

## Dickson and Federalism: In Search of the Right Balance

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### I. INTRODUCTION

THE 1970S AND THE 1980S WERE TURBULENT TIMES in the Canadian federal system. Province building initiatives, most obviously in Quebec, but in Alberta and other provinces as well, placed severe strains on national unity and resulted in often bitter disputes about such issues as constitutional amendment, natural resource policy, health care policy, and responsibility for various aspects of the criminal justice system. While efforts to resolve such conflicts occurred most frequently through the channels of executive federalism, many of these disputes also ended up before the Supreme Court of Canada, involving that institution in more federal-provincial disputes than at any other equivalent period in its history.<sup>1</sup> Sometimes it was governments which initiated the judicial involvement through the use of the reference procedure; more often, it was private parties who invoked the constitution to challenge legislation on jurisdictional grounds.<sup>2</sup> In either situation the Court was often plunged into controversy as it

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<sup>1</sup> Between 1970 and 1989, the Court decided 158 cases raising distribution of powers issues. It was particularly active in the years between 1975 and 1983, hearing a high of 14 cases in 1976-77. While federalism cases have never been a large part of the Court's docket, they clearly took up more of its time in this period than in earlier times.

These figures were collected for the book cited *supra*, note \*. An overview of the Court's role in federal-provincial relations is found in Chapter 1 of that volume. Further data is found in P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 151.

<sup>2</sup> References were used in some of the most bitter disputes, the most obvious examples being *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2, and 3)*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1 and *Reference Re Tax Proposed by Parliament of Canada on Exported Natural Gas*, [1982] 1 S.C.R. 1004, 136 D.L.R. (3d) 385.

tried to assess the competing claims for jurisdiction put forth by the national and provincial governments.

Brian Dickson played an important role in the adjudication of federalism disputes during this period although he started out cautiously and left it largely to other colleagues to dominate this area of the law for several years. Throughout the 1970s his colleagues on the Court included Bora Laskin, Jean Beetz and Louis-Philippe Pigeon, all noted constitutional scholars before their judicial appointments.<sup>3</sup> Laskin, in particular, was a prodigious writer of judgments, and Dickson often concurred with his judgments in distribution of powers cases.<sup>4</sup> By 1975 Dickson began to write judgments in some key federalism disputes, and on his retirement in 1990 he left a legacy of important decisions involving economic regulation, the administration of justice, and paramountcy.

In this paper I focus largely on two substantive areas in which Dickson concentrated his federalism writing — the administration of criminal justice and the control of the economy. The latter may turn out to be his most significant contribution to federalism doctrine, as he has given life to the general regulation of trade doctrine in ways that future federal governments will be sure to exploit. The administration of criminal justice cases, while less significant doctrinally because he was often in dissent, are nevertheless important for the insight that they provide about his approach to constitutional interpretation.

In addition to describing Dickson's contribution to federalism doctrine I shall examine his approach to the interpretation of the constitutional division of powers in an effort to assess his vision of the Supreme Court's role in shaping the federal system. Those who analyze judicial decision-making often like to place judges on a spectrum, which, in the case of federalism disputes, would have polar ends of "centralist" and "decentralist". Such an exercise always carries with it a danger of over-simplification, since it frequently misses the nuances of any individual judge's work. Nevertheless, despite that risk, it is interesting to contrast Dickson and some of his colleagues on the bench who were also important forces shaping federalism jurisprudence and who seem closer to the centralist/decentralist ends

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<sup>3</sup> Pigeon retired in 1980, while Laskin died in 1984. Beetz remained on the Court until he resigned in 1988. Because of the awkwardness of assigning judicial titles when Court members have been both justices and Chief Justice, I have dispensed with the usual formality of titles in this paper. No disrespect is intended.

<sup>4</sup> Laskin's centralist vision is described in Swinton, *supra*, note \*, c. 8.

of a spectrum than he. Bora Laskin was a strong centralist who read all the significant powers of the federal Parliament in an expansive manner. Clearly, Dickson shared Laskin's belief in the need for an expanded federal role over certain economic matters. Indeed, he is the judge who finally attracted a majority of the Court in the application of the general regulation of trade doctrine where Laskin had been unable to do so.<sup>5</sup> However, in contrast to Laskin, he was often quite sympathetic to provincial claims to jurisdiction, notably in the area of the administration of criminal justice. This would seem to bring him closer to some of his colleagues from Quebec — in particular, Beetz and Pigeon — who were much more sympathetic to claims of provincial jurisdiction in many areas of dispute. However, there is a significant contrast between the views of Dickson and these Quebec judges about the structure of the constitution.<sup>6</sup> To use one example developed in more detail later in this paper, he was less likely than Beetz to emphasize the exclusivity of federal and provincial areas of jurisdiction in ss.91 and 92 of the *Constitution Act, 1867*;<sup>7</sup> rather, he welcomed a large area of overlap between federal and provincial powers, a state of affairs that permits both federal and provincial governments a significant degree of discretion in the pursuit of their public policies, while leaving the resolution of many disputes between them to the political rather than the judicial sphere.

These issues of constitutional interpretation will be discussed in more detail later in this paper after I describe Dickson's view of the Court's role in federalism disputes and his decisions on federal economic regulation and the administration of criminal justice.

## II. SAFEGUARDING THE CONSTITUTION

ABOUT THE TIME BRIAN DICKSON joined the Supreme Court of Canada, Paul Weiler's controversial book on the Court was published.<sup>8</sup> In that work and in earlier articles, Weiler called for a tightly circumscribed role for the Supreme Court in federalism disputes, essentially

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<sup>5</sup> This case, *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *GM*] will be discussed further *infra*, note 23 and accompanying text.

<sup>6</sup> Beetz's classical approach to federalism is discussed in Swinton, *supra*, note \*, c. 9.

<sup>7</sup> (U.K.), 30 & 31 Vict., c.3.

<sup>8</sup> Dickson joined the Court in 1973, while *In the Last Resort* was published in 1974 (Toronto: Carswell, 1974).

confining the Court to two types of cases: the protection of extraprovincial individuals and products from provincial discrimination on the basis of residence or origin, and the resolution of conflict between federal and provincial actions through a narrow doctrine of federal paramountcy.<sup>9</sup> Weiler failed to convince the Court of the need for such restraint. Indeed over the years in which Dickson was a member of that institution, the Court often took a position in sharp contrast to Weiler's advice, as demonstrated best by its willingness to open its doors to constitutional litigation through relaxed standing rules.<sup>10</sup>

While Weiler began from a premise that there was no fixed content to the words of the constitution to constrain judicial discretion and that federal and provincial politicians were better suited to the task of devising acceptable power sharing arrangements, the judges of the Supreme Court of Canada began with a different assumption: they saw themselves as the guardians of the constitution, obligated by a commitment to the principle of the rule of law to engage in a process of judicial review which would ensure that provincial and federal laws are compatible with the jurisdictional constraints imposed by the words of the *Constitution Act, 1867*. Dickson himself gave one of the most frank expressions of this conception of the Court's role in *Amax Potash*,<sup>11</sup> a decision involving the validity of a provision of Saskatchewan's *Proceedings Against the Crown Act*<sup>12</sup>, which purported to bar the recovery of taxes collected under legislation beyond the legislative jurisdiction of the province. In striking down the legislation as an attempt to do indirectly what the constitution forbid the province to do directly, he spoke of the important responsibility of the Court to safeguard the constitution:

A State, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal

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<sup>9</sup> *Ibid.* at 176-77. The doctrine of paramountcy advocated would allow the Court to intervene only where the federal and provincial laws were so clearly in conflict that an actor could not comply with both.

<sup>10</sup> The Court relaxed the standing requirement for a litigant seeking a declaration that government action was unconstitutional in *Thorson v. A.G. Canada (No. 2)*, [1975] 1 S.C.R. 138, (1974) 43 D.L.R. (3d) 1 and went on to elaborate its position and to relax the rules even more in *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, (1975) 55 D.L.R. (3d) 632 and *Minister of Justice for Canada v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588.

<sup>11</sup> *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576, (1976) 71 D.L.R. (3d) 1.

<sup>12</sup> R.S.S. 1978, c. P27.

State. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution, are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.<sup>13</sup>

These are not the words of a judge (or a Court, since he wrote for a unanimous bench) who shied away from a dispute over the bounds of government jurisdiction or who assumed that the constitution is the preserve of political actors. The constitution enshrines a federal structure of government, and a court must give heed to the document however indeterminate the concept of federalism may seem to many and however disputable may be the meaning of the constitutional text.

At the same time this was also a judge who saw the need for some judicial restraint in the adjudicative process. In the result cases coming before the Court would have to be well argued. The litigation process in Canadian constitutional law has long contained special procedures to ensure that governments are given notice of and an opportunity to intervene in constitutional challenges that may affect their jurisdiction, and Dickson was careful to respect these procedures.<sup>14</sup> Thus, in *Northern Telecom* he refused to deal with a constitutional challenge to the jurisdiction of the Canada Labour Relations Board because the employer raising the constitutional issue had failed to do so at earlier stages of the proceedings. The result was a dearth of constitutional facts to aid the Court. Moreover the company had failed to comply with the procedural safeguards in the *Supreme Court Rules*<sup>15</sup> which require the statement of a constitutional question and notice of the question to federal and provincial Attorneys-General in order to give them an opportunity to decide whether to intervene. Dickson was unwilling to deal with the constitutional issue in such circumstances:

There is always the overriding concern that the constitution be applied with some degree of certainty and continuity and regularity and not be wholly subject to the

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<sup>13</sup> *Ibid.* at S.C.R. 590.

<sup>14</sup> One of the best descriptions of these procedures is found in B.L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed. (Toronto: Butterworths, 1988) at 73-86.

<sup>15</sup> *Rules of the Supreme Court of Canada*, C.R.C. 1978, c.1512.

vagaries of the adversarial process. The case at bar is an apt demonstration of the occasional vagaries of that adversarial process.<sup>16</sup>

Thus, while he accepted his responsibility to protect and elaborate upon constitutional norms, he did so with some degree of caution, for he recognized the valuable assistance that might be provided to the court by lawyers for governments concerned about their jurisdiction when the Court embarked on the classification process required in the interpretation of the constitutional distribution of powers.

### III. ECONOMIC REGULATION IN A FEDERAL COUNTRY

ALTHOUGH DICKSON DID NOT WRITE a great deal on general approaches to constitutional interpretation, passages in some of his judgments reveal his concept of the judicial role in a distribution of powers case. The best example is in the *Reference re Residential Tenancies Act*, in a discussion about the introduction of extrinsic materials.<sup>17</sup> Relying on Professors Whyte and Lederman,<sup>18</sup> he stated:

...a classification process is at the heart of judicial determination of the distribution or limitations of primary legislative powers. That process joins logic with social fact, value decisions and the authority of precedents.<sup>19</sup>

This was a judge well aware of the discretion to be exercised in federalism cases. While he might sometimes be discomfited by it, he did not deny the policy making role he played, and, indeed, he looked to many sources to inform his decision making. His judgments always contained a careful and thorough examination of past decisions. However, he was not unaware of the inconsistencies which may arise in a long line of cases and he was also ready to depart from the

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<sup>16</sup> *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] 1 S.C.R. 115 at 140, (1979) 98 D.L.R. (3d) 1 at 19. Dickson expressed a similar reluctance to deal with a constitutional issue that had not been the subject of a constitutional question under the *Supreme Court Rules* in *Minister of Mines and Northern Affairs (Ont.) v. Sheridan Geophysics Ltd.*, [1977] 2 S.C.R. 384 at 398, 70 D.L.R. (3d) 276 at 286.

<sup>17</sup> *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 721, 123 D.L.R. (3d) 554 at 560-61.

<sup>18</sup> J.D. Whyte and W.R. Lederman, *Canadian Constitutional Law* (Toronto: Butterworths, 1977) c. 4.

<sup>19</sup> *Supra*, note 17.

holdings of the past where that seemed appropriate.<sup>20</sup> In doing so, his discussion of community expectations, history, and policy issues demonstrated that there is no magic touchstone to provide solutions to federalism disputes. The exercise is one in which the judge cannot avoid decisions about the proper shape of the federal system under the distribution of powers set out in the constitution. Nowhere is this exercise better illustrated than in the general regulation of trade doctrine, which Dickson helped shape to give new bounds to federal economic jurisdiction.<sup>21</sup>

While Dickson was often quite sympathetic to provincial claims for jurisdiction there was one area where he perceived problems with the current distribution of legislative powers — namely, the state of federal jurisdiction over economic matters.<sup>22</sup> A survey of his decisions in his years on the bench indicate that he tried to expand this area of federal responsibility and had some measure of success. Many in the corporate field have sympathy for a stronger national presence in the control of the economy, and Dickson's views on federal economic regulation may well have been influenced by the fact that before his appointment to the bench, he practised corporate law for many years.

While his most important achievement was the 1989 *General Motors* case,<sup>23</sup> which upheld a section of the *Combines Investigation Act*<sup>24</sup> conferring the power to sue for civil damages on a party harmed by a violation of the Act or by an order of the Restrictive Trade Practices Commission, there were indications in earlier cases of his views. In concurring with Laskin in the *Anti-Inflation Act*

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<sup>20</sup> The best example is in the criminal area: *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161.

<sup>21</sup> I shall return to the discussion of sources *infra*, at note 70 and accompanying text.

<sup>22</sup> Dickson was clearly sympathetic to provincial claims to jurisdiction, as later parts of this paper dealing with the administration of criminal justice will illustrate. In many other important cases he took a position that many would describe as "pro-province": for example, in *Canadian Industrial Gas and Oil Ltd. v. Saskatchewan*, [1978] 2 S.C.R. 545, (1977) 80 D.L.R. (3d) 449 [hereinafter *CIGOL*], he would have upheld Saskatchewan's effort to impose a tax on oil production that the majority of the Court found invalid as an indirect tax and a regulation of interprovincial and international trade and commerce; in the *Reference re Amendment of the Constitution of Canada* (*supra*, note 2) he sided with the majority which held that there was a convention requiring substantial provincial support for a constitutional amendment affecting provincial powers (although he also joined with the majority which held that there was no *legal* requirement for provincial assent).

<sup>23</sup> *Supra*, note 5.

<sup>24</sup> R.S.C. 1985, c.C-34.

*Reference* he seemed to have accepted a wider view of the peace, order and good government clause than the majority of the Court at that time, which tried to close down the national dimensions doctrine and limit it entirely to residuary situations.<sup>25</sup> When he wrote about this doctrine in *Schneider* he revealed his sympathies for expanded federal jurisdiction — although it was also clear that he would build in limits to protect provincial autonomy.<sup>26</sup> Writing for the majority to uphold British Columbia's heroin treatment legislation, he spoke of the reasons why this legislation could not have been enacted under the peace, order and good government power — a power, he believed, that would allow the federal government to legislate with regard to problems of "national dimensions". This phrase encompassed problems sweeping in scope and beyond the ability of the provinces to resolve effectively.<sup>27</sup>

This "provincial inability" criterion, which had emerged from the academic literature, obviously resonated positively with Dickson, as with other judges, for it provided the doctrinal tool to put a brake on the expansiveness of the national dimensions test, while providing what Dickson saw as the added policy flexibility needed by the federal government in certain areas. He never applied the test in support of any federal legislation in the few judgments he wrote dealing with the

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<sup>25</sup> *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452. Beetz wrote for a narrow 5-4 majority on the scope of the national dimensions doctrine, holding that it was restricted to new matters that had a certain degree of indivisibility. He rejected the line of doctrine that suggested matters within provincial jurisdiction could take on a national aspect over time and thus shift to federal jurisdiction (at S.C.R. 458). Whether Dickson would have upheld wage and price controls under this strand of the national dimensions doctrine cannot be known, since Laskin upheld the legislation under the emergency power. For an overview of this doctrinal area see P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) c. 17.

<sup>26</sup> *Schneider v. R.*, [1982] 2 S.C.R. 112, 139 D.L.R. (3d) 417.

<sup>27</sup> *Ibid.* at S.C.R. 130-31.



peace, order and good government power,<sup>28</sup> although he did concur with the majority's endorsement of the test in *Crown-Zellerbach*<sup>29</sup>.

It is in the trade and commerce area that he made use of this provincial inability criterion and was the first member of the Court to discuss in any detail his understanding of the term. The two cases in which he did this both involved the validity of parts of the federal *Combines Investigation Act* under the general regulation of trade doctrine.<sup>30</sup> The first, *Canadian National Transportation*,<sup>31</sup> was supplemented and superseded by the *GM* case, in which Dickson attracted a majority of the Court to a judgment which tried to amplify some of the argument in the earlier case.<sup>32</sup> In the *CN* case Dickson's important contribution was to acknowledge, and then explore, the tensions between the traditional trade and commerce doctrine under s.91(2) of the *Constitution Act, 1867*, which essentially confines the federal government to the regulation of trade flowing across international and interprovincial boundaries, and the general regulation of trade doctrine, which must result in some federal government regulation of transactions occurring within a province. Arguing for a new approach to conceptualizing federal efforts to regulate the

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<sup>28</sup> He did consider whether certain sections of the federal *Food and Drugs Act*, R.S.C. 1985, c. F-27 could be upheld under the national dimensions test in *R. v. Wetmore*, [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577, rejecting the claim because there was nothing inherently national in the sections, aside from their national application and the "financial and logistical difficulties in enacting comparable provincial legislation" (at S.C.R. 296). See, as well, his concurrence with the majority judgment in *Reference Re Tax Proposed by Parliament of Canada on Exported Natural Gas*, *supra*, note 2 where the dissent would have upheld the National Energy Program under the national dimensions test (at S.C.R. 1042-43).

<sup>29</sup> *R. v. Crown-Zellerbach Ltd.*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 *per* LeDain for the majority upholding federal legislation regulating dumping in marine waters, including waters within provincial territory.

<sup>30</sup> Laskin revived this doctrine in *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1. It had been applied only twice before by the Privy Council, the last time in 1937, and had generally met with no success in the cases in which it had been invoked. For an overview, see Dickson's judgment in *A.G. Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206 at 261-63, 3 D.L.R. (4th) 16 at 57-58 [hereinafter *CN*].

<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra*, note 5.

economy,<sup>33</sup> he built on Laskin's early efforts to provide criteria for the general regulation of trade doctrine. These criteria had emphasized the presence of a regulatory scheme and a concern for trade in general, rather than a regulation of a particular trade or industry,<sup>34</sup> yet there seemed to be a problem with them because of the focus on form and the lack of protection for long-standing provincial autonomy. To these Dickson added criteria related to provincial inability which seemed reminiscent of the Court's evolving national dimensions doctrine under the peace, order and good government power. The federal government must be able, in his view, to deal with matters concerning the economy as a whole when the provinces "jointly or severally would be constitutionally incapable of passing such an enactment," particularly where "the failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country."<sup>35</sup> The test, as formulated, was clearly devised so as to allow new economic policy initiatives by the federal government, while at the same time placing a constraint on those initiatives in the interest of provincial autonomy. Dickson was open in his concern for provincial rights, stating in several places, both in *CN* and *GM*, that an appropriate balance between federal and provincial interests must be maintained.<sup>36</sup>

*GM* was an important victory for the federal government, for it upheld the *Combines Investigation Act* under the general regulation of trade doctrine and recognized that competition is a matter which the federal government is allowed to regulate in order to promote national economic health. This permits the federal Parliament to regulate purely intra-provincial economic activity to an unprecedented extent under the trade and commerce power and, to some provincial governments, may seem a dangerous doctrinal development. Yet the

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<sup>33</sup> In describing the need for a new vision, he pleaded for judges to remember that "[t]he forest is no less a forest for being made up of individual trees" (*CN*, *supra*, note 30 at S.C.R. 266). This statement follows these words: "Every general enactment will necessarily have some local impact, and if it is true that an overly literal conception of 'general interest' will endanger the very idea of the local, there are equal dangers in swinging the telescope the other way around."

<sup>34</sup> *MacDonald v. Vapor Canada Ltd.*, *supra*, note 30 at S.C.R. 164-65.

<sup>35</sup> *CN*, *supra*, note 30 at S.C.R. 267.

<sup>36</sup> In *GM*, *supra*, note 5, he states at S.C.R. 660 that "[t]he true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s.91(2) and an interpretation that renders the general trade and commerce power to all intents void and meaningless."

failure to allow federal legislation over competition would have probably undercut an effective national competition policy, as the Court stated, for the provinces are often incapable of dealing with anti-competitive practices which have harmful effects beyond the province in which the conduct occurs.<sup>37</sup>

Does this case signal an important shift in economic jurisdiction under the constitution? Some will seek to use it in support of other federal regulatory action, particularly in the area of securities regulation which, to date, has been regulated by the provinces.<sup>38</sup> The *Canada-United States Free Trade Agreement*<sup>39</sup> may also need the aid of this doctrine if the implementing legislation seems to tread on provincial areas of jurisdiction, such as wine pricing or professional regulation.<sup>40</sup> Whether such arguments will succeed is open to question, even after *GM*, for Dickson cautioned that the application of this doctrine must proceed on a case by case analysis, and he made clear that one of the concerns in its application is the maintenance of some degree of balance between federal and provincial governments. Moreover, there is need for much elaboration of the concept of provincial inability. Therefore, it is difficult to predict the reach of this

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<sup>37</sup> The provinces have problems with certain types of economic regulation, as there are territorial constraints on their legislative action. Efforts to regulate business activity such as pricing or supply practices out of the province are vulnerable to attack under s.92(13), the power to legislate with regard to "property and civil rights in the Province", although such provincial laws may in some circumstances survive. Contrast *Interprovincial Co-operatives Ltd. v. R.*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 and *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529, 96 D.L.R. (3d) 1.

<sup>38</sup> Anisman and Hogg suggested that the federal government could legislate in the securities area using the general regulation of trade doctrine after Laskin revived that doctrine in *Vapor Canada*, *supra*, note 30. See P. Anisman & P. Hogg, "Constitutional Aspects of Federal Securities Legislation" in *Consumer and Corporate Affairs Canada, Proposals for a Securities Market Law for Canada*, vol. 3 (Ottawa: Queen's Printer, 1979) 135 at 163-71.

<sup>39</sup> *Free Trade Agreement Between Canada and the United States of America* (being part A of the Schedule to the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65).

<sup>40</sup> For a good discussion on this point, see R. Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16 Can. Bus. L.J. 160 at 182.

new doctrine although these two examples can illustrate some of the problems which may be encountered.<sup>41</sup>

If one turns to the securities example, those desirous of a broader federal role will draw comfort from Dickson's indication elsewhere that he might be sympathetic to a federal securities law (although he did so in a discussion of the interprovincial and international trade doctrine rather than the general regulation of trade doctrine).<sup>42</sup> Since that doctrine restricts the federal government to the regulation of interprovincial and international flows of trade, it is not altogether satisfactory as a basis for federal action in the securities area, as it suggests constraints on federal regulation of certain types of local transactions. The advantage of the general regulation of trade doctrine is, of course, that this bifurcation of intraprovincial and extraprovincial trade is no longer necessary.

Nevertheless, the claim that a national securities regulatory scheme would be valid under the newer strand of trade and commerce doctrine is vulnerable to challenge, for the requisite element of "provincial inability" would not be easily proven. The provinces have played the leading role in securities regulation in Canada, and while there is overlap and duplication between the provinces, the problems which can result from diversity have been reduced, because there has been a significant degree of interprovincial cooperation and coordination, with Ontario playing the dominant regulatory role.<sup>43</sup> While the provinces are constitutionally unable to legislate directly with regard to some extraprovincial activity, they have been able to

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<sup>41</sup> Dickson in *GM, supra*, note 5 stated (at S.C.R. 663): "On any occasion where the general trade and commerce power is advanced as a ground of constitutional validity, a careful case analysis remains appropriate." Those encouraged by the *GM* case also invoke *Crown-Zellerbach, supra*, note 29, the peace, order and good government case upholding federal marine pollution regulation in provincial waters. There is no doubt that the two cases do signal a shift in the Court's approach, but of what reach?

<sup>42</sup> *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 173, 138 D.L.R. (3d) 1 at 10-11: "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. This is of particular significance considering the interprovincial and indeed international character of the securities industry."

<sup>43</sup> For discussions, see R.J. Schultz & A. Alexandroff, *Economic Regulation and the Federal System* (Toronto: University of Toronto Press, 1985) c. 4, and T.J. Courchene, *Economic Management and the Division of Powers* (Toronto: University of Toronto Press, 1985) at 158-82.

regulate national, and even international, activity through cooperative efforts.<sup>44</sup>

Before the federal government can successfully invoke the general regulation of trade doctrine (or, for that matter, a national dimensions test which rests on provincial inability), the Court will have to determine whether "provincial inability" refers to *constitutional incapacity* to enact a national regulatory scheme or *political inability* to mount a national effort through provincial cooperation. Dickson should not be taken as saying that the criterion of provincial inability is met just because one province is constitutionally incapable of addressing all aspects of a policy area such as securities or product standards. Indeed, to deprive the provinces of jurisdiction on that ground would shift jurisdiction much too quickly to the federal government, since the provinces have a territorial constraint on the reach of their legislation.

Should the Court then look at the efficacy of provincial legislative efforts to regulate in the area? Dickson was not clear on this issue although he seemed to indicate in *GM* that it was unnecessary to look at the existence of provincial legislation in determining the validity of federal legislation.<sup>45</sup> One might have thought that this information would be important to the determination of the efficacy of provincial policy making and the need for federal intervention in a particular area. For Dickson in *GM*, though, the concern was the inability of the provinces to enact a comprehensive national competition policy that could capture conduct harmful to the economy whether that conduct occurred in one province or several — seemingly a concern about constitutional capacity rather than political arrangements.

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<sup>44</sup> I do not suggest that there is unanimity on the efficacy of the provincial efforts — indeed, there is much criticism of provincial jurisdiction. See, for example, Anisman & Hogg, *supra*, note 38, and W.D. Moull, E.J. Waitzer, & J. Ziegel, "The Changing Regulatory Environment for Canadian Financial Institutions: Constitutional Aspects and Federal-Provincial Relations" in J. Ziegel, L. Waverman, & D.W. Conklin, eds., *Canadian Financial Institutions: Changing the Regulatory Environment* (Toronto: Ontario Economic Council, 1985) 101.

<sup>45</sup> *GM*, *supra*, note 5 at S.C.R. 682. In *CN*, *supra*, note 30, he referred to both constitutional incapacity and political considerations on the same page where he stated the criteria quoted earlier in this text. Thus, at S.C.R. 267, he also said that federal legislation valid under the general regulation of trade doctrine "is qualitatively different from anything that could *practically* or constitutionally be enacted by the individual provinces either separately or in combination" (emphasis added). This reference to practicality is repeated at S.C.R. 278.

Such disregard for the actions of the other level of government may be appropriate in determining the scope of enumerated heads of power in ss. 91 and 92 which, like the criminal law, have some substance to them. However, this approach requires further consideration when dealing with a head of federal power that rests on "provincial inability" to act, such as the national dimensions doctrine or the general regulation of trade test. Surely with these doctrines an important determinant of federal jurisdiction is the effect of existing provincial jurisdiction and the impact of inaction on those outside a province. Thus part of the inquiry should be empirical if provincial jurisdiction is to be respected.<sup>46</sup>

For Dickson, though, the inquiry is not really empirical despite his words suggesting that might be the case. He does not wish to explore the extent of provincial competition policy nor the practicalities of leaving it to the provinces to mount an effective policy. Rather, his real concern is to give the federal government the capacity to regulate certain areas of economic policy without the constraint on national policy making that comes about if jurisdiction is divided on the conceptual lines of traditional trade and commerce doctrine thereby avoiding the danger of multiple policies among the regions and alleviating the problem of coordinating uniformity among the provinces. The task in the future is to identify those economic policy areas which will be characterized as being of general, national interest which warrant uniform treatment and which are beyond either the political or constitutional capacity of the provinces because of their inability to speak for a unified national interest.

When it came to the regulation of competition, it was important to Dickson that Canada is seen as an economic union — indeed, he made reference to s.121 of the constitution in *CN*. It was important to him as well that federal competition policy is designed to facilitate the operation of this national market. To deny the federal government the power to regulate intraprovincial activity that harms competition,

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<sup>46</sup> Laskin also spoke of the irrelevance of provincial action or inaction in the *Reference re Anti-Inflation Act*, *supra*, note 25, when dealing with the emergency power under the peace, order and good government power. There, one might well agree that Parliament cannot always wait to see if provincial cooperation is forthcoming, and it may have to act in order to protect the nation.

Admittedly, in the competition area, there is not a lot of evidence of provincial capacity, as the regulation of competition has been dominated by the federal government through the criminal law power. Quebec's regulation of competition was noted in *GM*, *supra*, note 5, but held to be irrelevant to the determination of the scope of federal jurisdiction.

such as price fixing by Ontario steel mills, is to undercut an effective national competition policy — a policy that seems consistent with the fundamental structure of the constitution. Thus, the inquiry into “provincial inability” became a subtle statement about political community and the structure of our constitution, with Dickson assuming that competition policy is not an area in which interprovincial variation in policy should be tolerated. The national interest requires that one government, with a mandate to consider the interests of all regions of the country, have the ability to set minimum standards of behaviour for all. The provinces, in his view, do not have the ability to take this broader perspective of the national economic health.

Will there be a similar conclusion in the securities area? Obviously, the argument will be made that the securities market is both national and international and that the provinces cannot see the larger picture in the way the federal government can do so. The case is not as easy as competition, however, both because of the history of securities regulation in this country and the lack of a strong structural argument based on s.121.

Beyond these important questions about provincial inability and economic structure there is, as well, an issue of preserving a balance in the federal system which permeates Dickson’s doctrine in *GM*. While the shift of securities jurisdiction to the federal government would not, in many people’s minds, seriously undercut provincial autonomy, the free trade example is one that more squarely raises questions about the preservation of the balance of power in the federal system as we have known it in the last two decades. The free trade agreement reaches far into areas of provincial responsibility,<sup>47</sup> and upholding all of its measures under the general regulation of trade doctrine will result in a dramatic shift in legislative power to the federal government. It is difficult to determine where Dickson would stand on this issue, since he was circumspect about his views. His concern for the balance in the federal system might well lead him to exercise caution in upholding the agreement under this doctrine, even though his judgments in the economic area revealed a real sympathy for expanded federal jurisdiction, for such a conclusion would seriously undercut provincial regulation of trade activity within the provinces.

In sum, Dickson’s invocation of the general regulation of trade doctrine to support federal competition legislation is the most important doctrinal contribution he made in the federalism area,

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<sup>47</sup> See, for example, Attorney-General for Ontario, *The Impact of the Canada / U.S. Free Trade Agreement: A Legal Analysis* (Toronto: May 1988) (mimeo).

although the doctrine's reach is yet to be determined. At a minimum, the holding in *GM* is a significant victory for the federal government, effectively adding competition as a new class to the heads of federal power in s.91 of the constitution. Coupled with *Crown Zellerbach*, this case will provide encouragement to the federal government when it considers new regulatory initiatives over the economy.<sup>48</sup>

#### IV. THE ADMINISTRATION OF JUSTICE

FROM AN AREA IN WHICH DICKSON achieved important results, we turn to the administration of justice, an area in which he often found himself in the minority, as he demonstrated a strong belief in provincial autonomy not shared by the majority of judges. There were several cases in the late 1970s and through the 1980s in which the provinces' assertions of jurisdiction to deal with problems of crime investigation, policing, or criminal prosecution were challenged under the criminal law power in s.91(27) of the constitution.<sup>49</sup> Support for

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<sup>48</sup> There are two other significant economic regulation issues that should be mentioned in which Dickson wrote for the majority. In *Multiple Access, supra*, note 42, he upheld federal insider trading regulations included in the federal corporations legislation. While the dissenting judges would have struck them down, he found the regulation of insider trading to be a central aspect of company law, although he acknowledged that the impugned law also had a securities aspect and could also be regulated by the provinces (at S.C.R. 180-83).

The second case, *Alberta Government Telephones v. C.R.T.C.* (1989), 61 D.L.R. (4th) 193, was a significant constitutional victory for the federal government, holding that the Alberta Government Telephones company was a federal undertaking under s.92(10)(a) of the *Constitution Act, 1867* because it offered customers a mix of local, interprovincial and international telecommunications services. AGT was not subject to regulation by the CRTC because of the operation of Crown immunity doctrine in the interpretation of the statute conferring jurisdiction on the CRTC, but the federal government now had the authority to regulate should it wish to do so. Many will see this case as a natural follow-up to the earlier cabletelevision cases, *Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141, (1977) 81 D.L.R. (3d) 609 and *R. v. Public Service Board and Dionne*, [1978] 2 S.C.R. 191, (1977) 83 D.L.R. (3d) 178, in which Dickson concurred with Laskin's majority judgments upholding federal jurisdiction.

<sup>49</sup> Dickson wrote reasons in *DiIorio v. Warden of the Common Jail of Montreal*, [1978] 1 S.C.R. 152, (1976) 73 D.L.R. (3d) 491; *R. v. Hauser*, [1979] 1 S.C.R. 984, 98 D.L.R. (3d) 193; *A.G. Alta. v. Putnam*, [1981] 2 S.C.R. 267, 123 D.L.R. (3d) 257; *A.G. Canada v. Canadian National Transportation Ltd.*, *supra*, note 30; *R. v. Wetmore, supra*, note 28; and *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591, 45 D.L.R. (4th) 527. He was also a member of the Court in *Keable v. A.G. Canada*, [1979] 1 S.C.R. 218, (1978) 90 D.L.R. (3d) 161 and *Bisailon v. Keable*, [1983] 2 S.C.R. 60, 2 D.L.R. (4th) 193.

Section 91(27) confers on the federal Parliament the power to legislate with regard to "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but



the provinces lay in s.92(14) of the constitution, the power over the administration of justice, a provision that was relatively underdeveloped in past case law when compared to many other paragraphs of ss.91 and 92.<sup>50</sup> While Dickson was not a constitutional lawyer by background, having come to the bench from a corporate law practice, he had shown a strong interest in criminal law since becoming a judge, and this undoubtedly influenced his decision to write in the administration of justice cases.

*DiIorio*, the first of the series, involved a constitutional attack on Quebec's public inquiry into organized crime in the province.<sup>51</sup> The inquiry's mandate to look into the scope of organized crime activity within the province could be characterized as a new form of criminal procedure because of the inquiry's ability to compel individuals to testify and incriminate themselves, thus assisting police investigation into specific criminal activity. This was how Laskin saw the inquiry in his dissent — as a colourable attempt to change the law of criminal procedure, which is within exclusive federal jurisdiction.<sup>52</sup> In contrast, Dickson upheld the inquiry in a majority judgment, for he saw the inquiry as a *bona fide* investigation by the province into a serious local problem with ramifications for many areas of provincial concern, not the least of which was policing responsibility. Unlike Laskin, he concluded that the phrase "administration of justice" in s.92(14) included both civil and criminal justice, and the province, with responsibility for criminal justice, could investigate matters affecting that responsibility.

In *DiIorio*, Dickson employed an approach to constitutional issues which is characteristic in his judgments. He demonstrated a deep respect for history, which led him to search for the intent of the fathers of Confederation for guidance as to the meaning of the constitution. In this case evidence was found in a quotation from the Earl of Carnarvon, the Colonial Secretary, in a speech introducing the

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including the Procedure in Criminal Matters".

<sup>50</sup> Section 92(14) of the *Constitution Act, 1867* reads: "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

<sup>51</sup> *DiIorio*, *supra*, note 49.

<sup>52</sup> *Ibid.* at S.C.R. 177-80.

*British North America Act* in the House of Lords in 1867.<sup>53</sup> In this and in other cases historical materials post-Confederation were also consulted to determine federal and provincial assumptions about jurisdiction. Here Dickson looked at the responsibilities of the provincial attorneys-general since Confederation, finding in their expansive powers over the court system, the police, criminal investigation, prosecutions and corrections, evidence that the provinces were meant to have jurisdiction over both civil and criminal justice.<sup>54</sup> Indeed, he stated:

It seems late in the day to strip the Provinces of jurisdiction in respect of criminal justice which they have exercised without challenge for well over 100 years.<sup>55</sup>

History alone was never conclusive for Dickson. While it might explain why powers were conferred in a certain manner or ongoing assumptions about their content, the language of the constitution was also of critical importance. The structure of ss.91 and 92 revealed for him an intention to confer primary responsibility for the administration of justice on the provinces, with the federal power over criminal law and criminal procedure constituting a subtraction therefrom.<sup>56</sup>

*DiIorio* was succeeded by three other judgments written by him involving s.92(14). In *Putnam*, the issue was Alberta's jurisdiction to investigate a complaint of misconduct by a member of the Royal Canadian Mounted Police while he was serving as a provincial police officer under a contract between the federal and provincial governments.<sup>57</sup> The majority of the Court held that there was no such jurisdiction in reasons which seemed to conclude that such an

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<sup>53</sup> The quote is found *ibid.* at S.C.R. 200 and reads: "To the Central Parliament will also be assigned the enactment of criminal law. The administration of it indeed is vested in the local authorities; but the power of general legislation is very properly reserved for the Central Parliament."

<sup>54</sup> *Ibid.* at S.C.R. 205-06.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* at 199. As well, he canvassed past decisions to assist him, although, in this case, he acknowledged that there was little guidance in past case law. He also considered, although briefly, why Quebec needed such an inquiry in order to deal with the problem of organized crime.

<sup>57</sup> *Putnam*, *supra*, note 49.

investigation would constitute provincial interference with the internal operations of a federal force.<sup>58</sup>

Once again Dickson turned to history for guidance as to the scope of federal and provincial responsibility for policing, this time looking at the history of the RCMP as well as correspondence and statements of political figures post-Confederation to show the limited scope of federal policing responsibility. He also considered the reason why the provincial government should be able to undertake such an investigation. Since the provincial Attorney-General has ultimate responsibility for policing and the administration of justice in the province, he or she has a responsibility to maintain the integrity of that system. As well, the public in the province has an interest in the quality of policing which the provincial investigation was designed to advance. Dickson weighed against this, in a balancing of interests, the claim that the result of the investigation would interfere with the operation of the federal force — a claim that he did not find persuasive, since the provincial board of inquiry could, at most, recommend further action against the officer by his superiors or reprimand him, but could not affect the management of the RCMP.

The third case in this group, *Hauser*, involved a dispute over criminal prosecution.<sup>59</sup> At issue was the federal power to prosecute criminal laws passed under s.91(27), although the majority avoided the central issue in the case.<sup>60</sup> Pigeon, for the majority, started with the premise that executive power normally follows legislative power, although he conceded that this might not be the case with the criminal law power because of s.92(14). Then he held that the *Narcotic Control Act*, under which the prosecution in *Hauser* occurred, was enacted under the peace, order and good government clause of s.91, not the criminal power (as many had long thought). Thus, the federal government could authorize prosecutions of this legislation by its own

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<sup>58</sup> Laskin, for the majority, relied on *Keable v. A.G. Canada*, *supra*, note 49, which had held that a Quebec inquiry could not look into the internal practices and management of the federal force. The implication seemed to be a degree of intergovernmental immunity from such intrusive action. Dickson had concurred with the majority in *Keable*, which held that the province could set up an inquiry into possible illegal activity by the police, subject to the restriction on inquiry into internal operations of the RCMP.

<sup>59</sup> *Hauser*, *supra*, note 49.

<sup>60</sup> J. MacPherson, in "Developments in Constitutional Law: The 1978-79 Term" (1980) 1 S.C.L.R. 77 at 94, criticized Pigeon for focusing on an issue that was only briefly discussed in some factums: "It is one thing for an umpire to make a wrong decision (it happens all the time — in sports and in the courts of federations), but it is somewhat unusual, to say the least, for the umpire not even to find the right ball park."

officials because the normal rule applied and executive follows legislative power.

Dickson, in dissent, held that the *Narcotic Control Act*<sup>61</sup> was criminal law, a conclusion based on an examination of the Act's form, apparent purpose and past decisions interpreting it. As a result, he had to confront the issue of jurisdiction over criminal prosecution. Once again, he relied, in part, on historical materials, referring again to the passage from the Earl of Carnarvon on the intent of the framers of the constitution and to the longstanding provincial responsibility for, and local control of, prosecutions. These were not his only guides. He spoke of the rationale for provincial control of prosecutions, which would allow greater responsiveness to the concerns of different regions. In his view, there was no evidence that such provincial jurisdiction interfered with the effective implementation of federal policy in the area of criminal law, and so there was no national reason to disturb the tradition of local primacy over criminal prosecution.

Dickson reiterated this view in dissent several years later in *Wetmore*.<sup>62</sup> Once again the historical evidence was, in his view, persuasive to support provincial jurisdiction over criminal prosecutions. This time, he also noted that there was a practical reason why the fathers of Confederation would have provided for local control over this matter. In the early days of the country, the size and lack of reliable and speedy means of communication required local autonomy over prosecution and the administration of justice, since national control over such day to day matters was impossible.<sup>63</sup> Beyond history, there were policy reasons cited for provincial control, as the following passage illustrates:

The ultimate decision as to whether or not to prosecute a particular individual and, if so, in respect of which offences, is one which requires a careful weighing of a multitude of local considerations, including the seriousness of the conduct in light of community norms, the likely impact on the individual of bringing a prosecution, the likely benefit

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<sup>61</sup> R.S.C. 1985, c. N-1.

<sup>62</sup> *Wetmore*, *supra*, note 28 at S.C.R. 297ff. There was another prosecution case between *Hauser* and *Wetmore*: *A.G. Canada v. Canadian National Transportation*, *supra*, note 30, in which the majority of the Court held that the federal government has authority to prosecute criminal laws. Dickson wrote a concurring judgment upholding the federal power to prosecute violations of the *Combines Investigation Act*, because he believed that the legislation could be upheld under both the criminal law and trade and commerce powers. As executive power usually follows legislative power, the federal government could prosecute violations of the Act because of the trade and commerce base.

<sup>63</sup> *Ibid.* at S.C.R. 306.

to the community of doing so, the likelihood of a reoccurrence of the conduct, and the availability of alternative courses of action, for example, diversion or special rehabilitation programmes. Assessing these factors obviously requires an understanding of conditions prevalent in the community in which the criminal conduct occurred.<sup>64</sup>

Thus, over several years, Dickson developed his view of the administration of justice power as encompassing provincial responsibility for many aspects of criminal justice and, in particular, policing and prosecution. While in his view the language of the constitution supported this conclusion, the words were best understood in light of other considerations. The long-standing tradition of provincial responsibility for these matters influenced him, as did a conviction that matters of policing and prosecution should be dealt with at the local level to allow responsiveness to conditions and problems in a community. If one tries to measure his contribution in this area one finds that he had greater success in attracting majority support in the area of commissions of inquiry. Thus he wrote for the majority in *DiIorio*, upholding Quebec's inquiry into organized crime, and in *O'Hara*, upholding British Columbia's effort to investigate a complaint of wrongdoing against a municipal police officer.<sup>65</sup> In the area of prosecution, however, he tended to stand alone.

The legacy he left on commissions of inquiry, as developed in later judgments of the Court, is one of a confusing doctrine. While the Court has allowed some kinds of provincial inquiries associated with criminal activity, it has struck down other provincial investigatory attempts, the most recent being Ontario's effort to inquire into the relationships between a certain individual and company and individuals associated with the provincial government. In *Starr*<sup>66</sup>, the

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<sup>64</sup> *Ibid.* This sympathy for the value of diversity in the administration of criminal laws also surfaced in the interpretation of the *Charter of Rights*. In *R. v. S (S.)*, [1990] 2 S.C.R. 254, 77 C.R. (3d) 273, Dickson wrote for the Court in a case challenging Ontario's failure to provide a program of alternative measures under s.4 of the federal *Young Offenders Act*, R.S.C. 1985, c. Y-1 when all the other provinces had done so. The Court held that the alternative measures provision was valid criminal law under s.91(27) of the *Constitution Act, 1867* and went on to find that there was no violation of the equality guarantee in s. 15(1) of the Charter. Dickson noted that "differential application of federal law can be a legitimate means of forwarding the values of a federal system" (at S.C.R. 289), and he brought back memories of the administration of justice cases by stating that the division of powers between ss. 91(27) and 92(14) was a manifestation of the balancing of national interests and local concerns in our constitutional structure.

<sup>65</sup> *DiIorio*, *supra*, note 49; *O'Hara*, *supra*, note 49.

<sup>66</sup> *Starr v. Houlden*, [1990] 1 S.C.R. 1366, 68 D.L.R.(4th) 641. Lamer wrote the judgment, in which Dickson concurred.

Supreme Court characterized the inquiry as a colourable attempt by the province to invade federal criminal jurisdiction because the terms of reference focused on the activity of named persons and were directed at conduct very similar to that prohibited under the *Criminal Code*.<sup>67</sup> Yet there are very strong similarities between the inquiry in *Starr* and those upheld by the Court in *DiIorio* and *O'Hara*. Indeed, in *O'Hara*, Dickson had stated:

A province has a valid and legitimate interest in determining the nature, source and reasons for inappropriate and possibly criminal activities engaged in by members of police forces under its jurisdiction. At stake is the management of the means by which justice is administered in the province. That such activity may later form the basis of a criminal charge and thus engage federal interests in criminal law and criminal procedure does not, in my view, undermine this basic principle.<sup>68</sup>

What, then, is the rationale for upholding certain inquiries in which individuals can be forced to self-incriminate and to assist the police in investigations of criminal activity, but not others? While the Court's jurisprudence is confusing there is a concern going back to *DiIorio* which seems to permeate these cases, a concern about the dangers to the civil liberties of those investigated. Dickson was well aware of the dangers to the individuals compelled to testify before Quebec's crime inquiry. While this did not affect his determination on constitutionality, he did interpret the *Canada Evidence Act*<sup>69</sup> and the *Quebec Code of Civil Procedure*<sup>70</sup> in such a way as to provide some protection to the individual in subsequent proceedings.<sup>71</sup> In contrast, in *Starr*, the concern for the individual was an important factor influencing the characterization in ways that are difficult to harmonize with many of the cases on which he relied in *DiIorio*.<sup>72</sup> While one might try to distinguish *Starr* on the basis of the similarity to a police investigation, the explanation is not satisfactory, with the result that the provinces are left with a great deal of uncertainty about their power to appoint commissions of inquiry in the criminal law area.

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<sup>67</sup> R.S.C. 1985, c. C-46.

<sup>68</sup> *O'Hara*, *supra*, note 49 at S.C.R. 610-11.

<sup>69</sup> R.S.C. 1970, c. E-10.

<sup>70</sup> R.S.Q. c. C-25.

<sup>71</sup> *DiIorio*, *supra*, note 49 at S.C.R. 218-22.

<sup>72</sup> The most obvious is *Faber v. R.*, [1976] 2 S.C.R. 9, (1975) 65 D.L.R. (3d) 423 dealing with a coroner's inquest.

An underlying concern for civil liberties in the interpretation of the federal criminal law power is nothing new. Indeed, Dickson often sided with Laskin in cases striking down provincial penal laws on the basis that they invaded federal criminal jurisdiction. In decisions such as *McNeil* and *Dupond*, an important theme in Laskin's dissenting reasons is the protection of individual liberty through the negative restraint of the criminal law power on provincial action.<sup>73</sup> But Dickson, much more than Laskin, felt a tension, in these and other similar distribution of powers cases like *DiIorio*, between his concern for the individual's liberty and the claims of the provincial community to exercise jurisdiction over a pressing problem of public policy. This is well illustrated in *DiIorio* where he protected the claim of the province to inquire into a serious policing problem despite the concern for individuals' rights and in *O'Hara*, where he protected the provincial right to investigate an allegation of assault by a police officer. In *Starr*, he undoubtedly felt the same tensions, but for unexplained reasons he must have felt that he should not ignore the impact of the inquiry on the safeguards provided to an individual by the criminal process. The sentiments may be admirable, but the legacy is confusing.

From this discussion of doctrine, I turn in the following section to issues of interpretation, first discussing in more detail Dickson's uses of history, before concluding with some reflections on his approach to constitutional interpretation.

## V. THE APPEAL TO HISTORY

ONE OF THE MOST NOTEWORTHY ASPECTS of Dickson's federalism decisions has been his use of history. This was seen in its most pronounced fashion in the administration of justice cases described above where he looked to the intent of the framers as revealed by parliamentary debates and to historical evidence showing how the impugned power has been exercised since Confederation. However, his search for historical roots was not confined to these criminal justice cases. Again and again he sought an historical rationale for particular allocations of power, even when the record was sparse.<sup>74</sup>

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<sup>73</sup> *Re Nova Scotia Board of Censors and McNeil*, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1 and *A.G. Canada v. Dupond*, [1978] 2 S.C.R. 770, 84 D.L.R. (3d) 420.

<sup>74</sup> Thus, in *Reference Re Residential Tenancies Act*, *supra*, note 17, there was a reference to the purpose of s. 96 at S.C.R. 728 ("conceived as a strong constitutional base for national unity") and in *CIGOL*, *supra*, note 22, there was mention, again somewhat

Dickson openly acknowledged his belief in the relevance of historical materials. There are statements in his judgments such as “[a] page of history may illuminate more than a book of logic”<sup>75</sup> and “history and governmental attitudes can be helpful guides to interpretation”<sup>76</sup>. Yet Dickson was not a strict constructionist; he did not seem to feel himself firmly bound by the words of the fathers of Confederation, nor by past practice under the constitution. He also stated that “jurisdiction in the strict sense cannot come through consent or laches”.<sup>77</sup> Moreover, he frequently made reference to the need for progressive interpretation in constitutional law, captured in his frequently quoted exhortation from *Edwards* that instructs the courts to treat the constitution as a “living tree”.<sup>78</sup>

The recognition of the need for caution in the use of historical materials is important, although Dickson did not discuss this in any detail in his decisions. Were he purporting to bind himself through the historical record, an historian would undoubtedly criticize his methodology, both because of the material relied upon and the controversial nature of some of his conclusions.<sup>79</sup> Lawyers too might well have concerns if he were purporting to find the answers to the problems before him in this complex and often ambiguous ground. But that was not his objective in cases like *DiIorio* or *Putnam*. In the cases

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briefly, of the purpose behind s. 92(2), which limits the provinces to direct taxation (at S.C.R. 582-83).

<sup>75</sup> *Wetmore*, *supra*, note 28 at S.C.R. 299.

<sup>76</sup> *DiIorio*, *supra*, note 49 at S.C.R. 206. This is repeated in *Hauser*, *supra*, note 49 at S.C.R. 228 and *Putnam*, *supra*, note 49 at D.L.R. 276.

<sup>77</sup> *Hauser*, *supra*, note 49 at S.C.R. 228, relying on *DiIorio*, *supra*, note 49 at S.C.R. 206.

<sup>78</sup> *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.). In *CIGOL*, *supra*, note 22 at S.C.R. 583, Dickson in dissent mentioned that “there is no reason to believe that the *British North America Act, 1867* is not a document of evolving meaning...”

<sup>79</sup> Aside from his frequent invocation of the Earl of Carnarvon, as demonstrated above, he at times invoked history without reference to sources. For example, in the *Reference re Residential Tenancies Act*, *supra*, note 17, he spoke authoritatively about the intent of the fathers of Confederation with regard to judicial structure. Without any source cited, he stated: “Sections 92(14) and ss.96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s.96, would be destroyed if a Province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the Superior Courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined” (at S.C.R. 728). I discuss some of the problems of historical interpretation in Swinton, *supra*, note \*, c. 4.



in which Confederation history surfaced he appeared to search for background material to explain why the distribution of powers was set up in the way it was, to give some guidance as to underlying principles, to the extent that any principles emerged from what was clearly a political compromise. He was not searching for definitive answers in the past, nor postulating that Canadians today must be bound by the intent of those living more than a century ago. His inquiry was consistent with his broad ranging policy approach to constitutional cases outlined earlier, with inferences about the intent of the framers as only one source among many to assist him in his interpretation of the constitution. If one recalls Dickson's affection for the words of *Edwards*, his use of history would be seen as a search for knowledge about the roots of our constitutional tree.

There are some cases, though, in which historical material carried more weight — indeed, where it seemed to him to be conclusive of the dispute. This was true in some s.96 cases, where the first stage of inquiry — the determination whether a provincially appointed tribunal exercises powers analogous to a s.96 court — is historical, with the Court analyzing the functions of superior and county courts at the time of Confederation. If the tribunal's powers are not broadly analogous to those of an inferior court, then the inquiry is over.<sup>80</sup>

History also played a critical role in cases involving claims to ownership and jurisdiction over lands off the coasts of Newfoundland and British Columbia. While the decision in the Newfoundland case was issued as a judgment of "the Court,"<sup>81</sup> Dickson is reputed to have written the majority judgment in the case upholding exclusive federal jurisdiction over the right to explore and exploit the mineral and natural resources of the continental shelf offshore Newfoundland. Historical material played a major role in that case, as in the British Columbia dispute, where he wrote for the majority. Both British Columbia and the federal government laid claims to the lands of the seabed and subsoil covered by the waters between mainland British Columbia and Vancouver Island, and the resolution of the dispute required a determination of the historic boundaries of the colony of

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<sup>80</sup> See *Reference Re Residential Tenancies Act*, *supra*, note 17, where Dickson outlined a three-stage test for s.96 cases, the first stage of which is historical (at S.C.R. 734-36). His formulation of the doctrine has been very helpful in clarifying the case law on s. 96 and continues to be applied and refined by the Court, as in *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, 57 D.L.R. (4th) 1.

<sup>81</sup> *Reference Re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 385.

British Columbia.<sup>82</sup> After a careful examination of a lengthy historical record, including treaties, old statutes, and letters patent, Dickson concluded that the colony had been granted proprietorship of the territory prior to its entry to Confederation. As a result, the province of British Columbia continued the ownership of these lands after Confederation.<sup>83</sup>

In cases like *Strait of Georgia* and the s.96 disputes, historical materials were used for a limited purpose — to identify a state of affairs or an historical fact at the time a particular province joined Confederation. The task undertaken was far from simple, especially in a cases like *Strait of Georgia*, where the Court had to decipher old documents that are open to competing interpretations. Yet the relevance of those documents and other historical materials for interpretive purposes and could not be questioned. The Court was not seeking the intention of some long dead ancestors to tell us the proper allocation of legislative powers between federal and provincial governments today; rather, the judges were searching for material to tell them about facts in 1867 (or the date at which other provinces entered Confederation) which were necessary in the contemporary interpretation of the constitution — either the nature of superior courts or the boundaries and lands owned by a province.<sup>84</sup> Dickson seemed very comfortable with such an exercise.

There was a third form of historical inquiry in which Dickson often engaged, and this may be the most controversial. In the cases on administration of justice, he seemed to be influenced by the history of the administration of criminal justice since 1867. The following passage from *Wetmore* summarizes his view of the historical evidence on the control of criminal prosecution post-Confederation which he had considered in the earlier cases, *DiIorio* and *Hauser*:

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<sup>82</sup> *Re Ownership of the Bed of the Strait of Georgia*, [1984] 1 S.C.R. 388, 8 D.L.R. (4th) 161.

<sup>83</sup> A similar exploration of historical material is seen in cases dealing with aboriginal rights. An excellent example is found in Dickson's reasons in *Simon v. R.*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390.

<sup>84</sup> There may be some reason to question the reliance on historical material under s.96, for one could argue that powers of inferior courts in s.96 could become of such significance that they warrant the attention of s.96 judges today. While the Court has not adopted this view, its "narrow" characterization of the jurisdiction of the provincial tribunal and its generous interpretation of superior court jurisdiction at the historical stage of inquiry in *Sobeys Stores*, *supra*, note 80 seems to put real constraints on the provinces (*per* Wilson at S.C.R. 251-67).

If, as the Attorney-General of Canada contends, the provinces have for over 100 years been exercising, if not usurping, a jurisdiction not properly theirs, the provinces would seem to have been blissfully unaware of the fact, so also the federal Crown. One can look in vain among the Confederation debates, subsequent case law, the text books, other writings on the Constitution for any firm assertion on the part of the Attorney-General of Canada that the primary and, indeed, exclusive, prosecutorial authority in criminal cases rests, and has always rested, with the federal Crown.<sup>85</sup>

When Dickson looked to history here he used it to reveal government attitudes towards the distribution of powers. There was a message for him in the virtually uninterrupted provincial control of prosecution for over 100 years (until the federal Parliament amended the definition of "Attorney-General" in 1969 to permit federal prosecutions of violations of federal Acts other than the *Criminal Code*). This indicated to him both a provincial and federal recognition of provincial responsibility for criminal prosecution, which was persuasive in the case, particularly when coupled with other indications supporting provincial jurisdiction from the text, the Confederation debates, and policy considerations. Similarly, in *Putnam*, the correspondence from political figures on the limited role of the federal police force and the primary provincial responsibility for policing, coupled with the text and policy considerations, led to a finding of provincial competence to inquire into complaints about individual RCMP officers in the province.<sup>86</sup>

Underlying this appeal to history was a belief in the relevance of consensus, as revealed by long-standing expectations, on the interpretation of the distribution of powers. The Court was being asked in these cases to determine which level of government had jurisdiction over aspects of the administration of justice, and Dickson found the answer, at least in part, in the apparent government consensus over a long period of time that the provinces had the jurisdiction. The reliance on this consensus is appealing for a judge, for it shields him or her from a charge of imposing personal values in the interpretation of the constitution. Instead there is an external source, the public positions of the key actors in the federal system to assist the determination.

Unfortunately, for a judge like Dickson who finds this type of evidence persuasive, it is often unavailable in particular cases. While there was a historical record suggesting that the provinces bore

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<sup>85</sup> *Wetmore, supra*, note 28 at S.C.R. 303.

<sup>86</sup> *Supra*, note 49.

responsibility for prosecution and policing in the s. 92(14) cases,<sup>87</sup> such material does not often exist to help in other cases. Moreover, the use of historical material to demonstrate "consensus" is often problematic. Even if there is evidence of legislative practice in a given area, there are often federal and provincial governments lined up on opposing sides before the Court, with quite different views about the proper allocation of jurisdiction. As a result, Dickson was often unable to call on this type of consensus in areas other than the administration of justice.

Even when evidence of consensus was available, that fact was not always determinative for Dickson, as the criminal prosecution cases show, for expectations or consensus are only one more factor that helps the interpretive process.<sup>88</sup> Ultimately he came to considerations about the policy needs in criminal prosecution, which are especially acute in a federal country, and he determined that this is an area where diversity is important in order to allow responsiveness to local needs and priorities. Local control, at least in current circumstances, had done nothing to harm the national interest in the enforcement of the substantive law.

Thus Dickson used history in creative ways and more frequently than other members of the Court. In his hands it was a tool to explain the past and to illustrate the underlying structure of the constitution. As well it could be used to shape the evolution of the constitution, by showing the assumptions of governments about the bounds of the various heads of power. It did not provide definitive answers — for Dickson, no one source could do so in federalism cases. Ultimately the judge must make a determination based on a variety of considerations.

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<sup>87</sup> Obviously, the record was not uncontroversial, for Laskin interpreted it to mean the provinces had no independent responsibility for prosecution. In his view, the power continued after Confederation because of s.129 of the *Constitution Act, 1867* and federal sufferance of provincial control of the matter (see *CN, supra*, note 30 at S.C.R. 224-26).

<sup>88</sup> In another context, Dickson referred to the federal government's support for provincial legislation that was attacked constitutionally. In *Re Ontario Public Service Employees' Union and A.G. Ontario*, [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1 [hereinafter *OPSEU*], he stated (at S.C.R. 19-20): "The distribution of powers provisions contained in the *Constitution Act, 1867* do not have as their exclusive addressees the federal and provincial governments. They set boundaries that are of interest to, and can be relied upon by, all Canadians. Accordingly, the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that boundary. Nevertheless, in my opinion the court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it *and* has enacted legislation based on the same constitutional approach adopted in Ontario."

## VI. PRESERVING THE BALANCE

DICKSON WAS FRANK in his acknowledgement of the judge's creative role in federalism disputes. Ultimately the judge must balance federal and provincial interests in light of the constraints of the text and doctrine.<sup>89</sup> In an interpretive process that combines elements of continuity with social policy concerns, the judiciary must have adequate information, and Dickson welcomed the introduction of a range of extrinsic materials to help him. Thus in the *Reference re Residential Tenancies Act* he summarized background studies from the Ontario Law Reform Commission and the Ontario Ministry of Consumer and Commercial Relations on the reform of landlord and tenant law in order to give some context to the remedial powers conferred on the Residential Tenancies Commission in the challenged legislation.<sup>90</sup> Similarly, in *Schneider*, he studied the LeDain Commission report on the non-medical use of drugs and a provincial report leading up to the enactment of the provincial *Heroin Treatment Act*<sup>91</sup> imposing compulsory treatment for drug addicts.<sup>92</sup> In each case the policy context for the impugned legislation was examined to aid in the characterization process.

Dickson also relied extensively on academic writings. Sometimes this material was used as evidence of the purpose behind the Act, as in *Multiple Access*, where it helped explain the rationale for insider trading laws.<sup>93</sup> At other times, the material was used to assist in determining the scope of federal and provincial powers and, as a result, the validity of the impugned legislation. In *Multiple Access*, there was extensive reference to literature on the paramountcy doctrine and on constitutional aspects of securities law, with citations of the work of several academics, including Professors Hogg, Ziegel

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<sup>89</sup> The reference to balance is emphasized in *GM*, *supra*, note 5.

<sup>90</sup> The Commission's powers to order compliance and to give eviction orders were held to be s.96 court functions. Therefore, the provincially appointed Commission was in violation of s.96 of the *Constitution Act, 1867*: *supra*, note 17.

<sup>91</sup> S.B.C. 1978, c.24.

<sup>92</sup> *Schneider*, *supra*, note 26.

<sup>93</sup> *Multiple Access*, *supra*, note 42 at S.C.R. 179-80. This case dealt with the validity of both federal and provincial insider trading laws and the applicability of provincial securities legislation to a federally incorporated company (that is, a paramountcy question). The majority upheld the validity of both laws and found that both could operate together. The dissent (Estey, Beetz and Chouinard) found the federal legislation invalid and did not reach the paramountcy issue.

and Lederman. Another and perhaps more controversial example was found in *CN*, when Dickson first applied the general regulation of trade test.<sup>94</sup> In looking at provincial inability, Dickson stated that "if competition is to be regulated at all it must be regulated federally," quoting from an article by Professors Hogg and Grover that "effective" regulation of competition can occur only at the federal level.<sup>95</sup>

Dickson welcomed a wide variety of materials in other areas of the law as well. Although it was rare to see Supreme Court judges refer to academic writings and government reports in the early 1970s, it had become common by the end of the decade. Dickson was the first of the judges to use such material regularly in his judicial writings, and he often exhorted the academic community to assist the judges in their tasks. On the one hand this receptivity to a variety of materials beyond the somewhat barren language of the *Constitution Act*, the words of the statute, and past decisions of the courts is a welcome move by a judge of the Supreme Court. Indeed, one of the major criticisms of the Court has been the formalistic and abstract nature of its reasoning and decision process.<sup>96</sup> Therefore, Dickson's willingness to consider a range of materials in distribution of powers cases acknowledged that the adjudication of federalism disputes involves a policy element which requires the judges to determine both the rationale for a particular piece of legislation, its integration with existing legislation of the enacting government, and the impact of a finding of validity on the balance of powers between the federal and provincial governments.

But as *CN* shows, there is reason for concern in the use of some of this material. Dickson sometimes seemed too accepting of the work on which he relied — too uncritical of the conclusions and values expressed in government reports or academic writings. While Hogg and Grover may believe that there is a necessity for federal jurisdiction over competition policy (and, indeed, may have good reasons for that belief), there are opposing viewpoints about the need for national regulation of various economic matters of which a policy maker need

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<sup>94</sup> *Supra*, note 30.

<sup>95</sup> *Ibid.* at S.C.R. 278. In *GM*, *supra*, note 5, he also added references to Professor Safarian and the Economic Council of Canada (at S.C.R. 679-81).

<sup>96</sup> The most obvious critic is Paul Weiler in *In the Last Resort*, *supra*, note 8 at 161-63.

be aware.<sup>97</sup> Thomas Courchene, for example, has often extolled the efficacy of provincial efforts to regulate certain sectors of the economy, such as securities,<sup>98</sup> yet there was no indication in Dickson's judgments in the competition cases that he had explored the basis for the academics' assertions about competition policy, nor that he had considered the capacity of the provinces to regulate competition. Academic writers are often advocates of particular policy positions, and their writings are based on values such as a desire to promote economic efficiency or to maximize individual liberty. A judge should be aware of the nature of this writing and the values encompassed within the recommendations of the writers when relying on such material.

At times, in Dickson's reasons, this sensitivity appeared to be lacking. This may be explained, in part, by a dearth of material available to him to challenge that on which he relied. However, some will argue (and undoubtedly correctly in some cases) that the real explanation was his personal espousal of the underlying values of the writers which he consequently felt no need to examine. If this is true it signals a weakness in his reasoning process, for however difficult it is to escape our personal leanings and beliefs, it is important for the judge who helps shape the governmental system of the country to think critically about the implications of competing arguments. Failure to do so leaves the soundness of policy determinations vulnerable to attack, especially when they are based on incomplete empirical investigation.

In Dickson's defence, there may be less reason for concern about his trust in extrinsic material if one shares his view of the concurrency of legislative powers. Here there seems to be some real contrast with the approaches of his colleagues Laskin and Beetz. In Beetz's judgments on the distribution of powers there was a characteristic search for an "essence" to the heads of federal and provincial powers with the aim of establishing bounds for the exercise of exclusive federal and provincial jurisdiction. For him there was real meaning in the term "exclusive" in ss.91 and 92 of the constitution, and while he did not deny that matters can have federal and provincial aspects, he had a

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<sup>97</sup> Indeed, it is interesting to note that the paper relied on was an abridged version of a study prepared for the federal government, as was Safarian's study. I am not impugning the rigour and value of these studies. However, it is fair to suggest that the federal government might well choose researchers with some sympathy for the position that government wishes to pursue.

<sup>98</sup> Courchene, *supra*, note 43.

powerful sense of separate spheres, of fairly well delineated boundaries between federal and provincial governments.

This was not Dickson's view of the constitution. Although he shared with Beetz a grammar of constitutional law, Dickson was much less fixed on the finding of essence. Of course, he also had a sense that there are exclusive federal and provincial areas of responsibility — criminal prosecution is a good example of one matter that he believed belonged only to the provinces.<sup>99</sup> But he was much more comfortable with overlap between federal and provincial jurisdiction than his counterpart from Quebec. The best illustration of these competing views is found in *OPSEU*,<sup>100</sup> where Dickson, in a concurring judgment, would have overruled the 1965 *McKay* case, which had created a form of interjurisdictional immunity around the display of federal election signs and prevented the application of a municipal bylaw.<sup>101</sup> Endorsing the criticism of this case made by Professor Peter Hogg, Dickson stated:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional immunity and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather, they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramourty issues...<sup>102</sup>

This view was reiterated in *GM* to respond to a concern that federal competition legislation should not overlap provincial regulation of this conduct.<sup>103</sup> Rather than carve out mutually exclusive areas of extra-provincial and intraprovincial competition jurisdiction, he noted that

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<sup>99</sup> In *Hauser, supra*, note 49 and *Wetmore, supra*, note 28, he discussed the problems of concurrency of federal and provincial power in this area, concluding in favour of exclusive provincial responsibility.

<sup>100</sup> *Supra*, note 88.

<sup>101</sup> Beetz wrote for the majority in *OPSEU. McKay v. R.* is found at [1965] S.C.R. 798, 53 D.L.R. (2d) 532.

<sup>102</sup> *OPSEU, supra*, note 88 at S.C.R. 18. He failed to attract a majority of the judges to this view, for Beetz, writing for the Court, subsequently reaffirmed the doctrine of interjurisdictional immunity: *Bell Canada v. Québec commission de la santé et de la sécurité du travail*, [1988] 1 S.C.R. 749 at 839-45, 51 D.L.R. (4th) 161 at 229-34.

<sup>103</sup> *Supra*, note 5.



“overlap of legislation is to be expected and accommodated in a federal state.”<sup>104</sup>

This approach to concurrency is consistent with Dickson’s view that there should be a presumption of constitutionality.<sup>105</sup> The way of concurrency of legislative powers, just as the adoption of a narrow definition of conflict between federal and provincial laws for purposes of paramountcy doctrine,<sup>106</sup> is the way of judicial restraint, and Dickson was quite content to travel that road, leaving the resolution of problems arising from overlap and interaction of jurisdiction to the political forum.

It would be incorrect, however, to infer that Dickson would place no limits on concurrency; indeed, he did not deny that there are areas of exclusive federal and provincial jurisdiction.<sup>107</sup> In his view there could be no hard and fast rule as to when overlap is permitted or prohibited. The determination should be influenced by a variety of factors including the integration of the impugned law with an otherwise valid legislative scheme, and the impact on the policy

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<sup>104</sup> *Ibid.* at S.C.R. 669. This was an echo from an earlier case, *Multiple Access*, *supra*, note 43, where he upheld provincial and federal insider trading laws. See also *DiIorio*, *supra*, note 49 at S.C.R. 207: “Implicit in the grant to the Provinces of exclusive authority in respect of the administration of justice and in the grant to the federal Government of exclusive legislative authority in respect of criminal law and procedure is an acceptance of a certain degree of overlapping.”

<sup>105</sup> For example, he stated in *CIGOL*, *supra*, note 22 at S.C.R. 573-74: “This Court is sensitive to the freedom of action which must be allowed to the Legislatures to safeguard their legitimate interests as in their wisdom they see fit. It presumes that they have acted constitutionally. The onus of rebutting that presumption is upon the appellant. Before the Court concludes that the province has transcended its constitutional powers the evidence must be clear and unmistakable; more than conjecture or speculation is needed to underpin a finding of constitutional incompetence.” Laskin seemed to doubt the existence of such a presumption, especially for the provinces. An opaque reference in his casebook makes a distinction between a presumption of constitutionality and a “rule of construction that statutes must be interpreted, if possible, to conform to the powers of the enacting legislature”: B. Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto: Carswell, 1969) at 145-46.

<sup>106</sup> Dickson adopted such a narrow view in *Multiple Access*, *supra*, note 42, when he ruled that federal and provincial laws did not conflict unless compliance with one would lead to contravention of the other (at S.C.R. 190-91).

<sup>107</sup> Aside from the prosecution cases, he agreed with Martland in *Fowler v. R.*, [1980] 2 S.C.R. 213, 113 D.L.R. (3d) 513, in which the Court struck down a section of the federal *Fisheries Act*, R.S.C. 1970, c. F-14 because of its impact on the provincially regulated logging industry. Similarly, he was a member of the Court in *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, 54 D.L.R. (4th) 679, which struck down a limitation period for negligence actions against a railway in federal legislation.

initiatives of the other level of government as well as, more generally, the balance of the distribution of powers. Perhaps this explains his fondness for Professor Lederman's words that a double aspect must be found when the federal and provincial interests are relatively equal.<sup>108</sup> Similarly, in *GM* he cautioned about the need for flexibility in determining concurrency, suggesting that the Court would use different tests to determine the validity of overlapping federal and provincial laws depending on the degree of overlap and the seriousness of the apparent intrusion into the jurisdiction of the other level of government.

... if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive vis-à-vis provincial powers then a stricter test is appropriate.<sup>109</sup>

The language of this passage acknowledged that there is some essence to the heads of power in ss.91 and 92. Yet there was equally the recognition that both levels of government may have valid reasons to regulate the same activity or to use the same or similar policy instruments. However, when that exercise of power intrudes significantly on the traditional "turf" of the other level of government, there is an increasingly stringent burden to show the validity of the legislation. Thus, he described a spectrum of tests used by the Court ranging from "rational, functional connection" through to "necessarily incidental", with the variation explained by the degree of encroachment on the other government's jurisdiction.<sup>110</sup>

Dickson was quite comfortable with this range of tests, for it fit well with his judicial philosophy. His consideration of history, precedent, constitutional structure, and policy considerations appropriate to the particular dispute portray him as something of a pragmatist who preferred to decide cases in a particular factual context.<sup>111</sup> Clearly,

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<sup>108</sup> See, e.g., in *Multiple Access*, *supra*, note 42 at S.C.R. 182.

<sup>109</sup> *GM*, *supra*, note 5 at S.C.R. 669. See also 670-71.

<sup>110</sup> This might well explain *Fowler*, *supra*, note 107, in which the Court refused to uphold the federal legislation under the "necessarily incidental" test. The prohibition on the dumping of logging debris in that case had a severe impact on the provincially regulated logging industry.

<sup>111</sup> Indeed, he stated in *GM*, *supra*, note 5 that "a careful case-by-case assessment of the proper test is the best approach" (at S.C.R. 669). An interesting critique of balancing and pragmatism in the American context is found in T.A. Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale L.J. 943.

he accepted the judicial role of aiding in the evolution of the constitution to fit changing social needs. Doctrines like the national dimensions test and the general regulation of trade doctrine, as well as these "connection" tests, appealed because they gave scope for new governmental initiatives. These tests allow the Court to assess the competing claims of governments, both in the short and long term, on an incremental basis as each new piece of legislation comes before the Court.

The mode of reasoning is familiar to those trained in the common law and the instrumentalism may seem appealing in the interpretation of a constitution. There is a drawback however to this method of proceeding, as Beetz and other francophones have been quick to point out.<sup>112</sup> While Dickson considered a range of materials and weighed the interests of federal and provincial governments in each case, his approach was vulnerable to the criticism that we do not know what ultimately influenced him — what tipped the balance against or in favour of a particular legislative measure. In the view of many francophones this elasticity of the bounds of jurisdiction between federal and provincial jurisdiction is troublesome, for too often the boundaries only stretch when the federal government needs more legislative room. Dickson's sympathy for expanded federal economic jurisdiction and his support for a wider national dimensions test seemed to confirm their worst fears.

This is where a real contrast between Laskin and Dickson emerges. While both came out of the same intellectual tradition and sought to develop the law, especially constitutional law, in a way that meets societal needs, Laskin seemed too often to look only to his own beliefs about the proper shape of the federal system, and to neglect the strong claims for provincial jurisdiction and the protection of diversity that warranted attention in an era of province building. Dickson was much more likely to consider external sources in his judgments and this may have provided some check on his subjectivity, since such material can both instruct and challenge preconceptions. As well, the obligation to respond to competing views provides a check on judicial action. When one looks to Dickson's judgments one finds that the historical and social context are examined, to the extent that he had the necessary material available, and the conclusions he drew seemed to take into account claims for diversity as well as for centralization. Moreover, he was conscious of the need to articulate principles to constrain the application of doctrines such as the national dimensions or the general

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<sup>112</sup> See the discussion of Beetz's academic writings in Swinton, *supra*, note \* c. 9.

regulation of trade tests in order to provide some safeguard for regional diversity in the Canadian federal system.

The interpretive exercise was not mechanical nor did it lead to precise rules about the jurisdiction of each level of government.<sup>113</sup> Perhaps, then, in the adjudication of disputes about the distribution of powers Dickson's approach has much to commend it. He did not ignore the past — indeed, he was enormously respectful of the language of the constitution and the decisions of previous courts as well as the expectations of the important governmental actors in our federal system. But he was also conscious of the changes in the country over time which may require adaptation of constitutional responsibilities. In his view the Court should assist in that adaptation process, but in a way that protects the federal nature of the constitution and the country. Dickson's efforts to look at policy needs and to preserve a balance in the federal system were attentive to the social context as he saw it. He could not avoid subjectivity; he could not promise total predictability. However, the result of this approach to judging can be a constitution that is indeed a "living tree" with strong roots in the diversity of the Canadian community from which it springs.

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<sup>113</sup> Dickson seemed sympathetic to the work of B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), which discusses the variety of sources on which a judge should draw, including precedent, history, tradition, and sociology.