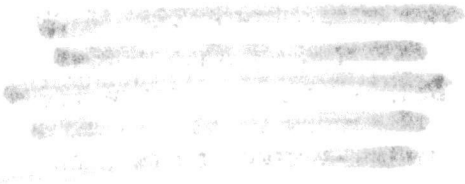
# *The Supreme Court of Canada as an Instrument of Political Change*



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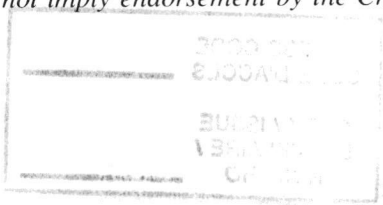
*The studies contained in this volume reflect the views of their authors and do not imply endorsement by the Chairman or Commissioners.*



IVAN BERNIER and ANDRÉE LAJOIE
Research Coordinators

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# FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

# INTRODUCTION

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

*Economics* research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

# PREFACE

This volume of research is part of the output of the Royal Commission research program on Law and Constitutional Issues, and falls within its section entitled Law, Society and the Economy. This section serves as both an introduction and background to all the Commission's research on law. It analyzes how law has evolved under the pressure of social and economic changes and how it in turn has brought about changes in Canada's social and economic conduct. Our objective was to highlight the relationship of law to the state, society and the economy. Our ultimate aim was to show how law affects Canadian society and to reveal its potential and limitations as an instrument for implementing government policy. In particular, we have addressed criticisms that focus on the multiplication of laws, regulations and tribunals as instruments of state intervention; on the complexity of our legal system and its essentially conflictual nature; and on the confusing character of the law and its apparent incapacity to respond to the needs of all Canadians.

We trust that with the inventory taken and the conclusions drawn in this section, we have provided the Commission with insight into one of the most fundamental issues confronting it — the role of the state in Canadian society. For to ask what is the role of the state is also to question the role of law.

The three studies included in this volume look at the Supreme Court as an instrument of change and try to evaluate its impact from that point of view. This is not an easy task as legal ideology puts law above society and its interpretation beyond the reach of political pressures and considerations. The Supreme Court's tendency to view itself as fundamentally neutral and apolitic does not make the task easier.

Guy Tremblay, in his paper, adheres to a certain extent to this ideology

of neutrality. He describes the Court as fundamentally non-interventionist and he views its products in political terms as a balance between centralist and decentralist forces and an encouragement to greater intergovernmental cooperation. For him, indeed, the Court has acted as an instrument of stability in a system prone to generate conflicts. Monahan views the Court quite differently. In his paper on the Supreme Court and the economy, he argues that the Court analyzes economic issues using a common set of assumptions, categories and arguments that define certain sorts of results as presumptively illegitimate and that therefore foreclose prematurely on the range of doctrinal possibility. In his view, there is no doubt that certain types of political arguments have been consistently eschewed by the Court. This should not be taken to mean that its judicial choices have been neutral or apolitical. Finally, Andrée Lajoie, Pierrette Mulazzi and Michèle Gamache consider the role of the Supreme Court in adapting the Canadian Constitution to changing political realities, having in mind in particular the evolution of political ideas in Quebec. Their conclusion is that far from being neutral, the Court has been influenced by political events and realities, but in a way that has rarely conformed to dominant political ideas in Quebec.

In the end, what comes out from these three studies is a view that the Supreme Court's contribution to change and adaptation has been somewhat limited. Whether the introduction of the Charter will change what appears a fundamental attitude of the Supreme Court remains to be seen.

IVAN BERNIER
ANDRÉE LAJOIE

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I.B. and A.L.

1

# Political Ideas in Quebec and the Evolution of Canadian Constitutional Law, 1945 to 1985

ANDRÉE LAJOIE
PIERRETTE MULAZZI
MICHÈLE GAMACHE

## Introduction

Canadian constitutional law since World War II has been influenced by a number of widely varying social factors. Among them should be noted remote economic and structural influences, undoubtedly resulting from the centrifugal forces preceding the concentration of capital, the requirements for exploitation of capital, and the need to adapt market sizes to the size of economic units in which the conditions determining profitable economic activity have changed. Since Confederation was a product of these forces, how could it escape their influence as it matured?

However, despite the strength of these variables there is room left for others in the relatively independent political arena, factors which have just as important a role to play in constitutional change. It was these considerations that drew our attention to the major political currents, on the provincial level, that have characterized the Quebec scene since World War II. We wanted to discover how they relate to the way in which the Constitution has developed, given that its original form was in part a result of Quebec's participation in the union.

Wisdom, even more than a desire to play by the rules, requires that we note that our study is both problematical and hypothetical.

If we were to consider the social factors in the development of the law only in relation to the enactment of statutes and regulations, we would encounter significant theoretical problems. There are some who believe that we may explain the actions of Parliament by examining how they reflect the social context of the legislation as exhibited in the work of parliamentary commissions and in public discussion. On the other hand, there are those who see these forums and debates as themselves the

effects of pre-existing economic and structural determinants, which though remote are unavoidable and are the real causes of the way in which the law and the accompanying debates develop.

During the period studied, Canadian constitutional law rarely changed as a result of legislative amendment. (The most important exception to this rule was, of course, the inclusion of the Canadian Charter of Rights and Freedoms in the Constitution when it was patriated in 1982.) This should not be surprising, since a specific characteristic of constitutional law is that it is more difficult to amend than other forms of law. The phenomenon may be more marked in Canada, where Quebec opposed patriating the Constitution with an amending formula and was successful in this opposition until 1982. This is in no way to deny the constitutional change that has occurred since 1945; it is simply to note the important role played by the courts and by constitutional negotiations.

This characteristic of Canadian constitutional law does, however, make it more difficult to relate legal developments to the factors that might help explain them. The question becomes how to establish the connection between political theory and practice during a particular period in Quebec and the decision of a court in a specific case. Clearly the courts could not themselves select the issues on which they would rule, except by refusing leave to appeal; and they were in any event restricted to the issues submitted to them, cases that were necessarily characterized by the interests of the individual parties, interests whose connection with the political issues in their society is hardly obvious.

In effect, we began by making a wager, for our premise is much more like a wager than a hypothesis proper. This is a luxury permitted us in a discipline still as largely unstructured as is the law as an object of research, as compared with the law as an objective construction. The wager was that we would find that the constitutional disputes that reached the Supreme Court of Canada cannot be entirely dissociated from their social context, any more than can the thought underlying the decisions rendered by the Court in such disputes.

We may state confidently that the conflicts that arise between individuals in a society, including legal conflicts, are connected to the most significant productive activities in that society. An example of this relationship may be found outside constitutional law in the subject matter of civil actions that have come before the Quebec courts since the 19th century. Jean-Louis Baudouin's unpublished survey indicates that while the most popular sources of litigation were initially damages for defamation and injuries suffered by pedestrians who fell on ice, these actions gave way to those arising from injuries on the job and more recently (following the establishment of the Workers' Compensation Board, as if by accident) have been replaced by automobile accident litigation (until the establishment of the Automobile Insurance Board,

again as if by accident). The Quebec courts are now developing a major preoccupation with medical malpractice and professional malpractice in general. The connection between these disputes and their social context is clear.

Moreover, and it is this hypothesis from which we begin, each of the social issues that generated these legal disputes was, at the time when the legal activity was taking place, the source as well of political debate among the groups affected and the subject of political action. Consequently, they were settled by the courts on the basis of the dynamics of the political power relationships.

More specifically, conflicts that arise in a particular set of circumstances and are then submitted to the courts, and eventually to the highest constitutional forum, will not likely be divorced from the fundamental political issues of the day in the society in which they arise. Too much intellectual, legal and physical energy must be devoted to this kind of exercise for it to be invested in trivial cases unconnected to society's concerns, particularly when the constitutional exercise is undertaken in order to determine legislative jurisdiction, one of the fundamental issues in a federal system. The resources of the Supreme Court are too limited for it to do otherwise than to choose (insofar as it can make choices through its power to grant leave to appeal) to hear only those cases in which the state of the constitutional law is as yet undecided and is still a social issue precisely because of the lack of political consensus on the questions raised. In a federal country, the form of government may mask fundamental political and social conflicts but cannot suppress them.

Not all political questions have a constitutional dimension, and not all those that do will reach the courts, particularly the Supreme Court. On the other hand, not all the cases heard by the Supreme Court relating to the distribution of legislative powers will necessarily have a political dimension apart from the specific constitutional question raised. In a federal system, however, such questions can easily be turned into political issues. As a result, such cases themselves, or at least the underlying constitutional principles that will be affirmed or rejected by the highest court of the land, will necessarily have an impact on political debate, and particularly on the conflict between the dominant political ideas of the parties in power and the ideas of the parliamentary or extra-parliamentary opposition seeking to acquire that power.

It is this relationship between politics and law that we will attempt to establish, a relationship as broad as the subject of the macroanalysis from which it is drawn, but nevertheless, and perhaps even more significant, the relationship between contemporary political thought in Quebec and the development of Canadian constitutional law from 1945 to 1985.

We will certainly not find a causal relationship in the strict sense of the expression. We would note as well, without going into the perpetually

unsettled question of causality in the social sciences, that it is questionable whether true causal relationships exist at all in this field. Nor can we really claim to speak of correlation. Rather, we may see objective convergence or divergence between, on the one hand, political thought, both dominant and opposition, and the constitutional demands arising out of that thought and, on the other, the constitutional decisions of the Supreme Court and the constitutional practices of the federal government. While these convergences or divergences may not be causal, properly speaking, they are not brought about by chance. They permit us to gauge the social climate in which the legal and political decision makers are steeped and to plot the path they choose between the two poles of an unsettled federalism.

With this explanation of the basis of our study, we move on to the question of its scope, the methodology used, and the limitations of the work. We have already noted that when we refer to changes in constitutional law, we mean both the legislative amendments to the *Constitution Act, 1867* between 1945 and 1980 (then known as the *British North America Act, 1867*) and the changes in the manner in which the Constitution was interpreted by the Supreme Court as its ultimate interpreter. Our study will concentrate on the latter aspect, in view of the parallel work being done by Daniel Soberman on the first. We have simply noted the 1982 amendments, given the importance of the changes, and related them to the political ideas circulating in Quebec on the subject. However, we have not ignored those changes that have resulted from constitutional practice, outside the formal process of amendment but nonetheless affecting that process.

We will analyze the jurisprudence of the Supreme Court from 1945 to 1982, according to a set of variables including the composition of the bench; the date at which the situation in question arose; the date of the decision; the origin and subject matter of the decision; the reasons of the Court and the constitutional theories or doctrines on which the decision is based; the participation of attorneys general; and the gains made by the provinces or the federal government as a result of the decision.

As an aid to understanding this process, we have distinguished three phases in the evolution of law and constitutional issues during the period that concerns us here. These phases do not always coincide for constitutional activities (legislation, programs, conferences) and constitutional decisions of the courts, since the latter can rule only after the fact, on conflicts that come to them for decision. On the whole, however, we assume that two turning points occurred, in 1960 and around 1975, with the qualification that we will include in each period those cases that were begun during the period even though they may not have been decided until later.

The first period, from 1945 to 1960, was that of unilateral federalism. In constitutional terms, World War II had not really ended: all the legis-

lative mechanisms justified by it (fiscal agreements, "renting" income tax jurisdiction) were still in place. Arguing the need for a rational organization of the political arena and regulation of the "tax jungle," the federal government had the lead, particularly in the fiscal and social fields. It was during this period that the tools for federal spending powers were created. In Quebec, the Tremblay Commission made a number of proposals, including a new and less unilateral system of income tax.

Toward the end of this period, in 1957, during a time of numerous federal-provincial conferences, the concept of equalization payments with no political conditions first appeared, followed closely by the establishment of programs which, on the contrary, imposed strict limitations on the provinces' powers in the most important of their legislative spheres.

During this time, the courts were developing a very centralist concept of Confederation.

The Supreme Court was still making these centralizing decisions when the scene for constitutional activity had already changed. The provinces began to participate in the debate, although the federal government had in no way given up the initiative. In Quebec, the Caisse de dépot and the new pension plan were established. The emphasis in the political arena was moving toward questions of health, energy, economic planning, the environment, and consumer protection. This form of federalism, which we refer to as bi-polar, lasted from 1960 to 1975. During this second period, a shift to another kind of negotiations took place which, while not amounting to true decentralization, provided for opting out with compensation.

The same unavoidable delays can be observed in the work of the Court during this period as during the preceding years. Thus it is not until the 1970s that we begin to see decentralization in the decisions of the Supreme Court, particularly in dealing with conflicts that had arisen after 1968.

The third period began in 1976 and culminated in the patriation of an amended Constitution in 1982. This period overlaps the previous one in that the first proposals for constitutional reform came from the provinces and were formulated by Ontario in about 1968. The federal government, however, rapidly regained the initiative. The issues raised dealt with aspects of the distribution of powers, which was already in question, and with the new issues of the Charter of Rights and the economic union.

The provinces' demands were focussed on the distribution of powers, particularly those powers believed to be capable of indefinite extension: the spending power, the declaratory power, the power of expropriation, and powers based on theories of interpretation such as emergency powers and the national dimensions doctrine. In the West, the provincial governments claimed wider provincial jurisdiction over natural resources; in Quebec, the government demanded the right to control

immigration and social security. At the top of Ottawa's agenda were individual rights and institutional reform, with a new and even more aggressive version of the spending power waiting in the wings.

This study is an examination of these developments in Canadian constitutional law since 1945, taking as its starting point the prevailing political ideas in Quebec, in order to determine the extent to which they influenced the emergence of constitutional law as it exists today. For this reason we are concerned with the manner in which the constitutional debate unfolded in Quebec, as well as in the manner in which the various participants in the political arena dealt with the question.

The constitutional question in Canada became a major political issue, and the positions taken in the debate became increasingly polarized. This process of polarization is evidenced by the creation of a number of commissions of inquiry (Sirois, Tremblay, Laurendeau-Dunton, Pépin-Robarts) and, in Quebec, of a Constitutional Committee, together with the États généraux and the referendum. We have seen as well a proliferation of federal-provincial and interprovincial conferences on the Constitution. As a result of these various events, political parties in Quebec have been forced to define their positions, in their own programs, during election campaigns, or when significant events relating to constitutional negotiations occurred.

We have therefore analyzed the constitutional proposals of the various participants both synchronologically (by comparing them to their adversaries' positions) and chronologically so as to observe the various forms they have taken in different circumstances.

We are also aware that we cannot understand the positions taken by the participants without examining the social forces that supported them and the extent to which they won public acceptance. We therefore sought to define the groups that formed the constituency of each of these participants, where appropriate, and whose contribution added to the constitutional debate. We have not, however, undertaken any analysis of the ideological praxis of these groups, since such a consideration would be outside the scope of our research.

We have analyzed the development of constitutional law in each of the three periods by examining three themes: distribution of powers, civil liberties, and political and legal institutions. We have not, however, gone beyond the primary constitutional proposals put forward by the provinces. This limitation was deliberate and carefully considered. Our research is not intended to be a discussion of Canadian political issues, but rather an examination of the relationship between Canadian constitutional law and political thought in Quebec on issues of provincial concern.

We have analyzed the convergences and divergences between the law (centralization or decentralization of power, the primacy of individual or collective rights, reform or retention of institutions) and the primary

currents of political thought (dominant government thought, and parliamentary and/or extra-parliamentary opposition thought). We have thus been able to determine the extent to which the constitutional proposals put forward in the political arena in Quebec have been taken into consideration (described here as "a positive relationship") or ignored or opposed (a "negative relationship"). These relationships in the evolution of Canadian constitutional law have been studied from the three aspects: legislation, case law, and constitutional practice.

## The First Period (1945–60): Unilateral Federalism

The political thought of the period concerned itself with a number of constitutional elements: the dominant government thought, Duplessis' argument for provincial autonomy (to be attained through the distribution of powers set out in the *Constitution Act, 1867*); challenges to the fiscal agreements put in place during World War II; and the question of whether federal institutions were truly representative. This analysis might lead us to the conclusion that there is, on the whole, a negative relationship between these currents of political thought and the developments in constitutional law emanating from the Supreme Court. In fact the decisions of the Supreme Court ratified none of the claims put forward on behalf of the community where a majority supported them. This is true whether it is a question of the distribution of powers, which the Court tended to centralize; institutional structures, which it upheld; or civil liberties, which it affirmed. The ideas advanced by the intellectual, political and labour opposition in Quebec in the field of civil liberties received more favourable treatment, however.

The situation was somewhat different for constitutional practice. Both Duplessis and the opposition categorically refused the agreements proposed by the federal government, with the result that some of the pervasive effects of the powers of the central government were held in check until the next period.

### *Distribution of Powers*

The most striking element in the decisions of the Supreme Court during this period with respect to the distribution of powers is the Court's tendency to support the central government's claims, particularly with respect to labour law, trade and commerce, taxation, criminal law and economic planning. The efforts of Quebec at the time were directed toward ensuring faithful adherence to the distribution of powers contained in the *Constitution Act, 1867*. Clearly the Court did not give expression to that position.

One point, brought to light by this research, has been unnoticed up to now. Almost all the Court's decisions were reached without the par-

ticipation of Quebec. Of the 33 decisions dealing with the distribution of powers, only two[1] concerned disputes in which the cause of action arose in Quebec.[2] As the proverb says, "Out of sight, out of mind."

How can we explain the absence of Quebec from the constitutional forum during a period when the jurisprudence was developing in a manner so contrary to the province's interests? We shall see that Quebec's absence arose out of the characteristics and thought peculiar to the Duplessis government, particularly its conservative concept of the role of the state and of the Constitution. We shall also see that this constitutional position was ultimately adopted by the opposition. Both parliamentary and extra-parliamentary, this opposition was primarily interested in economic and social questions and in the whole question of democracy. It paid little attention to *la question nationale*, or challenged the merits of the position, and never overstepped the bounds of "*autonomisme*," Duplessis' version of conservative federalism.

Canadian constitutional law also evolves through the parallel political process, through agreements that often twist the spirit, and sometimes the letter, of the Constitution. There has been no shortage of such agreements. Dominant political thought in Quebec at the time, which coincided with opposition thought on the issue of adherence to the distribution of powers established in 1867, was more successful in these agreements than it was before the Supreme Court.

We thus find two significant facts in our consideration of the constitutional distribution of powers in the context of the Quebec-Ottawa relationship during the period 1945–60: Quebec was absent from the legal forum where the Constitution was being interpreted by a relatively centralist Supreme Court, but was actively present in the process of constitutional practice.

### *The Supreme Court: Centralization in the Absence of Quebec*

Despite a number of minor concessions to provincial jurisdiction over property and civil rights[3] and taxation,[4] it would be accurate to say that the dominant tendency in the Supreme Court during this period was centralization. There were two main aspects to this tendency: restriction of provincial jurisdiction with corresponding expansion of federal jurisdiction where the federal legislation touched upon matters within provincial jurisdiction; and the extension of the federal jurisdiction itself on the basis of doctrines that encroached increasingly upon provincial jurisdiction.

During these years, the Supreme Court in fact moved out from the influence of earlier decisions of the Privy Council.[5] The Court reduced the significant constitutional gains the provinces had made with the help of the British court, which had enshrined provincial sovereignty in their spheres of power, within which spheres the provinces were as sovereign as was the federal government in its own.[6] In the eyes of the Judicial

Committee of the Privy Council, the *Constitution Act, 1867* demanded a generous interpretation.[7] The Judicial Committee had interpreted subsection 92(13) of the act broadly: in particular, it included intraprovincial commerce[8] and labour relations.[9]

We shall consider this second theme with reference to a series of decisions beginning with the *Stevedoring* and *Bell Telephone* decisions, which cut into provincial jurisdiction over property and civil rights to create a federal reserve, the importance of which should not be underestimated.[10] This was the basis of the doctrine of legislative construction in constitutional questions that we shall designate the "intrinsic elements" doctrine. This interpretive device includes in federal competence any element related in any way, however remote, to the heading invoked.[11]

The question of the extraprovincial nature of an enterprise,[12] when relied on alone[13] or together with the "intrinsic elements" doctrine,[14] further opened the spheres of provincial jurisdiction under the Constitution to federal intrusion in the areas of labour relations, which had until then been considered by the Privy Council to fall under the heading of property and civil rights. Since that time, an analogous reasoning has been used to reduce further this field of provincial jurisdiction (despite the broad terms in which it was originally formulated) in the name of a no less broad definition of interprovincial trade and commerce.[15]

But it was in the field of economic planning, which is so closely related to property and civil rights that if it had been an area of federal jurisdiction it would surely have been considered to be an "intrinsic element" of the federal jurisdiction, that the decisions of the Supreme Court had the greatest effect on provincial jurisdiction. This was not so much because of the broad or significant nature of the subject matter on which these decisions had a specific effect, but rather because of the doctrines on which the Court relied to support its decisions.

The Supreme Court ruled that federal rent control regulations were valid, relying on the emergency doctrine, which is of only temporary effect.[16] Then the Court, which had previously ruled that it was powerless to apply the same justification to expropriation of land needed for Wheat Board operations,[17] relied on the national dimensions doctrine, ruling that expropriations of land for the creation of an airport and the establishment of the national capital was valid.[18]

This was the contribution of the courts to the creation of the federal Parliament's indefinitely expandable jurisdiction. The written Constitution already provided for the declaratory power, and constitutional practice was developing in the same direction, through federal-provincial agreements, with respect to the federal spending power. For this reason it appeared of particular importance to reduce provincial jurisdiction over economic development, using the national dimensions doctrine. That doctrine completes the trio of indefinitely expanding

federal powers, together with the spending power and the declaratory power, and satisfied in part the needs that were attributed to the federal government by functionalist thinkers.

Any reduction in provincial jurisdiction adds to the federal government's jurisdiction, and vice versa;[19] thus it is somewhat artificial to distinguish between early decisions, which reduced provincial powers, and later decisions, which expanded federal power. However, decisions relating to bankruptcy[20] and criminal law are usually considered as expanding federal jurisdiction, remembering, of course, that they come under specific headings of federal jurisdiction.

In the field of criminal law, the Supreme Court has interpreted the federal jurisdiction very broadly, except in the areas of highway traffic and, more exceptionally, securities trading.[21] It has ruled, more particularly, that crime prevention,[22] confiscation of property used in the commission of a crime, prohibition of equipment used in gambling,[23] and even the prescription of penalties for failure to observe religious holidays[24] are within federal jurisdiction.

The centralist tendencies of the Supreme Court during this period have been recognized, at least broadly, by most legal writers. Most, however, appear not to have analyzed the Court's decision quantitatively, and have therefore failed to recognize that the Supreme Court was developing this tendency in the absence of Quebec cases and, consequently, arguments.[25] These facts demand an explanation. In this study we have examined them from the point of view of political practice and ideology in Quebec at the time.

### *Context and Political Thought: Autonomy and Non-Interventionism*

Admittedly, going to the Supreme Court is not the routine matter that going to mass once was in Quebec. Unless one is recognized as an intervenor, and even then one must demonstrate sufficient interest to justify participation (as was particularly so in the period under discussion), it is impossible to go to the Supreme Court otherwise than as a party to a dispute.[26] In the context of the cases that concern us here, one would have had to be a party to a dispute in which a constitutional question was raised.

We have also hypothesized that legal conflicts in a society will develop only in relation to the prevailing productive activities in that society. This is a necessary condition. In constitutional law as elsewhere, challenges will occur at the points where restrictions chafe. This premise leads us to the hypothesis that the distribution of powers set out in the *Constitution Act, 1867* incorporated the economic model of 19th century Victorian England by implicit reference and that, by the second half of the 20th century, this distribution of powers had begun to inhibit the development

of industrial and commercial activity, which was increasingly transcending provincial borders. The inevitable result was a dispute about the manner in which labour was organized in large enterprises; about credit management and bankruptcy, which could not be dissociated from the concentration of capital, then proceeding apace; about the expansion of trade into a market of a size more appropriate to the new profit threshhold in the most productive businesses; about the development of the public infrastructures necessary to support these new economic activities; and about the growth of a new kind of urban crime, which could almost be called "industrialized." These tendencies became increasingly prominent in the postwar Canadian economy, particularly in the large urban centres, and were of course apparent in Quebec society as well, although this observation must be qualified to some extent.

World War II initiated an economic recovery in Quebec. According to André Raynauld, in 1961 Quebec had "a developed economy which had gone through a rapid process of industrialization between 1896 and 1913" [translation].[27] Thus the economic problems that Quebec had, by 1961, been facing for some twenty years had nothing to do with "the passage from a stage of underdevelopment to a stage of industrialization" [translation].[28] The problem in Quebec was thus not one of delayed economic development, since development there had closely followed the process throughout Canada, and in Ontario in particular.

Other, more recent studies indicate the same. Since the end of World War II, the Quebec economy has shown exceptional levels of growth, its rate of growth in the manufacturing sector outstripping even that of Ontario:

> Despite the demons of reconversion, industrialization in Quebec increased at a lively rate, to the point where it exceeded the rate of growth in the Ontario manufacturing sector. Industrial sectors such as electric appliances, transportation engineering, and petro-chemicals developed rapidly, but without making any substantial changes in the industrial structure, which continued to be based largely on the production of non-durable goods. International scarcity also stimulated the development of the iron ore, copper and asbestos mining industries. The development of the New Quebec which was mobilized by a number of foreign (other than the Iron Ore Co.) industrial groups was seen by the government as the best guarantee of a dynamic economy. [Translation][29]

This economic vitality translated into a high rate of employment and an improvement in the standard of living and rates of consumption: from 1941 to 1957, the unemployment rate never went above 4 percent, and both industrial wages and personal income doubled.[30]

The Quebec economy participated in the postwar boom by accelerating the exploitation of its natural resources, and particularly its hydroelectric and mineral production.[31] The secondary and tertiary sectors

also underwent expansion.[32] The agricultural sector experienced a corresponding decline, in spite of increased productivity and income, and lost its position as Quebec's leading provider of jobs.[33]

Nevertheless, despite this expansion, Quebec's problem was still that it had experienced "growth whose structural and demographic characteristics were different from those of other provinces in the country" [translation].[34] Capital and entrepreneurs entered Quebec from the United States and from other provinces in Canada. U.S. capital moved into the primary production sectors. It is estimated that in 1960 francophone Quebeckers (who made up 80 percent of the population) controlled less than 20 percent of their economy and only two economic sectors: sawmills and shoe manufacturing.[35] Quebec's industrial structure was old, being based on the manufacturing of textiles, shoes, furniture and clothing, and heavy industry was concentrated in Ontario. Personal incomes in Quebec were 25 percent less than in Ontario, and incomes of francophone Quebeckers were 35 percent lower than those of their anglophone counterparts.

In 1973 Guy Rocher provided the following analysis:

> Quebec became fully industrialized as a result of the two world wars. The economic structure of the province, which had been rural, with small-scale production and markets, was transformed into a society with a relatively diversified industrial base. The resulting new economic structure, however, has undergone few significant alterations, and has not benefited from the presence of the more dynamic and innovative industries that have developed since World War II. [Translation][36]

He concluded:

> However, what largely caused the growth of an industrialized society in Quebec to swerve from its course and slow down was the fact that structural transformation occurred without the necessary cultural transformation. . . . This failure can apparently be explained by the fact that industrialization was imposed from outside. Quebec itself contributed little to this process, except by providing its primary resources and labour. The initial stimulus imparted by the entrepreneurial spirit, and by capital and technology, was of such a foreign nature that it did not affect its cultural context. [Translation][37]

It cannot be argued that Quebec had attained a level comparable to Ontario's. Nevertheless, despite the structural differences we have noted, it had attained a level that would generate economic activities that were too ambitious for an outdated, restrictive set of constitutional provisions, which were beginning to generate challenges themselves.

Thus most of the problems that gave rise elsewhere to the constitutional litigation over the distribution of powers on which the Supreme Court ruled existed in Quebec as well. In Quebec, however, only two constitutional cases went to the courts, both of them concerning labour

relations.[38] We must therefore determine why law failed to take economic development into account in Quebec. In our opinion, the failure of the government and the legislature to take action hindered this process. We shall first see to what extent this inaction was a factor, and then try to account for it.

McRoberts and Posgate emphasize the delayed political development of Quebec during this period, and the limited activity of the government:

> In the case of Quebec, it appears that for a substantial period of time the processes of political modernization lagged behind economic and social development. Social scientists have not yet produced a comprehensive, systematic history of Quebec governmental institutions. But available evidence indicates that during the first half of this century the pervasive processes of industrialization and urbanization . . . were not accompanied by a marked expansion of governmental activities, or by the development of a significant bureaucracy. One can locate substantial growth in financial support of private institutions by the Quebec state, but little growth in state regulation of these institutions or direct intervention by the state.[39]

Quebec failed to follow the lead of the other provinces, even in their rare experiments with public ownership (in Ontario, hydro-electricity had been publicly owned since 1905, while under Duplessis three-quarters of the electricity produced was still under private control).

The Duplessis administration also failed to use its powers to regulate the activities of private enterprise to any significant degree. Iron ore in Ungava is a good example. The legislature was also clearly reluctant to intervene in the areas of social policy and labour relations, and even more clearly committed to a laissez-faire approach in education, health and welfare.

To summarize, political modernization in Quebec during this period lagged well behind social and economic expansion. In comparison to those in other provinces, government activity and structures remained less developed than might have been expected.[40]

The explanation for Quebec's absence from the courts where constitutional law and the political future of Quebec were being decided may be explained by the political thought then prevailing in Quebec. The most important body of thought, although not the only one to be considered, was Duplessis' own, which was supported by the nationalist intellectuals of the period, by the clergy and by the economic elites.

Duplessis' primary political principle was that there should be no state intervention in the economy, except to take action to suppress any limitations on the development of capital and, in particular, to suppress union activity.[41] This policy of non-intervention was not unique to Duplessis, but arose rather out of the longstanding fear of the state in Quebec.[42] Indeed, it dated from the Conquest and was a normal reaction by a colonized people to the colonial government. Quebeckers main-

tained their suspicion of the state until the beginning of the 1960s. The Church also played a role in maintaining the people's distrust of the government.

However it began, this simplistic liberalism was as yet unaware of Keynesian theories, which would have the state play an active role in supporting economic producers, by managing human resources, and by taking action to deal with the negative effects of the system. The welfare state was not part of Duplessis' scheme of things. The government of Quebec had no interest in the kind of legislation generated by the welfare state, and particularly legislation that was not clearly within the jurisdiction of Parliament or the provinces (and for good reason) under Canada's Victorian Constitution.

This concept of the role of the state partially explains Quebec's failure to participate in the constitutional debate on the distribution of powers. Quebec did not enact potentially unconstitutional legislation open to challenge by anyone who felt that his or her interests were threatened. The litigation was thereby stopped at its source.

Moreover, this reductionist view of the role of the state was based on the strongest feature of political thought under Duplessis: faithfulness to the spirit and the letter of the Constitution as it stood in 1867.[43] If one adopts a minimalist, liberal concept of the state — the concept that inspired the drafters of the Constitution in the mid-19th century — one will see no need to deviate from the Constitution or from the manner in which it has been interpreted in order to adapt it to needs that one does not feel or to a reality that one does not see. On the contrary, a return to the original and literal compliance with it will be demanded, and even derogations resulting from past amendments and constitutional practice will be opposed.

This is just what Duplessis did. While he demanded provincial autonomy in the fields of jurisdiction granted to Quebec by the Constitution, this was largely in order *not* to use those powers:[44] thus Duplessis stated that provincial autonomy is also "the right to have our schools and hospitals managed by religious communities" [translation].[45]

Regardless of whether the province used or did not use the powers he demanded be maintained in the name of provincial autonomy, for Duplessis autonomy remained the vital, fundamental problem, the *primo vivere*, the "to be or not to be."[46] He frequently invoked the nationalist arguments in constitutional discussions.[47] For him, however, the struggle for autonomy was not a struggle by a clan or a race, but the struggle for democracy against bureaucracy, for the province's security from centralization.[48] His appeals to nationalist sentiment were often accompanied by references to religious values.[49] His constitutional speeches were also based on the values of order and security, and, in his opinion, security could not be built on the destruction of the Constitution, because it was the federative pact itself that guaranteed security. In his

struggle for autonomy he was seeking to ensure that the original Constitution would be respected and the centralizing tendencies advanced by Ottawa's constitutional practice rebuffed.

Duplessis' constitutional ideas were clearly conservative. He was certainly not opposed to federalism or to the *Constitution Act, 1867*: "Confederation was our permission to exist, and the protection for our French Catholic culture" [translation].[50] In these circumstances, the caution of the Quebec government with regard to becoming involved in the constitutional debate is understandable. This attitude was reinforced by the social background of the Union Nationale's MLAs. They were an elite in political terms only, a "partitocracy" of modest social origins, who did not see the government as a tool to be used for a general goal, and saw no need to make any changes to the role of the state.[51] During this period Quebec made no use of constitutional references to settle disputes over jurisdiction; it sought no opinion from its Court of Appeal or from the Supreme Court of Canada on the constitutionality of any legislation, whether federal or provincial. When Quebec intervened[52] in constitutional disputes to which it was not a party, the cases involved, with only two exceptions,[53] questions of civil rights. To Duplessis' way of thinking, civil law, together with language, religion and education, was part of the powers reserved absolutely to the provinces by the Constitution. It would be inconceivable for Quebec not to be heard on such a matter.[54]

On questions other than the distribution of powers (in the field of civil liberties, for example, as we shall see later), the Supreme Court adopted the political thought of the Quebec opposition. However, even the opposition had no objection to the distribution of powers set out in the provisions of the *Constitution Act, 1867*. Indeed, if we were to take a single characteristic to describe this period, we would say that the constitutional question in Quebec was still looked at only within the narrow confines of the federalism of the time, and only in relation to legal and fiscal arrangements. Generally speaking, there was no group or party in Quebec that questioned the federal system or Confederation, or the provisions of the *Constitution Act, 1867*.

Except for the power of disallowance, whose abolition was requested in submissions to the Tremblay Commission, the political system and the original distribution of powers met with general approval. "Constitutional problems" were thus related to the practices of the federal government with respect to compliance with both the letter and the spirit of the existing provisions concerning the distribution of powers or of tax revenue between the federal and provincial governments.

On this point, Maurice Duplessis, in power, and Pierre Trudeau, in opposition, were in agreement. During this period, the provincial Liberal party was not the centre of opposition to Duplessis: it is significant that the Liberal party in Quebec was not yet known as the Quebec

Liberal party. It was then totally identified with its federal counterpart, and was unable to perform the functions of an opposition on constitutional questions. The opposition that did exist was largely extra-parliamentary. It included the Confédération des travailleurs catholiques du Canada, the Fédération des unions industrielles du Québec, the Federations of miners and metalworkers, the Alliance des professeurs, the Faculty of Social Sciences at Laval University, the Social Democratic party, the League for Civic Action, the Rassemblement pour le Québec indépendant, the Institut canadien des affaires publiques, Radio-Canada, and the newspapers *Le Devoir* and *Vrai*.

Each of these various social forces was engaged in its own battle against the government, and particularly against the prevailing economic and social policies and official attitudes toward civil liberties. The constitutional positions adopted by these groups, although rarely expressed, were generally favourable to the constitutional status quo. The magazine *Cité libre*[55] was the exception. It frequently dealt with constitutional questions in political and legal terms, particularly in articles written by Pierre Elliott Trudeau, and thus *Cité Libre* provides more fertile material for analysis. We shall deal with some of the ideas expressed there for purposes of illustration, since they reflected quite a broad consensus.

The contributors to *Cité Libre* expressed a virulent anti-nationalism,[56] based on an individualist vision of the world; titles included "L'individu contre le nous" and "Revalorisation de l'homme derrière le Canadien français." *Cité Libre* argued for preserving and expanding federalism, which its contributors saw as the supreme value in that it brought together universalism and reason. Federalism in practice could, however, have its faults, and these would have to be corrected.[57] In this sense Trudeau expressed partial agreement with Maurice Duplessis' position on the subject of federal grants to Quebec universities and Duplessis' refusal to recognize that the federal government could infringe on provincial jurisdiction in the name of its spending power.

For the opposition forces joined together under the banner of *Cité Libre* as well as for Duplessis' followers, the problems of federalism did not arise from judicial interpretation of the constitutional distribution of powers. Rather, the problem lay in the federal government's deviant constitutional practice in the area of taxation and the conditional allocation of tax revenues for provincial purposes.

### *Constitutional Practice: Centralism in Ottawa, Passive Resistance in Quebec*

This collaboration between the Quebec government and the opposition to maintain the status quo of Confederation ultimately resulted in a tacit agreement to take the battle into the trenches, to a second front outside the courts: to the political arena.

Inspired by the economic theories of John Maynard Keynes in vogue in the postwar Western democracies, the federal government wanted to put in place the essential elements of the full range of powers of the welfare state. Circumstances during the Depression had permitted the federal government to get the constitutional amendment it needed to establish the unemployment insurance and old age pension plans. The same constitutional problems arose in the fields of health, social services and, later, income security, but, because of the political situation, it was not possible to settle these by constitutional amendment.

The federal government therefore went around the Constitution. The federal spending power was used to replace the agreements made during World War II, when the provinces had "rented" their taxation powers to the federal government.[58] This practice, which, as we have demonstrated elsewhere, was illegal and unconstitutional,[59] consisted of the federal government collecting taxes in excess of the monies required for the purposes designated by the Constitution as federal in order to use the revenue thus received for objects designated by the Constitution as provincial. Because conditions are imposed on the provinces if they are to receive repayment of the money that should never have been taken from them, the procedure is unconstitutional.[60]

Duplessis, for whom encroachment could never constitute amendment, and who refused to renew the fiscal agreements, found the procedure described above unacceptable. Finding himself blocked by lack of revenue, he created the provincial income tax in 1954.[61] He maintained his stand to the end, and refused to offer Quebec taxpayers the benefit of hospital insurance under an agreement made available for provincial acceptance in 1957.

What Duplessis refused to accept was the centralist approach taken by Ottawa, which had taken advantage of the economic crisis and the war to capture for itself all provincial revenues and several areas of provincial jurisdiction. Duplessis fought this encroachment in the political arena, but never took it to the courts, no doubt having little confidence in their ability to solve the problem to Quebec's satisfaction.[62] Trudeau, at the same time, fought it on the ideological front.

Having first shown that the story of Canadian federalism is one of constant intergovernmental exchange and cooperation,[63] Trudeau observed that "It is also in part a story of sometimes subtle, sometimes brazen, and usually tolerated encroachments by one government upon the jurisdiction of the other,"[64] and gave as an example federal grants to universities. He concluded by opposing interpretation of the federal spending power "as a federal right to decide . . . whether provincial governments are properly exercising any and every right they hold under the Constitution"[65] since this right belonged to the electorate and the taxpayers.

It must be acknowledged that Duplessis' tenacity, with the support of

the opposition, resulted in his slightly better showing on this second front than in the courts. He did not give in, the agreements were not signed, and his provincial income tax permitted him to continue to exercise the province's own political jurisdiction. Twenty-five years later, the spending power is again being challenged in the political arena, and has never been approved by the Supreme Court.

One may therefore say that during this period the dominant political thought in Quebec with respect to the distribution of powers (and to a large extent opposition thought as well, despite important differences in its conception of the role of the state) was not adopted by the courts, which were the primary authors of constitutional change in Canada. Nor did Quebec political thought succeed in altering federal constitutional practice, which continued along its path circumventing the constitutional distribution of powers. At most, the resulting political action was able only to modify the impact of federal practice on the exercise of provincial jurisdiction.

With the exception of the last-noted aspect, the relationship in this area between political thought in Quebec (in this situation one could almost say the political thought *of* Quebec) and constitutional change can be said to be negative on the whole.

## *Civil Liberties*

With respect to civil liberties in this period the situation is entirely different. First, the decisions of the Supreme Court, with one exception, concerned cases that originated in Quebec. Secondly, the similarity between Duplessis' and opposition political thought exhibited on the question of federalism is absent. Rather, we find absolute and irreconcilable differences. Finally, the positions that the Supreme Court decided to adopt were those advanced by the opposition forces in Quebec. Thus one may argue the existence of a positive relationship between the developments in Canadian constitutional law brought about by the courts in the area of civil liberties and the political thought of Duplessis' opponents.

### *The Supreme Court: Religious and Political Freedom*

Between 1945 and 1960, the Supreme Court handed down seven decisions concerning civil liberties,[66] the first six of which concerned cases originating in Quebec. In all these cases the question raised was the infringement on freedom of belief and expression, which was seen at the time in religious terms. Five of the seven decisions concerned Jehovah's Witnesses, and the other two concerned Communists. Both groups were thwarted in various ways in the practice of their religious or political beliefs by the government or police of Quebec or Nova Scotia.

In a series of well-known cases concerning freedom of religion and freedom of expression for Jehovah's Witnesses, the Supreme Court refused to uphold the argument that the publication and distribution of material expounding that religious doctrine constituted seditious libel.[67] The Court held that several arrests made in connection with distribution of such tracts were illegal,[68] as was the cancellation of the licence of the group's bondsman to sell alcohol and thereby raise bond money.[69]

Two other cases involved repression by the Quebec and Nova Scotia governments of Communist political ideology. The Supreme Court responded by declaring ultra vires the infamous Quebec "padlock law," which prohibited the use of property for propagating Communist or Bolshevist doctrines and imposed penalties for such use.[70] In Nova Scotia, the Labour Relations Board had refused to certify a union whose secretary-treasurer was a Communist. The Court quashed the decision, which it held was ultra vires the Board.[71]

*Context and Political Thought: Suppressing Civil Liberties*

It was no accident that, of all the civil liberties cases heard by the Supreme Court between 1945 and 1960, the Nova Scotia case was the only one that arose outside Quebec. The explanation for this constitutional phenomenon may be found in the characteristics of Quebec society itself, and in the dominant political thought current in the province, rather than in the international context of the Cold War.

In fact, although the judges of the Supreme Court occasionally relied on the distribution of powers as the basis for their decisions,[72] the Court often also based its decisions on the doctrine of implied rights under the preamble to the *Constitution Act, 1867* and the parliamentary form of government adopted in Canada.[73] That is, political thought played an important role in these decisions.

Before we attempt to determine which groups in Quebec adhered to the political ideas that the Supreme Court adopted in these cases, we should consider the relationship between the litigation and the reality of Quebec politics under Duplessis. Although Duplessis was somewhat reluctant to legislate on matters that were likely to fuel disputes over the distribution of powers, he demonstrated a much greater propensity for interventionism in his suppression of civil, political and union liberties. He permitted religious values to occupy a disproportionately important position in this area. Even though Quebec society had begun to shake off the values that had previously dominated it, they retained their importance in Duplessis' outdated vision of that society. The emerging, more materialistic currents of thought had not yet overcome the weight of the dominant value system.[74] The attempts made by both right and left, by Jehovah's Witnesses and Communists, to throw off the yoke of these values resulted in legislation and practices that imposed a weight of repression greater than anywhere else in Canada.

The strength of the opposition is demonstrated by the fact that the victims of this oppression were able to get as far as the Supreme Court and obtain the justice they sought. We can see here the distant origins of the Quiet Revolution, whose beginning, in 1960, was less spontaneous than long believed. The question is no longer one of social circumstances, but of political thought. It is not necessary to be an expert to see the close connection between Duplessis' political ideas and his religious and political intolerance.

Maurice Duplessis was a passionate nationalist, who professed a specific kind of nationalism based on race, the Roman Catholic religion, and the French language and cultural tradition. His definition of the nation put religious and spiritual values at the forefront. In his opinion, the province's strength lay in the depth of its religious convictions.[75] Duplessis made it his personal duty to defend this "fortress of Christian civilization in Canada" [translation][76] against its two biggest enemies: the Jehovah's Witnesses, whom he set about persecuting as we have seen above, and the Communists.[77] However his statements are weak in comparison to the actions he took: revoking Roncarelli's permit to sell alcohol and enacting the "padlock law." Duplessis' personal role in these events is well known. We must note as well the more passive role of a majority of people, whose own tolerance was so minimal as to raise no objection to this religious intolerance.

Trudeau's comments about this majority are still of interest:

> Another typical feature of French Canada is the strange manner in which civil liberties are regarded. Following the decision in which the Supreme Court ruled in favour of the Jehovah's Witnesses, thus upholding religious freedom, public opinion in Quebec was quick to seize on the fact that the judges had been somewhat divided according to religious and ethnic allegiance. The reaction was the same following the Supreme Court's judgment on the padlock law. For example, *Montréal-Matin* called attention to the dissenting reasons of Judge Taschereau, and called the case a victory for the Communists and good news for all the revolutionaries in Quebec. In *Le Devoir*, on March 19, 1957, Paul Sauriol wondered whether "the Supreme Court would have the same concerns, conversely, if the issue was the protection of provincial jurisdiction against federal intrusion," and noted "one of the profound differences between English Canadians and us . . . whether in defending freedom we should go so far as to defend and to respect the right to propagate error." In an article that appeared in *Le Devoir* on April 10, 1957, Gérard Filion wrote about the submissiveness of the CBC to the party in power and the issue of freedom of opinion; he stated that if the opposition parties believed that this issue could be of any value to them in the election they had "probably seriously misunderstood French Canada. The people of Quebec are not in the habit of leaping to engage in this kind of debate. This may be wrong, but that's the way it is." [Translation][78]

Duplessis' vision of the nation was conservative, oriented toward survival rather than toward progress, and failed to distinguish between the interests of the Church and those of the nation. It was a monolithic vision, which left no place for religious, intellectual or political tolerance and was therefore frequently denounced by the liberals and unionists in the opposition, as well as by the writers in *Cité Libre*, who called for greater freedom and democracy.

## *Institutions*

While, in the area of institutions, there appears to be no positive relationship between the decisions of the Supreme Court and political thought in Quebec during this period, the situation differs from that with respect to the distribution of powers or civil liberties. There is no positive relationship because there is no relationship at all.

The Supreme Court's decisions have dealt with Canada's judicial and parliamentary institutions. It is of little concern to Quebeckers that the Court upheld the centralist tendency that characterized this period in its considerations of judicial institutions, while it distanced itself somewhat from that tendency in considering parliamentary powers. These questions held no interest for Quebeckers: they arose in only one case originating in Quebec. The ten other decisions in this area concerned disputes that arose in other provinces. Quebec was not involved in the legal actions surrounding the challenges to the unity of the judicial system and the powers of Parliament, nor was this question the subject of any political concern.

It was not that the question of institutions did not arise in political debate; it did indeed, but it was not the primary subject of that debate, nor were the questions raised likely to be dealt with in the courts. Political discussion in Quebec centred on the structures of the Senate and the Supreme Court itself and sought to obtain structural changes that were far too extensive to be made by the courts. If these changes were to be realized, the Constitution itself would have to be amended.

Twenty-five years later, and despite the patriation of the Constitution, these changes have not yet taken place. Constitutional change in Canada and political thought in Quebec with respect to institutions have largely developed independently of each other.

### *The Supreme Court: Focus on the Unity of the Judicial System and Parliamentary Powers*

The first half of the decisions in this line of cases dealt with the unity of the judicial system, which was institutionalized in the Constitution in the form of the Supreme Court, the central institution of the Canadian judicial system. It was protected by section 96 of the *Constitution Act,*

*1867* against splintering of its jurisdiction through the creation of provincial courts, and by section 101 against erosion, by the federal courts, of its powers to consider the constitutionality of legislation and government actions.

During this period, the Supreme Court strengthened its jurisdiction. Basing its decisions on a functionalist concept of the jurisdiction of the Superior Court, it held that various administrative bodies or officials could not legally and constitutionally exercise powers that had belonged before 1867 to the Superior Court. These powers included ruling on whether real property was subject to property tax[79] and deciding disputes concerning the validity of titles to property[80] or the rights of workers.[81] In addition to these three decisions, which went against the provinces that were attempting to establish judicial institutions, there was another decision that favoured the federal government. The Supreme Court held that jurisdiction over compensation for expropriation by the federal government belonged to the Exchequer Court and not to the Superior Court.[82] With only two exceptions,[83] the centralist tendency continued to appear in the decisions of the Supreme Court in the area of judicial institutions as well.

This tendency cannot be seen in the other five decisions in this line of cases, all of which concerned the powers of Parliament. This is for the simple reason that these cases concerned the extent and structure of such powers, rather than the distribution of powers between the federal and provincial governments. The Court affirmed that the two levels of government in the federal system were each sovereign in their own jurisdiction, and held that delegations of legislative powers between Parliament and provincial legislative assemblies were invalid.[84] The Court did, however, rule that certain delegations of administrative powers were constitutional.[85] It also considered referential legislation[86] and conditional legislation[87] and the paramountcy, over pre-Confederation legislation in effect in a province, of legislation enacted by Parliament in a field within its jurisdiction.[88]

### *Quebec's Demands for Institutional Reform: The Supreme Court and the Senate*

Whether or not these decisions tended to follow the centralist tendency, Quebec at that time was not interested. Lawyers in the province were trained in civil law, and were still largely untrained in using administrative remedies to challenge the constitutionality of administrative tribunals in order to uphold the constitutional jurisdiction of the Superior Court. Quebeckers had little interest in the institutions of Parliament. These institutions had been obtained without a struggle when Quebec was colonized, and held no strong value for people there.[89] With only one exception,[90] the Supreme Court heard no cases from Quebec deal-

ing with these questions, and the issue of these institutions was of only minor significance in the political thought of the period.[91]

The institutions of greatest interest to the Quebec public then were the Supreme Court itself and the Senate. To see how these institutions were being questioned in contemporary political thought, we must turn to the constitutional amendments sought by Duplessis at the 1950 federal-provincial conference: "It is our considered opinion that in constitutional matters and in those relating to Canadian intergovernmental relations, the Supreme Court of Canada should meet all the conditions required of a third arbitrator."[92]

Some years later, at the height of Duplessis' power, the Tremblay Commission wrote that the Supreme Court was incapable of effectively exercising its role as an impartial arbitrator, since it was triply dependent on the federal government alone: for its existence, its jurisdiction and its members. It could therefore not be considered to be beyond the influence of the federal government.[93]

The Quebec Commissioners believed that by virtue of its powers the Court was in the ideal position to control, and even to direct, the development of the Canadian legal system. They therefore feared that it would use this power to promote uniformity in the law, and that it would become "the most dangerous possible instrument for centralization."[94] They also believed that the procedure for appointing judges suffered from the same weaknesses as that used for appointing Senators.[95]

Thus the Commissioners sought to have the Supreme Court enjoy "true constitutional status," and to have its jurisdiction reduced and the provinces participate in the appointment of judges. Failing that, they proposed that a special court be established to consider constitutional matters, with the provinces to have a role in appointing the members.

## The Second Period (1960–75): Bi-polar Federalism

When the Quiet Revolution began in 1960, the scene shifted dramatically, in terms of both political thought and constitutional developments. The change was not, however, as sudden as we have long believed, since, as we have seen, there were already indications of change in the social fabric of the previous period.

In relation to the preceding period, 1960 saw the birth of currents of political thought that had in common a rejection of Duplessis' fundamentally monolithic authoritarianism and his opposition to all government intervention. These new ideas retained a nationalist dimension, but in a much more dynamic version. From then on, neo-nationalist thought would be intertwined with pluralist, secular liberal ideology, an ideology that saw a positive role for the state, both in modernizing Quebec's human and physical resources and in affirming its existence as a nation.

The analysis of the relationship between the development of political thought in Quebec and the development of Canadian constitutional law during this second period leads to two conclusions. First, a positive relationship may be seen between the development of the decisions of the Supreme Court of Canada, specifically in relation to actions originating in Quebec, and the development of the neo-nationalist ideology that dominated this entire period, until 1976, when its supporters were replaced in power by the proponents of sovereignty. On the other hand, a negative relationship may be seen between the development of a rather moderate dominant ideology (and, to a more marked degree, of the much more radical opposition ideology) and the results of the various conferences, agreements and programs that make up the constitutional practice of the period, the parallel path of constitutional change.

This part of our study will be devoted to a consideration of this double process of change. We will examine this process under the headings we used in the first section: division of powers, civil liberties, and institutions; however, we will change the scheme somewhat in considering, first, the events and political thought of the time and then changes in the Supreme Court's decisions and in constitutional practice. We will in this way be better able to demonstrate the political climate surrounding the judges and politicians, and to see how this climate influenced their decisions.

## *Distribution of Powers*

We must first note the striking contrast between this period and its predecessor in questions of the distribution of powers, with respect to events and political thought as well as decisions of the Supreme Court and constitutional practice. To a certain extent, it could be argued that political thought in Quebec after 1960 was a product of both Duplessis' thought (in that it had a strong provincial autonomy component) and opposition thought (in its promotion of democracy and the modern concept of the state). However, it is the fusion of these two tendencies that characterized this second period and produced radical changes in Quebec's relationship with federalism and the Constitution.

The party in power moved to re-evaluate the very principle of federalism and support of the *Constitution Act, 1867*, which had until then been accepted by consensus among the political forces operating in Quebec. A number of opposition groups went further and challenged the concept of federalism itself. Such groups were still in a minority at the beginning of the 1960s, but they progressively acquired legitimacy and ultimately, by the end of this period, their thought, and they as its propounders, had become dominant.

Thus the vision of the role of the state, which had until then been the bone of contention between Duplessis and the extra-parliamentary

opposition, evolved into a common vision held unanimously by the various political groups in Quebec, including the moderate neo-nationalists and the voices of independence. In addition, the political forces in Quebec shared this modern vision of the state with Canadian nationalists, with the fundamental difference, of course, that the two groups had diverging ideas of where, on the geographical and political maps, they would place the powers that they wanted to give to the state: in Quebec or Canada respectively. The question that thus arose, which was largely one of the locus of state power, has recently become one of the major political issues.

The broad themes in political thought were reflected in expectations and demands on the Quebec political scene regarding the distribution of powers. These demands, which assumed a need for constitutional amendment in this arrangement, differed in the amount of autonomy they sought for the provincial legislatures, depending mostly on the political orientation of the groups proposing the changes. On the whole, they were much more favourably received by the judges of the Supreme Court than they were by federal politicians.

This was because, in matters concerning the distribution of powers — and here we see a significant difference — Quebec was no longer absent from the court where the Constitution was being fine-tuned.[96] Quebec's participation took the form of an increase in the number of cases originating in Quebec, but was also evident in the participation of the provincial attorney general. In addition, the subject matter in which the province intervened shifted from the traditional protection against federal encroachments in matters of civil law to the much more diversified field of important constitutional cases as a whole, including those originating in other provinces.

Had the law of a state undergoing rapid modernization finally moved to reflect the significant economic expansion that had resulted from the Quiet Revolution? And would that expansion then stimulate the kind of constitutional conflicts and challenges that had been common elsewhere in Canada before 1960, and that Duplessis' aversion to state intervention had until then prevented from developing? This hypothesis appears very plausible, as one theory among several, in explaining the greater frequency of cases originating in Quebec and heard by the Supreme Court.

There was also an increase in the number and variety of cases in which Quebec's attorney general intervened, in part as a result of the rise of technocracy. Like the marked increase in success experienced by Quebec litigants before the Court and the Court's increasing tendency to uphold provincial jurisdiction, the activity of the attorney general must also be seen as a function of the Quebec social situation as reflected in political thought.

During the first period, the only two decisions on the distribution of powers in which Quebec parties were involved went against Quebec. On

the other hand, between 1960 and 1975, two-thirds of the constitutional cases arising in Quebec were decided favourably to provincial interests in the Supreme Court. This is all the more remarkable because it was quite the opposite of the generally centralist tendency still being followed by the Court in dealing with the distribution of powers.

We would not claim that there is a direct causal relationship between the decentralizing decisions of the Supreme Court (or in any event those decisions that favoured the provinces) in cases originating in Quebec and the political events and thought in the province after 1960. Nonetheless, it is obvious that this retreat from centralization, particularly since 1968, escalated until the mid-1970s. At the same time, support for sovereignty rose in Quebec, and one faction of the extra-parliamentary opposition resorted to violence. We would neither be insulting the Supreme Court nor charging it with bias if we concluded that it was sensitive to its social and political context. No more is it able to escape from its environment than is any other institution.

While contemporary political thought in Quebec concerning the distribution of powers was to some extent accepted by the courts during this period, it did not experience the same success on the "second front" of the constitutional struggle, constitutional practice as elaborated by federal-provincial conferences and agreements. Again, the contrast between the first and second periods is striking.

Duplessis had maintained provincial jurisdiction on this front by refusing to participate in any joint programs. After 1960, this policy was reversed and Lesage began to take part, accepting terms that encroached on his jurisdiction, if only temporarily, in exchange for the revenue sources he needed to implement his vision of a modern state. Except for his 1964 successes relating to tax transfers and pensions, this period is notable for increasing encroachment on provincial jurisdiction by the federal government. Indeed, the efforts at constitutional reform undertaken by Daniel Johnson in 1968 ended with the failure of the Victoria Conference in 1971 even through the new Bourassa government had lowered Quebec's demands considerably, eventually seeking only legislative primacy in policy and abandoning the terms for the distribution of powers that Johnson had tied to acceptance of any formula for patriating and amending the Constitution.

The relationship between political thought and constitutional practice in this period is at best mixed and at worst negative, depending on whether one considers the glass to be half full or half empty.

### *Context and Political Thought: Neo-nationalism and Interventionism*

The economic situation that had distanced Quebec from the constitutional challenges heard in the Supreme Court had already begun to change during the preceding period, when the development of tertiary

production[97] and the continentalization of the economy[98] had progressed rapidly. However, the nature of Duplessis' political ideas had kept the government from taking these phenomena into account in formulating its policies and legislation, hence, as we have seen, obviating any challenge from Quebec to the distribution of powers in the Constitution.

This economic expansion continued after 1960. Activity in tertiary production increased[99] with the demographic result that urban growth, which had slowed between the Depression and the end of the war, picked up again. During the 1950s, the urban portion of the population of Quebec increased from 70 percent to 75 percent and by 1975 had reached 80 percent.[100] Metropolitan Montreal, where nearly half of the province's population lived in 1971, was of particular importance in the Quebec urban structure of the period.[101] Thus the new elites, who would bring social and political change to Quebec, came from a population living in a highly developed, urban economy.

These new francophone elites lacked any significant control over their economic resources. As a result, they concentrated on modernizing the state apparatus, particularly expanding the public and quasi-public sectors, including education and health,[102] and thus developed their bureaucratic characteristics. As Réjean Pelletier wrote:

> As the commerce, finance, insurance and communications sectors developed, there was a need to develop health, education and welfare institutions . . . which would be managed by administrators who were competent to do so. These specialists were not sought among the clergy, but rather among the young graduates in the social sciences and administration. Thus a new middle class was formed and grew out of major structural changes in society. Herbert Guindon described it as the product of the bureaucratic expansion of organizations [Translation].[103]

The identity of this new middle class was tied to the extension of political power in Quebec. It could therefore not remain indifferent for long to the selection of powers allocated to them in the federal system, or to the constitutional issues that arose around the composition of those powers. These structural factors alone would be sufficient to provoke conflicts between these elites and those who, motivated by similar forces, had chosen instead to realize their ambitions in Ottawa.

These new elites embarked on a program of legislative activism[104] witnessed in the great social and economic reforms undertaken by the government.[105] As a result, and confronted with the problems arising from the constitutional distribution of powers between the federal and provincial governments, they became acutely aware of the powers that remained beyond their grasp.

At the source of this new, dynamic approach by the state were the social and economic factors that would continue to influence the devel-

opment and structure of the Quebec political scene, as well as the people developing with it. In 1960, this scene was split by a deep political schism.

The 16-year reign of the Union Nationale (UN) had been marked, as we have seen, by a traditionalist, monolithic marriage of the political and the religious. In 1960, this restrictive atmosphere gave way to an exciting upsurge in political activity. Lesage, at the head of the Quebec Liberal party, came to power with a team characterized by anti-Duplessisism and an interventionist concept of the state. For a time, there was a measure of cohesion, despite the profound differences among the various tendencies on the *question nationale*,[106] and a number of *indépendantiste* movements were born, with a credibility that was entirely new for the time: the Rassemblement pour l'indépendance nationale (RIN) in 1960, the Ralliement national (RN) in 1964, and the Mouvement de libération populaire (MLP) in 1965. The society from which these *indépendantiste* movements emerged was one in which the debate about the national question was taking place at all levels. The Société Saint-Jean-Baptiste had convened the États généraux du Canada français, which met in 1964 and 1967 and claimed the right of Quebec to self-determination. At the same time, the Front de libération du Québec (FLQ) adopted the path of violence, and burst onto the scene with a first wave of attacks in 1963 followed by a second in 1966.

That year marked a turning point. The year before, the Union Nationale, led by Daniel Johnson, had published its manifesto *Égalité ou indépendance*, and in 1966 it returned to power following a campaign based on the same theme. In 1967, shortly after the visit of General de Gaulle and his famous "*Vive le Québec libre*," there was a split in the Liberal party. Paul Gérin-Lajoie attempted, and failed, to unite the liberal groups in the party under the moderate banner of "special status" for Quebec within Confederation, a compromise that was not designed to rally the dissident factions. The remaining wing of the Liberal party then came out under Robert Bourassa for staying in Confederation, while the splinter faction under René Lévesque went on to found the Mouvement souveraineté-association (MSA).

The following years showed progressive successes for the sovereignty movement. The MSA was able to polarize the numerous *indépendantiste* tendencies and to unify them under its own leadership in the Parti québécois, founded in 1968.[107]

After the October crisis in 1970, the Parti québécois became the official Opposition. A reformist element, favouring sovereignty, it gathered more than 24 percent of the votes in the 1970 election that brought the Liberals back to power. After that date, other individuals and groups gave their support to the PQ: Pierre Vallières, in 1971; the Montreal central committee of the CNTU and the entire QFL, in 1972. At the same time, this current of thought found expression in a number of publica-

tions (the 1972 manifesto "Quand nous serons maîtres chez nous," the weekly *Québec-Presse*, the daily *Le Jour*, and so on). The Parti québécois eventually won the 1976 election and formed the government.

Beginning around 1968–70, the various groups supporting sovereignty, now in a more respectable, institutionalized position, started to take a much more active role in developing an ideology that became increasingly dominant. At the same time, Quebec federalists were losing ground, particularly as a result of their ties to the federal government, personified by Trudeau in Ottawa.[108] The federalists' uncomfortable and clearly ambiguous position was also a major feature of the political scene. As well, after 1974 the international economic crisis played a large role in the development of Quebec's politics. The Canadian Confederation clearly felt the strain of this confluence of important events surrounding the national question in Quebec, and the status of Quebec within Confederation.

The distinction between the groups that were active on the political scene in Quebec during this period and the groups that had preceded them lay in the fact that the new groups had adopted values the earlier ones had believed to be antithetical to each other. This was true regardless of their political banner, and of whether they were in power or in the parliamentary or extra-parliamentary opposition. They gave birth to a new current of thought: neo-nationalism, a fusion of a modern, interventionist view of the state and a nationalist vision. There was great diversity in the resulting political constellations, having two common points of departure and differing in the weight placed on each of these facets of their political values. However, successive governments, as well as their various internal factions and the groups in opposition, shared a small, central policy core and occupied shifting portions of the surrounding political field.

## POLITICAL THOUGHT: THE COMMON DENOMINATOR

Before we discuss the constitutional positions adopted by each of the political groups present in Quebec, we shall try to identify their common denominator. For there did exist a common area of thought, a threshold below which no group or party would agree to go, either with respect to the powers they considered essential for the provincial government or with respect to the degree of autonomy they believed Quebec should enjoy.

The Union Nationale's position is clearly the threshold view of the role of the state. Until at least 1966, this party maintained its caution toward the new role of the state, and remained well below the kinds of activist positions taken by the Liberals in their economic and social reforms, and clearly even further below the positions later taken by the Péquistes. Thus, the Union Nationale opposed (although somewhat weakly) the nationalization of electricity,[109] the creation of the Ministry

of Education,[110] and universality of social programs.[111] It promoted volunteerism and action by non-government groups such as families and professional corporations.[112] However, driven by the social dynamics of the period, the UN ended up giving the state a support and coordinating role and even, after 1966, an interventionist role almost as great as the role the Liberals proposed. It was Jean-Jacques Bertrand who said, in his speech at the opening of the 1969 Constitutional Conference in Ottawa:

> At the present time, as a result of the evolution of society and the major part played by governments in activities which would have defied imagination one hundred years ago, it is absolutely essential and it is becoming increasingly urgent to re-examine the entire question as to how powers should be distributed between the central and the provincial governments. [Translation][113]

That is, all the groups that were active on the Quebec political scene in this period perceived the relationship between the demands of the new socio-economic role of the state and the need for the provincial government to have a certain minimum of constitutional powers. In the minds of everyone involved (even the Liberals of the Bourassa period, who were much less demanding on this point), this minimum required more than the powers granted to the provinces in the Constitution, and definitely more than what was conceded to them by federal constitutional practice.

Bertrand went on:

> Our present Constitution — I almost said our old Constitution — is silent on so many matters that it often gives us no inkling as to which sector of government is responsible for which field of endeavour. . . . And, above that, the Constitution is not always abided by. Thus in the long run, thanks to its financial resources, the Federal government ends up with actual jurisdiction over matters where Quebec's interest is vitally important. [Translation]

The minimum content of the nationalism of this period found its expression in the demands for "cultural security" made by the Liberal party from 1970 on in its attempt to develop a workable federalism.[114] The Liberals' aspirations to cultural security — the power to establish their own cultural priorities and have access to the necessary resources for that purpose — seems considerably less ambitious than the *maîtres chez nous* of Lesage or the "equality or independence" of Daniel Johnson. In fact, the Bourassa administration went at least as far, in some aspects, by demanding legislative primacy as well in the field of social legislation, in its broadest sense, a solution that, in practice, would be as advantageous as exclusive jurisdiction.[115]

In addition, even Bourassa, without giving up the revenue from a workable federalism, wanted to see a reorganization of jurisdictions in Quebec's favour in the areas of economic development,[116] immigra-

tion,[117] post-secondary and university education,[118] and communications.[119] As we have seen, he maintained his claim to jurisdiction over culture and social policy, including labour and employment as well as health and income security. The Liberal premier also wanted the federal government to give up its spending power in areas within the exclusive jurisdiction of the provinces and to agree to limit the exercise of its declaratory power and to allow the provinces to exercise the residual power.[120]

These were the minimum demands in the areas of nationalism and the role of the state put forward by those with the most limited vision of the provincial share in the distribution of powers. We shall now examine the extent to which the proposals of the various governments differed, both among themselves and from those of the opposition groups.

### DOMINANT POLITICAL THOUGHT

During the period we are considering, the dominant currents of political thought — those of the Lesage, Johnson-Bertrand and Bourassa governments in succession — contained the two common traits of the general current of thought of the time: an interventionist view of the state inseparably linked to nationalist demands. These currents of thought gave rise to differing constitutional demands, all of which, however, were compatible with federalism. However, in comparison to Dupplesis' ideas, this ideology represented a renewed, modernized, decentralized federalism, which no longer implied agreement with the distribution of powers in the *Constitution Act, 1867*, but rather thorough-going amendment. Still the dominant currents of thought in this second period did not take on the anti-federal characteristics of the constitutional positions held by the *indépendantistes* or those favouring sovereignty-association;[121] those positions of the political opposition became dominant only after 1975.

**The Lesage administration (1960–66)** Jean Lesage was elected in 1960 using the slogan "*Maîtres chez nous*." He led a government whose goal was to give the people of Quebec — particularly the francophone majority — the power to direct their economy. With this in mind, he set out to modernize the Quebec government and used the government to implement sweeping economic and social reforms. This process of modernizing and strengthening the provincial government led Quebec francophones to see themselves more and more as a separate people in a separate land. It also led them to question the distribution of powers between the federal and Quebec governments.

The economic and social needs of Quebec became increasingly visible as the ideology of *rattrapage* was elaborated. Lesage, sensitive to these needs, had to find the necessary sources of income to meet them. To do this, he demanded a distribution of powers based on tax revenues, proposed that electricity be nationalized, and sought to create a pension

plan to be managed by Quebec. He also promoted Quebec's cultural identity and international jurisdiction by establishing delegations in Paris, New York and London and negotiating cooperation agreements with France.

The powers and funds needed to implement this vision of Quebec were the factors that led him to demand not only that the provincial powers set out in the *Constitution Act, 1867* be respected, but further, that this distribution of powers be amended even more drastically than was proposed in the minimum policy core common throughout this period. What he sought was an increase in revenues to permit the Quebec government to take on the constitutional responsibilities and powers of a modern state in all its various forms and fields of jurisdiction. These included underwater mineral rights,[122] student loans and grants,[123] corporate and personal income tax and succession duties (25/25/100 formula),[124] and compensation in the event of opting out of health programs[125] or pension plans.[126] Lesage also demanded that the federal government withdraw from the field of labour relations and employment and agree to renounce its ancillary powers and its spending power.[127]

**The Johnson and Bertrand administrations (1966–70)** The Liberals in the Lesage period took a neo-nationalist stance; they demanded the powers and revenue they needed in order to implement their vision of the modern state, and sought these powers for Quebec rather than the other provinces, since this was where they were. The Union Nationale under Johnson and Bertrand, on the other hand, used this vision of the state to implement the policies necessary to promote a Quebec nation within the Canadian Confederation.

The Union Nationale's dominant central current of political thought at the time was of a "dual" Canada, a renewed federalism based on the coexistence of two equal nations. Johnson claimed "equality or independence," a remarkably ambiguous position. Some read in it his determination to establish an independent state himself if he could not establish equality, while others saw it as merely a way of using the tougher opposition stance to blackmail the federal government.

Whatever it was, this fundamental option may be seen in the position taken by the UN on the constitutional powers that Quebec required, a position that took in more than that of the provincial Liberals. During this period, negotiations for the patriation of the Constitution resumed, and a number of the changes demanded were possible only if there were to be legislative amendments to the Constitution.

The powers that the Union Nationale believed were essential if the Quebec identity were to be established as an equal partner in the two Canadian nations included agriculture,[128] economic planning,[129] communications,[130] environment,[131] bankruptcy,[132] immigration,[133] and

marriage and divorce.[134] None of these had been previously included in the common minimum demands, nor in the demands made by Lesage and adopted by Johnson. The list of federal powers to be abandoned was also extended to include the declaratory power.

**The Bourassa administration (1970–76)** The Bourassa administration had a less demanding view of Quebec's place in Confederation than did its predecessors. This is particularly true of the ideas he put forward early in his mandate, when the objectives he described as forming part of a workable, cooperative federalism related mainly to cultural security. Later, partly as a result of opposition pressure, he argued for legislative primacy in the area of social security, and for a decentralized federalism that would reflect Canada's regional diversity and permit the government of Quebec to guarantee the cultural future of the majority of its people.

This retreat in the political demands of Quebec was manifested in more modest constitutional thought,[135] although thought in Quebec remained incompatible with Canadian federalism as it was then known. These demands formed the minimum core common throughout the period, to which we have already referred.

OPPOSITION POLITICAL THOUGHT

The opposition is taken here to include the Union Nationale, when the Liberal party was in power, particularly between 1960 and 1966, as well as the *indépendantiste* extra-parliamentary opposition and, later, the parliamentary and extra-parliamentary opposition of the proponents of sovereignty vis-à-vis the federalist parties.

**The Union Nationale opposition** In opposition, and particularly during the period 1960–66, the Union Nationale exploited the opportunities offered by the new political awareness of the people of Quebec. In the 1962 elections the objective it presented was merely a badly defined form of sovereignty. Nonetheless, after that time it played an important role in broadening the debate on the constitutional question to include the people of Quebec as a whole.

As examples, there are the support of the Union Nationale for the convening of the États généraux du Canada français to call for constitutional reform,[136] the initiative taken by Jean-Jacques Bertrand in creating the Parliamentary Committee on the Constitution,[137] and the broad mobilization coordinated by the Union Nationale in 1965 against the Fulton-Favreau formula,[138] the proposal for patriating and amending the Constitution that was ultimately rejected by Quebec.

The debates that took place during this conflict indicated the ideological cleavage in the concept of Quebec nationalism. Various social groups adopted the position of the Royal Commission on Bilingualism and Biculturalism with respect to cultural, linguistic and even national

duality in Canada[139] and mobilized against the Fulton-Favreau formula, since it denied Quebec the opportunity for special status within the Canadian Confederation. The variety of reactions to this issue cut across the known boundaries of the traditionally nationalist groups. While the nationalist struggles of the past had aimed to ensure that provincial rights were guaranteed, the debate over the Fulton-Favreau formula showed that, from that time on, both the official Union Nationale opposition and the various social groups and public opinion leaders would be trying to re-negotiate the distribution of powers between the federal and provincial governments.[140]

We would also agree with Jean Beetz's analysis of the attitudes of Quebeckers during this period toward the Constitution. During the preceding period, the Constitution had been cast as the protector of the minority. However, Jean Beetz observed that during the 1960s it became known as an obstacle, a brake on Quebec's dynamism, and a major weakness in the legal system.[141]

In opposition to the integration of Quebec, which the leader of the Union Nationale expected would be the result of the Fulton-Favreau formula, Daniel Johnson published the manifesto *Egalité ou indépendance*[142] in 1965. In it, he defined a constitutional policy based on recognition of two nations within Canada. When the Union Nationale was again in power from 1966 to 1970, it made this policy a condition of accepting any amending formula.

**The anti-federalist opposition** From our vantage point in late 1985, we can impose post facto interpretations on the political thought of the various groups active in the opposition between 1960 and 1975. But their main common characteristic at the time, most of them having subsequently been subsumed under the PQ banner, could be seen as their challenge to the federalist vision of Canada. They offered a broad spectrum of proposals and political solutions, ranging from sovereignty-association to the positions of the radical *indépendantistes* and from parliamentary democracy to violence. Their concept of the state was even more interventionist than that of the Lesage administration and they made more explicit links between the affirmation of Quebec's national identity and the exercise of full state powers.

**The sovereignty-association proposal** We do not intend to go into the sovereignty-association proposal of the Parti québécois after 1968 at great length here, since we will be looking at it in more detail as the dominant current of political thought in the third period. We should, however, note here that this proposal was rooted in the concept of associated states that René Lévesque had been promoting since the early 1960s, within the Lesage administration, in opposition to the more moderate proposal of special status made by Paul Gérin-Lajoie. The

sovereignty-association position resulted from the hegemonization of the *indépendantiste* and other tendencies within the PQ by the former MSA.

The affirmation and acceptance of nation status for Quebec was the cornerstone of this option. It was based on the association of free states, each having the right to self-determination, who would themselves choose their own political system and the form of ties they would forge as independent states or as states voluntarily participating in a confederate political union. Those who proposed this option did not propose a permanent division between Quebec and Canada, but rather an attempt to form an economic union or association between them through negotiation, treaties and agreements, in which Quebec would participate as a politically sovereign state.[143]

The currents of political thought we have been discussing were, of course, not an insignificant factor in the increase in constitutional litigation between Quebec and Ottawa. Even the common minimum core included certain constitutional amendments that related specifically to the interpretive doctrines that the Supreme Court applied to the Constitution. In these circumstances, it is not surprising that successive governments sought to participate in constitutional challenges in order to battle against these doctrines, as well as in cases in which they believed that amendments to substance could be obtained through the courts.

The connection between the political context and the specific success of the Quebec litigants in the Supreme Court is less easy to demonstrate. There was a clear difference between the success rate of Quebec and those of the other provinces. Quebec litigants won two-thirds of their cases, with provincial victories in three-quarters of the cases,[146] while the other provinces were successful in only slightly more than one-third. Such a difference could not normally be explained by chance, particularly at a time when the centralist tendency of the Supreme Court remained strong and about half of its decisions still confirmed federal jurisdiction.[147]

It would appear, however, that Quebec's success was not unrelated to the political context in which the cases arose, and in which the constitutional proposals of successive governments could not help but appear reasonable in comparison to the anti-federalist opposition with its spectacular gestures, ranging from the formation of a party that became Her Majesty's loyal, democratic opposition to violent extra-parliamentary acts of protest.[148] We shall be analyzing the constitutional decisions of this period, both quantitatively and qualitatively, to determine the extent to which they integrated the constitutional thinking and demands of Quebec.

During the period 1960–75, the Supreme Court decided a number of important cases dealing with the distribution of powers. These decisions dealt with fields already familiar to constitutional law: labour relations,

trade and commerce, taxation, and criminal law. However, the issues raised concerned new aspects of these fields, since they arose in a changed socio-economic context. These decisions also dealt with newly contentious fields, such as communications and the environment, so that the political debate between the two increasingly opposed governments expanded into new areas. The quantitative aspect of our analysis, in particular, indicates that the Supreme Court wished to preserve the federal government's jurisdiction. More than half its decisions on the distribution of powers were in favour of the federal government. However, some of those cases were of less significance than others, while on the other hand the Court's decisions in favour of the provinces were of major importance.

Thus one should not conclude that the Court struck a neutral balance without examining the qualitative aspects of these decisions. Nor should one ignore the fact that the Court decided in favour of the provinces more frequently in cases originating in Quebec, on the basis of theories that incorporated elements of Quebec political thought into legal reasoning.

This tendency toward ambiguous, contradictory decision making appears perhaps most clearly in cases dealing with the powers traditionally grouped together under subsection 92(13) of the *Constitution Act, 1867*. Of the 13 decisions under this heading (which includes, by the curious internal logic of the legal discipline, labour law[149] and transport law[150] together with matrimonial law[151]), 9 went in favour of the federal government, and 4 in favour of the provincial government. However, among the latter group, some — including the *Construction Montcalm* decision — were of such significance as to return some balance to this apparently unbalanced record.

In the area of criminal law,[152] provincial jurisdiction was most often confirmed[153] by the Supreme Court during this period: only 3 of the 10 decisions were in favour of the federal government,[154] and the significance of these 3 was no greater than that of the other 7. In the other issues on which the Court ruled, and particularly with respect to economic powers[155] and powers over trade and commerce and natural resources,[156] as well as over environmental pollution,[157] economic development[158] and communications,[159] there is, on the whole, a quantitative tendency toward decisions in favour of the federal government: 20 as compared to 13 in favour of the provinces.

In order to paint an accurate picture of the approach taken by the Supreme Court in these cases, we must consider the relative significance of the Court's decisions and the doctrines and concepts on which it based its reasons. The grounds on which the Court relied to justify its centralist decisions during this period were part of the arsenal of the traditional theories of pith and substance and ancillary powers, which were closely related to the subject matter of the powers set out in the Constitution. This was particularly so in traditional fields such as marriage,[160] criminal law,[161] and the civil aspects of economic law.[162]

However, the transformation of the economy and the requirements of a modern state had led to an increased centralization that could not be justified by a narrow interpretation of the 1867 legislation. Thus the Supreme Court, which had begun during the preceding period to develop theories that would be more effective in promoting this new form of centralization, pursued and refined these theories before finally putting an abrupt end to their further expansion in the mid-1970s.

Various justifications were advanced for this centralization. Some were clearly political, as in the doctrine of national dimensions;[163] some were formulated in geographical terms, as when the extra-provincial nature of activities or enterprises was considered;[164] some were concealed in the more abstract "intrinsic elements" doctrine.[165] In all these cases, the Court relied on functionalist theories, which interpreted the constitutional distribution of powers not on the basis of the subject matter of the jurisdiction, but as a function of the manner in which the power was exercised and its relationship with a particular concept of the economy and the state.

After it had pursued this approach for quite some time, the Supreme Court put an end to further development along that line, and perhaps could be said to have made an about-face, in five decisions that clearly limited the use of these three theories and may have put an end to their influence altogether. Certainly the most spectacular case was the *Reference re Anti-Inflation Act*,[166] which the Court found to be valid, but using the emergency doctrine, whose effect is temporary, rather than the doctrine of national dimensions, which the federal government had invoked but a majority of the Court rejected. The decision in *Construction Montcalm*[167] was no less significant. It continued along the road taken in *Nor-Min*[168] and set limits beyond which a distinct subject matter could not be taken in under a head of jurisdiction as "intrinsic" to that head.

It is less clear whether the Supreme Court actually decided that federal jurisdiction could no longer be based on the extra-provincial nature of activities over which the federal government claimed jurisdiction. Nevertheless, there was certainly a withdrawal from this mechanism for centralization in the reasons of Pigeon J. in *Re Farm Products Marketing Act*,[169] and, though less explicitly, in the *Kellogg's* decision.[170]

These are significant decisions which succeeded in qualifying and moderating the centralist tendency indicated in the quantitative analysis of the constitutional decisions of the Supreme Court during this period. This moderation of the centralist nature of this line of cases is particularly significant in that it affected the less traditional and most intrusive doctrines of interpretation and appeared in a concentrated group of cases at the end of the period, so that the latter part of the period takes on a different coloration altogether.

These five decisions slowed the previous centralist tendency of the Court. This fact alone could lead us to conclude that the Court was

responding to the aspirations expressed in the then dominant current of political thought in Quebec, whose main demand was for a more decentralized form of federalism. But there is more to it. These decisions related to two areas of law included in the minimum constitutional demands of all the successive currents of thought that held sway in Quebec during this period, including the positions taken by the Bourassa government. This provides us with the common denominator: labour law (*Montcalm* and *Nor-Min*) and communications law (*Kellogg's*). In these areas, the Court managed at least to prevent any further exacerbation of the unbalanced constitutional situation.

However, the ideas that were undoubtedly best received were those of the Johnson government. All these decisions support its constitutional demands not only with respect to labour relations and communications, and of course agriculture (*Re Farm Products Marketing Act*), but more particularly with respect to the doctrine of national dimensions, which was rejected in the *Anti-Inflation* decision.[171] This last decision was of major impact, and had the effect, if not the intention, of adopting Johnson's constitutional concepts. The Court not only granted one of Johnson's specific demands, by reversing a contrary decision made earlier in the same period;[172] it went much further. By rejecting the doctrine of national dimensions, it made the two-nation concept of Canada, a pivotal point of Johnson's demands, a legal possibility.

We can thus conclude that overall the dominant constitutional proposals of the Johnson government were relatively well received by the Supreme Court, and no doubt had some influence on the development of law. The constitutional proposals and demands of the Lesage government were not as well received by the Court.

It may be that it was possible to conceive of the Lesage government's constitutional proposals as capable of being implemented only on the level of constitutional practice, particularly those proposals relating to student loans, health programs, income tax, pensions and the spending power. (We will return to this point later.) Others of Lesage's proposals, however, could have been accepted by the Court, and thus brought about further change in Canadian constitutional law. These include proposals concerning underwater mining rights, labour law, and ancillary powers.

In the area of underwater rights, Lesage had sought a political rather than judicial resolution in 1965. He undoubtedly foresaw that the provinces' position, argued by the Attorney General of Quebec in support of British Columbia's position, would not be accepted by the Supreme Court. This was in fact the outcome when the Court rendered its decision two years later.[173]

In the area of ancillary powers, which the Lesage government sought to have the federal government abandon, the province was clearly unable to influence the Supreme Court. The Court found that the federal legislation was valid, allowing legislation to stand under this rubric at least five times during the period in question.[174] The most we can say is

that the Court set limits on the exercise of this power that it had not imposed in the past. It expressly required that there be a clear need for the legislation if the power were to be found to be validly exercised.[175]

In fact, the only constitutional proposal made by Lesage that was favourably received by the Supreme Court was that the federal government withdraw from the field of labour law. The Court's acceptance of this demand was nonetheless only partial, and late in coming: late, because it came at the end of the period, after it had been demanded by the entire succession of Quebec governments; partial, because it impeded federal action only in that it prevented the federal government from expanding into new areas even further outside its jurisdiction than the subject matter on which it had already legislated, and on which the decision would have no effect.

At the time, it might have been thought, and may in fact have been the case, that the opposition to the federalist parties were challenging federalism as a whole and seeking sovereignty. Thus these were in essence ideas that could not be accepted by the judicial branch in a confederation and integrated into the confederation's constitutional law.

This is not to say that constitutional law has not been influenced by this current of thought. No Quebec opposition has played so well the foil to set the moderate dominant ideology of the governments in power to its best advantage for all Canadians to see. May we therefore conclude that the opposition contributed to the clearly favourable reception given to the constitutional arguments in support of Quebec's demands during this period, and more particularly beginning with the Johnson era, and to the rise of the *indépendantiste* opposition, both parliamentary and extra-parliamentary? Should we also conclude that judges have less to lose than politicians and are more likely to support arguments that, if accepted, would not tend to reduce the powers of politicians in the same circumstances?

However hypothetical they may be, these interpretations would not be incompatible with the conclusion suggested by the following analysis of constitutional practice during this period. The least we can say about federal practice is that it certainly did not support the political thought dominant in Quebec.

### *Constitutional Practice: Less Acceptance of the Dominant Political Thought of Quebec*

At the outset, we described this period as one of "bi-polar federalism." We were referring particularly to practice at the intergovernmental constitutional conferences, at which the federal government rapidly overtook the provinces and regained the initiative. Of the 17 federal-provincial constitutional conferences held between 1960 and 1976, 14 were called by the federal government.[176]

In these intergovernmental conferences, a pattern of constitutional practice arose in relation to both fiscal arrangements and the distribution

of powers that, on the whole, confirmed the functionalist, Keynesian theory of the federal government in the areas of revenue spending, the provinces' capacity to spend, and the provinces' areas of jurisdiction. As a whole, these conferences, the debates and the agreements emphasized fiscal arrangements: the allocation of revenue (taxation powers, ownership of resources) and spending (grants, joint programs, equalization payments, income security or individual transfer payments). This was the central, hidden agenda, the primary issue in this kind of federalism.

The distribution of powers, interpreted in the future improbable tense of post-patriation for some and the present conditional of pre-patriation for others, was never far from the surface in these developments. A full examination would require us to reconstitute the history of the evolution of fiscal federalism and of the patriation of the Canadian Constitution, an exercise that is clearly outside the boundaries of this study. Our objective here is only to determine whether there is a relationship between political thought and constitutional practice: to demonstrate to what extent practice reflected thought.

Overall, constitutional discussion during this period was dominated by two themes, with the accent on fiscal arrangements under Lesage and on a new distribution of powers as a condition of patriation under Johnson and subsequent Quebec governments. The Lesage government was primarily interested in increasing the revenue available to the Quebec government, so that it could effectively fulfill its new economic and social role. Thus it strove to gain control over the sources of taxation it needed and over underwater mineral rights, as well as to regain control of the areas of provincial jurisdiction that had been invaded by the federal government's use of joint programs and conditional grants, and to resume responsibility for these areas with financial compensation from the federal government.[177] Lesage also demanded that the province take over management of a pension plan, to be distinct from the federal government's plan, which was implemented during the same period, and opposed intrusion by the federal government into Quebec's natural resources by refusing to participate in a Canadian electricity system, preferring to nationalize the Quebec system.[178]

Overall, Lesage was successful only on these last two points (the pension plan and nationalizing electricity). On the others, aside from the two semi-successful battles over fiscal arrangements and compensation for opting out of joint programs, he ran up against the federal government's firm refusal to make any concessions. Thus, in the question of underwater mineral rights, which were the subject of long constitutional negotiations beginning in 1964,[179] Lesage's attempts to obtain a political resolution were unsuccessful, and in 1967 the Supreme Court decided the question in favour of the federal government. The defeat on this point was a major one.

Quebec's demands in the areas of the redistribution of sources of revenue (transferring to Quebec 25 percent of individual income tax

revenue, 25 percent of corporate tax revenue and 100 percent of succession duties), which the province had been putting forward since 1960, were only partially successful, and again only at the end of the period. In 1966, agreements were made to provide a tax rebate of 14 percent of individual income tax. At that time Quebec collected only 9 percent of corporate income tax.[180]

Lesage's success in obtaining compensation for opting out of joint programs was not unqualified. Quebec did obtain a rebate of 20 additional income tax points to compensate for its withdrawal from a number of joint programs, including hospitalization insurance and other social programs in which it had been participating, on the conditions demanded by the federal government, since 1960. This was but a partial victory, however, because, while the funding basis changed, the federal conditions attached to the programs remained in place and no restriction was put on the federal spending power. The Quebec government at the time did enjoy another small success in obtaining a satisfactory resolution of the question of student loans and allowances for young people 16 and 17 years old.[181]

However, only in the area of pension plans did political thought in Quebec find a clearly favourable reception in constitutional negotiations. In 1963, Ottawa and Quebec City each made proposals, a few weeks apart, for pension plan schemes. Quebec's proposal was inherently opposed to the universality proposed by Ottawa. Worse yet — or perhaps better, depending on whether the dispute is seen through the eyes of Ottawa or of Quebec — the proposal was to channel into Quebec funds coveted by the federal treasury, funds that would be significant for the future role of the state in economic development. The stakes were high, and the opposing arguments both relied on the same modernist, Keynesian theories, the only difference being the place they were to be applied. In April 1964, contrary to all expectations, Quebec won and Ottawa gave in, in exchange for Quebec's agreement to the necessary constitutional amendment for the federal government to establish its own pension plan.[182]

In the area of legislative jurisdiction, the gains and losses recorded during this period occurred mostly in the courts rather than through constitutional practice. Lesage was particularly interested in the fiscal gains that would permit him to exercise the powers he already had. He could not escape, however, the federal initiative in the process of patriating the Constitution. The Fulton-Favreau formula was discussed at the Jasper, Charlottetown and Ottawa conferences during 1964. In 1965, the Quebec government announced in the Speech from the Throne that it was proposing that the legislature adopt the formula, but Quebec was eventually prevented from giving its consent by the parliamentary and extra-parliamentary opposition, as primarily expressed at the États généraux.

When Johnson succeeded Lesage in 1966, he found the field of fiscal

negotiations closed. The agreements signed in 1965 were in effect until 1970 and could not be reopened. His increased fiscal demands for Quebec, seeking to have 100 percent of tax revenue sources, or all individual and corporate income taxes and all succession duties (100%, 100%, 100% formula), reserved for the province, were thus to no avail. His demands were therefore concentrated on eventually obtaining a distribution of powers that would respect the existence of two equal nations, and, as we have seen, most of these demands were at least partially accepted by the Supreme Court. However, apart from questions of language,[183] none of the federal-provincial conferences of this period dealt specifically with issues within the scope of Johnson's constitutional demands,[184] as was the case after 1970[185] for the issues that concerned the Bourassa government. Ultimately, the Johnson government made no gains: not in the area of language and culture, or in the other areas that could have been resolved in such a way as to respect the neo-nationalism of the period in constitutional accords.

To Johnson's credit, however, is the fact that he imposed — in the passive manner used by Duplessis before him — a moratorium on patriating the Constitution, by making his consent conditional on prior negotiation among equal partners of the substance of amendments to be made following patriation. As would be seen later, this condition was not about to be met.

The results of the constitutional negotiations during this period were no more successful from the point of view of Bourassa's political position. Even his minimal demand of cultural security for Quebec found no favour with the federal government, because any guarantee of such security would require primacy of provincial legislation in the area of social security in its widest sense.

Here, as with pension plans, both parties were acting from the same theory of the modern, Keynesian state, and from opposing theories of which government should exercise the powers of the state. Each party believed it essential that its government control revenue and have the economic and social power to exercise its jurisdiction over social security. As a result, the Victoria conference ended in failure.

## *Civil Liberties*

The contrast between this second period and the preceding period was as clear in the area of civil liberties as it was in the area of the distribution of powers. The constitutional decisions of the Supreme Court indeed remained an important avenue for change in this area; but in 1960 Parliament had adopted the *Canadian Bill of Rights*, a quasi-constitutional act, and almost half the decisions of the Supreme Court concerning civil liberties during this time — 17 out of 38 — dealt with interpretation of the *Bill of Rights*. On the other hand, although there was no real constitutional change

to be seen as a result of negotiations in the area of civil liberties, the subject dominated the federal government's discussions and strategy and was the pivotal point for the initiatives that have led us to describe this period as one of bi-polar federalism.

The position of Quebec in the development of the constitutional law of civil liberties, particularly in the courts, was also the complete reverse of the position taken under Duplessis. While 6 of the 7 decisions of the Supreme Court concerning civil liberties during the first period originated in Quebec, and dealt with freedom of opinion and freedom of religion, which had been infringed, the situation was reversed beginning in 1960. Only 3 out of 28 decisions in this area involved disputes originating in Quebec. In addition, 2 of these 3 disputes dealt with language rights, in one case, and the right to demonstrate, in the other. As a result, both took the debate into the realm of collective rights. These conflicts were also of a largely political nature, as opposed to the substance that prevailed in the comparable litigation of the preceding period, which related more to the rise of a technocratic class and the changes that were occurring in political and religious thought during that period.

Thus it is important to examine how political thought, and the context in which it existed, was transformed in Quebec after 1960, if we are to understand the manner in which constitutional law developed in the courts as well as through related constitutional practice. This is the first aspect we will consider.

### *Context and Political Thought: Emergence of the Concept of Collective Rights in Quebec*

The apparently precipitous departure from traditional religious beliefs and practices in Quebec at the beginning of the Quiet Revolution is so familiar that there would be little benefit in further documenting it here. However, the apparent suddenness of this change has been questioned. It has been pointed out that the collective religious practices of Quebeckers in the previous period had for long been a facade imposed by the dominant ideology, so that when urbanized Quebec entered the 1960s, its people merely stopped what had become an empty religious practice. This theory maintains that Duplessisism, like the Maurassism of the same period, used this universal religious practice for its own political purposes: to support its claim for provincial autonomy, not only on the basis of legal uniqueness, but also on the basis of religious uniqueness. This claim led to the incorporation of a dying religious practice into the system of political thought, so that at least the appearances of adherence to these practices had to be kept up "for the good of the nation." As well, the significance of this break with the religious past has been challenged by the suggestion that the dogmatism and absolutism that characterized the religion were simply transferred to the ideology of state intervention.

One fact remains, in any event. The sort of religious intolerance that had provoked earlier conflicts relating to civil liberties, particularly involving Jehovah's Witnesses and Communists, was no longer maintained by the provincial governments of this period.

Thus there arose among francophone Quebeckers a new group of lay elites, the product of educational advances in the province. Their capital was mainly cultural, and they found in the bureaucracy of the new state the ideal basis for their new power. For these workers in the fields of language and culture, collective rights — and particularly language and cultural rights — were far more important than religious rights. For these groups, political power became closely related to the rights for which they sought protection.

This was not a new phenomenon. When any culture cuts the bonds that tie it to the politically responsible and economically strong groups that created those bonds, it will quickly become folklore. In this light, the 1967 federal proposal for adoption of a constitutional charter of individual rights was merely, in the eyes of these new elites, a diversion intended to prevent them from obtaining their rights and establishing a new distribution of powers.

Under the Lesage government, it was largely the opposition that developed this awareness of the intimate relationship that binds politics and economics to cultural rights. Thus it was in the context of Johnson's neo-nationalism that this coherent system of political thought developed. It postulated equality between Canada's two nations as necessary for the political and collective aspects of cultural equality and it regarded the protection afforded to individual rights, even language rights, as inadequate and superficial.

Jean-Jacques Bertrand best expressed this position:

> We would be merely scratching the surface if we were to equate Canada's constitutional problem with a question of personal or linguistic rights. I am not saying that these rights are unimportant; what I am saying is that they do not reach the root of the problem which brings us here today. If there is a crisis in Canada, it is not because our country is made up of individuals who speak different languages; it is because Canada is the home of two communities, two peoples, two nations between which relations need to be harmonized.

He added:

> The important thing for French-Canadians from Quebec is not to be allowed, as individuals, to speak their mother tongue even in regions of the country where it has little chance of being understood; what they want is the opportunity to live together in French, to work in French, to build a society in their image. . . . Without Quebec, there might still be French minorities but French Canada would no longer exist.[186]

Under Bourassa's government, official thought abandoned the concept of the nation for the concept of the community. Those who promoted

cultural security no longer tied it to the exercise of the entire range of political powers of an independent state. Bourassa would have been satisfied with primacy for provincial social security legislation. It should be noted that the area selected as the minimum acceptable for provincial jurisdiction to ensure cultural guarantees is the area that, along with education and culture itself, was to experience the most significant growth as an area of public intervention, and thus provide the vehicle for the rise of the new technocrats to power.

Thus with the best (or worst) intentions in the world, the architects of the dominant ideology could not lower their demands below the vital interests of the groups that were emerging from the opposition soon to take power. Thus, even though the less-rigid wing of the government agreed to entrench individual language rights guarantees in the Constitution, it was held in check by its own less moderate rivals within its party and had to insist on minimum conditions for these provisions.

Similarly the extra-parliamentary opposition and the Parti québécois supported the Johnson-Bertrand position, which demanded reform of the distribution of powers in the Constitution as a prerequisite to establishing guarantees of individual rights. Thus there was agreement among all political groups in the province during this period that the redistribution of powers was a prerequisite to adoption of a Charter of Rights, and that the Charter should be concerned primarily with collective rather than individual rights, although the intolerance of rights and liberties demonstrated under Duplessis was no longer evident.

### *The Supreme Court: Focus on Individual Rights*

The decisions of the Supreme Court, together with practice in federal constitutional negotiations, were totally unrelated to the values that had come to the forefront in Quebec. The Court dealt mainly with interpreting the *Canadian Bill of Rights* and the rights of Indians. The federal government pursued a constitutional agenda diametrically opposed to Quebec's aspirations.

After an initial series of cases dealing with freedom of religion and expression, the main theme of the preceding period, the Supreme Court turned its attention to the rights of Indians and to the *Canadian Bill of Rights*. The only cases that had any connection with developments in the area of rights and liberties in Quebec were the four decisions dealing with language rights.

At the beginning of this period the Supreme Court was already faced with a number of cases dealing with themes characteristic of the Duplessis period. Decisions were rendered in six cases concerning freedom of religion and expression. All but one[187] of these judgements[188] upheld the legislation that had been challenged and rejected the rights and liberties that had been argued against the legislation. This was a major reversal of the Court's tendency to quash legislation and administrative actions and thus uphold infringed liberties.

There is here a certain coincidence. While during the preceding period six of the seven cases decided by the Supreme Court in this area had originated in Quebec, between 1960 and 1975 only one case[189] out of six was from Quebec. In that case, as in the others in this period, the Court upheld the challenged legislation (a municipal by-law prohibiting demonstrations).

While this last case prevents us from concluding that the Court's attitude toward civil liberties was always different when the question related to Quebec, we would still observe that even in that case the decision was a rejection of both dominant and opposition political thought current in Quebec at the time the dispute arose. The right to demonstrate is a collective right that Quebeckers in the 1960s, with the exception of the government, definitely intended to exercise.

In the area of Indian rights, the Supreme Court rendered three decisions[190] interpreting the *Canadian Bill of Rights*, along with nine others,[191] most of which dealt with treaty rights. On the whole, the decisions in these cases, which dealt mainly with status rights in addition to hunting and fishing, did not support the rights of Indians, particularly Indian women. The Court held that federal legislation took precedence over treaties.[192] Relying usually on a narrow interpretation of the facts, it was also able to justify applying provincial legislation to defeat Indian rights, whether or not those rights were guaranteed by treaty.[193]

We may thus conclude that this line of cases was in general favourable to provincial jurisdictional claims. However, although there was nothing in this affirmation of provincial jurisdiction that would appear contrary to the political thought expressed in Quebec during this period, there is also nothing to indicate that the Court in fact adopted either the dominant or the opposition position.

Almost half the decisions of the Supreme Court during this period dealt with interpretation of the *Canadian Bill of Rights*. This series of cases had a promising beginning, when the Supreme Court decided that the *Bill of Rights* was more than an interpretive statute and took precedence over other federal legislation if that legislation infringed the rights in the *Bill of Rights*.[194] The Court held that the principle of equality before the law meant that the law could not treat one individual differently from another.[195] The Court was more hesitant, however, to extend this interpretation beyond procedural rights.[196] It held that the exercise of discretion in enforcing a statute did not contravene the principle of equality.[197] As well, the Court ruled that the principle of equality must be interpreted on the basis of the rights and freedoms that existed before the *Canadian Bill of Rights* was enacted,[198] and could not limit the manner in which Parliament legislated in matters within its jurisdiction.[199] Parliament could therefore, for example, define who was an Indian and confer special status on Indians.[200]

Once the Court had established what it saw as the effect of the *Canadian Bill of Rights*, it consistently declined to apply its provisions[201]

except in three cases,[202] two of which[203] concerned language rights. We shall examine these cases later, along with other decisions that dealt with language rights but were not based on the *Bill of Rights*.

Only one of the cases under the *Bill of Rights* arose in Quebec: *Guay v. Lafleur*,[204] in which the Court held that an individual did not have a right to be heard at a purely administrative inquiry. Since this was not a question that had arisen, even by implication, in the political forum in Quebec during this period, we are unable to establish any relationship between this decision and the development of political thought in Quebec. The decisions that extended the right to be heard as a party or intervenor before the courts in order to challenge statutes or government actions did not originate in Quebec, and at the time they did not attract the attention that they deserved.[205]

During this period, the decisions of the Court concerning language rights tended to uphold such rights and the federal and provincial legislation[206] that guaranteed language rights, and to quash government actions that infringed them.[207] Before concluding that there was a positive relationship between the dominant political thought in Quebec, which demanded language rights guarantees, and the Court's treatment of language rights, at least, in the spectrum of civil liberties, we should note that, in each case considered, the rights in question were individual rights and the issue was the use of a language in the courts.

In Quebec, however, the language rights demanded during this period, particularly as framed by the Union Nationale, were perceived as collective rights. Although the Parti québécois was not yet in power and asserting the primacy of collective rights over individual rights where the two came into conflict, clearly individual language rights in the courts were beginning to be seen as inadequate by the leaders in the dominant political ideology in Quebec, as we have seen earlier in the speech given by Jean-Jacques Bertrand.[208]

In fact, the position adopted by the Supreme Court in the four decisions upholding individual language rights supported the dominant ideas in English Canada, rather than in Quebec, as we will see when we consider constitutional practice. It could be said that the Court created a dual route for the federal government in its efforts to include a charter of individual rights in the Constitution. The Court did this not only by establishing language rights as individual rights, but also by interpreting the *Bill of Rights* so restrictively that the need for a constitutional instrument that would take precedence over other legislation became obvious, even to those who remained staunch supporters of parliamentary supremacy.

### *Constitutional Practice: A Different Road*

Lesage still bore the mark of his years in federal politics when, at the federal-provincial conference during July 15–27, 1960, he proposed on behalf of Quebec that a declaration of fundamental rights be included in

the Constitution. The political views expressed by his party when it was in power indicated that he did not see this proposal as a substitute for reforming the distribution of powers. The federal government, on the other hand, made it clear through its constitutional practice that it wished to see a constitutional guarantee of individual rights only, to the exclusion of collective rights and of any change that would decentralize the distribution of powers. Nothing in the federal position, either in Pearson's statement[209] or in his later proposals,[210] in official documents[211] or in the federal refusal to negotiate for provincial primacy in social security legislation at the Victoria conference in 1973, showed any common ground with dominant political thought in Quebec under Johnson.

The Union Nationale's position at the time was:

> That the question of fundamental rights is closely linked with the constitutional problem as a whole and thus no decision can possibly be taken in this respect before agreement has been reached on certain basic reforms, particularly on the creation of a true constitutional tribunal.[212]

Constitutional practice made it impossible for Johnson to gain acceptance of his political views in this area, and in 1969 the Quebec government apparently changed its position and decided to participate in the committee of ministers on fundamental rights. This tendency continued after 1970, and federal political views gained ascendance in Quebec practice. Bourassa agreed to include provisions on political rights and fundamental rights in the Constitution. He went so far as to agree to a form of Canadian bilingualism that would be based on guarantees of individual rights as opposed to collective rights.[213]

None of these concessions, even the ultimate concession on language rights, was to any avail. The process of constitutional change could not surmount the obstacles that blocked it and change ground to a halt at Victoria when the federal government refused to accede to the sine qua non that Bourassa, under heavy pressure from the opposition, could not abandon: legislative primacy in social security. This impasse marked the end of the second period.

## *Institutions*

Unlike the developments in the distribution of powers and civil liberties, where there was a striking contrast between the first and second periods, the absence of any relationship between political thought and institutional change seen during the first period persisted through the period 1960–75.

The Senate and the Supreme Court continued to be subjects of political discussion in Quebec, although to a lesser extent than the distribution of powers. However, these concerns did not appear in the cases

decided by the Supreme Court, which continued to deal with the operation of the courts and of the parliamentary system in the federal structure, although it did begin to take a role in constitutional review. Nonetheless, these concerns were an issue in constitutional negotiations, although they failed to attract any more favourable attention in that realm either.

### *Context and Political Thought: Quebec's Traditional Demands Make Gains*

Beginning in 1960 under the Lesage government, Quebec proposed that there be a constitutional court that would follow the principles of federalism. It would be a creature of both the federal government and the provinces, particularly in the matter of the appointment of judges, since its role would be to arbitrate between the interests of the two orders of government.[214] This claim became the *Leitmotiv* of all the Quebec governments during this period. Johnson demanded an impartial court of last resort that would interpret the new Constitution, once it was adopted,[215] while Bourassa took the same position in a somewhat less forceful manner. Following the 1971 negotiations, which had ended in failure at Victoria, the Bourassa government lowered Quebec's demands on this point to a requirement that there be some participation by the provinces in appointing Supreme Court judges.[216]

In addition to demanding that the Supreme Court be restructured, Johnson sought a new form for the Senate, which he believed should reflect the nature of Canada as a federation of states and guarantee that the provinces would be able to participate in the federal legislative process.

Neither the extra-parliamentary opposition nor the Parti québécois had any interest in federal institutions. Some proposed that an independent Quebec should establish its own internal institutions; others favoured the creation of new kinds of institutions to be based on the associated-states proposal for the federation.

Finally, there were the internal judicial institutions — the Federal Court, the Superior Court, and administrative tribunals — that were the main subjects of the decisions of the Supreme Court. These remained largely outside the scope of political discussion during this period, although very much inside the political reality in the province. Their presence in the political reality in Quebec was largely due to the rise of the technocrats and the connection they made between neo-nationalism and state interventionism.

This phenomenon was apparent throughout the Quebec government, including the Ministry of Justice. An organized, competent public service developed, with professional and class interests tied closely to the assertion of provincial jurisdiction over the judicial system. This fact of the political scene, even in the absence of overt discussion, had an effect

on the decisions of the Supreme Court of Canada concerning the country's institutions.

*The Supreme Court: A Backdrop to Quebec's Demands*

A connection can be seen between the rise of the technocrats and the participation of the Attorney General of Quebec, as a party or an intervenor, in nearly half the cases heard by the Supreme Court dealing with the jurisdiction of the Superior Court and with provincial jurisdiction to create administrative tribunals. This active participation is in clear contrast to the total absence of the provincial attorney general from disputes brought before the Supreme Court on these same points during the preceding period.

However, the relationship between political thought in the province, as we have examined it here, and constitutional practice and decisions of the Supreme Court is negative overall. That is, the Court and the practice of the time reflect a negative response to Quebec's positions or fail to deal with them at all.

As a whole, the decisions of the Supreme Court dealing with the jurisdiction of the courts, including the Federal Court, the Superior Court, the Provincial Court and administrative tribunals, largely upheld provincial jurisdiction, which prevailed in three-quarters of the decisions.

When required to choose between recognizing the jurisdiction of the Superior Court, a mixed institution, and that of the Federal Court, the Supreme Court favoured the Superior Court.[217] However, when it was necessary to defend the Superior Court's jurisdiction, not against the Federal Court, but rather against provincially created administrative tribunals or inferior provincial courts with delegated powers, the Supreme Court still mostly upheld the jurisdiction of the Superior Court.[218] Similarly, the Court upheld the power of the Superior Court to control inferior tribunals, even those created by the federal government.[219] We cannot conclude, however, that because the Supreme Court appeared to favour the provinces in these cases the Court had adopted the ideas of any particular group in Quebec.

Finally, on the question of Parliamentary supremacy[220] and, in particular, constitutional review[221] — when there was no issue of the distribution of powers between the federal and provincial governments — the Supreme Court's decisions provoked no great political interest in Quebec, despite the major significance they held for the province.

On the other hand, the Supreme Court, as might be expected, could not adopt political views that premised the reform of the Court itself. As well, the Court was not called upon during this period to consider the powers of the Senate. In any event, the structural changes postulated by those whose political views we have examined could have been obtained only by legislative action.

This absence of any common ground between the Court's decisions

and the issues on the political scene in Quebec indicates the failure of both those whose views were dominant and the opposition to convince the Supreme Court of the correctness of their positions. Still, the increased activity of the attorney general in these cases demonstrated the effects of the political changes that had been realized in the form of state intervention.

*Constitutional Practice: Opposition to Quebec's Demands*

Federal constitutional practice concerning institutions was not unrelated to the political views that were current in Quebec at the time. However, while the existence of Quebec's views may have been recognized, the practice was to reject them. The two main indications of this federal practice were the 1969 publication of the federal white paper "The Constitution and the People of Canada"[222] and the 1971 Victoria conference. The white paper proposed institutional changes that were perceived by the Quebec government as superficial and unsatisfactory. The effect of these changes would have been to incorporate some provincial representation in the Senate and increase its powers, particularly with respect to appointments. The federal position on the Supreme Court, however, was to refuse to establish a constitutional tribunal and to maintain its own control over the appointment of judges.

The Victoria Charter was silent on the question of the Senate. It proposed the establishment of the Supreme Court as a constitutional tribunal, with the members of the Court to continue to be appointed by the federal government, after consultation with the provinces.

In the area of constitutional practice as well, then, the period ended in an impasse.

## The Third Period (1976–85): Standardizing Federalism

The third period began in November 1976 with the election of the Parti québécois government — an event that one might have thought would usher in major changes in the dominant political thought in Quebec, and might even have resulted, if not in an immediate constitutional separation from Canada, at least in rapid changes in constitutional institutions and distribution of powers, changes that would be conceded through a Canadian constitutional practice that would reflect a desire to avoid the worst.

Nothing of the sort happened.

Instead of the expected changes, there was the unilateral patriation[223] of the Canadian Constitution, following an escalated federal offensive toward economic centralization at the expense of the traditional jurisdiction of the provinces. Even the Supreme Court, which had demonstrated a consistent centralist tendency since World War II but had recently grown less rigid, reversed the position it had taken in favour of provincial

interests in the cases originating in Quebec during the preceding period. In addition to the setbacks Quebec suffered in the Supreme Court and as a result of federal constitutional practice, this period saw the most significant amendment to the Constitution since it had been enacted by the British Parliament in 1867.

There is no easy way to explain this unexpected setback in the ability of the dominant political views in Quebec to influence Canadian constitutional law at a moment when one might have expected just the opposite to happen. Our task is all the more difficult since we do not yet have the perspective of history to assist us. However, we shall attempt to formulate some theories to explain this situation in the light of the analysis already presented.

One current theory for Quebec's failure to shape constitutional developments was the all-out effort of the federal government, in particular the prime minister, to impose its own concept of Canadian unity and federalism. While this theory may appear to have an obvious basis in fact, it cannot stand up under examination. After all, the federal government's approach was far from new; its centralist tendencies had been made perfectly clear at Victoria in 1971. What must be explained is Quebec's vulnerability during this third period. To do so one must look at the internal situation.

First, the lines had been clearly drawn between the positions of the various Quebec political parties on the question of sovereignty, these positions being so firmly entrenched that the political arena became polarized between the proponents of sovereignty and those of federalism, between dominant and opposition ideas. This internal division had an adverse effect on Quebec's ability to present a broad united front against the federal offensive.

Also, after 1976, the Péquistes' proposals for sovereignty became dominant in Quebec society in only a very narrow sense. While they became dominant in that they were the position of the majority government, it could not be said that they were generally shared throughout Quebec society, as were Duplessis' political views. As the divided results of the 1980 referendum made clear, Quebec society was deeply divided on the question of federalism between the supporters of a renewed federalism and the proponents of sovereignty.

These trends in political thought had become institutionalized in Quebec politics and channelled into the structures of parliamentary democracy. They were monopolized by an eclectic party, and had become weaker, or at least less obviously dangerous, than when separatism was an undisciplined political force led by an opposition in part extra-parliamentary and in part violent, in a turbulent society. If the situation in Quebec alone were not enough to defuse its constitutional efforts, the Parti québécois government's own constitutional practice, which was completely unrelated to its political statements (if not actu-

ally counter to the objectives it professed to be seeking) shortly rendered its efforts ineffective.

In this context of political polarization and internal confrontation, we can see the crucial events in their logical sequence. The referendum was lost in 1980; the amended Constitution was unilaterally patriated in 1982; and the background for these events was an economic crisis that led to the gradual abandonment of the dominant Péquiste ideology. The first casualty was social democracy, as a result of what Mitterrand described in another context as "*l'intournable épaisseur*" of economic reality. The next was the goal of sovereignty itself, abandoned in the pursuit of votes, in a chaos that is still too recent to allow objective analysis.

## *Distribution of Powers*

Since 1975, the relationship between political thought in Quebec on the question of the distribution of powers in the Constitution and constitutional developments in Canada has been multifaceted. Indeed the scenario is in some ways even more complicated than the diverse relationships in the preceding period among the three successive dominant bodies of thought. First, the evolution of constitutional case law contrasted sharply with the obstacles posed by the federal government in constitutional practice. As well, although the dominant political thought was the product of a single party, which was in power throughout this period, it nevertheless changed from its original expression in official speeches and specific constitutional proposals as the crisis had its effect. Finally, the negative relationship between this body of political thought and the changes in constitutional law can be seen not only in the decisions of the Supreme Court and in constitutional practice, but as well in the legislative amendments imposed unilaterally by the federal government when it patriated the Constitution.

### *Context and Political Thought: Fact and Theory in Conflict*

To comprehend the differences between the dominant and opposition political ideas during this period in Quebec, one must remember that the Parti québécois was sending out conflicting messages. In its document *Pour une entente d'égal à égal: la souveraineté-association*,[224] the government proposed an option in which the distribution of powers was not even an issue, and which was diametrically opposed to the position of the Quebec Liberal party, which was firmly federalist. On the other hand, the constitutional practice of the PQ government was based on political positions and thought that were much closer to those of its political opponents.[225] The development of this second body of thought was clearly a product of the political reality of the period. It therefore appears important to consider the ideas and the reality in the dialectic order that best illustrates them.

Even given the reservations we have expressed concerning Parti québécois ideology during this period, it is possible to isolate the two bodies of thought we have described. First, the constitutional formula for sovereignty-association put forward by the extra-parliamentary opposition and developed by the Executive Committee of the Parti québécois in *La nouvelle entente Québec-Canada*[226] proposed a model for a society that would, as it put it, remove Quebec from the domination of Ottawa; ensure greater autonomy for Quebec; permit Quebec to acquire the economic resources it lacked; and link sovereignty closely with autonomy for Quebec in both the cultural and political realms.

This model did not actually propose sovereignty as a goal in itself, but rather as a means of implementing a social democratic program for Quebec society. This program would promote the economic, political and cultural development of Quebec society, and as such it was the same program proposed by the technocrats whose identity and power grew out of the development of government institutions.

Seen from this point of view, federalism and the distribution of powers that characterizes it have no place, and in fact have no meaning. Constitutional law ceases to provide any context for relations between Quebec and Canada and would be replaced by international law, which would govern relations between two sovereign states as they negotiated agreements, as equal parties, to formalize their economic dealings. Similarly, Quebec's repatriated powers would permit it to implement social-democratic economic policies to meet the specific needs of Quebec society.

While this view is now described as radical by many who held it then, even at the time it created divisions within the Parti québécois itself, particularly on the question of how and when it would be negotiated, for its proponents never considered imposing it by force. Some of them, proponents of unhyphenated sovereignty association, believed that the correct scenario required that sovereignty precede association. Others, who favoured the hyphenated form of sovereignty-association, believed that there would have to be negotiation of the practical aspects of association before Quebec could attain sovereignty. Both, however, believed that the eventual result would be a State of Quebec, which would have available to it the full range of exclusive jurisdiction that makes up sovereignty: powers to legislate and tax, a separate international state identity, territorial integrity, and control over citizenship and immigration. To the Péquistes, however, sovereignty was not incompatible with economic and monetary union with Canada, or with the existence of a joint Quebec-Canada court that would have the responsibility of applying the Treaty of Association.[227] Everyone, except a minority within the party, which was never able to integrate its ideas into the body of dominant political thought, believed that, regardless of which sce-

nario was followed, the process would have to take place gradually, by progressive stages.

If the ideas put forward in the Parti québécois government's practice in constitutional negotiations had followed this theoretical model alone, we could end our analysis by concluding that it culminated in total failure. It would not be necessary to examine the development of constitutional law in the courts or the federal government's constitutional practice, because if this model was incompatible with any form of federalism, however decentralized, it was even less compatible with the standardized federalism imposed during this period, and which holds sway today.

However, before we conclude that the relationship here was almost as negative as that between the dominant political thought of the period and constitutional changes (not a very different conclusion, in any event) we should examine the proposals actually made by the Parti québécois government. The PQ became ensnared in its own strategy of gradual change, and during the constitutional negotiations it justified its proposals by stating that the democratic process had to be followed in proceeding through the intermediary stages, and that so long as Quebeckers were contributing financially to Confederation they were also entitled to benefit from it.

The period opened with an economic crisis: the failure of the economic model of capital accumulation and the crisis in state financing.[228] This crisis exacerbated the tensions between the federal and provincial governments and resulted in an even more intense hunt for tax revenue, and in Quebec, the gradual abandonment not only of demands for sovereignty but also of social-democratic economic goals. In particular, shrinking budgets for health and education, especially during the 1980s, culminated in the summer of 1981 in a challenge to the universality principle itself in social programs.

This ideological reconversion to a belief that the state should step aside to allow market forces to function more freely had a negative impact on nationalist sentiment in Quebec, and brought economic questions to the fore. This was the beginning of the swing in dominant political thought toward a neo-liberalism more natural to the Quebec Liberal party. This swing continued on the constitutional scene, where the government's proposals not only became integrated into the format of the distribution of powers, but as time went on became less and less distinguishable from the proposals put forward by the opposition Liberal party, concerning both redistribution of powers and the economic policies that would be possible under such a new arrangement.

Having failed to attain the goal of sovereignty association right at the outset, the Lévesque government became a prisoner of its own policy of *étapisme*. It was then forced into a pattern of reacting to every political event that occurred. First, a broad federal offensive was directed toward instituting a standardizing federalism: the Pépin-Robarts Report (of the

Task Force on Canadian Unity); federal statements before the referendum; the unilateral patriation of the Constitution; the establishment of the Royal Commission on the Economic Union and Development Prospects for Canada; the promotion of the Canadian economic union; the attempt to impose national standards for health and education; and so on. As well, in reaction to the economic crisis, there was an ideological reconversion to the view of the welfare state as the enemy, and the question of sovereignty became secondary.

The Parti québécois government's response to these events, against the background of the economic crisis, is in fact a second body of dominant political and constitutional thought in the Quebec of this period. This body of specific constitutional proposals dealt with economic jurisdiction, ownership of natural resources, fisheries, communications, family law, equalization payments and the spending power.

One cannot legitimately conclude from this that the Parti québécois government decided to recognize federal jurisdiction over everything that it did not specifically claim as provincial. Rather, its specific demands were formulated in reaction to an agenda it did not control. One could probably assume, however, that the PQ government was content, at least temporarily and as a matter of tactics, to accept the status quo as it related to federal jurisdiction, except on those points where it sought specific changes.

In particular, its claims rejected any reduction in provincial economic jurisdiction in the name of preserving the Canadian economic union, and demanded that the provinces be given exclusive jurisdiction over exploration, conservation and exploitation of natural resources, together with concurrent jurisdiction over resource exports, and that the federal government renounce its declaratory power, residual power, implied jurisdiction and emergency powers.[229]

With respect to communications, the Lévesque government first tried to obtain federal agreement to recognize the provinces' power to adopt and implement policies that would comply with their objectives and priorities. However, in 1980, Quebec agreed to a document that recognized exclusive federal jurisdiction over broadcasting frequencies.[230] Similarly, demands that federal jurisdiction over fisheries, and over marriage and divorce, be transferred to the provinces, and that an integrated family court be established, were among those that gradually took the place of the claim to sovereignty.[231]

In addition, the conditions imposed by Quebec if it were to sign the agreement for the patriation of the Constitution were themselves specific constitutional proposals: recognition of the special nature of Quebec society and compensation for opting out of jointly funded programs. However, throughout this period, while the process of negotiating the patriation of the Constitution went on with the cooperation of the Parti québécois government, dominant political thought did not exclude the

possibility of unconditional equalization payments.[232] This was not surprising, since these were the prime considerations behind the policy, the basis for both Parti québécois cooperation and the goal of a workable federalism put forward by the opposition.

### THE COMMON IDEOLOGICAL DENOMINATOR

There was, however, a point below which neither side would go at this or any other time: the line that separated unconditional equalization payments from conditional grants. Through the latter, the federal government attempted to use its spending power to impose national standards on health and education programs, particularly in the post-patriation negotiations on the renewal of tax accords. Rejection of this centralizing tool formed part of the thought of both the government and the opposition, as may be seen in a brief moment of unanimity on the political scene from Johnson to Camille Laurin, from Castonguay to Claude Ryan.[233]

However, it must be recognized that the Quebec Liberal party did not officially adopt this position until the end of this third period. Badgered by the proponents of autonomy in its own organization, and mindful of its credibility, it eventually reversed its own earlier position in favour of the federal spending power.

This common denominator stops short of the line that Bourassa, himself also dogged by the opposition, had not been able to cross at Victoria: maintenance of existing provincial jurisdiction over health and education. One may hypothesize that the hard core common to all currents of political thought in Quebec coincided in every period and for every government with the professional and political interests of the dominant technocrat class in a society that had no developed business class.

Even in a relatively homogeneous society like Quebec, however, all interests did not come together on every question. The upper middle class, concentrated in the Quebec Liberal party, which represented the interests of the Quebec anglophone minority as well, put forward its interests in a body of thought that, while closer to the constitutional proposals of the ruling Parti québécois than to the principles of the extra-parliamentary Parti québécois, nevertheless remained different.

### OPPOSITION POLITICAL THOUGHT

The Parti québécois having originally succeeded in prevailing over most *indépendantiste* factions, its opposition, at least at the beginning of this period, faced it from the benches occupied by the Quebec Liberal party in the National Assembly. The constituency of the Quebec Liberal party came from the upper middle class, the layer of society just below the stratum from which the federal Liberal party drew its support. This group professed a form of economic liberalism even before the current worldwide wave of neo-liberalism and adhered to a form of federalism

that was slightly less centralist than that of its mentor in Ottawa. When the Liberals returned to opposition following the defeat of Bourassa, these were the two main characteristics of the party's political thought.

Ryan then took the party organization in hand and established a structure to develop the program that was to be the most important political statement by the party during this period: the "beige paper," published in 1980.[234] The constitutional thought of the Quebec Liberal party was opposed to the body of anti-federalist thought that formed the core of the sovereignty-association theoretical model. Liberal thought, as we have observed, was closer to the constitutional proposals made by the Parti québécois government throughout this period. It differed in spirit, however, as well as on some specific aspects of the distribution of powers.

The difference in spirit, first, was that Liberal thought was based on a vision of a permanent federalism, while the Parti québécois, even in its most diluted version, continued to be supported by at least some proponents of sovereignty who saw their support for federalism as temporary and tactical only. Liberal thought diverged from Parti québécois thought as well on the principle that determined the kind of federalism the two supported, even considering the Parti québécois proposals made after August 1985. The Péquistes who were converted to federalism after that date, both by a desire for votes and in order to recover the constitutional losses that had been incurred since the referendum and patriation, had no real theory of the distribution of powers. Rather, by putting forward specific proposals on the distribution of powers, they were reacting to the significant political events brought about by the economic crisis. The Liberals, on the other hand, took advantage of the opportunities offered them in opposition after 1976 to develop a concept of federalism, this process ultimately contributing to the "Ryanization" of the party.

This concept was based on several principles, the two most important of which were the greatest possible reduction of unilateral powers and subjects within exclusive jurisdictions and the creation of a federal council with power to control the exercise of certain jurisdictions of both orders of government. It would seem that these principles flowed, implicitly if not explicitly, from a functionalist concept of the state, particularly a federal state.

Implementation of the form of federalism proposed in the beige paper, based as it was on the practical requirements of daily political management in a functional state, would certainly require continuous cooperation between the federal and provincial governments. It is based on the premise that the operational format will be cooperation, rather than an independent exercise of a set of "watertight," opposing jurisdictions. It would therefore appear to be a much more centralist form of federalism than the concept put forward later by the Parti québécois. It took shape

in a number of specific proposals on the distribution of powers that differed sharply from the ad hoc reactions of the Parti québécois to constitutional events.

This version of federalism also premised a set of joint or non-exclusive jurisdictions that included all forms of taxation, research, immigration, labour relations, income redistribution policies, natural resource exploitation, financial institutions, and control over the content of telecommunications.[235] While the emergency power and the spending power would remain in the list of federal powers, exercise of these powers would be subject to the approval of a two-thirds majority of the "Federal Council." Thus what was proposed was, in a way, a joint jurisdiction operating according to a different modality.[236]

In addition, some of the jurisdictional areas that the Parti québécois government was claiming explicitly for the provinces in negotiations on the distribution of powers — natural resources, fisheries, trade and commerce, economic powers and the spending power — were assigned by the beige paper, at least in part, to the federal government. These included access to and a share in natural resources, currency protection, nuclear energy, and the interprovincial and international aspects of trade and commerce. The beige paper would also retain the federal spending power, subject to the control of the Federal council, particularly in the field of health, although the Quebec Liberal party reversed its position on health in 1984.[237]

*The Supreme Court: A Deaf Ear to Quebec's Demands*

Participation by Quebec parties in cases before the Supreme Court of Canada dealing with the distribution of powers appears to have settled at around one-quarter of all such cases heard.[238] This figure is no higher than in the preceding period and appears to correspond generally to the proportion of the population of Canada represented by Quebec.

There had been no economic recovery in Quebec, because the economy of the province remained weak in key sectors, and economic expansion was still hampered by the existence of soft sectors. It might therefore be surprising that participation in constitutional litigation remained at this level, were it not for the fact that the cases that arose in Quebec seldom dealt with jurisdiction over areas linked to economic development, but rather with criminal law, which is generally associated, rightly or wrongly, with economic stagnation.

The distinction between this period and the preceding periods appears rather in the quantitative aspects. If we did not examine the qualitative aspects of these cases, taking into consideration the relative importance of the decisions and the major political significance of the exceptions to this trend, we might be tempted to conclude that the general tendency of the Court had swung toward the provinces.

In fact, although the centralist tendency of the Court after World War II had been tempered somewhat, the Court had never actually veered from that course. Now, however, there seems to have been a reversal, at least in the numbers of decisions that favoured the provinces. Not only were a majority of decisions in favour of the provinces, but, with the exceptions of criminal law, the environment and the "meta-power" to amend the constitutional rules themselves, this majority was of significant proportions. In fact, if decisions involving criminal law, which were overwhelmingly favourable to the federal government, had not accounted for more than half of all cases heard, the total proportion of cases representing gains for the provinces would appear far higher.

However, and this is no less stunning a reversal, this tendency was reversed in cases arising in Quebec. In those cases, two-thirds of the judgments of the Supreme Court favoured the federal government.

Before we examine the relationship between the quantitative data and the events and currents in political thought examined earlier, we should first consider a particular aspect of the legal structure that, in our opinion, may partially explain our observations. As noted above, three-quarters of the cases arising in Quebec during this period concerned criminal law,[239] a field that the Constitution assigns specifically to the federal government and that has, in addition, always been given a broad interpretation by the Supreme Court. Thus it was more or less natural that all these decisions would confirm federal jurisdiction, even though the two last decisions also resulted, in one sense, in a limited provincial success.[240] In fact the centralist tendency of the Court resulted in decisions confirming federal jurisdiction over criminal law in more than half the cases, and was equally evident overall, regardless of their origin.

However, it would be naïve to examine this body of cases, which includes the three *Keable* cases in particular, solely from this limited statistical point of view. It seems to us that cases dealing with such obviously political questions clearly cannot be decided outside the context of the political issues to which they were inextricably connected. Certainly the decisions were in line with the interests of the federal government, sustained during that period by numerous favourable political factors, including the institutionalization of the *indépendantiste* opposition within a more moderate party, which was then defeated on the referendum and outwitted on patriation.

In all other areas where the distribution of powers was in question, with the exception of the environment[241] and economic development,[242] a majority of the Court's decisions favoured the provinces. These were, however, provinces other than Quebec, which during this period provided the Court with only two cases on the distribution of powers that did not concern criminal law.[243]

In all of these specific areas except health,[244] the Court adopted the

constitutional thinking that was expressly put forward in the opposition political thought set out in the beige paper. Nor were these decisions contrary to the dominant political thought of Quebec, in that the Parti québécois had put forward a theoretical model of sovereignty-association that claimed at least these specific areas for provincial jurisdiction, even though it did not demand them explicitly, and then reduced its demands and agreed to negotiate the distribution of powers.

Thus in the area of labour law, two[245] of the three[246] decisions favoured provincial jurisdiction by rejecting the "intrinsic elements" doctrine, following the *Montcalm* decision in the preceding period, and integrating liberal thought advocating that the provinces be given power over labour relations (except for the federal public service and employees in sectors within express federal jurisdiction, an exception that was to be confirmed in the decisions favouring the federal government in this area).[247]

The only decision in this period relating to transport[248] followed both the dominant and opposition bodies of thought, by confirming provincial jurisdiction over an intraprovincial work related to a neighbouring province and over related tax matters, as the Quebec Liberal party had specifically demanded.[249] All these decisions favoured the provinces,[250] although one was in some respects favourable to the federal government as well.[251]

The Court decided in favour of the provinces on the question of the power to tax, in general, and specifically to tax real property and natural resources,[252] thus satisfying the demands of both the Parti québécois and the Quebec Liberal party.[253] The situation was the same in the areas of financial institutions,[254] the Court holding trust companies to come within provincial jurisdiction, as proposed in the beige paper,[255] and trade and commerce,[256] in which federal legislation was held to be invalid because it related to intraprovincial trade and commerce, another of the areas of jurisdiction claimed for the provinces by the Quebec Liberal party.[257] While these powers had not been the subject of any specific comments by the Parti québécois government throughout the constitutional events of this period, they certainly fell within the group of powers that the PQ had not specifically renounced when it went into negotiations.

One might therefore be tempted to conclude that during this period there was a positive relationship between constitutional developments in the courts and political thought in Quebec, both dominant and opposition, were it not for two exceptions, both of prime importance. We have already examined one of these, the area of criminal law, which involves the repressive power of government, especially when that power is exercised in relation to politically sensitive subjects.

The second exception is the area of what we might call "meta-consti-

tutional" powers, which govern the amendment of the Constitution itself. We shall consider this area in relation to the institutions affected under the Constitution.

*Constitutional Practice: The Road to Unilateral Patriation and Constitutional Modification*

Constitutional practice between 1978 and 1981 was in a state of turmoil, particularly because Quebec itself was sharply divided by the 1980 referendum. The first event was the defeat suffered by Quebec in negotiations on the Constitution, culminating in unilateral patriation in 1982 of a Constitution that had first been amended by the British Parliament. Rather than moderating the offensive by the federal government, this victory spurred it on to its attempts in 1984 to impose national standards, particularly in the areas of health and education.

These negotiations opened with a conflict between the agendas proposed by the Quebec and federal governments, respectively. As Daniel Soberman is carrying out a study of these negotiations, we shall refer to them only briefly here. On the whole they were a failure from the Quebec point of view. The federal government wanted to focus negotiations on an amending formula for the Constitution, once it had been patriated, and on inclusion of a Charter of Rights and Freedoms. In addition, it proposed two new areas of discussion: inclusion of a preamble, and its proposals for the distribution of economic powers. Quebec in no way shared this order of priorities; it felt that the Charter was of lesser importance, and that neither a Charter nor an amending formula should be discussed before the question of the distribution of powers had been settled to its satisfaction.[258] Quebec also argued that the preamble should contain, in addition to recognition of the special nature of Quebec society and of Quebec's right to self-determination, a provision for opting out with compensation from joint programs.[259]

In addition to these factors, which concerned the agenda for discussions and the preamble, Quebec sought to maintain the status quo on economic powers, an amendment of the distribution of general, residual, declaratory and spending powers, and changes in the areas of communications, family law, equalization payments and natural resources. These are the demands we described earlier as forming the second body of Parti québécois political thought during this period.[260] They encountered varying receptions in the constitutional discussions, but overall the result was a failure.

Certainly the federal offensive directed toward amending the distribution of powers in its favour, in the name of preserving the economic union, was not reflected in the patriated Constitution,[261] but neither were Quebec's demands concerning the distribution of powers adopted, either in the broad areas of jurisdiction or in the specific areas where it had proposed change, except for natural resources[262] and extra-provin-

cial trade and commerce. As well, it must be noted that these amendments were concessions to the Western provinces, which were demanding them more loudly than Quebec and were bargaining from a position of greater strength. There is no basis for concluding that these amendments would have led to the changes contained in sections 50 and 51 of the *Constitution Act, 1982* had Quebec been the only province demanding such changes. Rather, we must conclude that the amendments proposed by Quebec would have met the same fate as its other demands for changes to the preamble and distribution of powers.

In the area of equalization payments, Quebec agreed to include them in the Constitution on condition that the federal government would not use this provision as an invitation to spend money or to interfere in areas under provincial jurisdiction.[263] Did Quebec, by agreeing in principle to this change, pave the way for the introduction of section 36 of the *Constitution Act, 1982* or would the federal government have made the change unilaterally in any event, as it did when it introduced the Charter into the Constitution? In any event, the federal government has never required an invitation, by legislation or otherwise, to invade areas of provincial jurisdiction indirectly on the basis of its spending power.[264] Section 36 provided it with an additional pretext for doing so,[265] even though the words of the section provide no such authorization.[266]

The Quebec government did not officially intend to discuss the Charter until it had attained its goals on the question of the distribution of powers. It perceived an entrenched Charter only as a source of problems for Quebec, which we shall discuss later when we deal with civil liberties. Nonetheless, the Charter was incorporated into the Constitution without the agreement of Quebec.

The Liberals, in opposition, and still today, went even further than the government in the demands they made respecting the preamble, in which they wanted to see a veto power for Quebec. To our knowledge, they neither restated nor withdrew their minimum demand as to the distribution of powers, which they had put forward during the preceding period and which was the basis of their refusal to sign the Victoria Charter: an amendment to the distribution of powers that would have guaranteed Quebec's social and cultural security.

In summary, constitutional practice during the years from 1976 to 1985 failed to accommodate in any way the government or opposition thought in Quebec.

## *Civil Liberties and Human Rights*

The relationship between political thought and constitutional change in the area of civil liberties and human rights is somewhat ambiguous. Generally it can be observed that, as regards the decisions of the Supreme Court and constitutional practice, where there is a clear rela-

tionship with dominant political thought in Quebec the changes did not incorporate that thought. On the contrary, the changes that did occur tended generally to correspond to opposition thought (which was similar to the federal government's positions).

*Political Thought: Commitment to Collective Rights*

As far as civil liberties and human rights were concerned, there was no common ground between the Quebec government and the Liberal opposition during this period. On the question of including a Charter of Rights in the Constitution, they differed on the need for a constitutional guarantee of rights, and as to whether individual or collective rights should be protected by the legislation. These differences were a result of the parties' different concepts of the role of the state and of the status of Quebec within the Canadian federation. These in turn arose out of the specific characteristics, particularly ethnic background and language, of the groups that made up the constituencies of the two parties.

On the basis of its position on sovereignty, the Parti québécois government favoured collective rights, particularly with respect to language, over the individual rights set out in the Charter. It saw only disadvantages in an entrenched Charter in the Constitution, particularly because the extent and variety of rights it contained could be used to restrict the provinces' jurisdictions, even before there had been a redistribution of powers, and to reduce parliamentary responsibility in favour of judicial interpretation.[267]

Quebec was especially wary about entrenchment of individual rights in the area of language, since such rights could alter the social and cultural priorities reflected in collective rights in that area.[268] Quebec proposed that the recommendations of the Pépin-Robarts Task Force be adopted: that rather than entrench guarantees in the Constitution the provinces be invited to enact legislation to protect their minorities.[269]

The opposition, on the other hand, was steeped in traditional liberalism and the belief that individual rights must take precedence over collective rights. Following its federalist option, it proposed a solution to the language problem, which would work for Canada as a whole and would respect the desires of the Liberals' anglophone constituency in Quebec: entrenchment of a Charter of Rights in the Constitution.[270] The Quebec Liberal party felt that the Constitution should give concrete expression, on the language question as on others, to the dual nature of Canadian society, by giving guarantees to Quebec that would not diminish individual rights and minority protection.[271] Thus the opposition favoured bilingualism in federal institutions and in four of the provinces,[272] as well as freedom of choice in the language of instruction on the basis of mother tongue, so that the Charter would protect minority rights by limiting provincial jurisdiction on this subject.

*The Supreme Court: Rejection of Quebec's Demands*

As in the preceding period, most of the decisions of the Supreme Court between 1976 and 1985 in the area of civil liberties dealt with rights and liberties that were not seen as significant issues on the political scene in Quebec. Questions such as freedom of expression,[273] the still very restricted application of the *Canadian Bill of Rights*,[274] the somewhat more liberal provisions of the Charter,[275] or Indian hunting and fishing rights found no reflection in the political thought that preoccupied Quebec. Overall, the decisions in these cases did not favour individual rights.[276]

On the other hand, but not necessarily, in our opinion, simply by chance, the Court confirmed (with some modifications[277]) the individual language rights protected both by section 133 of the *Constitution Act, 1867*[278] and by the *Constitution Act, 1982*.[279] In context, this confirmation of individual rights and liberal values appears to be a rejection of collective language rights, and a reduction in provincial jurisdiction in that field to implement their own social and cultural priorities.

In short, the Supreme Court rejected the dominant political thought of Quebec and adopted opposition thought, which was the same approach taken by the federal government. The positive relationship here between constitutional decisions of the Court and opposition political thought concerning civil liberties is therefore the same overall as we saw under Duplessis.

*Constitutional Practice: Rejection of Quebec's Demands*

In December 1981, Parliament adopted a resolution referring to the act that was to become the *Constitution Act, 1982* once it was adopted by the British Parliament. Overall, this resolution was a rejection of dominant political thought in Quebec and a confirmation of opposition thought. We should, however, qualify this statement.

Dominant thought was rejected insofar as it consisted of a general rejection of federalism itself, including the Charter, at least until agreement was reached on the question of the distribution of powers. It also proposed, as a temporary compromise that would follow the strategy of sovereignty by stages, that a version of collective language rights, as set out in the "Quebec clause,"[280] be included to permit children of parents who had received their education in English in Quebec to have access to English-language public schools.

On the other hand, however, the Charter recognized the collective nature of language rights, entrenched biculturalism rather than multiculturalism, and, by rejecting the "universal clause," refused the right of those whose parents had not received primary or secondary instruction in Canada in English to choose to attend an English-language school.[281] In this, as in the provision that language rights would not come into force

in Quebec until agreed to by the Quebec legislative assembly,[282] the Charter to a very limited extent recognized certain proposals arising out of dominant political thought in Quebec.

The Charter also represented an equally limited recognition of opposition thought, particularly in the areas of fundamental rights, legal rights, and mobility rights.[283] In the area of language, however, the Charter was still below even the opposition's demands in relation both to the "universal clause"[284] and to the actual subject matter of language rights. Liberal proposals in the areas of private services and commerce, health and social services, justice, and communications were rejected.[285]

The constitutional practice of the period and the legislative amendments it led to in the area of civil liberties are therefore more ambiguous than might have appeared at first glance. Nonetheless, the result was clearly closer to opposition thought, at the very least, and the minor concessions in the legislation to dominant thought in Quebec are not enough to establish a positive relationship.

## *Institutions*

During this third period, institutions took on an increased importance, both in political thought and in the development of constitutional law in the courts. In addition, we can observe direct relationships between the decisions of the Supreme Court and constitutional practice. The most striking factor, however, is the correspondence between opposition thought and one of the two bodies of dominant thought, depending on the institution concerned. Finally, we must also note that the structure of internal provincial courts, which had always been a major constitutional issue, became during this period for the first time an important issue in Quebec political thought.

### POLITICAL THOUGHT: QUESTIONING THE INSTITUTIONS OF FEDERALISM

In the area of institutions, as in the distribution of powers and civil liberties, dominant political thought in Quebec consisted of two distinct bodies during this period: first, Parti québécois thought as set out in the theoretical plan for sovereignty-association, and, secondly, the specific proposals put forward by the PQ in place of that plan, presumably temporarily, during the constitutional negotiations. Here again, the second body of thought was closer to the proposals of the opposition Quebec Liberal party.

### DOMINANT POLITICAL THOUGHT

In the *indépendantiste* thought of the Parti québécois, institutions occupied an important place. *La nouvelle entente* specifically proposed that there be a community council, a commission of experts, a court of

justice, and a monetary authority, which would have the respective powers appropriate to the functions indicated by their titles.[286] Clearly, however, these were intended to be bilateral bodies, on an international model, which presupposed two sovereign contracting parties, despite the apparently confederative nature of the system as a whole.

However, given the circumstances we have described, the government of Quebec then developed a set of alternate proposals on the question of institutions, as it did on the other matters in issue, in reaction to the federal proposals. The content of these proposals forms a second body of thought, which is more closely related to present federal institutions in Canada, which Quebec proposed to modify. The illogical nature of this course of action did not escape the notice of the authors of these proposals.

In relation to the Senate, which Quebec proposed should truly represent the provinces and should participate in a meaningful way in the exercise of federal powers so as to reflect the dual nature of Canadian society, Quebec's statement to the meeting of the Continuing Committee of Ministers on the Constitution, in July 1980, was as follows:

> How is it possible to determine the composition and powers of a new upper house, the function of which would be to provide provincial participation in the exercise of federal jurisdiction, if federal and provincial power have not been defined? The broader these powers are, the more the presence and weight of the provinces should make itself felt.[287]

On the same principles, Quebec sought to have an independent Supreme Court, which would reflect both the unique elements of Quebec civil law and the dual nature of Canada. In order to do so, appointments of judges by the federal government would be subject to the agreement of the provinces, the Chief Justice would be alternately from Quebec and another of the provinces, there would be a constitutional bench composed of judges of whom half would be from Quebec and half from other provinces, and there would be a civil bench made up entirely of Quebec judges. As well, the process for seeking advisory opinions would be directly available to the provinces.[288]

Finally, a new fact that must, in our opinion, be explained by the structure of the department of the attorney general arising out of the emergence of the Quebec bureaucracy during this period, the body of dominant constitutional thought concerning institutions then took in a number of elements relating to provincial jurisdiction over the Superior Court. Beginning in 1980, Quebec asserted its claim to have the power to appoint judges to the Superior Court transferred entirely to the province, and sought to have section 96 amended accordingly. This would have provided at least a partial solution to the problems arising out of Quebec's establishment of administrative tribunals.[289]

OPPOSITION POLITICAL THOUGHT

Curiously, some of the propositions made by the Quebec Liberal party were more similar to the theoretical, radical body of Parti québécois thought than to the government's proposals for change. Specifically, the Liberal opposition believed that the Senate was no longer suited to the needs of modern federalism, and sought to have it abolished.[290] It also proposed that the Senate be replaced by a Federal Council that would reflect Canada's dual nature, and was markedly similar to the Parti québécois proposal for a community council.[291]

The government's reactive proposals respecting the Supreme Court were similar to the proposals of the opposition, to the point that they virtually coincided, except with respect to the appointment of judges; the beige paper was silent on this point.[292] On the other hand, there was complete agreement between the government and the opposition on the question of the appointment of judges of the Superior Court.[293]

### *The Supreme Court: Rejection of the Status Sought by Quebec*

For the first time since World War II, political thought and constitutional changes relating to institutions did not on the whole proceed along separate lines. Rather, there was a tripartite relationship among political thought, the decisions of the Court, and constitutional practice.

During this period the decisions of the Supreme Court favoured the federal government and the provinces about equally. However, given the relative importance of the various decisions, the centralist tendency of the Court was clear, despite the fact that a majority of its decisions favoured the provinces. The exceptions, which favoured the federal government, were much the more important constitutional *References* arising out of the federal patriation initiative.

We should first note the line of decisions by the Court that still affects political debate in Quebec: the Court's decisions concerning the Federal Court. The Supreme Court dealt more favourably with the Federal Court during this period, and three decisions confirmed its administrative jurisdiction.[294] However, in three decisions of prime importance it held that Parliament had no jurisdiction to create a court that alone would have the power to determine the constitutionality of federal legislation and thus oust the jurisdiction of the Superior Court.[295]

These issues, important though they are for Quebec's judicial interests, had not yet entered into the arena of political discussion. The attorney general, no doubt overwhelmed at the time by constitutional references, intervened in only two of the six cases.

The question of the province's power to create administrative tribunals and to delegate powers to provincial courts is, as we know, related to the power to appoint judges to the Superior Court, which is governed by section 96 of the Constitution. Both the government and

the opposition were seeking to have this provision amended, and the Supreme Court showed a slight tendency to favour the provinces on this point. With respect to the jurisdiction of the Superior Court in relation to family law[296] and housing,[297] the Court's decisions were based on the same technical criteria,[298] although there was no clear operational coherence to its decisions.[299] In other cases, in the areas of agriculture[300] and the environment,[301] the Court ruled more favourably to the provinces than it did in the area of professional law.[302]

The Court continued to take into consideration the historical element of the issue, based on the specific functions exercised by the Superior Court before 1867. This approach continued to distort the system of administrative tribunals that the provinces were trying to institute and was unanimously opposed by the Quebec government and the opposition. We could not say, however, that the Court took these demands into account, and they were too technical to become a major political issue even when they became a subject of political debate.

In the area of political rather than judicial institutions, the Court rendered three major decisions. The first dealt with the Senate.[303] The Court held that the Senate was not a matter of exclusive federal jurisdiction and that it could therefore not be abolished by federal legislation alone. This decision affected constitutional practice in that it returned it to the political context of legislative amendments surrounding patriation of the Constitution.

The last two decisions we examine, however, ensured that the Supreme Court's approach during this period continued to be centralist. Because they related to the very core of constitutional powers (the legality and legitimacy of what might be called the meta-constitutional rules for amending the Constitution), the decisions in the *Reference re the Constitution of Canada*[304] and *Reference re Resolution to Amend the Constitution*[305] had a decisive effect on the future of the federation. Despite some concession to the provinces — the Court holding that the agreement of the provinces was required by constitutional *convention* for the patriation of an amended constitution — the Court definitely favoured the federal government in deciding that such consent was nevertheless not required as a matter of *law*, and specifically rejected Quebec's claim to a right of veto over constitutional amendments.

### *Constitutional Practice: Hostility to Quebec's Proposals*

Political thought in Quebec during this period, both opposition and government, largely concerned political institutions such as the Senate and the meta-constitutional rules and judicial institutions such as the Supreme Court and the provincial superior courts. In these areas, constitutional practice gave no more indication of being any more receptive than the Supreme Court.

The specific proposals that the Quebec government put forward in its

temporary approach, replacing sovereignty-association, and the proposals of the Quebec Liberal party in the beige paper together constituted the Quebec contribution to the constitutional negotiations of this period. Both ran up against the federal desire to patriate the constitution without any prior amendment beyond the Charter, and more specifically without any changes to institutions.

During the discussions at the constitutional conferences in the summer of 1980, there was no consensus reached concerning the superior courts, the Supreme Court or the Senate. Nor, of course, was there any agreement on the question of patriation itself.

This was the background to the three requests for advisory opinions from the Supreme Court, which dealt with the Senate (1980), amendment of the Constitution (1981), and the Quebec veto (1982). The result was to legitimize the federal government's constitutional practice and to permit the patriation of the Constitution with the newly entrenched Charter. With this kind of authority to justify its actions, the federal government, showing what respect it held for legitimacy, saw no necessity to negotiate in advance any amendment concerning institutions or the distribution of powers.

Thus the Constitution was patriated in accordance with the federal agenda, and with none of the institutional changes sought in Quebec's proposals, which had reflected to a large extent the political thought of both the Quebec government and the opposition.

## Conclusion

To look for signs of Quebec's political thought in the evolution of Canadian constitutional law since World War II does not imply the exclusive influence of the former on the latter. The law of a country cannot be reduced to the product of the socio-political relationships within one of its regions, nor can it be explained in total isolation from the international context. On the other hand, neither should we dismiss the possibility that the Quebec debate over sovereignty had some effect on the formulation of the Canadian constitution, or imagine that the conceptions of the state advanced within one unit of a federation will have no effect on the form of that federation as a whole. Thus, it did not seem irrelevant to examine developments in Canadian constitutional law and practice over the last 40 years in the light of the contemporary political thought in Quebec. In this conclusion we present a summary of our analysis and its results.

First, we consider the effect of Quebec constitutional thought on the direction taken by Canadian constitutional law. Secondly, we address the question of how far each of the specific vehicles of change in constitutional law — constitutional decisions of the Supreme Court,

federal-provincial negotiations and legislative amendment — were receptive to Quebec's concerns.

* * *

Generally speaking, and in spite of the exceptions, the body of constitutional thought current in Quebec during the period studied did not profoundly influence the changes that occurred in the substance of Canadian constitutional law. The exceptions were a result of occasions, ephemeral but effective, when the balance of power favoured certain political groups and consequently their ideas. In the area of the distribution of powers, these involved the integration into constitutional law of the ideas of the Johnson government and, later, opposition ideas expressed in the Liberal party's beige paper. In the area of civil liberties, the first exception was the success of anti-Duplessis opposition thought; later, the concept of individual language rights put forward by the Liberal opposition saw similar success.

But in the other areas of contention — limiting federal jurisdictional claims to the 1867 Constitution (let alone changing the distribution of powers to benefit the provinces), recognizing the language rights and collective cultural rights of francophone Quebeckers, or changing federal institutions to make them more impartial and more representative of regional differences — Quebec political thought was ignored at best, rejected at worst. Thus, in Canadian constitutional law there was to be no recognition of the dual nature of Canadian society or of special status for Quebec, nor any acceptance of a more decentralized form of federalism.

In Quebec, the political debate focussed increasingly on the distribution of powers in the Constitution, rather than on civil liberties or institutions. Demands for a new distribution of powers increased in number, radicalism and legitimacy, only to collapse finally in the 1980s following the referendum.

While Duplessis had been satisfied with the status quo ante as set out in the provisions of the 1867 Constitution — a relatively ambitious objective in the context of postwar centralization — the neo-nationalism that characterized the second period sought changes that would decentralize the distribution of powers. The bare minimum demanded by Bourassa, and refused at Victoria, was that Quebec be given the powers it needed to ensure its cultural and social security. But by then, federalism itself was being challenged by a growing number of Quebeckers who saw changes in the distribution of powers as insufficient. They sought to abolish federalism altogether.

This more radical position, which was later to be legitimated, dominated the third period, at least in the discussions of the PQ proponents of sovereignty. However, in practice they were almost indistinguishable from the Liberal opposition, which aimed much lower and sought only to

obtain a distribution of powers that would be more generally favourable to Quebec.

These varying positions on the question of the distribution of powers met with varying success. We are sorry to note that their effect increased with their radicalism and was greater the less legitimate their basis. In fact, the periods when the claims asserted were the most modest (the status quo under Duplessis and cultural and social sovereignty under Bourassa, bodies of thought one might consider to be minimalist for their time) coincided with the greatest setbacks in the area of the distribution of powers.

Duplessis sought to return to the status quo ante of the law as it was written in 1867, but succeeded only in maintaining the partial status quo of postwar constitutional practice. Bourassa's ultimate concessions got him no better results at Victoria, where the formal distribution of powers emerged unscathed. The unilateral patriation in 1982 of a Constitution containing a Charter of Rights and Freedoms and with no veto provision reflects the same negative relationship, perhaps even more obvious considering the referendum that preceded it. We may well hesitate to imagine what present reductionist positions augur for the future.

On the other hand, the political ideas that made their mark on constitutional developments were put forward by the governments that made greater demands in the area of provincial jurisdiction, and whose claims may have seemed like the lesser evil in relation to those of an even more radical and less legitimate opposition. The best example of this is the halt called to centralization at the end of the second period. This development reflected an acceptance — given the delay required to effect changes in the law — of the core of Johnson's political thought: a rejection of the doctrine of national dimensions and a decline in the doctrine of "intrinsic elements." These developments provided a constitutional foundation, fragile though it was, for the kind of decentralization implied in the dual society concept so dear to Johnson.

These parallel developments occurred as Quebec, through its legitimate government, continued to make demands, albeit more moderate, for changes in the distribution of powers, and against a backdrop of the demand of the more radical groups, some of which belonged to an extra-parliamentary opposition that did not eschew violence: the straightforward demand for abolition of the distribution of powers altogether and liquidation of the federation.

Other parallels may also be explained by the strength and radicalism underlying attempts to reappropriate provincial powers, although in the context of these periods illegitimacy was not a factor. The first such development came with the successes of the Lesage government in the area of taxation and of such important financial institutions as the Caisse de dépôt, as well as the pension plan. The second occurred between 1975 and 1980, when Canadian constitutional law underwent some changes in

the areas of labour relations, transport, taxation and, to some extent, interprovincial trade and commerce, along the lines proposed in the beige paper by the opposition Liberals. The changes coincided as well with the constitutional practices of the Parti québécois, if not with its stated objectives.

The distribution of powers in the Canadian Constitution also changed in directions seen as desirable by the dominant ideologies in Quebec only when their proponents were able to establish a sufficient balance of power. Not entirely by coincidence, these periods ushered in an interventionist concept of the role of the state, both under Lesage and Johnson and during the first term of the Parti québécois government.

The successes of Quebec political thought in influencing constitutional law were brought about by governments whose broader vision of the role of the state required greater legislative jurisdiction, which they could not abandon without losing the support of their constituencies. In contrast, the governments that held to a liberal vision of the state were forced to accept the status quo or to suffer setbacks — under Duplessis, by failure to occupy the field through legislation; under Bourassa and Lévesque, by undertaking deregulation as the 1980s and the economic crisis unfolded.

Although civil liberties had been confirmed in Canadian constitutional law since the mid-1940s, they were for a long time neglected in the dominant political thought of Quebec. Worse still, under Duplessis, political practice entrenched the casual violation of civil liberties, particularly freedom of religion and political expression. When a majority in Quebec began to show interest in this area, beginning under Lesage and with greater activity under Johnson, it was collective rights, particularly language rights, that were given priority. On occasion, this focus on collective rights took place at the expense of individual rights, which remained the primary concern in Canadian constitutional law.

Differences of opinion between dominant and opposition thought on these questions increased from Duplessis through Johnson and Lévesque as they faced their respective Liberal oppositions. It was the positions of those oppositions that were adopted into Canadian constitutional law, both in relation to political and religious freedoms and on the questions of the individual nature of language rights. Canadian constitutional law remained untouched by the dominant values of Quebec concerning civil liberties, a negative relationship that culminated in the adoption of the Canadian Charter of Rights in spite of Quebec's dissent. This dissent was directed less toward the substance of the values confirmed in the Charter than toward the federal refusal to amend the distribution of powers first. That is, there was a conflict between the ways in which the two societies that cohabit Canada perceived the importance of civil liberties and the distribution of legislative powers.

In addition, it is obvious that with a single exception — the replace-

ment of the "universal clause" by the "Canada clause" dealing with language rights — the Charter entrenched the concept of language put forward first by the *Cité Libre* group and later by the Liberal opposition in Quebec. It was a concept that coincided with the approach adopted by anglophone Canadians. Even allowing for the evolution of human rights on the international scene during this period, it is again clear that the respective strengths of the bargaining parties were significant factors in the outcome of this process.

It is not surprising that individual rights, which were not really opposed by the dominant thought in Quebec, were enshrined in the Canadian Constitution. The rejection of collective language rights, however, is a different matter. In the turmoil of the internal Quebec debate over national sovereignty, the demands concerning collective rights did not really surface in the political forum until the Bertrand government, which underestimated their importance, and did not enter into constitutional discussions until after the referendum, when Quebec had no position of strength from which to advance them. Although these demands were closely related both to the interests of the francophone elites and to the extension of state powers, they did not become a major constitutional issue until it was too late — when the Constitution had been patriated. By then these groups, which had already lowered their demands, were no longer the sole electoral base of the government, which had begun to look elsewhere for support.

In the area of institutions, the chasm between political thought in Quebec and changes in Canadian constitutional law appears even wider. The evolution of the law went in a direction that had nothing to do with the political debate in Quebec. Changes occurred in institutions while Quebec's attention was focussed elsewhere. This area of law remained so foreign to Quebec political thought that neither dominant nor opposition political thought, largely similar in this regard, had any influence on the changes that were occurring.

With the exception of radical *indépendantiste* contributions to the debate (which Parti québécois political practice did not follow, and which, in any event, concerned post-sovereignty institutions in a confederation), there soon developed a unanimous position, sustained in Quebec from 1945 to the present. This demanded, but without passion, a Senate and Supreme Court that would reflect in their composition, powers and method of appointment the federal nature of the Constitution. None of these demands were embodied in the changes that occurred in Canadian constitutional law. Rather, the unitary nature of the judicial system and the primacy of the Superior Court were upheld and strengthened. The challenges to the Superior Court by the proponents of Quebec's developing system of administrative tribunals were too technical and specialized to become issues for political debate.

If one includes in term "institutions," understood in the proper consti-

tutional sense, the "meta-rules" that govern constitutional amendment, we observe an even more serious defeat for all strains of Quebec political thought. This defeat culminated in the rejection of a veto power and in unilateral patriation of the Constitution.

The factors at play in the area of civil liberties were also important in relation to institutions. The changes that were rejected dealt with areas that had not attained major importance in the Quebec political debate: the Senate and the Supreme Court. The changes that were made dealt either with institutions that were of little concern in Quebec politics, such as the structure of the court system within the province, or with the constitutional meta-rules, which were imposed after the referendum, when, as we have seen, Quebec's bargaining power was weakened.

* * *

In the absence of any violent tear in the social fabric of a nation, constitutions change slowly. Only rarely do they take the path of legislative amendment, which is deliberately strewn with obstacles. When a constitution must adapt to social changes, it mostly does so by political compromise and judicial interpretation. Canada's federal constitution is no exception.

Since 1867 there has been no revolution in Canada to upset the Constitution. It has seldom been amended. From 1945 to the present, only the entrenchment of the Charter and a few other amendments in 1982 could be described as major legislative amendments. That does not mean that what happened was not a political process, just as political as the constitutional practice reflected in the negotiations and agreements made outside the constitutional rules with the apparent aim of adapting them, but really to simply circumvent them.

In theory, the judicial process is less traumatic. It does not amend or annul legislation, but interprets and clarifies it. Legal ideology, without which the courts, and law itself, would at times lack justification, represents the judicial process as neutral, technical and objective: in brief, as divorced from the political process, where all the negotiations, agreements and even legislative amendment take place. Legislative amendment, as is beginning to be admitted more easily, is the result of the relative strength of the various parties in a particular social context. In these circumstances, we could have assumed that the relationship that we have been examining between changes in Canadian constitutional law and political thought in Quebec would be more readily visible in legislative amendments and constitutional practice than in the decisions of the Supreme Court. In fact, the result was precisely the opposite.

The rare positive relationships we were able to identify between Quebec political thought and changes in constitutional law occurred in the developments brought about by decisions of the Supreme Court. In

the area of the distribution of powers, changes in the second period reflected the dominant thought of the Johnson government and in the third period, opposition thought as expressed in the beige paper. In the area of civil liberties, changes in the first period reflected *Cité Libre* opposition thought and in the third period, the concept of collective language rights, again put forward by the Liberal opposition. In all other areas, we observed either no relationship or a negative relationship, whether we consider the decisions of the Court or the constitutional practice of the time, except, in the latter case, for the limited success attained for the political thought of Lesage in relation to taxation early in the second period. Thus the little ground gained by either dominant or opposition political thought in Quebec over the last 40 years has been won in the courts, not within the real forum of politics, where the Constitution is at a standstill.

It was perhaps in part because the Court itself does not lose the political powers ceded by its decision that it has been more ready than politicians to let go of some of them. This impression is reinforced by the fact that the core of the state powers from which the Court itself derives its legitimacy was never abandoned: neither the repressive powers nor the jurisdiction over the constitutional meta-rules, as we clearly saw in the *Keable* cases and the constitutional *References* of the third period. For federal politicians, however, the lines were drawn too close for comfort, because any power given away is a power lost to them. There has never lived a politician who would voluntarily give up power, at least so long as there is a possibility that the power can be exercised.

* * *

Enter the economic crisis, and the situation may be reversed.

It is difficult to imagine a central structure moving to decentralize when its power is not threatened, so long as it retains resources to govern. However, when it is faced with distributing a shrinking budget and cutting expenditures, and when its power is fragile and threatened, decentralization takes on a new face for anyone looking to shift the burden of problems and poverty to others. So long as economic growth legitimized a Keynesian approach, and sustained the interventionist vision of the modern state, no federal government, and no provincial government as strongly identified with its constituency as was the Quebec government, could give up the powers it perceived as vital to the functioning of that model of the state.

But the neo-liberal response of the Western democracies, including the Canadian federation, to the economic crisis was to change the rules of the game. This meant not only the economic rules, but also those concerning the locus of political power, the more so since the question of political sovereignty remains inextricably linked to the form of the state.

With deregulation, free trade and a return to the laws of the marketplace in the wind (and let there be no mistake, these are indeed laws), the state no longer needs the same tools for implementing policies it is less inclined to make. It seems then possible for the federal government to move to decentralize those powers it no longer wishes to exercise, and the increased burden of which is unlikely to be overwhelmingly attractive to the provinces.

There is, however, a line that the federal government would not cross in its concessions to the provinces. Politically, it is represented by the state responsibilities that the public sees as the minimum acceptable, particularly in social policy, and by the interests of producers, who always feel more threatened when subject to uncoordinated regulation emanating from a number of sources.

In any event, this relaxing of the requirements of the state (for the moment, a neo-liberal state because it has a Conservative government) concerning the powers it needs to perform the reduced functions it perceives as adequate for it to operate at the optimum level explains, in our opinion, the "opening up" that marked the federal government's approach to constitutional practice in early 1985 and its receptiveness to the political thought that has dominated the recent scene in Quebec. Clearly, however, the substance of this thought must have undergone considerable change for it to be so received.

In this context, the practical relationship between dominant political thought and the interests of its proponents is suddenly clarified: the numerous relationships between the political power underlying the sovereignty question, a certain conception of the state and the effects of the economic crisis. "Thanks," if we can say this, to the crisis and to the neo-liberal reaction it has provoked, the resulting minimalist concept of the state will make possible a certain amount of decentralization, at least to the uncertain limit of social tolerance. Such decentralization supports a less intransigent solution, although at this point it would have to be agreed that it will be a federalist solution, to the question of Quebec sovereignty.

Suddenly, the normal application of the 1867 Constitution has again become a legitimate goal for the federal and provincial governments, which are again in accord on their concept of the role of the state, a concept that approaches the vision of the Constitution writers in the 19th century. The neo-liberal ideology, with its minimalist concept of the state, has come full circle to a kind of neo-Duplessisism in which the question of sovereignty will be relegated to the federal sphere, as it has always been in times of economic crisis.

## *Notes*

This study is a translation of the original French-language text, which was completed in March 1985.

1. *Commission du salaire minimum v. Bell Telephone*, [1966] S.C.R. 767, and *Birks (Henry) & Sons v. Montreal*, [1955] S.C.R. 799.
2. **Nature of Cases Heard by the Supreme Court of Canada, by Province of Origin, 1945–60**

| | Quebec | Ontario | Prairies | B.C. | Atlantic Provinces | Other | Total |
|---|---|---|---|---|---|---|---|
| Division of powers | 2 | 11 | 13 | 3 | 3 | 1 | 33 |
| Civil liberties | 6 | 0 | 0 | 0 | 1 | 0 | 7 |
| Institutions | 1 | 5 | 0 | 2 | 3 | 0 | 11 |
| Total | 9 | 16 | 13 | 5 | 7 | 1 | 51 |

3. The Court, following the aspect doctrine, held a provincial statute to be valid that regulated trade in bills or exchange by requiring traders to register (*Duplain v. Cameron*, [1961] S.C.R. 693). Relying on the pith and substance doctrine, it held a provincial statute to be valid that dealt with mechanics' liens and that regulated trust accounts for the purposes of the mechanics' lien legislation (*John Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487). The Court also held that a provincial statute that dealt with usurious loans was intra vires, since it affected federal jurisdiction over interest rates only incidentally (*A.-G. Ont. v. Barfried Enterprises Ltd*, [1963] S.C.R. 570).
4. See *Crawford and Hillside Farm Dairy Ltd. v. A.-G. B.C.*, [1960] 346, in which a scheme was held to be intra vires because it was a valid exercise of provincial jurisdiction under subsections 92(13) and (16) of the *Constitution Act, 1867*. The Supreme Court also held that, in essence, a provincial tax on resources in situ was a direct tax on property (*Canadian Pacific v. A.-G. Saskatchewan*, [1952] S.C.R. 231). It held that a tax on net profit anticipated or realized on the sale of iron ore was intra vires (*Nickel Rim Mines Ltd. v. A.-G. Ont.*, [1967] S.C.R. 270), as was a retail sales tax that was likely to be passed on (*Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619). The Supreme Court held that a residential property tax on a public servant who occupied Crown property was intra vires and did not contravene section 125 of the *Constitution Act, 1867* (*Phillips v. Sault Ste Marie*, [1954] S.C.R. 404). However, its decision was only partly in favour of the provinces in *Reference re the Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198; it ruled that a tax on resources in situ was ultra vires because it was in reality a tax on imports, since it discouraged, and in fact made impossible, the exporting of iron ore (*Texada Mines Ltd. v. A.-G. B.C.*, [1960] S.C.R. 713).
5. Since 1949, Canadians have no longer been able to appeal to the British Privy Council. Given the time required for a case to reach that level from the point at which the cause of action arose, we may conclude that it was the Supreme Court, rather than the Privy Council, which was to interpret the Canadian Constitution from that date onward. The decisions that were made after that date are the subject of our study here.
6. *Hodge v. The Queen* (1883–84), 9 A.C. 117; *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, [1892] A.C. 437; *Reference re the Initiative and Referendum Act*, [1919] A.C. 935; and *British Coal Corporation v. The King*, [1935] A.C. 500.
7. *Edwards v. A.-G. Can.*, [1930] A.C. 124.
8. Ibid.
9. *Toronto Electric Commissioners v. Snider*, [1925] A.C. 356.
10. The Supreme Court decided that regulation of labour disputes involving longshoremen was within federal jurisdiction, because of the powers of Parliament over navigation, and applying the ancillary powers doctrine (*Reference re Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955]

S.C.R. 529). The Court then held that a Quebec statute on working conditions did not apply to Bell Canada, because it was an undertaking that fell within paragraphs (92)(10)(a) and (c) of the *Constitution Act, 1867* and the subject matter of the legislation was an integral part of the area of federal jurisdiction over such an undertaking (*Commission du salaire minimum v. Bell Telephone*, [1966] S.C.R. 767).

11. Thus the Supreme Court held that a provincial statute governing the rights of workers was not applicable to an interprovincial pipeline, because such a statute might adversely affect the integrity of a federal undertaking (*Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207). In one of the broadest applications of this doctrine outside the field of labour relations, the Court held that Parliament, acting under its power to regulate railways, could legislate in respect of the ownership of mining rights (*A.-G. Can. v. Canadian Pacific*, [1958] S.C.R. 285).
12. On the basis of subsection 92(10) of the *Constitution Act, 1867*.
13. The Supreme Court held that an interprovincial transport service was an undertaking within the meaning of the first paragraph of subsection 92(10), cited *supra*, note 12, and therefore that a provincial statute could not affect the activities of such a service except where an isolated situation was of a local nature (*Winner v. SMT (Eastern) Ltd.*, [1951] S.C.R. 887). Even such local operations were later held to fall within federal jurisdiction (*A.-G. Ont. v. Winner*, [1954] A.C. 541). See also *Esso Standard (Inter-America) Inc. v. J.W. Enterprises*, [1963] S.C.R. 144, in which Judson J. held that Parliament could enact legislation governing the transfer of shares in federal companies, basing his opinion largely on the following passage from the decision of Laidlaw J. of the Court of Appeal: "It is my opinion that the Parliament of Canada having legislative power to create companies whose objects extend to more than one Province possesses also the legislative power to prescribe the manner in which shares of the capital of such companies can be transferred and acquired. That matter is one of general interest throughout the Dominion."
14. *Commission du salaire minimum v. Bell Telephone*, *supra*, note 10.
15. Rand J., in *Reference re the Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198, held that marketing programs for products destined for a province other than the province where they were produced was an extraprovincial matter; his opinion was affirmed by the Supreme Court the following year (*Murphy v. Canada Pacific Railway Co.*, [1958] S.C.R. 626). This decision was contrary to the decision of the Court in *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, in which it was held that similar provisions were unconstitutional since the subject matter was not agriculture but rather a product of agriculture, although such produce was largely destined for export.
16. *Reference as to the Validity of the Wartime Leasehold Regulations*, [1959] S.C.R. 124.
17. *Canadian Wheat Board v. Nolan*, [1951] S.C.R. 81. The Judicial Committee reversed this decision in *A.-G. Can. v. Halley and Carey Ltd.*, [1952] A.C. 427.
18. *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663.
19. Except for those after 1982 that resulted in the acceptance of the Canadian Charter of Rights and Freedoms. However, between 1945 and 1960, any interpretation that altered the distribution of powers followed the principle that what was given to one level was taken from another.
20. During this period, the Supreme Court held that Saskatchewan legislation imposing a moratorium and Alberta legislation to provide for orderly payment of debts were ultra vires, because they were in relation to bankruptcy and were intended to remedy a debtor's insolvency (*The Canadian Bankers' Association v. A.-G. Sask.*, [1956] S.C.R. 31; *Reference re the Orderly Payment of Debts Act 1959 (Alta.)*, [1960] S.C.R. 571).
21. In this area, the Supreme Court gave a number of decisions that favoured the provinces, based on the aspect doctrine. The Court hesitated to find that there was a conflict between federal and provincial legislation and to find that the federal prevailed. Thus it held that a provincial statute providing penalties for impaired driving was valid and operative, since it dealt with the administration and control of traffic in

the province and not with criminal law (*Reference re Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608). For the same reason, it held that provincial legislation imposing a penalty for driving a motor vehicle without due care and attention was valid, although the Criminal Code contained penalties for criminal negligence (*O'Grady v. Sparling*, [1960] S.C.R. 804). As well, the Supreme Court held that a provincial statute that prescribed the obligations of an individual involved in a car accident and applied penalties for failure to comply — as did the Criminal Code — was valid and operative, relying on the aspect doctrine (*Stephens v. R.*, [1960] S.C.R. 823). The Court also held that a provincial statute containing penalties for issuing a false stock prospectus was intra vires, because it was not in essence prohibitory legislation, but was ancillary to legislation concerning a subject of provincial jurisdiction (*Smith v. R.*, [1960] S.C.R. 776).

22. *Goodyear Tire and Rubber Co. of Canada v. R.*, [1956] S.C.R. 303.
23. *Industrial Acceptance Corporation Ltd. v. R.*, [1953] 2 S.C.R. 273; *Johnson v. A.-G. Alta.*, [1954] S.C.R. 127; see also *DeWare v. R.*, [1954] S.C.R. 182.
24. *Birks (Henry) and Sons v. Montreal*, [1955] S.C.R. 799. However, in *Lieberman v. R.*, [1963] S.C.R. 643, the Supreme Court held that a regulation prohibiting the operation of a bowling alley on Sunday was valid, because it was not in relation to Sunday observance, but to the hours of closing of certain commercial establishments, this being a valid exercise of provincial jurisdiction under subsection 92(13) of the *Constitution Act, 1867*.
25. See, *supra*, note 2.
26. This was not the case for provincial attorneys general, who were entitled to intervene as of right in constitutional cases, and even in cases that originated in provinces other than their own. By virtue of its jurisdiction over the administration of justice, the Quebec legislature had enacted a statute to this effect in 1882 (*An Act to facilitate the intervention of the Crown in civil cases, in which the constitutionality of Federal or Provincial Acts is in Question*, S.Q. 1882, c. 4). After 1905, the rules of practice of the Supreme Court required that notice be given to the attorneys general of Canada and of all the provinces by any party who intended to raise a constitutional question (Rules of Practice of the Supreme Court of Canada, C.R.C. 1978, c. 1512, rule 17). On this point, see B. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2d ed. (Toronto: Butterworth, 1983).
27. See Raynauld (1961, p. 29).
28. Ibid., p. 27.
29. Boismenu, Mailhot and Rouillard (1980, p. 15).
30. Collectif, CSN-CEQ (1985, p. 167).
31. **Two Indicators of Economic Growth in Quebec, 1931–71**

| | Hydroelectric Production (millions of kWh) | Mineral Production (dollars) |
|---|---|---|
| 1931 | 8,066 | 36,051,366 |
| 1941 | 17,741 | 99,700,027 |
| 1951 | 29,690 | 255,931,822 |
| 1961 | 50,433 | 455,522,933 |
| 1971 | 75,274 | 770,000,000 |

*Source:* McRoberts and Posgate (1980, p. 39).

32. **Participation by Males in the Quebec Labour Force, by Economic Sector, 1931–71**

| Sector | 1931 | 1941 | 1951 | 1961 | 1971 |
|---|---|---|---|---|---|
| Primary | 30.1 | 31.6 | 20.9 | 12.4 | 5.6 |
| Secondary | 29.8 | 36.6 | 41.1 | 38.2 | 35.2 |
| Tertiary | 33.8 | 30.2 | 35.9 | 46.0 | 51.2 |

*Source:* Ibid., p. 41.

33. **Agricultural Data, Quebec, 1941–71**

| | 1941 | 1951 | 1961 | 1971 |
|---|---|---|---|---|
| Number of farms | 154,669 | 134,336 | 95,777 | 61,257 |
| Population living on farms (%) | 25.2 | 19.5 | 11.1 | 5.6 |
| Average size of farms (acres) | 117 | 125 | 168 | 176 |

*Source*: Ibid., p. 40.

34. *Supra*, note 27, p. 53.
35. *Supra*, note 30, p. 167.
36. Rocher (1973, p. 16).
37. Ibid., p. 18.
38. On the face of it the *Birks* case appears to concern observance of religious holidays, but in fact the question was the terms of the saleswomen's employment. The dispute in the *Bell Telephone* case, which arose at the very end of the period and concerned a company whose activities extended outside Quebec, raised the question of whether the company was subject to Quebec labour legislation and, in particular, whether it was required to contribute to the minimum wage fund.
39. See *supra*, note 31, p. 60.
40. The weakness of legislative action on the part of the government before 1960 was noted by Vincent Lemieux, who showed that during this period the Union Nationale government enacted fewer statutes than in subsequent periods, and specifically noted that these statutes were less complicated than the later legislation. Vincent Lemieux, "Les gouvernements et leurs lois," *Interface* (September–October 1984): 12–15.
41. Boismenu et al., *supra*, note 29, p. 91; "There is another constant factor in this overall picture: non-intervention by the State, or rather, anti-State interventionism. Here we find the concept of the State as arbitrator, which does not intervene in economic relationships unless the economic and/or political situation requires it to do so. State intervention is seen to be the same as the Welfare State, which inhibits the natural laws by which capital operates in harmony. As well, State intervention is considered, in the purest liberal tradition, to be the cause of economic problems and a threat to liberties." [Translation]

    Thus Duplessis stated: "We believe that the Welfare State is the enemy of true progress. We believe that Quebec will develop more rationally and rapidly through private initiative." (Speech from the Throne, January 14, 1948, p. 5, translation.)

    And: "Heaven helps those who help themselves — Our rights will all be protected if we all fulfill our duty. Clearly, the Welfare State paralyses the productive initiatives we need, and will ultimately lead to ruin for us as individuals and as a people." (*Le Devoir*, January 2, 1952, translation.)
42. See Beetz (1965, pp. 121–22).
43. See Desrosiers (1971).
44. A course of action that was, in terms of Duplessis' legal thinking, perfectly justifiable, because assignment of a subject area to the jurisdiction of a particular level of government is merely an enabling provision and does not require that legislation be enacted, unless otherwise provided. See also Beetz, *supra*, note 42, p. 123.
45. *Le Devoir*, July 22, 1948.
46. *Le Devoir*, February 11, 1949.
47. "While Confederation may have been an agreement among four provinces, it was also an agreement between two great races. It was the result of an accord between the two races, English and French, whose cultures and traditions are precious and unsurpassed assets to the country. In this Canadian Confederation, the French province is not only a provincial entity, but above all an ethnic entity. Anyone who would reduce the constitutional question to simple material problems commits an error of enormous proportions." (*Le Devoir*, September 6, 1952, translation.)
48. "This is a battle between the forces of centralization and the forces of decentraliza-

tion and patriotism, both provincial and Canadian." (*Le Devoir*, April 30, 1947, translation.)

49. "We must tell those who could centralize and assimilate, who want only one Parliament, one language and one religion, who would have us lose our traditions and our mentality: you will not crucify the province of Quebec, even if you do it on a golden cross." (*Le Devoir*, January 4, 1956, translation.)
50. *Le Devoir*, November 27, 1952.
And: "We want to work hand in hand with anyone who wishes to preserve the Constitution" (*Le Devoir*, June 16, 1952, translation).
51. Boily (1976, pp. 101–43).
52. *Commission du salaire minimum v. Bell Telephone*, [1966] S.C.R. 767; *Birks (Henry) and Sons v. Montreal*, [1955] S.C.R. 799; *Reference re Validity and Applicability of the Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; *Winner v. SMT (Eastern) Ltd.*, [1951] S.C.R. 887; *A.-G. Ont. v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570; *Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124; *Munro v. National Capital Commission*, [1966] S.C.R. 663; *Reference re the Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198; *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619; *Nickel Rim Ltd. v. A.-G. Ont.*, [1967] S.C.R. 672.
53. However, the rarity of such interventions cannot be imputed to the lack of legal capacity, or ignorance of the fact that these constitutional cases were being heard, since the attorney general is automatically notified. See *supra*, note 26. As well, these exceptions both related to powers of taxation, concerning which Duplessis was at the same time battling on the field of constitutional practice, a question to which we shall return later. These interventions must be seen as complementing that battle. *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619; *Nickel Rim v. A.-G. Ont.*, [1967] S.C.R. 672.
54. Beetz, *supra*, note 42, p. 124.
55. See Carrier (1967).
56. This ideology, which was present during this period, was expressed some years later by P.E. Trudeau et al., in their "Manifeste pour une politique fonctionnelle," *Cité Libre* (May 1964), pp. 11 to 17, and specifically: "In the present political situation, it is important above all that we place new emphasis on the individual, regardless of accidents of ethnicity, geography or religion. The social and political order must be built first on the universal attributes of the person, and not on what separates us one from another. Political and social priorities based on the individual are totally incompatible with priorities based on race, religion or nationality." And: "If we are to move this country ahead, we must at all costs preserve and develop federalism." (Ibid., p. 13, translation.)
57. We must be careful to make this distinction: the ideal form of federalism in 1961, according to Trudeau (1968, pp. 124–50), would be a cooperative federalism, equidistant between the autonomy of Duplessis and the centralism of the federal government: "However, that is not to say . . . that this chapter pleads *for* provincial autonomy and *against* centralization in absolute terms . . . and if my argument is taken to mean that the present socialist preconception in favour of centralism should permanently be replaced by a preconception in favour of provincial autonomy, I shall have completely failed to make my point" (p. 125).
58. *The Dominion-Provincial Taxation Agreement Act (1942)*, S.C. 1942–43, c. 13.
59. Lajoie (1984, pp. 142–68).
60. Beetz, *supra*, note 42, p. 129.
61. His motives are well known: "No responsible government in existence restricts itself to administering money obtained from taxes imposed and collected by another government" (*Le Devoir*, April 20, 1955, translation). And: "What use would it be to the provinces to have such broad legislative and administrative powers, if they were then prevented from raising the money needed to exercise those powers?" (*Le Devoir*, October 4, 1952, translation.)
62. Lajoie and Molinari (1978).

63. Trudeau, *supra*, note 57, pp. 135–37.
64. Ibid., p. 137.
65. Ibid., p. 137.
66. *Boucher v. R.*, [1951] S.C.R. 265; *Chaput v. Romain*, [1955] S.C.R. 834; *Saumur v. The City of Quebec*, [1953] S.C.R. 299; *Lamb v. Benoit*, [1959] S.C.R. 321; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Switzman v. Elbling*, [1957] S.C.R. 285; *Smith and Rhuland v. R.*, [1953] 2 S.C.R. 95.

    Two other decisions are of interest as well. Both *Birks (Henry) and Sons v. Montreal*, [1955] S.C.R. 799, and *Lieberman v. R.*, [1963] S.C.R. 643, dealt with Sunday observance, and thereby with an aspect of religion. However, the parties and the Supreme Court did not consider them in this light, but rather as matters of labour relations and criminal law. We have dealt with them here in relation to the division of powers.
67. The Supreme Court interpreted the crime of seditious libel restrictively, and acquitted a Jehovah's Witness who had been prosecuted for publishing and distributing a pamphlet alleged to be seditious (*Boucher v. R.*, [1951] S.C.R. 265). Rand J. commented on the provision of the Criminal Code relating to seditious libel: "This, as it seems, is a fundamental provision which, with its background of free expression as a constituent of modern democratic government protects the widest range of public discussion and controversy, so long as it is done in good faith and for the purpose sanctioned," p. 290.
68. The Court found in favour of a Jehovah's Witness who had brought a civil action against three police officers who had seized religious books and pamphlets at his home without a warrant, and directed everyone present to disperse, while a religious service was being held (*Chaput v. Romain*, [1955] S.C.R. 834). Taschereau J. made the following important statement on freedom of religion (p. 840): "In our country, there is no State religion. No one is required to adhere to any particular belief. All religions are on the same equal footing, and all Catholics, like all Protestants, Jews or members of any other religious denomination have the fullest freedom to think as they wish. Everyone's conscience is a personal matter and is not the concern of anyone else." [Translation]

    We should note the statement of Kellock J. as well (p. 859): "The appellant suffered an invasion of his home and his right of freedom of worship was publicly and peremptorily interfered with."

    In *Saumur v. The City of Quebec*, [1959] 2 S.C.R. 299, a bylaw forbidding the distribution of books or pamphlets in the streets without permission from the chief of police was held not to apply to Jehovah's Witnesses. In *Lamb v. Benoit*, [1959] S.C.R. 321, it was held that the Jehovah's Witness was illegally arrested for distributing tracts, and damages were awarded.
69. Duplessis had ordered an official to cancel the liquor licence held by Roncarelli, who owned a successful restaurant and used the profits to assist his fellow Jehovah's Witnesses. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, the Supreme Court held that the decision to cancel the licence was illegal and allowed the civil action brought against the premier. The Court confirmed the principle of equality before the law and the limits imposed by our law on the exercise even of discretionary powers.
70. *Switzman v. Elbling*, [1957] S.C.R. 285. Relying on federal jurisdiction over criminal law, five of the majority judges held that the legislation was a disguised attempt to legislate in relation to criminal law. Three other judges, who also concurred in the majority judgment, Rand, Kellock and Abbott JJ based their decision on the doctrine of the implied bill of rights.
71. *Smith and Rhuland v. R.*, [1953] 2 S.C.R. 95.
72. On this point, see the *Saumur* and *Switzman* decisions, *supra*, notes 68 and 70.
73. On this point see *Saumur v. The City of Quebec*, which contains a specific reference to the leading decision in this area: *Reference re Alberta Statutes*, [1938] S.C.R. 100.
74. Beetz, *supra*, note 42, p. 23.
75. *Le Devoir*, January 20, 1954.
76. *Le Devoir*, January 3, 1950.

77. "We cannot tolerate atheism, which is a brother to communism" (*Le Devoir*, November 22, 1946, translation).
78. Trudeau, *supra*, note 56, p. 28.
79. *The Corporation of the City of Toronto v. Olympia Edward Recreation Club Ltd.*, [1955] S.C.R. 454.
80. *Hiller v. Registrar, Vancouver Land Registration District*, [1963] S.C.R. 229; in a contrary decision, Martland J. stated in obiter dictum that if the provincial statute intended to permit the Registrar to consider external evidence as to the validity of title to property, it would be ultra vires.
81. *A.-G. Ont. and Display Service Company Ltd. v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32.
82. *C.N.R. v. Trudeau*, [1961] S.C.R. 398.
83. The Court held that a Mining Commissioner could exercise certain powers, such as granting permits or deciding disputes concerning mining concessions (*Dupont v. Inglis*, [1958] S.C.R. 535), and that the Ontario Municipal Board could determine the assessment of a property and enter it on an assessment roll in order to fix the municipality's contribution of tax funds to a provincial program providing homes for the aged (*The Town of Copper Cliff v. Department of Municipal Affairs of Ontario*, [1961] S.C.R. 324).
84. *A.-G. N.S. v. A.-G. Can.*, [1951] S.C.R. 31.
85. *Prince Edward Island Potato Marketing Board v. H.B. Willis Inc.*, [1952] 2 S.C.R. 392.
86. *A.-G. Ont. v. Scott*, [1956] S.C.R. 137.
87. *Lord's Day Alliance v. A.-G. B.C.*, [1959] S.C.R. 497.
88. *Reference In re Bowster's Newfoundland Pulp and Paper Mills Ltd.*, [1950] S.C.R. 608.
89. Trudeau, "Some Obstacles to Democracy in Quebec," *supra*, note 57, p. 109: "A conquered people therefore not only faced a state which they feared as the creature of a foreign nation, but also belonged to a church which distrusted that state as a rival power and as a child of the Revolution, liable to be dominated by anti-clericals, Protestants, or even socialists. The resulting popular attitude was a combination of political superstition and social conservatism, wherein the state — any state — was regarded as an ominous being. . . . Electoral processes for the mass of the people remained mysterious rituals of foreign origin. . . . [in] Quebec, a school or hospital is not expected by the citizens as of right . . . but as a reward for having returned a member to the Government benches."

    Beetz, *supra*, note 42, p. 122: "But Quebeckers feared the state. . . . We could spend considerable time discussing the reasons for this initial anti-statism in Quebec. For a hundred years after the Conquest, Quebeckers had completely forgotten how to use the state, or even how to participate in it in their own way. . . . This state, which was in no way a product of their own creative genius, and over which they could have no influence since their participation was restricted by rules not of their own asking, was eventually seen, at best, as a foreign institution. . . . French Canadians felt alienated from the state. In my opinion, this must be seen as the source of the French Canadians' reputation for political corruption, which is a profound betrayal of the state. Since we can really only betray something that is ours, and to which we feel loyalty, it is not a contradiction to suggest that French Canadians were being bought without feeling that they had sold themselves." [Translation]
90. See *supra*, note 82.
91. See the preliminary brief of Quebec to the Canadian intergovernmental conference, Ottawa, January 10–12, 1950, reproduced in *Proceedings of the Constitutional Conference of Federal and Provincial Governments* (Ottawa: Edmond Cloutier, King's Printer, 1950), p. 100. In Chapter 2, concerning the powers of the provincial governments, Quebec proposed that judges of the civil and criminal courts and of the Court of Appeal in all the provinces be appointed provincially, and that the Court of Appeal become a court of last resort in matters of civil, municipal and education law.

92. Ibid., p. 101.

93. Royal Commission of Inquiry on Constitutional Problems, Province of Quebec, *Report*, vol. 3, book 1, 1956, pp. 288–96.

94. Ibid., p. 291.

95. Ibid.: "All the judges of the Supreme Court are at present named by the central government alone, so that the situation which now prevails in the Senate, might, strictly speaking, be reproduced in this tribunal. It would be sufficient, for example, for the custom to be established of naming to it former representatives or federal ministers . . . but in the case of constitutional disputes it is neither normal nor satisfactory that a single party should choose, name and pay all the arbiters."

96. **Nature of Cases Heard by the Supreme Court of Canada, by Province of Origin, 1960–75**

| | Quebec | Ontario | Prairies | B.C. | Atlantic Provinces | Other | Total |
|---|---|---|---|---|---|---|---|
| Division of powers | 11 | 11 | 12 | 8 | 4 | 6 | 52 |
| Civil liberties | 3 | 11 | 8 | 7 | 5 | 3 | 37 |
| Institutions | 6 | 3 | 3 | 2 | 1 | 2 | 17 |
| Total | 20 | 25 | 23 | 17 | 10 | 11 | 106 |

97. *Supra*, note 31.

98. D. Brunelle, *L'État solide* (Montreal: Éditions Sélect, 1982).

99. *Supra*, note 31.

100. Urban population of Quebec from 1931 to 1971 (in percentages): 1931: 63.1; 1941: 63.1; 1951: 70.0; 1961: 74.3; 1971: 80.6. *Annuaires du Québec*, 1962, p. 41; 1973, p. 198.

101. R. Pelletier, "Nationalisme et étatisme au Québec dans les années '60," *Dynamique sociale de l'État Québécois (1960–1976)*, notes et travaux de recherche No. 11 (Quebec City: Laval University, Department of Political Science, Faculty of Social Sciences, September 1978), p. 12.

102. Quebec, Government of Quebec, Document No. 2, *L'Économie: point de vue sur notre réalité*, subtitled *Le développement économique du Québec 1961–1980: Une Synthèse* (Quebec City, May 1977), p. 47.

103. *Supra*, note 101. The author was referring to the article by Guindon (1964, p. 152).

104. See *supra*, note 40, p. 13. "Under Jean Lesage's Liberal government, from 1960 to 1966, the proportion of statutes containing ten or more control measures increased by more than 10 percent over the record of the preceding Union Nationale government. This sudden increase in regulation by statute fits into our vision of the Quiet Revolution. But contrary to accepted wisdom, this did not end in 1966, at least with respect to legislation, when the Union Nationale returned to power, first under Daniel Johnson and then under Jean-Jacques Bertrand, from 1966 to 1970: during the 28th legislature, the proportion of statutes containing ten or more control measures continued to rise. From 20 percent under the Liberals it increased to 26 percent. Under the Bourassa government, from 1970 to 1976, legislation reached a new height of complexity." [Translation]

105. We can attribute to them the many economic and social reforms in which the Quebec government played a significant "lever" role. Among the most important economic reforms were the nationalization of electricity in 1964, the creation of the Caisse de dépôt et de placement to administer the funds held by the new Régie des rentes, the creation of the Société générale de financement and the Office de crédit industriel, and the establishment of Crown corporations in the field of natural resources (SOQUEM, SOQUIP, REXFOR, Sidbec). Social reforms that merit attention include the health system (started with hospitalization insurance in 1961 and finishing with the establishment of a public health insurance plan in 1966 and 1970 and the creation of the Ministry of Social Affairs), the public pension plan in 1966, the family allowance

program in 1967, and the education system (with the creation of the Ministry of Education in 1964, and a complete system of public post-secondary schools, the CEGEPs, in 1967).

106. The Liberals originally were composed of a federalist, rather conservative wing, led by Premier Jean Lesage, and a wing with more nationalist and reformist tendencies inspired, to varying degrees, by René Lévesque and Paul Gérin-Lajoie.

107. The ambiguity of the PQ's sovereignty option, as seen in the various incarnations of the sovereignty-association concept (with or without the hyphen) has been detectable since it was first put forward. This party was an amalgamation of various nationalist and progressive tendencies, which had come together in the MSA. At its third convention in 1971, the proportions of delegates from each of the other parties were as follows: MSA, 33.4 percent; RIN, 27 percent; Liberal, 13 percent; NDP, 11 percent; FRAP, 8.4 percent, UN, 6 percent; Créditiste, 2.1 percent; RN, 1.9 percent. See L. Beaudry et al., *Le souverainisme politique au Québec: le Parti Québécois et les courants indépendantistes, 1960–1980*, notes de recherches, No. 22 (Montreal: Université du Québec à Montréal, April 1982), p. 13.

108. On the federal scene, the years from 1962 to 1968 were a period of political instability, with three minority governments in rapid succession, but the 1968 election provided Trudeau with a majority government. With the arrival of "French power" on the scene, the "Three Wise Men" — Trudeau, Gérard Pelletier and Jean Marchand — came to Ottawa, in their words, to "save Canada." The country was threatened by the growing independence movement in Quebec, but the advent of the "just society" and the national implementation of bilingualism (*Official Languages Act, 1969*) brought on a period of constitutional stagnation.

109. H. Laurendeau, "Le processus politico-idéologique de la nationalisation de l'électricité de 1963 au Québec", *Les cahiers du CIDAR* (Montreal: Université de Montréal, Département de sociologie, September 1981), pp. 64–73.

110. L. Dion, *Le bill 60 et la société québécoise* (Montreal: Les Éditions HMH, 1967), pp. 37–50.

111. *Journal des Débats*, 1971, pp. B-5960-1 et seq., Parliamentary Committee on Social Affairs, December 17, 1971.

112. *Journal des Débats*, 1964, pp. 3534–54, 2nd reading of Bill 34 on the Conseil supérieur de la famille, May 25, 1964.

113. Ministère des Affaires intergouvernementales, *Les positions traditionnelles du Québec sur le partage des compétences* (Quebec City: Éditeur officiel du Québec, 1978), p. 10.

114. Statement by the parliamentary assistant to the Minister of Cultural Affairs of Quebec, Canadian Arts Conference, Ottawa, April 7, 8 and 9, 1973.

115. Statement by Claude Castonguay, Minister of Social Affairs of Quebec, Federal-provincial conference of social welfare ministers, Ottawa, January 28–29, 1971, pp. 1–7 and 17–18.

116. Statement by Robert Bourassa, First Ministers' Conference, Ottawa, November 15–17, 1971, at pp. 48–49.

117. Statement by Robert Bourassa, Constitutional Conference, Ottawa, September 14–15, 1970, at pp. 12–13.

118. See *supra*, note 115.

119. In 1973, at the federal-provincial conference of ministers of communication, Quebec filed a white paper entitled *Le Québec maître d'oeuvre de la politique des communications sur son territoire* (Quebec City: Éditeur officiel du Québec). This document called for the province to be given the power to regulate radio and television broadcasting and telecommunications companies.

120. Ministère des Affaires intergouvernementales, *supra*, note 113, at pp. 79, 82, 86 and 87.

121. At least from what could be seen at the time of the variety present within the ideology referred to, without the hyphen, as sovereignty association, which called for sovereignty before negotiating association.

122. Statement by Jean Lesage, federal-provincial conference, Ottawa, July 19, 1965, at pp. 30–31.
123. Statement by Jean Lesage, Federal-provincial conference, Quebec City, March 31, 1964, at p. 31.
124. Ibid., at pp. 3–8.
125. Ibid., at pp. 10, 21 and 22.
126. See *supra*, note 122, at pp. 16–23.
127. Ibid., at pp. 26–27.
128. Working paper presented by Quebec to the Continuing Committee of Officials on the Constitutional Conference, July 17, 1968, at p. 34.
129. Ibid., at p. 37.
130. Brief of Quebec on the constitutional question, Canadian intergovernmental conference, Ottawa, February 5–7, 1968, at pp. 11–17.
131. Speech by J.-J. Bertrand, federal-provincial conference, Ottawa, February 16–17, 1970, at p. 7.
132. Proposals for constitutional reform presented by Quebec to the Continuing Committee of Officials on the Constitutional Conference, July 17, 1968, at p. 34.
133. Ibid., at pp. 34–37.
134. Ibid., at p. 37.
135. It may also have been possible that this government's real demands were lower than those made publicly by Robert Bourassa, under pressure from Claude Castonguay, who vigourously defended his own jurisdiction, and from the opposition. This is suggested by the working paper on the Constitution presented at the meeting of first ministers on October 1 and 2, 1976, at Toronto.
136. On the initiative taken by the federation of the St-Jean-Baptiste Societies, under Jacques-Yvan Morin, the États généraux du Canada français held preliminary sittings in 1966 and national sittings in 1967 and 1969. On the political level, at the national sittings in 1969, the assembly adopted a series of resolutions concerning the Constitution of Quebec, the rights of citizens, participatory democracy, and the formation of a constituent assembly. Specifically, the assembly affirmed the right of Quebec to self-determination. *Les États généraux du Canada français, Assemblée préliminaire 1966* (Montreal: Imprimerie St-Joseph, 1966); *Les États généraux du Canada français, Assises nationales 1967* (Montreal: Éditions de l'Action Nationale, 1967); *Les États généraux du Canada français, Assises nationales, L'Action nationale* 58 (9 and 10) (May and June 1969).
137. The committee was created on March 28, 1963, by a resolution of the Quebec Legislative Assembly put forward by J.-J. Bertrand, then an opposition member. Although this committee met only irregularly, it had considerable influence on future constitutional debate. It undertook an extensive research program on constitutional formulas and provided a public forum for the constitutional debate. J.L. Roy, *Le choix d'un pays: Le débat constitutionnel Québec-Canada, 1960–1976* (Montreal: Éditions Leméac, 1978), at pp. 95–110.
138. The Fulton-Favreau amending formula, which was approved by the first ministers of the ten Canadian provinces on October 30, 1964, provided that the central government's amending power would be limited to its own functions and, for areas within the joint jurisdiction of the federal and provincial governments, required the agreement of all eleven governments for areas considered to be fundamental, and the approval of at least two thirds of the provinces, representing at least 50 percent of the population.
139. Royal Commission on Bilingualism and Biculturalism. *Preliminary Report* (Ottawa: Queen's Printer, 1965).
140. This mobilization affected both nationalists like J. Yvan Morin, who argued that such fundamental problems should be dealt with before patriation (J.Y. Morin, "Les Dessous de la formule Fulton-Favreau" (1965), 12 *McGill L.J.*, at pp. 394–96: "The most prevalent approach would be not to approve any amending procedure until Ottawa and the other provinces have agreed to the major changes discussed by the

Laurendeau-Dunton Commission" [translation]); and the student movement and some opinion leaders like Claude Ryan, who condemned the formula in *Le Devoir* on March 4, 1965, calling it an "unacceptable compromise."

141. Beetz, *supra*, note 42. The new material values that Quebeckers were pursuing convinced them, in the author's opinion, that the only strong factor available to them was the provincial government. While they had lost their traditional distrust of the state, they retained their nationalism: "But Quebec came to consider that this single instrument of power, the provincial government, was still not strong enough. . . . What could be more normal than for Quebeckers to dream of increasing its power, by adding a part, or even all, of the powers it was lacking? Quebec had previously been hesitant to use the powers available to it; it now began to covet those it did not have. The division of powers in the Constitution of 1867 seemed to Quebec to be an obstacle, in that the federal distribution of powers might be considered by Quebec as a devolution of powers that belonged to the provincial political institutions. It is now seen as having deprived these provincial institutions of the power that was given instead to federal institutions." [Translation]

    Similarly, Quebeckers began to see, as the author put it, that federalism was the absence of rights, a political vacuum at the highest level, because there was no body with the power to establish priorities, and a federal constitution prevented this choice being made by specific institutions (ibid., pp. 135–37).

142. D. Johnson, *Égalité ou indépendance* (Montreal: Éditions de l'Homme, 1965).

143. This option was generally explained by René Lévesque himself in his *Option for Quebec* (Montreal: Les Éditions de l'Homme, 1968).

144. For a more detailed analysis of the various *indépendantiste* groups, see *supra*, note 30.

145. The 1964 amendment of the *Constitution Act, 1867* adding subsection 91(1A), dealing with old age pensions, is the exception during this period.

146. The other quarter is composed of two decisions concerning unemployment insurance and one decision concerning communications.

147. These proportions take into account constitutional successes for more than one party in some cases.

148. There are clearly a number of other possible explanations, some of which cannot be verified, including, for example, the skills of counsel. So long as these hypotheses cannot be verified, we cannot attribute the specific successes of Quebec with certainty to any particular cause, and especially not to any single cause. Thus the composition of the bench, which could have been a factor in the result, was checked. It did not vary significantly between the cases that originated in Quebec and other cases. Other hypotheses could not be verified in the time available for this study: the possibility of economic expansion occurring in other provinces, resulting in constitutional demands that were not yet acceptable to the Supreme Court; the possibility that there was a split between the demands of Quebec, which were accepted because they were limited to the power to administer policies, and the demands of other provinces, which were rejected because they concerned the power to design the policies themselves.

149. Following the *Stevedoring* and *Bell Telephone* cases, the Supreme Court, relying on the doctrine of "intrinsic elements," extended federal jurisdiction in this area in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178, *Canada Labour Relations Board v. City of Yellowknife*, [1977] 2 S.C.R. 729. The Court then limited this jurisdiction, relying on the same doctrine, in *C.N.R. v. Nor-Min Supplies Ltd.*, [1977] 1 S.C.R. 332, and most notably in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754.

150. The extra-provincial nature of some undertakings (as described in subs. 92(10)) led the Court to bring them within federal jurisdiction, particularly in *R. v. Board of Transport Commissioners*, [1968] S.C.R. 118; *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811; *Kootenay and Elk Railway Co. v. C.P.R.*, [1974] S.C.R. 955; *C.N.R. v. Board of Commissioners of Public Utilities*, [1976] 2 S.C.R. 112, and *Saskatchewan Power Corporation v. TransCanada Pipelines*

*Ltd.*, [1979] 1 S.C.R. 297. If the undertaking was not of an extraprovincial nature, the Court held that it was within provincial jurisdiction, as in *Agence maritime Inc. v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 851, and *Three Rivers Boatman Ltd. v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 607.

151. The doctrine of ancillary powers here resulted in a finding of federal jurisdiction over matters corollary to a divorce: *Jackson v. Jackson*, [1973] S.C.R. 205, and *Zacks v. Zacks*, [1973] S.C.R. 891.

152. In Canada, because of the effects of the distribution of powers in the Constitution, a somewhat artificial distinction is drawn between penal and criminal law, although criminal law includes penal law. The provincial jurisdiction recognized by the Court therefore technically covers penal law in the narrow meaning of the term.

153. Provincial jurisdiction over health, in *Fawcett v. A.-G. Ont.*, [1960] S.C.R. 776; provincial jurisdiction over penal law in *Mann v. R.*, [1966] S.C.R. 238; *McIver v. R.*, [1966] S.C.R. 254; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Bell v. A.-G. P.E.I.*, [1975] 1 S.C.R. 525; and provincial jurisdiction over the administration of criminal justice in *Faber v. R.*, [1976] 2 S.C.R. 9, and *Di Iorio and Fontaine v. The Warden of the Common Jail of the City of Montreal*, [1978] 1 S.C.R. 152.

154. *Minister of National Revenue v. Lafleur*, [1964] S.C.R. 412; *Batary v. A.-G. Sask.*, [1965] S.C.R. 465; and *A.-G. B.C. v. Smith*, [1966] S.C.R. 719.

155. We have grouped under this heading those decisions that concerned bankruptcy, interest, unemployment insurance, taxation and inflation. Some of these were favourable to the federal government (*A.-G. Ont. v. Policyholders of Wentworth Insurance Co.*, [1969] S.C.R. 779; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974; *R. v. Scheer Ltd.*, [1974] S.C.R. 1046; *Martin Service Station Ltd. v. Minister of National Revenue*, [1977] 2 S.C.R. 996; *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; *R. v. Air Canada*, [1980] 2 S.C.R. 303, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373) while others were favourable to the provinces (*Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753; *Alworth v. Minister of Finance*, [1978] 1 S.C.R. 447; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *Simpsons-Sears Ltd. v. Minister of Finance of the Province of Nova Scotia*, [1980] 2 S.C.R. 774.

156. On the question of undertakings and trade and commerce, a quantitative analysis provides similar results, with six decisions in favour of the provinces (*Kootenay and Elk Railway Co. v. C.P.R.*, [1974] S.C.R. 955; *Canadian Indemnity Co. v. A.-G. B.C.*, [1977] 2 S.C.R. 504; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 163; *Carnation v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238; *McDonald and Railquip Enterprises Ltd. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; and *Reference re Farm Products Marketing Act*, [1978] 2 S.C.R. 1198) and eight in favour of the federal government (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 163; *A.-G. Man. v. Man. Egg and Poultry Association*, [1971] S.C.R. 689; *Caloil Inc. v. A.-G. Can.*, [1971] S.C.R. 543; *Jorgensen v. A.-G. Can.*, [1971] S.C.R. 725; *Chamney v. R.*, [1975] 2 S.C.R. 151; *Burns Foods Ltd. v. A.-G. Man.*, [1975] 1 S.C.R. 494; *Reference re Farm Products Marketing Act*, [1978] 2 S.C.R. 1198; and *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42).

157. *Interprovincial Co-operatives Ltd. v. R.*, [1976] 1 S.C.R. 477: the Supreme Court held that a Manitoba statute creating a cause of action against anyone who caused damage to fisheries in the province through spilling pollutants in water outside the province was ultra vires. At pp. 514–15 of the reasons of Pigeon J. (Martland and Beetz JJ concurring), it appears that control of pollution in interprovincial waters is a matter of federal jurisdiction. The Court then decided in favour of the province in another case involving pollution (*Fowler v. R.*, [1980] 2 S.C.R. 213).

158. In which the situation is the same, with two decisions, both of which are very significant, and which are contradictory: *Reference re Offshore Mineral Rights (B.C.)*, [1967] S.C.R. 792, and *Morgan v. A.-G. P.E.I.*, [1976] 2 S.C.R. 349.

159. The balance of success was in favour of the federal government with *Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141, and *Public Service Board v.*

*Dionne*, [1978] 2 S.C.R. 191; however, see *A.-G. Que. v. Kellogg's Co.*, [1978] 2 S.C.R. 211.

160. *Jackson v. Jackson*, [1973] S.C.R. 205; *Zacks v. Zacks*, [1973] S.C.R. 891.

161. *Minister of National Revenue v. Lafleur*, [1964] S.C.R. 412; *Batary v. A.-G. Sask.*, [1965] S.C.R. 465; *A.-G. B.C. v. Smith*, [1966] S.C.R. 719.

162. *A.-G. Ont. v. Policyholders of Wentworth Insurance Co.*, [1969] S.C.R. 779; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974; *R. v. Scheer Ltd.*, [1974] S.C.R. 1046; *Martin Service Station Ltd. v. Minister of National Revenue*, [1977] 2 S.C.R. 996.

163. This doctrine was used again during this period, in *Reference re Offshore Mineral Rights (B.C.)*, [1967] S.C.R. 792 at 817: "The lands under the territorial sea do not fall within any of the enumerated heads of s. 92 since they are not within the province. Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject is one not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression 'the peace, order and good government of Canada'."

    The Supreme Court had previously held that the rights in dispute were located in a geographical location that had not, in 1867, belonged to the provinces.

164. This was probably the predominant doctrine during this period, particularly in the areas of transport (*R.v. Canadian Transport Commission*, [1968] S.C.R. 118; *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811, in which the Supreme Court's decision was based on the decision in *A.-G. Ont. v. Winner*, [1954] A.C. 541; *Kootenay and Elk Railway Co. v. C.P.R.*, [1974] S.C.R. 955; *C.N.R. v. Board of Commissioners of Public Utilities*, [1976] S.C.R. 112; *C.N.R. v. Nor-Min Supplies Ltd.*, [1977] 1 S.C.R. 322; *Saskatchewan Power Corporation v. TransCanada Pipelines*, [1979] 1 S.C.R. 297); the environment (*Interprovincial Co-operatives Ltd. v. R.*, [1976] 1 S.C.R. 477); taxation (*R. v. Air Canada*, [1980] 2 S.C.R. 303; *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545); trade and commerce (*A.-G. Man. v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689; *Burns Foods Ltd. v. A.-G. Man.*, [1975] 1 S.C.R. 494; *Reference re Farm Products Marketing Act*, [1978] 2 S.C.R. 1198; *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42); and communications (*Capital Cities Communication Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141 and *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191).

165. Several decisions of this period continued in the direction taken in *Bell Telephone*: *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178; *Caloil Inc. v. A.-G. Can.*, [1971] S.C.R. 543; *Chamney v. R.*, [1975] 2 S.C.R. 151.

166. [1976] 2 S.C.R. 373.

167. [1979] 1 S.C.R. 754. This decision and the following decisions were rendered after the end of this period, but in keeping with our basic criterion we have included them here, because of the date when the events that gave rise to the litigation occurred.

168. [1977] 1 S.C.R. 322.

169. [1978] 2 S.C.R. 1198, at p. 1293: "In my view, the control of production, whether agricultural or industrial, is *prima facie* a local matter, a matter of provincial jurisdiction. Egg farms, if I may use this expression to designate the kind of factories in which feed is converted into eggs and fowl, are local undertakings subject to provincial jurisdiction under section 92(10) of the *B.N.A. Act*, unless they are considered as within the scope of 'agriculture', in which case, by virtue of s. 95, the jurisdiction is provincial subject to the overriding authority of Parliament. In my view the *Carnation* case is conclusive in favour of provincial jurisdiction over undertakings where primary agricultural products are transformed into other food products. In that case, the major portion of the production was shipped outside the province ([1968] S.C.R. 238, at p. 242). In view of the reasons given, the conclusion could not be different even if the whole production had been going into extraprovincial trade."

170. *A.-G. Que. v. Kellogg's Co.*, [1978] 2 S.C.R. 211, in which the Supreme Court held that a provincial regulation prohibiting the use of cartoons in television commercials was valid. The majority held that the regulation was not in relation to broadcasting, but dealt with Kellogg's advertising activities, even though the vehicle of that advertising fell within the jurisdiction of Parliament. Note that this decision may be interpreted as turning away from the "intrinsic elements" doctrine.

171. On this point, see the opinion of F. Chevrette and H. Marx in their article "Peace, Order and Good Government Buried" (1976) *Can. Bar Rev.* 732. For a discussion of the reasons of Beetz J. see Beetz *supra*, note 42, p. 120.

172. *Reference re Offshore Mining Rights (B.C.)*, [1976] 2 S.C.R. 237.

173. Ibid.

174. *Jackson v. Jackson*, [1973] S.C.R. 205; *Zacks v. Zacks*, [1973] S.C.R. 891; *R. v. Scheer Ltd.*, [1974] S.C.R. 1046; *Martin Service Station Ltd. v. Minister of National Revenue*, [1977] 2 S.C.R. 996; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974.

175. *Fowler v. R.*, [1980] 2 S.C.R. 213.

176. G. Rémillard, *Fédéralisme canadien — Éléments constitutionnels de formation et d'évolution* (Quebec: Éditions Québec-Amérique, 1980), Appendix 1. It was not until after 1968, however, that the federal government actually took the initiative in the negotiations. Until then, the provincial first ministers had had to take the initiative in the process of attempting to amend the Constitution. First, and significantly, the premier of Quebec, Jean Lesage, had invited the other first ministers to an interprovincial conference in Quebec City on December 1, 1960. Secondly, the Ontario premier, John Robarts, invited the other provinces to an interprovincial conference held in Toronto on November 27 and 29, 1967, the "Confederation of Tomorrow" conference. Only after that was the initiative taken by the federal government, which then began to call a multitude of federal-provincial conferences. On February 5 and 7, 1968, it held the Ottawa constitutional conference to open the process of constitutional amendment, which ended in the failure of the Victoria constitutional conference on June 14 and 16, 1971, when Quebec refused to come to an agreement. Throughout this process, in which Quebec's priorities had no place, there were 7 conferences of first ministers, 9 conferences of ministers, and 30 meetings of senior officials, not to mention the numerous bilateral meetings. Following this failure, the federal government started the process of constitutional meetings anew. In particular, it presented the "Constitutional Proclamation" of 1976, which was in essence a restatement of the federalist scenario and priorities of the Victoria Charter.

177. Government of Canada, *Dominion-Provincial Conference, 1960*, July 25–27, 1960 (Ottawa: Queen's Printer, 1960).

178. Jean Lesage's best statement of his liberal economic objectives came in his call for just such a nationalist solution: "For the first time in our history, the people of Quebec will be masters in our own home! The era of economic colonialism has come to an end. We are going forward to liberation! It's now or never! MAÎTRES CHEZ NOUS!" (Quoted by Roy, *supra*, note 138, translation.)

179. Most notably at the federal-provincial conferences of October 14–15, 1964, and July 12–22, 1965.

180. "Between 1962 and 1967, the federal government reduced its share of personal income tax on a number of occasions. These reductions were made by means of tax abatements. . . . Under the tax collection agreements of 1962, the abatements were first set at 16 percent of basic federal tax on personal income and nine percent on corporate taxable income. Steps were taken to increase the provincial income tax abatement from year to year until it reached 24 percent in 1966. In 1967, it was increased by four percentage points to 28 percent, while the corporate income tax abatement rose from nine to 10 percent of taxable income." (Canada, *Federalism and Decentralization: Where Do We Stand?* (Ottawa: Queen's Printer, 1981), p. 27.)

181. Ibid., p. 42. The federal government agreed not to apply its family allowance program to children aged 16 and 17 years, or to operate its student loans program in Quebec, because the province already had programs of this sort. As compensation, personal

income taxes in Quebec were lowered by 3 percentage points for the family allowance program, and annual replacement payments were to be made to Quebec, for the student loan program.

182. *Constitution Act, 1964*, 12–13 Eliz. II, c. 73 (U.K.).

183. The language question was discussed at a number of conferences, although it was never the primary topic of discussion. At the constitutional conference of February 5–7, 1968, at Ottawa, the federal government acknowledged the need to establish equality of language rights in Canada; at the conference of December 8–10, 1969, again at Ottawa, the question of official languages was discussed. By that time, however, the concessions offered were generally less than were sought, and demanded, by francophone Quebeckers. Following the Commission of Inquiry on the Position of the French Language and on Language Rights in Quebec (the Gendron Commission, 1968), Quebeckers began to demand the right to "live and work in French" in Quebec.

184. As discussed above: agriculture, economic planning, communications, environment, bankruptcy, immigration, marriage, divorce and general powers.

185. Beginning in 1970, the matters discussed at federal-provincial conferences reflected the constitutional concerns of the Quebec government to a greater extent than before, particularly with respect to social policy and communications, although the results were no more favourable to Quebec. Following the Report of the Castonguay-Nepveu Commission on Health and Welfare in Quebec, in 1970, two conferences of ministers responsible for health and welfare were held at Ottawa, on January 29 and 30, 1971, and on June 7 and 8, 1971. The Victoria Charter of June 14–16, 1971, however, did not contain any reference to social policy. In a working document in May 1971, "Pour une politique québécoise des communications" (toward a Quebec communications policy), the Quebec government demanded legislative paramountcy in the area of communications. This topic was discussed at the federal-provincial conferences on communications held on November 30, 1973, and May 13 and 14, 1975.

186. Opening address, Canadian Constitutional Conference, Ottawa, February 10, 1969.

187. *McKay v. R.*, [1965] S.C.R. 798.

188. *Robertson and Rosetanni v. R.*, [1963] S.C.R. 651; *Walter and Fletcher v. A.-G. Alta.*, [1969] S.C.R. 383; *Oil, Chemical and Atomic Workers v. Imperial Oil*, [1963] S.C.R. 584; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770.

189. *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770.

190. *R. v. Drybones*, [1970] S.C.R. 282; *A.-G. Can. v. Lavell*, [1974] S.C.R. 1349; *A.-G. Can. v. Canard*, [1976] 1 S.C.R. 170.

191. *Sikyea v. R.*, [1964] S.C.R. 642; *Prince and Myron v. R.*, [1964] S.C.R. 81; *R. v. George*, [1966] S.C.R. 276; *Daniel v. White and R.*, [1968] S.C.R. 517; *Cardinal v. A.-G. Alta.*, [1974] S.C.R. 695; *The Natural Parents v. Superintendent of Child Welfare and the Petitioners for Adoption*, [1976] 2 S.C.R. 751; *Myran v. R.*, [1976] 2 S.C.R. 137; *Frank v. R.*, [1978] 1 S.C.R. 95; *Kruger v. R.*, [1978] 1 S.C.R. 104; *Jack v. R.*, [1980] 1 S.C.R. 294; *Smith v. R.*, [1983] 1 S.C.R. 354.

192. *Sikyea v. R.*, [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267; *Daniel v. White and R.*, [1968] S.C.R. 517; see also *Jack v. R.*, [1980] 1 S.C.R. 294.

193. *Cardinal v. A.-G. Alta.*, [1974] S.C.R. 695; *Myran v. R.*, [1976] 2 S.C.R. 137; *Frank v. R.*, [1978] 1 S.C.R. 95; *Kruger v. R.*, [1978] 1 S.C.R. 104; *Jack v. R.*, [1980] S.C.R. 294; *Smith v. R.*, [1983] 1 S.C.R. 354.

194. *R. v. Drybones*, [1970] S.C.R. 282.

195. Ibid., p. 297, reasons of Ritchie J., concurred in by a majority. As a result, he found that a provision of the *Indian Act* that provided that an Indian who was intoxicated off a reserve thereby committed an offence, while another person committed an offence only if found intoxicated in a public place, was inoperative.

196. *Curr v. R.*, [1972] S.C.R. 889, in which the Court held that the provisions of the Criminal Code concerning breathalizer tests did not contravene the principle of

equality before the law; see the reasons of Laskin J., concurred in by a majority, at p. 859.

197. *Smythe v. R.*, [1971] S.C.R. 680, in which the Court held that a provision of the *Income Tax Act* permitting the attorney general to prosecute a person either by indictment or by summary conviction was valid. The Court stated that this discretionary power was within the British and Canadian concept of equality before the law.

198. Ibid. See also *Curr v. R.*, *supra*, note 196, at p. 916, reasons of Ritchie J.; *R. v. Burnshine*, [1975] S.C.R. 694, in which the majority opinion was that the *Canadian Bill of Rights* did not create new rights.

199. *A.-G. Can. v. Lavell*, [1974] S.C.R. 1349, at p. 1359; see the reasons of Ritchie J., concurred in by a majority, in which the Court held that a provision of the *Indian Act* that states that an Indian woman who marries a non-Indian loses her Indian status and cannot continue to live on a reservation does not contravene the principle of equality before the law.

200. *A.-G. Can. v. Canard*, [1976] 1 S.C.R. 179, in which the Court held that a provision of the *Indian Act* that had the effect of prohibiting an Indian woman from being the executor of her husband's estate did not violate the principle of equality before the law; see the reasons of Beetz J. at p. 207.

201. *R. v. Appleby*, [1972] S.C.R. 303; *Hogan v. R.*, [1975] S.C.R. 574; *Duke v. R.*, [1972] S.C.R. 917; *Guay v. Lafleur*, [1965] S.C.R. 412; *Miller and Cockriell v. R.*, [1977] 2 S.C.R. 680; *Jumaga v. R.*, [1977] S.C.R. 486.

202. *A.-G. Ont. v. Reale*, [1975] 2 S.C.R. 624; *Leiba v. Minister of Manpower and Immigration*, [1972] S.C.R. 660; *Lowry and Lepper v. R.*, [1974] S.C.R. 195. It could also be argued that the Supreme Court applied the *Canadian Bill of Rights* in its first decision on the use of the breathalizer (*Brownridge v. R.*, [1972] S.C.R. 926), but this situation was much changed by *Hogan v. R.*, [1975] 2 S.C.R. 574, where it appears that the *Bill of Rights* did not protect the right asserted in that case.

203. *A.-G. Ont. v. Reale*, [1975] 2 S.C.R. 624; *Leiba v. Minister of Manpower and Immigration*, [1972] S.C.R. 660.

204. [1965] S.C.R. 12.

205. *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Thorson v. A.-G. Can.*, [1975] 1 S.C.R. 138.

206. *Jones v. A.-G. N.B.*, [1975] 2 S.C.R. 182.

207. *Miller and Kyling v. R.*, [1970] S.C.R. 215; *A.-G. Ont. v. Reale*, [1975] 2 S.C.R. 624; *Leiba v. Minister of Manpower and Immigration*, [1972] S.C.R. 660.

208. See *supra*, note 186.

209. On May 10, 1967, Lester B. Pearson announced that he was calling a federal-provincial conference on the Constitution, the sole topic of which would be the question of a constitutional bill of fundamental rights for Canadians. Quebec replied by insisting that the federal plan be enlarged, because "a declaration of human rights should be considered within the context of an overall study of the Constitution, not as an intermediate step" [translation].

210. Canadian Intergovernmental Conference, Ottawa, February 5, 1968. In 1968, at the first federal-provincial conference on constitutional reform, Lester B. Pearson proposed that individual rights and cultural and language equality be entrenched. In his reply, Daniel Johnson called for consideration of a new distribution of powers in areas of current concern, since the question of fundamental rights was, in his opinion, closely tied to the whole constitutional question.

211. In February 1968, the government of Canada made public two documents setting out its initial concept of constitutional reform: *The Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) and *Federalism for the Future: A Statement of Policy by the Government of Canada* (Ottawa: Queen's Printer, 1968).

212. *Supra*, note 210, opening address by Daniel Johnson.

213. However, faced with bilingualism in Canada, we would note that successive premiers of Quebec, including Bourassa, expressed reservations as to the federal government's

stated intention to guarantee freedom of choice of schools throughout the country in the Constitution, and to adopt the principle of bilingual districts. The Victoria Charter did not contain any provision relating to language of instruction, because of the refusal by the Quebec premier to discuss the question.

"It would appear that the federal government had failed in its effort to have the equality of the French and English languages in Canada recognized in the Constitution. Under pressure from various provinces, including Quebec, it had left the whole area of education, and the proposal on bilingual districts, out of the Constitutional Charter. It had not been able to extend the right to use either official language in debate in the legislative assemblies and in communications between citizens and provincial government departments and bodies to all the provinces. The ommission of these questions makes it possible for us to assess the constitutional provisions on language rights in the Victoria Charter more accurately, and to conclude that they were of limited effect." (Roy, *supra*, note 138, pp. 256–58, translation.)

214. Federal-provincial conference, July 25–27, 1960, Ottawa.

215. This question was considered in the brief on the Canadian question filed by the Quebec delegation at the Canadian intergovernmental conference on February 5, 1968, at Ottawa, and in 1969 when, in response to a white paper published by the government of Canada in February 1969, "The Constitution and the People of Canada," the government of Quebec stated that the federal proposals constituted too superficial a reform of federal institutions.

216. Joint response of the provinces to the federal government, letter from the Premier of Alberta, Peter Lougheed, to the Prime Minister of Canada, Pierre Elliott Trudeau, October 14, 1976.

217. In two cases out of three: *Quebec North Shore Paper Co. v. Canadian Pacific Limited*, [1977] 2 S.C.R. 1054, and *McNamara Construction (Western) Ltd. v. R.*, [1977] S.C.R. 654, represent provincial successes in this area, while *Antares Shipping Corp. v. The Ship "Capricorn"*, [1980] 1 S.C.R. 553, was a federal victory.

218. In seven out of the ten cases: *Brooks v. Pavlick*, [1964] S.C.R. 108; *A.-G. B.C. v. McKenzie*, [1965] S.C.R. 490; *Renvoi concernant la constitutionnalité de la Loi concernant la juridiction de la Cour de magistrat*, [1965] S.C.R. 772; *Tremblay v. Commission des relations du travail du Québec*, [1967] S.C.R. 697; *Tomko v. Labour Relations Board*, [1977] 1 S.C.R. 112; *City of Mississauga v. Municipality of Peel et al.*, [1977] 2 S.C.R. 244; *Nissan Automobile Company (Canada) Ltd. v. Pelletier*, [1981] 1 S.C.R. 67. The federal government was successful in the following cases: *Séminaire de Chicoutimi v. City of Chicoutimi*, [1973] S.C.R. 681; *A.-G. Que. v. Farrah*, [1978] 2 S.C.R. 211; *The Canadian Broadcasting Corporation v. The Quebec Police Commission*, [1979] 2 S.C.R. 618.

219. *Three Rivers Boatman v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 607; *Agence Maritime Inc. v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 851.

220. *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 568; *Reference re Farm Products Marketing Act*, [1978] 2 S.C.R. 1198; *R. v. Smith*, [1972] S.C.R. 359.

221. *British Columbia Power Corporation Ltd. v. British Columbia Electric Co. Ltd.*, [1962] S.C.R. 642; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

222. See *supra*, note 215.

223. The use of this term is open to dispute. From a *Canadian* point of view, far from being perceived as unilateral, patriation may be seen as consensual, in that it was agreed to by nine of the ten provinces. From the point of view of the dissenting province, in this case, Quebec, where a majority of people adhered to a *dual* concept of Canadian society, it appeared rather that patriation was unilateral, and we have used the expression consciously in this context.

224. Government of Quebec, *La nouvelle entente Québec-Canada. Proposition du gouvernement du Québec pour une entente d'égal à égal: la souveraineté-association* (Quebec City: Éditeur officiel du Québec, 1979).

225. See Ministère des affaires intergouvernementales, *Dossier sur les discussions constitutionnelles*, Commission de la présidence du Conseil et de la Constitution, Quebec

City, August 14–15, 1980, p. 4. On the question of the gap between its ideas and its practice, the Lévesque government provided its own justifications for practice based on the step-by-step, democratic strategy. Before the 1980 referendum, and after, because of its loss, the PQ government did not consider that it was authorized to negotiate on the basis of its own constitutional position, and instead agreed to negotiate on the basis of traditional Quebec positions: to defend Quebec's right to autonomy in all areas (apart from the amending formula and patriation, which it refused to discuss before there had been an overall agreement on a more equitable distribution of powers).

226. Government of Quebec, *supra*, note 224, pp. 51–55.

227. Ibid., pp. 56–71.

228. A. Sales, "Intervention de l'État et positions idéologiques des dirigeants des bureaucraties publiques et privées," *Sociologie et sociétés* 20(1), (April 1983): 13–42.

229. *Supra*, note 225, notes for a statement by Quebec on natural resources, meeting of July 8–11, 1980, of the Continuing Committee of Ministers on the Constitution, at Montreal.

230. Ibid., notes for a statement by Quebec on communications.

231. Ibid., notes for a statement by Quebec on family law.

232. Ibid., notes for a statement by Quebec on equalization and regional disparities.

233. This debate may be seen in the pages of *Le Devoir* during the winter and spring of 1984.

234. Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal: Quebec Liberal Party, 1980).

235. Ibid., pp. 73, 77, 85, 87, 89, 95, 101 and 109.

236. Ibid., p. 65.

237. Ibid., p. 65.

238. **Nature of Cases Heard by the Supreme Court of Canada, by Province of Origin, 1976–85**

| | Quebec | Ontario | Prairies | B.C. | Atlantic Provinces | Other | Total |
|---|---|---|---|---|---|---|---|
| Division of powers | 7 | 4 | 9 | 5 | 4 | 6 | 35 |
| Civil liberties | 4 | 1 | 10 | 1 | 0 | 2 | 18 |
| Institutions | 3 | 1 | 1 | 2 | 2 | 2 | 11 |
| Total | 14 | 6 | 20 | 8 | 6 | 10 | 64 |

239. *A.-G. Que. and Keable v. A.-G. Can.*, [1979] 1 S.C.R. 218; *R. v. Aziz*, [1981] 1 S.C.R. 188; *A.-G. Que. v. Lechasseur*, [1981] 2 S.C.R. 253; *Bisaillon v. Keable*, [1983] 2 S.C.R. 71; see also *Vignola v. Keable*, [1983] 2 S.C.R. 117.

240. To the extent that the Supreme Court recognized provincial jurisdiction to create a commission that is constitutionally empowered to investigate, if not the Royal Canadian Mounted Police, at least provincial police forces.

241. The Supreme Court held that a provision of the *Fisheries Act* prohibiting the deposit of toxic substances in fishing waters was valid (*Northern Falling Contractors Ltd. v. R.*, [1980] 2 S.C.R. 292). The Court then held that a provincial statute concerning the seal hunt was ineffective as part of the pre-Confederation law of Newfoundland (*Moore v. Johnson et al.*, [1982] 1 S.C.R. 115).

242. The Supreme Court held that an act of the legislative assembly of Newfoundland providing for the reversion of energy rights that had been granted by a statutory lease to the province of Quebec of energy produced by Churchill Falls, was ultra vires (*Reference re the Upper Churchill Water Rights Reversion Act*, S.C.C. 17064, May 3, 1984 [Laskin, Dickson, Beetz, Estey, Chouinard, Lamer and Wilson JJ]). The Court held that Parliament owned the seabed and subsoil of the continental shelf offshore Newfoundland and was entitled to exploit the resources on that shelf (*Reference re Newfoundland Continental Shelf*, S.C.C. 17096, March 8, 1984

[Laskin, Ritchie, Dickson, Beetz, Estey, McIntyre and Chouinard JJ]). However, the Court was of the opinion that land between Vancouver Island and British Columbia was the property of the province, given that it was part of the colony of British Columbia at the time it entered Confederation (*A.-G. Can. v. A.-G. B.C.*, S.C.C. 14471, May 17, 1984 [Laskin, Ritchie, Dickson, Beetz, Estey, Chouinard and Wilson JJ]).

243. *Canada Labour Relations Board v. Paul l'Anglais Inc.*, [1983] 1 S.C.R. 147; *A.-G. Can. v. St-Hubert Base Teachers' Association*, [1983] 1 S.C.R. 498; the first decision was in favour of the province, and the second was in favour of the federal government.
244. *Schneider v. R.*, [1982] 2 S.C.R. 112; in this decision the Supreme court held that a British Columbia statute providing for voluntary or compulsory treatment of heroin addicts was valid, on the ground that it was an exercise of provincial jurisdiction over health.
245. *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Canada Labour Relations Board v. Paul l'Anglais Inc.*, [1983] 1 S.C.R. 147.
246. *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Canada Labour Relations Board v. Paul l'Anglais Inc.*, [1983] 1 S.C.R. 147; *Canadian Pioneer Management Ltd. v. Saskatchewan Labour Relations Board*, [1980] S.C.R. 433.
247. *A.-G. Can. v. St-Hubert Base Teachers' Association*, [1983] 1 S.C.R. 498; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1983] 1 S.C.R. 733.
248. *Fulton v. Energy Resources Conservation Board*, [1981] 1 S.C.R. 153.
249. *Supra*, note 234, p. 75.
250. *A.-G. B.C. v. Canada Trust Company*, [1980] 2 S.C.R. 466; *Massey-Ferguson Industries Ltd. v. Government of Saskatchewan*, [1981] 2 S.C.R. 413; *Minister of Finance of the Province of New Brunswick v. Simpsons-Sears Limited*, [1982] 1 S.C.R. 144; *Newfoundland and Labrador Corporation v. A.-G. Nfld.*, [1982] 2 S.C.R. 260; *Reference re Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004.
251. Cf. *supra*, note 250, last decision cited, in which the majority held that Parliament could enact tax measures affecting the property of a province if such measures flowed from the exercise of another jurisdiction of Parliament under subs. 91(3) of the *Constitution Act, 1867*.
252. Constitutional Committee of the Quebec Liberal Party, *supra*, note 234, p. 95.
253. *Supra*, note 225.
254. *Canadian Pioneer Management Ltd. v. Saskatchewan Labour Relations Board*, [1980] 1 S.C.R. 433.
255. *Supra*, note 234, p. 101.
256. *Dominion Stores Limited v. R.*, [1980] 1 S.C.R. 844; *Labatt Breweries of Canada Limited v. A.-G. Can.*, [1980] 1 S.C.R. 914.
257. *Supra*, note 234, p. 103.
258. *Supra*, note 225, Quebec's position on the Charter of Rights, meetings of the Continuing Committee of Ministers on the Constitution held in Montreal July 8–11, 1980, and in Toronto July 15–19, 1980.
259. Notes for a statement by René Lévesque, meeting of first ministers held at Ottawa on June 9, 1980.
260. *Supra*, note 225.
261. *Canada Act*, 1982, c. 11 (U.K.), Schedule B: *Constitution Act, 1982*.
262. Ibid., ss. 50 and 51.
263. Ibid., s. 36.
264. On this point, see Lajoie, *supra*, note 59.
265. M. Robert, "La Commission Macdonald s'apprête à intervenir dans le champ de l'éducation," *Le Devoir*, February 18, 1984.
266. A. Lajoie, "L'éducation: une nouvelle offensive du pouvoir de dépenser," *Le Devoir*, March 7, 1984.
267. *Supra*, note 258.

268. Ibid., p. 5.
269. Ibid., p. 6.
270. *Supra*, note 234, p. 31; see Recommendation 3, s. 1.
271. Ibid., s. 6.
272. Ibid., s. 7.
273. *Jabour v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.
274. With one exception (*R. v. Shelley*, [1981] 2 S.C.R. 296), the decisions of the Supreme Court during this period did not apply the *Bill of Rights*: see *Bliss v. A.-G. Can.*, [1979] 1 S.C.R. 183; *Chromiak v. R.*, [1980] 1 S.C.R. 471; *MacKay v. R.*, [1980] 2 S.C.R. 370; *Commission des droits de la personne v. A.-G. Canada*, [1982] 1 S.C.R. 215. In one case, however, an individual's legal rights were recognized (*Minister of Justice v. Borowski*, [1981] 2 S.C.R. 577).
275. Similarly, the Court applied a restrictive interpretation of mobility rights in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 (Ritchie, Dickson, Beetz, Estey, McIntyre, Lamer and Wilson JJ); on the other hand, individual rights to privacy were upheld over powers of search, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 (Laskin, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ).
276. Here again, with one exception: *R. v. Sutherland*, [1980] 2 S.C.R. 451; see also *Moosehunter v. R.*, [1981] 1 S.C.R. 282. In the following decisions, the individual rights asserted were not recognized: *Mckinney v. R.* [1980] 1 S.C.R. 401; *R. v. Mousseau*, [1980] 2 S.C.R. 89; *Elk v. R.*, [1980] 2 S.C.R. 166.
277. *A.-G. Que. v. Blaikie*, [1981] 1 S.C.R. 312, in which the Supreme Court held that municipal by-laws and school by-laws are not covered by s. 133; the former fall within provincial jurisdiction, and the Constitution is silent on the language of the latter.
278. *A.-G. Que. v. Blaikie*, [1979] 2 S.C.R. 1016; *A.-G. Man. v. Forest*, [1979] 2 S.C.R. 1032.
279. *A.-G. Que. v. Quebec Association of Protestant School Boards et al.*, [1984] 2 S.C.R. 66 (Ritchie, Dickson, Beetz, Estey, McIntyre, Lamer and Wilson JJ).
280. *Charter of the French Language*, R.S.Q. c. C-11, s. 73.
281. Canadian Charter of Rights and Freedoms, contained in the *Constitution Act, 1982*, Part I, s. 23.
282. *Constitution Act, 1982*, subss. 59(1) and (2).
283. *Supra*, note 234, p. 31: see Recommendation 3, ss. 2, 3 and 4.
284. Ibid., subs. 8(a) and (b).
285. Ibid., subs. 8(c), (d), (e) and (f).
286. *Supra*, note 224, pp. 64–69.
287. See *supra*, note 225, notes for a statement by Quebec on the Senate, meeting in Montreal from July 8–11, 1980.
288. Ibid., proposition by Quebec on the Supreme Court of Canada.
289. Ibid.
290. *Supra*, note 234, p. 45.
291. Ibid., p. 55.
292. Ibid., p. 60.
293. Ibid., p. 57.
294. *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd.) v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283; *Rhine et al. v. R., [1980] 2 S.C.R. 443; Northern Telecom Canada Ltd. v. Communications Workers of Canada*, [1983] 1 S.C.R. 733.
295. *Jabour v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; see also *Canada Labour Relations Board v. Paul l'Anglais Inc.*, [1983] 1 S.C.R. 147, and *Northern Pipeline Agency v. Parehinec*, [1983] 2 S.C.R. 513.
296. *Reference re B.C. Family Relations Act*, [1982] 1 S.C.R. 62.
297. *Reference re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *A.-G. Que. et al. v. Grondin et al.*, [1983] 2 S.C.R. 364.
298. In *Reference re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, Dickson J.,

speaking for the Court, set out a three-part criterion for deciding whether a provincial tribunal was in contravention of section 96. In *Massey-Ferguson v. Saskatchewan*, [1981] 2 S.C.R. 413, at p. 429, Laskin C.J. summarized this criterion as follows:
"1. Does the challenged power or jurisdiction broadly conform to the power or jurisdiction exercised by Superior, District or County courts at the time of Confederation?
2. Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the question which the tribunal is called upon to decide or, to put it in other words, is the tribunal concerned with a private dispute which it is called upon to adjudicate through the application of a recognized body of rules and in a manner consistent with fairness and impartiality?
3. If the power or jurisdiction of the provincial tribunal is exercised in a judicial manner, does its function as a whole in its entire institutional context violate s. 96?"

299. Thus, for example, the Supreme Court held that a provincial tribunal may decide questions relating to guardianship or custody of children, but not to the possession of the family home (*Re B.C. Family Relations Act*, [1982] 1 S.C.R. 62). The Court then held that a provincial board may not be given power to evict tenants and to require that landlords and tenants comply with obligations imposed by the board (*Re Residential Tenancies Act*, [1981] 1 S.C.R. 714), while it held that another provincial board had jurisdiction to settle disputes between landlords and tenants (*A.-G. Que. et al. v. Grondin et al.*, [1983] 2 S.C.R. 364.
300. *Massey-Ferguson Industries Ltd. v. A.-G. Sask.*, [1981] 1 S.C.R. 715.
301. *Capital Regional District v. Concerned Citizens of British Columbia*, [1982] 2 S.C.R. 842.
302. *Crevier v. A.-G. Que.*, [1981] 2 S.C.R. 220.
303. *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54.
304. [1982] 2 S.C.R. 793.
305. [1981] 1 S.C.R. 753.

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2

# The Supreme Court and the Economy

PATRICK J. MONAHAN

## Introduction

Current conventional wisdom informs us that the Supreme Court's analysis of economic problems has been, if not incompetent, at least seriously inadequate. The source of the trouble is thought to be the lack of expertise possessed by the Court. Judges of the Supreme Court of Canada typically have no formal training in economics. Their conceptions of how markets operate appear crude and untutored. The rules of evidence and the adversary process do little to assist the judiciary in surmounting the limitations inherent in their life histories. The orthodox lament is that the Court's economic decisions are "unfortunate and unwise and are likely to have serious negative implications for the Canadian economy and citizen."[1]

This paper does not seek to disabuse anyone of the force or cogency of these conventional criticisms. The question to be asked is whether it is possible to move beyond these very basic and preliminary generalizations regarding judicial performance in the economic sphere, and to identify any common methodologies, assumptions or values that judges bring to bear on economic problems. Merely to pose such a question is to highlight the extremely limited and tentative quality of current criticism of the Court, which has been sporadic and particularized. There has been little attempt to ascertain whether there are any core themes to the economic thinking of the Court. Indeed, it is difficult to identify any study that has even recognized the legitimacy of such a generalized line of inquiry. A reader surveying this literature could be forgiven for assuming that legal doctrine was little more than a random jumble of idiosyncratic outcomes largely unconnected to each other.

It is time to step back from the trees and examine the shape and substance of the forest. This paper will argue that the Supreme Court of Canada analyzes economic issues using a common set of assumptions, categories and arguments. The recourse to these common arguments does not necessarily require or demand a particular result in a given case. Reliance on a generic group of assumptions has a more subtle and systemic affect. It channels and contains the shape of doctrine. It defines certain sorts of results or arguments as presumptively illegitimate. It forecloses prematurely on the range of doctrinal possibility. A full defence of this thesis would require a survey of the Supreme Court's doctrinal product as a whole, a task beyond the scope of any single paper. Instead, the approach used here will be to examine two areas of doctrine that are usually regarded as separate and unrelated to each other. The aim will be to demonstrate how these apparently unconnected areas, competition policy and the interpretation of the federal trade and commerce power, are informed by the same core set of values and assumptions. These parallels suggest the outlines of a rich and comprehensive background theory applicable to any area of doctrine.

There is one preliminary objection to this undertaking that should be dealt with immediately. The objection is that it is impossible to identify any determinate class of cases that might be termed "economic." If there is no class of case that might be termed economic, how is it possible to formulate a theory about "economic reasoning" in the Supreme Court? It is quite correct to point out that there is no overriding principle that separates "economic" from "non-economic" litigation. The essence of economics is costly choice. Whenever an individual is forced to sacrifice some portion of one value in exchange for another, an economic choice occurs.[2] Thus all litigation implicates "economics" in one way or another; the jurist must resolve a dispute between contending parties over some valued commodity, interest or resource. But this phenomenon does not make it any more improbable that juridical choices of this kind are structured or ordered according to some larger principles. It merely requires that the range of relevant data be expanded. In reality, the subject of the analysis is legal reasoning itself, as opposed to some esoteric or isolated branch of doctrine.

If the analysis is to identify the core themes of the Supreme Court's economic thinking, it must begin at a relatively high level of abstraction. The analysis must focus on issues or conflicts that permeate liberal law and society in general. The most fundamental and enduring issue within liberal society remains the deceptively simple one originally identified by Thomas Hobbes: how the impulse for freedom can be reconciled with the demands of order. Within liberal society, individuals are assumed to desire maximum freedom to pursue their own self-interest. They demand freedom from external restraint, and, at the same time, they require security from the selfish and subjective interference of others.

The conundrum is that freedom seems possible only through its negation. While people want to be able to act in their own self-interest, thereby increasing their power and prestige at the expense of others, they also require security from others, which curbs their opportunities to exploit the vulnerabilities of others.[3]

It is hardly surprising that the fundamental tension between freedom and order should lend shape and structure to legal doctrine. At a very general level, legal disputes can be regarded as stylized recreations of this central dilemma. Thus in any area of legal doctrine, one will tend to observe matching pairs of arguments, with each side of the pair exemplifying one of the competing values of freedom or order. To give one common example, strict liability in tort is good because "as between two innocents, he who caused the damage must pay," but it is bad because it is "unfair to punish where there has been no wrongdoing."[4] For present purposes, the important point is to observe the relatively limited number of strategies for reconciling or choosing between these opposing values. The first strategy is to identify some principle that categorically separates the realm of freedom from the realm of security. The essence of the claim of this strategy is that there is no real conflict between freedom and security; properly defined, the categories do not implicate each other. In this way, it is possible to grant absolute protection for security without destroying liberty. The second strategy of reconciliation is to concede that the values of freedom and security overlap, but to suggest some mediating concept that permits a principled choice between them. This mediating concept might be an idea such as intent or fault or else some utilitarian balancing test.

Consider, as an illustration of these various strategies, John Stuart Mill's celebrated essay, *On Liberty*.[5] The dilemma that troubled Mill was precisely the tension between freedom and security. He believed that certain freedoms, such as freedom of thought and expression, required absolute protection. At the same time, he recognized that society must be able to interfere with individual conduct when that conduct compromised the interests of others. The problem was that these propositions seemed to cancel each other out; if society could intervene to protect general welfare, the freedom of the individual could hardly be said to be inviolable. Mill's resolution of this difficulty was his well-known distinction between self-regarding and other-regarding acts. The only principle that justified collective interference with the liberty of the individual was the need to prevent harm to others. This meant that "the only part of the conduct of any one, for which he is amenable to society, is that which concerns others."[6] If an action was "self-regarding," society had no right to interfere with individual liberty, no matter how unwise or wrongful the action might be. In terms of self-regarding actions, the individual possessed absolute authority; "over himself, over his own body and mind, the individual is sovereign."[7]

The basis of Mill's strategy was to deny that there was an irreconcilable conflict between freedom and security. The "province of liberty" did not overlap that of morality or law. Society could recognize the absolute freedom of the individual while at the same time according the necessary protection to the interests of society as a whole. Whenever an action was self-regarding, there was no need for the state to seek to maximize happiness or utility; this choice was within the absolute discretion of the individual. Conversely, if an action was "other-regarding," the inevitable conflict between the interests of the parties could be resolved through the use of a utilitarian calculus. Of course, this framework is workable only if there is some substance to the distinction between self-regarding and other-regarding acts. The central undertaking of Mill's critics has been to demonstrate that this meta-principle is illusory, and that Mill's theory is little more than a contorted utilitarianism.[8]

Consider the analogy between Mill's analysis and the various possible conceptions of a legal right. On one possible interpretation, a legal right is a power absolute within a sphere but void outside it. Society is composed of individuals and institutions exercising dominion over such absolute zones of entitlement. In this universe, there is no overlap between the respective spheres of pure autonomy. The role of the jurist is simply to delineate the boundaries separating the various zones of entitlement from each other, and there is no need to invoke a utilitarian calculus to resolve disputes. The jurist simply elaborates the objective legal language of the market and the democracy. An alternative conception of rightholding would deny the possibility or desirability of power absolute within a sphere. According to this alternative conception, no exercise of power can be absolute or unreviewable. Any action by one individual is bound to affect another, and therefore must conform to some external standard such as "reasonableness." It is for the jurist to define what conduct satisfies this external standard.

In the most general terms, the strategy of the Supreme Court has been to defend and rehabilitate the legitimacy of the first vision of rightholding against the increasingly cogent attack of the second. In essence, the Court has sought to deny that there is an irreducible conflict between freedom and order. Certain forms of conduct are banned absolutely, no matter how beneficial the consequences. At the same time, other categories of conduct are absolutely permitted, no matter how harmful they might be in a particular instance. The jurist resolves disputes by classifying the conduct in the appropriate category rather than by maximizing social utility. The recurring difficulty with this strategy is its instability. As with Mill's meta-principle of self-regarding versus other-regarding acts, the distinctions between the various categories of legal conduct are typically flimsy or arbitrary. As the awareness of these inadequacies becomes more pervasive, the cracks become increasingly impossible to ignore. Either the categories must be reworked, or they must be scrapped in favour of some utilitarian calculus.

Competition policy was chosen to illustrate this development because it raises, in particularly stark terms, the conflict between the values of freedom and order. The existence of a market presupposes that individuals should be free to exploit or coerce each other. Outcomes should be dictated by competitive struggle rather than official fiat. Yet paradoxically, this competitive struggle must not be carried too far. Without some limits on the permissible forms of coercion or competition, the competitive process itself might be undermined. In its place would arise rigid hierarchies in which certain individuals or factions could dictate to others the terms of market transactions. Competition policy is premised on the assumption that it is possible to formulate some principle separating permitted forms of competition from prohibited forms. The attempt to limit competition in the name of competition faces the same challenge issued to the shepherd who, upon driving the wolf from the sheep's throat, found himself denounced as the destroyer of liberty.[9]

The interpretation of the trade and commerce power was chosen as a second illustrative device precisely because it seems to raise such wholly different issues. In the trade and commerce area, the primary legal relationship does not implicate the state and the individual but rather different organs of the state itself. Thus, it will be particularly satisfying to witness in this second area of doctrine the same assumptions and categories that dominated the first. Their appearance will raise the possibility that seemingly disconnected and random areas of legal doctrine are informed by a core set of identifiable themes and assumptions, awaiting archaeological excavation.

## Competition Policy

Few areas of public policy in Canada have been in greater disarray over the past decade than has competition policy. Regardless of ideological perspective, commentators have come to share the view that current competition policy is "almost rudderless, lacking a sense of purpose."[10] In large part, the bankruptcy of the present law has been attributed to political timidity in the face of sustained and vociferous opposition to reform from certain elements of the business community. After nearly two decades, the federal government has still not succeeded in effecting a major overhaul of the *Combines Investigation Act*.[11] For public and professional observer alike, this "reform" process has assumed the character of "a national joke . . . a saga of delays and procrastination."[12] Yet responsibility for the impotence of current policy has not been laid at the door of Parliament alone. Judicial interpretations of the act are also blamed for the scepticism and controversy that surround the current law. The claim is that, through a series of misguided, perverse and contradictory rulings, the Supreme Court has removed whatever bite the statute might once have possessed. In the final analysis, it is judges who have rendered the tiger toothless.

There is no cause to quarrel with much of this criticism of the Supreme Court. Even a cursory analysis of the Court's combines jurisprudence indicates that important economic factors in the cases have been largely ignored or misunderstood. Many of the opinions have been ambiguous or cryptic, making it hazardous if not impossible to predict how the Court might react in the future. Some judicial interpretations have made enforcement of the statute difficult and cumbersome. Yet the larger question, which has thus far received no adequate response, is how to account for this lame judicial performance. The conventional explanation has been simple: the source of the trouble is judicial incompetence and/or perversity. The core assumption of this conventional analysis is that the *Combines Investigation Act* embodies a determinate and identifiable policy prescription regarding competition in the economy. The judiciary has failed to apply this policy choice in its decisions either because of a simple lack of understanding or else because the judiciary wanted to substitute its own values for those of the legislature. The common conclusion is that the Court should begin applying the purposes and policies contained in the act itself, instead of grafting onto the statute some alien values of its own choosing.[13]

This paper rejects the conventional analysis and advances an alternative interpretation of the Supreme Court's combines jurisprudence. The starting point of this alternative view is the claim that the *Combines Investigation Act* is essentially indeterminate. In its present form, the act fails to articulate any meaningful core set of values on the question of competition. This indeterminancy is not simply the result of poor drafting technique or the inclusion of such vague terms as "undue" or "public detriment" in the statute.[14] It flows from an essential controversy over the meaning of "competition" and an ambivalence over its proper function in a market economy.

A "free market" rhetoric implying that resources are allocated by impersonal market forces rather than through the conscious design of a faction features prominently in Canadian political discourse. This rhetoric advances the notion that the role of competition policy is to ensure that market regulation works fairly and efficiently; the *Combines Investigation Act* is "not a regulatory statute itself, but rather an alternative to regulation."[15] The problem with this popular view is simply the force of circumstance. The Canadian economy is one of the most highly concentrated economies in the industrial world.[16] Most manufacturing and financial industries in Canada are oligopolies. Within such industries, there are only a few leading firms, and these recognize that their pricing and output decisions are interdependent. The natural and artificial barriers to entry are typically high.[17] In short, firms in oligopolistic industries possess market power. Unlike firms in atomistically competitive industries, which are "price-takers," oligopolists have some discretion in setting the price of their products.[18] Output and prices do not reach the

level they would in a situation of monopoly, "but that is not because of aspiration but ability. . . . Like the despotism of the Dual Monarchy, [oligopoly] is saved only by its incompetence."[19]

Canadian policy-making elites have never regarded monopoly or oligopoly as such to be a problem. Competition policy has not attempted to systematically eliminate the market power of leading industrial firms. The focus of state intervention has been on the conduct of the actors in a market rather than on the structure of the market itself. The goal has been to regulate the "abuse" of market power, while leaving the basic sources of that power intact. If such an approach is to be coherent, there must be some determinate standard separating the abuse of market power from its legitimate exercise. The search for such a principle has been the central preoccupation of competition policy and doctrine. The search continues still. The Supreme Court has never succeeded in articulating any determinate and principled criteria for identifying improper market conduct. The criteria the Court has utilized have been either irrelevant or unwise. But the Court's analysis of the problem has not been random or artless. Its pronouncements have been structured around a relatively limited number of ideas that have been applied fairly consistently over time. By examining those core ideas, it is possible to grasp the conceptual unity of this apparently esoteric and labyrinthine discipline. It is also possible to glimpse the outline of alternative paths that might have led the Court in different directions.

This paper is not a brief for any particular substantive policy proposals. No revised draft statute is appended, and the scope of the analysis is limited. The point is to understand and to criticize the structure of the combines jurisprudence of the Supreme Court. The analysis in this paper has two aspects. First, the paper specifies how the Court has failed to resolve the indeterminacy that pervades the *Combines Investigation Act*. Second, it links the jurisprudence in this area with developments in legal thought more generally. The claim is that the judicial treatment of competition policy is a particular instance of a generic approach to economic problems. The assumptions and techniques that emerge in the combines jurisprudence parallel the attempts by classical analytic jurists like John Stuart Mill to resolve the basic conflict between freedom and security. Thus, this paper is not simply a story of judicial incompetence or perversity. It is also a restaging of a basic and enduring dilemma within the liberal order. Most important, it is a lesson about the possibilities and the limitations of legal reasoning in resolving that dilemma.

For convenience and clarity, the argument can be summarized as proceeding from the assumption that the goal of competition policy is to identify unfair or abusive market conduct. This problem can be restated in more general terms as one of "advantage taking." The question is whether, of all the methods of coercion or advantage taking that are

possible in a market setting, there are some that are necessarily illegitimate. For instance, it might be thought that the abstract idea of a market itself is inconsistent with certain forms of competitive conduct. But this hope is ultimately groundless. The abstract idea of a market is consistent with a vast range of alternative systems of entitlements, and the idea does not tell us in any determinate way the degree to which advantage taking must be prohibited. Neither is the use of "rights theory" of much assistance. Although the notion of protecting the rights of the parties has figured prominently in judicial discussions of competition, it is essentially vacuous. "Rights" talk becomes meaningful only in the context of some independent normative theory specifying the content of the rights. This normative theory cannot be derived from the concept of a legal right itself. Consequently, it is some separate principle, rather than the idea of a legal right per se, that distinguishes lawful from unlawful competition.

Two such likely normative principles are introduced in the discussion below. There are a number of reasons for singling out the particular principles in question. First, they have historically dominated Anglo-Canadian common law discussions of competition and restraint of trade. More important, these common law doctrines were subsequently imported into the jurisprudence surrounding the *Combines Investigation Act*. In both theoretical and practical terms, however, they were utterly useless from the point of view of distinguishing lawful from unlawful competition but, even today, they continue to dominate judicial discussions of the governing statute. The puzzle is why such manifestly inadequate ideas have persisted. One possible explanation is the economic interests they served. In general, the "winners" in the combines cases have tended to be large corporations, with the Court constricting the ability of the state to regulate their market power. Thus, the jurisprudence has reinforced the official acceptance of a highly concentrated Canadian economy. Such an analysis, however, is seriously incomplete; one can imagine a whole range of alternative judicial interpretations that would have served these interests equally well. Given this fact, the problem is to explain why these particular interpretations were chosen so consistently over the possible alternatives. The argument offered here is that the ruling ideas in the combines cases reflect an implicit background theory about the proper relationship between state, civil society, and the market. Of course, this background theory is never articulated in the decisions. Indeed, an important function of the constructs and doctrines that are featured in the cases is to suppress any awareness of the highly controversial and contingent character of the choices that are being made. In this way, political preference becomes clothed in the neutral garb of technical necessity or expertise.

In recent years, the bankruptcy of the Supreme Court's combines jurisprudence has become an open secret, producing a desire to revise or replace the central idea of the doctrine. In particular, there has been

increasing insistence that the act is essentially an economic document, and that economic concerns such as efficiency should inform its interpretation. Such concerns have been alien to the judicial treatment of the act. The final section of this paper examines the reason for the exclusion as well as the possibility and the implications of surmounting it. To the extent that the goal of the act is to promote the efficient allocation of resources, the courts are unsuited for performing the delicate and complex balancing involved. But the final section argues that efficiency is not and cannot be the sole concern of the governing statute. Thus the problem of institutional design in this area is extraordinarily subtle and demanding.

## *Ambiguity in the Market: The Problem of Coercion*

The core relationship underlying the abstract ideal of a market is that of exchange.[20] Resources are allocated through a process of inducement and bargaining between autonomous individuals, producing on their own initiative and for their own account. No central authority, public or private, has presumptive legitimate authority to determine outcomes in the market. Terms are settled by the parties themselves. There is a private, "non-directive" order, in which the only role of the state is to elaborate and enforce the general rules governing access to entitlements and resources.[21] As long as individuals act within the framework established by the formal rules, they are free to pursue their own narrow self-interest. They can utilize all the advantages and skill at their disposal in attempting to coerce others into accepting their terms. The term "coercion" is not used in any pejorative sense since there is nothing necessarily wrongful about the presence of coercion or advantage taking in market exchanges. It is elementary that advantage taking is an accepted and central element of exchange.[22] Indeed, the process by which the strong exclude and coerce the weak is said to be one of the chief virtues of a market regime, since this maximizes overall social wealth. The justification was first articulated by Adam Smith: "He intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention."[23]

Yet while some form of coercion in a market is legitimate, there is a fundamental ambiguity over the extent of this legitimacy. Consider the radical case, a social order in which there would be no limits on the permissible forms of advantage taking. The only rule would be that everyone could do or take whatever he was able to, utilizing all the strength and cunning at his disposal.[24] Since everyone would enjoy an equal freedom in this regard, there would be no "ownership" of anything by anyone.[25] While some individuals might succeed in excluding others from certain benefits or resources for extended periods of time, such exclusions would always be contingent, subject to the outcome of future

tests of will. There is no market regime governed by such a permissive Hobbesian rule. Indeed, such a social order seems inconsistent with the very notion of a market. Without any limits on the use of coercion, there would be nothing to prevent the emergence of rigid forms of hierarchy and subordination, in which certain individuals could simply dictate to others the terms on which they were to lead their lives. This rigid hierarchy would undermine the autonomy that is essential to the bargaining process.

Thus, all market systems are necessarily committed to cancelling out at least some of the possible forms of advantage taking. At the same time, no market regime seeks to eliminate advantage taking per se. This, too, would be inconsistent with the abstract idea of a market. Bargaining and exchange presuppose some differences in interests, power or knowledge between parties. Without such differences, bargains would be inconceivable. This is the point made by some critics of John Rawls' claim that parties in an "original position" might bargain over principles of justice.[26] These critics have shown that bargaining is impossible behind a "veil of ignorance," precisely because the parties have been stripped of all their natural assets and abilities. Since everyone possesses identical knowledge, perceptions and interests, everyone would simultaneously grasp the validity of any proposition put before them. There would be no necessity and no possibility of discussion or bargaining: "The deliberations of the parties proceed in silence and issue in a single conception which is unanimously agreed to."[27]

A market order presupposes some intermediate position on the question of advantage taking. Some, but not all, forms of coercion must be prohibited. But the abstract idea of a market cannot itself identify the illegitimate forms of coercion. There is a vast range of alternative regimes of entitlements consistent with a market order. The question, then, is whether it is possible to formulate some additional principle that would distinguish prohibited forms of coercion from those that are allowed.

In essence, competition policy is just a specialized restatement of the more general problem of advantage taking in a market. Unlike professional economists, who associate competition with the structure of markets,[28] jurists define competition in terms of the behaviour of individual sellers and buyers. The legal conception regards competition as synonymous with rivalry, the "independent striving for patronage by the various sellers in a market."[29] Seen in this light, competition is essentially just another way of describing the coercive element in the bargaining relationship. In its loose, nontechnical usage, competition refers to the process whereby individuals exploit their advantages and resources in order to coerce and exclude others from market opportunities. Competition policy seeks to cancel out certain forms of advantage taking while allowing others to flourish. The reason for imposing limitations is somewhat paradoxical; competition must be limited so that it may be

preserved. There are certain forms of rivalry that threaten or injure the competitive process itself. Unless these forms of advantage taking are prohibited, the competitiveness of the market might be compromised. As with freedom, competition seems possible only through negotiation.

Attempts to articulate some general principle distinguishing lawful from unlawful competition have identified two broad categories of conduct that injure the "competitive process."[30] The first involves two or more parties agreeing to eliminate rivalry between themselves. The paradigm case is that of two sellers agreeing to fix the price of their product in the market. The parties to the agreement thus secure an advantage over consumers and possibly over other producers. The second form of improper competition involves the infliction of injury upon rivals. Here, one party improperly excludes rivals from market opportunities by engaging in unfair or exclusionary practices. The apparent simplicity of these categories belies their underlying complexity. The basic problem is that the agreed elimination of rivalry and the infliction of injury on rivals both possess a double character. In some cases, they are means of injuring the competitive process. In others, they are legitimate and necessary forms of activity in a market.

Any economic unit of more than one person involves the elimination of rivalry between the participants in the enterprise. Thus the modern economy, which is dominated by the large business corporation, is premised on the legitimacy of agreed eliminations of rivalry. This is the elementary point emphasized by Mr. Justice Holmes in his memorable dissent in the *Northern Securities* case,[31] which involved the formation of a company to take control of two railroads operating "parallel and competing lines across the continent. . . ."[32] The majority of the U.S. Supreme Court held the defendants to be in violation of the *Sherman Antitrust Act*[33] on the basis that the combination constituted "a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected."[34] Mr. Justice Holmes believed that the majority opinion was constructed on an unworkable and false economic theory. For Holmes J., the mistake of the majority was to assume that any elimination of competition between rivals was illegal,[35] and in his memorable dissent, Holmes demonstrated the absurdity of such a rule.

To prohibit all eliminations of competition, Holmes J. argued, "would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms."[36] This would amount to an attempt to "reconstruct society," and would outlaw many forms of obviously legitimate economic activity:

> To see whether I am wrong, the illustrations put in argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the states, whether made after or before the act, if now

> continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination, caused by their entering into partnership, is a restraint of trade, every such combination, as well the small as the great, is within the act.[37]

Holmes J.'s essential point was that the agreed elimination of rivalry was an accepted and necessary feature of an advanced market economy. To adopt a per se rule prohibiting all eliminations of rivalry would be bizarre and unthinkable. The mere fact that two parties had voluntarily ceased to compete could not of itself support a finding of illegality. What was required was some independent principle or argument that was capable of distinguishing the beneficial from the unlawful eliminations of rivalry.

A similar sort of difficulty is inherent in the second category of improper market conduct, the infliction of injury upon rivals. Again, the infliction of injury and the exclusion of rivals seems an inevitable feature of any market. Virtually all economically productive activity has the effect of excluding others. The enforceability of contracts means that those not a party to a contract are excluded from it. Moreover, competition in the market presupposes that the economically efficient can exclude and eliminate their inefficient rivals.

The point is illustrated by the celebrated English case *The Mogul Steamship Company Ltd. v. McGregor, Gow and Co.*[38] The defendants were shipowners who had attempted to secure a monopoly of the tea trade with China. They induced Chinese shippers to deal exclusively with them in return for freight discounts. The plaintiffs were rival shipowners who had been excluded from the tea trade and sought damages for conspiracy. One of their arguments was that the defendants had engaged in "unfair" competition aimed at injuring their business. The Court of Appeal dismissed the argument, noting that the plaintiffs were calling into question "the instinct of self advancement and self-protection which is the very incentive to all trade."[39] The infliction of injury through competitive conduct was the very point of a market system: "the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition."[40] In effect, the mere infliction of injury on a rival could not be actionable in itself. Some other reason of policy must be invoked to support a finding of illegality.

## *Early Judicial Attempts to Define Unlawful Competition*

At common law, the problems of unlawful competition arose in a variety of contexts. The judiciary never succeeded in formulating any generalized theory regarding competition in a market. However, the cases did contain a number of suggestions regarding a theory of improper market conduct. Three such suggestions were particularly prominent: the "rights" of the parties, their economic intentions, and whether or not competition in a market had been completely eliminated.

*Rights Theory*

An early and recurring judicial analysis of the problem was framed in terms of rights theory. According to this analysis, the way to identify unlawful competition was to ask whether one party's "rights" had been invaded. In the absence of any invasion of a legal right, the conduct was presumptively lawful, notwithstanding the fact it might cause harm to the other party. This theory was advanced in the *Mogul* case itself. Lord Morris maintained that there was no such thing as "fair" competition; there was simply a general right to compete, and it was for the parties, not the court, to determine the fairness of any particular form of competition:

> . . . I am not aware of any stage of competition called "fair" intermediate between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncracies of individual judges. I can see no limit to competition, *except that you shall not invade the rights of another.*[41]

This neatly illustrates both the ambition and the shortcoming of the rights theory type of analysis. The claim is that there is a limited class of advantage takings that are inherently wrongful: the cases in which the rights of a competitor have been violated. Such wrongful activities are banned absolutely. However, as long as a party does not engage in any of these prohibited forms of conduct, his actions are unconditionally legitimate. He may coerce or take advantage of his neighbour in any manner he chooses, and the state will not intervene to overturn the results of the bargain. There is no need to judge the individual's actions according to any independent standard of fairness. The only issue for state officials is whether there is any element of "wrongfulness" associated with the conduct in question. The difficulty is in specifying the boundaries of this zone of absolute entitlement. Lord Morris supposes that it will be self-evident when the rights of one party have been violated, but this assumption is false. Every claim concerning rights requires some controversial normative theory. The boundaries of individual rights will vary according to the normative theory one deploys.[42] Lord Morris does not suggest what normative criteria might underlie his theory of rights. In short, his definition of unlawful competition is essentially vacuous. He fails to offer any meaningful guidance in distinguishing between the categories of lawful and unlawful market conduct.

The inadequacy of Lord Morris' formulation does not mean that one could never utilize a rights framework to resolve issues of improper competition. It simply means that the Court would have to specify some normative theory that made the notion of a legal right sufficiently determinate. The judiciary has never succeeded in devising such a normative framework. The only suggestion of any promise has been to link the content of a legal right to the idea of freedom. According to this argument, if an individual is free to engage in a certain activity, he has a right that others not interfere with the lawful exercise of his freedom. Thus to

impede the lawful exercise of another's freedom is to violate his rights. Such an argument featured prominently in a variety of common law contexts. A well-known example is the judgment of Chief Justice Holt in the early case of *Keeble v. Hickeringhill*.[43] The defendant had frightened wild fowl from a decoy pond located on the land of the plaintiff by deliberately discharging guns near the pond. The plaintiff sued to recover the damage. Holt C.J. observed that the practice of using land as a decoy pond is perfectly lawful, since "Every man that hath a property may employ it for his pleasure and profit."[44] The defendant's firing of guns was actionable, as "he that hinders another in his trade or livelihood is liable to an action for so hindering him."[45]

Some variant of this relatively straightforward argument has surfaced repeatedly in discussion of rights in a market.[46] The basic error in the argument is a failure to distinguish the notion of privilege from that of right.[47] The fact that someone has a privilege regarding a certain act means simply that he can perform the act without anyone else being able to summon state force in oppostion.[48] However, it does not necessarily mean that others must refrain from interfering, on their own initiative, with the performance of the act. In short, the fact that an action is lawful does not mean that the state will guarantee its unimpeded exercise. One can discover an unwitting illustration of this very principle in *Keeble v. Hickeringhill* itself. Later in his judgment, Holt C.J. cites a case in which a schoolmaster had set up a new school, thereby attracting scholars away from an existing school in the area. Holt notes that the action by the "ancient school" for damages was held not to lie. Yet the operation of the old school was certainly a lawful activity. The only explanation for the result must be that there is no necessary bond between the privilege of operating a school and a right that others not interfere with its operation.

Since rights do not flow from privileges, one can give content to rights only by deploying a normative theory; this theory must specify the circumstances in which, as a matter of policy, the state should shield a certain class of activity from interference. This normative theory cannot be derived from the idea of a legal right itself. Consequently, it is the normative theory, as opposed to the "rights" of the parties, that defines the boundary of legitimate competition.

### *Intent*

A second prominent and recurring judicial theory regarding competition focusses on the intent of the market actor. According to this theory, the mere fact that one trader happens to drive its rivals from the field is not, in itself, actionable. What is wrongful is an "intent" to eliminate competition and to secure a position of market dominance. For instance, this emphasis on intention was a central feature of the leading *Standard Oil* case,[49] in which the U.S. Supreme Court enunciated a "rule of reason" in its interpretation of the *Sherman Antitrust Act*. Mr. Justice White

concluded that the Standard Oil Trust had not employed "usual methods" of business in building its empire. Instead, the trust had been motivated by "the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view."[50]

As with rights theory, there is an obvious difficulty with utilizing "wrongful intention" in defining unlawful competition. It is incorrect to suppose that an intention to exclude or eliminate one's competitors is unnatural or unusual in a market setting. The very act of competing involves an intention to exclude others from market opportunity. Nor is there any accepted obligation to cease competing if one's rival appears in danger of bankruptcy. The intentional elimination of competitors is simply the logical consequence of market competition itself. Mr. Justice Holmes neatly illustrated the point when he observed that "a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already."[51] A similar line of argument was advanced by the British House of Lords in the *Mogul* case.[52] In answer to the claim that an intention to monopolize the China tea trade was actionable, the Law Lords replied: "If such an injury, and the motive of its infliction . . . can be truly asserted to be a malicious motive . . . all competition must be malicious and consequently unlawful."[53] Plainly, the intention to eliminate one's rivals is a natural and inevitable feature of all market activity. In itself, it cannot provide an adequate foundation for distinguishing lawful from unlawful competition.

*Elimination of Competition*

It has also been thought that the distinction between "reducing" and "eliminating" competition provides the key to understanding unfair market conduct. The suggestion here is that when competition in a given market has been entirely eradicated, the party responsible is guilty of wrongful conduct. A prominent illustration of this reasoning can be found in the leading English case on restraint of trade, *Nordenfelt v. Maxim Nordenfelt Co.*[54] The common law doctrine on restraint of trade essentially states that a restraint is enforceable if it is reasonable "in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public."[55] Although it is difficult to discover an instance where a restraint has been held void on the grounds that it was unreasonable in terms of the public interest, there has been some attempt to give content to this branch of the test. The Court of Appeal in the *Nordenfelt* case was of the view that the public interest would be damaged by what it termed a "pernicious monopoly":

> I can conceive of cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend to directly injure the public, and a rule founded on public policy does not admit of any exception that would

> really produce public mischief; such might be possibly the case if it was calculated to produce a pernicious monopoly in articles for English use — a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts may some day or other become extremely important.[56]

Yet it is difficult to see how this argument can overcome the objections raised earlier. If a competitor can lawfully eliminate some of his rivals, there appears to be no reason why he should not be permitted to eliminate them all. There is no logic in a rule that encourages traders to compete with each other, but then penalizes those who do so too effectively.[57] Perhaps the assumption is that situations of outright monopoly are qualitatively different from instances of imperfect competition, and therefore demand a different judicial response. It is perfectly understandable that judges might have held to such an assumption in 1894, prior to the development of modern price theory. But contemporary economic analysis rejects the validity of any rigid distinction between cases where competition has been eliminated and those in which it has merely been reduced. In the first place, the notion of "eliminating" competition is largely meaningless. Even in situations of monopoly, there has only been a dampening of competition. Because of the possibility of product substitution, and the invention of new products and processes, competitive alternatives always continue to exist.[58] Secondly, the only difference between monopoly and oligopoly is one of degree rather than kind. In both instances, firms possess some degree of influence over market price. Indeed, contemporary economic analysis includes oligopoly within its definition of "monopoly" or "market" power.[59] There is no principled basis for distinguishing monopoly from oligopoly in a radical way. To draw such a distinction would be comparable to finding a man who hits his neighbour over the head with a sledgehammer guilty of assault, but excusing the man who uses a lighter instrument or has a poorer aim.[60]

Neither this nor any of the various other arguments or distinctions canvassed provides a satisfactory resolution to the initial problem of improper market conduct. Nevertheless, Canadian combines jurisprudence has been little more than a restatement or refinement of these basic but discredited themes. Given such a shaky foundation, it is little wonder that this jurisprudence has come to resemble a decaying dike that continually springs leaks in unexpected places. No matter how assiduous the jurists' efforts, they can never succeed in plugging all the holes in the rotting structure.

## *The Birth of Canadian Combines Policy*

Although the first Canadian anticombines act was passed in 1889,[61] it was not until 1910 that the state made any serious attempt to regulate market power.[62]

*The Legislation*

The *Combines Investigation Act* of 1910 defined a "combine" as any arrangement that increased the price of an article or restricted competition "to the detriment of consumers or producers of such article," including trusts, monopolies, and mergers.[63] The act established a procedure whereby any six persons could apply to a judge for an order directing an investigation into a combine.[64] This new act supplemented section 498 of the *Criminal Code*, which defined the offence of conspiracy in restraint of trade.[65] Unlike the American *Sherman Antitrust Act*, the Canadian statute did not purport to declare "every" combination in restraint of trade to be illegal.[66] Instead, it proscribed only "undue" or "unreasonable" restraints. But in a sense, this was little more than a declaration of the obvious. The simple act of combining to "restrain trade" could not, in itself, be made an offence.[67] There must be some additional reason of policy, aside from the bare reduction in competition, to render conduct unlawful. The use of general terms such as "undue" and the "public interest" signalled the necessity for some such additional element. The problem was that this indeterminate phraseology provided no clue as to the precise policy of the statute.

The Minister of Labour, Mackenzie King, sought to remedy this defect when he introduced the bill into the House of Commons in 1910.[68] King's speech was an attempt to dispel popular misconceptions on the "trust" issue and to give some precision to the elusive concept of unlawful competition. King began by noting that the public had come to associate the formation of combines and trusts with recent large increases in prices.[69] This association had produced a great deal of "agitation . . . against combinations as such."[70] King believed that such attitudes were mistaken. Combinations, trusts and monopolies were often beneficial to the economy and, accordingly, the *Combines Investigation Act* made no attempt to legislate against these arrangements as such. Instead, the statute was aimed only at combinations that abused their power; "The one end and purpose of this legislation is to prevent the mean man from profiting in virtue of his own meanness."[71]

According to King, abuse of power occurred when a combine failed to consider the public interest as well as the private interests of its shareholders. The tendency to pursue private ends at the expense of the good of the nation as a whole resulted from the vast and impersonal character of the modern business organization. King observed that the small businessman is conscious of his obligation to his customers and the community. This sense of personal obligation tends to be submerged in vast corporate entities:

> Too often it happens that engaged in one of these large organizations, the persons so employed think only of their obligations to the corporation which employs them, it is so vast, its demands absorb all of their attention. A sense of obligation to consumers or society generally is lost.[72]

The remedy for this loss of personal obligation was a system of public supervision of large economic enterprises. In this way, the abuse of power by combines would be curbed, and the public would secure "some of the advantages which these large aggregations of capital are capable of rendering."[73]

King's analysis is crucial, since it established the basic framework that even today continues to dominate competition policy in this country. The *Combines Investigation Act* was being introduced in the midst of the first great wave of merger activity in Canada.[74] This merger movement was to alter the basic configuration of the Canadian economy. King's analysis was a signal that this process of consolidation was entirely legitimate. There would be no challenge to market power, or even to monopoly as such, as long as the firms did not abuse their dominant position. The message was undoubtedly understood by the business community, since the years 1909–1913 marked a height of merger activity. In 97 mergers, 221 enterprises with assets of over $200 million were absorbed.[75]

The problem is with King's attempt to identify instances of "abuse" of market power. Having assumed the basic legitimacy of this power, King supposes that it is abused only when the firm fails to consider the public interest. But this argument is a makeweight. The premise on which a market is based is that competitors need pay no heed to the public interest. Social wealth is maximized from the interaction of individuals motivated only by their own advancement: "the study of his own advantage, naturally or rather necessarily, leads him to prefer that employment which is most advantageous to the society."[76] Adam Smith maintained that there had never been much good produced by those who "affected to trade for the public good."[77]

In short, the Canadian legislation made it clear that only certain "undue" restraints on trade were illegitimate. But the statute did not provide any guidance on the crucial issue of how to distinguish the lawful from the unlawful limitations on competition. The only suggestion made by the sponsor of the act was an unworkable theory about wrongful intention. It remained for the courts to attempt to unscramble and decode the cryptic policy of the statute.

### *The Early Jurisprudence*

Within two years of the passage of the *Combines Investigation Act*, the Supreme Court of Canada was faced with its first major case under the legislation. In *Weidman v. Shragge*,[78] two junk dealers had attempted to gain control of the market for junk in Western Canada. The dealers, who controlled over 90 percent of the market, agreed on the prices to be paid for the junk they bought, and agreed to split the profits. The plaintiff sued to enforce the agreement, with the defendant pleading its illegality under section 498 of the *Criminal Code*. The majority of the Supreme Court

accepted the defendant's contention that the agreement violated the *Code* and was consequently unenforceable. But the various judgments of the members of the majority present two quite distinct theories as to what constitutes an "undue" restraint of trade within the terms of the legislation.

Mr. Justice Idington frames the issue in terms of absolute entitlement. On the one hand, there is the "absolute right of contract," which potentially could include the right to make contracts in restraint of trade. On the other, there is the right of the public to "enjoy their reasonable expectation of due and fair competition."[79] The difficulty is to draw a line separating the rights of the public from the "absolute" right of contract. The drawing of such a line is complicated by the fact that "the whole business fabric of Canada is founded upon restraint of competition."[80]

Idington J. fashions a solution based on the judgment of the House of Lords in the *Mogul* case.[81] It will be recalled that in the *Mogul* case, the House of Lords had rejected the argument that an intention to eliminate one's competitors was actionable at common law. The Law Lords rightly observed that such a rule would make all market competition illegal. Yet Idington J. concluded that the effect of section 498 of the *Criminal Code* was to reverse the holding in the *Mogul* case. The purpose of the statute was to prohibit agreements made with the intention of eliminating competitors. Idington J. appeared to recognize that market competition necessarily involved the elimination of some competitors. He distinguished cases where the elimination was consciously pursued from those in which it was simply the inevitable result of market forces. The statute was aimed only at the former class of activity, where the trader was "tainted with a desire to do that which may not of necessity and under all circumstances be held in itself vicious."[82] The plaintiff in this case had exhibited such a wrongful intent:

> His one thought was, if possible, to destroy all competition and, if need be, those who ventured to come into competition with him. His language and conduct portray exactly what this statute strikes at. Its aim was to put out of business use the methods of men banding themselves together to render it difficult if not impossible for others to become rivals, and stop competition in the same field of business.[83]

Idington J. had some doubts as to the wisdom of the legislation. The evil against which the statute was directed was "incapable of concise and accurate definition,"[84] and the law prior to the passage of the statute had been "in harmony with the commercial ethics of most men."[85] But Parliament had concluded that competition must be preserved, and it was not for the court to question this policy choice.

The concurring judgment of Mr. Justice Duff proceeded on different grounds. Duff J. observed that the Court of Appeal had decided the case solely on the basis of what was reasonably necessary to protect the interests of the parties to the agreement. This view was not only a

mistaken application of the statute, it was an "inadequate conception of the principle of the common law."[86] The Court of Appeal had ignored the second branch of the common law doctrine of restraint of trade, the requirement that the agreement be reasonable in terms of the interests of the public. Duff J. emphasized the point by quoting Bowen L.J. in the *Nordenfelt* case in which the suggestion regarding "pernicious monopoly" was offered.[87] Turning to the Canadian statute, Duff J. reasoned that the attempt to establish a virtual monopoly "in the trade of an important article of commerce throughout a considerable extent of territory" must clearly fall within the scope of section 498.[88] The policy of the statute was to protect the "specific public interest in free competition."[89] Here, the parties had attempted to totally stifle competition in the junk market in Western Canada. Accordingly, the requirements of the statute had been satisfied.[90]

Although Justices Idington and Duff present two distinct interpretations of the statute, their reasoning shares certain basic assumptions. Both justices refuse to employ any form of balancing test to distinguish lawful from unlawful restraints on competition. They do not suppose it possible to determine whether any particular reduction in competition is either beneficial or detrimental to the public interest. Instead, they each formulate a "bright line" standard that allows them to apply the statute in a categorical fashion. For Idington J., the bright line is constituted by the specific intention to eliminate competitors; for Duff J., by the attempt to stifle competition totally. Yet neither analysis is wholly convincing. The difficulty with Idington J.'s intention argument is simply that all market competition involves an intention to eliminate competitors. Thus, it hardly seems plausible to rely on the presence of such an intention to identify unlawful forms of competition. Duff J.'s criterion of "stifling competition" is more substantial. Duff J. is unwilling to specify what level of competition is desirable in the Canadian economy. However, he is prepared to hold that the attainment of a virtual monopoly must amount to an "undue" restraint on competition. If this statutory language means anything, it must include a situation where competitive forces have been virtually eliminated. For Duff J., this conclusion follows from the premise that the statute was designed to protect a public interest in "free competition." Duff J. is unwilling to entertain the possibility that, in certain circumstances, the elimination of competition might further the public interest. In his view, competition is not a means to some other end, it is the end itself.

For some commentators, an approach based on the elimination of competition is overly rigid; in their view, the court should be prepared to balance interests and allow competition to be eliminated where this would further some other social value.[91] It may be that the application of a categorical rule such as Duff J.'s involves the sacrifice of a certain degree of economic performance in favour of free competition. Yet

Duff J.'s rule is a narrow one; he is prepared to find a violation of the statute only when a price-fixing agreement virtually eliminates competition in a market. The social and economic gains from permitting this type of restrictive agreement would appear to be rather limited.[92] Moreover, the cost of employing a selective balancing rule would be more complex adjudication and the necessity for the courts to weigh technical economic arguments. The chief advantage of Duff's approach is that it requires only the most rudimentary form of economic understanding on the part of the judiciary. At the same time, the test is formulated in a narrow fashion so that it is unlikely that the statute will be applied to restrictive agreements that actually promote economic performance. In short, although there is an element of arbitrariness in Duff's analysis, it is likely to produce fewer economic mistakes on the part of the judiciary than some alternative balancing framework.

At the same time, there is a significant source of instability in Duff's framework that derives from the minimalist nature of his analysis. Since Duff J. is unwilling to balance competition against other values, he is prepared to hold that only the virtual elimination of competition is unlawful. The logic of this position is that competitors are free to fix prices as long as there is some residual competition in the market. The assumption is that there is some difference in kind between situations of monopoly and other imperfectly competitive markets such as oligopolies. The assumption is spurious. There is no need for a firm to possess a monopoly in order for it to be capable of exercising market power. The relevant issue is the nature and extent of that market power rather than whether there is a monopoly. Indeed, an exclusive emphasis on monopoly attacks the image of market power while leaving its substance untouched. Private monopoly is a relatively rare phenomenon in the contemporary Canadian economy, while oligopoly is pervasive.[93] Duff's approach is to attack the margins of market power while leaving its core intact. At the same time, he purports to be defending the public's interest in "free competition." This rhetoric creates the illusion that the problem of market power is being adequately addressed. He has put in place the "fig leaf by which power is kept out of sight."[94]

It might be thought that Duff's basic arguments could be reworked and the anomalies in his analysis eliminated. This is not as simple as it might at first appear. If Duff were to abandon the criterion of "eliminating" competition as the touchstone of his analysis, two fallback positions appear possible. The first is to hold that all price-fixing agreements are illegal per se, without any necessity for demonstrating the attempt to create a monopoly.[95] The attraction of this rule is that it is also a categorical analysis that relieves the court of the duty to weigh the economic consequences of the agreement. But this rule would vastly expand the scope and impact of the anticombines law. The other alternative would be to search for some middle ground in which price fixing

agreements would be held unlawful on a selective basis. This type of analysis would require some form of balancing test designed to assess the desirability of a given agreement in terms of the public interest. The problem is that Duff's analysis does not contain any criteria to guide such a balancing process. Indeed, the point of his whole enterprise was to obviate the need for courts to make such discretionary, policy-laden judgments. To attempt to transform Duff J.'s framework into a balancing test would be to sacrifice whatever coherence it originally possessed.

The Court in *Weidman v. Shragge* dealt with competition policy in a tentative and preliminary manner. Despite this, the arguments and assumptions put forward in the various opinions were to form the groundwork for the jurisprudence of the next 70 years. In many ways, this jurisprudence has been little more than an extended footnote to the seminal ideas formulated in that case. But the subsequent refinement of these ruling ideas has never succeeded in resolving the confusion and anomaly present at their birth.

### *The Ideas Refined*

In the five decades following *Weidman v. Shragge*, the Supreme Court delivered only three major combines judgments. In these cases, Idington J.'s "intention theory" received a mixed reception. To the extent that the Court explicitly considered the problem at all, it tended to reject the suggestion that some specific intention was an essential component of the offence of unduly restraining trade. But the court never dealt unequivocally with the mens rea requirement of the offence.

The leading case on the issue was *Container Materials Ltd. v. The King*,[96] decided by the Supreme Court in 1942. The defendants were manufacturers of paper boxes who supplied most of the market across Canada. They fixed prices, established sales quotas, and imposed various other restrictions on competition. The purpose and effect of the agreement was to secure a monopoly in the Canadian market.[97] The defendants argued that it was insufficient for the Crown simply to prove the existence of an agreement to limit competition unduly. They maintained that it must also be shown that the accused entered into the agreement with the intention "to do what they conceive will have the effect and which they intend to have the effect of unduly preventing or lessening competition, within the meaning of the statute."[98] This is a variation of Idington J.'s argument in *Weidman v. Shragge*. Whereas Idington J. appeared to hold that the intention to eliminate some competitors was sufficient, the argument here is that an intention to destroy all competitors is necessary.

Kerwin J. initially rejects the argument. He reasons that it is sufficient for the Crown to prove an agreement, the effect of which would be to lessen competition unduly: "That requirement was met in these prosecutions when it was shown that the appellants intended to enter, and did

enter, into the very arrangement found to exist."[99] This suggests that the only relevance of intention is on the issue of whether the parties actually agreed. Having proved an agreement, the only remaining issue would be the effect of the agreement. Later in his judgment, however, Kerwin J. qualifies this position. He suggests that the court must determine whether the direct and governing object of the agreement was to lessen competition unduly.[100] For unless the parties had actually intended to stifle competition, this could not be said to be the "object" of their agreement. This ambiguity was not resolved in any of the subsequent Supreme Court jurisprudence of the period, although the Court never emphasized the intention requirement in any of its opinions.[101]

Duff J.'s distinction between the reduction and the elimination of competition played a more central role for 50 years after *Weidman v. Shragge*. The dominant view, particularly in the Supreme Court, was that only a virtual elimination of competition constituted an "undue" limitation on competition. But there was a competing, deviationist line of cases that recognized the inadequacy of this rule and rejected it. The difficulty was that none of these anomalous cases was able to formulate a meaningful alternative definition of unlawful competition.

In each of the three leading Supreme Court decisions of the period,[102] the defendants had attempted to secure a monopoly in their respective markets, with the court emphasizing this finding in supporting the convictions.[103] Mr. Justice Cartwright in the *Fine Papers* case summarized the meaning of "unduly" lessening competition in the following terms:

> In essence, the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches the point at which the participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition, which influence Parliament is taken to regard as an indispensable protection of the public interest; that it is the arrogation to the members of the combination of the power to carry on their activities without competition which is unlawful.[104]

The necessity to demonstrate a complete stifling of competition did not apply simply in the context of the conspiracy section of the *Criminal Code*. Lower courts utilized the same criteria in interpreting other open-ended provisions of the statutory material. For instance, in *R. v. Canadian Breweries*,[105] McRuer C.J.H.C. applied Cartwright J.'s reasoning to the merger section of the *Combines Investigation Act*. He found that a merger operated "to the detriment or against the interest of the public"[106] only where it resulted in the attainment of monopolistic control: "As long as the evidence shows that there is strong virile competition in the market notwithstanding the merger, I do not think the merging of

competing companies comes within the standard of proof required in a criminal case."[107]

No Supreme Court decision of the period deviated from this view as to the meaning of unlawful competition. But a number of lower-court decisions rejected the claim that only the elimination of competition rendered a price fixing agreement illegal. Perhaps the leading case to espouse an alternative view was *R. v. Abitibi Power and Paper Co.*[108] The trial judge, Mr. Justice Batshaw, argued that Cartwright J.'s approach in the *Fine Papers* case ignored the "ordinary meaning" of the statutory language in question. Cartwright J. essentially equated the "prevention" or the "lessening" of competition with its extinguishment. According to Batshaw J., there was a clear difference between the words "prevent" or "lessen" and the word "extinguish." Accordingly, he rejected the view that a price-fixing conspiracy was illegal only when it created a virtual monopoly. Neither was Batshaw J. in favour of a rule which would render all price fixing agreements illegal per se. This left him with but one option, the formulation of a balancing test that would distinguish illegal conspiracies on a selective basis. Batshaw J. sought to discover such a balancing test in the judgment of Olser J.A. in the early case of *R. v. Elliott*.[109] Mr. Justice Osler, in a passage that even today continues to be frequently cited, defined "unduly" as "in an undue manner or degree, wrongly, improperly, excessively, inordinately . . . "[110] Elaborating on this initial definition, he suggested that a lessening of competition was undue if "by the combination of a few the right of the many is practically interfered with by restricting it to members of the combination."[111] Adopting this approach, Batshaw J. held that on the facts before him, the accused had conspired to unduly lessen competition.

It would be difficult to conceive of a more vacuous definition of unlawful competition. The use of adverbs such as wrongly or improperly is simply meaningless without some notion of the nature of the "wrong" being committed. Nor is the matter advanced by the suggestion that the "combination of the few" must not practically interfere with the "right of the many." As with the use of rights theory generally, such an argument is completely indeterminate without some independent normative theory specifying the character of the right in question. Of course, Osler J.A.'s formulation does not contain any such normative analysis. There remains Batshaw J.'s observation that the issue of undueness involves a finding of fact based on the circumstances of the particular case. But this formulation provides no answer to the problem. Whether the finding be characterized as one of "fact" or "law," there is still the necessity for some background theory or criteria to structure the analysis. In the absence of such a controlling theory, to characterize the issue as one of "fact" is simply to exercise judicial discretion. This is exemplified by the conclusory character of Batshaw J.'s own judgment, which reviews the facts of the case and then simply posits the view that

competition has been lessened unduly. There is no attempt to consider and balance the competing political and economic values at stake in the case. The result seems to be the product of some inarticulate and intangible impression that the jurist has developed of the legislation, but cannot make explicit or concise. This approach is typical of the other cases during this period that adopted Batshaw J.'s analysis.[112]

In summary, the leading combines cases into the 1960s continued to be structured around the basic arguments put forth in *Weidman v. Shragge*. As the full implications and inadequacies of the original ideas became apparent, there were some initial attempts at revision. The problem was that no new background theory emerged that might supplant the flawed premises of Justices Idington and Duff. Encumbered by the unwieldy baggage of its past, combines jurisprudence oscillated between arbitrariness and indeterminacy.

## *The Contemporary Jurisprudence*

In the past decade, the Supreme Court of Canada has handed down a number of major combines decisions.[113] These decisions have been subjected to near-unanimous condemnation and ridicule in the academic literature. The most common criticism has been that enforcement of the conspiracy and merger or monopoly provisions of the statute has been rendered impracticable.[114] The response of the federal government has been to draft legislation that would specifically reverse the holdings in a number of cases.[115] The apparent remedy to the problem is to return to the law as it stood prior to this unfortunate series of cases. But these decisions were not aberrational or even exemplary. For the most part, they represented little more than an elaboration of the basic themes developed in the early jurisprudence. The cases at issue concerned questions of intention to eliminate competition unduly, the actual elimination of competition, and the existence of monopoly as a detriment to the public.

### *Intention to Eliminate Competition*

A major focus of concern in these cases was the nature of the intention required in price-fixing conspiracies. In *Aetna Insurance*, charges of price fixing were brought against the members of an association of insurance companies.[116] The companies wrote 65 percent to 80 percent of the fire insurance premiums in the province of Nova Scotia, with the association setting the premiums. The accused were acquitted at trial.[117] While the long judgment is somewhat discursive, the trial judge appeared to focus on the intention of the accused. Mr. Justice Hart concluded that the accused never intended their activities to interfere with the public's right to free competition. Their purpose was to secure a stable climate in which to do business. Moreover, they knew that there

were other competitors outside of the association ready to compete for the premium dollars available. Since there was always a "capacity for free competition,"[118] there had been no undue lessening of competition.

The Court of Appeal allowed an appeal from the trial judgment,[119] but on further appeal to the Supreme Court of Canada, the acquittal was restored. One of the alleged errors of the trial judge was that he had improperly admitted evidence tending to show public benefit from the activities of the association.[120] Mr. Justice Ritchie, speaking for the majority of the Supreme Court of Canada, upheld the admissibility of the evidence. The reason for admitting the evidence was not to prove that the agreement was of benefit to the public, but to ascertain its purpose. The relevant issue was whether "the object of the agreement was to lessen competition unduly."[121] Ritchie J. was satisfied that the trial judge's acquittal had been based on a finding that the accused did not form the purpose of lessening competition unduly.[122] Since such a purpose was an essential element of the offence, the trial verdict ought to be restored.

Mr. Justice Pigeon sought to clarify this issue of the undue lessening of competition in his majority judgment in the *Atlantic Sugar* case. Pigeon J. stated that the meaning of the term unduly had been "exhaustively examined" by Mr. Justice Ritchie in the *Aetna* case. He quoted with approval a passage from *Aetna* in which the "intention to lessen competition unduly" was emphasized.[123] But Pigeon J. went on to observe that there was no necessity for the accused to be conscious of the illegality of the agreement. The parties to the agreement could not be acquitted simply because they mistakenly thought the lessening of competition would not be undue within the terms of the statute: "It is always for the Court to decide on the facts whether an agreement to lessen competition means that competition is to be lessened unduly and the views of the accused on that are irrelevant."[124]

Some commentators have claimed that Pigeon J. was contradicting himself in this final passage.[125] But there is no real inconsistency in the analysis. Pigeon J. maintains that the parties to an agreement must intend to lessen competition unduly. Upon forming such an intention, however, it is irrelevant that they might not have been aware of its illegality. This elementary point follows from the fact that it is the court and not the accused who are responsible for interpreting the statute. When Pigeon J. concludes that the views of the accused on the meaning of "unduly" are irrelevant, he is referring only to their views on the proper construction of the statute. This does not diminish the requirement that the parties must have intended to lessen competition "unduly," within the judicially construed meaning of the term.

The more serious problem with the "intention" requirement is simply its irrelevance. This can be illustrated concretely through the facts of the *Aetna* case. The trial judge, Mr. Justice Hart, found that the purpose of

the agreement had been to stabilize the rates for fire insurance premiums and to promote a positive business climate in the industry. There had been no desire to stifle competition, since the parties knew that some outside competition would remain.[126] Therefore the accused had not formed the intention to lessen competition unduly. Hart J.'s analysis seems to require that the explicit and primary goal of the parties must be the suppression of all competition.[127] Where the purpose can be framed in alternative terms, as in this case, no offence has been committed. But this focus on the goal of the parties seems misplaced. If the inevitable effect of the agreement would be to suppress competition, it should not matter whether the parties framed their purpose in these precise terms or utilized some other form of words. There seems no non-arbitrary reason to distinguish between such cases. Moreover, Hart J. requires proof that the parties intended to suppress all competition to support a finding of guilt. Since all market competition involves the intention to eliminate rivals, this test does not offer any meaningful criteria for distinguishing illegal conduct. Some additional argument or distinction is necessary in order to formulate a determinate standard. It is this additional distinction, whatever it might be, rather than a "wrongful" intention to eliminate rivals, that must inform and structure the analysis.

The question is how to account for the persistence of some form of "undue intention" requirement in the combines jurisprudence of the Supreme Court. From *Weidman v. Shragge* in 1912 to *Atlantic Sugar* in 1980, there have been recurring suggestions that some form of specific intention is an essential element of the offence. An obvious explanation is the fact that the legislation has historically been characterized as criminal law. The theory is that the necessity of proving mens rea has produced preoccupation and confusion over the intention of the accused. At best, the explanation is partial only. It fails to capture the larger issues relating to the proper role of the judiciary in the development of competition policy.

The response of the judiciary to the central issue in competition policy — how to distinguish those forms of advantage taking that are prohibited from those that are allowed — has been to analyze the problem in categorical fashion. They have attempted to formulate some standard that permits a sharp distinction to be drawn between the categories of conduct, and to avoid the use of balancing tests, which would require an assessment of the consequences of certain behaviour. Not only do judges lack the expertise to make such consequentialist assessments, these types of arguments would require choices that were overtly policy-laden and thus seemingly inappropriate for the judiciary.[128] The focus on the intention of the parties has been one of the major devices employed to avoid these difficulties. It has allowed the judiciary to define some intermediate position that did not depend on the economic or political consequences of the conduct in question. If the parties

possessed the requisite intent, their actions were unlawful, regardless of the larger social benefits they might have created.

This methodology has not been limited to the competition area. To anticipate the analysis of the next section, it is possible to trace the same forms of reasoning at work in other areas of doctrine outside the realm of criminal law.[129] This parallelism makes it doubtful that the criminal law character of the legislation can fully account for the judicial emphasis that has been placed on the intention of the parties. It also suggests that the courts will be reluctant to abandon this theory in the future, despite its economic irrelevance and regardless of whether the criminal law character of the legislation is altered.[130]

*Elimination of Competition*

In addition to focussing on the intention of the parties, both *Aetna* and *Atlantic Sugar* reaffirmed the proposition that price-fixing agreements must stifle all competition to be illegal. The most exemplary treatment of this issue is found in the trial judgment in the *Aetna* case. After a long review of the authorities, Mr. Justice Hart concludes that it is unnecessary for the Crown to prove the existence of a monopoly in order to obtain a conviction. Relying on cases such as *Elliott* and *Abitibi Power*, Hart J. concludes that it is sufficient if the agreement is intended to lessen competition "improperly, inordinately, excessively, oppressively. . . ."[131] Of course, the use of such terms is largely meaningless.[132] Thus to actually decide the case, Hart J. is forced to fall back on the "virtual monopoly" test. He acquits the accused since they made no attempt to monopolize the fire insurance market, and there was always a capacity for meaningful outside competition. This analysis was confirmed by Mr. Justice Ritchie when the case reached the Supreme Court of Canada. Ritchie J. rejected the argument that the lessening of competition was undue whenever it involved merely a "meaningful segment of the insurance industry."[133] As long as the parties had not "stifled" competition, the lessening of competition had not been undue.[134]

Mr. Justice Pigeon reiterated the same basic point in the *Atlantic Sugar* case. The evidence in this case indicated that the sugar producers in Eastern Canada had tacitly divided the market so as to maintain their "traditional" market shares. Pigeon J. was of the opinion that a tacit agreement, in which the parties made a conscious effort to parallel the actions of a "price leader," did not amount to a conspiracy under the act. But he also emphasized that the tacit agreement to maintain market shares did not eliminate all competition in the market. There was still some limited price competition between the parties to stabilize market fluctuations. Competition had not been suppressed.

The requirement that competition be suppressed as opposed to merely lessened has one virtue: it is a standard with a measure of determinacy. It allows courts to identify unlawful conspiracies without having to assess

the consequences of a given agreement. But the *Atlantic Sugar* case highlights the arbitrary and constricted nature of the distinction. Three firms were able to control over 90 percent of a given market for several decades, but because there was "some" price variation the arrangement was not unlawful. As has been suggested elsewhere, even OPEC has evidenced "some" price variation.[135] The important point is the nature and significance of the price variations at issue. The Court made no attempt at evaluation, simply holding that the existence of any form of price variation constituted a sufficient defence to the charge. The result in this case illustrates the arbitrariness of any distinction between monopoly and other imperfectly competitive markets.

The case also points to the anomalies inherent in the whole "conduct" philosophy that underlies the *Combines Investigation Act*. The statute does not attack the structure of markets, but only the behaviour of firms in the market. Thus there cannot be a conviction for price fixing without some explicit agreement between the accused. The facts of this case indicate that it is possible for firms to reach the same result without any formal consultation. The sugar producers were able to coordinate prices simply through study of each other's behaviour. No collusion was required. Of course, such "conscious parallelism" among firms can be effective only in highly concentrated markets. This is precisely the point. By focussing on overt collusion, the *Combines Investigation Act* ignores the fact that such collusion is unnecessary to those who possess the most entrenched market power. As Galbraith has argued, the law exempts those who possess market power, and concentrates on those who would try to possess it: "We discriminate against those who, as a result of numbers and weakness, must use crude or overt methods to control their markets and in favour of those who, because of achieved size and power, are under no such compulsion."[136]

The result in *Atlantic Sugar* was greeted by disbelief and ridicule in both popular and elite circles. But this did not produce any fundamental change of discretion in combines policy. Legislative reform has been piecemeal and ad hoc. There is no longer any necessity to prove the virtual elimination of competition,[137] and there are proposals to clarify the "intent" required in order to support a conviction.[138] Such a makeshift remedy may worsen the patient's condition rather than cure it. The difficulty is that the Court has never developed any alternative criteria to guide its analysis in this area. It has been steadfastly unwilling to undertake any meaningful balancing of the benefits or detriments arising from price-fixing agreements. The Court has simply resorted to such meaningless terms as "wrongly" and "oppressively" to describe those agreements that lessen competition unduly. By simply eliminating the criteria the Courts have utilized without providing any substitutes, Parliament appears to have rendered this area of doctrine virtually normless. There is no larger theory of the role of competition or the

nature of the public interest at stake. There is no higher principle that separates the lawful forms of competition from the unlawful ones. Outcomes are the product of guesswork and unprincipled analogizing.

*Monopoly and Detriment to the Public*

In *R. v. K.C. Irving Ltd.*, the Supreme Court of Canada handed down its first decision under the merger and monopoly sections of the *Combines Investigation Act*. The case arose out of the acquisition by the K.C. Irving family of all five of the English-language newspapers in New Brunswick from 1948 to 1971. Charges were laid under the "merger, trust or monopoly" provision of the act as it stood prior to August 10, 1960[139] and under the separate "merger" and "monopoly" provisions in the post-1960 statute.[140] The trial judge convicted the accused on all counts,[141] but the New Brunswick Court of Appeal allowed the appeal and directed an acquittal.[142] The Supreme Court of Canada unanimously dismissed the Crown's further appeal.

Chief Justice Laskin's decision turned on the meaning of the words "to the detriment of the public" in the statutory provisions before the Court. The trial judge had found that once a complete monopoly had been established, detriment to the public could be presumed. Laskin C.J.C. disagreed. According to the Chief Justice, the trial judge was erroneously applying jurisprudence from the conspiracy section to the interpretation of the merger and monopoly provisions. Proof of an illegal conspiracy did not require any demonstration of public detriment; once the lessening of competition became "undue" the offence was established. But this reasoning could not be transposed to the context of a merger or monopoly, where the element of detriment to the public is specifically mentioned in the statute. In these cases, there must be proof of some specific detriment to the public, regardless of the degree to which competition had been lessened. In Laskin C.J.C.'s view, the only evidence on this point has been "theoretical," from witnesses who had not made any study of the situation in New Brunswick.[143] Accordingly, the convictions were unsubstantiated.

It is true that the language of the conspiracy section differs from that of the monopoly and merger provisions. But it is spurious to conclude that sections must necessarily receive different interpretations. The phrase "to the detriment . . . of the public" in section 2 of the act simply indicates that mergers of monopolies are not illegal per se. Some other principle of public policy must be devised to distinguish unlawful mergers or monopolies from lawful ones. But the wording of the section does not determine what that principle of public policy should be. It simply invites the Court to devise its own theory as to what constitutes the "public interest" in competition. The independent normative theory, rather than anything in the wording of the statute itself, will give meaning to the section. This background theory of the public interest need not

necessarily mirror the meaning of the term "unduly" in the conspiracy section. But there is good reason to expect certain broad similarities in the interpretation of the various provisions. This is because the function of the term "unduly" in section 32 parallels that of the phrase "detriment of the public" in section 2. The use of the term "unduly" invites the court to develop some principle that will separate lawful from unlawful restraints on competition. This can be done only by deploying some overarching theory of the public interest in free competition. It would be curious if the notion of the public interest in the context of section 32 were diametrically opposed to that applied in section 2.

This parallelism between the two sections is clearly illustrated by the judgment of Chief Justice McRuer in *R. v. Canadian Breweries*.[144] Canadian Breweries had acquired 23 plants between 1930 and 1953, increasing its market share from 11.2 percent in 1931 to 60.0 percent in 1958. Charges of unlawful merger were laid under the statute as it stood prior to the 1960 amendments; McRuer C.J.H.C. had to determine whether the "merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public. . . ." No previous merger case had interpreted the phrase "the interest of the public."[145] But McRuer C.J.H.C. noted that the cases decided under the conspiracy section did contain a theory of the "specific public interest in free competition."[146] According to these cases, the public interest was violated when competition in a market was totally suppressed. McRuer C.J.H.C. concluded that the same theory of the public interest should operate in the merger area. If a merger resulted in the elimination of all competition in a market, the merger was operating against the interest of the public and was unlawful. McRuer C.J.H.C. proceeded to acquit the accused, relying in part on the fact that "the acquisition of plants did not have the effect of giving the accused a monopoly or substantial monopoly in the market."[147]

Mr. Justice McRuer's reasoning and conclusion were by no means inevitable. McRuer C.J.H.C. could have decided that the public interest in a merger case differed from the public interest in a conspiracy case. But this would have been the beginning of the analysis rather than its conclusion. McRuer C.J.H.C. would have had to develop some alternative theory of the public interest in competition applicable to mergers. Although Chief Justice Laskin does not frame the issue explicitly in such terms, his analysis does reveal the outlines of an alternative understanding of the public interest. The Chief Justice seems willing to accept the Crown's argument that there was an important public interest in maintaining diversity in newspaper ownership. This interest was not purely economic; it included some broader political value in promoting the free flow of ideas and opinion.[148] The assumption is that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a

free society."[149] Laskin C.J.C. seems to envisage some form of balancing analysis, in which the various societal benefits and detriments flowing from a merger would be assessed. However, any showing of detriment must be of "detriment in fact." It is insufficient to rely on "theoretical" arguments, not based on a study of the actual situation in New Brunswick at the time of the merger.

Many commentators have criticized Laskin C.J.C.'s requirement of proving detriment in fact as imposing an insurmountable burden of proof on the Crown in a merger case.[150] There is a more principled objection to the analysis. The Chief Justice's approach reveals an inadequate understanding of the interests supposedly protected by the values of free speech and freedom of the press. These values are designed to ensure that political viewpoints are voiced by "a multitude of tongues, [rather] than through any kind of authoritative selection."[151] The state should not determine who is to speak or the content of the message. Instead, political debate should be structured by the choices of the participants themselves.

The "marketplace of ideas" is indirectly threatened by the framework advanced by Laskin C.J.C. By insisting that there be proof of detriment in fact, his analysis would require the lower court to analyze the content and editorial policies of individual newspapers. The court could not limit its inquiry to cases where certain viewpoints had been deliberately and blatently suppressed. According to the Special Senate Committee on the Mass Media (Davey Committee), such cases of overt manipulation are relatively rare.[152] Of far more importance in Canada are instances where debate on issues of public policy is limited in a more covert, almost unconscious fashion. Perhaps the newspaper has framed the issues in such a way as to subtly exclude certain perspectives. Perhaps it has given prominence to certain views at the expense of others. Such so-called errors of omission are difficult to detect, but they constitute the chief threat to the public interest from concentrated media ownership.[153] Thus all of these questions would be relevant in applying the detriment-in-fact test. Newspaper editors could be called into court to account for their exercise of editorial discretion. Judges would examine newspaper reports to ensure that they conformed to some unannounced standard of "fairness." Such is the inevitable consequence of a rule aimed at the actual performance of the newspaper industry rather than its structure. Ostensibly designed to protect newspaper independence, the Laskin approach subverts it. It removes editorial decisions from the newsroom to the courtroom. It subjects the decisions about what and how to publish to the scrutiny of state officials. It is far more interventionist than a rule that presumes detriment in law upon the creation of a newspaper monopoly.

It may be that the Court was not aware of the full implications of the detriment-in-fact requirement adopted in Irving. But this is because the

Court failed to engage in any systematic consideration of the interests at stake in the litigation. The reader is left without any meaningful sense of the function newspapers are to play in our society or the reasons for promoting diversity in their ownership. In place of such an analysis, the Court offers conclusory statements that undermine the very values it purports to endorse.

The *Irving* case is but further testimony to the absence of any background theory or controlling principle underlying Canadian combines policy. In general, the state has not attempted to regulate the structure of the industry, regarding as objectionable only the abuse of monopoly and not monopoly as such. But in *Irving*, the Crown sought to argue that the mere presence of monopoly was illegal, without any evidence of improper conduct. There were good reasons for accepting the Crown's argument. But to do so would have called into question the basic thrust and philosophy that competition policy had always pursued. It would have meant rejecting the existing paradigm in favour of a new one. Introduce such a subversive counterprinciple in this particular case, and there was no guarantee that it would not run wild. Rather than take that chance, the Court underlined and reinforced its antistructuralist sentiments. Any paradigm shift would have to await a future occasion.

## *The Jurisprudence in Perspective*

It might be thought impossible or unwise to attempt to advance generalizations about a subject as complex and technical as competition policy. But its complexity is deceptive. Competition policy raises a rather limited number of fundamental issues about the organization of a market. These basic problems tend to reemerge in various forms, no matter what particular aspect of combines policy is under discussion. Once those core issues are addressed and answered, the rest is mere detail.

Canadian competition policy began with the assumption that the existence of market or monopoly power is not necessarily illegitimate. What is objectionable is the abuse of such power. This has meant that the central ambition of the jurisprudence has been to formulate some coherent principle that would define "abusive" market conduct. This has been the underlying issue in all of the Supreme Court's combines decisions, although the manner in which it framed the issue may have varied from case to case. The Court has advanced a number of suggestions as to what forms of advantage taking should be prohibited in a market. But none of these suggestions has provided a principled basis for decision. On the one hand, there are the cases that have attempted to identify conduct that was inherently wrongful. The claim was that there were certain forms of competitive action that could be absolutely prohibited, regardless of its economic consequences. Conversely, any conduct not

coming within the prohibited class was lawful, no matter how undesirable its economic effects. The difficulty with this analysis was that the Court was never able to move beyond the extremely crude ideas advanced in its first major combines decision, *Weidman v. Shragge*. The simplistic criteria employed were utterly incapable of identifying improper market conduct in a modern industrial economy. The dominant line of combines cases remained frozen in the past, oblivious to advances in general understanding of the behaviour of markets.

There were occasional deviations from this orthodoxy where courts rejected the dominant categorical approach in favour of a case-by-case balancing analysis. The problem was that these cases failed to announce the criteria that were to be utilized in the balancing process. There was never any background conception of the role of competition policy or a utilitarian calculus of the benefits flowing to the community as a whole. These cases were simply "a warrant to do good as the judge sees the good, with no more guidance than that public injury is to be weighed against private benefit on scales that are not described, or rather are described merely as the judge's 'preference.'"[154]

It might be thought that some form of materialist analysis could best account for this jurisprudence. A materialist argument would suggest that the Court in these cases had merely been serving the business interests of the economically powerful. At first blush, the results in the recent combines cases seem to support this thesis. The Crown lost all the major combines cases that reached the Supreme Court in the late 1970s, and these doctrinal defeats made it more difficult to secure convictions under the act in the future. But there are at least two major difficulties with any crude materialist explanation of these results. First, such an explanation vastly overstates the determinacy and coherence of the jurisprudence. It supposes that there has been some consistent, conscious design informing judicial choice. In fact, there is no such coherence to the legal materials. The cases have been unable to settle upon any foundational principle regarding the role of competition. The jurisprudence does not contain any single vision of the economy, much less of the role of corporate power. Second, the explanation falsely supposes that there is some homogeneous, uniform "business" interest that can structure the Court's analysis of these problems. This assumption is simply incorrect. In most cases, there are a variety of "business" interests at stake, with the Court being forced to choose between them.

Far from being homogeneous or monolithic, the interests of business in these cases are catholic and conflicting. To cite an obvious instance, in *Aetna* the Court was presented with a choice between the interests of those companies that were part of the association and the interests of those companies that were outside it. Nothing in the ideas of "capitalism" or the "business interest" could dictate which side to prefer. This is just another way of saying that in a given case, there is a whole

range of possible arguments that would serve corporate interests. To explain why doctrine developed in one direction rather than another it is necessary to introduce some additional factors into the analysis.

A more conventional explanation might be framed in terms of the criminal law character of the legislation. On this view, the doctrine has given disproportionate emphasis to such matters as mens rea and the burden of proof in criminal matters. The apparent remedy would be to decriminalize a number of provisions of the act in the hope of securing a more balanced interpretation.[155] The difficulty with this explanation is that it is too narrow. It ignores the important parallels between combines jurisprudence and other areas of doctrine. These parallels have already been outlined: the attempt to construct bright-line boundaries defining illegitimate conduct, the reluctance to engage in a utilitarian balancing of interests, and the notion of power absolute within a sphere. As discussed in the next section, these same features characterize the interpretation of the trade and commerce power in the *Constitution Act, 1867*. The great engine of doctrine is the need for the judiciary to avoid the charge that they have usurped the legislative function. A categorical mode of analysis appears to provide standards "meet for judicial judgment"[156] and to reduce the scope for judicial discretion.

The bankruptcy of the Supreme Court's approach to competition policy has been widely recognized in the past decade. There has been a number of attempts to overhaul the statute completely as well as an outpouring of scholarly literature on the subject.[157] This material has sought to reformulate the essential goals of competition policy. Beginning with the Economic Council's *Interim Report on Competition Policy* in 1969, there has been widespread recognition that the pursuit of "competition" as such is unworkable. Instead, competition is to be valued "not for itself, but for what it can accomplish in putting resources to work efficiently and effectively."[158] The term "efficiency" embraces two notions: that resources should be in the hands of those who value them the highest[159] and that society should be producing the greatest quantity of desired outputs at the minimum cost in scarce resources.[160] In many instances, there will be no conflict between these two goals. Where a trade-off becomes necessary, most commentators place a higher value on productive or technical efficiency. The general goal of competition policy is thought to be "to increase income per capita by increasing productivity. The role of a competition policy is to force change and efficiency upon industries."[161]

The apparent attraction of this approach is that it promises to resolve the theoretical indeterminacy of competition policy. On this view, adjudication is to be guided solely by efficiency considerations. Any conduct that decreases consumer welfare would be deemed unlawful. The implication is that the adjudicator must engage in a complex, case-by-case balancing of the efficiencies at stake in the litigation. For

instance, in the mid-1970s, Skeoch and McDonald proposed a sophisticated four-stage model for testing the legality of mergers.[162] The first stage was the identification of "significant mergers" through an analysis of the structure of the relevant market and the degree of market power possessed by the merging firms. The second stage was the analysis of the "primary consequences" of the merger in terms of strengthening or creating "artificial restraints" in the market. The third stage was a consideration of the longer-run implications of the merger, while the final stage was an examination of "the possibility of altering the reaction pattern of the industry by changes in the economic environment."[163] In recognition of the complexity and economic sophistication of this analysis, Skeoch and McDonald recommended that all mergers be subject to the jurisdiction of a specialized adjudicating body.[164] The most recent government proposals are no less complex, but recommend that authority over mergers remain with the regular courts.[165]

While this emphasis on consumer welfare resolves the historic indeterminacy of competition policy, its acceptance would create a number of new difficulties. Under this approach, the sole concern of competition policy is to be the efficient allocation of resources in the economy. Other possible considerations, such as the transfer of income from buyers to monopoly sellers or the desire to diffuse economic power, are categorized as irrelevant.[166] The argument is that this concentration on a single economic objective is necessary if the courts are to develop a coherent, principled approach to the problem of competition: as one influential U.S. commentator has put it, "to abandon economic theory is to abandon the possibility of a rational antitrust law."[167] To the extent that the redistribution of income and the diffusion of economic power are desirable goals, they can be achieved through other policy instruments such as the tax system and the structure of transfer payments.

While this paper is not a brief for any particular substantive policy proposals, it is difficult to ignore the extreme narrowness of the analysis involved. The issue of market power is not a purely "economic" one. Broader issues, such as the desire to diffuse economic power, are clearly relevant, in the broad sense of that term. If so, it is difficult to understand why they should be excluded from consideration in advance. Consider the *Irving* case. An important Crown argument in that case was that diversity in newspaper ownership was a desirable policy goal. The justification was not framed simply in terms of maximization of wealth; instead, the Crown emphasized the effect the *Irving* monopoly would have on the expression of competing political views. The proponents of a strictly "economic" approach to competition would apparently regard such arguments as illegitimate. They would maintain that the desire to maintain diversity in political opinion is a problem requiring separate legislative treatment. But this response begs the question. The lack of diversity of political opinion became a "problem," at least in part,

because of the Court's refusal to strike down monopoly ownership in the newspaper industry. It seems difficult to understand how the Court can legitimately regard as irrelevant a problem they themselves co-authored. This is particularly so when there is no guarantee that the legislature will ever give serious attention to the issue.

This argument can be generalized. The defenders of an exclusively economic approach to competition policy prefer to deal with distributional issues through other policy instruments. For instance, if competition policy permits the transfer of income from consumers to producers in the interests of efficiency, this is regarded as a matter for the tax system, rather than competition policy proper. But this argument is only plausible given the acceptance of a crucial assumption, that the distribution of economic power does not have a significant impact on policy outcomes in the political arena. If this is not the case — if economic power does, in fact, significantly influence political power — the exclusively economic approach to competition policy collapses. A linkage between economic and political power would mean that as market power became more concentrated, the possibility of curbing that power through other policy instruments such as the tax system would become more remote. There is good reason to suppose that this linkage does exist. This conclusion does not depend on any implausible determinism, which claims that political outcomes are "required" or dictated by economic power. It follows from the belief that, at a minimum, political outcomes do not evolve completely autonomously from underlying economic forces. To the extent that one is willing to acknowledge a significant connection between politics and economics, one is led to the conclusion that distributional concerns are relevant and important for competition policy.

In effect, competition policy cannot remain agnostic on distributional issues. If the policy makers refuse to deal with these issues directly, they are implicitly condoning the translation of economic power into political power. The proponents of an exclusively economic approach to these issues are attempting to "depoliticize" the debate. The goal is to transform a value-laden choice over the limits of economic power into a problem of technique. But the issue is not simply expertise. Competition policy raises fundamental problems regarding the role of business in the public policy process. Dismissing these issues is ideology, not science.

The attempt to assert the primacy of economic analysis raises a series of more limited problems relating to institutional design. Specifically, if competition cases are to be decided on the basis of an intricate balancing of economic consequences at stake, it is doubtful that the regular courts are the appropriate decision makers. The difficulty would not be so severe if the courts were simply required to possess a rudimentary familiarity with economic theory. But most of the proposals for reform in the past decade envisage a fairly sophisticated economic analysis on the

part of the decision-making body. The courts do not possess the background to make informed judgments on these issues. Moreover, if the evolution of combines jurisprudence tells us anything, it is that the courts are uncomfortable with making assessments regarding the economic consequences of anticompetitive market conduct. Instead, they have structured their analysis on the basis of determinate but economically irrelevant criteria. The purpose of these judicial standards has been to avoid having to engage in some utilitarian calculus regarding general welfare. There is no reason to suppose that this tendency will be reversed in the future. Regardless of the extent to which economic language proliferates in the statute, the courts can be expected to attempt to apply that language in a categorical, makeshift manner.

This does not mean that the only alternative is the creation of an expert administrative tribunal to resolve competition disputes. Since the issues involved are not merely technical, more than expertise is demanded of the adjudicator. The point is simply that the worst possible solution is to demand a sophisticated economic analysis from the regular court system. To the extent that the courts are to be utilized at all in these matters, they must be furnished with fairly determinate criteria that require only the most general understanding of economic theory. Otherwise, the courts will invent criteria of their own, and there is no guarantee that these imaginings will further any positive policy goal.

Devising determinate criteria is by no means impossible. Although such criteria would undoubtedly be somewhat arbitrary, they would reduce the complexity of litigation and the possibility of irrational and erroneous judicial choices. The most obvious example of such a categorical rule would be a per se prohibition of price-fixing agreements. Such a rule is capable of rational judicial application since it does not require any elaborate economic analysis. Moreover, it is not clear that the adoption of such a rule would be overly costly in terms of economic performance.[168] To the extent that such categorical standards are unavailable or politically undesirable, competition policy should be removed from the courts' jurisdiction and placed in the hands of some alternative tribunal. The rationale for such a proposal is not simply the desire to secure a decision-making body with greater expertise. The choices involved are as much political as technical. The attraction of a noncurial tribunal is that it could be given the mandate to make such political choices, a mandate the regular courts have been traditionally reluctant to assume in any explicit fashion. In such a forum, it would no longer be necessary to fit square pegs into round holes.

## Federal Regulation of the Economy: The Trade and Commerce Power

An important focus of contemporary public policy in Canada is the achievement of an appropriate degree of economic integration in the national

market.[169] On the one hand, there are those who claim that the economic union has been overly fragmented. They argue that interprovincial barriers to trade have distorted the free movement of goods and services and decreased national wealth. By consolidating regulatory power in the national government, "distortions" can be eliminated and significant economies of scale realized.[170] On the other hand, a matching set of counterarguments suggests that decentralization is necessary. On this view, the very notion of a distortion in the free market is value-laden; depending on one's perception as to what preferences should count in a federal state, it is possible to characterize a given market influence as either a "distortion" or a "correction."[171] Decentralized economic control is seen as the best means of satisfying the diverse needs and preferences of individuals across the country.

The relevant issue is not whether the Supreme Court in responding to this policy problem has arrived at a solution that is somehow "correct"; there is no neutral or uncontroversial solution to the value choices involved. The point is whether the Court has displayed a sensitivity to the relevant values at stake and an awareness of the implications that flow from its choices. What visions of the economy, of federalism and of the state underlie its division-of-power decisions? Do these judicial constructs correspond with understandings in the larger political community?

This section of the paper attempts to grapple with these issues through an examination of the recent Supreme Court jurisprudence on the trade and commerce power.[172] Authority over "trade and commerce" is one of the most important sources of national economic regulation. The Court's performance here should provide meaningful evidence of its attitudes more generally. The discussion of the cases will focus on two questions. The first, in doctrinal terms, is whether the court has developed a coherent set of background principles to structure its choices. These principles would specify the various local and national interests at stake in a given case and the methodology for choosing between them. The second question involves the broader policy implications flowing from the Court's political choices and the success of the Court in striking some appropriate compromise between economic integration and decentralization.

The analysis will suggest that there is considerable ambiguity and inconsistency in the Court's doctrine. Far from embodying a single set of principles, the jurisprudence is characterized by competing lines of cases premised on radically different conceptions of the Canadian political community. The cases oscillate radically between these contradictory principles without any explicit awareness of the tension between them. In a given case, either set of principles is logically available; there are always plausible justifications for a variety of legal outcomes. Moreover, there is rarely any meaningful analysis of the economic and political values raised by these cases. Where the Court strikes down federal

legislation, it typically justifies its decision on the basis of untutored generalizations derived from the Privy Council era. This crude methodology does not allow for any calculation of the policy implications of the choices that are made.

While there has been a lack of sophistication in the Court's analysis, the actual impact of the decisions on federal-provincial relations or on the economy generally is difficult to assess. Beginning with the abolition of appeals to the Privy Council in 1949, there was a pronounced tendency for the Court to uphold federal laws. The judicial reasoning and analysis may have been sparse, but the actual result typically left Parliament's policy choices intact. This deference no longer dominates the Court's treatment of the trade and commerce power. In recent years, the federal government has suffered a number of important doctrinal defeats; these results have called into question many forms of regulation that were previously thought to be constitutionally proper. The problem is that there has been little analysis of the wisdom or implications of this increased judicial activism.

## *Federalism and the Judiciary: Principle and Counterprinciple*

The basic issue in federalism disputes is said to be whether "it is better for the people that this thing be done on a national level or on a provincial level."[173] It might be thought possible to advance a relatively straightforward answer to this apparently simple question. The issue appears to depend on a functional, utilitarian analysis of general welfare. Legislative jurisdiction should be allocated to the level of government that can most efficiently carry out a given responsibility. In this way, citizen preferences for public services can be maximized.

Such a functional analysis is not as efficacious as it might at first appear. The utilitarian balancing of interests cannot determine, in itself, whether a given function should be performed by a provincial or a national government. This analysis merely structures arguments rather than producing concrete results. In part, this is because there are competing, equally plausible functional arguments in favour of both centralization and decentralization.[174] More fundamentally, no functional argument can define the scope of the relevant community across which values are to be maximized.[175] This is particularly important in Canadian federalism, since there is no single, uncontroversial vision of the nature of the Canadian political community. There are at least two, radically contradictory background ideals.

One conception of the Canadian community identifies it in national terms. On this view, there is a distinct and important national interest that is greater than the sum of provincial interests. The essence of this theory is that "the Canadian people constitutes the only legitimate

source of sovereign authority and that a government enjoying the support of a Canadian majority must be supreme over all other governments."[176] This pan-Canadian definition of community recognizes that there are diverse elements in the Canadian polity. But the central government is regarded as being best capable of representing and accommodating this diversity. Indeed, the best response to regional concern is to strengthen the attachment of Canadians to the central government rather than to disperse power to the provinces.[177] The ambition is to facilitate the expression of regional particularity through the institutions of the central government. The central theme of the pan-Canadian view of nationality is that "Parliament must be supreme and must have the ultimate power to act in cases of conflict with narrow, regional interests."[178]

This first concept of community generates specific prescriptions in terms of the division of legislative authority. The defender of the national community believes that the powers of the central government should be consolidated and expanded. For example, the central government should be given the jurisdictional levers to defend the Canadian common market against provincial obstruction. Natural resources should be exploited for the benefit of the country as a whole as opposed to that of a single province. The national government should protect individual civil liberties against the potential tyranny of provincial majorities. At its most general level, this first ideal of the Canadian community rejects the claim that the national and the local governments are co-equal in status. The proponent of the national community believes that the powers of the provincial governments should be limited so as not to interfere with the pursuit of national goals.[179]

An opposed ideal conceives of the Canadian polity as being composed of ten distinct communities, each receiving its primary expression through a provincial government. The national interest is simply the pooled interest of these ten distinct provincial communities. The whole is simply the sum of its parts. Simeon describes the provincialist theory in these terms: "The national interest has no moral claim superior to the provincial interest. The federal and provincial governments are political and juridical equals. There is no senior government. Provincial communities are also equals: no national majority can override the provincial will."[180]

The earliest incarnation of this second ideal was the so-called "compact" theory, which conceived of Canada as a compact between two cultural groups. This theory was later modified so that the parties to the compact were the ten provinces.[181] The "provincialist" ideal generates division-of-powers proposals that are the flip side of those advanced under the pan-Canadian ideal. Natural resources are regarded as the absolute property of the province.[182] Accordingly, provinces are said to have an absolute right to dispose of their resources in any manner they desire. Further, federal control over the economy should not be permit-

ted to frustrate provincial economic planning and development. Indeed, federal actions that directly affect the provinces should be taken only after provincial consultation and input. National policy in Canada should be the combined product of the efforts and energy of eleven governments rather than one.

These competing conceptions of community reflect a profound disagreement over the very foundations and nature of Canadian federalism. The choice between them is in large measure a matter of *a priori* belief rather than rational argument.[183] The advocate of the compact theory will not be swayed by the argument that the Fathers of Confederation conceived of Canada in different terms. The compact theorist holds the value of cultural autonomy as a good to be pursued for its own sake. Its authority is not derived from the beliefs or the practices of an elite group of 19th-century entrepreneurs. Like John Stuart Mill, compact theorists believe that "the boundaries of government should coincide in the main with those of nationalities."[184] By contrast, the advocate of a pan-Canadian nationality rejects this view as to the proper relationship between states and nations. He attributes independent normative authority to the value of pluralism, and holds that different nationalities ought to be united within the borders of a single political authority.[185] In short, the debate is not simply over the best means to achieve agreed-upon ends. The debate is about the ends themselves.

A federalism dispute implicates all these concerns and values. The federal umpire must develop some background conception of the political community as well as assess the functional implications of allocating jurisdiction to a particular level of government. The choices made by the jurist will always be contestable and contingent. The Privy Council and the Supreme Court of Canada have rarely been explicit about the nature of the choices they have made. The political character of the decisions has been disguised by a doctrinal veneer of neutrality. But it is possible to burrow below the surface of this jurisprudence and expose its contestability.

At a very general level, it is possible to identify two competing paradigms that have dominated judicial thinking about Canadian federalism.[186] The first paradigm, which was dominant during the Privy Council era, analogized federal-provincial relations to relations between private rightholders. The various levels of government each possessed "rights" or "jurisdiction" that was absolute within a sphere. Within this sphere, the institutional rightholder could act with impunity. It need pay no heed to the harmful consequences of its action on its neighbours. If, however, the rightholder strayed outside its sphere of entitlement, it would be dealt with harshly. Such unauthorized action would be absolutely void regardless of how desirable or socially beneficial its consequences. The Privy Council's role was not to weigh competing social values or to evaluate the consequences of proposed legislation. They

were judges, not social planners. Their task was to identify and police the boundaries separating the various zones of entitlement from each other. Their concern was with tracing out this conceptual map of jurisdiction, not with arriving at a result conducive to social welfare.[187]

Beginning in the 1930s, Canadian constitutional scholars severely criticized this classical paradigm. Essentially, the strategy of the critics was to demonstrate that two key assumptions underlying the classical paradigm were patently false.[188] The first assumption was that the various spheres of absolute autonomy did not overlap. The second assumption was that the boundaries between the various zones of entitlement could be delineated through some neutral methodology that did not itself collapse into a balancing of competing interests. Neither assumption was valid; the spheres did overlap, and the process of policing boundaries was covertly value-laden. The Privy Council was caught in an "unworkable tradition."[189] The critics seized upon certain anomalous elements of doctrine, recognizing in these anomalies the outline of a constitutional countervision. They elaborated a set of radically different premises about the nature of rightholding and of the judicial role itself. For the countervision, a right was not a power absolute within a sphere. There was no area of pure private autonomy in which individuals or institutions could act without infringing on the autonomy or interest of their neighbours. The interests of individuals and institutions must inevitably collide, and such conflicts could be resolved only by "balancing" the interests of the various actors involved. A balancer rather than a logician, the jurist must explicitly consider and evaluate the consequences flowing from the chosen result.

Logically, reliance on a balancing analysis does not necessarily favour either federal or provincial jurisdiction. There are plausible arguments supporting either national or local regulation in a given case. This dualism has already been noted in terms of the competing conceptions of the Canadian political community. The same phenomenon reappears in terms of a purely "functional" analysis of federalism problems. One body of arguments tends to favour centralization of jurisdiction. Central authority makes it possible to realize economies of scale while eliminating the problem of "externalities."[190] It also allows for redistribution of income among individuals and regions. But there are competing functional arguments that favour decentralization. Smaller governments are seen as better able to respond to local needs and interests. They also provide individuals with a choice of a number of jurisdictions offering different packages of public services.

Given the presence of these competing sets of arguments, one would expect the use of a balancing framework to produce two distinct trends in federalism jurisprudence. The first trend would be a tendency to uphold the validity of both federal and provincial laws. The reason for this may not at first be apparent. In theory, the Court could apply a

balancing analysis in an extremely activist manner, striking down large numbers of legislative initiatives. But in practice, this is unlikely to happen. The reason is the highly politicized nature of the decisions the Court would be called upon to make. The values at stake are fundamental; they implicate competing conceptions of the nature of the Canadian political community. Moreover, it is important to remember that in any case there will always be respectable arguments supporting the validity of the law in question. To overturn it would be to substitute the Court's assessment of fundamental political values for the assessment of the nation's elected representatives. It is unlikely that the Court would feel comfortable making such overtly political choices.

The second trend follows from the first. One would expect to see a balancing analysis favour overlapping of jurisdiction between provincial and federal governments. This is because there is no logical or practical limit to the pan-Canadian or the provincialist conceptions of community. They support the right of the respective levels of government to intervene in all areas of social life. On any significant issue of public policy, either Ottawa or the provinces have claims for participation that are legitimate and plausible. The result is "two levels of aggressive governments, often pursuing competing goals, and seeking greater control over the whole range of contemporary policy instruments."[191]

On the whole, the jurisprudence since the abolition of appeals to the Privy Council in 1949 confirms these expectations. This has been particularly so in the case of federal laws.[192] The Court made expanded use of arguments and assumptions that supported functional concurrency.[193] In recent years, however, the Court has departed from these tendencies and assumed a more activist stance. The remarkable fact is that these instances of increased activism have been cases in which the Court has refused to balance the relevant interests. Instead, the Court has struck down legislation on the basis of the apparently discredited categorical analysis that flourished in the Privy Council era. The difficulty is that there does not appear to be any principled way to distinguish the cases in which categorical reasoning was employed from those in which it was not. The legal materials have taken on the appearance of an illogical and random series of results rather than the coherent elaboration of a theory. But the explanation for the incoherence of the doctrinal results is not mere judicial incompetence.

The source of the trouble is an indeterminacy in the larger political understandings that surround and sustain Canadian federalism itself. The central tenet of federal theory is the notion that each level of government possesses separate and independent spheres of authority. This central conception no longer seems applicable to the Canadian context. Far from having two levels of government exercising authority over separate and neutrally exclusive spheres of authority, contemporary Canadian federalism is characterized by eleven governments, each

asserting authority over the full range of policy instruments. In the absence of any background political consensus on the meaning or purpose of Canadian federalism, it is little wonder that the court's attempt to invoke the logic of "divided jurisdiction" would meet with criticism and confusion.

## *The Evolution of Trade and Commerce*

The judgment of Chief Justice Duff in the *Natural Products Marketing Act Reference*[194] exemplifies the categorical mode of analysis that was dominant during the Privy Council era. Parliament had passed a statute that provided for the establishment of marketing schemes for natural products whose principal market was outside the province of production. The schemes would apply to local transactions involving these products, as well as to their movement in interprovincial and export trade. Duff C.J.C. held the statute to be an invasion of provincial jurisdiction over property and civil rights. He began his discussion of the trade and commerce power by referring to the *Parsons* case. He noted that, strictly speaking, *Parsons* had decided only that Parliament could not regulate the contracts of a particular trade in a province. But the judgment "suggests, although it does not decide" that Parliament cannot regulate particular trades themselves. Reviewing the subsequent jurisprudence, Duff C.J.C. concludes that Parliament has no authority to regulate "particular trades or occupations or . . . a particular kind of business such as the insurance business in the provinces. . . ."[195] National authority applies to the regulation of interprovincial and export trade and to matters necessarily incidental to such trade. Duff C.J.C. states that this may not be a "complete definition" of federal authority since "logically" there is scope for a "possible jurisdiction in relation to general trade and commerce."[196] But Duff C.J.C. does not specify what this "possible jurisdiction" might comprise. Indeed, in an earlier judgment he had defined the "general regulation" of "trade" in such a narrow fashion as virtually to preclude its applicability.[197] This is why its scope is a "logical" possibility only.

The thrust of the Chief Justice's analysis is to exclude the necessity for the jurist to balance competing interests. The jurist need not assess the desirability of federal versus provincial regulation of a particular industry. Particular industries fall within provincial jurisdiction regardless of their national significance or scope. There is no need for a qualitative analysis. Federal jurisdiction is essentially limited to the interprovincial movement of goods. Duff C.J.C. reinforces this analysis later in his judgment. He argues that if this federal statute is valid, the provinces must be destitute of the power to regulate the local trade in natural products. But, he observes, it is well established that the provinces possess power to regulate all aspects of local trade. Therefore, Parlia-

ment must lack this power, and the statute must be invalid. But his conclusion follows only if one begins with the assumption that legislative jurisdiction operates as a zone of absolute entitlement. Given such a starting point, it becomes obvious that if a matter falls within provincial authority, it is thereby excluded from federal authority.

Other options were available to Duff. For instance, the "aspect" doctrine entails a wholesale rejection of the Duff methodology. According to the aspect doctrine, subjects that "in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91."[198] Like the second branch of *Parsons*, the aspect doctrine is really just a modified form of balancing. It asks whether there is a federal (or, as the case may be, provincial) aspect to a legislative problem sufficient to justify this particular legislative intervention.[199] It is hardly surprising that Duff C.J.C. would regard this doctrine with suspicion, as a principle "which is well established, but nonetheless ought to be applied only with great caution."[200] The aspect doctrine and the second branch of *Parsons* were anomalies. They contradicted the very premises of the categorical mode of reasoning that dominated the constitutional jurisprudence of the period. These renegade elements survived on the fringes of doctrine, rarely invoked but never unequivocally abandoned.

Although the "watertight compartment" view of Canadian federalism was openly ridiculed by academic commentators in the latter 1930s and the 1940s,[201] it was not until the 1950s that the jurisprudence began to take account of the criticism. The shift in judicial attitude was evident in a number of the opinions in the *Reference re the Farm Products Marketing Act*.[202] The reference concerned the validity of a provincial statute establishing a marketing scheme for products in Ontario. Chief Justice Kerwin made the important point that intraprovincial transactions would not be subject in all cases to exclusive provincial jurisdiction. There was scope for federal authority even over local transactions within a province. Kerwin C.J.C. gave the example of a product that was destined to be sold beyond the borders of a single province. Where the market for a product is substantially interprovincial, the federal government may reach back into the province of production and regulate local transactions. Here is an instance where the aspect doctrine is being applied; these local transactions have federal aspects that justify federal regulatory authority.

The use of this methodology represents a rejection of the categorical analysis fashioned by the Privy Council. There is no longer a presumptive rule that transactions completed within a single province are subject to exclusive provincial jurisdiction. There is a subtle shading rather than a stark contrast between provincial and federal jurisdiction. The jurist must make some attempt to balance the respective interests at stake before reaching a decision.

Reliance on a pragmatic, concrete analysis soon came to dominate the interpretation of the trade and commerce power. *Carnation*,[203] though a case involving the validity of a provincial statute, exemplifies the new approach. The Carnation Company conducted business in the province of Quebec, and a provincial marketing board determined the price to be paid by the company for milk purchased from its local producers. Most of Carnation's production was destined for sale outside the province. The company argued that the board was setting the price for a commodity flowing in interprovincial and export trade, and thus was interfering with Parliament's exclusive jurisdiction over trade and commerce. Speaking for a unanimous court, Mr. Justice Martland rejected the contentions of the company. He argued that while the board's orders might "affect" interprovincial trade, they were not made "in relation to" such trade. The company purchased milk from local producers. Thus there was an important provincial interest in Carnation's operation. The mere fact that the board's orders would affect the price of Carnation's milk sold out of province did not override that interest. Martland J. emphasized that he was not laying down a general rule, since "each transaction and each regulation must be examined in relation to its own facts."[204] The fact that a transaction takes place wholly within a province does not necessarily lead to a conclusion that it is subject solely to provincial control. In the circumstances of this case, the legitimate provincial interests at stake in the transaction were sufficient to support the legislation. The case is a paradigmatic illustration of the application of the aspect doctrine.[205]

These cases evinced a more flexible interpretation of the distinction between interprovincial and local trade. At the same time, there were suggestions that the dormant "second branch" of *Parsons*, the "general regulation of trade affecting the whole dominion," was to be revived. In *Macdonald v. Vapour Canada*,[206] the Supreme Court ruled that a section of the federal *Trade Marks Act*[207] was invalid. But the judgment of Chief Justice Laskin suggested that had the section been integrated into a "general regulatory scheme to govern trading relations going beyond merely local concern," it may well have been valid. The presence of such regulatory monitoring would have lent "some colour to the alleged national or Canada-wide sweep of s. 7(e)."[208] The clear implication was that the Court was prepared to assess the utility of federal regulation in a particular case, rather than retreating behind the rhetoric of doctrinal categories.

While these cases signalled an expansive, pragmatic definition of federal regulatory authority, another feature of the cases is of overriding importance. In the vast majority of the decisions in the period, federal legislation was being upheld. The Court never subjected the legislative initiatives to any searching or rigorous analysis. Indeed, the Court continued to invoke the "in relation to" versus "affecting" language in

announcing its decisions. There was never any clear articulation of the weights and measures that were guiding the Court in its balancing of interests. In this sense, it was never clear that the formalism of the Privy Council period had been decisively abandoned.

## *The Contemporary Doctrine*

Two distinct generalizations may be advanced about the trade and commerce cases of the past five years. First, the Supreme Court has modified its previous attitude of deference to federal laws. This does not mean that the Court has become hostile to or suspicious of federal attempts to regulate the economy. The point is that the Court is no longer as reluctant to strike down federal economic legislation as it was in the past. The second generalization flows from those instances in which the Court has ruled against the federal government. The Court did not decide these cases through a sensitive balancing of the values at stake in the litigation. Instead, it simply reverted to categories and assumptions that had been dominant in the Privy Council era. The Court's reasoning attempted to draw bright lines between federal and provincial areas of jurisdiction. But the process of line drawing had about it an air of implausibility and manipulation, given that the dominant paradigm of the modern period rejects the legitimacy of such a categorical analysis.

This story begins with the decision of the Court in *Re Agricultural Products Marketing Act*.[209] In the aftermath of the Supreme Court's decision in the *Manitoba Egg* case,[210] it had become clear that some form of interprovincial cooperation would be necessary if the market for eggs were to be effectively regulated. The federal government and the provinces eventually agreed on an intricate scheme requiring dovetailing legislation from both levels of government. The scheme was designed to regulate comprehensively all dealings in eggs, whether for local, interprovincial or export trade. Overall quotas for each province were fixed by the federally established Canadian Egg Marketing Agency (CEMA). The agency was also responsible for purchasing and disposing of any surplus eggs that were within the allotted provincial quota. This guaranteed a fixed price for all eggs within quota, regardless of whether they were actually required for the table market. The provincial agency would set individual quotas based on the province's overall quota. There were extensive cross-delegations of authority from one level of government to the agency established by the other level. Both federal and provincial agencies financed their operations and redistributed receipts through levies on producers.

A host of constitutional issues was raised by this legislative framework. The judgments contain intricate discussions of the delegation doctrine and the constitutional characterization of producer levies, issues that are not germane to the present discussion. The interest of this

paper extends only to the analysis of the trade and commerce power in the judgment of Mr. Justice Pigeon. The discussion arose in the context of certain quotas that had been imposed on egg producers by the Ontario Farm Products Marketing Board. Not only did these quotas limit the number of eggs that could be marketed by provincial producers, they also directly regulated their production of eggs and their possession of fowl. The production quotas did not distinguish those producers who sold their product locally from those who exported their eggs. All producers were subject to these controls, regardless of the destination of the product. Those challenging the validity of the legislation claimed that the province had overreached its authority. Provincial production quotas were valid only to the extent that they applied to goods that would eventually be sold locally. Goods that would enter the stream of interprovincial trade had to be regulated by Parliament. It would not have been difficult to construct some functional counterargument in favour of the provincial quotas. For instance, it could have been suggested that it was impossible to identify, at the point of production, whether the goods were to be eventually sold locally or interprovincially.[211] Any requirement that separate regimes be established for local as opposed to interprovincial producers would have been unworkable. But Pigeon J. did not rely on any such limited, functional argument. Instead, he advanced the sweeping generalization that a province had control over all "production" of eggs. The destination of the eggs was irrelevant. One did not have to inquire whether most or even all of a producer's eggs would eventually leave the province. The only relevant issue was that the province had enacted "production" quotas rather than "marketing" quotas; "marketing does not include production and, therefore, provincial control of production is *prima facie* valid."[212]

This distinction between "marketing" and "production" is reminiscent of U.S. cases in the early 20th century interpreting Congress' power over interstate commerce. These cases relied on a distinction between "commerce" on the one hand and "manufacture" or "production" on the other. Congress was said to lack power to interfere with production or manufacture, regardless of their importance or interconnection with interstate trade. For instance, in *U.S. v. E.C. Knight Co.*,[213] the U.S. Supreme Court held that the *Sherman Antitrust Act* did not prohibit a near monopoly in the manufacture of refined sugar. This was because "commerce succeeds to manufacture and is not part of it." This distinction relieved the Court of the responsibility of determining the impact of this manufacturing monopoly on interstate commerce itself. The attempt to regulate manufacture was absolutely void regardless of how socially desirable or necessary it might have been. If the polity was not satisfied with this result, it might amend the Constitution. The judiciary was merely charged with interpreting the Constitution, not with rewriting it.

The difficulty with this line of argument was its extreme artificiality.

Economic reality simply does not conform to any rigid distinction between manufacture and commerce. Choices made at the production stage have a direct impact on the marketing of any product. A market constitutes a unified whole rather than isolated fragments or subdivisions. It was precisely because of these underlying economic factors that the U.S. Supreme Court subsequently abandoned its early categorical approach. The later jurisprudence emphasized the effect of an activity on commerce as opposed to "rubrics concerning its boundaries."[214]

> The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority.[215]

The Canadian Supreme Court has not been oblivious to these considerations. Indeed, it is possible to identify other recent cases in which the distinction between "production" and "trade" was simply ignored. In these instances, the Court displayed an awareness of the economic continuity between these various forms of activity. A good illustration is the *Potash* case,[216] decided less than a year after *Re Agricultural Products Marketing Act*. This litigation arose out of attempts by the government of Saskatchewan to stabilize the North American market for potash. Saskatchewan is one of the largest potash producers in the world, exporting the bulk of its production to the United States. In the late 1960s, there was a serious excess of supply and a drop in the world price. The Saskatchewan government, in concert with the largest U.S. potash supplier, devised a plan to limit production and increase market prices. The scheme fixed production quotas for potash producers and established a floor price for potash free on board the mine as a condition for obtaining a licence. The legislation was challenged by Central Canada Potash, a Saskatchewan producer that had an assured market for production in excess of its production allocation.

It would have been possible to uphold this legislation on the basis of the categorical distinction between production and trade. The argument would have focussed on the fact that the scheme established production quotas rather than marketing quotas. But merely to state such an argument is to reveal its inadequacy. The whole purpose of the legislation was to stabilize the market for potash in the United States. The regulatory framework operated at the point of production, but its purpose was to ensure that Saskatchewan producers received a fair return on the sale of their resources outside the province. These facts illustrate the artificiality of a rigid distinction between production and trade. Indeed, Chief Justice Laskin simply glossed over the distinction and concluded

that the legislation was ultra vires the province. In Laskin C.J.C.'s view, the Court had to determine the "true nature and character" of the legislation. This issue could be resolved only by considering "the circumstances under which the *Potash Conservation Regulations, 1969* came into being, [and] the market to which they were applied and in which they had their substantial operation."[217] Looking to those broader factors, the Chief Justice had little difficulty in concluding that they amounted to an attempt to regulate the export market in potash. The fact that the legislation took the form of quotas on production was irrelevant.

Laskin C.J.C. did make a half-hearted attempt to distinguish *Potash* from the *Agricultural Products Reference*. According to Laskin C.J.C., the crucial difference between the cases was that price fixing was a "central feature" of the Saskatchewan legislation. The reply to this argument is that price fixing was an equally central feature of the legislation considered in the *Agricultural Products* case. The prices paid to producers of eggs were fixed each week by the local boards and CEMA on a "cost of production formula."[218] The suggested distinction between the cases is not merely flimsy, but nonexistent.

The Court's analysis in these cases is instructive in jurisprudential terms. In one instance, the Court purports to decide a case on the basis of an artificial distinction between production and trade. Subsequently, the distinction is simply ignored, in substance if not in form. But because the initial distinction is never authoritatively repudiated, it retains doctrinal legitimacy. There are thus two lines of cases, espousing contradictory methodologies, both of which are logically available for use in subsequent litigation. Nor is there any theory to indicate the instances in which the principle is to be preferred over the counterprinciple. The notion of consistency in such a body of materials is little more than rhetorical posturing.

Consider the case of *Labatt v. The Attorney-General of Canada*.[219] At issue was the validity of section 6 of the federal *Food and Drugs Act*,[220] which prohibited anyone from marketing certain food unless it complied with the prescribed standards for such food. Labatt's marketed a beer called "Special Lite Beer" without complying with the standard for "light beer" prescribed in the regulations. Mr. Justice Estey delivered the judgment of the majority of the court on the constitutional issue. He purported to synthesize the jurisprudence that had developed surrounding the trade and commerce power. Relying on such cases as *Eastern Terminal*,[221] he concluded that Parliament had no authority under the first branch of *Parsons* to regulate "individual trades or sections of industry."[222] Estey J. suggested that the second branch of *Parsons* could only support legislation that dealt with trade in a "sweeping, general sense,"[223] such as the incorporation statute upheld in *Wharton*.[224] Turning to the facts of the particular case, Estey J. concluded that the legislation could not be supported on the basis of the trade and com-

merce power. The section fell outside the first branch of *Parsons* since it was not concerned with trade but with production. The act regulated the brewing process itself by means of a "legal recipe," and was not aimed at the movement of products through the channels of trade.[225] Neither could the second branch of *Parsons* be used here, since the regulations related to a single industry rather than to trade in general.

This analysis is essentially a reassertion of a categorical mode of reasoning. The discussion of the first branch of *Parsons* is premised on the artificial distinction between trade and production. Estey J. emphasizes that the distinction between the flow of commerce and production and local sale was "pointedly made" by Mr. Justice Pigeon in the *Agricultural Products Marketing Act* case. There is no discussion of the fact that this same distinction was simply glossed over in the *Potash* case. Nor is there any awareness of the makeshift quality of the distinction. The analysis of the second branch of *Parsons* assumes a similar tack. The second branch is said to support laws that regulate trade in general, as opposed to particular trades. This analysis is also categorical in nature. It emphasizes the purely formal aspects of a given statute. If the law fails to satisfy those purely formal requirements, it is void, regardless of its social utility.

The difficulty with these various distinctions and arguments is simply that they ignore the fundamental issue raised in the case, whether this type of law should be enacted on the federal or the provincial level. The purpose of the *Food and Drugs Act* was to reduce confusion and ignorance in the market by specifying uniform standards for food.[226] The expectation was that improving the quality of the information possessed by the consumer would enable individuals to spend their money more rationally. The issue is whether such a policy goal should be a national or a local responsibility. In his judgment, Estey J. failed to address the question of the provinces' ability to remove the "noise and static"[227] from the Canadian marketplace, or to consider whether central control over product standards might compromise values of local autonomy in some important way. The only "evidence" before the court on these issues was the labels from the beer, which indicated that Labatt's operated manufacturing establishments in a number of provinces. Estey J. relied on these labels in concluding that the beer industry was local in nature. But the beer industry in Canada, as in other Western countries, is dominated by a relatively small number of huge corporations.[228] The location of the manufacturing establishments does not alter the national character of the industry. By focussing exclusively on the location of the brewing plants, Estey J. was distorting the basic structure and operation of the industry. Instead of examining the economic reality of the beer industry, he was preoccupied with the arbitrary and artificial distinction between the production of beer and trade in beer.

In *Dominion Stores v. The Queen*,[229] the Court had another oppor-

tunity to clarify the reach of the trade and commerce power. Given the factual circumstances of the case, the indefatigable distinction between production and trade did not feature in the reasoning of the court. But the reasons and the result were no less unsatisfactory than they had been in *Labatt*. In *Dominion Stores*, the federal government had created certain national grade names for agricultural products and set standards to be met by sellers who utilized the grade names.[230] Traders engaged in interprovincial and export trade were required to use the applicable names, while traders engaged in purely intraprovincial trade could use the grade names if they desired, provided that they complied with the accompanying standard. A charge was laid under the federal act against Dominion Stores, a wholly intraprovincial trader[231] that had allegedly been selling apples under the grade name "Canada Extra Fancy" without complying with the standards prescribed for that grade name. Dominion Stores challenged the ability of the federal government to prosecute a local trader.

Arguably, the case was indistinguishable from an earlier Privy Council decision, the *Canada Standard* case.[232] The federal government had enacted that the words "Canada Standard" should be a national trade mark, and that the application of that mark to any commodity warranted it to conform to a certain standard. Although the Supreme Court of Canada had ruled the legislation invalid, the Privy Council overturned this decision, invoking Dominion authority over "general" trade and commerce. It was obvious, thought Lord Atkin, that the Dominion had authority to create a uniform law of trade marks,[233] and it was impossible to distinguish between trade mark rights for individual traders and the establishment of a national mark. The trial court in the *Dominion Stores* case relied on *Canada Standard* in upholding the application of the act.[234] Mr. Justice Grange pointed out that the meaning of the term "general" regulation of trade and commerce was uncertain. One knew from the authorities that it did *not* include the regulation of particular trades within a province, "nor does it appear to include the regulation of many trades . . . nor even of all trades . . . if that trade is or can be intraprovincial."[235] Beyond these negative limitations, there was little guidance in the cases. It did appear, however, that the power included the authority to create national marks of quality, since this very point had been decided in the *Canada Standard* case. In Grange J.'s opinion, the purpose of the *Canada Agricultural Products Standards Act* was precisely to create a national standard to be signified by a national grade name, and thus the case was indistinguishable from *Canada Standard*. He dismissed the argument that the federal act amounted to the regulation of local trade. "The answer to that contention," his Lordship opined, "can only be that in law it is not."[236]

This disposition was affirmed by the Ontario Court of Appeal, but the Supreme Court reversed it by a 5–4 majority. The majority opinion was

written by Mr. Justice Estey, who argued that there was no inconsistency between his conclusions and the result in the *Canada Standard* case. The main point emphasized by Estey J. was that the statute was mandatory, in substance if not in form, in its application to local traders. This result was produced by the interaction between the federal statute and a sister provincial act, the *Farm Products Grades and Sales Act*.[237] This made it compulsory for local traders to use certain provincial grade names, and the prescribed names were identical to the ones contained in the federal scheme. Thus "stripping off the complexities of the constitutional argument and reducing the transaction to its real proportions,"[238] the local traders were obliged to adopt the federal grade names and to comply with the applicable federal standard. This meant that the federal statute was in reality a "marketing scheme" as opposed to a "trade marks scheme," and the *Canada Standard* case did not apply. It went without saying, of course, that a marketing scheme directed at intraprovincial trade was beyond federal power.[239]

One might contest Estey J.'s conclusion that the statute was mandatory in relation to local traders.[240] But there is a deeper issue: why this should matter. Justice Estey's assumption was that a voluntary system of grade names was valid, while a mandatory system was not. But this is not necessarily so. If the federal government has authority to establish national grade names, the reason must be that this is a matter of general concern throughout the Dominion. This was apparently the conclusion of the Privy Council in the *Canada Standard* case. If this is accepted, then whether the grade names are mandatory or voluntary should be constitutionally irrelevant. It is for Parliament and not the courts to determine whether a mandatory program is warranted. The problem was that if Estey had approached the matter on this relatively straightforward footing, he would have had to abandon the "settled" principle that Parliament could not regulate local trade. If the Supreme Court had upheld a system of mandatory grade names for local traders, it would have been impossible to deny federal authority over all aspects of "local" trade. The dominant body of doctrine in the area would have been turned on its head.

To avoid this result, Estey J. seized on the fact that the legislation in the *Canada Standard* case happened to impose only voluntary standards. But the use of the voluntary/mandatory distinction brings another problem to mind. If mandatory national standards for local traders are invalid because they regulate intraprovincial trade, the basis for even voluntary federal standards in this area is questionable. It becomes more than a little strained to argue that voluntary standards are more "general" than mandatory standards and are for this reason supportable under the second branch of *Parsons*. Thus the result in *Dominion Stores* leads to the conclusion that the federal government has no authority to enact product standards for wholly local traders — in short, that

*Canada Standard* was "wrongly decided." Such conundrums arise only because of the irrelevance of the voluntary/mandatory distinction itself. Like the distinction between production and trade, the voluntary/mandatory dichotomy simply fails to address the underlying policy issues raised by the case. In fact, the whole purpose of invoking these sorts of distinctions is to permit the courts to avoid having to confront these political choices.

The Court's most recent pronouncements on the trade and commerce power came in two companion cases, *Canadian National Transportation Limited et al. v. Attorney General of Canada*[241] and *R. v. Wetmore et al. (Kripps Pharmacy)*.[242] The primary issue in the cases was the authority of the Attorney General of Canada to conduct criminal prosecutions.[243] However, the judgments do contain some discussion of the scope of federal authority over trade and commerce. In *Kripps Pharmacy*, the accused were charged under the *Food and Drugs Act* with selling drugs manufactured or stored under unsanitary conditions and with promoting drugs in a misleading manner. The majority judgment of Chief Justice Laskin concluded that the relevant sections of the act were supportable under Parliament's authority in relation to criminal law. But Laskin C.J.C. went on to suggest that certain provisions might also be valid under the trade and commerce power:

> This Court was concerned in *Labatt Breweries of Can. Ltd.* v. *A.G. Can.*, [1980] 1 S.C.R. 914, 9 B.L.R. 181, 30 N.R. 496, with a proceeding relating to ss. 6 and 25 [am. 1976-77, c. 28, s. 16(2)] and the regulations thereunder of this Act. While these sections and the provisions herein involved are both found in Pt. II of the Act, very different issues arise in this appeal.
>
> An examination of the various provisions of the *Food and Drugs Act* shows that it goes beyond mere prohibition to bring it solely within s. 91(27) but that it also involves a prescription of standards, including labelling and packaging as well as control of manufacture. The ramifications of the legislation, encompassing food, drugs, cosmetics and devices, and the emphasis on marketing standards seems to me to subjoin a trade and commerce aspect beyond mere criminal law alone. There appear to be three categories of provision in the *Food and Drugs Act*. Those that are in s. 8 are aimed at protecting the physical health and safety of the public. Those that are in s. 9 are aimed at marketing and those dealing with controlled drugs in Pt. III of the Act are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.[244]

The section Laskin C.J.C. regards as "inviting" the application of the trade and commerce power is section 9 of the *Food and Drugs Act*, which prohibits the labelling, packaging, treating, processing, selling or advertising of drugs in a manner that is "false, misleading or deceptive or is likely to create an erroneous impression. . . ." The difficulty is how this

observation can be squared with Estey J.'s opinion in *Labatt*. *Labatt* decided that section 6 of the *Food and Drugs Act* was ultra vires. It is not clear what the relevant distinction between the two sections might be. Like section 6, section 9 of the *Act* reaches back into the production of drugs in the province. *Labatt* emphasized that the regulation of production was a local matter falling under provincial jurisdiction, outside the scope of the "first branch" of the *Parsons* test. Nor could the second branch of *Parsons* apply, since the section does not deal with trade "in general." As the dissenting judgment of Mr. Justice Dickson points out, section 9 amounts to the "detailed regulation of the pharmaceutical industry."[245] There is no discussion of any of these matters in the majority judgment, other than the meaningless observation that the issues arising in *Kripps* were "very different" from those considered in *Labatt*. The reader is left to ponder why the differences between the two cases are relevant or significant.

If *Labatt* was the sequel to the *Agricultural Products* Reference, *Kripps* is the sequel to *Potash*. The *Agricultural Products Reference* relied on the distinction between production and marketing, while *Potash* ignored it. Although *Labatt* revived the distinction, it was ignored once again in *Kripps*. The astounding feature of these cases is the judicial oblivion to the inconsistencies between them. *Labatt* applies a categorical mode of reasoning to federalism problems. Each level of government possesses exclusive authority over a zone of absolute entitlement. These premises are rejected by the majority in *Kripps*. The federal government's authority over trade and commerce is framed in much more flexible and pragmatic terms. In a future case, one could plausibly justify a variety of different results, depending on the line of cases designated as "controlling."

The dissenting judgments of Mr. Justice Dickson (as he then was) in both *Kripps* and *Canadian National Transportation* undertake to reconcile these cases. The task is one of Herculean proportions. If Dickson J. ultimately falls short, this is due only to the illogical and contradictory state of the materials with which he is forced to work. Dickson J. is sensitive to the fundamental value choices the judiciary is called upon to make in constitutional cases. In his view, the scope of the trade and commerce power is not dictated by doctrine or defined by logic. It will depend on the degree to which federal economic regulation "encroaches on the degree of local autonomy contemplated by the constitution."[246] The difficulty is in reconciling this flexible, balancing attitude with the contradictions implicit in the doctrine. Dickson J. holds that the "second branch" of *Parsons* authorizes legislation aimed at the economy "as a single integrated economic unit rather than as a collection of separate local enterprises." There is a clear demarcation between "measures validly directed at a general regulation of the national economy and those merely aimed at centralized control over a large number of local economic entities."[247]

The question is how to interpret this form of words. On the one hand, Dickson J. may be advocating a pragmatic case-by-case balancing of the various federal and provincial interests implicated in a given case. On this interpretation, there is no categorical demarcation between federal and provincial jurisdiction. Dickson J. lends support to this view later in the judgment when he identifies a number of functional criteria as "indicia" supporting federal authority.[248] At the same time, Justice Dickson refuses to acknowledge the tension between such an approach and the judgment of Estey J. in the *Labatt* case. Indeed, he explicitly adopts Estey J.'s statement that "what is clearly not of national concern is the regulation of a single trade or industry."[249] This implies that the real test is not a functional one at all; instead, it is a purely formal question of whether the legislation singles out a particular industry. On this view, any federal attempt to regulate a particular industry is void, regardless of the functional utility of such regulation. Only where the law deals with trade in general is there scope for federal economic regulation.

This ambiguity is played out in Dickson J.'s substantive discussion of the two statutes in *CN* and *Kripps*. In *CN*, he upholds the conspiracy section of the *Combines Investigation Act* on the basis of the second branch of *Parsons*. The analysis is wholly functional. The statutory provision is part of a regulatory scheme. It applies to a wide range of unfair competitive practices across the economy. The conduct being prohibited is of national significance, and could not be effectively regulated by the provinces. Then, in *Kripps*, he holds that the relevant provisions of the *Food and Drugs Act* cannot be supported under the trade and commerce power. Indeed, Dickson J. contends that he cannot see "any justification" for classifying subsection 9(1) as falling under subsection 91(2) of the *Constitution Act, 1867*. This is because the section regulates a "single trade or business." The nationwide scope of the industry is irrelevant, as are all the other functional indicia articulated in *CN*. All that matters is that the regulations "amount simply to the detailed regulation of the pharmaceutical industry and consequently fall within the portion of economic regulation allocated to the provinces by virtue of s. 92(13)."[250]

The dissenting opinions of Dickson J. in *CN* and *Kripps* exemplify the current state of doctrine on the trade and commerce power. The dominant paradigm recognizes the inevitable necessity of balancing competing values in a pragmatic, utilitarian fashion. There can be no bright lines between provincial and federal jurisdiction. This dominant paradigm is associated with a clear tendency to uphold the validity of federal economic regulation. The dominance of this way of thinking does not go unchallenged, however. The doctrine is riddled with anomalies, fragments that have survived the collapse of the Privy Council era. These anomalies are premised on the antique notion of power absolute within a sphere and a rejection of the idea that it is necessary to balance compet-

ing values; the jurist simply decides the case by identifying the proper "matter" at issue. The anomalies are associated with a tendency to invalidate federal laws. But because these cases fail to analyze the values at stake in any meaningful way, it is not clear that anyone gains anything from these doctrinal rebuffs. Nor is it possible to predict how the Court will act in the future. It is as though it had discovered instruments handed down from some lost civilization without any instructions for their use.

## *The Jurisprudence in Perspective*

A number of years ago, one leading commentator raised fears of a "deregulation" ethic pervading the Supreme Court's constitutional jurisprudence.[251] Corporate interests appeared to be enjoying considerable success in utilizing litigation as a weapon in the continuing fight against government regulation. There is no doubt that corporate interests have been the main beneficiaries in instances where the court has struck down legislation. But to suggest that the jurisprudence as a whole exemplifies any deregulation ethic is to ignore the contradictory character of the materials. The Court is as likely to uphold sweeping governmental regulation of the economy (*Reference re Agricultural Products Marketing Act*; *Canadian National Transportation*) as it is to strike it down (*Labatt*; *Dominion Stores*). Nor is it possible to identify any criteria associated with laws ruled invalid that would distinguish them, as a class, from those upheld as constitutional. For instance, the *Food and Drugs Act* provision struck down in *Labatt* does not appear to be any more interventionist than the statutes upheld in *Agricultural Products* or *CN*.

The indeterminacy in the legal materials is a reflection of the indeterminacy in Canadians' background understanding of Canadian federalism itself. The competing provincialist and pan-Canadian visions of the Canadian political community are fundamentally at odds with one another. No attempt to reconcile these contradictory ideals could be stable or impermeable. In doctrinal terms, these competing visions will constantly generate matched pairs of arguments that lead in opposite directions. The jurist is unable to confront the presence of these stark oppositions in explicit terms. The various categories and distinctions that emerged during the Privy Council period represented an attempt to mediate these tensions by suggesting that they did not exist. The Privy Council "watertight compartments" theory was based on belief in symmetry rather than conflict. In the modern era, the plausibility of this way of thinking has been exploded.

With the evolution of cooperative federalism following World War II, the notion of divided jurisdiction became increasingly anachronistic in the Canadian setting. It was no longer possible to make neat distinctions

among economic policy, social policy and cultural policy. Cooperative federalism was not guided by any unified vision of the nature of the polity; the new structures emerged from ad hoc, incremental adjustments between governments rather than in accordance with an overarching scheme. This heightened sense of ambiguity made it particularly difficult for the Supreme Court to draw principled distinctions between federal and provincial responsibility. The only alternative jurisprudential methodology devised to cope with this indeterminacy was the suggestion that the jurist should "balance interests." If this balancing analysis were ever embraced in a systematic or rigorous fashion, the distinction between "legal" and "political" decision making in constitutional cases would lose all credibility. This explains the continued judicial tendency to invoke the discredited categories of the Privy Council era when the Court strikes down federal laws, as well as the artificiality of the analysis.

It would be a mistake to exaggerate the significance of the Supreme Court in the evolution of Canadian federalism. In the vast majority of federalism cases, the Court's pronouncement is not the final word on the matter. The judgment merely grants bargaining or political resources to the various levels of government in their ongoing jostling with each other.[252] The outcome chosen by the Court can usually be altered by further negotiation and compromises that will be reflected in future decisions of the Court. A classic instance is the decision of the Court in the *Patriation Appeals*,[253] followed by the negotiation of the Accord of November 1981, which in turn was followed by the court's judgment in the *Quebec Veto* case.[254] This illuminates the subtle and inextricable relationship between "legal" forms and other aspects of social reality. Law is neither divorced from that reality nor "determined" by it. Law is constituted by social reality while at the same time constituting it.[255]

At the same time, it would appear that the degree to which the Supreme Court is becoming involved in federalism disputes is on the increase. In the 7-year period from 1975 to 1982, the Court handed down more constitutional decisions than it had in the preceding 25 years.[256] There are some obvious explanations of this development. First, the Court has greatly liberalized the laws of standing, making it much easier for private citizens to launch constitutional challenges. Also, governments themselves appear more likely to look to the judicial branch for resolutions of federalism disputes.

The increased judicial involvement in federalism cases carries certain costs. The Court has never been able to balance, in any consistent or satisfactory way, the various interests that are at stake in such cases. It is an unelected body, appointed by one level of government alone, and is unrepresentative of the country as a whole. It is not clear what countervailing benefits flow from the current arrangement. The presence of a judicial umpire does ensure that some sort of rough equilibrium or balance is preserved between federal and provincial interests. But the

need for some body to impose limits and resolve interprovincial disputes does not necessarily dictate that this role be filled by judges. Given the political, value-laden character of the decisions required, this function could just as easily be performed by a noncurial tribunal that was more representative of the diverse interests of the polity. Moreover, such a body could deal with disputes without the necessity for imposing a zero-sum outcome on the litigants. Of course, replacing the judicial umpire with some type of federalism tribunal would by no means be costless, and the precise form and jurisdiction of such a tribunal would have to be carefully weighed. The design of such a body is beyond the scope of this paper. But there is at least one implication that emerges from this study: the Supreme Court is currently over-involved in the resolution of federalism disputes in Canada. It should be made more difficult for both citizens and governments to involve the Court in the process in the future.

## Conclusion

Combines jurisprudence and the interpretation of the federal trade and commerce power are not normally regarded as interconnected areas of doctrine. There is nothing surprising in this; the political and economic issues that arise in these two contexts are quite separate and distinct from each other. Nevertheless, the judicial treatment of these areas has been remarkably similar, at least in its broad outlines. The Supreme Court has consistently refused to structure doctrine on the basis of a utilitarian calculus of general welfare. Instead, it has attempted to organize the legal universe into distinct, mutually exclusive conceptual categories. The categories constitute zones of absolute entitlement possessed by individuals or institutions. These categories operate in an all-or-nothing manner. Fall within a protected sphere of interest, and an action is protected absolutely; fall outside such a sphere, and an action is void. The jurist is supposedly relieved of the necessity of balancing competing values or divining the public interest. All that is required is a decision as to which zone of entitlement is implicated in a particular case. In this way, the overarching tension between the values of freedom and security might be transcended.

This analysis implicates more than a concern with judicial method. Implicit in the Court's approach to economic problems is a conception of the proper relationship between state, law and society. The central and governing element in this judicial construct is the assumption that it is possible to identify some natural or prepolitical structure of human interaction in civil society. This structure is natural in the sense that it does not depend on the validity of any particular ideology or political doctrine. In this prepolitical setting, individuals are able to combine with each other free from "regulation"; the outcomes of interaction are the

product of their individual life plans and abilities, rather than the conscious implementation of some larger political program. Of course, it is recognized that no such "natural" order of things exists in contemporary liberal democracies, nor should society attempt to recast itself in pursuit of the naturalist ideal. Nevertheless, the belief in the possibility of such a prepolitical structure carries important implications for the judicial analysis of public policy. It means that deviations from what is seen as the natural order of things require some particular justification on the part of the state. The state is interfering with a set of arrangements that is thought to inhere in the "nature of things"; interference of this kind should legitimately be regarded with suspicion. The role of the Court is to ensure that the incursion on natural liberty is warranted in the circumstances.

To take the example of competition policy, the underlying assumption of the jurisprudence is that it is possible to imagine some prepolitical or natural market order, free from state regulation. State intervention is accordingly depicted as an interference with the natural balance of market forces. Such interference is not necessarily illegitimate. But derogations from "natural liberty" should be accepted only with misgivings and doubt. The Court's combines jurisprudence has been an expression of this sense of misgiving. Had the Court proceeded from an alternative assumption, its doctrinal product would no doubt have been quite different. This alternative assumption, commonplace in legal theory at least since the realists in the 1930s, is that the whole notion of a prepolitical order of human interaction is an absurdity. The objection is theoretical, not technical. Any market order must necessarily implicate some form of state regulation. Accordingly, the choice is not between some prepolitical state of affairs and "regulation," but simply between different forms of state regulation. Cast in this light, the Court's choices become more understandable, if no more convincing.

There are interesting parallels to be drawn between the case studies presented in this paper and the more general jurisprudential analysis of Ronald Dworkin.[257] According to Dworkin's well-known theory, the judiciary ought not to decide cases based on a utilitarian assessment of the welfare of the community as a whole. For Dworkin, calculations of general welfare are arguments of "policy," which are appropriate in the legislature but not in the courtroom. The judicial arena is the "forum of principle," where disputes are resolved according to the rights of the parties, even where this involves some sacrifice of overall social welfare. The general willingness to make such a sacrifice indicates a communal belief that individual rights are to be "taken seriously."

Dworkin's analysis is extremely controversial. His arguments have been subjected to widespread and sustained attack in the jurisprudential literature of the past decade by critics of virtually every political persuasion.[258] This literature need not trouble us here; the aim here is neither to

praise nor to debunk Dworkin's normative claims about the judicial role.[259] The claim is simply that the case studies presented in this paper lend some support to Dworkin's descriptive arguments about judging. Specifically, the doctrine in the combines and trade and commerce areas supports a belief that judges avoid relying on utilitarian assessments of general welfare in deciding cases. This should not be taken to mean that the judicial choices in these areas have been neutral or apolitical, or even that the cases can be analyzed in terms of a "rights" framework.[260] The point is simply that certain sorts of political arguments have been consistently eschewed by the Court, regardless of the particular doctrinal context.

This leads to a more general conclusion regarding institutional design and dispute resolution. Courts would appear to be a sensible and appropriate mechanism for resolving disputes in areas of social life that can be analyzed in categorical or absolute terms. On the other hand, where the relevant area of social life is susceptible only to judgments about overall social utility, courts would seem a far less appropriate mechanism. Since courts tend to analyze problems in categorical terms, their choices in these areas are more likely to be arbitrary or unwise. Significantly, both competition policy and federalism issues seem exemplary cases of problems analyzed in strictly utilitarian terms. For instance, current thinking about competition policy has abandoned the idea that a certain category of competitive conduct is "inherently wrongful." Judgments about fair and unfair competition depend almost entirely on an assessment of the impact of the activity on overall economic performance. Such judgments are largely incapable of being framed in categorical or absolute terms. Little wonder, then, that combines jurisprudence has assumed such an artificial and trumped-up form. What is required is not so much piecemeal tinkering with the details of doctrine as a reconstitution of the institution responsible for its development.

## *Notes*

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1. Macpherson, "Economic Regulation and the British North America Act: Labatt Breweries and Other Constitutional Imbroglios" (1980–81), 5 *Can. Bus. L.J.* 172 at p. 174.
2. For an accessible and clear analysis of the concept of "economic choice," see Lindblom, *Politics and Markets* (1977).
3. The analysis presented here is drawn from a number of sources, including the following: Unger, *Knowledge and Politics* (1975); Unger, *Law in Modern Society* (1976); Kennedy, "The Structure of Blackstone's Commentaries" (1979), 28 *Buffalo L. Rev.* at p. 205; Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982), *Wisconsin L. Rev.* at p. 975.
4. Kennedy, *supra*, note 3, at p. 359.
5. Mill, *On Liberty* (Spitz ed. 1975).

6. Ibid., at p. 11.
7. Ibid.
8. For a discussion, see Spitz, "Freedom and Individuality: Mill's *Liberty* in Retrospect," in *Liberty* (Friedrich ed. 1962), at p. 176; Ten, "Mill on Self-Regarding Actions" (1968), 43 *Philosophy* at p. 29.
9. See Singer, *supra*, note 3, at p. 976 (citing Abraham Lincoln).
10. Green, *Canadian Industrial Organization and Policy* (1980), at p. 194.
11. The latest effort was Bill C-29, "An Act to Amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof." The bill received first reading on April 2, 1984, but died on the order paper when the 32nd Parliament was dissolved on July 9, 1984.
12. (January 1979), *Financial Times of Canada*, quoted in Prichard et al., *Canadian Competition Policy: Essays in Law and Economics* (1979), at p. viii.
13. For examples of this type of analysis, see Cayne, "Market Power, Efficiencies and the Public Interest in Canadian Combines Law" (1970), 16 *McGill L.J.* at p. 488; and Roberts, "The Death of Competition Policy: Monopoly, Merger and Regina v. K.C. Irving Ltd." (1977), 16 *University of Western Ontario L. Rev.* at p. 215.
14. For arguments that the elimination of these vague terms would reduce confusion, see Green, *supra*, note 10, at pp. 194–95.
15. The Honourable Judy Erola, *Amendments to the Combines Investigation Act: Background Information and Explanatory Notes* (1984), at p. 4.
16. See *Report of the Royal Commission on Corporate Concentration* (1978), at pp. 11–42; the Royal Commission found that concentration in Canada was higher than in other industrial countries, even those with economies of roughly the same size.
17. Ibid., at pp. 71–77.
18. Within economic theory, an industry is said to be "competitive" when the number of firms selling a homogeneous commodity is so large that no individual firm is able to appreciably influence the price of the commodity. In this sense, the firm takes its price from the market, and price equals marginal cost. In situations of monopoly, in contrast, there is a single firm selling a differentiated product protected by high barriers to entry. The monopolist faces a downward sloping demand curve; for every additional unit of output, he must reduce the price of all units sold (assuming no price discrimination). He sets output at the point where marginal revenue equals marginal cost. In an oligopoly, there are a number of sellers, but they possess a degree of "market" or "monopoly" power since they recognize that they can increase output only by reducing price. They attempt to set output and prices at other than competitive levels. For a general introduction to these fundamentals of economic theory, see Scherer, *Industrial Market Structure and Economic Performance* (2d ed. 1980), at pp. 9–44; Landes, "An Introduction to the Economics of Antitrust," in *Antitrust: Cases, Economic Notes and Other Materials*, edited by Posner and Easterbrook (2d ed. 1981), at p. 1055.
19. Galbraith, *The New Industrial State* (1967), at p. 192.
20. See generally Lindblom, *supra*, note 2, at pp. 33–51.
21. For an elaboration of the notion of a "non-directive" formal order, see Kennedy and Michelman, "Are Property and Contract Efficient" (1980), 8 *Hofstra L. Rev.* 711 at p. 748.
22. For statements of this elementary proposition, see Hale, "Coercion and Distribution in a Supposedly Non-coercive State" (1923), 38 *Political Science Quarterly* at p. 470; Hale, *Freedom through Law: Public Control of Private Bargaining Power* (1952); Dawson, "Economic Duress: An Essay in Perspective" (1947), 45 *Michigan L. Rev.* at p. 253; Dalzell, "Duress by Economic Pressure" (1942), 20 *North Carolina L. Rev.* at pp. 237 and 341 (two parts).
23. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1893), Book IV, chap. 2, at p. 345.
24. For an analysis of such an "order," see Kennedy and Michelman, *supra*, note 21, at p. 750. See also Nozick, *Anarchy, State and Utopia* (1974), at pp. 12–14.

25. In Hohfeldian terms, there would be "privileges" but no "rights" within such a regime. "Privileges" refer to acts one can do without anyone else being able to summon state force in opposition, while "rights" are acts one can require or prevent with the assistance of the state. See Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913), 23 *Yale L.J.* at p. 16. For a discussion of the significance and implications of the right-privilege distinction, see Kennedy and Michelman, *supra*, note 21; Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982), *Wisconsin L. Rev.* at p. 975.
26. See Rawls, *A Theory of Justice* (1971), at p. 12. Rawls describes the "original position" in the following terms: "Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances."
27. Sandel, *Liberalism and the Limits of Justice* (1982), at p. 129.
28. In modern economic theory, an industry is said to be purely competitive when the number of firms selling a homogeneous commodity is so large, and each individual firm's share of the market is so small, that no individual firm can appreciably influence the price. Price is determined by market forces as opposed to the activity of individual sellers. For a general discussion, see Scherer, *supra*, note 18. For a historical survey of the economic literature, see Stigler, "Perfect Competition, Historically Contemplated" (1957), 65 *Journal of Political Economy* 1 at p. 65.
29. Scherer, *supra*, note 18, at p. 10.
30. See generally Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978), at pp. 134–60.
31. *Northern Securities v. United States*, 193 U.S. 197 (1904).
32. Ibid., at p. 320 (per Mr. Justice Harlan, announcing the opinion of the Court).
33. 26 Stat. 209 (1890).
34. *Supra*, note 31, at p. 327.
35. Mr. Justice Harlan's opinion emphasized that any "direct restraint" on interstate commerce was made illegal by the *Sherman Antitrust Act*: "*every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade and commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act." Ibid., at p. 331 (emphasis in original). Thus it is not correct to assert, as did Holmes, that Harlan held all restraints on trade per se illegal. The restraint must "extinguish" competition between rivals engaged in interstate commerce in order to fall within the scope of the act. For discussions of the Harlan opinion, see Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965); Bork, *supra*, note 30, at pp. 30–31.
36. *Supra*, note 31, at p. 411.
37. Ibid., at p. 410.
38. (1889), 23 Q.B.D. 598 (C.A.); [1892] A.C. 25 (H.L.).
39. (1889), 23 Q.B.D. 598 at p. 615 (per Bowen L.J.).
40. Ibid., at p. 626 (per Fry L.J.).
41. *Supra*, note 38, at p. 51.
42. For a more general discussion of rights theory, see Hutchinson and Monahan, "The Rights Stuff: Roberto Unger and Beyond" (1984), 62 *Texas L. Rev.* 1477.
43. 11 East 575, 103 Eng. Rep. (1707) at p. 1127.
44. Ibid., at p. 1128.
45. Ibid.

46. A similar form of argument played a central role in the analytic jurisprudence of Bentham, Austin and John Stuart Mill. See, in particular, Mill, *supra*, note 5. For another judicial invocation of a similar argument, see *Attorney-General of the Commonwealth of Australia v. The Adelaide Steamship Company Limited* [1913] A.C. 781 at p. 793 (per Lord Parker of Waddington). Even Oliver Wendell Holmes, a jurist sensitive to the doctrine of *damnum absque injuria*, assumed that "the intentional infliction of temporal damage . . . is actionable if done without just cause." See Holmes, "Privilege, Malice and Intent" (1894), 8 *Harv. L. Rev.* 1 at p. 3. Although Holmes emphasized that in many cases the infliction of harm was privileged, his initial assumption was that the defendant had to produce some legitimate excuse if he were to escape liability.
47. The argument in the text is simply a restatement of the analysis of Hohfeld, whose work survives "like a sack of dried beans, unesteemed by those who have lost the recipe for its use." (Kennedy and Michelman, *supra*, note 21, at p. 751.) See Hohfeld, *supra*, note 25, at p. 16.
48. Hohfeld defined a "privilege" in the manner indicated above, and a "right" as a claim, enforceable by state power, to prevent or require the performance of an act by another. Hohfeld illustrates the absence of any necessary bond between privileges and rights through the following example (*supra*, note 25, at p. 35): "A,B,C and D, being the owners of the salad, might say to X: 'Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you.' In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated."
49. 221 U.S. 1, 31 S. Ct. (1911) at p. 502.
50. Ibid., at p. 76.
51. Holmes, *supra*, note 46, at p. 3. See also *Vegelahn v. Gunter* 167 Mass. (1896) at p. 92 (per Holmes J. dissenting).
52. *Supra*, note 38.
53. [1892] A.C. 25 at pp. 36–37 (per Halsbury L.C.).
54. [1894] A.C. 535.
55. Ibid., at p. 574 (per Lord Macnaghten).
56. [1893] 1 Ch. 630 at p. 668 (per Bowen L.J.). For a similar argument, see *Adelaide Steamship Co.*, *supra*, note 46, at p. 796 (per Lord Parker).
57. We can gain further insight into this aspect of the problem by recalling the Holmes judgment in the *Northern Securities* case. Holmes pointed out that securing a monopoly could not be actionable per se since we allow many monopolies to operate in the economy (*supra*, note 31, at pp. 406–407): "A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed, every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the states."
58. For a discussion, see Lindblom, *supra*, note 2, at pp. 149–52.
59. See, for example, Scherer, *supra*, note 18 at p. 11.
60. This example is taken from Galbraith, *supra*, note 19, at p. 195.
61. See *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, S.C. 1889, c. 41. The preamble to this act stated that it was declaratory of the common law, but s. 1 of the act made it an offence to "unlawfully" limit competition "unduly." The double negative made the act difficult to enforce. The term "unlawfully" was dropped from the act in 1900, apparently by accident; see M. Bliss, *A Living Profit* (1974), at pp. 33–54.
62. See the *Combines Investigation Act*, S.C. 1910, c. 9.
63. Ibid., s. 2(c).
64. Ibid., s. 5.

65. S. 498 was originally s. 1 of the act of 1889, which in turn was incorporated into the Criminal Code in 1892 in the following terms:

> 520. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years imprisonment, and if a corporation is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully
> (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or
> (b) to restrain or injure trade or commerce in relation to any such article or commodity; or
> (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or
> (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

After deletion of the term "unlawfully" in 1900, s. 520 became s. 498 in 1906.

66. *Sherman Antitrust Act*, s. 1.
67. See *supra*, notes 30–38 and accompanying text.
68. *Debates of the House of Commons*, 1909–1910, pp. 6802–6861.
69. According to King's figures, prices had increased an average of 40 percent in the period 1896–1909. See ibid., at p. 6805 (citing statistics gathered by the Department of Labour).
70. Ibid., at p. 6814.
71. Ibid., at p. 6858.
72. Ibid., at p. 6831.
73. Ibid., at p. 6837.
74. Weldon, "Consolidations in Canadian Industry, 1900–48," in *Restrictive Trade Practices in Canada* (Skeoch ed. 1966), at p. 228.
75. Ibid., at p. 233.
76. Smith, *supra*, note 23, at p. 343.
77. Ibid., at p. 345.
78. [1912] 46 S.C.R. 1.
79. Ibid., at p. 23.
80. Ibid., at p. 21. Idington noted at p. 20 that "contracts of hiring, of leasing, of partnership and incorporation, may in some ways involve an actual, and within some of said cases, unreasonable lessening of competition."
81. *Supra*, note 38.
82. *Supra*, note 78, p. 22.
83. Ibid., at p. 32.
84. Ibid., at p. 27.
85. Ibid., at p. 32.
86. Ibid., at p. 34.
87. See *supra*, note 56.
88. *Supra*, note 78, at p. 37.
89. Ibid., at p. 36.
90. The judgments of Sir Charles Fitzpatrick C.J.C. and Anglin J. adopt a line of argument similar to that advanced by Mr. Justice Duff.
91. See, for example, Cayne, *supra*, note 13, at p. 488.

92. See Scherer, *supra*, note 18, at pp. 409–413.
93. See *Report of the Royal Commission on Corporate Concentration* (1978), at p. 73.
94. *Supra*, note 19, at p. 197.
95. This is the U.S. position. See *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. (1940) at p. 150: "the thrust of the rule reaches more than monopoly power. Any combination which tampers with price structures is engaged in unlawful activity."
96. [1942] S.C.R. 147.
97. See the findings of the trial judge, reported at [1940] 4 D.L.R. 293, confirmed on appeal.
98. *Supra*, note 96, at p. 150.
99. Ibid., at p. 156.
100. Ibid., at p. 157.
101. In *Howard Smith Paper Mills Ltd. v. R. (Fine Papers)*, [1957] S.C.R. 403, Cartwright J. simply noted the finding in the lower courts that the "purpose and effect" of the agreement had been to eliminate competition. For a discussion of the confusion surrounding the element of intention in the cases of this period, see Gosse, *The Law on Competition in Canada* (1962), at pp. 101–104.
102. *Stinson-Reeb Builders' Supply v. The King*, [1929] S.C.R. 276; *Container Materials*, *supra*, note 96; *Howard Smith*, *supra*, note 101.
103. For instance, in *Stinson-Reeb*, *supra*, note 102, the Court stated at p. 280: "That a monopoly of the trade in Montreal in Gypsum products was secured by the plasterers' association does not appear to be open to doubt." In *Container Materials*, *supra*, note 96, Duff C.J.C. stated (at p. 152) that: "The majority of the Court of Appeal rightly held, I think, that the aim of the parties to this agreement was to secure effective control of the market in Canada; it may be added that in this they were very largely successful."
104. *Howard Smith*, *supra*, note 101, at p. 426.
105. (1960), 126 C.C.C. 133 (Ont. H.C.); 33 C.R. 1.
106. *Combines Investigation Act*, R.S.C. 1952, c. 314, s. 2(a)(vi) (repealed by S.C. 1960, c. 45).
107. 33 C.R. 1 at p. 27.
108. (1960), 131 C.C.C. 201.
109. (1905), 9 O.L.R. 656.
110. Ibid., at p. 662.
111. Ibid.
112. See, for example *R. v. Northern Electric*, [1955] 3 D.L.R. 449; *R. v. Electrical Contractors Association of Ontario*, [1961] O.R. 265; *R. v. Beamish*, [1968] 2 C.C.C. 5 (per Laskin J.A.).
113. This section will focus on *Aetna Insurance Co. v. The Queen*, [1978] 1 S.C.R. 731; *Atlantic Sugar Refineries Co. Ltd. et al. v. Attorney General of Canada*, [1980] 2 S.C.R. 644; *R. v. K.C. Irving Ltd.*, [1978] 1 S.C.R. 408. A fourth case, *Attorney General of Canada et al. v. The Law Society of B.C.*; *Donald Jabour v. The Law Society of B.C.*, [1982] 2 S.C.R. 307, will not be discussed.
114. For instances of this line of argument, see Robert, *supra*, note 13, at p. 215; Stanbury and Reschenthaler, "Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases" (1977), 15 *Osgoode Hall L.J.* at p. 617; Cairns, "Monopoly, Detriment to the Public and the K.C. Irving Case" (1980–81), 30 *U.N.B.L.J.* at p. 167.
115. See, *supra*, note 11.
116. The charges were brought under s. 32(1)(c) of the *Combines Investigation Act*, alleging that the Aetna Insurance Company and 72 other companies had agreed "to prevent or lessen unduly competition in the price of fire insurance upon property in the province of Nova Scotia."
117. (1975), 19 C.C.C. (2d) 449.
118. Ibid., at p. 506.

119. (1976), 22 C.C.C. (2d) 513.
120. See, *supra*, note 117, at pp. 471–72.
121. [1978] 1 S.C.R. 731 at p. 751.
122. Ibid.
123. [1980] 2 S.C.R. 644 at p. 659. The cited passage was actually from the trial judgment in *Aetna*, although it had been expressly approved by Ritchie J. in the Supreme Court.
124. Ibid., at p. 660.
125. See, for instance, Cairns, "Aetna Insurance, Eastern Sugar and 'Unduly' in the Combines Investigation Act: Still More Confusion" (1980–81), 5 *Can. Bus. L.J.* 231 at p. 233.
126. *Supra*, note 117, at p. 506.
127. The anomaly is that Hart J. had concluded earlier in his judgment that it was not necessary for the Crown to demonstrate the existence of a monopoly, while here, he seems to require an intention on the part of the accused to create a virtual monopoly. See ibid., at pp. 504–506.
128. This has been one of the central arguments in the jurisprudence of Ronald Dworkin, who has argued that consequentialist assessments of the good of the community as a whole are inappropriate for judges. See Dworkin, *Taking Rights Seriously* (1977), at pp. 80–82.
129. See the analysis of the trade and commerce power, *infra*, in the third section of this paper.
130. S. 23(2) of Bill C-29, *supra*, note 11, proposed to deal with this problem by amending s. 32. The amendment would have required that the parties intended to enter into the conspiracy, but not that they intended the conspiracy to have an effect listed in s. 32. The amendment is not free of ambiguity. The language in the cases has referred to the "object of the conspiracy" as being important. The proposed amendment does not make it clear whether a consideration of the "object" is now irrelevant, the only issue being the "effects." Moreover, if the "effects" were undesired or unintended, the amendment does not prevent this being raised as a defence to a charge under s. 32.
131. *Supra*, note 117, at p. 504.
132. See discussion *supra*, notes 112 and 113 and accompanying text.
133. This had been the approach taken in the Court of Appeal, which had set aside the acquittal.
134. *Supra*, note 121, at p. 750.
135. Mitchell, "Natural Price Fixing and Anti-Combines Law: Atlantic Sugar Refineries Co. v. The Attorney General of Canada" (1981), 19 *University of Western Ontario L.R.* 303 at p. 305.
136. Galbraith, *supra*, note 19, at p. 194.
137. See s. 32(1.1), enacted by S.C. 1974–75, c. 76, s. 14(s). This section did not apply in *Atlantic Sugar*, since the charges arose prior to the amendment.
138. See discussion *supra*, at note 130.
139. S. 32(1) of the *Combines Investigation Act*, R.S.C. 1952, c. 314, made it an offence to be a party to the formation or operation of a combine. A "combine" was defined in s. 2(a) to mean, inter alia, a merger, trust or monopoly that has operated or is likely to operate to the detriment or against the interests of the public. The terms "merger, trust or monopoly" were not distinguished from one another.
140. S. 33 of the post-1960 act made it an offence to be a party to a merger or monopoly. "Merger" and "monopoly" were separately defined in s. 2 as follows:

> "merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or other person, whereby competition
>
> (a) in a trade or industry,
> (b) among the sources of supply of a trade or industry,

(c) among the outlets for sales of a trade or industry, or
(d) otherwise than in paragraphs (a), (b) and (c),

is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers, or others; . . .
"monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public, whether consumers, producers or others, but a situation shall not be deemed a monopoly within the meaning of this definition by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act, or any other Act of the Parliament of Canada; . . .

It can be seen that the key difference is that the merger provision required that "competition" be lessened to the detriment of the public, while the monopoly provision required that the business "be operated" to the detriment of the public. The apparent aim of the amendment was to make it easier to secure a conviction for an unlawful merger. See Skeoch, "Merger Issues in Canada" (1971), 16 *Antitrust Bulletin* at p. 133.

141. (1974), 7 N.B.R. (2d) 360.
142. (1975), 11 N.B.R. (2d) 181.
143. [1978] 1 S.C.R. 408 at p. 426.
144. (1960), 126 C.C.C. 133; [1960] O.R. 601 (H.C.J.).
145. Two earlier merger cases, *R. v. Canadian Import Co.* (1933), 61 C.C.C. 114 (Que. K.) and *R. v. Staples* (1940), 74 C.C.C. 178 (B.C.S.C.), had been decided on other grounds.
146. Per Duff J. in *Weidman v. Shragge*, *supra*, note 78, at p. 36.
147. [1960], 126 C.C.C. 133 at p. 158.
148. *Supra*, note 143, at p. 415. Although he technically left the point open, the Chief Justice said he would have found it incongruous if a prohibited merger or monopoly did not include newspapers in respect of their editorial direction.
149. Black J. in *Associated Press v. U.S.* 326 U.S. 1 (1944) at p. 20.
150. See, for example, Robert, *supra*, note 13, at p. 488; Cairns, *supra*, note 114.
151. Per Justice Learned Hand in *U.S. v. Associated Press* 52 F. Supp. 362 (1943) (Circuit Court) at p. 372.
152. *The Uncertain Mirror: Report of the Special Senate Committee on Mass Media*, vol. I (1970), at p. 87.
153. Ibid.
154. Bork, *supra*, note 30, at p. 53 (describing U.S. jurisprudence).
155. This was the clear intention of Bill C-29, which declared the *Combines Investigation Act* to be "an Act to provide for the *general regulation* of trade and commerce in respect of combines, mergers and trade practices affecting competition." This bill would have repealed the present criminal law sections dealing with mergers and monopolies and replaced them with civil law provisions. These matters would have continued to fall under the jurisdiction of the regular court system. Moreover, certain provisions currently adjudicated by the Restrictive Trade Practices Commission, such as refusal to deal and tied selling, would have been transferred to the regular courts.
156. *Baker v. Carr* 369 U.S. 186 (1962) at p. 289 (Frankfurter J., dissenting, charging that there were no accepted legal standards to guide the U.S. Supreme Court's foray into legislative reapportionment).
157. The most notable contributions include: Economic Council of Canada, *Interim Report on Competition Policy* (1969); Skeoch and McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (1976); Prichard et al., *supra*, note 12.
158. Economic Council, *supra*, note 157, at p. 9.
159. This is commonly referred to as "allocative efficiency." For a discussion, see

Kornhauser, "A Guide to the Perplexed Claims of Efficiency in the Law" (1980), 8 *Hofstra L. Rev.* 591 at pp. 592–95.

160. This is commonly known as "productive" or "technical efficiency." Ibid.
161. Moore, *How Much Price Competition?* (1970), at p. 127.
162. Skeoch and McDonald, *supra*, note 157, at pp. 47–126.
163. Ibid., at p. 89. This final stage of the analysis is directed at such changes as reductions in tariffs or the divestiture of part of the merged firm.
164. The authors argued that effective policy in this area "depends critically upon the existence of a decision-making authority capable of dealing perceptively and impartially on a case-by-case basis with the complex issues of fact and remedy that will frequently require analysis and prescription." They argued that a proposed "National Markets Board" should have jurisdiction over such central matters as mergers, abuses of dominant position, and price discrimination. Ibid., at pp. 279–315.
165. See *supra*, note 11, s. 22.
166. See, for example, Economic Council, *supra*, note 157; Bork, *supra*, note 30.
167. Bork, *supra*, note 30, at p. 117.
168. For a general discussion of the desirability of a per se rule against price-fixing agreements, see Scherer, *supra*, note 18, pp. 509–513.
169. For general discussions of this issue, see Trebilcock et al., *Federalism and the Canadian Economic Union* (1983); Safarian, *Ten Markets or One? Regional Barriers to Economic Activity in Canada* (1980).
170. Chrétien, *Securing the Canadian Economic Union in the Constitution* (1980).
171. See Prichard, "Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade," in Trebilcock et al., *supra*, note 169, at pp. 8–12.
172. This section will focus in particular on the following: *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *Labatt Breweries of Canada Ltd. v. A.-G. Canada*, [1980] 1 S.C.R. 914; *CN Transportation Ltd. and CN Railway v. A.-G. Canada* (1983), 49 N.R. 241; *R. v. Wetmore et al.* (1983), 49 N.R. 286.
173. Lederman, "Classification of Laws and the BNA Act," in *Continuing Constitutional Dilemmas* (1981), at p. 241.
174. See Prichard, *supra*, note 171; Simeon, "Criteria for Choice in Federal Systems" (1983), 8 *Queen's L.J.* at p. 131.
175. See Simeon, *supra*, note 174.
176. Black, *Divided Loyalties: Canadian Concepts of Federalism* (1975), at p. 16. The argument that follows is derived from Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 *U.T.L.J.* at p. 47.
177. It has been argued that this sentiment has been the underpinning for recent federal initiatives in the fields of energy and intergovernmental fiscal relations. See Doern, "Spending Priorities: The Liberal View," in *How Ottawa Spends Your Tax Dollars: Federal Priorities 1981*, edited by Doern (1981), at pp. 1 and 9; Whitaker, "Democracy and the Canadian Constitution," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Banting and Simeon (1983), at p. 240.
178. Banting and Simeon, "Federalism, Democracy and the Constitution," in *And No One Cheered*, *supra*, note 177, at p. 15.
179. For an analysis along similar lines, see Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (1979), at pp. 50–78.
180. See Simeon, "Intergovernmental Relations and the Challenges to Canadian Federalism" (1980), 23 *Can. Pub. Admin.* 14 at p. 27. The same contrast between "national" and "provincial" conceptions of the Canadian community is drawn by Cairns in "The Government and Societies of Canadian Federalism" (1977), 10 *Can. J. of Pol. Sci.* 695 at p. 722: "The national and provincial perspectives, although they frequently encompass the same interests, inevitably take into account a different set and range of considerations. A coast-to-coast perspective based on the federal authority granted by the BNA Act, and especially sensitive to the existing relations between the federal government and Canadian society produced by past and con-

tinuing federal policies, confronts the provincial perspective, restricted in geographic coverage, based on a different assignment of constitutional authority, and responsive to the current relationships between the provincial government and provincial society."

181. See Cook, *Provincial Autonomy, Minority Rights and the Compact Theory 1867–1921* (1969).

182. In this instance, "property" is defined in Blackstonian terms as an absolute right over a thing. For a discussion of the decline of Blackstone's physicalist and absolutist conception of property in private law, see Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980), 29 *Buff. L.R.* 325.

183. Simeon, *supra*, note 174. The contrast between these competing conceptions of community can be sharpened through an examination of the acrimony surrounding the recent process of constitutional amendment. As is well known, prior to the constitutional agreement of November 1981, the various levels of government were aligned into two competing camps. The federal government, Ontario and New Brunswick advanced or supported proposals that reflected a pan-Canadian vision of community. A universal charter of rights, an amendment procedure that included resort to popular referenda, and the very assertion of unilateralism all embodied this nationalist ideal. The remaining eight provinces, the so-called "gang of eight," subscribed to a constitutional accord that was essentially a province-protecting amending formula. In the words of Cairns, "The provincial constitutional Accord . . . inevitably reflected a provincialist vision of Canada." The agreement of November 1981 did not transcend or reconcile these competing visions; it simply "entrenches them in the constitution and provides new arenas in which the battles of the future will be fought" (Cairns, "The Politics of Constitutional Conservatism," in *And No One Cheered*, *supra*, note 177, at pp. 40 and 43).

184. Mill, *Utilitarianism, Liberty and Representative Government* (1910), at p. 361.

185. The classic exposition of this view is found in Acton, "Nationality," in *Essays on Freedom and Power*, edited by Acton (1957). A contemporary Canadian exponent of this view is Trudeau, *Federalism and the French Canadians* (1968). For a general discussion, see Smiley, *Canada in Question: Federalism in the Eighties* (1980), at pp. 284–303.

186. I have developed this argument in more detail elsewhere. See *supra*, note 176.

187. The classical viewpoint was succintly expressed by Mundell in "Tests for the Validity of Legislation under the BNA Act" (1954) 32 *Can. Bar Rev.* 813 at p. 840: "If the analysis I have suggested of the nature of 'matters' is accepted, it appears that the political views of the judges called upon to decide a question of *ultra vires* or their views on the wisdom or stupidity of any piece of legislation that comes before them, are quite irrelevant. As regards the objective aspect of a 'matter', the question is simply one of fact. Do the relations between individuals dealt with by the legislation fall within the field described by the 'matter'? Again, the motive that impelled Parliament is also to be ascertained as a fact. Did the motive that impelled Parliament to enact legislation arise from or is it connected with the thing, activity or concept described in the matter? On these two tests, the social scheme or views in accordance with which Parliament has enacted the legislation are not relevant."

188. None of the critics ever advanced arguments in the precise form stated in the text. Rather, the discussion that follows represents a distillation of the various arguments made in the literature. Among the sources relied on are Macdonald, "Judicial Interpretation of the Canadian Constitution" (1935–36), 1 *U.T.L.J.* 260; Laskin, "Peace, Order and Good Government Re-examined" (1947), 25 *Can. Bar Rev.* 1054; Scott, "Centralization and Decentralization in Canadian Federalism" (1951), 29 *Can. Bar Rev.* 1095; Tuck, "Canada and the Judicial Committee of the Privy Council" (1941–42), 4 *U.T.L.J.* 33.

189. Cairns, "The Judicial Committee and its Critics" (1971), 4 *Can. J. Pol. Science* 301 at p. 327.

190. The argument is that the jurisdiction for a given policy should coincide with the set of

people affected by it. It is difficult to internalize the actions of government within a province. Because of "spillovers," responsibility should be centralized. See Simeon, *supra*, note 174; Prichard, *supra*, note 171.

191. Simeon, *supra*, note 180 at p. 20. For variations on this theme, see Cairns, *supra*, note 180; Stevenson, *supra*, note 179.
192. See *Macdonald v. Vapour Canada*, [1977] 2 S.C.R. 134; *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.
193. The most obvious instance is the "aspect" doctrine, which, if taken to its logical extreme, would support concurrent federal and provincial jurisdiction in all areas of social life. This argument is developed in Monahan, *supra*, note 176.
194. [1936] S.C.R. 398.
195. Ibid., at p. 410. The *Parsons* case remains the seminal statement of principle in the trade and commerce area. See *Citizens' Insurance Company v. Parsons* (1881–82) 7 A.C. 96 at pp. 112–13.
196. *Supra*, note 194.
197. See the *Board of Commerce* case, 60 S.C.R. 456 (1920). The *Parsons* case is said to have established two branches to the federal trade and commerce power: the first, authority over interprovincial and export trade, the second, authority over "general regulation of trade affecting the whole dominion." The first branch established a categorical test, the second, a balancing test.
198. *Hodge v. The Queen* 9 App. Cas. (1883–4) 117 at p. 130.
199. Laskin, *supra*, note 188.
200. Per Lord Haldane in the *Insurance Reference*, [1916] 1 A.C. 588 at p. 596.
201. See sources cited, *supra*, note 188.
202. [1957] S.C.R. 198.
203. *Carnation Company Limited v. The Quebec Agricultural Marketing Board*, [1968] S.C.R. 238.
204. Ibid., at p. 254.
205. For another illustration, see *Caloil Inc. v. A.-G. Canada*, [1971] S.C.R. 543.
206. [1977] 2 S.C.R. 134.
207. R.S.C. 1970, c. T-10. The section at issue was s. 7(e), which created a civil right of action for those injured by unfair competition.
208. *Supra*, note 206, at p. 165. In the *Anti-Inflation Reference*, [1976] 2 S.C.R. 373, Laskin C.J.C. indicated that he might have been willing to uphold the act under the trade and commerce power. However, the majority of the court made no reference to trade and commerce, and the argument does not appear to have been pressed by federal counsel. See Hogg, *Constitutional Law of Canada* (1977), at p. 275.
209. [1978] 2 S.C.R. 1198.
210. *A.-G. Man. v. Man. Egg and Poultry Assn.*, [1971] S.C.R. 689.
211. Corry, *Difficulties of Divided Jurisdiction*, study for the Rowell-Sirois Royal Commission on Dominion-Provincial Relations (1939), cited by Laskin C.J.C. at [1978] 2 S.C.R. 1263.
212. *Supra*, note 209, at p. 1296.
213. 156 U.S. 1 (1895).
214. *Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), at p. 233.
215. Ibid., at p. 229.
216. *Central Canada Potash Co. Limited v. The Government of Saskatchewan*, [1979] 1 S.C.R. 42. The discussion that follows has benefited greatly from a series of conversations with Peter Hogg.
217. Ibid., at p. 75.
218. *Supra*, note 209, at p. 1217.
219. [1980] 1 S.C.R. 914.

220. R.S.C. 1970, c. F-27.
221. [1925] S.C.R. 434.
222. *Supra*, note 219, at p. 937.
223. Ibid., at p. 940.
224. *John Deere Plow Co. v. Wharton* [1915] A.C. 330.
225. *Supra*, note 219, at pp. 939 and 943.
226. See McQueen, "Commentary" (1980–81), 5 *Can. Bus. L.J.* 225 at p. 227.
227. See ibid., at p. 227.
228. For a discussion of the historical evolution of the industry in Ontario, see the judgment of Chief Justice McRuer in *R. v. Canadian Breweries*, [1960] O.R. 601 (H.C.J.).
229. [1980] 1 S.C.R. 844.
230. *Canada Agricultural Products Standards Act*, R.S.C. 1970, c. A-8, Part I.
231. It was assumed for the purposes of the appeal that the prosecution related to a wholly intraprovincial transaction.
232. *Attorney-General for Ontario v. Attorney-General for Canada* (1937), A.C. 406.
233. "There could hardly be a more appropriate form of the exercise of [the trade and commerce] power than the creation and regulation of a uniform law of trade marks" (ibid., at p. 417). There was at the time a well-established national code for trade marks, the *Trade Marks and Design Act*, R.S.C. 1927, c. 201.
234. (1978), 79 D.L.R. (3d) at p. 627.
235. Ibid., at p. 630.
236. Ibid., at p. 632.
237. R.S.O. 1970, c. 161.
238. *Supra*, note 228, at p. 859.
239. Estey J. cited the familiar litany of cases such as *A.-G. B.C. v. A.-G. Can.*, [1937] A.C. 377; *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198.
240. Professor Macpherson criticizes the judgment on these grounds. In his view, "the provincial law was a red herring which should not have influenced the characterization of the federal law." See "Developments in Constitutional Law: The 1979–80 Term" (1981), 2 *Supreme Court L. Rev.* at pp. 60–61. The difficulty with this objection is that it is not clear that the provincial law was a red herring; this would depend on the legislative history of the enactments.
241. 49 N.R. (1983) 241 (S.C.C.).
242. 49 N.R. (1983) 286 (S.C.C.). For a discussion of the cases and their implications for competition policy, see Finkelstein "Comment" (1984), 62 *Can. Bar Rev.* at p. 182.
243. For a discussion of the implications of the primary holding in the cases, see Petter, "Comment" (1985), 63 *Can. Bar Rev.* 162.
244. *Supra*, note 242, at p. 289.
245. Ibid., at p. 292.
246. *Supra*, note 241, at p. 273.
247. Ibid., at pp. 276–77.
248. Included in such criteria are the presence of a regulatory scheme, the fact that the provinces would be incapable of passing the enactment, and evidence that failure to include one or more provinces would jeopardize successful operation in other parts of the country. Ibid., at p. 277.
249. Ibid., at p. 276 (citing Estey J. from *Labatt*).
250. Ibid., at p. 292.
251. See Macpherson, *supra*, note 1, at p. 172.
252. See Russell, "The Effect of Judicial Decisions on Federal-Provincial Relations" (paper presented at the annual meeting of the Canadian Law Teachers, May 1984).
253. *A.-G. Man. et al. v. A.-G. Canada et al.*, [1981] 1 S.C.R. 753.

254. For a discussion see, *supra*, note 252, at p. 10.
255. For a sensitive and important discussion of these themes, see Gordon, "Critical Legal Histories" (1984), 36 *Stanford L. Rev.* at p. 57.
256. Russell, *supra*, note 252.
257. See, for example, Dworkin, *Taking Rights Seriously* (1977).
258. For a recent collection of writing on the subject, see *Ronald Dworkin and Contemporary Jurisprudence* (Cohen ed. 1983).
259. For a critical analysis of Dworkin's normative claims, see Monahan, "Mistaking Moral Growth: The Constitutional Mythology of Michael Perry" (1984), 9 *Queen's L.J.* at p. 293; Hutchinson and Monahan, *supra*, note 42.
260. See Hutchinson and Monahan, *supra*, note 42.

3

# The Supreme Court of Canada: *Final Arbiter of Political Disputes*

GUY TREMBLAY

## Introduction

In a sense, all the decisions handed down by the Supreme Court of Canada have a political effect because the law is a privileged instrument in the exercise of power in Canadian society. However, the research program of the Royal Commission on the Economic Union and Development Prospects for Canada is designed to distinguish among economic, social and political conflicts. This paper will therefore concentrate on the political aspect in a limited sense and on decisions that directly affect governmental and legislative institutions.

While many of the relevant cases are concerned with constitutional law, the subject matter and decisions examined in this paper have not been selected according to traditional legal categories. Instead the study considers all cases that help to reveal the Supreme Court's conception of the Canadian political entity, along with the values the Court has conveyed in this regard.

Certain factors inherent in the judicial process render the thinking of the Supreme Court fragmented in comparison with general political thought. First of all, the Court does not have the opportunity to express its opinion on all types of political conflict, but only on those that come before it through appeals in a legal proceeding or through questions submitted in a reference. Thus there are legal realities that play a decisive role in the Canadian political dynamic without being part of the case law: for example, the federal spending power in areas of provincial jurisdiction. Second, when it does intervene, the Court usually expresses its opinion only to the extent necessary to deal with the legal dispute or to answer the question asked. Third, even if judicial subtleties and

ingenuity make the distinction between ratio decidendi and obiter dictum a fluid one, common law tradition allows only the nub of the decision to be taken as the Court's firm opinion; in the case of the Supreme Court, the significance of the decision is also limited when the majority of the judges come to the same conclusion for different reasons. Finally, the Court often settles political conflicts without discussing the values involved, confining itself to legalistic considerations.

The Supreme Court's contribution to Canadian political life is thus the result of a series of piecemeal interventions which are individually clear but, when examined in their entirety, can be interpreted differently. Therefore, anyone attempting to characterize the Court's work adds a personal perception to the legal reality. The degree of subjectivity increases if one tries to relate the Court's performance to social and political factors that could confer on it an even broader significance.

Any researcher would be restricted by these major limitations. The scope of this study is also conditioned by the definition of the issues to be addressed and by the methodology chosen. I shall explain these as clearly as possible.

I have searched for basic trends in the political work of the Supreme Court since 1945, attempting to look beyond minority opinions and other fluctuations to emphasize the crucial directions of the period as a whole. In order to illustrate the trends emphasized in this study, I have had to deal with several cases concerning some very special areas of the law. However, the purpose is not to give a general account of the state of the law, since innumerable publications have already done so.

From a methodological point of view, I have gone to primary sources and examined all the decisions handed down by the Supreme Court from 1945 to the summer of 1984. The treatment afforded these decisions varies only to the extent that a distinction is drawn between cases occurring before or after 1981. The reason for this is explained below.

Because the definition of the issues to be addressed does not include describing the state of the law, it was necessary to find a way of placing the judicial reality in perspective. In addition, taking the sociopolitical context into account was advisable, but it goes far beyond simple examination of the decisions. Hence the following commentaries have been organized according to a particular pattern. For each trend identified, I first explain my reasons on the basis of Supreme Court opinions handed down in disputes of a political nature from 1945 to 1980. Then, in each case, I make a more personal "evaluation," which takes into account the decisions handed down since 1981, and attempts to broaden the focus to include extra-legal findings, an appraisal of the Supreme Court's political role, and even the role of the law in the solution of political conflicts.

This approach permits us to see the basic trends in a perspective that does not distort the older cases while making it possible to detect changes of course in recent case law. In this way the study can be given a

certain homogeneity; for with the patriation of the Constitution and the proclamation of the Canadian Charter of Rights and Freedoms, the "political" role of the Supreme Court is exercised in such a new context and has been so radically transformed that it may be said that 1981 was a turning point.

In 1945, the point at which this study begins, the Supreme Court was handing down the last decisions that could be appealed to the Privy Council. In 1949 it became Canada's highest court for cases initiated from that date on. In my opinion, it has followed three strong trends in its decisions with political import: it has demonstrated continuity in the basic conception of the Canadian form of government; it has maintained an equilibrium between federal and provincial powers; and it has tried to promote federal-provincial cooperation.

## Continuity in the Basic Conception of the Canadian Form of Government

The Privy Council's conception of Canada's political structure and its interpretation of the *British North America Act, 1867* provoked a famous controversy.[1] The imperial court was especially criticized for changing the nature of the political system created by the Fathers of Confederation, which involved a type of federalism where the central government had a predominant role and status. The Privy Council was said to be extremely preoccupied with provincial autonomy and willing to extend the powers of the provinces while reducing those of the federal government, especially its general power to legislate for "the peace, order and good government of Canada."

However, during the period under review and even after it became the final arbiter of political disputes in Canada, the Supreme Court did not question the basic principles the Privy Council had set forth. The Court repeated that provincial legislative powers are of the same nature as those of the Parliament in London,[2] that the federal government and the provinces are sovereign in their respective domains, and that the purpose of the 1867 act was not to melt the provinces into one unit nor to subordinate them to the central government.[3] On a more concrete level, the vast majority of political disputes submitted to the Supreme Court since 1945 have continued to be the result of the federal nature of the Canadian form of government. This basic characteristic has been perpetuated each time the Court has preserved certain areas of exclusivity for the benefit of the provinces. In particular, just as the Privy Council had done, it tried to control the application of the federal government's power to legislate for the peace, order and good government of Canada.[4] Thus in the *Margarine* case, the Court rejected the argument based on the general power of the federal government. Most of the majority judges expressed the view that if this power were not limited to exceptional

cases or to cases of truly national significance, then areas of provincial competence could be invaded at will.[5] The *Reference re the Anti-Inflation Act* is even more determinative in this regard. In a majority decision, the Court found that the *Anti-Inflation Act* was constitutional on the basis of the general power of the federal government to enact a law at a time of crisis. But a majority of the Court (the other four judges made no comment on this matter) also agreed with Mr. Justice Beetz when he said that the "national dimension or national interest" aspect and the "emergency" aspect of the general power of the federal government are in fact distinct powers, because the first is permanent whereas the other is not. The Court rejected as excessive the idea of giving the federal government the permanent and exclusive right to deal with "inflation" which is an aggregate of matters that the Constitution divides between the federal government and the provinces:

> It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly.[6]

Of course, federalism is a broad political reality which accommodates sometimes radically divergent conceptions. Both centralizing and provincialist trends are found in the Privy Council and the Supreme Court during various periods of Canadian history.[7] It would be illusory to imagine that these trends will disappear from the case law since the constant tension between them has always been a part of the Canadian way of life.

The Supreme Court has, however, never repudiated the classical form of federalism inherited from the Privy Council, nor has it ever promoted the centralizing model of federalism the critics of the imperial court expected it would.[8] Of course, to be valid, this general observation must be reflected in the crucial decisions dealing with the distribution of powers between the two levels of government. This aspect of the matter will be analyzed in the second part of this paper. In any case, as far as principles are concerned, if the Court has been more generous toward the federal power, it was not because of a changed perception of the internal workings of federalism, but rather because of its conception of what Canadian sovereignty requires at the international level.

For all practical purposes, Canada became a sovereign state at the time of the Balfour Declaration in 1926. This political reality, partially sanctioned by the Statute of Westminster in 1931, was clearly recognized by the Supreme Court,[9] which had to determine its legal implications in sometimes unprecedented situations.

In this area, the Supreme Court seemed to want to go beyond the Canadian federal structure and to give the government in Ottawa an international legal capacity, to make it the sole actor with respect to the

rights and obligations arising under international law. This is the basic tenor of the unanimous decision that held that Ottawa ("Canada"), not British Columbia, owns the natural resources of the territorial sea and continental shelf off the coast of British Columbia and has exclusive power to legislate in this regard.[10] Clearly, this decision is based on the fact that the area in dispute is located outside of British Columbia. Pursuant to the Statute of Westminster only the federal government acquired the right to enact extra-territorial legislation, a characteristic of the sovereign state. However, in allowing Canada and not British Columbia to benefit from the territorial extension and right of ownership, the Court rejected a plausible application of the well-known *Labour Conventions* case,[11] which holds that the Canadian ship of state maintains its federal structure when it navigates in international waters, and instead recognized the existence of a "senior" government in Canada whose characteristics transcend strictly federal responsibilities. Moreover, the Court reiterated that legislation must be passed to give effect to an international treaty in domestic law, and it has indicated on various occasions, though in obiter dicta, that it would be ready to reconsider the rule in the *Labour Conventions* case by virtue of which the power to legislate in this regard is shared between the federal government and the provinces according to the subject matters covered by the treaty.[12]

It is in the relation between the levels of government in a strictly domestic sense that the Court has perpetuated the values of unity and diversity that federalism combines and that underlie the model of political organization established in 1867, even if these values do not play a large role in the explicit reasoning of the Court. On the other hand, legislative uniformity in Canada, as an independent value, plays almost no role in the political philosophy of the Court;[13] in any event, the federal government is not obliged to legislate equally for all of Canada.

In fact, the Supreme Court has contributed in a variety of ways to reinforcing the principle of federalism in Canada insofar as this principle implies that certain rules of the game apply to the two levels of government. The Court has applied the test of constitutionality to ancillary measures purporting to give effect to unconstitutional legislation.[14] By virtue of their right to see the Constitution complied with, the Court has used its discretionary power liberally to recognize individuals' standing or interest in challenging the constitutionality of legislation.[15] Likewise, after a long period of silence and reticence, the Court has declared admissible evidence extrinsic to the Constitution or to the impugned legislation and has made wide use of such evidence when found relevant.[16] Finally, it has found invalid the unilateral amendment of the "political arrangement" on institutional bilingualism and of the features negotiated in 1867 to allow the Senate to ensure "regional and provincial representation in the federal legislative process."[17] On all of these points, precedents were rare, and the Court played a creative role within

the established parameters of the system. In the cases dealing with constitutional amendment in particular, extreme conservatism regarding principles has gone along with innovation and flexibility regarding their application: section 133 was declared inviolable, but it received a dynamic interpretation to cover the language of regulations and administrative tribunals. Similarly the Court has held that the federal Parliament cannot alter the characteristics of the Senate that enable it to protect regional interests (even though we know that the Senate has never really played such a role), but Parliament can bring about other types of changes to the upper house.

In a general way, the Supreme Court's attitude of continuity during the period under review might not have developed had it not corresponded to an authentic adherence to basic values transmitted by previous case law. Of course, one could also attribute this attitude to the technical rule of stare decisis, whose justification was vigorously reaffirmed soon after the abolition of appeals to the Privy Council.[18] But this reaffirmation was aimed at the lower courts; the Supreme Court reserved for itself the right to review certain decisions.[19] Still, the Court has been strikingly persistent in following precedents set by the Privy Council and by itself in practically all the decisions it has handed down in political matters since 1945.[20]

If the Supreme Court's conservatism demonstrates its adherence to the type of federalism deriving from earlier decisions, it has also perpetuated in Canada the British principle of legislative supremacy to the extent that it is compatible with the Constitution.[21] This principle, the Court's reluctance to substitute its opinion for that of the political authorities,[22] and a tendency to articulate its decisions on technical grounds[23] have not encouraged the emergence of new kinds of constitutional protection for rights and freedoms in Canada.

From 1945 to 1960, in most of the cases where fundamental freedoms were at issue, the Supreme Court handed down decisions that favoured such freedoms, but did so for legalistic reasons without explicitly discussing the underlying values.[24] Thus, the Court even found war measures to be invalid: for example, it decided that the government had not actually deemed it necessary or advisable for the security of the country to include women and children in the expulsion orders aimed at the Japanese[25] and also that it did not have the power, by virtue of a temporary emergency legislation, to award ownership of commodities to a board and to regulate the compensation to be paid.[26] In two cases where legislative jurisdiction was not at issue, the Court openly took fundamental freedoms into account.[27] Nevertheless, a majority of the judges did not adopt as their own the theory outlined in the *Alberta Statutes* case.[28] According to this theory the *British North America Act* and its preamble demonstrate an intent to protect parliamentary institutions and the freedom of the press and expression, if not freedom of

religion. In *Saumur v. City of Quebec*, the Court held, in a five-to-four decision, that a municipal regulation prohibiting the distribution of tracts or other documents in the streets without the authorization of the chief of police, did not prevent the Jehovah's Witnesses from distributing their literature. Only three judges repeated the implied bill-of-rights theory;[29] on the other hand, three others explained that Canada did not have a Bill of Rights as the United States, that these freedoms are not beyond the scope of federal and provincial legislation according to the distribution of powers, and that in this case the matter came under provincial jurisdiction.[30] By the same token, in *Switzman v. Elbling*, where the Quebec "padlock" law to thwart communism was declared unconstitutional, only three of the eight majority judges based their decision on the theory of a bill of rights implied in the *BNA Act*.[31] A similar approach, developed by Mr. Justice Rand in *Winner v. S.M.T. (Eastern) Ltd.*, to the effect that the *BNA Act* had established a single Canadian citizenship that includes such basic rights as the right to live, to work and to move freely within the country, was not formally shared by a majority of the judges of the Supreme Court.[32]

When the *Canadian Bill of Rights* was passed in 1960, the Canadian Parliament became actively involved in the domain of freedoms in the federal area and, from 1968 on, the central government attempted to add a charter of rights to the as yet unpatriated Constitution. These developments, combined with the gradual appearance of provincial charters of rights applicable within provincial jurisdictions, promoted the introduction of a new language into decisions that still remained legalistic.[33] They also contributed to leaving the primary responsibility for the improvement of fundamental rights in Canada to the political branches of government and to perpetuating, during the period under review, the reserved attitude of the Supreme Court in this area. First, while the theory of a bill of rights implied in the 1867 act was still, for a time, mentioned by the Court,[34] it was quickly forgotten and then finally abandoned.[35] Second, the cases enforcing the *Canadian Bill of Rights* have been quite few,[36] and the Supreme Court has relied upon various traditional approaches, which thwarted the Bill of Rights.[37] In particular, the hopes raised by *R. v. Drybones*[38] practically disappeared: the rights that were protected were often limited by rules and conceptions current before the *Bill of Rights*,[39] to the point that it was held that the *Bill of Rights* guarantees only those rights that existed at the time of its enactment and was not intended to create new rights;[40] a general statute like the *Bill of Rights*, unless its terms are very clear, does not take precedence over a specific act, nor does it deprive the federal government of its jurisdiction with respect to Indians as such;[41] in the absence of objective and easily applicable standards, the Court was very reluctant to substitute its opinion for that of democratic institutions,[42] and it developed the concept of "valid federal objective," giving these institutions an almost

uncontrollable margin within which to manoeuvre.[43] Consequently, the mandate given to the courts — to declare inoperative legislation that was contrary to the *Bill of Rights* — was challenged indirectly,[44] with the result that the Supreme Court no longer found an opportunity to exercise it.

## *Evaluation*

The Supreme Court's demonstration of continuity is not, in my view, incompatible with its capacity to make the law evolve and adapt to social and political realities. The element of continuity, indeed conservatism, that I have tried to describe relates to the basic conception of the political regime, a conception that contains a novel combination of the U.S. and British systems: it attempts to maintain an authentic form of federalism (which may seem too centralized or not centralized enough, depending on one's opinion), while leaving the two levels of government supreme over decision making within their areas of jurisdiction (with the risk that rights and freedoms will suffer the consequences). This element, combined with systematic recourse to the jurisprudence of the Privy Council, is absolutely primordial, given the expectations and fears that were demonstrated when appeals to London were abolished. Nevertheless there has been a certain degree of evolution regarding the recognition of a higher level of government capable of representing the whole of the Canadian political entity in its international dimension.

The existence of these two poles seems to be confirmed by the Supreme Court's attitude in the decisions on the constitutionality of the patriation plan. On the one hand, the recognition of the legality of the undertaking, in spite of the disagreement of a majority of the provinces, confirmed that Ottawa represents the whole of Canada in its relations with London. On the other hand, the requirement, because of constitutional convention, of a significant degree of provincial consent for the patriation project rested on the reaffirmation of classical federalism, as against a pan-Canadianism which has never succeeded in obtaining recognition.[45]

In another connection it has been said that, during the first half of the 20th century, the judicial process produced "a static and mechanical operation of law."[46] At the level of the Supreme Court, the situation did not suddenly change, but it is clear that the Court came closer to social and political realities. First of all, it became increasingly predisposed to solve concrete political problems by broadening the standing or interest required of those who wanted to institute constitutional proceedings. The Court also began to consider, fairly widely, evidence extrinsic to strictly legal sources, including political statements and speeches made in the House, thus putting the solution of legal problems into a broader and more realistic context.

Certain more recent actions of the Court also illustrate this capacity to

be adaptable and available. At the request of the Attorney General of Quebec, it agreed to specify which bodies are subject to the bilingualism requirement. Since this obligation is a truly judicial creation, the Court's decision was in Canadian judicial history a rather unique quasi-legislative document.[47] Moreover, in this case and in the three 1979 cases dealing with institutional bilingualism and Senate reform, the Supreme Court used a broad range of tools, including history, political speeches, and even constitutional conventions,[48] to block unilateral amendments to the Constitution. The Court reached a kind of peak with its decision on patriation. Few lawyers would have believed ten years ago that the Supreme Court of Canada would agree to give a decision with respect to the existence of constitutional conventions. But it has done so on two occasions.[49] Its major intervention, which amounted to requiring sufficient support in order to implement any patriation that affects the rights of the provinces, directly affected an ongoing political process. The subsequent agreement of the federal government and nine provinces and the content of the *Constitution Act, 1982* were conditioned by it.

It would seem that the Court has rid itself of the rather artificial line of reasoning that permeated the judiciary in the first half of the century. From this point of view, the break with the Privy Council era is final. It is clear that the Court is ready to assume the new role that it has acquired through the entrenchment of the Canadian Charter of Rights and Freedoms in the Constitution. On the other hand, if the past is an indication of the future, it will perpetuate the classic concept of the Canadian form of government, a concept that the Court has adopted as its own. Of course, it must challenge the traditional supremacy of legislative authorities in order to give effect to the constitutionalization of fundamental rights.[50] However, as far as federalism is concerned, the Court's decisions up to the summer of 1984 give no hint of short- or medium-term upheavals in the relationship of political forces in Canada.

## Preservation of an Equilibrium between Federal and Provincial Powers

The Supreme Court's adherence to classic federalism cannot in itself explain the Court's decisions with respect to the distribution of powers between the federal government and the provinces. In this subtle and political area, the Court has a considerable margin of discretion. Indeed, the field is as delicate for individuals who are attempting to assess the Court's performance and who must also cope with the difficulty of selecting cases to support their opinions. In fact, since 1945, most of the Supreme Court decisions that directly affect political institutions deal with the distribution of powers.

These cases include decisions that, while favourable or unfavourable to one level of government, do not involve a comparable disadvantage or

advantage to the other level. This is basically the situation in cases dealing with the exercise of the declaratory power, with restrictions on the power to establish tribunals pursuant to section 96 of the *Constitution Act, 1867* (formerly the *British North America Act, 1867*), or with limits on the powers of the federal courts under section 101 of the act. The same is true with decisions concerning the provinces' taxation powers, which are subject to certain restrictions by virtue of the *Constitution Act, 1867*, whereas the federal taxation power is, for all practical purposes, unlimited.[51]

If such cases are excluded, there are 90 decisions that were handed down during the period 1945–80 that can be used in assessing the balance established by the Court between the provincial and the federal powers.[52] The effect of decisions rendered since 1981 will be considered later.

The decisions that have interpreted the federal power to legislate for the "peace, order and good government of Canada" are very circumspect. The aspect of this power that allows for federal intervention in provincial areas in times of crisis gives a large measure of discretion to the central authorities. However, it allows only temporary intervention and was seldom used during the period under review.[53] Its other aspect, bearing on residual powers or matters of national interest, has given the federal government permanent exclusive power to legislate with respect to aeronautics, including the location of airports;[54] the establishment of a region as the seat of the Canadian government;[55] the territorial sea and the continental shelf off the coast of British Columbia;[56] and the control of narcotics.[57] In light of the rationalization of this area of the law carried out in the *Reference re the Anti-Inflation Act*, the conclusions published by William Lederman in 1975 are still valid:

> In the period since 1949, the Supreme Court of Canada has consistently followed and upheld what I would call the Watson-Simon conception of the scope of the federal general power; the Supreme Court justices have exhibited the caution and restraint that the Watson-Simon view embodies.[58]

In another field, several decisions have dealt with substantive and procedural problems related to criminal law, which is within exclusive federal jurisdiction. The limits of this jurisdiction have been interpreted and applied in a generous way, allowing the establishment of an integrated system of criminal law that cannot be thwarted by provincial measures.[59] It also allows the federal government a broad range in defining, preventing and punishing crimes,[60] even if the measures taken encroach upon matters within provincial jurisdiction[61] or relate to property and civil rights.[62] Nevertheless the Supreme Court requires at least a "proper exercise" of the power; and the generality of this criterion has not prevented an adequate control of constitutionality.[63]

If the provinces have been excluded from criminal law in the broad

sense, they have been allowed to participate in its implementation in two major ways. First the provincial power provided for in section 92(14) of the *Constitution Act, 1867* covers the administration of both civil and criminal justice.[64] This power is broader than the federal power with respect to criminal procedure.[65] Thus, for criminal activities, the provinces can impose compulsory investigative measures that do not come within the scope of criminal proceedings under way.[66] On two occasions, a majority of the Court has said in obiter dictum that the administration of justice also allowed the attorneys general of the provinces to conduct criminal proceedings.[67] However, in federal matters other than criminal, the provinces have neither the power of investigation nor the power to conduct proceedings.[68] Second, the Supreme Court has recognized something of a provincial counterpart to the criminal law by accepting the validity of nonpunitive but preventive measures that establish local standards of morality or of preservation of the peace. On these grounds the Nova Scotia legislation with respect to film censorship and the City of Montreal anti-demonstration regulation were declared valid.[69]

Thus if federal exclusiveness with respect to criminal law was given its broadest sense, the Supreme Court has accepted as normal the existence of some overlapping of jurisdiction in this area.[70] The concurrence of powers is even more common in the field of private law, but for different reasons. Indeed, the Supreme Court has given little exclusive jurisdiction in federal matters relating to civil law, yet has permitted the exercise of broad ancillary powers, with the result that the provinces may concurrently regulate the same matters:[71] thus alimony as well as maintenance and custody of children are necessary accessories to the federal power over divorce;[72] similarly, the exclusive federal power over interest applies only to a charge accruing day by day and, while it incidentally enables any other charge exceeding the allowed interest to be prohibited, it does not prevent the provinces from alleviating obligations arising from a loan of money should the cost be excessive and the transaction exorbitant;[73] and the federal exclusiveness with respect to bankruptcy and insolvency does not prevent the provinces from making fraudulent preferences voidable even if made in an insolvent state.[74]

The principle of provincial jurisdiction over private law was not affected by the few borderline cases that the Court decided during the period under consideration;[75] instead, it was maintained on solid grounds by several unanimous decisions.[76] In *Walter v. A.G. Alberta* in particular, a provincial law restricting the right to acquire land as communal property was declared valid, regardless of whether this practice was the result of religious belief.[77] Then, in *Morgan v. A.-G. Prince Edward Island*, a provincial act restricting the right of nonresidents to own land, whether or not they are citizens, was also declared valid as it related to property and civil rights legislation. This decision gives limited

scope to the concurrent federal jurisdiction over Canadian citizens and aliens.[78] From this point of view, it is comparable to the case of *MacDonald v. Vapor Canada Ltd.*, which declared invalid a federal provision creating a civil liability independent of any otherwise valid regulatory context.[79]

In commercial matters, the Supreme Court has maintained the distribution of powers elaborated by the Privy Council, and which prompted noteworthy dicta concerning concurrent and complementary powers. The Court upheld the validity of federal measures with respect to international or extraprovincial trade,[80] and it set aside provincial plans intended to control commodities brought into the province[81] or to fix prices on the export market.[82] But the Court has not yet given substance to the second aspect of the federal jurisdiction outlined in 1881 in *Citizens Insurance Co. v. Parsons*,[83] namely, the "general regulation of trade affecting the whole Dominion." The Court simply declared that to base a civil liability on any act or business practice that was "contrary to honest industrial or commercial usage in Canada" did not constitute a regulation and was not related to trade in general.[84] It also said that the dictum in *Parsons* does not allow for the regulation of a single trade or industry, and that such regulation does not become "general" simply because the legislation applies to other trades or industries separately, even if it touches in this way a significant portion of economic activity.[85]

Thus the power to control particular industries or trades within their boundaries is still viewed as being reserved to the provinces.[86] From a more dynamic point of view, it was decided that "the control of production, whether agricultural or industrial is prima facie a local matter, a matter of provincial jurisdiction"[87] and that there is "no basis for the view that there must be a division of authority at the stage of production between what will be going into intraprovincial and what will be going into extraprovincial trade."[88] But the question of whether such division of authority can be devised for the post-production stage remains problematic. Thus, in the *Reference re the Farm Products Marketing Act*,[89] it was reaffirmed that provinces may deal with intraprovincial marketing and transactions; however, the reasons of certain judges suggest that a province cannot control transactions affecting goods destined to be consumed outside the province. Then, in the *Carnation* case, the Court decided that each transaction and regulation must be examined on merit: simply because a transaction is completed in the province does not necessarily mean it is subject only to provincial legislation; but the fact that it has an incidental effect on a company involved in interprovincial commerce does not mean it is exempt from provincial control.[90] Having repeated that the federal government cannot regulate wholly intraprovincial operations or local commerce as part of a system controlling international and interprovincial commerce, the Supreme Court recently raised the possibility that it would reconsider "the interlocking

of the federal and provincial power with reference to the local marketing of articles of commerce, both natural products and otherwise, which have entered the interprovincial and international trade stream."[91]

It is well known that the central consideration in the distribution of powers is the true nature and character of the legislation challenged[92] — the subject matter or field to which it relates, and not what it might incidentally affect. This factor, as well as the exercise of ancillary federal powers, leads to considerable overlapping in the legislation passed by the two levels of government. But other factors are involved as well, which increase the possibilities of overlapping: thus the rule that allows for a restrained interpretation so that the impugned legislation does not impinge on the jurisdiction of the other level of government has a fairly limited impact in the constitutional case law.[93] More specifically, the Supreme Court has recognized that Indian reservations and federal property, which as subject matters of legislation come within exclusive federal jurisdiction, do not constitute "extra-territorial enclaves" within the provinces and that provincial legislation can apply to them.[94] Similarly, provincial legislation can apply to transportation and communication undertakings that come under exclusive federal jurisdiction, if it does not interfere with their operation;[95] here, however, the Supreme Court was fairly generous with respect to the degree of federal exclusiveness. Thus, in spite of the fact that, in principle, the provinces have jurisdiction over labour law,[96] the Court declared that federal exclusiveness covers labour relations, including salary scales, in an undertaking under federal jurisdiction, because this matter is an essential part of its administration and operation.[97] It had already been established that certain federal powers would be ineffective if they did not include the right to regulate aspects of property and civil rights.[98]

As for the question of which undertakings or services come within federal jurisdiction, the Privy Council set the tone for an all-encompassing and pragmatic approach, which happened to favour the federal power,[99] but which today would apply to only 10 percent of the active work force in Canada. Many Supreme Court cases have deduced from particular "constitutional facts" the extension of various federal services and various transportation and communication enterprises.[100] Basically, the Court applies an operational and functional criterion where corporate status is not a determinant and where occasional or exceptional factors are not taken into account. The most remarkable instance in this body of cases is without doubt the recognition that the cable distribution of programs picked up from Hertzian waves is an integral part of the broadcasting "enterprise" or "organization" and that it comes under federal jurisdiction:[101]

> Divided constitutional control of what is functionally an interrelated system of transmitting and receiving television signals, whether directly through air

> waves or through intermediate cable line operations, not only invites confusion but is alien to the principle of exclusiveness of legislative authority, a principle which is as much fed by a sense of the constitution as a working and workable instrument as by a literal reading of its words.[102]

The preoccupation with exclusiveness is clear in this matter. Nevertheless, in other respects and more generally, as the Supreme Court has said, "the division of constitutional authority under the Canadian Constitution often results in overlapping legislation."[103] Indeed, the Court was very liberal toward the provinces in its conception of inconsistent legislation. When penalties were enacted for provincial purposes, the Court refused to see an inconsistency between such offences and similar infractions existing in the Criminal Code;[104] if situations are governed by both the provincial and the federal legislation, the two provisions are not necessarily incompatible and they may operate concurrently. This case law is a fortiori applicable where provincial legislation assumes less repressive[105] or simply regulatory[106] forms. The very restrictive character of the definition of inconsistent legislation is an "important turning point" in constitutional decision making,[107] and it contributes to preserving provincial autonomy by bringing federal paramountcy into play less often.

## *Evaluation*

During the 36 years covered by the following quantitative survey, the Supreme Court has handed down 42 decisions favourable to the provinces (or unfavourable to the federal government) and 48 decisions favourable to the federal government (or unfavourable to the provinces).[108] In these cases, federal legislation was found ultra vires on 5 occasions and provincial legislation was found ultra vires three times as often. However, it should be said that provincial legislation was challenged for constitutional reasons at least twice as often as federal legislation. This is probably because of the diversity of provincial politics in Canada and also because of the fact that provincial legislation, as well as having to be related to an area of provincial jurisdiction, lends itself to disputes from the viewpoint of its applicability to federal enterprises and sectors, and from the view point of its inconsistency with federal legislation.[109] It is therefore impossible to evaluate the Court's performance simply by calculating the results that are favourable or unfavourable to either level of government. Normally, when its legislation is challenged, the federal government risks everything; on the other hand, in half of the cases where provincial legislation is challenged the worst that can happen is for it to be declared inapplicable to a federal enterprise or sector, or inoperative insofar only as it is in conflict with federal legislation.[110] At any rate there is little point in putting all cases, however important, in the same category.

If we consider the question from the point of view of substance, it is clear that the application of the general legislating power of the federal government has been confined within verifiable limits and that several decisions favourable to the provinces are feathers in the cap of their autonomy. In this way, the Supreme Court has preserved large areas of provincial exclusiveness. As far as the federal government is concerned, it enjoys even greater advantages because the very rules regarding the distribution of powers are in its favour: the existence of the general power, a longer list of specific powers, the "ancillary" powers doctrine and its paramountcy in case of conflict. Nevertheless, some observers of the judicial scene,[111] including myself, would argue that the Supreme Court has succeeded since 1945 in maintaining a balance of legislative powers comparable to that existing previous to that date. This balance is not perfect equality. It is part of a system that contains a bias in favour of the federal authority but also includes compensating mechanisms to prevent irremediable centralization. In addition, the jurisprudence demonstrates a subtle conjuncture of the dynamics of exclusiveness with the dynamics of overlapping powers, which leaves the Court free to see to the maintenance of a regime that is both federal and flexible, a regime capable of adapting to new contexts.

In coming to this conclusion, I have avoided concentrating on certain relatively short periods of judicial arbitrations of political conflicts between the two levels of government or on specific applications of the distribution of powers. To be sure, there have always been cycles of centralization and decentralization in Canadian constitutional decisions, even at the Supreme Court level since 1945.[112] But decisions handed down from 1981 to the summer of 1984 fall neatly into the overall perspective that has been adopted. Thus, the case of *Multiple Access Ltd. v. McCutcheon*[113] appears as a veritable apology for concurrent powers; on the other hand, the logic of exclusiveness sometimes prevails, as in *A.-G. Canada v. Canadian National Transportation Ltd.* and *R. v. Wetmore*.[114] More specifically, almost all recent decisions with respect to the distribution of powers fall into line with the parameters described above.[115] There is, however, one very surprising exception, which emerges from the *Canadian National Transportation Ltd.* and *Wetmore* cases: in deciding that jurisdiction over the conduct of criminal proceedings is exclusively federal, the Court did not actually question its previous decisions, but it did curtail the tendency, which it had initiated, to admit provincial jurisdiction over the administration of justice in the criminal field.[116] In fact, the scope of these two cases within the overall distribution of powers is fairly limited, and in the sector of criminal and quasi-criminal law, they must be counterbalanced by two other cases, which break new ground in favour of the provinces: *Regional Municipality of Peel v. MacKenzie* and *Schneider v. The Queen*.[117]

As a court of last resort, the Supreme Court has been working during a

period when the idea that powers were divided into tight, mutually exclusive compartments has become largely outmoded.[118] It happens more and more frequently that the same matter could fall under either federal or provincial control, depending on the aspect concerned. From this point of view, the Supreme Court is less often obliged to make a radical choice between the central and provincial powers. The Court's jurisprudence better reflects social reality, which really cannot be compartmentalized. It is the political actors themselves who, in many areas, must establish a workable marriage between federal and provincial measures, because the judiciary will intervene only in cases of extreme conflict.

In fact, the Supreme Court is not well placed to initiate a transformation of the *rapport de forces* which seems to be well accepted by governments and by the population. Certainly discussions of and demands for reform of the distribution of powers have been pursued during almost the entire postwar period, and recently they have been encouraged by the special situation in Quebec. But the very fact that they did not succeed has forced the Supreme Court to preserve the rules of the game, which are accepted at least by default. It is also possible that the Court must maintain its credibility as an arbiter between the central power, from which it derives its existence, and the provinces.[119]

It is difficult to imagine the Court significantly changing its course in the foreseeable future. What is more likely to happen is that the emphasis on the distribution of powers in constitutional jurisprudence will be replaced by an emphasis on the Canadian Charter of Rights and Freedoms. In *Westendorp v. The Queen* there is a dictum that reinforces this prospect: the Court has said that invoking the Charter implies that one accepts the validity of the legislation from the point of view of the distribution of powers.[120] Conversely, and rather paradoxically, the basic corpus of case law from the Privy Council and the Supreme Court with respect to the distribution of powers would be reinforced, because the law in this area would evolve more slowly and surreptitiously, in response to policies that are, by force of circumstances, better protected from traditional modes of attack.

## Promotion of Federal-Provincial Cooperation

It should be noted at the outset that during the period under review the Supreme Court rejected those modes of federal-provincial cooperation that it considered incompatible with the principle of the rule of law or with the federal regime.

Thus, in the *Reference re the Anti-inflation Act*, it unanimously decided that the federal-Ontario agreement did not have the effect of making the act and the anti-inflation guidelines applicable to the Ontario public sector because there was no act authorizing the Ontario government to

make such an agreement and to amend thereby the law of the province:

> There is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or order in council to bind citizens where it so acts without the support of a statute of the Legislature: see *Dicey*, Law of the Constitution (10th ed., 1959), pp. 50–54.[121]

A majority of the Court came to a similar conclusion in a case in which the Manitoba government had given its consent by virtue of a statute that could not be interpreted as allowing its public sector to be subjected to the anti-inflation legislation.[122]

As for the compatibility of the mechanisms of cooperation with the federal regime, one should mention the *Reference re Bowater's Pulp and Paper Mills Ltd.*[123] In this case, the company, supported by the Attorney General of Newfoundland, challenged the right of the federal government to withdraw, without the agreement of the province, customs and fiscal exemptions that had been granted by pre-1949 Newfoundland legislation. The company relied upon subsection 18(3) of the Terms of Union of Newfoundland with Canada: "Notwithstanding anything in these Terms, the Parliament of Canada may with the consent of the Legislature of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union." The Court decided that this clause did not prevent the normal application of subsection 1 of the same section by virtue of which legislation that existed prior to Newfoundland's entry into Confederation became subject to the normal distribution of powers.[124] The majority of the judges said that the contrary interpretation, which would necessitate the province's agreement for the federal government to amend existing law in areas of federal jurisdiction, would mean that Newfoundland would have a system that was completely foreign to the federal system established elsewhere. In a more basic case, the *Lord Nelson Hotel* case, the Court decided that the delegation or transfer of legislative powers from one level of government to the other could not be accomplished by ordinary legislation. In the absence of an amendment to the *BNA Act*, the distribution of exclusive powers as provided for in sections 91 and 92 is inviolable; it is only within their respective domains that the federal Parliament and the provincial legislatures are sovereign. The Court decided that this type of delegation or transfer would be incompatible with the federal regime established by the act.[125]

Nevertheless, during the same period, the Supreme Court ratified other methods of federal-provincial collaboration which do not affect the essence of the system. There are hence cases pointing out the importance the Court accorded to arrangements embodied in parallel legislation from the federal power and the province concerned. This is true of *A.-G. of Canada v. Higbie*, where the Court gave effect to orders in council from 1924, passed by the governments of Canada and British

Columbia, to settle the controversy over the ownership, under the *BNA Act*, of harbours and the foreshores in that province.[126] This is also true of *Esquimalt and Nanaimo Railway Co. v. A.-G. of British Columbia*. The Court decided that the province was contractually obliged to exempt the company's lands from taxes, according to the terms of a provincial act which, together with a similar federal act, had in 1883 crowned long negotiations between Ottawa and Victoria over the construction of a railway after the entry of British Columbia into Confederation.[127] In another connection, there is an area where the mechanism of parallel legislation was constitutionally required by section 3 of the *BNA Act, 1871*: the alteration of the boundaries of a province. In *A.-G. of Manitoba v. Canadian Pacific Railway Co.*, the Court decided that the respondent was entitled to a tax exemption on the territory added to Manitoba in 1881, because this exemption had been imposed as a condition of the extension of the province's boundaries, to which the province had consented. It was explained that once the extension had been made, the conditions could be changed only by the United Kingdom to the extent that the interests of a third party are at issue.[128] In a more general way, we may also refer to the Supreme Court's attitude in the cases involving constitutional amendments, where it has found that those characteristics of the political regime that were adopted by concurrence could not be changed unilaterally.[129]

The most significant contribution of the Supreme Court was, of course, its great tolerance toward mechanisms analogous to the system of delegation prohibited by the *Lord Nelson Hotel* case.[130] First it decided that this case did not prevent legislation enacted by one level of government from being conditional upon legislation enacted by another level of government if each were acting within its own domain.[131] In addition, in *Prince Edward Island Potato Marketing Board v. H.B. Willis Inc.*, the Court deemed valid federal legislation that delegated to a provincial marketing board, for extraprovincial activities, powers similar to those it possessed for local activities. It thus allowed the objective declared in the preamble to the federal act involved to be realized, namely cooperation with the provinces in the marketing of agricultural products.[132] The new mechanism was immediately used in the transportation sector.[133] Then, in the *Scott* case, it was decided that a province's adoption of British legislation on a subject as it reads from time to time, does not amount to a prohibited type of delegation; instead it is referential legislation that accepts or incorporates legislation from another jurisdiction for its own purposes.[134] Provided that the act that makes the reference is intra vires, the same type of arrangement could be made between the federal government and the provinces. This is clear from the case of *Coughlin v. Ontario Highway Transport Board*,[135] where the mechanism in dispute combined the characteristics of the *H.B. Willis Inc.* and *Scott* cases. The federal legislation allowed a provincial board to

issue extraprovincial transport permits[136] and to exercise in this regard the same powers it possessed from time to time by virtue of provincial legislation over local transport.[137] The Court said that the Board's powers were derived not from provincial legislation but from the federal Parliament,[138] which can always withdraw or amend them. The Court noted that the provinces had requested and the federal government had accepted this type of cooperation, and it concluded: "it is satisfactory to find that there is nothing which compels us to hold that the object sought by this co-operative effort is constitutionally unattainable."[139]

The case of *H.B. Willis Inc.* was also applied in the *Reference re the Agricultural Products Marketing Act*. Here the Court unanimously confirmed the validity of federal and Ontario legislation that implemented a 1972 agreement between the federal government and all of the provinces to set up a comprehensive program for the marketing of eggs.[140] In fact, this *Reference* reinforces the principle in *H.B. Willis Inc.* because it applies this principle in a new factual and legislative context: in particular, the delegation to a provincial body, was supplemented by the creation of a federal regulatory body authorized to act in the federal sphere in a coordinated way;[141] moreover, the system of cooperation imposed, by federal and provincial legislation, overall quotas of production for each province. In a manner that recalls the Privy Council's famous statement,[142] three judges had said in the *Reference re the Farm Products Marketing Act* that the best way to deal with marketing is by joint federal and provincial action,[143] and two other judges had mentioned that cooperation, by means of a common organization, for example, is the only effective way, because it is impossible to know a priori which of the commodities produced or processed will invoke extraprovincial concerns.[144] In the *Reference re Agricultural Products Marketing Act*, Mr. Justice Pigeon, speaking for the majority, recalled that dictum and said that Ontario regulation of production was not aimed at extraprovincial trade; to the extent that it touched that trade, it complemented the regulation established under the federal authority:

> In my view this is perfectly legitimate, otherwise it would mean that our Constitution makes it impossible by federal-provincial cooperative action to arrive at any practical scheme for the orderly and efficient production and marketing of a commodity which all governments concerned agree requires regulation in both intraprovincial and extraprovincial trade. . . . I do not overlook the admonition in the *Natural Products Marketing Act case*, at p. 389, that the legislation has to be carefully framed but, when after 40 years a sincere cooperative effort has been accomplished, it would really be unfortunate if this was all brought to nought. While I adhere to the view that provinces may not make use of their control over local undertakings to affect extraprovincial marketing, this does not, in my view, prevent the use of provincial control to complement federal regulation of extraprovincial trade.[145]

In a fairly general way, this concept of "provincial legislation complementary to federal legislation" was already present in constitutional jurisprudence.[146] As we have seen, the Supreme Court has not simply confined the federal government and the provinces within mutually exclusive fields of jurisdiction. Rather it has contributed to increasing the overlaps in legislation while at the same time limiting the concept of inconsistency, thus establishing between the two levels of government at least a passive cooperation which is more and more inevitable.[147] On the other hand, from a formal point of view, the judicial promotion of cooperative federalism has not changed provincial or federal legislative jurisdiction.[148] In *Dominion Stores Ltd. v. The Queen*, it was decided that the appellant should have been prosecuted pursuant to the provincial rather than the federal act because the alleged infraction came within the context of entirely intraprovincial activities and "Parliament cannot do indirectly, with provincial aid, what it could not have done directly."[149] As it happened, a system of cooperative legislation had been established, but the Court noted that governments now disagreed about its administration:

> If such cooperation at the legislative level must result in the wasteful overlapping or doubledecking of administration or enforcement, the constitutional plan designed and constructed in the *British North America Act* and as evolved through the decisions of the Privy Council and this Court must surely be defeated.[150]

## *Evaluation*

Much may be said in favour of the theory that interjurisdictional conflicts in Canada are basically political and that they should be solved in the political arena.[151] On the other hand, this type of solution may in practice be illusory, in view of the competition inherent in federal-provincial relations.[152] The Supreme Court has shown itself readily available to act as an umpire in this area, but at the same time its jurisprudence demonstrates clearly that, to the maximum extent compatible with the Constitution, it has wished to encourage federal-provincial cooperation as a means of solving political problems.[153]

On a technical level, the Court has recognized the validity of legal mechanisms that are perfectly suitable to assuring such collaboration as the two levels of government wish to establish between themselves. In any event, the lack of cooperation in certain sectors of Canadian political life is certainly not due to legal barriers. At the substantive level, the Supreme Court's decisions have tried to increase the points of connection, and the Court has demonstrated sympathy for cooperative federalism. This tendency became more marked at the time of the *References* regarding the constitutionality of patriation: P.W. Hogg has even maintained that on this occasion the Supreme Court's justification for

considering the existence of a constitutional convention was simply its desire to influence a political settlement.[154]

It is impossible to determine, in the context of a paper such as this, whether there was a reasonable level of intergovernmental cooperation in Canada during the period under review. Opinions vary, depending on whether one recommends political or legal solutions to the problems of federalism. I am inclined to believe that there would not have been so many jurisdictional conflicts before the courts had there been more cooperation. Moreover, the long period when it was not possible to patriate the Constitution and the way in which this objective was finally realized are sufficient indication that the primary preoccupation was the jealous preservation of acquired ground, while trying to gain more. It is also my opinion that, in spite of a fairly large measure of judicial reserve, the Supreme Court wanted to show that there was room for more cooperation than existed at the time.

Since the mechanisms of collaboration accepted by the Supreme Court still preserve the formal distribution of powers, it is difficult to see how a resolutely cooperative approach could in any way, even in the long term, favour one of the levels of government at the expense of the other. The level of government that has jurisdiction can always recover the area that belongs to it, because jurisdiction cannot be acquired by consent or lost by renunciation. Paradoxically, recent decisions that state that the powers of the provincial attorneys general with respect to criminal proceedings have depended upon a temporary clause as from 1867, should reassure the provinces on this score.[155]

One might think that federal-provincial collaboration would be encouraged if legal disputes dealing with the distribution of powers were eliminated or restricted. For example, individuals and corporations could be prevented from having recourse to them: in view of the inclusion of a Charter of Rights in the Constitution, persons are protected from both levels of government, and challenges based only on the distribution of powers could be left to the political authorities.[156] Or again, a model of jurisdictional control of legislation that is not diffused, but is monopolized by one tribunal, as in continental Europe, might be advisable, at least with respect to the distribution of powers. At any rate, it seems normal that in this area judicial recourse should compete with purely political solutions. In fact, constitutional jurisdiction is itself a "political resource," giving governments a unique power of negotiation;[157] cooperative federalism is more likely to develop when the respective powers have been clarified.[158] Even if the Supreme Court is likely to divide the weapons in a relatively equitable way on the whole, such a balance will not be evident in each particular case. That is why governments cannot abandon their call for judicial control, which is often a prerequisite for intergovernmental cooperation. Thus evidently lost causes are pursued in order to establish a basis for negotiation.[159] In

these circumstances, I do not think a choice can be made between political and judicial solutions to the disputes between the two levels of government: they are interdependent in the context of a process where the dynamics of the conflict seem normal and endogenous.

## Conclusion

Generally speaking, I approve the role the Supreme Court of Canada has played since 1945 in the various areas examined in this study. It is possible that this point of view has influenced my choice of basic trends, and it is probable that other observers, examining the same jurisprudence, would come to different conclusions. In any event, even within the general parameters I have attempted to establish, there are many nuances. For my part, I do not think that that venerable institution the Supreme Court, even though it deals regularly with political subjects, was supposed to supplant democratic process in order to develop a new order. In fact, the Supreme Court seems to have seen itself primarily as an instrument of neutrality and stability within a system of social management that generates conflict.

Only from this point of view, it seems to me, can it be said that the Supreme Court has had no significant political influence until recently.[160] In fact, its role, and the role of law administered under its auspices, was to maintain the balance of political powers on viable axes. That is why the Court has never provoked major controversy. The understanding of the Canadian political system articulated by the Court corresponds generally to the expectations of the governments and the people. Even by refusing judicial activism in this matter, the Court has performed a very delicate task: perpetuating a regime where the centrifugal and centripetal forces have been largely skewed by the presence of Quebec in the federation. From the Canadian point of view, that is, from the point of view of the country's unity, no one can say that the Court has failed at its task. And no one knows where Canada would be if it had acted otherwise. I therefore believe that the political role of the Supreme Court has been vital.

Nevertheless it seems to me that the Supreme Court has been placed in a defensive position because it has been denied the crucial element of its political legitimacy — a method of appointing judges that is not at the sole discretion of the government in Ottawa.[161] Ever since it became the final arbiter of political disputes, the Court has caused concern to those who believe in a traditional federalism. Various factors have nourished these reservations but they are all linked to the absolute control of the central power over appointments. These factors are: the systemic tendency, supported by the Constitution, in favour of the federal government; the Court's wide margin for discretion in settling political disputes; the fact that constitutional jurisprudence is full of obiter dicta and

particular positions that are contrary to the general trends discussed earlier, and which surely indicate that no unequivocal or homogeneous understanding of the Canadian political structure has been definitively devised so far. In this sense, the strong tendencies identified here provide no guarantees for the future.

In summary, it seems to me that since 1945 the Supreme Court has made a considerable contribution to the resolution of political tensions that had the potential to become more pronounced. By remaining within legal continuity, it allayed the fears expressed when appeals to London were abolished and it referred the task of reforming the basic characteristics of our method of government to the politicians and electorate. By a delicate rearrangement of the relationships between exclusiveness and concurrence of federal and provincial powers within a system of relative equilibrium, it relaxed the rules of the political game then in existence. By encouraging intergovernmental cooperation, it further increased the possibilities of adaptation within the status quo, which it seemed determined to maintain. If Canada is today still subject to forces that endanger its future, it is not the Supreme Court that inspired them nor is it the Court that impeded their control. Nor do I believe that the Court should have acted otherwise.

## *Notes*

This study is a translation of the original French-language text, which was completed in October 1984.

1. See A.C. Cairns "The Judicial Committee and Its Critics" (1971), 4 *Canadian Journal of Political Science* 301.
2. *A.-G. Ontario v. Scott*, [1956] S.C.R. 137, especially p. 143, where the Court applies *Hodge v. The Queen* (1883), 9 App. Cas. 117.
3. *R. v. Carroll*, [1948] S.C.R. 126, p. 129, where the Court applies another famous case, *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437. See also *R. v. Carroll*, [1950] S.C.R. 73.
4. See the *Local Prohibition Case*, [1896] A.C. 348, pp. 350–51.
5. *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, pp. 38, 52 and 63; this decision was upheld in *Canadian Federation of Agriculture v. A.-G. Quebec*, [1951] A.C. 179.
6. *Reference re the Anti-Inflation Act*, [1976] 2 S.C.R. 373, p. 445.
7. See for example J. Brossard, *La Cour suprême et la Constitution* (1968), p. 174 et seq.; D. Gibson, "And One Step Backward: The Supreme Court and Constitutional Law in the Sixties" (1975), 53 *Can. Bar Rev.* 621; and G. Rémillard, *Le fédéralisme canadien* (1983), p. 213 et seq.
8. F. Chevrette and H. Marx, "Comment" (1976), 54 *Can. Bar Rev.* 732, p. 736: in the *Reference re the Anti-Inflation Act*, "the majority of the court clearly opted for a decentralized federalism that is generally consistent with Judicial Committee precedents."
9. *R. v. British Columbia Electric Railway Co.*, [1946] S.C.R. 235, pp. 242 and 247; *Winner v. S.M.T. (Eastern) Ltd*, [1951] S.C.R. 887, p. 919, by Rand, J.; *Re: Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, pp. 816–17; and *Gulf Oil Corp. v. Gulf Canada Ltd*, [1980] 2 S.C.R. 39.

10. *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792. See also the *Reference re Newfoundland Continental Shelf*, Supreme Court, March 8, 1984.
11. [1937] A.C. 326.
12. See *Francis v. The Queen*, [1956] S.C.R. 618, p. 621; *MacDonald v. Vapor Canada Ltd*, [1977] 2 S.C.R. 134, pp. 168–69; and *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, pp. 154–55 and 173. See A.L.C. de Mestral, "Jurisprudence" (1983), 61 *Can. Bar Rev.* 856, which discusses a similar dictum in *Schneider v. The Queen*, [1982] 2 S.C.R. 112.
13. See *In re Storgoff*, [1945] S.C.R. 526, p. 566, by Mr. Justice Hudson; *Daniels v. White*, [1968] S.C.R. 517, p. 526 (*obiter dictum*); the minority opinions in *R. v. McEwen*, [1974] S.C.R. 185, in *Cardinal v. A.-G. Alberta*, [1974] S.C.R. 695, p. 725, and in *Chateau-Gai Wines Ltd v. Institut national des appellations*, [1975] 1 S.C.R. 190, p. 224; *R. v. Burnshine*, [1975] 1 S.C.R. 693; *Wolf v. The Queen*, [1975] 2 S.C.R. 107, p. 109; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, pp. 634–37; and *Reference re the Anti-Inflation Act*, [1976] 2 S.C.R. 373, p. 400.
14. *British Columbia Power Corp. v. British Columbia Electric Co.*, [1962] S.C.R. 642, pp. 644–45; *Amax Potash Ltd v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Labatt Breweries of Canada Ltd v. A.-G Canada*, [1980] 1 S.C.R. 594, p. 601. See also *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, p. 672.
15. *Thorson v. A.-G. Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Jack v. The Queen*, [1980] 1 S.C.R. 294.
16. Compare *A.-G. Canada v. Reader's Digest Association (Canada) Ltd*, [1961] S.C.R. 777, and *Texada Mines Ltd v. A.-G. British Columbia*, [1960] S.C.R. 713, with *Jones v. A.-G. New Brunswick*, [1975] 2 S.C.R. 182, pp. 194–95, *Reference re the Anti-Inflation Act*, [1976] 2 S.C.R. 373, pp. 388 et seq, 437–39 and 470, *R. v. Zelensky*, [1978] 2 S.C.R. 940, pp. 952–53, *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, p. 1213 et seq. and the *Reference re the Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, pp. 60–67.
17. *A.-G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, p. 1025, and *A.-G. Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *Reference re the Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, p. 78. See also *R. v. Sutherland*, [1980] 2 S.C.R. 451, and the *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, pp. 1233 and 1291.
18. *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, p. 515.
19. See also *Binus v. The Queen*, [1967] S.C.R. 594, p. 601; *McNamara Construction (Western) Ltd v. The Queen*, [1977] 2 S.C.R. 654, p. 651; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, p. 161; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, pp. 1256–57 and 1291; and *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*, [1979] 2 S.C.R. 43.
20. Chevrette and Marx, *supra*, note 8, at note 1 of their "Comment," speaking of a "collage of Judicial Committee pronouncements."
21. See *Farrell v. Workmen's Compensation Board*, [1962] S.C.R. 48, p. 52; *Sikyea v. The Queen*, [1964] S.C.R. 643; *R. v. George*, [1966] S.C.R. 267; and *Executors of Woodward Estate v. Minister of Finance*, [1973] S.C.R. 121.
22. See, for example, *Reference re the Criminal Law Amendment Act*, [1970] S.C.R. 777.
23. For example, see M. Cohen, "The Judicial Process and National Policy — A Problem for Canadian Federalism" (1970), 16 *McGill L.J.* 297, pp. 300–301.
24. *Noble v. Alley*, [1951] S.C.R. 64; *Douglas v. Tucker*, [1952] 1 S.C.R. 275; *Smith & Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95; *Beatty v. Kozak*, [1958] S.C.R. 177; *Roncarelli v. Duplessis*, [1959] S.C.R. 122; *Lamb v. Benoit*, [1959] S.C.R. 321; *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203. See also *Jones v. Bennett*, [1969] S.C.R. 277.
25. *Reference as to the Validity of Orders in Council in Relation to Persons of the Japanese Race*, [1946] S.C.R. 248. On appeal, the Privy Council was more generous toward the government: *Co-operative Committee on Japanese Canadians v. A.-G. Canada*, [1947] A.C. 87.

26. *Canadian Wheat Board v. Nolan*, [1951] S.C.R. 81.
27. *Boucher v. R.*, [1951] S.C.R. 265, and *Chaput v. Romain*, [1955] S.C.R. 834.
28. [1938] S.C.R. 100, by Duff C.J. and Davis and Cannon JJ.
29. [1953] 2 S.C.R. 299; Rand, Kellock and Locke JJ; see also the opinion of these judges in the case of *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799.
30. [1953] 2 S.C.R. 299: Kerwin J. (p. 324) and Cartwright and Fauteux JJ. dissenting; in *Walter v. A.-G. Alberta*, [1969] S.C.R. 383, p. 393, the Court did not consider it necessary to deal with this point.
31. [1957] S.C.R. 285: Rand, Kellock and Abbott JJ.
32. [1951] S.C.R. 887, p. 918 et seq.
33. See *Hofer v. Hofer*, [1970] S.C.R. 958; *Harrison v. Carswell*, [1976] 2 S.C.R. 200; and *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435.
34. See *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd*, [1963] S.C.R. 584, and the minority opinion in *McKay v. The Queen*, [1965] S.C.R. 798.
35. *A.-G. Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 771, pp. 796–97.
36. See *Brownridge v. The Queen*, [1972] S.C.R. 926; *Lowry v. The Queen*, [1974] S.C.R. 195; *A.-G. Ontario v. Reale*, [1975] 2 S.C.R. 62; and *Mitchell v. The Queen*, [1976] 2 S.C.R. 570. On the other hand, see *R. v. Randolph*, [1966] S.C.R. 260; *Duke v. The Queen*, [1972] S.C.R. 917; *Jumaga v. The Queen*, [1977] 1 S.C.R. 486; *Chromiak v. The Queen*, [1980] 1 S.C.R. 471; and the cases cited in the following notes.
37. In general, see also W.S. Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975), 53 *Can. Bar Rev.* 649, and H. Brun, "De Drybones à Lavell à Canard: les joies du tango judiciaire" (1975), 53 *Can. Bar Rev.* 795.
38. [1970] S.C.R. 282, rendering inoperative a provision of the *Indian Act* that violated equality before the law.
39. Such an approach was rejected in *Drybones*, but see *Robertson v. The Queen*, [1963] S.C.R. 651; *Smythe v. The Queen*, [1971] S.C.R. 680, p. 686; *R. v. Appleby*, [1972] S.C.R. 303, pp. 315–16; *A.-G. Canada v. Lavell*, [1974] S.C.R. 1349, p. 1365; and *Hogan v. The Queen*, [1975] 2 S.C.R. 574, pp. 583–84. Also, in the *Lavell* case, four of the majority judges assimilate "equality before the law" to Dicey's notion of the rule of law (1366–1367); see also *R. v. Burnshine*, [1975] 1 S.C.R. 693, pp. 702–705, and *Bliss v. A.-G. Canada*, [1979] 1 S.C.R. 183, p. 192.
40. *R. v. Burnshine*, [1975] 1 S.C.R. 693, pp. 702–705; and *Miller v. The Queen*, [1977] 2 S.C.R. 680, pp. 703–704.
41. See *A.-G. Canada v. Lavell*, [1974] S.C.R. 1349, pp. 1360–62, and *A.-G. Canada v. Canard*, [1976] 1 S.C.R. 170, the majority adopting the viewpoint of the dissenting judges in *Drybones*.
42. *Curr v. The Queen*, [1972] S.C.R. 889, pp. 899–903; *R. v. Burnshine*, [1975] 1 S.C.R. 693, pp. 707–708; *Bliss v. A.-G. Canada* [1979] 1 S.C.R. 183, p. 193; and *MacKay v. The Queen*, [1980] 2 S.C.R. 370, p. 393.
43. See *R. v. Burnshine*, [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, p. 382; *Bliss v. A.-G. Canada*, [1979] 1 S.C.R. 183; and *MacKay v. The Queen*, [1980] 2 S.C.R. 370, p. 391 et seq.
44. See also *Miller v. The Queen*, [1977] 2 S.C.R. 680, p. 705, and H. Brun, "Feu la D.C.D. L'arrêt Miller et la peine de mort" (1977), 18 *C. de D.* 567.
45. See *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, and W.R. Lederman, "The Supreme Court of Canada and Basic Constitutional Amendment" (1982), 27 *McGill L.J.* 527.
46. H.E. Read, "The Judicial Process in Common Law Canada" (1959), 37 *Can. Bar Rev.* 265, pp. 279–80.
47. *A.-G. Quebec v. Blaikie (No. 2)*, [1981] 1 S.C.R. 312.
48. See G. Tremblay, "La Cour suprême et l'amendement constitutionnel" (1980), 21 *C. de D.* 31.

49. *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, and *Re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 (with respect to Quebec's power of veto).
50. But see B. Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter" (1982), 28 *McGill L.J.* 31.
51. With the exception of s. 125 of the Act of 1867: *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004.
52. For another way of choosing and analyzing relevant decisions, see P.W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?" (1979), 57 *Can. Bar Rev.* 721.
53. *Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124, and the *Reference re the Anti-Inflation Act*, [1976] 2 S.C.R. 373.
54. *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.
55. *Munro v. National Capital Commission*, [1966] S.C.R. 663. See also *Jones v. A.-G. New Brunswick*, [1975] 2 S.C.R. 182, with respect to the language to be used in federal institutions and bodies.
56. *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.
57. *R. v. Hauser*, [1979] 1 S.C.R. 984.
58. W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, p. 609.
59. *A.-G. Quebec v. A.-G. Canada*, [1945] S.C.R. 600, and *In re Storgoff*, [1945] S.C.R. 526. After 1980, see *A.-G. Quebec v. Lechasseur*, [1981] 2 S.C.R. 253, and *Bisaillon v. Keable*, [1983] 2 S.C.R. 60.
60. See *Goodyear Tire & Rubber Co. of Canada Ltd v. The Queen*, [1956] S.C.R. 303; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, p. 15; and *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, pp. 622–27 (uncontradicted opinion of the dissenting judges).
61. In *A.-G. British Columbia v. Smith*, [1967] S.C.R. 702, the federal *Juvenile Delinquents Act* was held to be valid even to the extent that it provides for the procedure applicable in the case of offences against provincial laws. But see now *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9.
62. *Industrial Acceptance Corp. v. The Queen*, [1953] 2 S.C.R. 273, and *R. v. Zelensky*, [1978] 2 S.C.R. 940. See also *Johnson v. A.-G. Alberta*, [1954] S.C.R. 127; and *Switzman v. Elbling*, [1957] S.C.R. 285. And compare *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] S.C.R. 799, *Lord's Day Alliance of Canada v. A.-G. British Columbia*, [1959] S.C.R. 497, and *Lieberman v. The Queen*, [1963] S.C.R. 643.
63. See the *Margarine Case*, [1949] S.C.R. 1; *MacDonald v. Vapor Canada Ltd*, [1977] 2 S.C.R. 134; *Dominion Stores Ltd v. The Queen*, [1980] 1 S.C.R. 844; and *Labatt Breweries of Canada Ltd v. A.-G. Canada*, [1980] 1 S.C.R. 914. Also, see *Boggs v. The Queen*, [1981] 1 S.C.R. 49.
64. *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152; *A.-G. Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 771, pp. 791 et seq.; and *R. v. Hauser*, [1979] 1 S.C.R. 984, pp. 993 et seq., 1004–1005, as well as the opinion of the dissenting judges. This idea has recently been curtailed in *A.-G. Canada v. Canadian National Transportation*, [1983] 2 S.C.R. 206, and *R. v. Wetmore*, [1983] 2 S.C.R. 284.
65. This is the majority opinion in *Di Iorio*, *supra*, note 64; it was applied by the Court in *Ritcey v. The Queen*, [1980] 1 S.C.R. 1077.
66. See *Batary v. A.-G. Saskatchewan*, [1965] S.C.R. 465, and *Faber v. The Queen*, [1976] 2 S.C.R. 9; this last decision was applied in *Di Iorio*, *supra*, note 64, and in *A.-G. Quebec and Keable v. A.-G. Canada*, [1979] 1 S.C.R. 218.
67. *Di Iorio*, *supra*, note 64, pp. 205–206; and *R. v. Hauser*, [1979] 1 S.C.R. 984, pp. 993 et seq. But the Court decided to the contrary in the cases of *Canadian National Transportation* and *Wetmore*, *supra*, note 64.
68. *A.-G. Quebec and Keable v. A.-G. Canada*, [1979] 1 S.C.R. 218; *R. v. Hauser*, [1979] 1 S.C.R. 980, p. 996; and *MacKay v. The Queen*, [1980] 2 S.C.R. 370, pp. 396 et seq. And see now *A.-G. Alberta v. Putnam*, [1981] 2 S.C.R. 267. Clearly, the provinces

retain their powers over judicial organization: see *A.-G. British Columbia v. McKenzie*, [1965] S.C.R. 490.

69. *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; and *A.-G. Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 771. See the "Comment" by K. Swinton (1979), 57 *Can. Bar Rev.* 326. For local public health standards, see *Schneider v. The Queen*, [1982] 2 S.C.R. 112.
70. *Di Iorio*, *supra*, note 64, pp. 207–208 and 225–26. See also *A.-G. Quebec v. A.-G. Canada*, [1945] S.C.R. 600; *Jones v. A.-G. New Brunswick*, [1975] 2 S.C.R. 182; and *A.-G. Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 771, p. 794. The cases of *A.-G. Canada v. Canadian National Transportation*, [1983] 2 S.C.R. 206, especially pp. 226–28, and *R. v. Wetmore*, [1983] 2 S.C.R. 284, limit this tendency.
71. See *Duplain v. Cameron*, [1961] S.C.R. 693.
72. *Zacks v. Zacks*, [1973] S.C.R. 891, applying and generalizing a *dictum* found in *Jackson v. Jackson*, [1973] S.C.R. 205.
73. *A.-G. Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570; and *Tomell Investments Ltd. v. East Marstock Land Ltd.*, [1978] 1 S.C.R. 974. See however *Reference as to the Validity of Section 6 of the Farm Security Act, 1944, of the Province of Saskatchewan*, [1947] S.C.R. 394, confirmed in *A.-G. Saskatchewan v. A.-G. Canada*, [1949] A.C. 110.
74. *Robinson v. Countrywide Factors Ltd*, [1978] 1 S.C.R. 753; and see *Tomell Investments*, ibid. at pp. 986–87. But here there are more cases which hold provincial legislation based on insolvency unconstitutional: *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31; *Validity of the Orderly Payment of Debts Act, 1959 (Alta.)*, [1960] S.C.R. 571; *A.-G. Ontario v. Policy-Holders of Wentworth Insurance Co.*, [1969] S.C.R. 779.
75. Compare *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] S.C.R. 584, and *MacKay v. The Queen*, [1965] S.C.R. 798; *Interprovincial Co-operatives Ltd v. Dryden Chemicals Ltd.*, [1976] 1 S.C.R. 477, and *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529 (but where no constitutional issues were raised).
76. See *A.-G. Ontario v. Scott*, [1956] S.C.R. 137 (enforcement of alimony payments to the benefit of residents of another jurisdiction); *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238 (analogy made with labour relations legislation and with compulsory arbitration legislation); and the cases discussed later in the same paragraph.
77. [1969] S.C.R. 383.
78. [1976] 2 S.C.R. 349: the Court sees a link between the status of foreigners and citizens and that of companies incorporated under federal legislation. The federal authorities cannot make such people immune from provincial laws that do not extinguish their general capacity. See also *Canadian Indemnity Co. v. A.-G. British Columbia*, [1977] 2 S.C.R. 504.
79. [1977] 2 S.C.R. 134.
80. See the *Margarine Case*, [1949] S.C.R. 1, with respect to importing; *Murphy v. C.P.R. Co.*, [1958] S.C.R. 626; and *Caloil Inc. v. A.-G. Canada*, [1971] S.C.R. 543.
81. *A.-G. Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689; and *Burns Food Ltd. v. A.-G. Manitoba*, [1975] 1 S.C.R. 494.
82. *Canadian Industrial Gas & Oil Ltd v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42. To the extent that these cases deal with natural resources, their effect is overcome by the enactment of s. 92A of the *Constitution Act, 1867* by the *Constitution Act, 1982*.
83. (1881), 7 App. Cas. 96.
84. *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134.
85. *Labatt Breweries of Canada Ltd. v. A.-G. Canada*, [1980] 1 S.C.R. 914.
86. See the *Margarine Case*, [1949] S.C.R. 1; *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238; *Canadian Indemnity Co. v. A.-G. British Columbia*, [1977] 2 S.C.R. 504; *Canadian Industrial Gas & Oil Ltd v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, p. 569; *Nova Scotia Board of Censors v. McNeil*,

[1978] 2 S.C.R. 662; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, pp. 1293–94; and *Labatt Breweries*, ibid.

87. *Reference re Agricultural Products Marketing Act*, ibid., p. 1293; applied in *Labatt Breweries*, *supra*, note 85, and approved in *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, p. 74.
88. *Reference Agricultural Products Marketing Act*, *supra*, note 86, p. 1295.
89. [1957] S.C.R. 198, where Kerwin C.J. and Nolan and Locke JJ give to local transactions a limited scope, whereas Taschereau, Fauteux and Abbott JJ rejected this view. With respect to provincial jurisdiction, see also *Crawford v. A.-G. British Columbia*, [1960] S.C.R. 347, and *Brant Dairy Co. v. Milk Commission of Ontario*, [1973] S.C.R. 131, pp. 135 and 164–66.
90. *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238, especially p. 253. See also *Canadian Indemnity Co. v. A.-G. British Columbia*, [1977] 2 S.C.R. 504; and *A.-G. Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211.
91. *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, p. 866.
92. Compare *Fowler v. The Queen*, [1980] 2 S.C.R. 213, and *Northwest Falling Contractors Ltd v. The Queen*, [1980] 2 S.C.R. 292; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, and *R. v. Sutherland*, [1980] 2 S.C.R. 451. See also *Martin Service Station Ltd. v. Minister of National Revenue*, [1977] 2 S.C.R. 996.
93. See *McKay v. The Queen*, [1965] S.C.R. 798; *Jones v. A.-G. New Brunswick*, [1975] 2 S.C.R. 182; and *Natural Parents*, ibid.
94. *Cardinal v. A.-G. Alberta*, [1974] S.C.R. 695; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, pp. 777–78; and *Four B Manufacturing Ltd v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, pp. 1049 et seq.
95. See *Campbell-Bennett Ltd v. Comstock Midwestern Ltd*, [1954] S.C.R. 207; also, *C.N.R. Co. v. Trudeau*, [1962] S.C.R. 398, p. 405. In *A.-G. Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211, the provincial legislation was applied indirectly (through the respondent) to television.
96. See *Four B. Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, especially p. 1047.
97. *Minimum Wage Commission v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767. It was already known that the working conditions of federal public servants and postal service employees are exclusively under federal jurisdiction: *In the Matter of Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. 505; and *Reference as to the Applicability of the Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office*, [1948] S.C.R. 248.
98. *A.-G. Canada v. C.P.R. Co.*, [1958] S.C.R. 285. See also *Nykorak v. A.-G. Canada*, [1962] S.C.R. 331.
99. In *Winner v. S.M.T. (Eastern) Ltd*, [1951] S.C.R. 887, the Court held that an international and interprovincial bus service came within federal jurisdiction but that the undertaking remained within provincial jurisdiction with respect to transport from one point to another within the province; but the Privy Council held that the federal authorities had exclusive jurisdiction over the whole operation; *A.-G. Ontario v. Winner*, [1954] A.C. 541.
100. *The Empress Hotel Case*, [1948] S.C.R. 373, affirmed at [1950] A.C. 122; *Campbell-Bennett Ltd v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207; the *Stevedoring Case*, [1955] S.C.R. 529; *R. v. Board of Transport Commissioners*, [1968] S.C.R. 118, *Agence Maritime Inc. v. Canadian Labour Relations Board*, [1969] S.C.R. 851; *Kootenay and Elk Railway Co. v. C.P.*, [1974] S.C.R. 955; *Letter Carriers Union v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178; *Canadian Labour Relations Board v. C.N.*, [1975] 1 S.C.R. 787; *C.N. v. Board of Commissioners of Public Utilities*, [1976] 2 S.C.R. 112; *C.N. v. Nor-Min Supplies Ltd.*, [1977] 1 S.C.R. 322; *Saskatchewan Power Corp. v. TransCanada Pipelines Ltd*, [1979] 1 S.C.R. 297, *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Northern Telecom Ltd. v. Communications Workers*, [1980] 1 S.C.R. 115; and *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433.

101. *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, and *Public Service Commission v. Dionne*, [1978] 2 S.C.R. 191. In these two cases, the Court specified that it does not deal with cable systems transmitting their own programs to subscribers in the province.
102. *Dionne*, *supra*, note 101, p. 197.
103. *Caloil Inc. v. A.-G. Canada*, [1971] S.C.R. 543, pp. 549–50; and *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, p. 689.
104. *Smith v. The Queen*, [1960] S.C.R. 776: *O'Grady v. Sparling*, [1960] S.C.R. 804; *Stephens v. The Queen*, [1960] S.C.R. 823; and *Mann v. The Queen*, [1966] S.C.R. 238. See also *McNeil*, *supra*, note 103, pp. 693–95.
105. *Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *Lieberman v. The Queen*, [1963] S.C.R. 643; and *Fawcett v. A.-G. Ontario*, [1964] S.C.R. 625. Today, see especially *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161.
106. *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753; and *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, pp. 779–80.
107. See A. Tremblay, "Précis de droit constitutionnel" (1982), *Thémis*, p. 172; B. Laskin, "Occupying the Field: Paramountcy in Penal Legislation" (1963), 41 *Can. Bar Rev.* 234; and Hogg, *supra*, note 52, p. 738.
108. When a statute is declared unconstitutional, the other level of government cannot necessarily enact it in the same terms (*Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42, pp. 75–76), but it does have jurisdiction to regulate the matter at issue because of the exhaustive allocation of legislative powers (see *Jones v. A.-G. New Brunswick*, [1975] 2 S.C.R. 1982, p. 195, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, p. 408).
109. Hogg, *supra*, note 52, pp. 727 et seq., gives additional reasons to explain the larger number of cases challenging provincial legislation (and the larger number of such cases which succeed).
110. Compare, for example, the majority reasons to those of the minority in *A.-G. Ontario v. Policy-Holders of Wentworth Insurance Co.*, [1969] S.C.R. 779.
111. Hogg, *supra*, note 52; and P.H. Russell, "The Effect of Judicial Decisions on Federal-Provincial Relations" (Paper prepared for Annual Meeting of the Canadian Association of Law Teachers, University of Toronto, May 29, 1984). As for G. L'Ecuyer, he concludes that the Supreme Court has been more centralist than the Privy Council but that it has remained faithful to the spirit and the letter of the Constitution: G. L'Ecuyer, *La Cour suprême du Canada et le partage des compétences 1949–1978* (1978); see also Rémillard, *supra*, note 7, p. 258. Writing in 1968, Brossard found that since 1949 the Supreme Court had "strongly favoured" the central power (*supra*, note 7, p. 204).
112. See *supra*, note 7 and related text.
113. [1982] 2 S.C.R. 161.
114. Two decisions to the same effect handed down on October 13, 1983: [1983] 2 S.C.R. 206 and [1983] 2 S.C.R. 284. See *supra*, note 70 and related text.
115. In a general way, see the reviews of J.D. Whyte (1983), 5 *Supreme Court L.R.* 77 and (1984), 6 *Supreme Court L.R.* 49.
116. See *supra*, notes 64 and 67 and related text.
117. [1982] 2 S.C.R. 9 and [1982] 2 S.C.R. 112. See *supra*, notes 61 and 69 and related text.
118. See P.J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984), 34 *U. of T. L.J.* 47.
119. See Russell, *supra*, note 111, p. 8.
120. [1983] 1 S.C.R. 43, p. 46.
121. [1976] 2 S.C.R. 373, p. 433.
122. *Manitoba Government Employees Association v. Government of Manitoba*, [1978] 1 S.C.R. 1123.
123. [1950] S.C.R. 608.

124. See with respect to other provinces s. 129 of the *Constitution Act, 1867*.
125. *A.-G. Nova Scotia v. A.-G. Canada (Lord Nelson Hotel Case)*, [1951] S.C.R. 31.
126. [1945] S.C.R. 385: "that such a question could be settled only by or in the course of judicial proceedings is, I think, a misconception," p. 435, by Rand J.; and see p. 404, by Rinfret C.J. and Taschereau J.
127. [1948] S.C.R. 403, reversed on this point at [1950] A.C. 87.
128. [1958] S.C.R. 744, p. 755.
129. *A.-G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *A.-G. Manitoba v. Forest*, [1979] 2 S.C.R. 1032; and *Reference re the Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54. Also, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.
130. In fact, the only new applications of this case were made in the *Reference re the Upper House*, *supra*, note 129; first at pp. 72–73, to establish that a legislature cannot transfer all its powers to another body; then at p. 77, where it says that "the selection of senators by a provincial legislature or by the Lieutenant Governor of a province would involve an indirect participation by the provinces in the enactment of federal legislation and is contrary to the reasoning of this Court in the *Lord Nelson Hotel Case*."
131. *Lord's Day Alliance of Canada v. A.-G. British Columbia*, [1959] S.C.R. 497, the Court deciding the matter governed by the *Lord's Day Alliance of Canada v. A.-G. Manitoba*, [1925] A.C. 384; and *Jones v. A.-G. New Brunswick*, [1975] 2 S.C.R. 182, pp. 190–91.
132. [1952] 2 S.C.R. 392; the Court explained that it was not a delegation of the same nature as in the *Lord Nelson Hotel Case*, but rather of delegation to a subordinate body.
133. See W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967), 45 *Can. Bar. Rev.* 409, pp. 422–23; and *infra*, note 139.
134. *A.-G. Ontario v. Scott*, [1956] S.C.R. 137.
135. [1968] S.C.R. 569, in a five-to-two decision. See also the *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, p. 1224.
136. See *National Freight Consultants Inc. v. Motor Transport Board*, [1980] 2 S.C.R. 621.
137. See *R. v. Smith*, [1972] S.C.R. 359.
138. See also *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811.
139. *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, p. 576. The minority judges also point out that cooperation is desirable but they conclude that the scheme is a surrrender of powers in order to remedy the decision in *A.-G. Ontario v. Winner*, see *supra*, note 99.
140. [1978] 2 S.C.R. 1198. The preamble to the federal act at issue made specific reference to the desirability to cooperate with the provinces.
141. Ibid., pp. 1223–24.
142. "Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other." *A.-G. British Columbia v. A.-G. Canada*, [1937] A.C. 377, p. 389.
143. [1957] S.C.R. 198, p. 256, Taschereau, Fauteux and Abbott JJ.
144. Ibid., p. 214, Rand J., with whom Cartwright J. seems to agree.
145. [1978] 2 S.C.R. 1198, pp. 1296–97; the "admonition" referred to is cited *supra*, note 142.
146. See *A.-G. Canada and Dupond v. Montreal*, [1978] 2 S.C.R. 771, p. 794, with respect to case law on inconsistency cited at notes 104 and 105 *supra*.
147. See W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 *McGill L.J.* 185, p. 199; and Gibson, *supra*, note 7, pp. 629 and 638.
148. See the opinion of Laskin C.J. in the *Reference re Agricultural Products Marketing*

*Act*, [1978] 2 S.C.R. 1198, pp. 1264–65, and the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, p. 421.

149. [1980] 1 S.C.R. 844, p. 858; the majority also invoke the *Lord Nelson Hotel Case* to the effect that the power cannot be conferred by consent.
150. *Dominion Stores Ltd*, ibid., p. 864.
151. See Monahan, *supra*, note 118, p. 96; and P.C. Weiler, "The Supreme Court of Canada and Canadian Federalism" (1973), 11 *Osgoode Hall L.J.* 225.
152. See B. Laskin, "'Peace, Order and Good Government' Re-Examined" (1947), 25 *Can. Bar. Rev.* 1054, p. 1076; B. Laskin, "Reflections on the Canadian Constitution after the First Century" (1967), 45 *Can. Bar Rev.* 395; and N. Caplan, "Some Factors Affecting the Resolution of a Federal-Provincial Conflict" (1969), 2 *Canadian Journal of Political Science* 173, p. 184: "the basic nature of federal-provincial relations is *competitive*, rather than co-operative."
153. See also *Munro v. National Capital Commission*, [1966] S.C.R. 663, p. 667, and *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, p. 208; more generally, see P.H. Russell, "The Political Role of the Supreme Court of Canada in its First Century" (1975), 53 *Can. Bar Rev.* 576, especially p. 590.
154. P.W. Hogg, "Comment" (1982), 60 *Can. Bar Rev.* 307. On this occasion, the political interventionism of the Court was pointed out by all of the commentators, including J.D. Whyte (1983), 5 *Supreme Court L.R.* 77, p. 134 et seq.
155. *Supra*, note 114.
156. See also *supra*, note 120 and related text.
157. See Russell, *supra*, note 111; Lederman, *supra*, note 133; and Hogg, *supra*, note 154, p. 322 et seq.
158. See Hogg, *supra*, note 52, at note 18, p. 726; and Lederman, *supra*, note 58, p. 616.
159. For example, in Quebec, legislative and judicial unilingualism and the power of veto (*A.-G. Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, and *Re: Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793); and, in Newfoundland, the resources of the continental shelf and perhaps the nationalization of Churchill Falls (*Reference re Newfoundland Continental Shelf*, Supreme Court, March 8, 1984, and *Churchill Falls (Labrador) Corp. v. A.-G. Newfoundland*, Supreme Court, May 8, 1984).
160. See Russell, *supra*, note 153.
161. See H. Brun and G. Tremblay, *Droit constitutionnel* (1982), pp. 301–302.

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