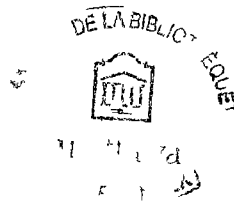
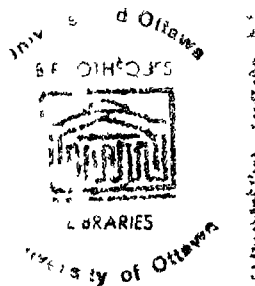


TRENDS IN THE CONSTITUTIONAL DECISIONS  
OF THE SUPREME COURT OF CANADA IN  
DETERMINING THE DIVISION OF LEGISLATIVE  
POWERS IN THE BRITISH NORTH AMERICA ACT  
1867

by Arnold D. Armstrong



Thesis and bibliography to be presented  
to the Faculty of Arts of the University  
of Ottawa through the School of Political,  
Economic and Social Sciences as fulfillment  
of the requirements for the degree of  
Master of Arts.

Ottawa, Canada, 1954

UMI Number: EC56049

### INFORMATION TO USERS

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleed-through, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

**UMI<sup>®</sup>**

---

UMI Microform EC56049  
Copyright 2011 by ProQuest LLC  
All rights reserved. This microform edition is protected against  
unauthorized copying under Title 17, United States Code.

---

ProQuest LLC  
789 East Eisenhower Parkway  
P.O. Box 1346  
Ann Arbor, MI 48106-1346

## TABLE OF CONTENTS

Chapter		Page
	INTRODUCTION	1
I	TRENDS IN REGARD TO PRINCIPLES OF INTERPRETATION AFFECTING:	
	1. The Relations of Terms of sections 91 and 92	11
	2. The Trenching and Related Doctrines	14
	3. The Determination of the Validity of Legislation	26
II	TRENDS IN DECISIONS AFFECTING:	
	1. Taxing Powers and the Credit System	38
	2. Property and Civil Rights	53
	3. Trade and Commerce in Canada	67
	4. Criminal Law	85
	5. Power to Implement Treaty Obligations	89
III	CONCLUSION	105
	SUGGESTIONS	113
	APPENDIX A	115
	BIBLIOGRAPHY	

## SUMMARY

The purpose of this thesis is to determine the trends in the constitutional decisions of the Supreme Court of Canada and to try to assess the extent to which the influence of the Judicial Committee has swayed these trends. As well, it is an attempt to throw some light upon the probable outcome of future decisions.

The approach used is to separate the decisions into groups in an attempt to see more clearly the individual trends in regard to decisions affecting different subject matters. This points up the trends in various aspects of the interpretation of division of legislative powers and makes possible a more intensive survey of the whole field, as well as a better view of the overall approach by the Supreme Court to the whole matter of constitutional interpretation.

This approach also makes possible an analysis of the extent to which the influences of prior decisions of the Judicial Committee, and social and economic pressures in Canada, have shaped the trends followed by the Supreme Court. It also throws some light upon the present place of the Supreme Court in Canada and the position which it will necessarily fill in the future.

However, the main purpose of the thesis is not concerned with definite predictions for the future, but is to stress the basic need for an underlying principle of interpretation to replace the 'balance of powers' principle

of the Judicial Committee. It is to point up the lack of such a principle now, and the resulting confusion in the later decisions. What this principle will be is not known, nor suggested, since it would only be a guess. However, it should be one which would provide a renewed emphasis on the individual rights of the people against the rights of either Dominion or provincial governments. It should be broad enough to cover the whole field of constitutional interpretation, and yet having an application which would make itself felt and respected by both governments and people.

The thesis stresses this need, and points out the morass which has come about and will continue to exist as a result of a lack of a comprehensive, intelligent principle as the basis for present and future constitutional decisions.

## INTRODUCTION

The constitutional decisions of the Supreme Court of Canada have been a major factor in determining the scope of the legislative grants of power as set forth in the British North America Act, although it is obvious that during the period that the Judicial Committee of the Privy Council was the last court of appeal, the decisions of the Supreme Court, although important in themselves, have been overshadowed and, in some cases, predetermined, by the trends adhered to by that august body. Now, however, that the Supreme Court has become the last court of appeal in Canada, its decisions will tend to be of much greater significance. The task of interpretation has been, and is, complicated by the several general descriptions of the ambit of legislative power given to the Dominion and the provinces. Unfortunately, the wording of these grants of legislative power lack a clear legal meaning. Of course, decisions of the Judicial Committee of the Privy Council, together with those of the Supreme Court, have given a clearer view of the practical division of power than existed when the Act came into operation in 1867. However, there are still wide areas of doubt and uncertainty where disputes will occur and which will require definite clarification and solution. An examination of past constitutional decisions by the Supreme

Court will point out its approach to the solution of these problems and the resultant interpretation of the limits of legislative power. It will also show the trends which have grown up and which will undoubtedly be of major importance in the future interpretation of the division of legislative power in the Act. It is the purpose of this thesis to determine what these trends are and to assess the probable extent of their influence on future constitutional decisions of the Supreme Court.

The British North America Act, 1867, which embodied the division of legislative powers between the central authority and the provinces, represented the compromise between those people who wanted a strong central government and those who wanted the emphasis placed on local autonomy.<sup>1</sup> On the one hand, many of the Founding Fathers felt that a strong central government was necessary to satisfy the forces which brought Confederation into being; on the other hand, legislative union was not acceptable to the French-speaking Canadians, who were afraid of losing their cultural heritage, nor to the Maritime Provinces, where municipal institutions were in an undeveloped state. The plans were necessarily vague in 1867, but the hope for a stronger, larger, and more prosperous community led to the compromise

---

1. An excellent summary of the principle objections may be found in Report of Royal Commission on Dominion-Provincial Relations, 1940, Book 1, p.p. 29-36.

formation of a federation comprised of a central government with authority over matters of general and common interest, and provincial governments with authority over matters of local concern. In sections 91 to 95 and 132,<sup>2</sup> of the British North America Act, are set forth the main lines of the division of legislative powers made necessary by this compromise.

The grant of legislative power to the Dominion is set forth in section 91. The opening paragraph reserves to the Dominion the residue of powers not expressly given to the provinces in section 92. This is the 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". The section then went on to enumerate twenty-nine classes of subjects, specifying but not restricting the ambit of the general words used earlier in the section. These enumerations include such classes of subjects as the postal service, navigation and shipping, sea coast and inland fisheries, copyrights, and defence. They also include topics of primarily economic interest such as the regulation of trade and commerce, the borrowing of money, currency and coinage, savings banks,

---

2. See Appendix A



interest, and legal tender. The concluding paragraph of section 91 provides that these enumerated topics should be safe against infringement by the class of matters assigned to the provinces by section 92.

In section 92 there are set forth sixteen classes of subjects over which the provincial legislatures are given exclusive power to make laws. They include such things as the management and sale of public lands in the provinces, municipal institutions, the administration of justice, direct taxation and licensing powers for raising of revenues for provincial purposes. The provinces are also given control over local works and undertakings, with the exception that international and interprovincial lines of communication are reserved to the Dominion. This exception also authorized the Dominion to take legislative power over any local work which might be declared by the Parliament of Canada to be for the general advantage of two or more provinces. Section 92 also includes two vague classes of subjects, vis., "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province".

The three other sections, 93, 94, and 95, deal with more specific topics. Section 93 gives the provinces control over education, subject to certain clauses intended to protect the rights of Roman Catholic and Protestant religious

minorities. Section 94 provides for the possibility of legislation for uniformity of laws in the provinces in relation to property and civil rights. In section 95, the Dominion and the provinces are given concurrent powers of legislation over agriculture and immigration. In this section federal legislation is to prevail in the case of conflict.

In theory, the division of powers seems to have been effected with a good measure of success; in practice, however, attempts to exercise particular powers allotted by the Act frequently raise queries as to their meaning, intention, and scope. The logical and apparently clear division of legislative power in the Act has not stopped infringements by one government on the legislative jurisdiction of another. The implications of legislation often cross the line which, in theory at least, is supposed to divide the spheres of legislation. It would be difficult for a province to make any law under its Property and Civil Rights clause without affecting some heading in section 91. Again it is obvious that most pieces of Dominion Legislation under the "Peace, Order and Good Government" grant of legislative power would affect provincial spheres of power in some way or other. This raises the problem of interpretation of the scope of the relevant sections of the Act when an invasion of one government into the sphere of another takes place.

The task of interpretation, which is one of continuing duration, has been made more complex by the indefinite terms used in the sections. "Peace, Order, and Good Government" and "Property and Civil Rights" do not convey too concrete or specific a meaning. The Supreme Court, and until recently the Judicial Committee, have laid down rules of construction which have made plainer what these terms mean. However, although these rules of construction have been so influential as to become a major factor in the development of certain trends in the decisions of these Courts, they have been only partially successful as a solution to the problem of interpreting the practical division of legislative powers in the Act. Thus, while the task of interpretation has been made simpler by the use of these principles, it has actually gained in magnitude and importance as the country developed and became faced with new challenges and needs.

During the ninety years of judicial interpretation, revolutionary social and economic changes have taken place which were not foreseen by the Founding Fathers. The original distribution and, more particularly the later "judicial distribution", of spheres of legislative power has been attacked by many as being antiquated and in need of amendment to cope with these changes.<sup>3</sup> The Judicial Committee has been charged with stultifying the natural

"progress" of Canada along the broad general lines set out by the founders of the British North America Act, by cutting into the central power to so great an extent as to cripple it in times of need. Moreover, in these ninety years both the Dominion and the provinces have been given particular stakes in certain spheres of legislative power. The Dominion has achieved a paramount position in the taxing field and is very indisposed to give up a portion of its interest, while the provinces are equally reluctant to yield any important portions of their legislative power in relation to property and civil rights.

The attempts of the Dominion and the provinces to reach agreement in regard to an amendment process points up the failure of the courts in the past to adapt the British North America Act to changing circumstances; from the failure of these attempts stems the evergrowing challenge facing the Supreme Court in the future. An increasing amount of attention<sup>4</sup> has been given to the fashioning of an amending procedure which would eliminate resort to the British

3

O'Connor, W. F. Report to the Senate of Canada on the B.N.A. Act, Ottawa, King's Printer, 1939

4

Dawson, R. M. Constitutional Issues in Canada 1900-1931 London, Humphrey Milford, 1937.

Gerin-Lajoie, P. Constitutional Amendments in Canada, Toronto, University of Toronto Press, 1950.

Ollivier, M. Problems of Canadian Sovereignty, Toronto, Canada Law Book Company, 1945

Parliament, but despite the suggestions and compromises, there are wide gaps among the opinions of the men who are in authority.<sup>5</sup> It is apparent then that should there be no further progress towards unanimity of opinion by the leaders of the country, and at present, this seems to be case, the decisions of the Supreme Court will be the only means by which the Act will be kept up to date. It follows that should a re-allocation of legislative power be necessary in Canada, it will be the responsibility of the Supreme Court to bridge the gap between what is required and what judicial interpretation and authoritative precedents have made it. An examination of the decisions of the Supreme Court of the United States in interpreting the constitution of that country proves that a court can keep an otherwise quite inflexible constitution alive and adapted to changing economic, political and social circumstances. The Supreme Court of Canada is an integral part of the government, and of the country, and it remains to be seen whether or not it will be strong enough and bold enough to apply a positive treatment to the faltering constitution of Canada.

In a relatively early decision in 1895 in Re-Prohibitory Liquor Laws,<sup>6</sup> the Supreme Court laid down a

---

<sup>5</sup> Proceedings of Constitutional Conference of Federal and Provincial Governments 1950 - King's Printer

<sup>6</sup> (1895) 24 S.C.R. 170

broad and comprehensive principle of construction in regard to the way in which the Court should interpret the British North America Act, Justice Sedgewick explained that since the British North America Act was a constitutional agreement or compact between the then existing provinces; -

..... it must be viewed from a Canadian standpoint. Although an Imperial Act, to interpret it correctly, reference may be had to the phraseology and nomenclature of pre-confederation Canadian legislation and jurisprudence, as well as to the history of the union movement and to the condition, sentiment, and surroundings of the Canadian people at the time. In the British North America Act, it was in a technical sense only that the Imperial Parliament spoke; it was there that in a real and substantial sense that Canadian people spoke, and it is to their language, as they understood it, that effect must be given. 7

According to O'Connor in his Report to the Senate,<sup>8</sup> the Judicial Committee has not followed this general principle of construction but has based its opinions on a different approach to the interpretation of the British North America Act. Thus, any attempt on the part of the Supreme Court to follow this principle, even if it had so desired, would have been largely nullified because its decisions were

---

7. Ibid., P. 205

8. O'Connor, W. F., Report to the Senate of Canada on the B.N.A. Act, Ottawa, King's Printer, 1939.

subject to review by the Judicial Committee. The latter body felt that it was not free to consider what the Founding Fathers intended, but rather was bound to restrict itself to considering the intention actually expressed in the Act itself. Whether or not this approach was liberal, sensible or logical, is of mostly academic interest now that the Supreme Court is the last court of appeal. However, during the period that the Judicial Committee was the ultimate source of appeal it determined to a significant extent the actual course of interpretation and while the Supreme Court often differed in its decisions from the former body, the dicta of the Judicial Committee always exercised a powerful and overriding influence. The general principle laid down by the Supreme Court in 1895 shows that at that time it was conscious of a need for a liberal interpretation, and even giving considerable latitude to the intentions of the Founding Fathers, this principle promised to be the basis for a very general interpretation of the British North America Act. An examination of the extent to which the Supreme Court adhered to this principle in its general approach to the interpretation of the division of legislative power and in its decisions in determining the scope of particular headings of power will show the basic trends built up over the years and will also throw some light upon the probable course of future interpretation.

## TRENDS IN REGARD TO PRINCIPLES OF INTERPRETATION AFFECTING;

## The Relations of terms of sections 91 and 92 .

The British North America Act by sections 91 and 92 distributes authority to enact statutes between the Dominion and the provinces. Accordingly, within the spheres allotted to them the Dominion and the provinces are coordinate governments, and together they embrace the whole ambit of legislative power. It follows then that where the Dominion has legislative power, the provinces have not the capacity to pass laws to interfere with the Dominion's lawful use of its power and vice versa. The determination by the courts of whether or not one government has infringed on the jurisdiction of another to the point where it is usurping authority has been aided by the use of principles or doctrines which have been laid down in various decisions as to what are the proper relationships of sections 91 and 92. These guides, while quite helpful, tended to stereotype later decisions, thus forming trends and to restrict the scope of the opinion of the courts. Even with these aids, the courts found the dividing line between legislation 'affecting' and 'in relation to' difficult to determine.

The first principle stems from a desire to keep the Dominion and provincial spheres of legislative power entirely separate - an impossible task. The Supreme Court has in various cases followed the doctrine that legislative powers are exclusive in the sense that if the Dominion



government has abstained from legislating to the full limit of its powers, a provincial legislature could not assume that the way was left open for it to take over this vacant sphere, even temporarily. The "exclusive doctrine" also means that the Dominion cannot legislate in relation to a matter coming within the class of subjects in section 92. However, a partial exception to this rule is that the Dominion Parliament may enact laws 'affecting' subject matter belonging to section 92; as well, the provinces may pass legislation 'affecting' subject matter belonging to section 91.

While this doctrine of exclusiveness extends to the whole of section 91, including both the enumerated powers and the general or residual power, and to the whole of section 92, the possibility of overlapping or conflicting powers could not be prevented since in a practical sense the spheres must overlap. The problem is to keep the infringement from becoming an invasion. This problem is acknowledged by the dominant decisions of the Judicial Committee which tried to reach a workable solution by trying to balance the two jurisdictions. The decision in *Tennant V. Union Bank of Canada*<sup>9</sup> was based on the related principle - the 'trenching doctrine' - that the Dominion could legislate in relation to a matter coming within one of the enumerated classes of subjects of

---

9 (1894) A.C. 31

section 91 - no mention of the general power was made - and could also enact provisions which are necessarily incidental to effective legislation under section 91, even though the incidental provisions were definitely within the provincial jurisdiction. This decision tended strongly to divide the enumerated clauses of section 91 from the general power, although the text of the British North America Act reads that the general power is the sole grant of power to the Dominion Parliament and the enumerations are examples only. The result was to weaken the scope of section 91 and expand the jurisdiction of section 92. In an earlier decision *Hodge vs. the Queen*<sup>10</sup> and in a relatively recent decision in the *Fish Canneries Case* in 1930<sup>11</sup> the proposition was made by the Judicial Committee that the Dominion could not 'trench' on the provincial jurisdiction in the exercise of its general power to make laws for the peace, order and good government of Canada unless the matters were of national importance. Thus, according to the opinions of the Judicial Committee the effective Dominion power was curtailed mainly to the enumerations together with the use of the general power in times of emergency - the "Emergency Doctrine". By the same decisions, the provincial jurisdiction

---

10 (1883) 9 App. Cas. 117

11 A. - G. Can. Vs. A.G. B.C. (1930) A.C.111.

gained in stature and the two general enumerations of section 92, vis., 'property and civil rights' and 'generally all matters of a local nature' become in fact the real depositories of residual power. Instead of a balanced constitution, by reducing the general power in 91 to something approximating an enumeration, the attempt of the Judicial Committee to reach a workable solution resulted in the present awkward position where there is deadlock over who is to control the progress and development of the country - the central power, or the local governments.

In examining the decisions of the Supreme Court involving trenching it becomes obvious that the Court followed one main trend, with occasional and very obvious lapses from it forming almost another trend. There is a strong trend towards the balanced constitution, obviously influenced by the decisions of the Judicial Committee, which is actually based to a far greater extent on the principle itself than on the literal intention of the British North America Act. The weaker tendency follows the Act more closely with a greater emphasis on the intentions of the Foudhing Fathers and resulting in a correspondingly more powerful central government. In considering the whole range of cases, there seems to be a haphazard approach to many decisions with no underlying principle as a firm basis, but this is because the two patterns interweave, leaving a very unsettled overall picture.

The weaker and more individualistic tendency has fewer cases to represent it but these stand out plainly. In *Gold Seal Limited vs. Dominion Express Company and A.-G. Alta.*, in 1921<sup>12</sup> the Canada Temperance Act was challenged. The appellant, a distributor of intoxicating liquors, was carrying on an inter-provincial business. Part IV of the Canada Temperance Act aided by 1919 (Can.) c.8 when duly brought into force, prohibited the importation of intoxicating liquor into any province which prohibited its sale for beverage purposes. The defendant express company refused to carry the liquor relying on the strength of the validity of the Canada Temperance Act. This stand was challenged on the ground that the defendant could not properly refuse to carry the liquor since the Canada Temperance Act was invalid. The Supreme Court held that the Dominion had the power under the peace order and good government clause to enact legislation trenching on the provincial sphere of jurisdiction, and not only in time of emergency. This placed the emphasis on the textual allocation of spheres of legislative jurisdiction and was at definite variance with the prevailing trend as followed by the Judicial Committee and the Supreme Court itself.

---

<sup>12</sup> (1921) 62 S.C.R. 424

In a later and more significant opinion, the Supreme Court passed judgement on the Emergency Doctrine. In Reference re Validity of the Wartime Leasehold Regulations<sup>13</sup> the Court relied on this doctrine as basis for its decision that the Dominion could use the general grant of power to trench on the provincial legislative ambit, with some qualifications; i.e., only in times of emergency. The important point is that it was laid down that Parliamentary declarations of policy as evidence of continuing emergency were acceptable to the Court, and clear and unmistakable evidence is necessary to justify the Court in overruling Parliament. While opinions given on Constitutional References are not binding judgements, they may be and are generally followed in later cases. This opinion then is one of the few that has gone against the trend, and has again upheld the textual allocation of spheres of legislative power. It would appear then that the Dominion could declare any given situation to be an emergency and to enact remedial legislation on the strength of the peace, order, and good government clause without fear of that legislation being declared ultra vires by the Supreme Court.

The principle set forth in these cases has not borne out in other cases brought before the Supreme Court. The

---

13 (1950) S.C.R. 124

trend has been to switch the effective residual power from section 91 to section 92 in favour of the provinces. In its decision in *In Re the Board of Commerce Act and the Combines and Fair Prices Act, 1919*,<sup>14</sup> the Supreme Court came down heavily on the side of the 'Emergency Doctrine', in opposition to the textual content of section 91. In this case, the Board of Commerce proposed to make an order prohibiting certain dry-good firms from charging more for goods than the Board decided was reasonable and just. This order went further and purported to empower the Court to restrain prospective breaches of the statute. The challenge was made that the Board was trenching on section 92. The Supreme Court not only held that this law was within the legislative ambit of the Dominion Parliament, but also that legislation which would be ascribed normally to one of the subject matters of provincial legislation should be ascribed in an emergency to one of the enumerated heads of section 91 as well as the introductory grant of power. In this case the general power obviously covered the situation which involved unjust business practices not only on local levels, but also on a national scale. The opinion of part of the Court rested the constitutional validity of this legislation on the power of the Dominion Parliament to legislate for the 'Regulation of Trade and Commerce' as well as on the general power. In upholding the

---

14 (1920) 54 D. L. R. 354

power of the Board and speaking for this part of the Court, Anglin, J. said:

.....I think it is better that legislation such as that with which we are now dealing, which undoubtedly affects what would ordinarily be subject matters of provincial jurisdiction, should if possible, be ascribed to one of the enumerated heads of section 91. <sup>15</sup>

He held this despite his opinion in an earlier case that:

"When a matter primarily of civil rights has attained such dimensions that it affects the body politic of the Dominion and has become of national concern it has in that aspect of it, not only ceased to be "local and provincial" but has also lost its character as a matter of "civil rights in the province" and has thus far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the peace, order and good government provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount." <sup>16</sup>

The reason he changed his opinion in the later case may be found in the judgment of the Privy Council on this same Insurance case where Lord Watson stated that great caution must always be exercised in applying the aspect principle<sup>17</sup> an illustrative example of the powerful influence of the Judicial Committee.

15 Ibid., P. 365

16 Insurance Act Reference, 48 S.C.R. 260 at p. 310

17 Insurance Act Reference, (1916) 1 A.C. 588 at p. 595

The rest of the Court came to a different conclusion.

In giving his opinion, Duff, J. stated:

.....my view is that where a subject matter is from a provincial point of view....under 'property and civil rights'.....it is incompetent to the Dominion in exercise of the authority given by the introductory clause to legislate upon that matter.

Nor do I think it matters in the least that the legislation is enacted with the view of providing a remedy uniformly applicable to the whole of Canada in relation to a situation of general importance to the Dominion.....if the legislation does deal with matters which.....are within any of the first fifteen heads of section 92, it is incompetent to the Dominion unless it can be supported as ancillary to legislation under one of the enumerated heads of section 91.<sup>18</sup>

The significant point is that while disagreeing, both sides agreed that the general grant of power in section 91 was not sufficient in itself to enable the Dominion to trench on the provincial jurisdiction.

Again, in another case, C.P.R. vs. A-G of B.C. et al<sup>19</sup> in 1948 the Supreme Court held that Dominion legislation covering matters ancillary to the main subject matter was ultra vires, so long as the ancillary legislation could be assumed as normally coming under one of the heads of section 92, and the main subject matter did not come under one enumeration of section 91. Thus the residual power of the Dominion Parliament has been reduced to inaction except in

---

18. Board of Commerce Case (1920) 59 D.L.R. 354 at P. 392

19. (1948) 3 D.L.R. 417



cases of emergency, and even then it is severely curtailed. Even in the cases where ancillary legislation has been upheld the enactment dealt with an aspect of a subject upon which provincial legislation would have been largely incompetent.<sup>20</sup>

The trend followed by the Supreme Court in determining the broad outlines of the division of legislative powers has started from a literal and hence liberal interpretation of the British North America Act and has progressed towards a position which is narrow and awkward, due to the strait-jacket imposed on it by the adherence of the Judicial Committee to its principle of a 'balanced constitution'. Not even social, economic, or political exigencies have been enough to sway the trend in a more liberal direction. The trend has been influenced by the desire of the Supreme Court to avoid a decision on constitutional grounds if at all possible, and if impossible, to refrain from setting down any general rules of interpretation. The result has been a piece-meal interpretation, with the emphasis placed on a restrictive rather than on a philosophic approach. In an approach such as this, it was almost certain that the general power of section 91 would be whittled by the more specific enumerations of section 92, and that the examples of section

---

20. Reference Re Companies' Creditors Arrangement Act  
(1934) 4D.L.R. 75.

91 would become more prominent than the general grant of power. When either the province or the Dominion passes legislation, it must necessarily be assumed that each has all the powers it needs to enact it in all its ramifications. The Supreme Court in determining whether a piece of legislation has infringed on the legislative ambit of another government, with its piece-meal approach, depended on the advice offered by the Judicial Committee, with its more logical system of interpretation based on a desire to balance the provinces with the Dominion, as in *Citizens Insurance Co. vs. Parsons Case* in 1881.<sup>21</sup> In this case Sir Montague Smith said,

...it is the duty of the Courts...to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them, the limits of their respective powers...In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question at hand.<sup>22</sup>

This has led to a purposeless and varied approach to the task of determining the division of spheres of legislative power. With only the desire to settle each problem as it came up with a minimum of effort, and depending on an excessive application of the principle of exclusiveness and the resulting balance of power theory of the Judicial

---

21 (1881), 7 App. Cas. 96

22 Ibid., at page 107

Committee, the Supreme Court has not set up any philosophical doctrine which could be applied to all the constitutional decisions. The piece-meal approach has resulted in wide differences between decisions in cases which were quite similar, and even in wide differences in opinions by the judges in the same case.<sup>23</sup>

Associated with the principle of exclusiveness was the principle of paramountcy. When valid provincial legislation and valid Dominion legislation occupy the same field, there is the problem of deciding which is paramount. In several cases before the Judicial Committee, that body has laid down the principle that the Dominion legislation is paramount and must override provincial legislation.<sup>24</sup> This external repeal of a provincial Act by the Parliament of Canada can only be effected if there is a direct clash between the provinces and the enactments of the Dominion; that is, if two different results occur from the two approaches to the subject. It would appear that so far as the Judicial Committee is concerned, the Dominion and provincial legislation must actually conflict and not merely deal with the same subject in different aspects.<sup>25</sup>

---

23 The Board of Commerce Case (1920) 59 D.L.R.354

24 Tennant vs. Union Bank of Canada (1894) A.C. 31  
A-G Ont. vs. A.-G. Can. (1896) A.C. 348  
City of Montreal vs. Montreal Street Ry. (1912) A.C. 333  
Royal Bank of Canada vs. Larue (1928) A.C. 187  
Forbes vs. A.-G. Man. (1931) A.C. 260

The Supreme Court of Canada does not take such a dogmatic approach to the problem. In one case, *Home Insurance Co. vs. Lindall and Beattie*<sup>26</sup> in 1934, the majority of the Court decided that the Dominion legislation, which was almost identical with the provincial legislation in declaring that no intoxicated person should drive a car, superseded this provincial legislation, and would continue to supersede it as long as the Dominion legislation remained in force. There was no conflict here, but this decision, while setting forth the determination of the Supreme Court to subscribe to the paramount principle, also suggested that a direct clash was not necessary before the Dominion legislation would be paramount. In a later case, *Provincial Secretary of P.E.I. vs. Egan and A-G, P.E.I.*<sup>27</sup> in 1941, Duff, C.J., discussed the principle of paramountcy. He suggested that where there is no conflict, it was doubtful whether there could be any test used to determine whether Dominion legislation should automatically supersede provincial legislation in regard to a subject over which both governments had jurisdiction. However, he went on to say:

---

25 Clement, W.H.P., The Law of the Canadian Constitution Toronto, The Carswell Co., Ltd. 1916 at p. 465.  
 Lefroy, A.H.F. Canada's Federal System, Toronto, The Carswell Co., Ltd. 1913, at p. 1266  
 MacDonald, V.C. "Judicial Interpretation of the Canadian Constitution" in the University of Toronto Law Journal, 1936, p. 260 at p. 165

26 (1934) S.C.R. 33

27 (1941) 3 D.L.R. 305

...The effect of the concluding part of section 91 is that the Parliament of Canada may legislate upon matters which are prima facie committed exclusively to the Provincial Legislature by section 92, where such legislation is necessarily incidental to the exercise of the powers conferred upon Parliament in relation to the specified subject "The Criminal Law"...including the Procedure in Criminal Matters. To the extent, at least, to which matters are prima facie provincial are regulated by Dominion legislation in exercise of this authority, such matters are excepted from those committed to the provincial legislatures by section 92; and, accordingly, the legislative authority of the provinces in relation to those matters is suspended....If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative. It would be most unwise, I think, to attempt to lay down any rules for determining repugnancy in this sense!"<sup>28</sup>

However, although he still declined to set down any definite working principle, he left the impression that there did not need to be a direct conflict before the Dominion legislation superseded that of the province. Despite this fact, however, he agreed with Rinfret, J., who decided that, in this case, at any rate, there was no conflict and that both pieces of legislation were legally operative.

The Supreme Court has realized that no abstract formula can resolve the problem and its approach as a result, is more liberal than that of the Judicial Committee. The experience of the United States has something to offer in terms of success or lack of success in solving this same problem.<sup>29</sup> Three tests have been

---

28 Ibid., at p.p. 309-10

29 "Occupation of the Field" in Commerce Clause Cases 11936-46; "Ten Years of Federalism" (1946) Harv. Law Rev., Notes p. 262-276.

used in that country, vis., the conflict test, the coincidence test, and the preclusion test. The conflict test invalidates state regulation only if the state and federal legislation are definitely incompatible. The coincidence test provides that even if there is no conflict, but there is similarity, then the state legislation must give way, but only in those sections of legislation where it is similar to the Federal Legislation. The preclusion test is that which invalidates state legislation in a field which Congress has covered with something like completeness, even though the state legislation neither coincides nor conflicts with the Federal legislation. The Supreme Court of the United States has admittedly found these tests difficult to apply. Whereas the Judicial Committee has held to only the conflict test, the Supreme Court has tended to apply the coincidence test and is not too firm in insisting that provincial legislation be necessarily intra vires even if it doesn't conflict with Dominion legislation. It is difficult to determine whether or not there is a trend towards having the Dominion legislation prevail over the provincial legislation where there is no conflict. It appears, however, that the Supreme Court goes farther than the Judicial Committee in treating Dominion legislation as paramount in cases where there is not necessarily a conflict. This tendency gives the Dominion wider legislative powers under the enumerated heads of section 91 at the expense of the provincial jurisdiction as outlined in section 92. It is too early yet to come to any definite conclusion in this matter on such a small number of decisions. However, it is obvious that the Supreme Court has once again tended to judge each case on its own merits, without any significant deference to a strict

application of a doctrine.

TRENDS IN THE DETERMINATION OF THE VALIDITY OF LEGISLATION

The determination of the validity of legislation embraces the attitude towards and the means by which decisions are made in constitutional cases and references. In the case of the Supreme Court Act, R.S.C. 1927, c.35 it was set forth in part, that the Governor General in Council may refer important questions of law or fact touching the interpretation of the British North America Act, or the constitutionality or interpretation of any Dominion or provincial legislation to the Court for a ruling on its validity. As a result of handling constitutional cases and references, the Supreme Court has apparently accepted some guiding principles.

In examining the approach to references first, it is clear that the Court prefers to avoid a decision on constitutional grounds if at all possible, and where it is not possible, to hold back from giving any extended discussion of constitutional principles, especially abstract constitutional doctrine. Of course, there are exceptions to this principle and in some cases, the Supreme Court has passed on the constitutionality of legislation, even where such legislation was not referred to it.<sup>30</sup> In *Water Powers' Reference*<sup>31</sup> in 1929 Duff, J. observed that opinions provoked by constitutional

---

30 Re Eskimos (1939) 2 D.L.R. 417  
Reference re Regulations (Chemicals) under War Measures Act (1943) 1 D.L.R. 248

31 (1929) 2 D.L.R. 481 at page 498

questions are only advisory and "when a concrete case is presented for the practical application of the principles discussed, it may be found necessary, under the light derived from a survey of the facts, to modify the statement of such views as are herein expressed".<sup>31</sup> The Supreme Court of Canada leans very heavily on the Judicial Committee in this regard. In several decisions of the Judicial Committee this body has declined to be too free with its constitutional advice and comments. In the decision given by the Supreme Court in Reference re Validity of the Wartime Leasehold Regulations<sup>33</sup> in 1950 much attention was given to the comments and decisions of former cases decided in both Courts in regard to the hesitancy in laying down down any principle which might turn into a general principle of interpretation, and which should be applied to a certain group of facts only, not to every set of circumstances.

Actually, there are a number of attitudes which may be taken towards giving constitutional decisions. Whether or not to use extrinsic aids, and to what extent, or to follow the rule of stare decisis have been the subjects of much discussion in the Supreme Court. It has already been noted that there is some difficulty in determining whether the

---

<sup>31</sup> (1929) 2 D.L.R. 481 at p. 498

<sup>33</sup> (1950) 2 D.L.R. 1



British North America Act should be interpreted as an ordinary statute or as a constitution. The discussion still goes on, and there does not seem to be a clear cut solution to the problem at this time.

In surveying the case decisions of the Supreme Court and the comments on them by various authorities,<sup>34</sup> it would appear that it is very easy to define the trend upon which the use of extrinsic materials has depended. In some cases there is quite an extensive and admitted dependency on aids outside the contested statute itself, especially in the general approach to the Act, while in other cases, especially in determining the 'character' of impugned legislation, the Court has strongly emphasized its duty to decide the case on its own merits with no help from outside at all.

The Supreme Court and the Judicial Committee have differed in their attitudes in this matter. In one case, *In re Prohibitory Liquor laws*<sup>35</sup> 1894, Sedgewick, J., speaking of the British North America Act, said that it was to be interpreted in the light of pre-Confederation legislation, the history of the union movement, and the general environment of the Canadian people at the time. In the case of *St. Catherines Milling and Lumber Company vs. the Queen* in 1887, and in Reference as to Whether 'Indians' in Section 91(24) of the British North America A

---

34 Willis, J. "Statute Interpretation in a Nutshell" (1938) 16 C.B.R. p. 1-27  
 Corry, J.A. "Administrative Law and the Interpretation of Statutes," (1937) 1 U. of T.L.J. p. 286.

35 (1894) 24 S.C.R. 170

36 (1887) 13 S.C.R. 577

Includes Eskimo Inhabitants of Quebec, 1939<sup>37</sup>, the Supreme Court had recourse to aids derived from surrounding circumstances and the history of the subject-matters dealt with. In at least two cases, in re Companies' Creditors Arrangement Act, in 1934,<sup>38</sup> A-G Quebec vs A-G Can. et al in 1931<sup>39</sup> and one reference, Re Regulation and Control of Radio Communications in 1932<sup>40</sup> the Supreme Court based each decision on the principle that the British North America Act should be interpreted as of the time when the question of the meaning arises, taking into due consideration the factors contributing to the passage of the British North America Act in the first place. This is a very liberal attitude to take and one which has not been challenged or modified by the Supreme Court and gives promise for a more modern approach in the future.<sup>41</sup> The Judicial Committee has varied in its approach. However, in one significant and important sphere, that of the treaty power, that body used the '1867 approach' and interpreted the British North America Act as of 1867, a very narrow and conservative approach. In two references<sup>42</sup> regarding aerial navigation and the control of Radio Communication, the Judicial Committee answered the questions as of the time when the question arose considered in the light of what would have

---

37 (1939) S.C.R. 104

38 (1934) S.C.R. 659

39 (1931) 4W.L.R. 865

40 (1932) 1 D.L.R. 58

41 MacDonalld, V. C., "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar p. 77-93

been the view taken in 1867 had the issue arisen at that time. However, in spite of this, the results of the decisions were very liberal and gave the Dominion Parliament the jurisdiction over the subject matter of treaty obligations as coming under the general power in section 91. In a later case, A-G Can. vs. A-G Ont., in 1937<sup>43</sup>, the Judicial Committee by applying the same 1867 approach, came to the conclusion that, despite the apparently contrary decisions in the Radio and Aeronautic cases, the Dominion Parliament may not give legislative effect to treaties if they deal with matters reserved to the provinces by the British North America Act.

Thus, it would appear that there is a distinct difference between the basic trend followed by the Judicial Committee and that followed by the Supreme Court. The latter is more inclined to apply a "modern" approach to a case, and to refer to a greater extent to the present day extrinsic aids in interpreting the meaning of the British North America Act.

In considering the second use of extrinsic aids, vis., in determining the "character" of impugned legislation, the trend is even more defined although it has been influenced to a large extent

---

42 Re Aerial Navigation (1932) A-C 54  
In Re Regulation and Control of Radio Communication in Canada  
 (1932) A-C 304

43 (1937) A-C 326

by a long history of previous decisions in England. In many cases, especially those before the period 1920-35, although the court admits that the use of extrinsic aids for the purpose of construing a statute would be very helpful, the rule against examining the environment in which the Act was passed was so strong that it was extremely undesirable to go against it. In 1903, in *Gosselin vs. the King*,<sup>44</sup> Taschereau, C.J., stated:

... "I deem it expedient, ... to say a few words upon the question raised during the argument of the reference by counsel to the debates in Parliament for the purpose of construing any statute. Such a reference has always been refused by my predecessors in this court and, when counsel in this case began to read from the Canadian Hansard the remarks made in Parliament when the Canada Evidence Act in question was under discussion, I did not feel justified in departing from the rule so laid down though, personally, I would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful. The same rule is observed in England!"<sup>44</sup>

The rule stated in the *Gosselin* case appears to be accepted by the Judicial Committee in most cases except in one notable case<sup>45</sup> where Canada is concerned, and this has had a profound influence on the Supreme Court, possibly because appeals could be made from the latter to the former Court, or perhaps economic and social pressures were not great enough to sway the court at that time.

A change took place after 1930. The Supreme Court has taken note of social, economic, and legislative data in

---

44. (1903) 33 S.C.R. 255

45. A.G. of Alta. vs. A.-G. Can. (1939) A.C. 117

connection with the argument of constitutionality of a statute, following the lead of the United States in this regard. The Supreme Court of the United States under the guidance of Brandeis, J., has more and more in the past fifty years taken judicial cognizance of all matters of general knowledge.<sup>46</sup> In Canada too, there has been a strong tendency, which has developed into a trend, to introduce extrinsic material in briefs of counsel. However, the problem of constitutional construction in Canada is such that the heads of legislative power are, in theory,, well defined, and precedent, rather than the presentation of briefs is still influential in maintaining the practical definitions.<sup>47</sup>

In spite of precedent in certain of these later decisions, it is obvious that the Supreme Court has noted and been influenced by extrinsic aids. In a recent case, Lower Mainland Dairy Product Board vs. Turner's Dairy Limited, 1951,<sup>48</sup> Tachereau, J., said:

"In certain cases, in order to avoid confusion, extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or even completely concealed. The true purposes and effect of legislation, when revealed to the courts, are indeed very precious elements which must be considered in order to discover its real substance.

---

46 "Social and Economic Facts - Appraisal of Suggested Techniques for Presenting Them to the Court" (1948) 61 Nat. Law Rev. 692, at p. 696

47 MacDonald, V.C. "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 Can. Bar Rev. p. 77-93

48 (1951) S.C.R. 57

If it were held that such evidence may not be allowed and that only the form of an Act may be considered, colourable devices would be used by legislative bodies to deal with matters beyond their powers. The Privy Council took similar views in *Attorney-General for Alberta vs. Attorney-General for Canada*, (1939) A.C. 117, at page 130.....

I believe that this is the law that should govern this case."<sup>49</sup>

In an earlier case, *Home Oil Distributors Limited, vs. A-G of British Columbia* in 1940<sup>50</sup> the Supreme Court allowed the use of a report of a Commissioner as permissible since it was a recital of what was present in the mind of the legislature, as to the original purpose in enacting the principal Act, and the suggested remedy. Davis, J., stated that if the Court looked at the Act itself, the language of the statutory provisions was plain and unambiguous. Taking the legislation as it stood, it was within the competence of the provincial legislature. However, if the commissioner's report were examined, the otherwise valid legislation apparently tried to control the petroleum industry at large and had interprovincial and international aspects. He further said:<sup>51</sup>

"Generally speaking, the Court has no right to interpret legislation by reference to such extraneous material as the evidence taken before and the report of a public inquiry under a Royal Commission. It would be a dangerous course to adopt.

A rule somewhat wider than the general rule may well be necessary in considering the constitutionality of legislation under a federal system where legislative authority is divided between the central and local legislative bodies."<sup>51</sup>

---

49 *Ibid.*, at page 583  
50 (1940) D.L.R. 609

51 *Ibid.*, at page 616

This represents a major change from the earlier approach. In the case of references, the Court suggested that they were in a different category from regular cases. In this regard, Rinfret, C.J.C., made an extremely important statement in Reference Re Validity of Wartime Leasehold Regulations in 1950.<sup>52</sup> He said:

"...the opinions are supposed to be given on the material which appears in the Order of Reference and the Court is not expected to look to outside evidence. It is clear that the Court may take into consideration any fact which is of common, or public, knowledge, or of which it could ordinarily take judicial notice. Otherwise, however, excepting very exceptional cases,...the Court is limited to the statements of fact contained in the Order of Reference. I would venture to say that this has been the constant practice of this Court on Reference submitted under section 55 of the Supreme Court Act."<sup>53</sup>

This would appear to prohibit any reference to extrinsic aids. However, he went on to state that:

'...But it would seem that the constitutionality of legislation disputed on the ground of colourability should really be brought before the Courts not on a Reference, but in an ordinary case.'<sup>54</sup>

From there he went on to state that in this reference he would not have reference to extrinsic aids since it was not an exception to the rule.

However, excluding constitutional references which, as stated in the previous reference are, or should be, subject to special consideration, there is a definite trend in the Supreme Court of Canada, bolstered by a similar trend in the Judicial Committee and led by the very well-developed and

---

<sup>52</sup> (1950) 1 D.L.R. p. 1

<sup>53</sup> Ibid., at page 3

<sup>54</sup> Ibid., at page 4

mature trend in the Supreme Court of the United States to have reference to extrinsic aids in determining the 'character' of challenged legislation. This trend, acknowledged and well defined, even by the Supreme Court itself, may in the future enable it to decide that factors change and that changed economic, political and social circumstances create situations in which the same piece of legislation may be valid at one time and invalid at another. It is a liberalizing trend, and, subject to the limitations mentioned in the constitution, it should go far to enable the Supreme Court to adequately ease the political and economic growing pains of Canada. It enables the Court, even now, within limits, to take cognisance of the results of legislation and to interpret its legality, with perhaps a more human touch.

Two principles tend to detract from the aforesaid conclusions. One is that the Court should not be concerned with the policy embodied in the legislation, and the other is the the doctrine of stare decisis, if adhered to, would prohibit any radical readjustment in attitude towards the interpretation of constitutional cases. These principles are recognized by the Court itself as being rules which in most cases should be followed, but whether or not it will do so strictly is difficult to accurately determine at present.

In the case of the former principle, the thinness of the line between adjudication on policy and adjudication on validity is very slight. In the cases regarding Alberta's



attempted social reorganization the line was very thin indeed. In a later case, Turner's Dairy Limited vs. Lower Mainland Dairy Products Board in 1941<sup>55</sup>, the Supreme Court held that legislation, despite its legal form, involved the unconstitutional imposition of indirect taxation and thus considered its 'colour' or policy behind it.

The second principle, that of stare decisis, is of greater significance. Until recently the Supreme Court was inferior to the Judicial Committee and it was understandable that it was governed by the decisions of the latter in so many constitutional cases. Now that the Supreme Court is supreme in its own right it is possible that it may review its official attitude to stare decisis, at least in respect to constitutional interpretation although since each case is different, it may not follow the doctrine at all if it wishes. In one case, Stuart vs. Bank of Montreal in 1909<sup>56</sup> it took the stand that, exceptional circumstances aside, it is bound by its own decisions. However, time has passed since then and it could easily be that it would wish not to overrule a previous decision, but as the Judicial Committee did, to disassociate itself from particular views enunciated in an earlier case. The examples of the United States Supreme Court are strong. Under the guidance of Stone, Cardozo, and especially Brandeis, J.J., the doctrine of stare decisis has been held to have only limited application in the field of constitutional law, and it is entirely within the discretion

---

55 (1941) S.C.R. 573

56 Laskin, B. "The Supreme Court of Canada: A Final Court of

of the Court as to whether it should be followed or departed from. This Court has adopted the viewpoint that in unconstitutional cases stare decisis is normally the best policy, because it is most often more important that the applicable rule of law be settled than it be settled right, and in any case the legislature may act to correct the defects of a faulty decision. However, in constitutional cases, where correction through legislative action is practically impossible, the Court has often overruled its earlier decisions.

This trend in the Supreme Court of the United States is far more applicable to Canadian conditions than the British example. In England, Parliament is free to correct any judicial error and it is this consideration which has enabled the Judicial Committee to apply the doctrine of stare decisis strictly to the great majority of cases. In Canada, the method of amending the constitution is not simple as in England, and the Supreme Court may well have to modify what is considered to be its rather stiff official position in regard to stare decisis, as did the Supreme Court of the United States, in order to enable the parts of the constitution of Canada to work together with less friction. So far, no opinions given in the Supreme Court have given a definite viewpoint in this regard and neither by direct reference nor by implication has the doctrine been laid aside, but as time goes on and more constitutional problems come up for interpretation, some obvious policy will have to be laid down, as in the United States even though it is not expressed in so many words.

Since 1867 the actual distribution of taxing powers has changed very little in Canada due to judicial decisions. In fact the decisions both of the Supreme Court and the Judicial Committee are noteworthy for their emphasis on the literal distribution of legislative power. The Dominion's powers are in section 91(3), 'the raising of money by any mode or system of taxation', and section 122, 'the customs and excise laws of each province, shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada'. It may now be concluded that customs and excise laws are, independently of section 122, included under section 91(2), 'the regulation of trade and commerce', and section 91(3), 'the raising of money by any mode or system of taxation.' In any event this is of relatively little importance since the Dominion taxing powers are broad and extremely inclusive. The provincial powers are in section 92(2) 'direct taxation within the province in order to raise revenue for provincial purposes' and section 92(9) 'shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local or municipal purposes.' Two provisions limit the provincial power vis., section 121, "all articles of the growth, produce or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces' and section 125, "no lands or property belonging to Canada or any province shall be liable to taxation".<sup>57</sup>

---

57 See Appendix A

Judicial decisions in regard to other matters have tended to aggravate the taxing structure. It has been noted already that judicial decisions, particularly those of the Judicial Committee, have acted very strongly to take away from the Dominion legislative powers which really belong to the Dominion according to a literal interpretation of the Act. These fields of authority, particularly in the sphere of social services, would be adequately provided for financially if they were still within the Dominion sphere of power. However, the judicial decisions which transferred the regulatory authority to the provinces, did not transfer the taxing ability and so the provinces in many cases do not have the financial resources to maintain an equal level of social services for all Canadians.

This has raised a central issue in Canadian federalism—an issue where the strict legal position is of little importance, an issue which has grown more acute each year, and for which no definite solution is in sight. The problem could be solved by having: (1) a reallocation of legislative powers, or (2) a reallocation of taxing powers. The provinces are against the first solution, and the Dominion will not consider the second. A piece-meal solution has been put into use in the areas of the most acute distress. Amendments to the British North America Act respecting unemployment insurance and old age pensions have eased the stress in two places, but they have left the general

legal framework of financial and taxing powers otherwise unimpaired.

Another type of partial solution, the development of grants in aid of by Dominion and the provinces, and the growth of a federal "spending" power involving disbursement of money on stipulated conditions but without the compulsory regulation of the provinces,<sup>58</sup> has tended to raise problems for the courts. While there is no legal problem about the Dominion's right to spend money which it has legally raised, in any manner which it has chosen, the issue of validity does arise where the legislation is not a mere spending enactment but an exercise of the taxing power linked with a scheme of disbursement, which would overlap into the provincial jurisdiction. In reference re Employment and Social Insurance Act in 1936<sup>59</sup> Duff, C.J., in his dissenting judgment said,<sup>60</sup>

...if Parliament out of public monies exclusively were to constitute a fund for the relief of unemployment and to give to unemployed persons a right to claim unemployment benefits, to be paid out of that fund upon such conditions as Parliament might see fit to prescribe, no plausible argument could be urged against the validity of such legislation.<sup>60</sup>

This dictum is unchallenged in itself. However, in an earlier decision in *In re Insurance Act of Canada* in 1932<sup>61</sup> the Judicial Committee decided:

---

58 Gouin, L.M. Claxton, B., Legislative Expedients and Devices Adopted by the Dominion and the Provinces (Royal Com. Study Appendix 8) Chap. III, King's Printer, 1940

GeItys, C.L. Administration of Canadian Constitutional Grants Chicago, Social Science Research Council, Vol. 3 1938.

59 (1936) 3 D.L.R. 644

60 Ibid., at page 647

61 (1932) A.C. 41

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal, the tax for that purpose must fall."<sup>62</sup>

In Employment and Social Insurance Act<sup>63</sup> Case, Rinfret, J., explained that the contributions or taxes in regard to social unemployment insurance were merely incidental to the regulation which was in itself ultra vires of the Dominion Parliament, and hence the whole scheme was invalid.

Whether legislation imposes a tax and whether that tax is direct or indirect is of supreme importance to its legality, especially to the provinces which are limited to direct taxation under section 92(2). It has been difficult for the Courts to lay down a precise definition of the word 'taxation', and even when a seemingly workable definition is stated, the Courts find it difficult to use. In the case Lawson vs. Interior Tree, Fruit, and Vegetable Committee in 1931,<sup>64</sup> involving the validity of provincial marketing legislation authorizing an administrative agency to impose levies on any products marketed to defray expenses of operation, Duff, J., put forward the following definitions. He stated that the levies were taxes because they were (1) enforceable by law; (2) imposed under the authority of the legislature; (3) imposed by a public body; and (4) made for a public purpose.<sup>65</sup>

62 Ibid., at page 52

63 In Reference re Employment and Social Insurance Act (1936)  
3 D.L.R. 644 at page 667

64 (1931) 2 D.L.R. 193

65 Ibid., at p.p. 197-198

However, in this case the levies were indirect taxes and hence ultra vires of the provincial legislature. It is apparent by this and later definitions<sup>66</sup> that a tax under the British North America Act is something broader than a levy for the support of the government. The Supreme Court and the Judicial Committee have taken the stand that they should be influenced by the legal view of the distribution of legislative power, and not by a theoretical belief in "pure taxation". This is a logical and liberal interpretation although not necessarily the only one.

While provincial taxing power is limited by section 92 (2) both in kind and area, the authority of the Dominion under section 91 (3) is full and non-restricted except possibly in one case where it may be limited. It would appear that the Dominion does not have authority for direct taxation within a province to raise revenue for provincial purposes.<sup>67</sup> It has been suggested that the Dominion provincial tax arrangements are ultra vires of the Dominion Parliament since it is direct taxation by the Dominion for provincial purposes, However, no delegation of power is involved since the Dominion is clearly entitled to levy such taxes although the question is still open and unsettled. However, there have been no decisions by the

---

66 A-G B.C. vs. E. and N. Reg., (1950) A.C. 87

67 Citizen's Insurance Company vs. Parsons (1881) 7 app. Cas. 96 at page 108.  
Bank of Toronto vs. Lambe (1887) 12 app. cas. 575 at p. 585  
Caron vs. the King (1924) A.C. 999

Judicial Committee on this specific matter and it is unlikely that any decisions in the future will switch the power of indirect taxation by the provinces for provincial purposes from the Dominion to the provinces, even under section 92 (16).

The tax immunity given by section 125 to 'lands or property belong to Canada or any other province' has been the subject of some litigation. While it confers an immunity in favour of lands vested in the Crown in the right of the Dominion or of a province, it does not confer an immunity on private persons who have some interest in Crown land. Section 125 deals with taxes charged on such lands and not with 'personal' taxes. This raises the interesting and, as yet, unsolved problem which is set forth by Duff, C.J. in *Spooner Oils Limited and Spooner vs. Turner Valley Gas Conservation Board and A-G Alberta*<sup>68</sup> in 1933, when he said:

The occupant of Dominion lands under a legal right may be taxed (by a province) in respect of his occupancy. But it is necessary to be cautious in inferring from this that such taxation can in every case be enforced by remedies involving the sale or appropriation of the occupant's right without regard to the nature of that right. Where the right is equivalent to an equitable title in fee simple, probably no difficulty would arise....., but if the enforcement of a tax imposed by provincial legislation would involve a nullification in whole or in part of competent Dominion legislation under which the right is constituted, then it is, to say the least, doubtful, whether such provisions could take effect.<sup>69</sup>

Again, the doctrine of supremacy works in favour of the

---

68. (1933) 4 D.L.R. 545

69 Ibid., at page 559



Dominion. In *Gauthier vs. the King*, in 1918<sup>70</sup> Anglin, J., said:

"Provincial legislation cannot proprio vigore take away or abridge any privilege of the Crown in right of the Dominion."<sup>71</sup>

while it was laid down in later decisions of the Judicial Committee that the Dominion can in the exercise of its legislative authority take away or impair prerogatives of the Crown in right of a province.

It appears that in the realm of taxation, the Courts have largely maintained the legislative scheme set up by the British North America Act.<sup>72</sup> The Supreme Court in particular has been very jealous of the powers of the Dominion and in numerous decisions has decided in favour of maintaining the Dominion 'taxing' ability. Although the British North America Act is very clear on this point, even where loopholes have appeared, in section 92 (16)<sup>73</sup> and in section 92 (9)<sup>73</sup>, the Supreme Court has not allowed one whit of Dominion taxing power to be whittled away. The maintenance of the status quo and the resulting supremacy of the Dominion in taxing matters may be considered to be a stable trend in the interpretation of the division of legislative powers. This trend has been consistent, and has supported the original concept of the Founding Fathers that Canada should be a strong country, with the central government predominating.

70 (1918) 4 D.L.R. 353

71 Ibid., at page 365

72 A/G, B.C. vs. A/G, Can., (1924) A.C. 222  
In re Silver Bros. Limited (1932) A.C. 514

73 See Appendix A

The powers of the Dominion in regard to the credit system have changed equally as little since the distribution in 1867, due to constitutional decisions in the Courts. Again the decisions of both the Judicial Committee and the Supreme Court are noteworthy for their adherence to the status quo. The Dominion's powers are based on sections 92 (2), (4), (14), (15), (16), (18), (19), (20), and (21) of the British North America Act.<sup>74</sup> These sections provide the Dominion with an impressive and expansive sphere of power in regard to the banking and credit system. It would also appear from a perusal of sections 91 and 92 that the provinces should have nothing to do with credit under any circumstances.

However, there have been cases where the provinces have passed Acts to regulate credit, and to tax banks, etc., and these have been referred to the Courts. The Supreme Court has laid down clear and unanimous decisions in these cases. In Reference Re Alberta Statutes in 1938,<sup>75</sup> three bills were referred to the Supreme Court. These were: Bill Number 1; An Act respecting the Taxation of Banks; Bill Number 8: An Act to Amend and Consolidate the Credit of Alberta Regulation Act; and Bill Number 9; An Act to Ensure the Publication of Accurate News and Information. The first two bills only will be considered.

The first Bill provided for a system of credit and

---

74 See Appendix A

75 (1938) 2 D.L.R. 81

and currency in Alberta which was to be competitive with the Dominion legal credit system. This was to provide an impetus to trade and alleviate depression conditions. Duff, C.J., said that the Court was not in the least concerned with any question of the practicability of the scheme, and that this was up to the people of Alberta.<sup>76</sup> However, he pointed out that it was quite plain that:

...it is not within the power of the province to establish statutory machinery with the functions for which this machinery is designed and to regulate the operation of it. Weighty reasons could be urged for the conclusion that, as subject matter of legislation, in part at least, it comes within the field designated by "Currency" (number 14 of section 91). We think the machinery in its essential components and features comes under head number 15, Banks and Banking; and if the legislation is not strictly within the ambit of number 14 or number 15, or partly in one and partly in the other, then we are satisfied that its subject matter is embraced within category number 2, Trade and Commerce, and that it does not come within section 92.<sup>76</sup>

This was a quite straightforward and decisive opinion.

The next Bill provided for the taxation of banks, and here the Court went outside the Act to determine the effect on the welfare of Canadian credit generally. The Alberta Government proposed to levy so stiff a tax on banks in the province that it was obvious it hoped to drive them out of business. Here Duff, C.J. said:

In our opinion it requires no demonstration to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta legislature to be prohibitive. It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally....<sup>77</sup>

---

76 Ibid., at page 92

77 Ibid., at page 103

Here the two spheres of power conflicted, and the Court decided, in view of the facts, that the Dominion's right to set up and regulate banking was not to be interfered with by the provincial power of direct taxation. The problem of where direct taxation ended and legislation directed at the abolition of the banks began was neatly evaded, but it leaves open the question of whether the Supreme Court actually did decide the case with no reference to the practicability or suitability of the Alberta legislative scheme as a whole and to what degree it looks at the 'effect' of provincial legislation on the Dominion as a whole. The judgment of the Supreme Court was upheld by the Judicial Committee on appeal on Bill Number 1 alone.

In the allied field, - bankruptcy - the Supreme Court again decided in favour of continued Dominion jurisdiction. In *A-G, B.C., vs. A-G Can.*, in 1937<sup>78</sup> the Court, with one dissenting member, held that the Farmers' Creditors Arrangement Act, 1934 (Can.) c. 53, amended 1935, c.20, was valid. The counsel for the appellants argued that in this Act there was not in pith and substance an Act to do with section 91(21) Bankruptcy and Insolvency. They argued that actually the Act concerned the step before bankruptcy, i.e., prevention of bankruptcy. The decision of the Supreme Court later upheld by the Judicial Committee held that legislative provision as to compositions, by which bankruptcy is avoided, but which

---

78 *In Re Companies' Creditors Arrangement Act* (1934) 4 D.L.R. at pages 75 & 76.

assumes insolvency, is properly within the jurisdiction of the Parliament of Canada. In an earlier case Duff, C.J., in upholding the validity of the federal statute said that:

".....legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law;..... Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion."<sup>79</sup>

This shows that the Supreme Court was anxious to provide the Dominion with all the authority necessary to cover the whole area.

It was in two recent cases, the decisions of which were upheld later in the Judicial Committee, that the provinces were even more definitely prohibited from invading the exclusive legislative sphere of the Dominion in relation to bankruptcy and insolvency. In A-G, Sask. vs. A-G Can., in 1947<sup>80</sup> the validity of the Farm Security Act, 1944, of Saskatchewan, was challenged. This Act provided for the lightening of the contractual obligations of a mortgagor or purchaser of farm land if and when the yield of wheat fell below a prescribed minimum, and each contract would be deemed to contain this clause that, in the case of failure, the principle was to be reduced by the amount of interest. This, in fact, if not in theory, made the mortgage interest free.

---

79 In Re Companies' Creditors Arrangement Act, (1934) 4 D.L.R. pages 75 & 76

80 (1947) S.C.R. 394

It would appear that this dealt with conditions of a purely local nature occurring predominantly in the Prairie provinces and in Saskatchewan in particular. The Supreme Court, however, decided that the Act encroached on 'interest' - a matter which by section 91 (19) of the British North America Act is within exclusive Dominion jurisdiction. Here the Court said that it was the true nature and character of the legislation which mattered, not its ultimate economic effect, an opinion which seems at variance with those expressed in the Alberta "Social Credit" references, except in the one respect, that of the Court's determination to keep the Dominion's power inviolate..

The second case was that of Reference re Alberta Debt Adjustment Act in 1942,<sup>81</sup> where that Act was challenged because of its supposed invasion of the Dominion sphere of legislation and interference with existing Dominion legislation in relation to bankruptcy and insolvency. This Act purported to set up a Board with wide powers to regulate and control the enforcement of contractual obligations for the payment of money so as to safeguard the interest of resident debtors who, owing to the depression, might find themselves in serious difficulty if their creditors' claims were strictly enforced. It was claimed that this Act came within the legislative sphere designated as 'property and civil rights' and none of the provisions were directed to insolvency legislation nor to banks

---

81 (1942) S.C.R. 31

and banking. In fact, one judge, Crocket, J. agreed with this defence and decided that the Act was intra vires of the provincial legislature on all points except where its regulations conflicted with existing valid Dominion legislation. The rest of the Supreme Court decided that the Act was ultra vires since it interfered with provisions of Dominion statutes such as the Bills of Exchange Act, the Bank Act, the Companies Act. etc. to such a degree that the whole of the Act was ultra vires of the provincial legislature. Special mention was made of the special position of the creditors who in this case consisted of companies incorporated by the Dominion. Where the business of the companies is subject to provincial legislative regulation, the provincial legislature may legislate so as to affect the business of the companies by laws of general application. The Supreme Court, however, decided that in this case, the Act was not a general law of that type.<sup>82</sup> Duff, C.J. said:

Indeed the whole statute is conceived as a means of protecting embarrassed debtors who are residents of Alberta. Most people would agree that in this point of view the motives prompting the legislation may be laudable ones. But the legislature, in seeking to attain its object, seems to have entered upon a field not open to it. The statute, if valid, enables the Board (invested with exclusive possession of the key to the Courts) to employ its position and powers coercively in compelling the creditors of an insolvent debtor and the debtor himself to a disposition of the resources of the debtor prescribed by the Board. In this way, the statute seeks to empower the Board to impose upon the insolvent debtor and his creditors a settlement of his affairs, which the creditors must accept in satisfaction of their claims. I cannot escape the conclusion that the statute contemplates the use of the powers of the Board in this way. I think this is an attempt to invade the field reserved to the Dominion under Bankruptcy and Insolvency.<sup>83</sup>

---

82 Note (1942) 20 Ban. Bar Rev. P. 343 - 346  
Notes (1943) 21 Can. Bar Rev. pp. 310 - 312, 416

It would appear that the motives may have been valid, but the means was not.

This case is quite important in its implications. It is to be noted, that in this case, appeal from the decisions of the Board could be made to the Supreme Court only on permission of the Board. Duff, C.J., stated that the competent elements could not be separated from the incompetent elements, and that even if it were possible to re-write the statute to confine it to what would be validly enacted, there was no probability that the legislature would enact it so that it would be valid the next time. The decision indicates that the scope for effective provincial debt adjustment legislation, and for that matter anything to do with money, credit, etc., is at best narrow, and in view of the rather overwhelming amount of Dominion legislation on the subject theoretical rather than practical. The position and powers of the Board in regard to the courts in this case were vitally important. In an earlier case, *A-G Alberta and Winstanley vs. Atlas Lumber Company* in 1941,<sup>84</sup> Davis, J. objected strenuously to the barring of access to the ordinary courts in relation to those matters which fell within exclusive Dominion competence. In addition he said "the Debt Adjustment Board of Alberta is an administrative body and is not validly constituted to receive what is in effect judicial authority."<sup>85</sup>

---

83 Reference re Alberta Debt Adjustment Act (1942) 1 D.L.R.1 at page 9

84 (1941) 1 D.L.R. 625

85 Ibid., page 637



In the Debt Adjustment case, Duff, C.J. made strong remarks in the same connection and held that the Act was ultra vires because it was infringing on Dominion jurisdiction.

It is clear that the existing Dominion legislation did not cover the whole field, and that the provincial legislation was an attempt to block part of the gap. It is equally clear from the opinion of the majority of the Supreme Court that future demands in respect of debt adjustment should be addressed to the Dominion and not to provincial authorities. It is worth considering that the decision might have been different if the Alberta Act had conditioned the right to sue on leave of a court as in the Mortgagors and Purchasers Relief Act, 1933, (Ont.) c. 35, instead of a board. The trend in the constitutional decisions of the Supreme Court in regard to taxation, banks and banking, bankruptcy, etc., has consistently followed the course of maintaining the literal division of legislative authority. The division of spheres of power set down in 1867 has not varied and it is due to the persistent adherence of the Supreme Court in maintaining this legislative division that the present division owes its existence. In all probability the decisions in these fields have been easier to make than in other spheres, since the powers of the Dominion were spelled out in great detail in section 91, and also because the problems were clearer and more specific. In any case, in the field of financial matters, the Supreme Court did not budge from the trend it started in maintaining the textual division of legislative powers. The adherence to this trend based on the grounds that it was in the best interest of Canada as a whole to have the central government control in the legislative area of jurisdiction, without reference to the balance of power principle so evident in other spheres of legislation.

TRENDS IN DECISIONS IN REGARD TO PROPERTY AND CIVIL RIGHTS

In examining the constitutional decisions on the issue of property and civil rights, it is again necessary to acknowledge that the decisions of the Judicial Committee have had a strong effect on those of the Supreme Court and hence it is necessary to examine the decisions of both Courts in order to determine whether the trend followed by the former body has promoted the birth and continuation of a similar one in the Supreme Court. The solution of the issues raised by the clash over the scope of property and civil rights has had a major part to play in the evolution of the place and scope of the general power of the Dominion and the resultant actual distribution of legislative power in Canada today. The result is still in doubt. Hence, any trend must necessarily be determined by the difference in capacity, from 1867 to the present, of the Dominion Parliament to be able to legislate for those matters of local interest which are important on a national scale, especially social service works.

The conflict between the general power and property and civil rights started with the regulation of the liquor traffic. One of the most important decisions in this matter was handed down by the Judicial Committee in *Russell vs. the Queen* in 1882.<sup>86</sup> This was an appeal from a judgment of the Supreme Court of New Brunswick discharging a rule nisi for certiorari to remove into the Court a conviction against the appellant for selling liquor contrary to the second part of

---

86 (1882) 7 App. Cas. 829

the Canada Temperance Act in 1878. This Court held the Dominion Act to be ultra vires. On appeal, the Supreme Court held it to be intra vires, a decision later upheld in the Judicial Committee. Thus in both the later decisions, the broad Dominion power was upheld over the local provincial power.

Later decisions followed a different pattern. In two unreported decisions, one in the Supreme Court and the appeal in the Judicial Committee, on the validity of the Dominion Liquor Licence Act, in 1883<sup>87</sup>, both Courts declared this Act to be ultra vires. Actually, this Act was a purely local licensing statute dealing with the liquor traffic as a purely local problem in local licence districts. It is difficult to reconcile the McCarthy Act decisions with the decisions in the Russell case, since the portion of the Canada Temperance Act in that case was quite similar to the invalid Dominion Liquor Licence Act.<sup>88</sup> The reason may be found in the Hodge case<sup>89</sup> in 1883, where the Judicial Committee declared the new aspect doctrine would apply and declared the provincial Liquor Licence Act to be intra vires under section 92 (8, 15 & 16). Thus, the provinces were declared to be competent to pass laws in regard to local matters under property and civil rights even though the Dominion had general legislation in the same field under the general power. The application of the aspect doctrine was affirmed in the McCarthy Act decisions.

---

87 In the McCarthy Act case, unreported

88 Laskin, B., "Peace, Order and Good Government Re-examined" (1947)  
25 Can. Bar Rev. p. 1054 - 1087 at p. 1066.

89 (1883) 9 App. Cas., 117

In a later reference, A-G Ont. vs. A-G Can. in 1896<sup>90</sup> on an appeal from the Supreme Court as to questions in regard to the relative legislative powers of the Dominion and the provinces, the Judicial Committee reviewed the situation up to date and came forth with the opinion, later accepted as final, that the general grant of power in section 91 was in supplement to the enumerations of that section, that the enumerations of section 91 took precedence over everything else in regard to incidental legislation (doctrine of Dominion Supremacy) and that

If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures.<sup>91</sup>

and,

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.<sup>91</sup>

Also the decision in the Russell case was declared to be not in relation to the regulation of trade and commerce, but was

90 (1896) A.C. 348

91 Ibid., at p.p. 360-361

actually a local matter which had become so serious on a national scale that it had grown into the Dominion sphere under the general grant of power. This decision is one of the most important ones, because in it was formulated the balance of power attitude which determined the course of Canadian constitutional development to the present.

The attitude of the Supreme Court to this same reference is difficult to define accurately, although it invalidated the Ontario Statute. The enactment challenged was actually declared to be valid by this Court in *Huson vs. South Norwich* in 1895<sup>92</sup> by a bare majority. The decision in the latter case was withheld until after argument on the reference had been heard. The result was that a majority invalidated the same enactment it had upheld only a little earlier with a change in personnel of one judge. Actually, in spite of the opposite decisions as to the validity of the same enactment, there was little difference between the views of the majority and minority in both decisions. The views of Strong in the *Huson* case are representative of the feeling of the Court. He said:

...it appears to me that there are in the Dominion and the provinces respectively several and distinct powers authorizing each, within its own sphere, to enact the same legislation.... That is to say, the Dominion, may enact a prohibitory law for the whole Dominion, whilst the provincial legislatures may also enact similar laws, restricted of course to their own jurisdictions.... On the whole, I am of the opinion that the provincial legislatures have power to enact prohibitory legislation to the extent I have mentioned, though this power is in no way exclusive of that of the Dominion, but concurrent with it.<sup>93</sup>

---

92 (1895) 24 S.C.R. 145

93 Ibid., at p. 147

The real difference, so far as the Supreme Court was concerned was on the question whether there was any room for provincial legislation while the paramount power of the Dominion was fully acknowledged.

The dominant trend as set up and followed by the Judicial Committee was further strengthened by the decision in A-G Can., vs. A-G Alta., in 1916<sup>94</sup> although it was not followed in its entirety by the Supreme Court. Here, Viscount Haldane, citing no authority to back his opening statement said:

.....It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada...does not, unless the subject matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject matters entrusted to the provincial Legislatures by the enumeration in section 92.<sup>94</sup>

Apparently he was thinking of the Local Prohibition case of 1896, in which the principle was set up that the enumerations of section 91 were independent of the general grant of power. This is a somewhat different attitude from that taken by the Supreme Court. Here Anglin, J. said:

When a matter primarily of civil rights has attained such dimensions that it affects the body politic of the Dominion and has become of national concern, it has in that aspect of it not only ceased to be "local and provincial" but has also lost its character as a matter of "civil rights in the province" and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the "peace, order, and good government" provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.<sup>95</sup>

---

94 (1916) 1 A.C. 588

95 Insurance Act Reference (1916) 48 S.C.R. 260, at p. 310

This approach was quite different from the emphasis placed by the Judicial Committee on the idea that occasions when local matters would grow to be of national concern would be very few indeed. In fact, this was an attempt to apply the nearly dead aspect theory.

The Supreme Court noted this very cautious and restrictive attitude on the part of the Judicial Committee and obviously felt compelled to let it show up in its later decisions on the same subject-matter. In *Re the Board of Commerce Act and the Combines and Fair Prices Act, 1919*, in 1920<sup>96</sup> Anglin, J., the same judge who had taken a relatively broad attitude in the *Insurance Reference*, reviewed the Judicial Committee's decision in that same case and quoted Lord Haldane when he said that great caution must always be exercised in applying the well established aspect principle. However, even allowing for this interpretation, Anglin went on to declare the legislation valid by saying:

...I think it is better that legislation such as that with which we are now dealing, which undoubtedly affects what would ordinarily be subject matters of provincial jurisdiction, should, if possible, be ascribed to one of the enumerated heads of section 91.<sup>97</sup>

In the same case, Duff, C.J., said:

...if...the legislation does deal with matters which, from a provincial point of view are within any of the first fifteen heads of section 92, it is incompetent to the Dominion unless it can be supported as ancillary to legislation under one of the enumerated heads of section 91.<sup>98</sup>

---

96 (1920) 54 D.L.R. 354

97 Ibid., at p. 365

98 Ibid., at p. 392

This represents a change in approach.

The trend of thought in the decisions of the Judicial Committee had led the Supreme Court to a place where it was undecided within itself as to the proper attitude to take. In this case, the power of the Board of Commerce was sustained on equal division and the drawn decision was appealed to the Judicial Committee which held that the Board of Commerce legislation was ultra vires. In the appeal decision emphasis was again laid on the fact that this particular legislation did not come under any enumeration of section 91, and was of provincial interest since the cause had not reached such paramount and overriding importance as to amount to what lies outside the heads in section 92 and is not covered by them owing to its emergency aspect. Again the Judicial Committee showed itself to be reluctant to apply the aspect doctrine, i.e., subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. The Supreme Court showed itself to be more influenced by the aspect doctrine, which at least tends to make less rigid a purely legal interpretation of the British North America Act. It would appear that while the latter Court for various reasons adhered to the emergency doctrine trend instituted and followed by the Judicial Committee, it was more lenient in deciding where an emergency so declared by Parliament was in fact a true emergency. However, if there is no emergency, the rule of law as set down by the Courts, and more specifically by the Judicial Committee as to the distribution of powers between the Parliament, the Dominion, and the provincial legislatures comes



into use.<sup>99</sup>

In a Judicial Committee decision in a later case, A-G Ont., vs. Reciprocal Insurers in 1924<sup>100</sup> the judgment was delivered by Duff, J. a member of the Supreme Court of Canada, and the same judge who, in the Board of Commerce case had been against the validity of the Dominion legislation. Here in summing up the effect of earlier decisions, he said:

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under section 91, head 27, appropriate to itself exclusively a field of jurisdiction, in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.<sup>101</sup>

Although in this case, the other members of the Supreme Court had not been given the opportunity to give their opinions since the appeal had been made from the Provincial Court directly to the Judicial Committee, his opinion was strongly supported by the balance of powers principle.

This division of opinion in the Supreme Court in regard to the balance of power trend versus the more liberal aspect theory is further exemplified in *The King vs. Eastern Terminal Elevator Company* in 1925.<sup>102</sup> The Dominion Act was an attempt to regulate directly through the Grain Comm-

99. (1922) A.C. 191

100 (1924) A.C. 328

101 Ibid., at p. 342

102 (1925) 3 D.L.R. 1

missioners the flow of grain from the farms through the elevators and finally to the export market. In doing so, the Dominion Parliament was regulating individual trades both locally and in respect of interprovincial and external trades, basing its claim to power on the trade and commerce clause. The principle object of the Act was to protect the external trade in grain. Here Duff, J. followed the trend already laid down in the previous two opinions given by him. He claimed that it was not within the power of the Dominion Parliament to accomplish this object since, although 70% of the grain was exported, the regulation of particular occupations in the provinces was actually a provincial concern, and was not necessarily incidental to the main object. The legislation covering the local trades in this case was an infringement on the provincial sphere of legislation. The Act was declared ultra vires.

The dissenting judgment of Anglin, J., took the other side. He said:

The incorporation of Dominion companies...does not fall under any enumerative head of section 91. It rests on the general power.... That power does not warrant an encroachment on the provincial domain. (Attorney-General for Ontario vs. Attorney-General for the Dominion, 1896, A.C., at page 360) ...If neither the power conferred by the general language of section 91, nor the power under the enumerative section 2, to regulate trade and commerce, taken independently, warrants Dominion legislation which trenches on the provincial field..., I find rather elusive and difficult to understand the foundation for the view that legislation authorized only by the former may be so helped out by the latter that invasion by it of the provincial domain may thus be justified. But the decisive authority of the judgments which have so far determined, cannot now be questioned in this Court. I defer to it.<sup>103</sup>

---

103. Ibid., at p. 6

It appears that at least one member of the Supreme Court did not agree with the prevailing opinion, and in fact he showed the Court its logical inconsistency. The decision of the majority of the court of course is what counts in determining the trend, yet the fact that one judge could adhere to an alternative theory makes possible the supposition the court was undecided within itself in what procedure to follow.

Actually, the trend followed by the Judicial Committee towards an 'expansive' interpretation of the phrase "Property and Civil Rights" at the expense of the now divided enumerations of section 91 and the general power, with a few notable exceptions was considered by that Court as the proper attitude to take in nearly all cases. In several cases,<sup>104</sup> mostly recent, the Judicial Committee has upheld the narrow limits of the Dominion's general power and the correspondingly wide scope of the provincial Property and Civil Rights power. The few cases which varied from the general trend were 'explained' in later decisions as being special cases and not supposed to apply as a general principle.

The most noticeable of these latter decisions going against the trend were the Aeronautics case in 1932,<sup>105</sup> the Radio Reference in 1932,<sup>106</sup> and A-G, Ont., vs. Canada Temperance Federation in 1946.<sup>107</sup> In the Aeronautics case, the judges pointed out that

---

104 Labour Conventions Case (1937) A.C. 326  
C.P.R. vs. A-G, Quebec (1950) A.C. 122  
Canadian Federation of Agriculture vs. A-G, Quebec, Reference  
re Validity of Section 5(a) of the Dairy Industry Act (1950)  
 4 D.L.R. p. 689

105 (1932) A.C. 54

106 (1932) A.C. 304

107 (1946) 2 D.L.R. 1

by section 132 of the British North America Act, the Dominion possesses powers to legislate in relation to matters which, in the domestic sense, would fall within section 92 when these matters have become affected by an international obligation by which Canada is bound. In the Radio Reference case, it was held that matters affected by an obligation arising under an international arrangement would fall within the general power of section 91, because international obligations were not part of the enumerations of either section 91 or section 92. In the last case mentioned, Viscount Simon said:

...The object of the appeal is to challenge the decision of this Board in the case of *Russell vs. The Queen* (1882) 7 App. Cas. 829, or at any rate to deny its applicability to the Act now in question.

...The Board, (in 1878), however, held that the Act did not deal with any of the matters exclusively reserved to the Provinces and upheld the validity of the statute on the ground that it related to the peace, order and good government of Canada. This decision has stood unreversed for 63 years.

...Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject in so far as it specially affects that Province.<sup>108</sup>

This emphasized the liberal interpretation of the British North America Act. As it has been shown this 'counter trend' in the decisions has not been followed extensively, being explained as "special cases". Many other decisions handed down about the same time follow the restrictive pattern.

---

108 Ibid., at p.p. 2-3

The Supreme Court in its opinions during this period tended strongly to follow the pattern laid down by the Privy Council within broad limits. In Reference re Natural Products Marketing Act in 1936,<sup>109</sup> Duff, C.J., said:

The initial clause of section 91 has been many times considered. There is no dispute now that the exception which excludes from the ambit of the general power all matters assigned to the exclusive authority of the legislatures, must be given its full effect. Nevertheless, it has been laid down that matters normally comprised within the subjects enumerated in section 92, may, in extraordinary circumstances, acquire aspects of such paramount significance as to take them outside the sphere of that section.<sup>110</sup>

On commenting on the Aeronautics Case and the Radio Reference, he dismissed them as having no authority in this case and stated that the Supreme Court was bound by the decisions of the Judicial Committee restricting the Trade and Commerce power. This decision may well be described as the locus in classicus of the law on this point as far as the Supreme Court is concerned. This Court has failed to apply the 'aspect doctrine' in recent cases, perhaps because it is awkward and illogical and seemingly incorrect to seek to apply the aspect doctrine to such essentially different clauses as the general power which is vague and indefinite, and property and civil rights which is concrete,<sup>111</sup> or perhaps, and more obviously

---

109 (1936) 3 D.L.R. 622

110 Ibid., p. 635

111 O'Connor, W.F. Report to the Senate of Canada on the B.N.A. Act, Ottawa, King's Printer (1939) annex 1 p. 52  
 Richard, F.R. "Peace, Order and Good Government" (1940) 18 Can. Bar Rev. 2 p. 243 to 260  
 Tuck, R. "Canada and the Judicial Committee of the Privy Council" (1941) 4 U. of T. Law Journal p. 33-75  
 Labrie, F.E. "Canadian Constitutional Interpretation and Legislative Review" (1950) 8 U. of T.L.J. p. 298-351

it was keenly aware of the opinions to the contrary held by the Judicial Committee. In any case, the restrictive trend has prevailed despite the few isolated cases to the contrary.

There is one possible and indeed probable exception to this trend. The scope and limits of section 91(7) giving exclusive legislative power to the Dominion in relation to militia, military and naval service and defence, has not been defined definitely and it would appear that other headings, notably trade and commerce, could be bolstered by tying it in with this section on the basis of a national emergency. In the Reference re Natural Products Marketing Act,<sup>112</sup> Duff, C.J., pointed out that in his opinion not every subject of local interest which attained national interest could be classed under the general power, but only those of the gravest concern would come under the Dominion sphere of power. In one case, Reference re Wartime Leasehold Regulations in 1950,<sup>113</sup> (which is a reference and does not hold the same authority as an actual case), Kellock, J., held that the Dominion Parliament was judge of whether or not an emergency existed. The Essential Materials (Defence) Act, 1950 is in force at present. This Act provides for the control and regulation of productions, distribution, and use of essential materials and services which in the government's opinion are necessary for the defence of the country. This Act actually ties up the two sections of 91 and to date it has not been challenged.

---

112 (1936) S.C.R. 398

113 (1950) S.C.R. 124

Thus, although the trend has been accepted definitely by the Supreme Court, the question of the scope of the property and civil rights heading is still unanswered in many respects.

As it stands now, the trend in the Supreme Court of Canada is to restrict both the enumerations and the general power of section 91 in favour of provincial property and civil rights. It would appear that in order for the Dominion to exercise effective power in regard to matters affecting the property and civil rights power of the provinces, legislation based on an enumeration of section 91 must necessarily also be based on the general emergency power. Instead of applying the aspect doctrine, which actually would have given the Supreme Court the opportunity to explore more fully the whole realm and background of the legislation with the probable result that a more practical division of spheres of authority would have resulted, the Court has stayed within the boundaries of a strictly legal and as a result conservative interpretation. It may be that the Court had no wish to accept even greater responsibility for the social and economic welfare of Canada than it now has, by changing over to the use of the aspect theory. It is certain that the Judicial Committee with its impersonal attitude and the doctrine of stare decisis to guide it was a significant deterrent against a distinctive Canadian trend. Now that the Supreme Court is the last court of appeal, it may take a more actively personal and less strictly legal attitude towards the solving of the problem of the scope of the property and civil rights clause, especially

in view of the obvious disagreement within itself over this matter. However, if the present trend is continued, the Dominion sphere of power will continue to be a narrow, imperfect, unsatisfactory and incomplete shadow of what it could be with a broader, more liberal and less restrictive approach.

#### TRENDS IN REGARD TO DECISIONS IN SECTION 91 (2)

##### THE REGULATION OF TRADE AND COMMERCE

Any trend that may be found in the constitutional decisions of the Supreme Court in regard to the regulation of trade and commerce, section 91(2) is of great importance in determining the distribution of power between the Dominion and the provinces. As has already been pointed out, the trend followed by the Judicial Committee in regard to the 'broadening' of the provincial grant of power based on the property and civil rights enumeration of section 92 has resulted in a 'narrowing' of the Dominion sphere of power under section 91 in an attempt to balance the two grants of power. The trade and commerce power even as it is now is important since it covers a wide scope, embracing as it does such matters as trade and labour relations, import and export of goods, marketing in agriculture and elsewhere, and the general regulation of the whole scheme of economic activity in the country. Any lessening of its scope must lessen the effectiveness of the central government to govern in this economic sphere.

The words "Trade and Commerce" were difficult to interpret, since although they are wide in scope they are vague



and indefinite. This type of grant of power has been subject to a whittling process by the Courts in their interpretation of the British North America Act, since, by trying to make the meaning more definite, limitations were placed on the scope of the phrase by each succeeding constitutional decision. The Supreme Court gave a broad sweep to this power in early decisions, such as *Severn vs. the Queen* in 1874<sup>114</sup> and the *City of Fredericton vs. The Queen* in 1880<sup>115</sup>. In these early decisions, the Court considered that this subsection included the whole sphere of what may be considered trade and commerce. In other words the trade and commerce power was considered to be a general power, having a wide scope and relatively no limitations within its own sphere.

The start of the whittling process came in a decision first made in the Supreme Court and later upheld in the Judicial Committee. In *Citizen's Insurance Company vs. Parsons*, *Queen Insurance Company vs. Parsons* in 1881<sup>116</sup> the validity of an Ontario Act providing for statutory conditions in fire insurance and its application to policies issued by a Dominion company was challenged on the ground that it was an infringement of the Dominion Trade and Commerce power. A majority of three to two in the Supreme Court upheld the Act. In this case, Ritchie, C.J., said:

---

114 (1878) 2 S.C.R. 70

115 (1880) 3 S.C.R. 505

116 (1881) C.R. App. Cas. 406  
(1881) 17 App. Cas. 96

I think the power of the Dominion parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the local legislatures to regulate property and civil rights in respect to all matters of a purely local and private nature...I do not think the local legislatures are to be deprived of all power to deal with property and civil rights, because Parliament, in the plenary exercise of its power to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the local legislatures of their powers - the exercise of the powers of the local legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe.<sup>116A</sup>

He went on to say that he felt the Act was not an infringement of section 91(2) since insurance was not trade and commerce but rather came under property and civil rights. The dissenting judgments took the opposite view. Taschereau said:

...we are not called upon to give a general definition of this word 'Trade' as used in the Act. In the interpretation of the constitution, general definitions are to be avoided. In this case, all that is necessary to determine is, whether the word embraces insurance companies, and their contracts, and, in my opinion, it does...  
...if the Federal parliament has the power to create insurance companies, it has the power to regulate them....<sup>116B</sup>

Gwynne went further and stated that the jurisdiction in property and civil rights was over only as much property and civil rights as may remain after the Dominion jurisdiction had been carved out of the general field. This is an application of the aspect theory combined with the Dominion supremacy theory.

Thus, there was a conflict between two general grants of power as to which was supreme. The Supreme Court decided by a narrow majority that the provincial property and civil rights clause was to be preferred before the Dominion trade and commerce grant of power in this case, although it did not rule out the

---

<sup>116A</sup> Ibid., (1881) 7 App. Cas., 96

<sup>116B</sup> Ibid., (1881) C.R. App. Cas. 406

probability that the Dominion would be supreme in a direct clash of jurisdictions. Thus, in Parson's Case, which is one of the leading cases in this matter, the Supreme Court laid the basis for a trend, perhaps unconsciously, to restrict the literal meaning of section 91 (2) in order to afford scope for powers given exclusively to the provincial legislatures. It is interesting to note the decision in the Judicial Committee, in the appeal. In this decision, it was suggested that in the absence of legislation upon the subject of trade and commerce by the Canadian Parliament, the Ontario legislature had authority to impose conditions under property and civil rights so long as those conditions affected only provincial trade. It would appear, that in both Courts, there was the feeling that the Dominion, if it wished, had the ultimate authority in this sphere. However, although the sphere of the trade and commerce clause was not definitely restricted, the basis was set for a trend in that direction.

In a later decision, In Re the Board of Commerce Act and the Combines and Fair Prices Act, 1919,<sup>117</sup> Anglin, J. gave a resume of the cases in which Dominion legislation supposedly based on trade and commerce was declared ultra vires and where provincial legislation supposedly invading the same sphere was declared intra vires. This is a very plain statement of what had occurred up to 1920 and it showed that despite the narrowing of

---

117 (1920) 54 D. L. R. 354

of the general power, as Anglin J., said:

...section 91(2) retains its place and office as an enumerative head of federal legislative jurisdiction and that legislation authorized by its terms, properly construed, is not subject to the restrictions imposed on Dominion legislation that depends solely on the general "peace, order and good government" clause, but, on the contrary, is effective although it invades some field of jurisdiction conferred on the provinces by an enumerated head of section 92.

He went on to set up a test which might be applied in deciding the validity of legislation. He suggested that if a subject matter was in pith and substance a question of general interest throughout the Dominion, it would come under the trade and commerce power. However, if it were from a provincial point of view of a local or private nature, it would come under property and civil rights. In applying this test, he came to the conclusion that the Dominion Act was valid under both section 91(2) and the general power. Duff, J., gave the principle argument for those judges who thought the Act was invalid since the authority conferred on the board to interfere with the proprietary rights of producers, suppliers, and consumers of a certain type of article was improperly based on section 91(2) and was rather a provincial matter. The fact that the Supreme Court was evenly split in this case shows that there were two strong currents at that time, one in favour of the broad interpretation of the trade and commerce clause, the other in favour of a broad interpretation of the property and civil rights clause.

However, although the trend in decisions of the Supreme Court has been mainly in the direction laid out by the later theory, in some decisions in all courts, provincial, the Supreme Court, and the Judicial Committee, provincial legislation has been declared ultra vires because it infringed on the sphere of legislative jurisdiction in relation to the regulation of trade and commerce.<sup>119</sup> This does not mean that the Dominion becomes fully able to pass certain legislation merely because the provincial legislature is not capable. The trade and commerce power is so broad that it is necessary to examine certain facets and the decisions on the interaction of federal and provincial power in its regulation in order to determine whether the trends in regard to one portion of the power is similar to trends in other portions.

#### AGRICULTURE and INSURANCE

Constitutional decisions in regard to marketing in agriculture have been marked by the same division of opinion as has been shown in decisions on the general place of Trade and Commerce in the British North America Act. Certain judges, notably Anglin C.J.C., have been prominent in arguing for a broad interpretation of this clause in pretty well every case it has appeared before them, while others, in particular Duff, J., have stressed the necessity for restricting this clause in order to give the provinces some room to exercise their legislative rights under property and civil rights. It appears that the

---

119 Rex vs. Nat. Bell Liquors Limited (1922) 2 A.C. 128  
Re Sheep and Swine Marketing Scheme (1941) 3 D.L.R. 569  
Lawson vs. Interior Tree, Fruit & Vegetable Committee (1931)  
 S.C.R. 357

latter influence has dominated the decisions in regard to marketing in agriculture.

The decision in *The King vs. Eastern Terminal Elevator Company* in 1925<sup>120</sup> is one example of this influence. In this case, the Dominion Grain Act was challenged on the ground that it was really legislation in relation to property and civil rights. The majority of the Court, led by Duff, J., held that this argument was correct, and that the Act was ultra vires of the Dominion Parliament. Anglin, J., in dissenting, held that the Grain Act was a statute of which the subject matter lay outside all of section 92, and thus came within section 91 under specifically the trade and commerce enumeration. The result was that the Act was declared ultra vires and the Dominion Parliament had to pass another Act declaring that all grain elevators and warehouses were to be works for the general advantage of Canada, and hence under Dominion control.

In a later case, *A-G British Columbia vs. A-G Can.* in 1937<sup>121</sup> the Supreme Court unanimously held that the Dominion Natural Products Marketing Act was ultra vires. After reviewing the various decisions in regard to trade and commerce, Duff, C.J. said:

It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of of particular kind of business such as the insurance business in the provinces, or the regulation of trade

---

120 (1925) S.C.R. 434

121 (1937) A.C. 377

in particular, commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

and,

Legislation necessarily incidental to the exercise of the undoubted powers of the Dominion in respect of the regulations of trade and commerce is competent although such legislation may trench upon subjects reserved to the provinces by section 92, but it cannot, we think, be seriously contended that sweeping regulation in respect of local trade...is, in the proper sense, necessarily incidental to the regulation of external trade or interprovincial trade or both combined.<sup>122</sup>

Thus, it would appear that both the Dominion and the provinces could pass legislation regulating the marketing of agricultural products provided that each stayed within its boundaries. Even so, the two Courts in their decisions gave rise to the startling revelation that there is a gap in effective regulatory control between the boundaries in regard to marketing agricultural products.<sup>123</sup> Thus, definite constitutional limitations were set up against Canada effectively governing herself. This is a direct result of the trend set up and followed by the Judicial Committee to enhance the property and civil rights power at the expense of the trade and commerce heading.

One of the latest decisions in this sphere was the Reference re Validity of Section 5(a) of the Dairy Industry

---

<sup>122</sup> 3 D.L.R. 622 at p. 629

<sup>123</sup> Corry, A.J. "Difficulties of Divided Jurisdiction" (Royal Commission Study, Appendix 7) p.p.11 ff.

Act in 1949<sup>124</sup> . . . . . In this reference the Court accepted the fact that the Dairy Industry Act and its regulations were intra vires of the Dominion Parliament by force of section 95 of the British North America Act. However, the majority of the Court decided that section 5(a) of the Act was not within the sphere of the Dominion Parliament since it had to do with the prohibition of the manufacture and sale of margarine and oleomargarine which were considered to be 'articles of trade' and not products of agriculture. Since these products are 'articles of trade', then they come under provincial jurisdiction unless their production and sale had attained such dimensions as to give it a Dominion aspect and thus bring it under the general power. This, the majority of the Court found, was not so. A minority of two judges dissented and agreed that these products were agricultural products and that their production and sale came under section 91(2). This argument was disregarded by the majority as not (a) following former decisions, i.e., the trend, and (b) not being correct in itself.

In concluding the survey on the decisions affecting the marketing aspect of agriculture it must be said that the situation is not too clear. It is obvious that the trend veers away from a 'wide' interpretation of section 91(2), but so far does not go the whole way and give the provinces the whole sphere of power in this matter. The Supreme Court is quite determined to strike some sort of balance so that both the Dominion and the



provinces will have the opportunity and authority to deal with this matter. The result appears to be that not only is the situation not clear, but also the new problem has arisen, viz., that of a gap in the effective control of some areas of marketing in agriculture. It appears that this is due to the fact that (a) the Court is divided within itself as to the proper course to take, and resulting from this, (b) piecemeal decisions are based on an inconsistent application of the balance of power principle. The majority is apparently determined to maintain the precarious balance on a very narrow basis of purely legal opinion, and not go too far to effective provincial supremacy, while a minority wishes to put more strength into the Dominion power of the regulation of trade and commerce due to a consciousness of the necessity for a practical as well as a legal solution to this predominantly economic and social problem. Future cases to be decided in this matter will determine more fully which path the Supreme Court will take since the present gap in effective regulatory control will be seriously emphasized in an agricultural recession or general depression. Although the trend so far has been to a balance in the middle of the road attitude, the decisions heretofore mentioned may be of lesser importance than formerly, since an effective and realistically practical stand will have to be taken, if not by the Court, then by a revision of the constitution, although the latter solution is apparently far off in the future.

The regulation of Insurance has had a particularly

unstable existence. Several decisions have been handed down, mostly by the Judicial Committee, which have had the effect of making the Dominion government grasp at any means it thought was legal in order to regulate insurance effectively in a country where national regulation of this topic is vitally necessary.<sup>125</sup> The Dominion Parliament has tried to accomplish this end under such varied headings of section 91 as the residuary clause, regulation of trade and commerce, the Criminal Law, Aliens, taxation, etc., without success. Each time the Courts decided that the Dominion Act was ultra vires.

The Courts have consistently held that the whole business of insurance is founded on the making of individual contracts of insurance, and that such contracts, their forms and what goes with them are local in nature, and as such are matters of property and civil rights in the province. Despite the fact that the Dominion Parliament tried to gain its end on various occasions by enacting legislation calculated to conceal its 'real' character, the Courts have sought to discover its 'true substance' and its 'real aspect and purpose' to defeat such 'colourable' moves.<sup>125</sup> Thus, the Courts have set themselves up as being able to discriminate between the true purpose of an Act, as opposed to its pretended purpose, and have gone further by going outside the text of the statute before them to determine its true purpose. The Courts seem to have been particularly eager to find the 'true' purpose in insurance legislation.

---

125 A-G for Ontario vs. Reciprocal Insurers (1924) A.C. 337  
MacDonald, V.C. "The Regulation of Insurance in Canada"  
(1946) 24 Can. Bar. Rev., p. 257-275

The power to make laws in relation to the incorporation and regulation of companies in Canada is divided in the British North America Act. While section 92(11) confers on the provinces the power to incorporate companies with provincial objects, the Dominion Parliament received no similar power as to companies with non-provincial objects. The dictum laid down by the Supreme Court and the Judicial Committee in the decision in *Great West Saddlery vs. the King* in 1921<sup>126</sup> to close this gap was that such a power is covered by the general enabling words of section 91, since there is no other place to put it. Accordingly, the Dominion is deemed to have the power to incorporate insurance companies with Dominion objects and to confer on them the corporate status to do business in the provinces.

The result of these decisions is not so far-reaching as it appears, as it has been tempered by a decision of prior standing in the Courts. Although the companies created by the Dominion cannot be prevented from carrying on business in Canada, and although they are subject to laws of general application passed by the Dominion, Court decisions have whittled down the effective power of the Dominion to regulate these insurance companies. The start of the trend to narrow the regulation of insurance under the trade and commerce heading, may be found in the decision in the *Parsons Case* in 1881.<sup>127</sup> By a majority of three to two, the Supreme Court upheld the

---

126 Great West Saddlery Co. vs. The King (1921) 2 A.C. at p.114

127 Citizens' Insurance Co. vs. Parsons (1881) 7 App. Cas. 96

validity of an Ontario statute prescribing certain conditions which were to form part of all policies of fire insurance, by making the distinction between the status of a company and the way in which the business of the company was carried on. Thus, the provinces can by legislation prescribe the way in which the insurance business and other business, shall be carried on in the provinces. Actually, the principle laid down in the Parsons case has been acted upon in nearly every insurance case since then,<sup>128</sup> whether it was decided by the Supreme Court or the Judicial Committee. The result has been that all persons in Canada, whether Canadians or foreigners, are subject in the conduct of every facet of the insurance business to provincial laws of general operation based on the property and civil rights grant of power. The Dominion may legislate in regard to controlling the general field of operations, but not in the carrying on of the business itself.

The Courts have gone to great lengths in the determination of colourable legislation. In a late case, the Reference re Section 16 of the Special War Revenue Act in 1942,<sup>129</sup> the validity of section 16 was challenged and also two other Acts on which it depended, viz., The Canadian and British Insurance Companies Act, 1932, and the Foreign Insurance Companies Act, 1932. Section 16 itself put a tax on premiums paid by people to a British or foreign company not registered by the Dominion. The two Insurance Acts required these companies to become

---

128 A-G Can. vs. A-G Alta. (1916) 1 A.C. 588  
A-G Ont. vs. Reciprocal Insurers (1924) A.C. 328  
In re Insurance Act of Canada (1932) A.C. 41  
A-G Can. vs. A-G Ont. (1937) A.C. 355

129 (1942) 4 D.L.R. 145,  
 (1942) S.C.R. 429

registered as a pre-requisite to doing business in Canada, and required, as one of the conditions of registration, that each company deposit a sum with the Dominion Government which the Government would determine. It was explained in the Acts that one of the major purposes was to ensure against such companies becoming insolvent and so hurting policy holders in Canada. The three pieces of legislation seemed to depend upon the Dominion power to legislate in regard to Aliens, Taxation, and Bankruptcy, and Insolvency. The Supreme Court held that the provinces could legislate to have the companies register and that the whole scheme was a colourable and hence invalid attempt on the part of the Dominion to legislate in regard to insurance. No reference was made to either the Bankruptcy and Insolvency or taxation powers supporting the Dominion claim to power and it could easily be inferred that the Supreme Court looked at the legislation, saw that it was concerned with insurance, and declared it ultra vires without considering seriously these two supports.

Any major Dominion claim to regulate insurance companies is based on the trade and commerce clause, the scope of which has been progressively limited in favour of the provincial property and civil rights heading. Moreover, despite its attempt to use many other headings of section 91 to bolster its attempt to regulate this vitally important sphere of business in Canada, it has failed completely due to the insistence of the Courts to ferret out any sign of 'colourable taint' in its legislation. It would appear that the Supreme Court in

this sphere at least, has determined to see to it that the present trend is continued. A revolutionary 'about-face' could be made by this Court, but this is very unlikely at present since the trend is so strongly based on precedent.

In the spheres of agriculture, insurance, and trade and labour relations, the Supreme Court has consistently emphasized the superior place of the property and civil rights enumeration of section 92 over the trade and commerce heading of section 91. The aspect doctrine has been disregarded here and section 92 (13) has been regarded as excluding power from the Dominion as well as conferring power on the provinces. W. F. O'Connor has suggested that civil rights in the provinces actually should be confined to civil rights as between subject and subject.<sup>130</sup> The Supreme Court, however, has treated this heading as encompassing the overall regulation of economic activity. The words at the end of section 92(13) "in the province", instead of being restrictive in nature, seem merely to limit the reach of provincial power inside its geographical borders, without permitting federal regulation in those areas where there is an interprovincial aspect to the particular problem. Insurance cases are particularly illustrative of this trend.

In early decisions, the Supreme Court showed itself unwilling to allow section 92(13) to become a residual power, but later it followed the restrictive trend laid down by the Judicial

---

130 O'Connor, W.F. "Property and Civil Rights in the Province" (1940) 26 Can. Bar Rev., p. 331-384, at p. 368

Committee. In early decisions on the determination of the division of legislative power, the Supreme Court felt that :

The right of the local legislatures to legislate as to civil rights...is subordinated to those civil rights not affected by Dominion powers of legislation and to those in the province and not including matters of a general character.<sup>131</sup>

Most of the Judicial Committee's decisions at that time went further and sustained provincial legislation in the absence of Dominion legislation, but would not use section 92(13) as a bar to future Dominion legislation. The later decisions<sup>132</sup> of both Courts tended to coincide in practical results although the Supreme Court was almost always divided within itself. The Judicial Committee based its decisions on the view that federalism rested, in Canada's case, on the provincial property and civil rights clause as is shown in decisions from the Local Prohibition case. In *John Deere Plow Company vs. Wharton* in 1915<sup>133</sup> Lord Haldane said:

"Without expressing a final opinion about it, I should say 'civil rights' was a residuary expression...."<sup>134</sup>

Although the Supreme Court did not go so far, the decisions of both the Courts were remarkably similar. To a certain extent, the former Court and to a much larger extent the latter body, tended to vary from one case to another with a strong dissenting voice appearing in most of the Supreme Court decisions, but always the latter obviously felt itself bound by prior Judicial Committee decisions. In any case, where it could decide the

131 Valin vs. Langlois (1879) 3 S.C.R. 1 at p. 67  
Fredericton vs. The Queen (1880) 3 S.C.R. 505

132 Citizens' Insurance Co. vs. Parsons (1881) 7 App. Cas. 96  
Russell vs. The Queen (1882) 7 App. Cas. 829

133 (1915) A.C. 330

134 See bottom of next page

issue on other than involved constitutional grounds, it did so, despite the fact that this led to distinct variations in decisions between otherwise apparently similar cases and to a distinctly piece-meal approach.

The result of this piece-meal approach to the interpretation of section 91(2) on the part of both Courts was to leave unanswered many questions affecting the economic lives of the citizens of the country. The practice of at times using the property and civil rights clause as a residuary power, with wide control over economic as well as personal rights, and at other times using the trade and commerce power as a limitation on the provincial regulatory power has left gaps where no one government may govern legally. This is borne out in the decisions on the regulation of agriculture and labour. However, this indecision is prominent in pretty well every matter in regard to trade and commerce. The border lines of this power are very clear at places, while at other places they are non-existent. The questions left unanswered cover the whole gamut of economic and personal contract rights, with indecision in each case as to which government may regulate with assurance that its legislation is *intra vires*.

It may be that since the border lines of section 91(2)<sup>134</sup> are not yet wholly determined and that the Supreme Court has vacillated between using first section 91(2) as a dominant power, and then section 92(13) as the residual power, the trend shown in past decisions may be reversed. Although the decisions already

---

134 Remark made during argument in John Deere Case, (quoted in Lefroy, *Constitutional Law of Canada*, p. 246)

135 Scott, F. R. "The Special Nature of Canadian Federalism" *Can. J. Econ.*, Vol. 13 (1947) p. 13-25



given have followed the trend to a narrow interpretation of the Dominion sphere of legislative power, yet there is plenty of problems left wherein some stand must be taken to set up definite principles by which the governments may guide themselves without fear of having legislation declared ultra vires after a lapse of years. Whether or not the trend will turn when these present-day problems, mainly economic, are solved, is doubtful. However, there is in the Supreme Court, a potential capability for almost any change, with each judge being free to give his own opinion. The trend to date has been towards an indefinite decentralization of power, based on the principle of a balanced constitution - a trend which has led to confusion as to the true seat of sovereignty in Canada.

TRENDS IN DECISIONS IN REGARD TO THE FEDERAL CRIMINAL LAW POWER

The Federal Criminal Law Power is set out in section 91(27) and reads as follows:

"The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

On its face this is a broad power and apparently all inclusive. However, decisions in both Courts have determined more specifically the practical extent of its application. The main problem to be solved was the place of provincial legislation in regard to criminal matters under the property and civil rights grant of power and to what degree this residual power involved the protection of the rights of individuals through criminal legislation.

It was early established that the federal criminal law power encompassed the control of human individual conduct through penal sanction and that the Dominion had exclusive jurisdiction in regard to prohibitory legislation. In a reference to the Supreme Court, Jurisdiction of a Province to Legislate Respecting Abstention from Labour on Sunday in 1905,<sup>136</sup> the Court decided that:

---

136 (1905) 35 S.C.R. 581

...it appears to us that the day commonly called Sunday...is recognized in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Ry. reference and is within the jurisdiction of the Dominion Parliament.<sup>137</sup>

This broad interpretation has, with one exception, been maintained by both the Supreme Court and the Judicial Committee in decisions down to the present. The exception was in the Board of Commerce case in 1922,<sup>138</sup> where Lord Haldane referred to section 91(27) as requiring judicial inquiry into the real 'pith' of the Act, rather than whether it was in the criminal law domain. In a later case, P.A.T.A. vs. A-G Can. in 1931,<sup>139</sup> the Judicial Committee felt obligated expressly to dissociate itself from this rather narrow view.

The growth of federal authority in relation to criminal law since Confederation due to 'new' crimes, has undoubtedly infringed heavily on the provincial sphere of authority under the property and civil rights enumeration. However, the Supreme Court has not seen fit to change even a small portion of the criminal law jurisdiction over to the provinces although the latter may enact criminal legislation

---

137 Ibid., at page 592

138 (1922) 1 A.C. 191

139 (1931) 2 D.L.R. 1 at page 11

closely similar to that of the Dominion. In one case, *Bedard vs. Dawson and A-G Quebec* in 1923,<sup>140</sup> in upholding a Quebec Act prohibiting the existence of disorderly houses, Idington, J. said:

...provincial legislatures have such absolute power over property and civil rights, that so long as they do not in fact encroach upon the powers assigned by the said Act to the Dominion Parliament, it would be almost impossible to question any such exercise of power so given....

I, therefore, do not see that if properly interpreted and construed, the said Act now in question could be said to be ultra vires.<sup>141</sup>

and Duff, J., added:

The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in which the provinces seem to be free to legislate. I think the legislation is not invalid.<sup>142</sup>

Again, Anglin, J. decided:

...I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it - a pure matter of civil right.<sup>143</sup>

Thus, it would appear that so long as the province legislates to safeguard the community from injurious use being made of it, i.e., eradication of the breeding place of crime, and does

140 (1923) 4 D.L.R. 1 at p. 11

141 Ibid., at page 295-6

142 Ibid. at page 297

143 Ibid., at page 297

not legislate to punish crime-doers - a very thin distinction - then its legislation is valid.

The main trend evident in Supreme Court decisions on the question of criminal law is aptly described in the words of Lord Atkin in the Judicial Committee decision in *A-G, B.C. vs. A-G, Can.* in 1937,<sup>144</sup> where he said:

The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in section 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule, is to deprive the citizen of the right to do that which, apart from the amendment, he could lawfully do. No doubt the plenary power given by section 91(27) does not deprive the provinces of their right under section 92(15) of affixing penal sanctions to their own competent legislation. On the other hand, there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments.<sup>144</sup>

This conception of the criminal law has been instrumental in reserving to the Dominion government alone the changing sphere of 'criminal jurisprudence', a wide area encompassing the acts which are declared by Parliament to be crimes. This approach has been prominent in every Supreme Court decision in regard to the interpretation of the criminal law enumeration of section 91.

---

<sup>144</sup> *A-G, B.C. vs. A-G Can.* (1937) 1 D.L.R. 688 at p. 690

TRENDS IN DECISIONS IN REGARD TO THE TREATY POWER

The power of Canada to conduct its external relations by means of treaties has undergone extensive changes since 1867. Treaty obligations originally were considered by the Supreme Court to be a matter of purely federal concern, but in more recent times a different approach has caused this Court to change its original conception, and to severely curtail the power of the Dominion to implement its treaty obligations. The trend has been to move executive and administrative power, rather abruptly away from federal jurisdiction, not to place it in the jurisdiction of the provinces, but rather to settle it somewhere in between.

The phrasing of section 132 of the British North America Act distinctly sets forth the need for, and the position of, the legislative jurisdiction of the treaty making power. While the Crown, i.e., the executive of the Dominion government, possesses prerogative authority to enter into obligations toward foreign states diplomatically binding Canada to fulfill these obligations, this does not permit the Crown by treaty to effect directly a change in the law governing the rights of private citizens. This requires supplementary legislation to make the treaty obligations effective, and it was for this reason that section 132 was included in the British North America Act. The Dominion Parliament could give legislative effect to matters over which it already had control but where the rights of the provinces were at issue,

it was necessary to turn to section 132. The problem then is for the courts to ascertain the extent of authority embodied in this section.

The problem was recognized in a relatively early reference in 1922. In *Re Employment of Aliens*<sup>145</sup> Duff, J., said:

Three views are perhaps conceivable as to the scope of the authority arising under section 132. It might be supposed that it was intended to give jurisdiction only in relation to those matters which are committed to the authority of parliament by section 91 and other provisions of the British North America Act. It might be supposed, on the other hand, to constitute a delegation of the entire authority of the parliament of the United Kingdom, in so far as the execution of such authority might be required for the purpose of giving effect to the treaty obligations of the Empire within Canada or in relation to Canada. On the other hand, it may be supposed that a less sweeping authority is conferred by this section; that it is subject to some limitations arising out of co-ordinate provisions of the British North America Act itself. As to the first of these views, it may, I think, be at once rejected upon the ground that otherwise the section would be quite unnecessary. 146

In discussing the last two viewpoints, he stated that in this case it was unnecessary to pass on these points. He went on to say:

The authority given by section 132 is an authority to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only...; 146

Thus, at that time, the Supreme Court considered that imperial and national matters could be separated from matters of purely Dominion concern. Accordingly, despite the fact that

145 (1922) 63 S.C.R. 293

146 Ibid., at page 295

the provincial Act dealt with civil rights, it was declared to be ultra vires, because it abrogated rights guaranteed by the treaty. Unfortunately, the Court did not go further and give a distinction between imperial and national matters on the one hand, and purely Dominion matters on the other. However, it did justify the invalidity of the provincial Act under section 132, although it cast a shadow of doubt on the power of the Dominion to implement certain kinds of treaties.

The distinction between Empire or imperial treaties and those effecting purely Dominion matters may be taken as meaning that the Court was uneasy about giving the Dominion government a completely free hand in the making of treaties.<sup>147</sup> It is interesting to note that in the United States the Supreme Court upheld the federal treaty-making power and has declared that treaties may override state legislation without reservation, although the proposed Bricker Amendment, if passed, would severely curtail this power. The Supreme Court of Canada was unwilling to go that far, and may have been influenced by decisions at that time which were declaring Dominion legislation ultra vires because the subject matter legislated upon was considered to be in the provincial sphere of jurisdiction.

Since the situation was not yet too clear, the Dominion Government hesitated before committing itself to implement the treaties passed after the First World War. In the Reference,

---

147 MacKenzie, N.A. M. "Canada and the Treaty-Making Power,"  
15 Can. Bar Rev., 1937, pp 436 to 454

Jennings, V.I. "Dominion Legislation and Treaties," 15  
Can. Bar. Rev., 1937 pp 455 to 463



In the matter of Legislative Jurisdiction over Hours of Labour <sup>148</sup> in 1925, the Supreme Court was asked its opinion as to firstly, the obligations of Canada in respect to Part XIII (the Labour section) of the Treaty of Versailles, and, secondly, the obligations of the Dominion Parliament in respect of the Conventions of the International Labour Conferences stemming from Part XIII. The Court decided that in regard to the first part of the Reference the Government of Canada had only to present the Convention to the proper authorities in Canada for legislative or other action—that both the Dominion and provinces were the appropriate and competent authorities, each in its proper sphere. It further stated that the Dominion was under no positive obligation to ratify any of the Conventions. The Court did not answer another part of the Reference as to what the situation would be if the Dominion would ratify one or more Conventions. The view was taken that there was a distinction between formal treaties to which His Majesty, acting on the advice of his Canadian Ministers, was a party, and the less formal Conventions in which His Majesty had no part except through the action of the Governor-General in Council. It was considered that in the case of formal treaties, the Dominion could legislate under the powers contained in section 132. An example of a formal treaty was the Boundary Waters Treaty between Canada and the United States, and for which the Dominion legislation implementing it specifically declared

that it amended and altered existing provincial legislation. This legislation has not been challenged. The situation in the case of Conventions was less clear and it was generally considered that the Dominion did not have the power to implement such Conventions if they invaded the field of provincial rights.

In two later references to the Supreme Court, however, the situation was cleared up as first that body and later the Judicial Committee passed judgment on this clouded issue. In *Re Aerial Navigation*<sup>149</sup> in 1931 the judges each reached the same basic decision but for different reasons and based on different principles. The significant point is that the Supreme Court decided that Parliament has the power to enact all legislation necessary to secure the effective performance of all international obligations devolving upon Canada under a treaty such as the "Convention Relating to the Regulation of Aerial Navigation" by virtue of section 132. It also decided that apart from section 132, Parliament has not legislative jurisdiction over the whole subject of aerial navigation in Canada. The Supreme Court, beside lumping Conventions and Treaties together also came to the conclusion as Duff, J., said:

---

149 (1931) 1 D.L.R. 13

The Dominion, I repeat, has full authority under section 132, to give effect to the rules embodied in the Convention and to take effective measures for the enforcement of them. It is now settled...that provincial legislation repugnant to legislation of the Dominion under section 132 is thereby superseded. <sup>150</sup>

and Newcombe, J., said:

Dominion powers derived under section 132 should, I think, be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined. The Dominion is, by that section, authorized to exercise these powers for performing its treaty obligations, and equally so, for performing those of a province; and this is true, irrespective of the question as to where the power would have resided if section 132 had not been enacted. <sup>151</sup>

Obviously, this was a change from the opinion in the previous reference. In the second reference, *Re Regulation and Control of Radio Communication*<sup>152</sup> in 1931, the Supreme Court handed down a similar opinion reinforcing the tenants enunciated in the *Aviation Reference*. Again, the reasons were varied. One judge, Anglin, C.J.C., held that radio communication was within the Dominion jurisdiction because as he said:

My reason for so concluding is largely that overwhelming convenience - under the circumstances amounting to necessity - dictates that answer. <sup>153</sup>

hardly a strictly legal principle, and went on to say that he failed to find anything of a local or private nature in radio communication such as would exclude Dominion jurisdiction

150 Ibid., at page 30

151 Ibid., at page 34

152 (1931) 4 D.L.R. 865

153 Ibid., at page 866

over it. He further added:

If, however, it should be found impossible to assign that subject-matter to any specifically enumerated head of legislative jurisdiction, either in section 91 or section 92 of the British North America Act, it would seem to be one of the subjects of residuary power under the general jurisdiction conferred on the Dominion by the opening paragraph of section 91. <sup>154</sup>

Rinfret, J., said:

...in treaty matters the federal powers are probably unlimited.

But, if we confine ourselves to the national field, my opinion is that...the basis of the jurisdiction in matters of radio is primarily in the hands of the provinces. <sup>155</sup>

The effect of these opinions, one based on expediency, the other on a liberal and literal interpretation, was to provide the Dominion with unlimited jurisdiction under the treaty power.

Although all the judges agreed that this was the correct solution, the different reasons for doing so are very significant. Two judges, Anglin, C.J.C., and Smith, J., decided that the regulation of radio was within the Dominion jurisdiction primarily because it was not in the provincial jurisdiction and not because of powers conferred on the Dominion by section 132, while Rinfret, J., and Lamont, J., followed the example set up in the Aerial Reference that the regulation of radio was under the jurisdiction of the

<sup>154</sup> Ibid., at page 867

<sup>155</sup> (1932) 1 D.L.R. 58

Dominion if that government legislated in relation to it to implement a treaty under s.132, but normally it was a provincial matter. The difference in reasons sets up the basis for two possible and distinct trends in regard to the treaty power. Thus the decision in the latter Reference was not so clear as it seems at first glance due to its conflicting inferences.

The decisions of the Judicial Committee in these two References supported those given by the Supreme Court. In the first, *Re Aerial Navigation*<sup>155</sup> in 1932, Lord Sankey stated:

Their Lordships...consider the governing section to be s.132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries...It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary for performing the obligations of Canada, or any Province thereof.<sup>156</sup>

This clearly seemed to cover all treaties and agreements and was fully in support of the decision handed down by the Supreme Court. In the second Reference, the *Radio Case*,<sup>157</sup> in 1932, again, the Judicial Committee comes to the same conclusion as the Supreme Court, but as in that Court, the reasons for the decision tended to deduct from the clarity of the principle upon which it appeared to be based--a broad approach to s.132. The Judicial Committee tended to separate the treaty from the convention, and place it within Dominion

---

<sup>156</sup> Ibid., at pages 67-68

<sup>157</sup> (1932) A.C.304

jurisdiction under s.132. The Dominion's powers in regard to conventions were confined to the general grant of power in s.91, which had been badly whittled down by previous constitutional decisions. The Judicial Committee went on to state that in this case, although the convention was not a treaty as is defined in s.132, it came to the same thing.

The result of the opinions in the Radio and Aeronautic References was to start a shortlived trend giving the Dominion Parliament full control over the legislative implementation of any treaties or conventions under s.132 and also to set up the basis for the destruction of this trend since the diverse principles upon which some of the judges' decisions were based formed the basis for a more restrictive trend in later decisions. This dual trend was stressed in an opinion given by the Supreme Court in Reference Re Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act and the Limitations of Hours of Work Act,<sup>158</sup> in 1936, in which three judges declared the Acts to be valid while three thought they were invalid. In this case the Acts were passed by the Dominion Parliament in 1935 in compliance with the draft convention respecting minimum wage fixing machinery adopted by the General Conference of the Labour Organization of the League of Nations in 1928. The real question was whether these statutes were constitutionally effective to alter the law of the provinces without their consent by bringing that law into conformity with the stipulations of the convention so ratified.

---

<sup>158</sup> (1936) 3 D.L.R. 673

Duff, C.J.C., in reviewing the decisions relative to this Reference said:

...by the combined effect of the judgments in the Aeronautics case and the Radio case, the jurisdiction of the Dominion Parliament in relation to international obligations is exclusive; and, moreover, as such matters are embraced within the authority of Parliament in relation to peace, order and good government, its power is plenary.<sup>159</sup>

He went on to say that the old supposition that s.132 was the sole source of authority for Parliament in respect of the enforcement of international obligations was now void and that:

It is now plain (as a result of these two decisions of 1932) that the provinces have no jurisdiction to legislate for the performance of such obligations, whether they be obligations within s.132 or whether they be outside that section and within the scope of the general power to make laws for the peace, order and good government of Canada. Such obligations, we repeat, it is now settled, are not matters within the subjects of s.92 or the enumerated subjects of s.91.<sup>160</sup>

Two other judges concurred with this opinion.

Thus, half the Court decided, in the light of past decisions both in the Supreme Court and in the Judicial Committee, that the Dominion was justified in passing the legislation to implement the conventions, but it could not do so under s.132, a partial and significant variation from the opinions given in the Radio Reference.

The dissenting judges reached a different conclusion by basing their opinions on a different approach. Rinfret, J., said that in his opinion that in the Radio and Aeronautic

159 Ibid., at page 689

160 Ibid., at pages 689-90

References, the Supreme Court and the Judicial Committee were dealing with conventions of an entirely different type from the one at hand. Further, the decision in the 1925 Reference in regard to Hours of Labour was the conclusive and only authority binding on this Reference.

Cannon, J., based his opinion on the principle that Canada was a federal, not a unitary state and decided that this convention was different from the Radio and Aeronautic conventions on the ground that the latter subject matters were not known in 1867, while labour was. Crocket, J., gave yet another reason. He stated that the judgment of

the Judicial Committee in the Radio Reference had clearly declared that s.132 could not be relied upon as empowering the Dominion Government to implement the conventions, and that section 91 must be used as the source of power. From this he concluded that if the subject matter was actually covered by s.92, then the Dominion could not implement the convention. It is hard to see the logic of this statement in the decision rendered by the Judicial Committee in the Radio Reference, but the judge used the argument to declare the Dominion Acts invalid.

The opinion given in this Reference was rich in significance. One result was that while the trend towards confirming that the Dominion was able to implement its treaty and convention obligations was not rejected entirely, there was a rather indefinite unclear tendency towards a



joint Dominion-Provincial jurisdiction in the realm of foreign relations. Another observation is that the judges approached the whole realm of external relations in a haphazard illogical manner and with no basic principle in mind. Still another result was that there was still no clear definition of Empire Treaties as used in section 132 of the B.N.A. Act. In the Radio case, Empire Treaties had been considered by the Supreme Court to include conventions to which his Majesty was personally not a party, and which do not conform to the ordinary formal requirements of normal treaties. The Judicial Committee had agreed that, while such a convention was not a treaty as is defined in section 132, it actually came to the same thing. Yet in this later Reference, three out of six judges either ignored or excused the Radio and Aviation decisions and decided that such conventions were not the same thing as treaties, in order apparently, not to limit Canadian autonomy so much as to protect provincial rights. As well, all six judges rejected the contention that the Acts were valid under section 132.

In the appeal to the Judicial Committee on this same Reference<sup>161</sup> in 1937, Lord Atkin upset the trend followed by that Court in the Radio and Aviation cases and went even further than the dissenting opinions in the Supreme Court in protecting provincial rights at the expense of Dominion autonomy. This decision which is now the most important one in point of reference has laid down

---

161 (1937) 1 D.L.R. 673

that Dominion Treaties, i.e., those treaties which the Dominion ministers advise His Majesty to conclude on behalf of Canada, are not 'Empire Treaties' as laid out in section 132, and that the Dominion Parliament may not give legislative effect to them if they deal with matters reserved to the provinces by the B. N. A. Act. This is a reversal from previous decisions of the Judicial Committee, and is the narrowest interpretation of section 132 yet handed down. The reason for this reversal, as stated in the decision is the same as the reason given by the three Supreme Court judges in declaring Dominion legislation invalid. In reverting to the old 'balanced constitution' trend Lord Atkin said:

In totality of legislative powers Dominion and provincial together, she is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure.<sup>162</sup>

It is obvious the Judicial Committee paid close attention to the opinions in the Supreme Court.

---

162 Ibid., pages 682-3

The result is that the Dominion has no power in external relations save in respect of matters over which it has been assigned ordinary powers by section 91. The one exception is that, in the case of "Empire Treaties" the Dominion may legislate to perform the obligations of the Dominion or any province. The difficulty is that there is no definition of "Empire Treaties" and what would normally be considered to constitute "Empire Treaties", i.e. "Dominion Treaties" has been declared by the Judicial Committee not to be included in section 132. It is worthy of note that the Judicial Committee referred specifically to the unanimous opinion of the Supreme Court that section 132 was not a competent authority on which the Dominion could base its treaty legislation. It would appear that half of the Supreme Court, and the Judicial Committee following after, did not trust the Dominion government to legislate properly on behalf of Canada. Thus, the basis for the change in trend was set up by the Supreme Court and the Judicial Committee, with its apparent desire to adhere more closely to Canadian judicial opinion after the Statute of Westminster in 1930, used this opportunity to further the balance of power trend.<sup>163</sup> The desire to protect the provincial jurisdiction was overwhelming, and here more than in other decisions, that principle was made very plain. As Lord Atkin said again:

---

163 Matas, R.J., "Treaty Making in Canada" 25 Can. Bar Rev., 1947, pages 458-477

...It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the provinces, yet its Government not responsible to the provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.<sup>164</sup>

It is of the greatest significance to note that the Supreme Court initiated the break in the liberal trend.

One peculiar result of these decisions is that if Canada enters a treaty, and the subject matter falls within section 92, the nine provincial legislatures must pass the implementing legislation. However, if the Dominion were to ask the British Government to enter into the same treaty, section 132 would apply and the Dominion could enact the appropriate legislation itself. This rather anomalous position was brought about more by the continuing conservative approach in the Supreme Court than by the apparently more independent viewpoint of the Judicial Committee, since when the decisions are read together it is plain that the latter Court simply picked out the side that supported its 'balance of power' approach, and pressed it to its ultimate conclusion.

There is one unfortunate aspect in this latter decision affecting treaty powers which is not so significant in

---

<sup>164</sup> Weekly Rest Act Reference (1937) 1 D.L.R. at page 682

decisions attempting to solve problems in other spheres of the divided jurisdiction of the B.N.A. Act. The language used in the opinion of the Judicial Committee is quite general in its terms and has left little if any room for movement in any future Reference or case on this same subject. Outside of a complete reversal of the authoritative trend by the Supreme Court, there is little chance of changing the present constitutional position in regard to the treaty power. The situation in other spheres is easier in this respect since the situation is not too clear in many respects, there are problems still to solve, and the Supreme Court is free to follow the present trends, or to veer off in a fresh direction without openly defying the doctrine of stare decisis.

It is worthy of note, though, that the Supreme Court could very easily decide that the principle set down in the 1937 decision would not apply to any new situation and that the liberal approach of the Radio and Aeronautic cases should apply. This would not be the first time this body has abruptly reversed former decisions in the same field. However, authoritative decisions are hard to ignore and it is impossible to foresee with any accuracy the future trend of decisions in the Supreme Court in regard to the treaty power.

## CONCLUSION

In considering the judicial decisions of the Supreme Court since 1867, in the interpretation of the division of legislative powers in the British North America Act, it appears that they may be grouped in three fairly distinguishable periods.

↳ The first, which lasted until about the turn of the century, is the period of the dominance of the British North America Act and the theories of the framers of the constitution. The tradition was still fresh - especially that conceived by Sir John A. MacDonald - that the constitution must be the vehicle to establish Canada as a national power commensurate with the potentially national scope of the economy, and it was felt that the constitution, i.e., the British North America Act, must be adapted to the various crises of human affairs. This period was one when both the Supreme Court and the Judicial Committee resolved legislative conflicts by referring to the British North America Act itself, rather than to a former decision which might have some application to the case at hand.

The second period stretches up to about 1930, but merges with the third period in many ways. This was the period when constitutional theory was of the greatest importance. The text of the British North America Act faded into the background, and former decisions were more and more cited and relied on. The one basic principle formulated by the Judicial Committee concerning the absolute necessity for the proper balancing of two equally sovereign legislatures was perfected in this period,

although it was not wholly accepted by the less objective, or perhaps more interested Supreme Court. This principle, which has affected the whole sphere of the division of legislative power in Canada, was not expressed in the British North America Act, but rather owes its origin to judicial sanction and encouragement. The effectiveness of this principle depends on the will of the Courts since the determination of legislative ability involves the choosing of one legislative aspect over others, and the Judicial Committee chose to uphold the complete equality of status of the Dominion and provincial legislatures. Subsidiary theories, such as the aspect doctrine, the trenching and ancillary doctrines and, the paramountcy doctrine, become of first importance by themselves, rather than as tools for the formation of the constitution of Canada to make ~~her~~ a national power able to look after her affairs efficiently and capably. The net result of these doctrines, with the possible exception of the aspect doctrine, has served to put the national law-making power into a strait-jacket as far as the regulation of national and international affairs are concerned, in situations other than national emergencies. This is obvious in the restrictions put on the Dominion government to control and legislate for such matters as insurance regulation, labour matters, the implementation of treaties in regard to external affairs, etc.

The last period is the present, starting about 1930;

it is the period of judicial review when the Supreme Court, heir to the accumulated doctrines of its predecessors, finds itself with a choice of either upholding the balance of power principle, and accepting the old doctrines and their results substantially without question, or emphasizing a new approach based on a new and more applicable basic principle. Actually, while the influence of the second period is still strongly superimposed on this relatively new period and necessarily determines its course to a great extent, the Supreme Court, now alone the last Court of Appeal, is gradually leaning away from a slavish adherence to the application of the set principle of the balance of power. It is vested with substantially complete jural freedom of choice as to the type of decisions it makes, and judging from the great variety of opinions given in recent decisions its members are taking advantage of this opportunity to the fullest extent.

An examination of the former decisions of both Courts and their practical results shows the awkward position of the division of legislative powers today, and the pressures building up to correct it. The result of the basic trend from reference to the British North America Act, then to theories, was to set up a state of affairs in Canada that is extremely difficult to repair unless by a change in the distribution of the legislative powers by constitutional amendment. Constitutional theory did not follow economic fact and there exists today a legislative gap between provincial and federal control not subject to any one sovereign control, except a rather indefinite dual control which



so far the two governments have not been able to set up. This state of affairs has become so serious from an economic point of view that constitutional conferences have been held frequently since 1930 in a vain effort to bring the constitution up to date.

A solution may be found in the change in approach in the decisions being given in the present period. As has been pointed out previously, the Supreme Court has been divided within itself as to the proper solution of many disputes. Until recently, the tradition of the second period, supported, presumably, by the knowledge that the Judicial Committee was the last Court of Appeal, has been strong enough to sway a majority in favour of adherence to the old theories. Lately there has been a great deal of variation in the opinions of the members of the Court and, since 1949, a tacit acknowledgment of a broadened jural freedom. If the Supreme Court of Canada follows in the path of the Supreme Court of the United States, as it seems to be doing, it will develop a broad unphilosophical approach to match its broad jural freedom. A trend based on an increasing materialist and relativist approach is obvious in the minority decisions of various cases since 1920 and especially in the latest decision in the Jehovah Witnesses Case.<sup>165</sup> The Supreme Court, to a far greater extent than the Judicial Committee, has made itself responsible for the welfare of the people, since it had always been reticent about accepting wholeheartedly the balance of power principle embraced so fervently by the Judicial Committee.

---

<sup>165</sup> Saumer vs. City of Quebec and A-G Quebec (1953) 4 D.L.R. at page 641

While it is difficult to determine precisely the extent to which the Supreme Court will further this new trend aimed at producing a flexible constitution, it is possible to point out the forces encouraging the general trend embodying a freer, more liberal, and less dogmatic approach to legislative problems. The trend is due in part to the building up of a large body of differing but quite legal and proper antecedents and in part to the practice of allowing each judge to give his own decision if he wishes. As well, despite the fact that the Supreme Court regards decisions on References as clearly limited in authority, the Constitutional Reference is becoming a regular practice, and in future constitutional law may become a matter of mainly inter-governmental contest, thus driving the Court onto the stage of political controversy in the guise of settling a purely legal problem. In any case, it is questionable whether the old and still predominating tendency to emphasize a disinterested approach without regard to social and economic consequences could be maintained by a Court which is appointed by the federal government. In a recent case, A-G, Ont. vs. A-G Can. (Abolition of Appeals Case)<sup>166</sup> in 1947, the Judicial Committee pointed out that final recourse to a tribunal, in the constitution of which the provinces have no voice, is an impairment of an element in provincial sovereignty. The inference is that in the opinion of the Judicial Committee, the Supreme Court would break away from the balance of

---

166 (1947) A.C. 154

power principle even more than it has already, and would favour the Dominion Government in future decisions to the detriment of the provincial governments.

While the new state of affairs is still too new to pass judgment on this opinion, it would appear, in looking over the decision in the Civil Rights Case in Quebec,<sup>167</sup> that the Supreme Court is going to continue to permit each judge to give his own opinion and hence tend away from the clarity and certainty in public law that the Judicial Committee provided, and to a large number of conflicting opinions. From this stems the fact that the number of propositions from which alternative major premises may be derived for future decisions is increased. Thus the doctrine of stare decisis, which is supposedly the strongest guard against deviations in a trend, is actually most easily adhered to when there are many precedents to follow. Thus there are powerful reasons why the Supreme Court should extend the liberal and piece-meal approach it is following, and no strict legal reason why it should adhere to the old theory of the balance of power so precious to the Judicial Committee.

One result is that the trend from the strict approach to a more liberal approach has brought the Supreme Court to the position of the Supreme Court of the United States after 1910. - that of the guardian of the well-being of the nation. Despite the fact that some writers have come to a different conclusion in their speculation on what will be the future of the Supreme Court, and the course it will take,<sup>168</sup> the evidence is that in nearly

---

167. Saumer vs. City of Quebec and A-G, Que., (1953) 4 D.L.R. p. 641

168 Friedmann, W., "Stare Decisis" 31 Can. Bar Rev., 1953, p. 723-751.

McWhinney, E. "Judicial Concurrences and Dissents" 31 Can. Bar Rev., 1953, p. 595

every sphere of legislative controversy the Supreme Court has reached the point where it is free to make any decision it wants, within jural limits, and base it on proper precedents. It is obviously following the course of the Supreme Court of the United States, but about 20 to 40 years behind. In many cases since 1920, and particularly in the later decisions, there has been no clear majority in favour of the reason for the final decision, and it was more like a debate among clever thinkers with the individual opinions embodied in scholarly dissertations in favour of one of several logical conclusions. As a direct result of the judges basing decisions on different precedents, and coming to opposing conclusions, the value of judicial precedent diminishes as a guide to future decisions, and the economic and social needs of the moment assume greater and eventually overwhelming importance.

This point in the trend has not yet quite been reached, yet there are obvious symptoms that some opinions are based on other principles than that adhered to so staunchly by the Judicial Committee, or else on the basis of expedience. When seven judges can give seven sets of different reasons as in the Quebec Civil Rights case, and reach a four to three decision, it is obvious that every judge wasn't depending too heavily on judicial precedents.

There is also the evident beginning of a change of emphasis from the interpretation of the division of powers on a strictly legal basis to an interpretation of it in regard to the rights

of individuals.<sup>169</sup> In recent cases, particularly in the Alberta References, economic and social and even political pressures have formed an intellectual jural climate which has been actively conducive in transforming the Supreme Court from a body with a strictly legal approach to a body with a social conscience with the welfare of Canada at heart. With so many legal precedents, the Court is actually allowed the discretion of deciding a case on the basis of impression and of judicial notice in preference to deciding it on evidence admitted to prove all relevant facts.

The old principles and theories have obviously failed, and in the natural reaction there is first a great divergence of opinions and later a new division of alliances within the Court based on the political, economic, social, and religious philosophies of its members. The Supreme Court of the United States has laid out the path and the Supreme Court of Canada appears to be following it consistently, not by design, but by the exercise of similar environmental forces. The present trend towards a more liberal humanistic approach to the interpretation of the division of legislative power will tend to give the central government a broader legislative jurisdiction at the expense of the provinces due to economic and social requirements pressing the Supreme Court to look after the welfare of Canada by giving the legislature power to the one body which can adequately provide for all Canadians equally. The trend

---

169 Boucher vs. The King (1951) 2 D.L.R. 369  
Social Credit References.

will not be smooth, since the piece-meal approach necessitated by the breakdown of the old balance of powers principle will dominate the decisions for a long time. However, until a new basic principle in the interpretation of the division of legislative powers in the British North America Act is found, this garbled, uncertain, indefinite approach will continue to result in a steadily enhanced central government.

### SUGGESTIONS

Since the urgent need for a new general approach to the judicial interpretation of the division of legislative powers in the British North America Act is not likely to be satisfied by the Supreme Court with its present powers and constitutional position, there is a growing necessity to place the Supreme Court in a position and to give it the jurisdiction which will enable it to develop this new approach. The following are suggestions for the attainment of this end.

- 1 The Supreme Court should become a constitutional court in the sense of having its existence and its jurisdiction guaranteed by fundamental law, rather than having its being, as well as its organization and its jurisdiction dependent on the exercise by the Dominion Parliament of the legislative power conferred by section 101 of the British North America Act. This could be achieved by an amendment to the British North America Act, in order to place the Court in the hitherto unachieved position of being regarded by the public at large as a basic and significant element in Canadian self-government.

- 2 Joint judgments should become the rule although not the law. This would avoid the many uncertainties and conflicts in the application of established principles which result from the multiplicity of judgments and the discordance of rationes decidendi. Separate concurring judgments should be allowed only when a member of the majority reaches his concurrent conclusions on substantially different grounds. This would eliminate the popular feeling that decisions in regard to rights, and in religious and racial issues were made on the basis of personal feeling by the judges. Dissenting minority judgments should be allowed, but under no circumstances should the number of judges dissenting be made public.
- 3 While the Supreme Court should have its basis firmly imbedded in the constitution of the country, there should continue to be no constitutional definition of the Court's powers, nor should there be any form of political interference by any government in the opinions of the judges.
- 4 The appointment <sup>of</sup> members of the Court should be continued as at present. If the judges are not subject to any political pressure after they are appointed, there is no need to have the provinces appoint them.

## APPENDIX A

### Section 91 - Powers of Parliament

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, 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; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:-

1. The Public Debts and Property.
2. The regulation of Trade and Commerce.
3. The raising of money by any mode or system of Taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea Coast and inland Fisheries.
13. Ferries between a Province and any British or Foreign country or between two Provinces.
14. Currency and Coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings Banks.



17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and Insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians, and lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

#### Section 92 - Exclusive Powers of Provincial Legislatures

In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:-

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.

3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial Officers.
5. The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals.
8. Municipal institutions in the Province.
9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes.
10. Local works and undertakings other than such as are of the following classes,-
  - a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;
  - b. Lines of steam ships between the Province and any British or Foreign country;
  - c. Such works as, although wholly situate within the Province, are before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.
11. The incorporation of companies with Provincial objects.
12. The solemnization of marriage in the Province.
13. Property and civil rights in the Province.

14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the Province.

#### Section 93 - Education

In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:-

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union.
2. All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada, on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.
3. Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.
4. In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial authority, in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under

this section.

Section 94 - Uniformity of Laws in Ontario,  
Nova Scotia and New Brunswick

Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

Section 95 - Agriculture and Immigration

In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to Agriculture in all or any of the Provinces; and to Immigration into all or any of the Provinces; and any law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

Section 132

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

## BIBLIOGRAPHY

### TEXTS

- Brady, A., & Scott, F.R., Canada After the War Toronto, The MacMillan Co. of Canada Ltd., 1944
- Cameron, E.R. The Supreme Court of Canada; Practice and Rules, Toronto, The Carswell Co., Ltd., 1924.
- Cardozo, B.N. The Nature of the Judicial Process, New Haven, Yale University Press, 1921.
- Clement, W.H.P. The Canadian Constitution, Toronto, The Carswell Co., Ltd., Third Edition, 1916
- Clokie, H. M., Canadian Government and Politics, Toronto Longmans, Green, 1944
- Corwin, E. S. The Twilight of the Supreme Court, New Haven, Yale University Press, 1934
- Dawson, R. M. Constitutional Issues in Canada, 1900-1931, London, Humphrey Milford, 1937.
- Egerton, H.E. & Grant, W.L. Canadian Constitutional Development, Toronto, The Musson Book Co. Ltd. 1907
- Fairman, C. American Constitutional Decisions, New York, Henry Holt and Co., 1948
- Gettys, C.L. The Administration of Canadian Constitutional Grants, Chicago, Publication for the Committee on Public Administration of the Social Sciences Research Council, 1938.
- Kennedy, W.P.M. Statutes, Treaties and Documents, 1713-1929, London, Oxford University Press 1930
- Kennedy, W.P.M. The Constitution of Canada, London, Oxford University Press, 1922
- Laskin, B., Canadian Constitutional Law, Toronto, The Carswell Co., Ltd., 1951

- Lefroy, A.H.F. Canada's Federal System, Toronto, The Carswell Co. Ltd., 1913
- Lefroy, A.H.F. Legislative Power in Canada, Toronto, The Toronto Law Book and Publishing Co. Ltd., 1897-8.
- Lefroy, A.H.F. A Short Treatise on Canadian Constitutional Law, Toronto, The Carswell Co. Ltd. 1918
- O'Connor, W.F. Report to the Senate of Canada on the British North America Act, Ottawa, King's Printer, 1939
- Ollivier, M. Problems of Canadian Sovereignty, Toronto, Canada Law Book Co. Ltd. 1945.
- Plaxton, C.P. Canadian Constitutional Decisions of Judicial Committee, 1930-1939, Ottawa, King's Printer, 1939. ✓
- Pope, J., Confederation Documents, Toronto, The Carswell Co. Ltd., 1895
- Pound , R., Justice According to Law, New Haven, Yale University Press, 1951.

## ARTICLES

- Carrothers, W.A. | "Problems of the Canadian Federation"  
Can. J. Econ., Vol. 1 (1935) pp 26-40
- Clokie, H. McD. | "Judicial Review, Federalism and the  
Canadian Constitution." Can. J. Econ.,  
Vol. 8 (1942) p.p. 537 - 556.
- Clokie, H. McD. | "Basic Problems of the Canadian Constitution."  
Can. Bar Rev., Vol. 20 (1942) p.p. 395-429,  
817-840.
- Corry, J.A. | "The Federal Dilemma." Can. J. Econ., Vol.  
7 (1941) p,p. 215 - 228.
- Corry, J.A. | "Administrative Law and the Interpretation  
of Statutes." University of Toronto Law  
Journal, Vol. 1 (1937) p. 286
- Corry, J.A. | "Recent Government Publications on the  
British North America Act, 2. Decisions  
of the Judicial Committee, 1930-39." Can.  
J. Econ., Vol. 5 (1939) p.p. 509-512
- Cronkite, F.C. | "The Judicial Committee and the Farm Debt  
Problem." Can. J. Econ., Vol. 9 (1943) p.p.  
557-564.
- Cronkite, F.C. | "The O'Connor Report." Can. J. Econ.,  
Vol. 5, (1939) 504-509.
- Dagget, A.P. | "Treaty Legislation in Canada" Can. Bar  
Rev., Vol. 16 (1938) p.p. 159-184.
- Davison, J.F. | "The Constitutionality and Utility of  
Advisory Opinions." University of Toronto  
Law Journal, Vol. 4 (1941-42) p.p.254-279.
- Eayrs, J., | "Canadian Federalism and the United Nations."  
Can. J. Econ., Vol. 16 (1950) p.p. 172-183.
- Evatt, H.V. | "Constitutional Interpretation in Australia."  
University of Toronto Law Journal, Vol. 3  
(1939-40) p.p. 1-23.
- Farris, J.W. de B.  
Scott, F.R.  
Gordon, D.M. | "Abolition of Appeals to the Privy Council:  
A Symposium." Can. Bar Rev., Vol. 25 (1947)  
p.p. 557 - 572

- Freund, P.A. "The Supreme Court of the United States." Can. Bar Rev., Vol. 29 (1951) p.p.1080-1094.
- Friedman, W. "Stare Decisis" Can., Bar Rev., Vol. 31 (1953) p.p. 723 - 751.
- Gray, E.V. "More on the Regulation of Insurance." Can. Bar Rev., Vol. 24 (1946) p.p. 481-488.
- Hopper, W.C. "The Natural Products Marketing Act, 1934. 2. Notes on the Administration of the Act." Can. J. Econ., Vol. 1 (1935) p.p.475-481.
- How, W.G. "The Too Limited Jurisdiction of the Supreme Court of Canada." Can. Bar Rev., Vol. 25, (1947) p.p. 573-586.
- Jennings, W. I. "Constitutional Interpretation - The Experience of Canada." Harv. L. Rev. Vol. 51, (1938) p. 35.
- Jennings, W. I. "Dominion Legislation and Treaties" Can. Bar Rev., Vol. 15 (1937) p.p. 455-463.
- Kennedy, W.P.M. "The British North America Act: Past and Future." Can., Bar Rev. Vol. 15 (1937) p.p. 393-400.
- Kieth, A.B. "Privy Council Decisions: A Comment from Great Britain." Can. Bar Rev., Vol. 15 (1937) p.p. 428-435.
- Laskin, B. "The Supreme Court of Canada: A Final Court for Canadians." Can. Bar Rev., Vol. 29 (1951) p.p. 1038-1079.
- Laskin, B. " Note on Canadian Constitutional Interpretation University of Toronto Law Journal, Vol. 5 (1943-44) p.p. 171-177.
- Laskin, B. "Peace, Order and Good Government Reexamined." Can. Bar Rev., Vol. 25(1947) p.p.1054-1087.
- MacDonald, V.C. "Taxation Powers in Canada." Can. Bar Rev. Vol. 19 (1941) p.p. 75-95.
- MacDonald, V.C. "Judicial Interpretation of the Canadian Constitution." Univ. of Toronto Law Journal, Vol. 1 (1935-6) p.p. 260-285.



- MacDonald, V.C. "The Regulation of Insurance in Canada" Can. Bar Rev., Vol. 24 (1946) p.p.257-275.
- MacDonald, V.C. "The Constitution in a Changing World" Can. Bar Rev., Vol. 26(1948) p.p. 21-45.
- MacDonald, V.C. "The Privy Council and the Canadian Constitution." Can. Bar Rev., Vol. 29 (1951) p.p. 1021-1037.
- MacDonald, V.C. "The Canadian Constitution Seventy Years After." Can. Bar Rev., Vol. 15(1937) p.p. 401-427.
- MacDonald, V.C. "The Constitution and the Courts in 1939" Can. Bar Rev., Vol. 18 (1940) p.p. 147-158.
- MacKenzie, N.A.M. "Canada and the Treaty-Making Power." Can. Bar Rev., Vol. 15 (1937) p.p. 436-453.
- Mallory, J.R. "The Courts and the Sovereignty of the Canadian Parliament." Can. J. Econ., Vol. 10 (1944) p.p. 165-178.
- Matas, R.J. "Treaty Making in Canada" Can. Bar. Rev., Vol. 25 (1947) p.p. 458-477.
- McWilliams, K.C. "The Amendment of the Constitution." Can. Bar Rev., Vol. 16 (1938) p.p. 466-475.
- Norris, T. G. "The Natural Products Marketing Act, 1934. 1. Constitutional Validity." Can. J. Econ., Vol. 1, (1935) p.p. 465-475.
- O'Connor, W.F. "Property and Civil Rights in the Provinces." Can. Bar Rev., Vol. 18 (1940) p.p.331-384.
- O'Halloran, C.H. "Criminal Law and the Supreme Court: 1923 - 1947" Can. Bar Rev. Vol. 26 (1946) p.p. 158 - 184.
- Richard, E. R. "Peace, Order, and Good Government." Can. Bar Rev., Vol. 18 (1940) p.p. 243-260.
- Rowell, Hon. N.W. "The Place and Functions of the Judiciary in our Canadian Constitution." Can. Bar. Rev., Vol. 15 (1937) p.p. 57-67.
- Schwartz, B. "The Changing Role of the United States Supreme Court." Can. Bar Rev., Vol. 28 (1950) p.p. 48-61.
- Scott, F. R. "Centralization and Decentralization in Canadian Federalism." Can. Bar. Rev., Vol. 29 (1951) p.p. 1095-1125.

- Scott, F.R. "Consequences of the Privy Council Decisions." Can. Bar Rev., Vol. 15 (1937) p.p. 485-494.
- Scott, F.R. "The Privy Council and Minority Rights." Queen's Quarterly, Vol. 37 (1930) p.p. 666-678.
- Scott, F.R. "Section 94 of the British North America Act." Can. Bar Rev., Vol. 20 (1942) p.p. 525-544.
- Scott, F.R. "The Privy Council and Mr. Bennett's 'New Deal' Legislation." Can. J. Econ., Vol. 3 (1937) p.p. 234-241.
- Scott, F.R. "Constitutional Adaptations to the Changing Functions of Government." Can. J. Econ., Vol. 11, (1945) p.p. 329-341.
- Scott, F.R. "The Special Nature of Canadian Federalism." Can. J. Econ., Vol. 13 (1947) p. 13-25.
- Tuck, R. "Canada and the Judicial Committee of the Privy Council." University of Toronto Law Journal, Vol. 4 (1941-42) p. 33-75.
- Willis, H.E. "Tendencies in American Constitutional Law." Univ. of Toronto Law Journal, Vol. 4 (1941-42) p. 338-365.
- Lord Wright of Durley, "Precedents." Univ. of Toronto Law Journal, The Rt. Hon., Vol. 4, (1941-42) p. 247-277.

#### MISCELLANEOUS

Proceedings of Constitutional Conference of Federal and Provincial Governments. 1950. Ottawa, King's Printer,

Dominion Law Reports  
Supreme Court Reports  
Canadian Appeal Cases Reports

"Occupation of the Field" in Commerce Clause Cases in 1936-46: Ten years of Federalism, (1946) Harv. Law Rev., Notes p. 262-276.

"Social and Economic Facts - Appraisal of Suggested Techniques for Presenting Them to the Court." (1948) 61. Harv. Law Rev., p. 692 at page 696.