

IS THE SUPREME COURT OF CANADA BIASED IN CONSTITUTIONAL CASES?

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I. *The Issue.*

In recent public discussions of the Supreme Court of Canada the allegation has occasionally surfaced that the court has been biased in favour of the federal interest in constitutional cases.¹ The allegation has been especially stimulated by the decisions in the two broadcasting cases,² which denied provincial power over cable television, and by the *CIGOL*³ and *Potash*⁴ cases, which limited provincial power to tax and regulate the production of natural resources located in the province. It is true that over the last few years there has been an increase in both the number and the importance of the constitutional cases before the Supreme Court of Canada, and the federal interest has fared much better than the provincial interest.⁵

When a province loses a case which engages vital provincial policies it is only to be expected that the province's politicians will be upset with the result, and that their criticism will depart from the conventions of polite legal discourse. But in my view the allegation of bias has to be taken seriously by lawyers and political scientists. It casts doubt upon the efficacy of judicial review as a means of resolving federal-provincial controversies. It underlies the proposals to entrench the court in the constitution and to provide a role for the

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This article originated as a paper which I delivered to classes at the University of Victoria and the University of British Columbia in January 1979. I have also tried it out on my own students and a number of my colleagues. It has been heard or read by a large number of people, and I have benefited from many comments. I should however specifically acknowledge the particularly helpful comments of law student Douglas Marshall and law professors Stanley Schiff, William Angus and Katherine Swinton.

¹ Charges of bias in the press prompted a defence of the court by the Chief Justice: Laskin, *Judicial Integrity and the Supreme Court of Canada*, [1978] *Law Soc. Gaz.* 116.

² *Capital Cities Communications v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191; but compare *A.-G. Que. v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211.

³ *Canadian Industrial Gas and Oil v. Govt. of Sask.*, [1978] 2 S.C.R. 545, hereinafter referred to as *CIGOL*.

⁴ *Central Canada Potash Co. v. Govt. of Sask.*, [1979] 1 S.C.R. 42.

⁵ See K. Lysyk, *Reshaping Canadian Federalism* (1979), 13 *U.B.C.L. Rev.* 1, at pp. 16-21, who does not, however, allege bias.

provinces in selecting the judges. The purpose of this article is to examine the allegation of bias on its merits.⁶

We must start with the trite proposition that the law rarely supplies a clear answer to the questions which come before the Supreme Court of Canada. A litigant is not likely to spend good money taking an appeal to the Supreme Court of Canada unless he is convinced that there is a fair chance that the Supreme Court will reverse the decision which was arrived at by the provincial (or federal) court of appeal. The Supreme Court is not likely to give leave to appeal if a simple point of law is involved. The fact is that the Supreme Court often does reverse the court of appeal, and is often divided itself. All of the constitutional controversies which come before the court are cases where the language of the constitution does not speak clearly with respect to the question at hand, and the precedents either do not quite cover the question at hand or are conflicting. Obviously, differences of opinion as to the "correct" result in such cases do not imply bias on the part of anyone.

There is a longstanding controversy among legal scholars as to how judges do decide these difficult cases where a judge has to choose between competing interpretations of the existing legal materials. The extreme "positivist" point of view that a judge simply applies the pre-existing rules to the case at hand is entirely unhelpful, because it is the ambiguous or vague condition of the pre-existing rules which has caused the litigation, and the judge's decision will itself define for the first time the rule which is applicable to the case at hand (and like cases). In this situation a new rule has been created (or developed or elaborated). In formulating that new rule the judge exercises a choice which cannot be wholly explained by the pre-existing rules. How is that choice made? The extreme "realist" point of view would be that judges are inevitably free to indulge their own personal policy preferences in choosing between competing interpretations of the pre-existing rules. But it seems clear that judges do not feel that they have this kind of freedom, and the shared assumption of appellate advocacy is that the judge is not free to develop the law along lines which would be congenial to his own preferences. The moderate position, which seems to me to be accurate, is that the judicial choice is primarily governed by the body of legal policies and principles which underlie

⁶ There is an important study in existence, commissioned by the government of Quebec, Gilbert L'Ecuyer, *La Cour suprême du Canada et le partage des compétences 1949-1978* (Gouvernement du Québec, Ministère des Affaires intergouvernementales, 1978), which rejects the allegation of bias. The present article, while agreeing with L'Ecuyer's conclusion, investigates the issue by different methods.

the more specific rules and which emerge from the statutes, cases and other conventional sources of law; the judge formulates the legal rule which seems to him to flow most plausibly from those conventional sources of law, even if the result does not accord with his own policy preferences.⁷ But it is undeniable that the decision of a difficult case may, as Oliver Wendell Holmes said long ago, "depend on a judgment or intuition more subtle than any articulate major premise";⁸ and precisely because that crucial judgment or intuition is inarticulate, it can be influenced—unconsciously no doubt—by the judge's predispositions.⁹

I conclude that it is at least possible for a judge to be biased in federal-provincial controversies. Of course, the Supreme Court of Canada consists of nine judges at any one point of time, and a total of fifty-seven judges have sat on the court. In investigating the charge of bias in federal-provincial controversies it is necessary to ask whether the numerous judges of the court are likely to share a predisposition to favour the federal or centralist side of the case.

II. *Federal Appointment of Judges.*

The simplest form of the argument for bias is that the judges are appointed and paid by the federal government, and will feel beholden to the federal government. Sometimes this argument is reinforced by the argument that the institution itself—the Supreme Court of Canada—was created by a federal statute, and could be abolished the same way. These facts, it would be said, may serve to inculcate gratitude or fear (or a mixture of the two) in the minds of the Supreme Court judges, predisposing them to render decisions pleasing to the federal government. It is obviously not necessary to embark on a detailed rebuttal of this argument. The fact is that once a judge has been appointed—admittedly by the federal government—he has nothing to hope for or fear from the federal government. Constitutional guarantees and powerful political traditions of judicial independence render the judge invulnerable to any kind of governmental action.¹⁰

⁷ Out of the vast literature on judicial decision-making, I cite as particularly useful on this point, Paul C. Weiler, *Two Models of Judicial Decision-Making* (1968), 46 *Can. Bar Rev.* 406; Paul C. Weiler, *Legal Values and Judicial Decision-Making* (1970), 48 *Can. Bar Rev.* 1.

⁸ *Lochner v. New York* (1905), 198 U.S. 45, at p. 76, per Holmes J. dissenting; see also *The Path of the Law* (1897), 10 *Harv. L. Rev.* 457, at p. 466.

⁹ In *Lochner v. New York*, *ibid.*, it will be recalled that the Supreme Court of the United States struck down a state law prescribing maximum hours of labour in bakeries as "an unreasonable, unnecessary and arbitrary interference" with freedom of contract.

¹⁰ The federal Parliament retains power over judicial salaries, and the Prime Minister decides who will be promoted to Chief Justice when that office is vacant.

The objective fact of judicial independence would not preclude the existence of a sycophantic psychology on the part of the judges. The fact here, however, is that the judges are all longstanding members of the legal profession; in most cases they have been engaged in the private practice of law; they have all been nurtured in a professional tradition which is highly unsympathetic to governmental authority especially when exercised from Ottawa; and they are unlikely to have developed attitudes which are unduly deferential to the federal government. The strong likelihood is that they value the assessment of their work by the legal profession infinitely more highly than they value the opinions of the members of the federal cabinet and civil service. The reputation of a judge in the legal profession is established partly through scholarly writing but mainly through informal discussion among lawyers, and it develops primarily as a result of professional assessment of craftsmanship and fairness. The judge who could always be counted on to vote for the federal government would be regarded with contempt by the profession.

A more subtle form of the bias argument holds that the federal government exercises its appointing power in favour of people with known centralist predispositions. It is only to be expected, so the argument runs, that a government intent on strengthening its power would make such appointments. In fact, however, it seems unlikely that the government does engage in this kind of court-packing. It is not easy to find eminent lawyers and judges who are in favour of increased centralization of power in Ottawa. If obvious candidates for appointment were being passed over in favour of committed centralists, or if enquiries were being made about the constitutional opinions of potential candidates, I think it is obvious that these facts would become known and would be the subject of a considerable protest.¹¹

To be sure, there are well-qualified candidates who have publicly recorded their views on some aspects of federal-provincial relationships. It is well known that Chief Justice Laskin, as a law professor, was a vigorous critic of the Privy Council decisions which strengthened provincial power at the expense of the federal government.¹² It is less well known that Mr. Justice Pigeon and Mr.

But the tradition of judicial independence ensures that these powers will not be used to punish or reward judges who render decisions adverse to or favourable to the federal government.

¹¹ For an account of the procedure which is followed in making judicial appointments, see E. Ratushny, *Judicial Appointments: The Lang Legacy*, in A.M. Linden (ed.), *The Canadian Judiciary* (1976), ch. 2.

¹² B. Laskin, *Peace, Order and Good Government Re-examined* (1947), 25 Can. Bar Rev. 1054.

Justice Beetz before their appointments had published articles which vigorously defended the decisions of the Privy Council.¹³ So far as I am aware, none of the other judges had before appointment recorded his opinions on constitutional law.¹⁴ On the basis of the precedents of Laskin C.J., Pigeon and Beetz JJ., it is impossible to substantiate any charge of court-packing. In any case it is impossible to predict with confidence how a person will vote when he assumes judicial office. For example, Laskin C.J. has written the court's opinion, or a separate concurring opinion, in every case in which a federal statute has been held unconstitutional;¹⁵ Pigeon and Beetz JJ. have often written or agreed to opinions holding a provincial statute to be unconstitutional.¹⁶

It must be remembered too that constitutional cases form only a very small part of the work of the Supreme Court of Canada. The great majority of cases are appeals in civil or criminal cases which involve no constitutional issues at all. One of the factors which is taken into account by the federal government in making appointments is the securing of an appropriate mix of legal experience and expertise among the judges. It would be impossible for the federal government to give due weight to this consideration, as well as conforming to the conventional regional balance of the judges,¹⁷ at the same time as it was pursuing judges who could be relied upon to vote the "right" way in constitutional cases.

The truth is, I suspect, that the federal government does not see the winning of constitutional law cases as a major policy objective,

¹³ L.-P. Pigeon, *The Meaning of Provincial Autonomy* (1951), 29 *Can. Bar Rev.* 1126; J. Beetz, *Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867*, in P.-A. Crépeau and C.B. Macpherson, *The Future of Canadian Federalism* (1965), p. 113.

¹⁴ Judges appointed to the Supreme Court of Canada from the bench of another court would normally have decided the occasional constitutional case.

¹⁵ *MacDonald v. Vapor Canada*, [1977] 2 S.C.R. 134; *McNamara Construction v. The Queen*, [1977] 2 S.C.R. 655; *Quebec North Shore Paper Co. v. Canadian Pacific*, [1977] 2 S.C.R. 1054; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.

¹⁶ *E.g.*, *Amx Potash v. Govt. of Sask.*, [1977] 2 S.C.R. 576; *Canadian Industrial Gas and Oil v. Govt. of Sask.*, *supra*, footnote 3; *A.-G. Que. v. Farrah*, [1978] 2 S.C.R. 638.

¹⁷ The Supreme Court Act, R.S.C., 1970, c. S-19, s. 6, stipulates that three of the nine judges must come from Québec. Until December 1978 the practice was to appoint three judges from Ontario, two from the four Western provinces, and one from the Atlantic provinces. In December 1978, on the retirement of Spence J. who had been appointed from Ontario, McIntyre J. was appointed from British Columbia. The present composition of the court therefore includes (as well as the three judges from Quebec and the one from the Atlantic provinces) two judges from Ontario, two judges from the prairie provinces and one judge from British Columbia. It remains to be seen whether this is now to be the permanent regional distribution of appointments.

does not see the role of the Supreme Court in constitutional cases as being of major importance in determining the balance of power between the centre and the provinces,¹⁸ and does see that any evidence of packing the court would provoke a storm of protest. If these viewpoints correspond with reality, as I believe they do, then one must conclude that it is good politics to make good appointments.

III. *Frequent Invalidation of Provincial Statutes.*

The only remaining argument for bias is based on the outcomes of constitutional cases¹⁹ decided in the Supreme Court of Canada from the abolition of appeals to the Privy Council on December 23rd, 1949, to the present.²⁰ I have looked at all those cases, and I find that

¹⁸ The federal-provincial financial arrangements, which are made by agreement between the eleven governments, and which encompass the sharing of tax "room", equalization grants and shared-cost programmes, are incomparably more significant. When a judicial decision does have a serious impact on the federal-provincial sharing of power, an accommodation is usually reached by agreement among the various governments. On three occasions that agreement has led to a constitutional amendment to reverse the effect of a judicial decision: s. 91(2A) of the British North America Act (added by British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)) and s. 94A (added by British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)) and revised by British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)), hereinafter referred to as B.N.A. Act, were designed to abrogate *A.-G. Can v. A.-G. Ont* (Unemployment Insurance), [1937] A.C. 355. More commonly, the effect of the decision can be overcome or modified by revenue-sharing arrangements (e.g., modifying effect of *Reference re Offshore Mineral Rights*, [1967] S.C.R. 792) or by federal inter-delegations of various kinds (e.g., those upheld in *Lord's Day Alliance v. A.-G. B.C.*, [1959] S.C.R. 497; *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392; *Coughlin v. Ont. Highway Transport Board*, [1968] S.C.R. 569; *Reference re Agricultural Products Marketing Act*, *supra*, footnote 15, each of which was a response to a judicial decision). I predict that current controversies over the control and taxation of natural resources and over cable television will also be settled reasonably agreeably to the contending governments. Indeed, one scholar has argued that judicial review could be abolished in view of the existence of consensual methods of resolving federal-provincial controversies: Paul C. Weiler, *The Supreme Court of Canada and Canadian Federalism* (1973), 11 Osgoode Hall L.J. 225; Paul C. Weiler, *In the Last Resort* (1974), ch. 6.

¹⁹ I included only cases which raised a constitutional issue of federalism. Constitutional cases on points not bearing on the distribution of powers were excluded, for example, cases on the Canadian Bill of Rights, R.S.C., 1970, Appendix III. I excluded cases in which the majority opinion was not based on a constitutional issue, even though the point may have been strenuously argued, or even formed the basis of a dissenting opinion (as in *Breckinridge Speedway v. The Queen*, [1970] S.C.R. 1975). I also excluded cases in which a constitutional point was referred to in the majority opinion, but was in my view either an *obiter dictum* or a subsidiary ground of decision; these exclusions are more controversial, but it must be appreciated that the constitution is argued in many cases and often receives passing reference in the decisions, for example, in administrative law cases.

²⁰ The cases comprise all the decisions of which I was aware, from the beginning of 1950 up to June 1st, 1979. This included all the cases reported in the Supreme

sixty-five provincial statutes were attacked in the Supreme Court of Canada and twenty-five of them were held to be unconstitutional in whole or in part,²¹ or to be inoperative through paramountcy. In the same period thirty-seven federal statutes were attacked in the Supreme Court of Canada and four of them were held to be unconstitutional in whole or in part.

This kind of raw data must be treated with the utmost caution. Consider some of the complicating factors.

First of all, there are ten legislative bodies busy enacting provincial laws and only one legislative body enacting federal laws. Even allowing for the fact that many provincial statutes duplicate those of other provinces, the volume and variety of provincial laws are so much greater that there are bound to be, and there are, more challenges to the constitutionality of provincial laws. In the period of my study, January 1950 to May 1979 inclusive, as I have just indicated above, there were sixty-five decisions on the validity of provincial laws, and thirty-seven decisions on the validity of federal laws. Of course, this point goes to explain the number of challenges to provincial laws, not the ratio of success to failure.

Secondly, in such a large and diverse country as Canada, the provinces really are the "social laboratories" that they are supposed to be. Innovative and even radical political ideas tend to find political expression at the provincial level. Federal governments, by contrast, cannot get elected except on middle-of-the-road policies which appeal to a broad cross-section of the country. Since the second world war cautious or weak federal governments have undertaken few initiatives which would invite a plausible constitutional challenge. The Trudeau government was quite exceptional in its willingness to intervene in the economy. The provinces, however, especially in the west and in Quebec, frequently elect governments with strong mandates to intervene in the economy. These interventions naturally provoke constitutional challenges.

Thirdly, technological developments have tended to diminish provincial powers of economic regulation and increase federal

Court Reports up to Part 2 of [1979] 1 S.C.R. together with four cases decided, but unreported in S.C.R. at that time, namely, *Construction Montcalm v. Commission du salaire minimum*, December 21st, 1978; *Tropwood A.G. v. Sivaco Wire and Nail Co.*, March 6th, 1979; *Mississauga v. Peel*, March 6th, 1979; *The Queen v. Hauser*, May 1st, 1979. I excluded *Winner v. S.M.T. Eastern*, [1951] S.C.R. 887 because, although it was decided after 1949, it still went on appeal up to the Privy Council.

²¹ In six cases a statute was not held invalid, but "read down" or interpreted narrowly so that it was held inapplicable to the facts on the ground that a literal application of the statute would have been unconstitutional. On reading down, see Hogg, *Constitutional Law of Canada* (1977), pp. 90-92. I counted these cases as holdings of partial invalidity.

powers.²² Even in 1867 shipping and rail could move products from their producers to distant markets; but those means of transportation have now been joined by the highways and the airlines. Similarly, the printing press has now been joined by the motion picture, the telephone, radio and television. The improvements in transportation and communication, and other technological developments, have led to larger and larger business units which can take advantage of the techniques of mass production, mass distribution and mass advertising. This has led to the gradual disappearance of locally-produced consumer goods. The general tendency of technological change is to convert activities which were once local and private, and which could be governed by the private law of contract, tort, and property, into activities which extend across the entire nation, make use of public facilities and require regulation in order to protect the public from predatory or monopolistic practices. These developments do not necessarily answer the question of which level of government should be the regulator. But in many instances the need for a single national policy is so clear that the federal claim is very plausible.

Fourthly, in a federal system—any federal system—provincial laws are vulnerable to constitutional challenge on the basis of their extraterritorial impact. Various doctrines are either expressed in the constitution or are inferred by the courts to limit the power of a provincial legislature, which is elected by and answerable to the people of only that province, to enact policies which will have an impact on the people of other provinces. This is the underlying policy behind many of the limits on the powers of the provinces, even though the limits may be expressed in terms of encroaching on interprovincial trade and commerce, imposing indirect taxation, as well as the more straightforward prohibition on extraterritorial laws. The federal Parliament, by contrast, is elected from all over the country. No doctrine has developed and none is needed to prevent it from overreaching in a territorial sense.²³

²² Paralleling technological developments has been the rise of egalitarian values reflected in social policies to provide income support and security from illness, disability and old age. Many of these policies are within provincial legislative jurisdiction, but there is also a heavy federal presence reflected in federal programmes of unemployment insurance, family allowances, Canada pension plan, old age security, guaranteed income supplement, and in shared-cost programmes of income support, hospital insurance and medical care. Unlike economic regulation, programmes of income distribution and social security rely primarily upon extensive spending powers and are rarely vulnerable to constitutional challenge.

²³ It may be objected that the federal Parliament is subject to a comparable limitation in the sense that it is precluded from legislating in relation to matters which are local. Perhaps the answer is that this fourth point is really only a corollary to the third point, which is that fewer and fewer matters are genuinely local.

Fifthly, in Canada, and apparently in all modern federations,²⁴ provincial laws are vulnerable to constitutional challenge on the basis of their inconsistency with federal law. This is a judge-made doctrine in Canada, to be sure, but one for which the Privy Council, and not the Supreme Court of Canada, bears the responsibility. In any event, I think there would be little quarrel with the general proposition that where national and provincial laws come into conflict it is the national law—the law with the broadest political support—which should prevail.²⁵ The doctrine of federal paramountcy provides a ground for challenging provincial laws which is not available in respect of federal laws.²⁶

What all this means is that we must expect many more successful constitutional challenges to provincial laws than federal laws. This situation stems from the nature of the Canadian federal system, not from any bias on the part of the judges. Even during the Privy Council period this was true. I only have figures from 1919 to the end of appeals, but that was the period when the Privy Council established doctrines highly favourable to the provinces. In that period there were thirty-five challenges to provincial statutes of which nineteen were held invalid in whole or in part, and twenty-two challenges to federal statutes of which eight were held invalid in whole or in part.²⁷ The Privy Council was less restrained in judicial review than the Supreme Court of Canada. Therefore the rate of invalidation is higher for both classes of statutes. But a similar discrepancy in the numbers of challenges and in the proportions of successful challenges is obvious.

IV. *Doctrines Established by the Court.*

1. *Legacy of the Privy Council.*

Let us now move away from the raw data and ask whether the doctrines established by the judges indicate a pro-centralist bias.

The legacy left by the Privy Council was a very broad provincial power over property and civil rights in the province, and correspondingly narrow federal powers over the peace, order, and good government of Canada and over the regulation of trade and

²⁴ K.C. Wheare, *Federal Government* (4th ed., 1963), p. 74.

²⁵ The practice of other federal systems, see Wheare, *op. cit.*, *ibid.*, supports this proposition. This is not to deny that in a revised Canadian constitution there may well be some areas of concurrent legislative power where the general rule should be reversed so that provincial laws would be paramount.

²⁶ In the period under study, 1950-1979, *supra*, footnote 20, only two provincial statutes were actually held inoperative by reason of federal paramountcy. The paramountcy cases are discussed later in this article.

²⁷ Paul C. Weiler, *In the Last Resort* (1974), p. 309, note 3.

commerce. As new kinds of legislation emerged, even when the initiative had come from the federal Parliament, the Privy Council had often allotted the new law to provincial jurisdiction, usually, property and civil rights in the province. The regulation of insurance, and therefore of other industries and occupations, most labour relations, trades and professions, wages and prices, combinations, health and welfare, and the marketing of natural products were all topics which the Privy Council ruled were outside the competence of the federal Parliament, except in time of war. During the depression of the 1930's the federal Parliament did not have the power to undertake measures designed to alleviate the distress and prevent its recurrence. Federal laws providing for unemployment insurance, minimum wage and maximum hours laws, as well as marketing regulation, were all held to be unconstitutional.²⁸

The decisions of the Privy Council were widely if not universally deplored by English-Canadian constitutional lawyers, although not by French-Canadian constitutional lawyers.²⁹ From a doctrinal point of view, however, there was surely force in the criticism that the decisions had virtually emptied the major federal powers of content. It was not a particularly plausible interpretation of the peace, order, and good government power that it applied only in wartime. It was not a particularly plausible interpretation of the trade and commerce power that it would not permit the regulation of any intraprovincial trade and commerce. Indeed, the Privy Council itself had left a number of decisions and dicta which reflected quite different opinions than those which became dominant during the Haldane period.

2. *Peace, Order, and Good Government.*

When we look at the extensions of the peace, order and good government power which have occurred since 1949, we have to remember how severely that power had been attenuated by the Privy Council and how inevitable it was that there would be a movement away from the Privy Council's more extreme views. In fact, the decisions of the Supreme Court of Canada have been quite cautious in departing from Privy Council precedents. The "national concern" branch of peace, order, and good government has been used to uphold federal power over aviation,³⁰ the national capital commission,³¹ the minerals off the shore of British Columbia³² and the

²⁸ See generally, Peter W. Hogg, *op. cit.*, footnote 21, chs 14, 15, 17.

²⁹ Compare the articles cited, *supra*, footnotes 12 and 13; and see Alan C. Cairns, *The Judicial Committee and its Critics* (1971), 4 Can. J. Pol. Sci. 301.

³⁰ *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292.

³¹ *Munro v. National Capital Commission*, [1966] S.C.R. 663.

³² *Reference re Offshore Mineral Rights*, *supra*, footnote 18.

control of narcotics.³³ None of these outcomes would surprise a visitor from another federation. But in the *Anti-Inflation Reference* (1976),³⁴ a case which shows up in the raw data as a federal victory, the Supreme Court of Canada refused to extend the national concern test to wage and price controls. These could only be enacted as a temporary emergency measure in wartime or in a peacetime crisis. To be sure, the court found that the requisite crisis existed, and upheld the Anti-Inflation Act; but the court emphasized that permanent controls were outside federal competence. I suggest that a visitor from another federation would be surprised that permanent wage and price controls cannot be enacted by the federal Parliament. This means, of course, that they cannot be enacted at all, because provincial controls could not be effective while there is free movement across provincial boundaries of personnel, capital, goods and services. The opinions in the *Anti-Inflation Reference*, and especially that of Beetz J., abundantly demonstrate the continuing life of the Privy Council extensions of property and civil rights in the province.

3. *Trade and Commerce.*

The history of the trade and commerce power is similar. Few people would quarrel with the Supreme Court of Canada's acceptance of federal marketing legislation for wheat³⁵ and oil,³⁶ products which flow across provincial boundaries.³⁷ But when the federal government sought to use the trade and commerce power to uphold a law which afforded a civil remedy for loss caused by an act or business practice which was "contrary to honest industrial or commercial practice in Canada" the Supreme Court of Canada in *MacDonald v. Vapor Canada* (1976),³⁸ unanimously condemned the law. Once again, the viability of the old cases on property and civil rights in the province was reaffirmed. In the *Anti-Inflation Reference* (1976),³⁹ counsel for the federal government did not even argue that

³³ *The Queen v. Hauser*, *supra*, footnote 20. This is a surprising decision, because it appears to resuscitate *Russell v. The Queen* (1882), 7 App. Cas. 829, a decision widely regarded as wrong, and because narcotics law had hitherto been generally regarded as criminal. But the allocation of narcotics law to federal power is not at all surprising.

³⁴ [1976] 2 S.C.R. 373.

³⁵ *Murphy v. Canadian Pacific Railway*, [1958] S.C.R. 626.

³⁶ *Caloil v. A.-G. Can.*, [1971] S.C.R. 543.

³⁷ See also *Reference re Agricultural Products Marketing Act*, *supra*, footnote 15, where an egg marketing scheme was upheld. The scheme was the fruit of a federal-provincial agreement and supported by both federal and provincial statutes; the federal statute was carefully expressed in most of its provisions to be limited to interprovincial and export trade.

³⁸ *Supra*, footnote 38.

³⁹ *Supra*, footnote 34.

the trade and commerce power could sustain the wage and price controls, and the tenor of the opinions makes clear that at least five of the nine judges would have emphatically rejected such an argument.

The Supreme Court of Canada has used an expanded view of the trade and commerce power to strike down several provincial marketing schemes, including Manitoba's egg marketing scheme⁴⁰ and Saskatchewan's scheme to control the production and price of potash.⁴¹ The essential basis of these decisions is that the provincial law had too severe an impact on interprovincial trade and commerce. In my opinion, these decisions are hard to reconcile with earlier decisions and therefore do represent a shift in doctrine by the Supreme Court of Canada;⁴² it is a shift which is unfavourable to provincial power. But, as I noted earlier, every federal system has to define limits on the power of its provincial (or state) governments to affect people in other parts of the country. The litigation which this same issue has spawned in the United States⁴³ and Australia⁴⁴ demonstrates that this is a real problem upon which people of equal intelligence and equal good faith are simply not going to agree. Moreover, while the provinces have lost some of the cases where the effects of provincial laws have rippled outside the province, they have won others, most notably, *Carnation Co. v Quebec Agricultural Marketing Board* (1968),⁴⁵ in which a provincial marketing scheme was held applicable to a processor of milk who shipped the bulk of the processed product out of the province,⁴⁶ and *Canadian Indemnity Co. v. A.-G. B.C.* (1976),⁴⁷ in which the creation of a provincial monopoly of automobile insurance was upheld despite the interprovincial character of the business of writing automobile insurance. The latter case reaffirmed the Privy Council precedents upholding provincial jurisdiction over the insurance industry. In the United States, by contrast, initial holdings of state jurisdiction over insurance were reversed in 1944 on the basis that the nation-wide

⁴⁰ *A.-G. Man. v. Man. Egg and Poultry Assn.*, [1971] S.C.R. 689; see also *Burns Foods v. A.-G. Man.* [1975] 1 S.C.R. 494.

⁴¹ *Central Canada Potash Co. v. Govt. of Sask.*, *supra*, footnote 4; see also *Canadian Industrial Gas and Oil v. Govt. of Sask.*, *supra*, footnote 3.

⁴² Peter W. Hogg, *op. cit.*, footnote 21, p. 311.

⁴³ Laurence H. Tribe, *American Constitutional Law* (1978), ch. 6.

⁴⁴ P.H. Lane, *The Australian Federal System* (1972), pp. 597-675.

⁴⁵ [1968] S.C.R. 238.

⁴⁶ See also *Reference re Agricultural Products Marketing Act*, *supra*, footnote 15, where provincial controls on the production of eggs were upheld, although the controls applied regardless of the ultimate destination of the eggs.

⁴⁷ [1977] 2 S.C.R. 504.

character of the industry brought it within the commerce clause and thus within federal jurisdiction.⁴⁸

One must conclude that while the federal trade and commerce power has expanded at the hands of the Supreme Court of Canada, it has not expanded very much. As a support to federal jurisdiction the expansion has been very cautious, confined to marketing schemes over wheat and oil and (with co-operative provincial supplementation) eggs. An observer from the United States would be astonished to learn that the trade and commerce power cannot be employed to regulate the insurance industry, or to impose nation-wide wage and price controls, and that the constitutional validity of federal regulation of foreign ownership, anti-trust and securities regulation are still matters of argument among constitutional lawyers. As a barrier to provincial jurisdiction, the trade and commerce power has been applied more boldly—to the chagrin of some of the provinces. Even here, however, the results have not been uniformly unfavourable to provincial power to regulate activity which spills outside provincial borders; and the difficulty of drawing the line between that which is predominantly local, and that which is predominantly interprovincial, is one which simply cannot be denied.

4. *Cable Television.*

The recent decisions affirming federal regulatory authority over cable television⁴⁹ and denying provincial authority over cable television⁵⁰ came as a blow to Quebec where the issues were perceived in terms of the protection of French-Canadian language and culture. However, federal jurisdiction over broadcast (non-cable) radio and television had been established by the Privy Council in the *Radio Reference* (1930),⁵¹ and the argument over cable television boiled down to the question whether it was feasible to regard the cable system as a local undertaking separate from the undeniably federal broadcasting system. The Supreme Court's decision that the cable system should not be regarded as separate was in accord with a virtually unanimous accumulation of prior decisions and published articles.⁵² The point was still open, as is evidenced by the dissents of the three French-Canadian judges, but it should be noted that the Federal Court of Appeal in the *Capital Cities* case and

⁴⁸ *United States v. South-Eastern Underwriters Assn.* (1944), 322 U.S. 533.

⁴⁹ *Capital Cities Communications v. Canadian Radio-Television Commission*, *supra*, footnote 2.

⁵⁰ *Public Service Board v. Dionne*, *supra*, footnote 2; but compare *A.-G. Que. v. Kellogg's Co. of Canada*, *supra*, footnote 2.

⁵¹ [1932] A.C. 304.

⁵² The case-law and commentary before *Capital Cities* and *Dionne* are discussed in Peter W. Hogg, *op. cit.*, footnote 21, pp. 336-342.

(more significantly, perhaps) the Quebec Court of Appeal in the *Dionne* case was each unanimously of the same opinion as the majority in the Supreme Court of Canada.

My opinion, for what it is worth, is that the competing federal and provincial claims to regulate cable television are each founded on real interests. A judicial decision which allocates jurisdiction to one level of the government or the other cannot be entirely satisfactory, whichever level of government emerges as the winner. It is most unlikely that the judicial resolution will turn out to be final. What is required is an agreement for the sharing of jurisdiction, either spelled out in a revised constitution, or embodied in sub-constitutional arrangements.

5. *Taxation.*

In *Canadian Industrial Gas and Oil v. Government of Saskatchewan* (1977),⁵³ the Supreme Court of Canada struck down a provincial tax on oil produced in the province. The tax was designed to appropriate to the province the dramatic increase in the price of oil which had started in 1973. Because of the huge sums involved the decision was a serious blow to the province of Saskatchewan, and it attracted severe criticism from the government of that province. The legal issue before the court was whether the tax was direct or indirect, because the provinces are confined to direct taxes by section 92(2) of the B.N.A. Act. Previous decisions established that a tax which tended to enter into the price of a commodity was an indirect tax and was incompetent to the provinces. The Saskatchewan Court of Appeal held that this tax was direct because the price of oil determined the tax rather than the other way around. This was also the view of Dickson J. (with de Grandpré J.) dissenting in the Supreme Court of Canada. But Martland J. for the seven-judge majority of the Supreme Court of Canada viewed the facts differently, emphasizing the power which the statute conferred on the provincial minister to fix the price at which oil was to be sold when the minister was of opinion that oil had been sold at less than fair value.

CIGOL must be accounted an important loss to the provinces in federal-provincial litigation. I find the majority opinion of Martland J. much less persuasive than the minority opinion of Dickson J. I do not see the answer to Dickson J.'s point that "purchasers would be paying the same price whether the tax existed or not".⁵⁴ The ministerial power to fix the price, which was relied upon by

⁵³ *Supra*, footnote 3. See also *Amax Potash v. Govt. of Sask. supra*, footnote 16.

⁵⁴ *Ibid.*, at p. 593.

Martland J., seems to me to be satisfactorily explained by Dickson J. as a subsidiary provision to block evasion of the tax by "such practices as sale of oil between related companies at artificially low prices".⁵⁵ However, the legal issue turned on one's perception of exactly how the tax and associated regulations would impinge on the price of Saskatchewan oil. Differences of opinion on complex issues of this kind should not lay the judges open to a charge of bias.

The Supreme Court of Canada recently made another decision upon the provincial taxing power. In the *Ontario Egg Reference* (1977),⁵⁶ the court held that marketing levies were not indirect taxes; the levies were regulatory charges which could be imposed by the provinces as an incident of a valid provincial marketing scheme. This holding involved an unprecedented overruling of the decision of the Privy Council in the *Crystal Dairy* case,⁵⁷ which had decided that marketing levies were indirect taxes which were incompetent to the provinces. It was also necessary to overrule (on this point) a previous decision of the Supreme Court of Canada, the *Farm Products Marketing Act Reference* (1957).⁵⁸ The court applied the new doctrine by striking down a federal statute authorizing the imposition of marketing levies by provincial marketing boards, notwithstanding the fact that the federal statute had been enacted in 1957 in reliance on the fact that the *Crystal Dairy* doctrine had been reaffirmed by the Supreme Court of Canada in the *Farm Products Marketing Act Reference* in 1957. This unanimous holding is a remarkable example of judicial activism, and of course its effect was to augment provincial power.

6. Administration of Justice.

Federal power over the administration of justice by federal courts, which is granted by section 101 of the B.N.A. Act, has been severely limited by the decisions of the Supreme Court of Canada in *Quebec North Shore* (1976)⁵⁹ and *McNamara Construction* (1977),⁶⁰ which hold that the federal Parliament can confer jurisdiction on federal courts only over issues governed by federal statute law. This has gravely undermined or rendered uncertain much of the jurisdiction of the Federal Court of Canada, introduced terrible complexities to multi-party litigation, especially where the federal Crown (which

⁵⁵ *Ibid.*, at p. 592.

⁵⁶ *Reference re Agricultural Products Marketing Act*, *supra*, footnote 15.

⁵⁷ *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy*, [1933] A.C. 168.

⁵⁸ [1957] S.C.R. 198.

⁵⁹ *Quebec North Shore Paper Co. v. Canadian Pacific*, *supra*, footnote 15.

⁶⁰ *McNamara Construction v. The Queen*, *supra*, footnote 15.

can only be sued in the Federal Court) is involved, and spawned a flood of litigation which is now working its way up through the system.⁶¹ I have criticized these decisions elsewhere.⁶² For present purposes it suffices to note that the new doctrine is highly unfavourable to federal power.

Provincial power over the administration of justice in the province has been contentious in recent years. In *Di Iorio v. Montreal Jail Warden* (1976),⁶³ the Supreme Court of Canada decided by a majority that the province of Quebec had the jurisdiction to establish an inquiry into organized crime, despite the close relationship with the federal subject of criminal law. However, in the *Keable* case⁶⁴ the court decided unanimously that the province of Quebec did not have the jurisdiction to establish a broad-ranging inquiry into the policies, procedures and methods of the Royal Canadian Mounted Police, although the inquiry could be continued in respect of particular criminal acts allegedly committed in Quebec by the force. In *The Queen v. Hauser* (1979),⁶⁵ the court decided by a majority that the federal Parliament had the jurisdiction to provide for the federal prosecution of offences under the Narcotic Control Act. This decision, like *Keable*, was unfavourable to the provincial point of view, but, also like *Keable*, it was based on rather narrow grounds. The court in *Hauser* did not affirm federal power to provide for the prosecution of criminal law (as many observers expected); a majority of the court managed to avoid this vexed issue by holding that the Narcotic Control Act was not really a criminal law after all,⁶⁶ which enabled the court to decide the case on the basis that the federal Parliament had the power to provide for the enforcement of its non-criminal laws.

Frequent attacks on provincial administrative agencies (or inferior courts), based on the allegation that the agencies (or courts) were exercising judicial powers analogous to those of a superior court in contravention of section 96 and the other judicature provisions of the B.N.A. Act, have met with success in three cases,⁶⁷ but have usually failed. The court has emphasized that "it is

⁶¹ At the time of writing only one case had reached the Supreme Court of Canada, namely, *Tropwood A.G. v. Sivaco Wire and Nail Co.*, *supra*, footnote 20, upholding federal jurisdiction in admiralty.

⁶² *Comment* (1977), 55 *Can. Bar Rev.* 550.

⁶³ [1978] 1 S.C.R. 152.

⁶⁴ *A.-G. Que. and Keable v. A.-G. Can.*, [1979] 1 S.C.R. 218.

⁶⁵ *Supra*, footnote 20.

⁶⁶ *Supra*, footnote 33.

⁶⁷ *Toronto v. Olympia Edward Recreation Club*, [1955] S.C.R. 454; *Seminary of Chicoutimi v. A.-G. Que.*, [1973] S.C.R. 681; *A.-G. Que. v. Farrah*, *supra*, footnote 16.

not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the provincial legislation".⁶⁸ This pragmatic contextual approach is of course favourable to the provincial power to set up administrative agencies.

7. *Civil Liberties.*

In the 1950s the Supreme Court of Canada rendered decisions which tended to limit if not deny provincial power to legislate in relation to speech and religion. The *Saumur* case (1953)⁶⁹ held that the City of Quebec could not prevent the distribution of religious tracts in the streets. *Switzman v. Elbling* (1957)⁷⁰ held that a provincial law prohibiting the use of a house to propagate communism was invalid. These cases were unfavourable to provincial power, to be sure, but they had their roots in well-respected dicta by Duff C.J. and Cannon J. in the *Alberta Press* case (1938),⁷¹ and they were widely applauded for their support of civil libertarian values. Recently, however, the court has upheld provincial restraints on civil liberties. In *Nova Scotia Board of Censors v. McNeil* (1978),⁷² provincial censorship of movies was upheld as being merely the regulation of a business (the movie business) and of property (films) in the province; and this despite the absence of any explicit criteria laid down by the statute or regulation or by the censorship board itself to limit the kinds of movies which could be forbidden. In *A.-G. Can. and Dupond v. Montreal* (1978),⁷³ a Montreal by-law prohibiting all demonstrations in the streets and parks of the city for a specified period of time was upheld as a regulation of the use of the municipal public domain.

It is difficult to believe that *McNeil* and *Dupond* would have been decided the same way by the Supreme Court of the 1950s. For present purposes, the point is, of course, that the value of provincial autonomy over local matters has been held to encompass even speech and assembly despite the nation-wide implications of speech and

⁶⁸ *Tomko v. Labour Relations Bd. (N.S.)*, [1977] 1 S.C.R. 112, at p. 120; see also *Reference re Quebec Magistrate's Court*, [1965] S.C.R. 772; *Dupont v. Inglis*, [1958] S.C.R. 535; *Brooks v. Pavlick*, [1964] S.C.R. 108; *Tremblay v. Commission des relations de travail du Québec*, [1967] S.C.R. 697; *Jones v. Edmonton School Trustees*, [1977] 2 S.C.R. 873; *Mississauga v. Peel*, *supra*, footnote 20. This pattern of judicial restraint in support of provincial power had been established by the Privy Council in *Labour Relations Bd. (Sask.) v. John East Iron Works*, [1949] A.C. 134.

⁶⁹ *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299.

⁷⁰ [1957] S.C.R. 285.

⁷¹ *Reference re Alberta Statutes*, [1938] S.C.R. 100.

⁷² [1978] 2 S.C.R. 662.

⁷³ [1978] 2 S.C.R. 770.

assembly for the democratic process. Whatever else one may say about the recent decisions, they are certainly favourable to provincial power.

8. *Paramountcy*.

The B.N.A. Act says nothing explicit about conflict between federal and provincial laws. The Privy Council early developed the rule of federal paramountcy: in the event of conflict the federal law was to prevail. Surprisingly, however, there were only a few occasions for the application of this rule by the Privy Council, and their lordships never developed any jurisprudence as to the degree of inconsistency which would amount to a conflict which would attract the rule. Here then was an opportunity for the court to give effect to any centralizing predispositions. Given the overriding force of federal law, a wide definition of inconsistency would result in the defeat of provincial laws in the same "field" as a federal law. In the United States and Australia there are many precedents for this covering-the-field test of conflict. On the other hand, a narrow definition of inconsistency would allow provincial laws to survive so long as they did not expressly contradict the federal law.⁷⁴

The Supreme Court of Canada has not followed the covering-the-field precedents of the United States and Australia. It has not taken the course of judicial activism in favour of central power. On the contrary, it has insisted upon a direct contradiction between the federal and provincial law to trigger the paramountcy doctrine. There are many cases in which the court has refused to render a provincial law inoperative for paramountcy,⁷⁵ and only two where the conflict was deemed sufficient to render the provincial law inoperative.⁷⁶ The cases have been described elsewhere,⁷⁷ but it is perhaps worth briefly describing one case. In *Ross v. Registrar of Motor Vehicles* (1973),⁷⁸ the court was concerned with the effect of a federal Criminal Code provision dealing with penalties for drunk driving and conferring a discretion on the sentencing court to prohibit driving on an intermittent basis—"at such times and places

⁷⁴ For general discussion, see Peter W. Hogg, *op. cit.*, footnote 21, ch. 6.

⁷⁵ The leading cases are *Reference re s. 92(4) of the Vehicles Act 1957 (Sask.)*, [1958] S.C.R. 608; *Smith v. The Queen*, [1960] S.C.R. 776; *O'Grady v. Sparling*, [1960] S.C.R. 804; *Stephens v. The Queen*, [1960] S.C.R. 823; *Mann v. The Queen*, [1966] S.C.R. 238; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Bell v. A.-G. P.E.I.*, [1975] 1 S.C.R. 25; *Robinson v. Countrywide Factors*, [1978] 1 S.C.R. 753; *Construction Montcalm v. Commission du salaire minimum*, *supra*, footnote 20.

⁷⁶ *A.-G. B.C. v. Smith*, [1967] S.C.R. 702; *A.-G. Ont. v. Policy-holders of Wentworth Insurance Co.*, [1969] S.C.R. 779.

⁷⁷ *Op. cit.*, footnote 21, ch. 6.

⁷⁸ *Supra*, footnote 75.

as may be specified in the order". In the *Ross* case this power had been exercised by prohibiting the defendant "from driving for a period of six months, except Monday to Friday, 8:00 a.m. to 5:45 p.m., in the course of employment and going to and from work". The question was whether the Criminal Code discretion, as exemplified by the *Ross* order, conflicted with a provincial law which automatically suspended the driving licence of anyone convicted of drunk driving. The provincial law had the effect of nullifying the spirit if not the letter of the carefully tailored order made under the Criminal Code because the order obviously contemplated that the defendant be free to drive in the periods which were exempt from the prohibition. Yet the Supreme Court of Canada held that the provincial law was not rendered inoperative by paramountcy. *Ross's* licence was suspended.

While the *Ross* case is the most extreme example, many others could be cited to show the length to which the court has been willing to go in support of provincial laws.⁷⁹ In this area the Supreme Court of Canada has developed doctrine highly favourable to provincial power.

9. *Conclusion.*

My conclusion is that the Supreme Court of Canada has generally adhered to the doctrine laid down by the Privy Council precedents; and that where the court has departed from those precedents, or has been without close precedents, the choices between competing lines of reasoning have favoured the provincial interest at least as often as they have favoured the federal interest. There is no basis for the claim that the court has been biased in favour of the federal interest in constitutional litigation.

⁷⁹ *Supra*, footnote 74, but see especially the decisions in *Reference re s. 92(4) of the Vehicles Act 1957 (Sask)*, *Smith v. The Queen* and *Mann v. The Queen*, *supra*, footnote 75.