FEDERALISM

Federalism is still a relevant and vital aspect of Canadian Constitutional Law. Although a lower profile aspect than the Charter of Rights and Aboriginal rights (and in common parlance less “sexy”), the division of powers continues to be an important part of the work of the Supreme Court of Canada and part of what defines us as a nation. The author argues that the Supreme Court has pursued an increasingly contextualized approach to division of powers issues - one that abandons the arid legalism of earlier days, in favour of a broad social analysis of issues based on extensive use of extrinsic evidence and academic commentary. He asserts that the role of the Court on these important matters of federalism is not just that of the traditional umpire, but rather the more active role of player - albeit a different kind of player than the front-line politicians. To illustrate this point Professor MacKay analyzes the federalism cases of the Laskin, Dickson and Lamer Courts, with a particular emphasis on the latter Court, which on matters of federalism was dominated by Justice La Forest. The focus of this federalism case study is on the expansion of the criminal law power with particular reference to the Hydro Québec case. The author concludes that the Court has generally served Canadians well on matters of federalism and its justices are appropriately players in Canada’s constitutional drama.

Le fédéralisme est toujours un aspect pertinent et vital du droit constitutionnel canadien. Bien qu’il jouisse de moins de visibilité que les droits de la Charte et les droits des autochtones (moins «sexy», en langage populaire), le partage des pouvoirs législatifs constitue toujours une part importante du travail de la Cour suprême du Canada et il continue de faire partie de ce qui nous définit comme nation. L’auteur soutient que la Cour suprême a adopté une approche de plus en plus contextuelle pour les questions de partage des pouvoirs législatifs – une approche qui abandonne le légalisme aride des jours d’antan en faveur d’une analyse sociale élargie qui s’appuie sur une utilisation considérable de la preuve d’éléments extérieurs au droit et sur la doctrine. Il affirme que le rôle de la Cour sur ces importantes questions de fédéralisme n’est pas simplement celui d’un arbitre, mais plutôt celui, plus actif, d’un joueur – quoiqu’il s’agisse d’un joueur ayant un rôle différent de celui des politiciens sur la première ligne. Pour illustrer cette proposition, le professeur MacKay analyse les décisions rendues sur des questions de fédéralisme par les cours des juges Laskin, Dickson et Lamer, en insistant sur cette dernière cour bien qu’elle fût dominée, sur les questions de fédéralisme, par le juge La Forest. Dans cette analyse de la jurisprudence sur le fédéralisme, le point central est l’expansion du pouvoir en matière de droit criminel, particulièrement dans l’affaire d’Hydro-Québec. L’auteur conclut que

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Federalism, although one of the founding principles upon which this nation was built, has received very little academic attention since the advent of the *Canadian Charter of Rights and Freedoms*. Since 1982, politicians, academics and Canadian citizens alike have been consumed with “talk” of rights and freedoms, and infringements thereof. In spite of this lack of attention, federalism and cases involving issues over the federal and provincial division of powers continue to have a significant impact on the Canadian political and legal scene. Federalism is recognized in the *Québec Secession Reference* as one of the underlying principles of our constitutional structure. Thus federalism has historically been one of the pillars of our constitutional structure and continues to have an important place on the nation-building agenda of the Supreme Court of Canada (“the Court”).

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The short answer to the question posed in my title is yes - many people do and should care about federalism and the role of the Court in delineating the proper division of powers in Canada. Federal, provincial and territorial governments, as well as First Nations asserting various levels of self-government take an on-going and vital interest in the proper allocation of powers within our constitutional structure. Furthermore, Canadians are significantly affected by the Court's decisions on federalism, although they may not be immediately aware of how such decisions affect their everyday lives. Law schools continue to require a constitutional law course which includes the division of powers as one significant component, and most lawyers and judges recognize the importance of understanding the federal framework within which laws are made and applied.

The reason for posing the question about the continuing significance of the Court's role in federalism is the reduced attention paid to division of powers decisions in the academic literature, and in media coverage of the Court's work in recent years. Since the arrival of the Charter in 1982, rulings on federalism have been eclipsed by the more high-profile and "constitutionally sexy" decisions on the Charter and Aboriginal rights. Academic and media articles on these latter aspects of constitutional law greatly outnumber those about the older but still important division of powers. A further shadow has been cast upon the Court's federalism decisions by some recent high-profile Reference cases raising broad questions of constitutional authority, beyond the traditional division of powers. The patriation of the Constitution, the scope of minority language rights, and the potential secession of Québec from Canada are a few examples of such cases. In the wake of these developments, federalism cases now attract less academic and public attention than other aspects of the Constitution.

One of the reasons that writing about federalism has diminished is a failure to recognize the links between issues of federalism, individual rights and Aboriginal rights. Prior to the recognition of Aboriginal and Treaty rights in section 35 of the Constitution Act, 1982, most legal disputes involving

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5 Reference re Secession of Québec, supra note 2.
6 Of course there are some exceptions to this broad statement. The Court's decision in R. v. Hydro-Québec, [1997] 3 S.C.R. 213 generated much academic writing, and the recent Reference re Firearms Act, [2000] 1 S.C.R. 783 received a great deal of media attention. Compared to the rest of the country, federalism issues have retained a higher profile in both academic and media circles in Québec. Federalism also has a higher place on the agenda of political scientists than legal academics. Despite these exceptions, D. Greschner notes that the last major legal manuscript devoted to Canadian federalism was Katherine Swinton's 1990 book - The Supreme Court and Canadian Federalism: the Laskin-Dickson Years (Toronto: Carswell, 1990). D. Greschner, "The Supreme Court, Federalism and Metaphors of Moderation" (2000) 79 Can. Bar Rev. 47 at 60.
Aboriginals were resolved within a division of powers framework. Individual rights were resolved in the same way. Mr. Justice Rand used broad interpretations of federal powers to protect the rights of Jehovah Witnesses against the sometimes harsh provincial legislation of Premier Maurice Duplessis in Québec. In a similar vein, then Chief Justice Laskin used an expansive view of the federal criminal law power to protect individual rights such as freedom of assembly and expression. In *Di Iorio v. Montreal Jail Warden*, then Chief Justice Laskin wrote about the interconnection of division of powers and individual rights:

Moreover, if governmental powers are to be exercised coercively against individuals, the latter are entitled to have at least such protection as is provided by the distribution of legislative powers under the *British North America Act, 1867*, in the sense that the Act should be construed as far as possible to preclude both levels of governmental authority from being entitled to converge on an individual for the same purpose and possibly even at the same time.

Thus properly understood, the Constitution is an integrated framework in which federalism, individual rights and Aboriginal rights are linked. These links are further demonstrated in more recent cases such as *R. v. S.(S)* and the denominational school cases, where *Charter* issues arise in a division of powers context.

The Court’s role in interpreting the division of powers under the *Constitution Act, 1867* continues to be a matter that is vital to Canada’s national identity. Constitutions as written and interpreted serve, in part, to define who we are as a nation and a people and this is true for all three aspects of the Constitution— the *Charter*, Aboriginal rights and the division of powers. At a political as well

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8 Section 91(24) of the *Constitution Act, 1867* grants jurisdiction over “Indians and Lands Reserved for Indians” to the federal government. Many disputes concerned the extent to which the federal government could implement its authority over Aboriginals under the *Indian Act*, R.S.C. 1985, c. I-5, and the scope of provincial governments to incidentally affect Aboriginal rights and exercise authority delegated to them under s. 88 of the *Indian Act*.


12 It is on this basis that my Dalhousie colleague, Professor Dianne Pothier and I have organized and taught the compulsory Constitutional Law course as an integrated and thematic course that is not segregated into three separate components. Issues such as communications and culture raise issues of federalism, individual rights and Aboriginal rights. The same could be said of just about any topic, such as economic regulation, labour relations and education, to name but a few. Reality rarely comes in neat packages.


as a legal level, federalism remains high on the national agenda and is an important aspect of major issues such as the appropriate degree of autonomy in Québec, the emergence of Aboriginal self-government, and issues of western alienation. Other issues could be added to this list—such as the problems of regional disparity, and the cycle of dependency in Atlantic Canada.

Professor Donna Greschner in a recent article echoes the on-going significance and importance of federalism in giving shape to Canada. She observes that issues of federalism were at the core of the failed Meech Lake and Charlottetown Accords. As I write this article the Canadian Alliance Party under the leadership of Stockwell Day is attempting to popularize a more decentralized version of Canadian federalism that emphasizes provincial autonomy and reduces the role of the federal government. The Charter and issues of Aboriginal rights have not removed federalism from the national agenda. Professor Greschner notes that:

Federalism ... remains the engine of Canadian politics and the blueprint of its constitutional structure. The core tensions that inhere in Canadian federalism - between unity and diversity, Ottawa and Québec City, the centre and the regions - proceed apace and, if anything, have been exacerbated by events and processes since the Charter was first proposed in 1980-81... In short, federalism conflicts have not gone away. They are staples of the Canadian political diet, and in no small measure their resolution affects Canada’s future as a nation.17

The line between law and politics is always a thin one and this is particularly so in matters constitutional. Traditionally the Court has been reluctant to acknowledge the political dimensions of allocating powers between different levels of government. The Court has described its activity in this area by using the legal term “division of powers” instead of the political term “federalism”. This choice of terminology reflects the Court’s desire to separate the legal from the political.18 While I agree that there is a line separating law and politics, I do not believe that this line can be drawn as clearly as some of the Court’s jurisprudence suggests. In this article I use the terms “division of powers” and “federalism” interchangeably to indicate my rejection of a clear line between law and politics.19

Of course, the role of the Court in federalism, as in other matters, is a changing and evolving one. The Supreme Court of Canada as final court of appeal has played a different role from its predecessor, the Privy Council.20

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17 D. Greschner, supra note 6 at 48.
18 Recently the Court unanimously stated that the legal aspects of a dispute involving the division of powers can be separated from the political aspects. See: Reference re Secession of Québec, supra note 2 at para. 28. Although in that case the Court used the term “federalism”, “division of powers” is the term more commonly found in the indices to the Supreme Court Reports.
19 Other legal academics also use the term “federalism” to describe what the Court calls “division of powers”. The work of these academics will be discussed in the next section of this article.
Furthermore, the Court has taken different approaches and played different roles at different points in its history. I do not propose to review the illustrious history of the Court on federalism but rather to examine its recent performance against the backdrop of its evolving role. Division of powers cases account for only a small percentage of the Court’s workload: they accounted for only 5% of its cases in the past decade, and only 16% of its constitutional law cases in the same time period. Nevertheless, the Court has an important role to play in the resolution of disputes between the federal government and the provinces. As Katherine Swinton notes, the Court does not always give the final word in the federal-provincial dispute resolution process, but it does facilitate the resolution of conflict in the federal system.

A. Focus on the Lamer Court (1990-2000)

In this paper, I have chosen to focus on the decisions of the “Lamer Court”. There will also be some consideration of the Laskin and Dickson Courts and their contributions to federalism as a backdrop for the focus on the tenure of former Chief Justice Lamer. The practice of naming a court after its Chief Justice is relatively novel in Canada, and deserves some explanation. The

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21 This statistic is the result of tabulations of the results of QuickLaw searches performed on June 28, 2000. The database “scj” was searched twice. The results of the first search showed that 1127 cases had been decided by the Court after 1989 and before 2000. The results of the second search showed that 58 of these cases, or 5%, contained both the phrases “constitutional law” and “division of powers”. It is not a new phenomenon that division of powers cases occupy a small portion of the Court’s agenda. During the 1950s there were only 21 such cases and that number only grew to 33 in the 1960s—an average for both decades of 2.4 such cases per year. P. Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23 U.T.L.J. 307 at 361 (note 102).

22 This statistic is the result of tabulations of the results of QuickLaw searches performed on June 28, 2000. The database “scj” was searched, using the keywords “constitutional law” and “division of powers” and the date range after 1989 and before 2000. Three-hundred and sixty-three cases were found to contain the phrase “constitutional law”. Of these, 58, or 16%, also contained the phrase “division of powers”.

23 Katherine Swinton draws a distinction between “legal federalism” and “political federalism”. She states that “even when disputes are determined by the Court, the result of a legal ‘win’ for one government is not the same as a political win. Often the Court’s decision is not the central element in the politics of the federal system, in the sense that it will not finally resolve a dispute between levels of government; rather, it is just one element in the ongoing dynamics of executive federalism.” K. Swinton, The Supreme Court and Canadian Federalism: the Laskin-Dickson Years (Toronto: Carswell, 1990) at 18.

24 Swinton states that: “The Supreme Court also has a role to play in managing conflict and change in the federal system, but its role is secondary and, ideally, facilitative.” K. Swinton, “Federalism Under Fire: the Role of the Supreme Court of Canada” (1992) 55(1) L. & Contemp. Probs. 121 at 138.

25 In this article, the term “Lamer Court” is used to mean the period of time in which Lamer was Chief Justice (i.e.: July 1, 1990- January 6, 2000). Any decisions released during this time period are considered to be the work of the Lamer Court. Decisions released after January 6, 2000 are not considered part of the Lamer Court, even though Lamer heard some of these cases argued during his tenure as Chief Justice.
practice appears to have begun in the United States in the 1960s, when books were published about the “Warren Court”. Since that time, several books have been written about the “Warren Court”, the “Burger Court”, and the “Rehnquist Court”. In Canada, the practice of naming a court after its Chief Justice first appeared in 1984, but really took hold in 1991, when a special issue of the Manitoba Law Journal was dedicated to the “Dickson Court”. In the years since, a few articles have appeared about the “Laskin Court”, the “Dickson Court” and the “Lamer Court”. Many of these articles have been written from a political science perspective, and attempt to measure “judicial power”, or the influence of each judge on the voting patterns of the court.

The decision to focus on the Lamer Court has several advantages. Firstly, it provides a convenient way to frame the analysis, by limiting it to a well-defined period of time. Secondly, it provides an opportunity to see what type of influence Lamer had on the Court during his tenure as Chief Justice. Thirdly, this era in the Court’s history has received little attention to date, and fourthly, it may provide the best indication of where the Court is heading under the leadership of Chief Justice McLachlin.

However, the approach is not without its limitations. An excessive focus on the Chief Justice may obscure the inner dynamics of decision-making in the Court. The Chief Justice has no authority to impose his/her views on the other eight Justices—who as a matter of judicial independence must answer only to the law in respect to how they render decisions. Indeed as Dean Peter Hogg has noted one of the important administrative roles of the Chief Justice is to maintain...
judicial independence from the other branches of government, 31 so it would hardly be appropriate for the Chief Justice to threaten the independence of his/her colleagues on a personal level. Of course, the Chief Justice is free to attempt to persuade his/her colleagues to his/her way of thinking but that is true for all members of the Court. The Chief Justice may not always be the key player in creating the informal alliances which constitute the institutional dynamics of a particular Court. For example, statistics clearly show that during Lamer’s tenure as Chief Justice, the Supreme Court of Canada was not a Lamer Court but a “La Forest Court” 32 in respect to matters of federalism. Justice La Forest wrote an opinion in 68% of the division of powers cases that he heard during this period, while the figure for the Chief Justice was a comparatively small 27%. 33 Similarly, Justice La Forest wrote four judgments on behalf of the Court, while Chief Justice Lamer wrote none. 34 It is easy to overstate the institutional character of the Court, which is not only an institution but also a collection of nine independent and strong-willed individuals, who are ultimately answerable only to the law.

In the second part of this article I will discuss the role of the Court in Canadian federalism. I will argue that the metaphor of the Court as the umpire of federalism disputes is outdated, and does not reflect the political nature of constitutional decision-making. If baseball metaphors are to be used, I suggest that it is more appropriate to conceive of the Court as a player in the game of federalism.

In the third part of this article I will explore the substantive performance of the Lamer Court on matters of federalism. My focus will be on the federal criminal law power, which has been significantly expanded in the past decade.

32 However influential a particular Chief Justice may be, he/she is unlikely to leave his/her stamp on every aspect of the Court’s work. Although I have not explored the Charter and Aboriginal rights aspects of the Court’s work during the Lamer Court, I would be surprised if former Chief Justice Lamer were not a major influence in both areas. I suspect this would be particularly true in respect to the Charter and criminal law. In the area of federalism the situation is quite different. Thus on matters of federalism the decade from 1990-2000 might be more accurately referred to as the La Forest Court. However, to be consistent with the emerging practice of personifying a Court in terms of the Chief Justice, I will continue to refer to the period covered as that of the Lamer Court.
33 Excluding decisions which were mere three paragraphs or less, 26 division of powers’ cases were decided during Lamer’s tenure as Chief Justice. Of these 26, Chief Justice Lamer heard 22 and wrote an opinion in 6. Justice La Forest heard 19 of these cases, and wrote an opinion in 13.
34 Justice La Forest’s total of 4 opinions on behalf of the Court was larger than the total of any other individual judge. Justices Sopinka, Gonthier and Binnie each wrote two decisions on behalf of the Court. This statistic is even more remarkable when one considers that during the decade in question (1990-2000), former Chief Justice Lamer was a member of the Court for ten years, while Justice La Forest was a member of the Court for only seven years. Compared to Chief Justice Lamer, Justice La Forest had fewer opportunities to write federalism decisions on behalf of the Court, yet he still managed to better the Chief Justice with regard to this statistic.
I argue that this expansion reflects political choices made by the Court in its role as a constitutional player. I turn now to the vital questions of judicial role and approach in federalism cases.

II. The role and approach of the Supreme Court in federalism disputes

To comprehensively assess the role and approach of the Supreme Court of Canada in federalism cases is a task beyond the scope of this article. Most of my commentary in this section will be based upon an analysis of the Court's role in the last three decades under the leadership of former Chief Justices - Laskin, Dickson and Lamer.

A. The Role of the Supreme Court in Federalism: Umpire or Player?

Much has been written about the proper role of the Court in matters of federalism by political scientists, legal academics, journalists, lawyers and judges. There is little consensus in these writings but there is a fairly consistent call for restraint and moderation in the exercise of judicial authority with respect to federalism.

The importance of defining the proper judicial role in constitutional issues—including federalism ones—is accentuated by the fact that judicial interpretation

35 Even if I were to attempt a more comprehensive assessment of the performance of the Court over time, it is not clear that the most suitable time would be the 125-year history of the Court that is being celebrated in this Symposium. Only in 1949 did the Court assume its role as the ultimate court of appeal on all matters, including matters of federalism, and only in the 1950s did the Court begin rendering final rulings on the allocation of powers. As noted earlier, the number of such cases was small in both the 1950s and 1960s—averaging only about 2+ federalism cases per year for those two decades (P. Weiler, supra note 21). Thus at the time that the Court celebrated its one-hundredth anniversary in 1975 the number of division of powers cases that it had decided was relatively small. During the years which followed, the picture dramatically changed. The Court heard more federalism cases between 1975-1982 than it had from 1949-1974 (P. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Relations" (1985) 11 Can. Pub. Pol. 161 at 162). The number of federalism cases again dropped off after the arrival of the Charter and as indicated earlier, continued at a low level through the 1990s era of the Lamer Court. Whether the McLachlin Court can expect another upturn in federalism disputes will likely depend heavily upon how the front-line politicians handle disputes over federalism.

36 My assessment of the performances of the Laskin and Dickson Courts relies heavily upon the excellent work of Katherine Swinton, The Supreme Court and Canadian Federalism: the Laskin-Dickson Years (Toronto: Carswell, 1990), and on her articles about Chief Justices Laskin and Dickson, infra notes 74 and 75. The more original assessment of the Lamer Court follows in the next section of this paper. Although my focus will be on the Supreme Court of Canada, it is worth noting that lower courts also play an important role in Canadian federalism, and much of this discussion may be applicable to them. Although lower courts do not transform the law as dramatically as the Supreme Court of Canada, they hear more cases than the Supreme Court, and many of their decisions are not appealed. As a result, their contribution to federalism is considerable.
is the major route to changing and updating the Canadian Constitution. While judges always play an important role in breathing life into constitutional texts (especially one drafted in 1867), the role is enhanced where there is little chance of using the formal amendment process to effect constitutional change. There have been very few amendments to the Canadian Constitution since 1867, and further significant amendments are unlikely due to the stringent criteria for amendment set out in the Constitution Act, 1982.\(^{37}\) By setting such restrictive criteria for constitutional amendment, politicians have effectively entrusted the Constitution to the courts, and judges can accurately be described as “guardians” of the Constitution.\(^{38}\)

As Professor Donna Greschner suggests in her interesting article in the first special issue of the Canadian Bar Review commemorating the 125th anniversary of the Supreme Court of Canada, metaphors are an effective way to describe the role of the Court in federalism disputes.\(^{39}\) Games and the roles implicit in them are a frequent source of metaphors. All metaphors have their limits and Greschner notes that the use of game terminology may trivialize constitutional disputes, where the stakes are more significant than those involved in baseball or hockey.\(^{40}\) Nevertheless, the same metaphors do shed light on the Court’s role. Before turning to the proper role for judges within the constitutional game, it is desirable to pause and consider the nature of constitutional interpretation.

Constitutional texts are abstract and broadly-worded - otherwise they would not be able to stand the test of time. Furthermore, although statutes may be fleshed out by regulations, the Canadian Constitution is not elaborated upon in this way. The closest analogy would be political practices and conventions developed under the Constitution, but unlike regulations these elaborations do not have the force of law. Thus a large discretionary role is left to judges (and ultimately the Court) to apply the abstract principles of the Constitution.

While all modern commentators agree that the Court has some discretion in deciding federalism cases, they disagree about the extent of that discretion, and about the proper role of the Court. Some argue that the Court should seek to restore predictability to the law of federalism by following neutral, abstract principles, while others argue that the Court should embrace the political nature of decision-making by emphasizing the facts of each case. Still others argue that

\(^{37}\) This point is dramatized by the failed efforts to achieve constitutional change in the Meech Lake and Charlottetown Accords of the late 1980s and early 1990s.

\(^{38}\) Supra note 6 at 53–54. Greschner notes that former Chief Justice Lamer describes the constitution as a “castle” in Judges Salaries Reference, [1997] 3 S.C.R. 3 at 109. She suggests that this metaphor casts judges as either guardians or princes of the constitutional realm.

\(^{39}\) Supra note 6.

\(^{40}\) Supra note 6 at 62. She also notes that it is culturally inappropriate to use a baseball metaphor in a country where hockey is the national sport. Perhaps we should refer to judges as referees. The continued use of baseball and umpire metaphors is an indication of the extent to which Canadian writing about the proper judicial role has been influenced by American thinking.
the Court should step aside and let politicians resolve federalism disputes through informal negotiation.

The indeterminacy of the law of federalism was emphatically stated by Professor Paul Weiler nearly thirty years ago:

What is distinctive about the judge-made 'law' of Canadian federalism is that our constitutional doctrines are always expressed in very abstract formulae and there are at least two opposing formulæ for every type of situation. A good example of this is the supposed 'distinction' between provincial legislation in relation to interprovincial trade and provincial legislation merely affecting such trade, but this is merely one among legion. When an area of law is shot through with verbal standards such as these, marching in pairs, the court is always given a choice between two alternative decisions. Instead of there being legal rules which have an intrinsic content shaping or channelling the decision in one direction or another, we have legal rationalizations which the court can use in its opinion to protect its choice, whatever it may be.41

In response to the perceived indeterminacy of this area of law, Weiler suggested that Canadians would be better served if disputes regarding the division of powers were settled in the political arena. He stated that the Supreme Court of Canada should only become involved in federalism disputes as a last resort, and, except in very rare circumstances, private citizens should not have the right to challenge the constitutionality of laws.42

The late Professor William Lederman responded to Weiler's critiques in an essay prepared for the centenary of the Supreme Court of Canada. Lederman disagreed with Weiler's assertion that the text of the Constitution provides little guidance to judges. Lederman argued that while the text does not provide easy answers to all problems, it nevertheless has some utility:

...I am definitely not saying that the British North America Act is complete and all-sufficient in the sense that it contains in its text detailed principles and concepts that automatically embody easy solutions for every problem in the division of legislative powers that may arise. If this were so, reading the Act would be all that was involved in constitutional interpretation. I know that this extremely simplistic view of interpretation and meaning is not valid. But Professor Weiler has gone to the opposite extreme. He says that the federal constitution has become virtually meaningless, so that the Supreme Court is really making up new constitutional rules as it goes along under the guise of interpreting the text of the British North America Act. This extreme is just as invalid as the other.43

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42 P. Weiler, In the Last Resort: a Critical Study of the Supreme Court of Canada. (Toronto: Carswell, 1974) at 181. "The only time that a private citizen should have a legal claim of his own right is when there are two contradictory statutes from contending jurisdictions and he is asking for the minimal judicial decision about paramountcy." Presumably Weiler would have to revise his comments about the rights of citizens to have the Constitution applied, in light of the newer branches of constitutional law—the Charter and Aboriginal rights.
Professor Lederman then expands upon his theory of the Court as the umpire of federalism disputes—albeit an umpire with particular values that are brought to the process of interpretation:

\[\ldots (1)\text{Impartial superior courts should act as umpires of the essential guide-lines for the respective federal and provincial responsibilities given by the federal constitution. Of course the value assumptions of the judges will enter into their decisions. We would complain if this were not so. They must weigh such matters as the relative values of nation-wide uniformity versus regional diversity, the relative merit of local versus central administration, and the justice of minority claims, when provincial or federal statutes are challenged for validity under the established division of powers.}\]

The umpire metaphor was recently revived by Professor Greschner. Rejecting the claim that in matters of federalism the Court engages in “dialogue” with the legislatures, Greschner argues that the metaphor of umpire has much to commend it both as a description of the Court’s role in federalism cases and as an ideal of the role to which it should aspire. In particular, she argues that the umpire metaphor has five advantages. First, it meets the expectations of both levels of government, particularly in reference cases. Second, the umpire metaphor assumes that the federalism “game” has “rules”, and thereby reinforces the Rule of Law. Third, the umpire metaphor captures the ideal of impartiality. Fourth, it promotes the ideal of balance, which may offset the centralizing tendencies of the Court. Finally, the umpire metaphor reduces the judicial role in governmental relationships, because the umpire only has the power that the parties decide to give it.

Attractive as the umpire metaphor may be, I do not think it accurately describes the significant role of the Court in shaping federalism in Canada, nor do I think it is an appropriate ideal. I will address each of Greschner’s arguments in turn, beginning with her second argument, and ending with her first.

According to Greschner, one of the benefits of the umpire metaphor is that it assumes that the federalism “game” has “rules”, and thereby reinforces the Rule of Law. However, Greschner does concede that one of the limitations of the metaphor is that it conceals the Court’s power to create many of the rules, not merely apply them as baseball umpires do. To my mind, the metaphor’s emphasis on the Rule of Law and the fixedness of legal doctrine is more of a disadvantage than an advantage in terms of accurately portraying the role of the Court in federalism disputes. Throughout its history, the Court has been forced to give shape and meaning to the words of the Constitution. As Professor David Beatty observes:

\[\text{There is no one, settled meaning for phrases such as “property and civil rights” or trade and commerce”…Read literally and according to their common meaning, each of the more sweeping allocations of power enumerated in sections 91 and 92 could be read as justifying either federal or provincial control.}\]

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44 Ibid. at 619. The late Chief Justice Laskin also supported the metaphor of the Court as umpire of the federal system see: Greschner, supra note 17 at 56 (note 38).
45 Supra note 6 at 54-55.
Faced with this textual ambiguity, the Court has long been forced to interpret broad phrases in more specific terms, in order to give meaning and predictability to the constitutional text. Even in the past decade, in cases such as the *Québec Secession Reference*\(^{47}\) and *Hunt v. T&N plc*,\(^{48}\) the Court has relied on unwritten principles to create new rules of constitutional law. Thus in my opinion it would be inaccurate to describe the Court as an umpire implementing pre-ordained rules. Nor would such a description provide a useful ideal, because the conception of the Constitution as a "living tree" demands that judges have the power to adapt the Constitution so that it reflects changes in our social values.

Greschner's third argument is that the umpire metaphor beneficially emphasizes the impartiality of the Court. However, she does concede that the umpire metaphor masks a serious institutional problem: one "team" (the federal government) has the exclusive power to select the umpires. Again, I cannot agree that a focus on impartiality is more of an advantage than a disadvantage in terms of accurately describing the Court's role. The Court's federalism jurisprudence over the past 125 years is marked by huge pendulum swings, sometimes favouring the federal government and other times favouring the provinces. It would be difficult to describe these pendulum swings as characterized by impartiality. As Lederman acknowledged in the earlier quotation, the Justices of the Supreme Court of Canada and the lower courts bring their values to the judicial task of interpretation. Furthermore, although impartiality enjoys considerable cachet as an ideal which should guide judicial decision-making, the concept of impartiality has been roundly criticized by many legal theorists. It has been argued that judicial decision-making is inherently subjective, and perfect impartiality can never be obtained. In this context I argue that a better ideal would be the principle of consistency- that like cases should be decided alike. Unlike the ideal of impartiality, the ideal of consistency frankly recognizes the subjective nature of judicial decision-making.

The fourth argument advanced by Greschner is that the umpire metaphor promotes the ideal of balance. Greschner notes that an examination of the Court's federalism jurisprudence over the past 25 years reveals that judicial interpretation has expanded the powers of the central government,\(^{49}\) so it would be inaccurate to describe the Court's approach as balanced. However, she claims that the *ideal* of balance may offset the centralizing tendencies of the Court and counter tendencies toward uniformity inherent in the *Charter*. At the same time, she warns that "(b)alance is often used as a shorthand or guise for more or less decentralization, or for a change in the existing distribution of powers".\(^{50}\) In my opinion, the ideal of balance falsely presupposes that the term "balance" can be objectively defined. Since I do not believe that such an

\(^{47}\) *Supra* note 2.


\(^{49}\) *Supra* note 17 at 68.

\(^{50}\) *Supra* note 17 at 67.
objective definition exists, I reject the term as an ideal to guide judicial behaviour. Asking judges to be guided by vague terms such as “balance” is akin to asking them to be guided in their decision-making by overly-broad phrases such as “property and civil rights” and “trade and commerce”. None of these terms provide enough specificity to guide judicial behaviour.

Fifthly, Greschner argues that the umpire metaphor reduces the judicial role in governmental relationships, because the umpire only has the power that the parties decide to give it. In other words, the umpire is dependent on the parties. This is undoubtedly true. The Supreme Court of Canada was created by an Act of Parliament, and politicians have always had the legal authority to get rid of the Court, if a significant majority of them thought it was worthwhile to do so. In that sense, the Court has always been dependent upon the federal and provincial governments, and the metaphor of the Court as umpire well describes that relationship. Clearly this is also a worthwhile ideal, as the metaphor of umpire connotes that the Court is dependent on politicians, who are ultimately accountable to the Canadian electorate. Thus the metaphor of umpire usefully highlights the democratic origin and nature of the Court.

Finally, I will address Greschner’s first argument— that the metaphor of the Court as umpire is consistent with the parties’ expectations of the Court. Central to this argument is the contention that by viewing the Court as an umpire, both levels of government will be more likely to go to the Court for rulings and comply with its opinions— in other words, that politicians will respect the legitimacy of the Court. From a descriptive point of view, this does seem to be a valid concern, as the government of Québec recently failed to recognize the legitimacy of the Court in federalism disputes. However, a strong desire to please both levels of government and to advocate for its own legitimacy should not be an ideal which guides the Court in deciding federalism cases. The fact is that the Court’s jurisdiction in federalism disputes is legitimate, in that it was conferred upon the Court by its founding statute. The Court need not waste energy in trying to convince politicians of the legitimacy of its federalism jurisdiction. If politicians are dissatisfied with the Court’s decisions, they may pass legislation to undermine the Court’s rulings, or they may, in an extreme case, formally amend the Constitution, or pass legislation in order to reform or dismantle the Court. In the meantime, Justices of the Court should continue to render their decisions without fear of repercussion.

As my critique of Greschner’s arguments makes clear, I do not agree that the metaphor of the Court as umpire adequately describes the role of the Court in federalism disputes. Nor do I believe that the umpire metaphor represents an ideal to which the Court should aspire. Although the metaphor advantageously highlights the democratic origins and nature of the Court by reminding us that the Court is dependent on politicians, the shortcomings of the metaphor greatly outweigh its benefits. Although it may be heresy to say so, I think that the more accurate game metaphor for the Court in federalism disputes is that of a player.

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51 Québec Secession Reference, supra note 2.
To refer to the Court as a constitutional player - albeit of a different order than the political players - better reflects its importance and influence. Eras in the development of Canadian federalism have been associated with individual Justices such as Lord Haldane or Chief Justices Laskin, Dickson or Lamer. Have you ever heard of an era in baseball named after a particular umpire, or an era in hockey named after a particular referee?

B. Definitions of the Judicial Style and Role: The Law and Politics Continuum

This topic could be a whole essay in itself and I will only scratch the surface of a large and complex theoretical debate. I will argue that the Court’s methodology in federalism cases has been influenced by the newer role of the Court in Charter and Aboriginal rights disputes. These newer areas have served to emphasize the political nature of the judicial role, which both judges and academics now acknowledge. The real questions are where the judicial role should fit on the law and politics continuum, and the extent to which the legal aspects of a question can be disentangled from the political.

1. Nature of the Modern Role

In simple, somewhat over-generalized terms, legal theorists can be divided into two major camps. The first can be described as the neutral principles and interest-balancing camp. Members of this group argue, with varying degrees of conviction, that legal analysis and adjudication can be separated from the politics of federalism. As an extension of this proposition, they argue that judges in applying doctrines such as the pith and substance, aspect or concurrency doctrines can produce predictable legal results in federalism cases. Such an idea is at the core of Professor Lederman’s definition of the judicial role in federalism. He is joined in this view by prominent constitutional scholars such as Dean Peter Hogg, the Canadian academic most frequently cited by the Court on constitutional matters. Neither Lederman nor Hogg would deny the elements of discretion and policy-making implicit in the Court’s federalism jurisprudence or the flexibility implicit in a living tree interpretation of the Constitution. Indeed, the recognition of interest-balancing as part of the judicial role concedes a political dimension to the task. However, they argue that at the heart of the judicial enterprise in federalism, as elsewhere, there is an application of identifiable and neutral principles which distinguish the judicial role from the political.

The second camp can be described as neo-realists who see the application

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52 Supra note 43.
54 P.W. Hogg, Canadian Constitutional Law, 4th ed., looseleaf (Scarborough, Ont.: Carswell, 1997). A thorough and lucid identification of such principles explains the extensive influence of this classic text.
of legal principles as a variant form of politics. They argue that judging is a process more marked by contingency than predictability, and has less to do with the proper application of neutral principles than it has to do with making choices about contending theories of reality. Consequently, it is important that judges acknowledge the contending theories and defend their choices. Members of the Critical Legal Studies Movement, such as Professors Richard Devlin and Allan Hutchinson, support such a view.\textsuperscript{55} Neo-realist theory is also attractive to many feminists, Aboriginals and members of other marginalized communities. While most analysis from the latter three groups has focused on rights discourse,\textsuperscript{56} it would also apply to federalism issues.\textsuperscript{57}

My sympathies are with the neo-realist group as my selection of the metaphor of player to describe the role of the Court implies. Being aware of the distortions produced by categories and labels, I do not dismiss the importance of the search for neutral principles as a way of distinguishing legal analysis from naked politics. There may in fact be little difference between an interventionist umpire and a restrained player in the constitutional game. With this in mind, I turn to a brief analysis of three Canadian commentators on federalism and the role of the Court.

Professor Patrick Monahan outlines what could be regarded as a neo-realist analysis on federalism in an important 1984 article.\textsuperscript{58} Monahan notes that Professor Paul Weiler went much further than Professor Lederman in concluding that the role of the Court in federalism disputes should be extremely limited. He then argues that the role of the Court in deciding federalism cases is essentially political, and cannot be explained in terms of neutral principles. Central to Monahan’s argument is the premise that the legal principles of federalism are abstract and contingent and offer little guidance on vital matters such as the distinction between local and national interest. In a passage reminiscent of Weiler’s earlier critique, Monahan notes that:

There is no coherent normative theory that accounts for and justifies the Canadian federation. Instead, there is a set of contradictory theories proceeding from radically different assumptions about the nature of the Canadian political


\textsuperscript{58} P. Monahan, “At Doctrine’s Twilight: The Structure of Canadian Federalism” (1984) 34 U.T.L.J. 47.
Monahan further notes that:

This indeterminacy is reflected in the concrete political life of Canadian federalism. Federalism in Canada is structured around two competing conceptions of the nature of Canadian political community. The opposed ideals are binary opposites; one ideal is the negative of the other. If either ideal were allowed full sway it would envelope and obliterate its opposite number. Yet there is no fixed or neutral method for limiting the possible application of either social ideal. Thus, in any given political dispute, both conceptions of community will always be available as a basis for argument....The struggle between them is ceaseless and ultimately unwinnable.\(^{59}\)

Monahan states that, "(t)he indeterminacy of federal theory means that any point on a continuum between 'provincialism' and 'nationalism' is consistent with the federal principle."\(^{61}\) In a bold, concluding paragraph, Professor Monahan appears to endorse the view of the Supreme Court of Canada and the lower courts as active constitutional players making choices about the nature and shape of federalism in Canada:

One can abandon the distinction between law and politics without descending into some realist nightmare. The essential continuity between legal and political reasoning simply means that federalism disputes are inseparable from the broader framework of federalism itself. These issues occupy a small corner of a larger political canvas. With little effort, the analysis of an ostensibly technical issue such as 'judicial review' can escalate into an open-ended discussion of the proper ends of federal government.... Our destiny is shaped rather than found.\(^{62}\)

Another approach to the judicial role in constitutional matters is presented by Professor David Beatty in his ambitious book, *Constitutional Law in Theory and Practice*.\(^{63}\) Like Professor Monahan, Beatty recognizes the discretion and policy-making inherent in any judicial decisions concerning federalism. However, compared to Monahan, Beatty places less emphasis on the elements of contingency and choice and more emphasis on the need for neutral principles which can guide the courts and provide a degree of rationality and predictability in the adjudication of federalism disputes. Like Weiler and Monahan before him, Beatty laments that the law of

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59 Ibid. at 70.

60 Ibid. at 84-85 [emphasis in original]. The failure of the Court to recognize this perspective is illustrated in the *Québec Sécision Reference*, supra note 2, where one version of Confederation is presented as an historical fact rather than a choice between contending theories—such as the compact theory.

61 Ibid. at 87.

62 Ibid. at 99.

63 Supra note 46. Beatty discusses the division of powers in chapter two of this book.
federalism often yields unpredictable results. He states that:

... (I)ndeterminacy and indefiniteness continue to plague the most important federal grants of power and still permit each judge to decide a case on his or her own views of what will be best for the country, rather than on the basis of some fixed or settled rule of law.64

In order to counteract this indeterminancy, Beatty calls upon the courts to apply the principles of proportionality and rationality, which he defines as follows:

Proportionality requires:

...that the public interest or purpose of the law is of sufficient purpose that it offsets (justifies) whatever limitations or restriction it imposes on individuals or groups other orders of government.

Rationality requires:

...that the means, or the particular policy instrument, that they have chosen for pursuing their objective, was the best available to them.65

Beatty rejects the strict "watertight compartments" theory of federalism, which he criticizes as follows:

The literal, categorical approach does not permit a law enacted by one level of government to have any effect on issues and policies that are within the jurisdiction of the other. The lists of subjects in section 91 and 92 serve not only to define the powers of both orders of government but also as absolute and impenetrable constraints on the sovereignty and autonomy of the other.66

In its stead, Beatty proposes the federal principle:

The essence of the federal principle [is] to protect the autonomy and sovereignty of both levels of government as much as possible.67

He argues that courts can best implement the federal principle by combining an application of the double aspect or concurrency doctrine with a narrow reading of what constitutes conflict.68

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64 Supra note 46 at 50.
65 Supra note 46 at 15-16 [emphasis added]. Beatty argues that these principles should apply to all constitutional law, not just federalism. These principles are reminiscent of the Oakes test [R. v. Oakes, [1986] 1 S.C.R. 103]. It could be argued that the principle of proportionality is really only a different way of calling for balance and moderation as advocated by Professor Lederman and others.
66 Supra note 46 at 41.
67 Supra note 46 at 41.
68 It is interesting that both R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, and General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641 were decided under the Dickson Court and these are the decisions that Professor Beatty finds most praiseworthy. This point becomes even more telling when one considers that the Dickson Court and former Chief Justice Dickson both promoted concurrency in matters of federalism—a trend that is applauded by both Professors Beatty and Monahan as a way to maximize the sovereignty of both levels of government. Professor Beatty is critical of the failure of the Laskin Court in Westendorp v. R., [1983] 1 S.C.R. 43 to find concurrent provincial jurisdiction to handle provincial aspects of street prostitution (Supra note 46 at 56-57).
Such an approach, he argues:

...promotes a system of intergovernmental relations and informal constitutional adjustment in which the political branches of government have considerable latitude in structuring their relations to suit their needs.69

Beatty's arguments suggest that the role of the Court in federalism should be that of an enabler, helping both levels of government do almost anything that can be mutually agreed upon. A concern with Professor Beatty's analysis is that it fails to consider the ability and preparedness of a particular level of government to legislate in a particular area. A neo-realist analysis would call for a more functional approach in which judges should have some latitude in adapting the federal structure to respond to changing problems.

Others have made a more fundamental critique of Professor Beatty's ambitious search for neutral principles governing all constitutional disputes. More particularly, he has been criticized for underplaying the elements of contingency and choice in adjudicating federalism issues. Professor Richard Devlin states that:

...[Beatty's argument] is pervaded by a sense of doctrinal presentism in that prior to the 1980s there was a bias towards either centralism or provincialism, but in the last 15 years the Supreme Court has struck the appropriate balance. For Beatty, this is a happy conjuncture because contemporary doctrine fits with his principles and reinforces cooperative federalism at the same time. The problem here is that Beatty fails to interrogate the virtues and possible limitations of cooperative federalism and, more importantly, its generative forces. Co-operative federalism as a political configuration may or may not be appropriate for late twentieth century Canada, but the point is that it is a contingent constitutional configuration determined by a host of social, political and economic forces.70

Finally, I turn to the work of Professor Katherine Swinton both for her assessment of the role of the Court in federalism cases and for her related assessment of the performance of the Laskin and Dickson Courts. I will limit myself largely to her comments about their treatment of the criminal law power, as that will be the basis of my assessment of the Lamer Court in the next part of this article. On the matter of the proper role of the Court in federalism disputes, Professor Swinton's views fall somewhere between those of Monohan and Beatty on the continuum between law and politics.71 Professor Swinton distinguishes between "legal federalism" as set out in the formal Constitution and "political federalism"—which is largely the product of the informal constitution in forms such as co-operative federalism and delegation. Thus she is aware of the legal and political extremes of federalism.

69 Supra note 46 at 60.
Swinton notes that a legal "win" in a federalism dispute is not equivalent to a political win.\(^{72}\) This leads her to conclude that:

The judicial decisions are not irrelevant, nor insignificant, but they are not the final word. They are important to the federal-provincial negotiating process and affect bargaining power in important ways.\(^{73}\)

Framed in terms of the metaphors discussed earlier in this article, Swinton might see the Court as an authoritative umpire in the realm of legal federalism, but merely one of several players in the larger game of political-legal federalism. In this larger political-legal game, she sees the role of the Court as secondary to that of the political players. Her comments echo Beatty’s concern that the Court should seek to maximize the autonomy of both levels of government:

The Supreme Court also has a role to play in managing conflict and change in the federal system, but its role is secondary and, ideally, facilitative....The Court’s attitudes toward the issues of concurrency of powers and the definition of conflict necessary to determine federal paramountcy affect both the agenda and the tenor of intergovernmental relations.\(^{74}\)

C. Federalism and the Laskin and Dickson Courts

In her ground-breaking text on federalism and the Laskin and Dickson years, Professor Swinton assesses the performance of the Court under these influential former Chief Justices.\(^{75}\) The essence of her appraisals also appears in an article on the late Chief Justice Laskin as part of a commemoration of his contribution to federalism\(^ {76}\) and a celebration of the legacy of the late Chief Justice Dickson, while he was still alive.\(^ {77}\) I rely largely on Swinton’s above works for my analysis of the Laskin and Dickson Courts.

The years between 1970 - 1989 (when Laskin and Dickson presided over the Court) were turbulent and important years for federalism in Canada. The Supreme Court decided 158 cases raising distribution of powers issues during these years, reaching a high of fourteen cases in 1976-77.\(^ {78}\) These numbers are in stark contrast to the paucity of federalism cases heard by the Court in the 1950s and 1960s and during the 1990s under the Lamer Court. Even during the 1970s and 1980s heyday of federalism cases, they still amounted to a small percentage of the Court’s overall agenda, but the profile and importance of these cases was high.

\(^{72}\) Supra note 23.

\(^{73}\) Supra note 71 at 139.

\(^{74}\) Supra note 71 at 138. A more accurate statement would be that Beatty’s comments echo those of Swinton, as her comments were published previous to his.


\(^{78}\) Ibid. at 483 (fn 1).
There is no doubt that the late Chief Justice Laskin left his mark on the federalism cases of his day. He sat on 96 federalism cases and wrote in 60 of them.\textsuperscript{79} Thus Laskin made a written contribution to more than half of the federalism cases heard during his time. These numbers exceed those of both his predecessors and successors. On the analysis of Professor Swinton and most other commentators, Laskin was a federalist and more inclined to strike down provincial than federal laws. Laskin did not always persuade a majority of the Court to his views and there were strong voices of provincial rights in the persons of Justices Martland, Ritchie and Beetz—who sometimes carried the day.\textsuperscript{80}

Implicitly adopting a neutral umpire standard for assessing the performance of the Laskin Court, Professor Swinton is critical of Laskin for not giving sufficient weight to the arguments for provincial autonomy.\textsuperscript{81} Her assessment of the Laskin Court in respect to the federal criminal law power provides a clear example. As mentioned earlier, Chief Justice Laskin viewed the federal criminal law power as a means to protect civil liberties and he thus took a broad approach to the power of the federal government to regulate morality—a term which he failed to clearly define.\textsuperscript{82} In Swinton’s view, Laskin ignored or downplayed the local economic and social context of morality:

Despite Laskin’s distaste for Provincial control of morality in \textit{McNeil}, the provinces have some responsibility therefore: in education, welfare services, and anti-discrimination legislation in employment, housing, or public services... Laskin does not consider the provincial claims, and thus seems to violate one of the principles for constitutional adjudication which he castigated the Privy Council for ignoring: the consideration of the social and economic context of the legislation.\textsuperscript{83}

If one were to adopt the more expansive metaphor of the Court as a constitutional player, the Laskin Court and late Chief Justice Laskin might be judged less harshly. In the politically contingent game of constitutional interpretation Laskin chose a larger national role in the area of criminal law and morality. As

\textsuperscript{79} \textit{Supra} note 76 at 353.

\textsuperscript{80} \textit{Supra} note 17 at 55. Greschner notes that any Court is a complex mix of individual and institutional factors:

\ldots (T)he word 'court' reminds us that the decisions from judges are not merely decisions of individuals Their opinions are shaped by the fact that they write as justices of a particular court, participants in an institution with traditions, purposes and values. In other words, the Supreme Court is not a haphazard collection of nine individuals, free to pursue their own policy convictions. Decisions result from the interplay of a judge's personal beliefs with many institutional factors.

As Greschner’s quote suggests, it is overly simplistic to consider the work of a Court merely in terms of the record of its Chief Justice.

\textsuperscript{81} \textit{Supra} note 76 at 370. She asserts that Laskin failed to examine provincial claims openly and fairly before rejecting them.

\textsuperscript{82} In \textit{R. v. Zelensky}, [1978] 2 S.C.R. 940, Laskin de-emphasized the need for a traditional penalty to invoke the federal criminal law power. This also served to expand the scope of the criminal law power.

\textsuperscript{83} \textit{Supra} note 76 at 371.
a constitutional player he advanced his vision of the way the Constitution should be interpreted. This view was countered by other Justices who advanced a more localized vision of morality. The end result was the kind of balance and moderation in federalism that is generally regarded as desirable.

The late Chief Justice Dickson and the Dickson Court receive a more favourable report from Professor Swinton. Like his predecessor Laskin, Dickson supported an expansive role for the federal government in the economy. However, unlike his predecessor, Dickson was quite sympathetic to claims for provincial jurisdiction, especially in relation to the provincial role in the administration of criminal justice. Chief Justice Dickson’s balanced approach to matters of federalism and his search for concurrency as a way of empowering both levels of government has sparked praise from Professor Swinton and others. Such an approach would suit not only Professor Lederman’s calls for moderation and balance but also meet Professor Beatty’s call for a maximizing of government powers and Professor Monahan’s desire for a flexible adaptation of federalism to new circumstances. Professor Swinton summarizes the virtues of the late Chief Justice Dickson’s approach to federalism as follows:

The interpretive exercise was not mechanical nor did it lead to precise rules about the jurisdiction of each level of government. Perhaps, then, in the adjudication of disputes about the distribution of powers Dickson’s approach has much to commend it. He did not ignore the past — indeed, he was enormously respectful of the language of the constitution and the decisions of previous courts as well as the expectations of the important governmental actors in our federal system. But he was also conscious of the changes in the country over time which may require adaptation of constitutional responsibilities. In his view the Court should assist in that adaptation process, but in a way that protects the federal nature of the constitution and the country. Dickson’s efforts to look at policy needs and to preserve a balance in the federal system were attentive to the social context as he saw it. He could not avoid subjectivity; he could not promise total predictability. However, the result of this approach to judging can be a constitution that is indeed a “living tree” with strong roots in the diversity of the Canadian community from which it springs.

In contrast to her praise of Dickson’s approach, Professor Swinton makes the following harsh assessment of the Laskin style of decision writing:

Laskin, the harsh critic of Privy Council style, was often guilty of the same type of legalism and formalism in his writing for which he castigated the British judges. A typical judgment by him in a federalism dispute is a recitation of cases, an effort to mould the precedents to fit his view of the Constitution, and a reluctance to address competing federalism concerns openly. Laskin the academic was undoubtedly a realist, recognizing the discretion of appellate court judges. Nevertheless, he often

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86 *Supra* note 77 at 518 and Greschner, *supra* note 17 at 67-68.
87 *Supra* note 77 at 518.
obscured this fact - or perhaps was troubled by it - whether in public speeches, in his judgments, and even in his academic writing. Too often in his academic work one finds brief reference to the need for judicial decisions to recognize social and economic reality, but then the bulk of the work is devoted to an exegesis of doctrine, without an in-dept consideration of the impact of particular decisions on the federal system.  

It would be unfair to suggest that the late Chief Justice Laskin completely failed in his efforts at a functional approach to federalism disputes. It was Laskin who pioneered the use of extrinsic evidence as a way of putting the constitutional text in the context of the larger social and economic problems of federalism. Laskin was also among the early jurists to acknowledge the political dimension of the judge’s role. While he was still an advocate of judicial restraint and saw the role of the Court as no more than an umpire, he pioneered the concept now widely accepted among judges and academics—that judges do make law.

It was left to Laskin’s successor, the late Chief Justice Dickson, to expand upon the role of the Court as a creative policy-maker which solves legal disputes such as federalism in the context of the broader polity. In pursuing this role Dickson also elaborated upon the use of extrinsic evidence in federalism cases:

Dickson was frank in his acknowledgement of the judge’s creative role in federalism disputes. Ultimately the judge must balance federal and provincial interests in light of the constraints of the text and doctrine. In an interpretive process that combines elements of continuity with social policy concerns, the judiciary must have adequate information, and Dickson welcomed the introduction of a range of extrinsic materials to help him.

It is no accident that this more open and functional approach to federalism reached full bloom in the Dickson Court—which ushered in the Charter.

88 Supra note 76 at 389. These contradictions in the Laskin style were also noted by others. See: E. McWhinney, “The Supreme Court of Canada and the Constitutional Division of Powers.” In: The Supreme Court of Canada’s Proceedings of the October 1985 Conference. (Cowansville, Qué: Y. Blais, 1986) 55 at 58. Beatty, supra note 46 at 60 states that: “For all their understanding and learning in law, Richard Haldane and Bora Laskin, perhaps more than anyone else, applied the principles of rationality and proportionality with their thumbs on the scales.”

89 Supra note 76 at 388. Reference re Anti-Inflation Act, 1975 (Canada), [1976] 2 S.C.R. 373 is a notable example.

90 Professor Greschner in supporting the above assertion cites both Laskin and Justice La Forest—who I have already identified as the leading influence on the federalism jurisprudence of the Lamier Court. (Supra note 6 at 62-63 (note 83) - which reads as follows: B. Laskin, “The Role and Function of Final Appellate Courts: The Supreme Court of Canada” (1975) 53 Can. Bär Rev. 468 at 477: “Controversy has now ceased on the law-making role of judges, especially of judges of a final appellate court. Laymen may beg the question by consoling the dissenting judges of a divided court with the remark, ‘too bad the law was against you, but judges and lawyers know better.’” See also: G. La Forest, “Judicial Lawmaking, Creativity and the Constraints” in Johnson et al (eds.), G. La Forest at the Supreme Court of Canada (Winnipeg: Canadian Legal History Project, 2000) 3: “I take it for granted that judges make law, that it is necessary for them to do so, and that this has been the case since earliest times.”)

91 Supra note 77 at 511 [capitalization in original].
D. Methodology and the Judicial Approach in the Charter Era

There is little doubt that the arrival of the Charter in 1982 changed both the public profile of the Court and the way in which it renders its decisions. The high-profile work of the Court on matters of individual rights under the Charter and Aboriginal rights has led to increased interest in the Court's decisions among journalists and the general public. This trend has been accelerated by the growing access to the internet and other forms of mass technology.

The change in the kinds of issues that confront the Court and the expansion of its audience have created a need to replace the traditional mechanical and formalistic reasoning in federalism cases with an open balancing of the competing policy arguments raised in each dispute. This involves a recognition of a greater policy-making role for the Court and the acknowledgement of the Court as a significant institutional actor (whether umpire or player) in the life of Canada. Such an evolution was in progress from the time of the Laskin Court, before the arrival of the Charter. There is little doubt that the Charter added fuel to the fire.

These changes affect not only the ultimate written product but also the methodology and sources that the Court consults to reach its conclusions. Because the Charter is focused on societal as well as legal effects the use of extrinsic evidence has expanded greatly since 1982. Although there has been little writing on the effect of the Charter and Aboriginal rights on the methodology of the Court in federalism cases, Professor Greschner does make a passing reference to the changes in the following passage:

The Court endorsed so-called extrinsic evidence and it began actively and consistently to discuss policies, principles and social context, which both Lederman and Weiler, amongst many others, had argued were essential for sophisticated constitutional adjudication. As part of the move away from formalism, it began to pay far greater attention to academic writings and legislative history. In 1975 a Supreme Court judgment differed little in style or sources from those of the Judicial Committee of the Privy Council. Twenty-five years later, judges routinely and openly consider contextual matters, discuss policy, examine legislative history, and peruse academic commentary.92

While the widespread use of extrinsic evidence began with the Laskin Court, its use has certainly grown since 1982.93 The use of such evidence

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92 Supra note 6 at 58.
93 The Court first indicated its broad acceptance of extrinsic evidence in Reference re Anti-Inflation Act, 1975 (Canada), [1976] 2 S.C.R. 373. For a commentary on this case, see: P.W. Hogg, “Proof of Facts in Constitutional Cases” (1976) 26 U.T.L.J. 386. For a discussion of how the use of extrinsic evidence in constitutional litigation has become commonplace following the introduction of the Charter, see: F.L. Morton and Ian Brodie, “The Use of Extrinsic Evidence in Charter Litigation Before the Supreme Court of Canada” (1993) 3 N.J.C.L. 1. The authors examine Supreme Court of Canada Charter decisions handed down between 1984 and 1990, in which at least one non-government intervenor was present during the hearing before the Court. They find that extrinsic evidence was present in the factums of 75% (or 61 out of 80) of the cases studied.
emphasizes the policy implications of legal interpretations and underscores the importance of context in constitutional decisions. Effects are at least as important as purposes in the modern approach to constitutional law disputes, including federalism. This changed methodology also changes the substantive results in cases and highlights the creative and political role of the Court in balancing and choosing between competing versions of federalism. The use of the word “context” by the Court in federalism cases provides a small glimpse of the possible impact of the Charter on federalism cases since 1982. My focus is on the Lamer Court which was exposed to the Charter for the full period 1990 - 2000. Since the Lamer Court had more exposure to the Charter than any previous Court, I hypothesized that the Charter would have influenced the Lamer Court more than the predecessor courts of Dickson and Laskin.

A search of all Supreme Court of Canada decisions revealed that whereas before 1982 the word “context” appeared in only 13% of the Court’s decisions, since 1982 the word has appeared in 50% of the Court’s decisions, a dramatic increase of nearly 400%. At the same time, the frequency of the word has increased steadily in the past three decades; the word “context” appeared in 30% of all decisions by the Laskin Court, 48% of all decisions by the Dickson Court, 55% of all decisions by the Lamer Court, and 77% of all decisions by the McLachlin Court (as of July 21, 2000). While it is not clear whether the Charter caused the increase in the word “context”, it is clear that there is a strong correlation between the advent of the Charter and the increase of the word “context”.

In the Court’s division of powers cases, the increased focus on context has been less dramatic, but significant nonetheless. In these cases, the use of the word “context” has more than doubled since 1982. As a result of these changes, the word “context” has appeared in 83% of all Supreme Court of Canada division of powers cases since 1982. While the word appeared in 62% of decisions by the Laskin Court, it appeared in over 80% of decisions by each of

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94 While the Laskin Court had two years of experience with the Charter (1982-84), and the Dickson Court had six years of experience with the Charter (1984-90), the Lamer Court had ten years of experience with the Charter (1990-2000).

95 These statistics were tabulated from the results of searches performed on QuickLaw on July 21, 2000. There were 1161 cases decided by the Laskin Court; 345 of these, or 30% contained the word “context”. There were 618 cases decided by the Dickson Court; 294 of these, or 48% contained the word “context”. There were 1054 cases decided by the Lamer Court; 574 of these, or 55% contained the word “context”. There were 39 cases decided by the McLachlin Court; 30 of these, or 77% contained the word “context”.

96 These statistics were tabulated from the results of searches performed on QuickLaw on June 28, 2000. Prior to 1982, the Court decided 254 cases containing the phrase “constitutional law” and either “91” or “92”; the word “context” appeared in 100, or 39%, of these. In 1982 and following, the Court decided 87 cases containing both the phrases “constitutional law” and “division of powers”. Seventy two of these, or 83%, also contained the word “context”. Thus, the frequency of the word “context” increased from 39% (before 1982) to 83% (in 1982 and following).
the Dickson and Lamer Courts.\textsuperscript{97} From these statistics, some general patterns emerge. Firstly, the Court seems to have a greater preoccupation with "context" in division of powers cases than in cases about other subjects.\textsuperscript{98} Secondly, the Laskin Court appears to have been more interested in the context of division of powers cases than the Courts which preceded it.\textsuperscript{99} Thirdly, following the coming-into-force of the \textit{Charter}, the Court's interest in context increased dramatically.

It cannot be asserted with certainty that these changes in methodology have produced a change in substantive decisions, but it would be hard to imagine otherwise. These changes in style and approach reinforce both an actual and perceived change in the role of the Court in federalism cases. The newer methodology emphasizes the need for a functional and contextual analysis of federalism issues. It also highlights the political dimensions of the judicial role and suggests a reconsideration of the neutral umpire metaphor. Examining federalism problems in their real life contexts allows the Court to respond creatively to problems of federalism in a way that can empower as well as restrict governments. By broadening the evidentiary base upon which decisions are made, the Court can promote a more inclusive form of federalism than what has gone before. I shall now extend these understandings of the role and approach of the Court in federalism cases to considering the performance of the Lamer Court on matters of federalism, and in particular the federal criminal law power.

\textbf{III. The Lamer Court and Federalism: The Federal Criminal Law Power}

Let me begin with the caveat that this part in no way claims to be a thorough assessment of the performance of the Lamer Court on federalism. It is merely a glimpse of that Court's performance in respect to the evolution of the federal criminal law power in section 91(27) of the \textit{Constitution Act, 1867}. As noted in the previous section, the Lamer Court continued the functional and context-specific approach to federalism problems, characterized by extensive use of extrinsic evidence and reliance on a wide range of sources. This approach to

\textsuperscript{97} These statistics were tabulated from the results of QuickLaw searches performed on July 21, 2000. The Laskin Court released 68 decisions containing the phrase "constitutional law" and either "91" or "92"; forty-two of these, or 62\%, contained the word "context". The Dickson Court released 32 decisions containing the phrases "constitutional law" and "division of powers"; twenty-six of these, or 81\%, contained the word "context". The Lamer Court released 51 decisions containing the phrases "constitutional law" and "division of powers"; 42 of these, or 82\% contained the word "context".

\textsuperscript{98} Recall that while the word "context" appeared in 13\% of all the Court's cases before 1982, it appeared in 39\% of division of powers cases. Similarly, while the word "context" appeared in 50\% of all the Court's cases in 1982 and following, it appeared in 83\% of division of powers cases.

\textsuperscript{99} The word "context" appeared in 39\% of all the Court's division of powers cases prior to 1982. However, the same word appeared in 62\% of division of powers cases decided by the Laskin Court.
federalism cases was reinforced by the similar broad-based and flexible approach to issues under the *Charter* and Aboriginal rights.

The Laskin and Dickson Courts supported a strong federal role in the regulation of the economy, in contrast to the restrictive approach taken on such matters by the Privy Council. As Professor Swinton and others have observed, this advance in federal jurisdiction was achieved through a broad approach to concomitancy. The advance in federal jurisdiction was argued largely in terms of Peace, Order and Good Government (POGG) and trade and commerce but there was also an increased use of the federal criminal law power in economic matters. The Lamer Court followed these trends on the division of powers over the economy. However, the Lamer Court blazed a new trail by allowing the use of the federal criminal law power as a response to social problems, such as threats to health from smoking cigarettes or polluting the environment. It is in this area that Justice La Forest, speaking for the Lamer Court, expands the federal criminal law power in a way that is more consistent with the role of the Court as a constitutional player, rather than mere umpire.

A. *Evolution of the Federal Criminal Law Power*

Like its sister powers POGG and trade and commerce, the federal criminal law power has changed over time. In the early restrictive days of Lord Haldane's Privy Council, the criminal law power was narrowly defined as applying only "... where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence". Lord Atkin for a later Privy Council took a much more expansive approach that allowed for recognition of new crimes, so long as the form of attacking the social evil was a statutory prohibition with penal consequences. Advocates for a balanced division of powers between the federal and provincial levels of government argued that this broad formulation put few (if any) substantive limits on the use of the criminal law power so long as the federal law was presented in the form of a prohibition and a penalty.

It fell to Justice Rand of the Supreme Court of Canada, shortly after it became the final court of appeal for Canada, to craft a definition of the federal criminal law power that falls between the two extremes articulated in the earlier cases. Justice Rand held that there must be a public purpose that can support the prohibition and penalty as being in relation to criminal law. In the *Margarine Reference* (which provides the current definition of the criminal law power)

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100 Supra note 75. While Swinton felt that Laskin as Chief Justice exhibited a federalist bias, his Court maintained a balance using concomitancy. Swinton praises Dickson for his overt balanced approach and promotion of concurrent analysis.


Justice Rand stated that examples of viable public purposes include, but are not limited to "... (p)ublic peace, order, security, health, [and] morality". Thus there are now three requirements for a valid exercise of the federal criminal law power—a prohibition, a penalty and a public purpose. All three of these limitations are quite elastic, giving the Court a considerable amount of discretion.

The contending provincial heads of power are the administration of justice under s. 92(14) and the imposition of fines for provincial purposes under s. 92(15) of the Constitution Act, 1867. These buttress the usual provincial jurisdiction arguments under property and civil rights (s. 92(13)) and local matters (s. 92(16)). Since criminal sanctions often involve matters of property and civil rights and deal with problems with local as well as national aspects, issues of concurrent jurisdiction as well as questions of validity and exclusive jurisdiction often arise.

Under the Laskin Court, the then Chief Justice took an expansive approach to the criminal law power which led Professor Swinton to conclude that he exhibited a federalist bias. In Morgentaler v. The Queen Chief Justice Laskin expanded the concept of public purpose beyond the protection of a woman’s health to the protection of the state interest in the fetus. He did not directly state that this was a matter of morality but nevertheless concluded that it fell within the ambit of the federal criminal law power. Laskin’s broad views about federal jurisdiction over morality were not shared by the majority in Nova Scotia Board of Censors v. McNeil. Laskin dissented again in Labatt Breweries v. A.G. Canada, where the majority of the Court was unwilling to extend the criminal law power to the compositional standards of beer. The Chief Justice did carry the day in Westendorp v. R. where the Court struck down a Calgary bylaw relating to the problems of street prostitution as invading the federal jurisdiction over criminal law. However, the legacy of the Laskin Court was not the expansion of the federal criminal law power that the late Chief Justice Laskin would have preferred.

In contrast to Laskin, Chief Justice Dickson and the Dickson Court were both promoters of a concurrent approach to most fields—including that of criminal law. While still a puisne justice in the Laskin Court, Dickson wrote for the majority in Schneider v. The Queen to uphold the British Columbia Heroin Treatment Act as a matter of local health jurisdiction under s. 92(16) of the Constitution Act, 1867. As Chief Justice, Dickson took a similar approach...
in *Rio Hotel Ltd. v. New Brunswick (Liquor Licencing Board)*,¹¹³ where he upheld a provincial law prohibiting nude entertainment as a valid exercise of the provincial jurisdiction over property and civil rights. The approach of the Dickson Court was to maintain federal/provincial balance by concurrency rather than expanding or contracting the definition of the federal criminal law power.

### B. The Legacy of the Lamer Court: Hydro-Québec

I have not attempted to examine all the cases decided during the Lamer Court that deal with the federal criminal law power, nor to tabulate the wins and losses for the federal and provincial levels of government. Instead I have decided to focus on what I consider to be the most significant federalism case decided by the Lamer Court as a way of assessing that Court's contribution. In doing this I am comforted by the observation of Professor Greschner that the performance of the Court is not just a tabulation of wins and losses but more a matter of the results in the big cases.¹¹⁴ I am further comforted by the fact that she chose as an example of such a case the very one I have chosen for my analysis—*R. v. Hydro-Québec*.¹¹⁵ This case expands the federal criminal law power in a way that raises important questions about the role of the Court in striking the proper balance in matters of federalism.

An early decision of the Lamer Court, *R. v. Swain*,¹¹⁶ reinforced the decision of the Laskin Court in *The Queen v. Zalensky*¹¹⁷ that there need not be a traditional penalty in order to invoke the criminal law power. The extent to which this limitation on the federal criminal law power has been eliminated is reflected in the following passage:

> Indeed, so long as a legitimate public objective is pursued, a law based on section 91(27) need not be confined to traditional modes of sanctions. Such interventions need not provide for the infliction of a penalty. In *Swain*, for instance, the Supreme Court held that a provision of the *Criminal Code* providing for the detention in a provincial mental institution of those acquitted by reason of insanity was validly enacted under section 91(27), even though no penalty was inflicted. According to the Court, a rational link existed between this preventive provision and the criminal law power, since it applied to persons who had perpetrated acts prohibited by the *Criminal Code*, and whose release could endanger the safety of the public.¹¹⁸

¹¹⁴ Supra note 17 at 66-67.
¹¹⁸ J. Leclair, "The Supreme Court, the Environment and the Construction of a National Identity: *R. v. Hydro-Québec*" (1998) 4 Rev. Const. Studies 372-374. This is one of a flood of academic commentaries on *Hydro-Québec* which adds to the argument that it is an important and pivotal case.
When this reduction in the penalty limitation on the federal criminal power is paired with the broad definition of what constitutes a public purpose, the expansion of the federal criminal law power becomes apparent. Not only is the range of what can be done under federal jurisdiction expanded under the Lamer Court, but there are also signs of a willingness to limit the extent to which the provinces can stiffen, supplement or replace the criminal law. This is the implication of *R. v. Morgentaler*\textsuperscript{119} where provincial laws restricting access to private abortion clinics were struck down as invading federal jurisdiction.

After the Lamer Court's decision in *R. v. Swain*, the most significant limitation on the federal criminal law power was that it only justified legislation which was prohibitory in nature. The dilution (some would argue elimination) of this prohibition requirement began with the Court's decision in *RJR-MacDonald v. Canada (A.G.)*\textsuperscript{120} In that case, the majority opinion on the criminal law power issue was written by Justice La Forest, holding it is within s. 91(27) of the *Constitution Act, 1867* for the federal government to enact legislation banning cigarette advertising. Justice La Forest stated that the criminal law is not frozen in time, but rather must be allowed to adapt to recognize new concerns and values. He identified the "evil" being targeted by the legislation as the detrimental effects of tobacco consumption, and then stated that Parliament is permitted to criminalize activities ancillary to the evil in question, or take other intermediate policy options without actually prohibiting the evil. Therefore, he concluded that it was valid for Parliament to ban cigarette advertising, while still allowing the sale of cigarettes. He also stated that though such measures represent a circuitous route to the goal of reducing cigarette smoking, they are still valid as long as they do not colourably intrude into provincial jurisdiction. Justice La Forest stated that "the criminal law power is plenary in nature and this court has always defined its scope broadly"\textsuperscript{121}

\textsuperscript{119} [1993] 3 S.C.R. 463. Commenting on this decision, Professor Monahan notes that the Court appeared to adopt a new test for justifying a law under the criminal law power. He notes that the Court's previous jurisprudence establishes that a law must exist in a "prohibition—penalty" form in order to be justified as criminal law. In contrast, he argues that the Court's decision in *Morgentaler* moves away from these requirements of form, emphasizing instead the substance of the law. (P. Monahan, *Constitutional Law* (Concord, Ont.: Irwin Law, 1997) at 303-04). In my opinion, Monahan's critique of *Morgentaler* under emphasizes the importance of the doctrine of colour ability in that case. In *Morgentaler*, extrinsic evidence showed that the law in question was passed in order to prohibit Dr. Morgentaler from performing abortions. Thus the Court's decision in *Morgentaler* should not be seen as removing the requirement that criminal law be passed in a certain form; rather, the decision highlights the importance of the doctrine of colour ability.

\textsuperscript{120} [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

\textsuperscript{121} *Ibid.* at para. 28. In addition to weakening the "prohibition" requirement (by allowing intermediate policy options to replace complete prohibition), this case is also considered to have expanded the scope of the criminal law power by expanding the types of "public purposes" which may justify criminal law. See further on this point: A. Hutchinson and D. Schneiderman, "Smoking Guns: the Federal Government Confronts the Tobacco and Gun Lobbies" (1995) 7 *Const. Forum* 16.
The Court further expanded the scope of the federal criminal law power with its decision in *Hydro-Québec*. Once again, the majority opinion was written by Justice La Forest. He found provisions of the *Canadian Environmental Protection Act* (CEPA) which allow for an administrative body to set legally-binding limits on the emissions of certain substances to be valid federal legislation under s. 91(27) of the *Constitution Act, 1867*. He held that protecting the environment was a valid public purpose of the type described in the *Margarine Reference*. Justice La Forest also rejected the argument that the category of substances that could be regulated under CEPA was so broad as to make it possible to regulate any substance. He noted that Schedule II of the Act establishes a set method for determining which substances are toxic and therefore subject to regulation, meaning that the legislation constitutes a "limited prohibition applicable to a restricted number of substances". Allowing an administrative body to set specific levels of permitted concentrations was simply Parliament's way of "carefully tailoring the prohibited action to specified substances used or dealt with in specific circumstances". He stressed that environmental issues can best be addressed by legislation which is both broad and flexible.

Former Chief Justice Lamer and Justice Iacobucci, in dissent, argued that the CEPA provisions amounted to the wholesale regulation of substances by the federal government. They stated that the legislation in question did not contain a prohibition: failure to comply with the standards was an offence, but that was ancillary to the main part of the legislation, which was regulatory. They also pointed out that under the legislation an offence could not occur without the involvement of an administrative agency, and remarked that "(i)t would be an odd crime whose definition was made entirely dependent on the discretion of the Executive".

In an era when there has been little academic commentary on federalism cases, the decision in *Hydro-Québec* has produced a flood of analysis. My linguistic limitations prevent me from exploring the considerable commentary from Québec on *Hydro-Québec" and I will only sample some of the English literature on the topic. Much of the legal analysis of the decision has been negative, lamenting the loss of predictability about the shape and scope of the federal criminal law power. The following passage is typical of this attack:

*Hydro-Québec's* legacy is a significantly expanded criminal law power. This legacy is manifested principally in two ways. First, the majority has effectively redefined the test for ascertaining if legislation — provincial or federal — may be characterized as criminal law. Second, the majority accepts a relentlessly regulatory role for the criminal law, one that prior to *Hydro-Québec* seemed minimal.

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122 *Supra* note 115.
123 *Supra* note 104.
124 *Supra* note 115 at para. 146.
125 *Supra* note 115 at para. 151.
126 *Supra* note 115 at para. 55.
127 L.N. Losep, "R. v. Hydro-Québec: la dénaturation du droit criminel au bénéfice de l'environnement" (1999) 33 *R.J.T.* 421 is one example of such writing.
Justice La Forest announced that "[t]he purpose of the criminal law is to underline and protect our fundamental values." Unfortunately, in our federal system this is an extremely nebulous standard for establishing whether a particular law can be characterized as being in relation to the criminal law and, as a consequence, within the exclusive legislative jurisdiction of Parliament. The uncertainty generated by this loose standard is compounded by La Forest J.'s understandable insistence that the criminal law must not be frozen in time, but rather "must be able to keep pace with and protect our emerging values." Many matters of public import, such as proper health care, the safe operation of motor vehicles, and quality education, to cite but three examples, are "values" which all Canadians would embrace. They are also subject matters over which provincial legislatures enjoy primary legislative authority. Yet, these are matters which now may be subjected to extensive federal regulation under section 91(27), should Parliament choose to do so. This fluid characterization of the criminal law power has the potential to disrupt, in significant ways, the division of legislative powers in our federal system by handing a further tool to Parliament to centralize authority over matters traditionally within the purview of provincial governments and legislatures.\(^{128}\)

In light of the above criticisms it is not surprising that Professor David Beatty finds the majority decision of Justice La Forest wanting in terms of his call for a principled approach to constitutional decisions based upon the principles of rationality and proportionality.\(^{129}\) In his article on Hydro-Québec, Beatty is blunt in his criticism of Justice La Forest's decision:

La Forest did refer to the two part—formal and substantive—definition of the federal government's criminal law powers but then he simply ignored the first part. Like conjurers, La Forest and his supporters made the requirement that the criminal law be drafted in the form of a prohibition backed by a penalty just disappear into thin air. For La Forest, there was only one limitation on the federal government's power to enact criminal laws which is that it cannot be used illicitly—that is for an improper or 'colourable' purpose. Without ever saying so explicitly, the majority simply turned its back on the Court's prior rulings and substituted a new, one-dimensional, open-ended test of the public welfare and the prevention of socially harmful behaviour that effectively imposed no restrictions on what the federal government could or could not do.\(^{130}\)

Professor Beatty's concerns go beyond the impact of Hydro-Québec on the predictability of federalism to an even broader issue—the nature of the judicial role in federalism:

Building different tests of constitutional validity into the different heads of power in s. 91 fits hand and glove with a subjective theory of law. Making each section a separate and distinct category gives each judge a discretion as to which part of the constitution will govern a case and so effectively control which rules of constitutional law will apply. Without any obligation to explain or justify why a law like C.E.P.A. is evaluated under one head of power rather than another, each judge is able to choose the category and the constitutional test that will allow them to come to the conclusion that is most consistent with their own personal and political views about the case....

...La Forest's judgment strips the law of the objectivity and determinacy on which its integrity depends.\(^{131}\)


\(^{129}\) Beatty, supra note 61.


\(^{131}\) Ibid. at 610 and 612 respectively.
A central component of Professor Beatty's critique of *Hydro-Québec* is that the Court could have achieved the same result without sacrificing constitutional principles and precedents. He argues that the Court missed an opportunity to apply POGG, which had already been used in an environmental context by the Dickson Court in *Crown Zellerbach*.\(^{132}\)

Had the Court respected its earlier precedents and assessed the constitutionality of C.E.P.A. under POGG, not only could it have validated the federal government's objective of establishing minimum national standards against toxic pollution, it could have demonstrated and elaborated how the principle of provincial inability (or subsidiarity as it is known in other parts of the world), that the federal government is required to meet when it acts under the authority of the residual clause, establishes an objective and normatively attractive standard for coordinating federal and provincial initiatives on this or indeed any other matter of common concern.\(^ {133}\)

The principle of subsidiarity referred to in the above quotation has been explored by Dean Peter Hogg and placed in a Canadian context by him:

The provincial inability test, with its high threshold of justification for federal action, plainly reflects a notion of subsidiarity. Power must be exercised at the provincial level, which is nearest to the people, unless the provinces are unable to deal effectively with the issue; only then may action be taken at the more distant national level.\(^ {134}\)

These ideas fit with Professor Beatty's arguments for maximizing all levels of sovereignty both local and national.\(^ {135}\)

There has been much speculation about why Justice La Forest opted for expanding the federal criminal law power rather than applying the federal general power but the following analysis is widely accepted:

Justice La Forest (L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ., concurring) selected section 91(27) as the CEPA's true constitutional home, rather than Parliament's residual power to legislate in relation to peace, order and good government or, "pogg", found in the opening language of section 91. He did so for two reasons. First, *RJR MacDonald Inc. v. Canada (Attorney General)* endorsed a broad regulatory component for the criminal law power which appeared to accommodate the legislative regime under attack in *Hydro-Québec*. Second, pogg should rarely be invoked for it radically alters the division of federal and provincial legislative powers set out in the *Constitution Act, 1867*. When applied, it removes matters from legitimate provincial regulation and assigns full legislative power over them to Parliament. The potential disruption to federalism would be far greater if the CEPA were sustained under pogg rather than the criminal power.\(^ {136}\)

It is ironic that Justice La Forest's attempts to produce a balanced federalism have been widely criticized for doing just the opposite. There are some flaws in the two basic propositions that led Justice La Forest to select the criminal law

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\(^{133}\) D. Beatty, "Polluting the Law to Protect the Environment" (1993) 9 *Const. Forum* 55 at 57.

\(^{134}\) P. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 *N.J.C.L.* 341 at 349.

\(^{135}\) *Supra* note 67.

\(^{136}\) *Supra* note 128 at 155-56.
power over POGG. While *RJR-MacDonald*¹³⁷ does endorse a regulatory component for the criminal law it does so in the context of the *Tobacco Products Control Act*, which does have a clear prohibition unlike the *Canadian Environmental Protection Act* (CEPA) at issue in *Hydro-Québec*.¹³⁸ There is a difference between a statutory regime which has regulatory components and one which is in pith and substance regulation. *Hydro-Québec* comes far closer to the latter situation than does *RJR-MacDonald*. In fairness to Justice La Forest it can be argued that this distinction between prohibition and regulation is unduly formalistic and that in functional terms CEPA does involve a form of prohibition as well as regulation.

The debate on his second proposition—that using the criminal law power leaves more room for provincial jurisdiction than using POGG—is more complex. There is no doubt that the federal criminal law power leaves room for concurrent provincial laws that do not conflict with federal ones in the same field. This long-standing proposition has been supported by the Laskin and Dickson Courts as well as the Lamer Court. There also have been concerns about using POGG in its national concern guise because of the potential for permanently altering the balance of federal and provincial powers.¹³⁹ In this context it is not surprising that Justice La Forest chooses the criminal law power as the least intrusive way to proceed:

I make these remarks because, in my view, the impugned provisions are valid legislation under the criminal law power—s. 91(27) of the *Constitution Act, 1867*. It thus becomes unnecessary to deal with the national concern doctrine, which inevitably raises profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power.¹⁴⁰

In taking this approach Justice La Forest is consistent with his dissenting views expressed in *Crown Zellerbach*¹⁴¹, where he expressed concerns about applying the national concern branch of POGG to environmental problems. Justice La Forest expresses particular concern that the invocation of POGG prevents provincial governments from exercising concurrent jurisdiction.

The national concern doctrine operates by assigning *full power* to regulate an area to Parliament. Criminal law does not work that way. Rather it seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health. In the criminal law area, reference to such broad policy objectives is simply a means of ensuring that the prohibition is legitimately aimed at some public evil Parliament wishes to suppress and so is not a colourable attempt to deal with a matter falling exclusively within an area of provincial legislative jurisdiction.¹⁴²

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¹³⁷ *Supra* note 120.
¹³⁹ *Reference re Anti-Inflation Act*, *supra* note 89. Beetz J., adopting the analysis of Professor Lederman, emphasizes the careful limits that must be placed on the national concern doctrine.
¹⁴⁰ *Supra* note 115 at para. 110.
¹⁴¹ *Supra* note 132.
¹⁴² *Supra* note 115 at para. 128 [emphasis added].
The broad assertion that the use of the national concern branch of POGG prevents concurrent provincial legislation is in line with the views expressed by Justice Beetz for the Court in Reference re Anti-Inflation. However, this clear position has been clouded by the majority decision of Justice Le Dain in Crown Zellerbach where he at least leaves open the possibility of concurrent provincial legislation where the federal government is acting under the national concern branch of POGG. In explaining the provincial inability test as a pre-condition to the exercise of federal jurisdiction, Le Dain states:

As expounded by Professor Gibson, the test would appear to involve a limited or qualified application of federal jurisdiction. As put by Professor Gibson at pp. 34-35, “By this approach, a national dimension would exist whenever significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the “P.O. & G.G.” clause bestows only residual powers, the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers.”

Justice Le Dain goes on to acknowledge that such an approach appears to conflict with the earlier position of Justice Beetz in Reference re Anti-Inflation but fails to resolve the apparent conflict. This situation has caused many academics to conclude that there may be room for concurrent provincial legislation even when the federal government has invoked the national concern power. Professor Hogg among others also argues that

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143 Supra note 89 at 444. Beetz J., contrasts this branch of POGG with the emergency branch, which does allow for concurrent jurisdiction.

144 Supra note 132 at 432-33.

145 Supra note 132 at 433.

146 Deimann, supra note 138 at 933. After citing La Forest J.’s reasoning on this point in Hydro-Québec he summarizes the academic commentary in note 58 as follows:

earlier cases from the Court on national concern did recognize a concurrent provincial jurisdiction. Thus one of Justice La Forest’s major reasons for preferring the federal criminal law power to POGG may well be a false premise.

Decisions like the one in Hydro-Québec have left some commentators speculating about whether the federal criminal law power has become a proxy for POGG as the main centralizing federal jurisdiction:

Whether or not the criminal law power has become a proxy for national concern is too early to tell. Presumably there is a more restricted scope available under the criminal law power than there would be under an increasingly expanding national concern doctrine.

Professor Baier suggests that whether the route is POGG or one of the enumerated federal powers, the Court has been on a centralizing course with respect to federalism in Canada. He also suggests that this is a trend to which legal commentators from Québec are more alert than those from elsewhere in Canada. The continuance of this centralizing trend (albeit in a different guise than before) would appear to be one of the Lamer Court’s legacies to federalism.

Many critics have argued that following Hydro-Québec, the scope of the federal criminal law power is too broad and open-ended. Dean Hogg expresses some concern about Hydro-Québec’s extension of the recent trend towards regulation under the criminal law power. It also seems likely that Justice La Forest’s decision in Hydro-Québec would not win praise from Professor Swinton. She would likely see the decision as more in line with the federalist bias of the late Chief Justice Laskin than the balanced approach of the late Chief Justice Dickson. By the standard of the umpire applying neutral principles, the Lamer Court in Hydro-Québec does not score well.

An application of the umpire metaphor leads to the conclusion that the terms prohibition and penalty should be defined narrowly so as to limit the scope of the federal criminal law power. However, I argue that using a narrow definition of prohibition and punishment to decide what fits under s.91(27) potentially leads to two equally undesirable outcomes. The first is that Parliament could continue to legislate in the area of the environment, or similar complex areas, but could only pass legislation in a “prohibition and punishment” form.

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147 P. Hogg, supra note 54 at 17-4 (fn 13) argues that there was some recognition of concurrent provincial jurisdiction in earlier national concern cases such as Munro v. National Capital Comm., [1966] S.C.R. 663.


149 Ibid. at 302-03. He cites H. Brun and G. Tremblay, Droit Constitutionnel 2nd ed. (Cowansville: Yvon Blais, 1990) at 492 as one example.

150 Supra note 54 at 18-28.

151 Supra note 75.
that is unable to deal effectively with very complex issues. The second possibility is that Parliament could confine its legislative ambit to those matters that can be effectively dealt with through prohibition-punishment type legislation. The problem with this option is that though Parliament may wish to pursue a valid public purpose by passing criminal legislation on a certain matter, it would have to refrain from doing so if the matter is too complex to be effectively dealt with through prohibition-punishment legislation. This appears to be a somewhat arbitrary limitation of Parliament's authority, and could leave legislative gaps in areas where a valid criminal purpose demands that effective legislation be enacted.

One way to solve this problem would be to do as many academic critics suggest and use the POGG power to justify such legislation. This perhaps accords better with our Canadian concept of federalism, in that the federal government's authority to pass regulations would be limited to matters of national concern. This appears to me to be a rational limit on federal power, something which does not clearly exist under the criminal law power as described in Hydro-Québec. As my earlier discussion of La Forest's decision in Hydro-Québec indicates, the Court has been reluctant to use POGG because of a fear that the application of POGG would exclude the concurrent jurisdiction of the provinces. However, it is far from clear that such a conclusion is supported by the Court's earlier jurisprudence. To the extent that there is any controversy about this matter, the Court in its role as a constitutional player and a maker of law can resolve the dispute in favour of allowing validity-enacted provincial legislation to exist concurrently with federal legislation enacted under the national concern branch of POGG.

152 Justice La Forest's point in Hydro-Québec that allowing an administrative body to set specific levels of permitted concentrations is the only effective way of "tailoring the prohibited action to specified substances used or dealt with in specific circumstances" (Supra note 115 at para. 151) is challenged neither by the academic critics nor by then Chief Justice Lamer and Justice Iacobucci in their dissenting judgment. Environmental problems are, by nature, nebulous, complex, and constantly evolving. Forcing environmental legislative schemes to take a narrow "prohibition and punishment" form would prevent them from having the flexibility and adaptability to adequately address such a dynamic area.

153 Writing before the decision in Hydro-Québec, Mark Walters explored the virtues of POGG as the primary vehicle for responding to environmental problems and as a potential "constitutional safety valve":

The p.o.g.g. clause is capable of capturing in a legal, constitutional sense the "spatial quality" of the environmental effects of resource management; it is, in short, a mechanism which serves to trigger the correct allocation of power at any given time depending on the degree of environmental externality involved. (M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 Alta. Law Rev. 420 at 442.)

It is likely that Walters, like many other people concerned with the protection of the environment, would welcome the expansion the extension of federal jurisdiction through the federal criminal law power as an addition to, rather than a substitution for the exercise
An alternative solution is provided by the flexible and functional approach that Justice La Forest brings to the federalism issues raised in Hydro-Québec. This decision has been much-criticized.\(^{154}\)

While the outcome of environmental protection in Hydro-Québec is undoubtedly desirable, the more difficult question concerns whether the decision was a positive contribution to the law of federalism. Like many of the commentators on this decision, I believe that Hydro-Québec expands the scope of the federal criminal law power, making the prediction of what constitutes criminal law jurisdiction more open-ended and less predictable. However, unlike many of the critics, I do not believe that in deciding Hydro-Québec the Court overstepped its role. As I have argued, the role of the Court is not that of a neutral umpire but rather that of a player forced to make value choices in the contextual game of constitutional interpretation. There is always a tension in the law between certainty and flexibility, and the Court in Hydro-Québec chose flexibility, so a certain lack of predictability and structural tidiness is the price that must be paid.

Some unpredictability, otherwise known as flexibility, has long been typical of Canadian federalism. Professor Monahan notes that:

One of the key advantages of the existing division of powers is its flexibility. Because the categories in sections 91 and 92 of the Constitution Act, 1867 fail to explicitly divide many of the important functions of contemporary government, the current system is characterized by extensive functional concurrency. This has permitted a whole range of flexible devices and arrangements to be created that have enabled Canadian governments to respond to changing circumstances.\(^{155}\)

The flexibility of the original division of powers in the Constitution Act, 1867 is celebrated by some judges as well as legal academics who favour a functional and context-specific approach to federalism. The late Chief Justice Bora Laskin while a legal academic observed that:

Our constitutional case law offers enough choices for fresh beginnings to enable a court to mark out a new trail without doing violence to judicial techniques.\(^{156}\)

\(^{154}\) The criticism has come largely from legal academics. Hydro-Québec has been more favourably received by those whose primary concern is the protection of the environment. See, for example: D. Robins, “The Impact of federalism on environmental law and policy: R. v. Hydro-Québec” (1999) 9 Windsor Rev. Legal and Social Issues 137.

\(^{155}\) P. Monahan, L. Covello & N. Smith, A New Division of Powers for Canada (Toronto: Centre for Public Law and Public Policy, 1992) at 36. They argue that the approach maximizes jurisdiction at all levels and suits the need to respond to new problems, such as protecting the environment.

While Justice La Forest makes a new departure in *Hydro-Québec*, he does not, in my view, do violence to the precedents and techniques that went before, nor overstep the role of the Court in federalism. Indeed, Justice La Forest can be seen in the tradition of the late Chief Justice Laskin, in making choices that leave his mark on the Constitution.

**IV. Concluding Thoughts: The Supreme Court and Federalism**

Since I have stated my conclusions in each of the preceding parts there is no need to repeat them here in any detail. Suffice it to say that federalism is still important even if it occupies a smaller portion of the Court’s agenda. There are many different views about the proper role of the Court in federalism cases but a majority of people call for the continued metaphor of the Court as a neutral umpire. I conclude on the basis of an analysis of the Laskin, Dickson and Lamer Courts that it is more accurate to consider the Court’s role as one of a restrained player, rather than a neutral umpire. A frank acknowledgement of this role, and its recognition of the inherently political dimensions of interpreting the division of powers, allows for a fairer assessment of the Court’s performance. This leads me to conclude that the Lamer Court’s watershed ruling in *Hydro-Québec* is not a violation of the proper role of the Court in federalism matters, though many critics suggest it is.

The approach of the Court to matters of federalism has changed from a formalistic and rigid analysis (epitomized by the Privy Council era) to a more functional and flexible approach focused on the real-life effects of decisions and not just on doctrinal symmetry. The increasing use of extrinsic evidence and the growing diversity of judicial sources add to the ability of the Court to adapt federalism theory to the changing demands of a complex Canadian society. This point is well illustrated in the response of the Lamer Court to problems of environmental pollution.

That is not to suggest that the Court plays the same political role in matters of federalism as the elected politicians. To the extent that the Court is a player, it is a restrained one. It must operate within the limits of the judicial role and ultimately be accountable to the text of the Constitution and the expectations of the interpretive community within which the Court operates. In that respect I am attracted to Swinton’s description of the Court as facilitator of the primary political process.\(^\text{157}\)

A good illustration of the tension between judicial discretion and limits can be seen in the move of the Court towards functional concurrency and away from the doctrines of water-tight compartments and exclusive spheres. The latter more formalistic approach would impede the evolution of federalism and its adaptation to new circumstances. However, the Court must still operate within a text that grants federal paramountcy. Well-established doctrines such as

\(^{157}\) *Supra* note 24.
mutual modification, the aspect doctrine, colour ability and the definition of conflict do place some limits on the march to concurrency. The formalist side of federalism has not been completely abandoned. The Court has not rejected the claim of the federal government to exclusive jurisdiction over the implementation of treaties as articulated in the *Labour Conventions Case*.\(^{158}\) There has been much criticism of this case and this may be one of the important challenges facing the McLachlin Court.\(^{159}\) The growing importance of international treaties and the general globalization of society makes the implementation of treaties a likely contested terrain.

The McLachlin Court will face the perennial challenge of striking the proper balance between federal and provincial powers. With all the limitations discussed earlier about the limits of the Chief Justice’s influence over the decisions of the Court, it is interesting to note that Chief Justice McLachlin concurred with Justice La Forest in *Hydro-Québec*. She was also part of a unanimous decision delivered by the Court in *Reference re Firearms Act*\(^{160}\) — which raised more complex political questions than legal ones\(^{161}\) — and adds little to the doctrine of the federal criminal law power, as developed by the Lamer Court. Then Justice McLachlin did dissent in *Westcoast Energy*,\(^{162}\) coming down on the side of provincial regulation, but it would be unfair to suggest that this was typical of her views on federalism. It is also unclear whether there is likely to be any successor to Justice La Forest in the McLachlin Court as the Justice (other than the Chief Justice) who might take the lead in matters of federalism. It is predictable that the McLachlin Court will continue the functional and effects-based approach to federalism, informed by a wide range of extrinsic evidence, and that is a good thing. Recent Courts have served Canadians well on matters of federalism and the McLachlin Court is likely to continue this tradition into the twenty-first century.

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\(^{158}\) [1937] A.C. 326.


\(^{160}\) 2000 SCC 31.
