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What's with Article III?
The nature of judicial authority and private international law
Janet Walker*

I-The mysterious gap in the Canadian Constitution

Some of the most intriguing mysteries arise not out of things that appear before us unexplained, but out of things that ought to be there but, inexplicably, are not. Like the dog that didn't bark in the Sherlock Holmes mystery, a strange lacuna in the Canadian Constitution in its provision for judicial authority has puzzled me for some time. And it has taken me to many distant places in search of an explanation of the way it affects Canada's private international law.

It took me through the great arched door of Worcester College in Oxford to find out what the students there studied in a Constitutional Law course. After all, Great Britain had no written constitution *per se*, it has no division of powers between federal and regional governments, and, at that time, it had no Bill of Rights.

It took me to a cozy faculty common room in Melbourne to find out how a people who were so proud of a constitution they had fashioned on the American model could regard the anniversary of their nationhood as less significant an occasion than an annual holiday celebrating a horse race; and how both of these occasions could lag far behind the anniversary celebrating the arrival of the first beleaguered travellers from Europe who happened upon Australia's shores.

* This paper has been written for the April 23, 2007 NYU Faculty Workshop (which may help to explain—but not justify—the informality/untidiness/inadequate citation, etc.). It touches upon a series of questions about which I have a continuing interest, some of which I have raised in other ways elsewhere, but it has been shaped to try to make the most out of the input that I hope faculty members here will be able to give me.

It took me, somewhat nervously, to a retreat of the judges of the Court of Appeal for Ontario to find out whether they knew who, in fact, won the battles of the Plains of Abraham (that is, the battles that determined who, as between the French and the English, would govern Canada) and, since the judges did not appear to know that, how it could be possible for them not to know about this critical moment in their history.

It took me to the Peace Palace in The Hague to ask the assembled devotees of private international law from around the globe what their experiences were of the ideas of “freedom” and “bijuralism.”

And it brings me here now to ask you “How does Article III shape your private international law?”

But I am getting ahead of myself...

II- Divided by a common language

These questions arose initially for me in the course of trying to understand the differences between private international law systems. The questions were prompted by the failure of participants in the negotiations at The Hague Conference on Private International Law to reach consensus on the principles of judicial jurisdiction that would form the basis of a multilateral convention on the recognition and enforcement of judgments in civil matters: Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.¹

This Convention, which was a project proposed to the Hague Conference by the US in

¹ The Hague Conference is an institution that develops and services multilateral legal instruments such as the Convention on Child Abduction and on Service of Process. A discussion of the difficulties encountered in the negotiation of this Convention can be found at: Hague Conference on Private International Law, Prel. Doc. No 16 of February 2002, “Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference” submitted by the Permanent Bureau, available at http://www.hcch.net/upload/wop/gen_pd16e.pdf

1992, would have been a multilateral arrangement to facilitate the recognition and enforcement of foreign judgments on the basis that courts had exercised jurisdiction on agreed bases and had otherwise complied with the terms of the Convention in adjudicating the matters and issuing the awards.²

Here were representatives of the various private international law systems of the world intent on reaching a consensus on harmonized standards for judicial jurisdiction as a way of improving international recognition and enforcement of judgments in civil and commercial matters. They were keenly aware of the importance of the project. They were highly capable and they benefited from extensive advice. They were willing to persevere with the negotiations over several years. And yet they failed to reach consensus. And all of this occurred in an area of private law that even in the ordinary course is dedicated to the facilitation of crossborder dealings. By that, I mean that for most countries it is in the very nature of the subject of private international law itself that the rules seek to meet or establish international standards that are broadly acceptable to other legal systems.

What could possibly have kept all those earnest, rational and well-informed participants from finding a workable set of common rules? Of course, when I asked that, I did not mean: What were the particular stumbling blocks? In fact, there seemed to have been as many different views on this question as there were persons who were prepared to venture an answer. What I meant was: What was it about the approaches that the various participating countries took to judicial jurisdiction in private international law that made them incapable of finding a way to reach consensus on common rules despite their clear commitment to do so?

² Eventually, in 2005, the Hague Conference adopted a far more modest Convention confined to judgments in business disputes where the parties had entered into jurisdiction agreements.

The more I thought about this, the more it seemed to me that private international lawyers in different legal systems are often divided by a common language. When they speak of “appropriately restrained jurisdiction”, of “overreaching”, and even of “reasonableness”,³ they often seem to have very different conceptions in mind. And this is not to mention when they speak of “comity” which, like the “rule of law”, seems to be universally affirmed and at the same time utterly lacking in a definition that could be used to construct or assess particular rules. But more than this, private international law seems to be almost completely lacking in a rubric, or a literature, or some other means for identifying and explaining the differences between private international law systems and their roots in different legal traditions.

This is not entirely surprising. Many people think that private international law is a difficult subject. But in the common law this seems more likely to be a product of its remarkable tendency towards incoherence than of any real intellectual challenge posed by the theory that has been developed to explain it. In fact, in the common law outside the United States, efforts to construct theoretical explanations have not merely been slow to develop—they have often been rejected outright. In case you find this surprising, read what one of the two leading English texts—*Cheshire and North’s Private International Law*—has to say about theory:

What, in the light of the theories and approaches discussed above [that comprise the “American Revolution”], is the theoretical or doctrinal basis of English private international law?on what principle are the rules constructed? Is there one overriding principle from which they can all be deduced?Clearly such theoretical analyses are unsupported in English private international law. They are alien to the common law tradition and

³ See for example, Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Oxford: Clarendon, 1996). One wonders how it could be possible for anyone to dissent from a plea for reasonableness—but that would depend, of course, on what is being proposed as “reasonable”.

if offered in argument would be a matter of surprise to an English judge. The instinct of an English lawyer is to test a proposed rule by its practical bearing on normal human activities and expectations. It is by this method that in his opinion the purpose of the law, which at bottom is to promote justice and convenience, can best be furthered. He is nothing if not an empiricist and a pragmatist.Private international law is no more an exact science than is any other part of the law of England; it is not scientifically founded on the reasoning of jurists, but it is beaten out on the anvil of experience.⁴

When one reflects on the coincidence of the fact that Americans have largely been alone in pursuing theoretical explanations for private international law and the fact that the approach to private international law that has emerged in the U.S. is exceptional, one might wonder whether a theoretical approach necessarily produces the particular approach to private international law that is taken in the United States. In other words, one wonders if the rest of the common lawyers around the world decided to think about what they are doing when they do private international law, whether they would inevitably wind up adopting the approach to private international law that prevails in the United States. This is an excellent question—but one best left for another day.⁵

In any event, in the absence of a common understanding of key terms, much like learning another language, there seemed to be a limit to the extent to which the differences between legal systems that could give rise to differences in private international law systems could be understood by studying them out of context. At some point, it seems that these differences can only be appreciated by immersing oneself in the other legal system. As with learning another language, it seems necessary to go to the

⁴ P North and JJ Fawcett, *Cheshire and North's Private International Law*, 13th ed (Butterworths: London, 1999) 31-32.

⁵ Of course, I am joking and, in fact, I think not—that is, I think that a theoretical approach to private international law can be generated in the context of other legal systems and sensibilities. But I am sometimes reminded of the struggles of early feminist writers to develop means to articulate and address the issues of relevance to them, and I hope you will see the efforts to grapple with the framing of the issues in this paper in that light.

place where the language is spoken and converse with the local people. Only then can one begin to understand the countless nuances and inflections in expression that simply cannot be translated. And only when one begins to gain fluency in the other language or legal system, can one begin to find ways to explain the differences between them. Only then is it possible to begin to work out where there are areas of common understanding—and what can and can not be harmonized, and why.

I said that my curiosity had been piqued by the failed efforts to achieve rapprochement at The Hague. But I should stress that other reasons have emerged that continue to sustain this curiosity, reasons that in some ways seem just as compelling as the practical benefits of an interest in comparing private international law systems—as many and varied as they may be. These reasons are that in the absence of a theoretical framework, comparative analysis seems to be one of the best ways to gain a real sense of perspective on one's own private international law system. As Oscar Chase explained in his inspiring book *Culture and Disputing*,⁶ comparative analysis is the strange light that illuminates powerfully.

III- Conceptions of judicial jurisdiction and judicial authority- the plot thickens

And so I puzzled and puzzled over what might produce the differences in the conceptions of judicial jurisdiction in different private international law systems that frustrated even the most determined efforts at harmonization. And the more I did, the more I began to think that different perspectives on the *scope* of judicial authority must be a product of different perspectives on the *nature* of judicial authority. This seemed promising because

⁶ Oscar G. Chase, *Law, Culture, and Ritual Disputing Systems in Cross-Cultural Context* (New York: NYU Press, 2007).

the fundamental nature and character of the role of one of the branches of government seems likely to be the kind of thing about which we would have profoundly held views and that we might think would require no explanation, but about which we might find that there was strong disagreement if we did in fact discuss it. It seemed to me that this impression was borne out the other week by the level of animation in the discussion of Jeremy Waldron's analysis of the role of the Legislature in fostering the Rule of Law.⁷

I should pause here to clarify two points when I speak of the "nature of judicial authority". The first point is that the nature of judicial authority is something that simply cannot be considered in the abstract, that is, in isolation from the relationship it has with the authority of other branches of government. And this became obvious when I went to England and learned that in the absence of constitutional texts and the interpretive jurisprudence and commentary that they produce, British students of Constitutional law still found much to consider in studying the institutions of government, and particularly in studying the *relationship* between the institutions of government. In other words, although they did not have a single comprehensive text that set out the roles of each of the main institutions of government, they could gain an understanding of this by considering how each worked with the others.

But this is also very intuitive in the area of private international law, in which it is relatively common to encounter questions about whether the sovereignty of the local government or a foreign government will be affected by the decision to exercise jurisdiction, to enforce a foreign judgment, or to apply foreign law. These commonly encountered questions clearly reflect discussions at the intersection between the authority

⁷ Jeremy Waldron, "Legislation and the Rule of Law", Faculty Workshop paper given on March 19, 2007.

of the courts in adjudicating private law disputes and the authority of the other branches of government in fulfilling their functions.

The second point is a little less obvious or intuitive. If the differences in private international law systems are a product of different perspectives on the nature of judicial authority, particularly in its role *vis-à-vis* the other branches of government, why does this not direct us to a consideration of the proper role of the courts in their public law, or judicial review, function? But my interest is not an interest in judicial review. In very simplistic terms, the subject of judicial review considers the court's responsive role in respect of the performance by other branches of government of their functions. It considers how the courts work to ensure that the other branches of the government do their jobs well. I am interested in the relationship between the courts and the other branches of government from the opposite perspective. I am interested in the role that private law dispute resolution plays in governance. And how the different ways of constructing that role affect the way government works (and how this shapes private international law rules).

Now, just as I used to feel compelled from time to time to tell my children that I was smarter than I looked, so too must I explain why this is not as mundane a point as it seems. For in the United States, the role of the courts as *lawmakers* in the course of private law dispute resolution, and how that role jibes with the legislative function, has given rise to a rich jurisprudence and academic literature. Although there are many examples, one that comes to mind is the fascinating history of the Rules Enabling Act⁸ and the proper authority of the Judiciary in making rules of procedure, particularly where

⁸ See for example, the fine work done by Stephen Burbank in "The Rules Enabling Act of 1934" (1982) U Penn L R 1018.

those rules might have an effect on substantive rights. At bottom, this set of issues is about the allocation of lawmaking power between the legislative and judicial branches of government.⁹

But what of the role of courts in the course of private law dispute resolution in countries where the emphasis seems to be placed less on the *lawmaking* function—that is, the law made in the course of this process—and more on the adequate resolution of the dispute and the reasoned analysis that supports it. In other words, what about the role of the courts in governance other than as an alternative process for making law to that of the Legislature?

Of course, in raising this question in the context of legal systems outside the US, I am leaving aside the role of courts in civil law jurisdictions, where the law to be applied has already been made by the Legislature and is prescribed in a Code, and the function of the courts is, at least notionally, purely one of resolving disputes. What I am asking about is the role of the courts in other common law countries, where the process of *judicial* decision-making rather than *political* decision-making¹⁰ and its role in governance is not thought of primarily in terms of the way in which it is not like the Legislature. That is, in terms of the way in which it is not democratic, or the way in which it serves some supportive or corrective function to other kinds of decision-making that play a role in governance. In other words, how is judicial authority understood in legal systems in

⁹ By way of contrast, so that it is clear that this approach is not universal, I might note that in Canada, there seem to be no equivalent set of concerns. The Rules Committees are typically explicitly authorized to make rules even where those rules affect substantive rights. And, I might note that as the common law legal advisor to the Federal Courts Rules Committee, I participate in reform projects that proceed in the most form-follows-function fashion to produce changes in the rules that, although involving notice and comment, are primarily influenced by discussions among the judges and counsel who have views on what will work best in the Federal Court practice.

¹⁰ Please don't take me to task on this description of the distinction in the abstract. I am grasping for words here.

which the process of adjudication in private law disputes is seen to have an important role in government that is different from that fulfilled by other governmental institutions.

IV- Consulting the text

If I am right about this (that differences in the conceptions of the scope of judicial authority in private international law are a function of different conceptions of the governance role played by private law adjudication) then, I thought, surely these differences would be reflected in the texts of the constitutions themselves where the countries had written texts. Of course, in choosing constitutional texts to compare, I began with the texts of the Canadian and the US Constitutions. They are both common law countries. They have broadly similar economies, social structures and approaches to the rule of law.¹¹ Moreover, one is the constitution of the legal system with which I am most familiar, and the other is the best known and probably the most rationally structured constitution.

I turned to the then standard printed version of the Canadian Constitution. It had remained unchanged since 1982 owing to the failure to reach agreement on an amending formula (a telling feature, but also one best left to be considered on another day). Very little of the Canadian Constitution is ever read. Although Constitutional Law has long been a required subject, the topic once consisted almost entirely of the “Division of Powers” between the Federal Government and the provinces, and, since 1982, it has also included the Charter of Rights and Freedoms. The Division of Powers was set out in sections 91 and 92, and the Charter in a schedule. These are the parts that tend to be

¹¹ Any version of this term honestly advanced by a reader is hereby adopted.

studied. Few of the remaining provisions ever give rise to litigation, and even then, the litigation rarely turns on the actual terms of the provisions.

So I set about to read the Canadian Constitution as one does an important religious text or classic work—unsure of what I might find in a basic text with which everyone claims familiarity but which no one actually reads. I noticed that there were “Parts” but no table of contents that would explain the overall structure. In the days before online versions proliferated, this was the printed version that everyone used. So I went through it and made a list of the names of the Parts. Here they are:

- Part I Preliminary
- Part II Union
- Part III Executive Power
- Part IV Legislative Power
- Part V Provincial Constitutions
- Part VI Distribution of Legislative Powers
- Part VII Judicature
- Part VIII Revenues; Debts; Assets; Taxation
- Part IX Miscellaneous Provisions
- Part X (Repealed)
- Part XI Admission of Other Colonies

You see right away that the structure is different from the US Constitution (which the drafters of the Canadian Constitution had available for consultation), and from the Australian Constitution, which was patterned on the US model. Both of those Constitutions begin by setting out the three branches of government:

United States Constitution	Australian Constitution
Article I Legislative Power	Chapter I The Parliament
Article II Executive Power	Chapter II The Executive Government
Article III Judicial Power	Chapter III The Judicature
Article IV Relations Among States and the Rights of States' Citizens	Chapter IV Finance and Trade

Article V	Amendment Procedures	Chapter V	The States
Article VI	Public Debt and the Ultimate Authority of the Constitution	Chapter VI	New States
Article VII	Terms of Ratification of Amendments	Chapter VII	Miscellaneous
		Chapter VIII	Alteration of the Constitution

Organizing a constitution in the way that the US and Australian Constitutions are organized gives the idea that a government has three branches a real sense of importance. It almost makes it seem inevitable. The Canadian Constitution begins with a little more diffidence. It does not get to the branches of government until Part III. And then it has “Parts” only for the Executive and the Legislature. Where is Article III? Yes, the Part labelled “Judicature” sounds suspiciously like a part in which you would find a grant of authority for the Judiciary. The fact that Chapter III of the Australian Constitution, which is the Australian equivalent of Article III, was labelled “The Judicature” seems to support this notion. However, if you read the Part of the Canadian Constitution called “Judicature”, you find that it provides for things like the rules for appointing judges and paying their salaries, and for the Supreme Court of Canada and the Federal Court of Canada. It does not contain any general provision vesting the main court system with its distinctive “powers,” or “sphere of influence” or describing its role within government.¹²

¹² I say “main court system” because the grant of authority to the Federal Government found in section 101 to set up the Supreme Court of Canada, which is a general appellate court, and the Federal Courts, which are statutory courts, is not a general description of the authority or role of the Judiciary. In the absence of diversity jurisdiction, or pendent or ancillary jurisdiction, the Federal Courts in Canada, important and respected though they are, are specialized statutory courts that are limited in their role to a few key matters such as admiralty, immigration, and intellectual property. Again, for the purposes of this discussion, it should be understood that when Canadians are asked to describe what constitutes “The Judiciary” in Canada, they would ordinarily point to the courts of inherent jurisdiction, the provincial superior courts, as the primary constituents of that branch of government.

For those of you who have the patience to follow a close textual analysis, I will put it in a footnote¹³ and for the rest, I will say that the upshot is that the basic grant of

¹³ Disappointed to find that there was no Part devoted to the Judiciary, I turned to the two sections of the Constitution that were once the mainstay of the subject of Constitutional Law in Canada: sections 91 and 92. These are the sections that set out the responsibilities respectively of the Federal Parliament and the Provincial Legislatures. In fact, I did so not merely because most of the rest of the text of the Constitution was unknown to me, but also because some commentators had said that the scope of judicial jurisdiction in private international law was founded on sections 92.13 and 92.14 of the Constitution. Here are those two provisions:

Exclusive Powers of Provincial Legislatures

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,-

...

92.13 Property and Civil Rights in the Province

92.14 The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

It is true that in a Constitution that contains scant mention of the courts these sections appear to contain words that suggest that they might be relevant. But the more I stared at these provisions, the less I was convinced. Yes, section 92.14 provides for the “Constitution, Maintenance, and Organization of Provincial Courts...of Civil... Jurisdiction” and yes, section 92.14 also provides for “Procedure in Civil Matters.” To the extent that private international law is thought of as a kind of adjectival or procedural law perhaps this section has some relevance. But that is not the whole story. As Canadian lawyers well know, the provision for the “Constitution, Maintenance, and Organization of Provincial Courts...of Civil...Jurisdiction” is just one half of a formula for cooperative federalism in which the Federal Government (under section 96) has the responsibility for appointing the judges who sit in the superior courts and the responsibility for paying their salaries. And so the provision in section 92.14 is a provision that allocates to the Provinces the responsibility for maintaining the court buildings and the court registry functions, and for the many and varied logistical aspects of the work of the courts. The two provisions (section 96 and section 92.14) work hand in hand: the Federal Government supplies the judges and the Provincial Governments supply the courts.

At the risk of sounding glib, unless we equate the assignment of responsibility for switching on the lights and providing the heat with the vesting of Judicial Authority, section 92.14 cannot be the provision that defines the role of the courts. There is a famous example of a British Columbia judge who, shortly after the advent of the Charter of Rights and Freedoms, crossed a picket line of court workers to go into his chambers and, of his own motion, issue an injunction against them on the purported authority he had to ensure access to justice. On that day the “justice” in the concept of “access to justice” was understood quite literally. But I digress....

Others claim that it is section 92.14 *in conjunction with* section 92.13—the one for “Property and Civil Rights in the Province” that marks out the scope of the authority of the provincial superior courts. It is important to note here that “Property and Civil Rights” has nothing to do with constitutional guarantees against deprivation of property, and it has nothing to do with the great social movement that occurred here in the 1960s. Rather, it refers in a compendious way to private law.

In fact, in a Constitution in which both levels of government are given a list of areas of exclusive legislative authority, the section 92.13 grant of legislative authority to the provinces in matters of private law has been interpreted so broadly as to become a kind of residuary clause in respect of matters of private law. As a result, there is so much provincial autonomy in the field of private law that the relationship between the provinces within the Canadian federation so far as private international law is concerned resembles that between independent countries. But I must resist a fuller discussion of the implications of that for private international law because it is difficult to shoehorn it into this paper.

The key point here is that those who have said that these provisions set out the scope of the authority of the provincial superior courts, did so because the various provisions of section 92 all contain

authority to the Judiciary—the equivalent of Article III—is not to be found in the lists of exclusive areas of legislative authority granted to the Provincial Legislatures or to the Federal Parliament. And so I was forced to begin again at the beginning and hope that something would turn up. And on reading and re-reading the “Whereas” clauses at the beginning of the Canadian Constitution (the part of the text that other drafters might have thought to label a “Preamble”), I found no mention of the Judiciary at all.

The absence of any mention of the Judiciary in this part of the Constitution is highlighted by the fact that the purpose of the Constitution in providing for the mandates of the Legislative and Executive Branches is announced in the third whereas clause above. That clause, once again, reads:

...it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared¹⁴

the phrase “in the Province,” which is understood as a territorial limitation on the grant of authority. The people who say that the “in the Province” territorial limitations on the provincial authority to legislate serve as the foundation for judicial authority in adjudicating crossborder disputes argue this in a way that resembles the reasoning applied by the US Supreme Court to the due process clause. Much in the same way that the due process clause in the United States has ultimately come to be understood not only as a guarantee of fairness to defendants, but also as a “an instrument of interstate federalism,” (*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)) so too, they have said, could the territorial limits on provincial authority be construed to form the basis for a kind of ordering within the federation that would resemble the limits of judicial authority in crossborder matters.

I won’t go on at length about why this makes no sense in the context of crossborder disputes. Would it mean that a court could not adjudicate a dispute involving a foreign party because this is somehow extraterritorial in nature? Would it mean that a court could not adjudicate a case involving an event that occurred outside the province, or that it could not apply foreign law because these too could be considered extraterritorial? It is not necessary to go into these questions because section 92 is inapplicable on its face. Section 92 provides for the exclusive powers of the provincial *legislature*. The provincial superior courts have always most emphatically been regarded as Canada’s courts of inherent jurisdiction – not courts whose mandate is statutorily defined or in any way confined to the role they serve “within the province.” The idea that the authority of these courts would be subsumed under the provincial legislatures fundamentally belies the carefully designed arrangements for cooperative federalism that were intended to eliminate the need for diversity jurisdiction and to enable the courts to serve as honest brokers in resolving disputes between the federal and provincial governments about the two governments’ respective spheres of influence.

¹⁴ Here are those clauses in their entirety.

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of

Why on earth would they fail to mention of the Judiciary? At first blush it seemed an omission so bizarre that it would not even register on a constitutional scholar's radar. I rushed to consult the basic text of Canada's most trusted scholar, Peter Hogg, and found that he began his book with a sanguine reassurance that the Canadian Constitution was much like the US Constitution as providing for a government in which there were three branches... etc. etc.

On the basis that one would not ordinarily expect to find casual drafting errors in Constitutions, I scoured the remaining provisions of the text of the Canadian Constitution. Despite nodding off on several occasions, I eventually reached section 129 (a section that is rarely given much attention), but which reads in reduced form as follows:

129. Except as otherwise provided by the Act...all Courts of Civil...Jurisdiction ...existing...at the Union, shall continue...as if the Union had not been made; subject nevertheless [to applicable legislation].¹⁵

Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

¹⁵ Section 129 in its entirety with the relevant words bolded to facilitate the "word search" method of exegesis necessary for many of the legislative texts of that era is as follows:

129. **Except as otherwise provided by the Act**, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and **all Courts of Civil and Criminal Jurisdiction**, and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative, and Ministerial, **existing therein at the Union, shall continue** in Ontario, Quebec, Nova Scotia and New Brunswick respectively, **as if the Union had not been made**; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

V- What's with Article III?

Eureka! It finally seemed clear that the Canadian Constitution was not intended to include a basic grant of Judicial Authority, and therefore serve as the source of the Judiciary's authority in the way that it does for the Legislative and Executive Branches. If I am right about this, then it could give rise to a significantly different structure, at least conceptually, for the government of Canada than exists in the most obvious precedent available to the drafters at the time, that is, the US Constitution. If the Canadian Constitution did not intend to serve as the source of judicial authority, but merely as an affirmation or endorsement of the continuing authority of the courts in the new country, then where was the source? Some further digging produced the following example of provisions found in the statutes of the provincial superior courts, which were promulgated under section 92.14. This example is from the Ontario Courts of Justice Act:

11(2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

I do not think that I was wrong to say that the basic grant of authority for one of the branches of government could not be found tucked into a piece of ordinary legislation enacted pursuant to a provincial grant of authority. And so this cannot be a grant of authority *per se*. Rather, I think that provisions such as this do not serve the "constitutional" or foundational function of a basic grant of authority. On the contrary, like section 129, and perhaps even more so, this broad affirmation of the historically defined jurisdiction of the provincial superior courts must be taken as a recital or an affirmation, and not as a source of authority.

If this is so, then remarkably, the source of authority that defines the scope of the courts' jurisdiction is not to be found in any text. It is to be found in the Canadian (and before that, the British) legal traditions. It is not only that the courts of inherent jurisdiction in Canada need to be understood as having a jurisdiction that is not defined or confined by a statutory grant of authority by reason of the fact that they are courts of inherent jurisdiction. It is more than this. They need to be understood as having a jurisdiction that is not defined (and so confined?) by a specific grant of authority found in the text of the country's Constitution.

Surely that would give rise to an approach to the relationship with other branches of government that is different from one that exists in the context of a Constitution that sets out the mandate of each branch of government clearly in its first three articles. And hence my question: What's with Article III? How is the approach that is taken to judicial authority in the United States shaped by the fact that it is based on a specific grant in the Constitution?

Now I should be clear about a few things that may not have been obvious from the discussion to this point. First, when I ask about the implications of Article III, I am not asking primarily about the contents of Article III. Clearly, the text of Article III and the history of the debates that led the framers to draft it as they did address a rich and complex discussion of federalism and the compromises and choices that are necessary to fashion a union out of otherwise independent sovereignties. So I apologize to the Federal Courts specialists here whose appetites might have been whetted by the title of this paper. It is true that a comparative analysis of the structure of the court systems in federations can also yield insights that are relevant to the questions that I am raising here. And I have

looked into this a bit elsewhere. But my question for today is a far more basic one, one that I hope will not seem tediously naïve to too many of you.

The question that I raise for this workshop relates to the very existence of Article III, and the decision by the framers to place the Judiciary on a co-equal footing with the Legislative and the Executive branches of government. Having tried your patience with a lengthy analysis of the text of the Constitution, let me try it further by suggesting that the answers cannot always be found through a simple (or even a sophisticated) analysis of the text alone. Sometimes it is necessary to look to the history of their drafting, both in the sense of the constitutional debates that preceded their adoption, and in the sense of the broader social and political context of the time in which the Constitution is put in place.

VI- Countries are people too

My point here is that although the constitutions of countries are intended to function like the blueprints for permanent edifices, even the most monumental of structures are built in particular times and places and in response to particular exigencies and aspirations. And so they reflect the architectural style and the engineering know-how of the time and place in which they are constructed.

And if you can forgive the mixing of metaphors here, I also believe that countries and their legal systems are like people. They are borne and they come of age, not in the abstract, but in particular circumstances. At critical moments in their development they fashion particular responses to particular problems, and where these responses succeed in enabling them to overcome significant obstacles and to further their interests in important ways, those responses shape their tendencies and inclinations in meeting subsequent

challenges. And so, despite their infinite complexity, there may nevertheless be a kind of internal logic to the way in which legal systems respond to the challenges they face. Like people, their responses may not always be entirely rational, and they may not always produce the best results. In fact, as with the study of psychology, it is the pathological courses of action, those that are taken despite the fact that they are ill-advised and unlikely to produce the most beneficial result, that can sometimes prove to be the most illuminating. And I should be clear that I think that these instances are not to be discounted as a product of the force of inertia or mere path dependency—on careful examination, they can often reveal deeply held convictions.

Constitutions sometimes serve to record the spirit of these responses to critical challenges. However, the larger historical context in which they are drafted may also be an important reference point in helping to inform us of the particular exigencies and aspirations for government that they were intended to address. And this can help to explain the particular conception of the nature of judicial authority and the role of the courts in government.

This point may not be obvious to you. Or, perhaps it may seem to be too obvious because many of the great moments in the formative years of the United States and of the American legal system are so well known that the way in which the events unfolded now seems almost inevitable. As a result, the many ways in which things could have turned out differently (and the ways in which they did turn out differently elsewhere) pale in significance. In addition, many of the formative moments in the American legal system culminated in the act of memorializing important accords in basic constitutional texts. In this way, although there is a historical context, much of the sense of the major texts can

largely be understood through a more conventional legislative history analysis without the need to look elsewhere to a history or a “backstory.”

But all this is far from true in some countries. In this respect, the Australian legal system and the history of its government are interesting. They are interesting because although the Australians adopted much of the structure and substance of the US Constitution in drafting their own Constitution—and are proud to have done so—it was very much a legal transplant for them. Consequently, in some significant respects their Constitution it is not fully reflective of the approach that their history has caused them to take to government. An obvious example of a discrepancy is the way in which the notion of parliamentary sovereignty seems to provide far more compelling guidance for the relationship between the main institutions of government in Australia than does the notion of the separation of powers, despite the apparent implications of the text of their Constitution. Further examples can be found in the eagerness to embrace a nationwide common law, the willingness to question the wisdom of having adopted a federalized judiciary,¹⁶ and the efforts to unify it legislatively.¹⁷

Fortunately, there are some wonderful social histories of Australia being written that help to place their Constitution into its historical context. These histories help to explain why, although it was a matter of considerable pride for them to adopt a first rate constitution, it was not a triumph of the expression of the local conception of government. Sometimes the Constitution reflects the emerging or established political traditions, sometimes it does not. Far more significant to Australians than the adoption of the Constitution was the moment when their ancestors landed in Australia, and this is

¹⁶ Owen Dixon, “The Law and the Constitution” (1935) 51 LQR 590.

¹⁷ Anthony Mason & James Crawford “The Cross-vesting Scheme” (1988) 62 Aus L J 328.

why that anniversary seems to mean more to them. As for the holiday dedicated to a horse race (the Melbourne Cup), I cannot say.

Of particular interest to me, though, is the history of the Canadian legal system and the way in which it shaped the distinctive approach taken in Canada to judicial authority. I will not recite it here—not because it would put me over the page limit, but because it is better in the telling. But, so that you can follow the argument, the upshot of it is that during a key period in the formative years of Canada and the Canadian legal system, the legislative and executive functions were, in typical colonial fashion, not directly responsive to the needs of the local population or reflective of their interests. During this time, the courts served as a kind of pre-political form of government that established them as one of the primary institutions, or *the* primary institution of government from the perspective of the people of Canada. Of critical interest is that the courts in question were common law courts applying the lois of the Canadiens. And so important was this to the stability and success of that fledgling government that a popular movement to introduce a local legislature and jury trials was rejected. At that time and in that place, for reasons that I will be happy to discuss, the proposed democracy would have been a kind of tyranny that might well have cost the British their ability to continue to rule.

The responses of the British were particular responses to the challenges of biculturalism at a time when it was critical to find a basis for peaceful relations between them and the Canadiens, relations that would enable the nascent country to withstand the very real physical threat of a hostile environment and the equally real political threat of being overrun by a foreign power. I think that the role served by the courts at this time in

Canadian history—a part of Canadian history that is not well known and that is rarely recounted—goes a long way to explaining the unusual structure of the Canadian Constitution that I described earlier, and the extraordinary role that is accorded to them today in Canada.

All of this is simply to emphasize that constitutional structures and the nature of judicial authority that they establish may vary with good reason from one country to another—and this is so even if in any given place it is difficult for lawyers in that legal system to appreciate the justification for an approach other than their own. To illustrate this, let me play the devil’s advocate with two provocative propositions:

VII- Who says that there should be three branches of government?

The US Constitution, and the political theory at the time, present such a compelling argument for a government comprised of three branches that it is hard to understand this point as anything but self-evident. To be sure, there are governments that have fewer branches, say, governments that have only an executive and no legislature and no independent judiciary, but these governments are usually taken to be primitive predecessors of modern governments or anomalous.

But the question of whether there should be three branches of government raises the question of what counts as a branch of government. For example, there are periods in history many centuries ago in which the Church was such powerful political force that one might wonder whether it too should have been considered a branch of government. Of course the history of the role played by the state-sponsored religion in government is a complex one. In some places, such as France, it has been thought necessary to establish in a formal way the understanding that the state is secular. In other places, such as England,

the head of state has assumed the role of the head of the Church as well. And in still others, such as the United States, the constitutional doctrine separating the Church from the State has been developed to control the impact of the religions on the work of government.

Another less debated example might make the point more clearly: What about the Press? It is widely thought that a free press is an essential feature of democratic government and that it has an enormous capacity to shape the public opinion that is in turn reflected in the legislative process. The Press may not have been given its own Article in the U.S. Constitution, but the task of securing the conditions essential to its operation was given pride of place in the First Amendment. But, you will say, members of the Press are free to choose what they will report and how they will report it: the essence of a free press is its *independence* from government.

If we set aside for a moment the question of the merits of securing the accountability of the Press through the simple market forces of circulation rates, it is still not obvious how independence from government distinguishes the Press from the Judiciary. One hallmark of the Judiciary in a free and democratic society is said to be its independence from the government, and it is understood to be one of the three branches.

This leaves the objection that the Press could not be considered a potential branch of government because it is not financed by government. That may happen to be so in the United States, but one of the most influential examples of the Press—the BBC—owes a great deal of its success to substantial government funding. This has not resulted in its being marginalized or disqualified as an example of “the Press”.

Of course, I do not raise the roles of the Church and the Press in government with the intention of engaging in serious debate on whether they should be accorded status as a branch of government. I raise them arguendo, in an effort to provoke you to reconsider what would otherwise seem so obvious and well established as to be self-evident or inevitable: that there should be three and only three branches of government.

VIII- And who says that the branches of government should be co-equal?

I raise this question in the same spirit as the last. In many famous trinities—such as the Holy Trinity, and the *cris de couer* of the French Revolution “Liberté, Egalité, Fraternité—it is fair to say that not all three parts have the same prominence. That this asymmetry could apply to the three branches of government is hardly new. Discussions of the relative dangerousness of the various branches highlight the difference of the judicial branch from the other branches. And the variations in the structure of democratic governments in the common law world appear to allow a margin of appreciation for the separation of the powers of the Executive and the Legislative branches that does not extend to the seemingly absolute requirement that the Judiciary must be independent. But explanations of the nature of judicial independence and the reasons for it vary significantly, even among common law federations. In some legal systems, such as Australia, where the emphasis is on parliamentary sovereignty, any discussion of the courts’ inherent jurisdiction tends to be handled diffidently by the courts—downplayed by describing it as “implied” rather than “inherent”—so as not to purport to compete with the lead branch of government in a configuration of institutions that appears to have an innate sense of hierarchy. Where in Canada, much to the chagrin of the political scientists who seem determined to cling to old anxieties about the “anti-democratic” nature of the

courts as an institution, the description of the relationship between the courts and the legislature that seems to be taking hold is that of “dialogue.” Similarly, the relationship between the courts and the Executive that in other countries is described in terms of deference and gives rise to doctrines such as the “political questions” doctrine is in Canada one in which there is very little that the courts are prepared to consider non-justiciable. But in the effort to open the range of discussion, I am straying far from the focus of the paper...

IX- What does all this have to do with private international law?

As I said at the outset, I began by wondering about the differences in private international law rules that have proved resistant to efforts at harmonization. I have tried to fashion a paper that was not so mired in the technical details of the doctrine that you would prefer to have spent the time drafting your exams. But so as to reassure you that it is possible to trace the effects of particular approaches to judicial authority in the private international law doctrine, let me mention just one area by way of example for illustration purposes. I stress that this is just one example, and like the strange model of car that you see for the first time on the street, once you have recognized it, you soon begin to see them everywhere.¹⁸

This example relates to the response made to the introduction into a case of foreign public law and the request to enforce a judgment that is seen to be the result of

¹⁸ In this way, the opportunity to teach the International Litigation seminar this term has been an absolute boon for me as it has given me a reason to reconsider *in context* many familiar decisions, that is, organized in a narrative constructed by a great American lawyer, and to debate the nuances of the reasoning and the implications of the results with some very good students, both those who have real familiarity with this legal system and those whose basic legal training has been done in other legal systems. See Andreas Lowenfeld, *International Litigation and Arbitration* (3 ed, 2006).

the application of foreign public law or the vindication of a foreign public interest. In the United States this issue finds expression in the Revenue Rule. The question is not so much whether the courts in various countries are concerned by the issues raised as what their responses have been. The awkwardness in these situations is that efforts to hive off issues and exclude the application of foreign public laws and thereby avoid giving effect to foreign sovereign interests can produce anomalous results—results that are at odds with what otherwise appear to be the equities as between the parties. Sometimes segregating the issues prevents a plaintiff from making out a meritorious claim—sometimes it precludes vindication of a defendant who has committed no wrong.

Still, in navigating these difficult situations, the courts of common law systems have shown remarkably clear tendencies to reason in distinct and characteristic ways. In a simple terms, the English courts have been concerned to ensure that the courts and the Executive “speak with one voice” on matters affecting foreign policy.¹⁹ The Australian courts have hastened to emphasize that they lack the capacity to adjudicate matters of high policy, and so should exercise complete restraint, even in respect of the requests for assistance by their closest allies requests that are of obvious merit and in no way contrary to their own national interests.²⁰ Canadian courts seem to see no reason to exercise restraint under such circumstances, and they see the obligations of comity as requiring them, in appropriate circumstances, to take active steps to cooperate with foreign courts in areas of common concern.²¹ And American courts have emphasized the fact that much

¹⁹ Lawrence Collins, “Foreign Relations and the Judiciary” (2002) 51 ICLQ 485; *Kuwait Airways Corporation v Iraqi Airways* [2002] 3 All ER 209 (HL).

²⁰ *AG v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

²¹ *United States of America v Ivey* (1995), 26 O.R. (3d) 533 (Gen. Div.), affd (1996) 30 O.R. (3d) 370 (C.A.), leave to appeal to S.C.C. refused, [1997] 2 S.C.R. x.

of the concern raised by venturing into matters of foreign policy is properly seen as a question of the separation of powers.²² All of these approaches are entirely valid, and each of them has its limitations, but I suggest that of paramount interest is that each of them is traceable to distinct visions of the nature of judicial authority and the role of private law adjudication in government. The differences between them have caused one great private international scholar to say that “Comity is a chameleon word.”²³ I agree that the colour of comity varies from one legal system to another, and I think that by looking at the palette from which it is drawn we can understand much about the way in which that legal system will interact with others, particularly in matters of private law.

I am deliberately truncating this part of the discussion because I have other opportunities to debate in detail the evolving doctrines of private international law in various countries,²⁴ but I am hoping that you will be able to offer your thoughts on both the usefulness of this approach to the comparative analysis of legal systems, and to suggest promising avenues that I might pursue to develop it.

X- Horses for Courses

You might wonder about the larger context for the kind of questions that I have raised in this paper. Perhaps you will see ways in which they could be significant. As the process of globalization advances, as was signalled to us by the failure to negotiate a multilateral convention on jurisdiction and judgments at The Hague, an improved understanding of

²² See for example, *Attorney General of Canada v R.J Reynolds Tobacco Holdings, Inc* 268 F3d 103 (2nd Cir 2001), cert denied 123 SCt 513 (Mem) and related litigation.

²³ Collins, above, at 504.

²⁴ In fact, there are now some really exciting comparative private international law projects underway, such as the contribution by Linda Silberman to the reader edited by Oscar Chase and Helen Hershkoff.

the conceptions of judicial authority in other legal systems could prove helpful on occasions in which harmonization is seen to be important. But more than this, we have learned some rather harsh object lessons in recent years about one-size-fits-all approaches to government. Perhaps the kind of sensitivity and sophistication that might emerge through a study of the diversity of successful constitutional structures—not only how they work well now that they are established, but also how they succeeded in addressing particular exigencies when they when they were first constructed—could help in developing more nuanced ways of dealing with evolving legal systems. And perhaps this could involve a recognition of the value of diverse approaches to judicial authority and the role in government that can be played by the distinctive nature of deliberative decisionmaking that occurs in adjudication.

But, then again, even if this is all a bit fanciful, perhaps this kind of comparative analysis will still have been of interest to you.

Oh, and if you are still curious about who won the Battles of the Plains of Abraham, just come along to the workshop on Monday and find out.