable degree of judicial impressionism, since the Supreme Court has revealed itself as singularly reluctant to commit to an identifying framework which would enable a more precise classification. As Dickson J. stated in *Residential Tenancies*:

> The teaching of *John East*, *Tomko* and *Mississauga* is that one must look to the "institutional setting" in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body....As the British Columbia Court of Appeal noted in its consideration of s. 96 in *Re Pepita and Doukas*: "it is notable that no general tests are offered or established in the *Tomko* judgment for the characterization of the function, the characterization of the institutional arrangements and the examination of their interrelationship."[63]

To maintain that an abstractly judicial power may be altered by institutional context without simultaneously advancing criteria of classification exacerbates an already undesirable level of subjectivity. It also results in an unintended irony. Emphasis on the external indicia of the decision-making framework favours only one class of agency: the tribunal with primarily administrative responsibilities. The delegation to such an institution of a "judicial" function historically within the ambit of a section 96 court is permissible when the fulfillment of political objectives depends on such delegation. As a result, the more "radical" the dispute resolution structure the more likely it is to survive a section 96 challenge. Conversely, the more closely a body in its

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[62] *Supra*, note 7 at 735-36.

[63] *Ibid.* at 733.

procedural and substantive dimensions approximates a traditional court structure the greater the probability that it will run afoul of section 96. The paradox is apparent. While the import of the *Residential Tenancies* test might seem to be designed to enhance accommodation of alternative dispute resolution techniques, it, in fact, frustrates adaptation of existing adjudicative bodies (particularly provincial courts) to perform novel tasks. Legislative attempts to confer powers traditionally associated with superior courts will, in such a case, invariably fail for "there can be no metamorphosis of the judicial function protected by section 96 because there is no administrative catalyst."[64] Thus, in constitutional terms, the transfer of "judicial" functions to executive agencies is more readily defended than a similar vesting in an inferior judicial body. Such a consequence is, at best, incongruous and inconsistent with what is claimed to be the principal purpose of the judicature provisions: "to ensure that judicial powers of a certain degree of importance are exercised by individuals whose independence and impartiality are guaranteed."[65]

However, the difficulties created by section 96 are greater than the problems inherent in the *Residential Tenancies* test itself. Judicial construction of section 96 raises very serious issues relative to the appropriate role of courts and the balance of power between the executive and the judiciary, issues not susceptible of immediate resolution but which certainly invite further discussion. What does the current approach taken toward the operation of section 96 reveal about a philosophy of decision-making? Clearly, cases elaborating the meaning of the judicature provisions appear to indicate a fundamental preference for judicial, rather than public, administration since the proscriptions inferred from these sections distinguish not between courts (in the generic sense) and all other decision-makers but between superior courts (whose jurisdiction is constitutionally entrenched) and all other adjudicative agencies (whose jurisdiction is contingent on an affirmative act of legislative will). While this perception is hardly revolutionary, the premises on which this bias is founded are only infrequently addressed.

If one recalls the contemporary justification for section 96 — the desire to ensure access to independent and impartial decision-makers in respect of certain subject matters — it seems that underlying section 96 is an implicit commitment to the Diceyan concept of the "Rule of Law" according to which:

> ordinary courts would act by applying known and pre-existing legal rules to particular cases, and that in all circumstances, this judicial function would be performed in a non-political and objective fashion.[66]

The Diceyan formulation of the "Rule of Law" contrasts sharply with the "Rule of Man":

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[64]Pépin, *supra*, note 17 at 249.

[65]*Ibid.* See also MacDonald, *supra* at note 24 & Mullan, *supra* at note 59. *Valente*, *supra* at note 30 clearly mandates the application of criteria of independence to the status of provincial court judges.

[66]MacDonald, *supra*, note 24 at 266.

> an epithet attaching to all exercises of decision-making powers resting on discretion, policy and arbitrariness (for example, not only to authorities such as parliaments who make broadly political decisions, but also to any actor in a regime of special courts applying special rules for special cases).[67]

The dichotomy between the "Rule of Law" and the "Rule of Man" relies on the division between the legislative and judicial function: "the former being the political process by which normative choices are made and the latter being a neutral and objective process for applying such choices to particular cases." [68] That this distinction (at least in part) founds current judicial interpretation of section 96 is evident in the following remarks of Dickson J.:

> Where the tribunal is faced with a private dispute between parties, and is called on to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally it is acting in a "judicial" capacity...the judicial task involves questions of "principle," that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of "policy" involving competing views of the collective good of the community as a whole.[69]

The accuracy of the separation of the judicial and legislative functions has been the subject of stringent criticism, a discussion of which is beyond the scope of this comment. However, it may be sufficient simply to ask whether the distrust of the executive implicit in this version of the "Rule of Law" is defensible. It is not suggested that the present executive is less corruptible, less arbitrary and less discretionary than its 19th-century counterpart. However, what judicial interpretation of section 96 fails to acknowledge is that there exist, beyond the judicature provisions of the constitutional instrument itself, techniques for controlling executive excess and for ensuring, in a more immediate way, direct access on the part of the citizenry to independent decision-makers.[70] I refer of course to the *Charter of Rights and Freedoms*, sections 7 and 11(d) of which provide:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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[67] *Ibid.*

[68] *Ibid.*

[69] *Re Residential Tenancies*, *supra*, note 7 at 735.

[70] MacDonald has observed that challenges to decision-makers on the basis of section 96 are rarely framed on civil libertarian grounds and, as noted previously, the conection between the judicature provisions and rights is extremely tenuous. MacDonald, *supra*, note 24 at 259-60:

> Drawing judges from local Bar Associations does less to enhance judicial independence than it does to enshrine the professional ideology of lawyers. In an age of government-fueled inflation the formality of salary establishment has been effectively neutralized. Finally, it is worth noting that the various provincial judges acts, the *Supreme Court Act* and principles of the common law have been invoked more frequently and more successfully against arbitrary dismissals than the joint address provision of section 99. Whatever independence of the judiciary in the liberal state may mean, it is difficult to see that reality reflected in any general theory derivable from sections 96-100.

> 11. Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

If the judicature provisions of the constitution ensure independence, they do so only tangentially and in a restricted circumference. The assurance of independence arguably entrenched is a limited one, applicable only to superior courts; its conception of independence is an absolutist and formal one, integrally linked to a singular theory of the significance of tenure and remuneration guarantees. Finally, the interpretation of section 96 involves a fundamental conflict of interest:

> each time that a superior court invokes section 96 to strike at the jurisdiction of an inferior tribunal, it by that very fact enhances its own residual jurisdiction. Those who ground interventionist theories of judicial review on Montesquieu's impoverished concept of the tri-partite state decline to acknowledge that, at one step removed, courts are themselves bureaucracies of public administration and judges are political actors. Typically, commentators who applaud judicial review also applaud the minimal state. Since the time of Dicey the conception of courts as a brake on despotic legislatures has been paramount. Is it not too much to expect section 96 alone to support the entire baggage of conservative politics, pro-federalist constitutional ideology and liberal political theory?[71]

The enactment of the *Charter* appears to cast doubt on the adequacy of section 96 as a guarantor of judicial independence. Sections 7 and 11(d) represent a superior means of satisfying the public interest in independence, not the least because the requirement of neutrality is one attaching to all decision-makers. However, unlike the judicature provisions, the concept of independence so protected is not institutionally contingent on formal indicia. Nor is it a concept of independence which relies on a theoretical antagonism between the judiciary and the executive. It is instead a vision of independence which is flexible, contextual, progressive and institutionally cooperative. According to the Supreme Court of Canada in *Valente* v. *The Queen*:

> It would not be feasible...to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence must bear some reasonable relationship to that variety. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(d) and not any particular legislative or constitutional formula by which it may be provided or guaranteed.[72]

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[71] MacDonald, "Comment — Constitutional Law," *supra*, note 60 at 141.

[72] *Supra*, note 30 at 674-75.

Parenthetically it should be observed that while *Valente* was immediately concerned with the independent status of provincial court judges according to the stipulations of section 11(d), the analysis of adjudicative independence ought, arguably, to be applicable to decision-makers in a non-criminal context, although advanced in the context of section 7 of the *Charter*.[73]

With the extension of the guarantees of independence to bodies other than superior courts by the *Charter*, the continued vitality of section 96 jurisprudence becomes suspect. Sections 7 and 11(d) do not per se legitimate the transfer of traditional superior court jurisdiction to inferior bodies. However, is it not now more appropriate than ever to challenge the view that section 96 engages libertarian concerns by ensuring an adjudicative monopoly in relation to certain matters in favour of constitutionally specified decision-makers? By this I mean simply that if arguments favouring recognition of a core of superior-court jurisdiction derive from the independent character of those courts, then inclusion of other agencies within the *Charter* concept of neutrality ought, at the very least, to invite a reconsideration of the theory of jurisdictional exclusivity on the part of superior courts. One can no longer assert, for example, that aspects of substantive law represent elements of inherent superior court authority *because* those courts are independent any more than one can seriously maintain that certain matters are within the purview of superior courts merely *because* of circumstances prevailing at the date of confederation. That is, what was once simultaneously a necessary and sufficient condition of jurisdictional attribution (constitutionally guaranteed independent status) now constitutes at best a preliminary argument favouring allocation of certain matters to superior courts. The reflexive correlation of formal indicia (appointment, tenure, remuneration) and functional powers, characteristic of current section 96 ideology, has been seriously and perhaps fatally disturbed by the *Charter*.

With the relaxation of the formerly mandatory equation of superior courts and judicial independence, it remains to be asked — what is the purpose of the judicature provisions? While the erosion of the conventional rationale ought, in itself, to create the impetus for the development of a more generous attitude towards expansion of the powers of inferior courts and administrative tribunals, this need not presage the decline of the unitary, hierarchical court system envisaged by the framers of the constitution. However, the more sensitive and discriminating thesis of independence articulated in the *Charter* should impel a re-examination of the justification of the special role accorded superior courts — one freed from the stultifying influence of an historically confined understanding of the relationship of the executive and judicial branches of

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[73]This would appear to be the logical consequence of the decision of the Supreme Court of Canada in *Re Section 94(2) of the Motor Vehicle Act* (1986), 63 N.R. 266 in which Lamer J. stated at 282: "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system." The right to be heard by an independent decision maker represents a "basic tenet" of the Canadian legal system, premised as it is on fidelity to the "Rule of Law." See *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121.

government.[74] The result of such an analysis, it is hoped, will not be merely pragmatic acquiescence in dispute resolution experimentation but the development of a more principled apprehension of the relationship between regimes of judicial and public administration.

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[74] As Colvin notes, *supra*, note 31 at 248-49:

> In recent years there has been a substantial shift away from the model of Executive-Judiciary relations which Canada inherited from England. Executive control over the Judiciary has weakened in matters of tenure, appointment and court administration. The tenure of judges of inferior courts is now protected by legislation establishing judicial councils and by s. 11(d) of the *Canadian Charter of Rights and Freedoms*. Some judicial councils are also involved in the process of appointments. In addition, it has been widely accepted that there is an institutional dimension to judicial independence, and certain minimum safeguards for judicial control of court administration have been held to be mandated by s. 11(d) of the *Charter*....The *Charter* itself may be the product of the same forces of constitutional rationalization which have generated concern about the traditional pattern of Executive-Judiciary.

While the shift detected by Colvin is generally analyzed in terms of greater judicial autonomy, is it not reasonable to assume that the new understanding of executive-judiciary relations ought to effect a parallel expansion of executive discretion to assign decision-making responsibilities to bodies other than superior courts? In such a case, the litmus test of the validity of such a transfer of power ought not to be a concept of independence controlled by section 96 but rather that emerging from the *Charter*.