ERGA OMNES OR *INTER PARTES*? THE LEGAL EFFECTS OF FEDERAL COURTS' CONSTITUTIONAL JUDGMENTS

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Does a Federal Court constitutional judgment apply only to parties to a case or can it extend beyond those parties? In other words, beyond the purview of the principles of stare decisis and res judicata, are the effects of the Federal Courts' constitutional rulings inter partes or erga omnes? The answer to this question will shape the conduct of public authorities and private actors, the deference accorded by other Canadian courts to the Federal Courts' constitutional jurisprudence, and, ultimately, institutional respect in the community. Little guidance can be found in the Constitution Acts, 1867–1982, the provisions of which are compatible with both inter partes and erga omnes views. With regard to provincial statutory courts, it has been held that their rulings produce inter partes effects only, as they have no inherent jurisdiction, a characteristic of superior courts. However, the resort to the notion of inherent jurisdiction fails to resolve the matter vis-à-vis the Federal Courts whose judgments are not subject to the supervisory jurisdiction of provincial superior courts. The clearest answer is offered by judicial practice and attitudes over the years, to the extent that Canadian judges have generally assumed the constitutional holdings of the Federal Courts to be erga omnes. However, as with any rule, a fortiori a judge-made law, the power to render erga omnes judgments can evolve as a reflection of the relevant changing realities in modern society. In this regard, normative considerations of the Federal Courts' expertise and efficiency of the dispute resolution process do not clearly favour one view over the other. It is probably the value of uniformity, as adapted to a federation, that tips the normative balance in favour of the erga omnes view. Therefore, until relevant changes affecting the judicial system occur, the safest view in respect of the Federal Courts' constitutional judgments would be to maintain the status quo.

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Une décision en matière constitutionnelle rendue par une Cour fédérale s'applique-t-elle uniquement aux parties à l'instance ou son application peut-elle être plus étendue? En d'autres termes, au-delà de la portée des principes de stare decisis et de res judicata, les effets des décisions en matière constitutionnelle rendues par les Cours fédérales sont-ils inter partes ou erga omnes? La réponse à cette question façonnera la conduite des pouvoirs publics et des personnes privées, la déférence accordée par d'autres tribunaux canadiens à la jurisprudence constitutionnelle des Cours fédérales et, en fin de compte, le respect institutionnel au sein de la communauté. Les Lois constitutionnelles de 1867 à 1982, n'offrent qu'une assistance très limitée, leurs dispositions étant compatibles tant avec la thèse favorisant une portée inter partes qu'avec celle qui lui préfère une portée erga omnes. Pour ce qui est des tribunaux provinciaux d'origine législative, d'aucuns ont affirmé que leurs décisions ne produisent que des effets inter partes puisqu'ils n'ont pas de compétence inhérente, cette dernière étant une caractéristique des cours supérieures. Cependant, le recours à la notion de compétence inhérente ne règle pas la question en ce qui a trait aux Cours fédérales dont les désisions ne sont pas soumis au contrôle judiciaire des cours supérieures provinciales. La réponse la plus claire se trouve dans la pratique et les attitudes judiciaires adoptées au fil des ans dans la mesure où les juges canadiens ont le plus souvent présumé que les décisions en matière constitutionnelle rendues par les Cours fédérales sont erga omnes. Toutefois, comme c'est le cas pour toute règle et a fortiori pour le droit créé par la jurisprudence , le pouvoir de rendre des décisions erga omnes peut évoluer, s'adaptant aux réalités changeantes pertinentes de la société moderne. À cet égard, l'analyse normative de l'expertise des Cours fédérales et de l'efficience du processus de règlement des différends ne favorise clairement ni l'une ni l'autre des thèses. C'est probablement la valeur représentée par l'uniformité, telle qu'elle est adaptée à une fédération, qui fait pencher la balance en faveur de la thèse erga omnes. Par conséquent, jusqu'à l'avènement de changements pertinents touchant le système judiciaire, le choix le plus prudent à l'égard des décisions rendues en matière constitutionnelle par les Cours fédérales serait de maintenir le statu quo.

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1. Introduction

The distinction between *inter partes* and *erga omnes* judgments is a well-known one in continental legal systems and international law. More than half a century ago, Hans Kelsen explained that:

> Invalidation [of a statute] can be effected *erga omnes*, that is, generally … Or, if the court is empowered not to apply what it regards as an "unconstitutional" statute—one that according to its meaning is to be applied in the concrete case—and so decides the case instead without regard to the statute, then the result is that the statute is set aside through a judicial decision that is simply *inter partes*, that applies solely to the parties to the concrete case. The statute, *in conformity to the constitution*, then remains valid; that is, it is to be applied in other cases by other courts that do not regard it as "unconstitutional" and even by the same court if, as actually happens, that court changes its opinion on the constitutionality of the statute.[1]

In the Canadian context, François Chevrette reflected on the question of the legal effects of constitutional judgments as early as 1974, asking whether, "as any other judgment, they have effects only between the litigating parties (*inter partes*) [or] towards all (*erga omnes*) since the unconstitutionality of a law is an objective reality, independent of the parties to that litigation in which that unconstitutionality was declared or found."[2] Chevrette seemed to lean towards the first option although he acknowledged that, in practice, a judgment of unconstitutionality, even at trial level, would amount to the repeal of the particular law declared unconstitutional and, under the principle of stare decisis, would be followed as a highly persuasive precedent, especially if it emanated from a superior court. Indeed, the position that subsequently prevailed, despite a few notable views to the contrary, is that a provincial superior court can render constitutional judgments with *erga omnes* effects within the

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1 Hans Kelsen,"The Concept of the Legal Order", translated by Stanley L Paulson (1982) 27 Am J Juris 64 at 70–71 [emphasis in original]. The translator mentions that he borrowed the terms *inter partes* and *erga omnes* from Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971) at 85–88.

2 François Chevrette, *Recueil de droit public: jurisprudence, notes et documents* (Montréal: Librairie de l'Université de Montréal, 1974) at 180 [Chevrette, translated by author].

province while non-superior court judgments and tribunal decisions on constitutional matters are only *inter partes*.[3]

What of Canada's Federal Courts?[4] When cases concerning the extent of their constitutional authority came before the Supreme Court of Canada, it typically chose to sidestep that complex question.[5] *Windsor (City) v Canadian Transit Co*[6] was the most recent opportunity for the Supreme Court to determine whether the Federal Courts' constitutional judgments could extend *erga omnes*. The case arose out of a dispute over certain properties in Windsor owned by Canadian Transit and intended to be used for the maintenance and expansion of the cross-border Ambassador Bridge. In 2013, the city ordered the properties repaired. As the order was being appealed before the Ontario Superior Court, Canadian Transit—a

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[3] See *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 at 596–98, 77 DLR (4th) 94 [*Douglas/Kwantlen*]; *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 17, 81 DLR (4th) 121; *Cooper v Canada (HRC)*, [1996] 3 SCR 854 at para 99, 140 DLR (4th) 193, McLachlin J, dissenting [*Cooper*]; *Nova Scotia (WCB) v Martin*, 2003 SCC 54 at paras 27–32, [2003] 2 SCR 504 [*Martin*]; *2747-3174 Québec Inc v RPAQ*, [1996] 3 SCR 919 at paras 143–44, 202, 140 DLR (4th) 577, L'Heureux-Dubé J [*RPAQ*]; *R v Lloyd*, 2016 SCC 13 at para 15, [2016] 1 SCR 130 [*Lloyd*]; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Montréal: Yvon Blais, 2014) at 1045–47 [Brun, Tremblay & Brouillet]; Nicole Duplé, *Droit constitutionnel: principes fondamentaux*, 6th ed (Montréal: Wilson & Lafleur, 2014) at 316–17, 537; Sébastien Grammond, "Observations de l'*amicus curiae*" at paras 24, 29–30 in *Descheneaux v Canada (AG)*, 2017 QCCS 2669, 2017 CarswellQue 5564 (WL Can) at Appendix 1; Maxime St-Hilaire, "Du non-droit de l'application de la Charte canadienne des droits et libertés" (2015) 45:1 RDUS 157 at 192–93 [St-Hilaire, translated by author]; David Stratas, "A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference" (2017) 68 UNBLJ 54 at 55–57 [Stratas]. Compare Luc Huppé, *Le régime juridique du pouvoir judiciaire*, (Montréal: Wilson & Lafleur, 2000) at 148–50 [Huppé]. But see Chevrette *supra*, note 2 at 179–81; Fabien Gélinas, "La primauté du droit et les effets d'une loi inconstitutionnelle" (1988) 67:3 Can Bar Rev 455 at 469–74 [Gélinas]; Stéphane Létourneau, "L'autorité d'un jugement prononçant l'inconstitutionnalité d'une loi" (1989) 23:1 RJT 173 at 182, 186, 198–202.

[4] *Federal Court Act*, RSC 1985, c F-7, s 1 provides that the Act may be cited as the *Federal Courts Act*. Accordingly, the terms "Federal Courts" in this article will refer to the Federal Court of Appeal and the Federal Court, while "Federal Court" can refer to the latter court only or to either court depending on the context.

[5] See e.g. *Canada (AG) v Law Society of BC*, [1982] 2 SCR 307 at 326, 137 DLR (3d) 1; *Northern Telecom Canada Ltd v Communications Workers*, [1983] 1 SCR 733 at 740, 147 DLR (3d) 1 [*Nortel*]; *R v Ahmad*, 2011 SCC 6 at para 57, [2011] 1 SCR 110 [*Ahmad*]. See also Gilles Pépin, "La compétence des tribunaux administratifs de décider de la constitutionnalité d'une loi, notamment de sa compatibilité avec la Charte canadienne des droits et libertés" (1991) 16:1 Queen's LJ 113 at 145 [Pépin]. But see L'Heureux-Dubé J's concurrent judgment in *RPAQ*, *supra* note 3.

[6] *Windsor (City) v Canadian Transit Co*, 2014 FC 461, (2014) 455 FTR 154, rev'd 2015 FCA 88, [2016] 1 FCR 265, rev'd 2016 SCC 54, [2016] 2 SCR 617 [*Windsor*].

company created by a 1921 federal statute for the purpose of constructing and operating the bridge—applied unsuccessfully to the Federal Court for a declaratory judgment that the 1921 Act superseded the City by-law and orders. In the Federal Court of Appeal, Stratas JA raised and examined at length the issue of whether a Federal Court has jurisdiction to make a declaration on constitutional matters, before confirming that it had such jurisdiction.

Despite the fact that more than half of Stratas JA's judgment on behalf of the Court had been devoted to its constitutional jurisdiction, the Supreme Court on appeal declined to discuss it, but not without making a few equivocal remarks. At the end of her majority judgment striking Canadian Transit's application on statutory grounds, Karakatsanis J noted the "important distinction between the power to make a constitutional finding which binds only the parties to the proceedings and the power to make a formal constitutional declaration which applies generally and which effectively removes a law from the statute books."[7] While recognizing that the Federal Court "clearly" has the former power, she declined to express her view on the latter one, cryptically specifying that "[m]y silence on this point should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion" (that the Federal Court has also the latter power).[8] One might wonder whether it is a silence that speaks volumes.

Karakatsanis J's dictum appears to have caused grave concerns among a number of Federal Court judges. In *Bilodeau-Massé v Canada (Procureur général)*,[9] Martineau J interpreted it as "a significant challenge … ultimately affect[ing] the social self and the jurisdiction of this federal court."[10] In his view, the Federal Court "is now facing a truly Shakespearean dilemma. To be or not to be a superior court."[11] In the course of a lengthy analysis of the Federal Courts' jurisdiction over constitutional matters, Martineau J proceeded to explain the Court's authority under section 52(1) of the *Constitution Act, 1982*, repeatedly reasserting its judges' power to render declaratory judgments on the constitutionality of legislation in matters within the Court's jurisdiction.[12] In a recent lecture, Stratas JA renewed his criticism of the suggestion that the legal effects of the Federal Courts' constitutional judgments were akin to those rendered by provincial statutory courts. He further argued that there should be no distinction

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7 *Ibid* at para 70 [footnotes omitted].

8 *Ibid* at para 71.

9 *Bilodeau-Massé v Canada (Procureur général)*, 2017 FC 604, [2018] 1 FCR 386 [*Bilodeau-Massé*].

10 *Ibid* at paras 58–60.

11 *Ibid* at para 60.

12 See *Ibid* at paras 11, 38, 63–64, 71, 83, 88–89.

between superior and non-superior courts as regards the effects of their constitutional rulings. Stratas JA concluded by suggesting that the Supreme Court reconsider and possibly cast aside Karakatsanis J's dictum in *Windsor*, and that "statutory courts might well wish to seek statutory amendments to shore up their powers."[13]

By contrast, Karakatsanis J's dictum has yet to attract any significant level of scrutiny before provincial courts and among legal commentators.[14] Such little interest thus far might be explained by a perceived lack of relevance of the matter. Indeed, in theory, one might assume that all issues pertaining to the legal effects of a judgment would be resolved by applying the principle of stare decisis, by virtue of which the only law court that must follow Federal Court of Appeal precedents is the Federal Court (subject of course to the principle of res judicata according to which a matter decided in a final judgment cannot be relitigated between the parties to that judgment). Absent any horizontal binding effect across Canada, no Canadian court need follow Federal Court precedents, which are only persuasive. A Federal Court judge may well declare a statute invalid or valid, but Canadian stare decisis does not require that thereafter other Canadian courts treat that statute as such. They can—and even should—conduct their own independent review when a statute is properly (re)challenged before them. However, in practice, a Canadian court will accord a fair degree of deference vis-à-vis judgments of other Canadian courts from parallel jurisdictions.

Nonetheless, one might still argue that the question raised by Karakatsanis J bears more than mere theoretical importance. At its core, it deals with Federal Court judges' power and the enforceability of their judgments concerning the supreme law of the land. More specifically, a conclusion that Federal Court judgments in constitutional matters are *erga omnes* would mean that all Canadians must abide by a Court's constitutional holding unless it is reversed or a provincial court seized

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13 Stratas, *supra* note 3 at 67.

14 The only exceptions found are: Nicolas Lambert, "Death by a Thousand Cuts: Federal Court Jurisdiction and the Constitution" (2018) 31:2 Can J Admin L & Prac 115 and Paul Daly, "When is a Court not a Court? Windsor (City) v Canadian Transit Co, 2016 SCC 54" (12 December 2016), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2016/12/12/when-is-a-court-not-a-court-windsor-city-v-canadian-transit-co-2016-scc-54/>. In *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132 at para 35, 409 DLR (4th) 129, a case dealing with the constitutional jurisdiction of a federal board, the BC Court of Appeal stated in passing that "only provincial and territorial superior courts can make *general* declarations of invalidity" [emphasis in original]. In *Stick v Onion Cree Lake Nation*, 2017 SKQB 176 at para 36, 2017 CarswellSask 299 (WL Can), the trial judge mentioned that "[t]hat issue has not yet been conclusively resolved".

of the same constitutional question decides differently. Conversely, the *inter partes* view would mean that, outside the scope of the principle of res judicata, any body, including a party to the proceedings giving rise to a Federal Court judgment, may validly ignore that judgment. Federal Court judges would witness the enforceability of their judgments put on a par with that of provincial statutory court judgments, which, in theory, remain subject to review by superior courts. Having in mind the Supreme Court's controversial decision regarding the eligibility of the Justices of the Federal Courts from Québec to be appointed to the Supreme Court,[15] one might wonder whether a reason why the effects of Federal Court judgments should be restricted to the parties to each case is that the overall level of expertise of Federal Court judges may be considered lower than that of provincial superior court judges. These consequences would raise concerns that provincial and territorial courts would start giving less deference to constitutional interpretations by Federal Courts, which might induce a reciprocal treatment by Federal Court judges of their provincial counterparts. The *inter partes* view would encourage constitutional challenges on issues already resolved by the Court and thus cause greater uncertainty in the legal system. More litigation means more legal and societal costs, including longer judicial delays, and therefore less access to justice. With less deference to an institution comes less prestige and less respect within the legal community. This grim picture could well turn into a self-fulfilling prophecy if it ends up influencing the decision of enough of the most competent members of the Bar who wish to apply to the Bench but then only seek an appointment to the provincial appellate or superior courts. In the long run, this will be to the detriment of the quality of justice rendered at the federal level.

The inquiry begins, in Part 2, with an examination of the Supreme Court opinions, practices and attitudes that should help uncover the judicial views regarding the legal effects of the Federal Courts' constitutional judgments. As it will be shown, Canadian judges, by and large have assumed that Federal Court judges can and do render *erga omnes* constitutional judgments. Part 3 inquires as to whether the *erga omnes* view, as applied to Federal Court judgments, fits within the constitutional scheme. This part focuses on the notion of the superior courts' inherent jurisdiction, against which virtually all claims regarding the non-superior courts' and tribunals' jurisdiction to hear constitutional matters have been assessed. Given the finding that a Federal Court judge's power to render *erga omnes* constitutional judgments is compatible with the constitution, Part 4 turns to the underlying normative considerations: why should Federal Courts be able to render *erga omnes* constitutional judgments? Those in favour of the *erga omnes* view (at Federal Court level)

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15 See *Reference Re Supreme Court Act (Canada)*, 2014 SCC 21, [2014] 1 SCR 433.

advance three main arguments, described in Section 4A: the efficiency gains in the legal process and judicial system, a higher level of uniformity of laws across Canada and the specific expertise of Federal Court judges who are assigned all or most of the cases in a number of specialized areas. Taking a closer look at these arguments, Section 4B suggests that, though they appear persuasive at first sight, their complexity and contentiousness warrant against drawing any firm normative conclusion beyond recognizing that the argument from uniformity seems to convey a modest measure of support to the *erga omnes* view (and then only because there is no interjurisdictional stare decisis in the Canadian federation).

2. Judicial Practice and Attitudes

In investigating the question of whether Federal Court constitutional judgments can have *erga omnes* effects, little help can be gleaned from the terms of the *Constitution Acts, 1867 to 1982* or of the *Federal Courts Act* themselves. Under section 101 of the *Constitution Act, 1867* and as reiterated by Parliament in sections 3 and 4 of the *Federal Courts Act*, Federal Courts have been established for "the better Administration of the Laws of Canada". To infer from this phrase the Federal Courts' power to render *erga omnes* judgments seems a stretch. Section 52(1) of the *Constitution Act, 1982*—the "Supremacy Clause"—is not much more helpful as it does not state which courts can declare a law inconsistent with the provisions of the Constitution to be "of no force or effect", and such type of declaration can arguably encompass both *erga omnes* and *inter partes* decisions. A similar observation could be made about sections 18.3(2) and 57(1) of the *Federal Courts Act*, which refer to the Federal Courts' competence to hear a question on "constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province." However, it is worth noting that, in *Re Manitoba Language Rights*,[16] the Supreme Court of Canada interpreted the phrase "of no force or effect" to mean "invalid", that is, "absolutely void and inoperative," invoking the "constitutional jurisprudence, developed under the *Colonial Laws Validity Act, 1865*" and the "unanimous" finding of Canadian courts in language rights cases.[17]

What transpires from this state of affairs is that, as some constitutional scholars have remarked, the judicial authority to review the validity of

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[16] *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 746–47, 19 DLR (4th) 1 [*Re Manitoba Language*].

[17] *Ibid.* Interestingly, one of the three cases cited by the Court in support of its interpretation was a judgment of a provincial statutory court, in which the judge declared the impugned Act "unconstitutional" after expressing the view that an Act found to be unconstitutional "has no more reasons to exist": *Québec (Procureur général) c Brunet*, JE 83-510 rev'd on other grounds, JE 84-62 (Qc Sup Ct).

Canadian legislation amounts to a self-conferral of jurisdiction stemming from the nature of the judicial function and the country's constitutional system.[18] In the same vein, the extent of judicial review, including the power to render *erga omnes* constitutional judgments, requires that we turn again to the courts' interpretations of their own constitutional authority.

Contrary to the well-settled *inter partes* limits of the provincial statutory courts' and Canadian tribunals' constitutional pronouncements, the case law prior to the Federal Court of Appeal's dictum in *Windsor* does not suggest that this question with respect to Federal Courts was of particular concern to Canadian judges. Federal Court judges themselves seemed to have simply assumed that they were empowered to render *erga omnes* judgments. The Supreme Court had many opportunities over the years to examine that assumption, but never sought to question it and even seemed at ease with it. For instance, in *Cooper*, La Forest J, delivering the majority judgment of the Court, found that one practical consideration in favour of denying the Canadian Human Rights Commission the power to decide a *Charter* issue was that "[i]t would be more efficient, both to the parties and to the system in general, to have a complainant seek a declaration of constitutional invalidity in either the Federal Court or a provincial superior court."[19] Similarly, in *Douglas/Kwantlen*, La Forest J, with the agreement of the majority Justices of the Court, noted that the application of constitutional norms by a tribunal, always subject to judicial review, was "a totally different function from a formal declaration of invalidity, a matter falling solely within the jurisdiction of a federal court."[20]

If the Supreme Court's (pre-*Windsor*) separate treatment of Federal Courts on the one hand, and of provincial statutory courts and tribunals on the other hand, were any indication, it would be that the *inter partes* view was not intended to apply to Federal Courts. Moreover, a closer look at the Supreme Court's constitutional cases on appeal from the Federal Court of Appeal—especially three major constitutional remedy cases that have never been examined in this particular context—confirms a tacit recognition of the Federal Courts' power to render *erga omnes* constitutional judgments.

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18 See Gélinas, *supra* note 3 at 457–58; Huppé, *supra* note 3 at 7–13; Pépin, *supra* note 5 at 146, citing Peter W Hogg, *Constitutional Law of Canada*, 2nd ed (Toronto: Carswell, 1985) at 93–96; *Cf Cooper*, *supra* note 3 at para 83; Barry L Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed (Toronto: Butterworths, 1988) at 2–22.

19 *Cooper*, *supra* note 3 at para 62.

20 *Douglas/Kwantlen*, *supra* note 3 at 599–600.

In *Osborne v Canada (Treasury Board)*,[21] a group of federal public servants challenged the constitutionality of a federal statute prohibiting them from "engaging in work" for or against a political party or candidate on the grounds that that prohibition violated their *Charter* right to freedom of expression. At trial level, the Federal Court judge interpreted and applied the phrase to each contested activity and issued separate rulings as to whether the activities in question were covered by the statute. The Federal Court of Appeal overturned the trial court's judgment and held instead that the impugned prohibition violated the *Charter*. The Supreme Court agreed with the Court of Appeal that the prohibition did not pass constitutional muster to the extent that it applied to a greater number of public servants and a greater variety of political activities than necessary to achieve the purpose of the statute. It is in the ensuing discussion of the appropriate remedy that the Court revealed its assumptions concerning the scope of the Federal Courts' constitutional rulings. In his majority judgment, Sopinka J compared the lower courts' respective approaches as follows:

> [The trial judge] dealt with the respondents on a case-by-case basis and tailored the legislation to conform with a result that would not involve an unreasonable limit on the freedom of expression … On the other hand, the Court of Appeal struck out the offending parts of the section, leaving it to Parliament to cure the defect by adopting an alternative that will conform to the *Charter* in its various applications.[22]

That Sopinka J understood the Court of Appeal's chosen remedy as one with *erga omnes* effects is inferred from his recognition that "striking out" the unconstitutional parts of the law would require Parliament to intervene should it wish to replace them with a constitutionally valid alternative.[23] With the unanimous agreement of the Court, Sopinka J sided with the Court of Appeal, as the impugned law's too many invalid applications strongly suggested "that it is invalid as a whole."[24] Therefore, he confirmed the Court of Appeal's decision to strike out the offending law and declaration that the impugned law was of no force and effect.[25]

In *Schachter v Canada*,[26] the plaintiff, who was the natural parent of a newborn child, challenged the constitutional validity of section 32

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21 *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 82 DLR (4th) 321 [*Osborne* cited to SCR].

22 *Ibid* at 101.

23 *Ibid* at 101, 105.

24 *Ibid* at 105.

25 *Ibid* at 105–06.

26 *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1 [*Schachter* cited to SCR].

of the federal *Unemployment Insurance Act*[27] which accorded parental benefits to adoptive parents only. Having concluded that this provision contravened the plaintiff's equality rights under section 15 of the *Charter*, Strayer J of the Federal Court considered the two available remedies in the circumstances. One would have been "to strike down the impugned provision."[28] However, because doing so would have had the consequence of denying benefits to all parents, Strayer J ultimately chose the alternative, which was to declare that natural parents were entitled to the same benefits as adoptive parents. On appeal, the majority Justices of the Federal Court of Appeal sided with Strayer J's analysis of the appropriate remedy, sharing his concern that a declaration that the impugned provision was invalid would deprive adoptive parents of their benefits under the existing law. The fact that the focus of the appropriateness of the remedy was on its consequences vis-à-vis all parents necessarily implies that both federal appellate and trial judges assumed the *erga omnes* dimension of their remedy. When the case was further appealed to the Supreme Court, the same assumption was made by its justices. Delivering the majority judgment of the Court, Lamer CJC adopted the same perspective set out in the trial and appeal judgments. He sought to determine whether Strayer J should have simply struck down the unconstitutional provision or should have granted a different remedy, including making an order "that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32."[29] Following a lengthy analysis of the consequences of the available remedies on natural and adoptive parents, the Court ruled that, in the circumstances of the case, "the Federal Court is … required by s. 52(1) of the *Constitution Act, 1982* to declare that s. 32 is of no force and effect,"[30] while recognizing that "a limited power to extend legislation [to third-party groups] is available to courts in appropriate circumstances" under section 52(1).[31]

In *Corbiere v Canada (Minister of Indian & Northern Affairs)*,[32] a group of members of the Batchewana Indian Band successfully challenged the constitutionality of section 77(1) of the federal *Indian Act*,[33] which required that band members be "ordinarily resident on the reserve" in order to be deemed eligible to vote in band elections.[34] Both the Federal Court, Trial Division and Federal Court of Appeal ruled that the

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27 *Unemployment Insurance Act*, *1971*, SC 1970-71-72, c 48.

28 *Schachter*, *supra* note 26 at 692.

29 *Ibid* at 694.

30 *Ibid* at 724.

31 *Ibid* at 725.

32 *Corbiere v Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere* cited to SCR].

33 *Indian Act*, RSC 1985, c I-5, s 77(1).

34 *Corbiere*, *supra* note 32 at para 23.

impugned section violated the off-reserve Batchewana Band members' equality rights under section 15 of the *Charter*. The trial judge declared the impugned law unconstitutional but limited its declaration to off-reserve Band members only, whereas the Court of Appeal issued a constitutional exemption to the Band. The Supreme Court unanimously dismissed the appeal although it disagreed with the Court of Appeal's and trial judge's decisions to grant *inter partes* remedies. In their majority judgment, McLachlin and Bastarache JJ stated that the there was "no evidence of special circumstances" giving rise to an exemption, and "off-reserve members of most if not all Indian bands in Canada" were concerned by the residency requirement of section 77(1) of the Act.[35] In her concurring judgment on behalf of three other justices, L'Heureux-Dubé J also opined that the exemption was not, in the circumstances, the appropriate remedy as it would have placed a heavy burden on members of other Indian bands living off-reserve, by "requir[ing] those in each band to take legal action to put forward their claim."[36] L'Heureux-Dubé J specified that, before considering the specific circumstances of the Batchewana Band, the trial judge and the Court of Appeal should have first examined "the general application of the legislation" and the available "evidence of general invalidity."[37] She agreed with the majority justices that the residency requirement, in its general application, violated the *Charter*. Therefore, in lieu of the trial and appellate courts' *inter partes* remedies, the Court substituted a declaration striking out the residency requirement from section 77(1).

Osborne, *Schachter* and *Corbiere* confirm the modern judicial position of generally assuming or acknowledging the Federal Courts' power to render *erga omnes* constitutional judgments. There is no perceived effort on the part of the Supreme Court to restrict the scope of their remedial powers. Until Karakatsanis J's dictum in *Windsor*, the Supreme Court had consistently maintained that position and no court had ever sought to question it. The extent to which the *erga omnes* view in the Federal Courts' context is backed by constitutional law and fits within the general constitutional scheme is examined in the next part.

3. Superior Courts and Inherent Jurisdiction

By and large, the most frequently invoked notion in jurisdictional disputes at the constitutional level is the inherent jurisdiction of superior courts. Thus, the question regarding *erga omnes* constitutional judgments is whether they fall within that inherent jurisdiction. To the extent that it

35 *Ibid* at para 22.
36 *Ibid* at para 113.
37 *Ibid* at para 46.

does, then the Federal Courts' power to render such judgments depends on whether they are considered to be superior courts, or on whether that aspect of the superior courts' inherent jurisdiction can be shared with other courts.

Superior courts have long been defined by the notion of inherent jurisdiction. In Canadian case law, the main source of the notion of "core or inherent jurisdiction of the superior courts" has been broadly inferred from sections 96–100 of the 1867 Act, which create and establish provincial superior courts, and grant them the guarantees of judicial independence originally derived from the *Act of Settlement* of 1701. In *MacMillan Bloedel Ltd v Simpson*,[38] Lamer CJC, delivering the majority judgment of the Supreme Court, stated that the criterion for determining the content of the inherent jurisdiction, as well as the reasons explaining why superior courts have inherent jurisdiction and why their inherent jurisdiction cannot be legislatively removed, were ultimately based on the rule of law:

> 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 … [T]he 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 … Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment. The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law.[39]

Probably the two most important and distinctive components of the superior courts' inherent jurisdiction are their residual jurisdiction over matters not specifically assigned to another adjudicative body and their authority to supervise and control the legality of decisions made by inferior courts, tribunals, administrative bodies and public authorities. According to one line of reasoning, it follows that a superior court's inherent jurisdiction cannot be transferred to a non-superior court and a court that does not possess this double residual and supervisory jurisdiction is not a superior court.

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38 *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 130 DLR (4th) 385 [*MacMillan Bloedel Ltd* cited to SCR].

39 *Ibid* at paras 37–38.

It has been stated that judicial review of legislation is part of the superior courts' inherent jurisdiction,[40] but that statement must be carefully qualified. At the outset, this authority has no historical grounding in the unwritten English constitution, from which the notion of inherent jurisdiction has been received in Canadian law. Moreover, nothing prohibits some sharing of the superior courts' inherent jurisdiction with statutory courts. In *MacMillan Bloedel Ltd*, Lamer CJC recognized that the fatal flaw of the impugned statute was not the fact that it conferred upon a provincial statutory court a power within the superior courts' inherent jurisdiction, namely the power to punish youths for *ex facie* contempt of court, but the fact that that power had been correspondingly stripped from superior courts. Had the statute created a concurrent jurisdiction over *ex facie* contempt of courts by youths, it would have passed constitutional muster. Even part of the supervisory authority can be transferred to another court and therefore be removed from superior courts (subject to some exceptions). Indeed, as the Supreme Court stated in *CLRB v Paul L'Anglais Inc*[41]: "Parliament has a perfect right to enact that the superintending and reforming power over federal agencies, acting in the administration of the laws of Canada … be exercised exclusively by the Federal Court, a court created for the better administration of those laws."[42]

While all Canadian courts and even many tribunals can and do exercise judicial review, it is nonetheless subject to certain caveats, which require one to distinguish yet again between the inherent jurisdiction of superior courts and all other courts' (necessarily statutory) jurisdiction. Non-superior courts' constitutional pronouncements may only be made in the course of the proper exercise of their statutory jurisdiction whereas a superior court, by virtue of its residual jurisdiction, is always competent to hear a constitutional challenge, notwithstanding another court's jurisdiction over the same challenge; constitutional jurisdiction

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40 See e.g. *Ahmad*, *supra* note 5 at para 62; TA Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995) 46:5 SCL Rev 1027 at 1027, 1030–31, 1042 [Cromwell]; Huppé, *supra* note 3 at 12–13, 221; Andrew K Lokan & Erin Burbidge, "The Federal Court's Jurisdiction to Apply the Constitution" (2006) 21 NJCL 151 at 153 [Lokan & Burbidge].

41 *CLRB v Paul L'Anglais Inc*, [1983] 1 SCR 147, 146 DLR (3d) 202 [*Paul L'Anglais* cited to SCR].

42 *Ibid* at 162. For more recent restatements, see *Strickland v Canada (AG)*, 2015 SCC 37 at paras 17–18, [2015] 2 SCR 713 [*Strickland*], citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 34, [2009] 1 SCR 339. Provincial superior courts retain a concurrent jurisdiction to hear applications for judicial review of federal executive or administrative action on constitutional grounds, and to rule on the legality of federal administrative action as a necessary step in adjudicating claims properly brought before them.

of superior courts, as part of their inherent jurisdiction, cannot be taken away by Parliament or the provincial legislatures.[43]

There appears to be a further caveat: the exclusive power of superior courts to render *erga omnes* judgments as part of their inherent jurisdiction.[44] However, that caveat does not necessarily resolve the question as to whether Federal Courts can render *erga omnes* judgments. At the outset, the demonstration that the *erga omnes* dimension of a judgment is an integral part of the inherent jurisdiction remains to be made, as the power to render such judgments does not appear to be a necessary implication of the inherent jurisdiction. Even assuming that such a power were part of the inherent jurisdiction, it would not in itself prohibit statutory courts from sharing that power with superior courts.

The debate concerning the power to make *erga omnes* judgments as part of the inherent jurisdiction might be put to rest if we accept Parliament's words as stated in sections 3 and 4 of the *Federal Courts Act* (and reiterated in respect of other federal statutory courts), that its "additional" section 101 courts are "superior courts of record". A number of constitutional scholars doubt that Federal Courts are or can be considered superior courts as they do not possess the superior courts' (same) residual and supervisory jurisdiction and, arguably, have no inherent jurisdiction. Because these aspects of the superior courts' jurisdiction are constitutionally protected, Henri Brun, Guy Tremblay and Eugénie Brouillet even argue that neither Parliament nor the provincial legislatures are competent to decide which court can be considered a superior court and, therefore, the reference to Federal Courts as superior courts in sections 3 and 4 would be unconstitutional.[45] In *Windsor*, the Supreme Court read the term narrowly by stating in a footnote that it

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[43] See *Canada (AG) v Law Society (British Columbia)*, [1982] 2 SCR 307 at 328, 137 DLR (3d) 1 [*Jabour*]; *Paul L'Anglais*, *supra* note 41 at 159; *Nortel*, *supra* note 5 at 745; *Ahmad*, *supra* note 5 at para 62; Brun, Tremblay & Brouillet, *supra* note 3 at 1046. But see in *Okwuobi v Lester B Pearson School Board*, 2005 SCC 16 at paras 54–55, [2005] 1 SCR 257, the Supreme Court ruled that when a tribunal is properly granted exclusive jurisdiction to consider constitutional challenges, applicants cannot bypass the administrative process and directly seek constitutional relief before the Superior Court.

[44] See e.g. *Douglas/Kwantlen*, *supra* note 3 at 592–95; *Cooper*, *supra* note 3 at para 99, McLachlin J, dissenting; *Martin*, *supra* note 3 at paras 28, 31; *Lloyd*, *supra* note 3 at para 15; Brun, Tremblay & Brouillet, *supra* note 3 at 1045–47; Lokan & Burbidge, *supra* note 40 at 153.

[45] See Brun, Tremblay & Brouillet, *supra* note 3 at 832–33, 845; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 7–28; Huppé, *supra* note 3 at 8, 61; Ghislain Otis, "Les obstacles constitutionnels à la juridiction de la Cour fédérale en matière de responsabilité publique pour violation de la Charte canadienne" (1992) 71:4 Can Bar Rev 647 at 660, n 61.

"means only that its jurisdiction is 'supervisory'. The Federal Court is not a superior court in the true sense of possessing inherent jurisdiction."[46]

To be sure, a court's limited supervisory jurisdiction alone would not suffice to make it a superior court, although the Federal Courts' current supervisory jurisdiction over all federal boards, commissions and other tribunals pursuant to section 18 of the *Federal Courts Act* is much wider than the corresponding jurisdiction of their provincial statutory counterparts. While Federal Courts also possess a limited residual jurisdiction conferred by sections 25 and 26 of the Act, what truly sets them apart from provincial statutory courts is the fact that they are not subject to the supervisory authority of a superior court.[47] Perhaps a better qualification of Federal Courts than "federal superior courts" or "statutory superior courts", neither of which can shake off the thorny questions related to inherent jurisdiction, is Maxime St-Hilaire's distinction between superior courts and "courts of superior jurisdiction".[48] The latter expression would include not only the provincial superior courts but also the Supreme Court, provincial courts of appeal (which are also section 96 courts), Federal Courts and the other federal statutory courts.[49] Furthermore, according to St-Hilaire, all the courts of superior jurisdiction can render *erga omnes* judgments.

Qualifying the judicial power to render *erga omnes* constitutional judgments as part of the inherent authority of superior courts does not imply that Federal Courts do not or cannot possess it. Further, it should be underscored that a court does not cease to be a court simply because it can only render *inter partes* constitutional judgments. Therefore, both the *erga omnes* and the *inter partes* views as pertaining to the Federal Courts are compatible with the constitution. The remainder of the article will examine whether one view is more desirable once normative considerations are integrated into the analysis.

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46 *Windsor* (SCC), *supra* note 6 at para 33, n 2, citing *Puerto Rico (Commonwealth) v Hernandez*, [1975] 1 SCR 228 at 233, 41 DLR (3d) 549. But see Laskin J's dissenting judgment at 245–46; *Canada (HRC) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 24, 157 DLR (4th) 385 [*Canadian Liberty Net*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 136, [2007] 1 SCR 350. Provisions similar to ss 3–4 have been inserted in the federal statutes creating the Tax Court of Canada, the Court Martial Appeal Court of Canada and the three territorial superior courts of record. See St-Hilaire, *supra* note 3, n 78.

47 See e.g. Francois Chevrette & Herbert Marx, *Droit constitutionnel: notes et jurisprudence* (Montréal: Les Presses de l'Université de Montréal, 1982) at 867.

48 St-Hilaire, *supra* note 3 at 190–91.

49 *Ibid* at 192.

4. Efficiency, Expertise and Uniformity

A) The Case for the *Erga Omnes* View

The normative case in support of the Federal Courts' power to make *erga omnes* constitutional rulings was summarized by Stratas JA in *Windsor* as follows:

> Were it not for Parliament's ability to create a national court to administer federal laws under section 101, provincial and territorial superior courts, thirteen in all, would administer those laws. One jurisdiction's superior court might disagree with another jurisdiction's superior court. Perhaps a third or fourth point of view may emerge as other jurisdictions' superior courts weigh in on the issue. So, for example, in some jurisdictions, a particular expense might be deductible for income tax purposes; in others, not. In some jurisdictions, a federal administrative tribunal's decision would be binding and in force; in others, not. In some jurisdictions, an illegal strike or lockout in an essential national service might be enjoined; in others, not. Interjurisdictional inconsistency and inequality would prevail, perhaps pleasing forum shoppers, but undermining the workability and unity of the federation.
>
> Section 101 exists to prevent this … Parliament intended the Exchequer Court and its successors to be strong national institutions—courts in every sense—able to fulfil the purpose of section 101 by adjudicating federal matters completely and to conclusion … To achieve that end, the Exchequer Court and its successors must be able to identify the operative and applicable laws before them, even when those laws are affected by paramountcy and interjurisdictional immunity.
>
> Were it otherwise, the purposes section 101 seeks to advance would be frustrated. Suppose that, as here, a party seeks in the Federal Court a declaration of its rights under a federal statute and is met with the argument that the doctrines of paramountcy and interjurisdictional immunity do not apply and so provincial law applies fully to affect those rights. If the Federal Court has no power to deal with paramountcy or interjurisdictional issues, the parties would have to proceed to a provincial superior court and later to provincial appeal courts and ultimately to the Supreme Court for a ruling on those issues, and then, depending on the result, proceed back to the Federal Court. Federal-provincial-federal hop-scotching does nothing to further access to justice … Further, over time, provincial superior courts and provincial appellate courts might disagree on the issues of paramountcy or interjurisdictional immunity, spawning the very inconsistency and inequality that section 101 was meant to prevent.[50]

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50 *Windsor* (FCA), *supra* note 6 at paras 52–54 [emphasis in original].

The substance of Stratas JA's reasoning borrows from the debate concerning the extent of the Federal Courts' jurisdiction—and other specialized courts and tribunals—and uses two of the main arguments in support of their establishment and at the heart of the broader debate in the law and social science literature over the merits of specialization, namely efficiency and uniformity.

Efficiency. Almost all jurisdictional disputes between two adjudicative bodies or levels of government will raise issues concerning the efficiency of the dispute resolution process in terms of time and resources necessary to reach settlement, including judgments on the merits. Indeed, one of the justifications of the creation of the Federal Courts was to offload from the generalist courts' docket those occasional but time-consuming cases that non-specialized judges had less or little experience with, in part because a provincial generalist court did not receive a critical mass of cases in certain legal niches.[51] Moreover, when deciding jurisdictional issues between Federal Courts and provincial superior courts, Canadian lawmakers and judges have been sensitive to the risk and consequences of the fragmentation of proceedings in a case, including what Stratas JA referred to as "federal-provincial-federal hop-scotching."[52] Multiple proceedings cause delays and incur additional legal costs. As delays and costs impact the entire judicial system, access to justice will be further compromised.[53]

Uniformity. The second virtue sought from granting jurisdiction over a given subject-matter to a single judicial body, especially a national court,

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51 See *House of Commons Debates*, 28-2, No 7 (26 May 1970) at 85–86 (Hon John N Turner); *House of Commons Debates*, 28-2, No 8 (9 June 1970) at 22 (Hon John N Turner); *House of Commons Debates*, 28-3, No 1 (29 October 1970) at 707 (Hon John N Turner); David J Mullan, *The Federal Court Act: A Study of the Court's Administrative Law Jurisdiction* (Ottawa: Minister of Supply and Services Canada, 1977) at 62 [Mullan]; Canada, Minister of Justice, *Proposals to Amend the Federal Court Act* (Ottawa: Department of Justice Canada, 1983) at 3 [*Proposals to Amend the Federal Court Act*].

52 *Windsor* (FCA), *supra* note 6 at para 54.

53 See *R v Foundation Co of Canada Ltd* [1980] 1 SCR 695 at 706, 106 DLR (3d) 193, Martland J, dissenting; *Ahmad*, *supra* note 5 at paras 4–5, 76, 80; *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at paras 18–19, 32, [2010] 3 SCR 585 [*TeleZone*]; *Windsor* (SCC), *supra* note 6 at paras 97–98, 120–21, Moldaver and Brown JJ, dissenting, at para 130, Abella J, dissenting; *Bilodeau-Massé*, *supra* note 9 at paras 52, 67–69, 80, 116; *House of Commons Debates*, 28-2, No 5 (25 March 1970) at 5470–73 (Hon John N Turner); *House of Commons Debates*, 28-5, No 1 (29 October 1970) at 707–08 (Hon John N Turner); *House of Commons Debates*, 34-2, No 4 (1 November 1989) at 5415 (Hon Doug Lewis); *Proposals to Amend the Federal Court Act*, *supra* note 51 at 2–4; K Campbell, "The Future of the Federal Court of Canada" (Paper delivered at The Federal Court of Canada — An Evaluation Symposium, 26 June 1991) [unpublished] [Campbell]; John N Turner, "The Origin and Mission of the Federal Court of Canada" (Paper delivered at The Federal Court of Canada—An Evaluation Symposium, 26 June 1991) [unpublished] [Turner].

is the attainment of greater uniformity in judicial interpretations. Echoing lawmakers' statements borrowing from the language of subsidiarity, Stratas JA referred to the purpose of the *Federal Courts Act*, which is to "establish … courts at the federal level to regulate matters that provinces alone cannot regulate and to harmonize the interpretation and application of federal laws."[54] In particular, the often invoked objective of assigning jurisdiction on a subject-matter to Federal Courts is the elimination of conflicting judgments between the parallel federal, provincial and territorial courts. Once these conflicts are eliminated, so are the opportunities for forum-shopping or rearguing the same case before different courts. In the end, the result would be more legal certainty in the legal system.

Expertise. At times, even the Supreme Court recognized a third virtue resulting from Federal Court judges' jurisdiction to hear constitutional challenges of federal laws, namely their particular expertise over complex issues involving the interpretation of these laws and their knowledge of the federal government apparatus.[55] It has been argued that their expertise helps produce better decisions in those areas, contributes to the development of the law and is used to afford citizens better constitutional protections.

To be sure, these three virtues are interrelated. For instance, it is frequently assumed that, overall, a court with expertise in a particular field should be able to resolve cases in that field more quickly. It is also believed that that court's expertise will contribute to produce more predictable judgments in its areas of specialization and thus enhance legal certainty.

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54 Stratas, *supra* note 3 at 63. See also *Canadian Liberty Net*, *supra* note 46 at para 33; *TeleZone*, *supra* note 53 at paras 49–50; *Strickland*, *supra* note 42 at paras 17–18; *Bilodeau-Massé*, *supra* note 9 at para 69; House of Commons, Standing Committee Justice/Legal Affairs, No 26 (7 May 1970) at 12 (Hon John N Turner); House of Commons, Standing Committee Justice/Legal Affairs, *Evidence*, No 31 (26 May 1970) at 85–86 (Hon John N Turner); House of Commons, Standing Committee Justice/Legal Affairs, *Evidence*, No 33 (9 June 1970) at 18 (CS Maxwell), at 22, 30 (Hon John N Turner); *House of Commons Debates*, 28-5, No 1 (29 October 1970) at 707 (Hon John N Turner); *House of CommonsDebates*, 34-2, No 4 (1 November 1989) at 5413–14 (Hon Doug Lewis); House of Commons, Legislative Committee, *Evidence*, No 1 (23 November 1989) at 14 (Hon Doug Lewis); Campbell, *supra* note 53 at 185, 188; Turner, *supra* note 53 at 5–8.

55 See e.g. *Tétreault-Gadoury v Canada (Employment & Immigration Commission)*, [1991] 2 SCR 22 at 34, 36, 81 DLR (4th) 358; *Reza v Canada*, [1994] 2 SCR 394 at 403–04, 116 DLR (4th) 61; *Strickland*, *supra* note 42 at para 17. See also Campbell, *supra* note 53 at 189; P Garant, "Réflexion prospective sur le destin de la Cour fédérale" (Paper delivered at The Federal Court of Canada—An Evaluation Symposium, 26 June 1991) [unpublished]. But see *Mission Institution v Khela*, 2014 SCC 24 at paras 45, 57, [2014] 1 SCR 502.

Better legal certainty will result in less litigation and will thus save judicial resources and reduce courts' caseload and judicial delays.

Altogether, efficiency, expertise and uniformity have been identified in the literature as "neutral virtues"[56] to the extent that they represent desirable qualities that are generally sought after in organizations and in society and so are viewed as helping to produce better decisions, but do not point towards specific substantive outcomes. In the context of the judiciary, it is assumed that having specialized courts (or judges) is similarly desirable. The argument for judicial specialization and neutral virtues unfolds in a highly logical fashion and strongly appeals to our common sense, so much so that it has often been assumed.[57] The same neutral virtues are invoked in support of the Federal Courts' jurisdiction to grant *erga omnes* constitutional remedies. While seemingly convincing at first sight, the argument based on neutral virtues, on its own or as applied to jurisdictional disputes involving Federal Courts, is far from unequivocal and requires many nuances.

B) Assessment

At the outset, the claim that judicial specialization necessarily enhances the neutral virtues or that enhancing them necessarily translates into a better judicial system or produces better decisions from a substantive standpoint is founded on little empirical study, no doubt because of the complexity of measuring the net benefits of judicial specialization and neutral virtues.[58] One could think of studies comparing the reversal rates of Federal Court of Appeal and provincial appellate court constitutional judgments by the Supreme Court over time. Another potentially relevant type of study, that might be somewhat indicative of party counsel's preferences and their perceptions as to the quality of the Federal Courts' system—including the quality of their judgments—could track the variations in the number and percentage of constitutional Federal Court cases over a period of time. There is also a valuable body of literature on judicial specialization that

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56 Lawrence Baum, *Specializing the Courts* (Chicago: University of Chicago Press, 2011) at 4, 32–34 [Baum].

57 See e.g. *Ibid* at 1, 4, 33; Daniel J Meador, "A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals" (1989) 56:2 U Chicago L Rev 603 at 615 [Meador]; Mullan, *supra* note 51 at 1–2, 15, 61.

58 See Baum, *supra* note 56 at 1, 4, 34, 218–19, 226; Edward K Cheng, "The Myth of the Generalist Judge" (2008) 61:3 Stan L Rev 519 at 549–50 [Cheng]; Chad M Oldfather, "Judging, Expertise, and the Rule of Law" (2012) 89:4 Wash UL Rev 847 at 866–67, 878, 892–93 [Oldfather]; Michael E Solimine, "The Fall and Rise of Specialized Federal Constitutional Courts" (2014) 17:1 U Pa J Const L 115 at 121–22 [Solimine]. In the context of judicial review of federal administrative action by Federal Courts, see Mullan, *supra* note 51 at 62–63.

has mainly developed in the US, whereas the subject remains unexplored in Canada. This literature sheds a useful light on the normative arguments put forward in support of the Federal Courts' asserted power to render *erga omnes* constitutional judgments.

A cursory examination points to a number of considerations challenging the underlying values of specialization. To be sure, courts at the federal level can convincingly claim that, given their higher concentration of cases dealing with federal law, they have developed a greater expertise than local courts in that area. It could then be argued that this expertise will inform their analysis of the constitutionality of federal laws, although it is not necessarily reflected in the overall percentages of appeals allowed by the Supreme Court.[59] Conversely, local courts of general jurisdiction can claim that, given their higher concentration of local cases, they have a finer grasp than their federal counterparts of the implications of federal law in their local contexts. And because of their continuous exposure to a wider range of cases, they approach legal issues with a broader perspective with respect to the impact and consequences of their decisions on the parties and the legal system.[60] Some authors also argue that specialization is attained at the cost of "professional bias". According to Lawrence Baum:

> At any given time, the set of people who work in a particular field such as patents or bankruptcy is likely to have a narrower range of opinion about the issues in their field than does the general public or political and social elites as a whole. That relative consensus reflects similarities in interests and values among people in the field, forged in part by their interactions … On the whole, however, the more likely effect of professional bias is that judges strongly adhere to certain positions. Whether or not they were specialists prior to their judicial service, judges who are immersed in a particular type of case may develop stereotypes about cases … The higher the level of judge concentration [i.e. the extent to which individual judges

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[59] Based on the data collected from one study of all Supreme Court cases between 2000 and 2016, 41.2% of all constitutional appeals from the Federal Court of Appeal during this period were allowed, a rate that is almost identical to the corresponding national average of 42.8%: see Portia Proctor, *Court Tracker: Summary Report: Supreme Court of Canada 2000-2016* (Calgary: Manning Foundation for Democratic Education, 2017).

[60] See e.g. Harold H Bruff, "Specialized Courts in Administrative Law" (1991) 43:3 Admin L Rev 329 at 331 [Bruff]; Rochelle C Dreyfuss, "Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes" (1995) 61:1 Brook L Rev 1 at 17; Amanda Frost, "Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?" (2015) 68:1 Vand L Rev 53 at 100–01 [Frost]; Jeffrey W Stempel, "Two Cheers for Specialization" (1995) 61:1 Brook L Rev 67 at 92 [Stempel].

> hear only a limited range of cases], the more likely it is that the judge will develop stereotypes about cases in a field.[61]

On a related note, empirical research conducted in the areas of US patent and antitrust law has shown more ideological decision-making on the part of judges who specialize in those areas than non-specialist judges.[62] In fact, the assumption that a judge's expertise in one domain is necessarily desirable because it translates into superior decision-making hides a complex question. Some authors argue that a judge's expertise is not likely to provide that judge with greater insight or to result in judgments of higher quality, but rather to produce "roughly equivalent insight more quickly."[63]

The value of uniformity must also be counterbalanced with other considerations, especially in the Canadian federal context. Indeed, for the Supreme Court, diversity in the federation and the autonomy of provincial governments within the constitutional scheme have led to the recognition that "differential application of federal law in different provinces can be a legitimate means of promoting and advancing the values of a federal system. Differences between provinces are a rational part of the political reality in the federal process."[64]

More generally, letting various litigants make the same legal challenge can generate conflicting judgments but it can also benefit the legal system by contributing to the development of the law. At the outset, a subsequent court hearing the same challenge might well agree with the decision of the earlier court, thus actually increasing rather than undermining legal certainty over the particular issue. Even when they are found to disagree between themselves, having different courts weigh in on the same question will yield a wider range of views on a given legal problem arising in different

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61 Baum, *supra* note 56 at 36; see also Bruff, *supra* note 60 at 331–32; Cheng, *supra* note 58 at 552–53; Oldfather, *supra* note 58 at 873; Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 264.

62 See Brett Curry & Banks Miller, "Judicial Specialization and Ideological Decision Making in the US Courts of Appeals" (2015) 40:1 Law & Soc Inquiry 29; Banks Miller & Brett Curry, "Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit" (2009) 43:4 Law & Soc'y Rev 839.

63 Oldfather, *supra* note 58 at 894, 899–900. See also Baum, *supra* note 56 at 219; Richard A Posner, *The Federal Courts: Challenge and Reform* (Cambridge: Harvard University Press, 1996) at 254 [Posner].

64 See *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 58, 161 DLR (4th) 385, citing *Haig v Canada*, [1993] 2 SCR 995 at 1046–47, 105 DLR (4th) 577, citing *R v S (S)*, [1990] 2 SCR 254 at 289–92, 10 WCB (2d) 440 (invoking a line of Supreme Court cases since Confederation that "consistently has upheld federal statutes with differential geographic application").

contexts.[65] That more than one court is called upon to rule on the same issue also acts as a "signaling device"[66] of the existence of a controversy that merits its members' attention, even more so if the courts disagree among themselves. Subsequent courts, including the Supreme Court, where that controversy is likely to end up, will benefit from the diversity of input generated through such process characterized as "percolation". Some authors have questioned the net benefits of percolation to the legal system, as it comes with increased legal uncertainty and delays before a legal issue can be definitively resolved by the Supreme Court, which may or may not rely on the various lower courts' input. [67]

The contentiousness of the normative dimension of jurisdictional disputes between the Federal Courts and the provincial superior courts based on sections 96–101 of the 1867 Act may be a reason why the Supreme Court has been hesitant to engage in them. That the Canadian courts only scrutinize the validity and not the wisdom of laws has become a well-worn mantra harking back to the days of the Judicial Committee of the Privy Council. In *Union Colliery v Bryden*,[68] a constitutional challenge of the validity of a provincial law that prohibited Chinese people from working in mines, the Privy Council stated that "[i]t is the proper function of a court of law to determine, what are the limits of the jurisdiction committed to [the parliaments]; but, when that point has been settled, Courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not."[69] More recently, Thomas Cromwell—before his appointment to the judiciary—remarked that one of the main characteristics of Canadian judicial review is "continuing adherence to the distinction between a law's legality, which is the courts' concern, and the law's wisdom, which is not."[70] Nevertheless, one could say that it is also well-known that courts have been selective in invoking or ignoring that mantra.

In the end, the debate over the merits of specialization is difficult to resolve solely from a qualitative perspective given the multifaceted dimensions of neutral virtues, which reflect specialized courts' and courts

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65 See e.g. Baum, *supra* note 56 at 2, 32–36; Frost, *supra* note 60 at 100–02; Meador, *supra* note 57 at 632–34; Posner, *supra* note 63 at 257; Richard L Revesz, "Specialized Courts and the Administrative Lawmaking System" (1990) 138:4 U Pa L Rev 1111 at 1156–59 [Revesz].

66 Frost, *supra* note 60 at 101, citing Revesz, *supra* note 65 at 1156.

67 See e.g. Meador, *supra* note 57 at 633–34; Solimine, *supra* note 58 at 144–46; Stempel, *supra* note 60 at 92–96.

68 *Union Colliery Co of British Columbia Ltd v Bryden*, [1899] UKPC 58, [1899] AC 580 [*Union Colliery v Bryden* cited to AC].

69 *Ibid* at 585.

70 Cromwell, *supra* note 40 at 1027, 1035.

of general jurisdiction's respective institutional strengths and weaknesses. When this analysis is applied to the inquiry into the legal effects of the Federal Courts' constitutional judgments, a limited case can be made in favour of the *erga omnes* view based on the value of uniformity as adapted to the Canadian federal structure. After a final Federal Court judgment is rendered and until a provincial court gets to rule on the same issue, litigants and society will benefit from the law having attained a better degree of legal certainty and coherence, knowing that everybody must abide by the judgment. At the same time, the absence of horizontal stare decisis preserves the federal principle and the opportunity for percolation.

5. Conclusion

Judicial review of legislation is not expressly provided for in the *Constitution Acts, 1867–1982*. Constitutional scholars have opined that it arose and has developed since Confederation as a self-conferral and practice. Even more so, the same can be said about the effects of judgments on constitutional matters. Today the view that has become generally accepted is that superior courts can render *erga omnes* constitutional judgments while non-superior court judgments and tribunal decisions can only be *inter partes*. This distinction has been identified by a number of judges and commentators as deriving from the superior courts' inherent jurisdiction, although that proposition has yet to be properly demonstrated.

On the one hand, the Federal Court of Appeal and Martineau J correctly held that, in the Canadian legal system, the Federal Courts can render what amounts to *erga omnes* constitutional judgments. While it has not been stated as clearly as with regard to provincial superior courts, the Federal Courts' power to render such judgments is inferred from the case law, notably from some of the Supreme Court's major constitutional remedy cases. More generally, for decades, the Federal Courts have been rendering constitutional judgments with *erga omnes* effects, and up until *Windsor*, the Supreme Court has never questioned their power to do so. To the extent that the *erga omnes* view at federal level has received judicial acceptance, it also normally entails that, subject to the Canadian principle of stare decisis, failure to abide by an *erga omnes* judgment can be sanctioned like any other failure to abide by a court order.

On the other hand, the Supreme Court can question the *erga omnes* view as applied to a particular court. As with any rule, a fortiori a judge-made law, the power to render *erga omnes* constitutional judgments can evolve: it might eventually be extended to all statutory courts or restricted only to the Supreme Court. Arguments over the merits of the *erga omnes*

view in respect of the Federal Courts' constitutional judgments have led to examining the underlying values of efficiency, expertise and uniformity. While a priori they seem to support the *erga omnes* view as pertaining to a specialized national court, upon a closer examination, one can also find relevant counterarguments questioning its concrete benefits, to say nothing of whether the Supreme Court would be willing to engage in such a complex analysis that it has many times tried to avoid.

One main reason the *erga omnes* versus *inter partes* debate at federal level has not generated more scrutiny could be that, thus far, it has not been demonstrably shown that national unity would be unduly affected. Potential undesirable consequences of some courts' lack of power to render *erga omnes* judgments are limited by the principle of stare decisis and res judicata, and by a tradition of interjurisdictional judicial deference. One could argue that the existing legal and institutional safeguards might prove insufficient if the undesirable consequences evoked in the article's introduction were to materialize to a more preoccupying degree. This might well be an additional reason to suggest that, until more data and research become available, the courts, if given the choice, should choose not to disturb a decades-long assumption that has not caused much judicial controversy until *Windsor*.