

From Railway Construction to Constitutional Construction: John Wellington Gwynne's National Dream¹

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I.

JOHN WELLINGTON GWYNNE sat on the Supreme Court of Canada from 1879 to 1902. He heard all but the first of the cases that came before the court in connection with what we know as the provincial rights controversy, and he stood out by virtue of his consistent preference for the federal cause. He regularly found for the Dominion on the basis of what he saw as the founders' intent, expressed in the *British North America Act*,² and he persisted in doing so, against the trend of the Privy Council decisions, even when it was clear to him that he was defending a lost cause.

Some thirty years before his promotion to the Supreme Court, Gwynne was briefly in the public eye as a railway promoter. His efforts at railway construction were a little more successful than his efforts at constitutional construction, though he made no money by them. What is historically important is the link between the two enterprises. Like his friend John A. Macdonald, Gwynne saw railway-building as a means to nation-building. For him, the construction of the Canadian Pacific Railway and the construction of the Canadian

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¹ The author gratefully acknowledges the financial support of the Osgoode Society and the Social Sciences and Humanities Research Council of Canada in the preparation of this article.

² (U.K.) 30 & 31 Vict., c. 3 [hereinafter *BNA Act*].

constitution were parts of the same grand project: the construction of a nation.

II.

GWYNNE WAS BORN NEAR DUBLIN IN 1814 and emigrated to Canada in 1832. A number of Irishmen like Gwynne - Protestants of genteel parentage - moved to Canada in that year and made their names there. Gwynne probably came with his elder brother, William Charles Gwynne, who settled in Toronto and became a leading light in the medical profession.³ Three others who figure in this story were William Hume Blake, George Skeffington Connor and Francis Hincks. Blake, the father of Edward Blake, became the first chancellor of Upper Canada. Connor, Blake's brother-in-law, became like Blake a prominent Reform politician and then a judge. Hincks, as finance minister and prime minister at mid-century, did more than any other politician of the time to encourage railway-building. He was the political godfather of the Grand Trunk Railway, the first of the three great "political" railways of nineteenth-century Canada, the others being the Intercolonial and the Canadian Pacific.⁴

Gwynne took articles in Kingston at the same time as John A. Macdonald; no doubt it was then that their friendship began. Unlike Macdonald, though, Gwynne completed his articles in Toronto. Moving to Toronto was the path of professional ambition, if you could get your foot in the door. Gwynne was probably helped by his brother William, who had married into the family of a former chief justice of Upper Canada, William Dummer Powell. He became attached to the firm of Christopher Hagerman and William Henry Draper. Hagerman was solicitor general and about to become attorney general; he would end up as a judge in the Court of King's Bench. Draper followed Hagerman in all three offices and went on to become chief justice of Upper Canada. In this capacity, he was routinely consulted on judicial appointments by Macdonald, and eventually he was able to advance

³ Two of their brothers, Hugh Nelson and James Wallace, also emigrated to Upper Canada, but it is not known when they did so. Hugh was for many years examiner and librarian for the Law Society of Upper Canada. James practised law in Berlin, U.C.

⁴ All of the prominent individuals mentioned in this article are treated in *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966-) [hereinafter *DCB*].

Gwynne to the bench. By that time Gwynne had been at the bar for more than thirty years and had begun to despair of promotion.⁵

Like Macdonald, Hagerman and Draper were Tories; but in the 1840s, upper-class Protestant Irishmen like the Gwynnes tended not to be Tories - not if they lived in Toronto, at any rate. They gravitated towards the Baldwins, the pre-eminent Irish family in Toronto. The Baldwins were immensely wealthy, and their social views were conservative, but in politics they were Reformers. William Warren Baldwin was the leading advocate of colonial responsible government; his son Robert made it his life's work to realize his father's ideal. Hincks, Blake and Connor were all Reformers, like the Gwynnes. Like Hincks, Blake and Robert Baldwin, John Gwynne stood as a Reformer at the general election of 1847. (Connor was urged by Baldwin to stand as well but declined for personal and professional reasons.) The Reformers won a great majority, which changed the face of Canadian politics by finally establishing responsible government. Gwynne was one of the few who lost. He never stood for election again.

Gwynne's politics had an ethnic or cultural aspect, then, but they also had a lot to do with railways. His interest in railways had begun in 1845, when he was in England, attached to the chambers of the equity practitioner John Rolt.⁶ It was the height of the British railway "rage," and British capitalists were plunging madly into all sorts of schemes - foreign and colonial, as well as domestic. Gwynne promoted a company to build a wooden railway from Toronto to Goderich and interested several capitalists in the project, one of them an MP. Gwynne, named the company's counsel and solicitor in Canada, undertook to seek the co-operation of certain prominent Upper Canadians, who had been prominent some years earlier in a Toronto railway scheme which had swiftly lapsed into desuetude. Gwynne brashly issued a prospectus naming these individuals as probable supporters of his project. He also began to court the Canada Company, the London-based land company which owned a vast tract on Georgian Bay, including the harbour at Goderich.⁷

⁵ Letter from Gwynne to ? (probably Isaac Buchanan) (19 November 1864) National Archives of Canada (NAC) MG24 D16 (Buchanan Papers).

⁶ See *The Dictionary of National Biography*, vol. 6 (London: Oxford University Press, 1921-22).

⁷ This narrative is based on City of Toronto and Lake Huron Rail Road Company Papers, Metropolitan Toronto Library, S124, and on a series of letters in William Allan Papers (City of Toronto and Lake Huron Rail Road Company Papers) 3 June - 18 July

So far, so good; but the affair now took a nasty turn. Gwynne learned to his dismay that the Toronto company had been revived and had acquired a charter authorizing it to build to any place on Lake Huron. Most of the men he had named were either committed to this enterprise or unavailable to support his own. The Toronto company offered to co-operate with him and his associates, but on terms which would have vested control in the Toronto board. This prospect was quite unacceptable to British investors, who would have to supply most of the capital. There was also a difference of opinion as to the terminus: the Toronto board preferred Sarnia, which Gwynne disparaged on the ground that it would serve American, rather than British and Canadian interests.

Recognizing the need to woo the Canada Company, the Toronto group sent one of the Company's Canadian commissioners to London to negotiate on their behalf. By the time he arrived, the Canada Company's wily president had exploited Gwynne's difficulties with the Toronto board in order to take over the English company. Gwynne remained active in the enterprise, but he had lost his standing as its Canadian adviser. The Englishmen soon ditched him without a penny as compensation for his services. Gwynne went back to Toronto and, still beating the patriotic drum, formed his own company there in order to build a line to Goderich. By that time, though, the British railway bubble had burst and both projects fizzled out.

But Gwynne was no quitter. Throughout the deep slump of the late 1840s he publicized the Goderich project incessantly, at dinners and public meetings and in the press. His parliamentary candidature in 1847, in the Georgian Bay county of Huron, probably had as much to do with railways as with politics. When business had recovered, in 1851, his enterprise was re-chartered as the Toronto and Guelph Railway - but Gwynne, its solicitor, parliamentary lobbyist and public relations man, still had Goderich in his mind's eye. This prospect seemed to be within reach in 1853, when, with Gwynne's warm concurrence, the uncompleted line became the western arm of Francis Hincks's Grand Trunk Railway scheme; but it was not to be. The Grand Trunk was more interested in Sarnia, and Goderich was relegated to a mere branch terminus. Then parliamentary opponents lopped the branch and awarded the Goderich terminus to a rival line. Still, Gwynne might have been happy enough but for the fact that the Grand Trunk refused to acknowledge his financial claims as promoter

1845, *supra* at S123 [hereinafter Allan Railway Papers].

of the Toronto and Guelph. The big money boys had taken him for a ride again.⁸

Still, Gwynne was not in the game for money alone: he was a dreamer, who saw railways as a means to a greater Canada, as his promotional rhetoric shows. This enthusiasm set him apart from most of the Toronto elite. They saw railways as a necessary evil - an engine of social disruption, but indispensable if Toronto was to compete with Montreal and Hamilton.⁹ For this reason among others, his passion for railways did much to fix his political orientation. In the 1840s, his repudiation by the Toronto Tory elite confirmed his Reform leanings; in the 1850s, his attraction into the Grand Trunk orbit estranged him from the Toronto elite as a whole (estranged him politically, that is - no doubt he still went to dinner with them). Francis Hincks had long since moved to Montreal, and the Grand Trunk was a Montreal venture, designed to reinforce that city's control over its commercial hinterland. It was cavalier in its treatment of local interests and a bit of a boondoggle. These features alienated Toronto's commercial and professional classes, regardless of their politics.¹⁰ Gwynne was associated with a minority composed of Hincksite Reformers and what one might, at the cost of a slight anachronism, call Macdonaldite Tories. These elements were the core of the Liberal-Conservative coalition, formed in 1854 and led by Macdonald from 1856 on, which controlled the government until 1862 in alliance with the Lower Canadian *Bleus* led by George-Etienne Cartier, the solicitor of the Grand Trunk Railway.

Gwynne's status as a political maverick was reflected in his role in the scandal known as the Ten Thousand Pound Job.¹¹ In 1853 it became known that the mayor of Toronto, together with an anonymous partner, had made a profit under suspicious circumstances on debentures.

⁸ Letter from Gwynne to the President and Directors of the Grand Trunk Railway of Canada (15 January 1859) Buchanan Papers, *supra*, note 5.

⁹ P. Baskerville, "Entrepreneurship and the Family Compact: York-Toronto 1822-1855" (1980-1) 9:3 *Urban Hist. Rev.*; B. Dyster, *Toronto 1840-1860: Making It in a British Protestant Town* (Ph.D. Thesis, University of Toronto, 1970) 295-305.

¹⁰ Dyster, *supra*, note 9 at 339-50; F. Mellen, *The Development of the Toronto Waterfront during the Railway Expansion Era, 1850-1812* (Ph.D. Thesis, University of Toronto, 1974) 31-78.

¹¹ P. Romney, "The Ten Thousand Pound Job: Political Corruption, Equitable Jurisdiction, and the Public Interest in Upper Canada, 1852-6" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Osgoode Society, 1983) 143.

tures in the amount of £50,000 which had been issued by the city of Toronto in aid of the Ontario, Simcoe and Huron Railroad. The mayor was John Bowes. He was a very rich merchant, and he had done more than any other Torontonians, Gwynne included, to bring railways to the city at last. The bond issue in question had been approved by the city council at his urging. Many people saw Bowes as a public benefactor, but the Toronto elite, as I have said, had mixed feelings about railways. To make things worse, Bowes was not only an Irishman but a Methodist. His rise symbolized the old elite's loss of civic primacy. He was very popular with Toronto's plebeian Irish population, Protestant and Catholic, but Reformers disliked him as a Conservative and many Tories loathed him as the wrong sort of Conservative.¹²

The bonds involved in the scandal were illegal: they were not backed by a sinking fund, as required by statute, and the by-law had been passed without due notice. The government had exploited their illegality in order to impose a general debt consolidation on the city, under which they were to be redeemed. By this means 20-year debentures, which Bowes and his partner had bought from the railway contractors at the standard discount of 20 per cent (that is, one per cent per year until maturity) as soon as they were issued, became redeemable at par after only a few months. Once the scandal got into court, it came out that the consolidation had been necessary in order to convert the city's debt into sterling debentures, that sterling debentures had been necessary because Bowes's partner had financed the deal in London, and that Bowes's partner was none other than the prime minister, Hincks. But the scandal did not get into court easily. There was a long and nasty brawl in the city council. Then, when Bowes's enemies failed to get the city to act, five ratepayers sued Bowes in Chancery for restitution to the city of his share of his, and Hincks's profit.

As mayor, Bowes had masterminded a £100,000 municipal investment in the Toronto and Guelph Railway - Gwynne's railway - an investment which had earned him the chairmanship of the board as the city's representative. He had lobbied for the Grand Trunk merger side by side with Gwynne (it was then, probably, that he had hitched up with Hincks). Naturally, when the writs hit the fan,¹³ he turned to Gwynne and another Irish railway lawyer, Skeffington Connor. They did a creditable job on Bowes's behalf. To justify the

¹² Dyster, *supra*, note 9 at 333-50, 386-91.

¹³ Narrative license: proceedings in Chancery were instituted by bill, not by writ.

passage of the debenture by-law without due notice, they proved that the railway contractors had needed money quickly in order to buy cheap iron. But for Bowes and Hincks, they argued, the contractors could not have converted the bonds into cash quickly enough. They dwelt on the benefit to the city of having its debentures secured by a sinking fund and traded on the London money market.

Gwynne and Connor did well enough to convince the chief justice of Upper Canada, John Beverley Robinson, who wrote a 70-page judgment in Bowes's favour in the Court of Appeal.¹⁴ They convinced none of the Chancery bench, though (not even Connor's brother-in-law, Chancellor Blake), nor a majority of the Court of Appeal (not even Gwynne's old master, Chief Justice Draper). In the end, their case failed to convince the Privy Council either.¹⁵ The conflict of interest was just too blatant, and Bowes had to pay up. There is an apparent paradox in the fact that the two judges who found for Bowes in the Court of Appeal, Robinson and Archibald McLean, both belonged to the old administrative elite, the so-called Family Compact - that is, the very element of Upper Canadian society that most resented Bowes and what he stood for. The explanation probably lies in the Family Compact's nature as a group whose members had made a speciality of doing well by doing good. Robinson might not like to see Bowes doing well by doing good, but he was committed to a doctrine of trust that allowed it. (This is called the rule of law.) At any rate, he could not condemn Bowes without condemning himself and his class.¹⁶

The Ten Thousand Pound Job is interesting both for its own sake and as a confrontation between Gwynne and Mowat which presaged their face-off in the provincial rights controversy. Mowat appeared for the plaintiffs, and there is evidence that neither man's commitment to his client was merely professional. In the interval between the trials in Chancery and Appeal a general election was held, and Bowes stood in Toronto. It was an at-large election: each elector had two votes and the two leading candidates were returned. All five of the candidates were Conservatives. Bowes topped the poll, partly because the anti-Bowes vote was split and partly because he was so popular with the plebeian Irish voters. Most of the city's social elite voted

¹⁴ *Bowes v. Toronto (City of)* (1856), 6 Grant. Ch. Rep. 1.

¹⁵ (1854) 4 Grant. Ch. Rep. 489; for the Privy Council decision, see 11 Moo. P.C. 463; 14 E.R. 770. The case was argued before the Privy Council by English counsel.

¹⁶ This argument is elaborated in Romney, *supra*, note 11 at 181-4.

against Bowes, and Gwynne's political alienation from the elite is illustrated by the fact that he "plumped" for Bowes - that is, voted only for Bowes, voiding his second vote. Mowat, by contrast, voted the strongest anti-Bowes ticket, thereby identifying himself with the cause of Toronto's and Upper Canada's independence of Montreal.¹⁷

III.

A LETTER WRITTEN IN DECEMBER 1873 reveals the link between Gwynne's passion for railways and the political ideals that were to inform his approach to the *BNA Act*. Gwynne was now a judge, having been nominated to the Ontario Court of Common Pleas five years previously by John A. Macdonald on the warm recommendation of Chief Justice Draper and others.¹⁸ In the summer he had taken six months' leave and shipped his family to Europe for the sake of a daughter's health.¹⁹ Gwynne was anxious on his daughter's account, but he was also worried about Macdonald. It was the time of the Pacific Scandal. Macdonald had been accused of taking huge sums of money for election purposes from Sir Hugh Allan at a time when the Montreal financier was treating with the government for the contract to build the CPR.²⁰ Gwynne had left Macdonald fighting for his political life, and ever since then he had been in a state of suspense because his Canadian newspapers had not been arriving in the mail.²¹

His anguish at the news of Macdonald's downfall, which he heard just before Christmas, spilled out in a letter to his and Macdonald's old friend, the Ontario county court judge James Robert Gowan. The letter included a good deal of general abuse of the Liberals, but what is interesting is Gwynne's antipathy towards their Pacific railway policy. This was the antithesis of Macdonald's grand scheme, since the Liberals envisaged nothing more than a short branch line linking Fort

¹⁷ The poll book is printed in *The [Toronto] Globe* (2 August 1854).

¹⁸ NAC, MG26A (John A. Macdonald Papers), vol. 160 passim.

¹⁹ See letters from Gwynne to J.R. Gowan (17 August, 9 November, & 21 December 1873) NAC, MG27 I E17 A1 (Gowan Papers).

²⁰ D. Creighton, *John A. Macdonald: The Old Chieftain* (Toronto: MacMillan, 1955) 153-78.

²¹ Letter from Gwynne to Gowan (9 November 1873) Gowan Papers, *supra*, note 19.

Garry with the American railway, the Northern Pacific.²² "I cannot tell you how my blood boils at the very notion of our great Pacific Railway being lost to us," he raged.

I feel again (as I never thought I should burned as I have been) my former Railway ardour rekindle in my breast. I feel as if, sadly maimed and wounded and crippled as I was for life by the cruel hands of those whom most I served, in my early railway conflicts, I could put on my armour again and enter the lists to fight for Canadian railway progress even tho' the result to me should be that the iron should again enter my soul and impale me. You will say perhaps that it is well for me that I am removed above the region of politics and that I breathe the pure air of judicial equanimity. Perhaps you are right but I should like to know how long it is reasonable to expect that any constitution can enjoy the benefit of the pure air of judicial equanimity which calmly says "ruat coelum" of all our hopes of nationality, are these with our iron zone to be sacrificed and if we are to be handed over ruthlessly bound hand and foot to the tender mercies of the Vanderbilts and the Cookes and the Fricks and the Tweeds et id genus omne of Americans - Judicial equanimity is no doubt a very heavenly virtue and when next it chants the heavenborn dirge "fiat Justitia ruat coelum" God grant it may be as a song of triumph while regarding the retributive justice of Heaven overwhelming in utter ruin, in eternal disgrace and ineffaceable infamy men so lost to all sense of honour and Patriotism as ever to contemplate even for a moment much less accomplish so dire a calamity. The enunciation of such treason must surely speedily bring about the ruin of the party enunciating it. If they were my nearest relations and if such be their policy I would not only fervently pray for their destruction but would feel myself highly honoured and exalted above my fellows in being permitted to renew the spectacle of a Judge descending from the bench to assume the office not of a *first* but of the *last minister* of the Crown -- I mean the Doomsman or Headsman or Hangman or whatever you will ...²³

This passage must be read in context. The French Riviera was enjoying the most glorious winter weather in living memory. Gwynne had just returned from a long, scenic walk in the hills behind Cannes, and most of the letter is a vivid account of the sights he had seen, couched in the form of a parody of the sort of guide book which addresses the reader in the second person. This part of the letter is quite merry, and both parts are obviously products of the same invigorated mind. One might read a glass or two of wine into it, although the writing is very tiny - there is clearly no loss of fine motor control.

But although the rhetoric is exaggerated, the sentiments are undoubtedly sincere. Why should Gwynne dissemble in a private letter to an old and like-minded friend? In any case, the letter expresses

²² D. Thomson, *Alexander Mackenzie: Clear Grit* (Toronto: MacMillan, 1960) 135-36.

²³ Letter from Gwynne to Gowan (21 December 1873) Gowan Papers, *supra*, note 19.

values we have already run into: anti-Americanism, an identification of railways not just with progress but with what one might call *national progress* and self-sufficiency, and finally the implicit idea that this at least is an end that justifies the means - the idea that underlay his and Connor's defence of Bowes in the Ten Thousand Pound Job, and which Gwynne had endorsed by his vote for Bowes at the general election of 1854. If ever Macdonald, miraculously raised from the slough of infamy to the highest political office in the Dominion, should wish to nominate to the highest court of the Dominion a judge who could be counted on to take an expansive view of the powers and importance of the federal government, he could hardly do better than name John Gwynne.

IV.

IN OCTOBER 1878 MACDONALD WAS MIRACULOUSLY RAISED from the slough of infamy to the highest political office in the Dominion. Three months later he named Gwynne to the Supreme Court. In doing so, he can hardly have been unaware of his nominee's approach to constitutional construction. Five weeks previously, in the *Niagara Election Case*,²⁴ Gwynne had dwelt on the differences between the Canadian constitution and that of the United States. Parliament and the provincial legislatures were equally creatures of the Imperial Parliament, he had noted, but the latter were mere municipal bodies, exercising narrowly defined powers of local application and rendered subordinate to the federal parliament by the federal veto power over provincial legislation.²⁵ An important constitutional case was impending in the Supreme Court, and Macdonald turned down Gwynne's request to stay in Toronto until the first week of February to clear up unfinished business in the Court of Common Pleas.²⁶ It is unlikely that Macdonald, determined to reduce the provincial governments to political nullity and fervid with the energy of a man plucked from certain

²⁴ 29 U.C.C.P. 261. The case concerned the validity of the *Dominion Elections Act, 1874* S.C. 1874, c. 9. I owe this reference to Prof. R.C.B. Risk, to whom I am also indebted for much stimulating discussion of matters related to the subject of this article.

²⁵ *Ibid.* at 274-75.

²⁶ Letter from Gwynne to Macdonald (19 January 1879) Macdonald Papers, *supra*, note 18, vol. 354 at 163486. *Lenoir v. Ritchie* (1879), 3 S.C.R. 575 was heard on 30 January.

death, was uninfluenced by Gwynne's published views on the *BNA Act*.²⁷

In three judgments rendered between November 1879 and June 1880, Gwynne manifested his distinctive approach to constitutional adjudication.²⁸ In those early cases, the judges of the Supreme Court paid considerable attention to the objects of Confederation, but they tended to be diverted by issues of public policy. Faced with a question of legislative jurisdiction, they might note the founders' concern to make the federal government stronger than its American counterpart. They might notice that, as a result, the residuary legislative power and the regulation of trade and commerce had been assigned to the Dominion. But they also attached weight to such questions as whether or not the federal and provincial legislatures should be allowed to pass laws that interfered with each other's taxing power.²⁹ Gwynne, however, in the *Niagara Election Case*, had declared his inability to see "with what reason the non-existence of a power can be fairly concluded from the suggestion of a possible abuse of it."³⁰ He preferred to reason from a comprehensive vision of the *BNA Act* as a whole.

A good example is Gwynne's first judgment on the division of legislative powers. It was rendered in *Fredericton v. R.*, which concerned the validity of the Canada Temperance Act. Gwynne began by declaring that all the arguments against the act were "attributable wholly ... to a want of due appreciation of the scheme of constitutional government embodied in the *B.N.A. Act*, and to a misconception of the

²⁷ Macdonald was sent the printed judgments in the *Niagara Election Case* on 8 January. D'Alton McCarthy's letter to Macdonald from Toronto, reporting on the interview at which he had offered Gwynne the job, is dated January 9. Assuming that Macdonald received the judgments on January 8 or 9, which is perfectly feasible, there was time for him to have telegraphed instructions to McCarthy to see Gwynne at once about the appointment. Of course, Macdonald might well have known about Gwynne's judgment, and about his constitutional views in general, before January 8. Letter from T. Hodgins to Macdonald (8 January 1879) Macdonald Papers, *supra*, note 18, vol. 307 at 139984-6; letter from McCarthy to Macdonald (9 January 1879) *supra*, vol. 25 at 9234-9.

²⁸ *Lenoir v. Ritchie*, *supra*, note 25; *Fredericton (City of) v. R.* (1880), 3 S.C.R. 505; *Citizens' Insurance Co. v. Parsons* (1880), 4 S.C.R. 215.

²⁹ Such reasoning is pervasive in *Fredericton* and *Citizens' Insurance*, as also in *Severn v. R.* (1878), 2 S.C.R. 70. On these cases see R.C.B. Risk, "Canadian Courts Under the Influence" (1990) 40 U.T.L.J. 687.

³⁰ *Supra*, note 24 at 279.

terms and provisions of that Act.” According to Gwynne, the object of the Act was

by the exercise of the Sovereign Imperial Power, called into action by the request of the then existing Provinces of *Canada, Nova Scotia and New Brunswick*, to revoke the constitutions under which those Provinces then existed, and, as the preamble of the Act recites, to unite them federally into one Dominion, under the Crown of the United Kingdom of *Great Britain and Ireland*, with a constitution similar in principle to that of the United Kingdom – to sow, in fact, the seed of the parent tree, which, growing up under the protecting shadow of the British crown, until it should attain perfect maturity, would in the progress of time become a nation, identical in its features and characteristics with that from which it had sprung ...

The Act had done this by constituting the Dominion

as a *quasi* Imperial Sovereign Power, invested with all the attributes of independence, as an appanage of the British Crown, whose executive and legislative authority should be similar to that of the United Kingdom, that is to say, as absolute, sovereign and plenary as consistently with its being a dependency of the British Crown it could be, save only in respect of matters of a purely municipal, local or private character – matters relating (to use the language of a statesman of the time) ‘to the family life’ (so to speak,) of certain subordinate divisions, termed Provinces[,] carved out of the Dominion, and to which Provinces legislative jurisdiction limited to such matters was to be given.³¹

On the basis of this view of the purposes of Confederation and the status of the provinces relative to the Dominion, Gwynne proceeded to lay down a scheme of construction of the division of legislative powers which tended at every point to minimize the provincial powers and amplify those of the Dominion.

Gwynne’s judgment in *Fredericton* is magnificent stuff, laid out in elaborate, sonorous, insistently repetitious -- one might almost say Brucknerian -- sentences a mile long. It is distinctive in the grandeur of its vision -- a grandeur reflected not only in its style but in Gwynne’s insistence on deducing the object of the *BNA Act* not, like his fellow judges, from the public statements of the Fathers of Confederation but from the preamble of the act itself. Even when he mentioned the Fathers’ intention to make the federal government stronger than its American counterpart, he was careful to make it a matter of inference from the terms of the act.³²

³¹ *Supra*, note 28 at 560-1.

³² *Ibid.* at 564.

As an exercise in textually based reasoning, however, the judgment contained serious flaws. The notions that the *BNA Act* had annihilated the old provinces and created new ones, and that the provincial legislatures were subordinate to Parliament, were both arguably inconsistent with the idea that the old provinces had sought to be *federally* united; but Gwynne made no effort to address this possible contradiction.³³ In addition, his scheme of analysis of the division of legislative powers contained a logical flaw which appears in a number of contemporary judgments: it neglected the implications of the declaration in section 91 that the federal legislative power, even in respect of the classes of subjects expressly enumerated in that section, was confined to "matters not coming within the classes of subjects ... assigned exclusively to the Provinces."³⁴ There were, then, defects in Gwynne's understanding both of the provinces' constitutional status vis-à-vis the Dominion and of the division of powers between the provinces and the Dominion. Furthermore, by basing his analysis of the division of powers on the premise of provincial subordination, he legitimized the provincialist tendency to view that question in the light of the opposite principle of provincial autonomy.³⁵

Oliver Mowat had already presented such an analysis to the Supreme Court in *Severn v. R.* (1878),³⁶ and he did so again in

³³ See R.C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991), 23-36 and passim.

³⁴ I refer to the qualification that introduces the declaration incorporating the enumerata, to the effect that it is made "for greater certainty, but not so as to restrict the generality of the foregoing Terms of this Section." The judges tended to elide this crucial phrase in quoting or summarizing the terms of section 91. In *Fredericton* Taschereau, J., did quote it, but he construed it only as a warning that the ensuing declaration was not to be taken as diminishing the generality (as he saw it) of the federal power; he ignored its force as limiting the scope of the enumerata: *supra*, note 28 at 558. Gwynne quoted it but ignored it for analytical purposes: *supra* at 565-6.

³⁵ This refers to W.F. O'Connor's condemnation of the Privy Council for applying the principle to its analysis of the division of powers in the *Prohibition Reference*, [1896] A.C. 348: Canada, Senate, "Report Pursuant to Resolution of the Senate ... Relating to the Enactment of the British North America Act, 1867" (1939), Annex 1, 47 [hereinafter O'Connor Report]. My argument is developed in P. Romney, "The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions, and the Construction of the British North America Act" forthcoming in *Can. J. Pol. Sci.*

³⁶ *Supra*, note 29 at 80-1, 84-5. This was the one major case decided before Gwynne's appointment to the Supreme Court.

Citizens' Insurance v. Parsons (1880).³⁷ He lost *Severn* and did not appeal, but he won *Citizens' Insurance*, Gwynne and one colleague (Henri-Elzéar Taschereau) dissenting. Gwynne wrote to Macdonald the next day advising him, on behalf of Taschereau and himself, to make sure the case was appealed. "To my mind the thin end of the wedge to bring about Provincial Sovereignty[,] which I believe Mr. Mowat is labouring to do[,] is inserted," he wrote.³⁸ In order to make sure that the provincialist case was properly presented, Mowat had his government assume the respondent's costs and went himself to England for the hearing. There he briefed respondent's counsel with his own analysis of the division of legislative powers, which was in essence a rebuttal of Gwynne's.³⁹

Citizens' Insurance was the first of a series of cases -- the others being *Mercer*,⁴⁰ *Hodge*,⁴¹ the *McCarthy Act Reference*,⁴² the *Maritime Bank Case*,⁴³ and the *Prohibition Reference*⁴⁴ -- in which Mowat progressively imposed his view of the *BNA Act* upon the Privy Council in language devoid of the rhetorical colour that marked Gwynne's but scrupulously based on the text of the act. The leading features of the *Citizens' Insurance* decision -- the narrow construction of the federal

³⁷ *Supra*, note 29 at 229-30.

³⁸ Letter from Gwynne to Macdonald (22 June 1880) Macdonald Papers, *supra*, note 18, vol. 369 at 171594-7.

³⁹ P. Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto: Osgoode Society, 1986) 277. The text of Mowat's brief is printed in *Ontario Sessional Papers* (1882) no. 31. Gwynne's doctrine is also the prime target of T.J.J. Loranger, *Letters upon the Interpretation of the Federal Constitutional known as the British North America Act, 1867. First Letter* (Quebec: Morning Chronicle Office, 1884).

⁴⁰ *A.G. Ont. v. Mercer* (1883), 8 A.C. 767 (P.C.).

⁴¹ *Hodge v. R.* (1883), 9 A.C. 117 (P.C.).

⁴² There is no reported judgment, but the verbatim argument was printed.

⁴³ *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.). Ontario was not involved in this case, but the government of New Brunswick was represented by Sir Horace Davey, who had been on retainer for Ontario since 1883 and had presented in *Mercer*, together with Mowat, the argument that the Privy Council endorsed in 1892.

⁴⁴ *Supra*, note 35.

power to regulate trade and commerce and the controversial dictum as to the meaning of the final clause of section 91 -- both reflect Mowat's influence. So do the general rules laid down in the *Prohibition Reference* for construing the division of powers. In his own judgment in the *Prohibition Reference*,⁴⁵ Gwynne had felt obliged to buttress his view of the *BNA Act* (now couched in a rhetoric apocalyptic rather than triumphal) with quotations from the Fathers of Confederation and contemporary British ministers, an expedient he had avoided fifteen years previously in *Fredericton*. "Mr. Gwynne takes a rather strong view," said R.B. Haldane dismissively in the course of presenting Ontario's case to the Privy Council. "There are a great many very edifying things like speeches from people who introduced these things into Parliament, and a number of other things which are of great historical value but not otherwise pertinent."⁴⁶ Mowat had won the battle for the text.

To Gwynne, however, as to twentieth-century critics such as W.F. O'Connor and Bora Laskin,⁴⁷ the *Prohibition* decision was judicial legislation. Several years previously, writing to a friend about the Supreme Court's split decision in the *Maritime Bank Case*, he had correctly predicted that "These conflicting judgments will no doubt give to the dispensers of the Prerogative in London of dispensing with the *BNA Act* another opportunity to indulge in their favourite game. I have long since [concluded] that such has been the result of the decisions of the P.C. Indeed so successful have they been that old as I am I fully expect that both you and I shall be present at the funeral of Confederation cruelly murdered in the house of its friends."⁴⁸ To

⁴⁵ *In re Provincial Jurisdiction to Pass Prohibitory Liquor Laws* (1895), 24 S.C.R. 170 at 204.

⁴⁶ *The Liquor Prohibition Appeal, 1895. An Appeal from the Supreme Court of Canada to Her Majesty the Queen in Council* (London: William Brown & Co., 1895), 160. See also Professor Risk's article in this volume.

⁴⁷ O'Connor Report, *supra*, note 35, Annex 1 at 25, 39-50, 63-7, 71-2; B. Laskin, "Peace, Order and Good Government' Re-examined" in W. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland & Stewart, 1964) 66 at 75-81; B. Laskin, "The Supreme Court of Canada: A Final Court for and of Canadians" in *The Courts and the Canadian Constitution*, *supra*, 125 at 134-39. The school of thought of which these writings are representative is reviewed in A. Cairns, "The Judicial Committee and its Critics" (1971) 4 Can. J. Pol. Sci. 301.

⁴⁸ Letter from Gwynne to Gowan (24 December 1889) Gowan Papers, *supra*, note 19.

Gwynne, 82 years old and still wearing the judicial ermine, the *Prohibition Reference* must have seemed the mortal blow.