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Divided Justice? Judicial Structures in Federal and Confederal States

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INTRODUCTION

The division of legislative authority is the mark of the contemporary, complex state whether it is federal or confederal in character.[1] The division of judicial authority enjoys less favor. Even in states recognized as federal, there may be resistance to application of federal principles to the judiciary. What explains the reluctance to divide the pursuit of justice? Why is the reluctance overcome in some instances? What are the results? This Paper will attempt to provide responses to these questions from the perspective of the Canadian Confederation (as it has been known),[2] as compared to the United States and Australian federations[3] by examining successively: (I) Basic Premises; (II) Structural Variations; and (III) inevitably, Resulting Problems.

I. BASIC PREMISES

Attitudes toward judicial structures appear heavily influenced by underlying attitudes concerning the nature of law, the nature of the particular complex state, and the administration of justice. Differences have emerged in these regards among Canada, the United States, and Australia, although it is interesting to observe that the same themes have figured in the debates in all three countries.

Canadian judicial structures clearly have been influenced by underlying ideas concerning the nature of both the common and civil laws. In neither legal tradition has there been institutional acceptance of the idea of law as the product, exclusively, of national political or legal officials. In common-law Canada, a national, binding concept of stare decisis never has been accepted

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1. The same is true of the essentially unitary state which tolerates a level of regional or local autonomy in one or more regions.

2. The language of federalism, as opposed to confederalism, has been increasingly used in Canada in recent years, largely as a reflection of the growth of Federal power. In terms of judicial authority, however, the confederal character of the structures still is very much in evidence.

3. For similar treatments of the subject, see Peter Hogg, *Federalism and the Jurisprudence of Canadian Courts*, 30 U.N.B.L.J. 9 (1981) and Bora Laskin, *Comparative Constitutional Law—Common Problems: Australia, Canada, United States of America*, 51 AUST. L.J. 450 (1977).

fully and an earlier tradition of the common law as a relatively free search for solutions has remained dominant. In Quebec, the civil-law codifications of 1866 and 1994 did not radically abolish pre-existing law, largely drawn from French sources, and the Quebec codification process has not demonstrated the apparent abruptness of the continental codifications. In common-law Canada and Quebec, the use of persuasive, nonnational authority is widespread as a judicial practice.[4] In common-law Canada in particular the use of American and Australian case law is well-known. A recent survey of common-law Canadian citation practices indicated that Canadian provincial courts cited decisions from their own jurisdiction in proportions ranging from only four to forty percent of all citations.[5]

For most of the present century this has not been seen as a modern view of law. Its roots certainly precede the movement of national positivism of the nineteenth and twentieth centuries. It may well be, however, the view of law that prevails in a future, transnational world and there appears to be little prospect of its abandonment in Canada. Its influence on court structures has been profound and appears likely to continue. If the common and civil laws are seen in this manner, it is not possible to think of either of them as being confined or limited by provincial, state or national boundaries. If there is no provincially distinct common law, there is no strong case for a particular judiciary established exclusively for its administration. Different arguments can be made with respect to the administration of provincial legislation, but they are unlikely to carry the day by themselves given the historical biases of the common law. If there are no particular provincial common laws, it follows that there is no particular Federal common law. From a common law perspective there is therefore no need to federalize the judiciary. Federal principles should apply only to legislative authority. The mere possibility that a legislature may attempt to change the common law does not mean that the common law is identified exclusively with that legislature.

This underlying view of law appears to have exercised the most influence in Canada. It also is widely subscribed to in Australia, although it has exercised less influence there on court structures. It has received the least support in the last two centuries in the United States, where it appears to have had very little influence on court structures. In Australia, Sir Owen Dixon expressed the view that "[o]ur conception of the unity of the law might naturally have led us to regard the courts of law as established to administer justice, not as agents either of State or Commonwealth, but . . . administering the law of the land independently of its source . . . ."[6] Measures tending to

4. *See generally* H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987).

5. H. Patrick Glenn, *The Common Law in Canada*, 74 CAN. B. REV. (forthcoming 1995).

6. *Address to the Section of the American Bar Association for International & Comparative Law*, 17 AUSTL. L.J. 138, 140 (1943) *cited in* HAROLD E. RENFREE, THE FEDERAL JUDICIAL

the federalization of the Australian court system have thus tended to rely on the need to ensure administration of statutory law by a judiciary drawing its support from the same source as the statutes.[7] In the United States, the notion of an indivisible common law was opposed in the name of distinctive state common laws seen as "means of fitting the common law into an emerging system of popular sovereignty,"[8] and there is less resistance in principle in the United States to the concept of a Federal common law than in Canada and Australia. The distinction between statutory law and common law has thus been seen as less important in the United States, and the argument of Madison eventually prevailed, although not without major opposition from the Anti-Federalists,[9] that "'A government without a proper executive and judiciary would be the mere trunk of a body, without arms and legs to act or move.'"[10] A "proper" judiciary in the United States thus became either Federal or state in character. The judiciary became subject to the principles of federalism.

SYSTEM OF AUSTRALIA 533 (1984). For further Australian judicial support of this view, see H.K. Lücke, *The Common Law: Judicial Impartiality and Judge-Made Law*, 98 L.Q.R. 29, 45 (1982) and Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, *in* PRECEDENT IN LAW 73, 75 (Laurence Goldstein ed., 1987). For explanation of this unity of law not in terms of uniformity of results or content but in terms of the inseparability of sources and open judicial discourse, see Glenn, *supra* note 5.

7. *See, e.g.*, M.H. Byers and P.B. Toose, *The Necessity for a New Federal Court*, 36 AUSTL. L.J. 308, 313 (1963) ("This device of investing the State courts with federal jurisdiction virtually means that the Federal Government hands over administration of the Statutes involved to State Governments without considering whether such State Governments might be or become hostile, friendly or merely disinterested.") (footnote omitted). This view appears to give very short shrift to the traditional independence of the Australian judiciary.

8. MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (citing J. Root, *On the Common Law of Connecticut* (1798)). The emergence of state reports and the popular election of state judges were related and reinforcing elements in the process of domestication of the common law. Today, however, the notion of "Anglo-American law" remains current in the United States and the flow of citation of cases is in some measure disrespectful of state boundaries. *See* Lawrence M. Friedmann, et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977). The United States federalized court system has itself contributed, however, to the decline in transnational citation of cases, which remains far less frequent in the United States than in Canada. For comparisons, see Glenn, *supra* note 5.

9. For the closeness of the debate and the result, see Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 837 (1995) (noting the parallel between Canadian and U.S. Anti-Federalist positions).

10. *See* Herbert A. Johnson, *Historical and Constitutional Perspectives on Cross-vesting of Court Jurisdiction*, 19 MELB. U.L. REV. 45, 51 n.32 (1993) (quoting DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION AT THE CONVENTION HELD IN PHILADELPHIA 158-59 (J. Elliot ed., 1907)).

These underlying views as to the nature of law were of fundamental importance in determining attitudes toward court structures. Their effect has been either reinforced or restricted by consideration of the nature of the particular complex state in question. Historically Canada has been known as a confederation, a reflection of the coming together of a number of separate colonies one of which, Quebec, was markedly different from the others in terms of language, religion, and legal tradition. The difference between a confederation and a federation is impossible to establish, but the historic insistence on the confederate character of the Canadian state has acted as a check on the growth of Federal power and the federalization of institutions.[11] Because each of the provinces already was vested with a court system at the time of confederation and the new structure was confederate in character, there was no necessary implication for the judiciary, although hard bargaining evidently occurred and what emerged was not simply a replica of previously existing court structures. If there is a logical pattern of federalism, for both legislative and judicial authority, there is no such logical pattern for confederalism insofar as the judiciary is concerned. The concept of a single, undivided judiciary of general jurisdiction, inherent in the Canadian view of the common and civil laws, was thus reinforced by the concept of Canada as a Confederation.

In contrast, Australia's more explicitly federal character[12] has had the effect of restricting or limiting the impact on the court structure of an underlying view of the unity of the common law. The courts must exist in a federal structure; they are not necessarily immune, as instruments of government, from that structure. The fact that Australia's court structures are different in kind from those of the United States appears to be a result of the effort to reconcile federalism and an underlying, unified concept of the common law. In the United States, however, there is a fundamental compatibility of principles. The common law is divisible; it and its judiciary are thus divisible according to the principles of federalism that control the entire governmental apparatus.

Finally, considerations of judicial administration cannot be excluded from a list of Basic Premises. The starting premise is that of the desirability of a simple, expeditious judicial system. A single court of general, residual

11. The same may be said of another well-known confederation, Switzerland, where the notion of Federal authority is one of inherent limitation. Swiss courts are cantonal in character, although a Federal court sits as ultimate court of appeal. The same type of court structure prevails in Germany, which is, however, recognized as a federation. The United States Articles of Confederation of the 1780s made no provision for any form of Federal judiciary.

12. *See* JOHN QUICK & ROBERT R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 332 (1901) ("The Federal ideal, therefore, pervades and largely dominates the structure of the newly-created community, its parliamentary, executive and judiciary departments.").

jurisdiction is therefore favored. All of the countries dealt with here share this point of departure. Notably absent is the idea of a separate court structure for public law matters, as prevails on the European continent. The common-law judiciary has historically been successful in maintaining the idea of a single, integrated judiciary, in public and private law. Federalism exercised its attraction here as well, however. Since the Federal governments could not have their own system of administrative law courts, for administration of their legislation, the argument became one of having their own courts, *tout court*. This too was met by the idea that lawsuits and disputes do not follow public and private or state and federal divisions, but simplicity is only a minor virtue in complex states. Arguments about simplicity and cost continue to be raised today and will be raised again in Part III of this Paper, but they are relative concepts. None of the jurisdictions concerned is today as simple as it might have been. There are too many other forces at work.

II. STRUCTURAL VARIATIONS

How have these Basic Premises played out in the different political and social contexts in which they have been the object of debate? Given the different levels of acceptance of Basic Premises, there is no over-all judicial structure common to the three countries. At the level of structures, the United States' system is the simplest. This might appear surprising to American lawyers, but the complexity of the law of courts in the United States flows from problems of implementation and not from complexity or inconsistency of underlying ideas. The United States structures flow directly from the governing ideas of particular laws and federalism. It follows that each jurisdiction has its own courts. Problems arise thereafter, but the point of departure is clear enough and does not appear to be challenged in the United States today.[13]

In contrast, the basic structures of Australia and Canada are more difficult to describe and fix. The distinction between structures and implementation is more difficult to draw, and in both countries the tension between unitary and federal models of court structures has been the object of ongoing structural debate, and ongoing structural change.

While subscribing to a unitary concept of the common law, Australia's version of federalism has been recognized as applying to court structures. From different perspectives, each one of the two Basic Premises of a unitary common law and federalism can be seen as dominating, or potentially

13. See generally Baker, *supra*, note 9, and notably the title, *A Catalogue of Judicial Federalism in the United States*. The federal character of the U.S. court system was established by the Judiciary Act of 1789, but the jurisdiction of the Federal district courts was originally very limited. *See generally* Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647 (1995).

dominating, Australian court structures. Federalism in relation to courts is found in the Constitution's recognition of a Commonwealth judicial power, which includes the creation of the High Court, creation of other federal courts, and vesting state courts with jurisdiction in Federal matters.[14] The logic of this structure is binary, or federal. On the other hand, Federal courts were not created directly by the Constitution and state courts, staffed by state judges, continued to function as courts of general, residual jurisdiction. This asymmetry, or limping judicial federalism, was reinforced by the general and long-standing refusal of the Commonwealth to create a system of Federal courts and by its willingness to vest judicial power in Federal matters in state courts. The "autochthonous expedient"[15] was an expedient from the perspective of federalism. It was, however, "autochthonous" and largely preserved the principle of a unitary court structure, that of the states, charged with application of a law still seen as fundamentally unitary. This asymmetry itself created problems, or perceived problems, however, and the solution to these problems has resulted in ongoing structural change in Australia.[16]

In spite of their differences, the U.S. and Australian court structures share a federal or binary way of thinking. Courts are thought of as Federal or state. The basic Canadian structure is more difficult to explain since this form of binary opposition was rejected, yet it was evidently impossible to continue with the idea of a unitary court such as that known in English legal history. If it is appropriate to speak of the U.S. court structure as federal and the Australian court structure as asymmetrically federal, perhaps the Canadian structure is best described as asymmetrically confederal! As in Australia, the superior courts of the provinces continue to exist as courts of general, residual jurisdiction. As in Australia, the Canadian Constitution recognizes a Federal power that extends to creation and administration of the Supreme Court of Canada as a final court of appeal for all Canadian jurisdictions, and creation of other Federal courts, at least for purposes of administration of the "laws of Canada."[17] As in Australia, there has been reluctance to make use of the Federal judicial power and provincial courts are responsible for application of much Federal legislation. The most unique feature of the Canadian judicial structure is found, however, in the Federal appointment and remuneration (and potential removal) of the superior court judges of the provincially-administered superior courts. No one has been able to establish precise historical grounds for this Federal participation in the structure of the provincial, unitary court structure. Professor Hogg suggests that it is "not unreasonable" given the

14. See generally J. CRAWFORD, AUSTRALIAN COURTS OF LAW 25 (1982); Renfree, *supra*, note 6, at 531-555; Johnson, *supra*, note 10, at 49-61.

15. The Queen v. Kirby; *Ex parte* the Boilermakers' Society of Australia, 94 C.L.R. 254, 268 (1956).

16. See *infra*, Part III.

17. See *infra*, Part III for discussion of the limiting effect of this grant of authority.

residual authority of the provincial courts[18] and states that the "answer that has become conventional" as that of insulating the judges from local pressures.[19] Professor Lederman spoke of the collaborative character of the system, and this ultimately may be the most interesting feature of it, a reflection of underlying ideas of law and state.[20] At a more prosaic level, the provinces may not have been able to pay judicial salaries. The potentially centrifugal character of Quebec law also may have been a consideration.[21]

Some indication of the effect of these basic structures is given by the number of judges in each country who are clearly recognizable as Federal. In the United States the number is clearly the largest at approximately 1100,[22] and for a long period the United States also clearly had the highest density per capita of Federal judges. In Australia, however, the number of Federal judges appears to be approaching 100 and this would mean Australia, with a population approaching 20 million, is the jurisdiction having most intensively implanted the Federal judiciary. The "autochthonous expedient" has thus not held as a basic structure, given the problems it has created. In Canada there are fewer than 40 Federal judges. The Federal participation in the provincially administered court structure clearly has dampened the growth of a purely Federal judiciary. In each of the jurisdictions, however, there are large problems and in some cases ongoing structural change.

III. RESULTING PROBLEMS

The variable court structures of the United States, Australia, and Canada appear to have been dictated largely by the first two of our Basic Premises: the controlling concept of law and the controlling concept of the particular complex state. It is in the implementation of these variable court structures that the third Basic Premise—the administration of justice—assumes greater weight. Indeed, the essential part of our subject appears to reside here. What problems in the administration of justice are created by each of the structures

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18. Hogg, *supra* note 3, at 15, (describing the solution as "anomalous" in a "federal system"). *Id.*

19. PETER HOGG, CONSTITUTIONAL LAW OF CANADA 165 (3rd ed., 1992).

20. W.R. Lederman, *The Independence of the Judiciary*, 34 CAN. B. REV. 1139, 1161 (1956); W.R. Lederman, *The Independence of the Judiciary* in THE CANADIAN JUDICIARY 1, 7 (A. Linden ed., 1976).

21. On the importance of Quebec in the debate over the creation of the Supreme Court of Canada, see Richard .C. Risk, *Canada*[:] *The Puzzle of Jurisdiction*, 46 S.C. L. REV. 703 (1995). On the retention of provincial courts, Professor Risk concludes that the question "was never debated in any substantial way, and any explanation needs to be constructed from the context of politics and ideas." *Id.* The same conclusion appears appropriate for the more precise question of the Federal appointing power.

22. See Baker, *supra*, note 9. The figure includes circuit appellate judges, district judges, and bankruptcy judges.

which have been adopted? Are the resulting problems justifiable? Or do they require re-assessment of Basic Premises? All of the jurisdictions have resulting problems, and it is not evident that any of them have discovered solutions to them. In the absence of solutions, whose problems are the better problems?

The problems that have arisen appear to be of two kinds: those of design and those of implementation. Canada and Australia have problems of both kinds. The design of their court structures is the object of ongoing debate and refinement; its description at any time is difficult and complex. They also have problems of implementation that are closely related to their problems of design. The U.S., in contrast, has problems only of implementation. The design of its federal court structure appears to be perfect or, more precisely, it is a perfect federal court system. Each of its constituent parts appears dictated by the logic of judicial federalism. Let us therefore examine first the United States. Its problems are the simplest to describe, although they may well be the most difficult to resolve.

The problems of implementation raised by U.S. judicial federalism are those of division and conflict *within* the system of administration of justice. To the insoluble larger problem of meeting the demand for judicial resources in a liberal, democratic state is thus added the duplication, cost and inefficiency inherent in any form of federal or confederal structure. In the U.S., these problems of implementation can be recited, although not described, under the headings of the definition of Federal law and Federal questions, diversity, supplementary (ancillary and pendent) jurisdiction, removal, coordination (inter-jurisdictional abstention and preclusion) and Supreme Court review.[23] The U.S. law of courts is one of the monuments of the modern world. It may be understood by no one. Underlying its complexity have been two basic needs: that of defining the boundaries of state and Federal jurisdiction and the need to assert, through jurisdictional rules, a means of control or surveillance of the particularist concepts of law and jurisdiction inherent in the basic design of the system.

Given the residual authority of state courts, the problem of defining state and Federal jurisdiction has been largely that of defining Federal jurisdiction. Unlike the situation in Australia and Canada, however, there appears to be little conceptual objection in the United States to the notion of a Federal common law as a logical counterpart to the various state common laws. Indeed, the idea of a Federal common law was taken to the extreme position throughout most of the history of the United States of existing even in the domain of state law when diversity jurisdiction was exercised.[24] Although

23. *See generally* Baker, *supra*, note 9.

24. *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842).

this view has been abandoned,[25] federal common law may be found to exist when it is seen in the national interest. In a federal system, this is likely to be more often the case than in a confederal system and is further encouraged, in a looping manner, by the Federal court structure available for its implementation and articulation. The U.S. structure is generous towards the idea of Federal law; its ongoing definition is necessary and important.

The remaining complexity of the U.S. system derives from the need to control or supervise the particularist concepts of law and jurisdiction that are anchored in the system. More simply, this means Federal control of state law and courts. Diversity jurisdiction is the most evident example of this need to control decentralization; removal and Supreme Court review are further means of ensuring exits from local forms of justice. Notions of ancillary and pendent jurisdiction ensure Federal control over the contours of any particular lawsuit where a Federal basis of jurisdiction exists. Given these multiple means of control and hence of conflict, notions of interjurisdictional preclusion and abstention appear as palliative measures. They are by no means mechanical in character, and each requires judicial determination, in one forum, that the process of the other should be respected.

Since the Australian judicial structure is one of asymmetrical or limping federalism, it does not have all of the problems of execution of a federalized system. To the extent the system *is* federal it has, of course, such problems. To the extent the structures do not faithfully reflect the logic of federalism, however, there are ongoing, additional problems of design. The creation of the Federal Court of Australia in 1976 thus followed complaints from the Federal level of government that the "autochthonous expedient" led to excessive reliance on state courts, with attendant delays, while inadequately protecting Federal interests in the application of Federal laws.[26] These arguments appear largely to mirror those made in the United States in favor of a federalized court system. The asymmetrically federal system was thus seen as an inadequate response to the pressures of federalism; the latently federal features of the Australian structure had to be reinforced and given more prominence once the structure was put into operation. The Australian

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25. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

26. The objects of complaint are "[d]elays, differences in interpretation or application (especially in matters of procedure, which would not in many cases reach the High Court for scrutiny), and lack of federal administrative control over court-room facilities and over the number (and appointment) of judges ....." CRAWFORD, *supra* note 14, at 127. *See also* Brian R. Opeskin, *Federal Jurisdiction in Australian Courts: Policies and Prospects*, 46 S.C. L. REV. 765 (1995) (outlining considerations of uniformity, specialty, philosophy, efficacy and history leading to the creation of the court). It should be noted, however, that the model chosen for the Federal Court was that of the "small" court model, with jurisdiction not extending to all matters of federal legislative jurisdiction. *Id.* The Federal Court was preceded by the creation of the Family Court of Australia in 1975. In 1994 the Industrial Relations Court of Australia was also created.

court system has thus become *more* federalized; its initial design did not adequately reflect the federal character of the constitution.

With the increase in federalism comes an increase in federal-type problems. The concepts of associated and accrued jurisdiction and cross-vesting accepted in Australian law are thus added to the initial definitional problem of determining the contours of Federal law and jurisdiction.[27] Still, the Australian structure does not present the full range of elements of control and supervision of state jurisdiction that are present in the United States. The unitary concept of law, administered by an independent judiciary, continues to exert its influence. There is thus hostility to the exercise of High Court diversity jurisdiction in Australia.[28] As well, removal to the Federal Court under the cross-vesting jurisdiction is not a statutory right of defendants as is the case in the United States and is subject to discretionary judicial control of state courts. Finally, the appellate jurisdiction exercised by the High Court in matters of state law appears to represent, not a control of one level of jurisdiction over another but the integration of the two, as will be seen to be the case in Canada. In the result, a unitary concept of the common law continues to prevail, and the notion of distinct and different state choice-of-law rules has not emerged.

The problems of design that have emerged in Canada are different from those known in Australia, and Canada's problems of design tend to overshadow those that might be seen elsewhere as problems of implementation. The debate over design in Australia has been as to the extent to which state court jurisdiction should be paralleled by Federal Court jurisdiction. It has been a debate over federalization, and in the logic of federalism the choice has been between two sets of courts. In Canada, the same forces of federalization are present, but the basic judicial structure of the superior courts is collaborative and neither Federal nor provincial. Federally appointed judges sit in provincially administered superior courts. The forces of federalization have had their effect outside this basic court structure, and there has been federalizing pressure and movement toward the Federal side and toward the provincial side. Purely Federal courts have been created, but also purely provincial courts. In the result, the effort in Canada to create a single, collaborative judicial structure has yielded three judicial structures: one Federal, one collaborative and one provincial. The ongoing debate about design is over the respective roles and jurisdiction of these three judicial structures. Put differently, implementing a single, collaborative judicial

27. These concepts parallel to a certain extent the concepts of ancillary and pendent jurisdiction in the United States. Opeskin, *supra* note 26.

28. Mary Crock & Ronald McCallum, *Australia's Federal Courts: Their Origins, Structure and Jurisdiction*, 46 S.C. L. REV. 719 (1995) (referring to High Court case law). *See also* ZELMAN COWEN & LESLIE ZINES, FEDERAL JURISDICTION IN AUSTRALIA 82-103 (2d ed. 1978).

structure entails an ongoing struggle against federalizing pressures outside the single structure. The debate is largely in constitutional terms.

The single, collaborative Canadian judicial structure is buttressed by two constitutional provisions, sections 96 and 101 of the Constitution Act of 1867. Both of these texts have provided support for, and limitations upon, the growth of other courts. Section 96 establishes the Federal power of appointment for superior court judges.[29] By necessary implication, however, it also denies to the provinces a power of appointment of judges exercising superior court functions. There can be no superior provincial courts. One of the most litigated features of Canadian constitutional law has been as to the definition of superior court functions.[30] All of the provinces have created vast adjudicative structures, some of which are formally designated as courts, for administration of provincial legislation.[31] Provincial courts also are competent with respect to a large number of Federal crimes. The contours of the jurisdiction of these purely provincial courts cannot here be traced. What is important is that the question of their jurisdiction, which in the United States and Australia is seen as a pure separation of powers question,[32] in Canada has become a major federalism question. To what extent does section 96 and the creation of a collaborative superior court structure preclude the federalizing tendency toward local courts? The answer has been: not entirely. Purely provincial courts have been subsumed, however, into the superior court structure by virtue of the powers of review and appeal exercised by the superior courts of first instance and appeal.

Section 101 of the Constitution Act of 1867, provides for the establishment of the Supreme Court of Canada and other Federal courts yet it also has acted as a buttress for the single, collaborative court structure.[33] The Federal Court of Canada was created in 1971 for reasons that appear to parallel those

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29. The text provides: "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."

30. *See generally* P. RUSSELL, THE JUDICIARY IN CANADA: THE THIRD BRANCH OF GOVERNMENT 47-63 (1987); Hogg, *supra* note 3, at 161-173, 184-200.

31. They also usually exercise small claims jurisdiction in matters governed by the common law or the Civil Code of Quebec. Authority for the creation of such purely provincial courts is found in § 92(14) of the Constitution Act of 1867, which establishes provincial authority over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." Constitution Act, 1867, § 92(14).

32. Can adjudicative functions be given to persons not enjoying judicial independence? Can courts and judges be given nonjudicial functions?

33. The text provides: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada." Constitution Act of 1867 § 101.

advanced in Australia in favor of the Australian Federal Court, in turn reflecting those advanced much earlier in the U.S. The Federal Court in Canada was preceded by the Exchequer Court, of much more limited jurisdiction. As a purely Federal Court that has subtracted from the jurisdiction of the provincial superior courts, already staffed by Federally appointed judges, the Federal Court has been the object of ongoing controversy. Its abolition was called for in the 1980s by at least one provincial Attorney General. Its jurisdiction has been the object of a number of decisions of the Supreme Court of Canada, which have placed constitutional limits on its jurisdiction, implicitly re-affirming the priority of the collaborative structure of provincial superior courts.

The leading decision on the jurisdiction of the Federal Court of Canada is *Quebec North Shore Paper Co. Ltd.* v. *C.P. Ltd.*[34] In U.S. terms, this was a diversity case, involving construction of the terminal facilities in Quebec of an inter-provincial and international industrial railway line. The contract provided that it was to be governed by Quebec law. The plaintiffs brought action in the Federal Court, the Federal Court Act provided that the Federal Court had jurisdiction over claims relating to works and undertakings connecting a province with any other province or extending beyond the limits of a province.[35] The Supreme Court denied the jurisdiction of the Federal Court, however, on the grounds that section 101 of the Constitution Act of 1867, allowed creation of Federal courts only for the better administration of the "laws of Canada" and that this expression required applicable and existing Federal law in order to establish Federal Court jurisdiction. Such applicable and existing Federal law did not exist for contractual claims involving private parties. Thus in Canada there is in principle no Federal common law for diversity cases and others (since diversity is unknown in Canada). The concept of the underlying unity of the common law here has resurfaced as constitutional principle. The decision re-affirms earlier Supreme Court assertions that there could be no Federal common law in Canada because of the co-existence of the civil and common laws in Canada and the impossibility of choosing between them at the Federal level.[36] The Canadian Supreme Court has subsequently recognized the existence of Federal common law in the fields of maritime law[37] and Crown liability,[38] but these stand as exceptions to

34. [1977] 2 S.C.R. 1054 (Can.).

35. R.S.C. 1970, ch. 10 (2nd Supp.).

36. *See* City of Quebec v. The Queen, 24 S.C.R. 420 at 428 (1894), (per Strong C.J.) ("...the circumstances that the private law of one province, that of Quebec, is derived from a different source, makes it impossible to say that there is any system of law, apart from statute, generally prevalent throughout the Dominion.").

37. *See* ITO-International Terminal Operators Ltd. v. Miida Electronics Inc. [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641. The decision has been severely criticized by civil law lawyers. *See* A. Braën, *L'arrêt ITO-International Terminal Operators Ltd. c. Miida Electronics Inc., ou*

to a general prohibition and not, as would be the case in the United States, as examples of construction of Federal law there where it is generally authorized and considered necessary in the national interest.

In a number of other respects the Supreme Court has placed important constitutional limits on Federal Court jurisdiction. While it exercises judicial review in administrative law matters over Federal agencies and boards, its jurisdiction does not oust that of the superior courts to determine the constitutional validity of any Federal legislation conferring jurisdiction on such agencies and boards.[39] There is also no general concept of supplementary, ancillary, pendent, associated, accrued or cross-vested jurisdiction allowing the Federal Court to control and adjudicate on all aspects of a case with which it has been seized.[40] The most that can be said is that the Federal Court has escaped censure in deciding matters governed by provincial law when so doing has been necessarily incidental to decision of a claim governed by federal law.[41] Recent amendments to the Federal Court Act have weakened even the most traditional area of Federal Court jurisdiction by providing that claims against the Federal Crown may heard concurrently in either the Federal Court or the provincial superior courts.[42]

The role of the Supreme Court of Canada has thus been of great importance in the ongoing debate over the design of the Canadian court structure. Two comments appear appropriate in this regard. The first is that, as a court administered and staffed by the Federal government, the Supreme Court has not acted in a manner expansive of the Federal judicial power. In this regard it has acted more as a general court of appeal over all Canadian court structures, which it is. As such, it has acted according to the Basic Premises underlying the Canadian court structure and not as an institution of a particular level of government. The second comment relates to the role of the Supreme Court as a general court of appeal over provincial courts, superior courts and Federal courts. As final authority on the merits, in all court structures, the Supreme Court is a collaborative institution. It is not a

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comment écarter l'application du droit civil dans un litige maritime au Québec, 32 MCGILL L.J. 386 (1987). The decision also raises the question of the civil law origins of English and Canadian maritime law. For further comment see H.P. Glenn 66 CAN. B. REV. 360 (1987).

38. *Roberts* v. *Canada*, [1989] 1 S.C.R. 322.

39. *See* Canadian Labor Relations Board v. Paul L'Anglais Inc., [1983] 1 S.C.R. 147; Canada (A.G.) v. Law Soc'y [1982] 2 S.C.R. 307.

40. *See* The Queen v. Thomas Fuller Construction Co. (1958) Ltd., [1980] 1 S.C.R. 695 (1979) (affirming that no Federal Court jurisdiction over third party claim made by Crown properly sued in Federal Court); Québec Ready Mix Inc. v. Rocois Construction Inc., [1989] 1 S.C.R. 695 (dismissing Federal Court jurisdiction to rule on damages claim based on provincial law appended to damages claim based on Federal law).

41. See Hogg, *supra*, note 3, at 22 for cases; and generally Hogg, *supra*, note 19, at 180 on the notion of "intertwining."

42. S.C. 1990, ch. 8, amending § 17 of the Federal Court Act.

Federal court exercising powers of review and supervision over otherwise sovereign local courts[43] but is rather an eventual participant in local court proceedings. Given an underlying concept of unity (although not necessarily uniformity) of law, the authority of the Supreme Court's decisions thus reaches across provincial and legislative boundaries. It does not act as an autonomous, ultimate Court of Appeal for each Canadian jurisdiction, whose separate common laws it individually crafts, but as a court whose decisions articulate a law accepted as common, at least for the common-law provinces. Geographic particularity is a feature of the Supreme Court's decisions only for Quebec cases, and even here there is a great deal of flexibility in the use of sources.[44] The structure and action of the Court thus reinforces, again in a looping manner, the Basic Premises underlying the collaborative court structure. The Federal Court has been limited to a subordinate and limited role in this structure. It goes without saying in this context that there are operative notions of abstention and inter-jurisdictional preclusion between the Federal Court and the provincial superior courts.[45]

In general terms, the Canadian collaborative structure is thus one that has largely subjugated the federalizing tendencies within the system. There is no diversity jurisdiction, no removal to federal courts, no Federal Court supplementary, ancillary or pendent jurisdiction, no cross-vesting and no Supreme Court review (as opposed to appeal). While the Constitution recognizes the federal pressures of the complex state, these have been constitutionally limited in favor of a single, collaborative structure, designed to allow local representation while ensuring enforcement of national standards.

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43. The Supreme Court has also held that the judiciary is not subject to review on grounds derived from the Canadian Charter of Rights and Freedoms, at least in private law cases governed by the common law. *See* Retail, Wholesale and Department Store Union v. Dolphin Delivery, [1986] 2 S.C.R. 573 (Can.); *cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (affirming the submission of state court judges to the Constitutional commands, as perceived by federal judges).

44. See Glenn, *supra* note 4; H. Patrick Glenn, *Le droit comparé et la Cour suprême du Canada* in MÉLANGES LOUIS-PHILIPPE PIGEON 197 (1989).

45. For superior court abstention in exercising *habeas corpus* jurisdiction in federal immigration matters, see, e.g., Peiroo v. Canada (Min. of Employment & Immigration) (1989) 60 D.L.R. (4th) 574; and for superior court abstention in constitutional challenges, see Reza v. Canada, [1994] S.C.R. 394 and Reference re Legislative Authority over Bypass Pipelines, 64 O.R. (2d) 393 (1988). The Federal Court will also stay proceedings in respect of a claim against the Crown where the Crown wishes to institute a counterclaim or third-party proceeding in a provincial superior court. *See* Federal Court Act § 50.1. For the preclusive effect of Federal Court proceedings on parallel superior court proceedings, see Rocois Constr. Inc. v. Dominion Ready Mix Inc., [1990] 2 S.C.R. 440 (Can.).

V. CONCLUSION

Which problems of the variable court structures that have been examined are the better problems? Probably those one knows best. Solutions may thus be imagined and may appear, at least in the short term, to be workable. There probably are no solutions, however, to the problems of providing adequate judicial resources in the liberal, democratic, and complex state. To inexhaustible demand are added the complexities of federal and confederal structures and none of the jurisdictions examined here is immune from these. Divided justice is not, therefore, an ideal or evident solution in any jurisdiction. This flows ultimately, perhaps, from the fact that the administration of justice is a more difficult process than the making of laws.