Vanderbilt Law Review

Volume 5
Issue 4 *Issue 4 - June 1952*

Article 3

6-1952

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THE ROLE OF THE PRIVY COUNCIL IN JUDICIAL REVIEW OF THE CANADIAN CONSTITUTION—A POST-SCRIPT

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In its Preamble, the Constitution of Canada speaks of the desire of the Provinces of Canada to be "federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." Historically, then, the Constitution of Canada like the Constitution of the United States, stems from a compact between a number of different territorial units: the Provinces of Lower Canada (Quebec), Upper Canada (Ontario), and the two eastern maritime Provinces of Nova Scotia and New Brunswick, joined together in 1867 to form the new Dominion of Canada, a number of other Provinces having been admitted to the union since that time. Juridically speaking, however, the origins are rather different. The fundamental instrument in which the Canadian Constitution is embodied, the British North America Act of 1867,[1] is a statute of the United Kingdom Parliament, which calls attention to the fact that though Canada in 1867 became a self-governing Dominion within the then British Empire by virtue of the Act, her status for many purposes internationally was still something less than a full sovereign state. Although by 1931 the highly developed conventions governing the relationship of the United Kingdom to the self-governing Dominions had crystallised into the positive law rules of the Statute of Westminster, some vestiges of Canada's former subordinate position still remained.

First, since the B.N.A. Act contains no provision as to its own amendment, constitutional change in Canada had perforce to be achieved by recourse to the original source of the Canadian Constitution, the United Kingdom Parliament. The considerable number of amendments to the Canadian Constitution that have been effected since 1867 have been in the form of Acts of the United Kingdom Parliament. Even today, when all political parties are satisfied as to the desirability of some amending procedure that can be operated by the Canadian people themselves, it is agreed that the exact formula for amendment, a matter of some considerable controversy as yet, must finally be emodied in an Act of the United Kingdom Parliament to become effective.[2] This is indeed a full concession to the formalism of Austinian jurisprudence.

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1. 30 & 31 VICT., c. 3 (1867).

2. Livingston, *The Amending Power of the Canadian Parliament*, 45 AM. POL. SCI. REV. 437 (1951); Gerin-Lajoie, *Du pouvoir d'amendment constitutionnel au Canada*, 29 CAN. B. REV. 1136 (1951).

A second important feature was that until the complete abolition of such right in 1949[3] an appeal existed from the Canadian Supreme Court to the Privy Council, the highest appellate tribunal of the British Empire, and of the British Commonwealth which succeeded the British Empire. The role that the Privy Council actually played in exercising ultimate judicial review of the Canadian Constitution is perhaps the most controversial aspect of Canadian constitutional history after the passage of the B.N.A. Act in 1867.[4]

The system of government as finally provided for Canada under the B.N.A. Act was a composite as opposed to a unitary system. The special interests of the French inhabitants of Lower Canada and in particular of the Roman Catholic Church had been recognised by the British Government soon after the abandonment of France's colonial interests in North America to the British, with the passage by the British Parliament of the Quebec Act of 1774 with the guarantees for those interests that it contained. It was clear in 1867 that a large degree of local autonomy was necessary if the interests of the French settlers and, for that matter, too, the special economic position of the British settlers in the Maritime communities were to be protected. On the other hand, the recent experience of the American Civil War was widely considered in 1867 to point to the need for a strong government at the centre, and the dangers of allowing too much power to be exercised at the periphery.

It seems clear that the intentions of the drafters of the Canadian Constitution were that the Dominion Parliament's legislative powers should be of paramount importance; that insofar as the system of government under the B.N.A. Act was a federal system it should be a centralised federalism.[5] The B.N.A. Act, as finally passed by the United Kingdom Parliament, establishes a distribution of legislative authority between the Dominion (or federal) Government and the Provincial Governments, the purpose being to allocate all powers of government between the two types of governing authority. Unlike the United States Constitution, therefore, there are no legislative powers which are denied to both federal and Provincial Governments—there is no Canadian Bill of Rights.

As the Lord Chancellor, Lord Loreburn, said, "there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within . . . Canada. It would be subversive

3. Supreme Court Act, 1949, 13 GEO. 6, c. 37, § 3, an Act of the Canadian Parliament. The right of Canada so to abolish the appeal to the Privy Council had already been upheld by the Privy Council, Att'y Gen. for Ontario v. Att'y Gen. for Canada, [1947] A.C. 127 (P.C.).

4. See, *e.g.*, a symposium on "Nationhood and the Constitution," in 29 CAN. B. REV. 1019-1197 (Dec. 1951).

5. MacDonald, *The Constitution in a Changing World*, 26 CAN. B. REV. 21 (1948).

of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."[6]

Under Section 91 of the B.N.A. Act, the Dominion Government is given a general power to make laws for the "Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Section 91 goes on to declare that "for greater Certainty, but not so as to restrict the Generality of the foregoing Terms," the legislative authority of the Dominion Parliament shall extend to all matters coming within a list of twenty-nine enumerated subjects. Under Section 92, on the other hand, the Provincial legislatures are given exclusive legislative authority over a list of sixteen subjects, of which perhaps the two most interesting from the constitutional viewpoint have been Section 92(13), "Property and Civil Rights in the Province," and Section 92(16), "Generally all matters of a merely local or private nature in the Province."

It seems clear that the general power conferred on the Dominion Parliament under Section 91 to make laws for the "Peace, Order, and good Government of Canada" was intended to be the major source of Dominion legislative power, with the 29 specific heads of federal legislative power, enumerated in Section 91, being merely illustrations of the general power. As Professor Kennedy said, "The federal powers are wholly residuary for the simple reason that the provincial powers are exclusive; and the twenty-nine "enumerations" in Section 91 cannot add to the residue; they cannot take away from it. . . . They have no meaning except as examples of the residuary power, which must be as exclusive as is the grant of legislative powers to the provinces. The enumerated examples of the residuary power cannot occupy any special place; they cannot be exalted at the expense of the residuary power, for that would 'restrict the generality' of that power. It all looks reasonably simple, and Sir John A. MacDonald was perhaps justified as he looked at the scheme in hoping that 'all conflict of jurisdiction' had been avoided."[7]

Certainly, by comparison with the United States Constitution it might have been expected that Canada both by reason of the very precise delineation of the respective powers of the Dominion and the Provincial Governments and also of the absence of any formal Bill of Rights, would have been spared the storms and battles that centered around the United States Constitution in the period from the Civil War up to the Court Revolution of 1937. Instead we find a suprisingly parallel development, though in place of the Due Process Clauses of the 5th and 14th Amendments, the conflict revolves

6. Att'y Gen. for Ontario v. Att'y Gen. for Canada, [1912] A.C. 571, 581 (P.C.).

7. Kennedy, *The Interpretation of the British North America Act*, 8 CAMB. L.J. 146, 150 (1942).

around an apparently simple choice in modes of judicial interpretation—whether the Constitution is to be regarded as an ordinary statute to be interpreted according to the ordinary rules of statutory construction, or whether it is something more—a "constitutional statute"—and therefore deserving of more "beneficial" interpretation than the normal rules of statutory construction might allow. The judicial approach to the interpretation of the Canadian Constitution has fluctuated widely between these two alternative approaches, and the fluctuations tend to accord with two and possibly three basic time periods.

In the first period from the passing of the B.N.A. Act in 1867 until the middle 1890's, the Privy Council, as final appellate court in Canadian constitutional cases was disposed to construe the legislative powers of the Dominion Parliament broadly, and in particular to concede full value to the Dominion Government's general power under Section 91 to legislate for the "Peace, Order, and good Government of Canada."[8]

The second period, beginning about 1896 and lasting generally right up to the present day, is notable for the contraction of Dominion legislative powers, and the concomitant assertion of Provincial rights. Under Lord Watson, and also under Lord Haldane, his spiritual successor, the Dominion's general legislative power under Section 91 is cut down by deference to the heads of Provincial power enumerated in Section 92—the Dominion cannot legislate under the general power in Section 91 where the effect is to "trench" upon the provincial classes of subjects.[9] Lord Haldane, indeed, went even further than Lord Watson and enunciated the so-called "emergency" doctrine under which the Dominion's legislative power under Section 91 was confined to use in periods of national emergency, such as war, famine or pestilence.[10]

Further, the Dominion's power under Section 132 to legislate to implement the obligations of Canada or any Province "as part of the British Empire . . . arising under Treaties between the Empire and such Foreign countries," was held not to cover obligations entered into by Canada herself in her new status as an international person,[11] this notwithstanding that the

8. Russell v. The Queen, 7 App. Cas. 829, 839 (1882). Per Sir Montague E. Smith: "Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it."

9. Att'y Gen. for Ontario v. Att'y Gen. for Canada, [1896] A.C. 348 (P.C.), per Lord Watson. See also Lord Watson's decision in Tennant v. Union Bank, [1894] A.C. 31 (P.C.).

10. *In re* Board of Commerce Act, [1922] 1 A.C. 191 (P.C.); Toronto Electric Commisioners v. Snider, [1925] A.C. 396 (P.C.).

11. Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326 (P.C.).

Privy Council expressly took notice of the constitutional developments in Dominion status since the enactment of the B.N.A. Act.[12]

Even the Dominion Government's head of power over the "regulation of trade and commerce,"[13] a power which has proved so fertile a source of federal legislative authority in the United States, was deprived of any real significance. Lord Haldane went so far as to rule in the *Board of Commerce* case[14] that the trade and commerce power was available only to "aid" the Dominion in an exceptional situation to exercise the powers conferred by the general language of Section 91; that where no power was possessed by the Dominion Parliament independently of the trade and commerce section, the trade and commerce section could not operate. So low indeed did the trade and commerce power fall that Chief Justice Anglin of the Canadian Supreme Court was moved to protest that it had been "denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction. . . ."[15]

Although this second period cannot yet be regarded as having come to an end, there is a trend of decisions from the 1930's onwards which may represent something more than the mere working out of the dialectic. Thus Lord Sankey declared in the *Persons* case in 1930: "The [B.N.A.] Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. . . . Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation. . . ."[16] It is true that Lord Sankey rather cut down the sweep of his comments by going on to add that in making his remark's he was not considering the question of the respective legislative competence of the Dominion and of the Provinces under Sections 91 and 92 of the Act. But in *British Coal Corporation v. The King*,[17] Lord Sankey, in upholding the right of the Dominion Parliament to abolish appeals from Canadian Courts to the Privy Council in criminal cases, quoted his own remarks in the *Persons* case but without the caveat as to Sections 91 and 92, and expressly recognised that "in interpreting a constituent or organic statute such as the [B.N.A.] Act, that construction most beneficial to the widest possible amplitude of its powers

12. "While it is true . . . that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section so as to cover the uncontemplated event." Per Lord Atkin, in Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326, 350 (P.C.). See also *In re* Regulation and Control of Radio Communication, [1932] A.C. 304 (P.C.).

13. Section 91(2).

14. *In re* Board of Commerce Act, [1922] 1 A.C. 191 (P.C.).

15. The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434, 442.

16. Edwards v. Att'y Gen. for Canada, [1930] A.C. 124, 136 (P.C.).

17. [1935] A.C. 500 (P.C.).

must be adopted."[18] It was in the tradition laid down by Lord Sankey in these two cases that the Privy Council in 1947 approached the question of the legislative competence of the Dominion Parliament to abolish altogether appeals from Canadian Courts to the Privy Council, in all classes of cases. Although the case did not directly concern Sections 91 and 92 of the B.N.A. Act, but principally Section 101 of the Act, the Privy Council approached most boldly the task of signing its own death warrant so far as Canadian appellate jurisdiction was concerned. "It is . . . irrelevant that the question is one that might have seemed unreal at the date of the [B.N.A.] Act. To such an organic statute the flexible interpretation must be given which changing circumstances require. . . ."[19]

It might be unwise to make too much of these few decisions. Thus, even while Lord Atkin was giving the Privy Council Appeals case decision, Lord Wright in the *Japanese Canadians* case[20] was apparently re-affirming Lord Haldane's "emergency" theory[21] of the Dominion's general legislative power under Section 91, even though only the previous year Lord Simon had thrown cold water on the emergency doctrine.[22] Still, if the Canadian Supreme Court, in its capacity of final arbiter of the interpretation of the B.N.A. Act, now that the appeal to the Privy Council has been finally abolished, wishes to chart out a liberal course of interpretation of Dominion legislative powers, Lord Sankey's "living tree" metaphor is available as a doctrinal justification for this.[23]

Necessarily, most of the controversy as to the role played by the Privy Council centres around the period from 1896 onwards, and the judicial personalities of Lord Watson and Lord Haldane.[24] In treating the B.N.A.

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18. *Id.* at 518.

19. Per Lord Atkin, Att'y Gen. for Ontario v. Att'y Gen. for Canada, [1947] A.C. 127, 154 (P.C.) (reference re Privy Council Appeals).

20. Co-operative Committee on Japanese Canadians v. Att'y Gen. for Canada, [1947] A.C. 87 (P.C.).

21. As enunciated in Toronto Electric Commissioners v. Snider, [1925] A.C. 193 (P.C.).

22. Att'y Gen. for Ontario v. Canada Temperence Federation, [1946] A.C. 193 (P.C.).

23. As the antithesis to Lord Sankey's "living tree," we have Lord Atkin's "ship of state." "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure." Per Lord Atkin in Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326, 354 (P.C.).

24. "Since . . . the privy council has treated the B.N.A. Act as an ordinary statute and not as a constitutional document, it has given no consideration to the intention of the 'fathers,' but has adhered to the view that the 'intention of parliament' must be interpreted as laid down in the act itself, in the words and context of which alone its meaning must he discovered. . . . The use of extraneous evidence has ben eschewed, and the board has sought the meaning of the act in the text, 'aided only by the flickering illumination afforded by rules of textual construction evolved with respect to ordinary statutes.'" Tuck, *Canada and the Judicial Committee of the Privy Council,* 4 U. OF TORONTO L.J. 33, 40 (1941).

Act as an ordinary statute without regard to the intentions of the "fathers" of the Constitution, the Privy Council after 1896 reached a "result which the historian knows to be untrue,"[25] and a Constitution which "(rightly or wrongly) embodied a Centralized Federalism in which Dominion legislative power was of paramount importance . . . has yielded a Decentralized Federalism in terms of legislative power; and one, moreover, that is ill-adapted to present needs."[26]

Professor MacDonald has collected an impressive list of Dominion social and economic legislation held invalid as encroaching upon Provincial powers under Sections 92(13) and 92(16) or otherwise beyond the powers of the Dominion Parliament.[27] It does not, it seems, require a Bill of Rights or a Due Process Clause for natural law concepts as to the proper sphere of governmental activity to operate in the field of constitutional law.

Granted the premise that the B.N.A. Act is to be treated as an ordinary statute, and not as a "constitutional" statute, do the Privy Council decisions flow inevitably from the words of the B.N.A. Act? Professor Kennedy seems convinced that any hope that effect would be given to the intentions of the framers of the Act was doomed to disappointment. The study of those intentions may be interesting, but it is of no value except in showing the futility of the hope that the intentions and statute will accord. The Privy Council's approach is in accord with the "rules of the legal game."[28]

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25. Smith, 9 J. COMP. LEG. & INT'L L. 160 (1927), quoted in Tuck, *supra* note 24, at 40, 41.

26. MacDonald, *The Constitution in a Changing World,* 26 CAN. B. REV. 21, 44 (1948).

27. MacDonald, *supra* note 26. The list includes the following: Legislation for the abolition of the liquor traffic, Att'y Gen. for Ontario v. Att'y Gen. for Dominion, [1896] A.C. 348 (P.C.); for the regulation of "through traffic" over Provincial and Dominion railways, Montreal v. Montreal Street Ry., [1912] A.C. 333 (P.C.); prohibiting trade combinations and hoarding and regulating the sale and fixation of prices of commodities, *In re* Board of Commerce Act, [1922] A.C. 191 (P.C.); for the regulation of the grain trade of Canada and of the business of those who deal in grain as warehousemen, etc., Eastern Terminal Elevator Co. v. The King, [1925] S.C.R. 434; regulating sales and deliveries of eggs within a province, R. v. Zaslavsky, [1935] 2 W.W.R. 34, [1935] 2 D.L.R. 788, 64 C.C.C. 706 (Sask.); R. v. Thorsby Traders Ltd., [1935] 3 W.W.R. 475, 65 C.C.C. 109 (Alta.); R. v. Brodsky, 43 Man. R. 522, [1936] 1 W.W.R. 177, [1936] 1 D.L.R. 578, 65 C.C.C. 4, for the regulation of individual forms of trade within a province such as marketing transactions in natural products having no connection with interprovincial or external trade, Att'y Gen. for British Columbia v. Att'y Gen. for Canada, [1937] A.C. 377; for the validation of agreements between persons in an industry as to competition in a trade within a province, *In re* Trade and Industry Act, [1936] S.C.R. 379; *cf.* Att'y Gen. for Ontario v. Att'y Gen. for Canada, [1937] A.C. 405; regulating the licensing of fish canneries and the trade processing of fish, Att'y Gen. for Canada v. Att'y Gen. for British Columbia, [1930] A.C. 111; and legislation for regulation of business of non-Dominion insurance companies, see MacDonald, *The Regulation of Insurance in Canada,* 24 CAN. B. REV. 257 (1946); legislation for the prevention of strikes and lock-outs and the settlement of industrial disputes between employers and employees, Toronto Electric Commissioners v. Snider, [1925] A.C. 396, legislation relating to weekly rest, minimum wages and limitation of hours of labour, Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326.

28. Kennedy, *The Constitution of Canada,* 2 POLITICA 356 (1937).

"After a careful examination of every case, in every jurisdiction, dealing with the interpretation of the Act, I venture to submit that in not one of them has the ratio decidendi depended on reasons external to the Act. . . . So generally uniform has been the approach of the judicial committee that, on the basis of it, I anticipated almost all these judgments except that on unemployment insurance, before their subject-matters were referred to the Supreme Court, and thence to London."[29]

But other commentators are not so certain as to the inevitability of the course of the Privy Council's decisions. Indeed, Professor Laskin goes so far as not merely to repudiate any idea of inevitability, but to assert "if anything, [the course of decisions] indicates conscious and deliberate choice of a policy which required, for its advancement, manipulations which can only with difficulty be represented as ordinary judicial techniques."[30]

Ultimately, to appraise the Privy Council's work, we must face up squarely to the question of whether judges legislate, in the sense of making conscious choices between conflicting policy alternatives. Although since the Court Revolution of 1937, few in the United States would hesitate to answer this question in the affirmative, the theory of the judicial slotmachine is still powerful in a country whose jurisprudence is dominated, as Canada's is, by the worst rigours of Austinian formalism.[31] It is not without significance that the controversy over the Privy Council's interpretation for the B.N.A. Act should all too frequently proceed in the form of a dispute over alternative rules of statutory construction, rather than in terms of the actual consequences to Canadian national life flowing from the individual decisions.

The need for a critical examination of the values employed by judges in making their decisions has been obscured all too frequently by much unproductive wrangling over the formulae in which the judges subsequently embody those values, although the varied members of the Privy Council have occasionally adverted directly to the consequences of their decisions. Thus Lord Haldane, in summing up in 1923 the work of his predecessor and mentor Lord Watson paid eloquent tribute—"As a result of a long series of decisions, Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the Constitution of Canada took a new form. The Provinces were recognised as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems, and produced a new contentment in

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29. KENNEDY, THE CONSTITUTION OF CANADA, 550 (2d ed. 1938).

30. Laskin, *"Peace, Order and Good Government" Re-examined*, 25 CAN. B. REV. 1054, 1086 (1947).

31. See, *e.g.*, the controversy over the Canadian Wheat Board case, Notes, 29 CAN. B. REV. 296 (1951), 29 CAN. B. REV. 572 (1951).

Canada with the Constitution they had got in 1867. It is difficult to say what the extent of the debt was that Canada owes to Lord Watson."[32]

It may be, indeed, that seen against a background of developing Canadian nationhood, the Privy Council's work is not entirely deserving of censure. The period from the passing of the B.N.A. Act in 1867 until 1896, represented in the judicial arena by the Privy Council decision in *Russell v. The Queen*[33] favouring a broad interpretation of Dominion powers even at the expense of the Provinces, coincides with the dominance in the legislative arena of Sir John A. MacDonald and the Conservative Party. This is the era of the "moving frontiers," when the settlers advanced ever Westward and into the North, when the railway is pushed across the Continent, and new Provinces are progressively admitted to the Canadian Confederation as the settlers' frontiers extend. It is a period when a strong centralised administration can aid and foster this expansion.

The period from 1896 onwards, however, when first of all Lord Watson and then Lord Haldane and his successors, restricted Dominion powers in favour of Provincial rights, is the period of the substantial political dominance of the Liberal Party of Laurier and Mackenzie King, which rested for its Parliamentary majority (as the Conservative Party never did) upon the French as well as the English voting population. It was a period introduced, appropriately enough, by the Manitoba education crisis when Laurier (a French Catholic himself) sacrificed short-range French Catholic interests in separate schools for the French Catholic minority in the Province of Manitoba for the long-range safeguard to French Catholic Quebec of the autonomy of Provincial administrations as against interference by the Dominion Government. This is what Professor Kennedy, appropriately enough, has hailed as an "experiment in sovereignty . . . a serious contribution to the destruction of the Austinian idea. Every province is from one point of view at least—in relation to the federal government—an example of a group with a life and purpose of its own."[34]

What I am saying is that whilst one may suspect at times in the United States that states' rights are being raised merely as a protective umbrella under which economic special interests may shelter,[35] this plea may frequently

32. Haldane, *The Judicial Committee of the Privy Council,* 1 CAMB. L.J. 143, 150 (1923). This concern for provincial autonomy runs through Lord Watson's seminal opinion upon the Dominion Government's general legislative power under § 91, Att'y Gen. for Ontario v. Att'y Gen. for Canada, [1896] A.C. 348 (P.C.), especially at 360; and we find it expressed again as late as 1937 in Lord Atkin's judgment on Canada's treaty-implementing power under § 132, Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326 (P.C.) (hours of labour case).

33. 7 App. Cas. 829 (1882).

34. KENNEDY, THE CONSTITUTION OF CANADA 431 (2d ed. 1938).

35. Thus in JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 21 (1941), the author comments upon Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed.

spring in Canada from some more deeply-rooted claim for the treatment of a problem at the local level. The existence in Canada of two distinct racial groups differing radically in language, religion and social customs, points to the existence of two distinct "living laws" within the Canadian nation, perhaps requiring a more pluralist organisation of national life with a large degree of policy-making located at the periphery rather than at the centre.[36] Nor has the interdiction of the Dominion Government's social and economic planning legislation necessarily created a complete legislative no-man's land in these matters—for example, although the field of labour law seems effectively barred to the Dominion Government,[37] most of the Provinces have in fact legislated in this field.[38] And there is also considerable scope for legislative co-operation between the Dominion Government and the Provinces, though the difficulties here should not be underestimated.[39] The special position of the French Canadians and the Catholic Church has been recognised by the United Kingdom Government as early as 1774 with the passage of the Quebec Act. The denominational schools in the Provinces were given special protection under Section 93 of the B.N.A. Act. Even the invalidation by the Privy Council of the Canadian "New Deal" legislation introduced by the Conservative Government of Mr. R. B. Bennett, (which seems to have aroused more ire among the critics than anything else)[40] was largely an academic question, at the time when the decisions were given. The Conservative Government had been defeated at the general elections, and it was Mr. Mackenzie King's Liberal Government which had referred its predecessor's legislation to the courts for an opinion.

It may be that the beginning of a new favouring of Dominion legislative powers, as evidenced in Lord Sankey's "living tree" doctrine and the cases which followed it, presages a new trend to centralisation in a world rapidly

1160 (1936): "Seven states appeared and joined with the Federal Government in support of the Act—no state appeared against it. Nevertheless the Court spoke of the danger of the states. being 'despoiled of their powers' and being reduced to 'little more than geographical sub-divisions of the national domain.'"

36. See the recent plea for "Provincial autonomy" raised by a French-Canadian jurist, Pigeon, *The Meaning of Provincial Autonomy*, 29 CAN. B. REV. 1126, 1134 (1951): "[I]t is wrong to assume that the same laws are suitable for all peoples. On the contrary, laws have a cultural aspect; hence due consideration should be given in framing them to the charcter, condition and beliefs of those for whom they are made. Autonomy is designed for the very purpose of meeting this requirement. The French-speaking population of the province of Quebec is obviously the group of Canadian citizens specially interested in it. For them autonomy is linked up with the preservation of their way of life." For a contrary viewpoint, see Scott, *Centralisation and Decentralisation in Canadian Federalism*, 29 CAN. B. REV. 1095 (1951).

37. Toronto Electric Commissioners v. Snider, [1925] A.C. 396 (P.C.).

38. See MacDonald, *The Constitution in a Changing World*, 26 CAN. B. REV. 21, 44 (1948), and further examples there listed.

39. *Id.* at 39-40.

40. See especially Kennedy, *The Interpretation of the British North America Act*, 8 CAMB. L.J. 154 (1943); Kennedy, *The British North American Act: Past and Future*, 15 CAN. B. REV. 393 (1937); MacDonald, *The Canadian Constitution Seventy Years After*, 15 CAN. B. REV. 401 (1937); Tuck, *supra* note 24.

shrinking under pressure of external events. But again, the situation can be overstated. If Lord Watson and Lord Haldane were consciously and overtly influenced in their approach to the interpretation of the B.N.A. Act by a bias in favour of Provincial powers, their approach seems nevertheless to have been a vague, impressionistic one, without the benefit of a detailed analysis and weighing of the policy alternatives involved in each case.[41] And with these two exceptions, the composition of the Privy Council Boards sitting on Canadian constitutional cases has been so varied and so changing as to make, even with the best of intentions, for only a piecemeal or erratic exertion of legislative power on the part of the judges.[42] In any case, where the history of judicial review in the United States from the Civil War onwards, indicates how readily conservatively-minded judges could accommodate a Constitution to the demands of corporate enterprise to be free from governmental regulation, the history of the Privy Council's interpretation of the Constitutions of Dominions other than Canada is also evidence that the traditional common law hostility to statute law[43] can lend itself easily to the maintenance of political laissez-faire.[44]

What of the future? With the final abolition of the appeal from Canadian Courts to the Privy Council, the Canadian Supreme Court is left as final arbiter as to the meaning of the B.N.A. Act. What will the Canadian judges do? The decisions of the Privy Council on the B.N.A. Act, coming to the Privy Council as they did on appeal from the Canadian Supreme Court,

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41. Laskin suggests, indeed, that Lord Haldane's views on the B.N.A. Act may have been influenced by his long apprenticeship at the Bar as counsel for the Provinces of Canada in at least ten Privy Council cases. He is careful to add that Lord Haldane also made several appearances for the Dominion Government. Laskin, *"Peace, Order and Good Government" Re-examined,* 25 CAN. B. REV. 1054, 1055 (1947).

42. See Scott, *The Consequences of the Privy Council Decisions,* 15 CAN. B. REV. 485, 493 (1937); MacDonald, *The Canadian Constitution Seventy Years After,* 15 CAN. B. REV. 401, 427 (1937).

43. Thus Amos, *The Interpretation of Statutes,* 5 CAMB. L.J. 163, 173 (1934), speaks of the "appropriate and specific adjustment of his mind" which the English judge makes when he finds himself confronted by a statute. See also FRIEDMANN, LEGAL THEORY 295 (1st ed. 1944).

44. Incidentally, KENNEDY, THE CONSTITUTION OF CANADA (2d ed. 1938), is in error in maintaining at 405-06, "The Australian High Court maintains that the Australian Constitution cannot be subject to the ordinary rules governing a British statute, which must be modified by the conception of the Constitution in the minds of the founders of the Commonwealth." This was substantially the position up to 1920, but the decision by the High Court of Australia in the *Engineers'* case in that year [Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd., 28 C.L.R. 109 (1920)], established the pattern of interpretation for the Commonwealth Constitution that the High Court and Privy Council have followed since that time, that the Constitution is a British statute to be interpreted according to normal (restrictive) rules of statutory construction. Professor Laskin, also, seems somewhat to have overemphasized the influence of American precedents in Australian constitutional jurisprudence. Thus Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians,* 29 CAN. B. REV. 1038, 1045 (1951): "It is a paradox that Australia, which is more 'English' than Canada and less 'American', has been influenced more by 'American' decisions and less by 'English' decisions." And again, Laskin refers somewhat wistfully to the "absence in Canada of independent judicial tradition like that in Australia."

do not differ very substantially from decisions of the Canadian Supreme Court in the first instance.[45] Professor Kennedy is at some pains to absolve the Canadian Supreme Court judges from any share of responsibility for the Privy Council's decisions. "The Supreme Court is bound by the judgments of the Privy Council, and it must profess to follow them to the best of its ability. The generality of judicial methods observed by the judicial committee almost made the decisions of the supreme court inevitable."[46] This view is, however, strongly challenged by Professor Laskin. Although it is true that Chief Justice Anglin indicated opposition to the Watson-Haldane viewpoint,[47] the views of Chief Justice Sir Lyman Duff[48] are "not solely the result of the compulsion of Privy Council decisions. The 'locus classicus' accolade bestowed by the Privy Council [in 1937] on [Duff's] judgment in the *Natural Products Marketing Act* reference[49] may, in part, have been merely a self-serving tribute to a skilful and faithful exposition of its own course of decision but Sir Lyman showed, as early as the *Board of Commerce* case [in 1920],[50] that he had embarked on that course as much by his own choice as by the dictate of *stare decisis*."[51]

Even in Australia where the categories of constitutional matters that may be appealed to the Privy Council are limited by the Constitution[52] and the final appellate jurisdiction of the High Court of Australia has therefore always been considerable, it may be questioned whether any marked pattern of divergence has appeared between the type of decisions given by the High Court on the one hand and the Privy Council on the other.

Some Canadian authorities fear that the weight of Privy Council decisions may be so heavy upon the Canadian judges, as to leave them no freedom of action for the future, even now that the appeal to the Privy Council has been finally abolished; that the only way of getting around the past may be direct constitutional amendment.[53] But such a proposal ignores the fact

45. But Scott, *The Privy Council and Minority Rights*, 37 QUEEN'S QUARTERLY 668 (1930), assails the "myth" that the Privy Council has been more impartial than the Canadian Supreme Court on matters of minority rights. And as to this point, see also MacDonald, *The Privy Council and the Canadian Constitution*, 29 CAN. B. REV. 1021, 1031 (1951): "It is history that, contrary to Lord Carnarvon's hopes, the Privy Council has not been a protector of minorities so much as it has been a protector of the provinces. . . ."

46. KENNEDY, THE CONSTITUTION OF CANADA 550 (2d ed. 1938).

47. See especially *In re* Board of Commerce Act, 60 S.C.R. 456 (1920); The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434.

48. See Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326 (P.C.).

49. *In re* Natural Products Marketing Act, [1936] S.C.R. 398.

50. *In re* Board of Commerce Act, 60 S.C.R. 456 (1920).

51. Laskin, *"Peace, Order and Good Government" Re-examined*, 25 CAN. B. REV. 1054, 1056 (1947); see also Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 CAN. B. REV. 1038, 1057 *et seq.* (1951).

52. COMMONWEALTH OF AUSTRALIA CONSTITUTION § 74.

53. KENNEDY, THE CONSTITUTION OF CANADA 550-51 (2d ed. 1938); Kennedy *The British North America Act: Past and Future*, 15 CAN. B. REV. 393, 399 (1937); Mac-

that the Constitution, even when amended, will still be subject to judicial interpretation. If, as Professor Laskin has suggested,[54] there was nothing that was inevitable in the interpretations that were in fact made of the B.N.A. Act, it may be that no amount of amendments will avail if the judges do not want it so. Similarly I think Laskin's suggestion that members of the Canadian Supreme Court should, in the future, exercise to the full their privilege of writing separate opinions in constitutional cases,[55] grasps at the form rather than at the substance. Even if they do not care to overrule a previous decision, common law judges have developed a real facility in "distinguishing" unwanted precedents; and the decisions of the Privy Council upon the B.N.A. Act make even the use of a device such as this unnecessary. For a strict holding as to Dominion legislative powers and a corresponding enlargement of the sphere of Provincial powers, to which, certainly, the bulk of the decisions point, Lord Atkin's marine metaphor[56] is available for invocation; for a broad, beneficial construction of Dominion Powers, Lord Sankey's arboreal metaphor[57] is the magic formula.[58]

It may, in fact, be a matter of changing the judges rather than of changing the Constitution. Whatever the excellence of the decisions of the judges of the Privy Council in the field of private law, there has been, perhaps, a certain rigidity and inflexibility in the approach of those same judges to public law questions—a product no doubt of the autonomous training and traditions of the legal profession in England and the Commonwealth, with the widespread emphasis on case-law.[59] It will be interesting to see how the present judges of the Canadian Supreme Court, recruited as they were for a jurisdiction that was substantially private-law at the time of their appointment, will adjust themselves to their new and extra public-law responsibilities, now that the Canadian Supreme Court is the final appellate court in constitutional matters. The frank acceptance of the essentially policy-making role of a Supreme Court exercising judicial review under a written

Donald, *The Constitution in a Changing World*, 26 CAN. B. REV. 21, 45 (1948); MacDonald, *The Canadian Constitution Seventy Years After*, 15 CAN. B. REV. 401, 425 (1937).

54. Laskin, *"Peace, Order and Good Government" Re-examined*, 25 CAN. B. REV. 1054, 1086 (1947).

55. *Ibid.* It must be noted that Laskin seems now more hopeful that the Canadian Supreme Court, as the final Canadian appellate court, might be persuaded to reverse itself, Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, 29 CAN. B. REV. 1038, 1069 *et seq.* (1951).

56. Per Lord Atkin, Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326 (P.C.).

57. Per Lord Sankey, in the Persons case, Edwards v. Att'y Gen. for Canada, [1930] A.C. 124, 136 (P.C.).

58. The situations where two lines of conflicting decisions, each line yielding a different result in the instant case, are available to the judges, have been classed as legal categories of competing reference, fallacies of the logical form. STONE, THE PROVINCE AND FUNCTION OF LAW 176 (1946).

59. FRIEDMANN, LEGAL THEORY 295 (1st ed. 1944).

and rigid Constitution, has led in the United States, especially since the Court Revolution of 1937, to a very broad basis of selection for Supreme Court justices, in which considerations of competence in purely technical legal questions play a lesser, (one might almost say a minor) role; and in which the opportunity may be taken, through the working of the Constitutional requirement of Senate confirmation of nominees to judicial office, to scrutinise very closely the background and the value preferences of the candidates for judicial appointment. Canadian Governments have, right from the outset, recognised the importance of regional and sectional factors in making appointments to the Canadian Supreme Court,[60] and it will be interesting to see whether, in the future, Canada also follows the United States pattern in looking beyond the closed ranks of the leaders of the Bar for future Supreme Court material. In that case we may yet see a law professor or two gracing the Canadian Supreme Court Bench.

The main task for the future however, will be to develop in Canada an informed body of opinion capable of appraising and criticising the decisions of the judges as they are handed down. There is, as yet, a real shortage of high calibre law journals capable of undertaking such a role—this, indeed, is a condition unfortunately common to all of the common law countries outside the United States. Yet legal education in Canada is at last breaking away from the fetters of professional control[61] and far-reaching changes, therefore, may not be long in coming.

One product of Canada's colonial heritage is a certain healthy disrespect for constituted authority. Thus, a leading journal some years back greeted the appointment of a new Governor-General for Canada with the following pungent comment: "None of the Cavendishes has ever been remarkable for brilliance and only one for genius. . . . The Cavendish type is strong and virile and clean and hard-working, but rarely brilliant. . . . He [the Duke] does not overpower with his brilliance, nor is his intellect an amazingly bright one, but he has a pleasing manner."[62]

Some of the same frankness directed at the Canadian Supreme Court judges and their work would go a long way to develop a distinctively Canadian constitutional jurisprudence.

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60. For example, the Supreme Court Act, 1875 § 4, provided that two judges out of a Bench of six should come from Quebec. The Supreme Court Act of 1949, in addition to its main task of abolishing the appeal to the Privy Council, increased the Court membership to nine judges, and at the same time provides that one third of these judges shall come from Quebec. See generally Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians,* 29 CAN. B. REV. 1038, 1041 (1951).

61. See Wright, *Should the Profession Control Legal Education?* 3 J. LEGAL EDUC. 1 (1950).

62. THE CANADIAN MAGAZINE 308, 312 (Feb. 1917), quoted in DAWSON, THE PRINCIPLE OF OFFICIAL INDEPENDENCE 217 (1922).