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CANADIAN FEDERALISM, THE PRIVY COUNCIL AND THE SUPREME COURT: REFLECTIONS ON THE DEBATE ABOUT CANADIAN FEDERALISM

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I. SCOPE OF THE PAPER

In preparation for our role in this conference, we revisited two articles about Canadian federalism that were published by Ken Lysyk in 1979, when he was Dean of the Faculty of Law at the University of British Columbia. The first article is entitled “Constitutional Reform and the Introductory Clause of Section 91”.¹ In that article, Lysyk argues that much of the controversy about the introductory clause of section 91 of the *Constitution Act, 1867* (originally the *British North America Act*)² is “attributable to failure to pay due regard to the text of the [Act] itself” and “to a mis-reading of a number of important decisions of the Judicial Committee of the Privy Council.”³ The second article is entitled “Reshaping Canadian Federalism”.⁴ In that article, Lysyk shares his thoughts on what degree of centralization is appropriate in the Canadian context, and suggests, for a number of reasons, that a highly centralized federal system is inappropriate for Canada.

These articles have encouraged us to reflect on the academic debate about Canadian federalism. As we reviewed the literature, we discovered that the debate has been dominated, explicitly or implicitly, by disagreements over the following four issues: First, did the framers of the *Constitution Act, 1867* intend, for Canada, a highly centralized federal system or a loose confederacy

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¹ K. Lysyk, “Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority” (1979) 57 Can. Bar Rev. 531 [Lysyk, “Constitutional Reform”].

² (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (The name was changed by the *Constitution Act, 1982*, Statutes of the U.K., 1982, c. 11) [Act].

³ Lysyk, “Constitutional Reform”, *supra* note 1 at 534.

⁴ K. M. Lysyk, “Reshaping Canadian Federalism” (1979) 13 U.B.C. L. Rev. 1 [Lysyk, “Reshaping Canadian Federalism”].

of largely independent provinces? Second, as drafted, does the *Constitution Act, 1867*⁵ indicate that it was intended to form the foundation for a highly centralized or highly decentralized federal system? Third, was the Privy Council biased in favour of the provinces in Canadian federalism cases, and, if so, has Canada been served well or poorly by that provincial bias? And, finally, has the Supreme Court of Canada expanded the scope of federal powers and departed from the main lines of interpretation laid down by the Privy Council, and, if so, has Canada been served well or poorly by those expansions or departures? These four issues are the topic of this paper.

II. DID THE FRAMERS OF THE CONSTITUTION ACT, 1867 INTEND, FOR CANADA, A HIGHLY CENTRALIZED FEDERAL SYSTEM OR A LOOSE CONFEDERACY OF LARGELY INDEPENDENT PROVINCES?

Academic writing about the original intentions of the framers of the *Constitution Act, 1867* can be divided, roughly, into two groups.⁶ The first group, largely dominated by English-speaking academics from central Canada, suggests that the framers of the *Act* intended Canada to be a highly centralized federal system.⁷ The second group, largely dominated by French-speaking academics from Quebec, suggests that the framers of the *Constitution Act, 1867* intended Canada to be a loose confederacy of largely independent provinces.⁸

⁵ *Supra* note 2.

⁶ Disagreements over the intentions of the framers are not confined to academic sources. In *Severn v. Ontario* ((1878), 2 S.C.R. 70, 1 Cart. 414), one of the earliest federalism cases decided by the newly formed Supreme Court of Canada, the Supreme Court divided over the original intent of the framers of the *Constitution Act, 1867*. Writing for the majority, Sir William Buell Richards, the first Chief Justice of Canada, suggested in support of his majority judgment that the framers intended to create a strong central government. Justice Strong, dissenting, reached the opposite conclusion, and suggested, in support of his minority judgment, that “everything indicates that co-equal and co-ordinate legislative powers in every particular were conferred by the *Act* on the Provinces” (at 110). This debate continued in other early Supreme Court federalism cases as well: see Ian Binnie, “Constitutional Interpretation and Original Intent” (2004) 23 Sup. Ct. L. Rev. (2d) 345 at 353-56 [Binnie, “Constitutional Interpretation”].

⁷ See e.g. Bora Laskin, “Peace, Order and Good Government Re-Examined” (1947) 25 Can. Bar Rev. 1054; Frank R. Scott, “Centralization and Decentralization in Canadian Federalism” (1951) 29 Can. Bar Rev. 1095; Canada, O’Connor Report: Senate of Canada, Parliamentary Counsel, *Report Relating to the British North America Act, 1867* (Canada: 1939; reprinted, 1961); and, most recently, John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002).

⁸ See e.g. Louis-Phillipe Pigeon, “The Meaning of Provincial Autonomy” (1951) 29 Can. Bar Rev. 1126; Jean Beetz “Les attitudes changeantes du Québec à l’endroit de la Constitution de 1867” in P.A. Crépeau & C.B. Macpherson, eds., *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965) 113; Gouvernement du Québec, (Rapport

There are a number of explanations for these differences in opinion. The first is that much will hinge, as Mr. Justice Ian Binnie recently noted, on whom we regard as the framers of the *Act*.⁹ If, for example, only Sir John A. Macdonald and the other English-Canadian federalists are regarded as the framers, the conclusion that will inevitably follow is that the framers intended Canada to be highly centralized.¹⁰ On the other hand, if only the provincial politicians from Quebec and the Maritimes are regarded as the framers, the conclusion that will inevitably follow is that the framers intended Canada to be highly decentralized.

The second explanation is that the historical record is weak, making it difficult to determine, definitively, the intentions of any of the framers. There are no verbatim records of the discussions at the confederation conferences held at Charlottetown (1864), Quebec City (1864), and London, England (1866). Further, of the three uniting provinces (the united province of Canada, Nova Scotia and New Brunswick), the legislative assemblies of two of those provinces (Nova Scotia and New Brunswick) did not hold confederation debates. The Parliament of the United Kingdom debated the bill that was finally drafted in London, and that debate is recorded in Hansard. The result is that we have an incomplete historical record, consisting of only: the text of the 72 Quebec City resolutions; the text of the 69 London resolutions; the confederation debates in the legislative assembly of the united province of Canada (1865); and the confederation debates in the Parliament of the United Kingdom (1867).¹¹

Not surprisingly, this led Alan Cairns to question whether “... the pursuit of the real meaning of the [*Constitution Act, 1867*] is ... a meaningless game, incapable of a decisive outcome.”¹² Although there is some force to that claim, in our view, there can be little doubt that the framers of the *Act* were divided,

Tremblay) *Le Rapport de la Commission Royale d'enquête sur les problèmes constitutionnels*, quatre volumes (Québec, 1956).

⁹ Binnie, “Constitutional Interpretation”, *supra* note 6 at 375; see *Act, supra* note 2.

¹⁰ This example is drawn from the judgment of Gwynne J. in the *Prohibition Reference (In re Prohibitory Liquor Laws)* (1895), 24 S.C.R. 170 at 206, 5 Cart. 303; rev'd [1896] A.C. 348, 11 C.R.A.C. 222 (P.C.) [*Prohibition Reference*], where Sir John A. MacDonal was cited to support the argument that the framers wanted to avoid the decentralizing force of the states' rights doctrine in the United States.

¹¹ The most comprehensive collection of confederation documents is in Gerald P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland, 1969). Janet Ajzenstat, ed., *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003) is an edited collection of the debates in the colonial legislative assemblies.

¹² Alan C. Cairns, “The Judicial Committee and its Critics” (1971) 4 *Canadian Journal of Political Science* 301 at 334-35.

some intending Canada to be highly centralized, and others intending Canada to be a loose confederacy of largely independent provinces.¹³

The view that the framers were sharply divided on the appropriate degree of centralization or decentralization is more realistic than the competing theories that attribute an exclusively centralist or decentralist impulse to the framers. It accords with the historical context in which the *Constitution Act, 1867*¹⁴ was drafted—the framers of the *Act* were required to accommodate two conflicting desiderata. On the one hand, English-Canadian politicians from central Canada, admiring the highly centralized form of government in the United Kingdom, and knowing that the principle of representation by population would give them control over the new Parliament of Canada, preferred a strong central government. This centralizing impulse was reinforced by the aftermath of the American Civil War, one cause of which was widely held to be the granting of excessive powers to the states by the United States Constitution. On the other hand, French-Canadian politicians were acutely aware that they would be a minority in the new Parliament of Canada, but also that they would control the Legislature of the new province of Quebec. Thus, they insisted that the provincial Legislature be vested with enough power to safeguard the French language and culture, the civil law, and the Roman Catholic religion of Quebec. Similarly fearful for their local traditions and institutions, and protective of their independence, the politicians from New Brunswick, Nova Scotia and Prince Edward Island also insisted that their legislatures be vested with enough power to regulate the daily life of the people, as they had been doing before confederation.

Considered against this historical backdrop, it is hardly surprising that those favouring a centralist interpretation of the *Constitution Act, 1867* and those favouring a decentralist interpretation of the *Act* have been able to locate evidence to support their respective positions. G. P. de T. Glazebrook's suggestion that "... particular interpretations and points of view were rationalized by tailored versions of the constitution"¹⁵ seems apposite. But, like Lysyk, we believe that these exclusively centralist or decentralist interpretations of the framers' intentions fail to acknowledge that "... the

¹³ This view is shared by Peter Russell: see "Book Review of *The Judicial Committee and the British North America Act*", Book Review of *The Judicial Committee and the British North America Act* by G.P. Brown, (March 1968) XLIX: 1 *Canadian Historical Review*, 66-67; "Introduction" in Peter Russell, Rainer Knopff, & Ted Morton, eds., *Federalism and the Charter: Leading Constitutional Decisions*, 3d ed. (Ottawa: Carleton University Press, 1982); and "Comment on 'Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation'" (1986) 19 *Canadian Journal of Political Science* 531.

¹⁴ *Supra* note 2.

¹⁵ George P. de Twenebroeker Glazebrook, *A History of Canadian Political Thought* (Toronto: McClelland, 1966) at 264.

architects of our Constitution were far from unanimous in their stated objectives ... ”.¹⁶

III. AS DRAFTED, DOES THE CONSTITUTION ACT, 1867 INDICATE THAT IT WAS INTENDED TO FORM THE FOUNDATION FOR A HIGHLY CENTRALIZED OR HIGHLY DECENTRALIZED FEDERAL SYSTEM?

As drafted, the *Constitution Act, 1867*¹⁷ contains a number of features that indicate that it was intended to form the foundation for a highly centralized federal system. The first indication is that the *Act* subordinated the provinces to the federal government or the federal Parliament, in the following five respects: First, by section 90, the federal government was given the power to disallow (invalidate) provincial statutes. Second, by section 58, the federal government was given the power to appoint the Lieutenant Governor of each province (and, by section 92(1), the provinces were denied the power to alter that part of their constitutions). Third, by section 96, the federal government was given the power to appoint the judges of the superior, district and county courts of each province. Fourth, by section 93, the federal government was given the power to determine appeals from provincial decisions affecting minority education rights, and the federal Parliament was given the power to enforce a decision on appeal by the enactment of “remedial laws”. Fifth, by sections 91(29) and 92(10)(c), the federal Parliament was given the unilateral power to bring local works within exclusive federal legislative jurisdiction by declaring them to be “for the general advantage of Canada”.

The second indication that the *Constitution Act, 1867* was intended to form the foundation for a highly centralized federal system is that the distribution of powers in the *Act* is, in the following three respects, more centralized than the distribution of powers in the United States’ Constitution—the only useful¹⁸ federal precedent available to the framers in 1867. First, in Canada, the federal Parliament was given the power to regulate “trade and commerce” without qualification, while in the United States, Congress was given the more limited power to regulate “commerce with foreign nations and among the several

¹⁶ Lysyk, “Reshaping Canadian Federalism”, *supra* note 4 at 3.

¹⁷ *Supra* note 2.

¹⁸ Anthony H. Birch, *Federalism, Finance and Social Legislation* (London: Oxford, 1955) at xiv (The constitution of Switzerland was the only other federal constitution in existence in 1867, but the small geographic size, and different social and political environment of Switzerland made it a dubious precedent in comparison with the United States).

states and with the Indian tribes".¹⁹ Second, in Canada, the list of specified federal heads of power included several topics left to the states in the United States' Constitution, including banking (section 91(15)), marriage and divorce (section 91(26)), the criminal law (section 91(27)), and penitentiaries (section 91(28)). Third, in Canada, the provincial Legislatures were given only enumerated powers to make laws, leaving the residue of power with the federal Parliament,²⁰ while in the United States, residuary power had been left with the states.²¹

The final indication that the *Constitution Act, 1867*²² was intended to form the foundation for a highly centralized federal system is that the distribution of power was structured to make the federal government fiscally dominant. By section 91(3), the federal government was given the power to levy indirect as well as direct taxes while, by section 92(2), the provinces were given only the authority to levy direct taxes. In 1867, the inability to levy indirect taxes placed serious fiscal restraints on the provinces, because at that time the indirect taxes of the customs and excise accounted for 80 percent of the revenues of the uniting colonies. The framers anticipated the shortfall between provincial revenues and provincial responsibilities, and the *Act* provided for federal grants to the provinces.

For a litany of commentators, these features of the *Constitution Act, 1867* provide incontrovertible proof that the *Act* was intended to form the foundation for a highly centralized federal system.²³ There are, however, at least two major features of the *Act* that provide support for the opposite view, namely, that the *Act* was intended to form the foundation for a less centralized federal system.

The first such feature is the power, assigned to the provincial Legislatures by section 92(13), to make laws concerning "property and civil rights in the province." Prior to confederation, the phrase "property and civil rights" provided a compendious description of the entire body of private law that governs the relationship between subject and subject, including much of the

¹⁹ U. S. Const., art. 1, § 8(3) (Ironically, the qualified language of the U.S. "commerce clause" has been given almost unlimited scope by the courts, while the unqualified language of the Canadian "trade and commerce" power has been severely restricted by the courts).

²⁰ There is uncertainty about this point, for reasons that are discussed below.

²¹ The residual legislative authority is also, for example, assigned to the constituent units of the federation in the constitutions of Australia, Switzerland, and Germany.

²² *Supra* note 2.

²³ See *supra* note 7.

law relating to property, the family, contracts and torts.²⁴ For some, including Lysyk, assignment of legislative authority over that broad class of subjects to the provinces is indicative of the intention to draft a document that, at the very least, granted extensive legislative powers to the provinces.²⁵

To be sure, the historical definition of property and civil rights underwent some changes in its new context in section 92(13). The enumerated list of federal heads of legislative power in section 91 included a number of matters which would otherwise have come within property and civil rights in the province, for example, trade and commerce (section 91(2)), banking (section 91(15)), bills of exchange and promissory notes (section 91(18)), interest (section 19(19)), bankruptcy and insolvency (section 91(12)), patents of invention and discovery (section 91(22)), copyrights (section 91(23)), and marriage and divorce (section 91(28)). By vesting these matters in the federal Parliament exclusively, the *Act*²⁶ withdrew them from the rubric of property and civil rights. In addition, the opening language of section 91 (described below) presumably contemplated that certain matters that would have come within property and civil rights could attain such a national dimension as to come within federal competence.²⁷ But, even after making all required subtractions, the phrase “property and civil rights in the province” was still apt to cover most of the legal relationships between persons, leaving much of the law relating to property, the family, contracts and torts.

The second feature of the *Constitution Act, 1867* that arguably points in the direction of a less centralized federal system is the allocation of the residuary legislative power. The drafting of the residuary power is a triumph of ambiguity and uncertainty, and has remained a central concern of the courts since confederation.

According to the conventional reading of the *Act*, the residuary power was conferred *exclusively* on the federal Parliament by the introductory words of section 91. These words confer on Parliament the power “to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this *Act* assigned exclusively to the Legislatures of the provinces.” According to this reading, of course, the assignment of the residuary power indicates a centralized model of federalism.

²⁴ *Quebec Act, 1774* (U.K.), 14 George III, c. 83, s. 8 (restoring French civil law to conquered colony of Quebec); *Property and Civil Rights Act, 1792*, R.S.U.C. 1792, s. 1 (restoring English law to the province of Upper Canada (now Ontario)).

²⁵ Lysyk, “Constitutional Reform”, *supra* note 1 at 543-45.

²⁶ *Supra* note 2.

²⁷ The zoning of the national capital region has since been held to be an example of this kind of federal subject matter: *Munro v. National Capital Commission*, [1966] S.C.R. 663, 57 D.L.R. (2d) 753 [*Munro*].

However, according to another (less conventional) reading of the *Constitution Act, 1867*,²⁸ it contains, not one residuary power, but two complementary grants of power that distribute the residue between the federal Parliament *and* the provincial Legislatures. Albert S. Abel advanced one version of this shared residuary power: In Abel's view, the federal residuary power to make laws for the peace, order, and good government of Canada is complemented by a provincial residuary power in section 92(16), which confers on the provincial Legislatures the power to make laws concerning "generally all matters of a merely local or private nature".²⁹ He argues that legislative competence to deal with a particular issue not covered by the enumerated heads of power in sections 91 and 92 would depend on whether the unassigned matter of legislation is in relation to "the peace, order, and good government of Canada" (federal) or "matters of a merely local or private nature" (provincial).

Lysyk advanced a slightly different version of the shared interpretation of the residuary power.³⁰ Lysyk agreed with Abel that the provincial Legislatures are granted a residuary power, by section 92(16), to make laws concerning "generally all matters of a merely local or private nature", and that the federal Parliament is granted a complementary residuary power by the introductory words of section 91. Unlike Abel, Lysyk insisted that the federal Parliament's residuary power was contained, not in the words conferring the power "to make laws for the peace, order and good government of Canada", but in the words conferring the power "... to make laws ... in relation to all matters not coming within the class of subjects ... assigned exclusively to the Legislatures of the Provinces." Thus, for Lysyk, legislative competence to deal with a particular issue not covered by the enumerated heads of power would depend entirely on whether the unassigned matter of legislation is in relation to

²⁸ *Supra* note 2.

²⁹ Albert S. Abel, "What Peace, Order and Good Government?" (1968) 7 U.W.O. L. Rev. 1. See also *Prohibition Reference*, *supra* note 10, Lord Watson.

³⁰ Lysyk, "Constitutional Reform", *supra* note 1 at 535-43 (In support of this claim that the *Constitution Act, 1867* contains two complementary residuary powers, Lysyk traces the evolution of the residuary power back to the Resolutions adopted at the Quebec City Conference (1864) and the London Conference (1866). In both Resolutions, the residuary power conferred on the provincial Legislatures (namely, the power to make laws concerning "matters of a private of local nature") and the residuary power conferred on the federal Parliament (namely, the power to make laws concerning "matters of a general character") were located at the end of the enumerated heads of power. The *Constitution Act, 1867* departed from this strictly parallel structure, by placing the residuary power conferred on the federal Parliament in the introductory words of section 91. Although Lysyk concedes this drafting change obscured the original intent (shared residuary powers), he still insists that the original Quebec City and London Resolutions make it clear that the drafters intended to provide for complementary federal and provincial residuary powers.).

“matters of a merely local or private nature”. Accordingly, if the matter is “of a merely local or private nature”, it is within the power of the provincial Legislatures; if, however, the matter is not “of a merely local or private nature,” the matter is within the power of the federal Parliament.

In our view, Lysyk’s reading is the more plausible of the two. First, in his article, Abel insisted that the phrase “peace, order and good government of Canada” should not be treated as “a jingle”,³¹ but should be dissected so that a court asks of a statute: “does this involve the peace of Canada? the order of Canada? the good government of Canada?”³² However, as Abel himself conceded, his suggestion finds no support in the case law.

In addition, Abel’s suggestion finds no support in the text of the *Constitution Act, 1867*³³ itself. As Lysyk notes, the introductory clause of section 91 “... confers authority to legislate *for* the peace, order and good government of Canada, but only *in relation to* matters not coming within provincial classes of subjects.”³⁴ This is significant, he argues, because the words “in relation to” are power-conferring words that are consistently used to identify “... the matters or subjects or classes of subjects which are being allotted.”³⁵

Finally, and most importantly, Abel’s suggestion seems to be historically inaccurate. The phrase “peace, order and good government”, or some variant thereof, is found in nearly all of the British-derived constitutions, and has consistently been interpreted as “a compendious means of delegating full powers of legislation”, subject to any limitations which may be derived from other language of the constitution.³⁶ It is, we think, consistent with this understanding that the relevant question, when called upon to determine legislative competence to deal with an issue not covered by the enumerated heads of power, is whether the matter is “of a merely local or private nature”, failing which it falls within federal jurisdiction (Lysyk), not whether the matter involves the peace of Canada, the order of Canada, or the good government of Canada (Abel).³⁷

³¹ Abel, *supra* note 29 at 4.

³² *Ibid.* at 6.

³³ *Supra* note 2.

³⁴ Lysyk, “Constitutional Reform”, *supra* note 1 at 541.

³⁵ *Ibid.* at 541-42.

³⁶ Ivor Jennings, *Constitutional Laws of the Commonwealth*, vol. 1 (Oxford: Clarendon Press, 1957) at 49; *Ibralebbe v. The Queen*, [1964] A.C. 900 at 923 (P.C.).

³⁷ Interestingly, this is, by inference, basically the same test used to determine whether a matter falls within the “national concern” branch of the peace, order and good government power. This test, which was formulated by Viscount Simon in the *Canada Temperance* case A.-

Of course, a good deal of water has flowed under the bridge since 1867, and these debates do not have much present practical significance. In practice, the provincial “residuary power” in section 92(16) has turned out to be relatively unimportant, because the wide scope of the “property and civil rights” power in section 92(13) has left little in the way of a residue of “merely local or private” matters. Indeed, at the hands of the Privy Council, the “property and civil rights” power became a kind of residuary power in its own right. Furthermore, a cluster of doctrine has now become embedded on the federal residuary power, authorizing laws to fill gaps, laws to deal with national emergencies, and laws to deal with matters of “national concern”. But these outcomes are not inconsistent with the basic scheme elaborated by Lysyk—and of course he was well aware of the post-1867 developments. For our purposes, the important point is this: there is a plausible argument that the *Constitution Act, 1867*³⁸ includes not one, but two complementary residuary powers. This argument, in turn, strengthens the view that the *Act*, as drafted, was intended to form the foundation for a federal system that is less centralized than many English-Canadian commentators have supposed.

Our conclusion is that the *Constitution Act, 1867* includes conflicting signals as to the degree of centralization or decentralization stipulated by the federal scheme that the *Act* established. In our view, the framers deliberately tolerated these conflicting signals in the *Act* because they needed to accommodate conflicting goals—the desire for a strong central government (English-Canada) and the desire to protect local languages, cultures, and institutions (French-Canada and the Maritimes). The text is ambiguous, probably intentionally so.

The framers of the Constitution needed these conflicting signals in order to ensure approval of their handiwork by the British North American colonists, who were divided by language, religion, tradition, and location. In fact, the ambiguities helped the scheme to win immediate approval in both Canada West (Ontario) and Canada East (Quebec) and in two of the Maritime provinces (Nova Scotia and New Brunswick). Moreover, over the years the *Act*, without significant amendment, has proved capable of accommodating—in a federal union of ten provinces and three territories—most of the northern part of North America from the Atlantic to the Pacific Ocean. This expansion was one of the original goals of the *Act*, which made provision for other colonies to adhere to the scheme (and for territories to be created into

G. Ont. v. Canada Temperance Foundation, [1946] A.C. 193, [1946] 2 D.L.R. 1 (P.C.) [*Canada Temperance* cited to A.C.], asks at 205-06 whether the matter of the legislation “goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole” [emphasis added]. See also Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1997) at 17.3.

³⁸ *Supra* note 2.

provinces), and for railways to run across the continent. The difficulties of interpretation and finding a degree of centralization acceptable to all were left to be settled later, either by political practice (as in the case of the federal-provincial financial arrangements) or by the decisions of the courts (which at the time meant the Privy Council, which remained the final court of appeal for Canada until 1949).

IV. WAS THE PRIVY COUNCIL BIASED IN FAVOUR OF THE PROVINCES IN CANADIAN FEDERALISM CASES, AND IF SO, HAS CANADA BEEN SERVED WELL OR SERVED POORLY BY THAT PROVINCIAL BIAS?

There is no doubt that the Privy Council favoured the provinces in federalism cases. In the disputes between the federal and provincial governments that reached the courts, the Privy Council consistently established doctrine that favoured the provinces. In two early decisions, the Council established that the federal and provincial governments were not in a relationship of superior to inferior, which, as noted above, was implied by some of the provisions of the *Constitution Act, 1867*.³⁹ Rather, their lordships held, the provinces were of coordinate status with the federal government.⁴⁰

Further favouring the provinces, the Privy Council gave a very narrow interpretation to the federal power to make laws for “the peace, order, and good government of Canada” (the “p.o.g.g.” power).⁴¹ The p.o.g.g. power was used by the Privy Council to sustain two types of federal legislation: legislation that filled a particular gap in the distribution of powers (the “gap branch”); and temporary legislation that responded to an emergency (the “emergency branch”).⁴² To restrict a federal residuary power to these two branches was in itself an extraordinary narrowing of the power, but the two branches were also narrowed by the Privy Council. With respect to the “gap

³⁹ *Supra* note 2.

⁴⁰ *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.) (provincial legislative powers as plenary and ample as imperial Parliament); *Liquidators of the Maritime Bank v. Receiver General of N.B.*, [1892] A.C. 437, 10 C.R.A.C. 180 (P.C.) (provincial executive powers match legislative powers).

⁴¹ See also Hogg, *Constitutional Law of Canada*, *supra* note 37 at ch. 17.

⁴² See further Hogg, *ibid.* (From 1911 to 1928, when Lord Haldane sat on the Privy Council, the Council consistently applied the view that only an emergency would serve to enable the federal Parliament to exercise its p.o.g.g. power. However, prior to 1911, the Privy Council did sustain one piece of federal legislation on the basis that the matter fell within the gap branch of the p.o.g.g. power. In addition, prior to 1911 and after 1928, the Privy Council suggested, in obiter, that matters of concern to the nation as a whole might also trigger the application of the p.o.g.g. power).

branch”, the Privy Council found only one gap in the distribution of powers—the incorporation of companies with other than provincial objects.⁴³ In contrast, new kinds of economic and social regulation were, typically, regarded as laws in relation to property and civil rights in the province and were assigned to the provinces under section 92(13).

With respect to the “emergency branch”, absent evidence of “a sudden danger to social order”⁴⁴ or “extraordinary peril to the national life of Canada”,⁴⁵ the Privy Council was slow to recognize the existence of an emergency. The First and Second World Wars did count as emergencies, enabling extensive federal wartime regulation that would have been outside federal authority in peacetime.⁴⁶ But the Privy Council held that the Great Depression of 1929 did not count as an emergency, and as a result, their lordships struck down the federal Parliament’s “Canadian New Deal” legislation (unemployment insurance, competition laws, minimum wages, natural products marketing scheme).⁴⁷

The Privy Council also gave a very narrow interpretation to the federal power to make laws relating to “trade and commerce” (section 91(2)), and a

⁴³ *Citizens' Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.) [*Citizens' Insurance*]. In the *Radio Reference* case (*Re Regulation and Control of Radio Communication in Can.*, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.)), the Privy Council held at 312 that the power to perform Canadian (as opposed to imperial) treaties also came within the “gap branch” of the p.o.g.g. power, because it was “not mentioned explicitly in either s. 91 or s. 92.” Even though this appeared to be a faithful reading of the *Constitution Act, 1867*, it was later emphatically rejected by a differently-constituted Privy Council, speaking through Lord Atkin, in the *Labour Conventions* case (*A.-G. Can. v. A.-G. Ont (Labour Conventions)*, [1937] A.C. 326, [1937] 1 D.L.R. 673 (P.C.) [*Labour Conventions* case]). Thus, incorporation of companies remains the only gap that the Privy Council ever found in the distribution of powers.

⁴⁴ *Fort Frances Pulp & Paper Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 at 703-04, [1923] 3 D.L.R. 629 (P.C.), Lord Haldane [*Fort Frances* cited to A.C.].

⁴⁵ *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 at 412, [1925] 2 D.L.R. 5 (P.C.), Lord Haldane [*Toronto Electric* cited to A.C.].

⁴⁶ See e.g., *Fort Frances*, *supra* note 44 (price of newsprint controlled by federal law during First World War); and *Coop Committee on Japanese Canadians v. A.G. Can.*, [1947] A.C. 87, [1947] 1 D.L.R. 577 (P.C.) (deportation of Japanese Canadians during Second World War).

⁴⁷ *Re Unemployment Insurance Reference*, [1937] A.C. 355, [1937] 1 D.L.R. 684 (P.C.) (striking down federal unemployment insurance scheme). The other “new deal cases” in the Privy Council are: the *Labour Conventions Case*, *supra* note 43; *A.-G. B.C. v. A.-G. Can. (Price Spreads)*, [1937] A.C. 368, [1937] 1 D.L.R. 688 (P.C.) [*Price Spreads*]; *A.-G. B.C. v. A.-G. Can. (Natural Products Marketing)*, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.) [*Natural Products Marketing*]; *A.-G. B.C. v. A.-G. Can. (Farmers' Creditors Arrangement)*, [1937] A.C. 391, [1937] 1 D.L.R. 695 (P.C.) [*Farmers' Creditors Arrangement*]; *A.-G. Ont. v. A.-G. Can. (Canada Standard Trade Mark)*, [1937] A.C. 405, [1937] 1 D.L.R. 702 (P.C.) [*Canada Standard Trade Mark*].

correspondingly expansive interpretation to the provincial power to make laws relating to “property and civil rights in the province” (section 92(13)).⁴⁸ In particular, the Privy Council read down the federal trade and commerce power, holding that it did not include “the power to regulate by legislation the contracts of a particular business or trade”⁴⁹ or the “particular trades in which Canadians would [otherwise] be free to engage in the Provinces”.⁵⁰ A pattern was thus set whereby the regulation of business⁵¹ and labour relations⁵² (with the exception of certain industries specifically allocated to Parliament)⁵³ fell within the provincial property and civil rights power, and the federal trade and commerce power was generally restricted to international and interprovincial trade and commerce. The Privy Council did say that the federal trade and commerce power could extend to “general regulation of trade affecting the whole dominion”,⁵⁴ but the only example of this potentially expansive category was a law establishing a national trademark.⁵⁵

There now seems to be little doubt that these developments stemmed, in part, from a pro-provincial bias.⁵⁶ Lord Watson and Lord Haldane, who dominated Canadian appeals to the Privy Council from 1880 to 1899 (Watson) and 1911 to 1928 (Haldane), shared a preconceived notion about the proper form of a federal system, a notion that placed much emphasis on the protection and enhancement of the position of the provinces.⁵⁷ This idea, as much as the

⁴⁸ Hogg, *Constitutional Law of Canada*, *supra* note 37 at ch. 20 and 21.

⁴⁹ *Citizens' Insurance*, *supra* note 43 at 113.

⁵⁰ *Reference Re Board of Commerce Act (Canada), 1919 & Combines and Fair Prices Act*, [1922] 1 A.C. 191 at 198, [1922] 1 W.W.R. 20 (P.C.).

⁵¹ *Citizens' Insurance*, *supra* note 43 (upholding provincial regulation of insurance industry).

⁵² *Toronto Electric Commissioners*, *supra* note 45 (striking down federal regulation of labour relations).

⁵³ The important exclusions from provincial power were ‘navigation and shipping’ (section 91(10)), ‘banking’ (section 91(15)), and ‘interprovincial transportation and communication’ (section 91(29), read with section 92(10(a)).

⁵⁴ *Citizens' Insurance*, *supra* note 43 at 113.

⁵⁵ *Canada Standard Trade Mark*, *supra* note 47.

⁵⁶ For discussions of the provincial bias of the Privy Council, see Cairns, *supra* note 12 at 312, n. 50.

⁵⁷ See, for example, Lord Haldane, “The Work for the Empire of the Judicial Committee of the Privy Council” (1923) 1 Cambridge L.J. 143 at 150 (the following passage was drawn from a speech that Lord Haldane delivered to the Cambridge University Law Society in 1923):

At one time, after the [*Constitution Act, 1867*] was passed, the conception took hold of the Canadian Courts that what was intended was to make the

(admittedly unclear) constitutional text, seems to have been the driving force behind decisions, discussed above, that elevated the provinces to coordinate status with the federal government, led to narrow interpretations of the principal federal powers, and that gave a wide interpretation to the principal provincial power over property and civil rights.

The decisions of Lord Watson and Lord Haldane (in particular) and the Privy Council (in general)—the ‘wicked stepfathers of confederation’, as they were wittily described—were much criticized in English Canada⁵⁸ (although not in French Canada)⁵⁹ for their provincial bias. In retrospect, we believe, like Lysyk⁶⁰ and several others,⁶¹ that these criticisms were unduly harsh, and that Canada was, on the whole, not badly served by the Privy Council. We have reached this conclusion for a number of reasons.

First, the text of the *Constitution Act, 1867*⁶² is not as clear as the critics claimed. As we noted above, the framers attempted to accommodate the conflicting goals of the English-Canadian politicians of Upper Canada (Canada West) on the one hand, and the French-Canadian and Maritime politicians on the other hand by incorporating features (centralizing features for the former, decentralizing features for the latter) that were attractive to both

Dominion the centre of the government in Canada, so that its statutes and position should be superior to the statutes and position of the Provincial Legislatures. That went so far that there arose a great fight; and 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 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.

See also *A.G. Australia v. Colonial Sugar Refining Co.*, [1914] A.C. 237 at 252 (P.C.) (Lord Haldane expounds on the nature of federalism in general and in Canada in particular).

⁵⁸ See the sources identified in *supra* note 7.

⁵⁹ See the sources identified in *supra* note 8.

⁶⁰ See Lysyk, “Reshaping Canadian Federalism”, *supra* note 4 at 5 (Lysyk wrote as follows: “I believe it must be acknowledged that, on the whole, the Privy Council did a creditable job of interpreting our Constitution in a way which preserved a balance in the Canadian federation.”).

⁶¹ See, in particular, Cairns, *supra* note 12 at 301. See also G.P. Browne, *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press, 1967); W.R. Lederman, “Unity and Diversity in Canadian Federalism”, (1975) 53 *Can. Bar Rev.* 597; Frederick Vaughan, “Critics of the Judicial Committee of the Privy Council”, (1986) 19 *Canadian Journal of Political Science* 495. But see Saywell, *supra* note 7, who takes an unrepentantly critical approach, and emphasizes their formalism, their ignorance of Canada, and their failure to understand the scheme that was established in 1867.

⁶² *Supra* note 2.

groups. And so, while the Privy Council did favour the provinces—for reasons that may have had very little to do with the text of the *Act*⁶³ itself—the text did not point uniformly in the direction of centralization.

Second, it is at least worth mentioning that the critics of the Privy Council assumed that considerations of economic and social policy all called for a highly centralized federation. They were influenced by the Great Depression of 1929 and the Second World War of 1939-45, both of which certainly required a powerful central government. Sixty years after these protracted but extraordinary crises, we can, we think, acknowledge that considerations of economic and social policy do not all point in one direction. There are virtues to decentralization as well. One virtue is the idea of the social laboratory. As Brandeis J. famously commented, it is a happy incident of a federal system that the states (or provinces) can act as a “social laboratory” in which new kinds of legislative programs can be “tested”.⁶⁴ If a new program is not successful, the nation as a whole has not been placed at risk; but, if the program does work out, it may be copied by the other provinces or states, and perhaps (if the Constitution permits) by the federal government. We have seen this benign process at work in Canada, as provinces experimented with social credit (which started in Alberta in 1935, and never took hold), Medicare (which started in Saskatchewan in 1961 and became a national program in 1968), family property regimes (which have now been adopted by all provinces), and no-fault automobile insurance (which now exists in several provinces). Lysyk certainly accepted the force of this point, emphasizing the value of experimentation and innovation at the provincial level, and worrying that worthwhile legislative initiatives may not be realized when the federal government controls the provinces too closely.⁶⁵

Another idea that has gained adherents, especially in Western Europe (where nations struggle to accommodate a European Community), is “subsidiarity”. Subsidiarity is the principle that decision-making should be kept as close to the individuals affected as possible.⁶⁶ In the Canadian context, this expresses a bias in favour of action at the provincial, rather than the federal level, because the provincial government is closer to the people and

⁶³ *Supra* note 2.

⁶⁴ *New State Ice Co. v. Liebmann* 285 U.S. 262 at 311, Brandeis J. (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)

⁶⁵ Lysyk, “Reshaping Canadian Federalism”, *supra* note 4 at 8.

⁶⁶ See Peter W. Hogg, “Subsidiarity and the Division of Powers in Canada” (1993) 3 N.J.C.L. 341; see also the other articles in the symposium on subsidiarity of which that article is one contribution: (1993) 3 N.J.C.L. 301-427.

more attuned to their circumstances and preferences. The word “subsidiarity” had not gained currency when Lysyk wrote his pieces on federalism, but he would have liked the idea. There are important governmental functions that are best performed at the central level (the regulation of competition and securities⁶⁷ are arguably two examples). But the principle of subsidiarity suggests that functions that can be performed at the provincial level should be handled at the provincial level—as close to the individuals affected as possible.

Third, there are, we believe, compelling practical reasons to prefer a decentralized federal system in the Canadian context. Critics of Canadian decentralization have often contrasted Canada (which is comparatively decentralized) with the United States and Australia (which are comparatively centralized).⁶⁸ We agree with Lysyk’s suggestion (made with respect to the United States) that “... a high degree of centralism might be suitable for a unilingual country which has seen itself as a ‘melting pot.’”⁶⁹ But, we doubt, like Lysyk, that a high degree of centralism is equally appropriate for Canada, “... a country with two official languages, two distinct legal systems, and a small multicultural population thinly distributed over a huge land mass.”⁷⁰

Finally, and most important of all, the decentralizing bias that is evident in the Privy Council’s decisions was, we think, consistent with other forces that were at play in Canada, forces that predetermined that Canada was going to be more decentralized than either the United States or Australia. The first such force is Quebec. In Canada, the majority of French Canadians live in Quebec, and their desire to protect their language and culture has taken the form of an insistence on provincial rights—a demand that Quebecers be masters in their own house. In contrast, in the United States and Australia, minority groups (for example, African Americans in the United States and the Aboriginal peoples of Australia) are dispersed across the country. Minority groups that are dispersed in this fashion are typically unsympathetic to the rights of states or provinces, and usually look to the institutions of the federal government for redress of their grievances, both in the form of legislation and judicial

⁶⁷ The case for federal power is argued by Consumer and Corporate Affairs Canada, *Proposals for a Securities Market Law for Canada*, vol. 3, by P. Anisman & Peter W. Hogg (Ottawa: Consumer and Corporate Affairs Canada, 1979) at 135.

⁶⁸ On Australian and Canadian federalism, see Christopher D. Gilbert, *Australian and Canadian Federalism* (Melbourne: Melbourne University Press, 1986). On United States and Canadian federalism, see Alexander Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963).

⁶⁹ Lysyk, “Reshaping Canadian Federalism”, *supra* note 4 at 5.

⁷⁰ *Ibid.*

decisions. Accordingly, they reinforce the economic and social forces that tend to favour the growth of central power.

The economic and social forces that in all modern economies are increasing the power of national governments in relation to regional governments are present in Canada as well, of course, but they meet continuous resistance from Quebec. And Quebec cannot be ignored. It has nearly 25 per cent of Canada's population (7.5 million of 32 million) and when it does not elect a separatist government it elects a government with strong 'nationalist' (meaning provincialist) ambitions.⁷¹ These governments, aided and abetted by the French-language media, keep the federal government highly sensitive to Quebec's concerns. In all federations, there is a high volume of rhetoric about states' rights (or similar such ideas), but in Canada these ideas are not just rhetoric. The threat of Quebec's secession gives the provinces more leverage in federal-provincial relations than is possessed by the states in the United States or Australia. And, of course, within Canada, Quebec's concerns are taken more seriously than the concerns of the other provinces, because the other provinces (notwithstanding occasional radical manifestations of "western alienation") are here to stay. Canadians outside of Quebec often complain that Quebec makes too many demands, but virtually all would regard the secession of Quebec as a tragedy. No one wants a large hole in the middle of the country, dividing the Maritimes from Ontario and the west. And, perhaps even more important, Canadian identity is associated with an image of the country as one that includes a unique, French-speaking province. For these reasons, no serious politician outside Quebec ever expresses indifference to (let alone support for) "breaking up the country".

The principal members of the Privy Council never visited Canada and some of the Privy Council's decisions include errors that show that their lordships were ill-informed about the country. Yet, the Privy Council somehow managed to perceive some part of the federal-provincial forces at work in Canada. And so, while it appears to make little sense, in a highly integrated economy, to regulate labour relations and business primarily at the provincial level, the reality is that in a country like Canada, efficiency is far from the only value that must be taken into account. In "Reshaping Canadian Federalism", Lysyk asked whether "... the jurisprudence passed on to us by the Privy Council, so roundly condemned as ignorant or perverse, may in fact have reflected an appreciation that an attempt to impose complete domination from

⁷¹ If there is an exception, it is the current Liberal government of Premier Charest, which was elected in 2003 following two terms of Parti Québécois government (which included a 1995 referendum on separation). The new government obviously believes there should be some respite from the divisive politics of the previous government, but it is safe to speculate that the new government will not behave much differently from its predecessors when issues arise that are seen as important to Quebec's autonomy.

the centre would have imposed strains on the Canadian federation which, quite simply, would have proved unacceptable".⁷² It may be a stretch to suggest that the law lords actually had such an appreciation, but we do believe that Pierre Trudeau was correct when he said, "... if the law lords had not leaned [in the direction of the provinces], Quebec separatism might not be a threat today: it might be an accomplished fact."⁷³

Although the existence of Quebec is enough to explain why Canada cannot be as highly centralized as the United States or Australia, there are other Canadian circumstances that have also contributed to this result.⁷⁴ For example, since 1867, social services and education, both areas of provincial jurisdiction, have increased enormously in significance, with the result that "... a great deal of 'the action', the real action, has turned out to be at the provincial level."⁷⁵ Since 1867, many of the centralizing features of the *Constitution Act, 1867*⁷⁶ (for example, the powers of reservation and disallowance) have fallen into disuse, "... not because their meaning was distorted by the courts, but because they were incompatible with developments in the country as a whole."⁷⁷

As well, the Canadian provinces, or small groups of them, correspond to different economic regions of the country, so that the provinces have become the natural advocates of regional interests—more so than in the United States and Australia. Moreover, provincial control of natural resources has given the resource-rich provinces important sources of wealth and power. In addition, new provinces have entered the union since 1867,⁷⁸ and those new provinces have fostered (some more than others) a strong provincial identity.

Finally, every federal policy initiative is automatically contested, in the political realm and, if necessary, in the courts, by provincial leaders not only in Quebec, but in the other provinces as well. This becomes a disincentive to federal initiatives, since any new federal programme leads to a fierce political battle with the provinces (on top of whatever other political opposition may exist). Recent examples are the (unsuccessful) provincial court challenges to

⁷² Lysyk, "Reshaping Canadian Federalism", *supra* note 4 at 5.

⁷³ Pierre E. Trudeau, *Federalism and the French Canadians* (Toronto: MacMillan, 1968) at 198.

⁷⁴ For a fuller account of these forces, see Cairns, *supra* note 12 at 319-27; Hogg, *Constitutional Law of Canada*, *supra* note 37 at 6.9.

⁷⁵ Lysyk, "Reshaping Canadian Federalism", *supra* note 4 at 6.

⁷⁶ *Supra* note 2.

⁷⁷ Cairns, *supra* note 12 at 322.

⁷⁸ Alberta (1905), British Columbia (1871), Manitoba (1870), and Saskatchewan (1905) in the west, and Prince Edward Island (1873) and Newfoundland (1949) in the east.

the Goods and Services Tax,⁷⁹ the *Canadian Environmental Protection Act*⁸⁰ and the *Firearms Act* (gun control).⁸¹ Not surprisingly, new federal programs have become few and far between. Even the regulation of the securities market, which is widely accepted as a necessary federal function, continues at the provincial level, despite periodic reports urging federal entry to the field. The reason, without doubt, is that the federal government does not want to pick another fight with the provinces.

For these reasons, we believe that Canada's federal system is bound to be less centralized than those of the United States and Australia. It follows that, although the Privy Council did favour the provinces, in the end, and perhaps more by accident than design, Canada was, on the whole, not badly served by the Privy Council.

V. HAS THE SUPREME COURT OF CANADA EXPANDED THE SCOPE OF CERTAIN FEDERAL POWERS AND DEPARTED FROM THE MAIN LINES OF INTERPRETATION LAID DOWN BY THE PRIVY COUNCIL, AND IF SO, HAS CANADA BEEN SERVED WELL OR SERVED POORLY BY THOSE EXPANSIONS OR DEPARTURES?

In 1949, appeals from Canada to the Privy Council came to an end, and the Supreme Court of Canada became the final court of appeal for the nation. Since assuming this responsibility, the Supreme Court has expanded the scope of the principal federal heads of power. In a series of decisions, the Court breathed new life into the national concern branch of the p.o.g.g. power by upholding federal jurisdiction over aviation,⁸² the national capital region,⁸³ and marine pollution.⁸⁴ In contrast, the Privy Council, while occasionally suggesting in dicta that matters of "national concern" might sustain federal legislation under the p.o.g.g. power,⁸⁵ had never explicitly upheld federal legislation on that basis. The Privy Council had restricted the p.o.g.g. power to

⁷⁹ *Re Goods and Services Tax*, [1992] 2 S.C.R. 445, 94 D.L.R. (4th) 51.

⁸⁰ R.S.C. 1999, c. 33; *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32 [*Hydro-Quebec* cited to S.C.R.].

⁸¹ R.S.C. 1995, c. 39; *Re Firearms Act*, [2000] 1 S.C.R. 783, 185 D.L.R. (4th) 577, 2000 SCC 31 [cited to S.C.R.].

⁸² *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292, [1952] 4 D.L.R. 609.

⁸³ *Munro*, *supra* note 27.

⁸⁴ *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161.

⁸⁵ A "national concern" definition of the p.o.g.g. power was first enunciated by Lord Watson in the *Local Prohibition* case, *supra* note 29, and later picked up by Viscount Simon in the *Canada Temperance* case (*supra* note 37).

federal legislation that filled gaps in the distribution of powers and that responded to emergencies. Gaps and emergencies were, however, very few and far between for their lordships, who did not regard the lack of a Canadian treaty power as a gap,⁸⁶ or the Great Depression of 1929 as an emergency.⁸⁷ The Supreme Court has not yet had an occasion to revisit the existence of a federal treaty power. However, in the *Anti-Inflation Reference*,⁸⁸ the Supreme Court expanded the scope of the emergency branch of the p.o.g.g. power, by accepting the (rather implausible) proposition that double-digit inflation was an emergency. On this basis, the Court upheld temporary wage and price controls enacted by Parliament.⁸⁹ In contrast, as we noted above, the Privy Council had struck down Parliament's "Canadian New Deal" legislation on the basis that the Great Depression was not an emergency.

In *General Motors v. City National Leasing*,⁹⁰ the Supreme Court breathed new life into the general branch of the federal trade and commerce power (section 91(2)) by upholding federal jurisdiction over competition (anti-trust) law. The Privy Council had consistently⁹¹ rejected the general branch of the federal trade and commerce power as a support for federal policies of economic regulation, including the federal regulation of combines, prices and profits.⁹²

The Supreme Court has also expanded the federal power over criminal law, upholding a Criminal Code provision that authorized an award of compensation to victims of crime (basically a civil remedy),⁹³ and a prohibition on tobacco advertising (while the harmful product itself remained lawful),⁹⁴ as well as upholding complicated administrative schemes to regulate

⁸⁶ See *supra* note 43.

⁸⁷ See *supra* note 47.

⁸⁸ *Re Anti-Inflation Act (Canada)*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [*Anti-Inflation Reference*].

⁸⁹ In addition, the Supreme Court was the first to apply the emergency branch of the p.o.g.g. power to a situation not associated with war.

⁹⁰ [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.

⁹¹ The one exception is the *Canada Standard Trade Mark Reference* *supra* note 47, in which the Privy Council upheld federal legislation which established a national mark called "Canada Standard" on the basis that it was a valid exercise of the general branch of the federal trade and commerce power.

⁹² *Re Board of Commerce Act*, [1922] 1 A.C. 191, 60 D.L.R. 513 (P.C.) [*Board of Commerce*].

⁹³ *R. v. Zelensky*, [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179.

⁹⁴ *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1. The *Tobacco Products Control Act*, R.S.C. 1988, c. 20 [*Tobacco Act*], was actually struck down for breach of

toxic substances⁹⁵ and firearm ownership and use.⁹⁶ In contrast, the Privy Council had consistently rejected the use of the criminal law power as a support for laws that did not fit the normal criminal format of a simple (self-applied) prohibition coupled with a penalty.⁹⁷

The Supreme Court has decided that it is not bound by decisions of the Privy Council, and it has explicitly refused to follow a Privy Council precedent in three constitutional cases.⁹⁸ The Court has also abandoned the Privy Council's practice of refusing to consider extrinsic interpretive aids (including legislative history) for the purpose of interpreting statutes, classifying statutes for constitutional purposes, and interpreting the Constitution of Canada. The Court now routinely refers to extrinsic interpretive aids, including the legislative history of the *Constitution Act, 1867*.⁹⁹ For example, the Court has referred to the Quebec resolutions¹⁰⁰ and the confederation debates,¹⁰¹ and, in one case, it referred to a speech in the United Kingdom Parliament.¹⁰²

the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11), but the majority of the Court held that the *Tobacco Act* came within the federal criminal-law power.

⁹⁵ *Hydro-Quebec*, *supra* note 80.

⁹⁶ *Re Firearms Act*, *supra* note 81.

⁹⁷ The *Board of Commerce* case, *supra* note 92; *Re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379, [1936] 3 D.L.R. 607; *A.G. Ont. v. Reciprocal Insurers*, [1924] A.C. 328, [1924] 1 D.L.R. 789.

⁹⁸ The first case is *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 at 1234, 1291, 84 D.L.R. (3d) 257 [*Re Agricultural Products Marketing Act* cited to S.C.R.]. This is a strong example since (as Laskin C.J. acknowledged at 1256) the Privy Council case, *Lower Mainland Dairy Products v. Crystal Dairy*, [1933] A.C. 168, [1933] 1 D.L.R. 82 (P.C.), had been followed by the Supreme Court of Canada in *Re Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. (2d) 257, and the marketing levies successfully challenged in *Re Agricultural Products Marketing Act* had been enacted by the federal Parliament in reliance on those two decisions. Neither judicial re-affirmation nor legislative reliance sufficed to save the Privy Council decision. The second case is *Re Bill 30 (Ont. Separate School Funding)*, [1987] 1 S.C.R. 1148 at 1190-1196, 40 D.L.R. (4th) 18 [*Re Bill 30* cited to S.C.R.] overruling *Tiny Roman Catholic Separate School Trustees v. The King*, [1928] A.C. 363, [1928] 3 D.L.R. 753 (P.C.). The third case is *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at para. 47, 177 D.L.R. (4th) 73 [*Wells* cited to S.C.R.], overruling *Reilly v. The King*, [1934] A.C. 176, 1 D.L.R. 434 (P.C.).

⁹⁹ *Supra* note 2.

¹⁰⁰ The most recent example is *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 at 494, 27 D.L.R. (4th) 321.

¹⁰¹ The most recent example is *A.G. Can. v. CN Transportation*, [1983] 2 S.C.R. 206 at 226, 3 D.L.R. (4th) 16.

¹⁰² *Di Iorio v. Warden of Montreal Jail*, [1978] 1 S.C.R. 152 at 200, 73 D.L.R. (3d) 491.

The decisions of the Supreme Court in federalism cases led Lysyk¹⁰³ to express a “concern” (he phrased it delicately) that the Court was unduly centralist in its orientation, tending to decide in favour of the federal government in important cases.¹⁰⁴ However, perhaps the better view is that the Court was really only supplying a corrective to the unduly narrow rulings of the Privy Council—rulings that could not have stood the test of time even if appeals had never been abolished. Certainly, we believe it to be obvious that the federal Parliament should play a significant role in aviation, the national capital region, the environment, and competition law, to list some of the leading decisions. (Perhaps one might argue more about tobacco advertising and gun control.) While these decisions did expand the federal heads of legislative power, they are far from revolutionary. Indeed, we take seriously the claim of the Supreme Court that it is concerned to preserve the balance of legislative powers. In fact, the main lines of authority established by the Privy Council, and especially the wide scope of provincial power over property and civil rights, have not been disturbed by the Supreme Court.

Perhaps the two most important federalism cases since 1949 are the *Patriation Reference*¹⁰⁵ and the *Secession Reference*.¹⁰⁶ In those cases, the Supreme Court actually granted new powers to the provinces. In the *Patriation Reference*, the Supreme Court held that there was a requirement of convention that a ‘substantial degree’ of provincial consent be obtained before a constitutional change was taken to the United Kingdom for enactment into law. In effect, this decision invented a new constitutional convention to regulate the amendment of the constitution in order to give a role to the provinces that was (before the *Constitution Act, 1982*¹⁰⁷) denied them by law. This surprising decision involved the Court accepting an argument advanced by only one of the parties to the Reference, namely, the Attorney General of

¹⁰³ Lysyk, “Reshaping Canadian Federalism”, *supra* note 4 at 15-21.

¹⁰⁴ See the studies of the decisions of the Supreme Court of Canada since 1949 by Paul Weiler, “The Supreme Court and Canadian Federalism”, (1973) 23 U. Toronto L.J. 307; Peter W. Hogg, “Is the Supreme Court of Canada Biased in Constitutional Cases?” (1979) 57 Can. Bar Rev. 721; Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell, 1987); Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990); and A. Wayne MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” (2001) 80 Can. Bar Rev. 241.

¹⁰⁵ *Reference Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (*sub nom. Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*) 125 D.L.R. (3d) 1 [*Patriation Reference*].

¹⁰⁶ *Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [*Secession Reference*].

¹⁰⁷ *Supra* note 2.

Saskatchewan. Who was the brilliant counsel for the Attorney General of Saskatchewan who single-handedly persuaded the Court? Why none other than Ken Lysyk!

Lysyk played no part in the *Secession Reference*;¹⁰⁸ he was a judge by then. But in that case, the Supreme Court held that, if a province voted to secede from Canada, the rest of Canada would come under a legal obligation to negotiate the terms of secession with that province. In effect, this decision invented a new constitutional duty to negotiate with a province that had voted to secede. The point, no doubt, was to soften the ruling that Quebec had no right to secede unilaterally.

For these reasons, we believe that, although the Supreme Court has expanded the main federal powers, this development was inevitable as a corrective to unsustainable Privy Council restrictions. The decisions of the Court have given needed powers to the federal Parliament, but they have not markedly altered the balance of power between Parliament and the Legislatures. The Court perceives the importance of this balance in its federalism decisions, and the main lines of Privy Council interpretation remain intact. We do not accept the argument that the federal government can count on winning important federalism cases, let alone the argument that the country is becoming too centralized as the result of the decisions of the Supreme Court.

VI. CONCLUSION

Since 1867, the debate about Canadian federalism has been dominated, explicitly or implicitly, by disagreements over four questions:

Did the framers of the *Constitution Act, 1867*¹⁰⁹ intend, for Canada, a highly centralized federal system or a loose confederacy of largely independent provinces? Our answer is that the English-Canadian framers from Upper Canada (Canada West) intended the new Canada to be highly centralized, and the French-Canadian framers from Lower Canada (Canada East), as well as the representatives from the Maritimes, intended Canada to be a loose confederacy of largely independent provinces.

As drafted, does the *Constitution Act, 1867* indicate that it was intended to form the foundation for a highly centralized or highly decentralized federal system? Our answer is that the *Act* includes a number of features that indicate an intention to create a highly centralized federal system and a number of features that indicate an intention to create a decentralized federal system. Whether it was unconscious or deliberate, the framers included conflicting and confusing signals in the *Act* in order to accommodate their differing goals.

¹⁰⁸ *Supra* note 106.

¹⁰⁹ *Supra* note 2.

Was the Privy Council biased in favour of the provinces in Canadian federalism cases, and, if so, has Canada been served well or served poorly by that provincial bias? Our answer is that the Privy Council was biased in favour of the provinces in federalism cases. We agree that the Privy Council went too far in restricting the powers of the central Parliament, but, on the whole, we say that the Privy Council's decisions served Canada reasonably well, because (notwithstanding the 1867 intentions of the Upper Canadians) a less centralized model is probably the right model for Canada.

Has the Supreme Court expanded the scope of certain federal powers and departed from the main lines of interpretation laid down by the Privy Council, and if so, has Canada been served well or served poorly by those expansions or departures? Our answer is that the Supreme Court has expanded the scope of the federal heads of power, and has also departed in other respects from the lines of authority laid down by the Privy Council. But these developments have not been dramatic, and can be seen as a reasonable corrective to the excesses of the Privy Council. The general balance of power between the centre and the provinces has not shifted markedly, and, where it has shifted, we say that Canada has generally been served well by the Supreme Court's decisions.

In sum, the framers of the *Constitution Act, 1867*¹¹⁰ deliberately drafted a document that included ambiguities and uncertainties that would need to be resolved later. The courts—the Privy Council (from 1867 to 1949) and the Supreme Court of Canada (from 1950 to present)—were left the unenviable task of resolving these ambiguities and uncertainties. In effect, much of the Constitution of Canada had to be designed by these final courts of appeal. This was no small task for a country with a huge land-mass, two official languages, two judicial systems, three founding peoples (English-Canadians, French-Canadians, and the Aboriginal peoples of Canada) and a multi-cultural citizenry. The large body of federalism case law leaves some things for every critic to complain about, but we say that, on the whole, Canada has not been badly served by *either* the Privy Council or the Supreme Court.

¹¹⁰ *Supra* note 2.