

The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity

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This paper is an examination of the Supreme Court of Canada's interpretation of federalism since constitutional repatriation in 1982. It argues that the lure of centralist efficiency is overpowering a fundamentally important part of our federal order: regionalism. The author contends that changes made by the Court to certain fundamental concepts of Canadian constitutional law now provide Parliament with greater latitude than before in the exercise of its legislative powers. According to the author, these changes are disturbing because they are structured so as to preclude consideration of the legitimate concerns of regional polities. Furthermore, he argues that the Court has reinforced the central government's power to regulate the economy, including intraprovincial matters affecting trade, by resorting to highly functional tests that emphasize economic efficiency over other criteria. This, he claims, makes it more difficult to invoke legitimate regional interests that would lead to duplication, overlapping and even, in the eyes of some, inefficiency.

*The author then focuses on the Court's treatment of environmental protection in an attempt to show the tension between the Court's desire to use a functional approach and the need to recognize regional interests. Finally, through an examination of recent case law, he attempts to demonstrate that the Court's dominant perspective remains functional despite its endorsement of a more community-oriented understanding of federalism in *Secession Reference*. If the Court chooses to proceed in this manner, it will alienate regional polities and may encourage them to choose more radical means of asserting their differences. Further, the author argues that strict adherence to the functional effectiveness approach will undermine the very values that federalism is meant to promote.*

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Parmi les vices inhérents à tout système fédéral, le plus visible de tous est la complication des moyens qu'il emploie. Ce système met nécessairement en présence deux souverainetés. Le législateur parvient à rendre les mouvements de ces deux souverainetés aussi simples et aussi égaux que possible, et peut les renfermer toutes les deux dans des sphères d'action nettement tracées; mais il ne saurait faire qu'il n'y en ait qu'une, ni empêcher qu'elles ne se touchent en quelque endroit.

Le système fédératif repose donc, quoi qu'on fasse, sur une théorie compliquée, dont l'application exige, dans les gouvernés, un usage journalier des lumières de leur raison.¹

Introduction

This article is about positive law and, more precisely, about the case law on the division of powers developed by the Supreme Court of Canada since constitutional repatriation in 1982. My aim is to demonstrate that this case law rests on two normative understandings of federalism that are sometimes in tension with one another. The dominant understanding focuses mainly on functional effectiveness. Put bluntly, it is a simple inquiry into which level of government can best get the job done. This emphasis has led the Court to strengthen the powers of the central government. The

1. Alexis de Tocqueville, *De la démocratie en Amérique*, t.1 (Paris: Gallimard, 1961) at 253.

Court has equated efficiency with centralism, and has thus favoured the national polity over regional ones. Nevertheless, the Court has not altogether abandoned concerns for the community dimension of federalism, which looks to how “individuals choose to aggregate themselves into political communities,”² and which calls for a judicial inquiry into the deeper and more substantive set of values that underlie Canadian federalism. Such an approach has, yet again, been resorted to by the Supreme Court to strengthen Parliament’s authority. Still, when division of powers issues have been addressed in this way, the legitimate interests of regional communities have stood a much better chance of being recognized. However, as I will try to show, this latter approach has not prevailed. Uniformity and efficiency have clearly been given the upper hand over community concerns. As a consequence, the regional communities’ diverse interests have not been paid all the attention they deserve.

Federalism implies the recognition of spheres of autonomy for the provinces and for the central government. It calls for a form of decentralization that is not just an instrumental strategy or mechanism designed to achieve a desirable national goal. It involves a collective right to be different. In the words of Edward Rubin and Malcolm Feeley, federalism entails “the right of states to act independently, in furtherance of goals the national government does not share.”³ Consequently, as the great Canadian statesman and constitutionalist Pierre Elliot Trudeau said, federalism allows “each government to look after its share of the common good *as it sees fit*.”⁴

In a celebrated article entitled “Criteria for Choice in Federal Systems,”⁵ Richard Simeon correctly emphasized that “federalism is not an end in itself . . . [It] is valued or criticized because it is felt to promote (or constrain) other important values [such as liberty or

2. Edward L. Rubin, “The Fundamentality and Irrelevance of Federalism” (1997) 13 Ga. St. U.L. Rev. 1009 at 1017.

3. Edward L. Rubin and Malcolm Feeley, “Federalism: Some Notes on A National Neurosis” (1994) 41 UCLA L. Rev. 903 at 913.

4. *Federalism and the French Canadians* (Toronto: Macmillan, 1968) at 80 [emphasis in original].

5. Richard E. Simeon, “Criteria for Choice in Federal Systems” (1983) 8 Queen’s L.J. at 131.

pluralism], and is believed to have certain kinds of effects.”⁶ Simeon explained that federalism can be evaluated and criticized from three different perspectives.⁷ First is the perspective of community: “what implications do different forms of federalism have for different images of the ideal or preferred community with which people identify and to which they feel loyalty?”⁸ Second is the perspective of democratic theory: how can federalism promote democracy? And third is the perspective of functional effectiveness: what model of federalism will “enhance or frustrate the capacity of government institutions to generate effective policy and respond to citizen needs?”⁹ As Simeon convincingly demonstrated, each perspective can serve to promote either centralism or regionalism because, even under the second and third perspectives, prior conceptions of community are determinative of the issue. Rubin and Feeley express the same idea when they state that “[d]etermining the identity of the polity to which one speaks necessarily precedes resolution of questions about the desires or interests of its citizens.”¹⁰ Furthermore, as others have shown, there is nothing inherently conservative in decentralization, nor anything inherently progressive in centralism.¹¹ I will now try to demonstrate that the Supreme

6. *Ibid.* at 131-132.

7. For other interesting studies on the “value” of federalism, see Daniel Weinstock, “Building Trust in Divided Societies” (1999) *The Journal of Political Philosophy* 287; Daniel Weinstock, “Vers une théorie normative du fédéralisme”, online: <http://www.ciff.on.ca/Reference/documents/bg_papers/docbg_weinstk_f.html>; Wayne J. Norman, “Towards a Philosophy of Federalism” in Judith Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994) at 79-100; Barry Freidman, “Valuing Federalism”(1997) 82 *Minn. L. Rev.* 317 and A.E. Howard, “The Values of Federalism”, (1993) 1 *New Eur. L. Rev.* 143.

8. *Simeon, supra* note 5 at 133.

9. *Ibid.*

10. *Rubin and Feeley, supra* note 3 at 949.

11. See Alain Noël, “Is Decentralization Conservative? Federalism and the Contemporary Debate on the Canadian Welfare State” in Robert Young, ed., *Stretching the Federation: The Art of State in Canada* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1999) at 195-225; Robert Howse, “Federalism, Democracy, and Regulatory Reform: A Sceptical View of the Case for Decentralization” in Karen Knop *et al.* eds., *Rethinking Federalism:*

Court's vision of federalism is generally premised—whether explicitly or not—on a functional effectiveness perspective, and moreover, on one that favours centralization as opposed to decentralization. The mere fact that it promotes the interests of the national polity does not make this approach illegitimate. What is troubling, however, is that this approach is generally not counterbalanced by a serious consideration of the legitimate concerns of the regional polities. In other words, the Court's approach appears to be one-sided. But, as we will see, the picture is not all that bleak.

In Part I, I will try to demonstrate that changes made by the Court to certain fundamental concepts of Canadian constitutional law now provide Parliament with greater latitude than before in the exercise of its legislative powers. These changes are disturbing because they are structured so as to preclude consideration of the legitimate concerns of regional polities. Furthermore, the Court has reinforced the central government's power to regulate the economy, including intraprovincial matters affecting trade, by resorting to highly functional tests that emphasize economic efficiency over other criteria. This makes it more difficult to assert legitimate regional interests, which would lead to duplication, overlap, and in the eyes of some, inefficiency. Finally, I will try to demonstrate that, in general, the Supreme Court's defence of national interests is more vigorously articulated than its vindication of provincial concerns, even in situations where the Court trades its functional effectiveness approach for a more community-oriented one.

In Part II, to show that the Court is not altogether oblivious to the centripetal consequences of its approach, I will describe the various ways in which it has addressed the issue of environmental protection. Finally, an examination of recent case law will show that although the Supreme Court endorsed a more community-oriented understanding of federalism in the *Secession Reference*,¹² its dominant perspective remains functional.

Citizens, Markets, and Governments in a Changing World (Vancouver: UBC Press, 1994) at 273–293.

12. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

Some will object that changes to constitutional doctrine will have no impact on the political order unless they are in harmony with the wider political culture, and that a study of this sort is of no value. I disagree. As Simeon rightly emphasized, constitutional doctrine does have an impact, and it operates at different levels. In his words:

[C]onstitutional doctrines have important educative values. They privilege some concepts of sovereignty, legitimacy, representation and the like over others and thus make them easier to defend or harder to attack. At a more empirical level, they entrench some kinds of interests over others, and structure the incentives within which political actors work.¹³

I. The Supreme Court of Canada's Functional Approach to Federalism

A. The Centripetal Potential of Judge-Made Constitutional Law Concepts

To claim that the Supreme Court has set out to divest the provinces of their autonomy would be absurd. Indeed, through the combined use of the double aspect doctrine and a restrictive definition of inconsistency, on which I will say more later, the Court has allowed the provinces to regulate matters of local public order, such as domestic securities,¹⁴ business hours in retail stores,¹⁵ “insider trading,”¹⁶ public nudity,¹⁷ and the question of compulsory treatment

13. Simeon, *supra* note 5 at 135. Jean-François Gaudreault-Desbiens, “The Quebec

Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity” (1999) 23 Vt. L. Rev. 793 at 818: “As a rhetorical tool, law may very well serve as a springboard for the creation of new beliefs or as a support to already existing beliefs about these issues.”

14. *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 [*Global Securities*].

15. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [*Edwards Books*].

16. *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161.

17. *Rio Hotel v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 [*Rio Hotel*].

for public health purposes.¹⁸ The Court has even recognized a greater role for provinces in certain Aboriginal matters,¹⁹ and it has given a broad interpretation to provincial taxing powers.²⁰ Nonetheless, important changes made by the Court to certain fundamental concepts have reinforced Parliament's ability to legislate on matters that fall within its jurisdiction.²¹

First and foremost among these Court-made changes was the clear preference given to the aspect doctrine over the classical "watertight compartments" approach to exclusivity²²—one which emphasizes regulatory segregation instead of overlap. According to the aspect doctrine, "a law which is federal in its true nature will be upheld

18. *Schneider v. R.*, [1982] 2 S.C.R. 112 [*Schneider*].

19. *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, 2002 SCC 31 (QL) [*Kitkatla*].

20. *Ontario Home Builders' Association v. York Region Board of Education*, [1996] S.C.R. 929 [*Ontario Home Builders' Association*].

21. Some of the critiques formulated in this article have already been expressed by a great many authors, not all of them Quebecers: Jacques Frémont, "La face cachée de l'évolution contemporaine du fédéralisme canadien" in Gerald A. Beaudoin et al., eds., *Le fédéralisme de demain: réformes essentielles—Federalism for the Future: Essential Reforms* (Montreal: Wilson & Lafleur Ltée, 1998) at 45-58; Villaysoun Loungnarath, "Le rôle du pouvoir judiciaire dans la structuration politico-juridique de la fédération canadienne" (1997) 57 R. du B. 1003; Ghislain Otis, "La justice constitutionnelle au Canada à l'approche de l'an 2000: uniformisation ou construction plurielle du droit?" (1995) 27 R.D. Ottawa 261; Katherine Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 Law & Contemp. Probs. 120 and by the same author "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union" (1995) 25 Can. Bus. L.J. 280; Donna Greschner, "The Supreme Court, Federalism and Metaphors of Moderation" (2000) 79 Can. Bar. Rev. 47-76; Henri Brun, "L'évolution récente de quelques principes généraux régissant le partage des compétences entre le fédéral et les provinces", in *Congrès annuel du Barreau du Québec (1992)*, Service de la formation permanente, Barreau du Québec, Montréal, 1992, 23-29; Micheline Patenaude, "L'interprétation du partage des compétences à l'heure du libre-échange" (1990) 21 R.D.U.S. 1. See also Bruce Ryder's excellent article, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308.

22. According to the text of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91 and 92, Parliament's and the provinces' powers are mutually exclusive.

even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa).”²³ Thus, if statutory provisions in pith and substance relate to a matter within Parliament’s exclusive jurisdiction, “the inquiry is at an end, for *it would then be immaterial that they also affect matters of property and civil rights.*”²⁴ Although this approach and its corollary, the double aspect doctrine, have undeniable advantages in terms of flexibility, they allow courts to forego the essential task of trying to define what is at the core of each exclusive head of power. This could be worrisome for the provinces, because the real beneficiary of the aspect doctrine is the federal government. Except for the residual power and the power over the “general regulation of trade,” federal heads of constitutional power are not as broadly worded as those of the provinces, especially the all-encompassing “property and civil rights” power. Under the aspect doctrine, the impact of federal legislation on provincial jurisdiction is judged to be immaterial, so the legitimate provincial interests at stake in a particular case are not even discussed. In the words of Justice Beetz, the aspect and double aspect doctrines must be invoked with great caution because there is a “risk that these two fields of exclusive powers [ss. 91 and 92 of the *Constitution Act, 1867*] will be combined into a single more or less concurrent field of power governed solely by the rule of paramountcy of federal legislation.”²⁵ Again, if provincial and federal fields of power are held to be concurrent, courts need not even address valid provincial interests.

Nevertheless, the aspect doctrine does not reign supreme because neither the exclusivity principle nor the ancillary power doctrine has been totally relegated to the past. The notion of exclusivity has found its way back into the case law through the concept of “interjurisdictional immunity.” As the case law demonstrates, this concept benefits only the central government because it immunizes core federal competencies—the “basic, minimum and unassailable

23. *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641 at 670 [*City National Leasing*].

24. *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 at 1286 [*Whitbread*] [emphasis added].

25. *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at 766.

content” of a particular head of power²⁶—from the effect of otherwise valid provincial laws. Consequently, “[w]here a provincial statute trenches upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations.”²⁷ Since this concept does not apply in reverse to protect provincial competencies,²⁸ one has to conclude that the Court sees the basic, minimum and unassailable content of provincial heads of power as never having to be defined or even protected. This implies that there are no provincial interests deserving of the kind of protection afforded to national interests.

As for the ancillary power doctrine, the *City National Leasing* case rekindled its dwindling light. Although the Court stressed that “[b]oth provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government’s sphere of power,”²⁹ the federal government is once again the main beneficiary because the provinces’ power over “property and civil rights” is already broad enough to encompass what might otherwise require an ancillary power.³⁰ According to the test developed in *City National Leasing*, an encroachment’s justifiability depends on its meeting a variable “test of ‘fit.’”³¹ By “fit,” the Court refers to “how well the provision is integrated into the scheme of the legislation and how important it is for the *efficacy* of the legislation.”³² The emphasis is no longer on whether the challenged provision is necessarily incidental to the exercise of a particular power—a test that requires the establishment of some nexus between the provision in question and the purpose of the power itself—but on whether that provision is essential for the efficacy of the legislative scheme. Again, the Court

26. *Ibid.* at 839.

27. *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 81 [*Ordon Estate*].

28. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 68 [*Friends of the Oldman River*]; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 at 380–381 [*Ontario Hydro*].

29. *City National Leasing*, *supra* note 23 at 670.

30. *Global Securities*, *supra* note 14 establishes this point.

31. *City National Leasing*, *supra* note 23 at 668.

32. *Ibid.* [emphasis added].

reneges on its duty to define the scope of what was meant to be exclusive.³³

Emphasizing efficiency also precludes the use of the technique of “reading down,” which seeks to strike a balance between the national and provincial interests at stake. When a statute is “read down,” it is held to apply only to fact situations that fall within the jurisdiction of the particular level of government that adopted it. The statute is not rendered void, but its reach is shortened. Focusing on efficiency prevents recourse to “reading down” because a provision is either efficient or it is not.

Finally, in examining the validity of provisions adopted under Parliament’s bankruptcy³⁴ and banking³⁵ powers, the Supreme Court, in the American style, invoked the “field pre-emption approach”³⁶ rather than the “express contradiction”³⁷ test normally used to determine federal paramountcy in Canadian constitutional

33. In *City National Leasing*, *supra* note 23, Parliament enjoyed the best of all worlds. The challenged federal legislative scheme was upheld on the basis of the aspect doctrine, so there was no need to justify the incidental effects of the statute. As for the challenged provision, it was upheld on the strength of an ancillary power test solely concerned with efficiency. For a more thorough critique of this aspect of *City National Leasing*, see Jean Leclair, “L’impact de la nature d’une compétence législative sur l’étendue du pouvoir conféré dans le cadre de la *Loi constitutionnelle de 1867*” (1994) 28 R.J.T. 661, 714–717 [Leclair, “Nature d’une compétence”].

34. *Husky Oil Operations v. Minister of National Revenue*, [1995] 3 S.C.R. 453 [Husky Oil].

35. *Bank of Montréal v. Hall*, [1990] 1 S.C.R. 121 [Hall] and *M & D Farm v. Manitoba Agricultural Credit Corporation*, [1999] 2 S.C.R. 961.

36. In *Gade v. National Solid Wastes Mgmt. Assn.*, 112 S.Ct. 2374 at 2383 (1992), the Supreme Court of the United States declared:

Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, . . . and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” [internal quotation marks and citations omitted].

37. Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1996) at para. 163.

law. In other words, a valid provincial law risks being pre-empted by federal legislation not only where dual compliance is impossible,³⁸ but also where the Court finds that the central government has already occupied the legislative field. If applied consistently, the field pre-emption doctrine could render inoperative a great number of provincial laws that have valid spillover effects in areas of federal jurisdiction. In *Hall*, the Court held that in cases where Parliament, in the exercise of its power to regulate a particular matter, enacted a “complete code,” there is no room left for the operation of provincial legislation.³⁹ Again, such a technique makes it more difficult to address the concerns of the provinces.⁴⁰

B. The Judicial Reinforcement of the Central Government’s Power to Regulate the Economy

Judicial reinforcement of the central government’s powers, particularly those concerned with the economy, must be added to the doctrinal changes described above. Again, we see the importance given to efficiency in the resolution of division of powers issues.

The reinforcement of the central government’s power was made possible by the judicial introduction of highly functional tests emphasizing efficiency to determine the scope of some federal heads of power. Most of these changes occurred in the field of economic regulation. This is not surprising, as federal subject matters are

38. *Smith v. The Queen*, [1960] S.C.R. 776 at 800. “When “compliance with one law [the provincial one] involves the breach of the other [the federal one].”

39. *Hall*, *supra* note 35 at 155.

40. Iacobucci J., speaking for the dissenters in *Husky Oil*, *supra* note 34 at para. 120, explained the rationale of the “express contradiction” test in the following terms:

The rationale behind this restrictive use of paramountcy is self-evident: governmental regulation in Canada operates through a complex web of federal and provincial legislation. The regimes structuring many areas of public policy, such as bankruptcy, actively involve both levels of government. To this end, barring a situation where obeying the enactment of one level places a citizen in disobedience of the legislation of the other level, an attempt must be made to read overlapping provincial and federal legislation in a complementary manner.

primarily economic in nature,⁴¹ and the changes were also concomitant with Canada's signing of the *Canada-U.S. Free Trade Agreement*⁴² (FTA). It would be naive to think that the Supreme Court of Canada's recognition of greater federal power over the economy is pure coincidence rather than a step taken deliberately by the Court to enable Parliament to meet its international responsibilities and ensure their implementation.

The FTA, the *North American Free Trade Agreement*⁴³ (NAFTA) and the World Trade Organization (WTO) have greatly constrained the ability of both Parliament and the provinces to establish economic and cultural policies. These constraints are "constitutionalized" in the sense that a political party could not change them, even if armed with a democratic mandate to do so. As Stephen Clarkson has shown, the advent of these trade treaties has already changed the relationship between the central and provincial governments.⁴⁴

Since the end of the 1980s the Supreme Court of Canada has adapted its understanding of federalism to these new political realities. It has progressively set the table, so to speak, for the FTA and NAFTA feast. Whether the political actors will avail themselves of these new powers is another question. I am not arguing that the Supreme Court is pursuing a neo-liberal agenda, but simply that the Court has made it possible for the central government to implement national economic policies of any ideological flavour, at both the national *and* the intraprovincial levels. I will now discuss two ways in which the Court's jurisprudence has strengthened federal authority over economic regulation.

41. See s. 91 of the *Constitution Act, 1867*.

42. 22 December 1987, Can. T.S. 1989 No. 3.

43. 17 December 1992, Can T.S. 1994 No. 2.

44. Stephen Clarkson, *The Multicentered State. Canadian Government under Globalizing Pressures* (2000), online: <<http://www.library.utoronto.ca/envireform/publications/stephen-clarkson/multi-centered-state.html>> .

(i) The Liberal Interpretation of Parliament's Enumerated Powers

First, each time the opportunity has arisen, the Court has given a generous interpretation to Parliament's enumerated powers. Many federal areas of jurisdiction have been interpreted broadly. Among them are interprovincial undertakings,⁴⁵ local undertakings functionally integrated with a primary interprovincial undertaking,⁴⁶ works declared to be to the advantage of the entire nation,⁴⁷ criminal law,⁴⁸ maritime law,⁴⁹ bankruptcy,⁵⁰ fisheries⁵¹ and exports.⁵² Most if not all of the decisions in those areas involved purely technical⁵³ or functional tests,⁵⁴ having great centripetal potential.

45. *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225 [*Alberta Government Telephones*]; *Téléphone Guèvremont v. Québec (Régie des télécommunications)*, [1994] 1 S.C.R. 878 [*Téléphone Guèvremont*].

46. *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 [*Westcoast Energy*].

47. *Ontario Hydro*, *supra* note 28.

48. *R. v. Swain*, [1991] 1 S.C.R. 933; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*Imperial Tobacco*]; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 [*Hydro-Quebec*]; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783.

49. *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 [*ITO*]; *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683 [*Chartwell*]; *Monk Corporation v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779 [*Monk Corporation*]; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 [*Bow Valley*]; *Ordon Estate*, *supra* note 27.

50. *Husky Oil*, *supra* note 35.

51. *Ward v. Canada (Attorney General)*, [2002] S.C.J. No. 21, 2002 SCC 17 (QL) [*Ward*].

52. *Quebec (Attorney-General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159.

53. *Téléphone Guèvremont*, *supra* note 45 at 879, provides an example of the kind of reasoning that is typical in cases involving interprovincial undertakings falling under Parliament's exclusive jurisdiction. The one-paragraph decision states bluntly:

We are of the view that *Téléphone Guèvremont Inc.* is an interprovincial work and undertaking within the legislative authority of the Parliament of Canada by virtue of ss. 92(10)(a) and 91(29) of the *Constitution Act, 1867* by reason of the nature of the services provided and the mode of operation of the undertaking, which provides a telecommunication signal carrier service

At first glance, unlike the other federal heads of power just mentioned, the criminal law power is not aimed at the regulation of the economy. Nevertheless, it should be recalled that both the *Imperial Tobacco*⁵⁵ and *Hydro-Québec*⁵⁶ cases dealt essentially with the regulation of intraprovincial *commercial and industrial* activities. The Court concluded that the criminal law power allowed the central government to regulate matters that had long been held to fall under the provinces' exclusive power over intraprovincial trade and commerce.⁵⁷ In *Canada (Attorney General) v. Canadian National*

whereby its subscribers send and receive interprovincial and international communications

54. In *Westcoast Energy*, *supra* note 46 at para. 49 the Court has developed a new and much more invasive test to determine whether an undertaking is functionally integrated to a primary federal undertaking. The test now focuses on whether there exists a "common management" between the two undertakings: "In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(a), they must be functionally integrated and subject to common management, control and direction." In the words of the dissenting judge, McLachlin J., at para. 145: "To adopt such a simple test would eviscerate provincial jurisdiction over local works and undertakings and would seriously deform the Constitutional division of powers. Applied to a sophisticated, economically integrated society, it would bring a vast array of provincial works into federal jurisdiction." Further, in six cases dealing with admiralty matters (*Whitbread*, *supra* note 24; *Ordon Estate*, *supra* note 27; *ITO, Chartwell, Monk Corporation and Bow Valley*, *supra* note 49), the Court adopted the same reasoning. It held that once a matter was qualified as "maritime" on the basis of a very pragmatic test, *i.e.* whether "the subject-matter under consideration in any case [is] so integrally connected to maritime matters as to be legitimate Canadian maritime law" (*ITO*, *supra* note 49 at 774), it fell under *exclusive* federal jurisdiction. This approach has two consequences. First, it guarantees the uniformity of Canadian maritime law. Second, it makes an ancillary application of provincial law next to impossible. For a critique of the Court's approach, see *Leclair*, "Nature d'une compétence", *supra* note 33 at 696-714.

55. *Supra* note 48.

56. *Supra* note 48.

57. For an analysis of these decisions, see Jean Leclair, "The Supreme Court, the Environment, and the Construction of National Identity" (1998) 4 R. études const. 372-378 [*Leclair*, "Environment"] and Jean Leclair, "Aperçu des virtualités de la compétence fédérale en matière de droit criminel dans le contexte de la protection de l'environnement", (1996) 27 R.G.D. 137-171 [*Leclair*, "Virtualités"].

Transportation Ltd.,⁵⁸ the Court recognized that Parliament is exclusively competent to legislate respecting the prosecution of any federal law offence, whether or not the offence is dependent on the criminal law power. The case involved the federal power to initiate prosecutions under the federal *Combines Investigation Act*,⁵⁹ which is economic legislation par excellence. The Court was undoubtedly influenced by economic considerations, namely the perception that the efficiency of the Act would be reduced if its enforcement depended on provincial prosecution.⁶⁰

Although it is unrelated to the interpretation of Parliament's enumerated powers, it is important to recall that the Court has also recognized the constitutionality of Ottawa's spending power,⁶¹ as well as that of the provinces.⁶² It is self-evident that the federal spending power has been repeatedly used to indirectly regulate matters coming within provincial heads of power. Furthermore, in *obiter*, the Court has also let it be known that if certain conditions are met, a full treaty power might be ascribed to Parliament.⁶³

(ii) The "Provincial Inability Test": A Federal Trojan Horse

This leads to the second and more important area of change in the Court's approach to economic regulation. In the preceding paragraphs, I described the expansion of spheres of federal economic power that are of rather limited scope. Some of those powers—over bankruptcy and banking, for instance—constitute exceptions to the provinces' general authority in matters of private law.⁶⁴ None of those powers allow for broad federal intervention in the field of

58. [1983] 2 S.C.R. 206 [*Canadian National Transportation*]. See also *R. v. Wetmore*, [1983] 2 S.C.R. 284 [*Wetmore*].

59. R.S.C. 1970, c. C-23.

60. I am grateful to Donna Greschner for suggesting this argument.

61. *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.

62. *Lovelace v. Ontario*, [2000] 1 S.C.R. 250.

63. *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 [*Vapor Canada*].

64. See Jean Leclair, "La Constitution par l'histoire: portée et étendue de la compétence fédérale exclusive en matière de lettres de change et de billets à ordre" (1992) 33 C. de D. 535, 541-548.

commerce, especially at the intraprovincial level. However, the situation changed radically with the Court's decision in the *City National Leasing*⁶⁵ case, coincidentally rendered two years after the *FTA* was signed.

Until *City National Leasing*, the trade and commerce power had been interpreted to allow the central government to regulate interprovincial and international trade, and to regulate intraprovincial transactions only to the extent that it was necessarily incidental to the effective regulation of interprovincial and international trade.⁶⁶ In *City National Leasing*, building upon an earlier judicial gloss⁶⁷ on a very laconic statement made by the Privy Council more than a hundred years before,⁶⁸ a unanimous Court recognized Parliament's power over the regulation of "general trade and commerce affecting Canada as a whole."⁶⁹ This new power enabled Parliament, under certain conditions,⁷⁰ to adopt legislation "concerned with trade as a whole rather than with a particular industry."⁷¹ What it conferred on the central government was jurisdiction over both the interprovincial and the intraprovincial aspects of trade. Thus, in *City National Leasing*, a federal law regulating competition was held to be *intra vires* even though it encroached upon the provinces' jurisdiction over intraprovincial competition. Of the five criteria that enable a court to determine if a

65. *City National Leasing*, *supra* note 23.

66. *Caloil Inc. v. Attorney General for Canada*, [1971] S.C.R. 543.

67. Laskin C.J.C's *obiter* in *Vapor Canada*, *supra* note 63, at 156-165 and the dissenting opinion of Dickson J. in *Canadian National Transportation*, *supra* note 58 at 267-68.

68. In *Citizen's Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, 113 (P.C.) [*Parsons*], Sir Montague Smith recognized that s. 91(2) conferred on Parliament a power over interprovincial and international trade regulation, but also over the "general regulation of trade affecting the whole dominion."

69. *City National Leasing*, *supra* note 24 at 657.

70. See *infra* note 81.

71. *City National Leasing*, *supra* note 24 at 661.

matter falls under the head of “general regulation of trade,” two deserve mention:

[T]he legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and . . . the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.⁷²

Under the functional approach adopted in *City National Leasing*, the Court is faced with the unenviable and highly subjective task of determining if and when a particular economic matter is of national importance.⁷³ Some argue that areas such as capital markets, product

72. *Ibid.* at 662. In addition to these two requirements and the fact that the legislation must be concerned with trade as a whole rather than with a particular industry, two more requirements need to be satisfied: “First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency” [at 661]. Justice Dickson specifies that these requirements all “serve to ensure that federal legislation does not upset the balance of power between federal and provincial governments” [at 662].

Each of these requirements is evidence of a concern that federal authority under the second branch of the trade and commerce power does not encroach on provincial jurisdiction. By limiting the means which federal legislators may employ to that of a regulatory scheme overseen by a regulatory agency, and by limiting the object of federal legislation to trade as a whole, these requirements attempt to maintain a delicate balance between federal and provincial power [at 661].

Finally, he added the following caveat: “[T]he five factors provide a preliminary check-list of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power. These *indicia* do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria necessarily determinative [at 662].”

73. Katherine Swinton, “Federalism Under Fire: The Role of the Supreme Court of Canada” *supra* note 21 at 133: “The judicial perspective has shifted from the conceptual (that is, is this a problem with a situs outside the territorial reach of the legislature which might wish to regulate it?) to the functional (is this a problem affecting the national interest, even if much of the regulation will fall within a province?). Once we shift to the functional, we face the perennial problem of criteria for national importance.”

standards and the environment might be caught in the federal government's jurisdictional net.⁷⁴ The double aspect doctrine would enable the provinces to regulate the very same matters in the exercise of their own exclusive powers.⁷⁵ However, the paramountcy rules, especially the recently adopted field pre-emption doctrine, will ensure the pre-eminence of federal legislation in the event of conflict. More ominous for the provinces, this power over economic matters of national importance might enable Parliament to bring the FTA and NAFTA into Canadian domestic law, even in areas of provincial jurisdiction. Indeed, the very purpose of this new power is to allow the regulation of intraprovincial commerce. In *City National Leasing*, Québec argued that the regulation of competition, in its intraprovincial dimension, did not fall within federal jurisdiction and thus the Act should be read down so that the impugned section would only apply to interprovincial trade. The Court rejected this argument, saying that the Act was not only meant to cover intraprovincial trade, but that it had to do so if it was to be effective.⁷⁶ The Court went on to say: "Because regulation of competition is so clearly of national interest and because competition cannot be successfully regulated by federal legislation which is restricted to interprovincial trade, the Québec argument must fail."⁷⁷

The "provincial inability" test had been invoked a year earlier in *Crown Zellerbach*, a case involving the "national concern" doctrine. According to that doctrine, when a subject matter is judicially found to have a "national dimension," it thereafter falls within Parliament's *permanent* and *exclusive* jurisdiction,⁷⁸ pursuant to the residual power set out in the opening words of section 91 of the *Constitution Act*,

74. Robert Howse, *Economic Union, Social Justice, and Constitutional Reform: Towards a High But Level Playing Field* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992. Series: Background Studies of the York University Constitutional Reform Project) at 57-58.

75. *City National Leasing*, *supra* note 23 at 682.

76. *Ibid.* at 681; see also 692-693.

77. *Ibid.*

78. *Re Anti-inflation Act*, [1976] 2 S.C.R. 373, 444 and 461; *Johannesson v. West Saint-Paul*, [1952] 1 S.C.R. 292, 311-312; *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401 at 433 [*Crown Zellerbach*] and *Hydro-Québec*, *supra* note 48 at paras. 67, 115.

1867. The main virtue of the doctrine is that the power it confers extends to both the interprovincial and intraprovincial aspects of the new subject matter.

In *Crown Zellerbach*, the Court breathed new life into the “national concern” doctrine. Contrary to what was believed earlier, it was held to apply not only to new matters that did not exist at Confederation, such as aeronautics and radio-communications, but also to matters “which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern.”⁷⁹ For a matter to qualify as a “national concern,” it “must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.”⁸⁰ In determining whether a matter has attained the required degree of “singleness,” Le Dain J., speaking for the majority,⁸¹ said that one had to consider “what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.”⁸²

As a result, both *City National Leasing* and *Crown Zellerbach* resort to a very vague criterion: “provincial inability.” What does that mean? Jurisdictional or political inability? What is the measure of the “success” to which the Court refers?⁸³ What evidence is required to establish such inability? In *City National Leasing*, the need for uniformity in competition law was established on the basis of the opinions of Peter Hogg, Warren Grover and a leading economist, A.E. Safarian.⁸⁴ Is this sufficient? Is a finding of provincial inability enough to lay the basis for co-extensive federal-provincial jurisdiction, as in the case of general regulation of trade, or for

79. *Crown Zellerbach*, *ibid.* at 432.

80. *Ibid.*

81. Dickson C.J.C., McIntyre and Wilson JJ. concurred with Le Dain J. Beetz, Lamer and La Forest JJ. dissented. Justice La Forest wrote the dissenting opinion.

82. *Crown Zellerbach*, *supra* note 78 at 432.

83. *City National Leasing*, *supra* note 23 at 663.

84. *Ibid.* at 678–689.

exclusive federal jurisdiction, as in the case of the national dimension doctrine? Some claim that the provincial inability test has introduced a principle of subsidiarity in Canadian law. I disagree. The subsidiarity principle was initially introduced to limit the powers of European institutions⁸⁵ in the exercise of concurrent powers.⁸⁶ However, in Canada, in the context of Parliament's power over matters deemed to be of national interest, the provincial inability test serves to expand the Central government's *exclusive* jurisdiction over *intraprovincial* matters.⁸⁷ If the principle of subsidiarity has a place in Canadian constitutional law, that place, as we will see later, lies elsewhere.

Whatever I may think of the functional tests developed in *City National Leasing* and *Crown Zellerbach*, I do not question the fact that they enable Parliament to implement some of the legislation made mandatory by Canada's international commitments. The extent to which Parliament can do that is still a matter for debate. Some authors go as far as to claim that some form of commandeering by Parliament would be permissible.⁸⁸

85. See Joël Rideau, *Le droit des communautés européennes*, (Paris: Presses Universitaires de France, 1995) at 12–13. However, as mentioned by Denis J. Edwards, "Fearing Federalism's Failure: Subsidiarity in the European Union" (1996) 44 Am. J. Comp. L. 537 at 543, "[t]he paradox of subsidiarity, a principle that aims to limit the federal powers of the EC, is that it is contained in a Treaty that aims to further the creation of a European federation. Subsidiarity reveals the fear that in Europe federalism possesses the same centripetal tendencies that some perceive it to have in the United States."

86. The principle of subsidiarity only applies in the interpretation of concurrent powers: Pierre-Alexis Féral, "Le principe de subsidiarité dans l'Union européenne" (1996) 112 Rev. D.P. & S.P. 203, at 213, 216.

87. *Crown Zellerbach*, *supra* note 78. For a critical analysis of the national dimension doctrine, see Jean Leclair, "Droit constitutionnel—partage des compétences—Loi réglementant les produits du tabac, C. 1988, c. 20—La théorie des dimensions nationales: une boîte à phantasmes: *Canada (Procureur Général) c. R.J.R.-MacDonald Inc.*" (1993) 72 Can. Bar Rev. at 524–538.

88. Mark A. Luz, "NAFTA, Investment and the Constitution of Canada: Will the Watertight Compartments Spring a Leak?" (2000–2001) 32 Ottawa L. Rev. 35 at 84.

C. The Court's Diverging Approaches to the Defence of National and Regional Interests

I will now critically assess the changes in Canadian constitutional jurisprudence that I have just discussed. By way of introduction, I will underline how the Privy Council's presumably more formal approach to federalism had the virtue of forcing courts to define what lay within the exclusive purview of the provincial polities. The "functional effectiveness" perspective allows courts to elude this important responsibility. I will then try to demonstrate that, in general, the Supreme Court's defence of national interests is more vigorously articulated than its vindication of provincial concerns, even in situations where the Court trades its functional effectiveness approach for a more community-oriented approach.

(i) The Neglected Virtues of "Formalism"

As I said earlier, the double aspect and the ancillary power doctrines enable courts to forego the task of defining the exclusive core of provincial jurisdictions. Forcing courts to assess and define a jurisdiction's exclusive core will not bring to light an objective and universal truth about the appropriate balance of powers in the Canadian federation. However, from a provincial perspective, it is certainly a better solution than letting courts develop purely functional tests that are confined to measuring efficiency. As Barry Friedman has said with respect to American federalism, "formalism may have been an illusion, but it was one that permitted the courts to hold certain state functions immune from national intervention."⁸⁹ This accurately describes the Canadian experience as well. In 1966, Jean Beetz, an academic at the time, was referring to exactly the same thing when he made the following comments:

Enfin le juriste québécois ne peut que se troubler devant l'attitude de certains juristes canadiens qui ou bien se contentent de critères surtout quantitatifs pour déterminer la validité des lois dont la constitutionnalité est mise en doute ou bien

89. Friedman, *supra* note 7 at 371.

prennent plaisir à souligner le degré considérable d'intuition qui entre en jeu dans l'interprétation judiciaire de la constitution. L'attitude de ces juristes constitue peut-être une description fidèle du processus d'interprétation constitutionnelle, mais lorsque l'on s'y complaît, elle peut provoquer une confusion entre la science politique et le droit, et entraîner une démission de l'esprit d'analyse et une renonciation à la conceptualisation, tous deux indispensables à la fécondité du droit. Or, d'un point de vue québécois, le droit ... est indispensable à la sauvegarde de l'identité collective du Québec.⁹⁰

Formalism may no longer be *à la page*, but it remains true that the legitimate concerns of the provinces have to be addressed seriously and cannot be hidden behind the veil of efficiency. Furthermore, was formalism ever as "formal" as some claim it was? The Privy Council's decisions on the division of powers in Canada have been chastised as the epitome of formalism, but a careful reading of two of the most important of those decisions, the *Parsons*⁹¹ and the *Labour Conventions*⁹² cases, demonstrate that intertwined with textual arguments are normative arguments based on a community perspective. In the *Labour Conventions* case, the Privy Council had to determine whether the federal government under its residual power could legislate for the purpose of fulfilling treaty obligations that dealt with matters falling within the exclusive purview of the provinces. The Court held that it could not, and that the determination of which level of government had the power to implement a treaty must respect the line drawn by the division of powers. In so holding, the Court said:

No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the *British North America Act* [now the *Constitution Act, 1867*] gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive

90. Jean Beetz, "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867," in P.A. Crépeau & C.B. MacPherson, eds., *L'avenir du fédéralisme canadien*, (Toronto: University of Toronto Press, 1965) 121 at 120.

91. *Supra* note 68.

92. *Attorney General for Canada v. Attorney General for Ontario (Labour Conventions)*, [1937] A.C. 326.

competence of her own Legislature in these matters. Nor is it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.⁹³

Whether this decision is good or bad is not important here. What does matter is the fact that the Privy Council clearly recognized that a historically informed approach to the division of powers required the assessment of normative arguments of community.⁹⁴

93. *Ibid.* at 351–352.

94. In *Parsons*, *supra* note 68 at 110, it was argued that insurance contracts fell within the jurisdiction of Parliament and not under “property and civil rights.” The Privy Council rejected the argument, concluding that the words “civil rights” were “sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract.” At 110–111, the Court developed the following argument:

The provision found in s. 94 of the *British North America Act*, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides as throwing light upon the sense in which the words “property and civil rights” are used. By that section the parliament of Canada is empowered to make provision for the uniformity of any laws relative to “property and civil rights” in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in these three provinces, if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words “property and civil rights” are, obviously, used in the same sense in this section as in s. 92(13), and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words “civil rights,” contended for by the appellants were to prevail, the dominion parliament could, under its general power, legislate in regard to contracts in all and each

(ii) The Court's Vigorous Defence of National Interests

The changes made by the Supreme Court of Canada in matters of commerce are not purely cosmetic. It is one thing for courts to claim that the division of powers over the economy is not in tune with the realities of our times. But for the courts to radically shift the balance of power in favour of Parliament is another thing, especially when the test used is essentially concerned with economic efficiency. Such an approach is based on a very limited normative understanding of federalism. First of all, the Court's functional approach is based on the dubious premise that efficiency is synonymous with centralism and uniformity. Second, the test as formulated makes it difficult to introduce other kinds of normative arguments. It is premised on the idea that only economic arguments are pertinent when the scope of Parliament's power over commerce is at stake. The exclusion of the remedy of reading down, associated with the occupied field test of inconsistency, will likely preclude any need to discuss the diversity of social preferences. The Court should keep in mind that Canada is a political arena and not simply a market. Caution is also called for because, as the European experience demonstrates, high courts are

of the provinces and as a consequence of this the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act. It is to be observed that the same words, "civil rights," are employed in the Act of 14 Geo. 3, c. 83, [the Quebec Act of 1774] which made provision for the Government of the province of Quebec. Sect. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

Interestingly, many have argued that the Privy Council paid too much attention to the regional communities' interests, to the detriment of legitimate concerns for economic efficiency.

quick to extend their jurisdiction over cultural and social policy matters under the guise of regulating issues of commerce.⁹⁵ Trade, as is well known, is “an ungovernable engine.”⁹⁶ Third, even though the test is expressed in terms of efficiency, it is implicitly supported by a preference for the national community.⁹⁷ As Simeon puts it: “Terms like “efficiency” and “effectiveness” or even “coordination” always contain the implicit “for whom,” “in whose eyes.”⁹⁸ In *City National Leasing*, for example, the Court clearly favoured the national polity. Finally, if the Supreme Court wants to lead us along the American “commerce clause” path, some provinces will want to make sure that we also have an American-style senate.

That being said, it would be a misrepresentation to claim that since 1982 the Supreme Court has always promoted centralism on the basis of efficiency alone. At times, the Court has justified, on more than just a formal level,⁹⁹ the need for federal intervention. For

95. See Charles H. Koch, Jr., “Judicial Review and Global Federalism” (2002) 54 Admin. L. Rev. 491; Nial Fennelly, “Legal Interpretation at the European Court of Justice” (1997) 20 Fordham Int’l L. J. 656 and Kevin Andrew Swartz, “Powerful, Unique, and Anonymous: The European Court of Justice and its Continuing Impact on the Formation of the European Community” (1994) 3 S. Cal. Interdisciplinary L. J. 687.

96. *Friedman*, *supra* note 7 at 375.

97. And one could add, for the international community. In *Ordon Estate*, *supra* note 27 at para. 79 (see also paras. 102 and 116), the Court justified Parliament’s exclusive jurisdiction over maritime law in the following terms: “When applying the above framework in the maritime law context, a court should be careful to ensure that it considers not only the social, moral and economic fabric of Canadian society, but also the fabric of the broader international community of maritime states, including the desirability of achieving uniformity between jurisdictions in maritime law matters. Similarly, in evaluating whether a change in Canadian maritime law would have complex ramifications, a court must consider not only the ramifications within Canada, but also the effects of the change upon Canada’s treaty obligations and international relations, as well as upon the state of international maritime law.”

98. Simeon, *supra* note 5 at 149.

99. Formal reasoning approaches federalism from a purely abstract and “neutral” perspective. Provinces are conceived of as interchangeable autonomous bodies having no specific characteristics. Formalism implies reasoning based essentially on references to precedents and textual arguments of a legal or

example, in the *Black*¹⁰⁰ decision on the interpretation of section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*,¹⁰¹ which guarantees to every citizen and permanent resident the right to pursue a livelihood in any province,¹⁰² Justice La Forest invoked history and the framers' intention to justify a vision of Canada in which political nationality and a national economy went hand in hand:

A dominant intention of the drafters of the *British North America Act* (now the *Constitution Act, 1867*) was to establish "a new political nationality" and, as the counterpart to national unity, the creation of a national economy The attainment of economic integration occupied a place of central importance in the scheme. . . . The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.¹⁰³

La Forest J. reiterated his faith in the centrality of this common citizenship in *Hunt*,¹⁰⁴ where the Court not only imposed constraints on a province's ability to interfere with litigation in other provinces, but also explicitly acknowledged the central government's power under the trade and commerce clause to legislate on the recognition

constitutional nature. Such an approach is not infused by, for example, any historical perspective.

100. *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 [*Black*].

101. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

102. Subject to the s. 6(3) reasonable residency requirements for the receipt of publicly provided services and to laws of general application operative in a province.

103. *Black*, *supra* note 100 at 608–609.

104. *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 at 322–323 [*Hunt*]. On the potentially centralizing effects of this decision, see Vaughan Black & A. Wayne MacKay, "Constitutional Alchemy in the Supreme Court: *Hunt v. T & N plc*" (1995) 5 N.J.C.L. 79 and Robert Wisner, "Uniformity, Diversity and Provincial Extraterritoriality: *Hunt v. T & N plc*" (1995) 40 McGill L. J. 759 at 771–775.

and enforcement of foreign judgments.¹⁰⁵ The importance of the *Hunt* decision also lies in the fact that the restriction on the territorial reach of provincial legislation was said not to be based on a specific provision of the Constitution, but on a principle of comity (a sort of “full faith and credit clause”¹⁰⁶) flowing from a variety of constitutional provisions¹⁰⁷ and was said to be inherent in the federalist core of the Canadian Constitution.¹⁰⁸

In his concurring opinion in *Ontario Home Builders' Association*,¹⁰⁹ La Forest J. insisted yet again on the importance of preserving the “national economic entity the framers had sought to create”¹¹⁰ when addressing a division of powers issue. In that case, a unanimous Court upheld the constitutional validity of Part III of Ontario’s *Development Charges Act*,¹¹¹ which authorized the province’s public and separate school boards to impose “education development charges” on buildings that resulted from new development. In what could be qualified as a major provincial victory, a majority of the Court concluded that, although the education development charges were *indirect* taxation contrary to section 92(2) of the *Constitution Act, 1867*, they were nevertheless *intra vires* the province as ancillary to a valid regulatory scheme enacted under section 92(9), which gives provinces the exclusive right to legislate in relation to “Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a

105. *Ibid.* at 326.

106. U.S. Const. art. IV, §1 “Full Faith and Credit Shall be Given in Each State to the Public Acts, Records and Judicial Proceedings of Every Other State.”

107. La Forest J. enumerates the following factors as proof of the framers’ intention “to create a single country” and a national economy: “(1) common citizenship, (2) interprovincial mobility of citizens, (3) the common market created by the union as reflected in ss. 91(2), 91(10), 121 and the peace, order and good government clause, and (4) the essentially unitary structure of our judicial system with the Supreme Court of Canada at its apex,” *Hunt, supra* note 104 at 322.

108. For a critical analysis of the recourse to unwritten constitutional principles, see Jean Leclair “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 *Queen’s L.J.* 389.

109. *Ontario Home Builders' Association, supra* note 20.

110. *Ibid.* at para. 140.

111. R.S.O. 1990, c. D.9.

Revenue for Provincial, Local, or Municipal Purposes.” Iacobucci J., speaking for the majority, stated that section 92(9) allowed for indirect taxation, as long as its purpose was strictly limited, as it was here, to defraying the costs of the regulatory scheme established under the challenged statute.

Although La Forest J. agreed in the result, his concurring judgment imposed limits on the potential reach of the provinces’ power to tax. Contrary to Iacobucci J., he thought that the development charge was *intra vires* “as tax on land, a type of tax that has always been regarded as a quintessential example of a direct tax.”¹¹² La Forest J. disagreed with the characterization of regulatory charges as an indirect tax, and argued that to approach the problem as Iacobucci J. did would deprive the distinction between taxation and regulation of virtually all meaning. He stressed that allowing the provinces to levy only direct taxes was based on “an important component of the constitutional arrangements agreed upon by the framers of the Constitution in 1867.”¹¹³ The “primary, if not the only” reason why section 92(2) of the *Constitution Act, 1867* prohibited indirect taxation by the provinces was that “the direct effect of their taxation measures must be confined within their territory . . . since an indirect tax, while being technically levied initially ‘within the province’ as contemplated by section 92(2), could ultimately be borne by persons outside the province.”¹¹⁴ Furthermore, such indirect taxes “have serious implications for interprovincial and international trade as well as generally on the national economic entity the framers had sought to create.”¹¹⁵ Allowing provincial legislatures to tax indirectly through legislation disguised as regulatory schemes, La Forest J. held, would fly in the face of the 1867 constitutional compromise.¹¹⁶

Finally, in *Hydro-Québec*, the Court justified a liberal interpretation of the criminal law power on the basis that its purpose

112. *Ontario Home Builders’ Association*, *supra* note 20 at para. 126.

113. *Ibid.* at para. 124.

114. *Ibid.* at para. 134.

115. *Ibid.* at para. 140.

116. *Ibid.* at para. 124.

was to protect “the fundamental value[s] of our society,”¹¹⁷ of which the protection of the environment was one.¹¹⁸ In both *Hydro-Québec* and *Black*, federalism was approached from a community perspective, and both decisions show partiality toward the national community.

In short, the Supreme Court of Canada has sometimes justified the need for federal intervention on more than just a formal level.¹¹⁹ However, one would have wished to see such eloquence harnessed more often in favour of interests other than the national interest. For instance, in *Chartwell*, why was the majority of the Court so

117. *Hydro-Quebec*, *supra* note 48 at para. 127 (La Forest J. speaking for the majority). At para. 154, La Forest J. recognized Parliament’s role in “protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power.”

118. I have argued elsewhere (Leclair, *supra* note 57) that, in recognizing very extensive powers to the Federal Parliament in matters such as the protection of health (*Imperial Tobacco*, *supra* note 48) and the protection of the environment (*Hydro-Quebec*, *supra* note 48), on the basis of its criminal law power, the Court participates in a process of legitimation of the Canadian state and in the construction of national identity. Not only do protection of health and protection of the environment represent two values perceived by many as traditionally and typically “Canadian” values, they also have the singular quality of enabling us to transcend the issues that constantly divide us (language, ethnic origin, etc.). They are matters on which we can all agree. Thus, they operate as symbols of what being a Canadian really means. According extensive legislative responsibility over such matters to the central government reinforces its legitimacy, because by legislating on matters which are important to the average Canadian, the central government will bring itself closer to the people, and gain more visibility. Furthermore, the Court itself strengthens its own legitimacy in upholding legislative initiatives which meet with popular approval. Johanne Poirier has argued that in multinational polities, orders of governments are eager to regulate what she refers to as the field of social protection (“domaine de la protection sociale” (at 138)) because, among other things, this exercise of normative power legitimizes the public institutions of all the governments involved. Johanne Poirier, “Pouvoir normatif et protection sociale dans les fédérations multinationales” (2001) 16 C.J.L.S. 137 at 157–158.

119. In addition, in its admiralty case law, the Supreme Court has taken great care to emphasize the need for and the benefits flowing from a uniform Canadian maritime law: see in particular *Whitbread*, *supra* note 24 and *Ordon Estate*, *supra* note 27.

indifferent to the spirit of the civil law tradition when it imposed a uniform Canadian maritime law of an essentially common law nature? Whether the Court likes it or not, two legal traditions do coexist in Canada. The Court's reasoning is all the more disappointing when one remembers, for instance, that Colbert's *Ordonnance de la marine* influenced the development of English admiralty law.¹²⁰ In *Alberta Government Telephones* and *Téléphone Guèvremont*, the Court decided that telecommunications was the exclusive preserve of the federal government. No attempt whatsoever was made to justify such a conclusion in other than purely technical terms. What about the legitimate concerns of the provinces with respect to the implementation of their cultural policies?

The broad interpretation of Parliament's powers described above enables it to legislate with apparent legitimacy over matters that did not previously fall within its jurisdiction. The federal government has often intervened in provincial areas of jurisdiction such as education, social welfare and health, with the avowed intention of gaining visibility. When Ottawa has done so, it has not acted under one of its enumerated powers, but has instead resorted to the use of its spending power. Encroaching upon the provinces' exclusive fields of jurisdiction in such a fashion has never been seen, at least not in Québec, as a legitimate method of federal intervention. This explains the importance of the Court's decisions expanding Parliament's authority under its *enumerated* and *residual* powers. These fields of jurisdiction provide the central government with an apparently

120. André Braën, *Le droit maritime au Québec* (Montréal: Wilson et Lafleur Ltée, 1992) at 38. The Court's line of reasoning has been severely criticized in Québec: see Leclair, "Nature d'une compétence", *supra* note 33 at 696-714; Guy Lefebvre, "Droit maritime—Compétence de la Cour fédérale—Contenu de l'expression "Droit maritime canadien": *The Monk Corporation v. Island Fertilizers Limited*" (1992) 71 Can. Bar Rev. 166; Guy Lefebvre et Normand Tamaro, "La Cour suprême et le droit maritime: la mise à l'écart du droit civil québécois est-elle justifiable?" (1991) 70 Can. Bar Rev. 121; André Braën, "L'arrêt *ITO-International Terminal Operators Ltd c. Miida Electronics Inc.*, ou comment écarter l'application du droit civil dans un litige maritime au Québec" (1987) 32 McGill L.J. 386 and Guy Tremblay, "L'application du droit provincial en matière de maritime après *Succession Ordon*" (1999) 59 R. du B. 679.

legitimate stepping stone enabling it to deal with social matters that have traditionally been held to fall under the provinces' exclusive jurisdiction.

It is not the forcefulness of the arguments in favour of national interests, nor the expansion of Parliament's powers, that I find disturbing. Rather, it is the Court's lack of concern for the legitimate interests of the regional polities that taints its reasoning, and therefore its conclusions.

(iii) The Court's Weak Defence of Regional Interests

My final comment has to do with the manner in which the Supreme Court addresses provincial concerns. To claim that the Court vindicates provincial interests in a purely formal manner would also be an exaggeration. If cases involving the equality provision of the *Charter*¹²¹ are excluded, normative arguments of community have been invoked in at least three decisions in which the validity of provincial legislation was upheld. First in the *Multiple Access* case, where mere duplication of valid provincial and federal legislation was held not to constitute an "express contradiction"¹²² triggering federal paramountcy, the Court had this to say about the cost of such duplication:

[D]uplication is . . . "the ultimate in harmony." The resulting "untidiness" or "diseconomy" of duplication is the price we pay for a federal system in which economy "often has to be subordinated to . . . provincial autonomy."¹²³

In *Schneider*,¹²⁴ the second of the three decisions, the Court unanimously held that British Columbia's *Heroin Treatment Act*¹²⁵ was *intra vires*. It concluded that the treatment of heroin

121. *R. v. S.(S.)*, [1990] 2 S.C.R. 254 at 290; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at 1029.

122. Peter W. Hogg, *supra* note 37.

123. *Multiple Access*, *supra* note 16 at 190 (quoting Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 110).

124. *Schneider*, *supra* note 18.

125. S.B.C. 1978, c. 24.

dependency, as distinct from the traffic in narcotic drugs, was not a matter falling within the federal peace, order and good government power. After describing the uniqueness of British Columbia's problem with respect to heroin use, Dickson J. stated that the problem of heroin dependency was "largely a local or provincial problem and not one which has become a matter of national concern."¹²⁶ Finally, in *Kitkatla*, the constitutional validity of British Columbia's *Heritage Conservation Act*¹²⁷ was challenged because it allowed for the alteration or destruction of native heritage property. A unanimous Court confirmed the validity of the legislation on a normative argument of community (that is, the dual nature of native culture):

The Act considers First Nations' culture as part of the heritage of all residents of British Columbia. It must be protected, not only as an essential part of the collective material memory which belongs to the history and identity of First Nations, but also as part of the shared heritage of all British Columbians.¹²⁸

It remains true that *Multiple Access*, *Schneider* and *Kitkatla* are exceptions.¹²⁹ Generally, even in cases where provincial legislation has been upheld (or held applicable to a federal undertaking),¹³⁰ the

126. *Schneider*, *supra* note 18 at 131-132.

127. R.S.B.C. 1996, c. 187.

128. *Kitkatla*, *supra* note 20 at para. 45.

129. *Edwards Books*, *supra* note 15, could also be said not to be based on a purely formal approach.

130. For example, see *Rio Hotel*, *supra* note 17; *Global Securities*, *supra* note 14; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Canadian Pacific Airlines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581. This formalism is even more pronounced in two important cases where provincial legislation was held inapplicable: *Scowby v. Glendinning*, [1986] 2 S.C.R. 227 and *Westcoast Energy*, *supra* note 46.

In *Ontario Home Builders' Association*, *supra* note 20, as compared to Justice La Forest's concurring opinion, the majority's reasoning is quite formal. At para. 146, La Forest J. even throws this dart at his colleague Iacobucci:

Court's approach to provincial politics is either very formal or is based once again on a criterion of efficiency.¹³¹ And in those three

Determining the constitutional validity [of a provincial tax] purely on the basis of pure technicalities or formalistic approaches must be avoided. One should not lose sight of the underlying reason why provinces are confined to having recourse to direct means of taxation. At the end of the day, this approach has the merit of focusing the constitutional analysis on substance rather than on form and furthering the constitutional values of the prohibition imposed on provinces regarding indirect taxation as they stand in a modern Canada.

131. *Global Securities*, *supra* note 14. *Ontario Hydro*, *supra* note 28 is an unusual case. Even though a provincial law was held inapplicable to a federal work, a majority of the Court nevertheless did express some concern for the interests of the provinces. At issue was the scope of Parliament's unilateral power to declare works for the general advantage of Canada. Justice Iacobucci (Sopinka and Cory JJ. concurring) said (at 404):

This Court recognized the primacy of the balance between federal and provincial powers in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, where the Court held that a substantial measure of provincial consent was required by convention before the Canadian Constitution could be amended. The majority held that the reason for the convention was the federal principle (at pp. 905-6): 'The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.' Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved.

Justice La Forest, with whom L'Heureux-Dubé and Gonthier JJ. concurred, disagreed:

It was argued that the declaratory power must be read narrowly to make it conform to principles of federalism. There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism. *But the Constitution must be read as it is, and not in accordance with abstract notions of theorists.* It expressly provides for the transfer of provincial powers to the federal Parliament over certain works. . . . There is no authority supporting the view that the declaratory power should be narrowly construed. Quite the contrary. It might, I suppose, have been possible to interpret s. 92(10)(c) so as to confine it to works related to communications and transportation such as those specifically listed in s. 92(10)(a) and (b) but the courts, including this Court, have never shown any disposition to so limit its operation . . . [at 370, emphasis added].

cases, the Court's reference to normative arguments is extremely cursory. The longest and most powerful arguments on the importance of protecting local interests are still to be found in dissenting¹³² or concurring¹³³ judgments.

Since no provincial field of jurisdiction is immune to federal intervention,¹³⁴ a much more serious defence of the interests of regional communities is required. Let us not forget that all provincial "victories" dealt with legislation on matters having a double aspect,¹³⁵ which means that the decisions did not restrict the central government's latitude. Moreover, paramountcy only benefits federal legislative interventions. So, at the very least, more attention should be paid to the legitimate interests of the regional communities, even if they do not prevail. This is especially so where the federal intervention is based on Parliament's residual power. When dealing with a *residual* power, the Court should first discuss the possible reasons for giving a particular power to the provinces; only in the

As for Lamer C.J.C., although he agreed with Iacobucci J.'s reasoning, he disagreed with the latter's application of the principle to the facts at issue (at 339-340). Consequently, even though provincial interests were taken into consideration, the provincial law was held inapplicable.

132. La Forest J. (with Beetz and Lamer JJ.) in *Crown Zellerbach*, *supra* note 78; McLachlin J., in *Westcoast Energy*, *supra* note 46; Dickson J. in *Wetmore*, *supra* note 58.

133. Lamer C.J.C., McLachlin J. and L'Heureux-Dubé J. in *Chartwell*, *supra* note 49.

134. Interjurisdictional immunity does not benefit the provinces: see *Friends of the Oldman River*, *supra*, note 28.

135. See *Global Securities*, *supra* note 14; *Edwards Books*, *supra* note 15; *Multiple Access*, *supra* note 16; *Rio Hotel*, *supra* note 17; *Kitkatla*, *supra* note 19 and *Schneider*, *supra* note 18. In *Multiple Access*, *ibid.* at 173, even though Ontario's *Securities Act* was upheld and declared applicable to a federal corporation, Dickson J. insisted, in *obiter*, on Parliament's ability to regulate the securities market if it chooses to do so: "I should not wish by anything said in this case to affect prejudicially the constitutional right of Parliament to enact a general scheme of securities legislation pursuant to its power to make laws in relation to interprovincial and export trade and commerce." See also *Global Securities*, *ibid.* at para. 46.

absence of any such reasons would the Court be justified in finding that Parliament has the authority to legislate.¹³⁶

In conclusion, when normative arguments have been invoked before the Supreme Court, the perspective of community has not been totally absent from judgments,¹³⁷ but that perspective has not been embraced with as much enthusiasm as the perspective of functional effectiveness.

In the preceding pages, I have tried to demonstrate how the Supreme Court of Canada has promoted unity by changing some fundamental concepts of constitutional law and by expanding the powers of the central government. In the next section, I will try to show that despite its centralist tack, the Court is not blind to the centripetal potential of some of its decisions.

II. The Tension Resulting from the Need to Address Federalism Issues from a Community Perspective

As we will now see, tension often arises between the Court's desire to resort to a criterion of efficiency—one that favours centralism—and the need to address federalism from the perspective of community—an approach which forces it to recognize some form of decentralization. The subject of environmental protection provides a good example of this tension.

In dealing with the protection of the environment, the Court has chosen two successive avenues, both of which have led to an enhancement of Parliament's authority to regulate the environment. However, while the first drastically limited the provinces' ability to deal with the subject, the second recognized their legitimate interest in it.

In *Crown Zellerbach*, the constitutional validity of Parliament's *Ocean Dumping Control Act*¹³⁸ was challenged. The Court upheld the

136. I am grateful to Tsvi Kahana for suggesting this argument.

137. Whether the constitutionality of provincial or federal legislation was being challenged.

138. S.C. 1974-75-76, c. 55.

legislation on the ground that marine pollution had become a matter of national concern, so as to bring it within the jurisdiction of Parliament under the residual power in the opening words of section 91 of the *Constitution Act, 1867*. As mentioned earlier, under the “national concern” doctrine, if a subject matter is judicially characterized as having a “national dimension,” it falls thereafter under Parliament’s *permanent* and *exclusive* jurisdiction.¹³⁹

The invasive potential of this power did not escape the notice of the dissenters in *Crown Zellerbach*. According to Justice La Forest, allowing judges to conceptualize a matter as being of national concern is fraught with danger. It enables courts to consider separate areas of activity, some within provincial legislative capacity and some within Parliament’s, to be a single indivisible matter of national interest lying within exclusive federal jurisdiction, “thereby incidentally removing them from provincial jurisdiction or at least abridging the provinces’ freedom of operation.”¹⁴⁰ Justice La Forest was of the opinion that “environmental protection [is] all-pervasive, and if accepted as [an item] falling within the general power of Parliament, would radically alter the division of legislative power in Canada.”¹⁴¹ More precisely, the recognition of such a broad exclusive power in Parliament would “effectively gut provincial legislative jurisdiction”¹⁴² and would “involve sacrificing the principles of federalism enshrined in the Constitution.”¹⁴³

Although this decision could have had dramatic consequences if it had been interpreted as allowing for the regulation of all matters having some connection to environmental protection, its compass was later restricted to the problem of marine pollution.¹⁴⁴ In subsequent cases,¹⁴⁵ the Court reacted against what it labelled the

139. *Crown Zellerbach*, *supra* note 78.

140. *Ibid.* at 452–453.

141. *Ibid.* at 453.

142. *Ibid.* at 454–455.

143. *Ibid.* at 455.

144. *Friends of the Oldman River*, *supra* note 28, at 64 and *Hydro-Quebec*, *supra* note 48, at paras. 115–116.

145. *Ibid.*

“enthusiastic adoption of the ‘national dimensions’ doctrine.”¹⁴⁶ Protection of the environment, said the Court, is not the exclusive preserve of either Parliament or the provinces, but has a double aspect. Consequently, both levels of government can address it. The extent of their power to intervene will be determined according to the particular nature of their respective heads of power: “[S]ince the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another.”¹⁴⁷ In *Hydro-Québec*, for example, La Forest J., for the majority, concluded that the *Canadian Environmental Protection Act*¹⁴⁸ was validly enacted under the federal criminal law power because it prohibited the introduction of toxic substances into the environment except on specified terms and conditions. As such, it pursued a legitimate public objective—the protection of the environment. According to La Forest J., “the stewardship of the environment is a fundamental value of our society,” on the same order as the protection of human life and health, and one that the criminal law power aims to protect.¹⁴⁹

Contrary to the “national concern” doctrine, which confers an exclusive and permanent jurisdiction over new federal matters, allowing Parliament to regulate the protection of the environment through its criminal law power does not preclude the possibility of shared environmental jurisdiction. Under the criminal law power, Parliament can only prohibit evils that go against certain fundamental values, such as the protection of health and the protection of the environment. On the other hand, if a province pursues an objective falling within its constitutional jurisdiction, it can regulate the very same activity or conduct. In so doing, it is not enacting criminal legislation. Thus, “the use of the federal criminal law power in no way precludes the provinces from exercising their

146. *Hydro-Quebec*, *supra* note 48 at para. 116.

147. *Friends of the Oldman River*, *supra* note 29 at 67; see also *Hydro-Quebec*, *supra* note 48 at paras. 114–117.

148. R.S.C. 1985 (4th Supp.), c. 16.

149. *Hydro-Quebec*, *supra* note 48 at para. 127.

extensive powers under section 92 to regulate and control the pollution of the environment either independently or to supplement federal action.”¹⁵⁰ The double aspect doctrine, combined with the “express contradiction” test of inconsistency, thus enables Parliament to establish minimal standards of environmental protection that the provinces may exceed in the exercise of their own powers.¹⁵¹ The combined use of these constitutional doctrines has enabled the Court to devise a mechanism that closely resembles the European principle of subsidiarity.¹⁵² In the words of La Forest J., such an approach “afford[s] both levels of government ample means to protect the environment while maintaining the general structure of the Constitution.”¹⁵³ Canadian constitutional doctrine therefore does not dictate centralist solutions. Choosing avenues that lead to the undermining of legitimate regional interests is a deliberate choice.

150. *Ibid.* at para. 131.

151. According to the “express contradiction” test of inconsistency, there is no conflict between a—valid—provincial law and a less severe—valid—federal law, because it is possible to obey both in respecting the more severe of the two: *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5.

152. This at least appears to be the conclusion of a majority of the Supreme Court in *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241. In the context of a case on the extent of a municipality’s power to regulate the environment, L’Heureux-Dubé J., speaking for the majority, had this to say at para. 3:

The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at para. 127, that ‘the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by *governments at all levels*’ (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations’ World Commission on the Environment and Development. The so-called ‘Brundtland Commission’ recommended that ‘local governments [should be] empowered to exceed, but not to lower, national norms’ (p. 220).

153. *Hydro-Quebec*, *supra* note 48 at para. 116.

Finally, one could ask whether the *Secession Reference*¹⁵⁴ has signalled a change from the formal to the normative in division of powers issues. In that decision, the Court willingly abandoned formalism for a more informed or contextualized understanding of the Canadian constitutional order: an understanding in which history, for example, played a part; one in which Québec's specificity was said to have been a determining factor in the adoption of a federal regime in 1867;¹⁵⁵ and one in which "[t]he protection of [Aboriginal and treaty] rights . . . reflects an important underlying constitutional value."¹⁵⁶ The *Secession Reference* also tried to unearth the fundamental values that infuse Canada's constitutional order.¹⁵⁷

Unfortunately, the recent *Ward* and *Kitkatla* cases show no radical departure from the Court's pre-*Secession Reference* reasoning. At issue in *Ward* was whether the regulation prohibiting the sale of blueback seal pelts, under which Mr. Ward had been charged, fell within the legislative competence of the federal government over fisheries. Marshall J., speaking for a majority of the Newfoundland Court of Appeal,¹⁵⁸ concluded that it did not. He held that it was not enough simply to argue, as the Attorney General for Canada had done, that the prohibition was promulgated for socio-economic purposes or for the common good. A more contextualized approach to the division of powers was required. Marshall J. recalled that:

[T]he management and control of . . . fishing grounds and the conservation of their resources, which is the *raison d'être* of this province's existence, is of primordial importance. Any doubt on that score is quickly dispelled on a random journey through outport communities where boarded-up homes and

154. *Secession reference*, *supra* note 12.

155. *Ibid.* at para. 59.

156. *Ibid.* at para. 82.

157. I have previously examined the Court's approach to federalism: Jean Leclair, "Impoverishment of the Law by the Law: A Critique of the Attorney General's Vision of the Rule of Law and the Federal Principle" (1998) 10 *Const. Forum Const.* 1.

158. *Ward v. Canada (Attorney General)* (1999), 182 D.L.R. (4th) 172 (Nfld. C.A.).

rotting hulls, left in the wake of the westward exodus which has followed depletion of ground fish stocks, are in full evidence today.¹⁵⁹

This led him to conclude:

While the power over seacoast and inland fisheries, like all federal powers enumerated under s. 91 of the *Constitution Act, 1867*, applies equally to all provinces, it obviously does not impact equally on all of them. To a landlocked province, for example, that power's seacoast component would obviously have no direct import. On the other hand, to the tenth province, its impact has been profound since its whole economic, social and cultural being is linked to the sea and its resources. Thus, any legislative measure whose true nature and character is aimed at conservation of any aspect of the offshore fishery is not only within the competence of the federal government, but is critical to the immediate and long term interests of this Province.¹⁶⁰

Marshall J. eventually found the challenged federal provision *ultra vires*. The Supreme Court of Canada overruled his decision without mentioning his powerful and careful reasoning, stating flatly that the prohibition was enacted "to preserve the economic viability of not only the seal fishery, but the Canadian fisheries in general,"¹⁶¹ and that such purpose could be pursued by Parliament. Justice Marshall might have been wrong, but his opinion deserved attention. The Court is duty bound to develop a vision of federalism that embraces both the virtues of uniformity and those of diversity.

A different type of problem arose in the *Kiitkatla* case, where the *British Columbia Heritage Act*¹⁶² was found *intra vires* even though it specifically referred to Aboriginal artefacts. That case was concerned with whether provincial legislation on the protection of cultural heritage property could apply to culturally modified trees (CMTs). The Court had to decide whether a provincial statute that referred explicitly to Aboriginal peoples could survive a constitutional challenge. Justice LeBel, speaking for a unanimous Court, first emphasized that "culture" had a double aspect and that

159. *Ibid.* at para. 15.

160. *Ibid.* at para. 17.

161. *Ward, supra* note 51 at para. 24.

162. R.S.B.C. 1996, c. 187.

"[c]onsequently, particular cultural issues must be analyzed in their context, in relation to the relevant sources of legislative powers."¹⁶³ The statute was found to be *intra vires* the province because it did not single out Aboriginal people for more severe treatment. It was essentially concerned with "the use and protection of property in the province,"¹⁶⁴ and it "struck an appropriate balance between native and non-native interests,"¹⁶⁵ "between the need to preserve the past while also allowing the exploitation of natural resources today."¹⁶⁶ As noted above, the Court's approach was not entirely formal because its foundation was the recognition of the dual nature of native culture.

Nevertheless, having concluded that the complainants had not submitted compelling evidence to back up their claim that there was a relationship between the CMTs and Kitkatla culture, the Court avoided the task of reconciling its Aboriginal rights case law with its approach to federalism.¹⁶⁷ The "particular weaknesses"¹⁶⁸ of the factual context also led the Court to hold that the complainants had failed to establish that the challenged statute affected their "Indianness."¹⁶⁹ As a result, they could not successfully invoke the interjurisdictional immunity doctrine to shield themselves from the application of the provincial legislation. The Court did state, however, that:

Heritage properties and sites may certainly, in some cases, turn out to be a key part of the collective identity of people. In some future case, it might very well happen that some component of the cultural heritage of a First Nation would go

163. *Kitkatla*, *supra* note 19 at para. 51.

164. *Ibid.*

165. *Ibid.* at para. 62.

166. *Ibid.* at para. 65.

167. *Ibid.* at paras. 70 and 48–50. In so doing, the Court also underlined that s. 8 of the challenged statute specifically mentioned that the Act did not apply to any Aboriginal heritage object or site which was the subject of an established Aboriginal right or title (at para. 71).

168. *Ibid.* at para.50.

169. *Ibid.* at para. 75.

to the core of its identity in such a way that it would affect the federal power over native affairs and the applicability of provincial legislation.¹⁷⁰

What is problematic in this case is the fact that Aboriginals are treated as mere “matters” over which provinces and the central government can legislate. The fundamental premise that underlies the recognition of special constitutional rights for the Aboriginal peoples of Canada—that is, the recognition of their existence as autonomous political entities—was nowhere to be seen in *Kitkatla*. Not only were Aboriginal peoples relegated to the status of “legislative matters,” but they also bore the responsibility of protecting Ottawa’s exclusive jurisdiction against provincial encroachment. In *Kitkatla*, the Attorney General for Canada intervened in support of British Columbia.¹⁷¹ The complainants themselves had to establish that the challenged statute affected their “Indianness.” Federalism issues concerning Aboriginals were thus addressed as issues of fact and not as issues requiring the reconciliation of clashing sovereignties. The end result in *Kitkatla* might be reasonable, but the reasoning failed to take into account the important changes consequent upon the 1982 entrenchment of the rights of Aboriginal peoples.¹⁷²

Conclusion

There is no perfect model of federalism. Nevertheless, the Supreme Court is duty bound to address both the centripetal and centrifugal virtues of federalism. Only then will it be able to maximize the benefits of our federal system. For a start, better account should be taken of the historical embeddedness of Canadian federalism, of Canada’s regional diversity and of the constitutional recognition of the collective rights of its Aboriginal peoples. This might not lead to

170. *Ibid.* at para. 78.

171. *Ibid.* at paras. 72–73.

172. For a more normative approach to federalism issues concerning Aboriginal rights, see Jean Leclair, “Aboriginal Rights as Seen Through the Prism of Federalism” (2002) [unpublished, on file with author].

definitive answers, but at least the discussion would be about values, about our differing understandings of community, and not just about abstract concepts. Taking serious account of those values might be a way of cultivating the trust of the various communities that make up our national polity. Listening is a form of recognition, albeit a small one, and at the very least, their voices would be heard. Such an approach might dissuade them from choosing more radical means of asserting their difference. It might even lead the Court to recognize the need for a limited form of asymmetry. Finally, the virtues of efficiency should not be overstated. In Friedman's words, "[i]t seems odd to test a system designed to some extent to defeat efficiency solely against efficiency's metric."¹⁷³

The task of developing a structured and normative understanding of the role of provinces—and Aboriginal nations—in our constitutional system is a daunting one. However, if the courts fail in that task, federalism will be in peril, and most significantly, the values that it promotes will be jeopardized.¹⁷⁴

173. *Friedman, supra* note 7, at 388.

174. For a much more enthusiastic assessment of the Court as umpire of Canadian federalism, see A. Wayne MacKay, "The Supreme Court of Canada and Federalism : Does/Should Anyone Care Anymore ? " (2001) 80 *Can. Bar Rev.* at 241-280.

