

## THE SUPREME COURT OF CANADA AND THE PROVINCIAL COURT IN CANADA

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*The Supreme Court of Canada has frequently dealt with issues arising from the bifurcated court system created by the Constitution Act, 1867. These decisions of the past provide many guiding principles, but the Supreme Court has never addressed the fundamental issue of the constitutionality of the system of two-tiered trial courts that have evolved since Confederation. The "inferior" national court system, which is now called the Provincial Court, has grown in jurisdiction, competence, and public importance to such a degree that the following fundamental constitutional question becomes increasingly relevant. Has the modern-day Provincial Court in Canada outgrown its 1867 status of a local, inferior court; and if so, can provincial governments continue to appoint judges to this court? This question puts at risk the very foundation of the court that handles the vast majority of cases in the country. If this question is not addressed properly in other forums it may well be placed before the Supreme Court of Canada, and this is neither fair to the Supreme Court nor is it the best method to address questions of fundamental court reform. This article outlines the history of the Provincial Court, including failed attempts at its fundamental reform, and argues that the Supreme Court's judgments imply the need for future reforms. Rather than letting the question fester and possibly lead to constitutional challenges, the authors propose a coordinated, ongoing study into the future of the Provincial Court to clarify the issues.*

*La Cour suprême du Canada a souvent eu l'occasion de se pencher sur des problèmes provenant du système dualiste de tribunaux créé par l'Acte constitutionnel de 1867. Ces décisions nous fournissent des principes d'orientation, mais la Cour suprême ne s'est jamais attaquée à la question fondamentale de la constitutionnalité de ce système de tribunaux de première instance à deux étages. La compétence et l'importance pour le public de ce système national de tribunaux «inférieurs», maintenant appelés Cours provinciales, se sont à ce point développées que la question suivante devient de plus en plus pertinente : la Cour provinciale d'aujourd'hui au Canada a-t-elle débordé le statut de tribunal inférieur, local qu'elle avait en 1867, et, si tel est le cas, les gouvernements provinciaux ont-ils toujours le pouvoirs d'en nommer les juges? Cette question menace le fondement même de la cour qui entend la vaste majorité des affaires dans ce pays. Si cette question n'était pas traitée comme il convient dans d'autres forums, elle pourrait bien être présentée à la Cour suprême du Canada; ceci ne serait pas juste envers la Cour et ne serait pas la meilleure façon de traiter d'une réforme fondamentale des tribunaux. Cet article retrace l'historique de la Cour provinciale, y compris*

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*les tentatives avortées de réforme fondamentale, et avance que les jugements de la Cour suprême révèlent le besoin de réformes futures. Au lieu de laisser le problème couvrir et possiblement mener à un litige constitutionnel, les auteurs proposent qu'une étude coordonnée et continue soit menée sur l'avenir de la Cour provinciale afin de clarifier le problème.*

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### I. *Introduction*<sup>1</sup>

The purpose of this article is to engender a discussion about the status of the Provincial Court. The focal questions are — has the modern-day Provincial Court in Canada outgrown its 1867 status of a local, inferior court; and if so, can provincial governments continue to appoint judges to this court?

As will be outlined in the body of the article, there is ambiguity in the constitutional status of the Provincial Court. The ambiguous status of the court has in the past raised constitutional questions that have not yet been fully resolved.<sup>2</sup> The more important of these will be reviewed further on in the article. This irresolution is made more urgent as a result of the expanded constitutional role of the Provincial Court in the wake of the Constitution Act, 1982. Separate

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<sup>1</sup> The Provincial Court should be thought of in the singular, as a uniform component of a national justice system, and not in the plural, as a fragmented series of courts situated in the various provinces and territories. This raises questions about the concept of a "national court" and how this concept relates to the judicature envisioned at the time of Confederation. See *infra* at notes 46 and 196. Also, in discussions about a bifurcated court system, there is a distinction between two processes of bifurcation. The first is the bifurcation of the federally appointed judiciary resulting from the federalization of our court system by the creation of a separate system of federal courts. The second form of bifurcation is the result of the growth of the provincially appointed Provincial Court alongside the existing provincially based trial courts that are staffed with federally appointed judges. Only this second issue of bifurcation is explored in this article.

<sup>2</sup> See P.H. Russell, *The Judiciary In Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson, 1987) at 48: "Just how far the provinces can go in developing courts presided over by provincial rather than federal appointees is an enduring issue of Canadian constitutional law."

from such constitutional questions, the status of the court within the juridical hierarchy causes a systemic stress that sometimes leads to conflict.<sup>3</sup> The status of the Provincial Court should be clarified both to avoid exposing the court to disruptive constitutional challenge and to avoid future conflict that is symptomatic of this underlying stress. At the very least, those responsible for maintaining confidence in the administration of justice should be in a dialogue about the status of the Provincial Court.

But such a dialogue is not happening. The failure to hold such a dialogue in the past decade allowed a crisis to develop within the justice system that resulted in litigation.<sup>4</sup> In the *Judges' Reference Case*,<sup>5</sup> the Supreme Court of Canada brought that escalating crisis under control by dealing with the specific issues of the cases before it. However, the Court recognized that the specifics of the cases before it merely demonstrated an underlying stress in the Provincial Court's relationship with the respective governments.<sup>6</sup> Although the Supreme Court did not identify the causes of this underlying stress, one fundamental cause has to do with the ambiguous status of the Provincial Court.

When confrontation results it can threaten the public's confidence in the administration of justice. Accordingly, there is an obligation on those responsible for maintaining that public confidence to work together to prevent crises from developing. It is neither in the public interest nor in the interest of the justice

<sup>3</sup> J.S. Ziegel, "The Supreme Court Radicalizes Judicial Compensation" (1998) 9:2 Constitutional Forum 31 at 40: "At bottom, however, Chief Justice Lamer does not address the most pervasive and most deeply felt of the [Provincial Court] judges' grievances – the disparity between their status and compensation and that accorded their federal counterparts. Perhaps there is no effective answer because of the constitutional anomaly of provincially appointed judges carrying the bulk of the burden of enforcing federally enacted criminal laws while having to settle for provincially created and administered compensation packages."

<sup>4</sup> G.T.G. Seniuk, *Judicial Independence and the Supreme Court of Canada* (1998) 77 Can. Bar Rev. 381 at 400. Also, see *infra* note 10 and note 148.

<sup>5</sup> *Re Provincial Court Judges*, [1997] 3 S.C.R. 3.

<sup>6</sup> *Ibid.* at para 6: "Although the cases from the different provinces are therefore varied in their origin, taken together, in my respectful view, they demonstrate that the proper constitutional relationship between the executive and the provincial court judges in those provinces has come under serious strain."

In *The Independence of Provincial Court Judges: A Public Trust* (Toronto: Canadian Association of Provincial Court Judges, 1996) D.A. Schmeiser and W.H. McConnell comment that:

Future legal historians may look back on the decade of the nineties as a time of unparalleled conflict between Canadian Provincial Court systems and the governments which established them. There was scarcely a single jurisdiction in which serious tension did not exist between judges and cabinet, and in a majority of provinces major disagreements on matters of constitutional principle resulted in lawsuits being launched on the issue of judicial independence. (at 1)

For a detailed account of how the crisis developed in one province, see W. H. McConnell, "The Sacrifice of Judicial Independence in Saskatchewan: The Case of Mr. Mitchell and the Provincial Court" (1994) 58:1 Sask. L. Rev. 3.

system to allow such issues to fester, and then look to the Supreme Court of Canada to solve the problem. The evolution of this court has required different commitments from different governments at different times. We are approaching another pivotal moment in the evolution of the Provincial Court, a constitutional moment when our governments need to decide if the Provincial Court is a truly independent court of justice or merely an *inferior* court as existed in 1867. Our purpose is to encourage discussions to examine that fundamental question in a coherent way that could result in a practical plan of action to rationalize our court system. Unification has been viewed as the ultimate resolution of the question of the status of the Provincial Court, and while that initiative had developed considerable momentum a decade ago, and despite much political will, the initiative stalled. Some of this history is outlined in later sections of this article. However, while court unification is an important topic in any such dialogue, the primary focus of such a dialogue should be on the rights of Canadians and on the Constitution. The question we pose is: does the current status of the Provincial Court provide Canadian citizens with the judicial system contemplated by the Constitution? Our conclusion is that there is sufficient uncertainty about the answer to that question that it should be clarified by dialogue.

The method we suggest for this dialogue is a coordinated study that brings together the various groups responsible for maintaining confidence in the administration of justice.<sup>7</sup> Periodically, conferences should be held to report on the progress of the studies, and to identify areas for further investigation.

## II. Underlying Issue

The Provincial Court is a unique court, and its uniqueness raises a number of questions about its status. It is a new court in our constitutional history, and it does not easily fit its assigned constitutional status as an *inferior* court. But neither is it a *superior* court. If the Provincial Court is neither functionally an *inferior* nor constitutionally a *superior* court, then in which of these two categories should it belong?

Beginning in the late 1960s and continuing into the next decade, the provincial governments passed legislation creating this court in their respective jurisdictions.<sup>8</sup>

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<sup>7</sup> Earlier drafts of this article were privately circulated in an effort to stimulate dialogue, and since that time steps have been taken to hold such a conference between September 12 to 14, 2001, in Saskatoon. The co-sponsors of the planned conference on "The Trial Courts of the Future" (with the representative co-chairs in brackets) are the Government of Saskatchewan (John Whyte Q.C., Deputy Minister of Justice), the Canadian Association of Provincial Court Judges (Judge Gerald Seniuk), the College of Law, University of Saskatchewan (Professor Sanjeev Anand) and the School of Law, University of Toronto (Professor Kent Roach).

<sup>8</sup> See *supra* note 2 at 126-27 and 208-10 for details on the "judicialization of the magistracy" across Canada during those years. Also see for an example of the legislative changes, Revised Statutes of Saskatchewan (Supp.), c.P-30.1. See also, *infra* note 64, for a discussion about the intentions behind the creation of the Provincial Court of Saskatchewan. For the general history of the Provincial Court in Canada see section III.B. of this article, "The History and Jurisdiction of the Provincial Court."

The federal government relies on this court to do the vast majority of criminal trials and sentencing. Since the Provincial Court was first created, its criminal jurisdiction has steadily increased. Although the Provincial Court grew out of and replaced the historical *inferior* courts, it now does criminal work that traditionally could only be done by *superior* courts. Provincial governments appoint the judges to these courts. But only the federal government can appoint judges to *superior* courts. If the Provincial Court does the work of a *superior* court, can the provinces appoint these judges? Or, by corollary, can judges appointed by provincial governments be assigned this work?

It also results in two trial courts in Canada with similarly qualified judges exercising increasingly similar criminal law jurisdiction, but with increasingly dissimilar institutional status. The federal government has continuously increased the criminal jurisdiction of the Provincial Court, thereby elevating its constitutional status.<sup>9</sup> At the same time, the provinces fund the Provincial Court and, as compared to the *superior* courts, it continues to be secondary in terms of resources, caseload, remuneration, facilities and other such indicators of institutional status. Many provinces were originally committed to virtual parity for both institutions. Although many important institutional improvements were made to the Provincial Court, the gulf between the two trial courts has increased in recent years, as is evident, for example, in salaries and caseloads. Furthermore, different provinces provide different levels of support to the Provincial Court. While the *superior* courts across Canada in general have the same institutional resources, the standards in the Provincial Court can vary widely between provinces and between judicial districts.

These institutional indicators determine how a court looks and responds to litigants, and how citizens in turn feel about the institution. Are we developing first and second class court systems with similar jurisdiction but with easier access to the first class court for those who can afford it? As Jacob Ziegel has noted, the Supreme Court has not directly addressed the implications of this disparity between the Provincial Courts and their federal counterparts.<sup>10</sup> Even if the quality of justice in each system is equal, collateral class distinctions can impair a citizen's sense of equal justice. Airline passengers all equally reach the same destination, but first class travel is a different experience than economy class. Class distinctions that may be acceptable in the transportation industry would prove invidious within a justice system. This raises societal and constitutional questions of equality of access to justice. Collaterally, what is the effect on the mindset of a judge who is institutionally relegated to a second-level status, and what unconscious effect does this psychological mindset have on the administration of justice in that court? More importantly, are the rights of Canadians protected equally?

<sup>9</sup> Generally see section III.B. of this article, and more specifically, *infra* note 84 and following.

<sup>10</sup> *Supra* note 3.

The two trial courts with their *superior/inferior* hierarchical distinction are an historical anachronism rather than a rational allocation of resources. It is a structure and hierarchy that was appropriate to the circumstances in 1867, when society was widely dispersed, often isolated in terms of communication and transportation from urban centers, and lacking availability of professionally trained judicial officers in many locations. But that does not fit the reality of today. Attempts have been made in the past 30 years to rationalize the system by unifying our trial courts. Some success was achieved, but where the Provincial Court was concerned early efforts floundered due to constitutional impediments<sup>11</sup> or stalled by what appeared to be status quo interests.<sup>12</sup> At the same time, piecemeal systemic changes are continuously underway, without any coherent and publicly accessible process to evaluate whether these changes provide better justice. This raises systemic questions about court reform.<sup>13</sup>

It is not our purpose to make the case against the constitutionality of the present structures. Rather, the constitution is the context within which we seek to understand the status of the Provincial Court. The constitutional imperative of ensuring that all Canadian citizens have equal protection of their rights has not been the driving force behind past initiatives to change the status of the Provincial Court. That is the framework we wish to bring to this dialogue. Thus far, we have raised a number of questions and suggested further avenues of inquiry. However, while the following explorations of these suggested avenues may provide further insights, they will not provide answers. We stress again: it is not our goal to provide such answers. The objective is to point to and encourage further study and discussion, and to suggest a method for such a coherent study.

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<sup>11</sup> See *McEvoy v. A.-G. N.B.*, [1983] 1 S.C.R. 704.

<sup>12</sup> C. Baar, "Judicial Independence and Judicial Administration: The Case of Provincial Court Judges", (1998) 9:4 Constitutional Forum 114. C. Baar has been a main contributor to our understanding of court administration and systems, and in preparing this article we have relied heavily on his outstanding work.

<sup>13</sup> C. Baar, *One Trial Court: Possibilities and Limitations* (Ottawa: Canadian Judicial Council, 1991) at 1: "We see the courts, pre-eminently among our public institutions, as steeped in tradition and conservatism. This view reflects our understanding of an institution that predates our own political system, and whose form and appearance reflect its origins and development in medieval times..."

Yet within the past 25 years, the ways our courts are organized have fundamentally changed. These changes in court organization contrast with the continuing appearance of stability and tradition. As a result, the public is largely unaware of how different our courts are from what they were a generation ago.

It is time to take stock of the changes the courts have undergone, and consider in light of that stocktaking a new generation of proposals that are emerging from governments, law reform bodies and members of the judiciary themselves."

### III. The Uniqueness of The Provincial Court

The creation of the Provincial Court system was one of the major structural court reforms of the past 30 years, transforming "local magistrate's courts, once the dispersed third level of trial courts often staffed by lay judges, into province-wide systems of trial courts with increasingly significant statutory jurisdiction."<sup>14</sup> The Provincial Court was a new creation, unlike any courts in the other major common law countries. They have "more extensive jurisdiction than any court of limited jurisdiction in the United States, the United Kingdom or Australia [and] handle an increasingly higher proportion of serious criminal matters."<sup>15</sup> Not surprisingly, therefore, the uniqueness of the Provincial Court sparked study and discussion soon after the court was created. One of the more important studies was the Law Reform Commission of Canada's working paper entitled *Toward a Unified Criminal Court*.<sup>16</sup> But despite this history of study, it is timely to reconsider the constitutional status of the Provincial Court because of three new factors.

The first new factor to consider is the constitutional analysis applied by the Supreme Court of Canada in the *Judges' Reference* case.<sup>17</sup> This was a landmark decision<sup>18</sup> that invoked unwritten constitutional principles to help understand the organizing values underlying the judiciary provisions of the Constitution.<sup>19</sup> Soon after the *Judges' Reference* case this principle of constitutional analysis was applied in the *Québec Secession* case.<sup>20</sup> This method of analysis allows

<sup>14</sup> *Supra* note 13 at 5, and also at 6-7: "But over the past quarter-century, every province has created a separate court called the Provincial Court, with statutory jurisdiction including and building upon the work of magistrate's courts and other local courts...[w]ithin a single generation it has transformed a collection of judicial bodies often deprecated as appendages to local law enforcement authorities into a set of increasingly and thoroughly professional institutions with jurisdiction extending well beyond their counterparts in England or the United States."

When these changes began, the magistrate's courts were at the bottom of a three-level trial court structure, often linked more closely to local government officials with whom they shared responsibilities (and usually also shared physical facilities) than to the other two levels of section 96 courts. Now, as the second tier in a provincially administered court system, Provincial Courts have become an integral part of the judicial framework."

<sup>15</sup> *Supra* note 12 at 120.

<sup>16</sup> Law Reform Commission of Canada, *Toward a Unified Criminal Court*, (Working Paper No. 59) (Ottawa, 1989).

<sup>17</sup> *Supra* note 5.

<sup>18</sup> *Supra* note 4 and note 3.

<sup>19</sup> *Supra* note 5 at paras. 104 and 109: "The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.... In fact, it is in the preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located."

<sup>20</sup> *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at Section (3) Analysis of the Constitutional Principles generally and para 53 specifically: "A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the Provincial Judges Reference that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference."

constitutional interpretation to look behind the written word to find the organizing principles underlying the text. The written constitution will reflect those principles according to the needs and understandings of a particular time in our history. Modern day issues may raise questions that were never foreseen in the era that produced the written document. Often these organizing principles will have grown out of our historical experience, and that history may illuminate the fundamental constitutional principles that were partially reflected in the written document. Therefore, the historical roots of these constitutional categories of *superior* and *inferior* courts can shed light on the nature of the status of the Provincial Court. This in turn will assist in interpreting the judicature provisions of the Constitution Act, 1867.

The second factor that invites further examination is the evolution of the Provincial Court. The institutional root of this court is the *inferior* court as it was in 1867. But the Provincial Court of today is quite different from those courts, both in the qualifications of its judges and in its jurisdiction. The criminal jurisdiction of the court has increased greatly in the past 30 years. Its jurisdiction bears no resemblance to the jurisdiction of an *inferior* court in 1867. Furthermore, the court system has also changed significantly since those years. For example, the original three-tiered court structure has been reduced to a two-tiered structure. And finally, with the inception of *The Charter of Rights and Freedoms*,<sup>21</sup> the Provincial Court has a greater constitutional role than could ever have been envisioned in 1867. Thus, the Provincial Court has an historic and systemic context. What is the genealogy of this court, and what is its constitutional and functional relationship to other courts in the justice system?<sup>22</sup>

The third factor is the recognition by the Supreme Court of Canada that the Provincial Court is as fully independent a court as the *superior* court.<sup>23</sup> In connection with judicial independence matters, the Supreme Court justices refused to relegate the Provincial Court (or any court) to an *inferior* status

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<sup>21</sup> *The Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982.

<sup>22</sup> For a thorough survey of the court structure in Canada, see Russell, *supra* note 2. For a service with updates on current court and judicial issues, see D. Lundy, ed., *Barristers & Solicitors In Practice* (Markham: Butterworths, 1998, including Service Issues 1999) ch. 11 "Judges" (Justice Kenneth M. Lysyk and Prof. Lorne Sossin Contributors).

<sup>23</sup> *Supra* note 5 at paras. 106-07: "The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement of 1701*. As we said in *Valente*, *supra* at 693, that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English *superior* courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the *superior* courts of this country... Section 11(d), far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear."



dependent upon *superior* court protection.<sup>24</sup> The degree of independence an institution has is one of its most fundamental defining characteristics. This full degree of independence is one of the distinguishing marks of a *superior* court, and the Provincial Court now has the same degree of independence as a *superior* court. If a court can be the same as a *superior* court in something as fundamental as this and yet remain an *inferior* court, then what are the criteria that distinguish between the two categories? To what degree can an *inferior* court increase in *superior* court characteristics before its constitutional status is put in issue?

### A. *Superior and Inferior Courts*

Given the ordinary meaning of the words, the choice of *superior* and *inferior* as descriptive terms is unfortunate. The Provincial Court is anything but 'inferior' in the ordinary sense of that word.<sup>25</sup> These are inherited terms. As Peter Hogg points out, our judicature is based on a pre-confederation pattern inherited from the English courts,<sup>26</sup> and with it came the two categories of *superior* and *inferior* courts.<sup>27</sup> Used in that way, the terms refer to an inherited juridical hierarchy and not to the importance of the work of the court or to the ability of the judges who toil in them. However, within that earlier juridical classification, the Provincial Court is classified as an *inferior* court.<sup>28</sup>

<sup>24</sup> Only La Forest J. disagreed. He would have applied full judicial independence protection to Provincial Courts when they exercised criminal jurisdiction, but otherwise would have held them to an inferior status, dependant upon *superior* court protection. See *supra* note 5 at para. 324: "The *superior* courts have significant appellate and supervisory jurisdiction over *inferior* courts. If the impartiality of decisions from *inferior* courts is threatened by a lack of independence, any ensuring injustice may be rectified by the *superior* courts."

<sup>25</sup> What would the public think if we actually named our two-tiered courts as "The Superior Court of Province X" and "The Inferior Court of Province X"? And yet, the perpetuation of such a hierarchy may create a false impression of a 'good, better and best' hierarchy of justice. As the Law Reform Commission of Canada has pointed out, there is simply no evidence that one court is "superior" to the other. See *supra* note 16 at 14: "There is certainly no empirical evidence that County Court judges are *superior* in any way to Provincial Court judges, nor that Supreme Court judges are more competent than all the others. What is troubling, however, is that various characteristics of respective court levels could lead to a public perception that a judicial hierarchy based on competence to try criminal cases does indeed exist."

<sup>26</sup> P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 7.1. For a full description of the English system, see R.M. Jackson, *The Machinery of Justice in England* 7th ed. (Cambridge: Cambridge University Press, 1977).

<sup>27</sup> See, for example, Black's Law Dictionary, 4th ed. Rev. (St. Paul: West Publishing, 1968) at 918. "The English courts of judicature are classed generally under two heads – the *superior* courts and the *inferior* courts: the former division comprising the courts at Westminster, the latter comprising all the other courts in general, many of which, however, are far from being of *inferior* importance in the common acceptation of the word."

<sup>28</sup> Although the *Constitution Act, 1867*, refers to "Provincial Courts" in s.92.14, these refer to the "Superior, District, and County Courts in each Province" that are referred to in s. 96, and not to the Provincial Courts in this discussion.

The *superior* court is the direct descendant of those courts that embodied the victory of the rule of law over the power of the monarch.<sup>29</sup> To these judges was reserved the highest protections for judicial independence because of the important constitutional role they played. In this regard, they are the standard against which other courts are measured. In a sense, there is only one classification of court that is defined, and that is the *superior* court. Originally the second category is the residue, and a court was an *inferior* court if it was not a *superior* court.<sup>30</sup> It is crucial to our judicature, therefore, to know whether a court is a *superior* court or not. However, the answer to that question is not always immediately clear and without disagreement. For example, in the *Addy* case,<sup>31</sup> the issue was whether the Federal Court of Canada was a *superior* court. How does that classification come about, and who determines the classification? Legislation might point to a particular tribunal and identify it as a *superior* court,<sup>32</sup> but nowhere does our written constitution define a *superior* court. The late W.R. Lederman told us that that definition can only come from the history of the central courts of London.

The *superior* courts, because of their unique combination of institutional characteristics and procedural practices, occupy a primary and central place in the total law-applying process. The prototype for the *superior* court is supplied by the English central royal courts after the *Act of Settlement*. It is this history alone that defines for us the essential institutional and procedural characteristics of these tribunals. There is no "judicial function" as such in legal or political theory that will perform this office of definition for us.... We must consider the guarantee of jurisdiction to the provincial *superior* courts in Canada in these terms. What law-applying tasks should be a monopoly of the *superior* courts? What legislative schemes are by their nature such that they should be entrusted for interpretation and application to *superior* courts, to the exclusion of administrative tribunals or executive officials?<sup>33</sup>

<sup>29</sup> See for example, Lamer C.J.C. in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at 753: "In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial *superior* courts are the foundation of the rule of law itself... In Canada, the provincial *superior* court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the *superior* court and therefore none is as crucial to the rule of law."

<sup>30</sup> *Supra* note 27. Also see Walker & Walker, *English Legal System*, 5th ed., (London: Butterworths, 1980) at 141: "A traditional classification of English courts is their division into *superior* and *inferior* courts... The most important of the *inferior* courts are county courts and magistrates' courts although all courts not listed above as *superior* are *inferior* courts." In Canada, however, the *Constitution Act, 1867*, created a three-tiered court structure with *superior* and district or county courts appointed by the federal government and the magistrates' courts appointed by the provinces. See *infra* section "3.2 The History and Jurisdiction of the Provincial Court."

<sup>31</sup> *Addy v. Canada*, [1985] 2 F.R. 452 (T.D.)

<sup>32</sup> See for example such federal legislation as the *Criminal Code*, s. 2; *Federal Court Act*, s. 3; the interpretation section of the *Judges Act*; and, *The Interpretation Act* s. 28.

<sup>33</sup> W.R. Lederman, "The Independence of the Judiciary", [1956] 34 Can. Bar Rev. 769 at 1167-68. Except where otherwise identified, the material in this section relies on this article for authority. Others have not accepted all of the interpretations and conclusions in this article. See, for example, B. Laskin, *Canadian Constitutional Law* (4th ed. Rev., 1975) at 472 and the discussion of this disagreement by Hogg, *supra* note 26 at 7.3(f).

These characteristics of specific courts in central London 300 years ago define a *superior* court. These were the judges who were given special constitutional protection by the revolutionary settlement of 1701. This protection was needed so that those judges could fulfill their constitutional role in a state governed according to the rule of law. The concept of the rule of law with its constitutional limitations on absolute political power was already in place before 1701.<sup>34</sup> But so long as the king could appoint and dismiss the judges, the constitutional restraints were fragile, and the point was reached when only political lackeys served on the bench.<sup>35</sup> To correct and guard against this political abuse, the revolutionary *Act of Settlement* of 1701 gave priority to guaranteeing tenure and financial security for the judges of the central courts of London - but only for those judges.<sup>36</sup> The *superior* court of today is the inheritor of these protections, responsibilities and defining characteristics. Canada reproduced *superior* courts in the image of these central London courts in 1867 when it adopted "a Constitution similar in Principle to that of the United Kingdom."<sup>37</sup> Therefore, these ancient courts today define a *superior* court in Canada. What were their identifying characteristics that reserved for them this special constitutional status?

A number of characteristics of a *superior* court have been recognized.<sup>38</sup> Some characteristics are unique to Canada as a result of provisions in the Constitution Act, 1867.<sup>39</sup> Thus, judges appointed to that court must be drawn from members of the bar in the same province where the judge will sit, they must receive salaries that are fixed and provided by the federal Parliament, and only

<sup>34</sup> Generally, see Jackson, *supra* note 26, and *infra* note 35.

<sup>35</sup> *Supra* note 33 at 1139-58. "Although the *Act of Settlement* was the high-water mark of judicial independence, a real measure of judicial independence had been secured as much as 400 years earlier. The *Statute of Northampton* in 1328 "declared that no royal command under the Great or Smaller Seal shall disturb the course of the common law, and that if such a command is issued, the judges shall ignore it. Slowly but steadily the judges ventured to enforce the plain words of this important act, and so to assume the detached position which is typical of most modern judiciaries." However, appointments were still at pleasure, and judges could and were arbitrarily dismissed for not deciding cases as the Crown wished. The point was reached when only political lackeys served on the bench and "by the eve of the Revolution of 1688, the courts had been brought very low indeed in public and professional esteem. All the decent legal talent of the day (including several ex-judges) was in practice at the bar, none of it was on the bench."

<sup>36</sup> *Ibid.* at 781.

<sup>37</sup> *Ibid.* at 1139-58 for a detailed history of the development of judicial independence in Colonial North America.

<sup>38</sup> See Walker & Walker, *supra* note 30: "The nature of *superior* courts is that their jurisdiction is limited neither by the value of the subject matter of an action nor geographically. The jurisdiction of *inferior* courts is limited both geographically and according to the value of the subject matter of the dispute... One of the distinctive features of *inferior* courts is that they are amenable to the supervisory jurisdiction of the High Court exercised by prerogative order... The distinction is also of importance in relation to contempt of court, since the penalties which may be imposed by *inferior* courts are far less than *superior* courts have power to inflict."

<sup>39</sup> U.K., (30 & 31 Vict.), c.3 ss.96, 97, 98 and 100.

the federal government can appoint the judges. The judges have security of tenure and generally maintain the highest standard of judicial independence. Such courts cannot be abolished by a simple Act of Parliament.<sup>40</sup> They have appellate and supervisory powers because of their role of judicial review,<sup>41</sup> and they even determine the limits of their own powers.<sup>42</sup> In addition there is a core jurisdiction that belongs to a *superior* court which cannot be usurped.<sup>43</sup> From considerations such as these Lederman concluded there are jurisdictional and institutional aspects to the test of whether a court is a *superior* court. The two-fold test is simply this:

If the provincial legislation did not leave it to be headed by a federal appointee, it cannot be a *superior* court, whatever else it may be, and one gets straight on to the real question ... whether the statutory provision it was to administer is appropriate in modern circumstances for exclusive *superior*-court administration."<sup>44</sup>

Applying that test to the Provincial Court, it is clear such courts are not *superior* courts because provincial governments and not the federal government appoint the judges; and it does not have supervisory power over *inferior* courts. The next question in the test, the "real question" in Lederman's words, is whether the statutory provisions the Provincial Court administers should only be administered by a *superior* court. Does the Provincial Court do work that in 1867 could only be done by a *superior* court? That is the "real question," and the answer is that the Provincial Court of today does appear to exercise criminal jurisdiction that in 1867 was reserved to a *superior* court.

## B. *The History and Jurisdiction of the Provincial Court*

The ambiguity of the Provincial Court's status arises from its history and evolution. It is a court that continues to grow in stature, jurisdiction, qualification and importance. This has occurred and continues to occur in a piecemeal and incremental fashion. The cumulative effect, however, has been, if not

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<sup>40</sup> Although only a superior court in this constitutional line is such a court that cannot be abolished, that does not preclude the existence of *superior* courts that, because they were created by legislation, could be abolished by legislation. See *Addy*, *supra*, note 31 at para. 33.

<sup>41</sup> These are the courts that can issue prerogative writs such as prohibition, certiorari and mandamus, and make declarations or grant injunctions.

<sup>42</sup> *Supra* note 33 at 1174-75: "It is historically characteristic of *superior* courts that they determine even the limits of their own powers under the relevant constitutional laws and statutes."

<sup>43</sup> *Supra* note 26 at 7.3(d): "There is no constitutional objection to the conferral on a *superior* court of a novel jurisdiction, or a jurisdiction traditionally exercised by *inferior* courts. [However] there are constitutional restrictions on the jurisdiction that can be withdrawn from a *superior* court. No part of an ill-defined "core" of a *superior*-court jurisdiction may be withdrawn from a *superior* court. Apart from this exception, the nature and scope of *superior*-court jurisdiction are simply issues of policy to be resolved and enacted by the competent legislative body."

<sup>44</sup> *Supra* note 33 at 1172.

revolutionary, certainly one of the major court reforms in our constitutional history.<sup>45</sup> At the time of Confederation we did not set out to create such a bifurcated system. According to Hogg, the system of courts established at that time was probably thought of as "a system of national courts":

In the early years of confederation none of the problems of a dual court system existed, because there was no dual court system....The confederation arrangements did not constitute precisely a system of national courts. The courts were provincial: their constitution, organization and maintenance was a provincial responsibility. However, it seems likely that the framers of the *B.N.A. Act* did think of them as national courts, because s. 96 of the *B.N.A. Act* provided that the judges of the superior, district and county courts in each province were to be appointed by the federal government.<sup>46</sup>

According to Russell's research, had Sir John A. Macdonald had his way, Canada probably would have begun confederation with a dual court system.<sup>47</sup> But instead of that bifurcated vision, the judicature provisions of the constitution provided for an integrated system; indeed, one of the most integrated in the world.<sup>48</sup> The key to this integration has been section 96 whereby the federal government appoints the judges to the system of provincial courts.<sup>49</sup> Whatever the intent or vision at confederation, the reality has developed differently, as Russell points out:

In emphasizing the integrated nature of Canada's judicial system it is important to bear in mind that there is often a considerable difference between the intent of the original constitutional provisions and the development of the institutions governed by those provisions. In the case at hand, there has been a tendency, more accentuated in recent years, to move away from the integrated model to a more bifurcated system of dual courts. This process has witnessed the expansion of courts entirely provincial in nature, established and staffed by the provinces, as well as courts which are entirely federal, established and staffed by the central government....

<sup>45</sup> *Supra* note 13 at 5-11.

<sup>46</sup> P.W. Hogg, *Federalism and the Jurisdiction of Canadian Courts*, (1981) 30 U.N.B. Law Journal 9 at 15. See Russell's comments on this article *infra* at note 197.

<sup>47</sup> *Supra* note 2 at 53: "If Macdonald had proceeded with these plans he would have committed Canada to the development of an American-style dual court system. However, he soon backed away from these plans, partly as the result of pressure from judges of superior courts in the provinces."

<sup>48</sup> *Ibid.* at 49-50: "Comparatively speaking, the Canadian judicial system ranks as one of the most integrated, or least federalized. The judicial provisions of the Canadian Constitution lean strongly in the direction of the judicial system of a unitary state...The only judicial arrangements specifically provided for in the Constitution are the very essence of an integrated federal-provincial system: federally appointed judges of provincial superior and intermediate courts. No other federation has this element of judicial integration."

<sup>49</sup> P.H. Russell, "Constitutional Reform of the Judicial Branch: Symbolic vs. Operational Consideration", *Canadian Journal of Political Science/Revue canadienne de science politique*, XVII:2 (June/Juin 1984), 225 at 246: "Section 96 has served as the linch-pin of Canada's integrated judicial system...The key to this high degree of integration has been the provision in section 96 for federal government appointments of the judges of the higher provincial courts. In a quiet, unnoticed way, this constitutional provision has contributed to the building of a Canadian political community by removing any fears of parochial justice."

The real growth sector of the Canadian judicial system has been the Provincial Courts presided over by provincially appointed judges – courts and judges not expressly provided for in the country's original constitution (although sections 92(14) and 129 contemplate such courts).<sup>50</sup>

Although the system that evolved in Canada has produced a judiciary of high repute,<sup>51</sup> as the Law Reform Commission of Canada noted, the institution of the courts has been scarred and misshapen by these historical shackles:

The Canadian court system bears the characteristics and scars of its distinctive history and evolution. Despite change, the system remains cast in the mould of the nineteenth century. Further, it is fragmented by the often-opposing demands of a federal system. The result is a multiplicity of trial courts and a consequent inability to centralize and rationalize administration and management.<sup>52</sup>

Important improvements have been made to the system since that observation was made a decade ago. For example, the elimination of the middle level courts replaced a three-tiered with a two-tiered trial court system.<sup>53</sup> However, the Law Reform Commission's observation remains an accurate description in connection with the status of the Provincial Court within the existing system. Aside from the issues of possible inefficiencies produced by such a two-tiered system, more fundamental issues, for example issues of equality,<sup>54</sup> arise when the Provincial Court is classified as an *inferior* court in the 1867 judicature model.<sup>55</sup>

Despite important changes to our judicature, the framework continues to be this 1867 model. We have tried to fit the Provincial Court into that hierarchical framework although no such court existed at Confederation. Like trying to fit a large figure into a small, ancient suit of clothes, we have tried to fit the Provincial Court into an *inferior* court status within our 1867 constitutional framework, and this obvious misfit can sometimes rip the peaceful fabric of today's justice system.<sup>56</sup>

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<sup>50</sup> *Supra* note 2 at 51.

<sup>51</sup> M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council 1995) at xiii: "Canadians are rightly proud of their judiciary. Foreign observers look with envy on the judiciary in Canada."

<sup>52</sup> *Supra* note 16 at 9.

<sup>53</sup> See *supra* note 26 at 7.2 and note 13 at 5-14.

<sup>54</sup> *Supra* note 16 at 13: "Another problem is the belief that inequality pervades the present court structures. The existence of multiple levels of criminal trial courts contributes to a perception that there is a hierarchy of these courts with the Provincial Court at the bottom."

<sup>55</sup> *Supra* note 26 at 7.1. At the creation of Canada in 1867, there were three trial-court levels plus the appellate Supreme Court of Canada. The highest court of general jurisdiction was the *superior* court. Below it was the county or district court. These were not *superior* courts, although the federal government appointed the judges. These mid-level, county/district courts have now been eliminated in all of the provinces that once had them. And below these courts were the *inferior* courts made up of magistrates or justices of the peace with jurisdiction over small claims and minor criminal offences. The provincial government appointed these legal officers.

<sup>56</sup> *Supra* note 4 at 400.

The 1867 model included Justices of the Peace and Magistrates to adjudicate minor criminal and civil matters.<sup>57</sup> These were the *inferior* courts. This continued to follow in many respects the English model.<sup>58</sup> But while the model was the same, the reality was quite different because the lay people holding these offices in Canada, at that time, did not have the same legal training or supports available to their English counterparts.<sup>59</sup> Thus the *inferior* courts in Canada differed significantly from their English prototypes.

The Magistrate's Court evolved in Canada, and by the middle of this century had already become more professional and was quite different from the similarly named courts of 1867.<sup>60</sup> The Provincial Court replaced these highly developed courts. Thus, the Provincial Court eliminated and replaced an already professionally developed court, and upon creation of the Provincial Court, all the legally qualified Magistrates could themselves become judges of the newly formed court.<sup>61</sup>

But while there was a clear line of succession, the creation of the Provincial Court was the creation of something new and better. There was a clearly stated

<sup>57</sup> The different titles have historic roots. See, for example Manitoba Law Reform Commission, *The Independence of Justices of the Peace and Magistrates*, (Report #7) (Winnipeg, 1991) at 5: "Justice of the Peace is a very old term dating back to 14<sup>th</sup> century England when justices of the peace were first appointed to enforce the law of the English countryside. Their powers evolved over the years to include the trial of offences and sentencing and the term 'Justice of the Peace' today refers to judicial officers of limited or *inferior* jurisdiction. 'Magistrate' is a more generic term, used to describe persons possessing either judicial or executive powers. The term is broad enough to include the office of the President of the United States (sometimes referred to as the Chief Magistrate), as well as any *inferior* or subordinate judicial officer. The term 'Magistrate' first came to be applied to Justices of the Peace in early eighteenth century England when courts presided over by justice of the peace eventually became known as Magistrates' Courts."

<sup>58</sup> *Supra* note 13 at 8-9. Until as late in our history as 1961, our three-tiered trial court structure "bore a striking resemblance to their English forebears." By 1991, however, structural changes reduced the three levels to two, "and each level was fundamentally different from the three that remained in England....Canada's current Provincial Courts bear little resemblance to English Magistrate's Courts, which have no jurisdiction to try indictable offences and rarely preside at preliminary hearings ... two tasks that are an important part of the work of Canadian Provincial Court judges."

<sup>59</sup> The status afforded Justices of the Peace or Stipendiary Magistrates in England cannot be compared to the Canadian situation in these early years. Legally trained persons rarely supported the inferior courts in Canada, which were scattered throughout isolated areas of the country. This was not the case in England. For example, as early as 1825, all but four of the Stipendiary Magistrates in London were legally trained, and by 1949 all had to be lawyers with at least 7 years experience. While the Justices of the Peace were lay appointees, by 1825 all such justices had to have legally-trained clerks. See *supra* note 12 at 116 and note 13 at 6. When the Magistrate's Courts in Canada were changed into Provincial Courts newly appointed judges were legally qualified, although existing lay magistrates also became Provincial Court judges. See *supra* note 2 at 11.

<sup>60</sup> Although Magistrates have not been eliminated completely, their powers have been reduced to the same level as a Justice of the Peace, unless they are appointed under the *Provincial Court Act*. See *supra* note 57 at 18.

<sup>61</sup> C. Baar, "JPs Return to Alberta – but Not Quietly", (1998) 22:10 Canadian Lawyer at 11.

intention to break with the past and create a new and even more professional court.<sup>62</sup> This development is seen as one of the three major structural court reforms in the past 25 years.<sup>63</sup> Creation of the Provincial Court in each province was not simply a consolidation and a renaming of an existing court. The creation of the Provincial Court was a step forward and a signal: a signal not only that the Magistrate's Courts had evolved, but that there was a clear intention that the Provincial Court was meant to be a break from the 1867 model of an *inferior* court.<sup>64</sup>

Aside from the statements made at the court's inception, this intention to break with the past is also reflected in the changes to the supervision, status and jurisdiction of the judges in the Provincial Court.

For example, the *inferior* tribunals of 1867 required the supervision of legally trained persons. This supervisory role belonged to the *superior* court, whereby professional judges supervised the work of the lay Justices of the Peace and Magistrates. At that time, Justices of the Peace,<sup>65</sup> and the early magistrates were more closely identified with law enforcement than with judicial supervision.<sup>66</sup> The legally trained judiciary in the *superior* courts supervised

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<sup>62</sup> See Russell, *supra* note 2 at 209: "[The] judicialization of the magistracy...involved the transformation of magistrates' courts into Provincial and Territorial Courts....Much more has been involved here than merely a change in name and titles. Behind the improvements in the selection and terms of office of the provincially appointed judiciary was a much stronger emphasis on the role these judges should play in protecting the rights of those who appear before them ... a clear recognition of these judges as independent adjudicators."

<sup>63</sup> *Supra* note 14. The merger of Superior with County and District courts and the beginning of the unified family court are the other two major structural court reforms referred to.

<sup>64</sup> See for example, the comments of Roy Romanow, the Saskatchewan Minister of Justice upon the creation of the Provincial Court of Saskatchewan in October of 1978, in the *The Saskatoon Star Phoenix* (18 September 1978). "Romanow said the change basically means the current Magistrate's Court will be upgraded and will become a Court of Record. Judges of other courts will be able to quote decisions made in the new provincial court. The upgrading of the Court, giving it more authority and independence, will also include institution of a judicial council which will serve as an advisory body in appointments or removal of judges and will have a disciplinary mechanism when necessary....In a written statement issued Thursday, Romanow said it is important that the status of the courts be improved and that the judges should have the same degree of independence as that enjoyed by the federally-appointed judges and by provincial judges in other provinces. New provisions have also been made respecting financial and pension benefits for the judges which will place them on an equal footing with their federally-appointed counterparts in Court of Queen's Bench and District Court. Romanow also notes that the Magistrates' Courts have traditionally 'played a significant role in the administration of justice in Saskatchewan, but, for several reasons, largely historical, these courts have always been regarded as inferior to the other provincially-established courts.'"

<sup>65</sup> *Supra* note 13 at 6.

<sup>66</sup> *Supra* note 61 at 11. The first Magistrates in provinces such as Alberta "were senior officers in RCMP detachments, and by current standards, a first appearance on a criminal charge would resemble more a superior reviewing the work of a subordinate than a judicial officer overseeing the work of a law enforcement officer."



the work of these legally untrained officers by means of judicial review and prerogative writs. This reflected the huge difference in legal ability between the *superior* and *inferior* courts in 1867. Those differences and the need for such supervision do not apply to the Provincial Court of today. The *superior* courts' supervisory role now applies primarily to judicial review of administrative bodies, and not to the Provincial Court. Prerogative writs are still used in matters affecting the Provincial Court, as for example in third-party applications.<sup>67</sup> But is there really a need for one trial court to exercise this jurisdiction over another?<sup>68</sup> This could be part of the appellate court jurisdiction, or a jurisdiction within a unified trial court, as in Nunavut.<sup>69</sup> In 1867, before the development of a full appellate process,<sup>70</sup> the primary common law method of 'appeal' from the decision of *inferior* courts<sup>71</sup> was by way of judicial review, which was appropriate when such tribunals were like administrative arms of the Executive.<sup>72</sup> But far from being an administrative arm of the government, the Provincial Court is one of the primary guardians of the rights of citizens from unlawful government action. For that reason, and with fully developed appellate court systems, the appellate process rather than administrative supervision is the means to review a Provincial Court decision, just as it is the means to review a decision of a *superior* trial court.

<sup>67</sup> See for example, *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.) It is perhaps worth noting that the special status of the *superior* courts requires in cases such as *Dagenais* a direct appeal to the Supreme Court.

<sup>68</sup> See *infra* IV.A Core Jurisdiction. Even if there were not practical need, core jurisdiction considerations may require that *superior* courts maintain this supervisory power over any provincially-appointed court. See especially, *McEvoy, infra* at note 11 Core Jurisdiction, at 718: "We have already raised the question whether unreviewable authority is to be given to the new provincial court in the proposed grant of exclusive jurisdiction or, at best, only a statutory right of appeal. Unreviewable authority might put the provincially-established Court and its provincially-appointed Judges in a s. 96 position notwithstanding that its jurisdiction comes from Parliament."

<sup>69</sup> *Nunavut Act, Chapter N - 28.6, Consolidated Statutes of Canada*, 1993, c.28. See the Judicature Provisions at sections 31-37.

<sup>70</sup> See Jackson, *supra* note 26 at 1-23 for the history of the introduction of appellate courts in England. This occurred after our judicature was put in place and modeled on the English system as it then was in 1867. Section 101 provided for a general court of appeal for Canada, and under that section the Supreme Court of Canada was created in 1875. The appellate courts in each province and the appellate provisions in the Criminal Code were also created after 1867.

<sup>71</sup> For the method of appealing from superior court decisions prior to the nineteenth century introduction of appeal courts, see A.K.R. Kiralfy, *The English Legal System*, 5th ed. (London: Sweet & Maxwell, 1973) at 128. Cases of exceptional legal importance "were informally and unofficially reserved for discussion by all the judges and barristers at Serjeants' Inn in London or in the room at Westminster known as the Exchequer Chamber, and their decision was honoured by all the courts."

<sup>72</sup> Judicial review of administrative bodies developed from these common law prerogative writs. They were a method of controlling those officers and institutions that enforced the administrative will of the government, which included the inferior courts of the day. See S.A. de Smith, *de Smith's Judicial Review of Administrative Action*, J. M. Evans, ed., 4th ed. (London: Stevens & Sons, 1980) at 6 and 28 for the development of these common law tools into the body of administrative law.

However, even some of the early appellate procedures continued to reflect the distinction between a professional court with a judiciary and the unprofessional *inferior* courts. A complete new trial, a trial *de novo*, was the method of appeal from an *inferior* court that had no proper record of what took place in the original trial. For that reason, trial *de novo*<sup>73</sup> was an appeal procedure suited to an *inferior* court in 1867. But that appellate procedure no more suits the Provincial Court of today than it would a *superior* court. This historical anachronism was recognized by former Supreme Court of Canada Justice Emmett M. Hall in 1974. Referring to the professional Magistrates' Court just prior to its re-naming as the Provincial Court, he said:

The trial *de novo* concept is an historical carry-over from the days of the lay Justice of the Peace. It seems an unnecessary duplication of the judicial process in this era of a competent and legally trained bench. The Province cannot change the provisions of the Criminal Code but I think it is relevant here to suggest that the Attorneys General of the several provinces might make representations to the Attorney General of Canada to abandon this procedure and to substitute for it an appeal on the record.<sup>74</sup>

Not long after, Criminal Code amendments of the sort envisioned by Justice Hall were made, and this form of appeal was restricted. Appeals from summary convictions in the Provincial Court are now on the record in the same way as are appeals from *superior* trial courts.<sup>75</sup> Furthermore, the senior appellate courts in the provinces have also required *superior* court judges, who hear the summary conviction appeals from the Provincial Court, to give deference to findings made by a Provincial Court judge.<sup>76</sup> This is the same standard of review that the appellate courts apply when hearing appeals from any trial court, including *superior* trial courts. Prior to such directives, *superior* trial court judges hearing summary conviction appeals freely substituted their verdicts in place of the decisions of the summary conviction court, however reasonable those initial verdicts might have been. This lack of deference reflected the paternalistic and

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<sup>73</sup> On an appeal from a Magistrate's decision on a summary procedure trial, the Criminal Code provided for a new trial in the District Court as the means of appeal.

<sup>74</sup> The Honourable Emmett M. Hall, *Report of the Survey of the Court Structure in Saskatchewan and its Utilization* (Pursuant to Order-in-Council 474-73: Submitted December 23, 1974). This report was filed with the Law Library, College of Law, University of Saskatchewan on (15 August 1975) at 23.

<sup>75</sup> *Criminal Code* R.S.C. 1985, Chap. C-46, s. 822 (1) applies certain of the provisions applicable in indictable matters to summary conviction appeals. S. 822 (4) provides for a trial *de novo* "where, because of the condition of the record of the trial in the summary conviction court or for any other reason, the appeal court, on application of the defendant, the informant, the Attorney General or his agent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial *de novo*." Previously, the appeals were automatically heard by a trial *de novo*. Despite this limited option for a trial *de novo*, appeals are rarely if ever heard by that procedure today.

<sup>76</sup> See for example, *R. v. Andres* (1980), 1 S.R. 96 (C.A.), where it was held that even if the appeal court differed with the trial court as to the facts established by the evidence, the appeal court has no jurisdiction to substitute its view for that of the trial judge, provided that the verdict was reasonable.

anachronistic nature of the *superior/inferior* court framework. As a reflection of the professional stature of the Provincial Court, that attitude is no longer acceptable. On issues of fact, it is now accepted that the summary convictions appeal court has no jurisdiction to retry the case. As on appeals from *superior* trial courts, an appeal from the Provincial Court is limited to determining whether the evidence is so weak that a verdict of guilty was unreasonable.<sup>77</sup> Thus, all appeals from the Provincial Court are now treated fully as appeals, and not as a supervision of an *inferior* tribunal.

The status of the Provincial Court judge of today also reflects the differences between that court and the *inferior* courts of 1867. The *superior* court judges had to be experienced lawyers; *inferior* court officers were not lawyers: the Provincial Court judges of today are lawyers who in most jurisdictions meet the same legal qualifications as *superior* court judges. The *superior* court judges had security of tenure and financial security; the *inferior* court officers had neither: Provincial Court judges have both. *Superior* court judges have wide powers to cite for contempt of court; *inferior* courts had none: the Provincial Court has power to cite for contempt in the face of the court.<sup>78</sup> *Superior* court judges had personal legal immunity provided they were acting judicially;<sup>79</sup> *inferior* court officers did not enjoy the same immunity; Provincial Court judges do. *Superior* courts were courts of record;<sup>80</sup> *inferior* courts were not: the Provincial Court is a court of record.<sup>81</sup>

Finally, and most significantly, the criminal law jurisdiction of the Provincial Court reflects not only the difference between it and the *inferior* courts of 1867 but also its similarities to the *superior* courts of those times. At the time of Confederation, each of the uniting provinces had its own system of courts modelled on the English courts, and at the bottom of the structure "were "inferior" courts staffed by Magistrates or Justices of the Peace with jurisdiction over small civil claims and minor criminal offences."<sup>82</sup> At Confederation, the important criminal and civil matters were reserved for the *superior* court. While

<sup>77</sup> *Martin's Criminal Code*, 1998, (Aurora: Canada Law Book, 1998) at 1303.

<sup>78</sup> When Provincial Court judges exercise their jurisdiction as judges of the Youth Court, they have the same powers as *superior* court judges to cite for contempt. See *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725.

<sup>79</sup> The reasons for this immunity are outlined by Lederman, *supra* 33 at 804. The purpose for immunity is so disappointed litigants will not personally harass those judges. Even if the judge exceeded his or her jurisdiction, removal from office or other extraordinary remedies are available rather than personal liability in damages.

<sup>80</sup> *Ibid.* at 801-02. The issue of whether a court is a court of record is a residue of unhistorical and unmeritorious distinctions that reflected a method the central royal courts used to assert the constitutional superiority of common law courts against other tribunals.

<sup>81</sup> In a correspondence dated 12 October 1979, following the creation of the Provincial Court of Saskatchewan, the then Attorney General, Roy Romanow, wrote to Judge R.E. Lee, the president of the Saskatchewan Provincial Court Judges' Association to confirm that based on established criteria, "I have concluded that the Provincial Court of Saskatchewan is a court of record."

<sup>82</sup> *Supra* note 26 at 7-2.

the Provincial Court continues to have jurisdiction over minor criminal matters, as do *superior* court judges, its jurisdiction over all criminal matters has increased so steadily that it is now the court with the broadest criminal jurisdiction.<sup>83</sup> In 1989, the Law Reform Commission noted the scope of this growth in jurisdiction.

Furthermore, the jurisdiction of Provincial Courts has increased greatly since Confederation to the point where it is the court with the broadest jurisdiction, including the power to try some of the most serious of crimes. In the 1892 *Criminal Code*, there were 136 crimes that had to be heard by Supreme Courts. This number has gradually diminished. There is now a total of nine substantive offences, only one of which is prosecuted with any frequency; i.e. murder (see Appendix B). This reduction in the crimes reserved to the jurisdiction of Supreme Courts has resulted in a parallel expansion in the jurisdiction of Provincial Courts.<sup>84</sup>

The cases over which the Provincial Courts has jurisdiction comprise at least 99 per cent of all Criminal Code offences.<sup>85</sup> Because of the concurrent jurisdiction with the *superior* court in each province, not all 99 per cent of criminal trials are held in the Provincial Court. Where there is concurrent jurisdiction, the offender can opt for one court or the other, and with hybrid offences, the Crown can also choose the Provincial Court. But whether the Crown or the Defence makes the choice, more often than not the choice is the Provincial Court. Therefore, despite the fact of concurrent jurisdiction in many cases, an over-whelming percentage, between 96 and 99 per cent, of all criminal trials are taken before the Provincial Court.<sup>86</sup> And it would be wrong to assume that the more serious, complex and lengthier cases are the ones brought before the *superior* court. The limited data available reveals that where the election is to a *superior* court, more than half of those cases resulted in penalties "that could have been meted out in a summary conviction proceeding."<sup>87</sup> A limited study in 1984 considered the question from the perspective of the seriousness of the offence, and found that the Provincial Court was the court of choice in 71 per cent of offences punishable by life imprisonment; and 77.3 per cent and 80.7 per cent of offences punishable by 14 years or 10 years imprisonment respectively.<sup>88</sup>

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<sup>83</sup> A significant procedural restriction exists. A Provincial Court cannot hold jury trials. However, a judge without a jury conducts the vast majority of criminal trials, and its use in civil and criminal matters has been shrinking in both Canada and England since the turn of the century. See, J. Sopinka and S.N. Lederman, *The Law of Evidence in Civil Cases* (Cambridge: Harvard University Press, 1983) at 1.

<sup>84</sup> *Supra* note 16 at 5. Other than murder, the offences listed in Appendix B as within the exclusive jurisdiction of the *superior* court are virtually never encountered today: treason, alarming Her Majesty, intimidating Parliament or Legislatures, inciting to mutiny, seditious offences, piracy, piratical acts, and bribery of a judicial officer.

<sup>85</sup> *Supra* note 26 at 19-4 footnote 15.

<sup>86</sup> *Ibid.* The percentage varies between different provinces and territories.1

<sup>87</sup> *Supra* note 13 at 106.

<sup>88</sup> *Infra*, *Court Reform in Canada*, note 106 at 84.

This percentage will undoubtedly increase with further amendments to the *Criminal Code* that will further restrict an offender's option to elect a trial in a *superior* court.<sup>89</sup>

There is no question that the primary criminal trial court for both summary and indictable offences is the Provincial Court. This is a significant change in our court system and a momentous reform of our judiciary that has happened gradually. In addition, since the inception of the *Charter* in 1982 the Provincial Court plays a critical role in protecting individual "rights against the state."<sup>90</sup> The Supreme Court of Canada concluded that inasmuch as the Provincial Court's "critical role in enforcing the provisions and protecting the values of the Constitution...has grown over the last few years, provincial courts must be granted some institutional independence."<sup>91</sup> Such a high degree of independence has always been reserved for courts that have held a *superior* court status in our constitution.<sup>92</sup> What are the constitutional implications of this piecemeal, evolutionary reform?

#### IV. Constitutional Issues

There are three constitutional issues. The first has to do with preserving the core jurisdiction of *superior* courts. The second has to do with ensuring that Provincial Court judges can properly fulfill their role as protectors of the Constitution. Connected to this second issue is another concern, namely equality of access to justice.

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<sup>89</sup> The role of the Provincial Courts in criminal matters has evolved substantially since the enactment of the first *Criminal Code* in 1892, especially by a series of amendments beginning in 1955 to the present. The most recent series of changes are included in what has been termed the criminal procedure reform initiative. The first phase, Bill c-42, the *Criminal Law Amendment Act*, 1994 (Chapter 44 of the Statutes of Canada, 1994) and the second phase, Bill C-17, the *Criminal Law Improvement Act*, 1996 (Chapter 18 of the Statutes of Canada, 1997). These changes are now in force. The final phase of the criminal procedure reform initiative, presently in draft legislation, would reclassify some 90 offences into dual or hybrid offences. This is a further reflection of the growing dominance of the Provincial Court in criminal law.

<sup>90</sup> *Supra* note 5 at para. 124.

<sup>91</sup> *Ibid.* at para. 126.

<sup>92</sup> See *Ibid.* at paras. 123, 124 and 125 regarding the distinction between individual independence and institutional independence. Individual independence, the "historic core" of judicial independence is necessary for the fair adjudication of individual disputes. Institutional independence enables the courts to fulfill their constitutional role as "organs of and protectors of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important." Institutional independence reflects the separation of powers between the legislative, executive and judicial organs of government.

The core jurisdiction issues arise from the need to protect a pillar of our rule of law, namely the *superior* court.<sup>93</sup> As outlined earlier,<sup>94</sup> the judicature provisions of the *Constitution Act, 1867*, reproduced *superior* courts in the image of the English central courts, and guaranteed to those courts a core jurisdiction. As Robin Elliot has written, and as the Supreme Court subsequently confirmed, the interests served by these judicature provisions "are clearly not solely, or even primarily, those of the federal government. They are, instead, those of Canadians generally."<sup>95</sup> For that reason, the federal government is itself bound by the judicature provisions,<sup>96</sup> and cannot destroy part of the core jurisdiction of a *superior* court without a constitutional amendment.<sup>97</sup> Do the piecemeal increases to the criminal jurisdiction of the Provincial Court threaten the core jurisdiction? Although this question has been addressed in the recent past, there is a lingering vagueness in the answers. This vagueness arises partly from the uncertainty that is latent in the concept of core jurisdiction and partly from the answer to a related question given by the Supreme Court in *McEvoy*.<sup>98</sup>

The second issue arises because of the role Provincial Court judges perform as protectors of the constitution. This raises issues about the purpose of the judicature provisions. These provisions do not apply to the Provincial Court. But do these provisions define the type of judge that Canadians should have recourse to for protection of their rights and freedoms?<sup>99</sup> Should the federal government appoint the judges that perform this constitutional role, and should these judges have the full protection of the judicature provisions? As Lamer C.J. noted, constitutional interpretation views the federal government appointing powers as more than a "staffing provision... The rationale for the provision has

<sup>93</sup> *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at 753-54. "In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial *superior* courts are the foundation of the rule of law itself... Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment."

<sup>94</sup> *Supra* III.A Superior and Inferior Courts.

<sup>95</sup> R. Elliot "Case Comments – Is Section 96 Binding on Parliament? – *Reference Re Establishment of Unified Criminal Court of New Brunswick*" (1982) 16:2 U.B.C. L.Rev. 313 at 329.

<sup>96</sup> *McEvoy v. A.-G. N.B.*, [1983] 1 S.C.R. 704 at 720: "Parliament can no more given away federal constitutional powers than a province can usurp them.... The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867*." Also, see *supra* note 5 at para. 88: "However, as I recently confirmed, s. 96 restricts not only the legislative competence of provincial legislatures, but of Parliament as well: *MacMillan Bloedel*, *supra* note 93."

<sup>97</sup> *Supra* note 93.

<sup>98</sup> *Supra* note 96. The ambiguity arises from one sentence at 719: "What is being contemplated here is not one or a few transfers of criminal law power, such as has already been accomplished under the *Criminal Code*, but a complete obliteration of Superior Court criminal law jurisdiction." See *infra*, IV.A. Core Jurisdiction.

<sup>99</sup> *Supra* note 95 at 327.

also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role.”<sup>100</sup> In other words, because of this judicial role that they now perform, do Provincial Court judges now need the full constitutional independence and protection of the judicature provisions?

### A. Core jurisdiction

The proper status of the Provincial Court is uncertain because the concept of core jurisdiction is itself vague. As Peter Hogg has pointed out, “no one knows what is included in the guaranteed core.”<sup>101</sup> Furthermore, courts like the Provincial Court can take on jurisdiction that in the past was exercised only by a *superior* court without impairing this core jurisdiction. But while the jurisdiction of *inferior* courts is not frozen at the 1867 limits and can be increased, such increases must “broadly conform to a type of jurisdiction generally exercisable by courts of summary conviction rather than the jurisdiction exercised by courts within the purview of section 96.”<sup>102</sup> As the jurisdiction of the Provincial Court is increased one straw at a time, when, if ever, will it be said that the increases have gone too far, that it has broken the back of the judicature sections of the constitution?<sup>103</sup> The *McEvoy* decision and its aftermath are illustrative.

In *McEvoy* the Supreme Court of Canada held that a reform attempted by the federal and provincial governments to create a unified criminal court staffed by provincially appointed judges was prevented by section 96, and therefore unconstitutional. As a result it is now clear that, short of a constitutional amendment, a unified court would have to be appointed by the federal government. This is because in 1867 the trial of indictable offences was within *superior* court jurisdiction and was part of its core jurisdiction. Thus, the federal government could not give jurisdiction over *all* indictable offences to a provincially appointed *inferior* court, not even if the *superior* court maintained a concurrent jurisdiction, because giving complete, albeit concurrent, jurisdiction to the Provincial Court “is the transformation...of an *inferior* court into a *superior*

<sup>100</sup> *Supra* note 5 at para. 88.

<sup>101</sup> *Supra* note 26 at 7-39: “[N]o one knows what is included in the guaranteed core. In *MacMillan Bloedel*, Lamer C.J.C. acknowledged that he was “not able to specify the powers that comprised the core...In other words, only a series of cases going all the way to the Supreme Court of Canada will chart the boundaries of the untouchable core.”

<sup>102</sup> *Re Adoption Act*, [1938] S.C.R. 398 at 421.

<sup>103</sup> See *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252 at headnote and at 266: The first step in the test to address such questions is whether the power or jurisdiction was exercised exclusively by the superior courts at the time of Confederation. Therefore, the characterization of the issue has great importance. “[T]he characterization of the issue must be sufficiently narrow to avoid large accretions of jurisdiction by inferior courts at the expense of *superior* courts, but not so narrow as to freeze the jurisdiction of *inferior* courts at what it was in 1867.”

court.”<sup>104</sup> However, the court then went on to draw a distinction between piecemeal and wholesale transfer of jurisdiction.

What is being contemplated here is not one or a few transfers of criminal law power, such as has already been accomplished under the *Criminal Code*, but a complete obliteration of Superior Court criminal law jurisdiction.<sup>105</sup>

Few predicted that the Supreme Court would hold that the federal government did not have the power to grant such jurisdiction to provincially appointed judges.<sup>106</sup> One scholar who did predict this outcome was Robin Elliot,<sup>107</sup> who perceived that the Supreme Court would need to do so “to protect the underlying value of Canada’s constitution.”<sup>108</sup> After the Supreme Court decided as he

<sup>104</sup> *Supra* note 11 at 721.

<sup>105</sup> *Ibid.* at 720.

<sup>106</sup> Not only did many not foresee this outcome, some incorrectly marginalized the decision and failed to understand its force. See for example The Canadian Bar Association Task Force Report: Court Reform in Canada, (Ottawa, 1991) (Chair: The Honourable Peter Seaton) at 19. “Prior to the Supreme Court’s judgment in *McEvoy v. A.G. New Brunswick*, section 96 had been interpreted as a restriction only on provincial infringement of federal powers. In *McEvoy*, the Court suggested that section 96 was equally binding on the federal government. This view is in accordance with the long-standing view of Professor William Lederman, but hardly anyone else. *McEvoy* is almost certainly not the last word on the issue of the binding effect of section 96 on the federal government.” However, as to the binding effect of s. 96 on the federal government, *McEvoy* has become the court’s last word. See for example, *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at 737 where Lamer C.J.C. said that “s. 96 of the *Constitution Act, 1867*, limits both Parliament and the provincial legislatures.” He went on to say at 739: “Following *McEvoy*, *supra*, this conclusion is equally applicable to the devolution of powers to a federally created court or tribunal. Essential historic functions of superior courts cannot be removed from those courts and granted to other adjudicative bodies to meet social policy goals if the resulting transfer contravenes our Constitution.”

<sup>107</sup> *Supra* note 95 at 313-16, commenting on *McEvoy* prior to the Supreme Court’s decision, (footnotes deleted): “The heretical thesis that the Parliament of Canada is subject to the same strictures as provincial legislatures when it assigns the task of administering its laws to tribunals other than superior courts [was] first advanced by Professor Lederman in his lengthy treatise on “The Independence of the Judiciary”.... Attempts to persuade the courts of the validity of this thesis have been few and far between. They have also been singularly unsuccessful. In fact, in each case in which the thesis has been advanced it has been rejected almost out of hand. As yet, however, this disappointing track record does not include a definitive rejection of the thesis by the Supreme Court of Canada.... What is the opinion of the Supreme Court likely to be? My suspicion is that most observers of the Court would, without a moment’s hesitation, predict that Professor Lederman’s thesis will again be rejected. This suspicion is based not only on the fact that the weight of authority is so clearly against the thesis, but also on the fact that the Court will likely be very much concerned about the implications of accepting it, particularly in the realm of the administration of criminal justice. (The concern here would be that much of the work already being done by provincially appointed judges over indictable offences would be vulnerable to attack.) I for one, however, am not prepared to say the outcome is a foregone conclusion. My reading of the Court at the moment suggests that it is very receptive now to arguments which, like that which can be advanced in support of Professor Lederman’s thesis, are founded on a need to protect the underlying values of Canada’s constitution.”

<sup>108</sup> *Ibid.* at 315.



predicted it might, Professor Elliot wrote again outlining the importance and implications of the *McEvoy* decision,<sup>109</sup> but noted that "there is still much to be ironed out."<sup>110</sup> One of the causes of the resulting uncertainty was the court's distinction between piecemeal and wholesale transfers. The court gave no justification for the distinction, and, as he noted, "it is hard to see what justification could be given."<sup>111</sup> Other scholars agreed, and as Hogg wrote in an earlier edition of his authoritative text:

The only remaining difference is the fact that a few indictable offences are withheld from the [Provincial Court's] jurisdiction, whereas all indictable offences would come within the jurisdiction of the unified criminal court. But it hardly seems reasonable, let alone principled, to say that an allocation of 99 per cent of all indictable offences to an inferior court does not violate s. 96, but an allocation of 100 per cent would.<sup>112</sup>

But while allowing for the serious constitutional ramification of *McEvoy*, Hogg adds "surely the Court did not intend the upheaval in the criminal justice system which would be attended by the removal of all indictable-offence jurisdiction from [the Provincial Court]."<sup>113</sup> As he notes in the later edition of his text, the Ontario Court of Appeal "has politely refused to draw this alarming conclusion, and has held that the Criminal Code's conferral of jurisdiction on the Provincial Court judges does not run afoul of the requirements of s. 96."<sup>114</sup> Elliott also suspects that the Supreme Court drew the piecemeal/wholesale distinction to avoid the logical inference of its ruling: Perhaps the Court was "hoping that no one would seek to challenge the piecemeal transfers of criminal jurisdiction...[because] when that occurs, the Court will have to either defend the distinction it makes in this case, or abandon it."<sup>115</sup> However, when the Supreme Court was asked to do so, it did neither, but instead dismissed applications for leave to appeal from the Ontario

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<sup>109</sup> R. Elliot, *Comment – New Brunswick Unified Criminal Court Reference* (1984) 18:1 U.B.C. L. Rev. 127 at 140: "The Supreme Court of Canada's decision in [*McEvoy*] is clearly a significant one. At stake in the case were two important constitutional values: on the one hand, access to knowledgeable, independent decision-makers for the purpose of interpreting and enforcing the most important of our rights and obligations and, on the other hand, equality of treatment for the two orders of government in a federal state. By holding that section 96 operates as a fetter on Parliament and by inferring that the same is true of sections 97, 98, 99 and 100, the Court has ensured that those values were respected."

<sup>110</sup> *Ibid.* at 141.

<sup>111</sup> *Ibid.* at 138.

<sup>112</sup> P. Hogg, *Constitutional Law of Canada*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1985) at 422-23.

<sup>113</sup> *Ibid.* at 422.

<sup>114</sup> *Supra* note 26 at 19.2(c). Three separate cases were indexed as *R. v. Trimarchi* (1987) 63 O.R. (2d) 515; [1987] O.J. No. 1171 (Ont. C.A.)

<sup>115</sup> *Supra* note 109 at 138. "My own suspicion is that the Court found itself in the awkward position of, on the one hand, agreeing in principle that section 96 should operate as a fetter on Parliament and, on the other hand, not wanting to invalidate the piecemeal transfers to inferior courts of criminal jurisdiction that had already been made. The distinction was a convenient way of reconciling these apparently conflicting positions. No justification for the distinction is given, however, and as the above discussion indicates it is hard to see what justification could be given. Perhaps the Court was hoping that no one would seek to challenge the piecemeal transfers of criminal jurisdiction. One suspects

decisions.<sup>116</sup> Therefore, the Supreme Court's last word on the issue is *McEvoy*, and as Hogg notes, *McEvoy* leaves the constitutionality of the expanded jurisdiction of the Provincial Court vulnerable to attack.

In *McEvoy v. A.-G. N.B.* (1983), the Supreme Court of Canada held that the federal Parliament could not confer jurisdiction over all indictable offences on a provincial inferior court (a proposed "unified criminal court"), because the trial of indictable offences was within superior-court jurisdiction in 1867. Unfortunately, the Court did not indicate any awareness of the fact that the present Criminal Code confers on provincial inferior courts jurisdiction over nearly all indictable offences. These jurisdictional provisions, although they have been upheld in earlier cases, are now vulnerable to attack on s. 96 grounds....<sup>117</sup> Obviously, the Criminal Code and the actual administration of criminal justice in each province is premised on the assumption that indictable jurisdiction may be exercised by a court with provincially-appointed judges, without violating s. 96. That assumption has to be questioned after the decision of the Supreme Court of Canada in *McEvoy*.<sup>118</sup>

Therefore, while the issue has lain fallow this past decade, there remains a lingering uncertainty arising from *McEvoy* and core jurisdiction considerations. This chronic uncertainty is complicated by the related issues that arise from the Provincial Court's new role as protector of the constitution.

## B. *Protectors of the Constitution*

There is a specific *judicial* role that is described as "protecting the values of the Constitution." That the Provincial Court is taking on more of this judicial role is beyond dispute. So much are Canadians looking to the Provincial Court to protect their rights that the Supreme Court describes the Provincial Court's role as *critical* "in enforcing the provisions and protecting the values of the Constitution."<sup>119</sup> Furthermore, the Provincial Court's role in protecting these values "has grown over the last few years"<sup>120</sup> to such an extent that, as Kent Roach has observed, "such courts determine the vast majority of criminal

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however that before too long, if not in the criminal law area then in some other, the Court will be called upon to resolve a case in which Parliament will be accused of having made a piecemeal transfer of a superior court's jurisdiction to some other body. When that occurs, the Court will have to either defend the distinction it makes in this case or abandon it."

<sup>116</sup> See S.C.C. File Nos. 20711 and 29832, at S.C.C. Bulletin 1988, pages 727, 959, 960.

<sup>117</sup> *Supra* note 26 at 7-28.

<sup>118</sup> *Ibid.* at 19-3.

<sup>119</sup> *Supra* note 5 at para. 126: "The point I want to make first is that the institutional role demanded of the judiciary under our Constitution is a role which we now expect of Provincial Court judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence."

<sup>120</sup> *Ibid.* at para. 126.

offences and most section 24(1) applications.”<sup>121</sup> But the volume of cases alone does not reflect the important role played by the Provincial Court in protecting the values of the Constitution. As the Supreme Court noted, the importance of this role “is most evident when we examine the remedial powers of provincial courts with respect to the enforcement of the Constitution.”<sup>122</sup> The Provincial Court

- enforce the supremacy clause, section 52 of the *Constitution Act, 1982*;
- employ the remedial powers conferred by sections 24(1) and 24(2) of the *Charter*, for example, ordering stays of proceedings or excluding evidence;
- enforce the rights in sections 7-14 of the *Charter*;
- enforce the fundamental freedoms, such as freedom of religion and freedom of expression, found in section 2 of the *Charter*;
- police federal division of powers, by interpreting the heads of jurisdiction found in sections 91 and 92 of the *Constitution Act, 1867*.
- decide on the rights of Canada’s aboriginal peoples, which are protected by section 35(1) of the *Constitution Act, 1982*.<sup>123</sup>

This judicial role is basic to our constitutional democracy, and one of the most critical roles performed by any judiciary. Dicey believed English democracy depended upon independent judges to protect “private citizens against the Executive authority.”<sup>124</sup> As inheritors of this tradition, Canadians also look to courts for their “defense of basic individual liberties and human rights against intrusions by all levels and branches of government.”<sup>125</sup> This is a primary judicial role under our constitution.

This role is directly related to the concept of the rule of law, “which in its historical setting grew up to arm first Parliament and later the judges with the power to resist the tyranny of Kings and Queens.”<sup>126</sup> And this in turn is directly related to the concept of judicial independence, because “it was the preservation of the rule of law which rested upon the independence of the judges.”<sup>127</sup> Indeed, as the late Lord Denning almost 50 years ago wrote: “The keystone of the rule of law in England has been the independence of the judges. It is the only respect

<sup>121</sup> K. Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1998) at 6-17.

<sup>122</sup> *Supra* note 5 at para. 127.

<sup>123</sup> *Ibid.* at paras. 127-28. Also see *supra* note 121.

<sup>124</sup> A.K.R. Kiralfy, *Potter’s Historical Introduction to English Law and Its Institutions*, 4th ed. (London: Sweet & Maxwell, 1952) at 152: “Dicey believed that English democracy depended upon the protection of private citizens against the Executive authority by independent judges determining all disputes according to the same law and in the same tribunals in pursuance of the judicial oath to administer justice indifferently to all men.”

<sup>125</sup> See *Beauregard v. R.*, [1986] 2 S.C.R. 56 at 69: “The enactment of [the *Charter*] conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government.”

<sup>126</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., with introduction by E. C. S. Wade (London: MacMillan & Co., 1959) at xxvi.

<sup>127</sup> *Ibid.* at xxv.

in which we make any real separation of powers.”<sup>128</sup> Such a separation is necessary because “in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government.”<sup>129</sup> For example, it has been held that a main reason for the objective guarantee of security of tenure in the *Constitution Act, 1867* is so judges can effectively protect the citizen “from improper proceedings taken against him by the state or inferior tribunals.”<sup>130</sup> The primary source of these objective guarantees against intrusions by the executive and legislative branches has been the judicature provisions of sections 96-100 of the *Constitution Act, 1867*.<sup>131</sup>

Unfortunately, the Provincial Court is not included in these judicature provisions. Admittedly, a number of other constitutional guarantees of the Provincial Court judge’s independence can be identified.<sup>132</sup> These include the *Charter* and Supreme Court decisions that guarantee financial security, security of tenure and administrative independence.<sup>133</sup> However, such guarantees of

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<sup>128</sup> Sir A.T. Denning, “The Spirit of the British Constitution” (1951) Can. Bar Rev. 1180 at 1182. In Canada, with the introduction of the *Charter*, this judicial separation of powers is especially important. See *Beauregard v. R.*, [1986] 2 S.C.R. 56 at 69, 72 and 73, per Dickson, C.J. for a unanimous court: “Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies....The enactment of [the *Charter*] conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government....The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.” Also, this role requires institutional, not only individual, independence. See *supra* note 5 at para. 123: “As I have mentioned, the concept of the institutional independence of the judiciary was discussed in *Valente*. However, other than stating that institutional independence is different than individual independence, the concept was left largely undefined. In *Beauregard* this Court expanded the meaning of that term, once again by contrasting with individual independence. Individual independence was referred to as the “historical core” of judicial independence, and was defined as “the complete liberty of individual judges to hear and decide the cases that come before them” (at 69). It is necessary for the fair and just adjudication of individual disputes. By contrast, the institutional independence of the judiciary was said to arise out of the position of the courts as organs of and protectors “of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important” (at 70). Institutional independence enables the courts to fulfill that second and distinctly constitutional role.” (The internal quotations are from *Beauregard*.)

<sup>129</sup> *Supra* note 5 at para. 138.

<sup>130</sup> *Supra* note 31 at para. 34.

<sup>131</sup> *Supra* note 5 at para. 311 per La Forest, J. : “[Sections 99-100] entrench the fundamental components of judicial independence set out in the *Act of Settlement* such that violations could be struck down by the courts.” See para. 84 per Lamer C.J.C.: “...sections 96-100 of the *Constitution Act, 1867*, separately and in combination, have protected and continue to protect the independence of provincial superior courts.”

<sup>132</sup> *Ibid.* at para 124.

<sup>133</sup> *Valente v. R.*, [1985] 2 S.C.R. 673, aff’g (1983), 2 C.C.C. (3d) 417; *Beauregard v. R.*, [1986] 2 S.C.R. 56; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *R. v. Genereux*, [1992] 1 S.C.R. 259; and *R. v. Lippe*, [1991] 2 S.C.R. 114.

*individual* judicial independence do not provide the Provincial Court with the objective guarantees provided by the judicature provisions, which are the provisions that are specifically linked to "the maintenance of the rule of law through the protection of the judicial role."<sup>134</sup> Therefore, as both legislators<sup>135</sup> and citizens<sup>136</sup> increasingly look to the Provincial Court to perform this judicial role of protecting the values of the constitution, the exclusion of the Provincial Court from the judicature provisions reveals some problematic gaps in that court's constitutional protection.

This is a problem created by the perpetuation of an archaic two-tiered system of trial courts that no longer fits the constitutional responsibilities of the Provincial Court or the realities of our modern court system. To some extent such gaps can be cured by judicial interpretation of the existing provisions. But there may be other gaps that can only be cured by either constitutional amendment or court reform. An example of a curable gap was the problem of setting compensation for Provincial Court judges. An example of the second type of gap arises when Provincial Court judges are subjected to local political pressures. This problem is most acute when their own Ministers of Justice are the source of such public pressure, or when the provincial governments that established the court, oppose some of the constitutional values that the judges of that court are sworn to maintain.

The series of Supreme Court of Canada decisions on *individual* judicial independence<sup>137</sup> and that Court's landmark ruling in the *Judges' Reference* exemplify the type of gap that is judicially curable. In compensation issues for example, although the Provincial Court did not have the protection of the judicature provisions, the earlier decisions cured this gap in *individual* judicial

<sup>134</sup> *Supra* note 5 at para. 88: "Section 96 seems to do no more than confer the power to appoint judges...It is a staffing provision...However, through a process of judicial interpretation, s. 96 has come to guarantee the core jurisdiction of the courts which come within the scope of that provision. In the past, this development has often been expressed as a logical inference from the express terms of s. 96. Assuming that the goal of s. 96 was the creation of "a unitary judicial system", that goal would have been undermined "if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts."...However, as I recently confirmed, s. 96 restricts not only the legislative competence of provincial legislatures, but of Parliament as well...The rationale for the provision has also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role."

<sup>135</sup> *Ibid.* at para 129: "It is worth noting that the increased role of provincial courts in enforcing the provisions and protecting the values of the Constitution is in part a function of a legislative policy of granting greater jurisdiction to these courts. Often, legislation of this nature denies litigants the choice of whether they must appear before a provincial court of a superior court."

<sup>136</sup> *Supra* note 85.

<sup>137</sup> *Supra* note 133.

<sup>138</sup> See *Valente, ibid.* at 49 C.R. (3d) 97 at 120: "The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence."

independence.<sup>138</sup> But while the principle of financial security was extended to Provincial Court judges, that court still lacked any objective guarantee such as contained in s.100 of the judicature provisions. However, the Supreme Court noted that such limitations were “large gaps”<sup>139</sup> in the written text. But underlying the text were “basic principles which are the very source of the substantive provisions of the *Constitution Act*, 1867.”<sup>140</sup> Since the text of the judicature provisions “merely elaborate those organizing principles”, the gaps in the text could be filled in based on these underlying values. “The preamble identifies the organizing principles of the *Constitution Act*, 1867, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.”<sup>141</sup> By looking to these organizing principles, the Supreme Court was able to grant the Provincial Court “some institutional independence” so that it could carry out the critical institutional role demanded of it “in enforcing the provisions and protecting the values of the Constitution.”<sup>142</sup> This resulted in an arm’s length compensation process as an objective guarantee of this limited institutional independence. By thus insulating the Provincial Court institutionally from the provincial Justice Minister the danger was removed that compensation might be perceived as a lever pressuring the provincially appointed judges.

The second type of gap is not obviously amenable to judicial cure. An example of this is the tension that arises from the new role Provincial Court judges play under the *Charter of Rights and Freedoms*. Judges never asked for this new role. It was a legislative and political decision.<sup>143</sup> Furthermore, it resulted from a federal government initiative that “most of the English-Canadian premiers were firmly opposed to.”<sup>144</sup> Perhaps reflecting that initial opposition, “political figures both in power and opposition, spurred on by public clamour, indulge themselves in public criticism of judges and even demands for discipline.”<sup>145</sup> So far, provincial politicians have been the main source of such political attacks on the judiciary.<sup>146</sup> Such criticisms have long been seen as

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<sup>139</sup> *Supra* note 5 at para. 85.

<sup>140</sup> *Ibid.* at para. 95.

<sup>141</sup> *Ibid.* at para. 104.

<sup>142</sup> *Ibid.* at para. 126.

<sup>143</sup> *Supra* note 4 at 390-93.

<sup>144</sup> K. McRoberts, *Misconceiving Canada—The Struggle for National Unity* (Toronto: Oxford University Press, 1997) at 167.

<sup>145</sup> Comments of the late Mr. Justice Sopinka in an address to the Ukrainian-Canadian Conference on Judicial Independence and Accountability, Kyiv, (2 October 1997) at 15. He went on to say, at 19: “[T]he Charter has turned the court into the messenger who is likely to get shot for bringing bad news. By enacting the Charter, the legislative branch of government enacted a permanent invitation to the judiciary to tell the majority that it is wrong—that it cannot do what it wants to do, or at least that it cannot do it in the way it wants to do it. If the majority is in a particularly surly mood, bringing this kind of bad news can be a singularly unpleasant business.”

<sup>146</sup> See *supra* note 4 at 390-93. See also W.H. McConnell, “*The Sacrifice of Judicial Independence in Saskatchewan: The Case of Mr. Mitchell and the Provincial Court*” (1994) 58(1) Sask. L. Rev. 3. For example, at 19 he reports that a former Justice Minister

injurious to the administration of justice<sup>147</sup> or even as a more direct threat against the “constitutional integrity of the judicial function.”<sup>148</sup> This is especially so if the “point man” for the government is the Minister of Justice, who sometimes has great administrative powers over the Provincial Court.<sup>149</sup> Given the judicature provisions’ organizing principle of insulating the judiciary from local pressures, it is understandable that scholars have conceptually linked the need for a unified court to the maintenance of the rule of law in order that “the courts themselves not be captives of any particular estate or locality.”<sup>150</sup> But because Provincial Courts are “captives” of the provinces, it has been said that “a key political problem for Provincial Court judges is that Provincial Courts are

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“was an incisive critic of a perceived over-use of the Charter by all judges. In the spring of 1987, he told the Progressive Conservative annual convention in Regina that lenient judges “in ivory towers” had better start paying attention to the will of the people.”

See also “Courts Stepping Out of Bounds”, *The Calgary Herald* (13 November 1997), C. Ford: “Only a court not beholden to politicians can be brave. Yet the Alberta government, with Justice Minister Jon Havelock as “point man”, believes the public supports attempts to politicize the judiciary and to place judges under the government’s control. Some do. Those who value their rights and freedoms do not. A number of challenges have been issued, including Premier Ralph Klein’s suggestion that judges were civil servants, as accountable to the government as any other of its minions.”

<sup>147</sup> *Supra* note 33 at 789, Lederman makes this point by quoting Gladstone: “But nothing could be more injurious to the administration of justice than that the House of Commons should take upon itself the duties of a court of review of the proceedings of an ordinary court of law; or of the decisions of a competent legal tribunal, — or that it should tamper with the question of whether judges are on this or that particular assailable and endeavour to inflict upon them a minor punishment by subjecting their official conduct to hostile criticism”

<sup>148</sup> See W. Renke, “Independence and Impartiality: The Case of Provincial Court Judges” (1998) 9:4 *Constitutional Forum* 95-126 at 121: “The independence and impartiality of Provincial Court judges has become a matter of significant public concern. I do not think it an exaggeration to suggest that we, in Alberta, are reaching the point of crisis: Albertans may decide to respect the constitutional integrity of the judicial function; or we may, to the extent possible, seek to subordinate judging to politics — and a bitter and narrow politics that could turn out to be.” The catalyst for events leading to this crisis was, it appears, a 1994 radio interview of Premier Klein.... The Premier’s elliptical pronouncements, which epitomize the view that politics should have dominion over judging, touched off reverberations which have yet to cease.”

<sup>149</sup> See M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 181: “In contrast with the federal courts, all provincial and territorial courts are now run by the attorney generals’ departments. Many judges, lawyers, and government officials expressed to me a desire to find a better solution. They recognize the awkwardness of the existing situation.”

<sup>150</sup> See *supra* note 13 at 115-16: “Unification’s Roots in Theories of the Rule of Law”.

“Ultimately, the legitimacy of both unification and integration rests upon the relationship of courts to the modern principle of the rule of law...[This] requires that the courts themselves not be captives of any particular estate or locality...In short, they must be unified so that they uphold the authority of the law rather than any particular ruler or special interest.

Thus court unification is not an American concept or an English concept or a common law concept, but one rooted in the liberal theory that remains the basis of modern European political institutions.”

provincial.”<sup>151</sup> Furthermore, these are not merely theoretical concerns. Informed, non-judicial observers such as Carl Baar warn that “the Provincial Court has now become the lightning rod for government and public criticism of the courts.”<sup>152</sup> Wayne Renke warns that such attacks are now threatening the independence and impartiality of the Provincial Court in Alberta.<sup>153</sup>

Thus, this second type of gap arises as a result of local pressure being put upon the Provincial Court judges in their judicial role as protectors of the constitution. The main source of protection against such local pressures on judges is found in the judicature provisions of the Constitution, especially the appointing power in section 96. As Russell wrote, “In a quiet, unnoticed way, this constitutional provision has contributed to the building of a Canadian political community by removing any fears of parochial justice.”<sup>154</sup> This is the conventional explanation, supported by the Privy Council decisions,<sup>155</sup> of the purpose of section 96. The organizing principle behind this provision is the insulation of judges from local pressures.<sup>156</sup> Or put another way, the focus of that section is “the maintenance of the rule of law through the protection of the judicial role.”<sup>157</sup> On a daily basis, the Provincial Court performs that role more than any other court,<sup>158</sup> and yet, is excluded from the very section intended to protect that judicial role.<sup>159</sup> As this is

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<sup>151</sup> *Supra* note 148 at 126. Renke explained why this is so: “Provincial governments are more easily pressured than the federal government to take steps against judges, the courts, and the administration of justice. Moreover, because of the smaller size and relatively more homogeneous nature of provincial constituencies, provincial governments may also exert a greater influence on provincial public opinion than can the federal government on national public opinion.”

<sup>152</sup> *Supra* note 61 at 11. Also, see *supra* note 4 at 392-93: “As a result [of such local political pressures], provincial courts across Canada, working through their respective provincial and national associations, began seeking ways to institutionally insulate themselves from the political branches of government. One of the main focuses of such attempts was to build commission processes.... The disputes that gave rise to the [*Judges’ Reference*] appeals before the Supreme Court in large part stemmed from the fear that the actions of some provincial governments obliterated that effort as governments pursued deficit reduction.”

<sup>153</sup> *Supra* note 148.

<sup>154</sup> *Supra* note 49 at 246.

<sup>155</sup> *Martineau & Sons v. Montréal*, [1932] A.C. 113 (P.C.), 120; *Toronto v. York*, [1938] A.C. 415 (P.C.), 426.

<sup>156</sup> Not all accept this explanation. See, for example, Hogg, *supra* note 26 at 7-5.

<sup>157</sup> *Supra* note 5 at para. 88.

<sup>158</sup> *Supra* note 121 at 6.320. Also, see Russell, at *supra* note 2 at 62.

<sup>159</sup> Provincial Court judges also have judicature protections in provincial legislation, and their security of tenure is protected by judicial councils and procedural safeguards. While this reflects the spirit of section 96, these bodies may also reflect local pressures. More comparative studies are needed, but anecdotally within the Provincial Court community a concern exists that the disciplining of Provincial Court judges has been more intrusive than the disciplining of judges protected by section 96. This issue may be addressed by a case presently before the New Brunswick Court of Appeal, which is considering the 15 April, 1999, order-in-council removal of Judge Jocelyne Moreau-Bérubé from office as a judge of the Provincial Court of New Brunswick. For a discussion of this case, see J.P. McEvoy, “Judging a Judge”, (1999) 23:2 Provincial Judges’ Journal



the appointing section,<sup>160</sup> it is difficult to see how the Supreme Court of Canada could ever correct this gap. That responsibility lies with the federal and provincial governments.

What some court critics seem not to understand is that we have made fundamental changes to our Constitution in 1982 such as to make that date a major turning point in our constitutional history. It was not just the *Charter* that we added to the Constitution at that time but also the supremacy clause in section 52 of the *Constitution Act, 1982* making the Constitution the supreme law of Canada, and rendering any law that is inconsistent with it of no force or effect. Some people may not like that change but as citizens they are bound to accept and respect it if the rule of law is to prevail. Legislative supremacy continues as a fundamental principle but it now operates within the limits set out in the Constitution. Judges do not create those limits but are constitutionally bound to enforce them.

Since questions of consistency of particular laws with the Constitution arise both in *superior* courts and the Provincial Court, it is hard to see how anyone can argue for two standards of independence, one constitutional and the other legislative only. If the Supreme Court of Canada has meant to say that the independence of provincial court judges is now constitutionally guaranteed then it seems self-evident to us that those judges have evolved into something very like *superior* court judges. What we have now is a situation where provincial governments are getting *superior* court functions performed on the cheap. But this may prove to be a false economy because of the questionable constitutional foundation upon which this rests. Logically, a truly *inferior* court, when faced with a question of constitutional interpretation, should adjourn the trial and refer that question to a *superior* court for a ruling before continuing with the trial. This is because constitutionally mandated judicial review of legislative and executive action is inherently a *superior* court function. To avoid such scenarios unfolding, governments should bite the constitutional bullet and make the necessary changes to the court structures rather than risk constitutional challenges that may result in the Supreme Court of Canada imposing the timetable for change.

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11. Professor McEvoy expresses concern that the Judicial Council substituted a recommendation for removal in place of an inquiry panel's recommendation for a reprimand and an order for additional judicial training. This action of "the Judicial Council risks a chilling effect on judges in New Brunswick and across Canada," he concluded. Of interest, this is the same McEvoy who brought the core jurisdiction issue before the Supreme Court of Canada that resulted in the pivotal decision of *McEvoy*, *supra* note 96.

<sup>160</sup> The matter is more complex than simple appointment provisions if the judicature provisions must be applied as a whole. See, *supra*, note 95 at 331: "[E]very person who performs the functions of a provincial superior court judges must satisfy each of the following requirements: (1) he must be appointed by the Governor General (section 96); (2) he must be selected from the appropriate bar (sections 97 and 98); (3) he must have security of tenure (section 99); and (4) his salary must be fixed and provided by Parliament (section 100). Failure to satisfy anyone of these requirements will disqualify the person in question from performing the functions of a superior court judge and, by implication, render invalid, or at least inoperative, any legislation that purports to assign such functions to him."

### C. *Equal access to justice*

And in fact, the political branches of government have tried to correct this gap when they tried to create a unified criminal court.<sup>161</sup> *Status quo* interests may have stalled their efforts, but that does not relieve governments of their responsibility because “the interests served by these [judicature] provisions are clearly not solely, or even primarily, those of the federal government. They are, instead, those of Canadians generally.”<sup>162</sup> The interest of Canadians served by the judicature provisions is “the protection of private citizens against the Executive authority by independent judges determining all disputes according to the same law and in the same tribunals in pursuance of the judicial oath to administer justice indifferently to all men.”<sup>163</sup> In this regard, the archaic distinction between a *superior* court and an *inferior* Provincial Court diminishes the ability of Canadians to be protected by “the same law and in the same tribunals.” Thus, the exclusion of the Provincial Court from the judicature provisions raises not only questions of *institutional* judicial independence, but related constitutional questions of equality and access to justice. As Roach points out:

The remedies that provincial courts may order are limited by their statutory powers and resort to a superior court before or after trial may be necessary to obtain *Charter* remedies such as damages and delayed declarations of invalidity. As a matter of principle, it can be argued that the minority of accused who are tried by a superior court of criminal jurisdiction should not have greater access to *Charter* remedies than the majority of accused people tried in provincial court. Nevertheless, our courts continue to accept differences between superior and inferior courts of criminal jurisdiction.<sup>164</sup>

Roach has elsewhere expressed concern that the two-tiered court system might foster a perception that we have first and second classes of litigants, only some of which have access to the first class court. In a recent editorial comment on the *Judges' Reference* in *The Criminal Law Quarterly* he wrote:

Unlike in many other countries, the lower trial courts in Canada have jurisdiction to hear almost every serious criminal case short of murder. Anything that affects the status of provincial courts as “inferior” courts affects the repute of the administration of criminal justice. Given that the clientele of criminal courts – accused, complainants, witnesses – frequently come from the most disadvantaged sections of society while the clientele of the superior courts are frequently corporations and the more advantaged, care must be taken to avoid any hint of second class justice.<sup>165</sup>

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<sup>161</sup> *Supra* “3.2 The History and Jurisdiction of the Provincial Court.”

<sup>162</sup> *Supra* note 95 at 329. Professor Elliot explains further that: “Sections 97 and 98 entrench the important value of having disputes resolved by persons knowledgeable in the law which they will be required to apply. Sections 99 and 100 enshrine the even more important value of having disputes resolved by persons who are, to use the words of Sir Wilfred Laurier, “responsible only to their own conscience” and who may, to use the words of MacGregor Dawson, “give decisions which are displeasing to the government, to the public, or to anyone else without fear of consequences.”

<sup>163</sup> *Supra* note 124 at 152.

<sup>164</sup> *Supra* note 121 at 6-350.

<sup>165</sup> *Editorial*, (1999) 43:1 C.L.Q. 1.

This echoes the prophetic concern expressed nearly two decades earlier by Russell that our judicature "has fostered, at the core of the Canadian judicial system, the development of an unfortunate two-class structure of trial courts: courts staffed by "superior" federally appointed judges and courts staffed by "inferior" provincially appointed judges. This double standard is no longer (if it ever was) acceptable."<sup>166</sup> Some litigators deal in cases involving large financial, property or corporate issues. They and their clients may never enter a Provincial Court, while the disadvantaged, whose cases involve criminal or small civil matters (typically under \$12,000), may never have access to the *superior* court or the judges that sit there. When the Constitution protects rights and freedoms, it serves Canadians, not governments or *status quo* interests. One important way it does this is by defining the type of judge that is to be available to all Canadians to protect their rights and freedoms. The text of the judicature provisions of the *Constitution Act, 1867* defines this type of judge. The mere text of the judicature provisions, however, are specific, and appear to be concerned with such mundane matters as appointments, tenure, and pensions of federally appointed judges. These are but the objective manifestations or guarantees of more basic organizing principles. Thus, underlying these provisions, as Lederman has shown, lies a spirit, a tradition and a purpose. Therefore, to understand such Constitutional texts, the Supreme Court of Canada sometimes looks behind the written document to the organizing principles that underlie it. The organizing principles that underlie the judicature provisions are reflected in what has been described as the Diceyan belief that:

English democracy depended upon the protection of private citizens against the Executive authority by independent judges determining all disputes according to the same law and in the same tribunals in pursuance of the judicial oath to administer justice indifferently to all men.<sup>167</sup>

The judicature provisions reflect these organizing values, and therefore they serve the interests of citizens, not governments.<sup>168</sup> They are more than "a

<sup>166</sup> *Supra* note 49 at 249. Also see Russell, *supra* note 2 at 62: "A further disadvantage of section 96 has been its tendency to promote a two-class system of Canadian trial courts. Judges appointed by the provinces can serve only on "inferior" courts. So long as the adjudicative responsibilities of the provincially appointed judiciary were confined to very minor cases this implication of section 96 may have been tolerable. But, as we have pointed out, the jurisdiction of the purely Provincial Courts (the courts presided over by provincially appointed judges) has expanded well beyond minor matters... Much as been done in recent years to improve the status of provincially appointed judges and the quality of the services provided by their courts... Still, section 96 perpetuates an invidious class distinction between the two groups of Canadian judges in Canada. This distinction has more than symbolic significance. Among other things it adversely affects recruitment to the "inferior courts" and impedes the integration of adjudicative services."

<sup>167</sup> *Supra* note 124 at 152.

<sup>168</sup> See for example Russell *supra* note 2 at 62-63: "Manifest as the negative features of section 96 are, they should not blind us to this section's positive consequences. On the plus side of the ledger, it is a key to the integrated judicial system established in the British North America Act. Whether or not integration was the prime motive behind section 96, it was unquestionably its prime benefit. For a federation such as Canada's, in which

staffing provision;" they reflect an intention to create "a unitary judicial system...the protection of national unity" and to maintain "the rule of law through the protection of the judicial role."<sup>169</sup> They intend to create a type of judge who will serve fundamental interests of citizens. Just as the Constitution protects rights and freedoms for the citizen, the judicature provisions of the Constitution protect the judges who adjudicate upon those rights and freedoms. The judiciary of the Provincial Court is, by definition therefore, not that type of judge. And yet, it is the Provincial Court judiciary that performs the majority of some of these functions that protect the rights and freedoms of citizens. As a result, there is a fundamental contradiction within our judicature, and the stress caused by this internal contradiction increasingly pressures the justice system.

Occasionally the pressure from this contradiction cannot be contained. It erupts in some particular aspect, destabilizing the administration of justice until the particular aspect of the contradiction is resolved. The *Judges' Reference* case is a prime example of this phenomenon. In that case, this fundamental contradiction arising from the ambiguous status of the Provincial Court erupted over the issue of the constitutional basis and scope of the Provincial Court's independence. If the Provincial Court judges are not the type of judge intended by the judicature provisions, then what kind of judges are they and how can citizens know that the Provincial Court judges can properly protect their rights and freedoms?

Unlike the Diceyan vision of "independent judges [impartially dispensing justice] in the same tribunals," those on the government's side of the *Judges' Reference* case argued that there are a variety of tribunals with different levels of formality, structures and principles of independence.<sup>170</sup> According to this conventional view, when comparing the two trial courts in Canada, each judge is not just a judge like every other: there are *judges*,<sup>171</sup> and there are other

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regional jealousies and provincial loyalties have continued to be particularly strong, this contribution to the development of a national community has been an important benefit. Section 96 has fostered mobility by removing the threat of parochial justice....The foundation section 96 provided for a truly national judicial system should be kept in mind in considering the various proposals to reform this part of the Canadian Constitution...While proposals of this kind may overcome many of the disadvantages of section 96, they may also undermine the integration and unity which section 96 has contributed to the Canadian judicial system"

<sup>169</sup> *Supra* note 5, Lamer, C.J.C. at para. 88.

<sup>170</sup> See the transcript of the hearing held the week of 2 December 1996. The 10 hours of hearing have been edited to a one-hour video. See G.T. Seniuk, ed., *Judicial Independence – Canada 1996* (North Battleford: Allyssa Studios, 1997). Copies of this video are included in *Judicial Independence – What it Means to You*, co-produced by G.T. Seniuk, D. Arnot, and F. Rolland, (Saskatoon: Canadian Bar Association-Canadian Judges' Forum, 2000) available at Canadian Bar Association offices, College of Law libraries, and the Canadian Judicial Council.

<sup>171</sup> "To put the matter in its strongest terms: the section 96 judges have long been thought of as the "real" judges, the ones whose independence was entrenched in the British North America Act even before the Charter extended the principle..." See P. McCormick, "Twelve Paradoxes of Judicial Discipline" (1998) 9:4 *Constitutional Forum* 105 at 108.

judges; there are *superior* court judges and there are *inferior* court judges. Relying on the text of the *Constitution Act, 1867*, one lawyer, advocating the position of the government side of the chamber, argued that the Provincial Court did not have the same constitutional level of independence as federally appointed judges. "There's a hierarchy, and there should be," he said, prompting Cory, J. to interject:

That may be a difficult argument when you consider the jurisdiction of Provincial Court judges in criminal matters. You couldn't have a tribunal that was more concerned with the liberty of the subject than the Provincial Court judges, and as a result, surely they are entitled to a recognition of judicial independence, which gets us back to the problem we have to wrestle with: what constitutes that independence.

But I don't think you get anywhere on the hierarchy of the judiciary when you consider the role and the importance of the Provincial [Court] judiciary.<sup>172</sup>

The argument developed in this article is inspired by that constitutional stance asserted by Cory, J. and that was expanded in the reasons of Lamer, C.J.C. Unlike La Forest J., who accepted the judicial hierarchy,<sup>173</sup> the other justices did not resolve the issue on the basis of different statuses of judges. Instead of acknowledging a different level of independence that depended on the status of the judge (what some might call first and second class judges), they endorsed the reasoning of Lamer, C.J.C. They looked to the organizing principles that underlay the judicature provisions, and based on those values they held that judicial independence "now extends to all courts, not just the superior courts of this country."<sup>174</sup>

In that way, the Supreme Court justices resolved one particular eruption caused by the ambiguous status of the Provincial Court. They did so by rejecting, in connection with judicial independence, the notion of first and second class judges. Implicitly, they also rejected the idea of first and second class citizenship before the law.

But so long as there is a two-tiered system of trial courts with a disparity of constitutional status (which is then reflected in a disparity of facility, working conditions and salary), how can the public be assured of a uniform standard of justice? The long-standing answer has been that this assurance is not possible under such a two-tiered system of trial courts and that unification of all trial courts is necessary to achieve this equity. "Only then will every person coming before a trial court be completely assured the same standard of justice,"<sup>175</sup> wrote Kent Roach in a recent editorial comment on the *Judges' Reference*.

<sup>172</sup> *Supra* note 170. The video recording of this exchange is included in the video *Selections from Judicial Independence – Canada 1996*, which is included in the educational and historical resource *Judicial Independence – What it Means to You*.

<sup>173</sup> *Supra* note 17 at para. 324: "I would emphasize that the express protections for judicial independence set out in the Constitution are broad and powerful...The superior courts have significant appellate and supervisory jurisdiction over inferior courts. If the impartiality of decisions from inferior courts is threatened by a lack of independence, any ensuing injustice may be rectified by the superior courts."

<sup>174</sup> *Ibid.* at para. 107.

<sup>175</sup> *Supra* note 165 at 1.

### V. Framework for dialogue

As can be seen by the frequent reference to the Supreme Court of Canada decisions,<sup>176</sup> that court has played an important role in sorting out issues that have arisen as a result of our bifurcated court system. Although this form of court reform has its disadvantages and critics,<sup>177</sup> their decisions have clarified the issues and provided useful principles to guide future reform. The recent *Judges' Reference* is especially significant in this regard. For that reason, now is an appropriate time to take a comprehensive review of the situation, and to reform the court system where needed. Where possible, any festering stresses in the judiciary should be identified and rectified by means other than constitutional challenges in the courts. Such challenges can severely strain the administration of justice, as happened in the events surrounding the *Judges' Reference*.<sup>178</sup> Furthermore, it is imprudent to risk the kind of disruption to the justice system that could result from successful challenges. The same point, in a related discussion, is made by Russell:

But it is doubtful whether judicial interpretation of a constitutional guarantee is the best way of resolving the complex and contentious policy issues that exist in this field... This process [of addressing constitutional issues arising from the growth of the Provincial Court] is still going on, at different paces, in the provinces and territories. Progress has been made through the interaction of responsible ministers, government officials, judges, and members of the legal profession. It is questionable how much this process benefits from a constitutional decision requiring the immediate reform of existing arrangements across the country, or alternatively, placing the good housekeeping constitutional seal of approval on the status quo... Certainly judges should continue to play a significant role in developing law and policy with respect to judicial institutions. But it may be best for their influence to flow through informal discussions and negotiations rather than through authoritative rules in constitutional cases.<sup>178a</sup>

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<sup>176</sup> See G.L. Gall, *The Canadian Legal System*, 3<sup>rd</sup> ed. (Toronto: Carswell, 1990) at 148-49 for a listing of relevant cases. A significant number of these decisions are from the Supreme Court of Canada, but the issue continues to generate case law from all superior court levels. For the most recent example at the time of writing, see *R. v. Louie* (1999), 137 C.C.C.(3d) 68 (B.C.S.C.) involving a *certiorari* application challenging the constitutionality of Provincial Court judges having absolute jurisdiction to try offences in relation to lotteries and games of chance.

<sup>177</sup> See Hogg for example, *supra* note 46 at 25. "I opened by arguing that a federal system does not entail federalizing the judiciary. The framers of the *B.N.A. Act* evidently agreed with me. But the federal Parliament has not agreed, as is demonstrated by the steady expansion of the jurisdiction of federal courts. Even so, many of the evils of a dual court system could have been avoided by the Supreme Court of Canada... The federalization of the Canadian judiciary which was started by the federal Parliament has been taken to such an extreme by the Supreme Court of Canada that it has produced an entirely unnecessary increase in the number of disputes which cannot be resolved in one lawsuit... These results have occurred because of the failure of the Supreme Court of Canada to accommodate its notions of federalism to the special nature of the administration of justice." See also, for examples of other criticisms, Ziegel, *supra* note 3 and the criticisms of Russell and Martin, quoted in *supra* note 4 at 383 and 385.

<sup>178</sup> See *supra* note 4.

<sup>178a</sup> *Supra* note 49 at 245-46.

Although sometimes a court would seek alternative remedies when legislation is found to be invalid, sometimes such legislation is simply struck.<sup>179</sup> Not only is it imprudent to run such a risk if it can be avoided, it is not proper to place courts in the position of having to make such rulings if there are alternative, non-adversarial methods.<sup>180</sup> All of which is in aid of saying that we believe that dialogue, education and court reform are needed.

However, the focus for such dialogue and study should not be, as it has often been interpreted as being, "in terms of the competition for status within the judiciary."<sup>181</sup> The focus should be our constitutional framework and the interests of Canadians that the Constitution serves. Furthermore, as explained by the Supreme Court of Canada in the *Judges' Reference*, our understanding of this constitutional framework includes not only the text but also the organizing principles that underlie the text. These organizing principles and values underlying the judicature provisions are relevant to any dialogue surrounding the question posed at the beginning of this article: does the current status of the Provincial Court provide Canadian citizens with the judicial system contemplated by the Constitution?

For the reasons outlined above, we submit that the only way this can be guaranteed is by the unification of all trial courts. Unification is not the only means by which trial courts can be improved to better serve the public, as Baar has pointed out.<sup>182</sup> However, credible institutions such as the American Bar Association in the United States<sup>183</sup> and the Law Reform Commission in

<sup>179</sup> See the recent cases of *Rice v. New Brunswick*, [1999] N.B.J. No. 543 (C.A.) and [1998] N.B.J. No. 266 (Q.B.) and *Mackin v. New Brunswick*, [1999] N.B.J. No 544 (C.A.) and [1998] N.B.J. No. 267 (Q.B.) In its decision, the Court of Appeal struck down the offending legislation that repealed the right of Provincial Court judges to elect supernumerary status. The trial judge also declared the legislation unconstitutional, but suspended his order until the question could be dealt with through the newly appointed commission process.

<sup>180</sup> See *supra* note 49 at 246, where a related concern is expressed: "There is one further, somewhat indelicate, thought that must be added to these reservations about a constitutional guarantee of judicial independence. That is the observation that in interpreting such a guarantee, judges would in effect be policing the boundaries of their own power."

<sup>181</sup> *Supra* note 12 at 114.

<sup>182</sup> Baar, "Trial court unification in practice" (1993) Vol. 76/No 4 *Judicature* 179 at 184: "At this point, there is simply no evidence that a one-level trial court is better fitted to implement the principle of the rule of law. It is likely that a two-level system could do so with equal effectiveness. Perhaps a three-level system could do so, or a separate system of unified family courts, unified criminal courts, and unified civil courts, if these systems are carefully and sensitively crafted....[A single level court] may assist in achieving important secondary benefits such as efficiency and flexibility of judicial assignment, but even here, many effective alternatives exist. Judges in fragmented multilevel court systems may shift from one court to another when local needs and case pressures arise. Two-level courts with common administrative authorities (the same presiding judge and trial court administrator) have also developed as an alternative to a system based on the quality of all judges."

<sup>183</sup> See Baar, *ibid.* at 179 on the American Bar Association, Standards Relating to Court Organization, particularly Sections 1.10 and 1.12 (Chicago, 1990), which were first proposed in 1974, "In its most recent restatement of the Standards on Court Organization, the American Bar Association has continued its long-standing support for a single-level

Canada<sup>184</sup> (as regards a specialized criminal trial court) have proposed a single-level trial court as the best model. This was the solution adopted in 1990 by the provincial attorneys general, who endorsed the principle of complete unification of both levels of trial court.<sup>185</sup> But whether the unification that was proposed was a specialized criminal court or the "Ian Scott" model of general unification of civil, criminal and family cases,<sup>186</sup> unification was stalled following the opposition of *superior* court judges and the Canadian Bar Association.<sup>187</sup> As Baar observed at the time, "Whatever the merits of these contending positions, the opponents appear to have seized the advantage from the reformers...[with] all but one provincial government placing its priorities elsewhere."<sup>188</sup> The one provincial government that persisted was New Brunswick, but its efforts were ultimately derailed, apparently by the same forces.<sup>189</sup>

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trial court with a single class of judges. By doing so, it has rejected the trial court structure that characterizes more than three-fourths of the 50 states, many of which have reformed their trial courts into two levels with separate courts of general and limited jurisdiction. In the past decade, only one state unified its trial courts into the one-level structure prescribed by the ABA standards."

<sup>184</sup> *Supra* note 16 at 49: "1. (1) Every province and territory should create a single court or court division called the Criminal Court. (2) The *Criminal Code* should confer exclusive jurisdiction on he Criminal Court to try all crimes."

<sup>185</sup> *Supra* note 13 at 12: "After June 1990...provincial attorneys general endorsed in principle complete unification of the trial courts...Complete unification would move yet another long step away from the English model, but would also break fundamentally with the existing Canadian model – eliminating the two levels of trial courts and with them the distinction between federally-appointed and provincially-appointed judges."

<sup>186</sup> *Ibid.* at 1-2: "The Attorney General of Ontario, then the Liberal Government's Ian Scott, had introduced a comprehensive court reorganization package in May 1989....By early 1990, what many observers had labeled an Ontario initiative emerged with broader support. Scott had won the support of his counterparts from New Brunswick and British Columbia, and was lobbying other provincial Attorneys General to secure their endorsement for a joint resolution in favour of trial court unification. In June 1990, a national meeting of provincial ministers unanimously approved the principle of a unified trial court." For the outline of the major court reform initiated in Ontario by Mr. Scott, see *supra* note 176 at 157-59. This initiative envisioned a single trial court, but this has not been achieved yet, ten years after the legislation outlining the reform was introduced.

<sup>187</sup> *Supra* note 12 at 114: "The proposal has been...opposed by section 96 judges, not only through their national association (the Canadian Judges Conference) but also by the Canadian Judicial Council (which has no representation from chief judges appointed by provincial governments) and the Canadian Bar Association."

<sup>188</sup> *Supra* note 13 at 96.

<sup>189</sup> *Supra* note 12 at 117: "In Canada, the province that has most fully embraced the notion that every judge should engage in all three adjudicatory processes is New Brunswick. Early provincial efforts to create a unified criminal court at the Provincial Court level were held unconstitutional by the Supreme Court of Canada [as per *McEvoy*]...Later, the provincial government tried to unify criminal matters in the Court of Queen's Bench, and had the support of the Q.B. Chief Justice. Those efforts were derailed after then federal Justice Minister Alan Rock's unprecedented undertaking that federal authorization (by amending the *Judges Act*) would require superior court and provincial bar endorsement of the proposal."



It is our intention to focus the debate on the constitutional values underlying our court system and to squarely locate the burden of proof on those who oppose unification. To date, opponents of unification have successfully shifted the burden, for example by calling for empirical evidence to support the need for unification.<sup>190</sup> They have managed to perpetuate an archaic judicial structure that reflects a 19<sup>th</sup> Century class structure of English society. Modern day Canada has rejected such notions and the onus of proof is on those who wish to perpetuate such outmoded class distinctions within the judiciary. The forces opposed to unification have been able to shift the burden because the debate has been framed in terms of judicial status rather than independence<sup>191</sup> or in terms of federal or provincial powers rather than the rights of citizens.<sup>192</sup> That has now changed, partly as a result of the Supreme Court of Canada's decision in the *Judges' Reference* and partly as a result of the increased criticism of the judiciary by provincial governments and the commensurate need for greater protection from local pressures.

This concern was not as great in the 1970s and 1980s, a time that political scientists characterized as "province building," as it is now when "many current reforms move in an opposite direction."<sup>193</sup> For example, there is a concern that the intention of some provinces to expand the role of Justices of the Peace may be a move away from "province building" to the "deconstruction of Provincial Courts."<sup>194</sup> Thus, while the political climate is such that some fear for the constitutional integrity of the Provincial Court as it is now constructed, other "critics fear that provincial governments are sacrificing justice to save money, and perhaps even reintroducing a new third tier of trial courts."<sup>195</sup> Further fragmentation of our court structures could only impair the judicial role envisioned by the Constitution, and thereby weaken the constitutional rights of citizens.

One caveat: when we speak of "unification" we are referring to the creation of a Unified Trial Court. This does not mean simply merging the Provincial Court *into* the existing provincial superior court structures. The Provincial Court is a unique court with important values and characteristics that must be preserved and fostered within a Unified Trial Court. We are thinking of such values as accessibility and efficiency (as manifested by the case loads and appeal ratios of Provincial Court judges), as well as proximity to the communities they serve. Nor should the creation of a Unified Trial Court simply result in a new round of off-loading to some newly developing lower level of court, thereby fostering another two-tiered level.

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<sup>190</sup> See for example, *supra* note 13 at 96.

<sup>191</sup> See *supra* note 12 at 114.

<sup>192</sup> See *McEvoy supra* at note 11.

<sup>193</sup> *Supra* note 12 at 120.

<sup>194</sup> *Ibid.* at 120.

<sup>195</sup> *Ibid.* at 114.

Which returns us to the question we wish to promote as the focus of an ongoing coordinated discussion: what court structure serves the constitutional interests of Canadian citizens?

We believe that in addressing this question, the concept of a national judiciary, jointly-appointed by both federal and provincial governments, is an important concept to discuss. As Russell wrote, "a joint system of federal-provincial appointments could be achieved in a variety of ways" but special attention should be given to the model proposed by William Lederman:

His nominating commission would draw its membership from both levels of government and from opposition as well as government benches. It would include lay persons as well as lawyers. Thus it would produce a much more pluralistic basis for judicial recruitment and a check on unjustifiable patronage appointments. Such a commission would be a true nominating commission in that the appointing authorities, be they federal or provincial, would be obliged to fill vacancies with persons approved by the commission.<sup>196</sup>

Such a national nominating commission will provide the proper foundation for a national judiciary that was reflective of the likely intent behind Canadian federalism. "It is the approach that will provide an enduring constitutional basis for a system of national courts which Professor Hogg has suggested was the original ideal of the framers of the *British North America Act*. But this system of national courts would be one that is faithful to the principle of federalism."<sup>197</sup>

From a functional point of view such a system of national courts would make it possible for Canadians to have disputes about their legal rights and duties – disputes which they do not perceive as falling into purely federal or provincial categories – adjudicated at conveniently located centres by judges who, while they may be specialists in some particular area of law, are all highly skilled professionals and not segregated into groups of "superior" federal appointees and "inferior" provincial appointees. This judiciary, a truly national judiciary, would be one which both levels of government could confidently entrust with the application of their laws and one which would command the respect of the citizenry which both levels of government serve.<sup>198</sup>

Because so many of the debates about these issues "have been intermittent, particularistic, and largely below public consciousness,"<sup>199</sup> there is a great need for information, education and dialogue. However, this should be a long-term, coordinated and coherent program, aimed at establishing Canada's court structure on a solid constitutional footing. It is unseemly to continue to allow conflicts to develop because of the residual constitutional stresses caused by our inability to modernize an archaic court structure. It denigrates the administration of justice to continue to rely on the Supreme Court of Canada to resolve these stresses. We suggest that the public interest requires that the governments sit

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<sup>196</sup> *Supra* note 49 at 250.

<sup>197</sup> *Ibid.* at 251.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Supra* note 194 at 114.

down with the judiciary and others to discuss possible ways that these anomalies can be removed and our court structure brought into accord with our modern Constitutional needs. Since such a dialogue is not now taking place, some institutional initiative is necessary to begin the process.<sup>200</sup>

## VI. Conclusion

The Provincial Court is a unique court that has evolved beyond its *inferior* court status inherited from the 19<sup>th</sup> Century. It handles well over 90 per cent of all trial cases across Canada and plays an important role in protecting the Constitution. As we begin the 21<sup>st</sup> Century, it is timely to reexamine the future of the Provincial Court and our court structures generally to ensure that they comply with the judicature contemplated by our Constitution. This would help avert constitutional challenges that continuously are spawned by our bifurcated system of trial courts. The only certain way to do away with the constitutional ambiguity of the two-tiered trial system is by unification. However, our experience has been that such a fundamental court reform is not easily achieved. The alternative should not only be to await further clarification from the Supreme Court of Canada. As an alternative, we call for dialogue and education, as a means to support and build a momentum for reform. Even if such a proactive approach by the justice system did not avoid constitutional challenges or references to the Supreme Court, such a program of dialogue and study would provide a useful resource for the litigants and the court.<sup>201</sup>

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<sup>200</sup> Efforts to create dialogue appears to be now underway. See *supra* note 7. A planning committee that includes many of those who have studied these questions in the past has met to begin developing such dialogue.

<sup>201</sup> The court has in the past deprecated "the practice of bringing before the Court as important constitutional questions...on extremely flimsy material." See *supra* note 96 at 714.