Articles

Federalism and the Jurisdiction of Canadian Courts*

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The federal form of government does not need a dual court system corresponding to the dual legislative and executive authorities. No such system was established at confederation. Yet a dual court system has now developed through the establishment and expansion of federal courts. The jurisdictional problems inherent in a dual court system have been exacerbated by recent decisions of the Supreme Court of Canada, forcing the fragmentation of litigation between the federal and provincial courts, and producing an unnecessary increase in the number of disputes which cannot be resolved in one lawsuit. This has occurred through the failure by the Supreme Court of Canada to accommodate its notions of federalism to the special nature of the administration of justice.

Lorsqu'on a un gouvernement de type fédéral, il n'est pas nécessaire d'avoir un système dualiste de tribunaux en corrélation avec les autorités législatives et exécutives. Il n'en a d'ailleurs pas été question au moment de la confédération. En dépit de cela, un tel système s'est toutefois développé par le truchement des cours fédérales. Ce dualisme a engendré des problèmes juridictionnels qui, par la suite, ont été amplifiés par les décisions récentes de la Cour Suprême du Canada. De tels conflits provoquent le partage des litiges entre les cours fédérales et provinciales. Ils ont aussi pour effet d'accroître le nombre

* This article is a revised version of the Viscount Bennett Lecture, which was delivered at the University of New Brunswick on March 13, 1980 at the University of New Brunswick Law School, Fredericton, New Brunswick. I am grateful to my colleague, Professor James C. MacPherson, who read an earlier draft of this article and made suggestions for its improvement.

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de litiges qui ne peuvent être tranchés au moyen d'une seule poursuite. Il semblerait donc que la Cour Suprême du Canada en s'abstenant d'adapter sa conception du fédéralisme à celle de la nature même de l'administration de la justice soit la cause de cet imbroglio.

> Neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of courts into state and federal be regarded as sound.[1]

> It hardly seems open to doubt that a full system of independent federal courts plays a valuable part in furthering the rapid, widespread, yet uniform and accurate interpretation of federal law.[2]

THE CRANBROOK AIR CRASH

On February 11th, 1978 a Pacific Western Airlines Boeing 737 aircraft began to make a landing at Cranbrook, British Columbia, in snowy conditions. As the plane touched down, the pilot saw that there was a snowplough on the runway ahead of him. He lifted off again, successfully avoiding the snowplough, but the aircraft went into a spin and crashed. The aircraft was destroyed, forty-three of the passengers and crew were killed, and the six survivors were injured.[3]

Pacific Western Airlines brought an action in the Federal Court of Canada to recover the value of the lost aircraft. It sued forty-three defendants, including: (1) the Crown in right of Canada which through the Department of Transport controlled traffic into and out of the airport; (2) various Crown servants who were officials in the Department of Transport; (3) the City of Cranbrook which maintained the airport and operated the snowplough which was allegedly on the runway at the time when the aircraft tried to land; (4) the employees of the City of Cranbrook who were alleged to have performed the City's functions; (5) the Boeing Corporation, located in the State of Washington, which manufactured the Boeing 737 aircraft; (6) various employees of Boeing; (7) the Rohr Corporation, located in the State of California, which manufactured the thrust reversers on the aircraft which were the components that were alleged by the plaintiff to have malfunctioned when the pilot made his sudden take-off, and (8) various employees of the Rohr Corporation.

It is obvious that there would also be claims brought in other proceedings by crew and passengers or their dependants, and that Pacific Western Airlines might well be named as one of the defendants. It is also obvious that in the present proceedings there would be claims

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[1]Dixon, "The Law and the Constitution", (1935) 51 *Law Quart. Rev.* 590, at 606.

[2]Mishkin, "The Federal 'Question' in the District Courts", (1953) 53 *Col. Law Rev.* 157, at 170-171. Both these quotations are reproduced in Cowen and Zines, *Federal Jurisdiction in Australia* (2nd ed.) (Melbourne: Oxford University Press, 1978), at 104.

for contribution or indemnity between the various defendants, and that a prime purpose was to secure an adjudication as to the respective degrees of fault of the major parties in order to provide a basis for a sharing of responsibility by the various insurance companies for the settlement of all the claims. This purpose could only be achieved if all parties were being sued in the one court.

The Trial Division of the Federal Court of Canada,[4] and, on appeal, the Federal Court of Appeal,[5] held that the action was competent only against the federal Crown. The *Federal Court Act*,[6] by s. 17(1), confers jurisdiction to determine a claim against the federal Crown, and such a claim is governed by applicable and existing federal law, namely, the federal *Crown Liability Act*.[7] But the claim against the Crown servants was not competent, in spite of the fact that the *Federal Court Act*, by s. 17(4)(*b*), confers jurisdiction over claims against Crown servants. The problem here was that two recent decisions of the Supreme Court of Canada (to be discussed later) had held that there was a constitutional requirement that a case in the Federal Court of Canada must be governed by applicable and existing federal law.[8] Since the liability of the Crown servants in this case would be governed by the common law, they had to be dismissed from the action. All of the other defendants were also dismissed, in spite of the fact that the *Federal Court Act*, by s. 23, confers jurisdiction over a claim for relief in relation to "aeronautics". The federal Parliament has legislative competence over aeronautics (and indeed the *Aeronautics Act* and the Air Regulations constitute a body of federal law applicable to air navigation and airworthiness of aircraft), but the court held that the civil liability of the defendants would be based on common law principles rather than any applicable and existing federal law.

Counsel for the plaintiff airline had argued that, even if the Federal Court would not have jurisdiction over the defendants if they were sued independently, the court could take jurisdiction over them because the action against the Crown was competent, and the presence of the other defendants was essential to a complete disposition of the action against the Crown. In American terminology the argument was that the Federal

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[3]The "facts" related are as alleged in the statement of claim of Pacific Western Airlines in the proceedings cited in footnotes 4 and 5, *infra*. For the purpose of the motions to dismiss defendants from the suit (discussed below) these facts are assumed to be true. Of course, when the case is tried the facts might be contested.

[4]*Pacific Western Airlines* v. *The Queen*, [1979] 2 F.C. 476 (T.D.).

[5]*Pacific Western Airlines* v. *The Queen*, [1980] 1 F.C. 86 (A.D.).

[6]S.C. 1970-71-72, c.1.

[7]R.S.C. 1970, c. C-31.

[8]*Quebec North Shore Paper Co.* v. *Canadian Pacific*, [1977] 2 S.C.R. 1054; *McNamara Construction* v. *The Queen*, [1977] 2 S.C.R. 655.

Court could exercise "ancillary jurisdiction" over those other parties.[9] In response to this argument, the Federal Court of Appeal said:

> As to appellants' counsel's last argument based on the "ancillary jurisdiction" of the Court, suffice it to say that he was unable to refer us to any law or precedent which would, for pure reason of convenience, authorize the Court to extend its jurisdiction beyond its statutory limits.[10]

In my opinion, the outcome of this case is unjust. Every person seeking relief by legal action for loss or injury arising out of the Cranbrook air crash has to bring action in a minimum of two courts. The federal Crown can be sued only in the Federal Court, because the jurisdiction of the Federal Court over suits against the federal Crown is exclusive. The City of Cranbrook, Boeing, Rohr and the various individual defendants cannot be sued in the Federal Court, but can be sued in several provincial courts and conceivably in some American state courts as well. Multiple proceedings not only increase the complexity and cost of the litigation, they raise the possibility of inconsistent verdicts, and they render impossible an apportionment of blame among all participants. These are the considerations which the Federal Court of Appeal dismissed as "pure reason of convenience" in rejecting the argument based on ancillary jurisdiction.

In the Trial Division Collier J., who reached exactly the same result as the Federal Court of Appeal, did at least show some remorse. He described the situation as "lamentable", and pointed out that "the jurisdictional perils must be, to all those potential litigants, mystifying and frightening."[11] However, he went on to say that "all these undesirable consequences may be a fact of life in a federal system, such as we have in Canada, with the division of legislative powers as set out in the *British North America Act,* 1867."[12]

In this paper I want to ask the question whether we really must accept the thesis that a federal system is inconsistent with the expeditious and exhaustive resolution of complex litigation in a single court. I will argue that there is no reason of principle or practicality why federal principles should be applied to the jurisdiction of Canadian courts. And I will trace the steps by which we have reached the present sorry state of the law.

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[9]*Infra,* at 17-19.

[10]*Supra,* footnote 5, at 89.

[11]*Supra,* footnote 4, at 490.

[12]*Ibid.*

FEDERALISM AND JUDICIAL POWER

The essence of the federal system of government, as exemplified by Canada, the United States and Australia, is the distribution of governmental powers between a central (or federal) government and provincial (or state) governments. Federalism entails that the central government and each provincial government must have a set of legislative and executive powers which it may exercise independently of the other governments. The purpose is to enable the central government to develop and implement public policies appropriate to the country as a whole, and to enable each province to develop and implement public policies appropriate to its region of the country. But what does federalism entail for judicial power? Must judicial power be similarly distributed between a federal court system and provincial court systems?

In some respects it is obvious that the jurisdiction of courts in a federal system cannot be strictly divided along the same lines as the legislative and executive powers. This is because in a federal system one of the functions of the courts is to determine, when the need arises in the course of litigation, whether one government or the other has exceeded its powers under the constitution. In order to perform this function the courts cannot themselves be confined by the same rules which confine the legislative and executive branches of the two levels of government. They have to apply those rules. It is logical to conclude that constitutional cases at least should not be decided by federal courts or by provincial courts; they should be decided by national courts.[13] By national courts I mean courts which are established by neither the federal nor the provincial governments, but by the constitution itself, with judicial appointments being made, and expenses born, jointly by both levels of government. Of course, none of the three federal systems of Canada, Australia and the United States has adopted such a system. In the United States the idea was completely rejected. However, Canada and Australia each has elements of a national system in the organization of its courts; and these will be considered later in this paper.

The conclusion that there should be a single national court system is easy to accept for constitutional cases. But I think the same conclusion can be reached, by a different argument, for non-constitutional cases as well. My argument here is that judicial power is so different from legislative and executive power that it need not be and should not be distributed in the same way as legislative and executive power. Judicial power is the power to determine disputes. To the extent that a dispute turns on a question of fact, it is accepted that a court must resolve the question according to the evidence presented to it, excluding material which is classified by law as inadmissible and applying the rules of law regarding the burden of proof. To the extent that a controversy turns

[13]The case for this in Australia has been argued by Sir Owen Dixon, "The Law and the Constitution", (1935) 51 *Law Quart. Rev.* 590, at 606.

on a question of law, it is accepted that a court must apply any statute law or common law which is applicable to the facts in issue. To the extent that a controversy calls for the exercise of discretion by a court, the discretion is always closely defined by rules of law. That courts "make" new law when they apply vague or ambiguous law to new fact-situations is a commonplace, but judicial law-making is interstitial and incremental, normally staying within the spirit of the pre-existing law, rarely engaging any significant new public policy, and rarely involving the expenditure of public funds. Moreover, in non-constitutional cases, on those rare occasions where a judicial ruling is sufficiently dramatic and unexpected to incur the displeasure of the competent legislative body, an amendment of the law can be enacted to abrogate the unwelcome judicial ruling.

If it is true that the exercise of judicial power in non-constitutional cases has only a minor effect on the public policy of a nation, then there is no compelling reason why it should be distributed in the same way as the much more important legislative and executive powers. Without any breach of federal principle, judicial power could remain undistributed or unitary. A single system of courts could adjudicate all controversies arising in the federal system, whether the controversies arose under federal law, provincial law or a mixture of the two.

Moreover, there are serious technical difficulties in federalizing the courts. A dual system of courts, corresponding to the dual legislative and executive authorities, entails a demarcation of jurisdiction which is inevitably far more difficult to apply than the demarcation of jurisdiction between federal and provincial legislative and executive authorities. The difficulty arises from the fact that a court must determine a dispute, and a dispute often presents facts which refuse to stay within the categories of case allocated to either system of courts. A dispute may well raise a question of federal law as well as a question of provincial law. The resolution of the dispute may involve answering both questions.

When a controversy raises questions of both federal and provincial law, how is jurisdiction to be allocated between a federal court and a provincial court? Is one court to be given exclusive jurisdiction? If so, how is that court to be selected, given the existence of applicable laws from both levels of government? Are both courts to be given concurrent jurisdiction? If so, how are duplicate litigation, forum-shopping and (worst of all) inconsistent verdicts to be avoided? Is the controversy to be divided into separate federal and provincial causes of action and each cause of action litigated separately? If so, the spectre of inconsistent verdicts remains, and the expense, delay and complexity of multiple litigation have to be justified. All of these problems are relevant in Canada today, and none of them has been resolved. Indeed, it is only in the last ten years or so that the seriousness of the problems has begun to emerge. However, in that time no progress whatever has been made in finding answers to them.

PROVINCIAL COURTS

In the early years of confederation none of the problems of a dual court system existed, because there was no dual court system. Each of the original uniting provinces (and those which joined later) had its own system of courts, and the authority of those courts was expressly continued after confederation (or admission) by s. 129 of the *British North America Act.* Each of the provinces was also given the authority to maintain its courts and establish new courts by s. 92(14) of the *B.N.A. Act* ("the administration of justice in the province"). These provincial courts, whether established at the time of confederation (or admission), or created later under s. 92(14), had jurisdiction over all justiciable disputes arising within the province. It did not matter whether a dispute raised a question of constitutional law, federal law, provincial law, or a mixture of the three, the provincial courts still had jurisdiction.

The confederation arrangements did not constitute precisely a system of national courts. The courts were provincial: their constitution, organization and maintenance was a provincial responsibility. However, it seems likely that the framers of the *B.N.A. Act* did think of them as national courts, because s. 96 of the *B.N.A. Act* provided that the judges of the superior, district and county courts in each province were to be appointed by the federal government. It is anomalous in a federal system that the federal government should appoint the judges of the provincial courts.[14] But the explanation for the anomaly may well lie in the fact that the provincial courts were courts of general jurisdiction. Since the courts would be deciding questions of federal law as well as provincial law, and questions of constitutional law as well as private law, some federal involvement in their establishment would not be unreasonable.[15]

PRIVY COUNCIL

At the time of confederation an appeal lay from the Court of Appeal in each province to the Privy Council. The Privy Council heard appeals from all the British colonies, including those of British North

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[14]There is no counterpart to s. 96 in the constitutions of the United States and Australia.

[15]The idea that the courts were really thought of as national does not find explicit support in the legislative history of the judicature sections of the *B.N.A. Act:* see Laskin, Comment, (1955) 33 *Can. Bar Rev.* 993, at 998; Pepin, G., *Les tribunaux administratifs et la constitution* (Montreal: University of Montreal Press, 1969), at 81-84; but it was recently expressed by Pigeon J. in *The Queen* v. *Thomas Fuller Construction,* [1980] 1 S.C.R. 695, at 706:

> A special feature of the constitution enacted for Canada by the *British North America Act* is the provision for provincial superior courts of general jurisdiction to be established in cooperation by each province and by the federal authority. While it is usual to refer to these courts as provincial, they are so only in a limited sense. Under s. 96 the federal government plays the most important role in their establishment: the appointment of the judges and, under s. 100, their salaries are fixed and provided by Parliament.

America. Its jurisdiction depended partly upon the royal prerogative and partly upon imperial statutes which could not be altered within Canada.[16] Its judges were appointed by the British government. The court could hardly be described as a national court: it was an imperial court. But it was neither a federal court nor a provincial court: it was entirely outside the control of either level of government in Canada. And it was a general court of appeal, hearing appeals across the full range of the law, whether federal, provincial or constitutional. The existence of this appeal tended to unify the administration of justice in Canada. Although each province had a separate hierarchy of courts, the Privy Council stood at the top of each hierarchy, so that what was technically several provincial hierarchies was in substance a single nation-wide system.

SUPREME COURT OF CANADA

The Supreme Court of Canada was not of course established by the *B.N.A. Act,* although the *B.N.A. Act,* by s. 101, did authorize the federal Parliament to establish "a general court of appeal for Canada". In 1875 the Supreme Court of Canada was established under this authority.[17] But the establishment of the new court did not change much, because the right to appeal to the Privy Council was not at first impaired. Not only was there an appeal from the new Supreme Court of Canada to the Privy Council, the right to appeal from a provincial court of appeal directly to the Privy Council was preserved. It was not until Privy Council appeals were finally abolished in 1949[18] that the Supreme Court of Canada assumed the role of a final court of appeal for Canada. The Supreme Court of Canada is technically a federal court, in that it is established by federal law and staffed by federally-appointed judges, but it functions as a national court. Like the Privy Council before it, the Supreme Court of Canada is a general court of appeal, hearing appeals on provincial law, federal law or constitutional law. And, again like the Privy Council before it, it stands at the top of each hierarchy of provincial courts (as well as the hierarchy of federal courts), unifying the administration of justice in Canada.

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[16]The power to abolish (or alter) appeals to the Privy Council was acquired in 1931, when the *Statute of Westminster,* 1931 (Imp.) gave Canada the power to amend or repeal imperial statutes. Appeals were abolished in 1949: S.C. 1949 (2d sess.), c. 37. The history of Privy Council appeals is related in Hogg, *Constitutional Law of Canada* (1977), at 127-129.

[17]*Supreme and Exchequer Courts Act,* S.C. 1875, c. 11.

[18]*Supra,* footnote 16.

FEDERAL COURT OF CANADA

Establishment

If this was all of the administration of justice in Canada, we could report with satisfaction that in substance it had not been federalized, and the evils of divided jurisdiction had been avoided. But the *British North America Act,* by s. 101, did authorize the federal Parliament to establish federal courts "for the better administration of the laws of Canada". In 1875 the Exchequer Court was established under this authority,[19] and with this event Canada acquired a dual court system. At first, the Exchequer Court was not a serious competitor of the provincial courts because its jurisdiction was so narrow. Initially it covered only certain classes of case involving the federal revenue and the Crown in right of Canada. This jurisdiction was gradually increased, however, so that it came to include copyright, trade marks, patents, admiralty, tax, citizenship and a few other matters regulated by federal law. As the jurisdiction expanded so did the opportunities for jurisdictional conflict, and we begin to find a trickle of cases on the question whether a particular cause of action should be tried in the Exchequer Court or the appropriate provincial court.[20] In 1971, the Exchequer Court was replaced by the Federal Court of Canada.[21] The new court not only inherited the jurisdiction possessed by its predecessor but acquired additional elements of jurisdiction as well, including the power to review the decisions of federal officials and agencies. Now the trickle of jurisdictional disputes turned into a steady stream.[22]

Requirement of Federal Law

Most of the questions regarding the scope of the jurisdiction of the Federal Court turn on the language of the *Federal Court Act.* But there are also constitutional limits to the jurisdiction of the Federal Court of Canada (or of any other federal court). A federal court cannot be granted plenary powers akin to those of the provincial superior courts. This is because s. 101 of the *B.N.A. Act* stipulates that federal courts may be established only "for the better administration of the laws of Canada". This phrase defines the limits of federal jurisdiction. The Federal Court of Canada can be given jurisdiction only over questions arising out of "the laws of Canada".

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[19]*Supra,* footnote 17.

[20]See Canadian Abridgement (2nd ed., 1971), vol. 21, 435-444.

[21]*Federal Court Act,* S.C. 1970-71-72, c. 1.

[22]The index to each annual volume of the Federal Court Reports discloses a number of cases concerning the jurisdiction of the court.

What is the meaning of the phrase "the laws of Canada"? Before 1976 there was substantial judicial support for the view that a federal court could be given jurisdiction over any matter in relation to which the federal Parliament had legislative competence. On this basis, the "laws of Canada" could include, not merely a rule of federal statute law, but also a rule of provincial statute law or a rule of the common law if its subject matter was such that the law could have been enacted or adopted by the federal Parliament. This test of federal legislative competence gave to the undefined phrase "laws of Canada" a meaning which was sound in principle and relatively easy to apply in practice. Yet, in two recent cases, *Quebec North Shore Paper Co.* v. *Canadian Pacific* (1976),[23] and *McNamara Construction* v. *The Queen* (1977),[24] the Supreme Court of Canada has rejected the test. What the court decided in these two cases was that it was not sufficient for a case before the Federal Court to be within the legislative competence of the federal Parliament; the case had to be governed by "applicable and existing federal law"[25] in order to be within the jurisdiction of the court. In each of the two cases the Supreme Court held that the Federal Court had no jurisdiction, despite the fact that the *Federal Court Act* clearly purported to confer jurisdiction, and the matter of the litigation was within federal legislative competence. But in neither case was the dispute governed by federal statute law: *Quebec North Shore,* which concerned a contract for the international transportation of paper, was governed by the civil law; *McNamara Construction,* which concerned a contract to build a penitentiary, was governed by the common law.[26]

After these two decisions the stream of cases contesting the jurisdiction of the Federal Court swelled into a torrent.[27] It is easy to see why. These decisions added a new layer of inquiry to the question whether the Federal Court had jurisdiction over a particular case. Before these decisions it was only necessary to ask the two obvious questions: (1) Did the federal Parliament have legislative authority over the subject matter of the case?, and (2) Did the *Federal Court Act* confer jurisdiction over the case? After *Quebec North Shore* and *McNamara Construction* a third question was now necessary: (3) Were the issues in the case governed by "applicable and existing federal law"? This third question seriously undermined much of the language of the *Federal Court Act.* Now that it was demonstrated that the language which purported to confer jurisdiction in *Quebec North Shore* and *McNamara*

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[23][1977] 2 S.C.R. 1054.

[24][1977] 2 S.C.R. 655.

[25]*Supra,* footnote 23, at 1065-1066 *per* Laskin C.J. The Words "and existing" seem redundant but in this technical area it seems wise to repeat the precise language in which the rule has been judicially expressed.

[26]For criticism of the two cases, see Hogg, "Comment", (1977) 55 *Can. Bar Rev.* 550.

[27]The index to [1978] F.C., vols. 1 and 2, notes 21 cases reported in 1978 alone.

Construction did not mean what it said, many other elements of the Federal Court's jurisdiction came under attack.[28] Moreover, the requirement of "applicable and existing federal law" vastly increased the potentiality that some issues or some defendants in a particular litigation would be within jurisdiction while other issues or other defandants in the same litigation would not be. That is illustrated by the Cranbrook air crash litigation described at the beginning of this paper.[29] In that case the *Federal Court Act* purported to confer jurisdiction over suits against the federal Crown, suits against federal Crown servants, and suits in relation to aeronautics. All those topics are within the legislative competence of the federal Parliament. But the requirement of applicable and existing federal law had the effect of excluding all defendants other than the federal Crown.

AUSTRALIA

The Australian constitution, by s. 71, empowers the federal Parliament to create federal courts.[30] For many years the only courts created under that power were the Australian Industrial Court (created in 1956) and the Federal Court of Bankruptcy (created in 1930), each with a specialized jurisdiction. In 1976 these two courts were abolished and two new courts were established: (1) the Federal Court of Australia, which inherited the jurisdiction formerly exercised by both the Australian Industrial Court and the Federal Court of Bankruptcy, and (2) the Family Court of Australia, which was given jurisdiction in family law matters including divorce, custody, maintenance, and property arrangements. The tendency in Australia, as in Canada, has been to gradually extend the jurisdiction of the federal courts, but the development has not gone as far in Australia.

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[28]For example, maritime jurisdiction, exercised by the Exchequer Court and Federal Court *(Federal Court Act,* s. 22) without challenge for many years, suddenly appeared vulnerable. Was maritime law a law of Canada? In dozens of cases, many of them reported, defendants raised this question. It remains to be seen whether the question has been definitively resolved by the affirmative answers given by the Supreme Court of Canada in *Tropwood A.G.* v. *Sivaco Wire and Nail Co.* (1979), 99 D.L.R. (3d) 235 (S.C.C.), *Antares Shipping Corp.* v. *The Ship "Capricorn",* [1980] 1 S.C.R. 553, and *Associated Metals & Minerals Corporation* v. *Ships "Evie W", Aris Steamship Co. Inc. and Worldwide Carriers Limited* (1980), 31 N.R. 584 (S.C.C.). As another example, jurisdiction over aeronautics litigation *(Federal Court Act,* s. 23) was challenged in several cases on the ground of the absence of a law of Canada; this challenge was usually successful: *e.g., McGregor* v. *The Queen,* [1977] 2 F.C. 520 (T.D.); *Haida Helicopters* v. *Field Aviation Co.* 1979] 1 F.C. 143 (T.D.); *Bensol Customs Brokers* v. *Air Canada,* [1979] 1 F.C. 167 (T.D.); *Pacific Western Airlines* v. *The Queen, supra,* footnote 5. As a further example, jurisdiction over actions by the federal Crown *(Federal Court Act,* s. 17(4)(*a*))has been denied for absence of a law of Canada: *McNamara Construction* v. *The Queen,* [1977] 2 S.C.R. 655; *The Queen* v. *Thomas Fuller Construction, supra,* footnote 15. The *Quebec North Shore* decision, *supra,* footnote 23, has been applied in many other areas of ostensible Federal Court jurisdiction as well, see the *Quebec North Shore* entry in "Cases Judicially Noted" in recent volumes of the Federal Court Reports.

[29]*Supra,* footnotes 4 and 5.

[30]On the Australian federal court system, see Cowen and Zines, *supra,* footnote 2, at ch. 3.

The Australian state courts, like the Canadian provincial courts, are courts of general jurisdiction, with power to decide "federal" questions as well as "state" questions.[31] In addition, the Australian constitution, by s. 71, authorizes the federal Parliament to invest state courts with federal jurisdiction,[32] and broad areas of federal jurisdiction have been invested in state courts under this power.[33]

The High Court of Australia, under s. 73 of the constitution, has general appellate jurisdiction.[34] It is not confined to cases coming within federal jurisdiction. In this respect the framers of the Australian constitution followed the Canadian rather than the American model.

The generality of the jurisdiction of the Australian state courts and the High Court of Australia, and the rather limited and specialized jurisdiction of the federal courts,[35] seem to have prevented the more acute problems of allocating jurisdiction between dual court systems which have now begun to surface in Canada.

UNITED STATES

Federal and State Courts

The Americans have had a long experience with a dual court system. Their federal courts consist of a District Court of original jurisdiction for each of 87 "districts", a Court of Appeals having mainly appellate jurisdiction for each of ten "circuits" and for the District of Columbia, and of course the Supreme Court of the United States. These courts have existed from the time of union. The Supreme Court was established by the constitution, and the other federal courts were established by the first act of the first Congress, the *Judiciary Act* of 1789.

Article III, s. 1, of the constitution of the United States provides that:

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[31] *Ibid.*, at 176-178.

[32] This power was described as the "autochthonous expedient" by the High Court of Australia in the *Boilermakers' Case* (1956), 94 C.L.R. 254, at 268. It has no counterpart in the American constitution. It also has no explicit counterpart in the *B.N.A. Act*, but it is well settled by case-law that the federal Parliament may confer federal jurisdiction on provincial courts, and it has done so from time to time: Hogg, *Constitutional Law of Canada* (1977), at 116-117.

[33] The investment of federal jurisdiction in state courts was necessary for cases in which the federal Crown was a party, but for most other cases coming within invested federal jurisdiction the state courts, as courts of general jurisdiction, would have had the power anyway: *supra*, footnote 30, at 176-178.

[34] *Ibid.*, at xvi.

[35] The Labour government of Prime Minister Whitlam introduced several bills to establish a new federal court, to be called the Superior Court of Australia, with broad federal jurisdiction, but none of these bills was enacted: *supra*, footnote 30, at 111.

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . .

Article III, s. 2, of the constitution then defines "the judicial power of the United States" as follows:

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under the grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The effect of these two provisions is to confine the federal courts, including the Supreme Court of the United States, to the "cases" and "controversies" included in the judicial power of the United States. Congress cannot give to the federal courts any jurisdiction wider than that allowed by the constitution. The state courts, by contrast, are courts of general jurisdiction.[36] This organization of the judiciary is of course very similar to that of Canada (except that the Supreme Court of Canada has general appellate jurisdiction extending beyond federal jurisdiction).

Pendent and Ancillary Jurisdiction

The federal courts of the United States have developed two doctrines to reduce the problems inherent in a dual court system. One is the doctrine of "pendent jurisdiction"; the other is the doctrine of "ancillary jurisdiction".

The doctrine of pendent jurisdiction is that where a federal court has jurisdiction over a particular case, then the court has jurisdiction to determine all the issues presented by the case, including "state" issues over which the federal court would have no independent jurisdiction. This doctrine accepts the reality that a single controversy between parties will often raise questions outside the judicial power of the United States as well as inside it. So long as both kinds of questions "derive from a common nucleus of operative fact" the federal court has jurisdiction over both kinds of questions, and may indeed determine the controversy on the basis of a non-federal question.[37] The doctrine of pendent jurisdiction, as it is usually understood, applies "only where the

[36]See generally Wright, C.A., *Federal Courts* (2nd ed.) (St. Paul, West Publ. Co., 1970), chs. 1 and 2; Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 1978), at ch. 3.

[37]Wright, at 62-65.

same parties are involved in the state and federal claims."[38] It does not permit the joinder of additional parties to respond to a state claim on the ground that the state claim against the new party is closely related to the federal claim against the existing party. However, the related doctrine of "ancillary jurisdiction" does enable joinder of claims and parties.

The doctrine of ancillary jurisdiction is that where a federal court has jurisdiction over a particular case, then the court also has jurisdiction over ancillary proceedings of which it could not take cognizance if they were independently presented. A complex body of law has developed around the doctrine of ancillary jurisdiction, but the general idea is that if the main action is properly before a federal court, then certain kinds of counterclaims and third party proceedings are within ancillary jurisdiction. The addition of new defendants, however, is conventionally regarded as outside ancillary jurisdiction.[39]

The constitutional explanation of the doctrines of pendent and ancillary jurisdiction is that the United States' constitution and the *Judiciary Act* are construed as granting to the federal courts the power to resolve a case which is within the judicial power of the United States in its entirety. The question is: could s. 101 of the *B.N.A. Act* receive a similar construction?

PENDENT JURISDICTION IN CANADA

So far as pendent jurisdiction is concerned, while no such doctrine has been enunciated in Canada, it seems to be almost an inevitable part of a federal court system. It would be a fantastic situation if a court of original jurisdiction were frequently precluded from determining some of the issues necessary for the disposition of a case properly before it. For example, the disposition of an income tax case often turns in the end on a question of provincial law. Thus, tax cases have involved the question whether the taxpayer was an employee or an independent contractor,[40] whether a trust was validly created,[41] whether a sale had been completed,[42] whether a disclaimer was effective,[43] and various

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[38]*Ibid.*, at 65.

[39]*Ibid.*, at 21.

[40]Noel, "Contract for Services, Contract of Service — A Tax Perspective and Analysis", [1977] *Can. Tax Found. Conf. Rep.* 712, at 716.

[41]*Ablan Leon* v. *Minister of National Revenue*, [1976] D.T.C. 6280 (F.C.A.).

[42]*The King* v. *Dominion Cartridge Co.*, [1923] Ex. C.R. 93 (Ex. Ct.).

[43]*Minister of National Revenue* v. *Smith*, [1960] S.C.R. 477.

points of Quebec's civil law.[44] When a tax case (or other case in a federal court) involves a question of provincial law, it is never suggested that the question of provincial law be remitted to the provincial courts for decision, the federal court simply goes ahead and decides the question. It is probably safe to assume, therefore, that the reference to "laws of Canada" in s. 101 of the *B.N.A. Act* does not preclude the Federal Court from applying provincial law where it is part of the body of law applicable to a case otherwise governed by federal law.[45]

ANCILLARY JURISDICTION IN CANADA

So far as ancillary jurisdiction is concerned, the overwhelming weight of Canadian authority holds that the Federal Court can take jurisdiction over an issue presented by a third party notice,[46] counterclaim[47] or co-defendant[48] only if the court would have had jurisdiction if the issue had been presented independently in a separate proceeding. This "independent jurisdiction" test is, of course, directly opposed to a doctrine of ancillary jurisdiction. The independent jurisdiction test has been enunciated by courts fully conscious of the savings in cost and time and avoidance of inconsistent decisions which a unified jurisdiction would provide. However, many of the cases which insist on the independent jurisdiction test were decided before *Quebec North Shore* and *McNamara Construction* introduced the new constitutional restrictions on federal jurisdiction and greatly expanded the scope of the problem.[49] This new development could have provided justification for the development of a doctrine of ancillary jurisdiction to mitigate the difficulties created by those cases. But in *McNamara Construction* there was an obiter dictum by Laskin C.J. which suggested, ominously, that he did not acknowledge any doctrine of ancillary jurisdiction.[50] This

[44]*Sura* v. *Minister of National Revenue*, [1962] S.C.R. 65 (community property law); *Minister of National Revenue* v. *Lemieux-Fournier*, [1971] D.T.C. 5325 (F.C.T.D.) (substitution); *The Queen* v. *Lagueux et Frères*, [1974] 2 F.C. 97, at 103 (F.C.T.D.) (contract law); *Rudnikoff* v. *The Queen*, [1975] D.T.C. 5008 (F.C.A.) (emphyteutic lease); *The Queen* v. *Compagnie Immobilière*, [1979] D.T.C. 5068 (S.C.C.) (emphyteutic lease).

[45]In some cases, of course, it will be held that provincial law has been incorporated by reference into federal law, in which case the provincial law would qualify as a law of Canada. For example, the application of provincial tort law to the federal Crown has been explained on that basis. In such a case no doctrine of pendent jurisdiction would need to be invoked by the Federal Court in order to apply provincial law.

[46]*The King* v. *Hume; Consolidated Distilleries* v. *Consolidated Exporters Corp.*, [1930] S.C.R. 531; *Bank of Montreal* v. *Royal Bank of Canada*, [1933] S.C.R. 311; *McNamara Construction* v. *The Queen*, [1977] 2 S.C.R. 654, at 664; *The Queen* v. *Thomas Fuller Construction*, [1980] 1 S.C.R. 553; this last case presumably overrules *Schwella* v. *The Queen*, [1957] Ex. C.R. 226, where ancillary jurisdiction over a third party notice seems to have been accepted.

[47]*Bow McLachlan* v. *Ship "Camosun"*, [1909] A.C. 597 (P.C.).

[48]*Pacific Western Airlines* v. *The Queen*, *supra*, footnotes 23 and 24; but compare *The Ship "Sparrows Point"* v. *Greater Vancouver Water District*, [1951] S.C.R. 396.

[49]*Supra*, footnote 23.

[50]*Ibid.*, at 664.

suggestion has been dramatically confirmed by the most recent decision of the court.

This decision is *The Queen* v. *Thomas Fuller Construction* (1979),[51] in which an action was brought against the federal Crown in the Federal Court by a Crown contractor who alleged breach of contract. The contractor was constructing a building in Ottawa for the federal government, and the work was delayed by blasting operations carried out on the same site by a sewage contractor. The main contractor sued the Crown in Federal Court for the cost of the delay. The Crown tried to issue a third party notice against the sewage contractor who had done the blasting; the Crown claimed (inter alia) contribution under Ontario's *Negligence Act*. The Supreme Court of Canada struck out the third party notice. The reasoning was the now familiar line that the principal action was governed by a law of Canada (because it concerned the liability of the Crown), but the third party proceeding was not.

It is bad enough that a second set of proceedings in a second court (provincial) should be required to resolve the rights and liabilities of the parties to what is essentially one controversy. But in this case there was an added complication. Two decisions of the Ontario Court of Appeal had held that a claim for contribution under the Ontario *Negligence Act* could only be made in the principal action; if the claim was not made in the principal action it could not be made at all.[52] Pigeon J., for the six-judge majority, doubted the correctness of these two decisions; but he held that even if they were correct the Crown should not be permitted to claim contribution in the principal action. The court thus refused to apply any doctrine of ancillary jurisdiction even when it was necessary to avoid not merely multiple proceedings, but the outright denial to a party of a legal right to which the party would otherwise be entitled.[53] By denying the doctrine of ancillary jurisdiction in this extreme case the court was making clear that it will never be willing to accept it.

CONCLUSION

I opened by arguing that a federal system does not entail federalizing the judiciary. The framers of the *B.N.A. Act* evidently agreed with me. But the federal Parliament has not agreed, as is

[51] [1980] 1 S.C.R. 553.

[52] *Cohen* v. *McCord*, [1944] O.R. 568 (Ont. C.A.); *Richwood* v. *Town of Aylmer* (1957), 8 D.L.R. (2d) 702 (Ont. C.A.).

[53] The reasoning by which a contrary result could have been reached is displayed in the dissenting opinion of Martland J. He emphasized the "interrelationship" between the principal action and the third party proceeding: the same conduct was relevant to each, and the liability in the principal action was "the very foundation of the Crown's third party claim". He also remarked on the "startling consequence" of the majority view that the whole issue should have to be retried in another court, and that the Crown's claim for contribution under the *Negligence Act* could not be brought at all.

demonstrated by the steady expansion of the judisdiction of federal courts. Even so, many of the evils of a dual court system could have been avoided by the Supreme Court of Canada. The test of federal legislative competence would have reduced the fragmentation of litigation, but the Supreme Court rejected it in *Quebec North Shore.* The doctrine of ancillary jurisdiction would also have reduced the fragmentation of litigation, but the Supreme Court has now rejected that too in *Thomas Fuller Construction.* The federalization of the Canadian judiciary which was started by the federal Parliament has been taken to such an extreme by the Supreme Court of Canada that it has produced an entirely unnecessary increase in the number of disputes which cannot be resolved in one lawsuit. The results of this increase include multiple proceedings, increased costs, increased delays, the possibility of inconsistent verdicts and occasional injustices. These results have occurred because of the failure of the Supreme Court of Canada to accommodate its notions of federalism to the special nature of the administration of justice.