

## XVI

# The Scholars and the Constitution: P.O.G.G. and the Privy Council

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CANADIAN LAWYERS, HISTORIANS, and political scientists have written countless pages about the judgments of the Judicial Committee of the Privy Council that interpreted the division of legislative powers made by ss. 91 and 92 of the *British North America Act* of 1867 (hereinafter the *BNA Act*).<sup>1</sup> They have named heroes and villains, and successive generations have had different understandings about how to analyse the judgments and about what standards define a hero or a villain. This essay does not attempt to add more pages to this pile. Instead, it is about the writers themselves and their ways of writing. It is, though, limited to the writers who were also lawyers, particularly common lawyers, because they have distinctive and important ways of thinking that need to be studied. My argument is hardly startling: their writing reflected their beliefs about legal reasoning and legal scholarship, as well as their visions of Canada. The story and the argument can best be presented chronologically, in four parts, although the dates do no more than mark convenient separations.

First, a description of ss. 91 and 92 is needed. Section 92 gave the provinces power to legislate “exclusively... in relation to matters coming within” a list of sixteen subjects, including, for example, “direct taxation within the province (s. 92(2)), “property and civil rights in the province” (s. 92(13)), and “all matters of a merely local or private nature in the province (s. 92(16)). Section 91 opened by giving the Dominion power to legislate for “the Peace, Order and good Government” (P.O.G.G.) of Canada, in relation to all matters not assigned to the provinces. It continued, “for greater certainty,” with a declaration that the exclusive power of the Dominion included all matters coming within a list of twenty-nine subjects, including, for example, the regulation of trade and commerce (s. 91(2)), taxation by any means (s. 91(3)), and the criminal law (s. 91(27)). Section 91 then concluded by saying that any matter coming within any of the subjects in this list “shall not be deemed to come within the class of matters of a local or private nature” assigned to the provinces. After lawyers had read and re-read these sections for a century and

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<sup>1</sup> The *BNA Act* was a statute of the imperial British parliament, enacted in 1867 to create the Dominion of Canada: 30-31 Victoria, c.3 (U.K.). In 1982, the name “*BNA Act*” was replaced by a new one: the *Constitution Act*, as part of the constitutional re-arrangements that included establishing the *Charter of Rights and Freedoms* and formally patriating the constitution. However, convenience justifies using the name that was used throughout the period considered in this paper.

more, the assumption suggested by the phrase “for greater certainty” had become wonderfully ironic.

## I. From Confederation to 1900: Lefroy

The early decisions by the Supreme Court of Canada tended to favour the Dominion,<sup>2</sup> but in the early 1880s, the results were mixed. In 1881, in *Citizen's Insurance v. Parsons*,<sup>3</sup> the Privy Council dismissed a challenge to Ontario legislation regulating the terms of insurance policies, and Sir Montague Smith limited s. 91(2) to regulation of inter-provincial and international trade, and, “it may be, .. general regulation of trade throughout the whole Dominion.” A year later, in *Russell v. R.*,<sup>4</sup> both the Supreme Court of Canada and the Privy Council upheld the Dominion's *Canada Temperance Act*, which permitted prohibition of liquor by local option. A majority of the Supreme Court put the *Act* squarely within s. 91(2), but the Privy Council chose a different ground: because prohibition was a matter of “public order, safety, or morals,” it was not within any of the enumerated powers in s. 92, and there was no need to decide whether it came within s. 91(2) or the general power to legislate for the peace, order, and good government of Canada (P.O.G.G.). Later generations saw *Russell* as the high-water mark of Dominion power.

The trend of the cases shifted decisively a year later in *R. v. Hodge*,<sup>5</sup> in which the Privy Council upheld an Ontario statute regulating taverns, as a matter of “good government, ... peace, and public decency.” A few years later, in 1885, a Dominion statute much like the Ontario statute affirmed in *Hodge* was declared *ultra vires* in the *McCarthy Act Reference*,<sup>6</sup> and the triumphs of the provinces continued through the next decade. The climax came in 1896, in the Privy Council's decision in the *Local Prohibition Reference*,<sup>7</sup> upholding Ontario's local option legislation, which permitted prohibition of liquor in substantially the same way as the Dominion's *Canada Temperance Act*. The result was hardly startling, because the crusade against drink was just the sort of local matter assigned to the provinces at Confederation, and from this perspective, *Russell* was the problematic holding. It was Lord Watson's reasons that were significant. He began with an essay on the structure of ss. 91 and 92, which was dominated by a fear that P.O.G.G. was a threat to the autonomy of the provinces. This fear led him to read it as secondary to the powers enumerated in s. 92, and also to declare that it should be “strictly confined” to matters of “national

<sup>2</sup> The major cases were *Severn v. R.* (1878), 2 Supreme Court [of Canada] Reports [henceforth, S.C.R.] 70, and *Fredericton v. R.* (1880), 3 S.C.R. 505. For a discussion of the cases from Confederation to 1900, see R. Risk, “Canadian Courts Under the Influence” (1990) 40 University of Toronto Law Journal 687.

<sup>3</sup> (1881), 4 S.C.R. 215, aff'd 7 Appeals Court [henceforth, A.C.] 96.

<sup>4</sup> (1882), 7 A.C. 829 (Privy Council). This case was essentially the same as *Fredericton*, *supra* note 2, which was not appealed; the result was the same, but the reasoning was different.

<sup>5</sup> (1883), 9 A.C. 117.

<sup>6</sup> In keeping with the prevailing practice for references, neither court gave a judgment. The arguments were reprinted in House of Commons, Sessional Papers, 1885, number 85.

<sup>7</sup> *A.G. Ontario v. A.G. Dominion and the Distillers and Brewers Association of Ontario*, [1896] A.C. 348, rev'g (1894) 24 S.C.R. 170.

concern.” This declaration was central to the analysis of ss. 91 and 92 during the next four decades: was it a declaration that P.O.G.G. was a robust power to deal with matters of a general or national nature, or a warning that P.O.G.G. would be narrowly interpreted? Next, Watson announced that the result in *Russell* could not have been based on s. 91(2), justifying this assertion by asserting that the word “regulation” did not include prohibition. Turning to the provincial powers, he said that the prohibition legislation was valid under either s. 92(13) or s. 92(16), launching s. 92(13) on its path to becoming the dominant section during the 1920s and 1930s.

Writings by lawyers about constitutional law began in the late 1870s, and by 1900 a small pile of texts, articles, and lectures had appeared, all written by practitioners.<sup>8</sup> Loyal to Great Britain, they saw Canada’s constitution as a distinctive combination of federalism and the glorious British constitution, especially parliamentary sovereignty, responsible government, and liberty. Federalism was their major topic, almost the exclusive topic, probably because it marked Canada’s distinctiveness and it created the most pressing doctrinal issues.

The most useful example of this writing was *The Law of Legislative Power in Canada*, written by A.H.F. Lefroy while he was a practitioner in Toronto, which appeared in 1898. In its Preface, Lefroy announced that his objective was to “extract” from the cases on the *BNA Act* the doctrine that was of “general application upon the law governing the distribution of power... , [and] to formulate the results so arrived at in general Propositions.” The Introduction was a long hymn to the British constitution and liberty, and to the accomplishment of combining responsible government and federalism. The main body of the text was just what Lefroy promised in the Preface. It was composed of sixty-eight numbered propositions, derived from the cases and each followed by extensive commentary. *Russell*, *Hodge*, the *Local Prohibition Reference*, and the other Privy Council judgments were analysed and synthesised at length. Many of the propositions were taken directly from the language of the judgments; the commentary was mostly quotations or paraphrases of judgments; and there was a large amount of uncritical overlapping and duplication. Nonetheless, the result was a major accomplishment. By the mid-1890s, the cases had become a jumble, which Lefroy ordered in ways that now seem simple, and much of what seemed simple after he wrote had not seemed simple before. Throughout, he was respectful to the courts, offering no criticism except an occasional suggestion that the cases might not be entirely consistent.<sup>9</sup>

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<sup>8</sup> The major texts were: D.A. O’Sullivan, *A Manual of Government in Canada*, 1st ed. (Toronto: J.C. Stuart, 1879; 2d ed., Toronto: Carswell, 1887); T.J.J. Loranger, *Letters Upon the Interpretation of the Federal Constitution* (Quebec: Morning Chronicle Office, 1884); J. Travis, *A Law Treatise on the Constitutional Powers of Parliament and of the Local Legislatures under the British North America Act, 1867* (St John: Sun Publishing, 1884); W.H.P. Clement, *The Law of the Canadian Constitution*, 1st ed. (Toronto: Carswell, 1892; 2nd ed., Toronto: Carswell, 1904; 3rd ed., Toronto: Carswell, 1916); and A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Law Book and Publishing, 1897-98). Articles about constitutional law began to appear in law journals in significant numbers during the 1880s, and virtually all of them were doctrinal analyses of particular issues of the division of powers.

<sup>9</sup> *Ibid.* at note 8. For a longer account of Lefroy, see R. Risk, “A.H.F. Lefroy: Common Law Thought in Late Nineteenth-Century Canada: On Burying One’s Grandfather” (1991) University of

For Lefroy, the powers of the Dominion and the provinces were mutually exclusive spheres of absolute power, defined and separated by sharp boundaries. The duty of the courts was to determine the limits of these spheres. This function was ultimately statutory interpretation, which was generally understood to be the determination of the will of the legislature as expressed in the words of the statute. Only the words of statutes were to be considered, unless they were unclear; and if they were, the interpretation was to be guided by "legal principles," typically the common law presumptions.<sup>10</sup> Lefroy perceived this task as an objective and apolitical one, and the only standard for assessing decisions was their consistency with the terms of the *BNA Act* and the "legal principles." Once made, decisions became precedents, which subsequent courts were obliged to follow.

Throughout, the text and its doctrine seemed to be separate from time, context, and values. The very form of the text contributed to this perception: the propositions were put in heavy type and set off by spacing from the commentary, which thereby became secondary. Both propositions and commentary were virtually all doctrinal analysis, unrelated to any historical, social, or political context, and there was little or no acknowledgment that the doctrine had changed. There was no significant discussion of Confederation and its understandings, or of the provincial rights movement: a struggle for power between the provinces, led by Ontario, and the Dominion, waged on many battlegrounds, and ending in triumph for the provinces. Nor was there any sense that the doctrine might be assessed by an inquiry into the nature of Canada, its federalism, and its needs.

A few months after the text appeared, Lefroy wrote a short comment about the *Local Prohibition Reference*, expressing a fear that the inquiry into whether a matter had become a matter of "national concern" might "bring before the courts very difficult questions and questions of a very political character."<sup>11</sup> His fear was that questions about division of powers might become questions of degree, not of bright lines, and might involve judgments about the nature and needs of the nation. As we shall see later, this fear was a crucial contrast to beliefs about interpretation almost a hundred years later.

Lefroy's text manifested understandings of legal reasoning and scholarship that became dominant among scholars in England and the United States during the second half of the nineteenth century. The basic elements of this thought were the equality and autonomy of individuals and legal entities generally, a division between the public and private realms, a conception of rights as spheres of absolute power, the paramountcy of the common law and the courts, and a belief that legal reasoning was sharply separated from politics and context.<sup>12</sup> Canadian lawyers embraced

Toronto Law Journal 307.

<sup>10</sup> See P.B. Maxwell, *The Interpretation of Statutes* (London: W. Maxwell & Son, 1875); and H.J. Powell, "The Original Understanding of the Original Intent" (1985) 99 *Harvard Law Review* 885.

<sup>11</sup> A.H.F. Lefroy, "Prohibition: The Late Privy Council Decision" (1896) 16 *Canada Law Times* 125 at 133.

<sup>12</sup> Of course this description is a model, and even as a model, it is greatly simplified, but Lefroy was one of the paradigms. See B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law and History Review* 219; R. Gordon, "Legal Thought and Legal

English thought; Lefroy had studied at Oxford, where much of the formative scholarship was done, and he was one of its exemplars in Canada. In contrast, he and his generation of the Canadian legal community did not often look to the United States, except to proclaim the superiority of the British constitution.

Lawyers learned during this period to separate talk about jurisdiction and power sharply from the nature and needs of Canada and its citizens, a lesson that shaped their thinking for much of the twentieth century. Yet their writings were not entirely divorced from the fray of late nineteenth century politics. The language of separate and autonomous spheres of power was also the language of the campaign for provincial rights. This link between scholarship, constitutional doctrine, and politics was clearly displayed in a set of lectures on constitutional law given at the University of Toronto in the 1890s by David Mills, a lawyer and one of the major provincial rights politicians. The point is not that Lefroy and Mills bent their scholarship to a political purpose. Instead, the language of absolute rights and spheres of powers was a pervasive one, and one that could give powerful symbols to the political campaign.<sup>13</sup>

## II. From 1900 to the Late 1920s: Ewart, Labatt, Smith

In the early twentieth century, Lord Haldane replaced Lord Watson as the dominant figure in the Privy Council, and a new generation of judges, led by Sir Lyman Poore Duff, appeared on the Supreme Court of Canada. By late 1920s, the Dominion's powers seemed to many Canadians to be a pale image of what had been contemplated at Confederation and what the *BNA Act* had given it: P.O.G.G. was a minor, supplementary power, to be used only in emergencies; s. 91(2) was severely restricted; and s. 92(13) seemed to be the dominant power. How was this departure to be understood? Was it essentially a product of the cases decided before 1900, especially the *Local Prohibition Reference*? Or, instead, was it a product of the twentieth century cases? Was the villain, or the saviour, Watson or Haldane? These have been tempting questions for half a century, but an attempt to fashion yet another answer here would stray from the topic. Instead, for studying the writers and their writings, the judgments can be ink blots, in the manner of a Rorschach test, for the writers to interpret.

Although several judgments between 1910 and 1920 suggested trends and doctrines, the major cases were decided in the early 1920s. The first was the *Board of Commerce Reference*. Here, Haldane limited s. 91(2) by saying that it did not permit regulation of "a particular trade in which Canadians would otherwise be free

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Practice in the Age of American Enterprise" in G. Geison, ed., *Professions and Professional Ideologies in America* (Chapel Hill: University North Carolina Press, 1983), 70; D. Kennedy, "Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940" (1980) 3 *Research in Law and Sociology* 3; and D. Sugarman, "Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition" in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 26.

<sup>13</sup> Mills' typescript lectures are in the David Mills Papers, University of Western Ontario Library. For an illuminating study of the language of the provincial rights' politicians, and its links to legal thought, see R. Vipond, *Liberty and Community* (Albany: State University of New York Press, 1991).

to engage in the provinces,” thereby extending the doctrine in *Parsons* about regulating terms of contracts of a trade to regulating an entire trade. As well, he added a comment that could be read as making s. 91(2) no more than a supplement to P.O.G.G., and said that s. 91(27) was confined to matters that were, in their “very nature” criminal. Coming to P.O.G.G. itself, he announced the limitation for which he became notorious in Canada: if legislation also affected property and civil rights, P.O.G.G. could be used only in “exceptional” or “special circumstances such as a great war.”<sup>14</sup>

A little less than two years later, in *Fort Frances Pulp and Paper v. Manitoba Free Press*, he added the phrases “sudden danger to the social order” and “emergency,”<sup>15</sup> and in *Toronto Electric Commissioners v. Snider*, he spoke of “some extra-ordinary peril to the national life of Canada”. As well, Haldane explained *Russell*, which he had been at pains to narrow throughout, by saying that drink had been a “menace to the national life of Canada,” and the Dominion prohibition had been designed “to protect the nation from disaster.”<sup>16</sup> “The “national concern” was either forgotten or collapsed into an emergency.

Early in this period, the Supreme Court of Canada was divided; but at the end, Duff dominated, and some of his decisions, rather than being entirely determined by the authority of the Privy Council, anticipated some of its more extreme holdings. Both Duff and Haldane seemed unwilling to contemplate the possibility that a particular episode or a collection of particular episodes could have some general or national dimensions. The capacity of the provinces to legislate, typically through s. 92(13), was alone sufficient to exclude the Dominion.<sup>17</sup>

From 1900 until the mid 1920s, almost all the writings continued to be done by practising lawyers, the only conspicuous academic being Lefroy, who had become a professor at the University of Toronto in 1900. Almost all of it took the form of articles in legal periodicals, analysing particular decisions of the Supreme Court or the Privy Council.<sup>18</sup> The understandings of legal reasoning and the job of a scholar continued to be the understandings that were dominant in the late nineteenth century, and a wonderful example was a debate about *Royal Bank of Canada v. The King*.<sup>19</sup> The problem was, who was entitled to the proceeds of bonds issued by a railway

<sup>14</sup> [1922] 1 A.C. 191 at 197-8.

<sup>15</sup> [1923] A.C. 696 at 703 and 704.

<sup>16</sup> [1925] A.C. 396 at 412.

<sup>17</sup> A few months after *Snider*, in *The King v. Eastern Terminal Elevator* [1924] Ex.C.R. 167, [1925] S.C.R. 434, the Supreme Court considered the *Canada Grain Act*, which was designed to impose comprehensive control on the grain trade, largely for the benefit of exporters. Duff, who was now dominant, would have held the entire *Act* invalid.

<sup>18</sup> Lefroy published three more books, all of which were derived from *The Law of Legislative Power in Canada*, and Clement's text appeared in a second and third edition, but there was no new effort to write a comprehensive text about the division of powers. W.R. Riddell, a judge in Ontario, wrote two books on the constitution: *The Constitution of Canada in its History and Practical Working* (New Haven: Yale University Press, 1917), and *The Canadian Constitution in Form and Fact* (New York: Columbia University Press, 1923), but he did not consider the division of powers.

<sup>19</sup> [1913] A.C. 283.

under construction in Alberta. They had been sold in England under an agreement providing that the proceeds were to be paid into an account of the Royal Bank in Edmonton, to be disbursed as construction proceeded, but the railway floundered. The bond holders were doubtless entitled to recover the proceeds from the railway, because the purpose of the bonds had ceased to exist, but Alberta enacted a statute expropriating the proceeds. In response, the bond holders brought an action claiming that the statute was invalid, and that they, not Alberta, were entitled to recover the proceeds. The validity depended upon the location of the proceeds: were they property "in the province?" Reversing the Supreme Court, the Privy Council held that the locus was Montreal, the head office of the Bank, and not Alberta, and therefore the claim of the bond holders to recover the proceeds was "a civil right outside the province," and the legislation was invalid.

The debate, waged from 1913 to 1915 in twelve articles, involved three of the major writers of the period and a couple of minor supporters. The first to enter the fray was Lefroy. He defined a civil right as a power to "invoke the aid of the courts of the province by way of action or by way of defence." Because the bond holders had a right to sue the Royal Bank in Alberta, the Treasurer had the same right. Therefore, the claim was a civil right in the province, and the legislation came within s. 92(13). He argued as well that bond holders also had a right to sue the Bank at its head office in Quebec, implying that Quebec could have enacted similar legislation.<sup>20</sup> Next came J.S. Ewart from Winnipeg, well-known to Canadian historians as a passionate advocate of independence for Canada, a leading counsel, and a remarkably powerful thinker, albeit cranky and erratic. He argued that the money was in the province, and therefore "property" within s. 92(13), or an asset of the company that could be expropriated under s. 92(10).<sup>21</sup>

The last of the three principle protagonists was C.B. Labatt, who defended the Privy Council. He was not as learned as Lefroy or as imaginative as Ewart, but he was an editor of the *Canadian Law Journal* and the most prolific writer of the period. He argued that the definition of a civil right should be derived from private international law: a substantive right incident to property. According to this principle, the proceeds were in Quebec, not Alberta, and the legislation was therefore *ultra vires*.<sup>22</sup>

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<sup>20</sup> A.H.F. Lefroy, "The Alberta and Great Waterways Railway Case" (1913) 29 *Law Quarterly Review* 285, and (1913); 49 *Canada Law Journal* 561; and "Royal Bank of Canada v. The King" (1914) 50 *Canada Law Journal* 622. At the outset, in "The Alberta and Great Waterways Railway Case," he announced (at 288) that the Privy Council had finally made a mistake: having studied every one of its reported judgments carefully, he had "never seen the smallest loophole for criticism or for doubt as to the correctness of any one of them before this last judgment." The quotation in the text is taken from "The Alberta and Great Waterways Railway Case" at 289.

<sup>21</sup> J.S. Ewart, "*The King v. The Royal Bank*" (1913) 33 *Canada Law Times* 269, and "The Judicial Committee: *Rex v. The Royal Bank*" (1914) 50 *Canada Law Journal* 560. His first article was one of a series in which he sought to demonstrate that appeals to the Privy Council should be abolished: it had been not only ignorant of vital Canadian context, but erratic and sloppy as well. For accounts of Ewart's life and legal writings, see Farr, "John S. Ewart" in McDougall, ed., *Our Living Tradition* (Toronto: University of Toronto Press, 1959) and R. Risk, "John Skirving Ewart: The Legal Thought" (1987) 37 *University of Toronto Law Journal* 335.

<sup>22</sup> C.B. Labatt, "Power of Provincial Legislatures to Enact Statutes Affecting the Rights of Non-

Despite heated disagreements, all three scholars shared understandings about legal reasoning and interpretation, and basic principles about division of powers' issues. Outcomes should be determined by using these principles, and subsidiary doctrines appropriate for particular cases, such as the common law doctrine about the location of a debt. In applying these principles, the nature of federalism, the historical understandings that might illuminate the *BNA Act* and the contemporary context were simply not permitted or even contemplated. For example, Labatt and Lefroy did not justify their definitions of civil rights, except for a vague reference to the autonomy of the provinces made by Lefroy, and none of the three considered the vulnerability of non-resident bond holders, or the effectiveness of democratic responsibility as a limit on provincial legislatures, even when considering whether Alberta or Quebec, or both, could legislate about the proceeds. Considerations of this sort were not simply irrelevant; instead, they were embedded in the general principles. Certainly outcomes might sometimes be affected by this kind of influence in the application of the principles, but this possibility was no more than the possibility of human error and fallibility.

Their understandings about legal reasoning illuminated the gulf between law, and politics and context. In his reply to Labatt, Lefroy challenged a claim, made by one of Labatt's supporters, that no one could doubt the "perfect justice or wisdom" of the Privy Council's decision.

All I can assume to discuss is law, not perfect justice or wisdom. Law may be, and ought to be, just and wise. But whether it is or not, is a matter with which a lawyer, as such, has nothing to do. That is what the old philosopher Hobbes meant when he laid down the dictum so shocking to weak minds, that "no law can be unjust."<sup>23</sup>

Labatt agreed. After Ewart had suggested that the Privy Council had been influenced by a desire to protect property and British investors, and that such influence was not only improper but a reason for abolishing appeals, Labatt rushed to its defence. Its ignorance of Canadian conditions, which Ewart saw as a disqualification, was really a blessing:

A controversy determined by jurists of ample practical experience, who consider the law and the facts with the intellectual detachment of College professors forming an opinion in regard to the soundness of abstract doctrines may well be said to have been determined under ideal conditions.<sup>24</sup>

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Resident Shareholders in Provincial Companies" (1914) 50 Canada Law Journal 41; "Power of Provincial Legislatures to Enact Statutes Affecting the Rights of Non-Residents" (1914) 50 Canada Law Journal 473; "Government Impairment of a Concession Granted by the Government—A Rejoinder to a Critic" (1914) 50 Canada Law Journal 204; "Power of Provincial Legislatures to Enact Statutes Affecting the Rights of Non-Residents: A Reply to Some of My Critics" (1915) 51 Canada Law Journal 265. He argued that Lefroy's claim (that there was a civil right in Alberta) depended upon circular reasoning and upon the existence of an effective claim in Alberta; but the condition of payment, construction of the railroad, had not been fulfilled. In reply to Ewart, Labatt made the same argument that the claim was incomplete and, more fundamentally, pointed out that Ewart had simply assumed, incorrectly and without justification, that the proceeds of the bonds were in Alberta. Two Toronto lawyers supported Labatt: G.S.H.[Eighthington?], "*The Royal Bank v. The King*" (1914) 50 Canada Law Journal 583, and "Royal Bank Case" (1915) 51 Canada Law Journal 60; and C.H. Masters, "Legislative Powers" (1914) 50 Canada Law Journal 208.

<sup>23</sup> Lefroy, "Royal Bank" *supra* note 20 at 624.



Before 1925, P.O.G.G. was rarely considered, although in a few articles it was perceived as a substantial power, albeit an unsettled or undefined one, and the possibility that matters might have national dimensions or importance seemed to be a real one. In 1909, for example, A.C. Heighington claimed that it might support the Dominion's *Industrial Disputes Investigation Act*, prohibiting strikes at railways and public works before arbitration,<sup>25</sup> a claim denied fifteen years later in *Snider*. Section 91(2), which was discussed more often, also seemed to most authors to be a substantial power, even though they were clearly aware of *Parsons*. Lefroy and Z.A. Lash, for example, both claimed that it gave the Dominion extensive powers to regulate the national economy.<sup>26</sup> Cases decided before 1900 were not perceived as raising discrete topics or problems, and there was little criticism of the judgments or the fate of the *BNA Act*.<sup>27</sup> Whether this absence of criticism was a product of beliefs about scholarship or an assessment of the cases is difficult to determine, although the debate about the *Royal Bank* case shows that criticism was not utterly unthinkable.

Beliefs about legal reasoning and scholarship changed dramatically in the mid-1920s, and the occasion for declaring the change was the *Snider* case, especially Haldane's comments about *Russell*. In 1926, H.A. Smith, a young Englishman teaching at McGill, wrote two articles that presented both a sustained criticism of the Privy Council and a different mode of reasoning.<sup>28</sup> He agreed that the object of

<sup>24</sup> Labatt, "...A Reply" *supra* note 22 at 287.

<sup>25</sup> A.C. Heighington, "The Jurisdiction of the Parliament of Canada in Regard to the Prevention and Settlement of Labour Strikes" (1909) 29 *Canada Law Times* 929.

<sup>26</sup> A.H.F. Lefroy, "Points of Special Interest in Canada's Federal Constitution" (1913) 33 *Canada Law Times* 898; A.H.F. Lefroy, "The John Deere Plow Company Case" (1915) 35 *Canada Law Times* 148; and Z.A. Lash, "The Working of Federal Institutions in Canada" (1917) 37 *Canada Law Times* 275. In a comment about the *Insurance Reference*, H.G. Garrett demonstrated more concern about the scope of s. 91(2), saying that it was unsettled and unilluminated, and that, "The interpretations have been negative rather than positive": "The Dominion Insurance Act, 1917, and Provincial Rights" (1918) 38 *Canada Law Times* 466 at 476. The difference between his perception and Lefroy's and Lash's may have been the holding in the *Insurance Reference* itself. Four years later, after the *Board of Commerce Reference*, Garrett clearly perceived change: "its meaning is gradually being interpreted in a negative way" ("Companies and Dominion and Provincial Laws" (1922) 42 *Canada Law Times* 466, 530 and 583 at 583.

<sup>27</sup> The provincial rights' movement was acknowledged, but not expressly related to the doctrine about division of powers; see Editor, "Federal and Provincial Jurisdiction as to Companies" (1918) 54 *Canada Law Journal* 81; and Editor, "Company Law-Dominion and Provincial Jurisdiction" (1921) 57 *Canada Law Journal* 87. Early in the 1900s, the decisions that made the provincial legislatures autonomous and equal in nature to parliament were criticised as a misreading of the *BNA Act*, but they too were not related to the doctrine about division of powers; see, M. Rae, "Some Constitutional Opinions of the Late Mr. Justice Gwynne" (1904) 24 *Canada Law Times* 1.

<sup>28</sup> H.A. Smith, "The Residue of Power in Canada" (1926) 4 *Canadian Bar Review* 432, and "Interpretation in English and Continental Law" (1927) *International and Comparative Law Quarterly* 153. The second article dealt more with interpretation generally and less with the Canadian constitution, and it presented a more radical claim about meaning. My account mingles the two. Several years before writing these articles, Smith wrote a book comparing the American and Canadian constitutions, *Federalism in North America* (Boston: Chipman, 1923). Here he suggested a vision of Confederation in which the Dominion was dominant, but he did not undertake any analysis of the cases. The influences on Smith are difficult to determine. For accounts of his career, see (1938) *Recueil des Cours*

interpretation was to discover the intent of the legislature as expressed in the words of the statute, but he argued that words alone did not have fixed meanings. Instead, their meanings depended upon purposes and contexts. Therefore, evidence about the making of a statute, such as parliamentary debates and public speeches, should be considered. Yet the English courts had deprived themselves of this information by an “arbitrary and unreasonable rule”, with the result that Canada had been given “a constitution substantially different from that which her founders intended that she should have.” Smith undertook a long account of the debates at Confederation to show that “the Dominion was endowed with a general power to pass all legislation that it might deem to be for the general interest of Canada.” The early decisions of the Privy Council had been faithful to this vision: the “national concern” limitation in the *Local Prohibition Reference* was “a clear recognition of the true test of jurisdiction”; but after Haldane, and the *Board of Commerce Reference* and *Snider*, s. 92(13) was “the real residuary power... in normal times,” and “this result is the precise opposite of that which our fathers hoped and endeavored to attain.” This set of ideas—his reading of the *BNA Act*, the claim that its meaning (as demonstrated by the context) had been betrayed, and the criticism of approaches to interpretation—set the stage for the next fifty years of constitutional arguments.<sup>29</sup> Smith’s attack on excluding evidence of context was much more than an attack on a small corner of doctrine. Ultimately it was a challenge to the distinction between law and politics, for to admit the evidence was to diminish the authority of “legal principles,” and to perceive interpretation as grounded in a particular time and place.<sup>30</sup>

### III. The 1930s: Kennedy, MacDonald, Scott

The Privy Council decided three cases, early in the 1930s, all involving challenges to Dominion legislation, that seemed to Canadian observers to signal a shift, both in results and in the manner of reasoning, in cases about the division of legislative powers.<sup>31</sup> In the first, *Proprietary Articles Trade Association v. A.G. Canada*,<sup>32</sup> Lord

607; R. St. J. Macdonald, “An Historical Introduction to the Teaching of International Law in Canada” (1974) *Canada Yearbook of International Law* 67 at 72-74; and R. Macdonald, “The National Law Programme at McGill” (1990) 13 *Dalhousie Law Journal* 211 at 256-261. There is a possible connection to Harold Laski, who was one of the central figures in the changes in England. Smith also made challenges to the earlier ideas in his proposals for legal education, in which he called for an independent law school, that would “serve in the fullest possible manner the legal needs of the Dominion”: H.A. Smith, “The Functions of a Law School” (1921) 41 *Canada Law Times* 27 at 29.

29 “The Residue of Power in Canada”, *ibid.* at 433, 438, 439, 433, and 434. Two articles, written a few months before Smith’s articles, described the changes but they were not as precise and did not explain or criticise; see, W.E. Raney, “Another Question of Dominion Jurisdiction Emerges” (1925) 3 *Canadian Bar Review* 614; and F.E.H., “Editorial: Judicial Committee Differences” (1925) 3 *Canadian Bar Review* 135.

30 For the orthodox approach, see C.K. Allen, *Law in the Making* (Oxford: Clarendon Press, 1927) 273-289; Allen noted Smith’s protest in a footnote in his second edition (1930) at 294, but did not permit it to affect the general approach.

31 In *Edwards v. A.G. Canada*, [1930] A.C. 124, Lord Sankey spoke of a “living tree” and the need for a “large and liberal interpretation,” but he also took pains to point out that the issue was not the division of powers. As well as the three cases considered in the text, there was a fourth, *British Coal Corporation v. R.*, [1935] A.C. 500.

Atkin gave s. 91(27) an expansive reading,<sup>33</sup> asserting that Haldane could not have meant what he said in the *Board of Commerce Reference* about acts in “their very nature” criminal. As well, he went out of his way to disavow Haldane’s suggestion that s. 91(2) was merely a supplementary power. Two more cases, *the Aeronautics Reference*<sup>34</sup> and the *Radio Communication Reference*<sup>35</sup> involved, for the first time in any substantial way, the Dominion’s power to implement treaty obligations. Section 132, which gave the Dominion power to implement “Empire treaties,” seemed to be limited to treaties binding Canada as part of the British Empire; but Lord Sankey suggested that it also gave the Dominion power to make legislation to implement treaties that it made as an independent nation. As well, he made some comments that seemed to give general support to the Dominion. He spoke of its “high functions and almost sovereign powers,”<sup>36</sup> at 724 and seemed to suggest that the “national concern” could support legislation to implement treaties.

Smith returned to England in 1929, and three other writers were dominant during the 1930s. The most prolific was W.P.M. Kennedy, dean of the Honour School of Law at the University of Toronto, who had been a distinguished historian of Elizabethan England before shifting his interests to Canada and law. After writing a ‘whiggish’ constitutional history of Canada in the early 1920s, his approach changed

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<sup>32</sup> [1931] A.C. 668.

<sup>33</sup> “The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences. Morality and criminality are far from co-extensive” (*ibid.* at 681).

<sup>34</sup> [1931] A.C. 54.

<sup>35</sup> [1932] A.C. 18.

<sup>36</sup> *The Aeronautics Reference*, *supra* note 34.

dramatically.<sup>37</sup> The second was Vincent MacDonald, who joined the Faculty of Law at Dalhousie University after ten years of varied practice, and became dean there in 1934.<sup>38</sup>

The third was Frank Scott, a member of the Faculty of Law at McGill, a major Canadian poet, a founder of the Co-operative Commonwealth Federation (CCF), and a crusader for civil liberties.<sup>39</sup> All three were obviously academics, and from this time onwards practitioners contributed a smaller and smaller portion of the writings.

For these three, Canada had become an independent nation and her economy and social structure, and the appropriate role of government, had all changed. They

<sup>37</sup> His first major book about Canada was *The Constitution of Canada* (Toronto: University Toronto Press, 1922), and a few years later, he wrote "The Disallowance of Provincial Acts in the Dominion of Canada" (1924) 6 *Journal of Comparative Legislation* (3rd Ser.) 81. His principal constitutional writings during the late 1920s and the 1930s were "Review" (1930) 8 *Canadian Bar Review* 703; *Some Aspects of the Theories and Workings of Constitutional Law* (New York: Macmillan, 1932); "Canada: Law and Custom in the Canadian Constitution" (1929) 20 *Round Table* 143; "Review" (1930) 8 *Canadian Bar Review* 703; "Some Aspects of Canadian and Australian Federal Constitutional Law" (1930) 15 *Cornell Law Quarterly* 345; "The Imperial Conferences, 1926-30: The Statute of Westminster" (1932) 48 *Law Quarterly Review* 191; "Crisis in the Canadian Constitution" (1934) 24 *Round Table* 803; "British Coal Corporation" (1935) 13 *Canadian Bar Review* 621; "The Workings of the British North America Acts, 1867-1931" (1936) 48 *Juridical Review* 57; and, "The British North America Act: Past and Future" (1937) 15 *Canadian Bar Review* 393. Kennedy's early book is discussed in C. Berger, *The Writing of Canadian History* (Toronto: University of Toronto Press, 1976) at 40-42, and there are some good glimpses of his approaches to legal education in I. Kyer and J. Bickenbach, *The Fiercest Debate* (Toronto: The Osgoode Society, 1987) at 107-120, but he has been otherwise sadly neglected.

<sup>38</sup> For an account of MacDonald, see Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979) 100, 104-105, and 121-124. His major writings during the 1930s were: "Canada's Power to Perform Treaty Obligations" (1933) 11 *Canadian Bar Review* 581; "British Coal Corporation v. The King: Three Comments" (1935) 13 *Canadian Bar Review* 625; "Judicial Interpretation of the Canadian Constitution" (1935) 1 *University of Toronto Law Journal* 260; "The Canadian Constitution Seventy Years After" (1937) 15 *Canadian Bar Review* 401; "Constitutional Interpretation and Extrinsic Evidence" (1939) 17 *Canadian Bar Review* 77; "The Licensing Powers of the Provinces" (1939) 17 *Canadian Bar Review* 240; and, "The Constitution and the Courts in 1939" (1940) 18 *Canadian Bar Review* 147.

<sup>39</sup> See S. Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland and Stewart, 1987); and S. Djwa and R. St. Macdonald, eds., *On F.R. Scott* (Kingston: McGill-Queen's University Press, 1983), and M. Horn "Frank Scott, The League for Social Reconstruction, and the Constitution" in J. Ajzenstat, ed., *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliamentary Group, 1992) 231. The major pieces of Scott's writing about the constitution during the 1930s were: "The Privy Council and Minority Rights" (1930) 37 *Queen's Quarterly* 668; "The Development of Canadian Federalism" [1931] *P.C.P.S.A.* 231; "Social Reconstruction and the *BNA Act*" (Toronto: Thomas Nelson, 1934), a pamphlet written for the League for Social Reconstruction; "The Privy Council and Mr. Bennett's 'New Deal' Legislation" (1937) 3 *Canadian Journal of Economics and Political Science* 234; "The Consequences of the Privy Council Decisions" (1937) 15 *Canadian Bar Review* 485; "Canada's Future in the British Commonwealth" (1937) *Foreign Affairs* 102; "The Royal Commission on Dominion-Provincial Relations" (1938) 7 *University of Toronto Quarterly* 141; "The Constitution and the War" (1939) 19 *Canadian Forum* 243; and "Constitutional Problems," in F.R. Scott, ed., *Canada Today* (Toronto: Oxford University Press, 1939) at 78-85. As well, Scott contributed to two important publications by the League for Social Reconstruction: *Social Planning for Canada* (Toronto: Thomas Nelson, 1935), and its brief to the Rowell-Sirois Commission in 1937.

believed passionately that only a strong Dominion government could respond adequately to the Depression. Even though they were encouraged by the suggestions of change in the early 1930s, they feared that the *BNA Act*, especially as interpreted by the Privy Council, was inadequate, and called for reform. All these beliefs were shared with a larger group of intellectuals, especially economists, political scientists and social workers, that had emerged since 1900.<sup>40</sup>

The most useful example of their work is a comprehensive article written by MacDonald in 1935 for the first volume of the *University of Toronto Law Journal*, itself a mark of the emergence of new attitudes towards legal thought and scholarship.<sup>41</sup> He began with an account of Confederation, claiming that the dominant objective had been to create a strong Dominion. Turning to the work of the courts, he set out a list of the principles and canons used in interpretation, taken from the leading cases: the same sort of list that formed Lefroy's text. He described trends in the results and reasonings in the cases, beginning with the betrayal of the *BNA Act* and the erosion of the Dominion's powers from the late nineteenth century to the late 1920s. Macdonald did not stop to give details or designate villains, saying that the story was trite. He described the signs of a shift in the early 1930s, and then turned to a discussion of interpretation generally, struggling to accommodate both the changing needs of Canada and the authority of the original text of the *BNA Act*. He concluded that the *BNA Act*, as interpreted by the Privy Council, was inappropriate for the needs of the nation that Canada had become. Amendment was needed, and even appeals to the Privy Council might be reconsidered. Kennedy and Scott would have agreed with virtually every word.

These three shared beliefs about interpretation that were substantially the same as Smith's, although they rarely expressed them at any length. The obligation of the courts continued to be to determine the intent of the legislature, although 'purpose' came to be the more common term. The words of a text alone were not reliable, but purpose could be gathered from history and context.<sup>42</sup> As well, they shared with Smith a belief about the general design of Confederation and the *BNA Act*: it gave the provinces specific powers to legislate about local matters, with the residue to the Dominion. P.O.G.G. was the sole grant of power to the Dominion, and the enumera-

<sup>40</sup> See D. Owram, *The Government Generation* (Toronto: University of Toronto Press, 1986) cc. 6, 7, and 9.

<sup>41</sup> Willis *supra* note 38. For an account of this volume and its significance for the 1930s, see R. Risk, "Volume I of the Journal: A Tribute and a Belated Review" (1987) 37 *University of Toronto Law Journal* 193.

<sup>42</sup> A. Corry, "Administrative Law: Interpretation of Statutes" (1936) 1 *University of Toronto Law Journal* 286. The general changes in legal thought during this period, especially in the United States, also included beliefs about interpretation that were more bleak. Some scholars argued that not only were the choices made by judges not determined by the words of statutes, but they were not constrained by context or purpose either. They were essentially political. Some strains of this belief appeared in Canada in 1938, in John Willis's great article, "Statute Interpretation in a Nutshell" (1938) 16 *Canadian Bar Review* 1, but it did not appear among the Canadian constitutional scholars during the 1930s. For this "dark streak," see G. Peller, "The Metaphysics of American Law" (1985) 73 *California Law Review* 1151; and for Willis, see R. Risk, "John Willis: A Tribute" (1985) 9 *Dalhousie Law Journal* 521.

tions in s. 91 were examples. Their efforts to articulate and justify this interpretation, which differed from much of the scholarship in the late nineteenth and early twentieth centuries, was a major part of the making of a vision of Confederation that dominated Canadian thought about the constitution for decades.

In the late 1920s and early 1930s, they berated the Privy Council for both its approach to interpretation and its betrayal of the *BNA Act*. Its claim that interpretation should be limited to words alone was founded on the unrealistic faith that words alone could have meaning, and had led it to ignore clear evidence about the objective of Confederation. In 1929, Kennedy made both Watson and Haldane villains by saying that the path of deviation began with *Hodge*. "Words could scarcely be clearer," but nonetheless the results were "diametrically opposed":

Seldom have statesmen more deliberately striven to write their purposes into law, and seldom have these more signally failed before the judicial technique of statutory interpretation.<sup>43</sup>

In 1931, Scott also located the beginnings of deviation in the late nineteenth century, but assigned most of the blame to Haldane, for his fictitious limitations on P.O.G.G., chiefly the "extraordinary" emergency doctrine, which were a "flat contradiction of the agreement of 1867," and which had obscured Watson's "sensible" inquiry into national concern. Scott was the first scholar to assert specifically that s. 91 had been divided, and P.O.G.G. had been separated from the enumerations. He clearly believed that the *BNA Act*, especially P.O.G.G., properly interpreted, would have been appropriate for the country Canada had become, but, like Kennedy, he called for fundamental reform.<sup>44</sup>

The only sustained discussion of interpretation and the most radical proposal came from MacDonald. Accepting that interpretation must be based ultimately on the text of the *BNA Act*, he argued in his 1935 article that courts should not seek the original intention of the framers or the meaning of the words in 1867, as the Privy Council had done in most of its judgments about the division of powers. "Construction by intention limits the words to their accepted meaning in 1867, and allows the horizon of that year to restrict the measures of the future." Instead, the guide should be the meaning of the words "from time to time," which "gives flexibility and power of adaptation."<sup>45</sup> He made the same argument in writing about treaties, arguing in 1933 that s. 132, if interpreted "progressively and liberally" would alone give the Dominion adequate power to legislate to implement treaties;<sup>46</sup> and in 1935, he illuminated his understanding of interpretation of words "from time to time," by adding "against the background of present legal and political facts," and considering "the purposes" of the *BNA Act*.<sup>47</sup> This proposal was an attempt to grapple with

<sup>43</sup> Kennedy, "Canada: Law and Custom" *supra* note 37 at 152, and Kennedy, "The Workings of the British North America Acts, 1867-1931" *ibid.* at 60.

<sup>44</sup> Djwa, "The Development of Canadian Federalism" *supra* note 39, especially at 41-48; the quotations are taken from 42 and 46.

<sup>45</sup> "Judicial Interpretation of the Canadian Constitution" *supra* note 38 at 280.

<sup>46</sup> Willis, "Canada's Power to Perform Treaty Obligations", *ibid.* at 589.

<sup>47</sup> Willis "British Coal Corporation v. The King" *ibid.* at 632 and 633. As well, he declared, at 582-3: "A constitution is intended never to be outgrown ... and to be given a progressive construction

change, a theme that pervaded the writings of this period. It contained a tension between respect for the understandings at Confederation and the needs of a different time, a tension that MacDonald and the others avoided discussing, perhaps because for them, a strong national government was both what had been intended and what was needed in the depths of the Depression.

Smith, Kennedy, Scott, and MacDonald were representatives of new approaches to legal reasoning and scholarship, which had begun around the turn of the century in law schools in the United States, under the banners of "sociological jurisprudence," and "legal realism," and in England a few decades afterwards. Although these new approaches did not constitute a unified school, they shared a few dominant themes. This new generation rejected the late nineteenth century beliefs or, more accurately, their own version of their ancestors' beliefs. Instead, they believed that judicial decisions were shaped, not by the play of formal logic on common law doctrine and statutory texts, but by values, choices and contexts. They attacked the distinction between law and politics and the vision of legal reasoning as objective and autonomous. Law should be assessed, not by its internal elegance, but by its social effects and by new values. Faith in absolute individual rights and a *laissez-faire* market must be replaced by balancing interests, collective responsibility, and a greater role for the state in regulating the economy and providing minimum support for individual life.

The function of scholarship included criticism and proposing reform, and was not limited to faithful syntheses of the cases. In the United States, the changes wrought by these approaches were profound, but in England they were modest and limited largely to public law scholarship and a relatively few individuals.<sup>48</sup> In Canada, during the late 1920s and the 1930s these ideas appeared in writings by a handful of academics, including these four, whose roles and abilities made them conspicuous in the literature. Sometimes, though, these new approaches were found together with the old ones, as in Macdonald's 1935 article where the list of principles and canons that Lefroy might have written appeared together with the newer criticism and approaches to interpretation. They seemed to have read much of the writings from the United States, especially Roscoe Pound's early articles; but very few of

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which will keep it an apt instrument of government even in its application to circumstances not foreseen by its framers. The words remain as written, but their connotation may be changed if their spirit be left unaltered."

<sup>48</sup> The experience in the United States has been written about extensively; the most useful includes M. Horwitz, *The Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992), cc. 6 and 7; E. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Kentucky Press, 1973); N. Hull, "Some Realism about the Llewellyn-Pound Exchange over Realism" (1987) *Wisconsin Law Review* 921; J. Schlegel, "American Legal Realism and Empirical Social Science: From the Yale Experience" (1979) 28 *Buffalo Law Review* 459; J. Schlegel, "American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore" (1980) 29 *Buffalo Law Review* 195; J. Singer, "Legal Realism Now" 76 *California Law Review* 465; and E. White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America" (1972) 58 *Virginia Law Review* 999. The English experience has not been nearly so well described, but for a recent and illuminating account of the general currents of public law thought, see M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon, 1992) c. 7.

them studied law abroad, and their writings did not simply duplicate the American models. Much of their concerns and their ideas seem to have been their own, developed for the problems they perceived in Canada, in the context of the general changes in twentieth century culture and thought.

During the mid 1930s, the central constitutional issue was the fate of Prime Minister R.B. Bennett's New Deal. Early in 1935, he promised Canadians a grand legislative program to escape from the Depression, to rescue the capitalist economic order, and to save his floundering government. A few months later, parliament enacted his program in six statutes, which fell far short of his promises and failed to save him from the electors. MacKenzie King and the Liberals came to power in the general election of 1935, and King quickly referred all six statutes to the Supreme Court of Canada, together with two others enacted by Bennett's government in 1934. After the courts had pronounced most of them invalid, some scholars said that the outcomes had been predictable or inevitable,<sup>49</sup> but during 1935 and 1936 the outcome was not so clear. In 1936, several competent writers made sustained arguments for validity, relying on either P.O.G.G. or 91(2);<sup>50</sup> and MacDonald, who was probably the most competent to make a prediction, gave his cautious opinion that there was a "reasonable possibility" of validity.<sup>51</sup>

The Supreme Court pronounced most of the program invalid and so did the Privy Council, although the results for a few of the statutes differed.<sup>52</sup> There were two major issues or groups of cases. One concerned treaties: three of the statutes were enacted to fulfill treaty obligations about working conditions undertaken by the Dominion for Canada as an independent nation. Because they seemed clearly to regulate subjects within s. 92, they could be valid only if the Dominion had a distinctive power to implement treaties. The Supreme Court divided three to three, and the Privy Council concluded that they were invalid. Atkin said that s. 132 was limited to treaties binding Canada as part of the British Empire, and that there was no other power to legislate about treaties. He rejected the appeal to the *Aeronautics*

<sup>49</sup> F.C. Cronkite, "The Social Legislation References" (1937) 15 Canadian Bar Review 478 at 478; B. Keith, "The Privy Council Decisions: A Comment From Great Britain" (1937) 15 Canadian Bar Review 428 at 439; and I. Jennings, "Constitutional Interpretation: the Experience of Canada" (1937) 51 Harvard Law Review 1 at 38.

<sup>50</sup> B. Claxton, "Social Reform and the Constitution" (1935) 1 Canadian Journal of Economics and Political Science 409; and T.G. Norris, "The Natural Products Marketing Act, 1934" (1935) 1 Canadian Journal of Economics and Political Science 465; both these articles are impressive pieces of scholarship, which anticipated some of the trends of the 1980s; another article on the New Deal statutes was C.W. Jenks, "The Dominion Jurisdiction in Respect of Criminal Law as a Basis for Social Legislation in Canada" (1935) 13 Canadian Bar Review 279.

<sup>51</sup> Willis, "Judicial Interpretation....," *supra* note 38 at 283; see also Kennedy, "The Workings....," *supra* note 37 at 60-68.

<sup>52</sup> *A.G. Canada v. A.G. Ont.* [1937] A.C. 326, aff'g [1936] S.C.R. 461; *A.G. Canada v. A.G. Ont.* [1937] A.C. 355, aff'g [1936] S.C.R. 427; *A.G. B.C. v. A.G. Canada* [1937] A.C. 368, aff'g [1936] S.C.R. 363; *A.G. B.C. v. A.G. Canada* [1937] A.C. 377, aff'g [1936] S.C.R. 398; *A.G. B.C. v. A.G. Canada* [1937] A.C. 391, aff'g [1936] S.C.R. 384; and *A.G. Ont. v. A.G. Canada* [1937] A.C. 405; varying [1936] S.C.R. 379. See W. McConnell, "The Judicial Review of Prime Minister Bennett's 'New Deal'" (1968) 6 Osgoode Hall Law Journal 39, for a description of these cases.



*Reference* and the *Radio Reference* by limiting them to their narrowest grounds or, less charitably, by misreading them.

The other major issue was economic regulation and the fate of the *Natural Products Marketing Act*, enacted in 1934. It was designed to support producers of natural products, and expressly limited to products for which the principal market was outside the province that produced them, and products that were, in some part, exported. Speaking through Duff, the Supreme Court unanimously held it *ultra vires*, and the Privy Council affirmed, saying that it was “unnecessary to add anything.” It was hardly surprising that the Privy Council was so magnanimous; Duff’s judgment sought to do no more than synthesise its decisions thoroughly and faithfully, although his readings tended to be ungenerous to the Dominion at every turn, contrasted, for example, to some of the scholarly writings in the mid-1930s. For s. 91(2), he was unwilling to contemplate the possibility of a general regulation of trade or an expansive use of the necessarily incidental doctrine. For P.O.G.G., he began with a narrow analysis of Watson’s language in the *Local Prohibition Reference*: not all matters that affected “the body politic of the Dominion” or that were of “national concern” were within the Dominion’s reach, only “some” of them. After a thorough account of the cases, he offered little to determine what these “some” were, except to repeat the warning that “great caution” was needed for such a “delicate and difficult task.” Atkin was pleased enough to hope that this would become “the locus classicus of the law on this point.”<sup>53</sup>

These decisions seemed to deny the hopes of the early 1930s and to condemn Canada to constitutional paralysis. The reaction was outrage, which can be illustrated by two examples. The first was a symposium in the *Canadian Bar Review*, which gathered comments from leading scholars. Kennedy, the editor of the symposium, said:

The federal power is gone with the winds. It can be relied on at the best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used....<sup>54</sup>

Scott was just as passionate:

This straining at technicalities will do little to enhance the prestige of the courts.... Canada has suffered a national set-back of grievous proportions. A federal government that cannot concern itself with questions of wages and hours and unemployment in industry, whose attempts at the regulation of trade and commerce are consistently thwarted, which has no power to join its sister nations in the establishment of world living standards...is a government wholly unable to direct and to control our economic development.<sup>55</sup>

The second example of outrage was the O’Connor Report, made in 1939 to the Senate by W.F. O’Connor.<sup>56</sup> At the time, he was the Senate’s clerk and counsel, but

<sup>53</sup> *A.G. B.C. v. A.G. Canada*, [1937] A.C. 377, aff’g [1936] S.C.R. 398 at A.C. 387, S.C.R. 638 and 639, and A.C. 205.

<sup>54</sup> Kennedy, “The British North America Act...,” *supra* note 37 at 398-9.

<sup>55</sup> Djwa. “The Consequences of the Privy Council Decisions,” *supra* note 39 at 492.

<sup>56</sup> Report to the Senate of Canada on the British North America Act (Ottawa: Queen’s Printer, 1939).

earlier he had been a member of the Board of Commerce and had represented it before the Supreme Court and the Privy Council. Throughout almost 150 pages of his report, he vented anger and frustration. After quoting extensively from the discussions preceding Confederation, he turned to an analysis of the structure of ss. 91 and 92. The basic principle was a division between general and local matters: s. 91 assigned power to the Dominion to legislate about general matters, and s. 92 assigned power to the provinces to legislate about local matters. This interpretation was supported by a thorough analysis of the various components of ss. 91 and 92: the enumerated subjects in s. 92, the opening words of s. 91, the enumerated subjects in s. 91, the “notwithstanding” clause, the “deeming” clause, and s. 92(16).

O'Connor claimed that the careful design of the *BNA Act* had been “repealed by judicial legislation.” The Privy Council had been guilty of “demonstrable error” and “serious and persistent deviation,” and it had “tortured” crucial words in the *Act* “in violation of their clear grammatical sense as well as their purpose.” Its path of error began as early as *Parsons*, and a stray comment about the concluding words of s. 91. *Russell v. The Queen* represented a proper understanding of this structure, but error returned in the 1890s and continued in Watson’s “extraordinary” decision in the *Local Prohibition Reference*, which struck s. 91 “the deadliest blow it has received.” The opening grant of power in s. 91, its sole grant of power, was divided from the enumerations and limited to “extraordinary circumstances only, and without exclusiveness or paramountcy.” This interpretation

...paralyzed many essential law-making activities of the Dominion....If only this fatal error in construction could be undone, nothing much need be done in order to restore the *BNA Act* to that state of reasonable satisfactoriness in which it was before the fatal error was committed.

Instead, the result was “an undeniable partial breakdown of the general scheme of Confederation.” During the twentieth century, Haldane’s decisions “exceeded those of Watson in their emasculatory effect upon the Dominion’s authority.”<sup>57</sup> “Villains” may be too mild a word to capture O’Connor’s opinion of Watson and Haldane.<sup>58</sup>

Earlier, writers in the late nineteenth century had also undertaken analyses of the structure of ss. 91 and 92, although not at nearly such length. Some of them, like O’Connor, believed that the central principle was the division between general and local matters, although they did not share his belief that the division was an expression of a design for a strong Dominion, and they supported the claims of the provinces instead.<sup>59</sup> O’Connor’s analysis shaped debate for two or three decades. Even though he had demonstrated a faith in words, grammar, and punctuation that was deeply at odds with the new ideas about interpretation, scholars tended to make their arguments in his terms, perhaps because his conclusions were so appealing to most of them.

<sup>57</sup> *Ibid.* at 41, 67, 38-40, 41, and 69

<sup>58</sup> In the late 1930s, O’Connor was defended by E. Richar, “Peace Order and Good Government” (1940) 18 *Canadian Bar Review* 243, and attacked by V. Gray, “The O’Connor Report on the British North America Act, 1867” (1939) 17 *Canadian Bar Review* 309.

<sup>59</sup> See especially the texts written by Loranger and O’Sullivan, *supra* note 8.

#### IV. From 1940 to the Early 1970s: Laskin, Lederman, Labrie

This story ends around 1970 and includes only the trends in scholarship that continued or began in the 1950s and early 1960s. There are two reasons for these limits. First, major changes in Canadian legal scholarship and education began in the 1970s and still continue. Bundles of ideas such as law and society, law and economics, critical legal studies, feminist legal analysis, debates about interpretation, and legal history, have made law schools more exciting places than I remember them being in the 1950s and 1960s. They have created a new world of scholarship for which a manageable perspective would be difficult to find. Second, my topic is writings about the decisions of the Privy Council. After it ceased to be Canada's final court of appeal in 1949, its decisions became less important to current doctrine and had less power to arouse passion and dissent. By the 1970s, they were no longer a battleground of constitutional scholarship, having been relegated to legal historians.

The protagonists who dominated the 1930s, Kennedy, MacDonald and Scott continued to write in the 1940s and 1950s, in substantially the same way and with substantially the same conclusions, although all of them incorporated O'Connor's analysis of the cases and therefore tended to see Watson as the villain even more than they had in the 1930s.<sup>60</sup> They were followed by younger scholars, who shared their beliefs about Canada and their strong criticisms of the Privy Council.<sup>61</sup> The best-known was Bora Laskin, and his 1947 article about P.O.G.G. is probably the most famous in this literature.<sup>62</sup>

Laskin began by taking it as settled and uncontroversial that P.O.G.G. was the sole grant of power to the Dominion, that the enumerations were merely examples and that the Privy Council had severed them and made P.O.G.G. into a residuary clause with a trivial scope. The bulk of the article was a comprehensive and searing indictment of its judgments, especially of the work of Duff and Haldane. Laskin spared Watson from the brunt of the indictment, arguing that even though the decision in the *Local Prohibition Reference* was muddled, it did permit accommodation of the "social economic development of Canada," through recognition of different and changing aspects. But Haldane's creation of the emergency doctrine was the work of a constitutional Houdini whose magic was "strong enough to make

<sup>60</sup> Their major articles were W.P.M. Kennedy, "The Interpretation of the British North America Act" (1943) 8 Cambridge Law Journal 146; V. MacDonald, "The Constitution in a Changing World" (1948) 26 Canadian Bar Review 21; V. MacDonald, "The Privy Council and the Canadian Constitution" (1951) 29 Canadian Bar Review 1021; F.R. Scott "Political Nationalism and Confederation" 8 Canadian Journal of Political Science and Economics. 386 (1942); and F.R. Scott, "Centralization and Decentralization in Canadian Federalism" (1951) 29 Canadian Bar Review 1095. Kennedy's article was essentially an elegant summary of O'Connor. Scott made a more thorough account of Confederation than he did in the 1930s, but added little by way of new ideas, except for the use of O'Connor. MacDonald not only incorporated O'Connor, but also some ideas about "functionalism".

<sup>61</sup> The first in this group was Raphael Tuck, "Canada and the Judicial Committee of the Privy Council" (1941) 4 University of Toronto Law Journal 33. His article was a thorough study of the cases, emphasising throughout the erratic course of the Privy Council and its failure to adapt the *BNA Act* to the changing conditions and needs of Canada.

<sup>62</sup> B. Laskin, "Peace, Order and Good Government Re-examined" (1947) 25 Canadian Bar Review 1054.

[P.O.G.G.] disappear altogether and to make it reappear as a spirit." The judgment in *Snider* was "almost shocking in its casualness," and a product of

...inflexible concepts that are often the product of a neat mind, often unwilling in the interests of some sort of formal logic to discourage thought patterns that had been nicely fitted together.

Duff's judgment in the *Natural Products Marketing Act Reference* failed to understand the *Local Prohibition Reference*, and amounted to no more than a "circulus inextricabilis." Again and again, as he went through the cases, Laskin demonstrated the series of woeful errors: inconsistencies, failures to explain, sheer inventions of doctrine, departures from the meaning of the *BNA Act* apparent to "any careful reading", and a preoccupation with subjects of legislation, not aspects. He did not discuss the understandings at Confederation, the changes in the social and economic contexts or the nature of contemporary Canada and its needs; but throughout, there ran a strong feeling that these decisions were not only poorly crafted but inappropriate for Canada. He concluded with a hope for change and for better work from an independent Supreme Court of Canada.<sup>63</sup>

A few years later, in 1951, writing about the Court as the final court of appeal, Laskin undertook the first substantial discussion of its work since Lefroy's text in the late nineteenth century.<sup>64</sup> Here, he saw the early cases as faithful to the *BNA Act*, the contributions of Duff to the eventual catastrophe, and the slow loss of independence and initiative to the Privy Council. Ten years later, much the same story as Laskin told for P.O.G.G. was told by Alexander Smith for the trade and commerce power, in his book, *The Commerce Power in Canada and the United States*.<sup>65</sup> He traced its erosion from *Parsons* to the *Natural Products Marketing Reference* with less passion than Laskin, but thoroughly and with great care. He, too, included the Supreme Court decisions at length.<sup>66</sup>

Competing assessments of the Privy Council began to appear in the 1950s, first in Quebec among civilians,<sup>67</sup> and then in a younger generation of common law scholars, of whom the first was William Lederman. In a series of articles beginning in 1965, he argued that at the heart of Canada was a balanced federalism: a balance between unity and diversity, and between a strong Dominion and autonomous provinces.<sup>68</sup> The "equilibrium points" of this balanced federalism had been devel-

<sup>63</sup> *Ibid.* at 1068, 1076, 1079, 1077, 1070, and 1064.

<sup>64</sup> B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Canadian Bar Review 1038.

<sup>65</sup> (Toronto: Butterworths, 1963).

<sup>66</sup> The same story was told by other scholars: E. McWhinney, *Judicial Review in the English Speaking World* (Toronto: University of Toronto Press, L.P. Pigeon 1956), c. 4; and M. MacGuigan, "The Privy Council and the Supreme Court: A Jurisprudential Analysis" (1966) 4 Alberta Law Review 419.

<sup>67</sup> L.P. Pigeon "The Meaning of Provincial Autonomy" (1951) 29 Canadian Bar Review 1126.

<sup>68</sup> See W. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1962) 9 McGill Law Journal 185, as reprinted in W. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 250; W. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in P. Crepeau and C. Macpherson, eds., *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965) 91, as reprinted in W. Leder-

oped painstakingly by the courts, especially the Privy Council, using two techniques. First, the larger and more expansive powers in the *BNA Act*, especially P.O.G.G., had been integrated with each other and limited. Lederman accepted the reading of s. 91 that made its enumerations independent grants of powers and P.O.G.G. a residue of the powers not enumerated in either s. 92 or s. 91, arguing that this reading was as consistent with the text as any other reading (presumably the readings that saw a grant of two powers, over general and local matters) and more appropriate for Canada. The crucial question was: when should new functions of government be recognised as new aspects? For Lederman, the best answer had been given by Watson, “the greatest of the Privy Council judges concerned with the Canadian constitution,” in his speech in the *Local Prohibition Reference*. The villain of the 1930s was now a hero, and even Haldane was given modest approval.<sup>69</sup>

The second way the courts had made a balanced federalism was based on Lederman’s perception that the powers in ss. 91 and 92 overlapped extensively and pervasively. This perception was not, by then, unusual; most modern scholars had either proclaimed it or would have accepted it, but Lederman made it a central theme. The courts chose between the overlapping powers through determination of pith and substance or they recognised concurrent powers, and Lederman saw a tendency to more and more concurrency as well as balance.<sup>70</sup> His reading of the cases, especially his perception of balance, paralleled shifts in federalism that emerged during the 1950s and 1960s: the need for coordination resulting from expansion of governmental programs, and decentralisation resulting from the ambitions of the provinces.<sup>71</sup>

In 1977, Peter Hogg published *Constitutional Law of Canada*,<sup>72</sup> which I wish to consider even though it is beyond my time limit, because it was the first significant text about the doctrine since Lefroy’s. Like Lefroy, he synthesised the doctrine in an orderly and coherent way, and the text deservedly became a standard and respected reference. He demonstrated more faith than Laskin and Lederman in the meanings of the *BNA Act* and the coherence of doctrine, although he perceived much more change and inconsistency in these cases than Lefroy did, and described much more context. Like Lederman, Hogg also accepted the reading of s. 91 that made the

man, *Continuing Canadian Constitutional Dilemmas*, 266; W. Lederman, “Cooperative Federalism: Constitutional Revision and Parliamentary Government in Canada” (1971) *Queen’s Quarterly* 7; and W. Lederman, “Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation” (1975) 53 *Canadian Bar Review* 597, as reprinted in W. Lederman, *Continuing Canadian Constitutional Dilemmas*, 285.

<sup>69</sup> “Unity and Diversity...,” *ibid.* at 291 and 294

<sup>70</sup> Lederman first wrote about overlap, although without the idea of balance in 1953: “Classification of Laws and the British North America Act” in J. Corry, F. Cronkite and E. Whitmore, eds., *Legal Essays in Honour of Arthur Moxon* (Toronto: University of Toronto Press, 1953) 183, as reprinted in Lederman, *supra* note 68, *Continuing Canadian Constitutional Dilemmas* at 243-245, 250-254, 275-278.

<sup>71</sup> See R. Simeon and I. Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), especially cc. 8 and 9, for an account of these developments.

<sup>72</sup> (Toronto: Carswell, 1977). The word “significant” is included to take account of the fact that there were a few other text books, which need not be mentioned here.

enumerations independent grants of powers, and P.O.G.G. a residue, relying both on the text and reasoning in the decisions. *Russell*, the shining example of P.O.G.G. as the sole grant of power and a strong Dominion, was deemed incorrect, albeit in retrospect, and P.O.G.G. was limited to emergencies and national concern. "One can debate a *fait accompli* for only so long."<sup>73</sup> A text book may be an inappropriate place to declare heroes, but here Watson was granted what he might have preferred anyway, orthodoxy.

Most scholars in the 1950s and 1960s shared beliefs about legal reasoning, especially interpretation, which were essentially a continuation of the approaches that emerged in the late 1920s and 1930s: statutory and constitutional texts alone did not determine outcomes, at least not in hard cases. Because the meanings of words were, at least at the edges, indefinite, judges made choices. To pretend otherwise was to mask the choices with barren "logic" and "abstract reasoning." Yet the choices were not personal or political; instead, interpretation was a distinctive, rational process. The judge must be faithful to the purpose of the text, taking into account its context and the values and needs of the contemporary society.<sup>74</sup>

The beliefs were rarely elaborated in any rigorous or sustained way, and varied from scholar to scholar, but Laskin and Lederman were good examples of both the common ground and the diversity. In his reconsideration of P.O.G.G., Laskin condemned the Privy Council's "cold abstract logic" and "rigid abstractions," and its failure to take account of "the social and factual considerations" in the *New Deal* legislation, and the future of "our society and its contemporary problems."<sup>75</sup> For Laskin, critical analysis of doctrine was central, and his criticisms of the reasonings of the past were not expanded into explanations of how judges might do their work better. He did not, for example, explain the tension between respect for the *BNA Act*, implicit in the argument that some Privy Council interpretations were contrary to "any careful reading", and the need to take account of current needs and problems, nor did he explain how judges should determine current values.

Even though Lederman's assessment of the results of the cases was different, he shared much of Laskin's beliefs about interpretation, especially the responsibility of judges to respond to current social conditions and needs. He claimed that the *BNA Act* was "ambiguous or incomplete" and therefore any debate about whether the Privy Council had betrayed its terms was meaningless. "I do not think the Judicial Committee should be disparaged for having failed to find answers in the text of the *BNA Act* that were not there to be found." The real issue was the need to escape from literal interpretation — the futile faith in the meanings of words that the Privy Council had too often displayed, and to undertake "sociological" interpretation — a care for

<sup>73</sup> *Ibid.* at 292

<sup>74</sup> In 1967, the results of the cases were defended by an historian, G.P. Browne, in *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press, 1967), who argued that the separation between P.O.G.G. and the enumerations in section 91 were derived from the text of the *BNA Act*, displaying a remarkable faith in the meaning of the bare text that was scorned by the mainstream scholars.

<sup>75</sup> The quotations are from Laskin, *supra* note 62 at 1059, 1060, 1080, and 1082

the “ongoing life of the country.” Because the words of a text alone could not give answers, they must be “related to the cultural, social and economic realities of the society for which they were and are intended.” In making their choices among overlapping powers, judges should weigh “the relative values of uniformity and regional diversity, ... the relative merits of local versus central administration, and the justice of minority claims,” and seek to implement “widely prevailing beliefs.” The crucial question was: “is it better for the people that this thing be done on a national level or on a provincial level?”<sup>76</sup>

The contrast to Lefroy’s beliefs about interpretation and the structure of powers was large and obvious. One illustration was embedded in Lederman’s word “balance.” His vision of federalism as a balance between the Dominion and the provinces merged with balancing as a way of reasoning. Lefroy’s belief that courts determined the sharp, bright lines between mutually exclusive spheres of absolute power, without consideration of context or need, was replaced by a belief that courts balanced overlapping and competing claims.<sup>77</sup> Here again is the jurisprudence of cooperative federalism. And Lefroy’s fear of the implications of the inquiry into “national concern” turned out to be prescient. In explaining why aeronautics was justifiably a “national concern,” Lederman said that it did not “imply large scale trespass” on provincial powers, and did not take over “great portions.”<sup>78</sup> Such questions of degree were just the kinds of questions that Lefroy had feared.<sup>79</sup>

A contrast to the scholars in the 1920s and 1930s was not as obvious or great as the contrast to Lefroy, but it existed nonetheless. Scholars in the 1950s and 1960s seemed to be more distant from the issues swirling about them, than had scholars in the 1920s and 1930s, and to be less passionate or, to be more precise, less openly so about the outcomes. For example, Laskin’s article on P.O.G.G. was powerful and passionate, but despite his personal belief in the need for a strong Dominion, the power and the passion seemed directed at the inadequacies of legal reasoning and not at a betrayal of Canada. Neither he nor Lederman sought expressly to explain the decisions of the Privy Council by invoking social, economic or political beliefs in any sustained way, or to talk much about contemporary conditions and issues. Instead, they emphasised judicial techniques, especially approaches to interpretation.

<sup>76</sup> W. Lederman, “Thoughts on Reform of the Supreme Court of Canada” (1970) 8 *Alberta Law Review* 1, at 2, 2, and 3; Lederman, *supra* note at 68; and Lederman, *supra* note 70 at 241.

<sup>77</sup> See T. Aleinikoff, “Constitutional Law in the Age of Balancing” ((1987) 96 *Yale Law Journal* 943 for a comprehensive account of the emergence of ‘balancing’ as the dominant way of reasoning in constitutional cases in the United States.

<sup>78</sup> Lederman, *supra* note 68 at 296

<sup>79</sup> Another example of the contrast was Lefroy’s retreat from the proposal by Story that judges consider “public policy and public welfare, according to the changes of time and circumstances:” *supra* note 8 at 475-6.

This contrast may reflect differences in legal education and scholarship. In the few decades after World War II, law schools in Canada contained two approaches to teaching and thinking, which mingled but which were never synthesised. The first was a modified continuation of the way of thinking established in the late nineteenth century which, unlike its fate in the United States, continued to be powerful in Canada. It was not, though, the approach of Laskin and Lederman. The second was a tamed version of the ferment of the 1920s and 1930s. The dangerous political edges were shorn away, and lawyers and legal scholars were perceived as professionals, skilled in the workings of the legal processes and in implementing society's preferences, which were typically perceived to be unproblematic and widely shared. This approach originated in the United States, and Canadian legal scholars in the 1950s and 1960s were much more shaped by thinking there than their predecessors were in the 1930s. Perhaps the difference between the 1930s and the 1950s and 1960s is best expressed in the word "tamed:" the political passions of Kennedy, MacDonald, and Scott had been tamed, or muffled.<sup>80</sup>

The dominant moods of the 1950s and 1960s can be illuminated by looking at a remarkable glimpse of bleaker beliefs about interpretation. F.E. LaBrie, writing in 1949, bluntly declared, "constitutional interpretation exists as a legislative process," and "... the *BNA Act* will have whatever meaning the courts choose to ascribe to it..." The rules made by courts, which Lefroy so carefully extracted, were "meaningless" and precedents "can have but little room for application." The choices of reasoning in cases were inconsistent, and the results all might have been different. The crucial function was the determination of the aspects, or pith and substance, and for the "newer fields and problems of government,... the courts' discretion is virtually unfettered." LaBrie gave examples from all the major cases, although he did not offer any rigorous theory of interpretation that linked them to his general claim.<sup>81</sup>

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<sup>80</sup> For stimulating accounts of legal thought in the United States in the 1950s and 1960s, see, M. Horwitz, *supra* note 48 at c. 9; R. Gordon, "New Developments in Legal Theory," in D. Kairys, ed., *The Politics of Law* (New York: Pantheon Books, 1982); and G. Peller, "Neutral Principles in the 1950s" (1988) 21 *Michigan Journal of Law Reform* 561. Gordon's brief description of legal education in the United States in the 1960s is remarkably perceptive. Some of these contrasts were noted in 1958 by E. McWhinney in "English Legal Philosophy and Canadian Legal Philosophy" (1958) 4 *McGill Law Review* 213 at 216-217.

<sup>81</sup> F.E. LaBrie, "Canadian Constitutional Interpretation and Legislative Review" (1949) 8 *University of Toronto Law Journal* 298 at 298, 312, 343, 342, 318, and 310. In 1953, Lederman made some claims about doctrine and precedent that resembled LaBrie's arguments, in his first constitutional article: Lederman, *supra* note 70, although he went on to argue that the judges should make their choices according to a vision of federalism and the needs of the country. In his later articles, he came to express more faith in the accumulated work of the courts and a distinctively "legal" reasoning, than he had suggested here.



Mainstream scholars would cheerfully have agreed that texts alone did not determine outcomes, but most would have hastened to affirm the duty of courts to make “policy,” derived from the purposes of the constitution, or from the needs and values of Canadian society and its federalism. Intentionally or not, LaBrie did not. Instead he stressed uncertainty and contingency. When he wrote this article, he had been teaching for a only few years and had never studied outside Canada. He made few references to literature beyond the cases, and the only clue to the sources of his interests and ideas was a footnote to John Willis’ article, “Statute Interpretation in a Nutshell.”<sup>82</sup> His article was read by contemporaries but soon disappeared from the literature.

## V. The Explanations

Historians, political scientists and legal scholars have offered a multitude of explanations for the decisions of the Privy Council.<sup>83</sup> Parts of this literature are hobbled by a few pervasive and overlapping tendencies. Some writers offered an explanation without specifying the period or the cases that they were explaining, even though the range of issues and complexity of events made it unlikely that one factor could be an effective explanation even at one brief time, let alone over the long span of time between 1880 and 1940. Some writers confused the doctrinal issues at stake in the cases, or assumed that they were essentially the same; but the division of legislative powers, the nature of the provincial legislatures, and the powers of provincial executives were all different issues, even though a holding about one might have suggested appropriate holdings for another. Other writers provided little of the evidence that would usually satisfy historians; and still others made a sharp and simplistic distinction between law and the rest of life, and between “legal,” and “political” or “sociological” explanations that reduced law to an extreme and unrealistic positivism and excluded any serious consideration of legal thought. Last, almost all of the writers accepted a vision of Confederation and the *BNA Act* in which the Dominion government was intended to be powerful and dominant, and assumed that their task was to explain departures and betrayals.<sup>84</sup>

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<sup>82</sup> *Supra* note 42.

<sup>83</sup> The literature, apart from items I shall refer later, includes, J.G. Morrison, *Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867-1896* (Toronto: The Ontario Department of Public Records and Archives, 1961) at 286-295; M. MacGuigan, “The Privy Council and the Supreme Court: A Jurisprudential Analysis” (1966) 4 *Alberta Law Review* 419; C.O. Johnson, “Did Judah P. Benjamin Plant the ‘States’ Rights’ Doctrine in the Interpretation of the British North America Act?” (1967) 45 *Canadian Bar Review* 454; J. Robinson, “Lord Haldane and the British North America Act” (1970) 20 *University of Toronto Law Journal* 55; S. Wexler, “The Urge to Idealize: Viscount Haldane and the Constitution of Canada” (1984) 29 *McGill Law Journal* 609; F. Vaughan, “Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation” (1986) 19 *Canadian Journal of Political Science* 495; A.C. Cairns, “Comment on ‘Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation’” (1986) 19 *Canadian Journal of Political Science* 521; and P. Russell, “Comment on ‘Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation’” (1986) 19 *Canadian Journal of Political Science* 521.

<sup>84</sup> One recent exception to this tendency is a pair of articles by P. Romney: “The Nature and Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions, and the Construction of the British

Among the more substantial explanations,<sup>85</sup> the most particular one was by F. Murray Greenwood, who argued in 1974 that the decisions of the Privy Council in the late nineteenth century were a product of its own interest in preserving its role.<sup>86</sup> Perceiving agitation in Canada to abolish appeals and make its Supreme Court the final court of appeal, it sought to preserve its role by making decisions that were both distinctive and responsive to the predominant opinion in Canada. Greenwood's argument was grounded in the results of the cases, but it seemed too particular to be the entire story.<sup>87</sup>

Next came explanations based on economic attitudes of the judges. In 1937, in the symposium about the New Deal cases, Frank Scott briefly suggested that the decisions made by the Privy Council during the 1930s were influenced by an aversion to economic regulation,<sup>88</sup> and in 1961 James Mallory made the same argument at length,<sup>89</sup> using cases from the late nineteenth century to the 1930s as examples. The results of the cases, some comments throughout the judgments, and the general political and economic beliefs of the legal profession made the idea a powerful one for the 1920s and 1930s. For cases decided before the 1920s, however, it was at odds with the results and, for the decisions of the Canadian courts, it was

North America Act" (1992) 25 Canadian Journal of Political Science 3, and "Why Lord Watson Was Right" in J. Ajzenstat, ed., *supra* note 39 at 193.

<sup>85</sup> Here are some even briefer comments about other explanations. Some scholars have observed that some members of the Privy Council were sympathetic to 'home rule' for Ireland. This sympathy alone is not an explanation. Assuming that it was based on a general belief in liberty for distinctive communities, why did the provinces seem to be distinctive communities or how did the provinces resemble Ireland? The answer probably depends upon a study of how the Privy Council acquired its knowledge of Canada, and here this explanation merges with some of the others. Some scholars have invoked Lord Haldane's idealism. (He was an accomplished philosopher, and a Hegelian.) This argument presents much the same question as the arguments based on 'home rule': why was the general will appropriately expressed through Ontario, rather than the Dominion, and why did rational principles tend to favour the provinces? Next, some scholars have argued that the Privy Council believed that its function was political, to undertake statecraft. This argument is at odds with the form of the arguments and the judgments, which are typical lawyers' talk and differ little from the form of arguments and judgments of the Supreme Court. More importantly, it leads to the same sort of question that has already appeared: why would statecraft lead to strong provinces? The simplest explanation is the speculation that Judah Benjamin, who had been a senior official in the American Confederacy and later a leading counsel in England, persuaded the Privy Council to espouse 'states rights'; but research into his appearances has demonstrated that the facts don't support the speculation. Last, perhaps the Privy Council was influenced by its desire to preserve the Empire; but even assuming such a desire, it is not clear what decisions about federalism it would produce.

<sup>86</sup> M. Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890s" (1974) University of British Columbia Law Review 244. As well as proposing his own explanation, Greenwood also gives a good survey of the competing candidates.

<sup>87</sup> Note that one element of the explanation, that of responsiveness to predominant opinion in Canada, alone could be an explanation, and in this way Greenwood's explanation approaches some of the others, but involves some of the same questions, especially about the Privy Council's understanding of its function and its knowledge of Canada.

<sup>88</sup> Scott, *supra* note 39 at 492.

<sup>89</sup> J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) at 25-56; see also J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1944) 10 Canadian Journal of Economics and Political Science 165.

also at odds with armchair speculation about kinds of governmental involvement in the economy and Canadian attitudes towards the state.<sup>90</sup> Much later, in 1991, Bruce Ryder made a fruitful modification by suggesting that the courts have been tolerant of legislation that seemed “necessary to the preservation of morality and the social order,” and much less tolerant of legislation that seemed to be “an interference with market relations.”<sup>91</sup>

Other explanations were based on beliefs about federalism, and they can be divided into two sharply different groups. The first began with the observation, first briefly made by Kennedy in 1930, that even though the decisions departed from the text of the *BNA Act* and the understandings at Confederation, they were appropriate for the pluralism of Canada.<sup>92</sup> He also suggested that a continuation of the tendency towards decentralisation would be dangerous, but even with this qualification, his attitude was more benign than it was a few years later. Alan Cairns made the same observation a major theme of a widely known and respected article written in 1971, in which he argued that the criticism in the 1930s was misplaced, and that the appropriateness of its results justified the Privy Council.<sup>93</sup> The observation alone was not an explanation, but Cairns also said that Watson and Haldane acted deliberately; that is, presumably, they interpreted the constitution in response to their perceptions of change and need. This claim could point to a famous comment by Haldane about Watson and his experience as counsel before he became Lord Chancellor;<sup>94</sup> but it raised large and difficult questions about their perceptions of their function and, especially for the cases in the late nineteenth century, as to how they gathered their knowledge of Canada.

The other use of beliefs about federalism involved, not the distinctive nature, real or imagined, of Canada, but the influence of ideas about the nature of federalism. It appeared first in LaBrie’s 1949 article. Having argued that text, rules, precedent did not determine aspects and outcomes, he turned to ask what did, and his answer began with the claim that the major factor was a model of federalism: the courts had imposed a federalism of “complete equality ... a state of opposed interest and continuing rivalry between provincial and federal sovereign legislatures.” In implementing this model of federalism, the courts had undertaken the “maintenance of a delicate balance.”<sup>95</sup> LaBrie also suggested other influences, especially comparisons to the past, the intent of the legislature, and the effect of the legislation; but here his

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<sup>90</sup> See B.J. Hibbitts, “A Bridle for Leviathan: The Supreme Court and The Board of Commerce” (1989) 21 *Ottawa Law Review* 65.

<sup>91</sup> “The Demise and Rise of the Classical Paradigm” (1991) 36 *McGill Law Journal* 309.

<sup>92</sup> “I often wonder, however, with the inevitable divergencies in our national life due to race, religion, geography and such like, whether after all the way of the Privy council up to 1929 has not been the better way.” Kennedy, “Review” *supra* note 37 at 708; also, *Some Aspects of the Theories and Workings of Constitutional Law*, in *supra* note 37 at 101-2.

<sup>93</sup> A. Cairns, “The Judicial Committee and its Critics” (1971) 4 *Canadian Journal of Political Science* 301

<sup>94</sup> R.B. Haldane, “Lord Watson” (1899) 11 *Juridical Review* 278; and Lord Haldane, “The Work for the Empire of the Judicial Committee of the Privy Council” ((1921) 1 *Cambridge Law Journal* 143.

<sup>95</sup> LaBrie, *supra* note 81 at 319-320, 344.

arguments were much less powerful; as well, he never sought to link the influences to the economic and political faiths he claimed were fundamental. LaBrie argued that this undertaking explained a reluctance to find new aspects, and therefore the withering of P.O.G.G., and the narrowing of s.91(2).

LaBrie did not develop this brief flash, and historians and political scientists have been unwilling to take lawyers' ideas and doctrines seriously in seeking explanations. Nonetheless, the path is a promising one. Consider the Privy Council's judgments in the late nineteenth century about the nature of Canadian federalism: the provincial legislatures were "supreme" within their spheres, and the provincial executives were entirely independent of the Dominion's executive.<sup>96</sup> These judgments made what has been called "coordinate federalism," although the phrase "model of autonomy" may be more expressive. The crucial point in considering the influence of ideas is that this model was the dominant understanding of English and Canadian lawyers from the 1860s onwards. It was best expressed for English lawyers by Dicey in his classic text, *The Law of the Constitution*, written in 1885, where he spoke of "co-ordinate and independent authorities," and said that the central government should not have any power of "encroaching upon the rights retained by the states."<sup>97</sup> In Canada, it appeared first around 1870 in speeches by David Mills, a lawyer, journalist and Liberal member of Parliament. By the late 1880s, it was firmly established and the stuff of texts. My suggestion is that the Privy Council's decisions about the nature of Canadian federalism were in large part expressions of their beliefs about the proper nature of federalism.

The difficult question is, though, was there a relation between this model of federalism and the decisions about the division of powers? Perhaps the independence in the model seemed to entail some measure of equality, and this thought might have been supported by the strong and pervasive belief in liberty: each of the governments must have liberty. Perhaps, as well, to consider other elements of the lawyers' ideas, the understanding of powers as defined and separated by sharp lines contributed to the withering of P.O.G.G. and the narrowing of s.91(2), a possibility Scott saw in 1931.<sup>98</sup>

## VI. Conclusion

My argument has been that writings about the Canadian constitution have reflected differing beliefs about legal reasoning and legal scholarship, and about visions of Canada. That is, as I said, hardly startling. In retrospect, I wish to recall the way in which the beliefs about legal reasoning were shaped first by models from England and then the United States. One can only hope that our current constitutional ferment will encourage thinking that is distinctively Canadian, about Canada as a distinctive country.

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<sup>96</sup> *Hodge v. The Queen* (1883), 9 A.C. 117, as well as the *Liquidators* judgment.

<sup>97</sup> A.V. Dicey, *The Law of the Constitution* (London: Macmillan, 1885) at 142 and 138.

<sup>98</sup> Scott, *supra* note 39 at 233.