The Impact of the Supreme Court of Canada on Intergovernmental Relations

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The Impact of the Supreme Court of Canada

In 1949, the Supreme Court of Canada replaced the Judicial Committee of the Privy Council (JCPC) as Canada’s final court of appeal, and since then, there has been a great deal of debate surrounding the Court’s appropriate role, and its impact on the practice of Canadian federalism. This paper will make two claims about the relationship between the Supreme Court and Canadian federalism. First, regarding the role of the Court in Canada’s federal system, this paper will outline its important, yet limited, role as constitutional ‘umpire,’ which primarily entails the establishment of jurisdictional boundaries to facilitate intergovernmental negotiation. Second, in regard to the impact of the Court’s jurisprudence on the distribution of powers, this paper will argue that its decisions have had a net balancing effect that has rewarded both the federal and provincial levels of government. It is important to note that this paper will mainly focus on cases from 1970s and 1980s, a time frame in which the court presided over key cases with the potential to shape the nature of Canadian federalism. [1]

To understand the role of the Supreme Court, it is important to note that its decisions are not central to intergovernmental negotiations, but rather one of the many factors at play. Indeed, as Katherine Swinton explains, “the result of a legal ‘win’ for one government is not the same as a political win,” meaning Supreme Court decisions do not conclusively end federal-provincial disputes, but are just one variable in the practice of executive federalism.[2] A prime example comes after the Court granted exclusive power to the federal government over the natural resources of the Continental Shelf. Following that decision, the Mulroney government re-engaged Newfoundland in negotiations and ultimately entered into an agreement that granted the province “an owners claim on royalties and equal management powers over the development of the area.” [3] Thus, it is clear that the Court’s impact is not absolute; however, it is nevertheless significant to the dynamics of Canadian federalism.
The outcomes of judicial decisions impact governments in two fundamental ways. The first is the more direct effect of preventing governments from legislating over a desired policy area. In some cases, there may be other ways to achieve the same objective, such as altered taxation or spending, or the use of a different power, meaning judicial decisions can alter the policy tools governments use.[4] For example, after the Court frequently rejected the federal government’s claim of authority over competition policy under the trade and commerce power, it eventually resorted to the use of the criminal law power to achieve the same objective.[5]

However, in most cases, the use of a different policy instrument is not feasible, and in these situations, the main role of the Court is to affect the bargaining behaviour of governments by setting jurisdictional boundaries for negotiations.[6] Peter Russell identifies this as the “political effect” of Supreme Court decisions, explaining that constitutional power from this perspective “should be viewed as a political resource just as popularity or a good international economic climate are resources for democratic politicians.”[7]

Emphasizing the role of the Supreme Court as a facilitator, Swinton explains the Court’s role as a “catalyst” or “restraining force” in the course of federal-provincial negotiations.[8] Weiler argues that the political process should completely replace judicial review in the resolution of intergovernmental disputes, placing great faith in the ability of governments to independently negotiate agreements by drawing an analogy to collective bargaining. Such an analogy, however, has a major shortcoming, which is that federal-provincial relations lack the threat of an effective sanction, such as the strike, and a change in political resources, such as a decisive Supreme Court ruling, is often needed to catalyze negotiation.[9] A prime example is the *Patriation Reference* case in 1981. By this time, intergovernmental negotiations over the patriation of the constitution and drafting of the Charter of Rights and Freedoms had collapsed,
and the federal government’s unilateral pursuit of this end seemed inevitable, despite the fact that such action would aggravate regional tensions. However, while the Supreme Court ruled that unilateral federal patriation was legal, their decision that constitutional convention required substantial provincial consent for constitutional amendment forced both levels of government back to negotiations that led to the ‘November Accord.’[10] Indeed, if the provinces had not returned to the bargaining table, Ottawa would have been legally permitted to ‘go it alone’ and a number of key provincial interests may have been neglected. Further, if the federal government had proceeded unilaterally, its image would be damaged for violating a constitutional convention. Thus, as Russell explains, the Court’s ruling provided both levels of government with a political resource that drove them back to the negotiating table.[11]

Supplementing the analysis of Swinton and Russell, James Kelly and Michael Murphy further examine the role of the Supreme Court in federalism disputes, defining the Court’s role as “meta-political,” meaning “the Supreme Court’s jurisprudence supplements rather than subverts the role of political actors.”[12] According to the authors, the primary role of the Court in federalism disputes is to apply rulings that balance the Constitution’s regard for national unity, and its respect for provincial diversity and regional tensions. The Court’s rulings are intended to shape intergovernmental negotiations around these key, broad principles, while providing the governments as much freedom as possible to arrive at specific solutions and agreements, thus preventing the subversion of the role of political actors. The authors define this process as “constitutional dialogue.”[13]

The Court’s majority decision in the Quebec Secession Reference is an excellent example of this constitutional dialogue, which established broad parameters for negotiation, namely the necessity of a referendum with a clear question that produces a clear mandate, without ruling on
specific requirements, such as the exact amount of approval necessary, the question that should be posed, or the parameters of intergovernmental debate on the issue.[14] After years of failed negotiations on secession dating back to the election of the Parti Québécois in 1976, the Supreme Court’s decision opened a constitutional dialogue on the issue, establishing parameters for future debate, and driving both Ottawa and Quebec to draft legislation based on the Court’s decision, the Clarity Act and Bill 99 respectively.[15] In recognizing Quebec’s right to secession under certain conditions, the Court established the need for the federal government to negotiate with Quebec, and, by rejecting Quebec’s unilateral right to secede, required Quebec to engage in negotiations with Ottawa.[16] Thus, motivating negotiation while leaving specific parameters to the political actors, the Secession Reference serves as a prime example of the Court’s important, yet limited, role in the practice of Canadian federalism.

In order to fully understand the Court’s impact on federal-provincial relations, it is essential to examine a distinct element of its method of constitutional interpretation. According to Swinton, there are two main methods of constitutional interpretation. The first is to attempt to understand and implement the document as originally intended by the Fathers of Confederation.[17] However, as Peter Hogg and Wade Wright explain, to understand this original intent is incredibly difficult. The authors illustrate that the British North America Act contains conflicting signals that do not establish a definitive preference toward centralization or decentralization, as the act contains evidence for both.[18] As a result, the text is very ambiguous, the framers likely accepting this ambiguity in order to satisfy conflicting provincial objectives, namely Ontario’s desire for a strong federal government, and Quebec and the Maritimes’ desire for the protection of local language and culture.[19]
The ambiguity of the text has given rise to the second major method of constitutional interpretation, which is to view the document as a ‘living tree’ that must adapt to the changing preferences and circumstances of Canadian society.[20] Since the document can be interpreted on a case-by-case basis from a centralist or decentralist perspective, the Court exercises a great deal of discretion that provides its members a significant level of creativity in allocating powers and clarifying jurisdiction. As a result, justices exert notable influence on the development of government policy, which is, however, limited by the Court’s ability to affect intergovernmental negotiations.[21]

Swinton outlines three main methods by which the Court can apply this adaptive approach. The first is to enunciate a changing meaning of the classes of subjects in sections 91 and 92 of the BNA Act, such as when the Court in the Zelensky case ruled that compensation orders fall under federal jurisdiction as part of the sentencing process, based on a new interpretation of criminal sanctions.[22] The second method used by the Court is related to its interpretation of the “peace, order and good government clause” in section 91 of the Act, which can place a provincial power under federal control if it is a matter of ‘national concern.’[23] The third method used by the Court to adapt the Constitution to changing circumstances is to rule a legislative power of one level of government “necessarily incidental” or “rationally connected” to the implementation of a power of another level of government.[24]

As Wayne MacKay explains, the Court’s adaptive approach is reflected in its increasing use of extrinsic evidence (outside, non-legal sources), which “emphasizes the policy implications of legal interpretations and underscores the importance of context in constitutional decisions.”[25] Indeed, this view of the Constitution as a “living tree” has led to a change in perspective, from the JCPC’s purely legal, ‘formalist’ approach, to the new ‘functional’ approach.
that considers questions of efficiency as opposed to simply the formal legal rights of governments.[26] A prime example of this approach is the Court’s decision in the General Motors case, which granted the federal government authority over competition policy, a traditionally provincial responsibility, not on the grounds of territoriality, but based on the fact that the power had taken on “national dimensions” that Ottawa, and not the provinces, could effectively reflect through policy.[27] This new approach was met with quite a bit of controversy.

Indeed, the ‘living tree’ approach to constitutional interpretation has been criticized as a way of justifying increasing centralization. [28] A prime example, in regard to the topic of globalization, is the ability of the provinces to block the movement of trade and labour. Another is their ability to obstruct the implementation of international agreements covering areas of provincial jurisdiction by refusing to pass enabling legislation. The result has been increasing demands for centralization to ensure stronger economic integration, and thus greater performance on the international stage. [29] However, those who fear the deterioration of provincial jurisdiction need not worry, as the evolving circumstances faced by the Court have not undermined its overall balanced approach to federalism jurisprudence.

An effective way of understanding the overall balance of Supreme Court jurisprudence is to analyze the three distinct perspectives of justices sitting on the bench. It is important to discuss the centralization, decentralization, and balanced interpretations separately, as the Court’s overall balance does not derive from a balancing approach by each individual justice. To the contrary, their competing preferences serve as opposing forces that ultimately establish equilibrium. [30] This section will focus on, arguably, three of the most influential members of the Court in the period between 1970 and 1990, Bora Laskin, Jean Beetz, and Brian Dickson. It will analyze their
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methods of constitutional interpretation through the lens of the important issue of the “peace, order and good government” (p.o.g.g.) power regarding federal economic regulation.

Chief Justice Bora Laskin was a known centralist, and a proponent of the view that the p.o.g.g. clause was a ‘general power’ that granted Parliament the authority to legislate on all matters of national concern. Such an interpretation is known as the ‘aspect doctrine,’ which grants the federal government the authority to legislate on all matters, including those under provincial jurisdiction, that have a ‘federal aspect’ or ‘national dimensions.’[31] The Anti-Inflation Reference was a prime opportunity for Laskin to enunciate this view and provide it a firm legal basis, supporting the federal government’s argument that the problem of inflation had become a ‘national concern,’ justifying federal wage and price controls despite provincial control over employment measures and business regulation.[32] Ultimately, a majority of the Court rejected this interpretation of the p.o.g.g. power; however, Laskin was still able to uphold the legislation through another understanding of the clause, the ‘emergency doctrine.’

In her decision, Laskin asserted that double-digit inflation constituted a ‘national emergency,’ which granted Ottawa the authority to legislate on the matter by whatever tools necessary.[33] This interpretation of the emergency doctrine stands in stark contrast to the JCPC’s decentralist interpretation of the doctrine, which ruled Bennett’s “New Deal” invalid on the basis that even the Great Depression of 1929 did not constitute a national crisis.[34] Laskin’s decision in the Anti-Inflation Reference serves as an excellent example of his overt centralism, with his decisions ultimately being driven by a concern for economic efficiency and a belief that the federal government was better equipped to deal with significant issues of Canada’s federal system.[35]
Justice Jean Beetz, by contrast, was a known proponent of decentralization, supporting rules that limit the discretionary power of judges, protect the rights of the provinces, and uphold the classical view of federalism enunciated by the JCPC.[36] Beetz’s decision in the Anti-Inflation Reference is clear proof of his preference for a limited central government, rejecting both the ‘national dimensions’ and ‘emergency power’ doctrines of the p.o.g.g. power. Instead, Beetz ruled the legislation invalid under the national dimensions doctrine on the basis that not doing so would establish a dangerous precedent under which there would exist few limitations on matters under federal control, which would result in a permanent change to the distribution of powers.[37]

In his ruling on the use of the emergency doctrine of the p.o.g.g. power to justify the legislation, Beetz claimed that such a shift in the division of powers, although temporary, would constitute an amendment to the Constitution. As a result, he argued that Parliament, and not the Court, should be required to affirm the use of this power, as “it is the duty of the Court to uphold the Constitution, not seal its suspension.”[38] Beetz’s approach was likely politically calculated, recognizing that it would be politically damaging for a government to support a doctrine that so clearly expands federal powers, as it would alienate the large decentralist voter base in Quebec.[39] Thus, clearly intended to safeguard provincial jurisdiction, Beetz’s decision in the Anti-Inflation Reference serves as a useful example of the decentralist forces affecting the Court’s overall jurisprudence.

The approach of Chief Justice Brian Dickson to division of powers cases was markedly different from those of Laskin and Beetz, as he did not demonstrate an established preference towards one level of government. Instead he embraced his policy-making role as judge, and enunciated a view of federalism that promoted balance and concurrency, allowing federalism...
disputes to be resolved primarily by political, as opposed to legal, actors.[40] Dickson’s approach to the p.o.g.g. power in the Canadian National Transportation case clearly exemplifies this balanced approach. Refusing to approve federal control over anti-competition legislation based on the expansive ‘national dimensions’ doctrine, Dickson instead justified it based on the more limited ‘provincial inability’ doctrine of the p.o.g.g. power. This doctrine granted the federal government authority over regulation affecting the “economy as a whole” that the provinces “jointly or severally would be constitutionally incapable of passing,” and where “the result of [federal] inaction must be to jeopardize the efficacy of the regulatory scheme elsewhere in the country.”[41] This decision was very balanced, granting the federal government authority over an important legislative matter, but protecting provincial jurisdiction in future disputes by making ‘provincial inability’ a prerequisite for future grants of power.

As Saywell explains, the justices appointed to the Supreme Court in the 1970s and 1980s were carefully selected to cultivate an overall balanced approach. The three decentralist Québécois justices served as an opposing force to the centralists, led by Laskin and joined by Spence and Dickson to form the “L-S-D connection,” with the three remaining justices serving as swing votes that allowed both the support of federal and provincial powers in different cases, creating an overall balanced approach.[42] As Russell explains, the net outcome of Supreme Court decisions has been the maintenance of a balanced distribution of powers, as, in all major policy areas, the Court has compensated for decisions favouring one level of government by eventually favouring the other.[43] A prime example is in the sphere of trade and commerce, for which the Court supported an expanded federal economic regulatory power. In Caloil and the Agricultural Marketing Act Reference, this was done by allowing federal intervention in intraprovincial trade. In the Vapor Canada and Labatt cases, however, the Court limited federal
The Impact of the Supreme Court of Canada economic regulation within the provinces by rejecting the expansive ‘general regulation of trade’ doctrine.[44] In the sphere of criminal justice, the Court’s rulings in the *McNeil* and *Dupond* cases established a judicial approach limiting the ability of the federal government to use its criminal law power to intervene in the administration of criminal justice, which is a provincial responsibility. However, in the *Houser* and *Keable* cases, the Court restricted provincial powers in this area by limiting their authority over sentencing and policing. [45]

In regards to culture, while Ottawa’s ‘win’ in the *Capital Cities* case allowed it exclusive authority over “the physical means of broadcasting,” and Quebec’s ‘loss’ in *Dionne* rejected the province’s right to license cable television outlets to develop culture, the Court’s rulings in the *Kellogg’s*, *Labatt*, and *Dominion Stores* cases compensated for these provincial losses by increasing provincial regulation over consumer protection.[46] Finally, in the area of constitutional amendment, Russell describes the Court’s decision in the *Patriation Reference* as “the epitome of balance,” granting Ottawa the legal right to unilaterally amend the Constitution, but limiting that authority by establishing a conventional responsibility to gain provincial approval.[47] Indeed, while the federal win ratio in federalism cases was slightly higher in this period, the victories each level of government accumulated in major policy areas in key cases contributed to net balance. According to Russell, this balanced approach has vastly legitimized the Court’s authority, reflecting the lack of consensus in Canadian society towards centralization or decentralization by refusing to decisively shift the distribution of power to either level of government. [48]

The role of the Supreme Court in the practice of Canadian federalism, specifically the extent of its power and the effects of that power, is a hotly contested issue in Canadian political science. While some, such as Weiler, have argued that the Court has taken on too political of a
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role and therefore must be restricted, this paper takes a different approach. Instead, it develops
the Court as a constitutional ‘umpire,’ whose rulings serve the important, but limited, functions
of allocating political resources to incentivize negotiation, and establishing jurisdictional
boundaries for said negotiations, leaving specific policy decisions to political, as opposed to
legal, actors. Concerning the net outcome of the Court’s jurisprudence on the distribution of
legislative powers, this paper has demonstrated the Court’s approach as one that promotes
overall balance, with grants of power to one level of government met with increases in authority
to the other, in all major policy areas. Thus, ultimately shown to embrace both a limited and
impartial approach to constitutional adjudication, the Court has done much to enhance its
democratic legitimacy and constitutional utility.
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[3] Ibid., 18.

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[5] Ibid.

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[7] Peter Russell, “The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources,” *Canadian Public Policy* 11(2) (1985): 165.

[8] Swinton, *The Supreme Court and Canadian Federalism*, 44.

[9] Ibid.

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[13] Ibid., 220.
[14] Ibid., 238.
[15] Ibid.
[16] Ibid.

[17] Swinton, *The Supreme Court and Canadian Federalism*, 21.

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[19] Ibid.

[20] Swinton, *The Supreme Court and Canadian Federalism*, 21.

[21] Ibid., 31.
[22] Ibid., 32.
[23] Ibid.
[24] Ibid.

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[27] Ibid.

[28] Ibid., 125.
[29] Ibid., 128-129.

[30] John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) 259.

[31] Swinton, *The Supreme Court and Canadian Federalism*, 241.

[32] Ibid.

[33] Ibid.

[34] Hogg and Wright, “Canadian Federalism, the Privy Council, and the Supreme Court,” 347-348.

[35] Swinton, *The Supreme Court and Canadian Federalism*, 223-224.

[36] Ibid., 259.
[37] Ibid., 271.

[38] Ibid.

[39] Ibid.

[40] MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?,” 263.

[41] Swinton, *The Supreme Court and Canadian Federalism*, 296.

[42] Saywell, *The Lawmakers*, 259.

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[43] Russell, “The Supreme Court and Federal-Provincial Relations,” 163.

[44] Ibid.

[45] Ibid.

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