

The Judicial Committee and Its Critics*

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The interpretation of the British North America Act by the Judicial Committee of the Privy Council is one of the most contentious aspects of the constitutional evolution of Canada. As an imperial body the Privy Council was unavoidably embroiled in the struggles between imperialism and nationalism which accompanied the transformation of Empire into Commonwealth. As the final judicial authority for constitutional interpretation its decisions became material for debate in the recurrent Canadian controversy over the future of federalism. The failure of Canadians to agree on a specific formula for constitutional amendment led many critics to place a special responsibility for adjusting the BNA Act on the Privy Council, and then to castigate it for not presiding wisely over the adaptation of Canadian federalism to conditions unforeseen in 1867.

Given the context in which it operated it is not surprising that much of the literature of judicial review, especially since the depression of the thirties, transformed the Privy Council into a scapegoat for a variety of ills which afflicted the Canadian polity. In language ranging from measured criticism to vehement denunciation, from mild disagreement to bitter sarcasm, a host of critics indicated their fundamental disagreement with the Privy Council's handling of its task. Lords Watson and Haldane have been caricatured as bungling intruders who, either through malevolence, stupidity, or inefficiency channelled Canadian development away from the centralized federal system wisely intended by the Fathers.¹

This article will survey the controversy over the performance of the Privy Council. Several purposes will be served. One purpose, the provision of a more favourable evaluation of the Privy Council's conduct, will emerge in the following discussion. This, however, is a by-product of the main purpose of this article: an assessment of the quality of Canadian jurisprudence through an examination of the most significant, continuing constitutional controversy in Canadian history. The performance of the Privy Council raised critical questions concerning the locus, style, and role of a final appeal court. An analysis of the way in which these and

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¹"Within the last twenty years in particular," wrote G. F. G. Stanley in 1956, "it has been the common sport of constitutional lawyers in Canada to criticize, cavil and poke fun at the *dicta* of the judges of the Privy Council and their decisions in Canadian cases. Canadian historians and political scientists have followed the legal party line with condemnations of 'the judicial revolution' said to have been accomplished by Lord Watson and Lord Haldane, and the alleged willful nullification of the true intentions of the Fathers of Confederation." "Act or Pact? Another Look at Confederation," in Ramsay Cook, ed., *Confederation* (Toronto, 1967), 112.

related questions were discussed provides important insights into Canadian jurisprudence.²

Varieties of criticism

Criticisms of the Privy Council can be roughly separated into two opposed prescriptions for the judicial role.³ One camp, called the constitutionalists in this essay, contained those critics who advocated a flexible, pragmatic approach so that judges could help to keep the BNA Act up to date. Another camp, called the fundamentalists, contained those who criticized the courts for not providing a technically correct, logical interpretation of a clearly worded document.

According to the fundamentalists the basic shortcoming of the Privy Council was its elementary misunderstanding of the act. The devotees of this criticism, who combined a stress on the literal meaning of the act with a widespread resort to historical materials surrounding Confederation, had four main stages in their argument.⁴ Naturally, not all critics employed the full battery of arguments possible.

1 The initial requirement was the provision of documented proof that the Fathers of Confederation intended to create a highly centralized federal system. This was done by ransacking the statements of the Fathers, particularly John A. Macdonald, and of British officials, for proof of centralist intent. Given the known desire of some Fathers for a "legislative union," or the closest approximation possible in 1867, a plethora of proof was readily assembled.

2 The next logical step was to prove that the centralization intended was clearly embodied in the act.⁵ This was done by combing the act for every indication of the

²I have not confined my sources to the writings of the legally trained. Historians and political scientists are also considered. Their approach, although less influenced by technical considerations, did not differ significantly in orientation from that of the lawyers.

Canadian criticism of the Privy Council was part of the more general dissatisfaction present in many of the jurisdictions for which it was a final appeal court. See Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), for an analysis.

³Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa, 1969), 34–5, identifies the same two streams of criticism singled out in this article. André Lapointe, "La jurisprudence constitutionnelle et le temps," *Thémis*, 7 (1956), 26–7, adds a third main criticism, the failure to use adequate legal arguments, but this is clearly subsidiary and is not in fact discussed in his article.

⁴V. C. MacDonald, "Judicial Interpretation of the Canadian Constitution," *University of Toronto Law Journal* (hereafter *UTLJ*), 1 (1935–6), provides a general centralist interpretation of the intentions of the Fathers and the BNA Act they created, which he contrasts with the judicial interpretation of the act. See also H. A. Smith, "The Residue of Power in Canada," *Canadian Bar Review* (hereafter *CBR*), 4 (1926), 438–9.

⁵MacDonald, "Judicial Interpretation," 267, after noting that a centralized federation was intended, observed "how closely the language of the act reproduces that intent ..." W. F. O'Connor stated: "there are not any material differences between the scheme of distribution of legislative powers between Dominion and provinces as apparently intended at the time of Confederation and the like legislative powers as expressed by the text of Part VI of the British North America Act, 1867." *Report Pursuant to Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them and cognate matters*, hereafter the *O'Connor Report* (Ottawa, 1939), 11.

In his most recent publication, Donald Creighton states that the Fathers regarded federalism as a "suspect and sinister form of government ... British American union, they admitted, would

Le Judicial Committee of the Privy Council (Londres) et ses critiques

Le « *Judicial Committee of the Privy Council* » (organisme gouvernemental anglais qui servit de cour constitutionnelle pour le Canada jusqu'en 1949) a été sévèrement critiqué par les milieux politiques et universitaires du Canada. Ces critiques se partagent en deux catégories : (1) celles qui soutinrent que les honorables-lords n'ont pas formulé d'interprétation opérationnellement acceptable du « BNA Act » (loi anglaise de 1867 qui tient lieu, encore aujourd'hui, de constitution au ... Canada) et (2) celles qui ont expliqué cet échec par leurs réticences à traiter cette loi comme une constitution devant tenir compte de l'évolution historique.

L'article montre que ces critiques sont basées sur une analyse et des postulats superficiels, inadéquats à servir de critères aux décisions juridictionnelles ; il souligne également que les arrêts du Conseil ont été chaleureusement accueillis jusqu'en 1930. Fait à souligner, les Canadiens français l'ont supporté largement, parce que sensibles à l'autonomie provinciale. Naturellement, les critiques d'origine anglo-canadienne, ouvertement centralisatrices, réclamaient l'abolition des appels auprès du Conseil dans l'espoir qu'une Cour Suprême indigène réfléterait leurs désirs. L'histoire du Canada suggère que ces critiques sous-estimaient la nature fédérative de la société canadienne et que, au contraire, vue dans une perspective plus sociologique, la performance du Conseil a été fort défendable.

En conclusion, l'auteur suggère que c'est le caractère étranger de cette cour britannique qui a conduit ses critiques à emmêler indûment des considérations de type nationaliste et de nature juridique. Une telle confusion est la source de la moindre valeur doctrinale de la jurisprudence attaqué par les critiques d'origine canadienne.

exalted role assigned to Ottawa and the paltry municipal role assigned to the provinces. This task required little skill. Even the least adept could assert, with convincing examples, that the division of powers heavily favoured Ottawa. If additional proof seemed necessary the dominance of the central government could also be illustrated by referring to the provisions of the act dealing with the disallowance

have to be federal in character; but at the same time it must also be the most strongly centralized union that was possible under federal forms ... This basic principle guided all the planning whose end result was the British North America Act of 1867." *Canada's First Century: 1867-1967* (Toronto, 1970), 10 (see also 44-6).

The extent of Macdonald's centralist bias is evident in his prediction in a letter to M. C. Cameron, dated Dec. 19, 1864: "If the Confederation goes on you, if spared the ordinary age of man, will see both local governments and all governments absorbed in the General Power." Cited in A. Brady, "Our Constitutional Tradition," mimeo., paper presented to the Progressive Conservative Party Policy Conference, Niagara Falls, Autumn 1969, 16n.

For additional support for the thesis that a centralized federal system was both intended and embodied in the BNA Act, see R. I. Cheffins, *The Constitutional Process in Canada* (Toronto, 1969), 37; D. G. Creighton, *British North America at Confederation* (Ottawa, 1939); R. M. Dawson, *The Government of Canada*, rev. by Norman Ward (4th ed., Toronto, 1963), chaps. 2 and 5; W. P. M. Kennedy, *The Constitution of Canada, 1534-1937: An Introduction to Its Development, Law and Custom* (2nd ed., London, 1938), chap. 19; Kennedy, *Some Aspects of the Theories and Workings of Constitutional Law* (New York, 1932), 86-7; A. R. M. Lower, *Colony to Nation* (Toronto, 1946), 329-31; E. McInnis, *Canada: A Political and Social History* (rev. ed., New York, 1960), chap. 13; *Report of the Royal Commission on Dominion-Provincial Relations*, hereafter the *Rowell-Sirois Report* (Ottawa, 1954), I, 32-5; F. R. Scott, "The Development of Canadian Federalism," *Papers and Proceedings of the Canadian Political Science Association* (hereafter *PPCPSA*), 3 (1931); Scott, "The Special Nature of Canadian Federalism," *Canadian Journal of Economics and Political Science* (hereafter *CJEPS*), 13 (1947); Scott, "Centralization and Decentralization in Canadian Federalism," *CBR*, 29 (1951); Scott, *Canada Today* (London, 1938), 75-8; R. Tuck, "Canada and the Judicial Committee of the Privy Council," *UTLJ*, 4 (1941-2), 41-3.

and reservation of provincial legislation, and with the special position of the lieutenant governor as a federal officer.

Once concordance was proved between what the Fathers intended and what they achieved in the act the critics could then delve into a vast grab bag of pre-Confederation sources for their arguments. This greatly increased the amount of material at their disposal, and strengthened their claim that a prime reason for Privy Council failure was its unwillingness to use similar materials.

3 The third feature of this fundamentalist approach was a definition of the judicial role which required of judges no more and no less than the technically correct interpretation of the act to bring out the meaning deliberately and clearly embodied in it by the Fathers. Where necessary the judges were to employ the methods of historical research in performing this task. This point was explicitly made by H. A. Smith in his criticism of the English rule against extrinsic evidence in the interpretation of statutes. This, he asserted, was to forbid the courts "to adopt historical methods in solving a historical problem." The consequences were grave:

... an arbitrary and unreasonable rule of interpretation has produced the very serious result of giving Canada a constitution substantially different from that which her founders intended that she should have. A study of the available historical evidence gives us a clear and definite idea of what the fathers of Canadian confederation sought to achieve. By excluding this historical evidence and considering the British North America Act without any regard to its historical setting the courts have recently imposed upon us a constitution which is different, not only in detail but also in principle, from that designed at Charlottetown and Quebec.⁶

In brief, the judge, like Ranke's ideal historian, was to find out "the way it really was," and then apply his historical findings to the cases which came before him.

4 Proof that the Fathers had intended and had created a centralized federal system in the terms of the BNA Act, coupled with the transformation of the judge into a historian, provided conclusive evidence of the failure of the Judicial Committee. This was done by contrasting the centralization intended and statutorily enacted with the actual evolution of the Canadian polity towards a more classical decentralized federalism, an evolution to which the courts contributed. Since the judges were explicitly directed to apply the act literally it was obvious that they had bungled their task. As W. P. M. Kennedy phrased it, their "interpretations cannot be supported on any reasonable grounds. They are simply due to inexplicable misreadings of the *terms* of the Act."⁷ The same point was made in more polemical fashion by J. T. Thorson in a parliamentary debate on the Privy Council's treatment of the Bennett New Deal legislation:

... they have mutilated the constitution. They have changed it from a centralized federalism, with the residue of legislative power in the dominion parliament, to a decentralized federalism with the residue of legislative power in the provinces – contrary

⁶"The Residue of Power in Canada," 433. For additional assertions that the failure of the Judicial Committee to use pre-Confederation evidence was partially responsible for their misinterpretation of the BNA Act, see Tuck, "Canada and the Judicial Committee," 40–1. V. C. MacDonald, "Constitutional Interpretation and Extrinsic Evidence," *CBR*, 17 (1939), is a helpful discussion of the actual practice of the Privy Council.

⁷"The Terms of the British North America Act," in R. Flenley, ed., *Essays in Canadian History* (Toronto, 1939), 129.

to the Quebec resolutions, contrary to the ideas that were in the minds of the fathers of confederation, contrary to the spirit of confederation itself, and contrary to the earlier decisions of the courts. We have Lord Haldane largely to blame for the damage that has been done to our constitution.⁸

In summary, the fundamentalists simply asserted that the Privy Council had done a bad job in failing to follow the clearly laid out understandings of the Fathers embodied in the BNA Act. O'Connor, the author of the most influential criticism of the Privy Council, viewed their decisions as indefensible interpretations of a lucidly worded constitutional document. He felt that the act was a marvellous instrument of government, the literal interpretation of which would have been perfectly consonant with the needs of a changing society.⁹ The same literal criticism was brandished by a critic of the decision in *Toronto Electric Commissioners v Snider* who "arose in his place in the House of Commons and protested against 'a condition which allows the Judicial Committee ... to shoot holes in our constitution.'" ¹⁰ For such critics the failure was technical, a simple case of misinterpretation. All critics who appealed to the intentions of the Fathers or to the clearly expressed meaning of the act when criticizing the "deviations" of the Judicial Committee fell into this category. Since this gambit was almost universal, this fundamentalist criticism was widespread.¹¹

In documenting the emasculation of federal authority critics concentrated on the opening "peace, order, and good government" clause of section 91, and on 91 (2) "the regulation of trade and commerce." The former, "the foundation of Macdonald's whole federal system,"¹² was the "favourite whipping-boy of most of the articles and comments on Canadian constitutional law ..."¹³ According to critics, the peace, order and good government clause was clearly designed to be the primary grant of federal authority with the enumerated clauses being illustrative, or "for greater certainty but not so as to restrict the generality" as section 91 declared. The destruction of the utility of the residuary clause, and its subsequent partial revival as a source of emergency power, evoked a series of violent critiques from a host of embittered commentators.¹⁴

⁸Can. H. of C. Debates, April 5, 1937, pp. 2584–5.

⁹O'Connor Report, 11–14, and Annex 1.

¹⁰R. W. S., "Criminal Appeals," *CBR*, 4 (1926), 410.

¹¹J. R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto, 1954), 29, notes that generally historians, political scientists, and lawyers have argued that the courts misinterpreted the BNA Act. See, for example, Lower, *Colony to Nation*, 376–7; D. G. Creighton, *Dominion of the North* (Boston, 1944), 380–1; C. H. Cahan, *Can. H. of C. Debates*, April 5, 1937, p. 2575; W. P. M. Kennedy, "The Interpretation of the British North America Act," *Cambridge Law Journal*, 8 (1943), 156–7, 160; V. C. MacDonald, "The Constitution in a Changing World," *CBR*, 26 (1948), 29–30, 41; MacDonald, "The Privy Council and the Canadian Constitution," *CBR*, 29 (1951), 1035; Smith, "The Residue of Power in Canada," 434.

¹²Creighton, *Canada's First Century*, 49.

¹³B. Laskin, " 'Peace, Order and Good Government' Re-examined," *CBR*, 25 (1947), 1054.

¹⁴The vehemence which ran through many of these criticisms is evident in Laskin's assertion: "My examination of the cases dealing with the Dominion's general power does not indicate any inevitability in the making of particular decisions; if anything, it indicates conscious and deliberate choice of a policy which required, for its advancement, manipulations which can only with difficulty be represented as ordinary judicial techniques." *Ibid.*, 1086. Kennedy, "Interpretation of the British North America Act," 153–6, and Tuck, "Canada and the Judicial Committee," 56–64, describe the development of the misinterpretation of this clause. See also Creighton, *Dominion of the North*, 380, 466–7; Dawson, *Government of Canada*, 94–102;

The Privy Council's handling of the trade and commerce power evoked only slightly less indignation. W. P. M. Kennedy, the most influential constitutional analyst of the period from the early twenties to the middle forties, spoke for the bulk of the critics when he protested that it "is reduced to the almost absurd position of being a power which the Canadian Parliament can only call in aid of a power granted elsewhere ..." It had been "relegated to a position utterly impossible to defend on the clearest terms of the Act, and one which makes any reliance on it barren and useless."¹⁵

The decline of peace, order, and good government and the virtual nullification of trade and commerce on the federal side were counterbalanced by the remarkable significance which came to be attached to "property and civil rights" in section 92.¹⁶ It was this provincial head that H. Carl Goldenberg described as "wide enough to cover nearly all legislation outside of criminal law," including the whole field of social legislation.¹⁷

In brief, the critics argued, the Privy Council seriously misinterpreted the division of powers in sections 91 and 92, to the extent that the provinces were left with responsibilities they were neither intended, nor competent, to handle. Several key decisions raised the status of the provinces,¹⁸ while other decisions enhanced the significance of provincial jurisdiction in section 92, especially property and civil

MacDonald, "The Constitution in a Changing World," 33–4, 41; *O'Connor Report*, Annex 1, 52–78; E. R. Richard, "Peace, Order and Good Government," *CBR*, 18 (1940); D. A. Schmeiser, *Civil Liberties in Canada* (London, 1964) 8–9.

¹⁵"Interpretation of the British North America Act," 156 and 156, n. 42. The situation was so anomalous that Anglin C.J. asserted that he found it difficult to accede to the proposition that "it should be denied all efficacy as an independent enumerative head of Dominion legislative jurisdiction." *King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, at 441. Lionel H. Schipper, "The Influence of Duff C.J.C. on the Trade and Commerce Power," *University of Toronto Faculty of Law Review*, 14 (1956), discusses the influence of the provincial bias of Duff on the evolution of this clause. For critiques of Privy Council interpretation, see B. Claxton, "Social Reform and the Constitution," *CJEPS*, 1 (1935), 419–22; A. B. Keith, "The Privy Council and the Canadian Constitution," *Journal of Comparative Legislation*, 7 (1925), 67–8; MacDonald, "The Constitution in a Changing World," 36–42; M. MacGuigan, "The Privy Council and the Supreme Court: A Jurisprudential Analysis," *Alberta Law Review*, 4 (1966), 421; F. R. Scott, "Constitutional Adaptations to Changing Functions of Government," *CJEPS*, 11 (1945), 332–3; A. Smith, *The Commerce Power in Canada and the United States* (Toronto, 1963); Tuck, "Canada and the Judicial Committee," 64–9.

¹⁶Smith, "The Residue of Power in Canada," 433; H. A. Smith, "Interpretation in English and Continental Law," *Journal of Comparative Legislation*, 9 (1927), 162–3; Creighton, *Dominion of the North*, 381; Dawson, *Government of Canada*, 96–8; Thorson, *Can. H. of C. Debates*, April 5, 1937, 2584.

The critics asserted that the original and intended meaning of property and civil rights was much more restrictive than it came to be under judicial fostering. See W. F. O'Connor, "Property and Civil Rights in the Province," *CBR*, 18 (1940).

¹⁷"Social and Economic Problems in Canadian Federalism," *CBR*, 12 (1934), 423.

¹⁸*Hodge v. The Queen* (1883), 9 App. Cas. 117; *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick*, [1892] A.C. 437; *A.G. Ont. v Mercer* (1883), 8 App. Cas. 767. See Cheffins, *Constitutional Process in Canada*, 38–9, 107–8. Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867–1921* (Ottawa, 1969), 21–2, discusses the successful attempt of Premier Mowat of Ontario "to make the lieutenant-governor as much the representative of the Queen in the province as the governor general was the representative of the Queen in federal affairs." See also G. F. G. Stanley, *A Short History of the Canadian Constitution* (Toronto, 1969), 99–102, and J. C. Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867–1896," in Ontario Department of Public Records and Archives, *Three History Theses* (Toronto, 1961), chap. 2.

rights. Conversely, the federal government, originally endowed with potent problem-solving and nation-building capacities, had its powers cribbed and confined to such a degree that the Fathers would not recognize their creation. As a consequence, an explicitly centralized federal system was transformed into its reverse, a decentralized system approximating a league of states.¹⁹

The previous approach defined the judicial role in terms of the literal, almost technical, task of correctly interpreting a historic document in terms of the intention of its framers. From this perspective the trouble with the Privy Council was that it had got its history wrong, or had misinterpreted the clear phraseology of the BNA Act.

The second stream of criticism rested on contrary assumptions. These critics, the constitutionalists, took their stand with John Marshall's assertion that judges must not forget that they were expounding a constitution.

Critics of this school were hostile to the Privy Council for treating the BNA Act as a statute to be analysed by "the ordinary rules of statutory construction." They asserted that the Judicial Committee should have been an agent for constitutional flexibility, concerned with the policy consequences of their decisions. They flatly rejected the Judicial Committee's own interpretation of its task, to treat "the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes."²⁰

Contrary to the narrow statutory approach officially adopted by the Privy Council the critics favoured a more generous, flexible, liberal approach which clearly recognized the constitutional significance of judicial review, with its corollary of a policy role for judges. In positive terms these critics spoke variously and vaguely of the need to keep the BNA Act up to date, particularly in its federal aspects. In a variety of ways they believed that a Canadian version of the United States Supreme Court was required. They spoke especially favourably of Lord Sankey, the closest approximation to a hero they could find on the Privy Council,

¹⁹This is the gist of comments by Mallory, *Social Credit and the Federal Power*, 29; Creighton, *Dominion of the North*, 381; J. M. S. Careless, *Canada: A Story of Challenge* (Toronto, 1963), 364–5; MacDonald, "The Constitution in a Changing World," 44.

²⁰*Bank of Toronto v Lambe* (1887), 12 App. Cas. 575, at 579. Critics of the Privy Council for its adoption of a narrow legal approach were legion. See, for example, Creighton, *Canada's First Century*, 49; Lower, *Colony to Nation*, 334; MacDonald, "The Privy Council and the Canadian Constitution," 1029–31; MacDonald, "Judicial Interpretation of the Canadian Constitution," 267–70; Kennedy, "Interpretation of the British North America Act," 151–2; Kennedy, *Some Aspects of the Theories and Working of Constitutional Law*, 70–2; MacDonald, "The Constitution in a Changing World," 23; Thorson, *Can. H. of C. Debates*, April 5, 1937, p. 2582; F. R. Scott, "Section 94 of the British North America Act," *CBR*, 20 (1942), 530; E. McWhinney, *Judicial Review* (4th ed., Toronto, 1969), 16–17, 29–30; Tuck, "Canada and the Judicial Committee," 36–41.

Even supporters of the Privy Council agree that this was its approach. In the midst of the furore over the New Deal decisions Ivor Jennings wrote: "It is not reasonable to expect that the members of the Judicial Committee of the Privy Council would interpret the Act in any way different from that adopted in the interpretation of other statutes. The Act is an ordinary statute, passed by Parliament at the request of certain rather troublesome and very remote colonists on the other side of the world. The judges did not think of themselves as determining the constitutional development of a great nation. Here was a statute in essence not different from many other pieces of legislation; and the judges naturally interpreted it in the usual way, by seeing what the statute said. They were concerned not with the desires of the Fathers, but with the progeny they had in fact produced." "Constitutional Interpretation: The Experience of Canada," *Harvard Law Review*, 51 (1937), 3 (see also 35).

and they delighted in the analogy of the “living tree” which he had applied to the BNA Act.²¹

The general tenor of the desired approach is readily apparent from the felicitous phrases used. MacDonald spoke of the need for interpreting the act “progressively so as to keep it as apt an instrument of government in new conditions as it was in the conditions current at its enactment.”²² Elsewhere he wrote of the necessity for “constant effort to bring and keep the Constitution up-to-date as the source of power adequate to present needs,”²³ and the desirability of “the flexible interpretation that changing circumstances require.”²⁴ Laskin wrote favourably of “those sentiments in existing constitutional doctrine which express principles of growth.” He contrasted “the higher level of constitutional interpretation” with the “lower level of statutory interpretation.”²⁵ F. R. Scott, one of the most prolific critics of the Privy Council, praised the “clear recognition” by courts in the United States “that a constitution is primarily intended, not to rivet on posterity the narrow concepts of an earlier age, but to provide a living tree capable of growth and adaptation to new national needs.”²⁶ To A. R. M. Lower the act should have been interpreted “as the vehicle for a nation’s growth. If the Act is the vehicle of a nation, then the broadest construction must be put on it in order that under it all parts of the nation may have adequate life.”²⁷

Essentially, these critics were strong on general exhortation and weak on specifics. What they disliked was very clear. Positively, they were concerned with consequences. They recognized the policy role of the judiciary, and the dangers of being tied down to the constitutional assumptions of a previous era. The difficulties of formal amendment encouraged them to look to the courts for the injection of flexibility into an ancient document. They also frequently noted the necessity of incorporating a broader range of facts into the judicial decision-making process. From this perspective their orientation was salutary, for the brunt of their message was to make judges more self-conscious than hitherto.

Inevitably the advocates of a living tree, liberal, flexible approach to constitutional interpretation were hostile to *stare decisis*. MacDonald spoke of the “shackles of previous decisions,”²⁸ Laskin of “the inertia of *stare decisis*,” and the “encrustation of *stare decisis*,”²⁹ and W. P. M. Kennedy of “that uncanny stranglehold with

²¹Lord Sankey’s bias was “clearly against pettifogging lawyers’ arguments that interfered with the effective control of social life and the freedom of Dominion action, and this led him to infuse a new spirit into the process of interpretation.” Jennings, “Constitutional Interpretation,” 36. He also suggested (p. 36) that had he been on the court at the time, the New Deal decisions might have been sustained. He discusses Sankey’s “liberal” approach on pp. 28–30. A “liberal” interpretation “implies a certain impatience with purely formal and technical arguments” (p. 31). “Liberal” decisions most frequently favourably cited by critics of the Privy Council were *Edwards v A.G. Can.*, [1930] A.C. 124; *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54; *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304; *British Coal Corporation v The King*, [1935] A.C. 500; *A.G. Ont. v A.G. Can. and A.G. Que.*, [1947] A.C. 127.

²²“The Privy Council and the Canadian Constitution,” 1034.

²³“The Constitution in a Changing World,” 24.

²⁴*Ibid.*, 41.

²⁵“‘Peace, Order and Good Government’ Re-examined,” 1087.

²⁶A. Brady and F. R. Scott, eds., *Canada after the War* (Toronto, 1943), 77.

²⁷*Colony to Nation*, 334.

²⁸“The Constitution in a Changing World,” 45.

²⁹“‘Peace, Order and Good Government’ Re-examined,” 1086–7.

which *stare decisis* seems doomed to rob the law of creative vitality.³⁰ They were far more concerned with the suitability of the developing constitution to new circumstances than with a narrow fidelity to previous constitutional case law.

Underlying the specific criticisms of the Privy Council there was the overriding assumption that a powerful central government endowed with broad ranging legislative authority and generous financial resources was an essential requirement of modern conditions. "The complications of modern industry and of modern business," asserted W. P. M. Kennedy in 1932, "will sooner or later demand national treatment and national action in the national legislature."³¹ In the mid-thirties Vincent MacDonald favourably noted "prevailing political theories which indicate the propriety or necessity of a greater degree of national control over, and governmental intervention in, matters of social welfare and business activity."³² The general centralist basis of the critics is most clearly found in the writings of the socialist law professor, F. R. Scott, the "unofficial constitutional advisor" of the CCF.³³ On numerous occasions Scott criticized the Privy Council for departing from the centralist federalism established in 1867 and for leaving Canada with a constitution which gravely hampered attempts to solve important public problems. In 1931 he stated:

Canadian federalism has developed continuously away from the original design. Constitutionally we have grown disunited, in spite of the fact that in other respects, as a result of the increased facility of communication, the rise of our international status, and the general spread of what may be called our national consciousness, we have grown more united. The Dominion Parliament does not play today the full part which the Fathers of Confederation planned for her ... Just at the time when the exigencies of the economic situation call for drastic action, for increased international co-operation and for a planned internal social order, we find ourselves with cumbrous legislative machinery and outworn constitutional doctrines.³⁴

The same point was made by Laskin in an article shortly after the Second World War. After noting the provincial bias of the Privy Council, he continued: "But has provincial autonomy been secured? In terms of positive ability to meet economic and social problems of interprovincial scope, the answer is no. A destructive negative autonomy exists, however, which has as a corollary that the citizens of a province are citizens of the Dominion for certain limited purposes only."³⁵

In the thirties when the impotence of the provinces was highlighted by the great depression this kind of opinion was greatly strengthened.³⁶ The interdependence of

³⁰"The British North America Act: Past and Future," *CBR*, 15 (1937), 399.

³¹*Some Aspects of the Theories and Workings of Constitutional Law*, 92-3.

³²"Judicial Interpretation of the Canadian Constitution," 282. See also MacDonald, "The Constitution in a Changing World," 26, 44.

³³Michiel S. D. Horn, "The League for Social Reconstruction: Socialism and Nationalism in Canada, 1939-1945," unpublished PhD thesis, University of Toronto, 1969, p. 158.

³⁴"Development of Canadian Federalism," 247; see also Scott, *Canada Today*, 32-3, 80-2.

³⁵"Peace, Order and Good Government' Re-examined," 1085.

³⁶In 1936 Vincent MacDonald wrote of the "inability of the Canadian constitution to meet the social, economic, and political needs of today and of the necessity for its revision ... great problems affecting the social and economic life of the country demand legislative capacity and solution. The second great fact at the moment is that effective solution of these contemporary problems is, in part, handicapped, and, in part, rendered impossible by (a) the terms of the act of 1867, and (b) previous decisions thereon, which, together, withhold jurisdiction where it is necessary that jurisdiction should be, divide jurisdiction where unity of jurisdiction is essential, and in other cases, paralyse action because of doubt as to jurisdiction where cer-

a modern economy, the growth of national corporations, national unions, and a national public opinion inevitably focused attention on the need for a strong national government. The recently formed CCF with its centralist orientation was inevitably hostile to the decentralizing tenor of Privy Council decisions. The intellectual spokesmen of the left in the League for Social Reconstruction viewed the provinces as reactionary supports of the business community.³⁷ The Conservatives, who had seen their New Deal program harshly treated by the Privy Council, reacted by raising the issue of abolishing appeals.

In the international arena a different set of factors existed to require strong central governments capable of decisive action by means of treaties which could be negotiated, ratified, and implemented without the inhibitions of a federalist division of powers. In these circumstances Lord Atkins' decision in the Labour Conventions case was viewed as an unmitigated disaster. "While it is true," his judgment stated, "... that it was not contemplated in 1867 that the Dominion would possess treaty-making powers, it is impossible to strain the section [132] so as to cover the un contemplated event."³⁸

This particular decision elicited a veritable flood of intemperate, polemical abuse of the Judicial Committee, both at the time and subsequently. The critics found it insulting to Canadian dignity and incompatible with Canadian autonomy that the evolution of Canadian independence from Great Britain should leave the federal government so seriously hampered in its relations with foreign states. F. R. Scott dramatized the choice as between local sovereignty and world peace.³⁹ W. P. M. Kennedy asserted in 1943 that the treaty situation was fraught with grave consequences for Canadian performance of postwar peace treaties.⁴⁰ Vincent MacDonald satirically noted:

The Dominion's power of treaty implementation is absolute as to types of treaty now obsolete. It is, however, almost non-existent as to many types of treaty called for by modern conditions; for these latter tend in point of subject matter to fall, entirely or largely, within Provincial heads of jurisdiction, as greatly expanded by judicial interpretation. This is a fact of the utmost importance in a day requiring co-operative action of many nations to control international forces of an economic, social or political character.⁴¹

Thus the critics, particularly the constitutionalists, were convinced that both domestic and foreign policy requirements necessitated the dominance of the central government in the federal system. Their opposition to the Privy Council on

tainty of jurisdiction is vital." "Judicial Interpretation of the Canadian Constitution," 282. According to A. R. M. Lower, "Objection to Privy Council appeals did not become considerable until about 1930, but it rapidly increased during the Depression when certain decisions visibly hampered the country's ability to cope with the situation." "Theories of Canadian Federalism – Yesterday and Today," in Lower *et al.*, *Evolving Canadian Federalism* (Durham, NC, 1958), 30. J. A. Corry, *Law and Policy* (Toronto, 1959), 26, notes how "the great depression of the thirties came perilously close to a breakdown in public order." See also Jean Beetz, "Les attitudes changeantes du Québec à l'endroit de la constitution de 1867," in P.-A. Crépeau and C. B. Macpherson, eds., *The Future of Canadian Federalism/L'avenir du fédéralisme canadien* (Toronto, 1965), 134–5.

³⁷Horn, "League for Social Reconstruction," 468.

³⁸*A.G. Can. v A.G. Ont.*, [1937] A.C. 326, at 350.

³⁹"Centralization and Decentralization in Canadian Federalism," 1113.

⁴⁰"Interpretation of the British North America Act," 159.

⁴¹"The Constitution in a Changing World," 42.

grounds of policy was backed by a growing Canadian nationalism. Even some of the early supporters of the Privy Council had recognized that in the fullness of time the elimination of appeals was inevitable. Nationalist arguments had been used by Edward Blake when the Supreme Court was established in 1875.⁴² They were later to form a staple part of John S. Ewart's long campaign for Canadian independence in the first three decades of this century. To Ewart the appeal was "one of the few remaining badges of colonialism, of subordination, of lack of self-government."⁴³ A later generation of critics reiterated Ewart's thesis. In 1947 F. R. Scott stated that the continuation of appeals "perpetuates in Canada that refusal to shoulder responsibility, that willingness to let some one else make our important decisions, which is a mark of immaturity and colonialism."⁴⁴ The nationalist argument was incorporated in the official justifications of the Liberal government when appeals were finally abolished in 1949.⁴⁵

The fact that the elimination of appeals occurred simultaneously with the admission of Newfoundland to Canada and a renewed attempt to find a domestic amending procedure was not accidental. On the one hand the meaning and value of the Commonwealth was not what it had been prior to the Second World War. A weakened Britain and an attenuated Commonwealth combined with a stronger and more self-confident Canada to diminish the significance of ties with the mother country, a phrase which had begun to sound quaint and archaic.⁴⁶

The nationalist attack on the Privy Council was fed by the special pride with which many Canadian writers asserted the superiority of Canadian over American federalism. The centralized variant of federalism established north of the "unguarded frontier," in reaction to the destructive effects of a decentralized federalism which the American civil war allegedly displayed, was for many critics part of the political distinctiveness of Canada which they prized. In these circumstances for a British court to reverse the intentions of the farsighted Fathers was doubly galling. This helps to explain the bitterness with which Canadian writers frequently con-

⁴²See Russell, *Supreme Court*, 11–17, for the controversy attending the establishment of the court and the failure to eliminate appeals at that time.

⁴³*The Kingdom of Canada* (Toronto, 1908), 227; see also 22, and Ewart, *The Kingdom Papers* (Ottawa, 1912), I, 88. For a study of Ewart, see Douglas L. Cole, "John S. Ewart and Canadian Nationalism," Canadian Historical Association, *Historical Papers*, 1969. "Canadian history as Ewart viewed it had but one chief theme – Canada's fight for freedom from imperial control" (p. 65).

Nationalist criticisms of the Privy Council waxed and waned up until the thirties. There was a brief flurry immediately prior to the First World War. See W. E. Raney, "Justice, Precedent and Ultimate Conjecture," *Canadian Law Times* (hereafter *CLT*), 29 (1909), 459; W. S. Deacon, "Canadians and the Privy Council," *CLT*, 31 (1911), 9, and "Canadians and the Privy Council," *CLT*, 31 (1911), 126–7; J. S. Ewart, "The Judicial Committee," *CLT*, 33 (1913), 676–7; also "Address by W. E. Raney," *Proceedings of the Canadian Bar Association* (hereafter *PCBA*), 5 (1920), 221–4. McWhinney points out that the very low repute of Privy Council judges in the depression represented not only dissatisfaction with "economically conservative judicial decisions ... [but] ... also, in part, an outpouring of local nationalism in that the court ... was an alien (in the sense of English) tribunal ..." *Comparative Federalism* (Toronto, 1962), 21–2.

⁴⁴"Abolition of Appeals to the Privy Council: A Symposium," *CBR*, 25 (1947), 571; see also Scott, "The Consequences of the Privy Council Decisions," *CBR*, 15 (1937), 493–4.

⁴⁵Hon. Stuart S. Garson (minister of justice), *Can. H. of C. Debates*, Sept. 20, 1949, pp. 69, 74–5.

⁴⁶Michel Brunet, "Canadians and Canadiens," in R. Cook, ed., *French-Canadian Nationalism: An Anthology* (Toronto, 1969), 289, discusses the war and postwar nationalist drive to centralism, of which the abolition of appeals was a part.

trusted the divergent evolutions of the American and Canadian federal systems away from their respective points of origin.

Explanations of the Judicial Committee

Critics of the Privy Council attempted to explain, as well as condemn, the results they deplored. In addition to explanations in terms of incompetence critics offered specific interpretations of the Privy Council's conduct. One explanation was legal, the assertion that it was natural for judges to attempt to reduce the discretion involved in interpreting vague phrases such as peace, order and good government. Frank Scott held that the decline of the federal residual power was due to the displeasure of a court of law at the task of having to distinguish between local and general matters. "Rather than commit themselves they have on the whole preferred to support legislation under some specific power, and thus the general residuary power has died of non-use."⁴⁷ A legal explanation of the Privy Council's conduct has been given recent support by Professor Browne's attempted justification of the claim that the act was in fact properly interpreted in the light of its evident meaning.⁴⁸

Occasionally critics suggested that Privy Council decisions were influenced by political considerations inappropriate to a court. While the nature of these considerations was seldom made clear, the most frequent accusation was that imperial interests were best served by a weak central government.⁴⁹ This explanation was consistent with the political bias most frequently attributed to the court, the protection and enhancement of the position of the provinces in Canadian federalism.⁵⁰ Proof of this was found in cases favouring the provinces, or restricting federal legislation, and in the provincialist statements which these cases frequently contained. Critics also pointed to the several occasions on which the Privy Council

⁴⁷"The Development of Canadian Federalism," 245. See also J. A. Corry, review of G. P. Browne, *The Judicial Committee and the British North America Act* (Toronto, 1967), in this JOURNAL, 1 (1968), 217-18; Rowell-Sirois Report, I, 57-9, and Browne, *The Judicial Committee*, 40, 84, 158-9.

⁴⁸*Ibid.*, Browne.

⁴⁹As John Dafoe believed. See R. Cook, *The Politics of John Dafoe and the Free Press* (Toronto, 1963), 217. Modified versions of this view were also presented by A. R. M. Lower, "Theories of Canadian Federalism," 38; Jacques Brossard, *La Cour Suprême et la constitution* (Montreal, 1968), 172; and Guisepppe Turi, "Le déséquilibre constitutionnel fiscal au Canada," *Thémis*, 10 (1959-60), 38. Hughes, *National Sovereignty and Judicial Autonomy*, 98, 104-5, discusses the possibility of Judicial Committee bias "where the issue is one between a Dominion and the British Government or between a Dominion person or firm and a British person or firm ... This is based on its composition which is predominantly English and partly political ..."

Unspecified allegations of political expediency are contained in Thorson, *Can. H. of C. Debates*, April 5, 1937, p. 2582, and MacDonald, "Judicial Interpretation of the Canadian Constitution," 285.

⁵⁰For discussions of the provincial bias of the Judicial Committee, see F. E. LaBrie, "Canadian Constitutional Interpretation and Legislative Review," *UTLJ*, 8 (1949-50), 318-23; McWhinney, *Judicial Review*, 51 n.7, 67, 69; MacDonald, "The Privy Council and the Canadian Constitution," 1030-2, 1035; MacDonald, "The Constitution in a Changing World," 23; MacGuigan, "The Privy Council and the Supreme Court," 426-7. R. F. McWilliams, "The Privy Council and the Constitution," *CBR*, 17 (1939), 582, attempts to prove that the Privy Council was not a defender of the provinces or responsible "for whittling down the powers of the Dominion." See also Browne, *The Judicial Committee*, 77.

referred to the BNA Act as a compact or a treaty.⁵¹ Further proof could be found in the speeches by Lord Haldane explicitly noting a protective attitude to the provinces, especially by his predecessor Lord Watson.⁵² Haldane's candid admissions are of special significance because of the propensity of Canadian critics to single out these two judges for particularly hostile treatment.⁵³ Haldane stated of Watson:

... as the result of a long series of decisions, Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the Constitution of Canada took a new form. The provinces were recognized as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems and produced a new contentment in Canada with the Constitution they had got in 1867. It is difficult to say what the extent of the debt was that Canada owes to Lord Watson ...⁵⁴

Haldane was also explicit that a judge on the Privy Council had "to be a statesman as well as a jurist to fill in the gaps which Parliament has deliberately left in the skeleton constitutions and laws that it has provided for the British colonies."⁵⁵ In view of these overt indications of a policy role favouring the provinces there can be no doubt that Watson and Haldane consciously fostered the provinces in Canadian federalism, and by so doing helped to transform the highly centralist structure originally created in 1867.

An alternative policy explanation deserves more extensive commentary. This was to identify the court with more or less subtlety as defenders of free enterprise against government encroachments. Spokesmen for the Canadian left, such as Woodsworth and Coldwell, were convinced that "reactionary interests have sought to shelter and to hide" behind the BNA Act.⁵⁶ F. R. Scott asserted that the "large economic interests" who were opposed to regulation sided with the provinces who would be less capable of their effective regulation than would the federal govern-

⁵¹Privy Council treaty references are summarized in R. Arès, *Dossier sur le pacte fédératif de 1867* (Montreal, 1967), 66–8, and criticized in MacDonald, "Privy Council and the Canadian Constitution," 1030–1.

⁵²Cheffins, *Constitutional Process in Canada*, 130, provides a summary of the speculation on the reasons for the provincial bias of Watson and Haldane. Some interesting reflections on Haldane are contained in the "Address by the Right Honourable Sir David Maxwell Fyfe," *PCBA*, 37 (1954), 149–51. Jonathon Robinson, "Lord Haldane and the British North America Act," *UTLJ*, 20 (1970), and Scott, *Canada Today*, 77, refer to the relevant writings of Haldane. Robinson attempts to explain Haldane's provincial bias as an outgrowth of his Hegelian philosophy. See also the obituary of Watson given by Haldane, *CLT*, 23 (1903), 223–5.

⁵³See, for example, Creighton, *Dominion of the North*, 466; Thorson, *Can. H. of C. Debates*, April 5, 1937, p. 2585; Laskin, "Peace, Order and Good Government' Re-examined," 1077; MacGuigan, "The Privy Council and the Supreme Court," 425; Scott, *Canada Today*, 77–8.

Jennings asserted that "Lord Watson held to the fixed idea that Canada was a true federation and that it was the function of the Board to maintain something called 'provincial autonomy' which was not in the Act." Jennings is an exception, however, in claiming that Haldane favoured the provinces reluctantly because of the "weight of the previous decisions." "Constitutional Interpretation," 35–6, 21.

⁵⁴Lord Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council," *Cambridge Law Journal*, 1 (1923), 150.

⁵⁵Cited in Ewart, *Kingdom of Canada*, 20.

⁵⁶*Can. H. of C. Debates*, Feb. 1, 1937, pp. 426, 444.

ment.⁵⁷ The courts, as both Scott and Professor Mallory noted, responded favourably to the protection from control which business sought.⁵⁸

Mallory's description is apt: "The force that starts our interpretative machinery in motion is the reaction of a free economy against regulation ... In short the plea of *ultra vires* has been the defence impartially applied to both legislatures by a system of free enterprise concerned with preventing the government from regulating it in the public interest."⁵⁹ Business was opposed by labour which has fought consistently for "greater Dominion jurisdiction, based on the facts of every day life as they must be met today by the Canadian working class population, looking to broader Dominion powers in questions touching the welfare of the wage earners."⁶⁰

⁵⁷*Special Committee on British North America Act: Proceedings and Evidence and Report* (Ottawa, 1935), 82. R. M. Dawson, ed., *Constitutional Issues in Canada, 1900–1931* (London, 1933), 343–4, reprints a 1912 editorial from the *Ottawa Journal* strongly critical of several decisions in which the Privy Council supported "vested right against the public weal," while the decisions of the Canadian courts had been "in favour of the public." These cases are briefly noted by C. G. Pierson, *Canada and the Privy Council* (London, 1960), 47. For depression fears that business would seek to shelter behind the provinces, see R. A. MacKay, "The Nature of Canadian Federalism," in W. W. McLaren *et al.*, eds., *Proceedings, Conference on Canadian-American Affairs* (Montreal, 1936), 202. F. H. Underhill wrote that the use of provincial rights to obstruct social reform was "largely camouflage put up by our industrial and financial magnates. None of these worthy gentlemen wants a national government with sufficient constitutional power to be able to interfere effectively with their own pursuit of profits." "Revolt in Canadian Politics," *Nation*, 139 (Dec. 12, 1934), 673, cited in Horn, "League for Social Reconstruction," 439.

⁵⁸Scott, "Centralization and Decentralization in Canadian Federalism," 1116; Scott, "The Consequences of the Privy Council Decisions," 492; J. R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament," *CJEPS*, 10 (1944), 166–73. Since the Revolution Settlement, asserted Mallory, British judges "have been activated by an acute suspicion of the motives of both the executive and the legislature and have conceived it their duty to confine the application of statute law to cases where its meaning could not be mistaken" (p. 167). "Upon occasion the very novelty of government expedients has seriously strained the impartiality of the type of judicial mind which is shocked by the unorthodox" (p. 173). See also Mallory, "The Five Faces of Federalism," Cr peau and Macpherson, *The Future of Canadian Federalism*, 6–7, and *Social Credit and the Federal Power*, 53–6 and chap. 3.

When Australia sought to restrict appeals to the Privy Council, the British Colonial Secretary, Chamberlain, stated: "The question of the right of appeal must also be looked at from the point of view of the very large class of persons interested in Australian securities or Australian undertakings, who are domiciled in the United Kingdom. Nothing could be more prejudicial to Australia than to diminish the security felt by capitalists who desire to invest their money there. One element in the security which at present exists is that there is the possibility of an ultimate appeal to the Queen in Council ..." Cited in Ewart, *Kingdom of Canada*, 232. In 1909 J. M. Clark stated that the right of appeal "is also regarded as an important security and safeguard by British foreign investors." "The Judicial Committee of the Privy Council," *CLT*, 29 (1909), 352–3.

The high cost of appeals, which played into the hands of the wealthy, and thus buttressed the position of the economically strong, was a frequent criticism of the Privy Council. See Editorial, "Procedure before the Judicial Committee," *CLT*, 25 (1905), 29–30; W. S. Deacon, "Gordon v. Horne: Canadians and the Privy Council," *CLT*, 30 (1910), 877; Deacon, "Canadians and the Privy Council," *CLT*, 31 (1911), 128, and "Canadians and the Privy Council," *CLT*, 31 (1911), 10; C. E. Kaubach, *Can. H. of C. Debates*, Feb. 26, 1880, p. 241; "Labor's Views on Dominion-Provincial Relations," *Canadian Congress Journal*, 17 (Feb. 1938), 15; Pierson, *Canada and the Privy Council*, 41–2, 70.

Sir Allen Aylesworth, a former Liberal minister of justice (1906–11), admitted in 1914 that the wealthy had an advantage in appeals due to their high cost, but that was "after all, but one of the advantages which the possession of wealth carries with it in every walk of life." "Address of Sir Allen Aylesworth, 7th Annual Meeting of the Ontario Bar Association," *CLT*, 34 (1914), 144.

⁵⁹"The Courts and the Sovereignty of the Canadian Parliament," 169.

⁶⁰"Labor's Views on Dominion-Provincial Relations," 10.

The tactics of business and labour were pragmatic reflections of self-interest. A necessary consequence of a federal system is that each organized interest will seek to transform the most sympathetic level of government into the main decision-maker in matters which concern it. The evaluation to be put on these tactics, and the responses of the courts to them, however, is another matter. Regardless of the groups which align themselves with different levels of government at different times, it is far from clear that support for provincial authority is necessarily reactionary and support for federal authority necessarily progressive.

There is considerable evidence that influential groups in Canada, including prominent lawyers, opposed the growing regulatory role of the modern state. Sir James Aikins, founder and first president of the Canadian Bar Association, frequently spoke in satirical and hostile terms of modern legislation and the politicians who inspired it. Unlike former times when harsh and antiquated law was softened by judicial fictions, "changes are dangerously empirical by reason of the easiness with which legislation can be secured, and the lack of comprehension in the legislator of the general principles of the law."⁶¹ He deprecated the fact that experiments in social control had been transferred from courts to legislatures which produce "an impromptu statute and try ... [it] ... out on a resigned public, amending or repealing according to the pained outcry." Legislatures, he felt, had an ephemeral membership unlike courts or "organized law bodies." Their members were not experts in the law, "only amateurs, and their acts, too often crude and inartistic, run the gauntlet of interpretation and construction by courts and lawyers before they are put right, usually at the expense of some unfortunate litigant."⁶² Aikins' antipathy to collectivism was shared by many. The report of the Committee on Noteworthy Changes in Statute Law in 1939 to the Canadian Bar Association expressed strong hostility to the growing role of government in the closing years of the depression. It reported ominously on the extent of socialism in Canada, and stated the belief that "private property is the pillar on which our whole civilization rests."⁶³ Critics of collectivism were disturbed by the "new despotism" of government by order-in-council, and the developing authority of proliferating tribunals which handled business felt to be the prerogative of the courts.⁶⁴

⁶¹Presidential address, *PCBA*, 6 (1921), 110.

⁶²Presidential address, *ibid.*, 12 (1927), 112–13.

⁶³ *Ibid.*, 24 (1939), 204–5. In their report the previous year the committee referred to the disallowance of Alberta legislation as a "reversion to sound thought. Disallowance in some cases is just as important as enactment." The report continued to warn, however, that "quite apart from certain notorious Acts, much of this year's product reveals an inspiration which is wholly alien to our usual habits of thought ... The Committee believes that it is the general view of the profession that unless we can govern ourselves according to settled and generally recognized principles of right and wrong, we are headed either for anarchy or despotism ... it can find no place in any civilized system of law for several Acts passed at the last Session of the Legislature of Alberta ... these are only high water marks which stand above the general level and are more conspicuous on that account." The committee went on to castigate open-ended legislation in British Columbia and Saskatchewan which gave significant, vaguely defined authority to the Lieutenant-Governor-in-Council to make regulations for the carrying out of legislation. *Ibid.*, 23 (1938), 191–3.

⁶⁴W. S. Johnson, "The Reign of Law Under an Expanding Bureaucracy," *CBR*, 22 (1944). Cheffins, *Constitutional Process in Canada*, chap. 3, contains a brief discussion of the factors behind this evolution in the procedures of government operation.

Cecil A. Wright stated in 1938: "we have to a great extent underestimated the importance of administrative tribunals and the place of modern legislation as regulating forces in modern

In brief, collectivism, in Canada as elsewhere, had to be fought out in a variety of arenas, before mass electorates,⁶⁵ in parliaments, and in courts.⁶⁶ In each arena there were supporters and opponents of the emerging transformation in the role of public authority. The real question is not whether courts were embroiled in the controversy, or whether some judges sided with “reactionary” forces. It would be astonishing if such were not the case.

The important questions are more difficult and/or more precise. Were the courts more or less receptive than other élite groups to collectivism? Where did they stand in the general trend to the welfare, regulatory state?⁶⁷ What were the links between judges and courts and the various influential groups that appeared before them? How did the Privy Council compare with other final appeal courts, or with lower Canadian courts, in its response to collectivism? Research on these questions would be extremely informative in pinning down the role of courts in the transition from the night watchman state to the era of big government.

Supporters of the Judicial Committee

Depression criticism, followed in the next decade by the elimination of appeals, had the effect that the period in which the Privy Council was under strongest attack has probably had the greatest effect on contemporary attitudes to it. Some of the most influential academic literature dealing with judicial review comes from that period and its passions.⁶⁸ As a consequence the Privy Council has typically received a very bad press in numerous influential writings by historians, political scientists, and lawyers in the past forty years.

In these circumstances, it is salutary to remember that if its critics reviled it, and turned Watson and Haldane into almost stock figures of fun, the Privy Council

society. Legislation has always been viewed with disfavour by the common law lawyer because of the traditional view of the common law broadening down from ‘precedent to precedent,’ and undoubtedly the general attitude of the profession today is not different from that of Lord Halsbury who is reputed to have said that ‘the best Act you can have is a repealing Act.’ One consequence of this is that our whole technique and approach to legislation is weak, and as a result antagonism between the legal profession and legislative and administrative bodies becomes more marked.

“We have, indeed, paid so much attention to past judicial policy, that courts and lawyers are frequently in danger of limiting present legislative policy by restrictive interpretations. The notion that a statute shall be deemed to have departed as little as possible from common law principles runs throughout many judicial decisions, yet, as a member of the House of Lords recently said, ‘it is an unsafe guide in days of modern legislation, often or perhaps generally based on objects and policies alien to the common law.’” “Law and Law Schools,” *PCBA*, 23 (1938), 115.

⁶⁵See G. L. Caplan, “The Failure of Canadian Socialism: The Ontario Experience,” *Canadian Historical Review*, 44 (1963), for the extreme anti-socialist campaign waged by business in the closing years of the Second World War.

⁶⁶For American experience, see Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court* (New York, 1962).

⁶⁷W. H. Hamilton, “The Path of Due Process of Law,” *Ethics*, 48 (1938), 296, asserted that American courts were more resistant to laissez-faire than other parts of the body politic. “It seems strange that so many jurists stood steadfast against the seductions of laissez-faire; history, political science, and economics can boast no such record ... does the whole story, in irony, paradox, and compromise, derive from the innate conservatism of the law – a rock of ages which even the untamed strength of laissez-faire could move but could not blast.”

⁶⁸Stanley, “Act or Pact?” 112–13.

nevertheless did have a very broad body of support. Many highly qualified and well-informed analysts gave it almost unstinting praise. Indeed, if its critics reviled it too bitterly, its supporters praised it too generously. Often they wrote in fulsome terms, replete with awe and reverence for this most distinguished court.⁶⁹

It was described as “this splendid body of experts,”⁷⁰ as “one of the most unique tribunals in the world,”⁷¹ as a body of judges which “possesses a weight and efficiency as a supreme Judicial tribunal unequalled in the history of judicial institutions ... a tribunal supremely equipped for the task – equipped for it in unexampled degree.”⁷² In 1914 Sir Charles Fitzpatrick, the chief justice of Canada, claimed that “amongst lawyers and Judges competent to speak on the subject, there is but one voice, that where constitutional questions are concerned, an appeal to the Judicial Committee must be retained.”⁷³ In 1921 the Hon. A. C. Galt, justice of the Court of King’s Bench, Manitoba, replied to the objection that the Privy Council derogated from the dignity of Canadians with the assertion that it was always sensible to employ experts. “Now it so happens that the Privy Council possesses all the advantages, as experts, to deal with legal ailments which the Mayo Brothers possess in dealing with physical ones.”⁷⁴ Howard Ferguson, premier of Ontario, ended a eulogy of the Privy Council in 1930 with special praise for Haldane, who protected “the Constitution of this country ... giving it sane and sound interpretation ... In this country of ours we will ever revere the memory of that great man.”⁷⁵ Another writer observed that it was neither necessary nor “in good taste” for counsel to cite authorities before the Privy Council, “as owing to the great learning and vast experience of the members of the Board, they are usually familiar with such as have a bearing on the matters in question.”⁷⁶ Supporters referred in an almost bemused way to the diversity of jurisdiction, extent of territory, and range of cases which it handled. “Imagination without actual experience,” stated Justice Duff, “is hardly adequate to realize the infinite variety of it all ...”⁷⁷

The defenders and supporters of the Judicial Committee typically intermingled judicial and imperial arguments. The alleged contribution of the board to uniformity of law between Britain and her colonies and dominions straddled both

⁶⁹Given the strong criticism it subsequently received it is worthwhile to document the extent of its support in earlier years. See, for example, John T. Small, “Supreme Court and Privy Council Appeals,” *CLT*, 29 (1909), 51–2; Clark, “The Judicial Committee of the Privy Council”; “Address of Sir Allen Aylesworth,” 139; “By the Way,” *CLT*, 36 (1916), 354–5, 662–3; W. E. Wilkinson, “Our London Letter,” *CLT*, 41 (1921), 61, reporting Lord Cave; B[ram] T[hompson], “Editor’s Note,” *CLT*, 41 (1921), 62–3; “Editorial,” *CLT*, 41 (1921), 83–6; Bram Thompson, “Editorial,” *CLT*, 41 (1921), 161–5; Edward Anderson, “Address to Manitoba Bar Association,” *CLT*, 41 (1921), 252–3; “Appeal to the Privy Council,” *CLT*, 41 (1921), 525–6; Pierson, *Canada and the Privy Council*, 39.

⁷⁰A. G. Galt, “Appeals to the Privy Council,” *CLT*, 41 (1921), 172.

⁷¹W. Nesbitt, “The Judicial Committee of the Privy Council,” *CLT*, 29 (1909), 252.

⁷²Sir L. P. Duff, “The Privy Council,” *CBR*, 3 (1925), 278–9.

⁷³“The Constitution of Canada,” *CLT*, 34 (1914), 1031.

⁷⁴“Appeals to the Privy Council,” 168–9.

⁷⁵*PCBA*, 15 (1930), 37. Another writer stated that Viscount Haldane was “recognized as the greatest living authority on the interpretation of the British North America Act.” W. E. Raney, “Another Question of Dominion Jurisdiction Emerges,” *CBR*, 3 (1925), 617.

⁷⁶Nesbitt, “The Judicial Committee,” 244.

⁷⁷“The Privy Council,” 278. See also Nesbitt, “The Judicial Committee,” 243, 245–6; W. R. Riddell, “The Judicial Committee of the Privy Council,” *CLT*, 30 (1910), 305–6; W. H. Newlands, “Appeals to the Privy Council,” *CBR*, 1 (1923), 814–15.

arguments,⁷⁸ while the general assertion that the court was a link of empire was explicitly imperial.⁷⁹ It was also from this vantage point – that of a British citizen across the seas – that appeals were viewed and defended as a birthright, and much sentiment was employed over the right to carry one's appeals to the foot of the throne.⁸⁰

A reading of the eulogies of the Privy Council prior to 1930 makes it clear that its most important source of Canadian support was imperial, and only secondarily judicial. The bulk of its supporters regarded it as an instrument of empire. Rather than viewing its dominant position in the judicial structure as a symbol of Canadian inferiority, they derived pride and dignity from the empire of which it was a part. They were British subjects first, and Canadians second, although from their perspective there was no conflict between these two definitions. The sentiments which inspired them are well presented in a statement of Justice Riddell in 1910 in which he spoke of

... the idea of fundamental union in all British communities – made manifest in concrete form in one great Court of Appeal for all the lands beyond the seas ... to me there is no more inspiring spectacle than that body of gentlemen in the dingy old room on Downing street, Westminster, sitting to decide cases from every quarter of the globe, administering justice to all under the red-cross flag and symbolizing the mighty unity of an Imperial people ... One name we bear, one flag covers us, to one throne we are loyal; and that Court is a token of our unity.⁸¹

The immediately preceding set of arguments was essentially imperial. One important set of arguments, however, was jurisprudential. This was the frequently reiterated thesis that the great virtue of the Privy Council was its impartiality, a product of its distance from the scene of the controversies it adjudicated, and, unlike the Supreme Court, its absence of any direct link with either level of the governments whose interests clashed in the court room. In the quaint phraseology of the time, the committee was without those local prepossessions, so the argument went, which inevitably influence the decisions of local courts, and thus prejudice the impartiality necessary in the judicial role.⁸²

⁷⁸Nesbitt, "The Judicial Committee," 250–1; Riddell, "The Judicial Committee," 304. Ewart, *Kingdom of Canada*, 228, argued that if the Privy Council did try to produce uniformity of laws in the empire appeals should be abolished, for each community required its own laws. In fact, however, he asserted that the Privy Council endeavoured to keep the various systems of laws distinct.

⁷⁹Nesbitt, "The Judicial Committee," 250–1; Clark, "The Judicial Committee," 349, 352–3; "By the Way," *CLT*, 37 (1917), 624–5; "Address of Sir Allen Aylesworth," 140; Bram Thompson, "Editorial," *CLT*, 41 (1921), 162–3; Howard Ferguson, *PCBA*, 15 (1930), 37. The desire of the Macdonald Conservatives to retain appeals to the Privy Council when the Supreme Court Act of 1875 was under discussion was based "primarily on their concern for preserving Canada's links with the Empire." Russell, *Supreme Court*, 16.

⁸⁰Clark, "The Judicial Committee," 352; Galt, "Appeals to the Privy Council," 172.

⁸¹"The Judicial Committee," 304.

⁸²This argument was used by British officials in 1876 when the Liberal government attempted to cut off appeals to the Privy Council." See L. A. Cannon, "Some Data Relating to the Appeal to the Privy Council," *CBR*, 3 (1925), 460–2. In discussions on the Australian constitution in 1900 Chamberlain stated that "questions ... which may sometimes involve a good deal of local feeling are the last that should be withdrawn from a tribunal of appeal with regard to which there could not be even a suspicion of prepossession." Cited in Ewart, *Kingdom of Canada*, 232. The British constitutional expert, A. B. Keith, asserted that the "true value of the appeal ... lies in the power of the Judicial Committee to deal in perfect freedom from local or racial prejudice with issues deeply affecting the relations of the two

In his presidential address to the Canadian Bar Association in 1927 Sir James Aikins spoke critically of the role of the American Supreme Court in augmenting national power, a court "appointed and paid by that central government, resident in the same place and within the influence and atmosphere of Congress and the Executive, consequently removed from any contact with the capitals or governments of the several states." He went on to mention that largely similar conditions prevailed in Canada, and similar results might be expected should the Supreme Court become the final appeal court. He concluded with the rhetorical question: "will it not be in the best interests of all to have constitutional interpretation made by an Empire Court which is not appointed or paid by or in the immediate environment of one of the parties interested?"⁸³

To the critics of the Privy Council, impartiality, or absence of local prepossessions, simply meant ignorance. Nevertheless, the argument is of some importance if only because of its durability. It is prominent in the contemporary debate over the Supreme Court. In recent years English Canadians have defended the Supreme Court on grounds of its impartiality, while French Canadians have criticized it on grounds of its insensitivity to their distinctive culture and special position in Canadian federalism. Further, this particular image of a good court is a reflection of one of the enduring visions of the judicial role – the blind eye of justice. It is also very close to the ideals behind the principle of judicial independence, and it is integrally related to the positivist conception of the judicial role, to the concept of the impartial third party as chairman, and to the concept of neutrality. This image, in brief, includes one of the ubiquitous central values which inevitably and properly intrudes into discussions of the role of public officials in general and judges in particular.

Sociological justification of the Judicial Committee

The defence of the Privy Council on grounds of its impartiality and neutrality is, however, difficult to sustain in view of the general provincial bias which ran through their decisions from the 1880s. This was the most consistent basis of criticism which the Judicial Committee encountered. A defence, therefore, must find some support for the general provincialist trend of its decisions.

It is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained, and caused the development of Canada in a federalist direction the country would otherwise not have taken. It is evident that on occasion the provinces found an ally in the Privy Council, and that on balance they were aided in their struggles with the federal government. To attribute more than this to the Privy Council strains credulity. Courts are not self-starting institutions. They are called into play by groups and individuals seeking

nationalities in Canada, or of the provinces and the Federation, or of the provinces *inter se*." Cited in W. E. Raney, "The Appeal to the Privy Council," *CBR*, 5 (1927), 608.

For the widespread Canadian support for this line of reasoning, see "Editorial Review," *CLT*, 27 (1907), 403–4; Small, "Supreme Court and Privy Council Appeals," 51; Nesbitt, "The Judicial Committee," 249; Riddell, "The Judicial Committee," 304; Fitzpatrick, "The Constitution of Canada," 1031; "Appeal to the Privy Council," *CLT*, 41 (1921), 525, reporting Premier Taschereau of Quebec; James Aikins, "President's Address to Conference of Commissioners on Uniformity of Legislation," *PCBA*, 6 (1921), 286; Brossard, *La Cour Suprême*, 171.

⁸³"Presidential Address," *CBR*, 5 (1927), 562–3.

objectives which can be furthered by judicial support. A comprehensive explanation of judicial decisions, therefore, must include the actors who employed the courts for their own purposes.⁸⁴

The most elementary justification of the Privy Council rests on the broad sociological ground that the provincial bias which pervaded so many of its decisions was in fundamental harmony with the regional pluralism of Canada. The successful assertion of this argument requires a rebuttal of the claim of many writers that the Privy Council caused the evolution of Canadian federalism away from the centralization of 1867.⁸⁵

From the vantage point of a century of constitutional evolution the centralist emphasis of the Confederation settlement appears increasingly unrealistic. In 1867 it seemed desirable and necessary to many of the leading Fathers. "The colonial life had been petty and bitter and frictional, and, outside, the civil war seemed to point to the need of binding up, as closely as it was at all possible, the political aspirations of the colonies."⁸⁶ Further, it can be argued that what appeared as overcentralization in the light of regional pluralism was necessary to establish the new polity and to allow the central government to undertake those nation-building tasks which constituted the prime reasons for union.

It is, however, far too easily overlooked, because of the idolatry with which the Fathers and their creation are often treated, that in the long run centralization was inappropriate for the regional diversities of a land of vast extent and a large, geographically concentrated, minority culture. The political leaders of Quebec, employing varying strategies, have consistently fought for provincial autonomy. The existence of Quebec alone has been sufficient to prevent Canada from follow-

⁸⁴Evan Gray made this point with vigour. "It is time the chief 'indoor sport' of constitutional lawyers in 'lambasting' the Privy Council and cavilling at decisions of that body was discontinued. The 'sport' never had any merit or excuse and it violates 'good form' – an essential element of all 'sport.' All this talk about distortion of the framework of Confederation and defeat of our national purposes by judicial authority is silly and puerile. If there is distortion, we Canadians all must take the responsibility for the distortion. If there is defeat of national purposes, let us do something worthy of our autonomy rather than continue to accept and complain of the defeat. Our constitution is what our forefathers made it and as we have applied it – not what British judges gave us. If we do not like the constitution as it is, we have always had leave to change it; let us change it – now – in an open, forthright and well-considered manner." "The O'Connor Report" on the British North America Act, 1867," *CBR*, 17 (1939), 333–4.

⁸⁵The issue was posed but not answered by R. Cheffins: "It could be argued that the type of strong federal government envisaged by the political founders of the Canadian nation was impractical and not realizable in a country as large geographically and as culturally diverse as Canada. It could also be argued that the Judicial Committee was recognizing the realities of the social and political life of the nation in upholding the validity of provincial statutes. On the other hand it could be maintained that if the Privy Council had not ruled the way it did, then the provincial governments would never have assumed the importance which they did, and thus their position would not have to be continually sustained by judicial decisions." "The Supreme Court of Canada: The Quiet Court in an Unquiet Country," *Osgoode Hall Law Journal*, 4 (1966), 267.

Both Morton and Careless lay great stress on the contributions of the Judicial Committee to the strong position of the provinces in the 1920s. W. L. Morton, *The Kingdom of Canada* (Toronto, 1969), 444; Careless, *Canada*, 364. D. G. Creighton also emphasizes the causal role of the Judicial Committee in breaking down Macdonald's centralized federalism. "The Decline and Fall of the Empire of the St. Lawrence," Canadian Historical Association, *Historical Papers*, 1969, 24. See also Scott, "The Development of Canadian Federalism," 238–47; Goldenberg, "Social and Economic Problems in Canadian Federalism."

⁸⁶Kennedy, *Some Aspects of the Theories and Workings of Constitutional Law*, 100.

ing the centralist route of some other federal systems. In retrospect, it is evident that only a peculiar conjuncture of circumstances, many of them to prove ephemeral, allowed the degree of central government dominance temporarily attained in 1867.⁸⁷

In the old provinces of Canada and the Maritimes provincial loyalties preceded the creation of the new political system. Nova Scotia and New Brunswick were reluctant entrants into Confederation, while Lower Canada sought to obtain as much decentralization as possible. A striking series of successes for the new Dominion might have generated the national loyalty necessary to support the central government in struggles with the provinces. Instead, the economic hopes on which so much had been placed in the movement to Confederation proved illusory and contributed to the undermining of federal prestige. Intermittent depression for most of the first thirty years of the new polity seriously eroded the flimsy supports for centralization on which Macdonald and some of his colleagues depended. The military dangers which had been an important original justification for a strong central government rapidly passed away. The thrusting ambitions of provincial politicians, bent on increasing the power and resources of their jurisdictions, wrested numerous concessions from the federal government by a variety of methods, of which resort to the courts was only one. Their conduct was sustained by the almost inevitable rivalry between politicians of the two levels of government, especially when belonging to opposed political parties.⁸⁸

The provinces, which had initially been endowed with functions of lesser significance, found that their control of natural resources gave them important sources of wealth and power, and extensive managerial responsibilities. By the decade of the twenties, highways, hydro-electric power, a host of welfare functions, and mushrooming educational responsibilities gave them tasks and burdens far beyond those anticipated in 1867. By this time the centralizing effect of the building of the railways and the settlement of the west was ended by the virtual completion of these great national purposes.

As the newer provinces west of the great lakes entered the union, or were created by federal legislation, they quickly developed their own identities and distinct public purposes. Their populations grew. Their economies expanded. Their separate histories lengthened. Their governmental functions proliferated, and their administrative and political competence developed. They quickly acquired feelings of individuality and a sense of power which contributed to the attenuation of federal dominance in the political system.

Only in special, unique, and temporary circumstances – typically of an emergency nature – has the federal system been oriented in a centralist direction.⁸⁹ The focus of so many Canadian academic nationalists on the central government re-

⁸⁷See N. McL. Rogers, "The Genesis of Provincial Rights," *Canadian Historical Review*, 14 (1933), for an incisive analysis of the weakness of the centralist basis of Confederation from the moment of its inception.

⁸⁸"The failure of the Dominion's economic policies, which formed such important elements in the new national interest, discouraged the growth of a strong, national sentiment; and local loyalties and interests began to reassert themselves." *Rowell-Sirois Report*, I, 54. See also E. R. Black and A. C. Cairns, "A Different Perspective on Canadian Federalism," *Canadian Public Administration*, 9 (1966), 29, and Cook, *Provincial Autonomy, Minority Rights and the Compact Theory*, chap. 3, especially p. 19.

⁸⁹Black and Cairns, "A Different Perspective," 29.

flected their primary concern with winning autonomy from the United Kingdom. An additional and less visible process was also taking place. Canadian political evolution has been characterized not only by nation-building, but by province-building.⁹⁰ Further, it is too readily overlooked that with the passing of time Canada became more federal. In 1867 there were only four provinces in a geographically much more compact area than the nine provinces which had emerged by 1905, and the ten by 1949. If a province is regarded as an institutionalized particularism the historical development of Canada has been characterized by expansion which has made the country more heterogeneous than hitherto.

In response to this increasingly federal society the various centralizing features of the BNA Act fell into disuse, not because their meaning was distorted by the courts, but because they were incompatible with developments in the country as a whole. In numerous areas, decentralizing developments occurred entirely on Canadian initiative, with no intervention by the Judicial Committee. The powers of reservation and disallowance were not eroded by the stupidity or malevolence of British judges but by concrete Canadian political facts. The failure to employ section 94 of the BNA Act to render uniform the laws relating to property and civil rights in the common law provinces was not due to the prejudice of Lords Watson and Haldane, but to the utopian nature of the assumptions which inspired it, and the consequent failure of Canadians to exploit its centralizing possibilities.

The preceding analysis of Canadian federalism makes it evident that the provincial bias of the Privy Council was generally harmonious with Canadian developments. A more detailed investigation provides added support for this thesis.

At the time when Privy Council decisions commenced to undermine the centralism of Macdonald there was a strong growth of regional feeling. During the long premiership of Oliver Mowat, 1872–96, Ontario was involved in almost constant struggle with Ottawa. The status of the lieutenant governor, the boundary dispute with Manitoba and the central government, and bitter controversies over the federal use of the power of disallowance constituted recurrent points of friction between Ottawa and Ontario. Friction was intensified by the fact that with the exception of the brief Liberal interlude from 1873 to 1878 the governing parties at the two levels were of opposed partisan complexion, and by the fact that Mowat and Macdonald were personally hostile to each other.⁹¹ The interprovincial conference of 1887, at which Mowat played a prominent part, indicated the general reassertion of provincialism. The “strength and diversity of provincial interests shown by the conference,” in the words of the *Rowell-Sirois Report*, “indicated that, under the conditions of the late nineteenth century, the working constitution of the Dominion must provide for a large sphere of provincial freedom.”⁹² Nationalism had become a strong political force in Quebec in reaction to the hanging of Riel and the failure of the newly opened west to develop along bicultural and bilingual lines. Nova Scotia was agitated by a secession movement. The maritime provinces generally were hostile to the tariff aspects of the National Policy. Manitoba was struggling against federal railway policies. British Columbia was only slowly being drawn into the national party system after the belated completion of

⁹⁰*Ibid.*, 38–43.

⁹¹Morrison, “Oliver Mowat,” *passim*.

⁹²*I*, 55.

the CPR in 1885. It was entering a long period of struggle with the Dominion over Oriental immigration. In addition, the late eighties and early nineties constituted one of the lowest points of national self-confidence in Canadian history.⁹³ It was a period in which the very survival of Canada was questioned. By the late 1890s, when economic conditions had markedly improved, a new Liberal government, with provincial sympathies, was in office. The year of the much criticized Local Prohibition decision was the same year in which Laurier assumed power and commenced to wield federal authority with much looser reins than had his Conservative predecessors. "The only means of maintaining Confederation," he had declared in 1889, "is to recognize that, within its sphere assigned to it by the constitution, each province is as independent of control by the federal Parliament as the latter is from control by the provincial legislatures."⁹⁴

The Privy Council clearly responded to these trends in a series of landmark decisions in the eighties and nineties.⁹⁵ Unfortunately it is not possible to provide detailed information on whether or not their decisions were supported or opposed by a majority or minority of the Canadian people. What can be asserted is that provincial political élites vigorously used the courts to attain their objectives of a more decentralized federal system. Further, they apparently received widespread popular support for their judicial struggles with Ottawa.⁹⁶ Premier Mowat of Ontario, who used to go personally to London for the appeals,⁹⁷ was received as a hero on his return from his engagements with the federal government.⁹⁸ It can thus be safely asserted that the Privy Council was not acting in isolation of deeply rooted, popularly supported trends in Canada. For critics of the Judicial Committee to appeal to the centralist wishes of the Fathers is an act of perversity which denies these provincialist trends their proper weight and influence.

It would be tedious and unnecessary to provide detailed documentation of the relative appropriateness of the decisions of the Judicial Committee to subsequent centrifugal and centripetal trends in Canadian society. It can be generally said that their decisions were harmonious with those trends. Their great contribution, the injection of a decentralizing impulse into a constitutional structure too centralist for the diversity it had to contain, and the placating of Quebec which was a consequence, was a positive influence in the evolution of Canadian federalism.⁹⁹ Had

⁹³F. H. Underhill, *The Image of Confederation* (Toronto, 1964), 27.

⁹⁴Cited in A. Brady, "Quebec and Canadian Federalism," *CJEPS*, 25 (1959), 260–1.

⁹⁵See the *Rowell-Sirois Report*, I, 55–9, for a discussion. André Lapointe, "La jurisprudence constitutionnelle et le temps," is a suggestive impressionistic study to the effect that Privy Council decisions, 1880–4, constituted appropriate responses to the forces of regionalism which were developing at that time.

⁹⁶Gray, "The O'Connor Report," 334–5.

⁹⁷"The Late Lord Watson," *CLT*, 23 (1903), 224.

⁹⁸For Mowat's position on the role of the provinces, his success with the Privy Council, and his favourable reception by the people of Ontario, see Lower, *Colony to Nation*, 376–9. Creighton, *Canada's First Century*, 47, provides a critical assessment of Mowat's philosophy and conduct. G. W. Ross, *Getting into Parliament and After* (Toronto, 1913), 187–8, states that "Sir Oliver Mowat's success in the courts of Canada, and particularly before the Privy Council, raised him greatly in the estimation of the whole people of Ontario. Were it not for these conflicts with the Dominion Government I doubt if Sir Oliver would have survived the general election of 1883." Morrison, "Oliver Mowat," provides the most detailed analysis of Mowat's strategy.

⁹⁹There is considerable academic support for the proposition that the federal system established in 1867 was too centralist for the underlying regional pluralism of Canadian society,

the Privy Council not leaned in that direction, argued P. E. Trudeau, "Quebec separatism might not be a threat today: it might be an accomplished fact."¹⁰⁰ The courts not only responded to provincialism. The discovery and amplification of an emergency power in section 91 may have done an injustice to the intentions of Macdonald for the residuary power, but it did allow Canada to conduct herself virtually as a unitary state in the two world wars in which centralized government authority was both required and supported.

The general congruence of Privy Council decisions with the cyclical trends in Canadian federalism not only provides a qualified sociological defence of the committee but also makes it clear that the accusation of literalism so frequently levelled at its decisions is absurd. Watson and Haldane in particular overtly and deliber-

and the related proposition that it was an act of creative judicial statesmanship for the Privy Council to adapt the constitution to pluralist realities. O. D. Skelton stated that the "provincial trend of court decisions paralleled or rather followed, with some time lag, the changes in Canada itself." *Special Committee on the British North America Act: 1935*, 27. "In all justice to the Judicial Committee," asserted Professor Brady, "they probably did no more than what the majority of Canadians in the earlier period desired. They gave judicial expression to the upsurge of provincialism, evident from the early eighties to the decade after the First World War ..." *Democracy in the Dominions* (2nd ed., Toronto, 1952), 45–6. See also Brady, "Our Constitutional Tradition," 16. Michael Oliver states of the centralist intentions of the Fathers: "It must be concluded that they either seriously overestimated the range of shared assumptions between the two cultures, or badly underestimated the degree of unity on fundamentals which was necessary to run the centralized state they had tried to create." "Quebec and Canadian Democracy," *CJEPS*, 23 (1957), 504. Cheffins states that the "ineffectiveness" of the centralist features of the BNA Act "serves as a classic example of the futility of written positive law in the face of a social environment which refuses to accept the original statutory intention." *Constitutional Process in Canada*, 37–8 (see also p. 132). G. P. Glazebrook states: "the Judicial Committee was a make-weight in scales that were otherwise uncertainly balanced. The committee did not create the provincial school of thought; and it is worthy of note that it was long after it had ceased to have jurisdiction that provincialism took on its most extreme form. Nevertheless the strong slant in the legal decisions ... may be regarded as influential in the years in which the constitutional debate began." *A History of Canadian Political Thought* (Toronto, 1966), 186–7. J. R. Mallory praised the political acumen of the Local Prohibition Case in 1896, but added that "No other judge since Lord Watson's time has attempted the judicial realignment needed by the times and comparable to that achieved by the Supreme Court of the United States after 1937." "The Courts and the Sovereignty of the Canadian Parliament," 177.

Even the leading Canadian constitutional expert, W. P. M. Kennedy, later to be so critical of the Privy Council, had strongly praised it in earlier writings. In 1930 he wrote: "I often wonder ... 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. We might, apart from the Privy Council, have followed paths of greater juristic cohesion. We might have created a stronger legal nation; but it is problematical, had we done so, whether our legal cohesion would not have been compelled, if federation was to have survived, to give ground ultimately to those more compelling forces ... and whether we should not have been forced ultimately, in the interest of continuing the union, to retrace our legal steps." Book review of E. Cameron, *The Canadian Constitution as Interpreted by the Judicial Committee, 1916–1929*, in *CBR*, 8 (1930), 708. Kennedy made the same point on several other occasions: see *Essays in Constitutional Law* (London, 1934), 59–60, 101–2; *Some Aspects of the Theories and Workings of Constitutional Law*, 93, 101–2.

See also J. A. Maxwell, "Aspects of Canadian Federalism," *Dalhousie Review*, 16 (1936–7), 277n; E. McWhinney, "Federalism, Constitutionalism, and Legal Change: Legal Implications of the 'Revolution' in Quebec," in Cr  peau and Macpherson, *The Future of Canadian Federalism*, 159–60; McWhinney, *Judicial Review*, 25–6, 70–1; E. Forsey, "Concepts of Federalism: Some Canadian Aspects," in J. P. Meekison, ed., *Canadian Federalism: Myth or Reality* (Toronto, 1968), 349; Stanley, *A Short History of the Canadian Constitution*, 142.

¹⁰⁰*Federalism and the French Canadians* (Toronto, 1968), 198.

ately enhanced provincial powers in partial defiance of the BNA Act itself.¹⁰¹ The Privy Council's solicitous regard for the provinces constituted a defensible response to trends in Canadian society.

Prior to the great outburst of criticism against the Privy Council in the depression of the thirties, strong approval for its decisions and their consequences was voiced by a variety of commentators. In 1909 J. M. Clark pointed out "what is too well known to require argument, namely, that the earlier decisions of our Supreme Court would have rendered our Constitution quite unworkable," a fate prevented by the existence of appeals to the Privy Council.¹⁰² A few years later another writer praised the Privy Council for the political astuteness it combined with its legal abilities: "Better for the Canadian Constitution that the highest tribunal is composed of judges who are also politicians, rather than of lawyers who are merely judges. The British North America Act is nearly forty-nine years old and works more easily every year; the American Constitution, admittedly a more artistic but less elastic document, is daily falling behind."¹⁰³

In 1921 another supporter strongly criticized the opponents of the Privy Council "whose interpretations have evolved for us all that is great, splendid and enduring in the Constitution under which the Dominion has flourished."¹⁰⁴ An unsigned, eulogistic editorial in the *Canadian Law Times* (1920) sums up the approbation with which many viewed the work of the Judicial Committee:

I have read many of the decisions of the Privy Council relating especially to the Constitutional questions of Canada which have come before it; and I say that if it never did anything else for the purification of our legal conceptions, it has by its interpretations of the B.N.A. Act rendered services to this country which should assure to it an abiding and grateful memory. With steady, persistent, and continuous adherence to the true lines of demarcation it has kept the Province and Dominion apart; and it has built up the Provincial fabric into a semi-sovereignty independent alike of the Dominion and of the United Kingdom. Its declarations on the Provincial Legislative powers alone are worthy of our gratitude and endless admiration. They are reverberant of that splendid independence which the several entities of Canada enjoy. These powers which the Dominion at one time thought subject to its control and doubtless would have striven to make them so, the Privy Council has declared are not delegated at all or subordinate to any authority except the Crown, but on the contrary that they are powers granted and surrendered by the Imperial Parliament directly in favor of the Legislature of each Province of Canada, and not even through the medium of the confederate Dominion.

How splendid an inheritance! This is not the letter of the B.N.A. Act but its spirit interpreted or declared for us by the Sovereign through his Privy Council in the light of aspirant freedom and of future nationhood.

Well may the upholder of our Constitution who stands aghast at the invectives of the would-be demolisher of the Privy Council say: *Si quaeris monumentum circumspice*.¹⁰⁵

Any plausible defence of the Privy Council must come to grips with the *cause célèbre* which more than any other indicated to its critics its incompetence and insensitivity as a final appeal court. In 1937, in a series of decisions, the Privy

¹⁰¹Cheffins, *Constitutional Process in Canada*, 130–1, and W. R. Lederman, "Thoughts on Reform of the Supreme Court of Canada," *Alberta Law Review*, 8 (1970), 3, both point out the inappropriateness of a literal criticism of Privy Council decisions.

¹⁰²"The Judicial Committee," 348.

¹⁰³E. W., "Random Remarks Regarding the Judicial Committee," *CLT*, 36 (1916), 370–1.

¹⁰⁴Bram Thompson, "Editorial," *CLT*, 41 (1921), 165.

¹⁰⁵"Editorial," *CLT*, 40 (1920), 261.

Council largely invalidated the New Deal legislation of the Bennett government. By so doing it indicated, to the fury of its critics, that even the emergency of a worldwide depression provided insufficient justification for central government authority to grapple with a devastating economic collapse. In these broad terms the case of the critics seems irrefutable. The New Deal decisions, more than any other, are responsible for the general hostility to the Privy Council in the literature of recent decades. The critics, however, have ignored a number of factors which place the action of the Privy Council in a much more favourable light.

The constitutionality of most of the New Deal legislation was in doubt from the moment of its inception.¹⁰⁶ Further, the final decisions by the courts were entirely predictable to a number of critics. Ivor Jennings' British law class "correctly forecast five of the decisions; and we were wrong on the sixth only because we took a different view of 'pith and substance.'" ¹⁰⁷ W. P. M. Kennedy anticipated every New Deal decision but one before they went to the Supreme Court or the Privy Council.¹⁰⁸ The decisions therefore were not wayward, random, or haphazard. The judges did what men trained in the law expected them to do.

Any impression of an aloof court slapping down a determined Canadian leadership backed by widespread support is wrong.¹⁰⁹ R. B. Bennett, the initiator of the legislation, was decisively beaten in the federal election of 1935. The victor, Mackenzie King, had questioned the constitutionality of the legislation from the outset, never displayed any enthusiasm for its retention on the statute books, forwarded it willingly, almost eagerly, to the courts for their opinion, and uttered no anguished cries of rage when the decisions were announced.

In brief, the decisions were legally predictable and politically acceptable. In addition, there were extremely powerful centrifugal forces operating in the depression. Hepburn in Ontario, Duplessis in Quebec, and Aberhart in Alberta symbolized the developing regionalism unleashed by massive economic breakdown. French-Canadian separatists loudly resisted the claim that the depression could only be fought by centralization.¹¹⁰ In these circumstances it is at least arguable that the political situation of the time was scarcely the most apposite for the enhancement of federal authority. The centralist bias of the critics ignored this fact. They unquestioningly assumed that the scale and nature of the problems facing the Canadian people could only be handled by the central government, and that no other considerations mattered. The critics were supported by the contribution of the Statute of Westminster in 1931 to Canadian autonomy. They were also encouraged by the dramatic development of "an astonishing number of voluntary, non-political, national associations" dealing with social, cultural, and intellectual affairs.¹¹¹ Given these factors the critics' position is understandable and defensible. Equally so, however, is the conduct of the Privy Council. The real controversy is

¹⁰⁶MacDonald, "Judicial Interpretation of the Canadian Constitution," 282–3.

¹⁰⁷Jennings, "Constitutional Interpretation," 38.

¹⁰⁸*The Constitution of Canada*, 550. See also F. C. Cronkite, "The Social Legislation References," *CBR*, 15 (1937), 478.

¹⁰⁹Left-wing critics of the time disagree with this interpretation. See the *Canadian Forum* (March 1937), 4, and Dorothy Steeves in CBC, *The Canadian Constitution* (Toronto, 1938), 97–8.

¹¹⁰R. Cook, *Canada and the French Canadian Question* (Toronto, 1966), 53.

¹¹¹Creighton, *Canada's First Century*, 213–14.

not over the performance of the Judicial Committee, but over the proper criteria for the evaluation of judicial decisions.

The weakness of the Judicial Committee

The Judicial Committee laboured under two fundamental weaknesses, the legal doctrine which ostensibly guided its deliberations, and its isolation from the setting to which those deliberations referred.

The basic overt doctrine of the court was to eschew considerations of policy and to analyse the BNA Act by the standard canons for the technical construction of ordinary statutes. The objection to this approach is manifold. Numerous legal writers have pointed out that the rules of statutory construction are little more than a grab bag of contradictions. It is also questionable whether a constitution should be treated as an ordinary statute, for clearly it is not. In the British political system, with which judges on the Privy Council were most acquainted, it is at least plausible to argue that the doctrine of parliamentary supremacy, and the consequent flexibility of the legislative process, provides some justification for the courts limiting their policy role and assigning to parliament the task of keeping the legislation of the state appropriate to constantly changing circumstances. The BNA Act, however, as a written constitutional document, was not subject to easy formal change by the amending process. Consequently, the premise that the transformation of the act could be left to law-making bodies in Canada, as in the United Kingdom, was invalid. A candid policy role for a final appeal court seems to be imperatively required in such conditions.

Even in the absence of this consideration it is self evident that no technical analysis of an increasingly ancient constitutional document can find answers to questions undreamt of by the Fathers. The Privy Council's basic legal doctrine was not only undesirable, therefore, it was also impossible. In reality, as already indicated, the Privy Council obliquely pursued a policy of protecting the provinces. The clear divergence between the act as written and the act as interpreted makes it impossible to believe that in practice the Privy Council viewed its role in the narrow, technical perspective of ordinary statutory construction. The problem of the court was that it was caught in an inappropriate legal tradition for its task of constitutional adjudication. It partially escaped from this dilemma by occasionally giving overt recognition to the need for a more flexible, pragmatic approach, and by covertly masking its actual policy choices behind the obfuscating language and precedents of statutory interpretations.

The covert pursuit of policy meant that the reasoning process in their decisions was often inadequate to sustain the decision reached. This also helps to explain the hypocritical and forced distinguishing of previous cases which was criticized by several authors.¹¹² Further, the impossibility of overt policy discussion in decisions implied the impossibility of open policy arguments in proceedings before the court. Inevitably, the court experienced severe handicaps in its role as policy-maker.

Caught in an unworkable tradition the Judicial Committee was unable to answer the basic question of constitutional jurisprudence, how it should apply the dis-

¹¹²MacDonald, "The Privy Council and the Canadian Constitution," 1036.

cretion it unavoidably possessed. The application of a constitution to novel conditions provides a court with the opportunity for creative statesmanship. To this challenge the Judicial Committee evolved no profound theories of its own role. Its most basic answer was silence, supplemented by isolated statements of principle dealing with the federal system, and occasional liberal statements concerning its role in contributing to the growth and evolution of the constitution. The confusion in Privy Council philosophy was cogently described by MacDonald:

Uncertainty and inconsistency in ... matters which lie at the very threshold of the problem of interpretation have played a large part in making the ascertainment of the meaning of the Canadian constitution the precarious task that it is today; for the chief element of predictability of legal decision inheres in a known and uniform technique of approach. It is a prime criticism of the Privy Council that it has had no uniform technique of approach to the act; for it has sought now the intention of the framers of the act, now the meaning of its terms; sometimes excluding, sometimes being influenced by, extraneous matters, and sometimes interpreting the terms of the act as speaking eternally in the tongue of 1867, and sometimes in the language of contemporary thought and need.¹¹³

The second main weakness of the Privy Council was its isolation from the scene to which its judgments applied. Its supporters argued otherwise by equating its distance from Canada with impartiality. Judges on the spot, it was implied, would be governed or influenced by the passions and emotions surrounding the controversy before them. British judges, by contrast, aloof and distant, would not be subject to the bias flowing from intimate acquaintance.

The logic of this frequently espoused position was curious. The same logic, as J. S. Ewart satirically observed, implied the desirability of sending British cases to the Supreme Court at Ottawa, but no such proposals were forthcoming. "Local information and local methods," he continued, "are very frequently essential to the understanding of a dispute. They are not disqualifications for judicial action."¹¹⁴

The critics were surely right in their assertions that absence of local prepossessions simply meant relative ignorance, insensitivity, and misunderstanding of the Canadian scene, deficiencies which would be absent in Canadian judges. "The British North America Act," Edward Blake had asserted in 1880, "is a skeleton. The true form and proportions, the true spirit of our Constitution, can be made

¹¹³"Judicial Interpretation of the Canadian Constitution," 281. MacDonald, "The Privy Council and the Canadian Constitution," 1034–5, reiterates his earlier statement, and adds that we do not even have certainty (p. 1036). Laskin, "Peace, Order and Good Government' Re-examined," 1056, accused the Privy Council of laying down too many unnecessary dicta and generalities. McWhinney, *Judicial Review*, 54, suggests that the need for compromise in the committee may have produced obscurities in their decisions. Some earlier technical criticisms may be found in "Editorial Review," *CLT*, 6 (1886), 375, and A. H. Marsh, "The Privy Council as a Colonial Court of Appeal," *CLT*, 14 (1894), 92. See, by contrast, E. W., "Random Remarks Regarding the Judicial Committee," 371–2, who praises the committee for its statesmanlike willingness to be inconsistent, and to override legal quibbles. The caveat of H. A. Innis is also worthy of consideration: "But though interpretations of decisions of the Privy Council have been subjected to intensive study and complaints have been made about their inconsistency, inconsistencies have implied flexibility and have offset the dangers of rigidity characteristic of written constitutions." "Great Britain, the United States and Canada," in M. Q. Innis, ed., *Essays in Canadian Economic History* (Toronto, 1956), 404.

¹¹⁴*Kingdom of Canada*, 226–8. Ewart repeated his opposition to this defence of the Privy Council on numerous occasions: *ibid.*, 20; *Kingdom Papers*, 1, 88; "The Judicial Committee," *CLT*, 34 (1914), 221, 230–1; "The Judicial Committee," *CLT*, 33 (1913), 676–8; "Some Further Comments on Dominion-Provincial Relations," *PPCPSA*, 3 (1931), 253–8.

manifest only to the men of the soil. I deny that it can be well expounded by men whose lives have been passed, not merely in another, but in an opposite sphere of practice ..."¹¹⁵ The same argument was reiterated by succeeding generations of critics until the final elimination of appeals.¹¹⁶

The weakness flowing from isolation was exacerbated by the shifting composition of the committee which deprived its members of those benefits of experience derived from constant application to the same task. "The personnel of that Court," stated a critic in 1894, "is as shifting as the Goodwin Sands. At one sitting it may be composed of the ablest judges in the land, and at the next sitting its chief characteristic may be senility and general weakness."¹¹⁷ This instability of membership contributed to discontinuities in interpretation as membership changed. It also allowed those who sat for long periods of time, as did Watson and Haldane, to acquire disproportionate influence on Privy Council decisions.

The professed legal philosophy of the Judicial Committee helped explain away the disadvantages allegedly flowing from isolation, by stressing the mechanical, technical, legal character of the judicial task. This minimized the advantages of local understanding for judges. Conversely, the position of the critics was strengthened when they stressed the policy component in judicial interpretation. While a plausible case might be made that technical, legal matters could be handled as well, or even better, by a distant court the same argument could scarcely be made of policy matters, where local understanding was obviously of first-rate importance. It necessarily followed that the Supreme Court of Canada, composed of men thoroughly conversant with Canadian social and political conditions, had a greater capacity to be a more sophisticated and sensitive court of appeal.

The understanding of Canadian politics held by British judges was well summarized by a sympathetic observer, Jennings:

The Atlantic separates them from the political disputes of Canada. Their information about the controversies of the Dominion is obtained from the summary cables of the London press, which is far more interested in problems nearer home. If Mr. Dooley came to London he could not say that the Judicial Committee followed the Canadian election returns. Unless their functions make them particularly interested in Canadian news, they are probably as uncertain of the politics of the governments in power as is the average Englishman. The controversies which appear to them to be merely legal disputes as to the meaning of Sections 91 and 92 of the Act often have a background of party strife and nice political compromises. The judges may know enough to realize that politics are involved, but not enough to appreciate exactly why and how.¹¹⁸

These considerations add a special cogency to Vincent MacDonald's plea for

¹¹⁵*Can. H. of C. Debates*, Feb. 26, 1880, pp. 253–5, and see Blake, cited in MacDonald, "The Privy Council and the Canadian Constitution," 1026. For Blake's later partial change of mind, see Russell, *Supreme Court*, 251, n. 173.

¹¹⁶Raney, "Justice, Precedent and Ultimate Conjecture," 460; Thorson, *Can. H. of C. Debates*, April 5, 1937, pp. 2581–2; Scott, *Canada Today*, 77; Tuck, "Canada and the Judicial Committee," 71–3; Mallory, "The Five Faces of Federalism," 6.

¹¹⁷A. H. Marsh, "The Privy Council as a Colonial Court of Appeal," *CLT*, 14 (1894), 94. See also Deacon, "Canadians and the Privy Council," 126–7. This criticism was popular among the opponents of the New Deal decisions. Cahan, *Can. H. of C. Debates*, April 5, 1937, p. 2574, and Scott, "The Consequences of the Privy Council Decisions," 493–4.

Jennings, "Constitutional Interpretation," is the best attempt to discuss the influence of Privy Council personnel on its judgments.

¹¹⁸"Constitutional Interpretation," 1–2.

abolition of appeals on the ground that “even in matters of dry law decision is affected by the national character and personal background of the judiciary.” One could not ignore, he continued, “the temperament, the experience, the social background and training of the final court,” especially when interpretation dealt with policy matters.¹¹⁹ Tuck’s argument was equally to the point:

Resort to the privy council is unnecessary where the two tribunals agree; and where they disagree, since constitutional interpretation turns largely on matters of policy, its development would be best directed by a Canadian court with first-hand experience of Canadian conditions and needs. The privy council, with its constantly shifting personnel, working always at a distance from the scene of operations, is hardly the appropriate body for this kind of work ... It is unlikely, therefore, that the board will ever be thoroughly familiar with the spirit of the Canadian constitution, or the environment necessary to its successful working.¹²⁰

Given the difficulties which inevitably flowed from its London location, and given the sterilities of the legal tradition it espoused, the decisions of the Privy Council were remarkably appropriate for the Canadian environment. The Privy Council, in its wisdom, was partially able to overcome some of the dangers caused by its own ignorance. That it did so imperfectly was only to be expected. Watson and Haldane have been criticized by McWhinney on the ground that if they were consciously influenced “by a bias in favour of provincial powers, their approach seems nevertheless to have been a vague, impressionistic one, without the benefit of a detailed analysis and weighing of the policy alternatives involved in each case.”¹²¹ Essentially the same criticism is made by MacGuigan who criticizes the abstract natural law approach adopted by the Privy Council in coming to its policy decisions. They were policy-makers without the necessary tools of understanding.¹²² These criticisms, while valid, reflect failings that were inevitable for a body of men who adjudicated disputes emanating from the legal systems of a large part of the world, and who could not be expected to become specialists in the shifting socio-economic contexts in which each legal system was embedded.¹²³ This particular weakness could not be overcome by a body of British judges. If local knowledge was a necessary attribute of a good court the Privy Council could only be a second best interim arrangement.

¹¹⁹“The Canadian Constitution Seventy Years After,” *CBR*, 15 (1937), 426–7.

¹²⁰“Canada and the Judicial Committee,” 73 (see also 55–6, 71–2). Versions of this point were made by various commentators. LaBrie, “Canadian Constitutional Interpretation and Legislative Review,” 346; W. R. Lederman, “The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada,” in Crépeau and Macpherson, *The Future of Canadian Federalism*, 111; Lederman, “Thoughts on the Reform of the Supreme Court of Canada,” 3–4.

¹²¹*Judicial Review*, 72.

¹²²“The Privy Council and the Supreme Court,” 425–6.

¹²³D. G. Creighton, speaking of the diversity of jurisdiction of the Privy Council, stated: “An expert knowledge of one of these legal systems might be regarded as a respectable accomplishment for an ordinary man. But the titans of the Judicial Committee, from long practice and profound study, have grown accustomed to the multifarious and exacting requirements of their office; and they apparently leap, with the agility of quick-change performers, from one legal metamorphosis to another ... To an outsider it might seem that there was at least the faint possibility of some bewilderment and confusion in these endlessly varied deliberations. The outsider might even be so far misled as to conceive of a noble judge who continued obstinately to peruse the Koran when he ought to have been consulting the *British North America Act*.” “Federal Relations in Canada since 1914,” in Chester Martin, ed., *Canada in Peace and War* (Toronto, 1941), 32–3.

The context in which the Privy Council existed deprived it of the continual feedback of relevant information on which wise and sensitive judging depends. Superficially this could be described as a deficiency of local knowledge. This deficiency, however, is sufficiently complex and important to require elaboration.

An effective court does not exist in a vacuum. It is part of a complicated institutional framework for the amelioration of the human condition through the device of law in individual nation states. Law is unavoidably national. It cannot be otherwise as long as the basic political unit is the nation state. Laws are not designed for men in general, but for Canadians, Americans, Germans, etc.

Within these national frameworks a variety of procedures has been developed to make law sensitive to the needs of particular communities. This is readily recognized and admitted for legislatures and executives. For courts, however, the attributes of objectivity and impartiality, combined with the status of judicial independence, tend to distract attention from the task similarity between judges and legislators. Both, however, are concerned with the applicability of particular laws to particular communities. There is consequently an important overlap in their mutual requirements. Both must be provided with the institutional arrangements which facilitate an adequate flow of the relevant information for their specific tasks.

A strong and effective court requires a variety of supporters. It must be part of a larger system which includes first class law schools, quality legal journals, and an able and sensitive legal fraternity – both teaching and practising. These are the minimum necessary conditions for a sophisticated jurisprudence without which a distinguished judicial performance is impossible. Unless judges can be made aware of the complexities of their role as judicial policy-makers, and sensitively cognizant of the societal effects of their decisions, a first-rate judicial performance will only occur intermittently and fortuitously. In brief, unless judges exist in a context which informs their understanding in the above manner they are deprived of the guidance necessary for effective decision-making. Most of the conditions required as supports for a first class court were only imperfectly realized in Canada prior to the abolition of appeals to the Privy Council. A shifting body of British judges, domiciled in London, whose jurisdiction covered a large part of the habitable globe, existed in limbo. This isolation of the court not only reduced its sensitivity to Canadian conditions, but rendered it relatively free from professional and academic criticism.¹²⁴ A related part of the problem was noted by Ewart in his observation that the Privy Council either had the assistance of English barristers devoid of an intimate understanding of Canadian circumstances, or “Canadian barristers, who speak from one standpoint and are listened to from another.”¹²⁵

The position of the Judicial Committee at the apex of a structure of judicial review of global extent virtually necessitated the conceptualizing approach found offensive to so many of its critics. The court was not, and could not be, adequately integrated into a network of communication and criticism capable of transmitting the nuances and subtleties which a first class appeal court required.

The single opinion of the court, while it possibly helped to sustain its authority

¹²⁴Ewart, “The Judicial Committee,” 676. He also asserted that the Judicial Committee “suffers from a conviction of its own superiority – a conviction due (a) to the ruling character of the race to which its members belong, and (b) to the fact that, by sending our cases to it, we appear to acknowledge our incapacity.”

¹²⁵*Ibid.*, 676.

and weaken the position of its critics,¹²⁶ had serious negative effects. Jennings pointed out that “the absence of a minority opinion sometimes makes the opinion of the Board look more logical and more obvious than it really is. The case is stated so as to come to the conclusion already reached by the majority in private consultation. It is often only by starting again and deliberately striving to reach the opposite conclusion that we realize that ... there were two ways of looking at it.”¹²⁷ The absence of dissents hindered the development of a dialogue over the quality of its judgments. Dissents provide a lever for the critic by their indication of a lack of judicial unanimity, and by their provision of specific alternatives to the decisions reached. Unanimity of its published opinion thus made its own contribution to the isolation of the court. In addition, as a final appeal court, it had “no dread of a higher judicial criticism.”¹²⁸ Finally, much of the debate which swirled around its existence and performance was so inextricably intertwined with the larger controversy between nationalism and imperialism that the question of the judicial quality of its task was not faced head on. These extraneous considerations partly account for the extremes in the evaluations made of the court, ranging between “undiscriminating praise and ... over-criticism.”¹²⁹

The confusion of the critics

For the better part of a century the performance of the Judicial Committee has been a continuing subject of academic and political controversy in Canada. Even the elementary question of whether its work was basically good or fundamentally bad has elicited contrary opinions. The distribution of favourable and critical attitudes has shifted over time. From the turn of the century until the onset of the depression of the thirties informed opinion was generally favourable. Subsequently, English-Canadian appraisals became overwhelmingly critical. It is a reasonable speculation, sustained by Browne’s recent volume,¹³⁰ by the contemporary strength of regional forces in Canadian society, and by the fact that Canadian judicial autonomy is now in its third decade, that more favourable evaluations of the Judicial Committee will begin to appear. For example, the Labour Conventions case (1937), which so aroused the ire of the critics who feared the emasculation of

¹²⁶“What gives its imposing respectability, its ponderous finality to a decision of the Privy Council is its unity. There may be considerable diversity of opinion, doubts, hesitations and dissents behind the curtain. But when the curtain goes up one judge delivers the opinion of the Court and it is law. It does not sprinkle like a garden hose; it hits like the hammer of Thor.” A. T. Hunter, “A Proposal for Statutory Relief from the Privy Council Controversy,” *CBR*, 4 (1926), 102. See McWhinney, *Judicial Review*, 52–3, for a discussion of the practice and suggested explanations for its survival.

¹²⁷He continued: “Though the reports summarize the arguments of counsel, the emphasis given to the written opinion mimimizes the case that the majority did not accept. Finally, the opinion of the whole Board is given by one member. The substance is, no doubt, agreed to by the rest of the majority; but it is never certain that all the expressions would have been accepted by the majority if they had fully considered them. The type of opinion differs according to the judge who renders it. He comes to the conclusion desired by the majority and states the reasons acceptable to the majority; but anyone who has drafted a document knows that there are many ways of saying the same thing and that a draft often says more than is intended.” “Constitutional Interpretation,” 2–3.

¹²⁸Ewart, “The Judicial Committee,” 676.

¹²⁹E. W., “Random Remarks Regarding the Judicial Committee,” 370.

¹³⁰*The Judicial Committee and the British North America Act.*

Canadian treaty-making, now seems to present a defensible proposition in contemporary Canadian federalism.

In the period up to and subsequent to the final abolition of appeals in 1949 there was a consistent tendency for opposed evaluations of the Judicial Committee to follow the French-English cleavage in Canada.¹³¹ This divergence of opinion was manifest in French-Canadian support for the Judicial Committee,¹³² with opposition on grounds of nationalism and its provincial bias largely found in English Canada. Many English-Canadian writers hoped that the Supreme Court, as a final appeal court, would adopt a liberal, flexible interpretation, eroding at least in part the debilitating influence of *stare decisis*. In practical terms, their pleas for a living tree approach presupposed a larger role for the central government than had developed under the interpretations of the Judicial Committee. In essence, one of the key attitudes of the predominantly English-Canadian abolitionists was to view a newly independent Supreme Court as an agent of centralization.¹³³ The very reasons and justifications which tumble forth in English-Canadian writings caused insecurity and apprehension in French Canada which feared, simply, that if English-Canadian desires were translated into judicial fact the status and influence of the provinces which had been fostered by British judges would be eroded.¹³⁴ The

¹³¹The reference is to a tendency, not to ethnic unanimity. Frank Scott was correct in pointing out in 1947 that Quebec had "no single view" on the question of the retention of the Judicial Committee, and in noting that a minister of justice from Quebec, Téléspore Fournier, who introduced the bill to establish the Supreme Court in 1875, stated that he "wished to see the practice put an end to altogether," and that Ernest Lapointe held similar views. "Abolition of Appeals to the Privy Council: A Symposium," 571. Scott had earlier argued that minority rights had received better protection from the Supreme Court than from the Privy Council. "The Privy Council and Minority Rights," *Queen's Quarterly*, 37 (1930). It is also worthy of note that the elimination of appeals occurred under a French-Canadian prime minister. Pierson, *Canada and the Privy Council*, 69–70, provides some evidence of French-Canadian opposition to appeals. The 1927 Labrador decision of the Privy Council turned some French Canadians against the system of appeals. See Brossard, *La Cour Suprême*, 189, and Dale C. Thomson, *Louis St. Laurent: Canadian* (Toronto, 1967), 91, 208. Further, it is clear that there have been many English-Canadian supporters of the Privy Council right up to its final abolition. These observations do not, however, invalidate the statement about a tendency for opposed evaluations of the Judicial Committee to follow the French-English cleavage.

¹³²For French-Canadian support of the Privy Council's interpretation of the BNA Act and/or support for its continuation as a final appeal court see L. P. Pigeon, "The Meaning of Provincial Autonomy," *CBR*, 29, (1951); Pigeon, "French Canada's attitude to the Canadian Constitution," in E. McWhinney, ed., *Canadian Jurisprudence* (Toronto, 1958); Jean Beetz, "Les attitudes changeantes du Québec à l'endroit de la constitution de 1867," 117–18; *CLT*, 40 (1920), 315, reporting a speech by Mr Horace J. Gagne of the Montreal Bar; "Appeal to the Privy Council," *CLT*, 41 (1921), 525, reporting a speech of Premier Taschereau of Quebec. Russell notes that in the nineteenth century French-Canadian support for the Judicial Committee, and opposition to the Supreme Court, was primarily based on the belief that the composition, training, and background of the former was much to be preferred to that of the latter for interpretations of Quebec civil law. *Supreme Court*, chap. 1, passim. See also Brossard, *La Cour Suprême*, 125.

¹³³On this attitude of the abolitionists, see Jonas L. Juskaitis, "On Understanding the Supreme Court of Canada," *School of Law Review*, University of Toronto, 9 (1951), 7–8; and Leonard H. Leigh, "The Supreme Court and the Constitution," *Ottawa Law Review*, 2 (1967–8), 323. Jacques Brossard, "The Supreme Court and the Constitution," in Ontario Advisory Committee on Confederation, *Quebec in the Canada of Tomorrow* (Toronto, n.d.), (translated from *Le Devoir*, special supplement, June 30, 1967), stated: "It was, moreover, in opposing the centralizing aims of the federal government that the Judicial Committee signed its own death warrant; it was accused, not without reason, of having violated the centralizing spirit of the B.N.A. Act of 1867." U.2.

¹³⁴Beetz, "Les attitudes changeantes," 119–21. The divergent evaluations of the Judicial Com-

American-style supreme court sought by the constitutionalist critics of the Privy Council was justifiably viewed with apprehension by French-Canadian observers. They assumed, not unfairly, that if such a court heeded the bias of its proponents it would degenerate into an instrument for the enhancement of national authority. These contrary English and French hopes and fears are closely related to the present crisis of legitimacy of the Supreme Court.

An additional significant cleavage in Canadian opinion was between those fundamentalist critics who opposed the Judicial Committee for its failure to provide a technically correct interpretation of a clearly worded document, and the constitutionalists who castigated it for its failure to take a broad, flexible approach to its task.

The fundamentalist approach, already discussed, imposed on the courts the task of faithfully interpreting a document in terms of the meanings deliberately embodied in it by the Fathers of Confederation. This approach was replete with insuperable difficulties:

1 If the task of the courts was to provide a literally correct interpretation of the agreement of 1867 it is possible to differ on the degree of their success or failure. The standard interpretation adhered to by MacDonald, O'Connor, and numerous others is that the performance of the Judicial Committee, from this perspective, was an abject failure. Recently, however, a new analysis by Professor G. P. Browne has lauded the Privy Council for the consistency of its interpretation, and has categorically asserted that refined textual analysis of sections 91 and 92 indicates that they were given a proper judicial interpretation. According to Browne, British judges were not acting out a bias in favour of the provinces, but were simply applying the logic of the BNA Act to the legal controversies which came before them for adjudication.¹³⁵ Browne's revisionist thesis has been both praised and harshly criticized.¹³⁶ Its truth, if such a word can be applied to such a subject as constitutional interpretation, is not germane to our purposes.¹³⁷ What is germane is the fact that a century after Confederation the question of the technically correct interpretation of the act can still produce violently opposed positions among serious, competent scholars. One is tempted to ask if the pursuit of the real meaning of the act is not a meaningless game, incapable of a decisive outcome.¹³⁸

mittee and of a proposed independent Supreme Court are discussed by Peter Russell, "The Supreme Court's Interpretation of the Constitution since 1949," in Paul Fox, ed., *Politics: Canada* (2nd ed., Toronto, 1966), 117–18. See also Russell, *Supreme Court*, 31–2, 36–7. In addition to the ethnic based opposition from French Canada there was also considerable provincial opposition to the unilateral nature of the federal action in abolishing appeals. P. Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto, 1950), xvii–xviii. By 1949 French Canadians had become critical of the Privy Council's treatment of French civil law, but this "was counter-balanced by approval of its interpretation of the B.N.A. Act." Russell, *Supreme Court*, 31.

¹³⁵*The Judicial Committee and the British North America Act.*

¹³⁶J. A. Corry, while doubtful of the final validity of Browne's thesis, gives the book a very favourable review in this JOURNAL, 1 (1968), 217–19. Critical reviews are provided by B. Laskin, *Canadian Public Administration*, 10 (1967), 514–18, and E. R. Alexander, *UTLJ*, 17 (1967), 371–7.

¹³⁷See the eminently sensible criticism by Corry, *ibid.*, 218–19. Jennings' observation is also relevant. "The idea that judges spend days on end in reading all the decisions on any particular topic is one which is sometimes assumed by academic writers; it can, however, be designated as clearly false by anyone who has watched a court give judgment immediately at the end of an argument." "Constitutional Interpretation," 27.

¹³⁸W. R. Lederman, after noting the antithetical literal interpretations of the BNA Act by

2 There is controversy over the relationship between the intentions of the Fathers and the act they created. The centralist argument is that the Fathers both intended and produced a centralized federal system. It has, however, been asserted by Professor Philippe Ferland that there is a discrepancy between the intentions and the result. This approach claims that the pre-Confederation statements of the Fathers favoured a legislative decentralization, but they drafted a text which devoured the provinces. The judges then, according to Ferland, concentrated on the text, ignored the external evidence, and thus damaged the interests of the provinces.¹³⁹ It is impossible to overlook the fact that here, as elsewhere, legal scholars have displayed an ingenious ability to locate evidence for the kind of intentions they sought.

3 LaBrie noted that even if it could be assumed that the Fathers of Confederation did have views on the newer areas of government "there remains the question whether, in the light of our own greater experience in the problems of federal government, these intentions ought to rule us at the present day."¹⁴⁰ By implication the fundamentalists attempted to tie succeeding generations of Canadians down to the constitutional assumptions of a small body of men in the 1860s. For a completely static society, in which the original settlement was perfectly suited to existing social values and needs, such an approach has some plausibility. But as society changes it seems evident that the faint glimmers of insights of the Fathers should be overruled by the more comprehensive understandings of their successors. Literalism, consequently, is an inadequate guide for judges. This was tacitly admitted by those fundamentalist critics who applied their literalism to the division of powers, but often proudly noted the flexibility of other portions of the act. They

Browne and O'Connor states that in his view "Browne and O'Connor simply cancel one another out. The truth is that the B.N.A. Act was simply ambiguous or incomplete in many respects as originally drafted and the answers just were not in the Act as to how these ambiguities were to be resolved and the gaps filled." "Thoughts on the Reform of the Supreme Court of Canada," 2.

Note also the chronic "historical" controversy over the validity of the compact theory and between centralist and provincialist interpretations of the BNA Act and/or the intentions of the Fathers. Glazebrook's comment is apt: "one has only to sample the speeches and writings of politicians, academics, and jurists to appreciate the wealth of interpretation of the intent and terms of the original union. It needs a conscious effort to realize that they are describing the same episode in Canadian history. Confederation, in fact, was what you thought it was – or often what it should have been. Which seems to suggest that particular interpretations and points of view were rationalized by tailored versions of the Constitution." *A History of Canadian Political Thought*, 264 (see also 153, 258).

¹³⁹"La Confédération à refaire," *Thémis*, 5 (1954), 105. Stanley, "Act or Pact?" 114, asserts that the pre-parliamentary history of the BNA Act appears to confirm the interpretation of the Judicial Committee rather than that of the critics.

The 1887 Interprovincial Conference which advocated a much more decentralized federal system than prevailed under Macdonald's prime ministership, claimed that two decades of experience with the BNA Act have "disclosed grave omissions in the provisions of the Act, and has shown (when the language of the Act came to be judicially interpreted) that in many respects what was the common understanding and intention had not been expressed, and that important provisions in the Act are obscure as to their true intent and meaning." *Dominion, Provincial and Interprovincial Conferences from 1887 to 1926* (Ottawa, 1951), 20.

¹⁴⁰"Canadian Constitutional Interpretation and Legislative Review," 310. K. N. Llewellyn's statement is also apt: "there is no quarrel to be had with judges *merely* because they disregard or twist Documentary language, or 'interpret' it to the despair of original intent, in the service of what those judges conceive to be the inherent nature of our institutions. To my mind, such action is their duty. To my mind, the judge who builds his decision to conform with his conception of what our institutions must be if we are to continue, roots in the deepest wisdom." "The Constitution as an Institution," *Columbia Law Review*, 23 (1934), 33.

were, for example, happy to accept the evolving conventions which transformed the roles of the governor general and the lieutenant governor. They tended to be literalist only when it suited their purposes.

Further, literalism, either as a description of what judges can or should do, is so clearly preposterous that its frequent employment as a tactic of criticism is, to say the least, surprising. M. R. Cohen's comment dealing with judicial review in the United States is no less applicable to Canada: "The pretence that every decision of the Supreme Court follows logically from the Constitution must ... be characterized as a superstition. No rational argument can prove that when the people adopted the Constitution they actually intended all the fine distinctions which the courts have introduced into its interpretation. Nor can we well deny the fact that judges have actually differed in their interpretations ..."¹⁴¹

4 Most obvious, and noted by various writers, was the fact that the new and developing areas of government activity, where uncertainty was greatest, could not be fitted into the intentions of a previous generation ignorant of the problems involved.¹⁴² The courts themselves have had to recognize the novelty of the issues they frequently encounter. When the Privy Council faced the question of whether a Canadian legislature could regulate appeals, the judgment stated that "it is ... irrelevant that the question is one that might have seemed unreal at the date of the British North America Act."¹⁴³

5 It can be argued that the relevant intentions of the Fathers include not only their specific intentions for the Canadian political system as they visualized it in 1867, but also their attitudes to the possibility that future generations might wish to transform the nature of their creation. Lord Haldane, for example, argued that the Fathers intended the courts to work out the constitution.¹⁴⁴

6 The question of the intentions of the Fathers is part of the larger controversy over the desirability of going beyond the wording of the act to a variety of pre-Confederation material that conceivably could throw light on its meaning.¹⁴⁵ Many critics recommended the use of the historical material surrounding Confederation as an aid to interpretation. Others asserted that not only was it the custom of the courts to exclude such materials, but that they were correct in doing so.¹⁴⁶ They

¹⁴¹*Reason and Law* (New York, 1961), 84.

¹⁴²G. H. Ross, "Interpreting the B.N.A. Act," *CBR*, 7 (1929), 704. LaBrie, "Canadian Constitutional Interpretation," 310, 318; *Rowell-Sirois Report*, I, 36.

¹⁴³*A.G. Ont. v A.G. Can.*, [1947], A.C. 127, at 154.

¹⁴⁴Robinson, "Lord Haldane and the British North America Act," 58. See also A. M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review*, 69 (1955).

¹⁴⁵Various American writers have noted that the appeal to history in American constitutional interpretation has led to an abuse of history, and does not in fact act as a control on the court. See, in particular, A. H. Kelly, "Clio and the Court: An Illicit Love Affair," in P. B. Kurland, ed., *The Supreme Court Review* (Chicago, 1965); J. TenBroek, "Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review*, 26 (1937-8), 448, 451; C. S. Hyneman, *The Supreme Court on Trial* (New York, 1964), 207-8. Felix Frankfurter, "Reflections on Reading Statutes," in A. F. Westin, ed., *The Supreme Court: Views from Inside* (New York, 1961), 75, 84-5, 88-92, argues the advantages in appealing to historical materials, although he also notes the difficult problems this entails. The difficulty in using historical material is also noted by W. O. Douglas, "Judges as Legislators," in Westin, *ibid.*, 68-9. A. A. North, *The Supreme Court, Judicial Process and Judicial Politics* (New York, 1966), 18-29, provides a neutral discussion. E. Bodenheimer, *Jurisprudence* (Cambridge, Mass., 1962), 348-53, is a good discussion of whether courts should take the original meaning at the time of statutory creation, or the contemporaneous ones understood at the time of decision.

¹⁴⁶See MacDonald, "Constitutional Interpretation and Extrinsic Evidence," for a discussion.

agreed with Lord Sankey in the Edwards case that in interpreting the BNA Act “the question is not what may be supposed to have been intended, but what has been said.”¹⁴⁷ Evan Gray, a critic of O’Connor, asserted that all pre-Confederation material “is illusory and inconclusive. It is not merely because a rigid rule of legal procedure binds our courts that we reject such material, but because as a matter of common sense we know that any other method of enquiry is unreliable, being speculative rather than logical and adding to uncertainty instead of resolving it.”¹⁴⁸ The use of such materials was also undesirable, according to Vincent MacDonald, because the tying down of interpretation to the intentions of the Fathers “allows the horizon of that year [1867] to restrict the measures of the future.” It was wiser, he argued, to interpret the words of the statute which allowed flexibility, and the incorporation of new meanings.¹⁴⁹

The use of pre-Confederation material to document the intentions of the Fathers as an aid to interpretation would not have improved the Privy Council’s performance. In addition to the much greater ambiguity of pre-Confederation speeches and resolutions compared to the BNA Act itself, their use is subject to all the criticisms of those who resist the binding of future generations by the restricted foresight of their predecessors. A living constitution incorporates only so much of the past as appears viable in the light of new conditions. A further weakness of the use of pre-Confederation material is that its contribution to understanding the BNA Act was greatest at the general level of the nature of the act as a whole, and weakest in the more specific areas covered by constitutional cases. It is significant that critics of the Privy Council tended to focus on pre-Confederation statements about the nature of the political system as a whole. Judges inevitably interpreted particular powers rather than the entire BNA Act, “because there was no machinery for the interpretation of the constitution as such.”¹⁵⁰

In summary, the intellectual rigour of the fundamentalist critics of the Privy

¹⁴⁷*Edwards v A.G. Can.*, [1930], A.C. 124, at 137.

¹⁴⁸He added: “it seems to us fallacious, as well as reckless, for the author to suggest that seventy years after Confederation he can assist us by such contemporary records to say that those who framed the Confederation Act intended to do other than what they embodied in the words of the statute.

“Indeed the matter goes deeper than that; what they are seeking to discover who speak of the pre-confederation intention of the framers of confederation or of the constituent provinces has no real existence. The search is pursuit of a ‘will-O-wisp’; when once you leave the natural light afforded by the text of the B.N.A. Act, you are in a realm of unreality

“Neither should we continue the pretension of the author that by a miracle of understanding and foresight, the Canadian Fathers of Confederation provided in 1867 a constitution suitable to any future.” “The O’Connor Report’ on the British North America Act 1867,” 316–18, 334.

See also Stanley, “Act or Pact?” 112, for the morass of contradictions involved in attempting to determine the “intentions” of the Fathers. “The one sure guide as to what the Fathers really agreed to agree upon, was the language of their resolutions, or better still, the language of the British North America Act itself. And in construing this Act in the way they have, the judges probably arrived at a more accurate interpretation than have the multitude of critics who have so emphatically disagreed with them.”

¹⁴⁹“Judicial Interpretation of the Canadian Constitution,” 280–1. His approach agreed with K. N. Llewellyn’s assertion that with an ancient statute “the sound quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the new light of what was originally unforeseen.” *The Common Law Tradition* (Boston, 1960), 374. See also W. Friedman, *Law and Social Change in Contemporary Britain* (London, 1951), 252, 254–5.

¹⁵⁰Mallory, “The Courts and the Sovereignty of the Canadian Parliament,” 173.

Council leaves much to be desired. Their case is destroyed by its essential shallowness.

The constitutionalist critics of the Privy Council based themselves on a much more promising normative and analytical stand. They welcomed and recognized a policy role for the courts in judicial review. They appreciated both the impossibility and undesirability of complete fidelity to a statute conceived in former times by men who lacked the gift of foresight. To this extent, they were judicial realists. They could easily document, when so inclined, the inevitable policy content of judicial decisions, and by so doing could puncture the slot machine theory of law. This was their achievement. Their recognition of a policy-making role helped to initiate normative discussions on what a final appeal court should do with the discretion inherent in its task.¹⁵¹ However, their own prescriptive statements were frequently shallow and seldom placed in a carefully articulated philosophy of the judicial role. An important contributing reason for the inadequacy of their normative contribution was that they were not clearly distinguished in policy objectives from the fundamentalists. Unlike the United States where the advocates of strict constitutional construction were usually state rightists,¹⁵² Canadian centralists could and did find in the 1867 agreement constitutional support for their position. Thus the distinctions between the constitutionalists and the fundamentalists were blurred by the fact that both were centralists.¹⁵³ Constitutionalists, accordingly, could always fall back on literalist justifications for their centralist policy position. They were not therefore under an obligation to prescribe a carefully defined policy justification, either for their centralization, or for the role of the court in helping to attain it. They thus lapsed into uncritical support for centralization on the general ground that it was required by the needs of the time.¹⁵⁴ This, however, as B. N. Cardozo pointed out, is not even the beginning of a judicial philosophy:

I have no quarrel, therefore, with the doctrine that judges ought to be in sympathy with the spirit of their times. Alas! assent to such a generality does not carry us far upon the road to truth. In every court there are likely to be as many estimates of the "Zeitgeist" as there are judges on its bench ... The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.¹⁵⁵

The critics did not develop a consistent and meaningful definition of the judicial role in constitutional review. The much maligned Judicial Committee was criticized on two mutually exclusive grounds.¹⁵⁶ The fundamentalists, fluctuating back and

¹⁵¹W. E. Rumble attributes the same achievement to the American legal realists. *American Legal Realism* (Ithaca, 1968), 232–3.

¹⁵²H. V. Jaffa, "The Case for a Stronger National Government," in R. A. Goldwin, ed., *A Nation of States* (Chicago, 1968), 121.

¹⁵³Browne suggests that the "constituent statute argument equates 'liberal' with 'federal' (and so 'literal' with 'provincial')." *The Judicial Committee and the British North America Act*, 31. This is not entirely true. As indicated in this essay there was also a critique of the Privy Council which was both "literal" and "federal."

¹⁵⁴The weak reasoning is similar to that noted by Smiley in "national interest" justifications for conditional grants. D. V. Smiley, *Conditional Grants and Canadian Federalism* (Toronto, 1963), 48–52.

¹⁵⁵*The Nature of the Judicial Process* (New Haven, 1960), 174–5.

¹⁵⁶Lapointe also notes the incompatibility of the two, and argues that the Privy Council con-

forth between the act itself and pre-Confederation material, charged it with departing from the clear meaning of the act and the obvious intent of its framers. The constitutionalists, concerned with policy, charged it with a failure to interpret the act in the flexible manner appropriate to a constitutional document. Their policy approach tended to be based on whether or not a given decision, or series of decisions, agreed with their values, which usually meant whether or not it facilitated government action regarded as desirable, or inhibited government action regarded as undesirable. The fundamentalist castigated the Privy Council for reaching decisions which every historian knew to be untrue, the very kind of decision which the logic of the constitutionalists invited the Bench to make. The fundamentalist demanded a technically correct performance of a mechanical act, the interpretation of a clearly worded document. The constitutionalist appealed less to the act than to the contemporary conditions to which it was to be applied. While they did not write off the BNA Act as irrelevant, the constitutionalists tended to be hostile when the act, or its judicial interpretation, stood in the way of their objectives. Their prime purpose was to allow the federal government to grapple with problems they deemed to be beyond provincial competence, or which they expected provincial governments to handle in some undesirable way. The simultaneous or sequential employment of these divergent fundamentalist and constitutionalist rationales was effective as a debating device. It was productive of great confusion over the basic question of the proper role for the court.

The critics of the Judicial Committee were moved more by the passions of nationalism and desires for centralization than by federalism. By the mid-thirties the two main perspectives on the judicial role agreed that the act, as interpreted, was increasingly irrelevant to the environment to which it applied. Both groups of critics "took it as axiomatic that the application of the appropriate techniques of interpretation of the B.N.A. Act, whether in the form of a larger dose of knowledgeable judicial statesmanship or greater fidelity to the true meaning of the constitutional text, could only be achieved by transferring the highest judicial power from English to Canadian judges."¹⁵⁷ Both groups of critics were centralists, although they found different constitutional justifications for their position. Neither group wrote favourably of the provinces, or expected much of them. They pinned their hopes on Ottawa. They shared Underhill's evaluation of the provinces: "The only province,"

ducted itself in accordance with the constitutional rather than the fundamentalist approach. "La jurisprudence constitutionnelle et le temps," 27–8.

"The manner of framing the question," writes Llewellyn, "is psychologically of huge importance. 'Is this within the powers granted by the Document?' throws the baseline of inquiry back a century and a half, constricts the vision to the static word, turns discussion into the channels of logomachy. It invites, and too often produces, artificial limitation of attention to the non-essential, the accidental: to wit, what language happens to stand in the Document, or in some hoary – or beardless – text of its 'interpretation' ..."

"Contrast the effect of framing the question thus: 'Is this within the leeway of change which our going governmental scheme affords? And even if not, does the nature of the case require the leeway to be widened to include it?' The baseline then becomes so much of the past only *as is still alive*, and the immediate future comes to bear as well. The tone and tendency of the very question is dynamic. The 'nature of the case' invites attention to explicit policy. While that continuity with the past which, if not a duty, is wisdom quite as well as a necessity, is carefully preserved – only that the past concerned is that embodied not in an ancient Text, but in a living Government." "The Constitution as an Institution," 32–3.

¹⁵⁷Russell, *Supreme Court*, 35.

he wrote in 1931, "which has not been subject to the regular alternation between short periods of comparatively good government and long periods of decay is Quebec. In Quebec they enjoy bad government all the time."¹⁵⁸ The critics assumed that industrial, technological, urban, or some other set of conditions required centralization. They stressed the difficulties of divided jurisdiction as barriers to the effective regulation of an interdependent economy. They placed great emphasis on the national structure of an economy no longer capable of meaningful delimitation by provincial boundaries. They assumed economic forces to be uncompromisingly centralist, and never regionalist in impact. They shared Laski's thesis that federalism was obsolete, paid little attention to the varying kinds of pluralism rooted in non-economic factors, and were hostile to the institutional arrangements which preserved and protected federalism. They were prone to stress the national-local distinction as crucial to the proper understanding of the BNA Act, and thus to employ a national dimension or general interest justification for federal legislation. This was an approach to which French Canadians took strong exception because of its obvious threat to provincial autonomy.¹⁵⁹

The really dramatic cleavage between the supporters and opponents, especially the constitutionalists, of the Privy Council, was, as hinted above, in their opposition over the kinds of non-legal facts which should be of significance in constitutional adjudication. The supporters stressed either the governmental pluralism of the federal system, or the underlying, regionally grouped diversities on which it was deemed to be based. Judicial decisions which protected and fostered this pluralism were praised. Judicial interpretation hostile to pluralism was opposed. The constitutionalists, by contrast, downplayed the significance of pluralism, which they frequently saw as a cover for vested interests seeking to avoid regulation. To them the paramount extra-legal factors were the ties of economic and technical interdependence and the corporate power behind them. These, by implication, had either undermined the sociological supports for pluralism or, by generating problems of national importance or scope which imperatively required central government authority for their resolution, had reduced pluralism to secondary significance.

There is no easy way by which these contrary definitions of relevant extra-legal facts can be categorized as more or less true. Both provided plausible justifications for the kind of federal system their advocates sought and the kind of judicial review required to achieve or sustain it.

Several speculations are in order. It is evident that with the passage of time since 1867 ties of interdependence have been generated which have helped to knit the Canadian economy together. It seems clear, however, that an economic interpretation of Canadian history which presupposes that this economic interdependence has undermined pluralist values is largely wrong. Canadians have remained pluralist in spite of economic change.

Economic interdependence is an omnibus concept which conceals as much as it reveals. To the extent that it does exist it is not always seen as beneficial by all the

¹⁵⁸"O Canada," *Canadian Forum*, 11 (June 1931), 332, cited in Horn, "League for Social Reconstruction," 433.

¹⁵⁹Ferland, "La Confédération à refaire," 106-7; Beetz, "Les attitudes changeantes du Québec à l'endroit de la constitution de 1867," 120.

parties caught in it. The National Policy incorporated the prairies into the Canadian economy in a manner which has generated disaffection ever since Manitoba began to fight the railway monopoly of the CPR shortly after being constituted as a province. French-Canadian provincial politicians have not been notably pleased with a system of interdependence in which capital and management were English and the workers were French.

The concept of interdependence is thus too general to be helpful in describing the nature of the Canadian economy or the kinds of political authority necessary to manage it. The concept also contributes to a disregard for the distinctive nature of the regional economies which have grown since Confederation. The importance of provincial control of natural resources, and the foreign markets to which these resources are sent, sustain distinct regional or provincial interests frequently hostile to a national approach. The nature of the Canadian economy has never been such as to offer unequivocal support for central government authority.

It is also probable that the alleged disastrous effects of Privy Council support for the provinces have been exaggerated. In recent years, at least, the provinces, particularly the larger and wealthier ones, have not been the impotent units of government which critics of the Privy Council assumed. They are neither synonyms for reaction nor backwaters of ineptitude. In the long view judicial support for the provinces has contributed to the formation of competent governments. It is also clear that the paralysing effect of judicial decisions on the federal government has been overstressed. For a decade and a half after the Second World War Canada was run in a highly centralist fashion despite nearly a century of judicial interpretation which was claimed to have reduced Ottawa to a powerless nonentity. Judicial review scarcely seems to have been as important a determinant of constitutional evolution as has often been imagined. Professor Corry has indeed speculated that judicial interpretation adverse to Ottawa precipitated the "spectacular refinement of the techniques of economic and fiscal powers after the war" on which postwar centralization was based. "Perhaps the Privy Council interpretations have, in the sequel, pushed effective centralization further and faster than it would otherwise have gone."¹⁶⁰

Professor McWhinney is critical of the quality of the controversy over the Privy Council because it too frequently proceeded "in the form of a dispute over alternative rules of statutory construction, rather than in terms of the actual consequences to Canadian national life flowing from the individual decisions."¹⁶¹ This is neither entirely true nor entirely fair. At bottom, the critics, of whatever school, were motivated by a concern for the consequences of constitutional interpretation. Especially in the depression of the thirties, it was the perceived consequences of the New Deal decisions that aroused their ire.

Hostility to the Judicial Committee was fed by the inability of Canadians to develop an amending procedure which would facilitate transfers of power from the provinces to the central government. In this situation the courts were viewed as the last resort. When they failed to respond to the challenge in the thirties, their critics retaliated with passionate hostility as the federal system appeared impotent when confronted with economic breakdown and social dislocation. In general,

¹⁶⁰"Commentaries," Cr peau and Macpherson, *The Future of Canadian Federalism*, 38.

¹⁶¹*Judicial Review*, 69.

criticisms resulted from an antipathy to the negative effects of Privy Council decisions on the capacity of Canadians to pursue certain objectives. The Privy Council left Canadians, in the phrase of one critic, with a "hardly workable polity."¹⁶² In area after area, argued the critics, the situation was intolerable in terms of administrative efficiency, the scope of the problem, or the power of the interests requiring regulation.¹⁶³

The constitutionalists, in particular, were much concerned with the consequences of judicial decisions. They inevitably sought legal justification for the decisions they favoured, but they can scarcely be faulted for that. They were simply playing the game in the accustomed manner. As indicated above, they exaggerated both the harmful consequences of the decisions and the role of the Judicial Committee in the evolution of Canadian federalism. They cannot, however, be criticized for a lack of concern with policy. Their chief weakness lies elsewhere, in their failure to produce a consistent, comprehensive definition of what can legitimately be expected from a particular institution, a definition necessarily related to the specific task of that institution in the complex of institutions which make up the political system as a whole. In a discussion of the Privy Council's handling of the New Deal, A. B. Keith asserted that from a "juristic point of view" he was able to accord "cordial appreciation" to the decisions. It was, he continued, a "completely different question" whether the constitution was an apt instrument for the solution of new problems; but this, he concluded, was "a work for the statesmen and people of the Dominion, and not for any court."¹⁶⁴ The particular distinction made by Keith may or may not be valid. What is relevant is that he made a distinction. It is not necessary to fall into the textbook simplification between those who make the laws, those who administer them, and those who interpret them to suggest that different institutions are entrusted with different tasks. The failure to make any kind of differentiation denies the validity of the institutional division of political labour which has been painfully evolved over centuries of western history. To blame the milkman for not delivering bread, or the doctor for the mistakes of the laundryman is a recipe for chaos. The basic, prior, and determining question is simply what can properly be expected of judicial review. In a constitutional system the function of judicial review must be more than simply allowing desirable policies to be implemented by whatever level of government so wishes. A worthwhile court of final appeal is bound on occasion to prevent one level of government from doing what a group of temporary incumbents or its supporters would like to do. Criticism of a court based on the fact that it has prevented a desirable objective from being attained is not good enough. Like the American legal realists, with whom the

¹⁶²Tuck, "Canada and the Judicial Committee," 75.

¹⁶³J. R. Mallory recently contrasted the capacity of the Supreme Court of the United States to "follow the election returns" with the Privy Council which "was so deficient in both sense and sensibility that the allocation of power in the constitution, by the end of the 1930's, had achieved a remarkable incongruity between the resources, capacities, and responsibilities of the federal and provincial governments." "The Five Faces of Federalism," 7. See also MacDonald, "The Privy Council and the Canadian Constitution," 1032-3, 1035, 1027; MacDonald, "The Constitution in a Changing World," 43-4; MacDonald, "Judicial Interpretation of the Canadian Constitution," 278; Tuck, "Canada and the Judicial Committee," 34; B. Laskin, "Reflections on the Canadian Constitution after the First Century," in Meekison, *Canadian Federalism*, 139.

¹⁶⁴"Privy Council Decisions: A Comment from Great Britain," *CBR*, 15 (1937), 435.

constitutionalists had some affinity, Canadian critics were effective at the task of demolition, and weak at telling the judge what he should do.¹⁶⁵

In sum, Canadian jurisprudence was deeply divided on the question of the relevant criteria for the guidance of judges in the difficult process of constitutional interpretation. Neither critics nor supporters of the Judicial Committee were able to develop consistent and defensible criteria for judicial review. Admittedly, Canadians were not alone in their confusion. Professor Corry asserted in 1939 that "one would have to search far to find a more confused portion of the English law" than "the rules to be followed in interpreting statutes and constitutions." He continued:

The text writers and judges all insist that the basic rule is to find the "expressed intention" of the makers of the constitution and that, in the case of constitutions, this intention is to be liberally rather than narrowly construed. The trouble is that constitutions often do not have "expressed intentions" about many of the situations to which they must be applied. The Fathers of Confederation could not express any intention about aviation and radio. At best then, in such circumstances, the court can only argue by analogy, making inferences as to what the framers would have said if they had thought about the problem. Even then, there are numerous situations where no compelling inferences can be found by logical processes. Nor does it help to propose that the constitution should be liberally construed, for one must still ask for what purpose and to what end. Liberal construction of Dominion power is, at the same time, strict construction of provincial power and *vice versa*.¹⁶⁶

In brief, if the performance of the Privy Council was, as its critics suggested, replete with inconsistencies and insensitivity, the confused outpourings of the critics displayed an incoherence completely inadequate to guide judges in decision-making. To contrast the performance of the Judicial Committee with the performance of its opponents is to ignore the dissimilarity of function between artist and critic. It is however clear that the Judicial Committee was much more sensitive to the federal nature of Canadian society than were the critics. From this perspective at least the policy output of British judges was far more harmonious with the underlying pluralism of Canada than were the confused prescriptive statements of her opponents.¹⁶⁷ For those critics, particularly on the left, who wished to transform

¹⁶⁵Rumble, *American Legal Realism*, 220–1, 227, 232.

¹⁶⁶J. A. Corry, "Decisions of the Judicial Committee, 1930–9," *CJEPS*, 5 (1939), 511–12. See also Rumble, *American Legal Realism*, 231, on the difficulty of defining relevant criteria for judicial decisions. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review*, 73 (1959), is an important attempt to define a judicial process which is "genuinely principled, resting with respect to every step ... in reaching judgment on analysis and reasons quite transcending the immediate result ... on grounds of adequate neutrality and generality." He is hostile to criteria concerned with immediate results which turn the court into a "naked power organ" rather than a court of law. He describes the resultant ad hoc evaluation as the "deepest problem of our [American] constitutionalism" (pp. 15, 12).

¹⁶⁷A related question is whether or not Canadian federalism would have had a less turbulent history if the task of judicial interpretation had been undertaken by the Supreme Court. McWhinney, *Judicial Review*, 73–4, provides evidence on both sides of the question, although personally doubtful that the Supreme Court would have acted differently. Glazebrook, *A History of Canadian Political Thought*, 258, finds no proof that the Supreme Court would have done otherwise than the Judicial Committee. MacGuigan argues that, from the evidence, it is impossible to decide whether or not the Supreme Court approved of the decisions of the Judicial Committee. "The Privy Council and the Supreme Court: A Jurisprudential Analysis," 421. R. F. McWilliams, "The Privy Council and the Constitution," 579, also doubts that the Supreme Court would have differed in its interpretation from the Privy Council. Russell,

society, this qualified defence of the Judicial Committee will lack conviction. However, such critics have an obligation not only to justify their objectives but also the role they advocated for a non-elected court in helping to attain them.

Whether the decline in the problem-solving capacity of governments in the federal system was real or serious enough to support the criticism which the Privy Council encountered involves a range of value judgments and empirical observations of a very complex nature. The purpose of this paper has been only to provide documentation for the minimum statement that a strong case can be made for the Judicial Committee, and to act as a reminder that the basic question was jurisprudential, a realm of discussion in which neither the Privy Council, its critics, nor its supporters proved particularly illuminating.

The abolition of appeals and an inadequate jurisprudence

It is valid, if somewhat perverse, to argue that the weakness and confusion of Canadian jurisprudence constituted one of the main justifications for ending appeals to the Privy Council. The attainment of judicial autonomy was a prerequisite for a first class Canadian jurisprudence.¹⁶⁸ Throughout most of the period of judicial subordination the weaknesses in Canadian legal education produced a lack of self-confidence and a reluctance to abolish appeals.¹⁶⁹ As long as the final court of appeal was an alien body the jurisprudence which did exist was entangled with the emotional contest of nationalism and imperialism, a mixture which deflected legal criticism into side issues. In these circumstances the victory of nationalism was a necessary preliminary to the development of an indigenous jurisprudence which has gathered momentum in the past two decades.

It is also likely that the quality of judicial performance by Canadian courts was hampered by subordination to the Privy Council. The existence of the Privy Coun-

Supreme Court, 255–6, n. 5, notes the difficulty in arguing that the Supreme Court was more pro-dominion than the Privy Council. On the other hand, supporters of the Supreme Court, who note that it and the Judicial Committee usually agreed, have been cautioned not to ignore the fact that the Supreme Court had to take the previous decisions of the committee as the major premise in its thinking. MacDonald, "The Canadian Constitution Seventy Years After," 426. Scott argues that an independent Supreme Court would have produced decisions much more favourable to the federal government. *Canada Today*, 77; "Development of Canadian Federalism," 246.

¹⁶⁸A point strongly made by W. E. Raney sixty years ago. "Justice, Precedent and Ultimate Conjecture," 461.

¹⁶⁹Innis, "Great Britain, the United States and Canada," 404. Sir Allen Aylesworth told the Ontario Bar Association that "It is ... no disparagement to Canadian lawyers or to Canadian judges to say that the men, or some of the men at any rate, who constitute the Judicial Bench in England, and some of the men who sit at the Council Board as members of the Judicial Committee are better read lawyers, are stronger lawyers than any men we have, either at the Bar or upon the Bench, in Canada, and in these circumstances it is a matter of actual daily practical advantage to the people of this country that they should have still the right to take to that Court their complicated cases as between citizen and citizen for final adjudication." Address of Sir Allen Aylesworth," 143.

Bram Thompson stated: "The reader of the Law Reports is constantly confronted with cases which the Privy Council decisions prove to have been decided in our local Courts upon the grossest misconception of even elementary principles. Indeed, some of our Courts seem to delight in rendering judgments which are, to say the least of them, utterly perverse." "Editorial," *CLT*, 41 (1921), 164. Russell notes that the early weakness of the Supreme Court inhibited moves to abolish appeals. *Supreme Court*, 24.

cil undermined the credibility of the Supreme Court and inhibited the development of its status and prestige. The Supreme Court could be overruled by a superior, external court. In many cases it was bypassed as litigants appealed directly from a provincial court to the Privy Council. Finally, the doctrine of *stare decisis* bound the Supreme Court to the decisions of its superior, the Privy Council. The subject status of the Supreme Court and other Canadian courts was further exacerbated by the absence of dissents which reduced the potential for flexibility of lower courts in subsequent cases. In spite of the quality of its performance the dominant position of the Privy Council in the Canadian judicial hierarchy was an anomaly, incompatible with the evolving independence of Canada in other spheres, and fraught with too many damaging consequences for its elimination to be regretted.

The inadequate jurisprudence, the legacy of nearly a century of judicial subordination, which accompanied the attainment of judicial autonomy in 1949, has harmfully affected the Supreme Court in the last two decades. The Supreme Court, the law schools, the legal profession, and the political élites have been unable to devise an acceptable role for the court in Canadian federalism. Shortly after the court attained autonomy the institutional fabric of the Canadian polity, the court included, began to experience serious questioning and challenges to its existence. The Diefenbaker Bill of Rights was succeeded by the Quiet Revolution with its confrontation between rival conceptions of federalism and coexistence. Additional uncertainty has been generated by the proposed Trudeau Charter which, if implemented, will drastically change the significance of the judiciary in our constitutional system. In the unlikely event that a significantly different BNA Act emerges from the present constitutional discussions the court will face the task of imparting meaning to a new constitutional document delineating a division of powers different from the existing division. To these factors, as indications of the shifting world of judicial review, can be added the possibility that the court may be reconstituted with a new appointment procedure, with a specific entrenched status, and perhaps even as a special court confined to constitutional questions.

It would be folly to suggest that the above problems would not exist if Canadian jurisprudence had been more highly developed. Their source largely lies beyond the confines of the legal system. On the other hand, the confused state of Canadian jurisprudence documented in this article adds an additional element of difficulty to their solution.