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1. Adjudicating Divisions of Powers Issues: A Canadian Perspective

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Adjudicating Divisions of Powers Issues: A Canadian Perspective

The Supreme Court Law Review


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Part I: Federalism and Aboriginal Rights

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I. Introduction

1. When the United Kingdom Parliament enacted the British North America Act in 1867, it bestowed upon Canada a Constitution that was patterned both upon the British tradition of parliamentary government in accordance with unwritten principles and conventions, and the American experiment with a written constitution and a federal system. In countries with a federal system, legislative authority is constitutionally distributed between a central government on the one hand and provinces or local states on the other. Where a dispute arises as to whether the central or the provincial (or state) government has the constitutional power to carry out the policy it has purported to enact into law, the courts are almost invariably called upon to act as arbiters and to decide the legal aspects of the controversy, having regard to the terms and underlying principles of the constitutional text.

2. This essay grew out of a preliminary paper on adjudicating divisions of powers matters in Canada that was presented as part of two special seminars in London and Edinburgh in July 2001 on the reform of the United Kingdom's highest courts. In 1998, the United Kingdom Parliament enacted one of the most important reforms in British constitutional history. Henceforth, the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, respectively, would be called upon to interpret and apply the Human Rights Act on the one hand and the U.K. devolution statutes -- the Government of Wales Act, the Scotland Act and the Northern Ireland Act -- on the other. Pursuant to their nascent research into the role (and potential reform) of the senior adjudicative bodies in the United Kingdom, Andrew Le Sueur, Barber Professor of Jurisprudence, University of Birmingham, and Richard Cornes, Lecturer in Public Law, University of Essex, were interested in the comparative lessons to be drawn, inter alia, from the Canadian experience with constitutionalism, federalism, an entrenched charter of rights and a national court structure.

3. American Supreme Court Justice Sandra Day O'Connor has observed that "recent constitutional changes in the United Kingdom raise the questions what effect the courts will have on devolution and, just as important, what effect devolution will have on the role of the courts." Given the mandate conferred upon the Judicial Committee of the Privy Council in the adjudication of divisions of powers matters under the devolution statutes this essay devotes particular attention to the role played by that body in the development of federalism and the federal principle in Canada's constitutional jurisprudence.

4. One must be mindful of the structural distinctions to be drawn between a federal constitution on the one hand and a unitary state on the other, whereby powers are delegated to local, subordinate bodies by the principal lawgiver; in the United Kingdom, the supreme Parliament at Westminster. Justice O'Connor puts the proposition boldly as follows: "Federalism represents a true division of power, whereas devolution is simply a delegation." She adds: "Further, devolution in the United Kingdom is asymmetrical, while federalism in America is almost perfectly symmetrical."

5. The Canadian experience is perhaps more in keeping with the evolution of the United Kingdom's constitutional arrangements, notably because the Canadian Constitution, as interpreted by the Privy Council and the Supreme Court of Canada, has evolved from a structure designed to favour a central Parliament over subordinate local
governments, to one that recognizes the autonomy of the provincial legislatures within their spheres of competence. It is a structure that has evolved to combine the principle of parliamentary sovereignty with the principle of federalism, and to harmonize the principle of the equality of the provinces with a recognition of the distinctiveness of Canada's regions, linguistic communities, history, interests and peoples. It is not a structure that has been free of the centripetal and centrifugal tensions that characterize most federations, but it is one that has dealt remarkably well with the challenges those tensions have presented, notably through resort to adjudication before the courts in accordance with the rule of law.

6 The late Dr. Geoffrey Marshall, in his remarks on the human rights and devolution statutes, observed that "the current legislation is only the latest stage in a process of transformation that has other sources and inspirations," and that "[o]ne such influence, in many ways unnoticed, has been the Commonwealth."

In the first half of the twentieth century, the trade in political institutions was mainly thought of in terms of the export of the Westminster model. In the second half of the century there has been a significant inspirational flow in the opposite direction. Think, for example, of the three key aspects of the British system that were set out in Professor A.V. Dicey's classic work on the constitution -- the sovereignty of Parliament, the conventions of the constitution, and the rule of law. It is evident that their present shape has been strongly influenced by constitutional developments in Canada, New Zealand, Australia, and South Africa.

... Politicians are now less, and judges more, in charge of our affairs. That is a considerable sea change for a nation whose tradition and culture have respected the rule of law while distrusting lawyers.

7 In Canada, division of powers (or "federalism") cases have been overshadowed for the past two decades by the sheer volume of human rights cases under the Canadian Charter of Rights and Freedoms, as well as by the intrinsic interest and media attention that such cases naturally generate. One observer has remarked that this is also reflected in the relative dearth of recent commentary on division of powers questions, the groves of academe now overrun, it seems, with commentators eager to analyze Charter issues. A division of powers case, like Dickens' description of a suit in Chancery, is too often perceived as "a slow, expensive, British, constitutional kind of thing." Arid though such matters may appear to be, an appreciation of the basic principles, rules, themes and dynamics behind the adjudication of division of powers issues is essential for constitutional lawyers, political scientists and other students of government.

II. The Touchstones of the Constitution of Canada

8 "As the British Constitution is the most subtle organism which has proceeded from the womb and long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man." British Prime Minister William Gladstone is often cited -- often in the United States, at least -- for that famous observation. What would Gladstone have thought of the Constitution of Canada (had he turned his mind to it)? Would he have remarked that the Canadian Constitution is a unique and judicious blend of the American and British models of constitutionalism? Or would he have thought it a curious amalgam of written and unwritten rules, of federal and unitary forms of government?

9 Certainly, the Constitution of Canada is similar in structure to that of the United States in that its broad outlines have been laid out in a pre-eminent written constitutional instrument -- or in the Canadian case, a series of instruments, the Constitution Acts, 1867 to 1982, and the amendments thereto. Like its American counterpart, the Canadian Constitution governs the relationships between the executive, legislative and judicial branches of government; regulates and controls the division of legislative powers between the central government of the federation and the local legislatures; contains an entrenched bill of rights; sets out special and complex procedures for constitutional amendment; and declares that the Constitution is the "supreme law" of the land.

10 The Constitution of Canada is also, however, as the preamble to the British North America Act -- now styled the Constitution Act, 1867 -- confirms, "a Constitution similar in Principle to that of the United Kingdom." Canada is a
constitutional monarchy "under the Crown of the United Kingdom," and a parliamentary democracy on the Westminster model. The executive government and authority "of and over Canada" is declared, by section 9 of the Act of 1867, "to continue and be vested in the Queen," and section 12 constitutes the Queen's Privy Council for Canada. Section 17 of the Act establishes "One Parliament for Canada," consisting of the Queen; an appointed upper house of sober second thought, the Senate; and a popularly elected lower chamber, the House of Commons. The Queen's representative in Canada, the Governor General, and the other actors and institutions of the central state exercise their powers and carry out their duties in accordance with the conventions of responsible government, whereby the executive ministry is, in principle, accountable to the elected house. The Lieutenant Governors, provincial legislatures and cabinets operate in kind.

11 Canada's constitutional arrangements thus differ from its American counterparts in Canada's allegiance to the Crown, in the pattern of its democratic institutions and in its adherence to British customs and traditions of governance. It is a constitution born of evolution, not revolution. This long and profound heritage of legal continuity is illustrated even by the fact that the Canada Act 1982 -- which gave legal effect to Canada's independence as a sovereign state (long recognized as a matter of convention by the Balfour declaration in 1926 and the preamble to the Statute of Westminster in 1931) -- is itself an Act of the United Kingdom Parliament.

12 A "Constitution similar in Principle to that of the United Kingdom," the courts have recognized, means that the Constitution of Canada is more than a collection of statutes and instruments. The law of the Constitution is, of course, to be found in the Constitution Acts and the rules of the common law. However, in accordance with the British (and Diceyian) model, the Constitution includes, in its broader analytical sense, the unwritten conventions that govern the way political actors exercise their powers under the written text of the Constitution. These conventions are political obligations, not rules enforceable at law, but the Supreme Court has recognized that in certain instances, they may be more important than the bare framework of the law itself in ensuring that the implementation of the text of the Constitution conforms to the prevailing values of Canadian society.

13 Straddling the divide between law and conventions are the organizing principles of the Constitution. These fundamental principles, our Supreme Court has declared, are the lifeblood of the Constitution. The principles infuse the provisions of the constitutional text with constitutional meaning, and they also provide the raison d'être for the unwritten rules of constitutional conventions. These principles are said to be "not merely descriptive" but rather, "invested with a powerful normative force" and "binding upon both courts and governments." Constitutional principles "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."

III. Some Fundamental Principles and Characteristics of the Canadian Federation

14 In Canada, as former Chief Justice Lamer once wrote, our constitutional evolution "has culminated in the supremacy of a definitive written constitution." He was later to add the following words of caution: "There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of judicial constitutional review." Nonetheless, Lamer C.J. was an exponent of the development of constitutional interpretation through resort to unwritten constitutional principles, many of them flowing ostensibly from the recitals in the preamble to the Constitution Act, 1867. "Indeed," he stated, "given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy."

15 Fundamental, then, to an understanding of the Constitution of Canada, and to the adjudication of disputes arising thereunder, are its basic principles. These, the Supreme Court has said, work in symbiosis. No single principle can be said to trump the others. Certain principles are, however, broader and overarching in nature. They go to the very structure of the Constitution, or to what the Court has referred to as the Constitution's basic values and "internal architecture."
16 These principles include constitutionalism and the rule of law, federalism, democracy, the protection of minorities, parliamentary sovereignty, responsible government, parliamentary privilege, judicial independence and the separation of powers. Several (and perhaps all) of these principles are relevant to the theme of this essay. Key amongst them are constitutionalism and the rule of law, and the federal principle.

IV. Constitutionalism and the Rule of Law

17 The first principle of the Canadian Constitution is respect for the rule of law and constitutionalism itself. This principle is reflected both in the preambles to the Constitution Act, 1867 and the Constitution Act, 1982, and in section 52 of the latter Act, the supremacy clause. We have already noted that the preamble to the Act of 1867 speaks of "a Constitution similar in Principle to that of the United Kingdom." The preamble to the Constitution Act, 1982 declares: "Whereas Canada is founded upon principles which recognize the supremacy of God and the rule of law..."

18 Section 52 of the Constitution Act, 1982 begins with the following clause:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

19 Section 52, in affirming that the provisions of the Constitution are supreme and render inconsistent laws invalid, expresses a rule of constitutional law that has always been recognized and applied by Canadian courts since 1867. By virtue of the Colonial Laws Validity Act enacted by the United Kingdom Parliament in 1865, any colonial law that was "repugnant to the Provisions" of any imperial statute "extending to the colony" was "absolutely void and inoperative" to the extent of the repugnancy. The British North America Act of 1867 was therefore the supreme law of Canada. The courts would declare any law enacted by the Canadian Parliament or the provincial legislatures that was inconsistent with the BNA Act to be ultra vires and thus void and inoperative. The repeal of the Colonial Laws Validity Act in 1931, at the instance of the dominions, did not affect the status of the British North America Acts, 1867 to 1930. At the request of Canada, their pre-eminent position was preserved by section 7(1) of the Statute of Westminster.

20 The rule of law, the Supreme Court has stated, is comprised of three principal elements. The first is that "the law is supreme over the acts of both government and private persons. There is, in short, one law for all." The second is that the rule of law requires "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order." The third element is that "the exercise of all public power must find its ultimate source in a legal rule;" i.e., that "the relationship between the state and the individual must be regulated by law." 16

21 The principle of constitutionalism, the Court has said, is similar but not identical to the rule of law. "Simply put, the constitutionalism principle requires that all government action must comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution." In Canada, the "essence of constitutionalism is embodied in s. 52(1) of the Constitution Act, 1982;" 17 that is, in the words and meaning of the supremacy clause set out above.

The Constitution binds all governments, including the executive branch ... They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source. 18

22 Constitutionalism and the rule of law have been strengthened by structural amendments to the Constitution, most notably the enactment and proclamation of Part I of the Constitution Act, 1982 -- the Canadian Charter of Rights and Freedoms -- and Part V setting out the legal rules that henceforth govern constitutional amendment.
Prior to 1982, significant constitutional amendments required action by the United Kingdom Parliament. In order to effect such constitutional amendments, a political process had emerged over time whereby the two houses of the Canadian Parliament would adopt a joint address to Her Majesty, requesting that she place the proposed measure before the U.K. Parliament for enactment. The precedents were such that it could fairly be said that the Canadian government would not, as a rule, proceed with an amendment through the joint resolution process if it did not have the support of provincial premiers. The legitimacy of Canadian Prime Minister Pierre Trudeau's 1980-1981 initiative to "patriate" the Constitution and entrench a charter of rights occasioned much controversy, because initially it had the formal support of just two of the 10 provincial premiers. The eight dissenting governments mounted constitutional challenges to the process. A majority of the Supreme Court opined that the process was not unconstitutional in the legal sense, but that it would breach a constitutional convention if a substantial consensus amongst the premiers was not reached. The Court left it to the political actors to determine the degree of consensus that would be necessary. In November 1981, after a final round of constitutional negotiations, nine provincial governments agreed to support the patriation package, and the joint address to the Queen (and through Her Majesty, to the United Kingdom Parliament) proceeded. The Canada Act, 1982 was enacted by the United Kingdom Parliament in March of that year, and its schedule, the Constitution Act, 1982, was proclaimed in force by Her Majesty in Ottawa on April 17.

The sole dissenting government was that of Quebec. In the meantime, it had renewed the constitutional challenge to the patriation process by submitting a new question to the Court of Appeal of the province as to whether, as a matter of constitutional convention, the consent of the Quebec government was required to move forward. The Court of Appeal ruled that what was required by the convention was a substantial degree of consensus, not unanimity, and that the government of Quebec had not demonstrated that it possessed a conventional power of veto over the process. The nine judges of the Supreme Court, in a per curiam opinion, confirmed the finding of the Quebec Court of Appeal. In ruling that there had been no breach in the constitutional convention governing the process of patriating the Constitution, the Court also emphasized, a fortiori, the validity of the constitutional law resulting from the patriation process:

The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for constitutional amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects.

Two further attempts at major constitutional reform between 1987 and 1990, and 1990 and 1992, the Meech Lake and Charlottetown Constitutional Accords, respectively, led to initial agreement amongst the Canadian Prime Minister and the provincial Premiers, but the agreements ultimately failed to be ratified. However, several less ambitious but still significant constitutional amendments have been enacted and proclaimed.

The principles of constitutionalism and the rule of law have also been forged and strengthened by the crucible of two challenges of momentous proportions. In 1985, the Supreme Court struck down as invalid and of no force and effect almost 90 years of laws enacted by the legislature of Manitoba solely in English, in contravention of the requirement of bilingual enactment and promulgation in both English and French mandated by section 23 of the Manitoba Act, 1870, which is part of the Constitution of Canada. Section 23 imposed a constitutional duty on the legislature with regard to the manner and form of its legislation; a duty which protected "the substantive rights of all Manitobans to equal access to the law" in English and French. That constitutional duty conferred upon the judiciary "the responsibility of protecting the correlative language rights of all Manitobans including the Franco-Manitoban minority." The Supreme Court spoke deeply to the values at the heart of constitutionalism:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the Constitution Act, 1982 declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.
The second challenge came to a head a decade later. Both prior to and in the aftermath of the October 1995 referendum on Quebec sovereignty, the Quebec government took the position that neither the Constitution nor the courts of Canada would have any role to play in determining the framework within which Quebec's "process of accession to sovereignty" might unfold. The premises of the draft bill, An Act respecting the sovereignty of Québec, and its successor, Bill 1, insofar as it purported to authorize the National Assembly of Quebec to effect the unilateral secession of Quebec from Canada, represented a radical -- indeed, revolutionary -- threat of unprecedented proportions to the stability of the Canadian legal order and the rule of law. Although the Bill did not proceed after the failure of the Quebec government to obtain majority support for its proposal from the population of the province in the referendum, that government continued to claim that should it obtain a simple majority, on a question of its choosing, in a referendum organized at a time of its convenience, the right of self-determination at international law would lead to a right of secession, by a unilateral declaration of independence, if necessary.

In the circumstances, the Government of Canada sought a comprehensive opinion from the Supreme Court on the legal issues relating to unilateral secession. In its landmark judgment in August 1998, the Court confirmed that unilateral secession would be an unlawful act under the Constitution and a violation of the Canadian legal order; a revolution. Nor was there any legal right at international law, whether as a matter of self-determination or otherwise, to unilateral secession in the circumstances of Quebec. Secession, to be lawful under the Constitution of Canada, would require a constitutional amendment. At the same time, the Court recognized that if a clear majority of Quebecers, on a clear question, expressed their desire to leave Canada, this would "confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means." Negotiations would be governed by the same constitutional principles identified by the Court at the outset as relevant to the question of secession: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

This balanced finding, marrying the need for constitutional legality with the search for political legitimacy, has been salutary for Canada's civic traditions and political culture. Those who favour sovereignty and independence over federalism have a stake in the proper operation and application of the Constitution of Canada, because it safeguards their legitimate interests, just as it does those of Canadians as a whole. However, those who would embrace the Court's finding of an obligation to negotiate must also accept the Court's rules as the circumstances in which such a duty would arise -- a clear expression of a clear majority of a desire to secede from Canada -- and the rules governing such negotiations: respect by all participants, including the sovereigntist government, of the underlying principles of the Constitution of Canada, and notably the rule of law and constitutionalism itself.

V. Federalism and the Division of Powers

The second broad principle of the Canadian Constitution -- in fact, the predominant one for many years, at least until the advent of the Charter of Rights -- is the principle of federalism.

The framers of the Constitution sought to achieve something unique for the governance of Canada. Unlike the United Kingdom, Canada would not be a unitary state; but by providing, it was thought, for a robust central government, the new country would also avoid the centrifugal tensions that had led to the recent civil war amongst the American states. Its structure would combine the features of a constitution similar in principle to the United Kingdom -- a constitutional monarchy, parliamentary sovereignty, the conventions of responsible government, the rule of law -- with provinces "federally united into one Dominion under the Crown."

In contrast to the situation that prevailed in the United States, where the state legislatures held the residue of power under the Constitution, in Canada, the powers of the provincial legislatures would be defined and therefore limited, whilst the Dominion Parliament would be empowered to make laws generally for "the Peace, Order and good Government of Canada" in relation to all matters not assigned exclusively to the provinces. The federal power to regulate trade and commerce would be drafted in broader terms than its American interstate equivalent, and the criminal law power, which in the U.S. was a state responsibility, would be conferred upon the central Parliament.
Stated Sir John A. Macdonald, the first Prime Minister of Canada, during the Confederation Debates:

They [i.e., the Americans] declared by their Constitution that each state was a sovereignty in itself, and that all the powers incident to a sovereignty belonged to each state, except those powers which, by the Constitution, were conferred upon the General Government and Congress.

Here we have adopted a different system. We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature.

We have thus avoided that great source of weakness which has been the cause of the disruption of the United States... 28

33 Beyond this, the provinces would be, in certain respects, subordinate to the central government. The Lieutenant Governor of each province would be appointed by the federal Cabinet (the Governor in Council), as would the judges of the provincial superior and appellate courts.29 The Bills passed by the legislatures would be subject to the reservation of assent by the Governor General, and the Acts of the legislatures to disallowance by the Governor General within one year of their enactment.30 The Parliament of Canada could assume legislative jurisdiction over various provincial works simply by declaring them to be for the advantage of Canada or two or more provinces.31

34 In the early years of the federation, the powers of reservation and disallowance, as well as the declaratory power, were employed quite frequently.32 Over time these powers fell largely into disuse,33 particularly reservation and disallowance, as constitutional adjudication came to be seen -- barring exceptional circumstances -- as a more appropriate means of dealing with the enactment of ultra vires legislation.34

35 For provincial legislatures and governments, however, those early years were often marked by a struggle to assert "provincial rights" -- at any rate, provincial powers -- in the face of the apparent dominance of the central Parliament and government. The provinces had little enthusiasm for the subordinate status that the formal constitutional arrangements appeared to have thrust upon them. They did not appreciate, for example, the disallowance of provincial legislation by the central government, which arguably placed the provinces in a position analogous to the colonial relationship that existed at the time between the British government and Canada (the latter also subject, in principle if not in practice, to the disallowance of its legislation by the former).

36 An increasing emphasis on provincial autonomy became an important objective for Premiers Oliver Mowat in Ontario and Honoré Mercier in Quebec, the latter province being the only one in which the French-Canadian population formed a majority. At the time of Confederation, the official use of the French language in the statutes, records and journals of Parliament and the legislature of Quebec, as well as in the proceedings of the courts of Canada and of Quebec, was expressly guaranteed by section 133 of the Constitution Act, 1867. The French civil law system and the freedom to practice the Roman Catholic religion, which had been restored to the province by the Quebec Act in 1774, were also preserved by the Constitution Act, 1867. Provincial powers over property and civil rights, local affairs and education were essential to the legislature and government of Quebec's pursuit of protecting and developing its distinctive identity within Canada.35

37 The issue of identity would continue to shape the political and constitutional forces at play in Canada over the next 130 years. Much of the debate originally centred upon the nature of the Canadian federation itself. Did 1867 bring about, in John A. Macdonald's and Georges-Etienne Cartier's terms, the birth of a new nation? Or was it to be simply a pact between pre-existing provinces, a loose confederation of regional and sectarian interests? Was it an agreement between two "founding peoples," English-speaking and French-speaking? Could the Canadian vision of citizenship accommodate multiple, cumulative identities, cultures and communities, and thereby cultivate a sense of belonging to a sum greater than the whole of its parts; "unity in diversity?" How might provincial interests best be harmonized with "the national interest?" These and related questions would later form the backdrop to many of the
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division of powers cases before the courts. The Judicial Committee of the Privy Council was alive to many of these questions and concerns.36

38 The Judicial Committee of the Privy Council established, case by case, the complex and intricate framework of principles of constitutional interpretation -- pith and substance, leading feature, true purpose, double aspect, occupied field, paramountcy, reading down, colourability, severability, and so on -- that still governs and shapes most of Canada's constitutional jurisprudence on the division of powers today. Nowhere, however, was its influence more markedly felt than in the balance it struck between the powers of the central Parliament on the one hand and the powers of the provincial legislatures on the other; in short, in articulating the federal principle underlying the Constitution. The Judicial Committee, and most notably, Lords Watson and Haldane, buttressed the role of the provinces as co-equals, rather than subordinates, in the conduct of the affairs of the federation.

39 In Liquidators of the Maritime Bank v. Receiver General of New Brunswick,37 for example, Lord Watson stated that the appellants had argued that the effect of the Constitution Act, 1867 had been "to sever all connection between the Crown and the provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions." For this position, he replied, there was neither principle nor authority:

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers executive and legislative ... But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and supreme as it was before the passing of the Act. ...

[T]he provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants ... its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration, merely, but of legislation, in the strictest sense of the word; and within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme.38

40 That powerful statement on provincial autonomy would later be embellished by Lord Haldane in Re The Initiative and Referendum Act:39

The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits the of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possesses in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution it enacted in 1867.40

41 In 1998, in the Quebec Secession Reference, the Supreme Court of Canada recognized federalism as one of a series of fundamental structural principles relevant to the resolution of the issues in question. Because the Reference dealt with "questions fundamental to the nature of Canada," the Court stated, "it should not be surprising that it is necessary to review the context in which the Canadian union has evolved."41 History revealed that "the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability."42 Within that historical evolution, the significance of Confederation was that it was driven by a desire for a federal union, with a division of powers between the central and provincial
Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. ... The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The Constitution Act, 1867 was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

Returning to this theme in its analysis of the relevant constitutional principles, the Court stated that although "on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces," in fact, "our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light." Citing, inter alia, the Privy Council's decision in Liquidators of the Maritime Bank, the Court stated that in a federal system, "political power is shared by two orders of government," each with "respective spheres of jurisdiction."

In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the Patriation Reference, supra, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the Patriation Reference, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the Charter, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a legal and political response to underlying social and political realities.

The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.

The scheme of the Constitution Act, 1867, the Court then affirmed, quoting the Judicial Committee in Re the Initiative and Referendum Act, was "not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority ...".

Finally, the Supreme Court made special reference to the place of Quebec in the context of federalism and the Canadian federal structure, and concluded this part of its opinion with another reference to autonomy and the provinces generally:

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (U.K.) 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled
French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.46

45 These several passages from the Supreme Court of Canada’s landmark opinion in the Quebec Secession Reference illustrate the extent to which the principle of federalism, as developed by the learned jurists of the Judicial Committee of the Privy Council and refined by our own high court, has come to be embraced as an integral part of the Canadian constitutional system.47 Adherence to the federal principle is central to the legacy left to Canada by the Judicial Committee and its impressive body of constitutional jurisprudence.

VI. The Supreme Court of Canada and the Canadian Court System

46 The Supreme Court of Canada stands at the apex of the Canadian court system as the final arbiter of legal disputes. Section 101 of the Constitution Act, 1867 granted to Parliament the power to constitute and maintain “a General Court of Appeal for Canada,” and the Supreme Court was established by statute in 1875. It was not until 1949, however, upon the abolition of civil appeals to the Judicial Committee of the Privy Council, that the Supreme Court became truly “supreme” as the court of last resort in Canadian constitutional adjudication.

47 Under the Supreme Court Act, the Court is composed of the Chief Justice of Canada and eight puisne judges, who are appointed by the Governor in Council from amongst the judges of the superior courts or members of the provincial bars with at least 10 years’ standing. By law, three of the nine judges are appointed from the Court of Appeal or the Superior Court of Quebec, or from the advocates of that province; by practice, three of the other justices are appointed from Ontario, one from the Atlantic provinces and two from the Western provinces, respectively.49

48 The Supreme Court exercises ultimate appellate jurisdiction in all civil and criminal matters arising before the courts of the provinces and territories, and before other courts established by Parliament for the better administration of the laws of Canada, notably the Federal Court. With the exception of certain classes of appeals as of right (for example, in criminal cases where one appellate court judge has dissented on a question of law), in most cases, appeals are heard by the Supreme Court only where leave to appeal is granted by the Court itself. Under section 40 of the Supreme Court Act, an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal, or of the highest court of final resort in a province, where the Supreme Court is of the opinion that the question is, by reason of its public importance, or the importance of the issue of law or mixed law and fact at stake, one that ought to be decided by the Supreme Court. The Court also exercises special jurisdiction in references by the Governor of Council, under section 53 of the Act, of important questions of law or fact relating to the interpretation of the Constitution Acts, the constitutionality or interpretation of any federal or provincial legislation, the powers of Parliament or the legislatures of the provinces, or the governments thereof, whether or not the power in question has actually been exercised; and any other important question the Governor in Council deems fit to refer.50

49 Justice La Forest, writing on behalf of the Court, has remarked appositely that:

In assessing constitutional issues, it is well to remember that the court system in Canada is, in general, a unitary one under which provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal as well as provincial laws under hierarchical arrangement culminating in the Supreme Court of Canada established by Parliament under s. 101 of the Constitution Act, 1867.51
In another matter, in which the validity of a provincial statute that had produced extra-provincial effects in another province was challenged before the latter province's courts, giving rise to issues of jurisdiction, La Forest J. elaborated further on the impact of the Canadian Constitution on the court structure and constitutional adjudication:

It is well established that a range of Canadian courts and tribunals in Canada are empowered to consider the constitutionality of the laws they apply. In doing so, they are applying the principle of the supremacy of the Constitution confirmed by s. 52(1) of the Constitution Act, 1982...

The same principle applies with, if anything, more force to the provincial superior courts. These are the ordinary courts of the land having inherent jurisdiction over all matters, both federal and provincial, unless a different forum is specified ...

This jurisdiction must include a determination of whether the laws sought to be applied are constitutionally valid. In Laskin J.'s words in Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, at p. 151: "The question of the constitutionality of legislation has in this country always been a justiciable question.' ...

[All judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.

The Supreme Court's position at the summit and its power to decide constitutional questions allows it to exercise a "unifying jurisdiction" over the provincial courts, which is consistent with its mandate under section 101 of the Constitution Act, 1867 as "a General Court of Appeal for Canada."52

At the same time, the Court has been careful to recognize that whilst "the Canadian Constitution does not insist on a strict separation of powers,"54 the role of the judiciary is distinct from that of the legislature and the executive in our constitutional system, and there are boundaries that should ordinarily be respected.

In the Provincial Court Judges Reference, Lamer C.J. contended that an unwritten constitutional principle of judicial independence was "recognized and affirmed by the preamble to the Constitution Act, 1867" and its reference to "a Constitution similar in Principle to that of the United Kingdom."55 The same principle can be said to flow from the "judicature" provisions in sections 96 to 101 of the Act of 1867 and the right to a fair hearing "by an independent and impartial tribunal" in section 11 of the Charter of Rights. Whatever the provenance of the principle, Lamer C.J. emphasized that "the institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government."56

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the judicial process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.57

"The institutional independence of the courts," the Chief Justice stated, "emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government."58 In the Quebec Secession Reference, the Supreme Court recognized that in exercising its discretion to determine questions alleged to be non-justiciable, the Court must ask itself:
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(i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or

(ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law. 59

In the Secession Reference, the questions put to the Court by the Governor in Council did not "ask the Court to usurp any democratic decision" that Quebecers might be called upon to make; rather, the questions, properly interpreted, were "limited to aspects of the legal framework in which that democratic decision is to be taken;" a legal framework involving "the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec." The questions could clearly be construed as "directed to legal issues," and thus the Court was in a position to answer them. 60

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers. 61

VII. The Judicial Committee’s Influence on the Division of Powers

55 When the Supreme Court became the court of final resort for Canada in 1949, it inherited an impressive legacy of constitutional jurisprudence from the Judicial Committee of the Privy Council. During the course of its reign as Canada’s highest appellate court, the Judicial Committee rendered over 170 decisions in Canadian constitutional law cases. In a series of significant rulings, the Judicial Committee, and particularly Lords Watson and Haldane, had at once expounded and transformed the Constitution of Canada. The federal powers over trade and commerce and the criminal law were narrowed (although the latter power was to wax and wane); provincial powers over property and civil rights were expanded. Perhaps most significantly, the general -- or residuary -- power of Parliament, under the opening words of section 91 of the Constitution Act, 1867, "to make Laws for the Peace, Order, and good Government of Canada," was progressively narrowed to matters of "national concern" and then, in Viscount Haldane’s hands in Board of Commerce and Snider, restricted to temporary circumstances of exceptional urgency: "cases arising out of some extraordinary peril to the national life of Canada," such as war, famine or pestilence.

56 The changes wrought by Lords Watson and Haldane led Professor (and later, Senator) Eugene Forsey, a leading constitutional expert in Canada, to affix their Lordships with the sobriquet of the "wicked Stepfathers of Confederation." In the early 1930s, with the passing of Viscount Haldane, the Judicial Committee, under Lords Sankey and Atkin, in the Proprietary Articles Trade Association case and in the Aeronautics and Radio References, upheld Parliament’s powers to legislate more broadly in the field of criminal law, and to regulate the new fields of aeronautics and radio communications, respectively. However, in the middle of the decade, when the government of Canada was struggling to cope with the grave social and economic crises provoked by the severity of the Great Depression and its effects on employment, incomes and prices, in a series of decisions the Judicial Committee struck down most of Parliament’s “New Deal” legislation. These decisions, which Professor Monahan describes as “formalistic and dysfunctional,” provoked serious criticism at the time from constitutional scholar F.R. Scott:

[T]he Dominion residuary clause, while kept alive verbally by courtesy, is virtually non-existent, and the residue of power throughout Canada, in matters of national as well as of local importance, even in the midst of an emergency as great as that which befell us between 1925 and 1935, belongs exclusively to the provinces. For it may be contended that an emergency power which the world economic crisis does not justify using is no power at all ... None but foreign judges ignorant of the Canadian environment and none too versed in constitutional law could have caused this constitutional revolution ... the net result of the Canadian constitutional developments, culminating in the decisions under review, has been very greatly to weaken the central government, and to postpone indefinitely any further attempts at government regulation of the economy in the interests of stability and social security. 69
57 Professor Scott reserved his sternest criticism for the finding of the Judicial Committee in the Labour Conventions case, and its implications for Canada's ability to implement its international treaty obligations effectively. Essentially, the Privy Council held that although the treaty-making *power* was vested in the government of Canada, the implementation of treaties by legislation would be divided in accordance with the respective jurisdictions of Parliament and the provincial legislatures. Thus, Parliament could not enact legislation limiting hours of work and imposing minimum wages in order to give effect to draft conventions adopted by the International Labour Organization (ILO), because the impugned federal statutes affected property and civil rights, a provincial matter. Lord Atkin summed up his judgment with what Professor Scott sardonically termed "the helpful reminder" that:

> It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative *powers*, Dominion and Provincial together, she is fully equipped.

58 In his concluding words, his Lordship could not resist another "unhappy metaphor" (as Professor J.R. Mallory put it), that seemed to put aside entirely the double-aspect theory first advanced in Hodge v. The Queen:

> But the legislative *powers* remain distributed, and if in the exercise of her new functions derived from her new international status Canada 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 cooperation 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.

59 Professor Scott was moved to the following statement of concern raised by this decision:

> As party to a British Empire treaty Canada is therefore a unitary state; as an independent country she is composed of nine (or is it ten?) sovereign states whose assent is required before the obligations of certain treaties can be fully performed. The logical political consequence of this is that plenipotentiaries from the provinces will have to attend at the negotiating of treaties of this third category in order to insure their adoption and enforcement; which is equivalent to saying that Canada is practically incompetent to make any such treaties at all. Moreover, no one but the courts will be able to tell with certainty to what category a particular treaty belongs, and this, of course, cannot be decided until after the treaty is made. The only certainty lies in reverting to colonial status and never venturing beyond the imperial orbit; the fruits of independence are disunity and decentralization. The law of the Canadian constitution has now degenerated into this welter of confusion.

60 While Scott may have, in retrospect, overstated his criticism, Professor Peter Hogg agrees that the Labour Conventions decision was "poorly reasoned" and that it produced an "unduly narrow and literal interpretation" as well as an "unquestionably anomalous" and "highly inconvenient result." However, he adds that "it is much more difficult to be confident that the result is undesirable as a matter of policy within a federation such as Canada:"

> In defence of the constitutional rule laid down by the Labour Conventions case, it may be said that Canada's difficulty in making and fulfilling treaty obligations is one of the prices of federalism. Provincial autonomy would be seriously threatened if every treaty made by the federal government led to an automatic increase in the legislative authority of Parliament. One does not need to suppose that the federal government would act in bad faith, or would enter into colourable treaties simply to increase federal legislative *power*, to be disturbed at this prospect. The proliferation of multinational treaties concerning health, education, welfare, labour relations, human rights and other matters within provincial jurisdiction which have been sponsored by international organizations of which Canada is a member is sufficient reason for caution.
Of the many other cases adjudicated by the Judicial Committee, one more stands out for special mention. For although it was decided near the end of the Privy Council's tenure as Canada's highest court, it dealt with constitutional issues canvassed in one of the Judicial Committee's first cases, and revisited periodically ever since. Moreover, as Professor Mallory observed, the case "astonished constitutional lawyers by apparently abandoning completely the narrow and restrictive interpretation of federal power which had stemmed from the labours of Lord Watson and Lord Haldane."

The case was that of Attorney-General for Ontario v. Canada Temperance Federation. It arose by way of a provincial reference as to the validity of the Canada Temperance Act enacted by Parliament in 1878. The Act was upheld by a majority of the Ontario Supreme Court. The Attorney General for Ontario, supported by Alberta and New Brunswick, appealed to the Privy Council. The Attorney General for Canada, the "Canada Temperance Federation" and others supported the constitutionality of the legislation. The real object sought in the appeal was to reverse the decision of in Russell v. The Queen, decided some 65 years earlier. The Judicial Committee had upheld the validity of the Canada Temperance Act in that case on the basis of the "general" or "residuary" power over peace, order and good government in the opening words of section 91 of the Constitution Act, 1867. Since then, the ratio in Russell had been restricted, firstly, by Lord Watson's "national concern" test, and later, explained away entirely by Viscount Haldane's impending national "disaster" rationale, as the Judicial Committee moved largely towards an interpretation of the POGG power founded exclusively on the emergency theory.

Viscount Simon delivered the judgment in the Canada Temperance Federation case. He carefully reviewed not only Russell but also Lord Watson's analysis in the subsequent Local Prohibition case and particularly, Viscount Haldane's characterization in Snider, in which Lord Haldane had affirmed that Russell could:

only be supported today ... on the assumption ... that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and so pressing that the National Parliament was called on to intervene to protect the nation from disaster.

Viscount Simon proceeded to debunk the basis for this elaborate hypothesis:

The first observation which their Lordships would make on this explanation of Russell's case is that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the provincial legislatures merely because of the existence of an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emergency; there was certainly no evidence before the Board that one existed. The Act of 1878 was a permanent, not a temporary, Act, and no objection to it was raised to it on that account.

Viscount Simon then went on to set out "the true test" for the application of the peace, order and good government clause (whilst invoking as illustrations the Aeronautics and Radio References, which had been distinguished and set aside by Lord Atkin in the Labour Conventions case):

In their Lordships' opinion the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specifically reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In Russell v. The Queen, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. 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.\textsuperscript{83}

65 Viscount Simon noted that nowhere in Snider was Russell said to be wrongly decided. All Snider did was advance an explanation of the Russell decision; an explanation "too narrowly expressed."\textsuperscript{84}

66 Viscount Simon advanced another reason why Russell should not be overruled:

on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by governments and subjects.

67 The present decision had stood for over 60 years and "must be regarded as firmly embedded in the constitutional law of Canada," and "impossible now to depart from it."\textsuperscript{85}

68 The Canada Temperance Association case did not put an end to the emergency branch of the POGG power. It was relied upon by Lord Wright in a subsequent case in 1946, Co-operative Committee on Japanese Canadians v. Attorney-General for Canada.\textsuperscript{86} Moreover, in the later Margarine Reference, Lord Morton set out everything that was said by Viscount Simon in the Canada Temperance case on the "true test" of national concern; only to conclude that "[i]t must be considered with the words used by Lord Atkin when delivering the judgment of the Board in the Labour Conventions case."\textsuperscript{87}

69 Nonetheless, the Canada Temperance Association case did breathe new life into the "national concern" branch of the peace, order and good government clause; a branch that was subsequently relied upon by the Supreme Court of Canada in several cases, including Johannesson,\textsuperscript{88} Munro,\textsuperscript{89} Crown Zellerbach,\textsuperscript{90} and Ontario Hydro.\textsuperscript{91} At the same time, the emergency branch continued to exist as the appropriate test in cases of exceptional circumstance, where sweeping measures might temporarily override the normal division of powers. Professor Hogg demonstrates that most of the cases can be explained by this contemporary analysis, which owes much to the work of Professor W.R. Lederman and is consistent with the need to preserve the integrity of the division of powers. Professor Hogg has put it very well:

The test [in the Canada Temperance case] is whether the matter of the legislation goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole'. If this test is satisfied, then the matter comes within the p.o.g.g. power in its national concern branch. Of course, ... the emergency cases are still good law in the sense that an emergency will also provide a basis for legislation under the p.o.g.g. power. But the Canada Temperance case established that there was a national concern branch of p.o.g.g. as well as an emergency branch. ...

One point has been settled by the course of decision since the abolition of appeals to the Privy Council. It is clear that the Privy Council was wrong in asserting that only an emergency would justify the invocation of the p.o.g.g. power. Johannesson, Munro, Crown Zellerbach and Ontario Hydro establish that the emergency test cannot be the exclusive touchstone. ... The problem then is to draw the line between these two different classes. ...

W.R. Lederman ... pointed out that such subject matters as aviation, the national capital region and atomic energy each has a natural unity that is quite limited and specific in its extent'. He contrasted these limited and specific' subject matters with such sweeping categories as environmental pollution, culture or language. If the sweeping pervasive categories were enfranchised as federal subject matters simply on the basis of national concern, then there would be no limit to the reach of federal legislative powers and the existing distribution of legislative powers would become unstable. Accordingly, in normal times such categories had to be broken down into more specific and meaningful categories for the purpose of allocating legislative jurisdiction; on this basis some parts of the sweeping categories would be within federal jurisdiction and other parts would be within provincial jurisdiction. Only in an emergency could the federal Parliament assume the plenary power over the whole of a sweeping category.\textsuperscript{92}
Professor Lederman was able to test his theory as one of counsel in the Anti-Inflation Reference, wherein he won over Beetz J., whose dissenting opinion had, on this point, the support of a majority of the bench. This was also the approach that was adopted by Le Dain J. for the majority of the Supreme Court in Crown Zellerbach. It has ensured that the peace, order and good government power cannot be invoked lightly to disturb the prevailing balance in the division of federal and provincial powers.

VIII. Some Later Assessments of the Jurisprudence of the Judicial Committee

In 1951, MacDonald J. of the Supreme Court of Nova Scotia summed up the opinion of many contemporary Canadian jurists when he described the legacy of the Judicial Committee of the Privy Council in the following stark terms:

early in its career it formed a very definite view of the nature of the Federal Union effected by the British North America Act and has persistently sought to make the Act square with that view. That view was that Canada is a true federation resulting from a "compact" between sovereign bodies the legislatures of which were intended to possess equal status and autonomy within their prescribed limits; and that it was the function of the courts to maintain this compact and make these legislative rivals hew to the line of division; and in particular to preserve provincial legislative "autonomy" from encroachment.

He continued:

The fact is that the B.N.A. Act does not embody a true federal system but a highly specialized kind of federalism; that both in executive and legislative terms it is deliberately weighted in favour of the central Government and Parliament; and in particular it reveals a scheme of legislative jurisdiction in which Parliament was to play the dominant part.

The truth is, also, that their Lordships never understood the kind of federalism intended to be given, and in terms given; and in revolt against contentions contrary to their own ideas, and against the pro-Dominion bias which underlay the distribution of powers, proceeded to establish a balance of jurisdiction more conformable to those ideas. ... In the result, as our most competent writers have agreed, it is incontestable that our Constitution, as it now exists in a text encrusted with decisions, is not what we sought or what the Imperial Parliament provided for us. It is history that, contrary to Lord Carnarvon's hopes, the Privy Council has not been a protector of minorities so much as it has been a protector of the provinces, and in that endeavour has distorted the whole scheme of legislative powers in the process of judicial fabrication of a constitution alien to that desired and enacted. ...

Misunderstanding of the nature of Canadian federalism and obsession with the idea of preserving provincial autonomy from encroachment led to the initial misinterpretation of the function of the various terms in sections 91 and 92, and to the debasement of Dominion heads and to the enlargement of provincial heads; and thereby to the fundamental result, which divorced jurisdiction from the practical ability to deal with grave problems in the form in which they presented themselves.

In "The Meaning of Provincial Autonomy," Professor Louis-Phillipe Pigeon, who would later be appointed to the Supreme Court of Canada, replied obliquely to this assessment from a very different perspective. Agreeing that the Judicial Committee of the Privy Council had "fairly consistently adopted the autonomist conception of federation" in its rulings, he contended that "[a]ll of the arguments advanced against these decisions are based either on the Peace, Order and good Government' clause or on the so-called historical construction' of the Act." Dealing with the POGG question, Professor Pigeon wrote:

In support of the first argument it is contended that the courts have failed to give full effect to the opening words of section 91 and that the authority thus conferred on the federal Parliament should be broadly construed. But it is significant that seldom do those who advance this contention quote the complete sentence. They speak of the importance of the grant of legislative authority for the "Peace, Order and good
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They point out that such expressions were traditionally used to grant legislative authority; but they pay slight attention to the fact that these pregnant words are immediately followed by the all-important restriction: "in relation to all Matters not coming within the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". If due attention is paid to these words, it becomes impossible to construe the grant of residuary power otherwise than as saving provincial authority instead of overriding it.99

As for the "pretended inquiry into the intentions of the framers of the Canadian constitution," Pigeon countered that the Constitution Act, 1867 was not the intention of one man, which might be gathered from extrinsic evidence with some certainty, but rather "the expression of a compromise between many men holding different and opposed viewpoints. When agreement was reached on a text, are we justified in assuming that agreement was also reached on intentions?"100

Waxing philosophically at some length on the nature of law, morality and freedom, Pigeon explained what he considered to be the true meaning of provincial autonomy:

The true concept of autonomy is thus like the true concept of freedom. It implies limitations, but it also implies free movement within the area bounded by the limitations: one no longer enjoys freedom when free to move in one direction only. It should therefore be realized that autonomy means the right of being different, of acting differently. This is what freedom means for the individual; it is also what it must mean for provincial legislatures and governments. ... Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies.

It must be conceded that autonomy thus understood allows the provinces on occasion to work at cross purposes. But it would be a grave mistake to assume that this is wrong in itself, or that it is necessarily against the national interest.101

For Pigeon, tests of constitutional validity invariably involve questions of judgment and degree, and broad principles rather than technical construction.

In my view it is wrong to read the generally accepted definition of legislative autonomy (that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs') as implying limits defined with mathematical accuracy. To do so is to conceive political science as an exact science ascertainable in the same manner as the natural sciences.102

Professor Pigeon concluded his article by stating that the "great volume of criticism" heaped upon the Privy Council (and the Supreme Court at that time) "on the ground that their decisions rest on a narrow and technical construction of the B.N.A. Act" was "ill-founded."

The decisions as a whole proceed from a much higher view. ... [T]hey recognize the implicit fluidity of any constitution by allowing for emergencies and by resting distinctions on questions of degree. At the same time they firmly uphold the fundamental principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another, to a legislative union. In doing so they are preserving the essential condition of the Canadian confederation.103

In the 100th anniversary year of Confederation, Professor G.P. Browne published a major re-assessment of the work of the Judicial Committee. Browne concluded that "whatever its practical defects, the Judicial Committee's interpretative scheme for the British North America Act is both fairly certain and generally congruous. This does not seem either a minor consideration or a mean achievement."104 To those who argued that the Judicial Committee had formulated a principle of balancing powers between sovereign legislatures, a principle not expressed in the Constitution Act, 1867, Browne replied that "it is just as likely that the "federal principle" was not imposed on the
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British North America Act, but derived from it." For Browne, the interpretation of sections 91 and 92 was generally consistent with the logic of federalism underlying the Act.

79 Senator Eugene Forsey, writing in 1970, provided a more balanced (if still acerbic) assessment than he had in earlier years:

The Judicial Committee of the Privy Council, the Stepfathers of Confederation, turned a good deal of the Fathers' work upside down, and, in effect, handed most of labour legislation and social security, and much of the regulation of trade and commerce, to the provinces. But even after the havoc they wrought, a good deal of the original division of powers remains. And a good many new things -- interprovincial and international highway motor traffic, interprovincial and international telephone lines, radio, television, air transport -- have in fact gone to the Dominion. Even the not-so-new grain trade, which a court decision fatuously assigned to the provinces, was rescued by the Fathers' far-sighted provision in section 92, head 10, paragraph (c) of the BNA Act, by which the Dominion Parliament can assert exclusive jurisdiction over any local "work" simply by declaring it to be "for the general advantage of Canada or of two or more of the provinces."**

80 Professor J.R. Mallory pointed out that: "most of the criticism by historians and legal writers of the judicial interpretation of the constitution was written from the perspective of the nineteen-twenties and thirties, when the important cases of the period before 1914 had become awkward precedents in determining the constitutional arrangements of an age when the problems of government were much different."**

81 Professor Hogg has captured the prevailing mood of most of the Canadian legal community towards the Judicial Committee's jurisprudence:

The denials of federal power in the "p.o.g.g. cases" of the Haldane period and the new deal period had profound effects on the nature of the Canadian federation. ... The emergency period of the Privy Council thus wrote an exceedingly important chapter of Canadian constitutional law. While ... the pendulum has subsequently tended to swing back to a position which allows larger use of the principal federal powers, it is likely that the broad lines of constitutional authority which were established by the Privy Council will continue to be controlling, and the expectations and patterns of legislative activity which they generated will certainly not be quickly revised. Recognizing this, constitutional lawyers have tended to lose interest in the once-heated debate over whether or not the Privy Council "misread" the Constitution in so limiting federal power. One can debate a fait accompli for only so long.

82 The Judicial Committee's influence on the interpretation of the division of powers under the Canadian Constitution is felt to this day. The Supreme Court of Canada has enlarged the scope of the trade and commerce power and the criminal law power, and has, as we have seen, resorted to the "national concern" branch to uphold certain statutes under the residuary power of "peace, order and good government." On the whole, however, the judges of the Supreme Court strive to maintain an appropriate balance between the powers necessary for a modern state and national (and international) economy, and the need to protect the distinctiveness and autonomy of the provinces and regions of Canada, in keeping with its status as a federation.

83 True, one can continue to cavil over whether, in specific instances of the application of the principle to the division of legislative powers under the Constitution, the Privy Council was too restrictive in its interpretation of the residuary power and the enumerated heads of federal jurisdiction, just as one can now attempt to claim (as some have) that the Supreme Court has been more than generous in construing, in specific instances -- the scope of certain of those powers. Professor Monahan has stated, "The reality is that under the existing Canadian constitution there are very few social, political, or economic levers that are denied to the provinces. While the Supreme Court has in recent years broadened the authority of Parliament, it has continued to favour an expansive interpretation of provincial powers."
IX. Conclusion

84 The Canadian experience in the adjudication of divisions of powers issues is likely to prove instructive in relation to the United Kingdom's devolution experiment. The Constitution of Canada, modelled as it is on those of Great Britain and the United States, provides an interesting vantage point for comparative law in this area. Still more pertinent is the fact that much of the development of the principle of federalism in Canada's constitutional jurisprudence has resulted from the work of the Judicial Committee of the Privy Council. Professor Vernon Bogdanor has noted that while constitutionally, "devolution is a mere delegation of power from a superior political body to an inferior," politically, it is a different matter, "[f]or power devolved, far from being power retained, is power transferred." He contends that the relationship between Westminster and Edinburgh, for example, "will be quasi-federal in normal times and unitary only in crisis times." He posits that over time, as the adjudication of issues in relation to the transferred powers progresses, "both Westminster and the Scottish Parliament will have come to depend upon the Judicial Committee for the protection of their sphere of action, a condition characteristic of federal systems of government."110

85 Whether the adjudication of the devolution of powers effected under the United Kingdom legislation shall pursue a path similar to that followed in regard to the division of powers under the Constitution of Canada remains to be seen. That the Canadian experience will be a useful reference point is, however, undeniable.

Cases

A.G. British Columbia v. A.G. Canada

A.G. Canada v. A.G. Ontario

A.G. Ontario v. A.G. Canada

Aeronautics

Anti-Inflation Reference

Attorney-General for Ontario v. Attorney-General for Canada

Attorney-General for Ontario v. Canada Temperance Federation

Bank of Toronto v. Lambe

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Canada Temperance

Canada Temperance Association

Canada Temperance Federation

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Crown Zellerbach

Edwards v. Canada
Fort Frances Pulp and Power Co. v. Manitoba Free Press

Hodge v. The Queen

Hunt v. T&N plc

In Re Initiative and Referendum Act

In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919

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Johannesson

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New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)

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Reference re Provincial Court Judges

Reference re Secession of Quebec

Russell

Russell v. The Queen

Secession Reference

Snider

Tennant v. Union Bank of Canada

Toronto Commissioners v. Snider

Toronto Electric Commissioners v. Snider

Union Colliery v. Bryden

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1 For an excellent examination of the first year of devolution in the United Kingdom, see R. Hazell, ed., The State and the Nations (Thorverton: Imprint Academic, 2000). Professor Hazell is the Director of the Constitution Unit and Professor of Government and the Constitution in the School of Public Policy, University College London.

2 1998 (U.K.), c. 42.


4 A. Le Sueur and R. Cornes, What Do the Top Cop Courts Do? (London: Constitution Unit, School of Public Policy, University College London, 2000).

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6 Id., at 502.
7 Id., at 503.
8 G. Marshall, "Remaking the British Constitution," John Tait Memorial Lecture, A Special Lecture delivered before the Faculty of Law, McGill University, October 5, 2000 (Published jointly by the Department of Justice of Canada and McGill University.) The late John Tait was an alumnus of McGill; Assistant Deputy Minister, Public Law; and subsequently, Deputy Minister of Justice of Canada from 1988 to 1994. He was a highly respected civil servant. Dr. Geoffrey Marshall was, until his death in June 2003, an Emeritus Fellow of Queen's College, Oxford and a distinguished scholar of constitutional law, theory and practice.

9 The Canadian Charter of Rights and Freedoms is one of the instruments of the Constitution of Canada. The Charter was enacted and proclaimed in force in 1982 as Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11. The Supreme Court of Canada has rendered more than 400 decisions in Charter cases since 1982.


11 Charles Dickens, Bleak House, chapter II.


15 Id., at para. 92.


17 Quebec Secession Reference, supra, note 12, at para. 72.

18 Id.


20 Re Objection to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793, at 806.

21 Both agreements were intended, to a greater or lesser extent, to restore constitutional harmony between the government of Quebec and that of Ottawa and the other nine provinces, notably by amendments to the Constitution that would have expressly recognized Quebec as a distinct society within Canada. The agreements would also have provided for other constitutional reforms, including changes in relation to the Senate and the Supreme Court, and in the case of the Charlottetown Accord, the recognition of an inherent right of the Aboriginal peoples of Canada to self-governance. The packages of constitutional amendments proposed by both agreements required the application of the strictest of the amending formulae, i.e., unanimity amongst the Senate, the House of Commons and the 10 provincial legislative assemblies, under s. 41 of the Constitution Act, 1982. Both federal Houses and nine provincial legislative assemblies approved the Meech Lake Accord; however, the Accord failed after the Newfoundland House of Assembly revoked its ratifying resolution and the resolution was never put to a vote in the Manitoba legislative assembly. The opinion of Canadian voters on whether to proceed with the amendments proposed in the Charlottetown Accord was solicited by the Governor in Council in October 1992 under An Act to provide for referendums on the Constitution of Canada, S.C. 1992, c. 30, but the Accord failed to win sufficient popular support and so the formal amendment process was never engaged.

22 These include an amendment to the Canadian Charter of Rights and Freedoms recognizing the equality of the English and French linguistic communities of the province of New Brunswick and amendments to the Constitution Act, 1867 and the Newfoundland Act in relation to denominational schools in the provinces of Quebec and Newfoundland, respectively. The constitutional amendment procedure employed to effect those changes is more flexible, requiring the
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consent of the Senate, the House of Commons and the legislative assembly of the province to which the amendment applies: see s. 43 of the Constitution Act, 1982.


24 Quebec Secession Reference, supra, note 12.

25 For further discussion of the events leading to the Reference and the wisdom of the Supreme Court's opinion, see W.J. Newman, The Quebec Secession Reference -- The Rule of Law and the Position of the Attorney General of Canada (Toronto: York University Centre for Public Law and Public Policy, 1999). See, as well, An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, 48-49 Eliz. II, S.C. 2000, c. 26, enacted by the Parliament of Canada, and An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State, S.C. 2000, c. 46, enacted by the Legislature of Quebec. The official opposition in the legislative assembly, the Quebec Liberal Party, voted against the enactment of the latter statute. The Liberals won the provincial election on April 14, 2003. The sovereigntist government of the Parti Québécois was thus replaced by a federalist one when the Lieutenant Governor of the province swore Premier Jean Charest and his ministry in office on April 29.

26 Constitution Act, 1867, preamble.

27 Constitution Act, 1867, ss. 91 and 92 et seq.


Like most politicians in the British tradition, he [Macdonald] did not like the idea of federations. The United Kingdom was a legislative union rather than a federation. One legislature, Parliament, under the Crown, governed all England, Ireland, Scotland, and Wales, and the system seemed to work wonderfully. By contrast, the world's most famous experiment in federalism, the United States of America, had fallen apart and into bloody civil war.

29 Constitution Act, 1867, ss. 58 and 96, respectively.

30 Constitution Act, 1867, s. 90 read with ss. 56 and 57.

31 Id., para. 92(10)(c).

32 This is partly a matter of historical perspective. In J.E.C. Munro’s The Constitution of Canada, published in 1889, the author observed:

The power of disallowance has been exercised in a comparatively small number of cases. Of the 6000 Acts passed by the provincial legislatures up to 1882 only 33 have been disallowed, viz. in Ontario 5, Quebec 2, Nova Scotia 5, Manitoba 7, British Columbia 12… the Dominion government are conscious that the power of disallowance ought to be exercised with great care and caution.

33 The power of disallowance was employed 112 times and last exercised in 1943; the power of reservation in 1961. This does not mean, of course, that the power has ceased to exist as a matter of law. "It was not the courts but political forces that dictated their near demise: " Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327, at 371, 372, per LaForest J.

34 On July 17, 1975, Prime Minister Pierre Trudeau, in refusing a public request for disallowance of Bill 22, the Official Language Act passed by the Legislature of Quebec and declaring French to be the official language of the province, wrote that:

[!]It is only in rare cases that the federal government should avail itself of this power since its use represents a clear exception to the general principle that the federal and provincial legislatures are autonomous in their respective areas of legislative competence and are responsible for the policies they embrace ... Not every provincial law which is contrary to federal policy or to the public interest, or which is "unwise and unjust" should be subject to disallowance. The responsibility for such laws should ordinarily be left with the province unless other elements are present: for example, that their effect cuts directly across the operation of federal law or creates serious disorder particularly beyond the boundaries of the province enacting them.
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(Correspondence tabled in the House of Commons, July 21, 1975, Sessional Papers No. 301-5/185).

35 For a sensitive study of attitudes in Quebec (i.e., Lower Canada) towards Confederation, see A.I. Silver, The French-Canadian Idea of Confederation 1864-1900 (Toronto: University of Toronto Press, 1982).

36 It is not within the scope of this paper to rehearse the decisions of the Judicial Committee in regard to minority rights per se, notably in respect of the nature and scope of the denominational rights guaranteed by s. 93 of the Constitution Act, 1867 and s. 22 of the Manitoba Act, 1870. In an influential piece that appeared in Queen's Quarterly in 1930, Professor F.R. Scott argued forcefully that the contention that the Privy Council was "the defender of minority rights" did not fit the facts:

What the Privy Council has done in our Constitution is to safeguard, not minority rights, but provincial rights...

It is little comfort for the French-Canadian minorities in the Maritimes, in Ontario, Manitoba, and Saskatchewan to realize that the provincial governments on which they depend for their educational privileges and their civil rights have had their powers enlarged, and that the Dominion Parliament, in which the French-speaking members must always exercise a powerful influence, has been deprived of much of its former capacity. Provincial rights and minority rights would be identical if the minority were confined to the province of Quebec.


38 Id., at 442-43 (emphasis added).


40 Id., at 109.


42 Id., at para. 48.

43 Id., at para. 43.

44 Id., at para. 55. The Court cited, as an example of this practice, the abandonment of the use of the disallowance power, now long dormant.

45 Id., at paras. 56-58.

46 Id., at paras. 59-60.

47 [F]ederative jurisprudence has influenced Canadian federalism to such an extent that, based on the legal decisions which have established case law, a federal system very different from the almost unitarian system found in the 1867 Act has emerged. It was the constitutional arbitration of the Privy Council ... which, more than any other arbitration, contributed to realizing the potential for federalism contained in the Canadian Constitution.


48 Criminal appeals to the Judicial Committee were abolished in 1933.

49 At the time of writing, five of the nine justices were francophones.

50 The validity of the reference power was upheld by the Judicial Committee of the Privy Council in Attorney-General for Ontario v. Attorney-General for Canada, [1912] A.C. 571, and more recently, by the Supreme Court in the Quebec Secession Reference, supra, note 41.


53 Id., at 318-19.

54 Quebec Secession Reference, supra, note 41, at para. 15.
Reference re Provincial Court Judges, [1997] 3 S.C.R. 3, at para. 64. For criticism of the historical basis for this approach, see the dissent of La Forest J. (at para. 304 et seq.), which is instructive. "[T]o the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from the structure of Canadian, and not British, constitutionalism"; at para. 319 (emphasis in original).

Id., per Lamer C.J., at para. 138.

Id., at para. 140 (emphasis in original).

Id., at para. 124.


Quebec Secession Reference, supra, note 41, at paras. 27 and 28.

Id., at para. 31.


Toronto Electric Commissioners v. Snider, id., at 412.


Id., at 99.

Labour Conventions, supra, note 67, at 353-54.


Labour Conventions, supra, note 67, at 354 (emphasis added).

There were, of course, only nine provinces when F.R. Scott was writing in 1937; Newfoundland became the 10th province in 1949.

F.R. Scott, Essays on the Constitution, supra, note 69, at 94.

In a subsequent piece he was no less dubious of the result: "So long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties, and no doctrine of watertight compartments' existed; once


80 [1881-1882] 7 A.C. 829.


83 Id., at 205-206 (emphasis added).

84 Id., at 206.

85 Id., at 207-208.


91 Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327 (Parliament had regulatory jurisdiction over nuclear power).

92 P.W. Hogg, Constitutional Law of Canada, 4th ed., supra, note 77, at 452, 470-71. (Professor Lederman's views are expressed in his article, "Unity and Diversity in Canadian Federalism" (1975) 53 Can. Bar Rev. 597). Professor Hogg, the former Dean of Osgoode Hall Law School, is widely recognized as the current Dean of Canadian constitutional lawyers.


94 See, for example, the views of more than 30 commentators cited by F.R. Scott in "Centralization and Decentralization in Canadian Federalism" (1951) 29 Can. Bar Rev. 1095, at 1108-09, note 44, each authority having "emphasized the degree to which the courts have departed from the original intention of the constitution."


96 Id., at 1031-35.


98 Professor Pigeon, id., at 1128, cited an article by Professor Bora Laskin, " Peace, Order and Good Government' Re-examined" (1947) 25 Can. Bar Rev. 1054, as an example of this call for a broader construction of the federal power. Professor Laskin would also become a Justice of the Supreme Court of Canada, and ultimately, its Chief Justice.

99 Id., at 1128.

100 Id.

101 Id., at 1132-33.

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103 Id., at 1135. For a lucid analysis of the role of the Privy Council’s jurisprudence in preserving Quebec’s ability to protect its collective identity, see J. Beetz, “Les Attitudes changeantes du Québec à l’endroit de la Constitution de 1867,” in P.A. Crepeau & C.B. Macpherson, eds., The Future of Canadian Federalism / L’avenir du fédéralisme canadien (University of Toronto Press / Les presses de l’Université de Montréal, 1965). Professor Beetz, like Professor Pigeon, went on to become a distinguished judge on the Supreme Court of Canada.


105 Id., at 32.


107 J.R. Mallory, The Structure of Canadian Government (1971), at 343: Mallory saw great benefits in the role played by the Judicial Committee as the head of a unified appellate system for the whole British Empire (at 336), but remained critical of the structural weaknesses he saw in the Committee (at 337-38):

It is apparent from a study of the case law on Canadian federalism that few if any of the distinguished judges understood the constitutional difficulties of federalism, or even what federalism as a form of government is. Their minds were wholly patterned in the legal system of a unitary state in which Parliament (one Parliament, not eleven) is sovereign and free to modify the law at will if the courts make a mess of it. ... Those few who professed to understand it, like Lord Watson and Lord Haldane, acted as if they had never read the British North America Act through.


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