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The Proposed Section 96B : An Ill-Conceived Reform Destined to Failure

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Article abstract

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L'article 96B semble déficient et mal rédigé. La promulgation de cet amendement entraînerait une multiplication de tribunaux inférieurs dont la structure laisserait à désirer en plus d'encourager une vaste distribution de juridictions ainsi qu'une délégation subjective de pouvoirs. Même si l'on croit que l'article 96B(2) protège les attributs distinctifs des cours supérieures, la porte est néanmoins ouverte aux provinces pour exploiter l'amendement. Il en découlerait une politisation accrue des cours supérieures.

Les articles 96 à 101 de la *Loi constitutionnelle de 1867* ne procurent pas une garantie constitutionnelle de l'indépendance judiciaire. L'auteur, après avoir étudié l'amendement 96B, conclut qu'il ne peut être considéré sérieusement comme étant une solution valable aux problèmes soulevés par ces articles.

The Proposed Section 96B: An Ill-Conceived Reform Destined to Failure **

Roderick A. MACDONALD *

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** This essay is a revised version of a speech delivered under the title « L'article 96B: une réforme mal conçue qui suscite de faux espoirs », on March 30, 1984 at the Conference on *The Reform of Federal Institutions.*

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Introduction

The fact that section 96 of the *Constitution Act, 1867* has recently become one of the most litigated provisions of the statute is no great surprise to constitutional and administrative law zealots [1]. Other legal scholars, however, must see a certain perversity in the fact that a text stating simply « [t]he 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 » should give rise to so much controversy. Similar language in respect of appointment to the Senate [2] has generated hardly any judicial (as opposed to political) disputes [3]. Yet, in this very

1. The jurisprudence and doctrine on section 96 are vast. For a brief review see, most recently, the papers by Professors Pépin and Duplé in this issue of the *Cahiers de droit*. See also *infra*, note 5.

2. 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. »

The language of sections 24 and 96 is to be contrasted with that of sections 58 and 66 which provide, respectively, for the appointment of Lieutenant-Governors and Administrators not by the Governor General, but by the Governor General in Council. The difference, although probably insignificant today, is in my view important for an understanding of the underlying political structure of section 96.

3. See, for rare examples of litigation in respect of the Senate, *Reference Legislative Authority of Parliament to Alter or Replace the Senate*, (1979) 102 D.L.R. (3d) 1 (S.C.C.); *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.). See also R.A. MACKAY, *The Unreformed Senate of Canada* (rev. ed.) Toronto, McClelland and Stewart, 1963, and compare E.A. FORSEY, *Freedom and Order*, Toronto, McClelland and Stewart, 1974, p. 227 on the question of provincial Upper Houses.

observation lies much of the explanation for what has come to be known as the « section 96 problem ».

While both Senate and superior courts were seen as national institutions, their projected roles have not been realized as originally conceived. The Senate was designed to perform a political role, in part reflecting provincial and regional concerns on the national scene; today it functions in fact largely as a non-political body. By contrast, the senior judicial tribunals (and especially the superior courts) were conceived initially as non-political institutions, committed to preserving the « objective » values of the Rule of Law; yet over the years they have become one of our most politicized governmental organs. The dissipation of the Senate's political role produces little more than cries for its abolition. But our belated recognition of the political structure of adjudication generates significant controversy. For there are few events more traumatic for a constitutional state than the delegation of manifestly political prerogatives to a body structurally inapt to exercise them.

Compounding what sociologists would characterize as the cognitive dissonance evoked by the changed role of the superior courts is the ideology of legal liberalism, which ascribes to the senior judiciary an independence and neutrality not immediately evident to certain observers of its work. For example, where the consequence of the ordinary exercise of a national institution's powers is the frustration of *bona fide* provincial legislative initiative, suspicion of partiality is understandable. What is more, the level of government least in need of a constitutional escape hatch (given its ordinary jurisdiction) is that which is permitted, *via* section 101, to overcome any restraints arising from section 96.

These observations suggest why the current volume of section 96 litigation surprises few experts. But other contemporary developments relating to the section are genuinely perplexing. The unwillingness of the federal government to take a tough stand on the constitutional principle enshrined by section 96, the seeming duplicity of some provincial administrations in arguing for flexibility in its application, and the frequently erratic behaviour of the judiciary itself (including the Supreme Court) in interpreting section 96 are only the three most evident elements to this puzzlement.

By far the most intriguing non-judicial development of recent years in this field, and certainly that which most clearly illustrates each of the confounding elements in section 96 speculation, is the proposal advanced in the Discussion Paper, *The Constitution of Canada: A suggested amendment relating to provincial administrative tribunals*[4]. This document argues, as a

4. Supply and Services, Canada 1983, Cat. No. J2-47/1983.

partial solution to the « section 96 problem », for the addition of a section 96B to the *Constitution Act, 1867*. This section would provide :

> 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.

While much could be said both about the reality of the alleged section 96 problem and about the possibility or desirability of amending this section at all, the remarks which follow will be restricted to a critique of these most recent federal proposals. Much sophisticated empirical work needs to be done before anyone can confidently assert that the existing section creates insoluble problems of public administration. More importantly, one would think that any proposals for reforming section 96 should call for a thorough re-examination of all the Judicature sections of the Constitution. In other words, absent an analysis of the nature of adjudication, of legal normativity and of the basic theory of the modern federal state one cannot say either that there is, in fact, a section 96 problem, or that, if there is a problem, it is the one politicians are arguing about. It follows that any reform of section 96 must be preceded by considerably more than a simple reconsideration of federal/provincial relations in matters of Judicature ; for section 96 primarily raises issues of constitutional theory and legal ideology, not issues of federalism [5].

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5. One might refer to discussions in *The Federalist Papers* nos. 78–83, R.B. UNGER, *Law in Modern Society*, New York, Free Press, 1976, and the essays in D. KAIRYS, *The Politics of Law*, New York, Pantheon Books, 1982 for development of this theme. See also D.P. JONES, « A Constitutionally Guaranteed Role for the Courts », (1979) 57 *Can. Bar Rev.* 669.
My colleague Suzanne Birks argues in an article forthcoming in the *McGill Law Journal* that there is a marked difference in the approach of Quebec and non-Quebec commentators. For non-Quebec scholars section 96 has not been perceived as much of a problem, especially because its major impact has been in the area of administrative tribunals : see P.W. HOGG, « Is judicial review of administrative action guaranteed by the B.N.A. Act? », (1976) 54 *Can. Bar Rev.* 716. In Quebec, however, quite the reverse is true because, starting with Duplessis' abolition of the County Courts in 1953, section 96 has impeded the provincial government from enlarging the jurisdiction of the Provincial Court so as to make it a quasi-Superior court : see G. PÉPIN, « Chronique », (1978) 38 *R. du b.* 818.
This point was first made by B. LASKIN, « Municipal Tax Assessment and Section 96 of the B.N.A. Act : The Olympia Bowling Alleys Case », (1955) 33 *Can. Bar Rev.* 993, and seems to explain, more or less, the approval of tribunals in *Dupont, Mississauga, Tomko*, and *Massey-Ferguson*, but the disapproval of courts in *Victoria Medical Building, Chicoutimi, Farrah,*

To initiates to the 20th century processes of Law Reform as a field of inquiry separate from Constitutional amendment, there can be little doubt the 1983 federal proposals should be typecast as « bad » law reform [6]. Indeed, criticism may be pitched at three different levels : the proposals are no more than a legislative band-aid — incomplete and insensitive to the sociopolitical context into which they are to be projected ; they are also constitutional in character — once enacted they will be protected by various manner and form requirements designed to impede amendment ; lastly, they are simply flawed from the point of view of legal technique — the distinctions which it is necessary to draw in order to apply these proposals to actual controversies can be sustained neither in theory nor in practice.

In what ways may it be said that the MacGuigan proposals are no more than a temporary or stop-gap solution to the most obvious difficulties posed by recent judicial interpretations of 96? One might essay a response by noting that, generally speaking, section 96 has been invoked to limit provincial legislative authority in three main areas : the conferral of jurisdiction (i) upon provincial family courts, (ii) upon provincial court judges in matters relating to the criminal law, and (iii) upon provincially-created administrative tribunals.

Not surprisingly, where the authority of provincial courts is in issue, various *modi vivendi* have been negotiated. Today, Unified Family Courts and Unified Criminal Courts seem to have accommodated most provincial concerns in two of the three section 96 problem areas. In other words, except in Quebec there does not seem to have been a general dissatisfaction with the underlying premises of section 96 whenever it affects what are, in essence, judicial tribunals [7]. The professional ideology of lawyers apparently compensates for the natural competitiveness between provincial and federal offices of the Attorney-General.

Crevier, Reference re Family Relations Act and *McEvoy*. Section 96 is invoked not by a federal body for the express purpose of limiting provincial autonomy, but rather by a judicial body anxious to maintain its hegemony. The issue, as the assault on the Federal Court through *Quebec North Shore, Law Society of B.C.* and *l'Anglais* confirms, is primarily one of legal and constitutional theory, not federalism.

6. The criteria by which law reform initiatives should be judged are elaborated in R.A. SAMEK, « A Case for Social Law Reform », (1977) 55 *Can. Bar Rev.* 409.

7. As an aside, it may be that a certain judicial realism by the Supreme Court in the accretion of the monetary jurisdiction of the Quebec Provincial Court, which now has a monetary jurisdiction of some $15,000, has prevented these questions from becoming an issue in Quebec where ordinary judicial-type jurisdiction is in issue : see *Reference re : Constitutionality of the Act Respecting the Jurisdiction of the Magistrate's Court*, [1965] S.C.R. 772. It should be noted, however, that the continuing attempt to use the Provincial Court in

As currently drafted, section 96B addresses only the third major area where judicial interpretations of section 96 have generated extensive litigation. It proposes an exception to section 96 where a provincial administrative tribunal is created. This, of course, perfectly illustrates the band-aid nature of the reform : law reformers simply ask « what elements of the interpretation of section 96 are most problematic ? » and then they attempt to carve out an exception to the section to deal with them. Nowhere is an effort made to get at the underlying disputes of which section 96 litigation is merely symptomatic. Surely, when the legislative, as opposed to contractual (*i.e.* intergovernmental accord) or judicial (*i.e.* the law « working itself pure »), mode of law reform is employed, a more thorough analysis and justification of suggested amendments is indicated.

The fact that these proposals necessarily will have a constitutional character gives rise to a second, closely-related, basis for criticism. At the best of times, constitutional amendment is laborious and fraught with unexpected diversions. Today, as those who have tried to work their way through the labyrinth of amending formulae set out in the *Canada Act* surely would acknowledge, one ought to be even more reticent about entrenching housekeeping proposals into a basic constitutional document. Yet, far from displaying the greater constitutional maturity which supporters of the *Charter of Rights* confidently predicted would emerge upon adoption of the Trudeau package, the proponents of section 96B simply repeat what has become the Canadian penchant for treating a constitution like an ordinary statute. The amendment is written in jargon, invites rote interpretation and encourages haphazard re-amendment.

If there are indeed problems of public administration flowing from certain Supreme Court decisions concerning the bearing of section 96 upon provincial administrative tribunals (and assuming this problem to be recognized by both federal and provincial governments, as opposed to being merely a provincial peeve) can there not be solutions to these specific problems which avoid recourse to constitutional amendment ? For example, to overcome the perceived unworkability of the result reached in the *Residential Tenancies* case [8] any one of at least three avenues are open : a Residential Tenancies Commission on the model of the Unified Family Court could be established ; an expedient similar to that put in place for

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Quebec as an appellate administrative tribunal evidences dissatisfaction with the implications of section 96 for judicial bodies. Moreover, certain other provincial Attorney's General, notably Mr. McMurtry of Ontario, are unhappy with the current situation even in respect of family courts.

8. *Reference re Residential Tenancies Act*, (1981) 123 D.L.R. (3d) 554 (S.C.C.).

Mechanic's Liens evaluations (*i.e.* the delegation of certain fact-finding tasks to officials who then report to a federal nominee) could be adopted; or a separate division of the Supreme or County Court of Ontario, whose members would be jointly nominated by federal and provincial governments could be instituted. Until a global reconsideration of the judicial power is undertaken, it is better to deal with problems arising from section 96 discretely and through consensus, rather than through constitutional amendment of a general legislative character.

These proposals may also be criticized from the perspective of legal technique. Section 96B suffers the two recurrent afflictions of modern legislative law reform : historicism and intellectualism. The historicist fallacy involves the unthinking projection of current understandings and preoccupations onto past events and prior texts. In my view, the apparent willingness of federal authorities to modify the constitution in the manner suggested by the MacGuigan proposals (especially as the amendment is explained in the Discussion Paper) may be attributed to an historically inaccurate interpretation of section 96. By not appreciating (from the perspective of 1867) why section 96 was formulated in its exact terms, one misses the political reality which led to its original enactment, and the diversity of values it enshrines.

The vice of intellectualism is a paradox, for it does not mean that the proposals are too theoretical. Quite the contrary. Intellectualism describes the act of positing concepts and categories which are incoherent, and the process of adopting dichotomies which are false, both usually on the basis of insufficient theoretical investigation and rigour. The vice is neatly encapsulated in the axiom : the idea which is good in theory but bad in practice, is bad in theory. In the case of the MacGuigan proposals, intellectualism results in a text which requires the drawing of unworkable distinctions.

Any one of the above concerns should counsel prudence in the pursuit of the reform of section 96 proposed in the Discussion Paper. However, the political reality in Canada today is such that neither of the first two lines of criticism are likely to be of much moment. I shall, therefore, limit my remarks to what may be termed an historical and jurisprudential analysis. This is not because I believe that even this third type of critique will have any influence upon federal decision-makers. Rather I do so because its absence in the past has permitted debate to proceed at such a low level that proposals as seriously flawed as those now on the table can be put forward seriously [9].

9. For similar comments in a slightly different context see S.A. SCOTT, « Bill C-60 : or, how not to draft a constitution », (1979) 57 *Can. Bar Rev.* 587.

1. Understanding Section 96: Historicist Fallacies

It is currently fashionable in legal circles to advocate a new mythology of section 96. The *Charter of Rights* has given impetus to this fashion, and the Discussion Paper accompanying the federal proposals repeats uncritically the revisionist dogma. Two main themes recur is this modern analysis: first, the conception that the basic policy originally sustaining the enactment of section 96 was the protection of civil libertarian values, and in particular, the independence of the judiciary; and second, the view that section 96 was intended to operate as a restraint upon the provincial *and federal* governments, balancing their authority in matters of Judicature. In my view, both these perspectives are false, and contribute to the current confusion about how best to reform section 96.

1.1. Judicial Independence

Since first announced systematically in 1956[10] the view that the Governor General's appointing power under section 96 is part of a constitutional structure which guarantees judicial independence has attracted several adherents[11]. In this section I do not argue either for or against the desirability of a constitutional guarantee of judicial independence; I claim only that, as a matter of practice, section 96 *et seq* do not provide such a guarantee, and that, as a matter of historical interpretation, they were not primarily intended to do so (at least in the sense that modern glossators assert).

The thesis relating section 96 to modern conceptions of judicial independence is purely formal. 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. Of course, there is some justification for this view (as the struggle leading up to the *Acts of Settlement* in 1701 attests), and on occasion the Privy Council[12] and the Supreme Court[13] seem to have said as much. But the reality is far more subtle than many contemporary observers are prepared to acknowledge. Long before the Berger[14], Drury

10. See W.R. LEDERMAN, « The Independence of the Judiciary », (1956) 34 *Can. Bar Rev.* 769 and 1139.
11. See most recently R. ELLIOT, « Constitutional Law — Judicature — Is Section 96 Binding on Parliament », (1982) 16 *U.B.C. Law Rev.* 313; G. LEHOUX, « L'arrêt McEvoy », (1983) 14 *R.G.D.* 169.
12. *Martineau & Sons v. Montreal*, [1932] A.C. 113.
13. *McEvoy v. A.G.N.B.*, (1983) 148 D.L.R. (3d) 25 (S.C.C.).
14. For complete documentation on the *Berger* affair see (1983) 28 *McGill L.J.* 378.

and Ouellet affairs made the point obvious, instances of political interference in particular judicial processes were not infrequent. What is more, the politics of the judicial appointment process have been well understood for many years; the current round of patronage is merely a particularly egregious example.

In other words, proponents of the judicial independence thesis are engaged in a neat play on words: to be sure, the ideology of adjudication is such that direct political interference in the decision of actual controversies is impeded; but sections 96 *et seq* explicitly enhance a particular ideological bias. Only a complete failure to consider this reality can explain the following pronouncement of the Supreme Court:

> 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, 1982* and cannot have less importance and force in the administration of criminal law than in case of civil matters. Under the Canadian Constitution the superior courts are independent of both levels of government. The provinces constitute, maintain and organize the superior courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867* guarantee the independence of the superior courts; they apply to Parliament as well as to the provincial Legislatures [15].

Surely, given constitutional convention, appointment by the Governor General is not today a particularly ironclad guarantee of judicial independence in the sense of political or ideological neutrality. What is more, in my view section 96 was intended precisely to ensure ideological non-neutrality.

Adherents to the judicial independence thesis also justify their claim through an appeal to the complementary Judicature provisions of the Act of 1867, sections 97–100. But again, the requirements of these sections are merely formal. 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.

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15. *Supra*, note 13, p. 38.

Nevertheless, modern theorists need not offer empirical support for their teleological claim about section 96. The section may simply have failed in its purpose. On the other hand, and this is the gravamen of the present discussion, the ascription of a civil libertarian objective to the Judicature sections of the *Constitution Act, 1867* hides important elements of the context within which the statute was enacted [16]. If there were indeed a political dispute relating to the judiciary in 1867, it was not found primarily in liberal notions of the tri-partite state and borrowed notions of federal balancing ; it was rather to be found in the struggle for popular and responsible government — the irony being that section 96 is evidence that this particular struggle was lost, not won, by the 19th century civil libertarians.

Modern analysts who see section 96 as a protection against the hegemonic power of Family Compact or Chateau Clique conveniently forget who, in fact, were supporting the federation, and who were especially desirous of a legislative union. Far from an attempt to break the power of local oligarchs, the Judicature sections of the Act of 1867 reflected an opposite goal. Among the main objectives of sections 96–100 was the desire to insulate the appointment of superior court judges from the ravages of unbridled democracy, be this reflected in the election of judges or the exertion of local pressures upon the judiciary, or be this in an assertion of Parliamentary control. Various structural features of the *Constitution Act, 1867* illustrate this ambition : appointment by the Governor General alone, (that is, neither appointment by the Governor-in-Council, nor the Lieutenant-Governor-in-Council, nor election by the populace) consolidates executive power ; the requirement that salaries be fixed by Parliament (rather than paid through fees of litigants, or from local coffers) helps insulate the courts from the pressure exerted by their clientele, and the demands of the marketplace ; and the joint address process is a mechanism for diluting the power of the elected House of Commons with the voices of « rationality and conservatism » of the appointed Senate, as well as for distancing judicial employment from municipal squabbling.

The defect of much modern thinking about section 96 is (i) its preoccupation with reading into the Judicature provisions of the Act of 1867 an abstract, but sophisticated, late 20th century liberal view of judicial independence, and (ii) its ignorance of the other political values promoted by

16. See the selections in P.B. WAITE, *The Confederation Debates in the province of Canada*, Toronto, McClelland and Stewart, 1963. For a detailed account of the events leading up to the enactment of section 96 see W.A. ANGUS, « Judicial Selection in Canada — The Historical Perspective » (unpublished paper delivered to the Annual Meeting of the Canadian Association of Law Teachers, June 10, 1966).

the sections. Far from consecrating a conception of judicial independence grounded in the separation of executive and judicial functions, section 96 served to consolidate political authority by ensuring the ideological commitment of the senior judiciary to traditional values such as private property, fault-based liability and markets [17].

1.2. Balancing Federal and Political Judicature Powers

A second revisionist perspective of the Discussion Paper is revealed in its claim that the « dual regime, where both orders of government are involved in the operation of the superior, district and county courts, strengthens the appearance of independence of these courts. » [18] Like the misreading of section 96 which re-interprets the nature of the Governor General's role in the appointment process this analysis also flows from a latter-day conception of what the section ought to have been designed to accomplish.

To begin with, one might ask precisely how a dual appointment regime serves the interests of judicial independence? Certainly recent events in Saskatchewan illustrate the use of the provisions of section 92(14) respecting the « constitution, maintenance and organization » of courts to precisely the reverse effect, namely to politicize the process doubly [19]. Unless one claims that, by definition, all possible political interests are exhausted in the positions taken by the two levels of government, and that, also by definition, compromise between all possible political positions means that a process becomes de-politicized (both highly dubious propositions), the enhancement of judicial independence hardly can be viewed as a consequence of the dual appointment regime.

There is yet another, and perhaps less sincere, claim which is made for the dual system. Proponents suggest that it reflects and promotes the values of federalism (in particular a sharing of political power between national and provincial governments) without, at the same time, committing Canada to the confusions of a truly dual court system, as in the United States [20]. No doubt the maintenance of an omnicompetent superior court of general

17. I have discussed this idea at length in « Regulation by Regulations in Canada Since 1945 » a paper prepared for the Royal Commission on the Economic Union and Development Prospects for Canada.
18. *Supra*, note 4, p. 1.
19. I refer, of course, to the government's refusal to authorize the appointment of new Superior Court justices because it is dissatisfied with its role in the selection of such judges.
20. *Supra*, note 4, p. 7.

jurisdiction preserves the facade of a unitary court system. But, one might well ask, how is our current system of multiple administrative tribunals, each with exclusive original jurisdiction, different from the dual court system prevailing in the United States? That is, there is no functional distinction to be drawn between the apportionment of jurisdiction through judicial review applications and the apportionment of jurisdiction as between state and federal courts by the Supreme Court. What is more, Parliament itself took a large step towards the creation of a dual regime when it established the Federal Court.

One might also note that, if a dual regime truly enhances the values of federalism to the extent claimed, surely these virtues are equally worthy of protection in the lowest provincial courts (such as Small Claims Courts), as well as in the highest federal courts (including the Supreme Court). To my knowledge, federal proponents of the dual appointment regime typically do not make any such claims. The Discussion Paper also intimates that any dual regime which dissociates appointment and judicial organization is the natural perfection of a Judicature system. To test this assertion, one might speculate whether federal policy-makers would so exalt the wisdom of the present system if the Lieutenant-Governors were to appoint superior court judges and Parliament were to constitute, maintain and organize the courts.

Adulation of the existing dual regime for the reasons given by federal authorities also misses the original significance in the titulary of the appointing power. This power was not placed in the Parliament's hands, nor even assigned to the Governor in Council. It was, and is, exercisable by the Governor General, in his own name. Of course, in 1984 this means that the Prime Minister effectively controls the appointment process, but the theory of section 96 remains unchanged. The dual regime had almost nothing to do with the division of *legislative* authority between federal and provincial Parliaments, and very little to do with the distribution of *executive* powers between provincial and federal governments. It was intended to keep the process of appointments to senior judicial offices firmly in the hands of the most reliable executive actor. After all, the Governor General is the Queen's direct representative and is named by her, unlike the Lieutenant-Governors, who are nominated by the Governor-in-Council [21].

Finally, the Discussion Paper makes the dubious claim that section 96 was designed to balance federal and provincial authority in respect of the judicial power. Whatever may be the case in 1984, now that the Supreme

21. The irony is that, in trying to balance concerns for judicial independence and federal duality, the vesting of authority in the Governor General does not really achieve either goal.

Court has rewritten the Judicature provisions of the Act of 1867 [22] and taken on its *Charter of Rights* jurisdiction, it is surely the case, upon an ordinary reading of the *Constitution Act, 1867*, that far from an equalization of powers, a preponderance was to be accorded to the federal authority in both the distribution of legislative powers and the establishment of the judiciary [23]. To compare the scope of sections 91 and 92 is to show where legislative hegemony was thought best to lie. Moreover, sections 56, 90 and 95 are conclusive evidence that federal authority (be it the Governor-General or the Parliament of Canada) was to be accorded both a veto on provincial enactments (sections 56 and 90) and a pre-emptive right on certain elements of provincial legislative competence (sections 94 and 95).

In matters of Judicature, sections 93, 94, 96 and 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 upon nominations to senior judicial positions and section 101, in combination with the opening provisions of sections 91 and section 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.

In other words, given its interrelationship with other Judicature provisions, section 96 should not be seen as intended to impose equal restrictions on both federal and provincial legislatures. The proponents 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. Today, the federal Parliament may deploy section 101 to create its own courts to administer its own laws. While the provinces may do likewise under section 92(14), the office holders of superior and county courts must remain as federal nominees under section 96. Finally, until the *McEvoy* decision, it was undoubted that Parliament had authority to delegate jurisdiction to administer statutes passed under section 91 to anyone it pleased, without the necessity of establishing a section 101 court [24]. Whatever may now be

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22. See in particular, *Quebec North Shore Paper Co. v. C.P.R.*, (1976) 71 D.L.R. (3d) 111 (S.C.C.); *McEvoy v. A.G.N.B.*, (1983) 148 D.L.R. (3d) 25 (S.C.C.); *Canada Labour Relations Board v. Paul l'Anglais*, (1983) 146 D.L.R. (3d) 202.

23. This point is trite, in respect of legislative powers: see R.M. DAWSON, *The Government of Canada*, 4th ed., Toronto, University of Toronto Press, 1963, p. 30–32.

24. The paradox of *McEvoy*, the holding of which seems directly at odds with this third proposition, is that it points the law down a patch which is analytically tortuous. For example, does the case mean that provincially appointed judges can no longer sit on extradition matters? And why is it that provincial judges may, in the exercise of their

desirable in view of the changed relationship between Prime Minister and Governor-General, and the advent of the *Canadian Charter of Rights and Freedoms*, it was not the case in 1867 that the provinces struck a deal which imposed restrictions upon the central authorities analogous to those implied by section 96, or that they saw the dual regime as an example of federal balancing.

1.3. Section 96 Reconsidered

There is always a danger in recalling sinners to the true way, and it is not my purpose here to claim that values such as judicial independence and equal restraint upon both federal and provincial authorities in matters of Judicature are unworthy. Nor do I pretend that courts have not bought the new rhetoric of section 96. Least of all do I claim that the *Charter of Rights* has not altered the structure of Judicature in such a way that the agenda ascribed to section 96 by revisionist theorists has now been assured. What is distressing, however, is that the federal proposals set out in the Discussion Paper appear to be based solely upon this revisionist dogma. To accept these modern claims is to ignore the variety of purposes served by section 96; and to ignore these multiple purposes is to invite false prescriptions for overcoming its defects.

A simple example will illustrate the dangers of historicism. Imagine that the Parliament of Canada wishes to reconsider the scheme of Family Allowances. How different proposals for reform would be if the prime purpose of the scheme were held to be « subsidy of children » (as it is today), rather than « stimulation of post-War consumer spending » (as it was in 1945). It may well be that it is no longer necessary to stimulate consumer spending, but to fail to take such an objective into account is certain to produce reforms which have unexpected consequences [25].

In light of their explanation of the purposes of section 96, one wonders if the federal proponents of section 96B truly understand the remarkable shifting of political power which their proposals may well bring about. Even though we live in an era far removed from the context in which it was

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absolute jurisdiction under the Criminal Code, sit on cases where persons may be incarcerated for up to five years, while in civil cases the limits of provincial jurisdiction end in many provinces with the Small Claims courts? Of course, in Quebec, the absence of County Courts permits the legislature to bump the jurisdiction of the provincial court to $15,000, but still, who would trade $15,001 for five years in prison?

25. An excellent jurisprudential discussion of this problem may be found in L.L. FULLER, *Anatomy of the Law*, New York, The New American Library, 1968, p. 36-39. See also, GORDON, « Historicism in Legal Scholarship », (1981) 90 *Yale Law Journal* 1017.

originally given, the counsel of Bishop Hoadly has a contemporary ring: not he who first made the law, but he who interprets it is the true law-giver. While one may decide that the entrenchment of liberal notions of judicial independence in the Constitution is a desirable objective, to do it by way of an amendment which undermines judicial power seems somewhat paradoxical.

2. Understanding Section 96B: Intellectualist Misconceptions

Even were one ready to accept the revisionist formulation of the original purposes of section 96 set out in the Discussion Paper, and even were one, in consequence, well disposed towards the objectives of the proposed amendments, there is no escaping the conclusion that section 96B is a failed attempt at legal and constitutional reform. This failure occurs because three false juridical distinctions underlie these proposals.

First, the distinction between courts and tribunals, upon which the applicability of section 96B(1) turns, presupposes, incorrectly, that a system of legal ordering reflecting an idealized version of the Rule of Law may be differentiated from one resting upon what has been stigmatized as the Rule of Men. Second, the supervisory control elaborated in section 96B(2) is contingent upon the finding of jurisdictional error, which assumes, also incorrectly, that there can be a rational test for distinguishing between jurisdictional error and mere error of law. Third, the supervisory jurisdiction itself takes for granted the inevitability of an omnicompetent superior court, which belief depends on the questionable view that, as adjudicative bodies, superior courts have various innate attributes not shared by any other type of judicial tribunal.

Each of the above beliefs is, of course, a product of a particular vision of the constitution popular about eighty years ago. Given its context, it is not surprising that this vision should have become so dominant. Nevertheless, this vision is wrong, and in the subsections which follow the consequences of its erroneousness will be explored in relation to the proposed section 96B.

2.1. The Rule of Law and the Rule of Men

Fundamental to the scheme envisioned by section 96B(1) is the drawing of a distinction between « real » courts and « administrative » tribunals. For the proposal does not contemplate correcting all problems with section 96, but only those relating to the « implied limitation on the power of provincial legislatures to assign functions to administrative tribunals. » To understand

the suggested distinction between courts and tribunals it is necessary to exhume 19th century legal theory.

One of the pillars of Dicey's constitutional edifice is the distinction between the Rule of Law and the Rule of Men. For Dicey, the Rule of Law required that « 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. The Rule of Men, by contrast, was an epithet attaching to all exercises of decision-making powers resting on discretion, policy and arbitrariness (*e.g.* 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). It is obvious that the omnicompetent superior court of section 96 is, under Dicey's conception, a Platonic form of the judicial tribunal bound by the Rule of Law, while the administrative tribunal exercising statutory discretions is its antithesis.

It is impossible in this short essay to demonstrate in the smallest detail the variety of defects in this understanding of law and the judicial power. Moreover, others have done so at great length[26]. Nevertheless, two of Dicey's assumptions are particularly relevant to the present question and can be explored with profit. First of all, Dicey seems to hold that a society generates a legal system only through the ordering processes of legislation and adjudication. For him, a proper legal system presupposes a clear separation between legislative and judicial functions : 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. Modern social theorists know, however, that both aspects of this view are oversimplifications. Societies may be bound together by a variety of other ordering processes such as custom, contract, property regimes, mediation, resort to chance, and so on ; and no process (not even adjudication in its most pristine form) can ever be neutral and objective in the sense Dicey intended.

In other words, not only is the decision to have recourse to any given social ordering mechanism such as adjudication the product of a political choice, but political choice pervades the operation of each of these processes. There is nothing natural or necessary about legislatures and courts as social institutions. Nor is there anything necessary about pretending that when such a model is adopted, all political choice may be delegated to the

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26. For present purposes the best brief dissection of Dicey is that undertaken by H.W. ARTHURS, « Rethinking Administrative Law : A Slightly Dicey Business », (1979) 17 *Osgoode Hall L. J.* 1.

legislature in order to preserve the neutrality of the courts. One might well wonder, if the Diceyan conception were really true, how to account for the entire phenomenon of the common law. Would the common law not be the product of an implicit delegation by Parliament to the courts (with no policy guidelines whatsoever) of a jurisdiction to work out, on a case by case basis, the rules of private law? And would not such a delegation be a classic example of the Rule of Men?

A second doubtful element of the Rule of Law thesis is the theory of language upon which it rests. In order that Dicey may hold that all political decision-making occurs in the legislature he has to claim that linguistic directions can be formulated in such a way as to completely eliminate decisional discretion. Whatever may be the current belief of lawyers, no philosophers of repute continue to hold this view. One also suspects that, when shown the implications of this position, neither do lawyers. Otherwise, why would they be so resistant to non-legally trained persons sitting as judges? If the legislature could formulate all its directives clearly and precisely, and if judging were nothing other than label reading, there would be little specialized content compressed into the idea of legal knowledge.

It remains to demonstrate exactly how the proposals set out in the Discussion Paper are grounded in the Diceyan conception of law and legislation. As noted, a distinction is taken in section 96B(1), between a « tribunal, board, commission or authority » and a « court ». Provinces will be authorized to delegate jurisdiction previously reserved to the superior, district and county courts only to tribunals. The Discussion Paper rightly points out that were this distinction not made, superior court authority could be undermined through jurisdictional transfers to other judicial bodies. But how is it proposed to draw this distinction? Simply by piggybacking on existing case law, which itself is grounded in Dicey's differentiation of the Rule of Law and the Rule of Men [27].

The Discussion Paper makes this point explicitly in its citation of the following paragraph from the decision in *Shell Company of Australia v. Federal Commissioner of Taxation*:

> 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

27. Representative cases showing this grounding are *Rex v. Electricity Commissioners*, [1924] 1 K.B. 171; *In re Farmers Creditors Arrangement Act, 1934*, [1934] 1 W.W. R. 535 (Man. C.A.); *Re: Ashby*, [1934] O.R. 421 (C.A.); *Re Ness and Incorporated Canadian Racing Associations*, [1946] O.R. 387 (C.A.); *Toronto Corporation v. York Corporation*, [1938] A.C. 415 (P.C.).

> 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 by another body. See *Rex v. Electricity Commissioners* ([1924] 1 K.B. 171)[28].

Moreover, the Discussion Paper continues with a classic quotation from an article by D. M. Gordon, in which the differentiation of courts and tribunals is linked directly to the distinction between law and policy. Gordon states :

> 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 ; and « administrative » tribunal, within its province, is a law unto itself[29].

The upshot of these citations is simply that the Discussion Paper assumes 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.

It is not my intention here to deny that when faced with making such distinctions, courts have by and large muddled their way through : one thinks of decisions on the availability of certiorari [30], and the applicability of the rules of natural justice [31], or the scope of section 133 of the *Constitution Act, 1867* [32]. But surely if one is going to enact a constitutional amendment in part designed to clarify the uncertainty resulting from the current language of section 96 (which itself is grounded on the same distinction) [33] it is necessary to have a better idea of the limits of the power being authorized than this pseudo-distinction seems to reveal. One does not solve an interpretational dilemma by enacting an amendment grounded in the same false dichotomy as the text originally giving rise to the dilemma.

The final irony flowing from this first defect in the MacGuigan proposals is that the distinction itself suggests an expedient, which, if

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28. [1931] A.C. 275 (P.C.), p. 297.
29. « Administrative Tribunals and the Courts », (1933) 49 *L.Q.R.* 94, at pages 106, 107, 108.
30. See *Calgary Power v. Copithone*, [1959] S.C.R. 24 ; *Saulnier v. Quebec Police Commission*, [1976] 1 S.C.R. 572.
31. See *R. v. Church Assembly Legislative Committee*, [1928] 1 K.B. 411.
32. *A.G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016.
33. This point is made most explicitly in *Lab. Rel. Bd. (Sask.) v. John East Iron Works Ltd.*, [1949] A.C. 134 (P.C.).

deployed craftily and selectively, could undermine the restriction imposed in section 96B(1). In other words, even were one able to distinguish courts and tribunals, the language of the amendment permits a reasonably inventive legislature to bring about indirectly an erosion of superior and county court jurisdiction. No doubt section 96B(1) would prevent the direct delegation of section 96 powers to the Provincial Court of Quebec or any similarly constituted judicial body[34]; but is it so clear that the proposal would proscribe the delegation of such powers to a number of administrative tribunals? For example, would it not be possible to establish a plethora of specialized private law administrative tribunals, to which are delegated broad judicial, legislative and administrative powers, all closely interrelated in a coherent and explicit policy context?

Today, provincial administrative tribunals are of two main types: quasi-public regulatory agencies such as Transport Boards, Energy Boards, Social Welfare Commissions, Municipal Commissions and so on; and specialized tribunals with extensive jurisdiction in purely private law fields such as Landlord and Tenant Law, Consumer Law, Workmen's Compensation Law, Automobile Accident Compensation Law, Labour Relations Law, Mental Incompetency, and Adoption. Heretofore, the only limit on the jurisdictional authority of these specialized private law tribunals has been that arising from section 96. Never have the courts intimated that entire areas of provincial property and civil rights jurisdiction are reserved exclusively to judicial (as opposed to administrative) tribunals[35].

To put it at its highest, there is currently no constitutional reason why a provincial legislature could not create specialized tribunals to administer, chapter by chapter, the entire Civil Code. Examples of fields of private law particularly suitable for such treatment are not difficult to conjure. Imagine a tribunal styled the Estates Administration and Family Dependant's Protection Board, to which would be delegated jurisdiction to probate testamentary dispositions, to levy succession duties, to administer the transfer of inheritances to abintestate and testamentary beneficiaries, to administer all testamentary substitutions and trusts, to evaluate claims for dependent's relief and to interpret (in the fashion of a labour arbitrator) testamentary documents. Assuming that such a Board were given sufficient

34. See *Séminaire de Chicoutimi v. Cité de Chicoutimi*, [1973] S.R.C. 681; *A.G. Quebec v. Farrah*, [1978] 2 S.C.R. 638; *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714; *Crevier v. A.G. Quebec*, (1982) 137 D.L.R. 1 (S.C.C.).

35. Of course, in the *Residential Tenancies Reference* and in the recent decision of the Quebec Court of Appeal, *Desmeules* c. *Le prêt hypothécaire et al.*, [1983] C.A. 43, the courts assert that what is reserved to section 96 courts is authority in respect of the « adjudicating relationship » where matters historically vested in the Superior Court are in issue.

administrative and legislative powers, and were permitted to develop its own procedural and policy rules within a broad policy mandate established by the legislature, (that is, assuming that its judicial-type powers were couched in an appropriate institutional setting) [36] it would be difficult not to characterize it as a tribunal rather than a court. By deploying such an expedient one could drain much of the current law of successions from the jurisdiction of the existing Superior Court of Quebec.

Of course, until now the main reason why most provinces have not undertaken such a radical reconceptualization of private law is the prohibition of section 96. Since the jurisdiction of superior and district courts simply could not be transferred to any decision-maker not appointed by the Governor General, administrative tribunals created in pursuit of the above goal either would be emasculated at the point of ultimate adjudication, or would be so structurally unorthodox as to be politically unacceptable. That is, currently, to meet the *Residential Tenancies* criteria an elaborate (or fictitious) institutional setting would have to be established.

However, because section 96B(1) would permit the transfer of even superior court jurisdiction to an administrative board or agency, the provinces will have an incentive to engage in a proliferation of non-judicial tribunals. The prohibition against delegating section 96 powers to bodies which are, formally, courts is a chimera. Once the substance of section 96 jurisdiction may be transferred to appropriately constituted provincial tribunals, the superior court has been emptied of its jurisdiction just the same [37]. And does anyone really doubt that some provinces will avail themselves of the opportunities section 96B(1) affords them?

2.2. Errors of Law and Errors of Jurisdiction

The federal proposals also rest on the view that jurisdictional errors are qualitatively different from ordinary errors of law, fact or policy. Section 96B(2) would have it that the exercise of any powers delegated to a tribunal under section 96B(1) would remain subject to superior court judicial review on the basis of « want or excess of jurisdiction ». In order to

36. See *Tomko v. Lab. Rel. Bd. (N.S.)*, [1977] 1 S.C.R. 112 and *Desmeules* for discussions of when an institutional setting is appropriate.

37. This position has been characterized by supporters of section 96B as the bogeyman thesis. One wonders, if indeed this position is implausible, why the Supreme Court felt obliged to come down so firmly in *Crevier* and *McEvoy*?

appreciate the significance of this distinction between jurisdictional and non-jurisdictional errors it is necessary to recall certain basics of administrative law theory [38].

In the Anglo-Canadian tradition, one aspect of the doctrine of Supremacy of Parliament is that courts must apply the law as enacted by legislatures, assuming that the legislation is constitutionally *intra vires*. Hence, should Parliament confer jurisdiction upon a non-judicial decision-maker, the courts have no authority to question the wisdom of this choice. Moreover, should Parliament provide that the decision taken is to be final and without appeal, in deference to this wish the Courts will not entertain a consideration of a case upon its merits. The adjudicative role of the courts is limited to ensuring that the Parliamentary delegate acts within the confines of his statutory authority or jurisdiction. This supervisory function of the superior courts, therefore, presupposes the drawing of a distinction between those decisions taken within a delegate's jurisdiction and those which he has no jurisdiction to take.

Is this, in practice, a distinction which can be sustained as a prescriptive norm, or can any decision of law, fact or policy be converted into a question of jurisdiction? Let us accept, as least for the sake of argument, that there can be (i) errors of law which are not jurisdictional errors (even if they may be in certain cases subject to judicial review by *certiorari* or otherwise), (ii) errors of fact which are not jurisdictional errors, and (iii) errors of policy that do not amount to an asking of the wrong question or a fettering of discretion. It is still necessary to inquire whether this is an exhaustive or exclusive typology, or whether the same decision may be subject to several characterizations. In another place I have developed an inventory of 27 kinds of jurisdictional error recognized in Canadian administrative law [39]. With such an arsenal of weapons it is not surprising that courts are able to locate jurisdictional errors almost at will.

Moreover, as several recent Supreme Court decisions suggest, it is always possible to convert any error into an error of jurisdiction, should this be necessary to sustain judicial review where thought desirable. In other words, the complexity of modern legislative schemes, in combination with the resources of statutory interpretation now available to courts, leads to a situation where the characterization of any determination of a tribunal as erroneous, and the treatment of such error as jurisdictional has become little more than an exercise in ratiocination.

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38. For an excellent general analysis see G.E. LEDAIN, « The Supervisory Jurisdiction in Quebec », (1957) 35 *Can. Bar Rev.* 788.
39. R.A. MACDONALD, « Absence of jurisdiction : a perspective », (1983) 43 *R. du B.* 307.

It follows that, other than in the realm of pure theory, there is no valid *a priori* distinction between errors within jurisdiction and errors going to jurisdiction. As long as the parties to a dispute have enough money to engage counsel with enough ingenuity (or disingenuity) to convince a reviewing court of the seriousness of their problem, they will have access to a superior court to challenge and overturn any determination of an administrative tribunal. The distinction between jurisdictional errors and errors within jurisdiction has no prescriptive force, even if it is a convenient descriptive device.

Surprisingly, the coherence of the scheme set out in the Discussion Paper depends heavily on this distinction. Section 96B(2) provides for judicial review for « want or excess of jurisdiction » whenever a provincial legislature confers superior court authority under section 96B(1). In these cases, the supervisory function of the superior court cannot be sterilized by a privative clause. While the legal proposition enshrined by section 96B(2) is not novel[40], the federal Discussion Paper seems to reveal a rather naive conception of what courts are currently holding to be jurisdictional error. Thus, the draft would seem to restrict the concept to its pre-*Anisminic* status, even though recent Canadian jurisprudence suggests a broader view. The unfortunate choice of the expression « want or excess of jurisdiction » by preference to terminology such as « jurisdictional error » or more generally « the supervisory jurisdiction » is at the root of this problem. In consequence, while some sort of jurisdictional control may be preserved by section 96B(2), it may well not extend to all those grounds for judicial review currently recognized in Canada, including fairness. Such a possibility only reinforces earlier observations about the aleatory nature of the concept of jurisdictional error. Not only must counsel continue to engage in gymnastics to convert « errors » into « jurisdictional errors », but now they must recharacterize all « jurisdictional errors » into errors relating to some presumed sub-set thereof, « want or excess of jurisdiction ».

One is driven to the conclusion that, far from facilitating the establishment and functioning of provincial administrative tribunals, the only practical effect of these proposals would seem to be to impose a mandatory barrier to market entry. The barrier is access to expertise in legal technology and the market is judicial control by superior courts. Anyone who doubts this proposition need only consider the jurisprudence of the Superior Court of Quebec in labour relations matters. Realistically, the preservation of jurisdictional control under section 96B(2) may well turn out to be a

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40. See *supra*, cases cited at note 34 ; see also SCOTT, « The Supreme Court and Civil Liberties », (1976) 14 *Alta. Law Rev.* 103.

mechanism for the courts to take back the jurisdiction which has been given to tribunals under section 96B(1). In the process, section 96B(2) will encourage unduly complicated language in enabling legislation, and dissimulating judicial acrobatics in review judgments [41].

Notwithstanding the excessive preoccupation of recent decades with manipulating the theory of jurisdiction in order to overcome the limitations inherent in jurisdictional review *stricto sensu*, provinces wishing to delegate section 96B(1) authority to administrative tribunals may impede, if not substantially oust section 96B(2) review. To appreciate the possibilities, however, some political realism about section 96 reform is required. While provincial authorities usually claim that they seek only to enhance administrative efficiency by integrating judicial powers into non-adversarial and non-adjudicative agency processes, and to ensure that boards and commissions genuinely pursue their policy mandates by making office-holders politically accountable to the cabinet, astute observers suggest a third motive : the desire to minimize federal political interference masquerading as the Rule of Law and the independence of the judiciary [42].

Should the provinces finally decide to make this political conflict visible, and at the same time, overcome the restrictions imposed by section 96B(2), existing administrative law jurisdictional theory provides the ideal vehicle for accomplishing this goal. That is, if one takes the theories of Parliamentary supremacy and jurisdiction seriously, the practical effect of a superior court's power of judicial review can be minimized. Ironically, because the concept of *a priori* jurisdictional error is incoherent, and can be used by courts to exercise a quasi-appellate power, this incoherence permits legislatures dedicated to the task to sterilize judicial review.

A first means to exploit the limits of the theory of jurisdictional review is to infuse each element of an inferior tribunal's jurisdiction with a maximum of subjectivity. Even before the *Crevier* case brought the point back to the forefront, Rule of Law theorists lamented the opportunities presented by subjective grants of decision-making power. As noted in the McRuer Report :

> The most effective and commonly used device for limiting judicial review of action taken by a tribunal is to include subjective ingredients in the powers conferred on the tribunal [43].

41. See CANADIAN BAR ASSOCIATION, « A Response to the Minister of Justice on the Discussion Paper — The Constitution of Canada : a suggested amendment relating to provincial administrative tribunals » (August, 1983) for an analysis of this problem.
42. See MATAS, « Validating Administrative Tribunals », a paper presented to the Annual Meeting of the Canadian Association of Law Teachers, June 28, 1984.
43. J.C. MCRUER, *Royal Commission Inquiry into Civil Rights*, Report no 1, Vol 1, Toronto, Queen's Printer, 1968–71, p. 275.

In its extreme form this technique would be translated by a delegation to a board of authority to take all decisions of law, fact, policy and procedure not on the basis of any pre-existing rules, but on the basis of any factors which it, in its sole discretion thought appropriate. Of course, to be realistic, recourse to anything remotely ressembling such broad delegations is politically unthinkable in areas other than National Security or its analogues. But the point is that the control is less legal than political ; there is a significant range of subjectivity which today could pass both legal and political muster.

A second component in any scheme to restrict the scope of judicial review would be to confer substantive jurisdiction upon all tribunals in the broadest language possible. After all, there is no constitutional reason other than section 96 which prevents a provincial government from delegating to any one of its tribunals authority to make determinations in respect of every matter falling within provincial legislative power under section 92. Once again, however, even given section 96B, political realities would prevent the delegation of concurrent jurisdiction over the entire range of section 92 to every provincial tribunal. But there is a broad scope for more general (though limited) jurisdictional delegations ; the present jurisdiction of the Provincial Court and its various divisions reflects some of these possibilities.

If deployed concurrently these two manœuvres could go a long way to trivializing section 96B(2). Let me offer an extreme (and, I assume ludicrous) example to illustrate the point. Suppose a province wished to insulate a Residential Tenancies Tribunal from judicial review on grounds of want or excess of jurisdiction. It would begin by delegating to it the power to make final, non-appealable determinations in respect of all matters of provincial law under section 92 : the tribunal would be given the power to make determinations in matters of family law, property law, gifts, wills, successions, obligations, and so on, to the extent such determinations were necessary, in the opinion of the tribunal, for the proper exercise of its authority. Through such an expedient the invention of jurisdictional facts such as those found in *Re Zwicker*[44] could, in theory, be avoided.

Moreover, to overcome the problem raised in the *Bell*[45] case, where the court usurped the power of a tribunal to interpret its constituant statute, the province simply delegates to the Residential Tenancies Commission the authority to decide, in respect of each question of law sustaining its jurisdiction, the meaning of the terms enacted by the legislature. Further, so that this wide grant of authority could not be seen as a general « jurisdiction

44. (1947) 3 D.L.R. 195 (N.S.S.C.).
45. [1971] S.C.R. 756.

to determine jurisdiction » device, which would run afoul of *Crevier*[46], each of these constituent elements would be specified in detail and defined subjectively.

Again, in order to prevent the *ex post facto* judicial imposition of procedural rules such as fairness or natural justice (which, after all are merely implied by the courts when the legislature is silent) the tribunal would be expressly authorized to establish its own procedures as it sees fit, and would be exempted from following any « common law » procedural rules. The objective of this exercise is, obviously, to establish an institutional structure bearing as little ressemblance as possible to the judicial model. The more the procedures of the tribunal depart from the adversarial, adjudicative model, the less judicial implication of the *audi alteram partem* and *nemo iudex* principles is plausible.

Finally, to avoid decisions such as that taken in the *Metropolitan Life*[47] case, the tribunal must be delegated the power to determine any question which it, in its sole discretion decides is necessary for the exercise of its authority. Decision-makers would be empowered to take decisions based not only on the terms of enabling statute (which they alone are authorized to interpret) and the facts (again, which they, in their sole discretion are entitled to find) but also on the basis of any principles of equity and public policy which they, in their absolute discretion, are entitled to invent or find applicable to the case to be determined.

In this convoluted example one sees the limits of the theory of jurisdiction. By constituting tribunal jurisdiction in this fashion, only questions which have at the same time a constitutional element — that is, which raise a problem of the distribution of legislative authority under sections 91 and 92 — will be reviewable under section 96B(2). Of course, the current conception of jurisdiction will also have been emptied of all possible significance. In other words, formally there is no impediment to a province attempting a similar manœuvre. Yet it is obvious that at a certain point far short of that mooted, the court will simply intervene and invent jurisdictional error. Nevertheless, unless courts are prepared to plunge the country into a constitutional crisis, it is apparent that some lesser combination of these expedients will be successful in at least limiting superior court review even under section 96B(2). And, once again, is it to be doubted that some provinces will seize the initiative?

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46. (1982) 137 D.L.R. (3d) 1 (S.C.C.); see also R.A. MACDONALD, « Crevier v. A.G. Quebec », (1983) 17 *U.B.C. Law Rev.* 111.
47. [1970] S.C.R. 425.

2.3. Superior and Inferior Courts

The third questionable distinction reflected in the federal proposals goes to the heart of the section 96 imbroglio. Section 96B(2) provides that decisions of tribunals exercising superior court jurisdiction conferred under section 96B(1) are reviewable « by a superior court of the Province ». In other words, the distinction between inferior and superior courts continues to pervade both sections 96 and 96B. Understanding the theoretical difference between these types of court also requires some historical research.

From a functional perspective, it is usually argued that, at common law and under the *Judicature Acts*, a superior court was possessed of three exclusive jurisdictional attributes. First, the court had a jurisdiction *rationae materiae*; that is, in respect of the underlying subject matter of the case before it. Thus, jurisdiction to try persons charged with murder resides in the superior court. Second, the court had a technical and remedial jurisdiction; that is, in respect of the kinds of orders and other remedies which it could issue. Thus, the authority to grant declarations, injunctions, writs of *certiorari*, eviction orders, and so on, and the power to decide questions of law on appeal were, in principle, reserved to the superior court. Finally, the court had a jurisdiction which may be called its constitutional jurisdiction; that is, its power to determine without review the extent of its own jurisdiction. Thus, the authority to supervise the jurisdiction of all other judicial tribunals was exclusive to the superior court.

If this absolutist formulation of superior court attributes at common law were ever true, which many commentators now doubt [48], there are good reasons for questioning its applicability in post-Confederation Canada. The constitutional division of powers, the structure of sections 96 and 101, and the principle enshrined in *Valin v. Langlois* [49] suggest that the common law theory of a superior court cannot be engrafted without nuance onto the meaning of Superior Court in section 96. Thus, in recent years, when the Supreme Court has been confronted with a constitutional challenge based upon the section (*i.e.* when it must attempt to state the attributes of a superior court), it has adopted a mode of analysis which collapses these three dimensions. For example, in the *Residential Tenancies Reference* it approached the question whether a provincial tribunal was exercising superior court authority by asking:

> 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

48. See D.J. MULLAN, « The Uncertain Constitutional Position of Canada's Administrative Appeal Tribunals », (1982) 14 *Ott. Law Rev.* 239.

49. (1879) 3 S.C.R. 1.

> analogous to a power exercised by a Section 96 court at Confederation, one should proceed to step 2. Can the function still be considered a « judicial » one when viewed within the institutional 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 [50].

In other words, for the Supreme Court, the litmus test for a section 96 superior court is not related to an abstract inventory of the kinds of powers being exercised (*i.e.* is not a purely historical exercise).

But, to appreciate how the Supreme Court came to this view, let us examine the section 96 question from the former perspective. Can it be said today that there is a certain jurisdiction *rationae materiae* which is the exclusive preserve of the superior court? Since the *Residential Tenancies Reference* it would seem that provided that the inferior delegate of such powers exercises them within an appropriate institutional setting in an ancillary and limited fashion, the answer is no. As a consequence of the *Tomko* decision a similar conclusion is probably in order with respect to the remedial and technical powers of the inferior tribunals. Most types of judicial orders seem now to be within the resort of inferior bodies: injunctions, declaratory orders, contempt citations, damages actions, incarceration orders, *etc.* can now all be rendered, again given the appropriate institutional setting and their subsidiary or ancillary character. Finally, and despite the *Crevier* case, it is not clear exactly what the scope of the superintending power of the Superior Court is, and whether the power to commit jurisdictional error remains an attribute of such courts.

This last point requires some clarification. There seems to be little doubt that a line of cases commencing with the *Séminaire de Chicoutimi* decision stands for the proposition that provincial inferior courts may not exercise the superintending power. On the other hand, section 101 would seem to permit federal inferior tribunals to claim this jurisdiction. That is, even though the Federal Court is styled as a superior court, such characterization is unnecessary to sustain its judicial review jurisdiction under sections 18 and 28 [51]. The second element of a superior court's constitutional jurisdiction has been held to be its own authority to err as to jurisdiction. This, of course, is the proposition enshrined by *Crevier*. But others have argued that since

50. [1981] 1 S.C.R. 714.

51. See the *l'Anglais* decision, *supra*, note 22.

superior courts are always subject to correction by the Court of Appeal, practically speaking, they exercise a limited jurisdiction [52]. In other words, the supposed unassailable distinction between superior and inferior courts is not as clear in practice as in theory.

Because the scheme set out in the Discussion Paper contemplates creating an exception to section 96, which itself requires differentiating superior and inferior courts, it is obvious that this difficult distinction is crucial to section 96B. As noted, when provinces deploy section 96B(1) to confer section 96 powers on their tribunals, decisions of these tribunals are reviewable by a superior court. Interestingly, there is a significant difference in the wording of sections 96B(1) and 96B(2). While the appointing power of the Governor General extends to County and District courts as well as to Superior courts, and while section 96B(1) makes no distinction between these insofar as the extended power of the provincial legislatures is concerned, for some reason section 96B(2) speaks only of superior court jurisdiction being subject to review. Thus, to determine the potential exposure of a provincial tribunal to review, the proposal requires a further assessment of the jurisdiction of a superior court.

But the actual draft of section 96B raises other concerns. For example, unless section 96B(1) were to be read as actually constituting provincial authorities as a species of superior court (which is improbable given the text), section 96B(2) is probably superfluous. The Supreme Court decision in *Crevier* suggests that all provincial administrative tribunals (which necessarily are inferior tribunals) are subject to the supervisory jurisdiction of the superior courts on jurisdictional grounds. Surely it is not the intention of the drafters of section 96B(2) to distinguish between tribunals upon which superior court jurisdiction has been conferred under section 96B(1) and other provincial tribunals; namely those upon which County and District Court jurisdiction has been conferred under section 96B(1), and those upon which no section 96 jurisdiction has been conferred. For if this were the case, then the former would be subject to judicial review under section 96B(2) and the latter subject to some sort of common law judicial review jurisdiction.

It requires no great insight to see the folly of the proposal if this is the intended result. To begin with, why should the reviewability of all decisions of a provincial authority be determined on the basis that one or more of its decisions are section 96-type decisions? If we have learned anything over the past sixty years of judicial review it must be that characterization of a tribunal is a hazardous business, and should not be attempted when a

52. This point is argued forcefully in H.P. GLENN, « La responsabilité des juges », (1983) 28 *McGill L. J.* 228.

characterization of a power will suffice[53]. Moreover, to the extent that section 96B(2) review may be narrower than common law review (which the Discussion Paper suggests), this would seem to permit provincial legislatures to in fact reduce the scope of judicial review by conferring superior court powers on existing tribunals. Those who think that this latter concern is purely academic, and believe that a legislative definition of a common law concept (*i.e.* jurisdiction) is not problematic need only examine the fate of section 28(1) of the *Federal Court Act* for evidence that judicial interpretation of the two concepts of jurisdiction is unlikely to be identical[54].

Perhaps the final irony with the federal proposals is that, even were one to believe that section 96B(2) protects the most distinctive attributes of the superior Court (*i.e.* the pristine adjudicative function and the superintending power), the door is open for the provinces to exploit the amendment. Because the Act of 1867 enshrined a conception of the judicial function which is historically contingent, 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.

This suggests a means for capitalizing upon the uncertainty of the conception of a superior court. The court created in the last century was given the task of regulating conflicts between various inferior jurisdictions and deciding jurisdictional disputes between itself and inferior courts. In Canada at least, the possibility of co-equal superior courts competing for jurisdiction was eliminated by the *Judicature Acts*. Only recently, in the *l'Anglais* case, did this issue resurface. But if the proposals in the Discussion Paper are adopted, such jurisdictional conflicts could become commonplace. What would be the consequence, for example, if one of the superior court powers delegated to a tribunal under section 96B(1) were precisely the jurisdiction to determine its own jurisdiction? In such a hypothesis, and again assuming that the tribunal were not a court within the meaning of section 96B(1), it would require deft manœuvring by the pre-existing

53. The tortuous route from *Rex v. Electricity Commissioners*, [1924] 1 K.B. 171 to *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.) illustrates perfectly this point.

54. See the litany set out in G. PÉPIN and Y. OUELLETTE, *Principes de contentieux administratif*, 2e éd., Cowansville, Éd. Yvon Blais, 1982, p. 393 à 421.

superior court to ground any review jurisdiction under section 96B(2). That is, the court would have to decide that gift of the power to err as to jurisdiction is not « a matter within the legislative authority of the Province ». Should it do so, the conflict of interest built into our current theory of judicial review would then be manifest. Each time the superior court declares an inferior tribunal to have exceeded its jurisdiction, by that very act the superior court augments its own jurisdiction.

From the foregoing discussion it follows that it is possible (at least in theory) to replicate the attributes of a superior court in a provincial tribunal created under section 96B(1). In other words, even though provincial authority is theoretically limited to the creation of agencies, boards and tribunals, if these bodies may indeed err as to jurisdiction, then they may proceed to engage in essentially unreviewable judicial type activities. For upon review the role of the superior court would be limited simply to noting that the inferior tribunal was exercising jurisdiction which, but for section 96B(1), it would have no authority to assert. This is hardly a result to be applauded even by the most die-hard proponents of administrative autonomy ; yet it is exactly the result which at least some provincial governments are eager to achieve.

2.4. Section 96B Reconsidered

The proposals set out in the Discussion Paper, although interesting, are in the final analysis, ill-conceived and not well drafted. If they are promulgated in their current form, they are certain to provoke a proliferation of inferior tribunals, which will no doubt be as poorly structured as many existing administrative agencies. These proposals will also encourage broad grants of jurisdiction and subjective delegations of power. Lastly, they will induce provinces to create tribunals bearing the least resemblance possible to courts both in respect of procedures they must follow and in respect of how they must justify their decisions.

In this section various extreme examples of the type of legislative tinkering likely to be generated by section 96B were raised. In each case, the example suggested the following two conclusions : (i) should these proposals be enacted, the theory of judicial review now in place will not prevent either the erosion of superior court authority, or the suppression of judicial review ; (ii) nevertheless, at a certain point the superior courts will not tolerate this erosion or suppression and will simply strike down provincial inferior courts parading as tribunals, or invent new grounds for judicial review to control unacceptable tribunal decisions theoretically taken within jurisdiction.

But, and this is the key point, these proposals are an invitation to the provinces to try to exploit the superior courts. Politically, we cannot expect the judiciary to constantly have to react negatively in order to defend its jurisdiction by voiding popular (but excessive) provincial measures. In other words, despite the intellectualist incoherencies just reviewed, the scheme of section 96B can be made to work; courts will develop criteria for distinguishing tribunals from courts, errors of law from errors of jurisdiction, and inferior courts from superior courts. But they will do so at the cost of their own credibility, for it will be obvious that these criteria represent *ex post facto* political judgments rather than *a priori* prescriptive norms. Far from reducing the administrative and political conflicts consequent upon section 96, these proposals will politicize the superior courts even further.

Conclusion

Because proponents of reform to section 96 have never really articulated what they conceive the section 96 problem to be, it is difficult to know exactly what the object of the amendment advanced in the Discussion Paper is: are the proposals intended to undermine the hegemony of the superior courts? are they intended to permit provinces to create a vast array of specialized tribunals? are they intended to provide a legislative text upon which to constitutionalize judicial review in the manner noted in *Crevier*?

It has not been my purpose here to offer a theory of the judicial power. Yet, if one is truly interested in rethinking the regime of section 96 in order to accomplish any or all of these goals, the development of such a theory is a prerequisite. And even in a rudimentary elaboration this theory would reveal that there are much better ways of accomplishing the objective. In short, even accepting that an amendment to the *Constitution Act, 1867* is required, several alternatives seem preferable to that noted in the Discussion Paper.

First of all, one could decide that a dual court system such as that existing in the United States is to be preferred to our so-called unitary system. This, I doubt is a viable proposition. However, one could (if it is thought that the real issue is the political balance of power between federal and provincial governments) provide for a joint nomination process or, (if certain Senate reforms are ever undertaken), establish an advise and consent jurisdiction in the Senate for Superior Court appointments.

On the other hand, if the real problem is perceived to be the decapitation of administrative tribunals by the exercise of a judicial jurisdiction unsympathetic to the goals being pursued by the agency itself, one could provide for an administrative panel of the existing superior courts where all such

supervisory powers would be exercised. In some measure the Divisional Court scheme of Ontario could easily be adapted to this goal.

Third, if the problem is that judicial assumptions often confuse and undermine administrative policy, one could decide to set up a scheme of joint nominations to the upper reaches of provincial agencies. By building a judicial component into administrative boards, judges can be sensitized to the value structure of administrative law. This of course, is the strategy that has been attempted with the Unified Family Courts.

Finally, if the underlying fear which sustains superior court review is the politicization of administrative tribunals, the solution would be to extend the constraints upon the provincial government currently in place under various provincial *Judges Acts* to all major administrative agencies exercising section 96 type powers. Since guarantees relating to security of tenure, salary and jurisdiction generate an ideology of independence for courts, they should do likewise for administrative tribunals.

Because it is not clear from either the proposals or the explanation of « provincial concerns » advanced in the Discussion Paper exactly what the section 96 problem is, one is left with the suspicion that the present controversy is merely the latest round in federal/provincial jurisdictional sparring. For the claim that section 96 restricts provincial power to conceive novel solutions for legal problems has never been seriously tested : to date, what administrative scheme relying on mediational, consultative, contractual or other non-adjudicative process has run afoul of section 96? The vast majority of unsuccessful provincial initiatives have arisen from attempts to expand judicial, not administrative jurisdiction.

It is also to be remembered that section 96 challenges rarely arise in the abstract. Most cases are decided in the context of a *lis inter partes* where section 96 is seen by one side as an additional argument to advance in order to obtain a favourable decision. For this reason the argument against the section loses much of its constitutional force. What is more, judicial review addicts in the profession will soon leave section 96 behind; they have the *Charter of Rights* now to amuse them.

If, in the final analysis, it is necessary to conclude that section 96B cannot be considered seriously as a solution to difficulties posed by sections 96–101 of the *Constitution Act, 1867*, the federal Discussion Paper has at least one important merit. For the first time, it requires lawyers to reflect upon the Judicature provisions of the Act of 1867 other than as a mere incident to the jurisdiction and composition of the Supreme Court. It is essential that late-nineteenth century prejudices about courts and law now be reconsidered, and that realistic debate about the judicial function in Canada begin at last.