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THE JUDICIAL PROCESS AND CANADIAN LEGISLATIVE POWERS

W. P. M. KENNEDY†

In accepting the honour of writing an article for the WASHINGTON UNIVERSITY LAW QUARTERLY on some aspect of Canadian constitutional law, I must presume a good deal of knowledge on the part of my readers; otherwise, it would be hard to know where to begin, where to end, what to say, what to omit. For my immediate purposes it will be sufficient to remember that Canada is a federation of nine provinces created by the British North America Act, 1867,¹ carrying on its activities in public and private law under that Act and its amendments, under the common law (except in Quebec, where the civil law holds sway), and under the great landmarks of British constitutional law in so far as not modified or changed by validly enacted federal or provincial legislation. Legislative powers are divided between the federal and provincial legislatures in such a way as to exhaust the whole field, which is not fenced, as in the United States, with any constitutional limitations. The doctrine of legislative supremacy prevails. Granted the power, the manner of its exercise cannot be questioned by any appeals to a bill of rights or to such refinements of argument as flow for example from "the privileges and immunities" or "due process of law" clauses in the American Constitution. Canadian legislative powers are distributed under the creating Act of 1867. To the provincial legislatures are given certain exclusive enumerated powers under section 92; while, under section 91, the undefined residue belongs to the federal parliament. For the moment, I need say nothing in detail; but it is necessary, at this point, to view in a cursory manner the constitutional evolution of these legislative powers in order to appreciate the judicial process in relation to them—the aim and purpose of this survey. I have specially selected this subject for an American law journal, because federalism and

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1. 30 and 31 Vict. c. 3. This Act and its Amendments can be conveniently consulted in Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution* (1930) 617.

the judicial process in relation to it are matters of perennial interest, and their workings in the Canadian jurisdictions are of creative value in the study of comparative law. On the other hand, I want to enter a *caveat*. I do not think that the so-called study of comparative law is worth much if it does not go far beyond mere legal analysis and reach the economic and social life of the particular nation-states concerned. I cannot, then, obviously, enter into this respect of the subject—which would occupy a treatise were it given worth-while consideration—and I must confine myself to an analysis which makes no claim to be more than a surface-view. The real problems—the social depths from which the judicial process has issued and the social consequences—must be matter for another day.

I. ORIGIN AND STATEMENT OF LEGISLATIVE POWERS

The immediate preliminaries to the British North America Act, 1867, are to be found in the conferences of representatives from the British North American colonies held in Quebec in 1864 and in London in 1866.² The Quebec Conference drafted a series of resolutions which met with such a political colonial reception as to nullify them as a basis for federation. It must be remembered, however, that, whatever their fate, the general purpose behind them, in relation to the distribution of legislative powers, remained unchanged amid all the political difficulties. The years above noted will give the American student some clue to the situation, coloured as it was both in sentiment and in express words by the Civil War. The colonists deliberately aimed to reverse the American system: to the provinces were to be allotted exclusive legislative powers over *enumerated* classes of matters and to the federation should belong the vast *residue* of undefined legislative powers. For better or for worse, this seemed an obvious lesson from the Civil War to the colonial statesmen, especially to John A. Macdonald who was the colonial counterpart to Alexander Hamilton.³ The failure of the Quebec conference was, fortunately, not irretrievable. A further conference was held in London in 1866, acting with colonial approval. There the whole scheme was considered *de novo*, and

2. The Resolutions of both these Conferences are in Kennedy, *op. cit.* supra note 1, at pp. 541 ff., 611 ff.

3. This point of view can be cursorily examined in W. B. Munro, *American Influences on Canadian Government* (1929) 3 ff.

sixty-nine resolutions were agreed on as a unanimous basis for the statutory structure of the new federation: "the sanction of the Imperial Parliament shall be sought for the union of the Provinces on the principles adopted by this Conference." If we keep in mind "the general purpose" already referred to and flowing from American experience, we shall see that it was never deviated from. This "general purpose," this governing principle, is abundantly clear. The London Conference laid it down unequivocally:

In the federation of the British North American Provinces, the system of government best adapted * * * to protect the diversified interests of the several Provinces and secure efficiency, harmony and permanency in the working of the Union is a general government charged with matters of common interest to the whole country and local governments [for the Provinces] charged with the control of local matters in their respective sections.

The London Resolutions were forwarded to the Colonial Secretary with a request for legislation based on their express terms.

The London Resolutions contained an enumeration of provincial legislative subject-matters (Resolution 41)—a necessary process based on "the general purpose," "the governing principle." These the draftsman, Lord Thring, one of the greatest in history, turned into section 92 of the British North America Act. They became exclusive to the provinces for the simple reason that the London Conference desired the provinces to have "control of local matters." Again, the London Resolutions (Resolution 28) assigned to the federal legislature "power to make laws for the peace, welfare and good government of the federation * * * and especially laws respecting the following subjects." Here followed thirty-six enumerated subject-matters of which the last read: "And generally respecting all matters of a general character, not specially and exclusively reserved for the local legislatures." Now, it is a matter of historical record that section 92 of the Act was drafted first; and, as Lord Thring approached the drafting of section 91 (the federal legislative powers), all that he strictly needed to do was to state that the federal legislature had power to legislate on all subject-matters not assigned exclusively by enumeration to the province. This, in fact, he did; and the clause would have been sufficient to distribute the powers. However, Resolution 28 confronted him, demanding its

expression in statutory form. He did not, and could not, include its enumerated heads in section 91 as *further* powers, because Resolution 28 had referred to them as "especially" subject-matters illustrative of the general residuary power given to the federal legislature. In sections 92 and 91, which were amply and carefully founded on Resolutions 41 and 28 of the London Conference, provincial powers were enumerated and exclusive, while federal powers were the residuum, with illustrations. The whole range of legislative powers within the new Dominion was exhausted by the distribution.⁴

Sections 91 and 92 of the British North America Act run as follows:

VI. Distribution of Legislative Powers

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, 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; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

4. "The Federation Act exhausts the whole range of legislative power * * * whatever is not thereby given to the provincial legislatures rests with the [federal] parliament." Lord Hobhouse, in *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575, 588. "Now, there can be no doubt that * * * the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada." Lord Loveburn L. C., in *Attorney-General for Ontario v. Attorney-General for Canada* [1912] A. C. 571, 581.

9. Beacons, Buoys, Lighthouses, and Sable Island.
 10. Navigation and Shipping.
 11. Quarantine and Establishment and Maintenance of Marine Hospitals.
 12. Sea Coast and Inland Fisheries.
 13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
 14. Currency and Coinage.
 15. Banking, Incorporation of Banks, and the Issue of Paper Money.
 16. Savings Banks.
 17. Weights and Measures.
 18. Bills of Exchange and Promissory Notes.
 19. Interest.
 20. Legal Tender.
 21. Bankruptcy and Insolvency.
 22. Patents of Invention and Discovery.
 23. Copyrights.
 24. Indians, and Lands reserved for the Indians.
 25. Naturalization and Aliens.
 26. Marriage and Divorce.
 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
 28. The Establishment, Maintenance, and Management of Penitentiaries.
 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
- And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—
1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
 2. Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.
 3. The borrowing of Money on the Sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Work and Undertakings other than such as are of the following Classes:—
 - a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
 - b. Lines of Steam Ships between the Province and any British or Foreign Country:
 - c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

Now, before leaving this division of the subject it is well to quote the words of Lord Carnarvon, the Minister in charge of the Act, speaking, on its introduction, both for the British government and for the unanimous colonial delegates:

The real object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces; and, at the same time to retain for each province * * * ample * * * measure of municipal liberty and self-government * * *. I ought to point out that * * * the residue of legislation, if any, unprovided for in the specific classification * * * will belong to the central body. It will be seen under the 91st clause that the classification is not intended to "restrict the generality" of the powers previously given to the central parliament, and that those powers extend to all laws made "for the peace, order and good government" of the federation.⁵

To sum up:

1. The British North America Act, in the distribution of legislative powers, amply carried out both in spirit and in terms the Resolutions of the London Conference.
2. The opening words of section 91 ("It shall be lawful * * * legislatures of the provinces") are undoubtedly the *enacting* words.
3. The words following in section 91, next in order after the "opening words," are not *enacting*, but *declaratory*.
4. The twenty-seven enumerated classes of subjects in section 91 are set down "for greater certainty" of "the foregoing terms," and they must not be used "to restrict the generality" of these terms.
5. The final words of the section ("And any matter * * *") undoubtedly refer, as a matter of construction, to *placitum* 16 of Section 92.

Thus, to borrow the words of Mr. Justice Frankfurter, I have attempted up to this point to regard rather "the constitution itself and not what we have said about it."⁶ The federal powers are wholly residuary for the simple reason that the provincial powers are exclusive; and the twenty-seven "enumerations" in Section 91 cannot add to the residue; they cannot take away from it. They are there, as I have pointed out, to satisfy the London Resolutions (No. 28). They have no meaning except as examples of the residuary power, which must be as exclusive as is the grant of legislative powers to the provinces. The enumerated examples of the residuary power cannot occupy any

5. This speech is given *in extenso* in 3 Hardinge, *The Fourth Earl of Carnarvon* (1925) 305.

6. *Graves v. New York ex rel. O'Keefe* (1939) 306 U. S. 466, 491.

special place; they cannot be exalted at the expense of the residuary power, for that would "restrict the generality" of that power. It all looks reasonably simple, and John A. Macdonald was perhaps justified as he looked at the scheme in hoping that "all conflict of jurisdiction"⁷ had been avoided.

Thus, we have a scheme of the distribution of legislative powers, which, in its terms, gives local matters to the provinces—we note how every provincial class of subjects is carefully qualified as "of the province," or "in the province," or "for provincial purposes"—with an undefined residue to the federal legislature. In other words, classes of subjects of a Canadian nature—"common to all the provinces"—are federal, while to the provinces belong certain enumerated and local matters. No field of law is distributed; each authority is given powers "in relation to matters." It is obvious that on construction some provincial matters may assume a national aspect, and that the judicial process must then be called in aid to resolve the problem of the legislative jurisdiction, when a statute in relation to some "matter" is in dispute.

II. THE JUDICIAL PROCESS

First of all, we must recall that the final interpretation of the British North America Act, 1867, lies at present with the Judicial Committee of the Privy Council. This is not the place to discuss the reasons which lie behind this exercise of jurisdiction. They are historical, emotional, and unfortunately largely professional. It is sufficient to say that, since the depression which has disclosed the woeful inadequacy of the constitutional law, there has been a growing demand to curb and control this procedure, and there can be no doubt that it will disappear in due course.⁸ My readers, however, will know something of legal conservatism and the difficulties which surround proposals for change in long established legal institutions.

Secondly, we must recall that the British North America Act is a statute, and the Judicial Committee have uniformly professed to apply to it that strange, indefinite, unreliable and

7. Kennedy, *op. cit. supra* note 1, at 559.

8. See some discussion of this point in Kennedy, *Essays in Constitutional Law* (1934) *passim*; and Kennedy, *The Development, Law and Custom of the Canadian Constitution* (2d ed. 1938) 525; and in *The Round Table* (September, 1939) 839 ff., where the most recent aspects of the subject are discussed.

wholly obscure bundle of processes, inaccurately called "rules of statutory interpretation."⁹ As a consequence, the Judicial Committee has paid lip service to the Quebec Conference and Resolutions of 1864—an extraordinary procedure seeing that the London Resolutions of 1866, the very existence of which the Judicial Committee has been completely ignorant,¹⁰ are alone worthy of consideration. But not once has the *ratio decidendi* turned on the study of external aids such as conferences, resolutions, parliamentary discussions, economic or social facts. Students of American constitutional law will, at once, recognize the differences between the judicial process in the Supreme Court of the United States and in the Judicial Committee. In only one case do we find any attempt to construe the statute as "a constitution"—*Edwards v. Attorney-General for Canada*¹¹—where, in 1930, the Lord Chancellor laid it down that the Judicial Committee has no desire to narrow the provisions of the Act by a technical construction, but were prepared to give them the large and liberal interpretation of a constitution. His Lordship, however, was careful to point out that this process was not to be applied to the distribution of legislative powers—the central problem. And so the *Edwards* case left these where they had always been—sections of a statute subject to the "rules" of statutory interpretation. It is true that Lord Sankey quoted himself, speaking in the *Edwards* case, in 1935 in *British Coal Corporation v. The King*,¹² without this caveat. The quotation from the *Edwards* case, however, has nothing whatever to do with the *ratio decidendi* in the *British Coal Corporation* case. Indeed, Lord Sankey's attempt—if such it be—to depart from the traditional methods called for severe professional disapproval such as that expressed in 1937, by McGillivray, J. A., in a learned judgment:

It seems to me that none of the observations of Viscount

9. Cf. Lord Hobhouse in *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575, 587.

10. During the argument in *Toronto Electric Commissioners v. Snider* [1925] A. C. 396, Lord Haldane agreed with counsel that there was no conference after that at Quebec in 1864. He pointed out subsequently in *Great West Saddlery Co. v. The King* [1921] 2 A. C. 91, 116, that "as matter of historical curiosity" the Quebec Resolutions of 1864 were drawn up to guide "the Imperial Parliament in enacting the Constitution of 1867." It is certainly an "historical curiosity."

11. [1930] A. C. 124, especially at 136-137.

12. [1935] A. C. 500, 518, 519.

Sankey can be said to provide legal justification for an attempt by Canadian Courts to mould and fashion the Canadian Constitution by judicial legislation so as to make it conform according to their views to the requirements of present day social and economic conditions.¹³

Lord Sankey, also, once quoted the parliamentary debates—Lord Carnarvon's speech already referred to—but the example is isolated; and His Lordship was careful, neither by punctuation nor reference, to reveal the quotation. So we can conclude that, as the British North America Act is a statute, a statute it remains.¹⁴

We have already pointed out that there need have been no great difficulties in this connexion. The Judicial Committee had only one fundamental function, with the Act in front of them and even with the "rules" of statutory interpretation binding on them. Their duty was to take section 91 and section 92 and apply their necessary terms when a statute, provincial or federal, came before them. They had merely to ascertain to the best of their ability to what class in either section the legislation, in its pith and substance, belonged ("the coming within" of the Act). There were evidently no vast difficulties other than those inherent in the interpretation process; and, as we have seen, the Act itself is remarkably clear. Indeed, it worked well for a generation. Here we must try to trace a judicial process almost unique in its evolution not merely for its social consequences—with which I am not here largely concerned, although they are indeed the only vital issues—but for its interest to legal students. It is obvious that, in a study such as this, I can make no pretence to be inclusive or to go into the *minutiae* of the judgments. My purpose will be fulfilled if I illustrate the processes and sum up the conclusions derived from them. I feel more easy in my mind about this when I remember that American students need not fear the burden of themselves examining the cases, as they can do so with great convenience in consolidated form;¹⁵ and they

13. *Kazakewich v. Kazakewich* [1937] 1 D. L. R. 548, 567 (Alberta). Cf. G. F. Henderson, *Eligibility of Women for the Senate* (1929) Can. Bar Rev. 617.

14. Lord Sankey, L. C., in *In re The Regulation and Control of Aeronautics in Canada* [1932] A. C. 54, 70, 71 (the passage beginning "It must no less" etc., which is almost word for word from Lord Carnarvon's speech already set out). See Kennedy, *Essays in Constitutional Law* (1934) 167.

15. The Canadian constitutional cases before the Judicial Committee from 1867 to 1939 are issued (under the editorship of Mr. E. R. Cameron

are few in number (scarcely two hundred)—a mere detail, when I think of the vast array of American constitutional cases which I have been compelled to read.

For over twenty years the Act worked admirably in that the judicial processes of interpretation could be reasonably related to its terms. In 1874, in *L'Union St. Jacques v. Bélisle*,¹⁶ Lord Selborne was as clear as possible about the relationship of sections 91 and 92; and he was equally clear that the concluding words of section 91 is to restrict the scope of *placitum* 16 of section 92. In the following year in *Dow v. Black*,¹⁷ in 1879 in *Valin v. Langlois*,¹⁸ in 1880 in *Cushing v. Dupuy*,¹⁹ and in 1881 in the *Citizens Insurance Co. v. Parsons*,²⁰ we see at work a reasonable judicial process. I would, however, like to point out that, in the *Parsons* case, Sir Montague Smith made certain observations of little importance to the parties to the case but of great importance years on. He glanced at, to put it mildly, a kind of subtle dichotomy between the residual power of the Dominion and the illustrations of it in section 91;²¹ and he introduced an error of construction of a destructive nature in the future. He said:

With the same object [as that of the declaratory provision—what he called 'the second branch' of section 91] apparently the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of section 92.²²

The statement was dangerous in the extreme; neither the clear grammar nor intent of the Act has prevented most serious consequences. However, at the moment the *Parsons* case did no harm. It is full of many loose phrases, but its sinister influence was not yet felt.

In 1882, came *Russell v. The Queen*²³ (explained and followed, in 1883, in *Hodge v. The Queen*²⁴) with a reasonable and clear-

and Mr. C. P. Plaxton) in three volumes by the King's Printer, Ottawa. The judgments, etc., are printed *in extenso*, are carefully referenced to the law reports, and are admirably and minutely cross-referenced.

16. (1874) L. R. 6 P. C. 31.
17. (1875) L. R. 6 P. C. 272.
18. (1879) 5 App. Cas. 115.
19. (1880) 5 App. Cas. 409.
20. (1881) 7 App. Cas. 96.
21. 7 App. Cas. at 107, 108.
22. 7 App. Cas. at 108.
23. (1882) 7 App. Cas. 829.
24. (1883) 9 App. Cas. 117.

cut decision fully in accord with the intent of the Act. "The principle which [*Russell v. The Queen*] and the case of the *Citizens Insurance Company* illustrates is, that subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91."²⁵ Thus, for many years we see that the judicial process was in keeping with the intent and terms of the Act. Matters of a national interest common to *all the provinces* have not been withdrawn from federal legislative competence, and matters "of a merely local or private nature" in a province are assigned to the exclusive legislative competence of the province, subject to the final words ("And any * * * provinces") of section 91.

In 1894, began the real serious decline in sound interpretation; and from this date we must summarize, if this survey is to be kept within reasonable bounds. In that year, in *Tennant v. Union Bank*,²⁶ first of all, Lord Watson misquoted the Act ("shall extend" for "extends"). Secondly, the Act gives the federal legislature power to make laws "in relation to" matters and says nothing about the exercise of this power as conditioned by a necessity that it shall not "interfere with," "trench upon" (as his Lordship says) matters under provincial legislative authority. Thirdly, his Lordship definitely *broke up* the federal legislative authority into two parts: (1) the general power; (2) "and also" enumerated subjects. In other words, where the Act provides the enumerated subjects of section 91 as examples of the federal residual power, his Lordship makes them an addition ("and also") to the general power. We shall see how this third error led to one more absurd. By this division he arrived at the conclusion that "the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority."²⁷ Here we have misquotation, and we have the Dominion's one and only power—the residue of legislative powers—made subject to enumerations which are not separate classes of matters, but flow from and depend on the residuary grant itself. The case is of vital im-

25. 9 App. Cas. at 130.

26. [1894] A. C. 31. See especially Lord Watson at 45, 46, 47.

27. *Id.* at 45.

portance because it established a more or less fatal line of decisions.

In 1896, came *Attorney-General for Ontario v. Attorney-General for Canada* (commonly known as the *Prohibition case*²⁸). Once more Lord Watson gives the decision of the Judicial Committee. Here we see something newer still. He had added the enumerated powers of section 91 to the power to legislate for "the peace order and good government of Canada" in the *Tennant case*; now he adds the latter to the former ("The general power * * * in supplement of its enumerated powers"²⁹). These enumerated powers are erected with a class by themselves, and the so-called federal "general power" (on which the enumerations depend and which is the *sole* federal power) now becomes a power only to be exercised in matters which are unquestionably of national interest and importance.³⁰ All this is extraordinary; but it did not stop there. The loose language of the *Parsons case* is now relied on to make the concluding words of section 91 refer to "all the matters enumerated in the sixteen heads of s. 92" and not to *placitum* 16 alone of section 92.³¹ So that we have now arrived at the position in which the federal residuary power—its sole and only power in the Act—is subjected to statutory examples of that power; while, in addition, Lord Watson set himself on record that the Judicial Committee must protect, guard, preserve the autonomy of the provinces.³² Of course, as the Judicial Committee has interpreted the Act, consequences of a serious nature might result; but its terms, properly read and reasonably applied, would prevent any such situation. After a quarter of a century of the judicial process on the terms of the Act, we now find by 1896 a situation where: (1) the enumerated *placita* of section 91 are divorced from the introductory words on which they undoubtedly depend; (2) the enumerated *placita* of section 91 are given an exclusiveness by the concluding words of the section and not by the prior *non obstante* clause; (3) the concluding words of section 91, in clear terms and intent a limiting power on the provincial power in *placitum* 16 of section 92, become, by application to all the *placita* of section 92, a limita-

28. [1896] A. C. 348.

29. *Id.* at 361.

30. *Id.* at 360.

31. *Id.* at 359.

32. *Id.* at 361.

tion on the scope of the federal enacting authority; (4) the federal power to legislate for the "peace order and good government" of Canada—its sole power, the residuary power—is erected into a *separate* power and reduced to a position of exercise only in some extraordinary cases and that without any exclusiveness or paramountcy as provided for in the Act.

What remains to be said is just the history of those four elements in the judicial process, summed up in 1929 in four propositions by Lord Tomlin which are utterly indefensible in terms of the Act, and only of value in canalizing the years of the erroneous judicial process.³³ For a moment, in 1921, Lord Birkenhead saw the light and got the terms of the Act clear—back to before 1896;³⁴ but the light failed, and Lord Tomlin's propositions remain to control—governed, not by the terms of the Act, but by Lord Watson's perversions of it and by amplifications of the same. Once only has the Judicial Committee actually protested against the situation, in *Proprietary Articles Trade Association v. Attorney General for Canada*, in 1931;³⁵ but Lord Atkin in that case is speaking *obiter* and his words have had no effect. In the *Board of Commerce* case³⁶ in 1922, in the *Newsprint Control* case³⁷ in 1923, in the *Snider* case³⁸ in 1925, in the *Weekly Rest* case of 1937³⁹ we see the errors of 1896 at work. Indeed the *Snider* case (followed in the *Weekly Rest* case) is almost pathetic. We have today arrived at a position (1) where in fact the residue of legislative powers has passed to the provinces under "property and civil rights;" (2) where the normal and usual powers of the federal legislature are those under the enumerated *placita* of section 91 (except

33. *Attorney-General for Canada v. Attorney-General for British Columbia* [1930] A. C. 111, 118. So strong have these four summaries become—in spite of their erroneous statements in the light of the terms of the Act, but flowing from the initial errors of the preceding years—that they were approved in *In re Regulation and Control of Aeronautics in Canada* [1932] A. C. 54, 71-72; and in *In re Silver Brothers* [1932] A. C. 514, 520-521.

34. *Canadian Pacific Wine Co. v. Tuley* [1921] 2 A. C. 417, 422-423. ("It was contended * * * description.")

35. [1931] A. C. 310, 326 ("The view that * * * that ground.")

36. *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* [1922] 1 A. C. 191.

37. *Fort Francis Pulp and Paper Co. v. Manitoba Free Press Co.* [1923] A. C. 695.

38. *Toronto Electric Commissioners v. Snider* [1925] A. C. 396.

39. *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A. C. 326.

that the power over "the regulation of trade and commerce" is in the absurd position of being a power which the federation can only call in aid of a power granted elsewhere⁴⁰); (3) where the so-called "general" federal power (in truth in terms of the Act, its only power) can only be employed by the federal legislature in times of pestilence, famine or some extraordinary national peril; (4) where the Act is regularly misquoted.⁴¹

As I have already indicated, it lies beyond the ambit and scope of this study to examine in any adequate way the reasons behind the judicial process which I have surveyed. From the very beginning of federation we have had "centralists" and "provincialists", "federalists" and "state-righters", and it may have been that the former, who enjoyed political power at Ottawa for almost the first quarter of a century after 1867, were inclined to be arrogant and exacting in relation to the provinces. In addition, we have had no Civil War, and the initial "state-rights" position, fortified by race, religion, and economic regions has been against national cohesion. It would almost seem that the Judicial Committee has not been entirely free from guile, and suggestions have not been wanting by men of position and judgment that the Judicial Committee once took a political view and feared that the provinces might be hurt, and that that view, implicitly influencing its judgments, has now become a somewhat rigid aspect of *stare decisis*. Moreover, political federal parties are organized on a provincial basis; and this organization minimizes protests and the development of judicial reform. These points are mere suggestions, and there remain to be examined by some competent student the reasons behind the judicial process. For myself, in this connexion, I could only write

40. This federal power over "the regulation of trade and commerce" is the one which, *obiter*, Lord Atkin would have rescued from the inferior position assigned to it (See *Proprietary Articles Trade Ass'n v. Attorney General for Canada* [1931] A. C. 310.) Unfortunately the Judicial Committee has refused to supplement this *obiter dictum*, and the power is regulated by the judicial process to a position utterly impossible to defend on the clear terms of the Act, and one which makes it barren and useless.

41. For extraordinary examples of using "affecting" for "in relation to"—the words of the Act—see the cases (*passim*) on the Canadian social legislation reported in [1937] A. C. Every lawyer can at once appreciate the vital importance of this error. On this point, see Kennedy, *Constitution of Canada* (1922) 551-52, and House of Commons Debates, Ottawa (April 5, 1937) 2773 ff.; and for a survey of these judgments, see (1937) 15 Can. Bar Rev. 393-507.

as the merest amateur; and it is little good attempting to explain through inexpert ways and means.

We can easily see from this survey how hampered and tied the federal legislature has become, how narrowed are its powers, how circumscribed its authority—and all this quite unnecessarily so. Even in these days of international and economic depression, Canada is unable to meet services which are in truth national—old age pensions, minimum-wage laws, hours of labour, unemployment insurance, in a word all the vast demands of social legislation—but which, by unfortunate and unaccountable interpretation of the British North America Act, are given to the provinces under “property and civil rights.”⁴² With a rigid constitution—almost impossible to change because of the political powers of the provinces accentuated by the Privy Council decisions—and with the clear terms of the Act so obscured and twisted and misquoted in favour of the provinces, we have reached a position in which federalism, difficult at any time and specially difficult in Canada owing to racial, religious, economic and linguistic divisions and groupings, becomes a source of national weakness. Provincial rights have become national wrongs. Of the future, I cannot write here. On all sides, however, we are at last turning to a serious consideration of the issues in constitutional law, and for the first time in our history the primitive ancestor-worship for long bestowed on the British North America Act is giving place to profound questionings and deep misgivings. To the legal student this is of great importance, as we now watch social forces—the life behind the law—biting into the recalcitrant material of entrenched provincial claims fortified by the judicial process. To explain that process—to give reasons for it—is well-nigh impossible; but at any rate, we shall arrive better through the pressure of life itself at more enduring reforms than if we had reached them through doctrinaire or logical methods. Once again in legal history we are venturing to hope that the life of the law will be through experience. It may be that, in the end, the very judicial processes which we have examined, which are simply inexplicable, and through which the *raison d'être* itself of the British North America Act has been completely overturned and the method of

42. In this connexion, see an important article by Brooke Claxton, “Social Reform and the Constitution” (1935) 1 Can. J. of Econ. and Poli. Sci. 409.

distribution of legislative powers reversed, will lead to a more realistic and more socially beneficial jurisprudence than we might have obtained even had the plain terms of the Act been applied. At the moment, however, I may well conclude this article by remarking that Solomon would have included the judicial process which I have sketched—with those of an eagle in the air, of a serpent upon a rock, of a ship in the midst of the sea, of a man with a maid—as totally beyond even his knowledge or comprehension.