A CONSTITUTIONALLY GUARANTEED ROLE FOR THE COURTS

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I. *Theoretical Considerations.*

a) *The Purpose of a Constitution.*

It might be said that the purpose of a constitution is to set out both the principles and the institutions by which a country is to be governed, and that this definition in turn provides a point of reference by which to judge the adequacy of a constitution.

By this definition, the British North America Act, 1867[1] does not amount to a complete constitution. Because the B.N.A. Act was passed by the British Parliament to rearrange the government of various British colonies in North America, it is not surprising to note that most of its provisions are concerned with institutional matters such as the formation of the federation, the division of legislative powers between Parliament and the provincial Legislatures, and the continuance of the courts and the Crown. The B.N.A. Act does not enunciate broad constitutional principles, but merely incorporates them by providing that the constitution of Canada shall be "similar in Principle to that of the United Kingdom".

By contrast, most of the recent proposals[2] to update the B.N.A. Act would result in a new and completely Canadian constitution, not

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[1] 30 & 31 Vict., c. 3 (U.K.) as am., hereinafter referred to as the B.N.A. Act.

[2] The proposals considered here are:

a) The Task Force on Canadian Unity (the Pepin-Robarts Committee) established under Part I of the Inquiries Act, R.S.C., 1970, c. I-13, by order in council dated July 5th, 1977 (P.C. 1977-19'0);

b) The Constitutional Amendme it Bill tabled in the House of Commons by Prime Minister Trudeau in June 1978, including the Canadian Charter of Rights and Freedoms published under the authority of the Minister of Justice, Mr. Lang, in August 1978;

c) The Report to Parliament of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, contained in Issue No. 20 of its Minutes of Proceedings and Evidence dated October 10th, 1978 (Third Session of the Thirtieth Parliament);

d) Harmony in Diversity: A New Federalism for Canada, Alberta Government Position Paper on Constitutional Change, October 1978, including the Report of the Alberta Advisory Committee on the Constitution, October 1978;

e) Towards a New Canada, published by the Committee on the Constitution as a research study for the Canadian Bar Foundation, July 1978.

contained in a British statute, and not requiring even ceremonial action by the British Parliament for its further amendment. Thus, although in constitutional matters Canada has hitherto been a (grown-up)[3] child of the United Kingdom, the umbilical cord will now be cut and our previous symbiotic constitutional relationship will terminate. The achievement of the patriation of our constitution, however, also implies the creation of a new touchstone for Canadian constitutional law and practice, a new source of legitimacy to be found in Canada. This will presumably be the constitution itself, as a reflection of the general will of the people. Thus, while undoubtedly many of the principles and institutions of such a new Canadian constitution will reflect our heritage from the United Kingdom—as a child resembles a parent—it will now be necessary to set out these principles and institutions explicitly; it will no longer be possible merely to adopt them by vaguely cross-referencing the constitution at Westminster. This, of course, is an enormous and challenging task, which provides us with the opportunity to consider precisely which principles and institutions are essential for the government of our country. At the same time, it is important to examine the various proposals for constitutional reform to determine whether they will indeed result in a constitution which will clearly and fully articulate these principles and institutions.

b) *The Rule of Law and the Role of the Courts.*

The Rule of Law[4] is one of the greatest constitutional principles which Canada has inherited from the United Kingdom. In a narrow sense, this noble phrase implies that all governmental actions must be authorized by law, and not by administrative fiat or by arbitrary personal rule. This definition does not explain how laws are made, in what circumstances, or with respect to which matters. In particular, the narrow view of the Rule of Law does not limit the sovereignty of the federal Parliament or of the provincial legislatures to make laws within their respective areas of legislative competence; and it assumes that the courts are mere creatures of the legislative branches of government and capable of being abolished by them.[5] In a broader sense, however, the Rule of Law evokes the concept of an independent judiciary before whom the legality of all governmental action can be canvassed, and before whom private disputes can be

[3] The age of majority was obtained with the Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.) at the latest.

[4] A phrase first popularized by A.V. Dicey in An Introduction to the Study of Law of the Constitution (1st ed. 1885, 10th ed. 1959). See especially Part II entitled "The Rule of Law".

[5] See, for example, the Report of the Royal Commission Inquiry Into Civil Rights (the McRuer Commission) (Ontario, 1968), pp. 242-243; and Lederman, The Independence of the Judiciary (1956), 34 Can. Bar Rev. 769.

settled. As Professor Lederman has said,[6] "Historical evidence suggests that judicial independence is a distinct governmental virtue of great importance worthy of cultivation in its own right". This view of the Rule of Law implies that the courts' existence is constitutionally recognized and entrenched, that judges are appointed impartially and are immune from arbitrary dismissal, and that the courts have some constitutionally guaranteed jurisdiction. It is important to note that this is not the same thing as saying that the courts have a guaranteed constitutional jurisdiction; for that implies that the courts' role is restricted to merely umpiring disputes between the federal Parliament and the provincial legislatures as to the right to make a particular law.[7] Can Parliament or the legislatures prevent the courts from determining the legality of actions taken by governmental officials? Can the courts be deprived of their traditional role of settling disputes between private individuals? If there is to be a Bill of Rights, can the courts be prevented from ruling that a certain law or action is illegal because it contravenes the Bill of Rights? All of these questions are raised by the wider concept of the Rule of Law, and raise points of principle which should be articulated specifically in writing the new Canadian constitution.

It is, of course, not surprising to note that the B.N.A. Act itself does not refer explicitly to the Rule of Law. Given its function to rearrange the government of various British colonies, the B.N.A. Act only had to deal with essentially four matters touching the courts: continuing the existing courts;[8] prescribing which level of government would be entitled to legislate with respect to both the substance and procedure of criminal and civil law;[9] providing for the establishment of a general court of appeal for Canada, as well as for other courts for the better administration of the laws of Canada;[10] and prescribing who should appoint which judges.[11] In fact, the Rule of Law in a narrow sense does generally apply in Canada, but only (as mentioned before) by virtue of the general cross-reference in the

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[6] *Op. cit. ibid.*, at p. 1158, as quoted by J.R. Mallory in The Structure of Canadian Government (1971), p. 289.

[7] Indeed, one can argue that too much attention has been paid by Canadian constitutional scholars to the division of legislative powers in our federal state. See, for example, the contents of Laskin's Canadian Constitutional Law (4th ed. by Albert S. Abel, 1973), which however is accurately sub-titled "Cases, Text and Notes on Distribution of Legislative Power".

[8] Implied by ss 96, 98 and 99 of the B.N.A. Act, *supra*, footnote 1. See also subs. 92(14) which permits the provincial Legislatures to constitute, maintain and organize provincial courts.

[9] Subs. 91(27): criminal law power, including procedure in criminal matters; and subs. 92(14): procedure in civil matters in provincial courts.

[10] S. 101.

[11] S. 96.

preamble of the B.N.A. Act to the principles of the constitution of the United Kingdom. It is at least theoretically possible for either Parliament or the legislatures to abolish the courts,[12] as well as to remove various matters from their jurisdictions. To this extent, the Rule of Law exists in Canada today at the suffrance of the legislative branches. While the B.N.A. Act, therefore, provides the basis for most of our present judicial institutions, it is important to realize that it does not enunciate the principles which govern them, their jurisdiction or their relationship to other constitutional elements such as Parliament and the provincial legislatures.

How do the various proposals for constitutional reform deal with the role of the courts, and with the Rule of Law? On the one hand, it appears that all do assume that the courts as we know them today will continue to exist. However, only the Pepin-Robarts Task Force[13] and the Bar Committee[14] specifically refer to the independence of the judiciary. And only the Bar Committee attempts to define the inalienable jurisdiction which should belong to the courts under the new constitution.[15]

Virtually all of the other recipes for reform concentrate far too narrowly on specific aspects of our judicial institutions—such as entrenching the existence of the Supreme Court of Canada (whether as a court of general jurisdiction[16] or only as a constitutional court),[17] creating a constitutional Bill of Rights, or changing the method of appointing various judges. Little attention appears to have been given to stating explicitly what role is to be assigned to the courts, and how far the traditional doctrine of the sovereignty of Parliament is to be curtailed. It is submitted, therefore, that while these specific reforms may be necessary and desirable, they are not

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[12] See *McRuer, op. cit.*, footnote 5; but see Lederman, *ibid*, at pp. 1177-1178, where he states: ". . . [T]here is high authority to the effect that the basic independence of the English superior courts is a first principle of the constitution capable of withstanding even the legislative primacy of the United Kingdom Parliament itself. If it is reasonable to do so in England, by so much the more it is reasonable to do so in a federal country like Canada. The necessities of federalism simply provide additional reasons to follow the model afforded by the English judicature. Hence we may concede the legislative primacy of the federal parliament and the provincial legislatures in their respective fields and nevertheless insist on the primary and specially—entrenched place of the superior courts of the country in the function of interpreting and applying law . . . ."

[13] *Supra*, footnote 2.

[14] *Supra*, footnote 2.

[15] *Ibid*, pp. 47-61 (Part IV: Judicial Power; chs 9 and 10).

[16] As recommended by both the Task Force on Canadian Unity, p. 100 of the volume entitled A Future Together; and the Bar Committee p. 55, *op. cit.*, footnote 2.

[17] As recommended by the Alberta Government Position Paper, *op. cit.*, footnote 2, p. 11; and various other commentators.

sufficient by themselves to entrench the concept of the Rule of Law in our new constitution.

Let us now, therefore, turn our attention to the types of jurisdiction which should be guaranteed to the courts under a new constitution implementing the wider concept of the Rule of Law, and see how these are dealt with by the various proposals for reform.

c) *Entrenching the Constitutional Jurisdiction of the Supreme Court of Canada.*

One of the most obvious reforms is the need to give the Supreme Court of Canada constitutional recognition instead of its present status as a mere creature of the federal Parliament.[18] All of the proposals for reform are agreed on this point, although they differ with respect to its size,[19] the appointment of its members,[20] and its jurisdiction.[21] Nevertheless, it is important to be clear precisely why it is necessary to entrench the Supreme Court. On the one hand, it is the final court charged with the arbitration of the distribution of legislative powers between the federal Parliament and the provincial legislatures. Because the distribution of legislative powers is of critical importance in a federation, it is equally important for the

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[18] Constituted pursuant to the Supreme Court Act, R.S.C., 1970, c. S-19, as am. by R.S.C., 1970 (1st Supp.), c. 44 and by S.C., 1974-75-76, c. 18, all passed under the authority granted to the federal Parliament under s. 101 of the B.N.A. Act.

[19] The Task Force on Canadian Unity recommended (at p. 101 of A Future Together) 11 judges, 5 from Quebec and 6 from the rest of Canada; the Bar Committee recommended (p. 55) the present 9 judges, including 3 from Quebec; the Alberta Government Position Paper contemplated a panel of 40 to 50 members from which particular panels of the constitutional court would be drawn; the former federal liberal Government's Constitutional Amendments Bill would have increased the court to 11 members (clause 102), 4 of whom would have come from Quebec (clause 104). *Op. cit.*, footnote 2.

[20] The Task Force on Canadian Unity proposed (p. 101 of A Future Together) that the appointments should be made by the federal Governor-in-Council on the advice of the federal cabinet after consultation with the relevant provincial attorneys-general. The Bar Committee preferred (p. 55) to have the judges appointed by the federal government with the consent of the Judiciary Committee of the reconstituted Upper House working in camera. The Alberta Government suggested (p. 11) that the panel of the 40 to 50 members for the constitutional court would be drawn from the provinces according to population from a list submitted to the federal government by the respective provincial governments. The Constitutional Amendment Bill proposed (in clauses 102, 106 and 107) elaborate procedures for permitting the federal Governor-in-Council to appoint judges after consultation with provincial attorneys-general and ratification by the House of the Federation. *Op. cit.*, footnote 2.

[21] See *supra*, footnotes 16 and 17. Under the Constitutional Amendment Bill, the jurisdiction of the Supreme Court of Canada with respect to a "constitutional question" would be entrenched, but Parliament would have the power to determine the jurisdiction of the Court with respect to other matters. See text accompanying notes 49 to 50 *infra*.

constitution to provide for an arbiter,[22] even if an effective amending formula also provides a vehicle for amending the distribution of legislative powers from time to time.[23] On the other hand, the present Supreme Court of Canada is also the apex of our entire judicial system, which considers many questions other than the distribution of legislative powers in the federation. Merely entrenching the "umpire" jurisdiction of the Supreme Court of Canada in the constitution, therefore, does not automatically entrench any of the rest of the courts nor any other parts of their jurisdiction, and does not give full effect to the Rule of Law.

d) *Entrenching a Bill of Rights.*

Entrenching a Bill of Rights does, to a certain extent, recognize a broader note for all of the courts. The unstated premise of most[24] of the proposals for a Bill of Rights, which would effectively remove from any level of government the ability to pass certain types of laws, is the enforceability of these rights in the ordinary courts. Achieving this, however, clearly necessitates limiting the sovereignty of both Parliament and the provincial legislatures. Otherwise, either of these legislative branches could simply abolish the right of an aggrieved citizen to vindicate his guaranteed rights in court.[25] It is not enough to adopt and entrench a Bill of Rights; those rights must be effectively enforceable through the courts. This aspect of the courts' jurisdiction, therefore, should be specifically dealt with by the constitution, and not left to be dealt with by ordinary legislation passed either by the federal Parliament or the provincial legislatures.

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[22] On the other hand, it is conceivable (though probably not practical) for there to be a federal state without a court acting as arbiter of the division of legislative powers.

[23] Query: could such an amendment abolish the Supreme Court?

[24] But note the dissenting view of the Alberta Government Position Paper, which would not entrench a Bill of Rights in the constitution at all, thereby making any judicial role in interpreting any legislated Bill of Rights exist at the suffrance of the legislature or Parliament. *Op. cit.*, footnote 2.

[25] The doctrine of the sovereignty of Parliament means that it could abolish the courts entirely, or could prevent the courts from hearing various matters (which is the purpose of a privative clause). If the citizen cannot obtain a remedy for breaches of the Bill of Rights, why call them "rights"? On the other hand, various commentators suggest that Parliament or the provincial legislatures could not abolish the superior courts, for they are part and parcel of our (unwritten) constitution: see, for example, Lederman, *op. cit.*, footnote 5, at p. 1173, where it is argued that: ". . . The implication that the B.N.A. Act contemplates the continuance of provincial superior courts *with a guaranteed core of substantive jurisdiction* is of the same order [as the freedom of the press referred to in *Reference Re Alberta Statutes*, [1938] S.C.R. 100]" (emphasis added). If there is such an implied inalienable jurisdiction for our courts under the B.N.A. Act, it should be made explicit in the new constitution.

e) *General Administrative Law Jurisdiction.*

Similarly, the courts now in fact exercise an inherent power[26] to determine the jurisdiction of administrative bodies. Although Parliament and the legislatures are capable (within their respective areas of legislative competence) of depriving the courts of this power, such privative clauses in fact are construed extremely narrowly by the courts.[27] This approach pays lip service to the doctrine of the sovereignty of Parliament but arguably is out of date, particularly in light of statutory provisions such as section 28 of the Federal Court Act.[28] If (contrary to the view of certain commentators twenty-five years ago[29]) judicial review of administrative action is desirable, the right of the courts to exercise this jurisdiction should be specifically recognized in the constitution. If (contrary to this commentator's opinion) certain privative clauses are desirable, the constitution itself should spell out the circumstances in which the courts' jurisdiction can thereby be abrogated. These matters are points of principle, and should not be left to the whim of Parliament or provincial legislatures (or the advisors drafting legislation for them) on an *ad hoc* basis.

It is important to note that this general administrative law jurisdiction differs from the "umpire" role of the courts in a federal state to determine the distribution of legislative powers between the federal Parliament and the provincial legislatures. This latter jurisdiction only permits the courts to determine which level of legislature has the authority to make laws with respect to a particular matter. Having determined that question, the courts need some further authority to determine whether a particular governmental action in fact falls within a law made by that legislative body. In a sense, this general administrative law jurisdiction lies at the heart of the Rule of Law: every governmental action must be authorized by law, and an aggrieved citizen is entitled to have the legality of the action determined by an independent court. On the other hand, if the doctrine of the sovereignty of Parliament is unfettered in the

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[26] See Le Dain, The Supervisory Jurisdiction in Quebec (1957), 35 Can. Bar Rev. 788, for a discussion of the origin of the Superior Court's inherent jurisdiction in administrative law, much of which is also applicable to the superior courts of the other provinces.

[27] See, for example, *Anisminic* v. *Foreign Compensation Commission*, [1969] A.C. 147 (H.L.); *Toronto Newspaper Guild* v. *Globe Printing Co.*, [1953] 3 D.L.R. 561 (S.C.C.); *cf. Pringle* v. *Fraser* (1972), 26 D.L.R. (3d) 28 (S.C.C.).

[28] R.S.C., 1970, c. 10 (2nd Supp.). S. 28 gives the Federal Court of Appeal a broad (though not perfect) jurisdiction to review the legality of certain federal administrative matters. S. 28 is operative "notwithstanding the provisions of any other Act...."

[29] See, for example, Laskin, Certiorari to Labour Boards: The Apparent Futility of Privative Clauses (1952), 30 Can. Bar Rev. 986.

constitution, both the federal Parliament and the provincial legislatures could at any time abolish the right of a citizen to have recourse to the courts to determine the lawfulness of governmental actions. If the courts are to continue their present role in administrative law, this aspect of the Rule of Law needs to be referred to specifically in the new constitution, right alongside those provisions making the courts an "umpire" between the levels of government and those making the Bill of Rights judicially enforceable.

f) *The "Section 96 Problem".*

A related point arises out of those proposals to change section 96 of the B.N.A. Act to permit the provinces to appoint the judges of their superior, district and county courts.[30] At present, section 96 acts indirectly as a constitutional restriction on the unfettered ability of either the federal Parliament[31] or the provincial legislatures to delegate certain judicial powers. Under section 96, those judicial powers which belong to the superior, district or county courts may only be delegated to persons named by the federal Governor-in-Council. While it may be difficult to determine with accuracy what these functions are, any delegation of them to other persons is unconstitutional; and any action taken by such an invalidly appointed person will be struck down by the courts.[32] In short, section 96 of the B.N.A. Act indirectly entrenches a vague jurisdiction in the superior courts over certain "judicial" matters[33] which cannot be derogated from legislatively. In fact, the most important application of section 96 has been to strike down actions of provincial delegates who were

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[30] As suggested by The Task Force on Canadian Unity, A Future Together, p. 102, *op. cit.*, footnote 2.

[31] S. 96 refers specifically to the superior, district and county courts *in each province*, and has generally only been applied as a fetter on the ability of provincial legislatures to delegate certain judicial powers away from these courts. If s. 96 were also construed to apply to *federal* superior courts (such as the Federal Court or the Supreme Court), s. 96 would not in fact pose a serious fetter on the ability of the federal Parliament to delegate these judicial powers away from such courts: all that would be required would be for the non-curial delegate to be appointed by the federal Governor-in-Council.

[32] For a general discussion, see: Gilles Pépin, Les Tribunaux administratifs et la constitution (1969), pp. 77-319.

[33] It is unclear what test is used to determine what judicial matters so inherently belong to superior courts that they may not be delegated away. One line of authorities suggests a historical test: was this power exercised by the superior courts in 1867? Another line adopts a mere functional test: should this power be reserved to the courts? See *John East Iron Works Ltd.* v. *Labour Relations Board of Saskatchewan*, [1948] 4 D.L.R. 673 (P.C.); *Seminary of Chicoutimi* v. *A.G. (Que.)* (1972), 27 D.L.R. (3d) 356 (S.C.C.); *Reference re Jurisdiction of Magistrates' Courts*, [1965] S.C.R. 772; *Reference Re Adoption*, [1938] S.C.R. 398; *A.G. (Que.)* v. *Slanec & Grimstead*, [1933] 2 D.L.R. 289 (K.B. Appeal side); *Lucy* v. *Interbuild Development Ltd.* (1975), 48 D.L.R. (3d) 150 (Alta S.C.T.D.); and *The Corporation of the*

not appointed by the federal Governor-in-Council. Any amendment to section 96, therefore, which would permit a province to appoint such judges would necessarily also remove this fetter on the ability of a provincial legislature to delegate various judicial powers to persons other than this type of judges. Without section 96, the doctrine of the supremacy of Parliament would permit a provincial legislature—or the federal Parliament—effectively to abolish the jurisdiction of the courts. And such legislative action would remove not only particular matters (such as labour disputes or workmen's compensation) from the courts' purview, but also both appeals from these administrative bodies as well as the courts' "inherent" power to review the jurisdiction of these "inferior" delegates. Again, our new constitution should attempt to delineate what matters must go to the courts, what their jurisdiction should be, and what role they are to perform. Is there to be any limit on the type of matters which can be delegated to administrative (as opposed to judicial) bodies? These matters should not be left to ordinary legislation, but require to be dealt with in the constitution.

g) *Private Law Jurisdiction.*

This point can, of course, be made with respect to the ordinary jurisdiction of the courts to settle private disputes between citizens. To what extent is this jurisdiction to be recognized by the constitution?

On the one hand, it is probably assumed by most Canadians that every citizen[34] has the inalienable right to have his disputes with other citizens determined by an independent court. Yet this presumes that the courts' jurisdiction in these matters is itself inalienable, which is not the case if the doctrine of the supremacy of Parliament is pushed to its extreme. Again, in drawing up a new constitution for Canada, which is intended to be a complete code in constitutional matters, surely some attention must be given to those matters which are inherently or customarily judicial in nature and which are to be dealt with by the courts. It is not good enough simply to assume that the federal Parliament and the provincial legislatures will, on suffrance, permit the courts to exercise their present customary

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City of Toronto v. *Olympia Edward Recreation Club Ltd.*, [1955] S.C.R. 454.

As to what constitutes a "judicial" power, see *Attorney-General for Australia* v. *The Queen and the Boilermakers' Society of Australia*, [1957] A.C. 288 (P.C.) dealing with the separation of powers under the Australian constitution; and *Liyanage* v. *The Queen*, [1967] A.C. 259 (P.C.), dealing with a similar question from Ceylon.

[34] As pointed out by the Special Joint Parliamentary Committee on the Constitution, why should the Bill of Rights or access to the courts only be guaranteed to citizens? Also, how is the citizenship of corporations to be determined?

functions. The purpose of a constitution is to establish both the principles and the institutions by which a country is to be governed. If the Rule of Law is an important constitutional principle, it should be fully enunciated in our new constitution, and provisions made for courts of constitutionally guaranteed jurisdiction. Again, this requires the framers of the constitution to ask what are inherently judicial matters, and is there to be any limit on the type of matters which can be delegated to administrative (as opposed to judicial) bodies?

II. *Evaluating the Proposals for Reform.*

How do the various proposals for constitutional reform measure up to these criteria? Let us examine them *seriatim*.

a) *The Task Force on Canadian Unity.*

The Task Force on Canadian Unity,[35] appointed in July 1977 by the federal Liberal Government under Part I of the Inquiries Act[36] and chaired by Messrs. Jean-Luc Pepin and John P. Robarts, was not really appointed with the goal of drafting a new constitution. Rather, its mandate was directed to:[37]

(i) support, encourage and publicize the efforts of the general public and particularly those of (voluntary) organizations, with regard to Canadian unity;
(ii) contribute the initiatives and views of the Commissioners concerning Canadian unity; and
(iii) advise the Government (of Canada) on unity issues.

It would be unreasonable, therefore, to judge their efforts on the same basis that one might scrutinize a legally drafted constitution.

Nevertheless, it is important to note that the Task Force recognized[38] the concept of the Rule of Law in the sense that everyone is subject to law and that no one is entitled to wield arbitrary powers over any citizen. Similarly, it recognizes the need for an entrenched Bill of Rights,[39] which in the end would be enforced by the Supreme Court of Canada. Although referring to the desirability of the independence of the judiciary,[40] the Task Force does not suggest how this principle should be expressed in the new constitution nor consider everything which it entails. It does,

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[35] *Supra*, footnote 2.

[36] *Ibid.*

[37] *Ibid.*, A Future Together, Appendix 2, p. 141.

[38] *Ibid.*, Coming to Terms, p. 18.

[39] *Ibid.*, pp. 65-68.

[40] *Ibid.*, p. 44.

however, devote considerable attention to the method of appointing members of the Supreme Court of Canada as well as of the federal and provincial courts.[41] In summary, therefore, it may be said that the Task Force concentrates its attention on the goal of renewing Canadian federalism, and only tangentially looks at the consequences this would have on certain judicial institutions such as the Supreme Court of Canada. Its recommendations would not result in a complete constitutional exposition of the role of the courts more generally.

b) *The Federal Liberal Government Bill.*

By contrast, the reforms contained in the Constitutional Amendment Bill[42] introduced in Parliament in June 1978 by the former Prime Minister, Mr. Trudeau, do resemble a complete and formal constitutional package, as indeed is suggested by their presentation as a bill. Section II of Part I of the Bill is entitled "Statement of Aims of the Canadian Federation", and refers in clause 4 *inter alia* to the following goals to be achieved by the constitution:

> — to protect the fundamental rights of all Canadians . . .;
> — to ensure that its society is governed by institutions and laws whose legitimacy is founded upon the will and consent of the people; and to ensure, as well, that neither the power of government nor the will of majority shall interfere in an unwarranted or arbitrary manner with the enjoyment of each Canadian of his or her liberty, security and well-being . . . .

Similarly, Section III of Part I of the Bill sets out various rights and freedoms to exist within the new Canadian federation. In particular, clauses 6, 7, 8 and 9 refer to basic political and legal rights. Thus, clause 6 provides *inter alia* for:[43]

> — the right of the individual to life, and to the liberty and security of his or her person, *and the right not to be deprived thereof except by due process of law*;
> — the right of the individual to the use and enjoyment of property, *and the right not to be deprived thereof except in accordance with law*; and
> — the right of the individual to equality *before the law* and to the equal protection *of the law*.

Clause 7 provides that:[44]

> In addition to the fundamental rights and freedoms declared by section 6, it is further declared that, in Canada, every individual shall enjoy and continue to enjoy:
> — the right to secure against unreasonable searches and seizures;

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[41] *Ibid.*, A Future Together, pp. 99-102.

[42] *Supra*, footnote 2.

[43] Emphasis added.

[44] Emphasis added.

— the right *not to be arbitrarily detained*, imprisoned or exiled;
— the right, as an individual who has been arrested or detained,
  (i) to be informed promptly of the reasons for his or her arrest or detention,
  (ii) to retain and instruct counsel without delay, and
  (iii) to the remedy by way of habeas corpus for the determination of the validity of his or her detention and for his or her release if the detention is not lawful;
— the right not to give evidence before any court, tribunal, commission, board or other authority, if the individual is denied counsel, protection against self-crimination or other constitutional safeguards;
— the right to the assistance of an interpreter in any proceedings before a court, tribunal, commission, board or other authority in which the individual is involved or is a party or witness, if he or she does not understand or speak the language in which the proceedings are conducted;
— *the right to a fair hearing*, in accordance with the principles of fundamental justice, for the determination of the individual's rights or obligations;
— the right, as an individual who has been charged with an offence, to be presumed innocent until proven guilty in a fair and public hearing *by an independent and impartial tribunal*, not to be denied reasonable bail without just cause having been established, not to be found guilty of the offence on account of any act or omission that at the time of such act or omission did not constitute an offence, and, if found guilty of the offence, not to be subjected to a punishment more severe than that applicable at the time the offence was committed; and
— the right not to be subjected to any cruel and unusual treatment or punishment.

Although these provisions are remarkably similar to those contained in both the Canadian Bill of Rights[45] and the first ten amendments to the Constitution of the United States of America,[46] notice that the Constitutional Amendment Bill does not declare these "rights" to be inalienable. Rather, these "rights" may generally only be said to exist *unless overridden by due process of law*, with no indication as to any restriction on the ability of either the federal Parliament or a provincial legislature to make laws derogating from these "rights". Again, the statement of these legal "rights" simply assumes that they will be enforceable in the courts.[47] But what, in the Bill, guarantees that these courts will exist or be available for the enforcement of these "rights"? Certainly clause 100 of the Bill reaffirms that:

> The principle of the independence of the judiciary under the rule of law and in consonance with the supremacy of the law is a fundamental principle of the Constitution of Canada.

But what precisely does this mean in practical terms?

Again, clauses 101 to 115 deal with the Supreme Court of Canada. But clause 111(1), for example, clearly states that the

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[45] R.S.C., 1970, Appendix III.

[46] Commonly called the Bill of Rights.

[47] Consider the maxim that there is no right without a remedy.

Supreme Court of Canada shall only have such appellate jurisdiction *as may be prescribed by the Parliament of Canada*. Even though clause 112(1) may entrench the jurisdiction of the court to:[48]

> . . . hear and determine appeals on any *constitutional* question from any judgment of *any court* in Canada and from any decision on any constitutional question by any such court in determining any question referred to it . . .,

it is not at all clear what constitutes a "constitutional" question. Does this refer only to the distribution of legislative powers under the Bill? Does it include any alleged infringement of the political and legal freedoms enunciated in the Bill?[49] Arguably, it does not include judicial review of the legality of administrative action; and it clearly does not include judicial determination of merely private rights. Access to the Supreme Court of Canada on these latter matters, at least, depends upon ordinary legislation enacted by the federal Parliament under clauses 111 or 113 of the Bill.[50] Indeed, even the entrenched "constitutional" appellate jurisdiction of the Supreme Court of Canada under clause 112 requires there to be a decision of the highest court of final resort of a province; but nothing in the Bill would appear to guarantee the jurisdiction of such a provincial court to determine these constitutional matters, nor to limit the right of a sovereign provincial Legislature (acting within the field of its legislative competence under the Bill) from delegating these or any other matters to non-judicial bodies, thereby short-circulating the constitutional jurisdiction of the Supreme Court of Canada.

Again, clauses 117 to 120 of the Bill deal with the superior, district and county courts of the provinces. These provisions virtually replicate the present provisions of the B.N.A. Act, with two consequences. First, there is no definition of the inherent

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[48] Emphasis added.

[49] See cls 6-9.

[50] Cl. 111 provides as follows:

"(1) Subject to this division, the Supreme Court of Canada shall have such appellate jurisdiction as may be prescribed by the Parliament of Canada.

(2) Where any case before the Supreme Court of Canada involves a question of law relating to the civil law of Quebec, that question shall be decided solely by those judges appointed from Quebec; a majority of the judges of the Court appointed from Quebec shall constitute a quorum for the decision of any such question and a decision of a majority of the judges of the Court appointed from Quebec on any such question shall constitute a decision of the Supreme Court thereon."

Cl. 113 provides as follows:

"The Parliament of Canada may make laws conferring original jurisdiction on the Supreme Court of Canada in respect of such matters in relation to the laws of Canada as may be prescribed by the Parliament of Canada, and authorizing the reference of questions of law or fact to the Court and requiring the Court to hear and determine such questions."

jurisdiction of these provincial courts; this still depends upon the benevolence of the respective provincial legislatures. Secondly, the fact that the federal Governor-in-Council will retain the right to appoint the judges of these courts will continue the "section 96 problem" under the B.N.A. Act, and act as a fetter on the ability of provincial Legislatures to delegate certain functions away from these courts.[51]

c) *Interim Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada.*

The federal Constitutional Amendment Bill was referred[52] to a Special Joint Committee of both houses of Parliament for consideration. The Joint Committee made an interim *Report*[53] containing a number of useful suggestions concerning both the substance and form of the Bill, particularly with respect to the individual "rights" to be guaranteed under the draft constitution. It did not, however, address the broader issues raised in this article—perhaps because its attention was directed too closely to the words of the Bill itself.

d) *The Government of Alberta's Position.*

The Government of Alberta disclosed the major premises upon which it was prepared to enter into constitutional discussions in a document entitled *Harmony in Diversity: A New Federalism for Canada* published in October 1978.[54] This position paper concentrates largely on the redistribution of legislative powers between the federal and provincial levels. Although it refers[55] generally to the constitutional principles inherited from the United Kingdom under the preamble to the B.N.A. Act, it does not include any reference to the independence of the judiciary, the Rule of Law, or any guaranteed jurisdiction for the courts. Indeed, the Alberta Government opposed entrenching a Bill of Rights in the constitution, preferring to leave the attainment of these rights to the federal Parliament and the provincial legislatures in enacting their various substantive laws.[56]

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[51] However, the proposed amendments do not clarify what constitutes a "judicial" function which inherently belongs exclusively to these superior courts.

[52] See Hansard for the Commons Debates of June 26th, 1978, p. 6723.

[53] *Op. cit.*, footnote 2.

[54] *Op. cit.*, footnote 2.

[55] *Ibid.*, p. 2.

[56] *Ibid.*, p. 22.

e) *The Canadian Bar Association's Proposals.*

In August 1977, the Canadian Bar Association established a Committee[57] on the Constitution to undertake "the search for a definition of the essential constitutional attributes of a Canadian federalism".[58] The results of that Committee's deliberations were published in July 1978 under the title *Towards a New Canada*, in the form of principles supplemented by substantial explanatory texts. Perhaps not surprisingly, given its authors and sponsors, the Canadian Bar Association's proposals devote considerably more attention to the establishment, protection, role and jurisdiction of the entire court system in a renewed confederation. For example, reference is to be made in the preamble to the Bar Committee's proposed constitution to "dedication to human rights and to freedom under law applied by independent courts" as being part of the essential attributes of Canadian federalism. Similarly, Part IV, dealing with the judiciary, was written with a view to achieving not only the protection of fundamental rights, but also providing an "atmosphere of freedom" where government is subject to law—law applied by courts of integrity and independence.[59] The Bar Committee is unequivocal in its commitment to enshrining a judicially enforceable Bill of Rights in the new constitution:[60]

> Supremacy of Parliament means supremacy to create law. Law will only operate effectively if it is enforced by an impartial tribunal after giving all sides equal opportunity to present factual and legal arguments. It is therefore a prerequisite to the proper operation of the principle of the supremacy of Parliament that the courts apply principles of natural or fundamental justice. A Bill of Rights places responsibility for the protection of civil liberties squarely on the judiciary, without removing responsibility from the legislature. The authoritative expression of fundamental rights may indeed, as we noted, make it easier to subject legislation to question on this ground in Parliament. Moreover, as noted, a Bill of Rights is aimed at the administrative process, including criminal law, where there is no public debate and accordingly where considerations of civil liberties may (often inadvertently) not have been brought into focus.
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> It is true, as some have observed, that a Bill of Rights will not guarantee liberty. Liberty lies in the hearts of men, and no constitution will make a free society. But it by no means follows that a free society should deprive itself of techniques, of which a Bill of Rights is one, for the preservation of individual liberties that our society as a whole cherishes. The argument underlines, however, that there should be adequate means to enforce the rights proclaimed by a Bill of Rights.
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> Again some have argued that a general definition of fundamental rights will tend to limit them to those perceived at the time they were enshrined. United States experience demonstrates, however, that courts adapt to new

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[57] *Op. cit.*, footnote 2.

[58] *Ibid.*, p. ix.

[59] *Ibid.*, pp. 47-61.

[60] *Ibid.*, p. 16.

> realities, particularly when there is a clause indicating that the rights spelled out are not exclusive. We, therefore, recommend the inclusion of such a clause, and that the rights delimited be expressed in broad terms. We are confident that courts will then read them subject to limitations that are reasonably justifiable.

Similarly, the Bar Committee's proposed constitution is quite explicit about the need to entrench judicial power in the constitution itself. For example, in Chapter 9, Recommendation 1 states that:[61]

> The independence of the courts should be enshrined in the Constitution as a fundamental principle of Canadian federalism.

Similarly, Recommendation 2 specifically recognizes the need to entrench the role of the superior courts of the provinces as courts of general jurisdiction, including judicial review.[62] Although the Bar Committee would leave to the provinces full power to change (but not abolish) the structure and organization of these courts, no changes could be made to reduce a constitutionally guaranteed minimum jurisdiction. As the text explains:[63]

> Because of the key role they play in a society committed to freedom under law, we think their status should be secured by guaranteeing their existence in the constitution.

As to the inalienable private law jurisdiction of the courts, the Bar Committee notes [64] that section 96 of the B.N.A. Act (which they would retain), providing for the appointment of the judges of these provincial superior courts by the federal Governor-in-Council, does limit the ability of a provincial legislature to delegate various functions away from these courts. Although the Bar committee did not have time to attempt to develop a definition of a superior court, to which section 96 and Part IV of its own proposals would apply, it decided to face the "section 96 problem" squarely by entrenching the right of judicial review of administrative action into the new constitution. One effect of this, of course, would be to outlaw privative clauses. Thus, while the federal Parliament or the provincial legislatures would be able to exercise their respective legislative competences, they would be constitutionally prevented from avoiding judicial scrutiny of their laws or of actions taken by their delegates under those laws. As the majority of the Bar Committee stated:[65] "What we wish to guarantee is access to the courts."

On the other hand, a minority of the Bar Committee felt that, in certain circumstances, there could be a need for a restricted use for

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[61] *Ibid.*, p. 47.

[62] *Ibid.*

[63] *Ibid.*

[64] *Ibid.*, p. 49.

[65] *Ibid.*, p. 51.

privative clauses. One would have thought that, if this need is real, it would be possible to specify these circumstances in the constitution itself, because they amount to an important qualification on the principle of the Rule of Law which is itself to be contained in the constitution. With respect, it totally misses the constitutional importance of the judiciary to suggest, as did the minority,[66] that "the techniques developed by the courts to avoid the effect of these [privative] clauses when necessary to achieve fundamental justice sufficiently serve to protect the individual, particularly if fundamental rights are enshrined in the Constitution". This approach retains the unfettered sovereignty of Parliament, and requires the courts to turn somersaults to uphold the Rule of Law. It would be better to face this problem squarely, for without guaranteed recourse to a remedy before the courts, all constitutional rhetoric about rights is hollow.

In my opinion, the Bar Committee's proposal to enshrine the position of the provincial superior courts and their right to review the legality of administrative action is bold, but necessary if we are to have a complete constitution. It is important, of course, to notice that the Bar Committee does not provide a comprehensive definition of the jurisdiction of these superior courts, in particular not with respect to private matters. Indeed, the Committee contemplates[67] that provincial legislatures will be able not only to reorganize their courts, but also continue to delegate various matters to non-curial bodies. A fuller attempt at defining all of the issues which constitutionally should be within the jurisdiction of the superior courts would, of course, have been desirable. Nevertheless, the reference to judicial review, though perhaps incomplete, is a substantial step in the right direction. Thus, while the Bar Committee does devote considerable attention to particular institutional matters such as entrenching the Supreme Court of Canada[68] and the appointment of its members[69] the thrust of its recommendations is to give constitutional recognition to the entire judiciary.

III. *Conclusion.*

As Messrs Cheffins and Tucker suggest:[70]

> A constitution is more than a mechanical set of ground rules. It is a mirror reflecting the national soul. It reflects those values the country regards as important, and shows how these values will be protected.

The courts and the Rule of Law in fact are important aspects of the

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[66] *Ibid.*, p. 50.

[67] *Ibid.*, p. 49.

[68] *Ibid.*, p. 56.

[69] *Ibid.*, pp. 59-60.

[70] The Constitutional Process in Canada (2nd ed., 1976), p. 4.

form of government which Canada inherited from the United Kingdom; undoubtedly they will continue to be important values under whatever new constitutional arrangements we finally adopt. If the new constitution is to be "a mirror reflecting the national soul", it must accurately reflect the whole picture of our judicial landscape, and not focus too narrowly on particular institutional details which need to be changed. The time has come to articulate the important and protected nature of these principles in our new, patriated constitution.