P. Russell, “The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources,” in R.D. Olling and M. Westmacott, *Perspectives on Canadian Federalism* (1988)

**Overview**

From a quantitative perspective it appears judicial decisions have been a significant factor in federal-provincial relations. Since 1950 (when the SCC took over from JCPC as highest court) to the end of 1982, there have been 158 cases re: Canada’s original constitution and its amendments. Nearly all concerned divisions of power, and the volume of constitutional litigation has increased in recent years (80/158 in the last 8 years – 1975-82). Chapter is an appraisal of the SCC in Cdn federalism. Argues that if the SCC’s record as constitutional umpire does nothing else, it at least establishes the Court’s claim to legitimacy in this role.

**Background**

* JCPC clearly had a significantly decentralizing effect on federation though scholars differ with respect to whether this was a good/bad thing
  + Conventional wisdom in English Canada largely views it that the JCPC reversed the decisions of the Fathers of Confederation, while French Canada (and Russell) believe that the Confederation coalition harbored a very complex and at times contradictory amalgam of hopes/fears for Canada
* An appraisal of the SCC in federation sees 2 types of consequences that flow from its decisions: (1) the effect of decisions on the legal powers of govt; and (2) the effect of decisions on political (as opposed to legal) consequences.
  + Legal Results: Russell argues that the overall record shows an “uncanny balance” – in so many areas the net outcome of its decision-making is to strike a balance btw federal and provincial powers. With POGG, the SCC has balanced what it conceded to the central govt with one hand by denying federal power or granting power to the provinces with the other
  + Political Effects: It has sustained litigation as a significant phase of fed-prov relations.
    - One might be tempted to suggest that because of the balance it has sustained that it has had no significant effect of IGR – this would be a mistake.
    - Two types of policy/political effects:
      * A decision on the division of powers usually means that a particular stays on the books or is removed – this may have important implications for govt policy (though not always – if a law is found *ultra vires* govt may be able to draft a new/different law that achieves the same policy objectives)
      * May effect the bargaining strength and position of gotvs in negotiating policy arrangements or constitutional change (i.e. Patriation Reference and Quebec Secession Reference would have this effect)
* In recent years, SCC rulings on the division of powers have been more useful to the federal than to the provincial politicians in the struggle over constitutional change

**Conclusion**

* In 1958 J.A. Corry suggested that the SCC would soon be retired from “its post as supervisor of the federal balance in Canada” – however, this has not been the case
* Corry was basking in glow of a cooperative federalism that did not endure. Provinces became more constitutionally aggressive than he anticipated
* If asked to explain why Corry was wrong, Russell would be inclined to suggest that a factor extraneous to fed-prov relations (a general increase in litigiousness) is to blame
* No doubt that the Charter will generate more cases than the division of powers, but those cases will not disappear