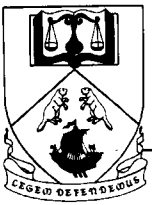

Notes and Comments/Commentaires

Is Amendment of Section 96 Really Necessary?

Something must be done about section 96 of the *Constitution Act, 1867.*[1] The Supreme Court of Canada's interpretation of that section and its companions leaves the provinces with little flexibility in re-organizing their courts and developing new kinds of administrative agencies. The thesis of this note is that what needs to be done can be accomplished merely by some refinement of interpretation by our new Supreme Court, which has shown remarkable openness to a purposive approach to its work since it received a shot of intellectual adrenalin from section 52 of the *Constitution Act, 1982.*[2]

The court deserves full credit for recognizing the soundness of the purposive interpretation of sections 96-100 put forward in 1956 by Professor Lederman in his classic article, "The Independence of the Judiciary."[3] The Lederman approach to the independence question consists of asking *why* those who drew up the 1867 constitution thought it desirable to entrench the independence of superior court judges, and then to look to constitutional history, institutional arrangements and principle for an answer. What the court has failed to do, however, is apply the refined approach of Lederman's article to the question of which functions of superior courts are constitutionally required to be performed exclusively by courts whose judges are secured in their independence by the law of the constitution. Instead, it has proceeded 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.

If we say that superior court functions are largely frozen in terms of the particulars of 1867, we indiscriminately deny provinces flexibility with respect to both the central constitutional functions of superior courts (a necessary denial) and the various other functions which resided in superior courts in 1867 merely by reason of the circumstances of the day (an unnecessary denial, I will argue). A pair of illustrations will help. Judicial review of the exercise of

[1](U.K.), 30 & 31 Vict., c. 3.

[2]Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[3](1956) 34 *Can. Bar Rev.* 769, 1139.

(1987), 36 *UNB LJ* 79.

statutory powers is the method our constitution uses to ensure government according to law. That function is our way of maintaining the rule of law, a fundamental constitutional value, and it follows that it must be performed by judges whose independence is as far as practicable insulated from political interference. On the other hand, there are many functions — such as deciding civil claims going beyond a small claims amount or the granting of divorces and child custody — 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.

The Supreme Court's historically restricted interpretation of sections 96-100 fails to take into account the transformation of institutions that has occurred since 1867. The last two decades have seen provincial courts progress from unsophisticated institutions staffed by lay magistrates, police prosecutors and untrained staff to professionalized courts whose judges in many instances provide a higher quality of administration of justice than superior court judges by reason of specialization, careful selection for suitability to particular functions (especially important in family courts) and more attention to appropriateness of setting and supply of support staff. The provinces have made an effort in recent years to find the flexibility they need if institutions are to be adapted to changing needs and circumstances. One effort in this direction was the proposed constitutional amendment that would have given provinces power to appoint judges and board members to adjudicate any matter coming within section 92.[4] In my view that approach is fundamentally misconceived. It treats the problem as one pertaining to the federal division of powers rather than recognizing that the primary value to be secured is not federalism but the rule of law, which only an independent judiciary can assure.

The power to lead us out of the impasse lies with the Supreme Court. What the court should do is identify those superior court functions whose performance by constitutionally secured judges is necessary to preserve fundamental constitutional values. This inquiry is easier today than it would have been in 1867, for two reasons. First, we have a clearer understanding, since 1982, of the role of courts in the constitutional process. Judicial review under the *Charter* and the rest of the constitution is expressly required by section 52 of the 1982 Act. Judicial review of the exercise of statutory powers is essential to maintaining a structure of government that makes possible effective limits on powers. Trial of some of the more serious offences is, according to the *McEvoy* case, reserved to superior court judges, although the Supreme Court gave little in the way of particulars nor any rationale for this reservation of function.[5] Secondly, the inquiry need no longer be cluttered with concerns

[4]The proposed amendment, which is set out in a discussion paper entitled "The Constitution of Canada — A Suggested Amendment Relating to Provincial Administrative Tribunals" issued in 1983 by the Minister of Justice of Canada, is as follows:

96B(1) Notwithstanding section 96, the Legislature of each province may confer on any tribunal, board, commission or authority other than a court, established pursuant to the laws of the Province, concurrent or exclusive jurisdiction in respect of any matter within the legislative authority of the province.

(2) Any decision of a tribunal, board, commission or authority on which any jurisdiction of a superior court is conferred under subsection (1) is subject to review by a superior court of the Province for want or excess of jurisdiction.

[5]*McEvoy* v. *A.-G. New Brunswick* (1983), [1983] 1 S.C.R. 704.

about the absence of other competent courts. The absence of other competent courts is not a *constitutional* reason for vesting certain functions in superior courts. That is just a circumstance of the evolution of a system of courts. Yet by using the 1867 situation as a benchmark we have elevated circumstance into constitutional principle. Provinces should be free to allocate judicial functions in response to a rational assessment of where they can be performed most effectively, subject only to such limits on flexibility as can be demonstrably justified by reference to the constitution.

Some flexibility is apparent in the leading case interpreting section 96. In *John East Iron Works* the Judicial Committee of the Privy Council gave a general green light to provincial establishment and appointment of new kinds of administrative tribunals such as labour relations boards, as long as they were not attempts to supplant superior courts in some of their functions and as long as they are subject to ultimate superior court review on jurisdictional grounds.[6] Similarly, in *A.-G. Quebec* v. *A.-G. Canada* the Supreme Court recognized that the respective jurisdictions of superior courts and other courts cannot be frozen in their 1867 state.[7] Changing circumstances such as changes in the value of money require some flexibility in re-allocating jurisdictions. However, our tendency to shun leading cases and principles as the basis of constitutional interpretation in favour of the encyclopedic marshalling of all conceivably relevant authorities has resulted in a failure to use the existing flexibility effectively for constitutional evolution. Hence the perceived constitutional impasse, accompanied by provincial demands for constitutional amendment to break it.

Such a conclusion is misguided. Consider, for instance, the implications of Lord Simonds' opinion in *John East Iron Works*:

> It is legitimate to ask whether, if trade unions had in 1867 been recognized by law, if collective bargaining had then been the accepted postulate of industrial peace, if, in a word, the economic and social 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.[8]

Lord Simonds' concern was whether decisions committed to the board should be made by judges rather than administrators, not whether it would require superior court judges or could be entrusted to other judges if judicial power were called for. Hence the view has developed that the case is not authority for flexibility in the allocation of functions as between superior court judges and provincially appointed judges. If, however, we recognize as the underlying concern of sections 96-100 that superior court judges, constitutionally secured from political interference, should have the exclusive exercise of those judicial powers necessary to preserve the constitution, we can then contemplate answering the following question by applying the principles of the *John East* case:

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[6] *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (1948), [1949] A.C. 134.

[7] (1965), [1965] S.C.R. 772.

[8] *Supra*, note 6 at 150-51.

> If the family had in 1867 been recognized as an important, discrete subject in the administration of justice, if the integrated provision of judicial and non-judicial services and forms of relief had been the accepted postulate of effective family law administration, and if there had existed the kinds of competent, professional inferior court judges who are found in the provincial family courts today, would it have been expedient to establish inferior courts to exercise comprehensive jurisdiction in family law matters?

But we do not even ask that question because of the indiscriminate approach that has led us to view *all* functions exercised by superior courts in 1867 as having a rational constitutional basis for exclusive reservation to those courts.

If we are to regain the flexibility needed to respond to normal evolution of institutions we must begin by asking more refined questions about what sections 96-100 are meant to protect. The historical approach does not, by itself, provide an answer. It provides only evidence of past practice, leaving us with the further question of how much of past practice was a response to constitutional principle as opposed to circumstance. There is no doubt that superior courts are central to our constutional system and house the core of judicial power that secures the rule of law and preserves the constitution itself. There is also no doubt that judicial review under the constitution, judicial review of the exercise of statutory powers, and a core of criminal and civil jurisdiction are permanently and exclusively committed to those courts. But it is an extravagant claim to assert that citizens have a constitutional right of access to superior courts on all matters which fell within their jurisdiction in 1867, when those courts did everything thought to require legal competence and experience because there were no alternatives. For the most part, inferior courts were staffed by people with little or no legal training, and this remained the dominant fact into the 1970s. Only in the last decade and a half have we found the necessary people and resources to develop fully professional benches in the courts of inferior jurisdiction. If inferior courts of today's calibre had been developed by 1867, I suggest that many more matters would have been committed to those courts than were in fact, and we would have been blessed with a better understanding of what matters belong in the exclusive core jurisdiction of superior courts.

Perhaps, therefore, the first question the *John East* case should lead us to ask is:

> If there had existed in the colonies in 1867 the calibre of inferior courts that exist today, would it have been expedient to confer wider jurisdiction generally on those courts, which were located throughout the colonies, leaving only certain key judicial functions to the inaccessible and expensive superior courts, which were centralized, usually in the capital city of each colony?

If an affirmative answer seems likely to this question, then we owe it to those provinces which have developed credible inferior court systems to call on the Supreme Court to indicate the key judicial functions that only superior courts may perform. In so doing, the court would give provinces a clear indication of the scope of their flexibility in court re-organization and put a merciful end to the movement for a constitutional amendment that may ultimately do more harm than good by substituting expedience for principle in the judicature provisions of the constitution.

The related question of what matters must, as a constitutional requirement, be committed to judicial power should be easier to answer once we have identified the key judicial functions that belong exclusively to those centralized, senior courts that form the core of the judicature and whose judges enjoy an entrenched independence. When we know what judicial functions require the special protection of entrenchment we will no longer see a threat to the constitution in every arrangement that seems to transfer authority from judges to administrators. Both history and theory point to a system of government with limited powers exercised in accordance with law. It follows that both judicial review under the constitution and judicial review of the exercise of statutory powers are among the constitutional functions of superior courts. Otherwise both the limits on powers and the requirement to observe the law become meaningless; governments could ignore them with impunity. The Supreme Court has clearly and specifically decided that this is so in the *B.C. Power* case and the *Crevier* case respectively.[9] Beyond that, the only specification of entrenched functions came in the *McEvoy* case in which the court added serious criminal cases to the list. There are two inferences that can be drawn from *McEvoy*. One is that citizens have a right of access to superior courts on all serious matters. The other is that superior courts, with their highly-skilled pools of legal experience, have a general supervisory function in the judicial system and must therefore retain the top slice of the criminal and civil jurisdiction sufficient to enable them to set the tone and maintain the standards for the entire judicial system. I suggest that the second hypothesis is the better one. Seriousness has been historically defined largely in terms of the amount of money involved, and the proposition becomes in reality one entitling those with the most money to not only the most expensive lawyers but also the most expensive judges. If the first hypothesis were sound, we would never have conferred on judges on inferior courts extensive powers to deprive citizens of their liberty.

The time has come to separate entrenched principle from entrenched privilege by defining the entrenched jurisdiction of superior courts, beyond judicial review, in terms of the minimum quality of administration of justice required by the constitution. In the administration of criminal justice this is not a difficult task. The *McEvoy* case has already performed it in a general way. If there is access to superior courts for trial of the most serious criminal offences those courts will control the shaping and development of criminal law and procedure. Whether there is a corresponding core of superior court jurisdiction in the sphere of civil justice is less clear. Civil justice includes many fields of law as well as the distinct systems of civil law, common law and equity. The problem is lessened, however, by the fact that appeals to superior courts lie from inferior court decisions in all matters. This was not the case in 1867, when general access to courts of appeal staffed by separate, appellate judges was not the rule as it is today, and it is a very important consideration. It means that, at least since *Crevier*, there is a right of access to superior courts either by way of appeal or judicial review in respect of virtually every decision

[9] *British Columbia Power Corporation* v. *British Columbia Electric Company* (1962), [1962] S.C.R. 642; *Crevier* v. *A.-G. Quebec* (1981), [1981] 2 S.C.R. 220.

that affects citizens directly, whether the decision-maker is an inferior court judge or an administrator.

In minimizing the inflexibility imposed by sections 96-100 to the minimum necessary to secure the fundamental values those provisions are meant to secure, we end up with four categories of function which ought to belong exclusively to superior courts and which cannot be transferred to inferior courts or to administrative tribunals. And if those values are to be secured, it cannot matter whether appointments to those inferior courts and administrative tribunals are made by the central or provincial governments. As Professor Lederman has argued convincingly, it is not the power of appointment which sections 96-100 are meant to secure but the independence of the judiciary.

The four categories of function reserved by the constitution to superior courts are: (1) judicial review of legislative and executive action under the constitution; (2) judicial review of the exercise of statutory powers; (3) a core of the administration of criminal justice; (4) a core of the administration of civil justice. The first two categories require little elaboration. They are well-defined, discrete areas of law. The other two are more difficult to pin down. If, however, we begin by asking *why* superior courts must exercise a core jurisdiction in both criminal and civil justice, we proceed through matters of independence, impartiality, competence and concentration of time and resources to reach the underlying value of the rule of law. Our constitution seeks to secure those minimum institutional arrangements necessary to ensure that ours is a society under law; that is, a society in which adjudication is the required method of resolving differences which cannot be worked out through discussion, negotiation, compromise and agreement. Coercion and other forms of self-help are incompatible with our conception of a free and democratic society. If this is our concern, then what matters for constitutional purposes is maintaining the quality in the law and in legal institutions necessary to preserve public respect for and confidence in the courts. Today, perhaps unlike 1867, there is a regular system of appeals to superior courts of the highest quality, and also in virtually every province a regionalized provincial court system of so-called inferior courts that is staffed by competent professionals. The inflexible view of entrenched superior court jurisdiction is simply inappropriate today.

The idea of a core jurisdiction in criminal and civil justice entrenched in the superior courts is admittedly vague, but it can be tested against some contemporary issues of court reform. One essential characteristic of criminal justice is that citizens do not come to the criminal courts out of choice. It is not surprising, then, that we have been willing since Confederation to confer extensive criminal jurisdiction on inferior courts even though the stakes are highest there. Our liberty is at risk in criminal prosecutions, and in 1867 one's life was also at risk in capital cases. Yet we conferred power on untrained judges in order to protect superior courts from being swamped by a volume of cases that would have denied them the conditions needed to perform a central, supervisory role. But we have always reserved the most serious criminal matters to superior courts, and in *McEvoy* the Supreme Court has decided that the constitution requires such a reservation.

The skewing of constitutional principal is particularly conspicuous in family law administration where the division of jurisdiction between superior and inferior courts has really reflected the wealth of litigants. For the wealthy, with property to fight over and with the means to retain lawyers for divorce and custody proceedings, superior courts have been the forum. For those without wealth the same human problems have been defined legally in terms of maintenance and child welfare and committed to provincial (inferior) courts. It is not wholly irrelevant that, when the Supreme Court decided in the *Adoption Act* reference that a variety of family law statutes dealing with these matters could be committed to judges appointed by the provinces (non-section 96 judges) it relied in part on an analogy between those statutes and the poor laws which, in England, were administered in the inferior courts.[10] No constitutional principal requires us to maintain a division of jurisdiction that depends ultimately on the economic status of litigants. That division reflects political priorities rather than constitutional principle and we have inadvertently, through a rather mechanical interpretation of sections 96-100, erected political priorities of 1867 into constitutional bars to legislative response to the changed priorities of today. Those new priorities find expression in the movement to establish unified family courts, a movement which since 1970 at least has been frustrated by an insistence that only superior court judges can exercise jurisdiction in relation to divorce, matrimonial property and child custody.

It is, however, simply irrational to claim that the constitution prohibits the allocation of these elements of family law administration to competent, professional judges who specialize in family law administration, who are selected for their suitability for that kind of judicial work, who are readily available in every part of the province (unlike the centralized superior court judges) and who function in a special court facility that is designed and located in response to the special needs and problems of family law administration and is served by a wide range of non-judicial family services. Yet for nearly two decades we have been deterred by that claim, based as it apparently is on the highest authority, from proceeding with the development of the unified family court system that virtually everyone seems now to agree is needed for the proper administration of family law.

As long as the Supreme Court treats all superior court functions indiscriminately we will be denied the full benefit of the excellent provincial court systems that all provinces have built over the past two decades. If, however, that court is willing to refine its interpretation of the functions entrenched in superior courts by sections 96-100 then the provinces will enjoy the benefit of needed flexibility in making rational re-allocations of jurisdiction on the basis of priorities and resources in the important provincial domain of the administration of justice. The alternative is constitutional amendment, which is difficult to secure and which may be less desirable because it lacks the flexibility of judicial interpretation as a method of securing the minimum conditions to preserve the rule of law. Judging by the one proposed amendment put forward by the provinces to date, there is a danger that lack of awareness of

[10]Reference *re* Authority to Perform Functions Vested by the *Adoption Act*, the *Children's Protection Act*, the *Children of Unmarried Parents Act*, the *Deserted Wives' and Children's Maintenance Act* of Ontario (1938), [1938] S.C.R. 398 at 403, 419.

what is at stake could produce a change that substitutes expedience for principle, and which would force the Supreme Court judges to engage in some form of intellectual gymnastics in order to secure the constitutional value which must be secured at all costs. That value is, of course, the rule of law.

We rightly look to history for help in the interpretation of constitutional provisions. But we may forget that not all of that history reflects deliberate and purposeful choices. Much of the historical context of 1867 was merely a reflection of happenstance, and bears no constitutional significance. I have suggested that the powers and jurisdiction of superior courts at the time of Confederation were the product of both design and accident. The unfinished business of the Supreme Court of Canada in the interpretation of section 96 is to identify those superior court functions so essential to our system of government that they must be reserved exclusively to judges whose independence is constitutionally secured. Once that is done, the provinces will be free to reorganize their court systems and allocate jurisdictions in response to rational, functional considerations. Amendment of section 96 is not necessary.

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